

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   JON B. CUTTER, ET AL.,                   :

4                   Petitioners                   :

5           v.                   :   No. 03-9877

6   REGINALD WILKINSON, DIRECTOR,                   :

7   OHIO DEPARTMENT OF                   :

8   REHABILITATION AND                   :

9   CORRECTION, ET AL.                   :

10   - - - - -X

11   Washington, D.C.

12   Monday, March 21, 2005

13           The above-entitled matter came on for oral

14   argument before the Supreme Court of the United States at

15   11:00 a.m.

16   APPEARANCES:

17   PAUL D. CLEMENT, ESQ., Acting Solicitor General,

18           Department of Justice, Washington, D.C.; on behalf of

19           Respondent United States, supporting the Petitioner.

20   DAVID GOLDBERGER, ESQ., Columbus, Ohio; on behalf of the

21           Petitioners.

22   DOUGLAS R. COLE, ESQ., State Solicitor, Columbus, Ohio; on

23           behalf of the Respondents.

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P R O C E E D I N G S

(11:00 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument  
next in No. 03-9877, Jon Cutter v. Reginald Wilkinson.

Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT  
ON BEHALF OF RESPONDENT UNITED STATES  
SUPPORTING THE PETITIONERS

MR. CLEMENT: Mr. Chief Justice, and may it  
please the Court:

When the government acts to remove government-  
imposed burdens on religious exercise, it does not violate  
the Establishment Clause. Rather, as this Court put the  
point in *Zorach* against *Clauson*, when the government eases  
those kind of burdens, it follows the best of our  
traditions.

The Religious Land Use and Institutionalized  
Persons Act, or RLUIPA, eases government burdens on  
restrictions by having institutions and prison officials  
examine burdens on religious exercise and remove  
unjustified, substantial burdens.

CHIEF JUSTICE REHNQUIST: But, you know, when  
you say it eases burdens, it doesn't just ease burdens  
imposed by the Federal Government. It eases burdens  
imposed by State governments.

1           MR. CLEMENT: That's exactly right, Mr. Chief  
2 Justice, but I think that -- that that doesn't make any  
3 substantial difference, in part, I think because if you  
4 think about certainly this application of RLUIPA, it's  
5 Spending Clause legislation. And spending legislation  
6 often takes the form of giving the States an incentive to  
7 take action on their own. And in this sense, I think you  
8 can understand this legislation as giving the States an  
9 opportunity to remove their own burdens on religious  
10 exercise. And that's precisely how it works in practice.  
11 The relevant action that a State takes is State action in  
12 removing its own burdens, not Federal action imposed on  
13 the States.

14           And I think that's consistent with the analysis  
15 of this Court in the Dole case where the Federal  
16 Government, on the assumption of this Court, didn't have  
17 the direct power under the 21st Amendment to raise the  
18 drinking age, but it could give the option to the States  
19 to exercise their power to do it. So I do think in the  
20 end, the burdens that are removed here are attributable to  
21 the State of Ohio, not to the Federal Government.

22           It is also true that the standard that's imposed  
23 by RLUIPA is a more exacting standard than that imposed by  
24 the Federal Constitution itself. But I don't think  
25 providing for greater accommodation of religious exercise

1     than the Federal Constitution creates an Establishment  
2     Clause problem.

3             CHIEF JUSTICE REHNQUIST: But in -- in the City  
4     of Boerne, didn't we say that Congress couldn't come in  
5     and simply rewrite some part of the Constitution to make  
6     it read differently than we had?

7             MR. CLEMENT: Absolutely, Mr. Chief Justice, but  
8     I don't think this case poses the same problems as City of  
9     Boerne. First of all, this really isn't an effort to  
10    rewrite a rule of decision for all cases the way that RFRA  
11    was. Congress in this legislation targeted two areas  
12    where there were particular problems with respect to  
13    religious exercise, and in those contexts, it addressed a  
14    different standard.

15            Now, as I say, that standard is higher, but so  
16    are the standards of over half of the States which also  
17    apply a heightened scrutiny test either as a matter of  
18    State constitutional law or State law.

19            JUSTICE SCALIA: Well, RFRA didn't involve a --  
20    a limitation to situations in which Federal funds were  
21    involved, and as I understand this statute does.

22            MR. CLEMENT: That is also true. I mean, there  
23    -- there is -- to be sure there is --

24            JUSTICE SCALIA: More than also. I -- that  
25    seems to me the principal difference between this and

1 RFRA.

2 MR. CLEMENT: Well, I take your point, Justice  
3 Scalia. I would -- I would clarify that there is the  
4 potential for applications to the statute under the  
5 Commerce Clause. We don't think that's really  
6 appropriately presented here. We also think that with  
7 respect to State prisons in all their applications, they  
8 will be Spending Clause applications.

9 JUSTICE GINSBURG: Is that -- what you're saying  
10 is academic because the statute doesn't require a Federal  
11 spending hook. It says it has the other commerce peg. I  
12 take it you -- you gave a pragmatic answer to that, that  
13 every State in fact gets Federal funds for their prison  
14 systems.

15 MR. CLEMENT: That's right, Justice Ginsburg,  
16 and I think the fact that there may be more than one hook  
17 for this legislation in certain applications shouldn't  
18 make any constitutional difference. And I think here it  
19 is Spending Clause legislation as it applies to the State  
20 of Ohio. I think that's conceded. They -- they take  
21 issue with whether it's valid.

22 JUSTICE STEVENS: But, Mr. Clement, it seems to  
23 me the Spending Clause aspect cuts in the other direction,  
24 if we're just focusing on the Establishment Clause. The  
25 fact that Federal money is involved, why does that make

1 your burden any less in defending the -- the statute under  
2 the Establishment Clause?

3 MR. CLEMENT: Well, Justice Stevens, I don't  
4 think the fact that there's money involved makes it harder  
5 or easier from a Spending Clause perspective. I think  
6 from the perspective of why this case is different from  
7 Boerne, the fact that it's Spending Clause and Commerce  
8 Clause and not section 5 legislation makes a big  
9 difference. But I certainly don't want to leave you with  
10 the impression that there's anything constitutionally  
11 problematic because there's Federal money involved  
12 because, of course, this Court has upheld Federal Spending  
13 Clause legislation in religion areas in cases like  
14 Zobrest, Mergens, Agostini, Mitchell against Helms.

15 JUSTICE STEVENS: Do you -- do you think the  
16 Establishment Clause issue in this case would be the same  
17 as the Establishment Clause issue in City of Boerne if we  
18 -- if the Court had reached the Establishment Clause issue  
19 in that case?

20 MR. CLEMENT: No, I don't, Justice Stevens. Or  
21 another way of answering that is I would say that even  
22 though you thought there was an Establishment Clause  
23 problem in the City of Boerne case, I don't think you need  
24 to find one here. And part of that is because this is  
25 more targeted legislation, and it particularly deals, as

1 -- as it comes to this Court in this application, with the  
2 exercise of religion in prisons. And I think that's an  
3 area like the military where the Government is necessarily  
4 going to be involved with religion in a way that it  
5 otherwise wouldn't be.

6 JUSTICE O'CONNOR: And yet, it -- it provides an  
7 unusual framework or incentive, if you will, in the prison  
8 context to get religion. If you can find some religious  
9 group that espouses drinking beer every day or other  
10 alcoholic beverages or taking certain amounts of marijuana  
11 or not telling what or having certain clothing or other  
12 things that would alter the conditions of the prison  
13 environment, there's a real incentive here to get  
14 religion.

15 (Laughter.)

16 JUSTICE O'CONNOR: And the --

17 MR. CLEMENT: Justice O'Connor --

18 JUSTICE O'CONNOR: -- Federal Government seems  
19 to be trying to provide those incentives. Is that a  
20 problem?

21 MR. CLEMENT: Well, Justice O'Connor, I don't  
22 think upon analysis it is, and I think there's a couple of  
23 reasons why that's so.

