

No. 06-2741

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

AMERICANS UNITED FOR SEPARATION
OF CHURCH AND STATE, *et al.*

Plaintiffs-Appellees,

v.

PRISON FELLOWSHIP MINISTRIES, INC., *et al.*

Defendants-Appellants

**Appeal from the United States District Court
For the Southern District of Iowa**

BRIEF *AMICUS CURIAE* OF ANTI-DEFAMATION LEAGUE
AND AMERICAN JEWISH COMMITTEE
ON BEHALF OF PLAINTIFFS-APPELLEES,
SUPPORTING AFFIRMANCE

Steven B. Varick
Hart M. Passman
HOLLAND & KNIGHT LLP
131 S. Dearborn St., 30th Floor
Chicago, Illinois 60603
Telephone: (312) 263-3600
Facsimile: (312) 578-6666

Steven Sheinberg
Daniel Elbaum
Steven M. Freeman
ANTI-DEFAMATION LEAGUE
605 Third Avenue
New York, NY 10158
Telephone: (212) 885-7743
Facsimile: (212) 885-5882

Jeffrey P. Sinensky
Kara H. Stein
THE AMERICAN JEWISH
COMMITTEE
165 East 56th Street
New York, NY 10022
(212) 751-4000

Dated: November 22, 2006

RULE 26.1 DISCLOSURE STATEMENT

Amici curiae Anti-Defamation League and American Jewish Committee are non-profit corporations qualified under §501(c)(3) of the Internal Revenue Code. *Amici* have no parent corporations, and no publicly-held company owns ten percent or more of either *amici*.

By: _____

Date: November 22, 2006

Steven B. Varick
Hart M. Passman
HOLLAND & KNIGHT LLP
131 S. Dearborn St., 30th Floor
Chicago, Illinois 60603
Telephone: (312) 263-3600
Facsimile: (312) 578-6666

Steven Sheinberg
Daniel Elbaum
Steven M. Freeman
ANTI-DEFAMATION LEAGUE
605 Third Avenue
New York, NY 10158
Telephone: (212) 885-7743
Facsimile: (212) 885-5882

Jeffrey P. Sinensky
Kara H. Stein
THE AMERICAN JEWISH COMMITTEE
165 East 56th Street
New York, NY 10022-2746
(212) 751-4000

Counsel for *amici curiae*

TABLE OF CONTENTS

	Page
RULE 26.1 DISCLOSURE STATEMENT.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF IDENTITY AND INTERESTS OF <i>AMICI CURIAE</i>	1
SOURCE OF AUTHORITY TO FILE	2
SUMMARY OF ARGUMENT	3
ARGUMENT	10
I. DIRECT MONETARY AID TO IFI CONSTITUTES UNCONSTITUTIONAL AND DISCRIMINATORY STATE ENDORSEMENT AND COERCION OF RELIGION.....	10
A. The State’s Selection of IFI, and Exclusion of All Other Religions, is Discriminatory and an Endorsement of a Particular Religion.....	11
B. Direct Monetary Aid to IFI Resulted in Impermissible Religious Indoctrination.....	13
II. IFI’S INCENTIVES TO OBSERVE EVANGELICAL CHRISTIANITY COERCE RELIGIOUS CHOICE AND ENDORSE A RELIGION.....	19
A. The Provision of Special Benefits to IFI Participants Is Coercive and Discriminatory.....	19
B. The “Choice” of Each Prisoner to Join IFI Was Not Independent, But Coerced by the State.....	22
1. IFI Forced Non-Evangelical Christian Prisoners to Either Relinquish Their Faiths or Suffer Discrimination.....	22
2. No Prisoner Was Given a "Genuine and Independent Private Choice" to Join or Abstain From IFI.....	25

3.	The Supposedly Neutral RFP Process Did Not Protect the Religious Rights of Prisoners.	28
	CONCLUSION.....	30
	CERTIFICATE OF COMPLIANCE.....	32

TABLE OF AUTHORITIES

	Page
CASES	
<i>Agostini v. Felton</i> , 521 U.S. 203 (1997)	17, 22, 29, 30
<i>Bowen v. Kendrick</i> , 487 U.S. 589 (1988)	6, 7
<i>Columbia Union Coll. v. Oliver</i> , 254 F.3d 496 (4th Cir. 2001)	16
<i>Community House, Inc. v. City of Boise, Idaho</i> , 2006 WL 3231393 (9th Cir. Nov. 9, 2006)	16
<i>County of Allegheny v. Amer. Civil Liberties Union Greater Pittsburgh Chapter</i> , 492 U.S. 573 (1989)	12
<i>DeStefano v. Emergency Housing Group, Inc.</i> , 247 F.3d 397 (2d Cir. 2001).....	6
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976)	16
<i>Hunt v. McNair</i> , 413 U.S. 734 (1973)	15
<i>In re Americans United for Separation of Church and State v. Prison Fellowship Ministries</i> , 432 F. Supp. 2d 862 (S.D. Iowa 2006) ..passim	
<i>Johnson v. Econ. Dev. Corp. of County of Oakland</i> , 241 F.3d 501 (6th Cir. 2001)	16
<i>Larson v. Valente</i> , 456 U.S. 228 (1982)	13
<i>Lee v. Weisman</i> , 505 U.S. 577 (1992)	4
<i>Lemon v. Kurtzman</i> , 403 U.S. 602 (1971)	17, 26
<i>Lynch v. Donnelly</i> , 465 U.S. 668 (1984)	7
<i>Marks v. United States</i> , 430 U.S. 188 (1977)	16
<i>Mitchell v. Helms</i> , 530 U.S. 793 (2000)	13, 14, 15, 17

