No. 24-394 Vide No. 24-396

In the Supreme Court of the United States

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

Petitioners,

v.

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

Respondent.

ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL,

Petitioner,

v.

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

Respondent.

On Writs of Certiorari to the Supreme Court of the State of Oklahoma

BRIEF OF *AMICI CURIAE* STATE OF SOUTH CAROLINA AND 11 OTHER STATES IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are the States of South Carolina, Alabama, Arkansas, Florida, Georgia, Kansas, Louisiana, Missouri, Montana, Nebraska, Ohio, and Texas (collectively, the *Amici* States). Many *Amici* States provide public aid to religious organizations and schools in a variety of ways, such as through grants, scholarships, and tuition assistance programs. Each of those aid mechanisms comport with this Court's First Amendment precedents. *See Trinity Lutheran Church of Columbia*, *Inc.* v. *Comer*, 582 U.S. 449 (2017) (grants); *Espinoza* v. *Montana Dept. of Revenue*, 591 U.S. 464 (2020) (scholarships); *Carson as next friend of O. C.* v. *Makin*, 596 U.S. 767 (2022) (tuition assistance programs).

What's more, this Court has held that states may contract with private organizations to provide educational instruction to the public without the schools becoming state actors. *See Rendell-Baker* v. *Kohn*, 457 U.S. 830 (1982). And the government may not require religious organizations to abandon their religious exercise to be eligible for government contracts. *Fulton* v. *City of Philadelphia, Pennsylvania*, 593 U.S. 522, 542 (2021).

The Oklahoma Supreme Court's contrary holding in this case—categorically barring religious organizations from entering charter school contracts solely because of their religious affiliation—violates the federal Constitution. *Amici* States have a

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[1] No counsel for any party authored this brief, in whole or in part. No person or entity other than *Amici* States contributed monetarily to its preparation or submission.

compelling interest in expanding educational opportunities for their citizens and upholding their Constitutional rights.

As states that contract with private organizations to provide educational opportunities to students through charter schools, *Amici* States need clarity from this Court as to how they are to conduct those programs. And given *Amici* States' role in chartering schools, they have a unique perspective to offer this Court.

It's admittedly unusual for state attorneys general to challenge the constitutionality of another state's laws. But the filing of this brief highlights the nature of *Amici* States' concern. The Oklahoma's Supreme Court's ruling is an expansion of the ever-widening split of authority regarding foundational constitutional rights, and the record must be set straight.

SUMMARY OF ARGUMENT

Excluding a religious entity "from a public benefit for which it is otherwise qualified, solely because it is a [religious entity], is odious to our Constitution." *Trinity Lutheran*, 582 U.S. at 467; *see also Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963) ("Governmental imposition" of a choice "between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand," puts an impermissible "burden upon the free exercise of religion...."). That's why this Court held in *Espinoza* that the Free Exercise Clause is violated when religious schools and parents are excluded "from

public benefits solely because of [their] religious character." *Espinoza*, 591 U.S. at 476. And in *Carson*, when reviewing a state's exclusion of religious schools from a tuition assistance program, this Court clarified that a "neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients *does not* offend the Establishment Clause." *Carson*, 596 U.S. at 781 (citing *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 652-53 (2002)) (emphasis added). This Court's free speech precedents are in accord.

The Oklahoma Supreme Court turned the Establishment Clause on its head. Rather than raise the Establishment Clause to shield religious observers from a state's religious mandate, the Oklahoma Supreme Court weaponized it to single out and exclude religious observers from eligibility for a public benefit. And the religious observers' Free Exercise rights were casualties of that exercise.

This Court should protect religious schools from unconstitutional discrimination, defend states' ability to provide educational opportunities to their citizens, and confirm that *Amici* States can permissibly give public aid to religious schools and organizations.

ARGUMENT

I. Religious charter schools comport with First Amendment religious liberty protections.

Does a private religious entity become a state actor for First Amendment purposes when it contracts with the state to provide free educational opportunities to students who choose them? This Court's precedents

clearly indicate the answer is "no." Instead, religious charter schools promote religious freedom.

A. Charter schools like Petitioner are not state actors for First Amendment purposes.

This Court need not reach the question of whether charter schools are state actors for every purpose. The key question here is whether charter schools like Petitioner St. Isidore of Seville Catholic Virtual School are state actors for purposes of the First Amendment. Indeed, "[f]or the purpose of religious charter schools, the most important issue is that charter schools are a private actor for curriculum purposes, so that the school could teach religion classes and incorporate religious concepts in other subjects without running afoul of the Establishment Clause. Without the ability to include religion in the curriculum, the school remains secular." Kathleen C. Ryan, *The Emerging Possibility of Religious Charter Schools: A Case Study of Arizona and Massachusetts*, 98 NOTRE DAME L. REV. 2257, 2267 (2023).

