No. 03-9877

IN THE
Supreme Court of the United States

Jon B. Cutter, et al.,

Petitioners,

v.

Reginald Wilkinson, et al.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF OF AMICI CURIAE SENATORS ORRIN G. HATCH AND EDWARD M. KENNEDY IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amicus Orrin G. Hatch, Chairman of the Senate Committee on the Judiciary, has been a United States Senator for 28 years, and has served on the Committee for that entire period, including three times as Chairman. Amicus Edward M. Kennedy has been a United States Senator for 42 years, during which time he has continuously served on the Committee on the Judiciary, including as Chairman from 1979-1981.

Both amici have been ardent defenders of religious liberty throughout their tenure in the Senate. They were sponsors of the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb *et seq.*, and were the two principal Senate sponsors of the statute that is challenged in this case, the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), Pub. L. No. 106-274, 114 Stat. 803, 42 U.S.C. §§ 2000cc, *et seq.* *See* Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000, 146 Cong. Rec. S7774-76 (daily ed. July 27, 2000) ("Joint Statement").

Although amici have a great interest in the Establishment Clause question on which this Court granted certiorari, that question is effectively addressed in the briefs of petitioners, the United States, and other amici. In this brief, amici will address the questions of congressional power that the respondents have announced they will ask this Court to resolve—questions concerning which the amici have long experience and considerable interest.

INTRODUCTION

Following this Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), Congress overwhelmingly passed RFRA, which as originally enacted prohibited *any* government

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, amici curiae state that no counsel for a party authored any part of this brief, and no person or entity, other than amici curiae and their counsel, made a monetary contribution to the preparation or submission of this brief.

within the United States from "substantially burden[ing]" a person's exercise of religion, unless the government could demonstrate that imposing the burden was "in furtherance of a compelling governmental interest" and was "the least restrictive means of furthering that compelling governmental interest," 42 U.S.C. § 2000bb-1.

In *City of Boerne v. Flores*, 521 U.S. 507 (1997), this Court held that Congress lacked the power under section 5 of the Fourteenth Amendment to apply RFRA to state and local governments. *City of Boerne* did not affect the application of RFRA to the federal government. Thus, for more than a decade, RFRA has modified *all* federal law, statutory or otherwise, *see* 42 U.S.C. §§ 2000bb-3(a), 2000bb-2(1)-(2)—including the administration of all laws within the federal prison system, where application of RFRA remains both constitutional and manageable (as the federal government concedes).[2]

Following *City of Boerne*, Congress and the President gave long and careful consideration to that decision and to other recent decisions of this Court respecting congressional power and religious liberty. Congress held nine hearings, in which numerous witnesses addressed in great detail both the need for religious liberty legislation, and the constitutional limits of Congress's powers to address the problem at the state and local level. The congressional sponsors of RLUIPA worked very closely with the Department of Justice to carefully craft a statute that comports with this Court's doctrines respecting the First Amendment and Congress's enumerated powers.[3]

In 2000, Congress without recorded dissent enacted RLUIPA, which is a much more circumscribed and targeted statute than RFRA. It does not apply to *all* state and local law. Instead, RLUIPA's substantive provisions address two discrete contexts in which Congress found that state and local

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[2] *See, e.g.*, *O'Bryan v. Bureau of Prisons*, 349 F.3d 399 (7th Cir. 2003); 146 Cong. Rec. at S7776 (Letter from Assistant Attorney General Robert Raben to the Hon. Orrin Hatch (July 19, 2000)) ("Raben Letter").

[3] *See* Raben Letter, *supra*.

governments often impose unwarranted and substantial burdens on religious exercise. RLUIPA section 2, which is not at issue here, protects the exercise of religion against certain substantial burdens, discriminations and exclusions imposed by zoning and landmark laws. Section 3, the statutory provision at issue in this case, protects the rights of institutionalized persons to exercise their religion free from substantial burdens imposed by "frivolous or arbitrary" governmental restrictions. Joint Statement, 146 Cong. Rec. at S7775.

Specifically, section 3(a) provides that no government shall impose a substantial burden on the religious exercise of a person "residing in or confined to an institution," unless the government demonstrates that imposition of the burden on that person is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000cc-1(a).[4]

RLUIPA section 3(b), *id.* § 2000cc-1(b) specifies that section 3(a)'s substantive rule applies *only* where at least one of two prerequisites is met:

First, invoking its power under the *Spending Clause*, U.S. Const. art. I, § 8, cl. 1, Congress provided in section 3(b)(1) that the substantive limitation on state action in section 3(a) applies where the substantial burden on religious exercise "is imposed in a program or activity that receives Federal financial assistance." 42 U.S.C. § 2000cc-1(b)(1). Section 8(6) of RLUIPA, 42 U.S.C. § 2000cc-5(6), specifically incorporates by reference the definition of "program or activity" used in Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-4(a), pursuant to which the phrase includes "all of the operations of" certain entities, including "a department, agency, special purpose district, or other instrumentality of a State or of a local government."

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[4] Section 3(a) incorporates by reference the definition of "institution" found in 42 U.S.C. § 1997, which includes certain state-owned, operated and managed facilities and institutions, including, inter alia, prisons and other correctional facilities; facilities for persons who are mentally ill, disabled, or retarded, or chronically ill or handicapped; and institutions providing skilled nursing, intermediate, long-term, custodial or residential care.

Second, invoking its power under the *Commerce Clause*, U.S. Const. art. I, § 8, cl. 3, Congress provided in section 3(b)(2) that the substantive limitation on state action found in section 3(a) applies where a plaintiff demonstrates that the substantial burden on religious exercise "affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes." 42 U.S.C. § 2000cc-1(b)(2). However, Congress also added a unique affirmative defense for the benefit of a state or local RLUIPA defendant. Pursuant to that provision, the Commerce Clause subsection shall not apply if the government can demonstrate that alleviating all substantial burdens from "similar" religious exercise across the nation would not, in the aggregate, lead to a *substantial* effect on interstate, foreign or Indian commerce. RLUIPA section 4(g), 42 U.S.C. § 2000cc-2(g).

SUMMARY OF ARGUMENT

If this Court chooses to consider the alternative arguments for affirmance that the Ohio respondents have indicated they will present, it should hold that Congress was authorized to enact RLUIPA section 3 under both its Spending Clause and Commerce Clause powers.

I. The Spending Clause provisions of RLUIPA section 3 impose *general* conditions upon recipients of federal funds—conditions that apply across a wide array of federal expenditures. This Court has upheld similar "cross-cutting" funding conditions in cases such as *Oklahoma v. U.S. Civil Service Comm'n*, 330 U.S. 127 (1947), and *Lau v. Nichols*, 414 U.S. 563 (1974). The particular agency-wide scope of RLUIPA section 3's coverage derives from a series of important civil rights laws (including Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and section 504 of the Rehabilitation Act of 1973) that impose restrictions on all of the operations of a particular state agency that receives federal aid. Like those statutes, however, section 3 does not apply to a state agency operating prisons merely because the State as a whole, or some other state agency, receives federal aid.

