Nos. 24-396, 24-394

In the Supreme Court of the United States

ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL,
Petitioner,

v.

GENTNER DRUMMOND, Attorney General for the State of Oklahoma, *ex rel.* STATE OF OKLAHOMA,
Respondent.

OKLAHOMA STATEWIDE CHARTER SCHOOL BOARD, et al.,
Petitioners,

v.

GENTNER DRUMMOND, Attorney General for the State of Oklahoma, *ex rel.* STATE OF OKLAHOMA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

BRIEF OF *AMICUS CURIAE* UNITED STATES CONFERENCE OF CATHOLIC BISHOPS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[*]

The United States Conference of Catholic Bishops (USCCB) is a nonprofit corporation whose members are the active Catholic Bishops in the United States. The USCCB provides a framework and a forum for the Bishops to teach Catholic doctrine, set pastoral directions, and develop policy positions on contemporary social issues. The USCCB advocates for, and promotes, Catholic education at the primary, secondary, and post-secondary levels. USCCB also supports school choice. Indeed, the importance of parental choice in schooling is so central to the Catholic faith that it is addressed in the Catechism. *See* Catechism of the Catholic Church, §2229, at 538 (2d ed. 2019) ("As those first responsible for the education of their children, parents have the right to *choose a school for them* which corresponds to their own convictions. This right is fundamental. … Public authorities have the duty of guaranteeing this parental right and of ensuring the concrete conditions for its exercise.").

The USCCB submits this brief to address the history of Catholic education and its role in advancing the common good for the benefit of all. The USCCB urges this Court to reverse the decision below. It files this brief in support of St. Isidore of

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[*] No counsel for any party authored this brief in whole or in part, and no person other than the *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of the brief. *See* Rule 37.6.

Seville Catholic Virtual School and the other petitioners.

SUMMARY OF ARGUMENT

This case presents the question whether States may constitutionally exclude religious schools from charter-school programs open to secular private schools. The answer to that question is "no." But the Supreme Court of Oklahoma held otherwise. Indeed, it went even further, holding that the United States Constitution *forbids* States to contract with religious schools for charter-school services.

The Oklahoma Supreme Court erred many times over, as the opening briefs ably demonstrate. This Court should reverse. In this brief, USCCB addresses two points that ought to inform the Court's analysis.

I. First, the Oklahoma Supreme Court erred when it held that private schools perform a traditional, exclusive public function when they enter contracts with States to operate a charter school.

Education in America began as a purely private enterprise. Early American children—religious and non-religious alike—learned reading, writing, mathematics, and foreign languages from their families, parishes, pastors, and itinerant schoolmasters. They learned at home and in the naves of churches.

As the country grew, its approach to education evolved. But private schools retained a prominent place. Indeed, in "the founding era and the early 19th century, governments provided financial

support to private schools, including denominational ones." *Espinoza v. Montana Dep't of Revenue*, 591 U.S. 464, 480 (2020). In so doing, these governments enabled their citizens to benefit from a private education. And even when the common-schools movement eventually led to the opening of modern, state-run public schools, private schools continued to operate, sometimes in tandem with the State. This Court confronted one such system in *Carson as next friend of O.C. v. Makin*, 596 U.S. 767 (2022), which considered a long-running program in which Maine guaranteed an education for rural students by subsidizing their private-school tuition.

Today, more than at any point in decades, States are again harnessing the value of private education. They do so through voucher programs, tax incentives, and other means of subsidizing private-school tuitions for their citizens. *See below* 15–17. Many students have availed themselves of these options. And many such students have enrolled at Catholic schools. Understandably so, as Catholic schools have significantly outperformed state-run public schools. To take just one example, the newly released national report card shows that, "[i]f Catholic schools were a state, they would rank first in NAEP scale scores for grades 4 and 8 in math and reading." National Catholic Education Association, *Catholic Schools Outshine Public Schools in Nation's Report Card* (Jan. 30, 2025), https://perma.cc/ZG4J-ZGU6. This data accords with decades of evidence establishing that Catholic schools outperform public schools, including and perhaps especially among populations for whom

"the promise of public school education has failed." *Zelman v. Simmons-Harris*, 536 U.S. 639, 682 (2002) (Thomas, J., concurring).

All told, St. Isidore will not perform a "traditional, exclusive public function" by participating in Oklahoma's charter-school program. To the contrary, it will serve a function—educating students—that was and remains a traditional function of private entities.

II. This brief also addresses the lower court's assertion that the no-aid provision in Oklahoma's constitution, *see* Okla. Const., art. II, §5, is not a Blaine Amendment. This might seem to be a distraction. After all, if the no-aid provision really does bar St. Isidore from participating in the program, then it violates the Free Exercise Clause and cannot be enforced no matter how one labels it. But the historical claim matters because Blaine Amendments have a "shameful pedigree" that must not be whitewashed. *Espinoza*, 591 U.S. at 482 (quoting *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality op.)).

