No. 24-394 & No. 24-396

In the Supreme Court of the United States

OKLAHOMA STATEWIDE CHARTER SCHOOL BOARD, ET AL.
Petitioners,

v.

GENTNER DRUMMOND, ATTORNEY GENERAL FOR THE STATE OF OKLAHOMA, EX REL. STATE OF OKLAHOMA,
Respondent.

ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL, ET AL.
Petitioners,

v.

GENTNER DRUMMOND, ATTORNEY GENERAL FOR THE STATE OF OKLAHOMA, EX REL. STATE OF OKLAHOMA,
Respondent.

On Writs of Certiorari to the Supreme Court of Oklahoma

BRIEF OF HISTORIANS AND LEGAL SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are historians and legal scholars who specialize in constitutional history and First Amendment law. They have substantial experience in the history and development of the Religion Clauses, including how those Clauses have related to education issues. *Amici* have a professional interest in the issues raised in this case and believe that the Court should resolve the case based on a complete and accurate account of the relevant history. *Amici* are:

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[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Amici address the question whether the First Amendment's Free Exercise Clause requires a state to provide financial support to religious schools whenever the state provides financial support to nongovernmental secular entities that operate schools. The

answer to this question lies in history and tradition, which shows unequivocally that, during the early years of the Republic, state and local governments often declined requests from religious schools for public funding—and consistently were understood to be entitled to do so within the boundaries of the then-existing right to free exercise of religion.

The question here is not a new one. In the generation just after adoption of the U.S. Constitution, and in the century leading to ratification of the Fourteenth Amendment, state and local governments repeatedly considered providing education through religious schools that were paid for by the government. And although governments sometimes did provide that support, they often—and increasingly—did not. Even so, those operating religious schools *never* initiated litigation asserting a right to such funding, notwithstanding the existence of free-exercise clauses in state constitutions. This "no-funding" practice, and the absence of any challenge to it, provides compelling evidence that free-exercise clauses (including the one in the U.S. Constitution) do not require state funding of religious schools in the circumstances of this case. That history and tradition is fatal to petitioners' contrary position.

A. This case should be resolved by reference to the history and tradition of public funding for religious schools. The Court consistently has looked to historical understandings in determining the original public meaning of constitutional provisions. In undertaking this inquiry, the treatment and application of state constitutional provisions is entitled to substantial weight, as is consistent and unchallenged state practice. When addressing application of the Bill of Rights to the States, the Court looks both to the Founding era

and to practice preceding ratification of the Fourteenth Amendment.

B. This history reflects a widely shared understanding that states had no obligation to fund religious schools. Throughout the antebellum period, as common schools were established, states declined requests to fund religious schools even while they funded schools operated by other entities. This practice was grounded, not in hostility to particular religions, but on the view that funding religious instruction would foment civic strife and damage school administration. During this period, virtually all state constitutions contained free-exercise clauses that were similar in principle to the U.S. Constitution's Free Exercise Clause, which religious litigants frequently invoked in asserting their free-exercise rights across a range of contexts. Nevertheless, religious schools never asserted a free-exercise right to public funding. This is powerful evidence that the free-exercise principle was not originally understood to include the right to public funding of religious schools.

C. Petitioners are incorrect in asserting that the no-funding provision of the Oklahoma Constitution derives from the Blaine Amendment and the anti-Catholic bigotry sometimes associated with that federal effort. Oklahoma has its own, distinct history. Oklahoma's no-funding provision is directly traceable, not to Blaine, but to the compelled Christianization of Native American children throughout the nineteenth and into the twentieth centuries. The federal and territorial governments sought to accomplish this compelled Christianization by funding religious schools, both Protestant and Catholic. In any event, petitioners do not dispute that the denial of funds at issue in this case was the direct result of a charter-school

statute enacted by the Oklahoma legislature in 1999. Because petitioners do not assert, and offer no evidence, that those lawmakers enacted the 1999 law to express hostility against Catholics, any assertion that Oklahoma's Constitution traces to the Blaine Amendment is not only mistaken, but legally irrelevant.

ARGUMENT

A. This case should be resolved by reference to historical practice and tradition.

As a threshold matter, the first issue to address in this case is *how* the Court should go about deciding the application of the Free Exercise Clause in the circumstances here. The answer is apparent in the Court's consistent approach to constitutional interpretation: the controlling constitutional provision "must be interpreted by 'reference to historical practices and understandings.'" *Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507, 535 (2022) (quoting *Town of Greece* v. *Galloway*, 572 U.S. 565, 576 (2014)).

First, the central importance of history and tradition to constitutional interpretation is settled. In recent years, the Court has repeatedly resolved constitutional questions by examining the relevant history and tradition of the practice in question. It has done so in determining the original public meaning of constitutional provisions in the widest range of contexts, including the Second Amendment (in *New York State Rifle & Pistol Ass'n* v. *Bruen*, 597 U.S. 1 (2022), and *United States* v. *Rahimi*, 602 U.S. 680 (2024)); the Fourteenth Amendment's Due Process Clause (in *Dobbs* v. *Jackson Women's Health Org.*, 597 U.S. 215 (2022)); the First Amendment's Free Speech Clause (in *Vidal* v. *Elster*, 602 U.S. 286 (2024)); the First Amendment's Establishment Clause (in *Kennedy*, 597

U.S. at 535); and the Fifth Amendment's Confrontation Clause (in *Samia* v. *United States*, 599 U.S. 635 (2023)). It should also do so here.

