

ORAL ARGUMENT SCHEDULED FOR JANUARY 14, 2005

Nos. 04-5317, 04-5318

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

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE,
Defendant-Appellant,

UNIVERSITY OF NOTRE DAME,
Defendant-Intervenor-Appellant,

v.

AMERICAN JEWISH CONGRESS,
Plaintiff-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL ACTION NO. 02-1948 (GK)

**BRIEF *AMICUS CURIAE* OF AMERICANS UNITED FOR SEPARATION OF CHURCH
AND STATE, AMERICAN JEWISH COMMITTEE, ANTI-DEFAMATION LEAGUE,
AND PEOPLE FOR THE AMERICAN WAY FOUNDATION,
ON BEHALF OF PLAINTIFF-APPELLEE, IN SUPPORT OF AFFIRMANCE**

Ayesha N. Khan	Jeffrey P. Sinensky	David L. Barkey	Elliot M. Minberg
Richard B. Katskee	Danielle A. Samulon	Anti-Defamation	Judith E. Schaeffer
Alex J. Luchenitser	Jeff Zack	League	People For the
Sara Rose	The American Jewish	823 United Nations	American Way
Americans United for	Committee	Plaza	Foundation
Separation of Church	165 East 56th Street	New York, NY 10017	2000 M Street, NW
and State	New York, NY 10022	Phone: (212) 885-7743	Suite 400
518 C Street NE	Phone: (212) 891-6742		Washington, DC
Washington, DC 20002			20036
Phone: (202) 466-3234			Phone: (202) 467- 4999

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and *Amici*. All parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Appellee.

Rulings Under Review. References to the rulings at issue appear in the Brief for Appellee.

Related Cases. This case has not previously been before this Court or any other court, except for the district court below. *Amici* are not aware of any related cases.

RULE 26.1 DISCLOSURE STATEMENT

Amici Curiae Americans United for Separation of Church and State, the American Jewish Committee, the Anti-Defamation League, and People For the American Way Foundation are 501(c)(3) non-profit corporations whose goals (described in detail *infra* at 1-3) include preserving religious liberty and the separation of church and state. None of the *amici* has any parent corporations. No publicly held company owns ten percent or more of any of the *amici*.

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GLOSSARY

ADL	Anti-Defamation League
AJC	American Jewish Congress
EAP	Education Awards Program
ND	Notre Dame
PFAWF	People For the American Way Foundation

STATEMENT OF IDENTITY AND INTERESTS OF *AMICI CURIAE*

Americans United for Separation of Church and State is a national, nonsectarian public interest organization based in Washington, D.C., that is committed to preserving the constitutional principles of religious freedom and separation of church and state. In furtherance of this mission, Americans United actively opposes the provision of government aid for religious instruction or activity. Since its founding in 1947, Americans United has participated as a party, counsel, or *amicus curiae* in many of the leading church-state cases decided by the U.S. Supreme Court and by the U.S. Courts of Appeals. Americans United has more than 75,000 members nationwide, including many within the jurisdiction of this Court.

The American Jewish Committee, a national organization of over 125,000 members and supporters and 33 regional chapters, was founded in 1906 to protect the civil and religious rights of Jews. The American Jewish Committee believes that the only way to achieve this goal is to safeguard the civil and religious rights of all Americans. A staunch defender of church-state separation as the surest guarantor of religious liberty for all Americans, the American Jewish Committee opposes government funding of educational programs and social services for

inherently religious activities — such as religious instruction, worship, or proselytization — as both unconstitutional and bad public policy.

Organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States, the Anti-Defamation League (“ADL”) is today one of the world’s leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. Among ADL’s core beliefs is strict adherence to the separation of Church and State embodied in the Establishment Clause of the First Amendment. Separation, ADL believes, preserves religious freedom and protects our democracy. ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is essential to the continued flourishing of religious practice and beliefs in America, and to the protection of minority religions and their adherents. From day-to-day experience serving its constituents, ADL can testify that the more government and religion become entangled, the more threatening the environment becomes for each. In the familiar words of Justice Black: “A union of government and religion tends to destroy government and degrade religion.” *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

People For the American Way Foundation (“PFAWF”) is a national, nonpartisan citizens’ organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation’s heritage of tolerance, pluralism, and liberty, PFAWF now has more than 600,000 members and activists nationwide, including many within the jurisdiction of this Court. PFAWF has frequently represented parties and filed *amicus curiae* briefs in litigation seeking to defend First Amendment rights, including in cases concerning religious liberty and the separation of church and state.

SOURCE OF AUTHORITY TO FILE

All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The AmeriCorps Education Awards Program (“EAP”) is not a “true private-choice program” of the sort upheld in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). Under a “true private-choice program,” government aid is distributed directly to individual students, and the institution at which the aid is used and

whether the aid is used for religious instruction are determined *solely* by the genuine and independent choices of the students.

