

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF GEORGIA  
STATESBORO DIVISION**

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RALPH HARRISON BENNING,

Plaintiff,

v.

Civil Action No.: CV602-139

STATE OF GEORGIA and the GEORGIA  
DEPARTMENT OF CORRECTIONS

Defendants.

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**BRIEF OF *AMICI CURIAE*  
THE BECKET FUND FOR RELIGIOUS LIBERTY  
AND JOAQUIN TERRERO  
OBJECTING TO REPORT AND RECOMMENDATION  
FINDING RLUIPA UNCONSTITUTIONAL**

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## INTEREST OF THE AMICI

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

The Becket Fund’s RLUIPA cases run the gamut – as *amicus curiae* and as plaintiffs’ counsel, in prisoner and land-use cases, from Alabama to Hawaii – including cases within the Eleventh Circuit.<sup>1</sup> The Becket Fund is also litigating a host of RLUIPA cases outside the Eleventh Circuit, including some that have resulted in published decisions,<sup>2</sup> and others that have concluded by favorable settlement.<sup>3</sup> In addition, we have filed a series of *amicus curiae* briefs in

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<sup>1</sup> See, e.g., *Cotton v. Fla. Dept. of Corrections*, Civ. No. 02-22760 (S.D. Fla. filed Sept 19, 2002) (settlement agreement signed October 2003); *Temple B’nai Sholom v. City of Huntsville*, Civ. No. 01-1412 (N.D. Ala. removed June 1, 2001) (settlement agreement signed June 2003); *Refuge Temple Ministries v. City of Forest Park*, Civ. No. 01-0958 (N.D. Ga. filed Apr. 12, 2001) (consent order March 2002); *Primera Iglesia Bautista Hispana v. Broward County*, No. 01-6530-CIV (S.D. Fla.) (*amicus* brief filed April 18, 2003); *Konikov v. Orange County*, No. 6:02-CV-376-ORL-28-JGG (M.D. Fla.) (*amicus* brief filed April 11, 2003).

<sup>2</sup> See, e.g., *Murphy v. Town of New Milford*, No. 3:00-CV-2297, 2003 WL 22299219, \_\_\_ F. Supp. 2d \_\_\_ (D. Conn. Sept. 30, 2003); *Williams v. Bitner*, No. 1:CV-01-2271, 2003 WL 22272302, \_\_\_ F. Supp. 2d \_\_\_ (M.D. Pa. Sept. 30, 2003); *Hale O Kaula v. Maui Planning Comm’n*, Civ. 229 F. Supp. 2d 1056 (D. Haw. 2002); *Cottonwood Christian Center v. City of Cypress*, 218 F. Supp. 2d 1203 (C.D. Ca. 2002); *Freedom Baptist Church v. Township of Middletown*, 204 F. Supp. 2d 857 (E.D. Pa. 2002). See also *Castle Hills First Baptist Church v. City of Castle Hills*, Civ. No. 01-1149 (W.D. Tex. removed Dec. 14, 2001); *Redwood Christian Schs. v. County of Alameda*, Civ. No. 01-4282 (N.D. Ca. filed Nov. 16, 2001); *Missionaries of Charity, Brothers v. City of Los Angeles*, Civ. No. 01-08511 (C.D. Ca. filed Sept. 19, 2001).

<sup>3</sup> See, e.g., *Cotton v. Fla. Dept. of Corrections*, Civ. No. 02-22760 (S.D. Fla.) (settlement agreement signed October 2003); *Temple B’nai Sholom v. City of Huntsville*, Civ. No. 01-1412 (N.D. Ala.) (settlement agreement signed June 2003); *Greenwood Comm’y Church v. City of Greenwood Village*, Civ. No. 02-1426 (Colo. D.C.) (permit granted Dec. 2, 2002); *Living Waters Bible Church v. Town of Enfield*, Civ. No. 01-450 (D.N.H.) (agreement for entry of judgment signed Nov. 18, 2002); *Calvary Chapel O’Hare v. Village of Franklin Park*, Civ. No. 02-3338 (N.D. Ill.)

both prisoner and land-use cases involving RLUIPA.<sup>4</sup> We intend to continue filing lawsuits and *amicus curiae* briefs under RLUIPA until the jurisprudence under the law, as well as its constitutionality, is established beyond reasonable dispute.

The Becket Fund believes that its experience in this area of the law enables it to aid the Court in clarifying the complex issues of the Act's constitutionality, and so will assist the Court in its evaluation of the pending Report and Recommendation on Defendants' Motion to Dismiss.

Joaquin Terrero presently has pending a suit for relief under Section 3 of RLUIPA before the Southern District of Georgia. *See Terrero v. Watts et al.*, No. CV202-134 (S.D. Ga.). The same magistrate who issued the Report and Recommendation in this case, also issued a Report and Recommendation in that case. Both recommended that RLUIPA be found unconstitutional. Accordingly, this Court's determination of whether to uphold the constitutionality of RLUIPA will profoundly influence, if not determine, the outcome of the same issue in Mr. Terrero's case.

## **ARGUMENT**

The Report and Recommendation ("Report") before the Court grants Defendants' Motion to Dismiss Plaintiff's claims under Section 3 of RLUIPA. Specifically, the Report accepts

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(settlement agreement signed Sept. 3, 2002); *Refuge Temple Ministries v. City of Forest Park*, Civ. No. 01-0958 (N.D. Ga.) (consent order signed Mar. 14, 2002); *Unitarian Universalist Church of Akron v. City of Fairlawn*, Civ. No. 00-3021 (N.D. Ohio) (settlement approved Oct. 1, 2001); *Haven Shores Comm'y Church v. City of Grand Haven*, 1:00-CV-175 (W.D. Mich.) (consent decree signed Dec. 20, 2000).

<sup>4</sup> *See, e.g., Madison v. Riter*, No. 03-6362 (4<sup>th</sup> Cir.) (*amicus* brief filed on behalf of a broad coalition June 6, 2003); *Fifth Avenue Presbyterian Church v. City of New York*, 293 F.3d 570 (2d Cir. 2002) (*amicus* brief filed on behalf of broad coalition, Mar. 15, 2002); *San Jose Christian College v. City of Morgan Hill*, No. 02-15693 (9<sup>th</sup> Cir.) (*amicus* brief filed on behalf of a broad coalition Aug. 28, 2002); *C.L.U.B. v. City of Chicago*, No. 01-4030 (7<sup>th</sup> Cir.) (*amicus* brief filed June 26, 2002); *Johnson v. Martin*, 223 F. Supp. 2d 820, 822 (W.D. Mich. 2002) (noting Becket Fund intervention in defense of constitutionality of RLUIPA); *Primera Iglesia Bautista Hispana v. Broward County*, No. 01-6530-CIV (S.D. Fla.) (*amicus* brief filed Apr. 18, 2003); *Konikov v. Orange County*, Civ. No. 6:02-376-ORL-28-JGG (M.D. Fla.) (*amicus* brief filed Apr. 11, 2003); *Goodman v. Snyder*, Civ. No. 2000-948 (N.D. Ill.) (*amicus* brief filed Mar. 17, 2003); *Murphy v. Town of New Milford*, Civ. No. 3:00-2297-HBF 2003 WL 22299219, \_\_\_ F. Supp. 2d \_\_\_ (D. Conn. Sept. 30, 2003) (*amicus* brief filed Dec. 27, 2002); *Williams v. Bitner*, Civ. No. 1:01-2271 2003 WL 22272302, \_\_\_ F. Supp. 2d. \_\_\_ (M.D. Pa. Sept. 30, 2003) (*amicus* brief filed Apr. 16, 2002); *Lighthouse Institute for Evangelism v. City of Long Branch*, Civ. No. 00-3366 (D.N.J.) (*amicus* brief filed May 7, 2001).