<i>Rosenberger v. Rector and Visitors of the Univ. of Virginia</i> , 515 U.S. 819 (1995).....	13
<i>Santa Fe Indep. Sch. Dist. v. Doe</i> , 530 U.S. 290 (2000)	4, 7
<i>United States v. Ollie</i> , 442 F.3d 1135 (8th Cir. 2006)	16
<i>Wallace v. Jaffree</i> , 472 U.S. 38 (1985).....	12
<i>Witters v. Washington Dep't of Services for the Blind</i> , 474 U.S. 481 (1986).....	25
<i>Zelman v. Simmons-Harris</i> , 536 U.S. 639 (2002)	4, 10, 25

OTHER AUTHORITIES

EDWIN GAUSTAD & LAIGH SCHMIDT, <i>THE RELIGIOUS HISTORY OF AMERICA</i> (2002).....	8
John C. Jeffries, Jr. & James E. Ryan, <i>A Political History of the Establishment Clause</i> , 100 MICH. L. REV. 279 (2001).....	8
THE COMPLETE MADISON (Saul K. Padover ed., 1953).....	3

STATEMENT OF IDENTITY AND INTERESTS OF *AMICI CURIAE*

Organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States, the Anti-Defamation League ("ADL") is today one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. Among ADL's core beliefs is strict adherence to the separation of church and state embodied in the Establishment Clause of the First Amendment. Separation, ADL believes, preserves religious freedom and protects our democracy. In furtherance of this belief, ADL has participated as *amicus curiae* before the Supreme Court and the Circuit Courts in many of the major church-state cases of the last half-century. ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is essential to the continued flourishing of religious practice and belief in America, and to the protection of minority religions and their adherents. From day-to-day experience serving its constituents, ADL can attest that the more government and religion become entangled, the more threatening the environment becomes for each.

The American Jewish Committee ("AJC"), a national organization of over 175,000 members and supporters and 33 regional chapters, was founded in 1906 to

protect the civil and religious rights of Jews. The American Jewish Committee believes that the only way to achieve this goal is to safeguard the civil and religious rights of all Americans. A staunch defender of church-state separation as the surest guarantor of religious liberty for all Americans, the American Jewish Committee opposes government funding of inmate rehabilitation programs replete with inherently religious activities – such as religious instruction, worship, and proselytization – as both unconstitutional and bad public policy.

SOURCE OF AUTHORITY TO FILE

All parties have consented in writing to the filing of this brief.

SUMMARY OF ARGUMENT

InnerChange Freedom Initiative ("IFI") has but one core objective – the conversion of participants to Evangelical Christianity. The State of Iowa ("State") directly funds that mission, purportedly to accomplish a secular goal. For IFI to accomplish that objective, participants must be willing to relinquish their chosen faith and to accept the preferred creed of Evangelical Christianity. That direct State subsidy of a sect's religious proselytizing plainly endorses one religion, coerces its observance, and discriminates against those who wish to follow other faiths (or no faith at all). It violates the Establishment Clause.

Over the years, ADL and the AJC have consistently advocated in this Court and other courts for a test which avoids entanglement between religion and government. That is not because *amici* wish to diminish religion, or its observance, but because *amici* believe that faith can thrive only when it is chosen freely without governmental coercion or inducement. As James Madison famously said, "[r]eligion flourishes in greater purity, without than with the aid of Government." THE COMPLETE MADISON 299-300 (Saul K. Padover ed., 1953). Thus, out of respect and reverence for the proper and exalted role of religion, *amici* contend that courts should be very wary of any government intrusion into matters of faith. That is the position *amici* take in hard cases; but this is not a hard case. It

is not necessary for the Court to reach thorny questions of the scope of the Establishment Clause in this case, because on the most fundamental First Amendment principles on which virtually all parties and *amici* here should agree, the District Court should be affirmed. On the facts found by the District Court – and to which this Court must defer – the State program below endorsed a particular faith, coerced participants to participate and to accept the endorsed faith, and discriminated against those unwilling to relinquish their own deeply-held beliefs.

The Supreme Court has consistently interpreted the Establishment Clause (in tandem with the Free Exercise Clause) to prohibit the government from enacting laws "that have the 'purpose' or 'effect' of advancing or inhibiting religion." *Zelman v. Simmons-Harris*, 536 U.S. 639, 648-49 (2002). That may take various forms, any one of which violates the Constitutional protection.

One form of governmental advancement of religion is governmental coercion of religious practice. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 310-313 (2000). Coercion is sufficient to prove a Constitutional violation, although not necessary.¹ This case presents coercion at two levels. First, the District Court found that inmates were induced to participate in the IFI program

¹ Even those who advocate a sharply limited role for the Establishment Clause concede that "government sponsored endorsement of religion," even without coercion, violates the Establishment Clause. *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting); *see also id.* at 604 (Blackmun, J., concurring); *id.* at 618 (Souter, J., concurring).

by a series of tangible non-religious benefits – improved living conditions, better accommodations, and fewer restrictions. This Court must accept the factual finding that "the state and InnerChange provide incentives to inmates to join the program." *In re Americans United for Separation of Church and State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862, 927 (S.D. Iowa 2006).

