

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,
Respondent.

ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL,
Petitioner,

v.

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

ON WRITS OF CERTIORARI TO
THE SUPREME COURT OF OKLAHOMA

**BRIEF OF THE RUTHERFORD INSTITUTE AS
AMICUS CURIAE IN SUPPORT OF PETITIONERS**

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IDENTITY AND INTEREST OF AMICUS CURIAE¹

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed by the Constitution and laws of the United States. The Rutherford Institute writes in support of Petitioners.

SUMMARY OF ARGUMENT

When a state makes programs or benefits publicly available, it cannot withhold those benefit or discriminate among participants based on religion or religious affiliation. This Court has repeatedly held that this principle applies equally in the context of public education, most recently in the trilogy of cases beginning with *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017), and continuing with *Espinoza v. Mont. Dep't of Rev.*, 591 U.S. 464 (2020) and *Carson v. Makin*, 596 U.S. 767 (2022). Despite these clear precedents, the Oklahoma Supreme Court directed the Charter School Board to

¹ No counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

rescind its charter contract with St. Isidore based on Article 2, Section 5 of the Oklahoma Constitution, which states that no public money “shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect . . . or sectarian institution” and a state law that explicitly prohibits sectarian programs and schools. While the Oklahoma Supreme Court has characterized Article 2, Section 5 as a laudable effort to promote religious freedom, this constitutional provision is at least the progeny of the ignoble “Blaine Amendment,” if not the real thing. The Rutherford Institute submits this brief to detail the origin of such provisions as necessary context for the present dispute.

ARGUMENT

I. The Oklahoma Charter Schools Act.

In 1999, the Oklahoma legislature adopted the Oklahoma Charter Schools Act in an effort to expand educational opportunities within the public school system. *See* Okla. Stat. tit. 70, § 3-130, *et seq.* Its purpose, as set forth by the legislature in the statute itself, is to “[i]ncrease learning opportunities for students,” “[e]ncourage the use of different and innovative teaching methods,” and “[p]rovide additional academic choices for parents and students,” among other things. *Id.*, § 3-131. Currently, Oklahoma has over 30 charter schools serving over 50,000 students in all 77 of its counties.²

Oklahoma’s charter school law promotes educational choice and diversity in educational

² <https://www.okcharters.org/our-schools>.

opportunities by allowing institutions to form around their unique mission or goals. Indeed, in seeking charter status, an applicant must explain its mission and provide “[a] description of [its] instructional design ... including the type of learning environment, class size and structure, curriculum overview, and teaching methods.” Okla. Stat. tit. 70, § 3-134. The diversity of missions and instructional designs is reflected in many of the existing charter schools in Oklahoma, including many arts-focused, STEM-tech focused, and vocational charter schools. Among the more unique missions is Western Gateway Elementary in Oklahoma City. Western Gateway is a bilingual school, blending native Spanish-speaking and non-native Spanish-speaking students and allowing them to learn to read and write in their native language while also gaining bilingual capability in the second language.³

While St. Isidore would increase and expand the educational choice that the charter school law promotes, Oklahoma’s charter school law explicitly prohibits “sectarian” schools: “A charter school shall be nonsectarian in its programs, admission policies, employment practices, and all other operations.” Okla. Stat. tit. 70, § 3-136(A)(2). The law also requires

³ A survey of charter schools across the country reveals a vast array of educational choice. For example, Hebrew Public Charter Schools in Staten Island, New York, and Philadelphia, Pennsylvania, seek to inspire and prepare its student body through post-secondary and career opportunities in Israel and with Israeli organizations. The Harambee Institute in Philadelphia focuses on the origins, current status, and future of the African world, and envisions a collective and informed African American community utilizing science and technology as a means of promoting education for self-reliance, locally and globally.

applicants for a charter school to be sponsored by certain entities, *id.*, § 3-132(A), but it prohibits those entities from sponsoring “a charter school or program that is affiliated with a nonpublic sectarian school or religious institution.” *Id.*, § 3-136(A)(2). Additionally, Oklahoma’s School Code generally prohibits “sectarian” instruction in its public schools. *Id.*, § 11-101 (“No sectarian or religious doctrine shall be taught or inculcated in any of the public schools of this state”).

Oklahoma’s exclusion of “sectarian” schools is compelled by the Oklahoma Constitution, which prohibits state funds from being used to support “sectarian institutions.” Okla. Const. art. II, § 5 (“No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.”). Inclusion of this provision—a version of the failed federal “Blaine Amendment”—was a condition of Oklahoma’s admission to the union.

