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' BRIEF OPPOSING MOTION FOR SUMMARY JUDGMENT BY CORRECTIONS CORPORATION OF AMERICA ON ISSUE OF STANDING

I. INTRODUCTION.

The defendant, Corrections Corporation of America ("CCA"), moves for summary judgment on the basis that the plaintiffs allegedly lack taxpayer standing. CCA argues that taxpayer standing requires a line-item appropriation to CCA for religious programming by the State of New Mexico, regardless of CCA's actual use of state funds for programming that is inherently religious. The Establishment Clause, however, prohibits the use of state funds for such programming, even if the State does not mandate the religious content. Here, funding from the State of New Mexico to operate the New Mexico Women's Correctional Facility ("NMWCF") is undisputedly being used to operate a program that is explicitly defined by its

religious content. The State, moreover, knows that CCA is conducting religious programming, yet does nothing to prohibit use of State funds for such practices. On the contrary, the State authorizes, endorses and approves the religious programming.

CCA disingenuously argues that CCA itself pays for the religious programming at the NMWCF. CCA ignores that the funds to operate the prison come from the State of New Mexico. CCA does not operate the prison as a philanthropic venture. CCA charges the State of New Mexico a fee to run the prison, calculated on a prisoner per diem basis.

CCA also ignores that it uses the funds collected from the State of New Mexico to pay the NMWCF operating costs, including the salary of the prison Chaplain. The Chaplain, in turn, is the principal person responsible for administering, overseeing and conducting the Life Principles/Crossings Faith-Based Program at the NMWCF. The evidence is undisputed that the Chaplain is directly involved on a daily basis in the operation of the Life Principles/Crossings Program. A separate pod, and the cost associated with that pod, are also dedicated to the Life Principles/Crossings Program, which is conducted by design as a residential program separated from the rest of the prison.

CCA's argument that no state funds are used for the Life Principles/Crossings Program absent a line-item allocation from the State of New Mexico strains credulity. CCA's argument logically would mean that the State of New Mexico does not pay for any of the NMWCF expenses because CCA does not charge for any line-item expenses. CCA's argument, if accepted, would mean that non-earmarked State funds can be used in any program to provide religious indoctrination, including public schools, religious mentoring, job training programs, etc., as long as religious programming is not specified or mandated by the state. CCA's

proposition would effectively nullify the Constitutional prohibition against compelled taxpayer support of religion.

Taxpayer standing, contrary to CCA's argument, does not require a separate or earmarked appropriation mandating religious programming. Standing also does not require a marginal increase in taxes in order to raise an Establishment Clause challenge. Standing, instead, only requires that public funds be improperly used to advance religion. The plaintiffs meet that test in this case.

II. RESPONSES TO CCA'S PROPOSED STATEMENT OF FACTS WHICH PLAINTIFFS DISPUTE.

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

Response: The faith-based unit at NMWCF is funded by the State of New Mexico from the 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.)

12. CCA expends its own funds to house, feed and provide programming for the inmates. Exhibit D, 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.)

14. CCA determines how its funds are allocated in the operation of the NMWCF. Exhibit D, at ¶ 14.

Response: CCA's contract with the State of New Mexico includes religious programming, which is within the scope of CCA's contract with the Corrections Department. CCA's contract further obligates CCA to comply with Corrections Department policies, including Department policies relating to faith-based living units. Corrections Department regulations authorize faith-based living programs to be operated within prisons under the Department's jurisdiction, which Units must be approved by the Department. (See Plaintiff's Statement of Facts, Numbers 1-2, 7, and 13-14, included in Plaintiffs' Brief in Support of Motion for Partial Summary Judgment.)

16. The NMWCF offers a wide array of programming, including education, mental health, recovery treatment, vocational, and faith-based. Id. 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 the 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.)

17. Plaintiffs have shown no appropriation of state funds directly supporting the faith-based living unit at NMWCF.

Response: The faith-based living unit at NMWCF is directly supported by New Mexico State appropriations paid to CCA to operate the prison. The funds paid to CCA by the State are used to pay the prison operating costs, including the wages of the prison Chaplain.

The Chaplain, in turn, is directly involved in the administration, oversight and operation of the Life Principles/Crossings Program. In addition, a separate faith-based living unit, considered integral to the Life Principles/Crossings Program, is dedicated to the program, the costs of which are paid for by CCA from State funds. (See Plaintiff's Statement of Facts, Numbers 9-22, 42-43, 92-110, included in Plaintiffs' Brief in Support of Motion for Partial Summary Judgment.)

