No. 24-4291

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN WOOLARD, *et al.*,
Plaintiffs-Appellants,

v.

TONY THURMOND, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of California, No. 2:23-cv-02305-JAM-JDP,
Hon. John A. Mendez

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October 23, 2024

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INTRODUCTION

This case challenges Defendants' unconstitutional discrimination against religious families in publicly funded homeschool aid programs in California. These programs, operated by charter schools Blue Ridge Academy and Visions in Education, grant parents access to funds to purchase a wide variety of curricula and other instructional materials from secular organizations that they can use to teach their own children in the privacy of their homes. But while touting a commitment to parental choice and individualized learning, the schools deny funds to religious families that wish to homeschool their children with comparable faith-based materials from faith-based organizations that meet state educational standards. Plaintiffs John Woolard, Breanna Woolard, Hector Gonzales, Diana Gonzales, and Carrie Dodson, on behalf of themselves and their minor children (hereinafter "the Families") brought suit to challenge this unlawful discrimination against faith-based educational choices.

"Such discrimination" against religion "is 'odious to our Constitution'" and cannot stand. *Carson ex rel. O.C. v. Makin*, 596 U.S. 767, 779 (2022) (quoting *Trinity Lutheran Church of Columbia, Inc. v.*

Comer, 582 U.S. 449, 467 (2017)). The Supreme Court recently reaffirmed that bedrock principle and rejected anti-religious discrimination in the context of public benefit programs that allow for parent-directed educational choices. *See id.*; *Espinoza v. Mont. Dep't of Revenue,* 591 U.S. 464, 486 (2020). The government is not required to subsidize such choices, but when it does, it cannot exclude some choices on the basis of religion. *See Carson*, 596 U.S. at 785-89. This case is a clear example of such discrimination.

As alleged in the complaint, Blue Ridge and Visions make available to parents a pool of public funds that parents can use to purchase materials to educate their children in the privacy of their own homes without any ideological restrictions, with one glaring exception—parents cannot choose faith-based materials or vendors. Despite the broad flexibility generally afforded to parents to select any curriculum of their choice, provided it meets state educational standards, religious families are prohibited from selecting faith-based curricula that meet the same standards. And when students submit work samples to Blue Ridge and Visions to demonstrate their academic progress, they are denied academic credit if the samples appear to reflect a religious worldview. In

short, while purporting to let a thousand flowers bloom, Defendants cut out religion, root and stem. "The Constitution neither mandates nor tolerates that kind of discrimination" against religious exercise and expression. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543-44 (2022).

The district court dismissed the Families' First Amendment claims with prejudice because it failed to properly apply strict scrutiny, disregarded the complaint's well-pleaded allegations, and ignored the fundamental differences between the structure of the Blue Ridge and Visions homeschool programs and traditional classroom-based instruction in public schools. The court did not meaningfully engage with the strict-scrutiny framework. Rather, the court assumed that discriminating against religion was necessary to comply with Establishment Clause principles borrowed from conventional public school settings where public employees (not homeschool parents) teach a government-curated (not parent-chosen) curriculum to a group of children from different families (not the parents' own children) in a government building (not in the privacy of the parents' own homes). The court rejected the Families' allegations that the homeschool programs here generally allow parents to select curricula of their own choosing

(subject only to final approval by school officials) and erroneously assumed that parental choice matters only if it is "unilateral." But in focusing on whether parental choice is unfettered, the court lost sight of what matters for Establishment Clause purposes: whether the choice to undergo faith-based education is coerced or voluntary. Without coercion, there is no Establishment Clause problem, and no justification for excluding religion from an otherwise generally available public benefit.

As alleged in the complaint, the homeschool programs here offer parents a wide variety of choices about how to educate their own children. And unlike in a traditional classroom-based public school, each family can choose its own curriculum, making each home a mini-school unto itself. The Free Speech Clause and Free Exercise Clause provide "double protection" for such religious expression. *Kennedy*, 597 U.S. at 540. The parents' instruction of their children in their own homes with their preferred instructional materials is the parents' "*private* speech," not "*government* speech." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 841 (1995) (quoting *Bd. of Educ. of Westside Cmty. Schs. v. Mergens ex rel. Mergens*, 496 U.S. 226, 250 (1990)). The district court's failure to understand that "critical difference," *id.*, and its conflation of

homeschooling programs with traditional public schools, led it to dismiss the Families' free-exercise and free-speech claims. Because the district court misunderstood the applicable First Amendment principles and declined to construe the complaint's well-pleaded allegations in a light favorable to the Families, its decision should be reversed.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. This Court has jurisdiction under 28 U.S.C. § 1291. The district court entered its order granting Defendants' motions to dismiss the complaint with prejudice, and entered its corresponding final judgment, on June 7, 2024. The Families filed a timely notice of appeal on July 5, 2024. Fed. R. App. P. 4(a)(1).

STATEMENT OF THE ISSUES

1. Whether the district court erred in dismissing the Families' claims for violation of their rights under the Free Exercise Clause where the Families alleged that they were denied access to a publicly funded program of private choice because of their religious exercise.

2. Whether the district court erred in dismissing the Families' claims for violation of their rights under the Free Speech Clause where the Families alleged that they were denied access to a publicly funded

program of private choice because they sought to express religious viewpoints.

STATEMENT OF THE CASE

The Families appeal the dismissal of their complaint asserting violations of their rights under the Free Exercise and Free Speech Clauses of the First Amendment to the United States Constitution. The Families are Christians who seek to educate their children with curricula that meet California's educational standards and reflect the parents' faith-based worldview. The Families enrolled their children in California charter schools that operate publicly funded homeschooling programs, which generally allow parents flexibility to select the curricula that suit their children's needs. Unlike traditional classroom-based instruction in public schools, where government employees teach a state-selected curriculum to a class of children from different backgrounds, these programs provide families with access to funds to purchase educational materials of their personal choosing, which the parents use to educate their own children in the privacy of their own homes. Nevertheless, in a blatantly discriminatory policy, the charter schools singled out for exclusion educational materials that reflect a religious worldview.

Defendants are the State Superintendent of Public Instruction, the two charter schools and their officials, and the members of the boards of education of the school districts that oversee the charters. The charter schools contend that California law requires them to deny the Families access to funds to purchase educational materials that reflect their religious worldview. They also assert that California law requires them to reject student work that expresses a religious viewpoint or derives from a religiously affiliated curriculum.

A. The Charter Schools' Discrimination Against Faith-Based Homeschooling

The Families are devout Christians with school-age children. The Families' faith is central to their identity and worldview, and they believe the most suitable education for their children is homeschooling with high-quality, academically rigorous faith-based curricula. *See* 3-ER-474 ¶ 4.

The Woolards have multiple school-aged children. At the time of the complaint, their daughter A.W. was enrolled at Blue Ridge Academy ("Blue Ridge"), and their sons E.W. and O.W. had previously been enrolled at Blue Ridge. John is a pastor at a small church in his community and works in the registrar's office at a local Christian

university to support his family. 3-ER-482 ¶ 46. Hector and Diana Gonzales are the legal guardians of their two school-aged grandchildren, C.W.1 and C.W.2, who are also enrolled at Blue Ridge. 3-ER-476, 482 ¶¶ 17, 47.

Carrie Dodson, a widowed mother, enrolled her son C.D. in the homeschooling program offered by Visions in Education ("Visions") for several years, beginning when C.D. was in the second grade. 3-ER-477 ¶ 18. In 2023, Visions expelled C.D. for using a religious curriculum. 3-ER-477 ¶ 18.

Defendants are officials of Blue Ridge and Visions, officials of the school districts (Maricopa Unified School District ("MUSD") and San Juan Unified School District ("SJUSD") that are the chartering authorities for Blue Ridge and Visions, respectively, and Tony Thurmond, the State Superintendent of Public Instruction. *See* 3-ER-477-479 ¶¶ 19-33. All defendants are sued only in their official capacities.

Both charter schools are tuition-free and offer funding to support independent study programs with instructional materials that parents and students are free to select based on their own private preferences. 3-ER-479 ¶ 35. Residents of the counties served by the charter schools are

able to participate in those programs. 3-ER-479 ¶ 35. But as described below, both models discriminate against faith-based educational choices.

1. Blue Ridge's "Independent Study Model"

Blue Ridge's "independent study model" allows parents to access public funds to use as they deem appropriate to purchase materials to teach their own children in the privacy of their own homes. 3-ER-479 ¶ 36. As Blue Ridge's "Parent-Student Handbook" explains, the independent study program allows "personalized learning" that is "designed to be extremely flexible and customizable" so as to meet each student's "own interests and specific learning needs." 3-ER-506, 508. In that program, parents educate their children with limited supervision from Blue Ridge's "Homeschool Teachers," who periodically review work samples to verify attendance and help ensure students meet basic statewide educational standards. 3-ER-509, 512. Families of students in grades K-8 are required to meet with the "Homeschool Teacher" about once a month ("every 20 school days"). 3-ER-509.

"In order to allow families flexibility on their personalized learning path," Blue Ridge provides an "Instructional Planning Amount[]" that allows parents to use "state funds" to order a wide variety of educational

items and services, including homeschooling curricula, enrichment materials, and field trips. 3-ER-511-512. The "Homeschool Teacher" must approve requests to use instructional planning funds. Despite the broad flexibility that parents generally enjoy in directing the use of instructional funds, the Handbook states that "[a]ll orders must be secular." 3-ER-512. The Handbook does not set out any other restrictions on the ideological content of curricula or other instructional materials.