Second, the range of sources that bear on this determination—that is, that are part of the generally accepted method of historical inquiry that sheds light on the meaning ascribed to a provision by contemporaries—also is clear. It will sometimes be apparent from the plain constitutional text, or from the Framers' unambiguous statement of intent regarding the meaning of the text, that a provision should be understood in a way that directly resolves the case. But when the Framers' understanding of the meaning of a constitutional provision is not expressly stated with respect to a particular practice—as is true of the school-funding question in this case—history and tradition illuminate original public meaning by showing what people thought the applicable constitutional provision meant (and didn't mean) at the relevant time. See *Elster*, 602 U.S. at 324 (Barrett, J., concurring in part); *Rahimi*, 602 U.S. at 739 (Barrett, J., concurring). In that way, history can determine the "original contours" of a right. *Rahimi*, 602 U.S. at 739 (Barrett, J., concurring); see also Aaron Tang & Ethan Hutt, *"Original History" and the Free Exercise Case for Religious Charter Schools*, 103 Wash. U. L. Rev. (forthcoming 2026) (manuscript at 12), https://perma.cc/5VYZ-PGBJ.

Relevant to this inquiry is "historical practice, historical precedent, historical word usage, historical context, and tradition." Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs*,* Bruen*, and* Kennedy*: The Role of History and Tradition*, 118 Nw. U. L. Rev. 433, 480 (2023) ("For originalists, consideration of such evidence of history and tradition is

mandatory, not optional. * * * [T]his entails that they are obligated to consider all the relevant evidence of original meaning in good faith."). Tradition, as the Court has suggested, is a "practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Town of Greece*, 572 U.S. at 577; see *American Legion* v. *American Humanist Ass'n*, 588 U.S. 29, 63 (2019) ("Where categories of * * * practices with a longstanding history follow in that tradition, they are likewise constitutional."); see also *Walz* v. *Tax Comm'n of City of N.Y.*, 397 U.S. 664, 680 (1970) (holding that granting tax exemptions to churches did not violate the Religion Clauses because "more than a century of our history and uninterrupted practice" revealed that "at least up to 1885 this Court * * * accepted without discussion" that church tax exemptions were constitutional).

In this exercise, state constitutional provisions, and the application of those provisions in practice, have particular force when determining the original public meaning of an analogous federal constitutional right. See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1456 (1990) [hereinafter McConnell, *The Origins*] ("[S]tate constitutions provide the most direct evidence of the original understanding [of the U.S. Constitution]."); *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 575 (2021) (Alito, J., concurring) (noting that "these state constitutional provisions provide the best evidence of the scope of the right embodied in the First Amendment").

Third, when interpreting provisions of the Bill of Rights as incorporated by the Fourteenth Amendment, the Court has looked to evidence both from 1791 and from 1868. *Cf. Bruen*, 597 U.S. at 37. It is

arguable that 1868 is the more relevant time. See Kurt Lash, *Respeaking the Bill of Rights: A New Doctrine of Incorporation*, 97 Ind. L.J. 1439, 1441 (2022); see also *Bruen*, 597 U.S. at 37-38 (acknowledging that "there is an ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope"). But however that may be, at a minimum, it is settled that history leading to the Reconstruction Era is highly relevant in casting light on, and confirming, understandings in 1791. See *Espinoza* v. *Montana Dep't of Revenue,* 591 U.S. 464, 482 (2020 ("recognizing that [nineteenth-century] evidence may reinforce an early practice"); see also *National Rifle Ass'n* v. *Bondi*, No. 21-12314, 2025 WL 815734, at *5 (11th Cir. Mar. 14, 2025) (Pryor, C.J.) ("[W]e may look to historical practice from the mid-to-late nineteenth century at least to confirm the Founding-era understanding of the Second Amendment.").

We set out the relevant history below: it tells us that Americans alive in both the Founding and the antebellum eras understood that the free-exercise principle does *not* include a right to public funding of religious private schools, even as other privately run schools did receive public funding.

B. State and local governments declined requests for public funding from religious schools through the nineteenth century, and no one challenged these denials under the free-exercise provisions of state constitutions.

Petitioners maintain that, in the early years of the Republic, the state and federal governments

sometimes provided funding to religious schools. See, *e.g.*, No. 24-394, Pet. Br. 4-5. They are correct in this, at least when existing religious educational institutions were the only ones capable of offering schooling. But that is *not* the relevant history for purposes of resolving the free-exercise question here. To answer that question—the one addressed below by *amici*—the key is not whether public funding of religious schools was sometimes thought constitutionally permissible; it is whether states *must* fund religious schools when government also funds other forms of education. Petitioners ignore the history on *that* question. Yet that history is clear, and it answers the question in this case: from very early in the Nation's history, states and cities across the country declined to fund religious schools, even as they funded other educational institutions. Nevertheless, religious schools never challenged this practice under the free-exercise clauses that were ubiquitous in state constitutions at the time. The necessary conclusion is that the free-exercise right was not originally understood to include an entitlement to public funding of religious schools.

