Nos. 24-394 & 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.

[Additional Caption on Inside Cover]

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

BRIEF OF *AMICI CURIAE* THE ASSOCIATION ON AMERICAN INDIAN AFFAIRS, THE NATIONAL NATIVE AMERICAN BOARDING SCHOOL HEALING COALITION, AND THE NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF RESPONDENT

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ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL,

Petitioner,

v.

GENTNER DRUMMOND, ATTORNEY GENERAL OF OKLAHOMA, *ex rel.,* OKLAHOMA,

Respondent.

QUESTIONS PRESENTED

1. Whether the academic and pedagogical choices of a privately owned and run school constitute state action simply because it contracts with the state to offer a free educational option for interested students.

2. Whether a state violates the Free Exercise Clause by excluding privately run religious schools from the state's charter-school program solely because the schools are religious, or whether a state can justify such an exclusion by invoking antiestablishment interests that go further than the Establishment Clause requires.

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INTEREST OF *AMICI CURIAE*[1]

Amicus Curiae, the Association on American Indian Affairs (Association), https://www.indian-affairs.org/, is the longest-serving national Native non-profit in the United States, operating since 1922. Since its founding, the Association has worked to protect tribal sovereignty and address the impact of federal Indian boarding schools on Native Nations, as well as to provide expertise and training on issues of federal Indian law. *Amicus Curiae*, the National Native American Boarding School Healing Coalition (NABS), https://boardingschoolhealing.org/, is an organization dedicated to addressing the historical trauma caused by the United States government's policy of forcibly removing Native American children from their families and communities to attend boarding schools. NABS works to raise awareness of this painful past by documenting the history and legacy of these schools, promoting legislative action to address the harm done by the schools, and advocating for truth-telling, healing and justice for Native communities impacted by the school system. *Amicus Curiae*, the National Congress of American Indians (NCAI), https://www.ncai.org/, is the oldest and largest national membership organization of American Indian and Alaska Native Nations and their citizens. Since 1944, NCAI has advised and educated tribal, state, and federal governments on issues of tribal sovereignty and federal Indian law and policy affecting Native Nations.

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1. Pursuant to Rule 37.6, counsel for *Amici Curiae* certify that no part of this brief was authored by counsel for any party, and no such counsel or party made a monetary contribution to the preparation or submission of the brief.

Amici firmly support Native Nations as distinct, separate sovereigns deciding for themselves how to educate their children and whether to direct the United States to use tribal monies for Indian education. *Amici* decry the harmful legacy of past federal policies which included forcibly converting Indian children to Christianity in federal Indian boarding schools and penalizing and criminalizing Native religions.

Amici are very concerned that these two important aspects of federal Indian law and federal policy might be misunderstood in these cases. *Amici* have a strong interest in ensuring that these matters are accurately depicted and not misused to support a constitutional rule that effectively would justify or celebrate the United States government's heinous treatment of Natives and Native religions. Accordingly, without taking a position on the merits of other issues raised in these cases, *Amici* submit this brief to remind the Court of its precedents appropriately upholding tribal expenditures of tribal monies for Indian education in religious schools and distinguishing those expenditures from federal expenditures of public monies for religious education for Indians. *Amici* also caution that the federal expenditures of public monies for religious education for Indians, cited by Petitioners and their *Amici*, must be understood in the context of the devastating historical federal Indian "civilization" policy.[2]

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2. The term "civilization" is a misnomer for what since has been recognized more appropriately as "cultural genocide." *See Indian Child Welfare Act of 1977: Hearing Before the S. Select Comm. on Indian Affs.*, 95th Cong 2 (1977) (statement of Sen. James Abourezk, D-SD).

SUMMARY OF ARGUMENT

In asking this Court for a constitutional rule that allows the State of Oklahoma to fund religious charter schools, Petitioners and their *Amici* argue that the United States has a tradition of funding denominational education without offending the Establishment Clause, U.S. Const. Amend. I. *E.g.*, Brief for Petitioner Oklahoma Statewide Charter Sch. Bd. at 4; Brief for Petitioner St. Isidore of Seville Catholic Virtual Sch. at 42; Brief *Amici Curiae* of Christian Legal Soc'y, *et al.* at 8-9. Petitioners rely on specific historical examples of the United States, *e.g.*, paying "churches to run schools for American Indians," making treaties to provide "financial support for 'a priest of [the Catholic] religion' to . . . educate the tribes children," and passing statutes "that paid religious groups to teach Native Americans 'literacy and agriculture.'" Brief for Petitioner Oklahoma Statewide Charter Sch. Bd. at 5 (citations omitted).

