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.* STATE OF OKLAHOMA,

Respondent.

ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL,

Petitioner,

v.

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

Respondent.

On Writs of Certiorari to the Oklahoma Supreme Court

BRIEF OF AMICI CURIAE AMERICAN ATHEISTS, INC. AND OTHER SECULAR GROUPS IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

American Atheists, Inc., is a national civil rights 501(c)(3) organization that works to achieve religious equality for all Americans by protecting what Thomas Jefferson called the "wall of separation" between government and religion created by the First Amendment. American Atheists strives to promote understanding of atheists through education, advocacy, and community-building; works to end the stigma associated with atheism; and fosters an environment where bigotry against our community is rejected. To that end, American Atheists opposes any effort to allow religious doctrine to govern public education in the United States.

The Secular Student Alliance ("SSA") is a 501(c)(3) educational nonprofit and network of over 200 student chapters on high school and college campuses. Dedicated to advancing nonreligious viewpoints in public discourse, the mission of the Secular Student Alliance is to organize, unite, educate, and serve secular students and student communities that promote the ideals of scientific and critical inquiry, democracy, secularism and human-based ethics. SSA empowers secular students to proudly express their identity, build welcoming communities, promote secular values, and set a course for lifelong activism.

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[1] Amici have no parent company nor have they issued stock. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than amici made a monetary contribution to the preparation or submission of this brief.

SSA and its chapters and affiliates value the efforts of high schools, colleges, and universities to ensure an inclusive and welcoming educational environment.

The American Humanist Association (AHA) is a national nonprofit membership organization based in Washington, DC, with over 235 local chapters and affiliates in 45 states and the District of Columbia, and over 34,000 members and supporters. Founded in 1941, the AHA is the nation's oldest and largest humanist organization. Humanism is a progressive lifestance that affirms—without theism or other supernatural beliefs—a responsibility to lead a meaningful, ethical life that adds to the greater good of humanity. The mission of the AHA's legal center is to protect one of the most fundamental principles of our democracy: the constitutional mandate requiring separation of church and state. To that end, the AHA's legal center has litigated dozens of Establishment Clause cases in state and federal courts nationwide, including in the U.S. Supreme Court.

The Secular Coalition for America is a group of diverse organizations large and small representing atheists, agnostics, humanists, and other nonreligious Americans. As such, the Secular Coalition for America is a dedicated 20-year-old lobbying organization whose mission is to advocate for the equal rights of nonreligious Americans and defend the separation of religion and government in Congress, in the executive branch, in the courts, and more recently, in public schools. SCA is also dedicated to amplifying the diverse and growing voice of the nontheistic community in the United States.

Center for Inquiry (CFI) is a non-profit educational organization dedicated to promoting and defending reason, science, and freedom of inquiry. Through

education, research, publishing, social services, and other activities, including litigation, CFI encourages evidence-based inquiry into science, pseudoscience, medicine and health, religion, and ethics. CFI believes that the separation of church and state is vital to the maintenance of a free society that allows for a reasoned exchange of ideas about public policy.

SUMMARY OF THE ARGUMENT

This Court, in *Kennedy v. Bremerton School District*, made clear that the *Lemon* test is not to be applied in future cases, stating that the courts must instead determine whether government actions challenged under the Establishment Clause comport with "historical practices and understandings," 597 U.S. 507, 535 (2022) (internal quotation marks omitted), and "faithfully reflect the understanding of the Founding Fathers," *id.* at 536 (internal quotation marks omitted). The *Kennedy* decision did not, however, elucidate how this inquiry should be undertaken in the Establishment Clause context, nor has any decision done so since. This Court should take the guidance from its Second Amendment cases, a context in which this Court regularly engages in "history and tradition" analysis. The similarities and distinctions between the rights protected by the Establishment Clause and Second Amendment help to clarify how this should be conducted in order to best achieve the "history and tradition" test's purpose.

Courts impact history. The judges, attorneys, clerks, and staff that comprise the judiciary make history by deciding landmark cases, advancing groundbreaking legal arguments, and shaping how statutes, regulations—even our founding documents—are interpreted in the future. But the courts do not *make* history. Officers of the court are not trained in historical analysis. Neither

the judiciary nor parties to litigation are equipped to carry out the tasks of document collection, authentication, and review that are generally entrusted to entire university departments, subject to peer review, and conducted cumulatively over centuries. And courts' factual conclusions, even those of the highest courts, apply only to the particular case at bar, not the historical record.

