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IN THE  
UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

Case No. C2-98-275; C2-95-517

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JOHN MILLER, *et al.*,

*Plaintiffs,*

v.

REGINALD WILKINSON, *et al.*,

*Defendants,*

JOHN BERHARDT,

*Plaintiff,*

v.

ALAN LAZAROFF, WARDEN, *et al.*,

*Defendants.*

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BRIEF *AMICUS CURIAE* of the AMERICAN JEWISH CONGRESS

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March 22, 2001

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**INTEREST OF THE *AMICUS***

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, political and religious rights of American Jews. It helped draft the Religious Land Use and Institutionalized Persons Act, whose constitutionality is at issue in this case.

The brief is filed with the consent of the parties.

## ARGUMENT

### I. RLUIPA IS A PERMISSIBLE CONDITIONAL EXERCISE OF THE SPENDING POWER

#### A. The Spending Power Allows Congress To Attach Conditions To Federal Grant Programs

Ohio wants to eat its cake and have it too. It challenges a condition Congress attached to its decision to fund Ohio's costs of incarcerating law violators. Although it insists it has no objection to other conditions Congress has imposed on federal subsidies of its correctional facilities, Ohio's challenge to the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.* (RLUIPA) cannot be so limited. Ohio's challenge under the Spending Clause is for the most part palpably without merit.<sup>(1)</sup> Because the Act is facially constitutional under that power, *amicus* finds it unnecessary to address the legitimacy of the Act under the Commerce Clause or Section 5 of the 14<sup>th</sup> Amendment.

Although historically the matter was contested, see 2 The Founders' Constitution Article 1, Section 8, pp. 446-70 (1987), it is settled since *U.S. v. Butler*, 297 U.S. 1 (1936), that the power to tax "for the general welfare" is an independent power of Congress, not merely an adjunct to the powers explicitly enumerated later in Article I, § 8. It may be exercised even if the congressional purpose is not otherwise authorized by the enumerated powers of Congress; *New York v. United States*, 505 U.S. 144, 158 (1992); *South Dakota v. Dole*, 483 U.S. 203, 207 (1987); *Butler*, *supra*; *Charles C. Steward Machinery v. U.S.*, 301 U.S. 548 (1937).

Congress may exercise the spending power directly by operating a fully federal program, but it need not do so. It may enlist the states in a program of cooperative federalism in which Congress funds state efforts to address a challenge to the general welfare, provided only the state agrees to abide by federal conditions, *Dole*, *supra*; *Charles Steward*, *supra*. From the earliest days of the Republic, with regard to internal improvements to today's interstate highway system, Congress has purchased cooperation in projects that serve the national interest, but which are not otherwise authorized by the Constitution.

In other cases, Congress uses umbrella legislation to attach conditions to all federal funds because it wishes to disassociate itself from certain state practices in programs, such as racial or sexual discrimination. Those conditions are quite similar in purpose and effect to the ones contained in RLUIPA, in that they insure that Congress does not inadvertently align itself with policies it finds reprehensible.

Either way, "[w]hen Congress acts pursuant to its spending power, it generates legislation much in the nature of a contract: in return for federal funds, the state agrees to comply with federally imposed conditions." *Davis v. Monroe County Board of Education*, 526 U.S. 629, 640 (1999), quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981). Congress may invoke the spending power to achieve indirectly what it

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1. The only exception is Ohio's challenge to the possible retroactive application of RLUIPA based on funding approved or expended before the effective date of RLUIPA. We discuss this problem below.

could not accomplish directly. *College Savings Bank v. Florida Prepaid Post Secondary Education Expense*, 527 U.S. 666 (1999); *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980); *Kansas v. United States*, 214 F.3d 1196 (10<sup>th</sup> Cir. 2000).

Under the Spending Clause, Congress cannot compel state compliance with federal objectives. States are free to preserve their own policies and choices by the simple expedient of turning down federal funds which come with unacceptable conditions, *Oklahoma v. U.S. Civil Service Comm'n*, 330 U.S. 127, 143-44 (1947); *New York v. United States*, *supra*, 505 U.S. at 168; *Jim C. v. Arkansas*, 235 F.3d 1079, 1082 (10<sup>th</sup> Cir. 2000).

