

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW MEXICO

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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.

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**PLAINTIFFS' BRIEF OPPOSING STATE DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT**

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**I. INTRODUCTION.**

The State Defendants, Corrections Department Secretary Joe Williams and Coordinator of Faith-Based Program, Homer Gonzales, have moved the Court for summary judgment dismissing Plaintiffs' Complaint. The State Defendants argue that the Life Principles/Crossings Residential Faith-Based Program at the New Mexico Women's Correctional Facility ("NMWCF") does not violate the Establishment Clause.

The Plaintiffs' Complaint alleges that Mr. Gonzales, as the Coordinator of Faith-Based Programs for the New Mexico Corrections Department oversees all of the Department's faith-based programming, which has the goal of teaching and modeling a Christian lifestyle, including by encouraging inmates to form new relationships within the Christian community. (Complaint, ¶ 30.)

The Complaint also alleges that the goal of faith-based programming provided by the New Mexico Corrections Department seeks “to encourage inmates to become involved in faith-based programming in their local community upon release from prison.” (Complaint, ¶ 31.) Mr. Gonzales further has been principally involved in developing post-release aftercare programs that are not neutral toward religion. (See Statement of Facts below.) The State Defendants have not moved for summary judgment on these claims.

**A. Standing.**

The State Defendants do argue for summary judgment on the alleged basis that the State taxpayer plaintiffs lack standing. The State Defendants contend that taxpayer standing requires a measurable effect on each plaintiff’s tax liability. This is the same argument made by the defendant, Corrections Corporation of America (“CCA”). The defendants’ argument is wrong when taxpayer standing is based upon the alleged misuse of tax appropriations in violation of the Establishment Clause. The misuse of public funds in violation of the Establishment Clause confers taxpayer standing, regardless of whether the misuse of funds causes a marginal increase in taxes. (Plaintiffs rely upon their Brief Opposing Motion for Summary Judgment by Corrections Corporation of America on Issue of Standing in opposition to the same standing argument made by the State Defendants.)

**B. Secular Purpose.**

The State Defendants also argue that the Life Principles/Crossings Program does not substantively violate the Establishment Clause because the program has the alleged secular purpose of modifying inmate behavior and because secular programs such as carpentry are also offered to inmates. Pursuing secular goals by means defined by religious content, however, does not satisfy

the required secular purpose. The Establishment Clause further prohibits the use of public funds for religious indoctrination, regardless of whether secular programming also is provided. The Establishment Clause prohibits any use of public funds for religious indoctrination, not just when there is exclusive funding of religious indoctrination. (These arguments are made by plaintiffs in their Brief in Support of Motion for Partial Summary Judgment and in their Brief in Opposition to CCA's Motion for Summary Judgment on the Issue of an Establishment Clause violation. The plaintiffs, therefore, rely upon the arguments set forth in those briefs.)

**C. Voucher Argument.**

The State Defendants argue that State funds are used to support the Life Principles/Crossings Program only as the result of individual private choices by prison inmates. The State Defendants, however, apparently misunderstand the distinction between direct funding and a program of true private choice where individuals allocate a sum given to them to a faith-based program. The State Defendants seem to argue that whenever program participation is voluntary, then public funds used in offering the program are deemed to be the result of individual private choices. This argument, if accepted, would always allow faith-based programming to be publicly financed, without taxpayer recourse, unless participation is coerced. The State Defendants' argument imputes coercion as a necessary element of an Establishment Clause violation. The State Defendants' argument is wrong.

Compelled taxpayer support of religious indoctrination cannot be justified on the basis that participants are not coerced. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by programs which include religious indoctrination, whether those programs operate directly to coerce non-observing

individuals or not. Engel v. Vitale, 370 U.S. 421, 430 (1962); Holloman v. Harland, 370 F.3d 1252, 1286 (11th Cir. 2004); Newdow v. U.S. Congress, 292 F.3d 597, 607, n. 5 (9th Cir. 2002).

