

# ARTICLE: THE GOOD NEWS OF INNERCHANGE

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## Text

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### Introduction

In his recent article, attorney Alex Luchenitser relates his view of the facts of the case in *Americans United for Separation of Church & State v. Prison Fellowship Ministries*,<sup>1</sup> summing them up as a "cautionary tale" that should counsel against any future use of the "faith-based-prison-unit model" of rehabilitation programming.<sup>2</sup> Instead, the decision of the Court of Appeals for the Eighth Circuit in that case should be read as charting a course forward under the Establishment Clause for units of precisely this type, and making clear that there remains substantial room for them within constitutional boundaries.

To be sure, the Eighth Circuit affirmed the core decision below that the particular version of the InnerChange Freedom Initiative ("InnerChange") program in Iowa violated the Federal Establishment Clause.<sup>3</sup> But if the broader goal of *Americans United for Separation of Church and State* ("Americans United") in bringing this public [\*26] interest case was to move the law in a direction that would deter or preclude prison officials or faith-based rehabilitation service providers from using a "faith-immersion" model for providing prison rehabilitation services, the Eighth Circuit's decision has undermined rather than advanced that goal. This is true for the reasons described briefly here, and explained more fully in the remainder of this Article.

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<sup>1</sup> [432 F. Supp. 2d 862 \(S.D. Iowa 2006\)](#), aff'd in part, rev'd in part, [509 F.3d 406 \(8th Cir. 2007\)](#).

<sup>2</sup> Alex J. Luchenitser, "InnerChange": Conversion as the Price of Freedom and Comfort - A Cautionary Tale About the Pitfalls of Faith-Based Prison Units, [6 Ave Maria L. Rev. 445, 445, 475-76 \(2008\)](#). Mr. Luchenitser stops short of counseling that all faith-based prisoner rehabilitation programs should be abandoned. Id. at 475-76.

<sup>3</sup> [Ams. United for Separation of Church & State v. Prison Fellowship Ministries, 509 F.3d 406, 425-26 \(8th Cir. 2007\)](#).

First, the Eighth Circuit squarely rejected several extreme theories that Americans United urged throughout, that the district court accepted, and that, if affirmed, would indeed have impeded any future use of the faith-immersion model in prisons. The Eighth Circuit held it was an abuse of discretion for the district court to order recoupment, which would have compelled InnerChange to disgorge over \$ 1.5 million in government funds long since spent to provide rehabilitation services. <sup>4</sup> If affirmed, this ruling would not only have deterred faith-immersion rehabilitation programs, it would have more broadly chilled any cooperation between faith-based organizations and government in providing social services. The Eighth Circuit expressly and summarily rejected the "pervasively sectarian" inquiry under the Establishment Clause. <sup>5</sup> Justice O'Connor's presence on the Eighth Circuit panel renders this decision especially significant, as the few remaining advocates of this doctrine often cite her concurrence in *Mitchell v. Helms* <sup>6</sup> to support the claim that the doctrine may still survive. <sup>7</sup> The Eighth Circuit also rejected the use of expert witness testimony as evidence of the faith of InnerChange, over against direct [\*27] evidence from InnerChange of its own faith. <sup>8</sup> The clear reaffirmation of this well-established principle will reduce the risk that the plaintiffs' experts will caricature the beliefs and practices of faith-based service providers in future litigation.

Second, the Eighth Circuit declined to adopt several other tendentious theories that were accepted (or arguably accepted) by the district court. These arguments include: that a service contract bidding process is a religious "gerrymander[]" that lacks "neutrality" where a faith-based service provider is the only bidder, and the bidder and state officials discuss the bid before its submission; <sup>9</sup> that a prison official violates the "endorsement" test by offering praise to a faith-based program for its success or by expressing an expectation that it will succeed; <sup>10</sup> that prisoner rehabilitation services are "traditionally and exclusively" provided by the state, so that any faith-based provider of those services is, by that very fact, a "state actor"; <sup>11</sup> that a faith-based rehabilitation program that requires participation in its religious component violates the "coercion" test, even though inmates enter the program voluntarily, with full knowledge of its religious content, and may exit the program without punishment; <sup>12</sup> that the Establishment Clause requires faith-based rehabilitation programs to be "nonsectarian" and not to "proselytize"; <sup>13</sup>

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<sup>4</sup> [Id. at 428](#); [Prison Fellowship Ministries, 432 F. Supp. 2d at 941](#).

<sup>5</sup> [Prison Fellowship Ministries, 509 F.3d at 414 n.2](#). Notwithstanding this reversal, and the other substantial differences between the district and appellate court decisions that are described below, Mr. Luchenitser asserts that "the Eighth Circuit affirmed the district court's ruling in its entirety," except with respect to the recoupment order. Luchenitser, *supra* note 2, at 448 n.19.

<sup>6</sup> [Mitchell v. Helms, 530 U.S. 793, 836-67 \(2000\)](#) (O'Connor, J., concurring in the judgment).

<sup>7</sup> For example, in a 2002 Sixth Circuit Court of Appeals case, the dissenting judge argued:

As the majority opinion recognizes, the pervasively sectarian test has not been abandoned... Although the majority notes that the [Supreme] Court questioned "the vitality of the pervasively sectarian test" in *Mitchell v. Helms*, we [have previously] noted ... that "it is Justice O'Connor's opinion [in *Mitchell*], which does not abolish the distinction between 'pervasively sectarian' and 'sectarian' institutions and which expressly declines to adopt Justice Thomas' expansive view, that is controlling upon this Court."

[Steele v. Indus. Dev. Bd., 301 F.3d 401, 426 \(6th Cir. 2002\)](#) (Clay, J., dissenting) (citation omitted) (quoting [Steele, 301 F.3d at 408](#) (majority opinion), and [Johnson v. Econ. Dev. Corp., 241 F.3d 501, 511 n.2 \(6th Cir. 2001\)](#)).

<sup>8</sup> [Prison Fellowship Ministries, 509 F.3d at 414 n.2](#).

<sup>9</sup> See [Prison Fellowship Ministries, 432 F. Supp. 2d at 880-84, 926](#) & n.42; Brief of Plaintiffs-Appellees at 42, [Prison Fellowship Ministries, 509 F.3d 406](#) (No. 06-2741).

<sup>10</sup> See [Prison Fellowship Ministries, 432 F. Supp. 2d at 880-81, 919 n.37](#); Brief of Plaintiffs-Appellees, *supra* note 9, at 47.

<sup>11</sup> See [Prison Fellowship Ministries, 432 F. Supp. 2d at 865 n.3, 919](#); Brief of Plaintiffs-Appellees, *supra* note 9, at 56-57.

<sup>12</sup> See [Prison Fellowship Ministries, 432 F. Supp. 2d at 923, 929-31](#); Brief of Plaintiffs-Appellees, *supra* note 9, at 19, 43.

that the potential to complete faith-based rehabilitation courses sooner than secular courses on the same subjects represents an impermissible incentive to join InnerChange.<sup>14</sup> If certain of these rationales for rejecting Iowa's InnerChange program had been adopted by the Eighth Circuit, future use of the faith-immersion model might well be jeopardized - but fortunately, none of them was.

Third and finally, the reasoning of the Eighth Circuit rested on the presence of certain discrete problems in the Iowa InnerChange [\*28] program that can be fixed readily without abandoning the entire faith-immersion enterprise. To the extent the Eighth Circuit emphasized, for example, that InnerChange's accounting and billing system lacked sufficient controls to assure that direct government aid was not spent on religious activities,<sup>15</sup> the corresponding solution for future programs would be simply to improve those controls. The Eighth Circuit identified other discrete problems that have similarly discrete solutions, such as: removing InnerChange staff from incarceration and disciplinary functions;<sup>16</sup> offering inmates an otherwise similar, privately run, wholly nonreligious program to which inmates could direct the money that they might otherwise direct to InnerChange;<sup>17</sup> and locating faith-based programs in marginally worse, rather than marginally better, facilities.<sup>18</sup> Mr. Luchenitser, by contrast, not only urges the removal of certain features of the Iowa InnerChange program that the Eighth Circuit did not identify as constitutionally problematic, he urges their removal by rejecting the faith-immersion model as a whole.<sup>19</sup>

In short, the decision of the Eighth Circuit made clear both that the patient needs minor surgery, and precisely how the surgery should be done. The decision does not suggest, as Americans United would have it, that the patient should be abandoned as a terminal case.

## I. Extreme Theories Rejected by the Eighth Circuit

### A. Restitution Relief for an Establishment Clause Violation

The single most egregious error of the district court - and the error which, if left uncorrected, threatened the greatest harm to the faith-immersion model of rehabilitation services - was the unprecedented decision to order InnerChange and Prison Fellowship Ministries to pay back to the State over \$ 1.5 million it had already spent to provide the State and its inmates with valuable rehabilitation [\*29] services.<sup>20</sup> Even a very small risk of such a crushing remedy would deter most faith-based service providers from contracting with the government, whether or not they operate on a faith-immersion model or in the prison setting.<sup>21</sup> This is particularly so when so many faith-

<sup>13</sup> See [Prison Fellowship Ministries](#), 432 F. Supp. 2d at 913, 920, 924-25; Brief of Plaintiffs-Appellees, supra note 9, at 32.

<sup>14</sup> See [Prison Fellowship Ministries](#), 432 F. Supp. 2d at 927; Brief of Plaintiffs-Appellees, supra note 9, at 13-14, 43.

<sup>15</sup> See [Ams. United for Separation of Church & State v. Prison Fellowship Ministries](#), 509 F.3d 406, 418-19, 428 (8th Cir. 2007).

<sup>16</sup> See [id.](#) at 423.

<sup>17</sup> See [id.](#) at 425.

<sup>18</sup> See [id.](#) at 424.