1. In the Founding and antebellum eras, states did not fund religious schools on equal terms with other private schools.

From early on, the state and federal governments left school funding largely to local discretion. Although states (and sometimes the federal government) did provide financial support to localities for use in operating schools during the Republic's early years, localities had broad leeway in their approaches. See Tang & Hutt, *supra*, at 19-21. Under this model, local officials could distribute state funds to recipients that included religious, charitable, and privately run schools. *Id.* at 20-21. Although state constitutions and

legislation called for the creation of free public schools, the infrastructure to achieve that goal did not yet exist and could not be created instantaneously. *Id.* at 21-22. States therefore funded existing schools of all kinds, even as they established their public-school systems. *Ibid.*

But as state and local governments became increasingly involved in school funding, government actors across the Nation refused to fund religious schools on equal terms with other schools. See Steven K. Green, *The Bible, the School, and The Constitution: The Clash that Shaped Modern Church-State Doctrine* 13-14 (2012) [hereinafter Green, *The Bible*]. States adopted this approach to advance principles of good governance and public accountability, as well as the desire to foster religious tolerance rather than competition and divisiveness. Even when government officials initially funded religious schools as the only existing educational option, they soon defunded those schools as public common schools were established. This pattern played out across the Nation.

New York. A prominent early example of this practice is found in New York. As that State began to expand support for schooling at the turn of the nineteenth century, appropriating funds and empowering local officials to disburse them, it largely directed money to charitable schools. Carl F. Kaestle*, The Evolution of an Urban School System: New York City 1750-1850*, at 41-60, 68-71 (1973). In particular, the State directed funds towards the Free School Society, then recently incorporated to educate children who did not have access to religious schooling. See William Oland Bourne, *History of the Public School Society of the City of New York, With Portraits of the Presidents of the Society* 5 (1870). The Society was a private

corporation that received a formal charter and public funds to provide public education to the city's poor, essentially indistinguishable from modern-day charter schools. See Thomas Boese, *Public Education in the City of New York: Its History, Condition, and Statistics* 100 (1869).

In 1822, New York temporarily extended similar funding to the Bethel Baptist Church, which operated religious free schools. Green, *The Bible*, *supra*, at 47-49. But in 1825, the New York Common Council unanimously decided to discontinue funding for all religious education, concerned about generating a "spirit of rivalry" between religious groups.[2] Boese, *supra*, at 106. In total, New York City provided partial funding to the Bethel schools for just three years. Tang & Hutt, *supra*, at 24-25 (citing Boese, *supra*, at 101-102). At the time, both city and state officials understood it to be "a violation of a fundamental principle * * * to allow the funds of the State * * * to be subject to the control of any religious corporation." Green, *The Bible*, at 49; see *id*. at 48-49 (describing the mayor and Common Council's memorial, which warned that funding these schools would "enlist a spirit of rivalry" and "disturb the harmony of society," and asked rhetorically whether disbursing funds "to religious or ecclesiastical bodies is not a violation of an elementary principle in the politics of the State and country"). Nevertheless, there is no evidence that the Bethel Baptist Church or other religious schools that could no longer obtain state funds filed lawsuits challenging the

[2] A state legislative committee had considered state funding of religious charity schools but, recognizing that question as one of local policy, left it to New York City's Common Council to direct the allocation of public funds to schools as it saw fit. See Green, *The Bible*, at 49.

funding decisions or otherwise believed that they possessed a free-exercise right to such funds. Boese, *supra*, at 106.

That absence is especially notable because religious schools made vigorous political appeals for funding. Thus, a few decades later, a coalition of Catholic, Jewish, and Protestant schools in New York City sought access to public funding. See Tang & Hutt, *supra*, at 25-26 (citing Green, *The Bible*, *supra*, at 51, 59, 63, 106). But hewing to its established rule, the City denied their requests. *Ibid.* Again, the religious schools resisted this result on political, not constitutional, grounds, petitioning the state legislature to intervene. *Ibid*. But after more than a year of debate in the legislature, the State reaffirmed the City's refusal to disburse funds for religious schooling. *Id.* at 26 (citing Green, *The Bible*, *supra*, at 68). Despite this loss, the schools once more did not assert a free-exercise claim. *Ibid.*

New Jersey. New Jersey's example points in the same direction. New Jersey adopted a law funding some religious schools that had been established before 1838, but not other religious schools. Tang & Hutt, *supra*, at 27. Potential claimants debated whether all denominations could have access to the funds or whether the law meant to designate only Quaker schools as eligible. *Id.* at 28. Those administering the program ultimately made funds available only to Quaker schools. *Id.* at 28-29. Thus, the law created unequal access to funding for religious schools, across time and denominations. Yet at a time when tuition was critically important for the functioning of all schools (*id.* at 31), the debate about the scope of this law did not include concern over its constitutionality, even by those who supported equal funding for

all religious schools. *Id.* at 29-30. Instead, discussion of judicial intervention addressed only the proper interpretation and application of the statute. *Id.* at 31.

Other States. The histories of school funding in New York City and New Jersey typify similar episodes in the historical record across the Nation. See Tang & Hutt, *supra*, at 32-35; see generally Richard James Gabel, *Public Funds for Church and Private Schools* 373 (1937) (providing more examples). For example, California funded Catholic charitable schools for two years from 1851 to 1853, but then changed its law to prevent this funding. See Tang & Hutt, *supra*, at 32. Yet there was no lawsuit based on the free-exercise right, even as California continued to fund nonreligious schools. *Id.* at 33. Similarly, Illinois prohibited communities from funding religious education in 1872—but again, there was no free-exercise litigation, even as religious groups lost the battle for taxpayer funds that ultimately went to nonreligious schools. *Id.* at 34-35; see Ill. Const. of 1870, art. VIII, § 3. Other states, too, followed this pattern. See Tang & Hutt, *supra*, at 33-35 (describing similar events in Pennsylvania, Massachusetts, Alabama, and Indiana); see generally Gabel, *supra* (providing more examples of the same).

