IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

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

Petitioner,

v.

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

Respondents,

ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL,

Intervenor.

Case No.: MA-121694

RESPONDENTS' BRIEF IN RESPONSE TO PETITIONER'S APPLICATION AND PETITION

Cheryl Plaxico, OBA #4499
PLAXICO LAW FIRM, PLLC
923 N. Robinson Ave., 5th Floor
Oklahoma City, OK 73102
T: (405) 400-9609
cplaxico@plaxico.law

Attorneys for Statewide Virtual Charter School Board and its members in their official capacity, Robert Franklin, William Pearson, Nellie Tayloe Sanders, Brian Bobek, and Scott Strawn

Philip A. Sechler, DC Bar #26358*
J. Caleb Dalton, VA Bar #83790**
ALLIANCE DEFENDING FREEDOM
44180 Riverside Parkway
Lansdowne, VA 20176
T: (571) 707-4655
psechler@adflegal.org
cdalton@adflegal.org

Mark Lippelmann, AZ Bar #036553**
ALLIANCE DEFENDING FREEDOM
15100 N. 90th St.
Scottsdale, AZ 85260
T: (480) 444-0020
mlippelmann@adflegal.org

**Pro Hac Vice* Application filed concurrently
***Pro Hac Vice* Application forthcoming

INDEX

Statutes

III. The First Amendment Compelled the Board to Treat Religious Applicants Equally to Secular Applicants 10

Cases

Statutes

A. The Free Exercise Clause Requires that the Act Satisfy Strict Scrutiny 10

Cases

Statutes

B. The Oklahoma Religious Freedom Act Trigger Strict Scrutiny 10

Cases

Statutes

C. The Act's Religious Exclusion Cannot Survive Strict Scrutiny 12

Cases

IV. The Oklahoma Constitution Did Not Require the Board to Reject St. Isidore 13

A. The Board Did Not Violate Article I § 5 13

Cases

In the name of "protect[ing] religious liberty," Petitioner asks the Court to cancel the contract that the Statewide Virtual Charter School Board (the "Board") entered with St. Isidore of Seville Catholic Virtual School *solely because* St. Isidore is Catholic. Pet. Br. 1. Far from displaying religious tolerance, Petitioner also singles out "sects of the Muslim faith" as groups who could establish charter schools with tenets "diametrically opposed by most Oklahomans." *Id.* Petitioner grievously misunderstands religious liberty. "[A] State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits." *Carson v. Makin,* 142 S. Ct. 1987, 1996 (2022). And "official expressions of hostility to religion" are "inconsistent with what the Free Exercise Clause requires." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm.,* 138 S. Ct. 1719, 1732 (2018).

To be sure, the Oklahoma Charter Schools Act (the "Act") requires charter schools to be "nonsectarian" in their "operations" and prohibits them from "affiliat[ing] with a ... religious institution." 70 O.S. §3-136(A)(2). But the Board members took an oath to "obey ... the Constitution of the United States." RA030.[1] And that oath prompted their decision *not* to discriminate against St. Isidore based on religion. Petitioner's predecessor advised the Board that these parts of the Act "likely violate the First Amendment ... and therefore should not be enforced." AG Op. 2022-7, RA020. It is troubling that Petitioner, who withdrew this opinion after taking office, accuses the Board of "intentional violation of their oath of office," Pet. Br. 1, without mentioning that the Board acted according to advice his office earlier provided.

Because the Act disqualifies charter-school applicants "solely because of their religious character," it "imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny." *Espinoza v. Mont. Dep't of Revenue,* 140 S. Ct. 2246, 2249 (2020) (quoting *Trinity Lutheran Church of Columbia Inc. v. Comer*, 582 U.S. 449, 462 (2017)). And "an interest in separating church and state more fiercely than the Federal Constitution" cannot suffice. *Carson,* 142 S. Ct. at 1998 (cleaned up). While Petitioner argues that the Board's approval of St. Isidore violates the Establishment Clause, St. Isidore is a privately organized and operated school whose religious mission is not "even influenced by any state regulation." *Rendall-Baker*

[1] "RA" is used to refer to Respondents' Appendix, whereas "PA" refers to Petitioner's Appendix.

v. Kohn, 457 U.S. 830, 841 (1982). Because St. Isidore's religious character is not "fairly attributable to the State," *id.* at 840, it is not a state actor for Establishment Clause purposes. The Board properly refused to disqualify St. Isidore solely because it is Catholic.

BACKGROUND

I. Oklahoma Charter Schools and the Statewide Virtual Charter School Board

The Act authorizes "private organization[s]" to operate charter schools by contracting with a public sponsor. 70 O.S. § 3-134(C). Its purposes include "[i]ncreas[ing] learning opportunities," encouraging "different and innovative teaching methods," and "[p]rovid[ing] additional academic choices for parents and students." § 3-131. But the Act categorically excludes one group in its push for diversity: all charter schools must be "nonsectarian in [their] programs, admission policies, employment practices, and all other operations" and cannot "affiliate[] with a nonpublic sectarian school or religious institution." § 3-136(A)(2).

