

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

FREEDOM FROM RELIGION
FOUNDATION, INC.; PETER VIVIANO,
ERNIE HIRSHMAN, SABINA HIRSHMAN,
PAUL WEINBAUM, MARTIN J. BOYD, M.D.,
and JESSE V. CHAVEZ,

Plaintiffs,

v.

Case No. CIV 05-1168-RLP/KBM

GOVERNOR BILL RICHARDSON, SECRETARY
JOE R. WILLIAMS, HOMER GONZALES,
BILL SNODGRAS, and CORRECTIONS
CORPORATION OF AMERICA, INC.,

Defendants.

**PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION
FOR PARTIAL SUMMARY JUDGMENT**

I. INTRODUCTION.

The evidence is undisputed that the New Mexico Corrections Department pays CCA to operate the New Mexico Women's Correctional Facility ("NMWCF"). CCA, in turn, uses the money received from the State to pay for its operating costs, including costs associated with programming offered to inmates. As part of its programming, CCA has implemented a Bible-based residential program. The content and structure of the program are determined by CCA in collaboration with the Institute for Basic Life Principles. The program, known as the Life Principles/Crossings Program, is supervised and run by the paid prison chaplain. (PPFF, Nos. 9-56 and 92-110.)

The defendants contend that State funds can be used by a private contractor like CCA to provide explicitly religious programming. They claim, in the first instance, that once the State gives money to a contractor, the contractor can use the money however it chooses -- and the State has no obligation to restrict the use of State funds for religious programming. Alternatively, the defendants contend that State funded religious programming is constitutionally permissible if non-religious programming is also funded and if participation in religious programming is voluntary. They argue that voluntariness is a *per se* "circuit-breaker." Finally, the defendants contend that prison authorities have special license to sponsor explicitly religious programming as a means to effect inmate behavior modifications.

Application of the law to the undisputed facts establishes that the plaintiffs are entitled to judgment in their favor. The plaintiffs have standing as taxpayers because State funds are being misused by CCA in a manner that violates the Establishment Clause. The undisputed facts further establish that the Life Principles/Crossings Program constitutes a program of religious indoctrination that is being supported by the funds received by CCA from the State. The Life Principles/Crossings Program, moreover, is not funded by vouchers allocated by inmates to the program. CCA has decided to offer the program to inmates, who do not control or determine the allocation of resources to the program. As a result, the use of State funded personnel to supervise and operate the Life Principles/ Crossings Program violates the Establishment Clause. The prison context does not change the result because the promotion of religious indoctrination is not a constitutionally legitimate penological objective.

II. THE USE OF COMPENSATED EMPLOYEE TIME IN FURTHERANCE OF RELIGIOUS INDOCTRINATION VIOLATES THE ESTABLISHMENT CLAUSE.

The defendants continue to argue that taxpayer standing to raise an Establishment Clause violation requires an incremental or marginal increase in the plaintiffs' tax obligations. The defendants are wrong. Taxpayer standing to raise an Establishment Clause violation only requires that state appropriations be used in violation of the Establishment Clause.

Publicly funded employees engaging in religious activities during their paid hours of work violate the Establishment Clause. Paid employees may not engage in religious indoctrination while they are "on the clock."

The basis for taxpayer standing in this case is similar to School District of Grand Rapids v. Ball, 473 U.S. 373 (1985). In that case, taxpayers challenged an educational program in which a public school district provided elective courses for students in sectarian, non-public schools. The courses were taught by paid public school employees. The teachers were not engaged exclusively to teach such classes, but they were paid during the time that they provided the challenged courses. The Supreme Court affirmed the plaintiffs' taxpayer standing:

Petitioners allege that respondents lack taxpayer standing under Flast v. Cohen, 392 U.S. 83 (1968), and Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982). The district court and the court of appeals rejected the standing challenge. We affirm this finding, relying on the numerous cases in which we have adjudicated Establishment Clause challenges by state taxpayers to programs for aiding non-public schools. Id. at 380, n. 5.

The Second Circuit Court of Appeals similarly recognized taxpayer standing to challenge paid staff participation in religious activities, in Destefano v. Emergency Housing Group, Inc.,

247 F.3d 397, 416-419 (2d Cir. 2001). In Destefano, the taxpayer plaintiffs alleged that paid staff of a private contractor for the State supervised and participated in religious activities involving religious indoctrination. The Court of Appeals first recognized that the use of state funds to pay persons who actively inculcate religious beliefs is impermissible under the Establishment Clause. Id. at 416. The Court also recognized that although it would be inappropriate to presume inculcation of religion, “we indulge in no such presumption here.” Id. at 417. The Court further reiterated that “one of the few absolutes in Establishment Clause jurisprudence is the prohibition against government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith.” Id.

