No. 04-1084

IN THE

Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL, ET AL.

Petitioners,

v.

O CENTRO ESPIRITA BENEFICIENTE UNIAO DO VEGETAL (USA), ET AL.,

Respondents.

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

BRIEF *AMICUS CURIAE* OF VARIOUS RELIGIOUS AND CIVIL RIGHTS ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI*

The various religious and civil liberties organizations joining this brief (listed with statement of interest in Appendix A) represent a range of religious denominations, liberals and conservatives (religious and nonreligious), and groups with world views as disparate as American Jewish Congress and Liberty Counsel.

Though this group includes members who often find themselves on opposite sides of Establishment Clause and federalism issues, they speak with one voice in the conviction that accommodating religious exercise by removing government-imposed substantial burdens on religious exercise is an essential element of a democratic society.

Members of this group supported the enactment of the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.* ("RFRA"), to achieve this purpose and now join together to defend its constitutionality. Accordingly, this brief focuses exclusively on the question whether RFRA is a constitutionally legitimate exercise of Congressional authority, specifically in response to the attacks raised by certain *amici.* *See generally* Brief of Amicus Curiae the Tort Claimants' Committee *et al.* in Support of Neither Party Urging Reversal ("Tort Cmtes. Br.").[1]

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[1] All parties have consented to the filing of this brief, and letters indicating their consent have been filed simultaneously with this brief. No counsel for any party authored this brief in whole or in part. No person or entity other than *amicus* and their members made any monetary contributions to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The constitutionality of RFRA as applied to the federal government lies beyond the scope of the certified question, has not been decided by the courts below, has not been briefed by the parties, and has not divided the Courts of Appeals. All of these factors weigh against taking up the issue in this case, and the special circumstances asserted by the Tort Committees weigh little or nothing in favor.

But if this Court were to reach the Tort Committees' challenges, it should reject them all.

All of the arguments raised under the rubric of Separation of Powers lack merit, and some of those arguments would *undermine* the Separation of Powers if accepted. Legislative accommodations of religious exercise like RFRA are the exact opposite of a "frank usurpation" of the judicial function; they are consistent with this Court's recent insistence that such accommodations are principally a legislative function. Nor do broader accommodations like RFRA purport to amend the Constitution apart from the Article V process. Nor is it relevant (at all) under the Separation of Powers that RFRA imposes a strict scrutiny standard to some applications of prior federal statutes.

Similarly flawed is the argument that RFRA has no basis in *any* enumerated power as applied to the federal government. Because RFRA represents a wholesale amendment of prior, inconsistent, federal legislation, RFRA is applied in each case pursuant to whatever enumerated power Congress previously employed to pass the curtailed legislation. What Congress gives, Congress may take away.

And finally, this Court recently rejected an Establishment Clause challenge to RLUIPA Section 3 in *Cutter* v. *Wilkinson,* 125 S. Ct. 2113 (2005), and RLUIPA

Section 3 and RFRA are identical in all respects relevant to *Cutter's* Establishment Clause analysis.

ARGUMENT

I. This Court Need Not Reach the Constitutionality of RFRA as Applied to the Federal Government.

A. The Constitutionality of RFRA Is Beyond the Scope of the Question on Which Certiorari Was Granted, Was Not Generated by the Parties Below, and Has Not Been Briefed or Otherwise Generated by the Parties Presently.

This Court generally avoids deciding questions that lie beyond the scope of the question presented on *certiorari, see Piper Aircraft Co.* v. *Reyno,* 454 U.S. 235, 246 n.12 (1981) (Court may consider questions beyond grant of *certiorari* when "necessary"); questions that were not decided first in the court below, *see, e.g., Cutter* v. *Wilkinson,* 125 S. Ct. 2113 (2005) (declining to address constitutional challenges not addressed below, noting that "we are a court of review, not of first view"); or questions that have not been briefed by the parties, *see, e.g., Patsy* v. *Board of Regents of State of Fla.,* 457 U.S. 496, 515 n.19 (1982) (declining to reach question even jurisdictional question under 11th Amendment where parties had not briefed the issue).

