

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

**BRIEF FOR *AMICUS CURIAE*
RELIGIOUS FREEDOM INSTITUTE
IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICUS CURIAE*¹

Amicus the Religious Freedom Institute (RFI) is committed to achieving broad acceptance of religious freedom as a fundamental human right, a source of individual and social flourishing, the cornerstone of a successful society, and a driver of national and international security. RFI works to make religious freedom a priority for the government, civil society, religious communities, businesses, and the general public. RFI envisions a world that respects religion as an indispensable societal good and promises religious believers the freedom to live out their beliefs fully and openly.

RFI has a strong interest in this case because the Ninth Circuit's decision permits States to exclude religious families from generally available public benefits solely because they choose to educate their children with religious curricula. This exclusion strikes at the heart of the First Amendment's protection of religious liberty.

RFI filed an *amicus curiae* brief in support of Petitioners in the Ninth Circuit. It submits this brief in support of the Petition for a Writ of Certiorari to urge the Court to correct a decision that, if left standing, will provide a roadmap for governments to deny religious families access to publicly funded educational programs solely because of their faith.

¹ Counsel certifies that no party or counsel for a party authored this brief in whole or in part. No entity (other than *amicus*, its members, and its counsel) made any monetary contribution toward the preparation or submission of this brief. Counsel of record received timely notice of this brief.

SUMMARY OF ARGUMENT

California puts religious homeschooling families to a choice: Use secular curricula they do not want and avoid any whiff of religion in work samples, or lose state funding. That is a textbook Free Exercise violation under this Court's precedents.

The Ninth Circuit avoided that straightforward conclusion by calling parents teaching their own children in their own homes a "public school program." To reach that Orwellian result, the Ninth Circuit claimed to apply a test for "publicness" from *Carson v. Makin*, 596 U.S. 767 (2022). Because the homeschool program is free, open to all, regulated by the State, and supervised by state-certified teachers, it supposedly qualifies as a "public school" that may be kept strictly secular.

The problem is that *Carson* established no such test. Quite the opposite: *Carson* reiterated, as this Court has made abundantly clear, that "a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits." 596 U.S. at 778. Thus, California "need not subsidize" homeschooling—"[b]ut once [California] decides to do so, it cannot disqualify some [homeschoolers] solely because they are religious." *Id.* at 785 (quotation marks omitted).

While *Carson* did observe that a State "may provide a strictly secular education in its public schools," *id.* at 785, nowhere did it purport to establish a test for *what counts* as a public school. And it is inconceivable that a parent who chooses to teach her own children in her own home is running a "public school" within

the meaning of *Carson* (or the English language more generally).

The implications of the lower court’s decision extend far beyond homeschooling. Reading *Carson* to permit religious exclusion from any program that is “sufficiently public” puts the Free Exercise Clause on a collision course with the state-action and government-entity doctrines—the actual legal frameworks for distinguishing public from private. And it invites States to exclude religion from charter schools, virtual academies, special-education placements, education savings accounts, and any other hybrid model that blends public funding with private choice, simply by structuring the program a certain way. If parents teaching their own children at home can be deemed a “public school program,” nothing is safe.

Three Members of this Court have called for a “general course correction” in the Ninth Circuit’s religious liberty jurisprudence. *Mirabelli v. Bonta*, 607 U.S. 492, 501 (2026) (Barrett, J., concurring). This case is the opportunity to deliver it.

ARGUMENT

I. THERE IS NO “SUFFICIENTLY PUBLIC” EXCEPTION TO THE FREE EXERCISE CLAUSE.

Under this Court’s Free-Exercise precedents, this case never should have reached this stage. The Ninth Circuit avoided those precedents only by applying a test that *Carson* never announced.

A. This Court’s Precedents Establish a Clear Rule: States Cannot Exclude Religion from Generally Available Benefits.

This Court has “repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits.” *Carson*, 596 U.S. at 778; *see also Espinoza v. Montana Dep’t of Revenue*, 591 U.S. 464, 467 (2020); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 467 (2017). That is true even if the State excludes religious observers “on the basis of their anticipated religious use of the benefits.” *Carson*, 596 U.S. at 789. And as this Court has recently made clear, the rule applies with full force to educational funding. *See id.* at 771–73 (tuition assistance); *Espinoza*, 591 U.S. at 467 (tax-credit scholarships).

