Nos. 24-394 & 24-396

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

ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL,
PETITIONER,
v.
GENTNER DRUMMOND, ATTORNEY GENERAL OF
OKLAHOMA, EX REL. OKLAHOMA

ON WRITS OF CERTIORARI TO THE
SUPREME COURT OF OKLAHOMA

BRIEF OF U.S. SENATORS JAMES LANKFORD, JOSH HAWLEY, KEVIN CRAMER, TED BUDD, AND TED CRUZ AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are United States Senators James Lankford, Josh Hawley, Kevin Cramer, Ted Budd, and Ted Cruz. As members of Congress, *amici* have a strong interest in protecting the Free Exercise Clause of the First Amendment, promoting a proper interpretation of the United States Constitution, and protecting religious organizations from unlawful discrimination and exclusion from public participation. *Amici* have worked tirelessly to put these principles into practice, including by sponsoring legislation and resolutions to protect religious freedom.

Moreover, because of their collective years of experience in government, *amici* are well positioned to explain how public-private partnerships benefit the American people, and how those important arrangements could be threatened if states were allowed to exclude entities from participation merely because of an entity's religious affiliation. Although this case involves charter schools and education, this Court's ruling could sweep much more broadly and affect all types of publicly funded projects. By reaffirming that governments cannot exclude religious organizations from public-private partnerships, this Court can ensure robust and valuable civic participation. All Americans, including religious Americans, should be able to contribute to the general welfare.

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[1] Counsel for *amici curiae* state that no counsel for a party authored this brief and that no person other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In a series of recent decisions, this Court deemed it "unremarkable" that "the Free Exercise Clause [does] not permit [states] to 'expressly discriminate[] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character.'" *Carson* v. *Makin*, 596 U.S. 767, 779 (2022); *see also Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449, 462 (2017); *Espinoza* v. *Mont. Dep't of Revenue*, 591 U.S. 464, 475 (2020).

The "unremarkable" nature of these holdings flows directly from the text, structure, and history of the First Amendment, which includes among its precepts a fundamental duty to protect against religious discrimination and exclusion by the government. Because of those core principles, the United States has a robust history of state and local governments partnering with private religious organizations to serve the public interest. For example, the vast majority of American educational institutions from before the Founding through the late nineteenth century were private and religious, and they were often funded by state and local governments. This deep tradition informed the drafting and historical understanding of the First Amendment, placing foundational principles of religious non-exclusion and non-discrimination at the center of our Nation's values.

The Oklahoma Supreme Court ignored the text, structure, and history of the First Amendment—as well as this Court's recent First Amendment jurisprudence—when it upheld an Oklahoma law that effectively excludes religious schools from a public-private charter program, merely because of the charter

schools' religious nature. This decision, and the provisions of the state law upon which it was based, violate the First Amendment and this Court's recent precedent.

Additionally, if upheld, the Oklahoma law and corresponding Oklahoma Supreme Court decision threaten to undermine the legitimacy of *all* partnerships between government and religious organizations—not only in the field of education, but in a wide variety of public projects that benefit from the contributions of private organizations. As explained below, public-private arrangements have been a key part of this Nation's history and its social and economic development. But sustaining the Oklahoma Supreme Court's decision would allow States to exclude religious entities from those arrangements. Not only would that be unconstitutional and antithetical to our Nation's core values; it would hinder important public works by cutting out many religious organizations that would otherwise contribute substantial value.

ARGUMENT

I. The Oklahoma Charter Schools Act Violates the First Amendment and This Court's Recent Precedents

The First Amendment prohibits states from discriminating against religious entities in generally available public benefit programs simply because they are religious. This Court has reaffirmed this principle in a trilogy of recent cases: *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, *Espinoza* v. *Montana Department of Revenue*, and *Carson* v. *Makin*. Each case built upon the former to make clear that states cannot exclude religious organizations from public programs solely because of their religious character or how they

might choose to use the benefits. By imposing a "non-sectarian" requirement on charter schools, however, Oklahoma undermines the Constitution and directly contradicts these cases, creating precisely the kind of religious discrimination the First Amendment forbids.

A. America Has a Long Tradition of Supporting Religious Education

"Government and faith-based organizations have been partners since Colonial America."[2] Throughout early American history, state and local governments often contracted with religious organizations to provide public services such as "hospitals, medical clinics, orphanages, and homes for the aged" in exchange for public funds.[3] These arrangements were based on "the perception that faith-based organizations were both more effective service providers and closer to their beneficiaries than government bureaucracies."[4]

In no field was this idea more powerful—or more accurate—than in the field of education. "[T]he public school system as we know it today did not exist" in the Nation's early years, when "most children were educated at home."[5] Instead, most of those who were educated received their education from religious schools,

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[2] Timothy J. O'Neill, *Faith-Based Organizations and Government*, FREE SPEECH CTR. AT MIDDLE TENN. STATE UNIV. (July 30, 2023), https://firstamendment.mtsu.edu/article/faith-based-organizations-and-government/ (last updated July 5, 2024).