Here, all of these factors militate against review of the constitutionality of RFRA as applied to the federal government. Aware of this, the Tort Committees urge three exceptional circumstances warranting review in this case. *See* Tort Cmtes. Br. 4-6.

Although present *amici* are receptive to this Court's reaching and deciding this question, they believe that the

better course is for the Court to follow its general practices and not address the question in this case, mainly because the three asserted reasons for exceptional treatment are flawed.

First, although the constitutionality of RFRA as applied to the federal government could dispose of this case, that fact should not suffice alone to justify review of the question. *See* Tort Cmtes. Br. 4-5. This argument proposes an exception that would swallow the rule. If the mere possibility of a constitutional challenge to a law – no matter how half-baked or widely rejected the challenge may be – were sufficient to justify this Court's addressing the challenge without presentation on *certiorari*, decision by the court below, or briefing by the parties, then review would be justified in every such case, unless and until this Court has addressed all conceivable constitutional challenges to the law.

Second, notwithstanding the Tort Committees' assertion to the contrary (p.5), the issue of RFRA's constitutionality is *not* especially difficult to get before a court. Indeed, any private litigant relying on a federal statute and faced with a RFRA defense can raise the issue. The Tort Committees themselves are a good example: they are free to challenge the constitutionality of RFRA in their own bankruptcy cases – and perhaps ultimately petition for *certiorari* – as did the creditors in *In re Young,* 141 F.3d 854 (8th Cir.), *cert. denied,* 525 U.S. 811 (1998).[2] And as the brief of the Tort Committees itself illustrates, the question has been decided many times, including in contexts other than bankruptcy. Tort Cmtes. Br. 3 & n.2 (listing cases).

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2 As this court's consideration of a petition for *certiorari* in *In re Young* reflects, the present case is *not* "the first opportunity for this Court to consider the Religious Freedom Restoration Act ('RFRA') since it was declared unconstitutional in *City of Boerne* v. *Flores,* 521 U.S. 507 (1997)." Tort Cmtes. Br. 3.

But even if the question were difficult to generate, this Court has never treated that difficulty as a basis for considering a question not properly presented. More specifically, the Tort Committees claim that the constitutionality of RFRA as applied to the federal government is a question capable of repetition, yet evading review. *See* Tort Cmtes. Br. 5. It is not, but even if it were, that would only provide a defense against the claim that the question is moot, not a reason for this Court to take up a question that is neither presented on *certiorari,* nor addressed below, nor or briefed by the parties.

Third, although *amici* agree that the constitutionality of RFRA is an issue great importance (p.6), that counsels in favor of restraint rather than haste. This Court has repeatedly recognized that "judg[ing] the constitutionality of an Act of Congress" is "'the gravest and most delicate duty that this Court is called upon to perform.'" *Rostker* v. *Goldberg,* 453 U.S. 57, 64 (1981) (quoting *Blodgett* v. *Holden,* 275 U.S. 142, 148, (1927) (Holmes, J.)). Rushing to judgment on this issue, without the benefit of a decision below or the briefing of the parties, might reflect less deference than is due to a "coequal branch of government whose Members take the same oath [the Justices] do to uphold the Constitution of the United States." *Rostker,* 453 U.S. at 64.

B. There Is No Circuit Split to Resolve, as Courts of Appeals Have Uniformly Upheld the Act as Applied to the Federal Government.

The constitutionality of RFRA as applied to the federal government is especially unfit for this Court's review, because there is no disagreement among the Courts of Appeals on that question. *Cf.* S. Ct. Rule 10(a).