Those cases set forth a binary rule. When the State directly operates its own public schools, it may require secular instruction. *Carson*, 596 U.S. at 785. But when it provides generally available benefits that support private choice, it cannot discriminate against religion—period. *Id.* at 785–86; *Espinoza*, 591 U.S. at 488–89. There is no third category of programs that are “public enough” to escape Free Exercise scrutiny yet not public enough to be actual state-operated schools.

Applying that rule, “this should have been an easy case.” App. 31a (Bumatay, J., dissenting from denial of rehearing en banc). California chose to provide homeschooling parents a generally available public benefit: academic credit and funding for instructional materials used in independent-study programs.

Under *Carson*, *Espinoza*, and *Trinity Lutheran*, California cannot deny that benefit to parents who select materials consistent with their religious beliefs.

B. The Ninth Circuit Invented a “Sufficiently Public” Exception That *Carson* Did Not Create.

Rather than apply these precedents, the Ninth Circuit manufactured an exception. It seized on *Carson*’s unremarkable observation that a State “may provide a strictly secular education in its public schools.” 596 U.S. at 785; *see* App. 15a. And it then concluded that *Carson* had actually announced a new framework for determining when a school or funding program is “sufficiently public” to justify religious exclusion. App. 8a; *see* App. 21a–22a. The panel later amended its opinion to remove that damning phrase, but its analysis and conclusion remain exactly the same: If a school or program has the right combination of features to meet its *Carson*-based publicness test, the Free Exercise Clause does not apply. And applying this made-up test, the panel concluded that parents who homeschool their children are, much to their surprise, running a *public* school.

Needless to say, *Carson* did not create such a bizarre escape hatch from the First Amendment. As *Carson* makes clear, a “strictly secular” education may be provided only when a State “operate[s] schools of its own”—*i.e.*, actual public schools. *Carson*, 596 U.S. at 785. A State cannot invoke that principle simply by structuring its benefit program to *look enough like* a public school program.

Indeed, *Carson* squarely rejected the argument that Maine could design its funding program to provide the

“rough equivalent of a [state] public education’—meaning a secular education.” *Id.* at 784–85. This Court refused to bless such “manipulat[ion]” of a program’s definition “to subsume the challenged condition.” *Id.* And it warned that allowing such manipulation would reduce the First Amendment to “a simple semantic exercise” and render it “essentially meaningless.” *Id.*

Carson also rejected Maine’s “rough equivalent” argument for another reason: It was disingenuous, given that Maine’s funding program could be used to obtain an education quite different from that provided in Maine’s public schools. *Id.* at 783–84. The Court discussed those differences simply to reject Maine’s argument as a factual matter. But that discussion did not, as the Ninth Circuit held, announce *a test* for when a program becomes “sufficiently public” to avoid constitutional scrutiny.

Carson’s authorization to keep a State’s own public schools “strictly secular” rests on the Establishment Clause: “state-sponsored and state-directed religious exercise *in a public school*” may exert “coercive pressures” on students who have “no real alternative” but to participate or appear to participate. *Lee v. Weisman*, 505 U.S. 577, 587–88 (1992) (emphasis added). In *Lee*, the Court held that “there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary *public schools*.” *Id.* at 592 (emphasis added). In that “public school context,” *Lee* held, state-sponsored religious exercise may appear “to be an attempt to employ the machinery of the State to enforce a religious orthodoxy” or to effectively “requir[e] participation.” *Id.* at 592, 594; *see also Engel*

v. Vitale, 370 U.S. 421, 425 (1962) (expressing concern with “a religious program carried on by government”).

Whatever the merits of those concerns when a government “operate[s] schools of its own,” *Carson*, 596 U.S. at 785, the concerns have no purchase here. Here, parents are educating their own children, in their own homes, with curricula they have independently selected. There is no state-operated classroom, no captive audience of other people’s children, and no government-directed instruction. As this Court has “repeatedly held,” “the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs.” *Espinoza*, 591 U.S. at 474.

