No. 21-5592

In the Supreme Court of the United States

JOHN H. RAMIREZ, *Petitioner,*

v.

BRYAN COLLIER, *et al., Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RELIGIOUS-LIBERTY SCHOLARS DOUGLAS LAYCOCK, STEVEN T. COLLIS, HELEN M. ALVARÉ, NATHAN S. CHAPMAN, ELIZABETH A. CLARK, ROBERT F. COCHRAN, TERESA S. COLLETT, W. COLE DURHAM, JR., CARL H. ESBECK, RICHARD W. GARNETT, CHRISTOPHER C. LUND, MICHAEL P. MORELAND, AND MICHAEL STOKES PAULSEN AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

This brief addresses whether respondents substantially burden petitioner's exercise of religion, under the Religious Land Use and Institutionalized Persons Act, when they allow a member of the clergy to be present in the execution chamber but prohibit that clergy person from offering audible prayers or laying hands on the person being executed.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions, Statutes, and Rules

Other Legislative Materials

Secondary Authorities

INTEREST OF *AMICI*

The individuals joining this brief are Douglas Laycock, Steven T. Collis, Helen M. Alvaré, Nathan S. Chapman, Elizabeth A. Clark, Robert F. Cochran, Teresa S. Collett, W. Cole Durham, Jr., Carl H. Esbeck, Richard W. Garnett, Christopher C. Lund, Michael P. Moreland, and Michael Stokes Paulsen. They are law professors who have taught and published for many years about law and religion in general, and the Religious Land Use and Institutionalized Persons Act in particular. Collectively, they have published hundreds of articles and at least thirty books in the field. *Amici* are further described in the Appendix.[1]

SUMMARY OF ARGUMENT

I. The state substantially burdens the exercise of religion if it coerces people to change their religious behavior *or* if it physically prevents religious behavior from occurring.

A. Respondents argue in their Brief in Opposition that the term "substantial burden" applies only when a prison requires inmates to engage in conduct that seriously violates their religious beliefs. This means a prison would never burden religious exercise even if it makes that exercise impossible, as long as the

1 This brief was prepared and funded entirely by amici and their counsel. No other person contributed financially or otherwise. The individual amici file in their individual capacities; their universities take no position on this case. All parties have consented in writing to this brief.

prison can show that it has not coerced a prisoner to change his religiously motivated conduct.

But examples abound of religious exercise that prisons can burden even when not coercing behavior. Denying requests for prayer rooms, kosher meals, or visits with clergy are just a few. Destroying religious property is another. Prisons enjoy so much power that many forms of religious exercise would be impossible unless the prison both grants permission and provides space, scripture, or other ritual items needed for that exercise to occur. If RLUIPA did not apply to these forms of exercise, it would not begin to achieve its purpose.

Respondents also burden religious exercise in other ways. Refusing to allow the minister to pray or touch the prisoner does not compel conduct from the inmate, but it does coerce the minister to abandon his religious behavior, and thereby prevents the prisoner's religious exercise. The prison thus burdens the religious exercise of the prisoner by prohibiting the religious exercise of the minister.

B. Respondents' position would lead to absurd results. Recent RLUIPA cases from nearly every circuit reflect this—all would need to be reversed if the Court adopted respondents' exclusively conduct-based definition of "substantial burden." Even this Court's recent decisions in *Murphy v. Collier* and *Dunn v. Smith* would be wrong. Such an outcome would be absurd.

II. Respondents ignore RLUIPA's text and the context of its enactment. The result would be to leave the statute far short of achieving its purpose.

A. Respondents' narrow interpretation violates RLUIPA's text in three ways.

1. It ignores RLUIPA's textual command that the Act "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted" by the statute and the Constitution. 42 U.S.C. §2000cc-3.

2. RLUIPA gives notice to government actors that they may be required to "incur expenses" in their "own operations to avoid imposing a substantial burden on religious exercise." *Id.* Such language would be unnecessary if all that prisons needed to avoid were coercing conduct that violates prisoners' religious beliefs. Instead, it requires genuine accommodation: prisons must sometimes do more than normal to ensure that prisoners can exercise their religion.