Here, the aid cannot be used at any institution an individual may select, but only at institutions pre-selected by the government based on discretionary criteria. The government also has ultimate authority over the amount of aid an institution is to receive. Whether aid directed to an institution can in fact be used for religious instruction is not controlled solely by individuals but is heavily affected by government regulatory and administrative actions. To the extent that individual choice is involved, the relevant choices are made not by the students who receive religious instruction, but by the persons who desire to present religious instruction. And part of the aid is composed of direct monetary payments to religious institutions. The AmeriCorps program therefore does not fall within the “true private-choice” rubric of *Zelman*.

The remainder of the constitutional analysis is not difficult. Where government aid reaches religious institutions through a scheme that is not a “true private-choice program,” the religious institutions are constitutionally prohibited from using the aid for religious instruction, the government must implement effective means of monitoring the aid to ensure that it is not so used, the aid must be secular in content, and the aid must not be used to support the core functions of a

parochial school. Here, religious institutions actually use AmeriCorps participants and grant funds for religious instruction and activities. The government has failed to create an effective system for monitoring how the aid is used. The aid consists of religious instructors who have received religious training from faith-based institutions. And the instructors perform core teaching functions at parochial schools. The district court's judgment should therefore be affirmed.

ARGUMENT

II. The AmeriCorps Program Is Not a True Private-Choice Program.

The Supreme Court's "decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Zelman*, 536 U.S. at 649. Although aid that reaches a religious institution through a "true private-choice program" can be used for religious instruction, government aid that makes its way to a religious institution through other means cannot. *Mitchell v. Helms*, 530 U.S. 793, 840-44 (2000) (O'Connor, J., concurring).¹ Furthermore, provision of aid through the latter form must meet several additional requirements in order to ensure that it does not unconstitutionally benefit religious institutions, including that the government must monitor the aid effectively in order to ensure that it is used lawfully. *See*

¹ As explained in detail in Section I(E) *infra*, Justice O'Connor's opinion in *Mitchell* sets forth the governing case law.

Mitchell, 530 U.S. at 848-49, 855-63 (O'Connor, J., concurring); *Agostini v. Felton*, 521 U.S. 203, 210-12, 226, 228-29, 234 (1997).

The threshold question in this case therefore is whether the AmeriCorps program is a “true private-choice program” — a program that “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.” *Zelman*, 536 U.S. at 652 (emphasis added). For a host of reasons, it is not.

A. Aid Recipients Are Determined Not Solely By Private Choices But By Discretionary Government Decisions.

As plaintiff-appellee American Jewish Congress (“AJC”) explains in detail, AmeriCorps participants are permitted to perform their AmeriCorps service not for any institution that satisfies some set of neutral requirements, but only for certain institutions that are selected by the government based on discretionary criteria. AJC Brief at 8-9, 47. In *Zelman*, however, the Supreme Court described “true private choice programs” as “programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions *of their own choosing*.” 536 U.S. at 649 (emphasis added). In fact, in all five cases in which the Supreme Court concluded that government aid programs complied with the Establishment Clause on “true private-choice” grounds, individual recipients of government aid could use the aid at a wide variety of educational institutions — both religious and secular — that were not hand-picked by government officials but only had to meet neutral, universal requirements. *See Locke v. Davey*, 124 S. Ct. 1307, 1310 (2004); *Zelman*, 536 U.S. at 645; *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993); *Witters v. Wash. Dep’t of*

Servs. for Blind, 474 U.S. 481, 488 (1986); *Mueller v. Allen*, 463 U.S. 388, 397-98 (1983).

Examining the original purposes of the Establishment Clause illuminates why it is critical, if government aid is to be used for religious purposes, that the aid reach religious institutions *solely* through private choices of individuals, and that government officials exercise no discretion in selecting aid recipients: “Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general.” *Flast v. Cohen*, 392 U.S. 83, 103 (1968). “[T]he Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization.” *Gillette v. United States*, 401 U.S. 437, 450 (1971); *see also Walz v. Tax Comm’n*, 397 U.S. 664, 669 (1970) (a “basic purpose” of the Religion Clauses of the First Amendment is “to insure that no religion be sponsored or favored, none commanded, and none inhibited”).

In *Zelman*, the Supreme Court explained that “if numerous private choices, rather than the single choice of a government, determine the distribution of aid, pursuant to neutral eligibility criteria, then a government cannot, or at least cannot

easily, grant special favors that might lead to a religious establishment.” 536 U.S. at 652-53 (quoting *Mitchell*, 530 U.S. at 810 (plurality opinion)). In this case, on the other hand, the broad discretion that Corporation for National and Community Service officials possess to approve some AmeriCorps grant applications and reject others creates a risk that the officials will — whether intentionally or subconsciously — allow the religious identities of applicants to affect who receives grant awards.

This risk is exacerbated by the nature of the discretionary criteria that guide Corporation officials in allocating AmeriCorps grants. The criteria include (1) “[s]trong community partnerships, including well-defined roles for faith- or community-based organizations”; (2) “[w]ell-designed activities that promote an ethic of service and civic responsibility”; and (3) “[w]ell-designed plan to engage participants in high-quality service learning as defined by the Corporation.” JA844.

These criteria invite Corporation officials to consider the religious natures and views of organizations applying for grants, and to inquire whether the organizations’ religious views “promote an ethic of service and civic responsibility” and are consistent with “high-quality service learning.”

