

No. 09-16404

United States Court of Appeals
FOR THE NINTH CIRCUIT

PATRICK M. McCOLLUM, et al.,

Plaintiffs/Appellants,

v.

**CALIFORNIA DEPARTMENT OF CORRECTIONS AND
REHABILITATION, et al.,**

Defendants/Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
CASE No. C-04-3339 CRB**

***AMICI CURIAE* FLORIDA JUSTICE INSTITUTE AND LEGAL AID
SOCIETY OF NEW YORK CITY'S BRIEF IN SUPPORT OF
PLAINTIFFS-APPELLANTS**

Randall C. Berg, Jr., Esq.*
Joshua A. Glickman, Esq.
Shawn A. Heller, Esq.

Florida Justice Institute, Inc.
100 S.E. Second Street
3750 Bank of America Tower
Miami, Florida 33131
(305) 358-2081
Attorneys for *Amici Curiae*
* Counsel of Record

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *Amici Curiae* certify that the Florida Justice Institute, Inc. and the Legal Aid Society of the City of New York are both Section 501(c)(3), not-for-profit public interest law firms, incorporated respectively in Florida and New York. None of the *amici* has a parent corporation and none is publicly held by a company which owns 10% or more of the *amici*'s stock, as none have stock.

Date: November 25, 2009

s/Randall C. Berg, Jr.

Randall C. Berg, Jr., Esq.*

Attorneys for *Amici Curiae*

Florida Justice Institute, Inc.
100 S.E. Second Street
3750 Bank of America Tower
Miami, Florida 33131
(305) 358-2081

* Counsel of Record

TABLE OF CONTENTS

<u>Item</u>	<u>Page</u>
RULE 26.1 CORPORATE DISCLOSURE STATEMENT.....	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF IDENTITIES OF AMICI CURIAE	1
ARGUMENT	3
I. NON-INSTITUTIONALIZED PERSONS OF FAITH HAVE STANDING TO ASSERT RLUIPA CLAIMS.....	3
A. Non-Institutionalized Persons of Faith Have Legally Protected Interests under RLUIPA and Suffer Injuries in Fact.....	7
B. Non-Institutionalized Persons of Faith Can Easily Trace Their Injuries to the Conduct of a Correctional Entity	11
C. Injuries Suffered by a Non-Institutionalized Person of Faith are Likely to be Redressed by a Favorable RLUIPA Ruling.....	13
II. NON-INSTITUTIONALIZED PERSONS OF FAITH ALTERNATIVELY ENJOY THIRD PARTY STANDING TO ASSERT RLUIPA CLAIMS ON BEHALF OF INCARCERATED PERSONS	14
A. Non-Institutionalized Persons of Faith Can Suffer Injuries in Fact Recognized as Addressable by RLUIPA.....	16
B. Non-Institutionalized Persons of Faith Have a Close Relationship with the Third Party – Institutionalized Persons – to Satisfy Third Party Standing	19

TABLE OF CONTENTS
(Continued)

	<u>Page</u>
C. Third Party Inmates are Hindered in Their Assertion of Their Own Interests	22
CONCLUSION	25
CERTIFICATE OF COMPLIANCE	26
CERTIFICATE OF SERVICE	27

TABLE OF AUTHORITIES

	<u>Page</u>
Federal Cases	
<i>Ass'n of Data Processing Serv. Orgs., Inc. v. Camp</i> , 397 U.S. 150 (1970).....	5,6
<i>Bonnichsen v. United States</i> , 367 F.3d 864 (9th Cir. 2004)	13
<i>Carey v. Population Serv. Int'l</i> , 431 U.S. 678 (1977).....	20
<i>Craig v. Boren</i> , 429 U.S. 190 (1976).....	20
<i>Cutter v. Wilkinson</i> , 54 U.S. 709 (2005).....	21
<i>Eisenstadt v. Baird</i> , 405 U.S. 438 (1972).....	21
<i>Friends of the Earth, Inc. v. Laidlaw Environmental Svcs., Inc.</i> , 528 U.S. 167 (2000).....	17, 18
<i>Gladstone Realtors v. Village of Bellwood</i> , 441 U.S. 91 (1979).....	5, 11
<i>Graham v. Fed. Emergency Mgmt. Agency</i> , 149 F.3d 997 (9th Cir.1998)	13
<i>Hodel v. Irving</i> , 481 U.S. 704 (1987).....	17
<i>Kowalski v. Tesmer</i> , 125 S. Ct. 564 (2004).....	15

TABLE OF AUTHORITIES
(Continued)

