

No. 26-237

IN THE
Supreme Court of the United States

JOHN WOOLARD, ET AL.,
Petitioners,

v.

TONY THURMOND, ET AL.,
Respondents.

*On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit*

**AMICUS CURIAE BRIEF OF
NC VALUES INSTITUTE
IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICUS CURIAE*¹

Amicus curiae respectfully urges this Court to grant the Petition and reverse the Ninth Circuit decision.

NC Values Institute, formerly known as the Institute for Faith and Family, is a North Carolina nonprofit corporation that works in various arenas of public policy to protect faith, family, and freedom. See <https://ncvi.org>.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

California has established a charter school system that offers independent, home-based study programs where parents, as direct educators, first “enter into a contract with the [charter] school specifying the objectives, methods of study, and methods used for evaluating student work.” *Woolard v. Thurman*, 170 F.4th 701, 706 (9th Cir. 2026); see Cal. Educ. Code §§ 51747(g)(2), (g)(9)(A)(i). The school purchases the “appropriate materials and services necessary to achieve the agreement's objectives.” *Ibid.*, see Cal. Educ. Code §§ 51746, 51747(g)(3); Cal. Code Regs. tit. 5, § 11700(i). These materials are chosen and then

¹ Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus curiae*'s intention to file this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

requested by the parents—but *only* approved if the curriculum selected is devoid of all religious content.

California’s absolute ban on religious curriculum—even when driven by private choices and taught directly by parents—is facial discrimination against religion, anathema to the First Amendment. Contrary to this Court’s precedent—particularly *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 460 (2017), *Espinoza v. Montana Dep’t of Revenue*, 591 U.S. 464, 482 (2020), and *Carson v. Makin*, 596 U.S. 767, 785 (2022)—California discriminates by requiring its citizens to sacrifice core Free Exercise rights to receive an otherwise available public benefit.

But California’s discrimination doesn’t stop there. *Parents*—not the state—have the primary responsibility to direct the upbringing of their children, including their education and religious training. California improperly usurps parental rights while claiming to offer them choice and flexibility in their children’s education. California’s statutory scheme freely supports families who prefer a wholly secular education but denies equal treatment to those who take their religious faith seriously and incorporate it into the training of their children.

Finally, California exploits the government speech doctrine to transform the private speech of parent educators into public speech exempt from First Amendment scrutiny.

ARGUMENT

I. CALIFORNIA DISCRIMINATES AGAINST RELIGION.

A. California law facially discriminates against religion.

"The minimum requirement of neutrality is that a law not discriminate on its face." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993). "Discrimination *on the face of a statute* . . . is not like a facially neutral law that happens to burden religious exercise, as in *Smith*." *Locke v. Davey*, 540 U.S. 712, 731 (2004) (Scalia, J., dissenting). In *Locke*, as in this case, the statute's facial discrimination caused an "indignity . . . so profound that the concrete harm produced can never be dismissed as insubstantial." *Ibid*. Blatant facial discrimination was present in *Locke*, where "a Washington state scholarship program . . . excluded students seeking a degree in theology." *Woolard*, 170 F.4th at 717 (Van Dyke, J., dissenting).

Under California law, "sectarian or denominational doctrine" shall not "be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State," Cal. Const. art. IX, § 8, and "a charter school shall be nonsectarian in its programs," Cal. Educ. Code § 47605(e)(1). *Woolard*, 170 F.4th at 706. "No public money shall ever be appropriated for the support of any sectarian or denominational school[.]" Cal. Const. art. IX, § 8. This is facial discrimination that explicitly targets religion, censors religious expression, and

