**Nos. 06-6266 and 06-6296**

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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**IRA W. MADISON**,

Plaintiff-Appellee,

and

**UNITED STATES OF AMERICA**,

Intervenor-Appellee,

v.

**GARY L. BASS, *et al.***,

Defendants-Appellants

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# BRIEF FOR *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, INC. IN SUPPORT OF APPELLE AND AFFIRMANCE

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## INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Virginia ("ACLU of Virginia"), is the Virginia affiliate of the American Civil Liberties Union, and has approximately 9,000 members in the Commonwealth of Virginia. Its mission is to protect the individual rights of Virginians under the federal and state constitutions and civil rights statutes, and it regularly appears before this Court and other federal and state courts in Virginia, both as *amicus* and as direct counsel. In particular, the ACLU of Virginia has been a forceful advocate for the religious freedom of prison inmates under both the First Amendment and the Religious Land Use and Institutionalized Persons Act.

## STATEMENT OF THE CASE

*Amicus* adopts the appellee's statement of the case.

## STATEMENT OF FACTS

*Amicus* adopts the appellee's statement of the facts.

## SUMMARY OF ARGUMENT

In this appeal, the Virginia Department of Corrections (VDOC) once again asks this Court to overturn the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc, *et seq.*, which provides enhanced protections for prison inmates' religious exercise, is unconstitutional. In *Madison v. Riter*, 355 F.3d 310 (4th Cir. 2003), this Court rejected VDOC's contention that RLUIPA violated the Establishment Clause. This Court's holding in that regard was affirmed by the Supreme Court.

*Cutter v. Wilkinson*, 544 U.S. 709 (2005). Now, VDOC claims that the statute is not a valid enactment under the Spending or Commerce Clause and is a violation of the Eleventh Amendment. These arguments have been rejected by every court to consider them. *See Benning v. Georgia*, 391 F.3d 1299 (11th Cir. 2004); *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003); *Mayweathers v. Newland*, 314 F.3d 1062 (9th Cir. 2002); *Gooden v. Crain*, 389 F.Supp.2d 722 (E.D. 2005); *Williams v. Bitner*, 295 F. Supp. 2d 593 (M.D. Pa. 2003); *Goodman v. Snyder*, 2003 WL 22765047 (N.D. Ill. November 20, 2003). This Court should reject them as well.

RLUIPA is well within the Congressional spending power. The Supreme Court and this Court have repeatedly recognized that Congress may attach conditions to federal spending, even when those conditions are outside the enumerated congressional powers of Article I. RLUIPA is also carefully crafted to ensure that it falls within Congress's Commerce Clause power. Finally, because Congress unambiguously required VDOC to waive its sovereign immunity as a condition on federal funds, the legislation does not violate the Eleventh Amendment.

## ARGUMENT

### I. THE ENACTMENT OF RLUIPA.

The Religious Land Use and Institutionalized Persons Act was enacted against a background of Supreme Court decisions limiting the scope of the Free Exercise Clause of the First Amendment. In *Employment Division v. Smith,* 494 U.S. 872 (1990), the Court held that the Free Exercise Clause does not require states to accommodate religious practices by creating exceptions to neutral laws of general applicability. In 1993, Congress responded to *Smith* by enacting the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq.*, which prohibited federal and state governments from imposing a "substantial burden" on religious exercise unless the burden was the "least restrictive means" of furthering a "compelling governmental interest." Congress enacted RFRA pursuant to its powers under Section 5 of the Fourteenth Amendment.

In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court held that RFRA exceeded Congress' Section 5 authority, because it went beyond "enforcing" the constitution to creating new substantive requirements. "In passing RLUIPA, Congress sought to avoid *Boerne* 's constitutional barrier by relying on its Spending and Commerce Clause powers, rather than on its remedial powers under section 5 of the Fourteenth Amendment as it had in RFRA." *Madison v. Riter*, 355 F.3d 310, 315 (4th Cir. 2003). To do so, it carefully limited the scope of RLUIPA to

programs and activities receiving federal funding (42 U.S.C. § 2000cc-1(b)(1)), and to burdens on religious exercise that substantially affect interstate commerce. 42 U.S.C. §§ 2000cc-1(b)(2), 2000cc-2(g). "RLUIPA's enactment was premised on congressional findings similar to those made for RFRA, namely, that in the absence of federal legislation, prisoners, detainees, and institutionalized mental health patients faced substantial burdens in practicing their religious faiths." *Id.* (*citing* Joint Statement of Senator Hatch and Senator Kennedy, 146 Cong. Rec. S7774-01 (daily ed. July 27, 2000)).

