

CASE NOS. 02-3270/3299/3301

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

JON CUTTER, *et al.*,
Plaintiffs - Appellees,

and

UNITED STATES OF AMERICA,
Intervenor - Appellee,

v.

REGINALD WILKINSON, *et al.*,
Defendants - Appellants

On Appeal from the United States District Court
for the Southern District of Ohio
Hon. James L. Graham, Hon. Edmund A. Sargus Jr.,
(Nos. 97-00832; 98-00275; 95-00517)

**BRIEF *AMICUS CURIAE* OF
VARIOUS RELIGIOUS AND CIVIL RIGHTS ORGANIZATIONS
IN SUPPORT OF PLAINTIFFS-APPELLEES' PETITION FOR REHEARING,
OR IN THE ALTERNATIVE, FOR REHEARING EN BANC**

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**DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST**

Pursuant to 6th Cir. R. 26.1, *Amici* the Aleph Institute, the American Civil Liberties Union, the American Jewish Committee, the American Jewish Congress, the Baptist Joint Committee on Public Affairs, the Becket Fund for Religious Liberty, and the Union of Orthodox Jewish Congregations of America make the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

Amici are not aware of any.

Derek L. Gaubatz

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INTEREST OF THE *AMICI*

Pursuant to Fed. R. App. P. 29, *amici* respectfully submit this brief *amicus curiae* in support of Plaintiffs-Appellees’ petition for rehearing and rehearing *en banc*. Counsel for all parties have consented to the filing of this brief. Fed. R. App. P. 29(a).

Amici—the Aleph Institute, the American Civil Liberties Union, the American Jewish Committee, the American Jewish Congress, the Baptist Joint Committee on Public Affairs, the Becket Fund for Religious Liberty, and the Union of Orthodox Jewish Congregations of America—are religious and civil rights organizations. Despite their vast religious and political diversity, the *amici* share a common interest in assuring that the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, *et seq.* (“RLUIPA”) is upheld as constitutional. *Amici* believe that their collective experience in this otherwise divisive area of the law enables them to aid the Court in addressing whether RLUIPA respects the Establishment Clause, and so will assist the Court in resolving this case.

ARGUMENT

The panel opinion holds that a statute accommodating religious exercise violates the “effects” prong of *Lemon*’s Establishment Clause test if it accommodates religious exercise without *also* accommodating other constitutional

rights. *See Cutter v. Wilkinson*, 349 F.3d 257, 264 (6th Cir. 2003) (“RLUIPA has the effect of impermissibly advancing religion by giving greater protection to religious rights than to other constitutionally protected rights.”). This proposed rule, enunciated for the very first time in the two overruled district court opinions cited by the panel, not only contradicts Supreme Court precedent governing accommodations of religious exercise, but would wreak havoc on a broad range of religious accommodations in Ohio and throughout the nation.

I. The Panel’s Opinion Is Contrary to Supreme Court Precedent

In contrast to the anti-accommodation rule proposed by the panel, the Supreme Court has specifically and repeatedly approved the practice of government accommodating religious exercise without simultaneously providing accommodation for other secular rights. In *Amos*, the Court specifically rejected the rule proposed by the panel that accommodations of religion must proceed in lockstep with accommodations of secular rights. The Court held that it:

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

Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 338 (1987) (emphasis added). Instead, the Court made clear

that the actual test under the effects prong is whether “the *government itself* has advanced religion through its own activities and influence.” *Id.* at 337 (rejecting Establishment Clause challenge to Title VII provision exempting religious organizations—and only religious organizations—from statute’s prohibition of religious discrimination in employment) (emphasis in original).¹

Similarly in *Zorach v. Clauson*, the Court rejected an Establishment Clause challenge to a “release-time” program that permitted students to leave public school grounds for religious—but not secular—instruction. 343 U.S. 306, 313-14 (1952) (“When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.”) Thus, the