By creating a “sufficiently public” exception to the Free Exercise Clause that reaches where the Establishment Clause does not, the Ninth Circuit unmoored *Carson*’s “strictly secular” authorization from its jurisprudential foundations. It transformed a principle designed to prevent the State from imposing religion into a license to discriminate against families engaged in private religious exercise. The Court should grant certiorari to correct that inversion.

II. The Ninth Circuit’s Rule Will Produce Untenable Practical Consequences and Clashes with Governing Doctrine.

The Ninth Circuit’s “sufficiently public” exception does not merely produce the wrong result in this case. It threatens the coherence of this Court’s jurisprudence in multiple ways.

A. The Decision Below Provides a Blueprint for Religious Discrimination in Hybrid Education Programs, in Conflict with Other Cases.

To begin, the decision below hands States a blueprint to engage in religious discrimination across the landscape of educational choice. As the Ninth Circuit read it, *Carson* drew a self-defeating roadmap for how to sidestep the strictures of the Free Exercise Clause: Simply add enough “legal requirements” or assemble the right blend of “features” in a school-choice program, and a State is free to discriminate against religious participants. App. 15a–18a.

The Court need not speculate as to how that principle might play out; this case demonstrates just how far a State could take it. The plaintiffs here are parents who *homeschool their own children in their own homes*. Yet simply because they are subsidized and subject to “extensive legal requirements,” the Ninth Circuit held that they are operating “public school programs.” App. 18a. “If educating one’s children in the privacy of one’s own home according to one’s private choices constitutes ‘public school’ activity, then pretty much anything can qualify as a governmental program exempt from First Amendment scrutiny.” App. 30a (Bumatay, J., dissenting from denial of rehearing en banc).

The implications are far-reaching. States are innovating with a variety of educational models that blend public oversight with private choice: charter schools, virtual schools, independent-study programs, voucher programs, education savings accounts, special-education placements, and dual-enrollment initiatives, to name a few. *See, e.g.*, Cong. Rsch. Serv.,

Overview of Public and Private School Choice Options (May 23, 2025). Many of these models share some or all of the features the Ninth Circuit identified. The programs may be “free,” open to “all students for which they have capacity” or who are eligible, subject to “state standards” and “state assessments,” and supervised by “state-certified teachers.” App. 16a–17a. If layering those features onto a school program is enough to label it a “public school program,” every innovative school-choice program is vulnerable to the religious exclusion that follows. That would defeat *Carson*, *Espinoza*, and *Trinity Lutheran*.

Unsurprisingly, then, the Ninth Circuit’s new test in *Woolard* creates a conflict with how others have analyzed these innovative educational models.

Take, for example, special-education placements. The “free appropriate public education” that federal law guarantees to students with disabilities is sometimes provided in privately-operated schools. See 20 U.S.C. § 1412(a)(10)(B). Properly applying *Trinity Lutheran*, *Espinoza*, and *Carson*, an earlier Ninth Circuit panel held that excluding religious schools constitutes a plausible Free Exercise violation. *Loffman v. Cal. Dep’t of Educ.*, 119 F.4th 1147, 1169 (9th Cir. 2024). Yet *Woolard*’s newly minted test would require the opposite result. Every feature the *Woolard* panel treated as dispositive is present, and more so: The special-education placement program is open to “all children with disabilities” for whom appropriate services are unavailable in government-operated schools; the State pays “the full amount of the tuition”; the school, “teaching staff,” “curriculum,” and “instructional materials” are “subject to ongoing oversight” by the

State; and, to top it off, the benefit is even called a “free . . . public education.” *Id.* at 1157–58. Under *Woolard*, the special-education program would qualify as a “public school program” that can discriminate against religious observers and schools.

Or take dual-enrollment programs. In Vermont, the State provides “public funding for eligible high school students to dual-enroll in up to two courses at approved Vermont colleges.” *A.H. ex rel. Hester v. French*, 985 F.3d 165, 170 (2d Cir. 2021). Reviewing the structure and features of the dual-enrollment program, the Second Circuit explained that it “is principally a public school program.” *Id.* at 171. But unlike the decision below, the Second Circuit did not treat the “public school program” conclusion as a license for the State to discriminate. Applying *Trinity Lutheran* and *Espinoza*, the court instead held that excluding religious-school students from the program likely violated the Free Exercise Clause.

