

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

AMERICAN JEWISH CONGRESS,

Plaintiff,

v.

CORPORATION FOR NATIONAL AND  
COMMUNITY SERVICE,

Defendant,

UNIVERSITY OF NOTRE DAME,

Defendant-Intervenor.

CIVIL ACTION NO.  
1:02cv01948 GK

BRIEF OF *AMICUS CURIAE*  
THE BECKET FUND FOR RELIGIOUS LIBERTY  
IN SUPPORT OF DEFENDANT'S MOTION  
FOR SUMMARY JUDGMENT

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## INTEREST OF *AMICUS*

The Becket Fund for Religious Liberty is a non-partisan and interfaith public interest law firm that protects the free expression of all religious traditions and the ability of religious people and institutions to participate fully in public life. The Becket Fund engages in litigation in the federal courts of the District of Columbia and throughout the United States, both as primary counsel and as *amicus curiae*. The Becket Fund has devoted particular attention to the application of the Free Exercise and Establishment Clauses in a wide range of factual contexts, on behalf of people of various faiths. Accordingly, The Becket Fund believes that its experience in this area of the law will prove helpful to the Court's resolution of this case. This brief will not duplicate the briefs of the parties, because it focuses on the narrow issue of the First Amendment violation that would result if the Court were to grant the unprecedented and exceptionally broad relief Plaintiff has requested.

## INTRODUCTION

Plaintiff's claims are based on the extraordinary assertion that a government program fails constitutional scrutiny unless it requires participants to forfeit their constitutionally protected right to engage in certain religious speech activities *on their own time*. Plaintiff asserts that permitting AmeriCorps participants to spend *any* time teaching religion in private religious schools violates the Establishment Clause and requests that this Court prohibit such individuals from participating in the program. *See* Complaint ¶ 4; *id.* ¶ 14. Implementing such a scheme would require that the government limit not only speech and activities financed by government funds, as the AmeriCorps

program *already* does,<sup>1</sup> but also religious speech and activities unrelated to the government program that is *not* government-funded and is wholly private.<sup>2</sup> Not only is such censorship not *constitutionally required*, it would actually impose a *constitutionally*

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<sup>1</sup> See 42 U.S.C. § 12634(a) (prohibiting use of Corporation for National Community Service funds for religious instruction, worship or proselytization); 45 C.F.R. § 2540.100 (same). The regulations explicitly provide that “[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, staff and members” are prohibited from, *inter alia*:

(7) Engaging in religious instruction, conducting worship services, providing instruction as part of a program that includes mandatory religious instruction or worship, constructing or operating facilities devoted to religious instruction or worship, maintaining facilities primarily or inherently devoted to religious instruction or worship, or engaging in any form of religious proselytization;

...

(8) Providing a direct benefit to –

...

(v) An organization engaged in the religious activities described in paragraph (g) of this section, unless Corporation assistance is not used to support those religious activities. . . .

45 C.F.R. § 2540.30(a). See also *id.* § 2540.30(b) (“Individuals may exercise their rights as private citizens and may participate in the activities listed above on their initiative, on non-AmeriCorps time, and using non-Corporation funds. Individuals should not wear the AmeriCorps logo while doing so.”).

<sup>2</sup> Although a full application of the Free Speech Clause is outside the scope of this brief, volunteers would be able to raise such a claim if the relief Plaintiff seeks were imposed. “The Supreme Court . . . has rejected the notion that speech about religion, religious speech designed to win converts, and religious worship . . . should be treated differently [than other forms of protected speech] under the First Amendment.” *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1279 (10<sup>th</sup> Cir.) (citing *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394-96 (1993); *Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981)), *cert. denied*, 519 U.S. 949 (1996). See also *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (“Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince.”). If the government cannot limit the viewpoint expressed within a limited public forum it has created or discriminate against a particular viewpoint without a compelling interest, see, e.g., *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb’s Chapel*, 508 U.S. 384, it certainly cannot discriminate on the basis of viewpoint in wholly private speech made independent of any government-created forum or benefit. Furthermore, dissecting speech to determine whether it is religious would conflict with the Supreme Court’s pronouncement that whenever public officials scan and evaluate private speech “to discern [its] underlying philosophic assumptions respecting religious theory and belief,” the result is “a denial of the right of free speech.” *Rosenberger*, 515 U.S. at 845.

