

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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**CORPORATE DISCLOSURE STATEMENT
AND CERTIFICATE OF INTERESTED PERSONS**

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.

Counsel also certifies that the following listed persons and entities have an interest in the outcome of this case and were not included in the Certificates of Interested Persons in briefs that were previously filed.

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Dated: October 30, 2024

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 fundamental right to religious liberty.

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,

¹ Pursuant to Fed. R. App. P. 29, counsel for *amici* sought consent to file this brief from all parties and received it from Plaintiffs-Appellants and some Defendants-Appellees. Other Defendants-Appellees did not respond, so *amici* have filed a motion for leave to file this brief. Further, no party's counsel authored any part of this brief and no person other than *amici* funded its preparation or submission.

which work with parents to develop custom curriculum 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.

Just two 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.

The district court mistakenly concluded that “there are no ‘public benefits’ . . . the state is excluding Plaintiffs from” in this case. *Woolard v. Thurmond*, 2:23-cv-02305-JAM-JDP, 13 (E.D. Cal. 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 Supreme Court cases, going back more than half a century, state 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).

Sadly, the program at issue here is not the only instance where California discriminates against religion. Instead, such discrimination pervades California law. In numerous programs, California law requires discrimination against religious entities, barring them from otherwise available public funds or requiring them to secularize as a condition of participation. The Supreme Court has made clear that

these practices violate the First Amendment. This Court should take this opportunity to reiterate that message to the state, which evidently has yet to absorb it.

ARGUMENT

I. THE GOVERNMENT MAY NOT AVOID THE FIRST AMENDMENT’S NON-DISCRIMINATION MANDATE MERELY BY LABELING CHARTER SCHOOLS “PUBLIC”

The defendants assert that they are not bound by the Free Exercise Clause’s prohibition against religious discrimination because California law nominally labels charter schools, including Blue Ridge Academy and Visions in Education, “public schools.” The district court agreed—and thus erred. Recent Supreme Court precedent is directly at odds with the decision below. This Court should reverse.

A. The Charter Schools Here Are Not State Actors

Whatever state law state calls them (or they call themselves) Blue Ridge Academy and Visions in Education are not state actors bound. Unlike traditional public schools, charter schools in California, including the two here, are privately operated and freed from government control in order to foster educational innovation and pluralism. *See* About, Blue Ridge Academy, <https://perma.cc/9ZFS-VJYF> (Blue Ridge Academy “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> (Visions

charter school provides an “education that addresses individual differences and learning styles” and values innovation). 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.

Relying on *Caviness*, two federal district judges have separately ruled that California charter schools are not state actors. Most recently, in *I.H. v. Oakland School for the Arts*, 234 F. Supp. 3d 987 (N.D. Cal. 2017), the court dismissed the student’s equal protection claim after finding that the student failed to establish that the school was a state actor. The court explicitly rejected the argument that the charter school was a state actor because California law designated charter schools “public schools.” An earlier court had 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.” *Sufi v. Leadership High School*, No. C–13–01598(EDL), 2013 WL 3339441 (N.D. Cal. July 13, 2013). Similarly here, if the schools here are not state actors, the Free Exercise Clause prohibits the state from ordering them to refrain from offering students the option of including religious content in their “personalized” curricular plans. *See Carson v. Makin*, 596 U.S. 767, 785 (2022).

B. If the Charter Schools Were to Be Considered State Actors, California’s Program Violates the First Amendment

The state and school districts cannot avoid their First Amendment obligation here even if the charter schools were to be considered state actors. Only two years ago in *Carson v. Makin*, the Supreme Court made clear that a state cannot avoid constitutional scrutiny 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. Thus the Supreme Court 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 Supreme Court made clear that the answer is no. In *Carson*, Maine argued that its public education benefit was, properly viewed, not 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 as a game of 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 using semantics to disqualify religious schools. And the Court 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 (*e.g.*, public funds for curricula) and then excluding otherwise eligible recipients based upon their intent to use the benefit for religious instructions. *Id.* at 789; *see also Espinoza v. Mont. Dep’t of Revenue*, 591 U.S. 464, 488 (2020) (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) (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).

