

No. 06-2741

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE,
et al.,

Plaintiffs-Appellees,

v.

PRISON FELLOWSHIP MINISTRIES, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the
Southern District of Iowa
Case No. 4:03-cv-90074-RP-TJS

BRIEF AMICUS CURIAE OF FOUNDATION FOR MORAL LAW
ON BEHALF OF DEFENDANTS-APPELLANTS,
IN SUPPORT OF REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, amicus curiae states:

Amicus curiae Foundation for Moral Law is a designated IRS Code 501(c)(3) non-profit corporation. Amicus has no parent corporations, and no publicly held company owns ten percent (10%) or more of amicus. No other law firm has appeared on behalf of amicus in this or any other case in which it has been involved.

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STATEMENT OF IDENTITY AND INTERESTS OF AMICUS CURIAE

Amicus curiae Foundation for Moral Law (the Foundation), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the inalienable right to acknowledge God. The Foundation promotes a return in the judiciary (and other branches of government) to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the Godly foundation of this country's laws and justice system. To those ends, the Foundation has assisted in several cases concerning the public display of the Ten Commandments, legislative prayer, and other public acknowledgments of God.

The Foundation has an interest in this case because it believes the lower court has ignored the original understanding of the Establishment Clause, resulting in blatant hostility toward a pre-release rehabilitation service simply for its Christian premises and ideals. If the lower court's decision is allowed to stand, misinterpretations of the Establishment Clause will be reinforced, and government partnerships with faith-based

organizations and ministries will be blocked and thwarted simply because the organization or ministry takes its religious beliefs seriously.

SOURCE OF AUTHORITY TO FILE

Pursuant to Fed. R. App. P. 29(a), all parties have granted blanket consent to the filing of amicus curiae briefs in this case.

SUMMARY OF ARGUMENT

Amicus proposes in this brief a straightforward argument: that the contractual relationship between the state of Iowa and InnerChange Freedom Initiative (hereafter “Iowa-InnerChange program” or similar) does not violate the Establishment Clause of the First Amendment because the program does not violate the text of that Amendment, particularly as it was historically defined by common understanding at the time of the Amendment’s adoption.

It is the responsibility of this Court, and any court exercising judicial authority under the U.S. Constitution, to decide this case based on the text of the document from which that authority is derived. A court forsakes its duty when it rules based upon case tests rather than the Constitution’s text. Moreover, constitutional substitutions such as the Lemon test and its progeny frustrate the true meaning of the Establishment Clause and foster judicial hostility and discrimination against religion in general and Christianity in particular, this case being a prime example. Amicus urges this Court to return to first principles and embrace the plain and original text of the Constitution, the “supreme Law of the Land.” U.S. Const. art. VI.

The text of the Establishment Clause still reads as it did when it was ratified: “Congress shall make no law respecting an establishment of religion.” U.S. Const. amend. I (emphasis added). When these words are applied to the Iowa-InnerChange program, it becomes evident that the program is not a law, it is not an independent religion, and it does not constitute a form of an establishment of religion. To affirm the district court’s legal conclusions would only perpetuate the already inconsistent manner in which the Establishment Clause is applied, and would result in unjust discrimination against InnerChange and other religious organizations throughout the Eighth Circuit and around the country.

ARGUMENT

This case would be easy if the [courts] were willing to abandon the inconsistent guideposts [they have] adopted for addressing Establishment Clause challenges and return to the original meaning of the Clauses.

Van Orden v. Perry, 545 U.S. 677, 125 S. Ct. 2854, 2865 (2005) (Thomas, J., concurring).

I. THE CONSTITUTIONALITY OF THE CONTRACTUAL RELATIONSHIP BETWEEN THE STATE OF IOWA AND INNERCHANGE FREEDOM INITIATIVE SHOULD BE DETERMINED BY THE TEXT OF THE FIRST AMENDMENT, NOT JUDICIALLY-FABRICATED TESTS.

The district court below correctly began its legal analysis of Iowa's contractual relationship with InnerChange by quoting the Establishment Clause of the First Amendment to the United States Constitution. See *Americans United v. Prison Fellowship*, 432 F. Supp. 2d 862, 914 (S.D. Iowa 2006). The court never looked back, however, claiming that the Establishment Clause, though never amended, “cannot easily be reduced to a single test,” and requires “different approaches” from case to case. *Id.* at 914-15 (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 33 (2004)). The district court based its decision on “the shape of the constitutional protections enunciated in the most recent, applicable,

authorities available.” *Id.* at 867 n.4. The court’s failure to consider the “supreme law of the land”—the Constitution—as an “applicable authority” was its most egregious and fundamental legal error.

