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Incarceration of the Free Exercise Clause: The Sixth Circuit's Misstep in *Cutter v. Wilkinson*

James B. McMullin

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> [T]he holy author of our religion, who being lord both of body and mind, yet chose not to propagate it by coercions on either . . . but to exalt it by its influence on reason alone; [as compared with] . . . the impious presumption of legislators and rulers, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others . . . .[1]
>
> *– Thomas Jefferson*

I. INTRODUCTION: THE FIRST AMENDMENT AND RLUIPA

Thomas Jefferson's quote reflects a dichotomy that is characteristic of many of the Constitutional Founders: a strong faith punctuated by a determined desire to face God in their own way free of the fetters of a state religion. The First Amendment embodies this duality and gives it expression through the competing interests of the Establishment and Free Exercise Clauses. Yet, the passage of the First Amendment did not end the tension between protection of religious liberties and the threat of government-established religion. Instead, that pronouncement ushered in a judicial and legislative balancing act of these religion clauses that has continued since the Founding. Recently this balancing act resulted in passage of the Religious Land Use and Institutionalized Person Act ("RLUIPA") and a circuit split with the decision of the Sixth Circuit in *Cutter v. Wilkinson* declaring RLUIPA unconstitutional.[2]

When introducing the bill that became RLUIPA, co-sponsors Senators Hatch and Kennedy stated, "Far more than any other Americans, persons residing in institutions are subject to the authority of one or a few local officials."[3] In this setting, "[i]t is well known that prisoners often file frivolous claims; it is less well known that prison

1. Thomas Jefferson, A Bill for Establishing Religious Freedom (June 12, 1779), *reprinted in*, 5 THE FOUNDERS' CONSTITUTION 77 (Philip B. Kurland & Ralph Learner eds., 1987).

2. 349 F.3d 257 (6th Cir. 2003).

3. 146 CONG. REC. S7774-01, S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

officials sometimes impose frivolous or arbitrary rules" many of which unjustifiably burden prisoners' religious freedoms.[4] As a result of years of hearings regarding prisoner's religious freedoms Congress concluded some additional legal protection was required to protect institutionalized persons' religious liberty from being restricted in "egregious and unnecessary ways."[5] RLUIPA is its most recent solution.[6]

RLUIPA is a federal act passed in 2000 in response to the demise of its predecessor, the Religious Freedom Restoration Act (RFRA) in *City of Boerne v. Flores*, paired with the perception that institutionalized persons need additional protection of their religious rights from governmental infringement.[7] RLUIPA's section three specifically applies to governmental regulations that burden institutionalized persons' exercise of religion.[8] Accordingly, RLUIPA was one of the basis relied upon by plaintiffs in *Cutter v. Wilkinson.*[9] This case consolidated three Ohio prisoners' challenges to prison regulations that impinged upon the exercise of their respective religious beliefs.[10] While not admitting liability under RLUIPA the state of Ohio responded in *Cutter* by arguing that, first, it was not violating RLUIPA and that, second, even if it is violating RLUIPA, the Act is unconstitutional.[11]

As a result, the Sixth Circuit in *Cutter* addressed the constitutionality of RLUIPA under the Establishment Clause and determined that it was unconstitutional.[12] This decision merits close attention because it stands with only two district courts against an "apparent juggernaut of circuit and district court opinions" that specifically uphold RLUIPA or RFRA's First Amendment constitutionality.[13] Furthermore, the *Cutter* court's decision warrants close attention because RLUIPA introduces an

4. *Id*.

5. *Id.*

6. *Id.*

7. *See* 521 U.S. 507, 511 (1997). *Boerne* found RFRA unconstitutional for federalism concerns. *Id*. at 515-16. Both RFRA and RLUIPA utilize strict scrutiny in evaluating neutral government laws that incidentally burden religious exercise. 42 U.S.C. § 2000cc-1(a)(1)-(2) (2004); 146 CONG. REC. S7774-01, S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

8. 42 U.S.C. §§ 2000cc, 2000cc-1 (2004) (also held unconstitutional by Al Ghashiyah v. Dep't of Corr. 250 F. Supp. 2d 1016 (E.D. Wis. 2003)).

9. Cutter v. Wilkinson, 349 F.3d 257 (6th Cir. 2003).

10. 349 F.3d 257, 259 (6th Cir. 2003). The three cases were combined for circuit court review because they each hinged on the constitutionality of RLUIPA. *Id.* at 259-60.

11. *Id*. at 264-67 (specifically finding it has the impermissible effect of promoting religious exercise as more fully described *infra* Part V.B discussion of the effects prong).

12. *Id.* at 268-69. In contrast to *Boerne* in which the Court addressed federalism concerns for RFRA, the Sixth Circuit found it unnecessary to address federalism concerns and limited its analysis to the Establishment Clause.

13. *Id*. at 262. (citing the Fifth, Seventh, Eighth, and Ninth Circuits as finding either RFRA or RLUIPA constitutional).

appreciable risk of impermissible governmental support of religion—yet without RLUIPA, there is a risk for significant erosion of protection for religious expression by institutionalized persons.

Although the prisoners' suit extends beyond RLUIPA based claims this Note limits its analysis to the *Cutter* court's rationale under the Establishment Clause. This narrow focus seems appropriate given that the Establishment Clause is the only issue over which the district and circuit courts are in direct conflict and is the only issue addressed to the Supreme Court in the parties' petition for certiorari.[14]

In analyzing *Cutter*, Part II outlines the reasons Congress considered in passing RLUIPA. Part III reviews the legal developments that led to the passage of RLUIPA. Part IV then sketches the relevant factual scenario presented to the *Cutter* court including the case's procedural history and the court's holding. Following this background material Part V analyzes the court's reasoning and concludes the court wrongly held that RLUIPA violated the Establishment Clause. Specifically, it explains that although the court facially applied the *Lemon v. Kurtzman* test ("*Lemon* test") in its Establishment Clause analysis, it improperly relied upon non-precedential factors in applying the *Lemon* test, used flawed reasoning, and wrongly dismissed RLUIPA's jurisprudential support to hold that RLUIPA is unconstitutional.[15] Part VI then addresses a few of RLUIPA's potential problems by acknowledging the burdens it may place upon states' penal systems. But it argues that such policy-based concerns are best addressed through the legislature rather than the courts. Finally, Part VII urges that upon review the Supreme Court should apply the *Lemon* test as applied in *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*[16] and *Madison v. Riter*[17] to overturn the Sixth Circuit's holding and uphold RLUIPA's Establishment Clause constitutionality.

