No. 05-282

IN THE

Supreme Court of the United States

AMERICAN JEWISH CONGRESS,

Petitioner,

v.

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE, ET AL.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENT UNIVERSITY OF NOTRE DAME'S BRIEF IN OPPOSITION

MARY BETH YOUNG
JONES DAY
325 John H. McConnell Blvd.
Suite 600
Columbus, Ohio 43215
(614) 469-3939

STEPHEN J. BROGAN
MICHAEL A. CARVIN
(Counsel of Record)
SHAY DVORETZKY
JOHN L. CHANEY
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Respondent University of Notre Dame

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20004

QUESTIONS PRESENTED

1. Whether an AmeriCorps program under which individual participants choose service opportunities from an array of options selected under neutral criteria is properly analyzed under this Court's decision in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), rather than under *School District of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985)?

2. Whether a government program involving "discretionary criteria" to select grantees is a neutral private choice program where there is no allegation or evidence that the "discretionary criteria" have been applied to favor religion and individuals choose from a wide range of approved grantees?

3. Whether auditing is necessary to ensure that funds provided to AmeriCorps grantees are restricted to secular purposes, where it is undisputed that the funds are "much less" than the grantees' secular administrative costs, the funds are restricted by statute and regulation to secular uses, and grantees are required to sign a specific assurance that these restrictions will be followed?

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JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). However, there are standing issues that threaten jurisdiction. *See infra* at 30.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

In addition to the provisions identified by Petitioner, 45 C.F.R. § 2540.100(b) is also relevant, and is set forth in Appendix A.

STATEMENT

1. Factual Background

The University of Notre Dame's ("Notre Dame") Alliance for Catholic Education ("ACE") is a graduate education program that also meets the needs of underserved schools. ACE participants teach subjects including science, mathematics, foreign languages, English, social sciences, and religion in needy Catholic schools. Pet. App. at 3a. ACE does not require participants to teach religion, only that they be willing to provide instruction in a Catholic school. JA0887-88, 1105, 1113.

ACE participants receive a salary from the schools in which they teach. JA0888. In addition, the schools pay a fee to Notre Dame which is used to cover administrative costs and to purchase health insurance for ACE teachers. *Id.* The total cost of an ACE teacher to a parochial school approximates that of an entry-level teacher. *Id.*; JA1144.

ACE enjoys a unique association with the Corporation for National and Community Service ("CNCS" or "the Corporation") and the AmeriCorps program. The opportunities to participate in AmeriCorps are virtually limitless, with the government leaving others — including the States, nonprofit organizations, and universities — to define the essence of their service programs. Participants may choose from a broad array of initiatives; the statute only requires that a program respond to "pressing unmet human,

educational, environmental, and public safety needs." 42 U.S.C. § 12501(a)(1). The statute includes "a church or other religious entity" as one of several types of organizations eligible to craft a program with qualifying national service positions. *Id.* § 12511(5).

The AmeriCorps Education Awards Program ("AEAP") provides limited funding to participating programs, and is designed for grantees, like Notre Dame, who are able to provide significant funding other than that received through AmeriCorps. *See* 61 Fed. Reg. 46,628-29 (Sept. 4, 1996); JA0748-49. The process used by the Corporation in selecting programs for participation in AEAP is set forth in program guidelines, and involves consideration of three neutral criteria — Program Design, Organizational Capacity, and Budget / Cost Effectiveness, each of which encompasses neutral subcriteria. JA1555-56.

Programs participating in AEAP include several, such as ACE, in which participants serve by teaching in disadvantaged schools. For fiscal year 2001, thirteen of the seventy-seven AEAP grantees involved service by teaching. JA0759. These grantees placed teachers in approximately 1608 elementary and secondary schools, of which only 328, or 20%, were religious schools. *Id.*; Pet. App. at 10a.

The funding provided under AEAP consists of two components. Pet. App. at 3a. AmeriCorps participants earn an education award of $4,725 if they provide at least 1700 hours of secular service. *See* 42 U.S.C. § 12602(a)(1); 45 C.F.R. § 2527.10(a); Pet. App. at 3a. In addition, grantees such as Notre Dame are entitled to a modest grant to assist in defraying the administrative costs of the program. In 2001-2002, ACE received $400 per participant in such grants, which represents less than 3% of ACE's annual budget. Pet. App. at 3a; JA0889.

Both types of AEAP funding come with detailed restrictions on their availability and use. Federal statutes and regulations and AmeriCorps grant provisions and guidelines

prohibit ACE teachers from earning AmeriCorps credit for any hours spent providing religious instruction or engaging in religious activities. 42 U.S.C. § 12634(a); 45 C.F.R. § 2540.100(b); Pet. App. at 7a; JA1490.[1] Similarly, grantees are prohibited from using any portion of an administrative grant "to provide religious instruction, conduct worship services, or engage in any form of proselytization." 42 U.S.C. § 12634(a); 45 C.F.R. § 2540.100(b). Accordingly, Notre Dame deposits funds received from the government in a restricted account and uses them only to offset secular program costs. Pet. App. at 34a.

However, the regulatory scheme takes care not to restrict private conduct unnecessarily. AEAP participants, grant provisions instruct, "may exercise their rights as private citizens" to participate in activities including "[e]ngaging in religious instruction, conducting worship services, or engaging in any form of religious proselytization," "on their initiative, on non-AmeriCorps time, and using non-Corporation funds." JA1490; Pet. App. at 7a. However, "[t]he AmeriCorps logo should not be worn while doing so." JA1490; Pet. App. at 7a.

The Corporation ensures that these rules are followed. JA0751-58, 0891-92. Grant applications must specify the applicant's plans for ensuring compliance with funding restrictions, and applicants must execute a specific assurance that they will comply with all rules regarding prohibited activities. JA0752-53, 0866, 0869. CNCS also requires grantee staff and participants to attend training on the rules

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[1] Petitioner erroneously cites 45 C.F.R. § 2520.30 as providing the relevant limitation on the activities of AmeriCorps participants. Pet. at 1, 2, 7 n.2, 9. But, as explained in the courts below by both the Corporation and Notre Dame, that provision applies only to AmeriCorps programs under Subtitle C of Title I of the National and Community Service Act. *See* 45 C.F.R. § 2520.30. AEAP programs are carried out under Subtitle H. JA0748.

regarding prohibited activities. JA0753, 0758, 1493. Grantees must review participants' timesheets to ensure that no time spent in religious activity is included. JA0892, 1505, 1544. Upon completing a term of service, participants must sign an Exit Form stating the number of AmeriCorps service hours performed, with the understanding that a willful false statement is punishable by a fine and/or imprisonment. JA0754, 0871-72. Every participant who serves in a religious school must sign an additional certification that the service hours reported on the Exit Form do not "include any religious instruction, worship, or proselytization." JA0754, 0874. CNCS personnel also conduct site visits to review time logs and interview participants and supervisors. JA0095-0100, 0755-56. Each grantee is required to submit to the Corporation an annual report following up on any compliance issues. JA0757.