As the Tort Committees recognize (p.3), every Court of Appeals to decide the question since *Boerne* has found

RFRA constitutional as applied to the federal government. *O'Bryan* v. *Bureau of Prisons,* 349 F.3d 399, 401 (7th Cir. 2003) (Easterbrook, J.); *Guam* v. *Guerrero,* 290 F.3d 1210, 1221 (9th Cir. 2002) (O'Scannlain, J.); *Kikumura* v. *Hurley,* 242 F.3d 950, 959 (10th Cir. 2001); *Christians* v. *Crystal Evangelical Free Church (In re Young),* 141 F.3d 854, 860 (8th Cir.), *cert. denied,* 525 U.S. 811 (1998). The D.C. Circuit has also upheld the application of RFRA to federal law since *Boerne*. *Henderson* v. *Kennedy,* 265 F.3d 1072, 1073 (D.C. Cir. 2001). *See also E.E.O.C.* v. *Catholic Univ. of America,* 83 F.3d 455, 470 (D.C. Cir. 1996) (rejecting, prior to *Boerne,* constitutional challenges to application of RFRA to federal law based on lack of enumerated powers, Separation of Powers, and Establishment Clause).

Notably, the Tort Committees omit that, prior to *Boerne,* the Courts of Appeals have rejected unanimously the very challenges to RFRA urged here.[3] To be sure, any Enforcement Clause analysis in these decisions has been abrogated or directly overruled by this Court's decision in *Boerne*. But their decisions on other constitutional challenges to RFRA remain good law in those Circuits. More to the point, the unanimity of the Courts of Appeals on the present challenges, even before *Boerne,* underscores the marginal character of those challenges and the lack of any need for this Court to address them.

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3 *Mockaitis* v. *Harcleroad,* 104 F.3d 1522, 1530 (9th Cir.) (rejecting, *inter alia,* Establishment Clause challenge to RFRA), *overruled on other grounds*, 521 U.S. 507 (1997); *Sasnett* v. *Sullivan,* 91 F.3d 1018, 1022 (7th Cir. 1996) (adopting Fifth Circuit's rejection of Establishment Clause and Separation of Powers challenges to RFRA in *Boerne*), *vacated on other grounds*, 521 U.S. 1114 (1997); *E.E.O.C.* v. *Catholic Univ. of America,* 83 F.3d 455, 470 (D.C. Cir. 1996) (rejecting, *inter alia,* lack of enumerated powers, Separation of Powers, and Establishment Clause challenges to RFRA); *Flores* v. *City of Boerne*, 73 F.3d 1352, 1364 (5th Cir. 1996) (rejecting, *inter alia,* Establishment Clause and Separation of Powers challenges), *rev'd on other grounds*, 521 U.S. 507 (1997).

II. If This Court Were to Reach Any Constitutional Challenges to RFRA, It Should Reject Them All.

A. RFRA Respects the Separation of Powers.

The Tort Committees raise various arguments under the rubric of "separation of powers": (1) RFRA "is a frank usurpation of this Court's critical role in interpreting the meaning of the Constitution" (p.7); (2) RFRA "is in fact a constitutional amendment in violation of Article V" (p.9); (3) RFRA "violates the separation of powers because it imposes strict scrutiny on … laws that are presumptively constitutional" (pp.10-11). In accordance with the unanimous views of the federal Courts of Appeals applying the precedents of this Court, these theories should be rejected.

First, Congress does not "usurp[]" the judicial power (p.7) simply by passing laws that provide stronger individual rights than this Court interprets the constitution to provide. Congress does so routinely, including in the area of religious exercise. For example, soon after this Court's decision in *Goldman* v. *Weinberger,* 475 U.S. 503 (1986), which rejected a Free Exercise challenge to the Air Force's ban on wearing yarmulkes, Congress passed legislation specifically accommodating that practice. *See Cutter,* 125 S. Ct. at 2122 (noting with approval Congress' legislative accommodation of religious apparel in response to *Goldman*). **[*ADD *LYNG* EXAMPLE*]**

Indeed, in *Employment Div.* v. *Smith,* 494 U.S. 872 (1990), this Court specifically emphasized the important role of the legislative power in the area of religious accommodation:

> Values that are protected against government interference through enshrinement in the Bill of

> Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.

