**Appeal No. 06-2741**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

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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.*

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

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

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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellants state that:

Defendant-Appellant Prison Fellowship Ministries is a 501(c)(3) non-profit corporation incorporated in the District of Columbia. Prison Fellowship Ministries has no parent corporation, and no publicly-held corporation owns ten percent (10%) or more of its stock.

Defendant-Appellant InnerChange Freedom Initiative is a 501(c)(3) non-profit corporation incorporated in the Commonwealth of Virginia. InnerChange Freedom Initiative has no parent corporation, and no publicly-held corporation owns ten percent (10%) or more of its stock.

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## SUMMARY OF THE CASE

The lower court struck down InnerChange, an innovative prison program that by all accounts has done enormous good. The program not only saved Iowa money that it could ill afford to spend on prisoners, but, more importantly, saved Iowans from the burglaries, robberies, rapes, and murders that went uncommitted because InnerChange reduced recidivism among former prisoners who completed its challenging curriculum.

The lower court erred on many grounds, but five errors bear emphasis here. First, the court concluded, without briefing or putting Plaintiffs to their proof, that present Appellants are "state actors" bearing the same obligation to be secular as Iowa itself. Second, the court used expert testimony concerning what "Evangelical Christians" ***generally*** believe as a substitute for determining how InnerChange's particular program was ***actually*** implemented. Third, the court relied on that unreliable account of InnerChange's beliefs to argue it is "pervasively sectarian" and so disqualified from government contracting. Fourth, the court failed to defer to prison authorities under *Turner* v. *Safley*. Fifth, the court imposed the unprecedented and severe remedy of restitution, never before granted to private Establishment Clause plaintiffs, and certainly unwarranted in this case.

Because the length of the decision below and the importance of the issues are both exceptional, Appellants request thirty minutes of oral argument per side.

## STATEMENT OF JURISDICTION

Present Appellants join the jurisdictional statement in Iowa's brief, except to add that this Court does not have jurisdiction over claims that are moot, or that Appellees lack standing to bring, as detailed below.

## STATEMENT OF THE ISSUES

1. Whether the court erred in concluding that IFI and PFM are state actors. *Rendell-Baker* v. *Kohn*, 457 U.S. 830 (1982); *Montano* v. *Hedgepeth*, 120 F.3d 844 (8th Cir. 1997).

2. Whether the court erred in admitting expert testimony to determine the religious beliefs of parties, particularly where the expert never interviewed the parties, and in crediting that expert testimony over the contrary firsthand testimony of the parties themselves. *Daubert* v. *Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993); *Thomas* v. *Review Board*, 450 U.S. 707 (1981).

3. Whether the court erred by failing to apply the proper standard for Religion Clause claims by prisoners. *O'Lone* v. *Shabazz*, 482 U.S. 342 (1987).

4. Whether the court erred in concluding that IFI's contract with Iowa is permissible under the Establishment Clause as "direct" aid. *Mitchell* v. *Helms*, 530 U.S. 793 (2000); *Agostini* v. *Felton*, 521 U.S. 203 (1997)

5. Whether the court erred in applying the "pervasively sectarian" presumption as part of the test for "direct" aid. *Mitchell*.

6. Whether the court erred in concluding that IFI's contract with Iowa is permissible under the Establishment Clause as "indirect" aid. *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002).

7. Whether the court erred in imposing equitable restitution on IFI and PFM, forcing them to repay to DOC the state funds already spent to provide DOC valuable rehabilitation services. *Lemon* v. *Kurtzman,* 411 U.S. 192 (1973)(*Lemon II*).

8. Whether the court erred in forever prohibiting IFI from contracting with Iowa for compensated rehabilitation services. *ES Development* v. *RWM Enterprises*, 939 F.2d 547 (8th Cir. 1991); *Mitchell*.

9. Whether the district court erred in prohibiting Iowa from paying IFI for services already rendered under their contract. *Lemon II.*

## STATEMENT OF THE CASE

This case arises from Iowa's decision to contract with a third-party provider to implement a values-based, pre-release program designed to improve public safety by providing cost-effective inmate treatment, improving prison living and working conditions, and reducing inmate recidivism.

After engaging in an open and public Request for Proposal ("RFP") process in August 1998, Iowa's Department of Corrections ("DOC") contracted with Prison Fellowship Ministries ("PFM") and InnerChange Freedom Initiative ("IFI") for the desired values-based, pre-release program. Under that contract, PFM and IFI agreed to provide DOC with such a program ("InnerChange" or the "Program"), and DOC agreed to reimburse PFM and IFI for some nonreligious Program expenses. Beginning in 1999, InnerChange was implemented at the Newton Correctional Facility ("NCF") in Newton, Iowa. IFI continued to operate InnerChange at NCF under subsequent contracts with DOC following additional RFPs in 2002 and 2005. Since InnerChange began, DOC has paid IFI approximately $1.5 million toward the Program's non-religious activities, which represents 35-40% of IFI's costs of operating the Program.

Plaintiffs, an assortment of inmates and taxpayers, filed suit against officials with the DOC and Board of Corrections, PFM, and IFI on February 12, 2003, claiming that DOC's contract with IFI for the Program violates the Establishment

Clause. The parties cross-moved for summary judgment, but their motions were largely denied on April 29, 2005.

The court held an 18-day bench trial between October 24 and December 1, 2005. On June 2, 2006, it issued an opinion declaring that the contractual relationship between Iowa and IFI and PFM violated the Establishment Clause. It permanently enjoined InnerChange from further operation at NCF, or any other institution within DOC, that uses government funds. Finally, the court ordered PFM and IFI to repay DOC all state funds paid to IFI since the Program began, but stayed injunctive relief pending appeal.

# STATEMENT OF FACTS

PFM is a non-profit organization that serves prisoners, ex-prisoners, crime victims, and their families. Op.12. IFI is a separate non-profit corporation that operates InnerChange, a pre-release prisoner treatment program. Op.13. IFI operates InnerChange programs in Iowa and six other states (Texas, Minnesota, Kansas, Tennessee, Arkansas, and Missouri). Op.13.

## A. DOC's Need for High-Quality, Low-Cost Treatment Programs.

In 1997, Iowa faced a growing crisis of prison overcrowding. Op.27. In response, Iowa built NCF, a medium-security facility, and began moving low-risk inmates to NCF even before completing construction. *Id.* Simultaneously, DOC faced significant budgetary restraints that affected the construction of NCF and programs that could be offered there. Op.27. Then-DOC Director Walter Kautzky responded by directing a search for innovative ways to meet NCF's programming challenges. Op.28. As part of that process, DOC's Coordinator for Offender Services gathered information about the InnerChange program in Texas and sought to determine whether that or a similar values-based program could work in Iowa. *Id.* DOC was unable to identify any other providers of in-prison, values-based programming. Op.28-29.

DOC officials visited Texas' InnerChange program and learned it was built upon a religious model. Op.29. While DOC officials considered designing a

secular program based on InnerChange, they recognized that InnerChange offered numerous treatment classes and excellent post-release aftercare that was much too expensive for DOC to replicate. Op.29-30. Not only could IFI offer the same in-prison and post-release components at a much lower cost, but DOC officials believed that the universal, secular values InnerChange taught could be instilled in offenders, regardless of any religious context in which they might be offered. Op.30.

**B. DOC's Process for Selecting InnerChange.**

In August 1998, Iowa's Department of General Services ("DGS"), which managed Iowa's procurement of services, issued a RFP to the general public for the establishment of a values-based, pre-release program at NCF. Op.31,n.19, 34. PFM and IFI submitted an initial proposal to Iowa on September 16, 1998, and an amended proposal on December 23, 1998. Op.34. While the RFP requested "non-compensated" services, the InnerChange proposal sought limited state funding. *Id.* DGS received no other responses to the RFP, so DOC accepted InnerChange's proposal. On March 24, 1999, DOC entered into a contract providing for InnerChange's operation at NCF, and reimbursing IFI only for "non-sectarian" costs. Op.34-35. Pursuant to an extension clause, DOC renewed the contract in 2000 and 2001. Op.35.

In May 2002, DGS issued a second RFP to the general public for a values-based, pre-release program at NCF; again, IFI submitted the only response. Op.36. In September 2002, DOC signed a contract to continue InnerChange, agreeing again to reimburse "nonsectarian" Program expenses. *Id.* DOC renewed the contract in 2003 and 2004 under an extension clause.

In April 2005, Iowa issued a third RFP for a similar program. *Id.* IFI submitted a proposal on June 8, 2005, and Emerald Correctional Management submitted one on June 10, 2005. *Id.* DOC awarded the 2005 contract to IFI because the InnerChange program offered a fuller array of services, at a price, $310,000, that was less than Emerald's $562,000 bid, and much less than the approximately $1,000,000 that DOC officials estimated it would cost DOC to run such a program. *Id.*

### C. InnerChange's Goals and Methods.

#### 1. InnerChange's distinctive approach.

The "ultimate goal" of InnerChange "is to see ex-prisoners become contributing members of society, by becoming responsible leaders in their family, church and community." Op.22. More specific Program goals are to "[r]educe the rate of re-offense and the resulting social costs" and to "[p]rovide a positive influence in prison." *Id.* These goals are accomplished by instilling in inmates six core values: integrity, restoration, responsibility, fellowship, affirmation, and

productivity. Op.58. These are the same pro-social values that DOC's own rehabilitation programming seeks to instill, Op.30, and that Plaintiffs' inmate witnesses all acknowledged to be universal and included within their various faiths. Op.58. InnerChange's curriculum teaches these six values from a Christian perspective. Op.20,n.13, 59-61.

2. <u>The choice to participate in InnerChange.</u>

Inmates aren't required to participate in InnerChange. Op.53. Neither DOC nor IFI threatens inmates with punishment or the loss of privileges, or otherwise pressures them, if they don't join InnerChange. *Id.*

IFI doesn't require inmates to be Christian or to "accept Jesus Christ as their Savior" to participate in InnerChange, Op.53&n.26, but instead requires only that inmates want to be in the Program and express a desire to change. Op.53. DOC additionally requires that inmates express a commitment to complete the Program, meet the criteria for medium or minimum custody, and be suitable for housing in multi-person dry cells. Op.56.

