Nos. 24-394, 24-396

IN THE
Supreme Court of the United States

ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL
Petitioner,

v.

GENTNER DRUMMOND, ATTORNEY GENERAL OF OKLAHOMA, *EX REL.* STATE OF OKLAHOMA,
Respondent.

OKLAHOMA STATEWIDE CHARTER SCHOOL BOARD, ET AL.
Petitioners,

v.

GENTNER DRUMMOND, ATTORNEY GENERAL OF OKLAHOMA, *EX REL.* STATE OF OKLAHOMA,
Respondent.

On Writ of Certiorari to the Oklahoma Supreme Court

Brief of National Religious Broadcasters as *Amicus Curiae* in support of Petitioners

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Interest of Amicus

National Religious Broadcasters (NRB) is a non-partisan association of Christian broadcasters united by their shared purpose of proclaiming Christian teaching and promoting biblical truths. NRB's 1,487 members reach a weekly audience of approximately 141 million American listeners, viewers, and readers through radio, television, the Internet, and other media.

Since its founding in 1944, NRB has worked to foster excellence, integrity, and accountability in its membership. NRB also works to promote its members' use of all forms of communication to ensure that they may broadcast their messages of hope through First Amendment guarantees. NRB believes that religious liberty and freedom of speech together form the cornerstone of a free society.

Broadcasters regularly must deal with government agencies. A correct understanding of the law ensures that religious organizations are not treated unequally under the guise of a desire to comply with the Establishment Clause.[1]

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[1] Pursuant to Supreme Court Rule 37.6, counsel for your amicus certifies that no counsel for any party authored this brief in whole or in part. No person or entity other than NRB furnished any monetary contribution for the preparation of this brief.

Summary of the Argument

This brief addresses only one issue decided by the Oklahoma Supreme Court. That court held that the federal Establishment Clause prohibits a religious school from contracting with the state's charter school agency.

The Oklahoma court's analysis of the Establishment Clause is deeply flawed. Claiming to rely on this Court's rule that there is "play in the joints" between the Establishment Clause and the Free Exercise Clause, it held the exact opposite of what this Court means by that phrase.

This Court has said that not everything permissible under the Establishment Clause is mandated by the Free Exercise Clause—most notably, state government support for theological education for ministers and the like. The Oklahoma Supreme Court turned that rule inside out holding that actions permissible under the Free Exercise may be banned by the Establishment Clause.

Most importantly, the Oklahoma court absolutely failed to address the many holdings of this Court that have confirmed that the inclusion of religious people or institutions in broad neutral programs do not violate the Establishment Clause.

Argument

I. The Holding of the Supreme Court of Oklahoma that the Contract with St. Isadore School Violates the Federal Establishment Clause cannot Withstand Scrutiny

The decision below proclaims: "The Establishment Clause cases from the U.S. Supreme Court have not dealt with the creation of a religious public school. Rather, the cases have revolved around religious acts in public schools." *Drummond ex rel. State v. Oklahoma Statewide Virtual Charter Sch. Bd.*, 2024 OK 53, ¶ 40, 558 P.3d 1, 13 (2024). The lower court follows this description with citations to *Kennedy v. Bremerton School District*, 597 U.S. 507, 541-42 (2022) (prayer by a public school football coach) *Zorach v. Clauson*, 343 U.S. 306 (1952) (released time program); *Lee v. Weisman*, 505 U.S. 577 (1992), (graduation prayers); and *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000) (public broadcasting of prayer over school sound system).

The Oklahoma court then summarized the lesson it claims to have derived from this line of cases. "These cases demonstrate the Establishment Clause prohibits public schools (state actors) from requiring or expecting students to participate in religious activities." 558 P.3d at 13.

While the rule that public schools are prohibited from requiring or expecting students to participate in religious activities is true enough, the use of *Kennedy* and *Zorach* for this purpose seems a bit odd since both cases affirm religious activities that were connected to public schools. *Wallace v. Jaffree*,

472 U.S. 38 (1985) or *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203 (1963) might have been better choices for the point the Oklahoma court was trying to make.

But the more serious error arises from the lower court's essential failure to address the branch of Establishment Clause cases which have arisen in the context of educational choice programs. See, e.g., *Zelman v. Simmons–Harris,* 536 U.S. 639, 652 (2002); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 13–14 (1993); *Witters v. Washington Dept. of Servs. for Blind*, 474 U.S. 481, 487 (1986); *Mueller v. Allen*, 463 U.S. 388, 399–400 (1983).

