No. 03-9877

In The Supreme Court Of The United States

JON B. CUTTER, et al.,

Petitioners,

v.

REGINALD WILKINSON, et al.,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Does application of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), codified in relevant part at 42 U.S.C. § 2000cc-1, to prisons violate the Establishment Clause or other constitutional limitations on Congress's powers?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF THE CASE 3

A. RLUIPA resurrects RFRA's least restrictive means test 3

B. The least restrictive means test disrupts prison operations 3

C. The facts of these cases 5

D. ODRC's federal funding 7

E. The proceedings below 7

SUMMARY OF ARGUMENT 8

ARGUMENT 10

A. RLUIPA violates the Establishment Clause 10

1. RLUIPA, as applied in prisons, has the primary effect of advancing religion 11

a. RLUIPA is not religiously neutral 11

b. RLUIPA creates powerful incentives for religiosity 15

Page

c. RLUIPA's application in prison burdens third parties 17

d. RLUIPA causes excessive government entanglement with religion 20

e. RLUIPA is not a permissible accommodation under *Amos* 21

2. RLUIPA unconstitutionally interferes with State power to act within the "play in the joints" between the Religion Clauses 25

B. The Court should reach the enumerated powers issues 33

C. RLUIPA is not valid Spending Clause legislation 35

1. Federalism mandates a strong relatedness requirement for State-directed spending power legislation that does not fall within any other enumerated power 35

2. Congress lacks authority to purchase State compliance on religious policy decisions within the "play in the joints" 40

3. Petitioners' arguments are inapposite 41

D. RLUIPA is not valid Commerce Clause legislation 42

E. The Tenth Amendment bars RLUIPA as Commerce Clause legislation 46

CONCLUSION 50

TABLE OF AUTHORITIES

Cases **Page**

Agostini v. Felton,
521 U.S. 203 (1997).....16, 21

Alameen v. Coughlin,
892 F. Supp. 440 (E.D.N.Y. 1995) 18

Alden v. Maine,
527 U.S. 706 (1999).....26, 28

Bd. of Educ. of Kiryas Joel v. Grumet,
512 U.S. 687 (1994).....11, 12, 13, 22

Card v. Dugger,
709 F. Supp. 1098 (M.D. Fla. 1988).....16

City of Boerne v. Flores,
521 U.S. 507 (1997).....12, 14, 29, 30

College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.,
527 U.S. 666 (1999).....48

Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).....12

Corporation of Presiding Bishop v. Amos,
483 U.S. 327 (1987).....*passim*

County of Allegheny v. ACLU,
492 U.S. 573 (1989).....32

Crawford v. Washington,
541 U.S. 36, 124 S. Ct. 1354 (2004).....26

Page

Cruz v. Beto,
405 U.S. 319 (1972).....21

Dennis v. Higgins,
498 U.S. 439 (1991).....45

Employment Div. v. Smith,
494 U.S. 872 (1990).....14, 20

Engel v. Vitale,
370 U.S. 421 (1962).....15

Epperson v. Arkansas,
393 U.S. 97 (1968).....12

Estate of Thornton v. Caldor, Inc.,
472 U.S. 703 (1985).....*passim*

Estep v. Dent,
914 F. Supp. 1462 (W.D. Ky. 1996).....18

Everson v. Bd. of Educ.,
330 U.S. 1 (1947).....17, 21

Exchange Nat'l Bank v. Henderson,
77 S.E. 36 (Ga. 1913).....40

al Ghashiyah v. Dep't of Corrs.,
250 F. Supp. 2d 1016 (E.D. Wis. 2003).....16

Hoevenaar v. Lazaroff, 276 F. Supp. 2d 811
(S.D. Ohio 2003), rev'd on other grounds
108 Fed. Appx. 250 (6th Cir. 2004).....18

Page

In re Long Term Admin. Segregation of Inmates,
174 F.3d 464 (4th Cir. 1999) 25

Jones v. North Carolina Prisoners' Labor Union, Inc.,
433 U.S. 119 (1977).....14, 47

Kelly v. Robinson,
479 U.S. 36 (1986).....39–40

Lau v. Nichols,
414 U.S. 563 (1974).....38

Lee v. Weisman,
505 U.S. 577 (1992).....15, 17, 22

Lemon v. Kurtzman,
403 U.S. 602 (1971).....11, 20

Lewis v. Scott,
1995 U.S. Dist. Lexis 20276
(E.D. Tex. Jan. 18, 1995).....4

Locke v. Davey,
540 U.S. 712 (2004).....*passim*

Lynch v. Donnelly,
465 U.S. 668 (1984).....32

Madison v. Riter,
240 F. Supp. 2d 256 (W.D. Va. 2003).....8

Meachum v. Fano,
427 U.S. 215 (1976).....46

Page

New York v. United States,
505 U.S. 144 (1992).....*passim*

O'Lone v. Estate of Shabazz,
482 U.S. 342 (1987).....3, 15

Oklahoma v. United States Civil Serv. Comm'n,
330 U.S. 127 (1947).....37, 39

Overton v. Bazzetta,
539 U.S. 126 (2003).....13, 14

Pell v. Procunier,
417 U.S. 817 (1974).....13

Phipps v. Parker,
879 F. Supp. 734 (W.D. Ky. 1995).....18

Pollock v. Marshall,
845 F.2d 656 (6th Cir. 1988) 18

Preiser v. Rodriguez,
411 U.S. 475 (1973).....1, 39

Printz v. United States,
521 U.S. 898 (1997).....46, 47, 48

Procunier v. Martinez,
416 U.S. 396 (1974).....2, 39

Reno v. Condon,
528 U.S. 141 (2000).....47

Sabri v. United States,
541 U.S. 600, 124 S. Ct. 1941 (2004).....41

Page

Santa Fe Indep. Sch. Dist. v. Doe,
530 U.S. 290 (2000) 12, 15

Sch. Dist. v. Schempp,
374 U.S. 203 (1963) 12

Seminole Tribe of Fla. v. Florida,
517 U.S. 44 (1996) 28

Shaw v. Murphy,
532 U.S. 223 (2001) 14

Smith v. Phillips,
455 U.S. 209 (1982) 34

South Dakota v. Dole,
83 U.S. 203 (1987) ..... *passim*

Steward Machine Co. v. Davis,
301 U.S. 548 (1937) 36, 39

Texas Monthly, Inc. v. Bullock,
489 U.S. 1 (1989) ..... *passim*

Turner v. Safley,
482 U.S. 78 (1987) ..... *passim*

U.S. Term Limits, Inc. v. Thornton,
514 U.S. 779 (1995) 26

Udey v. Kastner,
644 F. Supp. 1441 (E.D. Tex. 1986) 16

United States v. Butler,
297 U.S. 1 (1936) 35, 39

Page

United States v. Lopez,
514 U.S. 549 .....42, 44

United States v. Morrison,
529 U.S. 598 (2000).....43, 44

Wallace v. Jaffree,
472 U.S. 38 (1985).....25

Wolff v. McDonnell,
418 U.S. 539 (1974).....18

Zelman v. Simmons-Harris,
536 U.S. 639 (2002).....25

Zorach v. Clauson,
343 U.S. 306 (1952).....13

Constitution and Statutes

U.S. Const. Art. I.....28, 30, 32

U.S. Const. Art. I, § 8, cl. 1 35

U.S. Const. Art. I, § 8, cl. 18 45

U.S. Const. amend. X. .....*passim*

U.S. Const. amend. XIV.....29, 30, 42, 49

18 U.S.C. § 1951 45

20 U.S.C. § 1681 42

20 U.S.C. § 4071 42

Page

23 U.S.C. § 101(b).....37

29 U.S.C. § 701 42

42 U.S.C. § 2000bb-1(a) 3

42 U.S.C. § 2000cc-1(a).....3

42 U.S.C. § 2000cc 1

42 U.S.C. § 2000cc-1(b)(1).....34

42 U.S.C. § 2000cc-2(g).....44

42 U.S.C. § 2000d 42

Conn. Gen. Stat. § 22-272a(e).....33

Fla. Stat. § 761.03.....33

Idaho Code § 73-402 33

Ohio Rev. Code § 3313.671(A)(3).....33

Ohio Rev. Code § 4301.631(F) 33

Ohio Rev. Code § 4301.69(A) 33

Ohio Rev. Code § 4307.05(B).....33

Okla. Stat. tit. 51, § 253.....33

Miscellaneous **Page**

Anti-Defamation League, *Dangerous Convictions: An Introduction to Extremist Activities in Prisons* (2002) 3, 4, 6

Aryan-Nations.org, at www.aryan-nations.org (last visited Feb. 11, 2005) 6

139 Cong. Rec. S14355 4

146 Cong. Rec. S7775 47

T. Curry, The First Freedoms (1986) 27, 31

H. Dammer, *The Reasons for Religious Involvement in the Correctional Environment*, 35 Journal of Offender Rehabilitation No. 3/4, at 35 (2002) 4

Debates on the Adoption of the Federal Constitution (J. Elliot 2d ed., Ayer Co. 1987) (1888) 27, 32

FBI, Project Megiddo (1999) 6

S. Frey, Comment: *Religion Behind Bars: Prison Litigation under the Religious Freedom Restoration Act in the Wake of* Mack v. O'Leary, 101 Dick. L. Rev. 753 (1997) 4

M. Gardell, Gods of The Blood (2003) 6

W. Hurd & W. Thro, *The Federalism Aspect of the Establishment Clause*, 5 Engage 62 (2004) 27

In the Belly of the Whale: Religious Practice in Prison, 115 Harv. L. Rev. 1891 (2002) 4, 15

Page

J. Katz, *Tips on Managing Inmates: The Tricks of the Trade*, VII Correction Managers' Report 84 (2000) 14

L. Levy, The Establishment Clause (2d ed. 1994) 27

J. Madison, Memorial and Remonstrance Against Religious Assessments (1785) 15, 17

National Institute of Corrections, Prison Gangs: Their Extent, Nature and Impact on Prisons (1991) 4

Office of the Inspector General, A Review of the Federal Bureau of Prisons' Selection of Muslim Religious Services Providers (2004) 20

Restatement (Second) of Contract § 175 40

J. Rubenfeld, *Antidisestablishmentarianism: Why RFRA Really Was Unconstitutional*, 95 Mich. L. Rev. 2347 (1997) 27

Southern Poverty Law Ctr., *Identity Crisis: Expanding Race-Hate Faith Underlies Movement*, Intelligence Report No. 89 (1998), available at www.splcenter.org/intel/intelreport/article.jsp?pid=755 6

Southern Poverty Law Ctr., *The New Barbarians: New Brand of Odinism on the March*, Intelligence Report No. 98 (1999), available at www.splcenter.org/intel/intelreport/article.jsp?aid=451 6

Southern Poverty Law Ctr., *The New Romantics*, Intelligence Report No. 101 (2001), available at www.splcenter.org/intel/intelreport/article.jsp?aid=236 6

Page

T. Stewart & D. Brown, *Developing a Training Curriculum and Facility to Enhance Staff Safety in Corrections Work*, VIII Corrections Managers' Report 19 (2002) 15

J. Story, Commentaries on the Constitution (Carolina Academic Press 1987) (1833) 27

INTRODUCTION

Petitioners and their supporters fail to meaningfully address a key aspect of this case. They want it to be solely about whether, and to what extent, States may accommodate religion. But this case is about much more. It also asks whether Congress can demand that States provide religious accommodations in their prisons—accommodations that go beyond those the Constitution requires, and that compromise prison security. The answer to that question is "No."

