**No. MA-121694**

# In the Supreme Court of Oklahoma

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

*PETITIONER*,

*v.*

OKLAHOMA STATEWIDE VIRTUAL CHARTER SCHOOL BOARD; ROBERT FRANKLIN, Chairman of the Oklahoma Statewide Virtual Charter School Board for the First Congressional District; WILLIAM PEARSON, Member of the Oklahoma Statewide Charter School Board for the Second Congressional District; NELLIE TAYLOE SANDERS, Member of the Oklahoma Statewide Charter School Board for the Third Congressional District; BRIAN BOBEK, Member of the Oklahoma Statewide Charter School Board for the Fourth Congressional District; and SCOTT STRAWN, Member of the Oklahoma Statewide Charter School Board for the Fifth Congressional District,

*RESPONDENTS*,

and

ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL,

*RESPONDENTS-INTERVENOR*.

## BRIEF OF AMICUS CURIAE WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC. IN OPPOSITION TO THE PETITION

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## INTRODUCTION

President George Washington once wrote to a Jewish Congregation to assure its members that they were full citizens—despite being religious minorities. Letter from George Washington, President, to the Hebrew Congregation in Newport, R.I. (Aug. 18, 1790). In his words, "the Government . . . gives to bigotry no sanction, to persecution no assistance . . . ." *Id.*

The First Amendment to the United States Constitution codifies the anti-discrimination principle that President Washington described. It provides, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I. Accordingly, the United States Supreme Court has instructed that "upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and the rights it secures." *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018) (quoted source omitted).

Troublingly, the Attorney General asks this Court to revoke a Catholic school's status as a charter school, primarily

citing state constitutional provisions that originated in anti-Catholic bigotry. Herein, Amicus Curiae discusses these provisions' history and how analogous provisions in other state constitutions have been treated in light of the First Amendment's anti-discrimination principle. Amicus respectfully advises this Court to deny the Petition.

## BACKGROUND

The Attorney General omits relevant facts from the Petition. The Statewide Virtual Charter School Board received an application from St. Isidore of Seville Virtual Charter School—a Catholic entity. The Board's Executive Director then asked the Attorney General's predecessor for advice because state law purports to ban the Board from sponsoring a school affiliated with a "sectarian" entity. John M. O'Connor, Okla. Op. Att'y Gen. 2022-7, at 1 (Dec. 1), *withdrawn* Feb. 23, 2023. In a formal opinion, the Attorney General's predecessor interpreted United States Supreme Court precedent and concluded that enforcing these laws would "likely violate" the First Amendment's anti-discrimination principle. *Id.* at 15. Upon assuming office, the Attorney General withdrew his predecessor's opinion. Letter from Gentner Drummond, Okla. Att'y Gen., to Rebecca L. Wilkinson, Executive Director, Board (Feb. 23, 2023). The Attorney General told the Executive

Director, "[w]hile many Oklahomans undoubtedly support charter schools sponsored by various Christian faiths, the precedent created by approval of . . . [St. Isidore's] application will compel approval of similar applications by all faiths." *Id.* at 2. In his words, "most Oklahomans" consider non-Christian faiths "reprehensible" because these faiths are "diametrically opposed" to Christianity. *See id.* He "urge[d]" the Board to "use caution in reviewing . . . [St. Isidore's] application." *Id.*; *see also* Br. 1 (advancing a similar slippery slope argument). The Board granted St. Isidore's application, and the Attorney General filed the Petition.

**ARGUMENT**

The Attorney General does not inform this Court of his predecessor's opinion, and his slippery slope argument is unpersuasive. Parents are not forced to enroll their children at a charter school and can withdraw them from a charter school, safeguarding against overreach. *Jackson v. Benson*, 578 N.W.2d 602, 630 (Wis. 1998).

Most distressingly, the Attorney General relies on two provisions of the Oklahoma Constitution—Article I, Section 5 and Article II, Section 5—that originated in anti-Catholic bigotry. These provisions were not created to separate church and state. *See generally* Henry G. Snyder, *The Constitution of*

*Oklahoma* 13–16, 21 (1908). They were created "to target Catholics even as governments financially supported Protestant church teachings in public schools." Oklahoman Ed. Bd., Opinion, *Repeal of Oklahoma Constitutional Provision Is Long Overdue*, Oklahoman (July 6, 2015).

## I. The provisions of the Oklahoma Constitution on which the Attorney General relies originated in anti-Catholic bigotry.