Section 3 satisfies all possible requirements for permissible exercise of the conditional spending power. The condition it imposes on public agencies serves the general welfare by facilitating religious exercise in an environment where such fundamental freedom is commonly constrained. It is well-tailored to the government's interest in not permitting its subsidies to be used in any way to facilitate or subsidize unnecessary burdens on religious freedom. Section 3 moreover provides States with clear notice of the standards of conduct by which an agency must abide if it receives federal funds. Section 3 does not induce state recipients of aid to violate the constitutional rights of others. And the financial inducement offered by Congress to States (and to the Ohio Department of Rehabilitation and Corrections ("ODRC"), in particular) is not so "coercive" as to pass the point at which "pressure turns into compulsion."

II. The Commerce Clause provisions of section 3 are also a permissible exercise of Congress's article I powers.

A. RLUIPA subsection 3(b)(2) incorporates a "jurisdictional element" that requires proof of an effect upon interstate, foreign or Indian commerce in every case. Such an element is common to many important federal statutes, including the Hobbs Act, the constitutionality of which this Court has upheld. This Court has repeatedly acknowledged that such an "affects commerce" element is a means by which Congress may invoke its full authority under the Commerce Clause. Such an element ensures *facial* compliance with the Commerce Clause by limiting the statute's reach to a discrete set of cases that have an explicit and concrete connection with or effect upon interstate commerce—in contrast to the provisions this Court declared invalid in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), both of which lacked such a jurisdictional element. Indeed, RLUIPA goes one significant step beyond what is necessary to ensure its constitutionality: It contains a unique affirmative defense for the benefit of state or local RLUIPA defendants, which forecloses application under section 3's Commerce Clause subsection if the government demonstrates that alleviating all substantial burdens

from "similar" religious exercise would not, in the aggregate, *substantially* affect interstate, foreign or Indian commerce.

In all events, RLUIPA is plainly constitutional as applied to a discrete class of claims at issue in these cases, involving requests for religious items that plaintiffs allege can only be obtained through interstate commercial transactions: prohibiting prisoners from obtaining these items quite literally prevents specific transactions in interstate commerce.

B. The prohibitory commands of the commerce provisions of section 3 do not violate this Court's "anti-commandeering" doctrine. Those provisions do not require States to enact any laws or regulations or to assist in the enforcement of *federal* statutes regulating private individuals; and they do not "*require* the States in their sovereign capacity to regulate their own citizens." *Reno v. Condon*, 528 U.S. 141, 151 (2000) (emphasis added). A contrary holding would implicate numerous federal laws specifically limiting state regulation, including many deregulatory preemption statutes and doctrines.

ARGUMENT

Amici agree with petitioners and with the United States that section 3 of RLUIPA does not violate the Establishment Clause, because it alleviates substantial, government-imposed burdens on religious exercise without imposing significant burdens on other private parties. *See Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).[5] Respondents have indicated (Br. in Resp. 14-20)

[5] Respondents contend that some RLUIPA accommodations will endanger the safety of prison guards and fellow prisoners. Br. in Resp. 12. Even if that assumption were correct, the mere possibility of such as-applied problems cannot possibly be grounds for invalidating section 3 on its face. In any event, the assumption is mistaken, for two reasons: First, RLUIPA does not appear to impose upon Ohio prison officials any requirements of religious accommodation greater than those the Ohio Constitution already imposes of its own force. *See Humphrey v. Lane*, 728 N.E.2d 1039, 1043, 1045 (Ohio 2000). Accordingly, it is unlikely that RLUIPA would be the source of any of the risks that respondents identify. Second, even assuming arguendo

that they will ask this Court to consider whether the Spending and Commerce Clauses authorized Congress to enact section 3, in the event this Court holds that section 3 does not facially violate the Establishment Clause. The Court should decline that invitation.

The court of appeals based its decision solely upon the Establishment Clause and did not consider the questions of congressional power (Pet. App. A at 8). This Court "generally do[es] not address arguments that were not the basis for the decision below." *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996)—a practice the Court has followed in cases where it has reversed a lower court's judgment declaring a federal statute invalid, where alternative grounds for invalidation had not been addressed below. *See, e.g.*, *Pierce County v. Guillen*, 537 U.S. 129, 148 n.10 (2003); *Ashcroft v. ACLU*, 535 U.S. 564, 585-86 (2002).

Nor are the questions of congressional power independently worthy of this Court's review at this time. The three courts of appeals to have opined on the matter have held that RLUIPA section 3 is permissible Spending Clause legislation,[6] and therefore neither they, nor any other court of appeals, has had

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that a RLUIPA accommodation *would* result in an additional, serious safety risk, state defendants in such a case would be able to prevail quite easily as a statutory matter, because in determining whether a state institution has a narrowly tailored, compelling justification for denying the requested exemption, courts should "'continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.'" Joint Statement, 146 Cong. Rec. at S7775 (quoting RFRA Senate Report, S. Rep. No. 103-111, at 10 (1993)).

[6] *Mayweathers v. Newland*, 314 F.3d 1062, 1066-68 (9th Cir. 2002), *cert. denied sub nom. Alameida v. Mayweathers*, 124 S. Ct. 66 (2003); *Charles v. Verhagen*, 348 F.3d 601, 606-10 (7th Cir. 2003); *Benning v. Georgia*, No. 04-10979, 2004 WL 2749172, at *3-*7 (11th Cir. Dec. 2, 2004).

reason to address Congress's authority to impose section 3 directly under the Commerce Clause.

However, if the Court does address questions of Congress's authority to enact section 3, it should hold that section 3 is a proper exercise of Congress's enumerated article I powers.

I. The Spending Clause Authorizes RLUIPA Sections 3(a) and 3(b)(1).

Pursuant to its power to "provide for the common Defence and general Welfare of the United States," U.S. Const. art. I, § 8, cl. 1, Congress has "wide latitude" to impose conditions on States' receipt of federal funds, *United States v. American Library Ass'n*, 539 U.S. 194, 203 (2003) (plurality opinion), even where such conditions influence a State to act in a way that Congress could not directly compel absent the funding condition. *See South Dakota v. Dole*, 483 U.S. 203, 207 (1987); *New York v. United States*, 505 U.S. 144, 167, 171-73 (1992).

