Nos. 24-394 and 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.

ST. ISIDORE OF SEVILLE
CATHOLIC VIRTUAL SCHOOL,

Petitioner,

v.

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

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

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

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INTERESTS OF AMICUS

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

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

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

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

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

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

One critical option for parental school choice is a faith-based education. Although some theories of public education purport to be strictly secular, secularism is not neutral toward values and viewpoints important to parents. Instead, strict religious secularism can prioritize irreligion to religion, taking sides on important cultural, historical, political, and religious subject matters that are covered in the classroom. By prioritizing religion-free education, so-called "secular" public schools provide an education that is far from neutral. This leaves parents of deep religious conviction the impossible choice between

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

abandoning those religious convictions when it comes to educating their children or reaching deep in their own pockets. But school choice with a price tag isn't school choice at all.[4] Thus, when the State decides to subsidize alternatives to traditional public schools, it is crucial that those programs remain free from religious discrimination.

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

Governor Stitt is compelled to speak on behalf of Oklahomans in this case because another statewide official elected to advocate for their interests, the Oklahoma Attorney General ("AG"), launched this attack against their religious liberty and educational freedom. The AG's open hostility[5] against religion proves that a "trendy

4. *See also* Alexia Aston, THE OKLAHOMAN, *Gov. Kevin Stitt champions school choice at inaugural Oklahoma Charter Schools Conference* (Mar. 8, 2025), https://tinyurl.com/msetbt3u ("Rich people already have school choice").

5. *See, e.g.*, *Attorney General Drummond comments on St. Isidore filing* (Oct. 7, 2024), https://tinyurl.com/pp5h28pp (warning that St. Isidore's school charter would "open the floodgates and force taxpayers to fund all manner of religious indoctrination, including radical Islam or even the Church of Satan."); *Drummond remarks on actions of Oklahoma Charter School Board* (Jul. 10, 2024), https://

disdain for deep religious conviction" lives on amongst some that appear before this Court. *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 495 (2020) (Thomas, J., concurring) (quoting *Locke v. Davey*, 540 U.S. 712, 733 (2004) (Scalia, J., dissenting)). By reversing the decision below, this Court will help root-out the still deeply entrenched disdain for religion "fostered by [a] distorted understanding of the Establishment Clause[.]" *Id.* at 496.

SUMMARY OF ARGUMENT

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

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tinyurl.com/2wa7nuwy (characterizing the Board as "recklessly committed to using our tax dollars to fund radical religious teachings like Sharia law.").

II. The Oklahoma Supreme Court's discriminatory exclusion of St. Isidore from a school charter based solely on its religious status violates the Free Exercise Clause and cannot withstand strict scrutiny. The Establishment Clause neither compels nor justifies this infringement. Instead, the original meaning of the Clause, as well as the Free Exercise trilogy, confirms that granting St. Isidore a school charter does not bear any of the historical hallmarks of religious establishments. It does not resemble historical government coercion of participation in religious exercise as nothing in Oklahoma law requires students to enroll and attend a charter school. It does not resemble historical non-neutral denominational preferences, a fact the AG readily concedes when engaging in alarmism over the creation of charter schools of other religions. It does not resemble historical government control over doctrine or personnel of the established church as St. Isidore is privately owned and operated, not required to teach the traditional public-school curriculum, and allowed flexibility in personnel policies. Finally, it does not resemble historical monopolistic use of the established church to carry out certain civil functions, as Oklahoma has not abandoned its public school system and providing a free education at public expense is not exclusively a public function at all. In sum, had the Oklahoma Supreme Court properly applied this Court's precedents, it would have correctly concluded that granting St. Isidore a school charter does not bear any of the hallmark traits of establishments of religion. This Court should reverse.

ARGUMENT

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

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

One educational choice with the deepest roots is the religious school. Long before the introduction and ubiquity of the common (or "public") school system in the State of Oklahoma, faith-based mission schools served a critical role in educating the children of the Twin Territories.[6] By the mid-to-late 1800s, the Presbyterians, Baptists, Methodists, and Catholics all operated Christian mission

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

schools in the Indian Territory.[7] Today, religious schools educate approximately 35,000 Oklahoma students a year, representing 4.83% of all K-12 enrollment.[8]

Faith-based schools "are part of our Nation's proud story of religious freedom and tolerance, community development, immigration and assimilation, academic achievement, upward mobility, and more."[9] Faith-based schools "enable parents to pass down religious and cultural traditions important to their families and communities."[10] In addition, scholars and Justices have long observed a positive correlation between faith-based schools and educational outcomes.[11]

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

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7. *Id.*

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

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

10. *Id.* at 6.