Through the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc et seq. ("RLUIPA"), Congress does not regulate religion directly. Rather it tries to regulate the States' treatment of religion. Moreover, Congress does so in the context of state prison administration, an area in which the Court has recognized that State interests are particularly acute. See *Preiser v. Rodriguez*, 411 U.S. 475, 491–92 (1973) ("It is difficult to imagine an activity in which a State has a stronger interest . . . than the administration of its prisons."). And Congress does so through a particularly blunt instrument. It does not merely provide state prisoners with religious exemptions to a particular regulation or type of regulation. Instead, it mandates the standard States must apply in making their religious accommodation decisions in prisons. In other words, RLUIPA is far more than an accommodation. It is a powerful tool that prisoners advancing religious claims can use to obtain accommodations. And the standard Congress mandates—strict scrutiny—is the most demanding test known to constitutional law.

This dramatic enhancement of prisoners' rights—accomplished through wholesale trampling of the States' sovereign rights, both to control their prisons, and to decide on appropriate religious accommodations—violates the Constitution in two separate ways. First, RLUIPA, as applied in prisons, violates the Establishment Clause. The Act gives

prisoners who clothe their demands in religious garb a benefit unavailable to other prisoners. In prison's unique setting, where State control of inmates' lives is pervasive, and providing benefits for some inmates necessarily imposes costs on others, this has the constitutionally-impermissible effect of advancing religion. Moreover, as a command from Congress to the States, the Act separately violates the federalist principle embedded in the Establishment Clause, which reserves to the States the sovereign power to control their own treatment of religion.

Second, RLUIPA exceeds the scope of Congress's enumerated powers. Congress cannot rely on its Spending Clause power, as none of the spending to which RLUIPA's conditions apply is programmatically related to the restrictions that RLUIPA imposes. Moreover, even if it were, certain aspects of state governance, such as a State's religious policy choices, are irrevocably assigned to the States by our constitutional design, and thus are beyond Congress's ability to purchase through its spending powers. Nor can Congress rely on its commerce power as that power is limited to "economic endeavors." Neither prison administration, nor religion—the activities toward which the RLUIPA provision at issue here is directed—qualify. Moreover, RLUIPA, as Commerce Clause legislation, also violates the Tenth Amendment. That amendment specifically prevents Congress from using its commerce power to regulate State regulation, as it attempts to do here.

RLUIPA's unconstitutional intrusion on the States' management of their prisons imposes drastic consequences. The Court itself has recognized the "Herculean obstacles" to effective prison management, and the "complex and intractable" nature of the problems that prison officials face. *Procunier v. Martinez*, 416 U.S. 396, 404–05 (1974). RLUIPA's unconstitutional mandate adds to that burden by facilitating gang activity within prison walls, thereby dramatically compromising prison officials' abilities to

provide a safe environment for their charges. Accordingly, we urge the Court to declare the statute unconstitutional as applied there.

STATEMENT OF THE CASE

Several sets of facts are relevant here: RLUIPA's substantive standard, that standard's impact on prison operations, the facts underlying these consolidated cases, the nature of the federal funding triggering RLUIPA's applicability, and the proceedings below.

A. RLUIPA resurrects RFRA's least restrictive means test.

Through RLUIPA, Congress tells States how to respond to prisoners' religious requests. Section 3 of the Act prohibits governments from substantially burdening a prisoner's religious exercise unless the burden "is the least restrictive means" to further "a compelling governmental interest." That is identical to RFRA's standard. Compare 42 U.S.C. § 2000bb-1(a), with *id.* § 2000cc-1(a). All agree that this standard demands more from the States than the Constitution requires. Cf. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350 (1987).

B. The least restrictive means test disrupts prison operations.

The record contains substantial uncontested evidence that the least restrictive means test disrupts day-to-day prison operations. That is true in three related respects.

1. First, it makes it more difficult for States to preserve security by making "it harder for prison staff to regulate or prevent actions purportedly taken for religious reasons." J.A. 234–35. The extent of that problem is illustrated by several well-documented realities of prison life. For instance, prison gangs often claim religious status to further their illicit ends. *Id.* at 129, 131–32, 202, 210–11; Anti-Defamation League, *Dangerous Convictions: An*

Introduction to Extremist Activities in Prisons 7, 10, 34–35, 37–38 (2002); *In the Belly of the Whale: Religious Practice in Prison,* 115 Harv. L. Rev. 1891, 1903 (2002); National Institute of Corrections, Prison Gangs: Their Extent, Nature and Impact on Prisons 120, 141, 154, 158, 175 (1991); 139 Cong. Rec. S14355 (daily ed., Oct. 26, 1993). Gangs also use religious gatherings to circumvent the States' efforts to control their activities, and inmates use those events to pass contraband. J.A. 234, 235; H. Dammer, *The Reasons for Religious Involvement in the Correctional Environment*, 35 Journal of Offender Rehabilitation No. 3/4, at 35, 42–49 (2002). Officials have documented gangs' abuse of religious visits for drug smuggling. J.A. 236–39; S. Frey, Comment: *Religion Behind Bars: Prison Litigation under the Religious Freedom Restoration Act in the Wake of* Mack v. O'Leary, 101 Dick. L. Rev. 753, 772–73 (1997). Courts and commentators recognize that inmates abuse religion to obtain exemptions from grooming codes intended to suppress contraband. *Lewis v. Scott*, 1995 U.S. Dist. Lexis 20276, at *10–11 (E.D. Tex. Jan. 18, 1995). Those are not isolated occurrences: "most states responding" to a national survey on RFRA's effects "indicated that this pattern is being employed by racial hate groups, such as the Aryan Nation." J.A. 211.

2. Those dynamics have caused a dramatic upsurge in "religious" demands, diverting significant staff time from other pressing matters to respond to those demands. The national survey reported "significant increases in the number, belligerency, and unusual nature of inmates' [] demands for 'religiously motivated' alterations to . . . prison regulations." *Id.* at 211–12. It further noted that "[t]he large number of those requests, together with [the] 'least restrictive means' requirement, [] result[s] in very significant burdens on the already overburdened corrections staffs." *Id.* at 212; see also *id.* at 200, 204–05.

3. Finally, RLUIPA's standard has decreased the religious opportunities available to inmates in two ways.

Quantitatively, the increased demands on staff time limit the time that chaplains, who are heavily involved in vetting the prisoners' religious demands, can devote to developing and delivering religious programming. *Id.* at 200–01. Qualitatively, the increased frequency and stridency of inmates' demands, along with the chaplains' obligations to vet each demand, combine to degrade prison chaplains' relationships with inmates. *Id*. at 206.

C. The facts of these cases.

The three cases combined here, *Gerhardt v. Lazaroff*, *Cutter v. Wilkinson*, and *Miller v. Wilkinson*, exemplify the pattern of prisoners using RLUIPA to challenge reasonable security regulations.

1. These inmates are prone to violence. The plaintiff in *Gerhardt* was convicted for conspiring to bomb the school attended by the daughter of a judge presiding over a desegregation case. The court affirming his conviction found that "[w]hile [] Gerhardt insist[s] that [he was] without predisposition to commit violent acts, []a great deal of evidence . . . suggest[s] otherwise." J.A. 242.

The *Miller* plaintiffs also have violent backgrounds. Most have documented affiliations with prison gangs, including the Aryan Brotherhood, the Ku Klux Klan, and skinhead groups. *Id.* at 136, 138–40, 144–45, 147–49, 151, 153–55, 168, 169–71. Some have acted as "enforcers" or taken other leadership positions in those groups, *id.* at 147, 149, 151, 178, 180–83, and several have been involved in racially motivated killings or assaults, some since this case began, *id.* at 148, 154, 161, 181.

2. The religious sects at issue preach violence and are closely identified with violent gangs. A leading evangelist of Christian Identity, the creed underlying *Gerhardt,* taught that "violence solves everything," while another evangelist declared that "[t]here isn't a Jew on this earth that deserves to

live." Aryan-Nations.org, at www.aryan-nations.org (last visited Feb. 11, 2005). Leaders in the Odinist/Asatru movement, the faith driving the *Miller* case, call for "nothing less than total, uncompromising war." M. Gardell, Gods of The Blood, 199 (2003). In their view "[t]he only chance the White Race has of surviving is through violence and terrorism. The Mud Races will never leave peacefully." *Id.* at 181. Given their theologies, it is hardly surprising that those creeds are linked with white supremacist organizations that have killed law enforcement officers, and committed bank robberies and bombings. J.A. 165–66; FBI, Project Megiddo 15–17, 19–20 (1999); Southern Poverty Law Ctr., *Identity Crisis: Expanding Race-Hate Faith Underlies Movement*, Intelligence Report No. 89 (1998), available at www.splcenter.org/intel/intelreport/article.jsp?pid=755; Southern Poverty Law Ctr., *The New Romantics*, Intelligence Report No. 101 (2001), available at www.splcenter.org/intel/ntelreport/article.jsp?aid=236.

These violent groups are especially active behind bars. Anti-Defamation League, *supra*, at 33–40; Southern Poverty Law Ctr., *The New Barbarians: New Brand of Odinism on the March*, Intelligence Report No. 98 (1999), available at www.splcenter.org/intel/intelreport/article.jsp?aid=451; Gardell, *supra*, at 277. In Ohio alone, they helped start a riot resulting in ten deaths, and they have also been responsible for several other killings. J.A. 159, 160, 163, 231–32. They are the most sophisticated gangs Ohio confronts. J.A. 167–68, 173–74, 231.

3. The nature of their "religious claims" is also typical. *Gerhardt* and *Miller* ask for group services that would undermine officials' efforts to keep gang members separate from each other. *Id.* at 234–35. *Cutter* and *Gerhardt* seek access to publications that prisoners display as gang identifiers and that contain foreign languages gangs have used as codes. *Id.* at 233–34. *Miller* seeks exemptions from

grooming regulations that prevent inmates from wearing their hair in ways signifying gang affiliation.

D. ODRC's federal funding.

ODRC was receiving approximately $25 million in federal funding annually as of RLUIPA's effective date. That funding comes in 22 separate grants, in such specific areas as prison construction, sentencing policy, educational programs and drug treatment. *Id*. at 243–50, 320–22, 328–62. None of those programs deal with religious exercise, and no one claims that the religious burdens alleged here interfered with the programs, or Petitioners' ability to benefit from them.

E. The proceedings below.

Petitioners advanced their RLUIPA claims immediately after the statute was enacted. Ohio moved for summary judgment in each of the three cases, supported by depositions, affidavits, and stipulated facts, arguing that RLUIPA is unconstitutional as applied in the prison setting.[1] Ohio argued that RLUIPA violates the Establishment Clause and the Tenth Amendment, and that it exceeds Congress's powers under the Spending and Commerce Clauses. The magistrate recommended denying the motions, and the district judge adopted the recommendation over the State's objections. Pet. App. B5.

