No. _____

In The

Supreme Court of the United States

TIM REISCH, *et al.*,

Cross-Petitioners,

v.

CHARLES E. SISNEY; JAMES DEAN VAN WYHE;

AND UNITED STATES OF AMERICA,

Cross-Respondents.

On Cross-Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

Conditional Cross-Petition for a Writ of Certiorari

James E. Moore
WOODS, FULLER,
SHULTZ & SMITH
300 S. Phillips Ave.
P.O. Box 5027
Sioux Falls, SD 57117
(605) 978-0613

John C. Eastman
Counsel of Record
840 E. 37th Street
Long Beach, CA 90807
(562) 426-1934

Counsel for Cross-Petitioners

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QUESTION PRESENTED

1. Whether federal spending for state prisons violates the "general Welfare" limitation of the Spending Clause, and this Court's precedent in *United States v. Butler* and *South Dakota v. Dole*, because it constitutes spending for local, rather than national purposes, and because it intrudes upon the states' police power, which is a core function of government, traditionally reserved to the states?

List of Parties

Cross-Petitioners: In their individual and official capacities, Tim Reisch, Secretary of Corrections for South Dakota; Douglas L. Weber, Chief Warden for the Department of Corrections of South Dakota; Dennis Bock, Associate Warden for the South Dakota State Penitentiary; Jennifer Wagner a/k/a Jennifer Lane, Cultural Activities Coordinator for the South Dakota State Penitentiary; and Daryl Slykhuis, Interim Warden for the South Dakota State Penitentiary.

Cross-Respondents: Charles E. Sisney and James Dean Van Wyhe, inmates at the South Dakota State Penitentiary and Appellees below; United States of America, Intervenor and Appellee below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 581 F.3d 639 and reprinted in Petitioner's Appendix ("Pet. App.") at 1a-40a. The opinion of the United States District Court for the District of South Dakota in *Sisney v. Reisch* is reported at 533 F. Supp. 2d 952 and reprinted in Pet. App. 41a-142a. The District Court also issued an opinion in *Van Wyhe v. Reisch*, reported at 536 F. Supp. 2d 1110, that was part of the consolidated appeal considered by the Eighth Circuit. Because its discussion of the issues raised by Sisney's Petition and this Cross-Petition mirrors the opinion in *Sisney v. Reisch*, it was not reprinted in Petitioner's Appendix and is not reprinted here.

STATEMENT OF JURISDICTION

The decision of the Eighth Circuit Court of Appeals was entered on September 10, 2009 (Pet. App. 1a). On December 1, 2009, Justice Alito extended the time to file a petition for writ of certiorari until January 8, 2010. A petition for writ of certiorari was filed by Petitioner Charles Sisney on January 8, 2010, and docketed with responses due by February 10, 2010. Docket No. 09-821. This conditional cross-petition for writ of certiorari is therefore timely filed on or before February 10, 2010, pursuant to Supreme Court Rule 12.5. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The constitutionality of an Act of Congress is drawn into question; the United States intervened as a party below after certification pursuant to 28 U.S.C. § 2403(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 1 of the United States Constitution provides: "The Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."

Section 3 of the Religious Land Use and Institutionalized Person Act (RLUIPA), 42 U.S.C. § 2000cc-1, provides, in relevant part:

> (a) General rule
>
> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.
>
> (b) Scope of application
>
> This section applies in any case in which—
>
> (1) the substantial burden is imposed in a program or activity that receives Federal financial assistance. . . .

