Nos. 24-396, 24-394

IN THE

Supreme Court of the United States

ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL,
Petitioner,

v.

GENTNER DRUMMOND, Attorney General of Oklahoma,
ex rel. STATE OF OKLAHOMA,
Respondent.

OKLAHOMA STATEWIDE CHARTER SCHOOL BOARD, et al.,
Petitioners,

v.

GENTNER DRUMMOND, Attorney General of Oklahoma,
ex rel. STATE OF OKLAHOMA,
Respondent.

On Writ of Certiorari
to the Oklahoma Supreme Court

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONERS

Roy S. Moore*
**Counsel of Record*
Jeffrey Tuomala
Talmadge Butts
FOUNDATION FOR MORAL LAW
P.O. Box 148
Gallant, AL 35972
(334) 262-1245
kayla@morallaw.com
jtuomala.home@outlook.com
talmadge@morallaw.org

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Counsel for *Amicus Curiae*

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Foundation for Moral Law ("the Foundation") is a 501(c)(3) non-profit, national public interest organization based in Alabama, dedicated to defending religious liberty, God's moral foundation upon which this country was founded, and the strict interpretation of the Constitution as intended by its Framers who sought to enshrine both. To those ends, the Foundation directly assists or files *amicus* briefs in cases concerning religious freedom, the sanctity of life, and other issues that implicate the God-given freedoms enshrined in our Bill of Rights. The brief's principal author, Jeffrey Tuomala, is a constitutional scholar and professor of law at Liberty University School of Law. His career has been dedicated to teaching and restoring the moral foundations of law.

The Foundation has an interest in this case because it believes that the State of Oklahoma's denial of charter school status to St. Isidore. The Foundation believes that the root cause of these infringements is tax-funded education writ large, which necessarily promotes the establishment of religion, be it secularism or otherwise. However, to the extent that tax-funded education is public policy, it cannot discriminate against religion.

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae,* its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Since 1947, when this Court first incorporated the Establishment Clause into the Fourteenth Amendment, it has claimed that the state must maintain neutrality between religion and nonreligion or between believers and unbelievers. This case provides an opportunity for the Court to move a step closer to achieving that ideal by siding with the Oklahoma Statewide Virtual Charter School Board (Charter School Board) against the Oklahoma Attorney General in giving St. Isidore, a Catholic charter school, equal treatment with "nonsectarian" charter schools.

One of the main reasons that the Court has failed in the past to require equal treatment for religion and nonreligion is that it has falsely bifurcated reality between the "secular" and the "religious" without defining either term. This bifurcation is most obvious in the Court's formulation of the *Lemon* test, whose death has been widely rumored and, in some quarters, celebrated. The term "secular" usually appears to be used synonymously with the term "nonreligion," and somehow, labeling a particular government action *secular* justifies discrimination against religion.

A noticeable shift in the Court's Establishment Clause jurisprudence in the 1990s from a separationist approach to a non-preferentialist approach ameliorated in some small degree the disparity of treatment between religion and nonreligion for educational funding. In the current decade, the Court's Free Exercise Clause jurisprudence has served, in principle, to require

equal funding of religion and nonreligion. The Court also seems to have minimized the effects of the false bifurcation of secular and religious. Following this trajectory, the Court should rule in favor of the Charter School Board and St. Isidore.

The Court's inconsistency in ensuring neutral treatment for religion and nonreligion, and its false bifurcation of reality between the secular and religious, are rooted in its failure to provide a carefully articulated and satisfactory definition of religion. Frequently, difficult legal issues cannot be resolved by trying to narrowly focus on an issue but rather by taking a more enlarged view of the problem. That is certainly true in the case of trying to provide a definition of religion as it is used in the legal context of our Constitution.

The term *religion* is defined in the Virginia Declaration of Rights, and that definition provides the foundation for the Virginia Statute for Establishing Religious Freedom (Virginia Statute), which the *Everson* Court recognized as encapsulating the same objective and protection as the First Amendment. The Virginia definition draws a jurisdictional line between civil government and religion. Matters that are properly governed by "force or violence" are within the jurisdiction of civil government. All other matters are within the jurisdiction of religion because they are governed exclusively by conscience.

Religion as defined in Virginia includes all matters falling outside the jurisdiction of civil government. By properly defining religion, the Court would necessarily provide the foundation for

resolving the problems that arise under the state action doctrine. Either way the Court rules on the state action question, funding for St. Isidore creates an establishment problem, but failure to fund creates a neutrality between religion and nonreligion problem. The challenge for the Court is to develop, or perhaps it is more appropriate to say to adopt, a jurisprudence that provides an objective standard for judging which matters fall within the respective jurisdictions of civil government and religion.

The Virginia Statute identifies two fundamental principles of liberty. The first is that "God has created the mind free" and the second is that it is "sinful and tyrannical" to tax a person for the "propagation of opinions which he disbelieves." Compulsory attendance at tax-funded public schools violates both principles, but the Court has been inconsistent in acknowledging and applying these fundamental principles of liberty. Even if Oklahoma repealed its compulsory education laws, but funded all educational ventures equally, it would violate the second principle.

