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Inmates Who Follow Satanism and Wicca Find Unlikely Ally

By [LINDA GREENHOUSE](#)

WASHINGTON, March 21 - A Supreme Court argument on Monday about how far Congress may go to create and protect religious rights for prison inmates found the federal government in the unusual position of arguing on behalf of inmates seeking to practice religions based on magic, white supremacy and polytheism.

The government "follows the best of our traditions" when it relieves burdens on religious practice for all religions, not just "majoritarian" ones, the acting solicitor general, Paul D. Clement, told the justices.

On the opposite side, the State of Ohio argued that federal judges had been turned into "overseers of religious life in prisons across the 50 states" by a five-year-old federal law directing states to relieve "substantial burdens" on inmates' religious practices unless a challenged regulation served a "compelling state interest."

Douglas R. Cole, Ohio's state solicitor, asked the justices: "Can Congress really say to prisoners, 'We'd like you to be religious and we'll give you a better show for getting out from the rules that apply to everyone else?'"

Such a statutory preference for religion violates the constitutional prohibition against the official "establishment" of religion, Mr. Cole said, which is what the federal appeals court in Cincinnati concluded last year. The appeals court found that the law went beyond the permissible accommodation of inmates' religious needs by "giving religious prisoners rights superior to those of nonreligious prisoners."

The Supreme Court argument marked the resumption of a long-running confrontation between the court and Congress over the role of the government in protecting religious practice.

The focus of the case is the sensitive zone where the First Amendment's guarantee of the free exercise of religion runs up against the same amendment's prohibition against official religious "establishment."

At a deeper level, the case raises the question of whether, on this as on other constitutional questions,

Congress or the court has the last word. Given the complexity of the Religious Land Use and Institutionalized Persons Act of 2000, the law that the court is examining for the first time in this case, a definitive answer may not emerge from this particular round.

This case, *Cutter v. Wilkinson*, No. 03-9877, began as three separate lawsuits by five Ohio prison inmates accusing the state of violating their rights under the new law in various ways, including not permitting group worship sessions or the possession of religious literature and ceremonial objects. The prisoners identified themselves as followers of the Wicca religion, Satanism, the Church of Jesus Christ Christian and Asatru. The last two are identified with white supremacist movements.

The law provides that "no government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution" unless the burden can be justified as being the "least restrictive means" of furthering a "compelling governmental interest." Another provision in the law, not part of this case, applies a similar test to zoning and other land-use provisions that affect religious institutions.

Ohio responded by challenging the constitutionality of the law, and prevailed in the United States Court of Appeals for the Sixth Circuit, which ordered the suit dismissed. The federal government entered the case to defend the laws' constitutionality and joined the prisoners, represented by a professor and students at the Ohio State University College of Law, in their Supreme Court appeal.

Early in the argument by Mr. Clement, the government's lawyer, Chief Justice William H. Rehnquist interrupted to ask: "In *City of Boerne*, didn't we say that Congress couldn't simply come in to rewrite part of the Constitution" in a way that differed from the court's own interpretation.

His reference was to a landmark 1997 decision, *City of Boerne v. Flores*, in which the court ruled that the predecessor to the current law, the Religious Freedom Restoration Act, exceeded Congress's authority and was unconstitutional as applied to the states.

That law, which Congress passed in reaction to a 1990 Supreme Court decision, applied across the board to all state policies that interfered with religious practice. How was the new law different, the chief justice wanted to know.

Mr. Clement replied that the new law dealt with only two areas in which there were "particular problems," prisons and land-use regulations, and that unlike the earlier law, this one was enacted under Congress's authority to attach conditions to the expenditure of federal money, which every state prison system receives. If the federal government gives the Ohio prison system money for food, he said by way of example, it can require that the menu includes kosher meals.

But the justices' questions indicated that they were concerned with the law's implications that went beyond kosher food. What about a religious requirement for segregation of the races, or for distinctive dress or hairstyles that could signify gang membership, Justice Ruth Bader Ginsburg wanted to know.

Both Mr. Clement and David Goldberger, the Ohio professor arguing for the inmates, said that the prison's security needs, as well as the constitutional guarantee of racial equality, could serve as the "compelling state interests" to justify regulations restricting such religious practices.

But Mr. Cole, Ohio's lawyer, said the law nonetheless "forces prison officials to change the balance they would otherwise strike" between safety and religion.

He also said the law provided an "impermissible incentive" to inmates to adopt a religion as a way of obtaining favored treatment. He said the law invited "constant pressure, day after day, if you want this set of benefits, get religion."

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