ORIGINAL

IN THE SUPREME COURT OF THE STATE 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.	FILED SUPREME COURT STATE OF OKLAHOMA JAN - 8 2024 JOHN D. HADDEN CLERK Sup. Ct. Case No. 121,694

BRIEF OF THE LIBERTY JUSTICE CENTER AND THE JEWISH COALITION FOR RELIGIOUS LIBERTY AS *AMICI CURIAE* IN OPPOSITION TO THE PETITION

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INTRODUCTION

The Attorney General purports to bring this Petition in defense of "religious liberty." But his public statements evince a stunning hostility toward religious liberty and religious minorities throughout the state. One need only look to the first page of the Petition, in which the Attorney General attacks the faith of more than 30,000 Oklahomans by fearmongering about a "reckoning" in which "extreme sects of the Muslim faith" will teach "Sharia Law" in charter schools. His past public comments repeat these attacks on Islam while more broadly warning about any minority religion that "most Oklahomans would consider reprehensible and unworthy of public funding."

The Attorney General's aversion to religious plurality and educational choice in Oklahoma is misguided, both legally and with respect to the practical impact of expanding school choice for everyone, including religious families. Legally, the Attorney General's disparaging comments about minority faiths betray the First Amendment's mandate that government officials approach their official duties with "religious neutrality" as articulated by the Supreme Court in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), and related precedent. This Court should reject his invitation to write that unconstitutional animus into the laws of this state. Indeed, the Attorney General's public comments mirror government expressions of religious hostility that courts found impermissible in those cases. The Attorney General is also wrong when he argues that Oklahomans should fear religious pluralism and educational choice. Families will benefit from having a broad range of options to choose the best educational path for their needs. This applies equally to Jews, Catholics, Sikhs, Muslims, atheists, and any other religious group. Ultimately,

the only idea that Oklahomans should find "reprehensible" is the notion that religious people would harbor such a hostile view of their neighbors.

I. The Petition Asks this Court to Discriminate Against Religious Minorities in Violation of the First Amendment

Since reversing his office's prior opinion approving the establishment of faith-based charter schools, the Attorney General has clarified that animus toward religious minorities motivated his actions:

> While many Oklahomans undoubtedly support charter schools sponsored by various Christian faiths, the precedent created by approval of the SISCVS application will compel approval of similar applications by all faiths. I doubt most Oklahomans would want their tax dollars to fund a religious school whose tenets are diametrically opposed to their own faith. Unfortunately, the approval of a charter school by one faith will compel the approval of charter schools by all faiths, even those most Oklahomans would consider reprehensible and unworthy of public funding.[1]

While that statement seemed to malign all minority faiths inconsistent with the Christian majority as "reprehensible and unworthy of public funding," Attorney General Drummond later directed his animus specifically toward Oklahomans of the Muslim faith—a religious minority comprising more than 30,000 residents of the state:[2]

> Because of the legal precedent created by the Board's actions, tomorrow we may be forced to fund radical Muslim teachings like Sharia law. In fact, Governor Stitt has already indicated that he would welcome a Muslim charter school funded by our tax dollars. That is a gross violation of our religious liberty.[3]

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[1] Letter from Attorney General Gentner, Drummond to Rebecca L. Wilkinson, Ed.D. (Feb. 23, 2023), https://www.oag.ok.gov/sites/g/files/gmc766/f/documents/2023/rebecca_wilkinson_ag_opinion_2022-7_virtual_charter_schools.pdf

[2] CAIR Oklahoma, Guide to Islam and Muslims in Oklahoma, https://www.cairoklahoma.com/islamguide/

[3] Press Release, Office of the Oklahoma Attorney General, Drummond files lawsuit against state virtual charter board members for violating religious liberty of Oklahoma taxpayers (Oct. 20, 2023),

The Petition itself repeats this attack, arguing that permitting the St. Isidore charter school will lead to a "reckoning" that "will require the State to permit extreme sects of the Muslim faith to establish a taxpayer funded public charter school teaching Sharia Law." Pet. at 1. These comments demonstrate that the Petition is premised on an animus toward religious minorities impermissible under the United States Supreme Court's First Amendment precedent.

"Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). For example, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the Supreme Court struck down ordinances prohibiting animal sacrifice rituals, holding that its "Establishment Clause cases [recognize] the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general." *Id.* at 532. In finding that the ordinances were impermissibly motivated by religious bias, the Supreme Court examined the comments of city officials, including the City Attorney's comment that "[t]his community will not tolerate religious practices which are abhorrent to its citizens," and the city council's stated "commitment to a prohibition against any and all acts of any and all religious groups which are inconsistent with public morals, peace or safety." *Id.* at 526, 540-42.

Likewise, in *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719 (2018), the Court reiterated its holding from *Church of Lukumi*:

> [The Court has] made clear that the government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs

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https://www.oag.ok.gov/articles/drummond-files-lawsuit-against-state-virtual-charter-board-members-violating-religious

> and practices. The Free Exercise Clause bars even "subtle departures from neutrality" on matters of religion.

Id. at 1731. With that guidance, the Court overturned a decision of the Colorado Civil Rights Commission in which the commissioner stated that "freedom of religion has been used to justify discrimination" and critiqued a citizen's stated religious beliefs as "one of the most despicable pieces of rhetoric that people can use." *Id.* at 1729. The Court stated that the Constitution "commits government itself to religious tolerance, and 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." *Id.* at 1731.

Here, the Attorney General's statements go far beyond the "subtle departures from neutrality" recognized in the cases above by explicitly attacking one faith and broadly casting aspersions on all minority religious faiths as a basis for his official actions. The Petition effectively asks this Court to endorse the Attorney General's religious bias—this Court should decline to do so.