Standing in Destefano was like the present case. The state financed public services through a private organization, so the issue “we must now decide is whether such activities are ‘governmental indoctrination’ because they are supported directly and almost entirely by State funds.” Id. at 417. The Court concluded that such support constituted governmental indoctrination because staff salaries were paid from the grant money. Id. at 419.

Courts have consistently recognized that the use of compensated time to provide religious indoctrination is prohibited by the Establishment Clause. For example, in Newman v. City of East Point, 181 F. Supp. 2d 1374, 1381-82 (N.D. Ga. 2002), the court “enjoined [the defendants] from using City resources or employees on City time for organizing, advertising, or promoting or endorsing the Mayor’s prayer breakfast other than to a de minimis extent.” Similarly, in Lown v. The Salvation Army, Inc., 393 F. Supp. 2d 223, 238-39 (S. D. N.Y. 2005), the court held that taxpayers had standing to challenge the Salvation Army’s use of state grant money to pay employees while providing religious services.

The fact that state appropriations are paid to a private organization to provide public services does not insulate the defendants from taxpayer claims. The State has an obligation to implement effective restrictions on expenditures by grantees for activities involving religious indoctrination. As the Court held in Freedom From Religion Foundation v. Bugher, 249 F. 3d 606, 612-613 (7th Cir. 2001), “in the absence of effective means of guaranteeing that state aid derived from public funds will be used exclusively for secular, neutral, and non-ideological purposes, it is clear from our cases that direct aid in whatever form is invalid.”

Here, State funds given to CCA to operate the NMWCF are being used to support religious indoctrination -- with the State’s knowing approval and encouragement. Funds received by CCA from the State are used to pay the salaries of prison personnel, including the chaplain, who engage in activities related to the Life Principles/Crossings Program that violate the Establishment Clause; the chaplain engages in such activities within the scope of her employment and while she is being paid by CCA. (PPFF, Nos. 9-21.) CCA also uses State funds to pay for religious materials used in the curriculum of the Life Principles/Crossings Program, and funds received from the state are also used to pay for the facilities, including utilities, dedicated to the residential faith-based program at the NMWCF. (PPFF, Nos. 106-110.) Such uses of State funds improperly further religious indoctrination.

III. STATE FUNDS ARE ALLOCATED TO THE LIFE PRINCIPLES/CROSSINGS PROGRAM AT THE DIRECTION OF CCA AND THE STATE.

This is not a voucher case, nor does the decision in Zelman v. Simmons-Harris, 536 U.S. 639 (2002), authorize public funding of religious indoctrination without restraint whenever participants are not coerced, i.e., as long as participation is voluntary. The defendants misread

the Zelman case, which included individual vouchers as a necessary predicate. In Zelman, the voucher requirement was satisfied, so the case turned on the further question of voluntariness. The same was true in Freedom From Religion Foundation v. McCallum, 324 F.3d 880 (7th Cir. 2003).

In the present case, the Life Principles/Crossings Program is not funded by vouchers allocated by individual inmates. As the defendants admit, CCA decides how the funds from the State are allocated, including to the Life Principles/Crossings Program, which is then offered to inmates as a purported “elective.” CCA’s decision about what programs to offer gives the appearance of endorsement, including as to the Life Principles/Crossings Program, because allocation of resources to the Life Principles/Crossings Program is not the individual private choice of inmates -- CCA makes the threshold choice.

Under the defendants’ construction of Zelman, the government could always fund programs of religious indoctrination if participation is voluntary. This interpretation of Zelman eliminates the predicate voucher requirement and focuses exclusively upon the issue of coercion, which is not the touchstone of the Establishment Clause. In the absence of coercion, according to the defendants, public funding of religious indoctrination is always a matter of true private choice. That is not the holding of Zelman, or the Supreme Court’s other “true private choice” decisions, in which the voucher feature has always been an essential predicate.

The Supreme Court’s decision in Agostini v. Felton, 521 U.S. 203 (1997), is instructive. In Agostini, the Court reconsidered its prior decision in City of Grand Rapids v. Ball, 473 U.S. 373 (1985). In Ball, the Court had invalidated public funding of elective remedial courses offered by public school teachers to students at sectarian schools, but the Court acknowledged

there was no evidence that public school teachers actually engaged in religious indoctrination; the Court merely presumed that the teachers might engage in religious teaching.

