No. 24-394

IN THE

Supreme Court of the United States

OKLAHOMA STATEWIDE
CHARTER SCHOOL BOARD, *et al.*,

Petitioners,

v.

GENTNER DRUMMOND, ATTORNEY GENERAL
OF OKLAHOMA, *ex rel.* OKLAHOMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OKLAHOMA

BRIEF OF OKLAHOMA GOVERNOR J. KEVIN STITT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

TREVOR S. PEMBERTON
Counsel of Record
Special Counsel
AUDREY A. WEAVER
Deputy General Counsel
OFFICE OF OKLAHOMA GOVERNOR
J. KEVIN STITT
2300 North Lincoln Boulevard,
Suite 212
Oklahoma City, OK 73105
(405) 521-2342
trevor.pemberton@gov.ok.gov

Counsel for Amicus Curiae

120106

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CONTENTS. i

TABLE OF CITED AUTHORITIES iii

INTERESTS OF *AMICUS* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. EXCLUDING RELIGIOUS ENTITIES FROM SCHOOL CHARTERS UNDERMINES THE STATE'S INTERESTS IN EDUCATION AND PARENTAL CHOICE 5

II. THE OKLAHOMA SUPREME COURT'S EXCLUSION OF ST. ISIDORE FROM THE PUBLIC BENEFIT OF A SCHOOL CHARTER VIOLATES THE FREE EXERCISE CLAUSE AND CANNOT WITHSTAND STRICT SCRUTINY 10

A. Strict scrutiny applies to the Oklahoma Supreme Court's exclusion of St. Isidore from the generally available benefit of a school charter solely because of its religious character 11

B. State law cannot harbor the Oklahoma Supreme Court's infringement of free exercise of religion 12

Table of Contents

Page

C. The Oklahoma Supreme Court's religious discrimination against St. Isidore is not justified by the Establishment Clause. 15

CONCLUSION 23

TABLE OF CITED AUTHORITIES

Page

Cases

Bd. of Ed. for Indep. Sch. Dist. No. 52 v. Antone,
1963 OK 165, 384 P.2d 911 15

Brown v.
Bd. of Ed. of Topeka, Shawnee Cnty., Kan.,
347 U.S. 483 (1954) 5, 14

Carson as next friend of O. C. v. Makin,
596 U.S. 767 (2022) 10, 13, 17, 18, 19, 20

City of Detroit v. Murray Corp. of Am.,
355 U.S. 489 (1958) 18

Espinoza v. Mont. Dep't of Revenue,
591 U.S. 464 (2020) 3, 4, 5, 10, 11, 12, 13, 14, 21, 22

Everson v. Bd. of Ed. of Ewing Twp.,
330 U.S. 1 (1947) 15

Kennedy v. Bremerton Sch. Dist.,
4 F.4th 910 (9th Cir. 2021) 19

Kennedy v. Bremerton Sch. Dist.,
597 U.S. 507 (2022) 15, 16, 17, 19

Larson v. Valente,
456 U.S. 228 (1982) 19

Cited Authorities

Page

Lee v. Weisman,
505 U.S. 577 (1992) 16, 17

Locke v. Davey,
540 U.S. 712 (2004) 3, 20

Logiodice v. Trustees of Maine Cent. Inst.,
296 F.3d 22 (1st Cir. 2002) 22

Manhattan Cmty. Access Corp. v. Halleck,
587 U.S. 802 (2019) 18, 20

Meyer v. Nebraska,
262 U.S. 390 (1923) 5

Mitchell v. Helms,
530 U.S. 793 (2000) 19

Pierce v. Soc'y of Sisters,
268 U.S. 510 (1925) 2

Polk County v. Dodson,
454 U.S. 312 (1981) 18

Prescott v. Okla. Capitol Preservation Comm'n,
2015 OK 54, 373 P.3d 1032 15

Rendell-Baker v. Kohn,
457 U.S. 830 (1982) 18, 21, 22

Page

Shurtleff v. City of Bos., Mass.,
596 U.S. 243 (2022). 15, 17, 19, 20

Town of Greece v. Galloway,
572 U.S. 565 (2014) 15

Trinity Lutheran Church of Columbia, Inc. v. Comer,
582 U.S. 449 (2017) 10, 11, 12

Van Orden v. Perry,
545 U.S. 677 (2005) 15

West v. Atkins,
487 U.S. 42 (1988). 18, 21

Zelman v. Simmons-Harris,
536 U.S. 639 (2002). 7, 17

Constitutional Provisions

U.S. Const. amend. I 2

U.S. Const. amend. XIV 13

U.S. Const. art. VI, cl.2 13

Okla. Const. art. I, § 1 . . . . . .1, 13

Okla. Const. art. I, § 5 . . . . . .7, 13, 14

Page

OKLA. CONST. art. II, § 5 . . . . . 13, 15

OKLA. CONST. art. VI, §§ 2, 8. 1

Statutes, Rules and Regulations

70 O.S. §§ 3-130 *et al.* 8

70 O.S. § 3-132.2(C)(1) 18

70 O.S. § 3-134(C). 20

70 O.S. § 3-136(A). 20

70 O.S. § 3-136(A)(2) 13

70 O.S. § 3-136(A)(8) 20

70 O.S. § 3-136(A)(9) 17

70 O.S. § 3-136(B). 20

70 O.S. § 3-140(A). 17

70 O.S. § 3-140(E) 17

OKLA. ADMIN. CODE 777:10-3-4(b). 20

Supreme Court Rule 37 1

Page

Other Authorities

Attorney General Drummond comments on St. Isidore filing (Oct. 7, 2024), https://tinyurl.com/pp5h28pp 3