2. Religious schools that were denied funding did not challenge those denials under the free-exercise provisions of state constitutions.

The absence of litigation challenging the denial of funding for religious schools is especially notable because if there had been a constitutional basis for those sorts of challenges—that is, had it been thought that free-exercise principles conferred a right to public

funding for religious schools on the same basis as other schools that received public funds—those claims could (and presumably would) have been asserted. Before the adoption of the Fourteenth Amendment, the constitutions of all but one of the states included a free exercise or similar religious-liberty clause. Some of these provisions used language similar to the U.S. Constitution's Free Exercise Clause; others were written in terms that were more detailed or expansive; and all embraced a similar free-exercise principle. See Appendix, *infra* (citing provisions); see also Craig B. Mousin, *State Constitutions and Religious Liberty*, *in Religious Organizations in the United States: A Study of Identity, Liberty, and the Law* 167, 167-168 (James A. Serritella, et al., eds., 2006). Had it been thought that this principle supported a claim to public funding for religious schools, those that were denied funding surely would have advanced a challenge. But none did.

This lack of school-funding lawsuits is particularly instructive because claimants frequently did bring, and win, free-exercise or religious-liberty suits on *other* subjects during that same time, grounded on state constitutional free-exercise provisions.

In New York itself, a Catholic litigant won a major free-exercise case in 1813, even before the City denied funding to schools operated by the Bethel Baptist Church. See *People* v. *Philips*, 1 W.L.J. 109, 112-113 (Gen. Sess., N.Y. 1813), reprinted in William Sampson, *Catholic Question in America* 5 (1813). There, the New York Court of General Sessions heard a case arising from the trial of a man alleged to have confessed to his priest that he had committed a robbery. Sampson, *supra*, at 9-12. The defense argued that requiring the priest to testify violated the

religious-liberty clause of the New York Constitution. *Id.* at 44-51. The court agreed, recognizing the priest-penitent privilege on free-exercise grounds. *Philips*, 1 W.L.J. at 112-113; see also *Privileged Communications to Clergymen*, 1 Cath. L. 199, 206-209 (1955). A legal challenge to the City's school-funding decisions would have been evaluated under the same constitutional provision.

Other examples of this sort are legion. In *Commonwealth* v. *Cronin*, 2 Va. Cir. 488, 498 (1855), the Virginia Circuit Court followed *Philips* in accepting a priest-penitent privilege on free-exercise grounds based on the Virginia and federal Constitutions. In *Ex parte Newman*, the California Supreme Court reversed a Jewish man's conviction for violating a California law mandating observance of the Sunday Sabbath. 9 Cal. 502, 502 (1858). The court drew on the Free Exercise Clause of the California Constitution to hold the law unconstitutional. *Ibid.* See also *Commonwealth* v. *Wolf*, 3 Serge. & Rawle 48, 51 (Pa. 1817) (rejecting a challenge to a similar Sunday Sabbath law under the Pennsylvania Constitution).

Indeed, religious litigants even appealed to the *federal* Free Exercise Clause. In *Permoli* v. *Municipality No. 1 of the City of New Orleans*, arising in Louisiana (the one State that did not then have a state constitutional free-exercise clause), a Catholic priest challenged a fine assessed against him for performing funeral rites. 44 U.S. 589 (1845); see Michael W. McConnell, *Schism, Plague, and Late Rites in the French Quarter: The Strange Story Behind the Supreme Court's First Free Exercise Case*, in *First Amendment Stories* 39, 39 (Richard W. Garnett & Andrew Koppelman eds., 2012). He alleged that the ordinance prohibiting the rites violated the Free Exercise

Clause of the U.S. Constitution. *Permoli*, 44 U.S. at 591. Although this Court ultimately rejected his claim on the ground that the Free Exercise Clause did not apply to the states (*id.* at 606), the case evinced a willingness to litigate over free-exercise rights. That willingness puts the failure to do so in the school-funding context into sharp relief.

This history provides two lessons for this case. *First*, that cities and states frequently excluded religious schools from public funding tells us that the practice generally was understood to be legally unobjectionable. *Second*, the failure of litigants to challenge the exclusion confirms that this denial of funding was thought to be consistent with constitutional free-exercise principles even by religious school leaders themselves. See generally McConnell, *The Origins*, *supra*, at 1511-1512 (noting that the absence of "substantial evidence that [practices] were considered constitutionally questionable," even by "opponents" of the practice, is relevant to interpretation of a constitutional provision).

This is precisely the sort of historical pattern the Court found dispositive in *Dobbs*, *Vidal*, and *Samia*. As the Court put it in *Dobbs*, when states began to take action banning abortion in the nineteenth century, "no one, as far as we are aware, argued that the laws they enacted violated a fundamental right." 597 U.S. at 253. The same is true of the refusal to fund religious schools at issue here. The Court should follow this history, to hold that public funding of religious schools is outside the scope of the Free Exercise Clause.

3. Exclusion of religious schools from public funding early in the nineteenth century is not attributable to animus against Catholics.