¹ Because the panel applied the test manufactured in the two overruled district court decisions rather than the test set forth in *Amos*, it made no effort to show that RLUIPA somehow involves the government itself advancing religion. Of course, all three appellate courts to consider this question with regard to RLUIPA, and all five appellate courts addressing the analogous question as applied to RFRA, have concluded it does not involve the government itself advancing religion. *See Madison v. Riter*, No. 03-6362, -- F.3d --, --, 2003 WL 22883620 at *5 (4th Cir. Dec. 8, 2003) (RLUIPA does not involve the “government itself” advancing religion and therefore does not violate the Establishment Clause); *Charles v. Verhagen*, 348 F.3d 601, 610 (7th Cir. 2003) (same); *Mayweathers v. Newland*, 314 F.3d 1062, 1069 (9th Cir. 2002) (same), *cert. denied sub nom. Alameida v. Mayweathers*, No. 02-1655, ___ U.S. ___, 2003 WL 21180348, 71 USLW 3725 (U.S. Oct. 6, 2003); *In re Young*, 141 F.3d 854, 863 (8th Cir. 1998) (RFRA does not involve the “government itself” advancing religion and therefore does not violate the Establishment Clause); *Mockaitis v. Harcleroad*, 104 F.3d 1522, 1530 (9th Cir. 1997) (same); *Sasnett v. Sullivan*, 91 F.3d 1018, 1022 (7th Cir. 1996) (same), *vacated on other grounds*, 521 U.S. 1114 (1997); *E.E.O.C. v. Catholic Univ. of America*, 83 F.3d 455, 470 (D.C. Cir. 1996) (same); *Flores v. City of Boerne*, 73 F.3d 1352, 1364 (5th Cir. 1996) (same), *rev’d on other grounds*, 521 U.S. 507 (1997).

Court rejected the view that an accommodation of religious exercise is permissible only if a school also accommodates other constitutional rights. *Id.*

Finally, the panel’s rule also ignores the Supreme Court’s express invitation to the political branches to enact laws accommodating religious exercise.

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

Employment Div. v. Smith, 494 U.S. 872, 890 (1990) (emphasis added). Notably, in issuing this invitation the Court did not even *suggest* that accommodation efforts would only be permissible if they were packaged together with other “secular” rights. Thus, if the panel’s opinion really were the law, and legislation singling out religious exercise for accommodation really did have the impermissible effect of advancing the religion, then the Court’s invitation to pass such legislation would appear to be an inducement to violate the Establishment Clause.

II. The Exceptional Importance of Reviewing the Panel’s Proposed Rule Is Highlighted by the Breadth of Religious Accommodations That Would Be Invalidated in Ohio and Elsewhere if the Rule Is Allowed to Stand.

Under the panel’s rule, the Establishment Clause would run amok, invalidating wholesale the legion acts of the political branches—legislative and executive, federal, state, and local—whose *sole* purpose and effect is to

accommodate religious exercise. For starters, the rule adopted by the panel would invalidate the special protections afforded to religious exercise (and only religious exercise) by *Ohio's Constitution*. Although the federal Free Exercise Clause extends only rational basis scrutiny to neutral and generally applicable laws that burden religious exercise, *see Smith, supra*, Ohio goes beyond the federal constitutional floor and provides broader protection under its state constitution by applying strict scrutiny to *all* laws (even neutral and generally applicable ones) that burden religious exercise. *See Humphrey v. Lane*, 728 N.E.2d 1039 (Ohio 2000).² Thus, Ohio's Constitution provides special protection to only those seeking religious exemptions. But under the panel's anti-accommodation rule, this protection for religious exercise would violate the federal Establishment Clause.

The panel's anti-accommodation rule would similarly run roughshod over a whole host of Ohio *statutory* laws that accommodate religious exercise by affirmatively lifting burdens on religious exercise, but not secular constitutional rights. Appendix A to this brief lists a sample of Ohio laws that accommodate religious exercise. Because none of these laws also seeks to accommodate other secular constitutional rights, the panel's test would presumably strike down every single one of these Ohio laws.

² *See also Arizona v. Evans*, 514 U.S. 1, 8 (1995) (“state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution”).

Moreover, if allowed to stand, the panel’s anti-accommodation rule would not just devastate Ohio’s attempts to accommodate religious exercise, but would also potentially invalidate numerous other federal and state acts whose *sole* purpose and effect is to accommodate religious exercise. This includes, among many others, the *federal statutory* accommodations of religious peyote use,³ religious headwear in the military,⁴ and Native American religious exercise on federal land;⁵ other *state constitutional* provisions that, like Ohio’s discussed above, provide stronger protections for religious exercise (and only religious exercise) than the federal Free Exercise Clause;⁶ *state statutes* that provide broader

³ See 21 C.F.R. § 1307.31; *Lee v. Weisman*, 505 U.S. 577, 628–29 (1992) (Souter, J., concurring) (“[I]n freeing the Native American Church from federal laws forbidding peyote use, . . . the government conveys no endorsement of peyote rituals, the Church, or religion as such; it simply respects the centrality of peyote to the lives of certain Americans.”).

⁴ See National Defense Authorization Act for Fiscal Years 1988 and 1989, 10 U.S.C. § 774; see also *Texas Monthly v. Bullock*, 489 U.S. 1, 18 (1989) (plurality opinion) (“[I]f the Air Force provided a sufficiently broad exemption from its dress requirements for servicemen whose religious faiths commanded them to wear certain headgear or other attire, . . . that exemption would not be invalid under the Establishment Clause even though this Court has not found it to be required by the Free Exercise Clause.” (citation omitted)).