RLUIPA itself does not authorize any federal funding. Instead, RLUIPA section 3(a), as applied by section 3(b)(1), establishes a cross-cutting, or background, condition that applies to the receipt of *all* federal funds by a particular state agency, a condition intended to ensure that federal monies are not used to subsidize, or facilitate, certain disfavored conduct—in this case, unnecessary governmental imposition of substantial burdens on religious exercise. This Court has long upheld Congress's power to enact laws imposing such cross-cutting funding conditions. *E.g.*, *Oklahoma v. U.S. Civil Serv. Comm'n*, 330 U.S. 127 (1947); *Lau v. Nichols*, 414 U.S. 563 (1974).[7]

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[7] *See also Board of Educ. of Westside Community Schools v. Mergens ex rel. Mergens*, 496 U.S. 226, 241 (1990) (requirement of Equal Access Act, 20 U.S.C. § 4071(a), that public secondary schools that receive any federal financial assistance cannot engage in certain forms of discrimination with respect to "noncurriculum-related" student groups, "is the price a federally funded school must pay if it opens its facilities to noncurriculum-related student groups"). Last Term, in *Sabri v. United States*, 124 S. Ct. 1941 (2004), this Court broadly upheld the constitutionality of 18 U.S.C. § 666—not directly on Spending Clause grounds, but on the basis of Congress's

In this regard, RLUIPA is specifically patterned upon four other important civil rights statutes: Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, 2000d-4(a) (prohibiting discrimination on the basis of "race, color, or national origin" in "any program or activity receiving Federal financial assistance"); Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681(a), 1687(1)(a) (barring discrimination on the basis of sex in any "education program or activity receiving Federal financial assistance"); section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a)-(b) (prohibiting discrimination on the basis of disability in "any program or activity receiving Federal financial assistance"); and the Age Discrimination Act of 1975, 42 U.S.C. §§ 6102, 6107(4) (proscribing age discrimination under "any program or activity receiving Federal financial assistance").[8]

The upshot of each of these statutes is that if a state chooses to permit one of its agencies or departments to receive federal aid, the state thereby knowingly consents to the requirement that, in *all* of the operations *of that particular agency*, state conduct is constrained by (at least) the restrictions on conduct contained in these five statutes.[9]

"corresponding authority under the Necessary and Proper Clause, Art. I, § 8, cl. 18, to see to it that taxpayer dollars appropriated under [the Spending] power are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars." *Id.* at 1946. The decision in *Sabri* suggests that cross-cutting spending-condition statutes such as section 3 of RLUIPA might also be fruitfully viewed through the lens of the Necessary and Proper Clause, which empowers Congress to employ "rational means" to safeguard congressionally preferred uses of federal dollars. *Id.*

[8] Similarly, the Equal Access Act, 20 U.S.C. § 4071(a), applies its condition to "secondary schools" receiving any federal assistance. *See* note 7, *supra.*

[9] In the case of RLUIPA, the funding condition does not apply to all state agencies that receive federal aid, because by its terms it applies only to those agencies or departments that house or confine persons in a statutorily specified institution. *See supra* at 3 & note 4.

RLUIPA—like the civil-rights statutes on which it is modeled—satisfies this Court's requirements for the permissible exercise of Congress's conditional spending power.

1. *General Welfare*. Even if the express "general Welfare" requirement of the Spending Clause is judicially enforceable, *but see Dole*, 483 U.S. at 207 n.2, it is plainly satisfied here: RLUIPA section 3 furthers the general welfare by alleviating substantial, unwarranted government-imposed burdens on individuals' religious exercise in settings where the exercise of the fundamental human freedom to worship or exercise faith is often severely constrained—namely, in state-run institutions, including prisons.

2. *Relatedness*. This Court's cases "have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" *Dole*, 483 U.S. at 207 (citation omitted). RLUIPA exemplifies Congress's power to specify the conditions under which recipients can spend federal money. Just as Congress has an important interest in assuring that none of its funds are "'spent in any fashion which encourages, entrenches, subsidizes, or results in'" discrimination, *Lau*, 414 U.S. at 569 (quoting Sen. Humphrey), or on partisan political activity, *see Oklahoma v. CSC*, 330 U.S. at 143, so, too, "Congress has a strong interest in making certain that federal funds do not subsidize conduct that infringes individual liberties, such as the free practice of one's religion." *Mayweathers v. Newland*, 314 F.3d 1062, 1067 (9th Cir. 2002), *cert. denied sub nom. Alameida v. Mayweathers*, 124 S. Ct. 66 (2003).

Respondents have argued that the condition RLUIPA imposes is "unrelated 'to the federal interest in *particular* national projects or programs,' " *Dole*, 483 U.S. at 207, because RLUIPA does not require any *direct* connection between its restrictions and any specific funding streams that ODRC receives—for example, none of ODRC's federal funds "have any relation to religion" or to prisoners' religious rights. Defendants'-Appellants' Final Opening Br. (6th Cir.) ("Def. CTA6 Br.") 37-41. This argument misapprehends the nature of

the federal interests at stake when Congress imposes cross-cutting funding conditions—and prohibitory conditions on receipt of federal funds in general. When Congress insists upon such conditions in a statute such as RLUIPA (or Title VI, Title IX, the Equal Access Act, etc.), it announces a federal interest that follows with each federal dollar spent. Such conditions generally are designed, not so much to advance or complement the objectives of a *particular* federal spending program, but instead, as a permissible means of broadly controlling how federal moneys are to be expended. Whatever federal interests a particular funding program might otherwise serve, the condition imposed by RLUIPA (or a similar statute) *also* serves the federal interest in avoiding the use of federal funds to subsidize the imposition of substantial, unjustified burdens on religious exercise.[10]

To require a nexus between the "subject-matter" of a funding statute and every cross-cutting funding condition, as a matter of constitutional law, would make little sense. Where Congress does not wish to subsidize disfavored state conduct—be it burdens on religious exercise, discrimination on the basis of race, sex, or disability, or whatever else—there is no reason to read the Constitution to require Congress to do so. This is true whatever the "principal" purpose of any particular federal funding stream might be.

Respondents have also argued that the breadth of RLUIPA's "program or activity" definition—which, like the cognate provisions in Title VI, the Rehabilitation Act, etc., extends to all of the operations of a recipient state agency—is too broad to pass constitutional muster. Def. CTA6 Br. 41-45. As explained above, however, the condition at issue here is limited to those agencies in which the State has decided to receive federal funds. This line of demarcation is a reasonable

[10] In other words, such a cross-cutting condition achieves precisely the same result as if Congress attached the "prohibitory" condition (*e.g.*, "do not discriminate on the basis of disability") to each and every disparate funding statute. Nothing in the Constitution requires Congress to act in such a piecemeal fashion.

one for Congress to draw, because as this Court recognized last term in addressing a similar broad nexus test in *Sabri v. United States*, 124 S. Ct. 1941, 1946 (2004), money is fungible: Thus, financial aid to a particular state agency generally will be functionally indistinguishable from—and will "free up"—other funds within that agency's budget,[11] and will make it difficult for the federal government to track exactly where federal money ends up, and what it subsidizes, within an institution or agency. These problems are especially acute in the case of general aid and "block grants," such as the State Criminal Alien Assistance Program grants that the ODRC receives, J.A. 320-21, in which federal aid is authorized for a wide range of activities within a broadly defined functional area, with recipients having substantial discretion where to allocate resources. Such assistance inevitably has economic "ripple effects" throughout the agency and the use of it cannot be effectively traced. Thus, it makes perfect sense for Congress to impose spending conditions on all of the funds delivered to the state agency or department.