<sup>19</sup> Luchenitser, supra note 2, at 447 ("To avoid the constitutional issues and policy concerns raised by many faith-based prison programs, prison officials and religious organizations should move away from the recently popularized in-prison-faith-immersion model.").

<sup>20</sup> [Ams. United for Separation of Church & State v. Prison Fellowship Ministries](#), 432 F. Supp. 2d 862, 941 (S.D. Iowa 2006), aff'd in part, rev'd in part, 509 F.3d 406 (8th Cir. 2007).

<sup>21</sup> See [Lemon v. Kurtzman \(Lemon II\)](#), 411 U.S. 192, 207-09 (1973) (reasoning that 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"); see also Brief of Defendants-Appellants at 59, [Prison Fellowship Ministries](#), 509 F.3d 406

based providers survive on a shoestring, and when the standards for assessing liability under the Establishment Clause are so notoriously muddled, uncertain, and hotly contested.<sup>22</sup>

Americans United has made especially clear that such a far-reaching chilling effect was one of its principal goals in bringing the case. Its press release heralding the district court decision emphasized the breadth of its impact, quoting Executive Director Barry Lynn as saying that "there is no way to interpret this decision as anything but a body blow to so-called faith-based initiatives," and that the ruling affected funding of faith-based activities "in prisons or any other tax-funded institution."<sup>23</sup> It also emphasized the special risk to faith-based organizations as a result of the severe remedy:

Lynn said in light of this ruling, religious leaders need to be especially wary of the pitfalls of government funding. He noted that InnerChange has been ordered to repay the funds it spent for a program that the court said should have been recognized as unconstitutional.

"Church leaders who take faith-based funding may find that they've made an expensive misjudgment if their 'faith-based' funding is challenged," Lynn said.<sup>24</sup>

**[\*30]** In the appellate litigation that followed, by contrast, Americans United claimed that the remedy would deter only illegal programs.<sup>25</sup> In any event, the Eighth Circuit reversed the recoupment order as an abuse of discretion, thawing whatever chill Americans United may have created briefly.<sup>26</sup>

#### 1. Equitable Factors Relevant to Recoupment

The Court of Appeals for the Eighth Circuit found that the trial judge misapplied various equitable factors in reaching its conclusion that InnerChange and Prison Fellowship Ministries should be forced to pay the State back.<sup>27</sup> First and foremost, the panel rejected the claim that InnerChange and the State undertook the program in bad faith, citing the fact that the statutes authorizing the funds were presumptively valid; that the lower court had found elsewhere in its opinion that the funding did not have the purpose of advancing religion; and that the legislature stopped the funding after the adverse district court ruling.<sup>28</sup> The panel also rejected the district court's decision that InnerChange had clear notice that the program was unlawful when the district court attributed such knowledge to InnerChange based only on a factually distinguishable case from another state, and on a critical legal opinion letter by government officials in another state.<sup>29</sup> The court of appeals determined that this was insufficient to render unreasonable InnerChange's reliance on the lawfulness of the funding.<sup>30</sup> Other factors relevant to the court

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(No. 06-2741); Brief for the United States as Amicus Curiae Supporting Appellants at 11-12, [Prison Fellowship Ministries, 509 F.3d 406](#) (No. 06-2741) [hereinafter United States Amicus Brief].

<sup>22</sup> Cf. [Lemon II, 411 U.S. at 206-09](#) (affirming the "general principle" that "state officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful").

<sup>23</sup> Press Release, Ams. United for Separation of Church & State, Federal Court Strikes Down Tax Funding of Iowa Prison Program: Ruling Is a Sharp Rebuke to President George W. Bush's "Faith-Based" Initiative (June 3, 2006), [http://www.au.org/site/News2?news\\_iv\\_ctrl=-1&abbr=pr&page=NewsArticle&id=8245](http://www.au.org/site/News2?news_iv_ctrl=-1&abbr=pr&page=NewsArticle&id=8245).

<sup>24</sup> Id.

<sup>25</sup> See Brief of Plaintiffs-Appellees, supra note 9, at 81 (arguing that the recoupment order would deter religious organizations from "knowingly using state payments for religious purposes" (emphasis added)).

<sup>26</sup> [Prison Fellowship Ministries, 509 F.3d at 428](#).

<sup>27</sup> [Id. at 427-28](#).

<sup>28</sup> [Id. at 427](#).

<sup>29</sup> Id.

of appeals included the district court's failure to defer to the assessment of prison officials that "the program was beneficial and the state received much more value than it paid for,"<sup>31</sup> and the plaintiffs' failure to seek an interim injunction to prevent the continuation of payment during the litigation.<sup>32</sup> The panel appeared to agree with the district court that Prison Fellowship Ministries could afford the [\*31] financial hit of restitution, but rejected the argument that this was sufficient alone to support the remedy.<sup>33</sup>

Before the decision of the district court, no court had ever compelled restitution as relief for an Establishment Clause violation. The decision of the Eighth Circuit both corrects that anomaly and suggests to faith-based social service providers and their government counterparts some common sense steps they can take to contract without fear of restitution remedy down the line: do not participate in a government-funded program for the predominant purpose of advancing religion; legally assess the facial validity of the statutes authorizing the government funds; legally assess the contours of the planned program as it will be administered; respond promptly and constructively to constitutional concerns raised in the course of actual program administration; and if any litigation follows, comply with any court orders suspending the flow of funds.<sup>34</sup> In considering these factors, the contracting parties should recognize that the presence of some risk of violating the Establishment Clause is unavoidable, but that, at the same time, only knowledge of a very high risk of violation would create the additional risk of a recoupment order.<sup>35</sup>

## 2. Standing of Private Party to Compel Recoupment to the State

Importantly, the Eighth Circuit did not address a conceptually prior question regarding the remedy: whether a private Establishment Clause plaintiff has standing to sue for the remedy of compelling restitution to the state. The meaning of the court's silence on this question - particularly when it was thoroughly briefed by the parties and amici curiae, including the U.S. Department of Justice<sup>36</sup> - is unclear. On the one hand, the fact that the panel considered the lower court's weighing of equitable factors seems to imply that it was appropriate for the lower court to have weighed those factors at all, which in turn implies the potential availability of the remedy. On the other hand, although this implication would be very strong if the court ultimately affirmed the district court's order, it is [\*32] correspondingly weak where the remedy was reversed, as the conclusion that restitution is available is not necessary to the result. The panel may have simply assumed without deciding that the remedy was available to private plaintiffs in order to decide the question on the narrowest possible ground, which bears the added advantages of being highly fact-specific, and of not deciding a constitutional question.

In any event, there are strong arguments that may be raised in future cases to the effect that this particular remedy is not available to private Establishment Clause plaintiffs. The district court's holding that restitution is available to such plaintiffs<sup>37</sup> rested on the slender reed of the Seventh Circuit's sharply divided decision in *Laskowski v. Spellings* (*Laskowski I*),<sup>38</sup> which in the interim was vacated by the Supreme Court and remanded for

<sup>30</sup> *Id.*; [Ams. United for Separation of Church & State v. Prison Fellowship Ministries](#), 432 F. Supp. 2d 862, 940 (S.D. Iowa 2006), *aff'd in part, rev'd in part*, 509 F.3d 406 (8th Cir. 2007).

<sup>31</sup> [Prison Fellowship Ministries](#), 509 F.3d at 427.

<sup>32</sup> [Id.](#) at 428.

<sup>33</sup> See *id.*

<sup>34</sup> See [id.](#) at 427-28.

<sup>35</sup> See [id.](#) at 427 ("Even if there were some risk associated with the program, it cannot be said that resolution of this case was clearly foreshadowed." (citing [Lemon v. Kurtzman \(Lemon II\)](#), 411 U.S. 192, 206 (1973))).

<sup>36</sup> United States Amicus Brief, *supra* note 21, at 7-11; see Brief of Defendants-Appellants, *supra* note 21, at 60-63.

<sup>37</sup> [Ams. United for Separation of Church & State v. Prison Fellowship Ministries](#), 432 F. Supp. 2d 862, 935-41 (S.D. Iowa 2006), *aff'd in part, rev'd in part*, 509 F.3d 406 (8th Cir. 2007).

reconsideration in light of *Hein v. Freedom from Religion Foundation, Inc.*<sup>39</sup> Upon rehearing, the Seventh Circuit has since held that the taxpayer-plaintiffs lacked standing to seek restitution to restore funds directly to the federal treasury.<sup>40</sup> Before *Laskowski I*, 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. Now, *Laskowski II*, following *Hein*, has not only corrected that anomaly, but underscored that any such extension of *Flast v. Cohen*<sup>41</sup> is "unwarranted," as *Flast* should be "strictly confined to [its] result."<sup>42</sup> Courts that squarely address the question in the future should reject *Laskowski I*'s reasoning, and follow *Laskowski II*'s for three reasons.

First, it is well-established that "a plaintiff must demonstrate standing separately for each form of relief sought."<sup>43</sup> But plaintiffs get **[\*33]** no benefit of their own from this form of relief.<sup>44</sup> As Judge Sykes's forceful dissent in *Laskowski I* 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.<sup>45</sup> "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? Such a claim is unknown to the law ... ." <sup>46</sup>

Second, as emphasized in *Laskowski II*, allowing Establishment Clause plaintiffs to sue private parties for restitution would dramatically expand the narrow exception of *Flast* to the general rule against taxpayer standing.<sup>47</sup> *Flast* did not premise standing on "injuries to the public fisc" or on "vindicating losses sustained by the Treasury."<sup>48</sup> 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."<sup>49</sup> In a case like

<sup>38</sup> [443 F.3d 930 \(7th Cir. 2006\)](#), clarified on denial of reh'g, [456 F.3d 702 \(7th Cir. 2006\)](#), cert. granted, vacated and remanded mem. sub nom. ***Univ. of Notre Dame v. Laskowski***, 127 S. Ct. 3051 (2007), rev'd sub nom. [Laskowski v. Spellings \(Laskowski II\)](#), [546 F.3d 822 \(7th Cir. 2008\)](#).