To meet state independent-study guidelines, Blue Ridge periodically collects "work samples" that reflect each student's homeschool learning progress. 3-ER-514. To be "[a]cceptable," a work sample must meet basic criteria like demonstrating "neat and organized work" and being "a good reflection of your child's learning and abilities." 3-ER-514. But a work sample that meets those criteria is "acceptable" only if it is *also* "non-sectarian (non-religious)." 3-ER-514. There are no other restrictions on the ideological content of work samples.

2. Visions' "Home School Academy"

Similarly, Visions' "Home School Academy" offers a program of "parental choice with our support" that is designed to "honor[] your right to educate your children." 3-ER-481 ¶¶ 41-42; *see also* Visions in Educ.,

Home School, https://www.viedu.org/home-school/ ("educate your child with our support" (capitalization omitted)). In the Home School Academy, "parents select curriculum and educate their child in their own homes." 3-ER-481 ¶ 42. Visions states that the Home School Academy "works best for families who want to take a more involved role in their child's education." 3-ER-482 ¶ 45. The program offers these "[p]arent educators" thousands of dollars each year in public funding as a "student budget" that they can use for "curriculum, materials and support services" of their choosing. 3-ER-481 ¶ 42. Meanwhile, Visions' "credentialed teacher[s]" "assist[]" by providing "advice" and helping to "ensure that California State Standards are being met." 3-ER-481 ¶ 42. They also track student progress toward meeting those standards by periodically collecting work samples. 3-ER-481 ¶ 42.

If parent educators in Visions' Home School Academy select curricula that do not meet state standards on their own, Visions allows parent educators to use "supplemental curricula" to fill in any gaps. 3-ER-481 ¶ 43. Parent educators work with credentialed teachers to ensure that the parent's chosen "core" curriculum is supplemented as necessary to fulfill state standards. 3-ER-481 ¶ 43.

After a parent educator submits an order for educational and enrichment materials, the credentialed teacher will then "review and approve all expenditures of instructional budget funds." 3-ER-481 ¶ 44. The credentialed teacher also reviews work samples for quality, completion, and "mastery of California State Standards" and approves parent-assigned grades in accordance with the grading policy provided to parent educators. 3-ER-481 ¶ 44.

3. Blue Ridge and Visions' Anti-Religious Discrimination

Despite the charter schools' general commitment to customized, parent-directed learning, they have refused to allow the use of curricular materials and work samples that have any religious affiliation, reflect a religious viewpoint, or even reference religion. At Blue Ridge, when John Woolard asked whether A.W. could use the "instructional planning amount" to purchase religious works by Jonathan Edwards and William Penn as part of her study of colonial America, a Blue Ridge employee responded that instructional funds could not be used for "any curriculum products, classes, etc. … that contain religious content." 3-ER-483 ¶ 50. The Woolards' "Homeschool Teacher" confirmed that the only problem with ordering the requested books was "the religious content," which is

"not … allowed." 3-ER-483 ¶ 50. Likewise, when the Woolards requested to use instructional funds to purchase the "Focus on Fives" curriculum—focused on science, social studies, handwriting, phonics, and reading—from Bob Jones University, the "Homeschool Teacher" stated that she could not approve the curriculum because the description indicated that it also provided "[w]orldview shaping," including religious themes such as "God is great, and God is good" and "I learn in order to serve God and others." 3-ER-483 ¶ 52. She confirmed that the "[a]cademics" are "fine" and that the problem is the "religious aspect." 3-ER-484 ¶ 52.

The Woolards were also prohibited from using materials from Emmaus Classical Academy, which offers courses in history, literature, philosophy, and theology to help students learn in the context of a classical Christian perspective. Blue Ridge's vendor department denied approval for these materials because of its policy that vendors "may not be non-secular in nature." 3-ER-484 ¶ 53. The Woolards' "Homeschool Teacher" confirmed that the reason for denial was Blue Ridge's blanket ban on religious organizations as vendors. 3-ER-484 ¶ 53. The Woolards were also forbidden from using instructional funds to purchase an

economics textbook for A.W. from Emmaus. 3-ER-485 ¶ 58. The product description stated:

> Students will encounter communism through Marx & Engels, socialism through the writing of John Stuart Mill, the costs of opportunity and destruction in Frederic Bastiat, and different views of the Christian use of money through the works of John Chrysostom, John Wesley, and St. Thomas Aquinas. This volume presents primary texts with introduction or commentary[.]

3-ER-485 ¶ 58. Blue Ridge denied that request on the ground that the textbook "contains a Biblical worldview." 3-ER-486 ¶ 59.

Similarly, the Woolards were not allowed to use instructional funds to purchase *Bede's History of Me*, a book that introduces children to the basics of history (including the history of holidays, toys, and sports), because the product description stated that the book provided a "clear way to teach the importance of timelines and how God works in time." 3-ER-484 ¶ 54. And A.W. was not permitted to study church history as an elective unless, the "Homeschool Teacher" stated, A.W. also studied other world religions as part of the same course. She forwarded emails from Defendant Lisa Sophos, the Assistant Director of Curriculum & Instruction at Blue Ridge, that confirmed Blue Ridge's position that "the course must recognize and review all religions or churches and not just

one" and that "[i]t is imperative the course does not reflect a faith-based direction or focus." 3-ER-485 ¶ 56.

When Diana Gonzales submitted to Blue Ridge work samples for her grandchildren, C.W.1 and C.W.2, in October 2022, Blue Ridge rejected C.W.1's work sample, a grammar worksheet. 3-ER-485 ¶ 57. C.W.1's grammar worksheet taught sentence structure using examples of sentences about agriculture. It included a picture of the Bible with the sentence "God sends the rain to help plants grow." *See* 3-ER-516. Blue Ridge informed Diana that Blue Ridge "can't accept any work sample with any religious wording on it" and requested that Diana submit different work samples. 3-ER-485 ¶ 57.

The Woolard and Gonzales families have worked to identify instructional materials that are academically rigorous and incorporate a faith-oriented worldview. 3-ER-486 ¶ 59. There is no dispute that the materials the Woolard and Gonzales families selected satisfy state educational standards. But despite Blue Ridge's policy and practice of enabling parents to direct their children's education, Blue Ridge has rejected curriculum orders and work samples solely because school employees consider them too religious. 3-ER-486 ¶¶ 59-60. As a result of

Blue Ridge's singling out of faith-based materials for exclusion, the Woolard and Gonzales families have been forced to spend thousands of dollars out of pocket to purchase educational materials with their own money, a significant financial hardship. 3-ER-486 ¶ 61. But even when the parents can afford to purchase materials out of pocket, Blue Ridge rejects their children's work samples if the samples express religious viewpoints or even have "religious wording." 3-ER-486, 485 ¶¶ 61-62, 57.

The Dodson family experienced similar discrimination against religion in Visions' Home School Academy. Carrie Dodson's Christian faith is central to her identity and worldview, and her sincerely held religious beliefs motivate her to provide her child, C.D., with a faith-based education. 3-ER-486 ¶ 63. For the 2022–2023 school year, Carrie selected a curriculum called *The Good and the Beautiful* and expressed her willingness to supplement it with another curriculum and additional educational material if needed. Carrie has used supporting curricula to supplement C.D.'s curriculum in the past to ensure that her overall homeschooling approach meets all California state standards. Visions' TK-5 Grading Policy, which Visions provided to Carrie, expressly permits such supplementation. 3-ER-486, 487. ¶¶ 64, 66. *The Good and the*

Beautiful offers a variety of courses, including in math, history, science, and language arts. It emphasizes "family, God, high character, nature, and wholesome literature." 3-ER-487 ¶ 65.

Visions rejected Carrie's choice of *The Good and the Beautiful* for the sole reason that Visions would not accept any assignments derived from a faith-based curriculum. 3-ER-487 ¶ 66. C.D.'s "credentialed teacher" acknowledged that Carrie was "very excited" about using *The Good and the Beautiful* for "Math and [English Language Arts]" and told Carrie that the curriculum "sounds amazing." 3-ER-487 ¶ 67. Yet the "credentialed teacher" told Carrie that "[a]s a publicly funded school, Visions in Education cannot approve or consider work from a faith based curriculum." 3-ER-487 ¶ 67.

Carrie emailed Defendant Jennifer Morrison, Visions' Director of Instruction, with examples of C.D.'s completed work from *The Good and the Beautiful*. These examples included a math worksheet testing concepts such as multiplication and division. *See* 3-ER-518. Carrie asked Visions to explain what it considered objectionable about these materials and why C.D. should be prohibited from receiving full credit for his work on those assignments. 3-ER-488 ¶ 69. Defendant Studer, Visions' Chief

Academic Officer, issued a letter to Carrie titled "Use of Sectarian Materials for Attendance and Assignment Completion." 3-ER-488 ¶ 70. In that letter, Mr. Studer cited provisions of the California Constitution and the California Education Code and stated that Visions could not "us[e] sectarian or religious curriculum when evaluating C.D.'s work samples for attendance and work completion purposes." 3-ER-488 ¶ 70 & n.2. He did not identify any other basis for rejecting Carrie's chosen curriculum.

