No. 11-1071

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Maston Willis, *et al.*,

Plaintiffs-Appellees,

v.

Commissioner, Indiana Department of Correction, *et al.*

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION
CIVIL ACTION NO. 1:09-CV-815-JMS-DML
THE HONORABLE JUDGE JANE MAGNUS-STINSON

BRIEF OF PRISON FELLOWSHIP, THE CHRISTIAN LEGAL SOCIETY, THE NATIONAL ASSOCIATION OF EVANGELICALS AND THE BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY AS *AMICI CURIAE* IN SUPPORT OF APPELLEES AND AFFIRMANCE

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Appellate Court No: 11-1071

Short Caption: Willis v. Commissioner, Indiana Department of Correction

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"Defs.' S.J. Br. at __"	Memorandum in Support of Defendants' Motion for Summary Judgment in *Willis v. Commissioner, Indiana Department of Correction, et al.*, 1:09-cv-815 (JMS) (DML), filed July 19, 2010.
"Defs.' S.J. Resp. at __"	Response to Plaintiffs' Motion for Summary Judgment in *Willis v. Commissioner, Indiana Department of Correction, et al.*, 1:09-cv-815 (JMS) (DML), filed August 19, 2010.
"Op. at __"	Order of the United States District Court for the Southern District of Indiana in *Willis v. Commissioner, Indiana Department of Correction, et al.*, 1:09-cv-815 (JMS) (DML), dated November 1, 2010.
"Br. at __"	Brief of Defendants-Appellants, filed March 11, 2011.
"Appellee Br. at __"	Brief of Plaintiffs-Appellees, filed April 11, 2011.

The undersigned respectfully submit this brief *amicus curiae* in support of the District Court's November 1, 2010 decision in *Willis v. Commissioner, Indiana Department of Correction, et al.*, No. 1:09-cv-815 (JMS) (DML).

STATEMENT OF INTEREST

This brief is submitted on behalf of *amici curiae* Prison Fellowship, the Christian Legal Society, the National Association of Evangelicals and the Baptist Joint Committee for Religious Liberty. All parties have consented to the filing of this brief.

Prison Fellowship is the largest prison ministry in the world, and partners with thousands of churches and tens of thousands of volunteers to care for prisoners, former prisoners and their families. With one-on-one mentoring, in-prison seminars and various post-release initiatives, Prison Fellowship uses religious-based teachings to help guide prisoners when they return to their families and society, and thereby contributes to restoring peace in those communities most endangered by crime. Prison Fellowship has also vigorously defended the right of inmates of all faiths to practice their faith in prison. Prison Fellowship was active in the defeat of efforts in Congress to exclude prisoners from the protections of the Religious Freedom and Restoration Act of 1990 ("RFRA"), was an active leader in the broad coalition that drafted and secured passage of the Religious Land Use and

Incarcerated Persons Act of 2000 ("RLUIPA"), and has defended RLUIPA in courts through amicus briefs.

The Christian Legal Society is an association of Christian attorneys, judges, law professors and law students dedicated to the defense of religious freedoms. From its inception, members of the Christian Legal Society have fought to preserve autonomy from the government of religion and religious organizations, and to protect the free exercise rights of adherents of persons of all faiths.

The National Association of Evangelicals is the largest network of evangelical churches, denominations, colleges and independent ministries in the United States. It believes that religious freedom is God-given, and that the government does not create such freedom, but is charged to protect it. It is grateful for the American legal tradition of safeguarding religious freedom, and believes that this jurisprudential heritage should be carefully maintained.

The Baptist Joint Committee for Religious Liberty serves fifteen cooperating Baptist conventions and conferences in the United States, and is supported by thousands of congregations across the nation. It focuses exclusively on the issues of religious liberty and the separation of church and state, and believes that vigorous enforcement of both the Establishment Clause and the Free Exercise Clause is essential to securing religious liberty for all Americans.

