No. 06-2741

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, *et al.*,
Plaintiffs-Appellees,

v.

PRISON FELLOWSHIP MINISTRIES, ***et al.*****,**

Defendants-Appellants.

On Appeal from the United States District Court
For the Southern District Of Iowa
Chief Judge Robert W. Pratt

BRIEF *AMICUS CURIAE* OF WALLBUILDERS, INC.,

in support of Defendants-Appellants
Supporting reversal

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INTEREST OF THE AMICUS CURIAE

Amicus Curiae, WallBuilders, Inc., is a non-profit corporation dedicated to the restoration of America's moral and religious heritage. Possessing one of the largest privately held libraries in the nation with more than 70,000 documents predating 1812, it specializes in conducting research using primary source documents. This expertise in America's history and religious heritage causes this organization to take significant interest in the present case.

The Brief is filed pursuant to consent by all parties.

I. THE INNERCHANGE PROGRAM SHOULD BE UPHELD AS CONSTITUTIONAL BECAUSE THE DISTRICT COURT IMPROPERLY ENGAGED IN SWEEPING CONCLUSIONS ABOUT EVANGELICAL CHRISTIANS BELIEFS.

The district court embarked on a mission to define evangelical Christianity and ascribe to it certain characteristics, *Americans United for Separation of Church and State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862 (S.D. Iowa 2006). In doing so, the district court erred. First, it misrepresented its authority under current law to determine the substance of evangelical Christianity. Second, even if it did have the authority to define what evangelical Christianity is, it did so poorly, and in such a way that marginalizes evangelical Christianity.

A. The District Court Misrepresented Its Authority Under Current Law to Inappropriately Rule on the Substance of Evangelical Christianity Because Analyzing Religious Differences Are Outside the Competency of Courts.

The district court claimed authority to place InnerChange within a "well-accepted context of religious tradition and practice," *id.* at 873, by citing a proposition from a law review article:

> [N]either the institutional competence of the courts nor the separationist principle embodied in the Establishment Clause bars judicial resolution of positive religious questions, such as assessments of the content of religious doctrine, or determinations of the centrality or importance of a religious practice within the context of a religion.

Id. (quoting Jared A. Goldstein, *Is There a "Religious Question" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 Cath. U.L. Rev. 497, 501 (2005). However, that statement was written as a proposal for change. In the same article, the author describes the current state of the law:

> Beginning in the 1960s, with the Court's decision in cases addressing disputes over the ownership of church property and culminating in the [*Employment Division v.*] *Smith*[, 494 U.S. 872, 887 (1990)] decision in 1990, the principle has grown to an apparently absolute prohibition on judicial examination of all questions touching on religion. Courts are thus said to be equally barred from determining normative questions . . . as they are barred from determining positive questions . . . .

Id. at 502.

The Supreme Court has warned that the Religion Clauses forbid courts from engaging in and resolving disputes over religious doctrine and church administration issues. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 710 (1976). In that case, the Supreme Court held that civil courts did not have constitutional grounds to intervene in the defrocking of a priest. In another case, the Court determined that peyote use for religious ceremonies was unlawful under Oregon laws, but cautioned against judicial judgment on religious tenets:

> [I]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants interpretations of those creeds . . . . Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion . . . .

Employment Division v. Smith, 494 U.S. 872, 887 (1990) (internal quotation and citation omitted).

In the instant case, the district court judge admitted that there are "no formal membership requirements" to be an evangelical Christian, but proceeded to inquire into the central beliefs and practices of Evangelicalism. *Prison Fellowship,* 432 F. Supp. 2d at 873. The court's language and narrow descriptions of evangelical views of sacraments, worship style, and religious experiences were determined to "place the evangelical Christianity . . . [and] InnerChange at odds with members of Christian groups who would not consider themselves to be part of [that] camp." *Prison Fellowship,* 432 F. Supp. 2d at 873-74. By categorizing evangelical Christians, the district court not only determined religious doctrine, but also drew distinctions concerning the legitimacy and centrality of various beliefs. Even if those distinctions are true, those doctrinal judgments are outside the scope of inquiry of the courts. Therefore, this Court should hold that compartmentalizing evangelical Christianity was error.

B. Even if this Court holds that identifying tenets of Evangelical Christianity is appropriate, the District Court's generalizations about Evangelical Christianity do not all apply to InnerChange, nor are those beliefs held by all Evangelicals.

The methodology the district court employed to determine the core beliefs of InnerChange was flawed. First, the district court concluded that InnerChange, as a self-identified evangelical organization, necessarily ascribed to all the

characteristics of Evangelicals in general. *Id.* at 872. Second, the district court identified Evangelicals as having "several strong, associated characteristics." *Id.* at 873, n.8. Finally, the district court concluded that because some of the beliefs it ascribed to Evangelicals in general and InnerChange in particular were different than other Christians' beliefs, InnerChange would discriminate against these Christians (especially Roman Catholics). *Id*.

The district court poorly represented the diversity of evangelical beliefs: It ascribed beliefs to all Evangelicals and consequently InnerChange that are not necessarily representative of either of these groups. A brief history of evangelical Christianity will demonstrate the extreme variety of beliefs represented by evangelical faiths and illustrate the damage that will be caused by the District Court's marginalization.

