Nos. 24-394 and 24-396

In the Supreme Court of the United States

OKLAHOMA STATEWIDE CHARTER SCHOOL BOARD, ET AL.,
Petitioners,

v.

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

ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL,
Petitioner,

v.

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

On Writs of Certiorari to the Oklahoma Supreme Court

BRIEF *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY AND THE NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE[1]

Christian Legal Society ("CLS") is a nonprofit, non-denominational association of Christian attorneys, law students, and law professors with members in every state and chapters on over 140 law school campuses. CLS believes that parents of any faith have no higher right and responsibility than to oversee the education of their children; therefore, it has filed amicus briefs in many of this Court's cases cited herein.

The **National Association of Evangelicals** is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 40 member denominations, as well as numerous evangelical associations, mission social-service charities, refugee and humanitarian aid agencies, colleges, seminaries, and independent churches.

SUMMARY OF ARGUMENT

The court below held that St. Isidore is a state actor because "*free public* education is exclusively a public function." *Drummond ex rel. State v. Okla. Statewide Virtual Charter Sch. Bd.*, 558 P.3d 1, 12 (Okla. 2024). But the notion that publicly funded education is a traditional government function exclusively reserved to the state is a legal and historical mistake.

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[1] Pursuant to Rule 37.6, no counsel for any party in this case wrote any part of this amici brief, and no person except amici contributed to the costs of its preparation.

Since the Founding, public and private entities have worked hand in hand to educate our nation's youth. States provided common schools with taxpayer funds, not despite but often because of their practices of daily religious instruction and devotional prayers. In Oklahoma itself, the federal government established and funded numerous Native American boarding schools, with their operation left to Catholic and Protestant orders. Meanwhile, this Court has made clear—in cases from *Pierce* to *Zelman* to *Carson*—that education is not a function reserved solely to the government, that states may include private schools in their efforts to provide education to youth, and that when private schools are included in such efforts states may not exclude some schools based on their religious character. The public-private hybrid to education has produced a new concept called "charter schools" starting in the 1990s, but in essence they are far from novel; they are simply a modern iteration of the historic partnership between private and public entities providing education to our nation's children.

From the Founding, not only have religious schools coordinated with the government to provide the nation with an important social service, but religious institutions also have a rich tradition of providing a range of other critical social services. Religious providers of foster care, adoption, prisoner re-entry, court-mandated drug treatment programs, hospitals serving the poor, homeless shelters, and other social services work side by side with the government to accomplish important societal interests. Crucially, these religious organizations have done so while both

maintaining their religious character and receiving government funding, all without becoming state actors. Under the Oklahoma Supreme Court's logic, these same entities would be disqualified from receipt of government funds on Establishment Clause grounds. That result would not only be ahistorical, but also would threaten the vital social services and valuable goals these organizations help the government provide.

Finally, the Oklahoma Supreme Court's holding that St. Isidore is a state actor under the "entwinement" test of *Brentwood Academy* is also misplaced. The court focused on various regulations imposed on St. Isidore and the provision of various public benefits to charter schools and their employees to find state action. It did so even though St. Isidore is a private institution created by the Archdiocese of Oklahoma City and the Diocese of Tulsa, and its curriculum, vision, governing board, and teacher selection—the aspects of a school that go most directly to its character and substance—remained completely in the control of St. Isidore. The Oklahoma Supreme Court thus overlooked this Court's other cases addressing when a private entity becomes a public actor. These cases teach that courts should focus on *substantive* dominance and control by the government, not the sort of regulatory oversight and provision of benefits found here. This concept has parallels in changes to the entanglement concept under the Establishment Clause. Entanglement has evolved from a formalistic concern about any interactions between government and religious entities to a substantive focus, consistent with historical understandings of the Establishment

Clause, on the government intruding into religious questions or religious institutions taking on governmental powers.

Once it becomes clear that St. Isidore is a private and not a state actor, Oklahoma's exclusion of it from the state's charter program because of its religious character cannot be squared with this Court's free exercise decisions. The decision of the Oklahoma Supreme Court should thus be reversed.

ARGUMENT

I. The Oklahoma Supreme Court's Holding That "Free Public Education is Exclusively a Public Function" Is Ahistorical.

The Oklahoma Supreme Court held that under the public function test Oklahoma charter schools are state actors because "*free public* education is exclusively a public function." *Drummond ex rel. State v. Okla. Statewide Virtual Charter Sch. Bd.*, 558 P.3d 1, 12 (Okla. 2024). The court thus viewed public education as a government function "traditionally exclusively reserved to the State." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974).

The notion that publicly supported education is a traditional and exclusively governmental function, akin to police departments or the National Guard, is ahistorical. This history, as set forth below, demonstrates a robust cooperation between public and private entities to educate our nation's youth.