Studer warned Carrie that Visions could initiate involuntary expulsion proceedings if she continued to use a faith-based curriculum for her son's assignments. 3-ER-488 ¶ 71. Through the fall of 2022, Carrie participated in a series of meetings with school officials and counsel for Visions to reiterate her request to use *The Good and the Beautiful*. 3-ER-488 ¶ 72. In January 2023, Visions' Principal, Defendant Brian Albright, sent Carrie a letter stating that C.D. would be "disenrolled" from Visions at the end of the month. The purported basis for disenrollment was failure to complete assigned work. But an earlier letter from school administrators had acknowledged that the sole reason C.D.'s work was being deemed incomplete was that the school refused to consider

assignments derived from religious curricula. 3-ER-488 ¶ 73. Carrie appealed Visions' decision, but Visions' appeal panel again refused to permit the Dodson family to use the faith-based curriculum they had selected. 3-ER-488 ¶ 73. On February 24, 2023, Visions expelled C.D. 3-ER-489 ¶ 74.

Both charter schools invoked California law as the basis for the discrimination. In July 2022, when John Woolard asked Blue Ridge to permit the use of instructional funds to purchase religious materials in light of the Supreme Court's decision in *Carson ex rel. O.C. v. Makin*, 596 U.S. 767 (2022), Defendant Samantha Haynes, Blue Ridge's Executive Director and Principal, replied that *Carson* did not "pertain" to Blue Ridge or California law. 3-ER-483 ¶ 51. She later stated that the California Constitution and Education Code prohibit the teaching or funding of anything "religious or faith-based." 3-ER-483 ¶ 51. Meanwhile, Principal Albright told Carrie that under California law, "[n]o religious materials may be assigned as a part of the independent study, and students cannot use religious materials to complete independent study assignments." 3-ER-487 ¶ 68. He also stated that "[b]ecause Visions is a publicly funded school and [Visions is] using public

funds[, Visions is] required to follow these guidelines." 3-ER-487 ¶ 68. Similarly, at a February 2022 meeting of Visions' Board, a concerned parent complained about "religious item exemptions." 3-ER-489. ¶ 76. Visions' Superintendent, Defendant Olmos, responded by "remind[ing] the public that Visions is a public school funded by public dollars and using religious curriculum would be a violation of [Visions'] charter." 3-ER-489 ¶ 76.

B. California's "No-Aid" Provisions

The provision of the California Constitution invoked by Blue Ridge and Visions has historical roots in an era of open and pervasive bigotry against religious groups. Article IX, section 8 of the California Constitution, adopted in 1879, provides:

> No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State.

Such "no-aid" provisions have a "'shameful pedigree.'" *Espinoza*, 591 U.S. at 482 (quoting *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality op.)). California adopted its no-aid provision three years after the failed Blaine Amendment to the U.S. Constitution. The Blaine Amendment,

named after its sponsor, House Speaker James Blaine, would have prohibited aid to "sectarian" schools. Everyone understood that "sectarian" meant "Catholic." *Mitchell*, 530 U.S. at 829 (plurality op.). California's constitutional provision is part of that same "checkered tradition," "'born of bigotry'" in a time of "'pervasive hostility to the Catholic Church and to Catholics in general.'" *Espinoza*, 591 U.S. at 482 (quoting *Mitchell*, 530 U.S. at 828-29).

At the Sacramento Convention of 1878–1879, where California's legislature adopted its Blaine Amendment, multiple delegates' hostile comments made clear that the terms "sectarian" and "denominational" were bywords for "Catholic" and that the adoption of the provision was motivated by anti-immigrant sentiments. *See* Brian R. Callanan, The Original Intent of California's Blaine Provisions 15 (May 1, 2003), *available at* https://roseinstitute.org/white-papers-2/ ("[H]ostility toward Catholic schools helped fuel the passage of California's Blaine provisions.").

One delegate, for example, complained that immigrants from Mexico—who were largely Catholic and settled in Southern California, *see* Callanan, *supra*, at 24-25—had failed to "assimilate" even though

"[w]e have opened our public schools to them and their children, and attempted to educate them under the general influence of our schools." *Id.* "[I]f thirty years will not do it," the delegate said, "I think we had better send missionaries into the county from which the gentleman from San Bernardino comes." 2 Debates and Proceedings of the Constitutional Convention of the State of California 802 (1881), *available at* https://babel.hathitrust.org/cgi/pt?id=hvd.li12jr&seq=168. Another delegate defined the "central idea" of the public school system as "secur[ing] something like uniformity of sentiment" and argued that "educating orphans in sectarian institutions … has a tendency to educate them in hostile systems." Debates, *supra*, at 785. And a third delegate, *see* Cal. State Archives, Inventory of the Working Papers of the 1878–1879 Constitutional Convention, app. A, at 55 (1993), complained that, as a young man in France, he was "educated at a sectarian school" that gave him "wrong opinions"—by which he meant schools controlled by "the priesthood." Debates, *supra*, at 1103.

Both charter schools also referenced California Education Code section 47605(e)(1), which states, "[i]n addition to any other requirement imposed under this part, a charter school shall be nonsectarian in its

programs, admission policies, employment practices, and all other operations ....” 3-ER-490 ¶ 80. And Visions cited the California Department of Education’s Independent Study Frequently Asked Questions, 3-ER-490 ¶ 81, which stated:

> [N]o religious materials may be assigned as a part of independent study, and pupils cannot use religious materials to complete independent study assignments. Attendance cannot be taken and [local educational agencies] cannot claim apportionment credit for work using religious materials.

Cal. Dep’t of Educ., *Independent Study Frequently Asked Questions* (as of May 6, 2024), https://www.cde.ca.gov/sp/eo/is/faq.asp (answer to question 9 under “Assigned Work”).

C. The Role of Defendants Thurmond, SJUSD, and MUSD in Perpetuating Blue Ridge’s and Visions’ Unlawful Discrimination

Under California law, Defendant Thurmond, as the State Superintendent of Public Instruction, leads the California Department of Education and is responsible for enforcing California’s education laws and regulations, including those that govern the independent study programs at issue here. *See* Cal. Dep’t of Educ., *Roles & Responsibilities* (as of Oct. 19, 2023), https://www.cde.ca.gov/eo/mn/rr/index.asp; Cal. Educ. Code §§ 51749.3, 47612.5. Compliance with the Superintendent’s

rules and regulations is a condition for charter schools to receive state funds for independent-study students. *Id.* § 51747.

Chartering authorities, including the SJUSD and MUSD Defendants, are responsible for supervising a charter school's legal compliance using a variety of enforcement tools, including review of the petition establishing a charter school. *See generally* Cal. Educ. Code §§ 47605(c)(5)(A)(i), (c)(5)(D), 47607(b), (c)(1), 47604(a), (c). A charter school seeking approval or renewal is required to affirm in its petition that it will be "nonsectarian." *Id.* § 47605(e)(1). If the petition does not include that affirmation, the chartering authority may deny the petition. *Id.* §§ 47605(c)(4), 47607(b). A chartering authority may revoke a charter if it determines that the charter school "[c]ommitted a material violation of *any* of the conditions, standards, or procedures set forth in the charter" or "[v]iolated *any* law." *Id.* § 47067(f)(1), (4) (emphases added).

D. Procedural History

The Families first sought to remedy the discrimination without litigation. In April 2023, the Families sent letters to Blue Ridge and Visions outlining their concerns and asking to fully participate in the homeschool aid programs without surrendering their constitutional

rights. Both schools responded that they would not change their positions.

In October 2023, the Families filed suit to vindicate their free-exercise and free-speech rights. *See* 3-ER-472-503. The Families sought injunctive relief to restrain Defendants from enforcing or applying California law or school policy to exclude the Families from choosing to spend generally available funds on faith-based curricula and other instructional materials that reflect a religious viewpoint. 3-ER-501-502 ("Prayer for Relief"). The Families sought similar injunctive relief regarding work samples that derive from a faith-based curriculum or reflect a religious viewpoint. 3-ER-501-502. In addition, the Families requested a declaratory judgment that to the extent that Article IX, section 8 of the California Constitution and/or section 47605(e)(1) of the California Education Code require the challenged actions by the school defendants, those provisions violate the Free Exercise and Free Speech Clauses of the First Amendment to the U.S. Constitution. 3-ER-501-502. Finally, the Families requested reasonable attorney's fees and costs, nominal damages, and such other and further relief as the court may deem appropriate. 3-ER-502.

All five sets of Defendants—Thurmond, Blue Ridge and its officials, Visions and its officials, the MUSD officials, and the SJUSD officials—moved to dismiss the complaint. *See* ECF Nos. 24, 35, 36, 37, 39. Defendants asserted a variety of grounds, including failure to state a free-exercise claim, failure to state a free-speech claim, that the defendants were improperly named, and that the defendants had sovereign immunity. *See, e.g.*, ECF No. 24-1 at 14, 16, 17; ECF No. 39-1 at 13.

The district court granted the motions to dismiss without a hearing and solely on the ground that the Families had failed to state a claim under the First Amendment. *See* 1-ER-3-16. Despite the Families' allegations that Blue Ridge and Visions generally allow parents to select curricula that meet state standards, the court found that the Families "do not have the right under California law to independently choose instructional materials" and that both charter schools' "policies and practices" "make it clear that curriculum materials in these programs are strictly monitored." 1-ER-12-13 (capitalization omitted). The court also stated that the charter schools provide "public homeschool programs," not "private homeschool," and that "a public school's curriculum is a form

of government speech, not speech of a teacher, parent, or student." 1-ER-13, 14. In short, the district court found, "[t]here are no 'public benefits' in the form of grants or otherwise that the state is excluding [the Families] from." 1-ER-15. The court therefore dismissed the complaint in its entirety and with prejudice. 1-ER-16. This timely appeal followed.

