Nos. 24-394 and 24-396

IN THE

Supreme Court of the United States

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

Petitioners,

v.

GENTNER DRUMMOND, ATTORNEY GENERAL OF OKLAHOMA, EX REL. OKLAHOMA,

Respondent.

ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL,

Petitioner,

v.

GENTNER DRUMMOND, ATTORNEY GENERAL OF OKLAHOMA, EX REL. OKLAHOMA,

Respondent.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

BRIEF OF *AMICI CURIAE* RYAN WALTERS IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF PUBLIC INSTRUCTION FOR THE STATE OF OKLAHOMA, THE OKLAHOMA DEPARTMENT OF EDUCATION, AND THE OKLAHOMA STATE BOARD OF EDUCATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[*]

Amici are a state official and two state agencies charged with setting and implementing education policy for the State of Oklahoma.

Since 2023, Ryan Walters has served as the elected Oklahoma State Superintendent of Public Instruction. Upon assuming that role, Mr. Walters took an oath of office to "support, obey, and defend the Constitution of the United States, and the Constitution of the State of Oklahoma." Okla. Const. art. XV, § 1. As part of that undertaking, and in carrying out his responsibilities in formulating education policy for the State, Mr. Walters considers it a duty of his office to protect the free exercise of religion for all Oklahomans.

The Oklahoma Department of Education is "charged with the responsibility of determining the policies and directing the administration and supervision of the public school system of the state." 70 Okla. Stat. § 1-105 (A). The Department is charged with setting policy for and directing the administration and supervision of Oklahoma's public school system.

The Oklahoma State Board of Education is an "agency in the State Department of Education which shall be

[*] Pursuant to Supreme Court Rule 37.6, *amici* represent that this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. All parties received timely notice of *amici's* intent to file this brief.

the governing board of the public school system of the state." *Id.* § 1-105 (B). Among other duties, the Board is "responsible for accreditation of charter schools and virtual charter schools and ensure[s] compliance with special education laws and federal laws and programs administered by the State Board of Education." *Id.* § 3-132.2(B).

Amici have a strong interest in ensuring that the educational policies of the State of Oklahoma don't interfere with the federal constitutional rights of Oklahoma citizens. Because the decision below sows confusion and threatens Oklahomans' federal free exercise rights, *amici* urge this Court to grant certiorari and reverse.

STATEMENT AND SUMMARY OF ARGUMENT

Amici state officials take seriously their responsibilities to the children of Oklahoma. They also take seriously their obligations to safeguard the constitutional rights of all Oklahomans. The decision below needlessly puts the two in conflict, deepens an existing split, and sows needless confusion for educators and public officials earnestly trying to carry out their public duties to the children of Oklahoma and the Constitution of the United States. This Court's review is needed to resolve the conflict, dispel the confusion, and provide clarity on an issue that has significant practical implications.

In holding that religious affiliation disqualifies a school from serving as a charter school, the decision below violates the rule well established in this Court's precedent that privately owned, run, and operated institutions aren't state actors subject to constitutional constraints. And

it deepens an existing split that makes the exercise of federal free-exercise rights contingent on the jurisdiction in which those rights are exercised—an intolerable lack of uniformity especially where such a fundamental right is concerned. This Court should grant review and reverse.

1. Until just over two years ago, courts nationwide agreed that charter schools aren't state actors. See, e.g., *Logiodice* v. *Trustees of Maine Central Inst.*, 296 F.3d 22, 26 (1st Cir. 2002); *Caviness* v. *Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 814–816 (9th Cir. 2010); *Robert S.* v. *Stetson School, Inc.*, 256 F.3d 159, 164 (3d Cir. 2001); *Peltier* v. *Charter Day School, Inc.*, 37 F.4th 104, 142 (4th Cir. 2022) (Quattlebaum, J., dissenting in part) (collecting cases). That's because charter schools are typically operated by private entities and are meant to stand apart from public schools to provide a diverse array of educational options for students and parents. *Peltier*, 37 F.4th at 150 (Wilkinson, J., dissenting).

Oklahoma charter schools are no exception. The State's Charter Schools Act aims to "[i]ncrease learning opportunities for students"; "[e]ncourage the use of different and innovative teaching methods"; [i]mprove student learning"; and "[p]rovide additional academic choices for parents and students." *Id.* § 3-131(A). The Act allows any qualified "private college or university, private person, or private organization" to apply for charter-school status. 70 Okla. Stat. § 3-134(C). Once approved, the charter school retains the autonomy to "offer a curriculum which emphasizes a specific learning philosophy or style," *id.* § 3-136(A)(3). A charter school may adopt its own "method of school governance," and prescribe its own personnel policies and requisite qualifications. *Id.* § 3-136(C).