24 First of all, this is not an absolute  
25 entitlement to get your religious beer at 5:00 p.m. every



1 day. It is a balancing test, and I think things like  
2 getting beer every day, getting marijuana inside prison  
3 walls would not satisfy the test.

4 JUSTICE O'CONNOR: Well, the -- the language of  
5 the statute is pretty strong: unless the government  
6 demonstrates that the imposition is the least restrictive  
7 means and in furtherance of a compelling legislative  
8 interest. It puts quite a burden on the State.

9 MR. CLEMENT: Well, it does, Justice O'Connor,  
10 but just to take a step back, I mean, applying that same  
11 standard in the Smith case, you yourself thought that a  
12 general law banning marijuana use outside or -- or peyote  
13 use outside --

14 JUSTICE O'CONNOR: Yes, I think it was.

15 MR. CLEMENT: -- peyote outside of prison would  
16 be justified even under that standard. I would think, a  
17 fortiori, it would be justified within prison walls.

18 I want to make another point about the  
19 incentives, though, which I think is important. Every  
20 State in the Union provides some degree of accommodation  
21 for religion, and in many States it's majoritarian  
22 religions that are accommodated. Now, if there's going to  
23 be some incentive to engage in religiosity in prison in  
24 order to take advantage of things offered for religion  
25 that aren't available for something else, at least RLUIPA

1 has the virtue of making sure that all religions are  
2 accommodated neutrally. So if there's any incentive, it's  
3 an incentive for religion over irreligion as opposed to  
4 between sects -- sects of religions, and I think that's  
5 the way you would have without RLUIPA involved.

6           The other point I want to make is although there  
7 may be some extravagant claims of certain religions that  
8 would seem quite enticing, much religious exercise in many  
9 of the reported cases involve things that I don't think  
10 people are necessarily lining up to do. I mean, there are  
11 a number of lower court cases dealing with the  
12 availability of kosher food, and in prison what that means  
13 as a practical matter, is generally you are going to get  
14 cold food rather than hot food. And I don't think --

15           JUSTICE GINSBURG: What about garb that is said  
16 to be associated with the religion but also is used as a  
17 cue for gang membership? Let's say a beard. This  
18 religion requires me to wear a beard.

19           MR. CLEMENT: Well, Justice Ginsburg, I think --  
20 and we cite a few cases in footnote 2 of our reply brief  
21 that suggest that in dealing with legitimate concerns  
22 about using prison -- religious symbols or other religious  
23 items as a gang signifier or a gang identifier, that the  
24 -- that there have been cases where the courts, even  
25 applying the heightened standard or RLUIPA or RFRA, have

1 deferred to the government officials.

2 I also think, though, it's worth noting how the  
3 Federal Government and the Bureau of Prisons has dealt  
4 with the concern that religious medallions, as opposed to  
5 beards, would be used for gang identification or gang  
6 signification. Ohio, I take it, takes the position that  
7 if you have a medallion that could be used for those  
8 purposes, you can't have it within prison walls at all.  
9 The Bureau of Prisons, by contrast, takes the position  
10 that you can have the medallion, but you have to wear it  
11 inside your shirt. So it can't be used for prison  
12 signification purposes or gang identification purposes.  
13 And I think that shows the kind of reasonable  
14 accommodation that RLUIPA or RFRA, as it applies to the  
15 Federal Bureau of Prisons --

16 JUSTICE GINSBURG: What -- what about a religion  
17 that it's a genuine tenet of the religion that the races  
18 are to be separated and the person says, the accommodation  
19 I want is never to be celled with someone who is not of my  
20 race?

21 MR. CLEMENT: I think in a case like that -- I  
22 mean, obviously, this Court's recent decision in Johnson  
23 would suggest that -- that the prison officials are in a  
24 difficult position there and I think they could not accede  
25 to that request. And I think complying with the Equal

1 Protection Clause in that context would itself be a  
2 compelling interest under the statute. And I think this  
3 Court in *Widmar* against *Vincent*, for example, suggested  
4 that avoiding Establishment Clause problems is a  
5 sufficient compelling interest. I would think equally  
6 avoiding the Equal Protection Clause violation in that  
7 context would also be a compelling interest, and I don't  
8 think there would be a least restrictive alternative. And  
9 so I think that the statute -- there would be no statutory  
10 violation in refusing that particular accommodation.

11 I think there -- these show that there are ways  
12 to administer this statute in a way that's respectful of  
13 the decisions of local prison officials but also does make  
14 sure that they have a degree of sensitivity to these  
15 claims for religious exercise.

16 JUSTICE O'CONNOR: Does it -- does the statute  
17 require the prison officials to evaluate the bona fides of  
18 the particular religion that's espoused? Isn't one of the  
19 groups here a Satanist group? So the religion -- the bona  
20 fides of the group have to be reviewed by the prison  
21 authorities.

22 MR. CLEMENT: Well, Justice O'Connor, no more so  
23 than under the Free -- the Free Exercise Clause itself. I  
24 mean -- and as this case, of course, comes to this Court,  
25 the substantiality of the religious beliefs and that they

1 are actually held by these individuals has been stipulated  
2 to.

3 JUSTICE O'CONNOR: We don't have to decide it  
4 here, but it's looming. And when it goes back, if it  
5 does, that will have to be resolved in this and in every  
6 case.

7 MR. CLEMENT: That's right, Justice O'Connor,  
8 but that's true under the Free Exercise Clause as well.  
9 So even the Sixth Circuit, that obviously had some  
10 problems with the statute, understood that on that score  
11 there's no more entanglement with religion under RLUIPA  
12 than there is under the Free Exercise Clause itself.

13 CHIEF JUSTICE REHNQUIST: Haven't we said in at  
14 least one of our cases that the government can't favor  
15 religion over irreligion?

16 MR. CLEMENT: That's right, Mr. Chief Justice,  
17 but this Court has been clear in the context of  
18 legislative accommodations of religion in particular to  
19 make clear that that preference of religion over  
20 irreligion doesn't mean that the government cannot provide  
21 legislative accommodations of religion without providing  
22 benefits for secular organizations as well. That was the  
23 clear holding of this Court in Amos.

24 And I think that although this Court has  
25 expressed concerns about religious accommodations when

1   there's no guarantee that the religious accommodation will  
2   be provided to other sects -- take, for example, the  
3   Kiryas Joel case. This Court has been quite clear that  
4   there is not a constitutional problem in favoring religion  
5   over irreligion in providing legislative accommodations  
6   for religion.

7           And as I said, in -- in *Zorach* against *Clauson*,  
8   this Court noted that that's not just the absence of a  
9   constitutional problem, but there's really a  
10   constitutional virtue in the legislature acting to  
11   accommodate religion. The Court made basically the same  
12   point in *Smith* in saying that even though the Free  
13   Exercise Clause did not require the special accommodation  
14   or exemption for peyote, the legislatures could do so and  
15   in doing so, they would be furthering constitutional  
16   values.

17           If I could say a few words about the Spending  
18   Clause claim that is brought by Ohio in this case. They  
19   suggest that there's a difficulty with this legislation  
20   under the Spending Clause. Now, the court below --

21           CHIEF JUSTICE REHNQUIST: Is that before us on  
22   the questions presented?

23           MR. CLEMENT: Well, I think it is not in the  
24   questions presented themselves, I don't think, but I think  
25   it would be fairly open to this Court to reach it because

1 it would be an alternative ground to support the judgment  
2 below. That said, this Court doesn't have to reach it and  
3 its practice in recent cases has been when there's one  
4 constitutional claim that is -- that the Court has ruled  
5 on below, it doesn't necessarily reach the other -- the  
6 other constitutional claims. The Court did that in cases  
7 like Oakland Cannabis and the Pierce County case.

