IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

IN THE MATTER OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, et al.,	*	4:03-cv-90074 (lead), 4:02-cv-90447, 4:03-cv-90101
Plaintiffs,	*	
v.	*	
PRISON FELLOWSHIP MINISTRIES, et al.,	*	MEMORANDUM AND ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT
Defendants.	*	

I. INTRODUCTION

A. *Factual Background*

The primary question in this case is whether the State of Iowa violates the Establishment Clause of the First Amendment by paying a faith-based, private services provider to run a prison pre-release rehabilitation program, which, among other things, includes intensive religiously-oriented classes, group experiences, and counseling sessions. Defendant Prison Fellowship Ministries ("Prison Fellowship") and Defendant InnerChange Freedom Initiative ("InnerChange") have had a contract with Defendant Iowa Department of Corrections ("IDOC") since March 24, 1999, for the purpose of establishing and operating a values based pre-release program within the Iowa prison system. Since the first contract between IDOC and InnerChange and up until at least September 3, 2004, IDOC has paid InnerChange $1,111,553.50 in direct payments; the contract has been renewed and extended annually to the present. The Iowa state legislature has appropriated the payments largely from the Healthy

Iowans Tobacco Trust and the Inmate Telephone Rebate Fund.[1] Since June, 2002, the sole parties to the contract have been IDOC and InnerChange.

The InnerChange program was developed and is operated by Prison Fellowship, a Washington, D.C. Christian non-profit organization whose mission is to minister to prisoners, ex-prisoners, crime victims, and their families. The InnerChange program is a faith-based program designed to transform prisoners into good citizens, to reduce the recidivism rate of current inmates, and to prepare inmates for their return to society by providing educational, ethical, and religious instruction. The InnerChange program is conducted at the Newton Correctional Facility ("Newton facility"), a medium-sized prison within IDOC that houses 875 inmates. At the time of hearing on this matter on October 12 and 13, 2004, approximately 250 inmates participated in the InnerChange program. InnerChange inmates, including InnerChange graduates as well as those waiting to start the program, are housed in Unit E on the Newton facility campus. Currently, Unit E is filled entirely with these InnerChange inmates.[2] Building M on the Newton Facility campus is a modular building used exclusively by the InnerChange program, and contains offices, classrooms, a computer room, and a multi-purpose room that is also referred to as the "music room."

The Plaintiffs are IDOC inmates, their spouses, Iowa taxpayers, and Americans United for the Separation of Church and State ("Americans United"), a non-profit, non-partisan, educational and

---

[1] No federal dollars are involved.

[2] The Defendants contend that if the number of InnerChange inmates would drop below capacity, then non-InnerChange inmates would be housed in Unit E. Since its inception, however, the list of persons waiting to enter the InnerChange program has numbered at least 122 and has been as high as 156.

advocacy organization whose self-described purpose is to preserve the constitutional principle of church-state separation. The other named Defendants are Terry Mapes, both in his official capacity as Warden of the Newton Correctional Facility and as an individual; Walter "Kip" Kautzky, former Director of IDOC; John Baldwin, in his official capacity as former Acting Director of IDOC and in his individual capacity; other members of the Iowa Board of Corrections in their official and individual capacities; and Gary Maynard, current Director of IDOC.

B. *Procedural Background*

Before the Court are the parties' respective Motions for Summary Judgment (Clerk's Nos. 96, 100 and 104) regarding the merits of the Plaintiffs' Establishment Clause claims.[3] The Plaintiffs seek: 1) declaratory and injunctive relief that would disallow state funding of the InnerChange program in the state's prison system; 2) return to the state of funds paid to InnerChange and Prison Fellowship; 3) restitution in the form of *pro rata* refunds from the Inmate Telephone Rebate Fund ("Telephone Fund"); and 4) a grant of nominal damages.

Both parties also move for partial summary judgment on the issues of Plaintiffs' standing and the

[3] The Plaintiffs also bring two claims under the Iowa state constitution. First, Plaintiffs allege an Establishment Clause claim under the Iowa state constitution which, in relevant part, mirrors the language found in the Establishment Clause of the federal constitution. The second state claim comes under Article 1, section 4, of the Iowa state constitution, which states: "No religious test shall be required as a qualification to any office, or public trust, and no person shall be deprived of any of his rights, privileges, or capacities, or disqualified from the performance of any of his public or private duties . . . in consequence of his opinions on the subject of religion." *Compare* U.S. Const. art. VI, § 1, cl. 3 ("The Senators and Representatives . . . and the Members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.")

qualified immunity of the individually named state Defendants. *See* Clerk's Nos. 92, 96, 98, and 104. Both parties have filed timely memorandums in support of their motions, resistance memorandums, and replies. In addition, the parties have filed a virtual cornucopia filled with statements of undisputed facts, admissions, interrogatories, and appendices containing affidavits, expert opinions, and deposition testimony in support of the respective parties' positions.[4] A hearing on the issues was held on October 12 and 13, 2004, at which counsel for each party offered oral argument. The matter is fully submitted.

II. STANDING

The Defendants challenge whether the Plaintiffs have standing so as to qualify the current dispute as a case or controversy under Article III of the federal constitution. In order to satisfy the standing requirements of Article III, Plaintiffs must show:

> (1) [they have] suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

See Eckles v. City of Corydon, 341 F.3d 762, 767 (8th Cir. 2003) (following *Friends of the Earth, Inc. v. Laidlaw Env't Serv. (TOC), Inc*., 528 U.S. 167, 180-181 (2000)); *see also Allen v. Wright*, 468 U.S. 737, 751 (1984) (affirming that a court must also be mindful of prudential concerns, namely,

---

[4] As alluded to above, the discovery process in this case has resulted in a voluminous amount of factual material accompanying the various memorandums and other pleading documents filed by the parties. Counsel for Americans United contends that an extensive record is necessary because the most recent Supreme Court rulings in Establishment Clause cases, in Americans United's view, hinge on a comprehensive inquiry into the factual record. *See*, *e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002) (stating that the "reasonable observer in the endorsement inquiry" must be aware of the "full history and context" of the program being challenged) (citations omitted).

