

Appeal 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

- against -

PRISON FELLOWSHIP MINISTRIES, INC. AND
INNERCHANGE FREEDOM INITIATIVE, INC. *et al.*

Defendants-Appellants.

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

**REPLY BRIEF OF DEFENDANTS-APPELLANTS PRISON FELLOWSHIP
MINISTRIES AND INNERCHANGE FREEDOM INITIATIVE**

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ARGUMENT

Plaintiffs urge this Court to be shocked that PFM and IFI are very religious organizations whose beliefs motivate and shape their service to inmates. This basic fact should surprise no one, and should be irrelevant to the disposition of this case. But Plaintiffs' response – imitating the lower court – dwells on those beliefs, on the theory they could and should disqualify InnerChange from ever contracting with the government.

That kind of disqualification is religious discrimination – precisely the kind that the “pervasively sectarian” test used to invite, and one of many reasons six Supreme Court Justices repudiated it. *Mitchell*, 530 U.S. at 828 (“pervasively sectarian’ factor collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status”)(plurality); *id.* at 858 (“a presumption of indoctrination...constitutes an absolute bar to the aid in question...‘smacking of antiquated notions of “taint””)(concurrency).

Resurrecting this dead Establishment Clause theory would do even worse than implement that discrimination here. It would eliminate a *voluntary* religious option for Iowa prisoners in their choice of rehabilitation services, and a program that is especially effective against our nation's recidivism crisis. *See* Kasie Hunt, “One in 32 Americans in Jails, on Parole,” *Associated Press*, Nov. 30, 2006. And

the draconian remedy—also based on this theory of total disqualification, Op.127-28—would deter most faith-based providers from ever contracting with the government.

Once IFI's religious status is duly ignored, nothing should prevent it from contracting with Iowa to help pursue the conceded secular purpose of reducing recidivism. Where IFI engages in partially or entirely secular activities in the course of that contract, Iowa may fund those secular portions directly. And because government funds are directed to IFI's program only when prisoners choose it, those funds may even cover religious aspects of the program, because the decision to fund religion isn't attributable to the state. Either way, the Establishment Clause allows the contract, and so allows IFI to continue providing the best rehabilitation services at the lowest price to Iowa and its inmates – and, in turn, helps our nation confront a major social problem.

I. PLAINTIFFS FAIL TO REBUT DEFENDANTS' SHOWING THAT INNERCHANGE AND PRISON FELLOWSHIP ARE NOT STATE ACTORS.

Recognizing the weakness of the state action holding, Plaintiffs frantically back-pedal, claiming the Court need not decide the issue, because the *Iowa* defendants are state actors. AU-Br.54. But if IFI and PFM aren't state actors, they should be dismissed as defendants; the order exceeding \$1.5M against them

vacated; and the opinion whose Establishment Clause ruling rests on imputing their every religious word and deed to the State reversed. IFI-Br.26.

IFI and PFM showed they are private parties not acting under color of law regarding “the specific conduct of which plaintiffs complain.” IFI-Br.24-29. Here, the crux of Plaintiffs’ complaint—and thus the only issue relevant to state action analysis—is that Iowa’s decision to partially fund IFI’s program doesn’t comply with Establishment Clause limits on direct or indirect aid.

Plaintiffs offer no basis for making IFI and PFM responsible as state actors for *Iowa’s* sovereign funding decisions. Plaintiffs’ state action discussion (like the lower court’s) fails to cite a single case involving government aid to a religious institution finding the private recipient a state actor. This silence is unsurprising—the alleged unlawful conduct and basis for standing in Establishment Clause funding cases is the *State’s expenditure* of government funds. *See DeStefano v. Emergency Housing Group*, 1997 WL 473283, *3 (S.D.N.Y. 1997)(religious social service provider not state actor in Establishment Clause challenge because receipt of government funds may “not be equated with the government act of expending them”). *See also Rendell-Baker*, 457 U.S. at 831 (contractor’s “receipt of public funds” doesn’t turn private action into state action).

Plaintiffs’ attempts to defend the state action holding below should be rejected, because all fail to address the dispositive issue of whether IFI and PFM

are state actors *regarding the specific action complained of here*: Iowa’s decision to expend State funds. *Blum*, 457 U.S. at 1003 (court must not focus on all defendant activities, but instead must give “careful attention to the gravamen of the plaintiff’s complaint”).

Plaintiffs’ arguments lack merit even apart from this fatal flaw. Their claim that prisoner rehabilitation is a “traditional public function” merely parrots the lower court’s error of ignoring that this doctrine applies only rarely, where “the function performed has been traditionally the *exclusive* prerogative of the state.” *Rendell-Baker*, 457 U.S. at 831. Prisoner rehabilitation services have not been, now or at any time in our nation’s past. IFI-Br.22-24; *see* ADF-Br.7-14.¹ Although Plaintiffs trumpet Iowa’s admirable decision to mandate rehabilitation, that contemporary choice doesn’t rewrite history to make rehabilitation an exclusive state function. *See, e.g., Rendell-Baker*, 457 U.S. at 842 (state statute requiring educational services for “maladjusted youth” did not render those services exclusive state function).²

¹ State provision of rehabilitation services has waxed and waned with the approach to criminal justice—retribution, incapacitation, or rehabilitation—then in fashion. ADF-Br.10-12. Correspondingly, the Supreme Court has never found any constitutional right to state-provided rehabilitation (unlike basic medical care, as in *West*).

² *Rendell-Baker* also forecloses Plaintiffs’ claim (AU-Br.56) that IFI’s receipt of “substantial state aid” makes it a state actor. Government funds accounted for, at most, 40% of IFI’s operation costs, Op.41—much less than the 90% found insufficient in *Rendell-Baker*.