A. The Constitution is the “supreme Law of the Land.”

Our American constitutional paradigm dictates that the Constitution itself and all federal laws pursuant thereto are the “supreme Law of the Land.” U.S. Const. art. VI. All judges take their oath of office to support the Constitution itself—not a person, office, government body, or judicial opinion. *Id.* Amicus respectfully submits that this Constitution and the solemn oath thereto are still relevant today and should control, above all other “recent, applicable, authorities available,” the decisions of federal courts.

As Chief Justice John Marshall observed, the very purpose of a written constitution is to ensure that government officials, including judges, do not depart from the document’s fundamental principles. “[I]t is apparent that the framers of the constitution contemplated that instrument, as a rule of government of courts Why otherwise does it direct the judges to take an oath to support it?” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803).

James Madison insisted that “[a]s a guide in expounding and applying the provisions of the Constitution . . . the legitimate meanings of the Instrument must be derived from the text itself.” J. Madison, Letter to Thomas Ritchie, September 15, 1821, in 3 Letters and Other Writings of James Madison 228 (Philip R. Fendall ed., 1865). Chief Justice Marshall confirmed that this was the proper method of interpretation:

As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

Gibbons v. Ogden, 22 U.S. 1, 188 (1824).

Justice Joseph Story later succinctly summarized these thoughts on constitutional interpretation:

[The Constitution] is to be interpreted, as all other solemn instruments are, by endeavoring to ascertain the true sense and meaning of all the terms; and we are neither to narrow them, nor enlarge them, by straining them from their just and natural import, for the purpose of adding to, or diminishing its powers, or bending them to any favorite theory or dogma of party. It is the language of the people, to be judged according to common sense, and not by mere theoretical reasoning. It is not an instrument for the mere private interpretation of any particular men.

Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 42 (1840). Thus, “[i]n expounding the Constitution . . . , every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added.” *Holmes v. Jennison*, 39 U.S. (14 Peters) 540, 570-71 (1840).

Instead of heeding these truths, the district court below evaluated the Iowa-InnerChange contractual relationship under the guise of the Agostini-modified-Lemon test¹ at the expense of the carefully crafted words of the Establishment Clause.

B. The Lemon test and other constitutional counterfeits form a confusing labyrinth that contradicts the text of the “supreme Law of the Land.”

By adhering to Lemon and other tests rather than the legal text in cases involving the Establishment Clause, federal judges turn constitutional decision-making on its head, abandon their duty to decide cases “agreeably to the constitution,” and instead mechanically decide cases agreeably only to judicial precedent. *Marbury*, 5 U.S. at 180; see also, U.S. Const. art. VI. Reliance upon precedents such as Lemon and its

¹ See *Agostini v. Felton*, 521 U.S. 203 (1997); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

progeny is a poor and improper substitute for the concise language of the Establishment Clause, and actually fosters hostility toward the traditional role of religion in our country.

In the present case, the district court chose to apply the Supreme Court's 3-part test from *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), as modified by *Agostini v. Felton*, 521 U.S. 203 (1997). "Under the Lemon test, government practice is permissible for purposes of Establishment Clause analysis only if (1) it has a secular purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not foster an excessive entanglement with religion." *Prison Fellowship*, 432 F. Supp. 2d at 914 (quoting *ACLU Neb. Found. v. City of Plattsmouth, Neb.*, 419 F.3d 772, 775 (8th Cir. 2005) (en banc)). Under *Agostini*, "two other discrete factors" help determine "primary effect" of Lemon's second prong: "First, the Court must evaluate whether the government program results in governmental indoctrination and, second, whether the government program defines its recipients by reference to religion." 432 F. Supp. 2d at 915 (citing *Agostini*, 521 U.S. at 234). Finally, *Agostini* collapsed Lemon's "entanglement" prong into the "effects" prong since the analysis of either prong "consists of

essentially the same factors.” *Id.* This was the amalgamated “test” applied by the district court to the Iowa-InnerChange contractual relationship.

The Lemon test was born out of the Supreme Court’s obfuscating claim that “[t]he language of the Religion Clauses of the First Amendment is at best opaque” and that, therefore, “[i]n the absence of precisely stated constitutional prohibitions, [the Court] must draw lines” delineating what is constitutionally permissible or impermissible. *Lemon*, 403 U.S. at 612.

“[A]n absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court In each case, the inquiry calls for line drawing; no fixed, per se rule can be framed.”