"the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked"). For the purposes of establishing standing, a court looks to the complaint and accompanying documentation for assertions that a plaintiff has a stake in the outcome. *See Delorme v. United States*, 354 F.3d 810, 815-816 (8th Cir. 2004) (stating that "[g]eneral factual allegations of injury resulting from a defendant's conduct may suffice at the pleadings stage to meet the injury in fact requirement for constitutional standing") (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (internal citation omitted)). "In response to a summary judgment motion [, however] . . . the plaintiff must . . . set forth by affidavit or other evidence, specific facts . . . which for purposes of the summary judgment motion will be taken to be true." *Lujan*, 504 U.S. at 561 (citing Fed. R. Civ. P. 56(e)) (internal quotations omitted). The Plaintiffs respond that they have standing as an organization, taxpayers, inmates, Telephone Fund payers, and as tobacco users, respectively.[5] For the reasons set forth below, the Court finds that all the Plaintiffs meet the constitutional and prudential requirements for standing.

---

[5] Because the Plaintiffs have met the requirements for standing apart from their status as Telephone Fund payers and former or present tobacco users, the Court need not make an inquiry under those theories. If a constitutional violation is found, however, the shape of the remedy will be crafted according to the specific type of injuries sustained and shown by the Plaintiffs. *See Lewis v. Casey*, 581 U.S. 343, 351-353 (1996) (distinguishing, in majority and concurring opinions, that impropriety of relief did not turn on standing, but on the failure of plaintiffs to show past or imminent denials of access to prison libraries); *Allen*, 468 U.S. at 759-761 (reaffirming rule that the focus of standing analysis is the causal link between a defendant's actions and the plaintiff's injury; and limiting the holding in *Los Angeles v. Lyons*, 461 U.S. 95 (1983), which some interpreted broadly to require standing for each specific remedy sought, to its facts on this issue).

A. *Taxpayers*

Plaintiffs Carol Delp, Ardene McKeag, Dorothy Redd, and Sandra Sobotka are residents of Iowa who pay taxes to the State of Iowa and claim taxpayer standing.[6] The Establishment Clause exception regarding taxpayer standing is well-established. *See Bowen v. Kendrick,* 487 U.S. 589,

---

[6] This may be an appropriate time to raise the standing, or more correctly, mootness, tribulations of Plaintiff Bilal Shukr (a.k.a. Bobby Shelton), who has been the focus of a pleading battle regarding his individual standing as an inmate. *See* Clerk's Nos. 172-175, 186, 193, 197, and 201-207. Currently, Mr. Shukr, a Muslim, resides at a halfway house within IDOC in preparation for his parole and reentry into society. Defendants argue that, since he is no longer exposed to the alleged unconstitutional activity he seeks to enjoin, his claims are moot. *See Lyons*, 461 U.S. at 105-106. Plaintiffs counter that Mr. Shukr has violated the conditions of his work release before and, then, candidly state: "[T]here is a significant chance that Mr. Shukr will once again be sent back to prison." Pls.' Resp. to State Defts.' Mot. to Amend Mot. for Summ. J. Regarding Mootness of Pl. Shelton's Claim, at 2. This assertion is evidently offered to meet the standing requirement that an injury must be concrete or, at least, "imminent," *Eckles*, 341 F.3d at 767, or that Mr. Shukr's injury "is capable of repetition, yet evading review." *See Nelsen v. King County*, 895 F.2d 1248, 1254 (9th Cir. 1990) (explaining that "the capable of repetition but evading review" doctrine is an exception only to the mootness doctrine; it is not transferable to the standing context, except in those cases in which a plaintiff possesses standing, but loses it due to an intervening event). While he is actually in prison, as explained below, Mr. Shakr shares the individual standing of the other Plaintiff inmates. While he is in the halfway house program, however, the Court cannot, in good conscience, predicate Mr. Shakr's individual standing, or the mootness of his of claims, on the likelihood that he will violate the conditions of his release. *See Lyons*, 461 U.S. at 109 (requiring that "the named plaintiff [] make a reasonable showing that he will again be subjected to the alleged illegality"). The Court, rather, hopes and expects that Mr. Shakr will successfully meet his work-release conditions. To consider Mr. Shakr's possible future failure as a reasonable expectation, for the purposes of standing, is simply inimical to good policy and the law. *See O'Shea v. Littleton*, 414 U.S. 488, 497 (1974) (assuming that plaintiffs "will conduct their activities within the law and so avoid prosecution and conviction as well as exposure to the challenged course of conduct").

It is the Court's understanding, however, that Mr. Shakr has secured a job with a private employer; in which case, Mr. Shakr is an Iowa taxpayer. The Plaintiffs urge the Court to account for Mr. Shakr's new standing as a Plaintiff taxpayer. The Court so finds. The Court does not doubt that, if given the choice, Mr. Shakr would much rather proceed as a taxpayer than as a prisoner. In the unfortunate circumstance that Mr. Shakr's work release is revoked, the Court will revisit his standing to bring suit. Accordingly, for the time being, Mr. Shakr possesses taxpayer standing along with the other taxpayer Plaintiffs.

618 (1988); *Flast v. Cohen*, 392 U.S. 83, 106 (1968). In order to meet federal standing requirements, "state taxpayers must only show that there has been a disbursement of tax money in potential violation of constitutional guarantees" to establish standing under the Establishment Clause. *See Minn. Fed'n of Teachers v. Randall*, 891 F.2d 1354, 1358 (8th Cir. 1989) (announcing the requirements to obtain state taxpayer standing). Nevertheless, the state taxpayer must still show a nexus between the state funds expended and the alleged religious purposes being challenged. *See Doremus v. Bd. of Educ. of Borough of Hawthorne*, 342 U.S. 429, 431 (1952) (allowing for state taxpayer standing under the Establishment Clause, but denying taxpayer standing because plaintiff offered no actual charge, specification, or proof of the alleged injury); *Friedmann v. Sheldon Cmty. Sch. Dist*., 995 F.2d 802, 803 (8th Cir. 1993) (finding that plaintiffs had not established standing upon a failure to allege that the state was spending money for religious purposes).

