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MADISON V. RITER

LAMPARELLO V. FALWELL
420 F.3d 309 (4th Cir. 2005)

FACTS

Christopher Lamparello registered and maintains a website that is critical of Jerry Falwell at the domain name "www.fallwell.com."[1] Jerry Falwell is a well-known minister who regularly contributes commentary on politics and public affairs, including observations regarding homosexuality.[2] After hearing an interview in which Falwell expressed certain views on homosexuals which Lamparello considered offensive, Lamparello created a website criticizing Falwell's views and "untruths about gay people" and providing alternative facts, scriptural interpretations, and links to other resources.[3] While the website at one time included a link to an Amazon.com webpage, Lamparello's website never sold any goods or services.[4] Falwell holds common law trademarks for "Jerry Falwell," "Falwell," and "Listen America with Jerry Falwell." Falwell's website, "www.falwell.com," receives about 9,000 hits per day, while Lamparello's receives 200 per day.[5]

In October 2001 and June 2003, Falwell sent Lamparello letters demanding that he stop using "www.fallwell.com" or any similar variation of his name.[6] Lamparello filed for a declaratory judgment of noninfringement against Falwell and Jerry Falwell Ministries.[7] Falwell filed counter-claims for trademark infringement under 15 U.S.C. § 1114 (2000); false designation of origin under 15 U.S.C. § 1125(a); unfair competition under 15 U.S.C. § 1126 and the common law of Virginia; and cybersquatting under 15 U.S.C. § 1125(d).[8] The district court noted that no separate cause of action under 15 U.S.C. § 1126 existed for Falwell that was not covered under his 15 U.S.C. § 1125 claim.[9] Furthermore, since the likelihood of confusion test for trademark infringement and unfair competition is essentially the same under Virginia law and the Lanham Act, the state-law claim rose or fell with the federal claim so the court needed only analyze the federal claim.[10]

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1 Lamparello v. Falwell, 420 F.3d 309, 311 (4th Cir. 2005).

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.* at 312.

7 *Id.* Jerry Falwell Ministries is an organization that runs a number of Christian service programs and institutions, including Liberty University, The Old Time Gospel Hour, The Liberty Godparent Home for Unwed Mothers, and The National Liberty Journal Newspaper. Jerry Falwell Ministries, Mission Statement, http://www.falwell.com/about_us2.php (lasted visited Oct. 15, 2006).

8 Lamparello v. Falwell, 420 F.3d 309, 312 (4th Cir. 2005).

9 *Id.* at 312 n.1.

10 *Id.* The Lanham Act is the popular name referring to 15 U.S.C. §§ 1051 et seq., dealing with the law of trademarks, including 15 U.S.C. § 1114 dealing with limitations of remedies for causes of

Both parties filed cross-motions in the district court for summary judgment, stipulating to all relevant facts.[11] The district court granted summary judgment for Falwell, enjoined Lamparello from using Falwell's mark at "www.fallwell.com," and ordered Lamparello to turn the domain name over to Falwell.[12] However, the district court did not grant Falwell's request for statutory damages or attorney fees, finding that Lamparello's primary motive in establishing the site was to publish opinions contrary to Falwell's and was not to divert money or profits.[13] Lamparello appealed the judgment and Falwell appealed the denial of statutory damages and attorney fees.[14] The Fourth Circuit reviewed the case *de novo*.

HOLDING

The Fourth Circuit Court of Appeals, in a three judge panel, held 3-0 that Lamparello's website did not constitute trademark infringement or false designation of origin because it was clear that there was no likelihood of confusion between Lamparello's and Falwell's sites.[15] In addition, Lamparello's website did not violate cybersquatting law, because Lamparello had not exhibited a bad faith intent to profit by attempting to sell the website to Falwell.[16] Lamparello was awarded summary judgment on all counts, rendering Falwell's cross-appeals for statutory damages and lawyer fees moot.[17]

ANALYSIS

The court first addressed the issue of trademark infringement and false designation of origin. Lamparello contended that the Lanham Act should apply only to "commercial speech" in order to ensure that the Act does not encroach upon First Amendment rights.[18] While the court recognized that two recent amendments to the Act made exceptions for noncommercial usage in order to protect First Amendment concerns, the court noted the absence of such language in the provisions for trademark

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action under 15 U.S.C. § 1125(a), referring to civil actions including false designation of origin, and (d), referring to cyberpiracy prevention, which includes cybersquatting.

11 *Lamparello*, 420 F.3d at 312.

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.* at 311, 318.

16 *Id.* at 321–22.

17 *Id.* at 322 & 322 n.8.