Defendants' assertions that RLUIPA is unconstitutional because it exceeds Congress' power under the Spending Clause, the Commerce Clause, the Tenth Amendment, and the Establishment Clause.

Remarkably, the Report proposes to strike down a federal statute *without even mentioning*, let alone attempting to distinguish, the vast weight of authority that has rejected similar assertions that RLUIPA is unconstitutional.<sup>5</sup> See, e.g., *Charles v. Verhagen*, No. 02-3572 2003 WL 22455960, \_\_\_ F.3d \_\_\_ (7<sup>th</sup> Cir. Oct. 30, 2003) (rejecting Spending Clause, Establishment Clause, and Tenth Amendment challenges to RLUIPA Section 3); *Mayweathers v. Newland*, 314 F.3d 1062 (9<sup>th</sup> Cir. 2002) (rejecting Spending Clause, Establishment Clause, Tenth Amendment, Eleventh Amendment, and Separation-of-Powers challenges to RLUIPA Section 3), *cert. denied sub nom. Alameida v. Mayweathers*, No. 02-1655, \_\_\_ U.S. \_\_\_, 2003 WL 21180348, 71 USLW 3725 (U.S. Oct. 6, 2003); *Williams v. Bitner*, No. 1:CV-01-2271, 2003 WL 22272302, \_\_\_ F. Supp. 2d. \_\_\_ (M.D. Pa. Sept. 30, 2003) (rejecting Establishment Clause, Spending Clause, Tenth Amendment, and Eleventh Amendment challenges); *Sanabria v. Brown*, No. 99-4699 (D. N.J. June 5, 2003) (rejecting Establishment Clause, Spending Power, Tenth Amendment, Eleventh Amendment, and Separation-of-Powers challenges to RLUIPA Section 3); *Gordon v. Pepe*, No. 00-10453, 2003 WL 1571712 (D. Mass. Mar. 6, 2003) (rejecting Establishment Clause, Spending Power, Commerce Power, Tenth Amendment, and Eleventh Amendment challenges to RLUIPA Section 3); *Johnson v. Martin*, 223 F. Supp. 2d 820 (W.D.

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<sup>5</sup> The terse nature of the Report and its one-sided discussion of the pertinent authority that has resolved the question of RLUIPA's constitutionality is particularly surprising in light of the deference that is due to Congressional enactments. See, e.g., *United States v. Morrison*, 529 U.S. 598, 606 (2000) ("Due respect for the decisions of a coordinate branch of government demands that we invalidate a congressional enactment only upon a *plain showing* that Congress has exceeded its constitutional bounds.") (emphasis added); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985) ("Judging the constitutionality of an Act of Congress is properly considered 'the gravest and most delicate duty that this Court is called upon to perform.'") (quoting *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927))).

Mich. 2002) (rejecting Commerce, Spending, and Establishment Clause, and Tenth Amendment challenges); *Gerhardt v. Lazaroff*, 221 F. Supp. 2d 827 (S.D. Ohio 2002) (rejecting Spending Clause, Establishment Clause, and Tenth Amendment challenges); *Charles v. Verhagen*, 220 F. Supp. 2d 955 (W.D. Wis. 2002) (same); *Taylor v. Cockrell*, No. H-00-2809 (S.D. Tex. Sept. 25, 2002) (rejecting constitutional challenge to RLUIPA Section 3 based on *Charles* and *Mayweathers* district court decision) *vacated on other grounds*; *Love v. Evans*, No. 2:00-CV-91 (E.D. Ark., Aug. 8, 2001) (rejecting constitutional challenge to RLUIPA Section 3 based on *Mayweathers* district court decision).<sup>6</sup>

Likewise, the Report fails to note that courts have rejected similar constitutional challenges to the analogous land-use provisions of RLUIPA Section 2. *See Murphy v. Town of New Milford*, No. 3:00-CV-2297, 2003 WL 22299219, \_\_\_ F. Supp. 2d \_\_\_ (D. Conn. Sept. 30, 2003) (rejecting constitutional challenges to RLUIPA Section 2); *Westchester Day Sch. v. Village of Mamaroneck*, No. Civ. 02-6291-WCC, 2003 WL 22110445, \_\_\_ F. Supp. 2d \_\_\_ (S.D.N.Y. Sept. 5, 2003) (same); *Life Teen, Inc. v. Yavapai County*, No. Civ. 01-1490-PCT-RCB (D. Ariz. Mar. 26, 2003) (same); *Christ Universal Mission Church v. City of Chicago*, No. 01-C-1429, 2002 U.S. Dist. LEXIS 22917, at \*24 (N.D. Ill. Sept. 11, 2002) (same); *Freedom Baptist Church v. Township of Middletown*, 204 F. Supp. 2d 857 (E.D. Pa. 2002) (same).<sup>7</sup>

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<sup>6</sup> Only two lower court decisions (and these are notably the only decisions the Report cites) have seen fit to ignore the overwhelming authority rejecting constitutional challenges to RLUIPA. One of those decisions—*Al Ghashiyah v. Wis. Dept. of Corrections*, 250 F. Supp. 2d 1016 (E.D. Wis. 2003)—is no longer good law because the Seventh Circuit, which oversees the Eastern District of Wisconsin, has just expressly rejected an Establishment Clause challenge to Section 3 of RLUIPA in its *Charles v. Verhagen* decision. The other decision—*Madison v. Riter*, 240 F. Supp. 2d 566 (W.D. Va. 2003), *certified for interlocutory appeal*, Nos. 03-6362, 03-6363 (4th Cir. Mar. 4, 2003)—is presently briefed and argued before the Fourth Circuit on an interlocutory appeal.

<sup>7</sup> *See also Hale O Kaula v. Maui Planning Comm'n*, 223 F. Supp. 2d 1056, 1072 (D. Haw. 2002) (declining to address constitutionality of RLUIPA in detail, but concluding that “jurisdictional element” of § 2(a)(2)(B) precludes Commerce Clause challenge, and that § 2(a)(2)(C) “codifies the ‘individualized assessments’ doctrine”); *Cottonwood Christian Center v. City of Cypress*, 218 F. Supp. 2d 1203, 1221 n.7 (C.D. Cal. 2002) (noting that

As detailed further below, each of the four grounds on which the Report proposes to strike down RLUIPA (as well as Defendants' Eleventh Amendment argument not discussed by the Report) fails. Therefore, this Court should join the vast majority of courts to address the issue and hold that Section 3 of RLUIPA is constitutional.

