

December 18, 2018

The Honorable Chuck Grassley
Chairman
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Richard J. Durbin
Ranking Member
U.S. Senate Committee on the Judiciary
711 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Grassley and Ranking Member Durbin:

The undersigned organizations, which represent the secular nontheist community, applaud your bipartisan effort to reform and improve the U.S. criminal justice system and are appreciative of your leadership to advance the First Step Act ([S. 3649/H.R. 5682](#)). However, we write you with concerns about a provision in the bill that would violate the Constitution by imposing religious programs and services on incarcerated persons and by funding religious programs and services with taxpayer dollars.

Paragraph (1) (c) (ix) of subchapter 3635, Section 101 includes faith-based classes or services in its definition of an “evidence-based recidivism reduction program” that may be implemented by federal prisons and for which federal funding is authorized. This provision violates both the Establishment Clause and the freedom of religion of program participants and taxpayers.

The direct federal funding of faith-based programs and services is unconstitutional. We distinguish this type of direct funding from simply permitting faith-based organizations to compete for government contracts to provide secular public services. While some have interpreted the Supreme Court’s ruling in *Trinity Lutheran Church of Columbia v. Comer*¹ to say that the government may not discriminate against religiously affiliated organizations in the provision of secular programs, even this broad interpretation does not permit the funding of programs that directly promulgate specific religious doctrines. Such direct funding of religious activities remains unconstitutional.

This provision violates the religious freedom of taxpayers at large. To protect freedom of religion for all Americans, including the 29 percent of Americans who hold no religious beliefs,

¹ See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 n. 3 (2017) (“This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.”).

government must provide equally for freedom *from* religion.² Federal funding of faith-based programs that promulgate a specific religious doctrine violates the principle of government neutrality toward religion by compelling taxpayers to fund religious instructions, beliefs, and practices. Regardless of whether individual taxpayers agreed with the religious instruction that would be federally funded, requiring them to fund that instruction would deprive them of the freedom to practice religion, or not, in accordance with their deeply held beliefs.

Furthermore, the public provision of faith-based programs violates the Establishment Clause. Especially in facilities or institutions where incarcerated persons lack sufficient access to religiously neutral programs and where the government controls which religious and non-religious philosophical groups can obtain access, faith-based programming will serve to pressure individuals to abide or recite particular religious ideas that may not reflect, or may even violate, their deeply and sincerely held beliefs.

In the context of a prison recidivism reduction program, incarcerated persons in these facilities and institutions will face an overwhelming incentive to accede to religious ideas that may be incompatible with their own beliefs to secure their prompt release from incarceration. People would, quite literally, be rewarded for following a religious program funded by the government; a refusal to follow these religious programs could result in removal from the program and denial of the accompanying benefits. This would thereby constitute the federal government's imposition of religious beliefs and practices on a captive population, violating the neutrality toward religion, and between religion and non-religion, required by the Establishment Clause of the First Amendment of the Constitution.

We, as organizations committed to preserving the core constitutional values of freedom of religion and separation of church and state, urge you to correct this important legislation by removing paragraph (1) (c) (ix) of subchapter 3635, Section 101. Government neutrality toward religion is foundational to religious freedom for all. In its current form, this provision undermines the laudable criminal justice reforms of the First Step Act by placing this bipartisan legislation at risk of a constitutional challenge.

Sincerely,

American Atheists
American Humanist Association
Center for Inquiry

² Pew Research Center, *The Religious Typology: A new way to categorize Americans by religion*, August 29, 2018, at <http://www.pewforum.org/2018/08/29/the-religious-typology/>.

Freedom From Religion Foundation
Secular Coalition for America