CASE NO. 03-6362

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

IRA W. MADISON,
Plaintiff - Appellant,

and

UNITED STATES OF AMERICA,
Intervenor - Appellant,

v.

R. RITER, *et al.*,
Defendants - Appellees

On Appeal from the United States District Court
for the Western District of Virginia
Honorable James C. Turk (No. 7:01-CV-596)

BRIEF *AMICUS CURIAE* OF VARIOUS RELIGIOUS AND CIVIL RIGHTS ORGANIZATIONS IN SUPPORT OF APPELLANTS AND OF REVERSAL

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INTEREST OF THE *AMICI*

Pursuant to Fed. R. App. P. 29, the organizations listed alphabetically below respectfully submit this brief *amicus curiae* in support of Appellants and reversal. Counsel for all parties have consented to the filing of this brief. Fed. R. App. P. 29(a). Despite their vast religious and political diversity, the various *amici* share a common interest in assuring that the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, *et seq.* ("RLUIPA") is upheld as constitutional.

Aleph Institute ("Aleph") is a not-for-profit, national Jewish educational, humanitarian and advocacy organization founded in 1981 by Rabbi Sholom D. Lipskar at the direction of Rabbi Menachem M. Schneerson, the Lubavitcher Rebbe, of blessed memory. Aleph helps Jewish inmates and their families maintain essential connection 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. Accordingly, Aleph has a direct interest in how religion is treated in state and federal prisons.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, 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 American Civil Liberties Union of Virginia is one of the ACLU's state affiliates.

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. It is the conviction of AJC that those rights will be secure only when the rights of all Americans are equally secure. Recognizing the critical need to provide a remedy for persons confined to state residential facilities who are denied the right to practice their faith and to protect religious institutions against onerous and unfair application of land use regulations, AJC played a crucial role in moving RLUIPA to passage, and joins in this brief in support of the statute's constitutionality.

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, political, religious and economic rights of American Jews. It has taken a special interest in religious liberty issues, including litigation affecting prisoners and houses of worship. It also played an important role in drafting RLUIPA, legislation which protects the interests of those two groups.

The Baptist Joint Committee on Public Affairs ("BJC") is a religious liberty organization, serving various cooperating Baptist conventions and conferences in

the United States. 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. BJC believes that the First Amendment requires substantive, not simply formal, neutrality toward religion, which at times requires treating religion differently.

The Becket Fund for Religious Liberty is an interfaith, nonpartisan public interest law firm dedicated to protecting the free expression of all religious traditions, and the freedom of religious people and institutions to participate fully in public life and public benefits. The Becket Fund litigates in support of these principles in state and federal courts throughout the United States. Accordingly, the Becket Fund has been heavily involved in all forms of RLUIPA litigation on the side of religious adherents – as plaintiffs' counsel and as *amicus curiae*, in prisoner and land-use cases, from New Hampshire to Hawaii. *See* www.rluipa.org. The Becket Fund intends to continue filing lawsuits and *amicus* briefs under RLUIPA until the constitutionality of the Act is established beyond reasonable dispute. In addition, two of the authors of this brief have published a law review article containing a detailed defense of the constitutionality of the Act.[1]

[1] *See* Storzer & Picarello, *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929, 976-1000 (Summer 2001).

The Christian Legal Society, founded in 1961, is a nonprofit interdenominational association of Christian attorneys, law students, judges, and law professors 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 from the government of religion and religious organizations, in the Supreme Court of the United States and in state and federal courts throughout this nation.

People For the American Way ("PFAW") is a nonpartisan, education-oriented, citizen organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism and religious liberty, PFAW now has more than 600,000 members and supporters nationwide. PFAW vigorously supports religious liberty under the First Amendment, including the principles protected by both the Free Exercise and Establishment Clause. For example, PFAW has opposed efforts to improperly divert taxpayer funds to religious institutions. PFAW joins this brief to help vindicate the principle that RLUIPA, which is designed to relieve substantial burdens on religious free exercise, does not violate the Establishment Clause.

Amici believe that their collective experience in this otherwise divisive area of the law enables them to aid the Court in addressing whether RLUIPA is consistent with the Establishment Clause, and so will assist the Court in its resolution of this appeal.