Becket Fund for Religious Liberty, *Religious Freedom Index* 8 (5th ed. Jan. 2024), https://tinyurl.com/yc5ndb5b 9

Drummond asks U.S. Supreme Court to protect parental rights (Jul. 23, 2024), https://tinyurl.com/2t3usdwf 3

Drummond files brief in support of religious liberty before U.S. Supreme Court (Jul. 8, 2024), https://tinyurl.com/4ecp5m27 3

Drummond remarks on actions of Oklahoma Charter School Board (Jul. 10, 2024), https://tinyurl.com/2wa7nuwy 3

Gaston Litton, *History of Oklahoma at the Golden Anniversary of Statehood Vol. II* 241–52 (Lewis Historical Publishing Co., Inc. 1957), https://tinyurl.com/4a6ue2cc 6, 21, 22

Gov'r Charles Haskell, *1909 State of the State Address* (Jan. 5, 1909), https://tinyurl.com/5cpmbkjc 8

Cited Authorities

Page

Gov'r Frank Keating, *1998 State of the State Address* (Feb. 2, 1998), https://tinyurl.com/24r6cer7. 2

Gov'r Henry Bellmon, *1989 State of the State Address* (Jan. 3, 1989), https://tinyurl.com/3837u922 1

Gov'r Kevin Stitt, *2023 State of the State Address* (Feb. 6, 2023), https://tinyurl.com/2rbcu75j. 2

Gov'r Kevin Stitt, *2024 State of the State Address* (Feb. 5, 2024), https://tinyurl.com/bdcfmw3t. 2

Governor Stitt Celebrates Final Passage of Transformative School Choice Bill (May 2, 2023), https://tinyurl.com/mu4j8axc 1

L.W. Baxter, *Sixth Biennial Report of the Territorial Superintendent of Public Instruction* (Dec. 1, 1902), https://tinyurl.com/awy4tt8w 7

Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part i: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105 (2003) 21, 22

Okla. Hist. Soc'y, *Oklahoma Education*, https://www.okhistory.org/learn/education. 6

Page

Okla. State Dep't of Educ., *Oklahoma Charter School Report 2023*, https://tinyurl.com/4ydnjwmj 8, 9

Okla. State Dep't of Educ., *Oklahoma Public Schools Fast Facts 2021-22* (updated Jan. 2022), https://tinyurl.com/47n5a49u 8

Okla. State Leg., *Bill Information for S.B. 368* (2021), https://tinyurl.com/48byj568. 1

Paul E. Peterson & M. Danish Shakeel, *The Nation's Charter Report Card*, Educ. Next (2024), https://tinyurl.com/288cvhfh 9

Private Sch. Rev., *Best Oklahoma Religiously Affiliated Private Schools (2024-25)*, https://tinyurl.com/k3xvnjtk. 6

Public Sch. Rev., *Top 10 Best Oklahoma Charter Public Schools (2024-25)*, https://tinyurl.com/3hs2m7d5 8

Public Sch. Rev., *Top 10 Best Oklahoma Public Schools (2024-25)*, https://tinyurl.com/t96v7vfd 6, 8

SJR 18, State Question 526, Legislative Referendum 220 (Nov. 7, 1978), https://www.sos.ok.gov/documents/questions/526.pdf 14

Page

Thomas Elton Brown, *Bible Belt Catholicism: A History of the Roman Catholic Church in Oklahoma, 1905-1945* (1977). 14

U.S. Dep't of Educ., ED409-621, *A Study of Charter Schools, First-Year Report Executive Summary* (May 1997) 8

U.S. Dep't of Educ., *Preserving a Critical National Asset: America's Disadvantaged Students and the Crisis in Faith-based Urban Schools* (Sept. 2008), https://tinyurl.com/mtpfvsjv. 6

William H. Jeynes, *Religion, A Meta-Analysis on the Effects and Contributions of Public, Public Charter, and Religious Schools on Student Outcomes*, 87.3 Peabody J. of Educ. 305 (2012) 7

INTERESTS OF *AMICUS*

Amicus J. Kevin Stitt is the Governor of the State of Oklahoma.[1] As Oklahoma's "Chief Magistrate" vested with "[t]he Supreme Executive power[,]" Governor Stitt has a sworn duty to "cause the laws of the State to be faithfully executed" and uphold "the supreme law of the land"—the U.S. Constitution. OKLA. CONST. art. VI, §§ 2, 8; OKLA. CONST. art. I, § 1. Governor Stitt has a duty to protect the rights of all Oklahomans, and to advocate for the interests of Oklahomans. Having served as Oklahoma's Governor for over five years, Governor Stitt's unique experience renders him acutely attuned to those interests.

The State of Oklahoma is steadfast in her support of religious liberty for all and an innovative educational system that expands choice for all.[2] For over 30 years, Oklahoma Governors have supported parental school choice.[3] The reason is simple: Oklahoma's "greatest asset

1. As required by Supreme Court Rule 37, *Amicus* states that no counsel for a party authored this brief in whole or in part, no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, no person other than *Amicus* or his counsel made such a monetary contribution, and counsel of record received timely notice of intent to file this brief.

