No. 09-953

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

BRIEF OF CHARLES E. SISNEY IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Section 3 of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1, is a constitutional exercise of Congress' legislative authority under the Spending Clause, U.S. CONST. art. I, § 8, cl. 1. Specifically, whether Congress has the authority to determine that RLUIPA was enacted in pursuit of the general welfare to protect fundamental religious liberty and promote prisoner rehabilitation, or, instead, whether federal spending for state prisons violates the Spending Clause by intruding upon the states' police power.

LIST OF PARTIES

Cross-Respondents are Charles E. Sisney, an inmate at the South Dakota State Penitentiary, and the United States of America, Intervenor below.

Cross-Petitioners, in their individual and official capacities, are Tim Reisch, Secretary of Corrections for South Dakota; Douglas L. Weber, Chief Warden for the Department of Corrections of South Dakota; Dennis Block, 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.

James Dean Van Wyhe, an appellee in the circuit court proceedings, is named as a conditional Cross-Respondent, but is not a petitioner in this Court.

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The court of appeals' opinion is reported at 581 F.3d 639. Pet. App. 1a.[1] The district court's opinion is reported at 533 F. Supp. 2d 952. Pet. App. 41a.

JURISDICTION

The court of appeals' judgment was entered on September 10, 2009. On January 8, 2010, pursuant to a 30-day extension of time, Petitioner Charles E. Sisney filed a petition for a writ of certiorari. On February 9, 2010, Respondents Tim Reisch *et al.* filed a conditional cross-petition for a writ of certiorari. On March 3, 2010, Justice Samuel Alito extended the time for Cross-Respondents, including the United States, to file a response to the cross-petition until April 19, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. Constitutional Provisions

The Spending Clause in Article I of the United States Constitution provides, in part: "The Congress shall have 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. I, § 8, cl. 1.

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[1] References to Petitioner's Appendix are to the appendix filed in support of the petition for a writ of certiorari pending in *Sisney v. Reisch*, No. 09-821, filed Jan. 8, 2010.

II. Statutory Provisions

Section 3 of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1, provides, in pertinent 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 . . . 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; or
> >
> > (2) the substantial burden affects, or removal of that substantial burden would affect, commerce . . . among the several States. . . .

COUNTER-STATEMENT OF THE CASE

I. Statutory Background

Enacted on September 22, 2000, in response to this Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc to 2000cc-5, represents "the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens." *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005). Less sweeping in scope than its predecessor, the Religious Freedom Restoration Act, and invoking authority under the Spending and Commerce Clauses, Congress enacted RLUIPA to protect religious liberty against government-imposed burdens in two distinct contexts—discretionary applications of state and local land use regulations and the religious exercise of persons institutionalized in prisons, mental hospitals and similar state institutions.

Section 3 of RLUIPA, at issue here, applies to institutionalized persons and provides that no state or local government "shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person" is both "in furtherance of a compelling governmental interest" and "the least restrictive means" of furthering that interest. 42 U.S.C. § 2000cc-1(a). Congress did not invoke its

Fourteenth Amendment enforcement powers in enacting Section 3. Instead, in keeping with a long tradition of federal anti-discrimination legislation, Congress established compliance with Section 3 as a condition on the receipt of federal funds. Under Section 3(b), RLUIPA applies when "the substantial burden [on religious exercise] is imposed in a program or activity that receives Federal financial assistance,"[2] or "the substantial burden affects, or the 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)(1)-(2). Of relevance here, the term "program or activity" is defined to include "all of the operations of * * * a department, agency, special purpose district, or other instrumentality of a State or of a local government." 42 U.S.C. § 2000d-4a(1)(A); *see* 42 U.S.C. § 2000cc-5(6).

Before enacting Section 3, and seeking to establish an evidentiary record sufficient to withstand this Court's scrutiny, Congress documented in hearings spanning three years that "'frivolous and arbitrary'" barriers impeded institutionalized persons' free religious exercise. *Cutter*, 544 U.S. at 716 (quoting 146 Cong. Rec. S7774, S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA) ("Whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways")). Evidence before Congress demonstrated that in the

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[2] Every state, including South Dakota, *see* Pet. App. 21a-22a, accepts federal funding for its prisons. *Cutter*, 544 U.S. at 716 n.4.

absence of federal legislation, prisoners, civil detainees and individuals institutionalized in mental hospitals continued to endure substantial burdens in practicing their religious faiths. *See, e.g.*, 146 Cong. Rec. S7774-75 (daily ed. July 27, 2000); 146 Cong. Rec. E1563-64 (daily ed. Sept. 22, 2000); H.R. Rep. No. 106-219, 106th Cong. 1st Sess. (July 1, 1999), at 9-10 (summarizing testimony). Congress heard testimony from witnesses who recounted cases in which prison officials, arbitrarily and without justification, denied prisoners access to food, clothing or religious articles that were required by the prisoners' faiths. H.R. Rep. No. 106-219, 106th Cong. 1st Sess. (July 1, 1999), at 9-10. For example, congressional testimony demonstrated that prison officials disallowed the lighting of Chanukah candles but allowed votive candles, refused to purchase or allow prisoners to receive matzo, which Jews are required to eat on Passover, and refused to let Jewish prisoners fast when their religion so required or take a sack lunch to break their fast at nightfall. *See* Protecting Religious Liberty After *Boerne v. Flores* (Pt. III): Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong., 1st Sess. 41, 43 (1998) (statement of Isaac Jaroslawicz, Director of Legal Affairs, Aleph Institute); *see also Cutter*, 544 U.S. at 716 n.5 (citing examples).

Congress heard testimony concerning a case in which officials allowed a prisoner to attend Episcopal services but forbade him from taking communion, (*see* 146 Cong. Rec. S7774, S7775), and a case in which prison rules "without a ghost of a reason," prevented

Protestant prisoners from wearing crosses, as in *Sasnett v. Litscher*, 197 F.3d 290, 293 (7th Cir. 1999).