II. WHY RLUIPA, WHY NOW?

By definition, incarceration entails some measure of control over the incarcerated. State institutions and specifically prisons, are highly regulated environments in which uniformity of schedule, appearance, and activity for purposes of security and economy are top priorities.[18] Given

14. *E.g.* Brief for the United States at 9, Cutter v. Wilkinson, 349 F.3d 257 (6th Cir. 2003), *petition for certiorari filed*, 73 U.S.L.W. 3229 (No. 03-9877).

15. *See generally* Cutter v. Wilkinson, 349 F.3d 257 (6th Cir. 2003).

16. 483 U.S. 327 (1987).

17. 355 F.3d 310 (4th Cir. 2003).

18. *Developments in the Law – The Law of Prisons*, 115 HARV. L. REV. 1838, 1891 (2002) [hereinafter *Developments*].

the control necessary to imprison and society's general suspicion of prisoners' motivations for religious activity, extensive limitations on religious expression during incarceration have long been tolerated.[19] Naturally, because of the United State's traditional religious make-up, those religious expressions not conforming to the traditional Protestant mold have often been prohibited or severely limited.[20] However, modern sensibilities are offended when religious liberties are restricted in "egregious and unnecessary ways" that yield little benefit to prison administrators' goal of security. [21] Many of these offending restrictions result from a drive for efficiency seasoned with ignorance, lack of resources, and often, plain indifference.[22] The effect of these restrictions has been exacerbated keenly since the 1960s with the dramatic proliferation of variety in religious preferences among inmates, a burgeoning prison population, and the resultant budgetary pressures on the penal system.[23]

After years of hearings receiving testimony of unwarranted restriction on religious practice in general and discrimination among religious practices in prisons, Congress determined that action was required.[24] Congressional testimony described penal restrictions on religious activity that did not pose a threat to security or even efficiency. This testimony included accounts such as the following: Prohibiting a Catholic priest from bringing a small amount of sacramental wine into prison.[25] Or, prison administrators' refusal to purchase or accept donated matzo (the unleaved bread some Jews eat at Passover) from a Jewish organization.[26] In addition, prior to RLUIPA prison administrators often refused to make selective accommodations for adherents of non-majority religions.[27] For example, Muslim inmates were denied Islamic prayer oil even "though other kinds of fragrant body oils and lotions were made available to inmates."[28] Finally, Congress heard testimony of sectarian discrimination in the accommodations afforded prisoners, such as

19. *Id*.

20. *See id*. at 1892.

21. 146 CONG. REC. S7774-01, S7775 (daily ed. July 27, 2000) (joint statement of Senators Hatch and Kennedy).

22. *Id*.

23. See *Developments*, *supra* note 18, at 1893. A prime example of change in the religious identity of prison populations was the dramatic rise of predominantly African-American male Muslims in prison during the 1960's. *Id*.

24. Brief for the United States as Respondent Supporting Petitioners at 3, *Cutter* (No. 03-9877).

25. *Id*. at S7777.

26. *Id*.

27. Brief for the United States as Respondent Supporting Petitioners at 11-12, *Cutter* (No. 03-9877).

28. Charles v. Verhagen, 348 F.3d 601, 605 (7th Cir. 2003).

permitting the lighting of votive candles but not Chanukah candles.[29] Likewise, prison officials repeatedly refused to allow Jewish prisoners to miss meals on fast days or to obtain a sack lunch to breach their fast at nightfall.[30] These examples were legally tolerated because prior to RLUIPA, administrators were permitted to enforce restrictions on religious freedoms if the restrictions were reasonably related to executing a valid penal interest—and quite often the administrators draped the restrictions in the previously fail proof rationale of security.[31]

A. RLUIPA Effects

RLUIPA was formulated to address prison regulations with respect to religious exercise that are "grounded on mere speculation, exaggerated fears, or post-hoc rationalizations" clothed generally in the name of security.[32] However, heightened scrutiny, at least under RLUIPA's predecessor, the Religious Freedom Restoration Act ("RFRA"), did not produce a particularly inmate friendly trend as judges continued to defer to the asserted penal interests of correctional administrators.[33] Instead prison administrators have generally easily met RFRA's and RLUIPA's compelling interest prong and courts have not strictly enforced the least restrictive means requirement.[34] Accordingly, some commentators claim that RLUIPA like RFRA has not changed the nature of inmate religious rights at all.[35] However, unlike RFRA, RLUIPA defines religious exercise much more broadly so that it may be easier to initially advance a claim as religious and thus covered by RLUIPA.[36]

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29. *See Protecting Religious Liberty After* Boerne v. Flores: *Hearing Before the Subcomm. On the Constitution of the House Comm. on the Judiciary*, 105th Cong., 1st Sess., Pt. 3, at 41 (1988) hereinafter *Hearing*] (statement of Isaac Jaroslawicz). Votive candles are used by Christians as part of a devotional worship whereas Chanukah candles are used by some Jews in worship. *See* http://ohr.edu/yhiy/article.php/1318 (last vistited Mar. 25, 2005).

30. *See Hearing*, *supra* note 29, at 43.

31. *See Developments*, *supra* note 18, at 1894 n.19 (reporting prison official testimony on how regulations have traditionally been characterized in terms of security in order to pass judicial scrutiny).

32. 146 CONG. REC. S7774-01, S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

33. *Developments*, *supra* note 18, at 1894.

34. *Id*. Additional review of the effects of RLUIPA, regardless of its constitutionality, is warranted. At least one article questions whether RFRA and RLUIPA are simply restatements of the law established in *Employment Division, Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990) and thus are unnecessary and possibly will inhibit judicial discretion and creativity. *See* Sara Smolik, *The Utility and Efficacy of the RLUIPA: Was it a Waste*? 31 B.C. ENVTL. AFF. L. REV. 723 (2004) (discussing whether RLUIPA was really necessary).

35. *See* Sara Smolik, *The Utility and Efficacy of the RLUIPA: Was it a Waste*? 31 B.C. ENVTL. AFF. L. REV. 723 (2004).

36. *Developments*, *supra* note 18, at 1895.