2. *See*, *e.g.*, OKLA. STATE LEG., *Bill Information for S.B. 368* (2021), https://tinyurl.com/48byj568 (passing the Oklahoma Religious Freedom Act with a supermajority vote); *Governor Stitt Celebrates Final Passage of Transformative School Choice Bill* (May 2, 2023), https://tinyurl.com/mu4j8axc.

3. *See*, *e.g.*, Gov'r Kevin Stitt, *2023 State of the State Address* (Feb. 6, 2023), https://tinyurl.com/2rbcu75j; Gov'r Henry Bellmon, *1989 State of the State Address* (Jan. 3, 1989), https://tinyurl.com/3837u922 ("We are proposing that parents be given greater

isn't our oil and gas—It's not our football teams—It's not the aerospace and defense industry. It's our kids." Gov'r Kevin Stitt, *2023 State of the State Address* (Feb. 6, 2023), https://tinyurl.com/2rbcu75j. And Oklahomans know that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925); *see also* Gov'r Kevin Stitt, *2024 State of the State Address* (Feb. 5, 2024), https://tinyurl.com/bdcfmw3t ("[W]e know God gave kids to parents, not to the government."). Accordingly, Governor Stitt is committed to ensuring that all Oklahoma parents, regardless of religious affiliation, have access to a diverse array of high-quality schooling options that allow them to make choices based on what is best for their children.

Today, Governor Stitt adds his voice in support of Petitioners, the Oklahoma Statewide Charter School Board ("Board"), and those urging this Court to correct the decision below that excluded St. Isidore from a school charter *solely* because it is a religious, Catholic institution. The decision below violates the Free Exercise Clause of the First Amendment and sanctions open religious discrimination in the distribution of an otherwise equally available public benefit.

---

flexibility to determine which schools their children will attend, thus providing access to educational excellence by allowing more parental choice."); Gov'r Frank Keating, *1998 State of the State Address* (Feb. 2, 1998), https://tinyurl.com/24r6cer7 ("Parents and students are the ultimate consumers of education. Why do we continue to deny them free choice? This year, let's pass a workable school choice bill and give the green light to charter schools.").

Governor Stitt is compelled to speak on behalf of Oklahomans through this Brief because the Oklahoma Attorney General ("OAG") has deprived them of a true advocate by launching this attack against their religious liberty and educational freedom. Revealingly, the OAG has repeatedly justified the discriminatory exclusion of a Catholic institution from the benefit of a school charter with intolerance and open hostility toward other religions.[4] All while urging this Court to grant other petitions for certiorari "to stand up for the fundamental rights of parents to care and protect their children"[5] and to correct the denial of a public benefit to "a Jewish synagogue[ ] . . . simply because it is religious[.]"[6]

The OAG's open hostility against religion proves that a "trendy disdain for deep religious conviction" lives on amongst some that appear before this Court. *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 495 (2020) (Thomas, J., concurring) (quoting *Locke v. Davey*, 540 U.S. 712, 733 (2004) (Scalia, J., dissenting)). The OAG was not the

---

4. *See, e.g.*, *Attorney General Drummond comments on St. Isidore filing* (Oct. 7, 2024), https://tinyurl.com/pp5h28pp (warning that St. Isidore's school charter would "open the floodgates and force taxpayers to fund all manner of religious indoctrination, including radical Islam or even the Church of Satan."); *Drummond remarks on actions of Oklahoma Charter School Board* (Jul. 10, 2024), https://tinyurl.com/2wa7nuwy (characterizing the Board as "recklessly committed to using our tax dollars to fund radical religious teachings like Sharia law.").

5. *Drummond asks U.S. Supreme Court to protect parental rights* (Jul. 23, 2024), https://tinyurl.com/2t3usdwf.

6. *Drummond files brief in support of religious liberty before U.S. Supreme Court* (Jul. 8, 2024), https://tinyurl.com/4ecp5m27.

first to perpetuate this open hostility toward religion, and likely will not be the last. But granting certiorari in this case will go a long way toward eliminating the unfortunate disdain for religion that still plagues this great Nation, cloaked by its exponents under the cover of the Establishment Clause. Until then, and "[s]o long as this hostility remains, fostered by [a] distorted understanding of the Establishment Clause, free exercise rights will continue to suffer." *Id.* at 496.

SUMMARY OF ARGUMENT

I. Excluding religious entities from school charters undermines the State's interests in education and parental school choice. Religious charter schools will provide an invaluable public benefit to Oklahoma students, parents, and educators. Charter schools combine the best elements of the existing educational systems: the public funding and equal opportunity of the traditional public school and the flexibility and autonomy of the private school. These characteristics allow charter schools the unique ability to innovate, motivating both the public and private systems to improve. At the same time, faith-based schools consistently out-perform their counterparts in academic achievement, contribute to moral development, and allow parents to pass down important religious and cultural traditions. Allowing religious institutions the generally available public benefit of a school charter will bolster educational opportunities, educational diversity, and parental school choice.

II. The Oklahoma Supreme Court's discriminatory exclusion of St. Isidore from a school charter based solely on its religious status violates the Free Exercise Clause

and cannot withstand strict scrutiny. State law neither compels nor justifies this infringement of free exercise. When the Oklahoma Attorney General invited the court "to apply a state law no-aid provision to exclude religious schools from the program, it was obligated by the Federal Constitution to reject the invitation." *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 487–88 (2020). Nor does the Establishment Clause provide a compelling interest that satisfies strict scrutiny. Had the Oklahoma Supreme Court properly applied this Court's precedents, it would have correctly concluded that granting St. Isidore a school charter does not bear any of the hallmark traits of establishments of religion.

