
In the
Court of Appeal
of the
State of California
SECOND APPELLATE DISTRICT
DIVISION THREE

B192878

In re RACHEL L., et al., Persons coming under the Juvenile Court Law.,
JONATHAN L., and MARY GRACE L.,

Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent,

LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,

Real Party in Interest.

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY
HON. STEPHEN MARPET · NO. JD00773

BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

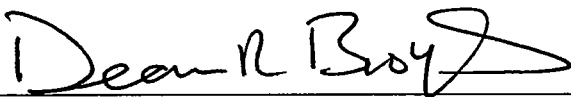
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☐ There are no interested entities or parties to list in this Certificate per California Rules of Court, Rule 8.208(d)(3).

☒ Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest
1. American Center for Law & Justice	Amicus in support of Petitioners
2. American Civil Rights Union	Amicus in support of Petitioners
3. Christian Leaders	Amicus in support of Petitioners
4. Jewish Homeschoolers of Napa & Sonoma	Amicus in support of Petitioners
5. The Western Center for Law & Policy	Amicus in support of Petitioners
6.	
7.	
8.	
9.	
10.	



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APPLICATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTRODUCTION

Pursuant to California Rules of Court, rule 8.520(f), we respectfully request leave to file the attached brief of *amici curiae* in support of Petitioners. This application is timely made within 30 days after the filing of the reply brief on the merits.

THE *AMICI CURIAE*

Organizations

The American Center for Law and Justice (ACLJ) is a Washington, D.C.-based non-profit legal and educational organization dedicated to, *inter alia*, the defense of rights guaranteed under the First Amendment. The ACLJ is specifically dedicated to the ideal that religious freedom and freedom of speech are inalienable, God-given rights. ACLJ's purpose is to educate, promulgate, conciliate, and where necessary, litigate, to ensure that those rights are protected under the law. Attorneys for *amicus* have participated in numerous cases before the Supreme Court of the United States, federal Court of Appeals, federal District Courts, and various state courts regarding freedom of religion and freedom of speech.

The Western Center for Law & Policy (WCLP) is a California-based non-profit legal defense organization dedicated to the protection and promotion of religious freedom, parental rights, and civil liberties. The WCLP engages in constitutional litigation in state and federal courts and is also active in the areas of public policy and education. Attorneys for *amicus* have directly litigated, provided important advisory counsel on, and submitted *amicus curiae* briefs for a number of court cases involving

parental rights and religious liberties in California appellate courts, the California Supreme Court, and the United States Supreme Court.

The American Civil Rights Union (ACRU) is a non-partisan legal policy organization dedicated to defending all constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long-time Reagan policy advisor and architect of modern welfare reform Robert B. Carleson, and since then has filed *amicus curiae* briefs on constitutional law issues in cases all over the country.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General Edwin Meese III; former federal Appeals Court Judge and Solicitor General Robert H. Bork; Pepperdine Law School Dean Kenneth W. Starr; former Assistant Attorney General for Civil Rights William Bradford Reynolds; Walter E. Williams, John M. Olin Distinguished Professor of Economics at George Mason University; former Harvard University Professor, Dr. James Q. Wilson; Ambassador Curtin Winsor, Jr.; and Dean Emeritus of the UCLA Anderson School of Management J. Clayburn LaForce.

Jewish Homeschoolers of Napa and Sonoma Counties is an organization providing support for local homeschool parents and students.

Christian Leaders is a not-for-profit organization dedicated to strengthening Christian families by encouraging a lifestyle and culture of "home discipleship," which includes but is not limited to families "stopping for a few minutes each day to read the Bible, memorize Scripture, and perhaps even sing a little together" (www.christianleaders.org), as well as homeschooling.

Christian Leaders accomplishes its endeavors by planting new churches across the country that encourage fathers and mothers to step forward in leading their homes, and then create an encouraging environment on Sunday mornings where the home's success is a key

priority, within a church setting with constant encouragement and accountability.

Families in home-discipleship churches stay faithful to patterns and habits that bring their children into a consistent walk with Christ and the Word of God, and most prominent among these patterns and habits is homeschooling. These future Christian leaders are thus grounded in the truth of God, ready to build strong Christian culture that is honoring to God, and ready to set an example of righteous living for the rest of the world.

