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August 23, 2007

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**VIA FAX AND FIRST CLASS MAIL**

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United States Senator  
(R-Utah)

**Re: Proposed Religious Observance Administrative Directive 380.01**

Hon. Henry J. Hyde  
United States Representative  
(R-Illinois)

Dear Commissioner Hofmann:

Prof. Douglas Kmiec  
Pepperdine Law School

Prof. Douglas Laycock  
University of Michigan Law School

Rev. Richard John Neuhaus  
President, Institute of Religion  
and Public Life

Eunice Kennedy Shriver  
Founder and Honorary Chairman,  
Special Olympics International

Sargent Shriver  
Chairman of the Board,  
Special Olympics International

Dr. Ronald B. Sobel  
Senior Rabbi, Congregation Emanu-El  
of the City of New York

John M. Templeton, Jr., M.D.  
Bryn Mawr, Pennsylvania

We are writing you to express our deep concern over proposed Administrative Directive 380.01, which would regulate inmate “Religious Observance.”<sup>1</sup> In our opinion, implementation of Directive 380.01 in Vermont’s prisons would result in the violation of a number of federal constitutional and statutory provisions, as well as Vermont’s own constitutional protection of religious exercise. In particular, it would run afoul of RLUIPA, the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 *et seq.*, a civil rights law signed by President Clinton in 2000.

Under RLUIPA it is illegal for any state prison system to place a substantial burden on an inmate’s practice of her faith unless there is a demonstrated compelling government interest that justifies the burden. Directive 380.01 would in many cases place great burdens on inmates’ ability to practice their respective faiths, without *any* apparent justification, much less a compelling one. In fact, Directive 380.01 seems quite foreign to Vermont’s longstanding tradition of seeking the rehabilitation of prisoners. Instead, Directive 380.01 seems more in line with the retribution that motivates prison policies in other states.

Some background about The Becket Fund for Religious Liberty and its involvement in prisoner litigation is in order. The Becket Fund is an international, interfaith, public interest law firm dedicated to protecting the free expression of *all*

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<sup>1</sup> <http://www.doc.state.vt.us/about/policies/rpd/religious-observance-380.01>.

religious traditions and the freedom of all religious people and institutions to participate fully in public life and public benefits. The Becket Fund has represented Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Sikhs and Zoroastrians, along with members of a number of other faith traditions in state and federal courts throughout the United States.

The Becket Fund has represented inmates in a number of religious liberty matters. For example, we have sued prison systems in a number of other states, resulting in settlements establishing our inmate clients' rights. *See, e.g., Benning v. Georgia*, 391 F.3d 1299 (11th Cir. 2004) (Jewish prisoner's RLUIPA claim could advance; Georgia eventually settled the lawsuit and changed its illegal policies); *Cotton, et al v. Florida Department of Corrections, et al*, No. 1:02-cv-22760-KMM (S.D. Fla.) (agreed final judgment guaranteeing religious accommodation to our client filed Oct. 29, 2003). We are also currently in settlement negotiations with the Texas Department of Criminal Justice in a lawsuit we brought under RLUIPA and the First Amendment. *See Moussazadeh v. Texas Dept. of Criminal Justice*, Civil Action No. 9:05-cv-197-TH-JKG (E.D. Tex.). We also defended RLUIPA's prisoner provisions before the United States Supreme Court in *Cutter v. Wilkinson*, 544 U.S. 709 (2005),<sup>2</sup> filing a brief *amicus curiae*, 2004 WL 2961151 (Dec. 20, 2004), on behalf of a coalition of more than fifty religious and civil rights organizations, including the Anti-Defamation League of B'nai B'rith International, the Hindu American Foundation, the Christian Legal Society, People for the American Way, the Association on American Indian Affairs, the Philadelphia Ethical Society, and the Unitarian Universalist Association.