Citing this Court's decisions in *FCC v. League of Women Voters* ("*LWV*"), 468 U.S. 364, 399-401 (1984), and *Rust v. Sullivan*, 500 U.S. 173, 196-199 (1991), respondents argued in the court of appeals that the coverage of RLUIPA section 3(a) creates a sort of "unconstitutional condition," barring a funding recipient from using even *wholly nonfederal funds* to finance activities prohibited by the funding condition. Def. CTA6 Br. 41-45. But *Rust* and *LWV* each involved the First Amendment rights of *private* parties, and little, if any, application to the

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[11] *See, e.g.*, *Civil Rights Restoration Act of 1987: Hearings Before the Senate Comm. on Labor & Human Resources*, 100th Cong., 1st Sess. 321-22 (1987) (David S. Tatel, former Director of Health, Education and Welfare Department's Office for Civil Rights) ("[t]here is absolutely no reason why a person who is discriminated against in . . . the program which has more local funds because of the receipt of federal financial assistance elsewhere in the institution . . . should receive any less protection than the person discriminated against in the program or activity directly receiving the federal financial assistance").

question whether Congress has properly imposed a condition on a *state entity*'s receipt of federal funds.[12]

In any event, even if the inapposite unconstitutional conditions doctrine of *LWV* and *Rust* applied with full force in this context, RLUIPA would be fully consistent with those decisions. In those cases, the Court explained that although Congress may not flatly prohibit a private funding recipient from using nonfederal funds to engage in unauthorized expression—even as a prophylactic rule in the service of protecting the use of the federal funds, *see LWV*, 468 U.S. at 400—Congress may require the funding recipient to guarantee a strict degree of separation between funded and unfunded activities in order to ensure that the federal funds do not subsidize the disfavored speech. Congress may, for example, require the recipient to form an affiliate organization—which must be kept "physically and financially separate" from the organization that receives federal funds, *Rust*, 500 U.S. at 180, 187-190—to receive and spend money from nonfederal sources to engage in the expressive activities that Congress disfavors.[13]

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[12] This Court has repeatedly noted that "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take," *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Board*, 527 U.S. 666, 686 (1999)—an unqualified proposition that would be strikingly out of place in the context of the First Amendment. Indeed, in *LWV* itself, the Court carefully distinguished the First Amendment unconstitutional conditions doctrine from the more deferential scrutiny that the Court applies in cases involving conditions placed on *public* recipients of federal funds. 468 U.S. at 401 n.27 (distinguishing *Oklahoma v. CSC*).

[13] In *Locke v. Davey*, 540 U.S. 712, 124 S. Ct. 1307 (2004), the Court went so far as to approve an analogous segregation requirement as applied to an *individual*'s choice of undergraduate studies. The Court held that the State of Washington not only could decline to permit its scholarships to be used for the study of devotional theology, but also that if students wished to pay for such devotional studies with *non-scholarship* funds, the State could require them to "use their scholarship to pursue a secular degree at a different institution from where they are studying devotional theology." *Id.* at 1313 n.4.

RLUIPA (and the conditional-spending statutes on which it is patterned) is cut from the same conceptual cloth: By imposing funding conditions on all of the operations of a state *agency* that receives any federal funds, Congress has elected to draw the line of coverage according to each State's own chosen governmental structure. States may thus engage in any operations they wish free of the conditions imposed by, *e.g.*, RLUIPA and section 504 of the Rehabilitation Act, by segregating those functions—or even, in the context of RLUIPA, by segregating particular prisons and other institutions—in agencies or departments for which the State declines to accept federal funding. "The State is accordingly not required to renounce all federal funding to shield chosen state agencies from compliance with [the condition]." *Jim C. v. United States*, 235 F.3d 1079, 1081 (8th Cir.) (en banc), *cert. denied sub nom. Arkansas Dept. of Educ. v. Jim C.*, 533 U.S. 949 (2001). To be sure, such segregation might well be costly and inconvenient. But that option is certainly no more untenable—and, more importantly, is far less constitutionally worrisome—than the option of a private health-care organization to establish a separate and independent affiliate in which it can discuss abortion (*Rust*), or the opportunity of an undergraduate student to attend two colleges simultaneously in order to retain scholarship eligibility and still continue to work toward dual majors (*Locke*).[14]

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[14] It has been suggested that the Court's recent "tolerance for such prophylactic rules"—such as permitting a stringent *Rust*-like segregation requirement in *Locke*—in the context of individuals' exercise of constitutional rights, threatens to undermine the unconstitutional conditions doctrine by "swallowing the rule against penalizing a constitutionally protected activity by withholding other related benefits." Douglas Laycock, *Theology Scholarships, The Pledge Of Allegiance, And Religious Liberty: Avoiding The Extremes But Missing The Liberty*, 118 Harv. L. Rev. 155, 181 (2004). Whether or not that is so, there should be no need for similar concern in the context of segregation requirements imposed on *state* recipients of federal funding. *Id.* at 182-183.

3. *Notice*. Congress must provide the States "'unambiguous[]'" notice of funding conditions, so as to "'enabl[e] the States to exercise their choice [to receive such funding] knowingly, cognizant of the consequences of their participation.'" *Dole*, 483 U.S. at 407 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). RLUIPA is crystal clear in informing States that section 3(a)'s substantive restriction applies to *all* of the operations of a state agency such as ODRC if that agency receives *any* federal financial assistance. *See supra* at 3. Accordingly, courts of appeals have uniformly and correctly concluded that RLUIPA satisfies the *Pennhurst* plain-notice requirement.[15]

In the lower courts, some states (but not Ohio), have argued that RLUIPA's substantive requirement—in particular, its "least restrictive means" test—is too amorphous to give States sufficient notice of what federal law requires when they accept federal funds. These states have relied on this Court's statement in *Pennhurst*, 451 U.S. at 24, that a "least restrictive setting" standard in a different statute was "largely indeterminate." That argument misses the mark for at least two reasons. For one, RLUIPA's "least restrictive means" standard is a familiar one in the area of religious exercise,[16] and Ohio, in particular, can hardly be heard to complain about it, because it is by terms the same standard that the Ohio Constitution prescribes to govern the conduct of the prison officials who are defendants here. *See Humphrey v. Lane*, 728 N.E.2d 1039, 1043, 1045 (Ohio 2000).

Moreover, the argument misreads *Pennhurst*. That case raised the question whether Congress intended the "least restrictive setting" provision of the Developmentally Disabled Assistance and Bill of Rights Act to be a funding condition that

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[15] *See Mayweathers*, 314 F.3d at 1067; *Charles*, 348 F.3d at 607-608; *Benning*, 2004 WL 2749172, at *4-*5.