Smith, 494 U.S. at 890. Thus, far from treating statutes that expand religious accommodation beyond the constitutional minimum as a "usurpation" of the judicial function, this Court has welcomed them as squarely – indeed, preferably – within the legislative function.

Of course, Congress may not implement its disagreement with this Court by passing laws that restrict individual rights guaranteed by the Constitution. *See, e.g., Dickerson* v. *United States,* 530 U.S. 428, 437-38 (2000) (striking down federal statute authorizing admission of evidence obtained in violation of constitutional protections set forth in *Miranda* v. *Arizona,* 384 U.S. 436 (1966)).[4] Nor may Congress express such disagreement by passing laws that exceed its enumerated powers. *See, e.g., Boerne,* 521 U.S. at 529-36 (discussing "whether RFRA can be considered enforcement legislation under § 5 of the Fourteenth Amendment," and concluding that it cannot).

But operating pursuant to its enumerated powers, and within the limits of those powers and of the Bill of Rights,

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4 The only Court of Appeals even to express doubt about the constitutionality of RFRA did so based on a passing reference to *Dickerson. See La Voz Radio de la Comunidad* v. *FCC,* 233 F.3d 313, 319 (6th Cir. 2000). But *Dickerson* does nothing whatsoever to undermine the constitutionality of RFRA, as there is no colorable argument that RFRA curtails existing individual rights under the Free Exercise Clause (or, for that matter, any other constitutional provision).

Congress is free to express and implement its own interpretation of the Constitution through legislation, even when it may differ from the interpretations of this Court. *Boerne,* 521 U.S. at 535 ("When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution.").[5]

In short, it is a time-honored tradition for this Court and Congress to disagree, even on the meaning of the Constitution. The separation of powers is served, not violated, by leaving latitude for that disagreement.

Second, RFRA does not amend, nor even purport to amend, the Constitution by a process less rigorous than Article V's. *See* Tort Cmtes. Br. 10. Although it is true that RFRA passed by large margins that suggested viability as a constitutional amendment,[6] RFRA may be repealed at any time by a simple congressional majority and is subject to judicial review for consistency with the Constitution, just like any other federal statute. To be sure, RFRA implements stronger protections for religious exercise than the First Amendment, but for the reasons stated above, that fact alone does not violate the separation of powers.

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5 Notably, none of these limitations on the legislative power of Congress compel it to accommodate religious exercise retail (amending one statute at a time) rather than wholesale (amending many statutes at once). *See* Tort Cmtes. Br. **[*CITE*]**. As discussed further below, Congress' latitude to prefer broader or narrower accommodations is precisely what the Necessary and Proper Clause protects, and Congress' choice in favor of broader accommodation makes assures rather than jeopardizes RFRA's consistency with the Establishment Clause.

6 In an attempt to diminish the great breadth of political support for RFRA, the Tort Committees inaccurately state that RFRA "was passed pursuant to the 'unanimous consent' procedure in both Houses of Congress." Tort Cmtes. Br. 10. In fact, there was a roll call vote in the Senate, which passed RFRA by a margin of 97-3. **[*CITE*]**

Third and finally, the fact that RFRA applies strict scrutiny to other federal laws is similarly irrelevant to the separation of powers. Notwithstanding the Tort Committees' exaggerations to the contrary, RFRA does not "direct[] the courts to treat all legislative acts as though they are probably illegal." Tort Cmtes. Br. 11. Federal laws will continue to enjoy the same, strong presumption of constitutionality in the vast majority of cases (*i.e.,* all cases not involving the imposition of "substantial burdens" on religious exercise by federal law). After twelve years in force, RFRA has yet to generate the radical shift in power from the legislature to the judiciary that the Tort Committees fear (or believe already exists). In any event, this Court has never held (or even hinted) that a federal law would violate the separation of powers simply because it applied strict scrutiny to other federal laws (however frequently or rarely).