Lynch v. Donnelly, 465 U.S. 668, 678-79 (1984). Jurisprudential experiments with various extra-textual “tests” such as *Lemon* have produced no clear delineations, only a continuum of disparate results.²

² Several courts of appeal have expressed frustration with the difficulty in applying the *Lemon* test in particular and Establishment Clause jurisprudence in general. The Third Circuit has observed that “[t]he uncertain contours of these Establishment Clause restrictions virtually guarantee that on a yearly basis, municipalities, religious groups, and citizens will find themselves embroiled in legal and political disputes over the content of municipal displays.” *ACLU of New Jersey v. Schundler*, 104 F.3d 1435, 1437 (3rd Cir. 1997). The Fourth Circuit has labeled it “the often dreaded and certainly murky area of Establishment Clause jurisprudence,” *Koenick v. Felton*, 190 F.3d 259, 263 (4th Cir. 1999), “marked by

Agostini's adjustment of Lemon only added to the obfuscation of the constitutional text. By adding two more sub-factors to Lemon's effects prong and essentially eliminating the third, and by admitting that its "Establishment Clause law has 'significant[ly] change[d]' since we decided *Aguilar v. Felton*, 473 U.S. 402 (1985)," the Agostini Court only exacerbated the problems in this area of the law, and expressly highlighted its jurisprudential inconsistency. 521 U.S. at 237 (quoting *Rufo v. Inmates of Suffolk County Jail*, 501 U.S. 367, 384 (1992)).

befuddlement and lack of agreement," *Myers v. Loudoun County Public Schools*, 418 F.3d 395, 406 (4th Cir. 2005). The Fifth Circuit has referred to this area of the law as a "vast, perplexing desert." *Helms v. Picard*, 151 F.3d 347, 350 (5th Cir. 1998), rev'd sub nom. *Mitchell v. Helms*, 530 U.S. 793 (2000). The Sixth Circuit has labeled it "purgatory." *ACLU of Ky. v. Mercer County, Ky.*, 432 F.3d 624, 636 (6th Cir. 2005). The Seventh Circuit has acknowledged the "persistent criticism" that Lemon has received since its inception. *Books v. Elkhart County, Indiana*, 401 F.3d 857, 863-64 (7th Cir. 2005). The Tenth Circuit opined that there is "perceived to be a morass of inconsistent Establishment Clause decisions." *Bauchman for Bauchman v. West High Sch.*, 132 F.3d 542, 561 (10th Cir. 1997).

District courts have likewise observed that the Supreme Court's Establishment Clause jurisprudence is: "convoluted, obscure, and incapable of succinct and compelling direct analysis," *Twombly v. City of Fargo*, 388 F. Supp. 2d 983, 986 (D. N.D. 2005); "mystif[ying] . . . , inconsistent, if not incompatible," *Card v. City of Everett*, 386 F. Supp. 2d 1171, 1173 (W.D. Wash. 2005); "utterly standardless," *Newdow v. Congress*, 383 F.3d 1229, 1244 n.22 (E.D. Cal. 2005); and "hardly Paradise," but "more akin to Limbo" than Purgatory, *Green v. Bd. of County Comm'rs of the County of Haskell*, No. 05-CIV-406, Slip op. at 21 (E.D. Okla. Aug. 18, 2006).

The abandonment of “fixed, per se rule[s]” results in the unpredictable application of judges’ complicated substitutes for the law. The district court below, after explaining the Lemon test and the Agostini factors, appeared to bristle at being ultimately bound by any legal analysis:

As reassuring as enunciated factors may appear, however, “[r]esolution . . . depends on the hard task of judging—sifting through the details and determining whether the challenged program offends the Establishment Clause. Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case.”

432 F. Supp. 2d at 915 (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 847 (1995) (O’Connor, J., concurring)). It is “the very ‘flexibility’ of [the Supreme] Court’s Establishment Clause precedent [that] leaves it incapable of consistent application.” *Van Orden v. Perry*, 545 U.S. 677, 125 S. Ct. 2854, 2867 (2005) (Thomas, J., concurring). Attempting to draw a clear legal line without the “straight-edge” of the Constitution is simply impossible.

James Madison observed in Federalist No. 62 that

[i]t will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes, that no man

who knows what the law is today, can guess what it will be tomorrow.

The Federalist No. 62 (James Madison), at 323-24 (George W. Carey & James McClellan eds., 2001). The “law” in Establishment Clause cases changes so often and is so incoherent that “no man . . . knows what the law is today, [or] can guess what it will be tomorrow,” “leav[ing] courts, governments, and believers and nonbelievers alike confused” Van Orden, 125 S. Ct. at 2866 (Thomas, J., concurring).

