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 Oklahoma Supreme Court

BRIEF OF *AMICUS CURIAE* CHARTER SCHOOL GROWTH FUND IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Charter School Growth Fund (CSGF) is a national nonprofit that identifies the country's best public charter schools, funds their growth, and helps increase their impact. CSGF makes multi-year, philanthropic investments in talented education leaders who are building networks of excellent public charter schools to help expand those schools' impact and achieve excellent outcomes for students. CSGF has funded more than 1,600 schools that serve more than 725,000 students in 32 States, the District of Columbia, and Puerto Rico.

CSGF knows firsthand how charter schools serve as hubs for education innovation—whether by implementing new schooling models or better utilizing technology in the classroom—tailored to serving their students and families and to meeting specific community needs. Fostering such innovation to serve specific communities and student populations requires substantial flexibility for charter schools, including setting their curriculum and exploring creative teaching models. By the same token, States must have flexibility to design their charter-school programs to provide high-quality public education to meet their citizens' needs. CSGF has a strong interest in any constitutional limits imposed on States' and charter schools' ability to provide innovative public education for the States' citizens.

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[1] Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION

This case concerns the States' responsibility and ability to provide for public education, and their corresponding authority to decide how best to do it, including whether and what kinds of charter schools to authorize, fund, and oversee. The principal arguments of the parties and other amici address the issue as if the Court must make a choice between two extremes: the Constitution either demands religious charter schools or prohibits them. And they frame that choice as if it turns on whether charter schools are properly deemed private or public entities (albeit under different standards).

If the Court believes it must follow that course and make that choice, we fully support Respondent. We support maintaining the current charter-school framework of providing public education that has served students, families, and communities throughout the country well for the last three decades. Amicus believes that States can lawfully support religious education in myriad ways while maintaining a purely secular charter-school program.

But the Court need not see this case as presenting a choice between two extremes. The Court does not need to hold that the First Amendment would prohibit a State from designing a framework, inspired by the success of charter schools, that includes religious schools to hold that the First Amendment does not demand that it do so. As with other government programs, States must have considerable leeway to design their public-education system. That leeway should include deciding whether to include religious education within their charter-school system—regardless of whether those schools are considered public or private entities for these purposes and whether the State could make a different choice. The concept of religious charter schools could fit within the "play in the joints"

between the Free Exercise and Establishment Clauses. Because Oklahoma acted within its discretion to design a charter-school program that does not provide for religious charter schools, this Court should affirm.

SUMMARY OF ARGUMENT

This Court's recent decisions confirm that while States are not required to fund private religious education, they may not exclude an independent private school from an otherwise available government benefit based solely on its religious status or exercise. *Carson v. Makin*, 596 U.S. 767 (2022); *see Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464 (2020); *Trinity Lutheran Church of Colum., Inc. v. Comer*, 582 U.S. 449 (2017). None of these cases, however, involved charter schools established, funded, and overseen within state-sponsored programs to provide public education that is free and open to all.

Although charter schools are often run by private organizations, the schools themselves offer a public education and meaningfully differ from independent private K-12 schools, like those in *Carson* and *Espinoza*, or private preschool and daycare centers like the one in *Trinity Lutheran*. Charter schools accept all comers and charge nothing to students and their families. And while they enjoy flexibility to innovate, they remain accountable to the State with respect to their curriculum, operations, and results. The Court should not extend its private-school precedents to the distinct charter-school context but should recognize instead that when a State decides to provide public education to its citizens through a charter-school program, it has latitude to include only secular charter schools.

I. Charter schools benefit students, families, and communities by providing free, public education that is open

to all. They occupy a unique position within public education because of their flexibility to innovate while still being accountable to their government sponsor. That flexibility makes charter schools well-positioned to adopt a variety of education approaches to foster student success. And the results are clear. Charter schools boost education outcomes compared to their district-school counterparts while serving more students from diverse backgrounds.

To date, no State in the country has attempted to construct a charter-school program that includes religious charter schools. As Respondent well explains, there are a host of potential obstacles to such an approach. But at the same time, amicus recognizes the benefits of religious education. We celebrate its inclusion among a parent's choices. And we can understand why a State might decide, as a policy matter, to deploy the lessons of the charter-school movement to provide for religious education that follows the same principles and standards of excellence that make charter schools thrive.

II.A. The Constitution should not be read to mandate that approach. States have a responsibility to design and operate programs that provide for the public education of their citizens. As the designers and funders of government programs that approve, fund, and oversee charter schools, States must have latitude to define their programs' contours, including by defining the characteristics of the charter schools their programs include (or exclude).