[16] *See Employment Div. v. Smith*, 494 U.S. at 899 (O'Connor, J., concurring in the judgment) (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981)); *see also Benning*, 2004 WL 2749172, at *4 ("RLUIPA gives states wide latitude in applying its provisions, but this flexibility does not make the conditions of RLUIPA opaque.").

was binding on the States at all. Given the open-endedness of that standard, the Court concluded that States would be surprised to learn that it was binding upon them; the canon that Congress must "express clearly its intent" to impose such a condition on the grant of federal funds therefore applied "with greatest force." 451 U.S. at 24. The Court explained that if Congress *had* "spoke[n] so clearly that we can fairly say that the State could make an informed choice," then "by accepting funds under the Act, [States] would indeed be obligated to comply with" the standard, notwithstanding its apparent indeterminacy. *Id.* at 25.

More recently, this Court has held that Title IX provides school districts that receive federal funds sufficient notice of their obligations regarding student-on-student sexual harassment, even though those obligations are framed in open-ended and highly context-dependent terms: A funding recipient must avoid being "deliberately indifferent to [student-on-student] sexual harassment, of which they have actual knowledge," that is "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." *Davis ex rel. LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650-651 (1999). As *Davis* demonstrates, and as one court of appeals reviewing RLUIPA section 3 has explained, "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; *see also Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 665-666 (1985). All the Constitution requires is that the law "make the existence of the condition itself—in exchange for the receipt of federal funds—explicitly obvious." *Mayweathers*, 314 F.3d at 1067. Congress has done so in RLUIPA.

4. *Inducing Unconstitutional State Conduct*. Federal funding conditions must not induce recipient States to violate the Constitution. *Dole*, 483 U.S. at 207-210; *see also American Library Ass'n*, 539 U.S. at 203 (plurality opinion). RLUIPA section 3 does not do so. Indeed, if in a particular case a prison

official would violate someone else's constitutional rights by granting a requested religious accommodation—such as, for example, by granting content-based preferences for prisoners' religious expression in a manner that the Free Speech, Press or Assembly Clauses of the First Amendment would forbid[17]—then the avoidance of that constitutional violation would itself be a "compelling interest" that would, under RLUIPA's own *statutory* standard, justify denial of the accommodation (at least in the form it was requested). By its terms, then, RLUIPA cannot fairly be construed to induce state officials to violate constitutional rights of others.

5. *Coercion*. The Court noted in *Dole* that one of its prior decisions had "recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" 483 U.S. at 211 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)). The Court reiterated, however, the skeptical caution of that earlier case that if there is such a metaphysical point at which "pressure turns into compulsion," it is unlikely that the judiciary is capable of discerning it: "'[T]o hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible.'" *Id.* (quoting *Steward Machine*, 301 U.S. at 589-590).

Understandably, then, this Court has never held that a funding condition applied to state recipients of aid was unduly coercive. But be that as it may—and even if it were theoretically possible for courts to discern a constitutional distinction between pressure and compulsion in the context of governmental budgetary choices—this case does not raise any serious question of undue coercion. In the district court, Ohio represented that federal funds comprise less than one percent of

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[17] *See, e.g., Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 652-653 (1981); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 25 (1989) (White, J., concurring in the judgment).

the ODRC's total budget. Reply Memorandum [on Motion to Dismiss] 17. Amici do not mean to suggest that a condition attached to federal aid comprising a more substantial portion of a state agency budget would be constitutionally suspect—to the contrary, this Court has indicated that such a condition can be constitutional even where it would be an "unrealistic option" for the state entity to forego the federal funding. *Board of Educ. of Westside Community Schools v. Mergens ex rel. Mergens*, 496 U.S. 226, 241 (1990). But if that is so, then surely Congress has not impermissibly "coerced" Ohio to accept the terms of RLUIPA within the operations of the ODRC merely because the cost of avoiding such restrictions would be the loss of a minuscule percentage of the agency's funding.

II. The Commerce Clause Authorizes RLUIPA Sections 3(a) and 3(b)(2).

In virtually every case litigated under RLUIPA section 3, the Commerce Clause provisions will be superfluous. An institution that houses or confines a section 3 plaintiff will almost certainly be operated by a department, agency, special purpose district, or other instrumentality of a State or of a local government that receives federal financial assistance, and proof of such federal assistance will be uncontested or easily obtainable. The Spending Clause subsection of RLUIPA therefore will be operative, and there will be no need for a plaintiff to rely upon the "affecting commerce" subsection. Accordingly, unless this Court were *both* to reverse the court of appeals on the Establishment Clause question, *and* to determine that Congress lacked the authority to enact the Spending provision (3(b)(1)), there almost certainly will never be an occasion for this Court to assess the constitutionality of subsection 3(b)(2). *See, e.g.*, *Guillen*, 537 U.S. at 147 n.9. In any event, the Court would not need to reach that question in *this* case, where the parties have stipulated that the spending provision of RLUIPA applies to ODRC—as do, e.g., Title VI, the Rehabilitation Act, etc.—because ODRC regularly receives federal financial assistance from dozens of different sources.

J.A. 319-22; Defs.' Consol. Memo in Support of Motion to Dismiss (D. Ct.) at 24 n.40.

If this Court does address the Commerce Clause question, however, it should confirm that Congress had the authority to enact subsection 3(b)(2), which incorporates a jurisdictional element that is common to many important federal statutes and that this Court has long approved.

A. The "Affecting Commerce" Jurisdictional Element Guarantees That the Commerce Provisions of RLUIPA Section 3 Are Constitutional.

1. Section 3(b)(2) provides that the substantive limitation on burdening religious exercise in RLUIPA section 3(a) applies where the government's substantial burden on religious exercise affects, or where removal of that substantial burden would affect, interstate, foreign or Indian commerce. *See supra* at 4. Such an "affects commerce" element is a familiar feature of the United States Code. Most famously, the Hobbs Act, 18 U.S.C. § 1951(a), prohibits actual and attempted robbery or extortion that "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce." This Court held almost half a century ago that the standard set by this "affects commerce" element of the offense is constitutional, because "racketeering affecting interstate commerce [i]s within federal legislative control." *United States v. Green*, 350 U.S. 415, 420-21 (1956). The Court thereafter confirmed that the "broad language" of this element "manifest[s] a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone v. United States*, 361 U.S. 212, 215 (1960).

Nothing in the Court's subsequent decisions has called into question the facial constitutionality of the Hobbs Act.[18] To the

[18] Thus, even after this Court's decisions in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), federal courts of appeals have regularly confirmed that the Hobbs Act is facially constitutional, and distinguishable from the statutes at issue in *Lopez* and *Morrison*, because of the "affects

contrary, since *Stirone* the Court has repeatedly noted that such an "affects commerce" element signals Congress's intent to invoke its full authority under the Commerce Clause. *See, e.g.*, *Scheidler v. National Org. for Women, Inc.*, 537 U.S. 393, 408 (2003); *Jones v. United States*, 529 U.S. 848, 854 (2000); *United States v. Culbert*, 435 U.S. 371, 373 (1978); *see also Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (per curiam). Heeding that signal, Congress has commonly employed an "affecting [interstate] commerce" element in its enactments in order to ensure their constitutionality—in more than 100 instances, by Justice Breyer's count. *See United States v. Lopez*, 514 U.S. 549, 630 (1995) (Breyer, J., dissenting).

