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Charitable Choice in the Courts: Round One

A U.S. district court ruled last week that the state of Wisconsin's funding of a particular faith-based drug treatment program violated the Establishment Clause. Instead of slamming the door on the Faith-Based and Community Initiative, the decision shows how far courts have come toward treating all faiths (religious and secular) equally in the public square—and how far they still need to go.

Judge Barbara Crabb declared unconstitutional a grant by the Wisconsin Department of Workforce Development (DWD) to Faith Works, a non-profit that offers Alcoholics Anonymous (AA) programs and counseling to addicts in Milwaukee. She justified her ruling on the grounds that the grants provide “unrestricted, direct funding of an organization that engages in religious indoctrination.” In particular, she objected that the program requires participation in spiritually focused AA meetings, and that this part of the program and religious counseling were funded with public dollars. Crabb faulted the state and Faith Works for not keeping the public and private dollars that support different parts of the program separate.

However, her opinion makes clear that if funds go to Faith Works because clients freely choose to receive services there, using vouchers, for example, then this “indirect” funding of the program is entirely permissible. Similarly, her judgment does not impact other funds Faith Works receives in its subcontracting relationship with the state. This is not good news for strict church-state separationists and Charitable Choice opponents, who argue—despite recent Supreme Court decisions—that faith-based programs should be denied access to public funds to provide services, no matter how effective their programs are.

Judge Crabb recognized that Faith Works provides an important public service of helping men get off drugs and find work. In her opinion, the contract poses no danger of creating an unacceptable entanglement of church and state, nor does it imply any governmental endorsement of or favoritism towards religion. On all these points, Judge Crabb's decision upholds the basic logic of Charitable Choice rules.

Government should not automatically exclude programs like Faith Works from funding as it has often done in the past. Certain religious activities should be voluntary and privately funded. Far from overturning Charitable Choice, which she does not even challenge, Judge Crabb's decision is a warning that states must carefully adhere to the specific guidelines laid down by Charitable Choice.

However, while this decision does not negatively impact Charitable Choice, it still jeopardizes the religious liberties of Faith Works and its clients. Judge Crabb's opinion would require Faith Works staff and clients to divest their program of its distinctive religious character to be eligible for direct funding. Here her reasoning takes a wrong turn. Charitable Choice, the controlling federal law, does not require this. Nor does the First Amendment.

But what if an organization uses public funds to “indoctrinate?” When government funds diverse groups, and makes receiving services from a faith-based group a choice and not a requirement, government has no proper interest in determining how religious an organization is. Instead, its concern should be whether the non-profit—Christian, Jewish, Muslim, secular (or whatever its religious character)—can demonstrate its ability to meet the needs of the people the government program intends to serve. In this way, pluralism becomes the partner of justice.

This is the spirit of Charitable Choice and of the growing call to treat all faiths equally in the public square. This is how to untie the knots into which much First Amendment jurisprudence has often tied itself. Judge Crabb missed this chance in round one. Who will lead the charge in round two?

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