

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 OF AMICUS CURIAE EDCHOICE, INC.
IN SUPPORT OF PETITIONERS**

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QUESTION PRESENTED BY THE PETITION

California funds independent-study programs in which parents teach their children in their homes using curricula and materials the parents select. Charter-school employees simply approve parent-directed purchases and periodically review student work for adherence to state academic standards.

The charter schools here denied parents funding and academic credit for curricula and materials even though they satisfied the State's academic standards, solely because officials deemed them "religious."

The Ninth Circuit approved this discrimination by holding that parents teaching their children in their own homes using curricula and materials they selected are conducting a "public school program" to which the First Amendment's prohibition against religious discrimination doesn't apply.

The question presented is:

Whether a State that chooses to recognize and fund homeschooling using parents' chosen curricula may deny recognition and funding to parents who desire to use faith-based curricula or materials to teach their children at home, solely because the State deems those materials religious?

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INTEREST OF AMICUS CURIAE¹

EdChoice is a nonprofit, nonpartisan 501(c)(3) organization that serves as a national leader in education-choice research, fiscal analysis, policy development, training, outreach, and legal defense. EdChoice’s mission is to advance education freedom and choice for all as a pathway to successful lives and a stronger society. EdChoice supports policies that afford families financial access to educational opportunities that best fit the needs of their children—whether public school, private school, charter school, home school, or any other learning environment.

As a national organization dedicated to ensuring families every available educational option for their children, EdChoice is interested in the outcome of this case. As EdChoice’s founder, Nobel laureate economist Milton Friedman, observed, the problem to be solved by education freedom is “an excess of conformity” and the solution “is to foster diversity” in education. Milton Friedman, *Capitalism and Freedom* 97 (1962). As part of this diversity in education, EdChoice supports the inclusion of all private schools in education benefits programs, including religious schools. EdChoice is concerned

¹ No party or its counsel authored any of this brief, and no person other than amici curiae, their members, or their counsel contributed monetarily to this brief. Undersigned counsel provided counsel of record timely notice of the amici’s intention to file a brief more than ten days prior to the due date. Sup. Ct. R. 37.2.

that the reasoning below enables state regulators to renew the exclusion of religious schools through creative use of regulations or academic standards. Advancing this Court's decision in *Carson as next friend of O. C. v. Makin*, 596 U.S. 767, 785 (2022), EdChoice seeks to prevent states from restricting student access to innovative educational options, including religious ones.

SUMMARY OF THE ARGUMENT

The Ninth Circuit was wrong to construe parents' instruction of their own children in their own home as government action. The relevant question for distinguishing government education from government-supported private education is who provides the instruction. The core of education is speech, *i.e.* teaching children; other school activities support that central action. The state of California might fund, regulate, and supervise independent study, but it does not choose the curriculum or teach the children. Neither *Carson as next friend of O. C. v. Makin*, 596 U.S. 767 (2022), nor any other Supreme Court authority, supports the Ninth Circuit's rule that government funding and regulation transform private instruction into government action.

California's alternative justifications for nixing religious content from independent study do not alter that conclusion. Educational quality requirements may ensure adequate instruction in reading, writing, and arithmetic, but they do not permit the State to

treat religious content as inherently deficient. To the contrary, academic studies confirm the common-sense observation that religious instruction can be high quality. Nor may the State exclude religious instruction merely because government employees may encounter religious homework. Reviewing a grammar worksheet that mentions God is not compelled religious exercise. Private instruction does not become government speech merely because a government employee evaluates the homework.

If the Ninth Circuit's rule stands, it will create a new mechanism for states to avoid *Carson* through regulation. The respondent in *St. Mary Catholic Parish v. Roy*, No. 25-581, has asserted the same quality rationale that California advanced here for excluding religious education. If California's regulation of independent study permits exclusion of religious education, Colorado could invoke the same theory to avoid *Carson*, regardless of the outcome in *St. Mary Catholic Parish*. The religious charter cases progressing through lower courts likewise will not resolve this question because a State's regulatory power to exclude religion does not depend on whether the regulator is a state employee or a state contractor. Accordingly, this Petition presents a distinct question not answered by other religious education cases, yet equally worthy of consideration: whether a State may accomplish through regulation what *Carson* forbids it from accomplishing directly.

