

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 06-2741

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

Appellees,

vs.

Prison Fellowship Ministries
Inc., et al.

Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION
HONORABLE ROBERT W. PRATT, JUDGE

STATE APPELLANTS' BRIEF

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SUMMARY AND NOTICE REGARDING ORAL ARGUMENT

Plaintiff-Appellees inmates, taxpayers, inmate relatives and Americans United sought a declaratory judgment and injunction pursuant to 42 U.S.C. § 1983, alleging that the discretionary decision of prison officials to pay the non-sectarian expenses on a per diem basis for each inmate who volunteered to participate in a values based pre-release program within the walls of the Newton Correctional Facility violated the Establishment Clause of the First Amendment. The Trial Court conducted a 14-day bench trial along with a site visit, and issued a 140-page Memorandum Opinion. Both the trial and the Opinion are necessarily fact intensive.

Defendant-Appellants are the State corrections officials and the organization with which the Department contracted, and are separately represented. The State requests oral argument.

Because of the novelty of the issues presented and the fact intensive inquiry, thirty minutes is requested, to be shared with the organizational defendants.

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**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

The District Court had jurisdiction of the initial Complaint under 28 U.S.C §§ 1331 and 1343(a)(3), as well as supplemental jurisdiction over the state claims under 28 U.S.C. § 1367(a). Final judgment was entered on June 5, 2006, and a timely notice of appeal was filed. This Court has appellate jurisdiction under 28 U.S.C § 1291.

**STATEMENT OF THE ISSUES
PRESENTED FOR REVIEW**

I. WHETHER THE DISTRICT COURT SHOULD HAVE APPLIED *TURNER v. SAFLEY* TO THE EXERCISE OF DISCRETION BY PRISON OFFICIALS.

CASES:

Turner v. Safley, 482 U.S. 78 (1987).

Overton v. Bazzetta, 539 U.S. 126 (2003).

Washington v. Harper, 494 U.S. 210 (1990).

II. WHETHER THE DOC'S CONTRACT WITH IFI UNCONSTITUTIONALLY ESTABLISHES RELIGION.

CASES:

Mitchell v. Helms, 530 U.S. 793 (2000).

Agostini v. Felton, 521 U.S. 203 (1997).

Locke v. Davey, 124 S.Ct. 1307 (2004).

Daubert v Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

III. WHETHER THE DOC'S CONTRACT WITH IFI FOSTERS EXCESSIVE GOVERNMENT ENTANGLEMENT.

CASES:

Agostini v. Felton, 521 U.S. 203 (1997).

STATEMENT OF THE CASE

Nature of the Case and Course of Proceedings. Plaintiffs challenged, under the Establishment Clause of the First Amendment, the discretionary decision of prison officials to

pay the non-sectarian costs of a values based prerelease program within the walls of the Newton Correctional Facility on a per diem basis for any inmate who volunteered for the program. The Trial Court ordered Judgment for the plaintiffs, following a 14-day bench trial and a site visit, and enjoined the Program and ordered restitution to the state of all monies paid. This appeal by both the Defendant State Corrections officials and the organization with whom the State contracted for the service, followed.

Facts: The State Defendant-Appellants adopt by this reference the Statement of Facts of the co-Defendant-Appellants, Prison Fellowship Ministries, and InnerChange Freedom Initiative. Any relevant and additional facts will be discussed within the argument which follows.

SUMMARY OF THE ARGUMENT

Plaintiffs challenged, under the Establishment Clause, the State's payment of non-sectarian expenses on a per diem basis for each inmate who volunteered to participate in a values based pre-release program located within the walls of the Newton Correctional Facility. Since the claim arose in a prison, the standard to be applied is whether the action "is reasonably related to legitimate penological interests," *Turner v. Safley*, 482 U.S. 78, 89 (1987), which applies "to all circumstances" . . . "even if the constitutional right

alleged to be infringed is fundamental. . ." *Washington v. Harper*, 494 U.S. 210, 223-4 (1990)(emphasis added). The District Court erroneously found *Turner* inapplicable, in a footnote. While lightly dismissing *Turner*, the Trial Court inconsistently relied upon prison factors to find the program unconstitutional under the *Lemon v. Kurtzman*, 403 U.S. 602 (1971) standard of review.

Despite the Court's finding that "[I]nmates are not required to participate in the InnerChange program", the Court erroneously found this voluntary choice was not a break in the essential nexus between indoctrination and state decision-making (*Mueller v. Allen*, 463 U.S. 388 (1983)) but rather found that inmates were "coerced" because "the state and InnerChange provide incentives . . ." This crucial finding of coercion was in error because: (1) after finding the Parole Board gave no consideration to IFI participation, the court concluded that somehow, someway, the Parole Board might "look favorably" on someone who completed their programming earlier; (2) inadmissible hearsay and speculative inmate testimony and (3) an inadmissible expert opinion (*Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)), were relied upon as to what other unidentified Iowa inmates might consider an incentive. Without the unsupportable finding of "coercion",

the payments by the State pursuant to the voluntary choice of the inmates to participate, are constitutional.

ARGUMENT

I. THE DISTRICT COURT FAILED TO APPLY *TURNER v. SAFLEY* TO THE EXERCISE OF DISCRETION BY PRISON OFFICIALS.

Plaintiffs challenged the State of Iowa's decision to contract on a neutral and nonexclusive basis with a faith-based provider, InnerChange Freedom Initiative, ("IFI") to implement a values based pre-release program, ("the Program") located within the walls of the Newton Correctional Facility ("NCF"). Plaintiffs claimed that the funding received from the State for payment of non-sectarian expenses of the program, on a per diem basis for each inmate who volunteered to participate in the program, violated the Establishment Clause of the United States Constitution.

A. Prison Authorities Are Entitled to Substantial Deference in Determining The Legitimate Goals of a Corrections System And The Most Appropriate Means to Achieve Them.

This case is not about state sponsorship or endorsement of religion (such as in the religious monument context), nor is it about state coercion or indoctrination of impressionable children (such as in the school prayer context). Compare *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 305 (2000) (emphasizing the impact of religious indoctrination on "school-age children") with *Tilton v. Richardson*, 403 U.S.

672, 686 (1971) (adults attending higher education institutions "are less impressionable and less susceptible to religious indoctrination" than children.) See also *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) ("[T]he individual claiming injury by the practice is an adult, presumably not readily susceptible to religious indoctrination or peer pressure".)

Here, the issue is whether the Iowa Department of Corrections ("DOC") properly exercised its discretion, in the prison administration context, to contract on a neutral and nonexclusive basis with a faith-based provider to implement a values based pre-release program. The fact that Plaintiffs' constitutional challenge arises in the prison setting is significant - a significance which was lightly dismissed by the District Court in a footnote. (Add. p. 92, n.36). As the United States Supreme Court has frequently admonished, Courts must

"accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them."

Overton v. Bazzetta, 539 U.S. 126, 132 (2003).

The proper standard for determining the validity of an action claimed to infringe on an inmate's constitutional rights is to ask whether the action "is reasonably related to

legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). The *Turner* "reasonableness" test applies "to all circumstances in which the needs of prison administration implicate constitutional rights," "even if the constitutional right alleged to be infringed is fundamental" *Washington v. Harper*, 494 U.S. 210, 223-4 (1990)(emphasis added).

