ORAL ARGUMENT SCHEDULED FOR JANUARY 14, 2005

Case Nos. 04-5317, 04-5318

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE
Defendant-Appellant,

UNIVERSITY OF NOTRE DAME
Defendant-Intervenor-Appellant

v.

AMERICAN JEWISH CONGRESS
Plaintiff-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT UNIVERSITY OF NOTRE DAME

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties and Amici. In the proceedings before the district court, the American Jewish Congress was the plaintiff, the Corporation for National and Community Service was the defendant, and the University of Notre Dame was defendant-intervenor. The Becket Fund For Religious Liberty participated as *amicus curiae* in the proceedings below. In the proceedings before this Court, the Corporation for National and Community Service and University of Notre Dame are the appellants and the American Jewish Congress is the appellee.

2. Rulings Under Review. The rulings under review are the district court's July 2, 2004 Memorandum Opinion and Order granting summary judgment (JA0031, JA0033), the district court's August 5, 2004 Order Granting Injunctive Relief (JA0080), and the district court's August 31, 2004 Memorandum Opinion and Order ruling on defendant/appellant Corporation for National and Community Service's Motion for Clarification (JA0083). Each ruling was made by the Hon. Gladys Kessler. The official citation for the district court's Memorandum Opinion is 323 F.Supp.2d 44 (D.D.C. 2004).

3. Related Cases. This case has not previously been before this Court or any other court, except the district court below.

Dated: October 14, 2004.

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RULE 26.1 DISCLOSURE STATEMENT

Defendant-Intervenor-Appellant University of Notre Dame is a private university. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

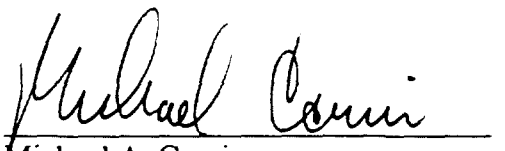

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

GLOSSARY

ACE	Alliance for Catholic Education
AEAP	AmeriCorps Education Awards Program
AJC	American Jewish Congress
CNCS	Corporation for National and Community Service
CNVS	Catholic Network of Volunteer Services
NDSUF in Opp.	Defendant-Intervenor University of Notre Dame's Statement of Undisputed Facts in Opposition to Plaintiff's Motion for Summary Judgment

STATEMENT OF JURISDICTION

Pursuant to 28 U.S.C. § 1331, the district court had subject matter jurisdiction over this civil action. The court entered summary judgment in favor of plaintiff American Jewish Congress ("AJC") on July 2, 2004 and granted injunctive relief on August 5, 2004. JA0031, 0033, 0080. Appellant Notre Dame filed a timely notice of appeal on September 1, 2004. JA0092. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. However, as explained fully at *infra* 8-10, AJC does not satisfy the requirements for taxpayer standing.

STATEMENT OF ISSUES

1. Whether the Corporation for National and Community Service's neutral provision of AmeriCorps education awards to participants who provide 1700 annual hours of approved secular service, the vast majority of which go to individuals serving in secular programs, violates the Establishment Clause because it fails to discriminatorily exclude participants who choose to serve in religiously affiliated schools and, on their own time and without federal funding, pray or attend Mass with students or engage in religious instruction.

2. Whether the Corporation for National and Community Service's neutral provision of modest grants for use in administering AmeriCorps programs, the vast majority of which go to secular grantees, violates the Establishment Clause because it fails to discriminatorily exclude religiously-affiliated grantees, even though the statute and regulations forbid using such funds for religious purposes and grantees must certify that they comply with that restriction.

3. Whether the district court's injunction violates the Free Exercise Clause and Free Speech Clause of the First Amendment by requiring the Corporation for National and Community Service to discriminate against religious grantees and against individuals who wish to engage in unfunded religious activities while providing secular AmeriCorps service, and by

singling out a specific religious for sectarian discrimination by enjoining funding of AmeriCorps participants who "attend[] Mass with students."

4. Whether the district court erred in enjoining Corporation for National and Community Service funding to all recipients providing religious instruction and all grantees with whom such recipients serve, rather than tailoring the injunction to remedy the identified, alleged constitutional violations.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are contained in an addendum bound to this brief.

STATEMENT OF FACTS AND OF THE CASE

The University of Notre Dame's ("Notre Dame") Alliance for Catholic Education ("ACE") is a graduate education program that also meets the needs of some our country's most underserved schools. During the school year, ACE participants teach subjects including science, mathematics, foreign languages, English, social sciences, and religion in needy Catholic schools. JA0887-88, 1096, 1137, 1155-56. ACE does not require participants to teach religion. JA1105, 1113. The only requirement is that ACE participants be willing to provide instruction to students attending a Catholic school. JA0887-88.

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. JA0888. 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). The statute includes "a church or other religious entity" as one of several types of organization eligible to craft a program with qualifying national service positions. 42 U.S.C. § 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 (1996); JA0748-49. AEAP funds a variety of initiatives, including 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. These grantees placed teachers in approximately 1608 elementary and secondary schools, of which only 328, or 20%, were religious schools. JA0759.

The funding provided under AEAP consists of two components. JA0748. 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; JA0889. 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 (approximately $62,000) in such grants, which represents less than 3% of ACE's annual budget. JA0888-89, 1142-43, 1168.

Both types of AEAP funding come with detailed restrictions on their availability and use. Federal statutes and regulations and AmeriCorps 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); JA1067, 1098, 1149, 1453, 1490. In addition, AmeriCorps education awards can be used only to fund post-secondary education, to repay student loans, or to pay expenses of an approved school-to-work program. 42 U.S.C. § 12604(a); 45 C.F.R. § 2528.10. Education awards are disbursed to the qualifying college, school-to-work program, or loan provider designated by the participant. *See* 45 C.F.R. §§ 2528.20, 2528.30, 2528.60.

Similar restrictions govern the University's use of AmeriCorps grants. Notre Dame is prohibited from using any portion of a 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, with the exception of minimal amounts used to fund the attendance of ACE staff at secular CNCS conferences, uses the funds solely to help pay the salaries of faculty members who engage in secular instruction of ACE participants. JA0887-89, 1068-69, 1143.

However, the regulatory scheme takes care not to restrict private conduct unnecessarily. AmeriCorps participants, applicable grant provisions instruct, "may exercise their rights as private citizens and may 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. However, "the AmeriCorps logo should not be worn while doing so." *Id.*

Both the Corporation and Notre Dame take extraordinary care to ensure that these rules are followed. JA0891-92. All 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 formal training on the rules regarding prohibited activities. JA0753, 0758, 1493, 1532, 1559. Grantees must review participants' timesheets to ensure that no time spent in religious activity is included. JA1505, 1544; *see also* JA0892, 1099, 1110-11, 1151. 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. In addition, 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. The Corporation conducted 37 such site visits in 2002, amounting to more than ten percent of the approximately 328 parochial schools in the AmeriCorps Program. JA0755-56, 059. After a site visit, the Corporation sends the grantee a written report addressing strengths and weaknesses, including issues requiring follow-up. JA0622-23, 0882-85, 1215. Each grantee is required to submit to the Corporation an annual progress 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, 1110-11, 1140, 1149, 1151-52, 1453, 1460. 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, 1140, 1149, 1152, 1453. In addition, Notre Dame personnel visit the sites where participants are serving to monitor compliance. JA0891-92, 1453. Every ACE participant receives at least four such site visits each calendar year. *Id.* ACE requires participants to complete time logs that are

reviewed and signed by the participant and the site supervisor and that emphasize that religious activity may not be included. JA0892, 0939, 1099, 1460. Moreover, Notre Dame removes incentives for ACE participants to improperly record time by providing participants who do not achieve the 1700-hour secular service requirement a scholarship equal to the $4725 AmeriCorps award. JA1113, 1159.

Despite the care taken to ensure that no AmeriCorps funds are used for religious purposes, AJC filed this action against CNCS on October 3, 2002, advancing a single count under the Establishment Clause and seeking declaratory and injunctive relief. Notre Dame intervened as defendant. Following discovery, the district court granted AJC's motion for summary judgment and denied Notre Dame's and the Corporation's cross-motions for summary judgment. The District Court then entered a sweeping injunction, which it later stayed pending this appeal.

SUMMARY OF ARGUMENT

AJC lacks standing to maintain this action because, by its own account, it is not challenging an exercise of Congress's taxing and spending authority, but only action by the Executive Branch, and thus falls outside the very limited realm of cases permitting taxpayer standing.

On the merits, the district court enjoined significant aspects of the AEAP on the ground that simply allowing individuals who provide secular service in a religious school to participate on equal footing with other AmeriCorps participants results in governmental indoctrination of religion. This is so even though not a single penny of federal money is provided either to AmeriCorps participants for any time spent in religious activity or to the religious schools at which they teach.