	<u>Page</u>
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992).....	7, 11, 13
<i>Massey v. Wheeler</i> , 221 F.3d 1030 (7th Cir. 2000)	24
<i>McCollum v. State of California</i> , 2006 WL 2263912 (N.D. Cal.)	9
<i>Niece v. Fitzner</i> , 922 F. Supp. 1208 (E.D. Mich. 1996).....	10
<i>Powers v. Ohio</i> , 499 U.S. 400 (1991).....	15, 16, 22, 23,24
<i>Secretary of State of Md. v. Joseph H. Munson Co.</i> , 467 U.S. 947 (1984).....	24,25
<i>Shaw v. Hahn</i> , 56 F.3d 1128 (9th Cir. 1995)	15
<i>Singleton v. Wulff</i> , 428 U.S. 106 (1976).....	15, 16, 19, 20, 22, 23, 24
<i>U.S. Dept't of Labor v. Triplett</i> , 494 U.S. 715 (1990).....	20, 21
<i>United Food & Commercial Workers Union v. Brown Group</i> , 517 U.S. 544 (1996).....	14
<i>United States v. Students Challenging Regulatory Agency Procedures (SCRAP)</i> , 412 U.S. 669 (1973).....	17
<i>Village of Arlington Heights v. Metropolitan Housing Development Corp.</i> , 429 U.S. 252 (1977).....	11, 12
<i>Virginia v. American Booksellers Ass'n</i> , 484 U.S. 383 (1988).....	20

TABLE OF AUTHORITIES
(Continued)

	<u>Page</u>
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975).....	11
<i>Young Apts., Inc. v. Town of Jupiter</i> , 529 F.3d 1027 (11th Cir. 2008)	15,16 ,18, 19, 21, 23
 Statutes	
42 U.S.C. § 2000cc-1	9, 18
42 U.S.C. § 2000cc-1(a).....	4, 5, 21
42 U.S.C. § 2000cc-2(e).....	5,6
42 U.S.C. § 2000cc-3(g).....	5
42 U.S.C. § 2000cc-5(1).....	5
 Other Authorities	
Administrative Law Treatise § 16.7.....	17
Derek L. Gaubatz, <i>RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA’s Prisoner Provisions</i> , 28 Harv.J.L. & Pub. Pol’y 501, (2005).....	7
Erwin Chemerinsky, <i>Federal Jurisdiction</i> , 83-89 (3d ed. 1999).....	15
Richard Pierce, <i>Administrative Law Treatise</i> § 16.7	17
Senator Edward Kennedy, <i>Statements of Introduced Bills and Joint Resolutions</i> , S. Doc. No. 6689, 106th Cong. (July 13, 2000)	6
Senator Orrin Hatch, <i>Statements of Introduced Bills and Joint Resolutions</i> , S. Doc. No. 6688, 106th Cong. (July 13, 2000)	8

STATEMENT OF IDENTITIES OF *AMICI CURIAE*

This *Amici Curiae* brief in support of Plaintiffs-Appellants is filed with an accompanying Motion for Leave to Appear, on behalf of the following organizations:

Florida Justice Institute, Inc. The Florida Justice Institute, Inc. (“FJI” or “Florida Justice Institute”) is a private, not-for-profit public interest law firm founded in 1978 by leaders of the private bar to, in part, provide civil legal assistance to persons in Florida’s prisons and jails as a way of seeking to improve conditions of incarceration. It is primarily funded by The Florida Bar Foundation. The non-institutionalized religious and faith-based clients of FJI whose ministries are designed to benefit prisoners are impacted by the lower court’s ruling because it holds that non-institutionalized persons and religious organizations lack standing under the Religious Land Use and Institutionalized Persons Act (“RLUIPA”) to bring a claim challenging their ability to minister to the institutionalized. The Florida Justice Institute believes that its experience with regards to the application of federal and constitutional law in the correctional setting enable it to aid the Court in clarifying the complex issues inherent in determining the proper scope of standing for non-institutionalized persons under RLUIPA, and so will assist the Court in its evaluation of the pending appeal.

Legal Aid Society of the City of New York. The Legal Aid Society of the City of New York (“Legal Aid Society”) is a private organization that has provided free legal assistance to indigent persons in New York City for nearly 125 years. Through its Prisoners’ Rights Project, the Legal Aid Society seeks to ensure that prisoners are afforded full protection of their constitutional and statutory rights. The Legal Aid Society assists prisoners in New York City jails and New York state prisons through administrative advocacy and litigation, and also advises members of the private bar who represent or assist prisoners. The ability of religious persons to bring claims under RLUIPA affects the Legal Aid Society’s ability to enforce its clients’ rights to practice their sincerely held religious beliefs. The Legal Aid Society believes that its experience with regards to the application of federal and constitutional law in the correctional setting enable it to aid the Court in clarifying the complex issues inherent in determining the proper scope of standing for non-institutionalized persons under RLUIPA, and so will assist the Court in its evaluation of the pending appeal.