18 *Id.* at 313.

infringement and false designation of origin.[19] The court also pointed out that websites "need not actually sell goods or services" to violate trademark infringement or false designation of origin.[20] However, the court stated that it was unnecessary to resolve the "commercial speech" question presented by Lamparello's argument, because Falwell's claims failed for the more fundamental reason that there was no likelihood of confusion.[21]

The Fourth Circuit held that it is permissible to use a competitor's mark if there is no likelihood of confusion.[22] In *Pizzeria Uno Corp. v. Temple*,[23] the court laid out seven factors that can help determine the existence of a likelihood of confusion, although these factors are not always relevant or equally weighed: "(a) the strength or distinctiveness of the mark; (b) the similarity of the two marks; (c) the similarity of the goods/services the marks identify; (d) the similarity of the facilities the two parties use in their businesses; (e) the similarity of the advertising used by the two parties; (f) the defendant's intent; (g) actual confusion."[24] Looking at the first three factors, the court stated that while Falwell's mark is distinctive and the domain name of Lamparello's website bears a close resemblance to Falwell's, Lamparello's site does not look anything like Falwell's.[25] Falwell did not argue that Lamparello's site advertised or conducted business, or that such advertising was similar to his own.[26] Lamparello only intended his site to be a forum of criticism.[27] Finally, the two sites provide opposing ideas such that no one who entered one site would be misled into believing it was authorized by the other.[28] Hence, it was clear, as Falwell conceded at oral argument, that no evidence existed that there was a likelihood of confusion between the two sites.[29]

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[19] *Id.* at 313–14.

[20] *Id.* at 314 (citing People for the Ethical Treatment of Animals v. Doughney, 263 F.3d 359, 365 (4th Cir. 2001)).

[21] *Id.* at 314.

[22] *Id.* at 314.

[23] Pizzeria Uno Corp. v. Temple, 747 F.2d 1522 (4th Cir. 1984). In *Pizzeria*, Pizzeria Uno Corporation filed suit for trademark infringement and unfair competition against Temple for registering the restaurant name, "Taco Uno." *Id.* at 1524–25. The Fourth Circuit examined the claim under the seven factors for trademark infringement. *Id.* at 1527–31. The court found that the mark was distinctive, the two companies served the same purpose and had similar advertising, and that Temple's intent was of no import if the court found a likelihood of confusion. *Id.* at 1534–35. Despite finding a likelihood of confusion, the court affirmed the district court's denial of injunctive relief, but without prejudice. *Id.* at 1535–36. Since Pizzeria Uno Corp. had not penetrated the geographic area where Temple was setting up his business, injunctive relief was not appropriate. *Id.*

[24] Lamparello v. Falwell, 420 F.3d 309, 314–15 (4th Cir. 2005) (citing *Pizzeria*, 747 F.2d at 1527).

[25] *Id.* at 315.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

Falwell, however, tried to argue his claim under the "initial interest confusion" doctrine, which forbids a competitor to lure customers by misleading himself as another even if the confusion is dispelled before the consummation of any sale.[30] Falwell argued that this doctrine was adopted by the court in *People for the Ethical Treatment of Animals v. Doughney (PETA)*[31] and requires the court to simply compare his mark with Lamparello's domain name, "www.fallwell.com," without any consideration of content.[32] The court rejected Falwell's argument, indicating that *PETA* had neither adopted the "initial interest confusion" doctrine nor retreated from the court's practice of examining the use of a mark in its entirety to decide the question of likelihood of confusion.[33] Moreover, the "initial interest confusion" doctrine would not resolve the case in Falwell's favor, because application of the doctrine has been limited to cases involving use of another's mark for financial gain, which is absent in the case of a free website.[34] Furthermore, the court noted that utilizing such a test here would allow a party to insulate itself from criticism, which is not an appropriate use of the Lanham Act.[35] In determining the likelihood of confusion when dealing with a critical website that has no financial impact, both the allegedly infringing domain name and the underlying content of the site must be examined.[36]

Next, the court considered Falwell's cybersquatting claim. A cybersquatting claim has two elements: (1) the owner of the site "had a bad faith intent to profit from using the domain name" and (2) the domain name "is identical or confusingly similar to, or dilutive of, the distinctive and famous mark."[37] The court pointed out that the anti-cybersquatting legislation was enacted to eliminate the problem of individuals registering hundreds of domain names to sell them to the highest bidder, but was not

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30 *Id.* at 315–16.

31 People for the Ethical Treatment of Animals v. Doughney, 263 F.3d 359, 365 (4th Cir. 2001). In *PETA*, Doughney registered the domain name "www.peta.org," for "People Eating Tasty Animals." *Id.* at 362. PETA sued Doughney for trademark infringement, unfair competition, service mark dilution, and cybersquatting. *Id.* The Fourth Circuit affirmed the district court's rejection of Doughney's parody defense to the violation of trademark infringement for likelihood of confusion. *Id.* at 367. A parody requires the simultaneous conveyance of two messages: (1) that it is the original, and (2) that it is not the original, but instead is a parody. *Id.* at 366. While the content of the site may have conveyed the second message, Doughney's domain name, www.peta.org, conveyed only the first message. *Id.* An alleged parody that does not convey the second message is vulnerable to a claim of trademark infringement, because of the likelihood of confusion. *Id.*

32 Lamparello v. Falwell, 420 F.3d 309, 316 (4th Cir. 2005).

33 *Id.*

34 *Id.* at 317.