STANDARD OF REVIEW

This Court reviews a decision granting a motion to dismiss *de novo*. *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In considering whether plaintiffs have stated a claim, the court generally limits its inquiry "to the allegations in the complaint, which are accepted as true and construed in the light most favorable to the plaintiff." *Lazy Y Ranch*, 546 F.3d at 588. Although a court "'may take judicial notice of matters of public record,'" the court "cannot take judicial

notice of disputed facts contained in such public records." *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018) (quoting *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001)).

SUMMARY OF ARGUMENT

Blue Ridge and Visions operate programs of private choice, in which parents can access public funds for a broad range of instructional materials and enrichment activities for homeschooling their children. Yet Blue Ridge and Visions deny the Families access to funds, and refuse to credit the work samples of their children, solely because the Families seek to use faith-based instructional materials. This is unconstitutional discrimination against religion in violation of the Free Exercise Clause and unconstitutional viewpoint discrimination in violation of the Free Exercise Clause.

1. The Families' allegations state a viable claim for violation of their Free Exercise rights. The district court failed to apply the proper standard of review at the motion-to-dismiss stage, and failed to properly apply Supreme Court precedents, including *Carson*, *Espinoza*, *Trinity Lutheran*, and other cases, which prohibit officials from denying public benefits to otherwise eligible recipients based on their religious exercise.

These cases make clear that neither the Establishment Clause nor independent state antiestablishment interests can serve as justification for barring religious participants from public aid programs, where aid flows to religion through the private choices of private actors. Contrary to the district court's reasoning, these cases make clear that parents need not be "unilateral" decisionmakers to make a program one of parental choice for First Amendment purposes. It is enough that the "link between government and religion is attenuated by private choices," so as to avoid any coercion that would violate the Establishment Clause. *Espinoza*, 591 U.S. at 485. The Free Exercise Clause *requires* that parents like those here be allowed to participate in benefit programs that fund a variety of parent-selected educational options. Defendants' express discrimination against religious families in the distribution of public benefits cannot survive strict scrutiny and plainly violates the Free Exercise Clause.

2. The Families have also stated a claim for violation of their rights under the Free Speech Clause. The Free Speech Clause prohibits the government from engaging in viewpoint discrimination, even in a "limited public forum ... of its own creation." *Rosenberger*, 515 U.S. at 829. In the context of educational funding, the Constitution imposes a

"requirement of viewpoint neutrality in the Government's provision of financial benefits." *Id.* at 834. The district court neglected these principles and dismissed the Families' free-speech claims, finding that "a public school's curriculum is a form of government speech, not speech of a teacher, parent, or student." 1-ER-14. But the district court applied the wrong standard of review and relied on readily distinguishable cases involving the speech of public-school employees. In contrast, the homeschool aid programs overseen by Visions and Blue Ridge place private individuals—parents, not school employees—in the role of selecting a curriculum for home education of their own children. When parents in the Blue Ridge and Visions programs select a diverse array of curricula for their children's diverse needs, they are not serving as mouthpieces for a government message. In holding otherwise, the district court disregarded the nature of the programs as described in the Families' allegations and misapplied fundamental First Amendment doctrine.

ARGUMENT

I. The Families Pleaded Viable Free Exercise Claims.

A. Exclusion of Religion from Publicly Funded Programs of Private Choice Violates the Free Exercise Clause.

In operating their independent study programs, Defendants have indisputably "single[d] out the religious for disfavored treatment." *Trinity Lutheran*, 582 U.S. at 460; *see* 3-ER-486, 488-489 ¶¶ 59-60, 70, 75. Such discrimination on the basis of religion "is odious to our Constitution" and "cannot stand." *Trinity Lutheran*, 582 U.S. at 467. The Free Exercise Clause "protect[s] religious observers against unequal treatment," including from "indirect coercion or penalties on the free exercise of religion." *Id.* at 458, 462 (quoting *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993) & *Lyng v. Nw. Indian Cemetery Prot. Ass'n*, 485 U.S. 439, 450 (1988)). "'A law that targets religious conduct for distinctive treatment'" must "be subjected to 'the strictest scrutiny'" and will "'survive ... only in rare cases.'" *Carson*, 596 U.S. at 780-81 (quoting *Lukumi*, 508 U.S. at 546 & *Espinoza*, 591 U.S. at 478); *see also Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 688 (9th Cir. 2023) ("[R]egulations are not neutral and generally applicable ... whenever they treat *any*

comparable secular activity more favorably than religious exercise." (quoting *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (per curiam))). Applying that anti-discrimination principle, the Supreme 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 (collecting cases). The Court has long recognized that "a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program." *Thomas v. Review Bd. of Ind. Emp. Sec. Div.,* 450 U.S. 707, 716 (1981). Recent Supreme Court precedent has reaffirmed that principle and clarified how it applies in the context of education aid programs. For instance, decades ago, it was an open question whether a state would violate the Establishment Clause by allowing generally available benefits to flow to religious institutions through the choice of private citizens. In *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002), the Supreme Court provided a definitive answer: Programs of "private choice," in which government aid reaches religious entities "as a result of the genuine and independent choices of private individuals," do not violate the Establishment Clause. The Court reasoned that a "neutral

program of private choice," such as a voucher program that provides tuition assistance for secular and religious schools alike, does not offend the Establishment Clause because it neither endorses religion nor "coerc[es] parents into sending their children to religious schools." *Id.* at 655-56.

After *Zelman*, the question became not whether inclusion of religion in generally available public benefit programs is *permitted* (under the Establishment Clause) but whether such evenhanded treatment of religion is *required* (under the Free Exercise Clause). A trio of cases answered in the affirmative.

First, in *Trinity Lutheran*, the Supreme Court struck down a Missouri policy, grounded in a "no-aid" provision of the Missouri Constitution, that barred religious entities from receiving playground improvement grants. The Court ruled that the Free Exercise Clause did not permit Missouri to "expressly discriminate[] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." 582 U.S. at 462.

Then, in *Espinoza v. Montana Department of Revenue*, the Court applied that anti-discrimination principle to a publicly funded school

choice program. 591 U.S. 464 (2020). At issue in *Espinoza* was a state program that granted a tax credit for donations to support scholarships at private schools, including some faith-based schools. *Id.* at 468-69. The Montana Supreme Court invalidated the program on state constitutional grounds, reasoning that the inclusion of faith-based schools violated a state constitutional provision forbidding "any direct or indirect appropriation or payment" for "any sectarian purpose or to aid any ... school ... controlled in whole or in part by any church, sect, or denomination." *Id.* at 470 (quoting Mont. Const. art. X, § 6(1)). The Montana constitutional provision closely resembles the California Blaine Amendment that is at issue in this case, and that Defendants have cited as the basis for the schools' actions. After noting the "shameful pedigree" of such no-aid provisions, the Court held that the Free Exercise Clause barred the application of Montana's no-aid provision. *Id.* at 482, 487-89 (quotation marks omitted). The Court reasoned that "once a State decides to [subsidize private education], it cannot disqualify some private schools solely because they are religious." *Id.* at 487.

Third, in *Carson*, the Court held that Maine violated the Free Exercise Clause when it excluded religious schools from a tuition

assistance program because of a state requirement that schools receiving such assistance must be "nonsectarian." 596 U.S. at 778. As in *Espinoza*, the Court held that this exclusion of religion failed strict scrutiny. *Id.* at 780. Citing *Zelman*, the Court observed that "a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause" of the First Amendment. *Id.* at 781 (citing 536 U.S. at 652-53). Like Montana, the Court explained, Maine had no compelling interest in maintaining a stricter church-state separation than is constitutionally required, because "[a] State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise." *Id.* at 781. Because Maine decided to offer tuition assistance that "parents may direct" to the "schools of their choice," Maine's administration of that benefit was "subject to the free exercise principles governing any such public benefit program—including the prohibition on denying the benefit based on a recipient's religious exercise." *Id.* at 785 (emphasis omitted).

Under the Supreme Court's precedents, the Families have clearly pled a viable free-exercise claim. The Families allege that Blue Ridge and Visions operate homeschool grant programs that provide access to public funds for a wide range of parent-selected curricula and other instructional materials—except faith-based materials, which are categorically prohibited even if they meet state educational standards. 3-ER-481, 486, 489 ¶¶ 43, 59, 75. And Blue Ridge and Visions have grounded that exclusion in California's Blaine Amendment, even though the Supreme Court has repeatedly made clear that Blaine Amendments were "born of bigotry" and "hardly evince a tradition that should inform our understanding of the Free Exercise Clause." *Espinoza*, 591 U.S. at 482 (quotation marks omitted). As in *Trinity Lutheran, Espinoza*, and *Carson*, this "policy of categorically disqualifying" religion, *Trinity Lutheran*, 582 U.S. at 454, triggers strict scrutiny. And Defendants cannot identify any "interests of the highest order" that justify such discrimination—let alone show that their blanket ban on faith-based materials is "narrowly tailored" to protecting that interest. *Carson*, 596 U.S. at 780 (quoting *Lukumi*, 508 U.S. at 546).