Indeed, a corporation can simultaneously be a state actor in some contexts while not in others. For example, "statutory disavowal of [] agency status deprives [a statutorily-created corporation] of sovereign immunity from suit, and of the ordinarily presumed power of Government agencies authorized to incur obligations to pledge the credit of the United States. But it is not for [the legislature] to make the final determination of [that corporation's] status as a Government entity for purposes of determining the constitutional rights of citizens affected by its actions." *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513

U.S. 374, 392 (1995) (internal citations omitted); *see also, e.g.*, *Bernard* v. *Fed. Nat. Mortg. Ass'n*, 587 F. App'x 266, 271 (6th Cir. 2014) (finding Fannie Mae was not a state actor for due process purposes); *Harvey* v. *Harvey*, 949 F.2d 1127, 1130 (11th Cir. 1992) ("Only in rare circumstances can a private party be viewed as a 'state actor' for section 1983 purposes.").

In the First Amendment context, charter schools like Petitioner are not state actors.

1. As an initial matter, a private organization that enters a contract with the government to provide educational services to the public "is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government." *Rendell-Baker*, 457 U.S. at 840–41. Indeed, "[a]cts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts." *Id.* at 841; *see also Manhattan Cmty. Access Corp.* v. *Halleck*, 587 U.S. 802, 814 (2019) ("[A]s the Court has long held, the fact that the government … contracts with … a private entity does not convert the private entity into a state actor."). And requiring a private contractor to provide its services to the public for "free" and on a "first-come, first-served" basis "do[es] not render [a private corporation] a state actor." *Id.* at 815.

In *Rendell-Baker*, former teachers challenged their discharge from a nonprofit, privately-operated school that contracted with the state to provide educational instruction to high school students. 457

U.S. at 831. They raised First, Fifth, and Fourteenth Amendment claims under § 1983. *Id.* at 835. And the Court held their action failed because the school was not a state actor. *Id.* at 843.

2. Government oversight also does not automatically convert a private actor into a "state actor," let alone in the First Amendment context. This Court's holding in *Blum* v. *Yaretsky*, 457 U.S. 991 (1982), illustrates why.

There, the Court considered whether the decision of nursing homes to transfer or discharge patients constituted state action in light of the state's requirement that physicians certify the medical necessity of nursing home services on a "long term care placement form" created by the state. 457 U.S. at 1006. The Court determined that even though the state had devised the evaluative form, "the physicians, and not the forms, make the decision about whether the patient's care is medically necessary." *Id.* Accordingly, the Court rejected the argument that "the [s]tate, by requiring completion of a form, is responsible for the physician's decision." *Id.* at 1006–07; s*ee also Am. Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 57–58 (1999) ("[W]orkers' compensation insurers are at least as extensively regulated as the private nursing facilities in *Blum*.... Like th[at] case[ ], though, the state statutory and regulatory scheme leaves the challenged decisions to the judgment of insurers.").

In the same way, state laws and regulations governing the creation and operation of charter schools like Petitioner leave academic and

pedagogical decisions to the judgment of the charter schools. As such, those decisions are not state action.

3. Additionally, subjecting private corporations to benefits and burdens ordinarily reserved for the state does not automatically convert a private contractor into a state actor.

States often extend powers and protections enjoyed by governments to private entities. And extending those public benefits to private contractors does not convert the private entities into public ones.

For example, some private actors enjoy immunity from suit that is normally reserved for the states under state Tort Claims Acts. *See, e.g.*, 51 Okla. Stat. § 152.2(A)(3) ("charitable health care provider[s]"); § 152(11)(o) ("youth services agenc[ies]"); § 152(11)(q) ("child-placing agenc[ies]"). States like New Jersey call this "derivative immunity," whereby "[i]ndependent contractors … 'share to a limited extent the immunity of public entities with whom they contract.'" *Stewart* v. *New Jersey Tpk. Auth./Garden State Parkway*, 249 N.J. 642, 656, 268 A.3d 346, 354 (2022) (cleaned up).

States sometimes also require private contractors to comply with some of the same obligations that the states normally face, and those contractors do not lose their private status for every purpose. Indeed, "an entity may be a State actor for some purposes but not for others." *Caviness* v. *Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 813 (9th Cir. 2010) (cleaned up).