1. *While Evangelicals Have Identifiable Characteristics, the Modern Movement is Large and Diverse and Cannot Be Easily Categorized.*

Modern Evangelicalism can be traced back to its roots during the eighteenth century. Mark Noll, professor of History at Notre Dame University, describes nine major historical movements since the Reformation that form the roots of modern evangelicalism through the centuries, including the offshoots of Fundamentalism and Neo-evangelicals. Mark Noll, *American Evangelical Christianity* 13 (2001). Fundamentalism arose as a militant derivative of the more moderate historical

Evangelicalism. Harriet A. Harris, *Fundamentalism and Evangelicals* 1 (1998). The moderate evangelical movement stagnated during the rise of Fundamentalism in the first half of the twentieth century; the more aggressive beliefs of the Fundamentalists were predominant. *See* Mark Noll, *supra* at 15-16.

The moderate Evangelical movement revived itself through the "Neo-evangelical" faction from 1949-1970 that rejected the militancy and separatism of the Fundamentalist movement. *See id.* at 18-19. Neo-evangelicals "wanted to reform conservative Protestantism and smooth its rougher edges." Harriet Harris, *supra* at 1. Evangelicals are not synonymous with Fundamentalists or Neo-evangelicals. Although both groups have started from the same source and have doctrines in common, the movements are distinct. Therefore, one could say that all Fundamentalists are Evangelicals, but not all Evangelicals are Fundamentalists.

Because of its diversity, Evangelicalism is notoriously difficult to define. Evangelicalism has been compared to a kaleidoscope, Richard T. Hughes, *Are the Restorationalists Evangelicals? in The Variety of American Evangelicalism* 109, 114 (Donald W. Dayton & Robert K. Johnston eds., 1998); a Rubik's Cube, Derek J. Tidball, *Who Are the Evangelicals?* 20 (1994); and a mosaic, David Wells, *On Being Evangelical, in Evangelicalism* 390 (Mark Noll, David Bebbington & George Rawlyk eds., 1994). While evangelical Christianity is very diverse, some

points of unity do exist. Four basic characteristics based upon doctrinal agreement can be found among the various branches of the Evangelicals:

1. They have had a "born-again" experience;
2. They believe that the Bible is the ultimate authority;
3. They have encouraged other people to believe in Jesus Christ; and
4. They believe in the redemption of the soul through Christ's death on the cross.

See Mark Noll, *American Evangelical Christianity* 13 (2001) (citing David Bebbington, *Evangelicalism in Britain: a History form the 1730s to the 1980s* 31 (1989)).

Even on these basic tenets, however, Evangelicals do not consistently believe in all four categories. The Angus Reid Group conducted a study in October 1996 with questions specifically crafted around the above four criteria. *Id.* at 33. In the United States, only 36% of the 3000 people surveyed affirmed all four of the beliefs while 20% affirmed just three. *Id.* at 34. The study also found that out of those people self-identified as evangelical, 61% were in an evangelical Protestant denominational tradition (Adventist, Baptist, Mennonite, and Church of Christ identified with this group); 16% in a mainline Protestant tradition (including Anglican, Episcopal, Congregational, Methodist, and Lutherans); and 13% in a Roman Catholic tradition. *Id.* at 34. The literature and statistics regarding Evangelicals demonstrate that they are a broad based group of moderate to

conservative Christians hailing from a wide variety of denominational traditions within the United States.

This understanding of the evangelical movement is striking when contrasted with the district court's caricature of the movement. Although the court claimed to bear no "animus" towards Evangelicals, *Prison Fellowship*, 432 F. Supp. 2d at 872, it repeatedly described them in disparaging terminology that would tend to rebut this assertion. Throughout the district court's opinion, Evangelicals were identified as "anti-sacramental" and "suspicious, if not contemptuous" of other faiths. *Id.* at 874. Further, they were described as being guilty of "downplay[ing] the traditional sacramental Christian events" and of being "counter to the core doctrinal beliefs of several Christian groups." *Id*. They "reflect[ ] a legalistic understanding of the sacrifice of Jesus," *Id.*

Furthermore, the district court made several erroneous assertions about the movement, some of which tend to marginalize it and paint a caricature of extremism. As *Amicus* will demonstrate, these descriptions were inaccurate.

2. *The District Court Erred In Generalizing About Evangelical Views Of the Bible and Doctrines Because Not All Groups Share the Same Characteristics.*

a. Evangelicals Do Not Share All of the Same Beliefs Like the District Court Implied; Disagreements Arise Over Whether the Bible Is Infallible and Is the Sole Source of Teaching.

The district court's first strong characteristic was that evangelicals "place

great emphasis on the Bible as the inerrant, sole source of authority for Christian teaching . . . ." *Id.* This statement is not characteristic of all Evangelicals for two reasons: Some groups believe in only limited inerrancy and some sects do not believe the Bible is the sole authority.

First, although many Evangelicals claim the Bible is without error there is a strong current of evangelical thought that affirms "limited inerrancy" or mere "infallibility" of the Scriptures. Understanding the diversity of evangelical thought requires some foundational explanation. Doctrines of inerrancy flow from the Evangelicals' understanding of the truthful nature of God, i.e., that He cannot deceive or lie in His inspired Word.