Defendants cannot invoke the need to prevent violations of the Establishment Clause as a compelling interest because any "link between government and religion is attenuated by private choices." *Espinoza*, 591 U.S. at 485; *see Carson*, 596 U.S. at 780-81; *Zelman*, 536 U.S. at 655-56. "In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, [the Court has] consistently turned to the principle of *neutrality*, upholding aid that is offered to a broad range of groups or persons without regard to their religion." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001) (quotation marks omitted) (holding that granting a Christian after-school club equal access to public school facilities did not violate the Establishment Clause); *see also Mergens*, 496 U.S. at 247 (plurality op.) (rejecting argument that "because the school's recognized student activities are an integral part of its educational mission, official recognition of" a Christian student club "would effectively incorporate religious activities into the school's official program" or "endorse participation in the religious club").

Families enrolled in the Blue Ridge and Visions programs opt to instruct their own children in the privacy of their own homes with a curriculum of their choice. There is no "coerci[on]" that might raise

Establishment Clause concerns, *Zelman*, 536 U.S. at 655-56. To the extent any funds go towards religious curricula or materials, it is only through the "genuine and independent private choice" of parents, *Carson*, 596 U.S. at 775 (quoting *Zelman*, 536 U.S. at 652). Indeed, the Establishment Clause "is *respected*, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger*, 515 U.S. at 839 (emphasis added); *see also Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion"); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring) (arguing that "a brooding and pervasive devotion to the secular" is "not only not compelled by the Constitution, but ... prohibited by it").

Moreover, even assuming California has an "interest in separating church and state 'more fiercely' than the Federal Constitution," the Supreme Court has made clear that such a purported interest "'cannot qualify as compelling' in the face of the infringement of free exercise." *Espinoza*, 591 U.S. at 484-85 (quoting *Trinity Lutheran*, 582 U.S. at 466).

That is, "[Defendants'] antiestablishment interest does not justify enactments that exclude [Plaintiffs] from an otherwise generally available public benefit because of their religious exercise." *Carson*, 596 U.S. at 781; *Kennedy*, 597 U.S. at 543 ("[I]n no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights."). Under the "straightforward rule ... against express religious discrimination," *Espinoza*, 591 U.S. at 484, the Free Exercise Clause bars Defendants from denying the Families access to public benefits solely because of their faith-based educational choices.

B. The District Court Erred in Failing to Analyze the Blue Ridge and Visions Programs as Programs of Private Choice.

Despite the "straightforward rule" against anti-religious discrimination, *id.*, the district court dismissed the Families' free-exercise claim with prejudice. Although the district court did not meaningfully engage with the strict-scrutiny framework described above, the court seemed to assume that Defendants' sweeping exclusion of religion was justified because, to comply with the Establishment Clause, "states are allowed to provide a strictly secular education in its [sic]

public schools." 1-ER-13-14 (citing *Carson*, 596 U.S. 767). That analysis misses the point; the education here is occurring in the privacy of parents' homes, not "in [California's] public school[]" classrooms. *Carson*, 596 U.S. at 783. The district court mistakenly assumed that, for constitutional purposes, the homeschool aid programs in this case are indistinguishable from traditional, classroom-based public schools.

That assumption is fundamentally misguided. Although the Establishment Clause may restrict government actors from coercing students to engage in religious activity, *Kennedy*, 597 U.S. at 537, there is no coercion where parents choose to teach their own children from a religious curriculum. On the contrary, "a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause." *Carson*, 596 U.S. at 781. The Families have alleged that the Blue Ridge and Visions programs function as benefit programs in which instructional funds flow to curriculum providers through the independent choices of parents. 3-ER-479 ¶ 35. The court's conflation of that decentralized model of parent-directed education with

conventional public schooling makes no sense and misunderstands the Supreme Court's precedents.

The linchpin of that error was the court's finding—contrary to the allegations in the complaint—that Blue Ridge and Visions "do not ... provide a private choice of curriculum." 1-ER-13. That was error for two reasons. First, the Families allege in detail—often citing the schools' own public descriptions of their programs—that the Blue Ridge and Visions programs generally allow parents to direct public funds to the curricula of their choice. When the district court failed to accept the Families' allegations as true or took judicial notice of facts subject to reasonable dispute, it failed to apply the proper standard on a motion to dismiss. *Lazy Y Ranch*, 546 F.3d at 588; *see also Lee*, 250 F.3d at 689 ("[A] court may not take judicial notice of a fact that is subject to reasonable dispute." (cleaned up)).

Second, and more fundamentally, the district court erred in treating as dispositive whether parents are the "*unilateral* decisionmaker[s] of a student's curriculum." 1-ER-13 (emphasis added). Under established law, whether a public benefit program is a program of private choice does not depend on whether the recipients of the benefit

enjoy unfettered discretion to direct public funds. As the Supreme Court recognized in *Carson*, a recipient of a public benefit has a "'genuine and independent private choice'" even if the state must "approve[]" that choice based on criteria that do not violate their Free Exercise rights. 596 U.S. at 775-76 (quoting *Zelman*, 536 U.S. at 652).

1. The district court ignored the Families' allegations that the schools allow homeschooling families broad choice in selecting a curriculum and spending instructional funds.

The district court did not accept as true the Families' well-pleaded allegations about how the Blue Ridge and Visions programs operate, let alone construe those allegations in the light most favorable to the Families, as the court was required to do at the pleading stage, *see Lazy Y Ranch*, 546 F.3d at 588. As the Families alleged, both schools operate homeschool programs in which parents instruct their own children in the privacy of their own homes with minimal, high-level oversight by school personnel. *See, e.g.*, 3-ER-474, 478 ¶¶ 3, 24, 28. The schools allow parents to choose the curriculum that best suits their child's needs, even if it is not on a pre-approved list, so long as it meets state standards with or without supplementation. *See, e.g.*, 3-ER-479-481 ¶¶ 35, 37, 41-42. To facilitate this homeschooling, both programs provide a stipend that can

be used on any number of items, including curricula, enrichment materials, field trips, and technology resources. *See, e.g.*, 3-ER-480, 481 ¶¶ 38, 42.

To be sure, personnel at the schools must ultimately "approve" parents' choice of curriculum and their requests for spending public funds. 3-ER-480, 481 ¶¶ 40, 44. But public funds do not flow to curriculum providers without the parents' direction and consent. *See, e.g.*, 3-ER-474, 478, 480, 481 ¶¶ 5, 24, 28, 40, 44. Furthermore, the Families' allegations detail specific phone conversations, emails, and official letters from the schools and demonstrate that the schools denied the Families' requested curricula and spending requests solely because the Families wanted to make faith-based educational choices. *See, e.g.*, 3-ER-482-488 ¶¶ 49-59, 66-73.

Ignoring the Families' pleadings, the district court sought to decide the issue as a matter of law based on its "review of California law, as well as the charter schools' policies and practices," 1-ER-12. But nothing in California law or in the "policies" contained in the schools' charter documents, which the court judicially noticed, contradicts the Families' allegations. The charter documents mostly describe school policies at a

high level of generality and do not specify the degree of leeway parents are afforded in choosing homeschool curricula. But to the extent the documents address the issue, they *support* the Families' allegations. *See, e.g.*, 3-ER-349 (Charter Renewal Petition for Visions) ("The TK-12 Home School Academy supports the right of parent educators to educate their children within the home"); 3-ER-370 ("Parent educators are responsible for providing direct instruction to students. In support of this learning environment, Visions In Education offers curriculum and instructional support to parent educators who choose to homeschool their children."); 3-ER-371 (parents may elect to develop a "personalized curriculum" for their student that is not pre-qualified by Visions, so long as they have teacher approval); 2-ER-28 (Charter Renewal Petition for Blue Ridge) ("Families choose BR for a variety of reasons such as the preference to educate through a homeschool model supported by credentialed teachers and flexibility to learn utilizing each student's individualized learning style … [and] educational philosophy"); 2-ER-217 (Homeschool Teachers "[h]elp[] *families* choose [a] curriculum." (emphasis added)).

Indeed, in seeking renewal of its charter, Blue Ridge relied on testimonials from parents touting their model of parental choice. 3-ER-

291-332 (letters praising Blue Ridge's policy of allowing parents to choose curricula). Among many other examples, for instance, one Blue Ridge parent explained: "I love that I can pick out our own curriculum and that we have someone to check in with and answer any questions we may have along the way." 3-ER-296. Another Blue Ridge parent noted that the "[t]he funding [her son] gets each month has allowed him to choose what enrichment classes he wishes to pursue based on his passion and interests" and that "Blue Ridge Academy allows parents to design a structure in the home tailored to fit the student." 3-ER-291. A third parent stated, "The ability for parents to choose curriculum and programs that will best suit their child's learning type, ability, and needs is essential for student growth." 3-ER-309. The district court ignored how the charter documents corroborate the Families' allegations and, if anything, construed the documents in the light most favorable to *Defendants*—just the opposite of what the court is supposed to do at this stage of the proceedings.

Nor do the provisions of California law cited by the court discredit the Families' allegations. On the contrary, they establish that Blue Ridge and Visions' independent study programs are "alternative[s]" to

classroom-based instruction, Cal. Educ. Code § 51747(g)(8), and that the personnel at these schools provide only "general supervision" and "oversight" to monitor progress towards meeting state standards, as opposed to being responsible for instruction or grading. *Id.* § 51749.5(a)(3); Cal. Code Regs. tit. 5, § 11700(b). Moreover, while "supervising teacher[s]" must provide ultimate approval for the "[m]ethods of study" chosen, Cal. Code Regs. tit. 5, § 11700(f), California law does not prohibit the "supervising teachers" from deferring to parents' preferences. The thrust of the Families' complaint is that the school officials here defer to parents' educational choices when those choices are secular, but categorically reject those choices when they are religious.