## II. RLUIPA IS A VALID EXERCISE OF CONGRESSIONAL SPENDING POWER.

Every court to consider the matter has found that Congress properly enacted RLUIPA under its Spending Clause powers. *See Benning v. Georgia*, 391 F.3d 1299 (11th Cir. 2004); *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003); *Mayweathers v. Newland*, 314 F.3d 1062 (9th Cir. 2002); *Gooden v. Crain*, 389 F.Supp.2d 722 (E.D. 2005); *Williams v. Bitner*, 295 F. Supp. 2d 593 (M.D. Pa. 2003); *Goodman v. Snyder*, 2003 WL 22765047 (N.D. Ill. November 20, 2003). This should come as no surprise, as RLUIPA is a classic example of the type of spending legislation that has been approved by the Supreme Court.

The Spending Clause of the United States Constitution authorizes Congress 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." Art. I, § 8, cl. 1. "Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'" *Dole v. South Dakota*, 483 U.S. 203, 206 (1987) (*quoting Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980)). Moreover, the broad spending power is not constrained by the other enumerated powers set forth in Article I. "Thus, objective 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.'" *Id.* at 207 (citation omitted).

*Dole* held that Congress could properly require states to prohibit the sale of alcohol to persons under age 21 as a condition for federal highway funds, and set forth the framework for determining whether a particular condition on federal spending exceeds the spending power. First, "the exercise of the spending power must be in pursuit of 'the general welfare'"; second "if Congress desires to

condition the States' receipt of federal funds, it 'must do so unambiguously'"; third, "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs'"; and fourth, "other constitutional provisions may provide an independent bar to the conditional grant of federal funds." *Dole*, 483 U.S. at 207-08 (citations omitted). The Court further indicated that "in *some* circumstances the financial inducement offered by Congress *might* be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Id.* at 211 (emphasis added) (citation omitted).

The appellants apparently do not contest that RLUIPA is "in pursuit of the general welfare." Instead, he argues that there is no federal interest in religious accommodation in prison, that RLUIPA is coercive, and that it infringes on state "sovereignty." The appellants are wrong on all counts.

A. The Federal Government has a Valid Interest in Ensuring Religious Accommodation in State Prisons.

At least two federal interests are furthered by RLUIPA. First, the federal government has an interest in ensuring that federal funds are not expended in programs that unduly repress inmates' free exercise of religion. In this sense, "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.'" *Verhagen*, 348 F.3d at 607 (*quoting Mayweathers*, 314 F.3d at 1067). Such legislation includes Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* (programs receiving federal funds may not discriminate on the basis of race), Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* (educational programs receiving federal funds may not discriminate on the basis of race), and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 791 *et seq.* (programs receiving federal funds may not discriminate on the basis of disability, and must make reasonable accommodations for qualified individuals with disabilities).

Additionally, "[i]n the context of protecting prisoners' religious rights, Congress also seeks to promote the rehabilitation of prisoners, a process in which religion can play an important role." *Verhagen*, 348 F.3d at 609. Since Congress provides funds to prisons at least in part to facilitate rehabilitation, it is entitled to ensure that states do not undermine that goal by denying inmates the ability to practice their religion.

B. RLUIPA is Not Coercive

"[T]he Supreme Court since 1937 has not struck down a Congressional exercise of its spending powers, and we are aware of no decision from any court finding a conditional grant to be impermissibly coercive." *West Virginia v. United States Dep't of Health and Human Services*, 289 F.3d 281 (4th Cir. 2002). RLUIPA is not a good candidate to be the first federal statute to be invalidated on such grounds. The Virginia Department of Corrections voluntarily accepted money from the federal government with full knowledge that it was conditioned on its compliance with RLUIPA. Thus, "the Commonwealth has voluntarily committed itself to lifting government-imposed burdens on the religious exercise of publicly institutionalized persons in exchange for federal correctional funds." *Madison v. Riter*, 355 F.3d 310, 321 (4th Cir. 2003).

VDOC's argument appears to be that because all of its federal funding is subject to the RLUIPA condition, rather than just a part of it, RLUIPA is *ipso facto* unconstitutional. This is simply wrong. First of all, many of the spending clause statutes that have been repeatedly upheld similarly provide that a state program or activity receiving *any* federal funds is subject to particular conditions. This is true of Title VI, Title IX and the Rehabilitation Act. Thus, while the portion of federal funds at stake may be a factor in determining

whether a statute is constitutional, it cannot be dispositive.