Allowing States to decide the scope of their charter-school programs is fully consistent with this Court's jurisprudence. This Court has long recognized that in both designing and implementing government initiatives—like administering spending programs, creating limited-public forums, and pursuing other public concerns—States need not provide for or include all alternatives. States "can,

without offending the Constitution, selectively fund certain programs to address an issue of public concern, without funding alternative ways of addressing the same problem." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 217 (2013) (*AOSI*). Such programs may further activities that a State wants to promote—like robust public education—while not providing for every alternative means of promoting that end.

Applying those principles here, States have leeway to decide how to best structure public-education programs, including when providing public education through charter schools. Designing such a charter-school program is distinct from extending a generally available government benefit like a tax credit or scholarship fund to independent private schools. In the States where they operate (nearly all of them), charter schools are a critical component of the State's public-education system—free, public, and open to all. The important constitutional limitations recognized in *Trinity Lutheran*, *Espinoza*, and *Carson* for providing generally available government benefits to independent private schools should not be reflexively extended to a State's design of its charter-school program.

II.B. If a State chooses to operate a charter-school program in providing public education to its citizens, the First Amendment should not be understood to require the State to include religious charter schools—for three reasons.

First, history and tradition support allowing States to decide whether and how to establish and authorize religious charter schools. In *Espinoza*, the Court recognized that States took varying approaches to religious schools from the Founding through Reconstruction. That variation is key, suggesting that States perceived freedom to legislate in this area. Drawing on that history and

tradition here favors affording States similar leeway on the issue of religious charter schools.

Second, allowing States to operate purely secular charter-school programs does not penalize religion or prohibit religious education. No student or family is barred from getting a public education at a charter school—nor is any compelled to attend one. Similarly, private entities are not prohibited from operating private religious schools, and parents are not forbidden from sending their children to them. And, critically, maintaining a secular charter-school program does not preclude a State from operating other programs that benefit religious schools.

Third, compelling non-discriminatory reasons support a State's decision to design a purely secular charter-school program. Providing for and supporting religious education is a public good. A State could well decide that creating a charter-school framework that included such education choice could add value to a State's public-education system. But there are also compelling reasons why a State may decide that religious schools should operate independently of its public-education system. Continuing government oversight of religious charter schools would present a host of complex issues that lead a State to find other ways to support religious education. States may have reasonable concerns about excessive entanglement, given that charter schools have a closer connection to the State than independent private schools. The Court can acknowledge the lawfulness of that choice without foreclosing a State, in the future, from making a different one.

Because the Constitution grants Oklahoma leeway to decide not to include religious schools within its charter-school framework—whether another State could constitutionally include them—the Court should hold that

Oklahoma has constitutionally exercised its prerogative here and affirm the judgment below.

ARGUMENT

I. Charter Schools Benefit Students, Families, and Communities by Providing Free Public Education with Flexibility to Innovate.

Charter schools have become a critical component of most States' public education. These schools diversify the options that parents have for educating their children. They often boost educational outcomes for a diverse range of students and have flexibility to adopt a variety of educational approaches to better serve students and families. And for decades, charter schools and private religious schools have co-existed in communities across the country, striving to educate students and serve more families.

No State has yet attempted to combine charter schooling and religious education. The creation of religious charter schools is fraught with practical complexities. But designing a charter-school construct that provided for religious education would be yet another innovation that could add diversity of educational opportunity that could appeal to some students and families. The Court need not foreclose that possibility.

A. Charter schools provide high-quality public education and enhance outcomes for a diverse range of students.

Charter schools now serve millions of students annually in the United States. *See* Nat'l All. for Pub. Charter Schs., *Charter Schs. 101*, https://tinyurl.com/23r89jbw. These schools provide high-quality public education that promotes the success of students from all backgrounds. The results are unmistakably positive.

Four traits are critical to any charter school. Charter schools must (1) be free, public, and open to all; (2) undergo a rigorous and fair authorization process by the State; (3) be assessed and held accountable for their performance by the State; and (4) comply with relevant state and federal regulations on human resources in education.

Beyond those four traits, charter schools have substantial "flexibility and autonomy to design classroom instruction to best serve their community's needs." *Charter Schs. 101*, *supra*. They employ a variety of approaches to educate students not just in foundational subjects but also in STEM, foreign language, the arts, and social-emotional learning. Indeed, charter schools come in many forms. While "[s]ome schools may focus on arts or theater," other schools "may emphasize science, technology, engineering, and mathematics." J. Fischler & C. Claybourn, *Understanding Charter Schs. vs. Pub. Schs.*, U.S. News & World Rep. (Nov. 14, 2023), https://tinyurl.com/5cmw3ve8.