Not only did the District Court err in its conclusion under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), but upon a finding of unconstitutionality, compounded its error by failing even to discuss the analysis required by *Turner*.

Had the District Court undertaken such an analysis, the conclusion would have been that the DOC's contract with IFI for a values based pre-release program has a clear connection to its objective of improving public safety. IFI was the only respondent to the DOC's first and second Requests for Proposal, and one of two bidders on the third. IFI provides a values based pre-release program at substantially lower cost than the DOC could provide on its own.

B. The Establishment Clause Is Not an Exception to Turner.

In *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003), the United States Supreme Court reaffirmed that "substantial deference must be given to prison administrators." In *Overton*

the Court upheld a prison's "severe" restriction on the family visitation privileges of a prisoner. Here the District Court failed to even mention the Supreme Court's admonition "that *Turner* applies to all circumstances . . ." *Washington v. Harper*, 494 U.S. 210, 223-24 (1990). *Washington* is not even cited. Instead, in support of its position, the District Court cited one Eighth Circuit case and one 1994 Iowa District Court opinion. (App. p. 63, n.12) *Murphy v. Missouri DOC*, 372 F.3d 979 (8th Cir. 2004), never reached, (nor did it have to) the issue of *Turner* because the Eighth Circuit panel found the plaintiff's Establishment Clause rights had not been violated. *Murphy*, in contrast to the District Court's characterization, did not answer the question --- because it was not asked.

Plaintiffs argued to the District Court below that an "overwhelming majority" of the lower courts that have considered inmate Establishment Clause challenges have declined to apply *Turner*. In truth, only a handful of Courts have addressed specifically whether *Turner* applies to inmate Establishment Clause challenges, and those Courts are divided in their analysis. The few cases rejecting application of *Turner* to inmate Establishment Clause claims are both contrary to the dictates of *Washington* and analytically unsound.

Three Courts, *Warburton v. Underwood*, 2 F. Supp. 2d 206 (W.D. N.Y. 1998) and its progeny, *Boyd v. Coughlin*, 914 F.

Supp. 828 (N.D. N.Y. 1996), and *Howard v. United States*, 864 F. Supp. 1019 (D. Colo. 1994), concluded that *Turner* does apply to inmate Establishment Clause challenges. See also *Higgins v. Davis*, 2001 U.S. Dist. LEXIS 2628 (S.D. N.Y. 2001); *Salahuddin v. Perez*, 2006 U.S. Dist. LEXIS 4406, 27-28 (S.D. N.Y. 2006); *Persad v. Savage*, 2004 U.S. Dist. LEXIS 13766 (W.D. N.Y. 2004); *Orafan v. Goord*, 411 F.Supp.2d 153 (N.D. N.Y. 2006). Three other courts, *Williams v. Lara*, 52 S.W.3d 171 (Tex. 2001), *Scarpino v. Grossheim*, 852 F. Supp. 798 (S.D. Iowa 1994), and *Griffin v. Coughlin*, 673 N.E.2d 98 (N.Y. 1996), concluded that *Turner* does not apply. The remainder of the cases stand for the unremarkable proposition that if there is no violation of the Establishment clause, no discussion of *Turner* is necessary.

The few cases rejecting application of *Turner* are both contrary to the Supreme Court's decision in *Washington* and like *Scarpino*, flawed logically. In *Scarpino*, Judge Longstaff held that *Turner* did not apply to Establishment Clause claims because the prison program at issue was not designed to accommodate the religious needs of other inmates. *Id.*, 852 F.Supp. at 804-05. This logic elevates one religion clause (Free Exercise) over the other (Establishment) and leads to incongruous results. Under this reasoning, if a program has the stated intent of accommodating religion, then the DOC's

actions would be judged under the more lenient "reasonableness" standard of *Turner*. However, if a program has a secular purpose and is *not* intended to accommodate religion, then the DOC's actions would *not* be accorded "substantial deference" under *Turner* and would be judged in the same way as Establishment Clause claims outside the prison context.

Under the logic of *Scarpino*, Plaintiffs challenging prison policies could affect or manipulate the legal standard to be applied, and thus the outcome of the case, merely by pleading their claim as an Establishment Clause challenge rather than, or in addition to, a Free Exercise challenge. As a glaring example of this available "art", the Supreme Court's analysis in *O'Lone v. Shabazz*, 482 U.S. 342 (1987), would have been entirely different if argued as an Establishment Clause case. As applied here, if the DOC had simply stated that its intent in contracting with IFI was to accommodate religion, then its actions would be judged under *Turner's* substantial deference standard. Instead, the DOC action had a secular purpose for its contract with IFI and for that reason alone, *Turner* was found not to apply. This results in an inconsistent and hierarchical application of the Establishment and Free Exercise Clauses - despite that these complementary provisions share a common purpose *i.e.*, protecting religious liberty.

C. While Lightly Dismissing *Turner*, The Trial Court Relied Upon Prison Factors to Find The Program Unconstitutional, And Engaged in The Very Micromanagement Warned Against by *Turner*.

Despite candid admissions by the District Court of the need for deference, (“[J]ust as the court asserts no theological expertise in this matter, the Court is also not an expert in the field of prison rehabilitation.” (Add. p. 5). In its opinion, the District Court embarked on an assessment, and then ultimately the supervision, of the very minutiae of prison life - from housing to treatment programs, from budgets to toilet facilities, from inmate preferences to administrative incentives for conduct. This occurred despite the Court’s acknowledgment and apparent acceptance of the proposition that “micromanagement” of prisons by Courts is discouraged. (Add. p. 128).

The District Court found the institutional environment “inherently coercive” in its discussion of whether the IFI program was “voluntary”, quoting with approval from *West v. Atkins*, 487 U.S. 42, 57, n.15 (1988). (Add. p. 105). In *Atkins*, the medical services provided to the inmates was necessarily impacted by the environment in which those services were delivered. Like the medical context in *Atkins*, the District Court considered the prison environment also to be “at work in the rehabilitation context”. But unlike

Atkins, there was no discussion of a *Turner* analysis of this environmental context and its absence is excused by footnote 36, only. (Add. p. 92).

The District Court candidly admitted the impact of the prison setting. (Add. p. 92, n.36). "Though the prison setting of the challenged program must be considered in this [Court's] analysis, the Court has already determined . . . that *Turner* . . . is not applicable." The significant limitations on the prison administration and the necessary restrictions on the conduct of the inmates in such a prison setting are the very reasons for *Turner's* call for deference to that administration and its judgment as to what constitute "sound penological reasons", even when the deprivation to the inmate is "severe".

The District Court's inclusion of "the prison setting", and exclusion of *Turner* from any consideration of that setting, leads inexorably to the Court's view that prison is "inherently coercive". Thereafter, the exclusion of a *Turner* analysis renders nearly indefensible, for this District Court at least, the judgment of these Defendant correctional administrators, who thought they had established a program of choice for the inmates.