The appellants rely heavily on a plurality opinion in *Virginia Dep't of Educ. v. Riley*, 106 F.3d 559 (4th Cir. 1997) (*en banc*) for its theory that RLUIPA must be coercive solely because one hundred percent of VDOC's federal funds are conditioned on compliance with its requirements. That opinion is not binding precedent and in any event does not support appellants' argument.

At issue in *Riley* was the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1411 *et seq.*, which provides states with money for special education on condition that the states "assure[] all children with disabilities the right to a free and appropriate education." The United States Department of Education threatened to revoke funding for Virginia because "the State had in effect a policy – like that the State maintains for its non-disabled students – pursuant to which it could cease providing free education to disabled students who are expelled or suspended long-term for behavior unrelated to their disabilities." *Riley*, 106 F.3d at 560. As framed by the majority, "[t]he question is whether, *in unmistakably clear terms*, Congress has conditioned the States' receipt of federal funds upon the provision of educational services to those handicapped

students expelled for misconduct unrelated to their handicap." *Id.* at 566 (emphasis in original). The court held that Congress had not done so, and that Virginia therefore had not knowingly accepted such a condition when it accepted federal funds.

Appellants rely on Part II of Judge Luttig's opinion, which suggested that, if such a condition did exist, it was unconstitutionally coercive. As a preliminary matter, the coercion analysis is not binding precedent, as it was (a) dicta, and (b) the opinion of less than a majority of the court. *See West Virginia v. U.S. Dep't of Health & Human Services*, 289 F.3d 281, 291 (4th Cir. 2002) (*Riley*'s coercion "analysis, of course, cannot be viewed as the holding of the court in *Riley* given that Judge Luttig's Tenth Amendment analysis was not necessary to the disposition of the case, and the analysis represented the views of only six judges.")

Even under the *Riley* plurality's analysis, however, RLUIPA cannot be considered coercive. First, it is simply not the case that the opinion imposes a *per se* rule that conditions affecting one hundred of a block of funding are unconstitutional. Were that the case, *every* condition in IDEA would be unconstitutional, rather than the relatively minor one at issue in the case, not to mention such statutes as Title IX and the Rehabilitation Act. Rather,

the plurality opinion looked at the percentage of funds at stake *relative* to the state's noncompliance with federal requirements:

> Here, in stark contrast [to *Dole*], the Federal Government has withheld from the Commonwealth 100% of an annual special education grant of $60 million because of the Commonwealth's failure to provide private educational services to less than one-tenth of one percent (126) of the 128,000 handicapped students for whom the special education funds were earmarked.

*Id.* at 569. The plurality went on to note that "only $58,000 of [the $60 million grant] would, on a *pro rata* basis, be available for educational services to the 120 expelled students." It was this vast disparity between the amount of money to be lost and the number of students affected by the state's policy that raised the eyebrows of the plurality. The plurality also acknowledged that the absolute dollar amount of the federal funds to be withheld was a factor to be considered. *Id.* at 570 ("The difference between a $1000 grant and, as here, a $60 million grant, insofar as their coercive potential is concerned, is self-evident.")

Moreover, in the later *West Virginia* case, the Fourth Circuit held that the *potential* loss of one-hundred percent of a federal grant does not render a statute unconstitutionally coercive on its face. In that case, West Virginia wished to avoid compliance with a Medicaid requirement that the state recover certain expenditures

from estates of deceased Medicaid beneficiaries. The Department of Health and Human Services warned the state that failure to comply "could result in West Virginia losing all or part of its Federal financial participation in the State's Medicaid Program." *West Virginia*, 289 F.3d at 285. West Virginia sought a declaration that the estate recovery requirement was unconstitutional on its face. The court noted that West Virginia "has a very heavy burden to carry, and must show that the estate recovery provisions cannot operate constitutionally under any circumstances." *Id.* at 292. That burden was not met because West Virginia could not show that it would *actually* lose all of its Medicaid funding.

