



ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

GENTNER DRUMMOND, Attorney General)
 for the State of Oklahoma, ex rel. STATE OF)
 OKLAHOMA,)
)
) Petitioner,)
)
 and)
)
) MELISSA ABDO, et al.,)
)
) Petitioners-Intervenors,)
)
) v.)
)
) OKLAHOMA STATEWIDE VIRTUAL)
)
) CHARTER SCHOOL BOARD, et al.,)
)
) Respondents.)

FILED
SUPREME COURT
STATE OF OKLAHOMA

NOV 14 2023

JOHN D. HADDEN
CLERK

No. 121,694

On Petitioner's application to assume original jurisdiction and petition for writ of mandamus and declaratory judgment against respondents Oklahoma Statewide Virtual Charter School Board and its members.

[PROPOSED] BRIEF IN SUPPORT OF APPLICATION AND PETITION IN INTERVENTION BY MELISSA ABDO, KRYSTAL BONSALE, BRENDA LENE, MICHELE MEDLEY, DR. BRUCE PRESCOTT, REV. DR. MITCH RANDALL, AND REV. DR. LORI WALKE

Benjamin H. Odom, OBA No. 10917
 John H. Sparks, OBA No. 15661
 Michael W. Ridgeway, OBA No. 15657
 Lisa M. Millington, OBA No. 15164
 ODOM & SPARKS, PLLC
 2500 McGee Drive, Suite 140
 Norman, OK 73072
 (405) 701-1863
 Fax: (405) 310-5394
 ridgewaym@odomsparks.com

Robert Kim*
 Jessica Levin*
 Wendy Lecker*
 EDUCATION LAW CENTER

Patrick Elliott*
 FREEDOM FROM RELIGION
 FOUNDATION

Alex J. Luchenitser*
 Kenneth D. Upton, Jr., OBA No. 12906
 Kalli A. Joslin*
 Jenny Samuels*
 Sarah Taitz*
 AMERICANS UNITED FOR
 SEPARATION OF CHURCH AND
 STATE
 1310 L Street NW, Suite 200
 Washington, DC 20005
 (202) 466-7306 / (202) 898-2133
 luchenitser@au.org

Daniel Mach*
 Heather L. Weaver*
 AMERICAN CIVIL LIBERTIES UNION
 FOUNDATION

11-14-23
 JM
 COA/OKC
 COA/TUL

*Pro hac vice application pending or forthcoming.

Attorneys for all Plaintiffs; full contact information for all is on signature page.

INDEX

INTRODUCTION..... 1

Constitutional Provisions

Article I, § 2 1

**SUMMARY OF THE RECORD
(SUPPLEMENTING PETITIONER’S SUMMARY) 1**

Other Authorities

Catechism of the Catholic Church ¶¶ 2333, 2353, 2357–59 (2d ed.),
<https://bit.ly/3Xm4Ub7> 3, 4

ARGUMENT AND AUTHORITIES (SUPPLEMENTING PETITIONER’S) 6

**I. As a public charter school, St. Isidore is a governmental entity and a state actor
and therefore must comply with the Oklahoma Constitution 6**

Cases

ACLU of Minn. v. Tarek Ibn Ziyad Acad.,
No. 09-138 (DWF/JJG), 2009 WL 2215072 (D. Minn. July 9, 2009)..... 10

Brammer-Hoelter v. Twin Peaks Charter Acad.,
602 F.3d 1175 (10th Cir. 2010)..... 9

Caviness v. Horizon Cmty. Learning Ctr.,
590 F.3d 806 (9th Cir. 2010)..... 10

Coleman v. Utah State Charter Sch. Bd.,
673 F. App’x 822 (10th Cir. 2016)..... 9

Daugherty v. Vanguard Charter Sch. Acad.,
116 F. Supp. 2d 897 (W.D. Mich. 2000)..... 10

Dillon v. Twin Peaks Charter Acad.,
241 F. App’x 490 (10th Cir. 2007)..... 9

Edmonson v. Leesville Concrete Co.,
500 U.S. 614 (1991)..... 6

Falash v. Inspire Acads., Inc.,
No. 1:14-cv-00223-REB, 2016 WL 4745171 (D. Idaho Sept. 12, 2016) 10

