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 FOR THE STATE OF OKLAHOMA, EX REL. STATE OF OKLAHOMA,
Respondent.

ST, ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL,
Petitioner,

v.

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

On Petitions for Writs of Certiorari to the Supreme Court of Oklahoma

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Constitutional Counsel Group
1628 N. Main St. #289
Salinas, CA 93906
(916) 601-1916
atcaso@ccg1776.com

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the principle that the Establishment Clauses was meant to protect States from a federal establishment and thus cannot be used by States as a defense to discrimination against religious entities. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing these issues, including *Kennedy v. Bremerton School Dist.*, 597 U.S. 507 (2022); *Carson v. Makin*, 596 U.S. 767 (2021); *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021); *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 591 U.S. 657 (2020); *Espinoza v. Montana Dept. of Revenue*, 591 U.S. 464 (2020); *Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U.S. 732 (2020); *American Legion v. American Humanist Ass'n*, 588 U.S. 29 (2019); and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), to name a few.

SUMMARY OF ARGUMENT

Oklahoma argues that when a private entity sponsors a charter school, that private entity becomes

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[1] In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief. All parties received notice of this brief more than 10 days prior to filing.

a state actor. On this basis, Oklahoma invokes the Establishment Clause as a defense against its discrimination against religious entities that wish to sponsor charter schools. It matters not that the school would be open to all students without discrimination on the basis of faith belief (or nonbelief). Oklahoma argues that the simple fact that the sponsor is a religious entity and may teach religious ideas disqualifies it from participation in the state program. This interpretation ignores the history and original understanding of the Establishment Clause.

The Establishment Clause neither authorizes nor permits states to discriminate against religion in the administration of a generally available state benefit. The Establishment Clause was meant as a federalism protection for states against the possibility that the new federal government would create an Establishment overriding state preferences.

The Court should grant review in this case to reverse the disastrous history begun with *Everson v. Board of Ed. of Ewing*, 330 U.S. 1 (1947). As Justice Thomas noted, the rule of *Everson* is "unmoored from the original meaning of the First Amendment." *Espinoza*, 591 U.S. at 490 (Thomas, J., concurring).

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant Review to Rule that the Establishment Clause Was Originally Understood as a Federalism Protection for the States.

The "Court's wayward approach to the Establishment Clause also impacts its free exercise jurisprudence. Specifically, its overly expansive understanding of the former Clause has led to a correspondingly cramped interpretation of the latter." *Espinoza*, 591 U.S. at 491-92 (Thomas, J., concurring). This case presents the Court with an opportunity to correct its wayward approach.

This Court in *Rosenberger* acknowledged that the "central lesson" in cases that involve an Establishment Clause challenge to the right of free exercise of religion is neutrality. *Rosenberger v. Rector and Visitors of U. of Virginia*, 515 U.S. 819, 839 (1995). Neutrality here prohibits the state from denying religious entities access to an otherwise available state program for sponsorship of a charter school. Such discrimination contradicts a philosophy that has informed this country's governance since its founding: "[r]eligion, morality, and knowledge ... being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *Rosenberger*, 515 U.S at 862 (Thomas, J., concurring) (quoting Northwest Ordinance, Art. III (1787)).

As Justice Scalia noted, "our Constitution cannot possibly rest upon the changeable philosophical predilections of the justices of this Court but must have deep foundations in the historic practices of our people." *Lee v. Weisman*, 505 U.S. 577, 632 (1992) (Scalia, J., dissenting). Much of this Court's Religion Clause jurisprudence, however, was constructed on an edifice of mistaken understanding (or studied ignorance) of the history of that Clause. A close look at the history demonstrates that the Establishment Clause was meant as a federalism protection for the states rather than as an individual right. *Zelman*, 536 U.S. at 678 (Thomas, J., concurring). If it does protect an individual right, it is a right against coercion, not a protection against a "personal sense of affront." *See Town of Greece v. Galloway*, 572 U.S. 565 , 589 (plurality opinion), 608 (Thomas, J. concurring) (2014). A government program that does not create or support a coercive establishment does not implicate the freedom enshrined in the Establishment Clause. *Van Orden v. Perry*, 545 U.S. 677, 693-94 (2005) (Thomas, J. concurring). A religious entity's sponsorship of a charter school that is open to all students without discrimination involves no state coercion in violation of the Establishment Clause.