Here, VDOC asks this Court to declare RLUIPA unconstitutionally coercive, but it too has failed to meet its "heavy burden." It has not put forth any facts about the amount and type of the federal funds at stake. Indeed, as far as *amicus* knows, it has not been threatened with loss of *any* federal funds. For similar reasons, in *Constantine v. Rectors and Visitors of George Mason University*, 411 F.3d 474 (2005), this Court refused to find that the § 504 Rehabilitation Act, which prohibits state programs that accept federal funds from discriminating on the basis of disability, was unconstitutionally coercive:

> While it is certainly true, as the defendants contend, that this waiver condition operates whenever a "program

> or activity" accepts *any* federal funds, that fact alone does not compel the conclusion that such a program or activity was coerced to accept the condition. . . . In this case, GMU has offered no estimate of the degree to which it actually relies upon federal funds, and we will not simply presume that the State's capacity for free choice was overcome by the prospect of financial assistance from the federal government.

411 F.3d at 494.

VDOC suggests that this Court simply ignore *Constantine* – decided just a year ago – because, it claims, that case "cannot be squared with *Dole*, *West Virginia*, or the six-judge plurality in *Riley*." But as the discussion above indicates, *none* of those cases indicated that a Spending Clause statute is unconstitutional simply because it imposes a particular condition on *all* federal funds. Rather, to prove coerciveness, a state must *at least* prove that (a) the state is *actually* in danger of losing federal funds; (b) that the state's noncompliance with federal policy is slight in comparison with the amount of money it would lose; and (c) that the amount of funds at stake, and the degree of the state's reliance on those funds, is so great as to be coercive.

This Court should reject VDOC's speculative claim of coercion. VDOC's broad coercion theory is not supported by case law or by facts, and would necessitate the invalidation of a whole range of federal spending clause legislation.

### C. Congress May Use Its Spending Clause Authority to Achieve Goals Indirectly Even When It May Not Do So Directly.

VDOC repeatedly makes the astonishing claim that because Congress could not directly require the states to provide religious accommodation greater than that required by the Constitution, it may not do so indirectly through a condition on federal funds. This is the precise opposite of what the Supreme Court has actually said. In *Dole*, the Court noted: "Here, Congress has acted indirectly under its spending power to encourage uniformity in the States' drinking ages. . . . [W]e find this legislative effort within constitutional bounds even if Congress may not regulate drinking ages directly." 483 U.S. at 206. That is, "objectives 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." *Id.* at 207 (internal quotation marks and citation omitted).

The only support VDOC offers for its direct contradiction of *Dole*'s holding is the recent case of *Forum for Academic and Institutional Rights, Inc. v. Rumsfeld*, 126 S. Ct. 1297 (2006). There, the Court rejected a coalition of colleges' free speech challenge to the Solomon Amendment, which prohibits colleges that receive federal funds from barring military recruiters on campus. In the course of it's ruling, the Supreme Court referred to the doctrine of "unconstitutional conditions," which provides that "the

government may not deny a benefit to a person on the basis that infringes his constitutionally protected freedom of speech even if he has no entitlement to that benefit." 126 S. Ct. at 1307 (internal quotation marks and citations omitted).

As VDOC would have it, *Rumsfeld*'s minimal discussion of the unconstitutional conditions doctrine overrules *Dole*, and with it *Constantine*, *Litman v. George Mason University*, 186 F.3d 544 (4th Cir. 1999) (upholding Title IX under the Spending Clause), and all of the federal cases upholding Congress's Spending Clause power to enact RLUIPA. This is incorrect. First of all, *Rumsfeld* does not even mention *Dole*, and this Court cannot assume that the Supreme Court has overruled that major Spending Clause case *sub silentio*. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997)(holding that lower courts should not "conclude our more recent cases have, by implication, overruled an earlier precedent").

Moreover, the unconstitutional conditions doctrine is nothing new; in fact, it far predates *Dole*. *See, e.g., Perry v. Sindermann*, 408 U.S. 593 (1972). Simply put, the unconstitutional conditions doctrine simply has nothing to do with the analysis, under *Dole*, of whether Congress has authority to enact certain legislation under the Spending Clause. The unconstitutional conditions doctrine provides that the government may not attach conditions on government benefits that infringe a constitutionally protected right – most frequently, as in *Rumsfeld*, the freedom of speech. It does not affect the government's power to attach other

conditions to spending, even if, as in *Dole*, those conditions are outside the enumerated powers of Article I.