ARGUMENT

I. RLUIPA Section 3 Does Not Violate the Establishment Clause

A. The Decision Below Is Anomalous Among Courts Addressing the Same or Similar Questions and Wholly Disregards the Controlling Precedent of This Court.

Federal courts have consistently upheld RLUIPA against a wide range of constitutional challenges.[2] The court below was the first to hold otherwise, finding that RLUIPA Section 3 violates the Establishment Clause of the First Amendment.

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[2] *See, e.g.*, *Mayweathers* v. *Newland*, 314 F.3d 1062 (9th Cir. 2002) (rejecting Spending Clause, Establishment Clause, Tenth Amendment, Eleventh Amendment, and Separation-of-Powers challenges); *Life Teen, Inc.* v. *Yavapai County*, No. Civ. 01-1490-PCT-RCB (D. Ariz. Mar. 26, 2003) (rejecting Commerce Clause, Enforcement Clause, Separation-of-Powers, Tenth Amendment, and Establishment Clause challenges); *Johnson* v. *Martin*, 223 F. Supp. 2d 820 (W.D. Mich. 2002) (rejecting Commerce, Spending, Establishment Clause, and Tenth Amendment challenges); *Gerhardt* v. *Lazaroff*, 221 F. Supp. 2d 827 (S.D. Ohio 2002) (rejecting Spending Clause, Establishment Clause, and Tenth Amendment challenges); *Charles* v. *Verhagen*, 220 F. Supp. 2d 955 (W.D. Wis. 2002) (same); *Freedom Baptist Church* v. *Township of Middletown*, 204 F. Supp. 2d 857 (E.D. Pa. 2002) (rejecting Enforcement, Commerce, and Establishment Clause challenges); *Gordon* v. *Pepe*, No. 00-10453, 2003 WL 1571712 (D. Mass., Mar. 6, 2003) (rejecting constitutionality challenge based on *Mayweathers* district court decision); *Christ Universal Mission Church* v. *City of Chicago*, No. 01-C-1429, 2002 U.S. Dist. LEXIS 22917, at *24 (N.D. Ill., Sept. 11, 2002) (rejecting constitutionality challenge based on *Freedom Baptist Church*); *Love* v. *Evans*, No. 2:00-CV-91 (E.D. Ark., Aug. 8, 2001) (rejecting constitutionality challenge based on *Mayweathers* district court decision). *See also Hale O Kaula* v. *Maui Planning Comm'n*, 223 F. Supp. 2d 1056, 1072 (D. Haw. 2002) (declining to address constitutionality of RLUIPA in detail, but concluding that "jurisdictional element" of § 2(a)(2)(B) precludes Commerce Clause challenge, and that § 2(a)(2)(C) "codifies the 'individualized assessments' doctrine"); *Cottonwood Christian Center* v. *City of Cypress*, 218 F. Supp. 2d 1203, 1221 n.7 (C.D. Cal. 2002) (noting that "RLUIPA would appear to have avoided the flaws of its predecessor

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Madison v. *Riter*, 240 F. Supp. 2d 566 (W.D. Va. 2003). Since then, one other district court has reached the same result, relying heavily on the language and reasoning of the decision below. *See Al Ghashiyah* v. *Wis. Dept. of Corrections*, 250 F. Supp. 2d 1016 (E.D. Wis. 2003), *certified for interlocutory appeal*, No. 03-8003 (7th Cir., Apr. 25, 2003). The core argument of both opinions is that the Establishment Clause forbids legislative accommodations of religious exercise if they accommodate only religious exercise.

But this argument is premised on a view of the Establishment Clause held by only one sitting Justice of the Supreme Court. *See City of Boerne* v. *Flores*, 521 U.S. 507, 536–37 (1997) (Stevens, J., concurring); *see also Freedom Baptist Church*, 204 F. Supp. 2d at 863–65 (describing implicit rejection of Justice Stevens' position by remaining eight Justices). Accordingly, the same argument has been rejected *in every single reported case* where it has been raised, not only against RLUIPA,[3] but against RLUIPA's broader predecessor, the Religious Freedom Restoration Act, 42 U.S.C. 2000bb, *et seq.* ("RFRA"), both before and

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RFRA, and be within Congress's constitutional authority," citing *Freedom Baptist Church*).