<sup>39</sup> [127 S. Ct. 2553 \(2007\)](#).

<sup>40</sup> [Laskowski II](#), [546 F.3d at 827-28](#).

<sup>41</sup> [392 U.S. 83 \(1968\)](#).

<sup>42</sup> [Laskowski II](#), [546 F.3d at 827](#) (emphasis omitted) ("Permitting a taxpayer to proceed against a private grant recipient for restitution to the Treasury as a remedy in an otherwise moot Establishment Clause case would extend the *Flast* exception beyond the limits of the result in *Flast*. After *Hein*, such an extension is unwarranted.").

<sup>43</sup> [Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. \(TOC\), Inc.](#), [528 U.S. 167, 185 \(2000\)](#).

<sup>44</sup> See [Great-West Life & Annuity Ins. Co. 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)).

<sup>45</sup> [Laskowski v. Spellings \(Laskowski I\)](#), [443 F.3d 930, 941 \(7th Cir. 2006\)](#) (Sykes, J., dissenting) (emphasis added).

<sup>46</sup> [Id. at 943](#); see also [Laskowski II](#), [546 F.3d at 826](#) (restating position of the *Laskowski I* dissent, that "restitution from a private party is not a known remedy for an Establishment Clause violation").

<sup>47</sup> [Flast v. Cohen](#), [392 U.S. 83, 102-03 \(1968\)](#).

<sup>48</sup> [Laskowski I](#), [443 F.3d at 943](#) (Sykes, J., dissenting).

InnerChange's in Iowa, the restitution order halted no exercise of Iowa's taxing and spending power - money was already "extracted and spent" <sup>50</sup> - so ordering restitution 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 [\*34] private attorneys general. Political branches possess unreviewable discretion to determine whether to seek remedial action against private parties in matters affecting the public fisc. <sup>51</sup> This rule is grounded in well-founded separation-of-powers principles, which courts should respect. <sup>52</sup> The political branches of the State of Iowa provide a helpful illustration, having exercised their discretion not to seek reimbursement from InnerChange, because the State determined that it had received value for InnerChange's services. <sup>53</sup> But the district court's allowing restitution disregarded that exercise of discretion and conferred it instead on private plaintiffs.

#### B. "Pervasively Sectarian" Doctrine

The district court analyzed plaintiffs' Establishment Clause claim according to the familiar and controversial tripartite test of *Lemon v. Kurtzman*, 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. <sup>54</sup> In assessing whether a funding arrangement has the "primary effect" of advancing religion, the district court appropriately considered whether the funding "results in governmental indoctrination." <sup>55</sup> But the district court took a wrong turn in assessing whether funding to InnerChange "resulted in governmental indoctrination" by examining whether InnerChange was "pervasively sectarian." <sup>56</sup> In short, the theory is that some organizations are so thoroughly imbued with religion that any government funds they receive - no matter how carefully allocated to secular purposes - are necessarily applied to the support of religious instruction. And this theory is death to the possibility that faith-based [\*35] organizations with strong religious commitments might contract with the government to provide social services. <sup>57</sup> Fortunately, the Eighth Circuit corrected this error on appeal, <sup>58</sup> and if it had not, the faith-immersion model of providing prison rehabilitation services would indeed have been jeopardized.

<sup>49</sup> *Id.* (emphasis added); see also [DaimlerChrysler Corp. v. Cuno](#), 126 S. Ct. 1854, 1865 (2006) (reaffirming that taxpayer standing exists only to pursue "an injunction against" the "extraction and spending of tax money in aid of religion" (alterations in original) (internal quotation marks omitted) (quoting [Flast](#), 392 U.S. at 106)).

<sup>50</sup> [Flast](#), 392 U.S. at 106.

<sup>51</sup> See [Heckler v. Chaney](#), 470 U.S. 821, 831-32 (1985).

<sup>52</sup> See *id.* at 832 (comparing agency's refusal to seek remedy from private party to "decision of a prosecutor in the Executive Branch not to indict"); [United States v. Standard Oil Co.](#), 332 U.S. 301, 314-15 (1947) (explaining that Congress, not courts, has authority to "secure the treasury or the government against financial losses however inflicted, including requiring reimbursement for injuries").

<sup>53</sup> Appendix of Defendants-Appellants at 377-81, [Ams. United for Separation of Church & State v. Prison Fellowship Ministries](#), 509 F.3d 406 (8th Cir. 2007) (No. 06-2741) [hereinafter Appendix].

<sup>54</sup> [Lemon v. Kurtzman \(Lemon I\)](#), 403 U.S. 602, 612-13 (1971).

<sup>55</sup> [Agostini v. Felton](#), 521 U.S. 203, 234-35 (1997); [Ams. United for Separation of Church & State v. Prison Fellowship Ministries](#), 432 F. Supp. 2d 862, 914-15 (S.D. Iowa 2006), *aff'd in part, rev'd in part*, 509 F.3d 406 (8th Cir. 2007).

<sup>56</sup> [Prison Fellowship Ministries](#), 432 F. Supp. 2d at 915, 917-25.

<sup>57</sup> Notably, the "pervasively sectarian" doctrine allows service providers with relatively weak religious affiliations to contract freely with the government. As a result, the doctrine compels the political branches to distinguish among contract service providers

Justice O'Connor's concurrence in *Mitchell v. Helms*,<sup>59</sup> joined by Justice Breyer, sets forth the controlling standard for assessing whether a direct aid program "results in governmental indoctrination."<sup>60</sup> The concurrence emphasizes, as against Justice Thomas's plurality opinion, that this element of the test still forbids "actual diversion of [direct] government aid to religious indoctrination," even when the aid is neutrally distributed.<sup>61</sup> But it also emphasizes, as against Justice Souter's 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."<sup>62</sup> Justice O'Connor specifically criticized - and joined the plurality in overruling - the reasoning of *Meek v. Pittenger*<sup>63</sup> and *Wolman v. Walters*,<sup>64</sup> precisely to the extent they applied the "pervasively sectarian" presumption to this effect.<sup>65</sup> 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 **[\*36]** "flat rule, smacking of antiquated notions of 'taint,' [that] would indeed exalt form over substance."<sup>66</sup>

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.<sup>67</sup> Correspondingly, in order to overcome this presumption in favor of compliance, Establishment Clause "plaintiffs must prove that the aid in question actually is, or has been, used for religious purposes."<sup>68</sup>

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based on their faith, ironically, in violation of the Establishment Clause. See [Colo. Christian Univ. v. Weaver](#), 534 F.3d 1245, 1258-59 (10th Cir. 2008).

<sup>58</sup> [Prison Fellowship Ministries](#), 509 F.3d at 414 n.2 ("An inquiry into an organization's religious views to determine if it is pervasively sectarian "is not only unnecessary but also offensive. It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs." (quoting [Mitchell v. Helms](#), 530 U.S. 793, 828 (2000) (plurality opinion))).

<sup>59</sup> [Mitchell](#), 530 U.S. at 836-67 (O'Connor, J., concurring in the judgment).

<sup>60</sup> [Columbia Union Coll. v. Oliver](#), 254 F.3d 496, 504 & n.1 (4th Cir. 2001).

<sup>61</sup> [Mitchell](#), 530 U.S. at 840-44 (O'Connor, J., concurring in the judgment).

<sup>62</sup> [Id.](#) at 850-51 (emphasis omitted) (internal quotation marks omitted) (quoting [Wolman v. Walter](#), 433 U.S. 229, 250 (1977), and [Meek v. Pittenger](#), 421 U.S. 349, 366 (1975)).

<sup>63</sup> [Meek](#), 421 U.S. at 365-66.

<sup>64</sup> [Wolman](#), 433 U.S. at 250.

<sup>65</sup> [Mitchell](#), 530 U.S. at 850-51 (O'Connor, J., concurring in the judgment).

<sup>66</sup> [Id.](#) at 858 (second alteration in original) (quoting [Zobrest v. Catalina Foothills Sch. Dist.](#), 509 U.S. 1, 13 (1993)).

<sup>67</sup> [Id.](#) at 863-64; see also [id.](#) at 863 ("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 ...").

<sup>68</sup> [Id.](#) at 857 (emphasis added); see [id.](#) at 857-58 ("Presumptions of religious indoctrination are normally inappropriate when evaluating neutral school aid programs under the Establishment Clause.").



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.<sup>69</sup> 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.<sup>70</sup>

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

1. "Its relevance in our precedents is in sharp decline... . We have not struck down an aid program in reliance on this factor since 1985 ... ."

2. "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."

**[\*37]**

3. "The inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive."

4. "Hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow."<sup>71</sup>

The plurality concluded that "this doctrine, born of bigotry, should be buried now."<sup>72</sup>

Thus, the district court was mistaken in concluding that "the 'pervasively sectarian' inquiry ... remains the law."<sup>73</sup> Although it correctly concluded that the four-vote plurality opinion does not suffice alone to defeat the test,<sup>74</sup> the court completely ignored Justices O'Connor 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 governmental indoctrination."<sup>75</sup>

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<sup>76</sup> - the very same language that Justice O'Connor had block-quoted with disapproval as it appeared in Meek.<sup>77</sup> Similarly, when the

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<sup>69</sup> See, e.g., [id. at 863-66](#) (rejecting evidence of actual diversion as de minimis); see also [id. at 861](#) (rejecting the claim that "government must have a failsafe mechanism capable of detecting any instance of diversion").

