No. 02-1655

In the Supreme Court of the United States

EDWARD S. ALAMEIDA, JR., DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL., PETITIONERS

v.

KARLUK M. MAYWEATHERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the institutionalized persons provisions of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc-1, violate separation-of-powers principles.

2. Whether the institutionalized persons provisions of RLUIPA are a valid exercise of Congress's Spending Clause or Commerce Clause powers.

3. Whether the institutionalized persons provisions of RLUIPA are valid under the Establishment Clause of the First Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 314 F.3d 1062. The opinion (Pet. App. 20-37) and orders (Pet. App. 38-53, 54-59) of the district court are not reported.

JURISDICTION

The court of appeals entered its judgment on December 27, 2002. A petition for rehearing was denied on February 6, 2003 (Pet. App. 60-62). The petition for a writ of certiorari was filed on May 7, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc *et seq.*, is a civil rights law designed to provide, as a matter of statutory right, heightened protection for the free exercise of religion and to prevent religious discrimination. At the time of RLUIPA's enactment, evidence before Congress demonstrated that, in the absence of federal legislation, prisoners, detainees, and individuals institutionalized in mental hospitals faced substantial and unwarranted burdens in freely practicing their religious faiths. See, *e.g.*, H.R. Rep. No. 219, 106th Cong., 1st Sess. 9-10 (1999) (summarizing testimony). Based on the evidence it compiled, Congress concluded that the rights of institutionalized persons to practice their faith often were burdened by "frivolous or arbitrary rules," and that, whether for reasons of "indifference, ignorance, bigotry, or lack of resources," some institutions restrict religious liberty in "egregious and unnecessary ways." 146 Cong. Rec. S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA).

Congress responded by enacting Section 3 of RLUIPA to provide institutionalized persons protection from unnecessary burdens on religious practice. 42 U.S.C. 2000cc-1.[1] Section 3(a) provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden "is in furtherance of a compelling governmental interest," and "is the least

[1] Section 2 of the statute, 42 U.S.C. 2000cc, protects persons and entities against land use regulations that burden religious exercise or discriminate on the basis of religion. That provision is not at issue in this suit.

restrictive means" of furthering that interest. 42 U.S.C. 2000cc-1(a).[2] RLUIPA defines the "government" to which it applies as "a State, county, municipality, or other governmental entity created under the authority of a State," and "any branch, department, agency, instrumentality, or official of [such] an entity." 42 U.S.C. 2000cc-5(4).[3]

Invoking its power under the Spending Clause, U.S. Const. Art. I, § 8, Cl. 1, Congress required compliance with Section 3(a) whenever "the substantial burden [on religion] is imposed in a program or activity that receives Federal financial assistance." 42 U.S.C. 2000cc-1(b)(1). Congress also exercised its Commerce Clause power, U.S. Const. Art. I, § 8, Cl. 3, as an independent constitutional basis for Section 3 in those cases where "the substantial burden affects, or removal of that substantial burden would affect, commerce with

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[2] 42 U.S.C. 2000cc-1(a) provides:

> 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.

[3] Through the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, Congress has imposed a much broader obligation on the federal government to justify substantial burdens on religion imposed by any federal governmental activity —not just zoning or institutionalization. The courts of appeals have uniformly rejected the argument that RFRA's application to the federal government violates separation-of-powers principles or the Establishment Clause. See cases cited at note 8, *infra*.

foreign nations, among the several States, or with Indian tribes." 42 U.S.C. 2000cc-1(b)(2). However, even if a plaintiff demonstrates the requisite effect on commerce, RLUIPA's provisions do not apply if the defendant demonstrates, as an affirmative defense, that the statute is inapplicable because the type of burden at issue, in the aggregate, would not have a substantial effect on commerce. 42 U.S.C. 2000cc-2(g).[4]

RLUIPA creates a private right of action, which allows any individual whose exercise of religion has been substantially burdened to "assert a violation of this chapter as a claim or defense in a judicial proceeding" and to obtain "appropriate relief against a government." 42 U.S.C. 2000cc-2(a). The United States also may seek injunctive or declaratory relief to enforce the statute. 42 U.S.C. 2000cc-2(f).