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

> The public school is the university of the masses; upon it depends the education of the future man, the citizen. That our people realize its immense importance is plainly demonstrated by their generous financial support and personal interest in this institution. . . . The school is not merely a preparation for life; "it is life itself." It develops the intellect, inspires higher ideals, greater ambitions, and loftier conceptions of life, thus building character and fitting individuals for complete living.[12]

Upon statehood, Oklahoma's founders turned that belief into a promise of free public education for all children. *See* OKLA. CONST. art. I, § 5 (1907). From there, Oklahoma's common school system was born.[13] Today, Oklahoma's public school system educates over 700,000 students a year, representing 94% of total K-12 enrollment.[14] Approximately 56% of those students come from economically disadvantaged households.[15]

In the early 1990s, an alternative educational choice to private and public schools rose to prominence in the United

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

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

14. *See* PUBLIC SCH. REV., *supra* n.7; OKLA. STATE DEP'T OF EDUC., *Oklahoma Public Schools Fast Facts 2021-22* 10 (updated Jan. 2022), https://tinyurl.com/47n5a49u.

15. Oklahoma Public Schools Fast Facts, *supra* n.13 at 30.

States: charter schools. Charter schools seek to combine the best elements of each educational system—the public funding and equal opportunity of the public school and the flexibility and autonomy of the private school.[16] These unique characteristics allow charter schools the freedom to innovate, "creat[ing] pressure on local and state public education systems to operate differently" and "acting as a catalyst for changing public education across the nation."[17] Oklahoma cleared the way for charter schools in 1999 with the passage of the Oklahoma Charter Schools Act ("Act"). *See* H.B. 1759, 1999 O.S.L. 320 (codified at 70 O.S. §§ 3-130 *et al.*). Today, charter schools serve over 50,000 students, representing 7.2% of total K-12 enrollment.[18] Oklahoma charter schools lead the Nation in academic excellence.[19]

Combining the moral grounding, community ethic, and academic rigor of a faith-based school with the innovation, flexibility, and public access of a charter school will expand educational opportunities and strengthen educational outcomes. The availability of religious charter schools will allow students and teachers to thrive in educational environments that support their unique needs and

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

17. *Id.*

18. Public Sch. Rev., *Top 10 Best Oklahoma Charter Public Schools (2024-25)*, https://tinyurl.com/3hs2m7d5; Okla. State Dep't of Educ., *Oklahoma Charter School Report 2023* 10, https://tinyurl.com/4ydnjwmj.

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

preferences. It will also allow communities to profit from increased stability and social engagement, and the State to strengthen accountability and spark positive change among all educational systems. Perhaps more importantly, the availability of religious charter schools will help alleviate wide-spread parental concern over school content they find morally objectionable—all without the crippling financial burden of tuition.[20] On the other hand, excluding religious entities, and only religious entities, from school charters will leave appreciable damage to the State's interest in education and parental school choice.

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

This Court has repeatedly instructed that "an interest in separating church and state more fiercely than the Federal Constitution . . . cannot qualify as compelling in the face of the infringement of free exercise." *Carson as next friend of O. C. v. Makin*, 596 U.S. 767, 781 (2022) (cleaned up). In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 466 (2017), this Court explained that a State interest in "skating as far as possible from religious establishment concerns" was not sufficiently compelling "[i]n the face of the clear infringement on free exercise[.]" In *Espinoza v. Montana Department of*

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

Revenue, 591 U.S. 464, 485 (2020), this Court reiterated that ""[a] State's interest 'in achieving greater separation of church and State than is already ensured under the Establishment Clause . . . is limited by the Free Exercise Clause.'" (citation omitted). And in *Carson*, this Court stressed that "[a] State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise." 596 U.S. at 781.

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

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

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

benefits solely because of the religious character of the schools." *Espinoza*, 591 U.S. at 476.

