

Appeal Nos. 04-11044-C and 04-10979C

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

RALPH H. BENNING
Plaintiff-Appellee

UNITED STATES OF AMERICA
Intervenor-Appellee

v.

WILLIAM F. AMIDEO, *et al.*
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA,
(HONORABLE B. AVANT EDENFIELD)

BRIEF OF PLAINTIFF-APPELLEE

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**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE
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The undersigned attorneys for Plaintiff-Appellee hereby certify, pursuant to 11th Circuit Rule 26.1-1 that the following have an interest in the outcome of this case.

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellee Ralph Benning agrees with Defendants-Appellants that oral argument would be useful in this case to address the arguments concerning the constitutionality of Section 3 of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-1.

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**STATEMENT REGARDING ADOPTION
OF BRIEFS OF OTHER PARTIES**

Plaintiff-Appellee Ralph Benning does not adopt the brief of any other party.

STATEMENT OF JURISDICTION

This court has jurisdiction pursuant to 28 U.S.C. § 1292(b) and this Court's order of March 10, 2004 granting the petition for permission to appeal. R-81.

STATEMENT OF ISSUES

Whether the District Court correctly held, in accordance with the overwhelming weight of authority, that Section 3 of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1, is a constitutional exercise of Congress' Spending Clause and Commerce Clause authority and is consistent with the Tenth Amendment and the Establishment Clause of the First Amendment.

STATEMENT OF THE CASE

Plaintiff-Appellee Ralph Benning is an inmate at the Georgia State Prison in Hancock and a sincere adherent to Judaism. R-1. Georgia Correctional officials have severely impinged on Mr. Benning's ability to exercise his religion by repeatedly denying him the kosher diet mandated by his faith and forbidding him from wearing a yarmulke. *Id.* Georgia's prohibiting him from keeping a kosher diet and wearing a yarmulke constitute a substantial burden on the practice of his religion by compelling him to violate daily what he holds to be fundamental tenets of Judaism. *Id.*

On December 18, 2002, proceeding *pro se*, Benning sued Georgia, the Georgia Department of Corrections and several of its officials (collectively "Georgia"), claiming violation of Section 3 of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1 (2000). RLUIPA Section 3 forbids prison officials from substantially burdening a prisoner's religious exercise, unless they can demonstrate that the burden is the least restrictive means of advancing a compelling government interest.

Georgia subsequently moved to dismiss the complaint, asserting that RLUIPA Section 3 is unconstitutional. R-10. On January 8, 2004, the District Court denied the motion to dismiss, agreeing with the vast consensus of courts that RLUIPA Section 3 is a constitutional exercise of Congress' enumerated Spending

Clause and Commerce Clause powers, and that it violates neither the Tenth Amendment nor the Establishment Clause of the First Amendment. R-75; R-79.

Georgia then took this interlocutory appeal from the district court's holding. This Court granted the petition for an interlocutory appeal on March 10, 2004, and granted Benning's request for an expedited schedule on March 19, 2004.

STANDARD OF REVIEW

This Court applies *de novo* review to a lower court's determination that an Act of Congress is constitutional. *See, e.g., Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1997). “Due respect for the decisions of a coordinate branch of government demands that [a court] invalidate a congressional enactment only upon a ***plain showing*** that Congress has exceeded its constitutional bounds.” *United States v. Morrison*, 529 U.S. 598, 606, 120 S.Ct. 1740, 1748 (2000) (emphasis added). *See also Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 319, 105 S.Ct. 3180, 3188 (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.”) (internal citations and quotations omitted).

SUMMARY OF ARGUMENT

Georgia urges this Court to strike down an Act of Congress, RLUIPA Section 3, without even attempting to distinguish the weight of authority rejecting similar challenges.¹ Likewise, Georgia ignores that courts have uniformly rejected its arguments as against Section 2 of RLUIPA, the analogous land-use provision.²

¹ See, e.g., *Madison v. Riter*, 355 F.3d 310 (4th Cir. 2003) (rejecting Establishment Clause challenge to RLUIPA Section 3); *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003) (rejecting Spending Clause, Establishment Clause, and Tenth Amendment challenges to RLUIPA Section 3); *Mayweathers v. Newland*, 314 F.3d 1062 (9th 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*, 124 S.Ct. 66 (2003); *Williams v. Bitner*, 285 F.Supp.2d 593 (M.D. Pa. 2003) (rejecting constitutional challenges to RLUIPA § 3); *Jones v. Toney*, No. 5:02CV00415 (E.D. Ark. Mar. 29, 2004) (same) (attached as **Ex. A**); *Sanabria v. Brown*, No. 99-4699 (D.N.J. June 5, 2003) (same) (attached as **Ex. B**); *Gordon v. Pepe*, No. 00-10453, 2003 WL 1571712 (D. Mass. Mar. 6, 2003) (same); *Johnson v. Martin*, 223 F.Supp.2d 820 (W.D. Mich. 2002) (same), *overruled by*, *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003); *Gerhardt v. Lazaroff*, 221 F.Supp.2d 827 (S.D. Ohio 2002) (same), *overruled by*, *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003); *Taylor v. Cockrell*, No. H-00-2809 (S.D. Tex., Sept. 25, 2002) (rejecting constitutional challenge to RLUIPA Section 3), *vacated on other grounds*, *Taylor v. Groom*, No. 02-21316 (5th Cir. Aug. 26, 2003); *Love v. Evans*, No. 2:00-CV-91 (E.D. Ark., Aug. 8, 2001) (same); *Mayweathers v. Terhune*, 2001 WL 804140, at *6 (E.D. Cal. 2001) (same). *But see* *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003) (holding RLUPA § 3 violates the Establishment Clause, relying on *Al Ghashiyah v. Wis. Dept. of Corrections*, 250 F.Supp.2d 1016 (E.D. Wis. 2003), *overruled by* *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003), and *Madison v. Riter*, 240 F.Supp.2d 566 (W.D. Va. 2003), *overruled by* *Madison v. Riter*, 355 F.3d 310 (4th Cir. 2003)).

² See *Midrash Sephardi, Inc. v. Town of Surfside*, No. 03-13858, ___ F.3d ___, 2004 WL 842527 (11th Cir., Apr. 21, 2004) (rejecting Establishment Clause and Tenth Amendment challenges to RLUIPA Section 2); *Castle Hills First Baptist Church v. City of Castle Hills*, No. SA-01-CA-1149, ___ F.Supp.2d ___, 2004 WL

Courts routinely reject constitutional challenges to RLUIPA because Congress carefully drafted the Act to ensure that its provisions respect the bounds of Congress' enumerated powers. In particular, RLUIPA Section 3 meets all of the conditions that the Supreme Court has identified for Congress to exercise its **Spending Power**. Congress' purposes of alleviating burdens on religious exercise and promoting rehabilitation are consistent with the general welfare; the condition Congress places on the receipt of federal funds—*i.e.*, that a state not substantially burden the religious exercise of prisoners unless the burden is the least restrictive means of advancing a compelling government interest—is unambiguously set forth in the text of RLUIPA; that condition is rationally related to Congress' purposes; and that condition does not offend any other constitutional provision.

546792 (W.D.Tex., Mar. 17, 2004) (rejecting constitutional challenges to RLUIPA § 2); *United States v. Maui County*, 298 F.Supp.2d 1010 (D. Haw. 2003); *Murphy v. New Milford*, 289 F.Supp.2d 87 (D. Conn. 2003) (rejecting constitutional challenges to RLUIPA Section 2); *Westchester Day Sch. v. Mamaroneck*, 280 F.Supp.2d 230 (S.D.N.Y. 2003) (same); *Guru Nanak Sikh Society v. County of Sutter*, No. S-02-1785 (E.D. Cal. Nov. 19, 2003) (same); *Life Teen, Inc. v. Yavapai County*, No. Civ. 01-1490-PCT (D. Ariz. Mar. 26, 2003) (same); *Christ Universal Mission Church v. Chicago*, No. 01-C-1429, 2002 U.S. Dist. LEXIS 22917 (N.D. Ill. Sept. 11, 2002) (same) *vacated on other grounds* 2004 WL 595392 (7th Cir. Mar. 26, 2004); *Freedom Baptist Church v. Middletown*, 204 F.Supp.2d 857 (E.D. Pa. 2002) (same). *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); *Cottonwood Christian Ctr. v. Cypress*, 218 F.Supp.2d 1203, 1221 n.7 (C.D. Cal. 2002) (noting that “RLUIPA would appear to have avoided the flaws of its predecessor RFRA, and be within Congress's constitutional authority”).

