

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

AMERICANS UNITED FOR SEPARATION OF
CHURCH AND STATE, ET AL.,

Plaintiffs-Appellees,

v.

PRISON FELLOWSHIP MINISTRIES, ET AL.,

Defendants-Appellants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING APPELLANTS

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No. 05-2741

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INTEREST OF THE UNITED STATES

The district court in this case held that contracts between the Iowa Department of Corrections and InnerChange Freedom Initiative to implement a pre-release rehabilitation program violated the Establishment Clause of the First Amendment. The court ordered InnerChange and its parent organization, Prison

Fellowship Ministries, to repay the Department of Corrections the full amount of funds received under the contracts.

The United States has a substantial interest in this case. Congress has enacted several statutes that authorize religious institutions to receive federal funds as long as they agree not to use those funds for religious activities. *See, e.g.*, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. §§ 604a(a)(2)(B)(ii), (c), and (e)(1) (Supp. V 1999); the Child Care and Development Block Grant Act of 1990, 42 U.S.C. § 9858n(2) (1994 & Supp. V 1999); the Community Services Block Grant Act of 1998, 42 U.S.C. § 9920 (Supp. 2000). Moreover, Executive Order No. 13279, 67 Fed. Reg. 77141 (Dec. 12, 2002), directs federal agencies to provide religious organizations with an equal opportunity to participate in federal grant programs. As a result, the United States has participated in a number of appellate cases to make clear its position that the constitutionality of direct aid to religious organizations depends on how the organization uses the aid and not on whether the organization is “pervasively sectarian.” *See, e.g., Laskowski v. Spellings*, 443 F.3d 930 (7th Cir. 2006); *Steele v. Industrial Development Bd.*, 301 F.3d 401 (6th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); *see also Columbia Union College v. Oliver*, 254 F.3d 496, 501-04 (4th Cir. 2001) (holding that the Supreme Court abandoned the pervasively

sectarian doctrine in *Mitchell v. Helms*, 530 U.S. 793, 826-29 (2000); *but see* District Court Opinion, *AUSCS v. Prison Fellowship Indus.*, 432 F. Supp. 2d 862, 888, 917 (S.D. Iowa 2006) (holding that the "pervasively sectarian" doctrine remains the law notwithstanding *Mitchell v. Helms*).¹

Congress also has enacted statutes connected with religion that make government aid available based on the independent and private choices of individuals. *See, e.g.*, 42 U.S.C. § 604a(b) (authorizing religious organizations to accept "certificates, vouchers, or other forms of disbursement" under federal Temporary Assistance to Needy Families ("TANF") and Welfare to Work programs); 42 U.S.C. § 9858q (1994) (authorizing faith-based child care centers to receive child care certificates provided to parents). The United States has accordingly participated as a party or amicus curiae in cases involving the question of whether particular government programs make assistance available based on truly independent and private choices. *See Zelman v. Simmons-Harris*,

¹ The *Mitchell* plurality criticized the "pervasively sectarian" doctrine as reflecting "special hostility for those who take their religion seriously," and concluded that "[t]his doctrine, born of bigotry, should be buried now." 530 U.S. at 827, 829. Justice O'Connor, joined by Justice Breyer, did not take issue with the plurality's rejection of the "pervasively sectarian" doctrine. *See id.* at 836-67 (opinion concurring in the judgment). The Fourth Circuit described Justice O'Connor's opinion as "replac[ing] the pervasively sectarian doctrine with a test of 'neutrality plus.'" *Columbia Union College*, 254 F.3d at 504.

536 U.S. 639 (2002); *Freedom from Religion Foundation, Inc. v. McCallum*, 324 F.3d 880 (7th Cir. 2003).

The United States has a particularly strong interest in the issue addressed in this brief: whether a district court may order a contractor or grant recipient to repay funds to the government to remedy a violation of the Establishment Clause, where the government itself had not sought recoupment of these funds. In *Laskowski, supra*, the United States argued that a court lacks authority to order a private party to repay grant funds that the court concludes were spent in violation of the Establishment Clause where the United States, in the exercise of its discretion, has determined not to seek recoupment of those funds. A judicial order directing such recoupment interferes with the discretion of the political branches over the public fisc, and the prospect of such retroactive relief threatens to deter private organizations (particularly those with limited resources) from participating in government funding programs. Those concerns are directly implicated by this case because the district court ordered recoupment even though the State itself did not seek reimbursement of the funds at issue.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In *Laskowski v. Spellings*, 443 F.3d 930 (7th Cir. 2006), a divided panel of the Seventh Circuit held that where the government expends money in violation of

the Establishment Clause, a federal court can order the recipient of the money, such as a contractor or grant recipient, to reimburse the public treasury under the common-law doctrine of restitution. The panel recognized that courts lacked authority to enjoin the government itself to seek recoupment of those funds. *Id.* at 934. The panel nevertheless acknowledged that the difference between such an injunction and its newly-created judicially-enforced recoupment remedy “has no practical significance.” *Id.* at 935.