Notre Dame also ensures compliance with AmeriCorps rules. JA0710-16, 0891-92, 0894-0939, 1094, 1098-1100, 1149, 1151-52, 1453. Through orientation sessions and written materials, Notre Dame describes and explains the prohibitions on religious activity to ACE participants and host schools. JA0710-11, 0891, 0896-98, 0906-39, 1099-1100, 1149, 1152, 1453. In addition, Notre Dame personnel visit sites where participants are serving to monitor compliance, JA0891-92, 1453, and require participants to complete time logs that emphasize that religious activity may not be included. JA0892, 0939, 1099.

2. Procedural Background

Petitioner filed this action against the Corporation on October 3, 2002, advancing a single count under the Establishment Clause. Petitioner sought a declaration and conforming injunction that the Establishment Clause forbade the Corporation "to approve or qualify the ACE Program, CNVS Program . . . and any other similar AmeriCorps program," or to provide funding to those programs or their

participants, if those participants, outside the scope of their secular AmeriCorps service hours, also provided religious instruction. JA0029 (Complaint, Prayer for Relief). Notre Dame intervened as a defendant. Following discovery, the District Court granted petitioner's motion for summary judgment and denied Notre Dame's and the Corporation's cross-motions for summary judgment. Pet. App. at 13a. The District Court entered an injunction, Pet. App. at 56a, which it later stayed pending appeal. JA0083.

The D.C. Circuit unanimously reversed the District Court, finding that the AEAP's provision of education awards to AmeriCorps participants for secular service was, like the school vouchers program upheld in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), a neutral program involving "genuine independent choice." Pet. App. at 9a. The D.C. Circuit also held that the fixed administrative grants provided to program sponsors such as Notre Dame were constitutional because they reimbursed sponsors for a portion of the secular administrative costs imposed on them by AmeriCorps requirements. Pet. App. at 11a-12a. Following the D.C. Circuit's unanimous opinion, petitioner filed a petition for rehearing *en banc*, which was denied without a single member of that court even calling for a vote. Pet. App. at 59a-60a.

REASONS FOR DENYING THE PETITION

The unanimous decision of the D.C. Circuit in this case involves a routine application of this Court's Establishment Clause precedents applicable to neutral private choice programs. According to petitioner, simply allowing individuals who provide secular service in a religious school to participate on equal footing with other AmeriCorps participants results in a governmental indoctrination of religion. This is so, petitioner claims, even though any participant who provides AmeriCorps service in a religious school has voluntarily chosen to do so from among a vast array of predominantly secular program options, and even

though no federal money is provided to either the AmeriCorps participants for any time spent in religious activity or to the religious schools at which they teach.

Petitioner's claims are irreconcilable with this Court's Establishment Clause jurisprudence and present no certworthy issue. Petitioner claims that the unanimous D.C. Circuit "usurped" this Court's authority when it concluded that *School District of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985), did not render the challenged program unconstitutional. But far from "overstep[ping] its bounds," Pet. at 2, the D.C. Circuit simply recognized that *Ball*'s core reasoning was rejected by *this* Court in *Agostini v. Felton*, 521 U.S. 203 (1997), and concluded that "the Supreme Court's more recent decisions upholding programs of true private choice, particularly *Zelman* . . . control this case."

Nor does petitioner's emphasis on the "discretionary" criteria for choosing AEAP grantees render this case certworthy. As the Court of Appeals recognized, the relevant question is not whether funding processes are "discretionary" but whether they are *neutral*. Only if facially neutral discretionary criteria are used to subtly favor religion (which petitioner did not allege here) is there constitutional concern. Petitioner's claim of a circuit split on this issue is unfounded, identifying only a 1986 case decided without this Court's recent guidance and footnote *dicta* in a case that did not decide an Establishment Clause issue.

Petitioner's attack on the modest $400-per-participant funding to AEAP grantees to recoup a portion of their administrative expenses is no more deserving of the Court's attention. Petitioner argues that while the statute forbids use of these funds for religious purposes, there are inadequate mechanisms to ensure that the restriction is followed. It is undisputed, however, that the amount of funding here is "much less" than the actual secular administrative costs grantees incur per participant. Further, there *are* significant mechanisms for restricting the use of these funds, including

the statutory prohibition and a requirement that grantees sign a specific assurance that the funds will not be used for religious activities. Finally, this case is an inherently flawed vehicle to resolve the extent of secular use restrictions needed to "safeguard" *actual* direct aid because these administrative grants flow from, and are intertwined with, the individual choices of AmeriCorps participants. In short, petitioner's argument on this issue represents a factbound challenge to the D.C. Circuit's application of existing law, on which petitioner alleges no circuit split.

I. THE DECISION BELOW IS A ROUTINE APPLICATION OF THIS COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE

A. Neutral Private Choice Programs Satisfy The Establishment Clause.

As this Court held in *Zelman v. Simmons-Harris*, "programs of true private choice," if neutral as to religion, do not have the "effect" of advancing religion because any religious indoctrination that might occur is not reasonably attributable to governmental action. 536 U.S. at 649. In *Zelman*, this Court upheld Ohio's tuition assistance program, which enabled qualifying families to use public funds to send children to participating schools. *Id.* Almost all recipients of this aid — 96% — enrolled in religious schools. *Id.* at 647. Nonetheless, because funds reached religious schools only through "genuine and independent private choice" within a neutral program, any religious indoctrination was not attributable to the government. This was so even though the vouchers would pay "for eligible students' instruction not only in secular subjects but in religion as well, in schools that can fairly be characterized as founded to teach religious doctrine and to imbue teaching in all subjects with a religious dimension." *Id.* at 687 (Souter, J., dissenting).