II. Blaine Amendments Were Born out of Anti-Catholic Bigotry.

Oklahoma is one of 37 states that currently have some version of a Blaine Amendment in their constitutions. In this case, the Court has the opportunity to address these amendments head on and to declare them inconsistent with the federal Constitution’s Free Exercise Clause when they are used to bar religious options from otherwise neutral and generally available public education programs and benefits. When considering this question, *amicus*

urges that the Court consider the historical origins of Blaine Amendments.

Blaine Amendments originated in an era where Anti-Catholicism was rampant, public, and unapologetic. Alarmed by the heavy influx of immigrants from Ireland and Germany in the nineteenth century,⁴ Protestant leaders formed “nativist” groups to oppose the growing “Catholic menace,” warning that Catholic immigrants would take jobs, spread disease and crime, and plot a coup to install the Pope in power. Tyler Anbinder, *Nativism & Slavery: The Northern Know Nothings & the Politics of the 1850s* 8-14 (1992).

During this time, nativist mob violence against Catholics was common and often went unpunished. In 1834, for example, firefighters watched idly as a Protestant mob ransacked and burned the Catholic convent in Charlestown, Massachusetts, inspired by rumors that the Catholic nuns were holding a woman against her will. Petitions for the state to indemnify the diocese for failing to protect the convent were soundly defeated by the Protestant-controlled Massachusetts legislature. Nancy Lusingan Schultz, *Fire & Roses: The Burning of the Charlestown Convent, 1834* 3-5, 223-224, 228 (2000).

In 1844, nativist mobs attacked and burned several Catholic churches and houses in Philadelphia in a series of riots, leading to at least 29 deaths. Michael Feldberg, *The Philadelphia Riots of 1844: A*

⁴ At the end of the eighteenth century, there were approximately 30,000 Catholics living in United States. By 1850, there were 1.6 million. By 1900, 12 million. See John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 299 (2001).

Study in Ethnic Conflict 99-175 (1975). A grand jury report blamed the Irish Catholics for the riots, stating that the outbreak of violence was due to “the efforts of a portion of the community to exclude the Bible from the public schools.” Margaret F. Brinig & Nicole Stelle Garnett, *Lost Classroom, Lost Community, Catholic Schools’ Importance in Urban America* 14 (2014).

In 1855, armed nativist mobs gathered at Louisville, Kentucky, polls on Election Day to deter the growing Catholic population from voting. In the ensuing “Bloody Monday” riots, at least 22 people were killed, and many German and Irish businesses, homes, and churches were attacked, looted, or burned. The dead included a Catholic priest who was stoned by rioters as he attempted to visit a sick parishioner and several Irish immigrants who were shot down as they tried to escape burning buildings. No one was convicted of any crimes in connection with the riots. C. Robert Ullrich & Victoria A. Ullrich, *Germans in Louisville: A History* 8 (2015).

The nativist movement grew in size and power throughout the mid-1850s. Politically, the anti-Catholic Native American Party, better known as the “Know Nothings,” enjoyed a rise in prominence that reached a high-water mark in the 1850s, when it controlled 52 seats in the United States House of Representatives, and its nominee for President received 21.5% of the popular vote in 1856. Richard F. Selcer, *Civil War America 1850 to 1875* 197-198 (2006). Although the party would soon collapse under an internal divide over slavery, anti-Catholic sentiment continued with broad public support. *Id.*

Public education proved to be a significant rallying point for nativists, who perceived Catholics as a threat to public schools. In the early nineteenth century, public education was unquestionably religious, specifically Protestant. *See Espinoza*, 591 U.S. at 503 (Alito, J., concurring). Reading from the Bible was common and, in some cases, a mandatory part of the curriculum, as were the singing of hymns and the recital of morning prayers. As one historian observed:

Protestant ministers and lay people were in the forefront of the public-school crusade and took a proprietary interest in the institution they had helped to build. They assumed a congruence of purpose between the common school and the Protestant churches. They had trouble conceiving of moral education not grounded in religion.

David Tyack, Thomas James & Aaron Benavot, *Law and the Shaping of Public Education, 1785-1954* 162 (1987).⁵

⁵ Additionally, “[m]ost nineteenth century Americans believed that morality and Christianity were inseparable and that both were necessary for the preservation of republican society. However, too many people failed to attend church to risk leaving the instruction of morality to religious institutions. Thus, the common school quickly became the primary institution for inculcating public morality. In all levels of education, both public and private, primary through collegiate, the moral teachings of the Bible were taught and, to varying degrees, religious services were conducted. But public schools did more than serve as surrogates for church instruction. The entire curriculum centered on general assumptions of God's existence, the sense of

As Catholic populations grew in large cities, they sought to break the Protestant monopoly on public education. See Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 669 (Summer 1998). Several Catholic groups filed lawsuits seeking to remove the Protestant Bible from public school curriculum, but they were largely unsuccessful. In *Donahoe v. Richards*, 38 Me. 379 (1854), for example, a Catholic student was expelled from a Maine public school for refusing to read the Protestant version of the Bible, which the town school committee required. The state's highest court ruled that required reading of the Protestant Bible was not an infringement of religious freedoms. *Id.* at 382–83. *Donahoe* was the first of 25 similar suits brought in 19 states through 1925, only five of which resulted in favorable rulings for the plaintiffs. See Viteritti, *supra* at 667.