Citing *Brentwood Academy v. Tenn. SSAA*, 531 U.S. 288 (2001), Plaintiffs claim IFI and PFM are state actors because they participated “in joint activity with the State.” AU-Br.56. But *Brentwood* required more than mere “joint activity”: it must be so extensive as to produce “pervasive entwinement to the point of largely overlapping identity” between the State and the private entity. *Id.* at 298-303. There is no such evidence here; unlike *Brentwood*, no government agents held positions of authority within IFI’s or PFM’s hierarchy, nor were public employee benefits available to IFI or PFM employees. *Id.*³

Finally, Plaintiffs seek to evade *Montano*, which forecloses the ruling that IFI and PFM were state actors for all purposes. *Montano* holds that even state employees—and *a fortiori* private contractors—are not state actors when they carry out religious functions. Thus, when PFM and IFI carry out secular functions, there might be state action, but those actions don’t violate the Establishment Clause; and when they carry out religious functions, *Montano* precludes any finding that they were state actors. IFI-Br.27-29.

³ Plaintiffs’ reliance on *Smith v. Cochran*, 339 F.3d 1205 (10th Cir. 2003), *Flint v. Ky. Dep’t of Corrs.*, 270 F.3d 340 (6th Cir. 2001), and *CSC v. Malesko*, 534 U.S. 61 (2001), is misplaced. *Smith* is inapposite: the defendant was a *state* employee (not a private actor as Plaintiffs suggest). *Flint* misstates the law, omitting the “exclusivity” element of the public function test. Finally, the *dicta* Plaintiffs cite in *Malesko*—that prisoners “enjoy a right of action against private correctional providers under [Section 1983],” 534 U.S. at 72n.5—doesn’t hold that rehabilitation is an exclusive public function, or that private entities contracting to provide prison services are state actors for all functions they may perform.

Plaintiffs respond by invoking the “pervasively sectarian” doctrine, arguing that IFI’s “religious activities are inseparable” from its secular functions. AU-Br.57. But that doctrine is no more legitimate here than under the Establishment Clause: *Mitchell* forbids any presumption that religious groups cannot separate religious from secular functions. IFI-Br.32-33. Thus, IFI and PFM aren’t state actors.⁴

II. PLAINTIFFS FAIL TO REBUT DEFENDANTS’ SHOWING THAT THE COURT ERRED IN ITS FACTUAL DETERMINATIONS.

A. Plaintiffs Overstate the Applicable Standard of Review for Facts.

Plaintiffs deny that *de novo* review applies to facts in Establishment Clause appeals. AU-Br.66-67. But the cases they cite were either silent on the proper standard (*Warnock*), or decided before this Court’s *en banc* discussion of the special First Amendment standard (*Clayton*) in *FAIR v. Nebraska DSS*, 111 F.3d 1408, 1411 (8th Cir. 1997). The Supreme Court itself has applied this stricter review to free association claims, *see Carver v. Nixon*, 72 F.3d 633, 639 (8th Cir. 1995), and other Circuits have found it applies equally to the Religion Clauses of the First Amendment. *Bronx Household v. Bd. of Educ.*, 331 F.3d 342, 348 (2d

⁴ Plaintiffs note that IFI helps (like other Newton contractors) provide security, and that some courts have found that private entities that provide security are state actors. But that’s irrelevant here, because this case doesn’t involve prisoners claiming injury attributable to IFI’s exercise of its secular security functions. Plaintiffs complain instead that Iowa’s decision to *spend* on rehabilitation services from a religious entity violates the Establishment Clause.

Cir. 2003)(Establishment); *Tenaflly Eruv Ass'n v. Tenaflly*, 309 F.3d 144, 156-57 (3d Cir. 2002)(Free Exercise and Free Speech).

Even under the clearly erroneous standard, Plaintiffs ignore that this Court sets aside fact-findings “based on an erroneous view of the law,” *Tadlock v. Powell*, 291 F.3d 541, 546 (8th Cir. 2002), as with the “pervasively sectarian” test or restitution remedy. Moreover, where the lower court ignored uncontradicted evidence and made no findings about it, this Court may rely on that evidence. *U.S. v. Spotts*, 275 F.3d 714, 716 (8th Cir. 2002).

B. Plaintiffs Fail to Rebut Defendants’ Showing That the Court Relied Erroneously on Expert Testimony About “Evangelical Christianity.”

Defendants demonstrated that Sullivan’s expert testimony is constitutionally barred by *Thomas* and irrelevant under *Daubert* to the extent it discusses “Evangelical Christianity” generally;⁵ and it is unreliable under *Daubert* to the extent it addresses administration of the Newton Program particularly. IFI-Br.27-29.

⁵ Defendants underscore that Sullivan’s general view of “Evangelical Christianity” is inaccurate regarding not only present parties, but the evangelical community more broadly, particularly her account of their views toward people of other faiths. In a similar attempt to tar Defendants as anti-Catholic, Plaintiffs cite stray remarks made primarily by IFI volunteers who were dismissed precisely for making them. *See* IA322-23, Tr.1925-26 (volunteer summarily dismissed for anti-Catholic tract cited in Plaintiffs’ brief); Tr.1953 (IFI took action to censure and stop anti-Catholic comments). As *amicus* Catholic League explained, CL-Br.1,4-8, Defendants have been exemplary ecumenicists and *friends* of Catholics.

Plaintiffs bury their response, AU-Br.72-74, and never mention *Thomas*. Plaintiffs instead tout Sullivan's credentials, which Defendants already acknowledged and addressed. IFI-Br.27. Plaintiffs also make the uncontested, irrelevant point that courts cannot evaluate the validity of religious beliefs, but may sometimes describe their content. AU-Br.73. Plaintiffs thus dodge the key point: the *type of evidence* at issue here is forbidden by the Constitution and inadmissible under rules of evidence.

On reliability under *Daubert*, Plaintiffs acknowledge that Sullivan considered only documentary evidence, AU-Br.72, but present no case or argument showing that this is sufficient evidentiary basis for her to testify about IFI's *actual administration*, particularly when she disavowed knowledge of it. (Meanwhile, the lower court emphasized that it used her testimony precisely for that. IFI-Br.28-29.)

