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April 19, 2006

Alberto R. Gonzales
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Harley G. Lappin
Director
Federal Bureau of Prisons
320 First St., NW
Washington, DC 20534

Re: solicitation of proposals for single-faith, residential re-entry programs (No. RFP-NAS-0171-2006)

Dear Attorney General Gonzales and Director Lappin:

I am writing about a solicitation issued by the Federal Bureau of Prisons that seeks proposals for "the provision of single-faith, residential re-entry programs" at six federal prisons (No. RFP-NAS-0171-2006, posted on March 31, 2006). The solicitation violates the U.S. Constitution in at least four different ways: (1) it creates a preference for religious programs and organizations over secular programs and organizations; (2) it creates a preference for instruction in a single faith over multi-faith programming; (3) it appears to be gerrymandered to result in awards to one particular religious organization; and (4) it contains no prohibitions against the use of government funds to support religious activity. Accordingly, in order to make legal action unnecessary, we ask that you either withdraw the solicitation or substantially revise it to eliminate its constitutional infirmities.

The U.S. Supreme Court has held that the Establishment Clause of the First Amendment to the U.S. Constitution mandates that "the government may not favor one religion over another, or religion over irreligion." *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722, 2742 (2005); *accord Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and non-religion."). Thus, the Supreme Court has ruled that the Establishment Clause bars any government aid program that "defines its recipients by reference to religion." *Mitchell v. Helms*, 530 U.S. 793, 813 (2000); *id.* at 845 (O'Connor, J., concurring); *Agostini v. Felton*, 521 U.S. 203, 234 (1997). In order to be constitutional, government aid must, at the very least, "[be] allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and [be] available to both religious and secular beneficiaries on a nondiscriminatory basis." *Mitchell*, 530 U.S. at 813; *id.* at 846 (O'Connor, J., concurring); *Agostini*, 521 U.S. at 231; *see also Zelman v. Simmons-Harris*, 536 U.S. 639, 654 n.3 (2002) (whether a "program differentiates based on the religious status of beneficiaries or providers of services" is "the touchstone of neutrality under the Establishment Clause").

The first way in which the Bureau's solicitation violates these constitutional principles is that it favors religious programs and organizations over non-religious programs and organizations. The solicitation does not allow proposals for non-religious prisoner re-entry programs, and instead requires the presentation of religious instruction. The Justice Department describes the purpose of the solicitation as "to facilitate personal transformation of the participating inmates through their own spirituality or faith," and the solicitation requires bidders to explain how they will "foster growth" in the "spiritual development" of prisoners. Moreover, all bidders are required to submit "a letter of endorsement from their local religious organization" and to complete a form entitled "Credentials of Religious Services Contractor," on which they must state their "Religious Affiliation" and must complete a section describing their "verifiable religious credentialing authority." Thus, the solicitation is not open to secular organizations.

Second, the solicitation permits proposals for "single-faith" programs only, refusing to entertain proposals for multi-faith instruction. But the Establishment Clause prohibits governmental preferences among religious groups even if they are not expressly couched along denominational lines. *See Larson v. Valente*, 456 U.S. 228, 246 & n.23 (1982). Accordingly, a rehabilitation program for jail inmates that provided instruction from the perspective of one specific faith was held unconstitutional by the Supreme Court of Texas in *Williams v. Lara*, 52 S.W.3d 171 (Tex. 2001). Such a program "endorses one religious view while excluding others, and thus conveys the impermissible message of official preference for one specific religious view." *Id.* at 192; *see also Kaufman v. McCaughtry*, 419 F.3d 678, 684 (7th Cir. 2005) (prison violated Establishment Clause by allowing inmates of certain religions to form study groups but prohibiting atheist inmate from doing the same — because atheism is a religion for purposes of the Establishment Clause — and "by accommodating some religious views" but not atheism prison was "promoting the favored ones").