#### B. The Conditions Imposed By RLUIPA Meet The Standards Imposed By *Dole*

The power to attach conditions to federal funds is not unlimited, although a party attacking such conditions carries a heavy burden, since such conditions are rarely invalidated. *Kansas v. U.S.*, *supra*, 214 F.3d at 1200. In *Dole*, the Court listed five conditions on a constitutional Spending Clause condition. The condition must (1) be in pursuit of the general welfare and not further merely a private or purely local interest; (2) stated unambiguously so that states know what bargain they are striking; (3) related to the federal interest in “particular national programs”; (4) not coerce state agreement; and (5) be otherwise constitutional.

##### 1. National Interest

The first condition is easily satisfied by RLUIPA, especially when measured by the deferential criteria applied by courts in determining whether a particular condition advances the general welfare, *Dole*, *supra*, citing *Helvering v. Davis*, 301 U.S. 619, 640 (1937). The Constitution confers the power to assess, address and protect the general welfare to Congress. Its decisions are entitled to substantial judicial deference, lest courts become super-legislatures.

RLUIPA’s provisions regarding institutionalized persons meets this test easily, even if it is conceded that a reasonable legislature might have drawn the balance differently. The test of the general welfare is not that a particular conception of the general welfare enjoys general assent.

RLUIPA imposes no condition on state correctional facilities not applicable to federal correctional facilities. The Religious Freedom Restoration Act, 42 U.S.C. 2000 bb, *et seq.* (RFRA), still applicable to federal agencies, including federal prisons, *Kikumura v. Hurley*, \_\_\_\_\_ F.3d \_\_\_\_ (10<sup>th</sup> Cir. 2001), despite *City of Boerne v. Flores*, 521 U.S. 507 (1997). That Congress believes federal prisons should respect religious liberty of inmates speaks volumes about RLUIPA being a law advancing the general welfare. Indeed, it should be conclusive.

In any event, it was surely reasonable for Congress to have concluded either that religious activity by inmates reduces the risk of recidivism or that the general welfare requires respect for certain rights even for

those incarcerated by the state.<sup>(2)</sup> Congress could rationally determine under either rationale that RLUIPA furthered the general welfare.

## 2. Clarity Of Statement

The second requirement is that the condition be clearly stated in the statute so that the states know what they are bargaining for in accepting federal funds. *Pennhurst Hospital v. Halderman*, *supra*. The conditions RLUIPA imposes on Ohio are set out unambiguously in the statute, 42 U.S.C. § 2000 cc-1. Ohio makes five arguments in an effort to avoid that fact:

RLUIPA cannot be retroactively applied. First, it argues that RLUIPA was enacted into law only after the suit was filed, so that the conditions it imposes were not clearly known to Ohio when it accepted federal funds. *Amicus* agrees that Congress cannot attach retroactive conditions to federal funds. *Pennhurst*, *supra*, 451 U.S. at 25. However, we note that the Court has never explained whether this foreknowledge is to be decided before a program year begins and a required annual state application is filed or before receipt of a periodic payment. *Cf. Hope Medical Group for Women v. Edwards*, 63 F.3d 418 (5<sup>th</sup> Cir. 1995) (applying changed federal restriction on abortion as of time of enactment of federal law to ongoing Medicaid program; collecting similar cases). Because a new fiscal year has begun subsequent to RLUIPA's effective date and Plaintiffs in these consolidated cases seek an injunction against further enforcement of challenged prison rules, *amicus* is uncertain whether the retroactivity point has any continuing relevance. (Even if it did, of course, Plaintiffs or other Ohio inmates, would be free to refile these same pleadings after Ohio filed a new application for federal funds, thus making this an issue largely of academic interest.)

The compelling interest test is definite. Ohio's second effort at obfuscation and creating ambiguity is to ask whether the "compelling interest test" is sufficiently definite to be enforced via the Spending Clause. The answer is yes. The leading case is *Pennhurst Hospital*, *supra*. There, Congress provided funds to help states pay the costs of providing care for the developmentally disabled pursuant to the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6000, *et seq.* In the "bill of rights" section of the Act, Congress declared that disabled persons had the right to "appropriate services and habilitation" in a setting that was "least restrictive of personal liberty." Plaintiffs alleged that conditions at a state hospital denied them this right. Other sections of the Act, 42 U.S.C. § 6005, contained explicit conditions for receipt of federal funds. By its (literal) terms, compliance with the Bill of Rights was not a funding condition.