Ultimately, Plaintiffs are forced to claim that the lower court never actually relied on Sullivan's testimony. AU-Br.73. But the lower court's own account of its use of her testimony belies this assertion. *See* Op.14-15&n.9; IFI-Br.28n.5,36-37. This evidence was thus unconstitutional, inadmissible, and prejudicial.

III. PLAINTIFFS FAIL TO REBUT DEFENDANTS' SHOWING THAT IOWA'S CONTRACT WITH INNERCHANGE DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

A. Plaintiffs' Concessions Dramatically Narrow the Range of Issues Before the Court.

Defendants explained that all contracts but the one operative at trial are moot because Plaintiffs waived their damages claims. IFI-Br.30-31,50-51. Plaintiffs don't contest this point—or even mention mootness in their brief—but merely note past contracts might still be relevant. AU-Br.71. This concession on mootness means that various decisions below should be vacated as moot, eliminating the need to address their merits:

- That the initial contract violated the Establishment Clause because the initial RFP wasn't "neutral." Op.111-12.
- That any *pre-per diem* system for allocating sectarian and nonsectarian costs violated the Establishment Clause because it "resulted in government indoctrination." Op.42-47,107-09.
- Any injunction, including the order of restitution, as a remedy for any Establishment Clause violations caused by any terminated contracts. Op.128,138-39.
- Any finding of liability and award of relief against PFM, which wasn't party to the contract operative at the time of trial. *Id.*

Similarly, the lower court found, Op.95, and Plaintiffs don't dispute on appeal, that the contracts had the primary secular purpose of reducing recidivism. This holding is virtually impossible to square with other holdings below, including

that the RFP process for the first (now moot) contract lacked neutrality, Op.111-13, and that the contracts were entered in “bad faith.” Op.131.

The lower court also found “the InnerChange computer training course could be considered thoroughly secular in nature,” Op.75, and Plaintiffs concur. AU-Br.4. This actual separation of religious and secular activities defeats any claim that IFI’s beliefs categorically make separation impossible.

Finally, Plaintiffs waive by their silence any argument that non-taxpayer Smoker and Prisoner Plaintiffs have standing. IFI-Br.61.⁶

B. Plaintiffs Fail to Rebut Defendants’ Showing That the Current Contract Is Permissible as Direct Aid.

1. Plaintiffs fail to rebut Defendants’ showing that the current contract does not result in government indoctrination.

IFI’s initial brief explained that Justice O’Connor’s *Mitchell* concurrence controlled the “government indoctrination” part of the direct aid test. IFI-Br.31-32. Plaintiffs appear to agree, but suggest Defendants must satisfy all six factors Justice O’Connor considered in *Mitchell*. AU-Br.36. But she was careful to avoid claiming that all six factors were constitutionally necessary, emphasizing instead

⁶ As for Telephone Fund Plaintiffs, Plaintiffs half-heartedly claim that profits Iowa makes from selling telephone services to inmates “are akin to taxes.” AU-Br.79. But prisoner telephone calls (and donations to prisoner telephone accounts) are voluntary acts, so profits from them can’t be taxes. *See CFFER v. FERC*, 297 F.3d 771, 778 (8th Cir. 2002)(tax is “general charge not correlated to a particular benefit”; fee is charge “voluntarily” paid).

that they were merely sufficient. *Mitchell*, 530 U.S. at 867. Plaintiffs also paraphrase the factors very loosely; the actual factors are that the aid is:

- not “actual[ly] diver[t]ed” beyond “*de minimis*” levels;
- “allocated on the basis of neutral, secular criteria;”
- “supplementary and cannot supplant non-Federal funds;”
- not to “reach the coffers of religious schools;”
- “secular;” and
- provided to a “program [that] includes adequate safeguards.”

Id. See also *id.* at 848-49(same). Compare *id.*, with AU-Br.36(listing factors).⁷

IFI’s opening brief detailed how the lower court mistakenly focused instead on the renounced “pervasively sectarian” doctrine. IFI then described the “actual diversion” showing Plaintiffs must (and didn’t) make to overcome the presumption *against* diversion working in Defendants’ favor. IFI-Br.32-39. IFI also showed that the RFP process was neutral, IFI-Br.46; that safeguards were adequate, IFI-Br.38-39,45; and that state funds supplemented, rather than supplanted, private funds (which has little or no relevance), IFI-Br.38&n.13. Defendants didn’t deny that *per diem* funds ultimately reach IFI’s “coffers,” but explained that those funds reimbursed only secular activities because of the *per diem* allocation system. IFI-

⁷ Notably, the actual factors don’t include whether “[t]he state is making direct cash payments to a thoroughly religious program,” but that is the first factor Plaintiffs would have this Court consider. AU-Br.36.

Br.38&n.12. As detailed below, Plaintiffs’ response on each of these factors fails. Therefore, the current contract did not “result in government indoctrination.”

a. Plaintiffs fail to resurrect the “pervasively sectarian” test.

Plaintiffs struggle to revive the “pervasively sectarian” test, arguing that although six votes in *Mitchell* ended that presumption where the government aid consists of “supplies, equipment, or services,” it somehow still applies where the aid consists of “direct cash payments.” AU-Br.38.

But *Mitchell* doesn’t admit that reading. Plaintiffs are correct that *Mitchell* acknowledged the “special Establishment Clause dangers” associated with “direct money grants” to religious institutions, but the Court did *not* conclude that those special risks alone justify a presumption of diversion to religious indoctrination. Instead, as detailed previously, IFI-Br. 32-35, six Justices *rejected* presumptions of diversion in very strong terms. *Mitchell*, 530 U.S. at 829 (“This doctrine, born of bigotry, should be buried now.”)(plurality); *id.* at 858 (“a presumption of indoctrination...constitutes an absolute bar to the aid in question...‘smacking of antiquated notions of “taint””)(concurrency).