35 *Id.* at 317–18.

36 *Id.* at 318.

37 *Id.*

enacted to prohibit noncommercial use of domain names.[38] Noncommercial uses, such as critical websites with free access, are beyond the scope of the Act.[39] In determining the difference between abusive and legitimate registration of domain names, the statute provides a non-exhaustive list of factors that may be a guide in deciding whether the registration of the site was motivated by a bad faith intent to profit.[40] The court, relying on the guidance of four of the statute's factors, found that Lamparello did not have a bad faith intent to profit: Lamparello's purpose was to criticize Falwell's views and did not give a financial return (Factor IV); there was no likelihood of confusion (Factor V); Lamparello had made no attempt nor expressed any interest in selling his site to Falwell (Factor VI); and Lamparello did not register multiple domain names (Factor VIII).[41] In fact, the court found that Lamparello's website for "comment and criticism" is precisely the type of action Congress recognized as militating against a finding of bad faith intent to profit.[42]

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[38] *Id.*

[39] *Id.* at 318–19.

[40] *Id.* at 319–20 (noting that the factors are a guide to the court's deliberations in determining bad faith intent to profit (citing Lucas Nursery and Landscaping v. Grosse, 359 F.3d 806, 811 (6th Cir. 2004))). The statue's nonexhaustive list of factors are:

> (I) the trademark or other intellectual property rights of the person, if any, in the domain name;
> (II) the extent to which the domain name consists of the legal name of the person or a name that is otherwise commonly used to identify that person;
> (III) the person's prior use, if any, of the domain name in connection with the bona fide offering of any goods or services;
> (IV) the person's bona fide noncommercial or fair use of the mark in a site accessible under the domain name;
> (V) the person's intent to divert consumers from the mark owner's online location to a site accessible under the domain name that could harm the goodwill represented by the mark, either for commercial gain or with the intent to tarnish or disparage the mark, by creating a likelihood of confusion as to the source, sponsorship, affiliation, or endorsement of the site;
> (VI) the person's offer to transfer, sell, or otherwise assign the domain name to the mark owner or any third party for financial gain without having used, or having an intent to use, the domain name in the bona fide offering of any goods or services, or the person's prior conduct indicating a pattern of such conduct;
> (VII) the person's provision of material and misleading false contact information when applying for the registration of the domain name, the person's intentional failure to maintain accurate contact information, or the person's prior conduct indicating a pattern of such conduct;
> (VIII) the person's registration or acquisitions of multiple domain names which the person knows are identical or confusingly similar to marks of others that are distinctive at the time of the registration of such domain names, or dilutive of famous marks of others that are famous at the time of registration of such domain names, without regard to the goods or services of the parties; and
> (IX) the extent to which the mark incorporated in the person's domain name registration is or is not distinctive and famous within the meaning of subsection (c)(1) of this section.
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> *Id.* at 319 (citing 15 U.S.C. 1125(d)(1)(B)(i)).

[41] *Id.* at 320–21.

[42] *Id.* at 321.

CONCLUSION

The United States Supreme Court denied Falwell's petition for writ of certiorari on April 17, 2006, leaving the Fourth Circuit's decision intact.[43]

The Fourth Circuit was clear in conveying its belief that, in general, the likelihood of confusion doctrine protects First Amendment rights in the realm of trademark infringement.[44] The court also distinguished the likelihood of confusion doctrine that governs violations of trademark infringement from, and not to be conflated with, an evaluation of a parody defense.[45] As in the case of Lamparello's website, it is a defense to a trademark infringement for likelihood of confusion, if the mark simultaneously conveys both the message that the mark is the original and that it is not the original, but actually a parody.[46] Hence, the Fourth Circuit reaffirmed its approach to evaluating a parody defense, which Falwell alleged was abandoned in *PETA*, and declared that when determining a likelihood of confusion between domain names "a court must evaluate an allegedly infringing domain name in conjunction with the content of the website identified by the domain name."[47] This distinction is important because the standard used to establish a parody defense is higher than that to show trademark infringement.

While protecting trademarks is important to commerce and the quality of goods in the market, the protection afforded to trademarks is not as fundamental to our legal and social structure as the freedoms established in the First Amendment. The Supreme Court has noted that "the extent to which the [Lanham] Act may be read to apply to noncommercial speech is limited."[48] Freedom of speech is not more limited just because copyright or trademark issues may be implicated. Moreover, copyright and trademark claims cannot be used as a way of stifling noncommercial speech.