In sum, Tort Committees' Separation of Powers arguments are so weak that the Court should not even bother to take them up. But if this Court were to address them, it should reject them resoundingly.

B. RFRA Does Not Exceed Congress's Enumerated Powers.

The Tort Committees argue (pp.13-14) that RFRA is not enacted pursuant to any enumerated power of Congress (except perhaps the Commerce Clause), and cannot be justified as an exercise of Congress' power under the Necessary and Proper Clause of Article I.

Lower courts have consistently rejected arguments like these, and always for the same reason:

> When [Congress] passes a law within one of its Article I powers (such as, for example, the Bankruptcy Code), Congress can decide, then or later,

> to restrict the reach of the law. In other words, the power to amend a particular federal law in a way that protects religious freedom rests on whatever Article I power authorized the enactment of the law originally. To continue with the bankruptcy example, Congress would certainly act within its Article I powers if it amended the fraudulent conveyance provision of the Bankruptcy Code to exclude tithes to churches from the category of pre-petition transfers that can be overturned by trustees.

Thomas Berg, *The Constitutional Future of Religious Freedom Legislation,* 20 U. ARK. LITTLE ROCK L.J. 715, 731 (1998). *See, e.g., Guerrero,* 290 F.3d at 1220-21 ("[Congress] can carve out a religious exemption from otherwise neutral, generally applicable laws based on its power to enact the underlying statute in the first place."); *In re Young,* 141 F.3d at 860-61 (concluding that RFRA, as applied to federal bankruptcy law, is an exercise of the bankruptcy power effectively amending bankruptcy laws).

In short, the greater includes the lesser. If Congress has the enumerated power to regulate narcotics in commerce (as in this case), Congress also has the power to regulate them incrementally less in order to minimize federal government interference with religious exercise.

The Tort Committees spend seven pages erecting and knocking down straw men on this point. Their lengthy analysis of RFRA as an exercise exclusively of the Commerce Clause (pp.14-18) is misguided. Instead, the appropriate question is whether RFRA is a legitimate *means* under the Necessary and Proper Clause for Congress to exercise whatever enumerated powers Congress had *previously* exercised in passing the federal statute that RFRA would now curtail.

Here, there can be no doubt that application of the Controlled Substances Act to the *hoasca* tea at issue here is a legitimate exercise of Congress' enumerated power under the Commerce Clause. *See Gonzales* v. *Raich,* 125 S. Ct. 2195 (2005). And pursuant to the Necessary and Proper Clause, Congress may subsequently limit the reach of that prior exercise of its authority, using virtually any means it would prefer. This Court long ago emphasized the breadth of Congress' discretion in this regard:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

M'Culloch v. *Maryland,* 17 U.S. (4 Wheat.) 316, 421 (1819). RFRA falls easily within this plenary power of Congress to choose precisely how it will exercise its enumerated powers.

The Tort Committees also argue that RFRA cannot be an exercise of the Necessary and Proper Clause alone, apart from another enumerated power. *See* Tort Cmtes. Br. 18-20. *See also id.* 8-9. But RFRA is not a free-standing exercise of the Necessary and Proper Clause. Instead, it is the means chosen by Congress – wholesale rather than retail – to exercise once again *all* of the enumerated powers it had exercised previously through prior legislation, in order to serve the legitimate end of minimizing federal interference with religious exercise. Once again, the separation of powers would be undermined, not protected, if this Court were to limit Congress' authority to make choices of this sort in shaping its legislation.

C. RFRA Is Consistent with the Establishment Clause.

Notwithstanding this Court's recent decision in *Cutter* v. *Wilkinson,* 125 S. Ct. 2113 (2005), the Tort Committees claim that RFRA violates the Establishment Clause. *Cutter* rejected an Establishment Clause challenge to Section 3 of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc *et seq*. ("RLUIPA"), which implements the *very same* substantial burden / strict scrutiny standard as RFRA.[7]

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7 The Tort Committees repeatedly attempt (pp.12 n.4, 26-27) to manufacture a difference among the strict scrutiny standards of RFRA, RLUIPA, and the U.S. Constitution. To begin with, even if there were such a difference, it would be irrelevant to the constitutionality of RFRA.