treats religious citizens unequally. It is rooted in “California’s version of the Blaine Amendment—a provision born of bigotry.” *Woolard*, 170 F.4th at 711 (Van Dyke, J., dissenting) (citing *Espinoza*, 591 U.S. at 482), internal quotation marks omitted). This “Blaine” provision is—plain and simple—a textbook Free Exercise violation that “single[s] out the religious for disfavored treatment” (*Trinity*, 582 U.S. at 460), with the result that “parents maintain wide latitude to decide what’s best for their children’s education—unless they choose a faith-based education” through their selection of curriculum. *Woolard*, 170 F.4th at 711 (Van Dyke, J., dissenting). “It’s about time that we leave facially discriminatory Blaine Amendments like California’s on the ash heap of constitutional history.” *Id.* at 724 (Van Dyke, J., dissenting). California and other states—like Washington in *Locke*, Missouri in *Trinity Lutheran*, and Montana in *Espinoza*—“repurpose them to excise religion from the public square” *Ibid.*

B. California discriminates against families who take their religious faith seriously and integrate it into all of life.

California has crafted an educational assistance program that poses no threat to “[t]hose apathetic about religion or passive in its practice” but denies participation to “those with a deep faith that requires them to do things” like incorporating their faith into all of life. *Espinoza*, 591 U.S. at 513 (Gorsuch, J., concurring). There is an implicit evaluation that a religious education is inferior to a religion-free, secular education. California’s exclusion of otherwise

qualified curriculum—chosen by *parents*, not by the state—discriminates against families “who take their religion seriously” and believe it “should affect the whole of their lives.” *Mitchell v. Helms*, 530 U.S. 793, 827-828 (2000) (plurality opinion). This hostility is contrary to the “benevolent neutrality” the Constitution requires. “[I]t is most bizarre that the [Ninth Circuit] would . . . reserve special hostility for those who take their religion seriously, who think that their religion should affect the whole of their lives, or who make the mistake of being effective in transmitting their views to children.” *Id.* at 827-828.

The exclusion of religious content targets families who integrate a religious worldview into the curriculum they select for their children. The law is not neutral because its object is to restrict an otherwise widely available benefit based solely on the religious content of the excluded curriculum. “The First Amendment forbids an official purpose to disapprove of a particular religion, or of religion in general.” *Lukumi*, 508 U.S. at 532. California disapproves of religious families who take their faith seriously.

The broad reaching “flexibility” of California’s independent study program is particularly odious in that “even a heavily Confucianist, Stoic, Marxist, or Woke curriculum would presumably pass muster under state law—but one with a whiff of religious content would not.” *Woolard*, 170 F.4th at 716 (Van Dyke, J., dissenting) (emphasis added). At that point the program’s flexibility evaporates.

C. California's discriminatory exclusion of religious curriculum creates improper entanglement.

California's monitoring of the independent study program demands a level of entanglement that transgresses the First Amendment. It is not only the state's rejection of particular curriculum that "may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry" leading to such exclusion. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979). State officials must identify and disqualify "sectarian" curriculum. Such a process creates the very entanglement the Establishment Clause was designed to prevent and simultaneously infringes Free Exercise rights. California officials must rummage through the materials selected by parents to snuff out religious content.

Earlier decisions of this Court do not support the Ninth Circuit. In *Mitchell*, this Court concluded that "trolling through a person's or institution's religious beliefs" to determine whether a school is "pervasively sectarian" is "not only unnecessary but also offensive." 530 U.S. at 828. In *New York v. Cathedral Academy*, this Court struck down a state statute that conditioned reimbursement for the cost of state-mandated examinations and teaching activities on a determination that the materials were devoid of religious content. 434 U.S. 125, 132 (1977) ("this sort of detailed inquiry . . . would itself constitute a significant encroachment" on the First Amendment).

Relevant decisions of other circuits do not support the Ninth Circuit. *Hartmann v. Stone* involved a child day-care program for military families that “prohibit[ed] Providers from having any religious practices, such as saying grace or reading Bible stories, during their day-care program,” regardless of the wishes of the families themselves. *Hartmann v. Stone*, 68 F.3d 973, 975 (6th Cir. 1995). Such burdensome regulation does not “require (*or even allow*) a *ban* on religious activity to prevent entanglement.” *Id.* at 981 (first emphasis added). The Sixth Circuit concluded that this “extensive array of regulations” “ironically . . . put the Army at great risk of unconstitutionally entangling itself with religion.” *Ibid.* The same is true here.

