Nos. 15-556, 15-557, and 15-558

In The Supreme Court of the United States

DOYLE, et al.,

Petitioners,

v.

TAXPAYERS FOR PUBLIC EDUCATION, et al.,

Respondents,

DOUGLAS COUNTY SCHOOL DISTRICT, et al.,

Petitioners,

v.

TAXPAYERS FOR PUBLIC EDUCATION, et al.,

Respondents,

COLORADO STATE BOARD OF EDUCATION, et al.,

Petitioners,

v.

TAXPAYERS FOR PUBLIC EDUCATION, et al.,

Respondents.

On Petitions For Writs Of Certiorari To The Supreme Court Of The State Of Colorado

BRIEF AMICUS CURIAE ON BEHALF OF THE STATE OF OKLAHOMA IN SUPPORT OF PETITIONERS

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STATEMENT OF THE IDENTITY, INTEREST, AND AUTHORITY OF AMICUS TO FILE

The State of Oklahoma has an interest in the outcome of these cases because Oklahoma, like Douglas County, has enacted a voucher program that has been attacked under a state constitutional provision that prohibits "aid to sectarian institutions." While Oklahoma fully joins the arguments made by the States of Arizona *et al.* in their brief in support of the petitions, Oklahoma writes separately to briefly describe its unique experiences with Article II, Section 5 of the Oklahoma Constitution.[1]

STATEMENT

A member of this Court once remarked that when it came to the Establishment Clause, it was "difficult to imagine an area of the law more in need of clarity."[2] But there is a more pernicious source of confusion that has until now escaped this Court's attention: a recent trend of state courts utilizing state constitutional provisions known as "Blaine Amendments" or other "no-aid" provisions to prohibit state actions that the Establishment Clause would allow. These state

[1] Pursuant to Supreme Court Rule 37(2)(a), the State of Oklahoma notified counsel for all parties of its intent to file a brief at least ten days in advance of the due date for amicus briefs.

[2] *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 22 (2011) (Thomas, J., dissenting from denial of cert.).

constitutional amendments were born of an era of animus towards Catholics, were forced on states through their enabling acts, and have been used by state courts to impose greater restrictions on state government than those imposed by the Establishment Clause. This has resulted in state officials frequently being subject to orders from state courts that require them to take actions that may conflict with federal law. These conflicts can and should be resolved with a decision from this Court holding that state no-aid provisions cannot be so restrictive so as to constitute the hostility to religion forbidden by the Establishment and Free Exercise Clauses.

1. Oklahoma's recent experiences illustrate the need for this Court's intervention. The Lindsey Nicole Henry Scholarship Act ("the Act") was enacted with bipartisan support in 2010. The Act allows parents of children with disabilities to receive scholarships from Oklahoma's State Department of Education that parents can then use to send their child to one of over four-dozen participating private K-12 schools.[3] Most of the participating schools are affiliated in varying degrees with a church or religious organization, but others are not.[4]

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[3] *See* OKLA. STAT. tit. 70, § 13-101.2(A)-(B) (Supp.2015).

[4] *Approved Private Schools for the Lindsey Nicole Henry (LNH) Scholarship*, Oklahoma State Department of Education (Dec. 30, 2014), http://www.ok.gov/sde/documents/2014-12-29/approved-private-schools-lindsey-nicole-henry-lnh-scholarship.

The idea behind the program is that children with disabilities have unique and special needs, and thus there is a particular need for school choice with regard to this class of children. Oklahoma does not presume that it is best-situated to make this choice for a parent of a child with such unique and special needs; the Act thus leaves that choice to the parents, and provides them with the financial wherewithal to do so.

The amount of each scholarship is capped at the amount that the Department of Education would have paid to the public school district attended by the child were the child to attend that school. The Department of Education simply makes that amount – or the amount of the tuition, whichever is lower – available to parents for use towards tuition at the school of their choice. In other words, the Department of Education is no worse off financially as a result of the scholarship program, and is in some respects better off. When a parent elects to take advantage of the program's scholarship opportunity, the cost to the State for the child remains the same as it was prior to that election, and may even decrease in some instances. And in every instance, the State is relieved of the burden of providing the special-needs child with an education and is relieved of the various liabilities and federal law burdens that attach when providing that education.