Perhaps even more troubling is a second level of coercion. Inmates participating in IFI were coerced to accept Evangelical Christian doctrine through overt proselytizing, all funded directly with State monies. As the District Court found, "inmates who do take part in InnerChange must be willing to productively participate in a program that is Christian based." *Id.* at 893. The District Court further found that inmates are required to attend Sunday morning church services, "devotionals," and community meetings that begin with prayers. *Id.* at 896 n.29, 902-903. IFI participants who complete their term of imprisonment must then attend church weekly in order to "graduate" from Phase IV of the program. *Id.* at 910. Thus, once in IFI, there is no escape for a prisoner from the pervasive Evangelical Christian indoctrination – even after he leaves the Newton facility.

Here, the District Court found, as a matter of fact which IFI literature and admissions make undeniable, that the fundamental objective of the InnerChange program, funded with public money, was to convert prisoners to Evangelical Christianity. Perhaps IFI believed it could accomplish socially beneficial goals

through that conversion – reduction of recidivism, for example. But IFI makes perfectly plain that its sole design to accomplish those goals is through religious conversion:

[T]he application of Biblical principles are not an agenda item – it is the agenda. IFI is a Christian community ... Prisoners are taught Biblical principles in the context of teachable moments ... The IFI community serves as the crucible for learning and testing Biblical principles. And to facilitate this, Biblical principles and core values are prominently displayed throughout the facility and promoted through memorization.

Id. at 897.

For all practical purposes, the state has literally established an Evangelical Christian congregation within the walls of one of its penal institutions, giving the leaders of that congregation, i.e. InnerChange employees, authority to control the spiritual, emotional and physical lives of hundreds of Iowa inmates.

Id. at 933. The record is replete with demonstrations of IFI's unabashed plan to use public funds to convert prisoners to their faith. *See, e.g.*, Appellees' Brief at 6-9.

The First Amendment prohibits "government financed or government sponsored indoctrination into the beliefs of a particular religious faith." *DeStefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397, 416 (2d Cir. 2001) (quoting *Bowen v. Kendrick*, 487 U.S. 589, 611 (1988)). Even *amici* for Appellants agree. *See* Brief of Amicus Curiae Iowa Policy Family Center at 9 ("A natural corollary of the freedom of religion is that individuals are protected from coerced indoctrination and/or proselytiation [sic]"). Thus, the Establishment Clause prohibits the use of

government funds to pay for religious programs or activities. *See, e.g., Bowen*, 487 U.S. at 610-11, 621.

Further, the program discriminates against those who are unwilling to relinquish their own beliefs and accept the tenets of Evangelical Christianity. As a result, "the intensive, indoctrinating Christian language and practice that makes up the InnerChange program effectively precludes non-Evangelical Christian inmates from participating." *In re Americans United*, 432 F. Supp. 2d at 898. The Supreme Court has explained that, for the State to sponsor one religious message "is impermissible because it sends the ancillary message to ... nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 309 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, concurring)). The factual record below demonstrates coercive pressure both to participate and to convert to IFI's beliefs and discrimination against those unwilling to accept those beliefs. Accordingly, this is not a close case.

Finally, many *amici* for Appellants purport to rely on the prevalence of prayer and the importance of religious institutions in our nation's history. That history supports the Court's decision below. As every school child should know, the Religion Clauses – both the Free Exercise and Establishment Clauses –

originate from the founders' concern with government support of and by religious majorities to the detriment of religious minorities. Over time, different sects have enjoyed dominant status. At the time of the founding, the nation was populated almost entirely by Protestant Christians. See EDWIN GAUSTAD & LAIGH SCHMIDT, *THE RELIGIOUS HISTORY OF AMERICA* 49, 74 (2002). Indeed, as the *amicus* brief of the Catholic League explains, there was large scale anti-Catholic bias in the original colonies. Brief of Amicus Curaie Catholic League for Civil and Religious Rights at 3. Since that time, Catholics have expanded their numbers and influence. Likewise, among Protestant faiths, there have been swings in popularity and political power. While "mainstream Protestants" once constituted a plurality (if not a majority) of Americans, Evangelical Christians have grown dramatically in numbers and political power. See John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 358 (2001). But whichever sect may have the greatest support at any given time, the protection afforded to the minority religions remains the same. It is never adequate to justify governmental funding for religious coercion or discrimination to contend that the favored sect should be preferred because it is the choice of the majority (as in *Santa Fe Independent School District*) or the lowest or only bidder (as in this case). The Establishment Clause prevents the government from endorsing any particular

sect, and prohibits governmental coercion of citizens toward any religious observance.

It is that protection of the religious liberty of minority religions that distinguishes the United States from those nations driven by majority or dominant religious sects today. What Appellants and their supporters here advocate is the evisceration of the Establishment Clause to allow the government to fund a program which has as its fundamental – if not sole – mission the conversion of citizens to its chosen faith. The Constitution does not permit that.

ARGUMENT

I. DIRECT MONETARY AID TO IFI CONSTITUTES UNCONSTITUTIONAL AND DISCRIMINATORY STATE ENDORSEMENT AND COERCION OF RELIGION.