Importantly, many of these "affecting commerce" statutes regulate conduct that almost certainly would not be deemed "commercial" or "economic" for Commerce Clause purposes *but for* the effect on commerce that the law itself requires to be proved in each case. For example, Congress has: prohibited the possession "in or affecting interstate or foreign commerce" of certain biological weapons (18 U.S.C. § 175b(a)(1)) and ballistic knives (15 U.S.C. § 1245(a)); made it unlawful for certain persons, such as felons and drug users, to possess any firearm or ammunition "in or affecting commerce" (18 U.S.C. § 922(g); *see also id.* § 842(i) (similar prohibition with respect to explosives)); made it unlawful to intentionally deface, damage, or destroy any religious real property because of the religious character of that property, or to intentionally obstruct, by force or threat of force, any person in the enjoyment of that person's free exercise of religious beliefs, where the conduct "is in or affects interstate or foreign commerce" (18 U.S.C. § 247(a)-(b)); and prohibited the use (or threatened use), without lawful authority, of a weapon of mass destruction—including a biological agent, toxin, or vector—against any person in the

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commerce" element. *See, e.g.*, *United States v. Capozzi*, 347 F.3d 327, 335-336 (1st Cir. 2003), *cert. denied*, 124 S. Ct. 1187 (2004), and cases cited therein; *United States v. Valenzeno*, 123 F.3d 365, 367-368 (6th Cir. 1997); *United States v. Robinson*, 119 F.3d 1205, 1212-1214 (5th Cir. 1997), *cert. denied*, 522 U.S. 1139 (1998).

United States, where the results of such use affect (or, in the case of a threatened use, would have affected) interstate or foreign commerce (18 U.S.C. § 2332a(a)(2)).[19]

In many other statutes, Congress has gone further still, prohibiting certain conduct upon proof, *not* that the regulated conduct itself affects commerce, but merely that the conduct has some specified relation to a group or enterprise that itself affects interstate commerce. So, for example, the Racketeer Influenced and Corrupt Organizations Act ("RICO") makes it unlawful, inter alia, for a person to participate in the conduct of an enterprise's affairs through a "pattern of racketeering activity"—which can consist exclusively of violent acts such as murder and kidnapping, *National Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 256-257 & n.4 (1994)—if the *enterprise*'s activities (not necessarily the wrongdoer's) affect interstate or foreign commerce. 18 U.S.C. § 1962(c). This Court has addressed § 1962(c) of RICO numerous times (and has even held that the enterprise need not have an economic motive—only an effect on interstate commerce—*National Org. for Women*, 510 U.S. at 256-262); but the Court has never so much as hinted that there might be something constitutionally dubious about the fact that culpability turns on an attenuated, mediated nexus between the defendant's noneconomic, violent conduct and the interstate commerce affected by the conduit enterprise.[20]

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[19] *See also, e.g.*, 18 U.S.C. § 844(e) (prohibiting the making of a willful threat of, or maliciously conveying knowingly false information concerning, violent acts, where the threat or transmission of information is "in or affecting interstate or foreign commerce").

[20] For other statutes requiring proof of a similar sort of attenuated nexus between the regulated conduct and the effect on interstate commerce, *see, e.g.*, 18 U.S.C. § 1959 (prohibiting the use of violent conduct for the purpose of maintaining or increasing position in an enterprise that is engaged in racketeering and the activities of which affect interstate or foreign commerce); *id.* § 521(d)(2) (increasing penalties for specified federal offenses where the defendant had the intent to promote or further the felonious activities of a criminal street gang or to maintain or increase his or her position in the gang, where "criminal street gang" is defined to mean, inter alia, an ongoing group

Courts have not seriously questioned the facial validity of any of these statutes containing an "affects commerce" jurisdictional element. Nor is enactment of such statutes inconsistent with this Court's recent Commerce Clause decisions in *Lopez* and *United States v. Morrison*, 529 U.S. 598 (2000). In both of these cases, the Court specifically emphasized that the statutes at issue required no proof of any nexus between the proscribed conduct and interstate commerce in each case. *Id.* at 613; *Lopez*, 514 U.S. at 561-562. The *Lopez* Court indicated that the presence of such a jurisdictional nexus would help meet its constitutional concerns, because such an "express jurisdictional element" "might limit [the statute's] reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." *Id.* at 562; *accord Morrison*, 529 U.S. at 611-612; *see also id.* at 613 ("Although *Lopez* makes clear that such a jurisdictional element would lend support to the argument that [the provision at issue in *Morrison*] is sufficiently tied to interstate commerce, Congress elected to cast [the provision's] remedy over a wider, and more purely intrastate, body of violent crime.").[21]

In sharp contrast to the statutes at issue in *Lopez* and *Morrison*, RLUIPA *does* contain a "jurisdictional element"—indeed, the very element that is, when unqualified, the way in

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or club the activities of which affect interstate or foreign commerce); *id.* § 668 (prohibiting theft of objects of cultural heritage from a "museum," defined as an organized and permanent institution established for an essentially educational or aesthetic purpose and the activities of which affect interstate or foreign commerce).

[21] Notably, the Court in *Lopez* specifically referred to the "affecting commerce" element of the "felon-in-possession" statute (the current version of which is found at 18 U.S.C. § 922(g)), which the Court had previously considered at length in *United States v. Bass*, 404 U.S. 336 (1971), and *Scarborough v. United States*, 431 U.S. 563 (1977). As the Court explained in *Lopez*, 514 U.S. at 561-562, *Bass* construed the possession component of that statute "to require an additional nexus to interstate commerce," precisely in order to guarantee that Congress "'will not be deemed to have significantly changed the federal-state balance'" (quoting *Bass*, 404 U.S. at 349).

which Congress ordinarily invokes its "full authority under the Commerce Clause." *Jones*, 529 U.S. at 854.

To be sure, the Court in *Morrison* "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." 529 U.S. at 617. But that holding does not affect the constitutionality of RLUIPA, for at least two reasons. First, even if Congress's authority to enact RLUIPA section 3 *were* "based solely" on the "aggregate effect" of the regulated conduct on interstate commerce, that regulated conduct—the activities of state prisoners and prison officials—does not constitute "violent criminal conduct," and the Court in *Morrison* expressly *declined* to "adopt a categorical rule against aggregating the effects of any noneconomic activity." *Id.* at 613.