*prohibited* restriction on the religious free exercise rights of both the individuals and organizations.<sup>3</sup>

## ARGUMENT

Granting Plaintiff the relief it seeks would require the government to restrict private religious speech, in contravention of the distinction the Supreme Court has maintained between private religious speech, which is constitutionally protected, and religious speech by the government, which is constitutionally restrained. To condition AmeriCorps participants' receipt of a public benefit on forfeiture of religious speech protected the First Amendment is unconstitutional. The remedy Plaintiff seeks would also substantially burden religious exercise in violation of the Religious Freedom Restoration Act. Finally, regulating the private religious speech of volunteers would fail the Free Exercise Clause's requirement of religious neutrality.

### **I. THE RELIEF PLAINTIFF REQUESTS WOULD UNCONSTITUTIONALLY CONDITION THE RECEIPT OF GOVERNMENT BENEFITS ON THE SURRENDER OF FUNDAMENTAL FIRST AMENDMENT RIGHTS.**

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<sup>3</sup> The central principle of Establishment Clause, Free Exercise Clause, Free Speech Clause, and Equal Protection analysis is the same: The Constitution mandates neutrality, not hostility, to religious expressive activity. *See Rosenberger*, 515 U.S. at 845 (stating that each separate clause of First Amendment requires neutrality); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973) (“A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of ‘neutrality’ toward religion.”); *see also Columbia Union College v. Clarke*, 527 U.S. 1013, 1013 (1999) (Thomas, J., dissenting from denial of *cert.*) (“The Constitution requires, at a minimum, *neutrality* not *hostility* toward religion.” (citing *Bowen v. Kendrick*, 487 U.S. 589, 624-25 (1988) (Kennedy, J., joined by Scalia, J., concurring)); *Engel v. Vitale*, 370 U.S. 421, 443 (1962) (Douglas, J., concurring) (“The First Amendment leaves the Government in a position not of hostility to religion but of neutrality.”)).

**A. The Government is Prohibited From Conditioning the Receipt of Government Benefits on the Surrender of First Amendment Rights.**

The broad rule Plaintiff seeks—prohibiting AmeriCorps volunteers from engaging in religious speech and activities on their own time—would effectively condition participation in the AmeriCorps program on the surrender of the right to private religious speech and activity. Courts, however, have squarely and repeatedly rejected the proposition that the receipt of public benefits can be conditioned upon the relinquishment of a First Amendment right. Forty years ago, the Supreme Court held:

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. . . . For example, . . . [i]n *Speiser v. Randall*, 357 U.S. 513 (1958), . . . [w]hile the State was surely under no obligation to afford such [a government benefit], we held that the imposition of such a condition upon even a gratuitous benefit inevitably deterred or discouraged the exercise of First Amendment rights of expression and thereby threatened to produce a result which the State could not command directly. To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Likewise, *to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.*

*Sherbert v. Verner*, 374 U.S. 398, 405-06 (1963) (emphasis added) (internal quotation marks, citations, and footnote omitted).<sup>4</sup> A decade later, the Court reiterated in *Perry v. Sindermann*,

For at least a quarter-century, this Court has made clear that even though a person has no “right” to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and

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<sup>4</sup> The *Sherbert* Court relied on *Wieman v. Updegraff*, 344 U.S. 183, 191-92 (1952); *American Communications Ass’n v. Douds*, 339 U.S. 382, 390 (1950); *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 155-56 (1946)); and *Speiser v. Randall*, 357 U.S. at 526.

inhibited. This would allow the government to produce a result which it could not command directly.

*Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (internal quotation marks and brackets deleted).<sup>5</sup>

Similarly, in *McDaniel v. Paty*, 435 U.S. 618 (1977), the Supreme Court found unconstitutional a state law that disqualified clergy members from serving as delegates to a constitutional convention. *See id.* at 626 (“Under the clergy-disqualification provision, McDaniel cannot exercise both rights simultaneously because the State has conditioned the exercise of one on the surrender of the other. . . . In so doing, Tennessee has encroached upon McDaniel’s right to the free exercise of religion.). Quite simply, the rule Plaintiff pushes on this court—forcing AmeriCorps volunteers to choose between eligibility for the program and adherence to their faith—is at odds with this fundamental principle that individuals need not surrender their First Amendment rights to be eligible for a government benefit.

The Ninth Circuit recently applied this principle to strike down a state law that conditioned eligibility for a state education grant on students’ not pursuing a degree in religious subjects. *Davey v. Locke*, 299 F.3d 748 (9<sup>th</sup> Cir. 2002) (holding that such a law thereby violated student’s Free Exercise right). The Ninth Circuit’s holding followed directly from the Supreme Court’s decision in *McDaniel*. The *Davey* court explained:

A state law may not offer a benefit to all (there, to hold a public position; here, to hold a Promise Scholarship), but exclude some on the basis of religion (there,

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<sup>5</sup> *See Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (“[The government] cannot exclude individual . . . members of any . . . faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.”). *See also Columbia Union College v. Clarke*, 527 U.S. 1013, 1013 (Thomas, J., dissenting) (“[O]ur decisions . . . have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity.” (citing *Rosenberger*, 515 U.S. 819; *Lamb’s Chapel*, 508 U.S. 384; *Widmar*, 454 U.S. 263)).

ministers; here, would-be ministers). Washington’s restriction disables students majoring in theology from the benefit of receiving the Scholarship just as Tennessee’s classification disabled ministers from the benefit of being a delegate. . . . Even though Davey (like McDaniel) was not forced to forego his religious calling, Davey’s eligibility for the Scholarship, like McDaniel’s eligibility for office, was conditioned on giving up his religious pursuit.

*Id.* at 754.

Precisely the same analysis compels the rejection of Plaintiff’s proposed rule. The government may not offer a benefit to all—here, participation in the AmeriCorps program—but exclude some on the basis of religion—here, those who refuse to give up their religious pursuit of teaching religion during non-federally funded time. Moreover, *McDaniel* and *Davey*, *supra*, make clear that such indirect coercion of religious individuals to forego their religious calling is no more permissible than a direct regulation requiring them not to teach religion.<sup>6</sup>

The prohibition Plaintiff seeks to impose on private religious activities, based merely on the fact that individuals have received a government benefit, would also eviscerate the clear and consistent distinction courts have drawn between the permissibility of government limits on *government-funded speech* and the impermissibility of restrictions on a recipients’ speech *outside* of a government-funded program. In *Rust v. Sullivan*, 500 U.S. 173 (1991), for example, the Supreme Court explicitly distinguished a limitation on speech within a government-funded program from

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<sup>6</sup> See also *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 77-78 (1990) (“What the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly.” (citing *Speiser*, 357 U.S. at 526)); *McDaniel*, 435 U.S. at 633 (Brennan, J., concurring) (“[T]he proposition—that the law does not interfere with free exercise because it does not directly prohibit religious activity, but merely conditions eligibility for office on its abandonment—is also squarely rejected by precedent.”); *Sherbert*, 374 U.S. at 404 (“Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for [religious observance].”).

a broader prohibition on an individual’s private, non-government-funded speech. The Court explained:

[H]ere the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized. The Secretary’s regulations do not force the [] grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from [government-funded project] activities. . . . The regulations govern the scope of the *project’s* activities, and *leave the grantee unfettered in its other activities.*

*Id.* at 196 (first emphasis in original; second emphasis added).<sup>7</sup>

The existing AmeriCorps regulations do exactly this—precluding religious speech during publicly funded activities and even forbidding religious speech while wearing the AmeriCorps logo—but otherwise leave the AmeriCorps grantees “unfettered in [their] other activities.” To broaden the regulations, as Plaintiff demands, would step into the impermissible area of restricting individuals in their other, non-program activities. Plaintiff’s proffered regime fits precisely among the

