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.

ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL,
Petitioner,

v.

GENTNER DRUMMOND, Attorney General of Oklahoma,
ex rel. OKLAHOMA,
Respondent.

On Writs of Certiorari
to the Oklahoma Supreme Court

BRIEF FOR SCHOLARS OF THE RELIGION CLAUSES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

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[1] *Amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici*, its members, and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The parties spend the better part of their briefs debating whether Oklahoma charter schools are part of the state government itself, and must therefore comply with the U.S. Constitution, or whether they are instead "autonomous private enterprise[s]," *Department of Transportation* v. *Association of American Railroads*, 575 U.S. 43, 53 (2015), that are not bound by the Religion Clauses.

For reasons *amici* will explain, this Court need not resolve that question, because regardless of whether the St. Isidore of Seville Catholic Virtual School would properly be deemed a state instrumentality or a private school, the Establishment Clause would prohibit the State of Oklahoma itself from establishing, sponsoring and subsidizing that charter school, given that St. Isidore's declared mission is the systematic inculcation of Catholic faith in its students.

If, on the one hand, St. Isidore is viewed not only as a "public school" under Oklahoma law (which is uncontested), but also as an instrumentality of the State of Oklahoma, it could not operate, as its proponent proposes, as a "specific pastoral ministry" of the Catholic Church, dedicated to "the evangelizing mission of the Church." Pet. App. 201a (No. 24-396). Not only would Oklahoma statutes prohibit a public school from providing religious instruction in the doctrines of a particular church, but so, too, would the Establishment Clause of the U.S. Constitution. The "clearest command" of that clause is that "one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*, 456 U.S. 228, 244 (1982). Moreover, a state may not endeavor to assess, or purport to resolve, denominational claims of religious truth. These

fundamental Establishment Clause principles apply with special force in the context of public schools, as this Court has confirmed in cases long predating *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). See*, e.g.*, *Illinois ex rel. McCollum* v. *Board of Educ.*, 333 U.S. 203 (1948). Nothing in this Court's more recent case law calls into question these well-established principles and holdings, nor do the petitioners suggest otherwise.

Moreover, the parties who have designed St. Isidore would not have any Free Exercise right to insist that such a public school teach religious doctrine to its students, not only because the Establishment Clause would stand as a barrier, but also because the Free Exercise Clause "simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Bowen* v. *Roy*, 476 U.S. 693, 699 (1986).

If, on the other hand, this Court were to hold that St. Isidore should be considered a private school that is not obligated to comply with the Religion Clauses, the Establishment Clause would nevertheless prohibit *the State of Oklahoma* from establishing that religious school in the first instance, which is the outcome the petitioners seek. In addition to that quite literal violation of the prohibition on an establishment of a religious enterprise, the petitioners also seek to require the State to *sponsor* a religious school and to *subsidize* the distinctively religious education that St. Isidore would provide. Yet "for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship [and] financial support * * * of the sovereign in religious activity." *Walz* v. *Tax Comm'n of City of New York*, 397 U.S. 664, 668 (1970).

The petitioner in No. 24-396 attempts to circumvent these constitutional constraints—and to bolster its Free Exercise claim—by insisting that this case is analogous to the Court's recent decisions in *Espinoza* v. *Montana Department of Revenue*, 591 U.S. 464 (2020), and *Carson* v. *Makin*, 596 U.S. 767 (2022). That analogy fails in at least two important respects.

First, *Espinoza* and *Carson* involved existing private schools that the children of the plaintiffs attended or hoped to attend. The Court held in those cases that the Constitution did not permit the States of Montana and Maine to preclude the students from using generally available, state-funded scholarships or tuition assistance to attend those existing private schools because the schools were religiously affiliated (*Espinoza*) or because their curriculum included the inculcation of religious doctrine (*Carson*).[2]

This case, by contrast, does not involve any form of aid that a state makes generally available to families for their use at private schools. To the contrary, Oklahoma law excludes all existing private schools, religious or not, from eligibility to become charter schools. See Okla. Stat. tit. 70, § 3-134(C). The central question here is thus about whether the Constitution requires a government agency—the Oklahoma Statewide Charter School Board—to quite literally "establish" the St. Isidore school in the first instance, see Okla. Stat. tit.

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[2] Similarly, in *Rendell-Baker* v. *Kohn*, 457 U.S. 830 (1982), the decision on which the petitioners place so much weight for their argument that the St. Isidore of Seville Virtual Charter School would not be a state actor, the school in question was "founded as a private institution," *id.* at 832, and was privately subsidized before it began receiving state aid and contracting with the state, see *Rendell-Baker* v. *Kohn*, 641 F.2d 14, 17 n.1 (1st Cir. 1981), *aff'd*, 457 U.S. 830 (1982).

70, § 3-132.2(A), (C)(1)(b)) (defining a "charter school" as, inter alia, "a public school *established* by contract" by a private party with one of several sorts of entities as "sponsors") (emphasis added); see also *id.* § 3-132.1(A)) (providing that only the Statewide Charter School Board is eligible to sponsor—and thus establish—a virtual charter school), and about whether the State of Oklahoma must or can sponsor and subsidize such a new charter school. *Espinoza* and *Carson* do not bear on those questions.

