

Appeal No. 04-11044-C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Ralph H. Benning,
Plaintiff and Appellee,

v.

State of Georgia, et alia,
Defendants and Appellants

Appeal from the United States District Court
for the Southern District of Georgia, Statesboro Division
Honorable B. Avant Edenfield (Case No. 02-CV-139)

**Brief *Amicus Curiae* of Religious and Civil Liberties
Organizations in Support of Affirmance**

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April 29, 2004

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INTEREST OF THE *AMICI*

Amici curiae are private, non-profit religious and civil rights organizations that are dedicated to protecting religious liberties, including the religious liberties of prisoners. *Amici* believe that the elimination of undue constraints on religious exercise by prisoners is a worthy and important goal that inures to the benefit not only of those in confinement, but in many respects of the wider society as well. This goal, moreover, can be realized without significantly burdening prison administrators and without compromising prison safety and security—as demonstrated by experience with the federal Religious Freedom Restoration Act and numerous religious accommodation policies voluntarily undertaken by the States themselves. *Amici* submit this brief because the resolution of this case could help to decide the fate of a key safeguard of prisoners’ religious freedom.

The **Aleph Institute** is a non-profit Jewish educational, humanitarian, and advocacy organization. Aleph helps Jewish inmates and their families to maintain essential connections to each other and to their spiritual heritage and provides educational materials to children of Jewish inmates; counseling to spouses, parents, and children; and financial assistance to families in need.

The **American Jewish Committee** (“AJC”), a national organization of over 125,000 members and supporters, was founded in 1906 to protect the civil and religious rights of Jews and all Americans. AJC played a crucial role in moving

the Religious Land Use and Institutionalized Persons Act (RLUIPA) to passage, and joins in this brief in support of the statute's constitutionality.

The **American Jewish Congress** was founded in 1918 to further the religious, civil, political, and economic interests of American Jews. It played an important role in the drafting of RLUIPA.

The **American Civil Liberties Union** (ACLU) is a nationwide, non-profit, nonpartisan organization of more than 400,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU established the **National Prison Project** in 1972 to protect and promote the civil and constitutional rights of prisoners. The **ACLU of Georgia** is one of the ACLU's state affiliates.

The **Anti-Defamation League** ("ADL") was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat prejudice in the United States, and is now one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. While the ADL counts among its core beliefs strict adherence to the separation of Church and State embodied in the Establishment Clause, it also believes that a zealous defense of the Free Exercise Clause is essential to the health of our religiously diverse society and to the preservation of our Republic.

The **Baptist Joint Committee on Public Affairs** (“BJC”) is a religious liberty organization serving various cooperating Baptist conventions and conferences. BJC deals exclusively with religious liberty and church-state separation issues and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to religious liberty for all Americans.

The **Christian Legal Society** is a non-profit interdenominational association of Christian legal professionals with chapters in nearly every state and at over 140 accredited law schools. Since 1975, the Society’s legal advocacy and information division, the Center for Law and Religious Freedom, has worked for the protection of religious belief and practice, as well as for the autonomy of religion and religious organizations, in courts throughout the nation.

Liberty Counsel, a national religious civil liberties litigation, education and policy organization, was part of the coalition that supported the passage of RLUIPA and has litigated many cases under RLUIPA since the law was enacted. Liberty Counsel has a strong interest in preserving the viability of RLUIPA.

People for the American Way Foundation (“PFAWF”) is a non-partisan citizens’ organization established to promote and protect civil and constitutional rights, including religious liberty. PFAWF participates in litigation and other activities to vindicate the principles protected by the Free Exercise and Establishment Clauses, as well as the constitutionality of RLUIPA.

Prison Fellowship Ministries is a non-profit, charitable religious organization, founded in 1976 and currently operating in every state and in 95 countries, that ministers to prisoners, ex-prisoners, crime victims, and their families.

SOURCE OF AUTHORITY TO FILE

All parties have consented in writing to the filing of this brief.

STATEMENT OF THE ISSUES

1. Was the District Court correct in finding the Religious Land Use and Institutionalized Persons Act (RLUIPA) a valid exercise of Congress's power under the Spending Clause?

2. Was the District Court correct in finding RLUIPA a valid exercise of Congress's power under the Commerce Clause?

3. Was the District Court correct in finding that RLUIPA does not violate the Tenth Amendment?

4. Was the District Court correct in finding that RLUIPA does not violate the Establishment Clause?

SUMMARY OF THE ARGUMENT

This is a landmark case, involving as it does the constitutionality of an important federal law enacted with overwhelming, bipartisan support. Section 3 of that law, the Religious Land Use and Institutionalized Persons Act, was designed to give prisoners in State institutions that choose to accept federal support the same religious-freedom rights that prisoners in federal institutions enjoy under the Religious Freedom Restoration Act. To that end, section 3 calls on States that accept federal support for their prison programs to give inmates, as a condition of that support, the same religious liberties accorded their counterparts in federal prisons.

