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 FOR THE STATE OF OKLAHOMA, *EX REL.* STATE OF OKLAHOMA,
Respondent.

ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL,
Petitioner,

v.

GENTNER DRUMMOND, ATTORNEY GENERAL FOR THE STATE OF OKLAHOMA, *EX REL.* STATE OF OKLAHOMA,
Respondent.

On Writs 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, THE OKLAHOMA STATE BOARD OF EDUCATION, AND FIRST LIBERTY INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[*]

Amici are a state official, two state agencies charged with setting and implementing education policy for the State of Oklahoma, and a nonprofit, public interest law firm dedicated to defending religious liberty for all Americans.

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. 15, § 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 the governing board of the public school system of the state." *Id.* § 1-105(B). Among other duties,

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[*] 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.

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).

First Liberty Institute is a public interest law firm that provides *pro bono* legal representation to individuals and institutions of all faiths—Catholic, Jewish, Muslim, Native American, Protestant, the Falun Gong, and others. As part of this work, First Liberty has repeatedly brought cases arguing that religious organizations shouldn't face discrimination in government grantmaking or contracting based on their religious identity.

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 Oklahomans. Because the decision below sows confusion and threatens Oklahomans' federal free exercise rights, *amici* urge this Court to reverse.

STATEMENT

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 and creates 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 should resolve the conflict in favor of preserving fundamental constitutional rights and provide clarity on an issue that has significant practical implications.

In holding that mere 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 makes 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 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 Institute*, 296 F.3d 22, 26 (1st Cir. 2002); *Caviness* v. *Horizon Community Learning Center, Inc.*, 590 F.3d 806, 814–816 (9th Cir. 2010); *Robert S.* v. *Stetson School, Inc.*, 256 F.3d 159, 165 (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." 70 Okla. Stat. § 3-131(A)(1)–(4). The Act allows any qualified "private college or university, private person, or private organization" to apply for charter-school status. *Id.* § 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. Le Monde International School is a "French and Spanish immersion school." About Us, Le Monde International School, https://tinyurl.com/mrx468bx. 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.

2. This Court has long held that privately operated schools aren't state actors. See *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 840–843 (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* prerogative 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, is a faith-based school that aims to "educate the entire child: soul, heart, intellect, and body" with "a curriculum that will reach students at an individual level, with an interactive learning environment that is rooted in virtue, rigor and innovation." St. Isidore Pet. App. 197a.

Ignoring the weight of authority holding otherwise, the Oklahoma Supreme Court sided with the Fourth Circuit 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." *Id.* at 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." *Id.* at 7a–11a, 22a–24a (quoting Okla. Const. art. 2, § 5).

4. The consequences of the Oklahoma Supreme Court's ruling are severe. Children who would have

benefitted from St. Isidore's faith-guided education have been denied their school of choice, just because the school is faith-based.

As petitioners point out, the decision also threatens to unravel decades of established precedent. St. Isidore Pet. Br. 24–27; School Bd. Pet. Br. 44–50. 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. THE OKLAHOMA SUPREME COURT'S DECISION IMPERILS THE EDUCATIONAL OPPORTUNITIES AVAILABLE TO CHILDREN AND THEIR FAMILIES.

St. Isidore—a privately owned and operated entity—isn't a state actor. Nor does it bear any of the hallmarks of a state actor that would subject it to constitutional constraints. But the decision below labels charter schools like St. Isidore as state actors because they supposedly fall within the State's "exclusive government function of operating the State's free public schools" and are "entwined with governmental policies." St. Isidore Pet. App. 18a–21a. That decision conflicts with the historical record and this Court's precedents. Worse, it imperils the variety and the quality of innovative educational opportunities available to children and their families—especially those children and families who are most disadvantaged.

1. Only an extremely "close nexus" between a private actor and the State can justify treating the private actor as the government, *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974), such as when the State exercises "coercive power" to force the private actor's hand, *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982). But this Court has long held that privately operated schools aren't under the State's coercive control, so they shouldn't be treated as state actors. *Rendell-Baker*, 457 U.S. at 841–843. That result doesn't change even if the school is funded or heavily regulated by the State. *Id.* at 840–842.