INTEREST OF AMICI CURIAE

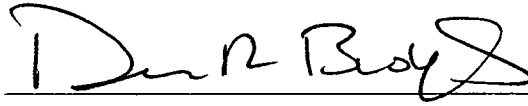
The present case involves, *inter alia*, the right of parents to choose home schooling for their children under the Free Exercise Clause and Free Speech Clause of the First Amendment. As such, this case implicates issues which the *amici curiae* have a particular interest in pursuing and defending on behalf of parties like Petitioners. The *amici curiae* want to ensure that all constitutional rights are fully protected, not just those that may advance a particular ideology. Additionally, Christian Leaders has a unique interest in the present matter as it seeks to establish churches in California and to ensure that this Court upholds the First and Fourteenth Amendment rights of families in such churches to freely exercise their Christianity. Christian Leaders fears that a ruling that would severely hinder parents from homeschooling their children would effect a wholesale crippling of parents' abilities to nurture their children according to the Christian faith. Finally, the *amici curiae* are particularly familiar with the constitutional issues implicated in the instant case and thus believe that their combined knowledge and interest in such areas will provide useful insight and argument to the Court in reaching a decision that most properly comports with the Constitution of the United States.

CONCLUSION

For the foregoing reasons, the *amici curiae* have a substantial interest in the present matter and respectfully request that the Court accept the accompanying brief for filing in this case.

Dated: May 16, 2008

Respectfully submitted,



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ARGUMENT

I. THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE ALLOWS THIS COURT TO AVOID ANSWERING THE DIFFICULT CONSTITUTIONAL QUESTION OF WHETHER PARENTS HAVE THE CONSTITUTIONAL RIGHT TO HOME EDUCATE THEIR CHILDREN.

It is a common practice for the California state courts to construe statutes, when reasonable, in such a way that avoids answering difficult constitutional questions. *Le Francois v. Goel*, 35 Cal. 4th 1094, 1104-05 (Cal. 2005); *see also In re Smith*, 42 Cal. 4th 1251, 1269 (Cal. 2008). Indeed, the California Court of Appeal for the First Appellate District recently stated that “[p]rudent judicial restraint requires courts to avoid the unnecessary decision of constitutional issues.” *Erika K. v. Brett D.*, ___ Cal. Rptr. 3d ___, 2008 WL 963408 (Cal. App. Apr. 10, 2008) (citing *Elkins v. Superior Court*, 41 Cal. 4th 1337, 1357 (Cal. 2007) (finding that a state family court had prematurely determined that an act was unconstitutional rather than first applying the substantive provisions of the act to determine whether a constitutional issue existed).

The question of whether a parent possesses the constitutional right to home school his or her child is important and unsettled. In light of the doctrine of constitutional avoidance, however, this Court need not address that question: when reasonably construed, California’s compulsory attendance law permits parents to home educate their children through its private school and private tutor exemptions. *See* Cal. Educ. Code § 48220 *et seq.* (2007).

California’s state compulsory attendance law states that

Each person between the ages of 6 and 18 years *not exempted under the provisions of this chapter* or Chapter 3 (commencing with Section 48400) is subject to compulsory full-time education. Each person subject to compulsory full-time education and each person subject to compulsory

continuation education not exempted under the provisions of Chapter 3 (commencing with Section 48400) shall attend the public full-time day school or continuation school or classes and for the full time designated as the length of the schoolday by the governing board of the school district in which the residency of either the parent or legal guardian is located and each parent, guardian, or other person having control or charge of the pupil shall send the pupil to the public full-time day school or continuation school or classes and for the full time designated as the length of the schoolday by the governing board of the school district in which the residence of either the parent or legal guardian is located.

Unless otherwise provided for in this code, a pupil shall not be enrolled for less than the minimum schoolday established by law.

Cal. Educ. Code § 48200 (emphasis added). Cal. Educ. Code § 48220 states that certain classes of children are exempt “from the requirements of attendance upon a public full-time day school.” The classes of children exempt under the California Education Code include children who attend a private full-time day school, Cal. Educ. Code § 48222, and children who receive private instruction from a tutor credentialed for the grade taught, Cal. Educ. Code § 48224.

Under the private school exemption, children between the ages of 6 and 18 are exempted from the State’s compulsory attendance law if they are “instructed in a private full-time day school by persons capable of teaching.” *Id.* Importantly, the statutory phrase “persons capable of teaching” is not defined or explained anywhere in the California Education Code. That fact notwithstanding, this phrase, coupled with the requirement that the instruction be provided in English, form the standard by which the *capacity* of a teacher engaging in private school instruction is measured. There are other requirements that must be met under the exemption, but not

one of them relates to the ability of an individual to lawfully engage in the private instruction of children under the California Education Code.