STATEMENT OF THE CASE

Respondents Charles Sisney and James Dean Van Wyhe are prisoners of the state of South Dakota who contend that officials with the South Dakota Department of Corrections ("South Dakota") violated the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §§ 2000cc–2000cc–5. *Van Wyhe* v. *Reisch*, 581 F.3d 639, 645 (8th Cir. 2009) (Pet. App. 3a). They invoked the District Court's jurisdiction under 28 U.S.C. §§ 1331 and 1343 and 42 U.S.C. § 1983. The District Court in Sisney's case denied South Dakota's summary judgment motion challenging RLUIPA's constitutionality, and held that it was a valid exercise of Congress' Spending Clause power. *Sisney* v. *Reisch*, 533 F. Supp. 2d 952, 983 (D.S.D. 2008) (Pet. App. 104a). On interlocutory appeal, the Eighth Circuit upheld RLUIPA's constitutionality on the basis that it satisfied the requirements set forth in *South Dakota* v. *Dole*, 483 U.S. 203 (1987), for conditioning a state's receipt of federal funds upon compliance with a federal statutory directive. *Van Wyhe*, 581 F.3d, at 649–52 (Pet. App. 14a-23a). The court reasoned that RLUIPA satisfied the first requirement under *Dole*—that spending be "in pursuit of the general welfare"—because "the concept of welfare . . . is shaped by Congress" and because "Congress has determined that encouraging greater protection of religious worship within prisons promotes the general welfare." *Id.*, at 650 (Pet. App. 16a-17a) (citing *Dole*, 483 U.S., at 208). Having found that RLUIPA also satisfied the remaining requirements under *Dole*, the court upheld it as valid

under the Spending Clause. *Van Wyhe*, 581 F.3d, at 652 (Pet. App. 22a-23a).

The Eighth Circuit then granted summary judgment to the State defendants on Sisney's and Van Whye's claims for monetary damages, holding that the claims were barred by the Eleventh Amendment because RLUIPA did not expressly require States to waive sovereign immunity as a condition for receiving federal funds. Pet. App. 23a-27a, 30a. The case was remanded to the trial court for resolution of the few remaining claims for injunctive relief and retaliation in Sisney's case. Pet. App. 39a-40a. The Eleventh Amendment immunity holding is the subject of Sisney's Petition for Writ of Certiorari, No. 09-821. The remaining injunctive relief claims have since been settled, and the retaliation claims, unrelated to the issues raised by the Petition and this Cross-Petition, have been set for trial. This case is thus ripe for review by this Court.

REASONS FOR GRANTING THE WRIT

This Court has yet to rule on whether the "institutionalized persons" section of RLUIPA, 42 U.S.C. § 2000cc-1, is a valid exercise of Congress' power under the Spending Clause. The issue was noted but not reached in *Cutter* v. *Wilkinson* because the Court of Appeals in that case had not addressed it. *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005); *see also id.*, at 727 n.2 (Thomas, J., concurring) (noting that "RLUIPA . . . may well exceed Congress' authority under with the Spending Clause or the Commerce Clause" but that the Court "properly

declines to reach those issues, since they are outside the question presented and were not addressed by the Court of Appeals").

Here, by contrast, the Court of Appeals has explicitly ruled on the issue, and this case is appropriate for review under Supreme Court Rule 10(c): "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." This Court should grant the petition for *certiorari* because the scope of the Spending Clause power—and whether it is subject to any limits whatsoever—bears not only on RLUIPA, but also on the myriad federal regulatory schemes that Congress has enacted pursuant to its purported authority under the Spending Clause.

Furthermore, this Court has not addressed the Spending Clause since its landmark decision in *United States* v. *Lopez*, 514 U.S. 549 (1995), in which this Court reaffirmed the limited scope of Congress' power under the Commerce Clause. In *Lopez*, this Court reasoned that the absence of a meaningful limit would be akin to "convert[ing] congressional authority under the Commerce Clause to a general police power of the sort retained by the States." 514 U.S., at 567. Such an arrangement would violate the principles of enumerated powers and federalism, which are necessary for maintaining a federal government of "few and defined" powers. *Id.*, at 552; *see also id.*, at 567–68 (noting that ruling for the Government "would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is

truly national and what is truly local") (internal citations omitted).

This Court likewise recognized in *United States* v. *Morrison*, 529 U.S. 598, 618 (2000), that certain categories of activities do not fall within Congress' Commerce Clause jurisdiction because they have "always been the province of the States." This Court noted that there was "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Id.*; *cf. Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 58-73 (1996) (holding that Congress may not use its Article I powers to abrogate state sovereign immunity); *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that Congress may not commandeer state executive officers to enforce federal law); *New York v. United States*, 505 U.S. 144, 187-88 (1992) (overturning a federal provision requiring states to take title to radioactive waste as exceeding Congress' authority and commandeering state legislative processes).