3. RLUIPA broadly defined the "religious exercise" it was meant to protect to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §2000cc-5. This expansive definition includes religious exercise that can be prevented without coercing a prisoner's personal conduct. Because respondents' definition of "substantial burden" would leave much "religious exercise" unprotected, it directly contradicts the statute.

RLUIPA's definition also negates respondents' proposed interpretation in another way, because the Act protects religious exercise even if it is not "compelled by, or central to, a system of religious belief." Respondents would protect only religious exercise involving coerced conduct that a prisoner's religious beliefs "forbid." But there are many acts not forbidden

or required by religion but motivated by religion and that, if prevented, either directly and physically or through prohibition or refusal to accommodate, would clearly be burdened. Voluntary prayer is an obvious example. Prayer is not mandatory in some faiths, but if a prison refused to allow inmates to engage in voluntary prayer, or punished them for doing so, no one would seriously dispute that the prison was placing a substantial burden on religious exercise.

Respondents are, in effect, trying to read all three of these provisions out of the statutory text.

B. To reach their interpretation, respondents misunderstand this Court's prior precedent. In *Holt v. Hobbs*, the Court concluded that a prison had placed a substantial burden on a prisoner by forcing him to cut his beard in violation of his religious beliefs. Respondents interpret that decision to say that forced conduct in violation of religion is the *only* way in which a prison might substantially burden a prisoner's religious exercise. But the opinion says no such thing. Because the burden in that case was "easily" shown, the Court had no need to opine on other scenarios in which prisons might substantially burden religious exercise.

C. As this Court has recognized, many of the cases that motivated the passage of both RLUIPA and the Religious Freedom Restoration Act did not involve government compelling a claimant's religious conduct. Instead, they involved autopsies in violation of religious beliefs. Congress clearly cared about these cases and intended to reach them, even though they did not involve coerced conduct.

III. In *Lyng v. Northwest Indian Cemetery Protective Association*, this Court said that plaintiffs had not shown a substantial burden on their religious exercise, because the government had not coerced them to change their religiously motivated conduct. If this statement is taken to imply that such coercion is the only way in which a government can substantially burden religious exercise, then the statement is overbroad, or at least it cannot be applied to RLUIPA, because it would cause all the misinterpretations discussed in Sections I and II of this brief. In *Lyng*, the government's development of its own land disrupted religious meditation by plaintiffs who were using that land for religious purposes. Here, the state is directly regulating the religious exercise of petitioner and his minister.

IV. Respondents also mistakenly assume that because they have granted plaintiff other religious accommodations, they are free to burden his religion by preventing the religious exercise at issue here. This Court squarely rejected that idea in *Holt v. Hobbs*.

V. Finally, respondents provide examples of compelling interests that might justify their burdening petitioner's religious exercise. In doing so, they show their own confusion. The question of whether a prison has substantially burdened an inmate's religious exercise is distinct from whether the prison has a compelling reason for doing so, and the state bears the burden of proof on compelling-interest issues.

ARGUMENT

I. The State Substantially Burdens the Exercise of Religion if It Coerces a Person to Change His Religious Behavior *or* if It Physically Prevents Religious Behavior from Occurring at All.

A. Prison Officials Can Substantially Burden Religious Exercise by Simply Preventing It from Happening, Without Ever Coercing a Prisoner's Religious Behavior.

In their Brief in Opposition, Opp. Cert. 15-22, respondents argued that the term "substantial burden" is limited to only those instances in which a prison requires an inmate to engage in conduct that "seriously violates" his religious beliefs. *Id*. at 18. In other words, a prison substantially burdens inmates' religious exercise only if it coerces inmates into acting in a way their religion forbids. *Id.* at 17-18. Presumably, religious exercise would also be burdened if the state *attempted* to coerce a prisoner into changing his religious behavior, and penalized him for refusing to do so—but so far the state has not clearly conceded even this.

Under the state's interpretation, a prison would never burden a prisoner's religious exercise, even if it makes all or nearly all religious behavior impossible, so long as it can show that no prisoner has been coerced into changing his religiously motivated behavior or (maybe) has not been expressly penalized for refusing to change that behavior. If the prison physically prevents prisoners from exercising their faith, as by refusing to allow Bibles or religious literature into the prison, that exclusion would

impose no burden, because a prisoner could not show that the exclusion coerced his religiously motivated behavior.

