

CASE NO. 24-4291

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN WOOLARD, *et al.*,

Plaintiffs-Appellants,

v.

JOHN THURMOND, *et al.*,

Defendants-Appellees,

On Appeal from the United States District Court
for the Eastern District of California
Case No. 2:23-CV-02305-JAM-JDP

**BRIEF OF *AMICI CURIAE* MANHATTAN INSTITUTE AND
NOTRE DAME EDUCATION LAW PROJECT
IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL**

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The Manhattan Institute states that it has no parent companies, subsidiaries, or affiliates, and does not issue shares to the public.

The Notre Dame Education Law Project is a program within Notre Dame Law School, which is part of Notre Dame University. None of these entities issue shares to the public.

Dated: November 3, 2025

s/ Ilya Shapiro
Ilya Shapiro

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INTEREST OF *AMICI CURIAE*¹

The Manhattan Institute for Policy Research is a nonpartisan public policy research foundation whose mission is to develop and disseminate ideas that foster greater economic choice and individual responsibility. To that end, it has historically sponsored scholarship and filed briefs supporting constitutionally protected liberties and educational opportunities and opposing governmental overreach.

The Notre Dame Education Law Project seeks to enhance civil society, promote educational opportunity, and protect religious liberty by supporting educational pluralism through research, scholarship, and legal advocacy.

This case interests *amici* because it highlights an ongoing problem with state provisions which violate the First Amendment's nondiscrimination mandate. This case also interests *amici* because they work to promote educational freedom, particularly in the context of the basic right to religious liberty. *Amici* believe that *en banc* review is necessary to provide certainty within the Ninth Circuit and decide an important question for parents and children.

¹ In accordance with Court rules at this *en banc* stage, *amici* have filed a motion for leave to file this brief. *Amici* also sought consent from all parties as a courtesy, which consent was granted. Further, none of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

SUMMARY OF ARGUMENT

As part of California's diverse array of education options, homeschooling parents may choose to enroll their children in independent study charter schools, which work with parents to develop custom curricula for their children's unique educational needs. The plaintiffs did just that here and enrolled their children in Blue Ridge Academy and Visions in Education, both independent study charter schools. Unfortunately, not all parents are able to avail themselves of this opportunity because California law bars otherwise publicly available funds from being used to purchase religious curricula. What's more, California allows supervising teachers at these charter schools to deny credit to, or even expel, students who include religious themes in their coursework. These prohibitions run afoul of the First Amendment.

Three years ago, the Supreme Court made clear that a state cannot bar access to an otherwise available educational program because a parent's independent choice would result in public funds being spent on religious instruction. *See Carson v. Makin*, 596 U.S. 767 (2022). That ruling directly applies here: California may not prevent religious parents who choose to cooperate with independent study charter schools from including religious content in their children's customized curricular programs. Nor can California avoid its First Amendment obligations by labeling these charter schools as "public." That same argument was made, and rejected, in

Carson. Moreover, as in *Carson*, this is a program of private choice. As the Court stated more than 20 years ago in *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002) and repeated in *Carson*, “independent private choice does not offend the Establishment Clause” and indeed, limiting beneficiaries of public benefits to “non-sectarian” choices violates the Free Exercise Clause. *Carson*, 596 U.S. at 775, 789.

Before the panel’s decision, the district court below mistakenly concluded that “there are no ‘public benefits’ . . . the state is excluding Plaintiffs from” in this case. *Woolard v. Thurmond*, No. 2:23-CV-02305-JAM-JDP, 2024 WL 3010899, at *5 (E.D. Cal. June 10, 2024). These independent study charter schools enable parents to use public funds to purchase curricular materials. This is a “benefit” squarely within the Supreme Court’s—and also this Court’s—public-benefit precedents. Moreover, the schools cannot reject a student’s work simply because it contains religious material. Nor can they discipline a student for including religious content in their assignments. A long line of precedent, going back more than half a century, holds that “the prohibition of expression of one particular opinion [within schools] . . . is not constitutionally permissible.” *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 511 (1969).