All the while, the Supreme Court has made clear, in cases from *Pierce v. Society of Sisters of the Holy*

Names of Jesus and Mary, 268 U.S. 510 (1925), to *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), to *Carson v. Makin*, 596 U.S. 767 (2022), that education—including publicly supported education—has never been a function reserved solely to the government, and the state may not monopolize education at the exclusion of religious partners. Schooling is regularly and widely performed by private entities, and this has been so since the Founding. *See, e.g.*, Ava Harriet Chadbourne, *A History of Education in Maine* 111 (1936). That is precisely why the Supreme Court, in *Rendell-Baker v. Kohn*, 457 U.S. 830, 840–43 (1982), and lower courts have declined to describe private schools as performing an exclusive public function. *See*, *e.g.*, *Logiodice v. Trs. of Maine Cent. Inst.*, 296 F.3d 22, 26–27 (1st Cir. 2002) ("Obviously, education is not and never has been a function reserved to the state."). These holdings are supported by a robust historical tradition of federal and state governments establishing and funding private schools in ways that do not create Establishment Clause concerns.

A. States have long provided for and even helped establish religious schools.

States have provided funds to schools to support religious education since the Founding. In the early Republic, "there was no such thing as a secular school; all schools used curriculum that was embued with religion." Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2171 (2003). For example, the New England states provided local schools with taxpayer funding,

and these schools took on an explicit religious character by making "religious instructions and devotions a normal part of their program." Charles L. Glenn, *The Myth of the Common School* 86 (1988). These schools were de facto "Congregational parochial schools," and certain states even required the teaching of Catechism. Richard J. Gabel, *Public Funds for Church and Private Schools* 183, 201 (1937).

After the Founding period, education reformers called for an expanded state role in education to shape youth, instill moral habits, and preserve Protestant cultural and religious hegemony. Diane Ravitch, *American Traditions of Education* 11, *in A Primer on America's Schools* (Terry M. Moe ed., 2001). These became known as common schools and "established free, tax-supported public schools in every state" where "Bible reading, hymn singing, prayers, and recitation of the Lord's Prayer" were common practice. *Id. See also* John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 297 (2001) (noting that the early common schools boasted "Bible reading, prayer, hymns, and holiday observances"). The cornerstone of common schools was "least-common-denominator Protestantism." *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 503 (2020) (Alito, J., concurring) (citation omitted). The common-school movement also began to dominate mid-Atlantic states by the 1840s, so much so that these states turned to general taxation to support these schools. Gabel, *supra*, at 348–49, 374, 380. Even with government support, religion informed all aspects of education, and mid-Atlantic states funded these schools fully aware of

this. Brief of Professor Charles L. Glenn as Amicus Curiae in Support of Petitioners at 12–16, *Carson v. Makin*, 596 U.S. 767 (No. 20-1088).

Throughout the 19th century, common schools were essentially non-denominational Protestant schools. *See generally id.* And these common schools were government-sanctioned and supported. The core value driving the common-school movement was that public schools would serve as "an agent of moral and social redemption," with this transformation stemming from "non-sectarian" religious teachings. Lloyd P. Jorgensen, *The State and the Non-Public School, 1825–1925* 23 (1987).

After the Civil War, these common schools evolved into public schools as they are thought of today but continued their robust religious practices like prayer and Bible reading well into the 20th century. Glenn Brief, *supra*, at 10. And throughout this period, many state and local governments generously supported religious schools through direct cash funding and land grants. Gabel, *supra*, at 186, 190, 194. This period saw the rise of Blaine Amendments. *See Mitchell v. Helms*, 530 U.S. 793, 828–29 (2000). Initially proposed as a federal constitutional amendment and later adopted in various state constitutions, these amendments varied from state to state, but their goal was consistent: to reduce competition for the common schools from Catholic schools by preventing funds either from going to any private school or to private religious schools and institutions specifically. *See, e.g.*, Philip Hamburger, *Separation of Church & State* 206 (2002).

The history of the Blaine Amendments illustrates the give-and-take between public and private education with regard to public funding in the United States. The fact that those advocating for greater state control and a reduction in private schooling saw the need for Blaine Amendments is particularly revealing. If it were universally assumed that schools funded by the government were necessarily public entities by definition, Blaine Amendments would not have been needed at all by those who did not want private schools receiving government funds. While 20th-century separationists argued that secular public schools were the norm and Blaine Amendments were meant to preserve this, the history is much more complicated and shows a continually shifting balance between public and private, religious, and non-religious schooling. *See Espinoza*, 591 U.S. at 482–83.