**I. RLUIPA Section 3 Is a Proper Exercise of Congress' Power Under the Spending Clause of Article I**

The Report uncritically accepts Defendants claim that Congress exceeded its authority under the Spending Clause in passing RLUIPA Section 3. *See* Report at 9-12. But Section 3(b)(1) specifically limits application of the substantial burden tests to circumstances where the burden was “imposed in a program or activity that receives Federal financial assistance.” RLUIPA § 3(b)(1). This provision invokes congressional authority under the Spending Clause, which empowers Congress to “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States.” U.S. CONST. art. I, § 8, cl. 1. “Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.” *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (internal quotations omitted). “When Congress acts pursuant to its spending power, it generates legislation much in the nature of a contract: in return for federal funds, the state agrees to comply with federally imposed conditions.” *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640 (1999) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). Thus, Congress may achieve indirectly through the spending power what it could not achieve directly otherwise. *See Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980). *See also United States*

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“RLUIPA would appear to have avoided the flaws of its predecessor RFRA, and be within Congress’s constitutional authority”).

*v. Butler*, 297 U.S. 1, 66 (1936) (“[T]he power of the Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.”).

Since *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937), the Supreme Court has consistently respected the power of Congress to attach conditions to federal spending. Although Congress’s power to attach such conditions is not unlimited, a party attacking them bears a heavy burden to show that they are invalid. See *Kansas v. United States*, 214 F.3d 1196, 1200 (10<sup>th</sup> Cir. 2000). Specifically, conditions on federal funds are permitted so long as they satisfy the four requirements set out in *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

First, they must serve “the general welfare” rather than a purely private or local interest. *Dole*, 483 U.S. at 207 (citing *Helvering v. Davis*, 301 U.S. 619, 640-41 (1937)). Second, they must be imposed “unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.” *Dole*, 483 U.S. at 207 (quoting *Pennhurst*, 451 U.S. at 17); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640 (1999) (“In interpreting language in spending legislation, we thus insis[t] that Congress speak with a clear voice, recognizing that [t]here can, of course, be no knowing acceptance [of the terms of the putative contract] if a State is unaware of the conditions [imposed by the legislation] or is unable to ascertain what is expected of it.”) (internal quotations omitted, brackets in original). Third, grants “might be illegitimate” if they do not bear some reasonable or minimal relationship “to the federal interest in particular national projects or programs.” *Dole*, 483 U.S. at 207-08 (internal quotations and citations omitted); see *New York v. United States*, 505 U.S. 144, 167 (1992) (conditions must “bear some relationship to the purpose of the federal spending”); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958) (“[T]he Federal Government may

establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof”). Fourth and finally, they must not violate any independent constitutional provisions. *Dole*, 483 U.S. at 208 (internal citations omitted).

As recently recognized by both the Seventh and Ninth Circuits, RLUIPA Section 3 readily meets all of these requirements and is a legitimate exercise of Congressional spending power.<sup>8</sup> First, RLUIPA’s conditions on the use of federal funds are designed better to “protect prisoners’ religious rights and to promote the rehabilitation of prisoners,” purposes that “fall[] squarely within Congress’ pursuit of the general welfare.” *Charles*, 2003 WL 22455960, at \*3; *Mayweathers*, 314 F.3d at 1066-67 (“protecting religious worship in institutions from substantial and illegitimate burdens *does* promote the general welfare. . . . [B]y fostering non-discrimination, RLUIPA follows a long tradition of federal legislation designed to guard against unfair bias and infringement on fundamental freedoms.”) (emphasis in original). This congressional finding is especially secure because “courts should defer substantially to the judgment of Congress” in this regard. *Dole*, 483 U.S. at 207 n.2.

Second, the conditions RLUIPA imposes “clearly and unambiguously” give States notice of the regulatory burdens they are undertaking along with federal funds. *Charles*, 2003 WL 22455960, at \*4. “RLUIPA unequivocally states that it applies to any ‘program or activity that receives Federal financial assistance.’ 42 U.S.C. § 2000cc-1(b)(1).” *Mayweathers*, 314 F.3d at 1067. In light of the statute’s plain language, the Report’s assertion that the conditions RLUIPA attaches to a state’s “receipt of federal funds are not unambiguous,” Report at 11, is simply a nonstarter. *See Mayweathers*, 314 F.3d at 1067 (“By its plain language, RLUIPA clearly

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<sup>8</sup> By its decision, the Seventh and Ninth Circuit joined the consensus of district court decisions to have addressed Spending Clause challenges to RLUIPA. *See Sanabria, supra* (RLUIPA § 3 valid exercise of spending power); *Gordon, supra* (same); *Johnson, supra* (same); *Gerhardt, supra* (same).

communicates that any institution receiving federal funds must not substantially burden the exercise of religion absent a showing that the burden is the least restrictive means of serving a compelling government interest”); *accord Charles*, 2003 WL 22455960, at \*4. Moreover, not only is RLUIPA’s text unambiguous, but its standard is well-developed and familiar as the result of years of free exercise litigation, both before and after *Employment Div. v. Smith*, 494 U.S. 872 (1990). Thus, this condition is indistinguishable from those upheld under the Spending Clause as a part of other civil rights legislation. *See, e.g., Davis*, 526 U.S. at 640-44 (upholding prohibitions against sexual harassment associated with receipt of federal funds under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1994)); *Lau v. Nichols*, 414 U.S. 563, 568-69 (1974) (upholding condition that public schools receiving federal funds comply with Title VI of Civil Rights Act of 1964).<sup>9</sup>

Moreover, any suggestion that the compelling interest and least restrictive means standard is too ambiguous for Defendants to know what conditions are being attached to federal funds, *see* Report at 11, is similarly unavailing. The compelling interest and least restrictive means test is hardly a novel standard; rather, it is a familiar and well-established component of the strict scrutiny test that applies to the States under the Fourteenth Amendment in a wide variety of circumstances, regardless of RLUIPA. *See, e.g., Smith*, 494 U.S. at 886 n.3 (“Just as we subject to the most exacting scrutiny laws that make classifications based on race, . . . or on the content of speech, . . . so too we strictly scrutinize governmental classifications based on