Examples abound of religious exercise that would be burdened by a government that physically limits or prevents religious exercise, even if it is not coercing behavior: Muslims seeking a room for prayer; Christians asking for space to hold a service; Jews asking for Kosher meals; Muslims requesting halal meals; prisoners asking that clergy be allowed to visit with them—in every instance, prisons could refuse such requests, substantially burdening inmates' religious exercise, and respondents' narrow interpretation would allow them to do it. Prisons could exclude Bibles, Qurans, and other religious literature, and prayer rugs, crosses, and other ritual items, even if prisoners were offering to pay for these items with their own money.

The same is true in cases involving the destruction of religious property. When prison guards damage, seize, or destroy an inmate's religious books, there is a tangible harm to the inmate, but under respondents' test, prisons impose no burden on religion because they never forced conduct.

These are not mere hypotheticals.

Prisoners have alleged such conduct by guards in reported cases, and courts have held that these allegations stated a claim of substantial burden. *See, e.g., DeMarco v. Davis*, 914 F.3d 383, 389-90 (5th Cir.) (prison guard allegedly seized and destroyed inmate's Bible and other religious books), *cert. denied*, 140 S. Ct. 250 (2019); *Harris v. Escamilla*, 736 F. App'x 618, 620 (9th Cir. 2018) (prison guard allegedly threw

down inmate's Quran and stomped on it, rendering it unusable). Instead of forbidding the prisoner from studying the Bible or the Quran, the guards in these cases simply destroyed the books. Destruction of religious materials is a more efficient way of preventing their study; no continuing enforcement is required. But the religious exercise of pondering holy writ is equally prevented either way. The affected prisoners changed their conduct from reading scripture to something else, but not because the prison coerced them. The guards simply prevented the religious conduct that the prisoner had planned.

These examples illustrate a more general point about prisons: prison authorities control everything, and the religious exercise of prisoners is entirely dependent on the permission or acquiescence (or if respondents prefer, the accommodations) granted by prison authorities. In prisons especially, "the government exerts a degree of control unparalleled in civilian society and severely disabling to private religious exercise." *Cutter v. Wilkinson*, 544 U.S. 709, 720-21 (2005). If RLUIPA did not apply to prison officials simply preventing, blocking, or cutting off religious exercise, it could not begin to achieve its purpose.

The execution chamber illustrates this perfectly. There, government exercises so much control that the condemned prisoner is strapped down and cannot change his conduct. Yet government can substantially burden religious exercise even so, as this Court has recognized. *See Murphy v. Collier*, 139 S. Ct. 1475 (2019) (granting a stay of execution when prison system refused inmate's request for a spiritual advisor in the execution chamber); *Dunn v. Smith*, 141 S. Ct. 725 (2021) (denying a request to vacate an

injunction requiring Alabama to honor a prisoner's request to allow his spiritual advisor into the execution chamber).

Respondents ignore how their vast power in the chamber can burden religious exercise in other ways. They allow the prisoner's minister to enter the death chamber, but he or she may do nothing once there. He cannot pray in any way that the prisoner might hear, and he cannot touch or lay hands on the prisoner. Of course, these restrictions do prohibit religiously motivated behavior. Respondents' whole argument hides behind the fact that they prohibit the behavior of the minister rather than that of the prisoner. Respondents ignore the fact that they *prevent* the religious exercise of the prisoner by *prohibiting* and *coercing* the conduct of his minister.

Whether these restrictions are justified is an issue of compelling interest and least restrictive means. *See* Section V. It is not an issue of substantial burden. Respondents substantially burden petitioner's exercise of religion by preventing that exercise from happening.

B. Respondents' Definition Would Lead to Absurd Results.

A review of even a few recent examples proves that respondents' position would lead to absurd outcomes, with much religious exercise left without protection.

Consider *Jones v. Carter*, 915 F.3d 1147 (7th Cir. 2019), and *Williams v. Annucci*, 895 F.3d 180 (2d Cir. 2018). *Jones* involved an inmate's request that the prison accommodate his religious dietary requirements by providing him a halal meal. 915 F.3d at 1147-48. The prison refused and lost under RLUIPA.