This historical evidence of contemporaneous understandings of the free-exercise right is not undermined by the anti-Catholic animus that, the Court has recognized, bears on legal developments at other times and in other contexts, particularly in the debate around the proposed "Blaine Amendment." See *Espinoza*, 591 U.S. at 482; *id.* at 497-507 (Alito, J., concurring). That animus is not reflected in the pre-Civil War religious-school funding history, which took place long before the Blaine Amendment and responded to a very different set of motivations. And it says nothing about the contemporaneous understanding of the scope of the free-exercise principle. This is so for several reasons.

First, history compels the conclusion that, in the schooling context, states generally moved toward a no-funding approach to religious schools that was rooted not in animus but in good-faith policy judgments. The Framers of the U.S. Constitution themselves showed an early embrace of the no-funding principle. As early as the 1770s, Thomas Jefferson and James Madison classified government financial support for religion as "infringements on religious liberty and rights of conscience." Steven K. Green, *'Blaming Blaine': Understanding the Blaine Amendment and the 'No-Funding' Principle*, 2 First Amend. L. Rev. 107, 114 (2003). As noted above, by the 1820s many state officials clearly rejected the funding of religious schools, a trend that was recognized throughout the nineteenth century. See Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 B.Y.U.

L. Rev. 295, 300 [hereinafter Green, *The Insignificance*].

This no-compelled-support-of-religion principle found very early and widespread recognition in state constitutions. A notable and influential version appeared in the Pennsylvania Constitution of 1776. See Green, *The Bible*, *supra*, at 69. The principle was then embraced in clauses in twenty-seven state constitutions, which restricted public appropriations or draws from state treasuries for support of religious institutions. Considered together, these "no compelled support," "no-funding," and "public purpose/control" clauses represent a long-standing practice of not funding religious education, so as both to ensure that the government does not advance religious doctrine and to guarantee the financial security of public education. Green, *The Bible*, *supra* at 46.

This history belies an origin in religious animus: the no-funding principle was animated not by hostility toward a particular denomination (or toward religion generally) but by ideals of good governance and public accountability, as well as by the desire to foster religious tolerance and avoid competition for scare public funds. See Green, *The Insignificance*, *supra*, at 310-315. For example, the no-funding principle was understood as a means to standardize education by enhancing state control over schools. *Id.* at 310 (citing *Editor's Table*, 7 Harper's New Monthly Mag. 269, 269 (1853)). Rather than express hostility towards religion (either generally or regarding particular faiths), the principle's proponents sought to respect religion while avoiding strife between religious groups, which they believed would naturally follow from disputes over school funding. See *id*. at 311 (citing Bourne, *supra*, at 140 ("If all sectarian schools be admitted to the receipt

of a portion of a fund sacredly appropriated to the support of common schools, it will give rise to a religious and anti-religious party, which will call into active exercise the passions and prejudices of men.")). This goal, no-funding advocates understood, was based on constitutional free-exercise values. See Bourne, *supra*, at 52-55, 88.

Second, the pattern of activity at issue does not map onto an explanation rooted in anti-Catholic animus. Many of the earliest examples of religious school funding denials are clearly in accord with these neutral principles, such as New York City's 1825 refusal to fund Bethel Baptist Church. Green, *The Insignificance*, *supra*, at 311. Six years later, the New York Common Council denied public funding to a Methodist school. *Ibid*. It would be odd to conclude that the denial of funds to a *Baptist* congregation and *Methodist* school was the product of anti-*Catholic* animus. See Green, *The Bible*, *supra*, at 50-53. Moreover, many of the state limits on funding for religious schools noted above predate the Blaine Amendment by close to half a century. For example, Massachusetts adopted a constitutional provision limiting funding for religious schools in 1827. *Id.* at 69 & n.80. Michigan adopted an express constitutional provision against funding religious schools in 1835. *Id.* at 70 & n.82. Thereafter, several states followed the Michigan model, including Wisconsin (in 1842); Indiana (in 1851); Ohio (in 1851); and Minnesota (in 1857). *Id.* at 70 & n. 83. These provisions then inspired similar provisions in the Oregon and Kansas constitutions, adopted in 1857 and 1858 respectively. *Id.* at 70. Thus, although anti-Catholic animus explains aspects of the Blaine Amendment and should be condemned accordingly, it is temporally

inapplicable to the history that is determinative in this case.

Finally, the prevalence of successful free-exercise litigation brought by Catholic litigants, without any suits on school funding, further undercuts the notion of anti-Catholic animus as an explanation for the denial of funding to religious schools in the first half of the nineteenth century. During this time, religious entities and individuals—notably including Catholic litigants—challenged on state constitutional grounds state and local laws that *were* grounded in religious animus or otherwise disadvantaged particular denominations. In this context, the failure to bring any such suit to challenge school-funding denials can be explained only as a reflection of belief and common understanding that such denials were consistent with free-exercise principles.

C. The Oklahoma Constitution's "no-funding" provision and charter-school statute are not products of anti-Catholic bigotry.

Petitioners and certain of their *amici* nevertheless seek support in their characterization of Article II, Section Five of the Oklahoma Constitution—that Constitution's no-funding provision—as "part and parcel of the broader anti-Catholic Blaine efforts." No. 24-394, Pet. Br. 7; Nos. 24-394, -396, Br. of the Rutherford Inst. as *Amicus Curiae* in Support of the Petitioners, at 12-15. This argument does not advance their position.