The rationale supporting this Court's recent Commerce Clause jurisprudence applies with equal force to the spending power, which this Court last thoroughly addressed in *South Dakota v. Dole*, 483 U.S. 203 (1987). In that case, this Court recognized a limit on Congress' spending power when it outlined five requirements that Congress must satisfy before conditioning the receipt of federal funds upon a state's compliance with a federal directive. *Id.*, at 207–12. However, some lower courts have read *Dole* as justifying an abdication of the judicial responsibility to enforce the first limit on the

spending power articulated by this Court, that the federal spending be in the "general welfare." *See* Lynn. A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke it to Do So*, 78 IND. L.J. 459, 464–68 (2003). The result is that Congress has used its spending power to intrude on state sovereignty by regulating in areas of purely local, rather than national concern. For example, Congress has routinely passed comprehensive regulatory schemes regarding education, *see, e.g. M.A. ex rel. E.S. v. State-Operated School Dist. of the City of Newark*, 344 F.3d 335, 350-51 (3d Cir. 2003) (upholding federal funding of educational services for children with disabilities to states that complied with federal regulatory scheme), in spite of the fact that education has traditionally been the exclusive realm of state authority. *Lopez*, 514 U.S., at 580 (Kennedy, J., concurring) ("[I]t is well established that education is a traditional concern of the States").

This case presents this Court with the opportunity to review its Spending Clause jurisprudence in light of its recent acknowledgements of the importance of limiting Congress' parallel powers under the Commerce Clause. This Court's assertion in *Lopez* that the "Constitution mandates . . . withholding from Congress a plenary police power that would authorize enactment of every type of legislation," also necessitates limiting Congress' Spending Clause power in order to protect federalism and to remain faithful to the Constitution. *See* Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195, 196 (2001) (warning that regardless of

how narrowly the court might construe Congress' commerce power, "the states will be at the mercy of Congress so long as there are no meaningful limits on its spending power"); *see also Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 654–55 (1999) (Kennedy, J., dissenting) ("[T]he Spending Clause power, if wielded without concern for the federal balance, has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the Federal Government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach"). This Court should grant the petition in order to address this vital issue.

I. RLUIPA Exceeds Congress' Authority Under The Spending Clause Because It Constitutes Spending That Is Not For The "General Welfare" As Required By The Constitution, As Understood By The Framers, and As Affirmed By Supreme Court Precedent.

The first clause of Article I, Section 8 of the Constitution gives Congress the power to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States...." U.S. Const. art 1, § 8. Congress' authority under this second half of this clause, the "Spending Clause," is plainly limited to two purposes: (1) paying the debts of the United States; and (2) providing for the common defense and general welfare of the United States.

The Eighth Circuit's finding that RLUIPA is a valid exercise of Congress' Spending Clause authority because it is spending for the "general welfare" is inconsistent with the original meaning of this phrase. The Framers of the Constitution used the term "general welfare" to delineate spending that was for national purposes, as opposed to state or regional ones. *See, e.g.,* Alexander Hamilton, Report on Manufactures (1791), *reprinted in* 2 THE FOUNDERS' CONSTITUTION at 446-47 (Philip B. Kurland & Ralph Lerner eds., 1987) (noting that the power is limited to appropriations for "*General* and not *local*" objects). Subsequent presidents also recognized that if this limit on Congress' spending power were removed, it would nullify the quintessential distinction between the federal and state governments and "constitute a sort of partnership between the two . . . equally ruinous to both." James Buchanan, Message to the House of Representatives (Feb. 24, 1859), *reprinted in* 5 A COMPILATION OF THE MESSAGES AND PAPERS AND PAPERS OF THE PRESIDENTS 1789–1897, at 543, 547 (James D. Richardson ed., 1897).