III. PLAINTIFFS' STATEMENT OF PROPOSED FACTS IN OPPOSITION TO CCA'S MOTION FOR SUMMARY JUDGMENT.[1]

A. The New Mexico Corrections Department Facially Endorses Programming Defined by Religious Content.

1. The New Mexico Corrections Department has adopted regulations facially authorizing Faith-Based Living Units. (Bolton Aff., Ex. 11.)

2. The Department regulations authorize Faith-Based Living Programs to be operated within prisons under the Department's jurisdiction. (Williams Dep. at 11.[2])

3. The Corrections Department supports the operation of Faith-Based Living Units "to give opportunity for inmates to grow, spiritually." (Williams Dep. at 14.)

4. The Department supports Faith-Based Living Units so that inmates can grow spiritually, which allegedly may cause positive behavior modification. (Williams Dep. at 21.)

5. The Corrections Department has incorporated Faith-Based Living Units into several of its prisons, including at the NMWCF. (Williams Dep. at 13.)

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[1]Plaintiffs' Proposed Facts herein are taken from Plaintiffs' Brief In Support of Motion for Partial Summary Judgment. The original numbering is used for consistency.

[2] True and correct copies of referenced deposition pages are attached to the Affidavit of Richard L. Bolton, previously filed.

6. The New Mexico program "is based on similar projects designed by national and/or international organizations which have focused on spiritual growth in a prison setting." (Bolton Aff., Ex. 11 at 4.)

7. Each Faith-Based Living Unit program is approved by the Corrections Department. (Bolton Aff., Ex. 11 at 3.)

8. The faith based program operates under the day-to-day direction of the prison chaplain or warden's designee. (Bolton Aff., Ex. 11 at 2.)

B. <u>The NMWCF is Operated by Corrections Corporation of America Under Contract With the State of New Mexico</u>.

9. The Corrections Department contracts with Corrections Corporation of America ("CCA") to operate the NMWCF. (Williams Dep. at 4-7 and Bolton Aff., Ex. 12.)

10. New Mexico pays CCA a fee to operate the prison, which fee is calculated as a per diem amount per prisoner. (Williams Dep. at 7.)

11. CCA invoices the Corrections Department separately for each prison that CCA operates. (Williams Dep. at 8.)

12. From the per diem charged to the State, CCA is expected to operate the prison. (Williams Dep. at 9.)

13. Religious programming is within the scope of CCA's contract with the Corrections Department. (Williams Dep. at 9.)

14. CCA's contract obligates CCA to comply with Corrections Department policies, including Department policies relating to Faith-Based Living Units. (Bolton Aff., Ex. 12.)

15. The contractual per diem that CCA charges the State of New Mexico is intended to cover all of the operational costs of the facility, including prison employees. (Smith Dep. at 15-16.)

16. The prison chaplain is included in each prison's budget as part of the ordinary operational costs of the facility. (Smith Dep., at 15-16.)

17. CCA charges the state the negotiated per diem amount, and CCA then operates the facility based on the per diem received, which funds are used for the operation of the prison. (Smith Dep. at 19-20.)

18. Each prison's budget is paid from the per diem charged by CCA "to cover the cost of providing the services that are required, identified by the contract." (Lanz Dep. at 10.)

19. The per diem is negotiated at a level intended to cover the estimated operational cost of the prison. (Cooper Dep. at 26.)

20. Wages and salary are the largest budget component, along with utility costs, such as for electricity. (Cooper Dep. at 9-11.)

21. The institutional budget for each prison includes the chaplain. (Cooper Dep. at 11.)

22. The prison chaplain at the NMWCF is Shirley Compton. (Compton Dep. at 4.)

C. <u>Prison Resources Are Utilized in the Life Principles Faith-Based Residential Program at the NMWCF</u>.

92. The Life Principles/Crossings Program at the NMWCF is coordinated and managed by the Prison Chaplain, Shirley Compton. (Snodgras Dep. at 30.)

93. The prison chaplain is the "gatekeeper" of the program. (Lanz Dep. at 30-31.)

94. The chaplain provides daily supervision of the program; she has daily direct contact with program participants; she provides institutional accountability for the program. (Lofgreen Dep. at 31.)