Id. at 1152. *Williams* involved similar facts, and a similar outcome, except the inmate was a Nazarite Jew requesting a kosher diet. 895 F.3d at 184. Under respondents' understanding of "substantial burden," Jones and Williams would have lost because the prison had no rule requiring them to eat something their religions forbade. It was merely refusing to accommodate their requests for special treatment. They could eat what was offered, or they could go hungry. But the prison did not regulate their religious behavior.

In another recent example, a prison violated RLUIPA when it refused to grant a Muslim prisoner's request to use scented oils as a part of group religious ceremonies. *Nance v. Miser*, 700 F. App'x 629, 633 (9th Cir. 2017). The prison did not demand behavior contradicted by religion; it simply denied a request for an "accommodation." It makes no difference whether the prison forbids the prisoner to use the oils or simply excludes them from the prison; it prevents religious exercise either way.

In *Greenhill v. Clarke*, a Muslim prisoner sought permission to participate in Friday prayer services over television. 944 F.3d 243, 246 (4th Cir. 2019). The prison did not prohibit him from watching the services; it simply refused to allow him physical access to a television. The prison lost under RLUIPA. *Id.*

Even this Court's recent decisions would be wrong under respondents' definition. In *Murphy* and *Dunn*, the prisons did not force the inmates to engage in conduct; they refused to "accommodate" requests for spiritual advisors to be present in the execution

chamber. Yet the substantial burden on religious exercise was clear in both cases.

These examples are by no means exhaustive; we could explore many more.[2] But what they show is telling: if the Court were to adopt respondents' conduct-based test, every single one of these cases would have resulted in the prisoner receiving zero protection from RLUIPA. Prisons would not even have been required to justify their prevention of religious practices.

Such outcomes would be absurd. They would go very far towards negating RLUIPA by hostile interpretation.

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[2] *See, e.g.*, Knowles v. Pfister, 829 F.3d 516, 519 (7th Cir. 2016) (confiscating Wiccan medallion); United States v. Secretary, Florida Department of Corrections, 828 F.3d 1341, 1343-44 (11th Cir. 2016) (refusing to provide inmate with kosher meals); Welch v. Spaulding, 627 F. App'x 479, 480-81 (6th Cir. 2015) (giving Muslim prisoners special meals for Ramadan that meant they got only 1,300 calories a day, when other prisoners got 2,600 calories a day); Schlemm v. Wall, 784 F.3d 362, 366 (7th Cir. 2015) (refusing to provide venison for Navajo religious meal); Davila v. Gladden, 777 F.3d 1198, 1203 (11th Cir. 2015) (refusing to allow delivery of special necklace to Santeria prisoner); Haight v. Thompson, 763 F.3d 554, 564-65 (6th Cir. 2014) (refusing to provide for or let Native American inmates purchase traditional foods for annual powwow); Moussazadeh v. Texas Department of Criminal Justice, 703 F.3d 781, 785, 793-94 (5th Cir. 2012) (refusing to provide Jewish inmate with kosher meals free of charge); Colvin v. Caruso, 605 F.3d 282, 291 (6th Cir. 2010) ("Colvin received nonkosher food at every meal for the first 16 days he was at LMF and was therefore limited to eating fruit during that time."); Washington v. Klem, 497 F.3d 272, 274 (3d Cir. 2007) (refusing to allow more than ten religious texts to be stored in inmate's cell).

II. RLUIPA's Text and History Contradict Respondents' Definition of Substantial Burden.

A. Respondents' Interpretation Violates Three of RLUIPA's Express Provisions.

Courts should interpret a statute according to its "'ordinary meaning … at the time Congress enacted" it. *Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (ellipsis in original) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

RLUIPA does not explicitly define "substantial burden," but it addresses closely related issues that cast light on the meaning of the phrase. Respondents' interpretation violates RLUIPA's plain text in three ways.

1. RLUIPA Is to Be Construed Broadly.

First, respondents ignore the congressional command to construe RLUIPA broadly. When a term in RLUIPA is undefined and a choice exists between a less-protective interpretation and a more-protective one, Congress has explicitly provided that courts must choose the latter. Under RLUIPA's "Rules of construction," in the subsection titled "Broad construction," Congress provided, "This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. §2000cc-3(g). Considering the numerous examples of religious exercise that would go unprotected, respondents' interpretation does not allow "maximum" free exercise; it minimizes free exercise.

