IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

MICHAEL D. REMMERS and ROBERT LONEY,

Plaintiffs,

vs.

LOU V. BREWER, et al.

Defendants.

NO. 4:72-cv-00177

MEMORANDUM IN SUPPORT OF DEFENDANTS' 60(B) MOTION

The defendants seek relief from the injunctive relief entered in *Remmers v. Brewer*, 361 F.Supp 537 (S.D. Iowa 1973) *aff'd*, 494 F.2d 1277 (8th Cir.) (per curiam), *cert. denied*, 419 U.S. 1012 (1974) and its progeny, including *Loney v. Scurr*, 474 F.Supp. 1186 (S.D. Iowa 1979) and *Wycoff, et al. v. Scurr, et al.*, Civ No. 81-303-D (S.D. Iowa., April 29, 1986, *as modified*, June 22, 1987) recognizing the Church of the New Song (CONS) as a religion protected by the First Amendment and mandating its equal treatment with other religions at the Iowa State Penitentiary.

Rule 60(b) Fed. R. Civ P. provides in part: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:....(5) the judgment has been satisfied, released, or discharged, or a *prior judgment upon which it is based has been reversed* or otherwise vacated, or it

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is *no longer equitable that the judgment should have prospective application*." (Emphasis added).

It is well settled that a district court retains authority under Rule 60(b)(5) to modify or terminate a continuing, permanent injunction if the injunction has become illegal or changed circumstances have caused it to operate unjustly. *Agostini v. Felton*, 521 U.S. 203, 215-16, 117 S.Ct. 1997, 2006-07, 138 L.Ed.2d 391, 409 (1997); *System Federation No. 91, Ry. Emp. Dept., AFL-CIO v. Wright*, 364 U.S. 642, 81 S.Ct 368, 5 L.Ed.2d. 349 (1961); *Association for Retarded Citizens of North Dakota v. Sinner*, 942 F.2d 1235 (8th Cir. 1991).

> Generally, such relief is granted only when "new and unforeseen conditions" cause "extreme and unexpected hardship" so that the "decree is oppressive." *United States v. City of Fort Smith*, 760 F.2d 231, 233 (8th Cir. 1985); *Humble Oil & Refining Co. v. American Oil Co.*, 405 F.2d 803, 813 (8th Cir.), *cert. denied*, 395 U.S. 905, 89 S.Ct. 1745, 23 L.Ed.2d 218 (1969). This restrictive standard is lessened in institutional reform litigation, however, both because of the need to shape practical and flexible equitable remedies, and because principles of federalism and comity require that "a federal court's regulatory control ... not extend beyond the time required to remedy the effects of past [constitutional violations]." *Board of Educ. v. Dowell*, 498 U.S. 237, 111 S.Ct. 630, 637, 112 L.Ed.2d 715 (1991).

Association for Retarded Citizens of North Dakota v. Sinner, 942 F.2d at 1239. See also, *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992) (party seeking modification of consent decree in institutional-reform setting bears burden of establishing that significant change in circumstances warrants revision of decree).

Church of the New Song litigation

The Church of the New Song (CONS) is a prison based "religion" founded in the 1970's by Harry Theriault, a prisoner in Federal Bureau of Prisons. Though the federal court initially recognized CONS as a religion entitled to First Amendment protection, *Theriault v. Carlson*, 339 F.Supp. 375 (N.D. Ga. 1972) *vacated*, 495 F.2d 390 (5th Cir. 1974), a later court recognized it as a "masquerade"..... which had "totally failed the 'trial run test' it received in the Northern District of Georgia three years ago". *Theriault v. Silber*, 453 F.Supp. 254, 260-61 (W.D. Tex.), *appeal dismissed*, 579 F.2d 302 (5th Cir. 1978), *cert. denied*, 440 U.S. 917, 99 S.Ct. 1236, 59 L.Ed.2d. 468 (1979). Meanwhile, the federal court in Iowa recognized CONS as a religion and enjoined prison officials to treat it equally with other religions at the prison. *Remmers v. Brewer*, 361 F.Supp 537 (S.D. Iowa 1973) *aff'd*, 494 F.2d 1277 (8th Cir.) (per curiam), *cert. denied*, 419 U.S. 1012 (1974). In *Remmers*, the district

court said that "If the Church of the New Song should prove to be a hoax and front that the state claims it is, that eventuality can be dealt with by both the prison administration and this Court." 361 F.Supp., at 542-543. See also 494 F.2d at 1278 n.1. An extensive history of the *Remmers* litigation is found in *Loney v. Scurr*, 474 F.Supp. 1186 (S.D. Iowa 1979) (rejecting prison officials' Motion for Relief from Judgment and overruling inmates' Motion for Order to Show Cause).

Changes in Circumstances Cause the Injunctions to Operate Unjustly

After years of existence at the Iowa State Penitentiary (ISP), CONS has proven to be both a hoax and a front for organized disorder at the prison. In *Goff, et al. v. Graves, et al.* 362 F.3d. 543 (8th Cir. 2004), inmates brought suit claiming that ISP officials had violated their First Amendment rights and were in contempt of the decree set forth in *Remmers*. They sought to have prison officials ordered to permit special food to be brought to the prison's segregation unit from the "celebration of life" banquet celebrated by CONS. The prison counterclaimed and sought a declaratory judgment to prevent the plaintiffs from participating in CONS activities. Prison officials did not assert a claim that *Remmers* should be overruled, even though new evidence appeared to be available to show that CONS is a sham

religion that exists only in the prison contest and serves as a cover for gang activity. *Goff, et al. v. Graves, et al.* 362 F.3d 543, 551 (8th Cir. 2004)("Defendant prison official now appear to have gathered substantial evidence that CONS functions not as religious organization but as a racist prison gang within ISP.") The Eighth Circuit reversed the district court injunction requiring the prison to take special food into the segregated lockup units but found that declaratory relief sought by prison officials was too broad in light of the *Remmers* decision. *Goff*, 362 F.3d at 550-551. The Court indicated the proper procedural mechanism for attacking *Remmers* is to bring a motion to dissolve the injunction entered in that case. *Id.*, at 551.