[3] *Id.*

[4] *Id.*

[5] *The History of Christian Schools*, NOAH WEBSTER EDUC. FOUND. (May 23, 2022), https://nwef.org/2022/05/23/the-history-of-christian-schools/.

with many colonists participating in "a vast network of private schools called 'charity schools.'"[6]

The roots of the charity school system trace back to the Puritans in seventeenth-century Europe.[7] Inspired by the Christian belief in the equality of all people before God, the Puritans established charity schools to make schooling universally available, regardless of the student's socioeconomic status.[8] While they were not the first to provide free schooling for the poor, the Puritans were "the first group to successfully inaugurate a system that would make charity or free schools a widespread practice."[9]

The success of the European charity school system encouraged migrants to transport this model to the New World.[10] Charity schools were a prominent feature of the early American colonies, with the Society for the Propagation of the Gospel—a group that originated in England and soon expanded to colonial America—serving as their largest organizational sponsor.[11] Organized around community needs and grounded in religious principles, charity schools brought "both spiritual and intellectual development" to the children of colonial families.[12] These schools

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[6] WILLIAM H. JEYNES, AMERICAN EDUCATIONAL HISTORY: SCHOOL, SOCIETY, AND THE COMMON GOOD 37 (2007) [hereinafter AMERICAN EDUCATIONAL HISTORY].

[7] *See id.* at 38.

[8] *See id.* at 37-39.

[9] *Id.* at 38.

[10] *See id.*

[11] *Id.*

[12] *Id.* at 40.

were widely popular and soon spread from the Northeast throughout the rest of colonial America.[13] Ultimately, colonial-era charity schools "helped form the foundation on which many future educational advances developed."[14]

Most American schools remained both private and religious throughout the late 1700s and early 1800s, including when the First Amendment was drafted.[15] Charity schools, Sunday schools, and other forms of private-religious schooling were so popular that "[t]he educative influence of the church continued powerfully during the early national era, even more so than during the eighteenth century."[16]

"One fascinating factor in the increase of church influence" in the educational realm during the post-Revolutionary period in America "was that it occurred at precisely the time when state legislatures and constitutional conventions were acting to eliminate traditional compulsions in the realm of religion."[17] That

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[13] *Id.* at 41-43.

[14] *Id.* at 41.

[15] *Id.* at 42; *see also* MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 318 (4th ed. 2016) [hereinafter RELIGION AND THE CONSTITUTION].

[16] LAWRENCE A. CREMIN, AMERICAN EDUCATION: THE NATIONAL EXPERIENCE, 1783-1876, at 378 (1980) [hereinafter AMERICAN EDUCATION]; *see also* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 228 n.4 (Harvey C. Mansfield & Delba Winthrop eds., 2002) (observing that, in the early nineteenth century, members of the clergy in the United States did not hold public office, "[u]nless one gives this name to the offices that many of them occupy in the schools" because "[t]he greater part of education [was] entrusted to the clergy").

[17] AMERICAN EDUCATION at 380.

said, citizens of the early Republic saw no contradiction between these developments. Instead, "to individuals living in the eighteenth and nineteenth centuries, education without religion was inconceivable," and "most educators of this era viewed moral education as the most important aspect of education," meaning "that religious instruction was required in the schools" because religion was viewed as morality's foundation.[18]

The Founders' support for charity schools shaped state- and local-government policy as the nineteenth century progressed. Faced with "the pressure of more and more poor immigrants coming to the United States in a nation that was not yet especially wealthy," private charity schools "look[ed] to the addition of public funds to [e]nsure that all who desired to be educated could be."[19] State and local authorities heeded this increase in demand, offering financial support to private-religious schools that needed the resources to educate a growing population.[20]

Again, Americans at the time saw no conflict between this arrangement and the country's constitutional values. "Far from prohibiting such support, the early state constitutions and statutes actively encouraged this policy." *Espinoza*, 591 U.S. at 480 (quoting LLOYD P. JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925, at 4 (1987)). "Even States with bans on government-supported clergy, such as

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[18] AMERICAN EDUCATIONAL HISTORY at 42.

[19] WILLIAM H. JEYNES, SCHOOL CHOICE: A BALANCED APPROACH 5 (2014) [hereinafter SCHOOL CHOICE].

[20] *See id.*

New Jersey, Pennsylvania, and Georgia, provided various forms of aid to religious schools." *Id.* at 481 (citations omitted). Likewise, "[e]arly federal aid (often land grants) went to religious schools": Congress gave financial support to religious schools in the District of Columbia until 1848, and the federal government paid churches to run schools for Native Americans through the end of the nineteenth century. *Id.* (citing RELIGION AND THE CONSTITUTION at 319).