Second, *Espinoza* and *Carson* involved "indirect aid" programs, i.e., "programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 649 (2002). As Chief Justice Rehnquist explained in *Zelman*, this Court has "drawn a consistent distinction," for purposes of the Establishment Clause, between such indirect aid programs and "government programs that provide aid directly to religious schools." *Id.* Here, in contrast to *Espinoza* and *Carson*, if the Oklahoma Board established St. Isidore as a public charter school, Oklahoma's substantial funding of that school not only would be direct but would also be a function of a discretionary choice made by the Oklahoma Board about whether to establish and sponsor the proposed charter school in the first instance. Numerous binding precedents of this Court prohibit such direct funding of religious education—a norm that traces back to the Founding. The petitioners have not asked this Court to overrule those precedents, let alone offered reasons why the predicates for overcoming *stare decisis* might be satisfied here.

* * * *

Before explaining in the Argument below why the Establishment Clause is a sufficient ground for affirming the decision of the Oklahoma Supreme Court, amici offer the following thoughts on why we agree with Attorney General Drummond (Resp. Br. 33-36) that if the Oklahoma Board *were* to establish St. Isidore as a public charter school, that school would be an instrumentality of the State and, as such, would be obligated to comply with the Bill of Rights in the same way traditional public schools must do.

Of greatest importance, and as noted above, a charter school in Oklahoma does not and cannot exist unless and until a state agency "establishe[s]" it "for the very purpose of pursuing [state] governmental objectives," *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 398 (1995). Moreover, the State itself expressly denominates approved charter schools—unlike private schools—to be part of the state's system of "public school[s]." See Okla. Stat. tit. 70, § 3-132.2(C)(1) (citing and incorporating the federal definition of "charter school"); see also *Arkansas* v. *Texas*, 346 U.S. 368, 370 (1953) (finding that the University of Arkansas was a state entity in part because Arkansas referred to it as "an instrument of the state in the performance of a governmental work"). Whether either of these two characteristics, standing alone, would resolve the question of whether to characterize St. Isidore as an arm of the State for purposes of applying the U.S. Constitution, amici are unaware of any case in which a court has held that an entity is not a state instrumentality where the state both creates it *and* designates it as a "public" institution—let alone where, as with Oklahoma charter schools, the entity in question as a matter of law cannot exist until a government agency establishes and sponsors it.

In addition, Oklahoma law requires charter schools, unlike private schools, to be "as equally free and open to all students as traditional public schools," Okla. Stat. tit. 70, § 3-136(A)(9), and prohibits charter schools—but not private schools—from charging tuition or fees, *id*. See *Carson*, 596 U.S. at 783 ("private schools are different by definition [from public schools] because they do not have to accept all students"). And the State also funds charter schools through the formula it uses to fund traditional district-run public schools, something it does not do for private schools. See Okla. Stat. tit. 70, § 3-136(A)(9); *id.* § 3-142(A).

Moreover, the Oklahoma Statewide Charter School Board can under certain circumstances *close* a charter school, *id.* § 3-137(D), (H), including for "good cause," *id.* § 3-137(F)—again, something it cannot do to a private school. See *Biden* v. *Nebraska*, 600 U.S. 477, 491 (2023) (relying upon, inter alia, the fact that the Missouri Higher Education Loan Authority could "be dissolved by the State" in holding that it was "an instrumentality of Missouri").

It is also telling that this Court itself has specifically distinguished private schools from charter schools, see *Zelman*, 536 U.S. at 654 ("private schools receiv[e] only half the government assistance given to community schools"); see also *Greater Heights Acad.* v. *Zelman*, 522 F.3d 678, 679 (6th Cir. 2008) (noting that Ohio community schools are "also known as 'charter schools'"). That reflects the Court's evident understanding that the latter are public instrumentalities. See *Lebron*, 513 U.S. at 395-396 (looking to how the Court itself had historically considered certain government-created corporations). And it is particularly significant that the federal government subsidizes Okla-

homa charter schools under the Charter Schools Program (CSP) of the Elementary and Secondary Education Act—something it could not do unless those schools were "public school[s]," 20 U.S.C. 7221i(2) that are "operated under public supervision and direction," *id.* § 7221i(2)(B).[3] Thus, a conclusion that Oklahoma

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[3] The United States agrees that Oklahoma charter schools are "public schools" in at least some "important" senses, but insists that they are nevertheless not "governmental entities." U.S. Br. 26. According to the Acting Solicitor General, such charter schools are not arms of the Oklahoma government because they are not created by the State and because state officials do not have the power to appoint a majority of a charter school's board of directors. *Id.* at 23-25 (citing *Lebron*, 513 U.S. at 398).