Based on this testimony, Congress concluded that "[i]nstitutional residents' right to practice their faith is at the mercy of those running the institution." 146 Cong. Rec. S7774, S7775.

In light of these findings, and in order "[t]o secure redress for inmates who encountered undue barriers to their religious observances, Congress carried over from RFRA the 'compelling governmental interest'/'least restrictive means' standard." *Cutter*, 544 U.S. at 716-17. As this Court recognized, Section 3 governs institutions "in which the government exerts a degree of control unparalleled in civilian society and severely disabling to private religious exercise." *Cutter*, 544 U.S. at 720-21. RLUIPA thus "alleviates exceptional government-created burdens on private religious exercise" and protects persons who, "unable freely to attend to their religious needs" are "dependent on the government's permission and accommodation for exercise of their religion." *Id.*

While RLUIPA's protection is broad, it is not unlimited, and it accords due deference to prison administrators. Even where a plaintiff establishes a substantial burden on religious exercise, prison officials can defeat her claim by establishing that the burden is justified by a compelling governmental interest furthered by the least restrictive means. Indeed, as the *Cutter* Court recognized, Congress, in enacting RLUIPA, expressly anticipated that "courts will

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." 146 Cong. Rec. at S7775; *see Cutter*, 544 U.S. at 722-23 (noting that "[l]awmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety and security in penal institutions" and stating that "[w]e have no cause to believe that RLUIPA would not be applied in an appropriately balanced way, with particular sensitivity to security concerns."); *see id.* at 725 (noting that the "'federal Bureau of Prisons has managed the largest correctional system in the Nation under the same heightened scrutiny standard as RLUIPA without compromising prison security, public safety, or the constitutional rights of other prisoners,'" and that "[t]he Congress that enacted RLUIPA was aware of the Bureau's experience") (citation omitted).

Unlike remedial legislation enacted pursuant to the Fourteenth Amendment, and because compliance with the substantive provisions of Section 3 is conditioned on the receipt of federal financial assistance pursuant to the Spending Clause, the states retain the power and the freedom to refuse federal funds and avoid the requirements of Section 3.[3]

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[3] Where plaintiff relies on Section 3(b)(2) and demonstrates an effect on commerce, defendant may defeat the jurisdictional basis by establishing that the burdens at issue, in the aggregate, do not have a substantial effect on commerce. 42 U.S.C. § 2000cc-2(g).

II. District Court's Opinion

Petitioner Charles Sisney, an inmate at the South Dakota State Penitentiary, brought an action against South Dakota prison officials asserting interference with his rights of free religious exercise in violation of RLUIPA. Pet. App. 43a-46a. The prison officials sought summary judgment asserting qualified immunity and Eleventh Amendment immunity, and challenging the constitutionality of RLUIPA on various grounds. Pet. App. 42a-43a. The United States intervened to defend RLUIPA's constitutionality. The district court upheld RLUIPA as a valid exercise of Congress' Spending Clause power, and rejected the balance of the constitutional claims. Pet. App. 102a-112a. The court granted summary judgment on the individual capacity claims, finding that because RLUIPA was enacted under the Spending Clause, Congress could not subject non-recipients of federal funds to private liability. Pet. App. 58a-61a.

In upholding RLUIPA as a constitutional exercise of Spending Clause power, the district court applied the four-factor test set forth in *South Dakota v. Dole*, 483 U.S. 203 (1987), for determining the validity of conditions Congress may impose to persuade funding recipients to conform to its policy choices. Pet. App. 104a-112a. The district court invoked *Cutter's* recognition of the congressional hearings documenting the frivolous or arbitrary barriers to institutionalized persons' religious exercise, and agreed with the Fourth, Seventh and Ninth Circuits that RLUIPA promotes the general welfare by protecting

fundamental religious rights against unjustified and substantial burdens, and promoting prisoner rehabilitation. Pet. App. 105a-107a (stating "the First Amendment's protection of the free exercise of religion 'demonstrates the great value placed on protecting religious worship from impermissible government intrusion'" and "'RLUIPA follows a long tradition of federal legislation designed to guard against unfair bias and infringement on fundamental freedoms'") (quoting *Mayweathers v. Newland*, 314 F.3d 1062, 1066-67 (9th Cir. 2002)).

The district court found that RLUIPA unambiguously sets forth the conditions on which state governments accept federal prison funds, and thus RLUIPA satisfied the second *Dole* factor. The third factor was "easily satisfied" because "'[b]oth the protection of the religious exercise of prisoners and their rehabilitation are rational goals of Congress, and those goals are related to the use of federal funds for state prisons.'" Pet. App. 108a (quoting *Benning v. Georgia*, 391 F.3d 1299, 1308 (11th Cir. 2004)). Concerning the fourth *Dole* factor, the court rejected the contention that RLUIPA is coercive or that it induces South Dakota to violate the Constitution, particularly the Tenth Amendment, under which power is not reserved to the states when Congress acts pursuant to Article I. Pet. App. 109a (quoting *Charles v. Verhagen*, 348 F.3d 601, 609 (7th Cir. 2003)). The district court noted that this Court has established a constitutional floor, not a ceiling, for the protection of religious liberty, and has explicitly invited the political branches to provide heightened legislative protection

for religious worship. Pet. App. 109a-110a (citing *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990)).

On the Eleventh Amendment, the district court denied summary judgment, noting that "'RLUIPA follows in the footsteps of a long-standing tradition of federal legislation that seeks to eradicate discrimination,'" Pet. App. 71a (citation omitted), and concluding that RLUIPA's remedial provision for "appropriate relief" expressly permits recovery of monetary damages; thus, by voluntarily accepting federal correctional funds, South Dakota waived its immunity from suits for monetary damages under the Civil Rights Remedies and Equalization Act of 1986 (CRREA), 42 U.S.C. § 2000d-7. Pet. App. 57a-58a.

