

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,

Respondent.

(For Continuation of Caption, See Inside Cover)

*On Writs of Certiorari
to the Oklahoma Supreme Court*

**AMICI CURIAE BRIEF OF JCRL, ABRAHAM
KNOWLEDGE ACADEMY, AND THE ISLAM
AND RELIGIOUS FREEDOM ACTION TEAM
OF RFI, SUPPORTING PETITIONERS**

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ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL,
Petitioner,

v.

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

QUESTIONS PRESENTED

1. Whether the academic and pedagogical choices of a privately owned and run school constitute state action simply because it contracts with the state to offer a free educational option for interested students.

2. 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.

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INTEREST OF THE *AMICI CURIAE*¹

The Jewish Coalition for Religious Liberty (“JCRL”) is a non-denominational organization of Jewish communal and lay leaders, seeking to protect the ability of Americans to freely practice their faith. Since its founding, JCRL has recruited a volunteer network of accomplished attorneys, submitted legal briefs, and written many op-eds in Jewish and general media outlets in defense of religious liberty. One of those op-eds directly addressed Attorney General Drummond’s position in these cases.

The Abraham Knowledge Academy (AKA) is a non-profit association that is in the process of creating a charter school in the Minneapolis, Minnesota, metropolitan area. The initiative was founded after area Muslim leaders conducted an intensive survey of parents that revealed a strong aspiration for the establishment of accessible Islamic schools and a willingness and eagerness among parents to invest in their children's education, albeit with concerns about affordability. In response to this demand, AKA initially sought to establish the first Islamic Charter School in Minnesota, committed to enhancing pupil learning and student achievement through a unique, holistic educational approach, integrating a knowledge-based curriculum with the teachings and

¹ Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than Amici funded its preparation or submission.

values of Islam, with an emphasis on virtue ethics and good citizenship. With the state government currently prohibiting religious schools from participating in the charter school program, AKA is focused on establishing a school offering the same academic excellence but with religion taught from a purely academic standpoint.

The Islam and Religious Freedom Action Team (IRF), an affiliate of the Religious Freedom Institute, serves as a Muslim voice for religious freedom grounded in the traditions of Islam. To this end, the Team engages in research, education, and advocacy on core issues including freedom from coercion in religious exercise and equal citizenship for people of diverse faiths.

SUMMARY OF ARGUMENT

In this brief, Amici—an interfaith coalition of religious liberty advocates—will offer their unique perspective on how the Oklahoma Attorney General has leveraged a provision of the Oklahoma Constitution that violates the Federal Constitution to justify explicit state hostility toward religious minorities, in violation of the First Amendment.

In its opinion, the Oklahoma Supreme Court repeatedly denied that Article II Section 5 of the Oklahoma Constitution is a “Blaine Amendment”—i.e., one of the many state constitutional provisions restricting funding to religious schools that were “prompted by virulent prejudice against immigrants, particularly Catholic immigrants.” *Espinoza v. Mont.*

Dep't of Revenue, 519 U.S. 464, 498 (2020) (Alito J. concurring). But the actions of the Attorney General have evinced the same hostility toward religious minorities, repeatedly demeaning Islam and other minority faiths as religions that “most Oklahomans would consider reprehensible and unworthy of public funding.”²

These are not isolated statements; they have pervaded every action taken by his office to ensure that religious institutions he disfavors cannot establish charter schools. And Oklahoma’s unconstitutional Blaine Amendment has provided the legal cudgel to allow the Attorney General’s office to weaponize that hostility into official efforts to thwart St. Isidore’s charter.