To affirm the District Court, this Court need look no further than the State's direct provision of monetary aid to the avowedly and pervasively sectarian IFI program.² Appellants and *amici* argue that IFI's goal is the rehabilitation of prisoners. Even if true, the program seeks to effect that rehabilitation by indoctrinating those prisoners with a particular brand of Evangelical Christianity. When religious indoctrination is undertaken with the use of State funds, and with the imprimatur of State approval, it is by definition an impermissible endorsement of religion that results in unconstitutional coercion and discrimination.

² In its brief, Prison Fellowship Ministries, Inc. ("PFM") attempts to demonstrate why its method of compensation from the State qualifies as "indirect" aid allowed under *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). However, as articulated in Part II.B.2 *infra*, this case differs from *Zelman* because the prisoners lacked the "genuine and independent choice" required for analysis under the Supreme Court's indirect aid cases. Therefore, the state aid to IFI should be properly characterized as direct monetary aid.

A. The State's Selection of IFI, and Exclusion of All Other Religions, is Discriminatory and an Endorsement of a Particular Religion.

The State of Iowa funded a program which expressly undertook to encourage prisoners to accept Evangelical Protestant Christianity and to practice its faith. It did not fund comparable programs endorsing other faiths, or remaining neutral to faith. This program, even if with the ultimate purpose of reducing recidivism, did so with one fundamental method – the conversion of its participants to its chosen faith. In hiring PFM to operate the IFI program at the Newton facility, the State of Iowa has sent a clear message – whether intended or not – that PFM's version of Evangelical Christianity is a favored religion (indeed, the only favored religion).

The District Court carefully reviewed IFI, and made factual findings that it is a wholly religious program, every component of which "is designed to transform an individual spiritually." *In re Americans United*, 432 F. Supp. 2d at 922. The District Court found that "[t]he overtly religious atmosphere [of IFI] is not simply an overlay or a secondary effect of the program – it is the program." *Id.* at 922. Further, PFM at its core is a sectarian organization, and all secular components of IFI are addressed via the wholly sectarian philosophy that drives the organization and the program. The District Court concluded that the entire IFI environment is "intended to coerce or persuade conversion to Christianity." *Id.* at 923. These

findings are well-supported by the evidence in the record and are entitled to deference by this Court.

The State's funding of this avowedly sectarian program is a plain endorsement of religion, and therefore an Establishment Clause violation. The Supreme Court has ruled that a governmental practice runs afoul of the Establishment Clause if it "either has the purpose or effect of 'endorsing' religion." *County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 592 (1989). This prohibition of endorsement reflects the Constitutional directive that government refrain "from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *Id.* at 593 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring)).

One harm inherent in government endorsement of a religion, or of religion generally, is that it necessarily causes "discriminat[ion] among persons on the basis of their religious beliefs and practices." *County of Allegheny*, 492 U.S. at 590. Government must remain neutral and secular "precisely in order to avoid discriminating among citizens on the basis of their religious faiths." *Id.* at 610. Simply, "[t]he antidiscrimination principle inherent in the Establishment Clause necessarily means that would-be discriminators on the basis of religion *cannot prevail*." *Id.* at 611 (emphasis added).

At the State's Newton Correctional Facility, there is only one "values-based" prison unit: IFI. Indeed, there is no analog of any type throughout the entire Iowa correctional system. The State has funded only one sect, and has excluded all others from State funding for the rehabilitation of its prisoners. The Supreme Court has stated that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). That is precisely what the State has done: it has officially sanctioned PFM's brand of Evangelical Christianity in the Newton Facility, and in doing so, has demonstrated a clear and official preference of that religion over all others.

B. Direct Monetary Aid to IFI Resulted in Impermissible Religious Indoctrination.

Moreover, the State's financing of IFI via direct monetary payments deepens the extent to which this program violates the Establishment Clause. The Supreme Court has repeatedly warned that there are "special Establishment Clause dangers when money is given to religious schools or entities directly." *Mitchell v. Helms*, 530 U.S. 793, 818-819 (2000) (Thomas, J., plurality opinion) (citations omitted); accord *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 842 (1995). "The most important reason for according special treatment to direct

money grants is that this form of aid falls precariously close to the original object of the Establishment Clause's prohibition." *Mitchell*, 530 U.S. at 856 (O'Connor, J., concurring).

The District Court concluded that the State's direct funding of IFI led to those very same risks and dangers of the establishment of religion that arise whenever government aid to religious institutions takes the form of a direct monetary payment. Indeed, the District Court found that State oversight of IFI's use of that aid was virtually non-existent, and that it was impossible to restrict that aid to secular uses. Those factual findings alone demonstrate the unconstitutional State sanction of IFI's mission of religious indoctrination and coercion. The District Court then made a further and truly dispositive finding: that State aid was diverted to religious uses. *In re Americans United*, 432 F. Supp. 2d at 888-890, 925. Simply, the District Court found precisely the type of conduct against which the Supreme Court has cautioned, and then found that its fears of actual diversion of State aid for sectarian purposes were justified, which the Establishment Clause prohibits.

In its brief, PFM criticizes the District Court for ruling that the State's payments to IFI violated the Establishment Clause because those payments constituted aid to a "pervasively sectarian" organization. *Id.* at 925; Brief for Prison Fellowship Ministries and Innerchange Freedom Initiative at 32-37.