Appellants disagree with the policy choice embodied in section 3. But rather than pressing their views through the political process, Appellants seek to convert their policy disagreement with Congress into a constitutional ruling. Appellants would prefer a different balance, one more deferential to state corrections systems and less solicitous of inmates' religious exercise, but they offer no tenable argument that section 3 is unconstitutional.

As the district court correctly concluded, section 3 is well within the bounds of Congress's authority under the Spending Clause. The statute is in pursuit of the general welfare, its condition on federal appropriations is clear and explicit, and the condition is closely related to the programs to which the funds are dedicated.

Section 3 also falls within the bounds of the Commerce Clause. The statute's jurisdictional element ensures that Congress's commerce power is invoked only when interstate commerce is actually affected. Indeed, the statute provides an affirmative defense that has the effect of ensuring an even narrower reach than that permitted by the Commerce Clause.

Because section 3 is a valid exercise of Congress's delegated powers, its operation does not implicate the Tenth Amendment. The statute does not intrude on the States' sovereignty, but simply requires state agencies and officers to comply with the conditions Congress has imposed on the use of federal prison funds.

Nor does Section 3 violate the Establishment Clause. It is well settled that the Establishment Clause permits legislative accommodation of religious practice and that such legislation need not be attended by accommodation of corresponding secular interests.

ARGUMENT

Part I of this brief explains why section 3 of RLUIPA falls within Congress's authority under the Spending and Commerce Clauses, and why it does not violate the Tenth Amendment. Part II rebuts Appellants' argument that Section 3 contravenes the Establishment Clause.

I. SECTION 3 IS A VALID EXERCISE OF CONGRESS'S SPENDING AND COMMERCE POWERS AND DOES NOT VIOLATE THE TENTH AMENDMENT.

Section 3 of RLUIPA was enacted pursuant to the powers delegated to Congress by the Spending and Commerce Clauses of the Constitution. Appellants contend that section 3 exceeds both delegated powers. They are wrong. Nor is there merit to Appellants' alternative argument that section 3 violates the Tenth Amendment.

A. Section 3 Is a Valid Exercise of the Spending Power.

Section 3(b)(1) of RLUIPA provides that the statute applies whenever the substantial burden being challenged "is imposed in a program or activity that receives Federal financial assistance." 42 U.S.C. § 2000cc-1(b)(1). Because

Appellants concede that the Georgia Department of Corrections (DOC) receives federal financial assistance, *see* Appellants' Brief ("App. Br.") at 10, there is no dispute that section 3(b)(1) makes RLUIPA applicable to this case if the statute is constitutionally valid.

It is settled that Congress may, incident to its appropriation authority, "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 objectives." *South Dakota v. Dole*, 483 U.S. 203, 206, 107 S. Ct. 2793, 2795-96 (1987) (internal quotation marks omitted); *accord Autery v. United States*, 992 F.2d 1523, 1527 (11th Cir. 1993). The power to impose conditions on federal spending is subject to the requirements that the conditions be in pursuit of the general welfare, be clear and explicit, and be related to the projects or programs for which the funds at issue are disbursed. *See Dole*, 483 U.S. at 207-08, 107 S. Ct. at 2796. As every federal court to address the issue has concluded, section 3 satisfies all of these requirements.¹

¹ *See Mayweathers v. Newland*, 314 F.3d 1062 (9th Cir. 2002), *cert. denied*, 124 S. Ct. 66 (2003); *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003); *Goodman v. Snyder*, No. 00 C 0948, 2003 WL 22765047, at *2 (N.D. Ill. Nov. 20, 2003); *Williams v. Bitner*, 285 F. Supp. 2d 593, 603 (M.D. Pa. 2003); *Gordon v. Pepe*, No. Civ.A. 00-10453-RWZ, 2003 WL 1571712, at *1 (D. Mass. Mar. 6, 2003); *Johnson v. Martin*, 223 F. Supp. 2d 820 (W.D. Mich. 2002), *overruled by Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003); *Taylor v. Cockrell*, Civ. No. H-00-2809, slip op. at 11 (S.D. Tex. Sept. 25, 2002), *appeal remanded for dismissal*, No. 02-21316 (5th Cir.

Appellants do not and could not dispute that section 3 is in pursuit of the general welfare. As the Seventh Circuit recently explained, RLUIPA’s “attempt to protect prisoners’ religious rights . . . falls squarely within Congress’ pursuit of the general welfare under its Spending Clause authority.” *Charles v. Verhagen*, 348 F.3d 601, 607 (7th Cir. 2003); accord *Mayweathers v. Newland*, 314 F.3d 1062, 1066-67 (9th Cir. 2002) (“The First Amendment, by prohibiting laws that proscribe the free exercise of religion, demonstrates the great value placed on protecting religious worship RLUIPA is clearly in line with this positive constitutional value.”), *cert. denied*, 124 S. Ct. 66 (2003). Surely religious freedom is consonant with the general welfare, even though (as is often the case with constitutional provisions) that value may not be completely protected by the First Amendment standing alone.

Appellants challenge the relationship between section 3’s condition and the purpose for which the conditional funds are spent. The challenge is meritless.