Each charter school must have a governing body "responsible for [its] policies and operational decisions." § 3-136(A)(8). It "may offer a curriculum which emphasizes a specific learning philosophy or style," § 3-136(A)(3), and adopt its own "personnel policies, personnel qualifications, and method of school governance." § 3-136(B). Charter schools must be "free and open to all students," § 3-135(A)(9), and "may not charge tuition or fees." § 3-136(A)(10). The state funding they receive is tied directly to enrollment. Lusnia Aff. ¶ 8, RA003.

In 2012, the legislature created the Board, giving it "sole authority to authorize and sponsor statewide virtual charter schools." § 3-145.1(A). The Act authorizes the Board to "[a]pprove quality charter applications that ... promote a diversity of educational choices." § 3-134(I). After approving an application, the Board enters a "contract for sponsorship" with the applicant. OAC § 777:10-3-3(a)(8). The Board then "provide[s] ongoing oversight of the charter schools through data and evidence collection, site visits, attendance of governing board meetings, compliance checks, and school performance reviews." *Id.* § 777:10-3-4(a). But except as otherwise provided in the Act, charter schools are "exempt from all statutes and rules relating to schools, boards of education, and school districts." § 3-136(A)(5).

In the 2022-23 school year, Oklahoma had 32 charter schools educating over 50,000

students. www.okcharters.org/our-schools (last visited Nov. 20, 2023). This included 26 physical charters sponsored by public entities and Indian tribes, and six virtual charters sponsored by the Board. Furthering the goal to "[p]rovide additional academic choices for parents and students," § 3-131(A)(4), each of the virtual charters advances a different mission. Lusnia Aff. ¶ 4, RA002.

II. St. Isidore of Seville Catholic Virtual School, Inc.

St. Isidore is a privately organized and operated non-profit corporation with two members—the Archbishop of Oklahoma City and the Bishop of Tulsa. PA314. Its privately appointed board of directors "manage and direct [its] business and affairs." *Id.* The board adopted bylaws setting forth its purpose to operate an Oklahoma virtual charter school "as a Catholic School." PA310. St. Isidore's application "envision[ed] a learning opportunity for students who want and desire a quality Catholic education, but for reasons of accessibility ... or due to cost cannot currently make it a reality." PA094. It projected initial enrollment of 500 students, half of whom would be economically disadvantaged. Lusnia Aff. ¶ 13, RA004.[2]

In June 2023, the Board (in a 3-to-2 vote) approved St. Isidore's application. The Board determined that, *but for* its religious character, St. Isidore was qualified. And the Board concluded that disqualifying St. Isidore *because of* its religious character would violate the federal Free Exercise Clause, which all Board members took an oath to uphold. Tr., RA031. As Board member Brian Bobek explained, relying on St. Isidore's religious nature "to justify a denial of the application ... would require [him] to ignore the U.S. Constitution and relevant U.S. Supreme Court cases applying it." *Id*., RA031–32.[3] The Board based this conclusion on AG Opinion 2022-7, which the former Attorney General issued in December 2022. That opinion advised that "[t]he State cannot enlist private organizations to 'promote a diversity of educational choices,' and then decide that any and every kind of religion is the wrong kind of diversity. This is not how the First Amendment works." AG Op. 2022-7, RA019. After taking office, Petitioner withdrew AG Opinion 2022-7. Drummond Ltr. to Wilkinson (Feb. 23, 2023),

[2] The Board rejected St. Isidore's initial application, citing eight areas of deficiency. Wilkinson Ltr. to Schuler (Apr. 13, 2023), RA023–24. On May 24, St. Isidore submitted a revised application. PA026.

[3] Respondents Brian Bobek and Scott Strawn have both since resigned from the Board.

RA021.[4]

In October 2023, the Board and St. Isidore executed a charter contract, setting forth the terms and conditions of the Board's sponsorship. The contract recognizes that St. Isidore "is a privately operated religious non-profit organization" authorized to "provide a comprehensive program of instruction for grades K through 12." PA002, 004. The contract permits St. Isidore to retain an educational management group to "provide management, administration and/or educational program implementation services," PA003, requires the school's private board to "retain oversight authority over the [school]," PA008, and allows St. Isidore to maintain its own "student conduct, discipline, and due process policies and procedures." PA016.