In this context, it is difficult to imagine how a presumption that six Justices find repugnant when applied to one form of divertible, secular aid could suddenly become acceptable to them – and, as Plaintiffs assert, mandatory – when applied to another form of divertible, secular aid. Such a dramatic about-face is especially

unlikely here, where the lower court’s application of the “pervasively sectarian” presumption generated the very problems that six Justices identified with it. IFI-Br.35-37.

In short, Defendants do not ask this Court to exceed its authority by overruling the Supreme Court, but instead simply to apply *Mitchell* faithfully. *See, e.g., Columbia Union College*, 254 F.3d at 503-04.⁸

b. Plaintiffs fail to manufacture a finding of “actual diversion” in the current contract, least of all at more than *de minimis* levels.

Defendants explained that: (1) under the *Mitchell* concurrence, Defendants enjoy a presumption of “good faith” that they will abide by requirements to use government funds only for secular purposes; (2) Defendants need not rely on that presumption here, because the *per diem* caps government funding at a level comfortably below the cost of IFI’s secular services; and (3) in any event, the lower court didn’t even begin to overcome this presumption (or evidence), because it didn’t even examine whether IFI “actually diverted” government money to religious indoctrination under the relevant contract, having presumed diversion under the “pervasively sectarian” test. IFI-Br.37-39,45.

⁸ Were this Court to find the “pervasively sectarian” test still good law, Defendants preserve the argument that it shouldn’t be. Plaintiffs also preserve the argument that compliance with the neutrality principle satisfies the Constitution. *Mitchell*, 530 U.S. at 826.

Plaintiffs' response complains that the sectarian/nonsectarian allocation here is "completely unreliable," comparing it to the allocation by "mere statistical judgment" rejected in *Nyquist*. AU-Br.39. Defendants note initially that the only allocation method still at issue is the *per diem* rate, because all prior methods are moot, *see supra* §III.A, and that *Mitchell's* concurrence, not *Nyquist*, provides the applicable standard. IFI-Br.38n.14.

But even if *Nyquist* applied, it is distinguishable. *Nyquist* faulted a state legislature for guessing, in general, that "at least 50% of the ordinary public school maintenance and repair budget would be devoted to purely secular facility upkeep in sectarian schools." 413 U.S. at 777. *Nyquist* discussed similar conjecture in *Earley v. DiCenso*, 403 U.S. 602 (1971), faulting Rhode Island for "simply relying on the assumption that...[a teacher] would surely devote at least 15% of his efforts to purely secular education." 413 U.S. at 779. Here, Defendants don't rely on "legislat[ive] supposition" or "mere assumption" about the allocation of time spent by IFI on secular activities, *id.* at 777-78, but instead on actual facts of IFI's Program, including studies of IFI employee activities, DOC staff observation of those activities, and other safeguards. IFI-Br.39,45.

Plaintiffs also complain that IFI's mere usage of prison facilities constitutes impermissible in-kind State aid. AU-Br.40. This argument proves *way* too much. By this logic, whenever prisons allow religious volunteers or prison chaplains to

provide religious services within a facility without exacting payment for the space, government aid is “actually divert[ed]” to religious indoctrination. This is hyper-separationist fantasy, not this Circuit’s law.⁹ *Lemon*, 403 U.S. at 614 (“Our prior holdings do not call for total separation between church and state” which is “not possible”).

c. Plaintiffs fail to show in any other way that the government directly funded religious indoctrination.

The Supreme Court has never required the “supplement, but not supplant” factor in the “government indoctrination” analysis, *Mitchell*, 530 U.S. at 814n.7; although Justice O’Connor applied it, she also didn’t require it. *Id.* at 867 (six factors “sufficient” rather than “necessary”). Indeed, the Supreme Court repeatedly rejects the near-identical argument that all aid to religious institutions “is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends.” *Widmar v. Vincent*, 454 U.S. 263, 275n.15 (1981).

In any event, the aid here is supplemental. The mere possibility that IFI might cover the difference if government funds were lost cannot be enough to show the contract “supplants” private funds. AU-Br.41. Instead, the question (for what it’s worth) is whether the government aid (1) helps the religious organization provide more secular functions than it otherwise would (supplement), or (2) merely

⁹ Perhaps predictably, only a divided Ninth Circuit panel has endorsed that rule. *See Cmty. House v. Boise*, 2006 WL 3231393 (9th Cir. 2006).

saves the religious organization money in providing the same level of secular function as it otherwise would (supplant). Here, InnerChange didn't exist in Iowa until the State provided aid, and no evidence exists that IFI would continue providing services there (especially at the same level) without aid. Thus, the aid supplements, rather than supplants, private funds.

Finally, although cash does ultimately reach IFI's "coffers," that is constitutionally unproblematic here, because the money is reimbursement for secular costs already incurred, Op.41, and at a level comfortably below the cost of IFI's secular activities. *See AmeriCorps*, 399 F.3d at 358-59 (discussing *C-PERL v. Regan*, 444 U.S. 646, 657-58 (1980)).

2. Plaintiffs fail to rebut Defendants' showing that the current contract does not define beneficiaries by reference to religion.

The lower court erred in concluding the current contract "defines its beneficiaries by reference to religion," *Mitchell*, 530 U.S. at 845, by offering incentives to join InnerChange in the form of better living conditions and the possibility of earlier parole. IFI-Br.40-44;IA-Br.27-32,42. Regarding living conditions, Defendants related overwhelming or undisputed evidence on the meaning of Unit E's prior "honor unit" designation; the variable preferences of inmates regarding Unit E's features; that access to computers, etc. wasn't unique to InnerChange; and the boot-camp-like requirements of InnerChange more than

offset any alleged incentives elsewhere. IFI-Br.40-42;IA-Br.30-35. Regarding parole, Defendants similarly demonstrated that InnerChange tended to delay rather than expedite completion of treatment compared with secular alternatives; and that even if inmates could complete InnerChange sooner, parole officials didn't look favorably on early completion of treatment. IFI-Br.42-44;IA-Br.27-30.