The present case does not involve a program of true private choice because the decision to allocate spending to the Life Principles/Crossings Program is not determined by individual choices made by prison inmates. The inmates at NMWCF are not given any sum of money that they in turn allocate or direct to specific prison programs. The State pays CCA an amount of money to operate the NMWCF, which CCA can use “however they want;” CCA then has determined to offer the Life Principles/Crossings Program to prison inmates, which program is overseen and operated by the Prison Chaplain, who is paid by funds received from the State; inmates then can choose to participate in the Life Principles/Crossings Program, but they are not given any sum to allocate toward funding of that program; as the State Defendants acknowledge, CCA determines how the funds from the State are allocated in the operation of the NMWCF (see State Defendants Proposed Findings of Fact Numbers 6 and 27).

**D. State Defendants Mis-state Facts.**

The State Defendants mis-state facts in their argument that funding is allocated to support the Life Principles/Crossings Program as the result of private individual choices of prison inmates. The State Defendants make the following factually unsupported and incorrect statement, at page 17 of their Memorandum: “The individual prisoner’s decision to enroll in a Faith Based program is an expressed precondition of the allotment of that prisoner’s share of the per diem -- if any at all can be shown to go directly to -- the Faith Based program.” There is no factual support for this statement. Prisoners are not given an allotment of the per diem paid by the State which they allocate or direct to specific prison programs. On the contrary, as the State Defendants admit in their

Proposed Finding Number 27, “CCA determines how its funds are allocated in the operation of the NMWCF.” The State Defendants further make the following incorrect statement, at page 17 of their Memorandum: “The prisoners then take that provided allotment [of the per diem] and make their own choice of what program in which to enlist.” From this statement, the State Defendants conclude that funding used to support the Life Principles/Crossings Program is based upon the amount of each participant’s “divided allotment.” In fact, the inmates are not given any such allotment and they do not personally designate any allocation of funding to the programs that CCA has decided to offer.

The State Defendants’ cite their proposed Finding of Fact Number 28 as support for the argument that inmates make an allocation of funds to the Life Principles/Crossings Program. Finding of Fact Number 28 states: “All inmates at the NMWCF have the opportunity to participate in some form of programming. Nearly one-hundred percent of the inmates participate in programming at NMWCF.” This proposed finding does not support the State Defendants’ claim that prisoners are given “an allotment,” which they then direct to specific programs. On the contrary, the per diem amount paid by the State to CCA “does not change and is not affected by whether or not an inmate participates in any particular program,” and “CCA determines how the funds are allocated in the operation of the NMWCF.” (See State Defendants’ Proposed Findings of Fact, Numbers 26 and 27.)

The undisputed facts establish that CCA decided to offer the Life Principles/ Crossings Program, under the oversight of the Prison Chaplain, with funds received from the State. The State, in turn, has authorized such residential faith-based units and supports the Life Principles/Crossings Program at NMWCF. The decision to offer the program under the control and oversight of the

Prison Chaplain, is made independent of any inmate allocation of funding to the program. No dollars are dedicated to the program by program participants. They are given no voucher.

The State Defendants, in reality, imply that publicly funded religious indoctrination is Constitutionally acceptable, if no one is coerced to accept the religious inculcation. That is not the law. Public funding of religious indoctrination is absolutely prohibited unless public dollars are directed to support the program by the individual choices of many individuals. That is not the situation in the present case.

The State Defendants may not agree with the law. They may believe that offering religious programming is good social policy. The limitations of the Establishment Clause make sense, however, as evidenced by the State's blindness to its own presumptions. The Life Principles/Crossings Program is characterized as a non-denominational Christian Bible-based program that supposedly appeals to Hispanic women. But who is the State to determine what should be religious orthodox appealing to the majority? Who is CCA to make such determinations? Why should the Institute for Basic Life Principles establish the State's civil religion? Under the Establishment Clause, these issues are not appropriate for the State or its public contractor CCA to decide -- but they have done so. The Life Principles/Crossings Program, therefore, necessarily is not religiously neutral. State taxpayers Constitutionally have the right to object to such religious endorsement and the State of New Mexico, for its part, has an obligation to impose safeguards on CCA to assure that State funds are not used to support religious indoctrination. The State has not fulfilled its Constitutional duty.