These historical examples need clarification on two points. First, at least for U.S. Constitutional purposes, this Court distinguishes expenditures by the United States of *tribal* monies for Indian education in religious schools *as directed by Tribes* from federal spending of public monies for religious education for Indians. The former is an exercise of tribal sovereignty not constrained by the U.S. Constitution. Second, the cited federal expenditures of public monies for religious education for Indians deserve context. They were based on federal policy which included forcing Indian children, with the assistance of churches and religious organizations, to convert to Christianity, as well as penalizing and criminalizing Native religions.[3]

3. Some repudiation of this policy has occurred recently. *See, e.g.*, American Indian Religious Freedom Act of 1978, Pub. L. 95–341, 92 Stat. 469, 42 U.S.C. § 1996; Dep't of Interior, B. Newland,

This Court's precedent distinguishing between tribal or tribe-directed expenditures of tribal monies and federal expenditures of public monies for religious education is well grounded and should not be disregarded. A central principle of federal Indian law is that Tribes are sovereign governments not subject to the entire U.S. Constitution. *Talton v. Mayes*, 163 U.S. 376, 383-84 (1896). Therefore, when Tribes spend tribal monies or direct the United States to spend tribal monies, these expenditures are not constrained by the Establishment Clause. *See also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 63 (1978) (noting the omission of an Establishment Clause in the Indian Civil Rights Act of 1968, Pub. L. 90-284, Title II, § 201, 82 Stat. 77, 25 U.S.C. §§ 1301-1303).

The sources of many tribal monies are the Treaties between the United States and Tribes. These Treaties typically provided for the United States to pay Tribes for land acquired from Tribes ("treaty funds"). Many treaties had provisions regarding Indian education. *See Haaland v. Brackeen*, 599 U.S. 255, 298 (2023) (citations omitted) (Gorsuch, J., concurring) (noting that over 150 treaties with Tribes had Indian education-related provisions). Some Treaties specifically dedicated a portion of the treaty funds for education of the Tribe's children. *See*, *e.g.*, *Quick Bear*

Federal Indian Boarding School Initiative Investigative Report (BIA Report Vol. I) (May 2022); Dep't of Interior, B. Newland, Federal Indian Boarding School Initiative Investigative Report Vol. II (July 2024); U.S. Conf. of Catholic Bishops, Keeping Christ's Sacred Promise: A Pastoral Framework for Indigenous Ministry, 6 (2024) https://www.usccb.org/resources/Indigenous%20Pastoral%20Framework%20-June%202024-Final%20Text.pdf; On Offering an Apology to Native Americans, Alaska Natives, and Native Hawaiians—From the Presbytery of Baltimore (2016), https://www.pc-biz.org/search/6350.

v. Leupp, 210 U.S. 50, 51 (1908) (citing Treaty Between the United States of Am. & Different Tribes of Sioux Indians, Feb. 24, 1869, 15 Stat. 635). In addition to treaty funds, some Treaties provided for the United States to appropriate other federal funds to be held in trust by the federal government for Tribes ("trust funds"). These trust funds also might be dedicated to Indian education. *Id.* 52.

In *Quick Bear v. Leupp*, this Court correctly held that the United States' use of the Rosebud Sioux Tribe's trust funds, guaranteed by treaty to the Tribe, for sectarian schools on the Tribe's reservation, did not violate federal legislation that restricted appropriations to religious organizations. 210 U.S. at 81. The Court reasoned, because the funds belonged to the Tribe "as [a] matter of right," and were "theirs for education," *id.* at 82, that federal expenditures to "Fulfill[] Treaty Stipulations," *id.* at 77, could fund any school chosen by the Tribe—secular or religious. To conclude otherwise would be to hold that Tribes "cannot be allowed to use *their own money* to educate their children in the schools of their own choice." *Id.* at 81 (emphasis added).

To put it simply, this Court differentiates between federal spending for religious education of "money appropriated to fulfill treaty obligations, to which trust relationship attaches, and 'gratuitous appropriations.'" *See Lincoln v. Vigil*, 508 U.S. 182, 195 (1993) (quoting *Quick Bear*). The latter, the expenditure of public monies for religious education, is an issue for the Establishment Clause, while the former is not. *Amici* respectfully ask this Court to adhere to its precedent properly distinguishing religious education funded by tribal monies and religious education funded by non-tribal governments. *Espinoza*

v. Montana Dep't of Revenue, 591 U.S. 464 (2020), does not alter this settled legal distinction. *Espinoza* did not address directly the tribal sovereignty basis for *Quick Bear*'s holding, and *Espinoza*'s examples of historical federal spending of public monies for religious education for Indians suffer from the same lack of essential context as Petitioners' examples, discussed next.

The cited examples of historical federal expenditures of public monies for religious education for Indians elide entirely the now-discredited federal policy underlying these expenditures. From its earliest days, United States policy was "to induce the Indians to abandon their mode of life, as hunters and warriors, and to cultivate in them a taste for and aid them in adopting the pursuits and manners of civilization." *In re Kansas Indians*, 72 U.S. 737, 747 (1866). At the core of the policy were efforts to convert Indian peoples, primarily children, to Christianity. "To this end enlightened missionaries have been encouraged to live among them as teachers. . . ." *Id.* "Christianity was equated with civilization." S. Rep. No. 103-411, at 2, 103rd Cong., 2d Sess. (1994). Simultaneously, the federal government penalized, and even criminalized, Native religions. *Id.*; *see also* Federal Agencies Task Force, *Report to Congress on American Indian Religious Freedom Act of 1978*, at 1–8 (Aug. 1979) (history of federal persecution of Native religions).

From its inception and well into the twentieth century, federal management of Indian affairs included suppressing Native religions, S. Rep. No. 103-411, at 1, and providing Christian religious education to Indians in schools not chosen by Indians and operated by the federal government or funded by the federal government but operated by

churches and missionaries. *See* BIA Report Vol. I, 25-31; BIA Report Vol. II, 19. "[G]overnment officials as well as [] church leaders" understood that efforts to civilize Indians through conversion to Christianity necessarily involved churches, missionaries, and religious groups. Francis Paul Prucha, *The Great Father: The United States Government and the American Indians* 146 (1995). Civilization, including conversion, was a federally directed and funded policy implemented by churches and missionaries, who reported their efforts and progress to the federal government. *Id.* 152, 155; BIA Report Vol. II, 19.