All tax-funded education constitutes an unconstitutional establishment of religion; therefore, tax funding for St. Isidore violates the Establishment Clause. But tax-funding for "nonsectarian" education, be it charter schools, traditional public schools, private schools, or homeschools also constitutes a violation of the Establishment Clause. It would be a greater injustice not to afford St. Isidore equal protection with all the other educational establishments that Oklahoma funds. Therefore, the Court should put an

end to disparate treatment of religion by ruling in favor of the Oklahoma Charter School Board and St. Isidore.

ARGUMENT

I. The charter school and other educational initiatives are driven by the religious cleansing of the public schools and consequent disfunction of those schools.

St. Isidore recognizes the importance of religious faith—in this case, the Catholic faith—for education. The problem is that it wants to foster its vision of religiously based education at the expense of taxpayers who do not share that vision. But this problem is not unique to St. Isidore; it is a problem endemic to all tax-funded education. All education is based on some ideological view of the world, whether categorized as philosophical, theological, or something else.

The fundamental question is whether education is properly within the jurisdiction of civil government. Does the state have jurisdiction over the mind (how we think) and over the heart (what we value)? Besides the jurisprudential question of whether the state has jurisdiction over the hearts and minds of children is the practical question of whether compulsory attendance at tax-funded schools is efficacious in winning hearts and minds.

A. The religious cleansing of public schools has harmed education.

The cleansing of religion from public schools began in 1948 with the Court's decision in *McCollum v. Board of Education*, 333 U.S. 203 (1948). By the

early 1960s, that cleansing reached its denouement with decisions outlawing state sponsored prayer and Bible reading in public schools. *Engel v. Vitale*, 370 U.S. 421 (1962) (outlawing prayer) and *Abington School District v. Schempp*, 374 U.S. 203 (1963) (outlawing Bible reading). Those decisions helped trigger the Chrisitan school and homeschool movements of the 1970s and 80s. Additionally, many states adopted a variety of measures to provide some aid to private religious schools and thereby lessen the financial burden on families who had to pay taxes and tuition to follow the dictates of conscience.

Whether or not the abolition of prayer and Bible reading contributed to the dysfunction in public schools, a decline in academic performance and standards of behavior followed. *See* Paul E. Peterson, *The Decline and Fall of American Education*, Hoover Institution, Jan. 30, 2003; [2] Gordon A. Crews, *A Study of School Disturbances in the United States: A Twentieth Century Perspective, Part Two*, Marshall Digital Scholar (1996); [3] *The Removal of Character Education from the Public Schools and America's Moral Decline Since 1963* in William Jeynes and David W. Robinson (editors), *International Handbook of Protestant Education* 25-47 (2012).[4]

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[2] https://www.hoover.org/research/decline-and-fall-american-education

[3] https://mds.marshall.edu/cgi/viewcontent.cgi?article=1032&context=criminal_justice_faculty

[4] https://link.springer.com/chapter/10.1007/978-94-007-2387-

Standards of conduct suffer in any organization that lacks moral authority. A basic principle is that a person and organization will have no authority if not under authority. *Matthew* 8:9. A teacher may be backed by a principal and a principal by higher government officials, but, if those officials recognize no higher authority than themselves, organizational decline is sure to follow. As George Washington warned, "[L]et us with caution indulge the supposition that morality can be maintained without religion. … [R]eason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle." *Farewell Address*, September 19, 1796.

Academic performance suffers for other reasons than lack of discipline. Students must have a greater sense of purpose in life than being good tax paying citizens and living the "American Dream" of having more stuff. The meaning of life and a belief in the unity of knowledge cannot be sustained by a belief in evolutionary materialism through which the universe is governed by chance or blind determinism. The Court squelched the most modest attempts by states to introduce students to a view of the world that includes a Creator who endows them with inalienable rights. *See, e.g.*, *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Stone v. Graham*, 449 U.S. 39 (1980); and *Edwards v. Aguillard*, 482 U.S. 578 (1987).

B. Two highly respected jurists have argued that the public schools as they currently operate are unconstitutional.

Former Attorney General William Barr, after surveying the history of the rise and demise of public schools, has concluded that as the public schools currently operate, they compromise the Establishment Clause by "promoting a radical secular belief system."[5] He further concluded that the Free Exercise Clause rights of children trapped in those schools who do not want a foreign ideology forced upon them are violated. *Id*.

One proposed solution is to implement a comprehensive voucher system that provides funding for a variety of educational options and thus freedom of choice. *Id*. Barr's critique of the current state of education in America is compelling, but he fails to define "religion." Rather than advocating for no educational establishment, he argues for a system of multiple establishments much like the type of system existing in some European countries. Jeffrey C. Tuomala, *Is Tax-funded Education Unconstitutional?*, 18 Liberty University Law Review 1009, 1060, n.203 (2024).