D. **The DOC's Contract With IFI For a Values Based Pre-Release Program Is Reasonably Related to Legitimate Penological Interests.**

Rather than judge Plaintiffs' Establishment Clause claims isolated from prison administrators' penological objectives, the Trial Court should have considered the Program in the unique setting in which it arose. To determine whether the DOC's actions were related to legitimate penological interests, the Court should have, but did not, consider:

(1) whether there is a valid, rational connection between the DOC's action and the asserted governmental interests; (2) the impact on DOC staff, other inmates, and the allocation of prison resources; and (3) the availability of ready alternatives to the DOC's action. *Turner*, 482 U.S. at 89-91; *O'Lone*, 482 U.S. at 348. Significantly, the burden is not on the DOC to prove the validity of its actions under these factors, but on Plaintiffs to prove invalidity. *Overton*, 539 U.S. at 132. Plaintiffs were saved from this test by the District Court's error.

1. **The DOC Contract Serves The Governmental Interest.**

The DOC's interest in supporting a values based pre-release program, such as InnerChange, was to improve public safety by obtaining a cost-effective inmate treatment program, improving prison living and working conditions, and reducing

recidivism. The DOC's contract with IFI for a values based pre-release program is directly in furtherance of, and rationally connected to, these governmental interests.

2. Scarce Prison Resources Are Effectively Utilized.

The second and third *Turner* factors essentially ask whether less drastic means exist to accomplish the DOC's penological objectives and, if so, whether (and how) prison resources would be adversely affected by such alternative means. In other words, Plaintiffs must show that the DOC has an alternative means of obtaining a cost-effective inmate treatment program, improving prison living and working conditions, and reducing recidivism, and which alternatives would result in the incurring of no more than *de minimis* costs. *Turner*, 482 U.S. at 90-91; *Overton*, 539 U.S. at 173.

The Iowa DOC has no readily available alternative to the InnerChange program. The DOC put its values based pre-release program out for bid on three occasions. IFI was the only bidder in the first two instances, and one of two, in the last. Without any other cost-effective providers from which to choose, the DOC's only alternatives were to have no programs, create and run its own values based pre-release program, or contract with IFI. The first and second options are really no options at all. DOC lacked the resources to create and operate such a program, which was the very reason

the DOC issued an RFP to find outside providers. Warden Mapes estimated it would take over a "million dollars" to run the same program with state funds. (Add. pp. 39, 43, 90).

Even if creating and running its own values based pre-release program had been a reasonable alternative for the DOC, this would have resulted in more than *de minimis* additional costs for the DOC. The DOC bears only a fraction of the cost of supporting the InnerChange program because IFI subsidizes more than half of the InnerChange program costs. (DOC currently provides less than 40%. Add. p. 41). Warden Terry Mapes, Finance Officer/Deputy Director John Baldwin, former Warden John Mathes, and former Deputy Director Ken Burger were unanimous: the programs provided by IFI could not be economically replicated. The DOC got a "good deal".

3. The DOC Provides Reasonable Alternatives For The Inmate Who Chooses Not to Participate.

The IFI program is not mandatory or required in any way, and was specifically found by the District Court to be voluntary. (Add. pp. 53, 55, 57, 62-3). For each treatment program offered there is a DOC alternative --- or in some cases, several. There is absolutely no reason for a particular inmate to enter the IFI treatment program, other than he chooses to do so. Based on the personal preference of any individual inmate, IFI may be attractive, but that does not render all other alternatives for programming non-

existent. Rather it demonstrates options for choice, as required by *Turner*. The District Court conceded that the success of the program, *i.e.* its attractiveness, cannot be coercion, or an impermissible "race to the bottom" will be the result. (Add. p. 117, citing *Freedom from Religion Foundation, Inc. v McCallum*, 324 F.3d 880, 884 (7th Cir. 2003)).

An application of *Turner*, even if the District Court was correct in its Establishment Clause analysis, would have yielded a different result. This Court should reverse the District Court on the basis of the record made, but at the very least, if the District Court is affirmed on the Establishment Clause determination, the case should be remanded, so that the Defendants may present evidence on the *Turner* factors.

II. THE DOC'S CONTRACT WITH IFI DOES NOT UNCONSTITUTIONALLY ESTABLISH RELIGION.

The Court needs to address the *Turner* issue if, and only if, the Plaintiffs' constitutional rights have been infringed.

Here, they have not. Although the District Court found a constitutional violation, this was based on a flawed legal analysis. In its opinion, the District Court purports to apply the three-pronged test under *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), *i.e.*, whether the challenged program (1) had a secular purpose, (2) had the primary effect of advancing

religion, and (3) fostered excessive entanglement with religion. (Add. p. 91). Instead, however, the District Court relied upon several other legal principles, such as the "pervasively sectarian" test, that are no longer valid or have no application to this case. As explained below, and in the contemporaneous brief of Appellant IFI, adopted here by reference, under a proper constitutional analysis, the DOC's contract with IFI for a values based pre-release program is constitutional.

A. The District Court Correctly Concluded The Contract With IFI Had a Secular Purpose.

Corrections officials were "confronted with the secular, pragmatic needs of running a state prison facility with sufficient programming in a tight budgetary environment". Despite adopting the Plaintiffs' description of the RFP as "gerrymandered", the District Court nevertheless found "the objective history of the selection process . . . shows that state officials at all levels" had as "their primary purpose" the reduction of recidivism. The first prong of the *Lemon* test was satisfied. (Add. p. 95).

B. The DOC's Contract With IFI Did Not Have The Primary Effect of Advancing Religion.

In evaluating the second or "primary effect" factor, the Court must consider: (a) whether the government defines its recipients by reference to religion; and (b) whether

governmental action results in "governmental indoctrination."

Agostini v. Felton, 521 U.S. 203, 234 (1997). Under this second prong, the DOC's contract with IFI is constitutional.

1. **The DOC Provides Aid Without Reference to Religion.**

The DOC provides support for a values based pre-release program, such as that currently run by IFI, without favoring or referring to religion. In evaluating this factor, courts look at whether the State's criteria for allocating aid clearly prefer religion or "create a financial incentive to undertake religious indoctrination." *Agostini*, 521 U.S. at 231. As the Supreme Court explained, "[t]his incentive is not present . . . where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Id.* Such is the case here, and the District Court's conclusion to the contrary is clearly erroneous.

Reciting at length the contacts and activities of the Iowa DOC and PFM which resulted in the contract, (Add. pp. 28-41), the District Court thereafter adopted the plaintiffs' characterization of it as an "unconstitutional religious gerrymander". (See Pls. Opp. to Motion for Summary Judgment at p. 13); (Add. p. 112, n.42). "So, too here, the gerrymandered RFP was not created and released according to

the customary and neutral principles associated with that process.”) The District Court, despite its prior finding on secular purpose, concluded that the DOC had pursued its admittedly secular purpose in an invalid way.

Respectfully, there is not a shred of evidence to support that conclusion. No witness testified to such. No document supports such a conclusion. The RFP was put out for public bid on three occasions, (1998-9, 2002 and 2005) at three year intervals. On the third occasion, a private provider located in Louisiana submitted a bid, which was evaluated according to neutral criteria of cost and program. (Add. pp. 39-40). The Court’s conclusion, that the IFI contract was predetermined, is in direct conflict with the only evidence on the issue, and is in conflict with other Findings made by the District Court.