Respondents appealed, and the Sixth Circuit reversed. It concluded, for two reasons, that RLUIPA, in the prison setting, has the primary effect of advancing religion. First, it found that "RLUIPA has the effect of impermissibly advancing religion by giving greater protection to religious rights than to other constitutionally protected rights." Pet. App. A5. The court illustrated that by contrasting the differing rights of secularly and religiously motivated inmates demanding the same white supremacist literature.

[1] Those motions were styled as motions to dismiss, but both sides' submission of evidence converted them to summary judgment motions.

See *id.* at A6–A7. If the former challenged denial of such literature, the "court would evaluate these claims under the deferential rational relationship test in *Turner*, placing a high burden of proof on the inmate and leaving the inmate with correspondingly dim prospects of success." *Id.* at A6 (quoting *Madison v. Riter*, 240 F. Supp. 2d 566, 576 (W.D. Va. 2003)). But a religiously-motivated inmate, helped by RLUIPA's strict scrutiny, would have "a much better chance of success than the non-religious white supremacist, as prison officials bear the burden of proving that the prison policy satisfies a compelling interest and is the least restrictive means of satisfying the interest." Pet. App. A7. The court concluded that such disparate treatment, based entirely on a claimant's religious status, violated the mandate of religious neutrality—"the fundamental requirement of the Establishment Clause." *Id.* at A4.

Second, the court found that, because RLUIPA enhanced religious inmates' ability to escape disagreeable aspects of the prison routine, it "has the effect of encouraging prisoners to become religious in order to enjoy greater rights." *Id.* at A7. The court also concluded that RLUIPA is not a proper accommodation under *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987), as, unlike the law there, RLUIPA is not necessary to avoid a constitutional violation. Pet. App. at A4–A5, A7–A8. This appeal followed.

SUMMARY OF ARGUMENT

RLUIPA gives prisoners a powerful weapon: the right to use religious demands—demands for accommodations beyond what the Constitution requires—to force State prison officials to change the way they manage prisons. As such, RLUIPA is an unprecedented federal intrusion on both the States' sovereign rights to control their prisons, and their sovereign right to make their own decisions—subject only to constitutional limits—regarding religious accommodations.

In giving state prisoners this weapon, Congress both transgressed the Establishment Clause, and exceeded its enumerated powers.

The Establishment Clause limits both Congress's power to regulate individuals and its power to regulate States. RLUIPA violates both limits. First, while Congress is free to adopt appropriate religious accommodations to burdens it has imposed, RLUIPA goes far beyond that. It is not merely an accommodation, but a pro-religious tool for seeking accommodations, and it does not remove burdens that Congress has imposed, but rather those imposed by a separate sovereign, the State. In prison's unique environment, where benefits for some impose burdens on others, and very little goes unnoticed by prisoners, RLUIPA has the impermissible effects of advancing religion and strongly encouraging religiosity.

RLUIPA also violates federalist principles enshrined in the Establishment Clause. Our constitutional design secures to the States the right to make their own choices regarding religious accommodations. In doing so, the States are, of course, governed by the same limitations the federal government faces in its regulation of individuals under the Free Exercise and Establishment Clauses. But within the "play in the joints" between those two, the States are not subject to congressional second-guessing.

Even if RLUIPA did not violate the Establishment Clause, it is also beyond the grasp of Congress's enumerated powers. Congress seeks to rely on its spending and its commerce powers, but neither justifies the foray into exclusive areas of State sovereignty that Congress undertakes here.

The spending power is limited in two ways, both of which prevent Congress from relying on it to enact RLUIPA. First, under *South Dakota v. Dole*, 483 U.S. 203 (1987), the conditions that Congress attaches to State funding must be

programmatically related to the projects Congress funds. But none of Congress's state prison funding is in any way related to the religious interests that RLUIPA advances. Second, the States' right to control their religious policy choices (within the "play in the joints") is inalienable. The Constitution assigns such choices exclusively to the States, as a structural mechanism for guaranteeing religious liberty by dispersing governmental power over religion. Thus, Congress is not free to buy, and the States are not free to sell, this aspect of State sovereignty.

Nor does the Commerce Clause provide Congress the power to enact RLUIPA. The commerce power, while broad, is limited to control over "economic endeavors." None of the activities to which RLUIPA is directed qualify. And because the activities are non-commercial in nature, their impact on interstate commerce, if any, is simply irrelevant. That renders RLUIPA's jurisdictional limitation (to acts that in the aggregate affect interstate commerce) insufficient to save the Act. Moreover, the Tenth Amendment independently bars Congress from using its commerce power to regulate State regulation, as Congress tries to do through RLUIPA.

The question presented is not whether inmates should be permitted to practice religion. Prison officials should and do accommodate religious practices. But these officials must also accommodate many other competing concerns. The test established in *Turner v. Safley*, 482 U.S. 78 (1987), properly recognized the realities of prison management and the appropriate limitations on prison officials. Congress's attempt to overturn that test violates the Constitution.

ARGUMENT

A. RLUIPA violates the Establishment Clause.

The Establishment Clause limits Congress's power over religion in two distinct ways. First, in its "libertarian aspect," the Clause limits Congress's (and after incorporation, a

State's) power to impose religious regulations on individuals.[2] Second, and equally important, the Clause's "federalist aspect"—and indeed, our constitutional structure as a whole—also limits Congress's authority to intermeddle with a State's treatment of religion. That is, the *State* has the right to make policy within the "play in the joints" between the Establishment and Free Exercise Clauses, *Locke v. Davey*, 540 U.S. 712, 718 (2004), and Congress may not order us to pick a different point in that spectrum. RLUIPA's prison provision violates both aspects of the Establishment Clause.

1. RLUIPA, as applied in prisons, has the primary effect of advancing religion.

A law violates the libertarian aspect of the Establishment Clause if its primary effect is to advance religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). RLUIPA, in prison's unique setting, has multiple features independently evincing that effect: it is not religiously neutral, it provides unprecedented incentives for religiosity, it imposes significant burdens on third parties, and it forces government to become more deeply entangled with religion. Any one of those features, amplified by prison dynamics, is fatal to RLUIPA's validity. Combined, they push it well beyond constitutional limits.

a. RLUIPA is not religiously neutral.

The neutrality principle lies at the very "heart of the Establishment Clause." *Bd. of Educ. of Kiryas Joel v. Grumet,* 512 U.S. 687, 704 (1994). And contrary to the federal government's suggestion, see U.S. Br. at 15–18, that principle does not merely forbid the government from preferring "one religion to another," but also from preferring "religion to irreligion." *Kiryas Joel*, 512 U.S. at 703. Indeed,

[2] With incorporation, this restriction applies with equal force to State governments. See below at 25.

one member of the Court opined that RLUIPA's predecessor, RFRA, was an invalid "'law respecting an establishment of religion," precisely because it provided the religious "with a legal weapon that no atheist or agnostic can obtain." *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (Stevens, J., concurring). While Ohio does not contend that such accommodations would be invalid outside prison walls, the unique prison environment brings RLUIPA's dramatic enhancement of religious rights into direct conflict with the Establishment Clause.

1. Religious neutrality has long been the cornerstone in the Court's religion clause jurisprudence. See *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792–93 (1973); *Epperson v. Arkansas*, 393 U.S. 97, 103–04 (1968); *Sch. Dist. v. Schempp*, 374 U.S. 203, 225–26 (1963). These neutrality concerns are especially significant where, as here, a statute *expressly* treats individuals differently based on their religion or irreligion. See *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 15–17 (1989) (plurality opinion).

Indeed, perhaps the Court's strongest Establishment Clause mandate is that the government may not treat people, based solely on their religious beliefs, as "insiders, favored members of the political community." *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 309 (2000). Consistent with that principle, the Court has struck laws that conferred a "valued and desirable benefit only on those [] who adhere to a particular religious belief," *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 711 (1985) (O'Connor, J., concurring), or that gave benefits to religious entities because of their religious status, *Texas Monthly*, *supra*. As the Court said in *Nyquist*, "[s]pecial [] benefits . . . cannot be squared with the principle of neutrality." 413 U.S. at 793; see also *Kiryas Joel*, 512 U.S. at 703.

That is not to say (and, despite Petitioners' contrary assertions, see Pet. Br. at 17–18, Ohio does not say), that all

religious accommodations violate the Establishment Clause. To be sure, as both the federal government and Petitioners note, the Court has upheld various religious accommodations. See *Zorach v. Clauson*, 343 U.S. 306, 312–14 (1952). And, as the *Texas Monthly* dissent noted, every religious accommodation, by its very nature, violates a strict neutrality principle. 489 U.S. at 40 (Scalia, J., dissenting). But as the Court has also repeatedly recognized, and as the *Texas Monthly* dissent agreed, some "accommodation[s] slide[] over . . . into favoritism." *Id.* The question is one of degree. While drawing the exact line may be difficult, the accommodation here is so overwhelming that it clearly crosses that line, whatever its precise location.

2. RLUIPA gives religious inmates greatly enhanced rights precisely because they are religious. And the magnitude of that enhancement far surpasses any case the Court has yet considered. RLUIPA does not merely provide an exemption to a particular tax, as in *Texas Monthly*. Nor does it simply draw a particular school district boundary to provide a religious benefit, as in *Kiryas Joel*. Rather, it gives religious inmates a powerful weapon to gain exemptions from whatever prison regulations they wish. That is, RLUIPA is not merely an accommodation; it is a pro-religious rule about making accommodations. It elevates the status of its beneficiaries across the board in an obvious way that, as discussed below, has "ripple effects" throughout an entire prison.

The magnitude of the benefits RLUIPA provides is best understood by comparing the rights of secular and religious prisoners. Inmates challenging prison regulations on secular grounds must prove that those regulations are not reasonably related to penological interests. *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003). Inmates must provide "substantial evidence" that the regulation is inappropriate, *Pell v. Procunier*, 417 U.S. 817, 827 (1974), and reasons that would be "unimpressive if . . . submitted as justification" for restricting "the general

public" suffice to sustain actions restricting even prisoners' fundamental rights, *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 133 n.9 (1977) (quotation marks omitted). Far from strict scrutiny, the standard upholds the regulation unless "the prisoner has pointed to some obvious regulatory alternative that fully accommodates the asserted right while not imposing more than a *de minimis* cost." *Overton*, 539 U.S. at 136. In short, inmates must rebut the "presumption that [] prison officials acted within their broad discretion." *Shaw v. Murphy*, 532 U.S. 223, 232 (2001) (quotation marks omitted).

RLUIPA, by contrast, gives religious inmates attacking the same regulation the benefit of strict scrutiny, a regimen that makes official action "presumptively invalid." *Employment Div. v. Smith*, 494 U.S. 872, 888 (1990) (emphasis omitted). Prison officials, not prisoners, have the burden of proof, and it is a heavy one. They must convince federal courts that a restriction serves a compelling government interest. More important, they must also show that the disputed practice is the least restrictive means to do so, a very difficult task in its own right. After all, "every administrative judgment [is]," as a practical matter, "subject to the possibility that some court somewhere would conclude that [prison officials] had a less restrictive way of solving the problem at hand." *Turner*, 482 U.S. at 89. That is why the Court has described that standard as "the most demanding test known to constitutional law." *Boerne*, 521 U.S. at 534.