Moreover, even if Corporation officials claim to not use religious considerations in selecting grant recipients, there will be no way for citizens to be

assured that this is in fact the case. Could Corporation officials truly remain blind to an applicant's religious identity and teachings if they are faced with a proposal from a controversial religious group, such as the Nation of Islam?

In fact, in the most recent fiscal year for which record evidence is available, the Corporation selected only six faith-based grantees, and none of these grantees were affiliated with non-Christian faiths such as Judaism, Islam, or Hinduism. *See* JA1663 (declaration identifying the six grantees); addendum hereto (containing statements on websites of the six grantees setting forth their missions and philosophies²). Indeed, five of the six grantees were Catholic-affiliated or Catholic-related. *See* JA1663; addendum. Regardless of whether AmeriCorps officials in fact intended to favor Christians and Catholics, the identities of the grantees convey the impermissible appearance that the government has placed its imprimatur of approval on Christianity in general and Catholicism in particular. *See County of*

² University of Notre Dame, *Mission Statement*, at http://www.nd.edu/aboutnd/about/mission/mission_statement.shtml (last visited Nov. 18, 2004); Catholic Network of Volunteer Service, *CNVS — Our Mission*, at <http://www.cnvs.org/a-missio.htm> (last visited Nov. 9, 2004); Mount Mary College, *Mission, Vision and Purposes*, at <http://www.mtmary.edu/mission.htm> (last visited Nov. 9, 2004); Camphill in North America, *Frequently Asked Questions: What is the philosophy behind Camphill?*, at <http://www.camphill.org/faq.php> (last visited Nov. 9, 2004); University of San Francisco, *Vision, Mission, Values Statement*, at <http://www.usfca.edu/mission/index.html> (Sept. 11, 2001); L'Arche USA, *About Us*, at <http://www.larcheusa.org/about.htm> (last visited Nov. 9, 2004).

Allegheny v. ACLU, 492 U.S. 573, 592-94 (1989) (Establishment Clause prohibits government officials both from intentionally taking action that favors or endorses a particular religion and from engaging in conduct that conveys an appearance of such favoritism or endorsement). Though the AmeriCorps EAP program would not qualify as a “true private-choice program” regardless of which grantees had been selected, the exclusively Christian nature of the actual grantees illuminates the danger created by the exercise of government discretion.

The exercise of such discretion was fatal to a “private choice” argument in *Stark v. St. Cloud State University*, 802 F.2d 1046 (8th Cir. 1986), a case with many similarities to this one. In *Stark*, the Eighth Circuit held unconstitutional a state university program that placed university students as student teachers at parochial (as well as secular) schools. *Id.* at 1052. The court rejected a contention that “any aid to religion stems from the private choices of the student teachers, and not from . . . University policy.” *Id.* at 1051. The court explained that “the placement of the students in the parochial schools cannot be seen as a purely private choice of the student” because “[t]he University initially selects the parochial school as a suitable student teaching site, and exercises the power of final approval over every student placement.” *Id.*; see also *Eulitt v. Maine Dep’t of Educ.*, 386 F.3d 344, 349 & n.1 (1st Cir. 2004) (without deciding issue, stating that including religious schools in

Maine program under which state paid tuition for students attending certain secular private schools might violate Establishment Clause, in part because “Maine’s scheme provides for the approval of applications based on an individualized assessment of educational benefit, whereas the Cleveland program [upheld in *Zelman*, 536 U.S. at 662-63] employed only objective criteria of financial need and residency”).

Contrary to what appellant-intervenor Notre Dame argues (*see* Notre Dame (“ND”) Br. at 23), disallowing religious organizations from using for religious purposes government aid received through programs in which government officials exercise discretion in selecting program beneficiaries would not lead to the general exclusion of religious organizations from government programs. Religious organizations would still be eligible for government aid through programs that truly prohibit the aid from being used to benefit the religious mission of an organization, for under such circumstances the risk that government officials will consider the religious nature or beliefs of an organization in selecting aid recipients is minimized. *See, e.g., Mitchell*, 530 U.S. at 861-62 (O’Connor, J., concurring) (upholding program in which religious schools were permitted to use government-provided educational materials and equipment solely for secular activities). And religious organizations would still be able to use for religious purposes government

assistance that finds its way to them through a *true* private-choice program, under which government officials do not exercise discretion in selecting the organizations that benefit.

B. The Government Has Ultimate Authority Over the Number Of AmeriCorps Participants At Each AmeriCorps Grantee.

As the AJC explains in detail, the Corporation has ultimate authority over how many AmeriCorps participants each AmeriCorps grantee is expected to recruit and enroll. *See* AJC Br. at 9, 49. This fact also precludes the AmeriCorps EAP program from being “a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals.” *Cf. Zelman*, 536 U.S. at 655. The Corporation’s ability to set how many AmeriCorps participants a grantee should receive additionally raises the danger of favoritism discussed above.