2. Prisons May Have to Incur Expenses to Avoid Burdening Religious Exercise.

Second, RLUIPA puts government actors on notice that it "may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise." 42 U.S.C. §2000cc-3(c). This language would be unnecessary if prison officials need only avoid coercing conduct—if government never has to do anything or pay for anything to facilitate or avoid burdening religious conduct. Giving orders or imposing punishments that compel behavior—requiring prisoners to act in violation of their faith—generally costs little or nothing. Refraining from such orders and punishments generally also costs little or nothing. *See, e.g., Garner v. Kennedy*, 713 F.3d 237, 245-46 (5th Cir. 2013) (finding that the Texas Department of Criminal Justice provided zero evidence that not compelling prisoners to shave their beards would significantly increase prison costs).

The statutory language implies not just avoiding coercion, and not just the physical interference with religious conduct at issue here, but genuine accommodation: the idea that prisons must sometimes engage in additional tasks, such as paying for a kosher or halal meal, above and beyond their normal operations, that will allow prisoners to exercise their religion.

But this section of the statute does not create some separate special rule about accommodation. Rather, it says that prisons may have to spend money "to avoid imposing a *substantial burden*"—the very term respondents chose to contest. If a prison can impose a substantial burden by failing to spend money, *a*

fortiori it can impose a substantial burden by preventing the simple religious conduct at issue here.

3. RLUIPA Defines "Religious Exercise" Broadly.

Third, RLUIPA's definition of "religious exercise" "includes *any* exercise of religion, whether or not compelled by, or central to, a system of religious belief." §2000cc-5(7)(A) (emphasis added). This definition is more expansive than what many lower courts had interpreted RFRA to provide before RLUIPA was enacted. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 696 (2014) (noting this definition and its expanded scope of protection).

The definition ensures that any and all forms of religious exercise receive protection, including religious exercise that can be prevented without coercing a prisoner's personal behavior. As explained above, respondents' definition of "substantial burden" would leave unprotected many forms of "religious exercise," directly contradicting the statute.

RLUIPA's definition of "religious exercise" also negates respondents' apparent position in another way. Religious exercise is protected whether or not that exercise is "compelled by, or central to, a system of religious belief." This language does not indicate "ambivalence," Opp. Cert. 17; it unambiguously says that religious exercise is included and protected "whether or not"—protected if it is central and compelled by religion, and equally protected if it is not central and not compelled by religion.

Respondents contend that a substantial burden exists only if prisoners are forced to engage in conduct that "seriously violates" their religious beliefs, that

their beliefs "forbid," or that their faith "prohibits." Opp. Cert. 18. These consistent word choices appear to mean that the prison imposes a substantial burden only if it requires conduct that the religion explicitly prohibits.

This thinking misunderstands both religion and the statute. Religious exercise comes in many forms, but one distinction is especially relevant here: acts motivated, forbidden, or required by religion. Respondents assert that RLUIPA applies only to those acts that are forbidden. But there are many acts motivated by religion that, if prevented, whether directly and physically or through prohibition or refusal to accommodate, would clearly be burdened.

Voluntary prayer is the most obvious among these. If a prison refused to allow inmates to engage in voluntary prayer, or punished them for doing so, no one would seriously argue that the prison was not placing a substantial burden on religious exercise. If the prisoners were Christian, it would not matter that there are few mandatory times at which Christian prayer is required.

Or consider the ministry. No one is religiously required to become a priest, a minister, a rabbi, or an imam. Only a tiny percentage of believers ever do so. But those who do are undoubtedly exercising religion. *See McDaniel v. Paty*, 435 U.S. 618, 626-29 (1978) (protecting the right to become a minister).

Respondents' interpretation of "substantial burden" is, in effect, reading all three of these clauses out of the statute. Given the vast range of religious exercise that they could entirely prevent without regulating prisoner behavior, they are asking this

Court to nullify most of RLUIPA's potential applications. They would leave the statute far short of achieving its purpose or implementing its text.

