Nos. 24-394 Vide 24-396

In the
Supreme Court of the United States

OKLAHOMA STATEWIDE
CHARTER SCHOOL BOARD, et al.,

PETITIONERS,

v.

GENTNER DRUMMOND, Attorney General
for the State of Oklahoma,
ex rel. STATE OF OKLAHOMA,

RESPONDENT.

"For Continuation of Caption,
See Inside Cover"

On Writs of Certiorari
to the Supreme Court of Oklahoma

BRIEF OF *AMICUS CURIAE* WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC. SUPPORTING THE PETITIONERS

RICHARD M. ESENBERG
Counsel of Record
LUCAS T. VEBBER
LUKE BERG
SKYLAR CROY

WISCONSIN INSTITUTE FOR
LAW & LIBERTY

330 E Kilbourn Ave, #725
Milwaukee, WI 53202
(414) 727-9455
Rick@will-law.org

Nos. 24-394 Vide 24-396

ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL,

PETITIONER,

v.

GENTNER DRUMMOND, Attorney General for the State of Oklahoma, ex rel. STATE OF OKLAHOMA,

RESPONDENT.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

INTEREST OF *AMICUS CURIAE*[1]

The Wisconsin Institute for Law & Liberty, Inc. (WILL) is a public interest law and policy center dedicated to, among other things, advancing educational and religious freedom. Research establishes that empowering parents to make decisions about their children's education leads to positive outcomes. *E.g.*, Will Flanders, *Ripple Effect: How Expanding Wisconsin's School Choice Programs Can Lead to More College Graduates and a Stronger Economy* 2 (2020).[2] WILL is interested in maximizing school choice, not only in Wisconsin, but across this nation. Schools operated by religious entities, and especially the Catholic Church, play a vital role in this educational ecosystem. *See, e.g.,* Wis. Dep't Pub. Instruction, *Private School Choice Programs & Special Needs Scholarship Program Summary* (2024–25);[3] *see also* Patrick J. Wolf et al., *The School to Family Pipeline: What Do Religious, Private, and Public Schooling Have to Do with Family Formation?*, 25 J. Cath. Educ. 206 (2022). This action will directly affect whether these entities can fulfill their potential or whether anti-religious bigotry will win the day.

---

[1] As required by Supreme Court Rule 37, the Counsel of Record for all parties received timely notice of intent to file this brief. No party's counsel authored any part of this brief; no person other than *amicus* or its members made a monetary contribution to fund its preparation or submission.

[2] https://bit.ly/3NSKGDJ.

[3] https://bit.ly/3YBOT3s.

SUMMARY OF ARGUMENT

President George Washington once wrote to a Jewish Congregation to assure its members that they were full citizens—despite being religious minorities. Letter from George Washington, President, to the Hebrew Congregation in Newport, R.I. (Aug. 18, 1790). In his words, "the Government … gives to bigotry no sanction, to persecution no assistance … ." *Id.*

The First Amendment to the United States Constitution codifies the anti-discrimination principle that President Washington described. It provides, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof … ." U.S. Const. amend. I. Accordingly, this Court has instructed that "upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and the rights it secures." *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 639–40 (2018) (quoting *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993)).

The anti-discrimination principle has been undermined by the Oklahoma Supreme Court. St. Isidore's App.1a.[4]

[4] All appendix citations are to the appendix filed by St. Isidore with its petition for certiorari.

For context, Oklahoma's Statewide Charter School Board received an application from St. Isidore of Seville Virtual Charter School—a Catholic entity. App.4a. The Board's Executive Director then asked the state's Attorney General for advice because state law purports to ban the Board from sponsoring a school affiliated with a "sectarian" entity. App.41a. In a formal opinion, the Attorney General interpreted United States Supreme Court precedent and concluded that enforcing these laws would "likely violate" the anti-discrimination principle. App.73a. Upon assuming office, a new Attorney General withdrew the opinion. App.74a. The new Attorney General told the Executive Director, "[w]hile many Oklahomans undoubtedly support charter schools sponsored by various Christian faiths, the precedent created by approval of … [St. Isidore's] application will compel approval of similar applications by all faiths." App.77a. In his words, "most Oklahomans" consider non-Christian faiths "reprehensible" because these faiths are "diametrically opposed" to Christianity. App.77a. He "urge[d]" the Board to "use caution in reviewing … [St. Isidore's] application." App.77a. The Board granted St. Isidore's application, and the Attorney General filed an action in the Oklahoma Supreme Court. App.2a, 5a.