This flexibility does not come at the expense of accountability to the State. Charter schools "can tailor their curriculum, academic focus, staffing ratios, discipline policies and other matters," but they remain accountable to the government body that authorized them. *Id.*; *see* G. Richmond, *Choice, Flexibility, and Accountability Drive Sch. Improvement*, Educ. Next (Jan. 25, 2022) (discussing ways charter schools have flexibility and accountability), https://tinyurl.com/yc4uhxcy. That accountability helps maintain high standards among charter schools and can result in defunding or closure because of low performance.

With this balance, charter schools achieve remarkable successes for their students, who often reflect more racial and socioeconomic diversity than traditional public schools. *See* N. Lopez, *Who Attends Charter Schs.?*, Nat'l All. for Pub. Charter Schs. (Nov. 20, 2024), https://tin

yurl.com/yfujdds7. A 2023 study concluded that "the typical charter school student in [the study's] national sample had reading and math gains that outpaced their peers in the traditional public schools … they otherwise would have attended." M. Raymond, *et al.*, *As a Matter of Fact: The Nat'l Charter Sch. Study III 2023*, at 5, Ctr. for Rsch. on Educ. Outcomes (2023), https://tinyurl.com/msbeydhf. These results "represent[] accelerated learning gains for tens of thousands of students across the country" and show that "it is possible to dramatically accelerate growth for students who have traditionally been underserved by traditional school systems." *Id.*[2] And beyond their own student populations, charter schools often have positive spillover effects that result in increased achievement for students in traditional public schools. *See* D. Griffith & H. Kuwayama, *Does Competition from Charter Schs. Help or Hurt Traditional Pub. Schs.?*, Thomas B. Fordham Inst. (Aug. 29, 2024), https://tinyurl.com/4pcxbmh6.

In short, charter schooling in the United States has materially improved public education across the country. In doing so, charter schools have served students and families in the same communities where private religious schools also operate and serve their own student populations.

B. A State could construct a charter-school framework that provides for religious education.

To date, no State has attempted to construct a charter-school framework that authorizes, funds, and provides

[2] The CSGF-funded schools included in the study helped drive these results. The study's authors found that "the strength of CSGF student results cannot be ignored." Raymond, *As a Matter of Fact*, *supra*, at 108.

continuing oversight of religious charter schools. As Respondent explains, serious obstacles stand in the way of doing so. *See* Resp. Br. 41-46. Still, amicus recognizes that religious education benefits students and aligns with families' desires for their children's education. As a policy matter, a State could employ the lessons of the charter-school movement to provide for the creation of publicly funded high-performing religious schools.

A charter school that incorporates religious education would diversify the public education offered by a State, allowing the State to give families and students a mosaic of diverse school choices. And just like course offerings in STEM, the arts, and foreign language can all play important roles in developing well-rounded and successful students, so too could religious education help students develop into multifaceted and well-developed citizens. Religious education may also be desirable to parents who wish to have their children educated in an environment consistent with lessons and values being taught at home.

A State thus might seek to further these policy considerations while ensuring that the resulting program used the same standards and guardrails that make the current status quo in charter schooling so successful. In other words, it might seek to permit a school to include a component of religious education while still (1) being free, public, and open to all; (2) undergoing a rigorous and fair authorization process like any other charter school; (3) being assessed and held accountable for their performance by the State, up to and including through defunding or closure; and (4) complying with state and federal regulations on human resources in education. In this way, a State could construct a charter-school framework that increased the diversity of high-performing school choices

available to parents without sacrificing the charter-school principles that make these programs thrive.

II. The Constitution Need Not Mandate a Uniform National Approach to Religious Charter Schools.

The First Amendment, as incorporated through the Fourteenth Amendment, prohibits States from enacting laws "respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const., amend. I. As the Court has recognized, these Religion Clauses often work in tandem. The arguments in this case have largely assumed they do so here—either religious charter schools must be permitted under the Free Exercise Clause and would not violate the Establishment Clause, or vice versa.

But "there is 'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels." *Trinity Lutheran*, 582 U.S. at 458 (quoting *Locke v. Davey*, 540 U.S. 712, 718 (2004)). "In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Locke*, 540 U.S. at 718-19. And the only question the Court must answer in this case is whether designing a purely secular charter school program violates the Free Exercise Clause.

It does not violate the Free Exercise Clause to include only secular schools in a State's charter-school program, even if it would not violate the Establishment Clause to design a new charter-school framework that included religious schools. Charter schools are authorized, publicly funded, and overseen through programs that States design and administer. States must have considerable latitude in defining the contours and contents of those programs, including by broadening or limiting the types of charter schools that may be established within them.

History, tradition, and reason show that the State has latitude whether to include religious schools in its charter-school program. As Respondent puts it, the "play in the joints between the Religion Clauses *permits* States to maintain strictly secular public schools, if they so choose." Resp. Br. 24.