While these policies may seem foreign today, state (and even federal) support for private-religious schools was considered essential by nineteenth-century Americans who "believed that the presence of education was so important that it was imperative that the private and public sectors support one another for the greater good of the country."[21]

Public support for private-religious education continued throughout the second half of the nineteenth century. Accordingly, the federal government turned to private-religious schools to support one of its most significant undertakings to date—the education of formerly enslaved persons in the American South during Reconstruction.[22]

In 1865, Congress established the Bureau of Refugees, Freedmen, and Abandoned Lands, which is often called the Freedmen's Bureau. In 1866, the same year that it passed the Fourteenth Amendment, Congress also passed a law that instructed the Freedmen's Bureau to work through "private benevolent associations" to help educate formerly enslaved persons whenever such associations could provide suitable

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[21] AMERICAN EDUCATIONAL HISTORY at 49.

[22] *See* RELIGION AND THE CONSTITUTION at 323.

teachers.[23] Most of these "private benevolent associations" were missionary societies from the North that were affiliated with specific religious denominations.[24]

Public funds during Reconstruction were frequently provided to Presbyterian, Methodist, Baptist, Congregationalist, and other religious-educational societies to help establish and staff schools throughout the South.[25] While some educators criticized the "missionary focus" of these schools, "the issue was never framed in terms of church-state separation" and had little effect on the debate over aid to private schools in the rest of the country.[26] Many others believed that the efforts of Northern missionaries "embodie[d] the great hope of the founders of the republic, that the country would have and be based upon . . . a widely educated populace."[27] According to this view, which was prevalent at the time, public efforts to support private-religious education did not conflict with the Constitution.[28]

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[23] *Id.* (citing Act of July 16, 1866, § 13).

[24] *Id.*

[25] *See* Marjorie H. Parker, *Some Educational Activities of the Freedmen's Bureau*, 23 J. NEGRO EDUC. 9, 11-13 (1954).

[26] RELIGION AND THE CONSTITUTION at 323.

[27] *Schools and Education During Reconstruction*, PBS: AM. EXPERIENCE, https://www.pbs.org/wgbh/americanexperience/features/reconstruction-schools-and-education-during-reconstruction/ (last visited Mar. 10, 2025).

[28] *See id.*

By the latter half of the nineteenth century, the number of purely public schools increased exponentially. This phenomenon began in earnest around 1874, when the Michigan Supreme Court upheld public taxation for high schools in *Stuart* v. *School District No. 1*, 30 Mich. 69 (1874). "[B]y 1892, about 70 percent of American high school students attended public schools," and by the mid-1960s, schools "became less and less community based and more monolithic in their structure."[29]

The rise of public schools, however, did not completely supplant America's robust tradition of private-religious education. After the Court removed voluntary prayer and Bible reading from public schools in *Engel* v. *Vitale*, 370 U.S. 421 (1962), and *School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963), American parents (and social scientists) began reexamining the merits of private-religious schools.[30]

Today, while rising school taxes and tuition often remain a barrier for parents who seek a private-religious education for their children, government programs in states like Ohio, Arizona, Tennessee, and Florida continue the time-honored tradition of allowing families to achieve this goal regardless of socioeconomic status.[31]

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[29] SCHOOL CHOICE at 5, 32-33.

[30] *See id.* at 33-34.

[31] *See* Libby Stanford et al., *Which States Have Private School Choice?*, EDUC. WEEK (Jan. 31, 2024), https://www.edweek.org/policy-politics/which-states-have-private-school-choice/2024/01 (last updated Mar. 5, 2025).

Indeed, the State of Oklahoma—like many other states—recognizes the importance of religious education, in accordance with America's tradition of support for partnerships between private-religious schools and state governments. Notwithstanding the recent exclusion of religious organizations from the charter school system at issue here, Oklahoma already provides tax credits up to $7,500 for eligible families who choose to send their children to qualifying private schools—including religious schools.[32] So too does the federal government, which offers need-based Pell Grants[33] to undergraduate students who attend both secular and religious institutions.[34]

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[32] *See Oklahoma Parental Choice Tax Credit Program*, OKLA. TAX COMM'N, https://oklahoma.gov/tax/individuals/parental-choice-tax-credit.html (last visited Mar. 10, 2025); *Oklahoma Parental Choice Tax Credit Program: School Directory*, OKLA. TAX COMM'N, https://oklahoma.gov/tax/individuals/parental-choice-tax-credit/parental-choice-tax-credit-participating-private-school-list.html (last visited Mar. 10, 2025) (listing participating private schools, including religious institutions like Temple Christian Academy, Global Harvest Christian School, and St. John Catholic School).

[33] *See* Federal Student Aid, *Federal Pell Grants*, U.S. DEP'T OF EDUC., https://studentaid.gov/understand-aid/types/grants/pell (last visited Mar. 10, 2025).