The Oklahoma Supreme Court made no secret it denied St. Isidore a school charter because St. Isidore is a "religious school" or "Catholic School." Board.App.5a, 9a, 17a, 25a–27a. The court explained St. Isidore would "establish and operate the school as a Catholic school[,]" "is an instrument of the Catholic church, operated by the Catholic church, and will further the evangelizing mission of the Catholic church in its educational programs." Board.App.9a, 13a. It repeatedly emphasized that "St. Isidore . . . is a religious institution" with a mission "[t] o create, establish, and operate' the school as a Catholic school." Board.App.7a; *see also* Board.App.9a ("St. Isidore warrants that it is affiliated with a nonpublic sectarian school or religious institution."); Board.App.15a ("There is no question that St. Isidore is a sectarian institution and will be sectarian in its programs and operations."). Like the Montana Supreme Court in *Espinoza*, Oklahoma relied on state constitutional provisions "which prohibit the State from using public money for the establishment of a religious institution." *Compare* App.9a *with Espinoza*, 591 U.S. at 476; *see also* Board.App.13a ("The expenditure of state funds for St. Isidore's operations constitutes the use of state funds for the benefit and support of the Catholic church."). Thus, strict scrutiny applies.

The fact that the Oklahoma Supreme Court "expressly discriminated 'based on religious identity' . . . [is] enough to invalidate the state policy without addressing how government funds were used." *Espinoza*, 591 U.S. at 476 (quoting *Trinity Lutheran*, 582 U.S. at 465 n.3). After all, "[s]tatus-based discrimination remains status based even if one of its goals or effects is preventing religious

organizations from putting aid to religious uses." *Id.* at 477.

But as in *Espinoza*, *id.*, the Oklahoma Supreme Court also highlighted that the state funds would be used "in direct support of the religious curriculum and activities within St. Isidore" and contrasts the unrestricted state funding with funding "non-religious use" funds used in *Trinity Lutheran*. Board.App.26a–28a. By emphasizing the use of funds as a defense to strict scrutiny, the court below ignored this Court's clear instruction that "the 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. As *Carson* firmly established, there is no meaningful distinction between status and use-based discrimination. *See id.* ("[U]se-based discrimination is [not] any less offensive to the Free Exercise Clause."); *Espinoza*, 591 U.S. at 478 ("None of this is meant to suggest . . . that some lesser degree of scrutiny applies to discrimination against religious use of government aid.").

No matter how the Oklahoma Supreme Court describes the benefit and restriction of the charter school program, it "operates to identify and exclude otherwise eligible schools on the basis of their religious exercise." *Carson*, 596 U.S. at 789.n. Strict scrutiny applies.

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

The principles espoused in the Free Exercise Trilogy conclusively resolve this case. As with *Trinity Lutheran*,

the "clear infringement on free exercise" before this Court cannot be justified by a "policy preference for skating as far as possible from religious establishment concerns." 582 U.S. at 466. As with *Espinoza*, the decision below penalizes parents' decision to "send[] their children to religious schools . . . by cutting families off from otherwise available benefits if they choose a religious private school rather than a secular one, and for no other reason." 591 U.S. at 486. As with *Carson*, the "State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise." 596 U.S. at 781. These "'unremarkable' principles . . . suffice to resolve this case." *Id.* at 780. But an independent analysis of the Establishment Clause makes this conclusion unavoidable.

Resolving Establishment Clause disputes requires a return to "the Constitution's original meaning[,]" "by reference to historical practices and understandings." *Shurtleff v. City of Bos., Mass.*, 596 U.S. 243, 277 (2022) (Gorsuch, J., concurring); *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014). As recently as *Kennedy v. Bremerton School District*, 597 U.S. 507, 536 (2022), this Court stressed that "[a]n analysis focused on original meaning and history . . . has long represented the rule rather than some "'exception'" within the 'Court's Establishment Clause jurisprudence.'" (citation omitted). Courts must therefore look to the "hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment." *Id.* at 537.