Before joining, inmates must sign a form expressing their informed consent to participate in a program that includes Christian religious content. Op.53&n.26. The form requires inmates to expressly acknowledge that their decision to participate in InnerChange "is of [their] own free will"; "will not affect [their] consideration for parole"; "[t]hat [their] good time will not be increased because

[they] participated in the program"; and "[t]hat [they] do not have to be of the Christian faith to participate in the Program." *Id.* In addition, Program participants must complete an introduction class followed by a four-week orientation program to give inmates even more information about InnerChange. Op.53-56.

Inmates may leave InnerChange on their own initiative at any time and are not penalized for doing so, as the consent form confirms. Op.53&n.26, 70. Inmates who quit InnerChange treatment classes early don't receive credit for the class, just like inmates failing to complete DOC treatment classes. Op.69-70&n.33.

3. InnerChange's structure and content.

InnerChange is a residential treatment program—sometimes called a "therapeutic community"—that consists of four phases. During Phases I (twelve months long) and II (six months long), inmates live together in Unit E, one of NCF's three, general population units that each house approximately 242 inmates. Op.49, 65. Unit E differs physically from the other general population units (C and D), in that it has communal bathrooms instead of in-cell toilets, and individually locking wooden doors rather than automatically locking steel doors. Op.51-52.

The Phase I and II curriculum consists of some classes on religious topics. Op.73. It also includes classes meeting the same rehabilitative treatment criteria as

DOC classes on the same topics: certified substance abuse treatment, anger management, victim impact, financial management, business, criminal thinking, computer classes, and family parenting classes. Op.70, 73, 75. To varying degrees, InnerChange's version of these courses reflects a Christian perspective. For example, while the substance abuse curriculum reflects a high level of religious content, Op.76-77, and the financial management class includes some religious content, Op.75-76, the computer training class is "thoroughly secular." Op.75.

In addition to classes, InnerChange includes religious services, as well as community meetings and group sessions. Op.65-69. InnerChange allows inmates to attend religious services of other faiths, Op.83,[1] and has graduated inmates of other faiths and of no faith. Apx.216, 218, 235, 295-96, 320-23, 329-30.

Phases III and IV are characterized as "aftercare programming," as they begin when inmates "graduate" to living outside NCF, first in a work release center (Phase III), and then in the broader community (Phase IV). Op.80, 85. To stay in

[1] The lower court fails to note that IFI inmates are not graded or evaluated on their participation in religious activities, like praying or singing, or their "religiosity" or "Christianity." Apx.246, 328. Inmates aren't required to clap or sing during community meetings or revivals. Apx.223, 342. The only participation requirement for revivals is attending and not being disruptive. Apx.389. And even attendance isn't always required, as inmates may be permitted to miss InnerChange programming to attend their own religious services. Apx.97, 220, 295-97, 320-21, 330, 395-96. Indeed, inmates are allowed to maintain and practice their own religious faiths and beliefs—or no religion at all—while in InnerChange. Apx.209-11.

InnerChange at this stage, inmates agree to stay employed, attend church regularly, and maintain behavioral standards consistent with the pro-social values the Program instills. Op.80. In Phase IV, InnerChange helps inmates find housing, employment, a mentor, and a church, as well as providing other aftercare services such as case management, intervention in crisis situations, and securing immediate needs such as clothing and hygiene items. Op.82.

IFI and PFM believe this approach to rehabilitation is uniquely effective and beneficial, both for individual inmates and the broader society. Op.45. DOC officials are consistently satisfied with InnerChange's results. Op.89-90.

### D. The Relationship Between DOC and InnerChange.

#### 1. Distinguishing sectarian and non-sectarian expenses.

All contracts between DOC and IFI explicitly limited the use of government funds to cover ***only*** the cost of "nonsectarian" activities, up to a certain annual cap.[2] IFI defined sectarian as "[p]ertaining to the religious aspect of the IFI program," and non-sectarian as "not specifically pertaining to religion or a religious organization." Op.43.

For contracts before July 1, 2004, Program costs were allocated between "sectarian" and "nonsectarian" by a method tailored to the type of expense incurred. Salaries were allocated as a percentage of time spent on "sectarian" and

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[2] Under the 1999 contract, the cap was $229,950. Op.34-35. For FY 2001 and 2002, the cap was $191,625. Op.36. For FY 2003, 2004, and 2005, the cap was increased to $310,000 to account for Program growth. Op.38.

"nonsectarian" activities. Op.43. IFI identified other expenses as "sectarian" or "nonsectarian" in the detailed ledger reports used to bill DOC. "Nonsectarian" expenses included computer hardware, software, and repairs, phone, internet, postage, copies, and similar office necessities. Op.44.

The DOC supervisor relied on the contract language itself, ongoing conversations with IFI employees, and IFI's detailed billings to monitor IFI's use of state funds and assure they weren't used for "sectarian" costs. Op.42. DOC staff never complained to DOC management that DOC funds were being misdirected to religious purposes. *Id.* Warden Mapes testified that the amount DOC paid IFI did not exceed the value of nonreligious services IFI provided. Op.43.

At one point, DOC funds were used to purchase items with religious content, including key rings, bookmarks, a music license, a booklet subscription, and promotional brochures. Op.44-47.[3]

For the fiscal year beginning July 1, 2004, DOC and IFI changed the method of payment for "non-sectarian" expenses incurred for Phases I and II, so that DOC would thereafter pay a per diem rate of $3.47 for each InnerChange participant, up to the same cap of $310,000. Op.38-39.

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[3] As discussed below, the district court omits the trivial amount and accidental character of these billings, and that they were since corrected.

From 1999 through June 30, 2005, IFI received $1,529,182.70 from DOC. Op.40. These DOC payments represent only 35-40% of IFI's direct cost of operating InnerChange. Op.41.

2. Allocation of authority between DOC and IFI.

Both DOC and IFI have the right to refuse any inmate admission to the Program, and expel any inmate. Op.69. DOC has no control over the selection or teaching of the IFI curriculum, or the hiring of IFI staff or volunteers, except for routine background checks. Apx.332-33. DOC retains authority over all security matters within NCF. Apx.254, 287, 292, 363, 368. DOC expects all contractors that operate within the prison walls, including IFI staff, to help provide security supervision and take corrective action, just like any other DOC staff member would. Op.86-87.

3. DOC alternatives to InnerChange.

Participation in InnerChange isn't the only way for inmates to obtain the rehabilitative treatment classes InnerChange provides. InnerChange covers the following core correctional treatment classes: certified substance abuse treatment, anger management, victim impact, criminal thinking, financial management, and marriage/family/parenting. Op.70, 73. DOC provides classes taught from an exclusively secular perspective in ***all*** of these treatment areas, both as individual classes, and as part of broader treatment programs. Apx.1237-40. These alternative classes are offered at various DOC institutions. *Id.*

The lower court omits any mention of DOC's community-based corrections system, which provides comprehensive "aftercare" programming. Apx.382-83. These programs provide identical or similar services as InnerChange aftercare, such as pretrial release programs, pre-sentence investigation, probation, residential facilities, and post-institutional programs including parole, work release, OWI facilities, and restitution programs. *Id.*

4. InnerChange and parole decisions.

InnerChange's consent form specifies that inmates are not promised reduced sentences or early parole for entering InnerChange. Op.53. In practice, moreover, the Iowa Parole Board doesn't treat InnerChange inmates differently than other inmates. Op.70.

The lower court opined that "the Iowa Parole Board would likely look favorably on any inmate who took the initiative and completed his recommended programming as early as possible." Op.71. But it omitted the uncontested testimony of Parole Board chair Elizabeth Robinson, stating that the Board often viewed voluntary participation in treatment programming with suspicion. Apx.360, 362.

The court also stated that InnerChange allows inmates to start their treatment earlier than if they obtained it by DOC's own treatment classes. *Id.* However,

InnerChange is longer than any of DOC's other treatment programs. Op.71; Apx.1240. Therefore, it must start earlier than the others to finish at the same time.

## STANDARD OF REVIEW

In appeal from a bench trial, "conclusions of law are subject to *de novo* review." *Cooper Tire & Rubber Co.* v. *St. Paul Fire and Marine Ins. Co.*, 48 F.3d 365, 369 (8th Cir. 1995). "Mixed questions of law and fact that require the consideration of legal concepts and the exercise of judgment about the values underlying legal principles are also reviewed *de novo*." *Id*

In reviewing First Amendment claims, the appellate court has "a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court…we are obliged to make a fresh examination of crucial facts." *Families Achieving Independence and Respect* v. *Nebraska Dept. of Social Services*, 111 F.3d 1408, 1411 (8th Cir. 1997) (en banc).

Findings of non-crucial facts are reviewed for clear error. *Id*. Under that standard, this Court "can overturn factual findings that [it] conclude[s] are clearly wrong even though they are not unreasonable." *Menendez-Donis* v. *Ashcroft,* 360 F.3d 915, 918 (8th Cir. 2004).

## SUMMARY OF ARGUMENT

The lower court struck down InnerChange primarily because it is "pervasively sectarian." That is, InnerChange is so thoroughly imbued with religion that any government funds it receives—no matter how carefully allocated to secular purposes—are irreparably tainted. Not only does this ruling disinter an analytical category that a majority of the Supreme Court recently buried, it illustrates one of the principal reasons the doctrine was buried in the first place: it tends to disqualify people and groups from government funding streams precisely because they are very religious (which should not matter at all), and without regard to how carefully they administer government funds (which is all that should matter).

Here, the problem is even worse, because the court not only rejected the Program based on the intensity of InnerChange's faith component, it got the faith component wrong, and by a wildly improper method. The court admitted expert testimony on both the "objective" content of "Evangelical Christianity," and whether InnerChange is "situated" in that group. But the expert didn't interview a single InnerChange staff member, nor a single inmate, and never observed their values in action. The result is a caricature of IFI's beliefs, whereby its staff are incapable of doing anything purely secular, and they are "at odds" with (and inclined to "coerce" or "discriminate" against) people of any other faith. The court

credited this testimony over firsthand testimony that members of other faiths and unbelievers alike have successfully completed InnerChange and gone on to begin productive, crime-free lives.