1. *The Condition Set by Section 3 Is Closely Related to the Purposes of the Funding.*

Section 3 plainly satisfies the requirement that a condition on a federal appropriation “bear some relationship to the purpose of the federal spending.”

Aug. 26, 2003); *Gerhardt v. Lazaroff*, 221 F. Supp. 2d 827 (S.D. Ohio 2002), *vacated sub nom. Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003), *petition for cert. filed*, No. 03-9877 (U.S. Apr. 19, 2004).

New York v. United States, 505 U.S. 144, 167, 112 S. Ct. 2408, 2423 (1992). As discussed above, Congress has an interest in ensuring that religious exercise is not unnecessarily fettered. It naturally has a concomitant interest in declining to subsidize institutions or programs that undermine those interests.

Appellants nevertheless contend that exercise of the spending power requires a “direct connection” between the condition imposed and the specific program receiving the conditional funds, App. Br. 8, and that Section 3 fails because “the requirements are not functionally related to the operation of any of the Department’s federal grants,” *id.* at 10. Nowhere in the governing jurisprudence are such requirements found. Indeed, Appellants’ contention is refuted by *Dole* itself. The statute in *Dole* conditioned all highway funds (not only those directly related to drunk driving) on the recipient State’s having a minimum drinking age of 21. The Court upheld the statute, notwithstanding the obviously attenuated relationship between liquor sales and road work, because the funding condition was “related to one of the main purposes for which highway funds are expended—safe interstate travel.” 483 U.S. at 208, 107 S. Ct. at 2797. If that is a sufficient nexus to satisfy the Spending Clause, then surely section 3 of RLUIPA satisfies it.

Moreover, the relationship between section 3’s mandate and the funds allotted to state prisons is much closer than Appellants suggest. As Appellants correctly note, “[t]he relationship of state prisoners and the state officials who

supervise their confinement is far more intimate than that of a state and a private citizen.” App. Br. 21. Because every aspect of an inmate’s life is overseen and controlled by the state, the potential for state interference (intentional or not) with an inmate’s exercise of religion inheres in every facet of prison administration. Accordingly, the assertion that “[n]either Benning nor the United States claim that any of the religious activities at the prison are funded with federal dollars,” App. Br. 7, is beside the point. Infringements on religious exercise can arise almost anywhere and any time in a prison environment.

2. *There Is No “Proportionality” Requirement on Conditional Funding.*

Appellants argue that DOC receives too little federal funding to be subject to “federal control over one hundred percent of the Department’s actions.” *Id.* at 11. Appellants claim to find a proportionality requirement for conditional federal spending 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). App. Br. 11. For the reasons set forth in the Appellees’ briefs, those decisions have no application here.²

Appellants also claim to find support for their proportionality argument in the legislative history of a bill that was proposed but never enacted, the Religious

² See Brief of Plaintiff-Appellee at 19; Brief of Intervenor-Appellee at 21-23.

Liberty Protection Act (RLPA). App. Br. 12 (citing congressional testimony by Douglas Laycock and Christopher Eisgruber). But that history does not aid Appellants; indeed, in key respects it contradicts their position. Appellants characterize RLPA as “the bill that evolved into RLUIPA,” *id.*, but do not acknowledge that the evolution involved a dramatic narrowing of scope. The proposed RLPA was a broad prohibition on limitations on religious liberty, in any setting, by any governmental body that received any federal money. RLUIPA, by contrast, is limited in application to land use and prisons receiving federal funds.

Significantly, even as to the much broader RLPA, Professor Laycock testified, “I am confident that [the spending power applications of RLPA] are constitutional.” *Religious Liberty Protection Act of 1998: Hearings on H.R. 4019 Before Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 2d Sess. 9 (1998) (statement of Douglas Laycock). Appellants’ contention that Professor Laycock’s *approval* of a much broader bill somehow supports their attack on a narrower spending enactment is puzzling. And while Professor Eisgruber did express Spending Clause concerns with RLPA, his criticisms were not aimed at, and do not apply to, the far narrower RLUIPA. The legislative history of RLPA simply does not address what is at issue here: grants to prisons conditioned on adherence to federal standards for the protection of inmates’ religious practice.

3. *The Conditions Attached to Section 3 Are Clear and Unambiguous.*

Appellants claim that the condition imposed by section 3 is too vague, citing *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 101 S. Ct. 1531 (1981). App. Br. 14-15. This argument is incorrect for two reasons. First, Appellants misconstrue the teaching of *Pennhurst*. That case, like other Spending Clause cases, held not that a funding condition must reach a particular level of clarity to be enforceable, but rather that the *existence* of the condition must be express and unambiguous. As the Supreme Court explained, it is not fatal to spending power legislation that “a State’s potential obligations . . . are largely indeterminate,” as long as Congress has “express[ed] clearly its intent to impose conditions on” the allotted funds. *Pennhurst*, 451 U.S. at 24, 101 S. Ct. at 1543. “The crucial inquiry . . . is not whether a State would knowingly undertake [an indeterminate] obligation, but whether Congress spoke so clearly that we can fairly say that the State could make an informed choice.” *Id.* at 25, 101 S. Ct. at 1544. As long as that criterion is satisfied, “Congress is not required to list every factual instance in which a state will fail to comply with a condition. Such specificity would prove too onerous, and perhaps, impossible.” *Mayweathers*, 314 F.3d at 1067; *accord Charles*, 348 F.3d at 608 (“Congress cannot delineate every instance in which a State may or may not comply with the least restrictive means test; it is simply impossible to do so”).