ARGUMENT

I. Government funding and regulation of an independent study program does not convert every activity in that program into government action.

The Ninth Circuit erred by concluding that government funding and supervision transform homeschooling into government education. The Court's cases distinguish between (1) government education and (2) government-supported (or regulated) private education. Under those cases, neither government funding nor supervision, alone or in combination, equals government education.

The Petition is correct that “parents teaching their own children at home using materials they select” are not “carrying out the State’s own educational program.” Pet. 20. The relevant activity in this case is instruction, and in the independent study program, *parents* provide the instruction. The state establishes requirements for the program and supervises compliance, but it does not instruct students. Regulating the conditions under which instruction occurs does not make the instruction a public-school activity or transform the parent into a government speaker.

A. Neither *Carson* nor any other Supreme Court precedent supports the Ninth Circuit’s rule below.

In the Ninth Circuit, when state control over a parent-directed program reaches some threshold, it changes the constitutional character of the underlying educational activity. *See* Appx. 18a (“The extensive legal requirements applicable to the defendant charter schools’ independent study programs make them public school programs ...”). The Ninth Circuit tries to justify its new rule by citing *Carson*, but it identifies no legal principle from *Carson* or elsewhere that explains what level of regulation accomplishes this conversion. *See id.* To the contrary, *Carson* supports Petitioners, not the Ninth Circuit.

A principal point in *Carson* was to distinguish private education supported by Maine’s town-tuitioning program from public education provided in government-operated schools. The Court rejected Maine’s attempt to equate private instruction purchased by the state with public instruction provided in government-operated schools which must avoid religious instruction under the Establishment Clause. *Carson as next friend of O. C. v. Makin*, 596 U.S. 767, 785 (2022). As this Court explained, the instruction purchased by the state was not “equivalent” to traditional public schools in any way except the directive to “be secular.” *Id.* at 784. The lack of any other equivalence requirement, such as

open admissions, free tuition, curriculum, or teacher certification, meant that Maine was engaging in a “semantic exercise” to hide religious discrimination. *Id.* at 785.

Carson thus confirms the distinction between education the government provides and education it purchases or supports through private providers. See *Carson*, 596 U.S. at 782–85. Public schools can be “strictly secular,” but the state cannot exclude religious providers when the instructors are “not public schools.” *Id.* at 785. *Carson* did not suggest that regulation or finance could convert private providers into public schools. See *id.*

The Ninth Circuit’s rule cannot be squared with *Carson*. Under the Ninth Circuit’s view, Maine could have transformed public finance of private education into public-school education by imposing additional curriculum, admissions and teacher qualifications requirements. But *Carson* never suggests that Maine’s error was that it regulated too little, as if the constitutional character of education changes depending on how extensively the state regulates it.

In the education context, government funding does not convert a private entity’s actions into government action. In *Rendell-Baker v. Kohn*, 457 U.S. 830, 832–33, 842 (1982), the Court held that a private school funded almost entirely by government grants was still a private actor with respect to employment decisions. The Court observed that even if “the State intends to

provide services for such students at public expense,” that intent “in no way makes these services the exclusive province of the State.” *Id.* at 842. *See also Logiodice v. Trustees of Maine Cent. Inst.*, 296 F.3d 22, 27 (1st Cir. 2002) (concluding that education under Maine’s town-tuitioning program is not an exclusive government function even as education of last resort); *Robert S. v. Stetson Sch., Inc.*, 256 F.3d 159, 164–65 (3d Cir. 2001) (concluding that a school contracting with a state agency to serve sex offenders was not performing an exclusively public function).