The first premise of that argument, however, is mistaken: An Oklahoma virtual charter school does not and cannot exist unless and until the Oklahoma Board chooses to enter into a contract that "establishes" it. And although it is true that the board of directors of an Oklahoma charter school typically is not composed of government appointees, this Court has never held that such immediate control by government appointees is a necessary condition of an entity's status as a government instrumentality for constitutional purposes, nor is there any apparent reason why that particular condition should be determinative where, as here, the school has so many other important characteristics of a governmental entity, including that it cannot exist until a state agency agrees to create it and become its "sponsor." In any event, even if an Oklahoma charter school's board of directors is not appointed by state officials, the Oklahoma State Board must sign off on the proposed directors, see Okla. Stat. tit. 70, § 3-134(B)(2) (requiring the applicant to disclose "background information of * * * the governing board of the charter school or virtual charter school"), and presumably would not approve any application if it had concerns about the designated individuals. Perhaps that explains why the federal Government's view must be that Oklahoma charter schools are in a meaningful sense operated under the "supervision and direction" of the Oklahoma Board, 20 U.S.C. 7221i(2)(B). If such state supervision and direction were

charter schools are public instrumentalities of the Oklahoma itself "accord[s] with public and judicial understanding of the nature of" such schools "over the years." *Lebron*, 513 U.S. at 394.

In light of this "combination of * * * features" of Oklahoma charter schools, *Association of American Railroads*, 575 U.S. at 53, amici agree that if Oklahoma were to establish the St. Isidore of Seville of Seville Catholic Virtual School as a charter school, St. Isidore would be an instrumentality of the State that is bound to comply with the Religion Clauses of the federal Constitution.

As we explain below, however, the Establishment Clause would prohibit *Oklahoma* from establishing, sponsoring and directly funding St. Isidore, regardless of how this Court were to characterize the school itself.

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absent, then the federal Government could not subsidize such schools with CSP funds—yet the Government routinely does fund such schools, in Oklahoma and in many other states.

ARGUMENT

I. If St. Isidore is an Instrumentality of the State, both Oklahoma law and the Establishment Clause Prohibit it from Inculcating Students in the Doctrines of a Particular Religion.

If the Oklahoma Supreme Court and the Oklahoma Attorney General are correct that the St. Isidore of Seville Catholic Virtual School would not only be a public school but also an instrumentality of the State, St. Isidore could not operate as its proponents have proposed.

A. St. Isidore's comprehensive inculcation of religious doctrine would violate Oklahoma statutory law.

Oklahoma law provides without exception that "[n]o sectarian or religious doctrine shall be taught or inculcated in any of the public schools of this state." Okla. Stat. tit. 70, § 11-101. It also specifies that a public *charter* school, in particular, "shall be nonsectarian in its programs, admission policies, employment practices, and all other operations." *Id.* § 3-136(A)(2).

The St. Isidore of Seville Catholic Virtual School would violate these statutory commands. In its application to the Oklahoma Board to establish St. Isidore as a public charter school, the proponent explained that the school would be "a place of real and specific pastoral ministry" that would "participate[] in the evangelizing mission of the [Catholic] Church." Pet. App. 201a (No. 24-396). As part of that evangelizing mission, the school would seek to help "form[] and cultivat[e]" students to know that God "has provided a path to salvation through the saving power of Christ,

the second person of the Trinity, in His suffering, death and resurrection"; to know "that in this earthly sojourn, each person is called to participate in Christ's suffering and death by daily taking up their own cross and following Him"; and to know "that human persons are destined for eternal life with the Holy Trinity * * * but that * * * an individual may reject God's invitation and by this 'definitive self-exclusion' end up in hell." *Id.* at 203a-204a.

The St. Isidore school would, moreover, incorporate the teachings of the Catholic Church's Magisterium "into every aspect of the School, including but not limited to, its curriculum and co-curricular activities." Resp. App. 458a (No. 24-394); see also *id.* 457a-458a. Teachers would be expected to "utilize the standards and benchmarks of the Archdiocese of Oklahoma City" in their teaching and curricular development. *Id.* 88a-89a; see Curriculum of the Archdiocese of OKC's Catholic Schools Office, https://archokc.org/curriculum (explaining that the curriculum should be "rooted in the life and teachings of Jesus Christ and respond[] to His call to make disciples of all peoples"). Accordingly, as explained in the St. Isidore School Parent and Student Handbook that the school would have used for the 2024-2025 school year (before the charter was cancelled), the school would teach "Catholic faith and morals in all fullness" to "students of all faith backgrounds or none." St. Isidore Seville Catholic Virtual Sch., *Parent & Student Handbook 2024-2025* at 9 (Mar. 18, 2024), https://tinyurl.com/33k8fhck. The "teachings of Jesus Christ as set by the *Catechism of the Catholic Church* and the local ordinaries [of] the Archbishop of Oklahoma City and the Bishop of Tulsa," *id.,* would "permeate the School day" and be expressed "through worship, prayer, [and] Religion classes," *id.* at 17.

Oklahoma law would not permit the school to operate in this way. Nor would this application of the state law prohibitions raise any colorable Free Exercise concerns. To be sure, compliance with such laws would prevent the Archdiocese of Oklahoma City and the Diocese of Tulsa, which designed the proposed St. Isidore virtual school, from being able to use that public charter school to inculcate their faith in the students attending it. Compliance with Oklahoma law would likewise prevent public school teachers dedicated to St. Isidore's mission from being able to convey Catholic doctrine to their students in the course of performing their official educational functions. That, however, would not impose a cognizable burden on those actors' religious exercise, because "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Bowen* v. *Roy*, 476 U.S. 693, 699 (1986); *accord Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 448-452 (1988). *Compare Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022) (explaining that the cognizable religious exercise in that case involved a coach's "short, private, personal prayer" that he was willing to perform after "the players have left the field" and that did "not involve leading prayers with the team or before any other captive audience"; see also *id.* at 525-526, 542 n.7 (noting that Kennedy had earlier "voluntarily discontinued the school tradition of locker-room prayers and his postgame religious talks to students"; that he "has not sought to claim First Amendment protection for" those earlier practices; and that the school district "disciplined him only for his decision to persist in praying quietly without his players").