<sup>70</sup> [Id. at 866](#) (discussing discovery and recall of 191 religious books purchased with government funds, totaling less than 1% of total aid allocation).

<sup>71</sup> [Id. at 826-28](#) (plurality opinion).

<sup>72</sup> [Id. at 829](#).

<sup>73</sup> [Ams. United for Separation of Church & State v. Prison Fellowship Ministries, 432 F. Supp. 2d 862, 917 \(S.D. Iowa 2006\)](#), aff'd in part, rev'd in part, [509 F.3d 406 \(8th Cir. 2007\)](#).

<sup>74</sup> See id.

<sup>75</sup> [Mitchell, 530 U.S. at 850-51, 857-58](#) (O'Connor, J., concurring in the judgment); [Prison Fellowship Ministries, 432 F. Supp. 2d at 915, 917](#); cf. [Columbia Union Coll. v. Oliver, 254 F.3d 496, 502-04 \(4th Cir. 2001\)](#) (examining the distinctions between the pervasively sectarian test and the test adopted by Justice O'Connor's concurrence in Mitchell).

<sup>76</sup> [413 U.S. 734, 743 \(1973\)](#).

<sup>77</sup> Compare [Prison Fellowship Ministries, 432 F. Supp. 2d at 917-18](#) (quoting [Hunt, 413 U.S. at 743](#)), with [Mitchell, 530 U.S. at 850](#) (O'Connor, J., concurring in the judgment) (quoting [Meek v. Pittenger, 421 U.S. 349, 365-66 \(1975\)](#) (quoting [Hunt, 413 U.S. at 743](#))).

lower court 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 same notion of "taint" that Justice O'Connor condemned in her concurrence.<sup>78</sup>

**[\*38]** Recognizing this, the Eighth Circuit panel, which fatefully included Justice O'Connor herself, refused to apply the "pervasively sectarian" doctrine.<sup>79</sup> In fact, by joining the unanimous opinion of the panel, Justice O'Connor adopted some of the stronger language of condemnation of the doctrine from the Mitchell plurality that had been absent from her concurrence, particularly the description of the "pervasively sectarian" inquiry as "'not only unnecessary but also offensive.'"<sup>80</sup> Of course, the implicit rejection of the "pervasively sectarian" doctrine in her concurrence is clear enough, but this latest opinion adds an important measure of clarity, as the viability of the doctrine is sometimes still disputed in the lower courts.<sup>81</sup> In short, the Eighth Circuit's decision represents a valuable precedent for faith-based providers who are threatened with exclusion from government contracts because of the vigor of their religious commitments.

### C. Expert Testimony on "Evangelical Christianity"

At trial, Americans United proffered Professor Winnifred Fallers Sullivan as an expert to describe "Evangelical Christianity" generally, and then to identify InnerChange and Prison Fellowship Ministries as "Evangelical Christian."<sup>82</sup> The admissibility of this evidence is governed by the Supreme Court's opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, which requires expert testimony to be both reliable and relevant to be admissible.<sup>83</sup>

Although Professor Sullivan's academic credentials might well have qualified her to testify reliably about "Evangelical Christianity" in general, such general testimony is irrelevant to how any particular InnerChange program was actually administered in any particular **[\*39]** prison.<sup>84</sup> Ever since *Thomas v. Review Board*, the Supreme Court has forbidden courts from determining the religious beliefs of litigants based on evidence of the beliefs of others - including the beliefs of the broader religious group of which the litigants may be part - insisting instead that courts take evidence of what the particular litigants before the court actually believe.<sup>85</sup> The district

<sup>78</sup> Compare *Prison Fellowship Ministries*, 432 F. Supp. 2d at 924 (finding that InnerChange'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 (O'Connor, J., concurring in the judgment) (linking "'flat rule'" of excluding pervasively sectarian groups from government aid with "antiquated notions of 'taint'" (quoting *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13 (1993))).

<sup>79</sup> *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406, 414 n.2, 424 n.4 (8th Cir. 2007).

<sup>80</sup> *Id.* at 414 n.2 (quoting *Mitchell*, 530 U.S. at 828 (plurality opinion)).

<sup>81</sup> See *Columbia Union Coll. v. Oliver*, 254 F.3d 496, 510 (4th Cir. 2001) (Motz, J., concurring in the judgment) (calling the majority's "disavowal" of the pervasively sectarian test "(perhaps) premature"); *Johnson v. Econ. Dev. Corp.*, 241 F.3d 501, 511 n.2 (6th Cir. 2001) (reaffirming the pervasively sectarian test in light of Justice O'Connor's concurrence in *Mitchell*); see also *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1259 & n.6 (10th Cir. 2008) (rejecting the pervasively sectarian test on other grounds).

<sup>82</sup> *Prison Fellowship Ministries*, 432 F. Supp. 2d at 872-74 & nn.9-11.

<sup>83</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589-90 (1993).

<sup>84</sup> Professor Sullivan herself disavowed any attempt to testify about InnerChange's actual administration. See Appendix, supra note 53, at 221-22 ("I was not asked to evaluate the program as it is administered."). At the same time, the district court disavowed the use of her testimony for anything but actual administration. See *Prison Fellowship Ministries*, 432 F. Supp. 2d at 872 n.9 (justifying Sullivan's testimony not as relevant to "the merits of InnerChange and Prison Fellowship's religious beliefs, but the constitutionality of their actions").

<sup>85</sup> *Thomas v. Review Bd.*, 450 U.S. 707, 715-16 (1981).

court disregarded this principle, admitting Professor Sullivan's broad pronouncements about "Evangelical Christianity," and then ascribing the beliefs of this broader class wholesale to InnerChange.<sup>86</sup>

Accordingly, the Eighth Circuit found her testimony to be irrelevant, and the district court's admission of that testimony to be an abuse of discretion.<sup>87</sup> In its own analysis, the court of appeals relied exclusively on direct evidence from InnerChange of its own beliefs, and only to the extent that those beliefs described the actual administration of this particular program.<sup>88</sup> In light of InnerChange's statements of its own beliefs, the Eighth Circuit found the presence in the record of the irrelevant expert testimony to be harmless.<sup>89</sup>

Although it is less apparent from the opinion, there is another likely reason why the Eighth Circuit treated Professor Sullivan's testimony as irrelevant: by repudiating the "pervasively sectarian" test, the court eliminated from the analysis the main legal category to which her testimony might be relevant.<sup>90</sup> And indeed, the district court relied on that testimony in its "pervasively sectarian" analysis,<sup>91</sup> illustrating the risks of religious discrimination and stereotyping [\*40] foreseen by the Mitchell plurality.<sup>92</sup> Rather than simply rely on InnerChange's own account of its own beliefs, the district court shoe-horned InnerChange into the category of "Evangelical Christianity" as defined by Professor Sullivan.<sup>93</sup> Unsurprisingly, that testimony 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.<sup>94</sup> This imagined class of people, in other words, is presumed incapable of doing anything that does not "result[] in religious indoctrination," so they should be disqualified as a class from contracting with the government to provide rehabilitation services.<sup>95</sup>

One can only hope that the Eighth Circuit's ruling regarding Professor Sullivan's testimony will deter Establishment Clause plaintiffs in future cases from using their own experts to describe (or, more likely, misrepresent) the beliefs

<sup>86</sup> [Prison Fellowship Ministries, 432 F. Supp. 2d at 871-74.](#)

<sup>87</sup> [Ams. United for Separation of Church & State v. Prison Fellowship Ministries, 509 F.3d 406, 414 n.2 \(8th Cir. 2007\).](#)

<sup>88</sup> See [id. at 413-16.](#)

<sup>89</sup> [Id. at 414 n.2.](#)

<sup>90</sup> See *id.* (linking rejection of expert testimony on "Evangelical Christianity" to the offensiveness of the "pervasively sectarian" inquiry).

<sup>91</sup> See [Prison Fellowship Ministries, 432 F. Supp. 2d at 920-23](#) (emphasizing inseparability of religious and nonreligious functions, and giving little, if any, weight to the testimony of InnerChange witnesses who testified that InnerChange does not attempt to convert inmates to Christianity).

<sup>92</sup> See [Mitchell v. Helms, 530 U.S. 793, 827-28 \(2000\)](#) (plurality opinion) ("The religious nature of a recipient should not matter to the constitutional analysis," and "the inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive.").

<sup>93</sup> [Prison Fellowship Ministries, 432 F. Supp. 2d at 871](#) ("Prison Fellowship's own religious commitments can best be characterized as Evangelical Christian in nature."); [id. at 873](#) ("As an Evangelical Christian organization, Prison Fellowship shares the predominate characteristics common to Evangelical Christianity.").

<sup>94</sup> [Id. at 873](#) (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. at 873-74](#) ("For Evangelical Christians, everything that happens in the world is understood through and interpreted by religious language.").

<sup>95</sup> See [Mitchell, 530 U.S. at 858](#) (O'Connor, J., concurring in the judgment); see also, e.g., [Prison Fellowship Ministries, 432 F. Supp. 2d at 906](#) ("As presented through the InnerChange program, however, these [treatment] classes are also used to indoctrinate InnerChange inmates into the Evangelical Christian faith."); [id. at 913](#) ("Every waking moment in the InnerChange program is devoted to teaching and indoctrinating inmates into the Christian faith.").

of faith-based service provider defendants, to the extent their beliefs are relevant at all. At best, expert testimony of this sort is irrelevant and superfluous; at worst, it employs religious stereotyping to distort another party's religious beliefs for litigation advantage, such as by stoking the religious antipathies of a finder of fact or law. In either case, it is a waste of time and money for plaintiffs, defendants, and courts alike, and it harms the judicial process. The decision of the Eighth Circuit thus represents a defeat for Americans United to the extent it had hoped to create room for this kind of litigation tactic.