Zelman did not "mark[] a dramatic break" from this Court's "prior Establishment Clause jurisprudence." *Id.* at 663 (O'Connor, J., concurring). In *Zobrest v. Catalina*

Foothills School District, 509 U.S. 1, 10 (1993), this Court held that a State's provision of a sign interpreter to a deaf student attending a Catholic high school did not offend the Establishment Clause: "When the government offers a neutral service on the premises of a sectarian school as part of a general program that is in no way skewed towards religion, it follows under our prior decisions that provision of that service does not offend the Establishment Clause." *Id.* (internal quotation marks and citation omitted); *see also Witters v. Wash. Dep't of Servs. for Blind*, 474 U.S. 481, 488 (1986) (upholding vocational assistance to blind student desiring pastoral training because "[a]ny aid . . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients"); *Mueller v. Allen*, 463 U.S. 388, 399-400 (1983) (upholding tax deductions for tuition and expenses incurred by parents at secular and religious schools, reasoning that religious schools benefited "only as a result of numerous, private choices of individual parents" to enroll their children). Recently, citing these precedents, this Court found "no doubt" that the government could constitutionally include in a scholarship program students choosing to pursue even a degree in devotional theology. *Locke v. Davey*, 540 U.S. 712, 719 (2004). This Court unanimously recognized that under *Zelman* and its predecessors, "the link between government funds and religious training is broken by the independent and private choice of recipients." *Id.*; *see also id.* at 728-29 (Scalia, J., dissenting).

In a related line of cases, this Court has upheld neutral programs in which funding or in-kind aid is provided *directly* to religious schools, if restricted to secular uses. In *Agostini v. Felton*, 521 U.S. 203 (1997), for example, the Court sustained parochial school participation in the Title I program, explaining that funding does not offend the Establishment Clause "where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular

beneficiaries on a nondiscriminatory basis." *Id.* at 231. The Court reached a similar conclusion in *Mitchell v. Helms*, 530 U.S. 793 (2000), upholding a neutral program providing computers and other teaching aids to parochial schools.

Together, these two lines of cases demonstrate that, where religious organizations and individuals participate in a government program on an equal footing, there is no basis to infer, as petitioners properly frame the question, that religious indoctrination is "reasonably attributable" to the government. Pet. at 20 (citing *Mitchell*, 530 U.S. at 809). Moreover, the only time aid must even arguably be restricted to secular uses is where there is a direct provision of aid to a religious organization. Neutral benefits may be used even for core religious purposes if their direction to religious organizations is made by the unfettered choice of private individuals.

B. AEAP's Provision Of Education Awards To Participants Serving In Religious Schools Meets The Commands Of The Establishment Clause.

As established above, a neutral governmental aid program satisfies the Establishment Clause if the program *either* functions on the basis of private choice *or* involves secular use restrictions. The D.C. Circuit's analysis of the AEAP's provision of Education Awards to participants serving in religious schools clearly comports with these principles: the AEAP is manifestly neutral, distributes aid on the basis of private choice *and* rewards only secular activities.

The D.C. Circuit was correct in recognizing that both individual AEAP participants and AEAP grantees "are, and must be, chosen without regard to religion." Pet. App. at 7a. It is undisputed that the criteria for individual AmeriCorps participants to receive the award — 1700 annual hours of approved secular service, a high school diploma, a minimum age of 17, and U.S. citizenship or residency, *see* 42 U.S.C. § 12602 — are secular, neutral and objective. Indeed, the

statute expressly forbids consideration of religion in the selection of participants. *See id.* § 12635(c).

AEAP grantees, too, are selected based on manifestly secular criteria — Program Design, Organizational Capacity, and Budget/Cost Effectiveness. JA1555-56.[2] Petitioner thus repeatedly conceded below that "the Corporation's grant selection criteria are neutral." *See, e.g.*, Dist. Ct. Docket No. 42 (Petitioner's Motion for Summary Judgment at 42 n.6). As the D.C. Circuit saliently noted, "[petitioner] did not allege that the Corporation had . . . favor[ed] religious organizations, and it conceded at oral argument that there was no evidentiary support for such an allegation." Pet. App. at 9a.

Nor would the facts allow any claim of favoritism. In stark contrast to *Zelman*, the vast majority of grantees are secular; fewer than *11%* of AEAP participants served under the sponsorship of faith-based organizations in 2001.[3] *Cf. Zelman*, 536 U.S. at 655-68 (no endorsement even though 96% of participating students enrolled in religious schools). Moreover, the Corporation approves the vast majority of AEAP grantee applicants (85% from 1999 to 2002), leaving little leeway for "favoritism" of any kind. JA0750, 1480. Given these facts, the D.C. Circuit sensibly concluded that "the program is neutral." Pet. App. at 9a.

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[2] Petitioner now quotes selectively from the grantee selection criteria, emphasizing one subfactor which considers whether a prospective grantee has "[s]trong community partnerships, including well-defined roles for faith- or community-based organizations." Pet. at 3-4. Petitioner does not actually appear to claim that this criteria impermissibly favors religion, nor could it. *See Bowen v. Kendrick*, 487 U.S. 589, 604, 607 (1988) (upholding statute as neutral although grantees required to describe how they would involve religious organizations).

[3] JA1582. If the universe is narrowed to AEAP participants who serve as teachers, only 18% of the 3200 teaching participants in 2001 served in religious schools. JA0759.

Likewise, the D.C. Circuit found the AEAP a program of true private choice, reasoning that "[t]he relevant question is whether participants seeking to earn an Educational Award possess a genuine independent choice between religious and non-religious organizations in which to perform their national service." *Id.* The undisputed facts plainly establish that such a choice does exist. An individual interested in participating in AmeriCorps has a large variety of service options available to him, the vast majority of which are entirely secular in nature. For example, in fiscal year 2001, there were 77 grantees providing service opportunities through the AEAP, with an even larger number of options available through other AmeriCorps programs. JA0759. Only 328 of the approximately 1608 schools employing AmeriCorps participants as teachers in 2001 were religious schools. Pet. App. at 10a. Moreover, as the D.C. Circuit recognized, "there is no evidence of any participant who wanted to teach in a secular school, but was impermissibly channeled to a religious school." Pet. App. at 9a. Thus, because "enough non-religious options exist, those participants who choose to teach in religious schools do so only as a result of their own genuine and private choice." Pet. App. at 10a. Indeed, participants in the AEAP have, if anything, a far *more* "genuine" choice than students in the Cleveland voucher program seeking to leave a failing public school system. The Court in *Zelman* found that Ohio students had a genuine choice even though 82% of participating schools were religious, and 96% of scholarship participants enrolled in religious schools, compared to the 11% here. 536 U.S. at 658-60; *see also Mueller*, 463 U.S. at 401 (upholding program although 96% of tax deductions claimed were for children in private school).