“What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle.” *McCreary County, Ky., v. ACLU of Kentucky*, 545 U.S. 844, 125 S. Ct. 2722, 2751 (2005) (Scalia, J., dissenting). *Lemon*, *Agostini*, and its shifting progeny are neither “grounded” nor “consistent,” and any legal analysis that attempts to find its way therein is bound to be constitutionally deficient.

The district court’s opinion below is no exception. In the end, the district court concluded that the Iowa-InnerChange program did not violate the “purpose” prong, but that it did violate the “effect” and “entanglement” prongs of *Lemon*-via-*Agostini*. 432 F. Supp. 2d at 915-33.

Amicus will not dwell upon the particular outcome that it believes Lemon and Agostini should have yielded in this particular case—arguments competently addressed in Appellants’ respective briefs—because Amicus contends that the Lemon test and its progeny are constitutionally irrelevant. The text of the constitution should control the outcome of these cases.

The district court faults InnerChange not for violating the Constitution, but for the crime of being “overtly religious,” “pervasively sectarian,” and for offering what the court labels an “Evangelical Christian transformational model” that is “set in the context of a Christ-centered, biblically based sectarian environment.” See *Prison Fellowship*, 432 F. Supp. 2d at 910, 920, 922, 926. Even worse in the eyes of the court was that it could not force a wall of separation between the Christian nature of the program and its overall “secular” purpose as a pre-release rehabilitation program.

The overtly religious atmosphere of the InnerChange program is not simply an overlay or a secondary effect of the program—it is the program. . . . Here, every activity—worship services, revivals, community meetings, daily devotionals—is organized and developed by the InnerChange program and is designed to transform an individual spiritually. . . . Every answer to an inmate's personal dilemmas involves a conversion to belief in Christ. . . . In the InnerChange program, the secular task of

changing criminal behavior is an essentially religious one, in purpose and in fact.

Id. at 922. In other words, InnerChange is too serious about its religious basis.

Lemon and its progeny have yet again produced another judicial opinion with the “primary effect” of advancing hostility toward religion in general and “overtly religious” programs in particular.³ Our nation’s history is inextricably entangled with religion and our laws, including the Constitution, are supposed to protect, not oppose, religion.

³ The Supreme Court has noted that not even Lemon was supposed to be so hostile to religion:

[Lemon] does not require a relentless extirpation of all contact between government and religion. Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage, and the Establishment Clause permits government some latitude in recognizing the central role of religion in society. Any approach less sensitive to our heritage would border on latent hostility to religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious.

County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 576 (1989).

- C. The primary effect of *Lemon* and other judicial tests is to contradict the historically important role religion has always played in our country.

“There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.” *Lynch*, 465 U.S. at 674; see also *Van Orden*, 125 S. Ct. at 2861-63 (listing numerous examples of the “rich American tradition” of the federal government acknowledging God). The primary author of the Declaration of Independence, Thomas Jefferson, observed that, “No nation has ever existed or been governed without religion. Nor can be.” T. Jefferson to Rev. Ethan Allen, quoted in James Hutson, *Religion and the Founding of the American Republic* 96 (1998). George Washington similarly declared that, “While just government protects all in their religious rights, true religion affords to government its surest support.” *The Writings of George Washington* 432, vol. XXX (1932). The Northwest Ordinance of 1787, reenacted by the First Congress in 1789 and considered, like the Declaration of Independence, to be part of this nation’s organic law, declared that, “Religion, morality, and knowledge [are] necessary to good government.” Northwest Ordinance, Article III, July 13, 1787, reprinted in 1 *The Founders’ Constitution*, 28 (Phillip B. Kurland & Ralph Lerner eds. 1987).

Concerning the Constitution in particular, John Adams observed that, “[W]e have no government armed with power capable of contending with human passions unbridled by morality and religion. . . . Our constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.” *The Works of John Adams, Second President of the United States* 229, vol. IX (1854). The United States Congress affirmed these sentiments in an 1853 Senate Judiciary Committee report concerning the constitutionality of the congressional and military chaplaincies:

[The Founders] had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people; they did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators; they did not intend to spread over all the public authorities and the whole public action of the nation the dead and revolting spectacle of atheistical apathy.

Senate Rep. No. 32-376 (1853). Even the Supreme Court itself has noted that “religion has been closely identified with our history and government.”

School Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203, 213 (1963).