The Oklahoma Supreme Court sided with the Attorney General, functionally revoking a Catholic school's status as a charter school solely because it is a religious entity. App.27a–28a. The court relied partly upon state constitutional provisions that originated in anti-Catholic bigotry. App.7a–12a. The court paid short shrift to this history, declaring in conclusory fashion that these provisions were never anti-Catholic, without actually addressing the historical record. App.9a–10a.

The Oklahoma Supreme Court did not heed Justice Samuel Alito's words that "the original motivation" for a law "certainly matters" under controlling precedent. *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 497 (2020) (Alito, J., concurring). Once unconstitutional, always unconstitutional (barring an amendment, of course). For example, a law "originally adopted for racially discriminatory reasons" cannot be constitutionally applied—not when enacted and not a century later. *Id.* (citing *Ramos v. Louisiana*, 590 U.S. 83 (2020)). Any other rule would place this Court in the uncomfortable position of deciding at what arbitrary moment in history such a law, for no reason other than the passage of time, suddenly passed muster. *See generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989). As Justice Alito explained, this logic also applies to a law designed to harm a religious minority. *Espinoza*, 591 U.S. at 497.

WILL respectfully urges this Court to reverse the Oklahoma Supreme Court.

ARGUMENT

This action presents two questions:

- Whether the academic and pedagogical choices of a privately owned and run school constitute state action under the Establish Clause of the First Amendment simply because the school contracts with the state to offer a free educational option for interested students.

- Whether a state violates the Free Exercise Clause by excluding privately run religious schools from the state's charter school program solely because the schools are religious, or whether a state can justify such an exclusion by invoking anti-establishment interests that go further than the Establishment Clause requires.

WILL proceeds by briefly discussing the first and then focusing on the second.

First, the Oklahoma Supreme Court misunderstood the Establishment Clause, which is meant to prevent government coercion in religious matters, not to exclude religious entities from generally available public benefits. St. Isidore's status as a charter school is compatible with the clause because the state does not coerce any parent to enroll his or her child there—parents have many other options. *See, e.g.*, *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022).

Second, the Oklahoma Supreme Court relied upon two provisions of the Oklahoma Constitution, Article I, Section 5 and Article II, Section 5, that originated in anti-Catholic bigotry, which is unacceptable. App.7a–12a. These provisions were not created to separate church and state. *See generally* Henry G. Snyder, *The Constitution of Oklahoma* 13–16, 21 (1908). They were created "to target Catholics even as governments financially supported Protestant church teachings in public schools." Oklahoman Ed. Bd., Opinion, *Repeal of Oklahoma Constitutional Provision Is Long Overdue*, Oklahoman (July 6, 2015).[5] They cannot now be applied to the detriment of Catholics.

I. If any state action is at issue, it is not the kind of state action that violates the Establishment Clause because it does not coerce the public.

As a preliminary matter, the Establishment Clause is about preventing coercion—a concern not present in this action. If any state action is at issue, it is not the kind of action that violates the clause. *Kennedy*, 597 U.S. 507; *see also Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 587 (2014) (lead opinion).

When construing the Establishment Clause, this Court looks to text, history, and tradition. *See Kennedy*, 597 U.S. at 535–36.

[5] https://bit.ly/4edFjtG.

As originally understood, the Establishment Clause does not command complete separation of church and state, contrary to modern sensibilities. *See generally* Philip Hamburger, *Separation of Church & State* (2002). For example, the founding generation routinely invoked God during official government proceedings, and the federal government even called for a national day of "public thanksgiving and prayer" to acknowledge the "single favors of Almighty God." *See* Charles Adside, III, *The Establishment Clause Forbids Coercion, Not Cooperation, Between Church and State: How the Direct Coercion Test Should Replace the Lemon Test*, 95 N.D. L. Rev. 533, 559 (2020). Additionally, the government actively engaged with religious entities, using public funds to hire chaplains who opened legislative sessions with prayer and conducted Sunday services in the Capitol. *Id.* Congress also allocated funds to build churches and support clergy on tribal lands. *Id.* These practices continued well past the Civil War. Philip Hamburger, *Separation of Church & State: A Theologically Liberal, Anti-Catholic, and American Principle*, Univ. Chi. L. Occasional Paper, No. 43, 49 (2002).