ARGUMENT

I.

NON-INSTITUTIONALIZED PERSONS OF FAITH HAVE STANDING TO ASSERT RLUIPA CLAIMS

The issue *Amici* encourages this Court to decide is whether a non-institutionalized person of faith has standing to bring a RLUIPA claim against a correctional entity imposing a substantial burden on that non-institutionalized person of faith's free exercise of religion. This issue is a case of first impression. The lower court's determination — without much substantive legal analysis — that a non-institutionalized person of faith does not enjoy standing to bring a claim pursuant to RLUIPA was decided primarily on the basis of the Act's title — the Religious Land Use and Institutionalized Persons Act. If not reversed, this holding would constitute the only reported decision, nationwide, which holds that a non-institutionalized person of faith does not have standing to pursue a RLUIPA claim against a correctional entity. *Amici* encourage this Court to reverse on at least this limited issue.

As discussed more fully below, Congress never intended to foreclose a religious person or organization, whose primary mission it is to minister to institutionalized persons, from bringing a RLUIPA claim against a governmental entity that

imposes a substantial burden on the religious exercise of prisoners. The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1(a), in relevant part, provides:

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person

- (1) is in furtherance of a compelling governmental interest; and
- (2) is the least restrictive means of furthering that compelling governmental interest.

RLUIPA does not state, as the lower court found, that the only person who can bring a claim alleging a violation of RLUIPA in the prison context is an institutionalized person. To the contrary, RLUIPA is completely devoid of any such limiting language.

It is in the Act itself where one should begin any legal analysis of who has statutory authority and standing to bring a RLUIPA claim. The language of RLUIPA clearly indicates that Congress intended for RLUIPA litigants who are not institutionalized to be broadly granted standing. However, the lower court did not address the broad standing language set forth in the RLUIPA.

In enacting RLUIPA, Congress stated that “standing to assert a claim or defense under this section shall be governed by the general rules of standing under Ar-

ticle III of the Constitution.” 42 U.S.C. § 2000cc-2(a). Congress further stated that RLUIPA “shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Chapter and the Constitution.” 42 U.S.C. § 2000cc-3(g). Thus, the broad standing provisions of RLUIPA indicate that Congress intended to confer standing to litigants who satisfy the constitutional requirements of Article III, without requiring more. *See Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 103 (1979) (discussing that where Congress intends standing to the full limits of Article III, the normal prudential rules do not apply).

There is certainly no suggestion, either in the plain language of the Act or its legislative history, that Congress intended to limit claimants to only institutionalized persons. Nor is there any indication in the legislation or legislative history that non-prisoners would not have standing to assert a RLUIPA claim. In fact, the Act clearly defines a RLUIPA claimant as “a person raising a claim or defense under the Act.” 42 U.S.C. § 2000cc-5(1). If Congress had wanted to limit a RLUIPA claimant in the prison context to only an institutionalized person as the lower court found, it could have easily stated as such. It did not.

The Supreme Court has noted that “[w]here statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action.” *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154

(1970). Additionally, the legislative history of RLUIPA reveals that its sponsors intended courts to apply a strict scrutiny standard to prison regulations and to “protect sincere faith and worship, recognizing it’s [sic] indispensable role in the rehabilitation process.” Senator Edward Kennedy, *Statements of Introduced Bills and Joint Resolutions*, S. Doc. No. 6689, 106th Cong. (July 13, 2000).

Some have argued that because RLUIPA states that the Prison Litigation Reform Act of 1995 (“PLRA”) applies to RLUIPA, that only institutionalized persons may bring claims. The fact that the PLRA applies to RLUIPA (42 U.S.C. § 2000cc-2(e)) simply means that when a prisoner plaintiff brings a claim under RLUIPA, the PLRA requirements still apply to that prisoner claimant. But just because the PLRA applies to a prisoner RLUIPA claimant does not mean that RLUIPA is only limited to prisoner claimants. In fact, in an exhaustive, well researched and reasoned Harvard Journal of Law and Public Policy article on the subject, the author states that “[l]astly, RLUIPA was seen as a way to remove state imposed barriers from those seeking to minister to prisoners. Clergymen and prisoner rights advocates repeatedly voiced their concerns that in the absence of such federal law, they would lack the leverage to compel prison administrators to allow them to conduct their ministries effectively...” Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA’s Prisoner Provisions*, 28

Harv.J.L. & Pub. Pol’y 501, 511-12 n. 44 (2005). Thus, non-institutionalized persons are precisely the type of religious plaintiffs intended by Congress to benefit from the passage of RLUIPA. Their standing is necessary to provide them with a remedy against prison administrators in order to effectively administer their ministries, and entirely consistent with the language and history of RLUIPA.