95. Chaplain Compton has taught classes as part of the Crossings program. (Compton Dep. at 18-19.)

96. She personally implemented the Life Principles curriculum, with the cooperation of the prison warden, assistant warden, chief of security and program manager. (Compton Dep. at 42.)

97. The chaplain interviews inmates for participation in the program. (Compton Dep. at 46.)

98. She decides with others whether to approve participation in the program. (Compton Dep. at 50.)

99. She recruits and trains volunteers to help conduct the program. (Compton Dep. at 50.)

100. The chaplain personally leads the Wisdom Search once or twice each week. (Compton Dep. at 52-53.)

101. She monitors and observes the program on a daily basis. (Compton Dep. at 53.)

102. She prepares paperwork and progress reports on inmate participants. (Compton Dep. at 54.)

103. She leads the daily Prayer Walk. (Compton Dep. at 55-56.)

104. The chaplain is in daily contact with the program and the participants. (Compton Dep. at 58.)

105. She oversees the program and is actively involved in its operation. (Smith Dep. at 12-14.)

106. Other prison resources are also dedicated to the Life Principles program, including a designated housing unit. (Snodgras Dep. at 18.)

107. The residential feature of the Life Principles/Crossings Program is considered integral to the program because "you don't change behavior like you do a faucet." (Compton Dep. at 16-17.)

108. The residential feature of the program provides a protective, insular and secure environment for participants. (Dinsmore Dep. at 44-45; Lofgreen Dep. at 50.)

109. In addition, program materials are provided to participants, which are purchased from the prison operating budget. (Compton Dep. at 74-75.)

110. Program materials are purchased by each prison from IBLP. (Lanz Dep. at 69.)

D. <u>The Plaintiffs Object to the Use of Taxpayer Appropriations to Support the Faith-Based Program at NMWCF</u>.

114. The plaintiff, Dr. Martin Boyd, is a full time emergency room physician in Las Cruces. (Boyd Dep. at 12.)

115. He has lived in New Mexico for more than twenty years and he has paid New Mexico state income taxes each of those years. (Boyd Dep. at 13.)

116. Dr. Boyd is a lifetime member of the Freedom From Religion Foundation. (Boyd Dep. at 16.)

117. He is opposed to the faith-based programming at the NMWCF because the program "places the State in the position of promoting religion over non-religion as a way of life." (Boyd Dep. at 33.)

118. Dr. Boyd opposes the use of his tax dollars to support the faith-based programming at the NMWCF. (Boyd Dep. at 36.)

119. The Freedom From Religion Foundation ("FFRF") has more than 7,500 members who are opposed to government endorsement of religion in violation of the Establishment Clause of the First Amendment to the United States Constitution. (Gaylor Aff., ¶ 2.)

120. FFRF's membership includes resident New Mexico taxpayers, including Dr. Martin Boyd, Jesse Chavez and Paul Weinbaum. (Gaylor Aff., ¶ 3.)

121. FFRF's purpose is to protect the fundamental constitutional principle of separation of church and state by representing and advocating on behalf of its members. (Gaylor Aff., ¶ 4.)

122. FFRF has been a party to lawsuits, in a representative capacity, throughout the United States opposing violations of the Establishment Clause. (Gaylor Aff., ¶ 5.)

IV. TAXPAYERS HAVE STANDING TO OBJECT TO THE USE OF STATE FUNDS IN VIOLATION OF THE ESTABLISHMENT CLAUSE.

A. Taxpayer Standing In Establishment Clause Cases Does Not Require A Separate Or Earmarked Appropriation For Religious Programming; The Use Of State Appropriations, Regardless Of Any Incremental Tax Increase, Is Sufficient To Confer Standing.

CCA argues incorrectly that taxpayer standing, to raise an Establishment Clause challenge, requires a separate earmarked appropriation resulting in a marginal increase in taxes. CCA is wrong. Taxpayer standing only requires a challenge to the use or application of state money in violation of the Establishment Clause, regardless whether the use causes an increase in taxes.

The United States Supreme Court recently recognized that taxpayer standing in Establishment Clause case is distinguishable from taxpayer standing requirements in non-establishment cases. In DaimlerChrysler Corporation v. Cuno, 126 S. Ct. 1854, 1863 (2006), the Court first recognized that the test for state taxpayer standing is the same as the test for federal taxpayer standing. The Court then explained that the evil protected against by taxpayer standing in Establishment Clause cases relates to the use of public tax appropriations, regardless of whether the money would otherwise be used in a way to personally benefit the taxpayer-plaintiff:

> 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. 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. Id. at 1865. (Emphasis added.)