⁵ See Department of the Interior and Related Agencies Appropriations Bill, 1989, H.R. Rep. No. 713, 100th Cong., 2d Sess. 72 (1988) (passed in response to statement in *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 435 U.S. 439, 454 (1988), that “[t]he Government’s rights to the use of its own land . . . need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents,” and defunding the project that would have destroyed government land used for religious exercise).

⁶ Since the Supreme Court’s *Smith* decision, the courts of at least *ten* states besides Ohio have held that their state constitutions provide broader protection for religious exercise (and only religious exercise) than the federal *Smith* rule. See, e.g., *In re Browning*, 476 S.E.2d 465, 124 N.C. App. 190 (North Carolina 1996); *State v. Miller*, 549 N.W.2d 235, 202 Wis. 2d (Wis. 1996); *Attorney Gen. v. Desilets*, 636 N.E.2d 233, 418 Mass. 316 (Mass. 1994); *Swanner v. Anchorage Equal Rights Comm’n*, 874 P.2d 274 (Alaska 1994); *Rourke v. N.Y. State Dep’t of Corr. Servs.*, 603 N.Y.S.2d 647 (N.Y. Sup. Ct. 1993), *aff’d*, 615 N.Y.S.2d 470 (N.Y. App. Div.

protection to religious exercise (and only religious exercise) than required by the federal or state constitution;⁷ *government chaplaincy programs* in Congress, the armed forces, and in prisons that facilitate religious exercise (and only religious exercise);⁸ the state and federal *clergy-penitent privilege*;⁹ and even *particular prison regulations* adopted by the Federal Bureau of Prisons that accommodate religious exercise (and only religious exercise).¹⁰

1994); *Rupert v. City of Portland*, 605 A.2d 63 (Me. 1992); *St. John's Lutheran Church v. State Comp. Ins. Fund*, 830 P.2d 1271, 252 Mont. 516 (Mont. 1992); *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174, 120 Wash. 2d 203 (Wash. 1992); *State v. Evans*, 796 P.2d 178, 14 Kan. App. 2d 591 (Kan.1990); *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990).

⁷ Since the Supreme Court's *Smith* decision, the political branches of at least *twelve* states have, either by statute or constitutional amendment, adopted state religious freedom provisions that provide broader protection for religious exercise (and only religious exercise) than the federal *Smith* rule. Those twelve states are Alabama, *see* ALA. CONST. amend. 622; Arizona, *see* ARIZ. REV. STAT. ANN. §§ 41-1493 *et seq.* (West 2003); Connecticut, *see* CONN. GEN. STAT. ANN. § 52-571b (West 2003); Florida, *see* FLA. STAT. ANN. §§ 761.01-761.04 (West 2003); Idaho, *see* IDAHO CODE §§ 73-401 *et seq.* (Supp. 2002); Illinois *see* 775 ILL. COMP. STAT. ANN. §§ 35/1 - 35/99 (West 2002); New Mexico, *see* N.M. STAT. ANN. §§ 28-22-1 to 28-22-5 (Michie 2002); Oklahoma, *see* OKLA. STAT. ANN. tit. 51, §251 (West 2003); Pennsylvania, *see* 71 PA. CONS. STAT. ANN. 2401 *et seq.*; Rhode Island, *see* R.I. GEN. LAWS §§ 42-80.1-1 to 42-80.1-4 (2001); South Carolina, *see* S.C. STAT. ANN. § 1-32-10 (Law. Co-op. 1999); and Texas, *see* TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001 *et seq.* (West 2003).

⁸ *See Mockaitis*, 104 F.3d at 1530 (holding that RFRA does not impermissibly promote religion anymore than "[t]he creation of chaplaincies in Congress and in the armed forces [which are] particularly striking promotions of religion.").

⁹ All fifty states and the federal government accommodate religious exercise by recognizing some form of the clergy-penitent privilege. *See Forgive Us Our Sins: The Inadequacies of the Clergy-Penitent Privilege*, 73 N.Y.U.L.Rev. 225, 231 & n.39 (April 1998). Despite the longstanding historical tradition of this religious accommodation, *see id.*, the panel's rule would invalidate it because it affords protection for religious exercise without simultaneously affording protections for other secular constitutional rights.

¹⁰ *See, e.g.*, Federal Bureau of Prisons Policy Statement (attached as Appendix B) at 15 (providing religious prisoners accommodation for religious use of wine, an otherwise contraband substance in prison); *id.* at 10-11 (providing religious prisoners relief from generally applicable work duties in order to observe religious holidays); *id.* at 11-12 (providing religious prisoners

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs-Appellees' petition and vacate the panel's anomalous decision.