Proper application of the entanglement doctrine “protects religious [families] from governmental monitoring or second-guessing of their religious beliefs and practices” to determine whether to qualify their curriculum for benefits or as a basis for exclusion. *Colorado Christian University v. Weaver*, 534 F.3d 1245, 1261 (10th Cir. 2008). A family’s selection of curriculum is the result of *private* parental choices. California has no legitimate interest in obstructing access to private religious education. Its sole legitimate interest would be to ensure the government *itself* is not engaged in religious indoctrination. “[N]eutrality and private choices” work together to serve that interest and eliminate any possible attribution to the government.” *Mitchell*, 530 U.S. at 811. California’s extensive entanglement is anything but neutral and hinders free choice among otherwise qualified curricular options.

The government may neither prescribe nor proscribe religious orthodoxy in an independent home-based educational context. California puts its thumb on the scale, blatantly preferring a “sanitized” education purged of religious influence. The state’s procedure for approving curriculum is tainted by unconstitutional entanglement. This is potentially a step toward establishing a “civic religion as a means of avoiding the establishment of a religion with more specific creeds.” *Lee v. Weisman*, 505 U.S. 577, 590 (1992).

D. The Ninth Circuit characterizes the independent study programs as “public schools,” twisting words to escape First Amendment scrutiny.

Appealing to *Carson*, the Ninth Circuit reasons that the Free Exercise Clause allows a state to provide “a strictly secular education in its public schools.” *Woolard*, 170 F.4th at 707 (quoting *Carson*, 596 U.S. at 785). The court then “slaps a ‘public school’ label on the homeschool programs and calls them exempt from free exercise scrutiny.” *Woolard*, 170 F.4th at 714 (Bumatay, J., dissenting). Several key factors drive the analysis—the independent study programs, unlike private schools, must accept all students, must not charge tuition, and must meet state-imposed curricular requirements. *Id.* at 708-709. The obvious irony here is that the programs do not really accept *all* students, but only those whose parents sacrifice their right to incorporate their faith into the curriculum.

Certainly a state may establish its own purely secular schools. But California chose a different path, offering to fund the private curricular choices of parents who teach their own children at home. Having chosen to offer a subsidy for education conducted by parents in private homes, the state may not discriminate against their choice of religious curriculum. *Carson*, 596 U.S. at 785.

II. CALIFORNIA DISCRIMINATES IN THE DISTRIBUTION OF A PUBLIC EDUCATIONAL BENEFIT.

This Court has long “prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity.” *Mitchell*, 530 U.S. at 828. Discrimination on the sole basis of religion *punishes* religious exercise and imposes a penalty that warrants “the most exacting scrutiny.” *Lukumi*, 508 U.S. at 533, 542. The government may not force a choice between participation in a public benefit and religious freedom. *See Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 716 (1981); *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 16 (1947).

Under California’s statutory scheme, the freedom to function as a religious family “comes at the cost” of “exclusion from the benefits of a public program . . . for which the [family] is otherwise fully qualified.” *Trinity*, 582 U.S. at 462.

A. The recent *Trinity-Espinoza-Carson* trilogy highlights the requirement for equal treatment of religion.

A recent trilogy of rulings (*Trinity Lutheran, Espinoza, Carson*)—all involving private education—reinforces this Court’s nondiscrimination principle where public benefits and religion intersect. In each case, the Court struck down a state law that “disqualif[ie]d a religious organization . . . from a generally available benefit, solely because of [its] religious character.” *Trinity*, 582 U.S. at 462 (Missouri’s Scrap Tire Program “expressly discriminates” by “put[ting] Trinity Lutheran to a choice” to either “participate in an otherwise available benefit program or remain a religious institution”); *Espinoza*, 591 U.S. at 476 (“Montana’s no-aid provision bars religious schools from public benefits solely because of the religious character of the schools”); The “unremarkable” principles applied in *Trinity* and *Espinoza* were sufficient to resolve the issues in *Carson*, where the State paid for private school tuition “so long as the schools [we]re not religious.” 596 U.S. at 780. “That is discrimination against religion.” *Id.* at 781.