CCA misreads the decision in Colorado Taxpayers Union, Inc. v. Romer, 963 F.2d 1394 (10th Cir. 1992), for the proposition that state taxpayer standing in Establishment Clause cases requires a separate and specific appropriation for an improper purpose, resulting in an increased tax obligation. The Romer decision concluded that a state taxpayer must demonstrate that she will be "out of pocket" because of an allegedly illegal appropriation only "where an Establishment Clause violation is not asserted." Id. at 1401. In Romer, the plaintiffs did not rely upon the Establishment Clause as the basis for their claim. As to non-Establishment Clause cases, the Court concluded that to show a distinct and palpable injury, a state taxpayer must allege that he has "suffered a monetary loss due to the allegedly unlawful activity's effect on his

tax liability." Id. at 1402. The Romer Court, therefore, denied standing because the plaintiffs "do not allege a distinct and palpable injury that results from an increased tax liability." Id. at 1403. The Romer decision, however, by its own express terms, did not apply this test to determine taxpayer standing in Establishment Clause cases.

The Romer Court, in fact, recognized that the requirement of an "increased tax liability" does not apply in Establishment Clause cases. For example, the Court recognized that the decision in Minnesota Federation of Teachers v. Randall, 891 F.2d 1354 (8th Cir. 1989), had rejected precisely the argument that increased tax liability is necessary to support taxpayer standing in Establishment Clause cases:

> [In Randall] the District Court dismissed the suit for lack of standing because it believed to achieve state taxpayer standing, the plaintiff would have to show an increase in his tax bill under Doremus. The Eighth Circuit disagreed, concluding that Doremus did not require a showing of an increased tax burden. The Court reasoned that "only a taxpayer really suffers a distinct injury from the improper use of public money in violation of the Establishment Clause" and "that taxpayer standing was created to specifically permit the airing of establishment claims." The Eighth Circuit concluded, "we do not believe that state taxpayers are required to show an increase in their tax burdens to allege sufficient injury." Id. at 1401.

The Randall decision further explained the practical effect on Establishment Clause protections if a separate ear-marked appropriation were to be required for taxpayer standing:

> Our interpretation of Doremus is buttressed by the fear that the district court's decision could lead to the abolition of taxpayer standing altogether. Where a free exercise of religion injury is alleged, plaintiffs can argue that an activity they distinctly wish to engage in has been restricted. But only a taxpayer really suffers a distinct injury from the improper use of public money in violation of the Establishment Clause. The district court's view would allow standing only where a special tax assessment was levied to pay for the expenditure. Thus, when expenditures are made from general

> funds, no one would be able to challenge Establishment Clause violations. We believe the taxpayer standing was created to specifically permit the airing of establishment claims, and we decline to effectively abolish it. 891 F.2d at 1358.

See also Booth v. Hvass, 302 F.3d 849, 852 (8th Cir. 2002) (Doremus construed not to require a state taxpayer to show that a violation of the Establishment Clause increased his or her tax burden).

The recent decision in Hinrichs v. Bosma, 440 F.3d 393 (7th Cir. 2006), further dispels CCA's argument that taxpayer standing in Establishment Clause cases requires an increase in taxes, i.e., that the challenged activity increases the marginal tax rate. In Hinrichs, the total tax dollars allegedly used in violation of the Establishment Clause amounted to only $448.38. Id. at 397. The defendants then challenged the plaintiffs taxpayer standing "because the elimination of the challenged program would not inure to the plaintiffs' fiscal benefit." Id. In other words, the defendants argued that the challenged expenditures had "no marginal cost to taxpayers." Id. The Court rejected this argument, while recognizing that such a requirement would nullify the basic protections of the Establishment Clause:

> If we were to accept the Speaker's argument as presented at this stage of the litigation, any time an unconstitutional practice could be replaced at no cost with a constitutional one, those asserting taxpayer standing would be powerless to challenge it. The Speaker has yet to respond persuasively to the District Court's criticism that acceptance of such a rule would mean the taxpayers are without standing to challenge the erection of a large stone cross on public land if it theoretically could be replaced with a secular monument of the same price.
>
> Such a theory misapprehends the purpose of taxpayer standing: The true injury is whether the plaintiff's tax dollars are being spent in an illegal manner. Such injury is redressed not by giving the tax money back, see D.C. Common Cause v. District of Columbia, 858 F.2d 1, 5 (D.C. Cir. 1988) ("The Supreme Court has never required

> state or municipal taxpayers to demonstrate that their taxes will be reduced as a result of a favorable judgment."); cf. Freedom From Religion, 433 F.3d at 990 (noting that the tangible harm of most unconstitutional spending practices is zero, because instead of returning the taxes that support the practices, the government spends the money elsewhere), but by ending the unconstitutional spending practice. Id. at 397-98.