As an initial matter, even if the description of the Oklahoma Constitution offered by petitioners and their *amici* were accurate, it should not affect the resolution of this case. For one thing, Oklahoma's denial of the funds at issue here rests not on the Oklahoma

Constitution's no-funding provision, but on the state charter-school statute enacted in 1999, almost a century after adoption of the state Constitution. See *Drummond* v. *Oklahoma Statewide Virtual Charter School Board*, 558 P.3d 1, 7 (2024). And there is no suggestion in petitioners' briefing (or in the record of this case or in the legislative history of the statute) either that Oklahoma's Charter Schools Act rests on the state constitutional no-aid provision or that the statute was itself motivated by anti-Catholic animus. Moreover, for the reasons explained above (at 18-21), the directly relevant history here is not that of the late-nineteenth-century federal and follow-on state Blaine Amendments; it is that of school funding practices in the Founding-era and antebellum period, when religious schools were routinely denied funds on equal terms with their counterpart schools without legal challenge.

But petitioners' Blaine Amendment contention also is wrong for another reason: it is factually false and legally insupportable. The framers of the Oklahoma Constitution's no-funding provision were inspired not by Senator Blaine and his supporters, but by their own experience with the publicly funded religious re-education of Native American children, as well as by pre-Blaine state constitutions. The Oklahoma framers sought to ensure that citizens of their new State, including its Native residents, could enjoy religious freedom after decades of religious repression through religious re-education. Given the vastly different histories and motivations of the Oklahoma Constitution's Article II, Section Five and the Blaine Amendment, the Blaine Amendment's history has no bearing on Oklahoma's no-funding provision and says nothing about the State's charter-school law.

1. The no-funding provision of the Oklahoma Constitution is a response to the compelled religious indoctrination of Native American children, not a Blaine Amendment.

This Court and individual Justices have recounted the history of the 1875-1876 Blaine Amendment, which was used to secure anti-Catholic votes for Senator James G. Blaine's presidential campaign. See *Espinoza*, 591 U.S. at 482; *id.* at 497-507 (Alito, J., concurring). Although Senator Blaine's gambit failed politically, his eponymous amendment would live on in the Enabling Act of 1889, which admitted Montana, North Dakota, South Dakota, and Washington into the Union. See Act of Feb. 22, 1889, ch. 180, 25 Stat. 676. Section Four of the Enabling Act required the newly admitted states to establish "systems of public schools * * * free from sectarian control," language that mirrored Senator Blaine's amendment. *Ibid.*

By the time Congress debated the Enabling Act of 1906 that would admit Oklahoma to the Union, however, the people and political pressures that advanced the Blaine Amendment held far less sway. Just six members of the 59th Congress that voted to admit Oklahoma had cast a congressional vote in favor of the Blaine Amendment. By contrast, forty-three Blaine supporters had considered the Enabling Act of 1889 and the "baby-Blaine" language it contained. See *Biographical Directory of the United States Congress*, Library of Congress, https://bioguide.congress.gov (data and processing code on file).

Although some States, like those admitted by the Enabling Act of 1889, have constitutional provisions that are descendants of Senator Blaine's amendment,

Oklahoma is not one of them. Instead, Oklahoma's framers drafted Article II, Section Five of the Oklahoma Constitution in a different demographic and political context. They drew upon a wholly distinct set of Native experiences and a set of documents that predate the Blaine Amendment.

First, the drafters of the Oklahoma Constitution relied on pre-Blaine Amendment state constitutions and history when drafting Article II, Section Five of the Oklahoma Constitution. The Oklahoma and Indian Territories became home to many Native American Tribes after federal troops forcefully relocated them in the 1830s. See Roy Gittinger, *The Formation of the State of Oklahoma* (1803-1906), at 9-22 (1917). With the Tribes' physical removal from the East Coast complete, President Grant sought to implement a "peace policy" with relocated Native Americans that would pacify the tribes and move them to adopt U.S.-style institutions. See Henry E. Fritz, *The Making of Grant's "Peace Policy,"* 37 Chrons. of Okla. 411, 417-421 (Winter 1959-60), https://perma.cc/Q8V7-RPCV. A major pillar of this policy was the compelled "Christianization" of Native children through religious education. See *id.* at 416-417; Francis Paul Prucha, *The Churches and the Indian Schools, 1888-1912*, at ix (1979). Both Protestant and Catholic organizations worked to implement this plan, establishing boarding schools for Native children across Oklahoma, Indian, and similar territories. See Bryan Newland, *Federal Indian Boarding School Initiative Investigative Report* 6 (2022) (identifying 408 Federal Indian Boarding Schools), https://perma.cc/664A-G652.

It was this history of publicly funded religious re-education that ultimately led to Oklahoma's no-funding state constitutional provision. Informed by forty

years of compelled attendance at Christian schools, a group from Indian Territory gathered to draft what it hoped would become the Constitution of the State of Sequoyah. See Amos D. Maxwell, *The Sequoyah Convention* 62 (1953). The convention that produced the draft Sequoyah Constitution was the result of years of work by Native American leaders in Indian Territory. See *id.* at 63. Many of these leaders would become delegates to the Oklahoma Constitutional Convention one year later, including the Oklahoma Convention's president, William Murray. See *ibid.*; Proceedings of the Constitutional Convention of the Proposed States of Oklahoma 15 (1907), https://perma.cc/8MHP-HPWD.