As the circuit court recognized in *Goff*, 362 F.3d at 551, Iowa prison officials have attempted to reopen the issue of whether the CONS should be accorded First Amendment protection on two occasions to no avail, *Loney v. Scurr*, 474 F.Supp. 1186 (S.D. Iowa 1979), and *Remmers v. Brewer*, 396 F.Supp. 145 (S.D. Iowa 1975), *aff'd*, 529 F.2d 656 (8th Cir. 1976). The factual basis of the decision in *Goff* reflects a material, and threatening change in which the CONS operates at ISP and in the Iowa Department of Corrections. The evidence referred to in the Court of Appeals opinion shows that members of CONS are among the most violent prison inmates, many of whom have backgrounds in white supremacist gangs or racist activity. Evidence shows involvement

by the CONS members in intimidation, strong arming and extortion, drug sales, trafficking in contraband, assaults against inmates, attempted murder, murder plots, and plots to escape.

Furthermore, evidence shows that members of the CONS have used the protection accorded them as a religion by the *Remmers* case in order to facilitate their misdeeds. Among the ways in which they have been shown to use the CONS is through communication allowed between members in the general prison population through regular meetings. Evidence shows that regular meetings of CONS have been used to plan bad acts, including assaults. Additionally, because CONS was deemed to be a religion in *Remmers,* the court has recognized a right of a "lay minister" to go into the segregated units and communicate with members there. *Wycoff, et al. v. Scurr, et al.*, Civ No. 81-303-D (S.D. Iowa., April 29, 1986, *as modified*, June 22, 1987). No other inmates are accorded this privilege. This not only facilitates communication otherwise prohibited by prison rules between CONS members on the yard and members or enemies in segregation, but it allows CONS members to pass messages within the locked unit-also ordinarily against the rules. Additionally, evidence suggests that the CONS, once primarily an anti-authoritarian group at ISP has become a white supremacist prison gang, and as such, has begun spreading to other prisons within the Iowa system, having serious effects on the security of other Iowa prisons as well.

Prison groups which purport to be religious but, in fact, are threats to security and are designated as such may have their activities limited within the prison. As the Circuit Court in *Goff* recently observed,

> We note that the Third Circuit has recently upheld the authority of prison administrators to designate purportedly religious organizations as security threat groups and limit their activities within prison. *Fraise v. Terhune*, 283 F.3d 506, 509 (3d Cir. 2002); *see also In re Long Term Admin. Segregation of Inmates Designated as Five Percenters (Mickle v. Moore)*, 174 F.3d 464, 466 (4th Cir), *cert denied*, 528 U.S. 874, 120 S.Ct. 179, 145 L.Ed.2d 151 (1999).

Goff v. Graves, 362 F.3d, at 551 n.6.

It is now eminently clear that the CONS is not a religion and is not serving a religious purpose. Any doubt existing at the time of the *Remmers* opinion has now been fully realized. CONS has been shown to be the "hoax" and "front" that prison official believed, and that Judge Hanson may have suspected years ago. It has, however, turned into even more of a threat than the prison officials thought at the time because it has become a racist gang. Further enforcement of the *Remmers* order and its progeny threatens the security and safety of inmates at ISP and other prisons, and is, as a result, unjust and no longer equitable.

Relief from Judgment

The *Remmers* injunction and the other injunctions based on the *Remmers* findings are being used for purposes of harm and are not protecting legitimate First Amendment rights of inmates. As a result, the findings in *Remmers* should be reversed and the defendants given relief from the *Remmers* Order and Injunction and the order in *Loney v. Scurr,* 474 F. Supp. 1186 (S.D. Iowa, 1979) to the extent that it provides for rights beyond the *Remmers* orders. In addition, defendants should be granted relief from the injunction granted in *Wycoff, et al. v. Scurr, et al.*, Civ No. 81-303-D (S.D. Iowa., April 29, 1986, *as modified*, June 22, 1987) which relied upon and implemented *Remmers,* as the legal basis for the *Wycoff* injunction no longer exists and it is no longer equitable for that judgment to have prospective application.

THOMAS J. MILLER
Attorney General of Iowa

H. Loraine Wallace

LAYNE M. LINDEBAK
H. LORAINE WALLACE
ATTORNEYS FOR DEFENDANTS
Assistant Attorney General
Special Litigation-Corrections
Hoover State Office Building
Des Moines, IA 50319
(515) 281-5319
FAX: (515) 281-4902
Email: llindeb@ag.state.ia.us
Email: lwallac@ag.state.ia.us

Copy to:

Mr. John Whiston
Clinical Law Programs
College of Law
University of Iowa
Iowa City, IA 52242-1113

Mr. Patrick E. Ingram
MEARS LAW OFFICE
209 East Washington St.
Paul-Helen Bldg., Suite 203
Iowa City, IA 52240

PROOF OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was

____ personally delivered
_X_ mailed
____ sent via telefax

to each party of record at their last known address on December 16 19 2004

Kathleen Watts