The cases cited by CCA, as in Hinrichs, do not even arguably create a "marginal cost" requirement. Rather, they simply apply the rule that taxpayers who cannot trace a challenged practice to any expenditure of tax dollars are without standing. Cf. Doremus v. Board of Education, 342 U.S. 422, 434-35 (1952); Gonzales v. North Township of Lake County, 4 F.3d 1412, 1416 (7th Cir. 1993); Freedom From Religion Foundation v. Zielke, 845 F.2d 1463, 1470 (7th Cir. 1988); Freedmann v. Sheldon Community School District, 995 F.2d 802 (8th Cir. 1993); Doe v. Duncan Independent School District, 70 F.3d 402, 408 (5th Cir. 1995); Doe v. Madison School District No. 321, 177 F.3d 789, 794 (9th Cir. 1999).

Here, the plaintiffs have taxpayer standing precisely because they do trace New Mexico State tax appropriations to a use that violates the Establishment Clause. Funds derived from the State are used by CCA to operate, oversee and conduct a program that explicitly endorses one religious view, characterized as a non-denominational Christian Bible-based program. The plaintiffs meet the standard for taxpayer standing, notwithstanding CCA's creative accounting arguments.

B. The Alleged Requirement Of A Separate Ear-Marked Program Mandating Religious Content Is Contrary To The Supreme Court's Holding In Bowen v. Kendrick.

CCA suggests that a separate ear-marked appropriation for religious programming, with a marginal tax cost, be required for standing in Establishment Clause cases. Such a requirement

cannot be reconciled with the Supreme Court's decision in Bowen v. Kendrick, 487 U.S. 589 (1988). In Bowen, the Supreme Court determined that taxpayer standing is not based upon Congressional culpability for making a decision to use tax appropriations in violation of the Establishment Clause. In fact, the Court recognized taxpayer standing even though a challenged expenditure was based on a facially Constitutional scheme, i.e., Congress appropriated money for purposes that in no way violated the Establishment Clause. The Supreme Court, nonetheless, recognized taxpayer standing based upon the alleged misuse of the tax appropriations in violation of the Establishment Clause, i.e., "as applied."

After concluding that a grant program for services relating to adolescent sexuality and pregnancy was facially Constitutional, the Supreme Court considered in Bowen whether funds were being spent in violation of the Establishment Clause as applied. The Court concluded that specific instances of Constitutionally impermissible use of funds by grantees could be challenged by taxpayers. The Supreme Court, therefore, directed the district court to consider "whether in particular cases AFLA aid has been used to fund specifically religious activities in an otherwise substantially secular setting." Id. at 621. The Supreme Court further directed the district court to determine whether AFLA grantees used materials with an explicitly religious content or that were designed to inculcate the views of a religious faith. Finally, the Supreme Court concluded that if the district court found grants to be used in violation of the Establishment Clause, then the court should consider the question of an appropriate remedy, i.e., "an appropriate remedy would require the Secretary [of Health and Human Services] to withdraw such approval." Id. at 621-22.

Bowen holds that taxpayers have standing to challenge the use of public appropriations in violation of the Establishment Clause, even in the absence of an ear-marked appropriation made

in violation of the Establishment Clause. The underlying AFLA program in Bowen, in fact, was found to be facially Constitutional. Prohibiting the use of funds in particular instances from being used in violation of the Establishment Clause, moreover, would not have inured to the personal benefit of any taxpayer. The cost of the program would not have been reduced, but the funds would simply have been used in Constitutionally permissible fashion. In short, the Supreme Court's recognition of taxpayer standing in Bowen cannot be reconciled with CCA's arguments to this Court. (See also Lown v. The Salvation Army, Inc., 393 F. Supp. 2d 223, 238-39 (S. D. N.Y. 2005) (finding taxpayer standing where the Salvation Army allegedly used public appropriations for religious purposes).