B. Respondents Misinterpret This Court's Cases to Reach Their Narrow Interpretation of RLUIPA.

Respondents reach their narrow interpretation of "substantial burden" by misunderstanding this Court's prior opinions. They rely on language that first appeared in *Hobby Lobby*, and which the Court later quoted in *Holt v. Hobbs*, 574 U.S. 352 (2015). In both cases, the Court concluded that government had demanded that the religious claimants "engage in conduct that seriously violates [their] religious beliefs." *Id.* at 361 (quoting *Hobby Lobby*, 573 U.S. at 720).

In each case, the Court was simply describing the facts of the case before it—describing how particular plaintiffs had shown a substantial burden. In neither case did the Court hold, or even suggest in *dicta*, that compelled conduct is the *only* means by which government could burden someone's religious exercise. The Court commented that petitioner in *Holt* had "easily" shown substantial burden, implying that there are other ways, including more difficult and perhaps less obvious ways, to show substantial burden. 574 U.S. at 361.

The Court had no reason to address in either case whether physically preventing a prisoner's religious exercise, or (as the state would prefer it) failing to accommodate a prisoner's religious exercise, can result in a substantial burden. If it had, the plain statutory text would have provided the answer.

Respondents also misinterpret *Murphy* and *Dunn*. In both, the Court implicitly rejected respondents' position about clergy in the death chamber. Neither case involved regulation of the prisoner's religious behavior. The condemned prisoner was strapped tightly to a gurney and unable to engage in any behavior beyond thought and speech. Allowing the presence of a minister at all is an "accommodation" in the state's characterization; doing so allows religious exercise that the state could physically prevent by excluding the minister. But in both cases, the existence of a substantial burden was clear.

C. Respondents Ignore the Context of RLUIPA's Enactment.

Understanding the context of RLUIPA's enactment is crucial to understanding the statute's text and how religious exercise can be burdened even if the plaintiff is not forced to engage in conduct that violates his or her religion. Congress enacted both RFRA and RLUIPA in response to *Employment Division v. Smith*, 494 U.S. 872 (1990), which held that neutral and generally applicable laws that burden religious exercise do not trigger strict scrutiny.

In response, RFRA explicitly acknowledged that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." 42 U.S.C. §2000bb(a)(2). RLUIPA is premised on that same view. The two statutes are in *pari materia*, and much of their key operative language is substantially identical, including the sentence about "substantial burden." *See Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) ("[W]hen Congress uses the same language in two statutes having similar purposes, particularly when one is enacted

shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.").

As this Court has recognized, many of the cases that motivated the passage of RFRA, and then of RLUIPA, did not involve government compelling a claimant's religious conduct. "Much of the discussion" about the need for RFRA "centered upon anecdotal evidence of autopsies performed on Jewish individuals and Hmong immigrants in violation of their religious beliefs." *City of Boerne v. Flores*, 521 U.S. 507, 530-31 (1997). The Court cited for this proposition four witness statements in the House, three in the Senate, and both committee reports.[3] *Id.* at 531. So many witnesses invoked this example because it was accurately perceived to be powerfully effective.

In the case Congress discussed most, a medical examiner performed an autopsy on a young Hmong man without notice to his family. The family sued. *Yang v. Sturner*, 728 F. Supp. 845 (D.R.I. 1990). Although government forced no one to engage in conduct that violated their religion, the court found that the Hmong family's religious exercise had been bur-

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[3] *Religious Freedom Restoration Act of 1991: Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary on H.R. 2797*, at 81, 122, 158 (May 13-14, 1992) (hereinafter House Hearings) (three witness statements citing *Montgomery v. County of Clinton*, 743 F. Supp. 1253 (W.D. Mich. 1990)); *The Religious Freedom Restoration Act, Hearing Before the Senate Committee on the Judiciary on S. 2969*, at 9, 50, 159, 193 (Sept. 18, 1992) (hereinafter Senate Hearing) (four witness statements citing *Montgomery*); Senate Report No. 103-111, *Religious Freedom Restoration Act of 1993*, at 8 (July 27, 1993); House Report No. 103-88, *Religious Freedom Restoration Act of 1993*, at 5-6 & n.14 (May 11, 1993).

dened in violation of the Free Exercise Clause. No member of Congress suggested otherwise.