**E. Prison Discretion.**

Finally, the Establishment Clause does not have an exception that allows prison officials to promote religious indoctrination. Religious indoctrination is not a legitimate penological objective, even as a specified means to modify behavior. Religious indoctrination, otherwise, could be used as a justification to promote moral values in any number of contexts. The State, including prison officials, may promote moral values, but not by State sponsorship of religious indoctrination as the specified means.

**II. RESPONSES TO STATE DEFENDANTS' PROPOSED STATEMENT OF FACTS WHICH PLAINTIFFS DISPUTE.**

2. Defendant Homer Gonzales is the Volunteer Services Coordinator for the New Mexico Corrections Department of Homer Gonzales, page 6, line 2 - Exhibit A.

Response: Homer Gonzales was identified as the Coordinator of Faith-Based Programs for the New Mexico Corrections Department as of April 2006; after the filing of this lawsuit, Mr. Gonzales' job title allegedly was changed to "Volunteer Services Coordinator," although he had no business cards with such title as of August 23, 2006. (Plaintiffs' Statement of Fact, Numbers 124-125.)

8. The New Mexico Department of Correction's policies setting forth the procedures to be followed in implementing a faith based program for inmates do not violate the United States Constitution. NMCD Policies Exhibit H(1),(2),(3).

Response: The proposed finding of fact is actually a conclusion of law. By setting forth religion as the organizing basis for the Faith-Based Living Program, as a means for inmates to grow spiritually, the Department's regulations do violate the United States Constitution.

(See Plaintiffs' Statement of Facts, Numbers 1-4, included in Plaintiffs' Brief in Support of Motion for Partial Summary Judgment.)

10. The NMDOC's rationale for offering prison programming to inmates is to reduce violent incidents and criminal activity while inmates are in prison, so that prisons are easier to administer. Deposition of Homer Gonzales, page 104, line 25; page 105, lines 1-22, attached as Exhibit J.

Response: The Department's rationale for the Faith-Based Living Units is "to give opportunity for inmates to grow, spiritually," which allegedly may cause positive behavior modification. (See Plaintiffs' Statement of Facts, Numbers 3-4, included in Plaintiffs' Brief in Support of Motion for Partial Summary Judgment.)

12. The goals for the faith based program offered at the NMWCF are for each participant to: a have a better understanding of herself; a better perspective on life itself; be able to handle responsibility; be accountable for their actions; be able to look at conflict as a challenge and to be able to work through conflicts without being a detriment or hurting someone else or themselves. Deposition of Shirley Compton page 64, lines 24-25; page 65, lines 1-7, Exhibit L.

Response: The goal of the Life Principles/Crossings Program is to facilitate spiritual growth as a mechanism for behavior modification. (See Plaintiffs' Statement of Facts, Numbers 3, 39, 57, and 62, included in Plaintiffs' Brief in Support of Motion for Partial Summary Judgment.)

13. Shirley Compton, a CCA employee working as a chaplain at the NMWCF, selected and implements the specific faith-based programming provided in the NMWCF faith-based pod.

Deposition of Shirley Compton, page 4, lines 12-14; page 13, lines 1-18, 23-25; page 14, lines 1-6, Exhibit M.

Response: CCA corporate headquarters encouraged officials at the NMWCF to implement a residential faith-based program, which final decision was made by the prison warden, the assistant warden, the prison chief of security, and the New Mexico Corrections Department. (See Plaintiffs' Statement of Facts, Numbers 25-27 and 59-62 and 85, included in Plaintiffs' Brief in Support of Motion for Partial Summary Judgment.)

