

In The  
**United States Court of Appeals**  
For The Eighth Circuit

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

*Plaintiffs – Appellees,*

v.

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

*Defendants – Appellants.*

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

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**BRIEF OF AMICI CURIAE  
THE COUNCIL FOR SECULAR HUMANISM AND  
CENTER FOR INQUIRY IN SUPPORT OF APPELLEES AND  
AFFIRMANCE OF THE DISTRICT COURT’S RULING**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amici Council for Secular Humanism and Center for Inquiry state that they are nonprofit corporations that do not issue stock to the public. They are affiliated corporations, but neither corporation has a parent corporation. Neither the amici nor their counsel represent or have appeared for any party in this case.

Dated: November 20, 2006

A handwritten signature in black ink, appearing to read 'R. Lindsay', written over a horizontal line.

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## INTEREST OF THE AMICI CURIAE

The Council for Secular Humanism (“Council”) is a nonprofit educational organization headquartered in Amherst, New York. The Council engages in a variety of activities that are designed to support institutions, principles, and values that are consistent with a secular worldview. The Council has participated as an amicus in several prominent cases, including *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005) and *Washington v. Glucksberg*, 521 U.S. 702 (1997).

The Center for Inquiry (“Center”) is another nonprofit educational organization headquartered in Amherst, New York. (It is affiliated with the Council.) The Center for Inquiry operates an Office of Public Policy in Washington, D. C. The particular focus of the Office of Public Policy is on defending the values of scientific naturalism and secular humanism in the context of U.S. law and public policy. To achieve that end, the Office of Public Policy publishes white papers on important topics, researches and provides nonpartisan analyses of relevant issues, and participates in litigation to protect our constitutional values, including religious liberty, reproductive freedom and equality for the nonreligious. The Center recently filed an amicus brief in *Paulson v. City of San Diego*, Case Nos. 06-55769, 06-55919 (9<sup>th</sup> Cir.).

This brief is being filed with the consent of all parties to the appeal.

## STATEMENT OF FACTS

The Council and the Center adopt, in pertinent part, the statement of facts set forth in the brief of the appellees. However, certain salient facts will be mentioned here to provide context to the arguments set forth in this brief.

InnerChange Freedom Initiative (“InnerChange”) is a subsidiary of Prison Fellowship Ministries (“PFM”). Both InnerChange and PFM are overtly sectarian organizations. InnerChange operates programs that seek to “transform” prisoners through religious conversion, specifically conversion to Evangelical Christianity.

In 1998, representatives of InnerChange and the Iowa Department of Correction (“DOC”) discussed establishing a pre-release prisoner rehabilitation program at the DOC’s Newton facility. Only after the DOC and InnerChange formulated a plan for implementing the program did the state issue a Request for Proposal (“RFP”) that purported to invite bids for a “Values Based Pre-Release Program.” The RFP specified that no compensation would be given to the service provider. InnerChange submitted the only bid.

After the DOC accepted InnerChange’s proposal, the DOC agreed to pay for a portion of InnerChange’s services with public money, specifically money from the Telephone Rebate Fund (funded principally by surcharges on inmate telephone calls) and the Tobacco Trust Fund (funded in substantial part with tax revenues).

The DOC made no effort to monitor whether public funds were used to support religious activities.

The DOC's lack of interest in monitoring InnerChange's use of public funds is not altogether surprising because monitoring would have been pointless.

InnerChange operates a twenty-four hour per day religious immersion program. In InnerChange's own words, "everything" it does is "Christ-centered and Bible-based." Slip op. at 22.<sup>1</sup> "[C]onversion ... is the program's central object." Slip op. at 88. This case presents in the starkest possible terms the issue of whether public money can be used to fund religious indoctrination.

## **ARGUMENT**

### **I. THE ESTABLISHMENT CLAUSE FORBIDS GOVERNMENT FUNDING OF INNERCHANGE'S PROGRAM OF RELIGIOUS INDOCTRINATION**

#### **A. State-Sponsored Religious Indoctrination Is Unconstitutional**

InnerChange aims to transform prison inmates by indoctrinating them in religion; InnerChange receives public money for this religious purpose. These facts -- which are undeniable on this record -- are more than sufficient to prove a violation of the Establishment Clause under any relevant decision of the Supreme Court. *E.g., Mitchell v. Helms*, 530 U. S. 795, 845 (2000) (O'Connor, J. concurring) (government financial aid impermissible if it results in religious

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<sup>1</sup> References to the opinion of the district court will be to the unpublished version (slip op. \_\_).

indoctrination); *Bowen v. Kendrick*, 487 U.S. 589, 621(1987) (impermissible to use grants to fund materials “designed to inculcate the views of a particular religious faith”); *Grand Rapids School Dist. v. Ball*, 473 U. S. 373, 385 (1985) (Establishment Clause “absolutely prohibit[s] government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith.”) *overruled in part on other grounds by Agostini v. Felton*, 521 U.S. 203 (1997); *Committee for Public Ed. v. Nyquist*, 413 U.S. 756, 780 (1973) (direct aid to sectarian institutions invalid absent effective restrictions that ensure aid is used only for secular purposes); *Everson v. Board of Ed.*, 330 U.S. 1, 16 (1947) (“No tax in any amount, large or small, can be levied to support any religious activities or institutions ....”). There is absolutely “no precedent [to support] the use of public funds to finance religious activities.” *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U. S. 819, 847 (1995) (O’Connor, J. concurring).