ARGUMENT

I. Excluding religious entities from school charters undermines the State's interests in education and parental choice.

In 1954, this Court recognized in its landmark *Brown v. Board of Education* decision that education "is the very foundation of good citizenship[,]" and the "principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." 347 U.S. 483, 493 (1954). Denying a child the opportunity of an education denies that child any reasonable expectation of success in life. *Id.*; *see also Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) ("The American people have always regarded education and acquisition of knowledge as matters of supreme importance"). Aware of the invaluable benefit of an education, Oklahoma has consistently strived to foster an array of K-12 educational choices for parents.

One educational choice with the deepest roots is the religious school. Long before the introduction and ubiquity of the common (or "public") school system in the State of Oklahoma, faith-based mission schools served a critical role in educating the children of the Twin Territories.[7] By the mid-to-late 1800s, the Presbyterians, Baptists, Methodists, and Catholics all operated Christian mission schools in the Indian Territory.[8] Today, religious schools educate approximately 35,000 Oklahoma students a year, representing 4.83% of all K-12 enrollment.[9]

Faith-based schools "are part of our Nation's proud story of religious freedom and tolerance, community development, immigration and assimilation, academic achievement, upward mobility, and more."[10] Faith-based schools "enable parents to pass down religious and cultural traditions important to their families and communities."[11] In addition, scholars and Justices have long observed

---

7. *See* Gaston Litton, *History of Oklahoma at the Golden Anniversary of Statehood Vol. II* 241–52 (Lewis Historical Publishing Co., Inc. 1957), https://tinyurl.com/4a6ue2cc; Okla. Hist. Soc'y, *Oklahoma Education*, https://www.okhistory.org/learn/education.

8. *Id.*

9. Private Sch. Rev., *Best Oklahoma Religiously Affiliated Private Schools (2024-25)*, https://tinyurl.com/k3xvnjtk; Public Sch. Rev., *Top 10 Best Oklahoma Public Schools (2024-25)*, https://tinyurl.com/t96v7vfd.

10. U.S. Dep't of Educ., *Preserving a Critical National Asset: America's Disadvantaged Students and the Crisis in Faith-based Urban Schools* 1 (Sept. 2008), https://tinyurl.com/mtpfvsjv.

11. *Id.* at 6.

a positive correlation between faith-based schools and educational outcomes.[12]

Public schools, too, have long been a critical educational option for Oklahoma families. Before Statehood, the superintendent of the Oklahoma Territory recognized:

> The public school is the university of the masses; upon it depends the education of the future man, the citizen. That our people realize its immense importance is plainly demonstrated by their generous financial support and personal interest in this institution. . . . The school is not merely a preparation for life; "it is life itself." It develops the intellect, inspires higher ideals, greater ambitions, and loftier conceptions of life, thus building character and fitting individuals for complete living.[13]

Upon statehood, Oklahoma's founders turned that belief into a promise of free public education for all children. *See* Okla. Const. art. I, § 5 (1907). From

---

12. *See id.* at 7–8; William H. Jeynes, *Religion, A Meta-Analysis on the Effects and Contributions of Public, Public Charter, and Religious Schools on Student Outcomes*, 87.3 Peabody J. of Educ. 305, 324 (2012) ("students who attend religious schools perform better than their counterparts who are in public schools. They achieve better both in terms of academic and behavioral outcomes."); *Zelman v. Simmons-Harris*, 536 U.S. 639, 681 (2002) (Thomas, J., concurring) ("Religious schools, like other private schools, achieve far better educational results than their public counterparts.").

13. L.W. Baxter, *Sixth Biennial Report of the Territorial Superintendent of Public Instruction* 12-13 (Dec. 1, 1902), https://tinyurl.com/awy4tt8w.

there, Oklahoma's common school system was born.[14] Today, Oklahoma's public school system educates over 700,000 students a year, representing 94% of total K-12 enrollment.[15] Approximately 56% of those students come from economically disadvantaged households.[16]

In the early 1990s, an alternative educational choice to private and public schools rose to prominence in the United States: charter schools. Charter schools seek to combine the best elements of each educational system—the public funding and equal opportunity of the public school and the flexibility and autonomy of the private school.[17] These unique characteristics allow charter schools the freedom to innovate, "creat[ing] pressure on local and state public education systems to operate differently" and "acting as a catalyst for changing public education across the nation."[18] Oklahoma cleared the way for charter schools in 1999 with the passage of the Oklahoma Charter Schools Act ("Act"). *See* H.B. 1759, 1999 O.S.L. 320 (codified at 70 O.S. §§ 3-130 *et al.*). Today, charter schools serve over 50,000 students, representing 7.2% of total K-12 enrollment.[19]

---

14. *See* Gov'r Charles Haskell, *1909 State of the State Address* (Jan. 5, 1909), https://tinyurl.com/5cpmbkjc.

15. *See* Public Sch. Rev., *supra* n.9; Okla. State Dep't of Educ., *Oklahoma Public Schools Fast Facts 2021-22* 10 (updated Jan. 2022), https://tinyurl.com/47n5a49u.