| | |
|--|------|
| <i>Fam. C.L. Union v. Dep't of Child. & Fams.</i> , 837 F. App'x 864 (3d Cir. 2020) | 9 |
| <i>Georgia v. McCollum</i> , 505 U.S. 42 (1992)..... | 6 |
| <i>Irene B. v. Phila. Acad. Charter Sch.</i> , No. Civ.A. 02-1716, 2003 WL 24052009 (E.D. Pa. Jan. 29, 2003)..... | 10 |
| <i>Jones v. Sabis Educ. Sys., Inc.</i> , 52 F. Supp. 2d 868 (N.D. Ill. 1999) | 10 |
| <i>Jordan v. N. Kane Educ. Corp.</i> , No. 08 C 4477, 2009 WL 509744 (N.D. Ill. Mar. 2, 2009)..... | 10 |
| <i>Lebron v. Nat'l R.R. Passenger Corp.</i> , 513 U.S. 374 (1995)..... | 6, 7 |
| <i>Lengele v. Willamette Leadership Acad.</i> , No. 6:22-cv-01077-MC, 2022 WL 17057894 (D. Or. Nov. 17, 2022) | 10 |
| <i>Manhattan Cmty. Access Corp. v. Halleck</i> , 139 S. Ct. 1921 (2019)..... | 6 |
| <i>Matwijko v. Bd. of Trs. of Glob. Concepts Charter Sch.</i> , No. 04-CV-663A, 2006 WL 2466868 (W.D.N.Y. Aug. 24, 2006)..... | 10 |
| <i>Meadows v. Lesh</i> , No. 10-CV-00223(M), 2011 WL 4744914 (W.D.N.Y. Oct. 6, 2011)..... | 10 |
| <i>Nampa Classical Acad. v. Goesling</i> , 447 F. App'x 776 (9th Cir. 2011) | 9 |
| <i>NCAA v. Tarkanian</i> , 488 U.S. 179 (1988)..... | 6 |
| <i>Oklahomans for Life, Inc. v. State Fair of Okla., Inc.</i> , 1981 OK 101, 634 P.2d 704 | 10 |
| <i>Patrick v. Success Acad. Charter Schs.</i> , 354 F. Supp. 3d 185 (E.D.N.Y. 2018) | 9 |
| <i>Peltier v. Charter Day Sch.</i> , 37 F.4th 104 (4th Cir. 2022) (en banc), cert. denied, 143 S. Ct. 2657 (2023) | 9 |

| | |
|--|-----------|
| <i>Pennsylvania v. Bd. of Dirs. of City Trs.</i> , 353 U.S. 230 (1957)..... | 6 |
| <i>Pocono Mountain Charter Sch. v. Pocono Mountain Sch. Dist.</i> , 908 F. Supp. 2d 597 (M.D. Pa. 2012) | 9, 10 |
| <i>Riester v. Riverside Cmty. Sch.</i> , 257 F. Supp. 2d 968 (S.D. Ohio 2002)..... | 9, 10 |
| <i>Scaggs v. N.Y. Dep't of Educ.</i> , No. 06-CV-0799 (JFB)(VVP), 2007 WL 1456221 (E.D.N.Y. May 16, 2007) | 10 |
| <i>United States v. Ackerman</i> , 831 F.3d 1292 (10th Cir. 2016)..... | 7 |
| <i>United States v. Minn. Transitions Charter Schs.</i> , 50 F. Supp. 3d 1106 (D. Minn. 2014) | 9 |
| <i>Statutes</i> | |
| 20 U.S.C. § 7801 | 8 |
| Oklahoma Charter Schools Act, 70 O.S. § 3-130 <i>et seq.</i> | 7, 8 |
| <i>Other Authorities</i> | |
| Hon. Al McAffrey, Okla. Att'y Gen. Op. No. 07-23, 2007 WL 2569195 (2007)..... | 9 |
| II. Article I, § II of the Oklahoma Constitution prohibits an Oklahoma charter school that indoctrinaes children in a religion, as St. Isidore will | 10 |
| <i>Cases</i> | |
| <i>Edwards v. Aguillard</i> , 482 U.S. 578 (1987)..... | 12 |
| <i>Guinn v. Church of Christ of Collinsville</i> , 1989 OK 8, 775 P.2d 766 | 11 |
| <i>Illinois ex rel. McCollum v. Bd. of Educ.</i> , 333 U.S. 203 (1948)..... | 12 |
| <i>Janny v. Gamez</i> , 8 F.4th 883 (10th Cir. 2021), <i>cert. dismissed sub nom. Carmack v. Janny</i> , 142 S. Ct. 878 (2022)..... | 12 |

Lee v. Weisman,
505 U.S. 577 (1992)..... 12

McMasters v. State,
207 P. 566 (Okla. Crim. App. 1922) 11

Prescott v. Okla. Capitol Pres. Comm'n,
2015 OK 54, 373 P.3d 1032 11

Santa Fe Indep. Sch. Dist. v. Doe,
530 U.S. 290 (2000)..... 12

Stone v. Graham,
449 U.S. 39 (1980)..... 12

Constitutional Provisions

Article I, § 2 10, 11

Other Authorities

Albert H. Ellis, *A History of the Constitutional Convention of the State of Oklahoma* (1923) 11

III. St. Isidore’s application, charter, and contract violate statutes and regulations requiring charter-school applicants to certify that they will comply with state law..... 12

Statutes and Regulations

Oklahoma Charter Schools Act,
70 O.S. § 3-130 *et seq.* 12, 13

Regulations

OAC § 777:10-3-3 12

IV. St. Isidore will violate the Oklahoma Constitution and state statutes by discriminating in student admissions, student discipline, and employment 13

Cases

Bostock v. Clayton County,
140 S. Ct. 1731 (2020)..... 14

| | |
|--|----|
| <i>Gillette v. United States</i> , 401 U.S. 437 (1971)..... | 14 |
| <i>Glassroth v. Moore</i> , 335 F.3d 1282 (11th Cir. 2003)..... | 14 |
| <i>Glenn v. Brumby</i> , 663 F.3d 1312 (11th Cir. 2011)..... | 14 |
| <i>Grimm v. Gloucester Cnty. Sch. Bd.</i> , 972 F.3d 586 (4th Cir. 2020)..... | 14 |
| <i>Larson v. Valente</i> , 456 U.S. 228, 244 (1982)..... | 14 |
| <i>Obergefell v. Hodges</i> , 576 U.S. 644 (2015)..... | 14 |
| <i>Okla. Ass'n for Equitable Tax'n v. Oklahoma City</i> , 1995 OK 62, 901 P.2d 800..... | 14 |
| <i>Pavan v. Smith</i> , 582 U.S. 563 (2017)..... | 14 |
| <i>United States v. Armstrong</i> , 517 U.S. 456 (1996)..... | 14 |