14. Inmate participation in the faith-based segregation pod at the NMWCF is done on a volunteer basis for which each inmate submits an application to participate in the program. Deposition of Shirley Compton, page 63, lines 1-25, Exhibit O.

Response: Inmates are expected to memorize Biblical passages before admission to the program. (See Plaintiffs' Statement of Fact, Number 90, included in Plaintiffs' Brief in Support of Motion for Partial Summary Judgment.)

15. Participants in the faith-based program are not pressured to adopt a particular religious view. Deposition of Shirley Compton, page 53, lines 23-25, Exhibit P.

Response: The Life Principles/Crossings Program is permeated with Biblical and Christian content, which participants are expected to memorize, and internalize, model and exhort. (See Plaintiffs' Statement of Facts, Numbers 28-30, 35-56, 66, 75-76, 80-84, included in Plaintiffs' Brief in Support of Motion for Partial Summary Judgment.)

23. The State of New Mexico does not fund the faith-based unit at NMWCF. Exhibit C, Deposition of Assistant Warden Jerry Smith, at 19:15-22; Exhibit A, at ¶¶ 9-10.

Response: The faith-based unit at NMWCF is funded by the State of New Mexico from money received by CCA to operate the prison. (See Plaintiff's Statement of Facts, Numbers 9-21 and 92-110, included in Plaintiffs' Brief in Support of Motion for Partial Summary Judgment.)

25. CCA expends its own funds to house, feed and provide programming for the inmates at the NMWCF. Exhibit A, Cooper Affidavit, at ¶ 12.

Response: CCA pays for the costs to operate the NMWCF from funds received from the State of New Mexico. (See Plaintiff's Statement of Facts, Numbers 9-22, included in Plaintiffs' Brief in Support of Motion for Partial Summary Judgment.)

27. CCA determines how its funds are allocated in the operation of the NMWCF. Exhibit R, Allen Cooper Affidavit at ¶ 14.

Response: Religious programming is within the scope of CCA's contract with the Corrections Department. (See Plaintiffs' Statement of Fact, Number 13, included in Plaintiffs' Brief in Support of Motion for Partial Summary Judgment.)

29. The NMWCF offers various program opportunities, including education, mental health, recovery treatment, vocational, and faith-based. Smith Affidavit, at ¶¶ 8-13.

Response: The Life Principles/Crossings Program is the only faith-based residential program utilized by CCA. The program is an explicitly Christian Bible-based program. The Life Principles/Crossings Program is the only faith-based residential program at NMWCF -- and the residential feature is considered an integral and valuable part of the program. The residential aspect of the program provides a more secure environment than general prison living units. (See Plaintiff's Statement of Facts, Numbers 28-56, 70-84, included in Plaintiffs' Brief in Support of Motion for Partial Summary Judgment.)

33. Inmates seeking to effect behavior changes may also participate in the Therapeutic Community, a secular residential program directed toward addictions, which provides counseling, parenting classes, and addictions treatment including Twelve Steps AA and NA programs. This program employs a program coordinator and a full-time addictions treatment counselor, along with a counselor trainee, and provides programming for eighty women who live together in a residential program. Smith Affidavit, at ¶ 12; Deposition of Thelma Flowers, Addictions Treatment Counselor, at 3:15-21, 25:25-26:1, attached as Exhibit G.

Response: The Therapeutic Community is not a purely secular residential program. The program includes Twelve Steps AA and NA programs, which are religious programs based upon belief in a “higher authority.” (Supp. Bolton Aff., Ex. 1, Gonzalez Dep. at 22-23.) The program includes religious content as judicially recognized. See Kerr v. Farrey, 95 F.3d 472, 479-80 (7th Cir. 1996).

34. The Life Principles/Crossings program has identified goals directed toward behavior change. The funds expended by CCA to develop the program were from CCA’s profits, and were not treated as operating expenses of any facility. Deposition of John Lanz, page 49 line 25 through page 50 line 6, page 45 lines 13-23, page 93 lines 16-18, attached as Exhibit Y; CCA Life Principles Executive Summary, attached as Exhibit EE; Exhibit Q, Shirley Compton Affidavit, at ¶ 11.