[34] *See, e.g.*, *Grants – Federal, State, & University*, CATH. UNIV. OF AM., https://financial-aid.catholic.edu/undergraduate/aid-programs/grants.html (last visited Mar. 10, 2025) (noting that Federal Pell Grants are available for students at the Catholic University of America); *Private School Vouchers and Pell Grants Are Not Comparable*, NAT'L COAL. FOR PUB. EDUC., https://www.ncpecoalition.org/pell-grants#:~:text=Both%20Pell%20Grants%20and%20vouchers,integrate%20religion%20into%20the%20curriculum (last visited Mar. 10, 2025) (opposing school voucher programs, but

B. This Court's Recent Decisions Protect Religious Entities from Discrimination in Public Benefit Programs

The United States' enduring tradition of government support for private-religious education has informed this Court's understanding of the First Amendment. *See Trinity Lutheran*, 582 U.S. at 465 (discussing "the historic core of the Religion Clauses"); *Espinoza*, 591 U.S. at 480-83 (same). This is because the Court "turn[s] to 'what history reveals was the contemporaneous understanding of [the Religion Clause's] guarantees'" when "the Framers did not discuss the precise question at issue." *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 359 (1995) (Thomas, J., concurring) (quoting *Lynch* v. *Donnelly*, 465 U.S. 668, 673 (1984)); *see also Schempp*, 374 U.S. at 294 (Brennan, J., concurring) ("[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers.").

Relying on this history in a trilogy of recent cases—*Trinity Lutheran*, *Espinoza*, and *Carson*—this Court has clarified and reaffirmed the First Amendment's core principles of religious non-discrimination and non-exclusion.

1. First, in *Trinity Lutheran* in 2017, this Court addressed whether a church could be excluded from a public benefit (for which it was otherwise eligible) solely because of its religious character. 582 U.S. at 453-54. Noting that "[i]t is too late in the day to doubt

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recognizing that "[b]oth Pell Grants and vouchers for K-12 students provide public funds to religious schools").

that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege," the Court held that such exclusion violates the Free Exercise Clause. *Id.* at 463 (quoting *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963)).

The public benefit in question was the Missouri Department of Natural Resources' Scrap Tire Program, which offered reimbursement grants to qualifying nonprofit organizations that purchased playground surfaces made from recycled tires. *Id.* at 453-55. The program was designed to reduce the number of used tires in landfills while providing safer playground surfaces for children. *Id.* The Department ranked grant applications based on several criteria, including the poverty level of the surrounding area and the applicant's recycling plans. *Id.* at 455.

The Trinity Lutheran Church operated a preschool and daycare center that included a playground with a gravel surface. *Id.* at 454. When the Church applied for a grant to resurface its playground with recycled tire material, it ranked fifth among the forty-four total applicants. *Id.* at 456. Despite its high eligibility ranking, the Church was "deemed categorically ineligible to receive a grant" based on an "express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity." *Id.* at 455-56. In the Department's view, Article I, Section 7 of the Missouri Constitution, which states that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion," compelled this categorical exclusion of the Church. *Id.* at 455.

Trinity Lutheran sued, alleging that the Department's failure to approve its application violated the

Free Exercise Clause. *Id.* at 456. The district court dismissed the suit, holding that the Free Exercise Clause "prohibits the government from outlawing or restricting the exercise of a religious practice," but "generally does not prohibit withholding an affirmative benefit on account of religion." *Id.* The Eighth Circuit affirmed, reasoning it was "rather clear" that the Free Exercise Clause of the U.S. Constitution did not compel Missouri "to disregard the antiestablishment principle reflected in its own Constitution." *Id.* at 457 (quoting *Trinity Lutheran Church of Columbia, Inc.* v. *Pauley*, 788 F. 3d 779, 784 (8th Cir. 2015)).

This Court reversed. *Id.* at 467. Writing for the majority, Chief Justice Roberts explained that the Free Exercise Clause "'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'" *Id.* at 458 (quoting *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520, 533, 542 (1993)). This was not a novel conclusion; instead, it was "unremarkable in light of [the Court's] prior decisions," *id.* at 462, which applied "that basic principle . . . [to] repeatedly confirm[] that denying 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.'" *Id.* at 458 (quoting *McDaniel* v. *Paty*, 435 U.S. 618, 628 (1978)).

The Court rejected the Department's proffered state interest, which was a "policy preference for skating as far as possible from religious establishment concerns." *Id.* at 466. As the Court had previously held in *Widmar* v. *Vincent*, 454 U.S. 263, 276 (1981), a state's interest "in achieving greater separation of

church and State than is already ensured under the Establishment Clause of the Federal Constitution" cannot be considered "compelling" when the policies it inspires infringe upon the Free Exercise Clause.