Of course, even if Oklahoma’s constitutional prohibition on intertwining any state money with religious institutions were not unconstitutional, the Attorney General’s aversion to religious plurality and educational choice in Oklahoma is misguided, both because it is legally impermissible and because it disregards the benefits of expanding school choice to include religious institutions. Legally, the Attorney General’s disparaging comments about minority faiths betray the First Amendment’s mandate that

² Letter from Attorney General Gentner Drummond to Rebecca L. Wilkinson, Ed.D. (Feb. 23, 2023), https://oklahoma.gov/content/dam/ok/en/oag/documents/news-documents/2023/march/rebecca_wilkinson_ag_opinion_2022-7_virtual_charter_schools.pdf.

government officials approach their official duties with “religious neutrality,” as this Court articulated in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 584 U.S. 617 (2018). The Attorney General is also wrong when he argues that Oklahomans should fear religious pluralism and educational choice. Families of all faiths (or no faith) benefit from a broad range of educational options. And while the Attorney General may find it “reprehensible” to allow educators from minority religions to access public funding on the same grounds as secular entities, Americans—as embodied in our founding legal documents and reflected in this Court’s opinions—have rejected such hostile views of their neighbors.

In granting the Attorney General’s petition to thwart St. Isidore’s charter, the Oklahoma Supreme Court failed to address the Attorney General’s explicit religious animus. This Court must enforce its own precedent and ensure that state action is not tainted by religious discrimination.

ARGUMENT

I. Certain provisions of Oklahoma’s Constitution operate with the same unconstitutional effect as a Blaine Amendment.

The Oklahoma Supreme Court has repeatedly denied that certain provisions of the Oklahoma Constitution operate with the same effect as a Blaine Amendment. Blaine Amendments, predominantly

passed in the late nineteenth century, are state constitutional amendments that prevent the state from appropriating funds in aid of sectarian schools. Erica Smith, *Religious Liberty: Blaine Amendments and the Unconstitutionality of Excluding Religious Options from School Choice Programs*, 18 *Federalist Soc’y Rev.* 88 (2017). These no-aid provisions, present in at least 37 state constitutions, are referred to as Blaine Amendments because they were modeled after a failed federal constitutional amendment proposed by Congressman James G. Blaine in 1875. *Id.* “The Blaine Amendment was ‘born of bigotry’ and ‘arose at a time of pervasive hostility to the Catholic Church and to Catholics in general’; many of its state counterparts have a similarly ‘shameful pedigree.’” *Espinoza v. Mont. Dep’t of Revenue*, 591 U.S. 464, 482 (2020) (quoting *Mitchell v. Helms*, 530 U.S. 793, 828-829 (2000) (plurality opinion)).

In *Prescott v. Oklahoma Capital Preservation Commission*, the Oklahoma Supreme Court denied that the state’s constitution contains a Blaine Amendment, but only because the constitution breaks up the components of a traditional Blaine Amendment and scatters them across different constitutional provisions. Justice Gurich wrote that while “the first sentence of the Blaine Amendment imposed the Establishment Clause’s restrictions on states . . . Oklahoma’s establishment clause restriction is found at Article I, Section II of the Oklahoma Constitution.” 373 P.3d 1032, 1040 (Okla. Sup. Ct. 2015) (Gurich, J. concurring). Justice Gurich also distinguishes the Oklahoma no-aid provision from

the original Blaine Amendment on the basis that the original Blaine Amendment only addresses aid for religious educational institutions, while Oklahoma’s version is a much broader “general prohibition on the use of state property to benefit religion.” *Id.*

The fact that the Oklahoma state constitution breaks up the components of a traditional Blaine Amendment and scatters them across different constitutional provisions, and goes farther than the original Blaine Amendment, either makes matters worse because it is more harmful to minority faiths, or it makes no substantive difference; these provisions operate with the same discriminatory purpose and result as they would if they were contained in a single Blaine Amendment provision.

Withholding access to otherwise available state funds and access to state property because of a school’s religious character flies in the face of this Court’s jurisprudence. *See Carson v. Makin*, 596 U.S. 767 (2022) (holding that Maine’s nonsectarian requirement for tuition assistance violated the Free Exercise clause); *Espinoza v. Mont. Dep’t of Revenue*, 591 U.S. 464 (2020) (concluding that withholding scholarships from use at religious schools based on the no-aid provision of Montana’s constitution violated the Free Exercise clause); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017) (holding that the Missouri Department of Natural Resources violated a church’s rights under the Free Exercise clause by prohibiting participation

in a reimbursement program for recycled tires used to make playgrounds safer).