The question before the Supreme Court was whether or not the so-called Bill of Rights provision "unambiguously" expressed a condition of funding so that Pennsylvania had knowingly exercised a choice in accepting funds under the Act and yielded its ability to make unfettered choices about care for the mentally ill. Reviewing both the statutory language and the legislative history, the Court concluded that this section could

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2. Although this case involves a challenge to prison regulations, RLUIPA covers all institutionalized persons, including persons in mental institutions, pretrial detainees, and others living in state run facilities.

not be said with certainty to be anything more than a congressional policy preference, not a legally binding obligation, 451 U.S. at 18-28. Because Congress had not plainly stated that the right to a “least restrictive environment” was binding on the states, plaintiffs could not enforce it. The Court did not hold that Congress could not have insisted on state compliance with an “indeterminate” standard. It merely held it had not done so.

There is no need to spell out Ohio’s choice. Ohio next contends that because neither RLUIPA nor the specific grant statutes directed at correctional facilities spell out the state’s “option to accept or decline federal funds in order to avoid RLUIPA,” it fails to satisfy *Dole’s* “unambiguous” standard rule. *Amicus* is unaware of any authority which requires that either a statute imposing a general condition on federal funding (*i.e.*, Title VI of the 1964 Civil Rights Act or Title IX of the Education Act Amendments of 1972) or specific program statutes such as the Interstate Highway Act must state explicitly that a state may either accept the condition or turn down the money.

The Supreme Court has (and reasonably so) assumed that it is enough if a condition is stated as binding for states to know that they must either accept the condition if they wish to accept the grant. *See Dole, supra*, 483 U.S. at 201-211 (collecting cases). The *Pennhurst* statute contained no such statement, and neither does either Title VI (after which RLUIPA is modeled) or Title IX, both of which have continued to be enforced against states since *Pennhurst, supra*; *Davis v. Monroe County, supra*; *Litman v. George Mason University*, 185 F.3d 544 (4<sup>th</sup> Cir. 1999).

RLUIPA is perfectly clear about imposing the obligation on those who accept federal funds, 42 U.S.C. § 2000cc-1(b)(1). The language is drawn from Title VI of the 1964 Civil Rights Act, which likewise does not explicitly offer the choice Ohio insists is necessary. Were it necessary to have such an explicit provision to validate a Spending Clause condition, the *Pennhurst* Court need not have bothered to fill 10 pages of the United States Reports parsing a difficult statute. It would have been sufficient to note the absence of a specific provision giving the state the choice of accepting funding or turning down federal money.

The requirement that conditions be unambiguous serves the purpose of allowing the state to make knowing and responsible choices. The function is served as long as the conditions are clearly stated. Additional details would serve no additional purpose, other than to treat states as if they were village idiots who need to have spelled out for them what every contracting party knows: if you don’t like the terms, don’t sign the contract. Ohio has invented a condition that does not exist.

Strict scrutiny is sufficiently defined to be binding standard. Ohio fourthly claims (Brief at 26) that nothing in RLUIPA explicitly spells out the requirement of “compliance with strict scrutiny any time a prisoner claims a religious burden, no matter how theologically frivolous its basis.” This is premised on a double misreading of the Act, as well as a misreading of the Supreme Court’s Spending Clause decisions.

First, RLUIPA does not apply to all burdens (“a religious burden”) but only to “substantial burdens” (42 U.S.C. § 2000cc-1(a)). That limitation will no doubt weed out many of the “frivolous claims” of which

Ohio complains. Second, § 2000cc-(8)(7) of RLUIPA defines “religious exercise” quite precisely to “include any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” The statute is explicit in rejecting Ohio’s request to be burdened only with religious claims it regards as serious. If a belief that is in words religious is not sincerely held, courts traditionally treat it as not religious, *see, e.g., United States v. Ballard*, 322 U.S. 78 (1944).

Should Ohio believe that its interests require it to ignore what it deems theologically frivolous complaints, it can simply reject federal funds and do so to the extent that the Constitution permits.<sup>(3)</sup> It does not have a right to funds on conditions other than those laid down by Congress.

Fact bound standards can be enforced under the Spending Clause. Finally, Ohio claims that the compelling interest test is too ambiguous to allow states to make an informed choice. It says that this is particularly true in the prison context, where rules are “context driven and subjective.” Other than a citation to Justice Kennedy’s dissenting opinion in *Davis* (regarding sexual harassment), Ohio cites no authority in support of its claim that rules which are fact bound cannot be the subject of Spending Clause conditions.