Notably, the Executive Branch endorsed this Court's decision and the principles of religious freedom that it expounded. In 2017, President Donald Trump signed an Executive Order entitled "Promoting Free Speech and Religious Liberty," which recognized that "[t]he Founders envisioned a Nation . . . in which religious people and institutions were free to practice their faith without fear of discrimination or retaliation" and confirmed that "the United States Constitution enshrines and protects the fundamental right to religious liberty as Americans' first freedom." Exec. Order No. 13,798, 82 Fed. Reg. 21675 (May 4, 2017). Then-Attorney General Jeff Sessions issued guidance for implementing the Executive Order, explaining that, "[e]xcept in the narrowest circumstances, no one should be forced to choose between living out his or her faith and complying with the law." Memorandum on Federal Law Protections for Religious Liberty, 82 Fed. Reg. 49668 (Oct. 6, 2017) (internal citations omitted). The guidance further provided that "[t]he freedom of religion is a fundamental right of paramount importance, expressly protected by federal law;" that "[t]he freedom of religion extends to persons *and* organizations;" and that "[g]overnment may not target religious individuals or entities for special disabilities based on their religion." *Id.*

The guidance also cited *Trinity Lutheran* for the proposition that "a law that disqualifies a religious person or organization from a right to compete for a

public benefit—including a grant or contract—because of the person's religious character is neither neutral nor generally applicable." *Id.* Likewise, it highlighted that "even a neutral, generally applicable law is subject to strict scrutiny under [the Free Exercise Clause] if it restricts the free exercise of religion and another constitutionally protected liberty, such as the freedom of speech or association, or the right to control the upbringing of one's children." *Id.* Both the Executive Order and the implementing memorandum remain in place today.

2. Only three years after *Trinity Lutheran*, the Court again confronted a similar question in *Espinoza*. *See* 591 U.S. 464. The public benefit at issue in that case was Montana's student scholarship program, which allowed taxpayers to receive tax credits for donating to certain "student scholarship organizations" that would in turn award scholarships to families who sought to send their children to private schools. *Id.* at 468-69. "Virtually every private school in Montana" was considered a "qualified education provider" that families who received these scholarships could select when the program first began, giving parents the flexibility to choose between a variety of educational environments. *Id.* at 469.

"Shortly after the scholarship program was created," however, the Montana Department of Revenue promulgated an administrative rule that shattered this flexibility. *Id.* at 470. "[O]ver the objection of the Montana Attorney General," the Department's "Rule 1" changed the definition of "'qualified education provider' to exclude any school 'owned or controlled in whole or in part by any church, religious sect, or denomination.'" *Id.* (quoting Mont. Admin. Rule

§ 42.4.802(1)(a) (2015)). According to the Department, Rule 1 was necessary "to reconcile the scholarship program" with the no-aid provision of the Montana Constitution, which prohibits state and local governments in Montana from making "any direct or indirect appropriation or payment from any public fund or monies . . . to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination." *Id*. at 470; Mont. Const. Art X, § 6(1).

Three mothers whose children attended a private Christian school—either through the scholarship program or with the intent to join the scholarship program—sued to enjoin Rule 1. They argued that Rule 1 "discriminated on the basis of their religious views and the religious nature of the school they had chosen for their children" and "could not be justified on the ground that it was compelled by the Montana Constitution's no-aid provision." *Id.* at 470-71. The state trial court agreed that Rule 1 was not required by the Montana Constitution, holding that the no-aid provision "prohibits only 'appropriations' that aid religious schools, [but] 'not tax credits'" like the ones available under the scholarship program. *Id.* at 471.

The Montana Supreme Court reversed, holding that "the scholarship program unmodified by Rule 1" violated the no-aid provision. *Id.* In its view, "using tax credits to 'subsidize tuition payments'" constituted the sort of government aid that was captured by the no-aid provision's "broad[] and strict[]" prohibition against funding religious schools. *Id.* at 471-72 (quoting *Espinoza* v. *Mont. Dep't of Revenue*, 393 Mont. 446, 459, 464-67 (2018)). Because the court also held that

Rule 1 was invalid for separate reasons (and thus could not be used to rehabilitate the scholarship program), it struck down the scholarship program altogether. *Id.* at 472.

This Court granted certiorari to determine whether the Free Exercise Clause "precluded the Montana Supreme Court from applying Montana's no-aid provision to bar religious schools from the scholarship program." *Id.* at 474. This Court held that it did. *Id.* at 487-89. Reaffirming *Trinity Lutheran*'s "'unremarkable' conclusion that disqualifying otherwise eligible recipients from a public benefit 'solely because of their religious character' imposes 'a penalty on the free exercise of religion that triggers the most exacting scrutiny,'" *id.* at 475 (quoting *Trinity Lutheran*, 582 U.S. at 462), the Court again held that the "'*supreme* law of the land' condemns discrimination against religious schools and the families whose children attend them." *Id.* at 488 (quoting *Marbury* v. *Madison*, 5 U.S. 137, 180 (1803)). And, again, the Court reiterated that a state's "interest in separating church and State 'more fiercely' than the Federal Constitution" is not compelling "in the face of the infringement of free exercise." *Id.* at 484-85 (quoting *Trinity Lutheran*, 582 U.S. at 462).