"Blaine" Amendments take their name from former "House Speaker James Blaine," who in 1875 proposed an amendment to the federal constitution. *Id*. at 498 (Alito, J., concurring). "That proposal—which Congress nearly passed—would have added to the Federal Constitution a provision similar to the state no-aid provisions, prohibiting States from aiding 'sectarian' schools." *Id*. at 482 (majority op.). The Amendment "was 'born of bigotry' and 'arose at a time of pervasive hostility to the Catholic Church and to Catholics in general'"—

it "was an open secret that 'sectarian' was code for 'Catholic.'" *Id.* (some quotation marks omitted). Sadly, the idea behind the Blaine Amendment did not die with the Amendment; after the federal effort failed, most States adopted state constitutional provisions barring aid to sectarian schools. These "Little Blaine Amendments" have the same shameful pedigree as their federal predecessor.

The Oklahoma Supreme Court, relying on its own precedent, held that the no-aid provision is not a Blaine Amendment. Pet.App.9a–11a (No. 24-396) (citing *Prescott v. Oklahoma Capitol Pres. Comm'n*, 2015 OK 54). That conclusion is hard to buy. The no-aid provision substantially tracks the language of the Blaine Amendment, even containing the "sectarian" codeword. Okla. Const., art. II, §5. Beyond that, the provision operates in a manner substantively identical to the Blaine Amendment, assuring that no aid makes its way to "sectarian" schools—a category of schools that, at the time of the 1907 ratification, would have consisted largely of Catholic schools.

In the end, the no-aid provision cannot be excused as reflecting only its drafters' desire to recognize the "necessity of a complete separation of church and state." Pet.App.9a (No. 24-396) (quotation omitted). The far more likely possibility is that the Oklahomans who proposed this no-aid provision—individuals "who started their proceedings during the Convention with prayers," notwithstanding their supposed dedication to a "*complete* separation" of church and state, *id.* (emphasis added, quotation omitted)—wanted a Blaine

Amendment. And a Blaine Amendment is what they got.

ARGUMENT

The Oklahoma Supreme Court erred when it held that St. Isidore would perform a traditional, exclusive public function by participating in Oklahoma's charter-school program. And it erred factually by whitewashing the ugly history behind the no-aid provision in Oklahoma's constitution. This brief addresses both errors.

Before proceeding, a note on citation: all "Pet.App." citations refer to the petition appendix filed by St. Isidore in Case No. 24-396.

I. Education is not a traditional, exclusive public function.

The Oklahoma Supreme Court held that St. Isidore cannot participate in Oklahoma's charter-school program. Pet.App.24a. Why not? Because St. Isidore is a Catholic school. The court reasoned that state law *and* the federal constitution's Establishment Clause forbid the State from entering contracts that allow religious schools to operate charter schools.

The lower court's ruling rests in part on its determination that St. Isidore is a state actor. And *that* determination rested, in part, on the court's determination that participating in the charter-school system entails performing a "traditional, exclusive public function." Pet.App.18a (quoting *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 809 (2019)). The court acknowledged that the "provision of education may not be a traditionally

exclusive public function." *Id.* But the "provision for *free public* education," the court decreed, "is exclusively a public function." Pet.App.18a–19a (emphasis in original). That function, the court said, is the one that schools perform when they participate in Oklahoma's charter-school program.

The Oklahoma Supreme Court's reasoning falls apart upon inspection. The court defined the relevant public function using the ambiguous phrase "public education," but never explained what that means. If "public education" means "education at a state-run school," then of course *that* narrowly defined function can, as a definitional matter, be performed only by the government. But St. Isidore and other private charter schools are not operating state-run schools and are thus not serving this narrowly defined public function. Instead, these schools perform the function of educating students. That is not a traditional, exclusive public function—to the contrary, it was initially, and in many cases still is, a private function. That charter schools accept government funds does nothing to alter the analysis. "Regardless of how the State chooses to label charter schools, the Charter Schools Act is clearly an invitation for *private* entities to *contract* to provide educational choices." *See* Pet.App.34a (Kuehn, J., dissenting).

This section shows that private schools, sometimes working alone and other times in conjunction with the government, have long performed the function of educating students. That is precisely the function St. Isidore would perform by participating in the charter-school program. Its doing so does not make it a state actor.

A. The American education system began with private schools.

1. For "most of world history, parents believed educating their children was their private responsibility." Jason Boffetti, *All Schools Are Public Schools*, Catholic Education Resource Center (2001), https://perma.cc/KN42-F844. "By the fourteenth and fifteenth centuries, canon law and civil law texts alike spoke about a child's right to life and the means to sustain life." John Witte, Jr., *The Nature of Family, the Family of Nature: The Surprising Liberal Defense of the Traditional Family in the Enlightenment*, 64 Emory L.J. 591, 613 (2015). From this sprang a duty to educate. Blackstone wrote that parents had a duty to provide their children with "an education suitable to their station in life." Blackstone, I *Commentaries on the Laws of England*, ch.16 at 438 (1765) (emphasis omitted). He added that a parent will not have "conferred any considerable benefit upon his child, by bringing him into the world; if he afterwards entirely neglects his culture and education, and suffers him to grow up like a mere beast, to lead a life useless to others, and shameful to himself." *Id*. at 439.