Catholics are and always have been religious minorities in this largely Protestant nation. Catholics comprised approximately one percent of the population when this nation was founded in the late 1700s. *See* Robert T. Handy, *A Christian America* 58 (1971). Several states had official churches—all Protestant—and their constitutions compelled support of these churches. For example, the 1780 Massachusetts Constitution declared that municipalities, "other bodies-politic," and "religious societies" had "to make suitable provision, at their own expense, for the institution of the public worship of God and for the support and maintenance of public Protestant teachers of piety, religion, and morality in all cases where such provision shall not be made voluntarily." Mass. Const. pt. I, art. III (1780).

The number of Catholics grew in the 1800s, which caused a panic. *See* Handy, *A Christian America*, at 73–75.

The Protestant majority "feared" that Catholics were loyal to the Pope and "would attempt to subvert representative government or would even gain enough adherents to impose religious tyranny by democratic means." Philip Hamburger, *Separation of Church & State* 206 (2002). "[I]numerable" Protestants believed that "Catholics had to be denied equal civil and political rights unless they first renounced their allegiance to the [P]ope." *Id.*

Catholics faced persecution, especially in public schools where Protestantism was at least unofficially endorsed. Mark Edward DeForrest, *An Overview & Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J. L. & Pub. Pol'y 551, 555 (2003). A well-known publication from the 1830s stated: "[L]et these Jesuit doctors take the place of our Protestant instructors, and where will [we] be in the political institutions of the country? . . . . *Popery is the natural enemy of* GENERAL *education*." Brutus, *Foreign Conspiracy Against the Liberties of the United States* 104, 106 (4th ed. 1836). When Catholics demanded better treatment, they put their lives at risk. Joseph B. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J. L. & Pub. Pol'y 657, 669 (1998). News media

portrayed Catholics as animals who posed a threat to the nation.

Figure 1: A caricature of Catholics as reptiles from the 1800s

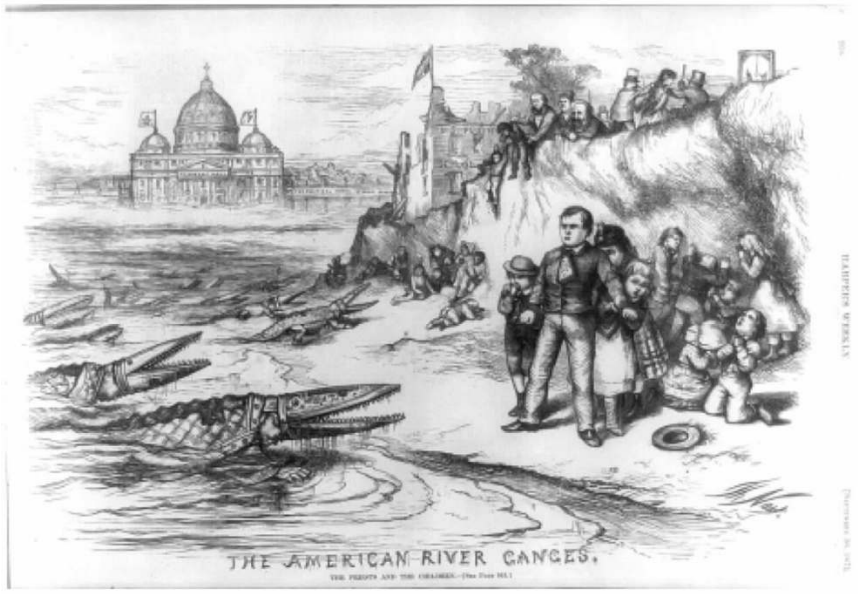


Figure 2: A caricature of Catholics as wolves from the 1800s

Eventually, Catholics in some states were able to secure limited state support for their own schools, which caused Protestant backlash. *See* John Higham, *Strangers in the Land* 28 (rev. ed. 2002).

In 1875, President Ulysses S. Grant exacerbated this backlash with a speech in which he stated: "If we are to have another contest in the near future of our national existence I predict that the dividing line will not be Mason and Dixon's, but between patriotism and intelligence on the one side, and superstition, ambition and ignorance on the other." Ulysses S. Grant, President, Speech in Des Moines, Iowa (Sept. 29, 1875). He advocated "that either the state[s] or Nation, or both combined, shall support institutions of learning sufficient to afford to every child . . . a good common school education, unmixed with sectarian, pagan or atheistical tenets." *Id.* By "sectarian," President Grant meant "Catholic." *See Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality). The terms were practically interchangeable. *Id.* A 1908 treatise on the Oklahoma Constitution even explained that a provision of the Wisconsin Constitution prohibiting "sectarian instruction" in public schools did not prevent "teach[ing] the existence of a supreme being of infinite wisdom, power and goodness, and

that it is the highest duty of all men to adore, obey and love him . . . ." Synder, *The Constitution of Oklahoma*, at 15–16. The Wisconsin provision applied only to "doctrine or dogma." *Id.*

Following this speech, Congressman James Blaine proposed an amendment to the United States Constitution—now sometimes called the "Blaine Amendment." DeForrest, *An Overview & Evaluation of State Blaine Amendments*, at 565. His goal was to prohibit state support of Catholic schools. *See id.* at 565–66.