Following the Civil War, the relationship between the United States and churches became further entwined. With congressional authorization, President Grant delegated the running of many entire Indian reservations to churches and religious groups and to the newly-created "Board of Indian Commissioners"—a board staffed entirely with religious leaders. Prucha, *Great Father* 503 (citing 16 Stat. 40 (1869)). During this period, churches and religious groups leveraged their delegated power over Indian affairs to expand the increasingly church-run but still federally instigated and maintained Indian school system. *Id.* 503-512. There were direct federal appropriations to and direct contracts with churches which paid them per pupil for Indian students within their schools. *Id.* 597.

But issues soon developed that the Founders anticipated in drafting the Establishment Clause. Competition between churches to obtain the most federal contracts for Indian education, thereby becoming the "preferred faith," began to divide the religious groups. Further, religious leaders, advocacy groups, and federal

officials, including members of Congress, increasingly raised concerns about the constitutionality of the entrenched church and state relationship, calling it "un-American." Francis Paul Prucha, *The Churches and the Indian Schools 1888-1912* 1-9 (1979). Some religious leaders openly vocalized that the only solution to both the rivalries and the entanglement was to cease federal funding to churches. *Id.* 8.

Driven by cries for reform, in the early twentieth century federal funding to churches was severely reduced and then eliminated entirely. *See* Act of March 1, 1899, 30 Stat. 924, 942 (1899). The federal government assumed direct control of most federal Indian schools. Prucha, *Churches* 57. But Christianization of Indians endured. Cloaked as the response to requests for separation of church and state, federal officials ran the Indian schools but employed church personnel for "Religious Instruction in Government Schools." *Id.* 161-170.

By the early mid-twentieth century, many aspects of federal Indian policy were under scrutiny and change was on the horizon. A 1928 study in cooperation with the Secretary of Interior was a "comprehensive and damning account of the failure of federal Indian policies[.]" Felix S. Cohen, *Cohen's Handbook of Federal Indian Law* § 2.09[1] (Nell Jessup Newton ed., 2024 ed.), referencing Lewis Meriam, *et al.*, *The Problem of Indian Administration*, Inst. For Gov't Rsch. (1928), https://narf.org/nill/resources/meriam.html. The Meriam Report "roundly condemned the shortcomings"

of the federal Indian "assimilationist era" and "harshly critiqued" the federal Indian boarding schools. *Id.*

With the appointment by President Franklin Roosevelt of John Collier as Commissioner of Indian Affairs in 1933, the "Indian New Deal" officially began. *Id.*[4] Comprehensive changes involving tribal lands, self-government, and cultures were contemplated to reverse past assimilationist policies. The Indian Reorganization Act (IRA) of 1934, Pub. L. 73-383, 48 Stat. 984, 25 U.S.C. § 5101, *et seq.*, enacted many of these changes. Collier's reports and orders addressed compulsory attendance at religious services in federal Indian boarding schools and federal interference with Native religions. The Indian New Deal encouraged state public school attendance for Indian children, rather than federal Indian schools. With new federal funding for Indians in public schools, comparative attendance at these schools dramatically shifted throughout the next several decades. Beginning in the 1970s, the federal policy of Indian Self-Determination included U.S. Congressional and Executive Branch efforts in consultation with Tribes either to close or transfer to tribal operation all but a few of the remaining once over 400 federal Indian boarding schools in this country. *See* H.R. Rep. No. 100-744, pt. 1, at 8, 100th Cong., 2d Sess. (1988).

But notwithstanding some repudiation, *see supra* n.3, the federal policy's history and its impact remain.

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4. John Collier was among the founders of *Amicus* Association. https://www.indian-affairs.org/uploads/8/7/3/8/87380358/2018_defenders_of_native_lands_pub_fallwinter_2018_newsletter.pdf.

In particular, the troubled legacy of federal Indian boarding schools comprises perhaps the darkest days of the American republic. Thousands of Indian children did not survive their conversion. Dana Hedgpeth, *et al.*, *More Than 3,100 Students Died At Schools Built to Crush Native American Cultures*, The Wash. Post (Dec. 22, 2024), https://www.washingtonpost.com/investigations/interactive/2024/native-american-deaths-burial-sites-boarding-schools/. Federal efforts to drive Native religions to extinction by penalizing and criminalizing them further exacerbate this past. If these histories came before this Court today, the actions of the United States likely would face challenges based on fundamental principles against establishment of national religion and in support of free exercise of religion. *Amici* humbly ask this Court to refrain from drawing on these histories to justify the funding of religious schools and to inform the meaning of the U.S. Constitution today.

ARGUMENT

This Section proceeds in three parts:

In Part I, *Amici* show that the examples of tribal or tribe-directed treaty and trust fund expenditures for religious education which this Court's precedents correctly ground in tribal sovereignty are inapposite to the issues in these cases of non-tribal government expenditures for religious education.