III. BACKGROUND: RELIGIOUS RIGHTS FRAMEWORK AND RLUIPA

Section three of RLUIPA is a legislative enhancement of the protection afforded institutionalized persons' religious expression beyond that guaranteed by the Free Exercise Clause.[37] Instituting a strict standard of review for otherwise religious-neutral governmental actions that burden institutionalized individuals' religious activity enhances protection. Although the Act is relatively new and specific to institutionalized persons, the quest of determining the standard of review required by the Free Exercise Clause, yet permitted by the Establishment Clause, long predates the Act's passage. Thus RLUIPA, although rather unique in its application, is yet another effort at promulgating a general standard of review for governmental actions that impede upon individual religious expression; in so doing it attempts to safeguard individual religious freedoms while balancing concerns for impermissible governmental sponsorship of religion.[38]

A. A Standard In Flux

The Court's modern Free Exercise Clause jurisprudence is a labyrinth of balancing and factor tests that have fluctuated in acceptance and use most notably since the 1963 case of *Sherbert v. Verner*. [39] In *Sherbert*, the Court, similar to Congress with RLUIPA, embraced a strict scrutiny test for analyzing all neutral government actions that substantially burden religious practice.[40] This test provided that any otherwise neutral public law that burdens religious expression must be "in furtherance of a compelling governmental interest and must be the least restrictive means of furthering that compelling governmental interest."[41]

Although strict scrutiny was the test for Free Exercise Clause analysis, in practice the Court narrowly interpreted the *Sherbert* test. In effect the Court largely replaced strict scrutiny with a rational basis scrutiny test until it became the de facto Free Exercise Clause test for most situations.[42] In contrast to strict scrutiny, this less intensive scrutiny

37. 42 U.S.C. § 2000cc-1 (2004).

38. *See* 146 CONG. REC. S7774-01, S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

39. *See* Anne Y. Chiu, Note & Comment, *When Prisoners are Weary and Their Religious Exercise Burdened, RLUIPA Provides Some Rest for their Souls*, 79 WASH. L. REV. 999, 1002-03 (2004); Sherbert v. Verner, 374 U.S. 398 (1963).

40. 374 U.S. 398 (1963), *overruled in part by* Employment Div. Dept. of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

41. *Id*.

42. O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987), *superseded by statute*.

test requires courts to consider: (1) if there is a "valid, rational connection" between a neutral law and a legitimate government interest; (2) if the burdened person has alternative means of exercising the right in question; (3) the impact of a requested accommodation upon governmental interests; and (4) the absence of alternatives to the law or regulation.[43] The practice of narrowly applying the *Sherbert* test in favor of the rational basis test became the rule in *Employment Division, Deparment of Human Resources of Oregon v. Smith*.[44] In *Smith*, the Court explained that the Free Exercise Clause did not require strict scrutiny of neutral laws that incidentally burden religious expression except in limited situations.[45] Instead the Court interpreted the Free Exercise Clause as only requiring the application of the rational basis test.[46] However, it explained that the Establishment Clause did not prohibit the strict scrutiny standard and invited concerned legislatures to consider enhancing religious legal protections by adopting a stricter standard than constitutionally required.[47]

B. RLUIPA: A Legislative Response

Responding to *Smith's* invitation and reacting to the widespread perception that *Smith* eviscerated Free Exercise protections, Congress enacted the Religious Freedom Restoration Act ("RFRA").[48] Like RLUIPA, RFRA employed a strict scrutiny test but applied it to the states via the Fourteenth Amendment.[49] However, principally because RFRA rested on the slender reed of the Fourteenth Amendment for applicability to states, the Court in *City of Boerne v. Flores* held that RFRA violated principles of federalism and thus was not applicable to states or their subdivisions.[50] However, the constitutionality of its strict

43. *See generally* Turner v. Safley, 482 U.S. 78, 89-90 (1987), *superseded by statute* (citing Block v. Rutherford, 468 US 576, 586 (1984)).

44. *See* 494 U.S. 872, 890 (1990), *superseded by statute*. *Smith* involved the constitutionality of an Oregon law that in effect criminalized the use of a hallucinogenic drug commonly called peyote unless prescribed by a medical practitioner. *See id.* at 874. The respondents used the drug as part of a sacramental right in the Native American Church. Their use of peyote resulted in dismissal from their jobs and refusal of unemployment benefits from the state. *Id*. In holding that Oregon's law was constitutional, the case became significant for redefining the scrutiny level for Court's review of the constitutionality of otherwise neutral laws that impede religious expression. *Id*.

45. *See id*. at 880-87 (allowing strict scrutiny to apply to laws that burden the Free Exercise Clause in conjunction with other constitutionally protected rights. For example, when more than one constitutionally protected right was involved, a higher level of scrutiny was permissible.).

46. *See id*. at 885-87.

47. *Id*. at 890.

48. City of Boerne v. Flores, 521 U.S. 507, 511 (1997), *superseded by statute.*

49. *See* Cutter v. Wilkinson, 349 F.3d 257, 260 (6th Cir. 2003).

50. *Boerne*, 521 U.S. at 511.

scrutiny standard was not specifically addressed; consequently, RFRA and its strict scrutiny standard continue to be applicable on a Federal level.[51] Despite RFRA's failure Congress was still eager to curtail what it perceived as widespread state and local governmental action that impinged individuals' freedom of religious exercise. Congress responded to *Boerne* with RLUIPA.[52] Anxious to avoid another confrontation with the Court, the Act's co-sponsors, Senators Hatch and Kennedy, attempted to answer the Court's Federalism concerns set forth in *Boerne* by bypassing the 14th Amendment and limiting RLUIPA's scope.[53] Accordingly, the Act applies to states under the Spending and Commerce Clauses and is limited to zoning and institutional settings.[54] Specifically, it uses the Spending and Commerce Clauses to apply to state's actions affecting zoning and institutional settings that receive Federal financial assistance or where the substantial burden on religion affects or its removal would affect commerce among the states, with foreign nations, or with Indian tribes.[55] In regard to its institutional application, the positive requirements and limitations of the pertinent portion of RLUIPA, section three, are as follows:

> Protection of religious exercise of institutionalized persons
>
> (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

51. *Cutter*, 349 F.3d at 260; *Boerne*, 521 U.S. at 519 (holding that RFRA is unconstitutional as applied to states because Congress exceeded its powers under the Fourteenth Amendment because it went beyond Fifth Amendment power to prevent abuse of religious rights to impermissibly defining those rights).

52. *See* 146 CONG. REC. S7774-01, S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

53. *See Cutter*, 349 F.3d at 260.

54. 42 U.S.C. § 2000cc-1 (2004).

55. *Id*.

> burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.[56]

To increase the likelihood of enforcement, RLUIPA provides for both a governmental and a private right of action.[57] Yet, given the need for order and safety in institutionalized settings, the Act's sponsors sought prudential limitations to enforcement of truly egregious or otherwise unjustified instances of religious burdening.[58] This desire is primarily expressed through RLUIPA's internal limitations such as permitting a law to burden religious expression if it serves a compelling governmental interest that may not be carried out in a less restrictive manner.[59] In addition, Senators Hatch and Kennedy sought self-imposed judicial limitations by cautioning courts enforcing RLUIPA to continue giving deference to institutional administrators' regulations given the considerations of security, discipline, and cost inherent to institutions.[60] Considering the enumerated precautions Congress took in ensuring RLUIPA's constitutionality, it is not surprising that a number of courts considering challenges to RLUIPA have determined it is constitutional.[61]

This context makes the Sixth Circuit's lone opposition to RLUIPA in *Cutter* all the more unusual and deserving of judicial review. Although the *Cutter* court originally drew support for its holding from two district court decisions in the Fourth and Seventh Circuits, both decisions have subsequently been overruled by their respective circuits.[62] Thus, two circuits have come to the exact opposite conclusion regarding RLUIPA's First Amendment constitutionality, and similarly, at least five circuits have concluded that the identical operative language in RFRA does not violate the Establishment Clause.[63]

IV. FACTS: *CUTTER V. WILKINSON*

Cutter v. Wilkinson is a compilation of three trial court cases in which inmates challenged several Ohio Department of Rehabilitation and Corrections ("ODRC") decisions that they claimed violated RLUIPA by

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56. *Id*.

57. § 2000cc-2(a). Note that plaintiffs in *Cutter* were able to sue state officials in federal court under the fiction of *Ex Parte* Young, 209 U.S. 123 (1908).

58. CONG. REC. S7774-01,S7776 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

59. *Id*. at S7774.

60. *Id*. at S7775.

61. Cutter v. Wilkinson, 349 F.3d 257, 261-62 (6th Cir. 2003).

62. *Id*. at 257, 262.

63. *Id*. at 257, 261-62.

denying their various requests for religious accommodations.[64] Although their claims are interesting, the facts of the individual cases are not particularly relevant.[65] The common issue that is relevant to the consolidation of these three cases is Ohio's challenge to RLUIPA's constitutionality.[66]

A. Procedural History: Cutter v. Wilkinson

Prior to consolidation of the three cases the individual plaintiffs initially brought claims against ODRC officials under the First and Fourteenth Amendments.[67] While the individual cases were pending, Congress passed RLUIPA and the plaintiffs amended their complaints to include claims under the Act.[68] The defendants responded with motions to dismiss the RLUIPA claims, arguing that RLUIPA is unconstitutional because it violates the Establishment Clause and exceeds Congress's Spending and Commerce Clause powers in its application to states.[69] The United States intervened in the district court to defend RLUIPA's constitutionality, and the cases were consolidated to decide the motions to dismiss.[70] The motions were referred to a magistrate judge who concluded that RLUIPA was constitutional and recommended the motions be denied.[71] The district court adopted the Magistrate's reasoning and recommendation and denied the motions, whereupon the state of Ohio was granted leave to make an interlocutory appeal to the Sixth Circuit.[74] The Sixth Circuit accepted Ohio's appeal and responded by reversing the district court; it held that section three of RLUIPA violates the Establishment Clause.[75] The United States and various

64. *Id*. at 260.

65. Gerhardt v. Lazaroff, 221 F. Supp. 2d 827, 833-34 (S.D. Ohio 2002). The inmates claims involved what may be characterized as non-traditional religious requests such as delivery of white supremacist literature. *Id*.

66. *See generally Cutter*, 349 F.3d at 260.

67. Memorandum in Support of the Plaintiff-Appellees' Petition for Rehearing and Suggestion for Rehearing En Banc at 2, Cutter v. Wilkinson, 349 F.3d 257 (6th Cir. 2003) (No. 02-3270, 02-3299, 02-3301).

68. *Id*. at 2-3.

69. Brief in Response to Petition for a Writ of Certiorari for the United States in the Supreme Court of the United States at 5, *Cutter* (No. 03-9877).

70. *Id*.

71. Petitions of United States of America for Rehearing and Rehearing En Banc in the United States Court of Appeals for the Sixth Circuit at 4, *Cutter* (No. 02-3270, 02-3299, 02-3301).

72. Brief for Appellants at 23-25, *Cutter* (No. 03-9877).

73. *Id.*

74. *Id*.

75. Cutter v. Wilkinson, 349 F.3d 257, 261, 268-69 (6th Cir. 2003).

Amicus Curiae in response petitioned the circuit court for a rehearing.[76] The Sixth Circuit denied the petition and the petitioners, joined by the defendants, filed a petition for a writ of certiorari to the Supreme Court.[77] On October 12, 2004, the Supreme Court granted certiorari to the parties on the issue of RLUIPA's section three constitutionality and subsequently scheduled oral arguments for April 19, 2005.[78]

V. ANALYSIS

The Establishment Clause of the Constitution states, "Congress shall make no law respecting an establishment of religion."[79] The Free Exercise clause instructs that Congress shall not make a law "prohibiting the free exercise thereof."[80] The Supreme Court has interpreted these juxtaposed clauses to collectively require that laws be religiously neutral as a fundamental aspect of the First Amendment.[81] Although such an interpretation may seem reasonable, what neutrality means in concrete terms leads to distinct differences of opinion.[82] For example, neutrality may mean that government may not support a particular religious sect but may support religion in general.[83] Or, conversely, neutrality may mean that laws may not assist religion directly or indirectly.[84] In short, neutrality is not self-defining.

To give guidance to the judiciary as to a definition of neutrality, at least in relation to the Establishment Clause, the Supreme Court enunciated the well-known *Lemon* test.[85] The *Lemon* test provides that in order to avoid an Establishment Clause violation a law must meet the following three criteria: a statute (1) "must have a secular legislative purpose," (2) "its principal or primary effect must be one that neither advances nor inhibits religion," and (3) it must not create "excessive government entanglement with religion."[86] The *Lemon* test fails, however, to render any guidance in relation to the Free Exercise Clause.

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76. *E.g.* Petitions of United States of America for Rehearing and Rehearing En Banc in the United States Court of Appeals for the Sixth Circuit, *Cutter* (No. 02-3270, 02-3299, 02-3301).

77. Cutter v. Wilkinson, 2004 U.S. App. LEXIS 4294 (Mar. 3, 2004), Brief in Response to Petition for a Writ of Certiorari for the United States in the Supreme Court of the United States at 7, *Cutter* (No. 03-9877).

78. *Cutter*, 349 F.3d 257, *cert. granted*, 73 U.S.L.W. 3229.

79. U.S. CONST. amend. I.

80. *Id*.

81. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

82. *E.g. Cutter*, 349 F.3d 257.

83. *Contra Lemon*, 403 U.S. at 602.

84. City of Boerne v. Flores, 521 U.S. 507, 536-37 (1997) (Stevens, J., concurring).

85. *Lemon*, 403 U.S. at 602.

86. *Id*. at 612-13.