**[\*41]**

## II. Extreme Theories Not Accepted by the Eighth Circuit

### A. Neutrality in the Bidding Process

The district court held that the Request for Proposal ("RFP") process for selecting InnerChange as a contractor lacked religious "neutrality," because it was "gerrymandered ... in order to ensure that the InnerChange program would come to Iowa."<sup>96</sup> The court based this conclusion on the facts that InnerChange "was the only real contender in the bid process" for the first contract cycle, and that InnerChange and state correctional officials discussed the bid at length before it was formally submitted.<sup>97</sup>

If affirmed, this reasoning would have created needless problems in the contracting process between government and faith-based service providers. If the fact that a faith-based provider is the sole bidder on an RFP were sufficient evidence that the bidding process lacked religious neutrality, then the constitutionality of a contract would hinge on a factor that lies beyond the control of both bidders and the government - namely, whether others choose to bid. And, of course, this perceived shortcoming lies beyond the control of the entities that would ultimately bear liability for it. So if a faith-based bidder even suspects that it might end up the only bidder in the process, it would simply withhold its bid, even if its proposal would have served the government's needs well. This tends to deter the participation of faith-based contractors in bidding, which, in turn, reduces the overall competitiveness of the bidding process.

The district court's reasoning also ignores that there may well be valid, religion-neutral reasons for the government to choose a faith-based provider without any bidding process at all. As Judge Posner recognized, the government may waive that process entirely consistent with the demands of neutrality when the state is especially "eager to have [a particular faith-based program] on its menu of [rehabilitation treatment] choices," because the "program has such attractive features from a purely secular standpoint, such as the length of the program."<sup>98</sup> Similarly, treating as evidence of religious bias any communication between faith-based bidders and government officials about the bid before it is submitted ignores the **[\*42]** many possible legitimate reasons for that kind of contact, such as assuring that bids meet the government's needs before they are submitted. Once again, discouraging this kind of contact would diminish both the quality of bids and the efficiency of the bidding process.

The Eighth Circuit, however, ignored these allegedly sinister facts and declined to adopt the reasoning of the district court associated with them. Although the panel found the program to lack religious neutrality, it did so on grounds that had nothing to do with the bidding process.<sup>99</sup> Instead, the panel touched on that process only briefly in its recitation of the facts.<sup>100</sup> And later in its analysis, when discussing whether the contract was entered in bad faith for the purpose of evaluating the recoupment remedy, the panel highlighted factual findings elsewhere in the district

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<sup>96</sup> [Prison Fellowship Ministries, 432 F. Supp. 2d at 926.](#)

<sup>97</sup> [Id. at 880-84, 926](#) & n.42.

<sup>98</sup> Freedom from [Religion Found., Inc. v. McCallum, 324 F.3d 880, 883 \(7th Cir. 2003\).](#)

<sup>99</sup> [Ams. United for Separation of Church & State v. Prison Fellowship Ministries, 509 F.3d 406, 423-26 \(8th Cir. 2007\).](#)

<sup>100</sup> [Id. at 416-18.](#)

court opinion that were inconsistent with the conclusion that the selection process lacked neutrality: that the contract was entered for a legitimate secular purpose, and that InnerChange merely received a "'warm welcome'" from government officials. <sup>101</sup>

#### B. Coercion Based on Inmates' Voluntary Adoption of Religious Restrictions

The district court occasionally described InnerChange as "coercive," <sup>102</sup> but it never analyzed the InnerChange program under the coercion test of *Lee v. Weisman*, <sup>103</sup> and *Santa Fe Independent School District v. Doe*. <sup>104</sup> This is probably because the undisputed facts in the record preclude any finding of coercion. As the Eighth Circuit specifically affirmed:

Inmates are not required to join InnerChange. No one from the DOC [Iowa Department of Corrections] or InnerChange threatens punishment, reduction in privileges, or otherwise pressures inmates to participate. If inmates join, no one from the DOC or InnerChange promises a reduced sentence or earlier parole. When joining, an [\*43] inmate confirms in writing that participation is voluntary and will not affect eligibility for parole. The mandatory statement adds that the program is based on Christian values and contains religious content, but an inmate need not be a Christian to participate. Also, discontinuation may be voluntary or involuntary, and the inmate will not be penalized for voluntary withdrawal. <sup>105</sup>

The Eighth Circuit declined to analyze the case under *Weisman* or *Santa Fe* and, unlike the district court, did not muddy the waters by using the word "coercion" or any variant in its opinion. <sup>106</sup>

If this kind of program design did, in fact, pose problems under the Supreme Court's coercion doctrine, the faith-immersion model would be virtually impossible to implement. Faith-immersion is undermined severely if inmates can make the program less immersive - not only for themselves, but for others in the program - by opting out of religious components on an ad hoc basis. The faith-immersion model does not undermine the religious liberty of individual inmates, so long as their entry into the program is undertaken only after they are presented with full information about the religious component of the program; their entry into and exit from are not rewarded or punished; and a secular alternative program is always available. That is, the program respects the liberty of inmates so long as the program is actually implemented according to its design. Indeed, far from diminishing the religious liberty of inmates, allowing faith-based programs to require participation in religious services as a condition of participation in the program enhances that liberty, because it allows for the development of programs with varying degrees of religious content and intensity, thus increasing religious options for inmates.

To be sure, the district court found, and the Eighth Circuit affirmed, that the availability of better facilities and other benefits represented an impermissible incentive to join InnerChange. <sup>107</sup> Both courts also found that InnerChange staff participated in the disciplinary function to an extent that blurred the lines between religious and secular rules and authorities, amounting to "joint [\*44] activity" with the State. <sup>108</sup> But neither of these problems amount to

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<sup>101</sup> See *id.* at 427 (quoting *Prison Fellowship Ministries*, 432 F. Supp. 2d at 917).

<sup>102</sup> *Prison Fellowship Ministries*, 432 F. Supp. 2d at 920, 922-23.

<sup>103</sup> *505 U.S. 577, 587 (1992)*.

<sup>104</sup> *530 U.S. 290, 301-02 (2000)*.

<sup>105</sup> *Prison Fellowship Ministries*, 509 F.3d at 414.

<sup>106</sup> Notwithstanding the Eighth Circuit's treatment of the coercion issue, Mr. Luchenitser's article contains an entire section entitled "Inmates Were Coerced to Enroll and Remain in InnerChange." Luchenitser, *supra* note 2, at 463.

<sup>107</sup> See, e.g., *Prison Fellowship Ministries*, 509 F.3d at 414, 415 n.3, 424.

"coercion" under Weisman or Santa Fe, and the Eighth Circuit neither found nor suggested they did. And especially with that doctrinal ambiguity removed, the decision no longer represents a threat to the faith-immersion model of providing rehabilitation services. As discussed more fully below, both of these problems - impermissible incentives and shared disciplinary responsibility - represent particular failures in the implementation of that model (which can be fixed readily), not inherent problems with the model itself (which cannot).<sup>109</sup>

### C. Endorsement Based on Program-Affirming Government Speech

Similarly, the district court occasionally described Iowa as having "endorsed" InnerChange, its goals, or its religious message.<sup>110</sup> But these references were always in the context of the district court's analysis of whether the InnerChange contract was permissible as direct or indirect aid, and never as an independent basis for finding an Establishment Clause violation.<sup>111</sup> That is, the district court's finding that InnerChange failed the updated Lemon-Agostini analysis compelled the conclusion that the program represented an impermissible endorsement.<sup>112</sup> The Eighth Circuit took a similar approach, but once again, avoided any needless ambiguities, using the term "endorsement" and its variants only to describe the ultimate conclusion to which the underlying Lemon-Agostini analysis was directed, and not as a distinct test.<sup>113</sup>

**[\*45]** On appeal, however, Americans United urged the Eighth Circuit to find in the first instance that two remarks by state officials amounted to unconstitutional endorsement. The first of these indicated the Department of Corrections' ("DOC") pride in its association with InnerChange, but lacked religious content.<sup>114</sup> The second, which did have religious content, was not challenged as an impermissible endorsement itself, but as a basis for concluding that the entire InnerChange program to which it referred was an endorsement.<sup>115</sup>

The Eighth Circuit declined to adopt or even address this argument - and with good reason. If a government official's praising a faith-based program merely for its effectiveness could create risks under the Establishment Clause, government officials would be deterred from any speech urging the adoption or continuation of such programs, risking a chill on and distortion of the ongoing political debate over this subject. Similarly harmful would be a rule that jeopardizes the validity of a faith-based program that otherwise complies with the demands of the Establishment Clause, simply because a politician spoke of the program in religious and positive terms. Again, the

<sup>108</sup> See, e.g., [id. at 416, 422-23](#) (internal quotation marks omitted) (quoting [Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 \(1970\)](#)).

<sup>109</sup> See *infra* Part III.B-C.

<sup>110</sup> See [Ams. United for Separation of Church & State v. Prison Fellowship Ministries, 432 F. Supp. 2d 862, 920 n.37, 923 n.39, 929, 931-32 \(S.D. Iowa 2006\)](#), *aff'd in part, rev'd in part, 509 F.3d 406 (8th Cir. 2007)*.

<sup>111</sup> See *id.*

<sup>112</sup> See [Agostini v. Felton, 521 U.S. 203, 234-35 \(1997\)](#) ("The same considerations that [satisfy the modified Lemon test] require us to conclude that this carefully constrained program also cannot reasonably be viewed as an endorsement of religion."); see also [Zelman v. Simmons-Harris, 536 U.S. 639, 654-55 \(2002\)](#) (noting that, when elements of the indirect aid test are satisfied, there can be no endorsement).