While the neutrality and private choice that characterize the AEAP would establish the program's constitutionality even if funds were available for religious uses, *see Zelman*, 536 U.S. at 657-59, AEAP funds are in fact strictly limited to secular purposes. The statute forbids any Corporation funds,

including education awards and administrative grants, from being used "to provide religious instruction, conduct worship services, or engage in any form of proselytization." 42 U.S.C. § 12634(a); 45 C.F.R. § 2540.100(b). In addition, the 1700 annual hours of service credit required for an education award can only be earned through secular service. *See id.*; Pet. App. at 7a. This statutory and administrative scheme, strictly limiting AEAP funds to secular purposes, parallels those upheld in *Agostini* and *Mitchell*. *See Mitchell*, 530 U.S. at 849 (O'Connor, J., concurring in the judgment) (statute prohibited "the making of any payment . . . for religious worship or instruction") (internal quotation marks omitted; ellipsis in original); *Agostini*, 521 U.S. at 210 (Title I services must be "secular, neutral, and nonideological") (internal quotation marks omitted).

Finally, no government funds ever reach the schools at which AEAP participants teach. In fact, the flow of funds is in the opposite direction, as the schools pay participants for the services they provide, and the cost to schools of hiring AmeriCorps teachers is approximately equal to the salary the schools pay their other new teachers. JA0888. This is thus a far easier case than *Mitchell* or *Zelman*, where it was undeniable that religious schools received a tangible financial benefit because they received aid either from the government, *Mitchell*, 530 U.S. at 802, or from students who transferred the government's earmarked funds to religious schools for tuition, *Zelman*, 536 U.S. at 645-48. *Cf. Zobrest*, 509 U.S. at 10 (finding case "easier" than earlier decisions because "no funds traceable to the government ever find their way into sectarian schools' coffers").

In these circumstances, the Court of Appeals ruling was not only correct; a contrary holding would have run afoul of AEAP grantees' and participants' Free Exercise and Free Speech rights. Petitioner's position would require CNCS to cease all funding to otherwise qualifying AEAP participants solely because they choose — without public support — to engage in religious activity on their own time. This result

would require the government to single out for disparate treatment institutions with religious missions and persons who choose to put their faith into action through community service. Petitioner's position would thus require the government to affirmatively discriminate against religion in violation of the First Amendment. *See Zelman*, 536 U.S. at 649 (First Amendment forbids laws either "advancing or inhibiting" religion); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993) (Free Exercise Clause "protects religious observers against unequal treatment") (internal quotation marks and brackets omitted); *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) ("State power is no more to be used so as to handicap religions, than it is to favor them.").

C. A Reasonable Observer Would Not Believe That The AEAP Is Endorsing Religion.

Despite the neutrality and private choice inherent in the AEAP, petitioner claims that the program results in government indoctrination because "the young elementary and secondary parochial school students" are "not privy" to any "private choice" of their teachers in choosing an AmeriCorps program. Pet. at 16. But as this Court has repeatedly made clear, the program must be considered from the perspective of an "objective observer" "familiar with the full history and context" of the program — not the perspective of schoolchildren. *See, e.g., Zelman*, 536 U.S. at 655; *Capitol Sq. Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring in part) ("the endorsement inquiry is not about the perceptions of particular individuals.").[4]

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[4] Petitioner's reliance on *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 308 (2000), Pet. at 17, is plainly misplaced. While the Court began with an inquiry into what the audience would perceive, it immediately turned to whether the "text and history" of the challenged policy would accord with that perception, concluding that not only the

An informed observer would be aware that no religious activity counts toward AmeriCorps service hours, and that AEAP participants serving in religious schools have chosen that service from a host of options. Thus, the D.C. Circuit was correct in holding that "no 'objective observer familiar with the full history and context' of the program would believe that the aid flowing to the religious institution carries with it 'the *imprimatur* of government endorsement.'" Pet. App. at 7a (quoting *Zelman*, 536 U.S. at 655) (emphasis in original). Petitioner's argument that the D.C. Circuit erred in its application of that standard identifies no circuit split, and presents at most a factbound challenge to the Court of Appeals' application of existing law.

II. *BALL* PROVIDES NO SUPPORT FOR GRANTING THE PETITION

Petitioner argues that the Court of Appeals "cast aside this Court's governing decision" in *School District of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985), and thus ignored this Court's instruction in *Agostini*, 521 U.S. at 237, that Courts of Appeal should not declare precedent of this Court to have been overruled by implication. Pet. at 13. But the court below did not "choose" to "disregard" binding precedent because it determined for itself that the precedent had been eroded. Rather, it simply recognized that there was nothing left of *Ball* to "follow": The specific holding in *Ball* that arguably survived subsequent cases was concededly inapposite and *Ball's* broader doctrinal principles could not be "extended" to this case since all those principles had been *expressly* rejected by *this* Court. In short, the situation here involves nothing remotely comparable to the "implicit overruling" at issue in *Agostini* for two fundamental reasons:

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students' perception but also the policy's text and history led to a conclusion that prayer was "in actuality, encouraged by the school." 530 U.S. at 308.

(1) *Ball*'s central reasoning has already been *expressly* rejected by this Court, and (2) unlike in *Agostini*, which involved the precise program that this Court had previously addressed in *Aguilar v. Felton*, 473 U.S. 402 (1985), the AEAP program at issue here is fundamentally different than the Community Education program at issue in *Ball*.

Ball invalidated two programs: the "Shared Time" program, in which public school employees taught courses in parochial schools; and the "Community Education" program, in which religious school teachers taught supplemental secular courses in religious schools with public funding. 473 U.S. at 377. In *Agostini*, which involved public school employees on parochial school grounds, the Court expressly overruled the part of *Ball* that invalidated the "Shared Time" program, but had no occasion to specifically address *Ball*'s holding regarding the "Community Education" program.

The Court did, however, explicitly reject the core doctrinal "premises upon which [it] relied in *Ball*. . . ." *Agostini*, 521 U.S. at 226 — premises that underlay both *Ball*'s "Shared Time" and "Community Education" holdings. Thus, *Agostini* "abandoned the presumption erected in *Meek* and *Ball* that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion." *Id.* at 223. *Agostini* also "departed from the rule relied on in *Ball* that all government aid that directly assists the educational function of religious schools is invalid," *id.* at 225, "even if the aid reaches such schools as a consequence of private decisionmaking," *id.* at 222.