Response: Funds used to operate the Life Principles/Crossings Program are derived from each prison’s operating budget, which includes the Prison Chaplain, who oversees and operates the Life Principles/Crossings Program. (See Plaintiffs’ Statement of Facts, Numbers 9-22 and 92-110.)

36. The Life Principles/Crossings program has identified goals directed toward behavior change. The funds expended by CCA to develop the program were from CCA's profits, and were not treated as operating expenses of any facility. Deposition of John Lanz, Exhibit Y, page 49 line 25 through page 50 line 6, page 54 lines 13-23, page 93 lines 16-18; Exhibit Q, Compton Affidavit at ¶ 11.

Response: Funds used to operate the Life Principles/Crossings Program are derived from each prison's operating budget, which includes the Prison Chaplain, who oversees and operates the Life Principles/Crossings Program. (See Plaintiffs' Statement of Facts, Numbers 9-22 and 92-110.)

39. The faith-based living unit is identical in furnishing and amenities to all other living units of equivalent security levels. Compton Affidavit, at ¶ 5; Smith Affidavit, at ¶ 15.

Response: The residential feature of the Life Principles/Crossing Program provides a protective, insular and secure environment for participants distinct from the general prison living units. (See Plaintiff's Statement of Facts, Number 108, included in Plaintiffs' Brief in Support of Motion for Partial Summary Judgment.)

42. Participation by inmates in the Life Principles Community/Crossings program is entirely voluntary. There are no positive or negative institutional consequences specific to the program for entry into or departure from the program. Compton Affidavit, at ¶¶ 6-8; Smith Affidavit, at ¶¶ 16-17.

Response: The residential feature of the Life Principles/Crossing Program provides a protective, insular and secure environment for participants distinct from the general prison

living units. (See Plaintiff's Statement of Facts, Number 108, included in Plaintiffs' Brief in Support of Motion for Partial Summary Judgment.)

43. Inmates are considered for eligibility for participation in the faith-based residential program without regard to their religious beliefs or lack thereof, and no religious services such as baptisms are performed within the program. Exhibit J, Compton Affidavit, at ¶ 9.

Response: Inmates must apply to the Prison Chaplain for admission to the Life Principles/Crossings Program, and they are expected to memorize Biblical passages before admission to the program. (See Plaintiff's Statement of Facts, Number 90, included in Plaintiffs' Brief in Support of Motion for Partial Summary Judgment.)

44. Inmates in the faith-based residential program may continue to follow their own religious practices whether those practices are Christian or non-Christian. This includes Native American sweat lodge ceremonies and Wiccan observances. Exhibit J, Compton Affidavit, at ¶ 10.

Response: The content of the Life Principles/Crossings Program that participants utilize is an intrinsically Christian Bible-based program. (See Plaintiff's Statement of Facts, Numbers 28-56, 75-84, included in Plaintiffs' Brief in Support of Motion for Partial Summary Judgment.)

45. Experts Elizabeth Dinsmore, Ph.D. and Victor Lofgreen, Ph.D., provided expert reports that the faith-based residential program at the NMWCF meets legitimate penological goals directed toward rehabilitation. Report of Dr. Lofgreen, attached as Exhibit N, and Report of Dr. Dinsmore, attached as Exhibit O.

Response: The effectiveness of faith-based programming in prisons is unsubstantiated, as admitted by CCA's own experts. The structured format of the program,

moreover, rather than its substantive content, is the most attractive feature to participants. (See Plaintiff's Statement of Facts, Numbers 111-113, included in Plaintiffs' Brief in Support of Motion for Partial Summary Judgment.)