Although Justice Gurich is correct that the provision of the Oklahoma State Constitution at issue “makes no mention of schools, the Catholic Church, or the Blaine Amendment,” *Prescott*, 373 P.3d at 1040, that does not prove that it lacks the same discriminatory intent and function, nor does it prevent bad actors from infusing their own discriminatory motives in its application. Indeed, the Attorney General, in using these constitutional provisions to justify his actions, has explicitly made mention of specific religions that he disfavors. The Attorney General’s actions here have illustrated how these provisions can be used as a tool of religious discrimination, and the overly credulous analysis of these provisions by the Oklahoma Supreme Court endangers religious liberty.

II. The Attorney General’s actions to thwart St. Isidore’s charter are tainted by explicit discrimination against religious minorities in violation of the First Amendment.

Shortly after taking office, the Attorney General reversed his predecessor’s published opinion that this Court’s precedent prohibited Oklahoma’s Virtual Charter School Board from discriminating against religious institutions in connection with school choice programs. In that letter, Attorney General Drummond explicitly cited animus toward religious minorities as the motivation for his action:

While many Oklahomans undoubtedly support charter schools sponsored by various Christian faiths, the precedent created by approval of the SISCVS application will compel approval of similar applications by all faiths. I doubt most Oklahomans would want their tax dollars to fund a religious school whose tenets are diametrically opposed to their own faith. Unfortunately, the approval of a charter school by one faith will compel the approval of charter schools by all faiths, even those most Oklahomans would consider reprehensible and unworthy of public funding.³

That statement maligned faiths outside the Christian majority as “reprehensible and unworthy of public funding.” And in a press release announcing the petition to cancel St. Isidore’s charter, Attorney General Drummond directed his animus specifically toward Oklahomans of the Muslim faith—a religious minority comprising more than 30,000 residents of the state⁴:

Because of the legal precedent created by the Board’s actions, tomorrow we may be forced to fund radical Muslim teachings like Sharia law. In fact, Governor Stitt has already indicated that he would welcome a Muslim charter

³ Office of the Oklahoma Attorney General, *supra*, note 2.

⁴ CAIR Oklahoma, Guide to Islam and Muslims in Oklahoma, <https://www.cairoklahoma.com/islamguide/>.

school funded by our tax dollars. That is a gross violation of our religious liberty.⁵

That hateful sentiment is also reflected in the petition and corresponding motion that his office filed before the Oklahoma Supreme Court, asserting that the State must shut down St. Isidore to avoid a “reckoning” that would “permit extreme sects of the Muslim faith to establish a taxpayer funded public charter school teaching Sharia Law.”⁶ Even in response to the petitions for certiorari in this Court, the Attorney General has continued his expressions of animus toward religious minorities, stating that permitting St. Isidore to operate “will open the floodgates and force taxpayers to fund all manner of religious indoctrination, including radical Islam or even the Church of Satan.”⁷

⁵ Press Release, Office of the Oklahoma Attorney General, Drummond files lawsuit against state virtual charter board members for violating religious liberty of Oklahoma taxpayers (Oct. 20, 2023), <https://oklahoma.gov/oag/news/newsroom/2023/october/drummond-files-lawsuit-against-state-virtual-charter-board-membe.html>. It is important to note that the Attorney General did not suggest that a particular school might promote violence or have a curriculum that failed to meet the state’s neutral educational standards. Instead, he used the vague specter of such a possibility to vilify an entire faith. That is precisely the sort of prejudice that this Court has found impermissible.

⁶ Pet.’s Br. in Supp. of Appl. to Assume Original Juris. at 1, *Drummond v. Okla. Statewide Virtual Charter Sch. Bd.*, No. 121,694 (Oct. 20, 2023).