There's no reason privately operated charter schools should be treated differently from privately operated noncharter schools. In *Rendell-Baker*, the private school this Court held wasn't a state actor received "virtually all" of its income from the government—as Oklahoma charter schools do. 457 U.S. at 840–841; see also 70 Okla. Stat. § 3-142(A). As this Court explained, a "school's receipt of public funds" doesn't transform it into an arm of the government. *Rendell-Baker*, 457 U.S. at 840. And while the school in *Rendell-Baker* was subject to "extensive and detailed" regulation by the State—as the Oklahoma Attorney General contends is the case for Oklahoma charter schools, Br. in Opp. to St. Isidore Pet. 6–8—the school still wasn't subject to the same constitutional constraints that bind government actors, 457 U.S. at 841–842; see also *Jackson*, 419 U.S. at 350. Following this Court's precedent and logic in *Rendell-Baker*, federal courts of appeals have affirmed that charter schools don't become state actors merely by dint of state regulation or funding. *Logiodice*, 296 F.3d at 26–27; *Robert S.*, 256 F.3d at 165–166.

Also pertinent to the state-actor analysis is whether charter schools *operate* like state actors—as public schools do. See *Caviness*, 590 F.3d at 812–813. Here, it's indisputable that Oklahoma charter schools operate differently from public schools. They're privately run, use different educational methods and policies, and are categorically exempt from dozens of laws that apply to public schools.

The differences don't stop there. In *Carson* v. *Makin*, 596 U.S. 767 (2022), this Court recognized that the differences between public and private schools are "numerous and important." *Id.* at 783. For example, private schools "need not hire state-certified teachers." *Id.* at 784. They "do not have to accept all students" and may charge tuition. *Id.* at 783. And a private school's curriculum "need not even resemble that taught in the Maine public schools." *Id.* at 783–784.

Charter schools are similarly distinguishable. For example, Oklahoma charter schools' broad authority to dictate teachers' employment terms and certification requirements sets charter schools apart from public schools—and counsels against ruling that those charter schools are state actors. See *Carson*, 596 U.S. at 784 (distinguishing private schools from public schools because private schools "need not hire state-certified teachers"). Unlike public schools, Oklahoma charter schools can prescribe their own "personnel policies, personnel qualifications, and method of school governance." 70 Okla. Stat. § 3-136(C). Charter schools retain wide latitude to contract with their employees—including setting employment policies "related to certification, professional development, evaluation, suspension, dismissal and nonreemployment,

sick leave," and more. *Ibid.* Public schools have no such discretion. See, e.g., *id.* § 6-190(A) (prohibiting school districts from employing anyone not "certified to teach by the State Board of Education"); *id.* § 6-101.22 (limiting public school districts' ability to terminate teachers' employment); *id.* § 6-104 (prescribing sick leave policy for public school teachers). These differences "further support[]" the conclusion that charter schools aren't like public schools—so they shouldn't be treated as state actors. *Caviness*, 590 F.3d at 817.

Although Oklahoma charter schools accept all students and don't charge tuition, they offer a wide variety of curricula that sets them apart from public schools—a distinction this Court weighed heavily in *Carson*. See 596 U.S. at 783–784. Indeed, Oklahoma 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." E.g., 70 Okla. Stat. § 3-131(A) (emphases added).

That philosophy isn't unique to Oklahoma. States nationwide have created charter schools to diversify the educational opportunities available to children and their families. See, e.g., Ariz. Rev. Stat. § 15-181(A) ("Charter schools" are meant to "provide *additional* academic choices for parents and pupils" by "serv[ing] as *alternatives* to traditional public schools") (emphases added); Mass. Gen. Laws ch. 71, § 89(b) (charter schools are created "to provide teachers with a vehicle for establishing schools with *alternative*, *innovative* methods of educational instruction") (emphasis added); Me. Stat. tit. 20-A, § 2402 (similar); N.H. Rev. Stat. Ann. § 194-B:1-a(V) (charter

schools exempted from state statutes applicable to public schools "to provide *innovative* learning and teaching in a *unique* environment") (emphases added). The goal of offering an array of educational opportunities to students is why Oklahoma charter schools, unlike public schools, can (and do) offer curricula that "emphasize[] a specific learning philosophy or style or certain subject areas." 70 Okla. Stat. § 3-136(A)(3). And it's why they're broadly "exempt from all statutes and rules" relating to public schools. *Id.* § 3-136(A)(1).