Plaintiffs' response mainly restates the facts that the lower court held to be incentives, and makes additional factual claims. AU-Br.13-18,43,68-70. Few of Plaintiffs' factual claims contradict the evidence Defendants have provided, but instead mostly describe additional facts that Plaintiffs believe represent incentives.¹⁰ Thus, although Plaintiffs would have it otherwise, *see* AU-Br.1-31 (one-third of extended response brief recasting facts), the dispute under this factor is not primarily factual, but legal. The core question is: do the Program's features (as found by the Court below, but modified under the applicable standard of

¹⁰ In response to Plaintiffs' additional facts, IFI adopts Iowa's relevant replies and adds the following: IFI discourages inmates from scheduling family visits during classtime. Apx.206,214. Inmates must sacrifice full-time jobs to join InnerChange, which pays half as much as some prison jobs. Apx.205, 227, 248; Tr.426; Tr.298-300. Classroom supplies and computers are available to non-IFI inmates in educational programs (primarily, but not exclusively, GED classes). IFI-Br.41, Apx.372, Tr.2808-10. Other treatment programs provide free phone calls. IFI-Br.41, AU-Br.69. IFI's movie screen is a "piece of junk" whiteboard "you can't hardly see." Tr.1241-42; Op.115. Plaintiffs' allegations of subjective benefits rely upon conjecture and hearsay. Tr.1015-17, 1037-39,1071, 1084-85, 1283.

review) represent an impermissible “incentive” to join InnerChange within the meaning of the Establishment Clause? The answer to that legal question is no.

3. Plaintiffs fail to rebut Defendants’ showing that the current contract does not create excessive entanglement.

There is no excessive entanglement here, because the contract requires no pervasive monitoring, nor is there any other excessive administrative cooperation. IFI-Br.44-46. DOC’s relationship to IFI is typical for government contract management and strikes the right constitutional balance. *Id.*

Plaintiffs’ response doesn’t contest the legal framework or facts Defendants raise, but instead makes additional assertions, including that some IFI staff have “the power to issue formal disciplinary reports.” AU-Br.47. But this represents no greater entanglement than may exist with prison chaplains, who may wield the same power. *See Montano*, 120 F.3d at 851 (contrasting “administrative and managerial tasks” from “inherently ecclesiastical functions” of state-employed prison chaplains).

Plaintiffs also cite two “facts” not found by the district court. First, they cite an isolated comment in PFM’s year 2000 promotional brochure that it runs Newton “as a Christian institution.” AU-Br.47. But the way PFM touted InnerChange in 2000 doesn’t even *tend* to create religious entanglement; all that is relevant is the *actual* interaction of IFI and DOC in present-day, *actual* administration.

Second, Plaintiffs claim that DOC officials are required “to support a faith-based atmosphere,”¹¹ including enforcing InnerChange’s rules. *Id.* DOC staff can (indeed, must) enforce InnerChange’s rules just like they would for any other rehabilitation program inmates might choose. To the extent those rules relate to the religious services sponsored by InnerChange, DOC does nothing different than when it enforces the rules relating to religious services sponsored by the prison chaplaincy (or for any other religious group allowed within prison). DOC staff also have the authority (and duty) to require inmates to show up wherever they are supposed to be. Tr.1199,2601-03. And sometimes, by their own prior choice, inmates are supposed to attend treatment-related activities. *Id.* In the case of InnerChange, that may include worship services, but attendance rules are correspondingly relaxed—DOC doesn’t enforce strict attendance at services, but occasionally acts on staff reports that an inmate isn’t in his assigned location. Tr.1199,2311,2601,2818.

Although this level of entanglement would be problematic outside prison, it is not, and cannot be, in prison. If the Establishment Clause required the same level of regulatory disengagement from the religious life of prisoners, every religious service in prison would involve “excessive entanglement,” and none would be constitutionally permissible. Far from supporting a claim of “excessive

¹¹ There’s no evidence that this draft mission statement was ever adopted. Tr.1769.

entanglement,” this implication counsels for the *Turner/O’Lone* overlay, at least for entanglement analysis. At a minimum, exigencies of the prison context should inform interpretation of the term “excessive”: the level of entanglement deemed “excessive” in prison must at least exceed the entanglement level that is unavoidable in prison. And here, none of the rule-enforcing conduct of DOC staff Plaintiffs cite exceeds that unavoidable level.

C. Plaintiffs Fail to Rebut Defendants’ Showing That the Current Contract Is Permissible as Indirect Aid.

Defendants’ opening brief described the three elements of *Zelman*’s indirect aid test, and then explained how the lower court erred in finding they weren’t satisfied. IFI-Br.31-32,46-50. Plaintiffs respond initially by claiming there are five elements to the *Zelman* test. AU-Br.48 (omitting quotations for elements (3) and (4) of their proposed test). This isn’t the law. *See Zelman*, 536 U.S. at 652 (government aid permissible as indirect where “program [1] is neutral with respect to religion, and [2] provides assistance directly to a broad class of citizens [3] who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice”)(enumeration added). *See, e.g., AJC v. Corporation for Nat’l Comm’y Serv.*, 399 F.3d 351, 356 (D.C.Cir.2005)(“*AmeriCorps*”).

1. Plaintiffs fail to rebut Defendants' showing that the contract selection process was neutral.

The lower court erred in finding the contract was non-neutral because IFI “was the only real contender in the bid process.” IFI was *not* the only bidder on the contract effective at the time of trial and, in any event, won because it offered the best services at the lowest price. IFI-Br.46. Having IFI as the only contender is also consistent with neutrality, because government may constitutionally waive the bidding process entirely, as in *McCallum*. IFI-Br.46. Plaintiffs’ response doesn’t even attempt to distinguish *McCallum*, but simply restates the lower court’s conclusion that IFI was “the only real contender.” AU-Br.42. Defendants need not rebut the argument again.