In 2011, several school districts challenged the validity of the Act, arguing that it violated a host of state constitutional provisions.[5] The primary thrust of the 2011 suit was that it violated Article II, Section 5 of the Oklahoma Constitution, which provides the following:

> No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.[6]

After a state district court held that the program violated this constitutional provision, the Oklahoma Supreme Court reversed, holding that the school districts lacked standing to challenge the Act. The merits of the Article II, Section 5 question were thus left unresolved.

Unfazed, individual (former) administrators from those school districts, along with other individuals, sued again raising the same claims. The district court readily disposed of all but the Article II, Section 5 claim. With regard to that claim, the district court held that the Act's scholarships may be applied

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[5] *See Indep. Sch. Dist. No. 5 of Tulsa Cnty. v. Spry*, 2012 OK 98, ¶¶ 0-1, 292 P.3d 19, 19-20.

[6] OKLA. CONST. art. II, § 5.

toward tuition at secular schools and at religiously-affiliated schools, but not at "sectarian" schools.[7] The district court reasoned that the difference between a "religiously-affiliated" school and a "sectarian" school was like the difference between Southern Methodist University and the University of Notre Dame.[8] At Southern Methodist University, the district court said, the church was "involved and . . . on the board of trustees," and the school's teachings were certainly "influenced by the teachings and principles of the United Methodist Church," but that the school was really "Methodist in name only," and thus merely "religiously affiliated."[9] Notre Dame, on the other hand, had a president who "is a priest" and was "a Catholic institution through and through," and thus "sectarian."[10]

As a result of the court's decision, the Department of Education must, in order to fulfill its obligation to administer the program, make a searching inquiry into whether the fifty-one schools participating in the

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[7] *See Oliver v. Hofmeister*, No. CV-2013-2072, Journal Entry of J. at 2-3 (Okla. Cnty. Dist. Ct. Sept. 10, 2014); Tr. of Proceedings at 28 (barring application of scholarships at "sectarian" schools), *Oliver v. Hofmeister*, No. CV-2013-2072 (Okla. Cnty. Aug. 28, 2014) (distinguishing between sectarian and religiously affiliated schools).

[8] *See* Tr. of Proceedings at 29, *Oliver v. Hofmeister*, No. CV-2013-2072 (Okla. Cnty. Aug. 28, 2014).

[9] *Id*. at 28-29.

[10] *Id*. at 29.

program are "sectarian" or whether they are merely "religiously affiliated."[11] For those that the Department of Education determines to be "religious through and through" and thus "sectarian," the Department of Education will have to inform those schools that they are barred from participating in the program because of the degree of their religiosity.

This decision places Oklahoma officials in the untenable position of being directed by a state court to violate federal law. In 2008, the Tenth Circuit examined a Colorado program that provided state-funded scholarships to certain Colorado students to attend that state's colleges and universities.[12] The program allowed the scholarships to be used at some religious schools, but barred their use at institutions that were "pervasively sectarian."[13] As a result of that requirement, the Colorado agency in charge of the scholarship program was forced to review each school's curriculum to determine whether the courses "tend[ed] to indoctrinate or proselytize."[14] The Tenth Circuit held that the program constituted "discrimination 'on the basis of religious views or religious

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[11] *Oliver v. Hofmeister*, No. CV-2013-2072, Journal Entry of J. at 3 (Okla. Cnty. Dist. Ct. Sept. 10, 2014) (enjoining expenditure of scholarship funds only insofar as spending at "sectarian" schools would occur).

[12] *See Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1250 (10th Cir. 2008).

[13] *Id*.

[14] *Id*. at 1253.

status,'"[15] was "fraught with entanglement problems,"[16] was "subject to heightened constitutional scrutiny,"[17] and was plainly in violation of the federal Free Exercise and Establishment Clauses.[18] The state court decision thus appears to be squarely in conflict with federal precedent and in violation of the United States Constitution because it requires the State of Oklahoma to engage in the very sort of practices already condemned by the Tenth Circuit.