Religious indoctrination is *the* purpose of InnerChange. As the lower court observed, one need look no further than InnerChange’s own website to determine that InnerChange exists to accomplish religious goals through religious means. Contrasting its so-called “transformational” model of rehabilitating prisoners with standard secular models, InnerChange proudly proclaims:

The IFI [InnerChange] model seeks to “cure” prisoners by identifying sin as the root of their problems. Inmates learn how God can heal them permanently, if they turn from their sinful past, are willing to see the world through God’s eyes, and surrender themselves to God’s

will. IFI relies and directs members to God as the source of love and inner healing. Members then build on this new relationship to recast human relationships based on Biblical insights.

In summary, IFI and therapeutic models have some similar methodologies, *but very different goals*, and are rooted in entirely different philosophies. The therapeutic model seeks first to reconcile the relationship of a prisoner to other human beings. The IFI model, in contrast, seeks to reconcile people through changing their relationship to God.

Appellees' Addendum at 5-6 (emphasis added). See slip op. at 21. A chart on that same website sets forth no fewer than eleven sharp contrasts between secular therapeutic programs and InnerChange's transformational model. A couple of those distinctions are that InnerChange seeks a "cure through the power of the Holy Spirit" and aims for a transformation "through an instantaneous miracle."

Appellees' Addendum at 5-6. See slip op. at 23-24. The "power of the Holy Spirit" is not a recognized secular method and a "miracle" is, by definition, a religious goal. Given InnerChange's own description of its program it is undeniable that it seeks to instill religious beliefs in prisoners. As one of InnerChange's amici candidly admits, religious conversion is a mark of "the success of the Program in [inmates'] lives." Commonwealth of Virginia ("Va.") Br. 22.

Moreover, the record in this case demonstrates that InnerChange did not abandon its methods or goals once the Iowa DOC contracted with it to provide a rehabilitation program at the DOC's Newton facility. To the contrary, from the introductory phase of InnerChange's program, which combines religious

proselytizing with promises of special privileges to participating inmates, through the final post-release phase, when InnerChange participants must attend church regularly and demonstrate a Christ-centered lifestyle to graduate from the program, religious instruction and activity permeate every aspect of InnerChange's program. Prior to the instant litigation, InnerChange made no effort to conceal the pervasively sectarian character of its program. Inmates accepted into InnerChange program are informed:

IFI is committed to Christ and the Bible. We try to base *everything* we do on biblical truth. In other words, IFI is Christ-centered and Bible-based.

InnerChange/PFM App. at 859 (emphasis added). See slip op. at 22.

In providing InnerChange with public funds to carry out its program of religious indoctrination, the Iowa DOC violated the core prohibition of the Establishment Clause, which absolutely forbids government-financed or government sponsored religious indoctrination. *Mitchell*, 530 U.S. at 845; *Grand Rapids School Dist.*, 473 U.S. at 385. If the Establishment Clause has any meaning, the government may not subsidize programs that aim to produce “instantaneous miracles” by channeling the power of supernatural beings and that have religious conversion as their central objective.

**B. The Record Demonstrates That InnerChange Uses Public Funds To Carry Out Religious Indoctrination**

Defendants and their amici struggle desperately to fit the InnerChange program into the mold of one of the cases in which the Supreme Court has upheld funding to a religious institution. They rely heavily on *Mitchell*, contending that the Supreme Court approved direct funding of pervasively sectarian institutions provided there is no evidence that funds are actually diverted to religious uses. They then contend that the Iowa DOC funded only the secular activities of InnerChange, and that the lower court's contrary conclusion is based on faulty presumptions and unwarranted reliance on expert testimony. InnerChange Br. 32-39; DOC Br. 21-24. These contentions find no support in the law or the record.

To begin, with respect to *Mitchell*, it is the concurring opinion of Justices O'Connor and Breyer that governs the interpretation of the case. *See Marks v. United States*, 430 U.S. 188, 193-94 (1977). That concurring opinion not only makes clear that public money may not be used to fund religious activities or programs, *id.* at 840, it also states that the government must take reasonable steps to ensure that public funds will not be diverted to religious use. *Id.* at 861-64. There is no question that InnerChange is using public funds to support religious activities and the record establishes that DOC officials failed to implement any effective measures to limit public funding to secular activities. *See slip op.* at 41-47, 102-110.

InnerChange's teachers and counselors are required to instruct inmates in the supposed truth of specific religious beliefs. This instruction does not take place in a separate religion or theology class. Instead, all classes, all activities (with the possible exception of the computer class) are designed to transform the inmate's beliefs and have him accept InnerChange's religious doctrines. For this reason, "[e]very class, save for the computing class, uses materials derived solely from the perspective of Evangelical Christian faith." Slip op. at 102.