Nor does adding regulation and active supervision convert private entities to public in other contexts. The Court in *Columbia Broad. Sys., Inc. v. Democratic Nat. Comm.*, 412 U.S. 94, 97–100, 118–121 (1973) (plurality op.), for example, rejected the argument that the Federal Communications Commission became a “partner” or “engaged in a ‘symbiotic relationship’” with a radio station whose advertising policy it was asked to review. The FCC heavily regulated how the radio station operated, but that did not vitiate the station’s private status. *See also Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 814 (2019) (citing the *CBS* plurality as correct).

Even substantial regulation with government funding does not transform private services into state conduct. A doctor treating Medicare and Medicaid patients is a private actor, not a state agent, even with extensive regulation and licensing of nursing homes. *See Blum v. Yaretsky*, 457 U.S. 991, 1008

(1982). And a lawyer licensed and hired by the state to represent the indigent is a private actor, not a state agent. *Polk Cnty. v. Dodson*, 454 U.S. 312, 318–319 (1981).

B. Parents, not the state, provide the instruction here.

The same principles from past funding and regulation cases apply here because the relevant question is whether the disputed activity—educational instruction—is the state’s own conduct. It is not. The program is public in some respects, but not every act occurring within it becomes government conduct as a result.

Under the independent study program, parents, not the government, decide the subjects their children study, the content of the courses, and the in-person instruction that educates their children. As the Petition explains, one school at issue “gives each family an instructional budget that parents direct to curriculum, materials, and services of their choice,” while the other school lets parents “direct state funds to books, supplies, technology, field trips, and other learning resources they select.” Pet. 8. Then, “[p]arents teach their children at home using materials they’ve chosen.” *Id.*

School teachers become involved in other ways: They provide the “objectives and methods of study for the pupil’s work, and the methods used to evaluate that work.” Appx. 17a (quoting Cal. Educ. Code

§ 51747(g)(2)). This supervision includes preparing a written agreement on the objectives, methods, and planned evaluation, and reviewing work to determine “the extent to which achievement of the pupil . . . meets the objectives of an assessment. *Id.* (alteration in original) (quoting Cal. Code Regs. tit. 5, § 11700(e), (f)). As the Petition explains, this typically involves the parent periodically meeting with a teacher who “reviews attendance records and work samples and answers questions,” and for at least one of the schools at issue here, “review[s] proposed expenditures.” Pet. 9. Those activities regulate and evaluate the parent’s instruction; they do not choose the subject or content of the course or deliver the education.

The distinction between instruction and administration fits the ordinary understanding of education. See Philip Hamburger, *Education is Speech: Parental Free Speech in Education*, 101 Tex. L. Rev. 415, 423 (2022). As Professor Hamburger explains, “Speech is the essential core and dominant reality of almost all education.” *Id.* Even in matters like “playtime, art, sports, and physical experiments in the sciences. . . the educational elements of these activities are largely, often crucially, a matter of speech.” *Id.* at 424. Education is not a collection of every administrative, supervisory, or regulatory function a school performs. At its core, education means instruction: communicating knowledge, ideas, and values to students. See *id.* at 423–24. All other activities in a school—*e.g.*, student transportation, meals, health and guidance services—support core

instruction. *See id.* at 450 n.109 (giving the example of “protect the health of children” as a non-speech activity performed by schools). The State’s role in setting conditions for acceptable education thus does not answer who provides the instruction any more than issuing a license to broadcasters answers who does the broadcasting. *See Columbia Broad. Sys., Inc.*, 412 U.S. at 118–121 (plurality op.).

Perhaps recognizing that parent-provided education is not a public-school program, California also argues that parents teaching their own children are really government speakers. *See* State Supt.’s Answering Br. at 48–53, *Woolard v. Thurmond*, No. 24-4291 (9th Cir. Jan. 22, 2025) (hereinafter “State Supt.’s 9th Cir. Answering Br.”). In their own words, “the fact that government-approved public school curricula may be engaged with by private citizens in their private home, does not convert the curricula materials into private speech.” *Id.* at 53.