The State doesn't (and can't) deny that Oklahoma charter schools offer curricula different from what public schools offer. Br. in Opp. to St. Isidore Pet. 27. But it argues that Oklahoma's requirement that charter school curricula be approved by the State erases the distinction between charter schools and public schools. Not so. This Court's precedents make clear that "mere approval or acquiescence of the State" isn't enough to turn a private actor into a state actor. *American Manufacturers Mutual Ins. Co.* v. *Sullivan*, 526 U.S. 40, 52 (1999). This Court rejected that exact argument in *Rendell-Baker*. There, the petitioners argued that a regulation requiring private entities to obtain government approval of hiring decisions made those entities state actors. 457 U.S. at 841–842. But the Court held that "[s]uch a regulation is not sufficient" to hold private entities to the same limitations as the government. *Ibid.* So even if charter schools in Oklahoma need state approval for their curricula, that still doesn't mean they're state actors. *Ibid.*; contra Br. in Opp. to St. Isidore Pet. 27.

2. Instead of focusing on how charter schools operate, the Oklahoma Supreme Court held that charter

schools are state actors just because they provide a "*free public* education"—supposedly an exclusive public function. St. Isidore Pet. App. 17a–18a (emphasis added). As an initial matter, the Oklahoma Supreme Court can't sidestep this Court's precedent through "this kind of tailoring by adjectives." *Logiodice*, 296 F.3d at 27; see also School Bd. Pet. Br. at 32–34. In any event, the decision below can't 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. *Society of Sisters*, 268 U.S. 510, 534 (1925)). Instead, it's been "regularly and widely performed by private entities" since "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.

In Connecticut, for example, section 10-184 of the General Statutes had obligated parents since 1796 to educate their children. Connecticut General Assembly, 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 employing 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. *Ibid.* 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. *Ibid.*; 1872 Conn. Pub. Acts 43–44. 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.

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 (N.H. Const. art. 83 (imposing a "duty o[n] the legislators 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; Ky. Rev. Stat. Ann. § 159.030(1); Mich. Comp. Laws § 380.1561(3); Ohio Rev. Code Ann. §§ 3321.042, 3321.07; Tenn. Code Ann. § 49-6-3001(c).

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), https://tinyurl.com/5n77ctbf; see also *Wright* v. *State*, 209 P. 179, 180 (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's been codified in Oklahoma law. 70 Okla. Stat. § 10-105. 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 St. Isidore Pet. App. 15a–21a. Aside from *Peltier*, the court identified no authority suggesting that labels in themselves are dispositive. For good reason. Even the State concedes they are not. Br. in Opp. to St. Isidore Pet. 25. Were a 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 are.

That can't be right. And it isn't. This Court disposed of that argument years ago in *Jackson*. There, this Court dispelled the notion that a state legislature labeling a private company as a "public utility" rendered the company a state actor. 419 U.S. 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. Two other federal courts of appeals have reached similar results by placing function above labels. See *Logiodice*, 296 F.3d at 26–27; *Robert S.*, 256 F.3d at 165–166. Rather than attempting to distinguish these cases, the Oklahoma Supreme Court simply ignored them.

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 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"). 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*, 596 U.S. at 782. 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 (quotation marks omitted).

3. 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 if it's permitted to stand—needlessly impeding charter schools' missions to provide diverse opportunities for students.