Second, although the Sequoyah Constitution did not result in Sequoyah's statehood, it directly inspired parts of the Oklahoma Constitution, which led to Oklahoma statehood just two years later. In particular, the Oklahoma Constitution's Article II, Section Five echoes the Sequoyah Constitution's Article I, Section Six. The Sequoyah provision provided:

> No money shall ever be taken from the public Treasury, directly or indirectly, in aid of any church, sect, or denomination of religion, or in aid of any priest, preacher, minister, or teacher thereof, as such. No preference shall be given to, nor any discrimination made against, any church, sect, or creed of religion, or any form of religious faith or worship.

Sequoyah Const. art. I § 6, in 1 *The Okla. Red Book* 624 (Seth K. Corden & W.B. Richards eds., 1912), https://perma.cc/TZ4B-AMC2. Section Six was drafted by the Sequoyah Convention's Committee on the Preamble, Declaration of Rights, and Powers of

Government. See Maxwell, *supra*, at app. E. The chair of the committee, Robert L. Owen, as well as another member, George W. Grayson, were Native Americans. See Kenny Lee Brown, *Robert Latham Owen, Jr.: His Careers as Indian Attorney and Progressive Senator* 3 (1985) (Ph.D. dissertation, Okla. State Univ.), https://perma.cc/MB6X-SEAG; George Washington Grayson, *A Creek Warrior for the Confederacy: The Autobiography of Chief G. W. Grayson* 34-37 (W. David Baird ed., 1988).

The Native American delegates to the Sequoyah Convention were well aware of the impact of government-funded religious instruction on Native American children and the threat to Native religious freedom it entailed. See generally Rennard Strickland, *The Indians in Oklahoma* (1980) (discussing the impact of forced religious schooling on Native practices and beliefs); Prucha, *supra*, at 5 (same). The Sequoyah Constitution's Section Six enshrined these men's desire to ensure that the hoped-for Sequoyah government respected all forms of religious faith by carefully separating religion and government.

The same desire led the delegates to the Oklahoma Constitutional Convention to include similar language in Article II, Section Five of the Oklahoma Constitution. The clear link between the earlier Sequoyah provision and Article II is seen in both sections' broad prohibitions on the expenditure of public funds for religious purposes. Far from the narrow, education-only focus of the Blaine Amendment, the Sequoyah and Oklahoma provisions sought to ensure religious tolerance by separating religion and government across *all* aspects of society.

Third, this desire to enforce a wide-reaching separation of church and state expressly drew from a parallel source: not anti-Catholic animus or Senator Blaine's political expediency, but the Oklahoma Framers' understanding of older state constitutions and the historical experiences, both European and Native, that informed them.

Albert H. Ellis, who served as the Second Vice President of the Oklahoma Constitutional Convention and the Speaker Pro Tempore of the First State Legislature of Oklahoma, attributed Section Five to the Convention's knowledge of "the history of the union of Church and State in Europe and in New England in Colonial days." See Albert H. Ellis, *A History of the Constitutional Convention of the State of Oklahoma*, at I, 135 (1923). Given this history, the Convention "made it impossible to appropriate or give to any church denomination * * * the money or property of the public." *Ibid.* Nowhere did Ellis mention Senator Blaine, his amendment, or the Catholic Church.

2. The Oklahoma Supreme Court consistently has recognized that the Oklahoma Constitution's no-funding provision is not a Blaine Amendment.

The Oklahoma Supreme Court has for over a century recognized that Article II, Section Five of the Oklahoma Constitution is not a Blaine Amendment. Chief Justice Robert L. Williams, a delegate to the state constitutional convention, provided the first judicial interpretation of the provision in *Connell* v. *Gray*, 127 P. 417, 418 (Okla. 1912). See *id.* at 421.[3]

[3] Justices Kane, Hayes, and Williams were delegates to the Oklahoma Constitutional Convention. A man with the same last name and initials as Justice Turner was also a delegate. See

Chief Justice Williams traced Article II, Section Five's lineage to the 1786 Virginia law introduced by Thomas Jefferson, and subsequently incorporated into Virginia's 1830 Constitution, entitled "[a]n act for establishing religious freedom." See *ibid.* Like Article II, Section Five of the Oklahoma Constitution, Article III, Section Eleven of the Virginia Constitution of 1830 demonstrated a commitment to protecting religious freedom by separating government from religion. *Ibid.* Section Eleven guaranteed that no "man [would] be enforced, restrained, molested, or burdened in his body or goods, or otherwise suffer, on account of his religious opinions or belief." *Ibid.* It paired this forceful statement of religious freedom with an equally clear prohibition against "any law requiring or authorizing * * * any tax for the erection or repair of any house for public worship, or for the support of any church or ministry." *Ibid.*

Chief Justice Williams further connected Oklahoma's Section Five to the state constitutions of Michigan (1835) and Missouri (1875), both of which predated the Blaine Amendment and also balanced religious freedom with a separation of church and state. 127 P. at 421.[4] As Chief Justice Williams pointed out,

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Proceedings of the Constitutional Convention of the Proposed States of Oklahoma 482-485 (1907) (identifying delegates).