The second flaw in Appellants' argument is that it would not undermine section 3 even if their reading of *Pennhurst* were correct. The statute is clear. It directs prison officials, if the furtherance of a compelling interest (such as prison security) requires the burdening of inmates' religious exercise, to employ the least burdensome means available. Of course, whether one alternative is less burdensome than another is a question of fact, and its answer will vary from case to case. But that is true of litigation over many statutory and constitutional standards. Such uncertainty does not make the statute vague or unintelligible.

Finally, Appellants' sovereign immunity argument, App. Br. 13-16, is misguided. Putting to one side the fact that the State of Georgia *voluntarily* accepted federal funds, complete with RLUIPA's conditions and the attendant prospect of litigation, Appellants ignore the venerable doctrine of *Ex parte Young* 209 U.S. 123, 28 S. Ct. 441 (1908). That doctrine allows, consonant with the Eleventh Amendment, suits seeking prospective injunctive relief against state officials. *See id.* at 159-62, 28 S. Ct. at 452-55; *Green v. Mansour*, 474 U.S. 64, 68, 106 S. Ct. 423, 426 (1985). *Ex parte Young* actions are routinely allowed against state officials to challenge prison operations. *See, e.g., Hutto v. Finney*, 437 U.S. 678, 690, 98 S. Ct. 2565, 2573 (1978); *Williams v. Wisconsin*, 336 F.3d 576, 580-81 (7th Cir. 2003); *Mayweathers*, 314 F.3d at 1069-70; *Hill v.*

Butterworth, 133 F.3d 783, 784-85 (11th Cir. 1997), *vacated on other grounds*, 147 F.3d 1333 (11th Cir. 1998).

Georgia may take or leave federal money for its prison operations, but once having voluntarily accepted the money with strings attached, the State may not cry foul because the grant is conditional. Appellants' plea for relief from the consequences of their decision to accept the encumbered funds is really a plea for unencumbered federal largesse. The Spending Clause warrants no such rule.

B. Section 3 Does Not Violate the Commerce Clause.

Appellants' argument that section 3 exceeds Congress's commerce power is equally unpersuasive. Section 3(b)(2) specifically provides that the statute applies in any case in which the substantial burden complained of "affects, or removal of that substantial burden would affect," interstate or foreign commerce. 42 U.S.C. § 2000cc-1(b)(2).³ Citing *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624 (1995), and *United States v. Morrison*, 529 U.S. 598, 120 S. Ct. 1740 (2000), Appellants assert that the commerce power extends only to those activities that "substantially affect" interstate commerce, which (they imply) a burden on an individual inmate's religious exercise does not do. *See* App. Br. 16-21.

³ This Court need not address the Commerce Clause question if it concludes that the statute is properly within the spending power.

Appellants misread *Lopez* and *Morrison*. Both cases, and decisions of this Court following them, make clear that a “substantial” commercial nexus is required only where the statute in question purports directly to regulate commercial activity. If, on the other hand, the statute contains a jurisdictional element specifically conditioning its operation on a finding that interstate commerce is *affected*, no more is needed to satisfy the Commerce Clause. *Morrison*, 529 U.S. at 612, 120 S. Ct. at 1751 (a statutory “jurisdictional element may establish that the enactment is in pursuance of Congress’ regulation of interstate commerce,” notwithstanding the absence of a substantial effect on commerce); *Lopez*, 514 U.S. at 561-62, 115 S. Ct. at 1631 (a jurisdictional element “ensure[s], through case-by-case inquiry, that the [activity] in question affects interstate commerce”).

Appellants’ proposed interpretation of the Commerce Clause is foreclosed by *United States v. Cunningham*, 161 F.3d 1343 (11th Cir. 1998), which upheld a federal law regulating the same activity at issue in *Lopez*—gun possession. The sole material difference between the statute invalidated by *Lopez* and that upheld by *Cunningham* is that the latter, “[u]nlike the provision invalidated in *Lopez*, . . . contains an explicit jurisdictional element.” *Id.* at 1345. Compare 18 U.S.C. § 922(q)(1)(A) (1988 Supp. V 1993) (stricken by *Lopez*) (making it a federal offense for “any individual knowingly to possess a firearm . . . [in] a school zone”), with 18 U.S.C. § 922(g) (upheld by *Cunningham*) (“It shall be unlawful for any

person . . . [to] possess in or affecting commerce, any firearm”). Similarly, this Court has upheld the federal arson statute based on its jurisdictional element. *United States v. Chowdhury*, 118 F.3d 742 (11th Cir. 1997) (per curiam) (rejecting Commerce Clause challenge to 18 U.S.C. § 844(i), which applies to intentional burning of property “used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce”). The jurisdictional element in section 3 of RLUIPA, which is in all material respects identical to those considered in *Cunningham* and *Chowdhury*, likewise satisfies the Commerce Clause.