This is true in the charter school context. 98 NOTRE DAME L. REV. at 2267 ("It is entirely possible that a charter school could be a state actor for one

purpose but not another, depending on the extent of the state's role in each aspect."). For example, the Ninth Circuit held a private nonprofit corporation running a charter school in Arizona was not a state actor for employment purposes. *Caviness*, 590 F.3d at 814. And it did so despite state statutes characterizing charter schools as "public schools" and a state Attorney General opinion construing charter schools as "political subdivisions" for purposes of a state Open Meetings Act. *Id.*[2]

4. The negative-implication cannon of construction (*expressio unius est exclusio alterius*) lends further support. Under that canon, the expression of one thing implies the exclusion of others. Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, at 85 (West, 2012). Applying that canon here, the express imputation of certain government benefits and burdens to private entities by contract implies at least two things.

First, it's significant that public benefits and burdens are expressly imputed in the first place. Such imputation presumes that government contractors are not ordinarily state actors. After all, if government contractors inherently retained the benefits and burdens of state actors, it would be

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[2] Arizona is not the only example of a state attorney general opining that charter schools are likely state actors for certain purposes. For example, the South Carolina attorney general has opined that charter schools are likely state actors regarding limitations on the investment of public funds. 2022 WL 20471447, at *4 (S.C.A.G. June 30, 2022). But as *Caviness* illustrates, a private charter school can be a state actor for some purposes but not for others. The First Amendment context is one where charter schools like Petitioner are not state actors.

pointless and redundant to expressly impute such conditions to contractors.

Second, the express imputation of some government benefits and burdens necessarily excludes other government privileges. Such government contractors do not receive the full range of benefits and burdens attributable to a true state actor.

A charter school is a privately-operated school that contracts with the government to provide free educational instruction to students. And charter schools' academic and pedagogical decisions are made by charter schools, not the state. Government oversight and extension of government benefits and burdens does not convert a privately-operated charter school into a "state actor" for First Amendment purposes.

5. Contrary to the Oklahoma Supreme Court's opining, a charter school is also not a "governmental entity." *Drummond ex rel. State* v. *Oklahoma Statewide Virtual Charter Sch. Bd.*, 2024 OK 53, ¶ 20. This Court has held that a "corporation is part of the Government for purposes of the First Amendment" when "the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation …." *Lebron*, 513 U.S. at 399. Charter schools do not fit that description.

First, charter schools are not corporations created by special law. In this case, the Oklahoma Charter Schools Act authorizes the state to contract with

private corporations for the provision of education services. 70 Okla. Stat. § 3-136. The corporations themselves are not the creation of the state.

And state action does not automatically attach to charter schools for purposes of the First Amendment simply because state statutes call them "public." *See, e.g.*, *Caviness*, 590 F.3d at 814 ("[A] state's statutory characterization of a private entity as a public actor for some purposes is not necessarily dispositive with respect to all of that entity's conduct.") (citing *Jackson* v. *Met. Edison Co.*, 419 U.S. 345, 350 & n. 7 (1974)). Statutory pronouncement that a corporation is a state actor is no more dispositive than a statutory pronouncement that a corporation is *not* a state actor. The ultimate question here is "what the *Constitution* regards as the Government," not what the legislature regards as the government. *Lebron*, 513 U.S. at 392 (emphasis added).

Second, while the education of students is certainly a governmental objective, education is not an exclusively public function. "That a private entity performs a function which serves the public does not make its acts state action" unless "the function performed has been 'traditionally the *exclusive* prerogative of the State.'" *Rendell-Baker*, 457 U.S. at 842 (quoting *Jackson*, 419 U.S. at 353) (emphasis in original). And that the state provides services for students at public expense "in no way makes these services the exclusive province of the State." *Id.* at 842.

Public schools are but one option in the marketplace of educational opportunities. While traditional private schools face some regulation by the

state, they do not lose their private status by simply educating students. Neither do charter schools. That's because education is not the exclusive prerogative of the state.