Under such discriminatory programs, “free exercise isn’t *free*”. *Locke*, 540 U.S. at 731 (Scalia, J., dissenting) (internal quotation marks omitted, emphasis added). “[W]hen the State exacts a financial penalty . . . for religious exercise—whether by tax or by forfeiture of an otherwise available benefit—religious practice is anything *but* free.” *Ibid.* Similarly, the challenged statute in *McDaniel v. Paty*

“require[d] [McDaniel] to *purchase* his right to engage in the ministry by sacrificing his candidacy,” thereby infringing the *free* exercise of his religion. 435 U.S. 618, 634 (1978) (plurality) (emphasis added). “[F]reedom comes at the cost of automatic and absolute exclusion” from an otherwise available benefit. *Trinity*, 582 U.S. at 462 (applying *McDaniel*). In *Espinoza*, likewise, “the no-aid provision” that prohibited all aid to religious schools . . . “put[] families to a choice between sending their children to a religious school or receiving [otherwise available] benefits.” 591 U.S. at 480.

As *Trinity Lutheran* reaffirmed, “[i]t 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.” 582 U.S. at 463 (quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)). Even before *Sherbert*, it was clear that a State may not exclude individuals from public benefits “*because of their faith, or lack of it.*” *Everson*, 330 U.S. at 16.

Equality is deeply embedded in America’s history and Constitution. “The ‘*supreme* law of the land’ condemns discrimination against religious ... families.” *Espinoza*, 591 U.S. at 488, quoting *Marbury v. Madison*, 5 U.S. 137, 180 (1803). If a state creates a program to provide funding for privately chosen curriculum, “it would seem that the principle of nondiscrimination requires [it] to extend that aid” to religious curriculum. Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment*

Concerns, 26 Harv. J. L. & Pub. Pol'y 551, 608 (2003). California's exclusion of certain curriculum solely because of its religious character "is not only offensive to fundamental principles of equality of citizenship, liberalism, and distributive justice, but also deeply offensive to the Constitution's guarantee of religious liberty." *Id.* at 613.

The government does not penalize a fundamental right by merely declining to subsidize it. But although "a state need not subsidize private education . . . once a State decides to do so, it cannot disqualify some [participants] solely because they are religious" (*Espinoza*, 591 U.S. at 487), as Montana did in *Espinoza*, as Maine did in *Carson*, and as California does here. California has offered financial assistance for "education that the parents conduct, exercising substantial choice as to the instructional materials." *Woolard*, 170 F.4th at 713 (Bumatay, J., dissenting). Under these circumstances, "the Free Exercise Clause's anti-discrimination principle applies with full force." *Ibid.*

B. Parents may not be required to sacrifice their constitutional rights as a condition of receiving the curriculum funding—a generally available public benefit.

California's unequal treatment of religion tramples parental rights. "Public education is a public benefit" that may not be conditioned "on parents' willingness to accept a burden on their religious exercise. *Mahmoud v. Taylor*, 606 U.S. 522, 561 (2025); see *Trinity*, 582 U.S. at 462 (government may

not condition availability of public benefits on “a recipient’s willingness to surrender his religiously impelled status”). Even the Ninth Circuit agreed that free exercise rights were burdened by “a statutory scheme that requires a family to forgo a sectarian education . . . in order to receive special education benefits otherwise available.” *Woolard*, 170 F.4th at 711 (Bumatay, J., dissenting) (quoting *Loffman v. Cal. Dep’t of Educ.*, 119 F.4th 1147, 1168 (9th Cir. 2024) (simplified)).