⁷ Press Release, Office of the Oklahoma Attorney General, Attorney General Drummond comments on St. Isidore filing (Oct.

The Attorney General’s comments demonstrate that his actions to thwart St. Isidore are motivated by an animus toward religious minorities impermissible under this Court’s First Amendment precedent. “Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature.” *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). For example, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), this Court struck down ordinances prohibiting animal sacrifice rituals, holding that its “Establishment Clause cases [recognize] the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general.” *Id.* at 532. In finding that the ordinances were impermissibly motivated by religious bias, this Court examined the comments of city officials, including the City Attorney’s comment that “[t]his community will not tolerate religious practices which are abhorrent to its citizens,” and the city council’s stated “commitment to a prohibition against any and all acts of any and all religious groups which are inconsistent with public morals, peace or safety.” *Id.* at 526, 540-42.

Likewise, in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, the Court built on its holding from *Church of Lukumi*: “[The Court has] made clear that the government, if it is to respect the

7, 2024)

<https://oklahoma.gov/oag/news/newsroom/2024/october/attorney-general-drummond-comments-on-st-isidore-filing.html>.

Constitution’s guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. The Free Exercise Clause bars even ‘subtle departures from neutrality’ on matters of religion.” 584 U.S. at 638 (citing *Church of Lukumi*, 508 U.S. at 534).

With that guidance, the Court overturned a decision of the Colorado Civil Rights Commission in which the commissioner stated that “freedom of religion has been used to justify discrimination” and critiqued a citizen’s stated religious beliefs as “one of the most despicable pieces of rhetoric that people can use.” *Id.* at 635. The Court stated that the Constitution “commits government itself to religious tolerance, and 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.” *Id.* at 638–639.

In *Trump v. Hawaii*, this Court considered remarks made by President Trump as possible motivation for his Proclamation colloquially known as the “Muslim Ban.” 585 U.S. 667 (2018). In declining to give those remarks significant weight, the majority recognized that the Proclamation itself (the President’s official action) was neutral on its face, that many of the remarks were made before the President took office, and that the special powers of the Executive in foreign affairs and national security required

significant deference. *Id.* at 701–02. Even with those mitigating factors, Justice Sotomayor recognized in her dissent that “the full record” of President Trump’s campaign comments “paint[ed] a . . . picture, from which a reasonable observer would readily conclude that the Proclamation was motivated by hostility and animus toward the Muslim faith.” *Id.* at 731 (Sotomayor, dissenting). “[T]he dispositive and narrow question here is whether a reasonable observer, presented with all “openly available data,’ the text and ‘historical context’ of the Proclamation, and the “specific sequence of events” leading to it, would conclude that the primary purpose of the Proclamation is to disfavor Islam and its adherents by excluding them from the country. The answer is unquestionably yes.” *Id.* at 737 (internal citations omitted). “Given the overwhelming record evidence of anti-Muslim animus, it simply cannot be said that the Proclamation has a legitimate basis.” *Id.* at 743 (Sotomayor, dissenting).

Here, the Attorney General’s statements go far beyond the “subtle departures from neutrality” disavowed in *Masterpiece Cakeshop* and other cases; he has instead explicitly and repeatedly referenced discrimination against Islam and other minority religious faiths as the reason for—and directly in connection with—each of his official actions. The Attorney General’s repeated invocations of “Sharia Law”⁸

⁸ See Office of the Oklahoma Attorney General, *supra*, note 5; see also Press Release, Office of the Oklahoma Attorney General, Drummond remarks on actions of Oklahoma Charter

and characterizations of Islam as “radical”⁹ in explaining his official opposition to religious charter schools unquestionably lead to the conclusion that this policy is motivated by an animus toward Islam and its adherents.

By disregarding the Attorney General’s explicit motivating animus, the Oklahoma Supreme Court disregarded decades of this Court’s First Amendment precedent.