16. Oklahoma Public Schools Fast Facts, *supra* n.15 at 30.

17. U.S. Dep't of Educ., ED409-621, *A Study of Charter Schools, First-Year Report Executive Summary* 1 (May 1997).

18. *Id.*

19. Public Sch. Rev., *Top 10 Best Oklahoma Charter Public Schools (2024-25)*, https://tinyurl.com/3hs2m7d5; Okla. State

Oklahoma charter schools lead the Nation in academic excellence.[20]

Combining the moral grounding, community ethic, and academic rigor of a faith-based school with the innovation, flexibility, and public access of a charter school will expand educational opportunities and strengthen educational outcomes. The availability of religious charter schools will allow students and teachers to thrive in educational environments that support their unique needs and preferences. It will also allow communities to profit from increased stability and social engagement, and the State to strengthen accountability and spark positive change among all educational systems. Perhaps more importantly, the availability of religious charter schools will help alleviate wide-spread parental concern over school content they find morally objectionable—all without the crippling financial burden of tuition.[21] On the other hand, excluding religious entities, and only religious entities, from school charters will leave appreciable damage to the State's interest in education and parental school choice.

DEP'T OF EDUC., *Oklahoma Charter School Report 2023* 10, https://tinyurl.com/4ydnjwmj.

20. Paul E. Peterson & M. Danish Shakeel, *The Nation's Charter Report Card*, EDUC. NEXT 26–28 (2024), https://tinyurl.com/288cvhfh.

21. *See* BECKET FUND FOR RELIGIOUS LIBERTY, *Religious Freedom Index* 8 (5th ed. Jan. 2024), https://tinyurl.com/yc5ndb5b ("67% of Americans agreed that parents should be able to opt their children out of school content that parents found morally objectionable . . . and 74% agreed with curriculum opt outs for reasons of faith or age-appropriateness concerns.").

II. The Oklahoma Supreme Court's exclusion of St. Isidore from the public benefit of a school charter violates the Free Exercise Clause and cannot withstand strict scrutiny.

This Court has repeatedly instructed that "an interest in separating church and state more fiercely than the Federal Constitution . . . cannot qualify as compelling in the face of the infringement of free exercise." *Carson as next friend of O. C. v. Makin*, 596 U.S. 767, 781 (2022) (cleaned up). In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 466 (2017), this Court explained that a State interest in "skating as far as possible from religious establishment concerns" was not sufficiently compelling "[i]n the face of the clear infringement on free exercise[.]" In *Espinoza v. Montana Department of Revenue*, 591 U.S. 464, 485 (2020), this Court reiterated that ""[a] State's interest 'in achieving greater separation of church and State than is already ensured under the Establishment Clause . . . is limited by the Free Exercise Clause.'" (citation omitted). And in *Carson*, this Court stressed that "[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." 596 U.S. at 781.

Those instructions continue to be ignored. In the decision below, the Oklahoma Supreme Court treads the same worn path as the Missouri Department of Natural Resources (*Trinity Lutheran*), the Montana Supreme Court (*Espinoza*), and the Maine Department of Education (*Carson*) by invoking the Establishment Clause to exclude yet another religious entity from yet another generally available public benefit *solely* because of its

religious character. This Court should grant certiorari to cure this blatant constitutional error.

A. Strict scrutiny applies to the Oklahoma Supreme Court's exclusion of St. Isidore from the generally available benefit of a school charter solely because of its religious character.

Excluding an organization from "a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest 'of the highest order.'" *Trinity Lutheran*, 582 U.S. at 458 (citation omitted); *see also id.* at 462. As it was with the scholarship program in *Espinoza* and the tuition assistance program in *Carson*, the charter school exclusion here "bars religious schools from public benefits solely because of the religious character of the schools." *Espinoza*, 591 U.S. at 476.

The Oklahoma Supreme Court made no secret it denied St. Isidore a school charter because St. Isidore is a "religious school" or "Catholic School." App.5a, 9a, 17a, 25a–27a. The court explained St. Isidore would "establish and operate the school as a Catholic school[,]" "is an instrument of the Catholic church, operated by the Catholic church, and will further the evangelizing mission of the Catholic church in its educational programs." App.9a, 13a. It repeatedly emphasized that "St. Isidore . . . is a religious institution" with a mission "[t]o create, establish, and operate' the school as a Catholic school." App.7a; *see also* App.9a ("St. Isidore warrants that it is affiliated with a nonpublic sectarian school or religious institution."); App.15a ("There is no question that

St. Isidore is a sectarian institution and will be sectarian in its programs and operations."). Like the Montana Supreme Court in *Espinoza*, Oklahoma relied on state constitutional provisions "which prohibit the State from using public money for the establishment of a religious institution." *Compare* App.9a *with Espinoza*, 591 U.S. at 476; *see also* App.13a ("The expenditure of state funds for St. Isidore's operations constitutes the use of state funds for the benefit and support of the Catholic church.").[22] Thus, St. Isidore was excluded from the public benefit solely because of its religious status, and strict scrutiny applies.[23]

B. State law cannot harbor the Oklahoma Supreme Court's infringement of free exercise of religion.

The Oklahoma Supreme Court defended its religious discrimination in part by concluding it was compelled by state law. App.9a–15a. The court relied on two constitutional provisions prohibiting the use of public money to support sectarian institutions and the sectarian

22. The fact that the Oklahoma Supreme Court "expressly discriminated 'based on religious identity' . . . [is] enough to invalidate the state policy without addressing how government funds were used." *Espinoza*, 591 U.S. at 476 (quoting *Trinity Lutheran*, 582 U.S. at 465 n.3).