For instance, the private school must keep the students' attendance in a register (subject to verification by the supervisor of the school district) and annually file an affidavit with the Superintendent of Public Instruction. Additionally, the private instruction offered must cover "the several branches of study required to be taught in the public schools of the state." *Id.* There are no requirements as to the size, nature or location of the school. Indeed, the California Department of Education expressly acknowledges that there are private schools that may consist of "five or fewer students" and allows such schools to file their private school affidavits (PSA) at anytime as opposed to the general October 1-15 timeframe for annual filing. California Department of Education (CDOE), Filing the Private School Affidavit, <http://www.cde.ca.gov/sp/ps/rq/Affidavit.asp> (last visited May 15, 2008). It should be noted that this concession for private schools indicates that the CDOE contemplates private *home* education as an option under the private school exemption as private institutional education does not typically commence at random times throughout the year, but rather in late summer in general keeping with the public school schedule.

In light of the foregoing, the private school exemption does not, on its face, bar a parent from lawfully engaging in private full-time day school instruction so as to exempt his or her child from California's compulsory attendance law. To qualify as a legitimate private school under the statutory language of the private school exemption, a parent may establish his or her own private home school. The parent need only be a "person[]" capable of teaching," speak English, keep his or her child's attendance in a register to be verified by the district supervisor, and annually file a PSA. Reasonably construed, the private school exemption permits parents to home educate their children. As such, this Court should avoid the difficult constitutional

question regarding parental rights to home school by construing Cal. Educ. Code § 48222 to exempt children who receive private home instruction, which is both provided by a parent and in compliance with the requirements set forth in that provision, from the State's compulsory attendance law.

Similarly, the private tutor exemption *also* permits parents to provide home education to their children. Under Cal. Educ. Code § 48224, children between the ages of 6 and 18 are exempted from the compulsory attendance law if they receive instruction from a tutor for at least three hours a day for 175 days a year. Like the private school exemption, the instruction must be conducted in English, and the areas of study offered must include those offered in the public schools. Unlike the private school exemption, however, the tutor may not merely qualify as a person capable of teaching, but must hold a valid state teaching credential for each grade taught. (Interestingly, while this requirement is not imposed on private school teachers, it is imposed on public school teachers. California Commission on Teacher Credentialing, *Become a Teacher in California*, <http://www.ctc.ca.gov/credentials/teach.html> (last visited May 15, 2008). The burden for conducting tutorial instruction is certainly higher than that for conducting instruction pursuant to the private school exemption, but once again, the text of this provision does not in any way bar a parent from teaching his or her child. Under the exemption, parents must go through the rigorous and time-consuming process of obtaining a valid state teaching credential for each grade they wish to teach, but the exemption nevertheless permits parents to home educate their children. Like the private school exemption, the private tutor exemption, reasonably construed, permits parents to engage in home education of their children. This Court need not address the question of whether parents have the constitutional right to home educate their children since the California Education Code itself permits home education.

Importantly, the doctrine of constitutional avoidance instructs courts not only to construe statutes, when possible, so as to avoid addressing constitutional questions, but also to “construe statutes to avoid ‘constitutional infirmities.’” *Myers v. Philip Morris Cos.*, 28 Cal. 4th 828, 846-47 (Cal. 2002) (quoting *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 407-08) (1909)). As the United States Supreme Court stated in *United States v. Security Industrial Bank*, “if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity.” 459 U.S. 70, 78 (1982) (as quoted in *Curran v. Mount Diablo Council of the Boy Scouts*, 17 Cal. 4th 670, 728 (Cal. 1998) (Kennard, J., concurring)). Accordingly, California’s compulsory attendance law should not be construed in such a way that bars or severely hinders parents from home educating their children as the law, so construed, would – as discussed below – unconstitutionally interfere with parental rights to direct the religious upbringing and education of their children and to protect their children from forced government inculcation.¹

¹ In 1953, the court of appeal construed California’s state compulsory attendance law to permit parental home education under the burdensome private tutor exemption alone. *People v. Turner*, 121 Cal. App. 2d Supp. 861 (Cal. App. Dep’t Super. Ct. 1953), *appeal dismissed*, 347 U.S. 972 (1954). The *Turner* court noted that “[t]here can be no doubt that if the statute, without qualification or exception, required parents to place their children in public schools, it would be unconstitutional.” 121 Cal. App. 2d Supp. at 865. The court, however, did not address the constitutional difficulties under the Free Speech and Free Exercise Clauses explained below; nor did it apply strict scrutiny to the law, as required in this case. As such, the *Turner* court’s construction of state law cannot control here.