> Intimately connected to this understanding of the divine inspiration of Scripture is the affirmation of the Bible's inerrancy and infallibility . . . *Infallible* is defined as "the quality of neither misleading nor being misled . . . [so that] Scripture is a sure, safe, and reliable rule and guide to all matters." *Inerrant* is defined as "the quality of being free from all falsehood or mistake . . . [so that] Scripture is entirely true and trustworthy in all its assertions." . . . Obviously, *inerrancy* is intended as the stronger term, connoting not just the trustworthiness of the Bible but also its absolute truthfulness and precision . . . .

Mark Ellingsen, *The Evangelical Movement* 206 (1988).

The more conservative Evangelical position can be described as "detailed inerrancy"—that the biblical account is accurate historically and scientifically. *Id.* at 219. A second approach is that the Bible is "infallible on matters of faith and conduct but not necessarily in all its assertions" which has been characterized as

"limited inerrancy." A similar approach is merely the affirmation of "infallibility" as characterized by the evangelical theologian Clark Pinnock: The Bible "*contains* errors but *teaches* none." *Id.* at 221 (quoting Clark Pinnock, "The Inerrancy Debate Among Evangelicals," *Theology, News and Notes* 12 (1976), (emphasis in original). In essence, "[t]he view that the Bible is inerrant, that is, without any error on any issue, however, does command support among evangelicals but not universally." Derek J. Tidball, *supra* at 80.

Second, many charismatic Evangelicals and some Anglican or Episcopal Evangelicals would not agree with the statement that the Bible is the *sole* source of authority for Christian teaching. Charismatic Evangelicals would disagree with the court because its characterization fails to account for the doctrine of subordinate revelation, which allows authoritative teaching from prophetic "words of knowledge" that do not conflict with Biblical mandates. *See* Wayne Grudem, *Systematic Theology* 1055-57 (1994). Furthermore, many Anglican or Episcopal Evangelicals adhere to the authority of the historic creeds of the church in addition to the scriptures. *See e.g.,* Reformed Episcopal Church Home Page, http://rechurch.org/recus/recus/principles.html (accessed August 1, 2006). The district court hastily grouped together many different Evangelicals despite their differing views of the Bible.

b. The District Court Erred Because Evangelicals Are Not Anti-Sacramental.

The district court's second strong characteristic was that Evangelicals "[tend] to be anti-sacramental, which means [Evangelicals] downplay[] the traditional sacramental Christian events . . . as appropriate ways to interact or meet with God." *Prison Fellowship,* 432 F. Supp. 2d at 873. This conclusion is false in at least two respects.

First, Evangelicalism is not anti-sacramental. The sacraments are an important facet of the religious life of the Evangelical; they are understood among evangelicals as a "means of grace." Grudem, *supra* at 950. While Roman Catholics view sacraments as a "means of salvation," or a way to "make people more fit to receive justification from God," (Norman L. Geisler & Ralph E. MacKenzie, *Roman Catholics & Evangelicals Agreements & Differences* 249 (1995), Grudem, *supra* at 951-52), Evangelicals have a different definition. Evangelicals affirm the sacraments as a "means of grace" that *is* an "appropriate way to interact or meet with God." *Cf. Prison Fellowship*, 432 F. Supp. 2d at 873. A means of grace is defined by one evangelical theologian as "any activit[y] within the fellowship of the church that *God uses to give more grace* to Christians." Grudem; *supra* at 950 (entire text emphasized in original, partial emphasis removed). Since the traditional view of salvation within evangelical Protestant Christianity is by grace alone, through faith alone, because of Christ alone, Geisler

& MacKenzie, *supra* 177, 221, it seems somewhat odd for the district court to suggest that the sacraments, as a means of grace, are downplayed by Evangelicals. On the contrary, they are celebrated by Evangelicals as a central part of their faith and life in the fellowship of the church.

Second, Evangelicals are diverse in the number of sacraments that they affirm, but almost all affirm at least two—baptism and communion. *Id.* at 950. Thus, to say that the sacraments are of little importance to Evangelicals comes dangerously close to taking sides in the historical discussion between the evangelical Protestant and Catholic churches about the meaning of the sacraments themselves. The district court's pronouncement is tantamount to a value judgment that Evangelical Protestants are incorrect in their view of the sacraments. This is forbidden. *See Employment Division*, 494 U.S. at 887.

c. The District Court Erroneously Held that Evangelicals are Characteristically Suspicious of Institutional Religion.

The district court also erred in characterizing the group as suspicious toward institutional religion. This characteristic, according to that court, is evinced most obviously by a free-form worship style. *Prison Fellowship*, 432 F. Supp. 2d at 873. This assertion is incorrect for at least two reasons.

First, the conclusion does not follow from the premise. Just because some Evangelicals have a free-form worship style does not mean that their "stance

toward religious institutions is one of suspicion." *Id.* Several possible reasons explain the use of such a worship style. Some Evangelicals might find that a free-form worship style ministers better to the needs of modern congregations. *See e.g.*, Willow Creek Community Church Home Page, http://www.willowcreek.org/history.asp (accessed Aug. 1, 2006) (describing the history of Willow Creek Community Church in Chicago, Illinois, which made popular the "seeker friendly" order of worship utilizing drama, technology, and contemporary music.) Others might defend a free-form style based on theological arguments from biblical interpretation. *See e.g.,* Grudem, *supra* at 1012 n.14, ("Since Scripture does not prescribe any one form [for worship in the church], the major principle to use is Paul's directive in 1 Corinthians 14:26: 'Let all things be done for edification.'")