Of course, even under the constitutional standard of *Turner v. Safley*, 482 U.S. 78 (1987), there is a fair amount of uncertainty and subjectivity, as for example, this Court’s recent decision in *Flagner v. Wilkinson*, \_\_\_\_\_ F.3d \_\_\_\_\_ (6<sup>th</sup> Cir. 2001) (inmate hair restriction unconstitutional as applied to particular inmate), indicates. In *Davis* moreover, a majority imposed the sort of indefinite fact-bound standard with regard to harassment of which Ohio complains. Yet it surely cannot be that, had Congress tied federal funding to compliance with the constitutional standard (*i.e.*, no funding of a facility which had violated the *Turner* standard) that the funding condition would be too vague to enforce. That result should not change because Congress has chosen to impose a higher standard.

*Pennhurst* also undermines Ohio’s claim. The Court found no constitutional bar to imposing a “least restrictive environment” test, a test the Court called largely “indeterminate.” 451 U.S. at 24. Instead, the Court found that Congress had simply chosen not to impose such a requirement on the states. Had it done so, the Court expressed doubts that states would accept funds under those conditions, 451 U.S. at 24, but it expressed no doubt that Congress could have put them to the choice.

In fact, Congress has enacted Spending Clause statutes which impose vague standards on the states, standards where results in a particular situation cannot be foretold in advance. Certainly, this is true of the broad anti-discrimination mandates of Title VI and Title IX. *See Davis, supra*. Specific answers to specific fact patterns need not be dictated by Congress. Title IX allows schools to be sued for damages for violating their

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3. It should be noted, however, even prison officials lack the competence—theological as well as legal—to decide which beliefs are theologically frivolous, *see West Virginia v. Barnette*, 319 U.S. 624 (1943) (“no official, high or petty may decide what shall be orthodox in matters of ... religion.”); *Thomas v. Review Board*, 450 U.S. 707 (1981) (officials are not empowered to decide theological questions); *Lyng v. Northwest Indian Protective Assoc.*, 484 U.S. 941 (1987) (same).

contractual obligation to provide an environment free of sexual harassment, even though that was “an issue on which Congress has not specifically spoken.” *Gerber v. Lago Vista ISD*, 524 U.S. 274, 284 (1998), and the Court has struggled to enunciate a standard for deciding such cases.

No plainer example can be found than the Individuals With Disabilities Education Act, 29 U.S.C. § 1400, *et seq.* (IDEA), enacted pursuant to the Spending Clause. *Westchester County v. Rowley*, 458 U.S. 176 (1982). Section 1412 (a)(1)(A) provides for grants to provide a “free appropriate public education” to the disabled, a term defined by the Act in ways the Court has labeled “tend[ing] toward the cryptic.” *Rowley, supra*, 458 U.S. 188.

IDEA requires not a general one-size-fits-all program for disabled students, but an “individualized education program,” *id.* at (a)(5), provided in the “least restrictive environment,” the very term the Supreme Court called “indeterminate” in *Pennhurst, supra*. IDEA also requires states to provide not only special educational services, but the rather uncertain “related services.” Each of those terms has led to repeated litigation, on which the Court has look to administrative interpretation of these uncertain words. *See, e.g., Cedar Rapids Comm. School Dist. v. Garrett F.*, 119 S.Ct. 992 (1999) (“related services”); *Rowley, supra* (“appropriate” free public education).

Neither term is inherently more certain than the terms “compelling interest” or “least restrictive environment”, whose meanings and content should be familiar to state officials charged with abiding by the Constitution. IDEA has led to extensive litigation. No state knows in advance what IDEA will require in particular cases or even in particular classes of cases. (*i.e.*, children with autism). How could it be otherwise, when the Act, recognizing the individuality of disabilities and their impact on individual children, requires of states an individualized assessment of each disabled child?

Indeed, Ohio’s argument was in part made by the dissenters in *Garret F., supra*; and they were not prepared to go as far as Ohio does here. Justice Thomas, writing for himself and Justice Kennedy, urged a reading of the term “related services” that was narrower than the Court applied, and one more responsive to the State’s fiscal concerns. The dissenters thought their narrower construction constitutionally mandated. Seven members of the Court thought that it was sufficient that the standard was plainly laid out. *Garrett F.* is dispositive.