In addition to a long tradition of litigation representations, each of the Amici played an active role in the drafting and advocacy of RLUIPA. After conducting extensive hearings and finding that various state prison systems were imposing "frivolous and arbitrary" restrictions on prisoners' practice of their religions, 146 Cong. Rec. 16,699 (2000) (joint statement of Sens. Orrin Hatch and Edward Kennedy), a unanimous Congress enacted RLUIPA to protect the free exercise rights of prisoners against unnecessary governmental restriction. Now, the statute is under attack by various state agencies which, under the banner of cost concerns, seek to narrow (or dispense with altogether) RLUIPA's free exercise safeguards. Respect for the language of the statute, respect for the legislative intent, and an appropriate concern for religious rights—even those of prisoners—all require that this Court reject that invitation and apply the statute with the full force intended by Congress.

Further—and this is of grave concern to Amici—this Court's treatment of RLUIPA will have implications far beyond prison walls. Because RLUIPA incorporates the traditional constitutional strict scrutiny analysis, any effort to "tone down" strict scrutiny in this context will provide tools and a precedent for weakening strict scrutiny across the board. As the Supreme Court has warned, the "watering down" of strict scrutiny in one context will inevitably

"subvert its rigor in the other fields where it is applied". *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 888 (1990).

SUMMARY OF THE ARGUMENT

In this appeal, Defendants-Appellants ("Appellants") attack the District Court's strict scrutiny analysis from several angles. The memorandum of law submitted by Plaintiffs-Appellees makes clear why each of those arguments should fail. Amici submit this brief to focus this Court on the most extreme aspect of Appellants' argument—the claim that saving money should *per se* be considered a compelling government interest for purposes of a strict scrutiny analysis.

In a section headed "Controlling Costs is a Compelling Governmental Interest", Appellants launch what is fundamentally a broadside attack against the policy choices embodied in RLUIPA. Appellants claim that if a religious accommodation costs money, then it should not be required. (Br. at 25-26.) This is an interesting argument, but it is not a possible interpretation of the statute. Appellants go on to claim that if times are really, really tough, then states should be permitted to keep Federal prison grants that are conditioned on RLUIPA's religious accommodation requirements, even while they are ignoring those requirements. (Br. at 27-28.) Of course, no "hard times" exception exists in the statute.

Instead, the statute says that sincerely held religious beliefs *shall* be accommodated in the prison setting *unless* the particular restrictions on free exercise can satisfy strict scrutiny. Supreme Court precedent makes very clear that "saving money" cannot itself be considered a "compelling state interest", and the *Cutter* decision, on which Appellants rely, reaffirmed that rule rather than undermining it. While it is possible that, on appropriate facts, increased cost burdens could have a negative impact on an *actual* compelling interest (such as prison security), Appellants did not even attempt to prove such a connection below.

Finally, Appellants' plea that strict scrutiny should be relaxed or effectively ignored to avoid unreasonably burdening the states ignores fiscal reality. The requirements of RLUIPA are conditions that Congress placed on *voluntary* Federal grants—grants that surely leave state prison finances better off, not worse off. Under RLUIPA, when a state chooses to accept such grants, its prison policies may not substantially burden the free exercise of prisoners unless those policies fit within a carefully circumscribed exception, which Congress defined with the rigorous and well-established strict scrutiny test used by courts to safeguard many of our most precious freedoms. In this context, there can be no reason—and certainly no statutory authorization—to dilute the application of the strict scrutiny test by labeling mere cost-saving as a "compelling interest".

ARGUMENT

I. RLUIPA REQUIRES THE APPLICATION OF THE TRADITIONAL "STRICT SCRUTINY" TEST.

The judicially created "strict scrutiny" standard is the guardian of this nation's most important civil rights. For example, a legislative action must survive strict scrutiny if it discriminates on the basis of race. *E.g., Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995). Likewise, a statute must survive strict scrutiny if it regulates the content of otherwise free speech. *E.g., United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813-14 (2000). Finally, strict scrutiny is used to protect those "fundamental" rights so "deeply rooted in this Nation's history and tradition . . . that neither liberty nor justice would exist if they were sacrificed". *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotation and citations omitted).