Others in Europe apparently agreed. By the seventeenth century, reformers aimed "to Erect *Schools* everywhere … [and] it was a common thing even for Little Villages of Twenty or Thirty Families, in the midst of all their Charges, [and] their Dangers, to maintain one of them." Cotton Mather, *A family well ordered. Or an essay to render parents and children happy in one another* 2 (1699), *available at* University of Michigan

Library Digital Collections, https://perma.cc/WPC5-3M3A (emphasis in original). When Europeans crossed the Atlantic to settle in America, they soon developed a similar tradition of grass roots, private, and highly communal education. The Concord report of 1680 shows "[h]ow common these private ventures were," recording that "'in every quarter of the town men and women that teach to write English when parents can spare their children and others go to them.'" Charles L. Glenn, *The American Model of State and School: An Historical Inquiry* 24 (2012) (quotation omitted).

These and other educational endeavors were distinctly private in nature. "In the colonial and early republican periods, there was no such thing as public education in the modern sense." Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2171 (2003). Education happened "through parental initiative and informal, local control of institutions." Carl F. Kaestle, *Pillars of the Republic: Common Schools and American Society, 1780–1860* 3 (1st ed. 1983). "The historical facts are that free public education was virtually nonexistent during the early years of independence, and where it did occur it had a distinctly religious orientation." Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 Calif. L. Rev. 260, 263 (1968). Most schools were not taught by public servants employed by a local government to educate the community's children. Most, in fact, "were taught or directed by the local minister." McConnell,

Establishment and Disestablishment, 44 Wm. & Mary L. Rev. at 2171. Early on, if the government was involved at all—often it was not, Kaestle, *Pillars of the Republic* at 3—it had very little to do with the school's finances or direction, McConnell, *Establishment and Disestablishment*, 44 Wm. & Mary L. Rev. at 2171.

To be sure, it is not hard to find references in early records to "public" schools. But the term "public," when used to describe schools, did not mean a government-run school. To "colonial Americans, 'public' school meant any school open to the public, serving the public good, and receiving some form of public support." Boffetti, *All Schools are Public Schools*.

2. The primary purpose of education in early America was to "provide the basis for religious life." Glenn, *The American Model* at 16. So entwined were religious belief and literacy that "many who learned to read as children lost the skill … unless it was maintained for religious reasons." *Id*. at 16. Noah Webster, recalling pre-Revolutionary education, observed that "[m]ore explicit in its educational function than either family or community was the church," bringing "the child into close relationship with the intangible loyalties, the ethos and higher principles, of the society in which he lived." *Id*. at 32.

Thus, in "the colonial and early republican periods," there was "no such thing as a secular school." McConnell, *Establishment and Disestablishment*, 44 Wm. & Mary L. Rev. at 2171.

Even when governments regulated education, they recognized the importance of faith to learning—and of learning to civic development. A Massachusetts law in 1642 required parents to ensure that their children could "read and understand the principles of religion and the capitall lawes [sic] of this country." Glenn, *The American Model* at 18. When the Massachusetts legislature deemed it prudent to require communities of certain sizes to provide schools, it did so using language that reflected the values of the people of the day:

> It being one chief project of that ould deluder, Satan, to keepe men from the knowledge of the Scriptures … that learning may not be buried in the grave of our fathers in the church and commonwealth … It is therefore ordered, that every township in this jurisdiction, after the Lord have increased them to the number of 50 householders, shall then forthwith appoint one within their towne to teach all such children as shall resort to him to write and reade, whose wages shall be paid either by the parents … or by the inhabitants in general."

Id. at 19.

Connecticut and New Hampshire enacted similar laws. *Id.* So did Virginia. In 1661, over one hundred years before Americans declared independence, the Old Dominion adopted its Diocesan Canons. Among the Canons' provisions: the setting aside of public land for a college and free

school "for the advance of learning, education of youth, supply of the ministry, and promotion of piety." McConnell, *Establishment and Disestablishment*, 44 Wm. & Mary L. Rev. at 2118. Colonial governments issued land grants to churches for day schools. *Id*. at 2148. "Government financial support for voluntary (including denominational) schools, so common during the colonial period, continued well into the national period." Lloyd P. Jorgenson, *The State and the Non-Public School, 1825–1925* 4 (1987). "And nobody thought this was unusual." Boffetti, *All Schools are Public Schools*. Local governments saw the success of private citizens' educational endeavors and, wisely, sought to support and expand access to private education.