Specifically, PFM argues that *Mitchell v. Helms* rejected the “pervasively sectarian” rule first announced in *Hunt v. McNair*, 413 U.S. 734 (1973), and therefore that the lower court’s opinion cannot stand because it relied upon that rule. In fact, *Mitchell* does not require that courts abandon a “pervasively sectarian” inquiry; rather, the District Court properly weighed its determination that PFM is “pervasively sectarian” as a factor within its Establishment Clause analysis.

In *Hunt v. McNair*, the Supreme Court held that “[a]id normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.” 413 U.S. at 743. In *Mitchell*, writing for a four-Justice plurality, Justice Thomas argued stridently against the pervasively sectarian rule set forth in *Hunt*. He opined that “an inquiry into the recipient’s religious views required by a focus on whether [an organization] is pervasively sectarian is not only unnecessary but offensive.” *Mitchell*, 530 U.S. at 828.

Appellants and their *amici* misconstrue Justice Thomas' statements in *Mitchell* and misapply his arguments. Justice Thomas criticized courts that refuse to permit aid to a pervasively sectarian *organization*. That is a red herring – for in

giving aid to IFI, the State funded a pervasively sectarian *program*. It does not matter to this case whether the State could fund a church-managed food pantry, for instance; a secular use of State aid by a sectarian recipient is not at issue. It is the provision of direct monetary aid to a pervasively sectarian program that is relevant here – something that no court has allowed.

Further, Justice Thomas' plurality opinion does not represent the holding of the Court. Justice Thomas was joined by only three other Justices; the necessary fifth vote came from Justice O'Connor's separate concurrence. "Where a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concur in the judgments on the narrowest grounds.'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)); accord *United States v. Ollie*, 442 F.3d 1135, 1142 (8th Cir. 2006). Numerous other Circuit Courts have ruled, based on *Marks*, that Justice O'Connor's opinion in *Mitchell* represents the Supreme Court's holding. See, e.g., *Community House, Inc. v. City of Boise, Idaho*, 2006 WL 3231393, at *13 (9th Cir. Nov. 9, 2006); *Columbia Union Coll. v. Oliver*, 254 F.3d 496, 504 n.1 (4th Cir. 2001); *Johnson v. Econ. Dev. Corp. of County of Oakland*, 241 F.3d 501, 510 n.2 (6th Cir. 2001).

In her controlling concurrence in *Mitchell*, Justice O'Connor argued that "presumptions of religious indoctrination are normally inappropriate when evaluating ... aid programs" to religious organizations. *Id.* at 858 (O'Connor, J., concurring). However, contrary to PFM's assertions, Justice O'Connor did *not* reject the pervasively sectarian rule altogether; rather, she asserted merely that, when aid is given to a pervasively sectarian organization, "plaintiffs raising an Establishment Clause challenge must present evidence that the government aid in question has resulted in religious indoctrination." *Id.* Importantly, Justice O'Connor did not disturb the rule, first announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and ratified in *Agostini v. Felton*, 521 U.S. 203 (1997), that whether a government aid program violates the Establishment Clause depends in part on "the character and purposes of the institutions that are benefited" by that aid. *Lemon*, 403 U.S. at 615; *Agostini*, 521 U.S. at 232.

Therefore, as noted by Appellees in their brief to this Court, neither *Mitchell v. Helms*, nor any other Supreme Court decision, prohibits a "pervasively sectarian" inquiry. Appellees' Brief at 36-39. Rather, consistent with Justice O'Connor's holding in *Mitchell*, this Court must examine whether an organization is pervasively sectarian as part of its overall Establishment Clause analysis. *See Agostini*, 521 U.S. at 232-233. Here, the District Court made specific findings of

fact, well supported by the record, that PFM is a pervasively sectarian organization *and* that IFI is a pervasively sectarian program.

The District Court also found that the State made direct monetary payments to IFI, and that IFI used State money for sectarian purposes. Direct monetary aid to a pervasively sectarian program crosses the line of an Establishment Clause violation; sectarian use of that aid goes way beyond that line, in every circumstance. The proof is in this very case: the State's aid to IFI resulted in religious coercion, discrimination, and indoctrination – all of which is flatly unconstitutional.

II. IFI'S INCENTIVES TO OBSERVE EVANGELICAL CHRISTIANITY COERCE RELIGIOUS CHOICE AND ENDORSE A RELIGION.

Apart from funding a program which sets out to encourage the observance of a single, preferred religion, the State offers special incentives to prisoners to participate in this program. The District Court found that IFI participants are afforded benefits not available to other prisoners. The State's sanctioning of these benefits sends an unmistakable message to prisoners in Iowa: if they adopt Evangelical Christianity as their religion, the State will reward them – and if they choose to abide by any other religion, they will be considered to be of a lesser status. This, too, constitutes unconstitutional coercion of religious beliefs.