[3] *See, e.g.*, *Mayweathers*, 314 F.3d at 1068-69 (rejecting Establishment Clause challenge to RLUIPA); *Johnson*, 223 F. Supp. 2d at 823-27 (same); *Gerhardt*, 221 F. Supp. 2d at 832, 846-49 (same); *Charles*, 220 F. Supp. 2d at 966-69 (same); *Freedom Baptist Church*, 204 F. Supp. 2d at 863-65 & n.9 (same).

after RFRA was struck down on other grounds in *City of Boerne*.[4] Although the court below noted the existence of some of these decisions, 240 F. Supp. 2d at 570, it neither discussed their reasoning nor attempted to distinguish them anywhere in its lengthy opinion.[5]

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[4] *See, e.g., In re Young*, 141 F.3d 854, 863 (8th Cir.) ("RFRA fulfills each of the elements presented in the *Lemon* test, and we conclude that Congress did not violate the Establishment Clause in enacting RFRA."), *cert. denied*, 525 U.S. 811 (1998); *Mockaitis* v. *Harcleroad*, 104 F.3d 1522, 1530 (9th Cir.) ("The narrow logic of this [Establishment Clause] attack is refuted by the experience of the nation."), *vacated on other grounds*, 521 U.S. 507 (1997); *Sasnett* v. *Sullivan*, 91 F.3d 1018, 1022 (7th Cir. 1996) ("We defer to the Fifth Circuit's analysis of why [RFRA] also does not violate ... the establishment clause of the First Amendment."), *vacated on other grounds*, 521 U.S. 1114 (1997); *E.E.O.C.* v. *Catholic Univ. of America*, 83 F.3d 455, 470 (D.C. Cir. 1996) ("We agree with the Fifth Circuit that RFRA represents nothing more sinister than a 'legislatively mandated accommodation of the exercise of religion.'"); *Flores* v. *City of Boerne*, 73 F.3d 1352, 1364 (5th Cir. 1996) ("RFRA's lifting of 'substantial burdens' on the exercise of religion does not amount to the Government coercing religious activity through 'its own activities and influence.'"), *rev'd on other grounds*, 521 U.S. 507 (1997).

[5] Instead, to promote the appearance of serious division on the Establishment Clause question before it, the court below cited *United States* v. *Sandia*, 6 F. Supp. 2d 1278, 1280 (D.N.M. 1997), where the district court read *City of Boerne* to have invalidated RFRA in its entirety on Separation of Powers grounds. But *Sandia* is irrelevant to the Establishment Clause question, because the court expressly avoided that question. *See id.* at 1281 (declining to address Establishment Clause issue because "the Supreme Court made no mention" of the Fifth Circuit's discussion "of the relationship between RFRA, the Establishment Clause, and the *Lemon* test"). More importantly, *Sandia* is no longer good law, as the Tenth Circuit has since rejected the claim that RFRA violates the Separation of Powers. *Kikumura* v. *Hurley*, 242 F.3d 950, 959-60 (10th Cir. 2001). *Kikumura*, moreover, is consistent with every other federal Court of Appeals to have decided that issue. *See, e.g., Guam* v. *Guerrero*, 290 F.3d 1210, 1220 (9th Cir. 2002) (rejecting Separation of Powers challenge to RFRA); *In re Young*, 141 F.3d at 861–63 (rejecting Separation of Powers and Establishment Clause challenges to RFRA).

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Notably, the court below failed to cite even once – not to mention discuss or attempt to distinguish – *Ehlers-Renzi* v. *Connelly School of the Holy Child*, 224 F.3d 283 (4th Cir. 2000), *cert. denied*, 531 U.S. 1192 (2001), where this Court rejected an Establishment Clause challenge to a law that had the purpose and effect of alleviating burdens on religious exercise, and only religious exercise. *Id.* at 291 (rejecting argument that "the exemption impermissibly advances religion by 'providing religious organizations an exclusive benefit.'").[6]

To be sure, the true test of RLUIPA under the Establishment Clause is whether the Act satisfies the three-part test of *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-13 (1971). But the circumstances of the decision below strongly suggest the result of that analysis – not only has the district court failed to extend due

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See also Adams v. *C.I.R.*, 170 F.3d 173, 175 n.1 (3d Cir. 1999) ("In general, courts that have addressed the question of constitutionality have found that RFRA is constitutional as applied to the federal government."); Thomas C. Berg, *The Constitutional Future of Religious Freedom Legislation*, 20 U. ARK. LITTLE ROCK L.J. 715, 727-48 (1998) (arguing that RFRA is constitutional as applied to the federal government).