Similarly, RLUIPA Section 3 is a valid exercise of Congress' *Commerce Power*. Section 3 contains an “express jurisdictional element” (which this Court has repeatedly held suffices alone to reject Commerce Clause challenges) and regulates economic activity (namely, the commercial transactions involved in the administration of prisons) whose connection to interstate commerce is not “attenuated,” but “visible to the naked eye.” *United States v. Lopez*, 514 U.S. 549, 561-63, 115 S.Ct. 1624, 1631-32 (1995).

Because RLUIPA Section 3 is a proper exercise of both the Spending and Commerce Powers the *Tenth Amendment* is not even implicated. Finally, the *Establishment Clause* is consistently interpreted to leave room laws just like RLUIPA—accommodations that relieve substantial regulatory burdens on religious exercise—because they “follow[] the best of our traditions.” *Zorach v. Clauson*, 343 U.S. 306, 314, 72 S.Ct. 679, 684 (1952).

ARGUMENT

Section 3(a) of RLUIPA provides that:

No government shall impose a substantial burden on the religious exercise of a person . . . unless the government demonstrates that imposition of the burden on that person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”

42 U.S.C. § 2000cc-1(a). Section 3(b) of the Act makes clear that Congress enacted the rule of RLUIPA Section 3(a) pursuant to its delegated constitutional powers under the Spending Clause (Article I, Section 8, Clause 1 of the Constitution) and Commerce Clause (Article I, Section 8, Clause 3 of the Constitution). *See* 42 U.S.C. § 2000cc-1(b) (“This section applies in any case in which—(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or (2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.”). As set forth below, RLUIPA Section 3 fits comfortably within the confines of both enumerated powers, and does not offend either the Tenth Amendment or the Establishment Clause.

I. RLUIPA Section 3 Is a Legitimate Exercise of Congress’ Power Under the Spending Clause of Article I.

RLUIPA Section 3(b)(1) specifically limits application of the substantial burden test of Section 3(a) to circumstances where the burden was “imposed in a program or activity that receives Federal financial assistance.” RLUIPA

§ 3(b)(1).³ Thus, RLUIPA 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, 107 S.Ct. 2793, 2795-96 (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, 119 S.Ct. 1661, 1670-71 (1999) (quotation omitted). In this way, Congress may achieve indirectly through the spending power what it could not achieve directly otherwise. *See Fullilove v. Klutznick*, 448 U.S. 448, 474, 100 S.Ct. 2758, 2772 (1980).

³ Because it is undisputed that Georgia’s Department of Corrections receives Federal financial assistance—including the “federal grants” that Georgia specifically acknowledges in its brief, Defs. Br. at 10—it is similarly undisputed that, if the statute passes constitutional muster, Section 2(a) would apply in this case pursuant to Section 3(b)(1).

Since *Steward Machine Co. v. Davis*, 301 U.S. 548, 57 S.Ct. 883 (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, e.g., Kansas v. United States*, 214 F.3d 1196, 1200 (10th 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. at 207, 107 S.Ct. 2796. Georgia’s brief notably fails to set forth *Dole*’s controlling test.

First, the conditions must serve “the general welfare” rather than a purely private or local interest. *Dole*, 483 U.S. at 207, 107 S.Ct. at 2796 (internal citation omitted). **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, 107 S.Ct. at 2796 (quotation omitted); *Davis*, 526 U.S. at 640, 119 S.Ct. at 1670 (“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, 107 S.Ct. at 2796 (internal quotations and citations omitted); see *New York v. United States*, 505 U.S. 144, 167, 112 S.Ct. 2408, 2423 (1992) (conditions must “bear some relationship to the purpose of the federal spending”). **Fourth**, the conditions must not violate any independent constitutional provisions. *Dole*, 483 U.S. at 208, 107 S.Ct. at 2796 (internal citations omitted).

Every court to address the issue, *see supra* n.1, including the Seventh and Ninth Circuits, has held that RLUIPA Section 3 readily meets all of these requirements and so is a legitimate exercise of the spending power.

A. RLUIPA Is in Pursuit of the General Welfare.

For the purposes of better “protect[ing] prisoners’ religious rights and to promote the rehabilitation of prisoners,” *Charles*, 348 F.3d at 607, RLUIPA imposes conditions on the use of federal funds received by state prisons, such as the “federal grants” that Georgia admits to receiving. *See* Defs. Br. at 10.⁴ These

⁴ RLUIPA’s legislative history confirms that all states receive federal money for prisons. *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, 105th Cong. (1998) (testimony of Isaac M. Jaroslawicz, Dir. of Legal Affairs, the Aleph Institute), available at <http://www.house.gov/judiciary/222356.html> (“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/2001pubs/fas-00.pdf>.

purposes “fall[] squarely within Congress’ pursuit of the general welfare.”

Charles, 348 F.3d at 607; *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 judgment is especially secure because “courts should defer substantially to the judgment of Congress” in this regard. *Dole*, 483 U.S. at 207 n.2, 107 S.Ct. at 2796 n.2.

B. RLUIPA Places Unambiguous Conditions on the Receipt of Federal Funds.

RLUIPA imposes its conditions “clearly and unambiguously,” giving States notice of the regulatory burdens they undertake when accepting federal funds for their prison programs. *Charles*, 348 F.3d at 608; *Mayweathers*, 314 F.3d at 1067 (“RLUIPA unequivocally states that it applies to any ‘program or activity that receives Federal financial assistance.’ 42 U.S.C. § 2000cc-1(b)(1).”) Specifically, RLUIPA’s plain language conditions a state’s receipt of federal money upon that state’s refraining from imposing substantial burdens on prisoners’ religious exercise, unless the burdens represent the least restrictive means to advance a compelling government interest. Thus, by expressly conditioning “the receipt of federal money in such a way that each State is made aware of the condition and is

simultaneously given the freedom to tailor compliance according to its particular penological interests and circumstances,” *Charles*, 348 F.3d at 608, RLUIPA amply satisfies *Dole*’s “clear and unambiguous” requirement. Though Georgia now complains about a court reviewing its decisions under the compelling interest and least restrictive means test, if it objected to this, “it certainly could have refused federal funding.” *Id.*⁵

Notwithstanding RLUIPA’s plain language, Georgia asserts that it was somehow not “unambiguously apprised,” Defs. Br. at 14, of RLUIPA’s conditions. This argument is a nonstarter. *See, e.g., Mayweathers*, 314 F.3d at 1067 (“By its plain language, RLUIPA clearly 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*, 348 F.3d at 608.⁶ Not only is the *existence*

⁵ Georgia additionally complains that the least restrictive means test is “amorphous” and “unworkable” in the prison environment. This argument boils down to impermissible second-guessing of Congress’ policy judgment. Benning notes that the experience of federal correctional officials in complying with the least restrictive means test found in the Religious Freedom Restoration Act (“RFRA”), does not suggest Georgia will find this standard “unworkable.” As the Fourth Circuit recently observed, “[i]n the case litigated under RFRA, federal correctional officials have continued to prevail the overwhelming majority of the time.” *Madison*, 355 F.3d at 321.

⁶ Georgia’s assertion that RLUIPA lacks any relationship because it “do[es] not target any specific State action,” Defs. Br. at 10, simply ignores the Act’s plain language, which specifies that it applies when a state engages in the specific action of imposing a substantial burden on a prisoner’s religious exercise.

of RLUIPA's conditions unambiguous, but so are the *contours* of those conditions: the substantial burden 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, 110 S.Ct. 1595 (1990).

Similarly, Georgia claims that the compelling interest and least restrictive means standard is “too ambiguous” for Defendants to make an “informed choice” about what conditions are being attached to federal funds. Defs. Br. at 15. But the compelling interest / least restrictive means test is hardly a novel standard; instead, it is familiar to any first-year law student as the “strict scrutiny” test that applies to Georgia and other states under the Fourteenth Amendment in a wide variety of circumstances. *See, e.g., Smith*, 494 U.S. at 886 n.3, 110 S.Ct. at 1604 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 religion.”); *Midrash*, 2004 WL 842527, at *13 (noting “least restrictive means as part of strict scrutiny test, both before and after *Smith*”).