8 And we would urge the same course here because,  
9 although the courts have divided on this Establishment  
10 Clause issue, the courts have not divided on the Spending  
11 Clause issue. All the courts that have reached it have  
12 upheld it as valid Spending Clause legislation.

13 And I think that reflects the fact that there is  
14 a clear nexus here between the Federal funds and the  
15 Federal conditions that are being imposed. If the Federal  
16 Government is going to provide money, over \$1 million to  
17 Ohio, to have prisoner meals, then certainly the Federal  
18 Government can insist that kosher meals are among the  
19 available options. And so too if the -- if the Federal  
20 Government is going to provide monies for Ohio to build  
21 prisons, they can ensure that those prisons are safe and  
22 are operated consistent with Federal policy such that  
23 there's not discrimination on the basis of race or  
24 religion.

25 The last issue in the case, of course, is the

1 Commerce Clause issue, and on that issue, no court below  
2 reached the issue. And we think this Court's recent  
3 admonition in the Sabri case that facial challenges are  
4 best when infrequent, applies with particular force here  
5 because --

6 JUSTICE SCALIA: I don't -- I don't understand,  
7 Mr. Clement, how your second point strengthens your first  
8 point. That is to say, if we disagree with your first  
9 point, namely that the institutionalized persons  
10 provisions are consistent with the Establishment Clause,  
11 we think that they contradict the Establishment Clause,  
12 they couldn't possibly be saved by your second point. Can  
13 you require as a -- as a condition of -- under the  
14 Spending Clause that a State violate the Establishment  
15 Clause?

16 MR. CLEMENT: No, of course not, Justice Scalia,  
17 and I must have misspoke. My point is they raise three  
18 arguments that are all alternative arguments to support  
19 the judgment below. My burden is to defeat all three of  
20 them to show -- if the Court reaches them. So I have to  
21 show that there's no Establishment Clause violation, which  
22 we -- we've certainly made that argument in the brief and  
23 here today, and that there's no Spending Clause violation,  
24 and that there's no Commerce Clause violation.

25 The -- in this case the Commerce Clause claim



1 has a completely abstract quality, and indeed, the only  
2 temptation to reach the issue at all would be that the --  
3 since RLUIPA has a jurisdictional element, the resolution  
4 of the Commerce Clause is so clear that it might be  
5 tempting to reach it. But I think the better course would  
6 be for this Court to allow that issue to be sorted out in  
7 the --in the lower courts.

8 If there are no further questions, I would  
9 reserve time for rebuttal.

10 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
11 Clement.

12 Mr. Goldberger, we'll hear from you.

13 ORAL ARGUMENT OF DAVID GOLDBERGER

14 ON BEHALF OF THE PETITIONERS

15 MR. GOLDBERGER: Mr. Chief Justice Rehnquist,  
16 and may it please the Court:

17 This case comes before the Court on a motion to  
18 dismiss, and the facts, the underlying facts, involving  
19 the motion to dismiss are in dispute, and it's a serious  
20 dispute. And those should be reserved for -- for the  
21 court below, in particular the claims that our clients'  
22 religions are affiliated with gang activities, but there  
23 are serious disputes about that. There is a Wicca  
24 chaplain that's been hired by the Department of  
25 Corrections in Wisconsin. Two of my former students, who

1 are upstanding members of the bar in every respect, are  
2 Asatrus, so that these are matters that should be  
3 preserved for the court below.

4           This Court has made -- asked many questions  
5 about the accommodation of religion, and the suggestion  
6 is, well, isn't there favoritism? Doesn't it encourage  
7 favoritism one way or the other? But the answer to each  
8 of those questions is the same with respect to the current  
9 accommodations already provided by the Ohio Department of  
10 Corrections with respect to mainstream religions, and in  
11 fact, we believe on remand, we will be able to show that  
12 there is a preference for accommodating mainstream  
13 religions as opposed to non-mainstream religions.

14           Similarly, there has -- there are -- there have  
15 been questions by this Court that -- that the standard  
16 imposed on the State of Ohio by RLUIPA is this  
17 particularly difficult or tortuous standard. In fact,  
18 under State law in *Humphrey v. Lane*, which is cited in our  
19 brief, the State of Ohio Supreme Court has already imposed  
20 a similar standard with regard to the religious  
21 accommodation claims of prison guards.

22           JUSTICE SCALIA: Is Satanism a non-mainstream  
23 religion?

24           MR. GOLDBERGER: With all due respect, Your  
25 Honor, I understand that there is some uncomfortable

1 feeling about the nature of my clients' religion. As the  
2 Court will note in a -- a footnote in our brief, it has  
3 been reported in the press that there is an adherent in  
4 the Royal Navy of Satanism, and the Royal Navy has agreed  
5 that if he's killed in the line of duty that there will be  
6 religious rights at the end consistent with his religion  
7 and, in fact, it amounts to a recognition of his religion.

8 JUSTICE SCALIA: What does this have to do with  
9 it? The Royal Navy you say?

10 MR. GOLDBERGER: Well, I --

11 (Laughter.)

12 JUSTICE SCALIA: Our Royal Navy?

13 (Laughter.)

14 MR. GOLDBERGER: The answer is yes then. It is  
15 a non-mainstream religion.

16 And I think that it's important for us to assure  
17 that religious groups of all stripes are -- are  
18 accommodated in the -- in the context --

19 JUSTICE GINSBURG: To what extent? And I asked  
20 the -- the racist -- the religion that says God wanted the  
21 races to be separated and the accommodation is do not cell  
22 me with someone of another race.

23 MR. GOLDBERGER: I believe that there is -- it  
24 -- the statute is pretty clear that if there is a -- if  
25 it's compelling or requiring the State of Ohio to engage

1 in an unconstitutional activity -- and that would be a  
2 segregation of the races -- that there's a compelling  
3 justification -- or a compelling governmental interest in  
4 not complying with the statute or saying that the statute  
5 does not apply under these circumstances.

6 JUSTICE GINSBURG: How about racist literature  
7 but it's under the aegis of a religious organization? And  
8 that -- suppose the prison does not permit, say, a member  
9 of the Aryan Nation to get that racist literature -- to  
10 get racist literature but --

11 MR. GOLDBERGER: To the extent that there is  
12 bona fide religious literature that is racist, there are  
13 -- we believe that the Constitution permits Congress or  
14 any legislative body to accommodate religion in isolation  
15 from other religious right --

16 CHIEF JUSTICE REHNQUIST: Well, when you --

17 MR. GOLDBERGER: -- fundamental rights.

18 CHIEF JUSTICE REHNQUIST: When you use the term  
19 bona fide, you're introducing a new kind of factor. Do  
20 courts evaluate the bona fides of someone claiming a  
21 religion?

22 MR. GOLDBERGER: I believe they -- as a matter  
23 of course, prison officials have to determine whether  
24 there's a good faith request for religious accommodation  
25 or whether the person is trying to seek something under --

1 as a ruse.

2 JUSTICE KENNEDY: I take it we've done that in  
3 the conscientious objector cases, United States v. Seeger  
4 and Gillette.

5 MR. GOLDBERGER: That's correct.

6 But to let me finish my -- my answer to Justice  
7 Ginsburg, if -- if this Court is of the view -- or members  
8 of this Court are of the view that it would be content  
9 discrimination, for example, although we believe that you  
10 can accommodate one fundamental right separately from the  
11 other fundamental rights, then of course, if there were a  
12 First Amendment violation, that too would be a compelling  
13 governmental interest in justifying refusal to apply  
14 RLUIPA. So that there is no serious problem here. And in  
15 fact, there is no reported case that any racist literature  
16 has ever been permitted in -- into the prisons that we've  
17 been able to find.