The lower court also erred in finding that IFI and PFM, mere government contractors, are nonetheless state actors. Nevermind that this broad holding would sweep all manner of government contractors into the strictures of the Bill of Rights and Fourteenth Amendment. For present purposes, it's enough to note the ruinous effect this conclusion had on the rest of the court's logic. Unlike other government contractors—religious schools and universities, for example—that need not forfeit their religious identity, InnerChange could not be significantly religious at all. Why not? Well, because it's a state actor, of course.

After finding an Establishment Clause violation on these grounds, the court ordered IFI to disgorge to Iowa over $1.5 million—all of the contract payments it received (and spent) to provide valuable inmate rehabilitation services. This is the first time ***any*** court has awarded a private Establishment Clause plaintiff the equitable remedy of restitution—a transfer of funds not to the plaintiff, but from one unwilling co-defendant to another. Even if this remedy were properly available to private Establishment Clause plaintiffs (and it isn't) it shouldn't have been awarded here: the court erred grievously in considering equitable factors, misapplying the ones it considered, and failing to consider others entirely.

# ARGUMENT

## I. THE DISTRICT COURT ERRED IN CONCLUDING THAT INNERCHANGE AND PRISON FELLOWSHIP ARE STATE ACTORS.

The lower court committed reversible error at the outset by ruling that IFI and PFM were state actors for all purposes. Op.2&n.3. By this ruling, the court not only reached out to address an issue that Plaintiffs (despite their burden of proof) never "actively litigated," *id*., it also overlooked controlling authority. This erroneous ruling infected the remainder of the court's analysis and should be reversed.

### A. The District Court Erred by Failing to Enter Judgment in Favor of IFI and PFM on Plaintiffs' § 1983 Claim.

IFI and PFM are private parties that can only be held liable under 42 U.S.C. § 1983 for unconstitutional acts committed "under color of state law," which is equivalent to the "state action required under the Fourteenth Amendment." *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 838 (1982). In determining whether a private party is a "state actor," a court should not examine all of the private party's possible activities, but instead focus on "the specific conduct of which the plaintiff complains." *Am. Mfrs. Mut. Ins.* v. *Sullivan*, 526 U.S. 40, 51 (1999); *see also Blum* v. *Yaretsky*, 457 U.S. 991, 1003 (1982)("Faithful adherence to the 'state action' requirement…requires careful attention to the gravamen of the plaintiff's complaint."). Here, Plaintiffs challenge DOC's contractual relationship with IFI

and PFM under which DOC expended state funds to purchase rehabilitative services from IFI and PFM.

The lower court's terse discussion (one footnote in a 140-page opinion) states two reasons for concluding IFI and PFM were state actors. First, without citing any authority, the court asserted that the contractual relationship with Iowa transformed IFI into a state actor. Op.2&n.3. This fails to recognize that the decisions to select IFI and PFM as contractors and to expend state funds under that contract were ***Iowa's***, not IFI's or PFM's. Sovereign decisions by Iowa provide no basis for bootstrapping a state action finding onto IFI or PFM. Moreover, the lower court failed to apply controlling Supreme Court precedent holding that a contractor's "receipt of public funds" doesn't turn private action into state action.[4] In short, IFI's "fiscal relationship with the State is not any different from that of many contractors performing services for the government," and therefore provides no basis for finding state action. *Rendell-Baker*, 457 U.S. at 831.

Alternatively, the lower court asserts that IFI and PFM are state actors because they perform a "public function" by providing rehabilitation services. This similarly ignores controlling precedent. The Supreme Court has emphasized that the relevant question is not simply whether a private group is serving a "public

[4] *Rendell-Baker*, 457 U.S. at 840 (extensively regulated private service provider receiving 90% of budget from state was not state actor); *Blum*, 457 U.S. at 1008 (same).

function, [but instead]…whether the function performed has been traditionally the ***exclusive*** prerogative of the State." *Id*. (quotation omitted). The lower court cites no case holding that rehabilitation is "a function traditionally and exclusively reserved to the state." That is because *Richardson* v. *McKnight*, 521 U.S. 399 (1997), precludes that holding.

*Richardson* involved a suit against guards employed by a private prison management corporation under a state contract. *Id.* at 401-02. The Court didn't reach whether § 1983 permitted such a suit and addressed only the narrow question whether the guards could invoke qualified immunity. *See id.* at 413. The Court held they could not, because "correctional functions have never been exclusively public," providing a long historical record in support. *Id.* at 405-07. Thus, the lower court's holding that rehabilitation is a correctional function in the ***exclusive*** province of the state is directly contradicted by *Richardson.*

Nor does *West* v. *Atkins*, 487 U.S. 42 (1988), suggest that rehabilitation is an exclusive state function. There, the Court held that a private physician employed by North Carolina to provide medical services to state prison inmates acted "under color of state law" when treating inmates. *Id*. at 54. Central to its analysis was the fact that states have a federal "constitutional duty to provide adequate medical treatment to those in its custody." *Id*. at 55.

Here, unlike provision of medical services, there is no constitutional obligation to rehabilitate prisoners. Iowa, like other states, may choose to provide rehabilitation services, or not. Although a state may make a policy choice to invest in rehabilitative services, that discretionary choice does not convert those services into an exclusive state function. *See Rendell-Baker*, 457 U.S. at 842 (policy choice of state to undertake special educational services for maladjusted youth did not transform services into exclusive state prerogative).

Moreover, there are literally hundreds of social service providers (religious and non-religious, non-profit and for-profit) nationwide that seek to assist prisoners and parolees in rehabilitation. The lower court's ill-considered holding that rehabilitation is an exclusive state function risks transforming every church with a prison rehabilitation ministry into a state actor. *Cf. id.* ("that a private entity performs a function which serves the public does not make its acts state action").

In sum, the lower court erred in holding that Plaintiffs carried their burden of proving that IFI and PFM were state actors. Instead, judgment and an order of dismissal should have been entered in favor of IFI and PFM.

### B. The District Court Erred by Failing to Apply This Circuit's State Actor Precedent.

Even if IFI or PFM did perform some exclusive state functions – whatever those may be in this case – that ***still*** would not mean that IFI and PFM were state actors for ***all*** purposes under the contract. This Court's decision in *Montano* v.

*Hedgepeth*, 120 F.3d 844 (8th Cir. 1997), makes clear that IFI and PFM are not state actors when carrying out religious functions.

*Montano* held that prison chaplains, even those employed by the state, are not "state actors" when engaged in religious functions. The Court explained that

> a prison chaplain…sometimes behaves in ways which are beyond the bounds of governmental authority. In matters of faith, a pastor…is not answerable to an administrative supervisor. The teachings endorsed and practiced by recognized spiritual leaders are not, and should not be, subject to government pressures.

*Id.* at 850. Thus, *Montano* recognized that the mere fact that prison inmates are in state custody doesn't mean that all services they receive are necessarily provided "under color of state law." Moreover, *Montano* held that a religious service provider may be a state actor for certain functions, but not for others. *Id.* ("In contrast to the administrative and managerial tasks [chaplains are] required to perform…interpretation and implementation of church doctrine do not constitute state action.").

*Montano* thus stands for two important principles: (1) a religious entity can provide services in prison without acting "under color of state law," and (2) religious service providers, even if "state actors" for certain functions, are not state actors when engaged in religious functions. Applying these principles here (which the lower court conspicuously failed to do) makes clear that IFI and PFM were not acting under color of law when engaged in religious functions, (*e.g.,* leading

Sunday worship services). They could only have been acting "under color of state law" when engaged in secular functions, and even then, only when the functions were the state's exclusive prerogative.

Thus, the lower court erred by wrongly concluding that IFI and PFM were state actors for all purposes. Instead, it should have found that, to the extent Plaintiffs' claims challenged any religious or rehabilitative functions performed by IFI or PFM, they were not state actors for those purposes. For this reason also, the lower court's state actor holding should be reversed.

### C. The District Court's Erroneous State Actor Ruling Infected Its Establishment Clause Analysis.

The lower court's error regarding state action infected the rest of its legal analysis, as the court proceeded to collapse any distinction between IFI or PFM and the State in considering the merits of the Establishment Clause claim:

- "As a state actor, [IFI] speak[s] on behalf of the government…."
- "[A]s state actors, [IFI] employees cloak themselves in the mantel of government … [and] are burdened with the same responsibilities of any state employee…."
- "As state actors, [IFI's] interest in *avoiding* an Establishment Clause violation 'may be characterized as compelling."

Op.99-100. This improper analytical shortcut distorted the court's legal analysis by causing an improper focus on whether ***IFI's*** actions were advancing religion, rather than on whether the ***government's*** actions did.

## II. THE DISTRICT COURT ERRED IN ADMITTING EXPERT TESTIMONY REGARDING "EVANGELICAL CHRISTIANITY" IN GENERAL TO DETERMINE THE BELIEFS OF INNERCHANGE AND PRISON FELLOWSHIP IN PARTICULAR.

*Daubert* v. *Merrell Dow Pharmaceuticals*, 509 U.S. 579, 589-90 (1993), requires expert testimony to be both reliable and relevant to be admissible. The lower court admission (Op.13-18&nn.9-11) of Professor Sullivan's testimony to describe "Evangelical Christianity" generally, and to identify IFI and PFM as "Evangelical Christian" fails both tests. To the extent Sullivan's testimony may be reliable, it is irrelevant; to the extent it may be relevant, it is unreliable.

Sullivan's academic credentials may qualify her to testify reliably about "Evangelical Christianity" in general, but that general testimony is ***irrelevant*** to how this particular program is actually administered in this particular prison. Ever since *Thomas* v. *Review Board,* 450 U.S. 707, 715-16 (1981), the Supreme Court has forbidden courts from determining the beliefs of parties based on evidence of the beliefs of others—including of the broader religious group of which the individuals may be part—insisting instead that courts take evidence of what the particular believers before the court actually believe. Flouting this instruction, the court admitted Sullivan's broad pronouncements about "Evangelical Christianity" for precisely this improper purpose. It ascribed the beliefs of this broader class

wholesale to IFI and PFM, Op.13-18, notwithstanding otherwise uncontradicted testimony by actual IFI staff about their actual beliefs (and conduct).[5]

Correspondingly, where Sullivan's testimony was focused on this particular program enough to be potentially relevant, it was ***unreliable*** for lack of an adequate factual predicate. Although Sullivan reviewed curriculum and other written materials, she never visited the site, saw the Program in operation, or spoke to InnerChange staff or inmates. Apx.221-22. *See Concord Boat* v. *Brunswick*, 207 F.3d 1039, 1057 (8th Cir. 2000)("Expert testimony that is speculative is not competent proof and contributes nothing to a legally sufficient evidentiary basis.")(quotations omitted); *U.S.* v. *Hoac*, 990 F.2d 1099, 1103 (9th Cir. 1993)(expert testimony excluded as unreliable and irrelevant because of limited contact with person who was subject of testimony).