B. The U.S. government supported religious instruction for Native Americans in Oklahoma and elsewhere.

The federal government's funding of Native American schools is particularly illustrative of the way in which public support of education has long included private religious entities. From the Founding, the federal government was heavily involved in efforts to educate Native Americans and coordinated with religious missionary groups to do so.[2] Francis Paul Prucha, *American Indian Policy in*

[2] An analysis of federal practice is particularly relevant to the historical understanding of the Religion Clauses, as the federal government was the only entity subject to the First Amendment pre-incorporation. *Marsh v. Chambers*, 463 U.S. 783, 790–91 (1983).

the Formative Years: The Indian Trade and Intercourse Acts, 1790-1834 220 (1962). For example, the Jefferson Administration provided funding for a Presbyterian mission school at which Native American "children were taught to read from the Bible and catechism, to say Christian prayers daily, and to sing Christian hymns." Charles L. Glenn, *American Indian/First Nations Schooling: From the Colonial Period to the Present* 52 (2011). Initiatives like these only expanded during the Monroe Administration, which provided federal funds to denominational missions, with the "actual operation of schools" left to religious organizations. *Id.* at 53–54.

By the mid-1850s, the federal government helped to fund and establish almost 40 schools established by religious missionary groups. K. Tsianina Lomawaima, *They Called It Prairie Light: The Story of Chilocco Indian School* 2 (1994). And federal dollars flowed directly to these missionary schools well into the late 19th century. *Espinoza*, 591 U.S. at 481. The federal government not only directed funds to these schools but even supported their provision of religious instruction. *See, e.g.*, Donald L. Drakeman, *Church, State, and Original Intent* 307 (2010).

At bottom, over *four hundred* Native American boarding schools existed between 1819-1969; all had robust financial support from the United States government and were operated by Protestants, Catholics, and/or the federal government itself. Bryan C. Rindfleisch, *Negotiating Assimilation & Missionization in Indian Territory* vii (2024). Ninety-five of these schools operated in Oklahoma, and eleven of those were run by Catholics. *Id.* The first Native

American/Catholic boarding school opened in 1880 in Konawa, ultimately closing in 1926. *Id.* And the final one—St. Patrick's in Anadarko—shut its doors in 1965. *Id.*

C. Modern trends reflect this historical understanding of a public-private balance in education.

The 20th century saw a continuation of the story of competing visions for education between public and private providers. In *Pierce*, the Court upheld the right of parents to send their children to private, religious schools and rejected a state government's attempt to monopolize education. 268 U.S. at 534–35. As the Court made clear, "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 535.

And in this spirit, states today—through vouchers, educational savings accounts, and tax credit scholarship programs—have expanded school choice to improve outcomes and alleviate the high costs of education. One such example involves the program the Court upheld in *Zelman*, 536 U.S. at 644. To address a crisis of underperforming schools in Cleveland, the Ohio legislature enacted a scholarship program that provided tuition assistance for students to "attend a participating public or private school of their parent's choosing." *Id.* at 645. This Court upheld the program against Establishment Clause challenge. *Id.* at 662–63.

Since *Zelman*, school choice programs and charter schools have grown, but they are far from novel; they are simply a modern iteration of the historic partnership between private and public entities providing education to America's children.[3] Oklahoma's highest court overlooked this robust historical tradition when it concluded that free public education is the exclusive province of the state. Quite the opposite, the history of American schooling demonstrates a "cooperation between public and private sectors to achieve valuable social goals." Ravitch, *supra*, at 13. Governments then and now have found it necessary to collaborate with the private sector for assistance, as "nonpublic organizations run preschool centers, Head Start centers, after-school programs, tutoring programs, and many other educational services." *Id.*

History, therefore, contradicts the idea that publicly funded education necessarily entails a singular "public function" carried out only by public schools. History demonstrates the opposite: private and religious entities working with the government in various ways to educate America's children. St. Isidore is simply another example of this.[4]

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[3] *See, e.g.*, Ravitch, *supra*, at 13–14 (Observing that charter schools "may be the lineal descendant of the nineteenth century academy . . . . The modern charter school, like the academy, has an independent board of trustees, survives only because its students choose to enroll, and receives public funding on a per-pupil basis.").

[4] As a historical matter, charter schools are merely a new name for a variation on an old concept. Oklahoma has labeled charter schools as "public schools." But this Court has held that the way the state casts an entity is irrelevant to the substantive

II. Religious Organizations That Provide Critical Social Services Do Not Become State Actors Simply by Receiving Government Funds.

Publicly funded schooling is just one example of how governments have advanced their goals by providing monetary support to private institutions. Numerous other social services reflect the same idea. Religious institutions have long offered a wide array of social services such as adoption, foster care, prisoner re-entry, court-mandated drug treatment programs, and hospitals serving the poor, among many others. They did so before—often long before—governments offered similar services.