[4] Article I, Section Four of the Michigan Constitution of 1835 provides that "[e]very person has a right to worship Almighty God according to the dictates of his own conscience," while Section Five prohibits "draw[ing] from the treasury for the benefit of religious societies, or theological or religious seminaries." Mich. Const. of 1835, https://perma.cc/8723-CU2Y. Similarly, Missouri's 1875 constitution states that "all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience." Mo. Const. of 1875 Art. II, § 5. Another provision also mandated that "no money shall ever be

the influence of Missouri's constitution on the Oklahoma framers is especially evident because the text of Missouri's Article II, Section Seven "appears to be identical" with Oklahoma's Article II, Section Five. *Ibid.*; see also *Prescott* v. *Oklahoma Capitol Preservation Commission*, 373 P.3d 1032, 1052 (Okla. 2015) (Gurich, J., concurring).

Chief Justice Williams' *Connell* opinion therefore provides a direct window into the minds of at least three framers of the Oklahoma Constitution. His opinion traces the text and purpose of Section Five through 125 years of state constitutional provisions. This history places Section Five into the well-settled tradition of state efforts to ensure religious liberty by carefully separating religion and government.

Moreover, in 2015, the Oklahoma Supreme Court re-affirmed Section Five's lineage in *Prescott* v. *Oklahoma Capitol Preservation Commission*, 373 P.3d 1032 (Okla. 2015). Several of the Court's justices wrote separately to emphasize that Section Five is *not* a Blaine amendment. See *Prescott*, 373 P.3d at 1036 (Edmonson, J. concurring); *id.* at 1040 (Taylor, J., concurring); *id.* at 1051-1052 (Gurich, J., concurring); *id.* at 1057 (Combs, V.C.J., dissenting from denial of rehearing).

In short, from almost immediately after the ratification of the Oklahoma Constitution into the twenty-first century, the Oklahoma Supreme Court has consistently traced the no-funding provision of the Oklahoma Constitution to Jefferson and much earlier state

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taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such * * *." *Id.* at Art. II, § 7.

constitutions—and not to the Blaine Amendment. Thus, even if the State in this case had not based its denial of funding on its 1999 charter-school law—a statute that no party argues is the product of anti-Catholic animus—the Oklahoma Constitution's no-funding provision would offer no support to petitioners.

CONCLUSION

For the foregoing reasons, the judgment of the Oklahoma Supreme Court should be affirmed.

Respectfully submitted.

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APPENDIX

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Before the Civil War, the constitutions of all but one of the 34 States to join the Union included a provision that protected the free exercise of religion.[5] These provisions can generally be characterized as (1) those that expressly protected a right to conscience or free exercise; (2) those that prohibited deprivations on the basis of religion; and (3) those that required equal protection of all religions. Despite the differences in form, each of these provisions reflected principles also recognized in the First Amendment's Free Exercise Clause. See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1416 (1990).

Category 1:
Right to Conscience or Free Exercise

State	Provision
Delaware	Article I, Constitution of 1831
Pennsylvania	Article I, Section III Constitution of 1838
Connecticut	Article I, Section III Constitution of 1818
South Carolina	Article VIII, Section I Constitution of 1790
Virginia	Declaration of Rights, Article XVI Constitution of 1830 (similar in constitution of 1851)

[5] Those states not yet admitted (in order of eventual admission) were West Virginia, Nevada, Nebraska, Colorado, North Dakota, South Dakota, Montana, Washington, Idaho, Wyoming, Utah, Oklahoma, New Mexico, Arizona, Alaska, and Hawaii.

State	Provision
New York	Article VII, Section III Constitution of 1821 (similar in subsequent versions)
North Carolina	Declaration of Rights, Article XXXIV Constitution of 1776
Rhode Island	Article I, Section III Constitution of 1842
Vermont	Chapter 1, Article III Constitution of 1793
Tennessee	Article XI, Section III Constitution of 1796 (same in constitutions of 1834)
Ohio	Article VIII, Section III Constitution of 1802 (same in Constitution of 1851)
Indiana	Article I, Section III Constitution of 1816 (similar in Constitution of 1851)
Mississippi	Article I, Section III Constitution of 1817 (same in Constitution of 1832)
Illinois	Article VIII, Section III Constitution of 1818 (same in Constitution of 1848)
Maine	Maine Constitution of 1820, Article I, Section III
Missouri	Article XIII, Section IV Constitution of 1820
Florida	Article I, Section III Constitution of 1838

State	Provision
Texas	Article I, Section IV Constitution of 1845 (similar in Constitution of 1836)
Iowa	Article II, Section III Constitution of 1846 (same in Constitution of 1857)
Wisconsin	Article I, Section XVIII Constitution of 1848
California	Article I, Section IV Constitution of 1849
Minnesota	Article I, Section XVI Constitutions of 1857 (both versions)
Oregon	Article I, Section II Constitution of 1859
Kansas	Bill of Rights, Section VII Constitution of 1859

Category 2:
Prohibiting Deprivations on the Basis of Religion

State	Provision
New Jersey	Article I, Section IV Constitution of 1844
Georgia	Article IV, Section X Constitution of 1798 (similar in Constitution of 1861)
New Hampshire	Bill of Rights, Article V Constitution of 1784
Kentucky	Article X, Section IV Constitution of 1799 (similar in constitution of 1850)

State	Provision
Alabama	Article I, Sections V-VI Constitution of 1819
Arkansas	Article II, Section IV Constitution of 1836
Michigan	Article I, Section VI Constitution of 1835 (same and expanded in Constitution of 1850)

Category 3:
Equal Protection for All Religions

State	Provision
Massachusetts	Articles of Amendment, Article XI Constitution of 1780
Maryland	Declaration of Rights, Article XXXIII Constitution of 1776 (similar in Constitution of 1851)