46. Prison officials observed that there were few misconduct reports coming from inmates in the Life Principles/Crossings program, and this has been a positive influence in the facility. Deposition of Eric Thompson, Exhibit P, at 18:21-19:9, 22:24-23:5; Deposition of Warden Bill Snodgrass, at 38:1-15, attached as Exhibit Q; Exhibit C, Deposition of Jerry Smith, at 5:4-12.

Response: The effectiveness of faith-based programming in prisons is unsubstantiated, as admitted by CCA's own experts. The structured format of the program, moreover, rather than its substantive content, is the most attractive feature to participants. (See Plaintiff's Statement of Facts, Numbers 111-113, included in Plaintiffs' Brief in Support of Motion for Partial Summary Judgment.)

### **III. PLAINTIFFS' SUPPLEMENTAL STATEMENT OF FACTS IN OPPOSITION TO STATE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.**

The plaintiffs rely upon the Statement of Facts included in their Brief in Support of Motion for Partial Summary Judgment, previously filed. They also submit the following supplemental proposed facts:

123. Homer Gonzalez is a paid employee of the State of New Mexico Corrections Department. (Gonzalez Dep. at 5.)<sup>1</sup>

124. Mr. Gonzalez was identified as the Coordinator of Faith-Based Programs for the New Mexico Corrections Department as of April 2006. (Gonzalez Dep. at 80-81.)

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<sup>1</sup> True and correct copies of deposition transcript pages are attached to the Supplemental Affidavit of Richard L. Bolton.

125. After the filing of this lawsuit, Mr. Gonzalez's job title allegedly was changed to Volunteer Services Coordinator, although he had no business cards with such title as of August 23, 2006. (Gonzalez Dep. at 6.)

126. Five men's and one women's prisons have residential faith-based programs in the New Mexico Corrections Department system. (Gonzalez Dep. at 10.)

127. All of the residential programs in the State-operated facilities are Christian-based faith programs. (Gonzalez Dep. at 13.)

128. Belief in a higher power is one of the key attributes of the Twelve Step program utilized by the therapeutic community at the New Mexico Women's Correctional Facility. (Gonzalez Dep. at 22-23.)

129. A significant part of Mr. Gonzalez's job responsibilities include development of a state-wide faith-based after-care strategy. (Gonzalez Dep. at 41; Supp. Aff. of R. L. Bolton, Ex. 2.)

130. Mr. Gonzalez's job responsibilities focus heavily on developing faith-based programs. (Gonzalez Dep. at 94 and 110; Supp. Aff. of R. L. Bolton, Ex. 5.)

131. One of Mr. Gonzalez's duties includes the development of a state-wide after-care strategy, which was a focus of Mr. Gonzalez's responsibility. (Gonzalez Dep. at 41; Supp. Aff. of R.L. Bolton, Ex. 2.)

132. Most of Mr. Gonzalez's job responsibilities relate to faith-based programming. (Gonzalez Dep. at 55; Supp. Aff. of R. L. Bolton, Ex. 5.)

133. The Catholic Church is a key client of the Correction Department's after-care strategy. (Gonzalez Dep. at 63.)

134. Faith-based programming in the New Mexico Corrections Department is designed to help inmates establish or strengthen a relationship with God and to form new relationships within the Christian community. (Supp. Aff. of R. L. Bolton, Ex. 4.)

**IV. FINANCIAL SUPPORT FOR THE LIFE PRINCIPLES/CROSSINGS PROGRAM IS NOT DETERMINED BY PRIVATE INDIVIDUAL ALLOCATIONS MADE BY INMATES.**

The use of public financial resources to support inherently religious activities is prohibited by the Establishment Clause unless resources spent on religious activities are allocated by the individual private decisions of participants. If a religious program is offered to potential participants, but funding is not the result of individual allocations by many private individuals, then the program is not deemed to be one of true private choice. This distinction is made clear in Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

Zelman involved an Ohio program providing tuition aid in the form of scholarship vouchers given to parents for students to attend public or private schools of the parent's choosing. The Supreme Court concluded that the program did not violate the Establishment Clause because individual parents decided where to spend the scholarship vouchers. The Supreme Court recognized a distinction between programs that are funded directly versus "programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choice of private individuals." Id. at 649.