This Court has explained that the "Establishment Clause must be interpreted by reference to historical practices and understandings." *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014). The history of government-funded social services bolsters the conclusion that charter schools are not state actors. *See Fulton v. City of Philadelphia*, 593 U.S. 522, 528–29 (2021) (outlining the history of Catholic foster care organizations in Philadelphia). From the Founding until the present day, religious institutions have provided important social services. *See Bowen v. Kendrick*, 487 U.S. 589, 609 (1988). But these

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constitutional analysis. *Carson*, 596 U.S. at 785 (explaining that "the definition of a particular program can always be manipulated to subsume the challenged condition, and to allow States to recast a condition on funding in this manner would be to see the First Amendment reduced to a simple semantic exercise" and that is why cases like these turn on the substance of the First Amendment and "not on the presence or absence of magic words.") (cleaned up).

institutions do not "metamorphose" into state actors merely because they receive government funds. *See Johnson v. Rodrigues*, 293 F.3d 1196, 1206 (10th Cir. 2002). To foist the state-actor moniker on religious charter schools now would not only exclude religious schools from receiving state funds, but also would threaten the long tradition of government support for and collaboration with private charities providing necessary social services.

A. Religious institutions have a rich tradition of providing critical social services as an expression of their respective faiths.

Alexis de Tocqueville observed that Americans routinely "form associations" or "societ[ies]" to "inculcate some truth or to foster some feeling by the encouragement of a great example." Alexis de Tocqueville, 2 *Democracy in America* 106 (Phillips Bradley, ed. and trans. 1990). Many Americans live out their religious creeds through such voluntary religious associations. They worship in churches, synagogues, mosques, and temples. They study in religious schools. And, because helping the needy is a pillar of many faith traditions, they operate and support charities and other organizations that provide important services to the needy. *See* Kerry O'Halloran, *Charity and Religion*, *in International Encyclopedia of Civil Society* 109, 109 (Helmut K. Anheier ed., 2010).

In accordance with these religious teachings, religious institutions have provided social services to the poor and the needy throughout the nation's

history. *See* Steven V. Monsma, *When Sacred and Secular Mix: Religious Nonprofit Organizations and Public Money* 2, 8 (1996). This was true in the Founding Era and remains true today.

1. Since the Founding Era, religious institutions have provided a vast range of social services, most of which initially had no government analogue.

Religious organizations have "historically played a vital role in one area of public service after another." *Id.* at 8. Indeed, such organizations have "[t]ypically . . . been the first into areas of societal need," predating the entry of "[s]ecular agencies and government." *Id.* Thus, "[f]rom before the Republic's founding in the late eighteenth century, and through much of the nineteenth century, social welfare was dominated by voluntary, faith-based agencies." Carl H. Esbeck, *Regulation of Religious Organizations via Governmental Financial Assistance*, *in Religious Organizations in the United States: A Study of Identity, Liberty, and Law* 349, 351 (James A. Serritella *et al. eds.,* 2006).

As a result, until the mid-19th century, religious and faith-based organizations were often the sole providers of certain social services in the United States. Nieli Langer, *Sectarian Organizations Serving Civic Purposes*, *in Religious Organizations in Community Services: A Social Work Perspective* 137, 137–38 (Terry Tirrito & Toni Cascio eds. 2003). It took the Civil War, the Great Depression, and the New Deal to drive the "government [to undertake] a more affirmative role" in providing similar charitable

services to those in need. Carl H. Esbeck, *Government Regulation of Religiously Based Social Service: The First Amendment Considerations*, 19 Hastings Const. L.Q. 343, 350-51 (1992).

Fulton illustrates this rich tradition of religious service. There, the Court analyzed whether Philadelphia could bar a government-funded, Catholic foster care agency from its foster care program consistent with the Free Exercise Clause. 593 U.S. at 542. The Court highlighted the Catholic Church's centuries-long history of supporting orphans and children in need of foster families, a mission continued by the agency in that case. *Id.* at 528–29. The Court further noted that "[f]or over 50 years," the agency had "successfully contracted" with Philadelphia "to provide foster care services while holding to [its religious] beliefs," which "inform its work in this system." *Id.* at 530.

Justice Alito went on to demonstrate how Christian and Jewish groups created some of the nation's first orphanages and foster care systems and continue to maintain those programs today. *See, e.g.*, *id.* at 547–48 (Alito, J. concurring). Eventually, in the late-19th and early-20th centuries, "the care of children was shifted from orphanages to foster families" and "an influx of federal money spurred States and local governments to take a more active role." *Id.* at 548. State and local governments created "what is essentially a licensing system" to vet potential foster parents and now work extensively with religious nonprofits to provide adoption and foster care placement. *Id.* But, when it comes to adoption and foster care, state and local governments

"typically leave most of the work to private agencies." *Id.* at 617.