Efforts to "unbundle religious activities" through statistics and accounting, moreover, have been systematically rejected by the Supreme Court. In Freedom From Religion Foundation, Inc. v. McCallum, 179 F. Supp. 2d 950, 974 (W.D. Wis. 2002), for example, the court rejected an attempt by a State grantee to avoid Establishment Clause limitations by differentiating time spent by employees on religious versus non-religious activities:

> The Supreme Court has systematically rejected attempts to unbundle religious activities through statistics and accounting. In Committee for Public Education v. Nyquist, 413 U.S. 756, 778-79 (1973), the plaintiff school tried unsuccessfully to justify public funding of the maintenance and repair of sectarian schools by using statistics to allocate funding between secular and sectarian functions. The Court noted that it "takes little imagination to perceive the extent to which states might openly subsidize parochial schools under such a lose standard of scrutiny." Id. at 779. In the cases cited by the defendants, the Supreme Court has not found a violation of the Establishment Clause where public support was provided for specifically identified secular materials such as books, Agostini, 521 U.S. 203 (1997), educational materials, Mitchell, 530 U.S. 793, and a sign language interpreter, Zobrest, 509 U.S. 1. "In those instances in which the Court has permitted funding to flow to religious schools, it has been in the

> context of a targeted grant, available to a limited population, for a specific purpose. " Strout v. Albanese, 178 F.3d 57, 62 (1st Cir. 1999). Not only are the public funds paid to Faith Works not targeted for a discrete purpose, but the funding takes the form of money rather than materials. In Mitchell, which involved targeted and explicitly secular school materials, the plurality, concurrence and dissent all noted that special dangers arise when money grants are given directly to religious institutions. 530 U.S. at 818-19 (Thomas, J., plurality), 855 (O'Connor, J., concurring), 890 (Souter, J., dissenting). In the present case, the Governor's discretionary funds given to Faith Works are not targeted or ear-marked for discrete, identified secular activities. Although defendants assert that Faith Works receives sufficient private funds to pay for the counselors' salaries, this accounting procedure does not guarantee that public funds are not put to sectarian use.

See also Americans United for Separation of Church and State v. Prison Fellowship Ministries, 432 F. Supp. 2d 862, 923-24 (S. D. Ia. 2006) (the Court rejected an argument by defendants that the State of Iowa paid for only those aspects of a program that were non-sectarian in nature; the Court, in a carefully reasoned opinion involving a prison religion program, similar to the present case, held that the program violated the Establishment Clause).

The present case is similar to the above cited cases. CCA receives non-ear-marked funds directly from the State of New Mexico, which funds are used to pay the salary of the prison Chaplain. The Chaplain, in turn, undisputedly administers, oversees and conducts the Life Principles/Crossings Program at the NMWCF. She is paid by CCA from funds received directly from the State, which funds are then used to pay for the religious indoctrination integrated into CCA's residential faith-based program. Such a program certainly can be challenged by these taxpayer plaintiffs.

C. The New Mexico Corrections Department Does Not 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). 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 would not "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.

Where money is being given even for a purpose with a secular component, however, "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 need for institutional safeguards to prevent grantees from using appropriations for religious activities would be unnecessary if taxpayer standing requires a separate ear-marked appropriation mandating religious programming. 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 practices. On the contrary, New Mexico's contract with CCA requires religious programming as an 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 put. The absence of such safeguards does not defeat the plaintiffs' taxpayer standing, as suggested by CCA. The absence of such safeguards, while making non-ear-marked payments to CCA, helps establish the

plaintiffs' taxpayer standing. The absence of such control is precisely one of the reasons why these taxpayers do have standing.

Conclusion

CCA's standing argument is unsupported by law or logic. Taxpayer standing does not require a line-item appropriation mandating the use of public funds in violation of the Establishment Clause. Standing does not require a marginal tax increase. Taxpayer standing, instead, only requires that funds used to inculcate religion be traced to a tax source. Here, CCA is paid by the State of New Mexico to operate the NMWCF. CCA is using the money received from New Mexico to operate a Christian Bible-based residential program. The State of New Mexico not only has no safeguards in place to prevent such use of funds by CCA, but instead, supports and approves such use of funds by CCA. On these facts, the plaintiffs do have taxpayer standing to raise an Establishment Clause challenge.

Dated this 3rd day of November, 2006.

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