The traditional remedy for the violation of the Establishment Clause up to this point has been an injunction – *i.e.*, prospective relief preventing the payment or receipt of additional funds. Recoupment is a more drastic and retroactive remedy that seeks disgorgement of funds already expended or received. Moreover, recoupment typically fails to take into account that a contractor or grant recipient may have provided valuable services to the government wholly apart from the Establishment Clause violation. It is for that reason that a decision to seek the severe remedy of recoupment in this context is particularly suited to the exclusive discretion of the government, since the government will be in the best position to determine the value of the services it received.

Laskowski was the first decision of which we are aware suggesting that a federal court may order one private party, at the behest of another private party, to

reimburse the public treasury, when the government itself has not sought reimbursement. The district court's decision in this case is the second such decision. Specifically pointing to *Laskowski*, the district court in this case held that the common law remedy of restitution can be applied to require the recipient of public funds to repay those funds to the public treasury in a suit by taxpayers alleging a violation of the Establishment Clause. *See* 432 F. Supp. 2d at 888, 938.

As we discuss below, *Laskowski* is fundamentally flawed and should not be followed. As the dissenting judge in that case correctly pointed out, “adapting the common law doctrine of restitution to fashion a remedy in a taxpayer suit for an alleged Establishment Clause violation is like trying to pound the proverbial square peg into a round hole.” *Laskowski*, 443 F.3d at 941 (Sykes, J., dissenting). Importing the private law concept of restitution into “the public law realm of Establishment Clause litigation” (*id.* at 939) contravenes the principle, grounded in separation of powers and federalism, that courts lack authority to determine whether reimbursement from private parties is an appropriate remedy to protect the public fisc. Instead, the government should make that determination, exercising its discretion as to whether the drastic remedy of recoupment is warranted under the circumstances.

The State in this case, like the federal government in *Laskowski*, has not sought reimbursement of the funds at issue. And a federal court lacks the authority to override that exercise of discretion and order recoupment of public monies.

ARGUMENT

THE DISTRICT COURT IMPROPERLY DIRECTED REIMBURSEMENT OF STATE FUNDS TO THE PUBLIC TREASURY.

1. The conventional remedy for an Establishment Clause violation is an injunction that prevents, as a prospective matter, the expenditure of funds in a manner that violates the Constitution. Recoupment is a much more drastic – and retroactive – remedy that requires the payment of funds already expended on goods or services.

The district court nonetheless held that recoupment is a proper remedy here because “restitution is among the remedies that a federal court can order for a violation of federal law.” 432 F. Supp. at 938 (quoting *Laskowski*, 443 F.3d at 935). As the dissent in *Laskowski* pointed out, however, restitution “is a private law equitable doctrine that orders liability and remedies between private individuals based on unjust enrichment; it has no application in a suit by taxpayers raising an Establishment Clause challenge to a congressional appropriation.” 443

F.3d at 941 (Sykes, J., dissenting); *see generally* Douglas Laycock, *The Scope and Significance of Restitution*, 67 Tex. L. Rev. 1277, 1284-85 (1988-89).

Restitution of public monies has no application in an Establishment Clause suit. That is because the political branches have unreviewable discretion to determine whether to seek remedial action against a private party to protect the public fisc. In the federal sphere, that rule is grounded upon separation-of-powers principles. *See Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985) (noting that an agency’s refusal to seek a remedy from a private party “shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict – a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed’”). The political branches, not the courts, have authority to “secur[e] the treasury or the government against financial losses, including requiring reimbursement for injuries.” *United States v. Standard Oil Co.*, 332 U.S. 301, 314-15 (1947); *see also OPM v. Richmond*, 496 U.S. 414, 425 (1990) (judicial branch’s Article III powers are “limited by a valid reservation of congressional control over funds in the Treasury”).

Federalism concerns likewise place limits on the ability of a federal court to interfere with the decision of state political branches declining to seek restitution

of public monies. *See Missouri v. Jenkins*, 515 U.S. 70, 132-33 (1995) (Thomas, J., concurring) (concluding that “Article III courts are constrained by the inherent constitutional limitations on their powers. . . . There is no difference between courts running school systems or prisons and courts running Executive Branch agencies.”). The State in this case has declined to seek reimbursement of the funds at issue.²

The exercise of such discretion is particularly appropriate given that, even when an Establishment Clause violation has been found, a grant recipient or contractor may nevertheless have provided valuable services to the government. In this case, for example, InnerChange provided pre-release rehabilitation services, including vocational and other training that had value to the Department of

² The district court’s holding that InnerChange was a state actor for purposes of 42 U.S.C. § 1983 is irrelevant to the Establishment Clause analysis. In the Establishment Clause context, the constitutional violation depends not upon whether the recipient of funds can be deemed a state actor, but upon the government’s act of funding the religious activities at issue. *See DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1865 (2006) (the “injury” in Establishment Clause cases is the “the very ‘extract[ion] and spen[din]g’ of ‘tax money’ in aid of religion alleged by a plaintiff.”) (quoting *Flast v. Cohen*, 392 U.S. 83, 106 (1968)). Moreover, even if InnerChange is a state actor for purposes of section 1983, the court’s recoupment order nonetheless effects an impermissible intrusion upon state prerogatives. Indeed, the court’s state action ruling underscores the intrusiveness of its remedial order by directing an agency of the State to reimburse the public fisc.