Professor Philip Hamburger also argues that state schools are unconstitutional insofar as they don't provide other options for parents, but he does so on freedom of speech grounds. Compulsory attendance in public schools that attempt to indoctrinate children without providing state

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[5] William Barr, Speech May 20, 2021, Alliance Defense Fund Awards Banquet.

financed alternatives constitutes compelled speech. Like Barr, Hamburger suggests a voucher system as a constitutional alternative to our predominant current system. [6] Arguments under the Speech Clause bolster arguments made under the religion clauses that the state has no authority to prescribe an orthodoxy of opinions and beliefs.

C. The history of attempts to ensure neutrality between religion and nonreligion has trended toward equal treatment.

Beginning with its decision in *Everson*, this Court has stated that the religion clauses require the government to maintain neutrality of treatment between religion and nonreligion, as well as between one religion and another.[7] The religious cleansing of public schools belies the Court's claim that the states must be neutral toward religion and nonreligion. Although in some cases the Court has approved equal treatment for religion and nonreligion (e.g., reimbursement for bus fare in *Everson*), overwhelming financial support is for nonreligion, and religious views are squelched. In recent years the public schools have gone even further and become a base for partisans engaged in the culture war against traditional religious values.

Justices on the Court have taken two basic approaches to the neutrality principle in cases dealing with support for religious education,

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[6] Philip Hamburger, Is the Public School System Constitutional? Wall Street Journal, Oct. 23-24, 2031, at A13.

[7] *See, e.g., McCreary Cnty v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005).

whether the aid goes directly to schools or indirectly to parents or students. For separationists on the Court, neutrality allows tax-funding for secular (non-religious) education but not for religious education. *See, e.g.,* dissenters *in Everson*. For non-preferentialists on the Court, neutrality has meant that the state may fund at least the secular component of religious schools, but it is not required to provide any funding for personnel, material, or services support at all. *See, e.g.,* the majority in *Everson*.[8]

Both separationists and non-preferentialists advocate very strange notions of neutrality. The state taxes everyone and provides so-called non-religious education that is free, but parents who are motivated by conscience to provide their children with a religious education must pay both taxes and tuition. These notions of neutrality are supposedly justified by a false bifurcation of reality between the secular and religious. Things secular, including law, inhabit the secular realm to be governed by autonomous reason. Things religious, are banished to the realm of personal belief and practice governed by faith rather than reason. See Tuomala at 1075-79.

This bifurcation leaves the state free to establish an orthodoxy of secular beliefs in public schools and to prohibit teaching from a perspective based on the authority of the Christian faith or any other disapproved faith or ideology. Although the Court has strongly hinted at the death of the *Lemon* test,[9]

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[8] *See* Tuomala, at 1079-1082.

[9] Prong one of *Lemon* requires a secular purpose, and prong

it will not be able to cast aside the secular-religious bifurcation without a major shift in its thinking.

This false bifurcation of secular and religious explains why the Oklahoma Attorney General has taken his position of opposing religious charter schools. The Oklahoma Charter School Board is attempting to treat religion and nonreligion neutrally. Quite commendably, St. Isidore rejects a false bifurcation of the secular and religious in its program of education: "[St. Isidore] fully incorporates these [teachings of the Catholic Church's Magisterium] into every aspect of the School, including but not limited to its curriculum and co-curricular activities." *Drummond ex rel. State v. Oklahoma Statewide Virtual Charter School Board*, 558 P.3d 1, 6 (Okla. 2024).

The Court's separationist approach prevailed in the 1970s and 1980s, but eventually the non-preferentialist approach gained ascendency. Its Establishment Clause jurisprudence since the 1990s has trended toward an amelioration of the disparity of treatment between religion and nonreligion. This ascendancy is evident in the provision of tutors and testing services in religious schools (*Agostini v. Felton*, 521 U.S. 203 (1997)), provision of computers and other equipment for religious schools (*Mitchell v. Helms*, 530 U.S. 793 (2000)), and vouchers that can be used in religious schools (*Zelman v.*

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two prohibits state action that has a primary effect of advancing or inhibiting religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). But just as the Court has not defined what *religion* means in the First Amendment, it has not defined what *secular* means in *Lemon*.

Simmons-Harris, 536 U.S. 639 (2002)). All these funding and support schemes further the freedom of choice in education, but the aid provided in those cases still came nowhere near equality of treatment for religion.

Separationists on the Court have expressed moral indignation that "religious" speech they disagree with should be supported by their taxes. They claim it is a violation of their consciences, and they are right, but their concern for the violation of the consciences of other taxpayers appears totally lacking. *See, e.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639, 715 (2002) (Souter, J. Dissenting).

D. The shift of focus to the Free Exercise Clause has, in principle, furthered the equality of treatment between religion and nonreligion.

The Court's more recent Free Exercise Clause jurisprudence holds greater promise for alleviating lack of neutrality and the disparity of treatment between religion and nonreligion. In a trilogy of cases, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017), *Espinoza v. Montana Department of Revenue*, 591 U.S. 464 (2020), and *Carson ex rel. O.C. v. Makin*, 596 U.S. 767 (2022), the Court has required states to afford equal treatment for religion and nonreligion, at least in certain situations.