Notably, Sullivan disavowed any attempt to testify about InnerChange's actual administration (sacrificing relevancy to reliability), *see* Apx.221-22 ("I was not asked to evaluate the program as it is administered"), but the court disavowed the use of her testimony for anything ***but*** actual administration (sacrificing

[5] Unsurprisingly, the beliefs of hypothetical "Evangelical Christians," instead of actual IFI staff, buttress two of the court's critical holdings: (1) the InnerChange Program is "pervasively sectarian," *i.e.,* its staff are so boundlessly driven to convert inmates that state money covering any portion of their salaries must be deemed to support that conversion effort; and (2) InnerChange isn't actually offered to a "broad class of beneficiaries without regard to religion," because its beliefs are so "at odds" with inmates of other faiths. These arguments are addressed below.

reliability to relevancy). *See* Op.15&n.9 (Sullivan testimony not relevant to "the merits of InnerChange and [PFM's] religious beliefs, *but the constitutionality of their* ***actions***")(second emphasis added). Either way, the court abused its discretion in admitting Sullivan's testimony.

## III. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE STATE'S CONTRACT WITH INNERCHANGE FOR REHABILITATION SERVICES VIOLATED THE ESTABLISHMENT CLAUSE.

The court below analyzed the federal and state Establishment Clause claims according to the familiar and controversial three-part structure of *Lemon* v. *Kurtzman*¸ 403 U.S. 602, 612-13 (1971), examining whether the government action: (1) has a secular purpose; (2) has a primary effect that neither advances nor inhibits religion; and (3) does not foster excessive entanglement with religion.

The court below erred under the Establishment Clause, first, in applying the *Lemon* framework only, without the additional overlay that applies to all constitutional claims by prisoners, *see Turner* v. *Safley,* 482 U.S. 78 (1987), including claims under the Religion Clauses of the First Amendment, *see, e.g., O'Lone* v. *Shabazz,* 482 U.S. 342 (1987)(applying *Turner* deference with equal force to Free Exercise Clause claim). Op.92,n.36. The State has developed these arguments at greater length in its brief and present Appellants now adopt those arguments. *See* FRAP 28(i).

The lower court additionally erred within the *Lemon* framework, to the extent it applies here.[6] The court correctly found that Iowa's contract with IFI to provide rehabilitation services serves a predominately secular purpose. Op.92-95. However, the court erred in holding that the contract had the impermissible "effect" of advancing religion as either "direct" (Op.95-110, 123-25) or "indirect" aid (Op.110-23).[7]

Appellants note initially that, although the InnerChange at NCF has changed (indeed, improved) substantially since it began, the court below lumped all forms of the program together for purposes of its analysis. This is error, as each distinct contract represents a distinct set of facts raising distinct substantive and procedural

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[6] This Court recently declined to apply *Lemon*, *ACLU* v. *Plattsmouth*, 419 F.3d 772, 778 n.8 (8th Cir. 2005), and Appellants don't encourage its application here. Instead, as set forth below, we analyze the contract between IFI and DOC according to the Supreme Court's more recent funding cases, which have modified the *Lemon* test substantially, including in their distinction between "direct" and "indirect" aid. *See infra* Section III.A.

[7] The lower court did not apply any other Establishment Clause tests. Although the lower court occasionally described InnerChange as "coercive," Op.101, 105-06, it never analyzed the Program under the coercion test of *Lee v. Weisman*, 505 U.S. 577 (1992), and *Santa Fe* v. *Doe,* 530 U.S. 290 (2000). In any event, the undisputed facts in the record preclude any finding of "coercion." *See* Facts C.2.,D.3.-4. Similarly, the court occasionally describes Iowa as having "endorsed" InnerChange, its goals, or its religious message, Op.100&n.37, 106&n.39, 116, 120, but this is always in the context of its discussion of the contract as either direct or indirect aid, never as an independent basis for finding an Establishment Clause violation. And because the tests for direct and indirect aid are both satisfied, there is no "endorsement." *Zelman,* 536 U.S. at 652-53; *Agostini,* 521 U.S. at 235. And finally, the lower court concluded that Iowa's Establishment Clause confers no greater rights than the federal one, Op.1-2&n.1, so that no distinct analysis is required to reverse that state claim.

legal issues. Appellants begin their analysis with the only set of facts that still presents a live case or controversy, namely, the contract in effect at the time of trial. *See infra* Section III.B.1.

### A. The District Court Erred in Finding That the Contract at the Time of Trial Had the Impermissible Effect of Advancing Religion.

The Supreme Court's analysis of the "effects" of government aid under the Establishment Clause depends on whether the aid flows "directly" or "indirectly" to religious institutions:

> [O]ur decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools, and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals.

*Zelman*, 536 U.S. at 649.

Where aid is direct, the Court uses "three primary criteria…to evaluate whether government aid has the effect of advancing religion…." *Agostini*, 521 U.S. at 234; *Mitchell*, 530 U.S. at 809. If a direct aid program "does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement," then it will be deemed constitutional. *Id.*

Where aid is indirect, *i.e.*, where non-governmental actors channel "government aid to religious [institutions] wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge

under the Establishment Clause." *Zelman,* 536 U.S. at 652. In that circumstance, the law need only be "neutral with respect to religion" and provide aid to "a broad class of citizens." *Id.*

As detailed below, whether this Court deems the contract operative at the time of trial "direct" or "indirect" aid, it satisfies both "effects" tests.

1. Iowa's contract with IFI at the time of trial was permissible as direct aid.

a. The district court erred in concluding that the contract results in government indoctrination.

*i. The applicable test is "actual diversion," not "pervasively sectarian."*

Justice O'Connor's concurrence in *Mitchell,* 530 U.S. at 836-67, joined by Justice Breyer, sets forth the controlling standard for assessing whether a direct aid program "results in government indoctrination." *Columbia Union Coll.* v. *Oliver,* 254 F.3d 496, 504 n.1 (4th Cir. 2001). The opinion emphasizes, as against the plurality, that this element of the test still forbids "actual diversion of [direct] government aid to religious indoctrination," even when the aid is neutrally distributed. *Mitchell,* 530 U.S. at 840-44. But it also emphasizes, as against the dissent, that courts may not presume that religious institutions that receive direct aid will "necessarily," "inescapably," or "inevitably" divert those funds to pay for "religious indoctrination." *Id.* at 850-51 (quoting *Meek* and *Wolman*). Justice O'Connor specifically criticized – and joined the plurality in overruling – the

reasoning of *Meek* and *Wolman,* ***precisely to the extent they applied the "pervasively sectarian" presumption to this effect.*** *Id.* Justice O'Connor added that

> a presumption of indoctrination, because it constitutes an absolute bar to the aid in question regardless of the religious [institution's] ability to separate that aid from its religious mission, constitutes a "flat rule, smacking of antiquated notions of 'taint,' [that] would indeed exalt form over substance."

*Id.* at 858 (quoting *Zobrest* v. *Catalina Hills School Dist.,* 509 U.S. 1, 13 (1993))(first alteration added).

Justice O'Connor replaces this presumption with its opposite, that government officials and employees of religious organizations are presumed to act in "good faith" and comply with program rules against using government funds for religious instruction. *Id.* at 863; *see also id.* ("To find that actual diversion will flourish, one must presume bad faith on the part of the religious school officials who report" to government aid monitors). Correspondingly, in order to overcome this presumption in favor of compliance, Establishment Clause "plaintiffs ***must prove*** that the aid in question ***is, or has been, used*** for religious purposes." *Id.* at 857 (emphasis added); *see id.* at 858.

Moreover, even if Establishment Clause plaintiffs can prove "actual diversion" of government aid to religious indoctrination, they must further prove it is more than *de minimis*. *See, e.g., id.* at 864 (rejecting evidence of actual diversion as *de minimis*); *see also id.* at 861 (rejecting claim that "government

must have a failsafe mechanism capable of detecting ***any*** instance of diversion"). Indeed, where, as in *Mitchell,* a system of safeguards catches and corrects small instances of actual diversion, that tends to show the system is "properly functioning" and should ***not*** be struck down. *Id.* at 866 (discussing correction of purchase of 191 religious books with government funds, totaling less than 1% of total aid allocation).

The four-Justice plurality opinion by Justice Thomas joined the concurrence in rejecting the "pervasively sectarian" presumption, but did so for more reasons:

- "its relevance in our precedents is in sharp decline.… [W]e have not struck down an aid program in reliance on this factor since 1985…"
- "the religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government's secular purpose.…"
- "the inquiry into the recipient's religious views required by the focus on whether a school is pervasively sectarian is not only unnecessary, but offensive.…"
- "hostility to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow."

*Id.* at 826-28. The plurality concluded that "[t]his doctrine, born of bigotry, should be buried now." *Id* at 829.

Thus, the lower court erred in concluding that "the 'pervasively sectarian' inquiry…remains the law." Op.96. Although it correctly concluded that the four-vote plurality opinion does not suffice alone to defeat the test, *id.,* the court completely ignored Justices O'Connor's and Breyer's rejection of the "pervasively

sectarian" test, and their formulation of an inconsistent test in its place for assessing whether "aid results in government indoctrination." *Mitchell,* 530 U.S. at 850-51, 857-58. *See Columbia Union,* 254 F.3d at 503-04.