Even though InnerChange's mission of religious indoctrination colors every aspect of its work, the DOC used public funds to pay portions of the salaries of InnerChange employees. Moreover, the record establishes that InnerChange billed the DOC for the costs of equipment and supplies used for religious indoctrination. The DOC also provided InnerChange with a building (Building M) and other facilities that InnerChange used for religious indoctrination. Although InnerChange and DOC argue that the contracts only committed DOC to pay for "nonsectarian" services, DOC made no effort to monitor how its funds were being used nor did InnerChange have in place any reliable method for segregating sectarian from nonsectarian activities.

Perhaps DOC did not bother to monitor InnerChange's use of public money because such monitoring would have been pointless. InnerChange operated the equivalent of a religious immersion program, isolating inmates within a religious

community, where they were required to participate in worship services, religious community meetings, revivals, daily devotions and frequent prayers and where a significant portion of the “instruction” offered inmates was compelled memorization of Biblical verses. As the lower court succinctly observed: “The overtly religious atmosphere of the InnerChange program is not simply an overlay or a secondary effect of the program -- it is the program.” Slip op. at 104. Not to put too fine a point on it: InnerChange operated the Christian equivalent of a madrassa.

Because religious indoctrination was the acknowledged goal of the InnerChange program, InnerChange’s quibbles about the testimony of plaintiffs’ expert Dr. Winnfred Sullivan (InnerChange Br. 27-29, 36-37) are irrelevant. The lower court relied on Dr. Sullivan’s testimony principally “to situate” InnerChange’s religious program within the context of religious traditions and practices. See slip op. at 14-15 n. 9. Contrary to the suggestion of InnerChange, the lower court did not treat Dr. Sullivan’s testimony as a substitute for the testimony of fact witnesses about the purpose and operation of InnerChange. There was ample testimony from fact witnesses to confirm that religious indoctrination was both the means and the end of the InnerChange program. For example, one witness stated unequivocally that InnerChange’s “transformational model uses the introduction of religion as the change agent [and] focuses on

teaching religious values.” Trial Tr. from Nov. 28, 2005 at 42 (2132). That witness was Norman Cox, Jr., the national director of InnerChange.

**C. Alleged Success in Reducing Recidivism Inexpensively Does Not Justify Government-Financed Religious Indoctrination**

Defendants and their amici urge this Court to create a novel exception to the Establishment Clause. They argue that because InnerChange purportedly can rehabilitate prisoners less expensively than the state or any other contractor, direct funding of InnerChange’s program of religious indoctrination is permissible. DOC Br. 12-14; Va. Br. 1-7, 14-22. Effectively they maintain that the state may sponsor religious indoctrination that arguably serves a secular end provided that, in doing so, it can save a buck or two.

There are several fundamental flaws in this argument. First, the argument assumes that the InnerChange program actually reduces recidivism. There is no reliable evidence to confirm this hypothesis, as the lower court found. Slip op. at 90. Some of the defendants’ amici refer to a study that supposedly shows that those who participated in one InnerChange program were less likely to be rearrested and reimprisoned than a control group of nonparticipants. Va. Br. 4. However, defendants themselves did not introduce this study into the record, presumably because they recognized this study does not show that the InnerChange program reduces recidivism. The study compared “graduates” of the InnerChange

program with nonparticipants. One cannot be a graduate of InnerChange unless one remains in the program following release from prison, obtains a job, and avoids being reimprisoned for at least six consecutive months. The cited study does not focus on the numerous participants who never graduated. If one looks at *all* the InnerChange program participants (both graduates and nongraduates), then the “InnerChange participants did somewhat worse than the controls: They were slightly more likely to be rearrested and noticeably more likely (24 percent versus 20 percent) to be reimprisoned.” Mark A. R. Kleinman, *Faith-Based Fudging: How a Bush-Promoted Christian Prison Program Fakes Success by Massaging Data*, Slate (Aug. 5, 2003), available at: <http://www.slate.com/id/2086617>. The fact that former prisoners who obtained jobs and stayed out of prison for six months were less likely to be reincarcerated subsequently is hardly surprising and proves nothing about the efficacy of religious “transformation.” To the contrary, the correlation between holding a job and reduced recidivism only reinforces the accepted secular view that having a regular source of income decreases the motivation to engage in criminal behavior.

The most comprehensive analysis of faith-based rehabilitation programs to date has concluded that “research on the effectiveness of faith-based reentry programs is scarce” and that “studies [which] have found positive outcomes . . .

invariably have suffered from considerable methodological problems, including a lack of random assignment, no use of controls or comparison groups, self-selection biases, and limited measures of impact.” Daniel P. Mears et al. *Faith-Based Efforts to Improve Prisoner Reentry: Assessing the Logic and Evidence*, 34 J. of Crim. Justice 351, 359 (2006). In short, the belief that faith-based programs reduce recidivism is itself a matter of faith and not empirical evidence.