Mitchell, too, rejected *Ball*'s willingness to "presume" religious indoctrination. Thus, while *Ball* presumed that the pressures of the religious school environment would lead to an unacceptable risk that publicly funded teachers would inculcate religion even during supposedly secular instruction,

473 U.S. at 387, *Mitchell* refused to presume that religious school teachers would use secular educational materials provided by the government for religious instruction — notwithstanding a number of examples where such actual diversion occurred. 530 U.S. at 823-24 (plurality); *id.* at 857-58 (O'Connor, J., concurring in the judgment).

Because this Court has rejected the logical underpinnings of *Ball*, lower courts are not authorized, much less obligated, to apply that logic to other programs. Even if *Ball*'s holding regarding the Community Education program itself continues to be binding, there is no surviving principle to apply in other contexts. *Cf. Agostini*, 521 U.S. at 237 (cautioning that if a Supreme Court precedent had "*direct application*," lower courts should "follow the case which *directly controls*") (emphasis added; internal quotation marks omitted). It is thus unsurprising that not only the unanimous D.C. Circuit, but even the District Court, rejected petitioners' reliance on *Ball*. Pet. App. at 6a; 39a n.11.

Reliance on whatever is left of *Ball* would in any event be entirely inappropriate given the fundamental differences in the Community Education program and the AEAP. Any benefit to religious schools from the AEAP comes only as a result of individual choices by AEAP participants to provide service in a religious school from an array of service opportunities. The Community Education program, in contrast, involved a government-created curricula taught by religious school teachers paid exclusively by the government for their teaching duties in those courses. 473 U.S. at 376-79. The program was clearly not neutral, because, as petitioner's law firm cogently explained in *Mitchell*, "the state gave hiring preferences to religious school teachers, which violates the dictates of neutrality." *Reply Brief* of Petitioners in *Mitchell*, 1999 WL 1016734, at *11 n.8 (Nov. 3, 1999); *Ball*, 473 U.S. at 377. Further, of the 41 schools where the Community Education program operated, 40 were identifiably religious schools. *Ball*, 473 U.S. at 377. *Ball* thus held that the Community Education program constituted

direct aid "indistinguishable from the provision of a direct cash subsidy to the religious school." *Id.* at 395; *see also Zobrest*, 509 U.S. at 12 (*Ball* involved "direct grants of government aid").[5]

Petitioner itself apparently recognizes that the analogy between the AEAP and the Community Education program proves too much. *Ball* held that the Community Education faculty could not teach *secular* courses in parochial schools, but petitioner has not argued that the Establishment Clause prevents AEAP participants from teaching secular courses in religious schools. Dist. Ct. Docket No. 62 (Plaintiff's Proposed Order, at 1-2); Petitioner's Appellate Brief, at 2. As this reflects, petitioner's procrustean effort to squeeze the remnants of *Ball* into this case produces an absurd and inconsistent rule. That is, post-*Agostini*, it is clear that full-time *public employees*, like the public school teachers in the Shared Time program and in *Agostini*, can teach at religious schools without violating the Establishment Clause. If *Ball*, as modified by *Agostini*, truly does provide relevant guidance here, this necessarily means that the government would be in a *better* position if it used full-time public school teachers, instead of AmeriCorps participants employed by the religious schools, to conduct the religious instruction challenged here. This, of course, makes no sense and is completely at odds with petitioner's premise that AmeriCorps participants are analogous to public employees

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[5] The same is true of the "salary supplement" in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which Petitioner attempts to analogize. Pet. at 16. Unlike the AEAP program, which rewards a wide variety of secular service in programs chosen by individuals, the "salary supplement" struck down there was targeted specifically to increasing the salaries of teachers at private schools, and Roman Catholic schools were the sole beneficiaries of the legislation. *See* 403 U.S. at 615. Moreover, the program was struck down as producing an "excessive entanglement" of church and state, a ground Petitioner does not press here. *Id.* at 619-20.

and, for that reason, *cannot* engage in religious instruction on their own time.

In the end, *Ball* offers no grounds whatever for granting review here. Neither of the courts below expressed any uncertainty or need for guidance from this Court regarding *Ball*'s application, nor has petitioner identified any other court that has done so. Moreover, this case would not be an appropriate vehicle for addressing the continuing vitality of *Ball* — indeed, given the fundamental differences in this program and the Community Education program in *Ball*, this case would present no occasion for the Court to revisit the continuing force of *Ball*'s Community Education holding. Despite petitioner's efforts to cast *Ball* as key, as the D.C. Circuit unanimously recognized, it is in fact the Court's decisions upholding neutral programs of true private choice that "control this case." Pet. App. at 6a-7a.

III. REVIEW IS UNWARRANTED TO ADDRESS THE SIGNIFICANCE OF DISCRETION IN GOVERNMENT AID PROGRAMS

Petitioner urges this Court to grant certiorari to "clarify" whether government grant programs involving discretionary criteria "can be considered programs of 'private choice.'" Pet. at 17. But petitioner has not demonstrated any need for "clarification" of this issue — it simply disagrees with the Court of Appeals' treatment of it. In fact, the D.C. Circuit's unanimous conclusion that such discretion was not constitutionally problematic absent evidence that it had been used to favor religious organizations is mandated by this Court's precedents. Moreover, petitioner's claim of a circuit split on the issue is unfounded.

A. The Decision Below Is Consistent With This Court's Precedents.

Far from "conflict[ing] with this Court's precedent," Pet. at 18, the Court of Appeals' decision on this point is in fact entirely consistent with and compelled by that precedent. Every government program subject to fiscal sanity "restricts"

where the public money may go, and the selection criteria typically involve substantial government discretion. In the voucher program upheld in *Zelman*, for example, Ohio Revised Code § 3313.976(A)(3) required that to participate in the voucher program, a private school must "meet[] all state minimum standards for chartered nonpublic schools . . . except that the state superintendent *at the superintendent's discretion* may register nonchartered nonpublic schools meeting the other requirements of this division." (emphasis added). Even apart from this manifestly discretionary exception to the usual "state minimum standards," those "minimum standards" themselves were full of discretionary criteria.[6]