The financial impact of those decisions for alleviating the disparity of treatment between religion and nonreligion was quite small, but the principle of equality if carried to its logical extent is foundation shaking. That principle requires equal

funding for religious and non-religious charter schools. In fact, it would require equal funding for traditional religious schools and non-religious public schools. In principle, equal funding for charter schools is no different from vouchers that parents could use in the school of their choice. The only significant difference in some minds is that vouchers go to the parents, whereas funds for charter schools go directly to the schools—and that is why the parties and *amici* have made the state action doctrine so central to their briefs in this case.

Providing equal funding for St. Isidore and all other educational choices would solve the problem of inequality of funding for religion and nonreligion. However, it would not solve the more basic question of whether tax-funding of schools, like tax-funding of churches, constitutes an unlawful establishment of religion. That problem cannot be resolved without defining "religion," an essential task that the Court has failed to perform. Its failure to define religion by drawing a line between that which is within the jurisdiction of civil government and that which is within the jurisdiction of religion or conscience explains its inability to provide a test for the "state action" doctrine. For First Amendment purposes, all human action falls within the jurisdiction of the state or of religion; therefore, to define religion is to conversely identify what belongs to Caesar.

II. Whether or not St. Isidore is deemed to be a state actor, state funding for it constitutes an establishment of religion.

A. The Court has been unable to formulate an adequate test for identifying state action.

A reasonable assumption is that the outcome of this case hinges on the question of whether St. Isidore is a state actor. This is clear from the attention that the Oklahoma Supreme Court in its opinion, as well as the parties and the *amici*, have devoted to the state action question. The implication is that if St. Isidore is a state actor it may not receive state funding, but if it is not a state actor it may be funded.

In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the Court stated that it was unable to distinguish between traditional and non-traditional functions of civil government upon which "state regulatory immunity" was based. In effect, the Court rejected a history and tradition approach for defining the functions of government. But the Court also rejected any "a priori definitions of state sovereignty," meaning that it rejected a law of nature approach. *Id.* at 547-48. Although there is a role reversal in St. Isidore's case—we have a private party arguably playing the role of the state rather than a state arguably playing the role of a private party as in *Garcia*—the fundamental issue is the same. Is it possible to distinguish between state and private action?[10] Despite its decision in

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[10] Are the critical legal theorists right that there is no

Garcia, the Court has concluded that it is possible, at least when applying the state action doctrine.

The Oklahoma Supreme Court referenced the five "state actor" tests that the U.S. Supreme Court identified in *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 198 (2001). The Oklahoma Court focused on two of those tests—"the entwinement and the public function tests." *Drummond*, 558 P.3d, at 11-12. Those two tests appear to be the most relevant in this case. Based on those tests, convincing arguments are made that St. Isidore is a state actor, and equally convincing arguments that it is not a state actor. Without a test that defines the nature of the state, parties are left to reason by analogy and to argue that the facts of this case are more or less like the facts of cases that the Court has previously decided.

The precedent that appears factually closest to this case is *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982). Perhaps the distinguishing fact is that the school in *Rendell-Baker* independently pre-existed the government contract to educate special needs students, whereas in this case the creation of the school and the formation of the contract under the Oklahoma Charter Schools Act were nearly simultaneous. Okla. Stat. tit. 70, § 3-134 (B) (1-35) (*See* Brief in Opposition on Petition for Writ of Certiorari 5-6).

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principled distinction between the public and private realms? Or if we do maintain the distinction, have we no better course of action than the pragmatist who does whatever seems to work, however "work" is measured?

B. If St. Isidore is not a state actor, failure to provide equal funding with nonsectarian schools likely violates the Free Exercise Clause.

If St. Isidore is not a state actor, Oklahoma's failure to give it the same funding as non-religious charter schools arguably constitutes a violation of the Free Exercise Clause. This conclusion follows from the Court's decisions in the Free Exercise trilogy of cases cited above—*Trinity Lutheran, Espinoza*, *and Carson*. In principle, the extension of the holdings in those cases to charter schools is logical.

Any claim Attorney General Drummond makes that equal funding of religious charter schools violates the Establishment Clause is weakened by the Court's general shift towards a non-preferentialist approach that religion and non-religion may be treated equally. This shift is evident in *Agostini*, *Mitchell*, and *Zelman*.

The Free Exercise trilogy of cases, as well as the latest Establishment Clause cases serve to undermine the effects of the false bifurcation between the secular and the religious and to ameliorate the harm caused by laws that discriminate against religion and in favor of non-religion in educational funding. The inexorable movement of the Court's religion clauses jurisprudence is to require equal funding for all educational options.

C. If St. Isidore is a state actor, it is more likely that state funding constitutes a violation of the Establishment Clause.

If St. Isidore, an admittedly religious school, is a state actor, it logically follows that Oklahoma's funding constitutes an establishment of religion. It might appear that the Oklahoma Constitution's "little Blaine Amendment" and implementing Act is congruent with the Establishment Clause, but that depends on the test that the Court applies. If rumors of *Lemon's* death are true, the history and tradition test is probably most relevant. It could be argued that the Founding generation's friendliness toward religion is evidence that tax-funded religious schools do not constitute an establishment.