A. States must have latitude to choose among various alternatives in providing public education.

Providing public education through a charter-school program that best serves the needs of students and families involves considering varying alternatives, including whether to authorize religious charter schools. A State may select among these alternatives to achieve valid policy objectives in administering its public-education programs, even if the choice means some putative charter schools will not be authorized under the program.

1. In numerous contexts, this Court has recognized that the Constitution affords States substantial latitude to design and implement government programs.

The Court has recognized in several lines of First Amendment decisions that in designing and implementing programs to carry out government functions, a government need not provide for all alternatives. In implementing a spending program, for example, the government can set its own spending priorities, even if doing so necessarily means government funds will support some activities but not others. In a similar vein, a government can create and operate a limited public forum, even though, by definition, that forum does not encompass all possible groups or issues. The Court has also extended this principle to state laws regulating how public-sector unions can spend certain funds. Together, these cases stand for the proposition

that the government has leeway to design and implement its programs, and the mere fact that a program is not all-inclusive does not necessarily mean that the government has penalized or burdened constitutional rights. Each line of cases is discussed in turn.

When States enact spending programs, they "have wide latitude to set spending priorities," "[s]o long as legislation does not infringe on other constitutionally protected rights." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587-88 (1998). In exercising this discretion, a State "can, without offending the Constitution, selectively fund certain programs to address an issue of public concern, without funding alternative ways of addressing the same problem." *AOSI*, 570 U.S. at 217; *see Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (articulating a similar standard); *cf. Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 543 (2001) (citing *Rust* for the proposition that when the government "establishes a subsidy for specified ends," "certain restrictions may be necessary to define the limits and purposes of the program"). Indeed, a State "may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake." *Finley*, 524 U.S. at 587-88.

Similarly, for limited public forums, the Court has recognized that "[n]othing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799-800 (1985). The "defining characteristic of limited public forums," after all, is that "the State may reserve them for certain groups" and may exclude those who are "not a member of the class of speakers for whose especial benefit the forum was created." *Christian Legal Soc'y Chapter of the Univ. of Cal.*,

Hastings Coll. of Law v. Martinez, 561 U.S. 661, 681 (2010) (internal quotation marks and alterations omitted); *see Velazquez*, 531 U.S. at 543 ("When the government creates a limited forum for speech, certain restrictions may be necessary to define the limits and purposes of the program."). Once the government opens a limited public forum, it may operate it according to "the lawful boundaries it has itself set." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

The Court has extended these same principles to state programs allowing public-sector unions to collect fees and dues but conditioning how the money may be spent. In *Davenport v. Washington Education Ass'n*, the State of Washington enacted a framework allowing the creation of public-sector unions and permitting those unions to collect agency shop fees from nonmember-employees. 551 U.S. 177, 181-82 (2007); *see id.* at 181 (noting the National Labor Relations Act "leaves States free to regulate their labor relationships with their public employees"). By statute, however, the unions could not use the fees to make campaign contributions, influence an election, or operate a political committee without the nonmember-employee's consent. *Id.* at 182. The Court upheld this limitation against a First Amendment challenge, relying on earlier spending and limited-public-forum cases. The principle underlying those cases was "equally applicable" to the limitation that Washington had placed on the use of agency shop fees. *Id.* at 188-89. Washington's law did not "impermissibly distort[] the marketplace of ideas" because the public-sector unions "remain[ed] as free as any other entity to participate in the electoral process." *Id.* at 189-90.

Similarly, in *Ysursa v. Pocatello Education Ass'n*, the State of Idaho enacted a law prohibiting "payroll deductions for political purposes" from public employees. 555

U.S. 353, 355-56 (2009). The Court found no First Amendment problem with the law, as Idaho did "not suppress political speech but simply decline[d] to promote it through public employer checkoffs for political activities." *Id.* at 361. The ban "plainly serve[d] the State's interest in separating public employment from political activities." *Id.* As in *Davenport*, the Court again cited its spending and limited-public-forum cases, among others, to reach this conclusion. *See id.* at 358-61. In *Davenport* and *Ysursa*, the Court sustained government initiatives in which States designed government programs "for the purpose of furthering activities that they particularly desired to promote but did not provide a similar benefit for the purpose of furthering other activities." *Matal v. Tam*, 582 U.S. 218, 243 (2017) (plurality opinion of Alito, J.). In choosing among available alternatives, neither State offended the Constitution.