3. In *Carson*, this Court continued to extend and reaffirm its precedents that protect religious organizations against exclusion from public benefit programs. 596 U.S. at 789. There, this Court held that Maine's tuition assistance program violated the Free Exercise Clause because it excluded religious schools. *Id.*

Maine's Constitution requires the state to ensure that every child has access to free public education. *Id.*

at 773. To fulfill this obligation in rural areas with no public secondary schools, Maine created a tuition assistance program whereby the state would pay tuition for students in those areas to attend "the approved private school of the parent's choice at which the student is accepted." *Id.* (quoting Me. Rev. Stat. Ann. Tit. 20-A, § 5204(4)). Qualifying parents would designate the school of their choice, and the state would transmit payments directly to that school. *Id.* at 773-74.

To be eligible for the tuition assistance payments, however, a school needed to be a "nonsectarian" institution. *Id.* at 773-75. This restriction, which had been in place since 1981, was enacted in response to an opinion from the Maine Attorney General that claimed public funding of religious schools violated the Establishment Clause. *Id.* at 774-75. Although the Maine Legislature "considered a proposed bill to repeal the 'nonsectarian' requirement" following this Court's decision in *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 652 (2002) (holding that a program under which private citizens "direct government aid to religious schools wholly as a result of their own genuine and independent private choice" does not violate the Establishment Clause), the bill was rejected and the nonsectarian requirement remained in place. *Carson*, 596 U.S. at 775.

The petitioners in *Carson* were parents whose children attended or wished to attend Christian schools that were accredited by the New England Association of Schools and Colleges and met Maine's compulsory attendance requirements. *Id.* at 775. The parents were otherwise eligible for the tuition assistance program but were excluded solely because the schools

they selected were religious. *Id.* at 775-76. The parents sued the Commissioner of the Maine Department of Education, alleging that the nonsectarian requirement violated the Free Exercise Clause. *Id.* at 776.

The district court rejected the parents' claims, and the First Circuit affirmed. *Id.* The First Circuit tried to distinguish the case from *Trinity Lutheran* and *Espinoza* on the grounds that Maine's program excluded schools based on their "religious use" of funds, not their religious "status." *Id.* at 776, 778. Further, the court contended that the program "sought to provide 'a rough equivalent of the public school education that Maine may permissibly require to be secular.'" *Id.* at 777 (quoting *Carson* v. *Makin*, 979 F.3d 21, 44 (1st Cir. 2022)).

This Court rejected that distinction. Yet again, the state's interest in maintaining a stricter separation of church and state than the Establishment Clause requires could not justify the infringement on free exercise rights—an infringement of religious liberty that is inherent in laws excluding religious schools from otherwise generally available public benefits. *Id.* at 780-86.

C. Despite This Court's Recent and Clear Rulings, Oklahoma Unconstitutionally Excludes Religious Organizations from Public Programs

The principles of *Trinity Lutheran*, *Espinoza*, and *Carson* are clear: the Free Exercise Clause, informed by our Nation's deep historical tradition of partnership between government and religious organizations, prohibits states from excluding otherwise eligible religious organizations from public benefit programs

solely because of their religious character or use. Nevertheless, the Oklahoma Charter Schools Act, through its "nonsectarian" requirement, explicitly bars religious organizations from participating in the state's charter school program.

The Oklahoma Charter Schools Act requires that all charter schools be "nonsectarian in [their] programs, admission policies, employment practices, and all other operations." Okla. Stat. tit. 70, § 3-136(A)(2). It further prohibits the Charter School Board from sponsoring a charter school that is "affiliated with a nonpublic sectarian school or religious institution." *Id.* By including these provisions, the Oklahoma Legislature intentionally excluded an entire category of potential charter school operators—religious organizations—from participating in a generally available public benefit program solely because of their religious character. Oklahoma organizations are told that they may partner with the state to open a charter school—but only if they surrender their faith first.

This statutory exclusion closely parallels the discriminatory programs struck down in *Trinity Lutheran*, *Espinoza*, and *Carson*. Just as Missouri categorically denied playground resurfacing grants to religious organizations (regardless of how they planned to use the funds); Montana barred religious schools from participating in its scholarship program; and Maine excluded religious schools from its tuition assistance program, Oklahoma has erected a religious-status barrier to participation in its state charter school program. Like those programs, Oklahoma's "nonsectarian" requirement is a facial restriction that disqualifies religious organizations based solely on

their religious character. This remains true regardless of how Oklahoma describes its discriminatory practices. "[T]he prohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use-based discrimination." *Carson*, 596 U.S. at 788.

The Oklahoma Supreme Court compounded this error in its decision in *Drummond* v. *Oklahoma Statewide Virtual Charter School Board*, 2024 OK 53. When faced with a challenge to the contract between the Charter School Board and St. Isidore of Seville Catholic Virtual School, the court held that the contract violated the Oklahoma Constitution, the Charter Schools Act, and the federal Establishment Clause. Central to its decision was the determination that St. Isidore, as a charter school, would be a "governmental entity and state actor," such that participation in the state charter school program would violate the Establishment Clause. *Drummond*, 2024 OK 53, ¶ 20.

The court's reasoning, however, turns on a semantic fallacy: by broadly designating all charter schools as "public" and therefore "state actors," the court transformed the religious exclusion into a purported Establishment Clause *requirement*. *See id.* at ¶ 43 ("The Free Exercise Trilogy cases do not apply to the governmental action in this case.").