<sup>113</sup> See, e.g., [Prison Fellowship Ministries, 509 F.3d at 424](#) & n.4 (assessing whether aid to InnerChange "has the effect of advancing or endorsing religion" by examining Agostini factors (emphasis added)); [id. at 425](#) (concluding that program "had the effect of advancing or endorsing religion" for failure to satisfy Agostini factors (emphasis added)).

<sup>114</sup> See Brief of Plaintiffs-Appellees, *supra* note 9, at 47 ("[We are] proud to be the flagship for [InnerChange] in Iowa." (second alteration in original) (internal quotation marks omitted)).

<sup>115</sup> See [id. at 48](#) (prison warden's speech at InnerChange graduation calling upon graduating InnerChange inmates to glorify and serve God).

world is safer for faith-based initiatives because the Eighth Circuit refused to validate such extreme arguments urged by Americans United.

#### D. Rehabilitation Services as "Traditional and Exclusive State Function"

The district court ruled, *sua sponte* and in a footnote, that InnerChange and Prison Fellowship Ministries were "state actors" subject to the constraints of the Constitution, even though they were private contractors.<sup>116</sup> The district court rested this decision on two grounds: (1) that "the contractual agreement ... and the executing of its terms" made InnerChange and Prison Fellowship Ministries "'willful participants in joint activity with the State or its agents"; and (2) that "the rehabilitative treatment provided by InnerChange is [\*46] a function traditionally and exclusively reserved to the state."<sup>117</sup> The Eighth Circuit affirmed only the "joint activity" theory:

In this case, the state effectively gave InnerChange its 24-hour power to incarcerate, treat, and discipline inmates. InnerChange teachers and counselors are authorized to issue inmate disciplinary reports, and progressive discipline is effectuated in concert with the DOC. Prison Fellowship and InnerChange acted jointly with the DOC and can be classified as state actors under § 1983.<sup>118</sup>

This aspect of the decision is good news for all faith-based providers of prison rehabilitation services, including those that follow the faith-immersion model. The terms and implementation of future contracts with faith-based providers can readily be tweaked so that their staff are not granted the "24-hour power to incarcerate, treat, and discipline inmates," including the "authority to issue inmate disciplinary reports" or to effectuate "progressive discipline ... in concert with" state officials.<sup>119</sup> By contrast, if the provision of rehabilitation services had been deemed a "traditional and exclusive state function," every faith-based provider of such services - whether following a faith-immersion model or not - would be a state actor whose every word and deed in performing that function would be attributable to the state. That, in turn, would limit faith-based providers of those services to as little religious content in their programming as anything undertaken by the state itself.

Once again, the Eighth Circuit had good reason not to adopt this problematic theory from the district court as the basis for its own state action ruling. The district court ignored *Richardson v. McKnight*,<sup>120</sup> Supreme Court precedent that precludes the holding that rehabilitation "has been "traditionally the exclusive prerogative of the State."<sup>121</sup> *Richardson* involved a suit against guards employed by a private prison management corporation under a state contract.<sup>122</sup> The Court did not reach whether § 1983 permitted such a suit and addressed only the narrow question whether the guards could invoke [\*47] qualified immunity.<sup>123</sup> The Court held they could not, because "correctional functions have never been exclusively public," providing a long historical record in support.<sup>124</sup>

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<sup>116</sup> See [Prison Fellowship Ministries](#), 432 F. Supp. 2d at 865 n.3 (noting that "the parties did not actively litigate" the state action question "at any stage of the case," but nonetheless raising the question and finding that InnerChange and Prison Fellowship Ministries were state actors).

<sup>117</sup> See *id.* (emphases added) (quoting [Lugar v. Edmondson Oil Co.](#), 457 U.S. 922, 941 (1982)).

<sup>118</sup> [Prison Fellowship Ministries](#), 509 F.3d at 423.

<sup>119</sup> *Id.*

<sup>120</sup> [521 U.S. 399, 405 \(1997\)](#).

<sup>121</sup> [Rendell-Baker v. Kohn](#), 457 U.S. 830, 842 (1982) (quoting [Jackson v. Metro. Edison Co.](#), 419 U.S. 345, 353 (1974)).

<sup>122</sup> [Richardson](#), 521 U.S. at 401-02.

<sup>123</sup> See *id.* at 413.

<sup>124</sup> See *id.* at 405-07 (emphasis added).

Richardson's conclusion and historical discussion also square with common sense. There are literally hundreds of social service providers nationwide - religious and nonreligious, nonprofit and for-profit - that seek to assist prisoners and parolees in rehabilitation. And adopting the district court's holding that rehabilitation is an exclusive state function would have risked transforming every prison rehabilitation ministry into a state actor.

Moreover, the case that the district court did cite in support of this rationale, *West v. Atkins*,<sup>125</sup> does not suggest that the rehabilitation of prisoners 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.<sup>126</sup> Central to its analysis was the fact that states have a federal "constitutional duty to provide adequate medical treatment to those in its custody."<sup>127</sup> But there is no corresponding constitutional obligation to provide rehabilitation programming to 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.<sup>128</sup>

#### E. "Nonsectarian" and "Nonproselytizing" Religious Programs

Mr. Luchenitser's article, and *Americans United* and some of their amici curiae on appeal, all take the position that, although the Establishment Clause allows some space for chaplaincy programs consisting of paid state employees who themselves provide religious ministry, InnerChange does not fit within that space because it is **["\*48]** "sectarian" and it "proselytizes."<sup>129</sup> The Eighth Circuit did not address, and certainly did not adopt, any of these arguments in its decision. But if it had, the consequences would have been severe, not only for the faith-immersion model but for all faith-based prison programs, including state-run prison chaplaincy programs. In short, this is because the alleged requisite characteristics of "nonsectarian" and "nonproselytizing" are conceptually problematic and practically unworkable terms.

First, the terms seem to describe an impossibly small category that bears little relation to prison chaplaincies as they actually exist. Just how far removed from the views of a particular "sect" must a chaplain's beliefs be in order to qualify as "nonsectarian"? Why should that bear constitutional significance? How could a Catholic priest offer Mass - which is unmistakably specific to Catholics and among the principal values that a chaplaincy program could offer a Catholic inmate - consistent with the requirement to be "nonsectarian"?<sup>130</sup> Who among inmates, who most often do have some denominational affiliation or another, would want to attend a religious service led by those who are defined precisely by their commitment not to share the inmate's (or any) such affiliation? Just how averse must a chaplain be to persuading others of the truth of his or her own beliefs to qualify as "nonproselytizing"?<sup>131</sup> In the

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<sup>125</sup> [487 U.S. 42 \(1988\)](#).

<sup>126</sup> [Id. at 54](#).

<sup>127</sup> [Id. at 56](#).

<sup>128</sup> See [Rendell-Baker v. Kohn, 457 U.S. 830, 842 \(1982\)](#) ("That a private entity performs a function which serves the public does not make its acts state action."); see also, e.g., *id.* (policy choice of state to undertake special educational services for maladjusted youth did not transform services into exclusive state prerogative).

<sup>129</sup> See Brief of Plaintiffs-Appellees, *supra* note 9, at 32; Brief of the American Correctional Chaplains Association et al. as Amici Curiae Supporting Plaintiffs-Appellees at 18-19, [Ams. United for Separation of Church & State v. Prison Fellowship Ministries, 509 F.3d 406 \(8th Cir. 2007\)](#) (No. 06-2741) [hereinafter Brief of ACCA]; Luchenitser, *supra* note 2, at 454 (listing alleged criteria for allowing prison chaplaincies under the Establishment Clause); see also [id. at 455-56](#) (arguing that the fact that InnerChange espouses one religion, and a particular version of it at that, supports the claim that it discriminates against those who do not espouse the same view).

<sup>130</sup> In light of this difficulty, it is especially puzzling that the American Catholic Correctional Chaplains Association joined an amicus curiae brief that endorsed the idea that prison chaplaincies (such as theirs) should be "nonsectarian." See Brief of ACCA, *supra* note 129.



universe of those who are so strongly committed to their beliefs as to follow their lead into prison ministry, how many would be willing to subject themselves to such a limit on advocating for those beliefs? <sup>132</sup>

**[\*49]** Second, these terms are often manipulated to serve constitutionally illegitimate purposes. The term "sectarian" is not merely a synonym for "denominational," but bears a negative connotation. <sup>133</sup> And as the Mitchell plurality explained, the term served as the legal weapon of choice for targeting Catholics for special disfavor in the mid-nineteenth century: <sup>134</sup> denying funds to "sectarian" schools allowed nativist majorities to block educational funding to Catholic schools while continuing to fund freely the "common" schools, where the "nonsectarian" religion of lowest-common-denominator Protestantism was taught. <sup>135</sup> Similarly, as then-Professor Michael McConnell put it during the oral argument in *Rosenberger v. Rector & Visitors of the University of Virginia*, the word "'proselytize' ... is nothing but an ugly word for 'persuade,' which is just exactly what the Free Speech Clause is designed to protect." <sup>136</sup>

Third, even if these terms were crystal clear and immune from manipulation, they would still invite governmental distinctions among faiths, bestowing official favor and support on the "nonsectarian" and "nonproselytizing" faiths, and the opposite on the "sectarian" and "proselytizing" ones. The religion clauses forbid this. <sup>137</sup>

For at least these reasons, the reality has been that prison chaplaincies are rarely if ever "nonsectarian" or "nonproselytizing," but are occupied by one or more individuals with certain particular beliefs and commitments, which are usually linked to a particular denomination, and which the chaplains hold to and advocate for **[\*50]** strongly. What should (and most often does) distinguish prison chaplains is their willingness to facilitate inmates' access to the religious resources of the inmates' own choosing, even when those resources lie beyond the chaplain's own tradition. <sup>138</sup>

<sup>131</sup> One of Mr. Luchenitser's arguments in favor of discarding the faith-immersion model altogether appears to be an argument more broadly against any prison minister who would attempt to convert another to the minister's beliefs. See Luchenitser, *supra* note 2, at 476.