This result flies in the face of a consistent line of Supreme Court cases upholding substantial government aid to religious schools in a variety of contexts. The Court has repeatedly held that religious indoctrination cannot be attributed to the government where aid is provided neutrally and reaches religious coffers only as a result of private choices, even if the public funds are available for religious uses. Moreover, the Court has upheld the provision of secular assistance to religious organizations as part of a neutral program, even without relying on private choice.

The AmeriCorps program is plainly constitutional under these precedents. The AmeriCorps program allocates aid on the basis of neutral criteria that neither favor nor disfavor religion. Education awards are available for service in a broad array of positions (most of which are entirely secular), and participants serve in religious schools only as a result of private choice. Moreover, although the Establishment Clause does not require it, applicable statutes and regulations forbid the use of any AmeriCorps funds for religious purposes, and no time spent in religious activities may be counted toward the required 1700 service hours.

Similarly, the government's award of a modest grant to Notre Dame to help defray the ACE program's administrative costs also does not violate the Establishment Clause. The grants are awarded only to offset program costs that result from private choices to participate in the program. Moreover, the statute forbids their use for religious purposes, grantees must certify that they will comply with that restriction, and there is no evidence that the restriction has been violated. The district court also failed to tailor the relief to the identified violations.

Finally, as reflected in its sectarian discrimination against attendance at "Mass," the court's injunction violates the Free Exercise and Free Speech rights of AmeriCorps participants

and grantees by discriminatorily excluding them from a neutral aid program solely because they wish to voluntarily pursue their religious practice and beliefs.

ARGUMENT

I. Plaintiff Lacks Standing To Challenge The Corporation's Funding Decisions

In general, a plaintiff asserting only his status as a taxpayer lacks standing to sue in federal court to challenge the constitutionality of a congressional enactment. *See Frothingham v. Mellon*, 262 U.S. 447, 486-87 (1923). A taxpayer generally cannot allege the requisite "direct injury" because an individual's "interest in the moneys of the Treasury . . . is comparatively minute and indeterminable" and "the effect upon future taxation of any payment out of the [Treasury's] funds . . . [is] remote, fluctuating and uncertain." *Id.* at 487.

The Supreme Court has created a limited exception to this general rule and has allowed taxpayer standing for Establishment Clause claims against exercises of congressional authority under the taxing and spending power of Article I, § 8 of the Constitution. *See Flast v. Cohen*, 392 U.S. 83, 98 (1968); *see also Bowen v. Kendrick*, 487 U.S. 589, 620 (1988) (taxpayer standing for Establishment Clause challenge to "how the funds *authorized by Congress* are being disbursed *pursuant to the . . . statutory mandate*") (emphasis added). But where the challenge is not to "an enactment under Art. I, § 8," but rather to an "action of the Executive Branch," the generalized bar against taxpayer standing applies in full force. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 228 (1974); *see also Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 479 (1982).

Numerous courts have rejected plaintiffs' attempts to invoke taxpayer standing to challenge decisions by an executive agency. For example, in *In re United States Catholic Conference*, 885 F.2d 1020 (2d Cir. 1989), the Second Circuit held that plaintiffs could not assert taxpayer standing to claim that the IRS, in failing to enforce against the Catholic Church the Tax

Code's prohibition on lobbying and campaigning by tax-exempt entities, "disregard[ed] the Code's mandate and the Constitution." *Id.* at 1028. Because "[t]he complaint center[ed] on an alleged decision made solely by the executive branch that in plaintiffs' view directly contravene[d] Congress' aim," there was "no nexus between plaintiffs' allegations and Congress' exercise of its taxing and spending power." *Id.*

Likewise, in *Fordyce v. Frohnmayer*, 763 F. Supp. 654 (D.D.C. 1991), the court held that taxpayers lacked standing to claim an Establishment Clause violation arising from a grant by the National Endowment for the Arts. The court explained that "*Flast* and its progeny countenance taxpayer challenges to executive branch action where 'Congress . . . decided how the . . . funds were to be spent, and the executive branch, in administering the statute, was merely carrying out Congress' scheme.'" *Id.* at 657 (quoting *Catholic Conference*, 885 F.2d at 1027). But where plaintiffs "cannot contend that . . . Congress participates in the decision to grant or deny applications for federal funding [from the NEA] or that the NEA merely administers a congressional directive," their challenge is to "a decision made solely by an agency of the executive branch," and they "cannot assert standing based on their status as taxpayers." *Id.*

As in *Fordyce*, AJC cannot assert taxpayer standing because it is challenging executive action that lacks the requisite nexus to Congress' power to tax and spend. AJC does not contend that "Congress participates in the decision to grant or deny [AmeriCorps] applications," *Fordyce*, 763 F. Supp. at 657, and the monitoring of administrative minutiae that AJC seeks is quintessentially the province of the executive branch, not Congress.

Moreover, "even if [AJC] ultimately prevailed, that outcome would not alter the total amount of taxpayer funds distributed by the [government]," the only type of redressability contemplated by taxpayer standing. *Id.* at 657 n.4. There is no indication that AJC's desired

injunction would reduce the amount of money spent by the government on education awards or on administrative grants; it would simply curtail the religious activities of AmeriCorps participants. Thus, "[e]ven if [AJC] had brought [its] claim within the outer limits of *Flast*" it still could not show, as required to establish taxpayer standing, that it "personally would benefit in a tangible way from the court's intervention." *Valley Forge*, 454 U.S. at 480-81 n.17.

Finally, AJC has suggested throughout this litigation that CNCS administers the AmeriCorps program in a way that is inconsistent with the statute. *See, e.g.*, JA0016 (Compl. ¶ 1) (alleging that the CNCS's practices "violate the Establishment Clause . . . as well as the governing statute . . . and the regulations promulgated thereunder"). Moreover, in its opposition to Notre Dame's motion for a stay in the district court, AJC expressly denied that this case "present[s] a challenge to any Act of Congress." Plaintiff's Opposition to Defendant's Expedited Motion for Clarification and for Stay Pending an Expedited Appeal and Defendant-Intervenor's Motion for Stay, at 4 n.1 (filed August 23, 2004). Instead, AJC insisted that this action "challenges the *Corporation's implementation* of such an Act *in violation of both its constitutional and statutory mandates*." *Id.* (emphasis added). Such a challenge to *executive* action, however, does not fall within the *Flast* exception to the general bar against taxpayer standing because it lacks the requisite nexus to *Congress'* taxing and spending power.[1] *See Bowen*, 487 U.S. at 620; *Catholic Conference*, 885 F.2d at 1028; *Fordyce*, 763 F. Supp. at 657; *see also Pulido v. Cavazos*, 934 F.2d 912, 924 n.7 (8th Cir. 1991).

[1] It was not until AJC opposed the motion for stay that AJC expressly stated that it was not challenging the constitutionality of the statute passed by Congress. In any event, a question implicating standing may be raised at any time. *See Nat'l Coal Ass'n v. Lujan*, 979 F.2d 1548, 1551 n.3 (D.C. Cir. 1992).

II. The Provision of Education Awards to AmeriCorps Participants Serving in Religious Schools Through Notre Dame's ACE AmeriCorps Program Does Not Violate the Establishment Clause

The Supreme Court has explained that for a law to have forbidden "effects . . . it must be fair to say the *government itself* has advanced religion through its own activities and influence." *Corp. of Presiding Bishop of The Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 337 (1987).[2] Thus, as even the district court recognized, the Establishment Clause is violated only where religious indoctrination "could reasonably be attributed to governmental action." *See* JA0063 (slip op. at 31) (quoting *Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (plurality)).[3]

But, as *Mitchell* itself makes clear, religious indoctrination by a religious institution cannot be attributed to the government if the organization received government aid through a neutral government program: "If the religious, irreligious, areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government." *Id.* at 809. The fact that the government refrains from discriminating against religion cannot rationally suggest that the government is somehow responsible for, or has endorsed, the religious message provided by private recipients.

Although some members of the Court have suggested that neutrality does not necessarily immunize all programs from Establishment Clause concerns, it is clear that neutral programs cannot offend the First Amendment if the receipt of money results from private choice *or*, with

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[2] This Court reviews the district court's grant of summary judgment de novo. *See, e.g., Foretich v. United States*, 351 F.3d 1198, 1209 (D.C. Cir. 2003).