III. Eighth Circuit's Opinion

The Eighth Circuit Court of Appeals affirmed that RLUIPA is a constitutional exercise of Congress' Spending Clause power, but reversed on Eleventh Amendment grounds. The United States intervened to defend the constitutionality of RLUIPA.

In affirming the district court, the Eighth Circuit joined every other circuit court of appeals that has addressed the question to conclude that Section 3 is a constitutional exercise of legislative power under the Spending Clause. Pet. App. 14a-22a. The Eighth Circuit expressly adopted the reasoning set forth by the decisions of the Fourth, Sixth, Seventh, Ninth and Eleventh Circuits upholding RLUIPA against a Spending Clause challenge. The Eighth Circuit engaged in a straightforward application of the *Dole* factors,

noting as this Court has that the Spending Clause provides Congress with incidental authority to "'attach conditions on the receipt of federal funds, and [Congress] has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal money[] upon compliance by the recipient with federal statutory and administrative directives.'" Pet. App. 15a (quoting *Dole*, 483 U.S. at 206 (internal marks omitted)). Following *Dole*, the court of appeals stated that under the Spending Clause, "Congress may use conditional grants of federal funds to achieve objectives that are not within the scope of Article I, *id.*, such as requiring a state to waive its 'sovereign immunity as a condition of receiving federal funds, even though Congress could not order the waiver directly.'" Pet. App. 15a (citing *Jim C. v. United States*, 235 F.3d 1079, 1081 (8th Cir. 2000) (en banc), *cert. denied*, 533 U.S. 949 (2001)).

The court of appeals determined that a state prison receiving funds under RLUIPA does so on two conditions: (1) that prison officials not impose a substantial burden on an inmate's free religious exercise unless the burden is justified by a compelling state interest achieved through the least restrictive means, and (2) that the state must submit to judicial proceedings for "appropriate relief" to enforce RLUIPA. Pet. App. 16a.

The court of appeals found the first *Dole* factor, requiring legislation to be in pursuit of the general welfare, was satisfied because RLUIPA protects inmates' religious exercise. The court of appeals rejected the contention that RLUIPA interferes with

prison administration and improperly encroaches on a purely local concern—the operation of state correctional facilities. Following *Dole*, the court stated that "[a]s a general matter, 'the concept of welfare or the opposite is shaped by Congress' in the first instance." Pet. App. 16-17a (quoting *Dole*, 483 U.S. at 208 (internal marks omitted)). The court of appeals held:

> Congress has determined that encouraging greater protection of religious worship within prisons promotes the general welfare, and we find it to be beyond serious dispute that this protection furthers society's larger goal of rehabilitating inmates as well as simply respecting individual religious worship. Purely local matters of prison administration are not jeopardized because RLUIPA permits even substantial burdens on religious exercise to be imposed when the state uses the least restrictive means of pursuing its compelling governmental interests.

Pet. App. 17a.

Echoing *Cutter*, the court of appeals further held:

> RLUIPA allows courts to give 'due deference' to the expertise of prison officials in achieving the compelling government interests involved in prison operations, and 'Congress did not intend to overly burden prison operations' but to

> provide heightened religious protection 'without undermining the security, discipline, and order of those institutions.' *Murphy v. Mo. Dep't of Corr.*, 372 F.3d 979, 987-88 (8th Cir. 2004), *cert. denied*, 543 U.S. 991 (2004)).

Pet. App. 17a.

Following five other circuits, the Eighth Circuit found the second and third *Dole* factors were satisfied, concluding that "RLUIPA sets forth the general right to heightened protection of religious exercise with sufficient clarity, and unambiguously conditions the states' acceptance of federal funding on its agreement to enforce that protection," Pet. App. 19a, and that "'[b]oth the protection of the religious exercise of prisoners and their rehabilitation are rational goals of Congress, and those goals are related to the use of federal funds for state prisons.'" *Id.* (quoting *Benning*, 391 F.3d at 1308).

Regarding the fourth *Dole* factor, the court of appeals rejected the contention that RLUIPA contravenes the doctrine of separation of powers by creating a higher standard of review than that which applies to constitutional claims. As *Cutter* previously noted, the court of appeals expressly held that:

> RLUIPA appropriately views the constitutional standard as a floor, not a ceiling, and provides additional statutory protection for religious worship in a particular context. *See Mayweathers*, 314 F.3d at 1070 (stating the Court in

> *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990), 'explicitly left [the question of whether to provide] heightened legislative protection for religious worship to the political branches').

Pet. App. 20a-21a.

Thus, "Congress's policy decision to provide this heightened protection is well within Congress's appropriate legislative role. 'Nothing in the Spending Clause . . . forecloses Congress from placing conditions on federal funds that reach beyond what the Constitution requires.'" Pet. App. 21a (citation omitted).

Finally, finding that RLUIPA's conditions are not unconstitutionally coercive, the court of appeals rejected the idea that the states are forced to comply with RLUIPA. "While a potential loss of 100% of the federal funding for state prisons would indeed be painful, the statute is intended as an inducement, and the final choice is left to each state." Pet. App. 22a. "'[H]ard choices do not alone amount to coercion.'" *Id.* (quoting *Madison v. Virginia*, 474 F.3d at 118, 128 (4th Cir. 2006)). ""'If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant.'"" *Id.* (quoting *Jim C.*, 235 F.3d at 1082 (quoting *New York v. United States*, 505 U.S. 144, 168 (1992)). Thus, "[w]e conclude that 'the Spending Clause allows Congress to present States with this sort of choice,' *id.*, and that RLUIPA is not unduly coercive." *Id.*

On the merits of the RLUIPA claims, the court of appeals affirmed the denial of summary judgment, finding that the prison's refusal to allow Petitioner to celebrate the festival of Sukkot in a succah, as the Jewish faith requires, imposed a substantial burden under RLUIPA, and reversed summary judgment on the remaining injunctive relief claims. Pet. App. 33a-37a.