California law requires independent study programs to be "of the same rigor, educational quality, and intellectual challenge" as classroom-based courses and mandate that the course of study be "aligned to all relevant local and state content standards." Cal. Educ. Code § 51749.5(a)(4). But as described above, the Families' allegations make clear that the schools did not deny the Families' curricula requests for reasons having to do with academic rigor or state learning requirements.

Even curricula that fully satisfied state standards were denied "solely because of [their] religious character." *Trinity Lutheran*, 582 U.S. at 466; *see, e.g.*, 3-ER-486 ¶ 59 ("Blue Ridge is rejecting curriculum orders and work samples not for any academic deficiency, but solely because school employees deem them to be 'too religious.'"); 3-ER-487 ¶ 66 (Visions denied Carrie Dodson's preferred curriculum "for the sole reason that Visions would not accept assignments derived from a faith-based curriculum.").

In sum, the policies reflected in the judicially noticed charter documents and the cited provisions of California law reinforce, rather than undermine, the Families' well-pleaded allegations that the programs here are programs of private choice. The district court had no basis for disregarding those allegations and deciding the issue as a matter of law.

2. The district court erred as a matter of law in determining that parents could not exercise "independent private choice" because the schools had the authority to approve parents' choices.

In addition to discounting the Families' allegations, the district court improperly treated the relevant legal standard as whether parents' educational choices are "unilateral." 1-ER-9, 13. As discussed above, the

Supreme Court has long held that programs in which public funds reach religious entities "as a result of the genuine and independent choices of private individuals" do not violate the Establishment Clause. *Zelman*, 536 U.S. at 649. More recently, the Court has clarified that banishing religion from programs structured in that way violates the Free Exercise Clause. *See, e.g.*, *Carson*, U.S. 596 at 781. Here, the district court emphasized that California law does not allow "parents or guardians to be the unilateral decisionmaker of a student's curriculum" or to "unilaterally choose and purchase students' curriculum." 1-ER-9, 13. But under a proper understanding of the Supreme Court's cases, a "genuine and independent private choice" need not be a "unilateral choice." It need only be sufficiently voluntary to "attenuate[]" the "link between government and religion." *Espinoza*, 591 U.S. at 485.

The district court lost sight of the reason "genuine and independent private choice" in a generally available public benefit program *matters*: because it severs any potential coercive connection between the government and religious entities, thereby avoiding any concerns that might otherwise arise under the Establishment Clause. *See Carson*, 596 U.S. at 775; *Zelman*, 536 U.S. at 652. And where a public benefit program

does not violate the Establishment Clause because of "genuine and independent private choice," the state cannot exclude religious choices from that program without running afoul of the Free Exercise Clause. *See, e.g.*, *Carson*, 596 U.S. at 781 ("[T]he state interest ... in achieving greater separation of church and State than is already ensured under the Establishment Clause ... is limited by the Free Exercise Clause.") (quoting *Widmar v. Vincent*, 454 U.S. 263, 276 (1981)); *see also Everson v. Board of Educ. of Ewing Twp.*, 330 U.S. 1, 16 (1947) (noting that a State "cannot exclude" individuals "because of their faith, or lack of it, from receiving the benefits of public welfare legislation").

A "genuine and independent private choice" in this context need not be an unfettered or "unilateral" choice. In *Zelman*, the school voucher benefit could be applied only to schools that met "statewide educational standards," so parents could choose only among schools that the state approved under those metrics. 536 U.S. at 645. But that did not mean the school voucher recipients lacked a "genuine and independent" choice in deciding how to use their vouchers. *Id.* at 652.

Likewise, in *Carson*, parents participating in Maine's tuition aid program could choose only among private schools that had been

"approved" by the Maine Department of Education. 596 U.S. at 773-74. Approval was contingent on a number of factors—for instance, the schools needed to use English as the language of instruction and had to teach a course about Maine history. *Id.* The parents in *Carson* thus lacked unilateral, unfettered power to direct the tuition assistance. *Id.* But the aid program remained a program of "private choice" in the constitutionally relevant sense, because aid would not flow to religious entities without the parent's voluntary decision to exercise that option. Accordingly, the Court held that Maine could not exclude religious educational options from the program. *Id.* at 789; *cf. Trinity Lutheran*, 582 U.S. at 456 (holding that Missouri violated the Free Exercise Clause when its grant program declared applicants with religious affiliations "categorically ineligible" even though the grant program did not guarantee selection for any applicant).

Here, as the Families have alleged, parents' preferences drive which curriculum is used to educate their children and how the public benefit is spent. That these selections must be approved or "monitored" by a "supervising teacher" for compliance with state educational standards, 1-ER-10, 13, makes no difference. Because the parental choice

is sufficient to avoid any concern about state coercion, and therefore to avoid an Establishment Clause problem, Defendants cannot justify their exclusion of religious educational options as necessary to comply with the Establishment Clause. As in *Carson*, the asserted "antiestablishment interest does not justify ... exclud[ing] some members of the community from an otherwise generally available public benefit because of their religious exercise." 596 U.S. at at 781.[1]

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[1] Several defendants also argued below that it is significant that the schools never transfer funds directly to any parents as part of their homeschooling programs. The district court noted this policy in its opinion, 1-ER-10, but it is unclear whether that mattered to the court's analysis. In any case, this feature of the schools' homeschooling programs does not distinguish them from the aid program in *Carson*. Under the tuition assistance program in *Carson*, parents communicated their selection of school to the school district in which they resided, and, if the school had received state approval for tuitioning purposes, the school district then paid the tuition directly to the school. 596 U.S. at 773-75. The scholarship program at issue in *Espinoza* operated similarly. *See Espinoza*, 591 U.S. at 469 ("Upon receiving a scholarship, the family designates its school of choice, and the scholarship organization sends the scholarship funds *directly* to the school." (emphasis added)). In both cases, the state never transferred the tuition money to the parents, but the parents could still properly challenge the state law denying them the opportunity to use the tuition benefit at religious schools. *See Carson*, 596 U.S. at 775-76, 789. What matters is the parent's practical ability to guide the use of the funds, not whether the funds are transferred to the parents' possession.

C. The District Court Erred in Labeling the Benefit a "Public" Education Rather than a Subsidy for Homeschooling.

In a related error, the court attempted to distinguish *Carson*, *Espinoza*, and *Trinity Lutheran* on the ground that those cases involved "public benefits in the form of grants, tax credits, or tuition assistance to *private* schools and students seeking a *private* education." 1-ER-15 (emphasis added); *see also* 1-ER-15 ("This case involves California's laws and regulations for state funded public schools, not private schools."). In deferring to Defendants' characterization of the benefit on offer here as a "public" education, the district court made the same fundamental error that the state of Maine and the First Circuit made in *Carson*—elevating "'semantic[s]'" over substance. 596 U.S. at 784 (quoting *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 215 (2013)).

The district court appears to have accepted at face value Defendants' contention that a family that chooses to enroll with a school like Blue Ridge or Visions "[c]hooses a [s]ecular [p]ublic [e]ducation." ECF No. 35-1 at 12. As the Families explained below, however, the Supreme Court rejected a materially identical argument in *Carson*. *See* ECF No. 44 at 11. In *Carson*, Maine argued that "[t]he public benefit

Maine is offering is a free public education." 596 U.S. at 782 (quotation marks omitted). Although in substance the benefit was tuition aid, which could be used at private schools, Maine contended that "the benefit was properly viewed not as tuition assistance payments to be used at approved private schools, but instead as funding for the rough equivalent of the public school education that Maine may permissibly require to be secular." *Id.* (quotation marks omitted). The First Circuit agreed and "attempted to distinguish [the Supreme Court's] precedent" on that ground. *Id.*

But the Supreme Court reversed, rejecting Maine's self-serving characterization of its program. The Court explained that federal constitutional rights cannot be made to depend on state labels. The First Amendment turns on the "substance of free exercise protections," not "on the presence or absence of magic words," *Id.* at 785. Recognizing that "[t]he definition of a particular program can always be manipulated," the Court explained that "to allow States to recast a condition on funding in this manner would be to see the First Amendment reduced to a simple semantic exercise." *Id.* at 784 (cleaned up). That "semantic exercise" could not obscure that many private schools eligible for its program did

not operate like traditional public schools but were instead given wide latitude in their pedagogy so long as they were not religious. *Id.* However Maine might try to label the program (*e.g.*, "a free public education"), in reality the program functioned as a subsidy for various private educational options. *Id.* (quotation marks omitted).

The same is true in this case. It does not matter that Defendants characterize the homeschool programs operated under the supervision of Blue Ridge and Visions as "public education" because in reality, "[t]he differences" between conventional public schooling and homeschooling with parent-chosen curricula are "numerous and important." *Id.* at 783.