Since standing under RLUIPA is governed only by the constitutional requirements of Article III, non-institutionalized persons of faith enjoy standing to bring a RLUIPA claim if three requirements are met. First, such a person must have suffered an injury in fact. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). Second, there must be a causal connection between that person’s injury and the conduct complained of. *Id.* Third, it must be likely, as opposed to merely speculative, that that person’s injury will be redressed by a favorable decision. *Id.* This section will address why a non-institutionalized person of faith can meet all three requirements when bringing a claim under RLUIPA.

A. Non-Institutionalized Persons of Faith Have Legally Protected Interests under RLUIPA and Suffer Injuries in Fact

In order to enjoy Article III standing, a non-institutionalized person of faith must have first “suffered an ‘injury in fact’ – an invasion of a legally protected interest which is (a) concrete and particularized and (b) ‘actual or imminent’, not

‘conjectural’ or ‘hypothetical.’” *Id.* (citations omitted). Under this definition, a non-institutionalized person of faith suffers an injury in fact where, as in the case at bar, a governmental entity prohibits a minister of any faith from ministering to institutionalized persons who may desire his or her religious and spiritual guidance.

Indeed, the protection of such religious expression and exercise in an institutionalized setting is the exact goal and purpose of RLUIPA. Senator Orrin Hatch, *Statements of Introduced Bills and Joint Resolutions*, S. Doc. No. 6688, 106th Cong. (July 13, 2000). In bringing such a challenge, a non-institutionalized person of faith may seek to protect not only his or her religious freedoms, but also to challenge a government regulation limiting the free exercise of religion in an institutional setting. For example, a non-institutionalized person’s prison ministry may seek to facilitate the rehabilitation process and assist inmates with the free exercise of their religion by providing religious counsel and prayer partners through religious activities performed through mail correspondence. This type of ministry, which takes place in an institutional setting, can easily be suppressed by prison officials, violating the free exercise rights of both prisoner and non-prisoner. Instead of barring a non-institutionalized person from bringing a RLUIPA claim at the outset on the basis of lack of standing, it would make far better sense, and fulfill Congress’

stated intent, to allow the claim to go forward on the merits, and not be dismissed for lack of standing.

In the case at bar, Rev. McCollum, a Wiccan/Pagan clergy member, brought suit in part under RLUIPA alleging a violation because the California Department of Corrections and Rehabilitation refused to hire him based solely on his faith, denying Wiccan/Pagan inmates of the same access to a chaplain as their “Five Faiths” counterparts. *McCollum v. State of California*, 2006 WL 2263912 (N.D. Cal.). As previously mentioned, the lower court dismissed McCollum’s RLUIPA claim for lack of standing without any real analysis of the Act and without any exploration of standing or the legislative purpose of RLUIPA.

The district court’s holding, however, would reach not only Rev. McCollum’s claim but also a claim by a non-institutionalized claimant that his or her own religious exercise includes ministering to institutionalized persons. Such exercise is expressly protected by the Act against substantial state-imposed burdens. 42 U.S.C. § 2000cc-1. In its opinion, the *McCollum* court also noted that the Defendants’ conduct did not prohibit the Plaintiff’s religious exercise outside of prison gates. But the district court’s holding fails to acknowledge that a non-institutionalized person of faith’s religious exercise may include ministering to individuals in prison and providing religious and spiritual counseling through correspondence. In that situa-

tion, a regulation forbidding such correspondence would impose more than a substantial burden on that religious exercise.

Courts in other instances have similarly granted non-prisoners standing to bring claims under other statutes which were silent on whether, like here, a non-institutionalized person had standing to bring a claim to enforce a statute in the prison context. For example, in *Niece v. Fitzner*, 922 F. Supp. 1208 (E.D. Mich. 1996), a non-prisoner deaf person and her prisoner fiancé challenged a prison's failure to provide a Telecommunications Device for the Deaf (TDD) so she could communicate with her prisoner fiancé. As in the case below, the prison authorities moved to dismiss on standing grounds, arguing that since the prisoner was not disabled and the non-prisoner was challenging a prison practice, neither plaintiff had standing to bring Americans with Disabilities Act ("ADA") and Rehabilitation Act claims. The court rejected the prison authorities' argument and held that both plaintiffs had standing to sue pursuant to the ADA and the Rehabilitation Act.