Further evidence of the integration of private education and religious institutions abounds. Consider what was, for many years, the largest formal school enterprise in the colonies: the Society for the Propagation of the Gospel in Foreign Parts, which was the missionary arm of the Church of England. Founded in 1701, the Society "provided the nearest approach to a public school system that was to be found among the English colonists in New York." Jorgenson, *The State and the Non-Public School* at 8 (quotation omitted). The Society earned the bulk of its income through donations. Students who could afford it paid fees. Poor students learned for free, "a centuries-old practice." *Id*. at 8.

Colonial legislatures took note of the Society's success. Because this privately directed society improved the public good, colonial lawmakers underwrote its work. South Carolina provided it with

annual grants and used the society as an early laboratory for innovation with quasi-public governing boards, appointing the South Carolina governor to one such board. The New York Colonial Assembly participated with the Society to create King's College (later Columbia University). In New York City, the Society's schools were mostly free for all children. *Id.* at 8–9; *contra* Pet.App.19a (describing "free" education open to all as an exclusive function of government.) And Connecticut's General Court financially supported the Society's work from 1742 to 1766. Jorgenson, *The State and the Non-Public School* at 9.

This history serves as a lens into the eighteenth-century view of education as "essentially religious in purpose" and "properly funded by philanthropy with the assistance of the state"—a view which would "remain workable and vigorous well in the nineteenth century." *Id.*

3. As the country grew, its system of education changed.

The common-schools movement, which gave rise to modern day public education, emerged in the nineteenth century. From this grew "a wider movement aimed at creating state controlled schools to teach diverse social groups a common body of basic knowledge." Ian Bartrum, *The Political Origins of Secular Public Education: The New York School Controversy, 1840–1842*, 3 NYU J.L. & Liberty 267, 280–81 (2008). The movement gained steam from nativist sentiments, including especially hostility toward Catholics. (On which, more below.) Indeed, "[o]ne cannot separate the

founding of the American common school and the strong nativist movement." *Espinoza*, 591 U.S. at 502–03 (Alito, J., concurring) (alteration in original, quotation omitted).

These common schools were not secular in any sense. To the contrary, the modern notion of "a *complete* separation of church and state" in the context of public education, Pet.App.9a (quotation omitted, emphasis added), became dominant only in the twentieth century. That occurred, in no small part, because this Court interpreted the Establishment Clause as requiring "the exclusion, rather than the inclusion, of all religious viewpoints in the public schools." Bartrum, *The Political Origins of Secular Education*, 3 NYU J.L. & Liberty at 331 (criticizing the decision in *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1 (1947)); *cf.* Samuel A. Alito, Note, *The "Released Time" Cases Revisited: A Study of Group Decisionmaking by the Supreme Court*, 83 Yale L.J. 1202, 1207 (1974). Rather than striving for scrupulous neutrality on religious matters, common-school proponents aimed "to establish a system that would inculcate a form of 'least-common-denominator Protestantism.'" *Espinoza*, 591 U.S. at 503 (Alito, J., concurring) (quotation omitted).

All the while, private schools retained an important place in the system. "In the founding era and the early 19th century, governments provided financial support to private schools, including denominational ones." *Id.* at 480 (majority op.). And as "early as 1812, cities with established charity school networks, such as New York, began funneling state funds into the existing system." Bartrum,

The Political Origins of Secular Public Education, 3 NYU J.L. & Liberty at 280. Through these subsidies, governments enlisted private schools to ensure the education of the area's children. *Espinoza*, 591 U.S. at 480–81.

Similar arrangements persisted for years afterwards. Indeed, they persist still today. Consider Maine. Its constitution requires "the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools." Me. Const., art. VIII, pt.1, §1. "But Maine is the most rural State in the Union, and for many school districts the realities of remote geography and low population density make those commands difficult to heed." *Carson*, 596 U.S. at 773. To address this problem, Maine enacted a tuition-assistance program that will pay the tuition at any public *or private* school to which the child is admitted. *Id*.

Ohio provides another example. The State offers vouchers that students can use at the school of their choosing, including religious private schools. *See* Ohio Rev. Code, Chapter 3310. But one can trace the history of vouchers in Ohio to the 1990s, when Ohio's General Assembly enacted the "Pilot Project Scholarship Program." *Zelman v. Simmons-Harris*, 536 U.S. 639, 644 (2002). The Buckeye State—with the assistance and support of Bishop Anthony M. Pilla, of Cleveland, *see* Amul Thapar, *The People's Justice: Clarence Thomas and the Constitutional Stories That Define Him* 29 (2023)—adopted this program to assist the tens of thousands of children in the Cleveland City School District, "among the worst performing" in the country. *Zelman*, 536 U.S. at 644. Many of these

students came from impoverished families and lacked the means to move or seek an education elsewhere. The Program changed that; it offered tuition assistance that parents could use to enroll their children at better-performing private schools, religious and secular alike. *Id.* at 645. Ohio's legislators, like their colonial-era and nineteenth-century predecessors, enlisted private schools to educate the State's children.