Congress was also told that *Smith* had barred relief for a Jewish parent after an unnecessary autopsy performed on her son. *Montgomery v. County of Clinton*, 743 F. Supp. 1253 (W.D. Mich. 1990), *aff'd mem.*, 940 F.2d 661 (6th Cir. 1991). He died in an automobile accident, so the cause of death was obvious. Despite *Smith*'s effect of causing the parents to lose their case, Congress recognized that the family's religious exercise had been substantially burdened—even though no one had been forced to engage in religion-violating behavior.

These cases, and *Yang* in particular, became prominent for two reasons. First, William Yang, the decedent's uncle, gave poignant testimony about the family's distress and their belief that they were cursed for allowing mutilation of the body. *Senate Hearing* 5-6; *House Hearings* 107-08 (both *supra* note 3). They were not compelled to act, but "it was plain to anyone who attended the hearings in either house that the committee members were moved by these cases and meant to subject them to the Act." Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 229 (1994).

And second, the district court reversed its original judgment in favor of the Yangs in light of *Employment Division v. Smith*, making *Yang* the clearest and least debatable example of *Smith*'s consequences. *Yang v. Sturner*, 750 F. Supp. 558 (D.R.I. 1990). The district judge expressed "the deepest sympathy for the Yangs," "moved by their tearful outburst" and "the depth of the Yangs' grief." *Id.* at 558.

The House committee report cited *Yang* as the first of four cases showing that "facially neutral and generally applicable laws have and will, unless the Religious Freedom Restoration Act is passed, continue to burden religion." House Report 5-6 & n.14 (*supra* note 3). *See also* Senate Report 8 & n.13 (*supra* note 3) (citing *Yang* as first example of how, "[b]y lowering the level of constitutional protection for religious practices, the [*Smith*] decision has created a climate in which the free exercise of religion is jeopardized"). Senator Hatch, the lead Republican sponsor, told the Senate that RFRA "is important because it restores protection to individuals like the Yangs and others who have suffered needlessly." 139 Cong. Rec. 26181 (Oct. 26, 1993). Representative Edwards, the subcommittee chair and an original co-sponsor, listed autopsies as the first example in explaining to the House why RFRA "is a very, very important bill." 139 Cong. Rec. 9681 (May 11, 1993).

The autopsy cases are important here. They show that government can burden religion within the meaning of RFRA and RLUIPA simply by preventing it or refusing to accommodate it, especially when government enjoys excessive control over the circumstances. Government simply seized control of the body and performed the autopsy, making adherence to the religious beliefs of the decedent and his family impossible. Stated the other way, these cases show the congressional understanding that government can and does burden religion even when it does not compel someone to engage in conduct that violates their beliefs.

III. *Bowen* and *Lyng* Do Not Require a Different Result.

In *Bowen v. Roy* and *Lyng v. Northwest Indian Cemetery Protective Association*, the Court said that plaintiffs there had failed to prove a substantial burden on their religious exercise, in part because the government had not coerced their religious behavior. *See* 476 U.S. 693 (1986), and 485 U.S. 439 (1988). All of the points in Sections I and II of this brief—the decided RLUIPA cases, the many examples of prison officials preventing religious exercise without coercing behavior, the statutory text, and the legislative history—show that any implication that such coercion is the only way to substantially burden religious exercise was overbroad, or at least that it is inapplicable to RLUIPA cases. *Bowen* and *Lyng* each presented claims under the Free Exercise Clause, not under RFRA or RLUIPA, which had not yet been enacted.

The facts of *Bowen* and *Lyng* were very different from this case and from many other prison cases. In *Bowen*, the Court held that government's use of a social security number in its own record keeping did not violate the Free Exercise Clause, despite plaintiffs' claim that this use would sap their daughter's spiritual power. 476 U.S. at 695-96. In *Lyng*, the Court held that the government could build a road on its own land, even though the resulting noise would disrupt religious meditation by Native Americans who used the land for religious purposes. 485 U.S. at 441-43. The Court said that "[i]n neither case, however, would the affected individuals be coerced by the Government's action into violating their religious beliefs; nor would either government action penalize religious activity by denying any

person an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Lyng*, 485 U.S. at 449.

