The State of the Law 2006

Legal Developments Affecting Government Partnerships with Faith-Based Organizations

By Ira C. Lupu & Robert W. Tuttle

The Roundtable on Religion and Social Welfare Policy

An Independent research project of the Rockefeller Institute of Government
Supported by The Pew Charitable Trusts

The State of the Law 2006:

Legal Developments Affecting Government Partnerships with Faith-Based Organizations

Ira C. Lupu and Robert W. Tuttle
Co-Directors of Legal Research, The Roundtable on Religion and Social Welfare Policy
Professors of Law, George Washington University

December 2006

Table of Contents

EXECUTIVE SUMMARY .... **i**
I. THE ONGOING PROBLEM OF ADEQUATE GUIDANCE TO GOVERNMENT OFFICIALS AND PROVIDERS **1**
A. Report of the United States Government Accountability Office, Faith-Based and Community Initiative: Improvements in Monitoring Grantees and Measuring Performance Could Enhance Accountability (GAO-06-616, June 2006). 1
B. ACLU of Massachusetts v. Michael O. Leavitt, Secretary of Health and Human Services (U.S. District Court for the District of Massachusetts, settled February 22, 2006). 2
1. Clarification of the phrase "inherently religious activities" 5
2. The Safeguards and Sexual Abstinence Education Programs 7
3. The Safeguards as Model Guidance 11
a. Context 11
b. Line-Drawing and Governing Principles 12
c. The Safeguards 13
i. Separate and Distinct Programs 13
ii. Separate Presentations 14
iii. Religious Materials 15
iv. Cost Allocation 15
v. Advertisements 16
vi. Invitation to Religious Program 16
4. The Need for Government Monitoring 17
II. GRANTS FOR CAPACITY-BUILDING **19**
A. Barry Christianson (and others) v. Michael O. Leavitt, Secretary of Health and Human Services (and others). U. S. District Court for the Western District of Washington. Lawsuit filed September 12, 2006. 19
1. The NMI Website 22
2. Computers, Office Machines, and Audio-Visual Equipment 24
3. Training and Technical Assistance 26
4. Salaries of NMI Staff 29
III. FAITH-BASED PROGRAMS IN PRISON **33**
A. Americans United for Separation of Church and State (and others) v. Prison Fellowship Ministries (and others), 432 F. Supp. 2d 862, 2006 U.S. Dist. LEXIS 36970 (United States District Court, Southern District of Iowa, decided June 2, 2006) 33
1. A "Pervasively Sectarian" Program 38
2. Significance for Other Jurisdictions 38
a. Neutrality 41
b. Voluntarism 42
c. Financial Responsibility for Religious Indoctrination 43
d. Repayment Order 44
B. Freedom From Religion Foundation v. Alberto R. Gonzales (U.S. District Court, Western District of Wisconsin, filed May 4, 2006) 47

1. Description of BOP's Life Connections Programs 49
2. FFRF's Complaint 52
3. Analysis of the Life Connections Programs and the FFRF Lawsuit 52
a. Neutrality 53
b. Religious Activities: Content and Safeguards 56
c. The Government's Likely Defenses 57
IV. CHAPLAINCIES AND THEIR LIMITS 61
A. Freedom From Religion Foundation, Inc. (and others) v. R. James Nicholson, Secretary of the Department of Veterans Affairs (and others). Lawsuit filed April 18, 2006; motion to dismiss denied September 5, 2006. 61
1. Secular Purpose 65
2. Government Responsibility for Religious Indoctrination 66
a. Military and Prison Chaplaincies – the Modified Establishment Clause Analysis 67
b. The Modified Analysis and VA Healthcare Chaplaincy 68
3. VA's motion to dismiss 72
B. GAO Report, Faith-Based and Community Initiative: Improvements in Monitoring Grantees and Measuring Performance Could Enhance Accountability (GAO-06-616, June 2006). 75
V. STRUCTURAL, PROCEDURAL, AND REMEDIAL CONCERNS IN ESTABLISHMENT CLAUSE LITIGATION 79
A. Freedom From Religion Foundation v. Dennis Grace, Acting Director of WHOFBCI (U.S. Court of Appeals, 7th Circuit, decided January 2006, rehearing denied May 2006, petition for certiorari filed August 2006) 80
1. Analysis of the Decision by the Court of Appeals 82
2. Likelihood and Possible Outcome of Supreme Court Review 84
B. Laskowski v. Spellings (U.S. Court of Appeals, 7th Circuit, decided May 2006, rehearing denied July 2006, petition for certiorari filed October 2006). 89
VI. STATE CONSTITUTIONAL LAW 97
A. Bush v. Holmes (Supreme Court of Florida, decided January 5, 2006) 97
B. Taetle v. Atlanta Independent School System (Georgia Supreme Court, decided January 17, 2006) 101

The State of the Law 2006: Legal Developments Affecting Government Partnerships with Faith-Based Organizations

Professor Ira C. Lupu and Professor Robert W. Tuttle[1]

EXECUTIVE SUMMARY

Legal developments pertaining to service partnerships between government and faith-based organizations ("FBOs") typically involve matters of both substance and process, and this year is no exception. Indeed, this year's most prominent developments provide a rich mix of procedural concerns, both administrative and judicial, and substantive outcomes, most of which are the product of litigation. And, as the Report will demonstrate, process and substance interact in ways that profoundly shape the legal milieu in which the Faith Based and Community Initiative (FBCI) proceeds.

For a number of years, we have expressed concern over the adequacy of guidance provided to FBOs by government agencies at all levels. The quality of such guidance significantly affects which FBOs participate in the Initiative, what activities they engage in, and their vulnerability to suit. Part I of the Report discusses developments in the area of administrative guidance, including the report of the Government Accountability Office on the FBCI. The principal focus of Part I is a very important settlement agreement that emerged from litigation, over a grant for a sexual abstinence program, between the American Civil Liberties Union and the Department of Health and Human Services

Capacity building grants, of the sort associated with the Compassion Capital Fund, raise their own unique issues. Part II of the Report focuses on these issues, and analyzes them primarily through the prism of a lawsuit (*Christianson v. Leavitt*) involving capacity-building grants to a faith-based program of marriage counseling.

---

[1] Ira C. Lupu is the F. Elwood & Eleanor Davis Professor of Law, George Washington University Law School; Robert W. Tuttle is Professor of Law and the David R. and Sherry Kirschner Berz Research Professor of Law and Religion, George Washington University Law School. Professors Lupu and Tuttle are the co-directors of legal research for the Roundtable on Religion and Social Welfare Policy. We wish to thank our research assistants Andrea Goplerud, Derek Lawlor, and Joe Oliveri for their excellent work on this project. We gratefully acknowledge the support of The Pew Charitable Trusts, the Nelson A. Rockefeller Institute of Government, and the George Washington University Law School. The views expressed here are, of course, exclusively our own, and are not necessarily shared by any of the institutions that have supported our work.

As a matter of substance, the year's most striking developments involve the role of FBOs in the prison setting, and Part III of the Report focuses on that particular context. At least four major cases involving faith-based rehabilitation programs are pending in the federal courts. One of them, in Iowa, has already led to a sweeping opinion against the constitutionality of such a program, and a court order that the money spent on that program be returned to the state. Part III discusses in depth that decision from Iowa, as well as a lawsuit that has been filed against the federal Bureau of Prisons in connection with its faith-based programming.

Under ordinary circumstances, government does not utilize clergy to do the state's work. In certain special contexts, however, government makes use of chaplains to minister to those under the state's control. These contexts include the armed forces, correctional facilities, and government-run hospitals. Part IV of the Report explores the scope and limits of government chaplaincy by examining the issues in *Freedom From Religion Foundation v. Nicholson*, a lawsuit that challenges the policy and conduct of the chaplaincy as it is being administered in hospitals being run by the Veterans Administration.

Issues relating to the structure of lawsuits pervasively influence the litigation concerning the Faith-Based and Community Initiative. In particular, questions of who may challenge certain government actions, when those challenges must occur, and what remedies courts may order when the law is violated have been of recurring significance. Part V of the report examines these concerns, with a particular focus on two prominent decisions from the U.S. Court of Appeals for the 7th Circuit – *Freedom From Religion Foundation v. Grace*, which involves the scope of taxpayer standing to complain about potential violations of the First Amendment's Establishment Clause, and *Laskowski v. Spellings*, which focuses on the criteria for deciding when FBOs may have to repay to the government monies that have been unconstitutionally put to religious use. As of this writing, the Supreme Court was considering whether or not to hear appeals in both *FFRF v. Grace* and *Laskowski v. Spellings*.

Although the FBCI is a federal initiative, state law and policy often have a considerable impact on the FBCI's reach. Part VI of the Report describes and analyzes two recent cases – one from Florida and another from Georgia – in which state Supreme Courts have analyzed their own state constitutions in ways that may influence state policy toward FBOs.

I. PROBLEMS OF GUIDANCE

Current Establishment Clause law generally prohibits the use of direct public funds for religious activity, including social services that have significant religious content. The constitutionality of a program of direct public aid depends significantly on the extent to which the program can ensure that public funds are not used for religious activities. A constitutionally sound program must therefore

provide officials and grantees with adequate guidance about limits on the use of public funds, and on necessary mechanisms for monitoring and auditing grantees' expenditures. As we have noted in prior reports, however, the guidance provided under the FBCI remains a matter of some concern.

A. Report of the U.S. Government Accountability Office, *Faith-Based and Community Initiative: Improvements in Monitoring Grantees and Measuring Performance Could Enhance Accountability* (June, 2006).

In June of 2006, the Government Accountability Office (GAO) released a study on the FBCI that focused on a number of aspects of the Initiative, including the extent to which federal and state agencies provide grantees with adequate information about the regulations that govern aid to FBOs. The report identified a number of successes within the FBCI, but also raised questions about faith-based grantees' understanding of restrictions that are especially relevant for FBOs, including limits on their use of public funds. In addition, GAO identified weaknesses in agencies' ability to monitor the compliance of FBOs with regulations on the use of government funds.

B. ACLU of Massachusetts v. Michael O. Leavitt, Secretary of Health and Human Services (U.S. District Court for the District of Massachusetts, settled February 22, 2006).

On February 22, 2006, the Department of Health and Human Services (HHS) and the American Civil Liberties Union (ACLU) of Massachusetts reached a settlement in a lawsuit that challenged the constitutionality of HHS grants to the Silver Ring Thing (SRT), a faith-based sexual abstinence education program. The settlement agreement is highly significant because it incorporates a set of safeguards that HHS agreed to impose on SRT should the program again receive government aid. The safeguards document, which was prepared by HHS, represents the clearest and most complete legal guidance for faith-based grantees that has thus far been produced under the FBCI.

II. GRANTS FOR CAPACITY-BUILDING

Barry Christianson v. Michael O. Leavitt, Secretary of Health and Human Services (U.S. District Court for the Western District of Washington, filed September 12, 2006).

On September 12, 2006, Americans United for Separation of Church and State filed suit against the Department of Health and Human Services (HHS), alleging that the Department violated the Establishment Clause by awarding grants under the Compassion Capital Fund (CCF) to a marriage counseling organization that provides exclusively religious counseling programs. The lawsuit is of great significance for the FBCI because it represents the first direct challenge to a grant for capacity building. Such grants are at the heart of the FBCI's project of

helping smaller religious and community-based entities improve their ability to deliver social welfare services. But the lawsuit raises serious questions about the constitutionality of capacity building grants for organizations that only provide explicitly religious social welfare services.

III. FAITH-BASED PROGRAMS IN PRISON

A. Americans United for Separation of Church and State v. Prison Fellowship Ministries (U.S. District Court for the Southern District of Iowa, decided June 2, 2006).

In June of 2006, a federal district court in the Southern District of Iowa issued a long-awaited ruling in a case involving a challenge by Americans United to a faith-based rehabilitation program in the Newton Correction facility in Iowa. The ruling represents a significant victory for Americans United.

Chief Judge Pratt's opinion describes a state-financed program of prisoner rehabilitation that is suffused with evangelical Christianity, and that involves substantial efforts to transform the religious identity of prison inmates. The state has sponsored no comparable secular program, nor any comparable program involving any other faith tradition. Moreover, the program offers valuable material privileges to its participants, and thereby induces religious participation. The judge declared the program to be a violation of the Establishment Clause, ordered the cessation of the program, and ordered Prison Fellowship Ministries, the program grantee, to return $1.5 million to the State of Iowa. The case is now on appeal.

B. Freedom From Religion Foundation v. Alberto R. Gonzales (U.S. District Court, Western District of Wisconsin, filed May 4, 2006).

Shortly before the Iowa decision involving Prison Fellowship Ministries, Freedom From Religion Foundation filed suit against the federal Bureau of Prisons with respect to the Bureau's "Life Connections" program. The program's first phase, Life Connections 1, involves a multi-faith approach to prisoner reentry and rehabilitation, all under the supervision of prison chaplains. By contrast, a new phase of the program, Life Connections 2, was described in the Bureau's initial request for proposals as a single-faith, residential program for prisoners. Several weeks after the lawsuit was filed, the federal Bureau of Prisons suspended plans for the Life Connection 2 program, and has recently cancelled it. Adjudication of the validity of the Life Connections 2 program is thus moot, but the case may nevertheless proceed with respect to the Life Connection 1 program.

IV. GOVERNMENT CHAPLAINCIES – AND THEIR LIMITS

A. Freedom From Religion Foundation v. R. James Nicholson, Secretary of Veterans Affairs (U.S. District Court for the Western District of Wisconsin, filed April 18, 2006, motion to dismiss denied September 5, 2006).

On April 18, 2006, FFRF filed suit against the Department of Veterans Affairs (VA), alleging that the chaplaincy program of the Veterans Health Administration violates the Establishment Clause because it integrates spirituality into all aspects of its healthcare. FFRF does not claim that the chaplaincy itself is unconstitutional, but rather that the VA's chaplaincy program exceeds the constitutionally limited warrant for government-financed chaplaincy.

The lawsuit will be an important test of the scope and limitations of government chaplaincies, which fall within a poorly developed area of Establishment Clause law. Because the practices of VA chaplains that are challenged in this lawsuit seem very similar to those of chaplains at other government-funded healthcare facilities, this lawsuit could have an impact far beyond the VA program.

The district court recently denied the VA's motion to dismiss the lawsuit. The parties will now proceed to develop the factual record that will be necessary to resolve the litigation.

B. GAO Report, *Faith-Based and Community Initiative: Improvements in Monitoring Grantees and Measuring Performance Could Enhance Accountability* (June 2006).

In its June, 2006 Report on the FBCI, GAO raised concerns about the interpretation of "chaplaincy" used in Department of Justice (DOJ) grants. Specifically, GAO questioned the claim apparently made by DOJ officials that restrictions on the use of direct government aid for religious activities do not apply in the context of community corrections centers. GAO's concerns highlight the need for greater clarity about limitations on the government's role in supporting religious activities for individuals who are under government care or control.

V. STRUCTURAL, PROCEDURAL, AND REMEDIAL CONCERNS

Increasingly, litigation under the Establishment Clause is shaped by concerns of structure, procedure, and remedy. In particular, questions of the identity of the parties, the timing of the suit, and remedial options available to the courts, all have significant impact on the litigation and the challenged programs. Two recent decisions by the U.S. Court of Appeals for the 7th Circuit have highlighted these concerns. The Supreme Court has been asked to review both of them.

A. Freedom From Religion Foundation v. Dennis Grace, Acting Director of WHOFBCI (U.S. Court of Appeals, 7th Circuit, decided January 2006, rehearing denied May 2006, petition for certiorari filed August 2006).

This case is a broad-based, constitutional challenge to the promotion of the FBCI by the White House Office of Faith-Based and Community Initiatives, and by various Cabinet-level agencies. The district court (Western District of Wisconsin) dismissed the suit on the ground that the named taxpayer-plaintiffs did not have legal standing to challenge this promotional conduct by the Executive Branch. In January, 2006, a panel of the Court of Appeals reinstated the lawsuit in an opinion that supported a very broad view of taxpayer standing. Several months later, the full court of appeals denied rehearing in the case. The denial was accompanied by opinions from several of the 7th Circuit judges explicitly calling for Supreme Court reconsideration of the law of taxpayer standing in Establishment Clause cases. The United States has asked the Supreme Court to review the 7th Circuit's decision. As of this writing, the Supreme Court had not yet decided whether or not to grant review in the case.

B. Laskowski v. Spellings (U.S. Court of Appeals, 7th Circuit, decided May 2006, rehearing denied July 2006, petition for certiorari filed October 2006).

This case involves a challenge to an earmarked appropriation that led to a grant from the U.S. Department of Education, to the University of Notre Dame, for a program entitled Alliance for Catholic Education. The program trains teachers, a number of whom participate in the Americorps program for placing teachers in schools in poor areas. Notre Dame redistributed much of the grant to other Catholic colleges that engage in this teacher training, and the suit alleges that subgrantees impermissibly spent grant funds on instruction to teachers on how to live and work within the Catholic faith. The district court dismissed the suit as moot, because the money had already been spent and the grant was non-recurring. On appeal, the 7th Circuit reinstated the case. Judge Posner's opinion argued that the case was not moot, because the district court might still order Notre Dame to repay any amount that had been spent in violation of the Establishment Clause. The obligation to repay, Judge Posner concluded, should turn on whether or not Notre Dame reasonably believed its expenditures to be lawful. The case raises very important questions about the potential impact on FBOs if they receive and spend government funds in ways that the Constitution forbids. In late October, Notre Dame filed a petition for certiorari with the Supreme Court, seeking review of the Seventh Circuit's decision. As of this writing, the Court had not yet acted on that petition.

VI. STATE CONSTITUTIONAL LAW

A. Bush v. Holmes (Florida Supreme Court, decided January 5, 2006)

In early January, 2006, the Supreme Court of Florida affirmed (by a vote of 5-2) a decision of an intermediate state court that Florida's school voucher program violated the state's constitution. Unlike the lower court, however, the state Supreme Court did not rely in this decision on the state's "Blaine Amendment," which prohibits financial assistance "directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution." Instead, the Supreme Court relied on a separate provision of the state constitution, which obliges the state to provide "by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education." As a result of this decision, the OSP will now terminate at the end of the 2005-06 school year. The full impact of Florida's Blaine Amendment on any other state policies of financial support for faith-based organizations remains highly uncertain.

B. Taetle v. Atlanta Independent School System (Georgia Supreme Court, decided January 17, 2006)

On January 17, 2006, the Georgia Supreme Court held that the Atlanta school system did not run afoul of Georgia's "Blaine Amendment" by leasing classroom space from a Baptist Church for a kindergarten annex that would be operated by the public school system. The Court reasoned that the transaction between the City and the church was entirely commercial, involved payment at ordinary market value, and did not include the provision of any educational or social services by the church itself. The arrangement thus did not involve the state in assisting the church, nor in supporting social or educational services offered by the church. The impact of Georgia's Blaine Amendment on government-financed social services by religious entities thus remains a highly controversial question in both the law and the politics of Georgia.

I. THE ONGOING PROBLEM OF ADEQUATE GUIDANCE TO GOVERNMENT OFFICIALS AND PROVIDERS

Under the current law of the Establishment Clause, the constitutionality of government programs that provide direct aid to religious entities depends largely on the extent to which the programs guard against the diversion of public funds to religious uses. This standard, drawn from the Supreme Court's decision in *Mitchell v. Helms*,[2] has three distinct requirements. A program should: 1) clearly articulate permissible and impermissible uses of government aid; 2) ensure that grantees agree to comply with the restrictions on the use of government aid; and 3) monitor grantees' conduct to deter and detect non-compliance.

The constitutionality of government programs that provide direct aid to religious entities depends largely on the extent to which the programs guard against the diversion of public funds to religious uses.

Over the past four years, the adequacy of guidance provided under the FBCI has been a recurring issue in commentary on federal rules that govern aid to FBOs and, more recently, in litigation over federal grants to FBOs. Two developments in 2006 concerning such guidance deserve special attention: the report of the Government Accountability Office (GAO) concerning the FBCI, and the settlement of a lawsuit over HHS grants to a sexual abstinence education provider.

A. Report of the United States Government Accountability Office, *Faith-Based and Community Initiative: Improvements in Monitoring Grantees and Measuring Performance Could Enhance Accountability* (GAO-06-616, June 2006).[3]

In June, 2006, GAO released a report on the FBCI, which examined the activities of the FBCI's agency offices and practices of some faith-based grantees under a variety of federal government programs. Among other things, the GAO study assessed the FBCI's implementation of safeguards in grants to religious providers. The study did not consider whether the safeguards, as promulgated in the federal rules, satisfied the constitutional standard. Instead, the GAO report looked only at whether the agencies provided adequate notice to grantees of their obligations, and conducted adequate monitoring to ensure grantees' compliance with the safeguards.

[2] *Mitchell v. Helms*, 530 U.S. 793, 844-45 (2000) (O'Connor, J., concurring in the judgment). We discuss the *Mitchell* decision at greater length in Ira C. Lupu & Robert W. Tuttle, The Faith-Based Initiative and the Constitution, 55 DePaul L. Rev. 1, 75-102 (2005).

[3] Available online at: http://www.gao.gov/new.items/d06616.pdf

The report found that a number of programs did not expressly inform grantees of restrictions on religious use of funds. Instead, the programs provided only citations to the regulations in which the restrictions could be found. None of the programs highlighted the constitutional significance of complying with restrictions on the religious use of public aid. Indeed, one program under the Department of Justice omitted any reference to restrictions on religious use of funds; DOJ administrators asserted that the program was not bound by the constitutional restrictions.[4] Moreover, the report found that very few programs required specific monitoring of FBOs to guard against impermissible uses of aid. Most programs did not include any reference to religious safeguards in their instructions to those providing oversight or audits of faith-based grantees.[5]

The GAO report concluded that the special legal character of religion justifies heightened attention to religious uses of public funds.

In response to the GAO report, the agency FBCI offices denied that federal programs need more explicit safeguards against religious use. The offices argued that affirmations or audit policies that make special reference to religion discriminate against FBOs by treating them with undue suspicion or imposing on them more burdensome monitoring than that imposed on non-religious grantees.[6] While acknowledging the offices' concerns, the GAO report concluded that the special legal character of religion justifies heightened attention to religious uses of public funds. "While these regulations may have more relevance to FBOs and their activities, we do not believe that having agencies ensure compliance with all applicable regulations, including the equal treatment regulations, results in any improper unequal treatment of FBOs. In our view, creating a level playing field for FBOs does not mean that agencies should be relieved of their oversight responsibilities relating to the equal treatment regulations."[7]

B. ACLU of Massachusetts v. Michael O. Leavitt, Secretary of Health and Human Services (U.S. District Court for the District of Massachusetts, settled February 22, 2006).

As the GAO report noted, the U.S. Department of Health and Human Services (HHS) provided extensive guidance for faith-based grantees in the context of one program, sexual abstinence education. HHS developed this guidance in response to a lawsuit over grants made by the agency to the Silver Ring Thing (SRT) for its sexual abstinence education programs with teenagers.[8] In May of 2005, the American Civil Liberties Union of Massachusetts (ACLU) sued HHS,[9] alleging

---

[4] On DOJ Community Corrections, GAO Report at 31-32. We discuss this program at greater length in part IV.
[5] GAO Report, 29-39.
[6] GAO Report, 68-82.
[7] GAO Report, 55.
[8] For more information about SRT's programs, see: www.silverringthing.com.
[9] For technical reasons the lawsuit was brought against Mike Leavitt, Secretary of HHS, acting in his official capacity, as well as against two other HHS administrators, also acting in their official capacities: Wade Horn,

that the grants to SRT violated the Establishment Clause's prohibition on direct financing of religious activities.[10] In particular, the ACLU claimed that SRT interwove religious messages throughout its government-funded program, used that program to proselytize, and provided only a weak form of the program to students who choose to receive a secular message.[11]

In August of 2005, HHS suspended SRT's grant after concluding that SRT lacked adequate safeguards to segregate the secular, government-funded portions of its program from the privately-funded religious components. HHS provided SRT with a list of "Safeguards Required" to bring its program into compliance and restore government funding. For reasons that remain somewhat disputed, HHS did not restore SRT's funding, and the grant was terminated in January, 2006.[12]

The most significant aspect of this settlement resides in the three-page document captioned "Safeguards Required," which provides the clearest and most specific guidance that the Administration has yet offered concerning the constitutional limits on direct aid to faith-based organizations.

On February 22, 2006, HHS and the ACLU agreed to settle the lawsuit. In the agreement that settled the ACLU lawsuit, HHS did not concede that its own actions violated any constitutional, statutory, or regulatory norms governing the use of public funds by religious entities. HHS committed itself, however, to follow a specified set of procedures should SRT apply for and receive future federal grants for sexual abstinence education programs. These procedures include notice to the ACLU that SRT has applied for or received future HHS funding, detailed requirements of HHS monitoring of expenditures under any grant to SRT, and a duty to obtain special assurances by SRT that it would comply with the terms of such a grant. The most significant aspect of this settlement, however, resides in the three-page document captioned "Safeguards Required," which HHS originally supplied to SRT as the set of conditions for reinstating the program's grant. This document provides the clearest and most specific guidance that the Administration has yet

---

Assistant Secretary for Children and Families, and Harry Wilson, Associate Commissioner, Administration on Children, Youth and Families. For purposes of simplicity, we will refer to these defendants as HHS.

[10] The ACLU's complaint can be found at: http://www.aclu.org/ReproductiveRights/ReproductiveRights.cfm?ID=18242&c=147.

[11] Our analysis of the ACLU's initial complaint in this lawsuit can be found at: http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=37.

[12] On its face, the settlement agreement suggests that SRT's funding was not restored because its program did not comply with the "Safeguards Required" by HHS. See p.2 of the Settlement Agreement, at: http://www.religionandsocialpolicy.org/docs/legal/cases/SRT-HHS-ACLU_Settlement%202-24-06.pdf.SRT, however, claims that the grant was fully paid notwithstanding the ACLU lawsuit. See SRT press release, at: http://www.silverringthing.com/press22806.html. That statement is difficult to reconcile with HHS's order of August 22, 2005 to "suspend… the drawdown of all Federal funds" until SRT complied with the ban on religious use of government funds – unless, of course, no funds remained to be withdrawn. See p. 2 of the Settlement Agreement.

offered concerning the constitutional limits on direct aid to faith-based organizations.

In its complaint, the ACLU alleged that SRT "makes no effort to segregate government funds for solely secular uses," and that it "uses taxpayer dollars to promote religious content, instruction, and indoctrination." The ACLU also alleged that HHS failed to establish and monitor safeguards to ensure that SRT would not divert government funds to religious uses.[13] Although SRT denied any misuse of government funds, an HHS review of SRT's expenditures concluded that "the Federal project that is funded under the SRT grant includes both secular and religious components that are not adequately separated," and for that reason HHS suspended future payments to SRT under the grant.[14] In an important sense, the HHS action responded to both facets of the ACLU's challenge. By addressing SRT's apparent failure to segregate secular and religious uses of government funds, HHS was also answering the ACLU's claim that the federal agency failed to establish and monitor adequate means of ensuring such segregation. If nothing else, HHS proved that it can identify and police the line between permissible and impermissible uses of government funds.

An HHS review concluded that "the Federal project that is funded under the SRT grant includes both secular and religious components that are not adequately separated."

In September, 2005, a month after completing its review of SRT's program, and suspending the grant that had supported that program, HHS provided SRT with a set of "Safeguards Required" for operation of the program in compliance with existing law and regulations.[15] HHS never restored SRT's funding – perhaps because SRT did not want to change its program to meet the requirements imposed by the Safeguards[16] – but the Safeguards document will, and rightly should, have a life beyond the termination of SRT's grant. As a practical matter, the Settlement Agreement ensures the continued importance of the Safeguards document, because the Agreement incorporates the provisions and procedures set forth in the Safeguards document as the normative framework to which any future grants to SRT will be subjected.

The Settlement Agreement contains a number of items in addition to the Safeguards document. During the term of the agreement, which runs through the end of the 2008 fiscal year (September 30, 2008), HHS agreed to scrutinize any SRT application for a grant to fund sexual abstinence education, and closely

[13] Complaint, ¶¶ 71 - 73.
[14] Letter from Harry Wilson, Associate Commissioner, Family and Youth Services Bureau, HHS, to Mr. Denny Pattyn, SRT (August 22, 2005). The letter is attached to the settlement agreement as Exhibit 1.
[15] Letter from Jeffrey Trimbath, Director, Abstinence Education, Family and Youth Services Bureau, HHS, to Mr. Denny Pattyn, SRT (September 20, 2005). The letter is attached to the settlement agreement as Exhibit 2.
[16] In the September 20 letter, SRT was asked to provide HHS with a Corrective Action Plan (CAP) that would conform its program to the provisions set forth in the Safeguards document. The settlement agreement is silent on the question of whether SRT filed such a plan.

monitor the performance by SRT of any grant that might be awarded. Moreover, HHS promised to notify the ACLU if SRT applied for or received a grant, and also to make publicly available the reports of any HHS inquiry into SRT's compliance with program restrictions.

Each of these parts of the agreement, however, depends on the answer to a more basic question. What activities may the government directly support? It is this question that the "Safeguards Required" document answers, and it does so in terms that are constitutionally accurate, unambiguous, and detailed.

1. Clarification of the phrase "inherently religious activities"

Since December of 2002, all rules and guidance materials promulgated by the FBCI have used the same phrase to define the Establishment Clause's limit on direct government aid to religion. For example, the HHS regulation governing SRT's grant provides that "Organizations that receive direct financial assistance from [HHS] under any Department program may not engage in inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services funded with direct financial assistance from the Department."[17] For the past three years, the White House and federal agencies have declined to provide additional guidance or clarification about the meaning of "inherently religious activities" under the regulations.

In many previous reports and comments on developments in the FBCI, we have raised concerns about the adequacy of the phrase "inherently religious activities" to describe the set of prohibited objects of direct government aid. That phrase, we have argued, could be construed to mean that the government may directly fund any activities except those that are "exclusively religious." The specific examples invariably given by FBCI publications to illustrate "inherently religious activities" – "religious worship, instruction, or proselytization" – leaves the phrase open to exactly that misunderstanding, because those activities seem to be done solely for religious purposes.

The U.S. Supreme Court's current interpretation of the Establishment Clause forbids direct public aid for any program that has significant religious content, even if that content is provided in a service activity that is not exclusively religious.