The District Court specifically commented on the “high level of professionalism displayed by Department of Corrections’ personnel”. (Add. p.48, n.25). Apparently, what the Court giveth, the Court can take away 64 pages later, because the Court later found those same professionals engaged in a “pretext” to “ensure that the InnerChange program would come to Iowa” “through a non-neutral RFP process”. Despite their professionalism, the District Court believed the Defendants intentionally engaged in this non-neutral process to “limit the pool of possible providers.” (Add. pp. 112, 113).

Respectfully, that is a conclusion made of whole cloth.

*The Request For Proposal and the contracts were in evidence, but there is no discussion in the opinion at all, as to what terms or specific language in that RFP, or the resulting contracts, are "non-neutral" or "limit the pool" or are "gerrymandered". Neither document is even cited in the opinion.

*Instead, the District Court relies upon a flawed description of the events leading to the 1999 contract. There is no support for the conclusion of "pretext". The DOC administrators all testified as to what they had done, and not done. The process which resulted in the IFI contracts was "customary" in an RFP process. No witness testified to the contrary.

*"Modeling" an RFP after one previously used by other states, (in this instance Texas), is not unusual, according to the uncontradicted testimony. It would be costly and unprofessional for any state administrator to reinvent the wheel each time a contract is let.

*Moreover, as former director Kautzky confirmed, the DOC's pre-contract discussions with IFI were typical of communications in the government contract context and did not result in any "back room" understanding or agreement. (App. pp. 107-125).

*As was "customary" in 1999, the RFP and the award of the contract were actually done by the Iowa Department

of General Services, an independent purchasing arm of Iowa state government. There is no discussion in the opinion as to how this separate arm of government was involved in the individual Defendants' "pretext."

*The DOC utilized a completely neutral RFP process again in 2005 resulting in the contract under which IFI operates today - a process which the District Court again describes in detail. (Add. pp. 39-41). And yet, even though in that instance there was another bidder, and the reviewers (Mapes and Bucklew) testified at length as to their use of neutral criteria in the competitive selection process, the District Court paints with the same broad brush.

In contrast, the evidence shows that in 1998, in 2002, and again in 2005, the DOC issued RFPs to the general public seeking proposals for a values based pre-release program. The language of these RFP's was neutral and nonexclusive, open to anyone and everyone whether religious or non-religious. Likewise, the DOC's neutral criteria for choosing a provider did not favor religious providers over non-religious providers. These criteria included the scope and breadth of the program to be provided, community support for the program, and prior experience providing such a program in a correctional setting. The DOC selected IFI based upon these non-religious criteria. Nothing about the RFP process created

any incentive for providers to claim or adopt a religious affiliation. There is no evidence to the contrary.

Second, the fact that the DOC provides funding only to a Christian-based provider, and not to providers from other religious perspectives, does not make its contract with IFI unconstitutional. The DOC did not limit or restrict those who could apply for funding or those who could receive funding for its values based pre-release program. The DOC's request for proposals was made available to anyone, religious and non-religious alike, on the same terms. Most importantly, Plaintiffs did not point to any secular group, or another religious group, ready, willing, and able to provide the requested values based programming. In short, the conclusion of the District Court rings hollow: if the RFP was "gerrymandered" as "pretext", where and who are the other bidders who were shut out? Why no appeal from Emerald, the unsuccessful bidder in 2005?

2. **The DOC's Contract With IFI Does Not Result in Governmental Indoctrination.**

The conclusion of the District Court to the contrary is clear error. To satisfy this criterion, the DOC's contract with IFI must not only result in religious indoctrination, but such indoctrination must be attributable to the DOC.

Agostini, 531 U.S. at 226; see also *Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (O'Conner, J., concurring in the judgment) (issue is whether "any indoctrination taking place"

is "directly attributable to the government"). Here, any indoctrination that may occur in the Program is attributable to IFI and not the State.

In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, the Supreme Court has focused on the "principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion." *Mitchell*, 530 U.S. at 809 (Thomas, J.). The principle of private choice assures governmental neutrality,

"[f]or if numerous private choices, rather than the single choice of a government, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment."

Id. at 810.

In other words, when the government, in furtherance of a secular purpose, offers aid to all on the same terms and without regard to religion, "then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose." *Id.* at 809. So it is here.

The critical and essential nexus between indoctrination and state decision-making is broken by (1) the DOC's neutrality in providing aid for a values based pre-release program, (2) the allocation of aid in proportion to the number

of participants in such program and only to reimburse nonsectarian expenses, and (3) the independent, private choice of individual inmates to participate or not participate in such program.

a. The DOC Acted Neutrally in Providing Aid To IFI.

From the outset, the evidence shows the DOC made its aid available to anyone who could offer a values based pre-release program - on the same terms and without regard to religion - to accomplish the DOC's secular goal of improving public safety by providing cost-effective inmate treatment, improving prison living and working conditions, and reducing inmate recidivism.

b. Aid Is Allocated on The Basis of Participants.

The DOC provides funding to IFI in proportion to the number of inmates who voluntarily participate in the InnerChange Program and only to reimburse nonsectarian expenses incurred by IFI.

Under the current agreement with the DOC, IFI receives \$3.47 per day for each inmate who participates in the InnerChange Program, not to exceed \$310,000 per year.

The amount of aid received by IFI correlates to the number of inmates who participate in the InnerChange Program on any given day, and can change daily based upon the

individual inmates' decisions to participate, or not participate, in the program. Under earlier versions of the agreements, the DOC provided lump sum reimbursements for nonsectarian expenses up to a pre-determined cap, but the current contract provides that the DOC "will reimburse IFI for the non-sectarian portion of its program at the per diem rate of \$3.47 for each IFI in-prison participant." (App. p. 192).

If no inmates choose to participate in the InnerChange Program, then IFI will receive no funding from the DOC.

In addition to these limits of funding for IFI, the DOC also requires that its funding be used to reimburse nonsectarian expenses. IFI accounts separately for nonsectarian expenses as incurred and invoices the DOC quarterly for reimbursement of those nonsectarian expenses (up to the reimbursement cap for each year). Because such reimbursements are for items that are not themselves religious in nature, even if IFI used those items for religious purposes, such use nevertheless could not "be attributed to the government and is thus not of constitutional concern." *Mitchell*, 530 U.S. at 820-823. ("[J]ust as a government interpreter does not herself inculcate a religious message - even when she is conveying one - so also a government computer or overhead projector does not itself inculcate a religious message, even when it is conveying one.").

c. The District Court's Conclusions That Inmate Participation Is Coerced Is Clearly Erroneous.

Relying on statistically insignificant and constitutionally irrelevant anecdotal evidence, inadmissible hearsay testimony from inmates, and inadmissible proffered 'expert' testimony, the District Court has attempted to support its conclusion with an improper and selective view of the evidence.