D. RLUIPA Does Not Impermissibly Impinge on State Sovereignty.

The appellants' theory that RLUIPA undermines its sovereignty is long on rhetoric and utterly lacking in legal support. First, the analysis set forth in *Dole* has the very purpose of preserving the balance between federal and state sovereignty. If spending legislation meets all of the *Dole* requirements, it is within the federal authority and is not an impermissible incursion on state sovereignty.

Second, there is no limiting principle to appellants' claim that states may not be required to choose between federal funds and an "aspect of sovereignty." Virtually all conditional federal grants require states surrender control over areas that would normally be within their sovereign authority. There is no better example of this than *Dole* itself. States have sovereign authority to determine whether certain activities should be criminalized. But in *Dole*, states were actually required to enact a particular criminal statute in order to receive federal funds. The Court held this to be a perfectly proper exercise of the spending power.

**III. RLUIPA IS A VALID ENACTMENT UNDER THE COMMERCE CLAUSE**

Because the Spending Clause provides Congress with all the authority it needed to enact RLUIPA, there is no need for an independent analysis under the Commerce Clause. Nonetheless, even if the Spending Clause did not apply, RLUIPA is a valid enactment under the Commerce Clause.

Congress carefully tailored RLUIPA to ensure that only cases properly within the spending or commerce clause were covered. The scope of the statute is limited by 42 U.S.C.A. § 2000cc-1(b), which provides:

> 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 with foreign nations, among the several States, or with Indian tribes.

Moreover, 42 U.S.C.A. § 2000cc-2 (g) provides that in cases where jurisdiction is based on interstate commerce, "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." If the Court determines that RLUIPA exceeds Congress' authority under the Spending Clause, it must determine, *not* whether prison policy generally affects interstate commerce, but whether

the kind of religious burden in this particular case, aggregated throughout the nation, would have a substantial effect on interstate commerce. There are no facts in this record on which the Court could base such a decision.

**IV. THE ELEVENTH AMENDMENT DOES NOT BAR THIS CASE**

VDOC has accepted federal funds with full knowledge that it would be subject to suit under RLUIPA. In so doing it has waived any Eleventh Amendment defense he may have had. *See Litman* (By accepting federal funds, state university waived Eleventh Amendment immunity from suits under Title IX).

VDOC's claim that Congress may not abrogate state sovereign immunity for claims that are not constitutional claims is fallacious. First, the federal interest in nondiscrimination is not limited to policing the states' compliance with the Constitution. Appellants cite no authority for such a limitation, and it is contrary to the Supreme Court's statement 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. Thus, objectives 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.

*Dole*, 483 U.S. at 207.

Second, Spending Clause legislation sometimes *does* go beyond the pre-existing constitutional obligations on the states. For example, Section 504 of the Rehabilitation Act prohibits federally funded state programs from discriminating on the basis of handicap, and imposes an affirmative obligation on states to provide reasonable accommodations for individuals with disabilities. The statute is far broader than the Fourteenth Amendment, which allows states to discriminate against persons with disabilities whenever there is a rational basis for doing so. *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001).[1]

**CONCLUSION**

[1] In *Garrett*, the Supreme Court held that Title I of the Americans With Disabilities Act (ADA), 42 U.S.C. § 12112, which prohibits employment discrimination on the basis of disability, is an invalid enactment under Section 5 of the Fourteenth Amendment precisely because the prohibited conduct reached beyond that prohibited by the Equal Protection Clause. In contrast, the Rehabilitation Act, which contains nearly identical substantive provisions, has been repeatedly upheld as a valid enactment under the *Spending Clause*, because it only applies to programs and activities receiving federal funds. *See, e.g. Nieves-Marquez v. Puerto Rico,* 353 F.3d 108 (1st Cir. 2003); *Koslow v. Pennsylvania*, 302 F.3d 161 (3d Cir. 2002); *Jim C v. Atkins Sch. Dist.*, 235 F.3d 1079 (8th Cir. 2000); *Shepard v. Irving*, 204 F.Supp.2d 902, (E.D. Va. 2002) , *aff'd in relevant part*, Shepard v. Irving, 77 Fed.Appx. 615, 2003 WL 21977963 (4th Cir. 2003); *Frederick L. v. Department of Public Welfare*, 157 F.Supp.2d 509 (E.D. Pa. 2001). Similarly, while *City of Boerne* held RFRA to be invalid under Section 5, RLUIPA is a valid Spending Clause enactment.

For the foregoing reasons, *amicus* respectfully urges that the judgment of the District Court be affirmed.

Respectfully submitted,

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