Nor was religion intended to be banished from America’s prisons. Dr. Benjamin Rush—signer of the Declaration, “Father of American Medicine,” and outspoken prison reformer—doubted whether the reformation of Pennsylvania’s prisoners was even possible without

religion: “And how is reformation to be produced or expected without the influence of Inspired Truth!” Benjamin Rush, *An Address of the Bible Society* 11, in David Barton, *Benjamin Rush: Signer of the Declaration of Independence* 177 (1999). Dr. Rush saw the benefits of religion for inmates necessarily unable to freely go to church: “A prison sometimes supplies the place of a church and out-preaches the preacher in conveying useful instruction to the heart.” Letter from Benjamin Rush to John Coakley Lettsom, Sept. 28, 1787, in Barton, *supra*, at 176. It is this reformation of the heart that InnerChange seeks to accomplish through its “useful instruction” at the Newton facility in Iowa. The Christian basis of the ministry should not disqualify it; indeed, it is what makes InnerChange such a successful program in Iowa and in states around the country.

“The recognition of religion in these early public pronouncements is important, unless we are to presume the ‘founders of the United States [were] unable to understand their own handiwork.’” *Myers v. Loudoun County Public Schools*, 418 F.3d 395, 404 (4th Cir. 2005) (quoting *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437, 445 (7th Cir. 1992)). The brilliant handiwork of the Founders, however, has been steadily warped and gerrymandered by judicial “line-drawing” into a completely different body

of law, one that would not even be recognized by the Founders. Current Establishment Clause jurisprudence actually subverts the historical relationship that religion has always enjoyed in this land. Today, “either in appearance or in fact, adjudication of Establishment Clause challenges turns on judicial predilections,” Van Orden, 125 S. Ct. at 2867 (Thomas, J., concurring) (citations omitted), instead of the “supreme Law of the Land.” As the judicial oath of office requires, the precise (and never amended) text of the Establishment Clause should be the determinative law in this case.

See *Marbury*, 5 U.S. at 180.

II. THE CONTRACTUAL RELATIONSHIP BETWEEN THE STATE OF IOWA AND INNERCHANGE FREEDOM INITIATIVE IS NOT A “LAW RESPECTING AN ESTABLISHMENT OF RELIGION.”

The First Amendment provides, in relevant part, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. Const. amend I. The Iowa-InnerChange program does not violate the Establishment Clause because it is not a “law respecting an establishment of religion.”⁴

⁴ Amicus will not address herein the compelling argument that the Establishment Clause, with its restriction upon only “Congress,” should not be “incorporated” against the states and local governments

A. The Iowa-InnerChange program is not a “law.”

A contractual agreement with a state agency is not a “law” under the First Amendment. At the time of the ratification of the First Amendment, “law” was defined as “a rule of civil conduct . . . commanding what is right and prohibiting what is wrong.” I William Blackstone, *Commentaries on the Laws of England* 44 (U. Chi. Facsimile Ed. 1765). Several decades later, Noah Webster’s 1828 Dictionary stated that “[l]aws are imperative or mandatory, commanding what shall be done; prohibitory, restraining from what is to be forborn; or permissive, declaring what may be done without incurring a penalty.” N. Webster, *American Dictionary of the English Language* (Found. for Am. Christian Educ. 2002) (1828) (emphasis in original). Alexander Hamilton explained what is and is not a law in Federalist No. 15:

It is essential to the idea of a law, that it be attended with a sanction; or in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will in fact amount to nothing more than advice or recommendation.

The Federalist No. 15 (Alexander Hamilton), at 72 (Carey & McClellan eds. 2001).

through the guise of the Fourteenth Amendment. Such an argument is a worthy pursuit for another brief (or book), but is hardly necessary to the textual argument raised in this brief.

In forming a contract between the Iowa Department of Corrections and InnerChange, and in carrying out the rehabilitation program, none of the defendants in this case has made a “law” under the First Amendment. Although a contract is a creature of the law and is itself governed by law, it is not itself a “law” under the proper definition. Moreover, no matter how “pervasively sectarian” or “overtly religious” InnerChange’s program may be, it does not amount to a “law.” The Iowa-InnerChange program therefore fails to meet the threshold requirement of being a “law” under the First Amendment.

B. The Iowa-InnerChange program is not a “religion.”

The original definition of “religion” as used in the First Amendment was provided in Article I, § 16 of the 1776 Virginia Constitution, was quoted by James Madison in his Memorial and Remonstrance in 1785, was referenced in the amendments to the Constitution proposed by the ratifying conventions of Virginia, North Carolina, and Rhode Island, and was echoed by the United States Supreme Court in *Reynolds v. United States*, 98 U.S. 145 (1878), and *Davis v. Beason*, 133 U.S. 333 (1890). It was repeated by Chief Justice Charles Evans Hughes in his dissent in *United States v. Macintosh*, 283 U.S. 605 (1931), and the influence of Madison and

his Memorial on the shaping of the First Amendment was emphasized in *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).⁵ In all these instances, “religion” was defined as:

The duty which we owe to our Creator, and the manner of discharging it.