Third, the state does not retain permanent authority to appoint a majority of the directors of each charter school. In fact, charter schools have their own governing bodies that create policies and are responsible for operational decisions. 70 Okla. Stat. § 3-136(A)(8). And the independence enjoyed by charter schools is evidenced throughout the Oklahoma Charter Schools Act. For example, charter schools in Oklahoma do not follow the State's core curriculum requirements, *id.* at § 3-136(A)(3); they may offer a curriculum that emphasizes a "specific learning philosophy or style or certain subject areas," *id.*; they are not required to hire teachers with a valid Oklahoma teaching certificate, *see Oklahoma Charter Schools*, OKLA. STATE DEP'T OF EDUC., Mar. 7, 2025 (https://tinyurl.com/bdd72rxy); they are not required to follow Oklahoma's Teacher and Leader Effectiveness standards, *id.*; they hire their own personnel, 70 Okla. Stat. § 3-136(B); and they adopt their own personnel policies, personnel qualifications, and method of school governance, *id.*

It's unsurprising, then, that the First, Third, and Ninth Circuits have concluded that the academic and pedagogical choices of charter schools do not amount to state action. *Caviness*, 590 F.3d 806 (holding a private nonprofit corporation that operated a charter school was not a state actor when it took employment actions against a teacher); *Logiodice* v. *Trustees of Maine Central Institute*, 296 F.3d 22 (1st Cir. 2002) (holding a privately-operated school that contracted

with a public school district to provide education services was not a state actor in the student discipline context); *Robert S.* v. *Stetson School, Inc.*, 256 F.3d 159 (3d Cir. 2001) (holding a state-funded school that educated juvenile sex offenders was not a state actor for purposes of claims of abuse by school staff).

Only the Fourth Circuit and the Oklahoma Supreme Court have held otherwise, and the Oklahoma Supreme Court is the only one to reach such a conclusion in the First Amendment context. *Peltier* v. *Charter Day School, Inc.*, 37 F.4th 104 (4th Cir. 2022), *cert. denied*, 143 S.Ct. 2657 (2023) (holding a private nonprofit corporation that operated a charter school was a state actor for purposes of an Equal Protection claim under § 1983 challenging the charter school's dress code); *Drummond*, 2024 OK 53, ¶ 20 (holding a religious charter school to be a "governmental entity and state actor" for purposes of a First Amendment challenge to the school's charter).

The state of Oklahoma has elected to contract with private organizations to provide educational instruction to the public. And it leaves key academic and pedagogical decisions up to the charter schools. This Court should apply *Rendell-Baker* to clarify that these private educational organizations do not become state actors for First Amendment purposes by virtue of entering charter school contracts.

B. Religious charter schools comport with the Court's Establishment Clause and Free Exercise Clause precedents.

1. The Establishment Clause does not prohibit the creation of religious charter schools. For starters, charter schools like Petitioner are not state actors for purposes of the First Amendment, so their mere existence cannot violate the Establishment Clause. But even more generally, the provision of public aid to religious charter schools bears no resemblance to true establishments of religion.

Under the Establishment Clause, "government *control over religion* offends the Constitution, but treating a church on par with secular entities and other churches does not." *Shurtleff* v. *City of Bos., Massachusetts*, 596 U.S. 243, 287 (2022) (Gorsuch, J., concur.) (citing M. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2205-2208 (2003)) (emphasis added). Indeed, "[n]o historically sensitive understanding of the Establishment Clause can be reconciled with a rule requiring governments to 'roa[m] the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine.' Our Constitution was not designed to erase religion from American life; it was designed to ensure 'respect and tolerance.'" *Id.* at 287–88 (quoting *Am. Legion* v. *Am. Humanist Ass'n*, 139 S.Ct. 2067, 2084–85 (2019)).

To understand the scope of the Establishment Clause, it's helpful to review the history of religious establishments in the United States.

"Beyond a formal declaration that a religious denomination was in fact the established church, it seems that founding-era religious establishments often bore certain other telling traits." *Shurtleff*, 596 U.S. at 285–86 (citing *Establishment and Disestablishment*, 2110–2112, 2131).

> First, the government exerted control over the doctrine and personnel of the established church. Second, the government mandated attendance in the established church and punished people for failing to participate. Third, the government punished dissenting churches and individuals for their religious exercise. Fourth, the government restricted political participation by dissenters. Fifth, the government provided financial support for the established church, often in a way that preferred the established denomination over other churches. And sixth, the government used the established church to carry out certain civil functions, often by giving the established church a monopoly over a specific function.

Id. at 286 (citing *Establishment and Disestablishment* at 2131–81). Most of these religious establishment hallmarks "reflect forms of 'coerc[ion]' regarding 'religion or its exercise.'" *Id.*, at 286 (quoting *Lee* v. *Weisman*, 505 U.S. 577, 587 (1992)); *Weisman*, 505 U.S. at 640 (Scalia, J., dissenting); *Van Orden* v. *Perry*, 545 U.S. 677, 692 (2005) (Thomas, J., concurring).