The U.S. Supreme Court's current interpretation of the Establishment Clause forbids direct government funding of "exclusively religious" activities, such as worship, religious instruction, or proselytization. However, it also forbids direct public aid for any program that has significant religious content, even if that content is provided in a service activity that is not exclusively religious. The

[17] 45 CFR § 87.1(c).

controlling law is found in Justice O'Connor's opinion in *Mitchell v. Helms*, in which the Establishment Clause analysis focuses on the government's support for religious indoctrination, even if that indoctrination occurs in a program that has a secular goal. For example, substance abuse treatment is not an exclusively religious activity, but direct government funding of a treatment program violates the Establishment Clause if that program incorporates religious messages in the service it provides at public expense.[18]

The lack of clarity about the line between permissible and impermissible direct expenditures has been the single most important weakness in the FBCI's legal guidance. If the Establishment Clause forbids the use of public aid only for activities that are "exclusively religious," then SRT would be permitted to use religious messages and commitments throughout its program, including the vows of sexual abstinence, because making – and, more importantly, learning how to keep – a commitment to sexual abstinence before marriage is not an "exclusively religious activity."[19] The Court's governing Establishment Clause law, however, focuses on the content of the activity supported, not on whether the activity is "inherently" or "exclusively" religious. If the activity involves a significant amount of specifically religious content, and the ACLU's complaint alleges that SRT's activity did include such content, then that program may not receive direct government aid.

The HHS Safeguards document states that "Any abstinence education program with religious content must be a separate and distinct program from the federally funded abstinence education program."

The Safeguards document resolves any ambiguity about the meaning of "inherently religious activity," at least with respect to SRT's program. In its opening sentence, the document reads: "Any abstinence education program with religious content must be a separate and distinct program from the federally funded abstinence education program."[20] Later, the document makes the same point with its requirement that SRT "eliminate all religious materials from the presentation of the federally funded abstinence education program" (SR ¶3). "Religious materials" encompasses any item or activity with religious content, from messages on rings to the wording of abstinence vows to materials sent home to parents. Throughout the document, the prohibition on aid for activities with religious content is treated as a logical conclusion from the regulatory ban on the use of funds for "inherently religious" activities.

---

[18] See, for example, *Freedom From Religion Foundation v. McCallum*, 179 F. Supp. 2d 950 (W.D. Wisc. 2002) (holding unconstitutional direct public aid to Faith Works, a faith-intensive substance abuse treatment program). See also our analysis of that decision at: http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=3.

[19] In light of this lack of clarity about the meaning of "inherently religious activities," we find wholly unsurprising SRT's claim that, at the time HHS suspended payment of the grant, SRT believed that it was acting in compliance with federal guidelines. SRT press release, online at: http://www.silverringthing.com/press22806.html.

[20] "Safeguards Required," ¶1 (document attached to Settlement Agreement). All subsequent references to this document will be incorporated in the text as "SR."

Two aspects of this new clarification deserve special attention. First, the clarification originated within the federal government. It was not forced on the government by the court or by the ACLU. An HHS administrator, Jeffrey Trimbath, identifies the Safeguards document in his September 20, 2005 letter to SRT, in which he indicates that the provisions contained in that document had been reviewed in a conference call with SRT that took place a day earlier.[21]

Second, the Settlement Agreement seems to recognize – at least implicitly – that the constitutional interpretation reflected in the Safeguards document rests on a body of Establishment Clause law that might change, perhaps even before the agreement expires on September 30, 2008. Paragraph 2 of the Settlement Agreement requires HHS to impose the Safeguards on any grant to SRT only "to the extent consistent with then-existing legal requirements administered by [HHS] as to all grantees." Changes in the personnel of the Supreme Court, and in particular Justice Samuel Alito's replacement of the now-retired Sandra Day O'Connor, lead many to speculate about future rulings on government aid to FBOs. One can certainly imagine a majority of the Supreme Court adopting a more limited reading of the Establishment Clause, one that permitted the use of religious messages in the service of secular goals such as substance abuse treatment or sexual abstinence education. Nonetheless, the Safeguards embody the present state of the law regarding aid to FBOs. Government may not provide direct support for programs that, like SRT, have specifically religious content.

2. The Safeguards and Sexual Abstinence Education Programs

Although the Safeguards document first surfaced in connection with this litigation, the document refers to sexual abstinence education programs generally, and by its own terms should apply to any federally funded sexual abstinence education program. It is fitting that the FBCI's clearest guidance on this core issue should arrive in the context of sexual abstinence education, because *Bowen v. Kendrick* (1988), the Supreme Court's landmark decision that opened the door to Charitable Choice and the Faith-Based Initiative, arose in the same context. In *Bowen*, the Court held that the Adolescent Family Life Act (AFLA) did not violate the Establishment Clause, even though the Act allowed religious entities (among a broad set of community organizations) to receive government funds for providing sexual abstinence education to minors. The Establishment Clause is not offended simply because a religious entity, funded under the public program, has religious reasons for promoting sexual abstinence that coincide with the

The Safeguards document refers to sexual abstinence education programs generally, and by its own terms should apply to any federally funded sexual abstinence education program.

[21] Trimbath letter, Settlement Exhibit 2.

government's secular reasons. The government's purposes remain validly secular, even when furthered by religious entities.

The Court in *Bowen* upheld AFLA, but sent the case back to the lower courts to determine "whether [HHS] has permitted AFLA grantees to use materials that have an explicitly religious content or are designed to inculcate the views of a particular religious faith."[22] The object of such an inquiry was twofold. First, it sought to discover whether particular AFLA grantees were engaging in religious indoctrination in and through the government service program. As the Court had earlier held, and Justice O'Connor would later emphasize, the Establishment Clause prohibits "government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith,"[23] even if such indoctrination occurs in a program that has a manifestly secular purpose.

In a program without meaningful procedures for monitoring grantees' compliance, the government may be deemed constitutionally responsible for a provider's religious indoctrination of program beneficiaries, even if that indoctrination violates specific written regulations.

Second, *Bowen* also required the lower court to determine whether HHS had developed and implemented adequate procedures to monitor AFLA grantees' compliance with constitutional restrictions on the use of government funds. The *Bowen* Court's wording of the remand instructions is significant, and worth repeating: "whether [HHS] has *permitted* AFLA grantees to use materials...." In a program without meaningful procedures for monitoring grantees' compliance, the government may be deemed constitutionally responsible for a provider's religious indoctrination of program beneficiaries, even if that indoctrination violates specific written regulations.[24]

On remand in *Bowen*, the parties to the litigation reached agreement on conditions for the funding of religious providers under AFLA. In addition to excluding all "pervasively sectarian" providers, these conditions included a strict system of monitoring by HHS, with prior approval of all

---

[22] *Bowen v. Kendrick*, 487 U.S. 589, 621 (1988). The Court also remanded the case to determine whether grants had been made to "pervasively sectarian organizations." As we noted in our earlier commentary on *ACLU v. Leavitt*, the Court has almost certainly jettisoned the concept of "pervasively sectarian organizations" as a set of entities barred from direct public aid. See our discussion of this concept in the 2002 State of the Law Report, at 29-34.

[23] *Bowen*, 487 U.S. at 611 (citing *Grand Rapids v. Ball*, 473 U.S. 373, 385 (1985).

[24] Justice O'Connor's concurring opinion in *Bowen* points to the constitutional significance of program safeguards against diversion of funds, but the concept only becomes fully developed – and constitutionally determinative – with her opinion *in Mitchell v. Helms*. See our analysis of O'Connor's view of safeguards in the 2005 State of the Law Report, at 14-17; see also Lupu and Tuttle, The Faith-Based Initiative and the Constitution, 55 DePaul L. Rev. 1, 89-102 (2005). In *ACLU of Louisiana v. Foster* (2002), a federal district court held that the Louisiana Governor's Program on Abstinence violated the Establishment Clause because it provided government funds to religious providers, and then failed to monitor their compliance with restrictions on religious content in the program, or even to respond when several providers disclosed extensive use of religious literature and themes. For further detail about this decision, see our analysis at: http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=5. As the court in Foster concluded, the government may bear responsibility for religious indoctrination in programs that it funds if it fails to provide and enforce appropriate restrictions on the inclusion of religious content in such programs.

curricula used by religious providers, and restrictions on the presence of religious images or publications in the space used for the program.[25] Although the *Bowen* agreement expired in 1998, HHS sexual abstinence education programs continued to abide by those restrictions at least into 2002.[26]

HHS's decision to lift the restrictions imposed by the *Bowen* agreement falls within the broader narrative of the Faith-Based Initiative. A number of elements of that agreement clearly belong to an earlier, more Separationist era of Establishment Clause law. Most significantly, the agreement's categorical exclusion of "pervasively sectarian organizations" is not required by current law, which focuses on the religious content of the activity funded, not the religious character of the funded entity. In addition, the *Bowen* agreement requires that religious images or symbols must be removed from any space used to provide the sexual abstinence education program. Like the ban on "pervasively sectarian organizations," such a requirement seems to be aimed more at the religious character of a funded entity than at the religious content of its program.

Although freed of the detailed conditions imposed by the *Bowen* agreement, HHS and its religious grantees are still bound by the law of the Establishment Clause. In many respects, that law has shifted considerably since *Bowen*, but the underlying inquiry remains unchanged. Should the government be deemed responsible for a grantee's religious indoctrination of program beneficiaries? The Safeguards document explains why that inquiry demands heightened sensitivity in the context of sexual abstinence education programs for minors:

> *[F]ederal guidelines that have been drafted for situations where a federal grantee also provides religious programming use examples where an organization offered programs that are completely different from each other such as a soup kitchen and a prayer meeting. Because the SRT organization offers two programs that both promote abstinence until marriage and because the clients served are children, it is very important that the separation between the [secular and religious] programs be accentuated (SR ¶2).*

The comment tacitly acknowledges that existing federal guidance materials have not adequately addressed the important – and entirely foreseeable – issues raised by religious grantees providing services that involve personal transformation, whether through substance abuse treatment, prisoner reentry preparation, or sexual abstinence education.

The comment then identifies the two characteristics of sexual abstinence education grants that require heightened governmental scrutiny. First, the

[25] "Guidance to AFL Grantees," Health & Human Services, Public Health Service, March 3, 1993 (copy on file with the authors and the Roundtable on Religion and Social Welfare Policy).
[26] See 2002 State of the Law Report, at 59-63 (on HHS sexual abstinence education program restrictions in 2002).

program targets minors, who are especially vulnerable to indoctrination (when compared to adults). This can be readily seen in the Supreme Court's Establishment Clause decisions concerning religion in public schools. Although Establishment Clause jurisprudence has generally moved away from Separationism, the Court's decisions on government sponsored religious expression in public schools have moved in the opposite direction, toward even greater exclusion.[27] In programs that involve minors, the government may have special obligations to ensure that providers do not exploit the vulnerability of beneficiaries.

Second, careful application of the Establishment Clause requires greater governmental scrutiny, and more robust restrictions on the grantee, when that grantee provides religious programming that involves the same subject matter or set of problems as its government-funded programming. In part, this scrutiny of the close tie between the two programs arises from a concern that public funds will be diverted from the secular to the religious program. Such concerns are exacerbated by the difficulty of monitoring employees' time when that time is shared between the religious and secular programs.[28] As we noted above, the government has an affirmative duty to guard against improper use of funds for religious purposes. Such a duty is considerably harder to fulfill where grantees offer secular and religious programs that are closely aligned.

The government has an affirmative duty to guard against improper use of funds for religious purposes. Such a duty is considerably harder to fulfill where grantees offer secular and religious programs that are closely aligned.

In addition, the Safeguards comment offers a specific and useful vantage point from which to view the connections between a grantee's religious and secular programs. According to the comment, "the distinction [between religious and secular programs] must be completely clear to the consumer" (SR ¶1). This analytic approach owes much to Justice O'Connor's Establishment Clause jurisprudence, which routinely examined problems from the perspective of those individuals most affected by a governmental action.[29] If a beneficiary is led to believe that participation in religious components of a program is a condition of receiving a government-provided service, the beneficiary may believe that the government itself is forcing her to choose between accepting the religious experience or foregoing the benefits of the service. Thus, sharp distinctions between the grantee's secular and religious programs are required to ensure that

[27] On the same day that the Supreme Court decided *Mitchell v. Helms* (2000), which permitted a much broader range of direct aid to religious schools, the Court also decided *Santa Fe v. Doe*, which held unconstitutional a rule that created a regime of student-led prayer before public school athletic events. See 2002 State of the Law Report, at 30.
[28] We discuss this problem of apportionment both in the context of employees' pay, in *FFRF v. McCallum*, available online at: http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=3, and in the context of aid for the restoration or repair of religious structures, in the essay *New Federal Policies on Grants for Disaster Relief or Historic Preservation at Houses of Worship and Places of Religious Instruction*, online at: http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=16. See below for further discussion of the proportional payment issue as addressed in the Safeguards document.
[29] See 2005 State of the Law Report, at 10-19.

beneficiaries do not come to believe that the government is responsible for the content of both programs.

> **Sharp distinctions between the grantee's secular and religious programs are required to ensure that beneficiaries do not come to believe that the government is responsible for the content of both programs.**

3. The Safeguards as Model Guidance

Those responsible for abstinence education programs are not the only ones who would benefit from a close study of the Safeguards document. Any government-funded social service that involves transformation of character or behavior must confront the same issues addressed in that document. In the following paragraphs, we identify the basic legal principles within the Safeguards document that can be applied across a wide range of service areas, and suggest how an understanding of those principles can help to provide sound, program-specific guidance for government officials and FBO leaders alike.

a. Context

The most important feature of the Safeguards document is its recognition that Establishment Clause analysis depends greatly on the specific context of the program at issue. This dependence flows from the core constitutional inquiry – is the government responsible for a grantee's religious indoctrination of program beneficiaries? The answer to that question rests on at least three basic features of a program: the vulnerability of beneficiaries to such religious indoctrination; whether the service is of a type that aims at the personal transformation of beneficiaries, rather than simply delivering goods such as food or shelter; and whether the service provider offers religious programming that is closely related to the secular service funded by the government.

Those three features provide an interpretive prism that can then be used to evaluate other characteristics of a program. In the SRT case, the prism disclosed a context that required heightened sensitivity. The beneficiaries were all minors, and SRT's program certainly had more ambitious aims than that of delivering material goods. Its program intended to reshape the teenagers' values, and specifically elicited from them commitments to lead lives of a particular quality. Finally, SRT's government-funded program was seamlessly joined with its religious program, such that the program appeared to be suffused with the hope of developing teenagers' moral commitments of sexual abstinence into religious commitments. As we explain below, those characteristics of SRT's program significantly increased the likelihood that the government would be found responsible for any religious indoctrination of beneficiaries. Given that increased likelihood, the government agency was faced with a choice: revoke the grant; or impose stricter limits on the use of government funds, along with more intense monitoring of such limits.

b. Line-Drawing and Governing Principles

Establishment Clause analysis, especially in the consideration of direct aid programs, is essentially an exercise in line-drawing. One side of the line represents the set of activities permitted within a government-funded program; the other side of the line represents the set of activities that the government may not directly finance. A lawyer averse to legal risk might recommend a broad exclusion of religious grantees, thereby minimizing the chances that a program would involve the government in religious indoctrination. And indeed, many government officials did – and some continue to – exclude at least some types of FBOs from participation in social welfare programs. Such broad strategies of exclusion, however, run contrary to the strong public policy of the federal government, and are certainly not required by the currently prevailing reading of the Establishment Clause. Instead, those required to provide legal guidance to government agencies must attempt to reconcile the policy goals of providing a "level playing field" for FBOs, and for enlisting such organizations' assistance in reaching those most in need, with the Establishment Clause's restrictions on direct aid to religion.

Government is responsible for indoctrination if public aid is diverted to uses that are not secular in content. Government is also responsible if the service program lacks adequate safeguards to prevent funds from being diverted to religious uses.

That work of reconciliation begins with a return to Justice O'Connor's statement of the core legal issue, from her controlling opinion in *Mitchell v. Helms*. When is the government constitutionally responsible for religious indoctrination, by government-funded service providers, of program beneficiaries? In *Mitchell*, O'Connor provides two answers. Government is responsible for such indoctrination if public aid is diverted to uses that are not secular in content. Government is also responsible if the service program lacks adequate safeguards to prevent funds from being diverted to religious uses.[30]

Although perhaps hard to appreciate in the abstract, O'Connor's analysis in her *Mitchell* concurrence is far from hostile to FBOs and their public grantors. Most significantly, O'Connor rejects the presumption that religious entities and officials will divert public aid to religious purposes. The dissenting justices in *Mitchell* adopted that presumption, and reasoned that if government cannot trust FBOs or their officials to comply with restrictions on the use of public aid, then such aid may only flow to religious entities in very limited circumstances. For O'Connor, however, FBOs enjoy the benefit of doubt that they can and will comply with rules governing appropriate uses of funds. Nonetheless, that presumption of trust can be lost, either through proof that aid has actually been diverted to religious uses, or through a showing that government lacks effective oversight to determine whether any such aid has been diverted.

[30] We develop Justice O'Connor's *Mitchell* analysis at much greater length in Lupu & Tuttle, The Faith-Based Initiative and the Constitution, 55 DePaul L. Rev. at 75-102.

c. The Safeguards

The Safeguards document translates Justice O'Connor's *Mitchell* analysis into a model of clear, practical guidance for sexual abstinence education programs. We offer here a brief commentary on each paragraph of the Safeguards, attempting to place the document's guidance within a broader framework of constitutional and regulatory norms.

i. Separate and Distinct Programs

The first paragraph requires SRT or any similar grantee to create wholly secular abstinence education programs, entirely distinct from their faith-based programs. At first glance, this requirement appears similar to a traditional rule that required religious entities to set up separate, secular charitable entities in order to be eligible for government grants and contracts. Erasing that traditional rule has been one of the main goals of the Faith-Based Initiative, which has sought to allow FBOs to participate in government aid programs, while maintaining their religious character.

On closer inspection, however, it seems unlikely that the first paragraph of the Safeguards document was intended as a limit on the religious character of SRT or any other provider. Instead, the paragraph focuses on the potential diversion of public funds to religious use. If, as was the case with SRT, the religious and publicly supported programs share the same "brand," and the same embodiments of such a brand – name, promotional materials, website – public resources devoted to the support of the secular program will inevitably, and directly, support the religious program as well.

Moreover, the requirement of separate and distinct programs is essential, at least in the context of sexual abstinence education, to avoid governmental responsibility for the religious indoctrination of service beneficiaries. This analysis takes a somewhat different approach than the prior treatment of diversion, because the concern here is more fundamental. The problem with a seamless unity of secular and religious programs rests not merely in the subtle subsidy that the public program might provide for the religious program, but in the risk that the public program as a whole might be operated for the benefit of the religious program. In SRT's case, that concern gave rise to suspicions that the publicly financed program of sexual abstinence education intentionally steered teenagers into religious experience.

The problem with a seamless unity of secular and religious programs rests not merely in the subtle subsidy that the public program might provide for the religious program, but in the risk that the public program as a whole might be operated for the benefit of the religious program.

Finally, the first paragraph's guidance also rests – if less explicitly – on the second prong of Justice O'Connor's *Mitchell* analysis, the requirement of adequate safeguards against diversion of funds to religious use. Seen in light of this analysis, the demand for separate and distinct programs can be understood as a reliable means of ensuring that promotional aid for the secular program is not captured for the primary benefit of the religious program.

ii. Separate Presentations

The second paragraph follows logically from the first. Because the secular and religious programs are separate and distinct, the grantee's presentation of those programs also must be separate and distinct. Not surprisingly, the rationale for this guidance also follows the same general line as that for the first paragraph. The requirement of separate presentations minimizes the risk that government funds will be diverted to religious use, and also makes it somewhat less likely that the publicly funded program will be designed and run as a means to steer beneficiaries into the provider's religious program.

The requirement of separate presentations minimizes the risk that government funds will be diverted to religious use, and also makes it somewhat less likely that the publicly funded program will be designed and run as a means to steer beneficiaries into the provider's religious program.

Unlike the guidance in the first paragraph, which is developed as an interpretation of agency rules, the second has an explicit regulatory basis. If a grantee holds religious activities, "the activities must be offered separately, in time or location, from the programs or services funded with direct financial assistance from [HHS]."[31] The Safeguards document adds one significant interpretive gloss to the rule. The document suggests that the relevant perspective for determining the "separateness" of presentations should be that of a program beneficiary. Each of the examples focus attention on beneficiaries' experience of the respective programs, emphasizing the need for beneficiaries' subjective disengagement from one program before another can begin.

This focus on beneficiaries and their experience has at least two implications. First, it reflects a commitment that beneficiaries' participation in religious experience should be consciously chosen, and not something entered thoughtlessly, as beneficiaries are drawn without pause or question through the public program and into the religious one. Second, the focus on beneficiaries reflects an even deeper commitment that religious experience should be freely chosen, rather than an experience accepted by beneficiaries because they believe it is a condition of receiving the public service. Whether beneficiaries drift into, or feel themselves compelled into, religious experience, the Establishment Clause

[31] 45 CFR 87.1 (c).

violation arises out of the government's responsibility for their journey into religious experience.

iii. Religious Materials

The third paragraph requires grantees to "eliminate all religious materials from the presentation of the federally funded abstinence education program." Like the first paragraph, this exclusion seems to strike a chord of hostility to religious identity or character. As with the first, however, the exclusion is limited to the content of the service – "the presentation" – not the religious identity of those who provide the service.

Perhaps implicit in this list of excluded items is an assumption that many program beneficiaries, if given a choice, would want to receive religious materials, such as Bibles or rings inscribed with religious messages. Apart from programs of indirect financing (such as a school voucher system), however, the voluntary consent of program beneficiaries does not cure Establishment Clause problems. Direct public aid for a program that, as an integral part of its service, distributes Bibles or other religious materials, violates the Establishment Clause.

iv. Cost Allocation

The question of allocating costs – whether the salary of a substance abuse counselor or the maintenance of a van used to transport service beneficiaries – may appear mundane, but it raises the most basic issues under the Establishment Clause. The prohibition on diversion of public aid to religious uses, and the obligation imposed on government to provide adequate safeguards against such diversion, directly implicate the question of how costs are allocated. A counselor employed by a provider of sexual abstinence education might spend part of her time working on a publicly financed, secular program, and another part of her day working on a religious program. Courts in other contexts have been skeptical of claims that such counselors could or would honestly segregate their time between hours of secular work, which are eligible for government subsidy, and hours of religious work.[32]

The prohibition on diversion of public aid to religious uses, and the obligation imposed on government to provide adequate safeguards against such diversion, directly implicate the question of how costs are allocated.

The Safeguards document, however, follows the analysis Justice O'Connor adopted in *Mitchell*. Her analysis rests on a presumption that individuals will act in good faith, and are generally willing and able to comply with clear rules. That

[32] In *Freedom From Religion Foundation v. McCallum*, the court rejected a counselor's estimation of relative time spent engaged in religious and secular counseling. 179 F. Supp. 2d 950 (W.D. Wisc. 2002) See also our analysis of that decision at: http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=3.

presumption itself rests on a prior condition, one also recognized by the Safeguards document. Our hypothetical counselor can only allocate time to one program rather than the other if she can reliably determine when work for one program ends and the other begins. The first two paragraphs of the Safeguards should be seen in this light. Without clear distinction between programs, cost allocation is impossible. And if cost allocation is impossible, the government cannot meet its obligation of ensuring that public funds are not diverted to religious use.

Without clear distinction between programs, cost allocation is impossible. And if cost allocation is impossible, the government cannot meet its obligation of ensuring that public funds are not diverted to religious use.

Resting on the foundation of separate and distinct programs, the fourth paragraph offers sound examples of how to allocate a range of costs. With respect to staff time, the default requirement is that public funding must be linked to specific hours worked by specific staff, documented by time sheets. Such a policy both avoids diversion to religious use, and also provides the means through which government can monitor the grantee's use of funds. The Safeguards document indicates that, under some narrow and limited circumstances costs may be shared between publicly funded and other programs. Such shared expenses, however, do not extend into program development, operation, or promotion, because any sharing of that kind or extent would weaken the "separate and distinct" identities required by the first two paragraphs of the document.[33]

v. Advertisements

The fifth paragraph prohibits grantees from limiting their potential set of beneficiaries "to only religious target populations." The Safeguards document, and the regulation it cites, view this provision primarily in terms of discrimination against service beneficiaries. While that is no doubt true, the provision is also relevant for assessing the extent to which a particular grantee has internalized – or perhaps even grasped – the basic requirement that the grantee must provide an exclusively secular program. An inclination to define one's audience by religion is likely to be followed by an inclination to deliver the program's content in those terms as well.

vi. Invitation to Religious Program

The sixth paragraph permits the grantee, at the end of the government sponsored abstinence education program, to "provide a brief and non-coercive invitation to attend the religious abstinence education program." This permission depends on the separation of secular and religious programs, and on how that separation is perceived by program beneficiaries. If the programs have been objectively

[33] The Safeguards document also explicitly rejects any proposal to allow proportional allocation of costs for promoting the shared religious/secular brand. ¶ 1.

separated, and beneficiaries understand that the religious program is both completely voluntary and not associated with the government, then the invitation is constitutionally appropriate. One can easily imagine such an invitation being made by any organization that has made a presentation at a school event.

4. The Need for Government Monitoring

Finally, we note that the Settlement Agreement reflects the general constitutional principle that a government agency that directly funds a faith-based provider may not merely specify a set of substantive safeguards, and then ignore the question of compliance with them. The Agreement requires that in the event of further grants to SRT, HHS must have regular procedures in place to monitor SRT's compliance with the safeguards.[34] These procedures include quarterly monitoring phone calls "that will include discussing key issues, problems, and corrective actions proposed,"[35] and on-site inspection as necessary and appropriate in light of information obtained through such phone calls. Although these particular monitoring procedures are not the only constitutionally acceptable options, those who make public funds available to FBOs must be mindful of their legal responsibility to monitor compliance with safeguards against diversion of public funds to religious activity. Moreover, this responsibility attaches to private intermediaries, such as Compassion Capital Fund grantees, who dispense public funds as much as it does to public agencies similarly engaged in making grants to FBOs. With respect to the question of religious content in social services, the Settlement Agreement is a stern reminder that a policy of "Don't Ask, Don't Tell" is not a legally sound strategy.

Those who make public funds available to FBOs must be mindful of their legal responsibility to monitor compliance with safeguards against diversion of public funds to religious activity. This responsibility attaches to private intermediaries, such as Compassion Capital Fund grantees, who dispense public funds, as much as it does to public agencies.

Conclusion

The Safeguards document represents a major legal development in the FBCI because the document directly identifies the set of goods and activities that the government may not directly fund. Following the line of decisions that reaches back to the Supreme Court's own encounter with sexual abstinence education, the document provides a concise and accurate answer. At least in the context of abstinence education, the government may not directly fund programs that have

[34] Settlement Agreement, ¶3.A.2.

[35] ¶3.A.2.c.

religious content. The document then proceeds to draw from that answer a body of practical guidance. This guidance starts with the requirement of segregated programs, a requirement that meets the constitutional demands both to avoid diversion of funds and to establish effective safeguards against such diversion. The document then shows how separation of programs in that manner satisfies a variety of constitutional or regulatory concerns, ranging from the voluntary participation of beneficiaries in religious activities to the method for allocating costs when staff work on both government-sponsored and religious programs. All of this guidance, however, depends on that first step – the clear designation of what is permitted, and what is prohibited, as an object of direct government support. Where that first step remains unsure, no clarity will follow.

Guidance depends on the clear designation of what is permitted, and what is prohibited, as an object of direct government support. Where that first step remains unsure, no clarity will follow.

II. GRANTS FOR CAPACITY-BUILDING

A. Barry Christianson (and others) v. Michael O. Leavitt, Secretary of Health and Human Services (and others). U. S. District Court for the Western District of Washington. Lawsuit filed September 12, 2006.

Since its creation in 2002, the Compassion Capital Fund (CCF) has been a significant component of the Faith-Based and Community Initiative.[36] CCF offers a variety of types and sources of assistance to faith-based and community providers of social welfare services. Working through private intermediary organizations, CCF funds training and technical assistance for these faith-based and community groups, helping them to be more effective in delivering services, and also to improve their ability to apply for and manage public funding of their services. CCF intermediaries also award sub-grants to faith-based and community providers in order to foster 'best practices' in particular services areas.[37]

Although several lawsuits have raised Establishment Clause challenges to CCF grants for delivery of particular services, no lawsuit had directly addressed the heart of CCF – support for building the capacity of organizations to deliver services. However, on September 12, 2006, Americans United for Separation of Church and State filed suit against the Secretary of Health and Human Services (HHS) and two of that department's CCF grantees. The suit, filed on behalf of thirteen Washington taxpayers, alleges that those grants have been used to finance religious activities, in violation of the Constitution's Establishment Clause. The lawsuit targets two grants made to the Northwest Marriage Institute (NMI)[38], a faith-based marriage education and counseling provider. NMI has used the grant funds to purchase computer and audio-visual equipment, create and maintain a website, and train its staff in fundraising and financial management. The lawsuit alleges that NMI has used the resources and skills acquired with the grants to conduct and support its program of expressly religious marriage counseling. The plaintiffs have asked the court to declare defendants' expenditure of public funds to be unconstitutional, to enjoin future HHS grants to NMI, and to order the grantees to repay all government aid that has been used for unconstitutional purposes. The defendants will have several weeks in which to answer the complaint, and are expected to raise legal and factual challenges to the plaintiffs' claims.

The lawsuit raises difficult and novel questions about the constitutionality of government financial assistance in building the capacity of religious

---

[36] http://www.acf.hhs.gov/programs/ccf.
[37] For full range of CCF activities, see HHS news release about 2003 CCF grants, http://www.acf.hhs.gov/news/press/2003/release_092203.htm.
[38] http://www.northwestmarriage.org.

organizations. Such aid has an uncertain status under current Establishment Clause jurisprudence, because the aid was not intended to directly finance the religious content of NMI's programming, but CCF funds inevitably provide financial support for the organization's religious activity. If NMI only provides services that have religious content – and the services are therefore ineligible for direct public assistance – may the government nonetheless provide the organization with funding to build its capacity to provide such services? Clarity on this question is greatly needed, because the Compassion Capital Fund (CCF) – among the most important components of the faith-based initiative – focuses its financial aid on capacity-building in faith-based and community-based organizations.

If an organization only provides services that have religious content – and the services are therefore ineligible for direct public assistance – may the government nonetheless provide the organization with funding to build its capacity to provide such services?