IV. Proceedings in This Court

On January 8, 2010, a petition for a writ of certiorari in *Sisney v. Reisch*, No. 09-821, was filed, raising the question whether the Eleventh Amendment bars private suits for money damages by prisoners against state officials for violations of Section 3 of RLUIPA, and whether the express prohibition against discrimination by federal funding recipients set forth in CRREA effectuates a waiver of Eleventh Amendment immunity, either alone or in combination with RLUIPA. Pet. at i-ii, 32-39; Pet. App. 23a-30a, 70a-76a.

On February 9, 2010, Respondent South Dakota filed a conditional cross-petition for a writ of certiorari to consider the constitutionality of RLUIPA under the Spending Clause. *Reisch v. Sisney*, No. 09-953.

On March 18, 2010, pursuant to this Court's November 2, 2009, invitation, the Solicitor General filed *amicus curiae* briefs expressing the views of the United States in *Sossamon v. Texas*, No. 08-1438, and *Cardinal v. Metrish*, No. 09-109, on the question whether RLUIPA effectuates a waiver of Eleventh Amendment immunity. The Solicitor General recommended that certiorari is warranted to resolve

the split among the circuits on whether RLUIPA contemplates private suits for money damages and, if so, whether such suits are barred by the Eleventh Amendment, *see* Brief for the United States in *Cardinal v. Metrish* at 6, 14-21, and further that CRREA effectuates a waiver of Eleventh Amendment immunity by federal funding recipients. *Id.* at 8-13. The Solicitor General recommended that certiorari should be granted in *Cardinal* and that *Sossamon* should be held pending disposition of *Cardinal*.

On April 12, 2010, the Solicitor General filed her response recommending that *Sisney* be held pending *Cardinal*. South Dakota filed a brief in opposition.

REASONS FOR DENYING THE WRIT

I. THE QUESTION PRESENTED FAILS TO IMPLICATE A SPLIT AMONG THE CIRCUIT COURTS OF APPEALS AND DOES NOT WARRANT REVIEW, AS ALL SIX CIRCUITS THAT HAVE CONSIDERED THE QUESTION HAVE UPHELD RLUIPA AS VALID SPENDING CLAUSE LEGISLATION

Cross-Petitioners have failed to demonstrate that review of the Eighth Circuit's decision is warranted by this Court. Six circuit courts of appeals, including the Fourth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits, have concluded that RLUIPA constitutes a valid exercise of Congress' legislative power under the Spending Clause. Every circuit that has considered the question has determined that

RLUIPA constitutes valid Spending Clause legislation, and every circuit that has considered the question has determined that RLUIPA was enacted in pursuit of the general welfare. There is no split among the circuits on this question, not even a dissenting opinion.

In expressly adopting the reasoning set forth by its sister circuits, the Eighth Circuit joined every other circuit that has rejected a Spending Clause challenge, "with little to add." Pet. App. 14a. *See Madison v. Virginia*, 474 F.3d 118, 123-29 (4th Cir. 2006); *Cutter v. Wilkinson*, 423 F.3d 579, 584-90 (6th Cir. 2005); *Benning v. Georgia*, 391 F.3d 1299, 1305-09 (11th Cir. 2004); *Charles v. Verhagen*, 348 F.3d 601, 606-11 (7th Cir. 2003); *Mayweathers v. Newland*, 314 F.3d 1062, 1066-67 (9th Cir. 2002), *cert. denied*, 540 U.S. 815 (2003); *see also Sossamon v. Texas*, 560 F.3d 316, 328-29 (5th Cir. 2009), *petition for cert. pending*, No. 08-1438 (filed May 18, 2009) (concluding that RLUIPA "was passed pursuant to the Spending Clause"); *Smith v. Allen*, 502 F.3d 1255, 1270, 1274 n.9 (11th Cir. 2007) (agreeing that RLUIPA "hinges on Congress' Spending Power").

Every one of those circuits easily found that RLUIPA satisfies the first *Dole* restriction. *See Madison*, 474 F.3d at 125 (noting that *Dole* requires substantial deference to Congress' legislative judgment, citing *Cutter* for its finding that "Congress sought to protect prisoners' religious liberty from unjustified and substantial burdens," and concluding 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.'") (quoting *Charles*, 348 F.3d at 607); *Cutter*, 423 F.3d at 585 ("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."); *Charles*, 348 F.3d at 607 ("RLUIPA follows in the footsteps of a long-standing tradition of federal legislation that seeks to eradicate discrimination and is 'designed to guard against unfair bias and infringement on fundamental freedoms.' . . . 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.") (citation omitted); *compare Benning*, 391 F.3d at 1305 (finding RLUIPA valid under the Spending Clause but declining to address first *Dole* restriction where state did not dispute that RLUIPA serves the general welfare).

The circuit courts have been in complete accord since 2002, when the Ninth Circuit recognized that "Congress possesses great leeway to determine which statutory aims advance the general welfare" and held:

> [P]rotecting religious worship in institutions from substantial and illegitimate burdens *does* promote the general welfare. The First Amendment, by prohibiting laws that proscribe the free exercise of religion, demonstrates the great value placed on protecting

> religious worship from impermissible government intrusion. By ensuring that governments do not act to burden the exercise of religion in institutions, RLUIPA is clearly in line with this positive constitutional value. Moreover, by fostering non-discrimination, RLUIPA follows a long tradition of federal legislation designed to guard against unfair bias and infringement on fundamental freedoms. *See, e.g.*, Title VI, 42 U.S.C. § 2000d *et seq.* (2002); Title VII, 42 U.S.C. § 2000e *et seq.* (2002); Title IX, 20 U.S.C. § 1681 (2002). No sound reason exists to disturb Congress's finding that RLUIPA promotes the general welfare.

Mayweathers, 314 F.3d at 1066-67 (emphasis in original); *see also Madison*, 474 F.3d at 128 (stating that "Congress has a legitimate interest in seeing how federal funds are spent. Congress also has a legitimate interest in protecting the religious freedoms of inmates and in not funding systems that violate them").

