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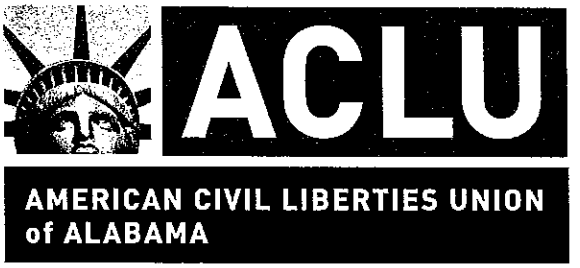

September 26, 2011

VIA U.S. MAIL AND E-MAIL
Bay Minette City Officials
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Danleigh Corbett, City Council Member (*dcorbett@ci.bay-minette.al.us*)
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Chris Norman, City Council Member (*cnorman@ci.bay-minette.al.us*)
Michael E. Rowland, Chief of Police (mrowland@ci.bay-minette.al.us)
Hon. Bayless E. Biles, Municipal Court Judge
c/o Hugh Dickson, Court Clerk (hdickson@ci.bay-minette.al.us)
301 D'Olive Street
Bay Minette, AL 36507

Re: Operation Restore Our Community

Dear Mayor Tillery, Council Members, Chief Rowland, and Judge Biles:

We write to demand that the City of Bay Minette immediately end Operation Restore Our Community ("ROC"), which requires first-time, non-violent misdemeanor offenders to choose between jail time or attending church once a week for a year. While the ACLU has long supported alternative sentencing programs, those programs must respect offenders' fundamental civil rights and comply with the Constitution. Operation ROC fails to meet this threshold: The abuse of the State's police power to mandate and enforce church attendance flagrantly violates the Establishment Clause of the First Amendment to the U.S. Constitution, as well as Section 3 of the Alabama Constitution, which provides that "no one shall be compelled by law to attend any place of worship."

I. Operation ROC Violates the Establishment Clause's Anti-Coercion Principle

Operation ROC contravenes a fundamental First Amendment principle: The government may not compel church attendance or other participation in religious exercise. Indeed, "[c]ompulsory church attendance was one of the primary restrictions on religious freedom which the Framers of our Constitution sought to abolish." *Anderson v. Laird*, 466 F.2d 283, 286 (D.C. Cir .1972) (per curiam) (holding that military academies' compulsory chapel attendance rules were unconstitutional). The Supreme Court has thus repeatedly affirmed that, under the Establishment Clause:

> Neither a state nor the Federal Government can . . . force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.

Everson v. Bd. of Educ., 330 U.S. 1, 15-16 (1947).[1]

In accordance with the First Amendment's proscription against religious coercion, the federal and state courts have consistently held that the government may not condition offenders' sentencing, probation, parole, or release on their refusal or willingness to attend church or engage in other religious exercise. For example, the U.S. Court of Appeals for the Eleventh Circuit, which encompasses Alabama, has explained that a parole or probation term would run afoul of the First Amendment if it "requires the probationer to adopt religion or to adopt any particular religion . . . [or] requires the probationer to submit himself to a course advocating the adoption of religion or a particular religion." *Owens v. Kelley*, 681 F.2d 1362, 1366 (11th Cir. 1982) (reversing district court decision and remanding for determination whether mandatory criminal rehabilitation program improperly incorporated religion). A number of other federal appeals courts have followed suit, holding that it is religiously coercive to require that offenders either participate in religious programs or face penalties or harsher terms in connection with their incarceration, probation, parole, or sentencing. *See, e.g.*, *Inouye v. Kemna*, 504 F.3d 705, 714 (9th Cir. 2007) (holding that revocation of parole for refusal to attend religious treatment program violated the Establishment Clause); *Warner v. Orange County Dep't of Probation*, 115 F.3d 1068, 1076-77 (2d Cir. 1997) (barring probation term requiring participation in religious treatment program); *Kerr v. Farrey*, 95 F.3d 472, 479 (7th Cir. 1996) (holding that state prison could not penalize inmate for refusing to take part in religious treatment program).

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[1] *See also, e.g.*, *Lee v. Weisman*,505 U.S. 577, 587 (1992) ("It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise..."); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) ("We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.'"); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) ("[The First Amendment] forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship."); *Griffin v. Coughlin*, 88 N.Y.2d 674, 686 (N.Y. 1996) ("There is no firmer or more settled principle of Establishment Clause jurisprudence than that prohibiting the use of the State's power to force one to profess a religious belief or participate in a religious activity.").