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

n.5; *Shurtleff*, 596 at 286 (Gorsuch, J., concurring). Those hallmarks include when the government (1) "mandated attendance in the established church[,]" (2) "exerted control over the doctrine and personnel of the established church[,]" (3) "punished dissenting churches and individuals for their religious exercise[,]" (4) "restricted political participation by dissenters[,]" (5) "provided financial support for the established church, often in a way that preferred the established denomination over other churches[,]" and (6) "used the established church to carry out certain civil functions, often by giving the established church a monopoly over a specific function." *Shurtleff*, 596 at 286 (Gorsuch, J., concurring).

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

This Court's historical framework starts with the foremost hallmark of religious establishments: impermissible government coercion of religious activities, especially when accompanied by threat of force of law and penalties. *See Kennedy*, 597 U.S. at 537 ("Government may not coerce anyone to attend church, . . . nor may it force

citizens to engage in a formal religious exercise") (cleaned up); *see also Lee v. Weisman*, 505 U.S. 577, 640–41 (1992) (Scalia, J., dissenting); *Van Orden v. Perry*, 545 U.S. 677, 693, (2005) (Thomas, J., concurring). Consistent with the same, government coercion (or mandate) of church attendance and participation in formal religious exercises has long been impermissible. *See Kennedy*, 597 U.S. at 537; *Shurtleff*, 596 U.S. at 286 (Gorsuch, J., concurring).

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

The fact that funding is provided directly to the charter school does not negate this conclusion. On this point, the Oklahoma Supreme Court tried to distinguish

the scholarship program in *Espinoza* from Oklahoma's charter school program by the "complete and direct financial support for a public charter school . . . mandated by the Act." Board.App.27a–28a. But whether aid is delivered indirectly (e.g., through a scholarship or tax credit to the parent) or directly (e.g., through the state aid formula to the school) is a distinction without a legal difference. This Court has already rejected a "direct/indirect distinction" that requires "aid be literally placed in the hands of schoolchildren rather than given directly to the school" as a formalistic and "arbitrary choice . . . that does not further the constitutional analysis." *Mitchell v. Helms*, 530 U.S. 793, 817–18 (2000). Again, this Court has reiterated that "the principles of neutrality and private choice would be adequate to address" any special Establishment Clause dangers with providing money directly to religious schools. *Id.* at 818–19, n.8.

Oklahoma's state aid formula reflects that funding only flows from the independent private choices of parents. The Act provides that "[a] charter school shall receive the State Aid allocation" calculated pursuant to 70 O.S. § 18-200.1, which is "calculated based on . . . the highest weighted average daily membership for the school district[.]" 70 O.S. § 3-142. In other words, parents must choose to send students to the school for the school to benefit from funding. The only difference, then, and a nominal one at that, is the mechanism in which the money gets to a school. This Court should reiterate that a direct/indirect distinction has no place in its Establishment Clause jurisprudence.

Another absent hallmark of religious establishments is "financial support for the established church, often in

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

Nothing in the record suggests the availability of a school charter is anything but neutral. Indeed, it was this very neutrality that inspired the Oklahoma Attorney General to prophesy doom by arguing a grant of St. Isidore's charter would force the State to "fund all manner of religious indoctrination, including radical Islam or even the Church of Satan" and "radical religious teachings like Sharia law." *Supra* n.5. Luckily for Oklahoma believers of any faith or no faith, "nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it." *Mitchell v. Helms*, 530 U.S. 793, 829 (2000). As this Court emphasized over twenty years ago: "[t]his doctrine, born of bigotry, should be buried now." *Id.*; *see also Kennedy v. Bremerton Sch. Dist.*, 4 F.4th 910, 945 (9th Cir. 2021) (Nelson, J., dissenting) ("The way to stop hostility to religion is to stop being hostile to religion.").

Another missing hallmark of religious establishments is "government exerted control over the doctrine and personnel of the established church." *Shurtleff*, 596 U.S. at 286 (Gorsuch, J., concurring). This hallmark primarily involved the government dictating church doctrine and regulating the appointment of minsters, clergy, or other church officials. *See* McConnell, *infra* n.21 at 2132. Accepting that the religious character of St. Isidore renders it analogous to an established church, granting St. Isidore a school charter does not implicate this historical hallmark.