In sum, there is simply no serious dispute among the circuit courts that Section 3 of RLUIPA promotes the general welfare, the purpose of which was documented in evidentiary hearings before Congress and recognized by this Court in *Cutter*.

So, too, the circuit courts of appeals have uniformly rejected the contention that RLUIPA

usurps the regulation of a core state function in violation of the Tenth Amendment or state sovereignty. While punishment remains a basic police power, the Sixth, Seventh, Ninth, and Eleventh Circuits, those courts which have addressed the question, have concluded that RLUIPA does not regulate the operation of state prisons or commandeer compliance; rather, prison officials remain free to run prisons as they see fit so long as they avoid substantially burdening prison inmates' free exercise of religion. *See Cutter*, 423 F.3d at 589-90 ("RLUIPA does not regulate a state's operation of its prison system and . . . the Tenth Amendment does not limit Congress's power to place conditions on federal funding;" rather, "Congress prohibited the operators of prisons and other institutions that receive federal funding from engaging in certain conduct."); *Benning*, 391 F.3d at 1308-09 ("'RLUIPA's core policy is not to regulate the states or compel their enforcement of a federal regulatory program, but to protect the exercise of religion, a valid exercise of [the power of Congress], which does not run afoul of the Tenth Amendment's protection of the principles of federalism.'") (citation omitted); *Charles*, 348 F.3d at 609 ("[T]he Tenth Amendment does not restrict the range of conditions Congress can impose on the receipt of federal funds, even if Congress could not achieve the goal(s) of those conditions directly."); *Mayweathers*, 314 F.3d at 1069 (RLUIPA "does not regulate the operation of prisons").

Even then, substantially burdensome prison regulations can be justified by compelling

governmental interests, or states can simply decline federal funds and voluntarily opt out. *See Cutter*, 423 F.3d at 589 ("RLUIPA does not require the states to enact or administer a federal program. The Act does not demand that states take any affirmative action at all. To the contrary, RLUIPA requires states to refrain from acting in a way that interferes with inmates' exercise of religion, unless the states' actions are the least restrictive means of furthering a compelling governmental interest."); *Madison*, 474 F.3d at 128 (rejecting claim that RLUIPA intrudes on state sovereignty where "one attribute of State sovereignty is the ability to waive it in pursuit of other objectives, in this case pursuit of federal funding"); *Benning*, 391 F.3d at 1308-09 ("RLUIPA does not compel the states to regulate in a specific manner" because "RLUIPA . . . 'leaves individual states free to eliminate the discrimination in any way they choose, so long as the discrimination is eliminated.'") (citation omitted); *Mayweathers*, 314 F.3d at 1069 ("If states disagree with the requirements of RLUIPA they remain free to forgo federal funding and opt out of its mandates.").

Here, too, on the question of whether RLUIPA interferes with local concerns the circuit courts of appeals are in complete accord, and not one has endorsed Cross-Petitioners' position. Given the substantial deference courts are instructed by *Dole* to accord Congress, the explicit invitation extended to the political branches in *Smith*, the extensive evidentiary record Congress amassed as recognized in *Cutter*, and the sovereign authority retained by the states to implement or opt out of RLUIPA as they see fit, "[t]o

strike RLUIPA down on Spending Clause grounds would be an extraordinary assertion of judicial authority." *Madison*, 474 F.3d at 129.

Absent a split among the circuits, or any decision supporting Cross-Petitioners' construction, review by this Court is not warranted.

II. THE QUESTION PRESENTED FAILS TO IMPLICATE A CONFLICT WITH ANY OF THIS COURT'S PRECEDENTS, AS THE EIGHTH CIRCUIT'S DECISION REPRESENTS A STRAIGHTFORWARD APPLICATION OF *BUTLER* AND *DOLE*

Cross-Petitioners contend that review is warranted because the Eighth Circuit deviated from *Dole* by deferring to Congress' legislative policy determination that RLUIPA promotes the general welfare, and to the extent the courts of appeals have declined to apply *Dole* in a manner that restricts the scope of Congress' legislative power under the Spending Clause to its enumerated Article I fields. Despite Cross-Petitioners' characterization, the Eighth Circuit, and the five circuit courts it followed, engaged in a straightforward application of *Dole* and did not remotely deviate from this Court's precedents. Indeed, *Dole* expressly forecloses Cross-Petitioners' argument.

In *Dole*, this Court made clear both that courts should substantially defer to Congress' policy judgments regarding the general welfare, and that Congress' power to legislate under the Spending Clause is not limited to Article I's enumerated fields.

The Spending Clause gives Congress the power "[t]o 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. I, § 8, cl. 1. Congress' power under the Spending Clause includes the power to require states to comply with federal directives as a condition of receiving federal funds. *See South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (holding that Congress may require states to raise the minimum drinking age to 21 as a condition of receiving federal highway funds). While Congress cannot force the states to enact or administer a federal regulatory scheme, the Spending Clause is a "permissible method of encouraging a State to conform to federal policy choices," because "the ultimate decision" of whether to conform is retained by the states - who can always decline the federal grant. *New York v. United States*, 505 U.S. 144, 168 (1992). In the Spending Clause context, Congress has "broad power to set the terms on which it disburses federal money to the States." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006); *see also Dole*, 483 U.S. at 206 (Congress "has repeatedly employed the [Spending Clause] power to further broad policy objectives by conditioning receipt of federal money[] upon compliance by the recipient with federal statutory and administrative directives").

Congress' power is not unlimited. *See, e.g.*, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 & n.13 (1981); thus, this Court in *Dole* placed several restrictions upon Congress' authority to persuade: (1) the legislation must be in pursuit of the

general welfare, (2) conditions on the state's receipt of federal funds must be set out unambiguously so that participation is the result of a knowing and informed choice, (3) conditions on federal funds must be related to the federal interest in particular national projects or programs, (4) conditions must not be prohibited by other constitutional provisions, and (5) the circumstances must not be so coercive that "pressure turns into compulsion." *Dole*, 483 U.S. at 207-11.