II. THE CALIFORNIA EDUCATION CODE, IF CONSTRUED TO PROHIBIT OR SEVERELY HINDER HOME EDUCATION, VIOLATES PARENTAL RIGHTS UNDER THE FIRST AMENDMENT'S FREE SPEECH AND FREE EXERCISE CLAUSES.

Because the law may be reasonably interpreted to *permit* home education under the private school and tutor exemptions, it should be so construed in order to save California's compulsory attendance law from constitutional infirmity. If this Court finds that California's compulsory attendance law does not permit parents to home educate their children under *both* the private school exemption and the more burdensome private tutor exemption, then this Court must also find that the law unconstitutionally interferes with the constitutional rights of parents to direct the religious upbringing of their children and to protect their children from forced government inculcation.

a. Parents have the constitutional right to home educate their children under the Free Speech Clause of the First Amendment.

The First Amendment right to free speech presupposes a right to freedom of thought. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Freedom of thought requires freedom from coercive government indoctrination. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). As the Supreme Court stated in *West Virginia Board of Education v. Barnette*,

[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

319 U.S. 624, 642 (1943). The Court reaffirmed this principle in yet another public school case, declaring that “students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.” *Tinker*, 393 U.S. at 511. “The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.” *Pierce*, 268 U.S. at 535. The First Amendment’s protection of freedom of thought thus precludes coercive government indoctrination of parents’ minor children.

In *Wooley*, the Supreme Court stated that

the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. A system which secures the right to proselytize religious, political, and ideological causes *must also guarantee the concomitant right to decline to foster such concepts*. The right to speak and the right to refrain from speaking are complementary components of the broader concept of “individual freedom of mind.”

430 U.S. at 714 (emphasis added). On this basis, the Court determined that the Free Speech Clause prohibited the state of New Hampshire from compelling its citizens to display the state motto, “Live Free or Die,” on their license plates. *A fortiori*, the Free Speech Clause prohibits the government from requiring parents to convey unwanted messages to their own children. Hence, it is unconstitutional—as *Pierce* held—to compel parents to surrender their children to government-run schools. 268 U.S. at 534-35.

It follows that California’s compulsory attendance law cannot compel students to participate in any *particular* education scheme (whether public, private or home education) without running afoul of the First Amendment, and parents have the right to protect their children from such

forced participation. A compulsory attendance law that bans home schooling – whether expressly or *de facto* – would require parents who wish to avoid the forced government indoctrination of their children either to pay the considerable sums needed to attend private school or to undertake the lengthy and cumbersome process of becoming credentialed tutors. Imposition of such heavy burdens would infringe the Free Speech rights of parents outlined above and would thus be subject to strict scrutiny analysis. As discussed below, while California’s interest in ensuring universal mandatory education of its citizens is indeed compelling, it is not – as *Pierce* illustrates – sufficiently compelling to override parents’ First Amendment right to protect their children from compelled government indoctrination. Moreover, the compulsory attendance law, construed to prohibit home education except under the private tutor exemption, is certainly not the least restrictive means of ensuring that the citizens of California are well-educated. Private schools are already permitted to operate without requiring their teachers to undergo the burden of obtaining a valid state teaching credential. As the *Yoder* Court acknowledged, states have the power to “impose *reasonable* regulations for the control and duration of basic education.” *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). Accordingly, California has the power to reasonably regulate home education to ensure that children are well-educated. This power to *regulate*, however, does not constitute the power to outlaw or excessively *burden*, particularly in light of the First Amendment interests that would be implicated by such a decision.

b. Parents have the constitutional right to home educate their children under the Free Exercise Clause of the First Amendment.²