[3] The sole allegation in this case is that the AEAP has the effect of advancing religion by resulting in governmental indoctrination. There is no claim that the program has an impermissible purpose, that it defines its participants by reference to religion, or that it creates an excessive entanglement. *See* JA0060-61 (slip op. at 28-29).

respect to so-called "direct aid," if the public money is not used for religious purposes. *See Mitchell*, 530 U.S. at 841-42, 854 (O'Connor, J., concurring in the judgment). Here, the $4725 education awards provided to AmeriCorps recipients are purely the product of unfettered private choice and are provided solely for the secular activities of those recipients. Indeed, not a penny of the $4725 even indirectly goes to the religious schools responsible for the challenged religious message, but goes only to the AmeriCorps participants to pay educational expenses. Thus, the threshold requirement for contending that the government "supports" sectarian religious messages is not present, making this a far "easier case" than those upholding neutral direct and indirect aid to religious schools. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993).

In short, consistent Supreme Court precedent holds that the neutral government provision of millions of dollars primarily to religious schools, without any restrictions on how that money is spent, and direct aid for secular purposes at religious schools, does not render the schools' religious message attributable to the government. This unquestionably establishes that the concededly nondiscriminatory provision of education awards to AmeriCorps participants cannot somehow constitute forbidden government indoctrination or endorsement. The district court's contrary conclusion is based on wholly irrelevant distinctions of governing law and rests on the thoroughly discredited premise that, to achieve the neutrality towards religion mandated by the Establishment Clause, government must affirmatively discriminate against religious adherents. Specifically, under the district court's skewed view of the First Amendment, the Corporation's affirmative exclusion of religious instruction or worship from the program is insufficient to avoid establishing religion; it must also treat such private religious activity as a disqualifying factor which renders participants ineligible for neutral, secular aid.

A. The Establishment Clause is Not Violated by the Inclusion of Faith-Based Organizations in Neutral Government Programs

In recent years, the Supreme Court has examined numerous government programs to discern whether the participation of, or provision of benefits to, religiously affiliated schools constitutes indoctrination attributable to the government. Each time the Court has sustained the challenged program, solidifying the principle that equal treatment of religious believers and institutions is not an establishment of religion, and that our Constitution requires neutrality, not hostility, towards religion.

In *Zelman*, the Court upheld Ohio's tuition assistance program, which enabled qualifying families to use public tax dollars to send children to participating schools. *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). Almost all recipients of this aid—96%—enrolled in religious schools. *See id.* at 647. Nonetheless, the Court held that "where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice," any religious indoctrination "is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits." *Id.* at 652. 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).

In *Locke v. Davey*, 124 S. Ct. 1307 (2004), the Court approved the use of a publicly funded Promise Scholarship by a student seeking to become a minister. The 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.* at 1311.

Thus, "there is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology . . . ." *Id.* at 1311-12; *see also id.* at 1317 (Scalia, J., dissenting) (same).

These cases did not "mark[] a dramatic break" from the Court's "prior Establishment Clause jurisprudence." *Zelman*, 536 U.S. at 663 (O'Connor, J., concurring). In *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), for example, the Court upheld a program that provided vocational assistance to a blind student desiring to receive pastoral training at a religious college. Because the student, not the government, chose a religious program, "[a]ny aid . . . that ultimately flow[ed] to religious institutions" did so "as a result of the genuinely independent and private choices of aid recipients." *Id.* at 488. Put differently, "[n]o reasonable observer [was] likely to draw . . . an inference that the State itself [was] endorsing a religious practice or belief." *Id.* at 493 (O'Connor, J., concurring). The Court adhered to the same reasoning in *Zobrest*, 509 U.S. at 10, holding 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 toward religion, it follows under our prior decisions that provision of that service does not offend the Establishment Clause." *Id.* (internal quotation omitted).

In a related line of cases, the Court has upheld neutral programs in which funding or in-kind aid is directly provided to religious schools or organizations for secular uses. In *Agostini v. Felton*, 521 U.S. 203 (1997), for example, the Court reversed *Aguilar v. Felton*, 473 U.S. 402 (1985), and sustained parochial school participation in the Title I program. The Court "abandoned" any presumption 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." 521 U.S. at 223. Instead, the Court held, government 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.

Three years later, as noted, the Court in *Mitchell v. Helms*, 530 U.S. 793 (2000), approved a program providing computers and other teaching aids to parochial elementary and secondary schools because of the program's neutrality. *Mitchell* and *Agostini* thus represent a continued development of the principle that the Establishment Clause does not preclude religious schools from participating, on equal footing, in secular government programs. *See, e.g., Everson v. Board of Educ.*, 330 U.S. 1, 17 (1947) (state reimbursement for costs of transporting children to parochial schools permissible "as part of a general program under which it pays the fares of pupils attending public and other schools"); *Board of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 243 (1968) (Establishment Clause did not prohibit allowing parochial school students to participate in "general program to lend school books free of charge"); *Hunt v. McNair*, 413 U.S. 734 (1973) (upholding neutral program facilitating bond issue for religious college); *Roemer v. Board of Public Works*, 426 U.S. 736 (1976) (annual state subsidy to religious colleges for secular purposes).

Together, these two lines of cases demonstrate that, where religious organizations and individuals participate in a government program on an equal basis, it is impossible to conclude that the government is inculcating religion. Moreover, post-*Zelman*, 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 private individuals.

B. The 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. Here, the plainly neutral AEAP distributes aid purely on the basis of private choice *and* rewards only secular activities, thus rendering it immune from Establishment Clause challenge.

The AEAP operates "on the basis of neutral, secular criteria that neither favor nor disfavor religion." *Agostini*, 521 U.S. at 231. 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. As the district court recognized, *see* JA0061 (slip op. at 29), AJC does not claim that the AEAP "define[s] its recipients by reference to religion." *Agostini*, 521 U.S. at 234. Indeed, the statute expressly forbids consideration of religion in the selection of participants. *See* 42 U.S.C. § 12635(c).

Grantees, too, are chosen based on three neutral criteria—Program Design, Organizational Capacity, and Budget/ Cost Effectiveness. JA1555-56. Appellee did not even contend, much less show, that these criteria favor religious organizations, either on their face or in application. To the contrary, AJC conceded that "the Corporation's grant selection criteria are neutral." *See* Statement of Points and Authorities In Support of Plaintiff American Jewish Congress' Motion for Summary Judgment at 42 n.3 (filed 12/15/03). 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.[4] *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. Thus, as in *Zelman*, any "objective observer" familiar with the "full history and context" of AEAP education awards would "reasonably view it as one aspect of a broader undertaking to [respond to unmet needs in public and private education], not as an endorsement of religious schooling in general." 536 U.S. at 655.

It follows inexorably that education awards to AmeriCorps participants for service in religious schools result from private choice. An individual interested in participating in AmeriCorps has a large variety of service options available to him, most of which are entirely secular in nature. For fiscal year 2001, there were 77 grantees providing service opportunities through AEAP, with an even larger number of options available through other AmeriCorps programs. JA0759. If an applicant chooses to apply to Notre Dame's ACE program and is accepted, his anticipated teaching placement is determined taking into consideration expressed individual preferences and experience, and the participant is informed what his teaching placement would be before he enrolls in the program. JA1138-39, 1065, 1155. No participant teaches religion unless he chooses to do so. JA1105, 1113.

Thus a student who chooses to enroll in ACE has chosen first, to apply to ACE from among all the possible (mostly secular) AmeriCorps service options, and second, to enroll in ACE with a full understanding that it will involve service in a religious school and with full information about the details of his teaching service. Indeed, participants in AEAP have, if

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

anything, a far *more* "genuine" choice than students in the Cleveland voucher program. 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.[5] *Id.* at 658-60; *see also Mueller v. Allen*, 463 U.S. 388, 401 (1983) (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 constitutionality of the program even if funds were available for religious uses, *see Zelman*, 536 U.S. at 657-59, funds expended in connection with the AEAP are in fact strictly limited to secular purposes. The statute forbids any Corporation funds, including education awards, from being used "to provide religious instruction, conduct worship services, or engage in any form or proselytization." 42 U.S.C. § 12634(a); 45 C.F.R. § 2540.100(b). Also, the 1700 annual hours of service credit required for an education award can only be earned through secular service. *See id.*; JA1490. To implement this restriction, grantees are required to monitor their participants' time through time sheets, *see* JA1505, 1544, and participants serving in religious schools must certify that their hours do not include "religious instruction, worship, or proselytization." JA0754, 0874. 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 . . .

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[5] Indeed, in *Zelman*, students seeking to escape Cleveland's failing public schools did not realistically have equivalent secular educational alternatives, thus providing students who did not share a parochial school's religious views with a strong incentive to nonetheless "subject" themselves to this government-funded religious "indoctrination." *See Zelman*, 536 U.S. at 704 (Souter, J., dissenting) (noting that "almost two out of three families using vouchers to send their children to religious schools did not embrace the religion of these schools"). In contrast, no potential AmeriCorps participant who does not share the values of the ACE program would have any additional incentive to participate in the program, given the broad array of equivalent secular alternatives.

for religious worship or instruction"); *Agostini*, 521 U.S. at 210 (Title I services must be "secular, neutral, and nonideological").