“unconstitutional conditions” cases involv[ing] situations 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*, 500 U.S. at 197 (first emphasis in original; second emphasis added). *See, e.g., Hartmann v. Stone*, 68 F.3d 973, 985-86 (6th Cir. 1995) (“It would be an extraordinary and unprecedented expansion of governmental (and military) authority to allow the direct and unequivocal regulation, and even prohibition, of private acts of religious conscience and practice by non-members of the military in their homes and under the guise of

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<sup>7</sup> *See also Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (“[We have] said that viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, or instances, like *Rust*, in which the government ‘used private speakers to transmit specific information pertaining to its own program.’” (citations omitted)).

regulating day-care.”). In short, the Supreme Court has never permitted what Plaintiff proposes: that an individual’s receipt of government funding trigger limitations on the individual’s own speech outside the government program.

The unconstitutional nature of the conditions Plaintiff seeks to impose on AmeriCorps volunteers’ First Amendment rights is further highlighted by contrasting it with the undisputed freedom public school teachers possess in their activities and speech outside the publicly funded classroom. *See, e.g., Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 798 (5th Cir. 1989) (“[P]ublic employees are entitled to the same measure of constitutional protection as enjoyed by their civilian counterparts when speaking as ‘citizens’ and not as ‘employees.’”), *cert. denied*, 496 U.S. 926 (1990).<sup>8</sup> These cases recognize precisely the distinction that Plaintiff wishes to tear down: that although the government may control the message of its own government-funded speech, the First Amendment prohibits the government from exercising similar censorship over the activities and speech of citizens outside the confines of the government-funded program. Accordingly, participants in the AmeriCorps program are entitled to full First Amendment protection for their religious activities and speech undertaken in their roles as citizens rather than as AmeriCorps volunteers.

The Supreme Court has made clear that conditioning the receipt of government benefits on a surrender of First Amendment freedoms can be allowed only when justified

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<sup>8</sup> *See, e.g., Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1016 (9<sup>th</sup> Cir. 2000) (pointing out that public high school teacher could “propound his own opinion” elsewhere, even though he could not do so while “speaking as the government”), *cert. denied*, 532 U.S. 944 (2001); *Edwards v. Calif. Univ. of Pa.*, 156 F.3d 488, 492 (3d Cir. 1998) (“[A]lthough [a public university professor] has a right to advocate outside of the classroom for the use of certain curriculum materials, he does not have a right to use those materials in the classroom”), *cert. denied*, 525 U.S. 1143 (1999); *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990) (“Although a [public high school] teacher’s out-of-class conduct . . . is protected [by the First Amendment], her in-class conduct is not.” (citations omitted)).

by a compelling government interest. *See, e.g., McDaniel*, 435 U.S. at 628 (concluding that state had failed to demonstrate any “interests of the highest order,” and therefore the provision failed strict scrutiny.). Because Plaintiff cannot demonstrate any such interest, its requested relief must be denied.<sup>9</sup>

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<sup>9</sup> Nor may Plaintiff manufacture a compelling interest by attempting to use the specter of an Establishment Clause violation as grounds to exclude from the AmeriCorps program those who engage in personal religious speech outside that program. The “Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American Ideals and therefore subject to unique disabilities.” *McDaniel*, 435 U.S. at 641; *see Agostini v. Felton*, 521 U.S. 203, 222-23 (1997) (Establishment Clause prohibits government from “passing laws which have either the purpose or effect of advancing *or inhibiting* religion” (emphasis added)).