The question for the panel here was whether California’s independent study charter schools violate the First Amendment. The panel held that they do not because

they are public schools. *Amici* maintain that this is error and that, regardless, these charter schools violate the First Amendment even if treated as public schools. *En banc* review is appropriate not simply to correct the erroneous panel decision, but to bring clarity and uniformity to the circuit’s definition of public schools.

ARGUMENT

I. THE PANEL ERRED IN LABELING THE CHARTER SCHOOLS “PUBLIC” AND CREATED UNCERTAINTY WITHIN THIS CIRCUIT

The panel accepted the defendants’ argument that the independent study programs at Blue Ridge Academy and Visions in Education are public schools and thus not bound by the First Amendment’s prohibition on religious discrimination. *Woolard v. Thurmond*, 152 F.4th 1050, 1057 (9th Cir. 2025). It began by noting that, as a matter of state law, “charter schools are part of California’s single, statewide public school system.” *Id.* at 1055 (quoting *Wilson v. State Bd. of Educ.*, 89 Cal. Rptr. 2d 745, 752 (Cal. Ct. App. 1999)). The plaintiffs argued that “the funding and materials California provides to parents for use in independent study programs are a generally available public benefit,” but the panel asserted that these programs share “critical features” with public schools that render them “sufficiently public to allow California to condition participation on parents’ use of secular curricula.” *Id.* at 1056.

Like public schools and unlike private schools, the panel explained, the independent study programs are free and open to all students, have similar curricular

standards, and are supervised by state-certified teachers. *Id.* The panel was unconvinced by the plaintiffs’ argument that the programs “provide parents great flexibility” over choice of curricula—with instruction in the home and parents serving as direct educators—explaining that these features come with “substantial legal constraints not applicable to private schools.” *Id.* at 1057.

But whatever state law calls them (or they call themselves), Blue Ridge Academy and Visions in Education are not state actors. Unlike traditional public schools, charter schools are privately operated in order to foster educational innovation and pluralism. *See* About, Blue Ridge Academy, <https://perma.cc/9ZFS-VJYF> (noting that the school “takes great pride” in offering “students flexible personalized learning experiences through our many unique and dynamic programs”); *see* Vision, Mission & Values, Visions in Education, <https://perma.cc/V6YH-AK5L> (stating that the school provides an “education that addresses individual differences and learning styles,” and values innovation).

The panel downplayed these differences between the charter schools and public schools while emphasizing their similarities to argue that the charter schools are “sufficiently public.” This approach relies on an arbitrary judgment of similarity and seemingly employs reasoning designed to fit a predetermined conclusion.

The panel’s decision also creates uncertainty within this circuit. Under identical circumstances in *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 814–16 (9th Cir. 2010), this Court previously concluded that Arizona charter schools are not state actors. And relying on *Caviness*, two district judges in this circuit have separately ruled that California charter schools are not state actors. *I.H. v. Oakland School for the Arts*, 234 F. Supp. 3d 987 (N.D. Cal. 2017); *Sufi v. Leadership High School*, No. C–13–01598(EDL), 2013 WL 3339441 (N.D. Cal. July 13, 2013). In *I.H.*, the court dismissed the student’s equal protection claim after finding that she failed to establish that a charter school was a state actor—explicitly rejecting the argument that the school was a state actor because California law designated charter schools as “public.” *I.H.*, 234 F. Supp. at 993. In *Sufi*, meanwhile, the court dismissed a teacher’s First Amendment claim against a California charter school, reasoning that the school’s decision to dismiss the teacher was too attenuated from the state’s decision to authorize the school to be classified as “state action.”

En banc review is necessary to provide clarity and uniformity within the Ninth Circuit on whether charter schools are state actors and to address an array of other questions. For example, why do the similarities that the panel identified between the charter schools and public schools outweigh the differences highlighted by the plaintiffs? At what point are charter schools “sufficiently public?” What would need

to be different about the charter schools here for them to be deemed not “sufficiently public?” How do we reconcile the panel’s decision with *Caviness*? Only the full Ninth Circuit can provide the uniformity and guidance needed on these questions.