### 3. RLUIPA Conditions Are Related To The Federal Concern

The next requirement to pass Spending Clause muster is that the condition be related to the federal interest in a particular program. Ohio insists that “RLUIPA’s conditions neither overlap with the general purposes of ODCR’s federal funds nor bear any logical relationship to the furtherance of those purposes, except perhaps an inverse relationship to the goal of reducing stress on correctional officers.” (Brief at 29). It offers no further elaboration of this argument, beyond the observation that *Dole* was an easier case with regard to logical relationships between the federal funds and the condition. On all counts, Ohio is wrong.

*Dole* involved a condition attached to federal highway construction funds, not highway safety funds, as Ohio characterizes them (Brief at 29). The challenged condition required the state to raise the drinking age to 21 for all persons in the state, whether or not they were driving, let alone driving on federally funded highways. Justice O’Connor in dissent would have invalidated this condition because it reached “far beyond the confines of the federally funded program to affect all sales of beverages to non-drivers. Rather than a condition determining how federal highway money shall be expended, it is a regulation determining whom shall be able to drink liquor.” 483 U.S. at 218.

The majority disagreed. It found that the age restriction’s connection to limiting accidents on federally financed highways sufficient. It is sufficient, the Court subsequently explained, if the condition has a “reasonable relationship” with the purpose of federal spending, *New York v. U.S.*, *supra*, 550 U.S. at 210, for the “constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly.” *Dole*, *supra*, 483 U.S. at 209.

In RLUIPA, unlike *Dole*, Congress did not seek to regulate outside the confines of funded programs. RLUIPA is simply an attempt to insure that federal funds are used only to fund incarceration meeting standards Congress found palatable. In this regard, it is on all fours with Title VI and Title IX. Ohio remains free to disagree with congressional policy. It is not free to disagree and take Congress’ money.

For present purposes, it is not necessary to determine whether all of the 27 federal programs funding Ohio’s prisons satisfy the nexus between purpose and funding, for it is sufficient if several do. (The definition of “program” in RLUIPA incorporates Title VI, 42 U.S.C. § 2000d-4(a). That statute reflects a deliberate choice by Congress about the scope of obligations imposed on federal grantees, overturning the decision of the Supreme Court in *Grove City v. Bell*, 465 U.S. 555 (1984). In light of the protracted and highly publicized battle over the scope of that obligation, Ohio should not now be heard to complain it is unaware of the scope of that statutory requirement.)

Thus, the very first budget item listed in the State’s Exhibit 1 is a federal grant to help fund a correctional institution for intensive confinement, which is to have an “emphasis in transition back to the community.” Surely, Congress could have thought RLUIPA bears at least some relationship to that purpose, by allowing inmates the fullest possible exercise of religion since religion plays an in important role in the community. The connection is even closer if Congress believed—as it well might have—that active participation in prison religious activity bears at least some relationship (some contend a very large relationship) with avoiding recidivism.<sup>(4)</sup>

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4. In its brief (p. 28), Ohio mocks the idea that RLUIPA could further the purposes of a grant to help corrections officers cope with stress. Is Ohio certain that treating inmates with a modicum of respect for their religious obligations would not reduce tension between inmates and corrections officers, thus furthering the purposes of the federal expenditure?

Ohio also receives funds for incarcerating illegal aliens convicted of crimes [Exhibit 1, p. 2]. Congress is certainly entitled to insist that aliens, who likely come from cultures with unfamiliar religions not normally accommodated in prison routines, are accorded ample opportunity to practice their faith. Congress could equally determine that it wanted no part of funding the incarceration of people under conditions which are harsher than those existing in federal facilities.

Likewise, Ohio receives federal funding to pay for the incarceration of violent offenders. Congress can as much decide that it wants inmates it is helping to incarcerate to have access to religious practices as it can protect them from racial discrimination.

Ohio's fundamental error is in assuming that Congress was only concerned with incapacitating inmates, not in rehabilitating them or preparing them for life in the outside world. *Amicus* does not doubt that Congress in part was concerned with punishment and incapacitation of felons. But Congress had multiple purposes in agreeing to fund state correctional facilities. Ohio is free to decide that it wants a no frills, purely punitive, system of incarceration. Congress could decide that it would subsidize only more complex forms of incarceration. Ohio is not compelled to accept Congress' views. *See Oklahoma v. U.S. Civil Service Comm'n, supra*. But neither is it entitled to demand that Congress abandon its vision of incarceration in order to fund Ohio's.