This Court affirmed that "general welfare" is a limit on Congress' spending power in *United States* v. *Butler*, 297 U.S. 1, 67–68 (1936), when it approvingly cited Justice Joseph Story for the proposition that the spending power "extend[s] only to matters of national, as distinguished from local, welfare" and held that Congress may not use its spending power to adopt an Act that "invades the reserved rights of the states." In *Dole*, this Court re-affirmed these limits when it delineated "general welfare" as the first prong of the five-prong

conditional spending test it articulated. 483 U.S., at 206–07. Although the *Dole* Court gave substantial deference to Congress in the determination of "general welfare," 483 U.S., at 207, the opinion deals with the deference generally granted legislative bodies on the question of what promotes the "welfare" of the nation, *see id.*, at 208, without addressing at all the question of whether the program is one of "general" (i.e., national) rather than local scope. Justice O'Connor noted this apparent incongruity between *Butler* and the majority's opinion in *Dole* when she stated:

> If the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives "power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed."

Id., at 217 (O'Connor, J., dissenting) (quoting *Butler*, 297 U.S., at 78).

Congress has exploited this "loophole" in the *Dole* opinion to increase the breadth of its spending power to the detriment of state autonomy. *See* Baker & Berman, *Getting Off the Dole*, at 499–511. The provision of RLUIPA at issue here is merely one manifestation of this larger phenomenon, which merits judicial review. *See Lopez*, 514 U.S., at 577–78 (Kennedy, J., concurring) (recognizing that while preserving federalism is primarily the responsibility of the political branches, "the federal balance is too

essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far"). Indeed, even when a state has declined federal moneys in order to avoid the conditions on state power, Congress has sought to bypass the sovereign structure of state government and make grants directly to local entities. *See, e.g.,* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1607(b), 2009 U.S.C.C.A.N. (123 Stat. 303) (allowing state legislatures to accept federal funds over the objection of the state's governor).

A. "General Welfare" Means National Rather Than Local Welfare.

The Framers of the Constitution understood the phrase "general welfare of the United States" to limit Congress' spending power. *See, generally*, Jeffery T. Renz, *What Spending Clause? (Or the President's Paramour): An Examination of the Views of Hamilton, Madison, and Story on Article I, Section 8, Clause 1 of the United States Constitution*, 33 J. MARSHALL L. REV. 81 (1999). Madison and Jefferson, for example, understood "general Welfare" as merely granting Congress permission to use federal funds to carry out its other enumerated powers in Article I, Section 8, such as its war powers and commerce power. *See, e.g.*, THE FEDERALIST NO. 41 (James Madison); James Madison, Debate on the Cod Fishery Bill, 3 Annals of Cong., 362, 386–87 (1792); Thomas Jefferson, Opinion on the Constitutionality of the National Bank (1791), *reprinted in* THOMAS JEFFERSON: WRITINGS, at 416, 418 (Merrill D. Peterson, ed., 1984). Madison reasoned that both the

text of the Constitution and the policy behind enumerating Congress' powers supported this interpretation:

> If the terms [general Welfare] be taken in the broad sense they maintain, the particular powers afterwards so carefully and distinctly enumerated would be without any meaning, and must go for nothing. It would be absurd to say, first, that Congress may do what they please, and then that they may do this or that particular thing . . . . In fact, the meaning of the general terms in question must either be sought in the subsequent enumeration which limits and details them, or they convert the Government from one limited, as hitherto supposed, to the enumerated powers, into a Government without any limits at all.

3 Annals of Cong. at 386–87 (1792). He and Jefferson both understood the danger of interpreting the Spending Clause in a manner that would give Congress unbridled discretion. "Such a view of the Constitution," wrote Madison, "would have the effect of giving to Congress a general power of legislation, instead of the defined and limited one hitherto understood to belong to them." 30 Annals of Cong. 212 (1817).