<sup>132</sup> Mr. Luchenitser appears to recognize this problem. See *id.* ("When one passionately feels that one's beliefs in matters of faith are right and that others should be brought over to those same beliefs, it may be quite hard to persuade others of one's perceived truth without communicating that the others' beliefs are wrong."). Religious disagreements between chaplains and inmates are unavoidable in a religiously diverse society, so whatever hurt feelings may occasionally result from such disagreements should not suffice to create a constitutional violation.

<sup>133</sup> See *The New Lexicon Webster's Dictionary of the English Language* 902 (1989) (defining "sectarian" as "of or relating to a sect or sects," or "narrow-minded and ready to quarrel over petty differences of opinion"); see also William Safire, *War Names: The Struggle Over Nomenclature*, *N.Y. Times Mag.*, Apr. 9, 2006, at 20 ("Sectarian is a word long associated with religion that has a nastier connotation than its synonym denominational.").

<sup>134</sup> See *Mitchell v. Helms*, [530 U.S. 793, 828-29 \(2000\)](#) (plurality opinion) (relating that "opposition to aid to 'sectarian' schools acquired prominence in the 1870's" and that "it was an open secret that 'sectarian' was code for 'Catholic'").

<sup>135</sup> See Brief for the Beckett Fund for Religious Liberty as Amicus Curiae in Support of Petitioners at 15-16, 20, [Mitchell](#), [530 U.S. 793](#) (No. 98-1648) ("In short, the common schools could be as religious as they wanted, so long as the religion in question was 'common.' It was only 'sectarian' schools that could not receive public funds.").

<sup>136</sup> Transcript of Oral Argument at 53, [Rosenberger v. Rector & Visitors of Univ. of Va.](#), [515 U.S. 819 \(1995\)](#) (No. 94-329), 1995 WL 117631.

<sup>137</sup> [Larson v. Valente](#), [456 U.S. 228, 253-55 \(1982\)](#); [Colo. Christian Univ. v. Weaver](#), [534 F.3d 1245, 1258-59 \(10th Cir. 2008\)](#).

<sup>138</sup> Cf. Ira C. Lupu & Robert W. Tuttle, *Instruments of Accommodation: The Military Chaplaincy and the Constitution*, [110 W. Va. L. Rev.](#) [89, 124-25, 133, 139-40, 160 \(2007\)](#) (explaining that, in the military context, chaplains are permitted to be denominationally affiliated, but are "required to facilitate all service members' free exercise of religion").

It is unclear to what extent, if any, this same limitation should apply to private contractors that provide faith-based rehabilitation, as opposed to chaplains who are actual state employees. This limitation would seem particularly misplaced where the religious component of a contractor's work is not government-funded, or where inmates are free to direct government funds to a faith-based contractor as one service provider among many. In any event, InnerChange did respect this limit, but the district court largely ignored that fact. InnerChange inmates were allowed to maintain and practice their own religious faiths and beliefs - or no religion at all - while in InnerChange,<sup>139</sup> and to attend their own religious services.<sup>140</sup> InnerChange has graduated inmates of diverse faiths and of no faith.<sup>141</sup>

What matters most for present purposes, however, is that the Eighth Circuit wisely declined the invitation of Americans United and its allies to hinge the constitutionality of InnerChange, or more broadly of prison chaplaincies, on whether they are "nonsectarian" and "nonproselytizing."

#### F. Timing of Completion of Classes as Parole Advantage

The district court squarely rejected the claim that the parole board treated Iowa InnerChange participants any differently than other inmates.<sup>142</sup> The court did, however, conclude that InnerChange provided "an opportunity to complete the required courses of rehabilitation classes before it would be otherwise possible."<sup>143</sup> The [\*51] Eighth Circuit agreed with the first finding, but disregarded the second.<sup>144</sup> This represents an improvement for two reasons.

First, the latter finding should not have been affirmed because it is misleading. Although inmates could start InnerChange courses earlier in their sentences,<sup>145</sup> InnerChange is longer in duration than any of DOC's other treatment programs,<sup>146</sup> so inmates must start earlier than the others to finish at the same time. Because of its length, InnerChange can actually delay completion of treatment.<sup>147</sup> But even if treatment could be completed sooner, this would confer no meaningful advantage on an inmate, notwithstanding the district court's tentative suggestion that it might.<sup>148</sup> Elizabeth Robinson, chair of the Iowa Board of Parole, presented undisputed testimony (alas, ignored by the district court) that the board prefers treatment to be completed immediately prior to release and has even instructed DOC not to begin inmate treatment too early.<sup>149</sup> Robinson testified that she looks critically

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<sup>139</sup> See Appendix, supra note 53, at 209-11.

<sup>140</sup> See *id.* at 220, 295-97, 320-21, 395-96; see also *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862, 910 (S.D. Iowa 2006), aff'd in part, rev'd in part, 509 F.3d 406 (8th Cir. 2007) (InnerChange allows inmates to attend religious services of other faiths).

<sup>141</sup> See Appendix, supra note 53, at 209-11, 216, 218, 235, 297, 329-30.

<sup>142</sup> *Prison Fellowship Ministries*, 432 F. Supp. 2d at 904 ("The Court found no evidence to support the Plaintiffs' contention that the Iowa Parole Board treats InnerChange inmates differently than other non-InnerChange inmates that come before it."); *id.* at 893-94 & n.26.

<sup>143</sup> *Id.* at 927; see also Luchenitser, supra note 2, at 445, 459-60.

<sup>144</sup> *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406, 414 (8th Cir. 2007) ("If inmates join, no one from the DOC or InnerChange promises a reduced sentence or earlier parole. When joining, an inmate confirms in writing that participation is voluntary and will not affect eligibility for parole.").

<sup>145</sup> *Prison Fellowship Ministries*, 432 F. Supp. 2d at 904.

<sup>146</sup> See Appendix, supra note 53, at 357.

<sup>147</sup> See *id.* at 260, 266-67, 286, 338, 357.

<sup>148</sup> *Prison Fellowship Ministries*, 432 F. Supp. 2d at 904 ("The Iowa Parole Board would likely look favorably on any inmate who took the initiative and completed his recommended programming as early as possible," but the board "looks to many other factors besides early completion of recommended classes to decide whether an inmate is eligible for an early release.").

at voluntary inmate treatment, because some inmates sign up for unnecessary classes to try to manipulate the board.<sup>150</sup>

Second, and more important here, it is good for the faith-based initiative that the Eighth Circuit did not treat a difference as minor as the timing of the completion of rehabilitation classes as constitutionally significant. In other words, if such a marginal difference were legally consequential, faith-based programs would need to be virtually identical to their secular counterparts to avoid the potential charge of providing impermissible incentives for religious participation under the Establishment Clause. Requiring such a high level of uniformity among programs would not only be practically difficult, it would threaten to eliminate the distinctive characteristics [\*52] of programs that would make an inmate's choice among them meaningful.<sup>151</sup>

### III. Refining, Rather than Discarding, the Faith-Immersion Model

#### A. Distinguishing Religious and Nonreligious Activities and Corresponding Funds

The Eighth Circuit found that InnerChange lacked an adequate system for distinguishing and tracking religious and nonreligious activities in its program; that, as a result, InnerChange actually spent significant amounts of government funds on religious items, instruction, and worship; and that its allocation process was not monitored at all by the State.<sup>152</sup> The solution to this problem, correspondingly, would be to develop an effective method for distinguishing religious and nonreligious activities; to track the money actually spent on each category and assure that no government money pays for the former; and to involve the state to a reasonable degree in monitoring those expenditures.

Use of the faith-immersion model may make some of these steps more difficult, but by no means impossible. For example, on this model, a higher proportion of the activities will be religious, and so a smaller proportion could be funded by government. Similarly, the more religious content there is in the program, the more care must be taken in distinguishing religious and nonreligious activities - fewer allocation decisions will be obvious, and seat-of-the-pants assessments will not do. Lawyers well familiar with Establishment Clause jurisprudence should be involved at the RFP stage, and the types of items and activities falling into each category should be provided to staff of the faith-based entity at the outset, in writing, based on the lawyers' analysis.

[\*53] As questions arise about the application of these categories in practice, lawyers should be available to address them. Payments from government funds should be based on actual items purchased (as documented by receipts), and actual staff time spent for nonreligious purposes (as documented, for example, by detailed time sheets). Over time, after experience provides a strong evidentiary basis for them, expenses and salaries may be allocated using percentages, but these should be subject to spot-checking and adjustment.<sup>153</sup> And although

<sup>149</sup> See Appendix, *supra* note 53, at 358-59, 361.

<sup>150</sup> See *id.* at 360, 362.

<sup>151</sup> See Freedom from *Religion Found., Inc. v. McCallum*, 324 F.3d 880, 884 (7th Cir. 2003) ("It is a misunderstanding of freedom ... to suppose that choice is not free when the objects between which the chooser must choose are not equally attractive to him.").

<sup>152</sup> *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406, 418 (8th Cir. 2007) (discussing lack of clear definition of religious-nonreligious distinction); *id.* ("InnerChange staff did not actually divide their work time into religious or nonreligious activities or make any allocation for payroll purposes."); *id.* at 418-19 (discussing items purchased with government funds having religious content); *id.* at 424 (quoting State disavowal of any monitoring beyond "receiving and reviewing periodic service invoices" from InnerChange).