The fact that application of RLUIPA's strict scrutiny standard may yield different outcomes under different factual circumstances does not somehow create a fatal ambiguity in RLUIPA's conditions. 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].” *Mayweathers*, 314 F.3d at 1067 (quoting *Pennhurst State School v. Halderman*, 451 U.S. 1, 24-25, 101 S.Ct. 1531, 1543-44 (1981)). (emphasis added).⁷

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 650-51, 119 S.Ct. at 1675 (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

⁷ Georgia asserts that *Pennhurst* held that the words “least restrictive” are too ambiguous to give a state notice of the conditions attached to funds. But as the Seventh Circuit recognized in rejecting the identical argument in *Charles*, 348 F.3d at 608, Georgia’s argument completely mischaracterizes *Pennhurst*’s holding. The issue in *Pennhurst* was whether a particular federal act included the requirement that States provide “appropriate treatment” to disabled residents in the “least restrictive environment” as a condition of federal funding. *Pennhurst*, 451 U.S. at 18, 101 S.Ct. at 1540. As a matter of statutory interpretation, the Court held that the act did not impose that condition. *Id.* Specifically, the Court found that the words “least restrictive environment” appearing in a stand alone section of the act—separate from other sections of the act that expressly set forth conditions on receipt of federal money—simply “reflected Congress’ **justification, or policy goals**, for appropriating federal money to the States through the Act, **not conditions** associated with the receipt of federal funds.” *Charles*, 348 F.3d at 608 (citing *Pennhurst*, 451 U.S. at 19, 23, 101 S.Ct. at 1541-43) (emphasis added). Nowhere in *Pennhurst* did the Court hold that, if Congress had explicitly made giving treatment in the “least restrictive environment” a condition of receiving federal funds, the “least restrictive” language would have been too ambiguous. Thus, *Pennhurst* provides no relief for Georgia, because RLUIPA, unlike the statute in *Pennhurst*, **expressly** makes application of the least restrictive means test a condition of receipt of federal funds.

surrounding circumstances, expectations, and relationships.”) (internal citations and quotations omitted); *Lau v. Nichols*, 414 U.S. 563, 568-69, 95 S.Ct. 786, 789 (1974) (upholding condition that public schools receiving federal funds comply with Title VI of Civil Rights Act of 1964), *overruled on other grounds*, *Regents v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733 (1978).

C. RLUIPA’s Conditions Relate to a Legitimate Federal Interest.

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,” *Lau*, 414 U.S. at 569, 94 S.Ct. at 789, in substantial burdens on, or discrimination against, religious exercise. Georgia asserts, without citation, that Spending Clause legislation is valid only if “the restriction bears a *particularized, proportional relationship* to the purpose of the individual federal spending program.” Defs. Br. at 6 (emphasis added).⁸ This omission of authority is telling, because the Supreme Court has repeatedly made clear that there is no such requirement of a highly particularized relationship between the conditions imposed and the purposes of the

⁸ Curiously, Georgia also spends two pages of its brief, Defs. Br. at 8-9, discussing Section 5 Enforcement Clause cases and Commerce Clause cases for the proposition that Congress must demonstrate either a “congruent and proportional” relationship or a “substantial nexus” to a federal interest to justify Spending Clause legislation. Benning is not aware of any Spending Clause case, and Georgia cites none, decided by the Supreme Court, this Court, or any court that has ever imposed these standards to limit the exercise of Congress’ Spending Power.

spending programs. Instead, the Supreme Court has said that “conditions on federal grants *might* be illegitimate if they are *unrelated* to the federal interest.” *Dole*, 483 U.S. at 207, 107 S.Ct. at 2796 (emphasis added), and need only possess “*some* relationship to the purpose of the federal spending.” *New York*, 505 U.S. at 167, 112 S.Ct. at 2423 (emphasis added). The threshold of relatedness required by this test is a “low” one. *Mayweathers*, 314 F.3d at 1067. In other words, “[t]he required degree of . . . relationship is one of *reasonableness or minimum rationality*.” *Kansas*, 214 F.3d at 1199 (emphasis added).

RLUIPA more than satisfies this standard. As the Seventh Circuit held, “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*, 348 F.3d at 608. Moreover, in light of the reasonable perception that religious exercise has rehabilitative qualities, *see infra* n.22, 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*, 348 F.3d at 608-09; *Mayweathers*, 314 F.3d at 1067; *Sanabria*, slip op. at 25.⁹

Here, there is an unmistakable relationship between federal funding of correctional institutes to assist in the rehabilitation of prisoners, and RLUIPA's conditions designed to protect prisoners' religious exercise, which may have rehabilitative benefits. *See, e.g., Charles*, 348 F.3d at 609 ("the goal of federal corrections funding and the conditions imposed by RLUIPA, with respect to the protection of prisoners' religious rights, share the goal of rehabilitation."); *Johnson*, 223 F.Supp.2d at 831 ("if Congress can restrict highway funds, used to build and repair roads, with a condition mandating a minimum drinking age, Congress can certainly restrict prison funds, used to support rehabilitation and education programs, with a condition mandating accommodation of religious activity.").

⁹ Other cases militate against requiring a particularized nexus between the imposed conditions and the purpose of the funds. *See, e.g., Oklahoma v. Civil Service Comm'n*, 330 U.S. 127, 129, 67 S.Ct. 544, 546 (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 (7th Cir. 2000) (upholding Spending Clause legislation conditioning receipt of federal farm benefits on farmer's willingness not to cultivate wetlands, even though benefits farmers lost for violating conditions were not limited to those relating to wetlands preservation).

Finally, Georgia argues that RLUIPA’s deregulation of prisoners’ religious exercise is somehow out of “proportion” to the federal funding Georgia receives, because it applies to all of the Department of Corrections’ actions. Defs. Br. at 11. This assertion lacks any legal support. Georgia claims to find in *FCC v. League of Women Voters*, 468 U.S. 364, 104 S.Ct. 3106 (1984), and *Rust v. Sullivan*, 500 U.S. 173, 111 S.Ct. 1759 (1991), a proportionality requirement for conditional federal spending. But Georgia neglects to mention that ***neither case involved the Spending Clause***. Instead, both addressed whether the federal government’s conditions violated the independent constitutional requirements of the Free Speech Clause.¹⁰

Besides, as one district court observed, a proportionality rule makes little sense in the context of quasi-contractual, conditional appropriations: “If the conditions imposed by the federal government are so out of proportion to the size of the funding stream on offer, a rational state will decline the funds and remain free of the onerous conditions.” *Charles*, 220 F.Supp.2d at 964. In short, nothing within Spending Clause jurisprudence or RLUIPA provides a basis for Georgia’s

¹⁰ The holding of *League of Women Voters* had nothing to do with the “proportionality” of the conditions imposed by the statute that the Court invalidated. The holding was that the conditions themselves violated the Free Speech Clause of the First Amendment. *See* 468 U.S. at 398, 104 S.Ct. at 3126-27. *Rust* involved the same issue, but the Court there held that the conditions did not violate the First Amendment. *See* 500 U.S. at 192-94, 111 S.Ct. at 1171-73. Again, the case did not involve proportionality of funding conditions.

novel proportionality rule; if Georgia “wishes to receive any federal funding, it must accept the related, unambiguous conditions in their entirety.” *Charles*, 348 F.3d at 609.¹¹

D. RLUIPA Does Not Violate Any Independent Constitutional Requirement.

Finally, RLUIPA does not violate any other constitutional provision, such as the Establishment Clause or Tenth Amendment. *See infra* Sections III-IV.

In sum, if 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. Georgia 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 constitutional structure of

¹¹ Georgia also argues (again without citation) that Congress exceeded its power by subjecting a state “to Federal enforcement and civil liability to compel enforcement.” Defs. Br. at 11. Georgia suggests that Congress only had the power to “restrict[] disbursement of federal funds” to a state violating RLUIPA’s commands. *Id.* at 10-11. Once again, this argument has no basis in the cases. This Court, following the Supreme Court, has made clear that, all that is necessary for individuals to have rights to enforce legislation enacted pursuant to Congress’ spending power, is for Congress to “speak with a clear voice’ and manifest an “unambiguous” intent to confer individual rights.” *31 Foster Children v. Bush*, 329 F.3d 1255, 1268 (11th Cir. 2003) (citation omitted). Here, Congress did precisely that in RLUIPA Section 4(a), providing that “A person may assert a violation of this Act as a claim . . . in a judicial proceeding and obtain appropriate relief against a government.”

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.

CI. RLUIPA Section 3 Is a Legitimate Exercise of Congress’ Power Under the Commerce Clause of Article I.

Georgia’s assertion that RLUIPA Section 3 falls outside of Congress’ Commerce Clause power is equally meritless. RLUIPA Section 3 contains an “express jurisdictional element,” and regulates “economic activity”—namely, the commercial transactions involved in the administration of prisons—whose connection to interstate commerce is not “attenuated,” but “visible to the naked eye.” *Lopez*, 514 U.S. at 561-63, 115 S.Ct. at 1631-32. Therefore, RLUIPA Section 3 should also be sustained as a valid exercise of Congress’ enumerated power under the Commerce Clause.