Private religious charities have historically provided social services in a wide range of areas beyond caring for orphans. For example, the Salvation Army, a Christian organization, provides community centers, rehabilitation, disaster relief, and other social services to those in need. *See* The Salvation Army, *2023 Annual Report,* https://perma.cc/8LSZ-KBPR. The Salvation Army received $616 million in government funds in 2022. *Id.* Similarly, motivated by its mission "to embody Catholic social and moral teaching," Catholic Relief Service provides refugee resettlement programs and emergency health services. Catholic Relief Services, *2023 Annual Report,* https://perma.cc/G3XF-8SB7. In 2023, the organization received $521 million in grants from the U.S. government to fund these services. *Id.*

In the criminal justice context, faith-based charities provide a range of government-funded services, including court-mandated substance abuse programs and re-entry programs. *See Freedom from Religion Found., Inc. v. McCallum*, 324 F.3d 880, 883–84 (7th Cir. 2003) (detailing the demonstrated value of a religiously operated halfway house). Other faith-based organizations, such as the Dream Center, a Christian non-profit affiliated with the Angelus Temple Church, "provid[e] support to those affected by homelessness, hunger, and the lack of education through residential and community outreach programs." *See* Dream Center, *Get to Know Us*, https://perma.cc/KU3G-FEVF**.** In 2012, this faith-based organization received a $49.7 million federal

grant to add more housing to its building in Los Angeles. *See* Roger Vincent, *Dream Center in L.A. Expects $49.7-million Grant*, L.A. Times (Aug. 27, 2012), https://perma.cc/NFW5-JBGA.

In short, although the states and the federal government have become more dominant forces in providing services to those in need, religious institutions provided this care long before the government ever did. And they continue to do so today with the government's support.

2. The Executive Branch has encouraged government partnerships with faith-based providers.

In recent decades, presidents of both parties have ratified the government's funding of faith-based providers of social services. In the 1990s, the Clinton Administration encouraged the federal government to contract with not-for-profit organizations, many of which are faith-based, because charities are "more flexible and responsive" to the needs of society. Esbeck, *Regulation of Religious Organizations*, *supra*, at 354.

In 2006, the Bush Administration issued guidance explaining President Bush's "belie[f] that the Federal government, within the framework of Constitutional church-state guidelines, should encourage faith-based charities to" help those in need. *Guidance to Faith-Based and Community Organizations on Partnering with the Federal Government*, White House Office of Faith-Based and Community Initiatives 1 (2006) ("Bush Guidance"). Citing the "thousands of faith-

based and community organizations" receiving federal funding, the guidance noted that "use of government money by faith-based organizations is not new." *Id.* at 2. For example, the guidance noted that "two-thirds of Federally-supported residences for the elderly are operated by faith-based organizations" and that "about one in every six child-care centers is housed in a religious facility." *Id.*

Over the last two decades, each presidential administration has stood by this position and encouraged its agencies to fund faith-based organizations meeting the needs of low-income and underprivileged communities in our nation.[5]

Nor does providing funds for faith-based organizations to provide social services negate their unique protections under the Section 702 exemption to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1. Section 702 partially exempts religious employers from Title VII's non-discrimination provisions, allowing the employer to employ persons of a particular religion to carry out its activities. *See id.*; *see also* U.S. Equal Employment Opportunity Commission Guidance, *Section 12: Religious Discrimination*, https://perma.cc/6NLX-QSDG. Under this provision, faith-based organizations may operate in accordance with their religious identity—an accommodation this Court upheld against Establishment Clause challenge in *Corp. of Presiding*

[5] See*, e.g.*, Exec. Order No. 13279, 3 C.F.R. 258 (2002); Exec. Order No. 13559, 3 C.F.R. 287 (2010); Exec. Order No. 13831, 3 C.F.R. 149 (2018); Exec. Order No. 14015, 3 C.F.R. 191 (2021); Exec. Order No. 14205, 90 Fed. Reg. 9499 (Feb. 12, 2025).

Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 339 (1987).

Section 702 affords this protection even when a religious organization receives government funding, thereby ensuring that religious organizations retain a right important to their religious identity. *See* Bush Guidance, *supra*, at 13 (explaining that "[i]n general," unless another federal or state law provides otherwise, a faith-based organization retains [the § 702] exemption even if it receives Federal, State, or local financial assistance"). This has remained true through the most recent federal rulemaking on faith-based partnerships. *See Partnerships with Faith-Based and Neighborhood Organizations*, 89 Fed. Reg. 15,671, 15,684 (Mar. 4, 2024) ("Most of the Agencies' regulations have long provided that a religious organization that qualifies for that Title VII religious-employer exemption is not precluded from invoking it even in programs funded by Federal financial assistance.").

This nation has a storied history of supporting social services through private charity. And this long tradition is reflected in our modern approaches to using government funds in support of organizations that continue to provide such services.

B. Private entities providing social services do not metamorphose into state actors.

As relevant here, this nation's long tradition of supporting and funding religious charities undercuts any claim that these charities are state actors or that this violates the Establishment Clause. Courts have

held time and again that receiving government funds to provide such services is insufficient to turn a charity into a state actor.