18 JUSTICE GINSBURG: Well, the content  
19 discrimination, I take it, would be raised by someone who  
20 wants to get this for political or psychological  
21 reasons --

22 MR. GOLDBERGER: That's --

23 JUSTICE GINSBURG: -- you would say, I'm not  
24 challenging the right of the -- as a member of this  
25 religious sect. I just say, me too.

1           MR. GOLDBERGER: Well, as I say, to the extent  
2   that that's right, if there were content discrimination  
3   along those lines and -- and the Court said that there  
4   could not be -- it was the Court's view that it could not  
5   be accommodated for religion only, then of course the --  
6   then there would be a compelling governmental interest in  
7   avoiding content discrimination. In terms of whether or  
8   not there's a compelling justification of dealing with  
9   inflammatory literature, I don't think that's in dispute  
10  in this case.

11           JUSTICE KENNEDY: Well, I -- I take it  
12  underlying Justice Ginsburg's question is -- is the  
13  concern that this accommodation is unequal because there  
14  are other First Amendment rights that are not given the --  
15  that are not given the same precedence.

16           MR. GOLDBERGER: Well, first of all --

17           JUSTICE KENNEDY: That -- that was at least an  
18  underlying concern of her question, and I think it's a  
19  legitimate concern.

20           MR. GOLDBERGER: Well, as -- as I read Amos,  
21  Amos says that the accommodation of religion need not  
22  come --

23           JUSTICE KENNEDY: Well, but in Amos, the Court  
24  was just -- the -- the government was just saying that one  
25  of its own statutes could be accommodated. This is

1 something different.

2 MR. GOLDBERGER: Well, it's not -- I'm not sure  
3 that it's different for constitutional purposes, that if  
4 there is a differential accommodation which the Court  
5 concludes violates the First Amendment rights of someone  
6 else because there's content discrimination, I'm not --  
7 there is no reason to treat the source of the  
8 accommodation as dispositive. It's whether -- it is the  
9 presence of the accommodation and whether it's broad  
10 enough or narrow enough.

11 On the other hand, the -- we -- we do want to  
12 make clear that there are numerous accommodations that  
13 involve First Amendment rights that do not overlap with --  
14 with religious exercise or accommodation of religious  
15 exercise. To the extent that there is political  
16 gatherings, they're not entitled under the First Amendment  
17 to the -- they're not accommodated in the same way that  
18 religious congregations in prison are accommodated. And  
19 this Court so far has found there to be no constitutional  
20 violation for that distinction. And to the extent that  
21 there's a compelling governmental interest, there is  
22 little doubt that the -- that the prison officials can  
23 simply say no. This -- we will not accommodate it. We're  
24 not required to accommodate it under the statute.

25 The -- it is important to note, that the --





1 ORAL ARGUMENT OF DOUGLAS R. COLE

2 ON BEHALF OF THE RESPONDENTS

3 MR. COLE: Mr. Chief Justice, and may it please  
4 the Court:

5 In prison's unique environment, RLUIPA violates  
6 the Constitution. It directly and impermissibly advances  
7 religion and it would have to be -- have to be --  
8 perceived by objective observers as endorsement.

9 JUSTICE SOUTER: Let me ask you this -- this  
10 question because it -- it -- I think it goes to the -- the  
11 heart of what I think is the problem in this case. If we  
12 are going to recognize a sphere of accommodation, which we  
13 have done previously, I think we have to recognize that  
14 the -- that the object of accommodating and the effect of  
15 accommodating is, in one sense, to benefit -- I mean, in  
16 an obvious sense, is to benefit religion. By recognizing  
17 a sphere of accommodation, in effect, I think the Court  
18 has said there is a sphere in which religion can be  
19 benefitted that does not rise necessarily to the level of  
20 government proselytization or -- or government  
21 endorsement. And it seems to me that the argument that  
22 you're making is that if the government endorses at all,  
23 it's immediately in -- in the -- the realm of  
24 establishment. Am I -- am I missing something in your  
25 argument?

1           MR. COLE: Well, I think you are, Your Honor,  
2   and if our brief came across that way, I -- I think it  
3   overstates the line that we're asking this Court to draw.  
4   The Court has recognized, in talking about accommodations,  
5   that of course accommodations by their very nature benefit  
6   religion. That's part of an accommodation and could be  
7   said to have the effect. But the Court has said then we  
8   must draw lines. That is, the Court has recognized that  
9   you can't just say, oh, it's an accommodation which means  
10  that's fine, it's always going to be fine if it's an  
11  accommodation. In fact, Justice O'Connor said we need to  
12  draw lines because otherwise everything will just become,  
13  oh, that's an accommodation.

14           JUSTICE SOUTER: All right. And -- and why is  
15  the line violated here?

16           MR. COLE: The line is violated here, Your  
17  Honor, because of the unique incentives and burdens that  
18  arise in the prison context.

19           JUSTICE O'CONNOR: Well, what the statute  
20  appears to be doing is to try to go back to the pre-  
21  Employment Division v. Smith case standard under the Free  
22  Exercise Clause, which did allow for accommodation of  
23  religion. And that appears to be what this statute is  
24  designed to do.

25           MR. COLE: But in -- in prison's unique

1 environment, Your Honor, where there are so many  
2 deprivations of liberty and then to say the one -- one way  
3 you can get out from under the thumb of all these prison  
4 regulations is to claim religion, and that's going to give  
5 you a powerful weapon not again to --

6 JUSTICE O'CONNOR: But -- but before Employment  
7 Division v. Smith, wouldn't we have had the same question  
8 arise in the prison context, and we would have dealt with  
9 it under the then-standards.

10 MR. COLE: But -- but the Court has -- has  
11 always articulated that the rules -- well, in Turner and  
12 O'Lone, the Court articulated that the rules are different  
13 in prison, citing to the intractable problems of prison  
14 administration and the -- and the problems of  
15 subjecting --

16 JUSTICE O'CONNOR: But had the Court ever said  
17 that the Free Exercise Clause couldn't be applied in the  
18 prison context?

19 MR. COLE: No, Your Honor. Going -- going back  
20 to the Beto case, the Court said free exercise applies in  
21 prison, but in O'Lone, the Court said it applies in prison  
22 but the standard what we're going to use is one that's  
23 very similar to -- to rational basis.

24 JUSTICE SOUTER: Okay. Then I think you're  
25 saying that in order to exceed what free exercise requires

1 in a prison necessarily forces you into establishment.  
2 And I think you're saying the reason it does so is that  
3 there are so many incentives on the part of prisoners to  
4 claim religion, that that's the only way you can sort of  
5 keep the genie in the bottle. Isn't that the -- the  
6 essence of your argument?

7 MR. COLE: We're not asking for that bright line  
8 rule, Your Honor. It could well be the case that  
9 providing kosher meals, for instance, whether that's  
10 required by the Free Exercise Clause or not, it might go  
11 marginally beyond what free exercise requires. That's an  
12 accommodation that would be perfectly legitimate. But to  
13 have a rule that says anytime you bring any request of any  
14 kind for an accommodation from any rule, it's going to be  
15 treated differently and better because it's religion --

16 JUSTICE SOUTER: Well, it -- but -- but that is  
17 not what the rule says. Number one, as -- as your brother  
18 on the other side pointed out, there's got to be some  
19 determination made as a threshold matter as to whether  
20 this is even a religious claim or -- or whether it's just  
21 gaming the system. So there's nothing automatic.

22 Number two, if there are, as -- as there  
23 frequently will be, in the prison context important  
24 governmental interests which can only be served by denying  
25 the -- the request, the request can be denied. And it

1 seems to me that if these are not sufficient recognitions  
2 of the -- of the prison context, then I don't know what  
3 kind of a rule we can have that would satisfy you except  
4 to say if it isn't absolutely required by free exercise,  
5 it is establishment.