III. Educational choice—including religious options—is beneficial and consistent with American ideals.

Religious families have long shared the tax burden of funding public schools, even if they did not view those schools as a viable option for their children. While wealthy families can afford to send their children to private schools that match their religious principles, thousands of low- and middle-income families struggle to do so while providing for other material needs (and paying, directly or indirectly, for schools they do not view as ideal for their children). Ultimately, no parent should be made to choose be-

School Board (July 30, 2024), <https://oklahoma.gov/oag/news/newsroom/2024/july/drummond-remarks-on-actions-of-oklahoma-charter-school-board.html> (“Rather than acting to protect religious liberty, they are recklessly committed to using our tax dollars to fund radical religious teachings like Sharia law.”)

⁹ See Office of the Oklahoma Attorney General, *supra*, notes 5, 8.

tween putting food on the table and providing their child with an appropriate education. And, despite the Attorney General's divisive rhetoric, no person should wish that on anyone else in keeping with "the principles of religious freedom and tolerance on which this Nation was founded." *Trump*, 585 U.S. at 701.

There are numerous reasons why a family from a minority religion might wish to send its children to a school affiliated with its faith. First, parents might wish to raise their children in their faith and to send them to a school that offers "[s]ystematic religious instruction and moral training according to the tenets" of that faith. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 532 (1925). For example, one Jewish mother explained her decision to move her daughter from a public school to a Jewish day school as follows:

This is her bat mitzvah year. She's missing out on the Jewish part of her education, and that's important to us. When it's Purim, I want her to feel like it's Purim that day. When it's Chanukah, I want her to feel it's Chanukah all week long. You're not going to get that in a public school. And that's an experience I want my daughter to have.¹⁰

¹⁰ Uriel Heilman, "Why some public school parents are switching to Jewish day schools," Jewish Telegraph Agency (Aug. 28, 2015).

For many Jewish families, these options would only be affordable through school choice programs. According to Rabbi Yitz Frank: “There is something to be gained by attending a Jewish day school and the reality is that there are many families that would not have the resources to do that without the help of [school choice] programs.”¹¹

Jewish day schools facilitate Jewish children's ability to flourish, both as students and as observant Jews. For example, these schools are closed on Jewish holidays. An Orthodox Jewish student in a public school would have to skip approximately a dozen days of school each year to observe the holidays. During these times, students cannot write, use electricity, or travel by car or bus. It would be effectively impossible for an Orthodox student to attend class on such days. Jewish students who attend public schools will necessarily miss class time and accrue a number of absences that may create disciplinary issues.¹²

Other days on the Jewish calendar pose a different set of difficulties: on certain dates, an observant Jewish student could go to school, but he would nev-

¹¹ Amanda Koehn, “Orthodox educators praise school choice,” *Cleveland Jewish News* (Feb. 10, 2017).

¹² Anti-Defamation League, *School & Workplace Accommodations for the Jewish High Holidays: Know Your Rights and Obligations*, <https://www.adl.org/sites/default/files/SWAJHH.pdf>

ertheless face difficulties due to specific religious practices. For example, on the intermediate days of the Holiday of Sukkot, Orthodox Jews eat all their meals in an outdoor booth known as Sukkah. If a Jewish day school is open on those days, it will provide a Sukkah in which to eat. A student attending a secular school would be unable to observe this practice while at school.

In other circumstances, school choice may be essential to safeguard children from a hostile environment where they are targeted for wearing unusual headgear or not cutting their hair like most of their classmates. For example, young “Muslims and Jews experience disproportionately high rates of hate speech and bullying.”¹³ Religious educational institutions reflecting their faith can help protect children from acts of discrimination.

Similarly, parents’ faith may include a deeply held commitment to community service, which they see encouraged at their faith’s educational institutions.¹⁴ Many Islamic schools focus on the core values of citizenship and community service in addition

¹³ Nadia S. Ansary, *Religious-Based Bullying: Insights on Research and Evidence-Based Best Practices from the National Interfaith Anti-Bullying Summit*, Institute for Social Policy and Understanding (2018) 21.