However, debating whether InnerChange reduces recidivism is immaterial to the central issues in this case. Failure to reduce recidivism would not make state sponsorship of InnerChange unconstitutional nor would success in reducing recidivism render state sponsorship constitutional. If effectiveness were the sole criterion for determining the constitutionality of a rehabilitation program, all manner of activities repugnant to the Bill of Rights would be acceptable. Assume that recidivism is reduced not by indoctrination through the InnerChange methodology, but only by programs that have absolutely no secular components (not even negligible computer training), that rely entirely on rote memorization of a sect’s creed and sacred scriptures, and that require participants to renounce whatever contrary religious beliefs they had prior to entry into the program. Would a reduction in recidivism warrant jettisoning the Establishment Clause for

the sake of such a program? Not to neglect other provisions of the Bill of Rights: May we ignore the Eighth Amendment if it turns out that sleep deprivation and periodic beatings reinforce the effects of “transformation”? What if successful transformational programs also require participants to waive their right to counsel or right to a trial in the event they are rearrested after release, on the ground they should rely entirely on the power of the Holy Spirit?

There is no need to belabor the point. The suggestion that we should not be concerned about the constitutionality of the InnerChange program because it is effective is just a different version of the many arguments that have been advanced -- and rejected -- that maintain that diluting or eliminating certain constitutional rights is required to reduce crime. The courts have properly rejected such arguments, and similarly this Court should reject defendants’ implicit claim that we can sacrifice the Establishment Clause for the sake of a speculative reduction in recidivism.

For similar reasons, defendants’ cost-savings argument fares no better. The defendants cannot circumvent the Establishment Clause by the simple expedient of claiming that it would be significantly more expensive for the state to hire another

contractor or to implement its own secular program.<sup>2</sup> The Clause does not read: “no law respecting an establishment of religion unless it helps the state save money.” The implications of defendants’ argument are obvious and troubling. On defendants’ logic, if religious organizations can run schools more cheaply, the state can simply fund sectarian schools and need not bother with supporting its own secular school system; if religious organizations can assist the poor and unemployed more efficiently, then there is no need for welfare; if religious organizations can regulate family relations inexpensively, then let state-funded churches, mosques and temples have exclusive control over marriage, divorce, birth and adoption. This Court needs to remind defendants that the Bill of Rights is not for sale.

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<sup>2</sup> The claim that it would be prohibitively expensive to have a comparable secular program is dubious for several reasons. For one, it is unclear whether a good faith estimate of the costs of an alternative program was ever carried out. The DOC did not make a legitimate solicitation of competitive bids at the outset. Moreover, defendants and their amici appear to have a serious misunderstanding of secular rehabilitation programs. According to one of defendants’ amici, secular alternatives to religious indoctrination would include programs based on the philosophies of “Marx or Rand or Nietzsche.” Va. Br. 24. Trying to establish a coherent, values-based rehabilitation program on the basis of *Beyond Good and Evil* probably would be inordinately expensive, as well as very challenging. But just as one cannot calculate accurately the costs of space exploration by using a Ptolemaic model of the universe, one cannot calculate accurately the costs of a secular rehabilitation program by designating Nietzsche as an expert in secular penology.

## II. RESTITUTION IS AN APPROPRIATE REMEDY

The district court ordered defendants InnerChange and PFM “to repay the Dept. of Corrections the full amount of state funds paid to InnerChange since the inception of its contractual relationship with the Dept. of Corrections in 1999.” Slip op. at 138-39. Defendants and various of their amici protest that the lower court erred in ordering restitution. InnerChange Br. 54-63; U.S. Br. 7-12; ACLJ Br. 6-11. Their contentions are flawed and find no discernible support in precedent. This Court should affirm the remedial aspects of the lower court’s order in their entirety.

### A. **Restitution Is Available as a Remedy for Establishment Clause Violations**

Where legal rights have been infringed, “federal courts may use any available remedy to make good the wrong done.” *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971) (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1996)). Absent an express limitation imposed by Congress, federal courts may select from all the remedial mechanisms normally available to the judiciary to redress an injury. *Id.* at 397. *See also Davis v. Passman*, 442 U.S. 228, 245 (1979).

“Restitution is a standard remedy and one ordered in public-law as well as private-law cases.” *Laskowski v. Spellings*, 443 F.3d 930, 934 (7<sup>th</sup> Cir. 2006). A

situation in which a party has mistakenly received payments represents a “routine” instance in which restitution is ordered. *Id.* at 934-35. *See also Iconco v. Jensen Constr. Co.*, 622 F.2d 1291 (8<sup>th</sup> Cir. 1980) (contractor unjustly enriched when it receives payments based on mistaken belief that contractor qualifies as a small business). Where a government agency has exceeded the limits on its authority in expending public funds, qualified taxpayers may seek judicial intervention to force the recipient of those funds to return them to the government. *Pugnier v. Ramharter*, 81 N.W.2d 38 (Wis. 1957); *Horner v. Chamber of Commerce*, 57 S.E.2d 789 (N.C. 1950); *Milquet v. Van Straten*, 202 N.W. 670 (Wis. 1925). *See also Crampton v. Zabriskie*, 101 U.S. 601 (1879) (taxpayers may force recipient of bonds to return bonds to government agency). *Laskowski* expressly held that restitution is available as a remedy for an Establishment Clause violation where a sectarian entity receives funding from the government and has disbursed that money in support of impermissible activities. 443 F.3d at 933-36. That is precisely the situation in the instant case.