Nevertheless, the courts must, under certain circumstances, examine history to arrive at legal conclusions. *Kennedy*, 597 U.S. at 535; *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 24-25 (2022). This examination must be conducted in a manner that is systematic and objective. This is necessary to ensure that the conclusions reached hew to the stated objective of the test: avoiding "chaos in the lower courts, . . . [and] differing results in materially identical cases," as well as providing clear guidance to legislators and other stakeholders. *Kennedy*, 597 U.S. at 534.

Beyond *Kennedy*, this Court *has* provided some guidance as to how this analysis is to be conducted. First, the courts should narrowly define the scope of the historical question with a high degree of particularity. Second, if that historical question has already been addressed by existing precedent, the courts should rely on those precedents and need not retread the same ground by conducting the analysis anew in every case. Third, the courts should examine the historical record, giving particular weight to federal practice at the time of the founding and state practice subsequent to incorporation of the constitutional provision. Fourth, if the historical record provides clear guidance in the form of affirmative government practices, the courts should determine whether the challenged government action is in line

with the historical practices. The government fails to meet this burden if it is unable to provide evidence of a robust, uniform tradition that is relevantly analogous to the challenged act.

ARGUMENT

I. The Court's analysis must be systematic and objective.

This Court set aside the test announced in *Lemon v. Kurtzman* in order to institute a test that, in the Court's view, does not suffer from the *Lemon* test's "shortcomings." *Kennedy*, 597 U.S. at 534. Namely, the Court highlighted several longstanding criticisms of the test, including that it "invited chaos in lower courts, led to differing results in materially identical cases, and created a minefield for legislators." *Id.* (cleaned up). If the historical analysis now required of the judiciary when addressing purported Establishment Clause violations is to succeed in correcting the *Lemon* test's shortcomings, it must be conducted in a systematic manner that objectively examines relevant primary sources for historical precedents and ensures that the challenged government action conforms to those precedents. To do otherwise would inject the same "chaos" into this analysis as that which resulted from the uneven application of the *Lemon* test.

This approach also avoids another pitfall that could easily lead to conflicting results: relying on the subjective understandings of individual Founders. As the courts conduct this analysis, they must assiduously avoid letting the personal views of individual (or numerous) government officials tarnish the analysis. The focus must be on acts and practices by the government. There are few issues about which the Founders were entirely in agreement. Their subjective

opinions will invariably be in conflict on numerous constitutional questions. Relying on the idiosyncratic views of this or that founder would inevitably result in the chaotic and inconsistent results that caused this Court to set aside the *Lemon* test in the first place.

II. This Court's Application of the History and Tradition Test.

In *Kennedy*, this Court expressly set aside the Establishment Clause test laid out in *Lemon v. Kurtzman*. In its place, where the courts lack guidance from existing precedent, their interpretation of the Establishment Clause should be guided "by 'reference to historical practices and understandings.'" *Kennedy*, 597 U.S. at 535. The Court provided no specific guidance in *Kennedy* as to how this analysis should be conducted.[2] However, the Court did favorably cite the historical analysis conducted in several prior opinions, including *American Legion v. American Humanist Association*, 588 U. S. 19 (2019), *Torcaso v. Watkins*, 367 U. S. 488 (1961), *McGowan v. Maryland*, 366 U. S. 420 (1961), and *Walz v. Tax Comm'n of City of New York*, 397 U. S. 664 (1970). The analysis employed in these cases comports with the historical analysis performed in *New York Rifle & Pistol Association v. Bruen*. Although *New York Rifle* concerned a Second Amendment claim rather than a claim under the First Amendment's Establishment Clause, it is nonetheless this Court's most concrete explication of the history and tradition analysis and thus helps illuminate how this analysis should be carried out.

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[2] *Kennedy* concerned a Free Exercise Clause claim and this Court's discussion of the Establishment Clause was limited to a brief explanation why the respondent school district's Establishment Clause concerns were misplaced.

A. The nature of the constitutional principle at issue must be stated with a high degree of particularity.

The analysis should begin by narrowly defining the constitutional question to be decided. In order to best ensure that the analysis is as rigorous and objective as possible—thereby limiting the risk that subsequent similar cases will arrive at conflicting results—the scope should be defined with a high degree of particularity. Both the judiciary and litigators are already familiar with this approach. *United States v. Rahimi*, 602 U.S. 680, 692 (2024).