2. Respondents, a class of Muslim inmates at the California State Prison at Solano, brought suit against petitioners alleging, *inter alia*, that certain prison procedures and regulations burdened their free exercise of religion, in violation of the First Amendment and RLUIPA. Pet. App. 10. Petitioners moved to dismiss the RLUIPA claim on the grounds that the statute ex-

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[4] 42 U.S.C. 2000cc-2(g) provides:

> If the only jurisdictional basis for applying a provision of this chapter is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.

ceeds Congress's powers under the Spending Clause, the Commerce Clause, and Section 5 of the Fourteenth Amendment, and that the statute violates the Establishment Clause, the separation-of-powers doctrine, the Tenth Amendment, and the Eleventh Amendment. *Ibid.* The United States intervened to defend the constitutionality of RLUIPA pursuant to 28 U.S.C. 2403(a). Pet. App. 10.

The district court denied the motion to dismiss, rejecting all of petitioners' constitutional challenges. Pet. App. 20-35. In a separate order, the court granted respondents a preliminary injunction prohibiting the petitioners from disciplining respondents or forcing respondents to forfeit good-time credits for attending Friday afternoon religious services (known as Jumu'ah) while the case is pending. *Id.* at 38-51. The court based its ruling on earlier orders that already had granted respondents the identical preliminary injunctive relief prior to the enactment of RLUIPA. *Id.* at 54-57. The court treated the earlier orders as law of the case, and determined that the enactment of RLUIPA simply reinforced its earlier conclusions concerning the respondents' likelihood of success on the merits and entitlement to preliminary injunctive relief. *Id.* at 42. The court also preliminarily enjoined petitioners from denying respondents the opportunity to earn good-time credits because of their observation of Jumu'ah. *Id.* at 43-51. The court determined that respondents had established a likelihood of success on the merits of that claim under RLUIPA and a risk of irreparable harm, and that the balance of equities tipped in their favor. *Id.* at 46-47.

3. The court of appeals affirmed. Pet. App. 1-19. The court held that, under this Court's decision in *South Dakota* v. *Dole*, 483 U.S. 203 (1987), RLUIPA "is

a legitimate exercise of Congressional spending power," Pet. App. 11, because it "promote[s] the general welfare" by "protecting religious worship in institutions from substantial and illegitimate burdens," *id.* at 12, and because "Congress has a strong interest in making certain that federal funds do not subsidize conduct that infringes individual liberties," *id.* at 14. Having determined that RLUIPA is a valid exercise of Congress's spending power, the court declined to address whether RLUIPA is also a valid exercise of Congress's Commerce Clause authority. *Id.* at 15 n.2.

The court of appeals further determined that RLUIPA is a permissible accommodation of religious practices under the Establishment Clause. Pet. App. 15-17. The court found that the primary aim and effect of RLUIPA's institutionalized persons provisions is to protect against substantial, state-imposed burdens on the religious exercise of institutionalized persons, and that the removal of such government-imposed burdens does not foster an excessive entanglement with religion. *Id.* at 17. The court concluded that "RLUIPA merely accommodates and protects the free exercise of religion, which the Constitution allows." *Ibid.*

Finally, the court of appeals rejected petitioners' claim that RLUIPA's institutionalized persons provisions violate separation-of-powers principles. Pet. App. 19. The court explained that RLUIPA does not purport to revise this Court's interpretation of the Constitution, but rather, like many other laws, simply "provides additional [statutory] protection for religious worship." *Ibid.*[5]

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[5] The court of appeals also rejected petitioners' Tenth and Eleventh Amendment challenges. Pet. App. 18-19. Petitioners do not renew those claims before this Court.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. The petition, moreover, seeks interlocutory review of a preliminary injunction that, itself, is largely predicated on alternative legal grounds that are not presented in the petition. Accordingly, this Court's review is not warranted.