State courts in Kansas, Louisiana, and Virginia also have held that conditioning an offender's sentence on church attendance is unconstitutional. *See State v. Evans*, 14 Kan. App. 2d 591, 593 (Kan. Ct. App. 1990) (holding that probation term requiring church attendance for five years was religiously coercive in violation of defendant's religious freedom rights); *State v. Morgan*, 459 So. 2d 6, 10 (La. Ct. App. 1984) ("[W]e have a strong tradition of separation of church and state, and making church attendance a condition of probation threatens this separation."); *Jones v. Commonwealth of Va.*, 185 Va. 335, 344 (Va. 1948) (invalidating probation term that included mandatory Sunday school and church attendance for a year); *cf. State v. Fuerst*, 181 Wis. 2d 903, 911-15 (Wis. Ct. App. 1994) (barring court from imposing harsher criminal sentence due to defendant's lack of religious convictions and church attendance).[2] And earlier this year, the Supreme Court of Mississippi ordered that a judge be publicly sanctioned and suspended from office for 30 days, in part, because the judge had repeatedly tied the reduction of offenders' bonds and bail obligations to mandatory church attendance. The court found that the judge had "knowingly misused her office" by engaging in the improper conduct. *Miss. Comm'n on Jud. Performance v. Dearman*, 66 So. 3d 112, 117 (Miss. 2011).

Given this legal precedent, it is beyond peradventure that Operation ROC violates the Establishment Clause's anti-coercion principle. That Bay Minnette offenders may, instead of attending church, pay a fine and serve time in jail does not render the program voluntary and non-coercive or otherwise cure its constitutional infirmity.[3] The "choice" between (1) going to jail, paying a fine, and developing a criminal record; or (2) going to church and having the charges eventually dismissed is, as a constitutional matter, no choice at all. Even Chief Rowland has admitted as much: "It's an easy choice for me. If I was given the choice of going to jail and paying a heavy fine or just going to church, I'd certainly select church." Pat Peterson, *Serve Time in Jail . . . Or in Church*, WKRG News, http://www2.wkrg.com/news/2011/sep/22/serve-time-jailor-church-ar-2450720/ (Sept. 22, 2011).

As in the cases discussed above, the State may not force offenders to choose between jail and participating in church and other religious activities. *See, e.g., Inouye*, 504 F.3d at 714 (holding that the State's action in revoking parole "was clearly coercive" because Inouye "could

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[2] *See also, e.g., L.M. v. State*, 587 So. 2d 648, 649 (Fla. Dist. Ct. App. 1991) (per curiam) (holding that court could not require delinquent on probation to "'get with the pastor' of his mother's church and enroll in any and all of the church's youth programs"); *Commonwealth v. Kuhn*, 327 Pa. Super. 72, 83 (Pa. Super. Ct. 1984) ("Such a requirement is most likely unconstitutional as a violation of the Establishment Clause of the First Amendment of the Constitution of the United States.").

[3] Nor is Operation ROC constitutional merely because offenders may attend the church of their choice or might have attended church anyway absent a court order. *See, e.g., Thompson v. Safety Council of Sw. La.*, 891 F. Supp. 306, 308 (W.D. La. 1995) ("The fact that Plaintiff may have chosen to attend a Christian church each week of his own volition and without an order of the court or the alleged denominational specification of the Safety Council does not remove the order or the Safety Council guideline from Constitutional scrutiny."); *Kuhn*, 327 Pa. Super. at 83 (noting that "nonrestriction [of church attendance requirement] to any particular church did] not alter" its likely unconstitutionality); *cf. Morgan*, 459 So. 2d at 10 (barring attendance at church of probationer's choosing as probation requirement).

be imprisoned if he did not attend and he was, in fact, ultimately returned to prison in part because of his refusal to participate in the [religiously based treatment] program"); *Warner*, 115 F.3d at 1075 ("If Warner had failed to attend A.A., he would have been subject to imprisonment for violation of probation."). Indeed, the courts have prohibited the government from offering far less coercive incentives to engage in religious activity than avoiding prison. *See, e.g.*, *Kerr*, 95 F.3d at 479-80 (holding that state prison could not impose higher security risk category on inmate who refused to participate in religious treatment program); *Griffin*, 88 N.Y.2d at 686 (explaining that correctional facility "exercised coercive power to advance religion by denying benefits of eligibility for the Family Reunion Program to atheist and agnostic inmates who object and refuse to participate in religious activity which is an inextricable part of the [treatment] Program").

II. Operation ROC Violates the Establishment Clause's Neutrality Principle

The program also violates the neutrality principle, another core tenet of the Establishment Clause. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 876 (2005) (explaining that the Establishment Clause was "intended not only to protect the integrity of individual conscience in religious matters, but to guard against the civic divisiveness that follows when the government weighs in on one side of religious debate"). Specifically, "the government may not favor one religion over another, or religion over irreligion." *Id.* at 875.[4]

But that is exactly what the city has done here in forming a partnership exclusively with local houses of worship—the overwhelming majority of which appear, based on media reports, to be Christian. The city solicited local churches to participate in the program and will require offenders to attend the churches in order to avoid jail, knowing full well that the churches intend to proselytize the offenders and attempt to convert them into devout Christians.[5] The city additionally will grant the churches supervisory and monitoring authority over offenders and even reinforce the religious lessons imparted during worship services by, according to media reports, requiring offenders to answer questions about the church services they attend.

These actions (1) favor religion generally and Christianity in particular, (2) convey an impermissible message of religious endorsement, and (3) unconstitutionally entangle the court and police department with religious matters and entities. *See, e.g.*, *Griffin*, 88 N.Y. 2d at 691-92 ("It is simply unimaginable that inmates in the inherently authoritarian atmosphere of a prison

[4] Section 3 of the Alabama Constitution also reflects this neutrality principle in its directive that "no preference shall be given by law to any religious sect, society, denomination, or mode of worship."