Moreover, the lawsuit represents the first Establishment Clause challenge to a faith-based program of marriage education and counseling. Although plaintiffs in this case challenge grants made under the CCF, Congress and the Administration have made a significant investment in this area through a different program, the Healthy Marriage Initiative,[39] under which the government plans to spend $750 million over the next five years on marriage-related education and research. The Healthy Marriage Initiative, like all federal grant programs, is open to faith-based providers, and this lawsuit may clarify the constitutional restrictions imposed on public funding of such providers.

Description

In its lawsuit, Americans United for Separation of Church and State (AU) alleges that two CCF grants were used to subsidize the religious activities of NMI. The Department of Health and Human Services (HHS) made the first grant, through the CCF Demonstration Program, to an intermediary entity, the Institute for Youth Development (IYD),[40] which provides training and technical assistance to faith-based and community-based organizations. Under its CCF grant, IYD also makes subgrants to such organizations, for the purpose of capacity-building. In June of 2005, NMI received a $47,750 subgrant from IYD, and used the proceeds from the grant to purchase computer, audio-visual, and other office equipment; to teach employees how to apply for and manage government grants, and to improve skills in financial management; and to pay part of the salaries of NMI's two staff members. HHS made the second grant, under the CCF Targeted Capacity-Building Program, directly to NMI. In September, 2005, NMI received a $50,000 grant that the organization has used to create and maintain a website, and to receive additional staff training in fundraising.

[39] http://www.acf.hhs.gov/healthymarriage.
[40] http://www.youthdevelopment.org.

AU's complaint asserts that HHS and its intermediary, IYD, violated the Establishment Clause by financing the religious activities of NMI, and by failing to institute adequate safeguards that would have prevented NMI from using public funds for religious purposes. In the paragraphs below, we explain and analyze the specific constitutional claims that AU raises against HHS and its grantees.

The complaint asserts that HHS and its intermediary, IYD, violated the Establishment Clause by financing the religious activities of NMI, and by failing to institute adequate safeguards that would have prevented NMI from using public funds for religious purposes.

Analysis

AU identifies four discrete categories of expenditures, each of which presents somewhat different issues for analysis under the Establishment Clause. These four categories are: (A) design and maintenance of NMI's website; (B) computers, audio-visual equipment, and other office equipment, including a copier and printer; (C) training and technical assistance in fundraising and financial management; and (D) part of the salaries of NMI's two employees. Although the differences among the expenditures are important, as our analysis will describe, the four categories share one legally significant characteristic. All reflect direct public aid for a religious organization, and are thus governed by the constitutional rule announced by Justice O'Connor in her concurring opinion in *Mitchell v. Helms*.[41] Because the CCF grant funds cannot reasonably be described as a type of indirect[42] – or voucher – aid for NMI, the government will be deemed constitutionally responsible for NMI's use of funds for religious purposes unless the following four conditions are met:

> (1) the government aid must be offered to a broad class of beneficiaries, both religious and secular;
>
> (2) the aid must be secular in content;
>
> (3) the aid must not be used for specifically religious activities, which includes programs with religious content;
>
> (4) government must establish safeguards that are adequate to prevent grantees from diverting public funds to religious uses.

---

[41] 530 U.S. 793, 837 (2000). We have provided extended analysis of this constitutional rule at a number of other places. See, e.g., the 2005 State of the Law Report, at 14-17; see also Lupu and Tuttle, The Faith-Based Initiative and the Constitution, 55 DePaul L. Rev. 1, 89-102 (2005) (available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=727744).

[42] In an program of indirect aid, government provides all eligible beneficiaries with a choice among a wide range of uses for the public assistance, such as a college scholarship that can be redeemed at any place of higher education. For a description of indirect aid programs – also referred to as beneficiary choice programs – see our analysis of the Supreme Court's decision in *Zelman v. Harris* (2002), online at: http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=10. See also our analysis of the federal appellate court's decision in *FFRF v. McCallum* (7th Cir. 2003), online at: http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=15.

The expenditures challenged in AU's lawsuit all pass scrutiny under the first two requirements. CCF grants are open to both religious and non-religious entities, and selection of grantees is based on secular factors, such as the specific types of need in a community.[43] Moreover, all four types of aid are secular in content; the government has not directly financed religious materials or worship. Electronic devices, website designers, and fundraising trainers all constitute forms of governmental assistance that are not intrinsically religious. Thus, the constitutional analysis turns on the last two requirements of the *Mitchell* test – the restriction on the use of public funds for religious activities, and the means used to enforce that restriction. With those two requirements as our measure, we will explore each category of aid challenged in the AU's lawsuit.

1. The NMI Website

AU alleges that NMI has used part of its direct funding under the CCF Targeted Capacity-Building Program to create and maintain a website "to disseminate information and to solicit donations" (Complaint, ¶ 40). The complaint asserts that NMI's website contains a significant amount of religious content, including scriptural references and explicitly theological concepts that support or explain the messages advanced by the program (Complaint, ¶ 43).[44] AU's claims about the website exemplify its most basic argument about NMI – the grantee's programs thoroughly intertwine religion with the marriage education and counseling services it offers, and thus NMI's website reflects its religious approach to the full range of issues that the organization addresses.

AU claims the grantee's programs thoroughly intertwine religion with the marriage education and counseling services it offers.

Before turning to the constitutionality of public aid for NMI's website, we note that HHS might claim that NMI's use of the CCF-funded website violates the terms of its CCF grant. In the grant application, HHS instructs grantees that the "inherently religious activities" of grantees must be segregated from "programs or services funded with CCF assistance." The application continues: "Some of the ways this may be accomplished include, but are not limited to, promoting only the Federally funded aspect of the program in materials, websites, or commercials purchased with any portion of the Federal funds."[45] If the NMI website was financed through the CCF grant, then the use of funds would appear to violate the requirement that public funds only support the "Federally funded aspect of the

[43] In an earlier lawsuit involving a CCF intermediary's subgrants, a federal district court found that the method for awarding such grants did not impermissibly favor religious applicants. *FFRF v. Towey* (W.D. Wisc. 2005), see our analysis of this decision online at: http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=32.

[44] The complaint also alleges - and inspection of the website confirms - that NMI uses the website to actively solicit donations for its program. Such solicitation would appear to contravene federal restrictions on the use of public funds for direct fundraising activities. OMB Circular A-122, Part B.17(a). Online at: http://www.whitehouse.gov/omb/circulars/a122/a122_2004.html.

[45] The 2006 CCF Targeted Capacity-Building Grant application is available online at: http://www.acf.hhs.gov/grants/open/HHS-2006-ACF-OCS-IJ-0036.html. The relevant portion is located in Part I.B of the application.

program," because NMI's explicitly religious marriage counseling and instruction is constitutionally ineligible for direct federal funding. The CCF's restriction could understandably create confusion for a grantee such as NMI, because – if AU's factual claims are accurate – NMI might be able to pay for a website with its CCF grant, but the website would not be permitted to say anything about the program for which NMI exists, its faith-rich marriage counseling.

Even if the website expenditure does not violate the terms of NMI's grant, however, public aid for the website raises serious issues under current Establishment Clause jurisprudence. As noted above, the *Mitchell* standard provides that government funds may not be used to directly support religious activities. Here, AU alleges, NMI is using a government-supported website to promote and disseminate its explicitly religious marriage counseling program. Under the *Mitchell* standard, the diversion of public aid to support religious activities violates the Establishment Clause, and the facts alleged by AU suggest such a diversion in this case, at least with respect to the website.

By suggesting that only "worship, religious instruction, and proselytization" are prohibited uses of direct aid, the government may inadvertently lead grantees to believe that the law permits them to use explicitly religious language and concepts in the provision of social welfare services. However, such use is considered just as religious for constitutional purposes as worship or proselytizing.

In assessing the website, the court might also examine HHS's safeguards against diversion of funding, and on this issue, too, the court might rule against the defendants. HHS, in its CCF grant application, does inform grantees that CCF-supported activities must be segregated from those that are "inherently religious." But HHS does not offer a clear and comprehensive statement of the activities courts would deem to be "inherently religious." Indeed, as we have argued elsewhere, by suggesting that only "worship, religious instruction, and proselytization" are prohibited uses of direct aid, the government may inadvertently lead grantees to believe that the law permits them to use explicitly religious language and concepts in the provision of social welfare services, such as marriage counseling or substance abuse treatment. Under current Establishment Clause law, however, such use is considered just as religious for constitutional purposes as worship or proselytizing.[46]

[46] See, e.g., *FFRF v. McCallum* (W.D. Wisc. 2002), and our analysis online at: http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=3. See also our analysis of the settlement in *ACLU v. Leavitt* (a lawsuit involving the Silver Ring Thing sexual abstinence education program), online at: http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=44.

2. Computers, Office Machines, and Audio-Visual Equipment

AU claims that NMI used part of its CCF subgrant from IYD to purchase "computers, printers, an LCD projector, and a portable public-address system," and that NMI has used at least some of these resources in the presentation of its marriage counseling program (Complaint, ¶ 42). As with the website, NMI's use of government-funded goods falls under the *Mitchell* standard, which requires that such goods must be segregated from the religious activities of the grantee. If AU's factual allegations are correct, then NMI appears to have used the equipment to promote its religious message, in violation of the Establishment Clause.

Does the constitutional restriction on a grantee's use of government-funded resources continue or expire at the end of the grant term? The question is important, because the CCF grants and subgrants are typically short in duration, and are not generally renewable.

NMI's use of these resources raises two additional questions that are not made explicit in the AU complaint, but are likely to arise at some point in the legal proceedings. First, does the constitutional restriction on a grantee's use of government-funded resources continue or expire at the end of the grant term? The question is important, because the CCF grants and subgrants are typically short in duration, and are not generally renewable. NMI's subgrant from IYD, for example, lasted for only six months.

Property acquired by a grantee using government aid is subject to certain restrictions on its use or disposition at the end of the grant, and these restrictions are contained in OMB Circular A-110, Part C.[47] Under these regulations, the resources at issue would be classified as "supplies," and NMI would be required to reimburse HHS for some portion of their value if the aggregate value of retained supplies exceeds $5000 at the end of the grant.[48] Thus, if NMI's computers, audio-visual equipment, and office machines have a total fair market value of more than $5000 at the end of NMI's grant, then NMI would be required to pay HHS some portion of the current value of the goods in order to retain them.[49]

Nothing in the HHS or IYD informational materials about the CCF, however, suggests that grantees will need to return or repay the cost of computers and other equipment purchased with the grant funds. Indeed, at least part of the justification for the program is that the capacity-building grants will enable small organizations to acquire the resources necessary for them to engage in a broader scope of service activities and partnerships, and computers and similar equipment

[47] These can be found online at: http://www.whitehouse.gov/omb/circulars/a110/a110.html. The relevant OMB provisions mirror those found in the HHS regulations, 45 CFR §§ 74.34 & 74.35.
[48] 45 CFR § 74.35(a).
[49] 45 CFR § 74.34(g) ("The amount of compensation shall be computed by applying the percentage of Federal participation in the cost of the original project or program to the current fair market value of the equipment.") If the CCF grant financed 100% of the purchase price of the computers, et.al., then NMI would be required to pay HHS 100% of the current fair market value of the items.

are important means through which that expansion can occur. An obligation to repay HHS for the equipment would seem to undermine the program's basic purpose.

Even if NMI is not required to reimburse HHS for the value of the equipment – either because its aggregate value is less than $5000, or the agency elects not to pursue this remedy – the federal policy on disposition of grant-financed property does not resolve, or even begin to address, the constitutional issue of such property held by a religious entity. Because federal rules provide that legal title to such supplies is held by the grantee, one might reasonably believe that, once the grant is completed and the grantor agency does not seek return of the goods, the grantee is free to use the property as it sees fit, including for religious purposes. In such circumstances, the grantee might think that the government is not constitutionally responsible for the grantee's religious use of the property because the property no longer belongs to the government, and the religious entity is not using the property as part of a government-funded program.

The federal policy on disposition of grant-financed property does not resolve the constitutional issue of such property held by a religious entity.

Such an argument, however, conflicts with the Supreme Court's decision in *Tilton v. Richardson* (1971).[50] In *Tilton*, the Court upheld a federal program that provided financial assistance for construction of buildings at colleges and universities, including religiously affiliated schools; the program provided that funds were not to be used for construction of buildings that would be used for religious purposes. Nonetheless, the Court struck down a provision of that program under which the restriction on religious use was limited to 20 years. After 20 years, the schools would have been permitted to use the buildings for any purpose, including worship or religious instruction. The Court reasoned that:

> *Limiting the prohibition for religious use of the structure to 20 years obviously opens the facility to use for any purpose at the end of that period. It cannot be assumed that a substantial structure has no value after that period and hence the unrestricted use of a valuable property is in effect a contribution of some value to a religious body. . . . The restrictive obligations of a recipient institution under [the Act] cannot, compatibly with the Religion Clauses, expire while the building has substantial value.*

[50] 403 U.S. 672 (1971). Because *Tilton* has not been overruled, we assume for purposes of this analysis that it remains binding precedent on lower courts. We discuss the *Tilton* decision in our analysis of government grants for religious structures, New Federal Policies on Grants for Disaster Relief or Historic Preservation at Houses of Worship and Places of Religious Instruction, online at: http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=16.

Under *Tilton*, the applicable restrictions must last as long as the property financed by the government has "substantial value." The *Tilton* decision thus stands in significant tension with a rule that would permit NMI to make unrestricted use of government-funded property, even if the grant under which the goods were purchased has expired. Such restrictions – which require that government-funded property must not be used for religious purposes – must endure for the useful life of the purchased property.[51] Thus, if *Tilton* is followed, NMI must either pay the government for the value of the used goods, or wait until the useful life of the goods has expired to use them for religious purposes.

The requirement that government-funded property may not be used for religious purposes must endure for the useful life of the property.

NMI's use of the government-funded equipment raises a second, and much more complex question: does the use of such equipment to support and promote an entity that engages in exclusively religious social service activities reflect an unconstitutional diversion of aid to religious purposes? In other words, if NMI does not conduct programs that are eligible for direct public aid – because, AU alleges, NMI employs overtly religious language and concepts in its entire service program – then does not any form of direct public support for the organization violate the conditions set forth in the *Mitchell* standard? We address this difficult question in connection with the third category of expenditures, the aid for training and technical assistance in fundraising and financial management.

3. *Training and Technical Assistance*

AU alleges that NMI has used federal grant funds to pay for the services of three types of consulting services: "a financial consultant to audit its books and to establish and train staff in a fiscal-management system"; "a federal-grant specialist to offer training in writing successful government-grant applications"; and a "fundraising consultant . . . to train the director and administrative assistant in fundraising techniques and to train the administrative assistant in using the donor-management software" (Complaint, ¶¶ 38, 49). These three services reflect core components of CCF's vision for building the capacities of faith-based and community-based organizations. The CCF is designed to assist such organizations "to increase their effectiveness, enhance their ability to provide social services to serve those most in need, expand their organizations, diversify their funding sources, and create collaborations to better serve those in need."[52]

The capacity-building assistance at issue here is only that which occurs through a discretionary government grant awarded to an organization, which uses such funds to purchase training and technical assistance. This analysis does not

---

[51] A court would certainly give the agency significant latitude in determining what constitutes the "useful life" of an item, but the agency must articulate some reasonable basis for making the determination, such as the ordinary depreciation schedule for property.
[52] http://www.acf.hhs.gov/programs/ccf/about_ccf/index.html (HHS website for CCF).

address training and technical assistance programs offered to all eligible organizations, such as a grant-writing workshop provided by HHS and open to any organization that now provides, or wants to provide, social welfare services.

AU does not allege that CCF funding for these consultants was used to develop or promulgate NMI's religious message. Instead, AU challenges the government's aid for the organization itself, on the theory that the support inevitably and intentionally subsidizes NMI's explicitly religious marriage education and counseling program. At first glance, the argument seems to revive the now-discredited principle that "pervasively sectarian organizations" are ineligible to participate in government-funded social welfare programs.[53] Over the past decade, Establishment Clause jurisprudence has shifted its focus from the institution to the activity. The constitutionality of an expenditure depends on the religious character of the activity supported, not the religious character of the institution that conducts the activity. Seen in that light, the CCF aid for capacity-building appears to be permissible, because the subsidized activities – training in fundraising and financial management – are secular.

Over the past decade, Establishment Clause jurisprudence has shifted its focus from the institution to the activity. The constitutionality of an expenditure depends on the religious character of the activity supported, not the religious character of the institution that conducts the activity.

The challenge to CCF funding of capacity-building, however, is more complex than it first seems. Under current Establishment Clause doctrine, the government likely would not be permitted to provide a grant to a house of worship (that engages in no social welfare activities), to assist the entity in improving its fundraising techniques. Such assistance to a religious organization would likely be found defective under the *Mitchell* rule that government funds must be used only for secular activities. Assisting a house of worship in its general fundraising does not support such a secular activity.

That analogy returns us to the reasoning through which Establishment Clause jurisprudence has moved away from the category of "pervasively sectarian institutions." Under the *Mitchell* standard, government may fund non-religious activities of religious organizations, but may not fund religious activities, whether conducted by a religious or non-religious organization. If an organization conducts exclusively religious activities, however, then the government would be prohibited from all direct funding of the organization. That result would follow whether the government proposes to pay for the rent, utilities, office expenses, fundraising costs, or any other overhead expense of the entity. Government aid

[53] On the demise of the "pervasively sectarian" standard, see our analysis of *ACLU of Louisiana v. Foster* (2002), online at: http://www.socialpolicyandreligion.org/legal/legal_update.cfm?id=5.

for overhead costs that are traceable to the conduct of religious activities would seem to have the same constitutional status as direct public aid for the activities themselves.[54]

Government aid for overhead costs that are traceable to the conduct of religious activities would seem to have the same constitutional status as direct public aid for the activities themselves.

That reading of the *Mitchell* standard would have a serious impact on the CCF, because the program does not exclude from eligibility those faith-based organizations that conduct exclusively religious social welfare services. Indeed, the most restrictive interpretation of *Mitchell* might lead to a ban on capacity-building aid to any organization that does not engage in exclusively secular programming, because the benefits of such capacity-building cannot be segregated into religious and secular components. In other words, capacity-building for secular services would invariably help an organization in ways that could be used also to enhance its religious services, as with skills in financial management. This restrictive interpretation of *Mitchell* is unlikely to be adopted by a court, because its logic would undermine all forms of direct aid for the secular activities of a religious organization. Any type of aid, whether food for a feeding program or a building for an affordable housing provider, may confer indirect but foreseeable benefits on the religious activities of the religious entity. Adoption of this restrictive reading of *Mitchell* would, for all practical purposes, return to the widespread exclusion of religious entities, and courts are highly unlikely to take that path again.

A somewhat less restrictive interpretation of the *Mitchell* standard might prove more persuasive to courts, but would still have a significant impact on the CCF. Under this interpretation, the government would be permitted to finance the capacity-building of entities that presently conduct some activities that are eligible for direct government aid. The government's purpose might reasonably be construed as expanding the organization's ability to provide such services. A court adopting this interpretation would then need to decide whether CCF funds could be used to finance the entire cost of capacity-building activities, or only a share that reflects the organization's proportion of non-religious services. In either case, however, entities that do not conduct any secular services would remain ineligible for CCF capacity-building funds.

Only the least restrictive interpretation of the *Mitchell* standard in this context would permit the CCF to continue its present policy of allowing all (otherwise eligible) providers to compete for funds. Under this third reading, the government would be permitted to finance the capacity-building of any entity that promised to provide, at some point in the future, activities that would be eligible for direct

[54] This would also be true for government-financed computers and office equipment – if the grantee does not have secular programming, then direct government assistance in any form would be constitutionally suspect.

government assistance.[55] Indeed, NMI's subgrant from IYD required it "to develop and submit a Federal Grant Application within two years of receipt of the CCF/IYD grant award."[56] This promise of future participation would supply the government's reason for extending present support, notwithstanding the fact that the funded entity now conducts exclusively religious social welfare services.

The least restrictive reading finds some support within current Establishment Clause jurisprudence, especially in Justice O'Connor's opinions in *Mitchell* and *Agostini v. Felton* (1997). O'Connor's dispositive analysis in both cases turned, at least in part, on the extent to which she believed that officials of government and religious institutions would act in good faith in attempting to comply with restrictions on religious uses of public aid. A similar reliance on grantees' good faith effort to participate in future government programs might be sufficient to justify the present award of aid for capacity building.

A reliance on grantees' good faith effort to participate in future government programs might be sufficient to justify the present award of aid for capacity building, notwithstanding the fact that the funded entity now conducts exclusively religious social welfare services.

O'Connor's reliance on good faith in *Agostini* and *Mitchell*, however, was predicated on the officials' realistic ability to segregate the secular, government-supported activity from the religious programs of the funded entity. But aid for a program that has no current secular activities might stretch the limits of a judge's willingness to rely on that good faith, especially if the funded entity cannot point to any objective indicia of its effort to create a secular program that would be eligible for direct aid. In the absence of such indicia, aid for the capacity-building of a religious entity, based solely on the promise that it will develop a program eligible to receive government funds, seems hard to distinguish – in constitutional terms – from the provision of such aid to a house of worship that offers no social service programs at all. Nonetheless, a court may accept this argument based on trust in good faith as the sole ground on which the CCF, as presently designed, may survive constitutional scrutiny.

4. Salaries of NMI Staff

Finally, AU alleges that NMI "used funds from both the subgrant and the direct grant to pay a portion of the salaries and benefits for its director and

[55] The promise must involve direct rather than indirect aid, because constitutionally sufficient programs of indirect aid do not reimburse the overhead expenses of providers. Providers in such programs may only receive public funds through the choices of specific beneficiaries.

[56] IYD grant forms for CCF subgrant program, letter of intent, available online at: http://www.youthdevelopment.org/pdf/Intent.pdf.

administrative assistant" (Complaint, ¶ 44). AU makes two discrete claims with respect to the use of public funds for NMI salaries. First, the complaint alleges that the salary payments subsidize the religious activities of the director and administrative assistant of NMI, because the grants pay for more time than the employees actually devote to the capacity-building activities permitted under the grant.[57] This allegation raises questions that are essentially factual. If NMI cannot produce adequate records showing that its employees have spent the required time working on grant-appropriate activities, rather than engaging in the organization's religious programming, then AU's Establishment Clause challenge to the salary aid is likely to succeed.

There would seem to be no legally relevant difference between aid that pays for a fundraising consultant, and aid that pays the salary of the organization's leader while she obtains training from that consultant. In both cases, the organization receives direct public support for its mission.

Second, even if NMI can show that it charged to the grant only the time that employees actually spent working on activities appropriate under the grant, AU's challenge to the training and technical assistance funding remains just as salient when applied to employee salaries. The constitutional issue here is identical to that raised in the previous section. If a funded entity engages in exclusively religious social welfare services, will any direct support for the organization and its mission survive scrutiny under the *Mitchell* standard? There would seem to be no legally relevant difference between aid that pays for a fundraising consultant, and aid that pays the salary of the organization's leader while she obtains training from that consultant. In both cases, the organization receives direct public support for its mission.

Conclusion: Monitoring and Remedies

The success of AU's lawsuit will turn on how the court assesses each of the four categories of public expenditures – whether the aid is itself unconstitutional, whether HHS and its intermediary failed in their responsibility to establish adequate protections against such unconstitutional use of public funds, and finally, what remedies a court might award if AU were to prevail. In conclusion, we briefly address the questions of safeguards and remedies.

1. Adequate Safeguards

Under the *Mitchell* standard, the government is required to establish and enforce adequate safeguards to prevent the diversion of public resources to religious uses. AU alleges that neither HHS nor IYD established or enforced such safeguards, and that the lack of guidance and monitoring renders the government

[57] In ¶¶ 48-49 of the Complaint, AU alleges that the direct grant pays for one-third of the full-time salary of the two employees, but neither employee works full-time for NMI. Moreover, AU claims, the training in fundraising accounts for only a small fraction of the time that NMI employees are supposed to devote to grant activities.

constitutionally responsible for NMI's religious use of government aid (Complaint, ¶ 52). AU's claim is strongest with respect to NMI's website, as we noted above, because the language in the grant that imposes the relevant restriction is easily misunderstood by grantees, which may in good faith make impermissible use of public aid. Moreover, AU alleges that the government failed to monitor the NMI website, even though the government should have known that (1) NMI intended to use public aid to create the website, (2) NMI's program is overtly religious in content, and (3) religious content would be likely to appear on any NMI website.

AU will also have a reasonable claim against HHS and IYD with respect to CCF's rules for disposition of property at the end of the grant term. Neither HHS nor its intermediary, IYD, seems to inform religious grantees in any particularized manner of their obligations, both regulatory and constitutional, with respect to property financed through the government grant. Under the *Tilton* rule, restrictions on religious use should remain through the "useful life" of the object. HHS and IYD do not provide guidance on this point, nor do they seem to have engaged in any monitoring of grantees to ensure compliance with the *Tilton* standard.

Under the *Tilton* rule, restrictions on religious use should remain through the "useful life" of the object. HHS and IYD do not provide guidance on this point, nor do they seem to have engaged in any monitoring of grantees to ensure compliance with the *Tilton* standard.

Courts are less likely to find the guidance defective with respect to the question of capacity-building grants, because the important constitutional issues remain conceptually difficult and unsettled. If a court ultimately restricts participation in CCF capacity-building grants to entities that offer at least some secular activities, it will be hard to hold HHS legally accountable for failing to foresee – and thus monitor grantees in light of – such a decision. HHS's constitutional obligation in such a case would be primarily prospective – to ensure that future grants comply with the restriction on providers with exclusively religious services.

2. Remedies

In its Complaint, AU asked the court for declaratory and injunctive remedies – that is, an order announcing that the grants to NMI violate the Establishment Clause, and an order commanding HHS and its intermediary grantees to cease direct public funding of NMI. If AU prevails in its factual and legal claims, the court will likely grant that requested relief. AU also asked the court, however, to order NMI and IYD to repay to HHS funds that were used to support the religious

activities of NMI. As we have discussed in other contexts,[58] orders of repayment (also called "recoupment") are highly unusual in Establishment Clause cases, because they require a court to conclude that the funded organization did not reasonably rely on the government's representation that its grant was lawful when awarded.

Orders of repayment are highly unusual in Establishment Clause cases, because they require a court to conclude that the funded organization did not reasonably rely on the government's representation that its grant was lawful when awarded.

Even if the court were to agree with AU that all of the categories of CCF funding for NMI violate the Establishment Clause, the court would almost certainly not order repayment of the funds used to pay for training and technical assistance, because the constitutional status of such expenditures is unclear, and it would have been reasonable for NMI to rely on the lawfulness of the government grant. Similarly, NMI would not likely be ordered to repay the cost of staff salaries, computers, and office equipment traceable to capacity-building activities. Equipment, the website, and staff time that may have been diverted to conduct the religious activities of NMI, however, might present a closer case, because the constitutional law governing such expenditures is far clearer than that concerning training and technical assistance. This is especially true with respect to the use of property acquired with the CCF grant, for which HHS may have some obligation to seek at least partial reimbursement. Nonetheless, a recoupment order remains highly unusual, and considering NMI's apparent lack of sophistication in the grants process, most courts would not impose such an order in this case.

[58] The issue has received prominent attention in the wake of the district court's decision in *Americans United v. Prison Fellowship Ministries* (2006), in which the court ordered Prison Fellowship Ministries to repay over $1.5 million that the grantee had received from the state of Iowa. That issue is now being appealed. Our analysis of that decision can be found in Part III of this Report, and also online at: http://www.religionandsocialpolicy.org/ legal/legal_update_display.cfm?id=49. See also our analysis of *American Jewish Congress v. Bost* (2002), which raised the same issue, online at: http://www.religionandsocialpolicy.org/ legal/legal_update_display.cfm?id=4.

III. FAITH-BASED PROGRAMS IN PRISON

In recent years, a number of states have entered into arrangements with FBOs for the provision of programs designed to rehabilitate those who have been incarcerated for crime. All of these programs include the teaching of life skills, such as reading, budgetary planning, and managing family relations. Some of these programs have components which aim at deep character transformation, and such efforts at transformation are often explicitly religious in their premises. In some programs, states are paying providers; in others, providers are acting on a voluntary basis. These programs have led to several significant episodes of litigation. In what follows, we explore these issues through the prism of the leading cases in the field, involving an Iowa state prison and the federal Bureau of Prisons. Along the way, we will explore the significance of these cases for other faith-based prison programs.

A. Americans United for Separation of Church and State (and others) v. Prison Fellowship Ministries (and others), 432 F. Supp. 2d 862, 2006 U.S. Dist. LEXIS 36970 (United States District Court, Southern District of Iowa, decided June 2, 2006).

On June 2, the U.S. District Court for the Southern District of Iowa issued its long-awaited decision in a case involving a challenge to the constitutionality of a faith-intensive, anti-recidivism program currently being operated in a state prison in Iowa. The lawsuit, filed by Americans United ("AU") in mid-February of 2003, challenged the constitutionality of the design and operation of a program in the Newton Correctional Facility ("Newton") in Iowa. The complaint alleged that state authorities had entered into an unlawful relationship with the InnerChange Freedom Initiative ("InnerChange"), a pre-release program operated by Prison Fellowship Ministries ("PFM"). The program has operated at the Newton facility since 1999. The suit named as defendants PFM, InnerChange, and state officials responsible for the program's implementation.

> **The U.S. District Court for the Southern District of Iowa found that a faith-intensive, anti-recidivism program operated in a state prison in Iowa was unlawful, enjoined its continued operation, ordered the state to cease payments for ongoing services, and ordered repayment of over $1.5 million in state funds that had already been spent in the program.**

After a lengthy pre-trial process of motions and discovery, and a trial lasting several weeks on the issues where factual disputes remained, Chief Judge Robert Pratt issued a lengthy and highly detailed opinion in which he ruled in favor of AU on almost every contested point. Chief Judge Pratt declared the program unlawful, enjoined its continued operation at Newton, and ordered the state to

cease payments to PFM for ongoing services. In addition, in his most attention-getting and least precedented ruling, Chief Judge Pratt ordered PFM to repay to the state of Iowa over $1.5 million in state funds that had already been spent in the program. PFM and the state have appealed to the U.S. Court of Appeals for the 8th Circuit,[59] and the Judge has stayed his ruling pending the outcome of the appeal.