Indeed, the lower court's disregard of the *Mitchell* concurrence was so complete that it began its discussion of the meaning of "pervasively sectarian" by quoting the definition of the term from *Hunt* v. *McNair,* 413 U.S. 734 (1973) – the ***very*** same language that Justice O'Connor had block-quoted with disapproval as it appeared in *Meek*. *Compare* Op.96 (quoting *Hunt*, 413 U.S. at 743), *with Mitchell,* 530 U.S. at 850 (quoting *Meek* v. *Pittenger*, 421 U.S. 349, 365-66 (1975) (quoting *Hunt*, 413 U.S. at 743)). Similarly, when the lower concluded that the "pervasively sectarian" character of InnerChange disqualified it from equal access to the same facilities that secular rehabilitation programs would need to function, the court used the ***very*** notion of "taint" that Justice O'Connor condemned. *Compare* Op.108 (IFI's use of government offices, furniture, and other in-kind aid "is tainted with the impermissible advancement of religion"), *with Mitchell,* 530 U.S. at 858 (linking "flat rule" of excluding pervasively sectarian groups from government aid with "antiquated notions of 'taint'")(quoting *Zobrest,* 509 U.S. at 13).

*ii. The district court's application of the "pervasively sectarian" presumption illustrates its problems.*

The application of the "pervasively sectarian" doctrine in this case amounts to little more than judicial religious stereotyping. It is bad enough that Plaintiffs' evidence and the court's findings focused so intensely on PFM's and IFI's beliefs, Op.12-24, rather than exclusively on their conduct in implementing this particular program.[8] But worse still, rather than simply rely on PFM's and IFI's own account of their own beliefs, the court shoe-horns them into the category of "Evangelical Christianity" as defined by Plaintiffs' expert, Professor Sullivan.[9] Unsurprisingly, Plaintiffs' expert describes a general category of people whose every word and deed has as its purpose the religious conversion of non-Evangelical Christians to Evangelical Christianity.[10] This imagined class of people, in other words, is presumed incapable of doing anything that does not "result in religious indoctrination," so they are disqualified as a class from contracting with the

[8] *See Mitchell,* 530 U.S. at 827-28 ("the religious nature of a recipient should not matter to the constitutional analysis," and "the inquiry into the recipient's religious views required by the focus on whether a school is pervasively sectarian is not only unnecessary, but offensive").

[9] Op.13&n.8 ("Prison Fellowship's own religious commitments can best be characterized as Evangelical Christian in nature"); Op.16 ("As an Evangelical Christian organization, Prison Fellowship shares the predominate characteristics common to Evangelical Christianity").

[10] Op.17 (describing as "paramount" the "duty of every Evangelical Christian to evangelize—that is to spread the good news of their faith and invite others to share the same adult conversion experience."); *id.* ("for Evangelical Christians, everything that happens in the world is understood through and interpreted by religious language.").

government to provide rehabilitation services. *Mitchell,* 530 U.S. at 858 (quoting *Zobrest,* 509 U.S. at 13).

But the real people who actually run IFI don't fit this stereotype. Sullivan's opinion didn't take them into account at all: she never observed InnerChange in operation, or interviewed any IFI staff members or participating inmates. Apx.221-22. Her uninformed (and so unreliable) opinion that InnerChange is designed simply to convert inmates is directly contradicted by the unequivocal testimony of those who actually operate the program, Apx.303-06, 312, 315-19, 355, and the fact that InnerChange makes accommodation for inmates to practice other faiths, and has graduated inmates of other faiths and of no faith. Apx.216, 218, 235, 295-96. 320-23, 329-30. The court nonetheless concluded that IFI staff relentlessly indoctrinate inmates who enroll in the Program.[11] The "pervasively sectarian" inquiry invites precisely this kind of stereotype of "Evangelical Christians" over the reality of law-abiding State and IFI staff.

*iii. The current contract passes the "actual diversion" test.*

Perhaps more egregious than its application of the "pervasively sectarian" test is the lower court's failure to apply Justice O'Connor's superseding test for

[11] Op.88 ("Every waking moment in the InnerChange program is devoted to teaching and indoctrinating inmates into the Christian faith."); Op.75 ("As presented through the InnerChange program, however, these [treatment] classes are also used to indoctrinate InnerChange inmates into the Evangelical Christian faith.").

assessing whether the direct aid "results in government indoctrination." For all its length, the court's opinion still fails to address the facts that are actually relevant: facts not about who IFI ***is***, but what IFI ***actually does,*** and particularly what it does with government funds. The court discusses no evidence from Plaintiffs, and certainly makes no finding, proving that the funds paid to IFI under the current contract—$3.47 per inmate per day, Apx.308-10—were "actually diverted" to pay for indoctrination, least of all at more than *de minimis* levels.[12] Similarly, its sweeping conclusion that "state funding unquestionably supplants, rather than merely supplements[,] 'the regular curricula' of the InnerChange program," Op.109, has no evidentiary basis.[13]

In the absence of such evidence, the presumption of State and IFI officials' "good faith" in using that money only for secular activities should carry the day. *Mitchell,* 530 U.S. at 863-64. *But see* Op.107 (claiming that, in *Nyquist,* "the Court did not accept the school's assurances that public funds would be safeguarded").[14]

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[12] Although the court criticizes the per diem as ineffective to render the aid "indirect," Op.120-22, it doesn't find (or even discuss evidence tending to show) that, as direct aid, IFI "actually diverted" even a cent of the per diem to religious worship or instruction. Instead, it falls back on the presumption that an organization as vigorously religious as IFI "inevitably," "necessarily," and "inescapably" uses any government money for indoctrination.

[13] As the court recognized, Op.109, the "supplement not supplant" factor is neither clearly of constitutional magnitude, nor clear in scope.

[14] The court makes the bold assertion that "*Nyquist* remains the definitive case to which the Supreme Court turns to characterize improper state funding of a religious institution," Op.122, apparently on the basis that *Zelman* bothered to

But in any event, the State and IFI need not rely on that presumption, because they adduced competent, undisputed evidence—ignored by the court—demonstrating how the per diem avoids funding religious indoctrination. Specifically, the aid covered less than 40% of the direct costs of operating InnerChange at NCF, Op.41, Apx.187-89, 308; and IFI provided certain unmistakably secular services (*e.g.*, computer classes, job training, security assistance). Apx.264-65, 272-74, 340-41, 377-81. IFI submitted detailed breakdowns of its programming hours to DOC and, at DOC's request, completed a thorough study of its sectarian and non-sectarian programming in 2001. Apx.453-59, 601-13, 1214-20. Each study concluded that at least 40% of InnerChange programming was non-sectarian. *Id.*

b. The district court erred in concluding that the contract defines beneficiaries by reference to religion.

The *Mitchell* concurrence explained that an aid program "'defines its recipients by reference to religion'" if the program "'creat[es] a financial incentive to undertake religious indoctrination.'" *Mitchell,* 530 U.S. at 845 (quoting *Agostini,* 521 U.S. at 231, 234).

Here, the lower court found that "the state and InnerChange provide incentives to inmates to join the program … in the form of [1] better conditions

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distinguish it. This only means *Nyquist* has not been overruled, not that every proposition within it remains good law. Although Plaintiffs might wish it otherwise, the "definitive cases" describing the applicable standards that govern this case are the *Mitchell* concurrence and *Agostini* for direct aid, and *Zelman* for indirect aid—not *Nyquist.*

once associated and reserved for honor unit inmates and [2] an opportunity to complete the required courses of rehabilitation classes before it would be otherwise possible." Op.114. Both conclusions are erroneous.

***First***, to the extent the conditions in Unit E may represent a constitutionally significant incentive at all—and they don't—those conditions are more than offset by the burdensome demands of participation in IFI.

Iowa assigned IFI to Unit E, a former "honor unit," for security reasons—DOC could keep volunteers out of other units. Apx.284-85. Unit E wasn't designed as an honor unit; in fact, honor units are not determined by the quality of facilities, but by the designation of DOC. Apx.281-83. Honor units are defined by the privileges given to inmates, and inmates who had been in Unit E before IFI retained those special privileges after moving to another unit. Apx.288, 298-99. The "benefits" of Unit E—communal bathrooms and inmate-controlled doors—are matters of preference. Some of ***Plaintiffs'*** witnesses testified they preferred in-cell bathrooms or had no preference at all. Apx.294, 300. Inmate-controlled doors generate security risks that some inmates may not wish to take.[15] Apx.375.

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[15] The court also found that "inmates in maximum security facilities with attendant high custody scores, who otherwise would not be allowed into the Newton Facility, were able to participate in the InnerChange program based in Unit E." Op.56. This finding is clearly erroneous. Classification decisions are always within DOC's discretion; custody scores provide guidelines about which facilities "may be appropriate," but are not rigid rules. Apx.280, 289-90. DOC

Other "benefits" of IFI are available through other DOC programs, and so do not represent a meaningful incentive to join. While more computers are available to inmates in InnerChange than to general population ("GP") inmates, GP inmates may obtain greater computer access by enrolling in a GED or college course. Apx.212-13, 224-26, 253, 372. IFI computers have no internet access or printing capability. *Id.* GP inmates taking college classes, like InnerChange inmates, have graduation ceremonies with free food brought in from the outside. Apx.337, 390. GP inmates, like InnerChange inmates, may obtain free phone calls in family emergencies or for treatment-related communication (*e.g.,* family reconciliation). Apx.219, 228-29, 252-53, 267-69, 371. InnerChange inmates, like GP inmates, have limited access to musical instruments. Apx.230-31, 250-52, 334.

Rather than tout these "benefits" of IFI in recruiting sessions, IFI staff focus instead on the difficulty of InnerChange programming and the comforts inmates must give up to enter the program. Apx.339, 398, 346. InnerChange prohibits inmates from having televisions in their cells (GP inmates are permitted TVs); possessing sexually explicit magazines, books or music; and cursing. Apx.205, 207, 249. Inmates may not hold full-time jobs during the Program's first twelve months. Apx.205, 215, 247-48. Inmates must keep their cells clean and submit to strict inspections of possessions. Apx.232-34. Discipline is strict in the

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regularly makes exceptions and places inmates with high custody scores in medium and even minimum security facilities. Apx.280.

InnerChange unit, and free time is limited. Apx.232-34, 205, 207, 249. Perhaps most significant, inmates must forego their weekday visiting hours, which conflict with InnerChange classes. Inmates are expected to confine visits to weekends, a time when the visiting room is overcrowded. Apx.215, 391-92.