The Supreme Court reversed its position in Agostini, rejecting any presumption that publicly funded elective courses would include religious inculcation. The Court concluded that publicly funded elective courses, offered even to students at sectarian schools, do not violate the Establishment Clause unless program offerings include religious inculcation as a matter of fact. Public funding of such elective courses, however, would violate the Establishment Clause if the courses included religious content. “As we have repeatedly recognized, government inculcation of religious beliefs has the impermissible effect of advancing religion.” Id. at 223. The Supreme Court, however, abandoned any presumption that public employees on parochial school grounds would engage in State-sponsored indoctrination. Id. As a result, federally funded remedial instruction to disadvantaged children, even at sectarian schools, was not invalid under the Establishment Clause “pursuant to a program containing safeguards such as those present here,” including safeguards that the instruction itself not include religious indoctrination. Id. at 234-235.

Agostini did not condition constitutionality solely on the absence of coercion. Agostini recognized that public funding of elective courses with religious content would violate the Establishment Clause. The holding in Agostini, therefore, turned on the fact that the district court “disregarded the lack of evidence of any specific incidents of religious indoctrination.” Id. at 220.

In the present case, religious inculcation inheres in the program that CCA has decided to offer to inmates. Such a program violates the Establishment Clause, even under Agostini,

regardless whether enrollment in such an “elective” program is voluntary. The program has CCA’s endorsement, and CCA makes the decision to devote resources to operate the program.

In fact, the Agostini decision, like Zelman, distinguished grants disbursed directly to students, who then direct the money to pay tuition at the educational institution of their choice. Such grants are constitutionally acceptable, even if the student directs the money to a religious educational institution, because such a transaction is “no different from a State’s issuing a paycheck to one of its employees, knowing that the employee would donate part or all of the check to a religious institution.” Id. at 226.

By contrast, in the present case, the allocation of resources to the Life Principles/Crossings Program is made by CCA, independent of inmates. Inmates are given no voucher. Inmates are given no fixed amount that they can allocate to their personal program choices. The “menu” of programs at the NMWCF is decided by CCA, which programs come with the endorsement and sponsorship of CCA and the State of New Mexico.

The actual use of public resources in providing religious programs remains the touchstone prohibition of the Establishment Clause. In Conley v. Jackson Township, 376 F. Supp. 2d 776, 785-86 (N.D. OH. 2005), for example, the court considered whether public grants to a local YMCA violated the Establishment Clause. The court noted that “the Establishment Clause requires that none of the Township’s aid has been or will be used for specifically religious activities. In other words, any aid to the local YMCA must be used exclusively for its secular purposes and operations.” Id. at 785. The court then concluded that no Establishment Clause violation occurred in Conley because there was no evidence that the Township’s aid was or would be used to fund specifically religious activities. See also Columbia Union College v.

Oliver, 254 F. 3d 496, 505-506 (4th Cir. 2001), where the Court held that while it is not of consequence that a sectarian school offers secular courses like computer science, plaintiffs must show evidence that the government aid in question has resulted in actual religious indoctrination.

CCA's use of state funds to operate the Life Principles/Crossings Program violates every tenet of Establishment Clause jurisprudence, including the purpose test of Lemon. As the Seventh Circuit Court of Appeals stated in Books v. Suetkamp, 235 F.3d 292, 303 (7th Cir. 2000), the use of an explicitly religious code to govern personal conduct evinces a purpose to endorse a code of religious values through government sponsorship. The same reasoning applies to the Life Principles/Crossings Program. Given the admitted religious content of the program, moreover, the defendants must take steps to "obviate its religious purpose." Id. at 304, n.8. Here, nothing has been done to obviate the religious purpose of the Life Principles/Crossings Program. Religious content defines the program.

IV. THE LIFE PRINCIPLES/CROSSINGS PROGRAM IS NOT OFFERED AS A RELIGIOUS ACCOMMODATION, AND IT VIOLATES THE ESTABLISHMENT CLAUSE IN THE PRISON CONTEXT EVEN WHEN RUN BY THE PRISON CHAPLAIN.

The Life Principles/Crossings Program was designed and implemented by CCA, in collaboration with the Institute for Basic Life Principles. The program is sponsored by CCA and the State, ostensibly to effect behavior modification through "non-denominational" religious instruction. This is not mere accommodation. It is religious endorsement and sponsorship at the behest of prison authorities.