1. *Discrimination against Religion Is Unconstitutional*

California’s attempt to relabel the charter schools’ “independent study programs” as public school programs doesn’t change the fact that the program here, like the one invalidated in *Carson*, unconstitutionally discriminates 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 Ed. 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).

Just last year, this Court held *en banc* that a school district could not deny a religious school club on the basis of its religion, recognition, and the ability to meet on campus (a benefit extended to all other clubs). *See Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.* 82 F.4th 664 (9th Cir. 2023) (*en banc*). Thus, as reflected in *Carson*, 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 this 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

Indeed, just this week, in *Loffman v. Calif. Dept. of Educ.*, 23-55714 (9th Cir., Oct. 28, 2024), 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. The Court, citing *Carson*, rejected the argument that plaintiffs’ claim—Orthodox Jews seeking 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.” 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.

2. *States Cannot Disfavor Religious Families*

There are numerous other constitutional problems with California’s program. The First Amendment’s 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.*

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).

Bd. of Educ., 330 U.S. 1, 16 (1947); *Lukumi*, 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, this kind of blatant discrimination would be constitutionally impermissible in any public school, or by any other state actor, in the country. In *Good News Club v. Milford Central School*, a Christian organization was denied access to a public school due to their 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. Additionally, California has 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.* As the Court stated, “teachers and students,” do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Id.* at 506.

Many other cases from the Supreme Court—and this Court—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 (2022) (the Free Exercise and Free Speech Clauses protect individuals engaging in religious expression and the Constitution does not permit its suppression); *Shurtleff v. City of Boston*, 596 U.S. 243 (2022) (refusal to allow organization to fly “Christian flag” was impermissible discrimination); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (impermissible to open forum but ban discussion of subject from religious viewpoint); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.* 508 U.S. 384 (1993) (same); *Widmar v. Vincent*, 454 U.S. 263 (1981) (exclusionary policy based on content of religious speech violated

fundamental principle that state regulation of speech be content neutral). 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,” 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 (11th Cir. 2024) (transit authority ban on all religious advertising was unreasonable and violated the Free Speech Clause); *Ne. Pa. Freethought Soc’y v. County of Lackawanna Transit Sys.*, 938 F.3d 424 (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 egregiously unconstitutional viewpoint discrimination.

II. CALIFORNIA ENGAGES IN PERVASIVE UNCONSTITUTIONAL DISCRIMINATION

The nonsectarian requirement at issue here is not the only way in which California unconstitutionally discriminates against religious individuals and organizations. *Amici* have identified at least 35 instances of similar anti-religious discrimination in the California code. Below we discuss a few examples that

highlight the need for this Court to make clear that the Constitution does not tolerate California’s religious discrimination.³

A. California Discriminates against Religious Schools and Educational Providers

As detailed above, the Supreme Court has made clear that, when the government chooses to establish a public-benefit program, it may not, absent a compelling reason, exclude religious organizations or religious conduct. Any law that bars religious groups from receiving public benefits solely because of their religious character or content of their programming is subject to the “strictest scrutiny.” *Carson*, 596 U.S. at 780 (quoting *Espinoza*, 591 U.S. at 478). The Court has also made clear that a state’s interest in promoting a greater degree of church–state separation than the U.S. Constitution requires does not qualify as a compelling