And this feature of the AmeriCorps program creates another problem. Under a “true private-choice program,” a “student can attend a religious school and yet retain control over whether the secular government aid will be applied toward the religious education.” *Mitchell*, 530 U.S. at 842 (O’Connor, J., concurring). In other words, an aid recipient can choose to attend a religious institution without using the aid at the institution. “The fact that aid flows to the religious schools and is used for the advancement of religion is therefore *wholly* dependent on the student’s private decision.” *Id.* Here, however, because AmeriCorps grantees are contractually obliged to seek to fill all of the participant slots allocated to them by the government (*see* AJC Br. at 9, 49), AmeriCorps participants may well not be able to obtain positions with religious AmeriCorps grantees unless they use their AmeriCorps awards to support those positions, as an applicant who is willing to use such an award will have an advantage over one who is not (or someone who does not have an award).

C. The Extent To Which AmeriCorps Awards Can Be Used To Support Religious Instruction Within Particular AmeriCorps Placements Is

Determined In Large Part By Government Decisions, Not Solely By Choices
Of Individuals.

In a “true private-choice program,” the role of the government “ends with the disbursement of benefits.” *Zelman*, 536 U.S. at 652. But in this case, federal regulatory and administrative actions heavily affect the extent to which AmeriCorps participants’ service can be used to support religion.

The statute governing the AmeriCorps program states that religious organizations cannot use AmeriCorps participants “to give religious instruction”; “to conduct worship services”; “to provide instruction as part of a program that includes mandatory religious education or worship”; “to construct or operate facilities devoted to religious instruction or worship or to maintain facilities primarily or inherently devoted to religious instruction or worship”; or “to engage in any form of proselytization.” 42 U.S.C. § 12584(a)(4) (reproduced in full in addendum). Until 2002, a Corporation regulation promulgated to implement the statute provided that AmeriCorps participants could not engage in these prohibited activities “in the course of their duties, at the request of program staff, or in a manner that would associate the activities with the AmeriCorps program or the Corporation.” Corporation Grant Programs and Support and Investment Activities, 59 Fed. Reg. 13772, 13794 (March 23, 1994) (enacting original version of 45 C.F.R. § 2520.30) (reproduced in addendum). In 2002, the Corporation amended

the regulation so that it now provides that AmeriCorps participants cannot engage in the prohibited activities only “[w]hile charging time to the AmeriCorps program, accumulating service or training hours, or otherwise performing activities supported by the AmeriCorps program or the Corporation.” AmeriCorps Grant Regulations, 67 Fed. Reg. 45357, 45359 (July 9, 2002) (enacting current version of 45 C.F.R. § 2520.30) (reproduced in addendum).

The Corporation’s regulatory action thus specifically authorized what had previously been forbidden: AmeriCorps participants engaging in religious instruction or activity at their positions in religious schools. Therefore, unlike in *Zelman*, it cannot be said in this case that “[t]he incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government.” *Cf. Zelman*, 536 U.S. at 652. The government’s monitoring efforts (*see* Corporation Br. at 42-45; ND Br. at 5-6; AJC Br. at 20-21) — though they are woefully inadequate to ensure that religious organizations actually do not use AmeriCorps participants for religious purposes — further evince an ongoing government role here.

The regulatory and administrative involvement of the government implicates another core Establishment Clause concern. The “first and most immediate

purpose” of the Establishment Clause “rested on the belief that a union of government and religion tends to destroy government and to degrade religion.” *Engel v. Vitale*, 370 U.S. 421, 431 (1962). In the words of James Madison, “Religion flourishes in greater purity, without than with the aid of Gov[ernment].” James Madison, *Memorial and Remonstrance against Religious Assessments*, in *The Complete Madison* 299, 309 (Saul K. Padover ed., 1953). “Government-financed or government-sponsored indoctrination into the beliefs of a particular faith” would, among other dangers, “taint[] the resulting religious beliefs with a corrosive secularism.” *School Dist. v. Ball*, 473 U.S. 373, 385 (1985), *overruled in part on other grounds by Agostini*, 521 U.S. 203. “[W]hen religion contracts an alliance of this nature . . . it risks that authority which is rightfully its own.” 1 Alexis de Tocqueville, *Democracy in America* 315 (Henry Reeve trans., P. F. Collier & Son 1900).

Here, AmeriCorps participants with a religious bent may well need to use their AmeriCorps status to obtain a position with a religious school. *See supra* § I(B). And once they get to the school, in order to comply with the Corporation’s record-keeping requirements, AmeriCorps participants must determine what portions of their activities are religious and what portions are not, even where their religious and secular activities are intermixed. *See* AJC Br. at 19. The regulatory

and administrative requirements here thus raise the danger of “degrad[ation]” of religion (*cf. Engel*, 370 U.S. at 431), while further removing the AmeriCorps EAP program from the “true private-choice” paradigm.

D. Insofar As Private Choices Affect the Allocation And Use Of Government Aid Here, the Choices Are Made Not By Those Who Receive Religious Instruction, But By Those Who Wish To Present It.