One issue that the reasoning of this case does not specifically address but does implicitly raise is what course of action should be taken when two domain name marks do engender a likelihood of confusion but have not penetrated the same geographic area. The court recognized in *Pizzeria* that injunctive relief is not appropriate where the established mark has not penetrated the geographic area.[49] However, because the worldwide web can be accessed from anywhere, by anyone, and delivers goods to virtually

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43 Falwell v. Lamparello, 126 S. Ct. 1772 (2006).
44 Lamparello v. Falwell, 420 F.3d 309, 314 (4th Cir. 2005).
45 *Id.* at 316.
46 *Id.*
47 *Id.*
48 San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 536 n.15 (1987).
49 Pizzeria Uno Corp. v. Temple, 747 F.2d 1522, 1536 (4th Cir. 1984).

everywhere, it is seemingly one large geographic area. Maintaining a distinction between geographic areas in cyberspace seems highly impractical. However, the argument could be made that on-line businesses that only provide their services to certain geographic areas could not be awarded injunctive relief on a claim against a similar provider with a similar mark that engendered a likelihood of confusion, but who only provided business in a different geographic area. For instance, a local cleaning service company in Virginia could establish an on-line service for its customers and employ the same mark as a major cleaning service company in New York with a similar on-line service. Could either of the companies be awarded injunctive relief?

Given the ubiquity of the internet it seems apparent that an argument of geographic penetration would not long survive; however, given the local nature of a plethora of businesses that will be going on-line in the next decade, such an argument may persist. While the nature of on-line businesses, such as Amazon.com and eBay, may easily penetrate every market as soon as it goes on-line, local businesses that wish to meet new demands of their clients and have no interest or plan of going global will present the same practical considerations that counseled against the availability of injunctive relief for non-geographic competition. One alternative advocated is to develop a jurisprudence that allows concurrent use of trademarks and imposes court issued modifications to diminish the likelihood to confusion.[50] In any event, this is an issue that the court may have to grapple with during next several years.

Summary and Analysis Prepared By:
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[50] Robert Nupp, *Concurrent Use of Trademarks on the Internet: Reconciling the Concept of Geographically Delimited Trademarks with the Reality of the Internet*, 64 OHIO ST. L.J. 617 (2003).

MADISON V. RITER
411 F. Supp. 2d 645 (W.D. Va. 2006)

FACTS

Ira W. Madison is a Virginia inmate held in custody by the Virginia Department of Corrections (VDOC).[1] Madison claims to be a "Hebrew Israelite" which requires him to eat a kosher diet.[2] He asserts that his religious beliefs can be satisfied by the provision of the Common Fare Diet, available to VDOC inmates upon approval from authorities.[3] Madison applied twice to receive this diet, but was turned down each time by prison officials.[4] Madison then brought suit under the Civil Rights Act[5] and the Religious Land Use and Institutionalized Persons Act (RLUIPA)[6] seeking monetary and permanent injunctive relief.[7]

Defendants filed a motion for summary judgment as to Madison's First Amendment claims and as to his RLUIPA claims, arguing that the statute was unconstitutional on several grounds.[8] The court granted the motion as to the First Amendment claims, but denied the motion as to the RLUIPA claims, and encouraged the parties to settle.[9] After no settlement was reached, the court ruled that RLUIPA violates the Establishment Clause[10] and was therefore unconstitutional.[11] The Fourth Circuit Court of Appeals reversed, and the Supreme Court denied defendants' petition for certiorari as to the Establishment Clause challenge.[12] The court then heard arguments from the parties, including the United States as intervener, as to the remaining constitutional challenges to RLUIPA.[13]

HOLDING

Writing for the court, Senior District Judge Turk held that RLUIPA is a valid exercise of Congress's authority under the Spending Clause[14]

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1 Madison v. Riter, 411 F. Supp. 2d 645, 648 (W.D. Va. 2006).
2 *Id.*
3 *Id.*
4 *Id.*
5 Civil Rights Act, 42 U.S.C. § 1983 (2000).
6 Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc–2000cc-5 (2000).
7 Madison v. Riter, 411 F. Supp. 2d 645, 648 (W.D. Va. 2006).
8 *Id.* at 649.
9 *Id.*
10 U.S. CONST. amend. I.
11 *See* Madison v. Riter, 240 F. Supp. 2d 566, 570 (W.D. Va. 2003) (stating that RLUIPA is a clear violation of the Establishment Clause because it has the primary effect of advancing religion above other fundamental rights), *rev'd*, 355 F.3d 310 (4th Cir. 2003), *cert. denied*, 125 S. Ct. 2536 (2005).
12 *Madison*, 411 F. Supp. 2d at 649.
13 *Id.*
14 U.S. CONST. art. I, § 8, cl. 1.

because it unambiguously conditions grants of federal funds on the protection of prisoners' religious rights.[15] The court also determined that RLUIPA does not impermissibly interfere with the State's sovereign authority to make religious policy and does not violate the separation of powers doctrine.[16]