As the Court of Appeals recognized, Pet. App. at 8a, the same principle is illustrated by *Bowen*, 487 U.S. at 589. The award of grants there was highly discretionary — for example, funded projects were required to "'use such methods as will strengthen the capacity of families to deal with the sexual behavior, pregnancy, or parenthood of adolescents . . .'" *Id.* at 596 (quoting 42 U.S.C. § 300z-2). It was also highly competitive — HHS received 1,088 grant applications and awarded only 141 grants, including some to "organizations with institutional ties to religious denominations." *Id.* at 597. The Court nonetheless rejected an Establishment Clause challenge, as there was no suggestion that the Act was "anything but neutral with respect to the grantee's status as a sectarian or purely secular institution." *Id.* at 608; *see also, e.g., Witters*, 474 U.S. at 483 (assistance for the blind to help "obtain the maximum degree of self support and self care," and limited to

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[6] *See, e.g.*, Ohio Admin. Code § 3301-35-06(A) ("Educational programs and experiences shall be designed and implemented to provide a general education of high quality for all students."); *id.* § 3301-35-05(B) ("The district or school shall maintain an environment that supports personal and organizational performance excellence.").

accredited schools) (internal quotation marks omitted); *Mitchell*, 530 U.S. at 803 (to receive materials, private school had to submit application "detailing which items the school seeks and how it will use them," which application could be disapproved by public agency).

Avoiding these examples of clearly constitutional yet discretionary programs, petitioner quotes the *Mitchell* plurality for the truism that "'if numerous private choices, rather than the single choice of a government, determine the distribution of aid pursuant to neutral eligibility criteria,'" then the danger of religious favoritism is diminished. Pet. at 19 (quoting *Mitchell*, 530 U.S. at 810). But here "numerous private choices" *do* "determine the distribution of aid pursuant to neutral eligibility criteria." Petitioner apparently believes that the private choice of AEAP participants is somehow invalidated because that choice is limited to "select" grantee programs approved by the government. Pet. at 19. But what is required is that private choice be "genuine," not that it be "universal."[7] As noted, *all* of the aid programs upheld by this Court limited the use of public money to those eligible participants selected by the government.

Nor is there any basis for petitioner's apparent view that "subjective" criteria are necessarily more manipulable than "fixed, mechanical criteria." Pet. at 18, 20. In *Zelman*, for example, four dissenting Justices argued that the program there had been subtly skewed by imposition of an "objective" $2,500 cap on tuition that would tend to favor religious schools due to their lower average cost. 536 U.S. at 705 (Souter, J., dissenting). The question is not whether a

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[7] It also bears noting that while service with approved grantee programs has been the prevailing practice, the governing statute specifically contemplates that education awards can be awarded for individual service in any program that would satisfy statutory requirements, even if it has not applied for an AmeriCorps grant. 42 U.S.C. § 12573.

government aid program's criteria are "subjective" or "objective," but whether they favor religion. Indeed, under petitioner's radical invalidation of all programs containing "discretion," no state university could award a scholarship to a religious studies student on the basis of discretionary criteria such as "academic excellence" and religious grantees would be entirely foreclosed from a host of grant programs.

Petitioner argues that the Court of Appeals placed on it "a burden that is unprecedented in Establishment Clause jurisprudence" to "show the government was intentionally discriminating in favor of religious groups." Pet. at 19-20. But, as the decision below recognizes, federal courts cannot simply enjoin presumptively constitutional federal programs on the mere *possibility* that discretionary criteria could be employed to favor religious organizations. Just as it is impermissible to "presume" that public employees teaching on religious school grounds will depart from the program's secular requirements, *see Agostini*, 521 U.S. at 223-24, a court cannot presume that the Corporation's employees will violate their statutory duties and skew the AEAP towards religious grantees. *See Mitchell*, 530 U.S. at 858 (O'Connor, J., concurring in the judgment) (explaining the "broad[] proposition that . . . presumptions of religious indoctrination are normally inappropriate when evaluating neutral school aid programs under the Establishment Clause"); *Agostini*, 521 U.S. at 229 (criticizing the dissent's reliance on "speculation . . . and not on any evidence in the record"); *cf. National Endowment for Arts v. Finley*, 524 U.S. 569, 587 (1998) (challenge to discretionary funding program as involving viewpoint discrimination rejected absent any allegation of discrimination in a particular funding decision).

Petitioner argues that the remand in *Bowen* indicates that the Court is "concerned about . . . using government funds to indoctrinate religion" even "when neutral criteria are used to select beneficiaries." Pet. at 20. That may well be true, but it lends no support to petitioner's altogether different contentions that *discretionary selection* programs are not

neutral and that the *government* has the *burden* of establishing the neutrality of such programs. Indeed, even with respect to the entirely separate question of whether the neutrally-selected grantee uses the public funds for religious purposes, the *Bowen* remand was for "consideration of the evidence presented by *appellees*" — the parties challenging the funding. 487 U.S. at 621 (emphasis added). Thus to the extent that this aspect of *Bowen* has any relevance, it supports the fundamental proposition that a party raising an Establishment Clause challenge has the burden of proving it, and is thus perfectly consistent with the Court's later decision in *Mitchell* that, where a statute is facially neutral, those challenging a government aid program "must prove" actual diversion of government aid. *See* 530 U.S. at 857 (O'Connor, J., concurring).

In any event, the "burden" issue is a red herring because petitioner did not even *allege* religious favoritism in the grantee selection process, and *conceded* that there was "no evidentiary support for such an allegation." Pet. App. at 9a.[8]

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[8] Petitioner now observes that the six faith-based AEAP grantees in 2004 all happen to be affiliated with Christian faiths, Pet. at 21, but there is no evidence that any programs affiliated with non-Christian faiths even applied for participation, or any *claim* that the Corporation discriminated *among* religions. Petitioner also neglects to consider non-Christian religious organizations in other AmeriCorps programs. Moreover, at least one host site served by a grantee is a non-Christian religious school. *See* Dist. Ct. Docket No. 78, Ex. 2 (AmeriCorps participant taught secular subjects at an Islamic school). In any event, the question is not whether every religion is represented under the AEAP but, instead, whether participants have a genuine choice between secular and religious grantees with which to serve. *Cf. Zelman*, 536 U.S. at 658 ("The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school.").

B. There Is No Circuit Split.

In a futile attempt to demonstrate a circuit split, petitioner cites decisions from the Eighth and First Circuits. The former, a decision from 1986, relied on outmoded reasoning and is inapposite on the crucial facts, while the latter did not even purport to resolve an Establishment Clause challenge. Tellingly, petitioner did not, in its D.C. Circuit briefing, see fit to even cite these cases, which were mentioned only by an amicus brief.