Against this historical backdrop, this Court has instructed that the Establishment Clause does not "mak[e] it necessary for government to be hostile to religion." *Kennedy*, 597 U.S. at 510 (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)). On the contrary, this Court has recognized "a long constitutional tradition in which learning how to tolerate diverse expressive activities has always been 'part of learning how to live in a pluralistic society.'" *Id.* (quoting *Lee v. Weisman*, 505 U.S. 577, 590 (1992)).

So, the Establishment Clause proscribes relatively narrow state action. To quote Justice Neil Gorsuch, "[m]ost … [historical] hallmarks [indicating that the clause has been transgressed] reflect forms of 'coerc[ion]' regarding 'religion or its exercise.'" *Shurtleff v. City of Boston*, 596 U.S. 243, 286 (2022) (Gorsuch, J., concurring in the judgment) (quoting *Lee*, 505 U.S. at 587). He has similarly remarked that a state may not condone a religious "monopoly" over a "civil function," which makes sense because monopolies are inherently coercive. *See id.* For example, if a parent's only option is to send his or her child to a Catholic school, the monopoly effectively coerces the parent to do so.

Just a few years ago, this Court emphasized coercion—or really the lack thereof—in one precedent, noting a state had not made "a religious observance compulsory," "coerce[d] anyone to attend church," or even made anyone engage in "a formal religious exercise." *Kennedy*, 597 U.S. at 537. Notably, it also explained that mere "visible religious conduct by a teacher or coach" is not "impermissibly coercive."[6] *Id.* at 540; *see also Town of Greece*, 572 U.S. at 589 ("Offense, however, does not equate to coercion. Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made

[6] Understanding the Establishment Clause through this lens avoids "prioritiz[ing] the secular over the spiritual, the temporal over the ecclesiastical, and the atheists and agnostics over the believers." Barry Black, *Secularism and the First Amendment's Establishment Clause*, N.Y.L.J. (2022), https://tinyurl.com/4f694x9x.

out any time a person experiences a sense of affront from the expression of contrary religious views … .").

St. Isidore's existence does not do any of these things. At bottom, Oklahoma's educational system is not coercive.

Oklahoma has thirty-three charter schools, including seven virtual charter schools that are authorized by the Statewide Charter School Board. *Charter Schools*, Okla. Statewide Charter Sch. Bd. (last visited Mar. 8, 2025);[7] *Virtual Charter Schools*, Okla. Statewide Charter Sch. Bd. (last visited Mar. 8, 2025).[8]

The availability of these choices underscores the voluntary nature of enrollment and negates any claim of state-imposed religious conformity. If a parent does not wish his or her child to attend St. Isidore, he or she has numerous secular alternatives, including brick-and-mortar options and other virtual charter schools.

Relatedly, Oklahoma does not cap the number of charter schools that may be established, unlike states such as Texas, which imposes a cap of 305 open-enrollment charter schools. Tex. Educ. Code § 12.101(b-2); *see also* Tex. Charter Schools Ass'n, *The Truth About Texas Charter Schools* 23 (2019).

As a result, Oklahoma has not created a zero-sum situation in which it functionally picks winners and losers; instead, it has maximized opportunities for would-be educational providers, leaving parents to be

---

[7] https://bit.ly/4bxIXyA.

[8] http://bit.ly/4i5egmy.

the ultimate arbiters. St. Isidore is not taking away a "spot" from someone else. Any institution that meets neutral, non-religious criteria may apply to operate a charter school, ensuring that no single religious or secular entity dominates the educational system.

This Court's precedent is in accord. As it noted in 2022, "a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause." *Carson ex rel. O.C. v. Markin*, 596 U.S. 767, 781 (2022).