Several Members of this Court have recognized that these same principles may apply more broadly beyond the contexts in which they arose. In *Matal v. Tam*, a plurality left open whether "a broader doctrine" based on "'government-program' cases" would be an appropriate framework to "analyz[e] free speech challenges to provisions of the Lanham Act" concerning federal trademark protection. *Id.* at 241, 244 n.16 (plurality opinion of Alito, J.). In *Iancu v. Brunetti*, several Justices again expressed similar interest in extending or applying the reasoning of these First Amendment cases involving government initiatives. *See* 588 U.S. 388, 401 (2019) (Roberts, C.J., concurring in part and dissenting in part) (agreeing that refusal to register certain trademarks did not violate the First Amendment when "[w]hether such marks can be registered does not affect the extent to which their owners may use them," "[n]o speech is being restricted[, and] no one is

being punished"); *id.* at 422-24 (Sotomayor, J., concurring) (discussing cases involving "government initiatives" and explaining no First Amendment issue arose "in the limited-forum and government-program cases" where "some speakers benefit[ed], but no speakers [were] harmed"). So too for a case decided just last Term. *See Vidal v. Elster*, 602 U.S. 286, 331-33 (2024) (Sotomayor, J., concurring).

2. These same principles should apply to a State's provision of public education through charter schools.

The Court should extend the logic of its government-initiative and limited-public-forum cases to States' provision of public education through charter schools.

It is this Court's "oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and [the] state." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *see* Okla. Const., Art. 13, § 1 ("The Legislature shall establish and maintain a system of free public schools wherein all the children of the State may be educated."). The States "hav[e] a high responsibility for education of [their] citizens," and "[p]roviding public schools ranks at the very apex of the function of a state." *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). Public education is a "paramount responsibility." *Id.*

Given that weighty responsibility, States must have corresponding authority to define the contours of their public-education programs. Schools "enjoy a significant measure of authority over the types of officially recognized activities in which their students participate." *Christian Legal Soc'y*, 561 U.S. at 686-87 (internal quotation marks omitted). Indeed, this Court has repeatedly

cautioned against second-guessing what constitutes sound education policy, *see id.* at 686 (collecting cases), subject to constitutional limits, and has even said that "First Amendment rights must be analyzed in light of the special characteristics of the school environment," *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981) (internal quotation marks omitted). States' latitude in designing and implementing public education allows for state-by-state experimentation and innovation to build excellent public-education systems that serve the needs of students and families. The nation's federal system not only allows such variation but is built for it. *See New State Ice Co. v. Leibmann*, 285 U.S. 262, 311 (1932).

Nothing in this Court's decisions forecloses States' latitude in designing their public-education system to include only secular charter schools. In *Carson*, *Espinoza*, and *Trinity Lutheran*, this Court reaffirmed that "disqualifying otherwise eligible recipients from a public benefit 'solely because of their religious character' imposes 'a penalty on the free exercise of religion that triggers the most exacting scrutiny.'" *Espinoza*, 591 U.S. at 475 (quoting *Trinity Lutheran*, 582 U.S. at 462); *see Carson*, 596 U.S. at 780. So, while States have no obligation to provide government aid to independent private schools, "[o]nce a State decides to do so, it cannot disqualify some private schools solely because they are religious." *Espinoza*, 591 U.S. at 487.

But none of these cases directly considered whether the States' decision could be justified by the principles, discussed above, that give States a significant measure of freedom in designing and implementing government programs. *Cf. Carson*, 596 U.S. at 784 (citing *AOSI*, 570 U.S. at 215, and *Velazquez*, 531 U.S. at 547). And there are good reasons to treat a State's design of a charter-school

program differently than the generally available benefits considered in those cases.

A charter school's inclusion in a State's public-education program does not amount to an independent private entity's receipt of a government benefit. *See Plyler v. Doe*, 457 U.S. 202, 221 (1982) (explaining public education is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation"). Operating a charter school within a State's charter-school program is entirely different than simply accepting tuition assistance provided to parents by the State. Moreover, charter schools are not like independent private schools. In *Carson*, the Court recognized "numerous and important" differences between the private schools at issue in that case and public schools. 596 U.S. at 783. Those same differences also distinguish charter schools from independent private schools.

To begin with the "most obvious," *Carson* identified that independent private schools are different from public schools "by definition because they do not have to accept all students." *Id.* Charter schools, by contrast, *do* accept all students—indeed, they obtain authorization from and collaborate with the State to provide public education open to everyone. The Court in *Carson* also noted that even when States provide tuition assistance, independent private schools are "often *not* free" and "charge several times the maximum benefit" provided by the State. *Id.* But as providers of public education, charter schools *are* free for students to attend.

The differences do not end with enrollment and tuition. *Carson* explained that "the curriculum taught at participating private schools need not even resemble that taught in the … public schools." 596 U.S. at 783. In contrast, although charter schools have flexibility in setting their

curriculum, the State generally retains some control over the curriculum and the standards that the curriculum must meet. Oklahoma is no exception. The contract between the Oklahoma Statewide Virtual Charter School Board and the St. Isidore of Seville Board of Directors provides that "[a]ny material change to the program of instruction, curriculum and other services specified in the Application or this Contract requires Sponsor approval prior to the change." Resp. App. 5a. That contractual provision contains no exception for the State's oversight over the religious curriculum.