The appeal of the district court's decision, in which the State has argued that the district court's application of Article II, Section 5 places that provision in conflict with federal law, is currently pending before the Oklahoma Supreme Court.[19]

2. Another recent Article II, Section 5 decision by the Oklahoma Supreme Court likewise placed state officials in the difficult position of being ordered by a state court to take actions that may conflict with federal law.

The original Oklahoma Constitution and a large display explaining its drafting and ratification has

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[15] *Id.* at 1258.

[16] *Id*. at 1261.

[17] *Id.* at 1258.

[18] *Id*. at 1250.

[19] The State requested oral argument, but the Oklahoma Supreme Court denied that request. The case has thus been fully briefed and ripe for decision since May 4, 2015. *See* Order at 1-2, *Oliver v. Hofmeister*, No. 113,267 (Okla. Aug. 3, 2015).

long resided outside the entrance to the Oklahoma Supreme Court's courtroom at the Oklahoma State Capitol. In 2009, the Oklahoma Legislature saw fit to authorize the placement of a Ten Commandments monument on the grounds of the Capitol to memorialize the Ten Commandments' influence on the drafting of that Constitution. The Legislature directed that the monument accord with the monument at issue in *Van Orden v. Perry*,[20] and further directed that such a monument (1) "shall be designed, constructed, and placed on the Capitol grounds . . . at no expense to the State of Oklahoma" and (2) "shall not be construed to mean that the State of Oklahoma favors any particular religion or denomination thereof over others."[21] The legislature explained that it was authorizing the monument because "the Ten Commandments are an important component of the foundation of the laws and legal system of the United States of America and of the State of Oklahoma."[22]

On this last point, the Oklahoma Legislature was undoubtedly correct. Oklahoma's constitutional tradition is deeply rooted in the teachings of the Ten Commandments. The state's constitutional convention was opened with a "supplication to the Divine Presence" led by a minister who praised the "Almighty

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[20] 545 U.S. 677 (2005).

[21] *Id*.

[22] 2009 Okla. Sess. Laws 852, ch. 204, § 1.

and everliving God."[23] And when shortly thereafter J.F. King was elected President Pro Tempore of the convention, he told the gathered delegates that

> [w]e have nothing to gain by copying the ten commandments into the Constitution . . . but we have everything to gain and nothing to lose by making a definite and specific application of the general principles and of the ten commandments to the business of the people. In my judgment the law rightly enacted and rightly interpreted is but an application of the ten commandments to the affairs of men.[24]

Continuing this theme, the delegates even inserted "invok[ation of] the guidance of Almighty God" into the preamble of the final state constitution.[25]

Once erected, the Ten Commandments monument quickly drew the ire of atheist advocacy groups and others, and litigation was soon afoot. But when ACLU lawyers crafted their lawsuit seeking its removal, they chose – in light of *Van Orden* – to omit any claim that the monument violated the Establishment Clause. They instead claimed that, even if allowed by

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[23] Oklahoma Constitutional Convention, Proceedings of the Constitutional Convention of the Proposed State of Oklahoma 5 (1907).

[24] Albert H. Ellis, *A History of the Constitutional Convention of the State of Oklahoma* 64 (1923).

[25] OKLA. CONST. pmbl.

federal law, the monument was barred by Article II, Section 5 of Oklahoma's Constitution.

In defense of the monument, Oklahoma relied heavily on the only monument case previously decided by the Oklahoma Supreme Court under Article II, Section 5, *Meyer v. Oklahoma City*.[26] In *Meyer*, the Oklahoma Supreme Court upheld a fifty-foot lighted cross at the state fairgrounds, which sits at the crossroads of two of the busiest interstate highways in the nation, Interstates 40 and 44. Despite being placed at the fairgrounds by pastors, the court allowed the cross to remain on state property, reasoning that "[n]otwithstanding the alleged sectarian conceptions of the individuals who sponsored the installation of this cross, it cannot be said to display, articulate or portray, except in a most evanescent form, any ideas that are alleged to pertain to any of the sectarian institutions or systems named in Art. 2, § 5."[27]

Based on *Meyer*, the district court granted summary judgment in the State's favor. On appeal, the Oklahoma Supreme Court reversed the judgment with a short per curiam opinion, finding that "the Ten Commandments are obviously religious in nature" and that any historical justifications for the monument were irrelevant for purposes of its Article II,

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[26] 1972 OK 45, 496 P.2d 789.