This language cannot be read to mean that coercing or penalizing religious behavior is the *only* means by which government can burden the exercise of religion. That would lead to all the absurd results discussed above. And it certainly cannot have such an exclusive meaning if applied to RLUIPA, because it would give prison officials carte blanche to prevent religious exercise by simply refusing to admit into the prison any religious literature, ritual items, kosher or halal food, or any other material necessary or helpful to the exercise of religion.

The Court emphasized in both cases that the government need not "conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Id.* at 448 (quoting *Bowen*, 476 U.S. at 699). But in this case, government is not merely managing its own affairs, its own record keeping, or its own real estate. In this case, the state is *regulating*. It is directly restricting petitioner's religious exercise by regulating what his minister can do for petitioner in the moments leading up to death.

Lyng also said that "[t]he crucial word in the constitutional text is 'prohibit.'" *Id.* at 451. Respondents here prohibit the minister from audibly praying or laying on hands, and by that rule, they prevent petitioner's free exercise. *Bowen* and *Lyng* were about the "incidental effects" of government action taken for reasons wholly unrelated to religion, let alone to any particular claimant's religion. 485 U.S. at 450. In *Lyng*, the government's reasons for the planned road

were wholly unrelated to religion and unrelated to the Native American plaintiffs in any other way. This case is very different. The state's rule was announced specifically in response to petitioner's religious request, and for the specific purpose of rejecting that request—to prohibit the minister's religious exercise and thereby prevent petitioner's religious exercise.

IV. Allowing Other Exercises of Religion Does Not Eliminate a Substantial Burden Caused by Preventing the Religious Exercise at Issue.

Respondents make the same mistake that this Court rejected in *Holt v. Hobbs*: assuming that because they have allowed petitioner some religious exercise by permitting him to meet with his minister on the day of his execution, they can freely forbid or prevent other religious exercise.

In *Holt*, this Court squarely rejected such arguments. It noted that "the availability of alternative means of practicing religion is a relevant consideration" in some cases under the highly deferential constitutional standard applied to prisons, but it concluded that "RLUIPA provides greater protection. RLUIPA's 'substantial burden' inquiry asks whether the government has substantially burdened religious exercise … not whether the RLUIPA claimant is able to engage in other forms of religious exercise." 574 U.S. at 361-62.

This is because religious practices are rarely fungible. "From the standpoint of the constitutional interest, telling the free exercise claimant to practice his other beliefs instead of this one would be like

telling the free-speech claimant to communicate other messages instead of this one." Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise under* Smith *and after* Smith, 2020-21 Cato Sup. Ct. Rev. 33, 48 (2021).

V. Respondents Confuse Substantial Burden with Compelling Interest.

Prisons need not "accede" to a prisoner's "every religious demand." Opp. Cert. at 18. RLUIPA does not say otherwise. But when a prisoner's exercise of religion is facing a substantial burden, the appropriate question is whether the prison can prove that it has a compelling interest and is using the narrowest means possible for achieving that interest.

Respondents confuse these two distinct principles. When trying to argue that petitioner faces no substantial burden, they give the example of an inmate asking to travel to an offsite location on the day of his execution. Such a request would interfere with the execution and pose a risk of escape attempts, and the prison could plausibly argue that it has a compelling interest in not allowing that interference; even so, the prisoner's religious exercise would be burdened.

Similarly, if petitioner were asking that his entire congregation be allowed into the chamber to lay hands on his head, the prison could plausibly burden that form of religious exercise as well, showing that the sheer number of people to control and the resultant crowding would interfere with the execution.

But in neither of these extreme examples, so different from the case before the Court, does the ques-

tion of "substantial burden" come into play, just as it does not in this case. Keeping these separate issues distinct is important, because it matters to burdens of proof. Respondents cannot escape their burden of proof by moving alleged justifications for the burden on religion from the issues of compelling interest and least restrictive means, where they bear the burden, to substantial burden on religious exercise, where plaintiffs bear the burden. See 42 U.S.C. §2000cc-1(a) (requiring government to "demonstrate[]" compelling interest and least restrictive means); *id.* §2000cc-5(2) (defining "demonstrates" as "meets the burdens of going forward with the evidence and of persuasion").

CONCLUSION

The judgment should be reversed and remanded with clear guidance that a failure to accommodate a prisoner's request causes a substantial burden on religious exercise if it prevents that religious exercise from occurring.

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APPENDIX

APPENDIX

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