California’s argument relies on the premise that government is principally responsible for a child’s education. That premise is false. “The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children.” *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535 (1925). Accordingly, parents have the right “to direct the upbringing and education of children under their control.” *Id.* at 534–35. More precisely for this case, “parents have speech rights that others do

not in the education of their minor children.” Hamburger, 101 Tex. L. Rev. at 427. Educational instruction is presumptively private and becomes governmental only when parents enroll their children in a school with instruction provided by a government teacher. *Id.* California errs by trying to reverse that presumption in its favor rather than establish how parents in this case consented to substitution of government speech for their own.

California also identifies no authority holding that a state’s approval or regulation of educational materials causes a parent’s instructional use of those materials to become government speech. *See* State Supt.’s 9th Cir. Answering Br. at 49–50. It cites *Walker v. Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015), *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), and *Johanns v. Livestock Marketing Ass’n*, 544 U.S. 550 (2005), but those cases involved license plates, monuments in a park, and mandatory fees for an ad council. *Walker*, 576 U.S. at 215; *Summum*, 555 U.S. at 469; *Johanns*, 544 U.S. at 553–54. License plates and city park monuments are government speech on government property. *Walker*, 576 U.S. at 215; *Summum*, 555 U.S. at 469. They do not establish that government regulation generates government speech from a private person in a private home. And a government exaction for a government-scripted promotion is not the same as a government benefit for unscripted private home instruction. *Johanns*, 544 U.S. at 560–62.

California's argument ultimately rests on the proposition that the State may impose restrictions on religious instruction when it finances an education program. State Supt.'s 9th Cir. Answering Br. at 33. *Carson* forecloses that argument. The state may not exclude eligible subsidy recipients from a benefits program solely because they engage in religious exercise. *Carson*, 596 U.S. at 785. California attempts to characterize the instruction as governmental rather than private merely to reformulate a losing argument from *Carson*.

California's theory would have consequences far beyond education. If government funding and regulations can convert a private speaker into a government speaker, then the government could potentially impose viewpoint-based restrictions on other private recipients of public benefits. Can the state order religious hospitals to scrub all crucifixes and Bible verses from the walls and literature when treating Medicare patients? Can the state condition welfare benefits on an agreement not to use the funds at Christian-owned stores? Of course not. But the Ninth Circuit's adoption of California's theory creates a legal justification for precisely that result.

In sum, the state funds and regulates an independent study program, but the parents choose the curriculum and instruct the child. The Ninth Circuit erred by using the State's regulatory role to convert the parent's instructional role into state speech. Because the instruction is privately chosen

and privately provided, the independent study program is properly understood as a government benefit for private education. Under *Carson*, the state may not condition such a benefit on forbearance of religious exercise. 596 U.S. at 785.

II. Neither educational quality nor teacher supervision justifies excluding religious instruction.

California raises two additional reasons to exclude religion: the supposedly lower quality of religious education and higher burden that religious material would impose on state teachers. These objections would narrow *Carson* to its facts, using immaterial distinctions between independent study and town tuitioning to achieve a different result. Neither concern justifies excluding religious instruction from an otherwise available educational benefit.

A. Education quality standards do not justify wholesale exclusion of religious instruction.

California argues that it can exclude religious curriculum as not “substantially equivalent in quality” to state standards. *See* State Supt.’s 9th Cir. Answering Br. at 21, 24–25. This argument proceeds in two steps. First, California identifies state standards as the sole measure of education quality. *Id.* at 21. Then, it asserts that secular content is necessary to satisfy those standards. *Id.* at 24–25.

The second proposition does not follow from the first: a state may establish neutral educational requirements without demanding secularism as a condition of educational quality. Instruction necessarily communicates both academic content and the values of the person providing it. *See* Hamburger, 101 Tex. L. Rev. at 424. When parents speak to their children, they necessarily communicate their values. The religious character of instruction does not establish whether the instruction satisfies quality academic standards.