Private choice is one significant factor in the analysis. Funds may flow to a private school or other religious organization through the “independent choices of private benefit recipients.” *Carson*, 596 U.S. at 781. Here, “any funding for religious instruction is *twice* removed from the State—first, it goes to a charter school (a privately owned entity operating as a public school) and, second, it goes to the parents’ chosen instruction.” *Woolard*, 170 F.4th at 712 (Bumatay, J., dissenting). The *State* itself is not funding religion in violation of the California Constitution.

III. CALIFORNIA UNDERMINES TIME-HONORED PARENTAL RIGHTS IN EDUCATION AND RELIGION.

Parental rights are “perhaps the oldest of the fundamental liberty interests recognized by this Court.” *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Parental rights are not created by statute or even constitutions but are natural, inalienable rights uniformly recognized by courts throughout American

history. History reveals “a founding generation that believed parents to have complete authority over their minor children and expected [them] to direct the development of those children.” *Brown v. Entertainment Merchants Ass’n*, 564 U.S. 786, 834 (2011) (Thomas, J., dissenting). Justice Scalia, while departing from the other Justices in *Troxel*, vigorously affirmed the “right of parents to direct the upbringing of their children” as “among the unalienable Rights’ with which the Declaration of Independence proclaims all Men . . . are endowed by their Creator.” 530 U.S. at 91 (Scalia, J., dissenting) (internal quotation marks omitted). Even though “the family itself is not beyond regulation in the public interest,” this Court reaffirmed the paramount importance of parental rights: “It is cardinal with us that the custody, care and nurture of the child reside *first in the parents*, whose primary function and freedom include preparation for obligations *the state can neither supply nor hinder*.” *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (emphasis added).

A. Parents have the fundamental right to direct the education of their children, including their religious training.

Parental rights specifically extend to education. Based on this Court’s “long-established precedent, parents—not the State—have primary authority with respect to . . . the education of children.” *Mirabelli v. Bonta*, 146 S. Ct. 797, 803 (2026); see *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925); accord, *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923). Reasoning that a child is “not the mere creature of the state,” this

Court explained that “those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” *Pierce*, 268 U.S. at 534-535. This expressly encompasses the “right of parents to guide the *religious* development of their children.” *Mirabelli*, 146 S. Ct. at 802 (quoting *Mahmoud*, 606 U.S. at 559) (emphasis added). Like the parents in *Mirabelli* and *Mahmoud*, Petitioners “feel a religious obligation to raise their children in accordance with” their religious convictions. 146 S. Ct. at 802. Like the policies at issue in *Mirabelli* and *Mahmoud*, the California policy excluding religious curriculum “violate[s] those beliefs” and “impos[e] the kind of burden on religious exercise that *Yoder* found unacceptable.” *Ibid.* (quoting *Mahmoud*, 606 U.S. at 550).

The Free *Exercise* Clause protects “the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance of religious acts.” *Mahmoud*, 606 U.S. at 546 (quoting *Kennedy v. Bremerton School Dist.*, 597 U.S. 507, 524 (2022)). The Clause “guarantees the free *exercise* of religion, not just the right to inward belief (or status).” *Trinity*, 582 U.S. at 469 (Thomas, J., concurring) (emphasis added).

Individuals are free to *believe* religious doctrine but increasingly coerced not to *act* on those beliefs in public life. “Even today . . . people of faith are made to choose between receiving the protection of the State and living lives true to their religious convictions.” *Espinoza*, 591 U.S. at 514 (Gorsuch, J., concurring).

Such censorship cuts against the Constitution’s guarantee of the right “not just . . . to *be* a religious person, holding beliefs inwardly and secretly” but “the right to *act* on those beliefs outwardly and publicly.” *Id.* at 510 (Gorsuch, J., concurring); see *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (“freedom to act” and “freedom to believe” are both protected).