The Supreme Court has also liberalized standing requirements in other, non-prison situations where, like here, the statute is silent as to who may bring a claim but where Congress expanded standing in the legislation itself. For example, the Court has found standing and injury for rental "testers" who brought claims of racial discrimination in housing cases even though the testers were not actually going

to rent or purchase the housing. *See Gladstone Realtors v. Village of Bellwood*, 441 U.S. at 100, citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975). “Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one ‘who otherwise would be barred by prudential standing rules.’” *Id.* Clearly, if housing testers have injury and standing even though they have no intention to live in the housing, a non-institutionalized person of faith being denied the ability to minister to prisoners certainly has suffered an injury in fact sufficient to give him or her standing to assert a RLUIPA claim.

B. Non-Institutionalized Persons of Faith Can Easily Trace Their Injuries to the Conduct of a Correctional Entity

The second requirement for Article III standing is that there must be a causal connection between the injury and the conduct complained of. *Lujan*, 504 U.S. at 560. The injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.

Instructive here is the Court’s decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, where a developer of low-income housing and one of its putative tenants were found to have standing to challenge exclusionary zoning practices. 429 U.S. 252 (1977). In *Village of Arlington Heights*, a developer had contracted to buy property contingent upon its rezoning for multiple

family use and filed a properly documented rezoning application. *Id.* at 256-9. When the city denied the rezoning application, the developer sued. *Id.* Although financing for the project was uncertain, the Court held that the developer had suffered an injury which was traceable to the challenged action of the defendant because the challenged action stood as an absolute barrier to the developer's construction efforts. *Id.* at 261. The individual plaintiff alleged that he would seek and qualify for housing in the proposed development in order to move closer to his job. Finding that the city's action frustrated the individual plaintiff's specific plan and that an injunction would create at least a "substantial possibility" of development, the Court concluded that he too had standing.

As in *Village of Arlington Heights*, a non-institutionalized person of faith could easily trace his or her injury to the conduct of a correctional entity where that conduct stands as an absolute barrier to that person's ability to practice their religion by ministering to institutionalized persons. The Florida Department of Corrections, for example, is currently prohibiting, by formally adopted rule, religious organizations from soliciting religious pen pals to minister to inmates through written correspondence. The type of injury suffered by these religious pen pal ministries is but one example of the types of injuries suffered by non-institutionalized persons as

the direct result of a correctional authority's adoption of an arguably unlawful rule which runs counter to RLUIPA.

C. Injuries Suffered by a Non-Institutionalized Person of Faith are Likely to be Redressed by a Favorable RLUIPA Ruling

In order for a plaintiff to have standing, a court must be able to redress plaintiffs' alleged injury. *Lujan*, 504 U.S. at 560. A plaintiff meets the redressability test if it is likely that the injury will be redressed by a favorable decision; the redressability of injury need not be certain. *Lujan*, 504 U.S. at 560; *Bonnichsen v. United States*, 367 F.3d 864, 873 (9th Cir. 2004). Plaintiffs need not demonstrate that there is a guarantee that their injuries will be redressed by a favorable decision. *Graham v. Fed. Emergency Mgmt. Agency*, 149 F.3d 997, 1003 (9th Cir.1998). As in the example above, where a correctional entity's rules and/or policies are the sole impediment to a non-institutionalized person of faith's religious exercise, that person's injury will certainly more than likely be redressed by the striking of said rules and/or policies.

II.

NON-INSTITUTIONALIZED PERSONS OF FAITH ALTERNATIVELY ENJOY THIRD PARTY STANDING TO ASSERT RLUIPA CLAIMS ON BEHALF OF INCARCERATED PERSONS

Any argument that Appellees might make that Rev. McCollum lacks standing to bring a RLUIPA claim on behalf of a third party inmate is similarly without merit. Assuming *arguendo* this Court finds Rev. McCollum has not satisfied the Article III case or controversy requirements for standing, *Amici* submit that he or any non-institutionalized person of faith alternatively has third party standing to raise a RLUIPA claim on behalf of inmates desirous of being a part of a non-institutionalized person's religious ministry and exercise.

Third-party standing issues arise when a party seeks relief by asserting the rights of third parties not before the court. It is true that, generally, parties may seek only to vindicate their own legal rights, rather than those of others. This presumption against third party or *jus tertii* standing rests on prudential principles, rather than an application of Article III limitations on standing. *See United Food & Commercial Workers Union v. Brown Group*, 517 U.S. 544, 557 (1996). In analyzing these prudential limitations on third party standing, the Court has stated three primary concerns: (1) third parties may not wish to have their rights asserted, (2) litigants are less likely to rigorously advocate the rights of others, and (3) the quality

of the judicial process may suffer when concrete evidence of harm is not presented by those suffering it. *See Singleton v. Wulff*, 428 U.S. 106, 114-5 (1976); Erwin Chemerinsky, *Federal Jurisdiction*, 83-89 (3d ed. 1999).