Wisconsin precedent is also illustrative. In the 1990s, the Wisconsin Supreme Court rejected an Establishment Clause challenge to private school vouchers, which are analogous to the charter school setting. *See Jackson v. Benson*, 578 N.W.2d 602, 618 (Wis. 1998). The court emphasized the significance of parental choice, reasoning that when parents—not the state—select a religious school for their children, the government is not establishing a religion. *Id.* (explaining "aid flows to sectarian private schools only as the result of numerous private choices"); *see also* Rick Esenberg & CJ Szafir, *The Story of School Choice – Constitutional Challenges and Victories* 4 (2013).[9]

Other courts have followed the Wisconsin approach. *Kotterman v. Killian*, 972 P.2d 606, 614 (Ariz. 1999) (en banc) (emphasizing "Arizona's statute provides multiple layers of private choice").

[9] https://bit.ly/3EOnjdn.

The Wisconsin Supreme Court's reasoning applies equally to Oklahoma's educational system, where parents exercise agency in selecting their children's school, reinforcing that no state action forces religious participation.

In summary, the Establishment Clause is not a mandate for absolute separation between church and state but a safeguard against coercion. St. Isidore operates within an educational system that prioritizes parental choice, ensuring that enrollment remains voluntary and that no single religious or secular entity is given preferential treatment. The clause is not violated via this type of state action—if it can even be called state action.

II. The provisions of the Oklahoma Constitution on which the Oklahoma Supreme Court relied originated in anti-Catholic bigotry, which is unacceptable.

Turning to the second question presented, the Oklahoma Supreme Court applied profoundly anti-Catholic provisions of the state constitution—and to the detriment of a Catholic entity. The court's reasoning unacceptably furthers a long history in this nation of religious bigotry. It cannot stand.

A. Anti-Catholic bigotry shaped the state constitutional provisions at issue in this action.

Catholics are and always have been religious minorities in this largely Protestant nation. Catholics comprised approximately one percent of the population when this nation was founded in the late 1700s. *See* Robert T. Handy, *A Christian America: Protestant Hopes and Historical Realities* 58

(1971). Several states had official churches—all Protestant—and their constitutions compelled support of these churches. For example, the 1780 Massachusetts Constitution declared that municipalities, "other bodies-politic," and "religious societies" had "to make suitable provision, at their own expense, for the institution of the public worship of God and for the support and maintenance of public Protestant teachers of piety, religion, and morality in all cases where such provision shall not be made voluntarily." Mass. Const. pt. I, art. III (1780).

The number of Catholics grew in the 1800s, which caused a panic. *See* Handy, *A Christian America*, at 58, 73–75. The Protestant majority "feared" that Catholics were loyal to the Pope and "would attempt to subvert representative government or would even gain enough adherents to impose religious tyranny by democratic means." Hamburger, *Separation of Church & State*, at 206. "[I]numerable" Protestants believed that "Catholics had to be denied equal civil and political rights unless they first renounced their allegiance to the [P]ope." *Id.*

Catholics faced persecution, especially in public schools where Protestantism was at least unofficially endorsed. Mark Edward DeForrest, *An Overview & Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J.L. & Pub. Pol'y 551, 555 (2003). A well-known publication from the 1830s stated: "[L]et these Jesuit doctors take the place of our Protestant instructors, and where will [we] be in the political institutions of the country? … . *Popery is the natural enemy of* GENERAL *education*." Brutus, *Foreign Conspiracy Against the Liberties of the United States* 104, 106 (4th

ed. 1836). When Catholics demanded better treatment, they put their lives at risk. *See* Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 669 (1998). News media portrayed Catholics as animals who posed a threat to the nation. See the figures below; Brief *Amicus Curiae* of the Becket Fund for Religious Liberty in Support of Petitioners at 8, 10; *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464 (2020) (No. 18-1195).