Constitutional Provisions

| | |
|-------------------------|----|
| Article I, § 2 | 13 |
| Article I, § 5 | 13 |
| Article II, § 7..... | 14 |
| Article II, § 36A..... | 14 |
| Article XI, § 2 | 13 |
| Article XI, § 3 | 13 |
| Article XIII, § 1 | 13 |

Statutes

Oklahoma Charter Schools Act,
70 O.S. § 3-130 *et seq.* 14, 15

70 O.S. § 1210.201 15

**V. St. Isidore has not committed to fully serving students with disabilities
as required by the Charter Schools Act 15**

Statutes

Oklahoma Charter Schools Act,
70 O.S. § 3-130 *et seq.* 15

CONCLUSION 15

INTRODUCTION

Petitioners-Intervenors Melissa Abdo, et al. supplement the Attorney General's brief in five ways. First, Intervenors provide additional argument demonstrating that St. Isidore of Seville Catholic Virtual School is a governmental entity and a state actor. Second, Intervenors explain that because St. Isidore's educational program will indoctrinate students in a particular religion, operation of St. Isidore as a public charter school is barred by Article I, § 2 of the Oklahoma Constitution in addition to the state constitutional and statutory prohibitions identified by the Attorney General. Third, Intervenors explain that St. Isidore's approved application for charter-school sponsorship violated a Statewide Virtual Charter School Board regulation requiring charter-school applicants to certify that they will comply with state law, and that St. Isidore's charter and contract with the Board violate similar statutory requirements. Fourth, Intervenors explain that funding and operation of St. Isidore as a public charter school would violate numerous state constitutional provisions and statutes because St. Isidore will discriminate in student admissions, student discipline, and employment based on religion, sexual orientation, gender identity, and other protected characteristics. Finally, Intervenors explain that St. Isidore has not committed to fully serving students with disabilities as required by the Oklahoma Charter Schools Act.

SUMMARY OF THE RECORD (SUPPLEMENTING PETITIONER'S SUMMARY)¹

St. Isidore plans to "operate the School as a Catholic School" and "participate[] in the evangelizing mission of the Church." (Approved application for charter-school sponsorship

¹ Citations to the Intervenors' appendix are in the format "IA__." Citations to petitioner Attorney General's appendix are in the format "PA__." All cited pages of the Attorney General's appendix are in its first volume.

(“Appl.”), PA92.) St. Isidore will indoctrinate students in the Catholic faith by suffusing its curriculum with Catholic religious doctrine and by requiring students to take theology classes. (Appl., PA78, 95, 115, 214, 264, 276; *see also* Intervenors’ Pet. ¶¶ 19–22.) Indeed, St. Isidore’s approved application for charter-school sponsorship is replete with statements that demonstrate the religious, indoctrinating nature of its planned curriculum. (*See* Appl., PA78, 92–94, 99, 212–16, 264, 268, 276, 310–13; *see also* Ints.’ Pet. ¶¶ 19–22.)

In its application, St. Isidore agreed to comply with antidiscrimination and other legal requirements applicable to Oklahoma charter schools *only* to the extent that those requirements do not conflict with its religious beliefs. (*See* Appl., PA181, 217; *see also* Ints.’ Pet. ¶¶ 25–27.) Similarly, St. Isidore’s contract with the Board, which doubles as St. Isidore’s charter, purports to grant St. Isidore broad religious exemptions from the antidiscrimination and other legal requirements applicable to Oklahoma charter schools. (Contract, PA1–4, 13, 19 ¶¶ 2.1, 3.1, 8.1, 11.1; *see also* Ints.’ Pet. ¶¶ 27, 47, 49, 51.)

St. Isidore will, in fact, discriminate in student admissions, student discipline, and employment based on religion, sexual orientation, gender identity, and other prohibited grounds. To begin with, St. Isidore will not be truly open to students of all religions. While St. Isidore claims in its application that it will admit students “of different faiths or no faith,” it qualifies that statement by warning that “[a]dmission assumes the student and family willingness to adhere with respect to the beliefs, expectations, policies, and procedures of the school.” (Appl., PA113.) St. Isidore identifies itself as a school of the Archdiocese of Oklahoma City, and the Archdiocese will control St. Isidore’s “beliefs, expectations, policies, and procedures.” (Appl., PA76, 177, 320; *see also* Ints.’ Pet. ¶ 37.) It is the Archdiocese’s policy that, “[s]hould a parent or student intentionally and knowingly” express

disagreement with Catholic faith and morals, they are effectively choosing not to fully embrace the promised school learning environment offered for all students and by that choice, freely made, they are choosing not to remain a part of the school community. School administration will respect that decision and act accordingly by withdrawing them from the school or decline to approve them for admission.