ANALYSIS

Section 3 of RLUIPA prohibits the government from imposing a substantial burden on the religious exercise of a person who is imprisoned unless the government demonstrates that imposing this burden furthers a compelling interest and is the least restrictive means of furthering that interest.[17] This applies in any case where such a burden is imposed on any program or activity that receives federal funding assistance.[18] It is undisputed that the VDOC receives such assistance and thereby falls within the reach of RLUIPA.[19]

Defendants first contend that Congress may not use the Spending Clause to regulate religious policies in state prisons.[20] In analysis of this contention, the court cited to *South Dakota v. Dole*[21] which stated that Congress, under the Spending Clause, may further desired policies by conditioning the receipt of federal funds on the compliance with its directives.[22] The Supreme Court established four limitations on this power: (1) that Congress use its spending power to further the general welfare; (2) that Congress state its conditions on the receipt of federal funds unambiguously; (3) that the conditions be related to the federal interest in particular programs; and (4) that the conditions be valid under any other

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15 Madison v. Riter, 411 F. Supp. 2d 645, 648 (W.D. Va. 2006).

16 *Id.* at 654, 656.

17 Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1(a) (2000).

18 42 U.S.C. § 2000cc-1(b)(1).

19 *Madison*, 411 F. Supp. 2d at 648.

20 *Id.* at 650.

21 South Dakota v. Dole, 483 U.S. 203 (1987). The Supreme Court considered the issue of federalism and Congressional power under the Taxing and Spending Clause. In 1984, Congress passed legislation withholding a certain percentage of federal highway funds from states that did not adopt a minimum drinking age of 21-years-old. *Id.* at 205. South Dakota allowed 19-year-olds to purchase beer containing up to 3.2% alcohol and sued to challenge the federal statute. *Id.* The Supreme Court held that Congress had engaged in a valid exercise of its power under the Taxing and Spending clause. *Id.* at 203. Congress's spending is subject to four restrictions: first, it must promote "general welfare;" it must be unambiguous; it should relate to the federal interest in particular national projects; and other constitutional provisions may supersede conditional grants. *Id.* at 207–08. However, the Court held that the statute was not an attempt to induce states to engage in activities that would be unconstitutional, and thus, the Twenty-first Amendment does not bar conditional grant of funds so as to invalidate the statute. *Id.* at 210. The highway funds were merely a pressure on the State to comply, not a compulsion to do so. *Id.* at 204.

22 Madison v. Riter, 411 F. Supp. 2d 645, 650 (W.D. Va. 2006) (citing *Dole*, 483 U.S. at 206).

constitutional provision.[23] The Supreme Court also noted that any inducements to take the federal funding must not be coercive in nature.[24]

The court addressed each of these considerations individually and concluded that Congress validly exercised its spending power in enacting RLUIPA. First, the court examined whether RLUIPA promotes the general welfare. The court deferred to Congress's judgment[25] that RLUIPA was designed to ensure prisoners' rights to exercise their religious beliefs without interference by state or local governments.[26] Moreover, other courts have previously held that RLUIPA does promote the general welfare.[27] Therefore, the court concluded that RLUIPA met the first *Dole* limitation.[28]

Second, the court addressed whether the RLUIPA conditions are ambiguous. In determining that the conditions are unambiguous, the court stated that RLUIPA, on its face, clearly notifies states that if they accept federal funds, they will be subject to lawsuits if they substantially burden a prisoner's religious exercise.[29] Congress does not have to list all types of conduct that would be improper, because this condition clearly subjects states to a duty not to burden prisoners' religious rights.[30] Furthermore, other courts have previously held that this condition is unambiguous.[31]

Third, the court addressed whether these conditions are related to a federal interest. A condition on federal funding is constitutional so long as it is "reasonably calculated to address [an] impediment to a purpose for which the funds are expended."[32] The court found that the condition here was directly related to the purpose of assisting states in rehabilitating their prisoners.[33] Defendants argued that federal funding conditions only apply to instrumentalities of commerce, but the court rejected this argument by stating that *Dole* does not limit the imposition of such conditions on only these entities.[34] The court cited the Rehabilitation Act[35] as an example, which the Fourth Circuit recently upheld as valid Spending Clause legislation even

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[23] *Dole*, 483 U.S. at 207–08.

[24] *Id.* at 211.

[25] *See id.* at 207 (stating that in considering whether an expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress).

[26] *Madison*, 411 F. Supp. 2d at 651.

[27] *Id.* (citing Cutter v. Wilkinson, 423 F.3d 579, 585 (6th Cir. 2005); Charles v. Verhagen, 348 F.3d 601, 607 (7th Cir. 2003); Mayweathers v. Newland, 314 F.3d 1062, 1066–67 (9th Cir. 2002)).

[28] *Id.*

[29] *Id.* (citing Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc-1(a), 1(b)(1), 2(a) (2000)).

[30] *Id.* (citing Benning v. Georgia, 391 F.3d 1299, 1306 (11th Cir. 2004)).