The test is undeniably and intentionally exacting: *First*, the government must prove that its action promotes a "compelling governmental interest"; *Second*, the government must prove that that interest is achieved through the "least restrictive means" available. *E.g., Playboy Entm't Group*, 529 U.S. at 813-14. In fact, strict scrutiny is considered the "most rigorous and exacting standard of constitutional review". *Miller v. Johnson*, 515 U.S. 900, 920 (1995).

There should be no dispute that the test required by RLUIPA is exactly this "strict scrutiny" test developed by the Supreme Court in the context of

protecting other constitutional rights. That Congress imported the Supreme Court's articulation of the strict scrutiny test verbatim into the text of the statute is a matter of fact.[1] It is equally indisputable that the importation of this well-developed "strict scrutiny" test into the context of prisoners' free exercise rights is exactly what Congress intended. 146 Cong. Rec. 19,123 (2000) (statement of Rep. Charles T. Canady) (explaining that RLUIPA was "intended to codify the traditional compelling interest test").

There is no hint of any justification in either the statute's language or its legislative history for the creation of a new, "not-quite-so-strict scrutiny" test. To the contrary, courts have repeatedly recognized that the test which must be satisfied to justify an impairment of free exercise under RLUIPA is one and the same as the constitutional strict scrutiny test. *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist*., 611 F.3d 248, 270 (5th Cir. 2010) (noting that RLUIPA "gives courts the power to mete out religious exemptions to federal prisoners under strict scrutiny"); *Lovelace v. Lee*, 472 F.3d 174, 186 (4th Cir. 2006) (explaining that

[1] *Compare* 42 U.S.C. § 2000cc-1(a) (stating that "no government shall impose a substantial burden on the religious exercise" of a prisoner unless the imposition of the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling interest") *with Playboy Entm't Group*, 529 U.S. at 813-14 (holding that in order to satisfy strict scrutiny, a statute that regulates speech based on its content must be "narrowly tailored to promote a compelling Government interest" and be the "least restrictive means" to further that interest) (internal quotation marks omitted).

RLUIPA prescribes "strict scrutiny"); *see also Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 546 U.S. 418, 430 (2006) (applying statutory test from RFRA that is identical to RLUIPA) ("Congress's express decision to legislate the compelling interest test indicates that RFRA challenges should be adjudicated in the same manner as constitutionally mandated applications of the test").

II. THE SUPREME COURT HAS REPEATEDLY REJECTED THE ARGUMENT THAT AVOIDING EXPENDITURE IS ITSELF A COMPELLING GOVERNMENTAL INTEREST.

Appellants claim that the state's desire to avoid expenditures is *per se* a compelling government interest for purposes of a strict scrutiny analysis. That position is contrary to established precedent. Instead, the Supreme Court has consistently and explicitly refused to recognize the desire to avoid expenditures as itself a "compelling governmental interest". This was first made clear in a trio of cases regarding state welfare programs:

In *Shapiro v. Thompson*, 394 U.S. 618 (1969), the Supreme Court was asked to determine whether the welfare statutes of Connecticut, Pennsylvania and the District of Columbia could properly limit benefits to residents who had lived in the jurisdiction for at least one year. *Id.* at 622-27. The Court found that, because the waiting period impaired the fundamental right of interstate travel, it could survive only if it promoted a compelling government interest. *Id.* at 638. The states had argued that the waiting period was constitutional because it would

"preserve the fiscal integrity of state public assistance programs". *Id.* at 627. The Court rejected that argument, and held that the state "must do more than show that denying welfare benefits to new residents saves money". *Id.* at 633. In other words, "[t]he saving of welfare costs cannot justify an otherwise invidious classification." *Id.*[2]

In *Graham v. Richardson*, 403 U.S. 365 (1971), the Supreme Court considered whether Arizona and Pennsylvania could properly deny welfare benefits to resident aliens. *Id.* at 366. Because alienage is a suspect classification, the Court applied strict scrutiny. *Id.* at 372. The states claimed that the discrimination promoted the "fiscal integrity" of their welfare programs, *id.* at 374, but the Court again held that saving money is not by itself a compelling governmental interest, concluding that "a concern for fiscal integrity is no more compelling a justification for the questioned classification in these cases than it was in *Shapiro*", *id.* at 374-75.