In sum, RLUIPA transforms imprisoned litigants—based solely on their religion—from presumptive losers to presumptive winners. Indeed, inmates have greater rights to demand religious accommodations than free citizens. *Smith*, *supra*.

3. If that were not enough, prison's unique dynamics amplify the effects of that disparity. With few distractions, "inmates are watchful," J. Katz, *Tips on Managing Inmates:*

The Tricks of the Trade, VII Corrections Managers' Report 84 (2002), and "when an inmate perceives that . . . he or she is being treated . . . unequally that is their reality." T. Stewart & D. Brown, *Developing a Training Curriculum and Facility to Enhance Staff Safety in Corrections Work*, VIII Corrections Managers' Report 19 (2002). Consequently, "differences in treatment that outside of prison would be understood as making a religious adherent whole, are likely in prison to be perceived as favoritism and thus to engender resentment." *In the Belly of the Whale*, *supra*, at 1899. Thus, special religious privileges in prisons "create problems as other inmates [see] that a certain segment [of the prison population] is escaping a rigorous [requirement] and perceive favoritism." *O'Lone*, 482 U.S. at 353 (quotations marks omitted). In short, considering the unique prison environment in which it applies, RLUIPA's departure from religious neutrality has far greater effects than any other law considered by the Court.

b. RLUIPA creates powerful incentives for religiosity.

The Establishment Clause bars government from promoting religious inculcation, and both the Clause's history and the Court's precedents teach that bestowing benefits on religion may amount to promotion. The Framers were concerned about "extraordinary privileges, by which proselytes may be enticed." J. Madison, Memorial and Remonstrance Against Religious Assessments, ¶ 4 (1785). And the Court has not hesitated to strike State attempts to foster religious practice, even if the State does so only by "subtle and indirect" means. *Lee v. Weisman*, 505 U.S. 577, 593 (1992); accord, *Engel v. Vitale*, 370 U.S. 421, 431 (1962) (condemning "the indirect coercive pressure" to engage in religious practices); *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 306 (striking policy that "by its terms, invites and encourages religious messages"). Even in upholding laws, the Court has expressly noted that the government may not

"creat[e] a[n] [] incentive to undertake religious indoctrination." *Agostini v. Felton,* 521 U.S. 203, 231 (1997). RLUIPA, in concert with the realities of prison, violates this principle by encouraging inmates to "get religion."

While religious accommodations are typically not an impermissible incentive for religiosity outside prison, any religion-based difference in treatment carries far greater weight in prison. Religious claims give inmates a way to gain privileges, and for inmates—who have few possessions and little control over their lives—such privileges are highly valued. Given that reality, it is not surprising that the then Chaplaincy Administrator of the Federal Bureau of Prisons has testified that religious privileges lead to a "proliferation of [such] requests" among inmates. See *Udey v. Kastner*, 644 F. Supp. 1441, 1447 (E.D. Tex. 1986); see also *Card v. Dugger*, 709 F. Supp. 1098, 1106 (M.D. Fla. 1988) ("if plaintiff is afforded these [religious] privileges, the prison can expect to encounter these requests from inmates of various faiths").

RLUIPA's dramatic enhancement of religious inmates' rights catalyzes that behavior. People can differ over the Sixth Circuit's legal analysis, but few would dispute its common sense observation that "[w]hen inmates see that the rules do not apply with the same force to the religious . . . non-religious prisoners will know what they have to do so that they, too, can benefit from the softer rules: become religious." Pet. App. A7 (quoting *al Ghashiyah v. Dep't of Corrs*., 250 F. Supp. 2d 1016, 1029 (E.D. Wis. 2003)). Indeed, under RFRA's identical provisions, "the number of inmate requests for accommodations of specific religious practices increased dramatically," J.A. 201, and "inmate claims of conversion . . . proliferated," *id.* at 212 n.2; see also *id.* at 200, 204–05.

This encouragement of religion is far more pronounced than in any other case the Court has considered. The closest

case is *Lee*, which held that even "subtle and indirect" pressures towards religiosity, occurring just once yearly (at a graduation ceremony), were invalid. 505 U.S. at 593, 595. RLUIPA, applied in prisons, creates strong pressure for religion by offering desirable, and otherwise unavailable, benefits. That pressure continues every day, not just once a year—so it is both stronger and more constant than the "subtle pressure" the Court found unconstitutional in *Lee*.

c. RLUIPA's application in prison burdens third parties.

RLUIPA also violates the Establishment Clause by imposing burdens on third parties. The concern over third-party burdens is rooted in both founding history and modern precedent. The Clause originated in opposition to taxes levied, even on non-adherents, to support religious institutions, and the Framers sought to avoid the imposition of such "peculiar burdens" in the future. Remonstrance, *supra*, ¶ 4; *Everson v. Bd. of Educ.*, 330 U.S. 1, 10–13 (1947).

The Court's decisions reflect that concern by including third-party burdens as an important, and even dispositive, Establishment Clause factor. *Caldor*, for example, invalidated a law requiring employers to adjust work schedules to accommodate some workers' religious practices, because it imposed "substantial economic burdens" on employers and "significant burdens on other employees required to work in place of the" accommodated worker. 472 U.S. at 709–10. A plurality in *Texas Monthly* struck a tax exemption given only to religious entities because it "burden[ed] nonbeneficiaries," thereby "conve[ying] a message of endorsement" to slighted members of the community. 489 U.S. at 15 (quotation marks omitted).

The common thread, from the Remonstrance through *Texas Monthly*, is that government may not burden third parties to facilitate someone else's religious activities. Yet

the RFRA/RLUIPA standard, as applied in the prison environment, does so in several ways.

First, it degrades security by forcing States to abandon measures that are reasonably related to preserving that security. For example, it interferes with prison officials' abilities to prevent the use of religious items as non-verbal gang identifiers, see *Alameen v. Coughlin*, 892 F. Supp. 440, 444–47 (E.D.N.Y. 1995) (contrasting RFRA and pre-RFRA standards), and to prevent inmates from growing long hair to hide contraband. Compare *Hoevenaar v. Lazaroff*, 276 F. Supp. 2d 811, 816–24 (S.D. Ohio 2003), rev'd on other grounds 108 Fed. Appx. 250 (6th Cir. 2004), with *Pollock v. Marshall*, 845 F.2d 656, 659–60 (6th Cir. 1988). That burdens others by diminishing the safety of all who live and work behind bars.

RLUIPA's strict scrutiny test also undermines security by undercutting the ability of those "on the spot and with the responsibility for the safety of inmates and staff," *Wolff v. McDonnell*, 418 U.S. 539, 566 (1974), to know what is allowed and what is not. Officials find it nearly impossible to predict whether denying an inmate's request will survive RLUIPA's scrutiny, for even if they are confident that safety interests are compelling, they are never sure whether a court looking in hindsight will discover a less-restrictive means to protect that interest. Indeed, even courts, with the advantage of hindsight, do not agree on what this standard requires. Compare, e.g., *Phipps v. Parker*, 879 F. Supp. 734, 736 (W.D. Ky. 1995), with *Estep v. Dent*, 914 F. Supp. 1462, 1467 (W.D. Ky. 1996) (contradictory decisions about the validity of the same grooming regulation under RFRA). That is precisely why the Court rejected the least restrictive means test in *Turner*, 482 U.S. at 89.

Second, RLUIPA imposes significant administrative burdens. The upsurge in religious demands triggered by RFRA's identical standard undisputedly caused "significant

burdens on [] already overburdened corrections staffs." J.A. 212. And RLUIPA's "least restrictive means test" requires staff, in responding to those demands, to "'set up and shoot down' all possible alternatives," *id.* at 204, which is "tremendously time consuming," *id.* at 205. That, in turn, makes those employees unavailable for other pressing tasks. *Id.*

Third, RLUIPA has the ironic effect of limiting the quantity and quality of religious services. Delivery of such services is inherently time-intensive and, before RFRA/ RLUIPA, it took up almost all of a chaplain's time. *Id.* at 200–01. RLUIPA's increased administrative demands diminish the time chaplains have to deliver these core services. *Id.* at 201–02, 212. And the increased stridency of inmates' demands, along with the large number of attempted abuses and chaplains' obligations to vet each demand, converge to degrade relationships with inmates. *Id.* at 206.

Those burdens far surpass those found fatal in other cases. The burdens in *Caldor* were more limited: nothing indicated that the law at issue was invoked with any frequency, and, although the work-scheduling burdens were no doubt inconvenient to those involved, those burdens did not implicate basic safety. And the extra tax burden imposed on others by the exemption considered in *Texas Monthly* was likely imperceptible.

RLUIPA's burdens exceed those in several ways. They involve basic security, not just inconvenience. It is routinely invoked, causing administrative disruptions that dwarf those considered in *Caldor*. And RLUIPA's burdens have a far larger footprint than those imposed by the obscure measures considered in *Caldor* and in *Texas Monthly*: "In the necessarily closed environment of the correctional institution, few changes . . . have no ramifications on the liberty of others or on the use of the prison's limited resources," almost

all have "significant 'ripple effect[s]' on fellow inmates [and] prison staff." *Turner*, 482 U.S. at 90.[3]

d. RLUIPA causes excessive government entanglement with religion.

Laws also violate the Establishment Clause if they cause excessive government entanglement with religion. *Lemon*, 403 U.S. at 613–15. RLUIPA, in the unique context of prison, does.

The entanglement RLUIPA causes is particularly problematic. Officials cannot contest whether an inmate's practices are central to his religious beliefs, but they can challenge whether the belief system is really a religion, and whether or not the inmate's beliefs are sincere. *Smith*, 494 U.S. at 906–07 (O'Connor, J., concurring). Given the frequency and potentially serious consequences of inmates' use of religion as a cover for other activities, state officials must conduct that inquiry carefully. For example, security concerns require a thorough vetting of outside providers and the doctrines those providers espouse, as well as close monitoring of religious activities conducted within prison. Office of the Inspector General, A Review of the Federal Bureau of Prisons' Selection of Muslim Religious Services Providers, 50–51, 53–54 (2004). Indeed, the record here shows that officials must review large volumes of religious publications sent to prisoners. J.A. 267–73, 277. That is the type of "comprehensive, discriminating, and continuing state surveillance," *Lemon*, 403 U.S. at 619, that constitutes excessive entanglement.

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[3] Further, Petitioners misread *Texas Monthly* by arguing that it allows secular burdens if they are imposed to lift religious ones. Pet. Br. at 32. The plurality states the test as disjunctive: a hyper-constitutional accommodation is invalid if it "*either* burdens nonbeneficiaries markedly *or"* does not remove religious burdens. 489 U.S. at 15 (emphasis added). Petitioners do not dispute the burdens on others, which invalidate RLUIPA regardless of its burden-lifting goal.

Ohio recognizes that the prison environment makes some level of entanglement inevitable. Prison officials, by necessity, pervasively monitor inmates' activities. And, of course, the Free Exercise Clause mandates that prisoners may engage in some forms of religious practice. See *Cruz v. Beto*, 405 U.S. 319, 321–23 (1972). These two realities combine to require some State entanglement in religion. Indeed, Ohio concedes that Free Exercise Clause requirements may allow a level of entanglement in prison that would violate the Establishment Clause outside of prison. But it is undisputed that RLUIPA goes well beyond what the Free Exercise Clause requires, so Petitioners cannot rely on the State's need to allow Free Exercise to justify the entanglement here.