These hallmarks also elucidate this Court's Establishment Clause cases. For example, this Court "has held unlawful practices that restrict political

participation by dissenters, including rules requiring public officials to proclaim a belief in God." *Id.* at 286 (citing *Torcaso* v. *Watkins*, 367 U.S. 488, 490 (1961)). The Court has also "checked government efforts to give churches monopolistic control over civil functions." *Shurtleff*, 596 U.S. at 286 (citing *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116, 127 (1982)).

At the same time, and relevant to this case, the Court "has upheld nondiscriminatory public financial support for religious institutions alongside other entities." *Id.* at 286 (citing *Espinoza*; *Trinity Lutheran*; and *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 662–663 (2002)). "The thread running through these cases derives directly from the historical hallmarks of an establishment of religion—government control over religion offends the Constitution, but treating a church on par with secular entities and other churches does not." *Id.* at 286-87 (citing *Establishment and Disestablishment* 2205–08).

Following that thread shows how Oklahoma's Supreme Court got it wrong. A religious entity's receipt of a public benefit does not equate to an establishment of religion, especially when that benefit is offered equally to secular entities. As a result, the creation of religious charter schools does not offend the Establishment Clause.

2. Oklahoma's refusal to award charter school contracts to religious organizations on the sole basis of their religious affiliation is odious to the Free Exercise Clause.

Of course, a state such as Oklahoma can negotiate terms for its charter school contracts like it does for other contracts with private entities. *See, e.g.*, Okla. Admin. Code 777:10-3-3(a)(8) (whereby approved charter applicants and the state charter school board negotiate and execute "a contract for sponsorship."). By statute, Oklahoma requires charter schools to be "free and open to all students," § 3-135(A)(9), so they may "not charge tuition or fees." § 3-136(A)(10). State aid is allocated to charter schools based on pupil count, which depends on parents' choices to enroll students at a charter school. § 3-142(A) (a charter school "receive[s] the State Aid allocation … and any other state-appropriated revenue *generated by its students* for the applicable year.") (emphasis added). And charter schools must "comply with all federal regulations and state and local rules and statutes relating to health, safety, civil rights and insurance." § 3-136(A)(1). So far, so good.

But as reflected in this Court's unanimous decision in *Fulton* v. *City of Philadelphia*, the Constitution prevents the government from requiring its contractors to swallow their religious exercise. *Fulton*, 593 U.S. at 542 ("The refusal of Philadelphia to contract with CSS for the provision of foster care services unless it agrees to certify same-sex couples as foster parents cannot survive strict scrutiny, and violates the First Amendment."); *see also* 2 C.F.R. § 3474.15 (under a U.S. Department of Education regulation governing grants and agreements, "[a] faith-based organization is eligible to contract with grantees and subgrantees, including States, on the same basis as any other private organization."). And while States have a "deeply rooted commitment to

education," religious liberties become "meaningless" if they must yield to the State's interest in education. *People* v. *DeJonge*, 501 N.W.2d 127, 138–39 (Mich. 1993).

Yet that's exactly the upshot of the Oklahoma Supreme Court's decision below.

State exclusion of public aid for religious schools reflects an open hostility toward religion and communicates the government's preference for secularism. And "official expressions of hostility to religion" are "inconsistent with what the Free Exercise Clause requires." *Masterpiece Cakeshop, Ltd.* v. *Colo. Civil Rights Comm.*, 138 S.Ct. 1719, 1732 (2018); *see also Espinoza*, 591 U.S. at 499 (Alito, J., concurring) (explaining how states' no-aid provisions originated from the failed Blaine amendment championed by the Ku Klux Klan in 1875).

The Ninth Circuit recently considered California's nonsectarian requirement for schools with which it contracts to provide free appropriate public education to students with disabilities. *Loffman* v. *California Dep't of Educ.*, No. 23-55714, 2024 WL 4586970 (9th Cir. Oct. 28, 2024). Relying on *Trinity Lutheran*, *Espinoza*, and *Carson*, the Ninth Circuit concluded that the nonsectarian requirement burdened religious parents' free exercise rights and failed to satisfy strict scrutiny. *Id.* at *15. In the same way, Oklahoma's "nonsectarian requirement burdens 'not only religious schools but also the families whose children attend or hope to attend them.'" *Id.* at *16 (quoting *Espinoza*, 591 U.S. at 486).