Nonetheless, InnerChange contends that restitution is “categorically unavailable” in an Establishment Clause suit brought by private plaintiffs. InnerChange Br. 60-63. Despite this confidently unqualified assertion, InnerChange fails to cite any precedent that supports this contention. Moreover, InnerChange and its amici concede that plaintiffs could seek an injunction to

prevent future disbursement of funds and the Iowa DOC could seek restitution of the funds that have already been disbursed. InnerChange Br. 62-63; U.S. Br. 7-11; ACLJ Br. 6 (“Certainly a governmental payor -- here the DOC -- would have standing to seek recoupment of funds allegedly obtained illegally.”) The argument of InnerChange and its amici that plaintiffs cannot seek restitution is based entirely on unwarranted inferences from general principles regarding standing; in particular, they claim that plaintiffs would receive no direct benefit from restitution and, therefore, supposedly cannot demonstrate standing with respect to this type of relief. ACLJ Br. 8 (“The remedy of restitution ... obviously yields no money to plaintiffs.”). The arguments of InnerChange and its amici exhibit a thorough misunderstanding of the relevant law and of the relationship between restitution and the injury suffered by taxpayers.

To begin, InnerChange and its amici are simply mistaken when they contend that a plaintiff can seek restitution only when it would directly benefit the plaintiff. Recovered funds do not have to go directly into a plaintiff’s pocket for restitution to be an appropriate remedy. *E.g.*, *Harris Trust and Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 252-53 (2000) (fiduciary may seek restitution even though fiduciary will not directly benefit from restoration of funds to trust). *Accord Crampton*, 101 U.S. at 609; *Pugnier*, 81 N.W.2d at 40; *Horner*, 57 S.E.2d at 793.

Moreover, allowing taxpayer plaintiffs to seek restitution to the government of unconstitutionally disbursed funds makes eminent good sense in the context of an action in which taxpayers maintain that the government has improperly funded sectarian activities.<sup>3</sup> InnerChange's suggested alternative of permitting only the government to have the right to seek restitution of funds provides a wrongdoer with an unreasonable amount of discretion. It was the government, after all, that was responsible for unlawfully expending the funds in question. Effectively, what InnerChange and its amici are asserting is that a wrongdoer should have the exclusive right to decide what efforts it will make to remedy its own wrong. If generally adopted, such a bizarre rule might reduce disputes over remedies, but this suggested rule finds no support in our jurisprudence. The persons who had their tax dollars diverted to illegal uses are the parties who both suffered the injury and have the incentive to ensure proper relief is obtained, not the government agency that authorized the illegal disbursement.

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<sup>3</sup> Plaintiffs in this case include, among others, taxpayers and individuals who contributed to the Telephone Rebate Fund. InnerChange received state funds from both the Tobacco Trust Fund, which is funded with tax revenues, and the Telephone Rebate Fund. The analysis in this section of the brief of taxpayers' right to seek restitution of tax dollars also applies to the right of contributors to the Telephone Rebate Fund to seek restitution. Accordingly, for simplicity, our arguments will refer to remedies available to taxpayers, with the understanding that the same arguments apply with at least equal force to Telephone Rebate Fund contributors.

Furthermore, contrary to the arguments of InnerChange and its amici, restitution will redress plaintiffs' injury and plaintiffs have standing to request such relief. In this case, the injury to taxpayers is the extraction *and spending* of tax money in aid of religion. *Flast v. Cohen*, 392 U.S. 83, 105-06 (1968). *Accord DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1865 (2006) Returning to the government the monies that were illicitly expended restores plaintiffs to the position they held prior to the illegal conduct: their tax dollars are once again available for constitutionally appropriate expenditures. This restoration of funds redresses the taxpayer's injury and is recognized as an appropriate objective in a taxpayer action. *See Pugnier*, 81 N.W. 2d at 40; *Horner*, 57 S.E.2d at 793; *Milquet*, 202 N.W. at 671 ("taxpayer may maintain an action ... to recover back into the public treasury funds which have been illegally extracted therefrom"). The fundamental principle underlying the law of remedies is to restore the injured party, as nearly as possible, to the position he would have occupied but for the action of the defendant. *United States v. Hatahley*, 257 F.2d 920, 923 (10<sup>th</sup> Cir. 1958). Restoration of the status quo ante is a traditional objective of judicial remedies, and there is absolutely no reason to suspect that objective is foreclosed in the context of an Establishment Clause violation. To the contrary, the Supreme Court has indicated that courts do have the authority to order sectarian institutions that have improperly received government funding to return such funds to the

government. *See, e. g., Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 767 n.23 (1976) (discussing repayment of unconstitutional funding).<sup>4</sup>

