

Testimony of Steven T. McFarland
Before the United States Commission On Civil Rights

“Religious Discrimination and Prisoners’ Rights”
Friday, February 8, 2008
Washington, D.C.

The following views are my own and do not necessarily represent those of my employer, the U.S. Department of Justice. My views are based upon several decades of specialized work in religious liberty law, both in trial and appellate litigation at all levels of state and federal courts, as well as having co-lead (with the ACLU) the lobbying efforts of a broad coalition that helped Congress pass the Religious Freedom Restoration Act, which will be discussed later today. It also has been my privilege to serve as an officer of the world’s largest faith-based organization serving prisoners, as well as to spend the majority of my time in the Justice Department on prisoner issues. So there is no subject nearer or dearer to my heart. Thank you for inviting me.

How much religion do inmates have a legal right to? Must prisons limit religious gatherings and activities to those that are central to or required by an inmate’s faith? Does the law forbid government from providing inmates with anything more than chapel and the most central, compulsory sacraments of their religion?

The First Amendment to the U.S. Constitution *requires* that prisons try to accommodate religious beliefs sincerely held by prisoners, and not just those beliefs or practices that are compulsory or “central tenets” of a religion. On the other hand, the First Amendment also *prohibits* government from promoting religion over secularism and from favoring one faith over another. There is a lot of religious activity between these two bookends - - between what the law

requires and what it forbids in a prison - - that the Constitution allows (but does not require) prisons to facilitate. The Supreme Court has recognized that there is plenty of room for “play in the joints” between these two complementary Free Exercise and Establishment clauses in the First Amendment. For example, the Free Exercise Clause might not *require* that a prison offer inmates the opportunity to volunteer for a faith-based program. But that does not mean that the Establishment Clause *forbids* the warden from choosing to offer such a program, provided it has a secular purpose and effect (i.e., to reduce recidivism).

Does it violate the First Amendment for prisons to pay chaplains or contractors to provide religious counseling or programs in prison? Must their message or theology be ecumenical and inclusive, free of “sectarian” or exclusive claims to truth? Does the law prohibit chaplains or outside volunteers from sharing their personal religious beliefs with inmates at any time, individually or in chapel?

No, no and no. Prison is a unique context where the state controls an inmate’s life. Therefore, not only is religious programming and counsel *permissible* for the state to provide, it is legally *required* to provide it under both the Free Exercise Clause of the First Amendment and federal statute¹. The chaplains or volunteers who provide that religious counsel - - whether one-on-one or before a group of inmates in chapel - - may be authentic to their sacred text, creeds, and liturgies (sectarian or ecumenical). The only requirements are that a) the inmate audience must be voluntary and b) the message must not be reasonably construed to threaten prison safety or order. A Jewish chaplain may answer an inmate’s religious question on the basis of the

¹ Religious Land Use and Institutionalized Persons Act, Pub. L. No. 106-274, 114 Stat. 803 [42 USC 2000cc (2000)]

rabbi's personal religious experience and study. A Catholic mentor (whether volunteer or paid contractor in a faith-based program) need not dilute or mask his understanding of truth for fear that an inmate might embrace it too. Outside guest speakers must comply with security and other content-neutral prison regulations that apply to volunteers. But religious speech need not be diluted or censored in prison unless it would incite violence or otherwise threaten security.

Must the prison meet the religious needs of inmates who follow small, nontraditional religions, or just those of mainstream or Abrahamic faiths?

As government officials, chaplains may not favor any religion (including atheism) over another. Neither may corrections personnel promote faith over unbelief, regardless of the number of inmates that embrace either. The federal constitution and a federal statute require state and federal officials to accommodate *any sincere exercise* of religion, subject to interests of institutional security or inmate health, safety, correction, or discipline.

Does the law permit prison officials to offer a voluntary faith- or character-based residential program to inmates?

Yes. We can chart a course for such programs that respects the First Amendment's Religion Clause, based on recent court decisions.

The Supreme Court ruled in 2002 that the First Amendment's Religion Clause permits the government to provide social service programs by funding faith-based organizations. The

court in *Zelman v. Simmons-Harris*² said government can use public funds to provide a secular social service (in that case, education), even if it is offered from a religious point of view, as long as four tests are met:

1) the state must have a secular, religion-neutral purpose (e.g., improving the rate of successful reentry by inmates) in allowing the program;

2) participation must be voluntary and available to many inmates (regardless of their religion or lack thereof);

3) the inmates must be given a “genuine and independent private choice” among religious and secular programs; and

4) there must be a secular alternative available to inmates, with benefits that are comparable to the religious option(s).

Inside a prison, the government controls everything inmates do 24/7 and determines all the options from which they can choose. They obviously cannot offer inmates of every faith (or none) the same program with all the same amenities. Chaplains are conversant about only so many religions (mainly their own). And relatively few religious groups are willing to volunteer or even be paid to work among inmates.

So how can prisons offer inmates a “genuine, private choice” of religious and secular programs? The answer is two-fold. A faith- and character-based reentry preparation program can meet the Supreme Court’s requirement of “a genuine and independent private choice” if

² 536 U.S. 639 (2002)

inmates have an option of choosing a secular version with all the same benefits that the prison provides with the religious version.

This has recently been planned for the federal prison system. As part of its “Residential Reentry Program”, the Federal Bureau of Prisons solicited bids last summer from non-government organizations that would train inmates 40 hours per week in secular topics: how to get and keep a job; how to get along with people; how to resist drug abuse; how to use leisure time, etc. These topics will be offered from a secular, nonreligious perspective. In another dorm or in a different prison, they may be taught by the same or different NGOs from a Christian, Muslim, Unitarian, Jewish, or other faith perspective. To ensure that it is truly a level choice, BOP will make sure that there are no collateral benefits or incentives for those who elect to participate in the faith program. So “God pod” inmates should not receive more family visitation, better living facilities, higher per diem, etc. than all the rest of the prisoners.

Bottom line: prisons can legally offer inmate volunteers a choice of faiths (including agnosticism) - - either in a multi-faith dorm or in a separate single-faith unit at a different institution - - provided it affords them no material benefits or incentives to choose any one option.³

In conclusion, the facts about recidivism of America’s prisoners demand dramatic changes, including in the role of faith among inmates. About 700,000 people will be released from U.S. prisons this year (averaging over 1,900 each day). As many as two-thirds of them will

³ *Americans United For Separation of Church and State v. Prison Fellowship Ministries*, 2007 U.S. App. LEXIS 27928 (8th Cir., December 3, 2007)

be re-arrested within 36 months of release. We spend \$60 Billion per year on our “correctional system” yet it fails to “correct” more than two-thirds of its targets. As the world’s largest incarcerator, America cannot afford to sterilize its prisons of the seeds of faith and of free (though limited) religious exercise. The good news is that the law neither requires nor permits government to do that.

Thank you for the privilege of addressing the Commission. I look forward to your questions.