The government violates Free Exercise when its policies “substantially interfer[e] with the religious development” of children by encroaching on the primary role of their parents. *Mahmoud*, 606 U.S. at 546; *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972). Parents have an essential role in directing the upbringing of their children that includes their education generally and religious training specifically. “[W]e have long recognized the rights of parents to direct ‘the religious upbringing’ of their children.” *Mahmoud*, 606 U.S. at 546 (quoting *Espinoza*, 591 U.S. at 486, *Yoder*, 406 U.S. at 213-214). “Religious education is vital to many faiths practiced in the United States.” *Our Lady of Guadalupe School v. Morrissey-Berru* (“*OLG*”), 591 U.S. 732, 754 (2020). For many, “the religious education of children is not merely a preferred practice but rather a religious *obligation*.” *Mahmoud*, 606 U.S. at 547 (emphasis added); see *OLG*, 591 U.S. at 754-756. Parental education of children in their religious beliefs, “like all religious acts and practices, receives a generous measure of protection from our Constitution.” *Mahmoud*, 606 U.S. at 547; see *Espinoza*, 591 U.S. at 486; *Yoder*, 406 U.S., at 213-214; *Pierce*, 268 U.S. at 532-535 (upholding parental right to enroll child in private religious school).

Government interference with Free Exercise may involve direct coercion, as in *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943) (compelled pledge of allegiance) but, as in *Yoder*, the Constitution also “protects against policies that impose more subtle forms of interference with the religious upbringing of children.” *Mahmoud*, 606 U.S. at 548.

B. The State does not have absolute, unfettered authority in the selection of public school curriculum.

Petitioners challenge a curriculum exclusion that discriminates against them for choosing material that teaches the religious values they wish to impart to their children. A curriculum that purges all references to religion implies that faith is irrelevant to daily life, directly contrary to the convictions of families who integrate their faith into all they do. California’s program is fully available to finance curriculum for families that have no interest in providing their children with an education infused with religious values. But it is hostile toward parents who take their faith seriously. There is no constitutionally valid rationale for such discrimination. In *Hartmann*, similarly, the government’s unconstitutional regulation of religious practices in the context of child daycare encroached “in an area traditionally reserved for, and uniquely suited to, parental authority.” 68 F.3d at 985. The same is true for home-based education. But California excises religion from its approved charter school curriculum and conditions an otherwise available benefit on the willingness of religious families to comply with the exclusion. This

“poses a very real threat of undermining the religious beliefs and practices that the parents wish to instill.” *Mahmoud*, 606 U.S. at 530 (cleaned up); see *Yoder*, 406 U.S. at 218.

The broad discretion of public schools to manage curriculum is “not absolute” and “must be exercised in a manner that comports with the transcendent imperatives of the First Amendment.” *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 863-864 (1982). Government discretion in selecting (or approving) curriculum cannot be used as a facade for viewpoint discrimination. Nor may officials carve out entire areas of knowledge and eject them, e.g., *Meyer v. Nebraska*, 262 U.S. 390 (striking down a law that forbade the teaching of modern foreign languages in public and private schools). The First Amendment facilitates the free flow of information and ideas, protecting a multitude of viewpoints—and “the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.” *Pico*, 457 U.S. at 866, quoting *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). “[S]tate-operated schools may not be enclaves of totalitarianism. . . . In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.” *Pico*, 457 U.S. at 877 (Blackmun, J., concurring) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969)).

California’s exclusion of religious curriculum—particularly in an independent study context where

parents select the curriculum and instruct their own children—violates all of this precedent.

IV. CALIFORNIA WEAPONIZES THE GOVERNMENT SPEECH DOCTRINE TO CHILL PRIVATE EXPRESSION.

One of the Ninth Circuit’s major errors is its classification of curriculum selected by *parents* as *government* speech, exempt from the constraints of the First Amendment. The developing government speech doctrine should be carefully restrained to prevent the power and machinery of government from being used to stifle private expression, particularly religious expression that is doubly protected by the Free Exercise and Speech Clauses. That is exactly what has happened here.