[27] *Id.* at ¶ 11, 496 P.2d at 792.

Section 5 analysis.[28] The opinion made no reference to *Meyer*, and concluded that *Van Orden* could be disregarded because no Establishment Clause claim had been brought.[29] The court insulated its conclusion from review by this Court by insisting that its conclusion rested "solely on the Oklahoma Constitution with no regard for federal jurisprudence."[30]

The State petitioned for rehearing, arguing that if the Court intended to "overturn *Meyer* with its new 'any religious purpose' test, it should do so explicitly to dispel any confusion" as to the governing standard for Article II, Section 5 claims.[31] The Court denied that petition in a four-sentence order that again made no mention of *Meyer*.[32]

On remand to the district court, the State immediately sought leave to amend its answer, arguing the following:

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[28] *Prescott v. Okla. Capitol Pres. Comm'n*, 2015 OK 54, ¶ 6, ___ P.3d ___ .

[29] *See id*.

[30] *Id.* (citing *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983)).

[31] Petition for Rehearing at 2-3, *Prescott v. Okla. Capitol Pres. Comm'n*, 2015 OK 54 (No. 113,332) (June 30, 2015).

[32] In concurring opinions, two justices indicated that they would overrule *Meyer*. *See Prescott v. Okla. Capitol Pres. Comm'n*, 2015 OK 54, ¶ 7 (Gurich, J., concurring) (*Meyer* implicitly overruled by Supreme Court's decision in this case); *id.* at ¶ 15 (Taylor, J., concurring) (*Meyer* should be explicitly overruled).

> The Oklahoma Supreme Court's interpretation of Article II, Section 5, now requires State hostility towards religion which, under U.S. Supreme Court case law, is a violation of the First Amendment's Establishment Clause. As a result, Article II, Section 5 is null and void as applied to the challenged State actions in this case, and the U.S. Constitution provides a complete defense to Plaintiffs' claim.[33]

The State pointed out that in the specific context of reviewing a Ten Commandments monument identical to Oklahoma's, a plurality of this Court has stated that the State cannot "evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage."[34] Thus, ordering state officials to remove the Ten Commandments monument "based primarily on the religious nature of the tablets' text would . . . lead the law to exhibit a hostility toward religion" and would "create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid."[35]

The district court, however, concluded that the Oklahoma Supreme Court's statement that the

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[33] Motion for Leave to Amend Answer at 3, *Prescott v. Okla. Capitol Pres. Comm'n*, No. CV-2013-1768 (Okla. Cnty. Dist. Ct. Sept. 30, 2015).

[34] *Van Orden*, 545 U.S. at 684 (plurality opinion); *see also id.* at 704 (Breyer, J., concurring in judgment).

[35] *Id.* at 704 (Breyer, J., concurring in judgment).

monument "shall be removed" left it with no discretion to allow the amendment, and thus entered judgment requiring that the monument be removed within thirty days.[36] Despite their very real fear that they were "creat[ing] the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid,"[37] state officials removed the monument on October 5, 2015, as directed by court order.[38]

3. Article II, Section 5 decisions that conflict with federal law are not merely a recent phenomenon. Around the mid-century, for example, the Oklahoma Supreme Court twice utilized Article II, Section 5 to invalidate programs that allowed public school buses – at no additional cost to the State – to pick up and drop off Catholic school students who lived and went to school along the buses' existing routes.[39]

In the first of those two cases, a 1941 case called *Gurney v. Ferguson*, the defenders of the law argued

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[36] *Prescott v. Okla. Capitol Pres. Comm'n*, No. CV-2013-1768, at 2 (Okla. Cnty. Dist. Ct. Sept. 11, 2015).

[37] *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring in judgment).