The taxpayer plaintiffs in *Doremus* and *Friedmann* are clearly distinguishable from the taxpayer Plaintiffs in the present case. In *Friedmann*, the taxpayers were not even citizens of the defendant school district, and could make no connection between state funds they supported through taxes and a benediction or invocation at the defendant's graduation ceremonies. *Friedmann*, 995 F.2d at 803. In *Doremus*, the single taxpayer plaintiff actually made no specific allegations at all, let alone allegations supported by evidence. *Doremus*, 342 U.S. at 431. In the present case, the taxpayer Plaintiffs have shown a direct link between their status as taxpayers and the precise nature of the constitutional violation alleged through their Complaint and exhaustive supporting documents. *See Flast,* 392 U.S. at 101-102 (holding that taxpayer plaintiffs must show a redressible stake in the dispute). The Plaintiffs have also made a sufficient showing, through supporting documentation in

response to Defendants' summary judgment motion, that a significant amount of state-appropriated funds have flowed directly to Defendants InnerChange and Prison Fellowship in the form of salaries, in-kind aid, and other materials to provide an intensive, religiously-oriented rehabilitative program for inmates in the Iowa state prison system that, the Plaintiffs allege, seeks to make those inmates into converts of a particular sect of Christianity. The Iowa taxpayers Plaintiffs' suit, therefore, qualifies as "a good-faith pocketbook action." *Doremus*, 342 U.S. at 434; *Randall*, 891 F.2d at 1358 (explaining that state taxpayers are not "required to show an increase in their tax burdens to allege sufficient injury . . . only [] that there has been a disbursement of tax money in potential violation of constitutional guarantees").

B. *Organizational Standing*

Americans United bases its standing to bring the present claim under the theory of representational standing. There are three prerequisites to representational standing that, if met, also quell the prudential concern that a party may not litigate another's legal rights:

> First, the members of the organization must otherwise have standing to sue in their own right. Second, the interests which the organization seeks to protect must be germane to its purpose. Third, neither the claim asserted, nor the relief requested, can require participation of the organization's individual members in the lawsuit.

See Randall, 891 F.2d at 1359 (following *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)); *Associated Gen. Contractors v. Otter Tail Power Co.*, 611 F.2d 684, 690 (8th Cir. 1979). As noted, Americans United is a non-profit, non-partisan, educational and advocacy organization whose self-described purpose is to preserve the constitutional principle of church-state separation. Americans United has over 75,000 members across the country, including hundreds of

members in Iowa, who pay taxes to the State of Iowa. The Defendants' argument as to Americans United's standing is that, like the other Iowa taxpayer plaintiffs, Americans United cannot show a redressible injury. As discussed above, the Court finds that Iowa taxpayers do have general taxpayer standing under the Establishment Clause exception. To the extent, therefore, that some of those Iowa taxpayers are also Americans United members, Americans United meets the first prong of representational standing. As to prongs two and three, the Court finds that Americans United seeks to protect interests germane to its purpose and that the suit does not require the individual participation of its members. Accordingly, Americans United has standing as a plaintiff in this case.

C. *Inmates*

The inmate Plaintiffs are Jerry Ashburn, Joel McKeag, Byran Chandler, Valentino Whitaker, Kevin Watson, Troy Redd, Robert Engle, Louis Boldon, and Bilal Shakr (a.k.a., Bobby Shelton). With the exception of Mr. Shakr, who is in a half-way house, [7] each is incarcerated within IDOC. Also with exception of Mr. Shakr, all have been inmates at the Newton Correctional Facility and, all except Mr. Shakr, Jerry Ashburn, and Louis Boldon, are still at the Newton Correctional Facility.

The inmates assert standing as individuals. As such, they must show, as recited above, that each has suffered an actual injury that can be traced to an illegal action by the Defendants, which can be redressed through the current action. *See Eckles*, 341 F.3d at 767. Each inmate alleges injury as a result of the unconstitutional actions taken by the Defendants in choosing, funding, and operating the religiously-oriented InnerChange rehabilitation program. Each inmate alleges injury in the form of a

[7] *See* note 5, *supra*, as to the issues regarding Bilal Shakr (a.k.a. Bobby Shelton).

coercive choice, forced upon them by the Defendants, to either join the InnerChange program and endure its particular brand of religious training,[8] thereby qualifying to receive its benefits, or choose to remain true to their deeply held beliefs, not join InnerChange, and be denied the benefits enjoyed by InnerChange inmates.[9] The inmate Plaintiffs go on to argue that the coercive choice and discrimination, to which they are subject, can be redressed by enjoining the InnerChange program from operating within the IDOC system or, in the alternative, by ordering the establishment of comparable values-based training for inmates of varying faiths.

The Defendants assert that the stigmatizing and psychological injuries of the inmate Plaintiffs do not rise to the level required to sustain constitutional standing. The Court disagrees. Noneconomic injury caused by violation of the Establishment Clause is sufficient to support standing. *See Wigg v. Sioux Falls Sch. Dist.*, 382 F.3d 807, 813 (8th Cir. 2004) (stating that: "It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way that establishes a [state] religion or religious faith, *or*

---

[8] It is undisputed that an InnerChange inmate can expect to spend five hours a day in "biblically-based instruction." Defs.' App. at 353 (Dye Aff.). In addition, community meetings and devotionals take up about one hour and twenty minutes a day. *Id*. What's more, each Friday night a revival is held, and each Sunday, the inmate must attend a worship service. *Id*. These practices are considered particularly onerous, the Plaintiffs allege, for the Islamic and Roman Catholic inmates who do not share the religious belief system of the InnerChange program and, for whom, undergoing its religious regime would be considered a renunciation of their own faith. Non-believers would also be forced to agree to undergo religious practices in order to enjoy the benefits associated with the InnerChange program.