If Oklahoma, or any other state, were to remove its statutory and constitutional exclusion of tax funding for religious charter schools, and if charter school cases are treated like school voucher cases, then arguably tax-funded religious charter schools would not violate the Establishment Clause. This further assumes that the Court eliminates the false bifurcation of secular and religious and allows equal funding for both non-religious and religious charter schools and school voucher schemes. As with any religious school that is worth its salt, St. Isidore acknowledges that its faith undergirds the entire educational enterprise, so it would be impossible to apportion tax-funding only to the secular portion of the education it provides.

Logically, if the religion clauses require the states to be neutral between religion and nonreligion, Oklahoma would have to fund every

kind of education equally, including traditional brick and mortar schools, charter schools, voucher schemes, and homeschools. Following this line of reasoning, establishment issues morph into equal protection issues and become a logical extension of the line of reasoning the Court adopted in the trilogy of Free Exercise cases.

III. The Court must properly define religion as it is used in the First Amendment.

Up to this point in the brief, "religion" has been used in the narrow sense of a system of beliefs and practices associated with a particular religious cultus or sect. The term religion, as it is used in the First Amendment and as informed by the definition whose meaning was hammered out during the Virginia establishment controversy, has a far broader meaning than that usually associated with a religious cultus or sect. That obviates the need to try to shoehorn various "secular" -isms, like secular humanism and atheistic humanism, into the mold of religions readily identified by doctrine and practice.

For good reason, religious liberty has been called the "fundamental liberty upon which all other forms of civil liberty depend."[11] The reason that all other forms of liberty depend on religious liberty is that religion constitutes all forms of beliefs, speech, and actions that are outside the jurisdiction of the state and are therefore exclusively governed by conscience. The Court, having failed to provide a careful exposition of the definition of religion, leaves

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[11] John Ragosta, Religious Freedom: Jefferson's Legacy, America's Creed 125 (University of Virginia Press, 2013).

nothing outside the jurisdiction of the state, including the hearts and minds of the people. This failure forced one federal judge to admit that he was not able to "formulate" a definition of religion and then claim that it would be "unwise and even dangerous, to put forth as a matter of law one definition of religion." *Glassroth v. Moore*, 229 F. Supp. 2d 1290, 1313 n. 5, 1314 (M.D. Ala. 2002).

A. A definition of religion and the basic principles of religious liberty were established during the Virginia establishment controversy.

On June 12, 1776, Virginia adopted its Declaration of Rights,[12] which included a provision guaranteeing religious liberty and defining religion. James Madison and George Mason coauthored section 16:

> Sec. 16. That religion, or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity towards each other.[13]

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[12] Virginia may have been the colony most repressive of religious liberty leading up to the War for Independence. *See* Tuomala, at 1021-1024 (2024) (based largely on Ragosta, Religious Freedom ch. 2.)

[13] Richard L. Perry (ed.), Sources of our Liberties 312 (American Bar Foundation 1978).

This definition of religion became a focal point around which the Virginia establishment controversy culminated in 1786 with the enactment of the Virginia Statute for Establishing Religious Freedom.[14] In *Everson v. Board of Education*, 390 U.S. 1 (1947), this Court identified the Virginia Statute as the progenitor of the First Amendment Establishment Clause. U.S. Const. Amend I.

> This Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective, and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute. *Reynolds v. United States, supra,* at 98 U. S. 164 . . . *Davis v. Beason,* 133 U. S. 333, 133 U. S. 342.[15]

Although the *Everson* Court did not offer a definition of religion, it did cite *Reynolds v. United States*, 98 U.S. 145 (1878), which quoted part of the definition provided in section 16 of the Virginia Declaration of Rights. *Id*. at 163. The *Everson* Court also cited Madison's famous Memorial and Remonstrance against Religious Assessments (Remonstrance) in support of its decision. *Everson* at 12, n.12. Justice Rutledge's dissent, agreeing with

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[14] *See generally* Tuomala, at 1016-38 for a survey of the key persons, events, and documents involved in the Virginia establishment controversy.

[15] *Everson*, 390 U.S., at 13. In *Davis v. Beason*, 133 U.S. 333 (1890), which *Everson* cited, the Court gave a longer explanation of the term "religion," but cited neither Madison nor Jefferson.

the importance of the Remonstrance, attached it as an appendix to his opinion. *Id.* at 63. The Remonstrance begins by quoting the definition of religion from section 16 of the Virginia Declaration of Rights. In large measure, Madison's Remonstrance is an extended explication of that definition of religion. Tuomala at 1029-34. The "Virginia statute," to which the *Everson* Court referred is the Virginia Statute for Establishing Religion Freedom. That Statute articulates two fundamental principles of religious liberty. They are, first, that "Almighty God hath created the mind free," and second, "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical."

It is especially noteworthy that Virginia defines religion by drawing a jurisdictional line between matters belonging to the state and those belonging to religion. Matters properly within the jurisdiction of the state may be directed by "force or violence." Those matters belonging to religion may be directed only by "reason and conviction." Once a matter is objectively determined to be outside the jurisdiction of the state and within the jurisdiction of religion, a person's beliefs, words, and actions are governed solely by the individual's conscience. The individual conscience, however, does not determine what falls within the jurisdiction of religion. Tuomala at 1024-26.