As the result of these and other programs, education today is *less* exclusively the province of government than at any point in decades. As the discussion above shows, private education options have always been part of the American system. But today, they are more accessible than ever.

For one thing, home schooling "has been legal in all 50 States since 1993" and, as of 2018, it was "estimated that nearly two million children"—3 percent of school-age children—"are being homeschooled in the United States." Stephanie R. Logan, *A Historical and Political Look at the Modern School Choice Movement*, 27 Int'l J. of Educ. Reform 1, 10 (2018).

Further, the success of voucher programs like that in Cleveland have spurred more States to experiment with similar programs. Thirty-three States have private school choice programs. Of those, "12 have laws allowing any student, regardless of income or need, to apply for government funding to subsidize their private, religious, or, in some cases, homeschool education." Liz Cohen & Bella DiMarco, *Early Returns: First Results from the New Wave of Public Funding of Private*

Schooling, FutureEd (Oct. 7, 2024), https://perma.cc/LL4V-V3N3. Arizona, for example, recently enacted a law under which "the money that would pay for [a] student's education in a neighborhood school follows that student to whichever school the parents choose for their child." *Empowerment Scholarship Account*, Ariz. Dep't. of Educ., https://perma.cc/M3MB-9KTY.

The Oklahoma law at issue here charts a similar course, as Justice Kuehn recognized in dissent below. "By design, the very purpose of the Charter Schools Act is to allow *private* entities to experiment with innovative curricula and teaching methods." Pet.App.35a (Kuehn, J., dissenting). Through this program, Oklahoma has chosen "to partner with private entities to provide common education." *Id.* That is in keeping with, not a departure from, the role of private schools in the American education system.

B. Catholic schools have long, and successfully, participated in the American education system.

1. "Catholic schools are among the oldest education institutions in the United States." Anthony S. Bryk, et al., *Catholic Schools and the Common Good* 15 (1993). Until the period of Catholic immigration, most of the organization of Catholic schooling happened informally, community by community. *See* J. A. Burns, *The Growth and Development of the Catholic School System in the United States* 199 (1912). But by 1840, there were at least 200 Catholic parish schools in America. *Id.* at 19; Boffetti, *All Schools Are Public Schools.*

Though they were what we would call "private" today, those schools provided essential public goods in their education of children.

Catholic schools, like their non-Catholic contemporaries, taught the "three R's," along with "spelling, grammar, geography, and history." Burns, *The Growth and Development of the Catholic School System* at 125. From the time of the American Revolution, Catholic schools "made free use of the text-books which were in common circulation in non-Catholic schools." *Id*. at 136. They used "the best school-books of the time." *Id*. at 137. Indeed, "[w]here parochial schools maintained themselves there developed to some extent even a system of compensation by which the state paid to the parochial schools a part of the cost of imparting *secular* information to its pupils." Carl Zollman, *Historical Background of Religious Day Schools*, 9 Marq. L. Rev. 155, 156 (1925).

The common-schools movement accelerated the need for Catholic schools. Remember, the first common schools "were not neutral on matters of religion." *Espinoza*, 591 U.S. at 504 (Alito, J., concurring). Instead, they sought to inculcate a generic form of Protestantism. Many supporters of the common-schools movement were nativists hostile to Catholicism, who hoped that this Protestant education would "'Americanize' the incoming Catholic immigrants." *Id*. at 503. This approach to religious instruction "was an affront to many Christians and especially Catholics, not to mention non-Christians." *Id*.

"Catholic and Jewish schools sprang up *because* the common schools were not neutral on matters of religion." *Id.* at 504 (emphasis added). "'Faced with public schools that were culturally Protestant and with curriculum[s] and textbooks that were, consequently, rife with material that Catholics and Jews found offensive, many Catholics and Orthodox Jews created separate schools,' and those 'who could afford to do so sent their children to' those schools." *Id.* at 504–05 (alteration in original, quoting Brief for Union of Orthodox Jewish Congregations of America as *Amicus Curiae* in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, O.T. 2016, No. 15-577, p.15).

The emergence of Catholic schools faced fierce pushback, which this brief addresses later on. For present purposes, what matters is that Catholic schools persisted. "Catholic leaders were able to create the earliest alternative to public education with a privately funded system of Catholic schools." Logan, *Historical and Political Look at the Modern School Choice Movement*, 27 Int'l J. of Educ. Reform at 2.