The contract also provides that "no student shall be denied admission ... on the basis of race, color, national origin, sex, sexual orientation, gender identity, gender expression, disability, age, proficiency in the English language, religious preference or lack thereof, income, aptitude, or academic ability." PA015. While St. Isidore may not charge tuition, it may "accept private donations." PA011, 15. The five-year contract begins on July 1, 2024. PA004.[5]

ARGUMENT

I. The Court Should Assume Original Jurisdiction of This Matter.

The Court should assume original jurisdiction over this matter to ensure that the State remains "neutral in its relations with groups of religious believers and non-believers." *Tulsa Area Hosp. Council, Inc. v. Oral Roberts Univ.*, 1981 OK 29, ¶ 13, 626 P.2d 316, 320 (holding that Health Planning Commission's approval of construction for religiously affiliated hospital did not violate Establishment Clause). The Board here has acted with neutrality toward religion, as demanded by the U.S. Constitution. Petitioner's request that this Court cancel the

[4] Petitioner's withdrawal prompted the Governor to issue a letter expressing his view that AG Opinion 2022-7 correctly interpreted the Constitution. Stitt Ltr. to Drummond (Feb. 27, 2023), [https://perma.cc/PFS5-6X7M], https://oklahoma.gov/content/dam/ok/en/governor/documents/23-02-27%20JKS%20Letter%20to%20AG%20Drummond%20re_Opinion%202022-7.pdf.

[5] Petitioner wrongly claims that "the Board has put at risk the billion plus dollars in federal education funds the State receives on a yearly basis." Pet. Br. 5–6. While 20 U.S.C. § 7221i(2)(E) requires charter schools to be "nonsectarian," it does so *only* for federal grants made under the Charter Schools Program. In any event, the U.S. Department of Education recently issued a Notice advising that it will "apply [the nonsectarian] element of the definition of 'charter school' consistent with applicable U.S. Supreme Court precedent, including *Trinity Lutheran, Espinoza,* and *Carson*." 88 Fed. Reg. 65980, 65984 (Sept. 26, 2023) (citations shortened).

contract because of St. Isidore's religious character signals religious hostility. The Court has previously assumed original jurisdiction to protect religious liberty. *Salatka v. Okla. Alcoholic Bev. Control Bd.*, 1980 OK 34, ¶ 1, 607 P.2d 1355, 1356 (assuming original jurisdiction to restrain alcoholic beverage control board from requiring Catholic Church to purchase sacramental wine from licensed liquor stores). It should do the same here.

II. The Board's Approval of St. Isidore Does Not Offend the Establishment Clause.

Petitioner claims that the Board's approval of St. Isidore violates the Establishment Clause because that approval authorizes "[g]overnment spending in direct support of religious education." Pet. Br. 10. But "a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause." *Carson*, 142 S. Ct. at 1997. As in *Carson*, St. Isidore will receive funds from the State *only if* parents choose to enroll their children in the school. Lusnia Aff. ¶ 8, RA003. ("With no students, State Aid [to St. Isidore] would be zero."). St. Isidore is merely one school choice among many for parents in the State to consider. Offering parents a "program of true private choice" that is "entirely neutral with respect to religion" does not offend the Establishment Clause. *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 (2002).[6]

Because of this, Petitioner stakes his Establishment Clause claim on a single theory: that St. Isidore—a private corporation under contract to provide education—is a state actor that cannot run a religious school. Pet. Br. 10–14.[7] This theory is flawed. First, no "sufficiently close nexus" exists "between the State and the challenged action." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974). Second, many courts, including the U.S. Supreme Court, have held that schools operating under contract with and funded by the state are *not* state actors. *See infra* Part II.B. Third, though the Act refers to a charter school as "a public school," the

[6] Petitioner cites *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947), to argue that spending in support of religious education violates the Establishment Clause. But that case *upheld* the use of taxpayer dollars to bus students to religious schools. *Id.* at 18. Indeed, *Everson* "held that the 'First Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." *Zelman,* 536 U.S. at 669 (O'Connor, J., concurring). And regardless of what *Everson* said, the Supreme Court in *Carson* recently confirmed that direct funding to religious schools does not violate the Establishment Clause. 142 S. Ct. at 1997.

[7] *See* Pet. Br. 15 (acknowledging "[t]here are already numerous public funds St. Isidore is eligible to receive ... as a Catholic private school" and "issue here is not the public funds going to St. Isidore").

Supreme Court analyzes substance, not labels. The substance here reveals that St. Isidore is not a state actor; and treating a religious applicant equally to a secular one in a neutral program of private choice does not offend the Establishment Clause.

A. There is No "Sufficiently Close Nexus" Between the State and St. Isidore's Religious Character.

Acts of a private entity do not constitute state action unless "there is a sufficiently close nexus between the State and the challenged action of the regulated entity *so that the action of the latter may be fairly treated as that of the State itself*." *Jackson*, 419 U.S. at 351 (emphasis added). This requirement ensures "that constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). In *Jackson*, the Court held that no "sufficient[] nexus" existed between the state and a public utility. 419 U.S. at 351. In *Blum*¸ the Court recognized the same lack of nexus for nursing-home transfers. And in *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, the Court held the U.S. Olympic Committee was "not a governmental actor" because its "choice of how to enforce its exclusive right to use the word 'Olympic' simply is not a governmental decision." 483 U.S. 522, 522, 547 (1987).