Finally, in *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), the Court rejected as unconstitutional Maricopa County's policy of denying free nonemergency medical care to those who had lived in the county for less than

[2] *Shapiro* was overruled in part by *Edelman v. Jordan*, 415 U.S. 651 (1974). However, *Edelman* did not disturb the court's finding that cost savings was not a compelling government interest.

one year. *Id.* at 251. The government argued that the durational requirement was necessary to "insure the fiscal integrity of its free medical care program by discouraging an influx of indigents". *Id.* at 263. For the third time in five years, the Court determined that a desire to save money is not a compelling interest of the type that can satisfy strict scrutiny and justify denial of constitutional rights: "The conservation of the taxpayer's purse is simply not a sufficient state interest . . . ." *Id.*[3]

Following this clear and repeated precedent, the Ninth Circuit has likewise held that protecting taxpayers from "unwanted expenses" is not a compelling interest for purposes of justifying content-based restrictions on speech. *Finley v. Nat'l Endowment for the Arts*, 100 F.3d 671, 683 n.23 (9th Cir. 1996), *rev'd on other grounds*, 524 U.S. 569 (1998).

The logic behind this strong rule is clear: almost every government action costs money; almost any freedom-numbing rule of uniformity can "save money". If strict scrutiny is to retain any meaning—and the rights it protects retain

[3] This remains true even if state actors attempt to recast cost concerns as "administrative convenience". *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 508 (1989) ("[W]hen we enter the realm of strict judicial scrutiny, there can be no doubt that administrative convenience is not a shibboleth, the mere recitation of which dictates constitutionality" (internal quotations omitted)); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 102 n.9 (1972) (rejecting "administrative convenience" as a justification for a content-based speech regulation).

any vitality—state actors must offer more than "slippery slope concerns that could be invoked in response to any . . . claim". *O Centro*, 546 U.S. at 431, 435-36. If simply saving money or avoiding costs were recognized as a compelling interest, one half of the strict scrutiny test would be neutered. *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1228-29 (C.D. Cal. 2002) (applying land-use provision of RLUIPA) ("If revenue generation were a compelling state interest, municipalities could exclude all [tax-exempt] religious institutions from their cities.").

III. THE *CUTTER* DECISION DID NOT ELEVATE COST SAVINGS TO THE LEVEL OF A COMPELLING GOVERNMENTAL INTEREST.

Appellants attempted to distinguish the *Shapiro* line of cases in their briefing below (Defs.' S.J. Resp. at 6), but have abandoned those efforts entirely on appeal. Instead, they cite *Cutter v. Wilkinson*, 544 U.S. 709 (2005), to argue that those precedents have been eroded, and their logic qualified, such that now "Controlling Costs is a Compelling Governmental Interest". (Br. at 22.) Appellants misread *Cutter*.

In *Cutter*, the court below had found RLUIPA to be an unconstitutional "establishment" or favoring of religion because it "might encourage prisoners to become religious in order to enjoy greater rights". *Cutter*, 544 U.S. at 718. The Supreme Court held that, on the contrary, RLUIPA was

proper because it merely "alleviates exceptional government-created burdens on private religious exercise". *Id.* at 720.

In the course of its discussion, the Supreme Court recognized that certain religious accommodations might undermine prison safety. It is not controversial that security and safety are compelling government interests in the prison context, *id.* at 723, 725 n.13, and the Court noted that RLUIPA did not alter or ignore that truth by "elevat[ing] accommodation of religious observances over any institution's need to maintain order and safety", *id.* at 722. Instead, it cautioned lower courts to apply strict scrutiny in the prison context with "particular sensitivity to security concerns". *Id.* at 722-23; *cf. Johnson v. California*, 543 U.S. 499, 512 (2005) (holding that "necessities of prison security and discipline" are a compelling government interest when determining whether a prison's race classification policy violated the Equal Protection Clause).