The cases cited by this Court in *Kennedy* provide substantial guidance as to the appropriate scope of the inquiry. In *Town of Greece*, the Court limited its historical inquiry to whether a legislative prayer that lacks any compelled participation or attendance and which favors no particular religion "fits within the tradition long followed in Congress and the state legislatures" of opening legislative proceedings with a prayer. 572 U.S. 565, 575 (2014) (citing *Marsh v. Chambers*, 463 U.S. 783 (1983) (whether "legislative invocations are compatible with the Establishment Clause")). In *Torcaso v. Watkins*, the Court examined the narrow history of religious tests for office that existed prior to the Founding and the steps undertaken by those in the former colonies to eliminate such tests from the fledgling United States. 367 U.S. at 490-92; *see also Kennedy v. Bremerton Sch. Dist.*, 597 U.S. at 536.

Last term, in *Rahimi*, this Court reiterated that the analysis must be framed in such a way as to encompass only "relevantly similar" practices. 602 U.S. at 692 (citing *N.Y. State Rifle*, 597 U.S. at 29). Thus, in examining whether the federal statute prohibiting

the possession of a firearm while subject to a domestic violence restraining order violated the Second Amendment, the Court's historical analysis was narrowly limited to the question of whether it was constitutional to restrict the possession of firearms "to mitigate demonstrated threats of physical violence." *Rahimi*, 602 U.S. at 698. The Court contrasted this formulation of the question with that addressed by the Court previously in *United States v. Heller*: whether it was constitutional to restrict the possession of firearms absent a "judicial determination[]" specific to the individual in question. *Compare Rahimi*, 602 U.S. at 698-99 *with United States v. Heller*, 554 U.S. 570, 626-27 (2008).

In keeping with the adversarial nature of our judicial system, this inquiry must rely on the record as it has been developed by the parties. This allows those most interested in the outcome of the case to "frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Greenlaw v. United States*, 554 U.S. 237, 243 (2008). As Justice Scalia pointed out, the courts proceed from the premise that "the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Castro v. United States*, 540 U.S. 375, 386 (2003), Scalia, J., concurring.

B. Historical analysis is unnecessary where existing precedent is on point.

Once the court has identified the appropriate scope of the Establishment Clause inquiry, the court must determine whether a historical analysis is necessary at all. Even as it set aside the *Lemon* test, this Court reiterated that certain classes of government conduct are presumptively invalid and cited numerous Establishment Clause cases that remain good law.

This includes government action that makes religious observance compulsory or coerces anyone to attend a house of worship, *Kennedy*, 597 U.S. at 536-37 (citing *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)), or put coercive pressure on individuals to engage in religious activities, *Id.* (citing *Lee v. Weisman*, 505 U.S. 577, 589 (1992)). "[C]oercion along these lines was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment." *Id*.

This Court's discussion of the history-and-tradition test demonstrates that it need not reinvent the wheel in every case. As relevant here, the government may not support religious instruction in school, *Zorach v. Clauson*, 343 U.S. 306, 315 (1952), nor impose prayers or other religious observances on students in class, *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 205 (1963), at school ceremonies, *Lee v. Weisman*, 505 U.S. 577, 599 (1992), nor at school athletic events, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000); *Kennedy*, 597 U.S. at 531-32. It is particularly noteworthy that, while this Court set aside the test announced in *Lemon*, it did not raise any issue with the actual holding of *Lemon* that "providing state aid to church-related elementary and secondary schools" violated the Establishment Clause. *Lemon v. Kurtzman*, 403 U.S. 602, 606-07 (1971). This holding was consistent with *Illinois ex rel McCollum v. Board of Education*. 333 U.S. 203, 212 (1948). This Court's favorable discussion of *Zorach*, which contrasted a permissible "released time" program with the unconstitutional program at issue in *McCollum*, shows that the outcome of *Lemon* remains valid, though the Court has repudiated the manner in which it arrived at that conclusion. *Kennedy*, 597 U.S. at 559.

In addition to these cases specifically cited by this Court in *Kennedy*, historical analysis was conducted in a similar manner in *Engel v. Vitale*, 370 U.S. 421, 425-30 (1962) (examining English and colonial history of state-controlled prayer practices), *Town of Greece v. Galloway*, 572 U.S. 565, 575-77 (2014) (examining legislative prayer practices since ratification of the First Amendment), *Marsh v. Chambers*, 463 U.S. 783, 786-92 (1983) (same), *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 182-85 (2012) (examining the English practice of appointing church ministers prior to the founding), *Lynch v. Donnelly*, 465 U.S. 668, 674-77 (1984) (examining the history of ceremonial deism since the founding era).