Equally important, the exclusion of religious instruction from the qualifying service credit hours creates a substantial *disincentive* for potential participants to engage in that activity. Those teaching religion must devote substantial time to it and *also* devote 1700 hours to secular activities, while teachers in secular schools or of secular courses do not face this barrier. The fact that the Corporation imposes this additional burden on religious teachers further confirms that those AmeriCorps participants selecting this activity on their own time do so purely as a product of private choice.

C. No AEAP Funds Flow To The Sectarian Schools Where Participants Serve

There is an even more fundamental reason that the program here cannot constitute government support or endorsement of the schools' religious instruction or worship: the aid here in no way reaches or supports those schools—a fact studiously ignored by the district court. A threshold issue in determining whether government assistance could possibly "advance religion" or "result in religious indoctrination" is whether the aid even goes to the religious schools conducting the indoctrination. In *Mitchell* and *Zelman*, it was undeniable that religious schools received a tangible financial benefit because they received aid either directly 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.

Here, in contrast, none of the $4725 education award provided to AmeriCorps participants goes directly or indirectly to the religious schools in which the participants serve. Instead, the awards can be used only to pay the participants' past or future educational expenses. 42 U.S.C. § 12604(a); 45 C.F.R. § 2528.10. Indeed, the flow of funds is in the opposite direction. While the student aid recipients in *Zelman* and *Witters* paid the parochial schools for

services rendered, the schools here pay the AmeriCorps participants for the services they provide, and it is undisputed that the cost to schools of hiring an ACE teacher is approximately equal to the salary that the schools pay to their other new teachers. JA0888.

The Court has made clear that where, as here, challenged aid does not flow to religious schools, Establishment Clause concerns are at a minimum, if cognizable at all. Thus the Court called *Zobrest* "an even easier case" than *Witters* because the funds at issue were directed to the sign-language interpreter, so that "no funds traceable to the government ever find their way into sectarian schools' coffers." 509 U.S. at 10; *see also Allen*, 392 U.S. at 243-44 (upholding aid where "no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools").

Given the lack of any identifiable financial benefit to the parochial schools, it is impossible to say that the education awards "result in" any religious indoctrination, *see Agostini*, 521 U.S. at 234, much less indoctrination that "could reasonably be attributed to governmental action." *Mitchell*, 530 U.S. at 809. There is no evidence that the availability of AmeriCorps teachers allows religious schools to serve (and proselytize) a larger number of students or to increase tuition, and such an indirect impact would be inadequate to trigger Establishment Clause concerns in any event. *See Allen*, 392 U.S. at 243-44 ("Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for religious institution"); *Zobrest*, 509 U.S. at 8, 10-11 (dismissing potential "indirect economic benefit" that the school might receive via increased tuition as a result of the funded interpreter's services); *see also Zelman*, 536 U.S. at 708 (Souter, J., dissenting) ("[T]he more attenuated [the] financial benefit . . . that eventually flows to parochial schools, the more the Court has been

willing to find a form of state aid permissible.") (quotation omitted). Nor is there any reason to think that education awards to students providing secular services augments the religious indoctrination undertaken by those schools.[6] The religious schools are teaching religion because that is their mission, not because of participation by or assistance from AmeriCorps.

D. The Reasons Advanced by the District Court and AJC for Viewing the Challenged Education Awards as Violating the Establishment Clause Are Patently Flawed

To support its quixotic effort to condemn a neutral program which does not fund religious schools as somehow more supportive of religion than the constitutional neutral aid programs that directly subsidize religious schools, the district court focused on three novel and irrelevant factors: the Corporation's "discretion" to approve grantees; the results of a web search purportedly showing that three subgrantee programs of one AEAP grantee allegedly impose religious qualifications on participants; and the court's conclusion that the AmeriCorps dollars were "impermissibly religious" in nature. The District Court was wrong on each count.

1. Governmental Discretion Does Not Undermine Neutrality and Private Choice

The district court concluded that the AEAP is not a neutral program of private choice because the Corporation allegedly utilizes "discretionary" criteria for determining eligibility for aid, *see* JA0067 (slip op. at 35), and because participants' choice of a service opportunity must be made from among "pre-approved programs," *see* JA0069-70 (slip op. at 37-38). But criteria for public aid need to be "neutral," not "nondiscretionary," and private choice needs to be "genuine," not "universal." Only if the Corporation's discretion is subtly manipulated to favor religion—which neither the district court nor AJC suggested—is there any cognizable Establishment Clause concern.

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[6] Indeed, if anything, the program might tend to result in a greater number of teaching positions being filled by laypersons, which could conceivably *reduce* the extent of religious indoctrination.

Needless to say, federal courts cannot simply enjoin presumptively constitutional federal programs on the mere *possibility* that discretionary criteria could be employed to favor religious organizations. Rather, plaintiffs must *prove* such religious favoritism. 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. NEA 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).

Nor is there any basis for the notion that subjective criteria are necessarily more manipulable than objective factors. In the Ohio voucher program at issue in *Zelman*, for example, four dissenting Justices argued that the facially neutral program there had been subtly skewed through an imposition of an "objective" $2500 cap on tuition that would tend to favor religious schools due to their lower average cost. 536 U.S. at 705 (Souter, J., dissenting). *See also Sch. Dist of Grand Rapids v. Ball*, 473 U.S. 473, 384-85 (1985) ("objective" program skewed toward religion); *Committee for Pub. Edu. & Religious Liberty v. Nyquist*, 413 U.S. 756, 767-68 & n.22 (1973) (same). The question is not whether selection criteria are objective or subjective, but whether they favor religion.

The illogic of the district court's condemnation of "discretion" is further illustrated by its broad sweep. If "discretion" in the grantee selection criteria leads to Establishment Clause concerns, that would seem to *entirely* preclude the participation of religious grantees—a claim that even AJC does not make. Moreover, if the selection of a religious grantee pursuant to discretionary criteria renders a program nonneutral, no state (or state university) could award a scholarship based on subjective criteria, such as "academic excellence" or "potential to contribute to student life," to a student whose plans involved religious studies.

In any event, the district court's claim that the AEAP is more subjective than the program in *Zelman*, JA0067 (Op. at 35), is flatly wrong. The requirements for individual AmeriCorps participants—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 just as "fixed, objective [and] measurable" as the income criteria for voucher recipients in *Zelman*.[7]

To be sure, AmeriCorps participants usually only participate in "pre-approved" programs.[8] This hardly distinguishes *Zelman*, or any other case, since vouchers could only be used at schools that met "statewide educational standards," *Zelman*, 536 U.S. at 645—that is, schools "pre-approved" by the state. Thus, the district court's assertion that the Ohio students could use vouchers "at any school program of his or her liking" is completely untrue. JA0070 (slip op. at 38). Moreover, contrary to the district court's apparent view, JA0066 (slip op. at 34), the AEAP serves a far "broader class" than the *Zelman* program, since there were 19,000 AEAP

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[7] The district court also erred in suggesting that *all* low-income Cleveland students received vouchers; they were simply "given priority." *Zelman*, 536 U.S. at 646. *See also* Ohio Rev. Code 3313.975; 3313.978.

[8] It bears noting that 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 any AmeriCorps grant. 42 U.S.C. § 12573.

participants serving with 77 grantees in 2001, as compared to 3,700 students attending 56 schools in *Zelman*. 536 U.S. at 647.

Of course, *every* government program subject to fiscal sanity specifies where the public money may go. And the selection criteria typically involve substantial government discretion. In *Zelman*, for example, Ohio Revised Code § 3313.976 requires that to participate in the voucher program, a private school "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." Even apart from this manifestly discretionary exception to the usual "state minimum standards," those "minimum standards" themselves are chock full of subjective criteria.[9] In fact, in the Cleveland voucher program, "[t]he state superintendent must approve schools which will be able to participate prior to parents/guardians enrolling children who are scholarship recipients." *See* http://www.ode.state.oh.us/school_options/scholarship/ScholarshipProgramRequirements.asp (Ohio Dept. of Education website, 10/14/2004).

The same principle is illustrated by *Bowen v. Kendrick*, 487 U.S. at 593. There, the award of grants by the government 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 598. The Court nonetheless rejected an Establishment Clause challenge, as there was no

[9] *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."); § 3301-35-05(B) ("The district or school shall maintain an environment that supports personal and organizational performance excellence.").