We have reviewed Directive 380.01 in light of this experience. As an initial matter, we are puzzled that a system as small as Vermont's, with fewer than 3000 inmates, is suddenly in need of voluminous religious observance regulations more appropriate to the Texas prison system. This is important under governing law, because what might pass for a compelling government interest in Texas, where there are over 150,000 inmates and a completely different attitude towards the purposes of incarceration, will not necessarily pass muster in Vermont. *See, e.g., Gonzales v. O Centro Espirita Beneficiente*, 126 S.Ct. 1211, 1220 ("the burden is placed squarely on the Government" to show that religious exercise restriction is necessary in a particular case); *id.* at 1221 (emphasizing that "context matters" in determining compelling government interest, and the standard is designed to "take 'relevant differences' into account"). For this reason, we respectfully request that you provide us with the reasons that make implementation of Directive 380.01 necessary at this time.<sup>3</sup>

Many of the particular regulations are also cause for concern. For example, we are aware of no reason for Vermont to begin, for the first time in state history, to classify prisoners by religion. Not only is it generally a bad idea to start dividing inmates up by religion, but also Directive 380.01's provisions regarding religious registration are also internally inconsistent and

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<sup>2</sup> The unanimous opinion issued by the Court in *Cutter* upheld the constitutionality of RLUIPA's protections for the religious rights of prisoners.

<sup>3</sup> We also note that the definition of "compelling governmental interest" in the Directive is incorrect. Consistency is not a compelling governmental interest, nor is "discipline" unconnected to safety or security interests.

subject inmates to a dizzying array of procedures. *See* Directive 380.01 at 3(b) (recognizing only Catholic, Protestant, Jewish, and Muslim religious designations), *but see* Directive 380.01 at 5(d)(ii)(e) (approving head coverings from other faiths), Attachment 1 (listing many faith groups). For instance, inmates may only change their designation once per year. But what of an inmate who decides to acknowledge a new faith? No purpose is served by forcing him to remain with a faith she no longer practices for an entire year. We are also troubled that Directive 380.01 prohibits inmates from attending the services of another faith group without permission. Directive 380.01 at 2(b). For an inmate interested in possible conversion or simply wishing to learn more about another faith, the most basic activity he can engage in is to visit and observe the religious services of that faith. This rule makes it extremely difficult for him to do so, requiring an administrative process which may take several weeks to complete. The rule also frustrates attempts to hold interfaith meetings and dialogues within prison, since members of one faith group will have to clear numerous bureaucratic hurdles to invite members of other faith groups for an interfaith gathering or discussion. These limits are especially unwarranted since they haven't been required before.

Directive 380.01's intrusion into ecclesiastical affairs is also troubling. The United States has a proud tradition of government non-interference in religious organizations. This tradition is rooted in both the Free Exercise and Establishment Clauses of the Constitution: "State governments, like the Federal Government, have been required to refrain from . . . insinuating themselves in ecclesiastical affairs. . . ." *McDaniel v. Paty*, 435 U.S. 618, 638 (1979). This is why the government regularly refuses to get involved in disputes over church membership and the appointment of clergy. *See, e.g., Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952) (holding that the Constitution protects a "spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."); *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190, 191 (1960) (Mem.) (applying *Kedroff's* reasoning to state legislative acts); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006) (declining to interfere in dispute between church and former director of music); *Curay-Cramer v. Ursuline Academy*, 450 F.3d 130 (3rd Cir. 2006) (refusing to interfere with hiring decisions for religion teachers at religious school). Directive 380.01 departs from this tradition and therefore stands on shaky Constitutional ground. The Department proposes to "deem[] inactive" any "faith-based credentials or titles" possessed by inmates. Directive 380.01 at 3(e)(viii). Neither the U.S. government nor the state of Vermont has the power to pass judgment on religious offices. *See Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335-336 (1987) (Brennan, J., concurring) ("[R]eligious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to: 'select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions.'" (citation omitted)). Directive 380.01's attempt to interfere in this way is a serious violation of religious institutions' right to select their own clergy.