Where the challenged government action is already addressed by existing precedent, and absent some glaring error identified by this Court in the previous historical analysis, conducting the historical analysis anew would only invite the same chaotic "minefield" that the Court sought to avoid by requiring application of the history-and-tradition test. This approach also avoids placing a substantially greater burden on the judicial system by limiting the circumstances in which the court must devote time and resources to a deep historical analysis.

C. Only if existing precedent is insufficient to resolve a question of Establishment Clause interpretation should the courts look to history for guidance.

Where no precedent is sufficiently on point to provide reliable guidance to the courts, it will be necessary to conduct an inquiry into relevant historical practices. This analysis must be rigorous in its approach and carefully conducted to avoid giving a particular historical source too much or too little weight in the

inquiry. Again, this deliberate approach is necessary to avoid the chaos of reaching conflicting results.

1. The government bears the burden of proof that its challenged action comports with historical understanding.

Before turning fully to the method of historical analysis now required by this Court, it is important to note that in this inquiry "the [g]overnment bears the burden of proving the constitutionality of its actions." *N.Y. State Rifle*, 597 U.S. at 24 (quoting *United States v. Playboy Entertainment Group, Inc.*, 529 U. S. 803, 816 (2000)); *see also Rahimi*, 602 U.S. at 691. Where a plaintiff has challenged a government action and existing precedent does not clearly resolve the question, "the government must generally point to historical evidence about the reach of the [First] Amendment's protections." *N.Y. State Rifle*, 597 U.S. at 24-25. This evidence must be sufficient to "affirmatively prove" that its action is part of the relevant historical tradition, *Id.* at 19, and that tradition must be of an "unambiguous and unbroken" nature, *Marsh v. Chambers*, 463 U.S. 783, 792 (1983).

This burden entails more than identifying one or a few supporting examples from history. *N.Y. State Rifle*, 597 U.S. at 46 ("we doubt that *three* colonial regulations could suffice to show a tradition" (emphasis in original)). The courts should no less "stake [their] interpretation of the [First] Amendment upon a single law, in effect in a single State, that contradicts the overwhelming weight of other evidence" than they should the Second Amendment. *Id.* at 65-66 (cleaned up). "[C]ourts should not 'uphold every modern law that remotely resembles a historical analogue,' because doing so 'risks endorsing outliers that our ancestors would never have accepted.'" *Id.* at 30 (quoting

Drummond v. Robinson Twp., 9 F.4th 217, 226 (9th Cir. 2021)) (cleaned up). The government's burden is to show that the challenged action conforms to "longstanding" history and tradition. *Id.* at 30; *see also Rahimi*, 602 U.S. at 692 ("A court must ascertain whether the new law is 'relevantly similar' to laws that our tradition is understood to permit, 'apply[ing] faithfully the balance struck by the founding generation to modern circumstances.'" (quoting *N.Y. State Rifle*, 597 U.S. at 29, and n.7)).

The lower courts have already begun to take this warning to heart. In *Koons v. Platkin*, the trial court examined whether a statute banning the carrying of a firearm on private property without the express consent of the property owner met the test laid out in *N.Y. State Rifle*. *Koons v. Platkin*, 673 F. Supp. 3d 515, 607 (D.N.J. 2023). Although New Jersey pointed to a trio of "relevantly similar" Reconstruction-era statutes from Louisiana, Oregon, and Texas, in support of its own statute, the court determined that this was insufficient to "establish a *representative* historical tradition to justify" the challenged statute. *Id.* at 622.

2. The court must carefully delineate between historical practices based on the era from which they originate.

i. Practices that predate the First Amendment

In *New York State Rifle*, this Court was careful to distinguish between the examination of historical practices that contribute to the understanding of a right that the people *already possessed* under pre-existing legal principles on the one hand—such as the Second Amendment's right to bear arms—and historical practices that impact the interpretation of

constitutional clauses that "lay down a *novel* principle." 597 U.S. at 20. Thus, while accepted practices that predated the adoption of the Second Amendment can be used to infer that like practices today are valid, the same cannot be said for the Establishment Clause. Both the Establishment and Free Exercise Clauses were *novel* developments in the law, adopted in direct response to, and in departure from, the status quo under English rule and the colonial governments. *Torcaso*, 367 U.S. at 492. These provisions, like the others contained in the First Amendment, "broke *new* constitutional ground in the protection it sought to afford to freedom of religion, speech, press, petition and assembly." *Id.* (emphasis added).