¹⁴ See Margaret F. Brinig & Nicole S. Garnett, *Catholic Schools, Urban Neighborhoods, and Education Reform*, 85 Notre Dame L. Rev. 887 (2010) (documenting the positive social effects of Catholic schools).

to academic excellence.¹⁵ Islamic schools focus on community-oriented goals such as “preparing students to contribute to the betterment of American society,”¹⁶ “fostering students who are determined to achieve the highest academic success while being actively engaged in making a difference in the world around them,”¹⁷ and “promoting excellence in teaching and community participation to ensure the successful education of all students.”¹⁸ The goals espoused in the mission statements of these schools are ones that many parents would support, regardless of their religious beliefs. Parents from minority or even majority religions may choose to enroll their children at Islamic schools because they believe their faith compels them to teach the value of community service to their children.

For example, amicus curiae The Abraham Knowledge Academy applied in 2023 to open an Islamic charter school in Minnesota to meet the unfulfilled need for an Islamic education amongst the

¹⁵ See Nader Al-Refai, *Muslim schools and the teaching of citizenship*, University of Huddersfield (2007).
https://eprints.hud.ac.uk/id/eprint/351/1/RefaiFinal_MPhil_The_sis.pdf.

¹⁶ Mercy School Institute, *Welcome from the Principal*,
<https://www.mercyschool.com/welcome-from-the-principal> (last visited Oct. 29, 2024).

¹⁷ Houston Quran Academy, *HQA Vision and Mission*,
<https://hquranacademy.org/> (last visited Oct. 29, 2024).

¹⁸ Al-Qalam Academy, *About Us*,
<http://www.alqalamus.org/educational-institution-about-us> (last visited Oct. 29, 2024).

large population of low socio-economic status families in the Minnesota Muslim community, particularly those with a refugee background from East Africa.¹⁹ These families, despite limited resources, considered it so vital to pursue an Islamic education that they were willing to choose hybrid schooling options, which required financial sacrifices and offered fewer resources, over the available public schools.²⁰ Many families chose to move their children back to Africa before the start of the 2023 school year to meet their desire for their children to have an Islamic education. *Id.* No American should feel compelled to leave the country in order to provide their children with an appropriate education—as long as an alternative is feasible. The Abraham Knowledge Academy is envisioned as a solution to this unfulfilled need. The Abraham Knowledge Academy aims to inculcate students with “a willingness to contribute to the common good” and prioritizes religious literacy, cultural heritage, moral character development, and understanding of virtue-ethics based perspectives. *Id.* It will not strive to be a racially or religiously homogeneous institution in its student body; indeed, people from diverse ethnic and racial backgrounds have shown an interest in the Academy’s offerings and non-Muslim families will be welcomed. *Id.* The

¹⁹ Abraham Education, *Applying for an Islamic Charter School in Minnesota* (Oct. 18, 2024), <https://bit.ly/aka-app>.

²⁰ Abraham Knowledge Academy, Letter of Intent to Apply, <https://drive.google.com/file/d/1eBwnvcaye1GZiq-N5OV53yDJhX1e3kcY/view> (last visited Oct. 29, 2024).

school's mission to offer quality academics with a focus on religious literacy and Islamic values is anticipated to attract a broad spectrum of families in a welcoming environment. *Id.*

Ultimately, Americans benefit as the panoply of distinctive educational institutions expands and reinforces the rich mosaic of diversity that makes up our nation. These values of diversity, pluralism, and the freedom to choose one's associations lie at the heart of our social order. By approving St. Isidore's—the nation's first explicitly religious charter school—the Oklahoma Virtual Charter School Board sought to honor these American ideals, consistent with this Court's precedent. The Supreme Court of Oklahoma erred in its decision to stifle religious freedom, and the Attorney General violated the First Amendment by leveraging religious bigotry as the basis for his official actions to revoke St. Isidore's charter.

CONCLUSION

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

Respectfully submitted,

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