In discussing its prior precedents in this area, the Zelman Court noted that public funds were made available to religious schools "only as a result of numerous, private choices of individual parents of school-aged children." Mueller v. Allen, 463 U.S. 388, 399-400 (1983). The Court also noted that in Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986), aid

recipients “were empowered to direct the aid to schools or institutions of their own choosing,” which was a determining Constitutional factor. Zelman, 536 U.S. at 651.

The Zelman Court concluded that where government funds are given to individual citizens who “in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients.” Id. at 652. In such a situation, “if numerous private choices, rather than the single choice of a government to determine the distribution of aid, pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment.” Id.

“In terms of public perception, a government program of direct aid to religious schools...differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools.” Id. Funding directed to a religious program, even on a per capita or per diem basis, is not a program of true private choice if individual participants are not empowered to direct allocation of money to the program. Justice O’Connor noted this important distinction in Mitchell v. Helms, 530 U.S. 793, 843-43 (2000) (O’Connor, J., concurring):

In terms of public perception, a government program of direct aid to religious schools based on the number of students attending each school differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools. In the former example, if the religious school uses the aid to inculcate religion in its students, it is reasonable to say that the government has communicated a message of endorsement. Because the religious indoctrination is supported by government assistance, the reasonable observer would naturally

perceive the aid program as government support for the advancement of religion.

The present case does not involve a program of true private choice because inmates do not make any allocation of resources to the Life Principles/Crossings Program. Inmates at the NMWCF are not empowered to direct a specific sum of money to the support of the Life Principles/Crossings Program -- or any other specific program. Prison administrators have made the decision to offer the Life Principles/Crossings Program to inmates, which program offering is supported with prison resources paid for from proceeds received from the State of New Mexico. Prison officials, therefore, have made the decision to allocate resources to the Life Principles/Crossings Program, which allocation gives the appearance of institutional endorsement of the program.

The situation in this case is similar to a public body offering courses in religious instruction, in which students could enroll. In that situation, even if enrollment is voluntary, the use of public funds to offer the course does not sanitize the program from Constitutional infirmity. Such government support is not the result of private individual choices, and the public support violates the Establishment Clause. See Freedom From Religion Foundation v. Montana Office of Rural Health, 2004 U.S. Dist. LEXIS 29139 (D. Mont. 2004) (public funding of parish nursing courses found to violate the Establishment Clause).

In the present case, resources are not directed to the Life Principles/Crossings Program as the result of any voucher given to inmates, or as the result of any individual financial allocation made by prison inmates. CCA has determined to offer the program, which is made available to inmates, who do not make any resource allocation to that program, or any other program.

**V. THE LIFE PRINCIPLES/CROSSINGS PROGRAM IS NOT RELIGIOUSLY NEUTRAL.**

The Life Principles/Crossings Program also is not a program of true private choice because only one residential faith-based program is offered. CCA has decided that the Life Principles/Crossings Program should be a Christian Bible-based program, intended to appeal to persons already adhering to the Christian faith. (See Plaintiff's Proposed Findings of Fact, Number 76.)

The State Defendants argue that the doctrinal decisions made by CCA are irrelevant to questions of true private choice because inmates can also choose carpentry, or woodworking, as alternative programs. In terms of faith-based programming, however, CCA provides only one residential faith-based program, which CCA offers to inmates on a take it or leave it basis.

The commitment of financial support for the Life Principles/Crossings Program has been determined by CCA, with the knowledge and consent of the New Mexico Corrections Department. The program is one of direct financial support of religious indoctrination, which the Establishment Clause prohibits. Resources are not directed to support the program by individual inmates. The State Defendants, therefore, incorrectly rely on Zelman for exoneration. Funding for the Life Principles/Crossings Program is not done on a voucher basis.