In Part II, *Amici* show that the examples of historical federal expenditures of public monies for religious education for Indians lack the needed context of now-discredited federal policy which likely presents

Establishment Clause and Free Exercise Clause violations which should not be misused to inform the Court's analyses of those Clauses in these cases.

In Part III, *Amici* show that the United States' suppression of Native religions, an integral part of historical federal policy, likewise should not be misused to inform the Court's decision making in these cases.

I. This Court's Precedents Upholding Tribal Expenditures Of Tribal Monies For Religious Education Are Inapposite To The Present Cases Involving State Expenditures Of Public Monies For Religious Education.

Petitioners and their *Amici* cite examples of tribal treaty and trust fund expenditures for religious education as historical evidence of direct United States government expenditures for religious education. *See* Brief for Petitioner Oklahoma Statewide Charter Sch. Bd. at 4; Brief for Petitioner St. Isidore of Seville Catholic Virtual School at 42; Brief *Amici Curiae* of Christian Legal Society, *et al.* at 8–9. These examples, however, are factually and legally distinguishable from whether the State of Oklahoma may spend public monies on religious charter schools.

Indian Tribes are "separate sovereigns pre-existing the Constitution." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (quoting *Santa Clara Pueblo*, 436 U.S. at 56). The inherent and continuing sovereignty of Tribes over their own citizens is broad—"virtually unlimited." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 160 (1982) (Stevens, J., dissenting). Tribal sovereignty

includes directing how tribal funds should be spent for the benefit of Tribe citizens. *See Quick Bear*, 210 U.S. at 80. This Court's Indian law precedents acknowledge tribal sovereignty and have created distinct legal frameworks reflecting Tribes' unique status within the United States. This includes that Tribal governments are not subject to the full force of the U.S. Constitution. *Talton*, 163 U.S. at 384 (holding that the Fifth Amendment does not apply to "powers of local self-government enjoyed" by the Cherokee Nation); *see also Santa Clara Pueblo*, 436 U.S. at 63 (noting the omission of the Establishment Clause from the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303).

In *Quick Bear*, individual citizens of the Rosebud Sioux Tribe sued to prevent the Commissioner of Indian Affairs from contracting with a sectarian organization to run a sectarian school on the Tribe's Reservation, paid for with the Tribe's treaty and trust funds. 210 U.S. at 50–53. Stepping back, under an 1868 treaty between the United States and the Sioux Indians, the Sioux ceded land and other rights in exchange for the United States agreeing, *inter alia*, to provide education for the Tribe's children. *Id.* at 80. Pursuant to further land cessions in 1877, the United States expanded its commitments to provide the Tribe with educational resources. *Id.* Pursuant to these agreements, Congress appropriated specific funding under the heading "Fulfilling Treaty Stipulations with, and Support of, Indian Tribes." *Id.* These funds, managed by the United States, were thereafter used to pay for educational services from a Catholic organization on the Rosebud Reservation to benefit the Tribe.

The *Quick Bear* Plaintiffs asserted that the payment of these funds to a sectarian organization violated legal restrictions on government appropriations going to sectarian schools. *See* Act of June 7, 1897, 30 Stat. 62, 79 (1897) ("And it is hereby declared to be the settled policy of the government to hereafter make no appropriation whatever for education in any sectarian school."); *Quick Bear*, 210 U.S. at 52. This Court ruled against Plaintiffs, holding that the specific funds at issue could be used to fund sectarian schools because they were not "public money in this sense. It is the Indians' money, or, at least, is dealt with by the government as if it belonged to them" and it represents the "price of land ceded by the Indians to the government." *Id.* at 80–81.

Quick Bear stands for the important proposition that tribal sovereignty requires that Tribes be free to "use their own money to educate their children in the schools of their own choice[.]" *Id.* at 81. Thus, this Court distinguished between funds expended by the United States pursuant to tribal treaty and trust responsibilities and the United States drawing on public money to fund religious schools. Put another way, the expenditures in *Quick Bear* did not trigger an Establishment Clause analysis because there was no state action, the funds and expenditures were credited to a separate sovereign—the Tribe—not the United States or a state. This Court has declined to review adherence by lower courts to this apt distinction. *See*, *e.g.*, *Sac and Fox Tribe of Indians of Okla. v. Apex Const. Co.*, 757 F.2d 221, 222–23 (10th Cir. 1985), *cert denied*, 474 U.S. 850 (1985) (observing "[t]he Supreme Court recognized the distinction between tribal funds and public monies. . . ." in *Quick Bear*); *Scholder v. United States*, 428 F.2d 1123, 1129 (9th Cir. 1970), *cert denied*, 400 U.S. 942 (1970) (same).

This same reasoning applies to the United States' 1803 Treaty with the Kaskaskia Tribe of Indians. Treaty Between the United States of America and the Kaskaskia Tribe of Indians, art. III, Aug. 13, 1803, 7 Stat. 78. The cited Kaskaskia Tribe treaty provision, *see*, *e.g.*, Brief for Petitioner Oklahoma Statewide Charter Sch. Bd. at 5, regarding funding for religious purposes is analogous to the expenditures in *Quick Bear*. The United States agreed to a treaty provision with a separate sovereign and thereafter appropriated funds according to those treaty obligations. This example bears no relevance to the issue before the Court, which is whether to allow the State of Oklahoma—a government subject to the full force of the U.S. Constitution—to fund religious schools.