In *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce*, 268 U.S. 510, the United States Supreme Court recognized that parents have a right to direct the upbringing and education of their children. In the seminal parental rights case that followed some fifty years later, the Supreme Court expressly found that parental rights are protected under the Free Exercise Clause of the federal Constitution. *Yoder*, 406 U.S. 205. In *Yoder*, the Court determined that because parents have a right to direct the *religious* upbringing of their children, parental choice of education necessarily constitutes a form of religious exercise and is thus shielded by the Free Exercise Clause against unjustified governmental interference. In light of the principles articulated in *Yoder*, as well as *Meyer* and *Pierce*, every parent residing within the borders of California has a right to choose the means of education, including home education, for his or her child, and that

² Parents in California have an independent *state* constitutional right to home educate their children under California's free exercise clause, Cal. Const., art. I, § 4, and such right is "not dependent on those guaranteed by the United States Constitution," Cal. Const., art. I, § 24. The California compulsory attendance law, construed to prohibit or severely hinder home schooling, would be subject to strict scrutiny review under the California free exercise clause. See *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527, 562 (Cal. 2004) ("We therefore review Catholic Charities' challenge . . . under the free exercise clause of the California Constitution in the same way we might have reviewed a similar challenge under the federal Constitution after *Sherbert*, [] 374 U.S. 398, 83 S.Ct. 1790 [(1963)], and before *Smith*, [] 494 U.S. 872, 110 S.Ct. 1595 [(1990)]."); see also *id.* at 585 (*Smith* "does not control our interpretation of the state Constitution's free exercise clause."). Article I, Section 4 of the California Constitution and the California Supreme Court's independent interpretation and application of strict scrutiny under the state's free exercise clause are further discussed in the briefs of other *amici*, namely Seventh Day Adventist Church State Council.

right is guaranteed and protected by the Free Exercise Clause of the First Amendment.

In *Yoder*, the Supreme Court upheld the Free Exercise claim of Amish parents convicted for violating Wisconsin's compulsory attendance law because, pursuant to their religious beliefs, they did not send their children to public high school, but instead educated them within the Amish community after they completed the eighth grade. While the Court acknowledged that a state certainly has the important responsibility to educate its citizens and thus has the power to "impose reasonable regulations for the control and duration of basic education," *id.* at 213, it explained that

a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children . . .

Id. at 214. Indeed, the Court found that, in the face of a legitimate religious belief prohibiting public school attendance beyond the eighth grade, the only way in which Wisconsin could lawfully compel adherents of that belief to attend public high school would be if there were "a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." *Id.* at 214. The Court explained that "[o]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion," *id.* at 215. Based on the evidence presented in the record, the Court found that enforcement of the state's compulsory attendance law against the Amish would "gravely endanger if not destroy the free exercise of [their] religious beliefs." *Id.* at 219. Accordingly, the Court found that Wisconsin's asserted interest in universal compulsory education, though important, could not

overbalance the Free Exercise claims of the Amish parents convicted under the state compulsory public school attendance law.

Like the Amish parents in *Yoder*, California parents have a Free Exercise right to direct the religious upbringing and education of their children. While California undoubtedly has an important, if not compelling, interest in universal compulsory public education, it simply may not prohibit parents from choosing to home educate their child – a choice upheld in *Yoder* as religious exercise – without justifying its capacity to do so under the Free Exercise Clause.

- i. Prohibiting or severely hindering the practice of home education in California would unconstitutionally infringe upon the Free Exercise rights of parents.

The government violates the Free Exercise Clause when a law that is not neutral and generally applicable substantially burdens an individual's religious exercise and fails to further a compelling governmental interest in the least restrictive means. *Employment Division v. Smith*, 494 U.S. 872, 878-80 (1990). If the California compulsory attendance law is construed to permit parents to home school under the private tutor exemption, but not under the private school exemption, then parents would have to meet the teacher credentialing requirement for such tutors. But those burdensome requirements are not generally applicable: they do not apply to teachers in private schools. Private school teachers need only be "persons capable of teaching."