Description

When AU filed the suit in 2003, its complaint alleged that InnerChange, which is supported in part by a contract with the Iowa Department of Corrections, operates and controls an entire wing of the Newton facility. According to the complaint, the inmates in the program are involved in "intensive, evangelical, Biblically-based instruction from a Christian fundamentalist viewpoint."[60] In addition, the complaint asserted that the inmates who participate in the program receive better conditions of confinement than non-participants. AU contended that the combination of state-supported religious transformation, preference for those inmates who were receptive to the Evangelical Christian message of InnerChange, and material advantages for participants all involved the state in unconstitutional promotion of religion.[61]

When we originally evaluated the AU complaint,[62] we were of the view that the plaintiffs were highly likely to prevail if the facts proved to be as they alleged. After a long and very thorough litigation process, Chief Judge Pratt's opinion has described in much further detail the picture that AU has painted of the programmatic and fiscal operation of the InnerChange program. The court made the following key findings:

- Officials at the Iowa Department of Corrections designed the process of contracting to ensure that only PFM (and its Inner Change program) would get the contract.
- The InnerChange program is pervasively and thoroughly designed to indoctrinate inmates in Evangelical Christianity, a Bible-centered program that includes doctrines and precepts that distinguish it from other, denominational forms of Christian belief and practice. Each day's programming includes many hours of explicitly religious teaching and Bible study.

[59] In addition to Iowa, the 8th Circuit includes Arkansas, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.
[60] *Americans United for Separation of Church and State et al. v. Prison Fellowship Ministries et al*, U.S. District Court for the Southern District of Iowa, Central Division, Complaint, par. 1.
[61] The original complaint also alleged that the employment practices of InnerChange were unlawful, but that claim subsequently disappeared from the case.
[62] State of the Law, 2003, at 68-75.

- The secular values of good citizenship and personal responsibility included in the program cannot be separated from its religious elements, because the entire program is built around the concept of personal, Evangelical Christian transformation of the character of participating inmates.
- Although Inner Change designated some program expenses as non-sectarian, and billed the state only for those, the state made no attempt to monitor the true content of those expense items, which included salaries of personnel teaching in the program and other items with unambiguous religious content.
- Although the InnerChange program was formally open to non-Christians, and to non-Evangelical Christians, the substance of the program effectively made it impossible to proceed through it without being fully indoctrinated in the teachings of Evangelical Christianity.
- The participants in the program are offered a variety of material privileges and benefits from being in the program, in particular more privacy in their living arrangements, which prison inmates value highly. Only those inmates willing to accept InnerChange teachings have the opportunity to obtain these benefits.
- Although the state switched the financing mechanism in last few years from direct financing of InnerChange (that is, a direct annual payment without regard to number of inmates) to a per diem payment to InnerChange based on the number of inmates enrolled, the program was never one of "true private choice" for inmates because the state offered no comparable programs, either secular or faith-based.

Based on this set of factual findings, which are documented in great detail in the opinion, Chief Judge Pratt reached the following legal conclusions:

1. In this program, PFM and InnerChange cannot be viewed as private parties. Their role in administering an entire wing of the Newton facility makes them "state actors," acting under color of law, and subjecting them directly to liability for constitutional violations in this program.

2. Because the InnerChange program is Bible-based and thick with the teachings of Evangelical Christianity, it is "pervasively sectarian" (meaning that virtually all of its activities are colored by and subsumed in its religious mission) and therefore involves heavy and continuous government-supported indoctrination into religion. In particular, the program includes accepting Jesus Christ as a personal savior, and recognizing the problem of criminal recidivism as a problem of sin rather than just a problem of behavior.

3. The program's classes on anger management, substance abuse, and other subjects which the state requires in pre-release programs are taught from a

perspective of religious devotion. The InnerChange program is a religiously integrated experience in a "modern, Evangelical Christian monastic setting in which every waking hour is devoted to living out an intentional Christian experience."[63]

4. The program unconstitutionally "defines beneficiaries by reference to religion," because only those willing to accept the beliefs of Evangelical Christianity can successfully get through the program. Although participants are not formally required to convert, "the object of the InnerChange program is to change inmates' behavior through personal conversion to [Evangelical] Christianity."[64]

5. The program includes material incentives which tend to induce inmates to participate in InnerChange's religious approach to personal transformation. These incentives include substantially more inmate privacy than is available to non-participants in the program.

6. PFM's attempt at "statistical segregation" of nonsectarian expenses – for example, billing the DOC for specified percentages of the salaries of various InnerChange employees – is constitutionally insufficient to insulate the state for financial responsibility for religious indoctrination, because the state engaged in no monitoring of InnerChange employees and in any event would have not been able to separate their religious messages from their secular ones.

7. Even when the state switched its payment arrangement with InnerChange to a per diem payment for each inmate, the program did not for constitutional purposes become a voucher-like program of the sort upheld in *Zelman v. Simmons-Harris* (the Cleveland voucher decision), because inmates did not have comparable options of either secular or other faith-based programs.

8. The defense by Iowa and the PFM that the program is justified by the state's interest in avoiding criminal recidivism is unavailing, because a) the law does not permit state interests to "outweigh" what otherwise would be Establishment Clause violations, and b) in any event, the defendants offered no evidence whatsoever that the recidivism rate was lower for the graduates of its Iowa program than the overall rate in Iowa for all post-release prisoners.

9. The state and PFM have committed "severe violations" of the Establishment Clause, which prohibits the government from promoting religion, creating incentives for religious observance, or financial supporting religious indoctrination.

[63] 432 F. Supp. 2d at 908.
[64] Id. at 913.

In light of these sweeping legal conclusions, Chief Judge Pratt entered the following remedial orders:

1. A declaration that the contractual relationship between the Iowa DOC and PFM violates the Establishment Clause;

2. An injunction against any future payments to PFM (or IC) under the contract;

3. An order to the State not to pay PFM (or IC) for services already delivered in the most recent quarter (worth not more than $77,500 under the terms of the contract); and

4. An order requiring PFM to repay over $1.5 million dollars to Iowa DOC, because that $1.5 million has been spent in violation of the Constitution.

The defendants have now appealed to the U.S. Court of Appeals for the 8th Circuit. The U.S. Department of Justice has filed a brief as an *amicus curia* (friend of the court) on PFM's side in the appeal,[65] but the brief for the United States objects only to the district court's order of repayment; the U.S. does not defend the constitutionality of the Iowa program.

The U.S. Department of Justice has filed a brief on PFM's side in the appeal but the brief for the United States objects only to the district court's order of repayment; the U.S. does not defend the constitutionality of the Iowa program.

Chief Judge Pratt stayed his orders pending the disposition of the appeal, so for the moment the InnerChange program at the Newton prison does not have to be dismantled, but the judge ordered PFM and InnerChange to post a bond for the $1.5 million pending the outcome of the appeal. In addition, Americans United will be entitled to recover attorneys' fees from the defendants if any part of the judgment in AU's favor is upheld on appeal, and those fees are likely to be substantial.

Analysis

As we indicated in the 2003 Report, we expected the court to rule against the state and PFM if AU proved its factual allegations. Under the law as it stood then and continues to stand, this sort of direct, governmental financial support for a

[65] At the time of the Iowa decision, the federal Bureau of Prisons had just become the target of a lawsuit filed by the Freedom From Religion Foundation with respect to the Bureau's recently announced Life Connections 2 program. We analyze that lawsuit against the federal Bureau of Prisons below. On June 6, soon after the decision in the Iowa case, the Bureau announced that it was withdrawing its Request for Proposals under the Life Connections 2 program.

program of massive religious indoctrination in a single faith is without question constitutionally impermissible. The facts and circumstances of *AU v. PFM* are extreme in a number of respects – the intensity of religious programming, the preference for a particular form of Christianity, the failure of PFM to make any real effort to segregate out secular aspects of the program and seek payment for those aspects alone, and the failure of the state to monitor any such attempt at segregation. On these facts, a ruling in favor of the program would have been a shock. In what follows, we reflect on several key themes in Chief Judge Pratt's opinion, and the bearing of those themes on the larger subject of the constitutionality of faith-based programs of inmate rehabilitation.

1. A "Pervasively Sectarian" Program

We think it somewhat unfortunate that Chief Judge Pratt grounded his opinion in part in the language of "pervasive sectarianism." Historically, the concept of "pervasively sectarian" entities has referred to organizations, such as houses of worship or religious schools, in which religious faith is so bound up in all activities that the organizations cannot operate an entirely secular program. The concept that some religious entities are "pervasively sectarian," and therefore are ineligible for state financial support, has fallen into some disrepute. Four Supreme Court Justices repudiated this idea in their plurality opinion in *Mitchell v. Helms* (2000), asserting that the idea is stained with anti-Catholic animus, and only three of the Justices attempted to rehabilitate the concept. We think that the categorical exclusion from government support of thoroughly religious entities is not likely to reappear in the Supreme Court's treatment of the Establishment Clause.

The judge's use of the term "pervasively sectarian" appears to be an inartful way of describing the very sort of program (rather than organization) that government may not directly support.

Chief Judge Pratt's use of the concept, however, is quite different from that condemned by the *Mitchell* plurality. Chief Judge Pratt was not asked to conclude, and did not conclude, that PFM as an entity was "pervasively sectarian;" instead, he concluded that the InnerChange program in the Newton facility was "pervasively sectarian." So understood, his use of that term accurately describes the program and is not in any way likely to lead to reversal on appeal. Indeed, the judge's use of the term appears to be an inartful way of describing the very sort of program (rather than organization) that government may not directly support.

2. Significance for Other Jurisdictions

What are the implications of *AU v. PFM* for the constitutionality of faith-based programs in the federal prisons, and the prisons of other states? As we discuss below, the federal Bureau of Prisons has now cancelled its Life Connections 2 (LC2) program, which was the target of a lawsuit by the Freedom From Religion Foundation. The proposed LC2 program was quite similar to the Iowa program.

In particular, LC2 was designed primarily for single faith programs, and seemed closely tailored to PFM's offerings. Accordingly, LC2 presented a significant danger of both the religious preferentialism and government-sponsored religious indoctrination that proved fatal to the Iowa program.

Serious questions remain, however, about the constitutionality of programs offered in a number of other states by PFM and other providers. One key question arises from Chief Judge Pratt's conclusion that PFM and InnerChange were operating under "color of law," and therefore were subject to liability under federal civil rights statutes that make legally actionable the violation of federal constitutional rights by those acting under state authority. As Chief Judge Pratt described the issue, he noted that the parties had not litigated this question. Moreover, this question is quite atypical in cases involving Establishment Clause challenges to government funding of faith-based services; ordinarily, officers of the funding agency are the defendants, and their actions are of course taken "under color of law." The actions of the private contracting parties or grantees are usually not viewed by courts as being taken under color of law, and these private parties are frequently not even named in the complaint as defendants. The Establishment Clause limits the government, not private parties, and it is government action that is the source of complaint in these lawsuits.

One key question arises from Chief Judge Pratt's conclusion that PFM and InnerChange were operating under "color of law," and therefore were subject to liability under federal civil rights statutes that make legally actionable the violation of federal constitutional rights by those acting under state authority.

Nevertheless, unprompted by Americans United, Chief Judge Pratt held that the joint contractual venture among the Iowa DOC, PFM, and InnerChange placed the actions of the private, faith-based groups "under color of law."[66] (Slip opinion at 2, n. 3). Chief Judge Pratt's reasoning on the point suggests that the conclusion would be the same whether or not Iowa was paying money to the private organizations providing this rehabilitative service. In *West v. Atkins* (1988),[67] the Supreme Court ruled that a physician, operating under a contract to provide medical care to inmates in a state prison system, operates "under color of law" in his delivery of that medical care. Chief Judge Pratt relied on that decision to rule that PFM and InnerChange similarly operated under state authority. He described the role of InnerChange as that of providing teaching, counseling, and security to inmates, and – analogizing the situation to that in *West v. Atkins*, he characterized the function of prisoner rehabilitation as one "traditionally and exclusively reserved to the state."

---

[66] 432 F. Supp. 2d at 865 & n.3.
[67] *West v. Atkins*, 487 U.S. 42 (1988).

Chief Judge Pratt may or may not be correct in his conclusion, but we do not think that this approach to determining the constitutionality of faith-based prison programs will ultimately prove helpful or decisive in other cases, and it may not prove to be important even in this one. On the one hand, the elaborate degree of public-private partnership in the Newton facility, in which a private group effectively took control of an entire wing of the prison and was intimately involved in daily decisions about security and other details of the lives of inmates under its control, surely has the look and feel of a joint venture between the state and the private organizations. On the other hand, the Court of Appeals in this case may look askance at any such conclusion reached without the benefit of adversary presentation by the parties. Moreover, the appellate court may find the analogy to *West v. Atkins* less than fully persuasive. *West* involved the provision of medical care, which the Supreme Court described as a service which the state was constitutionally obligated to provide and with respect to which the inmate had no choice among physicians. By contrast, rehabilitation of an inmate's character and attempts to transform his behavior are not efforts which the state is constitutionally obligated to undertake, and inmates may well have alternative methods – the efforts of visitors and self-help in particular – to achieve such goals.

More broadly, a theory focused on "joint ventures" as an approach to the Establishment Clause problems of faith-based programs in prison may simply prove too much to be helpful in distinguishing intelligently among such programs. Every program of rehabilitation, public or private, in a situation in which the state has custody of the persons in the program, can be described as a "joint venture." The state always has the right of approval and disapproval over the character and content of such programs, even if they are offered by private groups entirely without monetary compensation from the state. Moreover, the state will always be providing some form of valuable, in-kind assistance to such programs, including delivery of receptive inmates, physical space, security, and a likelihood of additional support services. We think it will be impossible to draw sensible lines between total immersion programs like that run by InnerChange in Iowa, and programs that involve faith-based groups in frequent contact with inmates but considerably less administration of the prison. All such programs are joint ventures, approved by the state and administered with its active daily cooperation, and therefore "under color of law."

The key question for courts will not be whether the programs operate "under color of law." Rather, the central inquiry will be the substantive limitations on the state in its degree of support for delivery of religious experience to those under its custody and control.

The key question for courts in cases like *AU v. PFM*, therefore, will not be whether the programs operate "under color of law." Rather, as it was for Chief Judge Pratt, the central inquiry will be the substantive limitations on the state in its degree of support for delivery of religious experience to those under its

custody and control. As we analyze this question in other sections of this Report, discussing recent lawsuits against the federal Bureau of Prisons and the Veterans' Administration, government institutions which have custodial authority may hire chaplains, host worship services, and take other actions designed to respond to the burden imposed by such custody on the religious freedom of institutionalized persons. These sorts of custodial institutions thus are free to employ or contract for personnel to engage in practices which would clearly be unconstitutional if undertaken by government agencies – for instance, a state's regulatory or tax collection bureaucracy.

Thus, the constitutional parameters for faith-based programs in prison turn on the appropriate scope and limitations of state-sponsored religious experience in custodial institutions. As we appraise this question in light of existing law, the state must obey three, overarching constitutional norms:

- The state's programs must respect requirements of neutrality (or nonpreferentialism);
- Inmate participation must be entirely voluntary;
- The state may not be financially responsible for religious indoctrination.

a. Neutrality

The constitutional obligation of neutrality in religious matters requires the state to refrain from preferring faith-based programs to secular programs, and from preferring some faiths to others. In the setting of prisons, the requirement of neutrality creates special problems, because inmates may be of many different faiths – some, like those with racist philosophies, quite repugnant to public values – and it will be administratively impossible for the state to have programs specifically tailored to each and every sectarian difference among inmates. But courts will not insist on perfect neutrality; instead, they are likely to look for some reasonable effort by the state to maintain this sort of non-preferentialism. The safest course of action for a state that wants pre-release, faith-based programs would be to ensure that its prisons have programs that appeal to wide variety of faiths, and to have secular programs as well. Multi-faith programs are one possible approach to this problem, as are more generic religious programs (Christian, Jewish, Islamic, etc) that try to cast a wide net and de-emphasize sectarian differences within particular religious traditions. A prison administration that made a good faith effort to find – and offer – such a variety of programs is likely to meet far greater receptivity from the courts than the Iowa DOC found in Chief Judge Pratt's court.

The safest course of action for a state that wants pre-release, faith-based programs would be to ensure that its prisons have programs that appeal to wide variety of faiths, and to have secular programs as well.

We want to emphasize that the requirement of neutrality attaches to these programs whether or not the state is directly financing them. The requirement emerges from state support alone, and it has two rationales. First, the state may not favor one faith over another, or favor religious methods over secular ones. To do so would involve the state in taking a position on the relative efficacy or truth of religion, or of a particular religion, and the Constitution forbids the state from taking such a position. Second, the state may not authorize a system that discriminates, formally or informally, among inmates on the basis of their religious commitments. To do so would be to distribute beneficial services on a basis that the Constitution interdicts.[68]

b. Voluntarism

The requirement of voluntarism is designed to protect the rights of prison inmates to choose freely whether or not to undertake religious experience. Such rights obviously attach to the institution of worship or religious counseling in prison; no inmate should ever be compelled by fear of punishment or loss of privileges to participate in such activities. Inmates should be similarly protected against compulsion to participate in rehabilitation programs with explicitly religious content.

The Iowa litigation suggests another, more subtle form of threat to voluntarism – the granting of privileges to those who elect to participate in a religious program of rehabilitation. Although inmates may in a sense "choose" to take the program as a way of obtaining the privileges, prison inmates are especially vulnerable to behavioral manipulation. Because prisons are places of persistent and widespread deprivation of the amenities of ordinary life, any restoration of those amenities – bathroom privacy, for example – may tend to induce participation in otherwise unwanted religious experience.

If inmates may select among an array of programs, religious or secular, any material incentives for committing to such a program will not steer inmates to a faith experience.

We want to clarify one important point about the relationship between material incentives and voluntarism. There is nothing improper about a prison offering improved material conditions of life for inmates who elect to involve themselves in rehabilitation programs, so long as inmates have a constitutionally appropriate set of choices among such programs. In this way, the principle of voluntarism intersects with the principle of neutrality.

---

[68] A lawsuit now pending before the U.S. Court of Appeals for the Seventh Circuit, *Winkler v. Rumsfeld*, deals directly with the question of the government's ability to substantially assist an organization that discriminates on religious grounds. *Winkler* involves aid provided by the U.S. Army to the Boy Scouts of America. The Army provides a range of support, including material goods and personnel, for the Boy Scouts Jamboree. The lawsuit claims that the aid violates the Establishment Clause because the Army does not provide similar aid to other organizations, and the Boy Scouts membership criteria discriminate against those who do not believe in God. *Winkler v. Rumsfeld*, Case No. 05-3451 (7th Cir., pending decision).

If inmates may select among an array of programs, religious or secular, any material incentives for committing to such a program will not steer inmates to a faith experience. Under these conditions, their choice of a religious over secular program, with equal privileges attached to either, can be seen as voluntary in the constitutionally relevant sense.

c. Financial Responsibility for Religious Indoctrination

Outside of institutions where the state has custodial control over persons, neutrality and voluntarism are necessary but not sufficient to guarantee the constitutionality of a program under the Establishment Clause. As the law now stands, the government may not directly finance religious activities and experience even if the program includes a wide variety of religious and secular providers, and is entirely voluntary for beneficiaries. As we suggested above, in the custodial context, the state may directly support (through chaplains and otherwise) religious experience as a way of responding to the felt religious needs of inmates, but may not directly support such experience as part of the state's independent agenda of combating religious recidivism.

Establishment Clause doctrines that constrain direct state financial support for religious experience may severely limit the legal capacity of states to pay for private, faith-based programs of inmate rehabilitation. The model of indirect financing, on the terms under which the Supreme Court upheld school tuition vouchers in *Zelman v. Simmons-Harris*, may provide a solution to the constitutional dilemma posed for those states and faith-based entities that want to work out a financial relationship.

These Establishment Clause doctrines that constrain direct state financial support for religious experience may severely limit the legal capacity of states to pay for private, faith-based programs of inmate rehabilitation. Along with budget constraints, state perception of these limits – transgressed in Iowa, according to Chief Judge Pratt – may explain why states like Florida (in its program at the Lawtey Corrections facility) and Arkansas (in its newly announced program at the Tucker Correctional Unit)[69] are permitting private, faith-based programming in their prisons without committing any direct expenditure of funds to these programs. Whether the state's provision of in-kind assistance alone to such programs invites litigation remains to be seen. We would expect that generic background assistance, such as that associated with food, housing and security provided to all inmates, would not raise serious questions, but that program-specific assistance –

[69] See Bryan Jackson., Arkansas Officials Believe Their Faith-Based Prison Program Unaffected by Court Decision, Roundtable on Religion and Social Welfare Policy, June 6, 2006, http://www.socialpolicyandreligion.org/news/article.cfm?id=4386.

e.g., books, supplies, computers, and other goods provided by the state to these programs without restriction on religious content – is the sort of state participation likely to generate constitutional controversy.

The model of indirect financing, on the terms under which the Supreme Court upheld school tuition vouchers in *Zelman v. Simmons-Harris*, may provide a solution to the constitutional dilemma posed for those states and faith-based entities that want to work out a financial relationship. *Zelman* upheld the Cleveland school voucher program, despite the presence of religious instruction and worship in some of the participating schools, on the theory that the state did not favor religious schools over others, and that beneficiaries exercised "true private choice" in directing the state's support to the school of each beneficiary's choice, religious or otherwise. So structured, the Court held that the program made each beneficiary (rather than the state) responsible for whatever religious experience the chosen school offered.

A prison program might be similarly structured – offering (for example) daily, weekly, or monthly payments to private providers, both religious and secular, based on the choices made by inmates to participate. This model would inhibit the state from "up front" financing of its preferred providers; inmates would vote with their feet about enrolling and remaining in programs of their choice. Although such a design may be less attractive to providers than direct (and guaranteed) financing, this sort of voucher-type arrangement potentially could combine all of the key elements of a constitutionally adequate program – state neutrality among providers (both religious and secular), voluntary inmate choice among providers (without state steering to particular providers), and indirect financial support. No state of which we are aware has created such a program, but this design is the safest possible to avoid possible litigation. In the wake of the Iowa decision, prison administrators have increased reason to fear such litigation over religion-based programs of personal transformation for inmates.

To our knowledge, this is the first time that a court has ever ordered a faith-based group to repay monies to the state or federal government after a finding that the payment was in violation of the Establishment Clause.

d. Repayment Order

The most controversial aspect of Chief Judge Pratt's opinion is the order that PFM repay over $1.5 million to the state of Iowa. To our knowledge, this is the first time that a court has ever ordered a faith-based group to repay monies to the state or federal government after a finding that the payment was in violation of the Establishment Clause. Ordinarily, judges in such cases simply order the government to cease making unconstitutional payments in the future. Here, the judge appeared to be profoundly influenced by the severity of the constitutional violations. Because the judge could identify virtually no good faith argument in favor of the constitutionality of the InnerChange program, he concluded that all of the equities lay in favor of ordering repayment of monies unconstitutionally spent.

Chief Judge Pratt discussed prior Supreme Court opinions that addressed related issues, but neither was directly akin to the problem in this case. In one of the prior opinions, the Court had refused to block future payments to religious schools for services rendered prior to the time at which the Court had held the program of aid to be unconstitutional.[70] In the other opinion, the Court concluded that a state legislature could not override a district court opinion, enjoining unconstitutional payments to religious schools, by enacting a subsequent statute authorizing future payments for services already rendered.[71] But this case is different from both of those, because here the money has already been disbursed and spent, and no court order prevented that disbursement at the time it was made. Chief Judge Pratt relied in part on general notions of equity jurisprudence, where the reasonableness of party behavior is a significant factor. When a party receives money from the government with no reasonable expectation that the program for which the money is paid will be upheld as lawful, that party's expectations of retaining the benefit of the money are very weak. Judge Posner's recent opinion for the Seventh Circuit in *Laskowski v. Spellings*,[72] which Chief Judge Pratt cites, suggested precisely this sort of equitable calculation in deciding whether a repayment order might be appropriate in Establishment Clause litigation.

Were there truly no reasonable grounds for belief by PFM that the Iowa InnerChange program was lawful? The best argument for the reasonableness of such a belief turns on the fact of incarceration, which limits inmates' ability to pursue their own religious freedom. It is that fact which permits the state to provide prison chaplains to serve the religious needs of inmates of all faiths. But this program was not driven by inmates' quest for worship or religious counseling; instead, it was motivated by the desire of state officials to have a relatively low-cost program aimed at curbing recidivism. The Iowa InnerChange program emerged from the state's own policy agenda, and from the religious convictions of some of its officials, rather than from the religious needs of its prison inmates. On the facts in Iowa, including the program's stark preference for a singular religious tradition, Chief Judge Pratt appears correct to have assessed the case as involving only the Establishment Clause, and not the accommodation of inmates' needs to exercise religious freedom. Moreover, the defenses offered by Iowa and PFM seem extraordinarily unpersuasive. Accordingly, the equities on the side of PFM are weak, and the Court of Appeals may be as unsympathetic to PFM's appeal of the repayment

The Iowa InnerChange program emerged from the state's own policy agenda, and from the religious convictions of some of its officials, rather than from the religious needs of its prison inmates.

[70] 411 U.S. 192 (1973).
[71] New York v. Cathedral Academy, 434 U.S. 125 (1977).
[72] We discuss *Laskowski* in Part IV, below.

order as the Court is likely to be of the appeal on the constitutionality of the underlying program.

In the *amicus* brief filed by the United States on behalf of PFM, the federal government offers a novel argument for the impermissibility of the repayment order. The U.S. argues that the order violates constitutional principles of power separation and federalism. In particular, the U.S. argues that courts lack the power to compel a private party to return monies to a government agency in a case in which the agency itself is not seeking return of the monies. According to the brief from the U.S., the agency itself should have complete discretion to seek reimbursement or to forego reimbursement. The U.S. argues that this limitation on judicial power should be seen as especially acute when a federal court is asked to police the relationship between a state agency and a private party; in such a case, considerations of federalism also come into play. The U.S. also argues that a repayment order like this one will discourage FBOs from participating in the FBCI.

The constitutional arguments made by the U.S. are worthy of note, although it seems to us that the fact of state (rather than federal) agency involvement actually weakens the power separation point, which would be stronger if expenditures by a federal agency were involved in the case. The brief does not mention those situations in which Congress has explicitly authorized private parties to go to federal court, seeking an order of reimbursement from a private grantee to a federal agency (for example, in cases of fraud). Such schemes, which go under the name of qui tam suits, are a common way to give incentives to private whistle-blowers, who get to keep some of the money that gets paid by the defendant to the government. In the Iowa prison case, however, where Congress has not so authorized this particular remedy against state grantees, the court of appeals may be appropriately wary of affirming this remedial step.

The innovative quality of the repayment order (coupled with its sheer magnitude) will lead the Court of Appeals to look at it very carefully, and we can imagine the possibility that the appeals court will reverse that order on the grounds that it is a financial hardship and an unfair surprise to PFM, and that Congress has not explicitly authorized the courts to provide this particular remedy.[73]

Conclusion

The Iowa decision is highly significant. Its thoroughness will help protect it from reversal on appeal, and it will be a model for judges in other jurisdictions. As we discuss below in connection with the lawsuit in *Freedom From Religion Foundation v. Gonzales*, the outcome in the District Court appears to have provoked the cancellation of a newly announced program by the Federal Bureau

[73] No doubt emboldened by its success on this point in the Iowa case, Americans United has now asked for a similar recoupment order in *Christianson v. Leavitt*, discussed in Part I above.

of Prisons. The opinion is also likely to influence the result in *Moeller v. Bradford County*, a case involving a county correctional facility, which we analyzed in last year's report.[74] But the Iowa case is one of extremes, because the arrangement there violated every core principle of non-Establishment – state neutrality, inmate voluntarism, and appropriate disconnection of the state from the enterprise of religious conversion and inculcation. This triple violation increases the likelihood that the repayment order will be upheld, and creates a model for other states to avoid. But it is easy to imagine other, far closer cases involving Establishment Clause challenges to pre-release, faith-based rehabilitation programs. The Iowa decision is likely to influence the outcome of those other cases, but the factual dissimilarities among them may produce a textured body of law and a variety of outcomes.

The Iowa decision is highly significant. Its thoroughness will help protect it from reversal on appeal, and it will be a model for judges in other jurisdictions. But the Iowa case is one of extremes. The Iowa decision is likely to influence the outcome of those other cases, but the factual dissimilarities among them may produce a textured body of law and a variety of outcomes.

Whether the Supreme Court will in the near future decide to take up a case that raises this precise set of issues is impossible to predict. Whatever the 8th Circuit may decide on the substantive questions in Americans United v. Prison Fellowship Ministries, a later grant of certiorari by the Supreme Court is unlikely, because the 8th Circuit opinion (however it turns out) will not create a conflict with the opinions of other Circuit Courts. An 8th Circuit opinion on the repayment order is more likely to attract Supreme Court attention than an opinion on the validity of the underlying program, because the repayment order raises a novel question of federal law.

B. Freedom From Religion Foundation v. Alberto R. Gonzales (U.S. District Court, Western District of Wisconsin, filed May 4, 2006)

On May 4, 2006 the Freedom From Religion Foundation ("FFRF") filed a lawsuit that challenges the constitutionality of new and existing faith-based programs administered by the federal Bureau of Prisons (BOP). In its complaint,[75] FFRF alleges that the BOP's proposed faith-based initiative, Life Connections 2 (LC2), violates the Establishment Clause because it supports only religious programs,

[74] The State of the Law, 2005, at 73-85. Bryan Jackson, "Federal Judge Gives Green Light to Pennsylvania Prison Lawsuit," Roundtable on Religion and Social Welfare Policy, Aug. 15, 2006, http://www.socialpolicyandreligion.org/news/article.cfm?id=4641. As alleged, though not yet proven, the facts in *Moeller* bear a considerable resemblance to those in the Iowa case; in both facilities, the programs receive direct financial support from the government; prisoners are offered only one program, which is intensely faith-based; and prisoners are provided material inducements to volunteer for the program.

[75] FFRF's complaint is available online at: http://ffrf.org/legal/gonzales_complaint.html.

May the government directly support religious transformation as a means to achieve social benefits? And, does the answer change in any way if the transformative programs occur in a prison setting?

and directly finances the religious transformation of inmates. FFRF also alleges that BOP's existing faith-based initiative, Life Connections 1 (LC1), provides unconstitutional aid for religious activities. The lawsuit asks the court to enjoin BOP's use of public funds for the Life Connections programs, and to require BOP to establish rules that would guard against future uses of government funds for social welfare programs that have religious content.[76]

With this lawsuit, four cases now pending in various stages in the federal courts raise significant challenges to the constitutionality of faith-based services for prisoners.[77] All four lawsuits raise the same two basic questions. May the government directly support religious transformation as a means to achieve social benefits (especially the reduction of recidivism)? And, does the answer to the first question change in any way if the transformative programs occur in a prison setting?