The Supreme Court has generally allowed third party standing, however, in cases, like the one at bar, where the enforcement of the challenged conduct affects third parties indirectly. *See Powers v. Ohio*, 499 U.S. 400 (1991); *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004). Courts have permitted third party standing in such cases where: (1) the litigant has suffered an injury in fact, giving her a sufficiently concrete interest in the outcome of the issue in dispute; (2) the litigant has a close relationship to the third party; and (3) there exists some hindrance to the third party's ability to protect his or her own interests.¹ *Powers*, 499 U.S. at 411; *Shaw v. Hahn*, 56 F.3d 1128, 1130-1131 (9th Cir. 1995). In *Young Apts., Inc. v. Town of Jupiter*, for instance, the Eleventh Circuit recently allowed third party standing after carefully analyzing these three requirements for standing. 529 F.3d 1027, 1041-2 (11th Cir. 2008). In *Young Apts.*, the court stated that an exception to the general limitation against third party standing allows businesses third party standing to advocate, on behalf of their clients and customers, against unconstitutional acts that

¹. As this test has been applied, however, the Court has found standing even in cases in which the second or third prong has not been clearly established.

interfere with that business relationship. *Id.* at 1041. Falling under this same exception, *Amici* asserts that a non-institutionalized person clearly meets all three requirements to assert a RLUIPA claim on behalf of the inmates to whom he or she ministers.

A. Non-Institutionalized Persons of Faith Can Suffer Injuries in Fact Recognized as Addressable by RLUIPA

This first prong of the test has been rigorously enforced. Before a plaintiff is allowed to assert a claim on behalf of a third party, that plaintiff must satisfy traditional constitutional standing requirements; the challenged law or conduct must injure the plaintiff in order for that plaintiff to assert the rights or interests of third parties. This requirement has been found to be satisfied when, for example, a plaintiff challenges, on behalf of a third party, a law that causes the plaintiff economic harm,² or when a criminal defendant challenges jury selection procedures on behalf of improperly excluded jurors.³

An injury in fact is an invasion of a legally protected interest which is concrete and particularized and actual or imminent, not conjectural or hypothetical.

². *See Singleton v. Wulff*, 428 U.S. 106, 119 (doctor suffers loss of Medicaid reimbursement income).

³. *See Powers*, 499 U.S. 400, 411 (1991) (discriminatory use of peremptory challenges harms criminal defendant).

Lujan, supra. Sufficient injury in fact for a plaintiff asserting the rights of third parties has been found, for example, where an environmental group alleged that failure to suspend a rate surcharge would cause its members economic, recreational and aesthetic harm, because the rate structure would discourage the use of recyclable materials, thereby adversely affecting the environment by encouraging unwarranted mining and lumbering. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 675-76 (1973). Additionally, a sufficient injury in fact was found when Native Americans were deprived of land they were set to inherit but denied under the Indian Land Consolidation Act of 1983. *Hodel v. Irving*, 481 U.S. 704 (1987).

Similarly, sufficient injury in fact was found where an organization asserted that its members had not used, but would use, a river for recreation if the river were not being polluted by the defendants. *Friends of the Earth, Inc. v. Laidlaw Environmental Svcs., Inc.*, 528 U.S. 167, 184 (2000). In *Friends of the Earth*, Plaintiffs were granted third party standing to bring a citizen suit under the Clean Water Act. *Id.* at 174. Standing for this suit has since been widely discussed, noting that “certain classes of plaintiffs suffer injury in fact when [certain federal statutes are] violated, that the violation causes the injury, and that such injury is redressable by the statutory remedies provided.” Richard Pierce, *Administrative Law Treatise* § 16.7.

In *Young Apartments*, the Eleventh Circuit similarly found that an owner of an apartment complex had suffered an “injury in fact” giving him a “sufficiently concrete interest” in the outcome of the issue in dispute in order to confer third party standing upon him to challenge a city housing ordinance in an race-based equal protection claim brought by the owner on behalf of his minority residents. *Young Apts.*, 529 F.3d at 1041-2.

Here, Rev. McCollum has suffered an injury in fact based on an invasion of his legally protected interest in practicing his religion and being a minister. The district court's holding would bar anyone seeking to minister to prisoners (regardless of whether they were seeking employment like Rev. McCollum or not) from challenging a prison's prohibition on their doing so. The governmental policy Rev. McCollum is challenging is but one example of the type of actual injury which would prohibit a non-institutionalized person from carrying out his or her religious ministry to institutionalized persons in violation of RLUIPA's mandates.