1. The District Court Correctly Concluded That Individual Inmates Are Not Required To Participate.

While finding inmates are free to choose to participate, the Court then inconsistently concludes that inmate participation is "coerced". The Court first specifically found that "inmates are not required to participate in the InnerChange program." (Add. p. 53). "The admission requirements are that an inmate wants to be in the program and expresses a desire to change." (Add. p. 53). The District Court acknowledged that each inmate who testified at trial, including all plaintiffs, "explicitly stated that no one from the Department of Corrections or InnerChange threatened to punish them, take away privileges, or otherwise pressure them to join. Likewise, none of these inmates stated they were promised a reduced sentence or an earlier parole for their participation." (Add. p. 53). In addition, the District

Court acknowledged that each participating inmate signs a consent form indicating their volitional actions. (Add. p. 53 and n.26).

The significance of this private choice was reemphasized in *Locke v. Davey*, 124 S.Ct. 1307 (2004) (a case not mentioned by the District Court) which considered whether the exclusion of students choosing to pursue a degree in devotional theology from a Washington scholarship program for postsecondary education was proper under the state's constitution. Noting that "[u]nder Establishment Clause precedent, the link between government funds and religious training is broken by the independent and private choice of recipients," Chief Justice Rehnquist (also the author of *Bowen v. Kendrick*, 487 U.S. 589 (1988)) stated that "there is no doubt that the State could, consistent with the Federal Constitution, permit [scholarship recipients] to pursue a degree in devotional theology . . . even where the students were required through instruction, modeling and classes, to use the Bible as their guide for truth" and even when the aid is paid directly to a religious institution, and without restrictions on its use. Justice Scalia, in dissent, said the question "wasn't even close", citing the unanimous decision in *Witters v. Washington Dept. of Servs. for Blind*, 474 U.S. 481 (1986). *Locke*, 124 S.Ct. at 1317. The concern for the characterization of the provider

was of no moment when the link was broken by the individual choice of the student, or as here and with the same constitutional effect, the inmate. *Mueller v. Allen*, 463 U.S. 388 (1983). If the inmate chooses not to participate, IFI receives nothing.

Apparently with this precedent in mind, the District Court then found this voluntary choice was coerced because "the state and InnerChange provide incentives . . . in the form of better conditions once associated and reserved for honor unit inmates and an opportunity to complete required courses of rehabilitation classes before it would be otherwise possible." (Add. p. 114) (emphasis added).

2. **The Evidence Showed No Effect On Parole Consideration.**

This opportunity for rehabilitation found by the Court is apparently only a shadow benefit, because the Court also found "no evidence to support the Plaintiffs' contention that the Iowa Parole Board treats InnerChange inmates differently than others". (Add. p. 70). Despite this finding about the indifference of the Parole Board, the District Court on the next page of the opinion cites to anonymous "trial testimony" to support the conclusion that somehow, someday, the Parole Board might "look favorably" on someone who completed their programming earlier, (Add. p. 71), making parole "more likely". (Add. p. 72).

That unsupported, unsupportable, and clearly erroneous conclusion is in stark contrast with the actual testimony. Plaintiffs did not identify or produce a single witness who received favorable parole treatment because of participation in IFI, or a person who received less favorable treatment because of non-participation in IFI. Indeed, the evidence showed that several inmates who completed IFI and appeared before the Parole Board were denied parole.

Elizabeth Robinson, current Parole Board chair, who has served on the board since 1994, testified in person, but a discussion of her testimony is conspicuous by its absence from the opinion. According to Ms. Robinson, the Parole Board is the only releasing authority; the DOC has no such authority. (App. p. 148). The Iowa Code requires the Parole Board to do a risk assessment. Treatment and discipline do not impact the risk of release assessed to any particular inmate. (App. pp. 149-150).

Prior to mid-2003, the Board had no information as to whether an inmate was even in IFI. (App. pp. 151-152). Being in IFI does not give an inmate "a leg up" on parole, nor does it give them a "better chance of getting parole." (App. pp. 152-153). In her experience, if inmates are not getting paroled, "it's because we're just not ready to give it, but I don't think treatment has anything to do with it." (App. pp.

154-155). In the last five years, since the inception of IFI, she has not given an inmate favorable treatment because of IFI or its programming, she has not heard any Board member or staff member, directly or indirectly, say that an inmate should receive favorable treatment because of IFI participation, nor has the DOC ever suggested that. (App. p. 156). On cross examination, Ms. Robinson opined that the statement: 'the earlier an inmate completes programming, the more favorably the inmate will be considered' is "not true." That statement is true "only if they have done enough punishment part of their sentence." (App. p. 157). This testimony was unanimously corroborated by the DOC administrators. In short there is no "trial testimony", as cited by the District Court, that the Parole Board might "look favorably" or that there is a "leg up" given to IFI inmates. The testimony of Warden Mapes is quite the opposite: "if you want a leg-up, you (the inmate) jump into the shorter program (provided by DOC) so that you have a fast track to meeting the code required by the Board of Parole." "You don't jump into the IFI program and make a 12 or 18 month commitment to get a leg up." (App. p. 141). The District Court's conclusion is clearly erroneous.

The InnerChange Program is just one of a number of treatment programs made available to Iowa's inmate population.

(App. pp. 167-170). These treatment programs and classes, like the non-religious classes provided by IFI, are sufficient to satisfy the conditions of an inmates' parole requirements and are reasonable alternatives to the InnerChange Program. The District Court's futile search for an exactly equivalent program is of no constitutional significance. See *Freedom from Religion Foundation, Inc. v. McCallum*, 214 F.Supp.2d 905, 916 (W.D. Wis. 2002) ("[T]he Constitution does not require that the religious and non-religious options offered to the offender have identical features, only that they be reasonable alternatives.").

Moreover, the DOC does not promote, recommend, pressure or attempt to influence any inmates concerning their decision about whether to participate in the InnerChange Program. The material terms of an inmate's incarceration are unaffected by his decision to participate, or not to participate, in InnerChange.

3. The Distinction In Living Conditions Upon Which The Court Relies Are Constitutionally Insignificant.

The second "benefit" which the Court held was an incentive for inmates to participate were "better conditions once associated and reserved for honor unit inmates." (Add. p. 114). That conclusion is also clearly erroneous. [It must be noted here, that if the prison environment (Unit E) is

considered "coercive", a discussion of the *Turner* factors should have been included.]

Despite substantial testimony to the contrary, the District Court concluded that the conditions of Unit E at NCF were part of the alleged benefits provided to IFI inmates. Instead, the evidence demonstrates that the conditions in Unit E were driven by reasonable and legitimate penological concerns of the prison administrators.

First, Unit E was selected by the DOC for the IFI program because of its location on the edge of the yard. Due to security concerns for IFI volunteers entering and leaving the yard, via the 'boulevard', (the large sidewalk which bisects the yard), it was safer to bring those volunteers around the edge. (App. pp. 159-162).

Second, as the District Court specifically found, budgetary considerations, not any intent to impact inmate choice, caused Unit E to be "value engineered", in the words of Director Kautzky.

"The structure of Living Unit E, originally designed to mirror Units C and D at the Newton facility, was changed to reduce costs. Unit E's wooden door and 'dry cells' . . . were not originally constructed to provide an honor unit setting to reward good behavior, but rather as a result of budgetary constraints."

(Add. p. 27).