23. The Oklahoma Supreme Court hardly contested its decision discriminated against religion. Instead, it summarily concluded "[t]he Free Exercise Trilogy cases do not apply" because "St. Isidore is a state-created school . . . [u]nlike the private entities in the Free Exercise Trilogy cases[.]" App.27a. It also concluded "[c]ompliance with the Establishment Clause in this case is a compelling interest that satisfies strict scrutiny[.]" App.29a.

control of schools, as well as a provision of the Act prohibiting sectarian affiliation. *Id.*; OKLA. CONST. art. I, § 5; OKLA. CONST. art. II, § 5; 70 O.S. § 3-136(A)(2).

But state law is no defense to a violation of the Free Exercise Clause. The Supremacy Clauses of both the U.S. and Oklahoma constitutions prevent state action that conflicts with the Free Exercise Clause, which is incorporated against the States by virtue of the Fourteenth Amendment. *See Espinoza*, 591 U.S. at 475, 487 (citing U.S. CONST. art. VI, cl.2); OKLA. CONST. art. I, § 1. Again, this 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. And "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Id.* (citation omitted).

In *Espinoza*, the Montana Supreme Court, like the Oklahoma Supreme Court, relied on the state "no-aid provision to bar religious schools from the scholarship program." 591 U.S. at 474. This Court explained that when that court "was called upon to apply a state law no-aid provision to exclude religious schools from the program, it was obligated by the Federal Constitution to reject the invitation." *Id.* at 487–88. Accordingly, and "[b]ecause the elimination of the program flowed directly from the Montana Supreme Court's failure to follow the dictates of federal law," the decision could not "be defended as a neutral policy decision, or as resting on adequate and independent state law grounds." *Id.* at 488.

So too here, this Court's precedents obliged the Oklahoma Supreme Court to reject the OAG's invitation to

violate the Free Exercise Clause by excluding St. Isidore from the public benefit of a school charter. The refusal to follow the U.S. Constitution cannot be defended on state law grounds.

Moreover, the Oklahoma Supreme Court's undue reliance on these state constitutional provisions was always perilous. Starting with Oklahoma's "no-aid" provision, the anti-religious origins of these "little Blaine Amendments" is notorious. *See Espinoza*, 591 U.S. at 482; *id.* at 499–507 (Alito, J., concurring). The court brushed aside those concerns by suggesting *our framers* were not motivated by religious bigotry and never mentioned the Blaine Amendment. App.10a–12a. But the seedy origins of the amendment Oklahoma adopted cannot be severed by mere suggestion of acquiescence.[24] What's more, this provision originally required not only a system of public schools "free from sectarian control[,]" but also "the establishment and maintenance of separate schools for white and colored children." OKLA. CONST. art. I, § 5 (1907). The latter requirement rightfully crumbled under the weight of time and reason.[25] It is past time for the former requirement to follow suit.

---

24. In addition, Oklahoma's history on this front is not as virtuous as its high court imagines. *See*, *e.g.*, Thomas Elton Brown, *Bible Belt Catholicism: A History of the Roman Catholic Church in Oklahoma, 1905-1945* 46 (1977) ("Paralleling this national t[r]end, Oklahoma experienced its own anti-Catholicism in the years immediately following statehood and witnessed its spread across the state by the advent of World War I.").

25. *See Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483, 495 (1954); SJR 18, State Question 526, Legislative Referendum 220 (Nov. 7, 1978), https://www.sos.ok.gov/documents/questions/526.pdf.

And reliance on Article II Section 5 often lands the Oklahoma Supreme Court on the wrong side of this Court's Establishment Clause cases—from the public transportation debate[26] to the Ten Commandments debate.[27] No doubt these outcomes have been steered by the court's belief that the Oklahoma framers intended "a complete separation of church and state." App.11a–12a; *but see Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 535 (2022) (explaining that the Establishment Clause does not "'compel the government to purge from the public sphere' anything an objective observer could reasonably infer endorses or 'partakes of the religious.'") (citation omitted). The Oklahoma Supreme Court's track record leaves little confidence in the court's ability to accurately draw the line between what the Free Exercise Clause protects and what the Establishment Clause prohibits.

C. The Oklahoma Supreme Court's religious discrimination against St. Isidore is not justified by the Establishment Clause.

Resolving Establishment Clause disputes requires a return to "the Constitution's original meaning[,]" "by reference to historical practices and understandings." *Shurtleff v. City of Bos., Mass.*, 596 U.S. 243, 277 (2022) (Gorsuch, J., concurring); *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014); *see also Kennedy*, 597 U.S. at 536

---

26. *Compare Bd. of Ed. for Indep. Sch. Dist. No. 52 v. Antone*, 1963 OK 165, ¶ 0, 384 P.2d 911, 911 *with Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 17 (1947).

27. *Compare Prescott v. Okla. Capitol Preservation Comm'n*, 2015 OK 54, ¶ 7, 373 P.3d 1032, 1034 *with Van Orden v. Perry*, 545 U.S. 677, 690 (2005).