[9] The Plaintiffs allege these benefits include, but are not limited to, early and easier access to classes and treatment programs that fulfill requirement for favorable parole review, better living conditions, guaranteed employment during work release and while on parole, and the enjoyment of other prison facilities not available to general population inmates.

tends to do so.") (quoting *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (emphasis added)). Additionally, injuries caused by discrimination against non-favored individuals have always been considered substantial, despite their psychological and emotional nature. *See Heckler v. Mathews*, 465 U.S. 728, 739-740 (1984) ("Rather, as we have repeatedly emphasized, discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community, *Mississippi University for Women v. Hogan*, 458 U.S. 718, 725 (1982), can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group. Accordingly, as Justice Brandeis explained, when the 'right invoked is that of equal treatment,' the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931)); *see also Valley Forge Christian Coll. v. Am. United for Separation of Church and State, Inc.*, 454 U.S. 464, 487 (1982) (reaffirming the well-established rule that standing can be "predicated on noneconomic injury").

The Defendants' arguments against the personal standing of the inmate Plaintiffs take the form of disputing the factual basis for the Plaintiffs' claims rather than the legality of the Plaintiffs' basis for standing. The Defendants assert that no Plaintiffs have actually been denied participation in the InnerChange program, that the program is open to all, that Plaintiffs have not chosen to participate because of their "subjective impressions" of the program, and that termination of the program would simply result in the Plaintiff inmates no longer "having to observe conduct with which they disagree."

Reply Mem. in Supp. of Defts.' Mot. for Summ. J. Based upon Lack of Subject Matter Jurisdiction, at 10-11. The Defendants also argue that the inmates are no worse off for not participating in the InnerChange program, i.e., they have not alleged any benefits or privileges accruing from participation in the InnerChange program. The only logical conclusion that the Court can draw from the Defendants' argument regarding the individual standing of the inmates, is that the Defendants require the Plaintiffs to prove the merits of their case in order to show standing. The Defendants require the Plaintiffs to prove too much. It is enough that the allegations of the Plaintiffs show an actual, redressible injury, and that it is traceable to the Defendants' actions. The Court finds that the inmate Plaintiffs in this case are not advocating standing based on an amorphous spiritual grievance, but as persons "directly affected by the laws and practices against which their complaints are directed." *See Sch. Dist. of Abingdon Township, Pa. v. Schempp*, 374 U.S. 203, 224 n.9 (1963).

As to the existence of remedy, the injuries to inmates through the existence of an allegedly unconstitutional, pervasively sectarian organization operating in a state prison, that is being funded through state tax dollars, can certainly be redressed by enjoining, in some fashion, the unconstitutional activity from continuing. The Defendants argue that this remedy will only mean that the inmate Plaintiffs would still not receive any benefits or privileges, putting them in the same place they are now. If the allegations of the Plaintiffs are true, this is simply not the case. IDOC could, it is imagined, stop all forms of rehabilitative classes and treatments. In such a scenario, unlikely as it may be,[10] the Plaintiff inmates would be in the same position they are now, except for one crucial reality. They will no longer

[10] Other nonsectarian oriented pre-release classes and treatment programs are offered throughout the Iowa Department of Corrections for qualifying inmates.

be the target of a coercive state-sponsored religious system that withholds classes and benefits merely because inmates refuse to be indoctrinated into a specific form of religious belief while rewarding those who embrace its views. Freedom from coercive pressure is the bedrock protection of the Establishment Clause. Disallowing such a practice is enough to confer standing. *See Heckler*, 465 U.S. at 739 (stating that "we have frequently entertained attacks on discriminatory statutes or practices even when the government could deprive a successful plaintiff . . . [by] withdrawing . . . benefits from both the favored and the excluded class").

The Defendants also attempt, in the standing arena, to invoke the prison context as a factor that precludes the inmates' personal standing. The Defendants argue that even if some benefits, such as living quarters, are withdrawn from the inmate Plaintiffs,[11] this is of no consequence, and thus not an injury, because a prisoner has no interest in being transferred to living unit that may be less desirable. *See Wycoff v. Nichols*, 94 F.3d 1187, 1190 (8th Cir. 1996) (holding that the plaintiff had no "liberty interest in avoiding administrative segregation unless the conditions of his confinement present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest") (citations omitted). The Plaintiffs correctly point out that this case is not a procedural due process case, but a case involving another type of protected constitutional right, and therefore is not subject to procedural due process analysis. *See Sandin v. Conner*, 515 U.S. 472, 487 n.11 (1995) (affirming that prisoners, like the plaintiff, "retain other protection even within the expected conditions of confinement. They may invoke the First and Eighth Amendments and the Equal Protection Clause of the Fourteenth

[11] Inmate Plaintiffs Bryan Chandler and Joel McKeag allege, because they did not choose to participate in the InnerChange program because of its particular religious nature, they were moved from Unit E (which now houses the InnerChange inmates) to make room for InnerChange inmates.

Amendment where appropriate"); *Phillips v. Norris*, 320 F.3d 844, 848 (8th Cir. 2003) (analyzing prisoner plaintiff's equal protection claim apart from his due process claims). The inmate Plaintiffs in this case are not claiming violation of a liberty or property interest, but rather a First Amendment interest not to be subjected to state-sponsored religious coercion. The Plaintiffs do not argue an interest in the Unit E living quarters, per se, but an interest in the state not using their living conditions to coerce participation in religious exercises. *See Cornell v. Woods*, 69 F.3d 1383, 1387 (8th Cir. 1995) (stating that the well-established precept that a prisoner enjoys no constitutional right to remain in a particular institution is limited by the prohibition of taking adverse actions against a prisoner based on that prisoner's constitutional rights) (citations omitted); *DeWalt v. Carter*, 224 F.3d 607, 613 (7th Cir. 2000) (stating that if prison officials withheld benefits or privileges from prisoners for discriminatory or illegal reasons, the officials' actions would still be unconstitutional apart from a prisoner's liberty or property interests). Accordingly, the Court finds that, as a matter of standing, the inmate Plaintiffs have suffered an injury in fact to the extent living conditions, or any other benefits, were predicated on their participation, as alleged, in state-sponsored religious practices.