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, 115 S.Ct. at 1630: (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, 115 S.Ct. at 1631; *Morrison*, 529 U.S. at 611-12, 120 S.Ct. at 1750; (2) whether the statute regulates

“economic activity,” *Lopez*, 514 U.S. at 559, 115 S.Ct at 1630; and (3) whether “the link between [the regulated activity] and a substantial effect on interstate commerce was attenuated,” *Morrison*, 529 U.S. at 612, 120 S.Ct. at 1751.

Although none of these factors is strictly required, all are satisfied here.

Notably, moreover, Commerce Clause legislation is entitled to the same judicial deference and strong presumption of constitutionality as other Acts of Congress. *See Groome Resources, Ltd. v. Parish of Jefferson*, 234 F.3d 192, 203 (5th Cir. 2000) (“In reviewing an act of Congress passed under its Commerce Clause authority, we apply the *rational basis test* as interpreted by the *Lopez* court.”) (emphasis added). Although neither Benning nor the United States bears the burden to show it, Benning explains below how RLUIPA Section 3(a), when applied through Section 3(b)(2), satisfies all factors in the *Lopez / Morrison* analysis.¹²

A. RLUIPA Has an Express, Constitutionally Adequate Jurisdictional Element.

First and foremost, in contrast to *Lopez* and *Morrison*, RLUIPA Section 3 is supported by an “express jurisdictional element which might limit its reach to a

¹² Though conceding that legislative findings are not mandatory, Georgia spends most of the Commerce Clause portion of its brief discussing the purported lack of findings in the Congressional record. Because the three factors of the *Lopez / Morrison* analysis are met—and, importantly, because the substantial effect on commerce of the regulated activity here is abundantly “visible”—Georgia’s complaints about the legislative record are irrelevant.

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, 120 S.Ct. at 1751. This Court has repeatedly held that a statute enacted under the Commerce Clause is constitutional if it contains a jurisdictional element that “ensure[s], through case-by-case inquiry, that the activity in question affects interstate commerce.” *United States v. Cunningham*, 161 F.3d 1343, 1346 (11th Cir. 1998) (quotations omitted). Accordingly, the presence of jurisdictional element in RLUIPA Section 3(b)(2) suffices alone for this Court to reject Georgia’s *facial* challenge to the Act as falling outside the bounds of the Commerce power: 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). *Compare id.*, with U.S. CONST. Art. I., § 8, cls. 3.

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)(2), then the conduct also falls within the sweep of the commerce power and may be regulated constitutionally. But if the facts do not satisfy the jurisdictional element, then the statute does not even *reach* the conduct under the commerce power. Thus, RLUIPA respects constitutional

limits by not regulating conduct outside the scope of the Commerce power.¹³ *See United States v. Odom*, 252 F.3d 1289, 1296 (11th Cir. 2001) (“The presence of a jurisdictional element may preserve the constitutionality of the statute so long as a case-by-case analysis requires sufficient proof of a connection to interstate commerce.”). In other words, the Act applies either constitutionally, or not at all.¹⁴

Realizing that the jurisdictional element dooms their challenge to the Act’s constitutionality, Georgia makes two attempts to show that the jurisdictional element is insufficient. Both lack merit. First, Georgia makes the hypertechnical assertion that the jurisdictional element is invalid because it uses the language “affects . . . commerce” instead of “substantially affects commerce,” *see* Defs. Br. at 19. Georgia ignores, however, this Court’s prior precedent holding that a jurisdictional element using the language “affects commerce” is sufficient. *See Cunningham*, 161 F.3d at 1345 (rejecting challenge to jurisdictional element providing that it applies to conduct “in or affecting commerce.”) *See also Johnson*,

¹³ *See also United States v. Grassie*, 237 F.3d 1199, 1211 (10th 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.”).

¹⁴ *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”); *Johnson*, 223 F.Supp.2d at 828 (same); *Hale O Kaula*, 229 F.Supp.2d at 1072 (concluding that “jurisdictional element” of § 2(a)(2)(B) precludes Commerce Clause challenge).

223 F.Supp.2d at 830 (rejecting argument that omission of word “substantially” in jurisdictional element invalidates RLUIPA).

Equally frivolous is Georgia’s characterization of RLUIPA Section 4(g) as a separate jurisdictional provision that renders Section 3(b)(2) ineffective as a constitutional jurisdictional element. Section 4(g) does not, as Georgia asserts, create “presumptive federal jurisdiction,” Defs. Br. at 19, but instead is an affirmative defense. *See, e.g., Johnson*, 223 F.Supp.2d at 829-30 (RLUIPA § 4(g) is “an additional defense *after* the complaining party has met its burden.”) (emphasis in original). That is, in a case where jurisdiction is predicated on the commerce power, Section 4(g) allows a State, to *defeat* jurisdiction if the State can show that the burdens at issue “would not lead in the aggregate to a substantial effect on commerce.” RLUIPA § 4(g). In practical effect, therefore, RLUIPA grants Defendants’ wish—it requires a substantial effect on commerce *before* Section 3(b)(2) can be invoked successfully. Thus, far from exceeding the commerce power, Section 4(g) provides a double assurance that RLUIPA’s reach will not exceed Congress’s Commerce Clause authority.

B. RLUIPA Regulates Economic Activity.

When a jurisdictional element assesses the effect of regulated activity on interstate commerce on a *case-by-case* basis, the Court need not additionally examine whether that regulated activity may also be characterized as “economic”

in some abstract or general sense.¹⁵ Nonetheless, in the abundance of caution, if the Court deems it necessary to examine this factor, the Court should find that RLUIPA clearly regulates “economic activity” in this case: the administration of prisons, which involves a host of commercial transactions.¹⁶

Indeed, the facts of this case illustrate with particular clarity how RLUIPA may govern commercial activity in the prison context. Everyday in the course of administering its prisons, Georgia engages in numerous commercial transactions in order to feed thousands of prisoners, including Benning. And everyday, Benning requests that Georgia engage in a slightly different set of commercial transactions to accommodate his request for a kosher diet, and so to avoid substantially burdening his religious exercise. Georgia’s argument that commerce is *never* implicated by the avoidance of substantial burdens—in this or any other case—has no merit and should therefore be rejected.

¹⁵ See *Hale O Kaula*, 229 F.Supp.2d at 1072 (further Commerce Clause analysis only appropriate for “laws of general applicability where Congress regulates an entire field of activity”); *Life Teen*, slip op. at 25-26.

¹⁶ 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.

C. RLUIPA Regulates a Class of Activity Having a Direct, Rather than an Attenuated, Link to 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, 115 S.Ct. at 1628 (quoting *Wickard v. Filburn*, 317 U.S. 111, 127-28, 63 S.Ct. at 90-91 (1942)); see, e.g., *Camps Newfound / Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 586, 117 S.Ct. 1590, 1603 (1997) (relying on “interstate commercial activities of nonprofit entities *as a class*” in Commerce Clause determination, citing *Lopez* and *Wickard*) (emphasis added). These aggregated effects fall beyond the commerce power only 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, 115 S.Ct. at 1628-29 (internal citations and quotations omitted).

It is clear that the burden at issue here—refusing to supply Benning and other Jewish prisoners with kosher meals—“taken together with ... many others similarly situated,” would “substantially affect interstate commerce.” *Lopez*, 514 U.S. at 556, 559, 115 S.Ct. at 1628, 1630. Even if every commercial transaction involved in supplying a kosher diet would occur exclusively in the State of Georgia—unlikely though that may be—the aggregate effect of similar activity

elsewhere would still implicate the commerce power.¹⁷ 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, 115 S.Ct. at 1634. Moreover, this Court need not “pile inference upon inference,” *id.*, to get from the regulated category of activity to an effect on interstate commerce. Georgia’s refusal to accommodate Jewish prisoners’ request for a kosher diet ***directly and immediately*** prevents numerous commercial transactions, *i.e.*, those necessary to establish and operate a kosher meal program.

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, 115 S.Ct. at 1629, 1633. RLUIPA neither replaces state rules for prison administration with federal ones, 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.

¹⁷ See, e.g., *Camps*, 520 U.S. at 586, 117 S.Ct. at 1603 (“[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.”). See also *Johnson*, 223 F.Supp.2d at 829 (noting that “RLUIPA covers regulation of the free exercise of religion, an objectively interstate activity,” and that religious exercise “affects interstate commerce in a multitude of ways”).

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

CII. RLUIPA Section 3 Is Consistent with the Tenth Amendment.

Georgia argues that RLUIPA Section 3 violates the Tenth Amendment, but the Tenth Amendment is implicated only when Congress acts outside the scope of its enumerated powers. *New York v. United States*, 505 U.S. 144, 156, 112 S.Ct. 2408, 2417 (1992) (“If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States.”).