6 MR. COLE: Well, Your Honor, I don't think we  
7 need to go that far. I -- I think we could look at given  
8 types of accommodations and say if a legislative  
9 determination is made that this type of accommodation with  
10 respect to this type of request is appropriate, based on a  
11 balancing of all the factors to consider in that  
12 particular case --

13 JUSTICE SOUTER: You -- you --

14 MR. COLE: -- that might not slide --

15 JUSTICE SOUTER: You mean specific  
16 accommodations like you can have kosher foods, you can  
17 wear a religious medal, you can have a tattoo? I mean,  
18 you're -- you're asking the legislature to be that  
19 specific.

20 MR. COLE: Well, a narrow, targeted -- I guess  
21 the point is, Your Honor, a narrow, targeted accommodation  
22 would be different in our view than this broad, wonder bus  
23 approach to accommodation.

24 JUSTICE SOUTER: It -- it would also be rather a  
25 discriminatory one, wouldn't it? I mean, one -- one point



1 the Free Exercise Clause, it raises special problems and  
2 special concerns that need to be dealt with --

3 JUSTICE SOUTER: Why can't they --

4 MR. COLE: -- on a case by case basis.

5 JUSTICE SOUTER: But why can't they be dealt  
6 with under the statute as it is written, saying that if  
7 you -- if it is a bona fide request, and you, the prison,  
8 determine that in fact you -- you have a compelling State  
9 interest that cannot be served in any other way, you can  
10 say no? Why is that insufficient and -- and why does that  
11 -- why is that, therefore, the reason that -- that jumps  
12 us into an Establishment Clause violation every time?

13 MR. COLE: It's insufficient, Your Honor,  
14 because it doesn't change the underlying fact that the  
15 request itself, whatever the ultimate outcome on the  
16 request is, the request itself gets treated differently  
17 and better merely because it's religious. This is a --

18 JUSTICE SOUTER: Well, are you saying that --  
19 that a statute is unconstitutional to recognize a  
20 prisoner's right to free exercise unless it also has a --  
21 a kind of a litany of sections recognizing speech rights,  
22 recognizing privacy rights, et cetera?

23 MR. COLE: No, Your Honor. I'm -- I'm not  
24 suggesting that.

25 JUSTICE SOUTER: Then it's got to single out

1 religion.

2 MR. COLE: And -- and as the Court noted in  
3 Amos, these type of statutes are necessarily going to  
4 single out religion, but that doesn't shield them from  
5 Establishment Clause scrutiny just because they take the  
6 form of being directed at religion and providing a benefit  
7 that's -- that's labeled as an accommodation.

8 I mean, for instance, Congress could say, look,  
9 we think it's difficult for State prisoners to practice  
10 their religious beliefs when they can't go to church. So  
11 absent some compelling State interest and least  
12 restrictive alternatives, the prisons need to arrange to  
13 release prisoners once a week to go to the church or  
14 synagogue of their choice. Well, that would provide an  
15 awfully powerful incentive inside prison walls for  
16 prisoners to -- to claim religion.

17 JUSTICE SOUTER: Sure it woul --

18 JUSTICE BREYER: So maybe that's --

19 JUSTICE SOUTER: And if you did it under the  
20 statute, you would clearly have a reason for saying no.

21 JUSTICE SCALIA: Mr. Cole, are you sure that  
22 this statute doesn't go beyond pre-Smith -- our pre-Smith  
23 law? I'm not aware that our pre-Smith law would have  
24 defined religious exercise as broadly as this statute  
25 defines it. I guess this is something Mr. Clement ought



1 to speak to as well. It says, the term religious exercise  
2 includes any exercise of religion whether or not compelled  
3 by or central to a system of religious belief.

4 MR. COLE: Thank you, Your Honor. That is --

5 JUSTICE SCALIA: Did our prior Smith cases go  
6 that far? I'm not aware that --

7 MR. COLE: No, they did not, Your Honor, and I  
8 think that's an important as well, that once someone has  
9 an -- a bona fide religion and -- and prison officials can  
10 challenge whether this is in fact a religious set of  
11 beliefs. But if they have a religious set of beliefs and  
12 if they are sincere, then you can't challenge this  
13 particular request as not being mandated by the religion.

14 JUSTICE SCALIA: They don't even have to say my  
15 -- my religion requires me not to eat this food. They  
16 just say, you know, I'm --

17 MR. COLE: For religious reasons, I would prefer  
18 to do this.

19 JUSTICE SCALIA: Yes.

20 JUSTICE BREYER: What is your argument in  
21 response to Justice Souter? You said it is not the  
22 following. It is not that the State has to list, along  
23 with these religious matters, the Second Amendment, the  
24 First Amendment, et cetera. It's not that. You then seem  
25 to say that the argument is that a person who files a

1 piece of paper and claims to be religious, that they have  
2 to consider it, and it's impelled only by religion. I  
3 suppose the same thing is true of a church that applies  
4 for a tax exemption. So I don't think that you could say  
5 that automatically that fact that they're going to give  
6 the church a tax exemption or that they're going to give  
7 the religious person some special consideration, that that  
8 in and of itself violates the Establishment Clause. Very  
9 well. What does?

10 MR. COLE: Well, Your Honor, I wish I could draw  
11 a brighter line rule --

12 JUSTICE BREYER: No. But I just need to know  
13 where you're going --

14 MR. COLE: Your Honor --

15 JUSTICE BREYER: -- generally. I don't need a  
16 bright line rule. I'm just trying to find out what it is  
17 about this that violates the clause if it isn't the first  
18 thing or the second thing that I mentioned.

19 MR. COLE: It's the magnitude by which Congress  
20 has enhanced the religious right. That is, we compare  
21 what the Constitution requires State prison officials to  
22 do and we say, how far has Congress moved the ball.

23 JUSTICE BREYER: Fine. Now, in respect to that,  
24 we have two points. One was Justice O'Connor's I think,  
25 which is that Congress is not enlarging it, but for my

1 second qualification, beyond what it would have been if  
2 Smith had never been decided. And the second is Justice  
3 Scalia's point, which is but there is one respect in which  
4 Congress did enlarge it, namely, that the right doesn't  
5 have -- the belief doesn't have to be central. It could  
6 be -- well, he just read that.

7 So is your whole argument then pinned on that  
8 latter point? And if it is not, again, what is it?

9 MR. COLE: Well, our argument is pinned on this  
10 Court's decisions in Turner and O'Lone, which we see as  
11 establishing the baseline for what type -- for what the  
12 Constitution requires in terms of free exercise in prison,  
13 and then we use that baseline and compare the standard  
14 imposed there to the standard Congress is seeking to  
15 impose through RLUIPA and compare the magnitude of the  
16 two, understanding, as this Court has said in Lemon, that  
17 lines of demarcation are difficult to perceive. It's  
18 difficult to say exactly where that line should be.

19 JUSTICE BREYER: You're saying if Turner had  
20 come up prior to Smith, the Court would have said that  
21 Turner trumps pre-Smith law, and you don't have to follow  
22 pre-Smith law in the prison.

23 MR. COLE: I -- I believe so, Your Honor, given  
24 prison's unique environment.

25 JUSTICE BREYER: I understand --

1           MR. COLE: I believe Turner and O'Lone are  
2 prison cases that talk about what the Constitution means  
3 in prison, understanding that in prison there need to be  
4 changes to what we would otherwise see as the inmates'  
5 constitutional rights if they were not in prison.

6           JUSTICE BREYER: Now, I -- I understand the  
7 argument now, which has been helpful. Very well.

8           From the prison's point of view, why is it so  
9 burdensome since you would have thought security is a  
10 compelling interest, prison administration is a compelling  
11 interest, so that really all we have to do is think about  
12 this and look to see whether there isn't some reasonable  
13 way of accommodating the request?