Figure 1: A caricature of Catholics as reptiles from the 1800s

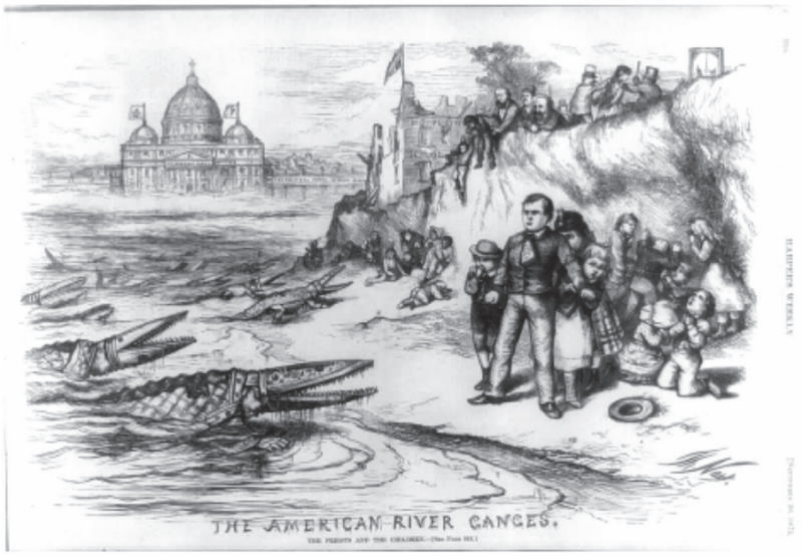
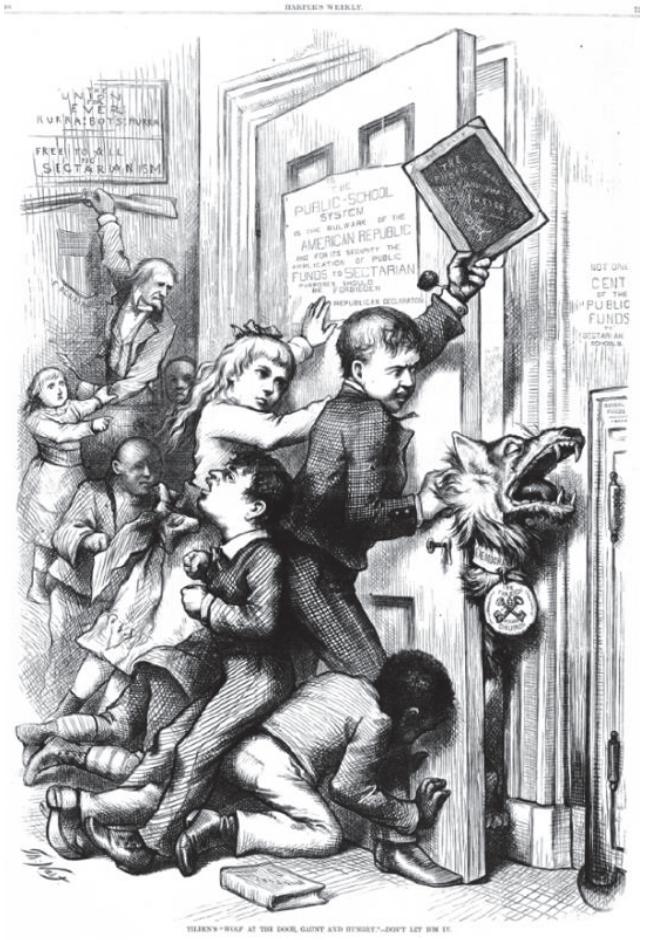


Figure 2: A caricature of Catholics as wolves from the 1800s



Eventually, Catholics in some states were able to secure limited state support for their own schools, which caused Protestant backlash. *See* John Higham, *Strangers in the Land: Patterns of American Nativism, 1860–1925*, at 28 (rev. ed. 2002).

In 1875, President Ulysses S. Grant exacerbated this backlash with a speech in which he stated: "If we are to have another contest in the near future of our national existence I predict that the dividing line will not be Mason and Dixon's, but between patriotism and intelligence on the one side, and superstition, ambition and ignorance on the other." Ulysses S. Grant, President, Speech in Des Moines, Iowa (Sept. 29, 1875). He advocated "that either the state[s] or Nation, or both combined, shall support institutions of learning sufficient to afford to every child … a good common school education, unmixed with sectarian, pagan or atheistical tenets." *Id.* By "sectarian," President Grant meant "Catholic." *See Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion). The terms were practically interchangeable. *Id.* A 1908 treatise on the Oklahoma Constitution even explained that a provision of the Wisconsin Constitution prohibiting "sectarian instruction" in public schools did not prevent "teach[ing] the existence of a supreme being of infinite wisdom, power and goodness, and that it is the highest duty of all men to adore, obey and love him … ." Snyder, *The Constitution of Oklahoma*, at 15–16. The Wisconsin provision applied only to "doctrine or dogma." *Id.* at 16. "Dogma" has long been little more than a dog whistle for "Catholic." *See* Letter from Josh Hawley, Senator, to Charles E. Schumer, Senate Minority Leader (Sept. 26, 2020) (criticizing a senator for saying "the dogma lives loudly within you" toward a Catholic judicial nominee, especially in light of the

"long history of anti-Catholic hatred by some in this country").[10]

Following this speech, Congressman James Blaine proposed an amendment to the United States Constitution—now sometimes called the "Blaine Amendment." DeForrest, *An Overview & Evaluation of State Blaine Amendments*, at 565. His goal was to prohibit state support of Catholic schools. *See id.* at 565–66.