1. Petitioners seek review (Pet. 6-14) of the court of appeals' decision sustaining the constitutionality of RLUIPA's institutionalized person provisions. That decision, however, does not conflict with the ruling of any other court of appeals. To the contrary, the court's ruling here represents the first appellate court decision on the question. The question is currently pending before the Fourth, Sixth, and Seventh Circuits.[6] Appellate consideration of and deliberation on the constitutional questions raised by the petition is thus in its nascency, making review by this Court at this stage unnecessary. Because RLUIPA is a relatively new law,

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[6] See *Madison* v. *Riter*, 240 F. Supp. 2d 566 (W.D. Va. 2003), interlocutory appeal pending, No. 03-6362 (4th Cir. filed Mar. 4, 2003) (pending briefing); *Gerhardt* v. *Lazaroff*, 221 F. Supp. 2d 827 (S.D. Ohio 2002), appeal pending, No. 02-3270 (6th Cir. filed Aug. 6, 2003) (oral argument scheduled for Sept. 10, 2003); *Charles* v. *Verhagen*, 220 F. Supp. 2d 955 (W.D. Wis. 2002), appeal pending, No. 02-3572 (7th Cir.) (argued May 15, 2003); *Kilaab Al Ghashiyah* v. *Wisconsin Dep't of Corrs.*, 250 F. Supp. 2d 1016 (E.D. Wis. 2003), petitions for permission to take interlocutory appeals granted, No. 03-8003 (7th Cir. Apr. 25, 2003) (held pending decision in *Charles* v. *Verhagen*, *supra*); *Williams* v. *Angelone*, No. 01-CV-00274 (W.D. Va. Mar. 31, 2003), appeal pending, No. 03-6758 (4th Cir. filed July 28, 2003) (held pending decision in *Madison* v. *Riter*, *supra*); *Beatty* v. *Johnson*, No. 02-CV-00506 (W.D. Va. Jan. 31, 2003), appeal pending, No. 03-6359 (4th Cir. filed May 5, 2003) (same).

moreover, the contours of the statute's terms and operation have only begun to be outlined through application and adjudication. Awaiting further experience in the implementation of the law would provide a more comprehensive and practical backdrop against which to evaluate the law's constitutionality.

2. Review is also unwarranted because the case arises in a profoundly interlocutory posture, such that a decision by this Court would have little practical impact on the litigation. "[E]xcept in extraordinary cases, the writ is not issued until final decree." See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (citing additional cases). Compare *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., on denial of certiorari, noting the interlocutory posture of the litigation), with *United States* v. *Virginia*, 518 U.S. 515 (1996) (review granted after final judgment). While interlocutory review is available for judgments denying Eleventh Amendment immunity, *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993), petitioners have abandoned their Eleventh Amendment challenge to RLUIPA by not presenting it in their petition. And they have abandoned that claim for good reason: the respondent prisoners seek only prospective injunctive relief against individual state officials, under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), claims to which the Eleventh Amendment poses no barrier.

The only basis for appellate jurisdiction at this interlocutory stage thus is *not* the district court's denial of the motion to dismiss based on petitioners' constitutional challenge to RLUIPA. Petitioners instead predicate their request for interlocutory review on the district court's order continuing and supplementing an earlier entered preliminary injunction (Pet. App. 38-43).

See 28 U.S.C. 1292(a)(1). The problem for petitioners is that much of the relief afforded by that preliminary injunction antedates any reliance on RLUIPA in the litigation and, in fact, is separately predicated on the district court's assessment of the respondents' likelihood of succeeding on their *constitutional* claims. See Pet. App. 40-43. Resolution of petitioners' challenge to RLUIPA thus would afford petitioners no relief from those aspects of the preliminary injunction that prohibit petitioners from disciplining respondents or forcing respondents to forfeit good-time credits for attending Jumu'ah religious services. While the petition references a separate preliminary injunction concerning the length of prisoners' beards (Pet. 5), that injunction was not issued until seven months after the preliminary injunction at issue here, that judgment was not included in petitioners' appeal to the Ninth Circuit, and the propriety of that injunction was not addressed by the Ninth Circuit (Pet. App. 11).[7]