It was with reference to the compelling interest of security that the Supreme Court then quoted the statement of the legislative sponsors that "due deference" should be paid by courts applying the law to the importance of maintaining "good order, security and discipline, consistent with consideration of costs and limited resources". *Cutter*, 544 U.S. at 723. But to say that "limited resources" may be taken into account when determining whether a proposed accommodation will adversely impact a compelling governmental interest is very

far from saying that saving money is a compelling interest in and of itself. Instead, the Court's focus remained firmly on *security* as the compelling interest, while money was treated as only a means or factor that may affect that interest.

Indeed, while the sponsors of RLUIPA invited courts to consider the reality of "costs and limited resources" when evaluating an accommodation's impact on "good order, security, and discipline", the legislative history makes it *impossible* to suppose that the sponsors intended that a bare showing of increased costs should void the religious accommodation requirements of RLUIPA. Quite the contrary, Congress *expected* that accommodating free exercise would cost something, and one of their *express* purposes was to require grant-receiving state prison systems to make those additional expenditures. That is, the drafters specifically identified, as targets of the act, restrictions on free exercise based on "indifference, ignorance, bigotry, *or lack of resources*", 146 Cong. Rec. 16,699 (emphasis added), and made clear in the text of the statute itself that the act "may require a government to incur expenses in its own operations", 42 U.S.C. § 2000cc-3(c).[4]

[4] Speaking in support of RFRA, the statutory predecessor of RLUIPA, Senator Orrin Hatch agreed that prisons might be required to "incur an added cost" and put the question clearly: "Is the Senate of the United States really prepared to say that a Jewish prisoner should always be denied kosher food solely because of its cost?" 139 Cong. Rec. 26,192 (1993).

Appellants' assertion that "the District Court's opinion completely forecloses the possibility that rising costs can ever be a compelling government interest" (Br. at 23) is thus literally correct but misleading. The district court correctly followed binding precedent and the legislative intent to hold that avoiding "rising costs" does not *itself* constitute a compelling interest. However, this does not prevent a prison from making a specific factual showing that rising costs will, *e.g.*, force a lower level of security than would otherwise be achieved, thereby satisfying the compelling interest prong of the strict scrutiny test. For this reason, Appellants are wrong in asserting that the lower court's interpretation of RLUIPA treats it as "a source of unlimited power for prisoners to demand and receive religious accommodations without regard to the burden those accommodations place on the State". (*Id*.)

Appellants attempt to leap this gap and make money *equivalent* to a recognized compelling interest—prison security—by arguing that "there is virtually no security measure that could not be improved with additional spending". (*Id*. at 25.) But the unanimous *Cutter* court rebuffed this exact type of speculative, abstract equation of money with security by citing with approval the district court's refusal to conclude as a matter of law that religious accommodations would impair security, instead requiring "[a] finding 'that it is *factually impossible* to provide the kind of accommodations that RLUIPA will

require without significantly compromising prison security or the levels of service provided to other inmates'" in order to establish that equation. *Cutter*, 544 U.S. at 725 (emphasis in original). In other words, while *Cutter* involved an establishment clause challenge to RLUIPA and thus presented a different procedural context, the state was required to show that accommodation would *actually* and *unavoidably* prejudice prison operations, not merely point to a budgetary impact.

And this is surely correct: the bald assertion that "there is virtually no security measure that could not be improved with additional spending"—even if admitted—establishes no causal connection at all between potential savings and prison security. Yes, security could always be improved, and security is a compelling interest, yet the state each year chooses to limit the amount it spends on prison security, even while spending large amounts on other budget items that could not meet the Supreme Court's definition of "compelling state interests". Supposing that some small amount could be saved by refusing kosher meals to all Jewish inmates, there is neither evidence nor reason to assume that the savings would be spent on improved security. Supposing that providing kosher meals will require a slight increase in the prison food service budget, there is neither evidence nor reason to assume that the result will be any decrease at all in the amount allocated by the state for prison security or safety.