II. EVEN IF THE CHARTER SCHOOLS ARE STATE ACTORS, CALIFORNIA’S PROGRAM VIOLATES THE FIRST AMENDMENT

The state cannot avoid its First Amendment obligation here even if the charter schools were to be considered state actors. Three years ago, the Supreme Court made clear that a state cannot avoid constitutional scrutiny simply by labeling a school’s educational program “public.” In that case, Maine—like California here—created a program that provided families educational opportunities outside of traditional public schools. *Carson*, 598 U.S. at 773. Maine gave rural school districts without public high schools the option of paying, up to a specified rate, the tuition at an approved private school. *Id.* And—like California here—Maine barred parents from receiving this public benefit if their child received a “sectarian” education. *Id.* at 774.

In *Carson*, there was no question that state actors were involved. The Supreme Court thus confronted the same issue the plaintiffs raise here: whether a state can bar access to an otherwise available educational program because a parent’s independent choice would result in public funds being spent on religious instruction.

The Court made clear that the answer is no. In *Carson*, Maine argued that its public-education benefit was not actually tuition assistance, but rather funding for

the “rough equivalent of [a Maine] public school education, an education that cannot include sectarian instruction.” 589 U.S. at 782. The Court rejected that claim as mere semantics. *Id.* at 784. As the Court explained, the only thing meant by “rough equivalent” was that the private school must be secular, and “[s]aying that Maine offers a benefit limited to private secular education is just another way of saying that Maine does not extend tuition assistance payments to parents who choose to educate their children at religious schools.” *Id.* In other words, Maine was playing word games to disqualify religious schools.

The Court also emphasized that it is in the business of protecting “the substance of free exercise,” not analyzing for “the presence or absence of magic words.” *Id.* at 785. The Court reiterated that the Free Exercise Clause prohibits a state from creating a public benefit—for example, curriculum funding—and then excluding otherwise eligible recipients based on their intent to use the benefit for religious instruction. *Id.* at 789; *see also Espinoza v. Mont. Dep’t of Revenue*, 591 U.S. 464, 488 (2020) (finding that discrimination against religious families in this manner is against the “supreme law of the land”); *Trinity Lutheran Church of Columbia v. Comer*, 582 U.S. 499, 451, 467 (2017) (explaining that the refusal to allow a church to participate in a grant program is express discrimination and “odious to our Constitution”).

Because Maine’s “nonsectarian” requirement violated those prohibitions, it was subject to strict scrutiny. Given that “[a] law that targets religious conduct for distinctive treatment . . . will survive strict scrutiny only in rare cases,” Maine’s arguments unsurprisingly fell flat. *Carson*, 589 U.S. at 780-81. As the Court summarized, “[a] State need not subsidize private education . . . [b]ut once a State decides to do so, it cannot disqualify some private schools solely because they are religious.” *Id.* (quoting *Espinoza*, 508 U.S. at 546).

A. Discrimination Against Religion Is Unconstitutional

Relabeling the charter schools’ “independent study programs” as public-school programs doesn’t change the fact that they, like the program invalidated in *Carson*, improperly discriminate against religious instruction. California does not endorse a religion when it permits parents to choose curricula for their children any more than Maine established a church when it let parents choose where their kids went to school. California’s argument otherwise is merely an attempt to “recast a condition on funding” and reduce “the First Amendment . . . to a simple semantic exercise.” *Id.* at 784. As the Supreme Court has repeatedly stated, it will “survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.” *Walz v. Tax Comm’n of City of New York*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring).