B. Even if Oklahoma law did not prohibit such inculcation of religion in a public school, the federal Establishment Clause would.

The same would be true even if Oklahoma law did not itself prohibit such a religious form of education, as a matter of federal constitutional law.

"[T]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Trump* v. *Hawaii*, 585 U.S. 667, 699 (2018) (quoting *Larson* v. *Valente*, 456 U.S. 228, 244 (1982)). Moreover, a state may not endeavor to assess, or purport to resolve, claims of religious truth. See *United States* v. *Ballard*, 322 U.S. 78, 87 (1944). The framers of the First Amendment, the Court has explained, "fashioned a charter of government" in which "[m]an's relation to his God was made no concern of the state." *Id*.; see also James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 5 (1785), https://founders.archives.gov/documents/Madison/01-08-02-0163 (the notion "that the Civil Magistrate is a competent Judge of Religious truth" is "an arrogant pretension falsified by the contradictory opinions of Rulers in all ages"), *reprinted in Everson* v. *Board of Educ. of Ewing Twp.*, 330 U.S. 1, 67 (1947) (Appendix to opinion of Justice Rutledge). It follows that a government may not establish or publicly express a view on distinctly sectarian questions that divide religions, including, in particular, "[t]he miracles of the New Testament [and] the Divinity of Christ." *Ballard*, 322 U.S. at 87. As Justice Scalia explained, "our constitutional tradition, from the Declaration of Independence and the first inaugural address of Washington * * * down to the present day, has,

with a few aberrations, * * * ruled out of order government-sponsored endorsement of religion—even when no legal coercion is present * * * —where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ)." *Lee* v. *Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting).

Ever since the Court recognized that the Establishment Clause applies to the states, see *Everson* v. *Board of Education*, 330 U.S. 1 (1947), it has been "particularly vigilant in monitoring compliance" with these fundamental Establishment Clause principles in public elementary and secondary schools. *Edwards* v. *Aguillard*, 482 U.S. 578, 583-584 (1987). The Court has done so in large measure because "[f]amilies entrust public schools with the education of their children." *Id.* at 584. Such families "condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary." *Id*.

In *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203 (1948), the Court ruled 8-1 that a public school could not permit religious teachers employed by private religious groups to come into the school buildings during regular school hours in order to teach Catholic, Protestant and Jewish doctrine to students in grades four through nine, even though attendance at such religious classes would have been limited to students whose families requested such religious clas-

ses. That practice, the Court found, "falls squarely under the ban of the First Amendment (made applicable to the States by the Fourteenth)." *Id.* at 210.

Four years later, in *Zorach* v. *Clauson*, 343 U.S. 306 (1952), this Court distinguished *McCollum* in upholding a "released time" program that permitted New York City public school students to *leave* school for religious instruction during what would otherwise be instructional time. In doing so, however, the Court in *Zorach* confirmed that "Government may not * * * undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person." *Id.* at 314.

Likewise, in *Epperson* v. *Arkansas*, 393 U.S. 97 (1968), the Court invoked *McCollum*, among other cases, as having established that that whereas "study of religions and of the Bible from a literary and historic viewpoint, presented objectively as part of a secular program of education, need not collide with the First Amendment's prohibition, the State may not adopt programs or practices in its public schools or colleges which 'aid or oppose' any religion." *Id.* at 106 (quoting *Abington Sch. Dist.* v. *Schempp*, 374 U.S. 203, 225 (1963)). "This prohibition," wrote the Court, "is absolute. It forbids alike the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma." *Id.* at 106-107.

In the 77 years since *McCollum*, nothing in this Court's jurisprudence has called into question this basic understanding that the Establishment Clause prohibits a public school from inculcating in its students the doctrine of a particular church.

To be sure, inculcating a church's teachings, and training young persons "to live their faith," are "responsibilities that lie at the very core of the mission of

a *private religious school*." *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 591 U.S. 732, 753-754 (2020) (emphasis added). The Constitution protects the rights of such schools, and of the families that choose them in lieu of public schools, to incorporate such religious education within their pedagogical missions. See *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). Those are not, however, the responsibilities of a *public* school that is a part of the state's own educational system—to the contrary, the Establishment Clause forbids a public school from engaging in any such effort to infuse its pedagogy with such religious inculcation. Yet that is precisely what the St. Isidore school would be designed to do.

Importantly, the petitioners have not taken issue with this long-settled understanding of what the Establishment Clause prohibits with respect to a public school that is itself an instrumentality of the state. Their argument depends, instead, on first establishing that St. Isidore, though denominated a "public school," would nonetheless be "an "autonomous private enterprise," *Association of American Railroads*, 575 U.S. at 53, rather than an instrumentality of the State of Oklahoma. As we explain in Part II, however, even if the Court were to adopt that view, the result under the Establishment Clause would be the same.