Second, the premise is invalid. It is simply not true that all evangelical churches have a free-form worship style. Some evangelical churches retain a liturgical order of worship. For example, the Reformed Episcopal Church (REC), has established the Book of Common Prayer as its acceptable liturgy in The Declaration of Principles of the REC, 1873. *See* Reformed Episcopal Church Home Page, http://rechurch.org/recus/recus/principles.html (accessed Aug. 1 2006). Tellingly, this website emblazons the motto of the Reformed Episcopal Church "Traditional, *Liturgical, Evangelical*, Scriptural" across the top of the page (emphasis added). That evangelical church also affirms the authority of the historic

creeds and the Thirty-Nine Articles of Religion–another example of institutional authority within an evangelical church. *Id.* A further example lies in the Orthodox Presbyterian Church, in which some members view that the "regulative principle of worship . . . requires the exclusive singing of psalms in worship." Orthodox Presbyterian Church Home Page, http://www.opc.org/whatis.html (last visited Sept. 20, 2006). In summary, there is considerable debate among Evangelicals about "modes of public worship . . . [[T]here is] much support in many churches for innovative contemporary styles . . . while others promote older patterns, and many vacillate in between." Mark Noll, *supra* at 24.

As the forgoing discussion has demonstrated, the district court made several categorical errors in describing Evangelical Christianity. Furthermore, it used condescending terminology that tends to marginalize and polarize evangelicals from other Christian groups. The Religion Clauses do not countenance these actions. *See Employment Division*, 494 U.S. at 887.

3. *The InnerChange Program and Its Leadership Are Not Anti-Catholic As the District Court Reasoned Because Its Precepts Coincide With Catholic Principles*.

The culmination of the district court's reasoning was to lay an accusation of anti-Catholicism at the door of a ministry whose head has been on the forefront of Evangelical and Roman Catholic ecumenical ministry and reconciliation. *See*

Charles Colson & Richard John Neuhaus eds., *Evangelicals & Catholics Together* (1995).

After giving the "well-accepted" characteristics of evangelicals, the district court concluded:

> [t]hese characteristics, along with the theological commitments in the Prison Fellowship and InnerChange Statement of Faith, place the Evangelical Christianity of Prison Fellowship and InnerChange at odds with members of Christian groups who would not consider themselves to be part of the Evangelical Christian camp.

Prison Fellowship, 432 F. Supp. 2d at 874. The court then stated that InnerChange would tend to be discriminatory towards Roman Catholic Christians because the belief systems did not always align. *Id.*

Amicus does not deny that there has been tension between Evangelicals, especially fundamentalist Evangelicals, and Roman Catholic Christians. However, to characterize all Evangelicals as being "suspicious if not contemptuous," *id.*, of the Catholic belief system goes beyond the legitimate role of any court and places the judiciary squarely in the position of judging the relative merit of one belief system over another. To say that Prison Fellowship is anti-Catholic because it is Evangelical and some Evangelicals have held anti-Catholic beliefs in the past is little different than concluding Southern Baptists are all sympathetic to the Ku Klux Klan, Roman Catholics are anti-Semitic, or that all Shiite Muslims want to participate in Jihad against infidels because historically some factions of these

groups have been participants in these causes. In essence, the district court's sweeping opinion encourages intolerance among different denominations because they have different belief systems.

Furthermore, even if the district court's general accusations were true of Evangelicals as a general characteristic, it improperly failed to consider the accessible history of Prison Fellowship Ministries and its leader, Chuck Colson, in the efforts to encourage Evangelical/Catholic ecumenical dialogue and partnership. For example, Chuck Colson was a catalyst in propagating *Evangelicals and Catholics Together*, a manifesto intended to reconcile these groups in a common mission. Colson received the Templeton Prize for progress in religion due to his efforts on this project. Charles Colson & Richard John Neuhaus eds., *Evangelicals & Catholics Together* (1995) (quote on back dust jacket). The book he edited and published to defend *Evangelicals and Catholics Together* was hailed by John Cardinal O'Connor, former Archbishop of New York, as

> [a] giant step toward understanding not only our differences, but how common is our goal and how much we share theologically. It is time that we caught up with the quiet, constructive revolution . . . in Evangelical-Catholic relations, and help to advance it.

Id. Furthermore, Chuck Colson is married to a Roman Catholic and regularly attends mass. *Id.*

In summary, the district court's assertions of anti-Catholicism by Evangelicals in general and Prison Fellowship in particular run counter to reason,

logic, the historical record, and doctrines of judicial neutrality articulated in *Employment Division*.

The law review article that the district court relied on for authority to make these "findings" about Evangelicals stated nonchalantly that

> [p]ositive declarations about religion pose little or no threat of interference with religion because religious bodies and individuals remain entirely free to decide for themselves what to do and what to believe, and they remain free even if the government mischaracterizes their beliefs and practices.

Goldstein, *supra* at 542. On the contrary, judicial mischaracterizations of religion such as those in the instant case present a threat to the free exercise of religion because the precedent stands for the proposition that religious groups in our pluralistic society cannot cooperate together because of diverse religious beliefs. Under *Employment Division v. Smith* and its progeny the district court's findings should not be allowed to stand.