For example, Comanche Academy might feel compelled to forgo using "the Comanche (Numunu) Culture language" as its "instructional format"—or else face uncertainty over whether its defining characteristic runs afoul of the Constitution. In fact, the disruption for charter schools could extend nationwide. Allowing the decision below to stand may also imperil single-sex charter schools in other States. 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. 5, 13 (2006), https://tinyurl.com/3vjmthpm ("[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* (Nov. 2011) at 10, https://tinyurl.com/2ww4b8yt ("[G]irls 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. See *United States* v. *Virginia*, 518 U.S. 515, 534 (1996); see also *id.* at 595–596 (Scalia, J., dissenting) (explaining that the court's logic rendered "single-sex public education * * * unconstitutional").

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. THE ESTABLISHMENT CLAUSE CAN'T BE USED AS A CUDGEL AGAINST THE FREE EXERCISE CLAUSE.

Because St. Isidore isn't a state actor, this Court's precedents forbid Oklahoma from disqualifying St. Isidore from receiving funds solely because of its purportedly "sectarian" nature.

"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) (brackets and quotation marks 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 couldn't "qualify as compelling." *Id.* at 466.

Second, in *Espinoza* v. *Montana Department of Revenue*, 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. 464, 476 (2020). 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. 591 U.S. at 484. The State's asserted "interest in separating church and State more fiercely than the Federal Constitution" failed that test. *Ibid.* (quotations marks 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.

Third, 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 (quotation marks omitted) (quoting *Trinity Lutheran*, 582 U.S. at 462). Yet again, a State's exclusion of religious entities from a public benefit didn't survive 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 here is just as "straightforward." *Espinoza*, 591 U.S. at 484. St. Isidore is an Oklahoma not-for-profit corporation, St. Isidore 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.* at 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. St. Isidore Pet. App. 152a. No one disputes that St. Isidore is otherwise 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 violates the Free Exercise Clause under this Court's decisions 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 to a state constitutional provision barring aid to religious schools here. See St. Isidore Pet. App. 7a (citing Okla. Const. art. 2, § 5). This provision overlaps substantially with the Montana constitutional provision in *Espinoza* that 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 (cleaned up). Its failure to do so threatens the free exercise rights of Oklahomans and has serious consequences for *amici* who seek to vindicate those rights.

It doesn't make any constitutional difference that this case involves a government contract, while others have involved government grant programs. This Court has expressly rejected the idea that "governments should enjoy greater leeway under the Free Exercise Clause when setting rules for contractors." *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 535 (2021). The same free-exercise principles apply here and lead to the conclusion that the government may not "discriminate against religion" in its role as a manager issuing contracts. *Id.* at 536.

The Oklahoma Supreme Court erred further when it 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." St. Isidore Pet. App. 23a. For that sweeping proposition, the court relied on a quote 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. As two leading scholars of the First Amendment have explained, this Court drew on founding-era debates in holding that the provision at issue in *Everson* passed constitutional muster because its "purpose was to promote education, or perhaps safe

transportation, and to equalize the treatment of families making different educational choices." Michael W. McConnell & Nathan S. Chapman, *Agreeing to Disagree: How the Establishment Clause Protects Religious Diversity and Freedom of Conscience* 130 (2023).

What's more, this Court has clarified that "the Establishment Clause must be interpreted by reference to historical practices and understandings." *Kennedy* v. *Bremerton School District*, 597 U.S. 507, 535 (2022) (quotation marks omitted). The history strongly favors St. Isidore here. As this Court explained in *Espinoza*, there's a long history of state and federal governments providing funding and land grants to religious schools. 591 U.S. at 480–481 (collecting historical examples). Founding-era history shows that "no one * * * took the position that education was not the business of government, even if it contained religious elements or was conducted by religious institutions." McConnell & Chapman at 130. 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 484–485; *Trinity Lutheran*, 582 U.S. at 466. As this Court explained in *Espinoza*, a State's 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 and a public interest law firm, *amici* are keenly aware of the burden the decision below places on the free exercise rights of Oklahomans. *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 affirmed those foundational rights in *Trinity Lutheran*, *Espinoza*, and *Carson*, it should do so again here.

CONCLUSION

For the reasons stated above, the Court should reverse.

Respectfully submitted,

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