

FREEDOM FROM RELIGION *foundation*

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SENT VIA EMAIL & U.S. MAIL:

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The Hon. Cam Ward
Chairman
Joint Legislative Prison Committee
Alabama State House
11 South Union St., Suite 719
Montgomery, AL 36130-4600

Re: Unconstitutional Execution Protocol at Holman Correctional Facility

Dear Senator Ward:

I am writing on behalf of the Freedom From Religion Foundation (FFRF) regarding an ongoing constitutional violation occurring at Holman Correctional Facility. FFRF is a national nonprofit organization with over 31,000 members across the country, including members in Alabama. FFRF's purposes are to protect the constitutional separation between state and church, and to educate the public on matters related to nontheism.

FFRF members from around the country, including Alabama, have reached out to express their shock and outrage over the blatantly unconstitutional circumstances surrounding the recent execution of Domineque Ray. As you likely know, Mr. Ray was a death row inmate at Holman Correctional Facility ("Holman"). Mr. Ray was also, by all accounts, a devout and practicing Muslim. On January 23, 2019, Ray met with Holman Warden Cynthia Stewart to discuss the procedures for the day of his execution. He then learned that the prison chaplain, a Christian minister, would be in the execution chamber during his lethal injection and would hold Mr. Ray's hand and pray with him if he so desired. As a non-Christian, Mr. Ray understandably objected to the chaplain's presence and requested that his imam be present instead, but Holman refused to accommodate this request, with little explanation. Instead, the prison agreed to a "compromise" wherein the chaplain would not be in the chamber during the execution, but still refused to permit Mr. Ray's imam.

Mr. Ray filed suit in federal district court on January 28, 2019 for claims under the Religious Land Use and Institutionalized Persons Act (RLUIPA), and the Free Exercise and Establishment Clauses of the First Amendment. The District court dismissed his suit, but the 11th Circuit Court of Appeals reversed, issuing a stay of execution in a thoughtful opinion that discussed the bedrock importance of safeguarding religious liberty by enforcing governmental neutrality in matters of religion. The Supreme Court then reversed on procedural grounds without addressing the merits of Mr. Ray's claims, and he was subsequently executed on February 7, 2019. In dissent, Justice Kagan argued that, "Ray has put forward a powerful claim that his religious rights will be violated at the moment the state puts him to death." *Dunn v. Ray*, 586 U.S. ____, slip op. at 3 (Feb. 7, 2019).

We write to request that your committee investigate the policies and procedures at Holman to ensure that no religion is given privileged status and to safeguard the rights of conscience of all inmates, regardless of their religious or nonreligious beliefs.

As government entities, prisons are bound by the Establishment Clause not to show preference for any particular religion or religion in general. “The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” *Larson v. Valente*, 456 U.S. 228, 244 (1982). Courts have been abundantly clear that while jails and prisons may *accommodate* inmates’ religious beliefs (and under RLUIPA are broadly *obligated* to do so), they may not, in policy or practice, condition any benefit or penalty on an inmate’s particular religious beliefs or lack thereof. See *Jackson v. Nixon*, 747 F.3d 537, 543 (8th Cir. 2014); *Inouye v. Kemna*, 504 F.3d 705, 714 n.9 (9th Cir. 2007); *Warner v. Orange Cty. Dep’t of Probation*, 115 F.3d 1068, 1077 (2nd Cir. 1997); *Kerr v. Ferrey*, 95 F.3d 472, 480 (7th Cir. 1996); *Arnold v. Tenn. Bd. of Paroles*, 956 S.W.2d 478, 484 (Tenn. 1997); *Griffin v. Coughlin*, 673 N.E.2d 98, 108 (N.Y. 1996).

Holman’s current policy of allowing only the Christian prison chaplain into the execution chamber violates this most basic constitutional mandate. This policy grants a substantial and desirable benefit—the comfort of being counseled by a like-minded person at the moment of one’s death—*exclusively* to a single religion. “[A] Christian prisoner may have a minister of his own faith accompany him into the execution chamber to say his last rites. But if an inmate practices a different religion ... he may not die with a minister of his own faith by his side.” *Dunn*, slip op. at 2 (Kagan, J., dissenting). See also *Ray v. Comm’r, Ala. Dep’t of Corr.*, No. 19-10405 at 20 (11th Cir. Feb. 6, 2019) (“If Ray were a Christian, he would have a profound benefit; because he is a Muslim, he is denied that benefit.”).

Had the Supreme Court allowed Mr. Ray’s case to move forward, it is exceedingly likely that Holman’s policy would have been held unconstitutional and that the prison would be permanently enjoined from continuing this practice. See *Ray v. Comm’r*, No. 19-10405 at 9, 23 (internal citation omitted) (holding that Mr. Ray was “substantially likely to succeed on the merits of his claims.”). And for good reason: “The claim presented by Domineque Ray touches at the heart of the Establishment Clause. Indeed, we can think of no principle more elemental to the Establishment Clause than that the states and the federal government shall not favor one religion denomination over another.” *Id.* at 9.

But while it may be too late for Domineque Ray, rest assured there will be others. Mr. Ray did not learn that Holman planned to foist a Christian chaplain onto him until two weeks before his execution—too late in the day to mount a challenge, at least according to the Supreme Court. Nonetheless, Holman’s execution policy remains a lingering legal liability for the State of Alabama, and there is nothing to prevent any of the 175 inmates currently sitting on death row¹ from bringing a timely lawsuit and having the policy struck down once and for all, at the cost of the State’s time, resources, and taxpayer dollars.

This can all be avoided if Holman simply brings their policy in line with constitutional requirements. A modest and equitable solution is to allow condemned inmates to select *any* one person to be in the execution chamber with them—whether that person be a priest,

¹ “Alabama Inmates Currently on Death Row.” The Alabama Department of Corrections. <http://www.doc.state.al.us/DeathRow> (last accessed Feb. 12, 2019).

imam, rabbi, celebrant, or simply a friend. This person would be trained on the execution protocol, thoroughly screened, and required to sign a pledge under penalty of contempt stating that they will not interfere with the execution in any way. *See Dunn*, slip op. at 2 (noting that “the State has no answer” as to why this exact proposal would be unworkable).

ADOC and Holman have not had to answer for their conduct in a court of law, and with the hurried execution of Domineque Ray, they won't have to—at least for now. But as the committee tasked with overseeing Alabama's prisons, we ask that you make them answerable to you. “Indeed, free exercise [of religion] depends in no small measure on non-interference and non-preferential treatment by the state, and it ‘can be guaranteed only when legislators ... are required to accord to their own religions the very same treatment given to small, new or unpopular denominations.’” *Ray v. Comm’r*, No. 19-10405 at 11 (quoting *Larson*, 456 U.S. at 245).

We request that the Joint Legislative Prison Committee investigate the situation at Holman and that it utilize any and all powers available to it to ensure that the prison adopts an execution protocol that respects every individual's right of conscience. Thank you for your time and attention to this matter.

Very truly yours,



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CC VIA EMAIL:

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