(Student-parent handbook of Christ the King Catholic School, a school of the Archdiocese of Oklahoma City, IA21–23.²) In any event, because St. Isidore will immerse students in instruction in its religious tenets, and students of a variety of faiths would be prohibited by their religions from submitting to religious indoctrination in a faith different from their own, St. Isidore is *de facto* not open to students of all faiths. (*See also* Ints.’ Pet. ¶ 39.)

St. Isidore’s approved application also demonstrates that St. Isidore will discriminate among prospective or enrolled students based on sexual orientation, gender identity, pregnancy outside of marriage, and sexual activity outside of marriage. The application states that St. Isidore will “operate a school in harmony with faith and morals, *including sexual morality*, as taught and understood by the Magisterium of the Catholic Church based upon Holy Scripture and Sacred Tradition.” (Appl., PA93 (emphasis added).) Authoritative Catholic teaching prohibits people from engaging in “homosexual acts,” requires lesbian and gay people to be “chast[e],” requires that “[e]veryone—man and woman—should acknowledge and accept his or her sexual identity” as assigned at birth, and prohibits heterosexual activity outside of marriage. *See Catechism of the Catholic Church* ¶¶ 2333, 2353, 2357–59 (2d ed.), <https://bit.ly/3Xm4Ub7>³; *see also* Ints.’ Pet. ¶ 42. Accordingly, St.

² All policies cited from the Christ the King handbook are expressly identified with blue highlighting in the original handbook as policies “required by the Archdiocese of Oklahoma City.” (*See* Christ the King handbook, IA21.)

³ St. Isidore cites the *Catechism of the Catholic Church* as an authority numerous times in its approved application. (*See, e.g.*, Appl., PA92–94, 181, 215–16.)

Isidore excludes sexual orientation and gender identity from the lists of characteristics protected under its nondiscrimination statements and policies. (Appl., PA118, 275–76; *see also* Ints.’ Pet. ¶ 43.) Moreover, as noted above, St. Isidore’s policies will be controlled by the Archdiocese of Oklahoma City, and it is Archdiocese policy that “advocating for, or expressing same-sex attraction . . . is not permitted for students” and that students who live as or transition to a gender different from the one they were assigned at birth will be expelled. (Christ the King handbook, IA28, 33–34; *see also* Ints.’ Pet. ¶ 44.)

In addition, St. Isidore plans to discriminate in employment based on religion, sexual orientation, gender identity, pregnancy outside of marriage, and sexual activity outside of marriage. St. Isidore’s revised application states that the school will “hire educators, administrators, and coaches as ministers committed to living and teaching Christ’s truth as understood by the Magisterium of the Roman Catholic Church through actions and words, using their commitment to Christ and his teachings in character formation, discipline, and instruction, and to live this faith as a model for students.” (Appl., PA93; *see also* Ints.’ Pet. ¶ 45.) Thus, both “in their day-to-day work and personal lives,” all St. Isidore employees are required to “adhere to the teachings of the Church” and “refrain from actions that are contrary to the teachings of the Church.” (Appl., PA213–14; *see also* Ints.’ Pet. ¶ 46.) As noted above, authoritative Catholic teaching prohibits LGBTQ people from expressing their sexual orientation or gender identity, and prohibits all people from having sex or becoming pregnant outside of marriage. *See Catechism of the Catholic Church* ¶¶ 2333, 2353, 2357–59. And, though St. Isidore’s application asserts that its employees are not required to be Catholic (Appl., PA213), it expressly states that “[t]he School retains its right to consider religion as a factor in employment-related decisions” (Appl., PA217).

What is more, St. Isidore's approved application states that the school will "comply with all applicable . . . [l]aws in serving students with disabilities" *only* "to the extent that it does not compromise the religious tenets of the school and the instructional model of the school." (Appl., PA155–56.) And Archdiocese of Oklahoma City policy is that "[s]tudent service plans" for students with disabilities "cannot contain accommodations or modifications that are in opposition of Church teaching." (Christ the King handbook, IA24.)

Also, the broad religious exemptions in the Board's contract with St. Isidore (*see* Contract, PA1–3, 13, 19 ¶¶ 1.5, 2.1, 3.1, 8.2, 11.1; *see also* Ints.' Pet. ¶¶ 27, 47, 51) will enable the school to override, on religious grounds, provisions in the contract that otherwise would have (1) prohibited St. Isidore from discriminating in admissions based on religion, sexual orientation, and gender identity and (2) required the school to fully comply with laws concerning services for students with disabilities (*see* Contract, PA14–15 ¶¶ 8.6, 8.8; *see also* Ints.' Pet. ¶¶ 47, 51). And even if the contract's clause concerning discrimination in admissions were not superseded by those exemptions and did require St. Isidore to enroll students who identify as non-Catholic or LGBTQ, the school is *de facto* not open to students of all religions and LGBTQ students. As explained above, students will be prohibited from expressing disagreement with the Catholic faith, St. Isidore's indoctrination of students in that faith will make the school unsuitable for students of a variety of other religions, and St. Isidore will prohibit LGBTQ students from living in accordance with their identities. (*See supra* at 2–4; *see also* Ints.' Pet. ¶¶ 36–44, 48.) Further, nothing in the contract bars St. Isidore from discriminating against non-Catholic or LGBTQ students in discipline or otherwise after they enroll or even from expelling them. (*See* Contract, PA2–22.)