The proposed amendment received the necessary two-thirds vote in the House of Representatives but narrowly failed in the Senate. *Id.* at 568, 573. The floor debates included "a tirade against" the Pope and criticisms of Catholics' patriotism. *Id.* at 570–72.

The legislators who supported the proposed amendment realized that they could achieve their goal another way: by requiring newly admitted states to adopt state constitutional provisions that prohibited aid to "sectarian" schools. *See Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2271 (2020) (Alito, J., concurring). These legislators viewed themselves as "completing the unfinished work of the failed

Blaine Amendment." *See* Jon Lauck, *"You Can't Mix Wheat and Potatoes in the Same Bin": Anti-Catholicism in Early Dakota*, 38 S.D. Hist. 1, 32 (2008).

Oklahoma was one such state. It was not a refuge for Catholics. For example, in 1892, a newspaper in the Oklahoma Territory published an article that read:

> Show us a nation that has ever been uplifted in the moral realm . . . by the religion of Rome. The greatest blight that even [sic] befell a nation . . . has been the curse of Rome's supremacy.
>
> PROTESTANT parents who send their children to Romanist schools, are simply blind fools. Thousands of recruits for the harlot nunneries have been furnished by Protestant homes. How thoroughly hoodwinked people must be to allow themselves to be bamboozled so easily by Jesuit cunning.

*Shots at the Mother of Harlots*, Craig Cnty. Democrat, at 2 (Feb. 1, 1892). Another newspaper reprinted a report from a Methodist conference in Illinois, in which the authors lamented "[t]he constant attacks of the Roman Catholic . . . upon our public school system . . . ." Minco Minstrel, at 8 (Oct. 9, 1891). The authors promised that they would try "to secure" constitutional amendments that "strengthen our entire school system and make it more than ever worthy of the support the earnest, loyal, moral, patriotic and Christian citizen . . . ." *Id.*

During the early years of Oklahoma's statehood, "all too familiar" charges were "hurled" at its Catholics. Thomas Elton Brown, *Bible Belt Catholicism* 46 (1977); *see also Come from Behind the Mask!*, Am. Socialist, at 4 (Oct. 20, 1910) ("The Democrats . . . must now . . . fight the Catholics, the Republicans, the negroes . . . ."). Specifically, "[t]he basic contention was that Catholics, because of their loyalty to the Pope, could not possible [sic] be loyal citizens of the United States." Brown, *Bible Belt Catholicism*, at 46. Anti-Catholic lectures were common, and the state had "three anti-Catholic newspapers with statewide circulation . . . ." *Id.* at 94. One group of citizens, with the backing of the Ku Klux Klan, collected signatures to shut down Catholic schools, claiming they taught "loyalty to Rome." *Id.* at 105–07. Catholics were also attacked for their purported "opposition to the public school system." *Id.* at 46. Superintendents openly fired teachers for being Catholic. *Id.* at 99. One principal explained, "[t]here are no professional objections, but Protestant teachers are preferred." *Id.* at 100. Catholics often listed "Christian" or "non-sectarian" on application forms to avoid discrimination. *Id.*; *see also Lady Teacher Rejected Because She Is a Catholic*, Enid Events, at 1 (Oct. 16, 1913). More generally, the

Oklahoma legislature considered legislation "tantamount to outlawing the Catholic Mass" and laws regulating nunneries, which were biasedly viewed as "oppressive." Brown, *Bible Belt Catholicism*, at 49, 66.

Animus, nationally and in Oklahoma, motivated the state constitutional provisions at issue in this action. The language of Article I, Section 5 of the Oklahoma Constitution, on which the Attorney General heavily relies, was taken directly from the Oklahoma Enabling Act. *See* Okla. Enabling Act, § 3(5) ("[P]rovisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all children of said State and free from sectarian control . . . ."); *see also* § 8 (listing a similar prohibition). Article I, Section 5 memorialized that the state would take action to ensure public schools were "free from sectarian control," and Article II, Section 5 was that action. *See* R. L. Williams, *The Constitution and the Enabling Act of the State of Oklahoma Annotated* 5, 10 (1912) (noting the link between both sections).