But this Court has warned states against employing just that kind of semantic maneuvering to circumvent the First Amendment. As the Court noted in *Carson*, "'the definition of a particular program can always be manipulated to subsume the challenged condition,' and to allow States to 'recast a condition on funding' in this manner would be to see 'the First

Amendment . . . reduced to a simple semantic exercise.'" 596 U.S. at 784 (quoting *Agency for Int'l Dev.* v. *All. for Open Society Int'l, Inc.*, 570 U.S. 205, 215 (2013)). The Court has further cautioned that it "must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Id.* (quoting *Walz* v. *Tax Comm'n of City of New York*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

The Oklahoma Supreme Court's decision creates precisely such a "religious gerrymander." By first declaring that all charter schools, by definition, are public schools and state actors, and then using that categorical designation to justify excluding religious organizations from the charter school program, the court effectively nullified the protections that this Court has established in its Free Exercise jurisprudence. If allowed to stand, this reasoning would permit states to evade the Free Exercise Clause simply by statutorily designating a program's participants as state actors—even when, as here, those participants are private organizations that just happen to contract with the state to provide educational services to families that *voluntarily* choose to participate in a charter school and where the state does not compel attendance at any religious charter school. Yet, as this Court has already noted, its Free Exercise holdings "turn[ ] on the substance of free exercise protections, not on the presence or absence of magic words." *Id.* at 785.

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The history of public-private partnerships in education reveals that not only is the government *permitted* to work with religious organizations to provide educational options without "establishing" a religion,

but also that these partnerships are deeply rooted in the original purposes and protections of the First Amendment. Similarly, this Court's precedents in *Trinity Lutheran*, *Espinoza*, and *Carson* confirm that the Free Exercise Clause protects religious organizations from any law that excludes such organizations from generally available public benefit programs or projects. The Oklahoma Charter Schools Act and the Oklahoma Supreme Court's decision undermine these principles by creating a blatant religious exclusion and then semantically dressing it up as an Establishment Clause requirement.

II. Upholding the Oklahoma Charter Schools Act Would Undermine Other Public-Private Partnerships that Benefit Citizens

The Oklahoma Charter Schools Act, by excluding religious organizations from participation, not only violates the First Amendment but also undermines the significant contributions that religious organizations make to public projects more generally. This exclusion is not only legally indefensible but also practically detrimental to the common good and social fabric of America.

Religious organizations have historically played a crucial role in public-private partnerships, bringing unique perspectives and often a charitable motivation to work at lower costs. Even today, federal, state, and local governments rely heavily on private-religious organizations to fulfill a myriad of public needs, extending far beyond the realm of education. These partnerships harness the unique strengths and missions of religious entities to deliver essential services that benefit every American. Religious organizations like

the YMCA, Jewish hospital systems, and religious foster care organizations, just to name a few, have been indispensable to government programs and projects.[35] These organizations' deep-rooted commitment to service, their extensive volunteer networks, and their ability to mobilize resources swiftly make them invaluable partners in addressing public challenges. Likewise, faith-based anti-recidivism programs in prisons are elective programs inclusive of many faiths—and often have some level of grant or public funding.[36]

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[35] *See, e.g.*, *Our Impact*, YMCA, https://www.ymca.org/who-we-are/our-impact#:~:text=Financial%20Transparency,must%20file%20with%20the%20IRS (last visited Mar. 7, 2025) (reporting "more than $600M in government grants" annually); *Meeting the Needs of the North American Jewish Community*, JEWISH FED'NS OF N. AM., https://www.jewishfederations.org/about-jfna (last visited Mar. 7, 2025) (noting the "tens of millions each year in public funds" that support Jewish organizations that "serv[e] people of all backgrounds, including hospitals, nursing homes, community centers, family and children's service agencies, and vocational training programs"); *Fulton* v. *City of Phila.*, 593 U.S. 522, 529 (2021) ("The Philadelphia foster care system depends on cooperation between the City and private [religious] foster agencies.").

[36] *See, e.g.*, Jack Brewer et al., *Research Report: Reducing Recidivism Through Faith-Based Prison Programs*, AM. FIRST POL'Y INST. (Apr. 18, 2023), https://americafirstpolicy.com/issues/research-report-reducing-recidivism-through-faith-based-prison-programs (describing several faith-based organizations that partner with prisons around the country to reduce recidivism, including the Buddhist Association of the United States, the Tayba Foundation (a Muslim nonprofit), the Aleph Institute (a Jewish nonprofit), and the multi-faith Horizon Communities).

This reliance stresses the critical role that religious organizations play in the fabric of American society, contributing to the common good in ways that government alone cannot achieve. By excluding these entities based on religion, state governments undermine the very foundations of our public service infrastructure, to the detriment of all citizens.