[38] Notice to the Court at 1, *Prescott v. Okla. Capitol Pres. Comm'n*, No. CV-2013-1768 (Okla. Cnty. Dist. Ct. Oct. 8, 2015).

[39] *Gurney v. Ferguson*, 1941 OK 397, 122 P.2d 1002; *Bd. of Ed. for Indep. Sch. Dist. No. 52 v. Antone*, 1963 OK 165, ¶ 3, 384 P.2d 911, 912 ("[T]he routes taken by such buses are not enlarged or altered and . . . there is no additional or appreciable expense incurred by the public school district by reason thereof.").

that Article II, Section 5 said nothing about schools, and was therefore distinct from Blaine Amendments that had "been considered in connection with similar questions" in other states.[40] The Oklahoma Supreme Court rejected this notion, holding that – when read in conjunction with a constitutional provision directing the establishment of public schools "free from sectarian control"[41] – Article II, Section 5 "no doubt" was intended to "prohibi[t] the use of public money or property for sectarian or parochial schools."[42] Having found that Article II, Section 5 was intended to block aid to parochial schools, the court concluded that the busing program at issue was "in aid of" the parochial school, and the busing of the parochial school students must cease.[43]

Soon after, this Court decided *Everson v. Board of Education*.[44] At issue was a New Jersey program that provided reimbursements to parents who used public buses to transport their children to school.[45] Because the program was open to even those parents who sent their children to private Catholic schools, a taxpayer sued claiming that the program violated the Establishment Clause.[46] Recognizing that the Free Exercise

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[40] *Gurney*, 1941 OK 397, ¶ 6, 122 P.2d at 1003.

[41] OKLA. CONST. art. I, § 5.

[42] *Gurney*, 1941 OK 397, ¶ 8, 122 P.2d at 1003.

[43] *Id*. at ¶¶ 10-12, 122 P.2d at 1004.

[44] 330 U.S. 1 (1947).

[45] *Id*. at 3.

[46] *Id.* at 3-4.

Clause forbade New Jersey from prohibiting "individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation,"[47] this Court held that the Establishment Clause did not prohibit New Jersey from "spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools."[48] This was true, this Court said, even where "some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets."[49] While the Court acknowledged that the First Amendment did not prohibit a state from passing a law providing transportation "only to children attending public schools,"[50] it cautioned that the Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers."[51] In other words, while a program limited to public school students might be permissible, if a program was opened up to private school students, it could not, on the basis of their religiosity, single out

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[47] *Id*. at 16.

[48] *Id*.

[49] *Id.*

[50] *Id.*

[51] *Id*. at 18.

students who attended religious schools for exclusion from the program.

The *Everson* decision prompted the Oklahoma Legislature to reinstate the program that had been invalidated in *Gurney*.[52] Litigation ensued, and the Oklahoma Supreme Court again held that parochial school students had to be excluded from the busing program. "Notwithstanding the practical effect" of this Court's holding in *Everson*, said the Oklahoma court, that holding "essentially constitutes a ruling that transportation of parochial pupils is not a Federal question."[53] That being so, the Oklahoma court said, "the decision does not change the effect of state constitutional provisions,"[54] and because of Article II, Section 5, the busing program would remain closed to students of parochial schools.[55] Once again, state officials were required by order of a state court to take actions that conflicted with federal law, and which prohibited its citizens, "because of their faith," from "receiving the benefits of public welfare legislation."[56]

[52] *See Antone*, 1963 OK 165, ¶¶ 4-8, 384 P.2d 911, 912-13.

[53] *See id.*

[54] *Id*. at ¶ 6, 384 P.2d at 913.

[55] *Id*. at ¶ 12, 384 P.2d at 914.

[56] *Everson*, 330 U.S. at 16.

ARGUMENT

I. Certiorari should be granted to provide guidance to state courts applying provisions like Article II, Section 5 of the Oklahoma Constitution.