Nor does *Espinoza* stand for *Quick Bear* establishing a "'historical and substantial' tradition" of government "financial support to private schools, including denominational ones" without offending the Establishment Clause. *Espinoza*, 591 U.S. at 480. *Espinoza* omits *Quick Bear*'s central legal holding—the distinction between the power of tribal governments to direct treaty and trust fund expenditures for religious education and expenditures by non-tribal governments of public monies for religious education, the latter of which is the present issue. Tellingly, the *Espinoza* Court did not discuss or cite to *Lincoln v. Vigil*—a case that expressly noted the distinction between expenditures of tribal monies and public monies. *Lincoln v. Vigil*, 508 U.S. 182, 195 (1993). Continued adherence to this Court's longstanding precedent is critical for respecting and preserving tribal sovereignty and self-determination. Finally, *Espinoza* failed to address federal policy, discussed next.

II. Examples Of Federal Indian Boarding Schools Are Paradigmatic Establishment And Free Exercise Clause Violations And Should Not Be Misused To Inform This Court's Decision-Making In These Cases.

The federal Indian boarding school era spanned nearly two hundred years and was the lynchpin of the federal government's crusade to "civilize" Indian peoples. Petitioners and their *Amici* cite federal Indian boarding schools for their argument that the United States has a history and tradition of providing monetary support for sectarian schools. *E.g.*, Brief for Petitioner Oklahoma Statewide Charter Sch. Bd. at 4; Brief for Petitioner St. Isidore of Seville Catholic Virtual School at 42; Brief *Amici Curiae* of Christian Legal Society, *et al.* at 8-9. Yet, their bare references to federal Indian boarding schools omit the requisite context needed to understand this era. Without the complete history, federal Indian boarding schools might be viewed as an exemplary model of federal and religious partnership, instead of one that should not be repeated.

Historically, federal Indian boarding schools consisted of both schools directly operated by churches and religious groups that received federal funding and schools directly operated by the federal government that required religious education for Indians. *See generally* BIA Report Vol. I; BIA Report Vol. II. At the core of both is the official policy that spurred these schools: the policy whereby the United States used schools to "civilize" Indian children by converting them to Christianity. Prucha, *Great Father* at 146.

The roots of this federal policy are deep. In 1776, the Continental Congress passed a resolution that mandated the "propagation of the Gospel" and the establishment of ministers and teachers among the Indians. Prucha, *Great Father* 139-140. When it came to Indians, of the two perceived options: "civilization" or extermination, "civilization" was preferred but could not be accomplished without missionaries for conversion. R. Pierce Beaver, *Church, State, and the American Indians: Two and a Half Centuries of Partnership in Missions Between Protestant Churches and Government* 63-64 (1966) (summarizing 1789 Secretary of War Henry Knox's communication to President George Washington). As federal policy developed, it was clear that the "American civilization offered to Indians was Christian civilization, [and] that Christianity was a component of civilization and could not and should not be separated from it." Prucha, *Great Father* 146; *see also In re Kansas Indians*, 72 U.S. at 747 (equating "civilization" with conversion to Christianity because of the policy's use of missionaries).

As the nineteenth century began, "civilization" was conducted primarily by missionaries within mission schools. Rather than establish a new federal school system, the Superintendent of Indian Trade and missionaries together merged existing mission schools with new federal funding. Prucha, *Great Father* 148-151. In 1819, Congress enacted the permanent Civilization Fund with $10,000 annual appropriations. Civilization Fund Act of 1819, Pub. L. No. 15-85, 3 Stat. 516b. The Civilization Fund marked the first time that consistent federal appropriations were funneled to missionaries to serve federal goals. Robert H. Keller, *American Protestantism and the United States Indian Policy 1869-82* 6 (1983). By 1824, federal funding

supported the operation of 32 Indian and mission schools, some of which were supplemented with the religious groups' own money. Prucha, *Great Father* 152. At its peak, the Civilization Fund supported 52 Indian and mission schools across the country. *Id.* 154.

Religious groups in charge of Indian schools reported directly to the federal government. For example, a missionary on the Creek Nation Reservation, R.M. Loughridge provided in his annual report to the Secretary of War "in compliance with the regulations of the War Department," the number of children within his school and their progress toward "civilizing and Christianizing the rising generation"—progress that required the children remain "under the constant influence of the teacher, both in and out of school[.]" Ann. Rep. of the Comm'r of Indian Aff., 29th Cong., 2nd Sess., 150-151 (1846). Missionary Loughridge further rejoiced that the policy of Christianizing Indian children was "the policy adopted by our government in regard to the appropriation of school funds." *Id.* 151. This documentation leaves no doubt that the federal government charged the religious groups with implementing federal policy.

In addition to the Civilization Fund, by the 1860s direct contracts between the federal government and religious groups significantly added more Indian schools. Keller 208. These contracts generally paid religious groups $167 per Indian student, Ann. Rep. of the Comm'r of Indian Aff., 49th Cong., 2nd Sess., 136-137 (1886), and resulted in nearly "every major denomination" signing a federal contract. Keller 208. By 1886, the number of Indian schools had reached nearly 300. *Id.* The direct contracts continued for another fifteen years, *see infra*.

