IN THE DISTRICT COURT FOR OKLAHOMA COUNTY
STATE OF OKLAHOMA

OKPLAC, INC., d/b/a Oklahoma Parent Legislative Action Committee, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. CV-2023-1857
STATEWIDE VIRTUAL CHARTER SCHOOL BOARD, et al.,	)	
Defendants.	)	

DEFENDANT OKLAHOMA STATE DEPARTMENT OF EDUCATION AND DEFENDANT STATE SUPERINTENDENT OF PUBLIC INSTRUCTION RYAN WALTERS' MOTION TO DISMISS

Bryan Cleveland, OBA No. 33860
Oklahoma State Department of Education
Oliver Hodge Building
2500 North Lincoln Boulevard
Oklahoma City, Oklahoma 73105
Telephone: (405) 521-3301
[redacted]

Anthony J. Ferate, OBA No. 21171
Andrew W. Lester, OBA No. 5388
Spencer Fane LLP
9400 North Broadway Extension, Suite 600
Oklahoma City, Oklahoma 73114-7423
Telephone: (405) 844-9900
[redacted]

Hiram Sasser, OBA No. 19559
Holly M. Randall, OBA No. 34763
FIRST LIBERTY INSTITUTE
2001 West Plano Parkway, Suite 1600
Plano, TX 75075
Telephone: (972) 941-4444
[redacted]

Attorneys for Defendants, Oklahoma State Department of Education and State Superintendent of Public Instruction, Ryan Walters, in his official capacity

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES **Page(s)**

STATE STATUTES

FEDERAL RULES

Defendant Oklahoma State Department of Education and Defendant Ryan Walters, in his official capacity as State Superintendent of Public Instruction (collectively, "the Department"), by and through undersigned counsel, respectfully move this Court to grant the Department's Motion to Dismiss as Plaintiffs failed to state a claim upon which relief can be granted. *See* 12 O.S. § 2012(B)(6).

INTRODUCTION

In the last six years, the United States Supreme Court has thrice told a state that its practice of excluding religious organizations from public benefits is "odious" to the United States Constitution. *Trinity Lutheran Church v. Comer,* 582 U.S. 449, 467 (2017) (Missouri), *Espinoza v. Mont. Dep't of Revenue,* 140 S. Ct. 2246, 2263 (2020) (Montana); *Carson v. Makin,* 142 S. Ct. 1987 (2022) (Maine). In this case, Plaintiffs ask the Court to require the Department to engage in the exact behavior that the Supreme Court told Missouri, Montana, and Maine was unconstitutional. This Court should reject that request and uphold the Constitutions and laws of the United States and Oklahoma.

For multiple reasons, Plaintiffs fail to state a claim upon which relief can be granted. First, when distributing state aid, the Department must follow precedent of the United States Supreme Court. The Supreme Court's Free Exercise trilogy of *Trinity Lutheran, Espinoza,* and *Carson* mandates that the government cannot exclude religious institutions from generally available public benefits merely because of their religious nature. Therefore, the Department must consider St. Isidore's request for state aid in the same manner that it would consider a secular request.

Second, the Department's actions—if it eventually takes action—will be consistent with Oklahoma law. Article II, section 5 of the Oklahoma Constitution does not apply when the circuit between government and religion is broken—as it is here. The State does not force any family to

enroll their child at St. Isidore, which is one of many virtual and brick-and-mortar charter school options for Oklahomans. Nor may the Department discriminate against St. Isidore because of its religious character or substantially burden St. Isidore's religious practices in violation of the Oklahoma Religious Freedom Act. 51 O.S. § 253.

Third, Plaintiffs fail to state any cause of action *at all*, because no relevant cause of action even exists under Oklahoma law. Moreover, Plaintiffs' theoretical causes of action are barred by sovereign immunity.

Fourth, Plaintiffs' claims are not ripe. The Petition contains no allegations that the Department has taken any action—or made any promises—regarding distribution of state aid, making Plaintiffs' claims far too hypothetical to be ripe for adjudication.

Therefore, the Court should dismiss Plaintiffs' Petition for failure to state a claim.

BACKGROUND

Oklahoma offers a robust variety of educational opportunities for students, including charter schools, which encourage "the use of different and innovative teaching methods." 70 O.S. § 3-131(A). In 1999, the Legislature enacted the Charter Schools Act to diversify options for Oklahoma families and provide "additional academic choices for parents and students." *Id.* The parties to a charter school contract include a public sponsor and an operator. Charter school operators may be "a board of education of a public school district, public body, public or private college or university, private person, or private organization." *Id.* at § 3-134(C).

By 2021, there were thirty-one charter schools in Oklahoma, including six fully virtual charter schools that enrolled 43,324 students. Okla. State Dep't of Educ., Okla. Charter School Report 2021 at 4, 7, 10, https://sde.ok.gov/sites/default/files/Oklahoma Charter School Report 2021.pdf. The Department, through the Office of State Aid,

allocates state aid funds calculated in accordance with the statutory state aid formula to charter schools, both brick-and-mortar and virtual. *Id.* at 8.