The education that students receive in the homeschooling programs at Blue Ridge and Visions is not, in substance, "public." Parents like Carrie Dodson and John Woolard "do not have to accept all students," *id.* but rather teach only their own children. Parents are not "certified" to teach in the way that teachers in California's traditional public schools are. And perhaps most importantly, the parents are not agents of the state when they instruct their children; on the contrary, the Supreme Court has long recognized the "'enduring American tradition'" of "the rights of parents to direct 'the religious upbringing' of their children,

including through religious education. *Espinoza*, 591 U.S. at 486 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 213-14, 232 (1972) and also citing *Pierce v. Soc'y of Sisters of Holy Names of Jesus & Mary*, 268 U.S. 510, 534-35 (1925)). Rather than being state actors, parents are private beneficiaries of a broadly available public benefit program that allows them to use instructional materials from private curriculum providers.

Moreover, the fact that the parents are teaching their own children or that the materials they use are partially funded by the state is not sufficient to turn the parents into state actors. *See, e.g.*, *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 816 (9th Cir. 2010) (holding that a charter school was not engaged in state action in part because the "provision of educational services is not a function that is traditionally and exclusively the prerogative of the state"); *I.H. ex rel. Hunter v. Oakland Sch. for Arts*, 234 F. Supp. 3d 987, 992 (N.D. Cal. 2017) (same); *cf. Rendell-Baker v. Kohn*, 457 U.S. 830, 840-41 (1982) (holding that a private school for special-needs students was not a state actor even though it was heavily regulated by, and received more than 90% of its funds from, the government).

The district court focused on whether Blue Ridge and Visions were public schools, but the relevant question for First Amendment purposes is whether the Dodson, Woolard, and Gonzales *homes* are "public schools" for constitutional purposes, comparable to government-run, classroom-based schools where students from many different families come together for instruction by government employees teaching a government-imposed curriculum. And there is a world of difference between a conventional public school, on the one hand, and a program that allows parents to choose what to teach their own children in the privacy of their own homes, on the other. "[P]ublic homeschool"—a term contrived by the district court, 1-ER-13—is an oxymoron.

Nor does it matter that Blue Ridge and Visions are classified as "public" schools under California law. In *Carson*, the Maine Department of Education was indisputably "public." 596 U.S. at 773-74. But what mattered was that Maine administered a publicly funded program of parental choice. And having opted to subsidize parents' educational choices, Maine could not mandate secularism and discriminate against religion. The same was true in *Rosenberger*, where the Court analyzed a student activities fund at a public university as a program of private

choice because it "expend[ed] funds to encourage a diversity of views from private speakers." 515 U.S. at 834. Although the university was public, it funded a program that enabled students to publish magazines expressing their personal opinions. *Id.* at 823-25. Having created that forum for diverse student viewpoints, the university could not banish students' religious perspectives. *Id.* at 829-30.

Furthermore, as the Supreme Court has long cautioned, the protections of the First Amendment cannot be made to depend on "state law labels." *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 679 (1996) (collecting cases). The Court has also specifically rejected the notion that statutory labels such as "public" or "private" control whether an entity or individual is engaged in "state action" for constitutional purposes. *See, e.g.*, *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995) (Amtrak); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353-54 (1974) (public utility); *Polk County v. Dodson*, 454 U.S. 312 (1981) (public defender). As the Ninth Circuit has explained, it is also "important to identify the function at issue because an entity may be a State actor for some purposes but not for others." *Caviness*, 590 F.3d at 812-13 (quoting *Lee v. Katz*, 276 F.3d 550, 555 n.5 (9th Cir. 2002)); *see also Hunter*, 234 F. Supp. 3d at 992

("[U]nder *Caviness*, it is unlikely that California law characterizing charter schools as 'public schools' will suffice to prove state action"). What matters for federal constitutional purposes is the substance of the specific program at issue, not the general status of the entity supervising that program.[2]

Here, the substance of the benefit that the state is making generally available is aid for homeschooling with curricula from private curriculum providers. Through the independent study programs they administer, Blue Ridge and Visions make available to California families a monetary benefit that flows to third-party curriculum providers (*e.g.*, the publishers of *The Good and the Beautiful* curriculum) based on the parents' "genuine and independent private choice." *Carson*, 596 U.S. at 775 (quoting *Zelman*, 536 U.S at 652); *see Rosenberger*, 515 U.S. at 834. Parents receive administrative and financial support to teach their children at home using a curriculum they choose and which the schools

[2] Independent study programs that Blue Ridge and Visions operate beyond the homeschooling program may be different in structure and operation and are not at issue in this case (*e.g.*, a program where a teacher leads a virtual classroom of students through the teacher's selected curriculum over Zoom). Other independent study programs not at issue in this case may provide a public education.

approve only for compliance with state standards. 3-ER-478 ¶¶ 24, 28. By replacing classroom-based instruction with aid for parental homeschooling under limited oversight, the government has essentially "decided *not* to operate schools of its own, but instead to offer [financial] assistance that parents may direct" to the homeschool curriculum "of *their* choice." *Carson*, 596 U.S. at 785. In substance, the benefit is a subsidy for private education in the home.

The schools' "administration of that benefit is therefore subject to the free exercise principles governing any such public benefit program—including the prohibition on denying the benefit based on a recipient's religious exercise." *Id.* A "State need not subsidize [home] education," but "once a State decides to do so, it cannot disqualify some [home] schools solely because they are religious." *Id.* at 785 (quoting *Espinoza*, 591 U.S. at 487). There is "nothing neutral" about a program that grants funding requests for a math workbook from a secular vendor but not from a religious vendor. *Id.* at 781; *see also Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 289 (6th Cir. 2009) (noting that government "[p]rograms that allocate benefits based on distinctions among religious, non-religious and areligious recipients are generally

doomed from the start."). Simply put, "[t]hat is discrimination against religion." *Carson*, 596 U.S. at 781.

The structure of the Visions and Blue Ridge homeschool programs is also critical context for interpreting the Supreme Court's statement that a state "may provide a strictly secular education in its public schools." *Id.* at 785. The Supreme Court's cases concerning religion in "public schools" have nothing to do with an education provided in the home by a parent from a curriculum of the parent's choice. The Court's Establishment Clause precedents impose certain restrictions on religious content in traditional public schools. *See e.g.*, *Lee v. Weisman*, 505 U.S. 577 (1992) (invalidating prayer before public school graduation); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (invalidating Louisiana law mandating the teaching of "creation science" in public schools);[3] *Schempp*, 374 U.S. at 226 (invalidating Bible reading and school prayer in public school). But in all of these contexts, "public school" meant

[3] *Lee* and *Edwards* relied on the now-abandoned Establishment Clause test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The Court has since rejected the "*Lemon* test" as unmoored from constitutional text and tradition and overly restrictive of religious expression. *See Kennedy*, 597 U.S. at 534 ("[T]his Court long ago abandoned *Lemon* and its endorsement test offshoot.").

something very different: government employees teaching a government-imposed curriculum to students from different families in a government classroom. None of these cases dealt with publicly funded, parent-directed homeschooling. There would obviously be no Establishment Clause problem, for instance, with homeschool parents leading their children in prayer at the start of the homeschool day. *See, e.g.*, *Yoder*, 406 U.S. at 232 (The "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."). The "coercive pressure" that led the Court to circumscribe the role of religion in conventional public schools does not exist in the fundamentally different context of homeschooling. *Weisman*, 505 U.S. at 592. Defendants therefore cannot rely on the Establishment Clause to justify their "departure[] from neutrality," *Lukumi*, 508 U.S. at 534 (quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971)), and the district court's out-of-context snippet of *Carson* does not mean what the district court apparently thought it meant, *see* 1-ER-13-14.

It is black-letter law that the Establishment Clause "is respected, not offended" when the government extends benefits to a broad class of recipients "following neutral criteria and evenhanded policies."

Rosenberger, 515 U.S. at 839. In *Rosenberger*, a public university managed a student activities fund from which students could request money for a wide range of extracurricular activities "related to the educational purpose" of the school. *Id.* at 824 (quotation marks omitted). The university denied funding to a student-run religious newspaper, citing Establishment Clause concerns. *Id.* at 827. The Supreme Court rejected the university's Establishment Clause defense. *Id.* at 839; *see also Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993) (holding that a public school may not discriminate against religious groups by denying them equal access to school facilities); *Mitchell*, 530 U.S. at 835 n.19 (noting that barring religious schools from a federal program that provided funding to lend equipment to public and private schools was not required by the Establishment Clause and "would raise serious questions under the Free Exercise Clause").

Like the student activities fund in *Rosenberger,* which was overseen by the public University of Virginia, the homeschool instructional funds at issue in this case, which are administered by Blue Ridge and Visions, are designed to support a wide variety of perspectives, not to inculcate a specific government message. California did not need to subsidize

homeschooling. But having made a subsidy for homeschooling available, Visions cannot disqualify some families because of their religious exercise. *Carson*, 596 U.S. at 778-80. The district court erred in deferring to Defendants' characterization of their homeschooling benefit rather than applying the "substance of free exercise protections." *Id.* at 785.

II. The Families Pleaded Viable Free Speech Claims.

A. Defendants Engaged in Unconstitutional Viewpoint Discrimination.

It is well-established that the First Amendment prohibits the government from engaging in viewpoint discrimination, even in a "limited public forum ... of its own creation." *Rosenberger*, 515 U.S. at 829. As the Supreme Court recently reaffirmed, discriminating against religious perspectives "constitutes impermissible viewpoint discrimination." *Shurtleff v. City of Boston*, 596 U.S. 243, 258 (2022) (quoting *Good News Club*, 533 U.S. at 112). In *Shurtleff*, the City of Boston generally permitted private groups to fly flags of their choosing on a city hall flagpole, but the City rejected a Christian group's flag solely because it "promoted a specific religion." *Id.* (cleaned up). The Court unanimously held that the exclusion of religious expression from the flag-raising program "discriminated based on religious viewpoint and violated

the Free Speech Clause." *Id.* at 259. Likewise, the Ninth Circuit has explained that "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Waln v. Dysart Sch. Dist.*, 54 F.4th 1152 (9th Cir. 2022) (quoting *Rosenberger*, 515 U.S. at 829).