Third, a word about safety: the District Court concluded that NCF is a 'safe facility' -- which it is. (Add. p. 48). Yet the Court concluded that going to the IFI program for the 'safety' of Unit E was also an incentive to inmates. However, the statistics cited by the District Court do not support its conclusion. Those statistics show that fewer inmates transfer from the general population of the Newton facility to IFI housing, than from other institutions. (Add. p. 55). If the added safety of Unit E were an incentive, one would expect the statistics to be nearly equal, or greater, for NCF inmates.

The District Court's conclusion (Add. p. 116) that Unit E was chosen to promote "spiritual growth and transformation", based on these facts, is clearly erroneous.

4. The District Court Relied Upon Inadmissible Hearsay Testimony.

Throughout the course of this lengthy trial, and continuously in response to inmate testimony, Defendants objected to hearsay statements of opinion by inmates as to what other inmates may, or may not, prefer in housing accommodations. As is customary in a bench trial, all of these hearsay opinions were "taken subject to the objection."

The Court's opinion then deals with these hearsay objections with silence. Yet the opinion is based on the testimony of these inmates expressing preferences on behalf of others. (Add. p. 114).

That is not the only silence in the otherwise lengthy opinion. Finding great weight in the "preferences of individual inmates," the District Court nevertheless fails to even mention those plaintiffs who express a preference different than that which supports the Court's conclusion.

For instance, Plaintiff Hammers is quoted at length to express his wish to have his own key, i.e. in the Court's view, an incentive to be in the IFI unit. (Add. p. 114). But Plaintiff Hammers is not quoted when he also described the lack of personal TV's, the restriction on videotapes, the restriction on sexually explicit materials otherwise allowed to non-IFI inmates, the full schedule, and the lack of a full-time job and the requisite loss of income, as disincentives to himself, and other inmates that he might know. (App. pp. 78-81).

Plaintiff Burens is quoted at length as a Native American who is "coerced" into giving up his own religion by joining IFI. Yet the Court fails to even discuss this same plaintiff's expression of a preference for "wet cells", that is, toilets in his cell. Dry cells in Unit E are erroneously considered by the Court, on the basis of the testimony of Plaintiffs' expert Kampka, to be a universal incentive for inmates to go there. (Add. pp. 114-115; App. p. 89). That opinion is simply not universal. Even more so, Plaintiff

Burens prefers not to have a job, but to serve his time in prison utilizing free time. For him, the IFI structure was a decided disincentive. (App. p. 90).

Other disincentives described by inmate witnesses but which did not make it into the Court's opinion included: the program was very difficult, (App. pp. 84-85); curfew was earlier in E than the other GP units, (App. p. 86); correctional officers were more 'nit-picky' on the rules, (App. p. 87); cells were expected to be kept cleaner, (App. p. 87).

The only truly supportable generalization which can be made on this evidence, is by Plaintiff Hammers: "I can't speak for other people; how they do their time." Hammers accurately describes incentives-disincentives as a matter of personal preference. (App. p. 82). What is good for one inmate, is not for another. On balance, the conditions of confinement in Cellhouses C, D and E, are similar. The differences however are minor and often turn on this personal preference. There is no requirement that a program such as IFI be conducted under conditions that exactly duplicate that of other areas of the prison. Indeed, if the District Court is correct on this point, a program such as IFI would have to be housed in an identical facility as that of nonparticipating inmates, which is not only unrealistic, but is the result of a

constitutionally unnecessary "race to the bottom." ("Quality cannot be coercion." *Freedom From Religion Foundation Inc. v McCallum*, 324 F.3d 880, 884 (7th Cir. 2003)).

In the world of human choice, without statistical sampling to justify generalizations, inmate Hammers' description of the personal preference of the inmates, seems logical and rational. It is that logic to which former Warden Mathes testified as Defendants' expert -- but his opinion, although intuitive and rational, was discounted because as the former warden at NCF, he was "personally involved." (Add. p. 115, n.43). His opinions were discounted despite his exemplary record as reviewer and monitor for the American Correctional Association, for other Courts, and other States, since that DOC employment terminated. (App. pp. 142-146, 165-166, 188). Instead, the Court accepted the inadmissible opinions offered by the Plaintiffs' expert, Gordon Kampka.

5. The District Court Erroneously Admitted Expert Testimony From Plaintiffs' Expert, Abdicating Any of Its Required Gatekeeper Function.

Gordon Kampka was accepted by the Court as an expert whose "credentials are stellar" (despite his felony conviction) and whose "conclusions about prison conditions were credible and helpful." (Add. p. 115, n.43). His testimony was neither credible nor helpful. Admission of any

of Mr. Kampka's opinions was an abuse of discretion, in violation of Fed. Rule Evid. 702 and reversible error.

In *Daubert v Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), the U.S. Supreme Court determined that the *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) test which required the exclusion of scientific testimony not derived from generally accepted principles or theories, had been superseded by the Federal Rule of Evidence. "Evidentiary reliability will be based on scientific validity." *Daubert*, 509 U.S. at 591, n.9 A Trial Court should ordinarily consider (1) whether the underlying theory or technique has been tested; (2) whether it is subject to peer review and publication; (3) whether there is a known rate of error; (4) whether it is generally accepted in the scientific community.

While *Daubert* states that the Trial Court focus should be on the principles and methodology, nevertheless, the Supreme Court has since clarified that methodology and conclusions are not entirely distinct, and "a court may conclude that there is just too great an analytical gap between the data and the opinion proffered." *General Electric Co. v Joiner*, 118 S.Ct. 512, 519 (1997).

In *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 143 L.Ed.2d 238, 119 S.Ct. 1167 (1999), the Supreme Court again clarified that the Trial Court's gatekeeping function applies

to all types of expert testimony, not only those based on scientific knowledge, but also those based on other "specialized knowledge". In *Peitzmeier v. Hennessey Indus. Inc.*, 97 F.3d 293 (8th Cir. 1996), this Court found *Daubert* applicable to basic engineering principles. There, because the proffered expert's designs had not been tested, his ideas had not been subjected to peer review, and because there was no evidence of rate of error or general scientific acceptance, the expert's testimony was properly excluded. The same result should have followed here.

Mr. Kampka, who has testified 74 of 75 times for plaintiffs (App. p. 99), was asked to expound on the results of self-described interviews of "thousands of inmates" "over the years", and based on those interviews, to describe what physical conditions would constitute an incentive, and which conditions would constitute a disincentive, for any particular Iowa inmate, (App. p. 91), on the issue of "whether the State is giving inmates material, nonreligious incentives to enroll in the IFI program, which goes to the coercion issue. . . ." (App. p. 92). The State made a *Daubert* objection to the proposed testimony. (App. p. 93). The Court took the testimony subject to the objection with a ruling to come in the substantive decision about "whether or not it's admissible". Kampka thereafter testified what Iowa inmates

like and dislike. (App. p. 94). Based upon his, and other inmate testimony on behalf of all inmates in Iowa, the Court found that "wooden doors, separate toilet facilities, dry cells (which are the same thing), access to one's own cell key, and generally safer environment" "are desirable reminders of freedom", (Add. p. 114), and are thus incentives provided by the State to enroll in IFI.