Collaborative efforts to "civilize" and Christianize Indians expanded after the Civil War. Coinciding with the end of the "Indian Wars," *see* Cohen § 2.07[2], President Grant signed into law the Peace Policy. Act of Apr. 10, 1869, 16 Stat. 40 (1869). The Peace Policy, like the Civilization Fund, aimed to implement "the comforts and benefits of a Christian civilization" to prepare the Indians "to assume the duties and privileges of citizenship." Francis Paul Prucha, *American Indian Policy in Crisis: Christian Reformers and the Indian, 1865-1900* 31-32 (1976). The Peace Policy emphasized the widespread belief that "Christianity alone could civilize the American Indians" and that this could only be accomplished by increased support of the federal government and increased delegated powers to religious groups. Keller 3.

Structurally, the Peace Policy included two main components. First, it established a centralized Board of Indian Commissioners. Prucha, *Great Father* 503. Second, it assigned on-reservation federal Indian agencies to various Christian religious groups. *Id.* at 512; *see also*, *e.g.*, Ann. Rep. of the Comm'r of Indian Aff., 42nd Cong., 3rd Sess. (1872) (discussing assignments). These actions effectively delegated control of most aspects of federal Indian affairs to select Christian religious groups.

Comprised of men from various Protestant denominations, the Board of Indian Commissioners' role in implementing federal policy was two-fold. Prucha, *Churches* 1. President Grant tasked the Board with the authority to oversee the Office of Indian Affairs (OIA) and with monitoring Christian religious groups' Indian "civilization" efforts. Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth Century*

Christianization Policy in Twentieth-Century Native American Free Exercise Cases, 49 Stan. L. Rev. 773, 779 (1997). Not just a liaison between the religious groups and the United States, the Board was authorized to recommend changes to federal policy. *Id*. The Board's recommendations included confining Tribes to reservations, discouraging Tribal relations, establishing schools with teachers "nominated by religious bodies[,]" and encouraging missions. Prucha, *Great Father* 509-10 (citing 1869 Ann. Rep. of the Comm'r of Indian Aff.)).

The Peace Policy also divided up and assigned on-reservation federal Indian agencies to various Christian religious groups. Under this regime, the religious group had the power to select the Indian agent and employees for the assigned Indian agency. Keller 33; Prucha, *Great Father* 517 (citing, *e.g.*, Table 3: Assigning the Tulalip Indian Agency in Washington Territory to the Catholics; assigning the Navajo Indian Agency in New Mexico Territory to the Presbyterians.) In total, nearly 75 federal Indian agencies spanning across the entire Western United States were apportioned to 12 different Christian denominations. Prucha, *Great Father* 516-19.

Tension over these assignments generated conflicts, as many religious groups viewed them as unjust. Prucha, *Great Father* 523. Methodists and Protestants received multiple Indian agencies, while Jews, Mormons, and Catholics either were excluded from assignment altogether or received fewer Indian agencies than expected. Keller 36; Prucha *Great Father* 523. The Catholics, who because of previous missionary work, expected to receive thirty-eight agencies, were shocked to receive only seven. Prucha, *Great Father* 523-24. Religious groups including

the Methodists, Protestants, Catholics, Episcopalians and Quakers advocated for their own interests, but none made a "move to grant so much as a hearing to the Indian religions." *Id.* 524. Nor was the federal government concerned with "the Indians' right to maintain and defend their own religion." *Id.* 525.

While interdenominational rivalry festered, the federal government undertook another chapter of infamy beginning with the Carlisle Indian Industrial School. Founded in 1879 by U.S. Army General Richard Henry Pratt, Carlisle was the model for what would become the United States' network of over 400 federal Indian boarding schools. *Brackeen*, 599 U.S. at 299 (Gorsuch, J., concurring). This model included forced assimilation in contained environments in remote locations. Off-reservation boarding schools were needed, the government maintained, to isolate Indian children from their "savage antecedents." *Id.* at 298 (Gorsuch, J., concurring). On-reservation Indian schools allowed children to maintain ties to their Native religions; thus, the further that Indian children were from their Tribes and communities, the easier it would be to assimilate them. *Id.*

Once children arrived at federal Indian boarding schools, school officials took away their Indian names and replaced them with English ones, cut their hair, prohibited children from speaking their Native languages or engaging in their Native religions, and prevented them from freely associating with citizens of their own Native Nations and communities. *Id.* at 300. These policies, combined with physical, psychological, and sexual abuse and abysmal living conditions led to devastating death tolls: at least 3,100 Indian children died at federal boarding

schools, with 179 dying at Carlisle alone. *See* Hedgpeth, *et al.*, *More Than 3,100 Students Died At Schools Built to Crush Native American Cultures*, *supra*, Hugh Matternes, *et al.*, *Archival Research of the Carlisle Indian School Cemetery*, at 1 (2017), https://armycemeteries.army.mil/Portals/1/Documents/CarlisleBarracks/Archival%20Research%20Report%20-%20July%202017v2.pdf?ver=2019-06-07-121535-723.