Charter schools enjoy substantial flexibility in operations and "may offer a curriculum which emphasizes a specific learning philosophy or style or certain subject areas . . . ." 70 O.S. § 3-136(A)(3). "[E]xempt from all statutes and rules relating to schools, boards of education, and school districts," *id.* at § 3-136(A)(5), charter schools primarily remain accountable to their public sponsor and governing boards but must be accredited by the Department, which ensures compliance with federal and state law, *Oklahoma Charter Schools Program*, Okla. State Dep't of Educ. (Apr. 25, 2022), https://sde.ok.gov/faqs/oklahoma-charter-schools-program.

Charter schools are funded through the Department's state aid allocation and federal funding. State aid is a public obligation the Department administers to public and private entities alike to sponsor charter schools that serve the unique educational needs of Oklahoma's students and parents. Overall, the flexibility in operation and curricula, combined with the ample state aid available, render Oklahoma's charter school system a significant public benefit for a private entity wishing to participate.

Hoping to participate in this public benefit, St. Isidore, an Oklahoma not-for-profit corporation, applied to serve as a charter school operator. St. Isidore is "under the umbrella of the Oklahoma Catholic Conference comprised of the Archdiocese of Oklahoma City and the Diocese of Tulsa." Pet. Ex. A. at 91. On June 5, 2023, the Oklahoma Statewide Virtual Charter School Board, a state agency, approved St. Isidore's charter school sponsorship. Because it is a religious entity, St. Isidore's sponsorship application included notarized statements that the school will comply with all legal requirements to the extent they do not conflict with St. Isidore's religious beliefs.

To date, the Department has not been involved with St. Isidore.

ARGUMENT

A motion to dismiss for failure to state a claim may be granted if "it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of the claim[s] which would entitle relief." *Gens v. Casady Sch.*, 2008 OK 5, ¶ 8, 177 P.3d 565, 569; *see also* 12 O.S. § 2012(B)(6). Plaintiffs must state a cognizable legal theory to support their claims and sufficient facts under that cognizable theory. *Id.* The moving party bears the burden of demonstrating the insufficiency of the pled facts. *Id.* Here, Plaintiffs do not plead a legally cognizable case against the State for the reasons discussed below, and their Petition against the Department should be dismissed in its entirety.

I. THE FREE EXERCISE CLAUSE PREVENTS THE DEPARTMENT FROM WITHHOLDING STATE AID ALLOCATIONS OR OTHER STATE FUNDING FROM ST. ISIDORE SOLELY BECAUSE OF ITS RELIGIOUS CHARACTER.

When making decisions about allocations of state aid, the Department intends to hold St. Isidore accountable to all statutes and regulations as required under Oklahoma law—a fact recognized by the Plaintiffs—that do not require St. Isidore to sacrifice its religious beliefs. *See* Pet. ¶ 117, 121. Moreover, when distributing state aid, the Department must act in a manner that complies with the United States Constitution. Under the Free Exercise trilogy, the Department would violate the Free Exercise Clause if it withholds any state aid to St. Isidore solely because it is a religious institution. *See Trinity Lutheran Church,* 582 U.S. 449; *Espinoza,* 140 S. Ct. 2246; *Carson v. Makin,* 142 S. Ct. 1987. Therefore, when distributing state aid, the Department is not bound by Title 70, Section 3-136(A)(2)'s non-sectarian and non-religious requirements, as that provision is unconstitutional in light of the Free Exercise trilogy.

A. Because the Oklahoma Charter Schools Act Creates Generally Available Public Benefits, the Department Cannot Exclude St. Isidore From Receiving Those Benefits Without Violating the First Amendment's Free Exercise Trilogy.

In the Free Exercise trilogy, the United States Supreme Court thrice held that religious organizations like St. Isidore are eligible for generally available public benefits. Indeed, to exclude them would violate the First Amendment. This trifecta of cases "repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion" that triggers and fails strict scrutiny. *Trinity Lutheran Church*, 582 U.S. at 458. A state cannot use its powers to handicap or otherwise treat religious organizations with hostility. *Id.*; *see also Am. Legion v. Am. Humanist Ass'n,* 139 S. Ct. 2067, 2074 (2019) (stating "a hostility toward religion . . . has no place in our Establishment Clause traditions"). Accordingly, the Supreme Court has long held that the Establishment Clause permits religious organizations to receive generally available government benefits. *See Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 839 (1995) (stating "the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse").

In each episode of this Free Exercise trilogy, the Court reaffirmed that allowing religious organizations to receive such benefits alongside their secular counterparts is permissible under the Establishment Clause. In episode one, *Trinity Lutheran Church*, the Court considered a Missouri state agency's denial of a Christian church's application to a generally available grant program to help resurface the church's playground. 582 U.S. at 454. The Court not only held that allowing the church to receive such a benefit was allowed under the Establishment Clause, but also that the state's alleged antiestablishment interest was insufficient to justify the state's denial. *See id.* at 465–66. Likewise, in episode two, *Espinoza*, the Court evaluated a Montana program that gave a

tax credit to anyone who sponsored a scholarship for a child's tuition at any private school chosen by the child's family. *Espinoza,* 140 S. Ct. at 2251. The Court held that "the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs." *Id.* at 2254. Finally, in episode three, *Carson*, the Court analyzed a Maine tuition assistance program for parents in rural school districts that lacked a secondary school. *Carson,* 142 S. Ct. at 1993. The Court once again reaffirmed that "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.