The lower court made much of the family visits given to InnerChange inmates during the Alpha Series, or Family Series. Op.84-85. These findings are clearly erroneous. The record demonstrates that InnerChange inmates actually have ***fewer*** family visits than GP inmates. Apx.215, 391-92. For a three-month period, InnerChange inmates may meet with their families on a weeknight as part of the Family Series. Apx.198. They are conducted in large groups with InnerChange counselors, other inmates, and their families. Apx.388. Inmates must spend the short visit working through a set curriculum with their families, and are reprimanded by the InnerChange counselor at the table if they stray from assigned materials. Apx.229, 335-36, 386-88. Inmates must submit to strip searches before and after these meetings. Apx.254, 388. The evidence demonstrates that IFI inmates actually have ***less*** time for visits—not more. Apx.215, 391-92.

***Second***, the lower court erred in concluding that InnerChange speeds up treatment and so leads to earlier parole. Op.70-71, 114.

IFI inmates receive the following core correctional treatment programming while in the program: substance abuse, criminal thinking, victim impact, anger management, financial management, and marriage/family/parenting. Apx.195, 238-39. DOC offers inmate more than 50 options for completing treatment in each of these areas (and others): there are multiple treatment programs available at each facility, and DOC will transfer inmates between facilities to help them obtain treatment. Apx.1237-40, 364-67. Most importantly here, inmates can take DOC classes simultaneously, completing as many as three treatment classes in six months. Apx.236-37. Most inmates don't require more than three treatment classes. Apx.292-93.

InnerChange, by contrast, doesn't allow for this kind of streamlining. InnerChange inmates must complete a one-month orientation and six months of the program before they begin formal treatment classes. Apx.238-39. Moreover, there is a waiting period to get into InnerChange and an additional waiting period (which may last several months) between the time an inmate arrives at NCF and the time his InnerChange classes begin. Apx.255, *see also* 374. InnerChange's substance abuse program is nine months long and does not begin until an inmate has been in InnerChange for 9 months. Apx.259, 266-67, 338, 357. Most substance abuse programs are 3-4 months long. Apx.259. Due to its length, InnerChange can actually ***delay*** completion of treatment. Apx.260, 266-67, 286, 357, 338.

Moreover, Elizabeth Robinson, Chair of the Parole Board, testified that the Board prefers that treatment be completed immediately prior to release and has in fact instructed DOC not to begin inmate treatment too early. Apx.358-59, 361. Robinson also testified that she looks critically at voluntary inmate treatment, because some inmates sign up for unnecessary classes to try and manipulate the Board. Apx.360, 362.

Thus, the IFI contract does not provide any incentive for aid recipients to undertake religious indoctrination, because it does not offer either improved living conditions or expedited parole.

c. The district court erred in concluding that the contract creates an excessive entanglement with religion.

As the Supreme Court has noted, "[i]nteraction between church and state is inevitable…and [the courts] have always tolerated some level of involvement between the two." *Agostini*, 521 U.S. at 233. Hence, "[e]ntanglement must be 'excessive' before it runs afoul of the Establishment Clause." *Id.* In assessing entanglement here, the Court must consider whether the DOC's contract with IFI requires: (a) "pervasive monitoring" by DOC, and (b) administrative cooperation between DOC and the provider. *Id.*

The lower court ignored these considerations, finding instead that "the transformational model employed by InnerChange forecloses any possibility that secular and sectarian aspects of the program may be separated." Op.125. That is,

the court resorts once again to the "pervasively sectarian" shortcut—if a service contractor is "too religious," it is presumed incapable of keeping government funds from religious use.

But under the controlling test ignored by the court, any "entanglement" between DOC and IFI falls well short of "excessive." There is no evidence, least of all a finding, that the current contract requires pervasive DOC monitoring. Indeed, the court faults IFI in this section—albeit inaccurately—for lack of monitoring. Op.124 ("[t]here are no adequate safeguards present"). The evidence, however, shows that DOC's monitoring includes receiving and reviewing regular service invoices from IFI, *see* Apx.981-1006; staff observation and discussion of IFI activities at NCF, *see* Apx.257, 277, 279; a budgetary cap strictly limiting DOC funding to a portion of the program, *see* Apx.187-88, 258; and contractual provisions specifically limiting use of state funds to "non-sectarian" purposes. *See,* Apx.256-57, 278, 453-59, 658. This strikes the proper constitutional balance and is not "excessive."

Nor is the level of administrative cooperation here "excessive." *Agostini*, 521 U.S. at 233 (administrative cooperation, by itself, is insufficient to create excessive entanglement). While DOC and IFI officials engage in some cooperation—meeting and communicating occasionally about administrative issues—it is no more than necessary to address those issues, which necessarily

arise from IFI's operation in the midst of the DOC's prison system. *See Peck* v. *Lansing*, 148 F.3d 619, 624, 628 (6th Cir. 1998)(entanglement caused by school district's providing physical therapy to parochial school student at her school was no more than necessary).

2. Iowa contract with InnerChange at the time of trial was permissible as indirect aid.

a. The district court erred in concluding that the contract selection process was not neutral.

The court held that the RFP process lacked "neutrality" because IFI "was the only real contender in the bid process," which was "gerrymandered…in order to assure that the InnerChange program would come to Iowa." Op.111-12. This is error, as the State could have waived the bidding process entirely consistent with the demands of neutrality, for the same reason Wisconsin did in *FFRF* v. *McCallum:* "because [the faith-based] program has such attractive features from a purely secular standpoint, such as the length of the program, … the state was eager to have it on its menu of [rehabilitation treatment] choices." 324 F.3d 880, 883 (7th Cir. 2003). Moreover, IFI was ***not*** the only real contender in the bid process for the contract in effect at the time of trial—IFI simply won because it offered the most services at the lowest price. Op.39. Appellants also adopt Iowa's arguments on this point. FRAP 28(i).

b. The district court erred in concluding that the contract does not provide benefits to a broad class of beneficiaries.

Although it is undisputed that IFI doesn't require inmates to be or become Christian to complete the Program, the lower court still held that InnerChange does not provide benefits to a "broad class of individual recipients defined without regard to religion," *Zelman*, 536 U.S. at 662. The court claimed that, "[i]n practice, the intensive religious content of the InnerChange program is a substantial disincentive to joining for persons of other faiths, or those professing no faith." Op.120.

This argument proves too much. Those who might be deterred from participating in IFI because of disagreement with its religious beliefs are in the same situation as those parents in Cleveland who might be deterred from sending their children to Catholic schools with the voucher funding at issue in *Zelman* because of disagreement with the schools' religious beliefs. This element of the test doesn't require participating religious programs to reshape themselves so that they are equally appealing to people of all faiths; it only requires them to offer their services to all potential beneficiaries, regardless of their faith, and it is undisputed that IFI does that (and that non-Christians have completed the Program). Indeed, the distinctive religious character of IFI (or the *Zelman* Catholic schools) is precisely one of the things that makes the inmates' choice a meaningful one. *See*

*McCallum,* 324 F.3d at 884 ("It is a misunderstanding of freedom…to suppose that a choice is not free when the objects between which the chooser must choose are not equally attractive to him.").

c. The district court erred in concluding that state funds were not directed to InnerChange as a result of genuinely independent private choice.

The lower court concluded that the InnerChange Program wasn't a system of true private choice for two reasons, both of which are erroneous.

***First***, it found that "there are not alternative, similar programs offered to Iowa inmates who are not interested in the InnerChange religious programming, ***but who also desire to meet their treatment requirements in the most timely way, be part of a residential community setting, and avail themselves of an intensive post-release program.***" Op.120-21 (emphasis added).[16] But the law requires much less similarity among treatment alternatives than the italicized language suggests. In other words, by ratcheting up the similarity requirements, the court completely ignored the huge menu of alternative secular treatment options available. DOC provides more than one hundred other treatment programs. Apx.1237-40. It runs six therapeutic communities. Apx.201. It offers the KEYS program, an intensive post-release alternative to InnerChange. Apx.272-73, 275-76, 331. In fact,

[16] Applying this stringent similarity test, the court concluded there were only two "therapeutic community" alternatives, and then rejected them as insufficient because they were limited to certain types of inmates. Op.71-72, 119.

enrolling in InnerChange can actually delay the completion of treatment. Apx.260, 266-67, 286, 357, 338.

For all the reasons why these alternatives are similar enough not to incentivize inmates to choose InnerChange, *see supra* Section III.A.1.b., they are also similar enough to InnerChange to represent a genuine alternative. *See also McCallum,* 324 F.3d at 883 (three-month and nine-month halfway-house programs are sufficiently comparable to allow "true private choice").

***Second***, the court faulted the per diem for not following inmates to whatever alternative treatment programs they choose. Op.120. But that overlooks the fact that IFI's access to contract funds still depends ***entirely*** on inmates' decision to choose InnerChange as their rehabilitation service provider: if inmates participate in InnerChange, IFI gets the money; if they don't, it doesn't. The fact that the money doesn't ***also*** go to an alternative provider when an inmate chooses that alternative doesn't affect whether the inmate's private choice is "genuine" or "independent," particularly where the decision has no financial impact on the inmate.[17]

[17] As the district court acknowledged, the fact that the aid went straight from Iowa to InnerChange, rather than through the hands of individual inmates, has no constitutional significance. Op.119&n.44 ("What needs to be shown is simply that an inmate's private, genuine choice directs the aid to the provider.")(citing *McCallum*, 324 F.3d at 882).

Therefore, the per diem system under the current contract represents a system of true private choice, and the aid should be analyzed as "indirect." Because the aid is also "neutral" and offered to a "broad class of beneficiaries defined without regard to religion," it complies with the Establishment Clause.

### B. The District Court Erred in Finding That the Contracts Prior to the Time of Trial Had the Impermissible Effect of Advancing Religion.

#### 1. This case is moot with respect to past contracts for rehabilitation services between IFI and DOC.

In general, civil rights plaintiffs under Section 1983 may seek three forms of relief: damages, injunction, and declaration. *See, e.g., Royal* v. *Kautzky*, 375 F.3d 720, 723 (8th Cir. 2004). Because none of these is available here as against any iterations of the IFI contract prior to the one operative at trial, the case is moot as to those prior iterations.