As detailed above, RLUIPA Section 3 represents a proper exercise of two, independently sufficient, enumerated powers of Congress, the commerce and spending powers. *See supra* Section I, II. Thus, Georgia’s Tenth Amendment challenge must fail. *See Midrash*, 2004 WL 84257, at *24 (holding that RLUIPA § 2 does not violate the Tenth Amendment, because the Act is a “proper exercise” of an enumerated power, and its “core policy is not to regulate the states or compel their enforcement of a federal regulatory program, but to protect the exercise of religion,”); *Charles*, 348 F.3d at 609; *Mayweathers*, 314 F.3d at 1069.

IV. RLUIPA Section 3 Is Consistent with the Establishment Clause.

Georgia’s core Establishment Clause argument—based on a single, rogue opinion—is that legislative accommodations of religious exercise are forbidden if

they accommodate only religious exercise. But this argument is premised on an extreme 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, 117 S.Ct. 2157, 2172 (1997) (Stevens, J., concurring); *Midrash*, 2004 WL 84257, *24 n.20 (describing rejection of Justice Stevens’ Establishment Clause view by the majority of Justices in *Boerne*). And as this Court recently recognized, *see id.* at *24 n.20, this 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*.¹⁸

And all but one court has rejected the argument in cases challenging the constitutionality of RLUIPA Section 3. *See supra* n.1. Likewise, this Court has rejected an Establishment Clause challenge to the analogous land-use provisions of RLUIPA Section 2, joining every other court to address the question. *See Midrash*, 2004 WL 84257, at *24. *See supra* n.2. Nowhere in its brief does Georgia even attempt to discuss or distinguish any of these cases, which address

¹⁸ *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.”); *Mockaitis v. Harcleroad*, 104 F.3d 1522, 1530 (9th Cir.) (same), *vacated on other grounds*, 521 U.S. 507, 117 S.Ct. 2157 (1997); *Sasnett v. Sullivan*, 91 F.3d 1018, 1022 (7th Cir. 1996) (same) *vacated on other grounds*, 521 U.S. 1114, 117 S.Ct. 2502 (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, 117 S.Ct. 2157 (1997).

the very question before the court. Georgia—like the outlier *Cutter* opinion on which it relies—also fails to cite, discuss, or attempt to distinguish three recent decisions of federal Courts of Appeals that are only one step removed, and so highly relevant. Specifically, those courts rejected Establishment Clause challenges to laws that have the purpose and effect of alleviating burdens on religious exercise, and *only* religious exercise.¹⁹

The marginal character of Georgia’s Establishment Clause argument is further illustrated by the entities that have rejected it. For example, the argument that RLUIPA violates the Establishment Clause was rejected by a unanimous panel of the Ninth Circuit, *see Mayweathers*, 314 F.3d at 1068-69, the same court that read the Establishment Clause to prohibit voluntary recitation of the Pledge of Allegiance. Georgia’s position has not even been adopted by the ACLU—friend to Establishment Clause claimants, yet one of RLUIPA’s strongest advocates. *See* American Civil Liberties Union, “Final Passage of Breakthrough Religious Freedom Bill Hailed By Religious and Civil Rights Groups” (available at

¹⁹ *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 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).

<http://www.aclu.org/news/2000/n072800a.html>) (July 28, 2000). Nonetheless, Georgia invites this Court to take a position even more separationist than these most separationist institutions. For the reasons set forth below, the Court should decline that invitation.

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) and the statute does not excessively entangle government with religion, because its purpose and effect is exactly the opposite—to *diminish* government interference with religious exercise. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111 (1971).

In other words, RLUIPA does not entail “sponsorship, financial support, and active involvement of the sovereign in religious activity,” *Midrash*, 2004 WL 842527, at *22 (quotation omitted), but instead “follows the best of our traditions” by relieving substantial regulatory burdens on religious exercise. *Zorach*, 343 U.S. at 314, 72 S.Ct. at 684.

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); *Madison*, 355 F.3d at 317; *Mayweathers*, 314 F.3d at 1068. As the Supreme Court has repeatedly made clear, it is a “*proper purpose* [to] lift[] a regulation that burdens the exercise of religion.” *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 338, 107 S.Ct. 2862, 2869 (1987) (emphasis added); *id.* at 339 (noting the “permissible purpose of limiting governmental interference with the exercise of religion”). Similarly, this Court has held that where “a law’s purpose is to alleviate significant interference with the exercise of religion, that purpose does not violate the Establishment Clause.” *Midrash*, 2004 WL 842527, at *23.

These cases simply emphasize the Supreme Court’s admonition that the requirement of a secular purpose “does not mean that the law’s purpose must be unrelated to religion—that would amount to a requirement that the government show a callous indifference to religious groups, and the Establishment Clause has never been so interpreted.” *Amos*, 483 U.S. at 335, 107 S.Ct. at 2868. Thus, “the government may (and sometimes must) accommodate religious practice and . . . it may do so without violating the Establishment Clause.” *Id.*, 483 U.S. at 334, 107

S.Ct at 2867. *See also Zorach*, 343 U.S. at 314, 72 S.Ct. at 684 (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.”).²⁰

²⁰ Indeed, legislation like RLUIPA that has the permissible purpose of lifting burdens on religious exercise is all the more common—and necessary—since the Supreme Court’s decision in *Smith* 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:

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, 110 S.Ct at 1606 (emphasis added).

Thus, for example, while *Smith* rejected the claim that the Free Exercise Clause mandated an exemption to drug laws, the Court noted with approval that accommodations of peyote use for religious use (and only religious 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. *See Lee v. Weisman*, 505 U.S. 577, 628–29, 112 S.Ct 2649, 2677 (1992) (Souter, J., concurring) (“[I]n freeing the Native American Church from federal laws forbidding peyote use, *see* . . . 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.”); *Peyote Way Church v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991) (exemptions from peyote laws for religious use do not violate Establishment Clause).

RLUIPA Section 3’s purpose of alleviating government burdens on prisoners’ religious exercise is a permissible secular purpose.²¹ *See Midrash*, 2004 WL 842527, at*23 (finding purpose of RLUIPA § 2(b)(1) was “to alleviate significant government interference with the exercise of religion,” and that this “purpose does not violate the Establishment Clause.”); *Madison*, 355 F.3d at 310 (Section 3 has secular purpose of alleviating burdens on religious exercise); *Charles*, 348 F.3d at 610; *Mayweathers*, 314 F.3d at 1068.

There is at least one other secular purpose for RLUIPA’s alleviating burdens on religion in the prison context—to promote rehabilitation. *See Charles*, 348 F.3d at 607 (identifying rehabilitation of prisoners as one of RLUIPA’s purposes). *Cf. Kikumura*, 242 F.3d at 961 (discussing how RFRA’s lifting of substantial burdens on the religious exercise of **federal** prisoners relates to Congressional purpose of rehabilitating prisoners).²²

²¹ As the Supreme Court emphasized in *Bd. of Educ. v. Mergens*, 496 U.S. 226, 110 S.Ct. 2356 (1990), courts should “not lightly second-guess such legislative judgments” when reviewing the policy reasons for an accommodation. *Id.*, 496 U.S. at 251, 110 S.Ct. at 2372. Moreover, government action has failed the “secular purpose” test only when “there was **no question** that the statute or activity was motivated **wholly** by religious considerations.” *Lynch*, 465 U.S. at 680, 104 S.Ct. at 1362 (emphasis added).

²² *See also generally* 139 Cong. Rec. S14,465 (daily ed. Oct. 27, 1993) (statement of Sen. Hatch) (“[E]xposure to religion is the best hope we have for rehabilitation of a prisoner. . . . We should accommodate efforts to bring religion to prisoners.”); *id.* at S14,466 (statement of Sen. Dole) (“[I]f religion can help just a handful of prison inmates get back on track, then the inconvenience of

B. RLUIPA and Does Not Have the Primary Effect of Advancing Religion.

1. *RLUIPA does not cause the government to advance religious exercise itself, but rather to avoid interference with private religious actors as they advance religious exercise.*

RLUIPA satisfies the second *Lemon* factor, because alleviating burdens on religious exercise does not have the principal or primary effect of advancing religion. RLUIPA merely reduces intrusion and oversight by the government into how religious individuals carry out their missions. While this may better enable those *individuals* 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, 107 S.Ct at 2869 (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 668, 90 S.Ct 1409, 1411 (1970)) (emphasis in original).

accommodating their religious beliefs is a very small price to pay.”); *id.* (statement of Sen. Hatfield) (“Mr. Colson’s prison ministries group, which has successfully rehabilitated many prisoners, has been denied access to prisoners in Maryland ... who did not identify themselves as [P]rotestants.... [This is an] example[] of the need for us to pass this bill without this amendment [which would exclude prisons from RFRA].”)