#### 4. RLUIPA Does Not Coerce The State's Decision

Ohio makes no claim that the relatively small amounts of federal assistance cannot be withheld without coercing its obedience to a congressional mandate. *Cf. Dole, supra*, 483 U.S. at 211. *Amicus* therefore does not discuss this requirement further, except to note that other courts of appeal have been skeptical if any congressional grant would ever fail this branch of the test. As the Tenth Circuit noted only recently, "the coercion theory has been much discussed but infrequently applied in federal case law, and never in favor of the challenging party," *Nevada v. Skinner*, 884 F.2d 445, 448 (9<sup>th</sup> Cir. 1989). "Most of the treatment given the theory in the federal courts have been negative." *Kansas v. U.S., supra*, 214 F.3d at 1201. *Accord, Jim C. v. Arkansas, supra*, 253 F.3d at 1082.

#### 5. RLUIPA Does Not Violate Any Independent Constitutional Provision

The final *Dole* criteria is that the condition(s) not violate any independent bar. *Dole* establishes that the Tenth Amendment is not an independent constitutional check on Congress' spending power. "We have also held that the perceived Tenth Amendment limitation on congressional regulation of state affairs did not concomitantly limit the range of conditions legitimately placed on federal grants." *Dole, supra*, 458 U.S. at 210.

The State raises three independent bar claims: the Tenth and Eleventh Amendments; and the Establishment Clause of the First Amendment. The Tenth Amendment claim is raised only under the Commerce Clause.

##### (a) The Tenth Amendment

The first claim Ohio raises is that given the Tenth Amendment, the Commerce Clause does not permit Congress to regulate states *qua* states, as, allegedly, RLUIPA does. Even if Congress was mistaken in thinking it could enact RLUIPA under the Commerce Clause, the Act is still constitutional as applied to federally funded programs. *Amicus* does not address this claim further.

(b) The Establishment Clause Is Likewise No Barrier

Ohio's Establishment Clause claim is no more substantial. Stripped to its essentials, the state argues that in light of *O'Lone v. Shabazz*, 479 U.S. 881 (1988) and *Turner v. Safley*, *supra*, RLUIPA cannot be justified as necessary to avoid a free exercise violation. Accommodation then is an impermissible naked religious preference. Absent a full-blown constitutional violation, Ohio argues, RLUIPA is an endorsement of religion over non-religion and burdens third parties, both inmates and institutional employees. (Brief at 42-44).

Because Ohio is not challenging any particular application of the Act, but is asserting that the Act is facially unconstitutional, it bears the heavy burden of demonstrating that in each and every application RLUIPA establishes religion. *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Salerno v. U.S.*, 481 U.S. 739 (1987). That is, Ohio must demonstrate that there is no constitutional application of RLUIPA. This it cannot do.

To begin with, Ohio again misconstrues RLUIPA as if the existence of a substantial burden on an inmate's religious practice ends in victory for the prisoner plaintiff.<sup>(5)</sup> It does not. It simply casts the burden on state officials to justify substantial restrictions on inmate religious practice. 42 U.S.C. § 2000cc-1(a). Where there is no such burden, the Establishment Clause issue does not arise, because the religious inmate will not have a RLUIPA claim.

If a practice substantially burdening religious practice serves a compelling interest, advancing the security of the institution or the safety of inmates or correctional officials (*i.e.*, testing for TB), officials are free to interfere with religious practice. See §2000c-3(e) (affirming right of defendants to cure a problem anyway they choose). There is no likelihood that a burden on others will be created by RLUIPA. Certainly the likelihood is not great enough to invalidate the statute on its face.

Moreover, the Act specifically states (42 U.S.C. § 2000cc-4) that the Establishment Clause is not displaced by the Act. As a matter of statutory interpretation, then, if a particular accommodation undertaken to comply with RLUIPA would violate the Establishment Clause, the Clause prevails.

There are other, equally fundamental flaws in Ohio's argument. Citing to the plurality opinion in *Texas Monthly v. Bullock*, 489 U.S. 1, 15 (1989), Ohio asserts that absent a full-blown free exercise violation an "accommodation" violates the Establishment Clause. The first thing to be said about this is that the cited page is a plurality opinion, on this very point rejected by a majority of the Court, 489 U.S. at 26-27 (O'Connor and

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5. We reiterate that RLUIPA is applicable to other persons incarcerated by the State, many through no fault of their own. Ohio chooses to ignore this fact in an effort to demonstrate that Congress overstepped. Ohio's callousness towards the rights of such persons suggests why Congress enacted RLUIPA.