Even while admitting that parents are “the direct educators” in the independent study programs, the Ninth Circuit held that when the charter schools refused to approve curricular materials with religious content, they “determined the ‘content of the education’” and “any resulting speech in instruction was theirs, not that of [the parents].” *Woolard*, 170 F.4th at 710. The court reasoned that public school curriculum is “School District speech” (*ibid.*, quoting *Riley’s Am. Heritage Farms v. Elsasser*, 32 F.4th 707, 728 (9th Cir. 2022)), an “expression of its policy” (*ibid.*, quoting *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1013-15 (9th Cir. 2000)), and therefore government speech “not subject to scrutiny under the Free Speech Clause” (*ibid.*, quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009)). But even

“extensive and detailed” regulation does not transform private conduct—parents teaching their own children in their own homes—into state action. *Woolard*, 170 F.4th at 713 (Bumatay, J., dissenting), citing *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982). The Ninth Circuit ignored “the critical feature of the homeschool programs—that parents design and teach their chosen curricula in the privacy of the parents’ home.” *Woolard*, 170 F.4th at 71 (Bumatay, J., dissenting). This flawed ruling “casts parents into the equivalent of state workers and parent-designed curricula into state-mandated curricula” (*ibid.*) and thwarts the purpose of a legislative scheme designed to enhance flexibility and educational freedom.

This is not an Establishment Clause case per se, but much like *Summum*, it is litigated “in the shadow” of the Establishment Clause. 555 U.S. at 482 (Scalia, J., concurring); *see id.* at 486 (Souter, J., concurring) (“litigated . . . with one eye on the Establishment Clause”). As in *Summum*, the Establishment Clause lurks beneath the surface. The public-private distinction is critical because *religious* speech is involved. “There is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.” *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 765 (1995), citing *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (emphasis added). There is no “establishment concern” that would justify California’s position because “parents—not the government—freely and independently choose to spend funds on faith-based

instruction.” *Woolard*, 170 F.4th at 714 (Bumatay, J., dissenting). The content of the curriculum, selected and then taught by parents directly to their own children, is the epitome of *private* speech—protected by the First Amendment.

Since America is a nation governed by consent of the people, “the democratic process . . . provides a check on government speech.” *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015); see *Bd. of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 235 (2000); *Summum*, 555 U.S. at 467-468. The government may “represent its citizens” by taking a position, promoting a program, or implementing a policy. *Walker*, 576 U.S. at 208. Government may directly fund its own message (e.g., *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2005)) or “disburse[] public funds to private entities to convey [its] message.” *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995), citing *Rust v. Sullivan*, 500 U.S. 173 (1991). But lines must be carefully drawn to prevent encroaching on private speech—*especially* religious speech.

The line between government and private speech is not always easy to draw. Some overlap is inevitable, raising constitutional concerns and “present[ing] heightened risks that the government may displace or monopolize private speech by inserting its voice in the speech marketplace.” R. Bezanson & W. Buss, *The Many Faces of Government Speech*, 86 Iowa L. Rev. 1377, 1381 (2001). In some contexts, government and private speech overlap or blend in a unique manner. Legislative prayer is a unique blend that has been

heavily litigated. License plates are perhaps "the quintessential example of speech that is both private and governmental." *Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*, 305 F.3d 241, 245 (4th Cir. 2002).

There is no rigid formula for every context, but here, California has invited parents to select curriculum for independent study programs where they will teach their own children. "And they assist parents by paying for educational materials and services the parents select. *See* Cal. Educ. Code §§ 51746, 51747(g)(3); Cal. Code Regs. Tit. 5, § 11700(i)." *Woolard*, 170 F.4th at 711 (Bumatay, J., dissenting). But there's a "catch" – religious families need not apply, because California blatantly censors the slightest hint of religion, flouting the liberties guaranteed by the First Amendment.

CONCLUSION

This Court should grant the Petition and reverse the Ninth Circuit decision.

Respectfully submitted,

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