In contrast, former Warden Mathes, offered as Defendants' expert, testified that such conditions were personal preferences among inmates and it would be impossible, without a statistically valid study of Iowa inmates, to determine which conditions were more important than others. These preferences for any one particular inmate would be weighed in favor of participation or non-participation for that inmate. (App. pp. 173-188).

This intuitive and seemingly logical opinion, (that "it depends"), was disregarded by the District Court because John Mathes was the immediate former warden of the Newton facility.

(Add. p. 115, n.43). The opinion as to what Iowa inmates would prefer and what Iowa administrators would use as incentives was accepted by the Court from Kampka, despite the fact he has not been actively involved in administration of a prison in over twenty years, and never in Iowa. Further, in contravention of *Daubert* principles, he purportedly spoke on

behalf of either the 8500 inmates in the Iowa system, or at a minimum the 1185 inmates at Newton. (App. p. 95).

His opinion was based on his interviews of nine inmates from Newton, pre-selected by the Plaintiffs' counsel (without disclosure as to the criteria for their selection). (App. pp. 96, 101). In fact, this expert didn't even ask what criteria were used by the Plaintiffs' lawyers. Further he did not ask to interview any other inmates, nor IFI or DOC staff, nor attend any classes. (App. pp. 97-98). He did not talk to anybody from the Parole Board. (App. p. 100).

Although he claimed in defense of his methods that he was short on time and money (App. p. 102), such a defense does nothing to reinforce his report, but further undermines its value, if any. Kampka didn't ask any of the nine interviewed inmates about disincentives, nor did he ask any DOC official about them, including the Warden, who was nevertheless described as "very forthcoming". (App. p. 103).

Perhaps no better example of the worth of this proffered expert is in the discussion of personal TVs. They are not allowed in the IFI unit, but are universally allowed in the other units of the NCF. Mr. Kampka opined this was not a disincentive, because the inmates in the IFI program had such a structured day that they would not have missed the TV anyway. (App. p. 104). But to Kampka, the library, the

computer room and the "music room" (which is actually a storage room where instruments are kept) are incentives. The question is begged: if there is no time to use personal TVs such that they aren't missed, when, if ever, is the music, computer, and library room in use?

Mr. Kampka did not randomly interview Newton inmates, IFI or not, and his opinion is based on his nine pre-selected interviews with tailored questions. (App. p. 105). He did no statistically significant study of preferences. He did not keep the names of any of the "thousands of inmates" upon which his opinion is based, so that his conclusions cannot be validated. (App. p. 99). In sum, his opinion is not:

(1) based upon an underlying theory or technique that has been tested;

(2) subject to peer review and publication;

(3) possessing a known rate of error;

(4) generally accepted in the scientific community.

See also, Smith v. Cangieter, ___ F.3d ___, 2006 WL 2588479 (8th Cir. September 11, 2006).

Under *Daubert*, his analysis "must be subject to some independent verification", which is the very definition of validity in the scientific community. This District Court accepted the "helpful and credible" opinion of Kampka over Mathes. In truth, Kampka was neither helpful nor credible.

The inadmissible Kampka opinion then formed the basis for the Court's decision that the personal choice of the inmates was "coerced." Ordinarily, credibility determinations are for the District Court, but here, there is a question of admissibility of the Kampka opinion in its entirety.

In a larger sense, the District Court opinion suffers from the same flaws as the Kampka opinion: both offer a 'cherry picking' approach of inconsistent and statistically insignificant anecdotal evidence with respect to personal preferences that lack constitutional dimension. Kampka is like the ranch hand who, because he had done it 74 times previously and had observed "thousands" of cows, was asked by the ranch foreman to look at nine pre-selected cattle in a pre-selected pasture, and report as to which direction the cows were heading. Since those nine were headed west, Kampka reported "west". The foreman told the ranch owner, who dutifully recorded his herd was headed west, despite the fact that Kampka, the ranch hand, had not looked at any of the other 1185 cows in that particular pasture, or any of the 8500 cows in any of the 15 other pastures on the ranch. The error is obvious. Not only is the conclusion about the herd unsupported, but the owner knows nothing about any individual cow in that, or any other pasture.

This Circuit Court should "conclude that there is just too great an analytical gap between the data and the opinion proffered." *General Electric Co. v. Joiner*, 118 S.Ct. 512, 519 (1997). Reversal is required to eliminate consideration of this "helpful" but inadmissible testimony.

6. **"Incentives", If Any, Are Personal Preferences of The Inmate, And Are Not Actions of The DOC.**

The only effect of an inmate's decision to participate in the InnerChange Program is a minor, temporary change in the incidental conditions of his confinement. To the extent that any "differences" actually benefit InnerChange participants, they have not resulted from government compulsion or coercion.

In the prison context, differences in the conditions of confinement always exist, but are not impermissibly coercive and do not give rise to any right of action unless they impose an "atypical and significant hardship" on the inmate. *Sandin v. Connor*, 515 U.S. 472, 484-86 (1995); *McKune v. Lile*, 536 U.S. 24, 40 (2002) (loss of privileges for refusing to participate in rehabilitation program impacting Fifth Amendment right against self-incrimination did not amount to unconstitutional coercion). This is because, "by virtue of their convictions, inmates must expect significant restrictions, inherent in prison life, on rights and privileges free citizens take for granted." *Meachum v. Fano*,

427 U.S. 215, 225 (1976). "The conviction [of a prisoner] has sufficiently extinguished [his] liberty interest to empower the State to confine him to any of its prisons . . . [and] discretion to transfer him [to another prison] for whatever reason or for no reason at all." *Id.*, 427 U.S. at 228.

The District Court acknowledges the principle that private choice insulates a government aid program from challenge under the Establishment Clause. Further, the District Court acknowledges that it is not constitutionally fatal that the DOC makes funding payments directly to IFI, and not the inmates, because of the problem of 'contraband' within the walls. (Add. p. 118, n.44). These concessions tacitly admit the context in which this constitutional challenge arises, *i.e.*, a prison, but fail to grasp the very reason why this context must be factored into the Court's analysis.

First, the Court is correct that private choice does not require that government funding pass through the hands of individuals before reaching religious entities. As the plurality explained in *Mitchell*, "[a]llthough the presence of private choice is easier to see when it literally passes through the hands of individuals . . . there is no reason why the Establishment Clause requires such a form." 530 U.S. 793, 816 (2000); *see also Freedom from Religion Foundation Inc.*, 324 F.3d at 883 ("there is no difference between giving the

voucher recipient a piece of paper that directs the public agency to pay the service provider and the agency's asking the recipient to indicate his preference and paying the provider whose service he prefers."). This is particularly true where, as here, the government funding cannot pass literally through the hands of the individual inmates. The DOC cannot simply provide funding directly to inmates without creating a host of other more serious security problems. The District Court accepts this reality and yet finds the constitutional jurisprudence established by *Turner* to be inapplicable.