In addition, several dioceses lobbied their state legislatures to appropriate funds for the establishment of their own schools. See *id.* at 699. These efforts were not only unsuccessful, they also were met with violence and condemnation:

This activity provoked a display of majoritarian politics of unprecedented brutality—all under the inverted banner of religious freedom. When Bishop Hughes of New York entered the fray in 1842 to demand public support for

His universe, and the 'spirituality' of human nature. Schools were the primary promulgators of this Protestant way of life." Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Leg. Hist. 38, 45 (1992).

Catholic schools, his residence was destroyed by an angry mob, and militia were summoned to protect St. Patrick's Cathedral. When Catholics in Michigan proposed a similar school bill in 1853, opponents portrayed their plan as a nation-wide plot hatched by the Jesuits to destroy public education. Parochial school advocates in Minnesota were accused of subverting basic American principles. When the Know-Nothing Party gained control of the Massachusetts legislature in 1854, it drafted one of the first state laws to prohibit aid to sectarian schools, and simultaneously instituted a Nunnery Investigating Committee. This same Massachusetts body that counted 24 Protestant clergymen among its members also tried to pass legislation that would limit the franchise and the right to hold office to native-born people.

Id. at 699–670.

In September of 1875, President Ulysses S. Grant seized on the rising nativist pressure to protect public schools from Catholic influence for political purposes. The Whiskey Ring conspiracy had recently been exposed, and Grant and the Republican Party were in desperate need of a popular issue to distract the public from the corruption and to reverse the political fortunes of the party, which had recently lost control of the House. *See Green, supra* at 49. Grant found his cause in the public school debate. Speaking to a group of Civil War veterans in Iowa, he vowed to encourage a system “of a good common school

education, unmingled with sectarian, pagan, or atheistical dogmas,” and he resolved “that not one dollar, appropriated for their support, shall be appropriated to the support of any sectarian schools.” *Id.* at 47.

Grant’s speech was well received by political leaders, who called for a constitutional amendment to put the suggestions into practice. *Id.* at 48. But the Catholic Church was wary. One prominent Catholic publication wrote that if the President’s speech could be accepted at face value, Catholics would have few complaints with its content, but complained that Grant’s condemnation of “sectarianism” was a veiled attack on Catholicism—an observation that has been echoed by this Court. *See id.*; *see also Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (Thomas, J., joined by Rehnquist, C.J., and Kennedy and Scalia, JJ.) (“[I]t was an open secret that ‘sectarian’ was code for ‘Catholic.’”); *Zelman v. Simmons-Harris*, 536 U.S. 639, 721 (2002) (Breyer, J., dissenting, joined by Stevens and Souter, JJ.) (“But the ‘Protestant position on this matter, scholars report, ‘was that public schools must be “nonsectarian” (which was usually understood to allow Bible reading and other Protestant observances) and public money must not support “sectarian” schools (which in practical terms meant Catholic).’”).

Still, Grant’s proposal was popular, and in December of 1875, he specifically called for a constitutional amendment to resolve the long simmering “Catholic question” in his annual address to Congress. Green, *supra* at 52. One week later, Representative James G. Blaine of Maine submitted such an amendment in the House, which read:

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

Id. at 53.

Ironically, there is little evidence that Blaine, who sent his own daughters to a Catholic-run boarding school, was himself anti-Catholic. But Blaine was politically ambitious. After serving in the Maine House of Representatives from 1858 to 1862, he ran for and won a seat in the United States House of Representatives in 1862. By 1869, he had become Speaker of the House, a position he held until his Republican party lost the House in 1875. Unlike Grant, Blaine was free of scandal and perceived as a viable Republican candidate for the presidency, and he hoped his amendment would provide the political mileage necessary to win his party's nomination. Green, *supra* at 50.⁶

⁶ As Green observes, it does not appear that Blaine had any interest in the issue after his federal amendment failed:

In his autobiography, *Twenty Years of Congress*, published in 1884, Blaine made no reference to the amendment. Grant's 1875 message received

Ultimately, however, Blaine's presidential ambitions would contribute to his amendment's undoing. Rivals for the Republican nomination hoped to embarrass him by criticizing the amendment for not being specific enough and suggesting that it could be used to drive Protestant practices out of public schools. Democrats, who recognized that the amendment was a political move to shore up Protestant votes in the upcoming election, passed a watered-down version of the amendment in hopes of removing it as a campaign issue in 1876. Ultimately, the Republicans proposed a compromise amendment that specifically guaranteed Bible reading in the public schools, but after passing in the House, it fell four votes short of the required two-thirds majority in the Senate to pass. 4 Cong. Rec. 5191-5192 (1876); 4 Cong. Rec. 5595 (1876).