2. Plaintiffs’ do not even attempt to rebut Defendants’ showing that the current contract provides benefits to a broad class of beneficiaries.

The fact that some inmates wouldn’t join InnerChange because they disagree with IFI’s religious beliefs doesn’t mean InnerChange fails to provide benefits to a “broad class of individual recipients without regard to religion.” IFI-Br.47. If that were true, then the only acceptable programs would be those religiously agreeable to all inmates, which is not only impossible, but deprives ultimate beneficiaries of meaningful choice in treatment programs. IFI-Br.47-48 (discussing *Zelman* and *McCallum*). Plaintiffs don’t respond on this factor, thereby conceding it.

3. Plaintiffs fail to rebut Defendants' showing that state funds were directed to InnerChange as a result of genuinely independent private choice.

Defendants explained that the current contract represents a system of “true private choice” because: (1) numerous DOC offerings cover the same treatment subjects as InnerChange from a secular viewpoint; and (2) there is no requirement that the aid inmates direct *away* from InnerChange must also be directed *toward* another treatment program. IFI-Br.48-50.

First, Plaintiffs neither distinguish Defendants' citation to *McCallum*, nor cite any case supporting their view that “other unit-based, residential treatment programs” are the only potential comparables. Plaintiffs simply recite undisputed facts about the features of those residential programs, ignore the numerous DOC offerings that cover the same treatment areas, and then declare no comparables exist. AU-Br.51. This mimics the lower court and is unresponsive to Defendants' appellate arguments. Second, Plaintiffs again respond by restating undisputed facts, this time about the *per diem* funding structure. AU-Br.50-51. Plaintiffs lack authority for their novel rule that directing funds away from InnerChange is not “genuine” or “private” unless it also directs funds toward another provider. This unprecedented rule should be rejected.

Plaintiffs' brief raises two new points, first, that inmates don't really choose to direct their \$3.47 to InnerChange, because DOC officials can veto those private

choices. AU-Br.49. But it's undisputed that no inmates enter InnerChange unless they choose to, and IFI gets no money unless inmates make that choice. Op.53&n.26. And as the State explained, the risk of rejection or ejection from InnerChange is indistinguishable from similar risks in attending the religious schools in *Zelman*. IA-Br.45. Second, Plaintiffs claim the aid is "direct" because it doesn't first pass through inmate hands before reaching IFI. AU-Br.52. But the aid only goes to IFI if *inmates* first direct it there. As the lower court correctly concluded, following *McCallum*, what matters is "simply that the inmate's private genuine choice directs the aid to the provider." See IFI-Br.49n.17; IA-Br.43-44.

D. Plaintiffs' Perfunctory Endorsement Argument Fails.

The lower court never actually undertook endorsement analysis or found an endorsement violation. IFI-Br.30n.7. Plaintiffs don't dispute this but urge this Court to find an endorsement in the first instance. AU-Br.47-48. Plaintiffs mainly argue that the contract(s) communicate endorsement because they don't satisfy standards for direct or indirect aid. AU-Br.47. Defendants agree those separate standards govern the endorsement question, but disagree those standards are violated. IFI-Br.30n.7.

Plaintiffs also claim that two remarks by DOC officials amount to unconstitutional endorsement. The first, indicating DOC's pride in its association with InnerChange, lacks religious content. AU-Br.47. And the "religious speech"

by Newton's ex-warden cannot possibly render the current contract unconstitutional. *Id.* Whether ***that speech itself*** is unconstitutional for its religious content is a separate question not before this Court (and an enormous stretch), but that speech could never invalidate an otherwise constitutional ***program*** simply because the speech mentioned the program. These extreme endorsement claims should be rejected.

E. Any Argument Under the Coercion Test Fails.

Defendants explained that the lower court's opinion used the word "coercion" liberally, but never actually undertook coercion analysis. IFI-Br.30n.7. Plaintiffs' response follows the same approach. AU-Br.35,43-47 (variants of "coercion"). At one point, Plaintiffs suggest that the alleged "incentives" to join InnerChange are actually "coercive." AU-Br.43. But InnerChange offers no unconstitutional "incentive," IFI-Br.16-17, 42-44; IA-Br.27-30, and certainly none strong enough to be "coercive." AU-Br.43 (citing *Kerr* and *Griffin*).

IV. PLAINTIFFS FAIL TO REBUT DEFENDANTS' SHOWING THAT THE DISTRICT COURT IMPROPERLY ORDERED RESTITUTION AND A PERMANENT INJUNCTION.

A. Plaintiffs Fail to Rebut Defendants' Showing That the Restitution Order Was Improper.

1. Plaintiffs fail to rebut Defendants' showing that the district court improperly balanced the equities.

Defendants demonstrated that because the restitution order is unprecedented, it offends numerous equitable doctrines. IFI-Br.59-66. Aside from a mistaken waiver argument,¹² Plaintiffs offer little rebuttal.¹³

First, IFI demonstrated its reliance on the contract payments was at least as reasonable as *Lemon II* and *Roemer*, neither of which allowed recoupment. IFI-Br.55-56. Plaintiffs don't dispute this dispositive comparison, but instead assert that IFI's reliance was unreasonable because lawyers had raised Establishment Clause "concerns," AU-Br.80, which Defendants have already addressed. IFI-

¹² Although Defendants asked the lower court to apply "familiar equitable principles" when considering recoupment, Dkt.363 at 19-20, Plaintiffs mistakenly claim Defendants waived their equitable challenges. This waiver claim is especially puzzling, since Defendants couldn't effectively contest the inequitable remedy until they knew its terms, *i.e.*, **after** it was issued. Moreover, Defendants did raise equitable defenses. *See, e.g., id.* at 20 (Iowa received value for IFI's services), Dkt.354 at 20¶53 (same); Dkt.363 at 20 (Defendants should have *quantum meruit* offset); *id.* (Iowa and IFI equally at fault, because both believed contract valid, and performed in good faith); Dkt.354 at 8¶4 (PFM and IFI not same corporate entity).