A. The Provision of Special Benefits to IFI Participants Is Coercive and Discriminatory.

The District Court identified numerous special benefits provided to IFI participants that are not made available to other state prisoners. For example, all inmates at the Newton facility have toilets in their cells, which toilets are not separated from the rest of the cell – except IFI participants. *In re Americans United*, 432 F. Supp. 2d at 893. The IFI "dry cells" therefore are more spacious than all other cells at Newton. *Id.* Also, IFI participants are given keys to their cells, allowing participants to leave and enter their cells as they please; in contrast,

the locks to all other Newton cells are controlled by correctional officers. *Id.* IFI participants also enjoyed greater telephone and visitation privileges than did other Newton prisoners. *Id.* at 901, 911.³

Inmates in the Iowa correctional system who – by reason of security risk of past conduct – would not otherwise be eligible to be housed at Newton, or for admission into State-offered treatment programs, are nonetheless allowed to live in the preferred cell block at Newton if they participate in IFI Evangelical Christian treatment programs. *Id.* at 895. For these prisoners, the State has sent a clear signal that they may enjoy the relative freedoms of anything less than maximum security, and receive the treatment services they need or desire, only if they submit themselves to Evangelical Christianity. This coercion is the exact antithesis of the sort of freedom of religious choice that ADL and the AJC dedicate themselves to protect, and that the Establishment Clause prohibits: the State rewards those who accept the State's religion and discriminates against those who do not.

Further, the District Court found that "the intensive, indoctrinating Christian language and practice that makes up the Innerchange program effectively precludes non-Evangelical Christian inmates from participating." *Id.* at 898. Before joining IFI, prisoners must sign a "Participation and Release of Information Form," which contains an acknowledgment that "the program contains religious

³ For a more complete list of the housing and other benefits received by IFI participants, *see* Parts II.B and II.C of Appellees' Brief.

content and is based upon Christian values and principles." *Id.* at 893 n.26. In its "Field Guide," distributed to inmates who express an interest in the program, IFI warns prisoners that non-Christians will not be allowed to observe those religious practices that prevent the participant "from fully taking part in the IFI program or if they prevent [him] from meeting every program requirement." *Id.* at 896. The goal of that program is to convert its participants to Christianity, and its components are "overwhelmingly devotional in nature and intended to indoctrinate InnerChange inmates into the Evangelical Christian belief system." *Id.* at 905, 913. Thus, a non-Evangelical Christian who wishes to take advantage of the State-endorsed benefits provided to IFI participants must agree to subject himself to an environment intent on indoctrinating him with Christianity and ridding him of every other religious belief and practice.

To that end, the District Court accepted as credible the testimony from non-Christian inmates who were dissuaded from joining IFI or expelled from the program because they did not conform to its religious requirements. Bilal Shukr, a Muslim, testified that he was told by a State employee that "there was no interfaith curriculum" in IFI and therefore that Shukr would not be allowed to engage in interfaith study. *Id.* at 899. He testified that, consequently, "there was no possibility for me, as a Sunni Muslim, to partake in the program without desecrating my faith, without me blaspheming God." *Id.*

If the Establishment Clause is to mean anything, the State cannot constitutionally sanction such discrimination against its citizens on the basis of their faith. The Supreme Court explained in *Agostini* that a program of governmental aid to a religious institution must be "allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Agostini*, 521 U.S. at 231. The record, and the District Court's findings, indicates that the State and IFI discriminated against those prisoners who did not or would not accept Evangelical Christianity by effectively screening them out of the program.

B. The "Choice" of Each Prisoner to Join IFI Was Not Independent, But Coerced by the State.

1. IFI Forced Non-Evangelical Christian Prisoners to Either Relinquish Their Faiths or Suffer Discrimination.

The Appellants and certain *amici* argue that participants of all religions were free to choose to enter the program. They argue that any decision to enroll in, or withdraw from, IFI was a decision each prisoner was free to make – and that any religious indoctrination that followed was the result of that private choice. However, the District Court found, as a matter of fact to which this Court must

defer, that participants other than Evangelical Christians were permitted to enter the program only if they would effectively surrender their own chosen faiths. Bilal Shukr testified that he could not join IFI because to do so would require blasphemy and a desecration of Islam. *In re Americans United*, 432 F. Supp. 2d at 899. Benjamin Burens, an adherent of Native American religious beliefs, testified that IFI staff told him that his religion was akin to "witchcraft" and "sorcery." *Id.* at 900. The treatment of Shukr and Burens is plainly discrimination against non-Christians solely because they are not Christians: they were dissuaded or denied from receiving IFI-exclusive benefits because they do not agree with IFI's religious premise.

Similarly, IFI employees and volunteers denigrated all other religious beliefs, generally and specifically. Russell Milligan and Allyn Gilbert both testified that one IFI volunteer told a class of IFI participants that a future Catholic Pope would be the anti-Christ. Tr. at 240-241, 1926. Michael Bauer testified that an IFI counselor told inmates that "the Catholic Church was the Whore of Babylon." Tr. at 405. Gilbert also testified that an IFI employee told another class of IFI participants that "if the Jews didn't turn their hearts over to Christ, they were doomed to hell." Tr. at 1927. John Curtis Lyons explained IFI's teachings simply: "[t]here is no other possibility of salvation unless it is through the blood of Christ,"

and those who believed in or practiced a different religion are "sinful" and Satanic. Tr. at 580.