* * *

We acknowledge that a law can remain valid even with some of the above indicia. *Amos* upheld a law that was not religiously neutral; *Everson* allowed a subsidy that may have motivated some families to send their children to religious schools; and *Agostini* sustained a program involving some State supervision of its religious beneficiaries. But none of those individual features were present with the enhanced intensity that the prison environment produces, and none of those cases involved the unprecedented confluence of invalidating factors found in RLUIPA. Whether discussed in terms of "effects" or "endorsement," RLUIPA's implications are clear: religious inmates, *because of their religion*, have far greater rights than others. That violates the Constitution.

e. RLUIPA is not a permissible accommodation under *Amos*.

Petitioners rely heavily on *Amos* to argue that RLUIPA is a valid accommodation. Their arguments misunderstand both *Amos*'s rule and how RLUIPA operates.

1. Initially, and notably, the Court has not said—in *Amos* or in any other case—that accommodation measures generally are insulated from Establishment Clause scrutiny.

Indeed, *Amos* expressly recognized that at "some point, accommodation may devolve into an unlawful fostering of religion," 483 U.S. at 334–35, a principle ratified in other cases. See *Lee*, 505 U.S. at 587; *Kiryas Joel*, 512 U.S. at 706. And the Court has, in *Texas Monthly*, *Caldor* and *Kiryas Joel*, struck laws offering religious exemptions or accommodations.

2. RLUIPA goes much further than the accommodation at issue in *Amos*. There, Congress had enacted a law "exempt[ing] religious organizations from Title VII's prohibition against discrimination in employment on the basis of religion." 483 U.S. at 329. An employee fired for religious reasons challenged the law on Establishment Clause grounds.

The Court rejected his claim. It held that "[f]or a law to have forbidden 'effects' . . . it must be fair to say that the *government itself* has advanced religion through its own activities and influence." 483 U.S. at 337 (emphasis in original). That required a showing of "active involvement of the sovereign in religious activity," something different from simply allowing churches to advance religion on their own. *Id.* The Court then explained that two related features of the law showed why that had not occurred.

First, the law did not affect churches' original pre-regulation rights. It did not give them greater rights than they had before Congress first entered the field; it simply left them where they were before Title VII. "In such circumstances, we do not see how any advancement of religion . . . can be fairly attributed to the Government, as opposed to the Church." *Id.*

Second, the law did not require anybody to take any action on account of religion, but left churches and their employees to their own devices: "In the present cases, [the employee] was not legally obligated to take [any] steps . . . and his discharge was not required by statute." *Id.* at n.15. The Court contrasted that to the law considered in *Caldor*,

which required employers to take affirmative steps to accommodate religious employees, and found that to be "very different." *Id.*

Indeed, most religious-accommodation laws follow the *Amos* model, i.e., a sovereign exempts religious objectors from some burden that it has imposed, thus leaving those citizens in the same position that they would be in if the sovereign had never entered the field. For example, as Petitioners note, Ohio exempts ordained ministers from State laws barring the unlicensed practice of psychology. Pet. Br. at 18. But that exemption leaves a minister in the same place that she would occupy if Ohio did not regulate psychology at all; she receives no net benefit. Further, her exemption does not burden anyone else. Ohio has no quarrel with this law, or any of the other "widely-accepted accommodations of religion" that Petitioners cite that follow this model. *Id*. at 17.[4]

But RLUIPA is different. Unlike such permissible burden-lifting laws, RLUIPA does not lift burdens that the same sovereign imposed. Rather, the federal government compels others, sovereign States, to take affirmative steps—to alter their otherwise lawful conduct—in order to accommodate religious practices. It is one thing to step aside to let someone pass (as exemption statutes do), it is quite another to push a third party out of the way (as RLUIPA does). And, in providing religious prisoners this benefit, Congress gives them far greater rights than they had before Congress entered the field.

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[4] Petitioners cite two other laws that, in their view, are threatened by Ohio's position, but both would easily survive. Connecticut may, in our view, continue to exempt religious rituals from animal slaughter laws, because those performing the rituals are no better off than if the State simply did not regulate animal slaughter. Likewise, Delaware may continue to exempt prayer-based treatment from medical-treatment laws, as again, the citizens who are accommodated are merely left alone.

3. The U.S. seeks to ignore the critical difference between prison life and normal civil society when it says that RLUIPA does not result in "government advancing religion," but "simply affords individuals the opportunity to exercise and advance their religious faith *on their own*." U.S. Br. at 18 (emphasis added). Outside prison walls, many religious accommodations may involve nothing more than the government "getting out of the way," so that citizens act "on their own." But prisoners do virtually nothing "on their own." Wardens oversee every aspect of their lives, including their religious exercises. Prison officials provide the rooms when inmates meet for religious purposes—as Petitioners demand here, J.A. 42—and provide a guard to supervise such meetings. Prison officials provide paid chaplains and pay extra for meals meeting religious dietary requirements. To be sure, the Free Exercise Clause may require prison officials to provide some of these things, but in providing any of them, the government is inherently active, not passive. So to the extent that such provision goes beyond constitutional minimums, the State is indeed advancing religion. And in forcing the States to do so, the federal government is also advancing religion. Viewed at either level, then, RLUIPA is "government itself" advancing religion. See *Amos*, 483 U.S. at 337 (quotation marks and emphasis omitted).

4. Other *Amos*-type exemptions also present very different Establishment Clause concerns because they arise outside of prison. Exemptions and accommodations outside prison will generally present little, if any, danger of communicating endorsement, as very few people notice when government grants such exemptions. Further, and perhaps more important, even fewer people are actually affected by those exemptions; they have very little impact on anyone besides those exempted.

Prison could not be more different. As discussed above, no official action goes unnoticed there, and almost all actions directly effect other inmates and staff. "[I]ncreased freedom

for [religious prisoners] come[s] 'only at the cost of significantly less liberty and safety for everyone else, guards and other prisoners alike.'" *In re Long Term Admin. Segregation of Inmates*, 174 F.3d 464, 470 (4th Cir. 1999) (quoting *Turner*, 482 U.S. at 92–93). While religious exemptions outside prison walls are typically valid, the powerful weapon RLUIPA provides religious inmates inside those walls violates the Establishment Clause.

2. RLUIPA unconstitutionally interferes with State power to act within the "play in the joints" between the Religion Clauses.

Even if RLUIPA did not violate the Establishment Clause's libertarian aspect by advancing religion within prisons, it separately violates another Establishment Clause limitation: the federalist aspect, which reserves to the States the power to act within the "play in the joints" between the two Religion Clauses. See *Locke*, 540 U.S. at 718.

This federalist aspect does not mean that the States (as compared to the federal government) face a different line between permissible acts and an Establishment Clause violation, or a different line between permissible acts and a Free Exercise violation. The State faces the identical restraints that the federal government does, in terms of the relationship between citizen and sovereign; Ohio does not challenge that. See *Wallace v. Jaffree,* 472 U.S. 38, 48–49 (1985). Similarly, the States and the federal government both have power—when acting as sovereigns directly regulating citizens—to act in the zone between the clauses.

But when a State exercises its *Locke* power, and selects a point between the clauses, Congress has no power to override that choice and tell the State to pick a different point in that zone. That is, a State may choose to have a school voucher plan that allows students to select either religious schools or secular schools, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), or it may choose to exclude theology majors

from an educational grant program, *Locke*, *supra*. But Congress cannot, simply by legislative fiat, reverse the results in *Zelman* or *Locke*, whether by telling Ohio to exclude religious schools from its voucher plan, or by telling Washington to include theology majors in its program. Independent of whether Congress has any power to do so under any enumerated power (discussed below at 34–46), the Establishment Clause's federalist aspect blocks Congress from imposing its choices on States regarding how to accommodate religion. That dooms RLUIPA.

a. The Court has routinely recognized that in defining the scope of constitutional guarantees, the starting point is the text, along with the original understanding of the drafters as revealed through historical evidence. See *Alden v. Maine*, 527 U.S. 706, 713–27 (1999); *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 1360 (2004); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 827 (1995) (looking to "the available historical and textual evidence, read in light of the basic principles of democracy underlying the Constitution").

Here, the text is plain: "Congress shall make no law *respecting* an establishment of religion." That meant, pre-incorporation, not only that Congress could not declare a national religion, but that Congress could not *interfere with* (i.e., make a law *respecting*) State choices to establish official religions. Of course, States can no longer establish preferred churches, but Congress is as unable as ever to contravene constitutionally permissible State choices regarding religious policy.

History confirms this textual meaning. Even a cursory review of the historical record reflects a broadly shared understanding at the founding that the newly-created federal government lacked any authority to regulate the States' treatment of religion. Madison himself stated that: "There is not a shadow of a right in the general government to intermeddle with religion. Its least interference with

[religion] would be a most flagrant usurpation." See 3 Debates on the Adoption of the Federal Constitution 330 (J. Elliot 2d ed., Ayer Co. 1987) (1888) ("Debates"). Others in the constitutional debates echoed those sentiments. For example, in the North Carolina debates, James Iredell asserted that Congress had no power over religion, and that it would be "a just cause of alarm" if it did. 4 Debates at 194; see generally J. Rubenfeld, *Antidisestablishmentarianism: Why RFRA Really Was Unconstitutional*, 95 Mich. L. Rev. 2347, 2351–57 (1997); W. Hurd & W. Thro, *The Federalism Aspect of the Establishment Clause*, 5 Engage 62–63 (2004).

Commentators confirm this understanding. As Justice Story explained, "the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions."[5] J. Story, Commentaries on the Constitution 702 (Carolina Academic Press 1987) (1833). Or, as one historian put it: "Americans in 1789 largely believed that issues of Church and State had been satisfactorily settled by the individual states. They agreed that the federal government had no power in such matters." T. Curry, The First Freedoms 194 (1986). Another historian put it this way: "[A] widespread understanding existed in the states during the ratification controversy that the new central government would have no power whatever to legislate on the subject of religion . . . . [R]eligion as a subject of legislation was reserved exclusively to the states." L. Levy, The Establishment Clause 93 (2d ed. 1994). See also Br. of Virginia, et al. at 6–15.

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[5]Of course, that may be a mild overstatement in the sense that there were some "distinctively federal domains"—such as the regulation of territories, the armed forces, and its own legislative sessions—where Congress could constitutionally make laws regarding religion. See Rubenfeld, *supra*, at 2357. But in these areas, Congress was regulating citizens directly, not regulating the State sovereign's treatment of religion.