For all the reasons set forth above, the Court finds the Plaintiff inmates have adequately shown a concrete and recognizable injury that can be traced to the allegedly unconstitutional actions of the Defendants which can be redressed through an equitable remedy. Accordingly, the Plaintiff inmates enjoy individual standing to bring the present action before a federal court.

III. STANDARD FOR SUMMARY JUDGMENT

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine

issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). A fact is material if the dispute over it might affect the outcome of the suit under the governing law. *Id.* The moving party has the burden of demonstrating the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986); *Anderson,* 477 U.S. at 248. In meeting its burden, the moving party may support his or her motion with affidavits, depositions, answers to interrogatories, and admissions. *See Celotex,* 477 U.S. at 323. Once the moving party has carried its burden, the nonmoving party must go beyond the pleadings and, by affidavits, depositions, answers to interrogatories, or admissions on file, designate the specific facts showing that there is a genuine issue for trial. *See* Fed. R. Civ. P. 56(e); *Celotex Corp.,* 477 U.S. at 322-323; *Anderson,* 477 U.S. at 257. In order to survive a motion for summary judgment, the nonmoving party must present sufficient evidence for a reasonable trier of fact to return a verdict in his or her favor. *Id.* On a motion for summary judgment, a court is required to "view the evidence in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences." *See United States v. City of Columbia,* 914 F.2d 151, 153 (8th Cir. 1990) (citing *Woodsmith Pub. Co. v. Meredith Corp*., 904 F.2d 1244, 1247 (8th Cir. 1990)). A court does not weigh the evidence or make credibility determinations. *See Anderson,* 477 U.S. at 252. A court only determines whether there are any disputed issues and, if so, whether those issues are both genuine and material. *Id.*

In the present case, both sides have moved for summary judgment on Plaintiffs' standing and the Plaintiffs' Establishment Clause claims. Particularly in the presence of competing cross motions for

summary judgment, a court must keep in mind that summary judgment is not a paper trial. Accordingly, a "district court's role in deciding the motion is not to sift through the evidence, pondering the nuances and inconsistencies, and decide whom to believe." *Waldridge v. American Hoechst Corp*., 24 F.3d 918, 920 (7th Cir.1994). In a motion for summary judgment this Court has but one task, to decide, based on the evidence of record as identified in the parties' moving and resistance papers, whether there is any material dispute of fact that requires a trial. *See id.* (citing *Anderson*, 477 U.S. at 249 and 10 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2712 (3d ed. 1998)). The parties then share the burden of identifying the evidence that will facilitate this assessment. *Waldridge*, 24 F.3d at 921.

Neither does filing cross motions for summary judgment mean the parties have waived their right to trial. *See Wermager v. Cormorant Township Bd.*, 716 F.2d 1211, 1214 (8th Cir. 1983) ("[T]he filing of cross motions for summary judgment does not necessarily indicate that there is no dispute as to a material fact, or have the effect of submitting the cause to a plenary determination on the merits.") (citations omitted). Rather, for the purposes of summary judgment, a party concedes there are no factual issues and accepts the other party's allegations only for the purpose of their own motion. *See Federal Practice and Procedure* § 2720; *see also Metropolitan Life Ins. Co. v. Johnson*, 297 F.3d 558, 561-62 (7th Cir. 2002) (reviewing the record with "all inferences in favor of the party against whom the motion under consideration is made") (citing *Herdricks-Robinson v. Excel Corp.,* 154 F.3d 685, 692 (7th Cir. 1998)). "Cross motions simply require [a court] to determine whether either of the parties deserves judgment as a matter of law on facts that are not disputed." *Barnes v. Fleet Nat. Bank*, 370 F.3d 164, 170 (1st Cir. 2004) (quoting *Wrightman v. Springfield Terminal*

Ry., 100 F.3d 228, 230 (1st Cir. 1996)). In this matter, then, each motion will be "evaluated independently to determine whether there exists a genuine dispute of material fact and whether the movant is entitled to judgment as a matter of law." *St. Luke's Methodist Hosp. v. Thompson*, 182 F. Supp. 2d 765, 769 (N.D. Iowa 2001). Nevertheless, "[s]ummary judgments in favor of parties who have the burden of proof are rare, and rightly so." *Turner v. Ferguson*, 149 F.3d 821, 824 (8th Cir. 1998).

III. MERITS

A. *Federal and State Establishment Clause Claims*

The First Amendment, in relevant part, states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I. The First Amendment is applied to the states through the due process clause of the Fourteenth Amendment. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947) (citing *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943)).

The state establishment clause claim will be considered together with the federal constitutional claim under an analysis of federal law. *See State v. Biddle*, 652 N.W.2d 191, 201 (Iowa 2002) (affirming that though the Iowa Supreme Court is "the final arbiter of the Iowa Constitution, similar provisions of the state and federal constitutions are usually deemed to be identical in scope, import, and purpose") (citing *State v. Boland*, 309 N.W.2d 438, 440 (Iowa 1981)). Despite fragmentation of the Supreme Court in Establishment Clause jurisprudence, the parties agree, and this Court concurs, that the law governing Establishment Clause cases still arises from the three-pronged test announced in

Lemon v. Kurtzman, 403 U.S. 602 (1971).[12] *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."); Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 1163 (2002) (counting four Justices on the current Court – Rehnquist, Scalia, Kennedy, and Thomas – who would abandon the entanglement prong and all of the *Lemon* test; counting three Justices – Stevens, Souter, and Ginsberg – who would continue using the *Lemon* test as is; and, counting two Justices – O'Connor and Breyer – for whom the *Lemon* test faces an uncertain future). Accordingly, the Court will analyze the InnerChange program using the *Lemon* test, but with a critical eye to the changing interpretation of its significance.[13]