It should not be surprising, then, that the District Court found numerous examples in which prisoners were required to leave the IFI program solely on the basis of religion. Burens was removed from IFI because he "was not growing spiritually" and "did not fully participate in the [IFI] services, instead remaining seated while others show[ed] their involvement by singing songs, standing, and raising hands." *In re Americans United*, 432 F. Supp. 2d at 900. Another prisoner who was dismissed from IFI was told that he "was not displaying the growth needed to remain in the program," because his "focus is not on God and His Son." *Id.* at 908. This, too, is religious discrimination: the IFI participant who disagreed with some or all of IFI's discriminatory teachings was given a choice between adopting IFI's religion, or foregoing the program altogether.

The Appellants counter that IFI allowed any otherwise-eligible prisoner to enter the program, regardless of his religious identification or lack thereof. Thus, according to Appellants, any decision to "undertake religious indoctrination" was made by each individual participant, which decision cannot be attributed to the State. This position borders on the absurd. If the State enacted a subsidy for the practice of Judaism, and allowed any person of any faith to participate so long as they relinquished their faith in Jesus or Allah or Buddha, the *amici* would be

outraged. That is precisely what the State of Iowa has done, and there is no merit to the spurious argument that anyone could benefit so long as they are willing to become Evangelical Christians.

2. No Prisoner Was Given a "Genuine and Independent Private Choice" to Join or Abstain From IFI.

The Appellants' argument also fails because the prisoner's decision whether or not to join IFI is not the result of a “genuine and independent private choice.” *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002). In *Zelman*, the Supreme Court upheld an Ohio program that allowed taxpayers to use state-funded vouchers for parochial school education. The Court stated that when government aid to religion is indirect – that is, when it flows to religious institutions “only as a result of the genuine and independent choices of private individuals” – then the aid program is constitutional if it is “neutral with respect to religion” and is available “to a broad class of citizens.” *Id.* at 649, 652. The *Zelman* Court then found that the voucher program was permissible, in part because the program involved “no financial incentives that skew the program toward religious schools.” *Id.* at 653 (citations omitted); *see also Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481, 488 (1986) (state aid permitted because “[i]t does not tend to provide greater or broader benefits for recipients who apply their aid to religious education,

nor are the full benefits of the program limited, in large part or in whole, to students at sectarian institutions.").

Unlike the voucher program at issue in *Zelman*, the State, through IFI, offers substantial benefits and incentives for prisoners to join IFI and undertake religious indoctrination. The District Court found that IFI participants live in Cell Block E, previously used as the Newton facility's honor unit, where they enjoy "dry cells" and greater freedoms than prisoners housed in other units at the prison.⁴ The District Court further found that IFI participants enjoyed other benefits that other Newton inmates did not, including pizza at graduation ceremonies, additional telephone privileges, greater access to computers and computer training, and greater interaction with visitors.⁵ These are precisely the types of incentives that "skew" what might otherwise be an individual's "independent choice" toward

⁴ Appellants suggest that Cell Block E was selected for "safety" and "security" reasons, and not because Appellants sought to reward IFI participants for accepting the religious teachings of the program. This suggestion erroneously dismisses the need for state programs to have both a neutral purpose *and* a neutral effect. *See Lemon*, 403 U.S. at 612 (1971). Even if the State had a fully secular and legitimate purpose in using Cell Block E for IFI, the presence of special benefits for the residents of that unit, and the requirement that those residents participate in IFI's indoctrination, is impermissible under the Establishment Clause. That Cell Block E was previously known as the "honor unit" in and of itself demonstrates the constitutional problems inherent in its use for IFI, as it shows the State's recognition that this particular unit was best used for "deserving" prisoners. When a prisoner is defined as "deserving" based upon his religious affiliation, or willingness to accept certain religious principles, the State violates the Establishment Clause.

⁵ *See* Part II.A *supra*.

religious programs. A dry cell and an occasional pizza may not seem like significant benefits to most, but as the District Court found, these rewards can be significant to a prisoner, who lacks the freedom that ordinary citizens enjoy. *See In re Americans United*, 432 F. Supp. 2d at 928-929. When the State offers to lighten the burden of imprisonment to anyone who will accept the yoke of a particular religious faith, it is engaging in precisely the type of coercion forbidden by the Establishment Clause.

The District Court found that the State paid PFM \$3.47 per day for each prisoner enrolled in IFI, and that if a particular prisoner did not participate, that \$3.47 remained with the State. Appellants point to this fact as evidence that the prisoners' decisions to enroll or not to enroll was "genuine and independent," because it purportedly shows that the determinant of whether the religious organization received state aid fell entirely on the individual decision of each prisoner. Brief of Prison Fellowship Ministries and Innerchange Freedom Initiative at 44. In fact, these findings demonstrate the very problem with the entire arrangement: the arrangement between the State and PFM effectively gave each prisoner \$3.47 to spend each day – with the caveat that he could only spend it with PFM, and that if he chose not to do so, he would forfeit that money. Like an employee's decision to spend company scrip at the company store, since it had no value elsewhere, the prisoner had no "choice". The only way for him to benefit

from this \$3.47 “voucher” was to cash it in for IFI's religious instruction. The scheme coerced prisoners to spend the \$3.47 at IFI's store, and discriminated against those who refused - all on the basis of religion.