[31] *Id.* at 652 (citing *Cutter*, 423 F.3d at 586; *Benning*, 391 F.3d at 1305; *Mayweathers*, 314 F.3d at 1067).

[32] *Id.* (quoting South Dakota v. Dole, 483 U.S. 203, 209 (1987)).

[33] *Id.*

[34] *Id.*

[35] Rehabilitation Act, 29 U.S.C. § 794 (2000).

though it applies to state agencies which are not instrumentalities of commerce.[36] Defendants also argued that RLUIPA requires state prisons to accommodate prisoners' religious beliefs to an extent not required by the First Amendment.[37] The court stated that while Congress may not use the spending power to induce states to engage in unconstitutional activities, Congress may use the spending power to indirectly achieve objectives that it does not have the power to achieve directly.[38] Congress certainly has an interest in the protection of civil rights and may, under the spending power, offer financial funding to only those institutions that protect these rights.[39] The court, therefore, found that RLUIPA's federal funding conditions are clearly related to the furtherance of federal interests.[40] The court also noted that other courts have consistently found that RLUIPA is reasonably calculated to address the federal government's interest in the protection of religious beliefs and conduct.[41]

Finally, the court concluded that no other constitutional provision bars the RLUIPA funding conditions before addressing the concern that the funding conditions must not be coercive.[42] The Fourth Circuit has based its determination on whether a funding condition is coercive on the degree to which the institution actually relies on the federal funding in question.[43] Consistent with this approach, the court announced that the coercion inquiry to be made is whether the funds conditioned are so necessary to a state agency that its only choice is to accept the funds and the attached conditions.[44]

In this situation, the VDOC received about $11 million in federal funds in 2005, an amount representing 1.3% of its total budget of $848

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[36] Madison v. Riter, 411 F. Supp. 2d 645, 652 (W.D. Va. 2006) (citing Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474 (4th Cir. 2005)).

[37] *Id.*

[38] *Id.* (citing South Dakota v. Dole, 483 U.S. 203, 210 (1987) (stating that the "independent constitutional bar limitation on the spending power is not a prohibition on the indirect achievement of objectives that Congress is not empowered to achieve directly, but rather stands for the proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional")).

[39] *Id.* See *Constantine*, 411 F.3d at 492 (stating that Congress under the spending power may require that "public funds, to which all taxpayers . . . contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in . . . discrimination." (quoting Lau v. Nichols, 414 U.S. 563, 569 (1974))).

[40] *Madison*, 411 F. Supp. at 653.

[41] *Id.* (citing Cutter v. Wilkinson, 423 F.3d 579, 586 (6th Cir. 2005); Benning v. Georgia, 391 F.3d 1299, 1307–08 (11th Cir. 2004); Charles v. Verhagen, 348 F.3d 601, 609 (7th Cir. 2003); Mayweathers v. Newland, 314 F.3d 1062, 1067 (9th Cir. 2002)).

[42] Madison v. Riter, 411 F. Supp. 2d 645, 653 (W.D. Va. 2006).

[43] *Id.* at 654 (citing Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 493 (4th Cir. 2005)).

[44] *Id.*

million.[45] Defendants assert that if it lost this 1.3%, Virginia would be forced to seek out options such as diverting money from other state agencies or raising taxes in order to make up for the deficit.[46] The court, however, found that the defendants failed to prove that such options are impractical for the State, and thereby failed to prove that the RLUIPA's funding conditions are coercive.[47]

Defendants' second main argument was that RLUIPA impermissibly interferes with the State's right to make its own religious policy. The court addressed this argument under the Tenth Amendment, Eleventh Amendment, and Fourteenth Amendment. First, the court determined whether RLUIPA violates the Tenth Amendment. The court stated that the Tenth Amendment argument must fail on its face, because the court held that RLUIPA is a valid exercise of Congressional power under the Spending Clause, an enumerated constitutional power.[48] The court also noted that RLUIPA does not require states to adopt particular religious policies, and that its provisions need not be followed if the VDOC decided not to accept federal funding.[49]

Second, the court examined whether the defendants were immune from this lawsuit under the Eleventh Amendment. RLUIPA states that a person may assert a violation of this Act as a claim in a judicial proceeding and obtain appropriate relief against a government.[50] The court stated that implicit in this section of RLUIPA was an unambiguous requirement that states which accept federal funds waive their sovereign immunity from lawsuits filed under the Act, and thereby found no Eleventh Amendment immunity.[51]

Third, the court analyzed the defendants' claim under the Fourteenth Amendment. The court found that because RLUIPA's requirements are rooted in Congress's spending and commerce powers, and because it already held that RLUIPA was a valid exercise of Congress's spending power, the defendants' Fourteenth Amendment argument must fail.[52]

Defendants finally contended that RLUIPA violates the separation of powers doctrine. The court noted the Supreme Court's decision in *Employment Division v. Smith*,[53] which held that laws of general applicability

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45 *Id.* at 653.