Petitioner complains about St. Isidore's religious affiliation and activity. Yet "a practice initiated by [a contracted entity] and approved by the [state]" but not "order[ed]" by the state is not "state action." *Jackson*, 419 U.S. at 357. The Board has not ordered or encouraged St. Isidore to engage in any religious affiliation or activity; it has merely treated St. Isidore's application neutrally under the law. St. Isidore's choice of its own curriculum, pedagogy, and affiliation, "where the initiative comes from it and not from the State, does not make its action ... 'state action' for purposes of the Fourteenth Amendment." *Id.*

B. Schools Operating Under Contract with the State Are Not State Actors.

In *Rendell-Baker v. Kohn*, the Supreme Court held that a school under contract with the state to educate maladjusted students was *not* a state actor when making employment decisions. 457 U.S. 830, 841 (1982). "Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts."

Id. Applying *Rendell-Baker*, numerous federal courts have held that schools operating under contract with the state are *not* state actors. In *Caviness v. Horizon County Learning Center, Inc.*, the Ninth Circuit held that an Arizona "public" charter school was not a state actor when making employment decisions. 590 F.3d 806, 818 (9th Cir. 2010). In *Logiodice v. Trustees of Maine Central Institute*, the First Circuit held that a high school contracting with the state to fulfill the role of a public school was not a state actor when administering student discipline. 296 F.3d 22, 26–28 (1st Cir. 2002). In *Robert S. v. Stetson Sch., Inc.*, 256 F.3d 159 (3d Cir. 2001), the Third Circuit (in an opinion written by then-Judge Alito) concluded that a school for juvenile sex offenders was not a state actor when its staff were accused of abusive behavior. Similarly, in *I.H. ex rel. Hunter v. Oakland School for Arts*, the court held that a "public" charter school was not a state actor for its staffer's wrongdoing. 234 F. Supp. 3d 987, 992 (N.D. Cal. 2017). This line of cases is directly at odds with Petitioner's claim.

Moreover, in *Rendall-Baker,* the Supreme Court rejected three of the arguments that Petitioner invokes here:

First, the Court concluded that the school was not a state actor simply because it performed a "public function." 457 U.S. at 842. Instead, the Court said, "the question is whether the function performed [is] the *exclusive* prerogative of the state." *Id*. But education is "in no way . . . the exclusive province of the State*." Id*. As the First and Ninth Circuits have observed, *Rendell-Baker* "foreclosed" the argument that "'public educational services' are traditionally and exclusively the province of the state." *Caviness*, 590 F.3d at 815; *Logiodice*, 296 F.3d at 26 (same). Indeed, education has never been the exclusive work of the state, considering that "10% of American schoolchildren are educated in private schools." Nicole Garnett, Manhattan Inst., *Religious Charter Schs.: Legally Permissible? Const. Required?* 9 (2020), https://media4.manhattan-institute.org/sites/default/files/religious-charter-schools-legally-permissible-NSG.pdf, [https://perma.cc/6EFA-QC57]. Oklahoma itself has its own impressive history of private education. Louise Scrivens, *Private School Primer* (Mar. 6,

2017), https://www.405magazine.com/private-school-primer/.[8]

Second, the Court rejected that the state's "extensive regulation of the school" made the school a state actor. 457 U.S. at 841. The Court noted that in *Blum*, regulations that "encouraged the nursing homes to transfer patients to less expensive facilities" did not make them state actors, and in *Jackson*, regulations that were "extensive and detailed" did not make a utility's actions state action. 419 U.S. at 350. Because the school's challenged actions in *Rendell-Baker* "were not compelled or even influenced" by state regulations, extensive regulation was insufficient to make the school a state actor. 457 U.S. at 841. Similarly, here, because the regulations Petitioner cites (e.g., accreditation, health and safety) did not "compel[] or even influence[]" St. Isidore's religious character, they do not render the school a state actor.[9]

Third, "virtually all of the school's income" in *Rendell-Baker* "was derived from government funding." 457 U.S. at 840–41. The Court nevertheless concluded "that the school's receipt of public funds does not make [its actions or decisions] acts of the State." *Id.*; *accord Blum*, 457 U.S. at 1011 (nursing homes that "depended on the State for funds" were not state actors). Here, too, the fact that St. Isidore will have the "direct financial backing" of the State, Pet. Br. 4, is insufficient to render it a state actor.

C. The Legislature's Use of the Term "Public School" Does Not Make St. Isidore a State Actor.

Petitioner contends that the "analysis [is] easy" because the legislature considers a charter school to be "a public school." Pet. Br. 11 (citing § 3-132(D)). But nowhere did the legislature indicate it used that term to turn charter schools into state actors subject to constitutional constraints. The term "public" can be explained simply as recognizing that charter schools are open to all, § 3-140(D), in the same manner as a "place of public accommodation."