Certainly, the parents' decision whether to read *Curious George*, *The Federalist*, or the Bible to their children is governed by conscience, not by "force or violence." In other words, it is a matter within the

jurisdiction of religion, not civil government. The state has no jurisdiction over the mind of the parent or the child; thus, the state may not use force or violence to decide what they may read or listen to. Education is within the jurisdiction of religion; therefore, all tax-funded education constitutes an establishment of religion.

B. James Madison's opposition to a bill that Patrick Henry introduced resulted in the Virginia Statute for Establishing Religious Freedom.

1. Patrick Henry introduced "A Bill Establishing a Provision for Teachers of the Christian religion."

The immediate flash point for the Virginia establishment controversy was the proposal for tax-funded education to counter the breakdown of public morals. Before the War for Independence, Virginia taxed everyone for the support of the Anglican Church but tolerated dissenting churches. To gain support from the Presbyterians and Baptists for the war effort, Virginia stopped exacting taxes for the support of the Anglican Church. Ragosta at 58, 60-62, 67, 74-75.

In 1785, hoping to counter the moral dissolution that accompanied the war effort, Patrick Henry introduced "A Bill Establishing a Provision for Teachers of the Christian Religion," [16] which, if

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[16] *Id.* at 13. Justice Rutledge's dissenting opinion appended Madison's Memorial and Remonstrance and Henry's Bill for Establishing a Provision for Teachers. *Id.* at 63, 72 (Rutledge, J., dissenting).

enacted, would have established a voucher system for funding moral instruction. Taxpayers would direct payment to the "society of Christians" of their choice or to a fund for the establishment of public schools. Tuomala at 1026-28.

St. Isidore, in arguing for equal funding of religious and nonreligious charter schools, has taken a position very similar to Henry's Bill that would have provided equal funding for educational choices. The main difference between Virgina and the Oklahoma Charter School Board is that Virginia rejected Henry's Bill as contrary to the fundamental principle that "God has created the mind free" and that it is "sinful and tyrannical" to tax a person "for the propagation of opinions which he disbelieves."

2. Madison issued a Memorial and Remonstrance in opposition to Religious Assessments to oppose enactment of Henry's Bill.

To rally opposition to defeat Henry's Bill, James Madison wrote his famous Remonstrance. He began by quoting Virginia's definition of religion from section 16 of the Declaration of Rights. Several important points must be emphasized. First, the definition is from a legal document, not a theological, psychological, or sociological treatise on religion. The Declaration defines religion as all matters that are properly directed only by "reason and conviction." The state's jurisdiction extends only to those matters that may properly be directed by "force or violence." Taxation for moral instruction is obviously backed by force or violence.

Madison identified the objective standard by which to determine the respective jurisdictions of civil government and individual conscience. He invoked "our Creator," or "Universal Sovereign" who governs by "the light of Christianity," "the light of revelation," and "Truth." Remonstrance paras. 1, 12. In other words, it is the Christian faith based most clearly and authoritatively in the Bible that places jurisdictional limits on the state, thus guaranteeing the freedom of conscience for those matters falling within the jurisdiction of religion. The Declaration of Independence likewise recognizes the distinction between the Creator and the creature, thus providing the only possible basis for objective standards of law and jurisdictional restrictions on state power that guarantee religious liberty.

Madison appealed to our Creator and Universal Sovereign as the objective source of our rights. "[Religion] is unalienable also, because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him." Of course we owe a duty to God in everything we do, but here Madison distinguishes those matters owed exclusively to God—and not within the jurisdiction of the state—to be religion. God is the source of all law, but he has not given the state jurisdiction to set up institutions designed for the purpose of telling citizens what we must think and value. Tuomala at 1110-18.

A curriculum based on the truth of Christianity is the only one that provides a basis for belief in the objectivity of truth and unity of knowledge, because in Christ all things were created and in Him all

things hold together. *Colossians* 1:16-17 (NIV). All people, whether they acknowledge it or not, have a duty to make every thought captive to Christ (2 *Corinthians* 10:5 (NIV)), in whom is hidden "all the treasures of wisdom and knowledge" (*Colossians* 2:3 (NIV)).[17] The state has no jurisdiction over the mind because every thought is to be made captive to Christ, who Himself chose not to propagate truth by force or violence. Virginia Statute.

Acknowledging God as the source of authority for the state, for law, and religious liberty does not constitute a religious establishment. In fact, there is no other basis for a belief in the rule of law or rights of any kind. This proposition is well-stated as a rhetorical question:

> What happens when the positive laws of the state lose all touch with the higher law and come to be seen as nothing more than the outcomes of a power struggle? Can the ideals of autonomy and generality in law survive the demise of the religious beliefs that presided over their birth?[18]

The answer is obviously "No!"

What the state may not do is set up institutions, be they churches, schools, or media, for the purpose of establishing an orthodoxy of opinion. Opinion should be governed solely by one's conscience as

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[17] *See* Jeffrey C. Tuomala, Christian Legal Education: From Bologna to Lynchburg and Beyond, 19 Liberty U. L. Rev. 60-65 (2024).