More importantly, however, RLUIPA does not present the Court with the need to resolve any difficult questions about when Congress *may* act to address the aggregated effects of any noneconomic activity—nor any subsidiary, vexing questions about the permissible scope of "economic activity" for purposes of evaluating such aggregation—*see Ashcroft v. Raich*, No. 03-1454 (argued Nov. 29, 2004)—because the regulation of state-imposed substantial burdens on religious exercise in RLUIPA section 3 is *not* based "solely on that conduct's aggregate effect on interstate commerce." Instead, the "affect[ing] interstate commerce" element limits the statute's coverage to a "'discrete set of [acts] that . . . have an explicit connection with or effect on interstate commerce.'" *Morrison*, 529 U.S. at 611-612 (quoting *Lopez*, 514 U.S. at 562). Absent the jurisdictional element, there would be a risk that "a few random instances of interstate effects could be used to justify regulation of a multitude of intrastate transactions with no interstate effects." *United States v. Harrington*, 108 F.3d 1460, 1467 (D.C. Cir. 1997). But with the requirement of proof of an effect on interstate commerce in every case, there is no such concern: "each case stands alone on its evidence that a concrete and specific effect does exist," *id.*, and the inclusion of the element "addresses the *Lopez* Court's constitutional concern that congressional authority under the Commerce Clause not become a 'general police power of the

sort retained by the States,'" *United States v. Capozzi*, 347 F.3d 327, 336 (1st Cir. 2003) (quoting *Lopez*, 514 U.S. at 567), *cert. denied*, 124 S. Ct. 1187 (2004).

Therefore, the Commerce Clause provision of section 3, standing alone, would be permissible Commerce Clause legislation. But that provision does *not* stand alone. In contrast to other federal laws incorporating an "affects commerce" element, Congress added an affirmative defense for the benefit of state or local RLUIPA defendants, pursuant to which the Commerce Clause subsection shall not apply if the government can demonstrate that alleviating all substantial burdens from "similar" religious exercise would not, in the aggregate, lead to a *substantial* effect on interstate, foreign or Indian commerce. 42 U.S.C. § 2000cc-2(g). *See supra* at 4. For the reasons explained above, such an affirmative defense is not constitutionally *required*, because under a statute in which an "explicit" and "concrete" effect on interstate commerce must be proved in every case, there is no need to rely upon a "substantial effects" test to ensure that Congress is not regulating a multitude of "purely" intrastate transactions with no interstate connections or effects. But surely, if statutes such as the Hobbs Act are facially constitutional *without* such an affirmative defense, it follows that RLUIPA—in which Congress has bent over backward to include such a defense so as to accommodate local prerogatives and to ensure that each application has indisputably national effects—falls comfortably within the parameters of Congress's commerce power.

Of course, the fact that an "affects commerce" element implements Congress's full constitutional power does not mean that a statute including such an element is unlimited in effect. In some cases there may be a real question whether a particular type or quantum of proof is adequate to show the "explicit" and "concrete" effect on interstate or foreign commerce that the element requires. *See Harrington*, 108 F.3d at 1464, 1467 (citing *Lopez*, 514 U.S. at 562, 567).[22] The connections between

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[22] *See, e.g.*, *United States v. Wilkerson*, 361 F.3d 717, 726-732 (2d Cir.) (describing how the courts of appeals have engaged in

the activities regulated and interstate commerce cannot be "impermissibly attenuated." *Id.* at 1467. But such "as applied" issues do not change the fact that a statute requiring proof of such a jurisdictional element is *facially* constitutional.

2. Because this case reaches the Court on a motion to dismiss, it would be premature to consider whether the evidence as to each of the plaintiffs' various claims in the case would be sufficient to demonstrate the sort of concrete effect on interstate commerce that the RLUIPA jurisdictional element, and the Constitution, requires—not to mention whether Ohio would be able to satisfy RLUIPA's affirmative defense as to any or all such claims. There may be some claims where plaintiffs would be hard-pressed to demonstrate the requisite effect (*e.g.*, requests to be able to assemble for worship within a prison). But there is one category of claims that should satisfy the statutory standard, and pass "as applied" constitutional muster, in virtually every case. Some of the plaintiffs here have requested, among other things, that ODRC officials permit them to obtain religious books, ritual foods and other ritual items (*e.g.*, medallions, bowls, crystals, teas), and have alleged that some such items can be obtained only by commercial transactions with sources outside Ohio. *E.g.*, J.A. 265-66, 274, 277-78. If plaintiffs' allegations are true, then prohibiting prisoners from obtaining these items quite literally prevents specific transactions in interstate commerce, and alleviating the burden on religious exercise would result in an increase in such interstate transactions.

Proof that application of RLUIPA will result in some such interstate economic transactions obviously would satisfy the jurisdictional element, and would implicate the very core of the activity that Congress may constitutionally regulate—the sale or transfer of "things in interstate commerce," *Lopez*, 514 U.S. at 558, which is inarguably "a proper subject of congressional regulation." *Reno v. Condon*, 528 U.S. 141, 148 (2000); *see*

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careful, fact-specific review to determine under what circumstances the robbery of an individual affects interstate commerce for purposes of the Hobbs Act), *cert. denied*, 125 S. Ct. 225 (2004).

also id. (sale or release of article of commerce "into the interstate stream of business is sufficient to support congressional regulation"); *United States v. Thomas*, 159 F.3d 296, 297-298 (7th Cir. 1998), *cert. denied*, 527 U.S. 1023 (1999).[23] Accordingly, whatever else might be said about the constitutionality of sections 3(a) and 3(b)(2) with respect to claims alleging other sorts of effects on commerce, those provisions are per se constitutional as applied to the class of RLUIPA claims that would, if successful, necessarily result in

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[23] Indeed, this Court has held that such an element can be satisfied—comfortably within constitutional limits—where the effect on interstate commerce is much more attenuated and speculative than would be the case with respect to the necessary interstate commercial transactions alleged here. In *Stirone*, for example, this Court affirmed a Hobbs Act conviction because the jury could have found that if the defendant's extortion there had been *resisted* (*i.e.*, had it been *un*successful), it may have hindered or destroyed the business, and thus interstate movements of sand to the victim "would have slackened or stopped." 361 U.S. at 215. The Court also has held that, under the federal statute prohibiting felons from possessing firearms in a manner "affecting commerce," the government may prove that the possession had the requisite effect on interstate commerce by showing that the firearm traveled in interstate commerce before the defendant obtained it (indeed, before the defendant committed the felony that triggered the restriction on possession). *Scarborough*, 431 U.S. at 571-572; *see also Lopez*, 514 U.S. at 561-562 (reaffirming the Court's decision in *Bass* that the jurisdictional element in the felon-in-possession statute ensures that it falls within Congress's commerce power). *Cf. Guillen*, 537 U.S. at 147 (federal statute requiring states to make certain hazardous-road reports inadmissible as evidence in state-court proceedings fell within Congress's Commerce Clause power to protect channels of commerce in light of the following possible causal chain: Requiring such an evidentiary rule would make it more difficult for would-be plaintiffs to obtain evidence to support negligence actions against state and local governments, which would in turn "result in more diligent [government] efforts to collect the relevant information, more candid discussions of hazardous locations, better informed decisionmaking, and, ultimately, greater safety on our Nation's roads").

actual interstate commercial transactions. *Cf. Tennesssee v. Lane*, 124 S. Ct. 1978, 1992-1993 (2004).