---

[12] The Defendants contend, however, that the analysis does not begin and end with *Lemon*. They argue that, even if a constitutional violation is found using the *Lemon* test, a court must then proceed to review whether the constitutional violation was "reasonably related to legitimate penological interests," as determined by the test in *Turner v. Safley*, 482 U.S. 78, 89-91 (1987). The Court does not agree. In a recent prison case involving allegations of unconstitutional conduct, the Eighth Circuit Court of Appeals applied the *Turner* analysis to the free exercise and free speech claims, but applied the *Lemon* inquiry, without comment, for the Establishment Clause claim. *See Murphy v. Mo. Dep't of Corr.,* 372 F.3d 979, 985 (8th Cir. 2004) (finding that prison television network programming aimed to promote freedom of religion by broadcasting a broad spectrum of religious ideas within the prison did not violate the Establishment Clause); *see also Scarpino v. Grosshiem*, 852 F. Supp. 798, 803 (S.D. Iowa 1994) (stating that the prison context is "irrelevant" for an Establishment Clause claim, because "[t]he 'exercise' of Establishment Clause rights differs from the exercise of most other constitutional rights, in that it is in essence a public matter: The inmate is not claiming a right to do something, but rather insisting the institution cannot expend public money to support religion."). This Court will follow the Circuit Court's pattern in these types of cases and agrees with the well-reasoned opinion formulated in *Scarpino*. Accordingly, the Court finds that the *Turner* inquiry is inapplicable to the present case and that the *Lemon* inquiry is sufficient to determine the existence of a constitutional violation for which an adequate remedy may be formed.

[13] Nonetheless,

The *Lemon* test, as applied to this case, asks: 1) whether the governmental practice has a secular purpose; 2) whether the primary effect of that practice is one that neither advances nor inhibits religion; and 3) whether the governmental practice creates an unacceptable entanglement of church and state. *Lemon*, 403 U.S. at 612-613 (citations omitted); *see also Agostini v. Felton*, 521 U.S. 203, 232 (1997) (amending the *Lemon* analysis by conflating prongs two and three: "Regardless of how we have characterized the issue, however, the factors we use to assess whether an entanglement is excessive are similar to the factors we use to examine effect. That is, to assess entanglement, we have looked to the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority.") (internal citations omitted). More recent Supreme Court decisions, while not overturning the *Lemon* test, have further distilled Establishment Clause analysis to a set of principles that, when applied to the facts in the present case, reveal genuine issues of material fact that preclude resolution of the present dispute as a matter of law.

First, the Supreme Court has placed great weight on determining whether the governmental

---

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.

Torcaso v. Watkins, 367 U.S. 488, 492-493 (1961).

practice in dispute is neutral toward religion, i.e., whether the government exercises its authority in a religiously neutral way. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001) (citing, e.g., *Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (plurality opinion), for the proposition that "[i]n distinguishing between indoctrination that is attributable to the State and indoctrination that is not, [the Court has] consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion")); *Schempp*, 374 U.S. at 222 ("The wholesome 'neutrality' of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits."); *Wigg v. Sioux Falls Sch. Dist. 49-5*, 382 F.3d 807, 814 (2004) ("Of utmost importance in Establishment Clause inquiries is whether the government regulation is neutral towards religion.").

Neutrality is determined "from the perspective of a hypothetical observer who is presumed to possess a certain level of information that all citizens might not share." *See Capital Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring). This "reasonable observer in the endorsement inquiry must be deemed aware of the history and context underlying the challenged program." *Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002) (citing *Good News Club*, 533 U.S. at 119 (internal quotations omitted)). "[T]he guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and

diverse." *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 839 (1995). Still, a trier of fact is required to determine whether a governmental policy is simply a pretext for a religious purpose. "When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to 'distinguis[h] a sham secular purpose from a sincere one.'" *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (citing *Wallace v. Jaffree*, 472 U.S. 38, 75 (2000) (O'Connor, J., concurring)).

Looking to the first prong of the *Lemon* inquiry in this case, an inquiry into whether the process by which IDOC hired InnerChange was motivated by a secular purpose will shed great light on whether the relationship between IDOC and InnerChange is, in fact, neutral. A factual matter over which the parties vigorously disagree is whether the state government engaged in a neutral and above-board selection process for a values-based program service provider, and whether the process still remains open to other service providers. The Plaintiffs argue that the government's selection process was, and continues to be, mere pretext in order to choose a particular religious provider to work within the prison system. The Defendants counter that the program's secular purpose is clearly outlined in IDOC's request for proposal process and included in the selection process is an annual review of any other service provider proposals. Without question, the issue of secular purpose is a genuine issue on which a trier of fact could reasonably base a decision in favor of either party on whether a constitutional violation has occurred. *Anderson,* 477 U.S. at 250.

Another important constitutional principle at work when applying the *Lemon* test is whether the participation in the religious program is voluntary, thereby making what appears to be an impermissible

direct subsidy to a religious institution by the government into a permissible indirect diversion of funds. *See Locke v. Davey*, 540 U.S. 712, 719 (2004) ("Under our Establishment Clause precedent, the link between government funds and religious training is broken by the independent and private choice of recipients."). "'[I]f numerous private choices, rather than the single choice of a government, 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.'" *See Zelman*, 536 U.S. at 652-653 (quoting *Mitchell*, 530 U.S. at 810). The choice must not be coerced or influenced in any way by governmental policies, regardless of the seemingly impartial nature of those policies. *See Santa Fe*, 530 U.S. at 307 n.21 (explaining that the even facially neutral policies must be carefully observed because "the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions") (citing *Pinette*, 515 U.S., at 777) (O'Connor, J., concurring)).