II. THE CONSTITUTIONALITY OF INNERCHANGE SHOULD BE EVALUATED AND UPHELD UNDER *MARSH V. CHAMBERS* BECAUSE OF AMERICA'S HISTORY OF RELIGIOUS PRISON MINISTRIES AND TRADITION OF FAITH-BASED REHABILITATION PROGRAMS.

While *Lemon v. Kurtzman*, 403 U.S. 602 (1971), has been recognized by courts to be the primary Establishment Clause test, that case is not the only test to determine whether the delicate balance between church and state has been tipped. In *Marsh v. Chambers*, 463 U.S. 783 (1983) the Supreme Court recognized a

separate Establishment Clause test that is based upon different principles than the three-pronged test in *Lemon*. In *Marsh*, the Supreme Court upheld prayers offered by a publicly funded, Christian clergyman at the opening of the Nebraska legislature's sessions. 463 U.S. at 786. The Court declared that the practice of prayer before legislative sessions "is deeply rooted in the history and tradition of this country," and that it had "become part of the fabric of our society," *Id.* at 792. The Court emphasized that long-standing traditions should be given great deference. *Id.* at 788.

The *Marsh* test asks whether a long-standing practice, "based upon the historical acceptance[,] . . . [has] become 'part of the fabric of our society.'" *Wallace v. Jaffree*, 472 U.S. 38, 63 n. 4 (1985) (Powell, J., concurring) (citation omitted). The plurality in *Van Orden* specifically referred to *Marsh* as an example of how the recognition of the role of religion in our nation's heritage is permissible under the Establishment Clause. *Van Orden v. Perry*, 125 S. Ct. 2854, 2862.

Writing for the plurality in *Van Orden*, Chief Justice Rehnquist noted that the constitutional analysis of the monument "is driven both by the nature of the monument and by our Nation's history." *Id*. at 2861. Justice Rehnquist recognized that, "[t]here is an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789." *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984). Justice Rehnquist cited the

deeply embedded practice of recognizing the role religion has played in our Nation's heritage. *Van Orden*, 125 S. Ct. at 2861-62.

Rehnquist compared the monument outside the Texas State Capitol with other Ten Commandment displays on government property, describing them as "acknowledgements of the role played by the Ten Commandments in our Nation's heritage," *id*. at 2862, and not unconstitutional establishments of religion. Thus, the *Van Orden* plurality applied a *Marsh* analysis to the Texas Decalogue and stated that *Lemon* is "not useful" in dealing with a "passive monument." *Van Orden*, 125 S. Ct. at 2861 (2005).[1]

Courts have used *Marsh* to uphold practices such as public proclamations with religious content, *Allen v. Consol. City of Jacksonville,* 719 F. Supp. 1532, 1538 (M.D. Fla. 1989) (upholding a city resolution urging residents to participate in a day of prayer and commitment to fighting drugs); *Zwerling v. Reagan*, 576 F. Supp. 1373, 1378 (C.D. Cal. 1983) (upholding Presidential Year of the Bible proclamation); chaplaincy programs in the Army, *Katcoff v. Marsh*, 755 F.2d 223,

[1] Justice Breyer's concurrence in *Van Orden* recognized the relevance of the *Marsh* analysis and found the *Lemon* test an unsatisfactory substitute for the exercise of legal judgment in these cases. *Van Orden*, 125 S. Ct. at 2869. Breyer distinguished *Van Orden* from *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005) – the other Ten Commandments case decided the same day – by noting that the *Van Orden* display is "simply an effort primarily to reflect, historically, the secular impact of a religiously inspired text." *Van Orden*, 125 S. Ct. at 2871. This historical reflection is exactly what the *Marsh* court found constitutionally acceptable.

232 (2d Cir. 1985), and in a sheriff's department, *Malyon v. Pierce County*, 935 P.2d 1272, 1285 (Wash. 1997); equal after-hours access to school facilities for religious purposes, *DeBoer v. Vill. Of Oak Park*, 267 F.3d 558, 569 (7th Cir. 2001); the use of the phrase "in the year of our Lord" on law licenses and on notary public commissions, *Doe v. La. Supreme. Ct.*, 1992 U.S. Dist. LEXIS 18803, 18-19 (E.D. La. Dec. 7, 1992); state involvement in a Kosher food regulation, *Ran-Dav's County Kosher, Inc.*, v. State, 608 A.2d 1353, 1375 (N.J. 1992) (relying on *Marsh*'s "fabric of society" language); prayers at the presidential inaugural ceremonies, *Newdow v. Bush*, 2001 U.S. Dist. LEXIS 25937 (E.D. Cal. July 17, 2001); *Newdow v. Bush*, 2001 U.S. Dist. LEXIS 25936 (E.D. Cal. Dec. 28, 2001); *Newdow v. Bush*, 2002 U.S. Dist. LEXIS 27758 (E.D. Cal. March 26, 2002); *Newdow v. Bush*, 2005 U.S. Dist. LEXIS 524 (D.D.C. Jan. 14, 2005); and directly in religious display cases, *ACLU v. Wilkinson*, 701 F. Supp. 1296 (E.D. Ky. 1988), *State v. Freedom from Religion Foundation*, 898 P.2d 1013, 1029, 1043 (Colo. 1996), *Conrad v. Denver*, 724 P.2d 1309, 1314 (Colo. 1986), *ACLU v. Capital Square Review & Advisory Bd*., 243 F.3d 289, 296, 300-01, 306 (6th Cir. 2001) (*en banc*), and *Murray v. Austin,* 947 F.2d 147, 170 (5th Cir. 1991) (cross on city insignia)*;* and to help explain why displays with "religious" content should pass constitutional muster under the endorsement test. *See, e.g., Ams. United for Separation of Church & State v. Grand Rapids*, 980 F.2d 1538, 1544 (6th Cir.