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<sup>9</sup> In addition, as the legislative history of RLUIPA makes clear, any federal funding accepted by a states’ correction’s department brings RLUIPA into play. *See* The Need for Federal Protection of Religion Freedom After *Boerne v. Flores*: Hearing Before the Subcomm on the Constitution of the House Comm. on the Judiciary, 105<sup>th</sup> Cong. (1998) (testimony of Isaac M. Jaroslawicz, Dir. Of Legal Affairs, the Aleph Institute), available at <http://www.house.gov/judiciary/222356.htm> [hereinafter “Jaroslawicz Testimony”] (“all state criminal justice systems obtain federal funding of one kind or another”). Additionally, state and local correctional facilities were budgeted \$258 million by the Office of Justice Programs for fiscal year 2000, as well as \$426 million for State prison drug treatment programs for that same year. *See* Table IV, Appendix A, U.S. Census Bureau. Federal Aid to States for Fiscal Year 2000 (2001), available at [http://www.census.gov/prod/2001\\_pubs/fas-00.pdf](http://www.census.gov/prod/2001_pubs/fas-00.pdf).

religion.”). Nor does the fact that this standard may result in differing outcomes depending on differing factual circumstances somehow make the conditions RLUIPA places on States fatally ambiguous. To the contrary, the “Supreme Court has held that conditions may be ‘largely indeterminate’ so long as that statute ‘provid[es] clear notice to States that they, by accepting funds under the Act, would indeed be obligated to comply with [the conditions].’ *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 24-25 (1981).” *Mayweathers*, 314 F.3d at 1067; *Charles* 2003 WL 22455960, at \*3-4 (same).<sup>10</sup>

Third, regardless of the particular federally funded program at issue, the conditions of RLUIPA always relate to the same federal purpose: that public funds “not be spent in any fashion which encourages, entrenches, subsidizes, or results” in discrimination against, or burdens on, religious exercise. *See Lau*, 414 U.S. at 569. The Supreme Court’s cases do not require a highly particularized “direct” relationship between the conditions imposed and the purposes of the spending programs. Instead, the Supreme Court has said only that “conditions on federal grants *might* be illegitimate if they are unrelated to the federal interest.” *Dole*, 483 U.S. at 207. The threshold of relatedness required by this test is a “low” one. *Mayweathers*, 314 F.3d at 1067. Conditions must only possess “*some* relationship to the purpose of the federal spending.” *New York*, 505 U.S. at 167 (emphasis added). In other words, “[t]he required degree of . . . relationship is one of reasonableness or minimum rationality.” *Kansas*, 214 F.3d at 1199.<sup>11</sup>

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<sup>10</sup> *Cf. Monroe*, 526 U.S. at 650-51 (Title IX’s general language proscribing school toleration of severe student-on-student sexual harassment satisfied *Pennhurst*’s notice requirement even though question of “whether gender-oriented conduct rises to level of actionable harassment . . . depends on a constellation of surrounding circumstances, expectations, and relationships.”) (internal citations and quotations omitted).

<sup>11</sup> The cases do not reveal any requirement of a *particularized* nexus between the imposed conditions and the particular purpose of the federal funds. *See, e.g., Dole*, 483 U.S. at 207 (upholding federal statute requiring adoption of 21-year old minimum drinking age in return for receipt of highway funds, none of which were specifically earmarked for purpose of preventing drunk driving). *See also Oklahoma v. Civil Service Comm’n*, 330 U.S. 127,

RLUIPA more than satisfies this standard. As the Seventh Circuit stated, “Congress has an interest in allocating federal funds to institutions that do not engage in discriminatory behavior or in conduct that infringes impermissibly upon individual liberties.” *Charles*, 2003 WL 22455960, at \*4. Moreover, in light of the reasonable perception that exercise of religion in itself has rehabilitative qualities, *see, e.g.*, 139 CONG. REC. S14465 (daily ed. Oct. 27, 1993) (“exposure to religion is the best hope we have for rehabilitation of a prisoner”) (statement of Sen. Hatch), Congress “can rationally seek to insure that states receiving federal funds targeted at rehabilitating prisoners are not simultaneously using those funds or other federal money to impede prisoners’ exercise of religion and its perceived rehabilitative effects.” *Charles v. Verhagen*, 220 F. Supp. 2d 955, 963 (W.D. Wis. 2002); *Charles*, 2003 WL 22455960, at \*5 (same); *Mayweathers*, 314 F.3d at 1067 (same).

Fourth, RLUIPA does not violate any independent constitutional requirement, such as the Establishment Clause or Tenth Amendment. *See Charles*, 2003 WL 22455960, at \*5-7; *Mayweathers*, 314 F.3d at 1068-69. *See also infra* §§ III-V.

In short, if the State of Georgia would rather not comply with RLUIPA’s unambiguous conditions imposed on the use of federal prison funds, it has been free since the passage of that Act—and remains free to this day—simply to decline that funding. The State is *not* free, however, to have its cake and eat it too, to accept federal funds while disregarding the federal conditions associated with them. To allow Georgia that additional latitude would be to allow a *State* to dictate to *Congress* how federal funds shall be used, which flies in the face of our

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129 (1947) (upholding provision of Hatch Act prohibiting state employees “whose principal employment is in connection with any activity which is financed in whole or in part” by the United States from taking “any active part in political management or in political campaigns,” even though this exercise of the Spending Power was not attached to any particular spending program); *United States v. Dierckman*, 201 F.3d 915, 922-23 (7<sup>th</sup> Cir. 2000) (upholding Spending Clause legislation conditioning receipt of federal farm benefits on farmer’s willingness not to cultivate wetlands, even though benefits lost for noncompliance with conditions were not limited to those relating to wetlands preservation).

constitutional structure of federalism. *See* U.S. CONST. art. VI (“[T]he laws of the United States . . . shall be the supreme law of the land”). Thus, in passing RLUIPA Section 3, Congress acted within its authority under the Spending Clause.

## **II. RLUIPA Section 3 Is a Proper Exercise of Congress’ Power Under the Commerce Clause of Article I**

The Report also asserts that Congress lacked the authority under the Commerce Clause to pass RLUIPA Section 3. *See* Report at 8-9. RLUIPA Section 3, however, contains an “express jurisdictional element,” and regulates “economic activity”—namely, the administration of prisons—whose connection to interstate commerce is not “attenuated,” but “visible to the naked eye.” *See United States v. Lopez*, 514 U.S. 549, 561-63 (1995). Therefore, Section 3 of RLUIPA should also be sustained as a valid exercise of Congress’ Commerce Clause power.

The Supreme Court recently clarified the factors courts should consider when assessing whether congressional legislation represents “regulation of an activity that substantially affects interstate commerce,” *Lopez*, 514 U.S. at 559: (1) whether the statute contains an express “jurisdictional element which would ensure, through case-by-case inquiry, that the [regulated activity] in question affects interstate commerce,” *Lopez*, 514 U.S. at 561; *United States v. Morrison*, 529 U.S. 598, 611-12 (2000); (2) whether the statute regulates “economic activity,” *Lopez*, 514 U.S. at 559; *Morrison*, 514 U.S. at 120 S. Ct. at 609-10; (3) whether “the link between [the regulated activity] and a substantial effect on interstate commerce was attenuated,” *Morrison*, 514 U.S. at 612 (citing *Lopez*, 514 U.S. at 563-67); and (4) whether the statute’s “legislative history contain[s] express congressional findings regarding the effects upon interstate commerce,” *id.* (quoting *Lopez*, 514 U.S. at 562). Although no single factor is strictly required, all are satisfied here.