Corrections. By contrast, the recoupment remedy effectively results in the contractor or grant recipient providing goods or services for nothing.

2. The district court relied upon a number of cases (also cited by the *Laskowski* majority) to support the proposition that restitution is among the remedies available for a violation of the Establishment Clause. *See* 452 F. Supp. 2d at 938. But those cases were suits brought *by the government* seeking restitution to the public treasury. *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288 (1960); *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946); *United States v. Lane Labs-USA, Inc.*, 427 F.3d 219 (3d Cir. 2005).³ The well-established principle that the government itself can seek reimbursement of funds, or that courts may order restitution of private funds to a private party as an equitable remedy, says nothing about the ability of the federal courts to overrule the government's exercise of its exclusive discretion by ordering a third party to reimburse the treasury.

The district court, again quoting from *Laskowski*, cited two cases for the proposition that “there is no per se rule that the recipient of illegal funds who has spent them cannot be forced to repay them, either in establishment clause cases or

³ *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 68 (1992), also cited by the district court, involved the availability of damages under Title IX of the Civil Rights Act and has no relevance to the issue of restitution or recoupment.

in any other cases.’” 432 F. Supp. 2d at 938 (quoting *Laskowski*, 443 F.3d at 936). Yet neither of the two cases cited supports the proposition that the common law remedy of restitution can be used to order recoupment to the public treasury in Establishment Clause cases. *Messersmith v. G.T. Murray & Co.*, 667 P.2d 655, 657-58 (Wyo. 1983), involved an attempt by a brokerage company to recover overpayments it had made to stockholders after a sale of stock. And *Equilease Corp. v. Hentz*, 634 F.2d 850, 854 (5th Cir. 1981), involved an action by a private leasing company against former property owners who had benefitted from a mistaken payment to a mortgage holder.

3. The recoupment remedy also is inappropriate in light of the potential deterrent effect it may have on entities applying for service contracts or grants involving government programs that involve religious entities but that do not contravene Establishment Clause principles. Numerous statutes, as well as Executive Order 13279, *supra*, permit faith-based organizations to participate in government contract and grant programs. *See* 42 U.S.C. § 604a(b); *id.* § 9920(a); *id.* § 300xx-65(a), (b). These programs are designed to ensure that “all eligible organizations, including faith-based organizations, are able to compete on an equal footing for Federal financial assistance used to support social programs.” E.O. 13279, § ¶ 2(b); *see* 42 U.S.C. § 604a(h)(1); *id.* § 9920(d)(1); *see also Brooklyn*

Legal Services Corp. v. Legal Services Corp., 2006 WL 2588005, at *14 (2d Cir. Sept. 8, 2006).

In addition, the Supreme Court's Establishment Clause jurisprudence is far from settled. *See Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971) (*Lemon I*) (Establishment Clause creates a "blurred, indistinct, and variable barrier" that depends upon the particular circumstances of each case); *id.* at 612 ("we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law."). Entities considering participation in a government program, often possessing limited resources and lacking expertise in constitutional law, cannot be assured that the program itself (or their participation in it) will not be challenged. The uncertain constitutional standard, combined with the drastic effect of the recoupment remedy, will discourage legitimate service providers from participation in important government programs. Just as government officials should not be forced to "stay their hands until newly enacted state programs are 'ratified' by the federal courts" at the risk of "draconian, retrospective decrees," *Lemon v. Kurtzman*, 411 U.S. 192, 207-08 (1973) (*Lemon II*), private contractors or grant recipients should not have to forego the opportunity to participate in government programs at the risk of the drastic and financially crippling remedy of recoupment should the program later be held unconstitutional.

CONCLUSION

For the foregoing reasons, the decision of the district court ordering recoupment should be reversed.

Respectfully submitted,

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BRIEF FORMAT CERTIFICATION

I hereby certify that the Brief for The United States as Amicus Curiae supporting Appellants complies with the Type-Volume requirements of Fed. R. App. P. 32(a)(7)(B) in the following manner:

The Brief was prepared using Corel Wordperfect 12.0. It is proportionately spaced in 14-point type, and contains 2,606 words.

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CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2006, I served the foregoing Brief for the United States as Amicus Curiae Supporting Appellants upon counsel of record by causing two copies to be mailed to:

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