³ *See also, e.g.*, CAL. EDUC. CODE § 69954 (barring student participants in work-study program from seeking employment with sectarian organizations); *id.* at § 44415 (requiring schools applying for the Teacher Residency Grant Program to be “nonsectarian”); *id.* at § 94110 (excluding facilities used for “sectarian instruction or . . . religious worship” from generally available school bond program); CAL. CODE REGS. tit. 5, § 30602 (2024) (excluding religious employers from participating in work-study program); *id.* at § 30603 (providing that the work performed by students “will not be related to the activities of any sectarian organization”); *id.* at § 80048.9.3 (excluding sectarian schools from credentialing program); *Bd. of Trs. v. Cory*, 145 Cal. Rptr. 136, 138 (Ct. App. 1978) (holding that statutes authorizing expenditure of public funds to support sectarian schools violated California’s Blaine amendment); *Feminist Women’s Health Ctr., Inc. v. Philibosian*, 203 Cal. Rptr. 918 (Ct. App. 1984) (holding that the California Constitution prohibited district attorney from burying 16,500 fetuses in religious cemetery).

interest. *See id.* at 781 (“[S]eparating church and state more fiercely than the Federal Constitution . . . cannot qualify as compelling in the face of the infringement of free exercise.”) (cleaned up). California thus lacks a compelling state interest to justify its exclusion of religious individuals and organizations from otherwise generally available public programs. Unfortunately, the state persists in engaging in widespread religious discrimination across a range of public programs.

The California Constitution contains a “Blaine amendment” similar to the Montana provision that the Supreme Court found unconstitutional as applied in *Espinoza*. *See* Cal. Const. art. IX, § 8; *Espinoza*, 591 U.S. at 489 (noting the “conflict between the Free Exercise Clause and the application of the no-aid provision” at issue). In *Calif. Teachers Assn. v. Riles*, 632 P.2d 953, 963–64 (Cal. 1981), the state supreme court relied on this provision of the state constitution to invalidate statutes authorizing the superintendent of public instruction to loan public-school textbooks to students attending religious schools, a practice that the Supreme Court has permitted. *See Bd. of Ed. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 238 (1968).

California has codified its high court’s anti-religious interpretation of its state constitution in dozens of places across its Education Code and Code of Regulations. For example, Section 56441.8 of the California Education Code provides that if the state wishes to contract with a nonpublic school to provide pre-kindergarten

schooling, it may only partner with “nonsectarian” schools. Cal. Educ. Code § 56441.8(d). Another provision of the Education Code empowers school districts to “exclude from schools and school libraries all books, publications, or papers of a sectarian, partisan, or denominational character.” *Id.* at § 18111. Yet another bars religious schools from participating in a grant program intended in part to increase teacher diversity.⁴ And another pronounces that “local educational agenc[ies] shall not contract with a sectarian hospital [to provide] instructional services” to patients with “exceptional needs.” *Id.* at § 56361.5.

California also unconstitutionally excludes religious schools from contracting with the state to serve students with special needs. Section 56366 of the California Education Code provides that only “nonsectarian school[s] or agenc[ies]” may partner with the state to provide alternative special education services. Cal. Educ. Code § 56366. Section 56836.20 similarly bars sectarian schools from contracting with state-run special education local plan areas. *See id.* at § 56836.20 (providing that the state may enter into special education “master contracts” with only “nonsectarian schools and agencies”). California further requires that all “[s]pecial education and related services” provided to students in private schools must be

⁴ *See id.* at § 56441; Teacher Residency Grant Program, CAL. COMM’N ON TEACHER CREDENTIALING (last visited Oct. 27, 2024), <https://tinyurl.com/yc8yy447>.

“secular, neutral, and nonideological.” *Id.* at § 56172. And Section 3051 of the California Code of Regulations provides that “[a]n individual providing [special education] services out of state [must] . . . [b]e employed by a nonpublic, nonsectarian school or agency certified by” the California Department of Education. Cal. Code Regs. tit. 5, § 3051(a)(5)(b) (2024). As discussed above, this Court just held that the prohibition on private religious schools participating in the program likely violates the Free Exercise Clause. See *Loffman, supra*.