The proposed amendment received the necessary two-thirds vote in the House of Representatives but narrowly failed in the Senate. *Id.* at 568, 573. The floor debates included "a tirade against" the Pope and criticisms of Catholics' patriotism. *Id.* at 570–72.

The legislators who supported the proposed amendment realized that they could achieve their goal another way: by requiring newly admitted states to adopt state constitutional provisions that prohibited aid to "sectarian" schools. *See Espinoza*, 591 U.S. at 502. These legislators viewed themselves as "completing the unfinished work of the failed Blaine Amendment." *See* Jon Lauck, *"You Can't Mix Wheat and Potatoes in the Same Bin": Anti-Catholicism in Early Dakota*, 38 S.D. Hist. 1, 32 (2008).

Oklahoma was one such state. It was not a refuge for Catholics. For example, in 1892, a newspaper in the Oklahoma Territory published an article that read:

> Show us a nation that has ever been uplifted in the moral realm … by the

[10] https://bit.ly/3C8UaYO.

> religion of Rome. The greatest blight that even [sic] befell a nation … has been the curse of Rome's supremacy.
>
> PROTESTANT parents who send their children to Romanist schools, are simply blind fools. Thousands of recruits for the harlot nunneries have been furnished by Protestant homes. How thoroughly hoodwinked people must be to allow themselves to be bamboozled so easily by Jesuit cunning.

Shots at the Mother of Harlots, Craig Cnty. Democrat, at 2 (Feb. 1, 1892).[11] Another newspaper reprinted a report from a Methodist conference in Illinois, in which the authors lamented "[t]he constant attacks of the Roman Catholic hierarchy upon our public school system … ." Minco Minstrel, at 8 (Oct. 9, 1891). The authors promised that they would try "to secure" constitutional amendments that "strengthen our entire school system and make it more than ever worthy of the support of the earnest, loyal, moral, patriotic and Christian citizen … ." *Id.*

During the early years of Oklahoma's statehood, "all too familiar" charges were "hurled" at its Catholics. Thomas Elton Brown, *Bible Belt Catholicism: A History of the Roman Catholic Church in Oklahoma, 1905-1945*, at 46 (1977); *see also Come from Behind the Mask!*, Am. Socialist, at 4 (Oct. 20, 1910) ("The Democrats … must now ... fight the Catholics, the Republicans, the negroes … .").

---

[11] The older newspaper articles cited in this brief can be found at https://www.newspapers.com/.

Specifically, "[t]he basic contention was that Catholics, because of their loyalty to the Pope, could not possible [sic] be loyal citizens of the United States." Brown, *Bible Belt Catholicism*, at 46. Anti-Catholic lectures were common, and the state had "three anti-Catholic newspapers with statewide circulation[ ] … ." *Id.* at 94. One group of citizens, with the backing of the Ku Klux Klan, collected signatures to shut down Catholic schools, claiming they taught "loyalty to Rome." *Id.* at 105–07; *see also Ramos*, 590 U.S. at 88 (holding a rule permitting nonunanimous jury verdicts unconstitutional in part because it could be "traced to the rise of the Ku Klux Klan"). Catholics were also attacked for their purported "opposition to the public school system." Brown, *Bible Belt Catholicism*, at 46. Superintendents openly fired teachers for being Catholic. *Id.* at 99. One principal explained, "[t]here are no professional objections, but Protestant teachers are preferred." *Id.* at 100. Catholics often listed "Christian" or "non-sectarian" on application forms to avoid discrimination. *Id.*; *see also Lady Teacher Rejected Because She Is a Catholic*, Enid Events, at 1 (Oct. 16, 1913). More generally, the Oklahoma legislature considered legislation "tantamount to outlawing the Catholic Mass" and laws regulating nunneries, which were biasedly viewed as "oppressive." Brown, *Bible Belt Catholicism*, at 49, 65–66.