[18] Roberto M. Unger, Law in Modern Society 83 (The Free Press 1976).

directed by reason and conviction rather than force or violence.

3. Virginia enacted the Statute for Establishing Religious Freedom that enshrines the fundamental principles of religious liberty.

Not only did Madison defeat Henry's Bill, but he also persuaded the Virginia legislature to enact the Virginia Statute for Establishing Religious Freedom. That Statute, which the *Everson* Court identified as particularly significant, articulated the two principles of fundamental importance, that "Almighty God has created the mind free," and "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical."

The Virginia Statute makes explicit what is implied in the definition of religion: the imposition of a tax for educational purposes constitutes unlawful force or violence, which seeks to shape the conscience. The conscience can be directed only by reason and conviction and not by force or violence. The entire state educational venture constitutes an establishment of religion regardless of whether it promotes a particular theological or philosophical perspective, or many perspectives. The Statute places even "opinions in physics and geometry" within the Statute's protection, thus belying any false bifurcation of reality between "secular" and "religious." Tuomala at 1034-38.

As with the case of St. Isidore, the problem of defining religion is usually not obviously in issue. Here all parties have simply assumed that St.

Isidore as a Catholic Charter School is religious. If a claimant says, "these are my religious beliefs," and if a court believes that they are sincerely held, those beliefs are deemed religious. In other words, the definition of religion is treated as subjective in nature and thus varies from individual to individual. *See* Tuomala at 1038-53 (addressing the problem of defining religion subjectively).

If something constitutes religion under the Free Exercise Clause, how can it not also constitute religion under the Establishment Clause? Professor Tribe suggested a possible fix: give religion a broad definition under the Free Exercise Clause but a narrow definition under the Establishment Clause. Laurence H. Tribe, *American Constitutional Law* 826-28 (1978). Under Tribe's approach, an activity may be religion for free exercise purposes (e.g., use of peyote), but not establishment purposes (e.g., accommodate only religious use of peyote). Of course, Tribe does not provide a definition or source of authority for defining religion under either clause. If religion has no objective meaning under the Establishment Clause, what authority, i.e., whose subjective conscience, gives it meaning? It must be the collective subjective conscience of the American people in 1791 or 1868 for the originalist and the ever-evolving collective conscience of the American people for the non-originalist.

C. The Court has affirmed the fundamental principles of religious liberty in numerous cases.

Because the Court has not defined religion, it has sent mixed signals regarding the freedom of the

mind, the power of the government to impose taxes for the propagation of opinions, and the power of the government to impose state-favored orthodoxies of opinion.

On occasion, the Court has affirmed the principle that God has created the mind free and that the state has no jurisdiction to impose an orthodoxy of opinion or belief by force or violence. An oft-quoted and celebrated statement of these principles comes from the Court's opinion in *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943):[19]

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein.[20]

In *Wooley v. Maynard*, 430 U.S. 705 (1977), the Court affirmed the proposition that the First Amendment secures "the right of freedom of

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[19] *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 12–13 (1947); *id.* at 22 (Jackson, J., dissenting); Schware v. Bd. of Bar Exam'rs of N.M., 353 U.S. 232, 244 n.15 (1957); Agency for Int'l Dev. v. All. for Open Soc'y Int'l, 570 U.S. 205, 220–21 (2013); Wallace v. Jaffree, 472 U.S. 38, 51–52, 55 (1985); Wooley v. Maynard, 430 U.S. 705, 714 (1977); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992); Texas v. Johnson, 491 U.S. 397, 415 (1989); Lee v. Weisman, 505 U.S. 577, 638–39 (1992) (Scalia, J., dissenting); Beilan v. Bd. of Pub. Educ., 357 U.S. 399, 413 (1958) (Douglas, J., dissenting); First Unitarian Church of L.A. v. Cnty. of Los Angeles, 357 U.S. 545, 548 (1958) (Douglas, J., concurring).

[20] *Id.* at 642.

thought." *Id*. at 714.[21] The *Wooley* Court recognized the right as extending equally to "religious, political, and ideological causes." The rights to speak and refrain from speaking "are complementary components of the broader concept of 'individual freedom of mind.'" *Id*.[22]

On numerous occasions the Court or individual justices have quoted or cited the Virgina Statute's maxim that it is "sinful and tyrannical" to tax a person for the "propagation of opinions which he disbelieves."[23] For example, in *Janus v. Am. Fed'n of State, Cnty., and Mun. Emps*, 585 U.S. 878 (2018), the Court ruled that public employees can't be forced to fund any category of labor union speech. In support of that holding, the Court quoted the celebrated statement in *Barnette* "that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion." *Id*. at 892 (quoting *Barnette*, 319 U.S. at 642). The *Janus* Court then quoted Jefferson's Bill[24]:

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[21] Citing *Barnette*, 319 U.S. at 633-34.

[22] Citing *Barnette*, 319 U.S. 637.