The decision in the Iowa prison case, described above, is likely to be very influential in the decision of other cases involving faith-based programs in prison. Indeed, in late October, the federal Bureau of Prisons announced the cancellation

---

[76] In addition, FFRF alleges in this suit that the federal Office of Management and Budget (OMB) violates the Establishment Clause by encouraging federal agencies to increase grants and contracts with faith-based organizations (FBOs). This claim is unrelated to the claim against BOP. The Department of Justice has asked the district court to sever the claim against OMB from that against BOP, and to stay the resolution of the claim against OMB pending the determination by the Supreme Court as to whether to grant the petition for certiorari in *FFRF v. Grace*, discussed in Part IV below.

FFRF's claim that OMB has unconstitutionally pressured agencies into funding religious activity is analogous to the claim made in FFRF's other, ongoing litigation (*FFRF v. Grace*, originally *FFRF v. Towey*) which challenges the conduct of the WHOFBCI and other Executive Branch agencies in promoting the initiative. The claim in this case against OMB thus will raise the same issues of standing that have consumed the Seventh Circuit in FFRF v. Grace. Moreover, the claim against OMB seems very weak on its merits. OMB's efforts are wholly internal to the government, and OMB does not distribute money to religious activities or organizations. No court is likely to find that OMB encouragement to agencies to follow the President's policy of inclusion of FBOs in social service is a violation of the Constitution, if the basic policy of inclusion itself is not constitutionally forbidden.

[77] The other three lawsuits are: *Americans United for Separation of Church and State v. Mapes*, discussed above; *Moeller v. Bradford County* (see our analysis at: http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=35); and *Freedom From Religion Foundation v. Richardson* (see Roundtable news story, by Claire Hughes, online at: http://www.religionandsocialpolicy.org/news/article.cfm?id=3460). There have been a number of other lawsuits alleging that faith-based programs in prisons violate the Establishment Clause, see, e.g., *Williams v. Huff*, 52 S.W.3d 171 (Tex. 2001); *Destefano v. Emergency Housing Group*, 247 F.3d 397 (2nd Cir. 2001). Most of these lawsuits, however, concern the compelled participation of inmates in religious activities, especially substance-abuse treatment programs that have explicitly religious components. See, e.g., *Kerr v. Farrey*, 95 F.3d 472 (7th Cir. 1996); *Munson v. Norris*, 435 F.3d 877 (8th Cir. 2006); *Warner v. Orange County Dep't of Prob*., 115 F.3d 1068 (2nd Cir. 1997). In addition, FFRF sued over the inclusion of a faith-intensive substance abuse treatment provider in a voucher program funded by Wisconsin's Department of Corrections, *Freedom From Religion Foundation v. McCallum*. See our analysis of the district court's decision, which rejected FFRF's claim: http://www.religionandsocialpolicy.org/ legal/legal_update_display.cfm?id=9. See also our analysis of the federal appellate court's decision in *McCallum*, which sustained the district court's judgment: http://www.religionandsocialpolicy.org/ legal/legal_update_display.cfm?id=15.

of its Life Connections 2 Program,[78] thus rendering moot FFRF's lawsuit with respect to that program.

Nevertheless, in the event that BOP decides to reinstate the Life Connections 2 Program, or states try to emulate it, we describe and analyze the program below. We also describe and analyze the Bureau's Life Connections 1 Program, which remains a target of the lawsuit. For reasons that will be brought out in the contrast between LC1 and LC2, the Bureau will have an easier time defending the LC1 program than would have been the case with respect to its newer counterpart.

1. Description of BOP's Life Connections Programs

On March 30, 2006, BOP posted a request for proposals (RFP) "for the provision of single-faith, residential re-entry programs" to be operated at up to six federal prisons.[79] According to the RFP, the residential re-entry programs are intended to "facilitate personal transformation, and thereby reduce recidivism through promoting the virtues of productive work, respect for others, responsibility, and accountability."[80] BOP's request identifies three essential components for the reentry programs:

- Program curricula and activities that will "foster growth" in ten areas: "daily living; mental health; wellness; interpersonal skills; academic; cognitive; vocational; leisure time; character; [and] spirituality."[81]
- Individual mentors for each program participant; the mentoring relationship should "reflect on spiritual (faith-based) or secular issues of broken-ness and healing; model appropriate social behaviors; and work with the participant in developing an appropriate action plan for maintaining life skills after release or reentry into the inmate population."[82]
- Development of a partnership between the inmate-participant and a "faith-based or other community organization" in the location to which the participant will go upon release from custody.

Further details of the Life Connections 2 (LC2) program are best understood through a comparison with BOP's now-operating Life Connections 1 (LC1) program.

---

[78] Neela Bannerjee, "Proposed Religion-Based Program for Federal Inmates is Canceled," New York Times, September 28, 2006.
[79] The BOP request is identified as RFP-NAS-0171-2006, and can be found online at: http://www2.fbo.gov/spg/DOJ/BPR/PPB/RFP%2DNAS%2D0171%2D2006/Attachments.html.
[80] Statement of Work (SOW), RFP Attachment II, p.1.
[81] Id. at pp. 2-3.
[82] Id. at 5. Note that the program contemplates that some participants will complete the program before their release from incarceration.

LC1, now operating in five BOP facilities, is a "residential multi-faith restorative justice program," in which "inmates participate in religion-specific and interfaith program components designed to help the inmate explore his faith's way to restoration with one's God, family, community, and self."[83] Like LC2, the LC1 program includes a substantive curriculum intended to advance a range of values important for the prisoner's personal development and reentry into the broader community. In addition, LC1 contemplates both individual mentoring, pre- and post-release, as well as developing a relationship with a faith community or other organization that can help the participant on release from prison.

Unlike LC2, however, LC1 is administered through the chaplain's office in each facility, and is specifically designed to include a variety of faiths. LC1 funds primarily support a program coordinator, who develops the program's multi-faith curriculum, teaches and leads discussion groups, and facilitates workshops and seminars. Working with the chaplain's office, the coordinator "ensure[s] that volunteers and mentors from a broad spectrum of religious faith communities are available to meet the needs of the program participants."[84] In addition to responsibility for the multi-faith curriculum, the LC1 coordinator arranges faith-specific classes and discussion groups for the participants. These responsibilities are reflected in the LC1 RFP's set of job qualifications for a coordinator: "selected contractor must possess, through a combination of education and experience, a general working knowledge of a broad variety of religious traditions." LC1 focuses on each participant's existing religious commitments, and facilitates the participant's personal development within the context of those commitments.

The Bureau of Prisons designed "Life Connections 2" to be a single-faith program.

By contrast, BOP expressly designed LC2 to be a "single faith" program. While the RFP required the LC2 provider to make specific accommodations for participants who do not share the service provider's faith, the provider was not required to offer an inter- or multi-faith curriculum. Instead, the LC2 provider was expected to offer a curriculum focused on the provider's religious commitments. In the April 18, 2006 "Pre-proposal Conference" for the RFP, the BOP representative asked and answered the central question:

> *How does the Bureau of Prisons define single faith? Is this different than faith-based? The single faith contract teaches the essential components of the overall residential program outlined in the statement of work through the particular principles of faith. A contract issued to a religious*

[83] A brief description of LC1 is found on the website of DOJ's Task Force for Faith-Based and Community Initiatives, at: http://www.ojp.usdoj.gov/fbci/progmenu_exoffndr.html. Further details of LC1 may be gleaned from its RFPs, one of which is available online at: http://www.fbodaily.com/archive/2004/03-March/24-Mar-2004/FBO-00552077.htm.

[84] Details of LC1 are drawn from the RFP cited above.

organization embodying a particular faith, for example, a Jewish, Christian, Moslem, etcetera.[85]

Under LC1, the coordinator is responsible for identifying mentors, teachers and discussion leaders that share participants' various faith commitments, but LC2 permitted the service provider to use only leaders and mentors of its own faith.

A significant distinction between LC1 and LC2 is that LC2 providers would not have been under the supervision of the facility's chaplain.[86] Thus, LC2 providers would have had only modest obligations to facilitate the religious life of program participants. The LC2 description seemed to expect that program participants would share the service provider's faith, and that the provider would offer religious worship services and instruction for those participants, but the LC2 solicitation also recognized the possibility that some participants would not share that – or perhaps any – faith. LC2 required providers to allow "non-adherents" to opt-out of certain religious activities:

> *Inmates accepted into faith-based programs who are not adherent to that program's faith must be excused from program activities to attend worship services of their own faith traditions, but must otherwise participate in all non- religious aspects of the faith-based program. Inmates may not be required to participate in religious ritual practices or creedal confessions inconsistent with their own faith or practice.*[87]

Surprisingly, the RFP and attachments for LC2 displayed a number of features that raise questions about the significance of religion in the program. The LC2 Pre-Solicitation Notice (posted March 13, 2006) and the cover letter for the RFP described the program as "single-faith." The actual Statement of Work (SOW) for the RFP, however, described LC2 as "a residential re-entry program that will build partnerships between the DOJ and social service organizations."[88]

The Statement of Work carefully avoided any suggestion that eligibility for Life Connections 2 was restricted to religious providers, content, participants, mentors, or partnering organizations.

Close reading of the SOW seems to show that faith-based entities were only a sub-set of those eligible to provide LC2 services. More significantly, the SOW also treated faith-based content as a contingent – rather than necessary – part of

[85] David Morton, BOP Faith-Based Coordinator, Pre-proposal Conference: Residential Re-entry Program (Tuesday, April 18, 2006), p. 4. Available online at: http://fs2.fbo.gov/EPSData/DOJ/Synopses/3015/RFP-NAS-0171-2006/Pre-SolicitationConferenceMinutes.pdf.
[86] This contrast between FC1 and LC2 is developed in some detail during the LC2 Pre-proposal conference. See id at pp. 46-47.
[87] Id. at p. 14; the same language is also used in the LC2 Statement of Work, p,2.
[88] LC2 RFP, Statement of Work, p.1.

the LC2 curriculum. LC2 providers might have offered secular programs, and the SOW exempted such providers from the requirement to foster participants' spiritual growth.[89] Indeed, the SOW carefully avoided any suggestion that eligibility for LC2 was restricted to religious providers, content, participants, mentors, or partnering organizations.

2. FFRF's Complaint

In its May 4, 2006 complaint, FFRF raises two closely related challenges to the constitutionality of the LC1 and LC2 programs. First, FFRF contends that the Life Connections programs reflect BOP's specific intent "to encourage and promote the development of faith among inmates,"[90] rather than an intent to accommodate prisoners' own religious choices. The Establishment Clause, FFRF asserts, prohibits the government from promoting religious faith, even if the government is doing so in order to advance secular goals, such as lowered recidivism. By promoting faith, FFRF claims, BOP has impermissibly endorsed religious transformation over other means of personal growth.

Second, FFRF alleges that LC1 and LC2 "use . . . federal taxpayer appropriations to integrate religion as a substantive and integral component of programs delivered by the Bureau of Prisons."[91] This challenge is based upon the Supreme Court's Establishment Clause jurisprudence, which provides that direct government funding may not be used for religious activities. Under this standard, the government may contract with FBOs, but the state must ensure that the public funds are not used for religious purposes. By integrating religion throughout the LC programs, FFRF contends, the government has made it impossible to segregate the religious from the secular components. Without such segregation, the program cannot pass scrutiny under Establishment Clause law.

3. Analysis of the Life Connections Programs and the FFRF Lawsuit

Substantive analysis fruitfully begins with the Supreme Court's decision in *Mitchell v. Helms* (2000). As we describe at greater length elsewhere,[92] *Mitchell* embodies the Court's Establishment Clause standard for programs of direct public financing of religion. The entire Court agreed on a general formulation of the relevant standard: the Establishment Clause is violated when government lacks a secular purpose for the program, or when public funding "results in religious indoctrination." The justices generally agreed that the program at issue in *Mitchell* had a valid secular purpose, but the Court fractured in its willingness to

---

[89] The LC2 SOW's contemplation of secular providers is evident in the statement of mission (p.1); of "program goal areas" (pp.2-3); of religious accommodation (p.5); and of community linkage (pp.5-6).
[90] FFRF complaint, at p.8.
[91] Id.
[92] See our discussion of the importance of *Mitchell* in Part I, above. For a more detailed analysis, see our essay, The Faith-Based Initiative and the Constitution, 55 DePaul L. Rev. 1, 75-102 (2005).

attribute public responsibility for religious indoctrination. Four justices – the *Mitchell* plurality – concluded that the government is not responsible when the aid "is offered to a broad range of groups or persons without regard to their religion." The plurality reasoned that "if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, . . . then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose."[93]

The entire Supreme Court agreed on a general formulation of the relevant standard: the Establishment Clause is violated when government lacks a secular purpose for the program, or when public funding "results in religious indoctrination."

Justices O'Connor and Breyer concurred in the Court's decision, but did not join the plurality's opinion. In her concurrence, O'Connor argued that the plurality's analysis provided necessary, but not sufficient, conditions for Establishment Clause scrutiny of direct public aid for religion. To survive such scrutiny, she wrote, programs of public aid must meet two additional conditions. First, public funds should not be used for religious activities or programs with explicit religious content. Second, the government must take reasonable steps to ensure that public support will not be diverted to religious use. Only if it meets these two conditions, O'Connor argued, is the government excused from responsibility for any religious indoctrination that might occur in the program. The O'Connor-Breyer concurring opinion in *Mitchell*, which adds O'Connor's two conditions to the plurality's two conditions, represents the controlling law of the Establishment Clause.

Analyzed in light of Justice O'Connor's *Mitchell* concurrence, the LC2 program appeared highly vulnerable to Establishment Clause challenge, and we are not surprised that BOP has cancelled the program.

a. Neutrality

Like the program invalidated in the district court in Iowa, LC2 may not even have satisfied the less restrictive standard set forth in the *Mitchell* plurality. For the plurality, the government is excused from responsibility when it offers aid on a neutral basis, which means that the challenged program does not use religious criteria to define the classes of service providers or service beneficiaries. BOP's LC2 program, however, seems to fall short of the neutrality requirement.
FFRF's complaint identifies the starkest aspect of LC2's apparent non-neutrality. In several prominent descriptions of the program, BOP characterizes LC2 as a "single-faith" program, which strongly indicates a preference for religious over non-religious service providers, and for religious rather than non-religious means

[93] *Mitchell v. Helms*, 530 U.S. 793, 809-10 (2000) (Plurality opinion).

of fulfilling the RFP's requirements. In the SOW, however, BOP avoids any overt statement of a preference for religious over secular service providers. To succeed in its claim that LC2 impermissibly favors religious providers, FFRF would have been required to show that the religion-neutral SOW masks a deliberate intent to support only religious programs. The LC2 RFP alone would not have supported FFRF's claim of bias toward religion.[94]

In an April 19, 2006 letter to DOJ and BOP,[95] Americans United for Separation of Church and State raised two concerns about LC2's neutrality that were not identified in FFRF's complaint, but might have provided support for FFRF's position. First, Americans United argued that the LC2 RFP "creates a preference for instruction in a single faith over multi-faith programming." The argument has significant strength, and emerges from a comparison of LC1 to LC2. The existing program requires multi-faith services, with an emphasis on learning religious toleration, while the proposed program seemed to exclude multi-faith services. Indeed, a literal reading of the LC2 RFP and attachments excluded *only* multi-faith services. LC2 invited single-faith providers, and, at least in the SOW, invited secular providers as well. But multi-faith services fit into neither category. It is certainly possible that BOP had intentionally excluded multi-faith providers and curricula. If so, a court would have been likely to hold that the exclusion represents an impermissible preference for a denominationally exclusive vision of religion over a more inclusive vision.

A court would have been likely to hold that the exclusion of multi-faith providers and curricula represents an impermissible preference for a denominationally exclusive vision of religion over a more inclusive vision.

The Americans United letter identified a second charge of preferential treatment that FFRF might have raised. The letter alleged that the LC2 RFP "appears to be gerrymandered to result in awards to one particular religious organization" – Prison Fellowship Ministries.[96] Americans United identified ten core requirements of the LC2 RFP that match features of Prison Fellowship's "InnerChange Freedom Initiative." By selecting these requirements, the letter argued, BOP simultaneously guaranteed Prison Fellowship's eligibility for LC2

[94] Both the FFRF complaint and a letter to BOP from Americans United for Separation and State focus on the LC2 RFP's form entitled "Credentials of Religious Services Contractor." They contend that the form's requirement of such religious credentials – which would be provided by a religious body – effectively excludes non-religious entities from participating. In both the SOW and the Pre-Proposal Conference, however, BOP says that non-religious providers are excused from submission of the form, unless that non-religious provider intends to introduce a religious component to its program. At least formally, religious credentials – like religious content and the religious character of service providers – are not necessary components of LC2 proposals.

[95] Letter from Alex J. Luchenitser, Americans United for Separation of Church and State, to Alberto R. Gonzales, DOJ, and Harley G. Lappin, BOP (April 19, 2006) (available online at: http://www.au.org/site/DocServer/BopLt060419bod.pdf?docID=821).

[96] Prison Fellowship Ministries operates the Iowa prison program recently held unconstitutional in *Americans United v. Mapes*, discussed in Part III.A., above.

contracts, and made it difficult for other potential providers to meet program requirements."[97]

Americans United's claim that the LC2 RFP appears to be "gerrymandered" for the benefit of Prison Fellowship was credible, especially in light of the brief time – one month – originally allowed between the RFP's posting and the due date for proposals. Moreover, the RFP requested very detailed information about potential providers' offered services, from the policies that would be used to select and train personnel, to the program curriculum, to the providers' ability to access a network of mentors and participating faith or community organizations. Such a tight deadline would be reasonable for organizations already operating similar programs, but virtually impossible to meet without such programs already in place, even if an organization were otherwise qualified.[98]

Neither FFRF nor Americans United focused on the one type of religious discrimination that appeared to remain even in the LC2 SOW. The SOW permitted religious service providers to prefer applicants that share the providers' faith. During the Pre-Proposal Conference, David Morton, the BOP Faith-Based Coordinator gave the following explanation of providers' choice of participants, using a Jewish program as his example:

> *The Jewish Faith-Based Residential Re-entry Program is open to all persons of all faiths. For admission purposes, how does the BOP propose to resolve a situation where, say, for example, there is only one available slot and the two persons applying for that slot are a Jew and a non-Jew. Would there be any admissions preference for the person of the Jewish faith? Once again, inmates must be willing to have the Life Connections program site designated for them. And each case will be evaluated individually. Persons of the same faith will ordinarily be given preference over inmates of another faith.*[99]

The SOW required providers, in the selection of participants, to comply with federal anti-discrimination laws. While the SOW specifically referenced a DOJ regulation that prohibits religious coercion or harassment, it also incorporated by reference Presidential Executive Orders and DOJ's regulations for faith-based service programs. In Executive Order 13279, "Equal Protection of the Laws for Faith-based and Community Organizations," as implemented in DOJ regulations, the administration has advanced a strong norm that prohibits religion-based discrimination against beneficiaries of federal programs.

[97] Americans United letter, cited above, at p. 2.

[98] The district court in the Iowa case found that the RFP there had been gerrymandered to favor Prison Fellowship Ministries, but concluded that the fact of such gerrymandering alone did not rise to the level of a constitutional violation, because the Iowa officials had secular reasons to prefer Prison Fellowship. 432 F. Supp. 2d at 916-17.

[99] Pre-Proposal Conference, cited above, at p.13.

By permitting LC2 providers to use religion as a criterion in selecting participants, BOP might have been in violation of applicable federal regulations. It might also have been acting unconstitutionally. The *Mitchell* plurality asserted that a program is deemed religion-neutral under the Establishment Clause if it "is offered to a broad range of groups or persons without regard to their religion." But the BOP's proposed method for selecting participants in LC2 programs appeared to fall short of the *Mitchell* plurality's standard. Under the RFP, it was possible that one religious provider would be awarded the contract for all six sites, and then would have been free to offer the program only to inmates that are part of – or are interested in becoming part of – its faith community. If the government offers aid only to those in select religious communities, and defines participants' eligibility based on their membership in those communities, then the government might reasonably be held responsible for the religious indoctrination carried out in that program.[100]

By permitting providers to use religion as a criterion in selecting participants, the Bureau of Prisons might have been in violation of applicable federal regulations and acting unconstitutionally.

b. Religious Activities: Content and Safeguards

As we noted above, Justice O'Connor's opinion in *Mitchell* represents the controlling Establishment Clause standard, and she adds two elements to the plurality's requirement of neutrality. To survive Establishment Clause scrutiny, O'Connor asserted, direct government aid must not be used for religious activities, and government must ensure that religious providers have in place adequate safeguards against the diversion of public funds to religious activities.[101] As recognized in both the FFRF complaint and the Americans United letter, the LC2 program made no distinction between permissible secular and impermissibly religious uses of direct government funding. In a preceding paragraph, we quoted BOP's definition of a single-faith program, and that quotation also described the contemplated use of religion by an LC2 provider: "The single faith contract teaches the essential components of the overall residential program outlined in the statement of work *through the particular principles of faith*."[102] The LC2 program appeared to permit, and even to encourage – although it did not require – providers to use explicitly religious means of fostering personal transformation. And, of course, LC2 contained no safeguards against diversion, because the

[100] Analysis of the government's neutrality toward program beneficiaries is a significantly more complicated task than this discussion indicates. Such neutrality must assume a baseline against which prospective participants' options can be measured. If benefits are extended only to those of select religious faiths, then the religious preference is obvious. But participants will often have a range of options available to them, and it is possible that a religion-based standard for participation might remedy certain criteria that might have effectively excluded the religious participant from availing herself of those options,

[101] This Establishment Clause analysis applies to any service provider receiving direct public financing, even if all other government-supported providers offer secular services.

[102] Pre-Proposal Conference, cited above, at p.4.

program specifically approved of the practices that such safeguards are supposed to prevent.[103]

In any other social service context, LC2's invitation to fully incorporate religious transformation into the government-funded service would violate the Establishment Clause standard set forth in the *Mitchell* concurrence. BOP, however, is likely to raise several defenses that apply specifically to the prison setting.

c. The Government's Likely Defenses

In defense of the LC1 program, which remains in operation, BOP may argue that the Establishment Clause should not be construed as strictly in the prison context. The Administration has incorporated a similar argument into a variety of federal regulations, including those that govern DOJ programs. The regulations generally provide that restrictions on direct public aid for religion do not apply – or at least not with the same force – with respect to government-supported religious activities in prison.[104] As a general matter, the exception for prisoners is valid to some extent, because prisoners would otherwise have significantly restricted access to religious life if the prison does not make some accommodations. But the justification for the exception contains within itself the standard for its own limitation. Government expenditures for prison programs do not violate the Establishment Clause only so long as the expenditures arise from the government's effort to facilitate the inmate's free exercise of religion.

Government expenditures for prison programs do not violate the Establishment Clause only so long as the expenditures arise from the government's effort to facilitate the inmate's free exercise of religion.

The contrast between BOP's LC1 and LC2 may prove instructive. The LC1 program is fairly well tailored to the legitimate purpose of facilitating inmates' religious exercise. The program coordinator is charged with identifying the resources to meet the varied religious needs of all participants, and the program is

[103] BOP would not have been able to argue that LC2 was a program of indirect assistance. For the funding structure in LC2 contracts, see Attachment I to the LC2 RFP, which provides that LC2 contracts will be "firm-fixed-price," with "ramp up" funding prior to enrollment, and then payments based on 3 levels of enrollment. Such financing does not fit within the Court's definition of "indirect aid," because funding of the provider is not entirely contingent upon a beneficiary's choice of that provider. For analysis of the distinction between direct and indirect financing, see our discussion of *Zelman v. Simmons-Harris*, the Supreme Court's 2002 decision upholding the Cleveland school voucher program, online at: http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=10.

[104] 28 CFR § 38.1(b)(2) ("The restrictions on inherently religious activities set forth in paragraph (b)(1) of this section do not apply to programs where Department funds are provided to chaplains to work with inmates in prisons, detention facilities, or community correction centers, or where Department funds are provided to religious or other organizations for programs in prisons, detention facilities, or community correction centers, in which such organizations assist chaplains in carrying out their duties"). We also discuss the scope of that exemption below, in connection with chaplaincy programs. See Part IV of this Report.

closely linked with each facility's office of chaplaincy, which further reinforces the need for religious inclusivity. In contrast, LC2 did not focus primarily on facilitating the religious needs of individual inmates. In fact, LC2 service providers would have been specifically asked to refer "non-adherent" participants to the office of prison chaplain, which would then have been responsible for meeting that inmate's religious needs. LC2 would have imposed only negative restrictions on providers' role in the religious life of particular inmates – the ban on mandatory participation in ritual or creedal confession, and the obligation to release prisoners to attend alternative worship services. For religious providers in LC2, the program's central focus appeared to have been the juncture of the government's desire for personal transformation of inmates, and the religious provider's freedom to build and operate a ministry program that is faithful to the organization's mission. The ambitious scope of LC2 was much broader than a concern to meet free exercise interests of inmates, and LC2 thus would have completely outrun the prison-based exception to Establishment Clause restrictions.

Indeed, LC2 looked very much like the Iowa program held unconstitutional in *Americans United v. Mapes*, discussed above. The federal district court in Wisconsin is not bound to follow the reasoning of Chief Judge Pratt in the Iowa case, but the thoroughness of Chief Judge Pratt's opinion is likely to be highly influential to other district court judges confronted with similar issues. If LC2 had gone forward, the opinion in *Americans United v. Mapes* would have been a model for the U.S. district court in Wisconsin. Now that BOP has cancelled LC2, the issues it presented are no longer available for discussion.[105]

The government will have fairly strong substantive arguments in defense of Life Connections 1 and may be able to show a sufficiently strong connection between that program and traditional chaplaincy functions.

With respect to LC1, which remains in operation, the government will have fairly strong substantive arguments in response. The government may be able to show a sufficiently strong connection between that program and traditional chaplaincy functions. LC1, especially when compared with what had been proposed in LC2, is designed to facilitate prisoners' exploration and development of their own religious commitments. LC2, in contrast, seemed to subordinate those individual concerns for religious exercise to the goals of the religious provider (and perhaps also the government).

[105] Soon after the lawsuit, BOP withdrew the RFP for LC2, but did not cancel it. Under those circumstances, the issues presented by LC2 would have been unripe for adjudication. We analyze the question of ripeness in this case as it stood in May, 2006 in our Roundtable Legal Update on the litigation, at http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=46.

Conclusion

FFRF's lawsuit, and the Americans United letter to DOJ and BOP, have highlighted a program that raises significant questions for Establishment Clause law. These questions, when eventually addressed by a court, will undoubtedly prove important for analysis of faith-based programs in prison and in the broader community as well. The court's assessment of BOP's LC1 program may offer additional clarifications of the relevant law, and BOP may well be required to defend that program on its merits. The LC2 program would have been considerably more difficult for the government to defend, but BOP's cancellation of that program has eliminated the need for the government to do so.

IV. CHAPLAINCIES AND THEIR LIMITS

In the federal rules promulgated through the FBCI, the government has rightly asserted that chaplaincy programs fall within an exception to the Establishment Clause's ordinary limits on direct public aid for religion.[106] Two important developments during the last year highlight the uncertain reach of that exception. The first is a lawsuit that challenges certain aspects of the Department of Veterans Affairs (VA) hospital chaplaincy; the second is a finding in the GAO's Report on the FBCI, which raised questions about the interpretation of "chaplain" under a Department of Justice (DOJ) grant program.

The government has rightly asserted that chaplaincy programs fall within an exception to the Establishment Clause's ordinary limits on direct public aid for religion.

A. Freedom From Religion Foundation, Inc. (and others) v. R. James Nicholson, Secretary of the Department of Veterans Affairs (and others). Lawsuit filed April 18, 2006; motion to dismiss denied September 5, 2006.

On April 18, 2006, the Freedom From Religion Foundation (FFRF) filed suit against officials of the U.S. Department of Veterans Affairs (VA), claiming that the VA's hospital chaplaincy program violates the Establishment Clause.[107] In its complaint, FFRF alleges that the VA integrates pastoral care into its treatment plan for every patient, because the agency believes that "good health care is incomplete without substantively addressing the spiritual dimension of each patient" (Complaint, ¶ 46). FFRF concedes that the law of the Establishment Clause allows publicly-funded chaplaincy in VA hospitals, but asserts that such chaplaincy programs may only facilitate the free exercise of religion by those who are confined within the institution.[108] The VA's chaplaincy program, FFRF argues, far exceeds the narrow purpose of aiding inpatients' religious activity. VA chaplains actively solicit intensive spiritual involvement with every patient, the complaint alleges, and they extend that involvement to outpatients, to families of patients, and even to hospital staff.

FFRF has brought two previous lawsuits against government programs that link religion and healthcare,[109] but this case against the VA represents a far more

---

[106] 28 CFR 38.1(b)(2) (Department of Justice rule permitting use of direct aid for chaplains in correctional settings); 29 CFR 2.33(b)(3) (Department of Labor rule permitting use of direct funds for chaplaincy and related programs).

[107] The FFRF complaint is available online at: http://www.ffrf.org/legal/veteransaffairs.html. Subsequent references to the complaint are included in the text as "Complaint, [paragraph number]."

[108] We have made a similar argument about government-supported chaplaincy in the prison context. See our analysis of FFRF's lawsuit against the federal Bureau of Prisons in Part III of this report, and online at http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=46.

[109] *FFRF v. Montana Office of Rural Health*, 2004 U.S. Dist. LEXIS 29139 (see our analysis of the decision, at: http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=30); *FFRF v. Minnesota Faith/Health*

significant challenge. In this lawsuit, FFRF has targeted a set of practices, and the philosophy of chaplaincy embodied in those practices, that are widely shared within both private and public healthcare institutions. If the courts ultimately agree with FFRF's argument, the case would dramatically reshape healthcare chaplaincy programs in all publicly-financed health facilities, from the VA to county hospitals and state-run nursing homes.