The Free Exercise trilogy demonstrates that religious schools may receive generally available public funds from the state without offending the Establishment Clause. Any remaining doubt was dispelled in *Kennedy v. Bremerton School District* when the Supreme Court overruled *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and its three-part strict separationist test for interpreting the Establishment Clause. *See* 142 S. Ct. 2407, 2427 (2022); *see also id.* at 2434 (Sotomayor, J., dissenting) (stating the Supreme Court has overruled *Lemon*). In place of *Lemon*, courts now interpret the Establishment Clause by looking to "historical practices and understandings" of the practice at issue. *Id.* at 2428. As the Court explained in *Espinoza*, "early state constitutions and statutes actively encouraged" policies that provided financial support to religious schools. 140 S. Ct. at 2258.

Here, the Department cannot withhold this publicly available benefit from St. Isidore without violating the Free Exercise trilogy and inviting constitutional reprimand from the United States Supreme Court. Like Missouri, Montana, and Maine, the Department would violate the First Amendment if it excluded St. Isidore from this public benefit because of its religious identity. *See Trinity Lutheran Church,* 582 U.S. 449; *Espinoza,* 140 S. Ct. 2246; *Carson,* 142 S. Ct. 1987.

Indeed, as in *Shurtleff v. City of Boston*, in which Boston tried to "avoid a spurious First Amendment problem" and "wound up inviting a real one," Oklahoma must not be forced to violate the Free Exercise Clause under the guise of promoting strict separation of church and state. 142 S. Ct. 1583, 1605 (2022) (Gorsuch, J., concurring) ("Call it a *Lemon* trade."). As the United States Supreme Court held in *Kennedy*, "in no world may a government entity's concerns about phantom constitutional violations justify actual violations of . . . First Amendment rights." *Kennedy,* 142 S. Ct. at 2432. This court can avoid such a "Lemon trade" by dismissing the Petition and allowing the Department to comply with its constitutional obligations. *Shurtleff*, 142 S. Ct. at 1605 (Gorsuch, J., concurring).

B. Because the Department is Making Case-By-Case Decisions on State Aid Distribution, Strict Scrutiny Applies Under the Free Exercise Clause.

Under United States Supreme Court precedent, when a government entity treats a religious entity less favorably than a secular entity, its actions are subject to strict scrutiny even when the issue involves a contract with a government agency. In *Fulton v. City of Philadelphia*, the United States Supreme Court held that because the city exercised discretion in choosing who it would contract with to provide foster care services, it could not deny a contract to Catholic Social Services simply because of its religious commitments. *See Fulton v. City of Philadelphia,* 141 S. Ct. 1868 (2021). The Court made clear: "We have never suggested that the government may discriminate against religion when acting in its managerial role." *Id.* at 1878. On the contrary, when a statute "incorporates a system of individual exemptions," and the government actors retain discretion to decide who participates, they "may not refuse to extend that [exemption] system to cases of 'religious hardship' without compelling reason." *Id.* at 1878. Therefore, the regime of neutral and generally applicable rules from *Employment Division v. Smith* does not apply. *See generally* 494 U.S. 872 (1990).

With its actions subject to strict scrutiny, the Department cannot exclude St. Isidore because of its religious identity. It is not enough to say that the Department has a compelling interest in vague notions of strict separation; on the contrary, courts must "scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal*, 546 U.S. 418, 431 (2006). "The question, then, is not whether the [Department] has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying [St. Isidore]." *Fulton,* 141 S. Ct. at 1881. The Department has no such compelling interest in excluding St. Isidore from the publicly available benefits it offers through the Charter Schools Act. The other requirement of strict scrutiny, the least restrictive means analysis, requires the Department to implement applicable state regulations in a manner that does not impact the religious mission of the school. This is exactly how the Department plans to implement regulations, once it is called upon to take action regarding St. Isidore.

Furthermore, to deny St. Isidore's application or require that they disaffiliate with any sectarian or religious institutions in order to qualify for participation would undermine the state's attempt to proceed neutrally and expose it to further liability. *See id.* at 1877 ("Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature."). And, for this Court to force the Department to withhold state aid or other funding to St. Isidore because it is religious would force the school into a Hobson's choice: sacrifice its religious character to participate in a public benefit or forgo participation and maintain its religious convictions. *See Trinity Lutheran Church,* 582 U.S. at 465 (finding a state's action unconstitutional where there is "no dispute that [Church] is put to the choice between being a church and receiving a government benefit"); *see also McDaniel v. Paty,* 435 U.S. 618, 626

(1978) (quoting *Sherbert v. Verner,* 374 U.S. 398, 406 (1963) ("'[T]o condition the availability of benefits [including access to the ballot] upon this appellant's willingness to violate a cardinal principle of [his] religious faith [by surrendering his religiously impelled ministry] effectively penalizes the free exercise of [his] constitutional liberties.'"). More broadly, to the extent that this Court's past or future decisions may conflict with United States Supreme Court precedent, the Supremacy Clause makes clear that federal law would bind the Department. Putting the Department to such a choice is not necessary, and doing so will invite censure from the United States Supreme Court, as the states of Missouri, Montana, and Maine experienced in the Free Exercise trilogy.