First and foremost, in contrast to *Lopez* and *Morrison*, Section 3 of RLUIPA is supported by an “express jurisdictional element which might limit its reach to a discrete set of [burdens on prisoners’ religious exercise] that additionally have an explicit connection with or effect on interstate commerce.” *Morrison*, 529 U.S. at 611-12; *see* RLUIPA § 3(b)(2). As a matter of law and logic, the presence of this provision ensures the *facial* constitutionality of the statute under the Commerce Clause: by its own terms, the statute applies only to conduct affecting “commerce with foreign nations, among the several States, or with Indian tribes.” RLUIPA § 3(b)(2).<sup>12</sup> The jurisdictional element also precludes *as-applied* challenges under the Commerce Clause. If the conduct at issue in a particular case satisfies the jurisdictional requirement of Section 3(b), then the conduct also falls within the sweep of the commerce power and may be regulated constitutionally; if the facts do not satisfy the jurisdictional element, then the statute *may not* reach the conduct under the commerce power, but the statute also *does not* reach the conduct, thus respecting constitutional limits.<sup>13</sup> In other words, the Act applies either constitutionally, or not at all. This has proven sufficient alone for courts to reject Commerce

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<sup>12</sup> Compare RLUIPA § 2(a)(2)(B), with U.S. CONST. Art. I., § 8, cls. 3; *see United States v. Sorrentino*, 72 F.3d 294, 296 (2d Cir. 1995) (“The statute before us avoids the constitutional deficiency identified in *Lopez* because it requires a legitimate nexus with interstate commerce” by means of a jurisdictional element.). *See also United States v. Chesney*, 86 F.3d 564, 568-69 (6<sup>th</sup> Cir. 1996) (concluding “presence of the jurisdictional element defeats [defendant’s] facial challenge”); *United States v. Bishop*, 66 F.3d 569, 588 (3d Cir. 1995) (“[T]he jurisdictional element in [the federal carjacking statute] independently refutes appellants’ arguments that the statute is constitutionally infirm.”).

<sup>13</sup> *See Morrison*, 529 U.S. at 611-12; *Lopez*, 514 U.S. at 561 (noting that jurisdictional element ensures “through case-by-case inquiry” that regulated activity falls within Commerce Clause authority); *see, e.g., United States v. Grassie*, 237 F.3d 1199, 1211 (10<sup>th</sup> Cir. 2001) (“[B]y making interstate commerce an element of the [Church Arson Prevention Act] ... to be decided on a case-by-case basis, constitutional problems are avoided.”). *See also United States v. Harrington*, 108 F.3d 1460, 1465 (D.C. Cir. 1997) (“Indeed, the Court specifically suggested that a jurisdictional element could justify the application of the commerce power to a single firearm possession, despite the inevitable insubstantiality of such a one-time, small-scale event from the perspective of interstate commerce.”).

Clause challenges to both RLUIPA Section 3(b)(2), and the analogous land use provision, Section 2(a)(2)(b).<sup>14</sup>

The second element of the Commerce Clause analysis is also readily satisfied. RLUIPA clearly regulates “economic activity” in this case: the administration of prisons, which involves a host of commercial transactions.<sup>15</sup>

Third, there can be little doubt that this class of economic activity has a direct link to a “substantial effect of interstate commerce.” Even after *Lopez* and *Morrison*, courts measure interstate effect by examining the activity at issue “‘taken together with that of many others similarly situated.’” *Lopez*, 514 U.S. at 556 (quoting *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942)); see, e.g., *Camps Newfound / Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 586 (1997) (relying on “interstate commercial activities of nonprofit entities *as a class*” in Commerce Clause determination, citing *Lopez* and *Wickard*) (emphasis added). Even these aggregated effects, however, fall beyond the commerce power if they are “so indirect and remote that to embrace them . . . would effectually obliterate the distinction between what is national and what is local.” *Lopez*, 514 U.S. at 557 (internal citations and quotations omitted).

Even if the full range of economic activities involved in the administration of Georgia prisons occurred exclusively in the State of Georgia, the aggregate effect of similar activity

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<sup>14</sup> See, e.g., *Westchester Day School*, 2003 WL 22110445 (“RLUIPA is a permissible exercise of Congress’s broad power to act under the Commerce Clause.”); *Hale O Kaula*, 229 F. Supp. 2d at 1072 (concluding that “jurisdictional element” of § 2(a)(2)(B) precludes Commerce Clause challenge); *Johnson*, 223 F. Supp. 2d at 828 (“RLUIPA is saved by its jurisdictional requirement which establishes the requisite nexus to interstate commerce to satisfy the Commerce Clause.”); *Mayweathers v. Terhune*, 2001 WL 804140, at \*7-\*8 (E.D. Cal. July 2, 2001) (“The jurisdictional element in § 3(b)(2) thereby ensures that Congress’ Commerce Clause power is only exercised in those cases where interstate commerce is directly affected by the prison regulation at issue.”). See also *Freedom Baptist Church*, 204 F. Supp. 2d at 867 (upholding RLUIPA’s land use provisions and noting that “subsection (a)(2)(B) on its face has an interstate commerce jurisdictional element”).

<sup>15</sup> In addition, “RLUIPA covers regulation of the free exercise of religion, an objectively interstate activity. . . . [T]he free exercise of religion affects interstate commerce in a multitude of ways including: use of the airwaves to advertise various religions and to seek charitable donations for domestic and international concerns; use of the interstate highway system for traveling choirs and missionary groups; and, use of the mail system to buy and sell ceremonial items and religious literature.” *Johnson*, 223 F. Supp. 2d at 829.

elsewhere would still implicate the commerce power. *See, e.g., Camps Newfound*, 520 U.S. at 586 (“[A]lthough the [Christian Scientist] summer camp involved in this case may have a relatively insignificant impact on the commerce of the entire Nation, the interstate commercial activities of nonprofit entities as a class are unquestionably significant.”). By contrast, the regulated activity in *Lopez* – possessing a gun in a school zone – was not one “that might, through repetition elsewhere, substantially affect any sort of interstate commerce.” *Lopez*, 514 U.S. at 567.

Moreover, applying RLUIPA here does not remotely threaten “the distinction between what is national and what is local.” *Lopez*, 514 U.S. at 557, 567. RLUIPA neither replaces state rules for prison administration with a federal one, nor provides religious adherents a blanket exemption from such state rules; instead, RLUIPA requires state authorities to provide *additional justification* for a *limited category* of rules, namely, those that *both* burden religious exercise *and* affect interstate commerce.

Fourth and finally, both *Lopez* and *Morrison* make clear that Congress is not required to make formal findings of the regulated activity’s effect on interstate commerce when “such substantial effect [is] visible to the naked eye.” *Morrison*, 529 U.S. at 612 (quoting *Lopez*, 514 U.S. at 563). Because the substantial effect on commerce of the regulated activity here is abundantly “visible,” the Court need not rely on congressional findings to conclude that Congress has acted within its bounds.