Even if the State has legitimate quality standards, it cannot use “quality” as a proxy for excluding religious viewpoints. The purpose of state standards is to ensure that a student learns subjects like reading, writing, and arithmetic at the appropriate depth and level of proficiency. Treating religious content as inherently deficient offends free exercise standards and traditions.

An example Judge Bumatay used in his dissent illustrates this problem. The sentence “God sends the rain to help plants grow” is a correct sentence for teaching grammar. Appx. 24a (Bumatay, J. dissenting from denial of rehearing en banc). So is the sentence “The sun warms the earth to help plants grow.” California’s requirement for teaching grammar would not result in a preference for either one. Whatever disagreement California may have with the proposition itself, *see* State Supt.’s 9th Cir.

Answering Br. at 25, religious content does not make otherwise adequate instruction defective.

Beyond the examples in this case, academic studies of education indicate that religious education is compatible with quality education. One meta-analysis reported positive academic associations for Christian school students compared with public school students. *See* William H. Jeynes, *The Effects of Catholic and Protestant Schools: A Meta-Analysis*, 12 J. Catholic Educ. 255, 255 (2008). Another meta-analysis found positive academic associations for all religious school students. *See* William H. Jeynes, *A Meta-Analysis on the Effects and Contributions of Public, Public Charter, and Religious Schools on Student Outcomes*, 87 Peabody J. Educ. 305, 305 (2012).

Religious education leads not only to greater academic achievement but also to other improved civic outcomes. A recent statistical meta-analysis examining the association between private schools and four civic outcomes (political tolerance, political participation, civic knowledge and skills, and voluntarism and social capital) showed that religious private schools are associated with higher civic outcomes for students over comparably situated public school students. *See* M. Danish Shakeel, Patrick J. Wolf, et al., *The Public Purposes of Private Education: A Civic Outcomes Meta-Analysis*, 36 Ed. Psychol. Rev. art. 40, at 23 (2024).

The record and these studies indicate that religious education can be, and often is, of very high quality. California cannot convert neutral academic standards into a categorical exclusion of religious instruction, lest it elevate secularism rather than academic proficiency as the defining feature of quality education—precisely the kind of religious discrimination that *Carson* forbids.

B. The state may not exclude religious instruction simply because its employees must supervise it.

One school appellee further objects that supervising teachers should not be required to evaluate worksheets containing religious references. See Blue Ridge Academy’s Answering Br. at 59, *Woolard v. Thurmond*, No. 24-4291 (9th Cir. Jan. 22, 2025). The argument appears to rest on the premise that a teacher’s exposure to religious content is an impermissible burden.

This objection confuses evaluating instructional materials with agreeing with the sentence. Merely seeing a worksheet that mentions God is not equivalent to being compelled to pray or to attend religious services. Exposure to religious expression is not governmental endorsement or compelled religious exercise.

This objection also misunderstands how the First Amendment works. Under current law, public schools remain neutral regarding religion to prevent

“mak[ing] a religious observance compulsory.” *See Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 537 (2022) (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)). Yet states cannot exclude private religious providers from other education programs. *Carson*, 596 U.S. at 785. These rules reflect the “complementary” purposes of the Free Exercise and Establishment Clauses. The government can neither compel religious observance nor suppress private religion. *See Kennedy*, 597 U.S. at 533.

As a result, the argument about helping teachers avoid religion depends on the speech premise discussed above. *See supra* Part I. If the parent’s instruction remains private speech, then a state employee’s supervision does not make the instruction the employee’s speech. Nor can a teacher’s desire to avoid exposure to religious content justify imposing that burden on the parent. Otherwise, the state could burden private religious exercise whenever one of its employees objected to encountering it when performing a supervisory function. A regulator’s role as homework grader does not give the state greater power to burden private religious exercise. Nothing in the Free Exercise Clause or the Establishment Clause permits the State to exclude private religious instruction merely because a government employee supervises the program.