**VI. THE NEW MEXICO CORRECTIONS DEPARTMENT IS CONSTITUTIONALLY REQUIRED TO PROVIDE SAFEGUARDS TO PREVENT THE USE OF APPROPRIATIONS BY CCA FOR RELIGIOUS ACTIVITIES.**

The New Mexico Corrections Department is required by the Establishment Clause to provide adequate safeguards to prevent CCA from using State appropriations for improper religious activities. See Laskowski v. Spellings, 443 F.3d 930, 937 (7th Cir. 2006); Bowen, 487 U.S. at 614-15; Freedom From Religion Foundation, Inc. v. Bugher, 249 F.3d 606, 612-13 (7th Cir. 2001);

American Jewish Congress v. Corporation for National and Community Service, 399 F.3d 351, 358 (D.C. Cir. 2005); Columbia Union College v. Oliver, 354 F.3d 496, 506 (4th Cir. 2001); ACLU v. Foster, 2002 U.S. Dist. LEXIS, 13778 at 49 (E.D. La. 2002). The requirement of safeguards does not presume misuse by grantees, but the State cannot ignore the practical need for State institutional control.

The Supreme Court's decision in Agostini did not abolish the requirement for safeguards to prevent the diversion of public money from secular to sectarian activities. In that case, a federal program paid for public school teachers to be sent into parochial schools, as well as other private schools, to teach special education classes. The teachers were not chosen for this study on the basis of their religious beliefs or affiliations, and the Supreme Court thought that the risk they would smuggle religious instruction into their classes, merely because of the parochial-school setting, was remote. The Court refused to "presume that public employees will inculcate religion simply because they happen to be in a sectarian environment. Since we have abandoned the assumption that properly instructed public employees will fail to discharge their duties faithfully, we must also discard the assumption that pervasive monitoring of Title I teachers is required. There is no suggestion in the record before us that unannounced monthly visits of public supervisors are insufficient to prevent or to detect inculcation of religion by public employees." 521 U.S. at 234.

Even where money is being given for a purpose with a secular component, "it is important that there be some mechanism for limiting the use of the money to the secular component." Laskowski, 443 F.3d at 938. Safeguards are required because "religion is an example of an activity that a grant of federal moneys may not be used to support." Id. The requirement of institutional

control recognizes that the government cannot turn a blind eye on the uses made of public appropriations by grantees, such as CCA.

In the present case, the New Mexico Corrections Department undisputedly has no institutional controls to prevent CCA from using public money for religious indoctrination. On the contrary, New Mexico's contract with CCA makes religious programming a required item within CCA's scope of work. The State also has administratively authorized the use of public money for residential faith-based programming. New Mexico is aware of and supports CCA's use of State funding for the purpose of conducting the Life Principles/Crossings Program.

The New Mexico Corrections Department is violating the Establishment Clause by not providing institutional controls to prevent CCA's use of State money for inculcating religion. The State cannot make direct payments of money to CCA to operate the NMWCF without safeguards to prevent precisely the use to which the State proceeds are being put.


### **CONCLUSION**

The use of public funds to support the Life Principles/Crossings Program violates the Establishment Clause. The use of public funds to support religious indoctrination is the most basic principle of Establishment Clause jurisprudence. The Establishment Clause, moreover, prohibits the support of religious indoctrination in all respects; State-sponsored religious indoctrination is not permitted just because reading, writing, and arithmetic may also be provided. The prohibitions of the Establishment Clause, moreover, do not recognize religious indoctrination as a legitimate penological objective. Arguments to the contrary are unprecedented. CCA is using public money for religious indoctrination, which the Establishment Clause prohibits -- and which the State admittedly has no safeguards to prevent. CCA can spend the money received from the State

“however they want,” which is at the heart of the problem. (State Defendants’ Proposed Finding, Number 6.)

Dated this 6<sup>th</sup> day of November, 2006.

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