[5] The pastors of several churches set to participate in Operation ROC have already made clear their intentions to indoctrinate offenders. Pastor Robert Gates of Christian Life Church told WKRG News, "You show me somebody who falls in love with Jesus and I'll show you a person who won't be a problem to society, but that will be an influence and a help to those around them." Peterson, *supra*, http://www2.wkrg.com/news/2011/sep/22/serve-time-jailor-church-ar-2450720/. And, in an interview with NBC-2 News, Pastor Bruce Hooks of the Abundant Life Christian Center stated, "We want to teach them that they're valuable. That God has a plan, God has a purpose. That they can be successful, that they possibly can become the person that God wants them to become." *Sentenced to Church*, NBC-2 News, http://www.nbc-2.com/story/15535489/2011/09/23/sentenced-to-church (Sept. 23, 2011).

would not perceive that such a mandatory, exclusive program, facially containing expressions and practices that 'ha[ve] always been religious' favors inmates who adhere to those beliefs, and symbolically condones the religious proselytizing those expressions literally reflect.") (internal citations omitted); *Fuerst*, 181 Wis.2d at 911-12 ("[A] judicial policy that favors as candidates for probation church-attending defendants over nonchurch-attending defendants not only intrudes into individual citizens' private matters of religion, but impermissibly entangles religious considerations with the secular function of sentencing.").

III. The City Should Pursue Constitutional Alternatives to Incarceration

Developing alternatives to incarceration is a worthy goal that has been a central focus of the ACLU's criminal justice work. Reforms that significantly decrease incarceration rates save taxpayer money, increase public safety, and improve fairness in the justice system. However, as the Eleventh Circuit has held, "the state cannot employ a religious means to serve otherwise legitimate secular interests." *See Holloman ex rel Holloman v. Harland*, 370 F.3d 1252, 1268 (11th Cir. 2004) (internal citations/quotation omitted) ("While promoting compassion may be a valid secular purpose, teaching students that praying is necessary or helpful to promoting compassion is not.").[6] We have advised and assisted government at all levels in creating *lawful* alternatives to incarceration. We would be pleased to provide additional information about these efforts or work with you to develop programs that make sense for Bay Minette. Please do not hesitate to contact us for assistance.

In the meantime, in light of its serious constitutional infirmities, we request that you immediately suspend implementation of Operation ROC. We also ask that you provide all public records responsive to the attached request to assist us in our ongoing investigation of the program and help us determine the appropriate next steps should the City fail to comply with the law.

Sincerely,

Olivia Turner

Olivia Turner
ACLU of Alabama
Heather L. Weaver
ACLU Program on Freedom of Religion and Belief

[6] *See, e.g.*, *Anderson*, 466 F.2d at 285, 296 (barring church attendance requirement in spite of military's claim that rule was necessary to provide an "'overall training program designed to create effective officers and leaders by preparing them to meet all the exigencies of command'"); *Morgan*, 459 So. 2d at 10 (holding church attendance requirement unlawful notwithstanding that trial judge "believed this condition to be directly related to defendant's rehabilitation"); *Kuhn*, 327 Pa. Super. at 83. (explaining that "[t]he possible effectiveness of this probation requirement" did not alter the court's analysis).

Public Records Request

On behalf of ACLU members in Alabama, we seek all public records relating to the development and implementation of Operation Restore Our Community ("ROC"). Pursuant to Alabama Code §§ 36-12-40 and 36-12-41, please provide copies of the following documents and materials identified below. Please contact us before collecting the records if fees associated with obtaining these records will exceed $100.

In the requests, the term "records" includes all written, audio, and visual materials, including email correspondence sent to or from City officials (whether sent to or from their work or personal email accounts). Electronic materials should be produced in electronic form where possible. We seek these records from all City officials, including all employees and agents of all City departments and governing bodies, including but not limited to the City Council, Police Department, and Municipal Court.

Because of the serious nature of these potential constitutional violations, we request that you produce these documents within 14 days of receiving this request.

(1) All policies, rules, or guidelines governing, referring to, or relating to Operation ROC.

(2) All policies, rules, or guidelines governing, referring to, or relating to alternative-to-incarceration programs other than Operation ROC.

(3) All policies, rules, or guidelines governing, referring to, or relating to sentencing options for nonviolent offenders.

(4) All minutes, agendas, or audio or video recordings of any meeting at which Operation ROC was discussed.

(5) All records referring to, relating to, or otherwise evincing the expenditure of taxpayer monies (including but not limited to police department and municipal court funds) in connection with the development or implementation of Operation ROC.

(6) All records referring or relating to potential or actual participation in Operation ROC by any house of worship, including but not limited to formal and informal written agreements.

(7) All communications referring or relating to Operation ROC – whether sent to or by City officials – including but not limited to communications with potential or actual participating houses of worship and communications relating to the legality of Operation ROC.

(8) All records relating to the development or creation of Operation ROC, including written proposals.