1992); *Okrand v. City of Los Angeles,* 207 Cal. App. 3d 566, 576-77 (Cal. Ct. App. 1989); *Suhre v. Haywood County*, 55 F. Supp. 2d 384, 396 (W.D.N.C. 1999).

Marsh should control this case because the American penitentiary system was founded on beliefs that religion could rehabilitate the criminal. Further, support of religious programs have remained in the prison systems through today. This Court should recognize the tradition of religion in the prison systems and uphold InnerChange under *Marsh*.

A. Since InnerChange Continues a Tradition of Religious Reform Programs Instituted in American Prison Systems Since the Founding of Penitentiaries, That "Deeply Rooted" Practice is Constitutional Under *Marsh*.

In the centuries preceding our Nation's founding, punishment was usually imposed corporal penalties, public humiliation, or monetary fines, while incarceration as punishment was rare. Adam Jay Hirsch, *The Rise of the Penitentiary: Prisons and Punishment in Early America* 3 (Yale U. Press 1992). Punishments, however, began to change in the late eighteenth century due to changing ideologies. *Id.* at 32. Religion was one ideology that guided the change toward penitentiaries and imprisonment. *Id.* at 20. The very idea of the word "penitentiary" developed from the Pennsylvania Quakers' "belief in penitence and self-examination as a means to salvation." *Prison Reform*, http://history.acusd.edu/gen/soc/prison.html (last visited Sept. 20, 2006). Since Christian philanthropists "tended to view crime as an outgrowth of the offender's estrangement from God,"

the key to rehabilitation rested in "restoring the criminal's faith in, and fear of the Lord." *Id.* at 19. The Christians wanted the "inmate [to] rediscover God, tearfully repent all sins, and be pledged ever after to a devout and honest life." *Id.*

This idea of religious transformation of the criminal's soul was carried not only by the Quaker's but also by prominent Philadelphians Benjamin Franklin, and Benjamin Rush. The two founded The Philadelphia Society for Alleviating the Miseries of Public Prisons in 1787, which later influenced programs in over 300 prisons in the new United States. Norman Johnston, *Prison Reform in Pennsylvania*, http://www.prisonsociety.org/about/history.shtml (last visited Sept 18, 2006). Benjamin Rush, the Society's spokesman, "proposed a radical idea: to build a true penitentiary, a prison designed to create genuine regret and penitence in the criminal's heart." *Eastern State Penitentiary*, http://www.ushistory.org/tour/tour_easternstate.htm (last visited Sept. 18, 2006).

Prisons following the Pennsylvania model held an "evening prayer [each of the] six workdays . . . [while Sunday was] a day devoted exclusively to prayer, instruction and salutary meditations." Michel Fouchault, *Discipline & Punish: The Birth of the Prison*, 239 (Alan Sheridan trans., Vintage Books 1995) (quoting Julius, N.H., Leçons sur les prisons, I, 417-18, (Fr. Trans, 1831). The only reading material was the Bible. *The Law of Prisons*, 115 Harv. L. Rev. 1838, 1892 n.3 (2002). "Chaplains made periodic rounds, encouraging each prisoner to read his

Bible and to cleanse his soul through prayerful repentance." Blake McKelvey, *American Prisons: A History of Good Intentions* 29, (Patterson Smith 1977).

Another similar prison system was developed in New York through the efforts of Thomas Eddy, *id.* at 9, and was continued by the work of Reverend Louis Dwight from 1825 to the 1850's. *Id.* at 15. Dwight persuaded several states to follow the Prison Discipline Society modeled in the New York system. *Id.* at 16-17. Members of that Society went "as missionaries to the various prisons, maintaining them in successive institutions until the states were persuaded to provide for resident or part-time chaplains." *Id.* at 20. The religious impact on prison reform was so strong that in 1847 the New York legislature passed a statewide prison reform bill that "[provided] a Bible for each cell and religious worship on Sundays. . . . [And] the chaplain [was required] to visit inmates in their cells, and to devote one hour each week and the afternoon of each Sunday to religious and moral instruction." *A Citizen Crusade For Prison Reform: The History of the Correctional Association of New York*, by Ilan K. Reich. Published by the Association (January 1, 1994), *available at* http://correctionhistory.org/html/chronicle/cany.