[8] Petitioner cites *West v. Atkins*, in which state reliance on a contract doctor for all prison medical care clothed the doctor with "authority of state law." 487 U.S. 42, 55 (1988). But unlike the state there, Oklahoma here has not "abdicated its constitutional obligation through a private contract"—its traditional public schools remain an option, and "students at [St. Isidore] have a choice that the inmate in *West* never had." *Peltier v. Charter Day Sch., Inc.,* 37 F.4th 104, 146–47 (4th Cir. 2022) (Quattlebaum, J., dissenting in part).

[9] Even regulations that require contractors to provide "free" and "first-come, first-serve" services to the public "do not render [a private corporation] a state actor." *Manhattan Cmty. Access Corp. v. Halleck,* 139 S. Ct. 1921, 1932 (2019).

25 O.S. § 1401; *see* PA003 ("'Public School' shall mean a school that is free and supported by funds appropriated by the Legislature"). Notably, in declaring that "[a] charter school shall comply with all federal regulations and state and local rules and statutes relating to ... civil rights," § 3-136(A)(1), the legislature did not mention *constitutional* obligations, suggesting it did not intend charter schools to bear that burden.

Moreover, the Supreme Court has repeatedly held that a legislature's characterization of an entity does not control its "state actor" status for constitutional purposes. In *Jackson*, the statutory term "public utilities" was insufficient to make the utility a state actor. 419 U.S. at 350 & n.7. In *Polk Cnty. v. Dodson*, "public" defenders, though employed by the state to meet constitutional obligations, were not state actors when acting as attorneys. 454 U.S. 312, 325 (1981). And in *Lebron v. Nat'l R.R. Passenger Corp.*, a "congressional label" did not control whether Amtrak was a state actor. 513 U.S. 374, 392–93 (1995). Following these cases, other courts have held that charter schools *are not* state actors despite being called "public." *Caviness,* 590 F.3d at 818; *Hunter,* 234 F. Supp. 3d at 992.

Disregarding that authority, Petitioner cites one case relying on a state's designation of charter schools as "public" to find state action. Pet. Br. 11 (citing *Peltier*, 37 F.4th at 121).[10] But *Peltier,* a 10-to-6 en banc decision, is an outlier. The majority there "misconstrue[d] and ignore[d] guidance from the Supreme Court and all of our sister circuits that have addressed either the same or very similar issues." *Id.* at 137 (Quattlebaum, J., joined by five judges, dissenting in part). The *Peltier* majority did not mention *Jackson* or *Dodson,* both of which "undermine [its] reliance on [the school's] public designation." *Id.* at 146. And one week after *Peltier*, the Supreme Court held that the constitutionality of excluding religious groups from public-benefit programs "turn[s] on the substance of free exercise protections, not on the presence or absence of magic words," or else the First Amendment could be "reduced to a

[10] Petitioner also cites a Tenth Circuit case, *Coleman v. Utah State Charter Sch. Bd.*, 673 F. App'x 822, 834 (10th Cir. 2016), but that court did not in any way address whether state action was present.

simple semantic exercise." *Carson*, 142 S. Ct. at 1999.[11]

III. The First Amendment Compelled the Board to Treat Religious Applicants Equally to Secular Applicants.

Decades of U.S. Supreme Court precedent hold that states may not exclude religious groups from public benefits and programs available to secular groups. Under the Act, any "private college or university, private person, or private organization may contract with a sponsor to establish a charter school," § 3-134(C), *unless the private person or organization is religiously affiliated or engages in religious practices.* § 3-136(A)(2). This discrimination against religion is "subject[] to the strictest scrutiny." *Carson,* 142 S. Ct. at 1989. "A law that targets religious conduct ... will survive strict scrutiny only in rare cases." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993). Because there is no compelling state interest "in separating church and State more fiercely than the Federal Constitution," *Espinoza,* 140 S. Ct. at 2260, the Act's exclusion of religious applicants fails strict scrutiny.

A. The Free Exercise Clause Requires that the Act Satisfy Strict Scrutiny.

The Supreme Court has "repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits." *Carson*, 142 S. Ct. at 1996. The Court applied that rule to defeat three "state efforts to withhold otherwise available public benefits from religious organizations," *id.,* including religious schools.

First, in *Trinity Lutheran*, the Court struck down a Missouri program that provided grants to nonprofit organizations to install cushioned playground surfaces but denied those grants to religious organizations. 582 U.S. at 454. The Free Exercise Clause did not allow Missouri to "expressly discriminate[] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." *Id*. at 462.