To remedy the injury caused by the improper expenditure of monies, taxpayers should have available to them the full range of remedies normally available to plaintiffs in federal court, including injunctions and restitution. *Bivens*, 403 U.S. at 396. An injunction is appropriate when the government money has not yet been received or disbursed by the religious institution; restitution is appropriate when the religious institution has utilized the government funds to support its sectarian activity. InnerChange and its amici acknowledge that plaintiffs could seek an injunction, but, as indicated, contend that plaintiffs cannot seek restitution. U.S. Br. 7 (“The conventional remedy for an Establishment Clause violation is an injunction that prevents, as a prospective matter, the expenditure of funds in a manner that violates the Constitution.”). This purported distinction between an injunction and restitution does not withstand analysis. Both remedies have the purpose and effect of ensuring that the public treasury is not depleted to support religious activities. Moreover, plaintiffs obtain no more personal benefit from an injunction than they do from restitution. Neither through an injunction nor

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<sup>4</sup> In *Roemer*, of course, the Court decided that restitution should not be ordered because the recipients of the funds had relied to their detriment on the legality of the funding and for other policy reasons. *Id.* However, the Court implicitly recognized that restitution could be ordered; otherwise, its explanation of the decision not to order restitution serves no purpose.

restitution does the individual taxpayer receive a refund that goes into his or her own personal pocket. The sole difference between an injunction -- which defendants and their amici concede is an appropriate form of relief -- and restitution is the timing of the disbursement of funds relative to the moment when relief is granted. The relationship between the injury suffered (unconstitutional extraction and expenditure of tax dollars) and the relief sought (preventing depletion of the public treasury through unconstitutional expenditures) is identical. There is no reason grounded in policy or precedent to permit taxpayers to obtain an injunction in an Establishment Clause case while denying them the right to obtain restitution.

To hold otherwise, that is to hold that restitution is unavailable even though plaintiffs could request an injunction of a grant that had not yet been received and spent by a sectarian institution, would lead to the anomalous result of relief being contingent on how quickly the sectarian institution cashed the check. For example, on InnerChange's analysis, a taxpayer could do nothing about a \$100 million appropriation to pay the salary of clergy that was disbursed overnight. *See Laskowski*, 443 F.3d at 934. InnerChange's argument succeeds only in trivializing the Establishment Clause. Redress of a violation of a fundamental constitutional right cannot be made dependent on the outcome of a race between defendants and

plaintiffs in which the former try to reach the bank before the latter reach the courthouse.

Given the logically insupportable conclusion of InnerChange's argument, one can readily discern that defendants' real quarrel is not with the remedy of restitution, but rather with the right of taxpayers to bring Establishment Clause lawsuits. What InnerChange and its amici really desire is to give the government the unreviewable discretion to spend public dollars any way it sees fit, even for unmistakably sectarian purposes. Fortunately, however, *Flast* remains controlling on taxpayer standing.

As indicated, the foregoing analysis applies with even greater force to those plaintiffs whose standing is based on the diversion of their contributions to the Telephone Rebate Fund. InnerChange and its amici struggle to find some basis on which to deny these plaintiffs standing to seek the remedy of restitution, but their novel arguments are unavailing. That the director of the DOC enjoys some discretion on how the monies in the Telephone Rebate Fund are used, does not detract from the fact that the monies must be used "for the benefit of inmates." Iowa Code § 904.508A. Beneficiaries of a trust fund are injured when the resources of the fund are improperly depleted, even though the trustee of the fund has discretion over how available fund resources are used. Moreover, restitution is a recognized remedy for improper use of trust fund property and beneficiaries of a

trust may request such relief from third parties who are recipients of trust fund property. *E.g.*, *Cox v. Waudby*, 433 N.W.2d 716, 720 (Iowa 1988) (citing Restatement of Restitution § 168).

**B. The District Court Properly Considered and Rejected InnerChange’s Defenses to the Restitution Order**

In addition to maintaining that restitution is “categorically unavailable,” InnerChange argues that it has defenses to restitution that the lower court improperly rejected. To the contrary, the lower court properly evaluated all defenses to its restitution order that were advanced by defendants and found no basis for such defenses in the record.

1. InnerChange Did Not Have a Reasonable Belief That Its Contract with DOC Was Lawful

InnerChange correctly observes that courts may decline to order restitution if the party receiving the monies or property reasonably believed it had a sound legal basis for accepting the monies or property. InnerChange Br. 56 However, InnerChange knew that the Iowa DOC’s funding of its religious indoctrination could be challenged as unconstitutional. As the lower court pointed out, slip op. at 138, the California Department of Corrections specifically advised InnerChange that its sectarian indoctrination program “would very likely be found by the courts to violate the Establishment Clause.” Appellees’ App. at 387. Thus, InnerChange clearly understood the risks involved in accepting public monies for its program.