46 *Id.* at 654.

47 *Id.*

48 *Id.* at 655.

49 *Id.*

50 Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-2(a) (2000).

51 Madison v. Riter, 411 F. Supp. 2d 645, 656 (W.D. Va. 2006) (citing Benning v. Georgia, 391 F.3d 1299, 1306–07 (11th Cir. 2004)).

52 *Id.*

53 Employment Division v. Smith, 494 U.S. 872 (1990) (holding that Oregon drug laws applied to ceremonial ingestion of peyote, thus the state could deny claimants unemployment compensation for work-related misconduct based on use of the drug regardless of the free exercise clause). In *Employment*,

that incidentally burden religious conduct do not violate the First Amendment.[54] RLUIPA on the other hand sets the standard higher by requiring that any substantial burden imposed on a prisoner's religious exercise be justified by a compelling government interest furthered in the least restrictive means.[55] The court stated that the Seventh Circuit had previously found that RLUIPA did not violate the separation of powers doctrine.[56] The Seventh Circuit Court of Appeals reasoned that RLUIPA did not overturn *Smith's* holding but rather provided further protection of religious conduct, respecting that *Smith* only set a constitutional floor, not a ceiling, for the protection of personal liberty.[57] *Smith* "explicitly left heightened legislative protection for religious worship to the political branches."[58]

CONCLUSION

The District Court's holding that Congress has properly exercised its power under the Spending Clause in enacting RLUIPA affirms that Congress seems to have nearly unlimited power in conditioning funds on any objective it seeks to achieve. Whether Congress is attempting to condition federal funds on regulations regarding highway safety,[59] education,[60] or most recently military recruitment,[61] the Supreme Court has been very willing to

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the Supreme Court considered whether a state can require an individual to comply with a law that forbids the performance of an act that his religious belief requires. The Court reasoned that as long as the law is not specifically directed to religious practice then it is constitutional. *Id.* at 872–74. Respondents Alfred Smith and Galen Black were fired from their jobs because they ingested peyote for religious purposes at a Native American Church ceremony. Their unemployment compensation petition was denied because they had been fired due to "work-related misconduct" despite the religious motivation. *Id.* at 874–76. Previous Supreme Court decisions have stated that the right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability" because the law bars conduct that a religion prescribes. *Id.* at 879.

[54] *Id.* at 879 (stating that the right of free exercise of religion does not relieve an individual of the obligation to comply with a neutral law of general applicability).

[55] *Madison*, 411 F. Supp. at 656–57.

[56] *Id.* at 657.

[57] *Id.* (citing Mayweathers v. Newland, 314 F.3d 1062, 1070 (9th Cir. 2002)).

[58] *Id.* (quoting *Mayweathers*, 314 F.3d at 1070).

[59] *See* South Dakota v. Dole, 483 U.S. 203 (1987) (holding that 23 U.S.C. § 158, which required the withdrawal of five percent of the federal highway funds to a State that failed to prohibit anyone under 21 years of age from purchasing or possessing alcohol, was a valid exercise of Congress's spending power).

[60] *See* Grove City Coll. v. Bell, 465 U.S. 555 (1984) (rejecting a private college's claim that conditioning its funds on compliance with Title IX of the Education Amendments violated the First Amendment because the college could decline the Government's funds).

[61] *See* Rumsfeld v. Forum for Academic and Institutional Rights, 126 S. Ct. 1297 (2006) (holding that Congress under the Solomon Amendment could require law schools to provide equal access to military recruiters without violating the schools' freedoms of speech or association under its spending power).

permit Congress to do so. It is no surprise then that this District Court and numerous Circuit Courts have found that Congress has not exceeded its spending power in enacting the statute at issue here. Perhaps this is because the test as enunciated in *Dole* does not appear to be difficult to satisfy. With regards to the first prong, the Supreme Court as far back as 1937 stated that the discretion as to what constitutes "general welfare" belongs to Congress, unless the choice was clearly wrong and was a display of arbitrary power rather than an exercise of judgment.[62] It appears that as long as Congress has a reasonably plausible explanation of how its use of the spending power helps the public at large, its decision-making will not be questioned. The second prong requires Congress to attach its conditions unambiguously; surely a clear statement within the statute of what must be done in order to receive the funds would fulfill this requirement. Concerning the third prong, Congress need only show that the federal funds are contingent on and related to a program that is of national interest. As this court stated, Congress certainly has an interest in the protection of civil rights and has the discretion to provide funds only to those institutions that protect such rights.[63] Finally, the legislation must not be in violation of any other constitutional provision and the receipt of the funding must not be coercive in nature. Congress simply must follow the law of the land and not provide such a significant amount of funds to a state agency to the point where that agency becomes fully reliant on those funds because it lacks other options to receive such money. Congress's Article I spending power is nearly unbridled, as it has successfully regulated any area it so chooses, and continues to do so.