Instead, Free Exercise Clause analysis after *Smith* and until RFRA and RLUIPA was analyzed under the judicially created rational relationship test.[87]

To determine if RLUIPA's standard of strict scrutiny violated the Establishment Clause the *Cutter* court used the *Lemon* test as a framework for its analysis.[88] Under the test's purpose prong, the court conceded that RLUIPA might be permissible, although it expends considerable space reasoning otherwise.[89] Similarly the court determined that RLUIPA does not violate the entanglement prong.[90] However, the court held that RLUIPA clearly violates the effect prong and is thus unconstitutional under the Establishment Clause.[91]

A. Purpose Prong

The *Lemon* test's purpose prong requires that a law have a "secular legislative purpose."[92] In defining this requirement the *Cutter* court relied on reasoning outlined in *Edwards v. Aguillard* to articulate the test for a secular legislative purpose as asking whether the "government's actual purpose is to endorse or disapprove of religion."[93] The court inferred the governmental purpose based upon the law's effects on religious rights as compared to other constitutionally protected rights.[94] If governmental action offered additional protection to religious rights without similarly protecting other constitutionally protected rights, the court reasoned that such action had the impermissible purpose of endorsing religion.[95] However, this so-called lockstep requirement was rejected in *Amos*.[96] In *Amos* the Court stated that it is a permitted governmental purpose "to alleviate significant governmental interference" with religious expression even without similarly affecting other constitutionally protected rights.[97] So, although Congress does not have a constitutional duty to remove or mitigate burdens on religious exercise, it is not forbidden from removing such burdens.[98] Accordingly, the plaintiffs in this case claim that

87. *See* Turner v. Safley, 482 U.S. 78 (1987).

88. Cutter v. Wilkinson, 349 F.3d 257, 267 (6th Cir. 2003).

89. *See id*. at 264.

90. *Id*. at 267-68.

91. *Id*.

92. *Lemon*, 403 U.S. at 612.

93. *Cutter*, 349 F.3d at 263 (citing Edwards v. Aguillard, 482 U.S. 578, 585 (1987)).

94. *Id*. at 264.

95. *Id*. at 262-64.

96. Corp. of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 338 (1987).

97. *See id*. at 335.

98. Employment Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872, 890 (1990).

RLUIPA, via the strict scrutiny test, does exactly what *Amos* said is a permissible purpose: alleviate significant governmental burdens on religious exercise, albeit in an institutional setting.[99]

1. The Amos *decision*

Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos considered the dismissal of various employees from nonprofit facilities owned and organized as corporations controlled by the Church of Jesus Christ of Latter-day Saints ("Church").[100] The employees were discharged for failing to meet certain religious requirements of the Church.[101] The disgruntled former employees sued the Church under § 703 of the Civil Rights Act of 1964 in Utah's District Court claiming they were impermissibly dismissed due to religious discrimination.[102] The Church replied that it was exempt from the prohibition against religious discrimination in employment by § 702 of that Act.[103] Section 702 provides that religious employers may be permissibly exempt from the prohibition on religious discrimination in employment.[104] However, the district court held that the § 702 exemption did not apply and furthermore that § 702 violated the effects prong of the *Lemon* test and thus was unconstitutional.[105] The Supreme Court granted certiorari and reversed. Using the *Lemon* test, the Court determined that government may—and at times must—accommodate religious practices.[106] Furthermore, the Court held that the Church acted properly in dismissing the employees because the Church's actions were covered by the religion exemption in § 702.[107]

The Court held that the § 702 exemption satisfied the *Lemon* test in the following ways. First, under the purpose prong the Court reasoned that although not required by the Free Exercise Clause it is a permissible legislative purpose to alleviate significant government interference with the ability of religious organizations to carry out their religious missions.[108] Second, under the effects prong the Court determined that §

99. Brief for Appellants at 24, *Cutter* (No. 02-3270).

100. *Amos*, 483 U.S. at 330. The referenced church is often referred to by the moniker "Mormon" although it does not officially recognize that appellation.

101. *Id*. Eligibility to attend temples is premised upon compliance with Church requirements such as meeting attendance and abstinence from alcohol and tobacco use.

102. *Id*. at 331.

103. *Id*.

104. 42 U.S.C. § 2000e-1 (2004).

105. *Amos*, 483 U.S. at 331-33.

106. *Id*. at 334-40.

107. *Id.*

108. *Id*. at 335.

702 is not unconstitutional because it allows religious organizations to advance their legal and stated purpose: promoting religion without simultaneously enhancing protection of other constitutional freedoms.[109] Instead, to violate the effects prong, the Court explained that government itself would have to advance religion through financial support or active involvement and not simply by removing governmental burdens upon religious activities.[110] Finally, the Court explained that instead of entangling church and state § 702 aided in separating the two by avoiding governmental inquiry into religious belief to determine if a particular job is truly religiously connected.[111]

2. Differentiating Amos

Apparently recognizing the threat *Amos* posed to their decision, the *Cutter* court attempted to differentiate *Amos*. It attempted to do so by emphasizing the factual difference in *Amos* and *Cutter*. Namely that § 702 in *Amos* was necessary to alleviate possible Establishment Clause violations, whereas RLUIPA elevated religious rights protection above an already constitutionally acceptable level.[112] Furthermore, the court claimed that RLUIPA is much larger in scope than the *Amos* § 702 exception, thus casting *Amos* as a narrow exception to the general rule.[113] In so doing the court failed to adequately distinguish *Amos* so as to make its reasoning inapplicable.

For example, initially the *Cutter* court focused on the Supreme Court's characterization of § 702 in *Amos* as necessary to avoid a violation of the Establishment Clause.[114] In contrast, the court explained that RLUIPA's strict scrutiny standard was not necessary to avoid violating the Establishment Clause since the Court in *Smith* had previously established the rational relationship test as adequate for Establishment Clause analysis.[115] The *Cutter* court concluded that because RLUIPA was not necessary to avoid an Establishment Clause violation, *Amos* is distinguishable and its reasoning is not applicable to this case.[116] The reasoning underpinning this conclusion, however, is fundamentally flawed in at least two ways.