Damages relief is generally available for individual or associational Establishment Clause plaintiffs, and Plaintiffs originally sought that relief. Apx.178. But although such relief ***would*** be available to remedy actual harms caused by completed action—such as any prior IFI contracts that are no longer operative and that may have violated the Establishment Clause—Plaintiffs chose to drop their damages claim. Apx.179.

Injunctive relief is prospective, and is therefore unavailable as a means to correct wholly completed action. *See Harmon* v. *Kansas City,* 197 F.3d 321, 327

(8th Cir. 1999)("mere fact that injurious activity took place in the past does nothing to convey standing to seek injunctive relief against future constitutional violations."). As discussed below, the injunctive relief of restitution, though calculated based on past conduct, is no exception to this rule. Accordingly, injunctive relief is unavailable as a remedy for challenges to any version of the IFI contract prior to the one operative at trial.

Finally, declaratory relief is unavailable in the absence of any viable claim for compensatory or injunctive relief. *Midwest Farmworker* v. *Dept. of Labor,* 200 F.3d 1198, 1201 (8th Cir. 2001).

Because none of the three potentially available forms of relief are available for any claim that prior IFI contracts violated the Establishment Clause, this court should reject any such claim as moot.

2. Even if the case were not moot with respect to past contracts, those contracts did not violate the Establishment Clause.

If this Court were nonetheless to reach Plaintiffs' apparent constitutional challenge to earlier IFI contracts that are no longer in effect, the Court should still reject that challenge.

Before the per diem payment system was instituted as part of the current IFI contract, there is no arguable claim that the IFI contract instituted a system of indirect aid, so the direct aid standards apply. *See supra* Section III.A. (describing applicable standards for direct and indirect aid). Under two of the three direct aid

factors—whether the aid defines recipients by reference to religion or creates excessive entanglement—the facts and analysis are essentially the same as above. *See supra* Section III.A.1.b.&c. Under the third—whether the aid results in government indoctrination—relevant facts are different, but the result is the same: there is no violation.

The lion's share of State funds paid under prior contracts went to staff salaries for time allocated to "nonsectarian" tasks. The court summarized these allocations briefly and then described them (albeit obliquely) as "a well-defined system for the coding of sectarian versus non-sectarian expenses." Op.47 ("a well-defined system for the coding of sectarian versus non-sectarian expenses, ***other than salaries***, at the Newton InnerChange Program was ***not*** in place."). And there is no evidence of "actual diversion" of the government funds spent on salaries.

As to out-of-pocket expenses, the parties agree that the costs of all photocopies (up to 40,000 per month), land and cell phones, internet, computer repair, computer hardware and software, audio equipment, blank videotapes, postage, letterhead, envelopes, and other office supplies were coded as "non-sectarian" and charged to Iowa. Op.44. But, importantly, the court didn't find what portion, if any, of these goods were ***actually*** applied toward religious indoctrination. Under the *Mitchell* concurrence, this is the Plaintiffs' burden to prove, and they failed to meet it. Instead, they (and the court below) mistakenly

relied on the discredited presumption that a "pervasively sectarian" organization "necessarily," "inevitably," or "inescapably" diverts government funds to pay for religious indoctrination. *Mitchell,* 530 U.S. at 850-51.

Although there is some evidence of funds "actually diverted" to religious indoctrination under a prior contract, those diversions were *de minimis.* Specifically, the court found that, before the per diem system, Iowa was billed for certain religious articles, but notably omits the amounts. The printing of brochures with religious content to recruit volunteers, Op.44-45, cost $600. Apx.1243. The religious key rings used as graduation gifts, Op.46-47, cost $63.96. Apx.1245, 1248. The religious bookmarks used as volunteer gifts, Op.47, cost $23.85. Apx. 1249. The copyright licenses to use religious music, Op.47, cost $203. Apx.1246. The cost of the subscription to a monthly religious booklet, Op.47, is not in evidence.[18]

In a program whose total budget hovers around $600,000.00 annually, for which Iowa's portion hovers around $200,000, if these diversions are not *de minimis*, then nothing ever could be. Indeed, the fact that the court bothered to

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[18] The fact that IFI uses state funds to pay for meals at volunteer appreciation events doesn't represent "actual diversion" toward religious indoctrination, simply because some of those volunteers "includ[e] those who lead Bible studies." Op.47. The court does not find as much, but suggests it by including these meals among out-of-pockets spent on religious items. *Id.*

emphasize such trivial diversions suggests how little evidence of "actual diversion" there was.

## IV. EVEN IF THE COURT DID NOT ERR IN FINDING AN ESTABLISHMENT CLAUSE VIOLATION, THE COURT DID ERR IN ITS REMEDY.

### A. The District Court Erred in Ordering InnerChange and Prison Fellowship to Repay State Funds Already Spent to Provide Rehabilitation Services to Inmates.

In ordering PFM and IFI to repay over $1,500,000 as equitable restitution to Iowa, the court severely misbalanced the equities. Moreover, restitution is unavailable as a remedy for private Establishment Clause plaintiffs.

#### 1. If restitution is available to private Establishment Clause plaintiffs, it should not be awarded on these facts.

The court failed to balance the equities properly by giving some factors too much weight, giving others too little weight, and ignoring some altogether. These errors are subject to *de novo* review and should be overturned. *See Brown* v. *Aventis*, 341 F.3d 822, 826 ($8^{th}$ Cir. 2003)(availability of equitable remedies subject to *de novo* review). *See also Correa* v. *Cruisers*, 298 F.3d 13, 34 (1st Cir. 2002)(abuse of discretion when "relevant factor deserving of significant weight is overlooked"; "improper factor is accorded significant weight"; or "court considers the appropriate mix of factors, but commits a palpable error of judgment in calibrating the decision scales.").

##### a. The district court erred by misapplying those equitable factors it considered.

*i. Reasonable reliance.*

*Lemon* v. *Kurtzman*, 411 U.S. 192 (1973)("*Lemon II*"), and *Roemer* v. *Board of Public Works*, 426 U.S. 736 (1976), should guide this Court's analysis of reasonable reliance.

In *Lemon II*, the Court held that religious schools could be paid for expenses incurred before the program at issue was declared unconstitutional. *Lemon II,* 411 U.S. at 208. Emphasizing the lack of predictability under Establishment Clause jurisprudence, the Court held that the schools' reliance on the contract was justified. *Lemon II*, 411 U.S. at 206-07. The Court rejected restitution because there was no showing that defendants "acted in bad faith or that they relied on a plainly unlawful statute." *Id.*[19]

In *Roemer*, the Court refused to order restitution of payments already made under a grant program benefiting religious colleges. *Roemer*, 426 U.S. at 767&n.23. The Court found the case for reasonable reliance stronger than in *Lemon II*: the colleges in *Lemon II* relied not as heavily because they "had not yet received the funds in question," and not as reasonably because "a suit had been filed prior to the time the reliance occurred." *Id.*

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[19] Outside Establishment Clause cases, courts have similarly refused to order restitution absent a showing of bad faith. *See*, *e.g.*, *Texaco Puerto Rico* v. *Dept. of Consumer Affairs*, 60 F.3d 867 (1st Cir. 1995); *Moss* v. *Civil Aeronautics Bd.*, 521 F.2d 298, 314 (D.C. Cir. 1975).

Under these precedents, IFI's reliance was reasonable, and restitution should be denied. As in *Roemer*, reliance is heavier, because payments are not just anticipated, but ***already made***, to IFI, and more reasonable, because this lawsuit didn't precede the Program. And as in *Lemon II*, the Establishment Clause law is complex, and its application to this case unpredictable (as the court below acknowledged, Op.135), so the Program could not have been "plainly unlawful." And as in both precedents, there is no showing of "bad faith." Indeed, the court found that the contract here had a legitimate and predominately secular (rather than sham religious) purpose. Op.95.

The court nonetheless rejected the reasonable reliance defense, based mainly on "the degree of knowledge of the Defendants about the risk associated with the program." Op.138. It cited a Texas opinion in support, but it was issued ***after*** this contract began, striking down a ***different*** program, in a state where InnerChange presently operates ***without*** legal incident. The court also cites a contrary legal opinion from the California DOC, but that state's difference of opinion with IFI, Iowa DOC, and their respective lawyers, doesn't remotely approach the higher level of risk that was insufficient for restitution in *Lemon II,* where a lawsuit "was plain from the outset." *Id.* at 207.

*ii. Financial hardship.*

The court rejected IFI's financial hardship defense because IFI is affiliated with PFM, and PFM revenues exceed $50 million annually. Op.133. But the court failed to consider PFM's assets and liabilities. *Id.* Without this information, it couldn't fairly determine whether it would be hardship for PFM to pay over 3% of its revenues to satisfy the restitution order. The court also articulates no theory of liability explaining why PFM should be responsible for paying a restitution order that runs against IFI. There is no ownership relationship or corporate veil to pierce.

b. The district court erred by failing to consider equitable factors that militate against restitution.

*i. Unjust enrichment.*

Restitution is premised on the notion, central to equity jurisprudence, that no one should be unjustly enriched. RESTATEMENT OF RESTITUTION § 1. *See also* Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1279 (1989)("'Restitution' means recovery based on and measured by unjust enrichment.") *State ex rel. Palmer* v. *Unisys*, 637 N.W.2d 142, 154 (Iowa 2001)("[t]he doctrine of unjust enrichment is based on the principle that a party should not be permitted to be unjustly enriched at the expense of another or receive…benefits without paying just compensation.")(citation omitted) .

The court turned this doctrine on its head by issuing a restitution order unjustly enriching Iowa at IFI's expense. Iowa admits it already received good

value for its purchase of IFI rehabilitation services. Apx.187-88, 263-65, 377-81. But the court's order would allow Iowa to keep the undisputed benefit of the rehabilitation services without paying the "just compensation" provided for in the contract, even though Iowa agrees that restitution would be unjust. And it makes restitution a one-way street that forces IFI to disgorge funds without making Iowa restore to IFI the additional $2 million IFI invested (without reimbursement) in the Program. Op.40-41.