[6] The court below also disregarded the decisions of two other Courts of Appeals that rejected similar Establishment Clause challenges to similar laws. *See Boyajian* v. *Gatzunis*, 212 F.3d 1 (1st Cir. 2000) (rejecting Establishment Clause challenge to state law and town ordinance that prohibited municipal authorities from excluding religious uses of property from any zoning area); *Cohen* v. *Des Plaines*, 8 F.3d 484 (7th Cir. 1993) (rejecting Establishment Clause challenge to 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).

deference to an act of the federal *legislature*,[7] it appears to have ignored the decisions of this Court and of the federal *judiciary* more broadly.

B. RLUIPA Section 3 Satisfies All Three Elements of the *Lemon* Test.

Courts so consistently uphold RLUIPA and similar laws because they satisfy all three elements of the *Lemon* test: (1) RLUIPA has a secular purpose, to minimize government interference with religious exercise; (2) it does not have the primary effect of advancing religion, because alleviating substantial burdens on religious exercise (even exclusively, as religious accommodation laws do) does not involve the government *itself* advancing religion; (3) it does not excessively entangle government with religion, because its purpose and effect is exactly the opposite – to diminish government interference with religious exercise. *See Ehlers-Renzi*, 224 F.3d at 288 (applying *Lemon* test after noting that it has been "recast" in funding cases but not overruled).

In other words, RLUIPA does not represent an "Establishment" of religion because it does not entail "'sponsorship, financial support, and active involvement

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[7] *See United States* v. *Morrison*, 529 U.S. 598, 606 (2000) ("Due respect for the decisions of a coordinate branch of government demands that we invalidate a congressional enactment only upon a *plain showing* that Congress has exceeded its constitutional bounds.") (emphasis added). *See also Walters* v. *Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985) ("Judging the constitutionality of an Act of Congress is properly considered 'the gravest and most delicate duty that this

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of the sovereign in religious activity.'" *Ehlers-Renzi*, 224 F.3d at 287 (quoting *Walz* v. *Tax Comm'n*, 397 U.S. 664, 668 (1970)). Instead, by sharp contrast, RLUIPA relieves substantial regulatory burdens on religious exercise, and so "follows the best of our traditions." *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952).

1. RLUIPA has a secular purpose.

First, RLUIPA was passed for the secular government purpose of "protect[ing] the free exercise of religion from unnecessary government interference." 146 CONG. REC. E1234, E1235 (daily ed. July 14, 2000) (statement of Rep. Canady); *Mayweathers*, 314 F.3d at 1068. As the Supreme Court has repeatedly made clear, it is a "proper [government] purpose [to] lift[] a regulation that burdens the exercise of religion." *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327, 338 (1987); *id*. at 339 (noting the "permissible purpose of limiting governmental interference with the exercise of religion"). Not only is it permissible for government to accommodate religious exercise, it is commendable and sometimes mandatory.[8]

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Court is called upon to perform.'") (quoting *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927))).

[8] *Amos*, 483 U.S. at 334 ("This Court has long recognized that the government may (and sometimes must) accommodate religious practice and that it may do so without violating the Establishment Clause."); *Lynch* v. *Donnelly*, 465 U.S. 668, 673 (1984) (noting that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.... Anything
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Indeed, legislation having this purpose is all the more common — and necessary — since the Supreme Court's decision in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), made clear that people of faith should turn in the first instance to the legislative and executive branches, rather than the courts, for the protection of religious liberty:

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

Smith, 494 U.S. at 890.