The only case the lower court cites from the school choice arena is *Locke v. Davey,* 540 U.S. 712 (2004), and it mishandles *Locke*—badly. What the Oklahoma decision says about *Locke's* rule is erroneous, and what it omits from *Locke* is both material and contrary to the conclusion reached regarding the federal Establishment Clause.

The Oklahoma decision cites *Locke* for the principle that "there is a play in the joints between what the Establishment Clause permits, and the Free Exercise Clause compels." 558 P.3d at 13 (cleaned up.) But as Inigo Montoya said to Vizzini in *The Princess Bride*, "I do not think it means what you think it means."

Locke, itself, explains the precise meaning of "play in the joints." "[T]here are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." 540 U.S. at

719. The Oklahoma court stands *Locke's* "play in the joints" concept on its head by its conclusion that the Establishment Clause prohibits the government from doing what the Free Exercise Clause permits.

There are two lessons from *Locke* that should have been apparent to the lower court. First, citing *Witters,* 474 U.S. at 489, this Court held: "there is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology." *Locke, supra* at 719. Since St. Isidore is not offering theological degrees for ministerial students, *Locke's* ultimate holding does not support the Oklahoma court's conclusion. Second, the Oklahoma court should have at least addressed *Locke's* summation of the rule arising from *Zelman, Zobrest, Witters,* and *Mueller*. "[T]he link between government funds and religious training is broken by the independent and private choice of recipients." *Id.* This principle is applicable here since St. Isidore's funding depends on student enrollment. Pet.App.157a (24-396); Okla. Stat. tit. 70, § 3-142(A), (B)(2) (2023) (§ 3-142(A), (C) (2024)).

In some sense, this Court's unanimous decision in *Witters* gives the ultimate "green light" for the rule that programs or students may not be excluded under the Establishment Clause on the ground that they are too religious. Larry Witters attended Inland Empire School of the Bible to be trained as "a pastor, missionary, or youth director." 474 U.S. at 489.

Witters clarified that the Establishment Clause is not violated when any aid "that ultimately flows to

religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." 474 U.S. at 488. Thus, the Establishment Clause is not offended by St. Isidore's participation.

The Oklahoma court made the same error that the Washington Supreme Court made in *Witters*. Establishment Clause violations are to be found in the program as a whole not in the fact that religious individuals are permitted to participate in a broad program of educational choice.

> In effect, the court analyzed the case as if the Washington Legislature had passed a private bill that awarded respondent free tuition to pursue religious studies. Such an analysis conflicts with both common sense and established precedent.[4] Nowhere in *Mueller* did we analyze the effect of Minnesota's tax deduction on the parents who were parties to the case; rather, we looked to the nature and consequences of the program *viewed as a whole. Mueller, supra* 463 U.S., at 397–400.

Witters, supra, 474 U.S. 492 (Powell, concurring).

Locke barely survives as good law today—but it is strictly limited to its facts. Like *Witters, Locke* involved a student who was studying theology at a religious college. This Court held that even though this form of theological education could be funded consistently with the Establishment Clause, the several states are permitted to have a stricter "no establishment" rule but only vis-à-vis formal theological education to train pastors and similar religious vocational positions. This narrowing of

Locke was announced first in *Espinoza v. Montana Dep't of Revenue*, 591 U.S. 464, 479 (2020) and was dramatically reinforced by *Carson as next friend of O. C. v. Makin*, 596 U.S. 767, 788 (2022).

This Court's observation concerning the Second Circuit's total failure to discuss relevant precedent in *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 109 (fn.3) (2001) ("We find it remarkable that the Court of Appeals majority did not cite *Lamb's Chapel*, despite its obvious relevance to the case") seems applicable here. Misusing *Locke,* while failing to discuss or follow *Mueller, Witters, Zobrest, Zelman, Espinoza,* and *Carson*, is indeed remarkable. If the lower court wanted to distinguish these cases on some factual or legal ground, that would be a different matter. But the failure to address these cases in their discussion of the Establishment Clause is telling.

This Court has firmly shut the door on the idea that discrimination against religious individuals or organizations may be justified by pointing to the Establishment Clause. That door should remain tightly closed.

Conclusion

For the foregoing reasons, this Court should reverse the holding of the Oklahoma Supreme Court that the First Amendment's Establishment Clause requires the exclusion of religious schools from its charter school program.

Respectfully submitted,

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