Because of all this, Oklahoma's Legislature, its executive branch officials, and its people are left at sea, with no way to predict what is permissible under this often conflicting combination of federal and state law. State officials are left with directives from state courts that conflict with federal law. And worse yet, Oklahomans' right to a state government that is not hostile toward religion, and their right to freely exercise their religion, are being violated by a state constitutional provision that state courts view as wholly unrestricted by the religion clauses of the federal First Amendment. This is untenable. The Court should grant the petitions and hold that state no-aid provisions cannot be applied in a manner that leads to the hostility to religion that is forbidden by the Establishment and Free Exercise Clauses.

First, certiorari is necessary to resolve the deep and long-running conflicts between state constitutional provisions like Article II, Section 5 and the federal constitution's religion clauses. Federal law imposes an obligation on government to not discriminate against religion. Under the Establishment Clause, "the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus preferring those who believe in no religion over those who do

believe."[57] Rather, "the Government [must] maintain strict neutrality, neither aiding nor opposing religion."[58] The Establishment Clause thus balances the desire for "a division between church and state," with the need to prevent "hostility to religion" and to enable government to "in some ways recogniz[e] our religious heritage."[59] The Establishment Clause simply "does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities."[60]

Because of their sweeping language, however, no-aid provisions like the one in Colorado[61] or Oklahoma's Article II, Section 5, are prone to clashes with these federal constitutional ideals. For example, Colorado at one point operated a program creating scholarships for students to use at universities and colleges so long as they were not "pervasively sectarian."[62] The Colorado Supreme Court upheld that program against an attack under Colorado's no-aid

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[57] *School Dist. of Abington v. Schempp*, 374 U.S. 203, 225 (1963) (citation and internal marks omitted).

[58] *Id.* at 218.

[59] *Van Orden*, 545 U.S. at 683-84 (plurality opinion).

[60] *Bd. of Ed. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 248 (1990).

[61] COLO. CONST. art. IX, § 7.

[62] *Weaver*, 534 F.3d at 1250; *Americans United for Separation of Church and State Fund, Inc. v. State*, 648 P.2d 1072, 1074 (Colo. 1982).

provision because the program required Colorado officials to scour internal university governance and the contents of coursework to ensure that no schools participating were "sectarian."[63] It was precisely *that* feature of the program, however, that caused the Tenth Circuit Court of Appeals to invalidate the program because of its discrimination against certain religious groups, its intrusive inquiry into colleges' religious activities, and the inadequate government interest advanced by the policy.[64]

Notwithstanding that decision, two different Oklahoma district courts have applied Oklahoma's Article II, Section 5 to require a similarly intrusive inquiry into K-12 schools' religious activities and to require state discrimination against those schools deemed "too religious." These decisions have transformed a program designed by the Oklahoma Legislature to treat all participating private schools equally and to avoid governmental entanglement with religion, into a program that is hostile to religious schools and that requires state officials to engage in the unseemly task of deciding where each school falls on a sliding scale of religiosity.

Consider also Oklahoma's Ten Commandments case. The Oklahoma Supreme Court interpreted Article II, Section 5 to have a "broad and expansive reach," banning all uses of public funds or property

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[63] *Americans United*, 648 P.2d at 1083-84.

[64] *Weaver*, 534 F.3d at 1257-69.

that in any way, even indirectly, benefits religion.[65] Under this interpretation, any item on State property or funded by the State, no matter how historically significant, no matter how elevating of virtue, morality, and good citizenship, no matter how beneficial to the State and good order, is forbidden under Oklahoma law if it is at all "religious in nature."[66]

That decision, therefore, does not merely require neutrality among religions, mandating the State treat all religions (and nonreligion) equally and approach them on a level playing field. Rather, it requires affirmative discrimination *against* religion, effectively requiring the State to countenance only secularism and prefer in all respects nonreligion over religion. Oklahoma law now requires, given two monuments of equal artistic worth and significance to the State of Oklahoma, one being completely secular and one linked to religion, that the religious one be rejected solely because of its religious nature. A statue honoring the philanthropist Bill Gates would stand while a statue of Mother Teresa would be toppled because of the Catholic nun's spiritual significance and the obvious faith that drove her ministry.[67] This is pure

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[65] *Prescott*, 2015 OK 54, ¶¶ 4-5, ___ P.3d at ___ .