Like the citizen suit in *Friends of the Earth* who sued under the Clean Water Act, Rev. McCollum has suffered an injury in fact because RLUIPA has been violated and that violation caused injury to him. *Friends of the Earth*, 528 U.S. at 184. Under RLUIPA, “no government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution...” 42 U.S.C. §

2000cc-1. The practice imposed by Appellees substantially burdens the religious exercise of inmates wishing to receive religious counsel through Rev. McCollum's ministry, thereby causing him and the prisoners an injury that is concrete and actual. The fact that Rev. McCollum's challenge will also serve to benefit the inmates does not divest him of third party standing. For as the Eleventh Circuit found in *Young Apts., Inc.*, "Young Apartments has [third party] standing to allege that it was injured by Jupiter's discriminatory actions, regardless of whether such claims might also vindicate the rights of its immigrant tenants..." *Young Apts.*, 529 F.3d at 1040.

B. Non-Institutionalized Persons of Faith Have a Close Relationship with the Third Party – Institutionalized Persons – to Satisfy Third Party Standing

A close relationship between the litigant and the third party is needed to satisfy the second prong of third party standing. *See Singleton v. Wulff*, 428 U.S. 106 (1976). In *Singleton*, a sufficiently close relationship was found between a physician and his patients when a physician wanted to assert the rights of his patients in challenging a state statute limiting Medicaid-covered abortions. *Id.* There the Court held that the physician had standing to assert the rights of his patients because the physician-patient relationship was directly implicated by the law challenged. *Id.* at 117. The Court further reasoned that when seeking an abortion for medical reasons, a woman cannot safely secure one without the aid of a physician. "Aside

from the woman herself, therefore, the physician is uniquely qualified to litigate the constitutionality of the State's interference with, or discrimination against, that decision.” *Id.* Here, the minister-congregant relationship, developed between Rev. McCollum and other non-institutionalized persons of faith and the inmates desirous of their religious services and counseling, is nearly identical to the doctor-patient relationship protected by *Singleton*, and non-institutionalized persons of faith should be similarly allowed to assert the rights of their institutionalized congregants.

Third party standing has also been upheld in cases where enforcement of a restriction against the litigant prevents the third party from entering into a relationship with the litigant, to which relationship the third party has a legal entitlement (typically a constitutional entitlement). *U.S. Dept't of Labor v. Triplett*, 494 U.S. 715, 720 (1990). Similarly, litigants are allowed to assert the rights of third parties that would be diluted or adversely affected should their constitutional challenge fail and the statute remain in force. *Craig v. Boren*, 429 U.S. 190, 195 (1976). Likewise, the Court has permitted booksellers to assert the First Amendment rights of book buyers⁴ and sellers of contraceptives to assert the privacy rights of customers.⁵

⁴. *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392 (1988).

In *Young Apartments*, the Eleventh Circuit similarly found that a minority landlord had a sufficiently close relationship with his minority tenants to satisfy this prong of third party standing. 529 F.3d at 1043-44.

Here, a non-institutionalized person of faith enjoys a sufficiently close relationship with a third party inmate by virtue of that inmate's participation in the non-institutionalized person's religious ministry. Third party standing should further be upheld in this context because the enforcement of many correctional rules and/or practices prevents non-institutionalized persons of faith from entering into and developing religious and spiritual relationships with inmates which are constitutionally and statutorily protected. *Triplett, supra*, at 720. When these protected relationships are preventing from ever developing, it not only impacts the affected inmate and non-institutionalized person, but also prevents other possible litigants from ever being readily identified.⁶

There is now no dispute that RLUIPA is constitutional and protects the religious exercise of persons confined to an institution. *Cutter v. Wilkinson*, 54 U.S. 709 (2005); 42 U.S.C. § 2000cc-1(a). But, RLUIPA also serves to protect the

⁵. *Carey v. Population Serv. Int'l*, 431 U.S. 678, 682-83 (1977); *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972).

ability of free world religious persons to minister to those institutionalized persons. Like the doctor in *Singleton*, an inmate's religious minister is uniquely qualified to litigate the constitutionality of a governmental entity's interference with that spiritual relationship. As a result, the non-institutionalized person's and the inmates' interests are "inextricably bound" because the challenged correctional practice injures the non-institutionalized person's ability to minister to prisoners at the same time it denies inmates access to seek out that person's ministry. *See Singleton*, 428 U.S. at 114-15. Because a non-institutionalized person of faith and third party inmates have a close and constitutionally protected relationship concerning any challenged religious practice, a non-institutionalized person of faith should easily satisfy the second requirement for third party standing.