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.[10]

The errors in the district court's analysis are well explained by Judge Posner's opinion in *Freedom from Religion Foundation, Inc. v. McCallum*, 324 F.3d 880 (7th Cir. 2003). There, 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 a specific halfway house. The Seventh Circuit unanimously upheld the program, finding it analogous to *Zelman*. Indeed, "[t]hat most of the halfway houses with which the state has contracts are secular makes this an easier case than the school voucher case." *Id.* at 883. Moreover, 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 would lead to a "perverse . . . result" because it would "sacrifice . . . a real good to avoid a conjectured bad." *Id.* at 884. It is just this "perverse" understanding of the Establishment Clause that the district court embraced. Indeed, under the district court's idiosyncratic reasoning, a program is not acceptable unless it objectively selects recipients to use public funds anywhere they like—which would exclude virtually all government programs.

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[10] Other programs upheld by the Court have contained similar elements of government "discretion." *See, e.g., Witters*, 474 U.S. at 483 (assistance for the blind should help "obtain the maximum degree of self-support and self-care," and choice was among schools accredited by state) (internal quotation omitted); *Mitchell*, 530 U.S. at 803 (to receive challenged materials, private school had to submit an "application detailing which items the school seeks and how it will use them," which application could be disapproved by the public agency); *Id.* at 846 (O'Connor, J., concurring) (local educational agencies distribute funds to "'innovative assistance programs' designed to improve student achievement") (quoting 20 U.S.C. § 7351); *Mueller*, 463 U.S. 388 (choice among schools accredited by state); *Zobrest*, 509 U.S. 1 (same).

2. The District Court's Reliance on Purported Religious Qualifications Used by Some Grantees Was Misplaced

The district court also concluded that the AEAP was not a neutral program of private choice because three sub-grantees of grantee Catholic Network of Volunteer Service ("CNVS") purportedly required participants to adhere to a particular religious faith. JA0067-68, 0070 (slip op. at 35-36, 38). Given that it would be the extraordinarily rare case in which an individual wishes to *teach* religion at a religious school whose belief he eschews, this distinction between *de jure* and *de facto* religious qualifications is, on its own terms, formalistic at best.

More important, there is no support for the notion that a neutral government program becomes impermissible because private religious grantees prefer those who share their values. In fact, the Supreme Court has upheld numerous programs despite the use of religious preferences by private organizations. *See, e.g., Locke,* 124 S. Ct. at 1311-12 ("no doubt" that Establishment Clause permits the use of a state scholarship to pursue a degree in devotional theology at college which required all applicants to indicate "a personal commitment to Jesus Christ as Lord and Savior," *Davey v. Locke*, 299 F.3d 748, 750 (9th Cir. 2002) (internal quotation omitted)); *Mitchell,* 530 U.S. at 906 n.23 (Souter, J., dissenting) (some schools exercised "a religious preference in accepting students and in charging tuition"); *Everson,* 330 U.S. at 22 (Jackson, J., dissenting) (Court upheld public financing of transportation costs to parochial schools despite Catholic Canon Law providing that "Catholic children shall not attend . . . schools open to Catholics and non-Catholics alike"); *Agostini*, 521 U.S. at 235 (overruling *Aguilar* and *Ball* even though "many of the schools" in those cases gave preference to students belonging to the sponsoring denomination, *see Aguilar*, 473 U.S. at 412; *Ball*, 473 U.S. at 384). As these cases illustrate, the Establishment Clause requires that the *government* be neutral toward religion. It does not require that religious organizations be neutral between adherents and others.

Indeed, the district court's condemnation of alleged private religious preferences reveals a fundamental misunderstanding of the role that "private choice" plays in Establishment Clause analysis. The reason that "private choice" is a factor is precisely because it establishes that "the decision to support religious education is made by the individual, not by the State." *Witters*, 474 U.S. at 488; *see also Mitchell*, 530 U.S. at 842 (O'Connor, J., concurring in the judgment). The potential concern would be that the playing field is "skewed" so as to effectively coerce recipients to direct their aid to religious organizations. *Zelman*, 536 U.S. at 653-54. This is why the presence of *non-believers* in religious schools is viewed as evidence that the recipients are *not* able to truly exercise unfettered choice, but have been effectively coerced into subjecting themselves to instruction in a religion that they do not share in order to achieve the secular educational benefits. *See Zelman*, 536 U.S. at 704 (Souter, J., dissenting). Here, the alleged *de jure* exclusion of non-adherents from religious programs guarantees that the only public money which reaches those organizations stems from the private choices of those who truly believe in the organization's mission and values (without having any effect on the broader array of secular opportunities available to the AmeriCorps participants). Thus, if anything, the allegedly exclusionary practices of three sub-grantees would actually reinforce that decisions to serve with those organizations, and hence any funds flowing to those organizations, are attributable to the individual participants.

The district court's approach essentially imputes the conduct of private organizations to the government just because those organizations participate in federal funding. This view is inconsistent with the "essential dichotomy" drawn, throughout the law, between government and private action. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349 (1974); *see also Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972); *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839

(2d Cir. 1996) (Equal Access Act requires school to open facilities to religious organization that imposes religious qualifications on officers). Moreover, it fails to recognize the significant Free Exercise interests served by avoiding government intrusion into personnel decisions of religious organizations. *Cf. Amos*, 483 U.S. 327 (1987) (exemption of religious organizations from Title VII's prohibition against religious discrimination does not violate the Establishment Clause); *EEOC v. Catholic Univ.*, 83 F.3d 455 (D.C. Cir. 1996) (Free Exercise Clause precludes civil courts from adjudicating federal gender discrimination claim by canon law professor at religious university). In short, "because religious discrimination by a religious group is 'vital' to the group's religious mission and the ability of the group to define itself on the basis of shared faith, no great suspicion attaches to a government decision to allow it." *Hsu*, 85 F.3d at 869.

In any event, the government here affirmatively *forbids*, through the statute and regulations, the consideration of religion by grantees in the selection of AmeriCorps participants. *See* 42 U.S.C. § 12635(c); 45 C.F.R. § 2540.210. Moreover, the Corporation's AEAP Grant Provisions require each grantee to publicly state and provide an affirmative assurance that its program, "including those of its subgrantees," will comply with nondiscrimination requirements. JA1507-08. Thus, the alleged use of prohibited religious qualifications by a few subgrantees cannot support the district court's sweeping injunction against *all* religious grantees, including those, like Notre Dame, who impose no religious qualifications.

Moreover, the factual record was entirely inadequate to form a proper basis for summary judgment. The entire basis for the district court's finding of religious qualifications was three printouts from the CNVS website that appellee produced for the first time with its reply brief. These website printouts did not establish, and defendants did not concede, that (1) the cited programs actually *used* religious qualifications; (2) for positions eligible for AmeriCorps

education awards; and, (3) that those positions involve religious instruction in a sectarian school. (Nor do the printouts say anything about whether the Corporation would expeditiously cure these violations.) Indeed, many subgrantees of CNVS do *not* place participants as religion teachers (or as teachers at all) and/or do *not* participate in the AEAP, JA0718-20, 0722, 1295-96, 1668, 1670, and Notre Dame made precisely these points below. *See* Defendant-Intervenor University of Notre Dame's Statement of Undisputed Facts in Opposition to Plaintiff's Motion for Summary Judgment ¶ 22 (filed January 29, 2004) ("NDSUF in Opp."). The district court's drawing of inferences for AJC on each of these disputed facts turned the proper summary judgment procedure on its head. *See, e.g., Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

3. The Education Awards Provided to Individual AmeriCorps Participants Have No "Impermissibly Religious" Content

The district court's most incomprehensible assertion was that "the $4,725 AmeriCorps Education Awards being challenged are in fact impermissibly religious in their nature and content." JA0071 (slip op. at 39). But the aid here is *money*, which has no "content" at all, much less religious content. *Cf. Mitchell*, 530 U.S. at 831 (noting that computers, without software, lacked pre-existing content). Thus, "there is no risk (as there is with books) of the government inadvertently providing improper content." *Id.* at 824.

Nor could the education awards be "diverted" to religious uses. Because they are not paid to the religious schools, there is nothing to "divert." Moreover, even where neutral aid does flow to a religious school through private choice, there is no constitutional restriction on the use of the aid for religious purposes, so even actual "diversion" is not a concern. *See, e.g., Zelman*, 536 U.S. at 652; *Mitchell*, 530 U.S. at 841-42 (O'Connor, J., concurring in the judgment).

Further, even if it was constitutionally necessary to limit AmeriCorps service to secular activities, mere "divertibility" would not condemn the program—a plaintiff must *show* actual, substantial diversion. *See id.* at 854. Similarly, even in direct aid cases, the Supreme Court has rejected "the assumption that pervasive monitoring . . . is required." *Agostini*, 521 U.S. at 234. Rather, funding recipients are presumed to "act in good faith" and "follow secular restrictions [on the use of government aid]." *Mitchell*, 530 U.S. at 859, 864 (O'Connor, J., concurring in the judgment).[11] Indeed, burdensome and intrusive monitoring can raise serious entanglement concerns. *See, e.g., NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979); *Walz*, 397 U.S. at 675.