<sup>153</sup> Percentages are an insufficient method of allocation when they are based on "legislative supposition" or "mere assumption" about the amount of time spent on secular activities. *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 777-79 (1973) (quoting *Earley v. DiCenso*, 403 U.S. 602, 619 (1971)); see also, e.g., *id.* at 777 (faulting state legislature for guessing, in general, that "at least 50% of the ordinary public school maintenance and repair budget would be devoted to purely secular

government agencies should avoid the kind of "pervasive monitoring" that might risk an "excessive entanglement," there is still plenty of room for the kind of monitoring of cost allocation consistent with ordinary business and accounting practices, such as periodic audits. <sup>154</sup>

#### B. Providing Alternative Programming That Is Secular, Private, and Generally Similar

The Establishment Clause requirement to avoid spending government funds on religious activities, which in turn necessitates the somewhat difficult religious-nonreligious allocation discussed above, applies only to funds that flow directly from the government to the faith-based service provider. <sup>155</sup> If, by contrast, funds flow to the aid provider indirectly - that is, only as a result of an inmate's genuine private choice among religious and nonreligious service providers alike - the provider may spend the funds on any aspect of [\*54] the program, including the religious. <sup>156</sup> That is because the decision to fund that religious activity is not attributable to the state, but instead to the private individual. <sup>157</sup>

After several years of operation, InnerChange attempted to move to a per diem model of funding, under which the program would receive \$ 3.47 per inmate per day for every inmate in the program, up to a certain cap. <sup>158</sup> Although InnerChange received money only if inmates chose to direct it to the program, the Eighth Circuit did not consider this sufficient to treat the system as indirect funding, because "there was no genuine and independent private choice." <sup>159</sup> That was because, under the terms of the legislative appropriation, inmates could only direct the aid to InnerChange; if inmates chose a secular alternative program, the funds would not follow them there. <sup>160</sup>

In light of this decision, the way to create an indirect aid structure would be for corrections officials to make available to inmates a second rehabilitation program that is nonreligious; that is generally comparable to the existing faith-based program; and that, when inmates choose it, would receive the funds that would otherwise be directed to the faith-based program. Because this arrangement would eliminate the need to allocate expenses between the religious and nonreligious within a program, this model would be especially well suited to faith-immersion programs, which often have such a small proportion of nonreligious expenses that government funding might not be worth the administrative hassle. In any event, both funding models should at least be explored before considering Mr. Luchenitser's advice to abandon the faith-immersion model entirely.

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facility upkeep in sectarian schools"); *id.* at 778-79 (faulting allocation system in *Earley*, 403 U.S. at 619, for "simply relying on the assumption that ... [a teacher] would surely devote at least 15% of his efforts to purely secular education").

<sup>154</sup> Compare *Lemon v. Kurtzman (Lemon I)*, 403 U.S. 602, 619-20 (1971) (finding pervasive monitoring), with *Earley*, 403 U.S. at 620-22 (finding excessive entanglement). See also *Prison Fellowship Ministries*, 509 F.3d at 418-19, 424-25 (finding insufficient accounting controls to allow presumption of compliance to stand, and correspondingly finding no excessive entanglement because "there was no pervasive monitoring by the DOC" despite "some administrative cooperation" between InnerChange and the DOC).

<sup>155</sup> E.g., *Meek v. Pittenger*, 421 U.S. 349, 363 (1975) (finding that a state's "direct loan" of equipment and instructional material to religious schools violated the Establishment Clause because it had the primary effect of advancing religion (emphasis added)).

<sup>156</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 652-53 (2002); *Am. Jewish Cong. v. Corp. for Nat'l & Cmty. Serv.*, 399 F.3d 351, 354-57 (D.C. Cir. 2005); *McCallum*, 324 F.3d at 882.

<sup>157</sup> *Zelman*, 536 U.S. at 652-53; *Am. Jewish Cong.*, 399 F.3d at 357-58; *McCallum*, 324 F.3d at 882.

<sup>158</sup> *Prison Fellowship Ministries*, 509 F.3d at 417, 425; *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862, 886 (S.D. Iowa 2006), aff'd in part, rev'd in part, 509 F.3d 406 (8th Cir. 2007).

<sup>159</sup> *Prison Fellowship Ministries*, 509 F.3d at 425.

<sup>160</sup> *Id.*; *Prison Fellowship Ministries*, 432 F. Supp. 2d at 931-32.

### C. Removing Private Actors from Disciplinary Functions

As discussed above, the Eighth Circuit affirmed the district court's holding that InnerChange and Prison Fellowship Ministries were "state actors," but only on the grounds that they engaged in "joint [\*55] activity" with the state.<sup>161</sup> The best way to avoid this problem is for faith-based staff never to seek or accept the state's "24-hour power to incarcerate, treat, and discipline inmates," including the authority "to issue inmate disciplinary reports, and [to effectuate] progressive discipline ... in concert with" state correctional staff.<sup>162</sup> To the extent the faith-immersion model has included the performance of these functions, it need not have and it should no longer. In addition to avoiding the business of incarceration and discipline, faith-based staff should focus on rehabilitation services and religious exercise, which are well-established as functions that are not "traditionally and exclusively" the government's.<sup>163</sup> To further underscore their distinction from the state, faith-based providers may wish to provide their staff with uniforms that are unmistakably different from those of correctional staff.

### D. Avoiding Facilities That Are Even Arguably Better, or Anything Else That Is Arguably an Incentive

To the extent that the Eighth Circuit actually did affirm findings of an impermissible incentive to join or remain with InnerChange, the lesson to be learned is that faith-based service providers and government officials should work together to ferret out and remove actual (and reasonably arguable) incentives, and perhaps to create some modest disincentives. The lesson is not that the faith-immersion model should be abandoned entirely.

The Eighth Circuit referenced and affirmed the district court's findings that InnerChange inmates received special benefits - such as living quarters that afforded greater privacy, more visits from family members, and greater access to computers - that their counterparts in secular programs did not.<sup>164</sup> The simple solution to this problem is to remove these special benefits, and to err on the side of disincentive, [\*56] rather than incentive:<sup>165</sup> provide the same (or marginally less) privacy, family visit time, and computer access to participants in the faith-based program. Similarly, faith-based programs should neither seek nor accept access to buildings or other facilities to which comparable programs lack access.<sup>166</sup>

Where parole advantages actually are used as an incentive for inmates to join or stay in a faith-based prison program (or any other religious activity), that certainly would cause serious constitutional problems.<sup>167</sup> But there is nothing about the faith-immersion model that makes the creation of parole-related incentives inevitable, or even more likely. The only alleged incentive of this kind in the InnerChange case was based on the potential for earlier completion of rehabilitation classes, which might be viewed more favorably by the board - and, as explained above,

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<sup>161</sup> See *supra* Part II.D.

<sup>162</sup> *Prison Fellowship Ministries*, 509 F.3d at 423. Mr. Luchenitser takes the view that the same facts tending to establish that InnerChange staff were "state actors" also establish the existence of an "excessive entanglement." See Luchenitser, *supra* note 2, at 477. But the Eighth Circuit found "state action" while squarely rejecting the district court's finding that the program created an "excessive entanglement." *Prison Fellowship Ministries*, 509 F.3d at 425. Therefore, the Eighth Circuit opinion should not be read as validating Mr. Luchenitser's view in any way.

<sup>163</sup> *Richardson v. McKnight*, 521 U.S. 399, 405 (1997) (rehabilitation services (considered as correctional functions)); *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (religious exercise).

<sup>164</sup> *Prison Fellowship Ministries*, 509 F.3d at 424.

<sup>165</sup> See *Zelman v. Simmons-Harris*, 536 U.S. 639, 653-54 (2002) (noting that, although built-in financial disincentives are not necessary to a faith-based program's constitutionality, "they clearly dispel the claim" that individuals have chosen the program for its financial incentives).

<sup>166</sup> See *Prison Fellowship Ministries*, 509 F.3d at 414 (discussing InnerChange's exclusive access to certain facilities).

<sup>167</sup> See, e.g., *Inouye v. Kemna*, 504 F.3d 705, 714 (9th Cir. 2007) (finding Establishment Clause violation where state gave defendant a "Hobson's choice" between being imprisoned and participating in religiously based rehabilitation program).

this finding of the district court was misleading and ignored uncontested evidence.<sup>168</sup> But even if these factual findings were sound with respect to this program, there is no basis for Mr. Luchenitser's suggestion that the faith-immersion model somehow makes it more likely in other programs that rehabilitation classes will start (or finish) sooner than their secular counterparts.<sup>169</sup> And even if there were some tendency to that effect, there is no reason to believe that schedules could not be adjusted to correct the disparity consistent with the faith-immersion model, or even to add a delay in the completion of faith-immersion classes.<sup>170</sup> But in any event, the ultimate outcome of the InnerChange case does not even support the claim that this kind of disparity is legally significant: the Eighth Circuit did not even mention, least of all rely on, the facts regarding the potential disparity and certainly did not adopt the district court's reasoning that the disparity was relevant to the Establishment Clause analysis.<sup>171</sup>

**[\*57]**

## Conclusion

After sorting out from Mr. Luchenitser's account of the Iowa InnerChange program the Establishment Clause claims and theories that the Eighth Circuit either rejected squarely or declined to accept, some actual constitutional problems remain. Faith-based service providers and government officials should indeed work together to avoid repeating those mistakes. But Mr. Luchenitser's article reflects that he is eager to throw out the baby with the bathwater. Rather than propose solutions that are tailored to the problems actually identified by the Eighth Circuit, he proposes to discard the entire faith-immersion model. That would be a grave mistake, as reducing the religious options available to prisoners reduces, rather than enhances, their religious freedom.

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<sup>168</sup> See *supra* Part II.F.

<sup>169</sup> Luchenitser, *supra* note 2, at 476-77.

<sup>170</sup> As noted above, InnerChange actually did tend to delay the completion of classes, but the district court simply ignored the evidence to that effect. See *supra* Part II.F.

<sup>171</sup> See *supra* Part II.F.