Accordingly, this Court declined to accord "compelling interest" status to general goals of efficiency in *Koger v. Bryan*, 523 F.3d 789 (7th Cir. 2008), in the course of evaluating the RLUIPA claim of an inmate who was denied access to a vegetarian diet required by his religion. *Id.* at 793. The state asserted an interest in the "orderly administration of the prison dietary system", which appeared to mean the "simplified and efficient" administration of food services. *Id.* at 800 (internal quotation omitted). This Court made clear that, while such concerns were "legitimate", "no appellate court has ever found the[m] to be compelling". *Id.*

Appellees correctly note that *Andreola v. Wisconsin*, 211 F. App'x 495 (7th Cir. 2006), is an unpublished order which this Circuit's rules prohibit even citing. (Appellee Br. at 40 n.22.)[5] And *Andreola* is in fact so concise as to be cryptic and potentially inaccurate on the relevant point. While that court was following clear authority in stating that prison security is a "compelling state interest", it is unclear what it believed to be the significance of labeling "abating the costs of a prisoner's keep" as a "legitimate interest". *Andreola*, 211 F. App'x

[5] That the Seventh Circuit prohibits citation to *Andreola* was true when the order was issued, and remains true today. *See* 7th Cir. R. 53(b)(2)(iv) (stating that unpublished orders "shall not be cited or used as a precedent"), *rescinded and replaced by* 7th Cir. R. 32.1(d) (stating that "[n]o [unpublished] order of this court issued before January 1, 2007 may be cited").

at 498-99. Whether an interest is "legitimate" is a threshold relevant to a rational basis test, but not to strict scrutiny or the statutory language of RLUIPA, and the State had not even argued on appeal that mere cost savings was a compelling interest (Andreola Br. at 24-25 (identifying only security as a compelling interest)). Possibly, the court's "legitimate interest" analysis was intended to relate to the prisoner's First Amendment claim rather than to his RLUIPA claim. Certainly, the only case cited by *Andreola* in this discussion upheld the denial of a prisoner's First Amendment claim under the rational basis test, but did *not* label cost savings a compelling government interest, and did *not* "uphold[] the denial of [a] RLUIPA claim" as the unpublished order asserts, *Andreola*, 211 F. App'x at 499 (citing *DeHart v. Horn*, 390 F.3d 262 (3d Cir. 2004)), but on the contrary *reversed* and remanded for further proceedings with respect to the RLUIPA claim.[6]

It is true that at least two lower courts have interpreted *Cutter* as recognizing cost savings *per se* as a compelling governmental interest under RLUIPA. *E.g.*, *Subil v. Sheriff of Porter County*, No. 2:04-cv-0257, 2008 WL 4690988, at *5 (N.D. Ind. Oct. 22, 2008) ("Security and economic concerns are compelling governmental interests."); *Berryman v. Granholm*, No. 06-cv-11010,

[6] In *DeHart*, the district court had dismissed the prisoner's RLUIPA claim for failure to exhaust all administrative remedies. *DeHart*, 390 F.3d at 267. The Third Circuit overruled that dismissal, and specifically instructed that the RLUIPA claim be examined by the district court on remand. *Id.* at 272-76.

2007 WL 2259334, at *3 (E.D. Mich. Aug. 3, 2007) (holding that the prison's "financial reason for limiting access to the Kosher Meal Program is among those specifically recognized by the Supreme Court as 'compelling'"). For the reasons stated above, these cases simply misunderstand the discussion of costs in *Cutter*, and are inconsistent with Supreme Court precedent, the legislative history of RLUIPA, and this Circuit's post-*Cutter* jurisprudence.