In *Bowen v. Kendrick*, the Court considered a challenge to government-funded services provided by "a wide variety of recipients," including private charities with "ties to religious denominations." 487 U.S. at 597. The services included pregnancy testing, adoption counseling and referral services, prenatal and postnatal care, educational services, residential care, childcare, and consumer education. *Id.* The Court explained that it "has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs." *Id.* at 609. In fact, it had previously concluded that giving federal funds to a hospital was "entirely consistent" with the Establishment Clause. *Id.* (citing *Bradfield v. Roberts*, 175 U.S. 291 (1899)). The hospital's religious affiliation was "wholly immaterial" to the Court's analysis. *Id.*

The same principle holds true across the spectrum. Lower federal courts have held what was implicit in *Fulton*: foster parents are not state actors. *See United States v. Peneaux*, 432 F.3d 882, 896 (8th Cir. 2005); *Leshko v. Servis*, 423 F.3d 337, 347 (3d Cir. 2005); *Rayburn ex rel. Rayburn v. Hogue*, 241 F.3d 1341, 1348 (11th Cir. 2001). Neither are foster homes: "[a]cross the country, there's near uniformity that foster homes do not count as state actors." *Howell v. Father Maloney's Boys' Haven, Inc.*, 976 F.3d 750, 753 (6th Cir. 2020) (collecting cases). Nor are adoption agencies: "To encourage private agencies to promote

adoption does not metamorphose private performance into government activity." *Johnson*, 293 F.3d at 1206.

Likewise, when reviewing the validity of providing faith-based substance-abuse programs in a halfway house, the Seventh Circuit reasoned that excluding the program because of its religious connection "would involve the sacrifice of a real good to avoid a conjectured bad." *Freedom from Religion Found.*, 324 F.3d at 884. Put differently, providing funds to the organization did not violate the Establishment Clause—and thus did not turn the organization into a state actor—because "[i]t would be perverse if the Constitution required this result." *Id.*

Finally, guidance and regulations from the G.W. Bush Administration to the Biden Administration make clear that religious social service providers retain their right to hire persons of a particular religion to carry out their work under the Section 702 exemption when receiving federal funding. *See* 89 Fed. Reg. at 15,684. This is a strong acknowledgement that these providers are not state actors. The right to employ persons of a particular religion is a right that they never could have if they were state actors. Accordingly, as one district court held, it does not violate the Establishment Clause for the Salvation Army to retain its Section 702 exemption for positions in a program funded by the government. *Lown v. Salvation Army, Inc.*, 393 F. Supp. 2d 223, 251, 255 (S.D.N.Y. 2005) (explaining that a religious organization that receives federal funds "is not a state actor" and "is not required to waive its eligibility for Section 702 protection").

Religious organizations have long provided critical services to the needy across the nation and retain their essential religious character while doing so. And courts have long permitted this without finding the organizations to be arms of the state under the Establishment Clause.

C. To hold that private charities providing social services are state actors would undermine the continued provision of vital services.

Affirming the Oklahoma Supreme Court's exclusive-public-function analysis would open the door to finding that whenever a religious charity receives government funds, it is a state actor and potentially subject to liability under civil rights laws. As Judge Sutton has noted, if a claim under 42 U.S.C. § 1983 were permitted against foster care agencies, "[i]t could cause some benevolent entities, otherwise inclined to offer a charitable service for the State, to 'abandon their plans.'" *Howell*, 976 F.3d at 754 (citing *Doe ex rel. Johnson v. S.C. Dep't of Soc. Servs.*, 597 F.3d 163, 182 (4th Cir. 2010) (Wilkinson, J., concurring)). Specifically, if a faith-based entity "becomes a state actor for federal constitutional purposes," he noted, "it could cause complications for private entities that provide secular services in the name of faith-based missions." *Id.*

This is no idle threat. If religious entities were to become state actors simply by receiving federal funds, they would face a serious dilemma. They could continue taking government funds to provide social services and shed their religious identity. Or they

could stop receiving funding and decrease the charitable services they offer. To be sure, many would elect to maintain their free exercise rights instead of adopting the state-actor moniker. But then the result would be to diminish the number of social services offered to the nation's most needy.

President Bush's guidance explained the importance of allowing organizations to preserve their religious identity, central to which is the ability to select employees who share their vision. Bush Guidance, *supra*, at 12. Without this essential right, an organization loses its ability "to promote common values, a sense of community and unity of purpose, and shared experiences through service." *Id.* An organization should not have to strip its religious identity to provide government-funded social services. A religious organization does not need "to remove the Star of David or the cross in [its] buildings in order to deliver a Federally-funded service there." *Id.* at 14. Nor does it need "to change its identity—including its name or chartering documents—in order to qualify for a Federal grant." *Id.*

Religious organizations are voluntary associations that provide invaluable services to Americans—from education to adoption to prison rehabilitation. If these organizations become state actors, they will face significant disincentives to continue accepting government funding. Instead, the Court should affirm that religious organizations are not state actors, a conclusion aligned with history and tradition from our nation's founding until today.

III. There Is no "Entwinement" of the State With St. Isidore or Other Private Charter Schools.

In addition to finding St. Isidore to be a state actor under the public function test, the Oklahoma Supreme Court found it to be a state actor under the "entwinement" test used in *Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001). *See Drummond*, 558 P.3d at 11.