II. If St. Isidore were Deemed a Private School Rather than an Instrumentality of the State, the Establishment Clause Would Prohibit Oklahoma from Establishing, Sponsoring and Subsidizing Such a School.

Even if this Court were to conclude that the St. Isidore school should be deemed a private institution for purposes of applying the Constitution (*but* see *supra*

at 6-9), the Establishment Clause would prohibit the State of Oklahoma itself from establishing, sponsoring and directly subsidizing that school.

The proponents of the St. Isidore school are seeking to have the State bring into being a religious institution that otherwise would not exist. That would be a literal "establishment of religion" that the First Amendment prohibits. Moreover, "for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship [and] financial support * * * of the sovereign in religious activity." *Walz*, 397 U.S. at 668. The relief petitioners seek would involve the State in both the sponsorship and the direct financial support of religious activity designed to promulgate the faith of a particular church—a result that this Court's precedents forbid.

A. Prohibited Establishment of a Religious Institution.

The Oklahoma Supreme Court correctly observed that this case "is about the State's creation * * * of a new religious institution." Pet. App. 26a (No. 24-396). As we explain, *supra* at 4, the St. Isidore of Seville Catholic Virtual School does not now exist, even though nothing in Oklahoma or federal law would prohibit the Archdiocese of Oklahoma City and the Diocese of Tulsa from creating and operating St. Isidore as a private school outside the aegis of the Oklahoma charter school system. What is more, St. Isidore *cannot* be "established" and begin to operate as a *charter* school without a formal decision by a state entity, the

Oklahoma Statewide Charter School Board, to create that school and sponsor it.[4]

Such a formal "establishment" by the State of Oklahoma of a religious institution designed to inculcate the faith of a particular church would directly violate the constitutional prohibition against an "establishment of religion." *Cf. Everson*, 330 U.S. at 15 ("The 'establishment of religion' clause of the First Amendment means at least this: neither a state nor the Federal Government can set up a church."); Veto Message from President James Madison to the House of Representatives (Feb. 21, 1811), https://founders.archives.gov/documents/Madison/03-03-02-0233 (vetoing a bill that would have incorporated an "Episcopal Church in the Town of Alexandria in the District of Columbia" "[b]ecause the Bill exceeds the rightful au-

[4] Petitioners insist that the charter contract with the Oklahoma Board would *not* create, or "establish," the St. Isidore school because that school was previously "formed as a private institution by the Archbishop of Oklahoma City and the Bishop of Tulsa." Pet. Br. at 19 (No. 24-396); see also, e.g., Pet. Br. at 21-22 (No. 24-394) (similar). That is incorrect. The entity previously formed by the Archbishop and the Bishop was not the St. Isidore school itself but instead a nonprofit corporation, St. Isidore of Seville Virtual Charter School, Inc.—the entity that is seeking to have the Oklahoma Board establish and sponsor the St. Isidore charter school. The school itself does not yet exist (which is why there is no such school currently operating, even though Oklahoma law would not prohibit its operation as a private institution). Indeed, if, as petitioners suggest, the school did exist before the Board "established" it as a charter school, then it would be ineligible under Oklahoma law to be established as a charter school. See Okla. Stat. tit. 70, § 3-134(C) ("A private school shall not be eligible to contract for a charter school or virtual charter school under the provisions of the Oklahoma Charter Schools Act.").

thority, to which Governments are limited by the essential distinction between Civil and Religious functions, and violates, in particular, the Article of the Constitution of the United States which declares, that 'Congress shall make no law respecting a Religious establishment'"); see also *Our Lady of Guadalupe*, 591 U.S. at 754-756 (describing the "close connection" many churches draw "between their central purpose and educating the young in the faith").

B. Prohibited Sponsorship and Approval of a Religious School.

If the Oklahoma Statewide Charter School Board were to enter into a contract establishing the St. Isidore of Seville Catholic Virtual School, the Board would thereby become a "sponsor" of that charter school under the plain terms of Oklahoma law. See Okla. Stat. tit. 70, § 3-132.1(A) (providing that the Oklahoma Board has "the sole authority to sponsor statewide virtual charter schools in this state and may sponsor charter schools in this state"); see also *id.* §§ 3-132.1(I); 3-132.2(A)(1).

Such sponsorship is not a mere formality. The Oklahoma Board must not only "accept[]" but also "approv[e]" a proponents' application in order to establish any virtual charter school, *id.* § 3-132.2(A)(3)—a subjective process that involves the Board's careful "evaluat[ion]" of that application, *id.* § 3-134(I)(2). Amici assume the Oklahoma Board will generally give some deference to charter school proponents when assessing a proposed charter school's mission, vision and curricular plans. After all, a principal objective of the State's charter school initiative is to encourage an array of innovative curricular approaches. Nevertheless, as part

of its evaluation, the Board must review the application "for high quality academic programming," Okla. Admin. Code § 777:10-3-3(c)(1), and assess whether the school officials will have the "capacity to successfully comply with the goals set forth in [the school's] vision and mission statements," *id.* § 777:10-3-3(c)(2). Such decisions are inevitably quite subjective. And it is easy to imagine proposed school missions and curricula that would cause the Board to refuse to approve an application and decline to sponsor a proposed school, particularly because the State would devote considerable resources to any such school deemed to be an Oklahoma "public school."