So by design, there's tremendous variation among charter schools. For example, Comanche Academy is an Oklahoma charter school "where the Comanche (Numunu) Culture language is the instructional format." Our Mission, Comanche Academy, https://tinyurl.com/3c6uzxr4 (last visited November 7, 2024). Le Monde International School is a "French and Spanish immersion school." About Us, Le Monde International School, https://tinyurl.com/mrx468bx (last visited November 7, 2024). Tulsa Classical Academy "aims to promote life-long learning, integration of all knowledge, human flourishing, and the life of the mind." About, Tulsa Classical Academy, https://tinyurl.com/yhdsn6j4 (last visited November 7, 2024).

2. This Court has long held that privately operated schools aren't state actors. See *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 840–842 (1982). In *Rendell-Baker*, this Court held that a privately owned and operated school wasn't a state actor—despite extensive government regulation and funding—because providing education wasn't "traditionally the *exclusive* province of the state." *Id.* at 842. Because charter schools are also privately operated schools with alternative educational methods and objectives, all federal circuits to consider the issue—until recently—have "followed the reasoning in *Rendell-Baker*" to hold that charter schools aren't state actors. *Peltier*, 37 F.4th at 142 (Quattlebaum, J., dissenting in part) (citing *Logiodice*, *Robert S.*, and *Caviness*).

The Fourth Circuit broke from this consensus in *Peltier*, which held that a charter school was a state actor because North Carolina law designated the school "public" and because the school served a public function. *Id.* at 117–119 (majority op.). So the court ruled that the school's

statutory inclusion in the "North Carolina public school system" gave it a function "traditionally and exclusively reserved to the state." *Id.* at 119.

3. The charter school at issue in this case, St. Isidore of Seville Catholic Virtual School, aims to "educate the entire child: soul, heart, intellect, and body of each child enrolled through a curriculum that will reach students at an individual level, with an interactive learning environment that is rooted in virtue, rigor and innovation." Pet. App. 197a.

Ignoring the weight of authority holding otherwise, the Oklahoma Supreme Court sided with the Fourth Circuit and deepened the split when it held that St. Isidore is a state actor simply by virtue of Oklahoma's designation of charter schools as "public" and the State's purported "exclusive government function of operating the State's free public schools." Pet. App. 19a–21a. The court went on to conclude that the school's religious character violates both the federal Establishment Clause and an Oklahoma constitutional provision that prohibits public money from being "appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion." Okla. Const. art. II, § 5.

4. The consequences of the Oklahoma Supreme Court's ruling are severe. As petitioners point out, the decision entrenches an acknowledged split and threatens to unravel decades of established precedent. St. Isidore Pet. 19–27; School Bd. Pet. 18–22. Contrary to that precedent, it transforms the Establishment Clause into a cudgel against the Free Exercise Clause. And it

sows confusion among public officials and educators—needlessly distracting from their responsibilities to improve the quality and quantity of educational offerings available to the Nation's children and their families.

ARGUMENT

I. This Court's Review Is Needed to Resolve a Split that Imperils the Educational Opportunities Available to the Nation's Children and Families.

The decision below that charter schools are state actors because they supposedly fall within the state's "exclusive government function of operating the State's free public schools," Pet. App. 21a, conflicts with this Court's precedents, with the decisions of at least three circuits, and with the historical record. If left to fester, that split will not only result in untenable disuniformity, but also imperil the variety and the quality of innovative educational opportunities available to children and their families—especially those children and families who are most disadvantaged.

The decision below cannot be squared with the long-settled understanding that "education is not and never has been a function reserved to the state." *Logiodice*, 296 F.3d at 26 (citing *Pierce* v. *Soc'y of Sisters*, 268 U.S. 510, 534 (1925)). Instead, it "is regularly and widely performed by private entities" and this "has been so from the outset of this country's history." *Id.* at 26–27; see also *Rendell-Baker*, 457 U.S. at 842 (providing educational services "at public expense" "in no way makes these services the exclusive province of the State"). This is true in all states, particularly because of the many private entities that

occupy the educational landscape throughout the country. *Logiodice*, 296 F.3d at 27.