The Oklahoma Enabling Act required "perfect toleration of religious sentiment," which was codified in Article I, Section 2 of the Oklahoma Constitution; however,

these provisions were also grounded in religious animosity. They banned "[p]olyagmous or plural marriages . . . forever," which is non-germane to religious freedom. Okla. Const. art. I, § 2. The apparent point of this carve-out was to target a Mormon practice. Annotations to Article I, Section 2 in the 1908 treatise further demonstrate that, regardless of the section's language, Protestantism was favored. One annotation notes that "[r]ules of trustees of State university requiring students to attend non-sectarian religious exercises in State University, held not in conflict with such provision." Synder, *The Constitution of Oklahoma*, at 13. Another states, "[r]egulation requiring protestant version of Bible to be read in public schools does not violate a constitutional provision guarantying citizen[s]" religious freedom. *Id.* Similarly, an annotation for Article II, Section 5 notes that an analogous provision in the Michigan Constitution did not prohibit using the Bible in public schools to teach "moral precepts." *Id.* at 21.

Notably, Oklahoma statutory law in the late 1800s and early 1900s permitted Biblical readings while disallowing "sectarian" ideology in public schools. *See* Rev. Laws Okla. § 7940 (1910) ("No sectarian doctrine shall be taught or inculcated in any of the public schools in the state; but nothing

in this section shall be construed to prohibit the reading of the Holy Scriptures, without note or comment."). These readings were supposed to occur "without note or comment," but Catholics still considered these readings "heresy" because they were from the King James Bible, which Catholics believed was a mistranslation. Brown, *Bible Belt Catholicism*, at 40. Additionally, hiring preferences for Protestant teachers call into question whether, in actuality, these readings were done without further instruction.

## II. A United States Supreme Court Justice concluded an analogous provision of the Montana Constitution was unenforceable because of its tainted history.

In a concurrence, United States Supreme Court Justice Samuel Alito examined whether an analogous provision in the Montana Constitution was unenforceable. *Espinoza*, 140 S. Ct. at 2270–71. Citing the "original motivation" for the provision, he concluded that its enforcement would be inconsistent with the First Amendment's anti-discrimination principle. *Id.* at 2268, 2270. Justice Alito first summarized the history of the Blaine Amendment and then noted that the 1889 Montana Enabling Act required "[t]hat provision shall be made for the establishment and maintenance of systems of public schools . . . free from sectarian control." Mont. Enabling

Act, § 4. Next, he noted that Montana adopted what amounted to a state Blaine Amendment, as it was required to do. *See* Mont. Const. art. XI, § 8 (1889). He concluded that the anti-Catholic taint was sufficient to prohibit its constitutional enforcement. *Espinoza*, 140 S. Ct. at 2274.

The analogy between the Montana and Oklahoma Constitutions is too strong to ignore. The relevant section of the Montana Enabling Act is identical to Oklahoma's. Like Montana, as a condition of becoming a state, Oklahoma adopted Article I, Section 5 of its constitution, which is a word-for-word match with the relevant provision of the Enabling Act. In the annotations to this section, an early treatise on the Oklahoma Constitution notes that "[a] similar requirement was made as to Montana . . . ." Williams, *The Constitution and the Enabling Act of the State of Oklahoma Annotated*, at 5. Additionally, Oklahoma adopted Article II, Section 5, which is materially identical to the provision of the Montana Constitution analyzed by Justice Alito. This action's proper outcome cannot stem from the application of bigoted laws to the detriment of the people that these laws were designed to injure.

### III. The New Mexico Supreme Court narrowly construed an analogous provision in its state's constitution because of the provision's tainted history.

A New Mexico Supreme Court decision is also relevant. The court noted that "it appears that the people of New Mexico intended for" an analogous provision in the New Mexico Constitution "to be . . . religiously neutral . . . ." *Moses v. Ruszkowski*, 458 P.3d 406, 419 (N.M. 2018). Even still, the court explained that "the history of the federal Blaine [A]mendment and the New Mexico Enabling Act le[d] . . . [it] to conclude that anti-Catholic sentiment tainted its adoption." *Id.* Accordingly, the court narrowly construed the provision to avoid conflict with the anti-discrimination principle of the First Amendment. *Id.* Amicus has referred to the "Oklahoma Enabling Act" for simplicity, but that act enabled both Oklahoma and New Mexico. The act that troubled the New Mexico Supreme Court is the same act that should trouble this court.

## CONCLUSION

Amicus respectfully advises this Court not to rely on either Article I, Section 5 or Article II, Section 5 of the Oklahoma Constitution. The Petition should be denied.

Dated: November 21, 2023.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

Pursuant to Rule 1.11(h), this is to certify that a true and correct copy of the foregoing was mailed by USPS, postage prepaid on November 21, 2023 to the following:

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