First, like *Cutter*, the *Amos* Court applied the *Lemon* test in

109. *Id*. at 337-39.
110. *Id*. at 337 (citing Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).
111. *Id*. at 339.
112. Cutter v. Wilkinson, 349 F.3d 257, 264 (6th Cir. 2003).
113. *Id.*
114. *Id*. at 263.
115. *Id*.
116. *Id*. at 263-64.

evaluating a law's constitutionality in relation to the Establishment Clause.[117] Although ostensibly differing motivations underlie the subject statutes in *Amos* and *Cutter*, the Court's *Lemon* test reasoning is none-the-less generally applicable to an analysis of RLUIPA or any other law's constitutionality under the Establishment Clause.[118] Thus, differing statutes do not warrant individualized purpose prong tests. This conclusion is supported by the widespread use of the *Amos* Court's reasoning by a number of courts analyzing the strict scrutiny test embodied in RFRA and RLUIPA.[119]

Second, and more importantly, in concluding that *Amos* was not applicable because RLUIPA was not necessary to avoid an Establishment Clause violation, the court appears to treat the standard of review for Free Exercise Clause analysis as a relevant test for Establishment Clause analysis. This is flawed. As mentioned above, the court reasoned that RLUIPA was not necessary to avoid a violation of the Establishment Clause.[120] While this may be a valid conclusion, the court errs in its explanation of why RLUIPA was not necessary to avoid an Establishment Clause violation: Because the Supreme Court had already approved rational relationship review for laws that interfered with prisoners' fundamental rights, RLUIPA's heightened standard was unnecessary.[121] Again, this too is a correct statement, although it should be noted that just because a standard is unnecessary does not make it impermissible. Regardless, the relevant error in reasoning here is concluding that the already established rational relationship standard somehow prevented Establishment Clause violations. This is simply incorrect—the referenced standards of review pertain to Free Exercise clause and not Establishment Clause analysis.[122] Although the court had held that the rational relationship standard did not violate the Establishment Clause, its principle purpose was to establish a floor for analysis of Free Exercise Clause analysis. The afore-referenced *Lemon* test is the applicable Establishment Clause test. Thus, comparison of the purposes of the underlying statutes at issue in *Amos* and *Cutter* is, as ironically noted by a RLUIPA critic, "like comparing apples and oranges" and misses the point that the shared and relevant analysis between the two cases is their application of the *Lemon* test.[123]

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117. *Amos*, 483 U.S. at 335-39; *Cutter*, 349 F.3d at 262-66.

118. *See Amos*, 483 U.S. at 335-39 (suggesting that the *Lemon* test is the generally applicable test for Establishment Clause analysis).

119. *E.g.* Madison v. Riter 355 F.3d 310 (4th Cir. 2003).

120. *Cutter*, 349 F.3d at 263.

121. *Id*. at 263-66.

122. *See* 42 U.S.C. § 2000cc-1 (2000).

123. *Cutter*, 349 F.3d at 268 (citing Marci A. Hamilton, *The Religious Freedom Restoration*

3. Purpose prong and RLUIPA's scope

In addition to the misplaced comparison of the purposes of the subject statutes in *Amos* and *Cutter*, the court claims that *Amos* is further distinguishable because RLUIPA is much larger in scope than the exception in *Amos.*[124] The court uses the issue of scope by suggesting RLUIPA has an impermissible purpose due to and evidenced by its broader sweep.[125] For example, it explains that unlike the exemption in *Amos*, RLUIPA does not remove a narrow obstacle to religious exercise but rather applies to any number of present and future governmental regulations.[126] Although the court stops short of declaring Congress disingenuous in stating that its purpose was accommodating religion by needlessly removing unnecessary obstacles, it implies that RLUIPA's effectual purpose is not the required secular purpose of protecting religious expression under the Free Exercise clause.[127] Instead the court determines that RLUIPA's purpose is to advance religion in institutional settings.[128]

The crux of this reasoning is that RLUIPA has in effect a prohibited purpose imputed by the Act's protection of religious freedoms without simultaneously affording protection to other constitutionally protected conduct.[129] Yet, the reasoning that RLUIPA does not protect constitutional freedoms in a lockstep fashion seems to be a fault of too narrow a sweep rather than too broad.[130] Regardless, the perceived failure to simultaneously protect constitutionally protected forms of conduct is not a controlling constitutional test.[131] Instead this test appears to be based on Justice Steven's dicta in a concurring opinion that neutrality dictates that governmental actions may not tend to favor religion over irreligion.[132] While perhaps persuasive to the court, it is not controlling—*Amos* is. In an apparent recognition of its weakness in distinguishing *Amos* and in using non-precedential factors to evaluate RLUIPA under the purpose prong, the court ends its purpose prong analysis abruptly by explaining that even if RLUIPA has a permissible purpose under *Amos* it

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Act is Unconstitutional, 1 U. PA. J. CONST. L. 1, 13-14. (1998)).

124. *Cutter*, 349 F.3d at 263-64.

125. *Id*. at 263-64.

126. *See id*. at 264.

127. *See id*.

128. *Id*.

129. *Id*. at 264-65

130. *See id*.

131. Corp. of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 337 (1987).

132. City of Boerne v. Flores, 521 U.S. 507, 536-37; *Amos*, 483 U.S. at 327, 337 (1987).

nevertheless fails the effects prong.[133]

B. Effects Prong

Because the court at least entertains the idea that RLUIPA has a permissible purpose and concludes that RLUIPA does not violate the entanglement prong, the court's holding rests on its effects prong analysis.[134] The court concludes that RLUIPA has the impermissible effect of inducing institutionalized persons to religious activity by relying on a pre-*Amos* test of the effects prong.[135] This old test asks whether the law or practice under review "conveys a message of endorsement or disapproval" as evidenced by protecting religious rights without similarly advancing other constitutional rights.[136] This again is a reiteration of the so-called lockstep rule.[137] In evaluating *Cutter* for impermissible effects under this lockstep rule, the court relied on the *Ghashiyah* court's two factor test to determine whether RLUIPA conveys a message of governmental endorsement of religion by protecting religious rights without similarly enhancing protection of other constitutional rights.[138] These two factors are (1) whether the governmental action benefits both secular and religious entities, and (2) whether the action will induce rather than merely protect religious exercise.[139] Under both factors the court essentially considers the same aspects of RLUIPA but asks different questions.[140]

In its discussion of the first *Ghashiyah* factor, the *Cutter* court analyzed whether the governmental action benefits both secular and religious entities in tandem—again, the lockstep rule.[141] Similar to the court's conclusion under its purpose prong analysis, the court concluded under this factor that RLUIPA's strict scrutiny standard fails to simultaneously advance secular and religious freedoms.[142] Thus, the court reasoned that RLUIPA has the effect of sending a message of governmental endorsement of religion.[143] In support of this conclusion

133. *Cutter*, 349 F.3d at 264.

134. *Id*. at 264-68.

135. *Cutter*, 349 F.3d at 264 (citing Lynch v. Donnely, 465 U.S. 668, 690 (1984)).

136. *Id*.

137. *See supra* text accompanying notes 92-93; *See infra* text accompanying note 138.

138. *Cutter*, 349 F.3d at 264 (citing Ghashiyah v. Dept. of Corr. of the State of Wis., 250 F. Supp. 2d 1016, 1025 -26 (E.D. Wis. 2003), *overruled by* Charles v. Verhagen, 348 F.3d 601 (7th Cir. 2003)).

139. *Id*.