ARGUMENT AND AUTHORITIES (SUPPLEMENTING PETITIONER'S)

I. As a public charter school, St. Isidore is a governmental entity and a state actor and therefore must comply with the Oklahoma Constitution.

Whether an entity must comply with constitutional requirements depends on whether the entity's conduct is state action. *See, e.g., Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019). The Attorney General correctly explains that St. Isidore is a state actor under various tests used to determine whether private entities are state actors, including the entwinement and public-function tests. (*See* Pet'r's Br. 10–14; *see also* Ints.' Pet. ¶¶ 16–17.) Intervenors wish to emphasize that although this is right, it is not necessary to apply these tests to reach the conclusion that St. Isidore is bound by constitutional prohibitions, because Oklahoma charter schools are governmental entities themselves.

As Justice Scalia explained for the U.S. Supreme Court in *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 378–82 (1995), when a party is a governmental official or entity, that is sufficient to render the party a state actor, and it is thus unnecessary to consider the tests that are used to assess *private* entities. Accordingly, without applying the tests used to analyze whether private entities are state actors, the Supreme Court has concluded that various organizations and persons are state actors because they are governmental entities or officials. *See, e.g., NCAA v. Tarkanian*, 488 U.S. 179, 192 (1988) (state universities); *Pennsylvania v. Bd. of Dirs. of City Trs.*, 353 U.S. 230, 231 (1957) (board created by state to operate privately endowed college); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624 (1991) (state judges); *Georgia v. McCollum*, 505 U.S. 42, 50 (1992) (prosecutors).

Indeed, in *Lebron*, without applying traditional state-action tests for private entities, the Supreme Court concluded that Amtrak is a governmental entity to which the First

Amendment applies, even though the statute that created Amtrak stated that it is a for-profit corporation and *not* “an agency or establishment of the United States government.” 513 U.S. at 383–86, 391, 397–400. The Court explained that Amtrak was created by legislation, its purpose is to pursue governmental goals, and it is controlled by government-appointed officials. *See id.* Likewise, without applying traditional state-action tests, then-Judge Gorsuch concluded for the Tenth Circuit in *United States v. Ackerman*, 831 F.3d 1292, 1295–1300 (10th Cir. 2016), that a clearinghouse for missing children that was originally created as a private, nonprofit organization was a governmental entity because it was given exclusive duties and powers by a federal statute and was funded primarily by the federal government.

As in these cases, Oklahoma charter schools are governmental entities. Charter schools were created by the Oklahoma legislature through the Charter Schools Act (70 O.S. § 3-130 *et seq.*), and they may be abolished by repeal of the Act. The Act expressly states that “‘charter school’ means a *public school* established by contract with a board of education of a school district” (70 O.S. § 3-132(D) (emphasis added)) or with certain other governmental entities (*see* 70 O.S. § 3-132(A)). Moreover, Oklahoma charter schools have numerous other characteristics that further confirm that they are public schools and governmental institutions.

For instance, Oklahoma charter schools must “be as equally free and open to all students as traditional public schools.” 70 O.S. § 3-135(A)(9). They must “comply with all . . . laws relating to the education of children with disabilities in the same manner as a school district.” 70 O.S. § 3-136(A)(7). They must not “charge tuition or fees.” 70 O.S. § 3-136(A)(10). They are “subject to the same academic standards and expectations as existing public schools.” 70 O.S. § 3-135(A)(11). They receive state “funding in accordance with statutory requirements and guidelines for existing public schools.” 70 O.S. § 3-135(A)(12).

And they must comply with the same rules that govern other public schools on school-year length (70 O.S. § 3-136(A)(11)), bus transportation (70 O.S. § 3-141(A)), student testing (70 O.S. § 3-136(A)(4)), student suspension (70 O.S. § 3-136(A)(12)), and financial reporting and auditing (70 O.S. §§ 3-135(C); 70 O.S. § 3-136(A)(6), (18); 70 O.S. § 3-145.3(E)).

Also, employees of Oklahoma charter schools are eligible for the same retirement benefits that Oklahoma provides to teachers at other public schools (70 O.S. § 3-136(A)(14)) and for the same insurance programs that are available to employees of the charter schools' governmental sponsors (70 O.S. § 3-136(A)(15)). Oklahoma charter schools must "comply with the Oklahoma Open Meeting Act and the Oklahoma Open Records Act." 70 O.S. § 3-136(A)(16). They are "eligible to receive current government lease rates" if they choose to lease property. 70 O.S. § 3-142(E). They must have governing boards that hold public meetings at least quarterly (70 O.S. §§ 3-135(A)(3), 3-145.3(F)) and that are "subject to the same conflict of interest requirements as a member of a local school board" (70 O.S. §§ 3-136(A)(17), 3-145.3(F)).

What is more, each Oklahoma charter school is considered a separate "local education agency" (70 O.S. §§ 3-142(C), 3-145.3(C)), which is "a public board of education or other public authority legally constituted" for "administrative control or direction" of public schools (*see* 20 U.S.C. § 7801(30)(A)). Oklahoma charter schools are "considered . . . school district[s] for purposes of tort liability under The Governmental Tort Claims Act." 70 O.S. § 3-136(A)(13). And a 2007 Oklahoma Attorney General opinion states that "charter schools . . . are part of the public school system," are "under the control of the Legislature," and further the Legislature's "mandate of establishing and maintaining a system of free

public education.” Hon. Al McAffrey, Okla. Att’y Gen. Op. No. 07-23, 2007 WL 2569195, at *7 (2007).