If *Baranowski v. Hart*, 486 F.3d 112 (5th Cir. 2007), is read as labeling "controlling costs" as a "compelling interest" standing alone, then it makes the same error. But, as the court below correctly noted, *Baranowski* did not so hold, because it did not in fact make any decision based on costs standing alone. (Op. at 15-16.) Rather, the *Baranowski* court considered costs as one part of a factual mix that also included the need to provide "nutritionally appropriate" meals to other inmates and the indisputably "compelling" interest of "maintaining good order". *Baranowski*, 486 F.3d at 116-18. The court below was also correct in observing that *Baranowski* did not conclude as a matter of law that increased costs could be *equated* with decreased prison security, as Appellants ask this Court to do. (Op. at 15-16.) Rather, the *Baranowski* court made a factual finding that security was threatened by the budgetary impact of providing kosher meals on the

facts of that case, after considering extensive evidence submitted through affidavits. *Baranowski*, 486 F.3d at 116-19.[7]

IV. RLUIPA CONSIDERED IN ITS PROPER CONTEXT *CANNOT* NEGATIVELY AFFECT STATE PRISON BUDGETS.

Perhaps hoping that fear will lead this Court where reason and precedent cannot, Appellants invoke a doomsday scenario of "unlimited" prisoner demands and "spiraling" accommodation costs. (Br. at 2, 23.) While this goes outside the question of whether saving money can constitute a "compelling interest", we will note briefly that this fiscal Armageddon is both irrelevant and impossible for at least two reasons.

First, as reviewed in detail above, if Appellants can make a factual showing that the cost of a requested accommodation is actually and causally threatening a compelling interest (which they have not done), then the accommodation will be excused (assuming the "least restrictive means" prong can also be met). RLUIPA grants no blank check to prisoners.

[7] Apparently sensing the weakness of their cost-based argument, Appellants claim for the first time on appeal that providing kosher meals also threatens prison security, because special treatment for religious prisoners will breed resentment. (Br. at 28.) This argument must be rejected, as Appellants have provided no evidence to support its claim, and have already admitted to the district court that "the security risk of [Willis's] requested accommodation is not so readily apparent". (Defs.' S.J. Br. at 26.)

Second, the RLUIPA requirements are attached to Federal grants that actually *increase* the available funds for state prison systems. 42 U.S.C. § 2000cc-1(b)(1); *Charles v. Verhagen*, 348 F.3d 601, 609 (7th Cir. 2003) (if the state prison system "wishes to receive any federal funding, it must accept the related, unambiguous conditions [in RLUIPA] in their entirety").[8] Once this is recognized, the notion of any fundamental inequity or "detrimental burden" on the state prison systems necessarily vanishes.

It cannot be disputed that "Congress may attach conditions to the receipt of federal funds" incident to its Spending Clause power. *South Dakota v. Dole*, 483 U.S. 203, 206 (1987). In doing so, "Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives", *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 203 (2003), and "broad power to set the terms on which it disburses federal money to the States", *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006).

Importantly, conditions attached to Federal funding by their nature take effect only with the state's consent. "[T]he receipt of federal funds under

[8] RLUIPA has been recognized as a proper exercise of Congress's Spending Clause power by every Circuit Court that has considered the question. *Nelson v. Miller*, 570 F.3d 868, 886 (7th Cir. 2009) (collecting cases).

typical Spending Clause legislation is a consensual matter". *Guardians Ass'n v. Civil Service Comm'n of the City of New York*, 463 U.S. 582, 596 (1983). It is expected and understood that "the State or other grantee weighs the benefits and burdens before accepting the funds and agreeing to comply with the conditions attached to their receipt". *Id.* To be sure, "the conditions attached to the funds by Congress may influence a State's legislative choices". *New York v. United States*, 505 U.S. 144, 167 (1992). But the choice is ultimately left to the states, which can "comply[] with the conditions set forth in the [relevant legislation] or forgo[] the benefits of federal funding". *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 11 (1981).