14          MR. COLE: Well, Your Honor, I think that the  
15 burdens in the prison environment are twofold. First,  
16 RLUIPA forces prison officials to change the balance they  
17 would otherwise strike between safety and accommodation,  
18 and by changing that balance, changing the margin of  
19 safety, if you will, they're now imposing risks on the  
20 other inmates that are in prison. And these aren't  
21 merely --

22          JUSTICE SCALIA: I think -- I think you may  
23 exaggerate what it takes to establish a compelling State  
24 interest. I mean, we -- this -- this Court held in the --  
25 in the pre-Smith days that it was a compelling State

1 interest to -- to prevent members of the Air Force from  
2 wearing yarmulkes. I mean, if that's a compelling State  
3 interest, I think it's pretty easy to get most anything  
4 declared a -- a compelling State interest under this  
5 statute, don't you think?

6 MR. COLE: Yes, Your Honor. And compelling  
7 State interest doesn't present a problem to the State of  
8 Ohio or to the other States that are operating under this  
9 statute. What it -- what presents the problem is the  
10 least restrictive alternative part of that which subjects  
11 State prison officials in their day-to-day judgments  
12 regarding prison operations to a strict scrutiny analysis  
13 on the back end.

14 JUSTICE SCALIA: And that goes beyond pre-Smith  
15 too, doesn't it? Least restrictive alternative.

16 MR. COLE: The -- the least restrictive  
17 alternative, which is what puts the teeth in RLUIPA and  
18 what's -- what creates the problem --

19 JUSTICE O'CONNOR: We now have some experience  
20 in the Federal system where the same standards apply under  
21 RFRA. And you are positing this terrible disturbance of  
22 prison administration in the -- what is it -- 6 years that  
23 -- that RFRA has been in force for Federal prisons. Have  
24 there been -- has there been this terrible disruption?  
25 Have there been -- have the accommodations required so

1 much of the prison administrators?

2 MR. COLE: Well, the United States claims no,  
3 Your Honor, of course. But when we look back at the  
4 experience of the States with RFRA, before it was declared  
5 unconstitutional, we presented substantial evidence in the  
6 -- in the joint appendix with regard to the way in which  
7 there was an explosion of demands for accommodations by  
8 prisoners from previously unheard of religions. There was  
9 an expansion -- an explosion of claims of conversion  
10 within --

11 JUSTICE GINSBURG: Yes, but now that some of  
12 that has gotten sorted out through the experience of the  
13 Bureau of Prisons on the Federal side, one would expect  
14 there would be less of those far-out claims. The -- you  
15 would expect when a statute is new, that there might be  
16 some claims that we would recognize as frivolous after  
17 there's been experience under it.

18 MR. COLE: That's correct, Your Honor, but the  
19 difficulty that doesn't seem to go away with the least  
20 restrictive alternative test is -- is the possibility, as  
21 this Court noted in Turner, that every judgment every day  
22 is subject to some court somewhere finding that there was  
23 a less restrictive way of achieving the goal. And -- and  
24 we see that --

25 JUSTICE BREYER: This is true. Now there you're

1 in the dilemma. I mean, you're putting yourself there in  
2 the same position that virtually every official is in in  
3 the United States but for judges who have -- who have to  
4 worry about the court of appeals. But anyway, the --  
5 the --

6 (Laughter.)

7 JUSTICE BREYER: You see -- now, the answer to  
8 that argument in your case, you're in a vice. They put  
9 you in a -- in a kind of pincers because where you have a  
10 good argument, they say, well, that doesn't violate the  
11 statute, and where your claim is weak, they say, well, it  
12 shouldn't be a -- it should violate the statute. And the  
13 difficulty with being in pincers like that is you can't  
14 win. And the virtue of it is you shouldn't win. All  
15 right. So -- so how do you get out of this -- of the --  
16 of that kind of an argument?

17 MR. COLE: Well, that's not particularly  
18 encouraging, Your Honor, but --

19 (Laughter.)

20 JUSTICE BREYER: No, but -- your point.

21 MR. COLE: Yes, Your Honor. And -- and I guess  
22 all I can do is go back and compare the accommodation if  
23 that's what this is that's at issue here with that that  
24 was at issue in Amos to say these employers don't need to  
25 comply with this one Federal statute and this one set of

1 obligations. And I asked, well, okay, so an employer. Is  
2 that going to make IBM switch from being a computer  
3 manufacturer to being a religious services provider  
4 because, boy, if we do that, we can get out from  
5 underneath title VII's nondiscrimination mandate? I don't  
6 think so.

7 But if I look in prison and I say, what is going  
8 to be the effect on the ground with respect to people  
9 claiming religion or converting to religion if I tell them  
10 there's going to be a different regulatory regime that  
11 applies to you --

12 JUSTICE SOUTER: Then why hasn't that been the  
13 effect on the Federal ground.

14 MR. COLE: Your Honor, I -- I don't know that it  
15 hasn't. I mean, I'm -- I'm surprised in a sense to hear  
16 that claim because in brief period in which RFRA did apply  
17 to State prisons, there was an explosion of these demands.  
18 And -- and I would direct the Court to, I believe it's,  
19 204, 210, 211, and 212 in the joint appendix to see some  
20 of the ways in which there's been this impact. I'd  
21 also --

22 JUSTICE SOUTER: I'll -- I'll grant you that,  
23 but it seems to -- I mean, Justice Ginsburg responded to  
24 that by saying that these things get sorted out. At the  
25 beginning you get all sorts of loony claims. As time goes



1 by, you get fewer of them. And -- and if -- if they  
2 weren't getting few of them, I would have expected the  
3 United States to make a different representation.

4 MR. COLE: Your Honor, I don't know that the  
5 fact that -- that strict scrutiny might become -- what  
6 that means, what that's going to require. And arguably,  
7 this is a slightly different strict scrutiny than other  
8 strict scrutinies because of some of the legislative  
9 history, to the extent one -- one wants to look at that.

10 And -- and that's, I guess, the problem. As we  
11 flesh that out, during that entire time, we're saying it's  
12 all right to burden other inmates in prisons. It's all  
13 right to burden prison officials. It's all right for  
14 Congress not to burden Federal prison officials, but for  
15 Congress to burden State prison officials with this new  
16 set of obligations.

17 JUSTICE SOUTER: Well, I don't know what that's  
18 got to -- you know, you may or may not have an argument  
19 there, but I don't know what it's got to do with the  
20 meaning of the Establishment Clause.

21 MR. COLE: Well, Your Honor, the --

22 JUSTICE SCALIA: And they're not burdening you  
23 anyway -- anyway. Just don't take the money.

24 MR. COLE: Well --

25 JUSTICE SCALIA: It comes with the money.

1 MR. COLE: I'm --

2 JUSTICE SCALIA: You don't want the burden?

3 Don't take the money. I mean, they -- they do that all  
4 the time.

5 MR. COLE: I'm not sure I agree with that, Your  
6 Honor, for -- for a couple of reasons. First, this also  
7 purports to be Commerce Clause legislation, in which case  
8 it would be a mandate upon the States whether --

9 JUSTICE SCALIA: What we have before us in this  
10 case is -- is a case covered by the -- the Spending  
11 Clause. So we don't have to grapple with the Commerce  
12 Clause for now.

13 MR. COLE: But -- but secondly, Your Honor, with  
14 respect to the Spending Clause issue, this Court has said  
15 in Dole that there needs to be relatedness between the  
16 spending, that if there's going to be strings attached,  
17 they actually have to be attached to the Federal money in  
18 some meaningful way. And here, Congress is relying on  
19 spending, most of which has absolutely nothing to do --

20 CHIEF JUSTICE REHNQUIST: But the Sixth Circuit  
21 didn't pass on the Spending -- Spending Clause issue.

22 MR. COLE: No, they did not, Your Honor, but  
23 we --

24 CHIEF JUSTICE REHNQUIST: And it isn't raised by  
25 your opponent's petition.

1           MR. COLE: That's -- that's true, Your Honor,  
2 but it is available to the Court as an alternate ground of  
3 affirmance of -- of the decision below.