In each of the five Supreme Court decisions holding or stating that programs of “true private choice” satisfied the Establishment Clause, the relevant choices were made by the individuals who *received* religious instruction (or, in the case of minors, by their parents). *See Locke*, 124 S. Ct. at 1310; *Zelman*, 536 U.S. at 646; *Zobrest*, 509 U.S. at 4, 10; *Witters*, 474 U.S. at 483, 488; *Mueller*, 463 U.S. at 391, 397-98. Here, by contrast, to the extent not made by the government, the choices are made by the persons who *deliver* religious instruction. For two reasons, this difference is critical.

6. Students perceive a governmental endorsement of religion.

First, in *Mueller*, the Supreme Court explained that when “aid to parochial schools is available only as a result of decisions of individual *parents* no ‘imprimatur of State approval’ can be deemed to have been conferred on any particular religion, or on religion generally.” 463 U.S. at 399 (quoting *Widmar v. Vincent*, 454 U.S. 263, 274 (1981)) (emphasis added). This makes sense, because when parents or students are the ones who make a choice to use government benefits at religious schools, the parents and the students are able to know that it was parental or student choice, not governmental choice, that caused the aid to be so used.

Here, by contrast, students in religious schools have no basis to believe that the presence of government-sponsored AmeriCorps religious teachers in their schools is the result of anything

other than governmental decision-making. Indeed, the students observe many indicia of government endorsement of their AmeriCorps religious teachers and the instruction they provide — AmeriCorps signs are placed in parochial school classrooms, AmeriCorps teachers introduce themselves to students as participants in the program, and AmeriCorps participants wear AmeriCorps T-shirts while teaching. *See* AJC Br. at 7-8, 34. Such visible signs of ongoing government support for, and approval of, the instruction AmeriCorps participants deliver in religious schools are not present in a constitutional voucher program, in which parents or students decide how to distribute government aid, and the government’s role accordingly “ends with the disbursement of benefits.” *Cf. Zelman*, 536 U.S. at 652.

Relying on *Zelman*, 536 U.S. at 654-55, the Corporation contends that a reasonable observer would not perceive endorsement of religion here because the observer would know all the facts about the AmeriCorps program. Corporation Br. at 50. However, unlike the students at AmeriCorps teaching sites, the students in *Zelman* were not confronted with continuing evidence of government association with their religious schools, so in *Zelman* the Supreme Court had no need to examine the endorsement question from the specific perspective of a parochial school student. In cases where the government’s conduct does create a serious risk that schoolchildren could perceive government endorsement of religion, the courts examine the endorsement question from the perspective of a reasonable student of the relevant age. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000); *Bd. of Educ. v. Mergens*, 496 U.S. 226, 249 (1990); *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1379 (9th Cir. 1994). Moreover, although a reasonable observer is deemed to be well-informed for purposes of the endorsement test, the observer is not an “ultrareasonable observer” (*Capitol Square Review & Advisory Bd. v.*

Pinette, 515 U.S. 753, 781 (1995) (O'Connor, J., concurring)) and “is not to be deemed omniscient” (*ACLU of Ohio v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289, 302 (6th Cir. 2001) (en banc)). And the courts are particularly reluctant to assume that young schoolchildren will be fully aware of the details of a government program and will be able to comprehend those details sufficiently to distinguish conduct that should be attributable to the government from conduct that should not be. See *Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274, 287 n* (4th Cir. 1998); *Brown*, 27 F.3d at 1378; *Berger v. Rensselaer Cent. Sch. Corp.*, 982 F.2d 1160, 1166 (7th Cir. 1993); *Stark*, 802 F.2d at 1051.

In this case, many of the parochial-school students taught by AmeriCorps participants are in elementary school, and some are even in pre-kindergarten. JA710-11, JA1393-94. It would be stretching a legal fiction to its breaking point to presume that such young children would know all the details of the complex AmeriCorps program, be able to understand and interpret those details, and then draw a conclusion that the government’s conduct does not evince endorsement of any religion. In fact, the Corporation asserted below that *one of its own employees* — a Corporation site monitor — incorrectly concluded, because she did not understand how the AmeriCorps program works, that AmeriCorps participants were teaching religion in their role as AmeriCorps representatives. See AJC Br. at 16-17. Furthermore, even if schoolchildren could fully comprehend how the program works, the conclusion they would likely reach would be that the visible symbols of government endorsement in their religious schools are not negated by any private choices, for the reasons set forth in the briefs of the AJC and *amici*.

7. Under Supreme Court precedent, aid directly to religious instructors is treated like direct aid to religious organizations, not like vouchers to students.

In addition to its impact on the endorsement issue, the fact that the non-governmental choices in question here are made by persons who deliver religious instruction instead of those who receive it is relevant for another fundamental reason. Although religious institutions exercise free choice in deciding whether to deliver religious schooling, the government could not utilize the “true private-choice” doctrine to justify direct grants of public aid to religious institutions for religious instruction. *See, e.g., Mitchell*, 530 U.S. at 840-42 (O’Connor, J., concurring) (reaffirming that direct government aid to religious institutions cannot be used for religious purposes). Likewise, the government cannot, under the rubric of “private choice,” avoid the constitutional ban on direct aid to religion by delivering government funds to religious instructors individually instead of religious institutions collectively.