Thus, for example, while the Court in *Smith* rejected the claim that the Free Exercise Clause mandated an exemption to drug laws, the Court noted with approval that accommodations for religious peyote use have been made by legislation. *Id*. (noting that "a number of States have made an exception to their drug laws for sacramental peyote use."). Such accommodations are constitutional, even though others wishing to use peyote for secular reasons are not offered the

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less would require the 'callous indifference' we have said was never intended by the Establishment Clause."); *Zorach*, 343 U.S. at 314 (accommodating religious exercise "follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.").

exemption.[9] Similarly, after the Supreme Court ruled in *Goldman* v. *Weinberger*, 475 U.S. 503 (1986), that an Air Force psychotherapist had no right under the Free Exercise Clause to wear a yarmulke while on duty, Congress responded by statutorily enacting such a right in the National Defense Authorization Act for Fiscal Years 1988 and 1989, 10 U.S.C. § 774, a permissible accommodation of the religious liberty of service members.[10]

Accordingly, the court below acknowledged in a footnote that "the stated secular purpose of RLUIPA, to protect the free exercise of religion, is a permissible secular purpose." *Madison*, 240 F. Supp. 2d at 572 n.4.[11]

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

[10] *See Texas Monthly* v. *Bullock*, 489 U.S. 1, 18 (1989) (plurality opinion of Brennan, Marshall, and Stevens) ("[I]f the Air Force provided a sufficiently broad exemption from its dress requirements for servicemen whose religious faiths commanded them to wear certain headgear or other attire, *see Goldman* v. *Weinberger*, . . . that exemption would not be invalid under the Establishment Clause even though this Court has not found it to be required by the Free Exercise Clause." (citation omitted)).

[11] If this secular purpose is somehow inadequate, there is at least one other secular purpose for RLUIPA's alleviating burdens on religion in prison – to promote rehabilitation. *See Kikumura*, 242 F.3d at 961 (discussing legislative history).

2. RLUIPA does not have the primary effect of advancing religion.

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

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

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

The court below nonetheless faulted RLUIPA because it accommodates religious exercise without also accommodating other fundamental rights. *See, e.g.*, *Madison*, 240 F. Supp. 2d at 574-75 ("RLUIPA singles out religious rights from [other] fundamental rights … and establishes a drastically increased level of protection for such rights."); *id.* at 576 ("The singling out of religious belief as the one fundamental right of prisoners deserving of legislative protection rejects any

notion of congressional neutrality in the passage of RLUIPA."); *id.* at 578 (faulting RLUIPA for "privileging religious rights over all other fundamental rights").

But the Supreme Court — and the litany of lower courts willing to follow it — have squarely rejected this very same argument, over and over again.[12] Nor could it be otherwise, as the district court's holding 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 (1968) – *not* between "Religious Rights" and "All Other Fundamental Rights." *Madison,* 240 F. Supp. 2d at 572. Certainly government cannot prefer the religious over the nonreligious: the state cannot imprison those who refuse to

[12] *See, e.g.*, *Amos,* 483 U.S. at 338 ("Where . . . government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities."); *Mayweathers,* 314 F.3d at 1069 ("The statute does not violate the Establishment Clause just because it seeks to lift burdens on religious worship in institutions without affording corresponding protection to secular activities or to non-religious prisoners."); *Johnson,* 223 F. Supp. 2d at 826 (concluding that, after *Amos,* "it does not follow, as Defendants argue, that merely because Congress has acted to provide religious activity with special protection and has not done the same for secular activity, that Congress has advanced religion."); *Gerhardt*, 221 F.Supp.2d at 847 ("Finally, the [*Amos*] Court rejected the notion that a law which singles out religions for the benefit it confers is *per se* unconstitutional."). *See also Freedom Baptist Church,* 204 F. Supp. 2d at 865 n.9 (noting that *Amos* "constitutes something of a silver bullet against any residual Establishment Clause concerns").

believe in a Creator, or withhold welfare checks from the atheist. But the government can – and often does – protect a single fundamental right in a particular piece of legislation or regulation, and the right to free religious exercise is no exception. Such government actions do not "prefer" religion over irreligion; instead, they simply protect or reinforce the *right* to religious exercise, just as they would any other right.

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

Third, there are practical problems. On the lower court'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.[13] Another strange

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

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.[14]

Finally, there is an historical problem. Laws that exist solely to accommodate religious exercise are so numerous because they represent a time-honored American tradition.[15] And, as discussed *supra*, accommodations by the political branches are all the more imperative since *Employment Division* v. *Smith* narrowed the role of the judiciary in this area. In other words, if legislation that singles out religious exercise for accommodation has the impermissible effect of

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[14] Moreover, as Plaintiff-Appellant has amply explained, *see* Brief of Appellant Ira W. Madison, at pp. 25-28, the formalistic symmetry required by the lower court's analysis would require a radical change to legislative and regulatory practice.