Furthermore, the Establishment Clause may, in fact, *compel* the same result as the Free Exercise Clause, as discussed *supra*. The Supreme Court has increasingly emphasized the neutrality principle in its Establishment Clause decisions. *See, e.g., Good News Club*, 533 U.S. at 114 (observing that “implication that granting [religious club] access [to government facilities] would do damage to the neutrality principle defies logic,” because “allowing the Club to speak on school grounds would ensure neutrality, not threaten it”); *Mitchell v. Helms*, 530 U.S. 793, 838 (2000) (“[W]e have emphasized a program’s neutrality repeatedly in our decisions approving various forms of school aid.” (O’Connor, J., concurring)); *Agostini v. Felton*, 521 U.S. at 230-32 (focusing on neutral eligibility criteria); *Rosenberger*, 515 U.S. at 839 (stating that series of cases established that “the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse”); *id.* at 846 (rejecting policy that would “foster[] a pervasive bias or hostility to religion, which could undermine the very *neutrality* the Establishment Clause requires” (emphasis added)).

And that principle has been present in many other Establishment Clause decisions. *See, e.g., Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968) (“The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.”); *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 226 (1963) (“In the relationship between man and religion, the State is firmly committed to a position of *neutrality*. . . . [T]he rule itself is clearly and concisely stated in the words of the First Amendment.” (emphasis added)); *id.* at 222 (referencing “wholesome neutrality” of religion clauses); *Everson*, 330 U.S. at 18 (Establishment Clause “requires the state to be a [sic] *neutral* in its relations with groups of religious believers and non-believers. . . . State power is no more to be used so as to handicap religions, than it is to favor them.” (emphasis added)). *See also Columbia Union College*, 159 F.3d 151, 172 (4<sup>th</sup> Cir. 1998) (Wilkinson, C.J., dissenting) (observing that state’s attempt to avoid any promotion of religion actually violated “a different core principle of the Establishment Clause, the requirement of nondiscrimination among religions” and that all religious viewpoints should receive similar, neutral treatment), *cert. denied*, 527 U.S. 1013 (1999).; *Hartmann*, 68 F.3d at 978 (“A rule that uniformly bans all religious practice is not neutral. . . . [T]he Supreme Court has made it clear that ‘neutral’ also means that there must be neutrality between religion and nonreligion.”).

**B. The Relief Plaintiff Has Proposed Would Require Individuals to Surrender Their Rights to Free Religious Speech and Exercise as a Condition of Participation in AmeriCorps.**

Plaintiff specifically objects to AmeriCorps participants' serving as "religious teachers" or "teaching religion" in private religious schools, *see* Complaint ¶ 4, presumably outside their AmeriCorps-funded hours.<sup>10</sup> Read narrowly, this objection would encompass the teaching of formal "religion classes" devoted entirely to the study of a particular faith.<sup>11</sup> It is self-evident that many of the AmeriCorps volunteers who teach such classes at religious schools (*without* government funding) do so as an expression of religious belief.

There is perhaps no clearer First Amendment principle than that communicating religious faith is core, protected religious speech. In fact, the earliest Supreme Court Free Exercise and Free Speech holdings have specifically protected this activity. *See, e.g., Cantwell v. Connecticut*, 310 U.S. 296 (1940) (invalidating licensing system for religious and charitable solicitations that restricted dissemination of religious ideas); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (invalidating flat tax on solicitation as applied to dissemination of religious ideas); *Follett v. McCormick*, 321 U.S. 573 (1944) (same). This Court recognized the same principle in *Rigdon v. Perry*, holding that the government

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<sup>10</sup> Such instruction *on AmeriCorps time* is already prohibited. *See* 45 C.F.R. §§ 2540.30, 2540.100.

<sup>11</sup> If the Complaint is read more broadly, Plaintiff's objection to "teaching religion" may encompass not just formal religious training, but also the effort by religious schools to integrate a religious perspective or component into teaching other so-called secular subjects as well. *See, e.g., Meek v. Pittenger*, 421 U.S. 349, 366 (1975) ("The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief."), *overruled on other grounds by Mitchell v. Helms*, 530 U.S. 793 (2000).

could not order military chaplains to limit their religious expression, regardless of their use of government facilities, or even the political nature of such expression. 962 F. Supp. 150, 165 (D.D.C. 1997) (holding that “a directive that clearly interferes with military chaplains’ free exercise and free speech rights . . . can be sanctioned only by compelling circumstances,” and that an “anti-lobbying” motive was not sufficient).