Such provision of public funds would contradict the Supreme Court’s ruling in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and the Supreme Court’s 7-2 invalidation of the Community Education program at issue in *Ball*, 473 U.S. 373. In both *Lemon*, 403 U.S. at 607, and *Ball*, 473 U.S. at 377, 397, the Court held that government bodies violated the Establishment Clause by instituting programs in which they made direct payments to private-school teachers, including teachers regularly employed by parochial schools, for the teaching of secular subjects in their schools. In the two cases, the teachers made the decisions of whether to work

at a religious school or not, yet the Court did not rule (or even intimate) that the funding programs could be upheld on “private choice” grounds. Moreover, in *Agostini*, where the Court upheld a program in which public-school teachers paid by the government provided purely secular instruction in religious schools, the public-school teachers had to volunteer for such assignments. *See* 521 U.S. at 211. Yet the Supreme Court did not sustain the *Agostini* program on “true private-choice” grounds, but instead measured the program against the rigorous standards applicable to direct aid programs (*see generally id.* at 223-35), including the prohibition against actual use of government aid for religious instruction (*see id.* at 226), and the requirement that there be effective government safeguards and monitoring to prevent such misuse (*see id.* at 234).

As in *Lemon*, *Ball*, and *Agostini*, the provision of funds directly to religious instructors instead of to religious schools does not permit the AmeriCorps program to be treated as a “true private-choice program.” This case is thus unlike *Zelman*, where the Court, in explaining its earlier “true private-choice” case *Zobrest*, 509 U.S. 1, stated that “[b]ecause the [*Zobrest*] program ensured that *parents* were the ones to select a religious school . . . the circuit between government and religion was broken, and the Establishment Clause was not implicated.” 536 U.S. at 652 (emphasis added).

E. The Corporation's \$400 Grants Are Transmitted Directly To Religious Institutions.

Thus far, *amici's* discussion has been confined to the provision to religious schools of AmeriCorps participants themselves. As the AJC points out, in reliance on Justice O'Connor's concurrence in *Mitchell*, 530 U.S. at 842, the \$400 cash payments that AmeriCorps grantees receive for each AmeriCorps participant they enroll cannot be treated as a "true private-choice program" for an additional reason — the payments are given directly to religious institutions, instead of being given to private individuals who have a right to determine whether to transmit them to a religious institution. *See* AJC Br. at 60.

Justice O'Connor's *Mitchell* concurrence represents the governing case law. Four other Justices in *Mitchell* agreed with Justice O'Connor on the direct payment point (*see* 530 U.S. at 841-42 (O'Connor, J., concurring, joined by Breyer, J), 888 & n.9, 889, 902 (Souter, J., dissenting, joined by Stevens, J., and Ginsburg, J.)), and, more generally, that government aid to religious institutions must at the very least meet the requirements set forth by Justice O'Connor in order to be constitutional (*see id.* at 848-49, 855-63 (O'Connor, J., concurring), 884-99 (Souter, J., dissenting)). Accordingly, federal appeals courts have agreed that Justice O'Connor's opinion in *Mitchell* sets forth the law governing governmental aid to religious organizations. *See DeStefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397, 418 (2d Cir. 2001) ("Justice O'Connor's position . . . garnered the support not only of Justice Breyer, who joined in her concurrence, but also of the three Justices in dissent, and is therefore

the majority view of the Supreme Court”); *Columbia Union Coll. v. Oliver*, 254 F.3d 496, 504 n.1 (4th Cir. 2001) (“[b]ecause the plurality opinion for the Court did not garner a majority, we must examine the details of the [aid] [p]rogram under the rubric of Justice O’Connor’s concurring opinion”); *Johnson v. Econ. Dev. Corp.*, 241 F.3d 501, 510 n.2 (6th Cir. 2001) (“Justice O’Connor’s opinion . . . is controlling upon this Court”); *Gentala v. City of Tuscon*, 244 F.3d 1065, 1076 (9th Cir.) (opinions of five concurring and dissenting Justices constitute a “clear holding by a Supreme Court majority”), *vac’d on other grounds*, 534 U.S. 946 (2001).

Contrary to what Notre Dame contends (*see* ND Br. at 34), *Locke*, 124 S. Ct. at 1311-12, does not permit direct grants from government bodies to religious institutions to be treated as a “true private-choice program.” In *Locke*, while the State of Washington initially sent scholarship checks to religiously affiliated universities under a broad scholarship program, the universities could not keep the checks and deposit them into their treasuries; instead, they had to disburse the checks to individual students who then had the choice of using the checks to pay for tuition or for other educational expenses. *See* 124 S. Ct. at 1310; Wash. Admin. Code § 250-80-060(5) (reproduced in full in addendum). In contrast, AmeriCorps participants never gain possession of the \$400 direct payments made by the

Corporation to AmeriCorps grantees, and they have no control over how the grantees use that money.

II. The AmeriCorps Program Violates the Constitutional Requirements Applicable To Aid Programs That Are Not “True Private-Choice Programs.”