B. The Commerce Provisions of Section 3 Do Not Implicate This Court's Anti-Commandeering Doctrine.

In the Court of Appeals, respondents argued that the Commerce Clause provisions of RLUIPA section 3 violate principles of federalism reflected in the Tenth Amendment by impermissibly "commandeering" state governments. Def. CTA6 Br. 53-60. This argument fundamentally misconceives this Court's anti-commandeering decisions in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997); it also ignores the numerous common, and constitutionally uncontroversial, contexts in which Congress limits the ability of states to regulate in a specific manner.[24]

In *New York* and *Printz*, this Court held that Congress had circumvented principles of federalism by requiring states to participate in the enforcement of federal law against private parties. The statutes at issue in those cases "conscript[ed] state governments" as "agents" of federal government, *New York*, 505 U.S. at 178; *see also Printz*, 521 U.S. at 935, in the implementation of federal regulatory schemes that addressed problems that the States had neither created nor exacerbated—in *New York*, by requiring states to impose restrictions on private parties or to bear the cost of remedying such parties' conduct, and in *Printz*, by requiring state officials to perform background checks necessary to the federal government's own enforcement of firearms laws against private actors.

RLUIPA section 3, in contrast with the statutes in *Printz* and *New York*—but in *common* with the statutes this Court upheld in *Reno v. Condon* and *South Carolina v. Baker*, 485

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[24] The anti-commandeering argument is inapposite to RLUIPA section 3's *spending* provisions, as respondents conceded in the district court proceedings, Reply Mem. [in Support of Motion to Dismiss in Dist. Ct.] 24. *See New York*, 505 U.S. at 167, 171-73; *Printz*, 521 U.S. at 936 (O'Connor, J., concurring); *see also Mayweathers*, 314 F.3d at 1069; *Charles*, 348 F.3d at 609; *Benning*, 2004 WL 2749172, at *7.

U.S. 505 (1988)—"does not require the [State] Legislature to enact any laws or regulations." *Condon*, 528 U.S. at 151. It "does not require state officials to assist in the enforcement of federal statutes regulating private individuals." *Id.* And it "does not *require* the States in their sovereign capacity to regulate their own citizens." *Id.* (emphasis added). Rather, RLUIPA imposes substantive *prohibitions* on certain state activities that restrict personal liberties. When a federal statute simply prevents state actors from taking action that will (in Congress's view) harm its own citizens, it is difficult to see how they have been "commandeered" into federal service. Indeed, *Condon* squarely rejects such a claim.[25]

In the court of appeals, respondents argued that *Condon* is inapposite, and that RLUIPA is unconstitutional, because the law "exclusively target[s] States." Defendant-Appellants' Final Reply Br. 30 (6th Cir.). But nothing in the Constitution imposes a rule that Congress can restrict state activities in or affecting commerce only if it also imposes identical or closely similar regulation on analogous private activities. Indeed, such a requirement would be difficult, if not impossible, to square with the familiar practice of federal preemption—a tradition that extends back at least as far as *Gibbons v. Ogden*, in which the Court construed a federal statute to prohibit New York from granting a navigational monopoly. 22 U.S. (9 Wheat) 1, 11-21 (1824). Statutory preemption provisions, of course, generally apply *only* to restrict state regulation affecting commerce.

In some such cases, a federal restriction on state law is effected, not by federal-law "occupation" of the field, but by a specific congressional command of deregulation. For example, the Airline Deregulation Act of 1978 commands that States not regulate with respect to any price, route, or service of an air

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[25] Respondents' accusation of federal "commandeering" is especially odd, because the substantive standard RLUIPA imposes on the ODRC is precisely the same standard of conduct that Ohio's own Constitution imposes on that department. *See Humphrey*, 728 N.E.2d at 1043, 1045. RLUIPA, in other words, does not appear to prohibit Ohio prison officials from doing anything that state law permits.

carrier. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992) (considering 49 U.S.C. § 41713(b)(1)). To similar effect is the "*Machinists* preemption" of the National Labor Relations Act, *see Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), which prevents state and local authorities from regulating labor-management relations, *not* because Congress replaced such regulation with a detailed federal scheme, but because the federal policy is one of government *non*intervention: "Congress intended to give parties to a collective-bargaining agreement the right to make use of 'economic weapons,' . . . free of governmental interference. . . . The *Machinists* rule creates a free zone from which all regulation, 'whether federal or State,' is excluded." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 111 (1989) (quoting *Machinsts*, 427 U.S. at 150, 153) (internal citation omitted).

These forms of deregulatory federal preemption by definition apply to restrict *only* governmental regulation, since there is no analogous private regulation. *See, e.g.*, *id.* at 110 (*Machinists* preemption "'protect[s] a range of [private] conduct against state but not private interference'") (quoting *Wisconsin Dep't of Industry v. Gould, Inc.*, 475 U.S. 282, 290 (1986)). RLUIPA likewise restricts a particular manner in which states may treat private parties, when such treatment affects interstate commerce.[26]

Indeed, the commerce provisions of RLUIPA section 3 limit state prerogatives in a most deferential manner. They forbid certain state institutions from imposing unnecessary

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[26] It is worth noting, in this respect, that RLUIPA does not single out the states for treatment that the federal government is not itself willing to live by—RFRA applies the same liberty-enhancing test on all of federal law. See supra at 2 & note 2. Moreover, there is good reason that Congress has not attempted to impose section 3's restrictions upon analogous *private* institutions—namely, that if Congress attempted to require private institutions to bear significant burdens in order to accommodate other private parties' religious exercise, it could raise Establishment Clause concerns. *See, e.g.*, *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-710 (1985).

restraints on personal religious liberty, but leave it largely to state discretion how the state's accommodations of religion should be effected: "A government may avoid the preemptive force of [RLUIPA] by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden." 42 U.S.C. § 2000cc-3(e).

Of course, despite this broad discretion that RLUIPA affords the States, on occasion a State may have to take some affirmative action, or incur some minor costs, in order to comply with RLUIPA. That, however, is "'an inevitable consequence of regulating a state activity. Any federal regulation demands compliance. That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect.'" *Condon*, 528 U.S. at 150-151 (quoting *Baker*, 485 U.S. at 514-515).

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the court of appeals on the Establishment Clause question, and decline to entertain the alternative grounds for affirmance. If the Court addresses those alternative grounds, it should hold that enactment of RLUIPA section 3 was a proper exercise of Congress's article I powers.

Respectfully submitted,

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