II. The Attorney General's Discrimination Against Religious Charter Schools Will Harm all Oklahomans and Will Uniquely Disadvantage Religious Minorities

The Attorney General—while acknowledging that under the status quo "Oklahoma students underperform their peers across the country in every subject"—seeks to reduce educational choice for Oklahomans based on his "prefer[ence]" that schools "focus on reading proficiency so [kids] can read the bible at home."[4] But the Attorney General's outdated views

[4] Press Release, Office of the Oklahoma Attorney General, Drummond files lawsuit against state virtual charter board members for violating religious liberty of Oklahoma taxpayers (Oct. 20, 2023), https://www.oag.ok.gov/articles/drummond-files-lawsuit-against-state-virtual-charter-board-members-violating-religious

of public education and First Amendment jurisprudence—in which religious people and institutions are barred from equal access to public benefits simply because of their faith—was, of course, rejected by the Supreme Court in *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020) and *Carson v. Makin*, 141 S. Ct. 1665 (2021). And it was rejected for good reasons: It was incompatible with the original public meaning of the First Amendment, inconsistent with our nation's history of religious pluralism, and harmful to religious Americans.[5]

Religious families have long shared the tax burden of funding public schools, even if they did not view those schools as a viable option for their children. While wealthy families are afforded the opportunity to send their children to private schools that match their religious values, thousands of low- and middle-income families struggle to do so while providing for other material needs. Ultimately, no parent should be made to choose between putting food on the table and providing their child with an appropriate education. And, despite the Attorney General's divisive rhetoric, no person of any religious faith should wish that upon anyone else, despite their own religious beliefs.

There are numerous reasons why a family from a minority religion may wish to send its children to a school affiliated with its faith. First, parents may wish to raise their children in their faith and to send them to a school which offers "[s]ystematic religious instruction and moral training according to the tenets" of that faith. *Pierce v. Soc'y of Sisters,* 268 U.S. 510,

[5] *See* Signing Statement by Governor Stitt to the Oklahoma Senate Regarding Signing of Senate Bill No. 516 (Jun. 5, 2023), https://www.sos.ok.gov/documents/legislation/59th/2023/1R/SB/0516.pdf ("First Amendment jurisprudence in the latter half of the 20th century fell into an unfortunate habit of focusing on the 'establishment' clause to the exclusion of the 'free exercise' clause. Thankfully, in the past decade, the United States Supreme Court has rectified this imbalance in a growing number of decisions that have pushed back against state policies that explicitly discriminate against people and institutions of faith.")

532 (1925). For example, one Jewish mother, Miriam, explained her decision to move her daughter from a public school to a Jewish day school as follows: "This is her bat mitzvah year. She's missing out on the Jewish part of her education, and that's important to us. When it's Purim, I want her to feel like it's Purim that day. When it's Chanukah, I want her to feel it's Chanukah all week long. You're not going to get that in a public school. And that's an experience I want my daughter to have."[6] For many Jewish families, these options would only be affordable through school choice programs. According to Rabbi Yitz Frank: "There is something to be gained by attending a Jewish day school and the reality is that there are many families that would not have the resources to do that without the help of [school choice] programs."[7]

Similarly, parents' faith may include a deeply held commitment to community service, which they see encouraged at their faith's educational institutions.[8] The Muslim Academy of Greater Orlando serves students through Florida's school-choice program. Once there, Muslim students find a welcoming community with high academic standards. Principal Jameer Abass says, "[W]hat I am trying to teach the kids is you are part of a larger society. You are American. We do fundraising for the Leukemia society and try to be as much as possible part of the community."[9] The Peace Academy—an Islamic private school in Tulsa, Oklahoma—similarly

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[6] Uriel Heilman, "Why some public school parents are switching to Jewish day schools," Jewish Telegraph Agency (Aug. 28, 2015).

[7] Amanda Koehn, "Orthodox educators praise school choice," Cleveland Jewish News (Feb. 10, 2017).

[8] *See* Margaret F. Brinig & Nicole S. Garnett, *Catholic Schools, Urban Neighborhoods, and Education Reform,* 85 Notre Dame L. Rev. 887 (2010) (documenting the positive social effects of Catholic schools).

[9] Livi Stanford, "Muslim schools share concerns about security RedefinED (May 22, 2017), https://www.redefinedonline.org/2017/05/muslim-schools-refuge/

touts its focus on community service and outreach.[10] Parents from minority religions may enroll their children at schools like the Muslim Academy or the Peace Academy because they believe their faith compels them to teach the value of community service to their children.

In other circumstances, school choice may be essential to safeguard children from a hostile environment where they are targeted for wearing unusual headgear or not cutting their hair like most of their classmates. For example, young "Muslims and Jews experience disproportionately high rates of hate speech and bullying."[11] Religious educational institutions reflecting their faith can help protect children from acts of discrimination.

Ultimately, states benefit as the panoply of distinctive educational institutions expands and reinforces the rich mosaic of diversity that makes up our nation. These values of diversity, pluralism, and the freedom to choose one's associations lie at the heart of our social order. By approving St. Isidore's—the nation's first religious charter school—the Oklahoma Virtual Charter School Board has expanded those options consistent with the law and consistent with what is best for Oklahoma families.

CONCLUSION

The Court should reject the Petition.

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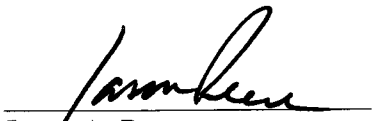
[10] Peace Academy, Tarbiyah (Character Education), https://patulsa.org/character-education/ (last visited Nov. 21, 2023).

[11] Nadia S. Ansary, *Religious-Based Bullying: Insights on Research and Evidence-Based Best Practices from the National Interfaith Anti-Bullying Summit*, Institute for Social Policy and Understanding (2018) 21

Respectfully submitted,



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