State-sponsored charter schools are thus different from independent private schools in key respects. In contrast to private schools, charter schools provide not merely a "rough equivalent of a … public education," *Carson*, 596 U.S. at 785, but a bona fide free, open-to-all, public education. *Carson* poses no obstacle to applying the government-program cases to a State's decisions in constructing public-education programs that authorize, fund, and oversee charter schools to benefit their citizens.

B. If a State chooses to operate a charter-school program, it is not bound to include religious charter schools.

Three considerations support the conclusion that, in exercising its leeway to provide public education through a charter-school program, a State may permissibly choose to include only secular charter schools, even if it would likewise be permissible to make a different choice. First, history and tradition support leaving it to States to decide whether to provide for religious schools in their charter-school programs. Second, choosing not to include religious schools in a State's charter-school program does not penalize the exercise of religion or prohibit religious education. And finally, there are compelling, non-

discriminatory reasons for a State to provide for only secular charter schools.

1. History and tradition support allowing States to decide whether to establish religious charter schools.

Over the Nation's history, States have adopted a variety of approaches to education. This history and tradition strongly favor allowing States discretion whether to authorize religious charter schools as part of the State's charter-school program. *Cf. Vidal*, 602 U.S. at 295-308; *id.* at 313-16, 319-23 (Barrett, J., concurring in part); *id.* at 327-29, 331-33 (Sotomayor, J., concurring in the judgment).

From the start, States have had competing visions for the relationship between church and state. During the Founding era, some States—like Massachusetts, Connecticut, New Hampshire, and Vermont—saw religion as vital to good and virtuous citizenship and provided public funding to support religious institutions and clergy. *See* V. Muñoz, *The Original Meaning of the Establishment Clause & the Impossibility of Its Incorporation*, 8 U. Pa. J. Const. L. 585, 605-08, 611 (2006). Other States—like Virginia, New York, and Rhode Island—took a more separationist approach, believing that religion did not need government financial support or influence to flourish. *Id.* at 608-12.

But in hashing out church-state relations, "there was considerable variation in the arrangements adopted in the various states." G. A. Tarr, *Church & State in the States*, 64 Wash. L. Rev. 73, 85 (1989). In fact, "[b]etween the Declaration of Independence and the ratification of the Constitution … each of the original thirteen states reconsidered the relationship between church and state within

its borders." *Id.* Some States enacted constitutional prohibitions against state religious establishments, others moved from single to multiple establishments, and yet others "liberalized their establishments by permitting citizens to support the churches of their choice." *Id.* While different in their particulars, the "overall direction" was toward disestablishment—a process that was underway by the 1780s and continued into the nineteenth century. *Id.* at 86.

State constitutional provisions reflect this shift. For example, constitutions dating between 1776 and 1792 in Maryland, North Carolina, Pennsylvania, and Vermont all provided in similar language that no person could be compelled "to contribute to the erection or support of any place of worship or to the maintenance of any ministry." Md. Const., Art. I, § 1 (1792), https://tinyurl.com/2ux7p4tb; *see* N.C. Const., Art. XXXIV, https://tinyurl.com/49bw8yrt; Pa. Const., Art. IX, § III (1790), https://tinyurl.com/3mk7x584; Vt. Const., Ch. I, § III (1786), https://tinyurl.com/uw5yspky. And Georgia and New Hampshire discussed religious instruction specifically. In Georgia's Constitution of 1777, the same provision containing a free exercise clause also states that persons "shall not, unless by consent, support any teacher or teachers except those of their own profession." Ga. Const., Art. LVI (1777), https://tinyurl.com/vpz4pmnk. New Hampshire's 1783 Bill of Rights provided that no one could be "compelled to pay towards the support of the teacher or teachers of another persuasion, sect or denomination." N.H. Bill of Rights, § VI (1783), https://tinyurl.com/yvmpjt89.

These competing visions for the relationship between church and state and early trends toward disestablishment were reflected in the provision of education. To be sure, at the Founding, "there was no such thing as public

education in the modern sense." M. McConnell, *Establishment & Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2171 (2003). Even as States became more involved in education, "there was no sharp distinction between public and private, religious and secular schools, until well into the nineteenth century." *Id.* A "public" school "meant only that schools were open to the general public." *Id.*

Initially, education that included religious components enjoyed widespread financial support from governments. *See* M. Storslee, *Church Taxes & the Original Understanding of the Establishment Clause*, 169 U. Penn. L. Rev. 111, 182-83 (2020). This Court has recognized that "[i]n the founding era and early 19th century, governments provided financial support to private schools, including denominational ones." *Espinoza*, 591 U.S. at 480. States encouraged this policy in their constitutions and statutes, "[l]ocal governments provided grants to private schools, including religious ones, for the education of the poor," and even States that banned government support for clergy still "provided various forms of aid to religious schools." *Id.* at 480-81; *see* L. Jorgenson, *The State & the Non-Public Sch.: 1825-1925*, at 4 (Univ. of Mo. Press 1987). Governments also supported religious schools after the Civil War. As the Court is aware, "Congress spent large sums on education for emancipated freedmen, often by supporting denominational schools in the South through the Freedmen's Bureau." *Espinoza*, 591 U.S. at 481.