In colonial America, state establishments of religion were ubiquitous. While the Puritans ruled New England to advance their vision of a Christian commonwealth, the Church of England held the allegiances of colonies like Virginia and Georgia. Michael McConnell, *The Origins and Historical Understanding of Free Exercise Of Religion*, 103 Harv. L. Rev. 1409, 1422-23 (1990) [hereinafter McConnell, Origins

of Free Exercise]. New York and New Jersey welcomed those that did not fit into the Puritan or Anglican tradition. *Id.* Pennsylvania and Delaware were founded as safe havens for Quakers, while Maryland was founded as a refuge for English Catholics who suffered persecution in Britain. *Id.* Most notably, Roger Williams founded Rhode Island as a colony for Protestant dissenters after the General Court banished him from Massachusetts. *Id.*

This variety of religious establishments allowed colonists to settle in a place that most accommodated their own religious preferences. Even as disestablishment took hold after the Revolution, states viewed religious belief and practice as essential to a civil society. See Mass. Const. of 1780, pt. 1, art. III ("[T]he happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion and morality..."); Petition for General Assessment (Nov. 4, 1784), reprinted in C. James, Documentary History of the Struggle for Religious Liberty in Virginia 125, 125 (1900 and photo. reprint 1971) ("[B]eing thoroughly convinced that the prosperity and happiness of this country essentially depends upon the progress of religion..."); G. Washington, Farewell Address (Sept. 17, 1796), reprinted in 1 Documents of American History 169, 173 (H. Commager 9th ed. 1973) ("[O]f all the dispositions and habits that lead to political prosperity, religion and morality are indispensible supports...").

This history of varied establishments and trend of disestablishment provided the impetus for the Religion Clauses. Antifederalists were alarmed at what

they saw as the Constitution's failure to limit the power of the new Federal government. They were concerned that the federal government would have the power to declare a national religion contrary to the religious practices protected in the States, thus squelching the practices of religious minorities. *See* Letters from the Federal Farmer (IV) (Oct. 12, 1787), reprinted in 2 The Complete Anti-Federalist 245, 249 (Herbert J. Storing ed., 1981); *see also* Essay by Samuel, Indep. Chron. & Universal Advertiser (Boston), Jan. 10, 1788, reprinted in 4 The Complete Anti-Federalist, *supra*, at 191, 195. Though not hostile to state establishments, the antifederalists were concerned that a federal government might "[M]ake every body worship God in a certain way, whether the people thought it right or no, and punish them severely, if they would not." Letters from a Countryman (V), N.Y, J., (Jan. 17, 1788), reprinted in 6 The Complete Anti-Federalist, *supra*, 86, 87. As one antifederalist noted regarding the differences between different states, "It is plain, therefore, that we [Massachusetts citizens] require for our regulation laws, which will not suit the circumstances of our southern brethren, and the laws made for them would not apply to us." Letters of Agrippa (XII), Mass. Gazette, (Jan. 11, 1788), reprinted in 4 The Complete Anti-Federalist, *supra*, 93, 94.

Acting upon these concerns, at least four states submitted amendments concerning religious liberty along with their official notice of ratification of the Constitution. *See* Declaration of Rights and Other Amendments, North Carolina Ratifying Convention

(Aug. 1, 1788), reprinted in 5 The Founders' Constitution at 18 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter The Founders Constitution] ("[A]ll men have an equal, natural, and unalienable right to the free exercise of religion, according the dictates of his conscience"); New Hampshire Ratification of the Constitution (June 21, 1788), reprinted in 1 The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787, at 325, 326 (Jonathan Elliot ed., 2d ed., William S. Hein & Co., Inc. 1996) ("Congress shall make no laws touching religion, or to infringe the rights of conscience"); New York Ratification of Constitution (July 26, 1788), reprinted in The Founders' Constitution, *supra* 11-12 ("That the people have an equal, natural, and unalienable right freely and peaceably to exercise their religion, according to the dictates of conscience; and that no religious sect or society ought to be favored or established by law in preference to others."); Proposed Amendments to the Constitution, Virginia Ratifying Convention (June 27, 1788), reprinted in The Founders' Constitution, supra 15-16 ("[A]ll men have an equal, natural, and unalienable right to the free exercise of religion").

With these demands from various states in mind, the First Congress set to work to fashion an amendment that would appease these concerns. McConnell, *Origins of Free Exercise*, *supra*, at 1476-77. After debate over the exact wording of the Religion Clause in the House and the Senate, both houses agreed to the final conference committee report. 1 Annals of Cong. 88 (Joseph Gales ed., 1789). From this committee

emerged the Religion Clauses as they are known today: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." U.S. Const. amend. I.