Finally, Appellants’ characterization of section 4(g) of RLUIPA as a separate jurisdictional element is mistaken—and the nature of the mistake illuminates a central weakness in their argument. Section 4(g) does not, as Appellants contend, “creat[e] presumptive federal jurisdiction.” App. Br. 19. It is an affirmative defense. Section 4(g) allows a State, in a case where jurisdiction is predicated on the commerce power, to *defeat* jurisdiction if the State can show that burdens like the one at issue “would not lead in the aggregate to a substantial effect on commerce.” 42 U.S.C. § 2000cc-2(g). In practical effect, therefore, RLUIPA requires what Appellants contend for—a substantial effect on commerce—before section 3(b)(2) can be successfully invoked. 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.

Again, Appellants might object to the policy represented by section 3, but the question at hand is not whether Congress struck the right balance. The question is whether the statute is within the scope of Congress's power. It is.

C. Section 3 Does Not Violate the Tenth Amendment.

Appellants' Tenth Amendment argument, *see* App. Br. 21-23, is refuted by the Amendment itself: "The powers *not delegated to the United States . . .* are reserved to the States respectively, or to the people." U.S. Const. amend. X (emphasis added). This language means what it says. "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." *New York*, 505 U.S. at 156, 112 S. Ct. at 2417 (emphasis omitted). As the Seventh Circuit has explained, "the Tenth Amendment and Article I of the Constitution are complements to one another; when Congress acts pursuant to an enumerated power, there can be no violation of the Tenth Amendment." *United States v. Wilson*, 159 F.3d 280, 287 (7th Cir. 1998). This is doubly so with respect to Spending Clause legislation, which is not "regulation," rightly understood, but a species of contract.⁴ RLUIPA is not an

⁴ At least where, as here, the "regulated" program receives federal funds. To the extent section 3 is grounded in the Spending Clause, the Tenth Amendment is not implicated—as Appellants tacitly concede by appending their Tenth Amendment argument to their Commerce Clause argument. *Cf. Dole*, 483 U.S. at 210, 107 S. Ct. at 2797 ("a perceived Tenth Amendment limitation on congressional regulation of state affairs [does] not concomitantly limit the range of conditions legitimately placed on federal grants"). Therefore, this Court need not reach the Tenth Amendment issue if it finds the statute a valid exercise of the spending power.

“attempt by the federal government to intrude upon the states regulation of their prisons,” App. Br. 21, but a stipulation as to how federal money can be spent. If a State finds the stipulation too onerous, it may simply reject the encumbered funds.

Undeterred, Appellants argue that “RLUIPA embodies the evil condemned in *New York v. United States*, 505 U.S. 144 (1992), and *United States v. Printz*, 521 U.S. 898 (1997) in that it requires states to regulate pursuant to federal direction.” App. Br. 21. But *New York* and *Printz* were very different from this case. *New York* involved a federal statute that directed States to enact regulations effecting the statute’s dictates. *See New York*, 505 U.S. at 174-76, 112 S. Ct. at 2427-28. The Court held that the Constitution did not authorize such direction: “The Federal Government may not compel the States to enact or administer a federal regulatory program.” *Id.* at 188, 112 S. Ct. at 2435. The statute considered in *Printz* was an attempt to evade the *New York* rule by directly enlisting state law enforcement officers (rather than legislatures) in the administration of a federal regulatory scheme. *See Printz v. United States*, 521 U.S. 898, 904, 117 S. Ct. 2365, 2369 (1997). The Court held that *New York*’s proscription applied equally where a federal law was directed at a State’s executive branch. The dispositive factor was that Congress was purporting to direct State governments in the exercise of their policymaking authority, a sphere of activity reserved to the States by the Tenth Amendment. *Id.* at 927-28, 117 S. Ct. at 2380-81.

Section 3 of RLUIPA bears no resemblance to the statutes in *New York* and *Printz*. It does not require the States to create a regulatory scheme, or mandate any other specific discretionary action. Section 3 merely requires States, if they accept federal funds for their prison programs, to *avoid* burdening religious exercise unless they have a compelling interest and have employed the least restrictive means to that end. *How* a State satisfies this condition is up to the State and its officers. Tenth Amendment considerations simply are not implicated.

II. SECTION 3 DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

Appellants argue that section 3 of RLUIPA contravenes the Establishment Clause. It does not. Accommodations of religious practice have been a common feature of the American political landscape since the nation's founding. Section 3 of RLUIPA fits well within this tradition. It has not the forbidden purpose of promoting religion, but the benign purpose of allowing inmates a small measure of the religious freedom enjoyed by their peers beyond the prison walls. It does not effect an improper government endorsement of religion, but only alleviates some of the burdens on religious freedom that inhere in incarceration. And the threshold inquiry into an inmate's sincerity of belief that RLUIPA requires of prison officials is no different from that required under the First Amendment itself.