As a dissenting justice noted below, "[i]t is undisputed that, aside from its religious affiliation, St. Isidore meets the requirements for operating a charter school." *Drummond*, 2024 OK 53, ¶ 8 (Kuehn, J., dissenting). Effectively, then, the Oklahoma Supreme Court's ruling permitted Oklahoma to wield its "little Blaine Amendments" to deny funding to a "sectarian" Catholic school so the state would not have to "fund all petitioning sectarian groups," including "extreme sects of the Muslim faith" and other minority faiths "most Oklahomans would consider reprehensible and unworthy of public funding." Pet.App.77, 174.

But "[a]t bottom, this argument is but another formulation of the 'classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions.'" *Holt* v. *Hobbs*, 574 U.S. 352, 368 (2015). This Court has "rejected a similar [Free Exercise] argument in analogous contexts" and it should "reject it again today." *Id.* (citing *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006)); *see also Sherbert*, 374 U.S. at 407.

C. This Court's Free Speech Clause precedents are in accord.

First Amendment cases addressing the Free Speech Clause reinforce the principle that states can't deny opportunities to religious organizations while affording them to secular ones.

When the government offers a messaging opportunity to private groups but prevents a private religious group from accessing that same opportunity

on account of their religious message, that's viewpoint discrimination. *Shurtleff*, 596 U.S. at 258 ("When a government does not speak for itself, it may not exclude speech based on 'religious viewpoint'; doing so 'constitutes impermissible viewpoint discrimination.'") (quoting *Good News Club* v. *Milford Central School*, 533 U.S. 98, 112 (2001)). Even if the government believes it would violate the Establishment Clause by granting the religious group access to the opportunity, that's no defense.

In *Shurtleff*, this Court considered a challenge to Boston's practice of allowing private groups to raise flags on public property while prohibiting a Christian individual from raising a Christian flag under the guise of Establishment Clause concerns. *Id.* at 250. Boston "concede[d] that it denied Shurtleff 's request solely because the Christian flag he asked to raise 'promot[ed] a specific religion.'" *Id.* at 258 (internal citations omitted). The Court concluded that "[u]nder our precedents, and in view of our government-speech holding here," Boston's "refusal discriminated based on religious viewpoint and violated the Free Speech Clause." *Id.* at 259.

That approach is not new. Almost three decades ago, in *Rosenberger* v. *Rector & Visitors of University of Virginia*, this Court considered a public university's grant of funds for printing costs to student publications while denying such funds to a student organization that published a newspaper with a Christian editorial viewpoint. 515 U.S. 819 (1995). The Court held the university's denial of funds to the Christian student organization violated the First Amendment by discriminating against that organization's viewpoint. *Id.* Indeed, "[i]t is axiomatic

that the government may not regulate speech based on its substantive content or the message it conveys." *Id.* at 828. And "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another." *Id.* As a result, the government "may not silence the expression of selected viewpoints." *Id.* at 835 (internal citations omitted).

Now back to our case. In an apparent effort to avoid an Establishment Clause issue, Oklahoma excluded religious groups from charter school contracts while allowing similarly situated secular groups to proceed. But this Court's First Amendment cases show that doing so discriminates based on viewpoint many times over.

Indeed, "[t]he State is not required to partner with private entities to provide common education. But if it does, it cannot close the door to an otherwise qualified entity simply because it is sectarian." *Drummond*, 2024 OK 53, ¶ 11 (Kuehn, J., dissenting) (citing *Espinoza*, 591 U.S. at 487). This Court should protect religious charter schools from viewpoint discrimination.

II. Religious charter schools are excellent vehicles for states to provide educational opportunities to their citizens.

A. Religious charter schools provide states more options to promote education.

Amici States have an interest in supporting and promoting the education of their citizens. And states have employed various tools to advance that interest.

To be sure, public schools play a significant educational role. About 85% of students in America attend public schools. U.S. DEP'T OF EDUC., REPORT ON THE CONDITION OF EDUCATION 2024 2-3 (2024). And public schools play an important part in instilling civic virtues in American society. Public education "prepare[s] pupils for citizenship in the Republic" by "inculcat[ing] the habits and manners of civility," which is "indispensable to the practice of self-government in the community and the nation." *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 681 (1986). The States undoubtedly take their role in administering public education seriously.

But many states acknowledge the benefits that additional educational options can afford. They also acknowledge that parents and students have varying educational needs and interests. And the States endeavor to adapt their educational strategies to help the most students reach their full potential while positioning parents to best direct the educational upbringing of their children.