In *Stark v. St. Cloud State University*, 802 F.2d 1046 (8th Cir. 1986), the court held that a public university could not allow students to fulfill their student teaching requirements by teaching secular subjects at religious schools. The court did not consider or discuss the significance of government "discretion." Instead, relying on *Ball*, the court reasoned that the provision of even indirect aid to religious schools did not "neutralize the symbolic link between the state and the church" and noted "[a] significant danger . . . that the University students will, intentionally or inadvertently, inject religious tenets into their teaching." *Id.* at 1051-52. Yet, subsequent to *St. Cloud*, *Agostini* explicitly rejected these "premises" upon which *Ball* and *St. Cloud* rested. *See supra* at 15. As such, as the North Dakota Attorney General has noted, *Stark* is a "mere survivor of obsolete constitutional thinking." Formal Op. 2002-F-05, 2002 WL 562573, at *8 (N.D.A.G. March 8, 2002) (internal quotation marks omitted).[9]

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[9] Even if such reasoning had not been declared "invalid" by *Agostini*, 521 U.S. at 226, the *Stark* decision rested on facts readily distinguishable from those here. St. Cloud University not only approved teaching sites, it "exercise[d] the power of final approval over every student placement," 802 F.2d at 1051. Moreover, by enlisting parochial schools in a public university's own teacher training, the program there made parochial schools "repositories of state trust," *id.*, quite unlike the much more attenuated relationship of parochial schools to the AEAP. Further, use of

Petitioner's citation to *Eulitt v. Maine Dep't of Educ.*, 386 F.3d 344 (1st Cir. 2004), is even more misplaced. That case did not purport to resolve an Establishment Clause issue, simply calling it "fairly debatable" whether public tuition for selected students attending private schools is permissible where the program was "substantially narrower" than in *Zelman* and depended on an "individualized assessment" of the appropriate pupil placement, *id.* at 349 n.1, features with no parallel here. Thus, even assuming *Eulitt* suggests that the role of discretionary criteria is "debatable," that debate has not yet occurred in the lower courts.

Indeed, the only other Circuit decision to meaningfully discuss the role of "discretion" in assessing compliance with the Establishment Clause is squarely in agreement with the decision below. In *Freedom from Religion Foundation, Inc. v. McCallum*, 324 F.3d 880 (7th Cir. 2003), a taxpayer sought to enjoin correction authorities from including a religiously-oriented halfway house among the options for parolees, where parole officers could and did recommend specific facilities. The Seventh Circuit unanimously upheld the program, finding it analogous to *Zelman*. Although parole officers' recommendations of a halfway house rested on discretionary judgments, the Seventh Circuit emphasized that the trial court had not found actual religious favoritism, and that striking down the funding without such a showing would lead to a "perverse . . . result" because it would "sacrifice . . . a real good to avoid a conjectured bad." *Id.* at 884. Contrary to petitioner's claim, this "perverse result"

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the parochial schools as teaching sites triggered payments from the University to those schools, with "no limitations on the schools' use of this money." *Id.* at 1048. In contrast, the religious schools here receive no funding from the government and AmeriCorps participants only serve at those schools after choosing from among a wide array of secular and religious options.

has not been embraced by any Circuit, and this Court's review is unwarranted.

IV. THE COURT OF APPEALS' DECISION UPHOLDING THE MODEST ADMINISTRATIVE GRANTS DOES NOT WARRANT REVIEW

There is no merit to petitioner's contention that the D.C. Circuit improperly applied this Court's precedent concerning reimbursement to religious groups for the costs of administering a government sponsored program. The D.C. Circuit's unanimous decision on this issue is a proper application of this Court's precedents, and petitioner alleges no circuit split. The question does not merit review.

The Court has upheld numerous programs where aid is provided on a neutral basis to religious institutions and statutory and administrative restrictions require that the funds be used only for secular activities. *See, e.g.*, *Mitchell*, 530 U.S. at 831, 835; *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 648-49 (1980); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 759 (1976); *Hunt v. McNair*, 413 U.S. 734, 736 (1973); *Tilton v. Richardson*, 403 U.S. 672, 679-82 (1971). Of particular relevance here, in *Regan*, the Court upheld a state statute providing "direct cash reimbursement" to religious and secular schools for the costs of complying with various state testing requirements. 444 U.S. at 657. The Court was untroubled that the reimbursements involved cash, noting that it "'has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its resources on religious ends.'" *Id.* at 658 (quoting *Hunt*, 413 U.S. at 743). The Court of Appeals concluded that *Regan* "controls this aspect of the case." Pet. App. at 12a. Like the reimbursements in *Regan*, the $400 grants here "reimburse grantees for a portion of the costs they incur when complying with various AmeriCorps requirements." Pet. App. at 11a.

Petitioner seeks to distinguish *Regan* on two grounds, neither of which is persuasive or certworthy. First, petitioner argues that while *Regan* involved "reimbursement of state-mandated testing," what is at issue here is not reimbursement, but "aid." Pet. at 24. This assertion is simply baffling. It is undisputed that the $400 reimburses grantees for a portion of the extra costs imposed by the government in implementing the programs. As the Court of Appeals noted, "detailed AmeriCorps guidelines require, among other things, that grantees train participants, provide them with adequate supervision by qualified supervisors, keep various records, and make regular reports to the Corporation." Pet. App. at 11a. And while the reimbursement in *Regan* put participants in the "same position" they would have been absent a government testing requirement, Pet. at 24, the $400 per participant program here leaves AEAP grantees in a *worse* position, as $400 is "much less" than grantees' administrative expenses. Pet. App. at 12a. In any event, to the extent that the Court of Appeals' characterization of these funds as "reimbursement" was somehow misguided (which it was not), the point presents a factbound question of interest only to the present case and not meriting this Court's review.[10]

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[10] It is also constitutionally irrelevant that the schools in *Regan* had their expenses imposed on them by the state while AmeriCorps grantees such as Notre Dame have an initial choice as to whether to participate in AmeriCorps. Religiously affiliated organizations such as Notre Dame have a First Amendment right to participate equally with secular grantees in neutral government programs, and denying reimbursement to such organizations for mandated costs while providing it to secular ones would offend that command. *See, e.g.*, *Mitchell*, 530 U.S. at 795 (Establishment Clause prohibits "disfavor[ing] religion"); *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) ("The government may not . . . impose special disabilities on the basis of religious views or religious status.").