Second, *Espinoza* held that "the Free Exercise Clause precluded the Montana Supreme Court from applying Montana's no-aid provision to bar religious schools from [a] scholarship program" "solely because of the religious character of the schools." 140 S. Ct. at 2254–55. "A

[11] Another flaw in Petitioner's claim is "that the Establishment Clause must be interpreted by reference to historical practices and understandings," *Kennedy v. Bremerton Sch. Dist.,* 142 S. Ct. 2407, 2428 (2022), and "there is no 'historical and substantial' tradition against aiding [religious] schools comparable to the tradition against state-supported clergy." *Espinoza,* 140 S. Ct. at 2259.

State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious." *Id*. at 2261. States cannot put "school[s] to a choice between being religious or receiving government benefits." *Id.* at 2257.[12]

Third, in *Carson*, the Court invalidated a Maine program that paid tuition directly to private secular schools, but not private religious schools, for students whose school district did not include a public secondary school. 142 S. Ct. at 1997. Disqualifying religious schools "from this generally available benefit 'solely because of their religious character'" "'penalize[d] the free exercise' of religion." *Id*. The Free Exercise Clause prohibits discrimination against a school's religious conduct—not just its religious status—because "use-based discrimination is [no] less offensive." *Id.* at 2001.

Here, the Act allows any qualified "private person" or "private organization ... to establish a charter school." § 3-134(C). Were the Board to reject St. Isidore because of its religious character, it would violate the Free Exercise Clause in the same way the states did in *Trinity Lutheran*, *Espinoza*, and *Carson*. Once the State opened its charter school program to private organizations, the Board may not "disqualify some private [organizations from participating] because they are religious." *Espinoza*, 140 S. Ct. at 2261.

Petitioner's efforts to distinguish these cases are unavailing. Pet. Br. 14–15. First, Petitioner argues that St. Isidore is a state actor rather than a private school protected by the First Amendment. As explained, that is wrong as a matter of fact and law. Second, Petitioner argues that excluding St. Isidore from the charter program is permissible because there "are already numerous public funds St. Isidore is eligible to receive." *Id.* But the availability of other benefits does not justify religious discrimination in *this* program. *See Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 694 (9th Cir. 2023) (exclusion of religious student group violated First Amendment notwithstanding alternatives).

B. The Oklahoma Religious Freedom Act Triggers Strict Scrutiny.

As a state agency, the Board is subject to the Oklahoma Religious Freedom Act

[12] In *McDaniel v. Paty*, the Supreme Court struck down a law disqualifying ministers from public office, because "[t]o condition the availability of benefits [on] ... surrendering ... religiously impelled ministry effectively penalizes the free exercise [of religion]." 435 U.S. 618, 626 (1978).

("ORFA"), 51 O.S. § 251 *et seq.*, which provides that "[n]o governmental entity shall substantially burden a person's free exercise of religion" unless the burden is "[e]ssential to further a compelling governmental interest" and the "least restrictive means of furthering that compelling governmental interest." *Id.* § 253(B). After a recent amendment, ORFA now states that "it shall be deemed a substantial burden to exclude any person or entity from participation in or receipt of governmental funds, benefits, programs, or exemptions *based solely on the religious character of the person or entity."* OK S.B. No. 404 (adding 51 O.S. § 253(D)).[13]

It is undeniable that Petitioner seeks to exclude St. Isidore from participating in the State's virtual charter school program *based on its religious character.* Under ORFA, any such exclusion must pass strict scrutiny and be justified by a "compelling [governmental] interest" of "vital importance." *State ex rel. Oklahoma Bar Ass'n v. Porter*, 1988 OK 114, ¶ 25, 766 P.2d 958, 968 (citing *Elrod v. Burns*, 427 U.S. 347, 362–63 (1976)).

C. The Act's Religious Exclusion Cannot Survive Strict Scrutiny.

"To satisfy strict scrutiny, government action 'must advance interests of the highest order and must be narrowly tailored in pursuit of those interests.'" *Carson*, 142 S. Ct. at 1997 (citation omitted). Here, the Board had no compelling interest in rejecting St. Isidore's application based on St. Isidore's religious character. Again, "an interest in separating church and state more fiercely than the [Establishment Clause] ... cannot qualify as compelling in the face of the infringement of free exercise." *Id.* at 1998 (citations omitted). And "a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause." *Id*. at 1997. "[I]n no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights." *Kennedy*, 142 S. Ct. at 2432. Simply put, the Board has no "antiestablishment interest" that would "justify ... exclud[ing] some members of the community from an otherwise generally available public benefit because of their religious exercise." *Carson,* 142 S. Ct. at 1998. Because applying the Act's religious

[13] Because St. Isidore's contract "commence[s] on July 1, 2024," PA004, this amendment, which took effect November 1, 2023, applies. Even before this amendment, ORFA would have triggered strict scrutiny because the prior version excluded "the denial of government funding" from the "[g]ranting governmental funds" exception in 51 O.S. § 255(B), subjecting a funding denial to strict scrutiny.

exclusion to deny St. Isidore's application would have violated the Free Exercise Clause, the Board's actions were not only proper, but mandated.[14]

IV. The Oklahoma Constitution Did Not Require the Board to Reject St. Isidore.

Petitioner claims that the Board's sponsorship of St. Isidore violates the "freedom from sectarian control" (Art. I § 5) and no-aid provisions (Art. II § 5) of the Oklahoma Constitution. These arguments stumble out of the gate because the Oklahoma Constitution declares the U.S. Constitution to be "the supreme law of the land" (Art. I § 1); and the Free Exercise Clause prohibited the Board from disqualifying St. Isidore because of its religious character. In any event, neither state constitutional provision prevented the Board from sponsoring St. Isidore.