While public sentiment and goals of the prison systems have changed during the past century, religion has maintained a close relationship with the criminal. For example, organizations such as the "Salvation Army provided chaplains, conducted

religious classes, and provided spiritual and economic resources for former inmates and their families." Alfred Himelson, *Prison Programs that Produce*, http://www.worldandihomeschool.com/public/2003/december/cipub1.asp (last visited Sept. 20, 2006). The Volunteers of America, a prison ministry group, also formed out of the Salvation Army, had a significant religious impact on the New York prisoners at Sing-Sing. *The Extra Mile,* http://www.extramile.us/honorees/booth.cfm (last visited Sept. 20, 2006). Throughout the centuries, chaplains have remained in state and federal prisons.

One prison study, which examined thirty-three states, found that most had state funded protestant Christian chaplains. *Law of Prisons*, 115 Harv. L. Rev. at 1896 nn.28-29. In a 2006 press release by the Georgia Department of Corrections the Commissioner explained that Georgia has recently reinstated full-time chaplains. He said, "[o]ur chaplains are vital to our mission in every facet of Corrections. The faith and character-based efforts they lead play a significant role in the transformation of inmates, spiritually and cognitively." *Georgia Department of Corrections*, http://www.dcor.state.ga.us/NewsRoom/PressReleases/060317.html (last visited Sept. 20, 2006).

As the above account has shown, religious influence has remained a continuous reality in American prisons. Although volunteer workers carry out much of the religious programs, the historic record demonstrates that state funding

of religiously based programs has existed since the foundation of our Nation, and should therefore be constitutional under the *Marsh* criteria.

B. The Federal Government Has A History of Financially Supporting Chaplaincy and Other Rehabilitation Programs In the Prison Systems, Thus Strengthening Constitutional Support For the InnerChange Program Under the *Marsh* Test.

In the federal prison system, which did not exist until the 1890s, chaplains worked for the salvation of the inmates. Paul W. Keve, *Prisons and the American Conscience: A History of U.S. Federal Corrections*, 1 (So. Ill. U. Press 1991). In the penitentiary at Leavenworth, Kansas, "Mr. F. J. Leavitt, Chaplain from 1896 to 1916, said, 'I have endeavored to preach such sermons as would arouse the conscience and lend to the reformation and salvation of the men, as to the result, Eternity alone can fully reveal.'" *United State Penitentiary: Leavenworth, Kansas* (2003), http://www.lvarea.com/data/usp_info.htm (last visited Sept. 20, 2006). The early federal chaplain "was, typically, a nearby minister who might be paid a few—very few—dollars to come to the prison on Sunday and preach. . . . However, the chaplains of the later years were true, full-time professionals (about eighty-five of them were in the [federal] system in 1987) and no longer were recruited on a strict denominational basis." Keve, *supra* at 241. In fact, even during "extreme lockdown conditions" after several incidents of inmate murder and violence against prison staff in Marion Illinois in 1983, the prison chaplaincy program was important enough so that the "[c]haplains visited the inmates in their

cells." *Id.* at 194. As can be seen through these examples, the government has sponsored and even paid chaplains to spread religion in the prison system.

In another example of religious rehabilitation, the alcoholic abuse recovery program, Alcoholics Anonymous (AA), demonstrates another thread in the religious fabric—state participation in religious activities. From its beginnings in 1935, AA's founders sought to help other recovering alcoholics through a program mimicking their own religious conversion. *Alcoholics Anonymous: Anonymous Theists?*: Griffin v. Coughlin *and the "Wall of Separation Between Church and State" in the New York State Prison System,* 19 Cardozo L. Rev. 1455, 1490 (1998). In 1942, AA entered an American penitentiary system at San Quentin in California, and the government encouraged rehabilitation of prisoners with the religious message. *Id.* at 1459. From the early 1960s onward, "AA has been imposed as a condition of probation" on a regular basis. Byron K. Henry, *In "A Higher Power" We Trust: Alcoholics Anonymous as a Condition of Probation and Establishment of Religion*, 3 Tex. Wesleyan L. Rev 443, 453 (1996-1997). Even though AA does not receive state financial support (*id.* at 449), judges and prisons often require convicted drunk drivers and inmates to participate in AA recovery programs.

Because AA is religious in nature, several people have sued prisons and probation programs for imposing participation in AA programs. Some courts have

agreed that requiring AA participation establishes a religion in violation of the constitution. *See, e.g., Kerr v. Farrey*, 95 F.3d 472 (7th Cir. 1996); *Griffin v. Coughlin*, 673 N.E.2d 98 (N.Y. 1996); *Warner v. Orange City*, 870 F. Supp. 69 (1994). Some courts, including the federal District Court of the Southern District of Iowa, refuse to call AA a "religion." *See Jones v. Smid*, 1993 WL 719562 (S.D. Iowa Apr. 29, 1993); *Stafford v. Harrison*, 766 F. Supp. 1014 (D. Ks. 1991). Regardless of which view this Court takes, the AA program has a religious and proselytizing emphasis. The testimonials included in AA's *The Big Book*, as well as the testimonies of AA's founders speak of the "traditional God of modern western theism." *Anonymous Theists, supra* at 1519. Further establishing the religious heritage of this program, the AA "twelve steps" program mentions God four times, refers to God as "Him" once, and also refers to "a Power greater than ourselves." In some instances, "attendees must tolerate the recitation of the Lord's Prayer and reading of Bible verses as part of the program." Henry, 3 Tex. Wesleyan L. Rev. at 447. Despite constitutional challenges, AA continues to be provided in mandatory substance abuse programs. *See Gray v. Johnson*, 436 F. Supp. 2d 795, at 797 (D. Va. 2006).