A. Prison Administrators Do Not Improperly “Foster” Religion by Accommodating Inmates’ Religious Exercise.

RLUIPA was passed for the valid secular 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). As this Court recently held, where “a law’s purpose is to alleviate significant government interference with the exercise of religion, that purpose does not violate the Establishment Clause.” *Midrash Sephardi, Inc. v. Town of Surfside*, No. 03-13858, 2004 WL 842527, at *23 (11th Cir. Apr. 21, 2004) (rejecting constitutional challenge to section 2 of RLUIPA).

Appellants say the stipulation that States show a measure of solicitude to religious exercise places section 3 in the forbidden zone where “accommodation may devolve into an unlawful fostering of religion.” App. Br. 25 (citing *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334-35, 107 S. Ct. 2862, 2867-68 (1987)). But the “fostering” of which that dictum warns occurs when government “abandon[s] neutrality and act[s] with the intent of promoting a particular point of view in religious matters.” *Amos*, 483 U.S. at 335, 107 S. Ct. at 2868. By contrast, RLUIPA (like the religious exemption upheld in *Amos*) merely lets religious exercise proceed unmolested, “without sponsorship and without interference.” *Id.* at 334, 107 S. Ct. at 2868. To forbid such accommodation “would amount to a

requirement ‘that the government show a callous indifference to religious groups.’” *Id.* at 335, 107 S. Ct. at 2868 (quoting *Zorach v. Clauson*, 343 U.S. 306, 314, 72 S. Ct. 679, 684 (1952)).

Appellants attempt to distinguish *Amos* by arguing that “RLUIPA requires more than passive action by the State government. The Act actually requires the State to affirmatively take action, thus it cannot be said to have a valid secular purpose.” App. Br. 25. Similarly, Appellants’ *amici* contend that “RLUIPA is distinguishable from passive exemption measures” in that it “actively *interjects* government into religious affairs.” Brief of Ohio and Other States (“Ohio Br.”) at 9. This argument is misguided for two reasons.

First, Appellants’ assumption that there is a constitutionally meaningful distinction between “active” and “passive” government action (for which they offer no authority) has no warrant in the Establishment Clause jurisprudence. A “passive” government stance relative to religion can as much run afoul of the Establishment Clause, *see County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 109 S. Ct. 3086 (1989) (finding Establishment Clause violation in county government’s passively allowing private holiday display on municipal grounds), as an “active” stance can be consonant with the Clause, *see Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985) (rejecting Establishment Clause challenge to Army’s chaplaincy program).

Secondly, even if Appellants’ active-passive dichotomy had some footing in the case law, it would break down into incoherence in the application. Of necessity, a prisoner cannot do anything—eat, sleep, shower, read, write, have a phone conversation—without the State’s active involvement. As Appellants aptly put it, “all elements of a prisoner’s life are controlled through regulation.” App. Br. 30. It is therefore pointless to posit a demarcation between affirmative governmental action and passive allowance of private activity; in prison, everything is on one side of the line. *Cf. id.* at 25 (“An inmate cannot just go to the store and purchase a special diet as would be the case in the free world.”). Thus, Appellants’ complaint that section 3 calls for hands-on religious accommodation is wide of the mark.⁵

Put another way, what section 3 really calls for, taking into account “the unique circumstances of the prison environment,” *id.*, is hands-off accommodation. The statute calls on prison officials not “to become involved in religious practice,” *id.*, but only to keep interference to a minimum—to give inmates the means and

⁵ Moreover, Appellants’ indictment of section 3, by unavoidable inference, would damn all accommodation of religious exercise by prison administrators, including DOC’s own chaplaincy and faith-based volunteer programs. Without doubt, DOC’s training of more than 3,000 volunteers to conduct (inter alia) worship services for inmates constitutes a far more “active” participation in the inmates’ religious life than allowing Mr. Benning to keep kosher and wear a yarmulke. *See* Press Release, Georgia DOC, Faith-Based Volunteers Offer Services (Aug. 25, 2003), *available at* <http://www.dcor.state.ga.us/PublicRelations/PressReleases/html/2003aug25.html>.

the reasonable latitude to engage in religious practice themselves. The fact that this, like everything in prison, entails implementing action has no bearing on the constitutional analysis.

B. An Accommodation of Religious Exercise Is Not an Endorsement of Religion.

Appellants and their *amici* contend that RLUIPA constitutes a forbidden endorsement of religion because “an inmate seeking an accommodation for a religious purpose is given preferential treatment over an inmate seeking the same accommodation for a non-religious purpose.” App. Br. 27. They rely on the sole circuit court decision to have embraced this reasoning, *Cutter v. Wilkinson*, 349 F.3d 257, 266 (6th Cir. 2003), *petition for cert. filed*, No. 03-9877 (U.S. Apr. 19, 2004), echoing the *Cutter* court’s hypothetical of religious and non-religious demands for white supremacist literature. *See* App. Br. 29 (citing *Cutter*, 349 F.3d at 266); Ohio Br. 13 (same). This argument too is wrong.