Likewise, it is beyond the power of the government to determine whether a particular religious exercise is valid. *See, e.g., Employment Division v. Smith*, 494 U.S. 872, 887 (1990) ("Repeatedly and in many different contexts, we have warned that courts must not presume to

determine the place of a particular belief in a religion or the plausibility of a religious claim.”). The only proper inquiry is whether the religious exercise is *sincere*. See *Watts v. Florida International University, et al*, --- F.3d ---, No. 05-13852, slip op. 11-12 (11th Cir. Aug. 17, 2007) (“[I]t is beyond the competence of the courts to determine the centrality of a particular religious belief or practice. The test is sincerity, not centrality.”); *id.* at 15 (“If Watts could explain or prove objectively why his religion commanded the belief in question, it might no longer be a religious belief, or at least not one rooted in faith.”); *id.* at 17 (“[The Plaintiff] is not on the hook for our inability to understand his religious system.”). Directive 380.01 ignores this longstanding legal principle, mandating government review of religious texts and authorities, rather than a simple assessment of the sincerity of an inmate’s belief. Directive 380.01 at 3(e)(ii).

The Directive’s restrictions on “demonstrative prayer” are also problematic. Directive 380.01 at 3(e)(iv). There are several reasons Vermont should not specifically discriminate against this type of prayer. First, the term “demonstrative prayer” is undefined, a fact which in itself may lead to misunderstandings by prison staff and hence improper enforcement. For instance, does “demonstrative prayer” include prostration, kneeling, bowing the head, clasping one’s hands? Does it include meditation? As written, this regulation conflicts with the teachings of a number of faiths, and as such is likely to impose substantial burdens on the religious exercise of many inmates. Many Christians and Jews pray at mealtimes and speak aloud, clasp hands, bow heads, or make the sign of the cross in order to do so. Under the new regulations, these widespread and benign practices might be prohibited at the whim of the particular staff member who is present at the time of the prayer.

Second, a ban on demonstrative prayer is likely to disproportionately affect members of minority faith groups. For example, a Muslim inmate who finds himself in the cafeteria at the appointed time for one of the daily prayers would be forced to violate the command to prostrate himself. Third, prisoners already engage in these practices, for reasons both religious and non-religious. No governmental interest in prohibiting a practice can be compelling if the practice has been tolerated for years. See, e.g., *Warsoldier v. Woodford*, 418 F.3d 989, 1000 (9th Cir. 2005) (no compelling government interest where prison system tolerated varying standards).

Finally, we are concerned by the requirement that an outside volunteer be present at all religious services and supervise all religious gatherings. Directive 380.01 at 4. This requirement will be particularly difficult on new or small faith groups within the system, which will be prohibited from holding religious services until they can identify a volunteer from the outside and wait for that person to be approved by the Department. Directive 380.01 at 3(b), 3(e)(ix). It will also prohibit faith groups from meeting at all when their outside volunteer is ill, traveling, or otherwise unavailable. *Id.* The volunteer restrictions are also cumbersome, forcing inmates to wait for approval before receiving the most basic spiritual services. Directive 380.01 at 4(b). These restrictions will be difficult for inmates with urgent needs for spiritual counseling, such as bereavement counseling upon the death of a loved one, or confession and prayers in a time of personal crisis.

There are a number of additional problems with the Directive that we can describe in

Commissioner Robert Hofmann

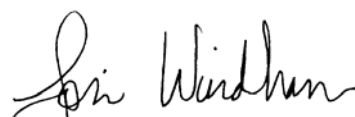
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more detail in future discussions. For the time being, however, we hope that this letter is useful to the Department as it evaluates proposed Directive 380.01. We also request that, within 30 days, the Department describe the compelling government interests which necessitate the unprecedented and extreme restrictions on inmate religious exercise set forth in Directive 380.01. We look forward to hearing from you soon. We also stand ready to help in revising Directive 380.01 to comply with the strictures of RLUIPA as well as the U.S. and Vermont Constitutions.

Regards,

The Becket Fund for Religious Liberty

A handwritten signature in black ink, appearing to read "Lori Windham", written over a horizontal line.

Lori H. Windham  
Legal Counsel

cc: William H. Sorrell, Attorney General of Vermont  
David C. Fathi, ACLU National Prison Project