The State exercises very limited, if any, control over the internal operations of St. Isidore—including personnel and instruction decisions. St. Isidore is a privately owned and operated entity that contracts with the State to provide education under a statewide charter school sponsorship. *See* PA057, 310, 314; 70 O.S. § 3-134(C). Under the Act, charter schools are exempted "from all statutes and rules relating to schools" unless specifically provided, but "may offer a curriculum which emphasizes a specific learning philosophy or style or certain subject area." 70 O.S. § 3-136(A). While the Board may "provide ongoing oversight of the charter schools[,]" the charter school's own board controls the school's "policies and operational decisions." OKLA. ADMIN. CODE 777:10-3-4(b); 70 O.S. § 3-136(A)(8). Like the private school in *Carson*, "the curriculum taught at participating [charter schools] need not even resemble that taught in the [Oklahoma] public schools" and "[p]articipating schools need not hire state-certified teachers." *Carson*, 596 U.S. at 783; *compare* 70 O.S. § 6-190(A) (requiring traditional public schools to "employ and contract in writing . . . only with persons certified to teach by the State Board of Education") *with*

70 O.S. § 3-136(B) (allowing charter schools flexibility in "personnel policies, personnel qualifications, and method of school governance"). Thus, the State exercises little, if any, control over the St. Isidore's structure, instruction, and personnel decisions.

To reach the opposite conclusion, the Oklahoma Supreme Court leaned heavily into the fact that "the Charter School Board will provide oversight of the operation for St. Isidore, monitor its performance and legal compliance, and decide whether to renew or revoke St. Isidore's charter." Board.App.21a. But this Court has already made clear that "receiv[ing] state funding" and "being regulated by the State does not make one a state actor." *West v. Atkins*, 487 U.S. 42, 52 n.10 (1988); *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 816 (2019). And under any applicable standard, the general oversight provided by the Board falls woefully short of establishing the type of pervasive entwinement or sham arrangement that would render St. Isidore a state actor, much less offend the Establishment Clause. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982) ("Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.").

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

exclusive public function."). Here, nothing in the record suggests Oklahoma has given St. Isidore (or any charter school) a monopoly over the civil function of education—whether categorized as "public" or not. Oklahoma has not abandoned its public school system and left students no choice but to submit to a religious charter school. *Cf. West*, 487 U.S. at 55 (involving a complete abdication of a state's constitutional obligation to provide medical care to inmates by contracting with a single physician to provide those services). The overwhelming majority of Oklahoma students still receive a traditional public education. *See supra* p. 9. Giving Oklahoma parents and students another alternative to the traditional public school setting does not equate to a total delegation of any independent obligation to provide free, publicly funded education.

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

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21. *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part i: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2171 (2003); Litton, *supra* n.6 at 241–52.

The Oklahoma Supreme Court evaded this well-established history by positing that "*free public* education is exclusively a public function" and declaring that St. Isidore fit that artificial criterion. Board.App.21a. Setting aside the court's flimsy circular reasoning, this Court has already held that "to provide services for such students at public expense . . . in no way makes these services the exclusive province of the State." *Rendell-Baker*, 457 U.S. at 842. The educational function that St. Isidore provides controls the inquiry—not whether the State pays for that function. *See, e.g., Logiodice v. Trustees of Maine Cent. Inst.*, 296 F.3d 22, 27 (1st Cir. 2002) ("There is no indication that the Supreme Court had this kind of tailoring by adjectives in mind when it spoke of functions 'exclusively' provided by government.").

Additionally, providing a free, publicly-funded education is *not* traditionally and exclusively a government function. Instead, religious schools have a well-documented history of offering free education and receiving governmental financial support. *See Espinoza*, 591 U.S. at 480 ("In the founding era and the early 19th century, governments provided financial support to private schools, including denominational ones."); McConnell, *infra* n.21 at 2174 (observing that religious schools in the colonial period offered "free or subsidized rates for the poor" and received "[g]overnmental financial support for education"); Litton, *supra* n.6 at 243, 250–52, 262, 274 (describing the operation of mission schools in Indian Territory through contracts or funding from tribal and federal governments and noting the first public school required tuition).

In sum, granting St. Isidore a school charter lacks any of the hallmark traits of establishment of religion and does not implicate the Establishment Clause. Accordingly, the Oklahoma Supreme Court's interest in complying with the Establishment Clause fails to justify the religious discrimination against St. Isidore. The decision below cannot withstand strict scrutiny.