In Connecticut, for example, section 10-184 of the General Statutes had obligated parents since 1796 to educate their children. Office of Legislative Research, *Legislative History of CGS § 10-184*, Sept. 23, 1994, 94-R-0847. That remained essentially unchanged until the Industrial Revolution, when factories began to employ children. In 1842, the Connecticut Legislature amended section 10-184 to prohibit factories from employing children under 15 years of age unless they had attended a public or private school for a portion of the year. *Id.* It wasn't until 1872 that the Legislature amended section 10-184 to require school attendance—whether public, private, or at home—regardless of employment status. *Id.*; 1872 Conn. Pub. Acts, Ch. 77, §§ 1, 3. Throughout the years and many amendments to section 10-184, the Connecticut Legislature never carved out education as an exclusively public function. Instead, it saw public education as an alternative to the traditional models of private or home education. See generally *Legislative History of CGS § 10-184*; see also Conn. Gen. Stat. § 10-184 (2023).

That's also true for Maine (*Logiodice*, 296 F.3d at 26–27), Arizona (*Caviness*, 590 F.3d at 808–809, 815–816), and New Hampshire. Const. of N.H. (1792), in 1 Constitution and Laws of the State of New Hampshire with the Constitution of the United States 16 (1805) (imposing a "duty o[n] the legislature and magistrates . . . to encourage private and public institutions" of education)). Indeed, it remains true in *every* state. See, e.g., Cal. Educ. Code §§ 48222, 48224 (2023); Ky. Rev. Stat. Ann. § 159.030(1) (2023); Mich. Comp. Laws § 380.1561(3) (2023); Ohio Rev.

Code Ann. §§ 3321.042, 3321.07 (2023); Tenn. Code Ann. § 49-6-3001(c) (2023).

So too (until the decision below) for Oklahoma, which joined the Union in 1907. Since Oklahoma's recognition as a territory in 1890, education was regularly and widely provided by private entities. See A. Kenneth Stern, *Homeschooling*, The Encyclopedia of Oklahoma History and Culture (Jan. 15, 2010);[1] see also *Wright* v. *State*, 209 P. 179 (Okla. Crim. App. 1922) ("[A] parent may have his children instructed by a competent private tutor or educated in a sectarian or other accredited school, without a strict adherence to the standard fixed for teachers in the public schools of the state.").

Unlike other states, Oklahoma constitutionalized "compulsory attendance at some public *or other school*, *unless other means of education* are provided." Okla. Const. art. XIII, § 4 (emphasis added). That language has remained unchanged since the Oklahoma Constitution was adopted in 1907. And it has been codified in Oklahoma law. Okla. Stat. § 70-10-105 (2023). The historical record makes plain that education has never been exclusively a government function.

The Oklahoma Supreme Court shunted all of that history to the side when it held that Oklahoma law labeling charter schools as "public schools" necessarily makes them state actors. See Pet. App. 15a–21a. Aside from *Peltier*, the court identified no authority suggesting that labels in themselves are dispositive. For good reason. Were a

1. https://www.okhistory.org/publications/enc/entry.php?entry=HO021 (last visited October 15, 2024).

label alone enough, state legislatures could ink their way around the Free Exercise Clause merely by classifying whichever entities they wish as "public," whether or not they actually are. That can't be right.

And it isn't. This Court disposed of that argument years ago in *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974). There, this Court rejected the argument that a state legislature labeling a private company as a "public utility" rendered the company a state actor. *Id.* at 350 & n.7. The Ninth Circuit later adopted that reasoning in concluding that a plaintiff couldn't rely on a state's "statutory characterization of charter schools as 'public schools'" to conclude that the school was a state actor because the proper focus of the inquiry is the entity's "function." *Caviness*, 590 F.3d at 814. And two other federal courts of appeals have recognized that charter schools don't become state actors merely by dint of state regulation or funding. *Logodice*, 296 F.3d at 26-27; *Robert S.*, 256 F.3d at 165-66. Rather than attempting to distinguish these cases, the Oklahoma Supreme Court simply ignored them.

Here, it's indisputable that Oklahoma charter schools function differently from public schools. They are privately operated, use different educational methods policies, and are exempt from laws that apply to public schools. See supra 3. This Court has rejected a similar attempt to gerrymander the definition of the public benefit to exclude religion by describing it as "a free public education." *Carson as next friend of O.C.* v. *Makin*, 596 U.S. 767, 782 (2022). The Court refused to allow "the definition of a particular program" to be "manipulated to subsume the challenged condition," because such a "magic words"

test would skate over the "substance of free exercise protections." *Id.* at 784–785. This Court's intervention is needed again to enforce that vital rule.