¹³ Contrary to Plaintiffs' assertion, AU-Br.77, this Court must review the restitution order *de novo*. IFI-Br.54 (citing *Brown*). The inapposite cases Plaintiffs cite involved federal penal statutes mandating a restitution remedy, *see U.S. v. Mickle*, 464 F.3d 804, 810 (8th Cir. 2006); *U.S. v. Ziomek*, 191 F.3d 818, 821 (8th Cir. 1951).

Br.56.¹⁴ Plaintiffs' surprising fraud claim is unfounded: the court below didn't find intent to deceive, finding instead that the contract had a legitimate, non-sham purpose. Op.95.

Second, Defendants demonstrated that restitution here violates core equitable principles by *creating*, rather than *remedying*, unjust enrichment. IFI-Br.57-58. Plaintiffs don't dispute those facts, but claim they're irrelevant because IFI received unquantified "ministry benefits." AU-Br.83. Plaintiffs don't explain how to quantify such subjective benefits, let alone present evidence of their value relevant to the unjust enrichment calculus.

Third, Defendants demonstrated that the lower court ignored financial hardship to IFI of imposing \$1.5 million in restitution. IFI-Br.56-57. Plaintiffs admit that in 2004, IFI had net losses of \$66,128, AU-Apx.160, and net assets of \$2,494, AU-Br.82. Nonetheless, Plaintiffs claim no hardship because the Court should "pierce the corporate veil" between PFM and IFI and consider PFM's assets. *Id.* But there's simply no veil to pierce: PFM doesn't own IFI and can't legally be held responsible for IFI's actions. *See, e.g., Haupt v. Miller*, 514 N.W.2d 905, 908 (Iowa 1994)(veil-piercing "used to impose personal liability upon the *owners, directors, or officers* of the corporation")(emphasis added).

¹⁴ Also, IFI never received advice that the contract Iowa proposed was *intrinsically* invalid (since it isn't), so it had no notice that a court might require disgorgement. *Mlynarik*, at 588.

Even judgment creditors would have no recourse to PFM if IFI went bankrupt. Even if veil-piercing were proper, the court didn't consider (Op.133) PFM's *net* assets or *net* income—predicates to determining financial hardship. Finally, restitution against PFM was improper because PFM was not party to the non-moot contract operative at trial.

Fourth, Defendants showed they should receive *quantum meruit* offset for rehabilitation services rendered. IFI-Br.58. Plaintiffs respond that IFI cannot recover on illegal contracts. AU-Br.83. However, the Iowa case they cite, *Marco v. Cedar Falls*, 473 N.W.2d 41, 44 (Iowa 1991), indicates that the illegal contract exception to *quantum meruit* applies where the contract is “unlawful for lack of authority,” *i.e.*, “intrinsicly” invalid. *Mlynarik*, 675 N.W.2d at 588. Since prisoner rehabilitation contracts and contracts with religious organizations aren't *intrinsicly* invalid, that exception doesn't apply.

Fifth, Defendants showed that where contracting parties are *in pari delicto* to an illegal contract, restitution is unavailable. IFI-Br.58-59. Plaintiffs respond that restitution is available where a contract is against “public policy.” AU-Br.84. But this exception to *in pari delicto* applies in Iowa only where the contract is “intrinsicly contrary to public policy.” *Mlynarik*, 675 N.W.2d at 588. That isn't true here. Plaintiffs are also mistaken that IFI was more at fault than Iowa (who drafted the RFP).

Sixth, Defendants and *amicus* United States showed that the restitution order offended public policy for its inevitable *in terrorem* effect on all faith-based service providers. IFI-Br.59;US-Br.12. Plaintiffs respond only that restitution will deter illegal contracts. AU-Br.81. But ordinary prohibitive injunctions also deter religious organizations from violating the Establishment Clause. *See Lemon II; Roemer supra*. Moreover, “separation of church and state may well be better served by not putting the State...in the position of a judgment creditor” of religious institutions. *Roemer*, 426 U.S. at 767n.23. This is especially true when counsel for the prospective judgment creditor—Iowa’s Attorney General—reviewed and approved the contract.

Seventh, Plaintiffs’ silence concedes Defendants’ showing that the injunction renders restitution redundant. IFI-Br.59-60.

2. Plaintiffs fail to rebut Defendants’ showing that restitution is unavailable to private Establishment Clause plaintiffs.

No other court has *ever* ordered a private party to pay a government restitution for an Establishment Clause violation by that government. IFI-Br.60-63. Despite scouring state and federal reports back to at least 1902, AU-Br.78-79, Plaintiffs fail to produce another instance. Instead, Plaintiffs are reduced to trying shore-up the troubled *Laskowski* opinion.¹⁵

¹⁵ Certiorari was granted in the case *Laskowski* relies on most, *see Hein*

But as Defendants demonstrated, IFI-Br.60-63, *Laskowski* is fatally flawed. Private taxpayer plaintiffs lack standing to bring Establishment Clause restitution claims because they “must demonstrate standing separately for each form of relief sought.” *DaimlerChrysler v. Cuno*, 126 S.Ct. 1854, 1867 (2006). *DaimlerChrysler* (decided post-*Laskowski*) reaffirms that the Supreme Court has never extended the narrow taxpayer standing created by *Flast* beyond injunctions that halt future unlawful “extract[ion] and spend[ing] of tax money.” *Id.* at 1865 (holding that “an injunction against the spending would of course redress [the *Flast* taxpayer] injury, *regardless* of whether lawmakers would dispose of the savings in a way that would benefit the taxpayer-plaintiffs personally.”)(emphasis added). Because restitution does nothing to halt extraction and spending, it impermissibly extends the limited taxpayer standing the Court allows for Establishment Clause cases. IFI-Br.62.