Jefferson likewise demonstrated his conviction that "general Welfare" was limited to Congress' enumerated powers when he proposed a constitutional amendment in his 1806 State of the Union Address that would permit surplus federal funds to be used for "public education, roads, rivers, canals, and such other objects of public

improvement." Thomas Jefferson, Sixth Annual Message, *reprinted in* WRITINGS, at 524, 529-530. Jefferson reasoned that Congress could not undertake these public works projects before amending the Constitution "because the objects now recommended are not among those enumerated in the Constitution, and to which it permits the public monies to be applied." *Id.*, at 530. This episode reveals the degree to which our elected officials recognized constitutional limits on Congress' spending power at the beginning of the nineteenth century, and illustrates the incredible extent to which Congress has ignored those limits since.

Even those who disagreed with Jefferson and Madison's view conceded that the "general Welfare" language itself limited Congress' spending power. Most notably, even Alexander Hamilton, who believed that the Spending Clause broadly conferred on Congress authority that was distinct from the other enumerated powers in Article I, Section 8, acknowledged that "general Welfare" limited Congress so that "the object to which an appropriation of money is to be made be *General* and not *local*." Alexander Hamilton, Report on Manufactures (1791), *reprinted in* 2 THE FOUNDERS' CONSTITUTION, at 446-47. Even the most robust federalist would not have accepted a spending power without limits.

Presidents after Jefferson and Madison continued to view Congress' spending power as limited even while disagreeing about the precise extent of its limits. Monroe agreed with Hamilton's interpretation of the Clause, but nonetheless vetoed as unconstitutional a bill to repair the Cumberland road

because Congress' power to spend was restricted "to purposes of common defence, and of general, not local, national, not State benefit." 39 Annals of Cong. 1849 (1822). Jackson, by contrast, completely rejected Hamilton's position that congressional spending was not limited by the other enumerated powers in Article I, Section 8, describing it as a "dangerous doctrine" when he vetoed as unconstitutional bills appropriating funds for constructing roads and canals, and for improving navigation on the Wabash River. 28 H.R. Journal 27, 29 (1834). He believed that such improvements constituted local improvements rather than improvements for the general welfare. *Id.*, at 32. When vetoing the Wabash River Act, Jackson warned about the dangers of "unconstitutional acts," which "proffer local advantages, and bring in their train the patronage of the Government." *Id.*, at 28. This early warning on the dangers of "earmarks" for purely local projects has proved prescient. Jackson further warned:

> To suppose that, because our Government has been instituted for the benefit of the people, it must therefore have the power to do whatever may seem to conduce to the public good, is an error, into which even honest minds are apt to fall. In yielding themselves to this fallacy, they overlook the great considerations in which the federal constitution was founded. They forget that, in consequence of the conceded diversities in the interest and condition of the different States, it was foreseen, at the period of its adoption, that although a particular measure of the Government might be beneficial and proper in

> one State, it might be the reverse in another—that it was for this reason the States would not consent to make a grant to the Federal Government of the general and usual powers of Government, but of such only as were specifically enumerated.

Id.

Presidents Tyler, Polk, Pierce and Buchanan likewise vetoed bills for "internal improvements"—those that uniquely benefited particular states or regions rather than the entire country—as exceeding Congress' power under the Spending Clause. *See, e.g.*, 39 H.R. Journal 1081 (1844); 43 H.R. Journal 82 (1847); 45 S. Journal 361 (1854); 55 H.R. Journal 501 (1859). Polk explained that the Constitution's limitation on congressional spending ensured that local improvements were financed locally, which promoted efficiency and respected federalism:

> [T]he expenditure being in the hands of those who are to pay the money and be immediately benefited, will be more carefully managed and more productive of good than if the funds were drawn from the national treasury and disbursed by the officers of the General Government; that such a system will carry with it no enlargement of federal power and patronage, and leave the States to be the sole judges of their own wants and interests.

43 H.R. Journal 88 (1847). He also warned that if Congress' spending power were not subject to limits, "combinations of individual and local interests will be found strong enough to control legislation, absorb

the revenues of the country, and plunge the government into hopeless indebtedness." *Id.*, at 85.