Blackmun, JJ., concurring); *id.* at 33-44 (Scalia, Rehnquist and Kennedy, JJ., dissenting). The Court subsequently disavowed any such reading of its precedents see the various opinions of the Justices in *School District of Kiryas Joel v. Grumet*, 512 U.S. 687 (1994).

Second, the cited plurality opinion does not even say what Ohio attributes to it. Justice Brennan nowhere in his plurality opinion states that accommodation is permissible only where there is a full-blown violation of the Free Exercise Clause. Rather, he speaks of accommodation being constitutionally permissible where it is “allevia[ting] governmental intrusions” interfering with religious practice. 498 U.S. at 18, n. 8. RLUIPA by its terms imposes a duty on public officials to accommodate religious practice only where there is a substantial burden on religious practice. 42 U.S.C. § 2000cc-1. It thus meets the requirement of Justice Brennan’s opinion.

A close reading of the relevant text also discloses that where the government relieves a burden on religious practice, some burden on others is permissible. Justice Brennan pointedly did not say that any accommodation placing a burden on others is unconstitutional. For this proposition, Justice Brennan cited *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1983). *Amos* upheld a broad religious exemption from the anti-discrimination provisions of Title VI that allowed (not-for-profit) religious employers to discriminate on the basis of religion in all hiring, not just for positions with religious content. It did so despite the burden cast on employees or potential employees denied employment because their religion differed from that of their employer.<sup>(6)</sup>

Finally, in *Employment Division v. Smith*, 494 U.S. 872 (1990), the Court held that the Free Exercise Clause does not require accommodation of religious practice burdened by facially neutral laws of general applicability. However, the Court also noted that nothing in that opinion was inconsistent with voluntary accommodation by legislative bodies, *id.* at 890. By hypothesis, all such legislative accommodation was not required by the Constitution, and inevitably resulted in some advantage for religious persons over their secular peers, even if only by the appearance of favored treatment.

Ohio’s insistence on perfect equality between religious and non-religious is the sort of untutored devotion to the secular against which Justices Goldberg and Harlan warned in *School District of Abington Twshp.*

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6. Ohio lumps together burdens on fellow inmates—apparently the bare fact of different treatment of religion—and those on prison employees. Obviously, if employee or inmate health or safety is unavoidably endangered by a particular religious practice, RLUIPA does not require that state officials accommodate it. Any lesser burden, such as some additional effort by employees to accommodate religious freedom, is not the sort of burden of concern to Justice Brennan in *Texas Monthly*. Government employees work for, and must accommodate the needs of the public, not the other way around. We find it unnecessary to address the question of whether Ohio may be heard to speak on behalf of its employees claiming that complying with RLUIPA establishes religion by burdening their job performance, that is, denying their putative “right” to an easier job.

*v. Schempp*, 374 U.S. 203, 306 (1963). It is an insistence tone deaf to the affirmative value that the Constitution confers on religious freedom. *Norwood v. Harrison*, 413 U.S. 455 (1973). It is, above all, not law.

## II. THE ELEVENTH AMENDMENT IS NO BARRIER TO APPLICATION OF RLUIPA

As a final desperate attack on RLUIPA, Ohio invokes the “special sovereignty interest” rubric of *Idaho v. Coeur D’Alene Tribe*, 521 U.S. 261 (1997), to claim an independent Eleventh Amendment bar to RLUIPA’s Spending Clause base. Ohio claims that RLUIPA “uniquely implicates special state sovereignty interests in a way not involved in most prisoner cases.” As a result, Ohio claims that suits nominally against state officers is really against it, and thus barred by the Eleventh Amendment.

It is common ground that incarcerating citizens because they have violated the law is the act of a sovereign entity. It is, we assume, also common ground that not every act of a sovereign falls within the scope of *Coeur D’Alene*, both because the case says so and because otherwise the Constitution would simply be unenforceable against the states.

Crucial to its argument is Ohio’s ability to distinguish RLUIPA claims from other prisoner claims brought to challenge prison rules or actions. Ohio concedes that *Ex Parte Young*, 209 U.S. 123 (1908) actions may be brought in ordinary prisoner cases. Each such challenge limits the state’s ability to punish offenders no less than does a RLUIPA suit. Absent such a distinction (and, for that matter, an explanation why its special sovereignty argument does not abolish the federal *habeas* jurisdiction), Ohio’s claim amounts to nothing less than the claim that no state inmate can sue state officials in federal courts.