C. InnerChange Should Be Upheld Because the Program Does Not Constitute Proselytizing.

Although the Supreme Court in *Marsh* indicated that a modern practice constituting proselytization might be subject to more scrutiny, proselytizing was

not at issue in that case. The *Marsh* Court, in *dicta*, noted:

> The content of the [challenged practice of legislative] prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.

463 U.S. at 794-95. The Court held that even though the chaplain represented one denomination and his prayer included mention of Jesus, the prayer itself was not advancing the chaplain's personal denomination. *Id.* In the instant case, InnerChange is functioning as other religious programs have in the past. A religious focus does not automatically denote a partisan or proselytizing central theme. The program's focus, "to transform prisoners into good citizens, to reduce the recidivism rate of current inmates, and to prepare inmates for their return to society," *Prison Fellowship,* 432 F. Supp. at 875, is for the general good, rather than the specific benefit for one denomination. From America's first penitentiaries (in which prisoners were to read their Bibles in intense solitude that would hopefully encourage a return to God and lawful living) through the present (when chaplains continue to minister and prisons require participation in AA's 12 step program), our penal history has consistently maintained a faith-based element.

This history is provided so that this Court recognizes the history of religious rehabilitation as a part of the fabric of American society. This history is sufficient

to uphold InnerChange under *Marsh*. InnerChange is merely another thread in the fabric of religious programs in American society from the birth of the country.

Ultimately, the question should be: Is it true that the InnerChange program "risks the beginning of the establishment the Founding Fathers feared"? *Marsh*, 463 U.S. at 795. While true that incarceration of criminals no longer relies on a religious philosophy that dictates biblical meditation, and daily prayers, the premise that Christian reformatory influences have remained in the prison system from the founding to the present is also equally true. Just as the Court reasoned in *Marsh*, so here this Court should recognize that religious reform programs were the heart of the penitentiary system, and are not the type of "evil" that the Founding Fathers were seeking to eliminate. Since the program is voluntary, and since inmates can choose from among thousands of American churches, this program is not a threat to establishing a government religion. The *Marsh* analysis demonstrates that religious rehabilitation, like InnerChange, is "deeply rooted in our history and tradition" (*Marsh*, 463 U.S. at 792), and should therefore be constitutional.

D. Even Were This Court To Find InnerChange Was Proselytizing, The Program Should Be Upheld Because Similar Proselytizing Programs Have A Long Historic Pedigree.

A key to properly applying the *Marsh* test is to apply it at the proper level of abstraction. Thus, it is important to note that not only have religious groups and

chaplains participated in the rehabilitation of prisoners throughout American history, but the government has also been a sponsor of other religious programs. From policies seeking to save the lives of alcoholics with the support of religion to programs seeking to Christianize the American Indians, Americans have supported proselytizing to groups that have required assistance to be fully integrated into society. Thus, the *Marsh dicta* about proselytizing is not dispositive. The analysis is simply that much easier where proselytization is absent.

Beginning with incorporating indigenous people groups during the late 1700's, American policies have included religious training. For example, Thomas Jefferson signed a treaty with the Kaskaskia Indians providing money for sectarian religious education. *Wallace v. Jaffree*, 472 U.S. 38, 103-04 (1985). Also,

> [f]rom 1789 to 1823 the United States Congress had provided a trust endowment of up to 12,000 acres of land "for the Society of the United Brethren, for *propagating the Gospel among the Heathen."* The Act creating this endowment was renewed periodically and the renewals were signed into law by Washington, Adams, and Jefferson.

Id. (emphasis added, citations omitted). During the eighteenth and nineteenth centuries, the government initiated a widespread policy to "civilize" the Indians. That policy included spreading the Gospel in order to convert the Indians to Christianity. *Race-The Power of an Illusion,* http://www.pbs.org/race/000_About/

002_04-background-02-07.htm (last visited Sept. 20, 2006). Early Americans (including prominent Founding Fathers) desired to assimilate the Indians into society by proselytizing and converting the Indians to the Christian faith.

Similarly, early prison systems sought a conversion of inmates that would enable them to meld peacefully into lawful existence once freed. InnerChange should be upheld because the program is similar to other proselytizing programs from American history.

Conclusion

For the foregoing reasons and for other reasons stated in the Appellant's brief, this Court should reverse the decision of the District Court.

Respectfully submitted
This 22 day of September, 2006

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CERTIFICATE OF COMPLIANCE

Pursuant to F.R.A.P. 32.2.7(C), the undersigned certifies that this brief complies with the type-volume limitations of F.R.A.P. 32.2.7(B). Exclusive of the exempted portions, this Brief contains 6,964 words. This total was calculated with the Word Count function of Microsoft Word 2003.

Pursuant to Eighth Circuit Rule 28A(d)(2) the undersigned certifies that the disk containing the digital version of this brief is virus free.

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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief *Amicus Curiae* of WallBuilders, Inc. in the case of *American United for Separation of Church & State, et al. v. Prison Fellowship Ministries, et al.,* No. 06-2741, on all required parties by depositing two paper copies and one electronic copy in the United States mail, first class postage, prepaid on September 22, 2006 addressed as follows:

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