As federal Indian boarding schools proliferated, federal appropriations for sectarian schools decreased. David Wallace Adams, *Education for Extinction: American Indians and the Boarding School Experience, 1875-1928* 72 (1995). Unaddressed concerns over separation of church and state persisted. The newly appointed Commissioner of Indian Affairs, Thomas Jefferson Morgan, was especially keen on ending the schools' federal-church partnership. Beaver 161-166. The 1889 Annual Report of the Commissioner of Indian Affairs stated Morgan's position. No longer would the federal government directly partner with religious groups in Indian education. *Id.* at 164; Ann. Rep. of the Comm'r of Indian Aff., 51st Cong., 1st Sess. (1889). Instead, the government would erect its own "compulsory, systemized, and comprehensive" education system for Indian children. Beaver 164. Congress soon followed. The Indian Appropriations Act of 1895 reduced appropriations to religious groups in fiscal year 1894 by twenty percent. Prucha, *Churches* 40. Subsequent annual appropriations decreased and then ended altogether. *Id*; Act of March 1, 1899, 30 Stat. 924, 942 (1899) ("this being the final funding for sectarian schools[.]").

This did little to keep the federal government's hands clean. Religious instruction continued in off-reservation

federal Indian boarding schools like Carlisle. *See* 1887 Superin. of Indian Educ. Ann. Rep. at 131; *see also* Prucha, *Churches* 161-170 (chapter entitled "Religious Instruction in Government Schools."). Beginning in 1890, the federal government issued a series of "Rules for Indian Schools" mandating Indian children's attendance at church services and observation of the Sabbath. Prucha, *Churches* 161; *see also* Ann. Rep. of the Comm'r of Indian Aff., 51st Cong., 2nd Sess. (1890), Appendix at CXLVI (publishing the Rules). The federal government also issued specific regulations for worship in federal Indian boarding schools. Prucha, *Churches* 214-216.

Notably, attendance at federal Indian boarding schools was something that neither Indian families nor Tribes could refuse or even impact. Indian parents had no right to choose which school their children could attend. Prucha, *Churches* 58 (citing Letter from Daniel M. Browning, Commissioner of Indian Affairs, to W.H. Clapp, Sept. 30, 1896). Other compulsory attendance measures were darker, as when Indian children were abducted from their families and Tribes under duress or outright force. BIA Report Vol. I 36; *Brackeen*, 599 U.S. at 299 (Gorsuch, J., concurring). Federal Indian agents routinely withheld treaty-guaranteed rations to force Indian parents to surrender their children. Ann. Rep. of the Comm'r of Indian Aff., at 199 (1886). When parents resisted, the federal government deployed the U.S. Army with direct orders: "*Take the children*." *See The Native American Boarding School System*, N.Y. Times, https://www.nytimes.com/interactive/2023/08/30/us/native-american-boardingschools.html (emphasis added) (last visited Apr. 4, 2025).

Many federal atrocities were called out in the 1928 Meriam Report. Lewis Meriam, *et al.*, *The Problem of Indian Administration*. The Report made specific recommendations for major changes in virtually every aspect of federal Indian policy. With respect to federal Indian boarding schools and their treatment of Indian children, the Meriam Report found "'frankly and unequivocally,' that 'the provisions for the care of the Indian children . . . are grossly inadequate' and recommended that the federal government 'accelerat[e]' the 'mov[e] away from the boarding school' system in favor of 'day school or public school facilities.'" *Brackeen*, 599 U.S. at 302 (Gorsuch, J., concurring) (cleaned up).

Key changes officially began with the Indian New Deal. Cohen § 2.09. President Franklin Roosevelt appointed John Collier as Commissioner of Indian Affairs in 1933. *Id.* § 2.09[1]. Collier immediately issued executive reforms regarding Indian religion and religious education for Indians. Prucha, *Great Father* 951-52. In his first departmental annual report Collier firmly stated that "[n]o interference with Indian religious life or expression will hereafter be tolerated. The cultural history of Indians is in all respects to be considered equal to that of any non-Indian group." Dep't of the Interior, Off. Indian Affs., Circular No. 2970 (Jan. 3, 1934). Collier's January 1934 directive titled "Regulations for Religious Worship and Instruction" in government schools prohibited "compulsory attendance at [religious] services" and only allowed religious instruction if the Indian children or their parents chose it. Prucha, *Great Father* 951-52. Over the objections of churches, missionaries and other critics, Collier insisted that Indians be granted the "fullest constitutional liberty, in all matters affecting religion."

Id. 952-53. Religious liberty did "not extend only to Christians." *Id*. 953.

Collier also initiated programs for bilingual education and Indian arts and culture in the federal Indian schools. S. Rep. No. 91-501, 155 91st Cong., 1st Sess. (1969), https://narf.org/nill/resources/education/reports/kennedy/toc.html. But with the IRA's emphasis on tribal governmental and economic autonomy, the federal role in Indian affairs generally began to subside. *Id*. 13. Federal Indian schools began to close and state public school attendance for Indian children was encouraged with new federal funding to public schools to educate Indians. *Id.* 14. Eventually, federal support for the role of Tribes in formal Indian education emerged. *See*, *e.g.*, the Indian Self-Determination and Education Assistance Act of 1975, Pub. L. 93–638, 88 Stat. 2203, 25 U.S.C. §§ 5301-5423 (Tribes can contract the operation of formerly federally run elementary and secondary schools). In the 1970s and 1980s, the federal policy of Indian Self-Determination affirmatively led to federal efforts in consultation with Tribes either to close or transfer to tribal operation all but a few of the remaining once over 400 federal Indian boarding schools in this country. *See* H.R. Rep. No. 100-744, pt. 1, at 8, 100th Cong., 2d Sess. (1988).