Indeed, charter schools were created precisely to operate differently from public schools—to provide "*additional* academic choices for parents and students" that employ "*different* and *innovative* teaching methods." 70 Okla. Stat. § 3-131(A) (emphases added). Whatever label the legislature puts on St. Isidore, this Court's precedents make clear that statutory labels can't dictate the answers to constitutional questions—including the threshold question whether an entity is a state actor to which constitutional constraints even apply. See, e.g., *Jackson*, 419 U.S. at 350 & n.7; *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374, 392 (1995) (congressional labels have no bearing on "what the Constitution regards as the Government").

Regrettably, the children who stand to benefit most from the diverse educational opportunities provided by charter schools will bear the brunt of the Oklahoma Supreme Court's decision. That's because a ruling that subjects privately operated entities to constitutional constraints designed for the government needlessly impedes on charter schools' mission to provide diverse opportunities for students.

For example, construing charter schools as state actors may imperil single-sex charter schools. Such schools can provide significant benefits to students. E.g., Teresa A. Hughes, The Advantages of Single-Sex Education, 23 Nat'l Forum of Educational Admin. & Supervision J. 2, 13 (2006) https://bit.ly/2swFNGX ("[I]n single-sex settings

teachers are able to design the curriculum to tailor to the individual needs of each sex."); Amy Robertson Hayes, et al., The Efficacy of Single-Sex Education: Testing for Selection and Peer Quality Effects, in Sex Roles (Nov. 2011) at 10, https://bit.ly/3fJCVCl ("Girls attending a single-sex school outperformed those girls attending coeducational schools"). But if charter schools are state actors, single-sex charter schools may be constitutionally impermissible. *United States v. Virginia*, 518 U.S. 515, 534 (1996); *id.* at 595 (Scalia, J., dissenting) (explaining that the court's logic rendered "single-sex public education *** unconstitutional").

By the same token, Comanche Academy might feel compelled to forego using "the Comanche (Numunu) Culture language" as its "instructional format"—or else face uncertainty over whether its defining characteristic runs afoul of the Constitution. The point is this: if charter schools are state actors, they may feel forced to color within lines drawn by the State—matching public schools' curricula, adopting their educative methods, and rejecting diverse or innovative perspectives for fear of liability or losing the State's blessing. Even the specter of time-consuming and expensive litigation may chill the educational innovation charter schools were designed to provide.

II. This Court's Review Is Needed to Keep the Establishment Clause from being Used as a Cudgel Against the Free Exercise Clause.

Because St. Isadore isn't a state actor, Oklahoma can't disqualify St. Isadore from receiving funds solely because of its purportedly "sectarian" nature under this Court's settled precedent.

"The Free Exercise Clause protects religious observers against unequal treatment and subjects to the strictest scrutiny laws that target the religious for special disabilities based on their religious status." *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449, 458 (2017) (quotations omitted). This Court has been crystal clear in three recent decisions that a state government may not condition eligibility for an otherwise-available public benefit based on a requirement that a private entity renounce its religious convictions and identity.

First, in *Trinity Lutheran*, this Court held that where a "policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character," that policy "imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny." 582 U.S. at 462. In that case, Missouri deemed a church ineligible for a competitive playground resurfacing grant based on a state constitutional provision prohibiting aid to religious institutions. *Id.* at 455–456.

But the church had "a right to participate in a government benefit program without having to disavow its religious character." *Id.* at 463. And under the strict scrutiny framework, Missouri's interest in avoiding "religious establishment concerns" simply "c[ould] not qualify as compelling." *Id.* at 466.

Next, in *Espinoza*, this Court reversed a decision based on a state constitutional provision that "single[d] out schools" for exclusion from funding "based on their religious character." 591 U.S. at 476. There, the Montana

Supreme Court's decision forced schools to choose either to "divorce [themselves] from any religious control or affiliation" or to remain "[in]eligible for government aid under the Montana Constitution." *Id.* at 478.

Drawing upon the "straightforward rule" from *Trinity Lutheran*, this Court applied strict scrutiny to the state's discriminatory policy. *Id.* at 484. The state's asserted "interest in separating church and State more fiercely than the Federal Constitution" failed that test. *Id.* (quotations omitted). And this Court emphasized that Montana's policy "burdens not only religious schools but also the families whose children attend or hope to attend them." *Id.* at 486.