Between the Founding and Reconstruction, however, as States began to increase their involvement in education, they simultaneously shifted public funding away from religious schools. Aid to denominational schools peaked in about 1820, and then gradually diminished. *See* Jorgenson, *The State & the Non-Public Sch.* 4.

Developments in New York provide an instructive case study. In the late 1700s, New York had a variety of schooling options, including boarding schools, denominational charity schools, and town-operated schools. *See* Steven K. Green, *The Bible, the Sch., and the Const.: The Clash that Shaped Modern Church-State Doctrine* 46 (Oxford Univ. Press 2012). In 1795, the State appropriated $50,000 annually for five years for cities and towns to use in support of existing schools, subject to local officials' discretion. *Id.* New York City used its share to support denominational charity schools. *Id.*

From 1800 to 1805, however, the State did not reauthorize the funding. *Id.* In 1805, the Free School Society was founded and offered a religious but nonsectarian curriculum. *See id.*; Jorgenson, *The State & the Non-Public Sch.* 14. As it gained popularity, the Free School Society received greater amounts of available public funding for schools. Green, *The Bible, the Sch., and the Const.* 46-47. By 1825, it boasted eleven elementary schools. *Id.* at 47; *see* Jorgenson, *The State & the Non-Public Sch.* 14 (explaining the Free School Society "was to all intents and purposes the public school system of the City of New York during the first half of the nineteenth century").

In the early 1820s, the Free School Society successfully opposed public funding for a denominational charity school operated by Bethel Baptist Church. The church had in 1820 founded a school and received public funds. *See* Green, *The Bible, the Sch. & the Const.* 47. In 1822, the church received a state grant to construct a school building and potentially open additional schools. *Id.* The Free School Society viewed the development as "a threat to its financial well-being, the nonsectarian model, and its long-range goals," and petitioned the legislature to repeal the grant. *Id.* The legislature deferred to the New York

City Common Council. In 1825, the Free School Society prevailed when the Common Council "voted to end the funding of religious charity schools. After 1825, only those schools of the Society and a handful of nondenominational charity schools were eligible to receive public school funds." *Id.* at 49; I. Bartrum, *The Political Origins of Secular Public Education: The New York School Controversy, 1840-42*, 3 N.Y.U. J. L. & Liberty 267, 287-91 (2008) (describing the Free School Society's origins and this controversy).

During the same period, more than 30 States adopted so-called "no-aid" provisions. *Espinoza*, 591 U.S. at 480. Michigan enacted the first of these provisions in 1835. More States followed in the 1840s and 1850s. Although no-aid provisions are now often associated with the failed Blaine Amendment, "[f]orty-five percent of the state no-funding provisions were drafted *before* the debate over the Blaine Amendment." S. Green, *The Insignificance of the Blaine Amendment*, 2008 B.Y.U. L. Rev. 295, 327–28 (2008) (emphasis added). By the last quarter of the nineteenth century, "states uniformly—even where no state Blaine existed—declined to fund religious education directly," instead providing direct funding only to public schools. N. Feldman, *Non-Sectarianism Reconsidered*, 18 J. L. & Politics 65, 113-14 (2002).

While historical practice during this period may not establish a "tradition against state support for religious schools," it powerfully supports the Court's recognition "that the historical record is complex." *Espinoza*, 591 U.S. at 482-83 (internal quotation marks and emphasis omitted). And for present purposes, that complexity is the point. "[G]overnments over time have taken a variety of approaches to religious schools." *Id.* at 483. The Court should draw on that history and tradition to afford States

similar leeway in deciding whether to establish and fund religious charter schools within their charter-school programs.

2. Allowing States to operate secular charter-school programs does not penalize religion or prohibit religious education.

Against the backdrop of that history and tradition, a charter-school program's unique role in public education makes clear that States do not discriminate against religious education simply by operating secular charter-school programs. This Court's "now-familiar refrain" is that "[t]he Free Exercise Clause protects against laws that 'impose[] special disabilities on the basis of … religious status.'" *Trinity Lutheran*, 582 U.S. at 461 (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993)). But just as the existence and funding of traditional, secular public schools do not penalize religion or forbid religious education, neither does a secular charter-school program.