Once it is clear that a program where parents educate their own children is a private benefits program, *see supra* Part I, neither educational quality standards nor state employee supervision provides a means of avoiding application of *Carson*. California may, of course, impose neutral academic requirements on education programs and supervise compliance. But it may not use quality as a proxy to exclude religious instruction; nor may it suppress religious exercise to spare state employees from encountering it.

III. The Ninth Circuit's approach would permit states to evade *Carson* through regulation.

The Ninth Circuit's decision illustrates a broader problem warranting review: State efforts to limit or avoid *Carson* via immaterial regulatory and factual distinctions. Critically, this problem is distinct from the question whether states may use anti-discrimination laws or charter schools to exclude religious education. To be sure, the Court is addressing, and will need to address, those discrete classes of cases. But it also needs to take this case to hammer a third whack-a-mole: Regulatory exclusion.

As this Court is aware, Colorado has excluded religious participation in a state-funded preschool program in a different distinction from *Carson*. See Brief of Amici EdChoice *et al.* at 4–6, *St. Mary Catholic Parish v. Roy*, No. 25-581 (U.S. July 2, 2026) (hereinafter “*St. Mary* Brief of Amici EdChoice”). In particular, it has prohibited specific religious views on sexuality rather than prohibiting all religious instruction. See *id.* It even uses the same “quality” argument that California uses here. Compare *supra* Part II.A, with Respondent’s Merits Brief, *St. Mary Catholic Parish v. Roy*, No. 25-581, at 4 (arguing that the challenged laws “ensure that [the program’s] publicly funded preschools deliver high-quality early childhood education”). This approach resulted in a functional exclusion of all religious preschools from its universal preschool program. See *St. Mary* Brief of Amici EdChoice at 4–6; see also, e.g., *Darren Patterson Christian Acad. v. Roy*, 765 F. Supp. 3d 1194 (D. Colo. 2025), appeal docketed, No. 25-1187 (10th Cir.).

Maine provides another example of a state imposing restrictions on participating religious school after *Carson*, taking the same approach as Colorado. See *Crosspoint Church v. Makin*, 180 F.4th 354, 357–58 (1st Cir. 2026); *St. Dominic Acad. v. Makin*, 181 F.4th 11, 20–26 (1st Cir. 2026). It also outlawed specific religious views on sexuality, resulting in exclusion of religious schools from town-tuitioning again despite this Court’s decision in *Carson*. See *id.*

If California's method of prohibiting religious instruction is permitted to stand, States like Colorado and Maine will have yet another path around *Carson*, regardless of the result in *St. Mary*. Even if States may not exclude religious providers based on their views on sexuality, they could exclude the same providers by requiring them to accept government supervision and comply with state standards that, they say, require secular instruction. The result would be a means of circumventing *Carson* and any adverse decision in *St. Mary*.

The *Carson* distinction declared by the Ninth Circuit in this case also cannot be settled by the religious charter cases working their way through lower courts. See, e.g., *Wilberforce Acad. of Knoxville v. Knox Cnty. Bd. of Educ.*, No. 3:25CV584 (E.D. Tenn.); *Nat'l Ben Gamla Jewish Charter Sch. Found., Inc. v. Drummond*, No. 5:26CV582 (W.D. Okla.). In those religious charter school cases, the question is whether the charter school is a private contractor or a government educator. See Petitioner Br. at i, *St. Isidore v. Drummond*, Nos. 24-394, 24-396. Although this case also involves charter schools, the status of charter schools and their teachers does not affect the outcome. The relevant question is what happens when the state regulates privately provided education. Whether the regulator is a state employee or a state contractor does not determine whether the regulated speaker is a government speaker.

In short, this Court should grant this petition because it raises a different and important question than other religious education cases now before this Court or likely to reach this Court. Neither the *St. Mary* case and related cases nor the religious charter cases necessarily resolve the legal consequence of the regulation and supervision in cases like this one. If the Ninth Circuit's error here is allowed to stand, it will permit states to continue restricting religious education and narrowing the protections this Court established in *Carson*.

CONCLUSION

This Court should grant the petition for certiorari.

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