II. THE OKLAHOMA CONSTITUTION AND OKLAHOMA LAW ALLOWS THE DEPARTMENT TO DISTRIBUTE STATE AID TO ST. ISIDORE.

The Oklahoma Constitution and the laws of Oklahoma present no impediment to the Department in funding St. Isidore in the same manner that it funds a large set of secular choices for Oklahoma students. In fact, both the Constitution and the laws of Oklahoma prevent the Department from discriminating against St. Isidore's religious character when providing state aid and other funding.

A. If the Department Ultimately Provides Funding for St. Isidore, It Will Be In Compliance With Article II, Section 5 and Its Obligations Under the Federal Constitution.

The Oklahoma Supreme Court interpreted Article II, section 5 to be inapplicable in a situation similar to this case. *See Oliver v. Hofmeister*, 2016 OK 15, 368 P.3d 1270. Religious schools may receive public aid when participation in the relevant program is the result of "*parents* and not the *government* . . . determining which private school offers the best learning environment for their child." *Id.* ¶ 13, 368 P.3d at 1274 (emphasis in original). In *Oliver,* the Supreme Court analyzed whether Article II, Section 5 prevented families participating in the Lindsey Nicole

Henry Scholarship, a program allowing families of disabled students to use state funds to attend approved private schools, from contracting with a "sectarian" school. *Id.* ¶ 11. Participation in the program was "entirely voluntary" and allowed each family to "independently decide[] without influence from the State whether to enroll their child." *Id.* ¶ 8, 368 P.3d at 1273. The Supreme Court unanimously held that the program did not violate Article II, Section 5. *Id.* ¶ 27, 368 P.3d 1277. Because of the "neutrality of the scholarship program" and the "private choice exercised by families," "the circuit between government and religion [was] broken," and the scholarship did not violate the no-aid provision. *Id.* ¶ 13, 368 P.3d at 1274 (citing *Zelman v. Simmons-Harris,* 536 U.S. 639, 641 (2002)).

Oliver is instructive—and binding—here. St. Isidore will join six other virtual charter schools, along with thirty-one brick-and-mortar schools, that parents may voluntarily choose for their children to attend given their family's educational needs. Enrollment in a charter school is entirely voluntary, which breaks the circuit between the government and religion. Beyond the broken circuit, allowing St. Isidore to receive state aid or other funding is the religiously neutral option under *Oliver*. Withholding funds from St. Isidore because it is religious while distributing state aid to secular charter schools is hostility to religion that neither the Oklahoma Constitution nor the United States Constitution will tolerate. *See id.* ¶ 26, 368 P.3d at 1277 (finding that the Lindsey Nicole Henry scholarship was "completely neutral with regard to religion" by allowing funds to go to any private school, both sectarian and non-sectarian); *Carson*, 142 S. Ct. at 1997 (citing *Zelman,* 536 U.S. at 652–53) (finding that "a neutral benefit program in which public funds flow to religious organizations through independent choices of private benefit recipients does not offend the Establishment Clause").

The Court should interpret Article II, section 5 in a manner that does not conflict with the federal constitution and the Free Exercise trilogy. *See Okla. Coal. For Reprod. Just. v. Cline*, 2012 OK 102, ¶ 2, 292 P.3d 27, 27 ("Thus, this Court is duty bound by the United States and Oklahoma Constitutions to 'follow the mandate of the United States Supreme Court on matters of federal constitutional law.'"). No-aid provisions like Oklahoma's "arose in the second half of the 19th century" in more than thirty states out of "pervasive hostility to the Catholic Church and Catholics in general." *Espinoza,* 140 S. Ct. at 2258–59. "[M]any of the no-aid provisions belong to a more checkered tradition shared with the Blaine Amendment of the 1870s" by sharing a "similarly 'shameful pedigree.'" *Id.* (quoting *Mitchell v. Helms*, 530 U.S. 793, 828 (2000)). In fact, "it was an open secret that 'sectarian' was code for 'Catholic.'" *Id.* (quoting *Mitchell,* 530 U.S. at 828–29). According to the United States Supreme Court, these "[t]he no-aid provisions of the 19th century hardly evince a tradition that should inform our understanding of the Free Exercise Clause." *Id.* The Supreme Court reiterated that any tradition of not funding religious institutions due to no-aid or similar constitutional clauses was "odious" to our Constitution in the Free Exercise trilogy. *See Trinity Lutheran,* 137 S. Ct. at 2025; *Espinoza*, 140 S. Ct. at 2262–63. Thus, it would be unlawful for the Department to base any decision to deny funding to St. Isidore on a provision of the Oklahoma Constitution that is constitutionally "odious" to the Free Exercise Clause of the federal Constitution. As such, this Court should not interpret Article II, Section 5 in a manner that would conflict with the federal constitution.

