

FREEDOM FROM RELIGION *foundation*

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SENT VIA EMAIL & U.S. MAIL
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The Honorable William L. Mallory
Court of Appeals, First Appellate District
William Howard Taft Law Center
12th Floor
230 East Ninth Street
Cincinnati, OH 45202-2138

Re: Unconstitutional and Unethical Church Sentence

Dear Judge Mallory:

I am writing on behalf of the Freedom From Religion Foundation (FFRF) to alert you to concerns over ethical and constitutional violations that occurred in your courtroom. FFRF is a national nonprofit organization with nearly 24,000 members across the country, including over 600 members in Ohio. FFRF's purpose is to protect the constitutional principle of separation between state and church.

It is our information and understanding that you are a Judge for the First Appellate District of Ohio, and that on May 25, 2016, you sentenced Jake Strotman to attend Morning Star Baptist Church for twelve consecutive Sunday services. Mr. Strotman was accused of assaulting a Baptist preacher during a chaotic brawl after a hockey game. Local news sources reported that, during the proceeding, you told Mr. Strotman to "Take a look at [the bailiff]. See how he has the handcuffs. He is a good reader of me and he suspects that I might be locking you up today." Later on, you said, "I admire the fact that you want to spread the word of God because I'm a religious man, too," and "[a]lso the thing about religion, I think it is kind of personal and for me I don't try to impose my religious views on other people except for sometimes in this room." After Mr. Strotman suggested being sent to a church of your choice as his punishment, you decided that it would be appropriate to sentence him to attend his victim's Baptist church for twelve Sundays.¹

Your actions in this case violated the Establishment Clause of the First Amendment. As you may be aware, it is a fundamental principle of Establishment Clause jurisprudence that the government cannot in any way promote, advance, or otherwise endorse religion. The Supreme Court has said time and again that the First Amendment "mandates governmental neutrality between religion and religion, and between religion and nonreligion." *McCreary County, Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005); *Wallace v. Jaffree*, 472 U.S. 38, 53

¹ <http://www.cincinnati.com/story/news/2016/05/29/hamilton-county-municipal-court-judge-sends-man-church-not-jail/84930822/>

(1985); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 15–16 (1947). The government must remain neutral toward religion because “the preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere.” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 310 (2000) (quoting *Lee v. Weisman*, 505 U.S. 577, 589 (1992)).

Court orders and terms of probation that require participation in religious programs violate the Establishment Clause. *Inouye v. Kemna*, 504 F.3d 705, 714 n.9 (9th Cir. 2007) (holding court-ordered participation in a religious program unconstitutional); *Warner v. Orange Cnty. Dept. of Probation*, 115 F.3d 1068 (2nd Cir. 1997) (same); see also *Jackson v. Nixon*, 747 F.3d 537 (8th Cir. 2014) (reasoning that required completion of a nonsecular program as a condition for early parole would violate the Establishment Clause); *Kerr v. Ferrey*, 95 F.3d 472, 480 (7th Cir. 1996) (same). Sentencing offenders to attend church services as an alternative sentence similarly imposes one religious viewpoint onto them, in violation of their constitutional rights.

The Establishment Clause guarantees that the “government may not coerce anyone to support or participate in religion or its exercise.” *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)). As a self-avowed person of faith, you surely understand that the government has no place telling citizens and criminal offenders whether and when they must attend religious services. As the courts have said, requirements to attend religious services “exceed the constitutionally permitted scope of governmental power . . . Attendance at religious exercises is an activity which under the Establishment Clause a government may never compel.” *Anderson v. Laird*, 466 F.2d 283, 285 (D.C. Cir. 1972).

Furthermore, your actions in this case violate Article 1, Section 7 of Ohio’s Constitution: “No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent.” Ohio Const. Art. 1, § 7.

While Mr. Strotman suggested and accepted his church-going sentence, it is hard to imagine his decision was completely free of coercion. In the beginning of the proceeding, you threatened Mr. Strotman with up to 90 days in jail, and encouraged his fear by having him look at your bailiff and his handcuffs. Many people would opt to go to church when faced with the fear of jail time. That level of coercion makes Mr. Strotman’s consent very questionable. Furthermore, the court system is inherently coercive; as a judge you operate from a position of power over those who come before you. Mr. Strotman has been commanded to attend the Morning Star Baptist Church for twelve straight Sundays as his sentence for a crime. If at any time throughout his sentence he no longer wishes to attend these services, he will still be compelled to attend under penalty of law.

But even if Mr. Strotman’s acceptance of the sentence were truly voluntary, that would not resolve the Establishment Clause issue. Courts have summarily rejected arguments that voluntariness excuses a constitutional violation. See, generally, *Lee*, 505 U.S. at 596 (“It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice.”); *Abington Sch. Dist.*, 374 U.S. at 288 (Brennan, J., concurring) (“Thus, the short, and to me sufficient, answer is that the availability of excusal or exemption simply has no relevance to the

establishment question”); *Mellen v. Bunting*, 327 F.3d 355, 372 (4th Cir. 2003) (“ . . . VMI cannot avoid Establishment Clause problems by simply asserting that a cadet’s attendance at supper or his or her participation in the supper prayer are ‘voluntary.’”).

Citizens are compelled to come before you on a variety of legal matters. Handing down religious sentences sends a message to non-adherents that they are “ outsiders, not full members of the political community and an accompanying message to adherents that they are insiders, favored members of the political community.” *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring). You evidently thought that Mr. Strotman’s church attendance would be good for him, but when you pass a special sentence on a Christian due to his religious views, we are concerned that other potential litigants in your courtroom who are nonbelievers may not get a similar opportunity. While acting as a Judge, you must refrain from lending your power and prestige to religion, amounting to a governmental endorsement that excludes the 23% of Americans who identify as nonreligious.²

We also question whether you violated several canons of the Ohio Code of Judicial Conduct through your actions in this case. Your statement about being a “religious man” and your decision to send a criminal to a Baptist Church as an appropriate form of repentance calls into question your ability to conduct yourself in an impartial manner. Your actions also demonstrate a bias on the basis of religion, and your admiration for “spread[ing] the word of God” indicates that your interest in Christian proselytization influenced your judgment. Your decision, based upon your own views of Christianity, to sentence a defendant to Christian services was inappropriate, and displays your bias regarding Christianity. By sentencing Mr. Strotman to attend church services, you have, as a government agent, implicitly endorsed those services as legitimate.

Judges are expected to show impartiality and grace. By your actions, you appear to rule based on your own personal religious beliefs instead of from the laws of the State of Ohio and the United States, which you have sworn to uphold.

We ask that you immediately end the practice of passing religious sentences on defendants. Please reply in writing indicating the steps you are taking to avoid future violations. Thank you in advance for your time and attention to this matter.

Sincerely,



Rebecca S. Markert
Staff Attorney

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² *America's Changing Religious Landscape*, PEW RESEARCH CENTER (May 12, 2015), available at www.pewforum.org/2015/05/12/americas-changing-religious-landscape/.