Plaintiffs’ response pretends that allowing standing for restitution wouldn’t really expand Supreme Court standing precedent after all, because various state courts occasionally recognize a *state-law* right of taxpayers to seek restitution. But these state cases are a red herring. States can, and frequently do, have more

v. *FFRF*, No.06-157 (*cert.* granted Dec. 1, 2006), and a petition is pending in *Laskowski*, see *University of Notre Dame v. Laskowski*, No.06-582 (docketed Oct. 27, 2006). Plaintiffs also claim *Roemer* supports the availability of restitution, but *Roemer* is a 3-vote plurality, and because plaintiffs there abandoned restitution claims, the restitution discussion was *dicta*. See *Roemer*, 426 U.S. at 767n.23.

relaxed standards for standing than federal courts, *see, e.g.*, MASS. CONST. Pt.II, chap.III, art.II (allowing advisory opinions), and those differing standards are irrelevant to *federal* constitutional standing. The law on the federal issue is clear: Establishment Clause taxpayer standing redresses *only* extraction and spending, and isn't freewheeling authority to remedy injuries to the public fisc.¹⁶

Finally, as *amicus* United States emphasizes, expanding standing to include restitution arrogates to the judiciary (and self-appointed private attorneys general) the executive's power to decide whether to seek restitution. *See* US-Br.4-11. Plaintiffs respond that state executives can't be trusted to exercise their discretion properly. AU-Br.78-79. But for the same reasons courts don't generally second-

¹⁶ Plaintiffs' invocation of state cases is also flawed because it contravenes 42 U.S.C. §1988(a), which allows federal courts to apply "the common law" only when "the laws of the United States" provide no remedy for a §1983 violation. And even then, it must be common law of "the State wherein the court having jurisdiction of [the case]...is held." Here, ordinary injunctive relief available under federal law adequately remedies any Establishment Clause violation, so there's no reason to consider Iowa law. But even if Iowa law were necessary, restitution is unavailable under it, because the Iowa rule is that courts leave the parties in unlawful contracts "where [they] find them." *Mlynarik*, 675 N.W.2d at 587. The two Iowa cases Plaintiffs cite aren't to the contrary. *See Heath v. Albrook*, 98 N.W. 619 (Iowa 1904)(recognizing exception for intrinsically invalid contracts); *Thompson v. Voldahl*, 188 N.W.2d 377 (Iowa 1971)(allowing special assessment taxpayers to sue because they, not the "general fund" treasury, would actually be repaid). And Plaintiffs' citation of cases outside Iowa is irrelevant under §1988(a).

Finally, *Franklin v. Gwinnett Pub. Schs.*, 503 U.S. 60 (1992), is inapposite. AU-Br.79. *Franklin* involved an implied right of action, but §§1983 and 1988 provide an express right of action, so the scope of remedies is governed by those statutes, not judicial implication. *See Gebser v. Lago Vista*, 524 U.S. 274, 284-85 (1998).

guess discretionary executive decisions, IFI-Br.62-63, they shouldn't second-guess a decision not to seek restitution – especially where, as here, injunctive relief is available to vindicate constitutional rights. *Cf. Burford v. Sun Oil*, 319 U.S. 315, 318 (1943)(“federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments.”).

B. Plaintiffs Fail to Rebut Defendants' Showing That the District Court's Injunction Was Overbroad.

Permanently banning IFI from Iowa wasn't narrowly tailored relief, but instead the broadest injunction possible. IFI-Br.63-64. Plaintiffs respond that IFI must be permanently banned because it's so “permeated with religion” that “no enforceable safeguards...could be erected to enable state support of only secular aspects of [InnerChange].” AU-Br.76. Plaintiffs thus resort again to the argument that IFI's “pervasively sectarian” status renders it incapable of *ever* doing *anything* secular (except, mysteriously, computer classes) or complying with *any* safeguards. Equally infirm is Plaintiffs' claim that any injunction short of a complete ban would force day-to-day court oversight of the prison and IFI's internal operations. Plaintiffs don't explain why an injunction couldn't be crafted that would require a relationship consistent with Establishment Clause principles.

Finally, prohibiting Iowa from paying IFI for services already rendered but not paid for is inequitable, and contradicts *Lemon II*, which was decided under

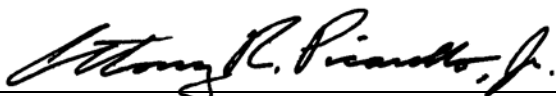
similar circumstances. IFI-Br.64. By failing to respond to Defendants' *Lemon II* and *Cathedral Academy* arguments, Plaintiffs concede this issue.¹⁷

CONCLUSION

The decision below should be reversed.

Dated: December 4, 2006

THE BECKET FUND FOR RELIGIOUS LIBERTY

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¹⁷ This Court shouldn't consider arguments *amici* make, but not Plaintiffs. *See Peltier v. Henman*, 997 F.2d 461, 475 (8th Cir. 1993).

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to FED. R. APP. P. 32(a)(7)(C), the foregoing Reply Brief is proportionally spaced, has a typeface of 14 points or more, and contains 6,997 words, as calculated by Microsoft Word 2003, the word processor used in its preparation.

Dated: December 4, 2006



Anthony R. Picarello, Jr.

CERTIFICATE OF SERVICE

I, Anthony R. Picarello, Jr., attorney for Defendants-Appellants, hereby certify that on the 4th day of December, 2006, two (2) true and correct copies of the Reply Brief of Defendants-Appellants Prison Fellowship Ministries and InnerChange Freedom Initiative were served upon the following counsel by overnight FedEx service:

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