B. California Discriminates against Religious Social Services Providers

California also discriminates against a range of religious social-service providers. For example, the state authorizes loans to private childcare programs, but requires providers to be nonsectarian. See Cal. Welfare & Insts. Code § 10475. Another instance of discrimination against religious organizations is in the Learning-Aligned Employment Program. See Cal. Educ. Code §§ 69950–69969.5. This scheme establishes public funding for a work-study program to help students defray the cost of education “while gaining education-aligned, career-related experience.” *Id.* at § 69951. However, only nonsectarian organizations are eligible to employ participating students. See *id.* at § 69954. California also discriminates in the provision of grants and contracts under the Workforce Innovation and Opportunity Act. The program excludes “[o]rganizations that are owned or operated as

pervasively sectarian organizations” from receiving public funding. Cal. Unemp. Ins. Code § 14003. Another partnership between the state and private organizations to employ Californians establishes a similar restriction: the state only permits “grants to faith-based organizations that are not owned or operated as pervasively sectarian organizations.” *Id.* at § 9617.

California also violates the Free Exercise Clause by requiring religious social services providers to desist from religious activities to receive otherwise generally available public benefits. For example, the Juvenile and Gang Violence Prevention, Detention and Public Protection Act of 1998 and its precursor, the Youth Center and Youth Shelter Bond Act Program, empower the Director of the Department of Youth Authority to “make awards to public or private nonprofit agencies or joint ventures, or both, for the purpose of acquiring, renovating, constructing, and purchasing equipment for youth centers or youth shelters.” Cal. Welfare & Insts. Code §§ 990–993; *id.* at §§ 2010–2025. However, the legislature stipulated that, to qualify for funds, the facility “may not be used and may not be intended to be used for sectarian instruction or as a place for religious worship.” *Id.* at § 2014. The Supreme Court explained in *Carson* that such use-based restrictions are no “less offensive to the Free Exercise Clause” than restrictions based on status. *See Carson*, 596 U.S. at 787. The California Code of Regulations also authorizes public funding for “[t]he

acquisition or alteration/renovation of existing facilities, or the construction of new facilities” to serve as a multipurpose senior center. Cal. Code Regs. tit. 22, § 7550 (2024). Funds may only be disbursed to a facility that “will not be used and is not intended to be used for sectarian use or as a place of religious worship.” *Id.* This type of religious discrimination is similarly unconstitutional. *See Carson*, 596 U.S. at 787–88 (“[P]rohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use-based discrimination.”).

Finally, many of California’s cities also discriminate against religious organizations. Los Angeles offers “subsidies of development or construction related fees” to non-profit organizations whose projects “will promote a public purpose for the City.” Los Angeles, Ca., Admin. Code § 5.65(a). This ordinance provides that “Development Fee subsidies shall not be granted to religious organizations other than for fees that apply to construction of facilities or improvements that will be utilized exclusively for secular purposes.” Los Angeles, Ca., Admin. Code § 5.65(h)(i). The municipal codes of Alhambra, Bakersfield, Hayward, San Rafael, and Visalia all include provisions on the disbursement of economic development revenue bonds that contain the following stipulation on the provision of this publicly available funding: a “facility [must] not include any facility, place or building used or to be used primarily for sectarian instruction or study or as a place for devotional

activities or religious worship.” Alhambra, Ca., Code of Ordinances § 8.01.030; Bakersfield, Ca., Municipal Code § 23.50.030; Hayward, Ca., Municipal Code § 8-11.110(e); San Rafael, Ca., Code of Ordinances § 3.30.030(e); Visalia, Ca., Municipal Code § 3.32.030. It is unconstitutional for cities to require organizations to abstain from religious activities to qualify for public funding.

California evidently has not yet absorbed the message of *Carson, Espinoza, and Trinity Lutheran*: When a state chooses to cooperate, through a public-benefit program, with private individuals or organizations, it cannot exclude some from participating merely because they are religious. Nor can it require these beneficiaries to engage in only secular activities as a condition of participation. *See Carson*, 596 U.S. at 784. This case presents an opportunity to make that clear to the state.

CONCLUSION

For the foregoing reasons, and those stated by the Plaintiffs-Appellants, the judgment below should be reversed.

Respectfully submitted,

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