Remarkably, InnerChange tries to argue that despite being advised of these risks, it is still entitled to the defense of reasonable reliance because it was uncertain whether a lawsuit challenging the program would be filed and whether it would lose such a lawsuit. InnerChange Br. 56. In other words, InnerChange hoped that no one would discover and successfully challenge its unconstitutional activities. Contrary to what InnerChange contends, “reasonable reliance” is not equivalent to the hope that one will not get caught. *See In Re Ball & Beckwith*, 838 F.2d 844, 849-50 (6<sup>th</sup> Cir. 1988) (recipient of funds who had some information that suggested source of funds was illegal had duty to inquire further).

2. There Is No Evidence That the Restitution Order Would Work a Hardship on Defendants

InnerChange argues that the lower court failed to consider PFM’s assets and liabilities in deciding that InnerChange (which receives funding from Prison Fellowship) would be able to repay the funds it improperly received from the DOC. InnerChange’s current position is curious because it made no effort to bring these assets and liabilities to the court’s attention. Accordingly, this argument has been waived. However, plaintiffs did take the trouble to introduce evidence of PFM’s finances. Appellees’ App. at 272. PFM’s Form 990 for 2003 demonstrates that this organization has financial resources that would be the envy of almost any nonprofit. *Id.* at line 21. At the end of that year, PFM had over \$26 million in assets. Thus, defendants have ample resources to satisfy the court’s order. If the

lower court failed to mention the lack of hardship to defendants, this omission may be attributed either to defendants' failure to present the hardship defense or to the fact that the lack of hardship was too patent to warrant any discussion.

3. “Unjust” Enrichment Does Not Require an Independent Civil Wrong Nor Does It Require Plaintiff’s Loss to Exceed Defendant’s Gain

InnerChange’s abbreviated discussion of “unjust enrichment” is confusing. InnerChange contends that restitution is premised on the notion of unjust enrichment and that it cannot have been unjustly enriched because the Iowa DOC received “good value” for its money. InnerChange Br. 57-58.

To the extent InnerChange is attempting to argue that a restitution order requires its conduct to have been intrinsically wrongful, this argument has a false premise. “Defendant may be unjustly enriched without having committed any other civil wrong.” Douglas Laycock, *The Scope and Significance of Restitution*, 67 Tex. L. Rev. 1277, 1284 (1989). “Innocent parties may frequently be unjustly enriched.” *Simonds v. Simonds*, 380 N.E.2d 189, 194 (N.Y. 1978). A defendant may be enriched by mistaken payments, which were made because of a misunderstanding of the law. *Iconco*, 622 F.2d at 1302. Under Iowa law, the only essential elements of a cause of action for unjust enrichment are proof that defendant received property to which plaintiff has an equitable claim and that circumstances make it unjust for defendant to retain this property. *Id.*

Similarly, there is no requirement that the plaintiff lose more than defendant gains for restitution to be available. To the contrary, restitution is used as a remedial measure precisely in those situations in which “defendant’s gain exceeds plaintiff’s provable loss, either because plaintiff’s loss is small or because it is hard to prove.” Laycock, *supra* at 1288. The exact monetary measurement of what plaintiff taxpayers lost through the unconstitutional funding of InnerChange’s program may be difficult to determine because, *inter alia*, one would have to consider the speculative benefits resulting from a possible reduction in recidivism caused by InnerChange’s program balanced against the benefits that would have been derived from a possibly even greater reduction in recidivism resulting from a more effective, albeit perhaps more costly, secular program as well as the injury caused by religious indoctrination of inmates. These various costs and benefits are virtually impossible to quantify and compare -- especially given their indeterminate and speculative nature. Under these circumstances, the public funds improperly received by InnerChange are themselves the best measurement of an appropriate recovery.

InnerChange’s suggestion that it, nonetheless, should receive credit for the “value” it provided, is more appropriately considered in a discussion of *quantum meruit*, to which we now turn.

4. InnerChange Has No Claim to a Setoff Based on Quantum Meruit

InnerChange argues that if it is required to return funds to the DOC, the costs it incurred in providing services to the DOC should be considered as a setoff to the restitution order. InnerChange Br. 58.

InnerChange overlooks the fact that the services it provided were illegal. DOC had no authority to contract for the religious indoctrination of its inmates, so there is no “value” to the services provided. *See Milquet*, 202 N.W. at 671 (defendant not entitled to compensation under *quantum meruit* theory where school district had no authority to contract for the transportation of children attending private schools). Under InnerChange’s theory, a security company would be entitled to be compensated for the “value” of services provided in connection with a program that sought to break the will of recalcitrant inmates through unconstitutional beatings.

The one case InnerChange cites in support of its *quantum meruit* argument is completely inapposite. *Scott v. Grinnell Mut. Reins. Co.*, 653 N.W.2d 556 (Iowa 2002) held that a recovery based on *quantum meruit* can be obtained only in a case involving an implied contract, not an express contract. *Id.* at 561-62. There is no dispute that DOC and InnerChange were parties to an express written contract.