The defendants disingenuously suggest that the Life Principles/Crossings Program is a mere accommodation of inmate free exercise rights. While there is room under the

Establishment Clause for “benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference, at some point, accommodation may devolve into an unlawful fostering of religion.” Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos, 483 U.S. 327, 334-35 (1987). In particular, a preference for the dissemination of religious ideas “exemplifies offense to our most basic understanding of what the Establishment Clause is all about and hence Constitutionally intolerable.” Texas Monthly, Inc. v. Bullock, 491 U.S. 1, 29 (1989) (Blackmun, J., concurring). Courts therefore, have consistently emphasized that a permissible accommodation must not involve the government in the act of promotion of particular religious viewpoints “or even religion in general.” Madison v. Riter, 335 F.3d 310, 317 (4th Cir. 2003). In short, “the principle that the government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause.” Lee v. Weisman, 505 U.S. 577, 587 (1992); Cutter v. Wilkinson, 544 U.S. 709, 714 (2005) (“accommodation may devolve into an unlawful fostering of religion”); Kiryas Joel Village School District v. Grumet, 512 U.S. 687, 706 (1994) (accommodation is not a principle without limits).

The Life Principles/Crossings Program was not adopted and implemented to accommodate free exercise rights, but with the objective to effect behavior modification based upon a religious code of conduct. The Life Principles/Crossings Program is not designed to alleviate burdens on free exercise rights, but constitutes an affirmative effort by CCA to promote a religious code of conduct. The program has the specific endorsement and imprimatur of CCA’s sponsorship. The program was designed at the instance of CCA, and it is the only residential faith-based program offered by CCA -- in any of the prison facilities that it manages.

The Life Principles/Crossings Program cannot be justified after-the-fact, or even before-the-fact, as a mere accommodation. The program constitutes an improper endorsement of religion by prison authorities that is funded by the State.

While prison chaplains may be properly employed, therefore, that does not mean everything a chaplain purports to do is permissible under the Establishment Clause. The defendants incorrectly reason that because prisons may employ chaplains, then chaplains can do anything without constitutional restraint. That is not the law, any more than it is the law that any permissible employment position creates a *carte blanche* to act without constitutional restraint.

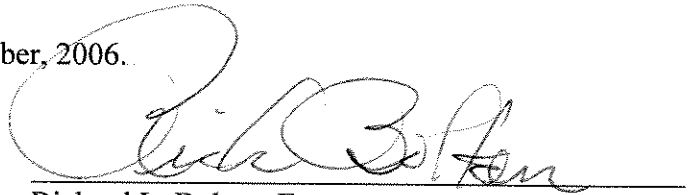
The relevant question is not whether prisons may employ chaplains, but whether such chaplains may engage in state-sponsored religious indoctrination. The question is not about the propriety of employing a chaplain at the NMWCF. It is about the specific activities of the chaplain that violate the Establishment Clause. If the Life Principles/Crossings Program is not an appropriate state-sponsored exercise in religious indoctrination, then the chaplain cannot run the program.

CCA has not implemented the Life Principles/Crossings Program to accommodate free exercise rights. CCA has designed, developed and deployed the Life Principles/Crossings Program to promote a religious code of conduct that CCA hopes will cause behavior modifications. The Establishment Clause prohibits state tax appropriations from being used to pay for such religious indoctrination.

Finally, the Establishment Clause also prohibits prison authorities from pursuing sectarian religious indoctrination as a penological objective. Prison authorities may pursue values education, but not indoctrination explicitly defined by sectarian religious content. Not

even “the unique history” of legislative prayer has justified affiliating the government with any specific faith or belief. See Hinrichs v. Bosma, 440 F.3d 393, 399 (7th Cir. 2006). Similarly, in the prison context, religious treatment programs have been held to violate the Establishment Clause, without special deference to prison authorities. See Kerr v. Farrey, 95 F.3d 472 (7th Cir. 1996). The Life Principles/ Crossings Program, in short, constitutes impermissible State funding of religious indoctrination.

Dated this 20th day of November, 2006.



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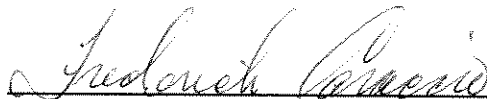
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CERTIFICATE OF SERVICE

Frederick Caraccio certifies that on November 20, 2006, a true and correct copy of **Plaintiffs' Reply Brief in Support of Their Motion for Partial Summary Judgment** was sent via first class mail to defendants counsel as follows:

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