A. The Board Did Not Violate Art. I § 5.

Art. I § 5 states that "[p]rovisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of the state and free from sectarian control." This requires that the "system of public schools"—not each individual charter school—must be "free from sectarian control."

The text supports this reading. The clause "free from sectarian control" modifies a single object: "a system of public schools," not each individual school in isolation. S*ee Fair Sch. Fin. Council of Okla., Inc. v. State*, 1987 OK 114, ¶ 59, 746 P.2d 1135, 1149 (Art. I § 5 "merely mandate[s] actions by the Legislature to establish and maintain a system of free public schools" and does not impose obligations at the level of each district). Notably, the framers used the singular form of the word "system" and a singular article—"a"—to describe the object. *See Pitco Prod. Co. v. Chaparral Energy, Inc.*, 2003 OK 5, ¶ 16, 63 P.3d 541, 546 (singular word and modifying article show intent to refer to singular entity). And the other clause modifying that object—"shall be open to all the children of the state"—proves that both clauses modify the singular "system of public schools," because each individual school is clearly not "open to all the children of the state." *See, e.g.*, 70 O.S. § 1-113 (limiting enrollment by residency), § 1-114 (age), § 8-101.2 (capacity). It is the *system* that must be "free from

[14] The First Amendment's Free Speech Clause also prohibited the Board from discriminating against St. Isidore because of its expression of its Catholic views. *See Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 843 (1995) (holding that the Free Speech Clause required university to fund religious college newspaper on same terms as secular student groups).

sectarian control," and Petitioner makes no plausible allegation that St. Isidore somehow exercises "control" over Oklahoma's entire "system of public schools."

Oliver v. Hofmeister is instructive. 2016 OK 15, ¶ 27, 368 P.3d 1270, 1277. The plaintiffs there argued that a scholarship program violated Art. I § 5 by allowing disabled students to use state funds to attend religious schools, but the trial court rejected that argument, and this Court did not overturn its ruling. *See Oliver, Jr. v. Barresi,* No. CV-2013-2072, 2014 WL 12531242, at *1 (Okla. Cnty. Dist. Ct. Sep. 10, 2014) (unpublished). As in *Oliver*, Art. I § 5 is not offended here simply because state funds are flowing to a religious school.

B. The Board Did Not Violate Art. II § 5.

Art. II § 5 provides that "[n]o public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, of support of any sect, church, denomination or system of religion." The Board did not violate this for three reasons:

First, the State does not violate the "no aid" provision when *the State* benefits from a payment to a religious organization. Petitioner relies upon *Gurney v. Ferguson*, which banned public buses to transport students to parochial schools. 1941 OK 397, ¶ 16, 122 P.2d 1002, 1005. But this Court has confined *Gurney* to situations where "public money was being spent to furnish a service to a parochial school *for which no corresponding value was received*." *Murrow Indian Orphans Home v. Childers*, 1946 OK 187, ¶ 5, 171 P.2d 600, 602 (emphasis added). *Murrow* held that state payments to a Baptist orphanage did *not* violate the "no-aid" provision because the State was required to provide such services and thus benefited from the orphanage's work. *Id.* at 601–03; *accord Burkhardt v. City of Enid*, 1989 OK 45, ¶¶ 15–16, 171 P.2d 608, 612 (key in applying "no-aid" provision is whether state receives benefit).

Oliver again provides guidance. The Court there found no constitutional violation because the scholarship program discharged obligations of the State. 2016 OK 15, ¶ 27, 368 P.3d at 1277. "Oklahoma public school districts are required to provide education ... to all children with disabilities." *Id.* at ¶ 7, 1272–73. The State was "simply contracting with private schools to perform a service (education of children with special needs) for a fee. The State receive[d] great benefit from this arrangement." *Id.* at ¶ 5, 1278 (Taylor, J., concurring).

Similarly, here, the Board is contracting with St. Isidore to provide education to Oklahoma children, an "element of substantial return to the state." *Id.* at ¶ 19, 1275.