President Buchanan echoed this concern for preserving the boundary between the national and state governments when he vetoed as unconstitutional an act donating public lands to states for establishing agricultural colleges. James Buchanan, Veto Message to the House of Representatives (Feb. 24, 1859), *reprinted in* 5 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 543. He warned that if Congress had this authority, it would:

> break down the barriers which have been so carefully constructed in the Constitution to separate Federal from State authority. We should then not only "lay and collect taxes, duties, imposts and excises" for Federal purposes, but for every State purpose which Congress might deem expedient or useful. This would be an actual consolidation of the Federal and State Governments so far as the great taxing and money power is concerned, and constitute a sort of partnership between the two in the Treasury of the United States, equally ruinous to both.

Id., at 547.

These presidential assertions, and the historical episodes they illuminate, confirm that for the first eighty-five years of our nation's history, the limits on Congress' spending power contained in the Constitution were real and consequential. *See generally*, John C. Eastman, *Restoring the "General" to the General Welfare Clause*, 4 CHAP. L. REV. 63, 87

(2001). The exact confines of that limit were debated, but most presidents prior to the Civil War followed Madison's position that Congress could not spend beyond its enumerated powers. Even presidents such as Monroe, who rejected this view, still believed that Congress' spending power was limited by the text of the Clause itself, and that Congress could only spend for purposes that were national, rather than local. 39 Annals of Cong. 1849 (1822).

That "general Welfare" limits Congress' Spending Clause power to national, as opposed to local matters, whether that restriction is confined to the clause itself or to the litany of other enumerated powers, is the only reading of the text that comports with the doctrine of enumerated powers and limited government. Both doctrines were essential in drafting a Constitution that was acceptable to the states, and necessary to ratification. The Framers sought to create a national government with sufficient power to combat the weaknesses of the Articles of Confederation, but lacking the potential to threaten state sovereignty over traditional governmental functions. *See, e.g.,* THE FEDERALIST NO. 45 (James Madison).

Accordingly, Roger Sherman, a delegate to the Constitutional Convention of 1787, proposed that Congress should have power to legislate "in all cases which may concern the common interests of the Union: but not to interfere with the government of the individual States in any matters of internal police which respect the government of the States only, and wherein the general welfare of the United States is not concerned." 2 THE RECORDS OF THE

FEDERAL CONVENTION 21 (Max Farrand, ed., 1911); *see also, id.*, Proposal of Gunning Bedford (giving to Congress the power "to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent"). During the Convention, the Committee of Detail considered Sherman's proposal, and others like it, and developed a list of enumerated powers that eventually became Article I, Section 8—powers designed to further the common interests or general welfare of the nation without interfering unnecessarily with the internal police powers of the states. Thus, the limitations implicit in the very idea of the enumerated powers doctrine paralleled the "general Welfare" limitation in the Spending Clause.

As this history illustrates, Congress may only spend money for national, rather than local purposes and it may not interfere with the internal, core governmental functions of the states. One of these core functions is the police power, which has always been considered a fundamental aspect of state sovereignty. *Morrison*, 529 U.S., at 618. The funding of state prisons is inherently local spending because state prisons house those individuals who have committed crimes against the people of the State, as defined by the Legislature of the State—a fact that this Court has previously recognized. *See, e.g., Preiser v. Rodrigeuz*, 411 U.S. 475, 491–92 (1973) ("it is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons").

Because RLUIPA is based on spending that is for a purely local rather than national purpose, and therefore exceeds Congress' power under the Spending Clause as originally understood, this case presents a perfect opportunity for this Court to address whether the limits it has recently reaffirmed with respect to the Commerce Clause apply equally to the Spending Clause.

B. Existing Precedent of this Court Confirms the General Welfare Limit on Congress' Spending Power.

This Court's two most recent cases construing the Spending Clause, *Butler* and *Dole*, confirm that "general Welfare" remains a limitation on Congress' spending power. In *Butler*, this Court overturned as unconstitutional the Agricultural Adjustment Act of 1933—a national, New Deal program that paid subsidies to farmers who agreed to reduce their crop production—because "The Act invade[d] the reserved rights of the states." 297 U.S., at 68. In its opinion, the Court sketched the outlines of the Spending Clause and discussed the debate between Madison and Hamilton about what should be its proper scope. *Id.*, at 65–67. The Court concluded that Hamilton's view was correct and that: "While, therefore, the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of section 8 which bestow and define the legislative powers of the Congress." *Id.*, at 66.