Similar to the neutrality issue, the voluntariness of participation in the InnerChange program is hotly contested by the parties. The Plaintiffs allege a multitude of benefits and privileges[14] that accrue to InnerChange inmates that, in effect, coerce non-believer inmates and inmate believers of other religious persuasions to engage in the Christian practices required by the InnerChange program. The Defendants claim that alternative, comparable, non-religious pre-release programs and classes are available to inmates, which make an inmate's choice wholly voluntary. In addition, the Defendants deny

---

[14] These benefits and privileges include, but is not limited to, ease of entry into classes and treatment programs, extra visitation rights, telephone liberties, post-release job opportunities, less severe disciplinary actions, access to computers, access to the music room and equipment, Unit E living quarters, and designation to the Newton facility itself.

that any other benefits or privileges, which the Plaintiffs allege exist, actually attach with an inmate's choice to enter the InnerChange program. Whether the participation in the InnerChange program is voluntary and/or whether the government coerces inmates to adopt a particular belief are factual issues in which dispute which preclude summary judgment.

Yet another well-established principle applied when analyzing a governmental practice under the second and third *Lemon* prongs, i.e., primary effect and entanglement, is whether a particular provider paid by the government is so pervasively sectarian that no governmental funding of that provider would be permissible. *See Hunt v. McNair*, 413 U.S. 734, 741 (1973) ("Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in [its] religious mission . . . ."). A court, when considering whether an institution is pervasively sectarian, engages in an overview of the nature and structure of an organization or institution to discern the interplay between its secular and sectarian aspects. *See Bowen v. Kendrick*, 487 U.S. 589, 621-622 (1988) (admonishing the district court's conclusory findings and ordering the court, on remand, to consider specific evidence showing an inextricable intertwining between an organization's secular and religious mission). This overview is case specific. *See Minn. Fed'n of Teachers v. Nelson*, 740 F. Supp. 694, 714 -715 (D. Minn. 1990) (compiling thirty-six factors considered by majority and plurality opinions in nine Supreme Court cases). The fact specific inquiry into whether an organization is pervasively sectarian, in and of itself, begs a court to not conclude one way or another on a summary judgment motion. *See Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 755 (1976) (interpreting *Hunt* to require a court to determine whether: 1) an organization's secular activities can be separated from sectarian ones, and 2) "if secular

activities can be separated out, that they alone [are] funded").

Recently, the pervasively sectarian inquiry has been severely criticized. *See, e.g., Mitchell v. Helms*, 530 U.S. 793, 829 (2000) ("This doctrine, born of bigotry, should be buried now.") (Thomas, J., writing for the plurality). This criticism has led to a lower court debate about whether the pervasively sectarian analysis is still worth considering. *Compare, e.g., Barnes-Wallace v. Boy Scouts of Am.*, 275 F. Supp. 2d 1259, 1269 (S.D. Cal. 2003) (interpreting *Mitchell* to mean that, no matter how pervasively sectarian a private religious provider, a true private choice program makes government funding legal) *with Steele v. Indus. Dev. Bd. of Metro. Gov't Nashville*, 301 F.3d 401, 408-409 (6th Cir. 2002) (affirming the district court's interpretation that because *Mitchell* was a plurality opinion in which "no single part of any opinion commanded the support of the Court's majority," the pervasively sectarian test, though questionable, is still the law). Unless the parties can disabuse the Court, through trial brief, of the notion that the pervasively sectarian test is no longer good law, the Court will follow the Sixth Circuit's interpretation and treat the test as still viable. *See also Columbia Union Coll. v. Oliver*, 254 F.3d 496, 508 n.2 (4th Cir. 2001) (citing *Agostini*, 521 U.S. at 237, for the proposition "that lower courts should not interpret even seismic shifts in Establishment Clause jurisprudence as signifying that prior Court decisions have been overruled indirectly"); *Freedom from Religion Found., Inc. v. Bugher*, 249 F.3d 606, 613-614 (7th Cir. 2001) (same).

The Plaintiff, again supported by voluminous documentation, asserts that the InnerChange program is so infused with religion that it is impossible to separate its sectarian from nonsectarian functioning. The Defendants argue, with supporting evidence, that though there are sectarian portions to the InnerChange program, because it is a values-based provider, its governmentally-funded

nonsectarian functions allow it, nevertheless, to pass constitutional muster. On the issue of the pervasively sectarian nature of the InnerChange program, the Court cannot state that, as a matter of law, the sectarian portions of the program so overrun its nonsectarian functions that governmental funding of the InnerChange program is unconstitutional. Accordingly, the material facts in dispute regarding the sectarian nature of the InnerChange program also preclude summary judgment.

B. *State Law Employment Claim*

The Plaintiffs also allege religious discrimination in employment under state constitutional provisions. *See* Iowa Const. art. 1, § 4 ("No religious test shall be required as a qualification to any office, or public trust, and no person shall be deprived of any of his rights, privileges, or capacities, or disqualified from the performance of any of his public or private duties . . . in consequence of his opinions on the subject of religion."). Iowa state claims are examined under the same "analytical framework" as that applied under federal law. *See Hulme v. Barrett*, 449 N.W.2d 629, 631 (1989) ("Our court has ruled that civil rights cases brought under [the Iowa Civil Rights Act of 1965] will be guided by federal law and federal cases.") (citations omitted). The Plaintiffs fail to show, however, an actual injury caused by any one of the Defendants upon which relief can be obtained. None of the Plaintiffs, for example, has been refused a job with InnerChange or Prison Fellowship in Iowa. For that matter, no Plaintiff has been personally affected, as a matter of employment, through actions taken by InnerChange or any other Defendant. The Plaintiffs cite to a federal district court decision involving an employment discrimination claim brought against a faith-based provider, but in that case the plaintiff was actually an employee who was fired for violating the employer's religious purposes requirements. *See Dodge v. Salvation Army*, No. S88-0353, 1989 WL 53857, at *1-4 (S.D. Miss. Jan. 9, 1999)

(ruling that the federal employment exception clause allowing religious employment discrimination for religious nonprofit employers does not protect a religious nonprofit employer who, under the Establishment Clause, participates in an unconstitutional relationship with the government).