> **The case could dramatically reshape healthcare chaplaincy programs in all publicly-financed health facilities, from the VA to county hospitals and state-run nursing homes.**

The VA responded by filing a motion to dismiss the lawsuit, arguing that its chaplaincy program falls within the scope of the constitutional exception. On September 5, 2006, U.S. district judge John C. Shabaz denied the government's motion to dismiss, for reasons explained below.

FFRF's Complaint

FFRF's complaint is based on two legal premises. First, government-financed chaplaincy programs survive Establishment Clause scrutiny only to the extent that such programs "accommodate the free exercise rights of patients, . . . who otherwise could not get to religious services because of hospitalization" (Complaint, ¶ 32). Second, the Establishment Clause prohibits the use of public funds to support any religious activities by chaplains that are not narrowly focused on serving the free exercise rights of patients confined to government facilities.

Drawing from these two premises, FFRF argues that the VA's chaplaincy program violates the Establishment Clause because it funds a broader range of religious activities than those necessary to accommodate patients' free exercise rights. This broad range of activities, FFRF argues, demonstrates that the VA has designed and operated its chaplaincy program to promote a distinctly religious vision – the belief that spiritual health is a necessary component of human well-being.

FFRF primarily focuses its lawsuit on the VA's policy of integrating pastoral care into the medical diagnosis and treatment of every patient who receives health services from the VA. Under this policy, VA chaplains work within

---

Consortium (see our analysis of FFRF's complaint in the suit, at: http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=36). The suit was dropped after the University ended its participation in the program. See Claire Hughes, Lawsuit Ends as Public University Drops Course on Faith and Health (Roundtable, Sept. 13, 2005) (online at: http://www.socialpolicyandreligion.org/news/article.cfm?id=3234). Another lawsuit, *FFRF v Towey*, also involved a challenge to a government-funded healthcare program operated by Emory University. In that suit, the court ruled that the challenged grant did not violate the Establishment Clause, even though the majority of sub-grants under the program were awarded to faith-based organizations. *FFRF v. Towey*, 2005 U.S. Dist. LEXIS 39444. For our analysis of that decision, see: http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=32

interdisciplinary teams of health professionals who offer "wholistic" care for patients. As part of such teams, chaplains serve in a "clinical role as the experts chiefly responsible for addressing spiritual issues," who bring their expertise in identifying and responding to spiritual needs and crises.[110] In particular, FFRF alleges, VA chaplains carry out their clinical role by conducting – and documenting – a "spiritual health assessment" of every patient treated in a VA facility, by recommending to patients specific courses of spiritual treatment, and by participating in the medical team's discussions about patient care (Complaint, ¶¶ 34-50, 58-68). Moreover, FFRF argues that the VA provides this integrated spiritual care even to those who are not confined in VA facilities, including outpatients, the families of patients, and VA hospital staff (Complaint, ¶¶ 44, 49, 53).[111] Finally, FFRF contends, the VA's National Chaplain Center provides educational programs that instruct chaplains and health care providers in this religious view of human life, and in the practices through which the VA fully integrates this religious vision into its patient care (Complaint, ¶¶ 74-79).

Before turning to our analysis of the complaint, it is important to note that FFRF does not challenge all aspects of the VA chaplaincy program. FFRF raises no objection to the more traditionally religious tasks of chaplaincy, such as providing worship services, praying with and offering counsel to those who request such care, or identifying and arranging for religious leaders to serve those whose faiths are not represented by a facility's own chaplains. Nor does FFRF challenge other, less patently religious, roles that chaplains often fulfill in healthcare institutions. These roles include assisting patients and families with end-of-life decisions (including the completion of advance medical directives); mediating conflicts among patients, their families, and healthcare providers; and serving on institutional committees for biomedical or research ethics. FFRF's constitutional challenge is directed entirely against the therapeutic role of VA chaplains. By identifying spiritual disease as an illness that government employees – VA chaplains – are expected to identify and treat, FFRF argues, the VA has exceeded the constitutionally limited authorization under which chaplaincy programs must operate.

Analysis

Our own review of materials published by the VA and its National Chaplain Center (NCC) suggests that the factual allegations in FFRF's lawsuit are well-

[110] Jack Klugh, "Role Clarification: Who Assesses Spirituality?" (Spiritual Grand Rounds, August 26, 2003). Available on the website of the Department of Veterans Affairs, National Chaplain Center, http://www.chaplain.med.va.gov/chaplain/page.cfm?pg=6.

[111] The complaint also alleges that some VA chaplains have authored prayers and other religious materials "for various situations that do not involve patient treatment at all" (Complaint, ¶¶ 53-57); and that VA chaplains have published devotional writings intended to be read and used by a broader audience than just VA patients (Complaint, ¶¶ 71-73). We see these allegations as specific instances of FFRF's more general claim that religious activities of the VA chaplaincy program are not narrowly tailored to serve the free exercise needs of hospitalized patients.

supported.[112] The VA's chaplaincy program embraces a vision of wholistic patient care, attempts to make pastoral contact with every patient treated in a VA facility, offers an array of services designed to address spiritual need and distress, and promotes its vision of spiritual health through courses and publications. In these respects, however, the VA's chaplaincy program seems to reflect an approach to pastoral care that is widespread within private and public healthcare facilities.[113] If we are correct that the VA's practice of wholistic care, with its specific concern for spiritual needs, is legally indistinguishable from the healthcare policies of other public facilities, then the FFRF's challenge could have dramatic implications for all publicly funded healthcare institutions.

Our review suggests that the factual allegations in FFRF's lawsuit are well-supported. The case could have dramatic implications for all publicly funded healthcare institutions.

Because the VA is unlikely to contest the core factual allegations in FFRF's complaint, the outcome of this lawsuit will turn on the constitutional significance of those allegations. That constitutional significance will depend on the district court's application of the relevant Establishment Clause standards, which are drawn from the Supreme Court's decisions in *Agostini v. Felton*[114] (1997) and *Mitchell v. Helms*[115] (2000). As we have discussed at length elsewhere, a program directly funded by the government violates the Establishment Clause if: 1) the aid program lacks a "legitimate secular purpose;" 2) "any religious indoctrination that occurs in [the government-funded program] could reasonably be attributed to governmental action;" 3) "the aid program defines its recipients by reference to religion;" or 4) the program "creates an excessive entanglement between government and religion."[116]

The VA's chaplaincy program, as described in FFRF's complaint, does not appear to be constitutionally vulnerable under the third or fourth parts of the

[112] We reviewed a wide range of material available through the website of the VA National Chaplain Center (NCC), including the VA Chaplains Handbook: Spiritual and Pastoral Care Procedures, online at http://www1.va.gov/vhapublications/viewpublication.asp?pub_id=1231; the NCC's list of Best Practices for Chaplaincy, online at: http://www.chaplain.med.va.gov/chaplain/page.cfm?pg=4; the NCC's list of continuing education programs for VA chaplains, online at: http://www.chaplain.med.va.gov/chaplain/page.cfm?pg=3; and the papers presented through the NCC's "Spiritual Grand Rounds" program, online at: http://www.chaplain.med.va.gov/chaplain/page.cfm?pg=6.

[113] For a good overview of healthcare chaplaincy, see Professional Chaplaincy: Its Role and Importance in Healthcare, eds. Larry VandeCreek & Laurel Burton, online at: http://www.healthcarechaplaincy.org/publications/publications/white_paper_05.22.01/index.html See also the accreditation policies for pastoral care programs, available in the Appendix to the VA Chaplain Service Spiritual and Pastoral Care Program Annual Report (2005), online at: http://www.chaplain.med.va.gov/chaplain/docs/Annual_Report_Appendixes.pdf.

[114] 521 U.S. 203 (1997).

[115] 530 U.S. 793 (2000).

[116] *Agostini*, 521 U.S. at 223-26; *Mitchell*, 530 U.S. at 807-10 (plurality opinion); *Mitchell*, 530 U.S. at 844-49 (O'Connor, J., concurring in the judgment). FFRF also alleges that the VA's spiritual care program should be assessed under the "endorsement" test advocated by Justice O'Connor. We do not believe that the endorsement inquiry – which is best suited to cases involving government-sponsored religious displays – adds anything to the *Agostini-Mitchell* analysis described and applied here.

Establishment Clause standard. In its assessment of spiritual needs and provision of spiritual care, the VA chaplaincy program does not "define its recipients on the basis of religion." Chaplains are trained to serve those of any or no faith, and FFRF does not allege any religion-based discrimination in the program.[117] Nor does FFRF raise the question of "excessive entanglement," although the chaplaincy program does depend on administrative relationships between the government and religious bodies. Most significantly, the VA requires chaplains to possess an "ecclesiastical endorsement" from a publicly recognized religious body. Chaplains are ineligible to serve without such an endorsement. Two federal appellate courts have addressed the issue of church-state entanglement in the context of government hospital chaplaincies, and both courts upheld the practice of using "ecclesiastical endorsements" as a criterion for service as a chaplain.[118] In Murphy v. Derwinski (1993), the court reasoned that the endorsement procedure minimizes such entanglements, because "it must be the endorsing body of a religious denomination – and not the VA – that determines the qualification of its representatives who provide religious services to VA patients."[119] Our analysis of FFRF's complaint will thus focus only on the first two prongs of the Establishment Clause test.

Two federal appellate courts have addressed the issue of "ecclesiastical endorsements" in the context of government hospital chaplaincies, and both courts upheld the practice.

1. Secular Purpose

In its complaint, FFRF alleges that "the integration of religion and spirituality into the medical services provided by the VA is intended to promote religion and belief, rather than to accommodate free exercise rights of veterans" (Complaint, ¶ 83). FFRF thus implicitly claims that the VA's program of spiritual assessment and care lacks a legitimate secular purpose, because the only such purpose – accommodating patients' free exercise rights – is fully satisfied by a much narrower policy and practice of religious involvement with patients.

We think the court is likely to find that the VA's integrated spiritual care program survives scrutiny under this first Establishment Clause test. This prediction arises, at least in part, from the Supreme Court's generally deferential application of the secular purpose standard. FFRF must do more than show that the VA's

---

[117] In *Baz v. Walters* (782 F.2d 701, 7th Cir. 1986), a federal appellate court rejected a former VA chaplain's claim that the VA chaplaincy program engaged in religion-based discrimination. The chaplain argued that, in prohibiting chaplains from proselytizing while serving in VA facilities, the VA discriminated against those for whom proselytizing is a core attribute of religious observance. The court rejected the former chaplain's argument, and concluded that the VA was justified in requiring "an ecumenical approach to its chaplaincy with special attention to the sensitive needs of its patient population." Id. at 709.

[118] *Carter v. Broadlawns Medical Center*, 857 F.2d 448 (8th Cir. 1988); *Murphy v. Derwinski*, 990 F.2d 540 (10th Cir. 1993).

[119] *Murphy*, 990 F.2d at 547.

program advances a religious purpose; it must show that the program is "entirely motivated by a purpose to advance religion."[120] Or, in the words of Justice O'Connor, FFRF must establish that any purportedly secular purpose offered by the VA is a "sham."[121]

The VA will almost certainly be able to show that its spiritual care program reflects a sincere secular purpose. That purpose lies in the VA's promotion of wholistic healthcare, an understanding of human health and well-being that is attentive to the spiritual and religious needs of patients. Such attention, the government will claim, is required by the significance that individual patients – and their families – give to spiritual matters, and not by any independent value that the government assigns to religion. Because these spiritual needs are not readily distinguished from concerns that are proper objects of government care, such as a patient's emotional or psychological condition, and neglect of the patient's spiritual needs may substantially interfere with the normal course of medical treatment, the VA should prevail against the claim that its spiritual care program lacks a legitimate secular purpose.

The VA should prevail against the claim that its spiritual care program lacks a legitimate secular purpose.

2. Government Responsibility for Religious Indoctrination

In Establishment Clause analysis of programs that provide direct public aid for religion, the most complex – and typically decisive – inquiry concerns the government's responsibility for any religious indoctrination that may be traceable to the public aid. Justice O'Connor's concurring opinion in *Mitchell v. Helms* provides the controlling statement for that inquiry. In her *Mitchell* opinion, O'Connor holds that the government is constitutionally responsible for religious indoctrination if the challenged program uses public funds for specifically religious activities, or if the challenged program lacks reasonably adequate safeguards against the diversion of government funds to religious activities.[122]

Because it appeared in cases challenging government aid to private religious grantees, however, O'Connor's analysis does not readily translate into the context of government chaplaincy, in which public funds are explicitly and intentionally used to support religious activities.[123] Nonetheless, we believe that the concerns manifest in her *Mitchell* opinion should remain at the core of any Establishment Clause inquiry into public aid for religious activity. To coherently apply to the

[120] Wallace v. Jaffree, 472 U.S. 38, 56 (1985).
[121] Id. at 75-76 (O'Connor, J., concurring in the judgment).
[122] We offer further analysis of the *Mitchell* concurrence in our 2005 State of the Law Report, at 15-17, and in our 2002 State of the Law Report, at 22-24. For a sustained exploration of O'Connor's *Mitchell* standard, see our essay, The Faith-Based Initiative and the Constitution, 55 DePaul L. Rev. 1, 75-102 (2005).
[123] The one Supreme Court decision involving a chaplaincy program, *Marsh v. Chambers* (1983), offers virtually no guidance. *Marsh* involved a challenge to a state-funded legislative chaplain, and the Court upheld the chaplaincy on historical grounds, citing the longstanding practice of employing legislative chaplains. 463 U.S. 783 (1983).

chaplaincy context, O'Connor's approach must be modified in ways that acknowledge a legitimate set of public expenditures for religion.

a. Military and Prison Chaplaincies – the Modified Establishment Clause Analysis

The standard justification for government-financed chaplaincy programs – whether in the military, prisons, or healthcare institutions – derives from the government's obligation to accommodate the religious needs of those under state care or control. In prisons, the government isolates inmates from ordinary access to religious services, and so has a coordinate obligation to facilitate inmates' religious observance. Likewise in the armed forces, the government deploys troops overseas, in remote and sometimes hostile locations, depriving them of access to religious services, and so the government supplies chaplains who offer religious worship, instruction and counsel within the military structure. With respect to prison and military chaplaincies, government expenditures for religion are therefore justified because – and to the extent that – they assist prisoners and service members to engage in the religious practices that they would have enjoyed but for the government's intervention.[124]

Government-financed prison chaplaincy programs are justified to the extent that they assist prisoners to engage in the religious practices that they would have enjoyed but for the government's intervention.

For Establishment Clause analysis, two criteria can be drawn from this standard justification for prison and military chaplaincies. First, the government may only provide religious services if those services are desired by members of the affected population. (We refer to this as the "choice" criteria.) Second, the government may only provide religious services if the services are not otherwise practicably available to the affected population. (We refer to this as the "isolation" criteria.) If these two criteria are met, the constitutional ban on direct aid for religious activities is set aside.

That conclusion, however, does not exhaust the significance of the two criteria. Even as they offer an exception to ordinary Establishment Clause restrictions, the criteria establish the conditions under which all religious aspects of publicly-funded chaplaincy programs must be operated. Whether the service at issue is an Army chaplain's pastoral counseling of a soldier's dependents, or a Muslim prison chaplain's classes in the study of Qur'an, the constitutional legitimacy of

[124] Of course, the prisons and military retain the authority to limit the content and timing of religious services to the extent that such limitations are required by those unique contexts. For example, prisons may limit inmates' freedom to participate in religious practices that impose security risks. See *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987).

the service – including the means by which it is delivered – depends on the extent to which the service conforms to these two criteria.

Seen in this light, the criteria suggest how courts might sensibly modify Justice O'Connor's approach to account for chaplaincy programs. Government is constitutionally responsible for religious indoctrination in the chaplaincy context a) if public funds support religious activities that do not meet the choice and isolation criteria; or b) if the chaplaincy program lacks adequate safeguards against the diversion of public funds to support religious activities that do not satisfy the two criteria.

More concretely, the government should be held constitutionally responsible for religious indoctrination if prisoners or service members are required to attend or participate in religious services.[125] The government should also be held responsible for religious indoctrination when religious activities are intended to serve those who are not reasonably deemed isolated from private sources of religious practice. Thus, a Navy chaplain's worship services clearly satisfy the isolation criteria when they are conducted on a warship that is at sea, in a combat zone. But the same conclusion should not apply to government-funded worship for an Air Force Reserve or National Guard unit, when that unit has not been called to active duty, and the members remain engaged in their ordinary civilian work and communities.[126]

A constitutionally sound chaplaincy program must incorporate training for chaplains in appropriate limits of this specialized ministry, adequate monitoring and reasonable procedures for responding to any misconduct.

Finally, the government bears responsibility for religious indoctrination when its chaplaincy programs lack the safeguards necessary to ensure that chaplains (or others) do not operate those programs in ways that exceed the limits established by the two criteria. A constitutionally sound chaplaincy program, therefore, must incorporate training for chaplains in appropriate forms and limits of this specialized ministry, adequate monitoring of such ministry to deter and detect inappropriate conduct, and reasonable procedures for responding to any misconduct.

b. The Modified Analysis and VA Healthcare Chaplaincy

We thus return to the decisive question raised by FFRF's challenge to the VA chaplaincy. Does the government bear constitutional responsibility for religious indoctrination of VA patients through the spiritual health program? To answer

[125] See, e.g., *Munson v. Norris*, 435 F.3d 877 (8th Cir. 2005) (Establishment Clause was violated when inmate was required to pray in mandatory counseling program).

[126] Although the issue is beyond of the scope of this update, we believe that courts would give the military significant – but certainly not absolute – deference in determining which contexts satisfy the isolation criteria. The issue is raised, but not resolved, in the only significant court decision in an Establishment Clause challenge to the military chaplaincy, *Katcoff v. Marsh*, 755 F.2d 223, 237-38 (1984).

that question, we look first to the VA program's consistency with the criteria of choice and isolation, and then at the adequacy of the program's safeguards against constitutionally impermissible practices.

Choice. Under this criteria, the court must ask whether or not the VA's spiritual health program is primarily designed to meet patients' desire for religious services. We intentionally use "desire" as the operative term – rather than "need" – to signify that the VA program satisfies this criteria only if the program rests on the expressed or reasonably anticipated religious preferences of patients, and not because the government independently believes that patients should avail themselves of spiritual healthcare. Two central characteristics of the VA's spiritual healthcare program indicate that the program should be able to satisfy the choice criteria.[127]

First, patients choose whether, and the extent to which, they will participate in the spiritual health program. FFRF's complaint places great emphasis on the VA chaplains' practice of conducting spiritual assessments of every patient, and the plaintiffs argue that such assessments prove that the chaplaincy program reflects a government-directed, rather than a patient-directed, emphasis on spiritual healthcare. That argument, however, treats the choice criteria as if it demands government passivity in religious matters. In other words, under FFRF's theory of the case, the VA may only offer religious services to those patients who first, and specifically, ask to receive such services. We think that understanding of patient choice is too restrictive. VA-sponsored chaplaincy services are still consistent with the choice criteria even if the chaplains, recognizing patients' statistically widespread desire for some connection with hospital chaplains, make the initial contact with patients.

The character of that initial contact matters greatly in determining whether or not the spiritual care program is consistent with a patient choice model. A suggestion by the chaplain that the VA's provision of medical treatment depends on the patient's participation in the spiritual health program would violate the choice criteria, as would a chaplain's repeated efforts to engage an unwilling patient in spiritual care. The VA's systematic practice of approaching every patient, however, might reasonably be deemed an effort to ensure that each patient is given the opportunity to express his or her specific needs and preferences for pastoral care.

The VA's systematic practice of approaching every patient might reasonably be deemed an effort to ensure that each patient is given the opportunity to express his or her specific needs and preferences for pastoral care.

[127] In the following analysis, we draw from documents published by or available through the VA's National Chaplain Center, including the Veterans Health Administration Handbook 1111.2, Spiritual and Pastoral Care Procedures (March 2005), and other materials found on the NCC's website, http://www.chaplain.med.va.gov/Chaplain/.

Moreover, the VA's integration of spirituality within its wholistic model of patient care seems – at least in principle – equally consistent with a model of patient choice. To the extent that patients believe they need pastoral care for their spiritual distress, the chaplaincy's provision of such religious services is no less patient-directed than a chaplain's compliance with a patient's request for prayer before surgery.

Second, and of equal importance, the VA spiritual health program does not promote the specific religious teachings or commitments of any particular faith tradition. Chaplains are prohibited from engaging in proselytizing in their relationships with patients. Instead, the substantive religious content of each pastoral relationship conforms to the religious beliefs and practices of each participating patient. In the model of spiritual care endorsed by the VA chaplaincy – and shared by professional healthcare chaplains across the broad spectrum of public and private hospitals – the chaplain helps the patient to understand better his or her own spiritual needs and resources, and then helps the patient to use those resources to address the patient's specific needs.

The VA will not deny that such chaplain-patient interactions involve a religious service. Nor will the VA deny that the chaplains' spiritual care is intended to achieve a religious objective – the improved spiritual well-being and lessened spiritual distress of VA patients. But this service and its religious objective depend, both practically and constitutionally, on the patient's choice to participate in the program of spiritual care.

Isolation. Compared to the prison and military contexts described above, that of VA healthcare would seem to involve far less isolation of patients from ordinary private religious services. Unlike the prisons or military, patients in VA facilities have very few – if any – government-imposed barriers to contact with private sources of religious care. Thus, one might argue, the government's obligation and constitutional authority to supply such patients with religious services should be correspondingly weaker than in the military or prison contexts.[128]

Such an analysis of VA's patients' relative isolation overstates the significance of barriers that are *legally imposed* by the government, and neglects the significance of the *practically constrained* religious options and experiences available to those in government care or control. VA regulations certainly do not prohibit patients from receiving pastoral care from their own religious leader and community. Indeed, part of the professional obligation of VA chaplains is to facilitate patients' access to such care.

[128] FFRF argues that the VA's constitutional authority to provide chaplaincy services is limited because of limited extent to which patients may be regarded as cut off from private sources of religious care and worship. Complaint, ¶¶ 44, 49. But FFRF does not attempt to compare such limitations in VA hospitals with those that might attach for prison or military chaplaincies.

In assessing the patient's isolation, however, the relevant question is whether patients in VA healthcare facilities would be deprived of a significant opportunity for religious experience if the facility did not offer the chaplaincy's integrated spiritual care program. To answer that question, the court should first look to the set of religious services generally available in public and private hospitals across the nation. Such an examination, we believe, would lead the court to conclude that the VA's spiritual healthcare program is fundamentally similar to pastoral care practices throughout the healthcare industry.[129] The court should next consider whether it would be practically feasible for patients in VA facilities to receive functionally equivalent religious services from those not employed by and working within the VA facility. Although such an analysis would depend on facts developed in the course of the lawsuit, we are deeply skeptical that non-VA chaplains could provide such a service, because the integrated spiritual health program requires the chaplain's interaction with the other professionals providing wholistic care for the patient, and the chaplain's consistent presence within the facility.

The relevant question is whether patients in VA healthcare facilities would be deprived of a significant opportunity for religious experience if the facility did not offer the chaplaincy's integrated spiritual care program.

Seen in this light, VA patients' isolation is of equal constitutional significance to that of prisoners or service members. The integrated spiritual care program offers to VA patients a form of religious service that would be available to them in virtually any other healthcare facility, a service that patients cannot reasonably obtain for themselves on an ad hoc, private basis. Were the VA not to offer its spiritual care program, therefore, patients' only alternative means of receiving wholistic care would be to seek treatment at a non-VA facility, which inevitably involve greater expense. We think that the government is constitutionally entitled, though not obligated, to provide this sort of wholistic care to those who have served in the armed forces.

Safeguards. Finally, the court will need to consider whether or not the VA program has in place adequate safeguards against inappropriate religious conduct within the program. As a substantive matter, such safeguards should reflect the two criteria – choice and isolation – through which such chaplaincy programs are constitutionally validated. For example, the program must take adequate measures to ensure that chaplains do not place undue pressure on patients to

[129] The VA's program is accredited by – and conforms to the model of spiritual care advocated by – the major professional organization for pastoral care. The professional organization is The COMISS Network - The Network on Ministry in Specialized Settings, and its accrediting organization is CCAPS (The COMISS Network Commission on Accreditation of Pastoral Services). http://www.comissnetwork.org/. The relevant accreditation standards can be found in the Appendix to the VA Chaplain Service Spiritual and Pastoral Care Program Annual Report (2005), online at: http://www.chaplain.med.va.gov/chaplain/docs/Annual_Report.pdf and http://www.chaplain.med.va.gov/chaplain/docs/Annual_Report_Appendixes.pdf.

receive spiritual care, or fail to respect patients' religious commitments (or lack thereof), or engage in proselytizing. Moreover, the program must ensure that its spiritual healthcare program remains consistent with the professional, non-denominational practice at non-VA facilities. Divergence from that standard could indicate that the VA's program has ceased to provide the religious service that patients would receive at other hospitals, and it also might indicate a shift away from the patient-directed model of care.

Most importantly, the analysis of safeguards should focus on the extent to which the challenged program has institutionalized the relevant constitutional limitations. In this context, such safeguards must include 1) training materials and courses that teach chaplains the appropriate, patient-directed methods for engaging in spiritual care, and specifically identify practices that are inappropriate; 2) administrative supervision that is reasonably designed to monitor chaplains' compliance with program norms and restrictions, and that regularly reinforces awareness of those norms and restrictions; and 3) a reasonably accessible and effective mechanism through which patients, staff, or other chaplains may report possibly inappropriate conduct, and which responds to all such reports with reasonable investigation and, where warranted, adequate remedial measures. From our review of the VA's chaplaincy program, we believe that the agency will be able to show that the program as a whole possesses such safeguards, although the adequacy of any safeguard depends, at least in part, on its implementation in a specific factual context.

3. *VA's motion to dismiss*

In its motion to dismiss, the government argued that the VA's chaplaincy program does not violate the Establishment Clause because it is a constitutionally permissible effort by the government to accommodate the religious needs of veterans who receive services from the VA. The government's argument may yet prevail in this case, but the court rejected it at this stage of the proceedings.

> For the government to win its motion to dismiss, the court needed to be convinced that the VA's chaplaincy program satisfies the relevant Establishment Clause standard even if everything that FFRF alleges about the program is true. This proved an insurmountable burden.

To win its motion to dismiss, the government needed to show that FFRF "cannot prove any set of facts in support of its claim which would entitle it to relief" (Opinion, at 6). The court must be convinced that the VA's chaplaincy program satisfies the relevant Establishment Clause standard even if everything that FFRF alleges about the program is true. This proved an insurmountable burden, because the legal standard for the motion essentially required the government to argue that the Establishment Clause permits the VA to engage in any integration of religion and health care, however broadly targeted or intensively conducted, so long as patients are free to decline the spiritual treatment. If the court had accepted that sweeping argument, it would have concluded that FFRF's complaint

failed to allege a constitutional violation. But the court disagreed with the interpretation of the Establishment Clause presupposed by the government's argument.

Implicit in the government's argument, the court reasoned, is a claim that the Establishment Clause forbids only coercive religious conduct by government chaplains. Citing the Supreme Court's decisions in *Agostini v. Felton* (1997) and *Mitchell v. Helms* (2000),[130] the court determined that the Establishment Clause bars any governmental action that has the "primary effect" of advancing religion, even if the action is not coercive. In this case, the court ruled, FFRF alleges that the VA's chaplaincy program advances religion "because it tends to send a message to non-religious veterans that they may be unable to completely heal if they do not believe that spirituality plays an important role in their recovery" (Opinion, at 11). Rather than simply accommodating patients' free exercise rights, FFRF argues, the VA has taken an active role in promoting religion and spirituality. The court found this allegation to be sufficient to state a claim that the VA is responsible for chaplains' religious indoctrination of patients (and perhaps staff and patients' families), in violation of the Establishment Clause.

The court also suggested that VA's integration of spirituality into its health care might result in "excessive entanglement" of government and religion (Opinion, at 11-12). Although entanglement remains a concern under the Supreme Court's current Establishment Clause jurisprudence, the concept is generally applied only to administrative relationships between government and religious institutions, such as when a government official would seek to review the teaching practices of a religious school. Thus, the entanglement doctrine is very unlikely to apply to the VA chaplaincy, because the religious conduct at issue is already under the exclusive control of the government.

Nonetheless, the district court stands on more doctrinally solid ground in its core analysis of the motion to dismiss. The government argued that all activities of the VA chaplaincy, integrating spirituality into the VA's healthcare, are encompassed within the government's authority and responsibility to accommodate the free exercise interests of patients under the VA's care. The court found that the doctrine of accommodation does not provide blanket justification for all conceivable activities of the VA chaplaincy. It is possible that some ways of integrating spiritual concerns into patient care might cross a line into constitutionally impermissible government promotion of religion. The court's decision allows FFRF the chance to gather sufficient facts to show whether such a

The court's decision permits the case to move forward, and the parties will now begin discovery of the facts relevant to resolution of the dispute.

[130] *Agostini*, 521 U.S. 203 (1997); *Mitchell*, 530 U.S. 793 (2000). We discuss the *Agostini* and *Mitchell* decisions at length in our 2002 State of the Law Report, at 20-25.

line has been crossed, whether at specific VA sites around the country, or in the system as a whole.

The court's decision resolves neither the legal nor the factual issues disputed in this case. Instead, the court simply found that FFRF's complaint met the minimal standard required to defeat a motion to dismiss. The court's decision permits the case to move forward, and the parties will now begin discovery of the facts relevant to resolution of the dispute. Once discovery is completed, the VA or FFRF may again ask the court for a legal judgment before trial, based on facts not disputed by the parties. If such a motion is denied, the case will then proceed to trial.

Conclusion

FFRF has alleged – and now bears the legal burden of proving – that the VA chaplaincy's spiritual healthcare program violates the Establishment Clause. In this respect, FFRF's challenge is legally similar to one decided by the Supreme Court in *Bowen v. Kendrick* (1988), the landmark ruling that opened the door for the Faith-Based and Community Initiative.[131] *Bowen* involved a challenge to a government-funded sexual abstinence education program, and plaintiffs alleged that the program as a whole was unconstitutional, because it permitted grants to religious organizations. The Court rejected plaintiffs' "facial" challenge to the entire program, concluding that the possibility of some unconstitutional uses of public funds did not necessarily impair the constitutionality of the overall program. The Court remanded the case to the lower court, however, to determine whether particular applications of the program were unconstitutional.

On its face, VA's spiritual healthcare program seems capable of implementation in a manner that does not violate the Establishment Clause, but FFRF may develop evidence of specific unconstitutional practices at one or more VA facility and if so, FFRF will be entitled to injunctive relief appropriate to the scope of such a violation.