Yet that is precisely what Defendants have done here. Defendants expressly discriminate against religious viewpoints when assessing parental requests for independent study funds and student work samples. *See, e.g.*, 3-ER-480 ¶ 38 ("All orders must be secular."); 3-ER-487 ¶ 68 (parents are "not able to purchase nor consider for instruction or attendance any faith-based materials at Visions," "no religious materials may be assigned as a part of the independent study," and "students cannot use religious materials to complete independent study assignments").

The Supreme Court has made clear that the constitutional prohibition on viewpoint discrimination applies with full force to educational funding programs, which must comport with a "requirement of viewpoint neutrality in the Government's provision of financial benefits." *Rosenberger*, 515 U.S. 832, 834 (holding that a public university

could not refuse to disburse student activities funds to a student magazine with a Christian editorial viewpoint solely because of the magazine's "religious speech"). Similarly, in *Prince ex rel. Prince v. Jacoby*, the Ninth Circuit concluded that a school district violated the First Amendment when it denied a student's Bible club access to funds and school resources generally available for student clubs. 303 F.3d 1074, 1093-94 (9th Cir. 2002). The Court noted that "[u]nder the logic of Supreme Court precedent, the expenditure of governmental funds cannot be prohibited whenever those funds pay for a service that is, pursuant to a religion-neutral program, used by a group for sectarian purposes." *Id.* at 1093.

The same logic applies to the homeschool aid programs overseen by Blue Ridge and Visions. By offering government funds to parents to purchase curricular materials of their choice, except those reflecting a faith-based worldview, Defendants engage in "viewpoint discrimination" that "cannot be sustained under the [F]ree [S]peech [C]lause." *Prince*, 303 F.3d at 1092; *see also Lamb's Chapel*, 508 U.S. at 393 ("[I]t discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except

those dealing with the subject matter from a religious standpoint."); *Culbertson v. Oakridge Sch. Dist. No. 76*, 258 F.3d 1061, 1065 (9th Cir. 2001) (holding that a public school engaged in unconstitutional viewpoint discrimination when it denied a Christian Bible study club use of school facilities that were open to all "educational" community groups); *Good News Club*, 533 U.S. at 114 ("Because allowing the Club to speak on school grounds would ensure neutrality, not threaten it, [the school district] faces an uphill battle in arguing that the Establishment Clause compels it to exclude the [Christian] Club.").

B. The District Court Erred in Finding the Families Are Engaged in Government Speech.

The district court ignored these fundamental First Amendment principles. Indeed, the district court did not even mention binding precedents such as *Rosenberger* and *Prince*, even though those cases featured prominently in the Families' briefing. *See, e.g.*, ECF No. 46 at 3, 12-13, ECF No. 47 at 9-12. Instead, the court dismissed the Families' free-speech claims on the ground that "a public school's curriculum is a form of government speech, not speech of a teacher, parent, or student." 1-ER-14. "[C]ourts must be very careful when a government claims that speech by one or more private speakers is actually government speech,"

Shurtleff, 596 U.S. at 262 (Alito, J., concurring in the judgment) because government speech "is exempt from scrutiny under the First Amendment's Speech Clause," *Nampa Classical Acad. v. Goesling*, 447 F. App'x 776, 778 (9th Cir. 2011); *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1012, 1015 (9th Cir. 2000). When the government tries to characterize the speech of private speakers as government speech, "it can be difficult to tell whether the government is using the doctrine 'as a subterfuge for favoring certain private speakers over others based on viewpoint,'" *Shurtleff*, 596 U.S. at 262 (Alito, J., concurring in the judgment) (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 473 (2009)), "and the government-speech doctrine becomes 'susceptible to dangerous misuse,'" *id.* (quoting *Matal v. Tam*, 582 U.S. 218, 235 (2017)).

The district court displayed no such caution here. To determine whether speech is private speech or government speech, the Ninth Circuit looks to who "actually was responsible for the speech." *Downs*, 228 F.3d at 1011. When the government elects to fund a private speaker, it is responsible for that speech only when it enlists the private speaker to convey the government's message. *Rosenberger*, 515 U.S. at 833. By contrast, when the government expends funds to set up a program that

allows expression of "a diversity of views from private speakers," the expression that results is private. *Id*. at 834. Here, that is what Blue Ridge and Visions programs do: they empower parents to teach their children a curriculum of their choice in their own homes. That teaching is the parent's speech, not the government's. Having disregarded the Families' well-pleaded allegations and having failed to perceive any material distinction between publicly funded *home* schooling and actual *public* schools, however, the district court concluded in peremptory fashion that the dozens of parents participating in the Blue Ridge and Visions homeschool programs—using diverse parent-selected curricula in the privacy of their homes with their own children—are all merely transmitting a government message.

In reaching that dubious conclusion, the district court relied principally on inapposite cases involving speech by government speakers in government schools, such as a government-mandated curriculum taught by public school teachers in a government classroom. *See Downs*, 228 F.3d at 1015; *Nampa*, 447 F. App'x at 778 (applying doctrine to charter school structured very differently from Blue Ridge and Visions). The district court also cited *Riley's American Heritage Farms v. Elsasser*,

which held only that speech by the host of a conventional public school's field trip "may be deemed to be part of the school's curriculum and thus School District speech," 32 F.4th 707, 728 (9th Cir. 2022), *as amended* (Apr. 29, 2022). None of these cases dealt with an educational funding program or a forum for diverse expression such as the programs in *Rosenberger*, *Shurtleff*, and *Prince*.

The district court overlooked the rationale of the decisions it cited and the dramatic ways in which the programs here differ from ordinary public schools. For example, in *Nampa*, the Ninth Circuit stated that "[a] public school's curriculum, no less than its bulletin boards, is 'an example of'" government speech, but only "because the *message is communicated by employees* working at institutions that are state-funded, state-authorized, and extensively state-regulated." 447 F. App'x at 778 (emphasis added) (quoting *Downs*, 228 F.3d at 1012). The district court did not engage in anything like the Supreme Court's "holistic inquiry" for government speech, which includes factors such as "the history of the expression at issue[;]" "the public's likely perception as to who (the government or private person) is speaking; and the extent to which the

government has actively shaped or controlled the expression." *Shurtleff*, 596 U.S. at 252.

Even a modest inquiry here should have made clear that parents and students participating in the Blue Ridge and Visions homeschool programs are not mouthpieces for the government. In contrast to classroom instruction by government employees teaching a government-imposed curriculum, the parents are the key decisionmakers and speaker here. Parents select the curriculum and teach it in the privacy of their homes with only limited oversight by school employees to ensure satisfaction of state standards. No one could mistake a parent's decision to educate a child in her own way in the privacy of her own home as government speech, especially when other parents are permitted to educate their own children in other ways. *Cf. Rosenberger*, 515 U.S. at 834 (noting that the university did "not itself speak or subsidize transmittal of a message it favors but instead expend[ed] funds to encourage a diversity of views from private speakers"). In *Prince*, for example, granting the Bible club access to school resources did not convert "a club's private speech" into "the speech of the school." 303 F.3d at 1093-94. Schools "do not endorse everything they fail to censor." *Hills*

v. Scottsdale Unified Sch. Dist., No. 48, 329 F.3d 1044, 1055 (9th Cir. 2003) (per curiam) (quoting *Mergens*, 496 U.S. at 250).

That Blue Ridge and Visions employees have ultimate approval authority over parents' funding requests also does not transform the individual curriculum choices into government speech. The student groups in *Rosenberger* similarly lacked unilateral control over the student activities budget, which was overseen by school faculty. 515 U.S. at 824. That did not make the speech of the students "the University's own speech." *Id.* at 834. The Supreme Court has warned that if "private speech could be passed off as government speech by simply affixing a government seal of approval" the government could "silence or muffle the expression of disfavored viewpoints." *Matal*, 582 U.S. at 235-36 (noting that if trademark registration were government speech, the government would be "babbling prodigiously and incoherently"); *see also Shurtleff*, 596 U.S. at 264 (Alito, J., concurring) ("[N]either 'control' nor 'final approval authority' can itself distinguish government speech from censorship of private speech."). The same goes here. The approval of funds for a diverse range of instructional materials does not constitute government endorsement of all of the various messages reflected in those

materials. The district court erred in treating parental speech as government speech and dismissing the Families' free-speech claim on that basis.

CONCLUSION

This Court should reverse the district court's decision dismissing the Families' free-exercise and free-speech claims.

Respectfully submitted,

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October 23, 2024

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, I state that I am not aware of any related case pending in this Court.

Date: October 23, 2024

/s/Ethan P. Davis
Ethan P. Davis

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure Rule 32(a)(7)(C), I certify that this brief complies with the length limitations set forth in Rule 32(a)(7)(B)(i) because it contains 13,907 words, excluding the items that may be excluded under Rule 32(a)(7)(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Word 365ProPlus in Century Schoolbook 14-point font.

Date: October 23, 2024

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