Thus, RLUIPA Section 3 satisfies all four elements of the Court’s Commerce Clause analysis, and so represents a proper exercise of that enumerated power.

### **III. RLUIPA Section 3 Is Fully Consistent with the Tenth Amendment**

The Report also suggests that RLUIPA Section 3 violates the Tenth Amendment. *See* Report at 12. The limits of the Tenth Amendment are implicated, however, only when Congress

acts outside the scope of its enumerated powers. *New York v. United States*, 505 U.S. 144, 156 (1992) (“If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States.”); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (“As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States.”). As detailed above, RLUIPA Section 3 represents a proper exercise of two, independently sufficient, enumerated powers of Congress, the commerce power and the spending power. *See supra* §§ I, II. Thus, any argument that RLUIPA Section 3 runs afoul of the Tenth Amendment has no merit. *See Charles*, 2003 WL 22455960, at \*5 (rejecting Tenth Amendment challenge to RLUIPA Section 3); *Mayweathers*, 314 F.3d at 1069 (same); *Johnson*, 223 F. Supp. 2d at 832-33; (same); *Gerhardt*, 221 F.Supp.2d at 850-51 (same); *Sanabria*, slip op. at 39 n.8 (same).

#### **IV. RLUIPA Section 3 Is Fully Consistent with the Establishment Clause**

The Report also recommends finding that RLUIPA Section 3 violates the Establishment Clause of the First Amendment. *See* Report at 12. The core argument of the Report (and the two rogue opinions on which it relies) is that the Establishment Clause forbids legislative accommodations of religious exercise if they accommodate only religious exercise. But this argument is premised on a radical view of the Establishment Clause held by only one sitting Justice of the Supreme Court. *See City of Boerne v. Flores*, 521 U.S. 507, 536–37 (1997) (Stevens, J., concurring). *See also Freedom Baptist Church*, 204 F. Supp. 2d at 863–65 (describing implicit rejection of Justice Stevens’ position by remaining eight Justices).

Accordingly, this same, hyper-separationist argument has been rejected *in every single case* in which it was raised against RFRA, RLUIPA’s broader predecessor, both before and after RFRA was struck down as applied to the states on other grounds in *Boerne*. *See, e.g., In re Young*, 141 F.3d 854, 863 (8th Cir.) (“RFRA fulfills each of the elements presented in the *Lemon*

test, and we conclude that Congress did not violate the Establishment Clause in enacting RFRA.”), *cert. denied*, 525 U.S. 811 (1998); *Mockaitis v. Harclerod*, 104 F.3d 1522, 1530 (9th Cir.) (“The narrow logic of this [Establishment Clause] attack is refuted by the experience of the nation.”), *vacated on other grounds*, 521 U.S. 507 (1997); *Sasnett v. Sullivan*, 91 F.3d 1018, 1022 (7th Cir. 1996) (“We defer to the Fifth Circuit’s analysis of why [RFRA] also does not violate ... the establishment clause of the First Amendment.”), *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) (“We agree with the Fifth Circuit that RFRA represents nothing more sinister than a ‘legislatively mandated accommodation of the exercise of religion.’”); *Flores v. City of Boerne*, 73 F.3d 1352, 1364 (5th Cir. 1996) (“RFRA’s lifting of ‘substantial burdens’ on the exercise of religion does not amount to the Government coercing religious activity through ‘its own activities and influence.’”), *rev’d on other grounds*, 521 U.S. 507 (1997). *See also Charles*, slip op. at 13 (“a provision of RFRA nearly identical to the one at issue in RLUIPA has been held constitutional under the Establishment Clause by this Circuit [*i.e.*, the Seventh Circuit] and several others”).<sup>16</sup>

And – until a few months ago – that argument had been rejected in every single case in which it was raised against both Section 3 of RLUIPA and the analogous land-use provisions in Section 2 of RLUIPA. *See, e.g., Charles v. Verhagen*, No. 02-3572, 2003 WL 22455960 (7<sup>th</sup> Cir. Oct. 30, 2003) (rejecting Establishment Clause challenge to RLUIPA) *Mayweathers v. Newland*, 314 F.3d 1062 (9<sup>th</sup> 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); *Williams v. Bitner*, No. 1:CV-01-2271, 2003 WL 22272302, \_\_\_ F. Supp. 2d. \_\_\_ (M.D. Pa. Sept. 30,

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<sup>16</sup> *Cf. Gibson v. Babbit*, 223 F.3d 1256 (11<sup>th</sup> Cir. 2000) (considering merits of RFRA claim against the federal government post-*Boerne* without suggesting that RFRA was unconstitutional).

2003) (same); *Murphy v. Town of New Milford*, No. 3:00-CV-2297, 2003 WL 22299219, \_\_\_ F. Supp. 2d \_\_\_ (D. Conn. Sept. 30, 2003) (same); *Westchester Day Sch. v. Village of Mamaroneck*, No. Civ. 02-6291-WCC, 2003 WL 22110445, \_\_\_ F. Supp. 2d \_\_\_ (S.D.N.Y. Sept. 5, 2003) (same); *Sanabria v. Brown*, No. 99-4699 (D. N.J. June 5, 2003) (same); *Life Teen, Inc. v. Yavapai County*, No. Civ. 01-1490-PCT-RCB (D. Ariz. Mar. 26, 2003) (same); *Gordon v. Pepe*, No. 00-10453, 2003 WL 1571712 (D. Mass. Mar. 6, 2003) (same); *Christ Universal Mission Church v. City of Chicago*, No. 01-C-1429, 2002 U.S. Dist. LEXIS 22917, at \*24 (N.D. Ill. Sept. 11, 2002) (same); *Johnson v. Martin*, 223 F. Supp. 2d 820 (W.D. Mich. 2002) (same); *Gerhardt v. Lazaroff*, 221 F. Supp. 2d 827 (S.D. Ohio 2002) (same); *Charles v. Verhagen*, 220 F. Supp. 2d 955 (W.D. Wis. 2002) (same); *Love v. Evans*, No. 2:00-CV-91 (E.D. Ark., Aug. 8, 2001) (same); *Freedom Baptist Church*, 204 F. Supp. 2d 857 (E.D. Pa. 2002) (same).