We believe that the court is likely to reach a similar conclusion in FFRF's challenge to the VA's spiritual healthcare program. On its face, the program seems capable of implementation in a manner that does not violate the Establishment Clause, and so we would expect the court to reject FFRF's effort to enjoin operation of the entire program. Through the course of the litigation, however, FFRF may develop evidence of specific unconstitutional practices at one or more VA facility. If so, FFRF will be entitled to injunctive relief appropriate to the scope of such a violation.

[131] *Bowen*, 487 U.S. 589 (1988). We discuss *Bowen v. Kendrick* in our 2002 State of the Law Report, at 20, and in our 2005 State of the Law Report, at 4-7, 12-13.

B. GAO Report, Faith-Based and Community Initiative: Improvements in Monitoring Grantees and Measuring Performance Could Enhance Accountability (GAO-06-616, June 2006).[132]

The GAO report brought to light some apparent uncertainty within the Department of Justice (DOJ) over the meaning of "chaplain" within DOJ's regulations for faith-based grantees. The report noted that the DOJ grant materials for the Community Corrections Contracting program contain no restriction on the use of funds for religious purposes. GAO stated that DOJ officials omitted the restriction because they "believe that FBOs providing services in Community Corrections Centers . . . are exempt from the prohibition related to inherently religious activities and therefore the agency does not include any reference to the prohibition in the contract documents for this program."[133]

This explanation is supported by a letter sent to GAO by Steven T. McFarland, Director of the DOJ Task Force for Faith-Based and Community Initiatives, in response to a draft of GAO's report. In the letter, McFarland criticizes GAO's analysis of religious conduct in a community corrections center:

> *The rationale that the GAO offered for this conclusion [about religious activity by staff in halfway houses] reflects a misunderstanding of the applicable law. Indeed, GAO officials conceded at our exit conference that they were unfamiliar with the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, and with First Amendment precedent recognizing the authority (if not the obligation) of the government to provide chaplains and other spiritual accommodation for inmates in custody. In fact, the applicable regulation expressly exempts community correction centers [28 CFR 38.1(b)(2)].*[134]

In one particular respect, McFarland's response to GAO is correct. Individuals confined in government facilities enjoy constitutional and statutory protections of their religious beliefs and practices, protections that may include assistance by the government. Moreover, the mere fact – referenced by GAO in its report – that a staff member of a correctional facility indicated a willingness to pray with an inmate certainly does not point to a per se violation of the Establishment Clause.

More broadly, however, McFarland's response fails to make clear the line that separates permissible accommodation of inmates' religious needs – the chaplaincy exception – from impermissible government involvement in religious activity. The last sentence of the letter creates significant confusion when it suggests that community correction centers are "exempt" from regulations

[132] Available online at: http://www.gao.gov/new.items/d06616.pdf.
[133] GAO Report, 32.
[134] Letter from Steven T. McFarland, Director, Task Force for Faith-Based and Community Initiatives, Department of Justice, to Andrew Sherrill, Assistant Director, Government Accountability Office, May 22, 2006. Appended to GAO Report, at 68-71.

limiting direct public funding of religious activities. The cited regulation does not, in fact, exempt community corrections centers. It reads, in relevant part:

> *The restrictions on inherently religious activities . . . do not apply to programs where Department funds are provided to chaplains to work with inmates in prisons, detention facilities, or community correction centers, or where Department funds are provided to religious or other organizations for programs in prisons, detention facilities, or community correction centers, in which such organizations assist chaplains in carrying out their duties.*

The exemption thus focuses exclusively on chaplaincy programs. The aid is exempt from restrictions on religious activities only to the extent that it is used for a chaplaincy program.

The confusion surrounds the meaning of "assistance to chaplains" under the regulation. The GAO report states that: "According to these [DOJ] officials, given the duty to accommodate inmates' rights to religious exercise, all FBOs providing services are essentially viewed as 'assisting chaplains' and fall within the exception."[135] Such an interpretation by DOJ officials would be deeply flawed. As we discussed in our analysis of the pending lawsuit over the VA chaplaincy program,[136] the constitutional warrant for government-funded chaplaincy programs is limited. The government may not inoculate its funding of a program against Establishment Clause challenge simply by labeling the program a form of "chaplaincy." Instead, the funded activity's primary purpose must be the facilitation of specific religious needs of those under government control.

When the government attempts to cloak state-funded social service entirely in the mantle of the chaplaincy, the constitutional line has been crossed.

A program that treats substance abuse or prepares inmates to reenter society is not one that has facilitation of religious needs as its primary purpose. This is especially true if the program reflects the perspective of only one faith tradition. The content of chaplaincy programs must be directed by the choices of inmates, not by the state's selection of social welfare providers. Of course, those who participate in substance abuse treatment or reentry programs continue to enjoy their right to religious exercise, and the government remains free to facilitate that exercise. When those facilitating the inmate's free exercise also provide state-funded social welfare services to the inmate, however, the line between chaplaincy and social service may become blurred. And when the government attempts to cloak state-funded social service

[135] GAO Report, 32. We do not know the source for GAO's claim about the DOJ interpretation of the exemption, and recognize that GAO may have misunderstood an explanation of the role of FBOs.

[136] Found above in this section of the report, and online at: http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=48.

entirely in the mantle of the chaplaincy, the constitutional line has been crossed.[137]

While we seriously doubt that DOJ officials believe that grants to FBOs may be treated as support for chaplaincy programs, and thus exempted from regulatory restrictions, we agree with GAO's ultimate conclusion. DOJ should clarify the scope of its chaplaincy exemption, to ensure that interpretations are consistent with the spirit of the regulation, as well as with the controlling law of the Establishment Clause.[138]

[137] As we have frequently noted, the government may support faith-intensive social services if it uses a beneficiary choice model, in which service recipients are free to choose from among a broad array of providers, both religious and secular. *Freedom From Religion Foundation v. McCallum and Faith Works*, (7th Cir. 2003), and our analysis, online at: http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=15

[138] Similar confusion seems likely with respect to the Department of Labor's regulations for faith-based grantees. Those regulations state that restrictions on the religious use of funds do not apply "[w]here DOL support is provided to social service programs in prisons, detention facilities, or community correction centers, in which social service organizations assist chaplains in carrying out their duties." 29 CFR 2.33(b)(3)(ii).

V. STRUCTURAL, PROCEDURAL, AND REMEDIAL CONCERNS IN ESTABLISHMENT CLAUSE LITIGATION

Several recent decisions by the U.S. Court of Appeals for the Seventh Circuit, in cases involving challenges under the Establishment Clause to federal expenditures related to faith-based social services, have highlighted very important issues concerning the structure of such lawsuits. Questions of structure reflect concerns about the proper role of courts in the administration of government. In the American system, it is not the job of the federal courts to give legal advice, or to decide questions of law in the abstract; rather, Article III of the U.S. Constitution harnesses the judicial power by authorizing the courts of the United States to decide "Cases" and "Controversies." Whether a particular dispute presents a case or controversy turns on a set of issues that lawyers frequently refer to collectively as questions of "justiciability." The concept of justiciability involves three categories of questions:

1) Whether the lawsuit involves the correct parties (the "who" of litigation). These questions usually arise under the rubric of "standing" to sue, which involves the issue of who is an appropriate plaintiff.[139] Unique rules of taxpayer standing apply in Establishment Clause cases, and the scope of these rules have been the source of considerable recent controversy in the Seventh Circuit. We discuss these rules and recent controversies below in the context of the two cases – one of which is now the subject of a petition for certiorari to the Supreme Court – that form the subject of this update.

> **Whether a particular dispute presents an appropriate matter for resolution by a court turns on: whether the lawsuit involves the correct parties; whether the lawsuit is too early, or is too late; and whether the subject matter of the litigation is appropriate for judicial resolution.**

2) Whether the lawsuit is too early, or is too late (the "when" of litigation). Cases that are brought prematurely raise issues of "ripeness," and cases that no longer permit the possibility of judicial redress of legal wrong raise issues of "mootness." We elaborated on the question of ripeness in our initial analysis of *FFRF v. Gonzales*,[140] a lawsuit challenging a now-cancelled program of faith-based grants by the federal Bureau of Prisons. We discuss the question of mootness below in connection with *Laskowski v. Spellings & University of Notre Dame.*

---

[139] There are also concerns about who is a proper defendant. The doctrine of sovereign immunity, which prevents suits against the U.S. unless it consents to them, requires that many suits against the government (including the cases discussed in this comment) be brought against named officers of the United States.

[140] Roundtable Legal Update, available online at: http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=46.

3) Whether the subject matter of the litigation is appropriate for judicial resolution (the "what" of litigation). Courts hold that some issues, usually called "political questions," may be resolved only by non-judicial branches of government. The label "political question" is frequently misunderstood, because many questions which have strong political overtones (the validity of laws regulating abortion, for example) are fully justiciable. The question of what constitutes an "impeachable offense" is a good illustration of a non-justiciable "political question." Only the House and Senate, and not the courts, are authorized to decide whether particular conduct constitutes a "High Crime or Misdemeanor" sufficient to justify the removal of a President or other officer of the United States.

Establishment Clause cases have never been held to involve "political questions," but they sometimes raise difficult questions of standing, ripeness, or mootness. These questions in turn may be related to issues of the appropriateness of certain remedies against government officers, or other defendants, in Establishment Clause litigation. In what follows, we discuss two recent Seventh Circuit decisions that highlight the growing importance of this set of structural concerns in litigation involving the Faith-Based and Community Initiative (FBCI) and issues related to it.

A. Freedom From Religion Foundation v. Dennis Grace, Acting Director of WHOFBCI (U.S. Court of Appeals, 7th Circuit, decided January 2006, rehearing denied May 2006, petition for certiorari filed August 2006)[141]

> The district court dismissed the case on the grounds that taxpayers did not have standing to challenge expenditures for a program that the Executive Branch rather than the Congress had brought into being, but a divided panel of the U.S. Court of Appeals reinstated portions of the lawsuit.

This case began in June of 2004, when FFRF filed suit against Jim Towey, then-director of the White House Office of Faith-Based and Community Initiatives (WHOFBCI), and other federal officers who are responsible within particular federal agencies for implementation of the Initiative. As explained in detail in our first update on this case,[142] the complaint asserts that a variety of Executive Branch activities and expenditures in support of the FBCI promote religion, and therefore violate the First Amendment's Establishment Clause. Among other things, the complaint asserted that the WHOFBCI had sponsored and paid for regional conferences that unconstitutionally sponsored and promoted religion. The standing of the plaintiffs – the FFRF itself, and several of its named individual members – rests on the status of the members as taxpayers, whose tax contributions are helping to finance these regional conferences.

[141] When Jim Towey left the WHOFBCI and Dennis Grace became Acting Director, Mr. Grace's name was substituted for Jim Towey's name in the caption to the lawsuit. Eventually, the caption will be corrected once more, and the name of Jay Hein (the new Director of the WHOFBCI) will be substituted in the place of Dennis Grace.
[142] Online at: http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=31.

In November, 2004, the district court dismissed the case on the grounds that taxpayers did not have standing to challenge expenditures for a program – the FBCI itself – that the Executive Branch rather than the Congress had brought into being. FFRF appealed the dismissal, and in January, 2006, a divided panel of the U.S. Court of Appeals for the Seventh Circuit reinstated portions of the lawsuit.[143] The Court ruled 2-1 that the plaintiffs' status as taxpayers was sufficient to confer standing to complain about Executive Branch expenditures allegedly made to promote religion, whether or not Congress had authorized the particular program in which that promotion occurred.

Status as taxpayers was sufficient to confer standing to complain about Executive Branch expenditures allegedly made to promote religion, whether or not Congress had authorized the particular program in which that promotion occurred.

In January, 2006, the U.S. Court of Appeals for the Seventh Circuit reversed a portion of the district court's ruling.[144] In an opinion by Judge Posner, and over a dissent by Judge Ripple, the appellate panel reinstated the portions of the FFRF complaint that alleged that various federal officers had made expenditures that unconstitutionally endorsed religion. The opinion describes the FFRF complaint as "wordy, vague, and in places frivolous," but it acknowledges that some portions are "not entirely frivolous, for [the complaint] portrays the conferences organized by the various [FBCI] Centers as propaganda vehicles for religion." After a detailed analysis, Judge Posner concluded that taxpayer standing is appropriate for FFRF's allegations about expenditures for such conferences. The Court of Appeals vacated the district court's order of dismissal, and ordered the case remanded to the district court for further proceedings on claims against "an executive branch program, alleged to promote religion, that is financed by a congressional appropriation, even if the program was created entirely within the executive branch, as by Presidential executive order."

The Court of Appeals also concluded, however, that FFRF lacks standing to complain about the content of particular speeches by government officers at those same conferences, because that content does not involve any incremental expenditure of legislatively appropriated funds (that is, the costs of the speech are the same, whether or not the speech promotes religion.) Accordingly, those portions of the FFRF lawsuit have not been reinstated.

---

143 *Freedom From Religion Foundation, Inc. v. Chao*, 433 F.3d 989 (7th Cir. 2006). We discuss this opinion in a Legal Update published January 17, 2006, available online at: http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=41.

144 433 F.3d 989 (7th Cir. 2006), rehearing denied, 447 F.3d 988 (7th Cir. 2006).

1. Analysis of the Decision by the Court of Appeals

As we noted in our discussion of this case in last year's Report,[145] the District Court's decision rested on a narrow and technical distinction. The District Court acknowledged that taxpayer standing was appropriate in Establishment Clause challenges to executive branch expenditures made pursuant to congressional appropriations for particular social service programs.[146] This case, however, involved executive branch expenditures pursuant to congressional appropriations for the general operation of executive agencies, such as the Department of Labor or the White House itself. Recognizing that taxpayer standing under the Establishment Clause is itself an exception to the typical limits on those who can challenge governmental programs, the District Court refused to extend the doctrine to a case in which Congress was not responsible for the content of the programs financed by the challenged expenditures.

The appeals court opinion concludes that the only relevant question is whether the legislative appropriation directly, rather than incidentally, supported the complained-of behavior by the Executive Branch.

The appeals court rejected this distinction. Judge Posner's opinion analyzes the full line of cases concerning taxpayer standing, and concludes that the only relevant question is whether the legislative appropriation directly, rather than incidentally, supported the complained-of behavior by the Executive Branch. On this basis, the opinion suggests that taxpayers would not have standing to challenge, for example, a religious endorsement in the President's State of the Union speech, because no legislative appropriation supports such a communication. (The fact that the Capitol must be heated during the speech, and that the President must be afforded security, are expenses incidental to rather than supportive of the speech, and therefore are not a basis for standing.)

Reasoning from this example, the opinion concludes that taxpayers lack standing in this case to challenge the constitutionality of a speech delivered by then-Education Secretary Paige at an FBCI conference. But the conferences themselves were paid for out of the general administrative budget of at least one federal agency, and the opinion concludes that such an expenditure is sufficient to confer taxpayer standing for an Establishment Clause challenge.

Judge Ripple's dissent takes a view much like that expressed in the District Court by Judge Shabaz. Starting from the proposition that taxpayer standing is exceptional, because it permits litigation by those whose stake in the case is essentially ideological rather than material, Judge Ripple argued that the majority opinion unreasonably expands the narrow and special doctrine of taxpayer

[145] 2005 State of the Law Report, at 58-61.

[146] For example, the Supreme Court upheld taxpayer standing in *Bowen v. Kendrick*, 487 U.S. 589 (1988), which involved a challenge to expenditures made pursuant to the Adolescent Family Life Act. We discuss all of the Supreme Court's decisions on taxpayer standing in Establishment Clause cases, including its germinal decision in *Flast v. Cohen*, 392 U.S. 83 (1968), in our two prior Legal Updates on this litigation.

standing. In Judge Ripple's view, the majority opinion would render "virtually any executive action subject to taxpayer suit." According to Judge Ripple, other Circuits have read the Supreme Court's opinions on this subject more narrowly, although – as far as we can see – the other cases cited by Judge Ripple do not involve allegations of money being spent to promote and endorse religion in the ways alleged in this case.

The Department of Justice, representing Jim Towey and other government officers, thereupon petitioned the Seventh Circuit to rehear the case *en banc*; that is, to have the question of the plaintiffs' standing reargued before all eleven members of the Circuit Court. In May, 2006, the full U.S. Court of Appeals for the Seventh Circuit voted (7-4) to deny the government's petition to rehear the case *en banc*.[147] In a rather extraordinary development, however, a number of the Circuit Court judges (including some who agreed and some who disagreed with the denial of rehearing) urged the Supreme Court to become involved in the case. Chief Judge Flaum, concurring in the decision to deny rehearing, expressed the view that the dissent's position might "eventually command high court endorsement."[148] Judge Easterbrook, also concurring, asserted that the current doctrine of taxpayer standing is arbitrary, involving illogical distinctions and internal contradictions, and concluded by saying that "[o]nly the rule's proprietors [i.e., the Supreme Court] can bring harmony – whether by extension or contraction – or decide to tolerate the existing state of affairs."[149] And Judge Ripple, who had dissented from the panel opinion in January, dissented (on behalf of himself and three other judges) from the denial of rehearing. He reiterated his view that taxpayer standing in Establishment Clause cases is exceptional, and argued that it should not be extended to cover challenges to Executive Branch programs. Judge Ripple asserted that the Seventh Circuit's decision to grant standing in this case conflicted with a decision of the Second Circuit, and he explicitly urged the government to pursue its "one last forum in which to seek a return to traditional principles governing the right of a taxpayer to challenge a decision of the executive."[150]

In a rather extraordinary development, a number of the Circuit Court judges urged the Supreme Court to become involved in the case and the United States petitioned the Supreme Court to review the Seventh Circuit's decision. It is difficult to predict whether the Supreme Court will review the matter and even more difficult to predict how the Court would resolve the question of taxpayer standing in this case.

[147] *Freedom From Religion Foundation, Inc. v. Chao*, 2006 U.S. App. LEXIS 10942 (May 3, 2006).
[148] Id. at 2.
[149] Id. at 7.
[150] Id. at 13.

On August 1, the United States petitioned the Supreme Court for a writ of certiorari to review the Seventh Circuit's decision on the standing question. The litigation in the district court is on hold pending the disposition of that petition, and the substance of the Establishment Clause claim in *FFRF v. Grace* thus will remain unresolved until the Supreme Court acts in the case. FFRF initially waived its right to respond to the government's petition – thus effectively inviting the Court to take the case, even though FFRF might thereby lose its victory in the 7th Circuit -- but the Supreme Court later requested a response, and FFRF filed one on October 30. As of this writing, the Court had not yet decided whether or not to hear the case, but is expected to so decide before the end of 2006.

2. Likelihood and Possible Outcome of Supreme Court Review

Now that the United States has petitioned the Supreme Court for review of the Seventh Circuit's decision on taxpayer standing in this case, it is difficult to predict whether the Supreme Court will grant the petition, and even more difficult to predict how the Court will resolve the question of taxpayer standing in this case if it does grant the petition. The criteria for granting such a petition, as specified in the Supreme Court's rules and illustrated by its practice, include a) the need to resolve a conflict among the courts below, and b) the need to settle an important (and unsettled) question of federal law. Does the issue of taxpayer standing in Establishment Clause cases satisfy either of those criteria?

As we have discussed in various legal updates and reports, the law of taxpayer standing is both highly technical and unusually favorable to plaintiffs in Establishment Clause cases. The basic requirements for standing to sue in the federal courts, as restated by the Supreme Court as recently as May 15, 2006 in its decision in *DaimlerChrysler Corp. v. Cuno*,[151] are that the plaintiff must a) allege personal injury that is b) fairly traceable to the defendant's allegedly unlawful conduct, and c) that is likely to be redressed by the requested judicial remedy. Ordinarily, federal taxpayers are not afforded standing to complain about allegedly unlawful federal expenditures. The prevailing theory is that such expenditures do not inflict a concrete injury on any particular taxpayers. Even if the taxpayer wins the suit, and the government stops spending money for the complained-of conduct, the taxpayer will receive no rebate or refund. Most taxpayer suits in the federal courts are thus treated as generalized complaints about government conduct, of the sort that any citizen might make, and are therefore dismissed as non-justiciable.

Ever since the Supreme Court's decision in *Flast v. Cohen*,[152] however, which involved federal aid to elementary and secondary schools, the Court has treated taxpayer suits under the Establishment Clause as an exception to that general rule. Although *Flast* explained this exception on the ground that the Establishment

[151] 2006 U.S. LEXIS 3956 (May 15, 2006).
[152] 392 U.S. 83 (1968).

Clause was a "specific" constitutional limitation on the power of Congress to spend, the most persuasive defense of this exception is functional, not conceptual. If taxpayers could not sue to block government financial support of religion, no one could, because frequently no one suffers concrete injury as a result of such support. So if the society wants the Establishment Clause to be enforced at all, taxpayer standing is a necessary instrument of that enforcement. Although *Flast* focused on the standing of federal taxpayers, the exception has been extended and recognized in suits in the federal courts by state and local taxpayers against state and local expenditures that allegedly violate the Establishment Clause. Moreover, in 1988, the Court explicitly applied the *Flast* principle to Executive Branch decisions about how to spend programmatic legislative appropriations in *Bowen v. Kendrick*,[153] which involved federal grants under the Adolescent Family Life Act.

If taxpayers could not sue to block government financial support of religion, no one could, because frequently no one suffers concrete injury as a result of such support. So if the society wants the Establishment Clause to be enforced at all, taxpayer standing is a necessary instrument of that enforcement.

The only significant decision in the Supreme Court in the past 40 years in which the Court rejected taxpayer status as sufficient to confer standing in Establishment Clause cases is *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*[154] The *Valley Forge* case involved a transfer of government-owned land and buildings from the Executive Branch to a religious college. Although legislative appropriations must have at some earlier time been used to acquire that land and construct those buildings, the Supreme Court treated the Executive's authority to transfer the property as arising under Article IV, section 3, which authorizes Congress to dispose of property of the United States, rather than Art. I, section 8, clause 1, which authorizes the Congress to tax and spend. The distinction between the two sources of congressional power makes conceptual sense – current taxpayers are "injured" in their capacity as taxpayers by unlawful current expenditures made out of tax dollars, but taxpayers are not directly injured by transfers of property acquired earlier with the tax dollars contributed by prior taxpayers. It makes considerably less functional sense, however, because the *Valley Forge* decision left unchallengeable all property transfers from the government to religious entities. Although such transfers are far less frequent than expenditures of tax funds, it remains difficult to see why the functional concern that appeared to underlay *Flast v. Cohen* did not extend with equal force to the context of *Valley Forge*.

---

[153] 487 U.S. 589 (1988).
[154] 454 U.S. 464 (1982).

In its petition for certiorari in *FFRF v. Grace*, the United States argues that the Seventh Circuit has erroneously extended *Flast* to a case of Executive Branch expenditures, with respect to which Congress has not explicitly authorized any expenditures for religion or religious organizations. In addition, the petition argues that the challenged expenditures are internal to the Executive Branch, and do not involve any transfers to religious entities. That, asserts the government, distinguishes this case from *Flast* and *Bowen*.

Whatever the persuasiveness of the distinctions among *Flast*, *Bowen*, *Valley Forge*, and this case, these distinguishing features – coupled with the exceptional quality of taxpayer standing in the first place – are at the core of the dispute raging within the Seventh Circuit. Judge Posner and others believe that Executive Branch expenditures of money to promote religion are all equally challengeable by taxpayers. Judge Ripple, and the other dissenters from the denial of rehearing, start from the premise that taxpayer standing is exceptional, and then seek to draw lines designed to limit its extension to the arguably new context of Executive Branch expenditures for Executive Branch programs.

Is the Supreme Court likely to accept review of this case, limited to the issue of taxpayer standing? (The substance of FFRF's case against the FBCI has not yet been decided.) The opinions from the Seventh Circuit calling for such a grant of review are extraordinary, and we think that the Justices will take those pleas very seriously. Moreover, the Court tends to accept petitions for certiorari from the United States more frequently than from any other party.

A number of considerations, however, will push in the other direction. First, the Court is reluctant to review cases that are in a non-final stage. If, as we expect,[155] the plaintiffs lose on their Establishment Clause claim in the district court, and then lose on appeal in the Seventh Circuit, the case will be effectively over without the grant of standing having led to any consequences more burdensome than the need to defend the case in district court. Even if the plaintiffs win, the Court can still hear the case and decide the issue of standing later on. Although that course of action may appear wasteful, it may provide a useful opportunity for the Supreme Court to avoid altogether taking on the standing issue in this case.

Second, the basic criteria for a grant of review may not be met here. Despite Judge Ripple's claim, it is not obvious that the Courts of Appeals are in conflict. The Second Circuit has denied standing to taxpayers in a case challenging, on Establishment Clause grounds, the grant of a tax exemption by the IRS to a religious entity. Although tax exemptions produce revenue consequences, it is not difficult to distinguish the case of an exemption (in which there is no actual revenue outlay) from the case of actual expenditure such as is involved in *FFRF v. Grace*. Moreover, it is a stretch to say that *FFRF v. Grace* involves an

[155] In our original update on the lawsuit (online at: http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=28), we explain why we think the plaintiffs will not prevail on the merits of their case.

unsettled question of federal law. Although the factual particulars of the case are not identical to those of *Flast* or *Bowen*, because Congress here has been less involved in the decision to spend for the benefit of religious entities, it seems more accurate to say that this case involves an application of *Flast* and *Bowen* to a new situation, rather than an entirely novel question of federal law.

If the Supreme Court were to grant review on the standing question as it is now presented in *FFRF v. Grace*, what might be the likely disposition? The worst outcome for the government would involve the Court agreeing to hear the case and then affirming Judge Posner's decision, an outcome likely to involve at most a technical clarification of the law of taxpayer standing. The best outcome for the Bush Administration, on the other hand, would be a grant of certiorari, followed by a decision in the Supreme Court to reverse the Court of Appeals and cut back on the law of taxpayer standing. Justices Scalia and Thomas are already on record as opposed to broad standing doctrines (as well as broad theories of non-Establishment), and it would be quite consistent with the philosophies of restraint asserted by Chief Justice Roberts and Justice Alito to join with them in narrowing the law in this regard. It is uncertain whether those four Justices would agree to grant certiorari in the case – four votes are required for such a grant – but it is even more uncertain whether they would find a fifth vote on the Court to support them in constricting the doctrine of taxpayer standing under the Establishment Clause.

Justices Scalia and Thomas are already on record as opposed to broad standing doctrines and it would be quite consistent with the philosophies of restraint asserted by Chief Justice Roberts and Justice Alito to join with them in narrowing the law in this regard.

Judge Ripple and those on his side in *FFRF v. Grace* quite obviously hope that the Court will treat this case like *Valley Forge*, and hold that taxpayers cannot challenge Executive Branch spending decisions that are not made pursuant to specific congressional programs for social service spending. But a number of factors suggest that the Court is not likely to rule that way.

The most recent of these is the Court's ruling in mid-May, 2006, in another taxpayer standing case, not involving the Establishment Clause. In *DaimlerChrysler Corp. v. Cuno*,[156] the Court unanimously rejected the standing of state and local taxpayers to sue in federal court claiming the unconstitutionality of state and local tax breaks, designed to get DaimlerChrysler to expand its operations in Toledo, Ohio. Drawing on a long tradition of rejecting the standing of taxpayers – federal, state, or local – to complain about the unconstitutionality of expenditure policy, Chief Justice Roberts' opinion repeated the conventional concerns about permitting taxpayers to air "generalized grievances" against

[156] 2006 U.S. LEXIS 3956 (May 15, 2006).

government even if they cannot show that they have been injured by the government, or that prevailing in the lawsuit would make them any better off. In the course of rejecting this claim of taxpayer standing, Chief Justice Roberts had this to say about the special case of the Establishment Clause:

> *"Flast is consistent with the principle, underlying the Article III prohibition on taxpayer suits, that a litigant may not assume a particular disposition of government funds in establishing standing. The Flast Court discerned in the history of the Establishment Clause 'the specific evils feared by [its drafters] that the taxing and spending power would be used to favor one religion over another or to support religion in general.' The Court therefore understood the 'injury' alleged in Establishment Clause challenges to federal spending to be the very 'extraction and spending' of 'tax money' in aid of religion alleged by a plaintiff. And an injunction against the spending would of course redress that injury, regardless of whether lawmakers would dispose of the savings in a way that would benefit the taxpayer-plaintiffs personally."*[157]

Although the Court's discussion in *DaimlerChrysler Corp.* of *Flast* and the unique context of the Establishment Clause does not guarantee that the Court would take the Posner view over the Ripple view in *FFRF v. Chao*, *DaimlerChrysler Corp.* certainly reaffirms the basic concept that Establishment Clause cases are unique for purposes of measuring taxpayer standing. There thus seems very little likelihood that the Court would grant review in *FFRF v. Grace* and completely jettison, or even cut back dramatically, on the regime of *Flast v. Cohen*.

It would seem quite anomalous for the Court to permit state and local taxpayers to challenge decisions by state and local executive officials while forbidding federal taxpayers from challenging the same sort of activity by officials in the executive branch of the federal government.

Moreover, the full equation in *DaimlerChrysler Corp.* of state and local taxpayers with federal taxpayers suggests that the view expounded by Judge Ripple would present a deep problem for the Supreme Court. For many years, the Court has recognized the standing of state and local taxpayers to challenge state and local action that is alleged to be in conflict with the Establishment Clause. These cases typically involve state or local spending for religious education, but may involve as well state or local promotion of religious symbols. In particular, cases that challenge government sponsorship of religious symbols often involve purely executive decisions, rather than legislative-executive partnerships. It would seem quite anomalous for the Court to permit state and local taxpayers to challenge decisions by state and local executive officials to sponsor internal religious messages – for example, by putting Christmas or Chanukah symbols in

[157] Id. at 29-30 (citations omitted).

public buildings – while forbidding federal taxpayers from challenging the same sort of activity by officials in the executive branch of the federal government.

Thus, if the Supreme Court were to grant review in *FFRF v. Grace* and reverse the Court of Appeals on the ground that the challenged expenditure was a programmatic creature of the Executive Branch, and not of the Congress, the Court's ruling might cast doubt on the standing of taxpayers in a wide variety of Establishment Clause cases in which both federal and non-federal decisions were the product of an executive branch alone. Any such ruling would destabilize the current regime of Establishment Clause enforcement.