In addition to finding support in the historical record, the federalist aspect of the Establishment Clause is reflected in the basic constitutional framework and the system of dual sovereignty that it enacts. "Although the Constitution establishes a National Government with broad, often plenary authority over matters within its recognized competence, the founding document 'specifically recognizes the States as sovereign entities.'" *Alden*, 527 U.S. at 713 (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 71 n.15 (1996)). These State sovereigns, when acting within their "respective sphere[s]"—such as in matters of religion—are not subject to federal oversight. And, to protect this sovereignty, "[t]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *New York v. United States*, 505 U.S. 144, 166 (1992). In short, Congress and the States are both free to directly regulate religion within the "play in the joints," (i.e., both remain subject to the libertarian aspect of the Establishment Clause as well as the Free Exercise Clause), but Congress cannot use its Article I powers to tell the States what choices they must make in that range.

RLUIPA simply ignores this vital constitutional limitation. Through RLUIPA, the federal government orders the States to accede to inmates' religious demands unless prison officials can first show a compelling state interest supporting denial, and also show that denial of the request is the least restrictive means to achieve that interest. One could scarcely imagine a more direct federal intrusion on State decisionmaking about religion.

b. Petitioners and their supporters, unable to meaningfully dispute this historical meaning, instead attempt to sidestep it. Together, they present essentially four arguments. All are flawed.

1. Contrary to Petitioners' suggestion, Ohio does not argue for "two different Establishment Clauses with varying

levels of potency." See U.S. Br. at 26; Pet. Br. at 33–35. Nor does Ohio seek "junior-varsity disincorporation." See U.S. Br. at 32, 31–36. In fact, we concede that Ohio and the federal government face identical limits, under the Religion Clauses, on what we may do as sovereigns regulating our citizens. Ohio insists only that in the permissible zone—where the States may make policy choices without violating either Clause—*the States,* not Congress, get to choose. It is that separate, federalist limit on Congress, not "varying levels of potency," that Ohio relies on here.

2. Nor can the U.S. successfully argue that Congress is not interfering with the States' authority within the "play in the joints," but is merely purchasing the States' acquiescence through its spending power. See *id.* at 28–30. That argument simply ignores that RLUIPA also purports to rest on Commerce Clause grounds, and thus would apply, if constitutional, whether States accept the federal money or not. And as described below, RLUIPA is not a valid exercise of the spending power.

3. The U.S.'s assertion that "everything changed with the Fourteenth Amendment," U.S. Br. at 32, and its insistence that RLUIPA is justified by "Congress's power to protect and enforce the free exercise of religion against State intrusion," *id.* at 34, cannot be squared with *Boerne*. But importantly, in advancing these arguments, the U.S. admits that the federalist aspect of the Clause was "no doubt [] part of the Establishment Clause's genesis." *Id.* at 31. In other words, they admit that we are right about the Clause's meaning, or at least regarding its meaning from 1791 to 1868. Thus, the parties agree, in effect, that the question presented here has been converted from an Establishment Clause question to a Fourteenth Amendment question: did the latter Amendment give the federal government a previously-unavailable power to govern the States' policy choices in the permissible zone between the Religion Clauses? The answer to that question is plainly no.

In particular, this argument entirely sidesteps two fundamental facts about *Boerne* and RLUIPA: (1) the U.S. *lost* in *Boerne*, because RFRA was *not* valid Section 5 legislation, and (2) RLUIPA, just like RFRA, does not "enforce" Free Exercise rights, but openly grants substantive accommodation rights *beyond* the constitutional minimum. Thus, Congress's power to "enforce" free exercise rights is not at issue here, as RLUIPA does not enforce the Constitution. And any suggestion that RLUIPA is valid "prophylactic legislation," see U.S. Br. at 36, is also wrong, as no one even asserts, let alone demonstrates, that RLUIPA meets *Boerne*'s requirement that such legislation be a proportional and congruent response to a historical pattern of State discrimination. See *City of Boerne*, 521 U.S. at 530–32.

The U.S. never says, of course, that Section 5 directly empowers Congress to pass RLUIPA. Instead, the U.S. seems to say that, in addition to the Section 5 enforcement power, there is a "junior-varsity" Section 5. The latter, they appear to claim, does not provide Congress with positive power to act, but rather clears the field of obstacles—such as the federalist aspect of the Establishment Clause—that would otherwise prevent Congress from using its Article I powers to regulate the States. See U.S. Br. at 36. This lesser aspect of Section 5, however, finds no support in either the text or jurisprudence of the Fourteenth Amendment. Section 5 is textually tied to due process and equal protection rights, not to Article I enumerated powers, such as the Commerce Clause, so it cannot boost Congress's ability to "enforce" those powers. In sum, the Fourteenth Amendment did not grant Congress new power, other than through Section 5's actual enforcement provision, to overcome the federalist aspect of the Establishment Clause.[6]

[6] Notably, in arguing that the Fourteenth Amendment left in place the federalist aspect of the Establishment Clause, Ohio does not say that "the Framers of the Fourteenth Amendment intended to decamp on the subject

4. Amicus National Association of Evangelicals, et al. ("NAE") erects one further strawman. It contends that Ohio broadly argues that Congress can make no law "touching religion." NAE Br. at 28. But that also misstates Ohio's argument. To be sure, as the NAE points out, Congress had power to directly regulate religion during the founding times. But this was true, as the NAE's own examples demonstrate, where Congress was exercising state-like control, acting as a sovereign directly regulating citizens. *Id.* at 29 (citing the Northwest Territory, Indian tribes, and the Louisiana Purchase). NAE provides no examples—nor do any exist, to our knowledge—of instances in which the federal government told the States how to exercise *our* sovereign powers in regulating our citizens within the "play in the joints." Ohio freely admits that Congress can, where its enumerated powers enable it, directly regulate individuals regarding religion (again, within the "play in the joints"), including individuals within the States. But the federalist aspect of the Establishment Clause prevents Congress from intruding on *State* choices regarding the treatment of religion.[7]

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of religious freedom, putting all their trust in the State governments' discretionary protection and accommodation of religious exercise." U.S. Br. at 35. The Fourteenth Amendment imposed federal control over the States regarding religion in at least three ways: (1) it substantively imposed the libertarian aspect of the Clause, through incorporation, (2) it thus procedurally empowered the federal judiciary to enforce individuals' rights against the States, and (3) it gave Congress enforcement power under Section 5, when Section 5 is truly triggered. Thus, the U.S.'s accusation is yet another attack on a strawman.

[7] NAE's alternative argument—that to the extent that the Establishment Clause polices federal-state boundaries, it merely prevents Congress from interfering with State "establishments"—is also flawed. NAE Br. at 21. The Founders understood the Constitution to prevent *any* federal "intermeddling" in the States' treatment of religion. See above at 25–27. Indeed, the chief concern that New England representatives raised during the discussion of the First Amendment was that it might be interpreted to "give Congress power to interfere with existing [religious] arrangements

Once this distinction is clear, the NAE's parade of horribles disappears. See *id.* at 29. For example, the federalist aspect, as Ohio urges it, leaves Congress free, under *Locke*, to include (or exclude) church-affiliated schools in federal programs to aid education. See *id.* What Congress cannot do through its Article I powers is mandate that States follow the same course with their own programs.

By contrast, while the NAE's parade of horribles does not truly threaten, Petitioners' view would cause devastating effects, as it would allow Congress to impose national religious regulations in a host of areas now left to State and local governments. For example, the Court has repeatedly allowed local governments to recognize the social significance of Christmas by displaying decorations that include secular and religious symbols alike, within certain limits. *Lynch v. Donnelly*, 465 U.S. 668 (1984); *County of Allegheny v. ACLU*, 492 U.S. 573 (1989). Of course, while such displays are permitted, none are required, and in our diverse nation, state and local governments choose varying degrees of Christmas recognition (within Establishment Clause bounds). But if Congress has the power to choose for us, within the permissible zone, then Congress could pass a national ban on Christmas displays on state and local government property, or Congress could *require* every State to display a constitutionally-compliant crèche on State grounds, or, at the very least, Congress could impose that requirement as a condition to receiving federal money.

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in the individual states," as the New England States did not consider their treatment of religion to rise to the level of an establishment. See Curry, above, at 203. It was this concern that prompted Madison to insist that "the least interference" by the federal government would be a "flagrant usurpation" of State prerogative. 3 Debates at 330. NAE thus seeks a reading of the Establishment Clause that rejects Madison, and visits upon the States the very intermeddling that the New England representatives feared.

Similarly, Congress could impose all sorts of religious accommodations, crushing the religious diversity among the States and imposing a procrustean plan on the Nation. The States have always served as "laboratories of democracy," and nowhere is that more true than within the "play in the joints" between the Religion Clauses. States provide differing degrees of protection, and they do so in different specific areas. Some have enacted "state RFRAs," directing their state courts to generally protect religion.[8] Others have enacted religious exemptions to specific laws, such as vaccination requirements, Ohio Rev. Code § 3313.671(A)(3), alcohol regulations exempting sacramental wines, *id.* §§ 4301.631(F), 4301.69(A), 4307.05(B), and rules about animal slaughter, Conn. Gen. Stat. § 22-272a(e), among many others.

But under Petitioners' view, Congress could simply order all the States to allow exemptions from vaccination or other laws, or could mandate a national accommodation scheme in any way it wishes, within the *Locke* permissible zone. Surely that is not what the law allows, and surely that would not be good for federalism or for religious diversity. Yet that is the unavoidable result of adopting Petitioners' evisceration of the federalist aspect of the Establishment Clause. The Court should decline to take that step.

B. The Court should reach the enumerated powers issues.

In addition to violating the Establishment Clause, RLUIPA also exceeds the scope of Congress's enumerated powers. RLUIPA's attempt to regulate state regulation does not fall within either the spending or the commerce powers, the two bases on which Congress relies. And, despite

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[8] See, e.g., Okla. Stat. tit. 51, § 253; Idaho Code § 73-402; Fla. Stat. § 761.03.

Petitioners' suggestion to the contrary, it is not only appropriate, but vital, for the Court to address these issues. See Pet. Br. at 35–36.

It is appropriate, as the Court has long recognized its ability to affirm judgments of lower courts on alternate grounds. *Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982). This is especially true where, as here, the alternate grounds are principally legal issues—for which no further factual development is necessary—that were fully briefed and presented below. Indeed, not only did the parties present the enumerated powers argument, but the district court expressly ruled on the spending issue in its decision below. Pet. App. B8–B13. Nor is remand required to decide if the statutory effect-on-commerce jurisdictional hook is met here, as in our view, Congress lacked commerce power even if that element is satisfied. Thus, the Court should consider the enumerated powers arguments as well.

And it is vital that the Court do so. As our acquiescence noted, declining to address these arguments could lead to the anomalous result that the Court could uphold RLUIPA even if a majority of Justices would find it unconstitutional, albeit on varying grounds. See Ohio Br. in Resp. to Cert. Pet. at 16–17. Further, failing to reach the issues would impose years of uncertainty and litigation on the States.

Finally, the Court should reach *both* the commerce and spending issues, regardless of its answer on either. If the Court upholds RLUIPA on spending grounds, but leaves the commerce question open, States will not know if refusing federal prison funds will actually free them of RLUIPA's demands. Conversely, if the Court upholds it on commerce grounds, but does not address spending, States will not know if RLUIPA would apply in cases involving no effect on interstate commerce. See 42 U.S.C. § 2000cc-1(b)(1). In fact, RLUIPA does not fall within either of these powers.