Here, in any event, the secular use restriction *is* carefully enforced. Both the Corporation and Notre Dame take care to ensure that the secular restrictions on AmeriCorps service hours are understood and followed. *See supra* at 3-6. Indeed, the monitoring undertaken here closely parallels that deemed sufficient in *Mitchell*: the statute limits aid to secular uses, 42 U.S.C. § 12634(a), and requires that the aid supplement and not supplant non-federal funds, 42 U.S.C. §§ 12633; 12637, participating schools must sign assurances they will use the federal aid only for secular purposes, JA0752-53, 0866, 0869, and the operation of the program is monitored by site visits, JA0754-56. *Cf. Mitchell*, 530 U.S. at 861-62 (O'Connor, J., concurring in the judgment). Moreover, this case involves *additional* forms of monitoring *not* paralleled in *Mitchell*. Not only the administering agencies, but the individual participants are carefully apprised of the necessity of avoiding use of federal support for religious activity. JA0710-11, 0891-92, 0896-98, 1099-

[11] *See also Bowen*, 487 U.S. at 612 ("nothing in our prior cases warrants the presumption adopted by the District Court that religiously affiliated AFLA grantees are not capable of carrying out their functions under the AFLA in a lawful, secular manner."); *Roemer*, 426 U.S. at 760 ("We must assume that the colleges . . . will exercise their delegated control over use of the funds in compliance with the statutory, and therefore the constitutional, mandate.").

1100, 1140, 1149, 1152, 1453; *cf. Mitchell*, 530 U.S. at 832 n.15 (noting that local agency made no effort to inform teachers on the use of the federally funded equipment). Grantees must also provide an advance assurance that aid will not be used for prohibited activities, and must submit an annual progress report addressing any compliance issues. JA0752-53, 0757, 0866, 0869. Further, AmeriCorps participants, after the fact, must certify that their recorded service hours do not include religious instruction, worship, or proselytization. JA0754, 0874. *Mitchell* involved no corresponding requirement that individual teachers certify that they had not used the equipment and materials for religious purposes. In addition, although the program in *Mitchell* did involve site visits by state and local officials, those visits consisted of talking to a contact person not directly involved in the use of the funded equipment, and the officials testified that those visits would provide no way of knowing whether the materials were being used for religious purposes. *See Mitchell*, 530 U.S. at 832 n.15.[12]

Moreover, the district court blindly accepted AJC's claim of "serious infractions" of religious activity policies. But the claimed infractions are, even if true, no more than "scattered de minimis statutory violations, discovered and remedied by the relevant authorities themselves," *Mitchell*, 530 U.S. at 835. As such they cannot justify declaring "an entire aid program unconstitutional." *Id.* at 865 (O'Connor, J., concurring in the judgment). Moreover, the isolated claimed irregularities mentioned by the district court, JA0053-56 (Slip. op. at 21-24), were hotly disputed by the defendants, NDSUF in Opp. ¶¶ 15, 26-32, 34, 42-49, 51; Defendant's Opposition

[12] *Bowen* and *Agostini*, the other cases relied on by the district court in its monitoring discussion, are equally inapt. In *Agostini*, the Court *rejected* its previous assumption that extensive monitoring was necessary to avoid indoctrination by secular employees in sectarian schools. 521 U.S. at 234. And in *Bowen*, the Court held that "nothing in our prior cases warrants the presumption . . . that religiously affiliated . . . grantees are not capable of carrying out their functions . . . in a lawful, secular manner." *Bowen*, 487 U.S. at 612.

to Plaintiff's Local Rule 7.1(h) Statement of Undisputed Facts as to Which There Is No Genuine Issue ¶¶ 92-126, 169-200, and thus cannot afford a basis for summary judgment.

Finally, the district court's reference to the "blurring" of the religious and non-religious activities of AmeriCorps participants is simply baffling. JA0073 (Slip op. at 41). A "reasonable observer" who knew, because of scattered signs in the school with the AmeriCorps insignia, that a religious instructor was an AmeriCorps participant would also know that any such instruction is outside the scope of the AmeriCorps program and that no AmeriCorps money subsidized that religious school in any way. *See, e.g, Zelman*, 536 U.S. at 655 (reasonable observer deemed aware of "history and context" of program). He would also know that AmeriCorps participants, by law, are not employees or agents of the government. 45 C.F.R. § 2523.100. Thus, there is no way of rationally perceiving the religious teaching of an AmeriCorps participant as being subsidized or conducted by, or as otherwise attributable to, the government. This is true regardless of whether every student knew that the religious instructor was an AmeriCorps award recipient. (In terms of actual perceptions, there is not a scintilla of evidence that any student ever thought that his religious instructor was an AmeriCorps participant or knew what that might mean.) Even with respect to the direct aid of *Mitchell*, the fact that the government required that the federally-supplied equipment be labeled as such did not constitute impermissible "blurring" or render the program unconstitutional. 530 U.S. at 832. More broadly, as noted, *Mitchell* makes clear that any presumption that religion is infused throughout even secular courses in a sectarian school has no remaining force. 530 U.S. at 826-29; *id.* at 857-60 (O'Connor, J., concurring in the judgment). *See also Columbia Union College v. Oliver*, 254 F.3d 496, 502-04 (4th Cir. 2001).

III. The Modest Administrative Grants to Organizations Such As Notre Dame Do Not Violate the Establishment Clause

The district court erred in analyzing the administrative grants to grantees like Notre Dame as "direct monetary aid," applying *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), even though the Supreme Court held in *Zelman* that "*Nyquist* does not govern neutral educational assistance programs that . . . offer aid directly to a broad class of individuals defined without regard to religion." 536 U.S. at 662.

Properly analyzed, the AEAP administrative grants, like the school vouchers upheld in *Zelman*, "reach religious institutions only by way of the deliberate choices of numerous individual recipients." *Zelman*, 536 U.S. at 652. The only distinction between the administrative grants here and the vouchers in *Zelman* is that the administrative grants may be paid directly to religious institutions. To the extent the formalistic distinction between direct and indirect aid remains significant, *but see id.* at 666-67 (O'Connor, J., concurring) (discussing direct aid programs in context of a "private choice" case), it is because of the risk of the "public perception" that direct aid represents government's "endorsement" of religion, whereas "endorsement of the religious message" in an indirect aid case "is reasonably attributed to the individuals who select the path of the aid." *Mitchell*, 530 U.S. at 842-43 (O'Connor, J., concurring in the judgment). Here, however, unlike in the typical direct aid case, the administrative grants must be viewed as the product of private choice because they are intertwined with the education awards paid to students as a result of individual choices to serve through the ACE program. Absent choices by individual students to serve through the ACE program, Notre Dame's "approval" as an AEAP grantee entitles it to no funds. JA0888, 1143, 1168. Treating the administrative grants as impermissible "direct aid" in these circumstances would impermissibly "exalt form over substance." *See Zobrest*, 509 U.S. at 13 & n.11 (rejecting

distinction between government's placing a sign language interpreter in a sectarian school and providing funds to student's parents to do the same); *see also Locke*, 124 S. Ct. at 1310-12 (explaining that "there is no doubt" that the State could subsidize a degree in "devotional theology," regardless of fact that "scholarship funds [were] *sent* to the [religious] institution"); *McCallum*, 324 F.3d at 882 (parolee benefits analogous to vouchers even though state dispensed with "intermediate step" of giving voucher to individual).

Moreover, the administrative grants are not "direct aid" because they are not really "aid" to the institution at all, but are used solely to offset the cost of administering service programs, like ACE, for the benefit of their participants and the individuals served. In this respect, the grants are no more "direct aid" to Notre Dame than government payments to a religious hospital to offset the cost of medical care, or direct payments to a religious college through the Pell Grant program (to offset the cost of education), are "direct aid" to those institutions. As Justice O'Connor explained in *Zelman*, "religious hospitals received nearly $45 billion from the federal fisc in 1998" under Medicare and Medicaid, and "a substantial share of Pell Grant and other federal funds for college tuition reach religious schools." 536 U.S. at 666-67 (O'Connor, J., concurring). These forms of aid—all of which "are well-established parts of our social welfare system," *id.* at 667 (O'Connor, J., concurring)—are not impermissible "direct aid," because they are directed to the hospital or college to benefit private citizens who have chosen to use the institution.