Thus, when viewed as a condition to federal funding, RLUIPA is logically *incapable* of leaving the Indiana prison system worse off, or of imperiling its valid security interests.[9] Indeed, multiple courts have held that a state can decline Federal funding and thereby avoid RLUIPA if it concludes that the financial costs of providing religious accommodations exceed the financial

[9] While explicitly relying on the Federal spending power, the incarcerated-persons section of RLUIPA also purports to be an exercise of the Federal government's jurisdiction over interstate commerce. 42 U.S.C. § 2000cc-1(b)(2); *see also* 146 Cong. Rec. 16,699. Whether the requirements of this section of RLUIPA could constitutionally be imposed on the states as an exercise of the commerce power alone was not considered below, has not been decided by any Circuit Court, and is not before this Court.

advantage of accepting Federal prison funding grants. *See, e.g., Van Wyhe v. Reisch*, 581 F.3d 639, 652 (8th Cir. 2009) ("If a State's citizens view federal policy as sufficiently contrary to local interests they may elect to decline a federal grant." (internal quotation omitted)); *Madison v. Virginia*, 474 F.3d 118, 128 (4th Cir. 2006) ("[T]he choice to accept or reject federal funds remains the prerogative of the States." (internal quotation omitted)).

In extreme cases, it has been recognized that a State's ability to decline federal funding—and thus to avoid the costs of associated requirements—may become illusory. *Dole*, 483 U.S. at 211 ("Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion'." (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937))). However, the present case is very far from such facts. Indiana uses Federal monies to cover just 0.08% of its total prison spending. (Br. at 27 n.1.)[10] The Eighth Circuit has held that South Dakota could choose to reject Federal funding and remove itself from RLUIPA even though that state had historically relied on Federal funds for at least 9.5% of its prison spending. *Van Wyhe*, 581 F.3d at 652 (noting that, although the

[10] According to Appellants, Indiana allocated $740,999,810 to the Department of Corrections for fiscal year 2010-2011. (Br. at 27 n.1.) Of that total, $595,000 came from the Federal government. (*Id.*) Accordingly, Federal funding comprised only 0.08% of the total prison budget.

rejection of federal funds "would indeed be painful, the statute is intended as an inducement, and the final choice is left to each state"). Similarly, the Fourth Circuit held that Virginia could choose to reject Federal funding and free itself from RLUIPA even though it had previously relied on Federal funds for 1.3% of its prison budget. *Madison*, 474 F.3d at 128 (rejecting claim that "this tiny fraction could leave the State without a real choice regarding the funds and their conditions"). Both figures dwarf that of Indiana. Indeed, if 1.3% is a "tiny fraction", then 0.08% is vanishingly small. Clearly, Indiana is not coerced, and could reject Federal prison funding without notable impact if it so chose.

In short, this Court need not fear that RLUIPA, correctly applied, poses any threat to Indiana's ability to maintain security and good order in its prisons.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court reject Appellants' argument that a goal of avoiding expenditures or reducing costs constitutes a compelling governmental interest for the purposes of strict scrutiny analysis, and affirm the District Court's grant of summary judgment.

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COMBINED CERTIFICATIONS

ROGER G. BROOKS hereby certifies as follows:

1. Independent Authorship—This brief complies with Fed. R. App. P. 29(c)(5) because no counsel for any party authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person, other than the amici curiae, their members or their counsel, contributed money that was intended to fund preparing or submitting the brief.

2. Type-Volume Limitations—This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because it contains 5,374 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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4. Filing—Pursuant to Fed. R. App. P. 25(a)(2)(B)(ii), Fed. R. App. P. 31(b) and Circuit Rule 31(b), on April 18, 2011, fifteen copies of this brief were

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5. Service—Pursuant to Fed. R. App. P. 25(c)(1)(C) and 31(b), on April 18, 2011, two copies of this brief were dispatched via third-party commercial carrier for delivery within three days to the following counsel:

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Pursuant to Circuit Rule 31(e)(4), a CD-ROM containing a non-scanned PDF file of this brief was also dispatched to the foregoing counsel.

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