Second, it is of no constitutional significance (unless the discussion is of *Turner*) that prison inmates lack the genuine and independent choices of private individuals. That may be axiomatic, but constitutionally irrelevant. The DOC severely limits an inmate's freedom and independence as part of the terms of their confinement. The DOC cannot allow inmates to enter or leave the IFI program at will; rather, the DOC must oversee participation in the IFI program to the extent necessary to prevent security problems. But this does not negate inmates' freedom to choose to participate, or not participate, in the InnerChange Program. See, e.g., *Freedom from Religion Foundation, Inc. v. McCallum*, 214 F.Supp.2d 905, 916 (W.D. Wis. 2002). ("[T]he fact that offenders are under control of the department [of corrections] does not mean that

they are incapable of making their own private, independent choice to participate in a particular program or not."). Moreover, the fact that inmates do not fully control whether they enter or remain in the InnerChange Program is no different from the situation for students who choose to attend a religious private school: even if such a school receives government aid, it retains the right to deny a student admission or expel a student for bad grades, bad behavior or other legitimate reasons. In the same way that these limitations do not invalidate the students' genuine and independent choices, the limitations on inmates' ability to participate in the InnerChange Program do not invalidate their genuine and independent choice to do so.

Third, the fact that inmates cannot direct state funding to other providers does not erase the inmates' freedom to choose to (a) obtain treatment through IFI, (b) seek treatment through the DOC's secular programs, or (c) forego treatment altogether. See, e.g., *Freedom from Religion Foundation, Inc. v. McCallum*, 214 F. Supp.2d at 916 (fact that offenders' choice was between single religious program and several secular programs was not constitutionally significant). In contrast to the Court's clearly erroneous conclusion that "there is no other treatment program to which the inmate" can direct his per diem (Add. p. 122), if an inmate obtains

secular treatment through a DOC program, then he effectively causes state funding to be allocated to the DOC program. If an inmate chooses not to participate in the InnerChange Program, then he effectively denies State funding to IFI. These choices enable inmates in a prison context to exercise their own private, independent choice to participate, or not participate, in the InnerChange Program. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 656 (2002) (in evaluating private choice program, court must consider all schooling options available to students, not just schools participating in voucher program.). In *Zelman*, genuine opportunities were provided the Ohio school children, despite the fact that over 80% of the schools were religiously affiliated, and 95% of the funding went to religiously affiliated schools. Constitutional opportunities for choice are provided the Iowa inmates as well.

IFI receives government funding to reimburse secular expenses only as the result of the private choice of individual inmates, thus breaking any link between government funding and religious indoctrination.

III. THE DOC'S CONTRACT WITH IFI DOES NOT FOSTER EXCESSIVE GOVERNMENT ENTANGLEMENT.

In assessing government entanglement, the Court must consider whether the DOC's contract with IFI (a) requires "pervasive monitoring" by the DOC, and (b) requires

administrative cooperation between the DOC and the provider. *Agostini*, 521 U.S. at 233 (citation omitted). As the Supreme Court has noted, however, “[i]nteraction between church and state is inevitable . . . and [the courts] have always tolerated some level of involvement between the two.” *Id.* Hence, “[e]ntanglement must be ‘excessive’ before it runs afoul of the Establishment Clause.” *Id.*

Here, any “entanglement” between the DOC and IFI falls well short of “excessive.” The DOC’s “monitoring” of the InnerChange Program is limited to receiving and reviewing periodic service invoices from IFI. (App. pp. 127-134). The DOC does not, to be sure, involve itself in monitoring the InnerChange Program, IFI’s billing procedures, or IFI’s use of the money received from the DOC.

Similarly, there is no significant administrative cooperation that would support a finding of excessive entanglement. DOC and IFI officials do engage in some amount of cooperation - meeting and communicating occasionally about administrative issues that necessarily arise from IFI’s operation of its program in the midst of the DOC’s prison system. Plainly, this is insufficient to establish “excessive” governmental entanglement. *See Agostini*, 521 U.S. at 233 (administrative cooperation, by itself, is insufficient to create excessive entanglement).

Since the contract of 2005, payment to IFI has been on a per diem, per inmate basis, which minimizes governmental entanglement in the IFI administration. IFI's religiousness, however, is no more relevant to the entanglement inquiry than the religiousness of parochial schools in the school aid context. Courts are not called upon to measure religiousness in determining government entanglement. To the contrary, "[t]he religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government's secular purpose." *Mitchell*, 530 U.S. at 828.

IV. RESTITUTION IS AN IMPROPER REMEDY.

A word about that. Finding that the State and PFM made an "intentional choice to inculcate prisoners as a treatment for recidivist behavior" and then engaged in an "extraordinary level of religious indoctrination", despite the "level of knowledge and experience of counsel for these Defendants", the District Court ordered restitution to the State of all monies paid by the State to PFM for the duration of the contracts. (Add. pp. 134-140). The District Court reiterated its belief that the selection process "preferred" PFM, to foster a program that "intentionally indoctrinated" inmates (Add. pp. 137-8) who had no "genuine, private choice". (Add. p. 136). Because the "Court now knows what the Defendants knew before

the Plaintiffs took this action" (Add. p. 137), equity requires that PFM repay the taxpayer funds to the co-defendant State of Iowa. If this brief does not succeed in convincing this Court that the decision must be reversed, surely it must be concluded that the issues are at the very least, complex and debatable, laying bare the conclusion of the Court as to the equities.

The irony of restitution as a result is not lost on the State. Probably in no other case has the State "lost" the decision, but won restitution of all the monies paid. The State joined the brief and arguments of PFM before the District Court, and here also, adopts by reference the legal points and authorities offered on this issue by PFM. Restitution for those reasons is an inappropriate remedy.

But for the DOC: none of the discussion by the District Court on the reasons for the equity of restitution as a remedy, focuses on quantum meruit. Instead, the District Court simply orders all monies returned, in direct contradiction to the unanimous testimony of finance officer Baldwin, former Warden Mathes, current Warden Mapes, Deputy Warden Weitzell, and former Director Kautzky. The State could not replicate the program for less than a million dollars a year; we got our monies worth - we got a lot of "bang for the buck, value!" (App. pp. 136-137, 171-172). In addition, the

Court orders restitution to a particular state fund, *i.e.* to "replenish" the inmate telephone fund. Again, there is no discussion of value received by the inmate. In the case of the telephone fund, the inmates got what they paid for, a long distance call.

If restitution is available at all, and it is not, any discussion should deal with the equities of what the State and the inmates received in return for their expenditures. Babies and bath water come to mind.

CONCLUSION

The decision of the District Court must be reversed.

CERTIFICATE OF COMPLIANCE

COME NOW State Appellants, through undersigned counsel, and certify that the contents of the State Appellants' Brief in the above-captioned case are contained on the enclosed diskette. This diskette has been scanned by McAfee Virus Scan and no viruses were found. The brief is in WordPerfect 8.0 format and the font is Courier New 12 point.

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COST CERTIFICATE

The certified cost of printing this brief was \$286.00. See Eighth Circuit Rule 39A(a)(1), (2) (allowing charges for ten copies of brief and addendum, plus two copies for each

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CERTIFICATE OF SERVICE

I, H. Loraine Wallace, Assistant Attorney General for the State of Iowa, hereby certify that I mailed two (2) copies of this State Appellants' Brief on the 13th day of September, 2006, to the following:

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