B. The Oklahoma Religious Freedom Act Prohibits Religious Discrimination.

The Oklahoma Religious Freedom Act ("ORFA") provides that "No governmental entity shall substantially burden a person's free exercise of religion unless it demonstrates that application of the burden to the person is: [e]ssential to further a compelling governmental interest;

and [t]he least restrictive means of furthering that compelling interest." 51 O.S. § 253. This rule applies even when the "burden results from a rule of general applicability." *Beach v. Okla. Dep't of Pub. Safety,* 2017 OK 40, ¶ 12, 398 P.3d 1, 5. "Exercise of religion" under ORFA "means the exercise of religion under Article 1, Section 2, of the Constitution of the State of Oklahoma . . . and the First Amendment to the Constitution of the United States." 51 O.S. § 252. If the Department were to deny state aid or other funding to St. Isidore, it would surely pose a substantial burden on St. Isidore's free exercise of religion. This burden would be more than incidental, because failure to receive state aid would effectively prevent St. Isidore's operation as a school. *See Steele v. Guilfoyle,* 2003 OK CIV APP 70, ¶ 8, 76 P.3d 99, 102 (citing *Lyng v. Nw. Indian Cemetery Protective Ass'n,* 485 U.S. 439 (1988)). Therefore, the Department would be required to prove that it has a compelling interest in discriminating against the St. Isidore and is using the least restrictive means of doing so. *See Wisdom Ministries, Inc. v. Garrett,* No. 22-cv-0477, 2015 WL 4919660, at *9 (N.D. Okla. Aug. 1, 2023). As discussed above, the Department cannot assert a compelling interest in vague notions of strict separation of church and state, *see* Part I.B, *supra.* Therefore, under ORFA, the Department is prohibited from discrimination against St. Isidore because of its religious identity when distributing state aid or other funding.

C. Accepting State Aid Does Not Automatically Transform St. Isidore Into A State Actor.

Mere participation in a government program does not transform a private party into a state actor. To be considered a state actor, a private entity's action must "fairly be attributed to the state," *Blum v. Yaretsky,* 457 U.S. 991, 1004 (1982), and that action must be "traditionally the *exclusive* prerogative of the State," *Rendell-Baker v. Kohn,* 457 U.S. 830, 842 (1982).

When a school is operated by a private board, it is not necessarily a state actor even when "virtually all of the school's income [is] derived from government funding," the school must

"comply with a variety of regulations," and the school's diplomas are certified by a local public school. *See id.* at 832–33, 840. In *Rendell-Baker,* the Supreme Court held that a nonprofit institution, operated by a board of directors, that specialized in dealing with "students who have experienced difficulty completing public high schools" was not a state actor, even when "all of the students at the school have been referred to it" by a public school district or the state department of mental health. *Id.* at 831–32. Notably, the *Rendell-Baker* decision involved a First Amendment challenge. Since the decision in *Rendell-Baker,* three United States Courts of Appeals have held that charter schools are not state actors. *See Caviness v. Horizon Cmty. Learning Ctr., Inc.,* 590 F.3d 806 (9th Cir. 2010) (finding no state action for Arizona charter schools that are funded by the state); *Logiodice v. Trs. of Maine Cent. Inst.,* 296 F.3d 22 (1st Cir. 2002) (finding no state action in Maine because education is not a function reserved to the state); *Robert S. v. Stetson Sch., Inc.,* 256 F. 3d 159 (3d Cir. 2001) (finding no state action for a publicly-funded, contract-based school in Pennsylvania); *but see Peltier v. Charter Day Sch.,* 37 F.4th 104 (4th Cir. 2022) (finding state action where a charter school implemented a dress code).

Under current Supreme Court precedent, it is unlikely that St. Isidore is considered a state actor—a fact that labeling the school "public" or distributing state aid or funding will not change. The Charter School Act expressly authorizes private organizations—like St. Isidore—to establish charter schools. 70 O.S. § 3-134(C). Similar to Massachusetts' distribution of state funds to the alternative school in *Rendell-Baker*, the Department will not automatically transform St. Isidore into a state actor by distributing state aid.

III. PLAINTIFFS FAILED TO PLEAD A JUSTICIABLE CAUSE OF ACTION UNDER OKLAHOMA LAW.

To maintain a claim for relief, Plaintiffs must assert a valid cause of action. *See Lafalier v. Lead-Impacted Cmtys. Relocation Assistance Tr.,* 2010 OK 48, ¶ 20, 237 P.3d 181, 190 ("Public

protection falls within the Legislature's authority, as does the authority to define what constitutes an actionable wrong . . . ."); *see also Barrios v. Haskell Cnty. Pub. Facilities Auth.*, 2018 OK 90, ¶ 4, 432 P.3d 233, 242 (Edmondson, J., concurring) ("Any alleged federal or state right must be adjudicated within the remedial framework of a legally cognizable action . . . ."). On a motion brought under § 2012(B)(6), a court "may determine [a] petition suffers from non-existence of a cause of action making an opportunity to amend futile for a plaintiff's case." *Berkson v. State ex rel. Askins*, 2023 OK 70, ¶ 24, 532 P.3d 36, 47. Plaintiffs failed to plead their claims pursuant to a cause of action recognized by the Oklahoma Legislature, and Plaintiffs' allegations of constitutional violations are barred by sovereign immunity.