Third, the solicitation appears to be tailored to a program delivered by one particular religious group — the Evangelical Christian organization Prison Fellowship Ministries. The solicitation provides that program proposals must meet the following requirements: (1) the program must be "single-faith"; (2) the in-prison phase of the program must be at least eighteen months long; (3) it must be residential; (4) it must be able to serve up to 150 inmates at once; (5) it must provide both daytime and evening programming; (6) it must provide a "rigorous schedule" covering at least forty hours per week; (7) the program must contain a post-release phase that is six months long; (8) the program must match inmates with mentors; (9) the post-release phase must match ex-inmates with support groups; and (10) the program must provide instruction in a large number of enumerated subject areas. These ten specific requirements are identical to the features of one particular prison program, Prison Fellowship's "InnerChange Freedom Initiative." The solicitation thus seems to have been drafted in a manner designed to ensure that Prison Fellowship / InnerChange would be an acceptable bidder while making it unlikely that other proposals would pass muster. As the solicitation appears intended to result in contract awards to Prison Fellowship / InnerChange, it violates the Establishment Clause's prohibition against "religious gerrymanders" — government actions that are "artfully drawn" to result in distinctive treatment of one particular religious group without naming it. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993); *Gillette v. United States*, 401 U.S. 437, 452 (1971); *Am. Family Ass'n v. FCC*, 365 F.3d 1156, 1170 (D.C. Cir. 2004).

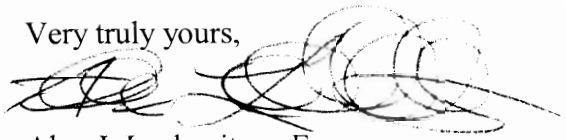
The fourth constitutional defect of the solicitation is that it authorizes monetary payments to faith-based contractors but fails to prohibit the contractors from using federal funds to pay for religious activity or instruction. The Supreme Court has repeatedly held that it is unconstitutional for state funds to be put to religious uses, and that governmental aid to religious organizations must be accompanied by restrictions against religious use of the aid. *See, e.g.*, *Mitchell*, 530 U.S. at 840, 849, 857-58, 862 (O'Connor, J., concurring); *Agostini*, 521 U.S. at 211-12, 234-35; *Bowen v. Kendrick*, 487 U.S. 589, 613, 621 (1988); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 747, 752, 759-60 (1976); *Levitt v. Comm. for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 480 (1973); *Hunt v. McNair*, 413 U.S. 734, 743 (1973); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 780 (1973); *Tilton v. Richardson*, 403 U.S. 672, 683 (1971). While the government may fund chaplains in prisons and the military to the extent reasonably necessary to permit inmates and soldiers to practice their religions, such "accommodations of religion" are permissible under the Establishment Clause only if they lift a state-imposed burden on the free exercise of religion and do not favor one religious sect over others. *See Cutter v. Wilkinson*, 125 S. Ct. 2113, 2121-24 (2005); *Bd. of Educ. v. Grumet*, 512 U.S. 687, 706-07 (1994); *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 613 n.59 (1989); *Katcoff v. Marsh*, 755 F.2d 223, 235 (2d Cir. 1985). Since the re-entry programs sought by the solicitation would not be necessary to enable prisoners to practice their religions and would favor particular sects over others, federal funding of the religious elements of the programs would not be constitutional.

On several previous occasions, cabinet departments had announced grant programs that contained unconstitutional preferences for religious organizations similar to those in this solicitation. *See* 66 Fed. Reg. 15,733 (SAMHSA announcement No. SP 01-006); 67 Fed. Reg. 2736, 2742-43 (ACF Program Announcement No. OCS 2002-05); 67 Fed. Reg. 50,891 (CDC Program Announcement No. 02163); 68 Fed. Reg. 21,002 (HUD 2003 SuperNOFA). On each of those occasions, the department involved eliminated the preferences after we alerted the department that the preferences were unconstitutional. *See* 66 Fed. Reg. 28,757 (amendment to SAMHSA announcement); 67 Fed. Reg. 46,340, 46,341-43 (amendment to ACF announcement); 67 Fed. Reg. 63,664 (amendment to CDC announcement); 68 Fed. Reg. 36,426 (amendment to HUD announcement). Copies of the relevant correspondence are enclosed.

We hope that this matter can be resolved in the same cooperative manner, so that litigation will be unnecessary. We request that you withdraw the solicitation. Alternatively, it may be possible to eliminate the constitutional infirmities in the solicitation by (1) opening it to both non-religious and multi-faith programs and groups; (2) prohibiting winning bidders from using federal funds for religious activity or instruction; and (3) removing the detailed specifications that match Prison Fellowship's InnerChange program and substantially revising the solicitation to cover broader kinds of re-entry programs. Of course, any revised solicitation would have to be reviewed afresh to determine whether it meets constitutional requirements.

Since applications under the solicitation are due on May 1, 2006, we ask that you notify us of the action you intend to take by April 28.

Very truly yours,



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