[66] *Id.* at ¶ 6; *see also id.* at ¶ 27 (Taylor, J., concurring) (reasoning that historical value, legislative intent, context, and all other objective factors are irrelevant; "the only question is whether the monument benefits a system of religion").

[67] *Cf. id.* at ¶¶ 8, 13 (Gurich, J., concurring) (concluding that monument was impermissibly religious in part because sponsor is "an ordained Southern Baptist Deacon and Sunday

(Continued on following page)

discrimination *because of* religion, and such handicapping of, opposition to, and hostility against religion is forbidden by the Establishment Clause.

The Supreme Court has stated that such discrimination is so impermissibly hostile towards religion that it violates the Establishment Clause. The "Government may not mandate a civic religion that stifles any but the most generic reference to the sacred" because this level of hostility creates "the very divisions along religious lines that the Establishment Clause seeks to prevent."[68] Thus, "purg[ing] from the public sphere all that in any way partakes of the religious" would "tend to promote the kind of social conflict the Establishment Clause seeks to avoid."[69]

These kinds of conflicting outcomes can only be expected to proliferate. Indeed, no-aid provisions like those in Oklahoma or Colorado have the potential to affect programs worth tens of millions of dollars – programs that do or could exist in numerous jurisdictions – and to infringe on the constitutional rights of Americans across the country. A grant of certiorari in this case can provide guidance to lower courts,

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School teacher" and law firm representing the State asked supporters to pray for this case).

[68] *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819-22 (2014).

[69] *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in judgment).

legislators, and government officials as to the interplay between federal and state constitutional provisions.

Second, while the Court might otherwise hesitate to intervene in state constitutional affairs, the Court should have no such hesitations here because the state law provisions at issue here were foisted on many states by Congress as preconditions to statehood and are of a "shameful pedigree."[70]

Oklahoma, for example, was directed by Congress to insert provisions in its constitution ensuring that the state's schools remained free "from sectarian control."[71] Delegates to Oklahoma's constitutional convention complained about the unprecedented conditions imposed on the nascent state by Congress,[72] but as required by congressional mandate, those delegates inserted several provisions into Oklahoma's constitution designed to prevent aid to

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[70] *See Mitchell v. Helms*, 530 U.S. 793, 828-29 (2000) (plurality opinion).

[71] 34 Stat. 267, 270 (1906).

[72] Kathy Jekel, *The Original Constitution of the State of Oklahoma 1907 & the Road to Statehood* 195 (2007) (letter from William H. Murray, President of the Constitutional Convention to President Theodore Roosevelt, complaining that "[t]he Enabling Act . . . contains a greater number of limitations upon the sovereignty of the citizenship of the proposed State than ever before required of a people in the history of the admission of states.").

sectarian schools, including Article I, Section 5 and Article II, Section 5.[73]

While these Oklahoma constitutional provisions were adopted in 1907, they bear the same heritage of anti-Catholic bias as those adopted by states some 30 years prior on the heels of the failure of the federal Blaine Amendment.[74] Oklahoma's Article II, Section 5 is in fact modeled on Article II, Section 7 of Missouri's Constitution,[75] which was adopted in 1875 in the heat of the anti-Catholic passions that sparked a rash of state Blaine Amendments.[76] This Court should "not hesitate to disavow"[77] the shameful heritage of these types of provisions and to require that they be narrowly construed so as to avoid conflict with the federal constitution, particularly since they are not products of the free will of sovereign states, but rather the product of a federal mandate.

[73] *See Gurney*, 1941 OK 397, ¶¶ 5-8, 122 P.2d at 1003 (reading Article I, Section 5 and Article II, Section 5 as complementary provisions barring state aid to sectarian schools and institutions).

[74] *See Connell v. Gray*, 1912 OK 607, ¶ 12, 127 P. 417, 421.

[75] *Id*.

[76] *See* Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub Pol'y 657, 672-73 & n.78 (1998).

[77] *Mitchell*, 530 U.S. at 828 (plurality opinion).

CONCLUSION

For the reasons above, the petitions should be granted.

Respectfully submitted,

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