Additionally, as in *Carson*, this is a program of private choice. In *Carson*, eligible families could opt to have their public benefit apply towards a school of their choosing, so long as it was not a religious school. 596 U.S. at 774. The Court rejected that, reasoning, as it held in *Zelman* two decades earlier, that “‘independent private choice’ does not offend the Establishment Clause.” *Id.* at 775 (quoting *Zelman*, 536 U.S. at 652). Instead, *Carson* and many other cases make clear that, far from being required by the Establishment Clause, limiting beneficiaries of public benefits to “non-sectarian” choices violates the Free Exercise Clause. *Carson*, 596 U.S. at 789. The policies challenged here have the same constitutional flaw as those invalidated in *Carson*: California has opted to approve charter schools that provide curricular assistance for homeschooling families, but then to prevent those families who avail themselves of this public benefit from choosing to use it on any religious content. Again, the “independent choices of private benefit recipients does not offend the Establishment Clause.” *Id.* at 781. Applied here, the Establishment Clause does not bar parents from choosing religious curricula with their public benefit—and the Free Exercise Clause bars California from prohibiting that choice.

Moreover, the district court was simply wrong that “there are no ‘public benefits’ . . . the state is excluding Plaintiffs from.” *Woolard, supra*, at *13. Through Blue Ridge and Visions independent study programs, parents may access public

funds to choose curricula and instructional material that align with their preferences in order to better educate their children at home. That is a public benefit. The fact that these funds aren't given in the form of grants is immaterial to the constitutional analysis and flies in the face of numerous Supreme Court precedents that didn't involve grants at all. *See, e.g., Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (access to public school property); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (sign language interpreter); *Bd. of Educ. of Westside Cmty. Schs. (Dist. 66) v. Mergens*, 496 U.S. 226 (1990) (club access to school property); *Mueller v. Allen*, 463 U.S. 388 (1983) (tax deductions).

Two years ago, this Court held *en banc* that a school district could not deny recognition and the ability to meet on campus—benefits extended to all student clubs—to a religious club on the basis of its religion. *See Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664 (9th Cir. 2023) (*en banc*). That result should not have been surprising, because any time a state denies “a generally available benefit solely on account of religious identity, [it] imposes a penalty on the free exercise of religion that can be justified only by a state interest of the highest order.” *Trinity Lutheran*, 582 U.S. at 489 (quotation omitted). Simply put, a state may not put individuals or institutions “to the choice between being [religious] and receiving a government benefit.” *Id.* at 465.

Another clear consequence of that principle is that a state may not target religious conduct for special disfavor. *See, e.g., Fulton v. City of Phila.*, 593 U.S. 522, 533-34 (2021); *Tandon v. Newsom*, 593 U.S. 61, 62 (2021); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535-38 (1993). But California’s law prohibiting parents from including “sectarian” content in their independent study programs singles out religious families and content for disfavor.²

As recently as last year, in *Loffman v. Calif. Dep’t. of Educ.*, this Court held that California’s practice of excluding religious schools from a program enabling families to place their disabled children in private schools under the federal Individuals with Disabilities Education Act likely violates the Free Exercise Clause. 119 F.4th 1147, 1153 (9th Cir. 2024). The Court, citing *Carson*, rejected the argument that plaintiffs’ suit—Orthodox Jews sought to place their children in Jewish schools—was foreclosed by the fact that California characterized the placement of disabled students in private schools as “public education.” *Id.* at 1166–67. It similarly rejected the argument that the plaintiffs’ claim was precluded by the fact that the state’s relationship with the private schools educating children with disabilities was contractual in nature. *Id.* at 1168–69.

² Moreover, the targeting of those called “sectarian” has a long, unfortunate history. *See Espinoza*, 591 U.S. at 499 (Alito, J., concurring) (detailing the racism, nativism, and anti-Catholic bigotry underlying the state targeting of sectarian institutions).

Such legal analysis is—or should be—uncontroversial anywhere in the country, flowing as it does from a long line of Supreme Court jurisprudence. Indeed, just over a month ago a federal district court in New York ruled that New York City could not avoid an order to reimburse tuition for the religious education of a student with a disability. *Bd. of Educ. of City Sch. Dist. of City of New York v. E.L.*, No. 24-CV-1176 (JGLC), 2025 WL 2781305, at *1 (S.D.N.Y. Sept. 30, 2025). The court rejected the argument that the Individuals with Disabilities Education Act “warrants a reduction in the tuition award” and explained that “prohibit[ing] all funding for all religious instruction” would violate Supreme Court precedent. *Id.* at *3–5.