("An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some '"exception"' within the 'Court's Establishment Clause jurisprudence.'") (citation omitted). Courts must look to the "hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment." *Kennedy*, 597 U.S. at 537.[28]

The Oklahoma Supreme Court failed to apply this historical framework. Instead, the court focused "on whether religious activity involves a 'state actor' or constitutes 'state action'" and fixated on labels like "public school," "state actor[,]" and "governmental entity." App.17a, 20a, 24a–26a. To apply those labels, the court imported the "state actor" test found in the civil rights context—laying out five of those tests as a buffet from which the court could pick and choose. App.20a–21a. Had the court applied the proper historical framework, however, it would have correctly concluded that granting St. Isidore a school charter does not bear any of the hallmark traits of establishment of religion.

The Oklahoma Supreme Court should have focused its analysis on the foremost historical hallmark of religious establishments: impermissible government coercion of religious activities, especially when accompanied by threat of force of law and penalties. *See Kennedy*, 597 U.S. at 537 ("Government may not coerce anyone to attend church, . . . nor may it force citizens to engage in a formal religious exercise") (cleaned up); *see also Lee v. Weisman*, 505 U.S.

28. At least six hallmarks of religious establishments can be extrapolated from the discussion in *Kennedy* or the authorities citied therein. *See Kennedy*, 597 U.S. at 537, n.5.

577, 640–41 (1992) (Scalia, J., dissenting). Consistent with the same, government coercion (or mandate) of church attendance and participation in formal religious exercises has long been impermissible. *See Kennedy*, 597 U.S. at 537; *Shurtleff*, 596 U.S. at 286 (Gorsuch, J., concurring).

The grant of St. Isidore a school charter does not resemble government coercion of religious exercise by threat of force of law or penalty. Distracted analogizing charter schools and traditional public schools, the Oklahoma Supreme Court missed this unique feature: the absence of compelled enrollment. While a charter school must be "as equally free and open to all students as traditional public school[,]" 70 O.S. § 3-136(A)(9), nothing in Oklahoma law requires students to enroll and attend a charter school. *See* 70 O.S. § 3-140(A) (requiring students to "submit a timely application" to enroll in charter school). Unlike traditional public schools, charter schools can cap enrollment capacity. *See* 70 O.S. § 3-140(A), (E). Thus, the State does not compel attendance or participation in a religious charter school. Instead, it is the "genuine and independent choices" of parents and students that dictate attendance. *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002). This principle of private choice distinguishes charter schools from traditional public schools, placing this case well within the scope of the Free Exercise Trilogy. *See Carson*, 596 U.S. at 781.

To reach the opposite conclusion, the Oklahoma Supreme Court leaned heavily into the fact that "the Charter School Board will provide oversight of the operation for St. Isidore, monitor its performance and legal compliance, and decide whether to renew or revoke St. Isidore's charter." App.21a. But this Court has already

made clear that "receiv[ing] state funding" and "being regulated by the State does not make one a state actor." *West v. Atkins*, 487 U.S. 42, 52 n.10 (1988); *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 816 (2019). And under any applicable standard, the general oversight provided by the Board falls woefully short of establishing the type of pervasive entwinement or sham arrangement that would render St. Isidore a state actor, much less offend the Establishment Clause. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982) ("Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.").

The court also relied heavily on the language in the Act defining a charter school as a "'public school' established by contract" to distinguish charter schools from the public benefits at issue in the Free Exercise Trilogy. App.17a (quoting 70 O.S. § 3-132.2(C)(1)); *see also* App.27a–28a. But the substance of the public benefit directs the First Amendment inquiry, not statutory labeling or "the presence or absence of magic words." *Carson*, 596 U.S. at 785. That *maxim* holds up in nearly every constitutional context, including in state action cases. *See*, *e.g.*, *City of Detroit v. Murray Corp. of Am.*, 355 U.S. 489, 492 (1958) ("[I]n determining . . . constitutional immunity we must look . . . behind labels to substance."); *Polk County v. Dodson*, 454 U.S. 312, 317–19 (1981) (concluding a public defender was not a state actor after analyzing the functions and obligations of the office). Thus, the legislative label of "public school" is of no import to the Establishment Clause analysis.

Another hallmark of religious establishments the Oklahoma Supreme Court should have considered is

"financial support for the established church, often in a way that preferred the established denomination over other churches." *Shurtleff*, 596 U.S. at 286 (Gorsuch, J., concurring). This hallmark sounds familiar because denominational neutrality is a common feature of this Court's religion clause jurisprudence. *See*, *e.g.*, *Carson*, 596 U.S. at 781 (describing 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."); *Larson v. Valente*, 456 U.S. 228, 246 (1982) ("[T]his Court has adhered to the principle, clearly manifested in the history and logic of the Establishment Clause, that no State can 'pass laws which aid one religion' or that 'prefer one religion over another.'") (citation omitted).

Again, nothing in the record suggests the availability of a school charter is anything but neutral. Indeed, it was this very neutrality that inspired the Oklahoma Attorney General to prophesy doom by arguing a grant of St. Isidore's charter would force the State to "fund all manner of religious indoctrination, including radical Islam or even the Church of Satan" and "radical religious teachings like Sharia law." *Supra* n.4. Luckily for Oklahoma believers of any faith or no faith, "nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it." *Mitchell v. Helms*, 530 U.S. 793, 829 (2000). As this Court emphasized over twenty years ago: "[t]his doctrine, born of bigotry, should be buried now." *Id.*; *see also Kennedy v. Bremerton Sch. Dist.*, 4 F.4th 910, 945 (9th Cir. 2021) (Nelson, J., dissenting) ("The way to stop hostility to religion is to stop being hostile to religion.").