Amici present a very condensed summary of an extensive and brutal federal policy at least with respect to federal Indian boarding schools to show the paradigmatic Establishment and Free Exercise Clause violations that policy and those schools engendered. As this Court considers the contours of these Clauses today, these violations should be informative but not mischaracterized or misused.

III. The United States' Suppression Of Native Religions, An Integral Part Of Historical Federal Policy, Likewise Should Not Be Misused To Inform The Court's Decision-Making In These Cases.

Like the federal Indian boarding schools, the federal government's historical treatment of Native religions should not be invoked improperly to determine the scope of U.S. Constitutional religious protections at issue in these cases. "The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993). Yet the history of the federal government's treatment of Native religions defies this summary, since it is rife with abuses of "this fundamental nonpersecution principle of the First Amendment[.]" *Id.* Over the course of two centuries, beyond schools, the federal government targeted Native religions generally in an explicit attempt to "suppress religious belief or practice." *See Report to Congress on American Indian Religious Freedom Act of 1978* at 1–8 (history of federal persecution of Native religions).

These broad and pervasive federal policies are well documented. In 1883, for instance, the OIA established Courts of Indian Offenses. *See Denezpi v. United States*, 596 U.S. 591, 594-95 (2022) (discussing the establishment of these courts). Prompted by a call from the Commissioner of Indian Affairs to suppress the "old heathenish dances," the OIA promulgated Rules for Indian Courts that criminalized participation in "the 'sun-dance,' the 'scalp-dance,' [and] the 'war dance,'" as well as the "usual practices of so-called 'medicine-men.'" Letter

from Hiram Price, Commissioner of Indian Affairs, to Henry M. Teller, Secretary of the Interior, Mar. 30, 1883 (Rules Governing the Court of Indian Offenses); *see also Denezpi*, 596 U.S. at 607 (Gorsuch, J., dissenting). Native religious practitioners and participants faced sanctions, including the withholding of rations or "incarceration in the agency prison." Hiram Price, *Rules Governing the Court of Indian Offenses*. Federal Indian agents also resorted to threats of military force and the destruction of Native dance houses. Ann. Rep. of the Comm'r of Indian Aff., 190-191 (1889) (reporting that Kiowa Tribe medicine dance was "demoralizing and degrading and that it should not be permitted . . . I was advised to take immediate steps to prevent it, and if necessary to call on the military for aid to enforce the order."); *see also* Dussias, *Ghost Dance*, 49 Stan. L. Rev. 791-792.

Enforcement of these policies included the following examples. In the late 1880s, federal officials panicked over the Ghost Dance, a religious revival begun by the Paiute prophet Wavoka in Nevada but that quickly spread throughout the American West. *See* Louis S. Warren, *God's Red Son: The Ghost Dance Religion and the Making of Modern America* 211 (2017) ("As the new faith advanced, so did official alarm."). In response, the federal government dispatched the U.S. Army to suppress the dance on the Pine Ridge Reservation in South Dakota and arrest its adherents—an effort that culminated in the Wounded Knee Massacre, where the military murdered nearly three hundred Lakota. *Id.* at 271-94. In the early twentieth century, Christian missionaries pressured federal officials to target dances among the Pueblo Nations of the American Southwest. Tisa Joy Wenger, *We Have a Religion: The 1920s Pueblo Indian Dance*

Controversy and American Religious Freedom (2009). The Commissioner of Indian Affairs duly issued a circular instructing agents to use "punitive measures" to limit the dances, which later included attempts to constrain their number and timing and restrict attendees to those over 50. Dussias, *Ghost Dance*, 49 Stan. L. Rev 802-805.

It is difficult to imagine clearer violations of Free Exercise rights than these specific policies and their enforcement. But there was little serious contemporary argument over or questioning of the constitutionality of the federal government's actions. At the time, the federal government assumed itself to be the "guardian" of its Indian "wards." *See Felix v. Patrick*, 145 U.S. 317, 330-31 (1892). This was the basis for its treatment of Native religions which were seen as an obstacle to its overriding goal of Indian "civilization." *See* Dussias, *supra*, at 794 ("The agents assumed that the government had the authority to suppress specific religious practices of its Native American wards, because their practices were not Christian and were obstacles to civilization.").

As with the federal Indian boarding schools and other aspects of federal policy, the 1930s Indian New Deal officially began reforms, many of which have continued. *See supra*, Commissioner Collier's reports and orders; *see also* the American Indian Religious Freedom Act of 1978, Pub. L. 95–341, 92 Stat. 469, 42 U.S.C. § 1996. But as this snapshot of profound tragic history amply demonstrates, the federal government's actions in this area likely violated even the most basic and limited understanding of what the Free Exercise Clause protects. Accordingly, this history should not be invoked improperly to guide the Court's interpretation of that Clause.

CONCLUSION

Petitioners and their *Amici*'s examples of a purported historical tradition of federal funding for religious schools involving Native Nations, federal Indian boarding schools, and Native religions are either inapposite or lack appropriate context. To resolve these cases, the Court need not disturb or invoke its precedents regarding tribal sovereignty over tribal expenditures of tribal monies. Nor should the examples of federal expenditures of public monies for religious education for Indians be cited superficially without accurate explanation of their underlying context.

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