Thus, it is only one part of the preliminary injunction—that portion concerning the withholding of good-time credits for inmates attending Jumu'ah services (Pet. App. 46-50)—for which petitioners seek this Court's interlocutory intervention. Even if, against the full backdrop of this litigation, that one legal claim warranted the unusual step of interlocutory review by this Court, that isolated claim provides an awkward vehicle for evaluating RLUIPA's constitutionality. That is because the question before this Court will not be whether the lower courts' rulings of constitutional law

[7] Indeed, the petitioners later filed a separate appeal of the district court's preliminary injunction pertaining to the grooming regulations, but petitioners voluntarily dismissed that appeal on February 26, 2003.

were proper, but whether the court of appeals properly found no abuse of discretion in the district court's evaluation of the respondents' likelihood of success on the merits, the irreparable harm faced by respondents, and the parties' competing equities. That latter inquiry, moreover, would itself be restricted by yet another unappealed injunction entered by the district court, in separate litigation between a California prison inmate and petitioner, the Director of the California Department of Corrections, requiring that petitioner to provide prisoners Excused Time Off from work details to attend Jumu'ah services. See Pet. App. 47-50 (explaining that the petitioner's obligation to comply with that earlier judgment influences the balance of equities component of the preliminary injunction inquiry).

In short, the present litigation is an inapt vehicle for deciding the constitutional questions raised by the petition, particularly in light of the dearth of appellate decisions resolving those same questions. See *New York City Transit Auth.* v. *Beazer*, 440 U.S. 568, 582 (1979) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality * * * unless such adjudication is unavoidable.") (quoting *Spector Motor Serv., Inc.* v. *McLaughlin*, 323 U.S. 101, 105 (1944)); *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Petitioner fails to demonstrate that any serious or irreparable harm will ensue from a denial of review at this stage. The fact that States and localities must comply with the law unless it is held to be unconstitutional (Pet. 7) does not itself warrant review. Such compliance is commonplace in a system that presumes the constitutionality of legisla-

tion and obliges parties to obey the law unless and until a court invalidates it.

3. The court of appeals' decision is a correct and straightforward application of this Court's precedents.

a. Petitioners contend (Pet. 8, 10) that RLUIPA violates the separation of powers because it adopts a more stringent standard of review than the standard that governs Free Exercise Clause claims generally under *Employment Division* v. *Smith*, 494 U.S. 872 (1990), or prisoners' First Amendment claims under *Turner* v. *Safley*, 482 U.S. 78 (1987). But as long as there is a valid source of authority for the legislation, separation-of-powers principles do not prevent Congress from providing broader statutory protection for civil rights than the Constitution itself provides. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, the Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.*, the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*, and the Voting Rights Act of 1965, 42 U.S.C. 1971 *et seq.*, are but a few examples of laws that require States to afford individuals broader statutory protection for civil rights than the Constitution requires. Indeed, the Court in *Smith* expressly invited a legislative response to its decision. 494 U.S. at 890 (explaining that the Court's holding delineated only a constitutional floor, and that "a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation").

Petitioners' contention (Pet. 9-10) that the court of appeals' opinion conflicts with *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), misunderstands that decision. In *Flores*, this Court held only that the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*, as applied to state and local governments, exceeded Con-

gress's legislative power under Section 5 of the Fourteenth Amendment. 521 U.S. at 519-522. The decision did not hold that the statute also violated the separation-of-powers doctrine, as the courts of appeals have consistently recognized.[8]

b. Petitioners' argument (Pet. 12) that RLUIPA exceeds Congress's power under the Spending Clause fares no better. Nothing in the Constitution compels Congress to subsidize state programs that burden the exercise of constitutionally protected rights, unless the state conduct is itself barred by the Constitution. "The Federal Government has [the] power to fix the terms on which its money allotments to the States shall be disbursed." *Lau* v. *Nichols*, 414 U.S. 563, 569 (1974). As with Congress's restriction on funding for programs that discriminate on the basis of race in Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, the federal government has a legitimate interest in restricting the expenditure of federal funds for programs that engage in conduct that Congress believes to be contrary to the public interest and injurious to individual rights. See also *Grove City College* v. *Bell*, 465 U.S. 555, 575 (1984) (rejecting First Amendment challenge