A. Plaintiffs Do Not Plead A Recognized Cause of Action For Their Claims.

Plaintiffs' Petition asserts five claims for relief, *see* Pet. ¶¶ 213–265, alleging various violations of the Oklahoma Administrative Code, the Oklahoma Constitution, and the Oklahoma Charter Schools Act. These claims are based on what Plaintiffs title the "legal requirements applicable to Oklahoma Charter Schools." *See* Pet. ¶¶ 50–111. And while Plaintiffs identify nearly twelve pages worth of legal requirements for charter schools, their Petition fails to identify *any* private causes of action authorized by the Legislature. *Id.* In short, Plaintiffs bring their claims for relief with no statutory basis or vehicle that provides them with a cause of action. Plaintiffs do not identify any causes of action because no such private causes of action exist under which Plaintiffs can challenge the actions of the Department. *See* Part III.B, *infra* (constitutional claims) (Pet. ¶¶ 221–230, 234–239, 257–261, 264–265); 75 O.S. § 250 *et seq.* (Oklahoma Administrative Procedures Act) (Pet. ¶¶ 214–219, 243–244, 246–248, 250–255); 70 O.S. § 3-130 *et seq.* (Oklahoma Charter Schools Act) (Pet. ¶¶ 231–239, 241–242, 245–248, 261–265). Because

Plaintiffs do not identify a private cause of action under which to assert their legal and constitutional rights before this Court, they do not state a claim upon which relief can be granted.

B. Plaintiffs' Constitutional Claims Are Barred by Sovereign Immunity.

Not only do Plaintiffs fail to identify any relevant causes of action, they also fail to acknowledge that sovereign immunity bars their claims against the Department. In 2014, the Legislature amended the Governmental Tort Claims Act ("GTCA") to "specify that the State's immunity from suit extended even to torts arising from alleged deprivation of constitutional rights." *Barrios*, 2018 OK 90, ¶ 10; *see also* 51 O.S. § 152(17) ("'Tort' means a legal wrong . . . involving violation of a duty imposed by . . . the Constitution of the State of Oklahoma . . ."). Therefore, the GTCA governs any asserted violations of the Oklahoma Constitution. This is true even if there were an implied cause of action. *Barrios,* 2018 OK 90, ¶ 12 ("The Legislature's amendment of the GTCA to specify that the GTCA applies even to tort suits alleging violations of constitutional rights was an exercise of the Legislature's long-recognized power to define the scope of the State's sovereign immunity, which forecloses [this Court's] ability to expand the common law in a manner that would conflict with statutory law.").

Through the GTCA, the Legislature has the "final say" in defining the scope of the State's sovereign immunity. *Barrios,* 2018 OK 90, ¶ 7. "Accordingly, in cases including tort claims against the State and state actors, the Court begins with the understanding that the State is statutorily immune from tort suit unless the Legislature has expressly waived that immunity." *Id.* at ¶ 8; *see also* 51 O.S. § 152.1(A) ("The State of Oklahoma does hereby adopt the doctrine of sovereign immunity. The State . . . shall be immune from liability for torts."). The Legislature waived the State's immunity only to the extent provided in the GTCA. *Id.* at § 152.1(B). "The

liability of the state . . . under the [GTCA] shall be exclusive and shall constitute the extent of tort liability of the state arising from . . . the Oklahoma Constitution." *Id.* at § 153(B).

The scope of the State's waiver of sovereign immunity under the GTCA does not cover Plaintiffs' claims. "The state . . . shall be liable for loss resulting from its torts . . . subject to the limitations and exceptions specified [t]he [GTCA] and only where the state . . . , if a private person or entity, would be liable for *money damages* under the laws of the state." *Id.* at § 153 (emphasis added).

Plaintiffs' Claim Two alleges that any provision of state aid or funding would violate various provisions of the Oklahoma Constitution. *See* Pet. ¶¶ 221–222, 234–239. Claim Five similarly alleges that distributing state aid or funding would violate multiple provisions of the Oklahoma Constitution. *See* Pet. ¶¶ 257–261, 264–265. However, these claims are not within the scope of the GTCA's waiver of Oklahoma's sovereign immunity, because Plaintiffs do not seek money damages and the asserted violations are not of the sort that, if they had been done by a private individual, would result in money damages. Instead, Plaintiffs seek a temporary injunction, a permanent injunction, a declaratory judgment, and costs and attorneys' fees. *See* Pet. ¶ 266. Under the GTCA, the Department can be liable *only where* it would also be liable for money damages if it were a private person. Therefore, even if Plaintiffs' claims and prayer for relief had been properly pled with a cause of action under the GTCA, they will still fail, as they are not within the scope of the Legislature's waiver of sovereign immunity.