A State that creates a charter-school program and chooses not to allow religious schools within that program does not burden the free exercise of religion. Religious observers are neither excluded from nor compelled to attend state-sponsored charter schools. No student or family is prohibited from getting a public education at a charter school "because of their faith, or lack of it." *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 16 (1947). No student faces a choice in which "to pursue [charter-school education], he would have to give up" his religion. *Trinity Lutheran*, 582 U.S. at 459 (discussing *McDaniel v. Paty*, 435 U.S. 618 (1978)). And those who practice religion are not denied "an equal share of the rights, benefits, and privileges enjoyed by other citizens" with respect to accessing high-quality, state-sponsored public education at a

charter school. *Id.* at 460 (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988)). Likewise, private entities are not prohibited from operating private religious schools, and parents are not forbidden from sending their students to them. In a secular charter-school program, the State has simply defined the contours of one program within its public-education system without purporting to regulate any conduct outside that program. *Cf. AOSI*, 570 U.S. at 214-15 (explaining "the relevant distinction" is between "conditions that define the limits of the government … program" and those that regulate conduct "outside the contours of the program itself").

Nor does a State's creation of a secular charter-school program preclude a State from operating other programs in which religious schools may participate or from which they can benefit. Oklahoma both operates a secular charter-school program *and* provides several forms of vouchers and need-based scholarships to help parents send their children to private schools, including religious schools. *See* Resp. Br. 6.

One could also readily imagine other creative frameworks that provide a secular charter-school program while allowing optional religious instruction through the same. A State might consider, for example, an approach that awards a charter for secular public education during the school day but does not forbid religious instruction in optional programs after school, especially when those optional programs are supported by outside funding. In analogous circumstances, the Court has already held that optional religious programming with a tangential connection to secular public education does not violate the Religion Clauses. *See Zorach v. Clauson*, 343 U.S. 306 (1952).

3. Compelling, non-discriminatory reasons support an exclusively secular public-education system.

Finally, a constitutional rule that permits States to authorize only secular charter schools is supported by compelling, non-discriminatory reasons for that choice.

To be sure, religious charter schools could be valuable additions to a State's public-education offerings. *See supra,* Part I.B. Charter schools' success is driven in part by their ability to employ a variety of education approaches to meet the particular needs of students and families in their communities. A charter school that incorporates religious education could enhance students' personal and academic development, just as training in STEM, the arts, and foreign language does. In addition, the availability of religious charter schools could broaden parents' ability to direct the upbringing of their children. *See Wisconsin*, 406 U.S. at 214 (noting "the traditional interest of parents with respect to the religious upbringing of their children" (internal quotation marks omitted)).

But there are compelling, non-discriminatory reasons why, to date, every State to establish a charter-school program has decided that religious schools—even if eligible for state subsidies—should operate independently of the State's public-education system. Respondent persuasively catalogs a number of these reasons. *See* Resp. Br. 41-46.

A State's relationship to a charter school does not end once the school is authorized and established but continues through ongoing oversight of the schools. A State may well conclude that the complexities of State involvement in religious charter schools, including overseeing (or at least having a veto power on) religious curriculum and the

hiring and firing of teachers and staff based on the school's religious tenets, may be more than a State wishes to take on. *See, e.g.*, *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 759 (2020) (noting "Catholic elementary school teachers" are "their students' primary teachers of religion" (emphasis omitted)); *id.* at 760 (describing how "many primary school teachers tie their instruction closely to textbooks, and many faith traditions prioritize teaching from authoritative texts," and discussing a teacher who "prayed with her students, taught them prayers, and supervised the prayers led by students"); *id.* at 761 (explaining that "[i]n hiring a teacher to provide religious instruction, a religious school is very likely to try to select a person who" is a practicing member of the employer's religion, but identifying whether someone is a "'co-religionist' will not always be easy").

A State may also reasonably be concerned about excessive entanglement with religion, especially given that charter schools provide public education and have a closer connection to the State than independent private schools do. *See Carson*, 596 U.S. at 787 (rejecting an argument that would "raise serious concerns about state entanglement with religion"). Finally, State legislatures should be able to decide whether including religious charter schools is consistent with the preferences of the citizens in that State. If it is not, a legislature might reasonably conclude that it should not act inconsistent with voter preferences by using public funds to establish religious charter schools.

* * *

Oklahoma created a charter-school program that, as a condition of the program, requires that charter schools be secular. The program does not forbid religious education outside the program and does not compel attendance at charter schools. In designing its program this way,

Oklahoma did not violate the Free Exercise Clause, even if the Establishment Clause would allow a different choice.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Oklahoma should be affirmed.

Respectfully submitted,

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