The right to speak about and advance religion includes the right to pursue a religious calling. For example, as discussed *supra*, in *McDaniel v. Paty*, 435 U.S. 618 (1977), the Supreme Court found unconstitutional a state law that disqualified clergy members from serving as delegates to a constitutional convention.<sup>12</sup> Such protection—which applied in *McDaniel* to clergy whose religious beliefs motivate them to teach a congregation religious faith—applies equally here where individuals, motivated by their faith, pursue a religious calling to teach religion to students in a private school. AmeriCorps volunteers need not surrender their freedom to pursue a religious calling on their *own* time merely because they happen to participate in a government program that excludes religious activity on *government* time.

Moreover, Plaintiff’s argument proves too much. If the Constitution really did forbid receipt of government benefits by those who engage in private religious activity for fear of endorsement or advancement of religion, then the activities of AmeriCorps volunteers should be limited not only during “classes,” but also during activities outside of school as well. Plaintiff’s claim suggests that when an individual receiving

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<sup>12</sup> *See, e.g., McDaniel*, 435 U.S. at 630-31 (Brennan, J., concurring) (“Clearly freedom of belief protected by the Free Exercise Clause embraces freedom to profess or practice that belief, even including doing so to earn a livelihood. One’s religious belief surely does not cease to enjoy the protection of the First Amendment when held with such depth of sincerity as to impel one to join the ministry.”).

government funds or a public benefit engages in private, non-government-funded religious speech, there is such a risk of *government association* with religion that the private religious speech must be prohibited.<sup>13</sup> If this were true, *public* school teachers would be prohibited from attending the same church as their students, teaching Sunday School on their own time, or even talking with students about religion in a private capacity. Indeed, if the danger of leaving an impression of government endorsement were not limited simply to government time but extended to personal time, the full range of government employees would be forbidden from taking an active role in their religious communities. But just as a public school teacher (like other government employees) is limited in talking about religion only during government-funded school time, *see supra*, so too do AmeriCorps volunteers retain their First Amendment rights during private, non-government-funded time.

## **II. THE RELIEF PLAINTIFF REQUESTS WOULD IMPOSE A “SUBSTANTIAL BURDEN” ON RELIGIOUS EXERCISE IN VIOLATION OF THE RELIGIOUS FREEDOM RESTORATION ACT.**

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<sup>13</sup> Unlike Plaintiff, the Supreme Court has observed a clear distinction between government speech and private speech:

Where we have tested for endorsement of religion, the subject of the test was either expression *by the government itself*, or else government action alleged to *discriminate in favor* of private religious expression or activity. The test petitioners propose, which would attribute to a neutrally behaving government *private* religious expression, has no antecedent in our jurisprudence, and would better be called a “transferred endorsement” test.

*Pinette*, 515 U.S. at 764 (plurality opinion) (citing *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Board of Ed. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994); and *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989)). Any attempt to revive this theory, by arguing that the private citizens’ religious speech may be “transferred” to AmeriCorps program, must therefore fail.

If the AmeriCorps program prohibited religious speech by volunteers even during non-federally funded time, the policy would also violate the Religious Freedom Restoration Act (RFRA).<sup>14</sup> See 42 U.S.C. § 2000bb, *et seq.* RFRA prohibits the federal government from imposing a “substantial burden” on the “religious exercise” of an individual or institution unless that burden furthers a compelling governmental interest by the means least restrictive of religious exercise.<sup>15</sup>

Under RFRA, the “exercise of religion” includes “*any exercise of religion, whether or not compelled by, or central to, a system of religious belief.*” 42 U.S.C.