2. Catholic schools have long provided a quality education to their students, Catholic and non-Catholic alike. To take but one example, minority students in 1830s Baltimore received an education from the "Oblate Sisters of Providence, an order of Black sisters, [who] operated Saint Frances Academy for Colored Girls." Michael Bindas, *The Once and Future Promise of Religious Schools for Poor and Minority Students*, 132 Yale L.J. Forum 529, 534 (2022). Saint Frances taught "the poor, orphans, and paying students," Catholic or not, and

established more schools in other metropolitan centers. *Id.*

The good work carried on into the twentieth century. Consider a Rand Corporation study from 1990, which measured educational performance at Catholic high schools "that attracted minority and disadvantaged youth." Nina Shokraii, *Why Catholic Schools Spell Success for America's Inner-City Children*, The Heritage Foundation (June 30, 1997), https://perma.cc/R7KH-PSAD. The study determined that "Catholic high schools graduated 95 percent of their students each year, while the public schools graduated slightly more [than] 50 percent of their senior class[es]." *Id.* "Over 66 percent of the Catholic school graduates received the New York State Regents diploma to signify completion of an academically demanding college preparatory curriculum, while only about 5 percent of the public school students received this distinction." *Id.* And while the "Catholic school students achieved an average combined SAT score of 803," the public school students' averaged just 642. *Id.*

The U.S. Reports provide more such data. In *Zelman*, this Court upheld the constitutionality of the Cleveland voucher program discussed above. Justice Thomas's concurrence describes the performance of Cleveland's Catholic schools. With the program in place, "the students at Cleveland's Catholic schools score[d] significantly higher on Ohio proficiency tests than students at Cleveland public schools." *Zelman*, 536 U.S. at 681 (Thomas, J., concurring). "Of Cleveland eighth graders taking the 1999 Ohio proficiency test, 95 percent in Catholic schools passed the reading test, whereas

only 57 percent in public schools passed." *Id.* "And 75 percent of Catholic school students passed the math proficiency test, compared to only 22 percent of public school students." *Id.*

More recent data is of a piece. This past January, the federal government released the National Assessment of Educational Progress (NAEP), sometimes called the Nation's Report Card. The scores showed that Catholic school students continued to demonstrate higher achievement levels than their public-school counterparts in both reading and math—so much so that, "[i]f Catholic schools were a state, they would rank first in NAEP scale scores for grades 4 and 8 in math and reading." National Catholic Education Association, *Catholic Schools Outshine Public Schools in Nation's Report Card*, https://perma.cc/ZG4J-ZGU6. This table charts the differences:

4th Grade Math

SCHOOL TYPE	2003	2013	2019	2024
CATHOLIC	244*	246*	246*	247*
PUBLIC	234	241	240	237

8th Grade Math

SCHOOL TYPE	2003	2013	2019	2024
CATHOLIC	289*	295*	293*	293*
PUBLIC	276	284	281	272

4th Grade Reading

SCHOOL TYPE	2003	2013	2019	2024
CATHOLIC	235*	235*	235*	230*
PUBLIC	216	221	219	214

8th Grade Reading

SCHOOL TYPE	2003	2013	2019	2024
CATHOLIC	281*	286*	278*	277*
PUBLIC	261	266	262	257

*Significantly different ($p < .05$) from Public.
SOURCE: U.S. Department of Education, Institute of Education Sciences, National Center for Education Statistics, National Assessment of Educational Progress (NAEP), 2024 Mathematics Assessment and 2024 Reading Assessment

Id.

The table shows that 4th grade Catholic school students outperformed their public-school peers by 10 points in math and 16 points in reading. The 8th graders outperformed public-school peers by *21 points* in math and *20* in reading. This aligns with longstanding trends of Catholic-school performance: since 2003, Catholic schools have outperformed their public-school peers on the NAEP in fourth- and eighth-grade math and reading. (This data is available on the "NAEP Data Explorer" page of the nationsreportcard.gov website.)

Catholic schools also demonstrate a comparative advantage over other private schools and public schools when it comes to graduation rates. Data shows that, as of the 2019–2020 school year (the latest available data at the time of the below report's publication), Catholic schools had a high-school graduation rate of 98.9 percent, compared to traditional public schools, which had a graduation rate of 86 percent:

EXHIBIT 4: COMPARISON OF NATIONAL GRADUATION RATES

Data collected from several sources by the U.S. Department of Education's National Center for Education Statistics (NCES) and NCEA provide a portrait of American high school graduates and their post-secondary school experiences.

National Secondary School Graduation Rates

Type of School	Graduation Rate
Catholic	98.9%
Other Religious	98.2%
Non-Sectarian	90.3%
Public Schools	86.0% (actual high school diplomas awarded)

Sources: Broughman et al. (2021); Irwin et al. (2022).

National Catholic Education Association, *United States Catholic Elementary and Secondary Schools 2023–2024: The Annual Statistical Report on Schools, Enrollment and Staffing* 4 (2024).