Va. Const. of 1776, art. I, § 16 (emphasis added); see also James Madison, Memorial and Remonstrance Against Religious Assessments, June 20, 1785, reprinted in 5 Founders’ Constitution at 82; Virginia Ratifying Convention, Proposed Amendments, June 27, 1788, reprinted in 5 Founders’ Constitution at 89; *Reynolds*, 98 U.S. at 163-66; *Beason*, 133 U.S. at 342; *Macintosh*, 283 U.S. at 634 (Hughes, C.J., dissenting); *Everson*, 330 U.S. at 13; The Complete Bill of Rights 12-13 (Neil H. Cogan ed. 1997). According to the Virginia Constitution, those duties “can be directed only by reason and conviction, and not by force or violence.” Va. Const. of 1776, art. I, § 16.

In *Reynolds*, the United States Supreme Court stated that the definition of “religion” contained in the Virginia Constitution was the same as it is in the First Amendment. See *Reynolds*, 98 U.S. at 163-66. The Court

⁵ Later in *Torcaso v. Watkins*, 367 U.S. 488 (1961), the U.S. Supreme Court reaffirmed the discussions of the meaning of the First Amendment found in *Reynolds*, *Beason*, and the *Macintosh* dissent. See *Torcaso*, 367 U.S. at 492 n.7.

thereby found that the duty not to enter into a polygamous marriage was not religion—that is, a duty owed solely to the Creator—but was “an offense against [civil] society,” and therefore, was “within the legitimate scope of the power of . . . civil government.” *Id.* In *Beason*, the Supreme Court affirmed its decision in *Reynolds*, reiterating that the definition that governed both the Establishment and Free Exercise Clauses was the aforementioned Virginia constitutional definition of “religion.” See *Beason*, 133 U.S. at 342 (“[t]he term ‘religion’ has reference to one’s views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. . .”). In *Macintosh*, Chief Justice Hughes, in his dissent to a case which years later was overturned by the Supreme Court,⁶ quoted from *Beason* in defining “the essence of religion.” See *Macintosh*, 283 U.S. at 633-34 (Hughes, C.J., dissenting).

Sixteen years later in *Everson*, the Supreme Court noted that it had previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against

⁶ See *Girouard v. United States*, 328 U.S. 61 (1946).

governmental intrusion on religious liberty as the Virginia statute [Jefferson's 1785 Act for Establishing Religious Freedom].

Everson, 330 U.S. at 13. The Virginia Act for Establishing Religious Freedom enacted the sentiments expressed in Madison's Memorial and Remonstrance. See Virginia Act for Establishing Religious Freedom, October 31, 1785, reprinted in 5 Founders' Constitution, at 84-85. The Everson Court emphasized the importance of Madison's "great Memorial and Remonstrance," which "received strong support throughout Virginia," and played a pivotal role in garnering support for the passage of the Virginia statute. 330 U.S. at 12. Madison's Memorial offered as the first ground for the disestablishment of religion the express definition of religion found in the 1776 Virginia Constitution. For good measure, Justice Rutledge attached Madison's Memorial as an appendix to his dissent in Everson which was joined by Justices Frankfurter, Jackson, and Burton. See *id.* at 64. Thus, the United States Supreme Court has repeatedly recognized that the constitutional definition of the term "religion" is "[t]he dut[ies] which we owe to our Creator, and the manner of discharging [them]." Va. Const. of 1776, art. I, § 16.

As the constitutional definition makes clear, not everything that may be termed “religious” meets the definition of “religion.” For example, from its inception in 1789 to the present, Congress has opened its sessions with prayer, a plainly religious exercise, yet those who drafted the First Amendment never considered such prayers to be a “religion” because the prayers do not mandate the duties congressmen and senators owe to God or dictate how those duties should be carried out. See *Marsh v. Chambers*, 463 U.S. 783, 788-789 (1983). To equate all that may be deemed “religious” with “religion” would eradicate every vestige of the sacred from the public square.

The district court in this case seemed to equate a “religious” program with “religion,” but defined neither. Not only did the court repeatedly label InnerChange as an “overtly religious” and “Evangelical Christian” program, e.g., 432 F. Supp. 2d at 905, 906, 909, the court seemed shocked to find that “the physical setting . . . , the programming, and the daily schedule all create a sort of modern, Evangelical Christian monastic setting in which every waking hour is devoted to living out an intentional Christian experience.” *Id.* at 908-09. No parties to the case dispute that InnerChange is “religious,” even “overly” or “pervasively” so.