The Court then discussed the limits on Congress' power, which it deemed were important because, "'The Constitution was, from its very origin, contemplated to be the frame of a national

government, of special and enumerated powers, and not of general and unlimited powers.'" *Id.*, at 66 (quoting Chief Justice Story). Citing Hamilton's assertion that the spending power must be used for "general, and not local" purposes, the Court concluded that Congress' "powers of taxation and appropriation extend only to matters of national, as distinguished from local, welfare." *Id.*, at 67. Thus, while *Butler* accepted the broader view of the Spending Clause espoused by Hamilton instead of that held by Madison, it nonetheless recognized a significant limit on the extent of that power, commensurate with the historical understanding of "*general* Welfare" and of the federalism-based purpose for limiting the national spending power.

Fifty years later, in *Dole*, this Court considered a challenge to a federal statute that required states to raise their legal drinking age to twenty-one years, or else forfeit a percentage of federal highway funding. The Court found that Congress may, pursuant to its Spending Clause power, "attach conditions on the receipt of federal funds" provided that it satisfies five requirements. *Dole*, 483 U.S., at 206–212 (the spending scheme must be "in pursuit of the general welfare"; Congress may only condition funds "unambiguously" so that states may freely decide whether to accept them; the condition must be related "to the federal interest in particular national projects or programs"; it may not violate any other constitutional provisions; and it must not rise to the level of coercion).

The opinion specifically affirmed *Butler* for the first of these requirements, namely, that "the exercise of the spending power must be in pursuit of

the general welfare." *Dole,* 483 U.S., at 207. The Court's assertion that courts should defer to Congress' judgment about "whether a particular expenditure is intended to serve general public purposes," does not nullify the requirement that spending must be *general*—that is, for national, rather than local purposes. *Id.* In fact, the *Dole* Court cited *Helvering v. Davis*, 301 U.S. 619, 640 (1937), a case in which this Court recognized that "[t]he line must still be drawn between one welfare and another, between particular and general." The Court largely deferred to Congress to determine whether a program advanced the "welfare" of the nation (i.e., whether the program was "wise"). *Id.*, at 640. However, the Court still reviewed the spending program to ensure that the exercise of power was not arbitrary and that the program at issue was "national" rather than local. *Id.*, at 640–45.

Read together, *Butler* and *Dole* affirm that "*general* welfare" is a limit on Congress' spending power. However, as the opinion below reveals, it is a limit not honored by Congress and not enforced by the lower courts, undoubtedly because the lower courts have misread the deference this Court gave to Congress as applicable not just to the "welfare" determination but to the "general" limitation as well. The Eighth Circuit's conclusory assertion that RLUIPA is a valid exercise of Congress' spending power ignores this critical distinction, for example, even to the point of omitting the "general" limitation in its description of the deference due Congress under the spending power. 581 F.3d, at 650 (Pet. App. 16a-17a) ("As a general matter, 'the concept of

welfare or the opposite is shaped by Congress' in the first instance" (citing *Dole*, 483 U.S. at 208)).

A similar error is made by each of the other circuits that have addressed the issue. See *Madison v. Virginia*, 474 F.3d 118, 125 (4th Cir. 2006) ("'In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress'" (quoting *Dole*, 483 U.S., at 207)); *Cutter v. Wilkinson*, 423 F.3d 579, 585 (6th Cir. 2005) ("Heeding the Supreme Court's instruction to 'defer substantially' to Congress' legislative judgment, we agree with our sister circuits that RLUIPA furthers the general welfare"), *rev'd on other grounds*, 544 U.S. 709 (2005); *Charles v. Verhagen*, 348 F.3d 601, 607 (7th Cir. 2003) ("Given the Supreme Court's directive to defer substantially to Congress' judgment, we agree with the Ninth Circuit that RLUIPA's attempt to protect prisoners' religious rights and to promote the rehabilitation of prisoners falls squarely within Congress' pursuit of the general welfare under its Spending Clause authority"); *Mayweathers v. Newland*, 314 F.3d 1062, 1066 (9th Cir. 2002) (noting that "federal courts must 'defer substantially' to Congress in determining if a statute advances the general welfare," and further, that "protecting religious worship in institutions from substantial and illegitimate burdens *does* promote the general welfare"), *cert. denied*, 540 U.S. 815 (2003); *cf. Benning v. Georgia*, 391 F.3d 1299, 1305 (11th Cir. 2004) ("Georgia does not dispute that RLUIPA serves the general welfare").