Another missing hallmark of religious establishments is "government exerted control over the doctrine and personnel of the established church." *Shurtleff*, 596 U.S. at 286 (Gorsuch, J., concurring). Accepting that the religious character of St. Isidore renders it analogous to an established church, the State exercises very limited, if any, control over the internal operations of St. Isidore. St. Isidore is a privately owned and operated entity that contracts with the State to provide education under a statewide charter school sponsorship. *See* PA057, 310, 314; 70 O.S. § 3-134(C). Under the Act, charter schools are exempted "from all statutes and rules relating to schools" unless specifically provided, but "may offer a curriculum which emphasizes a specific learning philosophy or style or certain subject area." 70 O.S. § 3-136(A). While the Board may "provide ongoing oversight of the charter schools[,]" the charter school's own board controls the school's "policies and operational decisions." OKLA. ADMIN. CODE 777:10-3-4(b); 70 O.S. § 3-136(A)(8). Like the private school in *Carson*, "the curriculum taught at participating [charter schools] need not even resemble that taught in the [Oklahoma] public schools" and "[p]articipating schools need not hire state-certified teachers." *Carson*, 596 U.S. at 783; 70 O.S. § 3-136(B) (allowing charter schools flexibility in "personnel policies, personnel qualifications, and method of school governance").

One final absent hallmark of religious establishments is the use of "the established church to carry out certain civil functions, often by giving the established church a monopoly over a specific function." *Shurtleff*, 596 U.S. at 286 (Gorsuch, J., concurring); *but see Halleck*, 587 U.S. at 814 ("[T]he fact that the government licenses, contracts with, or grants a monopoly to a private entity does not convert the private entity into a state actor—unless the

private entity is performing a traditional, exclusive public function."). Here, nothing in the record suggests Oklahoma has given St. Isidore (or any charter school) a monopoly over the civil function of education—whether categorized as "public" or not. Oklahoma has not abandoned its public school system and left students no choice but to submit to a religious charter school. *Cf. West v. Atkins*, 487 U.S. 42, 55 (1988) (involving a complete abdication of a state's constitutional obligation to provide medical care to inmates by contracting with a single physician to provide those services). The overwhelming majority of Oklahoma students still receive a traditional public education. *See supra* p. 8. Giving Oklahoma parents and students another alternative to the traditional public school setting does not equate to a total delegation of any independent obligation to provide free, public education.

Moreover, "it is clear that there is no 'historic and substantial' tradition against aiding such [religious] schools comparable to the tradition against state-supported clergy invoked by *Locke*." *Espinoza*, 591 U.S. at 483; *see also Halleck*, 587 U.S. at 809 (observing that "'very few' functions fall into this category" of "powers traditionally exclusively reserved to the State." (citations omitted)). Even the Oklahoma Supreme Court conceded that "[t]he provision of education may not be a traditionally exclusive public function[.]" App.21a; *see also Rendell-Baker*, 457 U.S. at 842. Indeed, religious institutions carried out the civil function of education long before the common school movement.[29]

---

29. *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part i: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2171 (2003); Litton, *supra* n.7 at 241–52.

The Oklahoma Supreme Court evaded this well-established history by positing that "*free public* education is exclusively a public function" and declaring that St. Isidore fit that artificial criterion. App.21a. Setting aside the court's flimsy circular reasoning, this Court has already held that "to provide services for such students at public expense . . . in no way makes these services the exclusive province of the State." *Rendell-Baker*, 457 U.S. at 842. The educational function that St. Isidore provides controls the inquiry—not whether the State pays for that function. *See*, *e.g.*, *Logiodice v. Trustees of Maine Cent. Inst.*, 296 F.3d 22, 27 (1st Cir. 2002) ("There is no indication that the Supreme Court had this kind of tailoring by adjectives in mind when it spoke of functions 'exclusively' provided by government."). Additionally, providing a free, publicly-funded education is *not* traditionally and exclusively a government function. Instead, religious schools have a well-documented history of offering free education and receiving governmental financial support. *See Espinoza*, 591 U.S. at 480 ("In the founding era and the early 19th century, governments provided financial support to private schools, including denominational ones."); McConnell, *supra* n.29 at 2174 (observing that religious schools in the colonial period offered "free or subsidized rates for the poor" and received "[g]overnmental financial support for education"); Litton, *supra* n.7 at 243, 250–52, 262, 274 (describing the operation of mission schools in Indian Territory through contracts or funding from tribal and federal governments and noting the first public school required tuition).

In sum, granting St. Isidore a school charter lacks any of the hallmark traits of establishment of religion and does not implicate the Establishment Clause. Accordingly,

the Oklahoma Supreme Court's interest in complying with the Establishment Clause fails to justify the religious discrimination against St. Isidore. The decision below cannot withstand strict scrutiny. And this Court ought to rectify the discrimination instigated by the Oklahoma Attorney General and condoned by the Oklahoma Supreme Court.

CONCLUSION

For the reasons stated, *Amicus* Oklahoma Governor J. Kevin Stitt respectfully requests that this Court grant Petitioners the writ of certiorari.

Respectfully submitted,

Trevor S. Pemberton
Counsel of Record
Special Counsel
Audrey A. Weaver
Deputy General Counsel
Office of Oklahoma Governor
J. Kevin Stitt
2300 North Lincoln Boulevard,
Suite 212
Oklahoma City, OK 73105
(405) 521-2342
trevor.pemberton@gov.ok.gov

Counsel for Amicus Curiae

November 8, 2024