5. The Doctrine of *In Pari Delicto* Does Not Bar Restitution

In addressing this alleged defense, one must bear in mind that plaintiffs in this case include taxpayers or contributors to the Telephone Fund who seek to have public funds restored so that they can once more become available for legitimate use. The DOC is not a plaintiff and plaintiffs did not contract with InnerChange for illegal services. The doctrine of *in pari delicto* has no application to a situation in which taxpayers seek restitution of public monies and InnerChange cites no precedent to support application of the doctrine to such a situation.

The case InnerChange does cite, *Mlynarik v. Bergantzel*, 675 N.W.2d 584 (Iowa 2004), proves once again that InnerChange has difficulty interpreting precedent. *Mlynarik* held that the doctrine of *in pari delicto* does *not* apply when the contract in question is against public policy. *Id.* at 587-88 (allowing client to recover fees from nonlawyer because fee arrangement was contrary to public policy). A contract that violates the Establishment Clause is a paradigmatic example of a contract against public policy.

## 6. Public Policy Considerations Favor Restitution

The foregoing argument foreshadows our response to the curious claim that public policy considerations “preclude restitution.” InnerChange Br. 58. See U.S. Br. 11-12. The alleged public policy consideration is the deterrent effect that a restitution award might have on religious institutions competing for government grants.

This concern is both exaggerated and misplaced. Faith-based organizations “have long participated in government-funded . . . social service grants and programs.” Steven K. Green, “*A Legacy of Discrimination*”? *The Rhetoric and Reality of the Faith-Based Initiative: Oregon as a Case Study*, 84 Or. L. Rev. 725, 754 (2005). This funding has been substantial. For example, in 1996, the year Charitable Choice was enacted, Catholic Charities USA received \$1.3 billion in public funding. *Id.* Other religious institutions received hundreds of millions of dollars in funding. *Id.* at 755. No challenge has been made to the overwhelming majority of grants, and for good reason. Many religious institutions provide unmistakably secular services in a predominantly secular setting, so no constitutional question is presented. Even in situations in which secular services are provided in a sectarian setting, care ordinarily is taken to segregate secular from sectarian activities and to limit public funding to the former. A restitution order in this case poses no threat whatsoever to the vast majority of religious

organizations and entities, which have usually honored and respected the legal limits on their activities.

In the instant case, InnerChange and the Iowa DOC deliberately have refused to adhere to recognized limits on government funding of sectarian activity. Furthermore, their blatant disregard for constitutional limits on funding of activities of religious organizations is confirmed not only by the negligible, inadequate effort made to limit funding to secular activities, but by the design of the program itself. This is a program designed to indoctrinate prisoners. Bringing about a religious transformation of inmates is the *raison d'être* of InnerChange. No court has ever endorsed government-funded religious indoctrination, and, as indicated, InnerChange was well aware that their government-funded activities very likely violated the Establishment Clause. Nonetheless, in their zeal to spread their religious message, InnerChange and PFM made a calculated decision to disregard the restrictions of the Establishment Clause in implementing their program.

To state that freedom of conscience is a core value under the Constitution would be an understatement. Religious liberty is one of our fundamental freedoms, and it cannot be denied that it advances public policy to preserve religious liberty and to prevent the government from allowing its resources to be used for religious indoctrination. At the end of the day, remedies are intended to implement

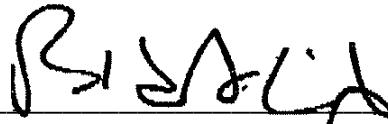
substantive policies. InnerChange and PFM knew or should have known that the funding they received was unconstitutional. Requiring them to restore these funds to the public will discourage others from flouting the Establishment Clause while having no negative effect whatsoever on the many religious organizations that have adhered and will continue to adhere to recognized limits on public funding.

### CONCLUSION

For all the foregoing reasons, this Court should affirm the order of the District Court in its entirety.

Respectfully submitted,

COUNCIL FOR SECULAR HUMANISM  
CENTER FOR INQUIRY



Dated: November 20, 2006

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## CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 29(d) and 32(a)(7), and 8<sup>th</sup> Cir. R. 28(A), the attached amicus brief proportionally spaced, in Times New Roman font and has a typeface of 14 point and contains 6,913 words, exclusive of material not counted under the applicable rules. The brief was prepared using Microsoft Word, Version Office 2003. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7).

I further certify that the diskettes filed with the Court and served on parties to this proceeding have been scanned for viruses and are virus-free.

Dated: November 20, 2006



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## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 20<sup>th</sup> day of November 2006, I filed with the Clerk's Office of the United States Court of Appeals for the Eighth Circuit, via UPS 3 Day Air, the required number of copies of this Brief of *Amici Curiae* and I further certify that I served, via UPS 3 Day Air, the required copies upon:

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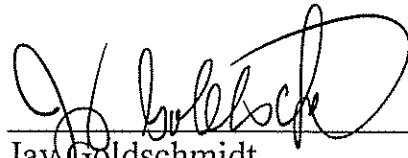
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