Even so, this Court has expressly recognized that Congress' power to legislate pursuant to the Spending Clause is not limited to the scope of its enumerated powers; rather, Congress may use its spending power to pursue policy objectives outside the scope of Article I's "enumerated legislative fields." *Dole*, 483 U.S. at 207 (quoting *United States v. Butler*, 297 U.S. 1, 65 (1936)). Indeed, this Court long ago considered the historical commentaries of Hamilton and Madison and expressly rejected Cross-Petitioners' narrow construction of the Spending Clause:

> Hamilton, on the other hand, maintained the clause confers a power separate and distinct from those later enumerated [and] is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States. . . . Mr. Justice Story, in his Commentaries, espouses the

> Hamiltonian position. . . . Study of all these [writings] leads us to conclude that the reading advocated by Mr. Justice Story is the correct one. 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. It results that *the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.*

Butler, 297 U.S. at 65-66 (emphasis added); *see also Dole*, 483 U.S. at 207 ("[O]bjectives not thought to be within Article I's enumerated legislative fields, may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.") (internal citation and quotation omitted).

This Court has not retreated from *Butler*, or from *Dole,* since. *See, e.g., Rumsfeld v. FAIR, Inc.*, 547 U.S. 47, 58-59 (2006) (rejecting Spending Clause challenge and noting that where Congress was free to regulate directly pursuant to its Article I powers, it could necessarily impose conditions pursuant to its spending power, which is "arguably greater" than Congress' power to regulate directly because funding recipients are "free to decline the federal funds"); *New York*, 505 U.S. at 167 (stating that where Congress may lack the power to regulate directly, "[t]his is not to

say that Congress lacks the ability to encourage a State to regulate in a particular way, or that Congress may not hold out incentives to the states as a method of influencing a State's policy choices," and citing *Dole* as one of many examples of validly exercised Spending Clause power by which "Congress may urge a State to adopt a legislative program consistent with federal interests").[4] No circuit court has suggested otherwise. *Compare Madison*, 474 F.3d at 126-27 (rejecting contention that this Court adopted the Madisonian, rather than the Hamiltonian, view of the Spending Clause, and refusing to overrule "decades of clear directives" concerning the scope of Spending Clause power.)

Just as fundamentally, and despite Cross-Petitioners' suggestion to the contrary, this Court has directed, clearly and expressly, that: "In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress." *Dole*, 483 U.S. at 207. "When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress . . . ." *Helvering v. Davis*, 301 U.S. 619, 645 (1937). As Justice Cardozo observed: "The discretion, however, *is not confided to the courts.* The discretion belongs to Congress, unless the choice is

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[4] Specifically, according to this Court, "[s]imilar examples abound." *Id.* at 167 (collecting cases); *see also* Erwin Chemerinsky, "*Protecting the Spending Power*," 4 CHAP. L. REV. 89, 89-97 (2001) (discussing Hamilton's view and pre- and post-*Dole* authority for a broad construction of the Spending Clause).

clearly wrong, a display of arbitrary power, not an exercise of judgment." *Id.* at 640 (emphasis added). This Court has left to the political branches the determination of what promotes the general welfare absent "a showing that by *no reasonable possibility* can the challenged legislation fall within the wide range of discretion permitted to the Congress." *Id.* at 641 (quoting *Butler*, 297 U.S. at 67) (emphasis added).

Indeed, the deference due Congress' policy judgments is such that this Court has indicated doubt whether a failure to advance the general welfare could ever be adequate grounds for invalidating an otherwise valid federal statute. *See Dole*, 483 U.S. at 207 n.2; *see also Mayweathers*, 314 F.3d at 1066.

Such deference to Congress' legislative determinations and policy choices is particularly apt in this case, in light of RLUIPA's long history and this Court's express invitation for the political branches to provide heightened legislative protection for religious liberty beyond what the Constitution requires. *See Employment Div. v. Smith*, 494 U.S. 872, 890 (1990).

Here, as this Court in *Cutter* expressly recognized, Congress, in enacting RLUIPA, sought to protect religious liberty from unjustified and substantial burdens. Congress certainly has a legitimate interest in ensuring that its funds do not subsidize discriminatory behavior or conduct that infringes upon individual liberties, such as the free exercise of religion. *See Benning*, 391 F.3d at 1303; *Charles*, 348 F.3d at 608-09; *Mayweathers*, 314 F.3d at

1067; *see also Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 652-54 (1999) (upholding anti-discrimination prohibition of sexual harassment in schools and corresponding private right of action as a condition on receipt of federal funds under Title IX). RLUIPA's aim to protect institutionalized persons' free religious exercise and promote rehabilitation falls squarely within the scope of the general welfare.

Under *Dole*, that policy choice deserves substantial deference. Cross-Petitioners cite no contrary precedent from this Court.

Cross-Petitioners furthermore dedicate several pages to historical references offered in support of a narrow Madisonian construction of the Spending Clause. Cross-Pet. at 11-18, 20. However, as discussed, this Court has expressly rejected the Madisonian view, and has not indicated a willingness to overrule *Butler* or *Dole*. Moreover, in each of the examples Cross-Petitioners cite, the political branches of government declined to spend federal money; Cross-Petitioners provide no example where the courts struck down a spending program as exceeding the scope of Congress' powers. None exist. *See* Chemerinsky, *supra* n.4, at 105 n.5.

Finally, Cross-Petitioners never advanced these historical arguments or argued that the spending power is limited to enumerated Article I fields before the court of appeals. Their arguments should not be considered for the first time here.