Only two decisions (and these are notably the only decisions the Report cites) have seen fit to ignore the overwhelming authority rejecting Establishment Clause challenges to RLUIPA (and its predecessor statute). One of those decisions—*Al Ghashiyah v. Wis. Dept. of Corrections*, 250 F. Supp. 2d 1016 (E.D. Wis. 2003)—is no longer good law because the Seventh Circuit, which oversees the Eastern District of Wisconsin, has just expressly rejected an Establishment Clause challenge to Section 3 of RLUIPA in its *Charles v. Verhagen* decision. The other decision—*Madison v. Riter*, 240 F. Supp. 2d 566 (W.D. Va. 2003), *certified for interlocutory appeal*, Nos. 03-6362, 03-6363 (4th Cir. Mar. 4, 2003)—is presently briefed and argued before the Fourth Circuit on an interlocutory appeal.<sup>17</sup>

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<sup>17</sup>Moreover, the Report also, like the anomalous district court opinions on which it relies, fails to cite, discuss, or attempt to distinguish the recent opinions of three federal Courts of Appeals that have rejected Establishment Clause challenges to laws that have the purpose and effect of alleviating burdens on religious exercise, and *only* religious exercise. See *Ehlers-Renzi v. Connelly School of the Holy Child*, 224 F.3d 283, 291 (4th Cir. 2000) (upholding county zoning ordinance exempting from special exception requirement parochial schools located on land owned by religious organization); *Boyajian v. Gatzunis*, 212 F.3d 1 (1st Cir. 2000) (upholding state law and town by-law

Finally, the marginal character of the Establishment Clause argument accepted by the Report is further illustrated by the entities that have rejected it. For example, the argument that RLUIPA violates the Establishment Clause was recently rejected by a unanimous panel of the Ninth Circuit Court of Appeals, *see Mayweathers*, 314 F.3d at 1068–69, the same court that has read the Establishment Clause to prohibit the voluntary recitation of the Pledge of Allegiance in public schools. The holding recommended by the Report has not even been adopted by the ACLU – a friend to Establishment Clause claimants, yet one of the strongest advocates of RLUIPA. *See* American Civil Liberties Union, “Final Passage of Breakthrough Religious Freedom Bill Hailed By Religious and Civil Rights Groups,” July 28, 2000 (available at <<http://www.aclu.org/news/2000/n072800a.html>>). Nonetheless, the Report, if adopted, would result in this Court taking a position even more separationist than these most separationist institutions.

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

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prohibiting municipal authorities from excluding religious uses of property from any zoning area); *Cohen v. Des Plaines*, 8 F.3d 484 (7th Cir. 1993) (upholding zoning ordinance that allowed churches to operate day-care centers in single-family residential districts, while requiring other operators of day-care centers to obtain special use permits).

In other words, RLUIPA does not represent an “establishment” of religion because it does not entail “sponsorship, financial support, and active involvement of the sovereign in religious activity.” *Ehlers-Renzi*, 224 F.3d at 287 (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970)). Instead, by sharp contrast, RLUIPA relieves substantial regulatory burdens on religious exercise, and so “follow[] the best of our traditions.” *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

**A. RLUIPA has a secular purpose.**

First, RLUIPA was passed for the secular government purpose of “protect[ing] the free exercise of religion from unnecessary government interference.” 146 CONG. REC. E1234, E1235 (daily ed. July 14, 2000) (statement of Rep. Canady); *Mayweathers*, 314 F.3d at 1068. As the Supreme Court has repeatedly made clear, it is a “proper [government] purpose [to] lift[] a regulation that burdens the exercise of religion.” *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 338 (1987); *id.* at 339 (noting the “permissible purpose of limiting governmental interference with the exercise of religion”). Not only is it permissible for government to accommodate religious exercise, it is commendable and sometimes mandatory.<sup>18</sup>

Indeed, legislation having this purpose is all the more common — and necessary — since the Supreme Court’s decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), made clear that people of faith should turn in the first instance to the legislative and executive branches, rather than the courts, for the protection of religious liberty:

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<sup>18</sup> *Amos*, 483 U.S. at 334 (“This Court has long recognized that the government may (and sometimes must) accommodate religious practice and that it may do so without violating the Establishment Clause.”); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (noting that the Constitution “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.... Anything less would require the ‘callous indifference’ we have said was never intended by the Establishment Clause.”); *Zorach*, 343 U.S. at 314 (accommodating religious exercise “follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.”).

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

*Smith*, 494 U.S. at 890.

Thus, for example, while the Court in *Smith* rejected the claim that the Free Exercise Clause mandated an exemption to drug laws, the Court noted with approval that accommodations for religious peyote use have been made by legislation. *Id.* (noting that “a number of States have made an exception to their drug laws for sacramental peyote use.”). Such accommodations are constitutional, even though others wishing to use peyote for secular reasons are not offered the exemption.<sup>19</sup> Similarly, after the Supreme Court ruled in *Goldman v. Weinberger*, 475 U.S. 503 (1986), that an Air Force psychotherapist had no right under the Free Exercise Clause to wear a yarmulke while on duty, Congress responded by statutorily enacting such a right in the National Defense Authorization Act for Fiscal Years 1988 and 1989, 10 U.S.C. § 774, a permissible accommodation of the religious liberty of service members.<sup>20</sup>

In addition, if this secular purpose is somehow inadequate, there is at least one other secular purpose for RLUIPA’s alleviating burdens on religion in prison – to promote rehabilitation. *See Charles*, 2003 WL 22455960, at \*3 (identifying rehabilitation of prisoners as

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<sup>19</sup> *See Lee v. Weisman*, 505 U.S. 577, 628–29 (1992) (Souter, J., concurring) (“[I]n freeing the Native American Church from federal laws forbidding peyote use, *see* Drug Enforcement Administration Miscellaneous Exemptions, 21 C.F.R. § 1307.31 (1991), the government conveys no endorsement of peyote rituals, the Church, or religion as such; it simply respects the centrality of peyote to the lives of certain Americans.”)

<sup>20</sup> *See Texas Monthly v. Bullock*, 489 U.S. 1, 18 (1989) (plurality opinion of Brennan, Marshall, and Stevens) (“[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, *see Goldman v. Weinberger*, . . . 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)).

one of RLUIPA’s purposes); *Kikumura*, 242 F.3d at 961 (discussing RLUIPA’s legislative history).

**B. RLUIPA does not have the primary effect of advancing religion.**

RLUIPA also satisfies the second *Lemon* factor, because alleviating substantial burdens on religious exercise — here, on institutionalized persons such as the plaintiff Benning — does not have the principal or primary effect of advancing religion. It merely reduces intrusion and oversight by the government as to how religious individuals and institutions carry out their missions. While this may better enable those individuals and entities to advance their religious purposes, the Supreme Court has held this to be a permissible effect:

A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden “effects” under *Lemon*, it must be fair to say that the government itself has advanced religion through its own activities and influence. As the Court observed in *Walz*, “for the men who wrote the Religion Clauses of the First Amendment the ‘establishment’ of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity.”

*Amos*, 483 U.S. at 337 (quoting *Walz*, 397 U.S. at 668).

The Report nonetheless faults RLUIPA because it accommodates religious exercise without also accommodating other fundamental rights. *See* Report at 14. But the Supreme Court — and the litany of lower courts willing to follow it — have squarely rejected this very same argument, over and over again.<sup>21</sup> Nor could it be otherwise, as such a holding is fraught with problems on many levels.