III. Oklahoma's Blaine Amendment Was Forced upon It as a Condition of Statehood.

While Blaine's amendment ultimately failed at the federal level, it found much greater success at the state level. By 1876, 14 states had enacted legislation prohibiting the use of public funds for religious schools; by 1890, 29 states had incorporated such provisions into their constitutions; today, 37 states

only a brief comment in his book, and he failed to mention his own call for sectarian-free schools. To Blaine, the substance of the amendment was insignificant. After the amendment failed to secure him the nomination, it also lost all importance as even an historical event.

Green, *supra* at 54.

include some version of the Blaine Amendment in their state constitution.⁷

Oklahoma is one of the 37. Article 2, Section 5 of the Oklahoma Constitution reads:

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

Id.

Notably, Article 2, Section 5 does not appear to be born out of any deep-rooted Catholic hostility that existed in the then-territory. Rather, Oklahoma, like

⁷ ALA. CONST. art. XIV, § 263; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. IX, § 10, art. II, § 12; CAL. CONST. art. IX, § 8, art. XVI, § 5; COLO. CONST. art. V, § 34, art. IX, § 7; DEL. CONST. art. X, § 3; FLA. CONST. art. I, § 3; GA. CONST. art. I, § II, para. VII; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 5; ILL. CONST. art. 10, § 3; IND. CONST. art. I, § 6; KAN. CONST. art. 6, § 6(c); KY. CONST. § 189; MASS. CONST. art. XVIII, § 2; MICH. CONST. art. I, § 4; MINN. CONST. art. I, § 16, art. XIII, § 2; MISS. CONST. art. IV, § 66, art. 8, § 208; MO. CONST. art. I, § 7, art. IX, § 8; MONT. CONST. art. X, § 6; NEB. CONST. art. VII, § 11; NEV. CONST. art. XI, § 10; N.H. CONST. pt. 2, art. 83; N.M. CONST. art. XII, § 3; N.Y. CONST. art. XI, § 3; N.D. CONST. art. VIII, § 5; OKLA. CONST. art. 2, § 5; OR. CONST. art. I, § 5; PA. CONST. art. III, § 15, art. III, § 29; S.C. CONST. art. XI, § 4; S.D. CONST. art. VI, § 3, art. VIII, § 16; TEX. CONST. art. I, § 7, art. VII, § 5(C); UTAH CONST. art. I, § 4, art. X, § 9; VA. CONST. art. IV, § 16; WASH. CONST. art. I, § 11; WIS. CONST. art. I, § 18; WYO. CONST. art. I, § 19, art. III, § 36, art. VII, § 8.

many other western territories, was required to include the amendment as a condition for statehood:

And [the Oklahoma constitutional] convention shall provide in said constitution: ... for the establishment and maintenance of a system of public schools, which shall be open to all the children of said State and free from sectarian control. . . .

ENABLING ACT OF 1906, Ch. 3335, 59th Cong. § 4 (1st Sess. 1906). Article 2, Section 5 is not a Blaine *amendment* only insofar as it was part of Oklahoma's original constitutional text. It is nevertheless a relic of the effort to bar funding for Catholic educational institutions and preserve the Protestant-infused system of public education.

Overt anti-Catholic bigotry has largely subsided, but the legacy of Oklahoma's Blaine Amendment is nevertheless present today. Through its charter school law, Oklahoma seeks to increase learning opportunities for students, encourage different and innovative teaching methods, and provide academic choices for parents and students. To accomplish these goals, the state places few limits on eligible charter school applicants, allowing nonprofits, educators, parents, and other community members to establish charter schools. St. Isidore, with a unique perspective and mission, achieves all of the objectives of the charter school law, but St. Isidore is excluded solely because it is a "sectarian" institution affiliated with the Catholic Church. A state constitutional provision that excludes only religious institutions from a law designed to foster educational choice is incompatible

with the United States Constitution and the First Amendment's religion clauses, which require neutrality among religions *and toward religion itself*.

CONCLUSION

This Court should reverse the judgment of the Oklahoma Supreme Court, hold that charter schools, including St. Isidore's, are not state actors, and hold that the Free Exercise Clause prohibits states, including Oklahoma, from discriminating against religious schools when operating their charter school programs.

Respectfully submitted,

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