The Ninth Circuit rejected a claim almost on all fours with Ohio’s with regard to the Rehabilitation Act. *Armstrong v. Wilson*, 124 F.3d 1019 (9<sup>th</sup> Cir. 1997). No other state appears to have raised a *Coeur D’Alene* challenge to a prisoner § 1983 action. Any distinction between ordinary prisoner suits, which Ohio concedes do not give rise to a *Coeur D’Alene* exemption from *Ex Parte Young*, and RLUIPA suits, which Ohio insists do, is absent from Ohio’s brief. No such distinction is self-evident.

Ohio claims that prisons are “an important aspect [of] the sovereignty retained by the state.” (Brief at 48, citing *Kelley v. Robinson*, 489 U.S. 36 (1986)). But the *Coeur D’Alene* rule requires more than a lawsuit challenging an expression of sovereignty. All § 1983 suits brought under *Ex Parte Young* challenge some expression of sovereignty.

The controlling opinion in *Coeur D’Alene* requires more than that for a state to have a special immunity from *Ex Parte Young*. In *Coeur D’Alene* the issue was the extent of the territorial writ of the State of Idaho. That issue was raised in a quiet title action brought by an Indian tribe against the State of Idaho with regard to regulatory authority over underwater lands. The Court found that *Ex Parte Young* did not permit a suit by the tribe in federal court, the Court treating the case as one against the state treasury itself (and therefore barred by the Eleventh Amendment), not its officers under *Ex Parte Young*.

Notions of sovereignty are inextricable from the territory over which the sovereign asserts authority. A challenge to ownership of land thus goes to the essence of sovereignty. The Restatement of International Law (Revised) Section 201 defines a state as “an entity that has defined territory . . . .” A challenge to the extent of a state’s territory is thus a challenge to the state’s sovereignty itself. As Justice O’Connor wrote, 521 U.S. at 289, in the controlling opinion for the Court: “[T]he tribe seeks to eliminate altogether the state’s regulatory power over submerged lands at issue—to establish not only that the state has no right to possess the property, but also that the property is not within Idaho’s sovereign jurisdiction at all.” Here Plaintiffs’ claims do not go to the essence of Ohio’s sovereignty, but to a quotidian problem of the supremacy of federal statutory law over the conduct of state officials.

The only argument that Ohio makes that remotely offers some glimmer of distinction between RLUIPA cases and other prisoner cases appears to be that inmates are marginally more likely to win RLUIPA cases than other cases. If the state enjoys immunity, it is not because its positions are meritorious, but because its sovereignty precluded it being challenged in the court of another sovereign. The Eleventh Amendment is about the autonomy of states from subjugation to another sovereign, not whether they win or lose particular lawsuits.

Should the Supreme Court someday repudiate the deferential standard of *Estate of O’Lone, supra* or *Turner v. Safley, supra*,<sup>(7)</sup> the Eleventh Amendment would not then create an immunity where none existed under a lower standard. Nothing in those cases talks about immunity. Instead, they talk about the process of evaluating claims brought against prison officials. Cognizant of the difficulties courts have in deciding such matters, and given the risk of error, the Court decided to scale back its scrutiny of prison officials. The Eleventh Amendment immunity is by contrast about where a state is sued, not about a thumb on the scales of justice.

As in other instances, Ohio reads RLUIPA incorrectly. In its most sarcastic tones, Ohio complains that RLUIPA requires the ‘state officials to justify their action to convicted felons in the absence of any evidence that these security analyses are incorrect.’ (Brief at 49). Aside from the fact that the state has to offer its justifications to federal judges (not a class identical with convicted felons), Ohio is wrong about RLUIPA’s respect for the security analyses of state officials. A Senate Manager’s statement set out the following standard based on RFRA:

“[T]he committee expects that courts will continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.”

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7. The State’s brief assumes that the *Turner* standard was given to Moses on Sinai and is the correct standard against which to judge its special immunity interests. *Turner* itself departed from more stringent standards applied by federal courts, yet no one thought that the earlier standard impinged on state sovereignty.

“At the same time, however, inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act’s requirements.” Senate Report 108-111 at 10 (1993).

\_\_\_\_\_ Cong. Rec. S.7774; July 27, 2000.

#### CONCLUSION

For the reasons stated, the judgment should be affirmed.

Respectfully Submitted,

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