Finally, even if the administrative grants were analyzed as direct aid, they would be permissible because statutory and administrative restrictions require that the funds be used only to fund secular activities. As the Supreme Court has made clear, neutral direct aid to religious organizations is constitutional, particularly if the aid is limited to activities that are not directly

religious. *See, e.g., Mitchell*, 530 U.S. at 835; *Agostini*, 521 U.S. at 231. Moreover, the Supreme Court has upheld direct *monetary* aid to religious institutions where, as here, statutory and administrative restrictions require that the funds be used only for secular activities. *See, e.g., Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 648-49 (1990); *Roemer*, 426 U.S. at 759; *Hunt*, 413 U.S. at 736; *Tilton v. Richardson*, 403 U.S. 672, 679-82 (1971).

As in the above cases, AEAP grants come with strict parameters on their use, forbidding any use for religious purposes. *See* 42 U.S.C. § 12634(a); 45 C.F.R. § 2540.100(b). Indeed, the district court simply ignored that 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," which include religious activities. JA0752-53, 0866, 0869. And all grantees at issue here have affirmatively attested that no funds were so used. JA0721, 0723-24, 0887-89, 1068-69, 1143. Moreover, it is undisputed that the secular administrative costs incurred by grantees will far exceed $400 per participant. JA0748-49, 0888-89, 1304.

The district court concluded that under *Nyquist*, additional "segregation or accounting" is required. JA0077 (slip op. at 45). But *Nyquist* is inapposite because it involved a *preferential* program the function of which was "to provide desired financial support for nonpublic, sectarian institutions." *Zobrest*, 509 U.S. at 12-13 (internal quotation omitted). Moreover, the preferential direct aid to religious institutions in *Nyquist* was made in the absence of any statutory restriction or administrative mechanisms to prevent the use of government funds for sectarian purposes. *See Nyquist*, 413 U.S. at 774.

In the end, it was plaintiff's burden to prove *substantial, actual* diversion of the administrative grants for religious activities. *Mitchell*, 530 U.S. at 864 (O'Connor, J., concurring

in the judgment); *see also Hunt*, 413 U.S. at 744; *Columbia Union College*, 254 F.3d at 506.[13] The district court's approach—requiring additional monitoring without identifying any misuse of funds—contravenes precedent by presuming that secular restrictions on the use of funds will not be obeyed by religious grantees.

IV. The District Court's Broad Injunction Is Not Tailored To The Supposed Violations

The district court also failed to heed the basic equitable principle that "[a]n injunction must be narrowly tailored to remedy the *specific* harm shown." *Aviation Consumer Action Project v. Washburn*, 535 F.2d 101, 108 (D.C. Cir. 1976) (emphasis added). This Court and the Supreme Court have repeatedly rejected injunctions that exceeded the scope of the violation. *See, e.g., Lewis v. Casey*, 518 U.S. 343, 359 (1996); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 419 (1977); *Milliken v. Bradley*, 418 U.S. 717, 738 (1974); *Lever Bros. v. United States*, 981 F.2d 1330, 1338 (D.C. Cir. 1993); *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 972 (D.C. Cir. 1990).

Moreover, a plaintiff must demonstrate a "reasonable likelihood of further violations in the future." *SEC v. Savoy Indus., Inc.*, 587 F.2d 1149, 1168 (D.C. Cir. 1978). But AJC did not even claim that Notre Dame has a pattern or policy of allowing AmeriCorps funds to support religious instruction. As this Court has observed, "[e]ven if mistakes were made in some instances, it is not reasonable to extrapolate a general policy . . . from such mistakes." *Ellis v. District of Columbia*, 84 F.3d 1413, 1424 (D.C. Cir. 1996) (internal quotation omitted); *see also Rizzo v. Goode*, 423 U.S. 362, 372 (1976).

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[13] This willingness to assume that funds will be used in keeping with secular restrictions is particularly appropriate where, as with the grants to Notre Dame here, the challenged funds go to religiously-affiliated colleges and universities rather than primary and secondary schools. *See, e.g., Columbia Union College*, 254 F.3d at 507 (citing *Mitchell*, 530 U.S. at 826-27 (plurality)); *Roemer*, 426 U.S. at 764-65 (plurality); *Hunt*, 413 U.S. at 746; *Tilton*, 403 U.S. at 687 (plurality).

Because of the competing First Amendment values involved, it is particularly clear in Establishment Clause cases that evidence of isolated irregularities does not justify striking down an entire program. *See Mitchell*, 530 U.S. at 861 (O'Connor, J., concurring in the judgment). Thus, in *Bowen*, the Supreme Court remanded an Establishment Clause challenge to the district court where "the court did not adequately design its remedy to address the specific problems it found in the Secretary's administration of the statute." 487 U.S. at 620. On remand, the district court was instructed to consider "whether *particular* AFLA grants had the primary effect of advancing religion." *Id.* at 622; *see also id.* at 623 (noting that "*extensive* violations—if they can be proved in this case—will be highly relevant in shaping an appropriate remedy").

The district court, however, entered a broad injunction that goes far beyond the alleged violations. The district court invalidated the $400 administrative grants because of a lack of "segregation or accounting for the use of those funds so as to ensure that the money is spent only on secular activities." JA0076-77 (slip op. at 44-45). However, the district court's injunction precludes payment of administrative grant funds to *all* "AmeriCorps EAP grantees which place AmeriCorps participants as teachers in private sectarian schools," JA0081, even where, as is undisputed as to Notre Dame, the grantee *already* segregates the grant funds into a separate account used only for secular purposes. JA0887-89, 1068-69, 1143.[14]

Similarly, as noted, the Court's injunction against providing education awards is not limited to AmeriCorps participants serving with subgrantees allegedly imposing religious qualifications, but extends to participants serving with grantees, such as Notre Dame, who have not been alleged to use any religious qualifications. JA0080-81. Finally, the injunction does not

[14] In addition, the injunction incomprehensibly prohibits administrative grants until the Corporation demonstrates that "AmeriCorps participants do not receive public funding for the time they spend in religious activity." JA0081. Timekeeping requirements at the religious schools, however, are unrelated to any segregation or accounting of the administrative grant funds themselves.

seek to remedy alleged timekeeping problems by requiring additional monitoring of timekeeping, but broadly enjoins all education awards to participants who engage in religious instruction and activities.

The district court's injunction also improperly goes beyond "that relief specifically sought in [the plaintiff's] complaint," *Lever Bros. Co. v. United States*, 981 F.2d 1330, 1338 (D.C. Cir. 1993). In its complaint, briefs, and initial proposed order to the district court, AJC sought only to ensure that AmeriCorps participants did not *teach religion* in their placements. *See, e.g.*, JA0025-26, 0028-29 (Complaint ¶¶ 43-47, 49, 63-66, Prayer for Relief ¶¶ A-B). The district court's injunction, however, goes much farther, extending to participants who engage in "the leading of students in prayer during the school day, and the attending of Mass with students during the school day." JA0081.

V. The District Court's Decision and Injunction Are Inconsistent With the Free Exercise and Free Speech Clause

A. Restricting AmeriCorps Funding To The ACE Program Would Violate The Free Exercise And Free Speech Clauses Of The Constitution.

Treating Notre Dame and its ACE teachers as ineligible for AmeriCorps funds is also forbidden by the Free Exercise and Free Speech Clauses. The injunction entered by the district court would require CNCS to cease all funding to a program and its participants solely because some aspects of the program—those not receiving financial support from AmeriCorps—include an emphasis on the role of faith, and because some ACE participants—also without any support from AmeriCorps—engage in religious activity, such as "the attending of Mass with students," JA0081, on their own time. Requiring such naked discrimination against institutions with religious missions and persons of Catholic faith in particular offends the neutrality commands of the First Amendment.

1. "State power is no more to be used so as to handicap religions, than it is to favor them." *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947). Consequently, the Supreme Court has frequently made clear that discriminatory treatment of religious observers violates the Free Exercise Clause.

It is well established that "the government may not . . . impose special disabilities on the basis of religious views or religious status." *Employment Division v. Smith*, 494 U.S. 872, 877 (1990). In *Church of Lukumi Babalu Aye, Inc. v. City of Hileah*, 508 U.S. 520, 542 (1993), for example, the Supreme Court held that municipal prohibitions on animal sacrifice enacted to single out the practices of the Santeria faith violated the neutrality principle of the Free Exercise Clause, which "protects religious observers against unequal treatment." (internal quotation omitted). So, too, in *McDaniel v. Paty*, 435 U.S. 618 (1978), the Court invalidated on Free Exercise grounds a Tennessee constitutional provision that barred clergy from public office, because it "punish[ed] a religious profession with the privation of a civil right." *Id.* at 626 (plurality) (quoting 5 *Writings of James Madison* 288 (G. Hunt ed. 1904)). Tennessee could not condition a neutral privilege (holding secular office) upon a citizen's "willingness to eschew certain protected religious practices." *Id.* at 632 (Brennan, J., concurring).