Here, like the Title VII exemption approved in *Amos*, RLUIPA does not involve the **government itself** advancing religion.²³ Instead, RLUIPA simply permits prisoners some latitude to practice and define their own religious exercise by limiting government interference. Put another way, RLUIPA’s lifting of any non-compelling, state-imposed regulations that substantially burden religious exercise is an example of “benevolent neutrality” that “permit[s] religious exercise to exist without sponsorship and without [government] interference.” *Amos*, 483

²³ *Amos* cannot be distinguished on the grounds that the Title VII accommodation at issue was somehow required by the Religion Clauses. See *Cutter*, 349 F.3d at 263 (suggesting that the accommodation in *Amos* was necessary to avoid violating First Amendment). With regard to the Free Exercise Clause, the Court in *Amos* expressly **declined** to rest its decision on the ground that Title VII’s applicability to religious groups, prior to the enactment in 1972 of the legislative accommodation for religious organizations challenged in *Amos*, violated the Free Exercise Clause so that the 1972 amendment was constitutionally mandated. *Amos*, 483 U.S. at 336, 107 S.Ct. at 2868 (“We may assume for the sake of argument that the pre-1972 exemption was adequate in the sense that the Free Exercise Clause required no more”). Moreover, the Court took pains to point out that “[i]t is well established . . . that the limits of permissible state accommodation to religion are by no means co-extensive with noninterference mandated by the Free Exercise Clause.” *Id.*, 483 U.S. at 334, 107 S.Ct. at 2867.

The argument that the accommodation in *Amos* was required in order to avoid an Establishment Clause violation is equally infirm. None of the opinions of the Justices in *Amos* make (or even suggest) such a holding, and courts have held that the government is not generally prohibited from regulating the hiring decisions of religious organizations. See, e.g., *E.E.O.C. v. Roman Catholic Diocese*, 213 F.3d 795 (4th Cir. 2000) (“ministerial exception” doctrine does not completely exempt hiring decisions of all employees (e.g., building custodians) of a religious organization from anti-discrimination laws.). If the Establishment Clause permits the government to interfere with a religious organization’s hiring of at least some employees, then the exemption approved in *Amos*—which involved the Title VII exemption’s application to all employees of a religious organization—could not have been required by the Establishment Clause.

U.S. at 334, 107 S.Ct. at 2867-68. *See Madison*, 355 F.3d at 318 (“Congress has simply lifted government burdens on religious exercise and thereby facilitated free exercise of religion for those who wish to practice their faiths.”).

2. *None of the rationales suggested by Georgia distinguishes RLUIPA from the myriad accommodations of religious exercise by the political branches that “follow[] the best of our traditions.”*

In discussing the effects prong, Georgia fails even to *mention* the controlling analysis of *Amos*, not to mention distinguish its binding holding. Instead, Georgia—relying on the anomalous *Cutter* opinion—invokes three rationales in an effort to escape *Amos*. Binding precedent forecloses all three.

- a. The Establishment Clause does not prohibit laws passed solely to accommodate religious exercise.

Neither Georgia nor *Cutter* even attempts to show that RLUIPA involves the “government itself” advancing religion. *Amos*, 483 U.S. at 337, 107 S.Ct. at 2869. Georgia still faults RLUIPA, because it accommodates religious exercise without *also* accommodating other fundamental rights. *See* Defs. Br. at 27. But the Supreme Court and this Court have expressly rejected this rule, holding instead that 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.” *Amos*, 483 U.S. at 338, 107 S.Ct. at 2869; *see Midrash*, 2004 WL 842527, *23 (“a law does not violate the

Establishment Clause simply because it lifts burdens on religious institutions without affording similar benefits to secular entities”). Legion other courts have rejected arguments like Georgia’s over and over again in upholding Sections 2 and 3 of RLUIPA.²⁴ Nor could it be otherwise, as Georgia’s theory is fraught with problems on many levels.

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, 89 S.Ct 266, 270 (1968)—*not* between religious exercise *rights* and all other fundamental *rights*, as Georgia would have it. Certainly government cannot

²⁴ See, e.g., *Madison*, 355 F.3d at 318-19 (holding that under *Amos* “[t]he Establishment Clause’s requirement of neutrality does not mandate that when Congress relieves the burdens of regulation on one fundamental right, that it must similarly reduce government burdens on all other rights.”); *Mayweathers*, 314 F.3d at 1069 (holding that under *Amos*, RLUIPA “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*, 348 F.3d at 610 (same); *Sanabria*, slip op. at 35 (same); *Johnson*, 223 F.Supp.2d at 826 (“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.”). Cf. *In re Young*, 141 F.3d at 863 (rejecting reasoning of Justice Stevens’ solitary concurrence in *Boerne* that RFRA is impermissible because it accommodates the religious without also providing a benefit for atheists as a viewpoint “in direct contradiction to the declaration of a majority of the Supreme Court in” *Amos*).

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.²⁵ 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.²⁶ As the Fourth Circuit recently held, “[i]t was reasonable for Congress to seek to reduce the burdens on religious exercise for prisoners without simultaneously enhancing, say, an inmate’s First Amendment

²⁵ See, e.g., Privacy Protection Act of 1980, 42 U.S.C. §§ 2000aa *et seq.* (reacting to *Zurcher v. Stanford Daily*, 436 U.S. 547, 98 S.Ct. 1970 (1978), and providing journalists with greater protection against searches and seizures); Department of the Interior and Related Agencies Appropriations Bill, 1989, H.R. Rep. No. 713, 100th Cong., 2d Sess. 72 (1988) (reacting to statement in *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 454, 108 S.Ct 1319, 1328 (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” (emphasis added), and defunding the project at issue in *Lyng* that would have destroyed government land used by Indians for religious exercise); Exemption Act of 1988, 26 U.S.C. § 3127 (reacting to *United States v. Lee*, 455 U.S. 252, 102 S.Ct 1051 (1982), that declined to recognize Amish free exercise of religion claim, and providing a special Social Security tax exemption for employers and their employees who are members of “a recognized religious sect” whose “established tenets” oppose participation in Social Security); National Defense Authorization Act, 10 U.S.C. § 774 .

²⁶ Following Georgia’s logic to its conclusion leads to other absurdities. For example, if protecting religious exercise rights alone reflects impermissible *favor* for religion, then protecting any fundamental right alone *other than* religious exercise would reflect impermissible *disfavor* for religion.

rights to access pornography.” *Madison*, 355 F.3d at 319. This is because the Supreme Court has never held or even suggested “that legislative protections for fundamental rights march in lockstep.” *Id.* at 318.²⁷

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, 104 S.Ct 1355, 1359 (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. Under Georgia’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. *See Madison*, 355 F.3d at 320 (holding that RLUIPA had an invalid purpose “would throw into question a wide variety of religious accommodation laws”). This includes, among

²⁷ Moreover, not only would “a requirement of symmetry of protection for fundamental liberties” ignore Supreme Court precedent, “but it would also place prison administrators and other public officials in the untenable position of calibrating burdens and remedies with the specter of judicial second-guessing at every turn.” *Madison*, 355 F.3d at 319.

many others, the *federal statutory* accommodations of religious peyote use and headwear in the military noted above; *state constitutional* provisions that provide stronger protections for religious exercise (and only religious exercise) than the federal Free Exercise Clause;²⁸ *state statutes* that provide broader protection to