That's why many states offer alternative opportunities for students to receive a free education, including scholarships, tuition assistance, and charter schools. In fact, most states and the District of Columbia have at least one private school choice program. Stanford, L., Lieberman, M., Ifatusin, V., *Which States Have Private School Choice*, EDUCATIONWEEK, Mar. 5, 2024 (https://tinyurl.com/yuzafyaa). And 46 states have charter school programs. Sean Salai, *Report finds charter school enrollment booming while traditional school districts decline*, THE WASHINGTON TIMES, Oct. 8, 2024 (https://tinyurl.com/45ucvs3j).

By disqualifying religious organizations from eligibility for charter school contracts, the Oklahoma Supreme Court narrowed Oklahoma's options for promoting the education of its citizenry.

B. Religious charter schools provide students more educational choices.

Due to economic constraints, "[m]ost parents, realistically, have no choice but to send their children to a public school." *Morse* v. *Frederick*, 551 U.S. 393, 424 (2007) (Alito, J., concurring). Approximately sixty percent of charter school students are in poverty. Raymond, M.E., Woodworth, J.L., Lee, W.F, Bachofer, S., *As a Matter of Fact: The National Charter School Study III 2023*, STANFORD UNIVERSITY CENTER FOR RESEARCH ON EDUCATION OUTCOMES, at 37, Jun. 19, 2023 (https://tinyurl.com/yv6tstm8). And "charter schools tend to disproportionately enroll minority and low-income students, especially in urban areas, which are groups that experienced the greatest learning losses" from the COVID-19 pandemic. 98 NOTRE DAME L. REV. at 2261.

But charter schools are not alone in that regard. Religious private schools have historically played a significant role in educating children in underserved populations. Michael Bindas, *The Once and Future Promise of Religious Schools for Poor and Minority Students*, 132 YALE L.J. FORUM 529, 549 (2022) ("Poor, minority, and immigrant children have long relied on religious schools to procure an education that respects and meets their needs….").

Religious charter schools bridge the gap between the low cost of public and charter schools with the

historical mission of religious schools to educate the underserved. And that is consistent with the design of the charter school system, "the very purpose of [which] is to allow *private* entities to experiment with innovative curricula and teaching methods, and to give students and parents 'additional academic choices.'" *Drummond*, 2024 OK 53, ¶ 11 (Kuehn, J., dissenting) (quoting 70 Okla. Stat. § 3-131(A)) (emphasis in original).

But in Oklahoma, "[r]eligious entities that are equally or better qualified than secular ones" to provide education to students "are disqualified solely because they are" operated by a religious organization. *Loffman*, 2024 WL 4586970, at *15. If a state categorically excludes religious schools from charter school contracts, it necessarily prioritizes secular values over quality of education. When a failing nonsectarian school stands a better chance of being approved for a charter school contract than a thriving religious school, students suffer for it.

C. Religious charter schools provide parents more opportunities to direct the upbringing of their children.

Many parents increasingly want alternatives to public education. Between 2011 and 2021, enrollment in charter schools almost doubled. Mark Lieberman, *What's Going On With Public School Enrollment? All the Big Questions, Answered*, EDUCATIONWEEK, Jun. 27, 2024 (https://tinyurl.com/3uw3mxe6). Since the beginning of the pandemic, public school enrollment has declined by approximately 2 million students, and

almost half of the students who left turned to private alternatives and homeschooling. *Id.*

In the 2023-24 school year alone, charter schools added 83,172 students while district public schools lost 274,412, a "'clear sign that families are not waiting for the system to catch up to their needs.'" *See Supra*, Salai, THE WASHINGTON TIMES (quoting Starlee Coleman).

And what parents want matters. This Court has time and again upheld the right of parents "to direct the education and upbringing of one's children." *Washington* v. *Glucksburg*, 521 U.S. 702, 720 (1997) (citing *Meyer* v. *Nebraska*, 262 U.S. 390 (1923)); *see also Wisconsin* v. *Yoder*, 406 U.S. 205, 233 (1972) (parents have a fundamental right to direct the "inculcation of moral standards" and "religious beliefs" of their children). Without question, "[t]he values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society." *Yoder*, 406 U.S. at 213-14.

American law prioritizes parental control over the upbringing of children for multiple reasons. For example, "historically [the law] has recognized that natural bonds of affection lead parents to act in the best interests of their children." *Parham* v. *J. R.*, 442 U.S. 584, 602 (1979) (citing 1 W. Blackstone, Commentaries * 447).