As this Court noted in *Everson v. Board of Education*, the practices of established churches "shock[ed] the freedom-loving colonials into a feeling of abhorrence" and "aroused their indignation." 330 U.S. 1, 8-11 (1947). The colonists' objections to practices such as taxing the public to pay government-approved ministers and build and maintain churches, compelling tithes and church attendance, and other hallmarks of established churches "found expression in the First Amendment." *Id.* at 11.

Any effort to interpret the Establishment Clause and apply it to new circumstances must take into account its origin as a culmination of colonists' efforts to *break* from prior English practices. As a result, practices predating the states' ratification of the First Amendment are relevant only insofar as they may illustrate practices from which the fledgling United States sought to depart.

ii. Practices that originate between the adoption of the First Amendment and the incorporation of the Fourteenth Amendment

Federal practices immediately following the ratification of the First Amendment are highly relevant to any inquiry into the proper application of the Establishment Clause. Actions taken by the First Congress are strong indicators of the Founders' understanding of the scope of that provision. *See Marsh*, 463 U.S. at 787-90. When examining such actions, however, it is important to focus the inquiry on primary sources in order to avoid polluting the inquiry with subsequent writers' and historians' biases and self-serving glosses on the historical record.[3]

Just as colonial practices in place before the Establishment Clause came into operation should not be relied on to justify current practices, state practices

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[3] Such second-hand sources, as hearsay within hearsay regarding the contents of original documents referred to therein, are not even admissible under the ancient document exception to the Rule Against Hearsay. Fed. R. Evid. 803(16); Fed. R. Evid. 803, Notes of Advisory Committee on Rules ("In a hearsay situation, the declarant is, of course, a witness, and neither this rule nor Rule 804 dispenses with the requirement of firsthand knowledge."); Fed. R. Evid. 805; *see also Langbord v. United States Dep't of the Treasury*, 832 F.3d 170, 189-91 (3d Cir. 2016) (portions of Secret Service reports that contained statements of individuals other than the reporting officer were inadmissible hearsay within hearsay); *United States v. Hajda*, 135 F.3d 439, 444 (7th Cir. 1998) ("If the [ancient] document contains more than one level of hearsay, an appropriate exception must be found for each level."); *Threadgill v. Armstrong World Industries, Inc.*, 928 F.2d 1366, 1376 (3d Cir. 1991) (authentication and admission of an ancient document "in no way precludes counsel from challenging the *content* of the documents" (emphasis added)).

in place prior to the incorporation of that Clause to the states through the Fourteenth Amendment's Due Process Clause are of little, if any, value in determining what government practices are permitted.

To be sure, some states' constitutions and statutes contained provisions that mirrored the Establishment Clause. Virginia is one such example, with An Act for Establishing Religious Freedom, 16 January 1786, Manuscript, Records of the General Assembly, Enrolled Bills, Record Group 78, Library of Virginia, later folded into the state's 1830 constitution, Va. Const. art. I (1830). Although practices under such state constitutional provisions may be helpful in guiding the analysis, the Court should nonetheless always bear in mind that in many instances, states' interpretation of their constitutional provisions would not necessarily have mirrored the interpretation of the Establishment Clause, and such parallel interpretations should not be assumed where the record is silent on the issue.[4]

III. The Board's approval of a religious public school fails the history-and-tradition test.

The Board's challenged action, approving a religious school as part of Oklahoma's public school system, is directly contrary to nearly a century of this Court's First Amendment jurisprudence, including cases containing in-depth historical analysis that this Court very recently endorsed. See Part II(B), above. Furthermore, the Board has failed to carry its burden for showing an unambiguous and uninterrupted history and tradition of state-sponsored religious public schools. The few historical examples it does

[4] Again, the government bears the burden of showing that such historic examples in fact support upholding the challenged act.

provide in an effort to support its absurd action in this case bear *no* similarity to the case at bar, let alone a "relevant similarity," *N.Y. State Rifle*, 597 U.S. at 29, thus they do not support the Board's action.

This Court saw fit to set aside the *Lemon* test in order to avoid the chaos it invited in lower courts, the specter of reaching "differing results in materially identical cases," and the "minefield" it created "for legislators." *Kennedy*, 597 U.S. at 534 (internal quotation marks omitted). The "history and tradition" analysis that the courts are directed to use in its place must be conducted in a consistent and objective manner, lest the new test succumb to the same infirmities as its predecessor. Such an application of the test to the present case mandates a decision in favor of the Respondent.

CONCLUSION

For the foregoing reasons, the Board's action is inconsistent with the Establishment Clause and *amici* urge this Court to AFFIRM the decision below.

Respectfully submitted,

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