For one thing, the sort of differential treatment of which Appellants complain is commonplace in First Amendment cases, even under the constricted standard applicable to inmate claims, *see Turner v. Safley*, 482 U.S. 78, 88-89, 107 S. Ct. 2254, 2261-62 (1987). For example, courts have held that inmates have a *constitutional* right—because of the grounding of the claims in religious belief—to possess sacred texts, *see Sutton v. Rasheed*, 323 F.3d 236 (3d Cir. 2003) (*per curiam*), and to display religious icons, *see Sasnett v. Litscher*, 197 F.3d 290 (7th

Cir. 1999), among other things. And the Georgia DOC itself makes allowances specifically for religious exercise, notably in its chaplain program. Therefore, even if it were true that a religiously motivated request for racist literature stood a better chance under RLUIPA,⁶ the mere fact that the motivation behind a claim is given legal weight, such that a religious claim enjoys greater protection than a non-religious one, clearly does not violate the Constitution. As the Fourth Circuit put it in *Madison v. Riter*, 355 F.3d 310 (2003), *petition for cert. filed*, No. 03-1404 (U.S. Apr. 6, 2004), Congress may permissibly

seek to reduce the burdens on religious exercise for prisoners without simultaneously enhancing, say, an inmate's First Amendment rights to access pornography. Free exercise and other First Amendment rights may be equally burdened by prison regulations, but the Constitution itself provides religious exercise with special safeguards. And no provision of the Constitution even suggests that Congress cannot single out fundamental rights for additional protection.

⁶ In reality, such claims have been singularly unsuccessful under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb *et seq.*, which is materially identical to section 3 of RLUIPA. See, e.g., *Lawson v. Singletary*, 85 F.3d 502, 511-12 (11th Cir. 1996) (*per curiam*); *George v. Sullivan*, 896 F. Supp. 895, 898 (W.D. Wis. 1995); *Reimann v. Murphy*, 897 F. Supp. 398, 402-03 (E.D. Wis. 1995). Likewise incorrect is the contention by Appellants' *amici* that RFRA and RLUIPA have been a boon to prison gangs. See Ohio Br. 6-8. It is beyond question that combating prison gangs is a compelling interest, and a violent gang in religious garb can be quelled without interference from RLUIPA or any other federal statute. For this reason, RFRA and RLUIPA claims that present colorable threats to prison security are routinely rejected. See, e.g., *Mickle v. Moore*, 174 F.3d 464 (4th Cir. 1999); *Stefanow v. McFadden*, 103 F.3d 1466 (9th Cir. 1996); *Ochs v. Thalaker*, 90 F.3d 293 (8th Cir. 1996); *Sledge v. Cummings*, 995 F. Supp. 1276 (D. Kan. 1998); *Van Dyke v. Washington*, 896 F. Supp. 183 (C.D. Ill. 1995); *George v. Sullivan*, 896 F. Supp. 895 (W.D. Wis. 1995); *Reimann v. Murphy*, 897 F. Supp. 398 (E.D. Wis. 1995); *Metheney v. Anderson*, 953 F. Supp. 854 (N.D. Ohio 1996); *but see Marria v. Broaddus*, No. 97 Civ. 8297 (NRB), 2003 WL 21782633 (S.D.N.Y. July 31, 2003) (granting injunctive relief to inmate).

Id. at 319; *cf. Midrash Sephardi*, 2004 WL 842527, at *23 (“a law does not violate the Establishment Clause simply because it lifts burdens imposed on religious institutions without affording similar benefits to secular entities”).

More fundamentally, the legal regime proposed by Appellants—requiring protections of religious liberty to be coupled with corresponding protections of other liberty interests—would take a wrecking ball to the religious accommodation policies not only of the federal government but of the States. Among the casualties would be Georgia’s own deep-set and commendable policy of accommodating religious exercise. For example, Georgia exempts from civil or criminal discovery any communication to a priest, minister, or rabbi by a “person professing religious faith, seeking spiritual comfort, or seeking counseling.” Ga. Code Ann. § 24-9-22. With a few exceptions, other communications enjoy no such privilege. Georgia’s statute authorizing State and county agencies to require submission to immunization recognizes and creates an exemption for religious objections, though there is no corresponding exemption for secular beliefs. *Id.* § 31-12-3(b). Georgia’s proscription of unlicensed interstate shipment of alcohol does not apply to shipments of “sacramental alcoholic beverages to bona fide religious organizations.” *Id.* § 3-3-32(c). There is no such exemption for alcohol put to non-religious use.

These examples represent the tip of the iceberg. One would be hard-pressed to identify a single facet of American civil society in which religious exercise is not officially set apart in some respect. The corollary of this point is self-evident: these instances of differential treatment are seldom accompanied by concomitant allowances respecting non-religious interests, belief systems, etc.—and *never* by allowances for *all* fundamental rights.