As the appellants’ arguments that the AmeriCorps program is a “true private-choice program” are without merit, the AmeriCorps program must be judged under the Establishment Clause standards applicable to aid that is received directly by religious institutions. *See Mitchell*, 530 U.S. at 840-42 (O’Connor, J., concurring).

The program violates those standards in at least four ways.

A. Government Aid Is Being Used For Religious Purposes.

First, outside the context of a “true private-choice program,” government aid to religious institutions cannot constitutionally be used for religious instruction or activity. *Mitchell*, 530 U.S. at 840, 857-58 (O’Connor, J., concurring); *Bowen v. Kendrick*, 487 U.S. 589, 613, 621 (1988); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 747, 752, 759-60 (1976); *Hunt v. McNair*, 413 U.S. 734, 743 (1973). The aid received by the religious schools here (putting the \$400 payments to AmeriCorps grantees to one side for the moment) consists of the AmeriCorps participants and their services. *See Agostini*, 521 U.S. at 228 (treating relevant government aid as

the instructional services provided to religious schools by publicly paid teachers); *Ball*, 473 U.S. at 395 (treating as the relevant government aid the publicly paid teachers working in religious schools). As the AJC explains in detail, the record in this case discloses substantial use by religious schools of AmeriCorps participants for religious purposes — for instance, 30 to 50 percent of AmeriCorps participants placed in religious schools by two of the major AmeriCorps faith-based grantees teach religious subjects in their schools. *See* AJC Br. at 10-19. The record also discloses evidence of use for religious purposes of the \$400 grants to AmeriCorps grantees. *See* AJC Br. at 22-23.

The Corporation’s scheme of having AmeriCorps participants fill out time sheets on which they are supposed to record secular work-hours in an amount sufficient to meet the minimum-hour requirement of their AmeriCorps awards does not rectify the religious use of the government’s aid. *See* AJC Br. at 37-41. “The Supreme Court has systematically rejected attempts to unbundle religious activities through statistics and accounting.” *Freedom From Religion Found. v. McCallum*, 179 F. Supp. 2d 950, 974 (W.D. Wis. 2002). For instance, in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 778 (1973), the Supreme Court stated that “a mere statistical judgment will not suffice as a guarantee that state funds will not be used to finance religious education.” The Court explained

that the government could not, for example, justify paying a religious institution half the cost of constructing a facility that would sometimes be used for religious purposes by establishing that half of the facility would be devoted to secular purposes. *Id.* at 779 n.36.

And, even if such attempts at statistical “unbundling” of religion were permissible, the Corporation does not require religious schools to keep track of the percentage of AmeriCorps participants’ time that is spent on religious activity and to reimburse the Corporation for the *pro rata* shares of the participants’ service awards accordingly. Nor does the Corporation reduce the service awards to participants *pro rata* by the percentage of participants’ time that is religious. Nor does the Corporation similarly reduce *pro rata* the \$400 grants to AmeriCorps grantees. Instead, the Corporation simply provides the AmeriCorps participants to the religious schools, and allows the schools to use the participants for religious purposes so long as they spend a minimum amount of time engaging in secular activity. This is no more constitutional than it would be for the government to provide computers to religious schools and to allow the religious schools to use the computers for religious purposes as much as the schools wanted so long as the schools used the computers for secular purposes a minimum number of hours per week. *See, e.g., Mitchell*, 530 U.S. at 840, 857-58 (O’Connor, J., concurring)

(upholding lending of computers to religious schools where computers could not be used for religious instruction, and reaffirming that direct public aid to religious institutions cannot actually be used for religious purposes).

B. The Government Fails To Monitor Its Aid Adequately.

Where government aid reaches religious institutions through a path other than a “true private-choice program,” the Establishment Clause requires the government to monitor the aid effectively, in order to ensure that the aid is not diverted to religious uses. *See Bowen*, 487 U.S. at 615; *Nyquist*, 413 U.S. at 780; *Levitt v. Comm. for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 480 (1973); *Freedom From Religion Found. v. Bugher*, 249 F.3d 606, 612-13 (7th Cir. 2001); *McCallum*, 179 F. Supp. 2d at 967, 977-78. As explained in detail by the AJC, here the Corporation’s efforts to monitor its aid to religious schools are woefully inadequate. *See* AJC Br. at 20-21, 41-44, 58-59.

C. The Government’s Aid Is Not Secular In Content.

To be constitutional, government aid to religious institutions must be secular in content. *See Mitchell*, 530 U.S. at 820 (plurality opinion), 848-49, 867 (O’Connor, J., concurring). For example, the government can constitutionally loan books to students in parochial schools so long as the content of the books is not religious. *Bd. of Educ. v. Allen*, 392 U.S. 236, 245 (1968). Here, however, the aid

is not secular in content — the aid to parochial schools consists of religious instructors who have received religious training from faith-based AmeriCorps grantees. *See* AJC Br. at 10-14.