140. *Id*. at 264-67.

141. *See Cutter*, 349 F.3d at 267.

142. *Id*. at 265-67.

143. *Id.*

the court largely relied on a district court's assessment in *Madison v. Riter* that RLUIPA switches the burden of proof from an inmate to prison officials.[144] After citing numerous examples of how this represents a change from the status quo the court summed up its estimation of the effect of this change by again citing *Madison*: "it is hard to imagine a greater reversal of fortunes for the religious rights of inmates than the one involved in . . . RLUIPA" without any corresponding secular benefit.[145] Despite this reversal of prisoners' fortunes, the court does not indicate how the enhanced standard is unconstitutional or otherwise illegal.[146] Instead it attempts to present the appearance of an Act that has so drastically changed the balance of religious to secular rights so as to unquestionably establish an endorsement of religion by the state.[147]

Regardless of the change in the balance of protection for religious and other constitutional rights, this lockstep rule is simply not a controlling Establishment Clause or effects prong test.[148] Instead, this test appears to be derived from a concurring opinion by Justice Stevens reasoning that government may not support religion over irreligion.[149] As a derivative of Justice Stevens' reasoning comes the notion that religious rights may not be granted greater protection than other constitutionally guaranteed rights unless there is some identifiable need for greater protection.[150] Therefore, this test is not derived from controlling common or statutory law and was clearly rejected by the *Amos* court.[151] However, assuming that this is a valid requirement, RLUIPA does not enhance religious rights protection to an extent that induces institutionalized persons to practice religion.[152] Furthermore, under the second *Ghashiyah* factor—at least in institutional settings—there is arguably an identifiable need for greater protection of religious freedoms.

For example, in regard to the court's claim that RLUIPA's enhancement of protections for religious rights induces persons to practice religion, the court explains that under strict scrutiny prison officials bear the burden of proof instead of the plaintiff prisoners.[153] Yet,

144. *Id*. at 265 (citing Madison v. Riter, 240 F. Supp. 2d 566, 575 (W.D. Va. 2003), *overruled by* Madison v. Riter, 355 F.3d 310 (4th Cir. 2003)).

145. *Id*.

146. *See id*.

147. *See generally id*. at 266.

148. *See supra* note 138 and accompanying text.

149. City of Boerne v. Flores, 521 U.S. 507, 537 (1997).

150. *See id*.

151. Corp. of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 338 (1987); *Cutter*, 349 F. 3d at 264 (citing Lynch v. Donnelly, 465 U.S. 668, 690 (1984)).

152. Madison v. Riter, 355 F.3d 310 (4th Cir. 2003).

153. *Cutter*, 349 F.3d at 265-67.

it fails to mention that prior to the prison officials bearing the burden of proof a claimant must first offer prima facie evidence of a violation of the Free Exercise Clause.[154] Regarding this point, Senator Hatch explained that the "party asserting a violation of this Act shall in all cases bear the burden of proof that the governmental action in question constitutes a substantial burden on religious exercise."[155] Furthermore, if the government provides prima facie evidence that it has offered to make an accommodation to relieve the substantial burden the claimant then has the burden to show that the proposed accommodation is unreasonable or ineffective in relieving the burden.[156] Both Senators Hatch and Kennedy expected the courts to continue to give deference to the experience of prison administrators in establishing regulations necessary to maintain security.[157] They believed, however, that the Act's enhancement of the burden of proof on the government would assist prisoners in challenging regulations based on mere speculation or justified by post-hoc rationalizations.[158] Thus, although the lockstep rule is not controlling, even if it is an applicable test, the court fails to show that strict scrutiny shifts the burden of proof such that religious rights are granted excessive protection resulting in the impermissible effect of government inducing institutionalized persons' religious activity.

The second *Ghashiyah* factor asks if the Act will induce rather than simply protect religious exercise.[159] Under this factor the court determined that RLUIPA has the effect of encouraging prisoners to be religious in order to enjoy greater rights and thus fails to satisfy this factor.[160] In doing so, the court relies upon its own circuit court test that asks "whether an objective observer, acquainted with the text, legislative history, and implementation of the enactment would view it as state endorsement of religion."[161] However, this circuit court test was derived from *Texas Monthly, Inc. v. Bullock*, in which the Supreme Court considered a statute's effect on nonreligious persons as part of an effect analysis. But it did so in the context of government compelling non-adherents to support religious practice as opposed to a possible enticement to do so.[162] Thus, the case is factually dissimilar from *Cutter*

154. *Id*. at 265; 146 CONG. REC. S7774-01, S7774 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

155. 146 CONG. REC. S7774-01, S7776 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

156. *Id*.

157. *Id*. at S7775.

158. *Id*.

159. *Cutter*, 349 F.3d at 264.

160. *Id*. at 266.

161. Adland v. Russ, 307 F.3d 471, 484 (6th Cir. 2002).

162. *Cutter*, 349 F.3d at 267. *See* Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 9 (1989). This

and the rule is not applicable in this context.

Yet, like the first factor, even if the second factor is applicable RLUIPA is in compliance. For example, the court reasons that RLUIPA will allow religious adherents special rights, and as a result, other prisoners will feel compelled to become religious in order to enjoy similar benefits.[163] This implies that RLUIPA will somehow prevent substantive prison rules from applying with equal force to the religious and irreligious. This is not correct. As noted earlier, Senators Hatch and Kennedy both stated on the record that they expected courts to continue to give deference to prison administrators in terms of rules of safety and order.[164] In addition, even if RLUIPA does grant religious activity greater protections than other activities, it is hard to imagine that the so-called extra freedoms that will accrue to religious activity will be a substantive attraction to the irreligious. RLUIPA's legislative history illustrates this point. The history cites as evidence of the need for RLUIPA instances of prison authorities surreptitiously recording the confession of a prisoner to his priest and an instance where a prisoner was permitted to attend a religious service but forbidden to take communion.[165] If RLUIPA allows prisoners to confess in private or partake of communion it is difficult to imagine similarly permissible freedoms enticing a large or even a minimal number of non-religious prisoners to profess religious adherence.

Likewise, because the strict scrutiny test is self-limiting, the government will have ample opportunity to prevent the accrual of generally attractive rights that are otherwise disruptive to an institutional setting. The test is self-limiting by allowing the government an opportunity to establish regulations that burden religion provided it can establish a compelling governmental interest and show that the goal of the regulation is accomplished by the least restrictive means.[166] Combined with Senator Hatch's admonitions to courts to give deference to prison administrators' expertise, such a test allows prison officials to continue to limit any religious expression that will otherwise threaten

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case considered a statute's effect on nonreligious persons as part of the effect analysis. However, it is only a plurality opinion and simply held that the government may not compel non-adherents to support religious practices. The question then remains as to the court's contention that failure to protect other constitutional rights in lockstep with religious rights de facto compels non-adherents to support religious practices.