Respectfully submitted,

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accommodation to allow visits by outside religious advisors that do not count against the limit otherwise posed on social visits from outsiders).

CERTIFICATION OF COMPLIANCE

This Brief *Amicus Curiae* is seven and one half pages long, and therefore complies with the pertinent page length limits required by Fed. R. App. P. 29 and 32.

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APPENDIX A

This appendix lists a sample of Ohio laws that accommodate religious exercise without also accommodating secular constitutional rights.¹¹

- Exemption for those with religious objections from service in Ohio’s militia, *see* Oh. St. § 5923.02(B);
- Property tax exemption for real property held by churches, *see* Oh. St. § 5709.07(3);
- Exemption for a “rabbi, priest, Christian Science practitioner, clergy, or member of a religious order . . . when the chemical dependency counseling activities are within the scope of the performance of their regular or specialized ministerial duties . . .,” from Ohio’s chemical dependency counselor licensing requirements, *see* Oh. St. § 4758.03(B);
- Exemption for minors consuming certain alcoholic beverages for religious purposes from underage drinking laws, *see* Oh. St. § 4301.631(H);
- Exemption for religious employers “opposed to benefits to employers and employees from any public or private insurance that makes payment in the event of death, disability, impairment, old age, or retirement or makes payments toward the cost of, or provides services in connection with the payment for, medical services,” from required payment of premiums into Ohio’s worker compensation system, *see* Oh. St. § 4123.15(A);
- Exemption for employees who have religious “objections to joining or financially supporting an employee organization” from required payment of fee to employee organization who secured collective bargaining agreement, *see* Oh. St. § 4117.09 (C);

¹¹ By listing the various religious accommodations below, *amici* do not intend to express that they consider any or all of them good policy. Indeed, for many (if not most) accommodations, many (if not most) *amici* have not even formulated a position on the wisdom of these accommodations. The point, instead, is that the constitutionality of all of these accommodations would be called seriously into question if the opinion of the panel stands.

- Exemption for children whose parents have religious objections to the test from required childhood health tests, *see, e.g.*, Oh. St. § 3701.508(2)-(3) (religious exemption from hearing tests); Oh. St. § 3742.30 (religious exemption from blood lead screening test); Oh. St. § 3701.501(2) (religious exemption from tests for genetic disorders); Oh. St. § 3313.71 (religious exemption from tuberculosis tests); Oh. St. § 3313.671 (religious exemption for immunization requirements);
- Availability of absentee ballots to any “elector . . . unable to vote on the day of an election on account of observance of the elector's religious belief,” Oh. St. § 3509.02(6);
- Exemption for employees with religious objections to administering drugs from requirement that public school employees administer certain prescription drugs to students, *see* Oh. St. § 3313.713(F);
- Defense for care givers who “rel[y] upon treatment by spiritual means through prayer alone” to charge of patient neglect, *see* Oh. St. § 2903.34(B)(1);
- Defense for parents who for religious reasons do not provide medical or surgical care to a child to charge of child neglect; *see* Oh. St. § 2151.03(8);
- Privilege from arrest for persons “within, going to, or returning from their place of worship,” *see* Oh. St. § 2331.11(5);
- Clergy-penitent privilege for a communicant’s confessions or other information confidentially communicated to clergy, *see* Oh. St. § 2903.34(C);
- Exemption for “cloistered member[s] of a religious organization” from jury service, *see* Oh. St. § 2331.11(5);
- Exemption for religious objections to autopsy requirement of removing deceased’s pituitary gland, *see* Oh. St. § 2108.53(C);
- Exemption for those with religious objections to requirements of testing and treatment of tuberculosis, *see* Oh. St. § 339.89;

- Exemption of church property from participation in Ohio’s statutorily created “special improvement districts,” *see* Oh. St. § 1710.02(A);
- Exemption for “bible colleges” and “bible institutes” to requirement that institutions conferring degrees or diplomas obtain a certificate of authorization from the Ohio board of regents, *see* Oh. St. § 1713.02(E);
- Exemption of religious organizations providing funeral services from state laws governing preneed funeral contracts, *see* Oh. St. § 1111.19(L);
- Exemption to protect the “religious freedom of any person or group” from animal slaughter laws, *see* Oh. St. § 945.02;
- Exemption for those whose “religion prohibits the person from obtaining a license” from Ohio’s milk license requirements, *see* Oh. St. § 917.09(I);
- Accommodation of religious exercise in city jails and workhouses by requiring “provision of religious services therein each week” and permitting employment of “a clergyman or religious organization to conduct such services,” *see* Oh. St. § 753.18.

APPENDIX B