Second, any public money that flows to St. Isidore will result from the voluntary choices of parents. When a funding program is "*entirely voluntary* with respect to eligible students and their families" and "[w]hen the *parents* and not the *government* are the ones determining which private school offers the best learning environment for their child, the circuit bet-ween government and religion is broken." *Oliver*, 2016 OK 15, ¶¶ 8, 13, 368 P.3d at 1273–74. "Because the *parent* receive[d] and direct[ed] the funds to the private school, *sectarian* or *non-sectarian*, ... the State [wa]s not actively involved in the adoption of sectarian principles or directing monetary support to a sectarian institution." *Id.* at ¶ 22, 1276. Likewise, any state funding for St. Isidore will depend entirely on parents' voluntary decisions to enroll their children, *see* § 142(B)(2); Lusnia Aff. ¶ 7, RA003, and "the circuit between government and religion is broken." *Oliver*, 2016 OK 15, ¶ 13, 368 P.3d at 1274.

Third, the Board's criteria for determining whether to approve St. Isidore are "void of any suggestion or inference to favor religion or any particular sect." *Id.* at ¶ 26, 1277. If a statute or decision is "void of any preference between a *sectarian* or *non-sectarian* private school," "there is no influence being exerted by the State for any sectarian purpose." *Id.* at ¶ 11, 1274. Approval "without regard to religious affiliation" "based on statewide educational standards, health and safety regulations" is permissible. *Id.* at ¶ 21, 1276. The Board approves virtual charter schools "without regard to religious affiliation," and the standards for approving them are "void of any suggestion or inference to favor religion or any particular sect." *Id.* at ¶¶ 21, 26, 1276–77. Accordingly, the Board's approval of St. Isidore did not violate the "no aid" provision.

CONCLUSION

Protecting religious liberty requires placing religious organizations on equal footing with their secular counterparts and not treating religious organizations with hostility. Petitioner would have the Board violate both requirements. This Court should assume original jurisdiction and deny Petitioner the relief requested.

Dated: November 21, 2023

Respectfully submitted,

Cheryl Plaxico, OBA No. 4499
PLAXICO LAW FIRM, PLLC
923 N. Robinson Ave., 5th Floor
Oklahoma City, OK 73102
T: (405) 400-9609
cplaxico@plaxico.law

Philip A. Sechler*
DC Bar No.: 426358
J. Caleb Dalton**
VA Bar No.: 83790
ALLIANCE DEFENDING FREEDOM
44180 Riverside Parkway
Lansdowne, VA 20176
T: (571) 707-4655
psechler@adflegal.org
cdalton@adflegal.org

Mark Lippelmann**
AZ Bar No.: 036553
ALLIANCE DEFENDING FREEDOM
15100 N. 90th St.
Scottsdale, AZ 85260
T: (480) 444-0020
mlippelmann@adflegal.org

Attorneys for Statewide Virtual Charter School Board and its members in their official capacity, Robert Franklin, William Pearson, Nellie Tayloe Sanders, Brian Bobek, and Scott Strawn

**Pro Hac Vice* Application filed concurrently
***Pro Hac Vice* Application forthcoming

CERTIFICATE OF SERVICE

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

Michael H. McGinley
Steven A. Engel
M. Scott Proctor, OBA #33590
DECHERT LLP
1900 K Street, NW
Washington, DC 20006
T (202) 261-3308
michael.mcginley@dechert.com
steven.engel@dechert.com
scott.proctor@dechert.com

Michael R. Perri, OBA #11954
Socorro Adams Dooley, OBA #32716
PERRI DUNN, PLLC
100 N. Broadway, Suite 3280
Oklahoma City, OK 73102
T: (405) 724-8543
mrperri@perrridunn.com

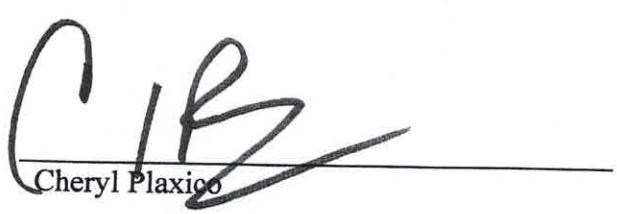
John A. Meiser
NOTRE DAME LAW SCHOOL
RELIGIOUS LIBERTY CLINIC
1338 Biolchini Hall of Law
Notre Dame, IN 46556
T: (574) 631-3880
jmeiser@nd.edu

Attorneys for Intervenor St. Isidore of Seville Catholic Virtual School

Gentner Drummond, OBA #16645
Attorney General
Garry M. Gaskins, II, OBA #20212
Solicitor General
Brad Clark, OBA #22525
Deputy General Counsel
Kyle Peppler, OBA #31681
William Flanagan, OBA #35110
Assistant Solicitors General
OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA
313 N.E. 21st Street
Oklahoma City, OK 73105
T: (405) 521-3921
garry.gaskins@oag.ok.gov

Attorneys for Petitioner

Dated: November 21, 2023



Cheryl Plaxico