[23] *See, e.g.*, *Everson*, 330 U.S. at 12–13 *id.* at 45 (Rutledge, J., dissenting); *Chi. Tchrs. Union v. Hudson*, 475 U.S. 292, 305 (1986); *Keller v. State Bar of Cal.*, 496 U.S. 1, 10 (1990); *McGowan v. Maryland*, 366 U.S. 420, 465 (1961) (Frankfurter, J., separate opinion); *Int'l Ass'n of Machinists v. Street.*, 367 U.S. 740, 791 (1961) (Black, J., dissenting); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 869–71 (1995) (Souter, J., dissenting); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 572 (2005) (Souter, J., dissenting); *Zelman v. Simmons-Harris*, 536 U.S. 639, 689 (2002).

[24] Note that Jefferson's Bill, with minor changes, was enacted by the Virginia legislature as the Virginia Statute for Establishing Religious Freedom.

"to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical." *Janus*, 585 U.S. at 893. The Court drove its point further home by citing Jefferson's Bill a second time. *Id.* at 905.

Assume that Janus had been a public-school teacher who was required to pay union agency fees. It would be "sinful and tyrannical" to force him to pay those fees. How much more sinful and tyrannical is it to force taxpayers to pay a teacher's salary to propagate opinions the taxpayers disbelieve? Not only that, but the taxpayers are also forced to send their children to school for indoctrination unless they opt out by paying tuition to attend a private school. To label compulsory union fees sinful and tyrannical, but not taxes for public schools as sinful and tyrannical, constitutes a classic case of "straining out a gnat but swallowing a camel." *Matthew* 23:24 (NIV).

D. The Court has not upheld the fundamental principles of religious liberty in other cases.

Contrary to the Court's protections for freedom of the mind in some cases, passages from opinions in other cases can be cited for the proposition that one of the high purposes of civil government is to tell citizens what they should think and what they should value at taxpayer expense. The Court in *Pleasant Grove City v. Summum* stated that "[I]t is the very business of government to favor and disfavor points of view." 555 U.S. 460, 468 (2009) (quoting Scalia, J. concurring opinion in *National*

Endowment for the Arts v. Finley, 524 U.S. 569, 598 (1998)).

Although the Court has never held that people have a constitutional right to a tax-funded education that the states must provide, it has stated that the establishment of public schools is instrumental for inculcating proper values and political beliefs in citizens. In *Brown v. Bd of Educ.*, 347 U.S. 483 (1954), the Court in dicta touted what it considered to be the importance of compulsory attendance at public schools for "our democratic society." "It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values . . . ." *Id.* at 493. The mind is created free, but the state has the power to prescribe what children shall believe and value regarding politics?

In *Plyler v. Doe*, 457 U.S. 202 (1982), the Court made similar claims about the importance of public schools for imposing a system of acceptable political values:

> We have recognized "the public schools as a most vital civic institution for the preservation of a democratic system of government," and as the primary vehicle for transmitting "the values on which our society rests." . . . And these historic "perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists." . . . In sum, education has a

> fundamental role in maintaining the fabric of our society.[25]

Both *Brown* and *Plyler* contain odes to the power and importance of public schools as a means of imposing an orthodoxy of opinions, beliefs, and values on children. Even though public schools were virtually nonexistent at the time of the founding of this nation and could not have been essential for creating the fabric of our society, those schools are apparently necessary for maintaining it.[26] Perhaps it is a different society, cut from a different cloth and changing with the latest trends, that the Court looks to accommodate.

State funded education, especially that which is compulsory and provided by the state, violates a fundamental principle of our republican form of government. In America the people are sovereign, and governments are our agents. Madison, *The Federalist*, No. 46. We are citizens, not subjects. Citizens of a republic school their agents; agents don't school their principals.

CONCLUSION

The Court must take the initial steps of affirming and explaining the definition of religion as it is used in the First Amendment and of affirming the fundamental principles of freedom of the mind and the lack of civil power to establish an orthodoxy of thought. Based on those principles, state funding for

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[25] *Id.* at 221 (citations omitted).

[26] *See* Nathan Chapman & Michael W. McConnell, Agreeing to Disagree: How the Establishment Clause Protects Religious Diversity and Freedom of Conscience 146 (2023).

St. Isidore constitutes an unlawful establishment of religion whether it is a state actor or not. But those principles make tax-funding of any education an unlawful establishment.

In *Brown v. Board of Education*, the Court ruled that discrimination on the basis of race violated the Equal Protection Clause and ordered an end to segregated schools. Tax-funding for those schools constituted an establishment of religion, but racial discrimination only compounded that wrong. Similarly, in this case, discrimination based on religion only compounds the wrong done by the funding of education in violation of the Establishment Clause. Two wrongs do not make a right, but one right—the equal treatment of religion—can ameliorate the wrong of establishing religion.

In this case the Court should put an end to disparate treatment of religion by ruling in favor of the Oklahoma Charter School Board and St. Isidore.

Respectfully submitted,

Roy S. Moore*
**Counsel of Record*
Jeffrey Tuomala
Talmadge Butts
FOUNDATION FOR MORAL LAW
P.O. Box 148
Gallant, AL 35972
(334) 262-1245

kayla@morallaw.com
jtuomala.home@outlook.com
talmadge@morallaw.org

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