Petitioner's second effort at distinguishing *Regan* focuses on the reporting and auditing requirements in place there and argues that the AEAP program lacks comparable restrictions. The Court of Appeals concluded that the small amount of the reimbursement as compared to the amount of administrative expenses would render such auditing "senseless" here, Pet. App. at 12a, — a conclusion that petitioner apparently views as too practical to be correct.

Here, as noted, there are both statutory and administrative prohibitions against diverting the $400 stipend to religious uses. The statute clearly provides that no Corporation funds may be used "to provide religious instruction, conduct worship services, or engage in any form of proselytization." 42 U.S.C. § 12634(a). Moreover, all AEAP grantees are required to sign a specific assurance that they will "ensure that no assistance made available by the Corporation will be used to support any . . . prohibited activities," including religious activities. JA0752-53, 0866, 0869. And all grantees at issue here have attested that no funds were so used. JA0721, 0723-24, 0887-89, 1068-69.

Nothing in *Regan* or the Court's other cases suggests that the government is constitutionally obliged to further "guarantee" adherence to such secular use restrictions by engaging in a burdensome and time-consuming audit where, as here, the modest administrative stipend does not come close to reimbursing the grantees for the government-imposed program costs. Nothing in the Court's precedent suggests that the "safeguards" used in *Regan* were the *exclusive* method for preventing direct aid from being diverted to religious use.

Apparently recognizing this, petitioner attacks a strawman. It says that there is a "*possibility*" that the opinion below "*implicitly* endorsed a rule of proportional financing," under which government funds can be spent for explicitly religious purposes, such as "religious pamphlets," as long as the total funding is less than the total secular

portion of the funded activity. Pet. at 23 (quoting Ira C. Lupu & Robert W. Tuttle, *Legal Analysis*, posted on the Roundtable on Religion & Social Welfare Policy, *available at* http://www.religionandsocialpolicy.org/legal/legal_update.cfm?id=34) (emphasis added). But the opinion below did not remotely endorse any such sweeping rule, implicitly or otherwise. It simply held, again, that it would be senseless to mandate an audit to merely confirm that the government-mandated costs exceed $400 per student where, as here, there are statutory and enforcement prohibitions against diverting that money to religious uses. It never held that such an administrative audit was unnecessary where there are no secular use restrictions, much less that religious uses are *permissible* if the public aid is less than the government-imposed costs. Thus, petitioner's attempt to hypothesize how the narrow holding below would play out if applied in *Bowen* — where the funding was not even arguably "reimbursement" and where there was *no* express statutory restriction of the funding to secular uses — is entirely beside the point. *See* Pet. at 23.

The other cases cited by petitioner, Pet. at 22 n.6, provide no assistance in evaluating whether auditing is required in this situation. *Roemer upheld* a program that featured both a "statutory prohibition against sectarian use and . . . administrative enforcement of that provision," *Roemer*, 426 U.S. at 759, which in no way suggests the statutory prohibition and grantee assurances here would be inadequate. *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), is entirely inapposite, because, as even the District Court recognized, "*Nyquist* does not govern neutral educational assistance programs." Pet. App. at 51a n.18 (quoting *Zelman*, 536 U.S. at 641). *Nyquist* was a *preferential* program designed to "provide desired financial support for nonpublic, sectarian institutions," *Zobrest*, 509 U.S. at 12-13 (internal citations omitted), and the aid was made without *either* statutory restrictions *or* administrative

monitoring to prevent the use of government funds for sectarian purposes. *See Nyquist*, 413 U.S. at 774.

Similarly undeserving of review is petitioner's argument that the Court of Appeals "improperly placed the burden of proof on AJC to show that the amount of the aid in fact exceeded the secular administrative costs of maintaining the program." Pet. at 25. As an initial matter, such a conclusion would be entirely consistent with this Court's precedents, which make clear that in direct aid cases, where funds are provided on a neutral basis and are restricted to secular uses, it is plaintiff's burden to prove *substantial, actual* diversion of government grants to religious activities. *Mitchell*, 530 U.S. at 864 (O'Connor, J., concurring in the judgment); *see also Hunt*, 413 U.S. at 744.

In any event, here too, this case would be an inappropriate vehicle for addressing the "burden of proof," given that AJC did not even *allege*, and produced "no evidence," that the $400 grants exceeded the programs' secular administrative costs. Pet. App. at 12a. The Court of Appeals did not rest on the mere "assumption," Pet. at 21, that the grants would exceed the grantees' administrative costs, it noted the *affirmative undisputed* evidence showing that very fact. Pet. App. at 12a.

Finally, while the Court of Appeals analyzed the $400 grants as direct aid under *Regan*, it did not address the arguments of the Corporation and Notre Dame that the grants were properly viewed instead as indirect funding which "reach[es] religious institutions only by way of the deliberate choices of numerous individual recipients." *Zelman*, 536 U.S. at 652. Here, unlike in the typical direct aid case, the administrative grants must be viewed as a product of private choice because they are intertwined with the education awards paid to individual students as a result of individual choices to serve through the ACE program. *Cf. McCallum*, 324 F.3d at 882 (parolee benefits analogous to vouchers even though state dispensed with "intermediate step" of giving

voucher to individual). Thus, this case does not even squarely present a question concerning the secular use safeguards required for true direct aid. And, to reach that question, the Court would first have to resolve the antecedent issue of whether aid to institutions stemming directly from private individual choice is judged by a different standard — an issue never reached by the court below.[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MARY BETH YOUNG
JONES DAY
325 John H. McConnell Blvd.
Suite 600
Columbus, Ohio 43215
(614) 469-3939

STEPHEN J. BROGAN
MICHAEL A. CARVIN
(Counsel of Record)
SHAY DVORETZKY
JOHN L. CHANEY
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Respondent University of Notre Dame

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[11] Finally, it should be noted that petitioner lacks standing to bring this action because it is not challenging an exercise of Congress' taxing and spending authority, but instead only action by the Executive Branch, which falls outside the very limited realm of cases permitting taxpayer standing. *See, e.g., In re United States Catholic Conference*, 885 F.2d 1020, 1028 (2d Cir. 1989); *Fordyce v. Frohnmayer*, 763 F. Supp. 654, 657 (D.D.C. 1991); *see also* University of Notre Dame's Appellate Brief, at 8-10. While this argument was rejected below, *see* Pet. App. 4a-6a, it will be necessary to resolve this jurisdictional issue if certiorari is granted.