²⁸ See *Arizona v. Evans*, 514 U.S. 1, 8, 115 S.Ct 1185, 1190 (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”). Since the Supreme Court’s *Smith* decision, the courts of at least *eleven* states have held that their state constitutions provide broader protection for religious exercise (and only religious exercise). See, e.g., *Swanner v. Anchorage Equal Rights Comm’n*, 874 P.2d 274 (Alaska 1994) (*Sherbert* strict scrutiny test applies to free exercise claims under Alaska Constitution); *Rupert v. City of Portland*, 605 A.2d 63 (Me. 1992) (Maine constitution requires compelling interest/least restrictive means test); *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990) (test of “least restrictive alternative for protecting public safety” applies to Free Exercise claims under Minnesota constitution); *St. John’s Lutheran v. State Comp. Ins. Fund*, 830 P.2d 1271 (Mont. 1992) (under Montana constitution “[T]he state may regulate affairs impacting religious activity when there is an overriding governmental interest in so doing.”); *Humphrey v. Lane*, 728 N.E.2d 1039 (Ohio 2000) (Ohio constitution requires compelling state interest/least restrictive means test); *First Covenant Church v. City of Seattle*, 840 P.2d 174 (Wash. 1992) (Under Washington constitution, “[a] facially neutral, even-handedly enforced statute that does not directly burden free exercise may, nonetheless, violate [the state constitution], if it indirectly burdens the exercise of religion.”); *State v. Miller*, 549 N.W.2d 235 (Wis. 1996) (Wisconsin constitution requires compelling state interest/least restrictive alternative test when free exercise of religion burdened); *State v. Evans*, 796 P.2d 178, 14 Kan. App. 2d 591 (Kan.1990) (under Kansas constitution, “[o]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.”); *Attorney Gen. v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (although *Smith* “substantially altered” federal constitutional standard, Massachusetts constitution requires strict scrutiny when religious exercise burdened); *In re Browning*, 476 S.E.2d 465, (N.C. 1996) (requiring “compelling state interest in the regulation of a subject within the [North Carolina’s] Constitutional power to regulate”); *Rourke v. N.Y. Dep’t of Corr.*, 603 N.Y.S.2d 647 (N.Y. Sup. Ct. 1993) (New York

religious exercise (and only religious exercise) than required by the federal or state constitution;²⁹ *government chaplaincy programs* in Congress, the armed forces, and in prisons that facilitate religious exercise (and only religious exercise);³⁰ and even *particular prison regulations* adopted by the Federal Bureau of Prisons that accommodate religious exercise (and only religious exercise).³¹

constitution requires least restrictive means for serving compelling state interest when laws burden religious exercise), *aff'd*, 615 N.Y.S.2d 470 (N.Y. App. Div. 1994). See also Gary S. Gildin, *Coda to William Penn's Overture: Safeguarding Non-Mainstream Religious Liberty Under the Pennsylvania Constitution*, 4 U. PA. J. CONST. L. 81, 125-26 & nn.200-10 (2001).

²⁹ Since the Supreme Court's *Smith* decision, the political branches of at least *twelve* states have, either by statute or constitutional amendment, provided stronger protection for religious exercise (and only religious exercise). 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, 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).

³⁰ See, e.g., *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.”).

³¹ See, e.g., Federal Bureau of Prisons Policy Statement (attached as **Ex. C**) 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 accommodation to allow

Another strange consequence of this reasoning is that, if legislative and executive 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. *See Madison*, 355 F.3d at 320 (noting “[t]he byzantine complexities that such compliance would entail”).

Indeed, the Supreme Court has squarely rejected that argument when it explained 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.*

Amos, 483 U.S. at 338, 107 S.Ct at 2869 (emphasis added).

Fourth, lacking *any* Supreme Court authority for its position, Georgia relies on a hypothetical discussed in *Cutter*. Two white supremacist prisoners—one secular and the other a religious adherent to the Church of Jesus Christ Christian, Aryan Nation (“CJCC”)—want to challenge a prison’s decision not to let them possess white supremacist literature. According to the hypothetical, assuming the visits by outside religious advisors that do not count against the limit otherwise posed on social visits from outsiders).

showing of a substantial burden on religious exercise, the religious prisoner would be able to challenge the prison's failure to accommodate his religious beliefs under RLUIPA's strict scrutiny standard, but the secular prisoner could bring free speech and association claims against the policy, but only under the more deferential standard of *Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254 (1987). Thus, the *Cutter* court concludes, the "primary effect of RLUIPA is not simply to accommodate the exercise of religion by individual prisoners, but to advance religion generally by giving religious prisoners rights superior to those of nonreligious prisoners." *Cutter*, 349 F.3d at 266 (citations and quotations omitted).

But applying the reasoning of this hypothetical to factual circumstances ***actually addressed*** by the Supreme Court reveals starkly that the Court has ***already*** rejected that reasoning ***repeatedly***. For example, in *Zorach*, the Supreme 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. *Zorach*, 343 U.S. at 308, 72 S.Ct. at 681. Thus, under ***the very program*** already approved by the Court in *Zorach*, if there were two white supremacist students, the one seeking instruction from CJCC would be excused, but the one seeking instruction from a secular supremacist group would not. Similarly, in *Amos*, the Supreme Court approved a provision of Title VII that exempted religious organizations—and only religious organizations—from the

statute’s general prohibition of religious discrimination in employment. Thus, under *the very exemption* approved by the Court in *Amos*, if there were two white supremacist employers, a religious one such as CJCC could hire based on religion, but the secular one could not. *See also Madison*, 355 F.3d at 319 (*Amos* “does not at all indicate that Congress must examine how or if any other fundamental rights are similarly burdened.”).

And why has the Supreme Court (and faithful lower courts) so consistently rejected Establishment Clause challenges to these laws? In short, government must be free to *speciallly* deregulate religious exercise, because it is a category of private activity in which government interference is *uniquely* misplaced. To quibble with that is to quibble with the Religion Clauses themselves. The same principle applies to RLUIPA—it lifts burdens only on religious exercise in order to *minimize* government interference with a human phenomenon that the Constitution itself recognizes to be uniquely sensitive to government interference.³² Thus, in accordance with the overwhelming weight of authority—and notwithstanding the

³² Of course, the First Amendment and laws like RLUIPA seek only to minimize government involvement in private religious conduct, not to eliminate it altogether. Even under these laws, whenever the specific religious practice of white supremacists (or any other prisoner) would create a demonstrable threat to the safety of other inmates or to prison security, prison administrators could still forbid the practice.

superficial appeal of a single hypothetical—RLUIPA does not offend the Establishment Clause.

Fifth, there is an historical problem. Laws that exist solely to accommodate religious exercise are so numerous because they represent a time-honored American tradition.³³ 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 Georgia’s theory were accepted, then the *Smith* Court’s invitation to enact religious accommodations, *see Smith*, 494 U.S. at 890, 110 S.Ct. at 1606, would appear to be an inducement to violate the Establishment Clause.³⁴

Therefore, this Court should join the others that have heeded the Supreme Court’s instruction in *Amos*, 483 U.S. at 338, 107 S.Ct at 2869, and should reject

³³ *See, e.g., Kiryas Joel v. Grumet*, 512 U.S. 687, 705, 114 S.Ct. 2481, 2492 (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 676, 90 S.Ct at 1415 (“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).

³⁴ Notably, the *Smith* Court, in encouraging the political branches to take responsibility for providing for accommodation of religious exercise, did not even *suggest* that those accommodations would be permissible only if packaged with other “secular” rights.

the argument that accommodations of religious exercise alone impermissibly advance religion.

- b. RLUIPA does not have any impermissible effects on the religious freedoms of others.

As an alternative argument under *Lemon*'s effect prong, Georgia asserts that RLUIPA has impermissible effects on other state prison officials. This argument is unsound as a matter of both law and fact.

Georgia relies primarily on *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 105 S.Ct. 2914 (1985), for its assertion that RLUIPA will improperly burden state prison administrators. There, the Court struck down a statute imposing an *absolute* condition that employers retain employees who refused to work on the Sabbath. In contrast to the “unfettered right [given] to persons with certain religious practices [in *Caldor*] regardless of the countervailing interests of other entities,” RLUIPA (like RFRA) “addresses the countervailing interests of prison administrators by allowing the government to burden inmates’ religious freedom, provided this burden serves as the least restrictive means to achieve a compelling government interest.” *Bitner*, 285 F.Supp.2d at 600 n.7; *see also Sanabria*, slip op. at 32 (RLUIPA is distinguishable from *Caldor* because it “invests prisoners with no absolute rights”); *Gerhardt*, 221 F.Supp.2d at 848-49 (same). The statute in *Caldor* is also distinguishable from RLUIPA because, unlike the absolute mandate imposed on private employers in *Caldor*, Georgia “has voluntarily committed itself

to lifting government-imposed burdens on the religious exercise of publicly institutionalized persons in exchange for federal” funds. *Madison*, 355 F.3d at 322.³⁵

Georgia’s policy judgment that RLUIPA will impose intolerable costs by making it impossible for prisons to combat problems of religiously motivated gang violence also fail to rise to the level of a cognizable Establishment Clause violation. First, far from removing a prison’s ability to address issues of prison security implicated by gang violence, RLUIPA’s provisions expressly grants prisons leeway to burden religious exercise where a compelling interest—like security—is actually implicated.