III. THE EIGHTH CIRCUIT CORRECTLY DETERMINED THAT RLUIPA PROMOTES THE GENERAL WELFARE AND DOES NOT ENCROACH UPON LOCAL CONCERNS

Cross-Petitioners contend that review is warranted because RLUIPA encroaches on areas of local concern and interferes with the states' police power. As discussed above, however, this Court has long recognized that Congress has broad power to condition federal funds upon compliance with its legislative policy directives, including anti-discrimination policies, *see Davis*, 526 U.S. at 649-50, and that Congress enacted RLUIPA based on well-documented evidence that "'frivolous or arbitrary'" barriers impeded institutionalized persons' free religious exercise. *Cutter*, 544 U.S. at 716. RLUIPA effectuates validly enacted federal legislative policy to protect fundamental rights; it does not regulate the operation of state prisons and local affairs.

The federal government has the power under the Supremacy Clause to ensure compliance with federal law. While Congress cannot force the states to enact or administer a federal regulatory scheme, the Spending Clause and the Commerce Clause are treated differently with respect to traditional Tenth Amendment and federalism concerns. Because Congress can regulate indirectly under the Spending Clause that which it cannot regulate directly under the Commerce Clause, and because states retain the ultimate power and choice to decline participation in the federal programs, state sovereignty is preserved.

In *Dole*, this Court observed that "a perceived Tenth Amendment limitation on congressional regulation of state affairs [does] not concomitantly limit the range of conditions placed on federal grants." *Dole*, 483 U.S. at 210. To the contrary, the Court stated that conditions on funding do not intrude on state sovereignty precisely because they leave each state with "the 'simple expedient' of not yielding to what [the state] urges is federal coercion." *Id.* (citing *Oklahoma v. Civil Serv. Comm'n*, 330 U.S. 127, 143-44 (1947)).

This Court's post-*Dole* decisions did not alter the constitutional calculus. Unlike *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997), RLUIPA does not commandeer state governments into service for a regulatory purpose. As the Sixth Circuit in *Cutter*, 423 F.3d at 589, held, RLUIPA does not require the states to enact or administer any federal program. It does not require the states to take any affirmative action at all. Instead, "RLUIPA requires states to refrain from acting in a way that interferes with inmates' exercise of religion, unless the states' actions are the least restrictive means of furthering a compelling governmental interest." *Id.*; *compare Reno v. Condon*, 528 U.S. 141, 144, 151 (2000) (upholding federal statute prohibiting states from disclosing drivers' personal information where statute did not require states to enact federal laws or regulations or assist in enforcement).

Cross-Petitioners' reliance on this Court's decisions in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598

(2000), striking federal legislation as beyond Congress' Commerce Clause power, is misplaced. As discussed, Congress's power to condition funds pursuant to its spending power is broader than and distinct from its power to regulate directly under the Commerce Clause. In *New York*, this Court expressly recognized the power of Congress, through its spending authority, to induce states to do what could not be compelled through the commerce power. *See* Chemerinsky, *supra* n.4, at 101.

As Justice O'Connor wrote in distinguishing the two powers in *New York*, 505 U.S. at 166-67:

> This is not to say that Congress lacks the ability to encourage a State to regulate in a particular way, or that Congress may not hold out incentives to the States as a method of influencing a State's policy choices. Our cases have identified a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests. . . . First, under Congress' spending power, 'Congress may attach conditions on the receipt of federal funds,' . . . Where the recipient of federal funds is a State, as is not unusual today, the conditions attached to the funds by Congress may influence a State's legislative choices.

Id. (quoting *Dole*, 483 U.S. at 203 (citations omitted)); *see also Coll. Sav. Bank v. Fl. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999).

Moreover, unlike the sweeping and potentially unlimited legislation at issue in *Lopez* and *Morrison*, RLUIPA, by its terms, is limited to substantially burdensome infringements, and even those burdens can be justified (and thus exempted from liability under RLUIPA) where the state's actions are the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000cc-1. Not only can states opt out of RLUIPA (an option not available in *Lopez* or *Morrison*), but RLUIPA provides that participating states can avoid the preemptive force of the statute by changing their policies and practices in a manner that eliminates the substantial burden, or by retaining their policies and exempting the substantially burdened religious exercise. 42 U.S.C. § 2000cc-3(e). The absence of similar, or any, limiting principles was a driving force in *Lopez* and *Morrison*.

Unlike the "unlimited Commerce Clause authority rejected in *Lopez*," Cross-Pet. at 23, the validity of RLUIPA is constrained by the restrictions in *Dole*. More fundamentally, compliance is not mandatory and is ultimately subject to rejection by the states. *See Bd. of Educ. v. Mergens*, 496 U.S. 226, 241 (1990); *see also Cutter*, 544 U.S. at 733 (stating that "the States' voluntary acceptance of Congress' condition undercuts Ohio's argument that Congress is encroaching on its turf") (Thomas, J., concurring).

Prison officials are not commandeered. To the contrary, this Court recognized in *Cutter* that Congress, in enacting RLUIPA, expressly anticipated that "courts will 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." 146 Cong. Rec. at S7775; *Cutter*, 544 U.S. at 722-23 (noting "[l]awmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety, and security in penal institutions" and stating "[w]e have no cause to believe that RLUIPA would not be applied in an appropriately balanced way, with particular sensitivity to security concerns"); *see id.* at 725-26 (noting "'the federal Bureau of Prisons has managed the largest correctional system in the Nation under the same heightened scrutiny standard as RLUIPA without compromising prison security, public safety, or the constitutional rights of other prisoners,'" and that "[t]he Congress that enacted RLUIPA was aware of the Bureau's experience") (citation omitted).