But in any event, there is no difference. The language defining strict scrutiny in RFRA and RLUIPA is identical. *Compare* 42 U.S.C. § 2000bb-1(b)(1)-(2) (strict scrutiny language in RFRA), *with id*. § 2000cc-1(a)(1)-(2) (strict scrutiny language in under RLUIPA prison provision), *and with id.* § 2000cc(a)(1)(A)-(B) (strict scrutiny language in under RLUIPA land use provision). Both statutes, in turn, were explicitly modeled after the strict constitutional scrutiny that applied more frequently under the Free Exercise Clause before *Smith,* as the Tort Committees acknowledge elsewhere in their brief. *See* Tort Cmtes. Br. 6-7 (quoting statutory purpose section of RFRA containing specific citations to *Sherbert* v. *Verner,* 374 U.S. 398 (1963) and *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972)). And by the unmistakable terms of both statutes, just as under the Constitution, the government bears the burden of proving both elements of that scrutiny. *Compare* 42 U.S.C. §§ 2000bb-1(b), 2(c), *with id.* §§ 2000cc-1(a), 2(b).

Moreover, this Court's recent decision in *Cutter* relied on constitutional strict scrutiny case law in discussing the meaning of RLUIPA's statutory strict scrutiny language. *See Cutter,* 125 S. Ct. at 2123 (citing *Grutter* v. *Bollinger,* 539 U.S. 306, 327 (2003)). To be sure, *Cutter* recognized that, in the particular context of prisons, it will be more common for the government to satisfy this standard than in other contexts. *See Cutter,* 125 S. Ct. at 2123. But that is because, *as a matter of fact* in the prison context (as in the military context), immediate threats to human health and safety are commonplace and best assessed in the first

Notably, as in *Cutter,* the Establishment Clause challenge asserted here is a facial one. Its principal complaint is with the breadth of the statute, not with its application to the particular facts of this case. Indeed, the Tort Committees' Establishment Clause argument consists mainly of a series of assertions to the effect that RFRA is extremely broad in scope, and much broader than RLUIPA Section 3. *See* Br. 20-22, 26-29.[8]

Some of these assertions are simple exaggerations. Br. 21 (RLUIPA Section 3 "pales in comparison to the scope of RFRA"); *id.* at 26 ("RFRA's scope is breathtaking"). Some are meaningless epithets. *Id.* at 22, 27 (RFRA is "a blind handout"). Some are patently false. *Id.* at 20 ("RFRA has no boundaries").

Hyperbole aside, the bare fact is that RFRA covers federal law of all types but does not reach state or local law at all. RLUIPA Section 3, on the other hand, covers all state and municipal governments that affect interstate commerce or receive federal funds in the course of running their prisons.

Even if this difference in scope were as colossal as the Tort Committees would have it – and it is not – the difference is irrelevant under the Establishment Clause. Although the Court in *Cutter* recognized that the scope of RLUIPA Section 3 is limited to state and local prisons, the decision did not hinge on that fact. Instead, *Cutter* upheld

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instance by the officials closest to those threats; it is *not* because the strict scrutiny standard is any different *as a matter of law*.

8 The Establishment Clause section of Tort Committees' brief contains other arguments as well, but their connection to the Establishment Clause is unclear. There is a 2-page block quote (p.23-24) from *Boerne,* a decision that did not reach the Establishment Clause question, and a third page (p.25) listing references to *Smith* (some hostile) in RFRA's legislative history.

the law "because it alleviates exceptional government-created burdens on private religious exercise," while allowing courts to "take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries," and to assure "that the Act's prescriptions are and will be administered neutrally among different faiths." *Cutter,* 125 S. Ct. at 2121 (citations omitted).