The District Court's holding is a continued effort by the courts to uphold RLUIPA on its face and ensure that prisoners' religious beliefs and conduct for the most part are free from interference. In fact, RLUIPA offers a level of protection of religious worship that is not even constitutionally required, and the courts have respected Congress's objectives against several constitutional challenges brought against the statute. Writing for a unanimous Supreme Court, Justice Ginsburg in *Cutter v. Wilkinson*[64] upheld Section 3 of RLUIPA against an Establishment Clause challenge.[65] Ginsburg wrote that this section had a legitimate purpose of alleviating substantial burdens imposed by the government on religious exercise, did not

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[62] Helvering v. Davis, 301 U.S. 619, 640 (1937).

[63] Madison v. Riter, 411 F. Supp. 2d 645, 652 (W.D. Va. 2006) (citing Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 492 (4th Cir. 2005)).

[64] Cutter v. Wilkinson, 544 U.S. 709 (2005). In three different actions, prison officials were sued by state prisoners who complained that they were denied their right to freely practice their religion. This came at a time when there were concerns with security in violation of RLUIPA. The Court held that Section 3 of RLUIPA did not violate the Establishment Clause because it does not impede on state establishments as no State has an established religion. *Id.* at 732.

[65] *Id.* at 720.

elevate the accommodation of religious exercise over an institution's need to preserve order and safety, and did not treat one faith differently from any other.[66] Ginsburg noted that the Court's holding in *Smith* did not prevent the political branches from being able to protect religious exercise through legislative accommodation.[67] This was echoed here when the court concluded that the legislature did not violate the separation of powers doctrine because it had the right to expand the protections offered by *Smith*.[68] Furthermore, the Sixth Circuit,[69] Seventh Circuit,[70] Ninth Circuit,[71] and Eleventh Circuit[72] also rejected the Spending Clause challenge showing a developing uniformity amongst the courts throughout the nation. Although this case is up for an interlocutory appeal, it seems unlikely that the Fourth Circuit Court of Appeals will reverse the District Court's holding in light of how several other circuits have addressed the issue.

Altogether, these cases show that the courts are not only taking seriously the importance of religion but also ensuring that prisoners are not being forgotten about or further punished for exercising their religious beliefs. Religious liberty is not simply a fundamental right, nor simply a constitutional right, but the "first freedom" mentioned under the First Amendment that we as U.S. citizens have.[73] Accordingly, the courts have permitted Congress to step in and condition federal funding assistance on allowing prisoners to be free from substantial burdens on their religious conduct. This is especially important considering that prisoners are a confined class of people who need outside assistance in order to be able to exercise some of their constitutional rights. The government must usually step in when a prisoner seeks to exercise his religious beliefs or observe a religious holiday.[74] The government is thus very much in control and highly

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[66] *Id.* at 720–23.

[67] *Id.* at 714 (citing Employment Division v. Smith, 494 U.S. 872, 874 (1990)).

[68] *Madison*, 411 F. Supp. 2d at 657.

[69] *See* Cutter v. Wilkinson, 423 F.3d 579 (6th Cir. 2005) (holding that RLUIPA is a valid exercise of Congress's spending power and under the Tenth Amendment).

[70] *See* Charles v. Verhagen, 348 F.3d 601 (7th Cir. 2003) (holding that RLUIPA does not violate the Establishment Clause and is valid under the Spending Clause).

[71] *See* Mayweathers v. Newland, 314 F.3d 1062 (9th Cir. 2002) (rejecting challenges against RLUIPA under the Spending Clause, Establishment Clause, Commerce Clause, Tenth Amendment, and separation of powers doctrine).

[72] *See* Benning v. Georgia, 391 F.3d 1299 (11th Cir. 2004) (holding that RLUIPA is a valid exercise of Congress's spending power and does not violate the Establishment Clause).

[73] *See Permissible Accommodation of Religion—Religious Land Use and Institutionalized Persons Act of 2000*, 119 HARV. L. REV. 238, 246–47 (2005) (stating that religion is privileged in the Constitution's textual hierarchy and has been discussed as the "first freedom" standing at the core of liberal democratic ideas).

[74] *Id.* at 245 (stating that virtually any religious observance requires some government involvement).

able to prevent a prisoner from engaging in his religious observance.[75] This concern has not gone unnoticed by the Supreme Court; instead it was a major factor in upholding Section 3 of RLUIPA. As Justice Ginsburg emphasized in *Cutter*, RLUIPA "protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion."[76] Since the Supreme Court's holding in *Cutter*, the courts have continued to reject any and all constitutional challenges to Section 3 of RLUIPA, and it appears that prisoners, mental patients, or anyone else institutionalized by a facility accepting federal funds will be able to freely exercise their religious beliefs.

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[75] *Id.* at 246 (stating that the potential for the government to deprive prisoners of their ability to engage in religious observance is extremely high).

[76] Cutter v. Wilkinson, 544 U.S. 709, 721 (2005).