RLUIPA does not, as Cross-Petitioners suggest, contemplate "[a]bject deference" to Congress' policy determinations, nor have the lower courts turned a blind eye to *Dole*. Cross-Pet. at 23. As demonstrated above, the courts of appeals have thoughtfully and correctly applied the *Dole* factors. What Cross-Petitioners seek, in effect, is to overrule or profoundly limit *Dole*, to impose a judicial limitation on Congress' constitutional power to condition federal

funds and its concomitant power to make legislative policy judgments on how to promote the general welfare, and to limit the scope of the Spending Clause to Article I's enumerated fields.[5]

Dole remains the law of the land, under which Congress' judgment that RLUIPA promotes the general welfare merits substantial deference—deference of such a profound nature and degree that this Court has questioned whether it is judicially enforceable. *Dole*, 483 U.S. at 207 n.2. A statute designed to protect First Amendment values against substantially burdensome interference is certainly one that promotes the general welfare. Like legislation that conditions federal funds on compliance with analogous antidiscrimination provisions on the basis of race (42 U.S.C. § 2000d), gender (20 U.S.C. § 1681(a)), disability (29 U.S.C. § 794), and age (42 U.S.C. § 6102), RLUIPA protects the integrity of important civil rights by ensuring that substantial burdens are not imposed on religious exercise. This Court has recognized the propriety of promoting core constitutional values in legislation like RLUIPA. *Smith*, 494 U.S. at 890; *see also Cutter*, 544 U.S. at 719.

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[5] Even if these were cognizable grounds for review, these particular challenges were not advanced in or passed on by the court of appeals. Even on the question of whether RLUIPA unduly interferes with the operation of local prisons, there is no evidence in the record below to evaluate whether in fact RLUIPA undermines state affairs. Judgment on that issue should be reserved for a case that allows consideration of evidentiary facts.

Cross-Petitioners contend that deference to the political branches in crafting Spending Clause legislation is too broad, but they fail to articulate a workable standard for governing judicial limitations on Congress' policy judgments concerning what is in the general welfare, as opposed to what interferes with "traditional" state activities. History shows that there is good reason for judicial deference to Congress in this context. In overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976), which had held that the Tenth Amendment prevents Congress from interfering with "integral" or "traditional" state activities, this Court cited as a primary reason for its decision the impossibility of judicially defining what constitutes "integral" and "traditional" state functions: "We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular government function is 'integral' or 'traditional.'" *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985). Arguing in favor of judicial restraint, Justice Blackmun stated: "Any rule of state immunity that looks to the 'traditional,' 'integral,' or 'necessary' nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes." *Id.* at 546.

The Court's reasoning in *Garcia* applies with equal force here. Judicially imposed constraints on the exercise of Congress' legislative judgment to determine what promotes the general welfare would inevitably call for normative line-drawing in a manner

that the Constitution does not contemplate. *See* Chemerinsky, *supra* n.4, at 102-04. Requiring courts to distinguish between the local and national welfare would involve the kind of indeterminate, policy-driven analysis that has proven unenforceable in the past. Cross-Petitioners contend that RLUIPA should be characterized as a form of prison administration, which, to them, is a matter of local concern. However, RLUIPA is more accurately described as a civil rights statute intended to protect the religious liberty of members of minority faiths. The civil rights of minorities have been a matter of national concern and welfare since 1868, and cannot seriously be considered merely a matter of state or local concern.

Indeed, RLUIPA has international as well as national implications. The rights of the imprisoned, the accused and the detained are most certainly a matter of international concern today. United States foreign policy initiatives to promote religious liberty and tolerance in other countries would obviously be undercut by a failure to protect the religious liberty of minority faiths at home in our own institutions.

Cross-Petitioners advocate for a standard of judicial enforcement that has not had the benefit of evaluation and development in the lower courts. Cross-Petitioners fail to articulate how this new standard is supposed to work, and where, exactly, the line between local and national is to be judicially drawn. This Court should not reach out to craft a new Spending Clause standard that has not been thoroughly adjudicated and tested in the lower courts.

In sum, *Dole* remains the controlling law on conditional grants of federal money. Cross-Petitioners seek a return to a pre-*Butler* reading of the Spending Clause—a reading this Court has expressly rejected—and, in so doing, seek to effectively overrule 75 years of Spending Clause jurisprudence. Just one year after the Hamiltonian view was adopted, this Court was unwilling to "resurrect the contest." *Helvering*, 301 U.S. at 640 ("It is now settled by decision. The conception of the spending power advocated by Hamilton . . . has prevailed over that of Madison."). Cross-Petitioners' rule would invalidate substantial modern spending legislation and render the Spending Clause a "mere tautology" by limiting Congress' power to Article I's enumerated fields. *Butler*, 297 U.S. at 65.

Cross-Petitioners have failed to point to a single case where this Court struck federal legislation on Spending Clause grounds, and they have failed to articulate cognizable grounds for certiorari. *Lopez* and *Morrison* involved distinct Article I powers, and were not subject to the same limiting principles RLUIPA engenders. They are inapposite.[6] *See, e.g.*, *Sabri v. United States*, 541 U.S. 600, 607-08 (2004) (declining to apply *Lopez* and *Morrison* on grounds that those

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[6] Even in areas that implicate traditional areas of "local" concern, Congress can regulate pursuant to the Commerce Clause, and judicially enforceable limits on federal power are constrained. *See, e.g.*, *Gonzales v. Raich*, 545 U.S. 1 (2005) (upholding constitutionality of Controlled Substances Act as applied to non-commercial intrastate possession and consumption of medical marijuana as authorized by California law).

decisions do not control where regulation falls within Congress' spending power). If South Dakota objects to refraining from prison practices that substantially burden religious exercise, then South Dakota can say no to federal funds.[7] But it should not be permitted to take federal money and, at the same time, contend that Congress has unduly interfered with its local affairs.

CONCLUSION

For the reasons above, the conditional cross-petition for a writ of certiorari should be denied.

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[7] Allowing the states to decide for themselves whether to accept federal funds, and thus whether to support federal policy choices, does far more to preserve state sovereignty than a rule that vests that choice, preemptively and categorically, with the federal courts. *See Oklahoma v. Civil Serv. Comm'n*, 330 U.S. at 143-44 (spending power does not violate state sovereignty).