The GTCA aside, Plaintiffs are not left without an avenue for injunctive relief. "The remedy of 42 U.S.C. § 1983 is available in an Oklahoma state court regardless of state statutory sovereign immunity." *Barrios,* 2018 OK 90, ¶ 4 (Edmondson, J., concurring). "An alleged . . . state right," which the Plaintiffs here seek to vindicate, "must be adjudicated within the remedial

framework of a legally cognizable action, and the [GTCA] does not provide a remedy or recognize a cause of action when that Act expressly prohibits a party using a state constitutional right . . . as a basis *for any tort liability against the state when the cause of action is otherwise prohibited by that Act." Id.* (emphasis in original). In contrast, 42 U.S.C. *does* provide a remedy to Plaintiffs. However, as discussed above, Plaintiffs do not assert this necessary cause of action to proceed with their litigation. *See* Pet. ¶ 8 ("The plaintiffs' claims for relief are brought solely under the state constitution, state statutes, and state regulations."). Presumably, Plaintiffs made this strategic choice to avoid any removal to federal court. *See* Pet. ¶ 8. Nevertheless, Plaintiffs remain free to amend their Petition to fix this constitutional infirmity regarding injunctive relief.

At the same time, the deficiency in Plaintiffs' request for declaratory relief is not so easily cured. While it's true that "[a] declaratory judgment may be sought to determine the validity of any statute, municipal ordinance, or other governmental regulation," that is not what the Plaintiffs ask this Court to do. *Osage Nation v. Bd. of Comm'rs of Osage Cnty*, 2017 OK 34, ¶ 58, 394 P.3d 1224, 1243. When an actual controversy is live, *see* Part IV, *supra*, a district court may "determine rights, status, or other legal relations, including but not limited to a determination of the construction or validity of . . . any statute . . . or other governmental regulation." 12 O.S. § 1651. Plaintiffs' prayer for relief asks for "[a] declaratory judgment under 12 O.S. § 1651 that the Oklahoma Constitution, the Charter Schools Act, and the Board's regulations bar the provision of any State Aid allocations or other state funding to St. Isidore." Pet. ¶ 266(B). In effect, the Plaintiffs are not asking this Court to determine the validity of the Constitution, the Charter Schools Act, or any specific Board regulation. Rather, they are asking this Court to determine the validity of any future action the Department might take *in light of* those regulations. By its plain terms, § 1651 does not waive sovereign immunity for the Department under these circumstances for this case.

IV. ANY CLAIM AGAINST THE DEPARTMENT IS NOT RIPE BECAUSE IT HAS NOT DISTRIBUTED ANY STATE FUNDING TO ST. ISIDORE.

"It [is] clear that the first requisite for a proper case for declaratory relief is an actual controversy." *Knight ex rel. Ellis v. Miller,* 2008 OK 81, ¶ 8, 195 P.3d 372, 374. Oklahoma courts do not "issue advisory opinions or answer hypothetical questions where these is no case or controversy, and this rule does not change when a declaratory judgment is involved." *Id.* A "requisite precedent fact[] or condition[] which the courts generally hold must exist in order that declaratory relief may be obtained" is that "the issue involved in the controversy must be ripe for judicial determination." *Id.; see also Shop & Swap Advertiser, Inc. v. Okla. Tax Comm'n.,* 1989 OK 81, ¶ 17, 774 P.2d 1058, 1062 (Simms, J., dissenting) ("If this were a case at controversy ripe for adjudication, I would agree with the majority's resolution . . . I do not agree, however, that this is a matter ripe for adjudication . . . In my view, the matter should be dismissed . . . .). Ripeness is a "judicial policy militating against the decision of abstract or hypothetical questions." *French Petroleum Corp. v. Okla. Corp. Comm'n.*, 1991 OK 1, ¶ 7, 805 P.2d 650, 652–53. A case is not ripe if "[s]ubsequent events may sharpen the controversy or remove the need for decision of at least some aspects of the matter." *Id.* A court will consider "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.*

Plaintiffs' case against the Department is not ripe for adjudication. In fact, Plaintiffs' Petition pleads no relevant facts beyond the conclusory assertion that "[the Department] will distribute state aid allocations to St. Isidore." Pet. ¶ 38. Absent from the Petition, however, is any evidence for this conclusion. Plaintiffs do not assert any factual allegation that the Department has taken any action regarding St. Isidore. Indeed, to date, the Department has taken no action regarding St. Isidore: no state aid or other funding has been distributed. Nor has the Department made any tangible preparations to distribute state aid or funding to St. Isidore or even been asked

to begin the process to do so. Therefore, any relief by this Court against the Department would be merely advisory, and any injunction would rest on hypothetical facts or the Court's speculation about what the Department *might* do. In fact, Plaintiffs raise concerns about St. Isidore that are unrelated to its religious character, *see e.g.*, Pet. ¶¶249–255 (potential violations of Board regulations requiring charter schools and their boards members to be independent from the school's educational management organizations). The Department is equally concerned about any non-compliance with regulations that do not burden St. Isidore's religious beliefs; but, currently, the Department has simply not had occasion to evaluate St. Isidore in any way. Any determination of St. Isidore's compliance is premature. In fact, there may still be reasons entirely unrelated to St. Isidore's religious character that prompt the Department to deny funding. But, at present, the Department has made no evaluations as to St. Isidore's suitability to receive state aid. The Department fully intends to follow the constitutions and laws of Oklahoma and the United States. Yet, the "requisite precedent facts" are simply not currently present or pled. Therefore, the issues presented to this Court by Plaintiffs against the State are unripe for judicial determination.