Animus, nationally and in Oklahoma, motivated the creation of the state constitutional provisions at issue in this action. The language of Article I, Section 5 of the Oklahoma Constitution, on which the Oklahoma Supreme Court relied, was taken directly from the Oklahoma Enabling Act. *See* Okla. Enabling Act, § 3(5) ("[P]rovisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all children of said State and free from sectarian control … ."); *see also* § 8 (listing a similar prohibition). Article I, Section 5 memorialized that the state would take action to ensure public schools were "free from sectarian control," and Article II, Section 5 was that action. *See* R. L. Williams, *The Constitution and the Enabling Act of the State of Oklahoma Annotated* 5, 10 (1912) (noting the link between both sections).

The Oklahoma Enabling Act required "perfect toleration of religious sentiment," which was codified in Article I, Section 2 of the Oklahoma Constitution; however, these provisions were also grounded in religious animosity. They banned "[p]olygamous or plural marriages … forever," which is non-germane to religious freedom. Okla. Const. art. I, § 2. The apparent point of this carve-out was to target a Mormon practice. Annotations to Article I, Section 2 in the 1908 treatise further demonstrate that, regardless of the section's language, Protestantism was favored. One annotation notes that "[r]ules of trustees of State university requiring students to attend non-sectarian religious exercises in State University, held not in conflict with such provision." Snyder, *The Constitution of Oklahoma*, at 13. Another states, "[r]egulation requiring protestant version of

Bible to be read in public schools does not violate a constitutional provision guarantying citizen[s]" religious freedom. *Id.* Similarly, an annotation for Article II, Section 5 notes that an analogous provision in the Michigan Constitution did not prohibit using the Bible in public schools to teach "moral precepts." *Id.* at 21.

Notably, Oklahoma statutory law in the late 1800s and early 1900s permitted Biblical readings while disallowing "sectarian" ideology in public schools. *See* Rev. Laws Okla. § 7940 (1910) ("No sectarian doctrine shall be taught or inculcated in any of the public schools in the state; but nothing in this section shall be construed to prohibit the reading of the Holy Scriptures, without note or comment."). These readings were supposed to occur "without note or comment," but Catholics still considered these readings "heresy" because they were from the King James Bible, which Catholics believed was a mistranslation. Brown, *Bible Belt Catholicism*, at 40. Additionally, hiring preferences for Protestant teachers call into question whether, in actuality, these readings were done without further instruction.[12]

[12] This Court should be aware that Oklahoma seems ready to reimplement mandated Biblical studies in its public schools—while at the same time apparently taking issue with a religious entity operating a charter school. Emma Murphy, *Lawmaker Requests Oklahoma Attorney General Opinion on Funding for Walters' Bible Mandate*, Okla. Voice (Oct. 7, 2024), https://bit.ly/3NQAADx.

B. Analogous provisions in other state constitutions have been viewed skeptically given their tainted history.

Unlike the Oklahoma Supreme Court, other courts construing analogous provisions have viewed them with skepticism given their tainted history. For example, in 2018, the New Mexico Supreme Court noted that "it appears that the people of New Mexico intended for" an analogous provision in the New Mexico Constitution "to be … religiously neutral … ." *Moses v. Ruszkowski*, 458 P.3d 406, 419 (N.M. 2018). Even still, the court explained that "the history of the federal Blaine [A]mendment and the New Mexico Enabling Act le[d] … [it] to conclude that anti-Catholic sentiment tainted its adoption." *Id.* Accordingly, the court narrowly construed the provision to avoid conflict with the First Amendment's anti-discrimination principle. *Id.* This brief has referred to the "Oklahoma Enabling Act" for simplicity, but that act enabled both Oklahoma and New Mexico. The act that troubled the New Mexico Supreme Court is the same act that should have troubled the Oklahoma Supreme Court.

Similarly, in a concurrence, Justice Alito examined whether an analogous provision in the Montana Constitution was unenforceable. *Espinoza*, 591 U.S. at 500–03.