After high school, Catholic school students who attend four-year colleges significantly outpace students in traditional public schools. They even outperform students from other private schools, both religious and non-sectarian. The most recent available data shows that high school graduates of Catholic schools attend four-year colleges at a rate of 85.2 percent, whereas traditional public schools had a four-year college attendance rate of 43 percent:

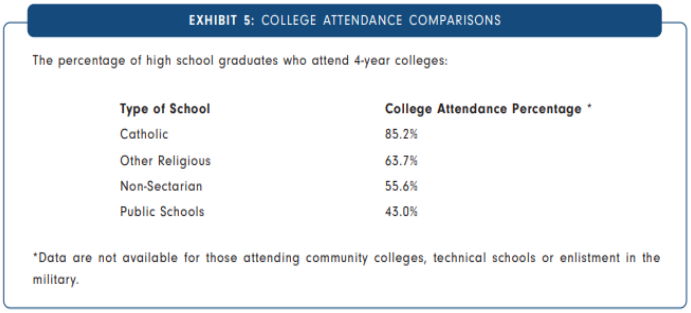

EXHIBIT 5: COLLEGE ATTENDANCE COMPARISONS

The percentage of high school graduates who attend 4-year colleges:

Type of School	College Attendance Percentage *
Catholic	85.2%
Other Religious	63.7%
Non-Sectarian	55.6%
Public Schools	43.0%

*Data are not available for those attending community colleges, technical schools or enlistment in the military.

Sources: Broughman et al. (2021); Irwin et al. (2022).

Id. at 5.

This data proves the value of Catholic school education, to the students, their families, and the communities in which they live. The same data shows why Oklahoma would want to contract with a school like St. Isidore for charter-school services.

II. Article 2, Section 5 of the Oklahoma Constitution is a Blaine Amendment

The Oklahoma Supreme Court's decision relies in part on Article 2, §5 of the Oklahoma Constitution—the no-aid provision—which states:

> No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.

Properly understood, this no-aid provision does not bar the State from contracting with religious

schools for charter-school services. *See* Pet.App. 32a (Kuehn, J., dissenting) ("the 'no-aid' clause is not violated by contracts for services"). And if it did, it would violate the federal constitution, as the petitioners' briefs show. So, the Court need not address the Oklahoma Supreme Court's interpretation.

Still, "hostility to aid to pervasively sectarian schools has a shameful pedigree that" this Court has "not hesitate[d] to disavow." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality op.). And indeed, one sees hints of that shameful pedigree in the reasoning advanced by Oklahoma's Attorney General to justify St. Isidore's exclusion from the charter-school program. Attorney General Drummond claims that private schools must be excluded, lest Muslims be allowed to open schools that teach "sharia law." Pet.App.174. That slippery-slope argument is precisely the sort of talking point that proponents of Blaine Amendments might have advanced in the nineteenth century.

This short section explores the history of anti-Catholic bias in America, the echoes of which one sees in the no-aid provision.

Fewer Catholics than Protestants immigrated to colonial America. Those who did, after "suffer[ing] through the perilous ocean voyage[,] found a society even more anti-Catholic than the one they had left behind in England." Timothy Walch, *Parish School: American Catholic Parochial Education from Colonial Times to the Present* 12 (1996). In the colonies, Catholics dealt with animus in every quarter. Scaremongering newspaper editors

published libel about "Catholic plots" to usurp American liberties. *Id.* Congregations heard all about papal decadence from Protestant pulpits. "The very idea of tolerating Catholics was regarded by many colonists as an act of weakness." *Id.* at 13.

As early as 1641, anti-Catholicism was codified into law. Indeed, the law became a favorite tool with which to suppress Catholic faith. Virginia, for example, enacted a law that forbade "popish recusants" from holding any office. Act LI, Laws of Va. (Jan. 1641), *reprinted in* 1 William Waller Hening, *The Statutes at Large: Being a Collection of All the Laws of Virginia* 268 (2d ed. 1823), https://perma.cc/N8W7-NEXN. Catholics were thus "[u]tterly disabled" from serving the public unless and until they abandoned their faith. *Id.* And to make sure no root of Catholic faith could germinate, Catholic priests were not allowed to stay in the colony for longer than five days. *Id.* at 269. In Maryland, Catholics were not permitted to vote or hold public office. Walch, *Parish School* at 13. Massachusetts forbade Catholics to hold religious services or even preach Catholic doctrine. *Id.*

Resentment of Catholics festered all the more when, between 1820 and 1870, millions of immigrants, many of them Catholic, began to arrive on American shores. *See id.* at 23. "An entire political party, the Know Nothings, formed in the 1850s 'to decrease the political influence of immigrants and Catholics,' gaining hundreds of seats in Federal and State Government." *Espinoza*, 591 U.S. at 499 (Alito, J., concurring) (quotation omitted). "Catholics were considered by such groups not as citizens

of the United States, but as 'soldiers of the Church of Rome,' who 'would attempt to subvert representative government.'" *Id*. (quotation omitted).