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<sup>14</sup> Although RFRA was struck down as unconstitutional as applied to the States, *City of Boerne v. Flores*, 521 U.S. 507 (1997), it continues to apply to federal actors. See *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savs. Bank*, 527 U.S. 627, 638 (1999) (“[T]his Court held that [RFRA] exceeded Congress’ authority under § 5 of the Fourteenth Amendment, insofar as RFRA was made applicable to the States.” (citation omitted)). Most federal courts, including the D.C. Circuit, have either assumed or expressly found that RFRA is constitutional as applied to the federal government. See *Jackson v. District of Columbia*, 254 F.3d 262, 265 (D.C. Cir. 2001) (court continues to assume, without deciding, that RFRA is constitutional in federal sphere). See also *Guam v. Guerrero*, 290 F.3d 1210, 1221-22 (9<sup>th</sup> Cir. 2002) (finding RFRA constitutional as applied to federal realm and federal instrumentalities); *Kikumura v. Hurley*, 242 F.3d 950, 959-60 (10<sup>th</sup> Cir. 2001) (“RFRA as applied to the federal government is severable from the portion of RFRA declared unconstitutional in *Flores*, and independently remains applicable to federal officials.”); *U.S. v. Indianapolis Baptist Temple*, 224 F.3d 627, 629 n.1 (7<sup>th</sup> Cir. 2000) (in absence of challenge to RFRA’s constitutionality, court assumes it is constitutional), *cert. denied*, 531 U.S. 1112 (2001); *Adams v. C.I.R.*, 170 F.3d 173, 175 (3d Cir. 1999) (assuming without deciding RFRA is constitutional as applied to federal government), *cert. denied*, 528 U.S. 1117 (2000); *In re Young*, 141 F.3d 854, 857-60 (8<sup>th</sup> Cir.) (concluding that portion of RFRA applicable to federal law is constitutional because it violates neither separation of powers doctrine nor Establishment Clause), *cert. denied sub nom., Christians v. Crystal Evangelical Free Church*, 525 U.S. 881 (1998); see also *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002) (National Labor Relations Board acts on assumption that RFRA is constitutional as applied to federal government); *Gibson v. Babbitt*, 223 F.3d 1256, 1258 (11<sup>th</sup> Cir. 2000) (applying RFRA to conduct of federal government without explicitly addressing RFRA’s constitutionality); *Browne v. U.S.*, 176 F.3d 25, 26 (2d Cir. 1999) (same), *cert. denied*, 528 U.S. 1116 (2000).

<sup>15</sup> 42 U.S.C. § 2000bb-1(b) (“Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”).

§ 2000cc-5(7)(A) (emphasis added).<sup>16</sup> Teaching religion at a religious school fits easily within the bounds of “any exercise of religion.”

Furthermore, this case does not implicate mere “inconvenience” on religious exercise. *Graham v. Comm’r*, 822 F.2d 844, 851 (9th Cir. 1987), *aff’d sub nom.*, *Hernandez v. Comm’r*, 490 U.S. 680, (1989). Rather, the issues involved here deal with individuals’ fundamental rights to speak about their religious beliefs and to pursue a religious calling. Accordingly, the regime Plaintiff proposes—a flat prohibition on this religious exercise during the non-government-funded time of AmeriCorps volunteers—would certainly impose a substantial burden on religious exercise without any compelling interest that could justify such a burden.

### **III. THE RELIEF PLAINTIFF REQUESTS WOULD FAIL THE REQUIREMENT OF RELIGIOUS NEUTRALITY IN VIOLATION OF THE FREE EXERCISE CLAUSE.**

An additional and independently sufficient reason that Plaintiff’s proposed regime is unconstitutional is that such a prohibition fails the Free Exercise Clause’s requirement of neutrality. Accordingly, it “must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests.” *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993) (quoting

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<sup>16</sup> As originally enacted, RFRA defined “exercise of religion” as “the exercise of religion under the First Amendment to the Constitution.” 42 U.S.C. § 2000bb-2(4) (1999). However, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) amended RFRA so that “exercise of religion” now means “religious exercise, as defined in [42 U.S.C. §] 2000cc-5,” 42 U.S.C. § 2000bb-2(4), thereby encompassing “any exercise of religion, whether or not compelled by, or central to, a system of religious belief,” 42 U.S.C. § 2000cc-5. This amendment serves to codify the Supreme Court’s dictate in *Smith* that courts may not inquire into the centrality of a belief within a religious system. *Smith*, 494 U.S. at 887.