Moreover, "[t]he law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult

decisions." *Id.* at 602. And the law further reflects a "basic assumption that our society makes about children as a class," that "they do not yet act as adults do, and thus we act in their interest by restricting certain choices that … they are not yet ready to make with full benefit of the costs and benefits attending such decisions." *Thompson* v. *Oklahoma*, 487 U.S. 815, 826 n.23 (1988).

Another key reason "the custody, care and nurture of the child reside first in the parents" is because parents' "primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.* Parents—not governments—are the ones "who nurture [their child] and direct [their child's] destiny," and they "have the right, coupled with the high duty, to recognize and prepare [their child] for additional obligations." *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535 (1925). Importantly, "[t]he child is not the mere creature of the state ...." *Id.* There in fact exists a "private realm of family life which the state cannot enter." *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944).

True, parental rights are not absolute. For example, parents may not abuse or neglect their children. *Parham*, 442 U.S. at 602–04 ("[A] state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized."). And the state, as *parens patriae*, may act "to guard the general interest in youth's well being" in circumstances such as "requiring school attendance" and "regulating or prohibiting the child's labor ...." *Prince*, 321 U.S. at 166 (internal citations omitted). But ultimately,

parents have the right to direct their children's education. *Glucksburg*, 521 U.S. at 720.

That right is largely illusory when choices are few. 132 YALE L.J. FORUM at 551 ("The practice of assigning children to schools based not on their needs but on their home addresses (read: wealth) relegates poor and often minority students to public schools that are far more likely to be underperforming or failing."). Allowing religious charter schools to participate in the marketplace of education would "empower[] every child to access the school that will best serve her rather than the school to which the government assigns her." *Id.* at 558.

Importantly, "[s]ome parents prefer religious education for their students, as well as the moral education associated with a religious school." 98 NOTRE DAME L. REV. at 2263. But not all parents can afford a private religious education for their children. As a result, "[r]eligious charter schools would expand access to those who cannot afford private tuition but desire religious education or a better academic experience." *Id.*

For such parents, religious charter schools "afford[] learning opportunities that ensure good results and high achievement with a low price tag." Julia Clementi, *The First Religious Charter School: A Viable Option for School Choice or Prohibited Under the State Action Doctrine and Religion Clauses?*, 92 FORDHAM L. REV. 2151, 2192 (2024). And in some cases, "religious charter schools can actually provide a better alternative to both public schooling and private religious schooling," *id.*, making them an important option for parents to consider when

deciding how best to direct the upbringing of their children.

III. Banning religious charter schools casts doubt on states' ability to give public aid to religious schools and organizations generally.

Even under a narrow reading of the Oklahoma Supreme Court's ruling, prohibiting religious organizations from competing for charter school contracts compromises the freedom of religious organizations, hampers opportunities for states to provide education to their citizens, stifles students' opportunities to thrive in a quality educational environment, and limits parents' choice of schools to send their children. But the impacts of the decision below extend much further.

At stake here is the states' ability to contract with religious organizations in general and to provide public aid to religious organizations in particular. Because if states can't enter charter school contracts with religious organizations, that calls into question the ability of states to give public aid to, or contract with, religious organizations generally.

After all, state oversight of charter schools resembles state oversight of other state contractors. In both situations, private entities contract with the state to provide products and services to the state, and the state exerts some degree of oversight of the contractors, as well as of the products and services provided. If that oversight converts private contractors into state actors for First Amendment purposes, then the promise of *Fulton* becomes

illusory. In such a case, states likely have to exclude private religious organizations from consideration for government contracts more generally.

Additionally, longstanding programs like grants, scholarships, and tuition assistance programs may be impacted. Other programs could be threatened too, such as "the use of public funds for a purchase and lease-back arrangement involving a sectarian university." *Drummond*, 2024 OK 53, ¶ 5 (Kuehn, J. dissenting) (citing *Burkhardt* v. *City of Enid*, 1989 OK 45). And "the use of public funds to contract with [a church] to operate an orphanage." *Id.* (citing *Murrow Indian Orphans Home* v. *Childers*, 1946 OK 187).

Amici States hope to continue contracting with, and extending public aid to, religious organizations alongside secular ones. This Court should confirm that practice aligns with the Constitution.

CONCLUSION

The First Amendment restrains the government from exerting control over religious life. It does not empower the government to excise religion from public life. And it cannot be used as a pretext to prevent religious organizations from contracting with the government merely because of their religious beliefs. This Court should say so.

[Signature page follows]

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