St. Isidore's vision and mission statements are, and its proposed curriculum would be, pervasively centered around "the evangelizing mission of the [Catholic] Church" and the objective of teaching students the truth of particular religious doctrines. Pet. App. 201a (No. 24-396); see *supra* at 10-11. It is difficult to see how the Board could assess whether St. Isidore's plans with respect to such matters involve "high quality * * * programming" and whether school officials are likely "to successfully comply with the goals set forth in [the school's] vision and mission statements"—assessments of religious matters by civil authorities that would themselves raise profound constitutional concerns. But if the Oklahoma Board were, in the exercise of its discretion, to approve the application and thereby establish and "sponsor" the school, that decision would have to be understood as a decision by the Board as vouching that the St. Isidore school is likely to successfully advance its religious missions and, in effect, to declare to parents that they ought to consider that school among the government-approved "public school" options for their children's education.

Such approval would be a form of "sponsorship * * * of the sovereign in religious activity" that the Establishment Clause prohibits. *Walz*, 397 U.S. at 668.

C. Prohibited Direct Financial Subsidization of Religious Education.

If the Oklahoma Statewide Charter School Board were to establish the St. Isidore of Seville Catholic Virtual School as a charter school, the State of Oklahoma would directly subsidize the school's inculcation of religious doctrine to its students. See Resp. Br. 47 (citing Okla. Stat. tit. 70, § 3-142(A)). The Establishment Clause prohibits such a direct subsidy of distinctively religious education.

As the Court unanimously held in *Bowen* v. *Kendrick*, 487 U.S. 589 (1988), even when a government permissibly provides direct financial aid to a religious institution for the achievement of secular governmental objectives, the Constitution "'prohibit[s] government-financed * * * indoctrination into the beliefs of a particular religious faith.'" *Id*. at 611 (citation omitted).[5] Justice O'Connor reaffirmed this limitation

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[5] All nine Justices in *Kendrick* coalesced on this point, notwithstanding their sharp disagreements on other aspects of the case. See *id*. at 611-12 (Establishment Clause would be violated if public monies were used to fund "indoctrination into the beliefs of a particular religious faith") (internal quotation omitted); *id.* at 621 (in assessing the constitutionality of funding a particular program it would be relevant to determine, for example, "whether the Secretary has permitted * * * grantees to use materials that have an explicitly religious content or are used to inculcate the views of particular religious faith"); *id.* at 623 (O'Connor, J., concurring) ("[A]ny use of public funds to promote religious doctrines violates the Establishment Clause."); *id.* at 624 (Kennedy, J., concurring) (Establishment Clause would be violated if funds were "in fact being used to further religion"); *id.*

in her concurring opinion in *Mitchell* v. *Helms*, 530 U.S. 793, 847 (2000), which is the governing precedent from that case (see *Marks* v. *United States*, 430 U.S. 188, 193 (1977)). "Although '[o]ur cases have permitted some government funding of secular functions performed by sectarian organizations,'" Justice O'Connor explained, "our decisions 'provide no precedent for the use of public funds to finance religious activities.'" *Mitchell,* 530 U.S. at 840 (2000) (O'Connor, J., concurring) (quoting *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 847 (1995) (O'Connor, J., concurring)).[6] Accordingly, in *Mitchell* itself, Justice O'Connor held that it was constitutional for the federal government to afford private religious schools in-kind loans of materials and equipment only because there were sufficient safeguards in place to ensure that the schools would not divert those materials and equipment to religious educational uses. See *id.* at 840-841, 848-849.

This "bedrock" Establishment Clause prohibition on the direct funding of distinctively religious activities, see *Rosenberger*, 515 U.S. at 847 (O'Connor, J., concurring), is starkly illustrated by this Court's decision in *Tilton* v. *Richardson*, 403 U.S. 672 (1971). In that case, the Justices divided 5-4 in upholding a fed-

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at 634-48 (Blackmun, J., dissenting) (government aid may not be used to advance religion, even if the government provided such aid for secular objectives).

[6] See also *Mitchell,* 530 U.S. at 840 (O'Connor, J., concurring) (explaining that the Court "rested [its] approval of the relevant programs" in *Agostini* v. *Felton*, 521 U.S. 203 (1997), and in *Board of Ed. of Central School Dist. No. 1* v. *Allen*, 392 U.S. 236 (1968), "in part on the fact that the aid had not been used to advance the religious missions of the recipient schools").

eral law that provided aid to religiously affiliated colleges and universities for the repair and construction of school buildings. The Court was unanimous, however, in declaring invalid a provision of the statute that would have permitted the schools to use the subsidized buildings for religious worship twenty years after the repair or construction; all of the Justices agreed that the prohibition on the use of such buildings for religious activities had to be permanent. See *id.* at 683 (plurality opinion); *id.* at 692 (Douglas, J., dissenting in part).