RFRA and RLUIPA Section 3 are exactly alike with respect to these criteria, and any law that satisfies them – whether broader or narrower in scope than RLUIPA Section 3 – would satisfy the requirements of the Establishment Clause.

Indeed, the breadth of an accommodation is an asset rather than a liability under the Establishment Clause. Although narrower accommodations may also satisfy the Establishment Clause, this Court tends to scrutinize them more closely to assess whether they impermissibly prefer one or a few religious groups. *See, e.g., Kiryas Joel* v. *Grumet,* 512 U.S. 687 (1994). *See also Larson* v. *Valente,* 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.") Accordingly, any suggestion that the breadth of an accommodation *increases* Establishment Clause risks has it exactly backwards and should be rejected out of hand.

The Tort Committees' argument based on breadth has an additional flaw that they recognize but fail to address adequately. If legislative accommodations violate the Establishment Clause simply because they cover a broad range of policy areas within a given jurisdiction, approximately a dozen state RFRAs would be invalidated wholesale. *See* Br. 29 n.6. And although the Tort Committees do not acknowledge it, state constitutions that

are interpreted to apply a similarly vigorous standard would suffer the same fate.[9]

The Tort Committees admit that their Establishment Clause theory would jeopardize some state RFRAs, but claim it would only affect those without exceptions. *See* Tort Cmtes. Br. 29 n.6. This is a distinction without a difference. There is simply no reason why a state RFRA (or state constitution) that covers every area of law within the state would violate the Establishment Clause, while another that carves out only a single area would not. Even if the breadth of an accommodation were an Establishment Clause problem – and it is not – it strains credulity to suggest that the incremental difference between comprehensive coverage and a single exception to coverage is a difference of constitutional magnitude under the Establishment Clause. Notably, the Tort Committees fail to cite a single case in support of this meaningless distinction.

CONCLUSION

For the foregoing reasons, this Court should either decline to reach any constitutional challenges to RFRA, or reject any such challenges it would reach.

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9 *See, e.g., Humphrey* v. *Lane*, 728 N.E.2d 1039 (Ohio 2000); *In re Browning*, 476 S.E.2d 465 (N.C. 1996); *State* v. *Miller*, 549 N.W.2d 235 (Wis. 1996); *Attorney Gen.* v. *Desilets*, 636 N.E.2d 233 (Mass. 1994); *Swanner* v. *Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994); *Rourke* v. *N.Y. State Dep't of Corr. Servs*., 603 N.Y.S.2d 647 (N.Y. Sup. Ct. 1993), *aff'd*, 615 N.Y.S.2d 470 (N.Y. App. Div. 1994); *Rupert* v. *City of Portland*, 605 A.2d 63 (Me. 1992); *St. John's Lutheran Church* v. *State Comp. Ins. Fund*, 830 P.2d 1271 (Mont. 1992); *First Covenant Church of Seattle* v. *City of Seattle*, 840 P.2d 174 (Wash. 1992); *State* v. *Evans*, 796 P.2d 178 (Kan.1990); *State* v. *Hershberger*, 462 N.W.2d 393 (Minn. 1990). *See also Arizona* v. *Evans,* 514 U.S. 1, 8 (1995) ("[S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution").

Respectfully submitted,

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September 9, 2005

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APPENDIX A

American Jewish Committee **[*ADD STATEMENT OF INTEREST*]**

American Jewish Congress **[*ADD STATEMENT OF INTEREST*]**

Association on American Indian Affairs **[*ADD STATEMENT OF INTEREST*]**

Becket Fund for Religious Liberty **[*ADD STATEMENT OF INTEREST*]**

Hindu American Foundation **[*ADD STATEMENT OF INTEREST*]**

Liberty Counsel **[*ADD STATEMENT OF INTEREST*]**

Unitarian Universalist Association **[*ADD STATEMENT OF INTEREST*]**