In sum, Oklahoma charter schools were created by legislation; Oklahoma law defines and treats them as public schools and governmental bodies; they have the same responsibilities and privileges as other public schools; and they must comply with myriad legal requirements that govern other public schools. Because Oklahoma charter schools are governmental entities, there is no question that they are state actors, and “this ends the inquiry.” See *Riester v. Riverside Cmty. Sch.*, 257 F. Supp. 2d 968, 972 (S.D. Ohio 2002).

The Tenth Circuit has accordingly treated charter schools as governmental entities. See *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1188 (10th Cir. 2010) (charter school was “a local governmental entity” and therefore was subject to the same legal rules that apply to other governmental entities in lawsuits alleging violations of constitutional rights); *Coleman v. Utah State Charter Sch. Bd.*, 673 F. App’x 822, 830 (10th Cir. 2016) (employees of charter school were “government officials”); accord *Dillon v. Twin Peaks Charter Acad.*, 241 F. App’x 490, 496–97 (10th Cir. 2007). Many other federal courts across the country, including the en banc Fourth Circuit and panels of the Third and Ninth Circuits, have treated charter schools as governmental entities or other state actors as well. See *Peltier v. Charter Day Sch.*, 37 F.4th 104, 115–23 (4th Cir. 2022) (en banc), cert. denied, 143 S. Ct. 2657 (2023); *Fam. C.L. Union v. Dep’t of Child. & Fams.*, 837 F. App’x 864, 869 (3d Cir. 2020); *Nampa Classical Acad. v. Goesling*, 447 F. App’x 776, 777–78 (9th Cir. 2011);⁴ but

⁴ See also *Patrick v. Success Acad. Charter Schs.*, 354 F. Supp. 3d 185, 209 n.24 (E.D.N.Y. 2018); *United States v. Minn. Transitions Charter Schs.*, 50 F. Supp. 3d 1106, 1120 (D. Minn. 2014); *Pocono Mountain Charter Sch. v. Pocono Mountain Sch. Dist.*, 908 F. Supp. 2d 597,

see *Caviness v. Horizon Cmty. Learning Ctr.*, 590 F.3d 806, 812–14, 817 (9th Cir. 2010) (holding that charter school’s employment decisions were not state action—without deciding whether performance of its educational functions is state action—based on analysis of Arizona statutory and constitutional provisions that are substantially different from Oklahoma’s).

Though they are not bound by it, Oklahoma courts generally look to federal caselaw to determine whether an entity is a state actor under state law. See, e.g., *Oklahomans for Life, Inc. v. State Fair of Okla., Inc.*, 1981 OK 101, ¶¶ 16–18 & nn.13–15, 634 P.2d 704. Thus St. Isidore is a governmental entity and a state actor under both federal and state law and must comply with the Oklahoma Constitution in addition to the federal one.

II. Article I, § 2 of the Oklahoma Constitution prohibits the creation of a public charter school that indoctrinates children in a religion, as St. Isidore will.

One of the provisions of the Oklahoma Constitution that St. Isidore must obey as a public charter school and a governmental entity is Article I, § 2, which provides: “Perfect toleration of religious sentiment shall be secured, and no inhabitant of the State shall ever be molested in person or property on account of his or her mode of religious worship; and no

604–05 (M.D. Pa. 2012); *Riester*, 257 F. Supp. 2d at 972–73; *Daugherty v. Vanguard Charter Sch. Acad.*, 116 F. Supp. 2d 897, 906 (W.D. Mich. 2000); *Jones v. Sabis Educ. Sys., Inc.*, 52 F. Supp. 2d 868, 876, 879 (N.D. Ill. 1999); *Lengele v. Willamette Leadership Acad.*, No. 6:22-cv-01077-MC, 2022 WL 17057894, at *4 (D. Or. Nov. 17, 2022); *Falash v. Inspire Acads., Inc.*, No. 1:14-cv-00223-REB, 2016 WL 4745171, at *2, 6 (D. Idaho Sept. 12, 2016); *Meadows v. Lesh*, No. 10-CV-00223(M), 2011 WL 4744914, at *1–2 (W.D.N.Y. Oct. 6, 2011); *ACLU of Minn. v. Tarek Ibn Ziyad Acad.*, No. 09-138 (DWF/JJG), 2009 WL 2215072, at *9–10 (D. Minn. July 9, 2009); *Jordan v. N. Kane Educ. Corp.*, No. 08 C 4477, 2009 WL 509744, at *2–3 (N.D. Ill. Mar. 2, 2009); *Scaggs v. N.Y. Dep’t of Educ.*, No. 06-CV-0799 (JFB)(VVP), 2007 WL 1456221, at *12–13 (E.D.N.Y. May 16, 2007); *Matwijko v. Bd. of Trs. of Glob. Concepts Charter Sch.*, No. 04-CV-663A, 2006 WL 2466868, at *3–5 (W.D.N.Y. Aug. 24, 2006); *Irene B. v. Phila. Acad. Charter Sch.*, No. Civ.A. 02-1716, 2003 WL 24052009, at *11 (E.D. Pa. Jan. 29, 2003).

religious test shall be required for the exercise of civil or political rights.” Yet St. Isidore plans to teach a religious curriculum and inculcate a religion in its students. (*See supra* at 1–2; *see also* Ints.’ Pet. ¶¶ 19–22.) The plain text of Article I, § 2 prohibits St. Isidore from operating in this manner. A public school that requires its students to submit to religious indoctrination in one faith inherently is intolerant of other beliefs, molests students based on their religious beliefs, and imposes a religious test on the civil right to receive an education.