Even if a Plaintiff had suffered an adverse discriminatory employment action under Iowa law, that person is required to file a complaint, as directed by the Iowa Civil Rights Act of 1965. *See* Iowa Code ch. 216 (establishing the Iowa Civil Rights Commission and providing statutory remedies for enforcement of basic civil right claims); *Thompto v. Coborn's Inc.*, 871 F. Supp. 1097, 1108 -1109 (N.D. Iowa 1994) (interpreting Iowa Supreme Court cases to hold that the remedies under the Iowa Civil Rights Act of 1965 are preemptive and exclusive unless claims are separate and independent, e.g., a contracts claim); *Vaughan v. Ag Processing*, 459 N.W.2d 627, 638 (Iowa 1990) (ruling that the Iowa Civil Rights Act of 1965 preempted other state provisions touching on discriminatory acts in the workplace). Even though the Iowa courts construe the Iowa Civil Rights Act filing requirement liberally, claimants must still at least file a general claim with the Iowa Civil Rights Commission. *See Hulme*, 449 N.W.2d at 633 (citing *Anderson v. Block*, 807 F.2d 145 (8th Cir. 1986), for the principle that administrative filing requirements in civil rights actions should be treated liberally to avoid needless procedural barriers). The Plaintiffs have provided no evidence that they have exhausted the appropriate, and quite liberal, administrative requirements under Iowa law. Accordingly, for failure to show an injury in fact and for failure to exhaust administrative remedies, this Court has no jurisdiction over the Plaintiffs' Iowa state employment law claim. *See* Iowa Const. art 1., § 4. Defendants' motion for summary judgment on that state law claim is granted.

IV. QUALIFIED IMMUNITY

Because the Plaintiffs seek no remedy at law, the plea of the named state Defendants for qualified immunity in this case is moot. A qualified immunity defense is only applicable to safeguard the named state Defendants from legal remedies. *See Hopkins v. Saunders*, 199 F.3d 968, 976-977 (8th Cir. 1999) (en banc) ("Qualified immunity insulates a defendant from all claims for legal damages, but it does not shield a defendant from claims for equitable relief."). The only remedy sought by the Plaintiffs that could be considered legal in nature is the claim for nominal damages.[15] *See id.* at 977 (affirming the general rule that a remedy of nominal damages is considered legal, except if awarded to prevent unjust enrichment or intertwined with injunctive relief). The remedy for nominal damages, in this case, is not sought to prevent improper disgorgement, but it is almost completely intertwined with the principle remedy of injunctive relief and, as such, incidental to the primary remedy being sought. A remedy of nominal damages in this case, therefore, is properly considered equitable. *See Hopkins*, 199 F.3d at 977 (defining nominal damages as a legal remedy where the court did not grant reinstatement or any other type of injunctive relief to the plaintiff). Without a remedy at law, the named individual state Defendants Terry Mapes, Walter Kautzky, John Baldwin, Gary Maynard, Haywood Belle, Frances Colston, Robyn Mills, Arthur Neu, Suellen Overton, Walter Reed, Jr., and Donald Tietz may not assert

---

[15] Two of the proposed remedies in this case may be considered restitutional, the return of unconstitutionally appropriated state funds and the *pro rata* reimbursement of inmate telephone funds. Because these remedies are discretionary they are also equitable in nature. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 205 (2002) (explaining that "[r]estitution is a legal remedy when ordered in a case at law and an equitable remedy when ordered in an equity case, and whether it is legal or equitable depends on the basis for the plaintiff's claim and the nature of the underlying remedies sought. For restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession.").

qualified immunity. Their motion for qualified immunity is denied. To the extent InnerChange and Prison Fellowship argue they too should enjoy qualified immunity as state actors (Clerk's No. 98, n.1), their motion is also denied.

V. CONCLUSION

Genuine issues of material fact as to the merits, supported by evidence on both sides, still remain in dispute, which necessarily preclude summary judgment. Particularly, genuine issues of material fact still remain as to IDOC's past and current process used to select a non-compensated, values based pre-release prison program, the voluntary nature of the InnerChange program, and the question of whether the InnerChange program is pervasively sectarian. The parties have offered affidavits, expert opinion, and depositions supporting their respective positions regarding these issues. While not an exhaustive listing of all the elements the Plaintiffs must prove at trial, the genuine issues of material fact as to any one of these Establishment Clause factors leave the Court no choice but to err on the side of denying summary judgment, on the merits, to either party.

Accordingly, for the reasons contained herein, Plaintiffs' Motion for Summary Judgment (Clerk's No. 104) as to the merits is DENIED, but as to standing, it is GRANTED. Defendants' Motions for Summary Judgment Based Upon Lack of Subject Matter Jurisdiction (Clerk's Nos. 92, 96) is DENIED, but is GRANTED as to the Iowa state employment law claim. Defendants' Motions for Summary Judgment on the Merits (Clerk's Nos. 96, 100) is DENIED. State Defendants' Motion for Qualified Immunity (Clerk's No. 98) is DENIED. Defendants' Motion for Summary Judgment Regarding Mootness of Plaintiff's Shelton's Claim (Clerk's No. 172) is DENIED.

In order not to waste the parties' hard work in order to arrive at this juncture in this litigation,

and because of the importance of the constitutional issue at stake, it is further ordered that a trial will be held as soon as feasibly possible on Plaintiffs' claim that IDOC's funding of the InnerChange program violates the Establishment Clause. A scheduling conference will be held at the direction of the United States Magistrate Judge Thomas Shields to set a trial date.

In the interest of economy at trial, the Court strongly suggests that the parties file a joint statement of stipulated facts. *See Freedom from Religion v. McCallum*, 214 F. Supp. 2d 905, 908-913 (W.D. Wisc. 2002) (including facts regarding contractual agreement, selection process, services provided, offender eligibility, and available alternative services).

IT IS SO ORDERED.

Dated this ___29th___ of April, 2005.

ROBERT W. PRATT
U.S. DISTRICT JUDGE