Conclusion

FFRF v. Grace has the potential to become a significant case in the Supreme Court on taxpayer standing to raise Establishment Clause claims, but we do not think it will. Instead, we expect the Supreme Court to deny the government's petition for certiorari on the standing question. The lawsuit will then be adjudicated in the federal district court for the western District of Wisconsin, where we expect it will fail on its merits. But we have been wrong on our predicted disposition of the standing question in this case at the two lower levels of the federal judiciary, so no one should be surprised if we turn out to be wrong once more.

B. Laskowski v. Spellings (U.S. Court of Appeals, 7th Circuit, decided May 2006, rehearing denied July 2006, petition for certiorari filed October 2006).[158]

Another recent decision in the Seventh Circuit has raised intricate, difficult, and potentially far-reaching issues involving the relationship among doctrines of taxpayer standing, mootness, and the authority of courts to order faith-based grantees to repay to the government monies spent in violation of the Establishment Clause.

Description

The case involves an earmarked congressional appropriation, for fiscal year 2000, pursuant to which the U.S. Department of Education made a grant of slightly under $500,000 to the University of Notre Dame, for a program entitled Alliance for Catholic Education. Teachers trained in this program go on to teach in Catholic schools, and frequently participate in the Americorps program for placing teachers in schools, public and private, in economically deprived areas. The grant to Notre Dame was made for the purpose of redistribution to other

[158] 443 F.3d 930 (7th Cir. 2006), rehearing denied, 456 F.3d 702 (7th Cir. 2006).

religious colleges,[159] each of which replicated on its own campus some version of Notre Dame's training program.

The training program has both secular and religious components. As the Seventh Circuit panel describes it, one portion of the program involves encouragement of the trainees to live and work in accordance with the Catholic faith. Several taxpayers brought suits against the Secretary of Education, alleging that the grant to Notre Dame violated the Establishment Clause because the subgrants either directly supported religious training, or were not subject to adequate safeguards to prevent diversion to religious activities. The taxpayers sought an injunction against further grants for these purposes, and an order to the Secretary of Education to recover from Notre Dame, and return to the U.S. Treasury, the money unconstitutionally spent on religious programs. Notre Dame voluntarily intervened in the lawsuit, presumably to protect its interest against the possibility of a reimbursement order. The grant period expired at the end of 2004.

The taxpayers sought an injunction against further grants and an order to the Secretary of Education to recover and return to the U.S. Treasury the money unconstitutionally spent on religious programs.

In May, 2005, the district court dismissed the taxpayer suit as moot.[160] The grant was a one-time appropriation, and Notre Dame (and its subgrantees) had already spent the money. The district court reasoned that it could not enjoin an expenditure already made, and there was no future plan or likelihood of future expenditures to enjoin. Even if the grant violated the Establishment Clause, the district court concluded, the possibility of a judicial order to the Secretary of Education to recover the monies spent from Notre Dame was not enough to keep the claim from being dismissed as moot. Although a valid claim for money damages owed to the plaintiff would keep the suit alive, the district court concluded that the possibility of a restitution order from the Department of Education to Notre Dame would not save the taxpayer suit from dismissal as moot, because the plaintiffs could no longer obtain an order that would run to their benefit and redress their grievance as taxpayers. Thus, the district court concluded that the controversy was no longer "live" because there was no relief that it could provide to the plaintiffs.

On appeal, a divided panel of the U.S. Court of Appeals for the Seventh Circuit reversed the district court. In an opinion by Judge Posner,[161] the panel asserted that the case was not moot because the district court – if it concluded that the grant violated the Establishment Clause – could directly order Notre Dame to

[159] Notre Dame's subgrantees included Loyola Marymount University, Providence College, Valparaiso University, and the University of Portland.
[160] The dismissal order is reported at 2005 WL 1140694 (S.D. Indiana).
[161] *Laskowski v. Spellings*, 443 F. 3d 930 (7th Circuit, 2006), 2006 U.S. App. LEXIS 9276. Judge Posner has become a pervasive presence in Seventh Circuit cases that touch upon the FBCI. In addition to this case, see *Freedom From Religion Foundation, Inc. v. McCallum*, 324 F. 3d 880 (7th Cir. 2003); *Freedom From Religion Foundation, Inc. v. Chao*, 433 F.3d 989 (7th Cir. 2006).

repay the amount of the grant to the Department of Education.[162] Thus, because meaningful relief was still possible – even if it did not operate to the material benefit of the taxpayer-plaintiffs – the appeals court remanded the case to the district court for further consideration. That consideration is to include the questions whether the grant was spent or diverted to impermissible religious purposes, and whether the grant contained adequate safeguards against such diversion. If the grant was so spent or diverted, and the grant lacked adequate safeguards against those possibilities, Notre Dame's only remaining defense to a restitution order would be that it relied reasonably on a belief that the grant was lawful. Restitution is an equitable remedy, and if Notre Dame did rely on an honest and reasonable view that the grant was lawful, it would be inequitable to require Notre Dame to repay monies that had already been subgranted and spent. But both of these questions – whether the grant violated the Establishment Clause, and whether Notre Dame reasonably relied on some notion that the grant did not violate the Clause – must now be answered by the district court on remand.

If the district court concluded that the grant violated the Establishment Clause, the court could order repayment directly to the Department of Education, thereby providing meaningful relief even if it did not operate to the material benefit of the taxpayer-plaintiffs. The appeals court therefore remanded the case for further consideration.

Judge Posner's opinion prompted a lengthy and pointed dissent from Judge Sykes of the Seventh Circuit. Judge Sykes insisted that the case was moot, and that the dismissal should have been affirmed. In Judge Sykes' view, a judicial order in this case that Notre Dame repay the money would be legally inappropriate. Judge Sykes offered several reasons for this conclusion. First, the taxpayers never asked either the district court or the court of appeals to order Notre Dame to repay the money to the U.S. The taxpayers' claims were against only the Secretary, and those claims were moot because the grant had expired, and no evidence existed that it was likely to be renewed. Second, the plaintiffs sued only the Secretary, not Notre Dame. According to Judge Sykes, "Under these circumstances, Notre Dame would be justified to think itself sandbagged; it had no notice and no reason to expect when it moved to intervene that this injunction action might morph into a claim for restitutionary monetary relief on appeal."[163]

[162] The plaintiffs had argued that the case was not moot because the district court could still order the Secretary of Education to seek restitution from Notre Dame of monies wrongfully spent. Judge Posner rejected this argument, on the ground that courts lack authority to order an agency to exercise its discretion to enforce the law. But Judge Posner, without being asked by the plaintiffs, offered the view that the court could skip the middleman – the Department of Education – and directly order Notre Dame to repay to the United States any amount of the grant that had been unlawfully spent.

[163] 2006 U.S. App. LEXIS 9276, at 27.

Third, and most central to Judge Sykes' argument, a restitution remedy – ordering a grantee to repay grant amounts to the government – does not comport with the structure of a taxpayer suit against government officers, and in any event "cannot operate as the sole basis for standing in an otherwise moot taxpayer suit."[164] Once the possibility of injunctive relief against a government officer is gone, Judge Sykes asserted, the taxpayers no longer have a sufficiently concrete and individualized stake in the controversy to maintain the suit. Because the taxpayer standing permitted under *Flast v. Cohen* represents a special and narrow exception to the general bar on taxpayer standing, such standing should not be extended to a case like this, where the challenged grant has expired and the taxpayer suit can longer stop the government from making the challenged expenditure. If there is no remedy left against the government, the taxpayer's case against government officials has been mooted and must be dismissed.

The dissenting opinion argues that if there is no remedy left against the government, the taxpayer's case against government officials has been mooted and must be dismissed, and cannot be used to order the grantee to return the funds.

Finally, Judge Sykes argued that it would be entirely unprecedented for a court to use a taxpayer suit to order the grantee to return the funds, whether or not the case had become moot with respect to the possibility of future payments. The leading Supreme Court cases relied upon by Judge Posner to suggest that such restitution might be appropriate all involved questions of whether the government remained free in some circumstances to continue payment to grantees under programs that courts had ruled unconstitutional.[165] In this case, no court has ruled that this grant is unconstitutional, and Judge Sykes asserted that the relevant case law does not support a judicial order of restitution in these circumstances. The Establishment Clause binds only the government, not its grantees, and here (because the grant has expired) the case against the government has expired.

The government petitioned the 7th Circuit to rehear the case *en banc*.[166] On July 26, the 7th Circuit announced that it had denied the request for a rehearing. In a brief opinion accompanying the denial, Judge Posner reiterated his basic argument that if the lower court found the distribution of funds to subgrantees to be unlawful, Notre Dame could still defend against an order of restitution by showing that it had relied on a reasonable understanding of the relevant law and facts. In late October, Notre Dame filed a petition for certiorari with the Supreme Court, seeking review of the Seventh Circuit's decision. The petition raises the questions of whether federal taxpayers have standing to pursue a remedial order of repayment when the government is not seeking such an order, and

---

[164] Id. at 28.

[165] We discuss these cases in our analysis of *American Jewish Congress v. Bost*, online at: http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=4.

[166] 456 F.3d 702 (7th Cir. 2006), 2006 U.S. App. LEXIS 18681. The vote on the rehearing petition was 6-3. Two of the eleven judges on the 7th Circuit did not participate).

(secondarily) whether *Flast v. Cohen* should be overruled if it supports such a remedial order.[167]

Analysis

The Seventh Circuit's opinion in *Laskowski* presents two questions. The first, which is narrow and technical, involves the complex relationship among doctrines of standing, mootness, and remedy. Is Judge Posner correct or incorrect in his conclusion that the availability of a direct order to a grantee to return funds to the government rescues this case from a dismissal on grounds that the expiration of the grant has rendered the case moot? The second question is neither narrow nor technical, and speaks to a concern that we have raised in the past about government grants to FBOs. When a court decides that a grant violates the Establishment Clause because the grant lacks a prohibition on, and adequate safeguards against, diversion to religious uses, may a court order the grant amount to be repaid to the government?

When a court decides that a grant violates the Establishment Clause because the grant lacks a prohibition on, and adequate safeguards against, diversion to religious uses, may a court order the grant amount to be repaid to the government?

On the first question, which is at the core of the dispute between Judge Posner and Judge Sykes, there is something to be said for both sides. On the one hand, Judge Sykes is correct that taxpayer standing is exceptional, and any extension of it is in some tension with its exceptional quality. And Notre Dame indeed may be surprised that its voluntary intervention in the case has resulted in the case going forward rather than being dismissed, and going forward on terms that leave Notre Dame vulnerable to an order to repay a half million dollars to the government. But Judge Sykes' view of the need to confine taxpayer-plaintiffs to injunctive relief, because *Flast* and *Bowen* involved only such claims for relief, seems quite formalistic. Judge Posner's reasoning about taxpayer standing, mootness, and the restitution remedy seems in better keeping with the functional justification for taxpayer standing in Establishment Clause cases.

Taxpayers do not bring suit in these cases to get a refund, or to make themselves materially better off. An injunction against future unconstitutional payment satisfies the substantive concerns of the Clause, not the personal needs of the plaintiffs, because the Clause has long been thought to have been designed in part to stop the government from supporting religion, and in particular from compelling taxpayers to contribute to that support. Restitution of money already

[167] In its *amicus* brief in *Americans United v. Prison Fellowship Ministries*, discussed above, the United States calls attention to and criticizes the 7th Circuit's opinion in *Laskowski*. It remains to be seen whether the United States will support Notre Dame's petition for certiorari in *Laskowski*.

spent will cure the harm to taxpayers just as readily and fully as an injunction against future payment. Either way, once the remedy is enforced, the government treasury will not be depleted by amounts that impermissibly support religion. The only conceptual difference between an injunction and a restitution order involves time; the former blocks the payment before it is made, while the latter recovers the payment after it has been made. Either way, when the litigation is complete and the remedy effectuated, there will be no debit to the state's treasury for support of religious activity.

What makes *Laskowski* very important to the future of the FBCI is not the narrow question of whether the possibility of restitution saves a case from being moot. It is the issue of restitution itself, and the criteria for measuring its appropriateness, that renders *Laskowski* of central importance to litigation against agencies with respect to grants made under the FBCI and similar programs.

What makes *Laskowski* very important to the future of the FBCI is not the narrow question of whether the possibility of restitution saves a case from being moot. It is the issue of restitution itself, and the criteria for measuring its appropriateness.

The issue of restitution is equally or more likely to arise in cases that are not obviously moot. Suppose that taxpayer-plaintiffs bring a lawsuit in the first year of a three year grant to an FBO. The plaintiffs typically will seek a declaration that the grant is unlawful, and an injunction against future payments under the grant. So timed, that request for injunction is of course not moot, because there remain two grant years still unpaid. But the same plaintiffs might also seek an order that the FBO restore to the government the monies paid under the grant during the first year. Because those monies may already have been spent or committed in unrecoverable ways, such an order would create considerable practical and financial difficulty for an FBO subject to it.

We have discussed this possibility at some length above, in connection with the Iowa prison case, in which Chief Judge Pratt ordered Prison Fellowship Ministries to repay approximately $1.5 million to the State of Iowa.[168] Prior to the Iowa decision, plaintiffs had been reluctant to seek such restitution remedies in cases related to the FBCI, perhaps because the relevant law on the subject has been somewhat obscure and seemingly unfavorable toward attempts at securing such orders of restitution. Judge Posner's opinion in *Laskowski*, however, attempts to reshape the relevant law in ways that assimilate it with general remedial principles involving repayment of monies wrongfully received, rather than more specialized Establishment Clause considerations. The key question, says Judge Posner, is whether the grantee has relied to its detriment on a reasonable belief that it was legally entitled to the money. But if a grantee knows or should reasonably know that the grant is unlawful, because it is made available for religious activities and/or lacks safeguards to prevent diversion to such activities, then its reliance on

[168] Id.

the grant is no longer subject to this sort of equitable defense, and a repayment order may properly issue. In *Americans United v. Mapes* (the Iowa prison case), Chief Judge Pratt relied explicitly on the 7th Circuit's opinion in *Laskowski* in support of his order that Prison Fellowship Ministries return monies wrongfully expended to the State of Iowa.[169]

Even though much Establishment Clause litigation about government expenditures has been about religious schools, and the Supreme Court law on the subject has been in considerable flux, FBOs will have a difficult time claiming that they reasonably relied on any understanding that they could use direct government support for religious activities, or divert government support toward such activities. And the course of litigation in the lower federal courts over the past four or five years has reinforced that proposition again and again. In social service contexts that include abstinence education, substance abuse treatment, job training, nursing programs, and mentoring of children, courts have consistently ruled that government violates the Establishment Clause when it provides financial support for activities that have significant religious content. In light of that consistent pattern of rulings, with no rulings to the contrary, it will be very difficult for an FBO to show that it has reasonably relied on any understanding of the law that would permit the use of such funds to support religious activity. Under Judge Posner's view in *Laskowski*, an FBO that cannot show such reasonable reliance may be exposed to an order to return the grant amount to the government, even if all of the money has been spent. That possibility should lead FBOs to be very careful indeed about understanding the relevant constitutional rules before applying for and accepting such grants.

The *amicus* brief filed by the United States in the Iowa prison case, discussed above,[170] suggests one additional set of arguments against such a repayment order, especially in a case (like *Laskowski*) involving a federal grant. In that brief, the U.S. took dead aim at the opinion in *Laskowski*, and asserted that spending agencies should have unfettered control over whether to seek reimbursement of monies unlawfully spent by the grantee. At times, Congress explicitly authorizes private third parties to go to federal court, seeking an order of reimbursement from a private grantee to a federal agency (for example, in cases of fraud). Such schemes (frequently called *qui tam* suits) create incentives to private whistle-blowers, who get to keep a statutorily specified percentage of any money that gets recovered from the private contractor and repaid to the government. In *Laskowski*, no such statute exists to authorize private third parties (here, taxpayers) to seek an order of repayment to the government. If the amicus brief from the U.S. is correct on this point, such orders are not legally appropriate in cases involving direct federal grants.

[169] 432 F.Supp. 2d at 938.
[170] Section III.A.

Conclusion

We can only speculate about how the litigation in *Laskowski v. Spellings* will play out. As noted above, Notre Dame has filed a petition for certiorari with the Supreme Court, seeking review of the Seventh Circuit's decision. The United States may eventually join in the request for Supreme Court review. There is currently no conflict among the federal Circuit Courts on the repayment question, but that issue is important to the FBCI and quite unsettled. If the effort to gain Supreme Court review at this time fails, the case will return to the district court for decision on whether the grant to Notre Dame violated the Establishment Clause. If the grant is held to have been lawful, the case will end without further consideration of a restitution order.

The repayment question is important to the FBCI and quite unsettled.

If, however, the grant for ACE education is held to have been unlawful because it permitted use for support of the religious experience of the teachers in training, or lacked adequate safeguards against diversion to such activities, the issue of the appropriateness of a restitution order will return, and Judge Posner's view will be the controlling law of the case. If his view spreads to other Circuits, and taxpayer-plaintiffs begin to take a more aggressive posture in seeking restitution remedies, *Laskowski v. Spellings* could turn out to be of lasting consequence in the law that shapes the FBCI.

VI. STATE CONSTITUTIONAL LAW

Two cases involving state constitutional law deserve notice in this year's Report. In *Bush v. Holmes*, discussed below, the Florida Supreme Court invalidated the state's school voucher program, but rested that decision on grounds unrelated to the religious character of some of the participating schools. In *Taetle v. Atlanta Independent School System*, the Georgia Supreme Court ruled that the city's lease of classroom space from a Baptist Church, for a kindergarten annex that would be operated by the public school system, did not run afoul of the state's constitutional prohibition on direct or indirect aid to religious entities.

A. Bush v. Holmes (Supreme Court of Florida, decided January 5, 2006)

Description

On January 5, 2006, the Supreme Court of Florida affirmed (by a vote of 5-2) a decision of an intermediate state court that Florida's Opportunity Scholarship Program ("OSP") violated the state's constitution.[171] Unlike the lower court,[172] however, the state Supreme Court did not rely in this decision on Art. I, sec. 3 (the state's "Blaine Amendment") which provides that: "No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution."[173] Instead, the Supreme Court relied on Article IX, section 1, (Florida's "public education amendment") which obliges the state to provide "by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education."[174] As a result of this decision, the OSP will now terminate at the end of the 2005-06 school year. The full impact of Florida's Blaine Amendment on any other state policies of financial support for faith-based organizations remains highly uncertain.

The full impact of Florida's Blaine Amendment on any other state policies of financial support for faith-based organizations remains highly uncertain.

Analysis

We describe the OSP in some detail in our original update, posted August 6, 2002,[175] immediately after the trial court ruled against the program. The program

[171] *Bush v. Holmes*, 919 So. 2d 392, 2006 FLA. LEXIS 4.
[172] We discuss the County Court decision in our 2002 State of the Law Report, at pp. 38-39.
[173] Florida Constitution, Article I, Section 3.
[174] Florida Constitution, Article IX, sec. 1(a).
[175] Update on *Bush v. Holmes*, http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=8.

was designed to give parents and students an option to exit public schools judged to be failing under state standards. The program permitted such exiting students to select among out-of-district public schools, participating private secular schools, and participating private religious schools. The numbers of failing schools, and the numbers of students who obtained and used Opportunity Scholarships, were never very large.

The plaintiffs in this case had relied on both the state's Blaine Amendment and the education amendment, described above, in their state constitutional attack on the OSP. In the earliest rounds in the litigation, a lower court had struck down the OSP on the ground that it violated the public education amendment, but an intermediate state court reversed that decision, and the state Supreme Court had refused at that time to hear an appeal, because not all of the arguments in the case had been presented in the lower courts. Thereafter, the lower courts focused on the Blaine Amendment, and arguments against the OSP based on that section of the state constitution had carried the day. In our prior writing for the Roundtable on this case, here is the way that we described the development of the arguments and results in the lower state courts:

> *"The County Court opinion rejected the state's argument that the U.S. Supreme Court's opinion in the Cleveland voucher case (Zelman v. Simmons-Harris) should be the guidepost in construing the state constitution's Blaine Amendment. Rather, the County Court ruled, the state constitution is broader in its language and Separationist intentions than the Establishment Clause of the First Amendment. Relying heavily on the reference to both indirect and direct state support in Florida's Blaine Amendment, the County Court ruled that the Amendment barred Florida's OSP.*
>
> *On appeal to an intermediate appellate court, the state renewed its argument that the Florida state courts should construe the Blaine Amendment to prohibit no more than the federal constitution prohibits. During the pendency of the appeal, the case of Locke v. Davey was pending in the Supreme Court, and a number of briefs filed in the Florida court asserted that excluding religious schools from a state voucher program would be an unconstitutional infringement on the First Amendment right of voucher recipients to freely exercise religion. A decision in Mr. Locke's favor would have greatly strengthened that argument.*
>
> *In August, 2004, the appellate state court (dividing 2-1) affirmed the ruling of the County Court, and held that the Florida OSP violated Article I, section 3 of the Florida Constitution. In a lengthy and careful opinion, the court once again dismissed the argument that the Blaine Amendment in the Florida constitution should be construed to be a mirror image of current interpretations of the Establishment Clause by the U.S. Supreme*

> *Court. Other state courts have accepted such arguments,*[176] *but here the language of the state constitution, with its broad and explicit prohibition on both direct and indirect financing of sectarian entities, proved insurmountable. In addition, the appellate court relied explicitly and heavily on Locke v. Davey, which by then had been decided by the Supreme Court, in rejecting the argument that state exclusion of religious schools from a voucher program would violate federal norms of nondiscrimination against the recipients' free exercise of religion. Noting that the Supreme Court's opinion had recognized room for states to create and constitutionalize their own policy of church-state relations, the Florida appellate court asserted that excluding OSP recipients from using state-financed vouchers to attend religious schools was analogous to excluding students majoring in theology from using Washington's Promise Scholarships."*[177]

The appeal from the Florida intermediate appellate court to the Florida Supreme Court thus set the stage for what could have been an extremely important ruling on the scope of the state's Blaine Amendment. Had the Florida Supreme Court affirmed both the result and the broad reasoning of the lower state courts, which had asserted that Art. I, section 3, of the state constitution indeed prohibited all forms of state financial support "in aid of any church, sect, or religious denomination or in aid of any sectarian institution," the implications for state support of faith-based social services in Florida would have been very substantial. Such a ruling inevitably would have excluded from state support anything resembling the federal Faith-Based and Community Initiative, and its effort to enlist in service partnerships with government a wide variety of faith-based groups, including some that undeniably qualify as churches, religious denominations, or sectarian institutions. Perhaps such a ruling would have attempted to find grounds to permit state support for the secularized service arms of religious communities, such as Catholic Charities or Lutheran Social Services,

Had the Florida Supreme Court affirmed both the result and the broad reasoning of the lower state courts, it would have excluded from state support anything resembling the federal Faith-Based and Community Initiative, and its effort to enlist in service partnerships with government a wide variety of faith-based groups. Instead, it rested its decision on what it saw as the Public Education Amendment's requirement of exclusivity of state support for free public schools.

[176] The Wisconsin Supreme Court's opinion upholding the Milwaukee school voucher program is a leading example. *Jackson v. Benson*, 218 Wis. 2d 835, 578 N.W. 2d 602 ((Wisconsin 1998).

[177] "The State of the Law, 2004: Partnerships Between Government and Faith-Based Organizations," The Roundtable on Religion and Social Welfare Policy, Nelson A. Rockefeller Institute of Government, SUNY (co-authored with Robert Tuttle) (December, 2004), at pp. 91-92.

which had considerable pre-existing financial relationships with state and local government in Florida. But it is not obvious that such grounds could have been found, and the defenders of the OSP had argued in the Florida Supreme Court that affirming the lower courts based on the Blaine Amendment would have threatened a substantial portion of the state's pre-existing social welfare arrangements.

Faced with that argument, the Florida Supreme Court unsurprisingly chose to steer away entirely from the state's Blaine Amendment. Instead, it rested its decision on what it saw as the Public Education Amendment's requirement of exclusivity of state support for free public schools. There are certainly more-than-plausible arguments in favor of this interpretation, although the dissenting opinion in the Florida Supreme Court offered a set of perhaps equally plausible arguments to the contrary. Given our focus on the implications of the court's ruling for faith-based social services, we will not dwell on the respective merits of those competing arguments about the meaning of the Public Education Amendment. Without question, this is an important legal victory for the public school-oriented, anti-voucher movement, and a significant defeat for the proponents of vouchers and state-supported school choice. We cannot with any confidence predict whether the reasoning of the Florida Supreme Court will be adopted in any other cases involving similar constitutional provisions and comparable programs, of which there are very few in the U.S. at the present time.

In our estimation, the District Court's opinion remains the law in the area in and around Tallahassee, and it remains a matter of supposition whether the First District's approach to Florida's Blaine Amendment would invalidate some or all social service arrangements in which government money flows, "directly or indirectly," to faith-based organizations.

In Florida, and elsewhere,[178] however, an open question remains about the status of the "no-aid" provision in the Blaine Amendments.[179] The Florida Supreme Court neither approved nor disapproved the District Court's reliance on Art. I, section 3, to invalidate the OSP. In our estimation, that disposition by the Supreme Court leaves the District Court's approach to Article I, section 3 intact, and the District Court's opinion remains the law in the area in and around Tallahassee. It remains a matter of supposition whether the First District's approach to Florida's Blaine Amendment would invalidate some or all social

[178] On January 17, 2006, the Georgia Supreme Court decided *Taetle v. Atlanta Independent School System*, a case involving Georgia's "Establishment Clause," which bears a very strong resemblance to Article I. section 3 of the Florida Constitution. (The Georgia provision provides that "No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution.").

[179] State constitutions reflect many different versions of "no aid" provisions aimed at faith-based entities. Some versions are aimed only at educational institutions, while others (like Florida's Article I, Section 3) are much broader. And a number of state courts have construed such provisions in ways that narrow their scope and reduce their likelihood of interference with state initiatives aimed at partnering with faith groups in social service delivery. We collect the relevant constitutional provisions, and court annotations concerning those provisions, in our 2002 State of the Law Report, Appendix A. The Roundtable website includes updates to that information. http://www.religionandsocialpolicy.org/resources/state_constitutional_provisionsresources.cfm.

service arrangements in which government money flows, “directly or indirectly,” to faith-based organizations. But the prospect that such arrangements would be held invalid in that District (and perhaps other Districts, following the lead of the First District) remains quite strong, especially in cases in which the faith-based entity has a strongly religious character. Any lawsuit asserting such a challenge would inevitably wind up in the Supreme Court of Florida, which in *Bush v. Holmes* refused to tip its hand on the question.

In this regard, we note that in the summer of 2005, the Council for Secular Humanism (“CSH”) had sued Governor Bush and other Florida officials responsible for administering Florida’s version of the state’s faith-based and community initiative. CSH had alleged that these officials were taking steps and spending state funds in ways that violate Art. I,section 3. In the fall of 2005, CSH voluntarily withdrew its suit, and several of its representatives told us that they had withdrawn the suit in anticipation of the Supreme Court’s ruling in *Bush v. Holmes*. That ruling has neither delivered nor withdrawn legal sustenance for the suit, and it remains to be seen whether CSH will re-file it. But other organizations, like Freedom From Religion Foundation, Inc., have threatened similar suits aimed at state level faith-based initiatives elsewhere, and have suggested that state Blaine Amendments would be the ground upon which such suits would be based. In *Bush v. Holmes*, the Supreme Court of Florida refused to fuel this movement, but it also did nothing to derail it. State constitutional law thus remains a potential impediment to a significant number of state initiatives designed to bring faith organizations into social service partnerships with government.

State constitutional law remains a potential impediment to a significant number of state initiatives designed to bring faith organizations into social service partnerships with government.

B. Taetle v. Atlanta Independent School System (Georgia Supreme Court, decided January 17, 2006)

On January 17, 2006, the Georgia Supreme Court ruled in *Taetle v. Atlanta Independent School System*[180] that the Atlanta school system did not run afoul of what the Court described as Georgia’s “Establishment Clause” in leasing classroom space from a Baptist Church for a kindergarten annex that would be operated by the public school system. The relevant constitutional provision, Article I, Section II, Paragraph VII, provides that “No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution.”[181]

[180] 625 S.E. 2d 770 (Ga Sup. Ct. 2006), 2006 GA LEXIS 1.

[181] This provision bears a very strong resemblance to Article I, section 3 of the Florida Constitution, which we discuss above in connection with the decision by the Supreme Court of Florida in *Bush v. Holmes*.

In upholding the lease arrangement, the Court in *Taetle* reasoned that the transaction between the City and the church was entirely commercial, involved payment at ordinary market value, and did not include the provision of any educational or social services by the church itself. As the Court put it, "a political subdivision of this state cannot give money to a religious institution in such a way as to promote the sectarian handiwork of the institution. But a . . . political subdivision of [the] state . . . may enter into a arms-length, commercial agreement with a sectarian institution to accomplish a non-sectarian purpose." Slip op. at 3. Here, because the purpose of the arrangement was to obtain space for a public kindergarten, "payments under that lease do not constitute the giving of monetary aid to the church and do not . . . violate the [state] . . . Constitution." Slip op. at 3-4.

We would have been very surprised at a contrary result. *Taetle* seems to us an easy case, because the City was buying space from a church for a public program, rather than financing a church-run service. The opinion does contain language, concerning the permissibility of agreements "with a sectarian institution to accomplish a non-sectarian purpose," that suggests that government contracts for non-sectarian social services to be performed by agents of a sectarian entity might be acceptable. But such an agreement would not ordinarily be considered "commercial," as the Court viewed the transaction in *Taetle*. Moreover, the facts emphasized and citations marshaled by the Georgia Supreme Court do not signal approval of any enterprise involving social services provided by faith-based entities and financed by the state. So the decision seems to us very narrow in terms of what it approves, and very firm in its dictum that "a political subdivision of this state cannot give money to a religious institution in such a way as to promote the sectarian handiwork of the institution."

Taetle is no victory for faith-based social services, but its narrow factual setting means that it should not be viewed as any sort of defeat for such services. The impact of Georgia's Blaine Amendment on government-financed social services by religious entities thus remains a highly controversial question in both the law and the politics of Georgia.[182]

[182] Governor Perdue of Georgia has tried unsuccessfully on several occasions to persuade the Georgia legislature to support an amendment to the state constitution that would explicitly permit state financial support for social services provided through FBOs. See Bryan Jackson, "Georgia Faith-Based Amendment Defeated," Roundtable on Religion and Social Welfare Policy, March 21, 2006, http://www.socialpolicyandreligion.org/news/article.cfm?id=3991.