Consider, for example, the partnership between the City of Mesa and The Church of Jesus Christ of Latter-Day Saints to revitalize the area around the Mesa Arizona Temple.[37] This collaboration led to the creation of "The Grove on Main," a mixed-use community that replaced vacant lots and dilapidated buildings with new housing, retail spaces, and improved streetscapes. This project not only enhanced the environment around the temple but also attracted businesses and residents to the area, increasing the economic and social vitality of downtown Mesa. The success of this project underscores the potential benefits of involving religious organizations in public initiatives.

Another notable example is the collaboration between Habitat for Humanity and various local governments across the United States.[38] Habitat for Human-

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[37] *See The Church's Redevelopment Project in Mesa Is Complete*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS (Sept. 29, 2021), https://newsroom.churchofjesuschrist.org/article/church-mesa-arizona-redevelopment-project.

[38] *See Our Work*, HABITAT FOR HUMAN., https://www.habitat.org/our-work (last visited Mar. 3, 2025); *State Support Organizations*, HABITAT FOR HUMAN.,

ity is a Christian organization, and it has been instrumental in addressing housing needs by building affordable homes for low-income families. These partnerships have not only provided safe and stable housing but also fostered community development and empowerment. The organization's commitment to its mission and its ability to mobilize volunteers and resources have made it a valuable partner in public housing projects.

Another prominent public-private partnership is the collaboration between the Salvation Army and various local governments across the United States.[39] The Salvation Army, a well-known Christian organization, has partnered with cities and counties to provide essential services such as disaster relief, homeless shelters, and rehabilitation programs. For instance, in the aftermath of Hurricane Katrina, the Salvation Army worked closely with federal, state, and local agencies to deliver food, shelter, and medical care to thousands of displaced individuals.[40] This partnership not only provided immediate relief but also facilitated long-term recovery efforts, demonstrating the critical role that religious organizations

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https://www.habitat.org/about/state-support-organizations (last visited Mar. 3, 2025).

[39] *See What Do We Do?*, SALVATION ARMY, https://www.salvationarmyusa.org/usn/about/ (last visited Mar. 3, 2025); *Positional Statement: The Salvation Army and the State*, SALVATION ARMY (Mar. 2011), https://www.salvationarmy.org/ihq/ipsstate.

[40] *See, e.g.*, *Hurricane Katrina Ten Years on: The Salvation Army Continues to Serve the USA Gulf Coast*, SALVATION ARMY INT'L (Aug. 25, 2015), https://www.salvationarmy.org/ihq/news/inr250815.

can play in addressing public needs. The widespread recognition and trust in the Salvation Army's mission and capabilities underscores the importance of including religious entities in public projects for the greater good of society.

The exclusion of religious organizations from public projects, as mandated by the Oklahoma Charter Schools Act, would have far-reaching consequences insofar as it could be extended beyond education. Each of the partnerships above and many others would be threatened if states could simply exclude religious organizations from those types of projects and programs. Further, if state courts could simply designate all partnering religious groups as "state actors," as did the Oklahoma Supreme Court, it could potentially subject each of those entities to § 1983 liability and deter participation. *See, e.g.*, *Doe* v. *N. Homes, Inc.*, 11 F.4th 633, 635 (8th Cir. 2021); *Roberson* v. *Dakota Boys & Girls Ranch*, 42 F.4th 924, 926 (8th Cir. 2022).

Accordingly, allowing the religious exclusion in this case would substantially limit the pool of potential partners for public projects and, in turn, exclude a significant portion of the American population from participating in public initiatives simply because of their faith. According to a recent Gallup poll, about three in four Americans identify with a specific religious faith.[41] If the Oklahoma law were upheld, a substantial portion of American organizations could be excluded from important public projects and partnerships, depriving these initiatives of the diverse viewpoints and experiences that religious organizations

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[41] *How Religious Are Americans?*, GALLUP: THE SHORT ANSWER, (Mar. 29, 2024), https://news.gallup.com/poll/358364/religious-americans.aspx.

bring. Moreover, religious organizations often operate with a level of dedication and commitment that is difficult to match. Their missions are deeply rooted in service to others, and they frequently go above and beyond to ensure the success of the projects they undertake.

The impact of this case could extend beyond education and could have substantial unintended consequences. Federal, state, and local governments rely heavily on private-religious organizations for a wide range of public works that benefit citizens, but—under the Oklahoma Supreme Court's reasoning—these organizations could all be designated as state actors and therefore unable to participate in the public sphere due to their religious status.

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Upholding the Oklahoma Charter Schools Act with the included exclusion of religious organizations would set a dangerous precedent, signaling that religious organizations are not welcome in public projects. This would not only violate the First Amendment, but it would also deprive society of the valuable contributions that these organizations make. Religious organizations bring invaluable resources, perspectives, and energy to public projects, and their exclusion would have far-reaching negative consequences. The Court should reaffirm its recent precedent and make clear that state governments cannot discriminate against or exclude religious people and organizations from public projects and benefits merely because they are religious.

CONCLUSION

This Court should reverse the decision of the Oklahoma Supreme Court.

Respectfully submitted,

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