As stated, the California Education Code requires minor children to be enrolled in a public full-time day school. Cal. Educ. Code § 48200 *et seq.* Minor children are exempted from this law if they are instead enrolled in a private full-time day school or qualify for another exemption under the Code such as receiving instruction from a private tutor. *Id.* Under this

compulsory attendance exemption, private school teachers need only be “persons capable of teaching.” Cal. Educ. Code § 48222. Private tutors, however, must obtain a valid state teaching credential for each grade taught. Cal. Educ. Code § 48224. If this Court finds that California’s compulsory attendance law, as articulated in the California Education Code, only permits home schooling under the private tutor exemption, then the law is not a neutral law *of general applicability*. Under that interpretation, parents exercising their right to direct the religious upbringing and education of their children through home education would be required to shoulder the heavy burden of teacher credentialing, but that requirement is not generally applicable as it does not apply to teachers in private schools.³

If interpreted to prohibit home schooling except under the private tutor exemption, California’s compulsory attendance law would substantially burden home school parents’ Free Exercise rights by requiring

³ While the *Turner* court determined that the stricter standards required for private commercial tutors – as opposed to private school teachers – were not arbitrary or unreasonable, 121 Cal. App. 2d Supp. at 867, the *Turner* court did not apply strict scrutiny. Here, the statutory standards must survive strict scrutiny analysis. As the *Yoder* Court held:

A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion. The Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise.

406 U.S. at 220-21 (emphasis added). The *Smith* Court did not purport to overrule *Yoder*; rather, it explained *Yoder* as an application of combined Free Exercise and parental rights—precisely the context here. Thus, even if the teacher credentialing requirement were generally applicable – which it clearly is not – *Yoder* would still require strict scrutiny.

them to obtain a valid state teaching credential for every grade to be taught at home. The process for obtaining a valid state teaching credential is a cumbersome and time-consuming process that is required for state-run school teachers, but is not similarly required for private school teachers. *See, e.g.,* Commission on Teacher Credentialing, Multiple Subject Teaching Credential, <http://www.ctc.ca.gov/credentials/leaflets/cl561c.pdf> (last visited May 15, 2008). Because tutors qualifying to teach under the private tutor exemption follow the same credentialing requirements as public school teachers, a brief overview of those requirements demonstrates the substantial burden that would be imposed upon parents desiring to home educate their children if the compulsory attendance law is construed to permit home schooling only under the private tutor exemption.

To teach in public schools, a teacher must obtain a Multiple Subject Teaching Credential (MSTC), which includes first obtaining a five-year preliminary credential and then obtaining a “clear credential” if the teacher wishes to continue teaching after the expiration of the five-year credential. The requirements for obtaining a preliminary credential include the following: (1) completing a baccalaureate degree; (2) satisfying a basic skills exam; (3) completing a multiple subject teacher preparation program that includes student teaching; (4) pass a subject matter competence exam or, if applicable, complete a subject matter program; (5) pass the Reading Instruction Competence Assessment; (6) complete a comprehensive reading instruction course, which covers (a) the systematic study of phonemic awareness, phonics, and decoding, (b) literature, language and comprehension, and (c) diagnostic and early intervention techniques; (7) complete a year-long course on the federal Constitution (or pass an exam given by an accredited college or university); and (8) complete foundational computer technology course work that includes general and specialized skills in the use of computers in educational settings. *Id.* Upon completing

these requirements, and prior to the expiration of the five-year preliminary credential, individuals wishing to obtain the clear credential must complete one of three requirements: (1) complete a Professional Teacher Induction Program; (2) complete a fifth year of study at a California college or university; or (3) receive certification by National Board of Teaching Standards. *Id.* There can be no question that requiring parents to meet the foregoing obligations before they can teach their own children substantially burdens their Free Exercise rights to direct the religious upbringing and education of their children. To impose such obligations on individuals wishing to engage in private commercial tutorial instruction is one thing; to impose them on parents wishing to home educate their children is quite another and, in light of the rights recognized in *Yoder*, must be justified by a compelling government interest and be the least restrictive means of furthering that interest.

While the California state government's interest in ensuring "the general diffusion of knowledge and intelligence" by encouraging by "all suitable means the promotion of intellectual, scientific, moral and agricultural improvement," Cal. Const. art IX, sec. 1, may be compelling, substantially burdening the religious practice of home education by requiring that home school parents obtain a valid state teaching credential for every grade taught at home is in no way the least restrictive means of furthering that interest. This point is underscored by the fact that California's compulsory attendance law, as an outgrowth of the State's interest in ensuring the general diffusion of knowledge and intelligence amongst its citizens, permits private institutional instruction without requiring those providing the instruction to undergo such a cumbersome and time-consuming process before being legally qualified to teach. As previously explained, the law merely requires instructors to speak English and be persons capable of teaching. The State itself has thus demonstrated

that prohibiting private home instruction except under the private tutor exemption would not be the least restrictive means of ensuring the general diffusion of knowledge and intelligence amongst its citizens.