The Ninth Circuit’s new publicness test creates a conflict on a recurring question of national importance and, if adopted more widely, would threaten religious participation in a variety of school-choice programs. This Court’s review is warranted to restore uniformity in how courts apply *Trinity Lutheran*, *Espinoza*, and *Carson* to the landscape of educational models.

B. The Decision Below Conflicts with This Court’s State-Action and Government-Entity Precedents.

The practical problems with *Woolard*’s test are compounded by its doctrinal incoherence. The Ninth Circuit’s approach sets *Carson* on a collision course with the established doctrines that actually govern

the line between public and private. This Court has developed two frameworks for addressing that question: the state-action tests, which ask whether a private actor’s conduct is fairly attributable to the State, *see, e.g., Rendell-Baker v. Kohn*, 457 U.S. 830, 839–40 (1982); and the government-entity doctrine, which asks whether the government created the entity and controls its operations, *see Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 397–98 (1995). The Ninth Circuit applied neither. Instead, it misconstrued *Carson* to fashion an ad hoc checklist that bypasses those frameworks altogether.

Under this Court’s precedents, none of the features the Ninth Circuit identified—regulatory oversight, state funding, credentialed personnel, and the legislative “public school” label—suffices to establish state action. State regulation of a private entity, “even if extensive and detailed,” does not transform that entity’s conduct into the State’s own. *Rendell-Baker*, 457 U.S. at 841 (quotation marks omitted); *see* App. 26a (Bumatay, J., dissenting from denial of rehearing en banc). Public funding is equally unavailing: This Court held in *Rendell-Baker* that even a school receiving virtually all its revenue from the State remained a private actor. 457 U.S. at 832, 840. And the “public school” label is constitutionally irrelevant, because the “distinction between private conduct and state action turns on substance, not labels.” *Lindke v. Freed*, 601 U.S. 187, 197 (2024).

Performing a traditional, exclusive public function can also transform a private actor into a state actor—but that is not present here, either. *See Rendell-Baker*, 457 U.S. at 842. To qualify, the entity must exercise “powers traditionally exclusively reserved to

the State.” *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 809 (2019). Education is not an exclusive public function. “Along with private schools, homeschooling has always played a substantial role in our society as an alternative primary education method.” *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 144 (4th Cir. 2022) (Quattlebaum, J., dissenting in part and concurring in part).

The Ninth Circuit’s new test clashes with the government-entity doctrine even more. Under decades of precedent, this Court treats a nominally private entity as a part of the government itself when the entity is “Government-created and -controlled.” *Lebron*, 513 U.S. at 397. That describes Amtrak, a corporation Congress created by statute, whose board the President largely appoints, and whose operations the government directs and controls. *Id.* at 397–98. It does not begin to describe Blue Ridge Academy and Visions in Education, the charter schools that sponsor the independent-study programs at issue here. See *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 543–44 (1987) (explaining that acting “under charters granted by a government” does not cause privately-operated entities to “thereby lose their essentially private character”). Much less does it apply to parents teaching their children at home.

The result of the decision below is a new standard for public-private distinction that operates in the school context alone, but bears no relationship or even resemblance to the structural criteria this Court’s precedents require in any other context. The collision is not theoretical. No one contends that “parents teaching their own children” at home satisfy either the state-action tests or the creation-and-control

standard. App. 28a (Bumatay, J., dissenting from denial of rehearing en banc). The Ninth Circuit reached a result those doctrines would plainly forbid, by the simple expedient of ignoring them.

* * *

California and other States remain free to provide a strictly secular education in the public schools that they operate. But when they choose to offer independent-study benefits to homeschooling families—or any other innovative educational model that empowers private choice—they cannot condition those benefits on the abandonment of religious belief. Without this Court’s intervention, the decision below creates a glaring path for any government in the nation’s largest circuit to circumvent those rules, in direct contravention of the state-action and government-entity doctrines. The petition for certiorari should be granted.

CONCLUSION

This Court should grant the petition for a writ of certiorari and reverse the decision below.

Respectfully submitted,

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