InnerChange does not want to be just another secular organization anyway, nor would it be InnerChange without the Christian basis. As the court below noted, the Christian basis of InnerChange “is the program.” *Id.* at 922 (emphasis added).

Regardless, the InnerChange program still does not constitute an independent “religion” under the First Amendment. There is no Church of InnerChange or Church of Prison Fellowship that an Iowa inmate (or anybody else) may join. At best, InnerChange is a para-church organization based upon Christian principles but is not itself a church or denomination. As this Court recognized last year, while a public display or program may have “undeniable religious significance, ‘[s]imply having religious content or promoting a message consistent with religious doctrine does not run afoul of the Establishment Clause.’” *ACLU Neb. Found. v. City of Plattsmouth, Neb.*, 419 F.3d 772, 778 (8th Cir. 2005) (en banc) (quoting *Van Orden*, 125 S. Ct. at 2863) (emphasis added).

C. The Iowa-InnerChange program is not an “establishment.”

The program at issue also does not meet the definition of an “establishment” of religion under the First Amendment.

At the time the First Amendment was adopted in 1791, “five of the nation’s fourteen states (Vermont joined the Union in 1791) provided for tax support of ministers, and those five plus seven others maintained religious tests for state office.” Mark A. Noll, *A History of Christianity in the United States and Canada* 144 (1992). To avoid entanglements with the states’ policies on religion and to prevent the fighting for national dominance among the myriad religious sects, the Founders through the Establishment Clause sought to prohibit Congress from setting up a national church “establishment.”⁷

⁷ See, e.g., Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 441 (1840):

We do not attribute this prohibition of a national religious establishment to an indifference to religion in general, especially to Christianity, (which none could hold in more reverence, than the framers of the Constitution,) but to a dread by the people of the influence of ecclesiastical power in matters of government; a dread, which their ancestors brought with them from the parent country, and which, unhappily for human infirmity, their own conduct, after their emigration, had not in any just degree, tended to diminish. It was also obvious, from the numerous and powerful sects existing in the United States, that there would be perpetual temptations to struggle for ascendancy in the National councils, if any one might thereby hope to found a permanent and exclusive national establishment of its own, and religious persecutions might thus be introduced, to an extent utterly subversive of the true

An “establishment” of religion, as understood at the time of the adoption of the First Amendment, involved “the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others.” Thomas M. Cooley, *General Principles of Constitutional Law* 213 (Weisman pub. 1998) (1891). For example, in Virginia, “where the Church of England had been established [until 1785], ministers were required by law to conform to the doctrine and rites of the Church of England; and all persons were required to attend church and observe the Sabbath, were tithed for the public support of Anglican ministers, and were taxed for the costs of building and repairing churches.” *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 52 (2004) (Thomas, J., dissenting). Justice Joseph Story explained in his *Commentaries on the Constitution* that “[t]he real object of the amendment was . . . to prevent any national ecclesiastical establishment, which should give to an [sic] hierarchy the exclusive patronage of the national government.” II Joseph Story, *Commentaries on the Constitution* § 1871 (1833). In the congressional debates concerning the passage of the Bill of Rights, James

interests and good order of the Republic. The most effectual mode of suppressing this evil, in the view of the people, was, to strike down the temptations to its introduction.

Madison stated that he “apprehended the meaning of the [Establishment Clause] to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience.” 1 Annals of Cong. 757 (1789) (Gales & Seaton’s ed. 1834). The House Judiciary Committee in 1854 summarized these thoughts in a report on the constitutionality of chaplains in Congress and the army and navy, stating that an “establishment of religion”

must have a creed defining what a man must believe; it must have rites and ordinances which believers must observe; it must have ministers of defined qualifications, to teach the doctrines and administer the rights; it must have tests for the submissive, and penalties for the non-conformist. There never was an established religion without all these.

House of Representatives Rep. No. 33-124 (1854) (emphasis added). At the time of its adoption, therefore, “establishment involved coercion of religious orthodoxy and of financial support by force of law and threat of penalty.” *Cutter v. Wilkinson*, 544 U.S. 709, 729 (2005) (Thomas, J., concurring) (citations and quotations omitted).