[15] *See Bd. of Educ. of Kiryas Joel Village Sch. Dist.* v. *Grumet*, 512 U.S. 687, 705 (1994) ("Our cases leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice."); *Walz*, 397 U.S. at 673 ("Few concepts are more deeply embedded in the fabric of our national life … than for the government to exercise *at the very least* this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference.") (emphasis added); *Zorach*, 343 U.S. at 314 (accommodating religious exercise "follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs."). *But see Madison*, 240 F. Supp. 2d at 577 n.9 (attempting to distinguish permissible accommodation in *Amos* on the ground of "constitutional necessity" under the Free Exercise Clause).

advancing religion, then the *Smith* Court's invitation to pass such legislation, *see Smith*, 494 U.S. at 890, would appear to be an inducement to violate the Establishment Clause.

Accordingly, all the courts to address "effects" challenges to RLUIPA – other than the decision below and the heavily overlapping *Al Ghashiyah* decision – have rejected them. *See, e.g.*, *Mayweathers*, 314 F.3d at 1068-69; *Johnson*, 223 F. Supp. 2d at 825-26; *Gerhardt*, 221 F. Supp. 2d at 846-49; *Charles*, 220 F. Supp. 2d at 967-69; *see also Freedom Baptist Church*, 204 F. Supp. 2d at 865 n.9 (rejecting Establishment Clause challenge to RLUIPA's land use provisions).

3. RLUIPA does not foster excessive entanglement with religion.

Although it is not formally styled as an entanglement problem, the court below criticized RLUIPA because avoiding substantial burdens "requires a prison to measure 'the effects of ... action on an objector's spiritual development.'" *Madison*, 240 F. Supp. 2d at 579 (quoting *Smith*, 494 U.S. at 885).

But this argument proves too much, for then government could never take account of religious belief for the purpose of accommodation, even under the more deferential test under *Turner* v. *Safley*, 482 U.S. 78 (1987). *See Johnson*, 223 F. Supp. 2d at 826–27; *Charles*, 220 F. Supp. 2d at 967; *see also Mockaitis*, 104 F.3d at 1530 ("Of course, application of RFRA, like the application of the First Amendment itself and any objection made under this amendment, requires a court

to determine what is a religion and to define an exercise of it. There is no excessive entanglement."). Finding excessive entanglement here would contradict not only common sense, but the Supreme Court's emphasis that "[t]here is ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.'" *Amos*, 483 U.S. at 334.

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

Similarly, far from increasing entanglement, *see Madison*, 240 F. Supp. 2d at 578-79, RLUIPA's definition of "religious exercise" tends to decrease it. To begin with, defining "religious exercise" to "include any exercise of religion, whether or not compelled by, or central to, a system of religious belief," RLUIPA § 8(7)(A), 42 U.S.C. § 2000cc-5(7)(A), precisely tracks Supreme Court precedent, and so entails no greater entanglement problem than the ordinary application of Free Exercise doctrine. Moreover, that doctrine itself is designed to minimize

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

In sum, because RLUIPA – like RFRA before it, as well as a broad range of legislative accommodations of religion "follow[ing] the best of our traditions," *Zorach*, 343 U.S. at 314 – satisfies all three elements of the *Lemon* test, the Act should be found not to violate the Establishment Clause.[16]

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[16] Because RLUIPA satisfies all three elements of the *Lemon* test, it cannot reasonably be viewed as an endorsement of religion. *See Mitchell* v. *Helms*, 530 U.S. 793, 835 (2000). Thus, the district court's complaints about RLUIPA that draw on endorsement jurisprudence must fail. *See, e.g.*, *Madison*, 240 F. Supp. 2d at 580 (quoting various O'Connor concurrences warning against second-class citizenship for the nonreligious). Here again, the lower court's argument proves too much – by definition, *every* law that accommodates only religious exercise treats conduct more leniently when it is religiously motivated, whether in the prison context or otherwise. Thus, unless *all* religion-only accommodations are unconstitutional on that basis, the lower court's various hypotheticals to illustrate the inequity of religious accommodation in prison lose their force. *See, e.g.*, *Madison*, 240 F. Supp. 2d at 576; *id.* at 579-80.

CONCLUSION

For the foregoing reasons, the decision of the District Court should be reversed.

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