Moreover, no evidence supports Georgia’s “sky is falling” claims. In passing RLUIPA, Congress had before it a letter **supporting** RLUIPA’s passage from the authorities overseeing federal prisons. The letter reported that, in the six

³⁵ Nor is Georgia helped by its citation to the plurality opinion in *Texas Monthly v. Bullock*, 489 U.S. 1, 109 S.Ct. 890 (1989), for the proposition that a statute may not benefit the religious if that benefit also burdens non-believers. In *Texas Monthly*, a fractured Court struck down a statute that exempted certain religious publications from a state sales tax. Georgia fails to note that it cites language from the opinion that did not garner a majority in that case or any since. Even if that plurality opinion were the law, it distinguished the case before it from one involving “remov[al of] a significant state-imposed deterrent to the free exercise of religion.” *Id.* at 15, 109 S.Ct. at 899 (plurality opinion). Here, of course, RLUIPA alleviates just such a deterrent to religious exercise, by generally relieving substantial burdens on prisoners’ religious exercise. Moreover, unlike the absolute exemption for the religious publications in *Texas Monthly*, RLUIPA does not give an unfettered right to religious exercise, but accounts for countervailing interests.

years that the Bureau of Prisons had been required to apply RFRA—which also applies the same substantial burden standard—the BOP had not been overwhelmed by frivolous prisoner lawsuits. *See* 146 Cong. Rec. S7776 (daily ed. July 27, 2000) (July 19, 2000 letter of Robert Raben) (“Since enactment of RFRA in 1994, Federal inmates have filed approximately 65 RFRA lawsuits in Federal court naming the Bureau of Prisons (or its employees) as defendants. Most of these suits have been dismissed on motions by the defendants. . . . RFRA has not . . . significantly burdened the operation of Federal prisons.”). *See also Developments in the Law—Religious Practice in Prison*, 115 Harv.L.Rev. 1891, 1894 (2000) (finding that federal officials overwhelmingly prevail in RFRA cases). Far from supporting Georgia’s second-guessing of Congress’ policy judgment, the evidence only confirms “that RLUIPA should not hamstring [Georgia’s] ability” to maintain safety and order in its prisons. *Madison*, 355 F.3d at 321.

Cutter is equally unfounded in asserting that RLUIPA will improperly affect third parties by “induc[ing] prisoners to adopt or feign religious belief in order to receive the statute’s benefits.” *Cutter*, 349 F.3d at 266. Even if RLUIPA would generate that effect, RLUIPA (like RFRA) does not prevent prison administrators from inquiring, as courts also may, into the sincerity of the religious beliefs of prisoners seeking relief from burdens on religious exercise. Just as sincerity of belief is a “threshold requirement” for a Free Exercise claimant, *see Levitan v.*

Ashcroft, 281 F.3d 1313, 1320 (D.C. Cir. 2002), so too is it a threshold showing for a RLUIPA or RFRA claimant, *see, e.g., Kikumura*, 242 F.3d at 960. Thus, even assuming that RLUIPA causes a flood of religion-faking, claim-filing prisoners—and there is absolutely no evidence that it has—prison administrators retain the means to address the issue of feigned belief.

In addition, *Cutter* assumes that the religious exercise to be accommodated is typically desirable to the average prisoner. But this assumption has no basis in the record before Congress or elsewhere. Acts of religious faith, though deeply meaningful to an adherent, often appear irrational or baffling to a non-adherent, thus inviting derision rather than envy. Similarly, religious rituals and observances frequently demand rigorous attention to detail and form (*e.g.*, keeping a kosher diet) that only a true religious adherent would ever want to perform.³⁶

Finally, even where the religious accommodation may be desirable outside a particular faith (*e.g.*, the ability to consume wine for communion), that fact alone would hardly render an accommodation unconstitutional. If that were true, then all sorts of accommodations for religious exercise in all sorts of contexts (even those required under the more deferential *Turner v. Safley* test) would be at risk of

³⁶ The facts of the Seventh Circuit’s decision in *O’Bryan* provide a good illustration. There, a Wiccan prisoner sued under RFRA for the right to cast spells. *O’Bryan v. Bureau of Prisons*, 349 F.3d 257 (7th Cir. 2003). It is unlikely that many non-Wiccans would find spell-casting so desirable that they would pretend to be Wiccan in order to obtain the “benefit” of the right to cast spells.

violating the Establishment Clause by creating some incentive, no matter how minimal, to feign religious belief. For example, such an inducement to feign religious belief would presumably arise from a statute that provided a religious exemption from the general criminal prohibition against peyote use. Indeed, if peyote is indeed a desirable (yet dangerous) hallucinogenic substance, as those who have outlawed it believe, *see* 21 U.S.C. § 812 (listing peyote as a schedule 1 controlled substance), then the inducement to fake religious devotion in order to obtain the benefit of the religious accommodation would seem to be particularly strong. Nonetheless, in explaining that the legislature, rather than the courts, would be the appropriate place to provide an exemption for religious use of peyote, the Supreme Court in *Smith* did not suggest that any inducement to false piety created by the exemption would violate the Establishment Clause. *See Smith*, 494 U.S. at 890, 110 S.Ct. at 1606.

- c. The mandates of the Free Exercise Clause are not a ceiling on permissible accommodation of religious exercise.

Georgia last argues that RLUIPA impermissibly advances religion because its accommodation of religious exercise exceeds what the Supreme Court has required under the Free Exercise Clause in the prison setting under the deferential test of *Turner v. Safley* and *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 107 S.Ct. 2400 (1987). But this argument proves too much. On this theory, *any*

accommodation of prisoner religious exercise that is not mandated by the Free Exercise Clause would violate the Establishment Clause.

Once again, this argument ignores on the nation's long history of specially accommodating religious exercise; would invalidate wholesale numerous federal and state laws that accommodate religion beyond what the Free Exercise Clause requires; and ignores *Smith*'s specific invitation to the political branches to provide that additional measure of accommodation. But most importantly, this argument is foreclosed by *Amos*. *See Amos*, 483 U.S. at 334, 107 S.Ct at 2867 (“It is well established that the limits of permissible accommodation of religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause.”) (quotation omitted).

C. RLUIPA Does Not Foster Excessive Entanglement with Religion.

Georgia finally argues that RLUIPA creates excessive entanglement, because it allegedly forces states to become knowledgeable about the religious practices of their inmates. Defs. Br. at 35-36. Once again, the argument proves too much, for then government could never take account of religious belief for the purpose of accommodation, even under the more deferential *Turner v. Safley* test. *See, e.g., 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.”).³⁷ 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, 107 S.Ct at 2867-68.

Indeed, RLUIPA is designed precisely to *minimize* government entanglement 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.*, 483 U.S. at 339, 107 S.Ct at 2870.

Similarly, far from increasing entanglement, RLUIPA’s definition of “religious exercise” tends to decrease it. The Act defines “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 tracking Supreme Court precedent. RLUIPA thus entails no greater entanglement problem

³⁷ Notably, even *Cutter* was unwilling to accept this argument. *Cutter*, 349 F.3d at 267 (“we question whether RLUIPA requires any greater interaction between government officials and religion than exists under present law.”).

than the ordinary application of Free Exercise doctrine. That doctrine, moreover, is designed to minimize entanglement by precluding inquiry into the rationality of a belief or its centrality within a system. *See, e.g., Hernandez v. Commissioner*, 490 U.S. 680, 699, 109 S.Ct. 2136, 2148 (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, 101 S.Ct. 1425, 1430 (1981) (“[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”). Like Free Exercise doctrine itself, RLUIPA’s definition of religious exercise tends to avoid—not create—entanglements.

In sum, because RLUIPA—like so many other religious accommodations—satisfies all three elements of the *Lemon* test, it does not violate the Establishment Clause.³⁸

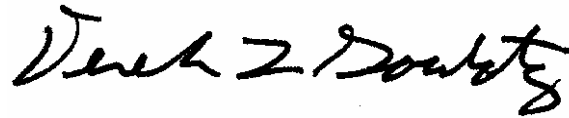
³⁸ Because RLUIPA satisfies the *Lemon* test, it cannot reasonably be viewed as endorsing religion. *See Mitchell v. Helms*, 530 U.S. 793, 835, 120 S.Ct. 2530, 2555 (2000). Thus, Georgia’s complaints based on endorsement jurisprudence must fail.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision below.

Respectfully submitted,

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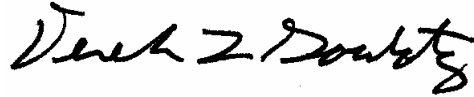
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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 14,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).



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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of April, 2004, I served on all parties the above and foregoing Brief of Plaintiff-Appellee by sending two copies of same via Federal Express, prepaid, addressed to counsel of record as follows:

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APPENDIX