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<sup>21</sup> *See, e.g., Amos*, 483 U.S. at 338 (“Where . . . government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities.”); *Mayweathers*, 314 F.3d at 1069 (“The statute does not violate the Establishment Clause just because it seeks to lift burdens on religious worship in institutions without affording corresponding protection to secular activities or to non-religious prisoners.”); *Charles*, slip op. at 13 (same); *Johnson*, 223 F. Supp. 2d at 826 (concluding that, after *Amos*, “it does not follow, as Defendants argue, that merely because Congress has acted to provide religious activity with special protection and has not done the same for secular activity, that Congress has advanced religion.”); *Gerhardt*, 221 F.Supp.2d at 847 (“Finally, the [*Amos*] Court rejected the notion that a law which singles out religions for the benefit it confers is *per se* unconstitutional.”). *See also Freedom Baptist Church*,

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

Second, this reasoning defies logic. If the purpose of the Establishment Clause really were to preclude laws that *single out* religious exercise for protection from government interference, then the Establishment Clause would squarely contradict the Free Exercise Clause, which does precisely that. *See Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (“Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.”).

Third, there are practical problems. On the Report’s view, the Establishment Clause would run amok, invalidating wholesale the legion acts of the political branches – legislative and executive, federal, state, and local – whose sole purpose and effect is to accommodate religious exercise.<sup>22</sup> Another strange consequence of this reasoning is that, if legislative and executive

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204 F. Supp. 2d at 865 n.9 (noting that *Amos* “constitutes something of a silver bullet against any residual Establishment Clause concerns”).

<sup>22</sup> This includes, among many others, the federal statutory accommodations of religious peyote use and headwear in the military noted above, state and federal religious freedom restoration acts, state constitutional free exercise clauses, and even particular prison regulations designed to accommodate religious exercise.

officials would merely tack on to each protection of religious exercise the protection of another fundamental right, then the entire (allegedly grievous) constitutional problem would disappear. The Establishment Clause does not exist to require government actors to undertake such formalistic (and completely unprecedented) exercises.

Finally, there is an historical problem. Laws that exist solely to accommodate religious exercise are so numerous because they represent a time-honored American tradition.<sup>23</sup> And, as discussed *supra*, accommodations by the political branches are all the more imperative since *Employment Division v. Smith* narrowed the role of the judiciary in this area. In other words, if legislation that singles out religious exercise for accommodation has the impermissible effect of advancing religion, then the *Smith* Court’s invitation to pass such legislation, *see Smith*, 494 U.S. at 890, would appear to be an inducement to violate the Establishment Clause.

Accordingly, all the courts to address “effects” challenges to RLUIPA – other than the heavily overlapping *Madison* and *Al Ghashiyah* decisions cited by the Report – have rejected them. *See, e.g., Charles*, 2003 WL 22455960, at \*6-7; *Mayweathers*, 314 F.3d at 1068-69; *Johnson*, 223 F. Supp. 2d at 825-26; *Gerhardt*, 221 F. Supp. 2d at 846-49; *see also Murphy, supra* (rejecting Establishment Clause challenge to RLUIPA’s land use provisions); *Westchester Day School, supra* (same); *Freedom Baptist Church, supra* (same).

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<sup>23</sup> *See Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 705 (1994) (“Our cases leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice.”); *Walz*, 397 U.S. at 673 (“Few concepts are more deeply embedded in the fabric of our national life ... than for the government to exercise *at the very least* this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference.”) (emphasis added); *Zorach*, 343 U.S. at 314 (accommodating religious exercise “follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.”).

### C. RLUIPA does not foster excessive entanglement with religion.

The Report, citing the now-overruled *Al Ghashiyah* decision, claims that “RLUIPA fosters an excessive entanglement because it forces the states to become involved with, knowledgeable about, and exceedingly sensitive to the varied religious practices of their inmates.” Report at 16 (internal quotations omitted). But this argument proves too much, for then government could never take account of religious belief for the purpose of accommodation, even under the more deferential test under *Turner v. Safley*, 482 U.S. 78 (1987). See *Johnson*, 223 F. Supp. 2d at 826–27; see also *Mockaitis*, 104 F.3d at 1530 (“Of course, application of RFRA, like the application of the First Amendment itself and any objection made under this amendment, requires a court to determine what is a religion and to define an exercise of it. There is no excessive entanglement.”). Finding excessive entanglement here would contradict not only common sense, but the Supreme Court’s emphasis that “[t]here is ample room under the Establishment Clause for ‘benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.’” *Amos*, 483 U.S. at 334.

Indeed, the purpose and effect of RLUIPA is precisely to *minimize* the entanglement of government officials in religious exercise; RLUIPA’s deregulation of religion is the *exact opposite* of entanglement. As in *Amos*, “[i]t cannot be seriously contended that [the statutory accommodation of religious exercise] impermissibly entangles church and state; the statute effectuates a more complete separation of the two and avoids the kind of intrusive inquiry into religious belief’ that the Constitution prohibits. *Id.* at 339.

Similarly, far from increasing entanglement, RLUIPA’s definition of “religious exercise” tends to decrease it. To begin with, RLUIPA’s definition of “religious exercise” to “include any exercise of religion, whether or not compelled by, or central to, a system of religious belief,” 42 U.S.C. § 2000cc-5(7)(A), precisely tracks Supreme Court precedent, and so entails no greater

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

In sum, because RLUIPA – like RFRA before it, as well as a broad range of legislative accommodations of religion “follow[ing] the best of our traditions,” *Zorach*, 343 U.S. at 314 – satisfies all three elements of the *Lemon* test, the Act should be found not to violate the Establishment Clause.<sup>24</sup>

#### **IV. RLUIPA Section 3 Is Fully Consistent with the Eleventh Amendment**

Finally, Defendants’ attempt to invoke the Eleventh Amendment as a bar to this suit must also be rejected. The prospective injunctive relief sought by the Plaintiff against state officials falls squarely within the *Ex parte Young* exception to sovereign immunity and does not violate the Eleventh Amendment. *See Mayweathers*, 314 F.3d at 1070.

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<sup>24</sup> Because RLUIPA satisfies all three elements of the *Lemon* test, it cannot reasonably be viewed as an endorsement of religion. *See Mitchell v. Helms*, 530 U.S. 793, 835 (2000). Thus, the Report’s complaints about RLUIPA that draw on endorsement jurisprudence must fail. Here again, the argument proves too much – by definition, *every* law that accommodates only religious exercise treats conduct more leniently when it is religiously motivated, whether in the prison context or otherwise. Thus, unless *all* religion-only accommodations are unconstitutional on that basis, the Report’s assertions concerning the inequity of religious accommodation in prison lose their force.

**CONCLUSION**

For the foregoing reasons, this Court should hold that RLUIPA Section 3 is constitutional.

Respectfully submitted,

THE BECKET FUND FOR RELIGIOUS LIBERTY

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Dated: October 31, 2003

**CERTIFICATE OF SERVICE**

I hereby certify that on this 31<sup>st</sup> day of October, 2003, I served on all parties the above and foregoing Brief *Amici Curiae* by depositing same in the United States mail, with proper first-class postage affixed thereto, addressed to counsel of record as follows:

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