163. *Cutter*, 349 F.3d at 266.

164. 146 CONG. REC. S7774-01, S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

165. *Id*.

166. CONG. REC. S7774-01, S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

safety and order.[167] This deduction is supported by empirical evidence gathered under RFRA.[168] This evidence, complied by the Department of Justice, demonstrated that RFRA's strict scrutiny requirement had not been an unreasonable burden to the Federal prison system.[169] For example, the Federal Bureau of Prisons experienced only sixty-five RFRA suits during RFRA's six-year life, and the Justice Department points out that most of those alleged other legal theories and thus would have been filed anyway.[170]

In summary, as in its purpose prong analysis, in its effects prong analysis the *Cutter* court relied on an improper differentiation of *Amos*, which resulted in its use of non-controlling tests, flawed reasoning, and an incorrect determination that RLUIPA has impermissible effects.

C. Entanglement Prong

Under the final *Lemon* prong, entanglement, the court must determine whether RLUIPA results in an excessive entanglement of government and religion.[171] The court appropriately rejects *Ghashiyah's* overzealous analysis and recognizes that RLUIPA does not require any greater interaction between government officials and religion than existed under the rational relationship standard.[172] Indeed, the court appears to acquiesce to the fact enunciated in *Amos* that government, under current jurisprudence, is able to legislate regarding religion and must to some degree be entangled with it.[173] Thus, it is not a matter of whether government may be involved with religion but to what degree it is involved.[174] Because RLUIPA does not promote any greater government involvement than permissibly existed previously it does not violate this prong.

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167. *Id*. at S7775.

168. *Id*.

169. *Id*.

170. *Id.* A study of RFRA cases showed that of the inmate religious claims that reached trial, only nine percent were successful. *Developments in the Law – The Law of Prisons*, 115 HARV. L. REV. 1838, 1894 (2002). Apparently, administrators easily met RFRA's (now RLUIPA's) compelling interest prong while courts generally ignored the least restrictive means requirement. *Id*. Furthermore, in connection with RFRA's passage and applicable to RLUIPA, the Prison Litigation Reform Act was passed, requiring prisoners to exhaust administrative remedies prior to bringing suit under any federal law. 42 U.S.C. § 1997e(a) (2000).

171. *Lemon*, 403 U.S. at 613.

172. Cutter v. Wilkinson, 349 F.3d 257, 267-68 (6th Cir. 2003).

173. Corp. of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 334-35, 338 (1987).

174. *Id*.

D. Note on RLUIPA's Jurisprudential Foundation

Although the Supreme Court in *Smith* held that a rational relationship was the only test required by the Free Exercise Clause, the Court recognized it as the floor and not the ceiling of legislatively available Free Exercise requirements.[175] Accordingly, the *Smith* Court invited legislatures concerned with Free Exercise limitations to increase available protection as RLUIPA attempts to do.[176] Although the Act does change the burden of proof, the change is not so drastic as to do what this court implies: make the burden on the government so high as to send a message of governmental endorsement of religion and overstep *Smith*'s invitation to increase Free Exercise protections.[177] Instead, with the strict scrutiny standard, RLUIPA—legislatively and according to *Smith*—permissively elevates Free Exercise analysis above the constitutionally mandated base rational relationship standard without penetrating the Establishment Clause's ceiling.[178]

VI. RLUIPA's WEAKNESSES: NOT A JUDICIAL PROBLEM

Despite RLUIPA's probable constitutionality, it is not necessarily effective or appropriate legislation. In fact, although the Justice Department and Senators Hatch and Kennedy claim that RFRA has not and RLUIPA will not significantly increase the burden on state institutional administrators, state administrators strongly claim otherwise.[179] These interested parties render an impassioned pleading against RLUIPA on account of the burdens that they claim it imposes as evidenced by their experience under RFRA.[180] Such burdens include complicating the task of "combating gangs" or diverting resources to responding to requests for special religious accommodations.[181] These appear to be valid concerns that give one pause when considering the wisdom of RLUIPA in an institutional setting. However, Ohio's experience with RLUIPA may not be representative of most states. As the defendants in *Cutter* recognized, the problems they experienced under RFRA's strict scrutiny test may be unique to them because Ohio has a greater problem with white supremacist groups than most other

175. *See* Employment Div., Dept. of Human Res. of Or. v. Smith, 449 U.S. 872, 890 (1990).

176. *Id*.

177. *Cutter*, 349 F.3d at 265.

178. *See Smith*, 449 U.S. at 890.

179. 146 CONG. REC. S7774-01 (daily ed. July 27, 2000) (joint statement of Senators Hatch and Kennedy); Defendant-Appellants' Final Opening Brief at 1-2 & 9-10, *Cutter* (No. 02-3270).

180. Defendant-Appellants' Final Opening Brief at 1-2, *Cutter* (No. 02-3270).

181. *Id*.

states.[182] Such inmate groups are the largest and most sophisticated in Ohio's correctional system and presumably the most active in invoking the protection of RFRA.[183] In their effort to avoid these burdens, appellants ought to direct such policy-based arguments to Congress and save the courts for adjudication, not legislation.[184] Although the courts must determine the constitutionality of the law, Congress is best suited to hear and act based on policy concerns.[185]

VII. CONCLUSION

RLUIPA is certainly not a perfect law in the eyes of supporters who wish for it to be applied more broadly, nor of detractors who, among other things, consider it overtly burdensome.[186] However, it is constitutional. This court makes an admirable effort to rationalize its holding but instead should have followed the controlling reasoning of *Amos* to hold for RLUIPA's constitutionality. Upon review of this decision, the Supreme Court should utilize the *Lemon* test as explained in *Amos*. In so doing, the Court may find it helpful to consider the excellent application of *Amos* reasoning to RLUIPA as found in *Madison v. Riter*[187] and leave further policy or political arguments regarding RLUIPA to Congress.

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182. *Id*.

183. *Id*. at 14-16, *Cutter* (No. 02-3270).

184. *See* THE FEDERALIST NOS. 47 & 48 (James Madison) (quoting Baron de Montesquieu who stated, "'there can be no liberty . . . if the power of judging be not separated from the legislative and executive powers'").

185. *See generally* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (holding that legislatures, or in this case agencies, by virtue of their delegated authority, are better positioned than courts to analyze competing policy arguments when Congress has not directly spoken to the issue).

186. 146 CONG. REC. S7774-01 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy); Defendant-Appellants' Final Opening Brief at 1-2, *Cutter* (No. 02-3270).

187. 355 F.3d 310 (2003).