The no-direct-funding rule is, moreover, deeply grounded in "historical practices and understandings," *Kennedy*, 597 U.S. at 535 (quoting *Town of Greece* v. *Galloway*, 572 U.S. 565, 576 (2014)), extending back at least to the lessons derived from the debates about religious assessments in Virginia shortly before the Religion Clauses were drafted and ratified. See Baptist Joint Comm. Amicus Br. Part I-A; see also Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875, 921 (1986) ("[I]f the debates of the 1780's support any proposition, it is that the Framers opposed government financial support for religion."). Of particular significance was James Madison's *Memorial and Remonstrance Against Religious Assessments*,[7] in which he objected to Patrick Henry's bill that would have levied a tax to be "appropriated to a provision for a Minister or Teacher of the Gospel of their denomination,

[7] See *Everson* v. *Board of Educ. of the Township of Ewing*, 330 U.S. 1, 63-72 (1947) (appendix to Justice Rutledge's opinion) (reprinting the *Memorial and Remonstrance*).

or the providing places of divine worship."[8] Madison warned that competition among religions for public resources, with the inevitable strife that accompanies it, would "destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion has produced among its several sects" (¶ 11). He also identified the potential harms to religion itself when the state sustains religious institutions with financial inducements, warning that such aid might sully the "purity and efficacy of Religion" (¶ 7).[9] And Madison famously remarked (¶ 5) that any state effort to "employ Religion as an engine of Civil policy" would be "an unhallowed perversion of the means of salvation."[10]

As support for Henry's bill dissipated in the face of those critiques, Madison led the effort to have the Virginia General Assembly instead enact the "Act for Establishing Religious Freedom" (Oct. 31, 1785). See https://founders.archives.gov/documents/Madison/01-08-02-0206. That law guaranteed, inter alia, that "no man shall be compelled to * * * support any religious

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[8] *Patrick Henry, A Bill Establishing a Provision for Teachers of the Christian Religion* (Jan. 1, 1784), *quoted in Everson*, 330 U.S. at 74 (appendix to Justice Rutledge's opinion).

[9] See also *Letter from James Madison to Edward Livingston* (July 10, 1822), National Archives, https://founders.archives.gov/documents/Madison/04-02-02-0471 ("Religion flourishes in greater purity, without than with the aid of Government.").

[10] Madison was not alone in the effort to emphasize the risks of harm to religion itself when church and state are financially intertwined. Indeed, the *Memorial and Remonstrance* was a synthesis of well-established, disestablishment views of the era, many emanating from within Protestant churches themselves. See generally Thomas E. Buckley, *Church and State in Revolutionary Virginia, 1776-1787*, at 136-140, 175-180 (1977).

worship, place, or ministry whatsoever," and warned that state subsidization of religion "tends * * * to corrupt the principles of that very religion it is meant to encourage, by bribing, with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it."

Direct funding of religious education is thus "among the foremost hallmarks of religious establishments," *Kennedy*, 597 U.S. at 537, that the Founders intended to forbid.

This Court's more recent decisions have not overruled *Kendrick*, *Mitchell*, *Tilton*, or any of the other cases in which the Court has affirmed—often unanimously—the doctrine that a state cannot provide direct aid to be used for distinctively religious activities, including religious education. Moreover, Presidents and agencies in administrations of both parties have recognized the continuing authority of those precedents. Of particular importance, Section 2(e) of Executive Order 13279, *Equal Protection of the Laws for Faith-Based and Community Organizations*, which President Bush first promulgated in 2002, specifies that Federal agencies must implement social service programs "in accordance with the Establishment Clause and the Free Exercise Clause of the First Amendment to the Constitution" and that, "[t]herefore, organizations that engage in explicitly religious activities, such as worship, religious instruction, and proselytization, must offer those services separately in time or location from any programs or services supported with direct Federal financial assistance." See Exec. Order No. 13,279, 67 Fed. Reg. 77,141 (2002), as

amended by Exec. Order No. 13,559, sec. 1(b), 75 Fed. Reg. 71,319, 71,320 (2010).[11]

Amici recognize that in *Trinity Lutheran Church* v. *Comer*, 582 U.S. 449 (2017), two Justices noted that they "harbor[ed] doubts" about drawing a constitutional line based upon religious uses of government aid, even in the context of a direct funding program. *Id.* at 469 (Gorsuch, J., joined by Thomas, J., concurring in part).[12] Whatever the merits of that course might be, particularly in the context of direct *financial* aid,[13] adopting it would require the Court to overrule

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[11] Most of the agencies covered by that Executive Order imposed such conditions shortly after President Bush promulgated it, see 88 Fed. Reg. 2395, 2399-2400 (2023), and all of the covered agencies maintained the conditions in connection with a rule promulgated during the first Trump Administration, see 85 Fed. Reg. 82,037, 82,041-43, 82,109 (2020).

[12] That issue was not raised in *Trinity Lutheran* itself. The Court held there that the Establishment Clause did not prohibit a state from providing financial assistance for the resurfacing of a playground of a Church-run preschool. *Id.* at 457 (majority opinion). The Missouri agency in that case, however, required grant recipients to certify that that they would use funds "for secular (separate from religion; not spiritual) purposes rather than for sectarian (Denominational, devoted to a sect) purposes," and the religious school had submitted such a certification in its grant application. See Plaintiff's Response in Opposition to Defendant's Motion to Dismiss, Exh. A, at 5, No. 2:13-cv-04022-NKL (W.D. Mo. Apr. 5, 2013), ECF No. 20-1. This Court expressly declined to opine on the question of whether a direct grant could be used for religious education. See 582 U.S. at 465 n.3 ("We do not address religious uses of funding.").