C. Applying the formulaic label of "public school" does not control the First Amendment inquiry.

Both the Oklahoma Supreme Court and the AG rely heavily on formulaic labels of "public" or "public school" to defeat the Free Exercise Clause arguments. For example, they cite language in the Act defining a charter school as a "'public school' established by contract" to distinguish charter schools from the public benefits at issue in the Free Exercise Trilogy. Board.App.17a (quoting 70 O.S. § 3-132.2(C)(1)); *see also* Board.App.27a–28a; Opp.Br.5; *but see* Board.App.35a (Kuehn, J., dissenting) (stressing that "labeling all charter schools as 'public schools' . . . places form over substance."). The AG likewise summarily concludes that "Oklahoma's charter schools are public schools" and tries for a gotcha moment by citing a multi-state letter joined by Governor Stitt calling charter schools public schools. Opp.Br.24.

This use of "public" to mean "irreligious," or "secular" is a misnomer, revealing the anti-religious bias of those who believe there should be a 'naked' public square, where parents, students, and schools are excluded when they bring their religious identities. And by obsessing over the term "public school[,]" the AG and court below continue to miss the point: labels—whether in statutes

or letters—do not decide the constitutional inquiry.[22] The substance of the public benefit directs the First Amendment inquiry, not "the presence or absence of magic words." *Carson*, 596 U.S. at 785. After all, "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." *Carson*, 596 U.S. at 784 (cleaned up). That *maxim* holds up in nearly every constitutional context, including in state action cases. *See, e.g., Lindke v. Freed*, 601 U.S. 187, 197 (2024) ("The distinction between private conduct and state action turns on substance, not labels[.]"); *Polk County v. Dodson*, 454 U.S. 312, 317–19 (1981) (concluding a public defender was not a state actor after analyzing the functions and obligations of the office); *City of Detroit v. Murray Corp. of Am.*, 355 U.S. 489, 492 (1958) ("[I]n determining . . . constitutional immunity we must look . . . behind labels to substance."); *Young v. Higbee Co.*, 324 U.S. 204, 209 (1945) ("Equity looks to the substance and not merely to the form.").

The Federal government has long supported student educational choice, using public support, of private colleges and universities. *See* Title IV of the Higher Education Act, Pub. L. No. 89-329 (Nov. 8, 1965). Many private colleges are secular, but this does not make them "public" schools. Many private colleges are religious, but this does not deprive them of the right to receive Title IV funds.

22. The fixation on the phrase "public school" also misunderstands that describing a school as "public" is intended to refer to the source of the school funding—not convey the obviously incorrect proposition that a charter school is identical in every aspect to a traditional public school.

The same can be said in contexts outside of education, including foster care, child nutrition, health care, refugee assistance, and more. *See, e.g., Fulton v. City of Phila.*, 593 U.S. 522, 542 (2021) (acknowledging that a Catholic religious organization had "long been a point of light in the City's foster-care system" and that excluding that organization violated the First Amendment); OKLA. HUM. SERVS., *Oklahoma Adoption Agencies*, https://tinyurl.com/ms62ykmc (last visited Mar. 10, 2025) (listing Oklahoma foster agency partners, which include religiously affiliated institutions); OKLA. HUM. SERVS., *School Food Authority (SFA) Administrative Review Summary Reports*, https://tinyurl.com/ybbhw5zs (last visited Mar. 10, 2025) (same for school food authority programs); OKLA. HUM. SERVS., Refugee Resettlement Program Benefit and Service Providers (Feb. 20, 2025), https://tinyurl.com/3wk4huk8 (same for refugee assistance programs). Oklahoma's use of a similar system in elementary and primary education does not violate the First Amendment.

Thus, the label of "public school" is of no import to this Court's analysis. And fixating on the phrase "public school" only clouds this Court's analysis, instead of resolving it. Because nothing about the statutory label "public school" changes this Court's constitutional analysis, reversal is proper.

CONCLUSION

For the reasons stated, *Amicus* Oklahoma Governor J. Kevin Stitt respectfully requests that this Court reverse the Oklahoma Supreme Court's decision below.

Respectfully submitted,

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