Citing the "original motivation" for the provision, he concluded that its enforcement would be inconsistent with the First Amendment's anti-discrimination principle. *Id.* at 497, 500–01. Justice Alito first summarized the history of the Blaine Amendment and then noted that the 1889 Montana

Enabling Act required "[t]hat provision shall be made for the establishment and maintenance of systems of public schools … free from sectarian control." Mont. Enabling Act, § 4. Next, he noted that Montana adopted what amounted to a state Blaine Amendment, as it was required to do. *See* Mont. Const. art. XI, § 8 (1889). He concluded that the tainted history was sufficient to prohibit its constitutional enforcement.[13] *Espinoza*, 591 U.S. at 507–08.

The analogy between the Montana and Oklahoma Constitutions is too strong to ignore. The relevant section of the Montana Enabling Act is identical to Oklahoma's. Like Montana, as a condition of becoming a state, Oklahoma adopted Article I, Section 5 of its constitution, which is a word-for-word match with the relevant provision of the Enabling Act. In the annotations to this section, an early treatise on the Oklahoma Constitution notes that "[a] similar requirement was made as to Montana … ." Williams, *The Constitution and the Enabling Act of the State of Oklahoma Annotated*, at 5. Additionally, Oklahoma adopted Article II, Section 5, which is materially identical to the provision of the Montana Constitution analyzed by Justice Alito.

---

[13] Some lower courts seem to have dismissed this concurrence in questionable ways. *E.g.*, *United States v. Gutierrez-Barba*, No. CR-19-01224-001-PHX-DJH, 2021 WL 2138801, at *4 (D. Ariz. May 25, 2021) (quoting *Espinoza*, 591 U.S. at 541 n.2 (Sotomayor, J., dissenting)) (relying on Justice Sonia Sotomayor's dissent, in which she said that laws with an "uncomfortable past" are not necessarily unconstitutional, to entirely dismiss Justice Alito's concurrence).

C. This Court should take this opportunity to provide guidance on Blaine Amendments because 37 states have such provisions.

Article I, Section 5 and Article II, Section 5 of the Oklahoma Constitution are far from unusual. Thirty-seven states have the state equivalent of a Blaine Amendment. *Blaine Amendments*, U.S. Conf. Cath. Bishops (last visited Oct. 8, 2024).[14] This Court has an opportunity to address the constitutional concerns raised by the continued existence of Blaine Amendments in various state constitutions.

This Court already knows the unique dangers posed by Blaine Amendments. *See generally Espinoza*, 591 U.S. 464 (majority opinion). In *Espinoza v. Montana Department of Revenue*, this Court recognized that such amendments often violate the First Amendment by fostering discrimination against religious entities. *Id.* at 477 (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 455, 462 (2017)) ("The Montana Constitution discriminates based on religious status just like the Missouri policy in *Trinity Lutheran*, which excluded organizations 'owned or controlled by a church, sect, or other religious entity.'"); *Trinity Lutheran*, 582 U.S. at 462 ("The Department's policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character."). It established that religious entities cannot be excluded from public benefit programs solely on the basis of their religious

[14] https://bit.ly/3Yr3Aq0.

character. *Espinoza*, 591 U.S. at 487 ("A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious."). Despite this clear command, some lower courts apparently are confused about the application and scope of *Espinoza*.

This action presents a good vehicle for this Court to examine the interplay of Blaine Amendments and the First Amendment's anti-discrimination principle. This interplay requires further examination to ensure that state constitutions cannot be used as shields for discrimination. Lower courts would benefit from guidance, and this Court should provide it. Doing so would reinforce the principle that public benefits, once provided, cannot be withheld solely because of the religious character of the recipient.

CONCLUSION

Contrary to the decision below, this action's proper outcome cannot stem from the application of bigoted laws to the detriment of the people that these laws were designed to injure. WILL respectfully urges this Court to reverse the Oklahoma Supreme Court, thereby affirming that Blaine Amendments are incompatible with the guarantee of religious liberty in the First Amendment.

Dated: March 12, 2025.

Respectfully submitted,

RICHARD M. ESENBERG
Counsel of Record
LUCAS T. VEBBER
LUKE BERG
SKYLAR CROY

WISCONSIN INSTITUTE FOR
LAW & LIBERTY

330 E Kilbourn Ave, #725
Milwaukee, WI 53202
(414) 727-9455
Rick@will-law.org