The historical background of Article I, § 2 leads to the same conclusion. “The Oklahoma Constitutional Convention members . . . advocated for the toleration of all religious beliefs and complete separation of church and state” *Prescott v. Okla. Capitol Pres. Comm’n*, 2015 OK 54, ¶ 6, 373 P.3d 1032 (Taylor, J., concurring in denial of rehearing). Albert H. Ellis, the Second Vice President of the Oklahoma Constitutional Convention, explained that the approach to religion of the framers of the state constitution was shaped by their concern for the protection of religious minorities—“the rights of all denominations, however few the number of their respective adherents.” *See* Albert H. Ellis, *A History of the Constitutional Convention of the State of Oklahoma* 134 (1923). Ensuring that no public school, charter or otherwise, attempts to indoctrinate its students in any religion vindicates the framers’ concerns and protects the rights of religious minorities.

Furthermore, Article I, § 2 provides at least the same protections as the federal Establishment and Free Exercise Clauses. *See Prescott*, 2015 OK 54, ¶ 6 (Taylor, J., concurring); *McMasters v. State*, 207 P. 566, 568 (Okla. Crim. App. 1922); *Guinn v. Church of Christ of Collinsville*, 1989 OK 8, ¶ 6, 775 P.2d 766 (Kauger, J., concurring in part). The federal Establishment Clause prohibits state actors from inculcating religion in the classroom or otherwise coercing students to take part in religious activity or promoting religion to

students. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309–10 (2000); *Lee v. Weisman*, 505 U.S. 577, 587 (1992); *Edwards v. Aguillard*, 482 U.S. 578, 591–94 (1987); *Stone v. Graham*, 449 U.S. 39, 42 (1980); *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948). In addition, the federal Free Exercise Clause prohibits state actors from “coerc[ing] participation in religious programming.” *Janny v. Gamez*, 8 F.4th 883, 911–12, 916–18 (10th Cir. 2021), *cert. dismissed sub nom. Carmack v. Janny*, 142 S. Ct. 878 (2022).

III. St. Isidore’s application, charter, and contract violate statutes and regulations requiring charter-school applicants to certify that they will comply with state law.

One of the Board’s regulations requires applications for sponsorship of a new charter school to “include signed and notarized statements from the Head of the School and the governing body members . . . showing their agreement to fully comply as an Oklahoma public charter school with all statute[s], regulations, and requirements of the . . . State of Oklahoma, Statewide Virtual Charter School Board, and Oklahoma Department of Education,” and to “[s]pecifically cite agreement . . . to guarantee access to education and equity for all eligible students regardless of their race, ethnicity, economic status, academic ability, or other factors as established by law.” OAC § 777:10-3-3(c)(1)(F). In violation of these requirements, St. Isidore’s approved application includes notarized statements that the school will comply with antidiscrimination and other legal requirements *only* “to the extent required by law, including . . . religious exemptions, . . . with priority given to the Catholic Church’s understanding of itself and its rights and obligations pursuant to the Code of Canon Law and the Catechism of the Catholic Church.” (Appl., PA181; *see also* Ints.’ Pet. ¶ 25.)

Similarly, the Charter Schools Act requires each charter school to “adopt a charter which will ensure” that the “school shall comply with all . . . state and local rules and statutes relating to health, safety, civil rights and insurance.” 70 O.S. § 3-136(A)(1). The Act further

requires the contract between a charter school and its sponsor to describe “how the charter school will comply with the charter requirements set forth in the [Act].” 70 O.S. § 3-135(A)(5). In violation of these provisions, St. Isidore’s contract with the Board—which doubles as St. Isidore’s charter—purports to grant St. Isidore broad exemptions from the antidiscrimination and other legal requirements applicable to Oklahoma charter schools. (Contract, PA2–4, 13, 19 ¶¶ 2.1, 3.1, 8.2, 11.1; *see also* Ints.’ Pet. ¶ 27.)

IV. St. Isidore will violate the Oklahoma Constitution and state statutes by discriminating in student admissions, student discipline, and employment.

St. Isidore will, in fact, discriminate in student admissions, student discipline, and employment based on religion, sexual orientation, gender identity, pregnancy outside of marriage, and sexual activity outside of marriage. (*See supra* at 2–4; *see also* Ints.’ Pet. ¶¶ 28–49.) Numerous Oklahoma constitutional and statutory provisions bar charter schools from engaging in these discriminatory practices.