Most recently, in *Carson*, this Court held that Maine "effectively penalize[d] the free exercise of religion" when it disqualified schools from a generally available scholarship for rural students "solely because of their religious character." 596 U.S. at 780 (quoting *Trinity Lutheran*, 582 U.S. at 462). For the third time, a state's exclusion of religious entities from a public benefit didn't survive strict scrutiny because "[a] State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise." *Id.* at 781.

The application of this precedent to this case is also "straightforward." *Espinoza*, 591 U.S. 484. St. Isidore is an Oklahoma not-for-profit corporation, Pet. App. 217a, and its only members are the Archbishop of the Archdiocese of Oklahoma City and the Bishop of the Diocese of Tulsa, *id.* 225a. These two members in turn appointed a board

of directors, who "manage and direct the business and affairs of the School." *Id.* at 226a.

As a private non-profit entity, St. Isidore executed a charter school contract with the Oklahoma Statewide Virtual Charter School Board. *Id.* at 152a. No one disputes that aside from its religious character, St. Isidore is qualified to serve as a charter school. So putting the school to the choice of abandoning its religious identity or losing its contract with the state to open a charter school violates the Free Exercise Clause under this Court's holdings in *Trinity Lutheran*, *Espinoza*, and *Carson*.

Those precedents establish that the federal free exercise right to be free from discrimination based on religious status or use of funds trumps any provision to the contrary in state statutes or constitutions. That same federal free exercise right means that the decision below should not have looked for support to a state constitutional provision barring aid to religious schools here. See Pet. App. 7a (citing Okla. Const. art. II, § 5). This provision overlaps substantially with the Montana constitutional provision used to justify the exclusion of schools from the scholarship program in *Espinoza*, which prohibited the state from making "any direct or indirect appropriation or payment from any public fund or monies *** to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination." Mont. Const. art. X, § 6.

In that case, as in this one, "[g]iven the conflict between the Free Exercise Clause and the application of the no-aid provision here," the state supreme court

"should have disregarded the no-aid provision and decided this case conformably to the Constitution of the United States." *Espinoza*, 591 U.S. at 488 (quotation omitted). Its failure to do so threatens the free exercise rights of Oklahomans and causes dire consequences for *amici* who seek to vindicate those rights.

The Oklahoma Supreme Court made matters worse when it further held that St. Isidore's contract violates the federal Establishment Clause, which the court understood to "prohibit[] government spending in direct support of any religious activities or institutions." *Id.* 23a. For that sweeping proposition, the court relied on a quotation from *Everson* v. *Board of Education of Ewing Township*, 330 U.S. 1, 15 (1947); but if anything *Everson* supports petitioners because the program at issue here isn't meaningfully different from the one that *Everson* held *was* constitutional: a state's "general program under which it pays the [bus] fares of pupils attending public and other schools." *Id.* at 17.

What's more, this Court has clarified that "the Establishment Clause must be interpreted by reference to historical practices and understandings." *Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507, 535 (2022). The history strongly favors St. Isidore here. As this Court explained in *Espinoza*, there's a long history of state and federal government providing funding and land grants to religious schools. 591 U.S. at 480-81 (collecting historical examples). And this Court rejected a reading of the Establishment Clause that would have foreclosed religious use of generally available funds in *Carson*, explaining that "the prohibition on status-based discrimination under the

Free Exercise Clause is not a permission to engage in use-based discrimination." 596 U.S. at 788.

Three times already, this Court has rejected the argument that a "stricter separation of church and state than the Federal Constitution requires" can serve as a compelling interest that satisfies strict scrutiny. *Carson*, 596 U.S. at 781; *Espinoza*, 591 U.S. at 484-85; *Trinity Lutheran*, 582 U.S. at 466. As this Court explained in *Espinoza*, a state policy that denies funding to eligible religious schools based on overblown Establishment Clause concerns "burdens not only religious schools but also the families whose children attend or hope to attend them." 591 U.S. at 486.

As state public officials, *amici* are keenly aware of the burden the decision below places on the free exercise rights of their constituents. *Amici* are also deeply concerned about the confusion the decision below has sown in an area where clarity is essential to safeguarding free-exercise rights. Just as this Court's intervention was indispensable in vindicating those foundational rights in *Trinity Lutheran*, *Espinoza*, and *Carson*, it is necessary again here.

CONCLUSION

For the reasons stated above, the Court should grant the Board's and School's petitions.

Respectfully submitted,

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