Further, even if Appellants’ radical overhaul of religious accommodation policy were defensible in theory, it would be utterly unworkable in practice. Again, the *Madison* opinion is instructive. The Fourth Circuit explained that the reasoning advanced by the *Cutter* court, and repeated by Appellants here,

would create a test that Congress could rarely, if ever, meet in attempting to lift regulatory burdens on religious entities or individuals. For example, if Congress sought to grant religious organizations an exemption from a particularly demanding legal requirement, then Congress might have to grant similar exemptions to radio and TV stations or secular advocacy groups, absent congressional findings that free exercise rights were somehow more endangered by the law than other rights. Congress would have to make determinations in every instance of what fundamental rights are at risk and to what degree they are at risk, and it would be able only to heighten protection for fundamental rights in a symmetric fashion according to these assessments. The byzantine complexities that such compliance would entail would likely cripple government at all levels from providing any fundamental rights with protection above the Constitution’s minimum requirements.

355 F. 3d at 320.

C. The Threshold Inquiry into a Religious Claimant’s Sincerity Is No More “Entangling” Under RLUIPA than Under the First Amendment.

Finally, Appellants argue that RLUIPA creates an excessive entanglement between government and religion by requiring prison officials to “question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds.” App. Br. 36. But the Supreme Court has squarely rejected the notion that such threshold inquiries into religious beliefs offend the Establishment Clause. For example, in *Mueller v. Allen*, 463 U.S. 388, 403, 103 S. Ct. 3062, 3071 (1983), the Court found no impermissible entanglement in a program that required State officials to determine whether a given textbook taught or inculcated ““religious tenets, doctrines or worship.””

In fact, these sorts of threshold inquiries are no different in kind from those *required* by the Free Exercise Clause, even under the deferential *Turner* standard. *See, e.g., Sutton*, 323 F.3d at 250-51 (holding that a court deciding an inmate’s Free Exercise claim must first determine whether the belief at issue is ““religious”” and ““sincere[.]””); *Martinelli v. Dugger*, 817 F.2d 1499, 1503 (11th Cir. 1987) (same), *abrogated on other grounds by Harris v. Chapman*, 97 F.3d 499 (11th Cir. 1996); *LaFevers v. Saffle*, 936 F.2d 1117, 1119 (10th Cir. 1991) (same). It makes no difference, in this regard, that *Turner* review accords greater deference to prison administrators, because that deference applies only *after* the threshold inquiries

into religious belief have been made. Thus, RLUIPA “does not require prison officials to develop expertise on religious worship,” *Mayweathers*, 314 F.3d at 1069, any more than the well-established *Turner* test does.

RLUIPA in no way merges religious and governmental functions, as in *Board of Education v. Grumet*, 512 U.S. 687, 114 S. Ct. 2481 (1994), where State authority was improperly delegated to a religious group, or *Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415 (2d Cir. 2002), *cert. denied*, 536 U.S. 1187, 123 S. Ct. 1250 (2003), where State officials were tasked with determining compliance with religious dietary laws. RLUIPA neither prescribes religious criteria for the performance of governmental tasks nor requires officials to be involved in religious functions. Nor, as this Court recently noted, does RLUIPA “require ‘pervasive monitoring’ to prevent the government from indoctrinating religion.” *Midrash Sephardi*, 2004 WL 842527, at *23 (quoting *Agostini v. Felton*, 521 U.S. 203, 233, 117 S. Ct. 1997, 2015 (1997)). The statute merely requires the State to make allowance for prison inmates in *their* exercise of *their* religious beliefs. Neither the Supreme Court nor this Court has ever found such a requirement to effect an unconstitutional entanglement.⁷

⁷ It is perhaps conceivable that some inmate claim under RLUIPA would necessitate official involvement in religious exercise rising to the level of excessive entanglement. It is not necessary to parse hypotheticals on this point, however, because in such a case the State could satisfy RLUIPA’s strict scrutiny test by demonstrating an unavoidable entanglement. *See*

CONCLUSION

Section 3 of RLUIPA is a valid exercise of Congress's powers under the Spending and Commerce Clauses and does not contravene the Tenth Amendment or the Establishment Clause. Therefore, Appellants' constitutional challenge to the statute should be rejected, and the district court's ruling should be affirmed.

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Respectfully submitted,

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Widmar v. Vincent, 454 U.S. 263, 271, 102 S. Ct. 269, 275 (1981); *Chabad-Lubavitch v. Miller*, 5 F.3d 1383, 1388 (11th Cir. 1993). In any event, the remote prospect of an unconstitutionally "entangling" claim is not material to Appellants' *facial* challenge to the statute. Clearly RLUIPA does not *necessarily* involve (and in most cases in fact does not involve) an excessive entanglement within the meaning of the controlling case law. And there is no indication that Mr. Benning's specific RLUIPA claim would create an entanglement problem.

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that this brief contains 6,973 words in 14-point proportional font.

April 29, 2004

Richard H. Menard Jr.

CERTIFICATE OF SERVICE

I certify that I caused true copies of the Brief *Amicus Curiae* of Religious and Civil Rights Organizations in Support of Affirmance, and the Rule 26.1 Disclosure Statement of *Amici Curiae*, to be sent this 29th day of April, 2004, to each of the following persons by first-class mail, postage pre-paid:

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