Catholic children were not spared abuse. Those who refused to read from the King James Bible faced expulsion from non-Catholic schools. Protests from parish priests fell on deaf ears. Said one opponent: Catholic children "shall read the Protestant Bible or be dismissed from the schools; and should we find them loafing around the wharves, we will clap them in jail." Walch, *Parish School* at 54. "In some States[,] 'Catholic students suffered beatings or expulsions for refusing to read from the Protestant Bible, and crowds … rioted over whether Catholic children could be released from the classroom during Bible reading.'" *Zelman*, 536 U.S. at 720–21 (Breyer, J., dissenting) (ellipsis in original, quotation omitted).

As noted above, Catholic parishes responded by opening their own schools. Walch, *Parish School* at 54. Even that helped only somewhat—California made it illegal for a parent to send a child to a private school without permission from the public board of education, while New York "set its face strongly against the view that private schools are things with which the State has nothing to do." Burns, *The Growth and Development of the Catholic School System* at 218–19.

The opening of these schools begat more hostility. And ambitious politicians saw in anti-Catholicism a tool for gaining votes. Consider James Blaine, a Mainer who served in the House and Senate and repeatedly mounted failing bids for the

Presidency. During his tenure in the House, Blaine led a failed attempt to amend the United States Constitution. What became known as the Blaine Amendment would have provided:

> No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

H.R.J. Res. 1, 44th Cong., 4 Cong. Rec. 205 (1875).

The amendment, which the Ku Klux Klan openly supported, failed at the federal level. *Espinoza*, 591 U.S. at 498 (Alito, J., concurring). But it fared much better in the States, most of which amended their constitutions to enact no-aid provisions. *Id*. at 499. And since the movement to enact these amendments "arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, … it was an open secret that 'sectarian' was code for 'Catholic.'" *Mitchell*, 530 U.S. at 828 (plurality op.) (citing Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38 (1992)). "Catholic schools, influential Americans believed, were a menace to society." Charles L. Glenn, *Historical Background to Conflicts Over Religion in Public Schools*, 33 Pro Rege 1, 13 (2004).

The Little Blaine Amendments purported to address the menace. And many States did not stop with Blaine-type amendments. They went further and "looked for ways to exert public control over portions of the parish school curricula." Walch, *Parish School* at 63.

If the Blaine Amendment carried the virulent strain of bigotry, *see Espinoza*, 591 U.S. at 482 (majority op.); *id*. at 498 (Alito, J., concurring), the no-aid provisions are its vectors. When this Court decided *Espinoza*, thirty-eight States still had "little Blaine Amendments." *Id*. at 499. That includes the Oklahoma Constitution's no-aid provision. The slightly remodeled language in Oklahoma's no-aid provision, enacted in 1907, scarcely makes it any different in effect to the original Blaine Amendment. Compare the relevant portions of the two, side by side:

Blaine Amendment	**Article II, Section 5**
… and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided	No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary,

between religious sects or denominations.	or sectarian institution as such.

Had Oklahoma ratified the Blaine Amendment word-for-word, the result would be the same: no public money or property whatsoever may ever be used to benefit or support any religious organization, priest, or other religious teacher, even if the funds are used to promote education in the State. For this reason, it is hard to credit any suggestion that, because "Article II, Section 5 makes no mention of schools, the Catholic Church, or the Blaine Amendment," it must not be a Blaine amendment. *Prescott v. Oklahoma Capitol Pres. Comm'n*, 2015 OK 54, ¶ 20 (Taylor, J. concurring in the denial of the petition for rehearing). That cannot be right. As with any other Blaine Amendment, Oklahoma's speaks to "sectarian" institutions, and even specifically mentions "religious teacher[s]." Okla. Const., art. II, §5. It is substantively identical to the Blaine Amendment in all material respects. Blaine's DNA is as much a part of Oklahoma's no-aid provision as it was Montana's. *See Espinoza*, 591 U.S. at 507 (Alito, J., concurring).

The no-aid provision cannot be excused by claiming that its architects wanted only to recognize "the necessity of a complete separation of church and state." Pet.App.9a (quotation omitted). For one thing, these very architects "started their proceedings during the Convention with prayers"—hardly a complete separation. *Id.* For another, popular conceptions about "separation of church and state" grew out of the same anti-

Catholicism that motivated the Blaine Amendments. *See* Philip Hamburger, *Privileges or Immunities*, 105 Nw. U.L. Rev. 61, 135 (2011); *accord Espinoza*, 591 U.S. at 494–95 (Thomas, J., concurring). Finally, it is hard to buy that the architects of Oklahoma's constitution were driven by a desire to completely separate religion and schooling, as the view that religion had no place *at all* in schools had not yet taken hold. *See above* 13–14.

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Oklahoma does not need to subsidize private education, but it has wisely chosen to do so. And because it has, "it cannot disqualify some private schools solely because they are religious." *Espinoza*, 591 U.S. at 487 (majority op.). That is what the Free Exercise Clause demands. If saying so would inter Oklahoma's Blaine Amendment, that would be just one of the happy consequences of reversal.

CONCLUSION

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

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