C. RLUIPA is not valid Spending Clause legislation.

The spending power fails, for two reasons, to justify RLUIPA's application here. First, where, as here, a federal law seeking to regulate the States falls outside the scope of any other enumerated power, and also opens the States to coercive sanctions, the relatedness requirement is especially significant. RLUIPA fails to meet that requirement, as no nexus exists between RLUIPA's demands and the federal funds to which its conditions attach. Second, the spending power has a contractual nature; Congress buys State acquiescence. But the power to contract has limits. In particular, Congress cannot buy, and a State cannot sell, the State's power to make religious policy within the "play in the joints."

1. Federalism mandates a strong relatedness requirement for State-directed spending power legislation that does not fall within any other enumerated power.

a. The spending power presents special concerns, for, left unchecked, it "could render academic the Constitution's other grants and limits of federal authority." *New York*, 505 U.S. at 167. It could transform our constitutional republic from one in which "[e]ach State has all governmental powers save such as the people, by their Constitution, have conferred upon the United States . . . or reserved to themselves," *United States v. Butler*, 297 U.S. 1, 63 (1936), into one in which the federal government's regulatory tendrils weave their way into every possible field of governance, choking off the States' separate sovereignty.

By making that observation, Ohio does not suggest that Congress's spending powers are limited to its enumerated powers. It is now settled that Congress can use its power to tax and spend for the general welfare under Article I, § 8, clause 1, to reach areas it otherwise could not. *Butler*, 297 U.S. at 66; *Dole*, 483 U.S. at 207. In other words, Ohio

concedes that Congress can fund (and impose conditions on) projects that it concludes would further the general welfare, even if those projects are outside of its regulatory authority.

But that power is limited in two ways. First, Congress must identify a legitimate *national* interest underlying its conception of the "general welfare." Second, in pursuing that interest, Congress can only impose conditions that are related to the funding it is providing (i.e., to the national interests it is pursuing through that funding). Congress cannot go further and attach conditions that control matters unrelated to the grant unless, of course, Congress is independently authorized by other enumerated powers to regulate those matters directly.[9] And this relatedness requirement takes on special significance where the "contractual obligation" comes with teeth—opening the State to federal lawsuits by third parties that seek to change the State's regulatory behavior.

The Court's spending power cases reflect these principles. *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937), for example, involved financial incentives for States to enact unemployment insurance systems meeting federal standards. The Court upheld the conditions at issue based on its findings that (1) the national interest was clear—at the time, the problem of unemployment "had become national in area and dimensions," and Congress was acting "to safeguard its own treasury," *id*. at 586, 591; (2) the conditions Congress imposed were closely related to achieving that federal interest, *id.* at 591; and, (3) the States were not subject to lawsuits for failure to comply, rather, the only sanction would be loss of the federal funds, *id.* at 595. Thus, the legislation did not impermissibly invade State sovereignty, as

[9] If Congress could impose the regulation directly, i.e., without relying on its ability to purchase State acquiescence through its spending power, the relatedness requirement can be relaxed. In such cases, Congress is not expanding the scope of its authority, but rather merely relying on one grant of power (i.e., spending) rather than another (e.g., commerce).

both the condition and the enforcement mechanism did not stray beyond the clear national purpose underlying the financial incentive.

The same was true in *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127 (1947). There the condition attached to the funds was closely connected to the national interest in ensuring efficient expenditure of federal grants. In particular, it was meant to eliminate political influence in the administration of federal programs. It did so by prohibiting actively partisan state officials from managing the federal funds. *Id.* at 143. And the relatedness to that national interest was strong, as the condition was directed to "activit[ies] financed in whole or in part by . . . a federal agency." *Id.* at 132. Finally, once again, the condition did not compel the State to do anything, as the only sanction for non-compliance was a reduction in future federal funds. *Id.* at 129 n.1.

The same pattern was also present in *Dole*. The Court there stressed that conditions would be "illegitimate if they [were] unrelated to the federal interest in *particular* national projects or programs." 483 U.S. at 209 (emphasis added; quotation marks omitted). The Court found that the condition at issue there could be constitutionally enforced because it addressed particular state action that directly impeded the functioning of an existing federal program—alcohol laws that led to drunk driving on highways Congress subsidized specifically to increase safety. See 23 U.S.C. § 101(b) (declaring a federal policy "to increase the safety of [federally funded highway] systems to the maximum extent"). The Court therefore had no difficulty concluding that the conditions addressed a "*particular* impediment to a purpose for which the funds are expended." *Dole*, 482 U.S. at 209 (emphasis added). Further, the condition did not provide any sanction beyond a reduction of future federal funds; the State could not be forced to do anything. *Id.* at 211.

b. Allowing RLUIPA to stand based on the federal funding here would be a large step beyond what the Court has previously approved.

First, no legitimate national interest exists in removing burdens on religious exercise that States may impose in prisons. As noted above, the Constitution expressly allocates to the States the right to control their own religious policy choices within the permissible constitutional range between Free Exercise and Establishment. Congress's attempt to nationalize the standard thus not only fails to serve any legitimate national interest, but actually violates the Constitution of its own accord. See above at 25–29.

Second, the funding to which the condition attaches is wholly unrelated to RLUIPA's subject matter. Petitioners have never claimed, nor could they, that the religious burdens they allege interfere with any federally funded programs in prison, or with Petitioners' ability to benefit from those programs. Hence we are not dealing with a "particular," or indeed any, "impediment to a purpose for which the funds are expended" within *Dole*'s meaning. Moreover, no one claims that those religious burdens are imposed by Ohio's operation of these federal programs, so Petitioners cannot claim that federal dollars are being used to subsidize state conduct Congress has no wish to support. Cf. *Lau v. Nichols*, 414 U.S. 563, 568–69 (1974).

In short, the federal funding here is completely disconnected from the matters at issue; this is a case about Ohio's use of its *own*, non-federally generated, resources. Applying RLUIPA here thus cannot be justified as an effort to ensure that federal funds are used for their intended purposes, but that is the only legitimate function of Spending Clause legislation under our constitutional system.

Third, the way in which RLUIPA's conditions are enforced is also problematic. The Court has never enforced, over a State's objection that the law attempted to regulate

beyond Congress's enumerated powers, Spending Clause legislation that provided for anything more than the termination of the federal incentive when a violation occurs. Further, it has supported its decisions sustaining those measures by specifically referencing that aspect of the conditions. *Steward Mach. Co.*, 301 U.S. at 595; *Oklahoma*, 330 U.S. at 143.

By contrast, RLUIPA is not enforced by the withdrawal of federal funds. Far from simply turning off the federal spigot in the face of non-compliance, RLUIPA compels States, by way of a federal court order, to change prison operations. As the Court held in *Butler*, "[t]here is an obvious difference between a statute stating the conditions upon which moneys shall be expended" and one that forces compliance with "a regulation which otherwise could not be enforced." 297 U.S. at 73.

Moreover, such regulation would intrude into a core function that is undoubtedly one of state, rather than federal, concern. That is not only true of religious policy choices, but also of state prison management. "The right to formulate and enforce penal sanctions is an important aspect for the sovereignty retained by the State," *Kelly v. Robinson*, 479 U.S. 36, 47 (1986), and the management of "penal institutions is an essential part of that task," *Procunier v. Martinez*, 416 U.S. 396, 412 (1974). Indeed, "[i]t is difficult to imagine an activity in which a state has a stronger interest." *Preiser*, 411 U.S. at 491–92.

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In sum, Congress can reach these matters via its Spending Power only if the religious burdens at issue actually affect the operation of particular federal programs. They do not, as evidenced by the indisputable (and undisputed) facts that (1) the relief requested would not in any way change the manner in which those grants are administered and (2) that relief would constrict Ohio's

constitutionally recognized discretion to use its *own* resources in otherwise lawful ways. RLUIPA therefore cannot be constitutionally applied to this case.

2. Congress lacks authority to purchase State compliance on religious policy decisions within the "play in the joints."

Petitioners' reliance on Congress's spending power fails for another reason as well. Congress lacks authority to buy the State compliance that is at issue here.

The spending power is a form of contractual exchange: the federal government "buys" from the State, and the State "sells" to the federal government, the power to set policy X or Y. But this sale may take place only if Congress is free to buy, and the State is free to sell. Neither is the case here. The power to contract, after all, has limits. Courts do not enforce certain deals, such as those based on duress, Restatement (Second) of Contracts § 175, or those that threaten our political process—for example, vote-buying agreements, see *Exchange Nat'l Bank v. Henderson*, 77 S.E. 36, 39 (Ga. 1913). Similarly, the Court should reject attempted spending power purchases that would undermine our constitutional framework.

While States can sell many aspects of their rule-making authority—their power under the 21st Amendment to set the drinking age for example, see *Dole*—religion is different. The Constitution assigns exclusively to the *States* all religious policy decisions within the States' sovereign sphere. And it does so not merely for the benefit of the States, but also for the benefit of the citizens. The specific danger the Establishment Clause was designed to prevent is the problem of a national orthodoxy. And the structural method the Founders chose to address that danger was to ensure that governmental power over religion, to the extent it exists, would be dispersed among the States. But Congress could easily undo that dispersal, and destroy that structural

safeguard, if it may simply purchase each State's separate sovereignty and therefore create a national uniformity. That would indeed "render academic the Constitution's other grants and limits of federal authority." *New York*, 505 U.S. at 167.

3. Petitioners' arguments are inapposite.

Petitioners, the Government and their amici offer several arguments in support of RLUIPA's validity as Spending Clause legislation, but they are based on misconceptions about our analysis.

First, the arguments that a general overlap between religious exercise and some program's rehabilitative goals is sufficient to sustain RLUIPA overlooks the nature of the challenge. Pet. Br. at 40; U.S. Br. at 43; Sens. Hatch & Kennedy Br. at 10–11. Respondents agree that such an overlap would defeat a facial challenge, but Ohio is not making such a challenge. Instead, our relatedness argument has always been that the religious burdens alleged are not sufficiently related to the funding Ohio actually receives from the federal government. Hence, these arguments address a claim not made here.

The same is true of our opponents' reliance on *Sabri v. United States*, 541 U.S. 600, 124 S. Ct. 1941 (2004), a case that is distinguishable in two ways. First, it did not involve the most crucial aspect of this case—Congress's power to regulate States—but instead dealt with private conduct. Indeed, it expressly distinguished the law considered there from other laws by which Congress tries to influence "a State's own choices of public policy." *Id*. at 1948. Further, the law there was directly related to ensuring that federal funds are spent as Congress intends; it policed federal grants by ensuring their recipients' fiscal integrity. As noted above, RLUIPA's application here is not connected to any federal program.

RLUIPA's supporters are also mistaken on several levels in suggesting that success on this challenge will invalidate other federal laws. Initially, that argument overstates the import of this challenge to this particular application of this particular law. At most, success on our claim would mean that a party would need to show a functional nexus to a particular federal program when using a Spending Clause law to constrict a *State's* discretion in an area otherwise beyond Congress's reach. That holding would not affect claims against private grant recipients. Further, most of the laws Petitioners cite are within Congress's reach under other constitutional provisions, so success for Ohio here would not imperil those laws. Section 5 of the Fourteenth Amendment justifies the Equal Access Act, 20 U.S.C. §§ 4071 et seq., and Title VI, 42 U.S.C. §§ 2000d et seq., as they simply enforce constitutional rights. And the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 et seq., and Title IX, 20 U.S.C. §§ 1681 et seq., fit well within the Commerce Power. Thus, the holding we seek here would not affect those laws at all.