- ii. The California state government would not violate the Establishment Clause by permitting an exemption from state compulsory attendance laws based on the religious exercise of home education.

Like the exemption permitted to the Amish parents in *Yoder*, an exemption for home school parents under the California compulsory attendance law would not violate the Establishment Clause. The *Yoder* Court upheld the exemption afforded to the Amish for three reasons. First, the accommodation of their religious beliefs did not qualify as sponsorship or active involvement with religion. Second, the exemption's purpose and effect did not support, favor, advance or assist the Amish, but merely allowed a religious society to operate without the heavy impediment that compliance with the compulsory attendance law would impose. Finally, the exemption reflected government *neutrality* in the face of religious differences and did not represent the impermissible entanglement of government with religion. *Yoder*, 406 U.S. at 235 n.22 (citing *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970); *Sherbert v. Verner*, 374 U.S. 398, 409 (1963)).

Similarly, permitting parents to home school under the private school exemption cannot be fairly characterized as sponsorship of or active involvement in religious affairs. Additionally, the purpose and effect of such an exemption would not be to support, favor, advance, or assist home school parents, but would allow the truly centuries-old practice of home education (certainly one that pre-dated California's compulsory public school attendance law) to survive free from the heavy impediment which

compliance with the state compulsory attendance law would impose. And finally, like the exemption in *Yoder*, an accommodation for home school parents would reflect nothing more than the governmental obligation of neutrality in the face of religious differences since the exemption, if construed otherwise, would specifically target and burden the religious practice of home education.

c. Parents have the constitutional right to home educate their children under the hybrid rights theory articulated in Employment Division v. Smith.

Even if the California compulsory attendance law were a neutral law of general applicability, the law would nevertheless be subject to strict scrutiny analysis under the Free Exercise Clause because, as *Smith* recognized, parents' constitutional rights to direct their children's education form a hybrid of rights under both the Free Exercise and Free Speech Clauses of the First Amendment. 494 U.S. at 881-82. In *Smith*, the Supreme Court found that the "First Amendment bars application of a neutral, generally applicable law to religiously motivated action" when the law implicates the Free Exercise Clause *and* "other constitutional protections, such as freedom of speech and of the press." *Id.* at 881. While the California state courts have yet to apply the hybrid rights doctrine to a Free Exercise claim, it should be noted that the Ninth Circuit has held that the hybrid rights doctrine applies when a "colorable constitutional claim" accompanies a free exercise violation. *Miller v. Reed*, 176 F.3d 1202 (9th Cir. 1999). And while the decisions of the lower federal courts interpreting federal law are certainly not binding on California state courts, *Tiffany A. v. Superior Court*, 150 Cal. App. 4th 1344, 1359-1360 (Cal. Ct. App. 2007), they are indeed "persuasive and entitled to great weight," *People v. Bradley*, 1 Cal. 3d 80, 86 (Cal. 1969).

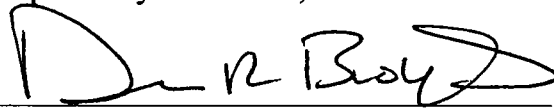
As discussed *supra*, California's compulsory attendance law, if construed to prohibit home education except under the private tutor exemption, undoubtedly implicates parental rights under both the Free Exercise Clause and the Free Speech Clause. As such, the law would be required to pass strict scrutiny—a burden which, as demonstrated, the law simply cannot shoulder.

CONCLUSION

In light of the foregoing, this Court should construe the California Education Code provisions at issue to permit home education under both the private school and private tutor exemptions. Alternatively, if the Court construes such provisions to permit home education only under the private tutor exemption, the Court should find that the California Education Code unjustifiably and unconstitutionally infringes upon parental rights under the Free Exercise and Free Speech Clauses of the First Amendment.

Dated: May 16, 2008

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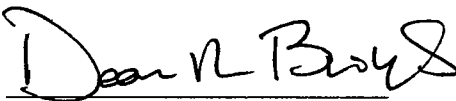
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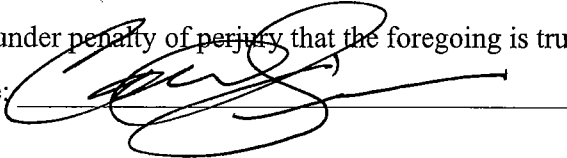
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