*McDaniel*, 435 U.S. at 628, and *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (quotation marks omitted)); *see also Employment Division, Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 888 (1990). A law fails this neutrality requirement if it “targets religious conduct for distinctive treatment.” *Lukumi*, 508 U.S. at 534. Accordingly, a law that limits only private *religious* speech—only what volunteers say about religion outside of government-funded time—is clearly not neutral. *See also Smith*, 494 U.S. 877 (“The government may not . . . impose special disabilities on the basis of religious views or religious status.”).

By proposing a regime in which AmeriCorps volunteers may not engage in religious speech activities even on their own time, Plaintiff would create a category that singled out the *religious* private speech of individuals for prohibition, without visiting similar disfavor on any other form of speech. Doing so would discriminate against religion by effectively saying that “religious persons should not apply” to the AmeriCorps program. *See Lukumi*, 508 U.S. at 542 (Free Exercise Clause “protect[s] religious observers against unequal treatment”). By explicitly treating private religious speech differently, and not placing any other limitations on what AmeriCorps volunteers may say or teach outside of the program,<sup>17</sup> such a prohibition “discriminates on its face” based on religious status. *See id.* at 533.<sup>18</sup>

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<sup>17</sup> Of course, the constitutionality of other prohibitions on private speech may be problematic as well, but at least a policy would appear more neutral if some of the other prohibitions placed on volunteers’ government-funded speech were extended to their private speech, for example, if the prohibition on “attempting to influence legislation,” 45 C.F.R. § 2520.30(a)(1), were extended to forbid a volunteer from ever encouraging students to engage in a letter-writing campaign in a political science class; or if the prohibition on “assisting, promoting, or deterring union organizing,” 45 C.F.R. § 2520.30(a)(3), were extended to prohibit all such activity during non-funded time.

As explained *supra*, Plaintiff proposes no compelling interest to justify such a non-neutral policy, which discriminates against religion. As such, the proposed prohibition fails strict scrutiny.

## CONCLUSION

If the prohibitions proposed by the Plaintiff in its Complaint were adopted, individuals will be able to qualify for the AmeriCorps program only by compromising their religious beliefs. Such a system would violate long-established constitutional principles. And, as the Sixth Circuit observed, “A program that violates the Free Exercise Clause cannot be saved by relying on implausible Establishment Clause concerns.” *Hartmann v. Stone*, 68 F.3d 973, 978 (6th Cir. 1995). In light of the above, and as the brief of the United States asserts, limiting the current rules regarding religious speech to federally funded time is “constitutionally compelled.” U.S. Brief at 32.

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<sup>18</sup> Restricting only the private speech of religious individuals also violates Equal Protection principles. Because most claims of religious discrimination are addressed in the context of the First Amendment, few opinions address religion under the Fifth or Fourteenth Amendment. The Supreme Court has made clear that discrimination on the basis of religion is a suspect classification subject to strict scrutiny. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (rational basis review of economic legislation contrasted with “inherently suspect distinctions such as race, religion, or alienage”); *see also United States v. Armstrong*, 517 U.S. 456, 464 (1996) (prosecution may not be based on “unjustifiable standard such as race, religion, or other arbitrary classification” (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962))). Strict scrutiny would also be required under an Equal Protection analysis because the free exercise of religion is a fundamental right. *See Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) (“Unquestionably, the free exercise of religion is a fundamental constitutional right.”); *Fellowship Baptist Church v. Benton*, 815 F.2d 485, 497 (8<sup>th</sup> Cir. 1987) (holding that “[b]ecause religion is a fundamental right, any classification of religious groups is subject to strict scrutiny.”).

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Respectfully submitted,

**THE BECKET FUND FOR RELIGIOUS  
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