In the case below, the district court’s own findings show that InnerChange’s program is not an establishment of religion. “Inmates are not required to participate in the InnerChange program,” and “all

prescribed treatment programs and education classes are voluntary.”
Prison Fellowship, 432 F. Supp. 2d at 893, 903. Although the court begrudgingly acknowledged that “inmates of [non-Christian] faiths may enter the program voluntarily,” id. at 931, and that “an inmate could, theoretically, graduate from InnerChange without converting to Christianity,” id. at 920, it nevertheless went on to find that due to the “inherently coercive environments” found in prisons, id. at 923, the “incentives to join InnerChange,” id. at 927, and the “intensive religious content” of the program, id. at 930, InnerChange and Iowa are “impermissibly endorsing religion.” Id. at 932. The court breathlessly concluded, “For all practical purposes, the state has literally established an Evangelical Christian congregation within the walls of one [of] its penal institutions, giving the leaders of that congregation, i.e., InnerChange employees, authority to control the spiritual, emotional, and physical lives of hundreds of Iowa inmates.” Id. at 933.

However vociferously or pervasively InnerChange promotes its Christian beliefs, the district court could not deny that entry into the program is entirely voluntary. There are no penalties for those who decline to join the program. No inmate is forced to join InnerChange or any

religion, church, or denomination whatsoever. If InnerChange employees actually “control the spiritual, emotional, and physical lives” of InnerChange participants, it is only by the free and informed choice of the inmate, not by coercion.

Yet even if Iowa were endorsing the religious message of InnerChange, it has not established a religion. Endorsement is not establishment. “Equating ‘endorsement’ with ‘establishment’ is a novelty with neither linguistic nor historical provenance.” *Books v. Elkhart County, Indiana*, 401 F.3d 857, 869 (7th Cir. 2005) (Easterbrook, J., dissenting). “A government does not ‘establish’ milk as the national beverage when it endorses milk as part of a sound diet.” *Id.*

The district court may not like a voluntary “Evangelical Christian congregation within the walls of one [of Iowa’s] penal institutions,” but its presence is not an establishment of religion. If “[n]o principle of constitutional law is violated when thanksgiving or fast days are appointed; when chaplains are designated for the army and navy; when legislative sessions are opened with prayer or the reading of the Scriptures, or when religious teaching is encouraged by a general exemption of the houses of religious worship from taxation for the support of the state

government,’” *Wallace v. Jaffree*, 472 U.S. 38, 105 (1985) (Rehnquist, J., dissenting) (quoting Thomas M. Cooley, *Treatise on Constitutional Limitations* 470, 471 (1874)), then neither is an “establishment” created through government support of a private organization like InnerChange.⁸

“Establishment” under the First Amendment has been expanded far beyond its original context. Amicus urges this Court to interpret and apply the term “establishment” in its “just and natural” meaning and thus recognize that the Iowa-InnerChange program does not constitute an “establishment” of religion.

CONCLUSION

“When faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, [the courts] should not hesitate to resolve the tension in favor of the Constitution’s original meaning.” *Kelo v. City of New*

⁸ Perhaps a closer analogy to the present case is the repeated congressional appropriation in the 18th and 19th centuries of “public moneys in support of sectarian Indian education carried on by religious organizations. Typical of these was Jefferson’s treaty with the Kaskaskia Indians, which provided annual cash support for the Tribe’s Roman Catholic priest and church.” *Wallace*, 472 U.S. at 103 (Rehnquist, J., dissenting). Public funds for “sectarian Indian education” did not trigger an Establishment Clause concern, and neither should the Iowa-InnerChange program.

London, Conn., 545 U.S. 469, 125 S. Ct. 2655, 2687 (2005) (Thomas, J., dissenting). Such a clash exists in this case between Lemon and its progeny and the words of the Establishment Clause. The proper solution is to fall back to the foundation, the text of the Constitution.

As it is the responsibility of this Court to decide this case based on the Constitution from which it derives its authority, this Court should decide that contractual relationship between Iowa and InnerChange Freedom Initiative does not violate the text of the Establishment Clause of the First Amendment.

Dated this 22th day of September, 2006.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because this brief contains 6,695 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Book Antiqua, size 14.

3. Pursuant to 8th Cir. R. 28A(d), all diskettes submitted to the Court and counsel have been scanned for viruses and are virus-free.

Dated this 22nd day of September, 2006.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two (2) true and correct copies of this Brief of Amicus Curiae have been served on counsel (listed below) for each party, in paper and electronic form, by first-class U.S. Mail, and that ten (10) copies of this Brief of Amicus Curiae have been dispatched to the Clerk of the United States Court of Appeals for the 8th Circuit, by first-class U.S. Mail, on this 22nd day of September, 2006.

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