C. Third Party Inmates are Hindered in Their Assertion of Their Own Interests

The Supreme Court frequently permits third party standing when the third party is hindered in the assertion of his or her own interests. *See Powers v. Ohio*, 499 U.S. 400 (1991). In *Powers*, the litigant was a criminal defendant who appealed his conviction on the ground that the prosecutor had used discriminatory peremptory challenges during *voir dire*. *Powers*, 499 U.S. at 400. The Court held

⁶ The inability to identify appropriate plaintiffs is one reason to grant third-party

that the discriminatory use of peremptory challenges did cause the litigant injury in fact because it could have played a role in his conviction. *Id.* at 411-12. The Court also found that the relationship between the third party jurors and the litigant was close enough due to the *voir dire* process and the trust established with the jurors. *Id.* at 413. Lastly, the Court held that the third prong of the third party standing test was also met because even though the third party jurors had the ability to bring a claim, it was unlikely that the jurors would assert the claims themselves because of the high costs and low benefits of such an action. *Id.* at 415. Addressing another of the concerns of third party standing, the Court noted that the litigant was likely to advocate vigorously on behalf of the excluded jurors in order to secure a reversal of his conviction. *Id.* at 413.

Similarly, the *Singleton* Court found that the women plaintiffs who were seeking medically related abortions were unlikely to assert their own rights in court. *Singleton*, 428 U.S. at 117. The Court noted several reasons why these potential plaintiffs would avoid litigating the issue despite their ability to bring a claim, including their desire to protect their privacy from the publicity of a court suit and the technical mootness of any one individual's claim who underwent the abortion before suit. *Id.* at 117-8.

standing in a civil rights case. *Young Apts., Inc.*, 529 F.3d at 1043.

Like the indirect litigants in *Powers* and *Singleton*, non-institutionalized persons of faith are also likely to advocate vigorously on behalf of their inmate congregants in order to continue their prison ministry and protect their and their congregants' ability to freely exercise their religion.⁷ Here, certain prisoners may be hesitant to challenge a religious restriction due to fear of retaliation and stigmatization, loss of good time credits or parole eligibility, loss of work release, or some other form of disciplinary action taken by the correctional entity. *See Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956-57 (1984) (holding that a fund raising organization had third party standing to challenge a statute, on behalf of a charity, when the statute's "very existence may cause others not before the court to refrain from constitutionally protected speech or expression").

In nearly every conceivable legal challenge to a governmental entity's burden on a prisoner's religious practice, the interests of a non-institutionalized person of faith and the inmate seeking his or her spiritual guidance are invariably identical.

7. "When the third-party plaintiff seeks to vindicate First Amendment rights, the Supreme Court has further relaxed the requirement that the plaintiff show some obstacle to the first party's ability to bring his own claim. Understanding that some parties who could challenge a statute on First Amendment grounds may choose to forgo litigation to avoid the risk of punishment or retribution, the Court has allowed third parties to bring claims 'without regard to the ability of the other to assert his own claims.'" *Massey v. Wheeler*, 221 F.3d 1030, 1035 (7th Cir. 2000) (citing *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984)).

Once a non-institutionalized person of faith with a RLUIPA claim shows that all three prongs have been met, standing to pursue that claim pursuant to RLUIPA should be found.

CONCLUSION

Amici Curiae respectfully submit that the judgment of the district court should be reversed on the grounds that a non-institutionalized person may enjoy standing to bring a RLUIPA claim when challenging a correctional entity for violations of religious rights.

Respectfully submitted,

s/ Randall C. Berg, Jr. _____

Randall C. Berg, Jr., Esq.*

Joshua A. Glickman, Esq.

Shawn A. Heller, Esq.

Florida Justice Institute, Inc.

3750 Bank of America Tower

100 S.E. Second Street

Miami, Fla. 33131

(305) 358-2081

fax (305) 358-0910

E-Mail: RBerg@FloridaJusticeInstitute.org

* Counsel of Record

Counsel for *Amici Curiae*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), counsel for the *Amici Curiae* hereby certify that the foregoing brief for the *Amici* is proportionally spaced, using a typeface of 14 points and – exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B)(iii) – contains 5,454 words. As permitted by Fed. R. App. P. 32(a)(7)(C), in making this declaration, counsel for the *Amici* has relied upon the word count of the word-processing system used to prepare the foregoing brief.

s/ Randall C. Berg, Jr. _____

Randall C. Berg, Jr., Esq.
Counsel for *Amici Curiae*

Dated: November 25, 2009

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of November, 2009, I electronically filed the foregoing brief with the Clerk of the United States Court of Appeals for the Ninth Circuit using the CM/ECF system.

I further certify that all of the participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Randall C. Berg, Jr.

Randall C. Berg, Jr., Esq.
Counsel for *Amici Curiae*