The Oklahoma Supreme Court cited *Brentwood Academy* for the proposition that "a nominally private entity [i]s a state actor . . . when it is 'entwined with governmental policies,' or when the government is 'entwined in [its] management or control.'" See *id.* at 11 (quoting *Brentwood Academy*, 531 U.S. at 296). Here, the court found such entwinement in the Oklahoma Charter School Board's sponsorship of charter schools, through which the board "provide[s] oversight of the operation for St. Isidore, monitor[s] its performance and legal compliance, and decide[s] whether to renew or revoke [its] charter." 538 P.3d at 11. The court also found entwinement because the "charter schools also receive many of the same legal protections and benefits as their government sponsor." *Id.* The court so held despite the fact that St. Isidore's curriculum, vision, board supervision, and teacher selection—the aspects of a school that go most directly to its character and substance—remained completely in the control of St. Isidore, a private entity created by the Archdiocese of Oklahoma City and the Diocese of Tulsa. Oklahoma Pet. App. 7, 8.

The Oklahoma Supreme Court's reliance on *Brentwood Academy* was misplaced. This Court has not invoked the test to decide a state action issue since. Moreover, this Court's other holdings regarding when a private entity becomes a public actor teach that courts should focus on *substantive* dominance and control by the government, not the sort of oversight and provision of benefits found here. *See*, *e.g.*, *Rendell-Baker*, 457 U.S. at 830–31, 841–42 (holding that absent "comp[ulsion] or . . . influence[] by any state regulation," even "extensive regulation" of a private school is insufficient to make its discharge of the school's guidance counselor state action); *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 815 (2019) (determining that the state's "extensive regulation of [plaintiff nonprofit]'s operation of the public access channels does not make [the nonprofit] a state actor").

Brentwood Academy considered whether an association regulating interscholastic athletic competition among schools engaged in state action when it enforced rules against its members. 531 U.S. at 290. The Court noted that "state action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated *as that of the State itself*.'" *Id.* at 295 (emphasis added) (citation omitted). There is nothing in the Oklahoma Charter School program that makes the private behavior of schools like St. Isidore actions "of the State itself." The Oklahoma Charter Schools Act provides that the purpose of these charter schools is to "[e]ncourage the use of different and innovative teaching methods" and "create different and

innovative forms of measuring student learning." 70 Okla. Stat. § 3-131(A)(3), (5). St. Isidore, through its independent board and not the state, would develop its own vision for the school, set the curriculum, choose faculty, and establish its operational policies. Oklahoma Cert. Pet. at 8. *See also* 70 Okla. Stat. § 3-134 (outlining the application requirements the school itself is responsible for developing and submitting to the state).

The *Brentwood Academy* majority noted the other state-actor tests used by this Court but instead focused on the concept of entwinement. 531 U.S. at 296. This was likely a result of multiple unique factors of the athletic association's makeup. Public schools and their officials constituted an overwhelming 84 percent of the athletic association's membership. *Id.* at 299. The two governing bodies of the athletic association, the governing legislative council and board of control, were composed entirely of public school officials at the time the case was decided. *Id.* Additionally, the Tennessee State Board of Education members are ex-officio members of the two controlling boards of the athletic association. *Id.* at 300. Underscoring the fact-specific nature of *Brentwood Academy*, four Justices dissented, observing that "[t]he state-action doctrine was developed to reach only those actions that are truly attributable to the State, not to subject private citizens to the control of federal courts." *Id.* at 314–15 (Thomas, J., dissenting). This Court has not relied on the entwinement holding of *Brentwood Academy* in any subsequent holding.

The same degree of state involvement in *Brentwood Academy* that supported entwinement

does not exist for charter schools. Far fewer than 84 percent of the charter schools in Oklahoma are public schools: almost none of them are. With one exception, they are all, like St. Isidore, privately created and governed entities. *See* Okla. State Dep't of Educ., *Oklahoma Charter School Report 2023* 5 (2023), https://perma.cc/4GD9-CBS2.

Charter schools are also responsible for developing their own curricula and policies, staffing their own schools, and managing their own operations. *See* Oklahoma Pet. App. 8. While the Charter School Board would monitor St. Isidore's operations for compliance with certain standards, "[t]he mere fact that [it] is subject to state regulation does not by itself convert its action into that of the State," *Jackson*, 419 U.S. at 350; neither does its employees' eligibility for many of the same benefits as public employees. *Brentwood Academy*, 531 U.S. at 300.

The focus in this Court's public actor cases on substantive control by the government such that the private entity's actions may fairly be said to be that "of the State itself," rather than mere regulation, has parallels in this Court's treatment of entanglement in Establishment Clause jurisprudence.