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[8] See, *e.g.*, *Guam* v. *Guerrero*, 290 F.3d 1210, 1220-1221 (9th Cir. 2002); *Kikumura* v. *Hurley*, 242 F.3d 950, 958-960 (10th Cir. 2001); *Sutton* v. *Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 833 (9th Cir. 1999) ("Viewed in context, the Court's discussion [in *Flores*] of separation-of-powers principles did not serve as an independent basis for invalidating RFRA, as applied to state law, but was a corollary to the Court's conclusion that no Constitutional provision authorized Congress to pass RFRA with respect to the states."); *Adams* v. *Commissioner*, 170 F.3d 173, 175 (3d Cir. 1999) (RFRA continues to apply to the federal government), cert. denied, 528 U.S. 1117 (2000); *In re Young*, 141 F.3d 854, 859-861 (8th Cir.), cert. denied, 525 U.S. 811 (1998) (same).

to Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, holding that "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept").[9] Imposing a condition on all the operations of a state agency ensures that federal funds, which are fungible, are not used to support the disfavored conduct.[10]

Beyond that, petitioners' suggestion that conditions imposed on federal funds must pertain to the "specific" (Pet. 12) subject matter of the program receiving the funds cannot be reconciled with this Court's precedent. See, *e.g.*, *Oklahoma* v. *United States Civil Serv. Comm'n*, 330 U.S. 127, 143-144 (1947) (upholding Hatch Act's broad mandate that no state employee whose principal employment was in connection with any activity that was financed in whole or in part by the United States could take "any active part in political management").[11]

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[9] RLUIPA explicitly incorporates the Title VI (42 U.S.C. 2000d-4(a)) definition of a covered "program or activity," 42 U.S.C. 2000cc-5(6).

[10] See *Koslow* v. *Pennsylvania*, 302 F.3d 161, 175-176 (3d Cir. 2002) (rejecting Spending Clause challenge to Rehabilitation Act), cert. denied, 123 S. Ct. 1353 (2003); see also *United States* v. *Grossi*, 143 F.3d 348, 350 (7th Cir.) ("money is fungible and its effect transcends program boundaries"), cert. denied, 525 U.S. 879 (1998).

[11] Although petitioners briefly assert that RLUIPA exceeds Congress's powers under the Commerce Clause (see Pet. 11), they make no specific arguments in support of that contention, and the court of appeals did not address the issue. See Pet. App. 15 n.2. The Commerce Clause question thus is not properly presented for this Court's review. See *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001) (Court ordinarily does not decide issues not resolved below).

c. Petitioners' argument (Pet. 13) that RLUIPA violates the Establishment Clause because it accommodates religious, but not secular, beliefs disregards this Court's precedent. The suggestion that "statutes that give special consideration to religious groups are *per se* invalid * * * run[s] contrary to the teaching of [the Court's] cases that there is ample room for accommodation of religion under the Establishment Clause." *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327, 338 (1987); see also *Board of Educ. of Kiryas Joel Village Sch. Dist.* v. *Grumet*, 512 U.S. 687, 705 (1994) (Court's cases "leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice"). The alleviation of significant or "substantial" governmental interference with religious exercise is a permissible secular purpose, as long as Congress does not "abandon[] neutrality and act[] with the intent of promoting a particular point of view in religious matters." *Amos*, 483 U.S. at 335; cf. *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 15 (1989) (opinion of Brennan, J.) (tax subsidy invalidated because it "cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion"). Exemptions from otherwise generally applicable statutes do not constitute impermissible governmental facilitation of religion, because the government neither adds to nor subsidizes the propagation of the religious message. See *Amos*, 483 U.S. at 338 (accommodation statute need not "come packaged with benefits to secular entities"). To hold otherwise would lead to the untenable conclusion that the Establishment Clause *forbids* States, as a matter of state constitutional or statutory law, from affording religious exercise (within

prisons or without) the same level of constitutional protection that this Court generally afforded religious exercise prior to *Smith*. That principle could imperil numerous state constitutional protections of religion. More broadly, that principle ignores the reality that, when government acts to remedy substantial burdens on religious exercise, it not only acts consistently with the Establishment Clause, it in fact, "follows the best of our traditions." *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2003