4           CHIEF JUSTICE REHNQUIST: Yes, if we're looking  
5 for that.

6           MR. COLE: Well, Your Honor --

7           JUSTICE GINSBURG: There was one question  
8 brought up about Ohio's own practice. But you -- you say  
9 we have no obligation to relieve burdens. If we did, we  
10 would violate the Establishment Clause. The point was  
11 made that Ohio pays for chaplains, but it doesn't pay for,  
12 say, psychologists to come in for agnostics. So aren't  
13 you right there violating the Establishment Clause on your  
14 own theory?

15           MR. COLE: I don't believe so, Your Honor,  
16 because our theory isn't that anytime you go beyond what  
17 free exercise requires, you're immediately into an  
18 Establishment Clause violation. We recognize that there  
19 is a play in the joints. And providing chaplains, given  
20 the -- the rich history and tradition of doing so in  
21 prisons, seems to fall very comfortably within that play  
22 in the joints.

23           The question is when have we gone too far. When  
24 has our accommodation slid over, as the dissent put it in  
25 Texas Monthly, into a -- or an impermissible incentive to

1 practice religion?

2 JUSTICE STEVENS: May I ask this question, Mr.  
3 Cole? I am troubled also, as you point out, about the  
4 least restrictive language in the statute. But as I try  
5 and apply it to this particular case, weren't most of the  
6 allegations that the petitioners made is that they were  
7 treated differently from other mainstream religions and  
8 that the accommodation would have been, well, treat them  
9 the same, which would have been the least restrictive  
10 alternative? It wouldn't have created all the problems  
11 you describe. And they say they don't -- can't have group  
12 meetings. They -- if they were treated exactly the same,  
13 would that -- that would satisfy the least restrictive  
14 alternative part of the statute, wouldn't it? And why  
15 would that be such a burden?

16 MR. COLE: Your Honor, first, I'm not sure that  
17 their claim is that, oh, we're being treated differently  
18 and worse. Their claim was we want to get together for  
19 congregational religious services or, in Mr. Hampton's case --  
20 he was a Wicca -- he wanted certain objects, including a  
21 quartz crystal that he would be able to keep in his cell.

22 JUSTICE STEVENS: Don't mainstream religion  
23 adherents have certain objects they'd like to keep in  
24 their cell?

25 MR. COLE: They -- they may well, Your Honor,

1 and -- and the point is in each of those cases, prison  
2 officials look at the object and say what's the potential  
3 for harm here. Should we let them have it in their cell?  
4 There's a -- there's a practice in Ohio prisons of --

5 JUSTICE STEVENS: The mainstream person, if  
6 there's a potential for harm, they wouldn't let them keep  
7 it in the -- in the cell, would they?

8 MR. COLE: That's right, Your Honor.

9 JUSTICE STEVENS: And in other words, is it  
10 really -- although the language in the statute seems to go  
11 farther, is there anything really at stake here beyond  
12 saying treat us the same as you treat mainstream --  
13 members of mainstream religions?

14 MR. COLE: Absolutely, Your Honor. Absolutely.

15 JUSTICE STEVENS: And what is the best example  
16 of that?

17 MR. COLE: There's a -- a request for a prisoner  
18 who wants the grooming regulations changed with respect to  
19 him. He's a prisoner who's got a history of contraband  
20 violations. He's involved in a -- in a prison betting  
21 pool and carries -- tries to carry betting slips and  
22 secret them on his person. And so if he could violate the  
23 grooming regulations, the concern is he might use that to  
24 hide contraband. There are prisoners that want to wear  
25 their hair in a certain way to signify gang affiliation,

1 and instead, they claim, well, I need this for religious  
2 purposes, but what's really going on is they want to  
3 signify gang affiliation.

4 JUSTICE KENNEDY: If you want us to say that --

5 JUSTICE STEVENS: It would seem to me that would  
6 be a compelling interest to say you can't do that.

7 MR. COLE: Your Honor, again, I'm -- I'm sure  
8 there's a compelling interest. The question is the least  
9 restrictive alternative. Are we going to be able to meet  
10 every Federal judges' view of is this the least  
11 restrictive way we could go about achieving this  
12 compelling interest? There's no doubt that prison  
13 security is going to be recognized as a compelling State  
14 interest, but the difficulty is the least restrictive  
15 alternative test.

16 JUSTICE KENNEDY: Well, I -- I suppose you're  
17 saying you want us to make the holding that -- one of the  
18 holdings you'd be satisfied with is that while some  
19 accommodation is -- is appropriate, this is extreme  
20 accommodation. What's your best case for that?

21 I -- I just can't remember a case in which we've  
22 tried to ask whether every form a request for  
23 accommodation has to be acknowledged. Is -- is this the  
24 only case that you've come across?

25 MR. COLE: Frankly, Your Honor, other than RFRA,

1 it's the only time Congress has gone this far. And so to  
2 say that there's a lack of case law on this is more to  
3 suggest that there's been settled understandings that we  
4 can't go this far rather than --

5 JUSTICE KENNEDY: Well, I guess what I'm asking  
6 is what's the closest analogy you can --

7 MR. COLE: In our brief we -- we looked at Lee  
8 v. Weisman in what the Court called subtle and indirect  
9 coercion to religion when it was merely standing for a --  
10 a invocation during graduation once a year. And we  
11 contrast that with what's going on here and the constant  
12 pressure day after day, if you want this set of benefits,  
13 get religion.

14 JUSTICE BREYER: What about the American Indian  
15 who didn't -- or was it -- I think it was an American  
16 Indian. But -- who didn't want to be known -- it was a  
17 woman and she didn't want to be known as a number. She  
18 wanted a name. That was a religious basis. And Social  
19 Security -- I think the Court held -- didn't have to give  
20 her that.

21 MR. COLE: That's correct, Your Honor.

22 JUSTICE BREYER: So that to me stood for the  
23 proposition that administrative considerations play an  
24 important role in deciding whether you've hit upon the  
25 least restrictive alternative. And as long as that was

1 the law, then you're okay. And that was a Supreme Court  
2 case I think. I may be misremembering.

3 MR. COLE: Again, Your Honor, it's not that we  
4 couldn't potentially win these cases under least  
5 restrictive alternative. The question is by changing the  
6 standard to that, changing the standard to one in which  
7 these prison officials -- I mean, Congress is, in a sense,  
8 asking Federal judges to sit as overseers of religious  
9 life in the prisons across the 50 States. And given what  
10 this Court said in Turner, given what this Court said in  
11 O'Lone about the intractable problems that prison  
12 officials face, it just seems an inappropriate task and  
13 one that, if motivated with the desire of increasing  
14 religiosity in prison, seems to cross the Establishment --

15 JUSTICE KENNEDY: You're asking us --

16 JUSTICE SCALIA: Why is it -- why is it worse  
17 for -- for judges to be overseers of religious life in  
18 prison than it is for wardens to be overseers of religious  
19 life in prison? I mean, somebody has to say what the  
20 lines are, what will -- what will be accommodated and what  
21 won't.

22 MR. COLE: Right, and it's --

23 JUSTICE SCALIA: And that someone is going to be  
24 a government official. I have no reason to believe that  
25 wardens are -- are better at it than judges except with





1 we'll give you something lesser?

2 MR. COLE: Well, I believe Mr. Clement noted  
3 that -- that there was a case that held that, okay, you  
4 can't wear the medallion on the outside of your shirt, you  
5 can wear it on the inside of your shirt. So that would be  
6 a less restrictive alternative for not allowing you to use  
7 the medallion, I guess, as a gang identifier. Now, it  
8 doesn't really deal with the problem that as soon as the  
9 guard is not looking, again it can be pulled outside the  
10 shirt and can be used as a gang identifier.