In none of these cases have the courts focused on the distinction between national and local, critical to

this Court's decision in *Butler* and re-affirmed in *Dole*.

Where, as here, the only spending involved is for local prisons, the critical question is whether the federal spending qualifies as "general" rather than merely local welfare. Without complying with that Spending Clause limitation, the conditions Congress seeks to impose via its local spending largess simply cannot be sustained, particularly when they intrude upon core police powers of the states dealing with crime and punishment – quintessential examples of the sovereign police power retained by the states. *See Morrison*, 529 U.S., at 618.

Certiorari is warranted so that this Court can make clear that the lower courts may not simply defer to Congress' assertion that RLUIPA satisfies the general welfare requirement because it seeks to correct a perceived social wrong. Abject deference is unwarranted because Congress has overstepped the line demarcating the national from the local. To allow the lower court holdings to the contrary would, as with the claims of unlimited Commerce Clause authority rejected in *Lopez*, "convert congressional authority . . . to a general police power of the sort retained by the States." 514 U.S., at 567.

CONCLUSION

RLUIPA is an unconstitutional exercise of Congress' Spending Clause power. The Constitution only allows Congress to spend for the "*general* Welfare," which the framers' understanding, history, and this Court's precedent all reveal to mean

national welfare, as opposed to state or local welfare. The operation of state prisons is an inherently local matter and one that is fundamental to the core functions of state government. Allowing the federal government to regulate state prisons, by means of its spending power, intrudes on state sovereignty and upsets the balance of power between state and local government.

In addition, the lack of a robust, judicially-enforced "general welfare" limitation on the spending power has fuelled the pork-barrel system of legislation that prevails in federal politics. State representatives, eager to ingratiate themselves to their constituents, vie for federal funds to benefit their states, and promises of earmarked funds for particular states are used as bargaining chips to gain majority support for bills. This phenomenon recently made headlines when Senator Ben Nelson of Nebraska cast the deciding vote in favor of health care reform, after the bill's authors exempted Nebraska from having to pay for the proposed expansion of Medicaid. *See,* Monica Davey, *Senator Nelson Defends His Health Care Vote*, New York Times A13 (Dec. 31, 2009). Finally, the absence of a meaningful "general welfare" limit on Congress' Spending power has arguably undermined elected officials' ability to act in furtherance of the actual general welfare. President Polk, writing in 1847, recognized this problem and issued a prophetic warning:

> But a greater practical evil would be found in the art and industry by which appropriations would be sought and obtained. The most artful and industrious [politicians] would be

> the most successful; the true interests of the country would be lost sight of in an annual scramble for the contents of the treasury; and the member of Congress who could procure the largest appropriations to be expended in his district would claim the reward of victory from his enriched constituents. The necessary consequence would be sectional discontents and heart-burnings, increased taxation, and a national debt, never to be extinguished.

43 H.R. Journal 87 (1847). The ramifications of the Spending Clause power clearly extend beyond the provisions of RLUIPA at issue here and go to the heart of Congressional power in our federal system.

For these reasons, the Court should grant the cross-petition for writ of certiorari and use this case as an opportunity to address the scope of Congress' Spending Clause power.

Respectfully submitted,

James E. Moore
WOODS, FULLER,
SHULTZ & SMITH
300 S. Phillips Ave.
P.O. Box 5027
Sioux Falls, SD 57117
(605) 978-0613

John C. Eastman
Counsel of Record
840 E. 37th Street
Long Beach, CA 90807
(562) 426-1934

Counsel for Cross-Petitioners

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