[13] It is noteworthy that although Justice Thomas, in his plurality opinion in *Mitchell*, expressed some skepticism about the "no direct funding" doctrine in the context of nonfinancial aid, he acknowledged that "we have seen 'special Establishment Clause dangers' when money is given to religious schools or entities

numerous precedential decisions. Petitioners have not requested that this Court do so, let alone established that the predicates for overcoming *stare decisis* have been satisfied.

The St. Isidore petitioner does argue, however, that this case should be viewed not through the lens of those direct-aid precedents but, rather, as being governed by this Court's decisions in *indirect aid* cases, such as *Zelman*, *Espinoza*, and *Carson*. Pet. Br. at 49 (No. 24-396).

As Respondent notes (Br. 6), Oklahoma does offer some forms of indirect aid to families who choose to send students to private schools. Nothing in Oklahoma law or the federal Constitution would preclude the nonprofit corporation that has proposed St. Isidore, see *supra* note 4, from itself creating and operating the institution as a private school. If it did so, then parents could choose to use vouchers under Oklahoma's Parental Choice Tax Credit Act, or state-funded scholarships, to help defray the costs of tuition at that private school, in accord with this Court's indirect aid precedents, including Espinoza and Carson. The St. Isidore nonprofit corporation, however, has made no efforts to establish such a private school. Instead, it has asked the Oklahoma Board to establish St. Isidore as a pubic charter school that would receive substantial *direct* financial assistance from the State, without the intervention of independent private decision-making.

Petitioner argues that "the link between government and religion is attenuated by private choices" nevertheless, in that the "amount of State Aid received

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directly rather than * * * indirectly." 530 U.S. at 818-819 (quoting *Rosenberger*, 515 U.S. at 842).

by [St. Isidore] is 'generated by students enrolled in the virtual charter school for the applicable year.'" Pet. Br. at 49 (No. 24-396) (*quoting Espinoza*, 591 U.S. at 485, and an affidavit in the state court proceedings, respectively). In relying upon this "per capita" argument, petitioner appears to be taking a page from Justice Thomas's plurality opinion in *Mitchell*, which suggested that the Establishment Clause should not prohibit private schools from using at least some forms of "direct" aid—in that case, library and media materials and computer software and hardware—for specifically religious education, as long as the aid also serves the secular functions for which it was provided and the government distributes the aid on a strictly *per capita* basis, based upon the number of students enrolled at each school. See 530 U.S. at 829-830 (plurality opinion).

Adopting that view would also require the Court to overrule precedent, given that Justice O'Connor specifically rejected Justice Thomas's "per capita" reasoning in her governing opinion in *Mitchell* itself. See 530 U.S. at 842-844 (O'Connor, J., concurring in the judgment). But even if this Court were inclined to consider whether to adopt the *Mitchell* plurality's rationale, the Establishment Clause would permit government aid to subsidize religious education only where "[i]t is the students and their parents—not the government—who, through their choice of school, determine who receives * * * funds." *Id.* at 830 (plurality opinion).

That does not describe this case. As Respondent notes (Br. 47-48), not all state funding for Oklahoma charter schools is calculated solely on the basis of student enrollment. Moreover, even as to those forms of aid that *are* based upon enrollment numbers, the funding would not be merely a function of independent

choices of private individuals. As we have explained, *supra* at 19-20, the Oklahoma State Board is afforded significant discretion to decide whether or not to "sponsor" and "establish" proposed charter schools in the first instance, after careful assessment of many factors, including a school's proposed curriculum and mission statement. Such decisions of the Board are not based upon private choices, "genuine and independent," *Zelman*, 536 U.S. at 649, or otherwise, and would not necessarily be "neutral" in the sense described in the *Mitchell* plurality opinion and the *Zelman* line of indirect-aid decisions. There was no similar subjective and discretionary state evaluation of school eligibility in *Carson* and *Espinoza*. Therefore, the State's responsibility for the subsidization of religious education would be present here in a way it was not in those cases.[14]

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For all of these reasons, the Establishment Clause would prohibit the State of Oklahoma from establishing and sponsoring the St. Isidore charter school, and from subsidizing its distinctively religious education,

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[14] See *Walz*, 397 U.S. at 675 (distinguishing the constitutionality of tax exemptions for churches from prohibited subsidies to places of worship in part because "[o]bviously a direct money subsidy," in contrast to a tax exemption, "would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards"); see also *id.* at 699 (Harlan, J., concurring) (explaining that the "general rule" is that because "subsidies or direct aid * * * are granted on the basis of enumerated and more complicated qualifications [than tax exemptions], [they] frequently involve the state in administration to a higher degree").

even if that school were itself deemed to be a private school rather than a state instrumentality.

CONCLUSION

The Court should affirm the judgment of the Oklahoma Supreme Court.

Respectfully submitted,

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