In *Aguilar v. Felton*, 473 U.S. 402 (1985), the Court struck down a program paying for public school teachers to provide remedial instruction at parochial schools to qualifying students. The Court found a violation of the entanglement prong of the test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in two aspects of the program. First, it found entanglement in the city's "ongoing inspection . . . to ensure the

absence of a religious message" in the public teachers' instruction while on the site of a "pervasively sectarian" school. *Aguilar*, 473 U.S. at 412. It also found entanglement in the "administrative cooperation that is required to maintain the educational program" such as the parochial school administration and the public school supervisors "work[ing] together in resolving matters related to schedules, classroom assignments, problems that arise in the implementation of the program, requests for additional services, and the dissemination of information regarding the program." *Id*. at 413.

This Court overruled *Augilar* in *Agostini v. Felton*, 521 U.S. 203 (1997), rejecting the notion that such routine administrative interactions were improper entanglements. The Court noted that "not all entanglements . . . have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable, and [the Court] ha[s] always tolerated some level of involvement between the two." *Id.* at 233. The Court in *Agostini* thus "recast *Lemon*'s entanglement inquiry as simply one criterion relevant to determining a statute's effect," *Mitchell v. Helms*, 530 U.S. 793, 807–08 (2000), and *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534 (2022), repudiated *Lemon* entirely.

Yet this does not mean that government may insert itself into religious questions or give religious institutions governmental powers. *See*, *e.g., Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 761 (2020) (reasoning that for a court to decide the fitness of a minister "risk[s] judicial entanglement in religious issues"); *Larkin v. Grendel's Den*, 459 U.S.

116, 126–27 (1982) (holding that an ordinance allowing churches to effectively veto the granting of liquor licenses unconstitutionally "enmeshes churches in the processes of government"). But various interactions between religious and governmental entities that do not substantively entangle them in each other's respective religious or governmental spheres do not violate the Constitution. *See*, *e.g., Town of Greece*, 572 U.S. at 591–92 (holding that opening town board meetings with a prayer was not coercive and so did not entangle religion with the state); *Lynch v. Donnelly*, 465 U.S. 668, 678–79, 685 (1984) (holding that, in including a creche in a public park Christmas display, the City "d[id] not create excessive entanglement between religion and government," and holding that question in reviewing challenged conduct is "whether, in reality, it establishes a religion or religious faith, or tends to do so").

Thus the Court rejected entanglement as a free-standing test in Establishment Clause jurisprudence because it looked at interactions between government and religious institutions formally rather than substantively. So, too, should the Court reject the Oklahoma Supreme Court's focus on regulatory interactions rather than on the fact that governance, curriculum, vision, and selection and management of faculty remains a private endeavor. Doing so would be most consistent with this Court's state-action decisions, which focus on whether the "decisions of the [private entity are] fairly attributable to the State," *Rendell-Baker*, 457 U.S. at 840, and would reaffirm that "the fact the government licenses, contracts with, or grants a monopoly to a private entity does not

convert the private entity into a state actor." *Halleck*, 587 U.S. at 814. These decisions acknowledge that private entities like charter schools operate within a state-established framework, but also that "[a]ction taken by private entities with the mere approval or acquiescence of the State is not state action." *American Mfrs. Mut. Ins. Co. v. Sullivan,* 526 U.S. 40, 52 (1999).

* * *

If charter schools, at least those like St. Isidore that are run by private nonprofits and which account for all but one of the charter schools in Oklahoma, are not state actors, then there is no basis for excluding those private nonprofits that are religious from the program. As set forth above, the Oklahoma Supreme Court erred in finding St. Isidore to be a state actor. The history of education in the United States undermines any argument that publicly funded schooling is an exclusive governmental function. This conclusion is only strengthened by the myriad social services for which government enlists and funds private entities and which do not make these charities state actors. And the Oklahoma Supreme Court's reliance on "entwinement" to make St. Isidore a state actor was misplaced and departed from this Court's precedents for determining when a private entity's actions can be deemed "*that of the state itself*." St. Isidore is simply not a state actor.

If St. Isidore is not a state actor, to exclude it from the charter school program in Oklahoma solely because of its religious character violates the Free Exercise Clause. This Court held in *Carson*, 596 U.S.

at 787, that government educational funding programs that include private schools may not exclude religious private schools based on their religious character. *Id.* ("[T]he Free Exercise Clause forbids discrimination on the basis of religious status."). Likewise, in *Espinoza*, 591 U.S. at 476, this Court stressed that while a state need not include private schools in publicly funded educational programs, "once a State decides to do so, it cannot disqualify some private schools solely because they are religious." *Id.* at 487.

Nor does it make a difference if charter schools are deemed indirect aid, as in typical school choice programs, or as a form of direct aid. As this Court held in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017), a case involving direct aid, when the government "discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character[,] . . . such a policy imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny." *Id.* at 462. Such non-neutral treatment of religion is impermissible under our Constitution. *See Kennedy,* 597 U.S. at 526 ("A government policy will not qualify as neutral if it is specifically directed at religious practice.") (quotation omitted).

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

Respectfully submitted,

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March 12, 2025