CONCLUSION

For these reasons, the Department requests that this Court dismiss Plaintiffs' Petition in its entirety.

Respectfully submitted,

Bryan Cleveland, OBA No. 33860
Oklahoma State Department of Education
Oliver Hodge Building
2500 North Lincoln Boulevard
Oklahoma City, Oklahoma 73105
Telephone: (405) 521-3301
[redacted]

Attorney for Defendants, Oklahoma State Department of Education and State Superintendent of Public Instruction, Ryan Walters, in his official capacity

Anthony J. Ferate, OBA No. 21171
Andrew W. Lester, OBA No. 5388
Spencer Fane LLP
9400 North Broadway Extension, Suite 600
Oklahoma City, Oklahoma 73114-7423
Telephone: (405) 844-9900
Facsimile: (405) 844-9958
[redacted]

Attorneys for Defendants, Oklahoma State Department of Education and State Superintendent of Public Instruction, Ryan Walters, in his official capacity

Hiram Sasser, OBA No. 19559
Holly M. Randall, OBA No. 34763
FIRST LIBERTY INSTITUTE
2001 West Plano Parkway, Suite 1600
Plano, TX 75075
Telephone: (972) 941-4444
[redacted]

Attorneys for Defendants, Oklahoma State Department of Education and State Superintendent of Public Instruction, Ryan Walters, in his official capacity

CERTIFICATE OF MAILING

I hereby certify that on the 20TH day of September, 2023, a true and correct copy of the above and foregoing document was sent by U.S. first class mail, postage prepaid to:

Cheryl Plaxico
Plaxico Law Firm PLLC
923 N. Robinson, 5th Floor
Oklahoma City, OK 73102
Attorney for Defendants, Statewide Virtual Charter School Board, Dr. Robert Franklin, William Pearson, Nellie Tayloe Sanders, Brian Bobek, Dr. Scott Strawn

M. Scott Proctor
Michael H. McGinley
Steven A. Engel
Dechert LLP
1900 K Street, NW
Washington, DC 20006
-and-
John A. Meiser
Notre Dame Law School
Religious Liberty Clinic
1338 Biolchini Hall
Notre Dame, IN 46556
Attorneys for Defendant, St. Isidore of Seville Catholic Virtual School

Benjamin H. Odom
John H. Sparks
Michael W. Ridgeway
Lisa M. Millington
ODOM & SPARKS, PLLC
HiPoint Office Building, Suite 140
2500 McGee Drive
Norman, Oklahoma 73072
-and-
J. Douglas Mann
1116 East 21st Place
Tulsa, OK 74114

-and-
Kenneth D. Upton
Kalli A. Joslin
Alex J. Luchenitser
Americans United for Separation of Church and State
1310 L Street NW, Suite 200
Washington, DC 20005
-and-
Michael W. Ridgeway
Benjamin H. Odom
Lisa M. Millington
John H. Sparks
ODOM & SPARKS, PLLC
HiPoint Office Building, Suite 140
2500 McGee Drive
Norman, OK 73072
-and-
Daniel Mach
Heather L. Weaver
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW, Suite 600
Washington, DC 20005
-and-
Robert Kim
Jessica Levin
Wendy Lecker
EDUCATION LAW CENTER
60 Park Place, Suite 300
Newark, NJ 07102
-and-
Patrick Elliott
FREEDOM FROM RELIGION FOUNDATION
PO Box 750
Madison, WI 53701
Attorneys for Plaintiffs, OKPLAC, Inc., d/b/a Oklahoma Parent Legislative Action Committee, Melissa Abdo, Krystal Bonsall, Leslie Briggs, Brenda Lene, Michele Medley, Dr. Bruce Prescott, Rev. Dr. Mitch Randall, Rev. Dr. Lori Walke and Erika Wright

Michael H. McGinley
Steven A. Engel
Dechert LLP
1900 K Street, NW
Washington, DC 20006
-and-
John A. Meiser
Notre Dame Law School
Religious Liberty Clinic
1338 Biolchini Hall
Notre Dame, IN 46556
-and-
Michael R. Perri
Socorro Adams Dooley
PERRI DUNN, PLLC
100 North Broadway Avenue, Suite 3280
Oklahoma City, OK 73102
Attorney for Defendant, Saint Isidore of Seville Catholic Virtual School M. Scott Proctor