In short, notwithstanding Petitioners' arguments, the spending power has limits. RLUIPA, especially in light of the federal funding here, far surpasses them.

D. RLUIPA is not valid Commerce Clause legislation.

Nor can RLUIPA rest on Congress's commerce power. While that power is broad, Congress cannot use it to regulate patently noneconomic activities. Yet that is precisely what Congress seeks to do here.

1. Congress's commerce power is limited to three general categories: (1) regulating the "channels of interstate commerce," (2) regulating and protecting "the instrumentalities of interstate commerce," and (3) regulating activities that "hav[e] a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549,

558 (1995) (citations omitted). Of course, RLUIPA, as applied in state prisons, does not seek to regulate either the channels or instrumentalities of commerce. Thus, RLUIPA, like the laws at issue in *Lopez* and *United States v. Morrison*, 529 U.S. 598 (2000), stands or falls on the "substantial relation" or "substantial effects" test.

But *Lopez* and *Morrison* impose an insuperable obstacle to finding that RLUIPA meets the "substantial effects" criterion. In particular, both cases confirm that Congress can regulate only "*economic activity* that substantially affects interstate commerce." *Lopez*, 514 U.S. at 560 (emphasis added); *Morrison*, 529 U.S. at 610–11. That is, Congress may not regulate non-economic activity, even if that non-economic activity has a substantial effect on interstate commerce. Thus, the Gun-Free School Zones Act was invalidated because gun possession is not "'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 514 U.S. at 561. It did not matter that gun possession might impact interstate commerce: the activity itself was not economic, and that was dispositive. *Id.* at 567–68. Similarly, Congress had no power to enact the civil remedy provision of the Violence Against Women Act, because "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity," even though such crimes may substantially impact interstate commerce. *Morrison*, 529 U.S. at 613.

Policing this economic/non-economic distinction is vital to preserving the Commerce Clause's federalist protections. "Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur." *Morrison*, 529 U.S. at 611 (quoting *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring)). Indeed, the boundaries would disappear altogether. After all, school curriculum, as the Court noted in *Lopez*, could

significantly affect learning, which could in turn have a "substantial effect on interstate commerce." 514 U.S. at 565. But, by limiting Congress's reach to "economic activities," the Court preserves State control over this and other traditional areas of state concern.

The "economic endeavors" limitation dooms RLUIPA. The Act regulates State regulation of prisoners' religious practices. But neither prison governance generally, nor prison decisions imposing burdens on prisoners' religious exercise in particular, nor the inmates' religious practices themselves qualify as a commercial or economic endeavor.[10] To be sure, these activities may impact commerce—just like gun possession in *Lopez*, or crimes against women in *Morrison*—but that effect is not enough. And, while prison operations, as opposed to prison governance, certainly include a variety of commercial elements—for example, purchasing food and clothing for prisoners—RLUIPA's text is not directed to any of them. Rather, its exclusive focus is on removing religious burdens.

Nor does RLUIPA's inclusion of a commerce-based jurisdictional limit cure this constitutional problem. Ohio recognizes that RLUIPA's commerce-based application extends only to those religious burdens that "lead in the aggregate to a substantial effect on commerce," 42 U.S.C. 2000cc-2(g), but that misses the point. Because the regulated activities are not "economic endeavors," their aggregate effect is simply irrelevant.[11] And the Hobbs Act jurisdictional

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[10] By contrast, a prison does engage in economic endeavors when it purchases goods or services or hires employees. But prison governance of inmates is different.

[11] The jurisdictional provision also fails for another reason. Because a valid commerce connection is a constitutional threshold, courts cannot presume that commerce effects exist. But RLUIPA mandates that presumption. It places the burden on the defendant/State to show that the alleged religious burdens do not, in the aggregate, have a substantial effect on interstate commerce. 42 U.S.C. § 2000cc-2(g).

provision on which Petitioners rely is simply inapposite. To be sure, the Hobbs Act, 18 U.S.C. § 1951, limits its jurisdiction to conduct that "in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce." But the Hobbs Act is directed against property crimes, which necessarily involve depriving someone of an economic asset (e.g., money, property, etc.). In that sense, those crimes are economic activities, and the question of their impact on intrastate commerce is thus constitutionally relevant.

Moreover, RLUIPA may not be predicated on broad notions of resuscitating state prisoners' ability to engage in commerce generally. Congress has the power to protect the general Commerce Clause "right to engage in interstate commerce free of restrictive state regulation." *Dennis v. Higgins*, 498 U.S. 439, 448 (1991) (quotation marks omitted). But that power cannot extend to restoring to prisoners the liberty to engage in commerce, once the State has constitutionally diminished that liberty by convicting and sentencing offenders. To accord Congress such power would wholly distort the balance between the State and federal sovereigns. Indeed, the same logic that would bless RLUIPA on those grounds would also permit a law in which Congress, seeking to offset the impact that jailing people has on commerce, mandates that inmates be released for shopping trips at specified intervals. That is not the law, nor should it be.

2. The Necessary and Proper Clause does not bolster Petitioners' Commerce Clause argument. See Art. I, § 8, cl. 18. As the Court has noted, "[w]hen a [l]aw for carrying into [e]xecution the Commerce Clause violates the principle of state sovereignty reflected in [] various constitutional provisions . . . it is not a [l]aw *proper* for carrying into [e]xecution the Commerce Clause, and is thus . . . merely [an] act of usurpation which deserves to be

treated as such." *Printz v. United States*, 521 U.S. 898, 923–24 (1997) (internal citations and quotation marks omitted; emphasis in original).

RLUIPA is just such a usurpation. It attempts to deprive the State of its sovereign right, following "a valid conviction," to "constitutionally depriv[e] [a prisoner] of his liberty" and "confine him and subject him to the rules of its prison system." *Meachum v. Fano*, 427 U.S. 215, 224 (1976).

E. The Tenth Amendment bars RLUIPA as Commerce Clause legislation.

The Tenth Amendment independently bars Congress's ability to use the commerce power to justify RLUIPA. As the Court has observed in language directly on point here:

> Even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts . . . . The Commerce Clause, for example, authorizes Congress to regulate state governments' regulation of interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.

Printz, 521 U.S. at 924 (quoting *New York*, 505 U.S. at 166). Through RLUIPA, Congress travels this forbidden path.

1. The prohibition on federal attempts to regulate state regulation rests directly on our constitutional framework of dual sovereignty. "[T]he Framers rejected the concept of a central government that would act upon and through the states, and instead designed a system in which the State and federal governments would exercise concurrent authority over the people—who were, in Hamilton's words, 'the only proper objects of government.'" *Printz*, 521 U.S. at 919–20. Indeed, the pervasive theme running through *New York* was that "Congress generally may not compel state governments

to regulate pursuant to federal direction." 505 U.S. at 177 (emphasis omitted); see also *id.* at 162 ("the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions"). And the prohibition applies even where Congress would otherwise have the power to regulate directly. See *Reno v. Condon*, 528 U.S. 141, 149 (2000) (The statutes in *New York* and *Printz* were invalid "not because Congress lacked legislative authority over the subject matter, but because those statutes violated the principles of federalism contained in the Tenth Amendment.").

RLUIPA as applied in prisons flies directly in the face of this constitutional demand. But the Court need not take our word for it. In floor comments, RLUIPA's two primary sponsors explicitly acknowledge its core purpose—to regulate the States' regulation of their prisons, by overriding what the two Senators viewed as "inadequately formulated [] regulations and policies."[12] In short, Congress expressly sought to regulate the way States regulate their prisons.

Not only does § 3 improperly regulate State regulation, it does so in a way that strikes at the very heart of State sovereignty. Incarcerating people, and determining the terms of that incarceration, is a uniquely sovereign function, and federal attempts "to 'second guess' the decisions of state . . . administrators in this sensitive area" are to be avoided. *Jones*, 433 U.S. at 137 (Burger, C.J., concurring). But RLUIPA ensures constant "second guessing," as State prison management decisions will always be "subject to the possibility" of a federal override, making federal courts "the primary arbiters of what constitutes the best solution to every administrative problem." *Turner*, 482 U.S. at 89. In short, RLUIPA seeks to mandate the way in which state officials make their regulatory decisions in this sensitive area.

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[12] 146 Cong. Rec. S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

2. In doing so, RLUIPA provides a prime example of the structural problem such federal overreaching causes—lack of accountability. By regulating State regulation, Congress distorts the public's perception of who is responsible for policy decisions. Congress places States "in the position of taking the blame" for the shortcomings in Congress's policy choices. *Printz*, 521 U.S. at 930. That will undoubtedly occur here, as Ohio's citizens will properly be outraged that their tax dollars are being used to accommodate "religious expression" in Ohio's prisons that openly advocates violence against minorities. See above at 6.

New York and *Printz* establish that Congress cannot compel States to affirmatively regulate according to congressional policy choices. RLUIPA does that. It is difficult to imagine a more flagrant violation of the Tenth Amendment's federalism mandate.[13]

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RLUIPA purports to be a law expanding individual rights, but it is not. Its ultimate results undercut individual rights, including rights of religious liberty. By forcing third parties to bear the burdens of accommodation—including forcing other inmates to risk their safety—it surely harms those parties' rights. And by offering powerful incentives to claim or feign religion to obtain benefits in prison, it degrades, rather than enhances, the religious liberty of the inmates who feel that pressure.

Equally, or perhaps more, important, RLUIPA threatens religious liberty by expanding the federal government's

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[13] The U.S. also addresses the Eleventh Amendment in its brief. See U.S. Br. at 48–49. Ohio agrees with the U.S. that the Court should not reach that issue, as there are antecedent statutory questions regarding the scope of relief RLUIPA authorizes. See *id.* at 49 n.29. Ohio does *not* agree, however, see *id.* at 49, that Ohio has waived its Eleventh Amendment immunity here. Ohio has not made any "clear declaration" of its willingness to waive such immunity. See *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675–76 (1999).

power at the expense of the States. In ratifying the Constitution, the States did not cede their sovereign power over religion to the newly formed federal government. To be sure, incorporation has limited the scope of the States' power in that area, and the Fourteenth Amendment has given Congress power to enforce the Constitution against the States, but neither of these developments gave Congress the power to enact the supra-constitutional accommodation mandate reflected in RLUIPA. Permitting a congressional takeover of the zone between the Religion Clauses thus directly contradicts the constitutional design, and it would stifle the rich diversity of State approaches to religious accommodation.

To be sure, the Court had never struck a congressional statute on this basis. But that is only because Congress has never before—save in its ill-fated attempt in RFRA—attempted such a blatant takeover of religious policy. It is Congress, not Ohio, that seeks an unprecedented rewriting of the Constitution—one that violates text and tradition, and not incidentally would aggrandize Congress's own power at the expense of States and citizens alike. The Court should again tell Congress "No."

CONCLUSION

For the above reasons, the judgment of the court of appeals should be affirmed.

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February 11, 2005