3. The Supposedly Neutral RFP Process Did Not Protect the Religious Rights of Prisoners.

Appellants make much of the supposedly neutral Request for Proposals (“RFP”) issued by the State to select the provider of the proposed values-based prison program. They argue that the State offered its contract on the same neutral terms to all potential bidders, without any reference to religion, and that the RFP’s terms made clear that the State would not fund exclusively sectarian expenses. The District Court found to the contrary: that the RFP process was not neutral, but that instead it was geared toward awarding the State's funds to PFM and its IFI program. The record is replete with evidence that, from the onset of the State’s decision to pursue these services, its officials sought a Christian institution to meet its goals, and that some of these officials targeted PFM and IFI specifically. The District Court specifically found that “the initial RFP, itself, was essentially a gerrymandered document” intended to bring IFI to the Newton facility. *In re Americans United*, 432 F. Supp. 2d at 926. This evidence demonstrates that the State did not use “neutral, secular criteria that neither favor[ed] nor disfavor[ed]

religion,” but instead applied weighted factors that carried a clear preference for a sectarian bidder, thereby discriminating against nonsectarian entities.

More importantly, Appellants' argument regarding the RFP process misses the point. The critical issue is not whether non-Christians could have bid to perform this state contract; presumably, they could have.⁶ The issue for this Court is whether the beneficiaries of the state program – the prisoners, not IFI – were allowed to participate regardless of their faith or their chosen means to observe their faith. To that question, the District Court correctly identified that IFI is not “made available to both religious and secular beneficiaries on a nondiscriminatory basis.” *Agostini*, 521 U.S. at 231. The IFI Field Guide, distributed to prospective participants, warns prisoners that IFI prohibits religious practices that prevent full participation in IFI. *See In re Americans United*, 432 F. Supp. 2d at 896 (“Suppose you see that you cannot fully practice your religion in IFI, then you may choose not to join the program.”). The District Court found that IFI is based upon the principle “that an inmate's anti-social attitude and self-destructive behavior can only be overcome through an intensive religion-based program that is able to ‘rewire’ that inmate's most basic emotional and mental structures.” *Id.* at 878. The religion on which the program is based is, of course, Christianity; the Field Guide

⁶ Of course, a non-Christian bidder would have had little chance of winning the bid that had been meant for PFM and IFI all along, as Emerald Correctional Management would learn in 2005. *See In re Americans United*, 432 F. Supp. 2d at 887.

states that it "emphasizes the change in behavior as a result of encountering Jesus Christ." *Id.* at 877. This informational material evinces IFI's discrimination against any otherwise-eligible prisoner who, due to his own religious affiliation, disagrees with the religious principles required for program participation.

In sum, Appellants' arguments that the State allocated aid neutrally, and then made it available on a nondiscriminatory basis, are wholly without merit. The Establishment Clause prohibits the State from favoring one religion over another, or religion over non-religion – and it expressly prohibits the State from putting its thumb on the scale of an individual's religious choices. The State's relationship with, and funding of, the IFI program violated these doctrines by providing “incentive[s] to undertake religious indoctrination.” *Agostini*, 521 U.S. at 231.

CONCLUSION

Many amicus participants filed briefs to support the defendants below. They advocate that different tests be used in Establishment Clause analysis, or question the factual findings of the District Court. But not one even attempted to argue that religious coercion and endorsement – by any standard – could be permitted under the First Amendment. The IFI program is designed to coerce prisoners to adopt

Evangelical Christianity, and has the effect of theological indoctrination. The State's financing of that program is impermissible endorsement of religion, and the operation of the program within a State prison results in discrimination against those who do not follow the State's chosen faith. For all of these reasons – and for protection of those very values of religious liberty and tolerance that the First Amendment represents – this Court must affirm the District Court's opinion.

Dated: November 22, 2006

Respectfully submitted,
**ANTI-DEFAMATION LEAGUE AND
AMERICAN JEWISH COMMITTEE**

One of Their Attorneys

Steven B. Varick
Hart M. Passman
HOLLAND & KNIGHT LLP
131 South Dearborn Street, 30th Floor
Chicago, Illinois 60603
(312) 263-3600
(312) 578-6666

Jeffrey P. Sinensky
Kara H. Stein
THE AMERICAN JEWISH COMMITTEE
165 East 56th Street
New York, NY 10022
(212) 751-4000

Steven Sheinberg
Daniel Elbaum
Steven M. Freeman
ANTI-DEFAMATION LEAGUE
605 Third Avenue
New York, NY 10158
Telephone: (212) 885-7743
Facsimile: (212) 885-5882

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

The undersigned counsel of record for Amici Curiae, Anti-Defamation League and American Jewish Committee, certifies, pursuant to Fed.R.App.P. 32(a)(7)(B) and (C), and Eighth Circuit Rule 28A(c) and (d), that this brief complies with the following requirements:

I. The number of words in the brief, with the exception of those tables, certificates, and statements that are excluded by Rule 32(a)(7)(B)(iii) is 6,267. The word count was determined by using the Word Count feature of Microsoft Office Word 2003, the word processing software used to prepare this brief. This brief was prepared in Times New Roman 14-point proportionally-spaced font.

II. The CD diskettes filed with the Court and served upon counsel contain the full text of this brief, saved under the file name "Amicus Brief of ADL and AJCommittee" The CD diskettes provide the digital version of the brief in Portable Document Format from the original word processing file. The materials on the CDs have been scanned for viruses using Symantec Anti Virus Ver. 10, and, according to the software, are virus-free.

III. One copy of the digital version of the brief has been furnished to each party separately represented by counsel in this case.

Hart M. Passman