*ii. Quantum meruit.*

*Quantum meruit* compensates a party who provided beneficial services to another without a valid contract: "For breach of an implied-in-fact contract, the injured party is entitled to quantum meruit—'the reasonable value of the services provided and the market value of the materials furnished.'" *Scott* v. *Grinnell Mut. Reinsurance*, 653 N.W.2d 556, 562 (Iowa 2002). Here, even if IFI's contract with DOC is invalid, IFI is entitled to "the reasonable value of the [rehabilitation] services provided," and Iowa has repeatedly emphasized that the value of those services was high, even exceeding their cost to Iowa. Apx.263-65, 270-71, 273-74, 370, 671, 1223-36. Therefore, the amounts paid under the contract should remain with IFI or, at a minimum, be set off against IFI's costs in providing the services.

*iii. In pari delicto.*

When a contract is illegal, and both parties to the contract are at fault for its illegality, courts "will ordinarily leave [the parties] where it finds them, whether the contract is executory or executed, refusing relief to both." *Mlynarik* v. *Bergantzel*, 675 N.W.2d 584, 587 (Iowa 2004). Here, assuming the contract between DOC and IFI is illegal, both parties would be at fault, and the court should leave the parties where it found them, not grant Iowa a windfall.

*iv. Public policy.*

Public policy considerations also preclude restitution. If this remedy stands, both religious service providers and governments will be broadly deterred from entering into contracts, regardless of the terms. *See Lemon II,* 411 U.S. at 207-08 (if restitution were common, providers would have to "stay their hands until newly enacted state programs are 'ratified' by the federal courts, or risk draconian, retrospective decrees should the legislation fall."). Even a very small risk of such a crushing remedy is enough to create this chilling effect, particularly in light of the inherent uncertainties of Establishment Clause law. *Id.* at 206-07.

*v. Redundancy.*

Restitution here is also inequitable because it is cumulative. Unlike compensatory restitution—which "focuses on a plaintiff's losses and aims to recover the harm done to him"—equitable restitution instead seeks to "remov[e] [the Defendant's] incentive to perform the wrongful act again." *Knieriem* v.

*Group Health Plan*, 434 F.3d 1058, 1061 (8th Cir. 2006). But where the court has already issued a prohibitory injunction (and a broad one at that), there is no need to pile on by issuing another injunction to further deter the already-prohibited conduct.

In sum, the lower court ignored a wide range of considerations all pointing to the same conclusion—forcing IFI to repay Iowa for valuable services it already rendered Iowa is inequitable under the circumstances.

2. Restitution is categorically unavailable to private plaintiffs as a remedy for Establishment Clause violations.

The court's holding that restitution is a remedy available to private Establishment Clause plaintiffs rests on the slender reed of the Seventh Circuit's recent, sharply divided decision in *Laskowski* v. *Spellings*, 443 F.3d 930 (7th Cir.), *clarified upon pet. for reh'g,* 456 F.3d 702 (7th Cir. 2006). Before *Laskowski,* no court had ever stretched standing so far as to grant private plaintiffs *qui tam*-like authority to force private parties to reimburse the government for its Establishment Clause violations. This Court should reject the lower court's uncritical adoption of *Laskowski* for three reasons.

First, it is well-established that "a plaintiff must demonstrate standing separately for each form of relief sought." *Friends of the Earth* v. *Laidlaw*, 528 U.S. 167, 185 (2000). But plaintiffs get no benefit ***of their own*** from this form of relief. *See Great-West Life* v. *Knudson*, 534 U.S. 204, 214 (2002)(equitable

restitution "must seek not to impose personal liability on the defendant, but to restore ***to the plaintiff*** particular funds or property in the defendant's possession.")(emphasis added). As Judge Sykes' forceful dissent in *Laskowki* explains, 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 government appropriations. *Laskowski*, 443 F.3d at 941 (emphasis added). "The taxpayers' standing to pursue their Establishment Clause challenge is now based on – what? A common law claim against [a private recipient of state funds] for unjust enrichment based on the government's alleged Establishment Clause violation?" *Id*. at 943. "Such a claim is unknown to the law." *Id.*[20]

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[20] The non-taxpayer Plaintiffs also lack Article III standing to seek restitution to the public fisc of monies paid to InnerChange. The "smoker standing" Plaintiffs do not, by virtue of having bought tobacco products, have standing to challenge how Iowa spends money received from tobacco settlements. Telephone Fund Plaintiffs lack standing to challenge how Iowa uses the profits Iowa makes from selling telephone service to prisoners. IOWA ADMIN. CODE § 201-20.20(2). Although these profits are to be used "for the benefit of inmates," IOWA ADMIN. CODE § 904-508A, as long as prisoners' ability to use deposits on their behalf to make telephone calls remains unaffected, Telephone Fund Plaintiffs lack any concrete injury. *See Young America* v. *Affiliated Computer Servs.*, 424 F.3d 840, 843 (8th Cir. 2005). And Prisoner Plaintiffs lack standing to complain about the ***source*** of funds for the InnerChange program—their interest is in the conditions of their confinement alone. With respect to Iowa's funding decisions, these Plaintiffs therefore raise only impermissible "generalized grievance[s]." *DaimlerChrysler*, 126 S.Ct. at 1865.

Second, allowing Establishment Clause plaintiffs to sue private parties for restitution would dramatically expand the narrow exception of *Flast* v. *Cohen*, 392 U.S. 83 (1968), to the general rule against taxpayer standing. *Flast* didn't premise standing on "injuries to the public fisc" or on "vindicating losses sustained by the Treasury." *Laskowski*, 443 F.3d at 943. Instead, *Flast* merely authorizes "Establishment Clause challenges to actions by Congress under the taxing and spending power of Article I, Section 8 for the purpose of ***halting*** the unconstitutional exercise of that power." *Id.* (emphasis added). *See also DaimlerChrysler* v. *Cuno*, 126 S.Ct. 1854, 1865 (2006)(re-affirming that taxpayer standing exists only to pursue "an injunction against" the "extract[ion] and spen[ding] of tax money in aid of religion."). Here, the restitution order halts no exercise of Iowa's taxing and spending power—money was already "extract[ed] and spen[t]." Thus, ordering restitution of funds from a private party extends well beyond *Flast*'s limited purpose.

Finally, allowing private plaintiffs to seek restitution for the government violates separation-of-powers and federalism principles by taking the discretion to seek reimbursement away from the executive and giving it to the judiciary and those it appoints as private attorneys general. Political branches possess unreviewable discretion to determine whether to seek remedial action against private parties in matters affecting the public fisc. *See Heckler* v. *Chaney*, 470

U.S. 821, 831-32 (1985). This rule is grounded in separation-of-powers principles, which courts must respect. *See id.* (comparing agency's refusal to seek remedy from private party to "decision of a prosecutor in the Executive Branch not to indict"); *U.S.* v. *Standard Oil*, 332 U.S. 301, 314-15 (1947)(political branches, not courts, have authority to "secur[e] the treasury or the government against financial losses, including requiring reimbursement for injuries."). Here, Iowa exercised its discretion ***not*** to seek reimbursement from IFI, recognizing it had received value for IFI's services. Apx.377-81. But the lower court, through judicial fiat, transferred that discretion from Iowa's political branches to private plaintiffs.

### B. The District Court Erred in Its Award of Prohibitory Injunctive Relief.

#### 1. The district court erred in forever banning InnerChange from operating within the Iowa prison system.

Courts must narrowly tailor every injunction, as a court is "limited by the requirement that it model [its] judgment[] to fit the exigencies of the particular case." *ES Development* v. *RWM Enterprises*, 939 F.2d 547, 558 (8th Cir. 1991)(quotations omitted). Ignoring this requirement, the court issued the broadest possible prohibitory injunction: banning InnerChange from ***ever*** contracting with Iowa for paid services, ***no matter*** the terms. Op.128. Consistent with the "pervasively sectarian" doctrine it enforces, this overbroad order represents an "absolute bar to the aid in question regardless of the [IFI's] ability to separate that

aid from its religious mission," and therefore "constitutes a 'flat rule, smacking of antiquated notions of "taint," [that] would indeed exalt form over substance.'" *Mitchell,* 530 U.S. at 858. The court abused its discretion by preferring this "absolute bar" to the narrower remedy of enjoining the current contract, and perhaps any future contract that similarly violated the Establishment Clause.

2. <u>The district court erred in ordering the immediate cessation of payments to InnerChange.</u>

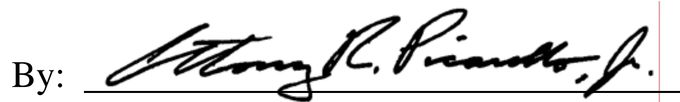
The court also overreached by prohibiting Iowa from paying IFI for services rendered ***before*** the contract was invalidated. Op.133-34. Denying InnerChange payment for services already rendered is inequitable for all the same reasons it would be inequitable to force InnerChange to disgorge state funds already spent on providing Iowa valuable rehabilitation services. Indeed, InnerChange's situation is identical to *Lemon II*, 411 U.S. at 201-08, where the Court refused to block payments for services already rendered under a contract held unconstitutional. The lower court's citation to *Cathedral Academy* is also inapposite. Op.131-32. That case involved no contractual reliance, but instead a legislative attempt to circumvent a court decision by enacting a system to provide payments to religious entities that a court had already found unlawful. *Id.* No circumvention exists here.

## **<u>CONCLUSION</u>**

The decision below should be reversed and judgment entered for Defendants-Appellants.

Dated: September 13, 2006

THE BECKET FUND FOR RELIGIOUS LIBERTY

By: 

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that pursuant to FED. R. APP. P. 32(a)(7)(C), the foregoing Appellants' Brief is proportionally spaced, has a typeface of 14 points or more, and contains 13,910 words, as calculated by Microsoft Word 2003, the word processor used in its preparation.

Dated: September 13, 2006

Anthony R. Picarello, Jr.

## CERTIFICATE OF SERVICE

I, Anthony R. Picarello, Jr., attorney for Defendants-Appellants, hereby certify that on the 13th day of September, 2006, two (2) true and correct copies of the Brief of Defendants-Appellants Prison Fellowship Ministries and InnerChange Freedom Initiative were served upon the following counsel by overnight DHL delivery service:

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