As *McDaniel* illustrates, denial of an opportunity based on religious practice constitutes an "unconstitutional penalty" on the exercise of religious rights. *See id.* at 633. This principle applies with full force to government benefits to which there is no entitlement: "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *see also Everson*, 330 U.S. at 16 (Free Exercise Clause forbids the government from excluding "members of any . . . faith, because of their faith . . . from receiving the benefits of public

welfare legislation"). Applying this anti-discrimination principle, the Court has invalidated numerous restrictions conditioning the receipt of a public benefit on the waiver of Free Exercise rights. *See, e.g., Sherbert*, 374 U.S. at 404 (invalidating denial of unemployment benefits to employee discharged for unwillingness to work on Saturday, her Sabbath, because it "puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship"); *Torcaso v. Watkins*, 367 U.S. 488, 496 (1961) ("whether or not an abstract right to public employment exists, Congress could not pass a law providing that no federal employee shall attend Mass or take any active part in missionary work") (internal quotations omitted).

The district court's injunction, however, bars AmeriCorps participation to ACE teachers who teach secular subjects, if, on their own time and without any government funding, they engage in religious activities such as "the attending of Mass with students during the school day." JA0081. Indeed, the district court's order impermissibly singles out adherents of one religion—Catholics who attend Mass—in particular. Likewise, AJC attacks Notre Dame's participation in AmeriCorps precisely because of ACE's religious *philosophy* —because one of its three pillars is "Spirituality." JA0024 (Compl. ¶ 38). In AJC's view, Notre Dame must be expelled from AmeriCorps because it is has developed a community service program designed to "advance the educational and catechetical mission of the Catholic Church," JA0023 (*id.* ¶ 32), by encouraging its participants to "develop their own spiritual and prayer lives," JA0024 (*id.* ¶ 38). But ACE's eligibility for funding, and ACE students' eligibility for AmeriCorps education awards, like McDaniel's eligibility for office, cannot be discriminatorily conditioned on giving up personal religious pursuits. *McDaniel,* 435 U.S. at 626; *see also Hartmann v. Stone*, 68 F.3d

973, 978 (6th Cir. 1995) (invalidating regulation preventing day-care providers in Army program from engaging in religious activities).

The district court summarily dismissed any Free Exercise concern, citing *Locke*. However, while the statute's refusal to fund religious instruction is permissible under *Locke*, the injunction's alteration of the program to financially *penalize* religious activity *outside* AmeriCorps sponsored service is plainly unconstitutional. In *Locke*, the Supreme Court held that Washington could refuse to allow an individual to use a state scholarship to subsidize the pursuit of a degree in devotional theology. Thus, to be sure, *Locke* confirmed that the government can refrain from directly *subsidizing* particular religious *activity* or a "distinct category of instruction." 124 S. Ct. at 1313. But the government cannot deny *all* generally available benefits to a recipient simply because the recipient is engaged in constitutionally protected activity.

For instance, while government may refuse to provide Medicaid funding for abortions, it may not "withhold all Medicaid benefits from an otherwise eligible candidate simply because that candidate had exercised her constitutionally protected freedom to terminate her pregnancy by abortion." *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980). As the Court noted, under *Sherbert*, a state may not "withhold *all* unemployment compensation benefits from a claimant who would otherwise be eligible for such benefits but for the fact that she is unwilling to work one day per week on her Sabbath." *Id.* (emphasis in original). Ever since, the Court has repeatedly distinguished between refusals to subsidize particular *activities*, and the forbidden situation in which "the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." *Rust v. Sullivan*,

500 U.S. 173, 197 (1991).[15] *See also Fed. Election Comm'n v. Int'l Funding Inst., Inc.*, 969 F.2d 1110, 1115 (D.C. Cir. 1992) (en banc) ("the Supreme Court has consistently scrutinized more closely statutes that condition the receipt of a government benefit upon the recipient's altering its independently funded activities . . . than it scrutinizes statutes that restrict only the use to which the recipient may put the government benefit").

The Promise Scholarship Program in *Locke* scrupulously adhered to this distinction. It did not deny its scholarship awards to those students "attend[ing] pervasively religious schools" or prohibit scholarship award recipients from taking *mandatory* "devotional theology courses"; rather, it simply refrained from subsidizing a particular theology major. *Locke*, 124 S. Ct. at 1315. On this basis, the Court distinguished *Sherbert* and the other unconstitutional condition cases, since the Washington program did not "require students to choose between their religious beliefs and receiving a government benefit." *Id.* at 1312-13 (footnote omitted). The district court, in contrast, converted Congress' permissible refusal to subsidize a particular "course of instruction"—religious instruction—into a sweeping denial of eligibility for any recipient solely because he chooses to participate, on his own time, in religious instruction or activity unsupported by the government's award.

Locke is also plainly distinguishable for another fundamental reason. As the Court repeatedly noted, the limitation on the scholarship award there solely prevented government aid to "train[] someone to lead a congregation" and emphasized that the "*only* interest at issue here is the State's interest in not funding the religious *training of clergy*." *Id.* at 1313, 1314 n.5. This interest was based on a long tradition of "prohibitions against using tax funds to support the

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[15] *See also FCC v. League of Women Voters of California*, 468 U.S. 364, 400 (1984) (restriction on editorial activity by public stations violated the First Amendment where each station "barred from using even wholly private funds to finance its editorial activity").

ministry." *Id.* at 1314 (emphasis added). Here, of course, AmeriCorps funds do not support training individuals to become clergy, but only the provision of teaching services. There is an obvious, manifest difference between directly supporting the priesthood and providing secular instruction in a sectarian school.

2. The district court's injunction also offends the Free Speech Clause. The Supreme Court has made clear that it constitutes impermissible viewpoint discrimination to exclude religious groups from general benefits based on their religious perspective. In *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), a unanimous Supreme Court held that "it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint." *Id.* at 393. Similarly, in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), the Court held that an elementary school system could not open its facilities to public use for events "pertaining to the welfare of the community," *id.* at 108, but deny access to a religious group fitting that description: "[W]e can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons." *Id.* at 111.

Of course, the non-discrimination principle of viewpoint neutrality also applies to government funding. In *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), a public university, fearing an Establishment Clause violation, denied otherwise available funding to a religious group desiring to advance Christian viewpoints. The Supreme Court held that "[the University's] course of action was a denial of the right of free speech and

would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." *Id.* at 845-46.

The neutrality principle prohibits discriminatorily excluding ACE's participation in AmeriCorps. Congress carefully structured AmeriCorps to encourage a diversity of initiatives designed to "meet unmet human, educational, environmental, and public safety needs" and to "expand educational opportunity." 42 U.S.C. § 12501(b); 45 C.F.R. § 2522.410 (acclaiming the "overall diversity of programs desired by the Corporation").[16] Moreover, one of the basic purposes of the AmeriCorps programs is to instill values of citizenship and moral conduct. *See* 42 U.S.C. § 12637(e) (requiring programs to establish "standards of conduct" to promote "proper moral and disciplinary conditions"); 42 U.S.C. § 12501(b)(2) (noting purpose of "renew[ing] the ethic of civic responsibility"). Under the district court's facially discriminatory regime, inculcation of "proper moral . . . conditions" can only be done in *secular* programs, while the religious perspective is to be singled out for exclusion precisely because it is religious. But to preclude ACE from incorporating a religious perspective in pursuing the very goals articulated by Congress for AmeriCorps programs would constitute just the sort of viewpoint discrimination barred by binding Supreme Court precedent. *See, e.g., Good News*, 533 U.S. at 111; *Legal Serv. Corp. v. Carmen Velazquez*, 531 U.S. 533 (2001) (holding that restrictions on positions that could be taken by government-funded attorney organization violated Free Speech Clause). As the Eighth Circuit recently held in a directly analogous context, the Free Speech Clause does not permit the district court to force Notre Dame and its ACE teachers to silence their religiously-motivated expression as a condition for participating in AmeriCorps. *See Wigg v. Sioux Falls Sch. Dist.*, 382 F.3d 807, 814 (8th Cir. 2004) (public school's barring of teacher from

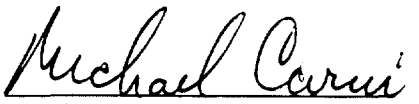
[16] This emphasis on diversity parallels the program in *Rosenberger*, 515 U.S. at 834, and distinguishes the program in *Locke*, 124 S. Ct. at 1313 n.3.

participating in Christian after-school program constituted impermissible viewpoint discrimination and there was no valid Establishment Clause interest in limiting "the ability of [school] employees to engage in private religious speech on their own time").

CONCLUSION

The Court should reverse the grant of summary judgment to AJC, vacate the injunction, and enter summary judgment in favor of defendant-appellants.

Respectfully Submitted,



Dated: October 14, 2004.

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), this brief uses proportionately spaced font and contains 13,925 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Local Circuit Rule 32(a)(2).

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