States that had establishments feared federal interference. Letters of Agrippa (XII), Mass. Gazette, (Jan. 11, 1788), reprinted in 4 The Complete Anti-Federalist, supra, 93, 94. That fear was also shared by states that had no establishment. Because of the Supremacy Clause, states were concerned that Congress might impose a federal establishment that would overrule individual State rules. Thus, the First Amendment's "no law respecting an establishment of religion" provision had a clear federalism purpose. Incorporation of this provision against the States can only be understood as protecting state authority to the maximum extent possible consistent with individual liberty lest it be interpreted to require the very thing that it forbids, federal interference with state support of religion. *Zelman*, 536 U.S. at 678, 679 (Thomas, J., concurring); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 50 (2004) (Thomas, J., concurring). If an individual liberty is protected by the clause, it is freedom from government coercion of individual religious observance or interference with the form of religious worship. It cannot mandate prohibition of participation by religious entities in a generally available state program, such as the one at issue here allowing private organizations to sponsor charter schools.

The prohibition on any law "respecting an establishment of religion" was never meant to be a prohibi-

tion on public acknowledgement of religion. It was instead a ban on federal government coercion and federal intrusion on state authority. This distinction is clear from the rich history of religious acknowledgments and exercises by all three branches of government after adoption of the First Amendment.

II. The Court Should Grant Review to Hold that if it is Incorporated Against the States, the Establishment Clause Only Protects against Coercion of Individuals and Religious Institutions.

This Court, in *Our Lady of Guadalupe*, identified what the founding generation saw as an establishment. The laws that the founders knew about included the Acts of Uniformity and legislation dictating the contents of the Common Book of Prayer. 591 U.S. at 748. These were practices that the colonists brought with them to America, and which formed the basis of the various state establishments. *Id.* at 748-49.

The Congress that proposed the First Amendment and the states that ratified it had significant experience with the concept of religious establishments. Some establishments involved governmental coercion that compelled a form of religious observance. Thus, some states sought to control the doctrines and structure of the church. South Carolina did this through its 1778 Constitution requiring a church to ascribe to five articles of faith before being incorporated as a state church. S.C. Const. of 1778 art. XXXVIII, reprinted in 2 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the

United States 1626 (Ben Perley Poore ed., The Lawbook Exch. Ltd. 2d ed. 2001) (1878). Other states, like Virginia, sought to control the personnel of the church and vested the power of appointing ministers of the Anglican Church in local governing bodies known as vestries. Rhys Isaac, *Religion and Authority: Problems of the Anglican Establishment in Virginia in the Era of the Great Awakening and the Parsons' Cause*, 30 Wm. & Mary Q. 3 (1973).

The other type of government coercion at play in religious establishments involved coercion of the individual in his or her religious practice. Massachusetts, for instance, prosecuted Baptists who refused to baptize their children or attend Congregationalist services. Michael McConnell, *Establishment & Dis-establishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev 2105, 2145 (2003) [hereinafter McConnell, Establishment & Dis-establishment]. Georgia supported the state church through a liquor tax. *Id.* at 2154. Other states limited political participation to members of the state church. *Id.* at 2178. The Establishment Clause was designed to protect these state choices and let the states choose the time and manner of disestablishment.

If it protects an individual right at all, it protects only against legal coercion of religious orthodoxy. *Van Orden*, 545 U.S. at 693 (Thomas, J., concurring). Yet even in that protection, it does nothing that is not already accomplished by the Free Exercise Clause. *See, e.g.*, *Kennedy*, 597 U.S. at 524 (The Free Exercise Clause "does perhaps its most important work by protecting the ability of those who hold religious beliefs

of all kinds to live out their faiths in daily life through 'the performance of (or abstention from) physical acts.'"); *Carson*, 596 U.S. at 778 ("The Free Exercise Clause of the First Amendment protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.'"); *Espinoza*, 591 U.S. at 478 (The Free Exercise Clause protects against even 'indirect coercion'").

There is no coercion in allowing a religious entity to sponsor a charter school on the same basis as any other private entity. The school is open to all students regardless of religious belief. No student is required to believe in any doctrine.

The state has no interest in disqualifying religious entities from sponsoring charter schools because they include religious practice and teaching about faith. No one is coerced into religious practice. Instead, the state seeks to coerce families *away* from religious practice by prohibiting the use of this state aid to attend an accredited school operated by a religious organization. The prohibition announces a state policy of hostility toward religion.

This case presents the Court with the opportunity to correct the confusion that was created by incorporating the Establishment Clause against the states.

CONCLUSION

Official hostility toward religious thought and practice has no place in our constitutional order. The Establishment Clause was never intended to compel state discrimination against religion. Its only purpose

was to protect states from federal establishments. The Court should grant review to resolve this ongoing confusion.

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JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Constitutional Counsel Group
1628 N. Main St. #289
Salinas, CA 93906
(916) 601-1916
atcaso@ccg1776.com

Counsel for Amicus Curiae