B. States Cannot Disfavor Religious Families

There are numerous other constitutional problems with California’s program. The Free Exercise Clause requires governments to, at a minimum, place religious organizations or families on equal footing as non-religious ones when promulgating and enforcing their laws. *See, e.g., Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947); *Church of Lukumi Babalu Aye*, 508 U.S. at 531 (1993); *Trinity Lutheran*, 582 U.S. at 453 (2017); *Espinoza*, 591 U.S. at 485-86 (2020); *Tandon*, 593 U.S. at 62 (2021); *Fulton*, 593 U.S. at 533-34 (2021). California intentionally puts religious families on unequal footing. In both the Blue Ridge and Visions independent study programs, parents have broad autonomy to choose curricula for

their children, provided that they are not religious. California is deliberately expanding the options of secular families, while limiting them for religious ones.

Finally, and perhaps most egregiously, California cannot reject a student's work or punish a student—going so far in one case as expulsion—because it contains religious material. Even if these charter schools are state actors, such blatant discrimination would be constitutionally impermissible in any public school in the country, or by any other state actor. In *Good News Club v. Milford Central School*, a Christian organization was denied access to a public school due to its religious nature and message. 533 U.S. 98 (2001). The Supreme Court held that this was unconstitutional viewpoint discrimination in violation of their right to free speech. While public schools are certainly a “limited public forum,” religious speech “discussing otherwise permissible subjects cannot be excluded . . . on the ground that the subject is discussed from a religious viewpoint.” *Id.* at 112.

As the Supreme Court stated in *Tinker*, “the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.” 393 U.S. at 511. California has simply not—and cannot—show that the blanket prohibition of nonsecular opinions, ideas, or references is “necessary to avoid material and substantial interference” with the homeschool independent

study program. *Id.* Most famously, students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Id.* at 506.

Many other Supreme Court cases illustrate the straightforward point that a public school cannot reject a student’s work because it contains religious themes. *See Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 507 (2022) (holding that the Free Exercise and Free Speech Clauses protect individuals engaging in religious expression and that the Constitution does not permit its suppression); *Shurtleff v. City of Boston*, 596 U.S. 243, 258 (2022) (finding that the City of Boston’s refusal to allow an organization to fly a “Christian flag” over City Hall constituted impermissible discrimination); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 820-21 (1995) (holding that it is impermissible to open a forum but ban discussion of subjects from a religious viewpoint); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.* 508 U.S. 384, 384-85 (1993) (same); *Widmar v. Vincent*, 454 U.S. 263, 263 (1981) (holding that a policy making exclusions based on the religious content of speech violated the fundamental principle that state regulation of speech be content neutral).

And as this Court held *en banc* in *Fellowship of Christian Athletes*, the intentional targeting of religious activity “is not required for a governmental policy to violate the Free Exercise Clause,” but instead the mere favoring of “comparable

secular activity is sufficient.” 82 F.4th at 686. *See also Young Israel of Tampa, Inc. v. Hillsborough Area Reg’l Transit Auth.*, 89 F.4th 1337, 1339 (11th Cir. 2024) (holding that a transit authority ban on all religious advertising violated the Free Speech Clause); *Ne. Pa. Freethought Soc’y v. County of Lackawanna Transit Sys.*, 938 F.3d 424, 442 (3d Cir. 2019) (same); *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1297 (7th Cir. 1993) (“[N]o arm of government may discriminate against religious speech when speech on other subjects is permitted in the same place at the same time.”). By allowing Blue Ridge and Visions to reject “non-secular” work, California is enabling unconstitutional discrimination.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2025, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit for filing and transmittal of a Notice of Electronic Filing to the participants in this appeal who are registered ACMS users.

DATED: November 3, 2025

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