11 JUSTICE GINSBURG: Well, maybe if the warden  
12 says that, the court would say, fine, you don't have to  
13 accommodate.

14 MR. COLE: Maybe, Your Honor, but -- but the  
15 question is, is it permissible for Congress to create  
16 incentives for prisoners to say, yes, I'm religious  
17 because I want these other benefits? Can Congress really  
18 say, boy, we'd like you to be religious, and the way we're  
19 going to provide that incentive is by giving you a better  
20 shot at getting out from the rules in prison? It's not a  
21 guaranteed shot from getting out, but it's a better shot  
22 at getting out from the rules that apply to everybody else  
23 in prison and to get that, you have to become religious.

24 JUSTICE SOUTER: Better shot than -- better shot  
25 than what? Better shot than the -- than the Free Exercise

1 Clause alone would allow?

2 MR. COLE: Better shot than --

3 JUSTICE SOUTER: And aren't you arguing that in  
4 the prison context, once you get beyond the free exercise  
5 line, you are into establishment?

6 MR. COLE: Well, and Your Honor, I was not  
7 careful there. I should say much better shot. I mean,  
8 again, it's this point that --

9 JUSTICE SOUTER: Okay. But how do we administer  
10 it? How does anyone administer that -- that kind of a  
11 test?

12 MR. COLE: I --

13 JUSTICE SOUTER: It can -- it can be better but  
14 not much better?

15 MR. COLE: I think by comparing to what's gone  
16 before. In fact, the Court has adopted a version of that  
17 approach already. In Caldor, the Court said if it's  
18 unqualified and imposes a burden on others, that's going  
19 to violate the Establishment Clause.

20 I see my time is up, Your Honor.

21 CHIEF JUSTICE REHNQUIST: It is. Thank you, Mr.  
22 Cole.

23 MR. COLE: Thank you.

24 CHIEF JUSTICE REHNQUIST: Mr. Clement, you have  
25 4 minutes remaining.

1 REBUTTAL ARGUMENT OF PAUL D. CLEMENT  
2 ON BEHALF OF RESPONDENT UNITED STATES  
3 SUPPORTING THE PETITIONERS

4 MR. CLEMENT: Thank you, Mr. Chief Justice.  
5 Just a few points in rebuttal.

6 First of all, I'd like to note the anomaly that  
7 much of the argument of General Cole would be an argument  
8 for why the State constitutional provision that gives  
9 higher protection for freedom of conscience in Ohio is  
10 itself unconstitutional.

11 JUSTICE O'CONNOR: Why don't you address the  
12 ways in which this act goes beyond our former free  
13 exercise --

14 MR. CLEMENT: I'd be happy to do that, Justice  
15 O'Connor. I think that there's been an exaggeration of  
16 how far it goes beyond. Now, I want to be clear about one  
17 thing, which is this Court, even before Smith and O'Lone,  
18 said that there was going to be deference to prison  
19 officials and a Turner standard would apply. So to the  
20 extent that there's a little less deference here than  
21 under the O'Lone standard, that is a modification.

22 The centrality requirement, though, is not  
23 something that can be charged to RLUIPA or to RFRA because  
24 even before the Smith case, this Court in Ling and  
25 Hernandez was moving away from centrality and --

1 JUSTICE SCALIA: Also not compelled -- not  
2 compelled -- by religion. You just say, you know, I -- I  
3 want to give up everything except candy for Lent, and the  
4 -- the prison has to accommodate you. Right?

5 MR. CLEMENT: Well, Justice Scalia --

6 JUSTICE SCALIA: It's not compelled. I -- you  
7 know, I could do something else. But I had thought that  
8 our prior religion cases did -- did, indeed, require some  
9 religious compulsion than just I -- you know, I'd like to  
10 do this as a religious matter.

11 MR. CLEMENT: Justice Scalia, I don't think this  
12 Court has ever in its accommodations cases held that the  
13 government can only accommodate those things that are  
14 central. I don't know for sure, but I rather doubt that  
15 employing co-religionists in a gymnasium is central to the  
16 practice of any faith. Yet, in Amos, this Court upheld  
17 that as a valid accommodation.

18 And I do think the centrality requirement --

19 CHIEF JUSTICE REHNQUIST: -- the LDS.

20 MR. CLEMENT: What's that?

21 CHIEF JUSTICE REHNQUIST: I said you may  
22 underestimate the LDS.

23 (Laughter.)

24 MR. CLEMENT: I may, Mr. Chief Justice. But  
25 again -- but -- but to the extent I do, I think those are

1 questions that are best to be kept out of the courts,  
2 which is why even before Smith this Court moved away from  
3 centrality. It's why even Justice O'Connor, who otherwise  
4 was in disagreement in Smith, also agreed that we should  
5 get rid of the centrality requirement.

6 And if you look at some of the cases that are  
7 actually decided under RLUIPA, the cases involve things  
8 like Muslim prayer oil and they -- the cases -- the  
9 Seventh Circuit, for example, allows it. Now, we don't  
10 want the courts getting into --

11 JUSTICE SCALIA: I guess you're right. I think  
12 I was thinking of free exercise cases rather than  
13 establishment cases.

14 MR. CLEMENT: Well, I -- I think that's right,  
15 and I think there is not that centrality requirement for  
16 accommodations.

17 I do want to make the point, though, that --  
18 that Ohio already, under its State constitution, has this  
19 heightened review with a lot of these, you know, least  
20 restrictive alternative tests and the like. Nobody thinks  
21 Ohio's constitution violates the Federal Constitution.  
22 That's true even though Ohio applies it in the prison  
23 context, at least when it's a claim by a guard rather than  
24 an inmate. That -- those are the facts of Humphrey  
25 against Lane.

1           It's also true that many of Ohio's arguments  
2   would suggest their own accommodations of some religions  
3   would give too much of an incentive for religious exercise  
4   and the like. And I think that's a defect as well.

5           I don't think -- and I agree with Justice Souter  
6   in this regard -- that narrower accommodations actually  
7   raise more constitutional problems than broader  
8   accommodations. I think that this Court, for example, in  
9   Caldor dealt with an accommodation that was at a fairly  
10   high level of generality, but yet this Court said and  
11   Justice O'Connor emphasized in her concurrence, well,  
12   that's a preference for Sabbatarian religions. And I  
13   think you avoid that with this kind of across-the-board  
14   test.

15           Justice Kennedy, you made a point about whether  
16   this is extreme in the degree that it accommodates  
17   religion, but it's certainly no more extreme than the --  
18   than the laws and constitutions of 26 States, which across  
19   the board apply this heightened scrutiny to all manner of  
20   State actions. So in that sense, the fact that it  
21   accommodates religion kind of wholesale with a broader  
22   standard, as opposed to retail, I don't think is a  
23   constitutional defect.

24           The last point I wanted to make is on the racist  
25   literature hypothetical, and I think it is in large

1    measure just a hypothetical.  As footnote 2 in our brief  
2    points out, prisons have been generally successful in  
3    keeping racist literature out even when it's supported as  
4    a claim for religious-based racist literature.  The only  
5    cases that I've come across where that hasn't prevailed is  
6    when the -- the prison's own policy had exceptions in it  
7    that made very little sense.

8                   And in this case, for example, if you look at  
9   joint appendix page 118, there's an allegation that with  
10 -- with one piece of literature that was described as  
11 racist, that some prisoners were allowed to have it while  
12 others were not allowed to have that same kind of  
13 literature. Now, I don't know whether those claims are in  
14 fact true, but that's the kind of claim that should be  
15 able to go forward in a case like this.

16           With all respect, I think the Sixth Circuit here  
17   made a mistake, ignored this Court's precedents, and  
18   should be reversed.

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
20 Clement.

21                   The case is submitted.

22 (Whereupon, at 12:01 p.m., the case in the  
23 above-entitled matter was submitted.)