These individuals will intrinsically be particularly inclined to include religion in the instruction they deliver. The primary distinction between the Community Education program struck down by the 7-2 ruling in *Ball* that remains good law and the Shared Time program invalidated by the 5-4 ruling in *Ball* that was overturned by *Agostini*, 521 U.S. at 226, is that the state-paid teachers provided by the Community Education program were regular parochial-school teachers, while the ones provided by the Shared Time program were public-school teachers. *See Ball*, 473 U.S. at 376-77. The background and training of the AmeriCorps participants placed in religious schools here makes them much more like the parochial-school instructors of the Community Education program than the public-school instructors of the Shared Time program.

D. The State Is Supporting Core Functions Of Parochial Schools.

The Supreme Court held in *Lemon*, 403 U.S. at 615-22, that the state cannot pay full-time parochial-school teachers to teach even *secular* subjects in parochial schools, regardless of whether government monitoring could successfully prevent the teachers from inculcating religion. Thus, even if AmeriCorps participants were not being used for religious instruction or activity, and even if the government's monitoring was adequate, the placement of AmeriCorps participants as parochial-school teachers would still be unconstitutional. While in *Agostini*, 521 U.S. at 210, 228-29, the Court upheld the provision of *supplemental* instructional services in

parochial schools by *public*-school teachers, there is no contention here that the instruction being provided by AmeriCorps participants is merely supplemental, and the AmeriCorps participants receive their pre-placement training from religious AmeriCorps grantees, not public educational agencies.

CONCLUSION

For the foregoing reasons, *amici* respectfully ask this Court to affirm the judgment of the district court.

Respectfully submitted,

By: _____
Alex J. Luchenitser, Esq.

Date: _____

Ayesha N. Khan, Esq.
Richard B. Katskee, Esq.
Alex J. Luchenitser, Esq.
Sara Rose, Esq.
Americans United for Separation of Church and State
518 C Street NE
Washington, DC 20002
Phone: (202) 466-3234
Fax: (202) 466-2587
E-mail: akhan@au.org / katskee@au.org / luchenitser@au.org / rose@au.org

Jeffrey P. Sinensky, Esq.
Danielle A. Samulon, Esq.
Jeff Zack, Esq.
The American Jewish Committee
165 East 56th Street
New York, NY 10022
Phone: (212) 891-6742

David L. Barkey, Esq.
Anti-Defamation League
823 United Nations Plaza
New York, NY 10017
Phone: (212) 885-7743

Elliot M. Mincberg, Esq.
Judith E. Schaeffer, Esq.
People For the American Way Foundation
2000 M Street, NW, Suite 400
Washington, DC 20036
Phone: (202) 467-4999

Counsel for *amici curiae*

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies as follows:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,458 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Respectfully submitted,

By: _____
Alex J. Luchenitser, Esq.

Date: _____

Ayesha N. Khan, Esq.

Richard B. Katskee, Esq.

Alex J. Luchenitser, Esq.

Sara Rose, Esq.

Americans United for Separation of Church and State

518 C Street NE

Washington, DC 20002

Phone: (202) 466-3234

Fax: (202) 466-2587

E-mail: akhan@au.org / katskee@au.org / luchenitser@au.org / rose@au.org

Jeffrey P. Sinensky, Esq.

Danielle A. Samulon, Esq.

Jeff Zack, Esq.

The American Jewish Committee
165 East 56th Street
New York, NY 10022
Phone: (212) 891-6742

David L. Barkey, Esq.
Anti-Defamation League
823 United Nations Plaza
New York, NY 10017
Phone: (212) 885-7743

Elliot M. Mincberg, Esq.
Judith E. Schaeffer, Esq.
People For the American Way Foundation
2000 M Street, NW, Suite 400
Washington, DC 20036
Phone: (202) 467-4999

Counsel for *amici curiae*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of this Brief of *Amici Curiae* have been served on counsel (listed below) for each party by first-class U.S. mail, that this Brief has also been served on counsel (listed below) for each party by electronic mail (not including the second addendum), and that an original and fourteen copies of this Brief have been dispatched to the Clerk of the United States Court of Appeals for the D.C. Circuit by first-class U.S. mail on November 19, 2004.

Service list:

Daniel Pariser, Esq. (Daniel_Pariser@aporter.com)
Donald Gordon, Esq. (Donald_Gordon@aporter.com)
Robyn M. Holtzman, Esq. (Robyn_Holtzman@aporter.com)
Arnold & Porter LLP
555 Twelfth Street, NW
Washington, DC 20004-1202

Marc D. Stern, Esq. (mstern@ajcongress.org)
American Jewish Congress
Stephen Wise Congress House
15 East 84th Street
New York, NY 10028

Lewis S. Yelin, Esq. (*Lewis.Yelin@usdoj.gov*)
Civil Division, Room 7318
Department of Justice
950 Pennsylvania Ave.
Washington, DC 20530-0001

Michael A. Carvin, Esq. (*macarvin@JonesDay.com*)
John L. Chaney, Esq. (*jlchaney@JonesDay.com*)
Jones Day
51 Louisiana Ave., NW
Washington, DC 20001

Thelma Scott

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**ADDENDUM OF DOCUMENTS AVAILABLE ON INTERNET CITED
HEREIN (MISSION STATEMENTS OF FISCAL YEAR 2004
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