Several provisions of the Oklahoma Constitution require that public schools serve *all* students. Article I, § 5 requires that the State “establish[] and maintain[] . . . a system of public schools, which shall be open to all the children of the state.” Article XIII, § 1 requires that the State “establish and maintain a system of free public schools, wherein all the children of the State may be educated.” And Article XI, §§ 2 and 3 establish a “permanent school fund” and prohibit it from being used “for any other purpose than the support and maintenance of common schools for the equal benefit of all the people of the State.”

Article I, § 2 prohibits public schools from discriminating based on religion. That is evident from the clause’s text: “Perfect toleration of religious sentiment shall be secured, and no inhabitant of the State shall ever be molested in person or property on account of his or her mode of religious worship; and no religious test shall be required for the exercise of civil

or political rights.” The same conclusion follows from the caselaw holding that the clause is at least as protective as the federal Free Exercise and Establishment Clauses (*see supra* at 11), both of which prohibit religious discrimination by governmental entities (*see, e.g., Gillette v. United States*, 401 U.S. 437, 462 (1971); *Larson v. Valente*, 456 U.S. 228, 244 (1982); *Glassroth v. Moore*, 335 F.3d 1282, 1293 (11th Cir. 2003)).

Article II, § 36A of the Oklahoma Constitution provides that “[t]he state shall not grant preferential treatment to, or discriminate against, any individual or group on the basis of . . . sex . . . in the operation of public employment, public education, or public contracting.” This prohibition is properly construed as encompassing discrimination based on sexual orientation and gender identity. *See, e.g., Bostock v. Clayton County*, 140 S. Ct. 1731, 1741 (2020).

Further, Article II, § 7 of the Oklahoma Constitution—which provides that “no person shall be deprived of life, liberty, or property, without due process of law”—“contain[s] [a] built-in anti-discrimination component[] which afford[s] protection against unreasonable or unreasoned classifications which serve no important governmental interests” and is similar to the U.S. Constitution’s Equal Protection Clause. *See Okla. Ass’n for Equitable Tax’n v. Oklahoma City*, 1995 OK 62, ¶ 12, 901 P.2d 800. Article II, § 7 thus prohibits governmental discrimination based on religion (*see United States v. Armstrong*, 517 U.S. 456, 464 (1996)), sexual orientation (*see Pavan v. Smith*, 582 U.S. 563, 566 (2017); *Obergefell v. Hodges*, 576 U.S. 644, 670–76 (2015)), and gender identity (*see Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608–09 (4th Cir. 2020); *Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011)).

In addition, the Charter Schools Act requires charter schools to “be as equally free and open to all students as traditional public schools” (70 O.S. § 3-135(A)(9)) and prohibits

any admission preferences other than geographic ones (*see* 70 O.S. §§ 3-135(A)(10), 3-140, 3-145.3(J)). The Act also requires charter schools to be “nonsectarian in [their] . . . admission policies [and] employment practices.” 70 O.S. § 3-136(A)(2). And a separate statute, 70 O.S. § 1210.201, provides that “[s]egregation of children in the public schools of the State of Oklahoma on account of . . . creed . . . is prohibited.”

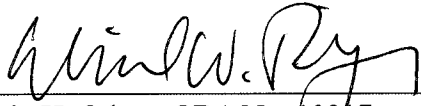
V. St. Isidore has not committed to fully serving students with disabilities as required by the Charter Schools Act.

The Charter Schools Act requires Oklahoma charter schools to “comply with all . . . laws relating to the education of children with disabilities in the same manner as a school district.” 70 O.S. § 3-136(A)(7). But St. Isidore’s approved application states only that the school “will comply with all applicable . . . [l]aws in serving students with disabilities . . . to the extent that it does not compromise the religious tenets of the school and the instructional model of the school.” (Appl., PA155–56.) Moreover, as noted above, St. Isidore is an Archdiocese of Oklahoma City school, and the Archdiocese will control St. Isidore’s policies. (*See supra* at 2; *see also* Ints.’ Pet. ¶ 37.) Archdiocese of Oklahoma City policy is that “[s]tudent service plans” for students with disabilities “cannot contain accommodations or modifications that are in opposition of Church teaching.” (Christ the King handbook, IA24.)

CONCLUSION

For the foregoing reasons, the Court should order the Board to (1) terminate its contract with St. Isidore, (2) revoke the Board’s approval of St. Isidore’s application for sponsorship as a charter school, and (3) refrain from taking any action in the future that would authorize or facilitate St. Isidore operating or receiving state funding as a charter school.

Respectfully submitted on November 14, 2023.



Benjamin H. Odom, OBA No. 10917
John H. Sparks, OBA No. 15661
Michael W. Ridgeway, OBA No. 15657
Lisa M. Millington, OBA No. 15164
ODOM & SPARKS, PLLC
2500 McGee Drive, Suite 140
Norman, OK 73072
(405) 701-1863
Fax: (405) 310-5394
odomb@odomsparks.com
sparksj@odomsparks.com
ridgewaym@odomsparks.com
millingtonl@odomsparks.com

Robert Kim*
Jessica Levin*
Wendy Lecker*
EDUCATION LAW CENTER
60 Park Place, Suite 300
Newark, NJ 07102
(973) 624-1815
RKim@edlawcenter.org
JLevin@edlawcenter.org
WLecker@edlawcenter.org

Patrick Elliott*
FREEDOM FROM RELIGION
FOUNDATION
P.O. Box 750
Madison, WI 53701
(608) 256-8900
pelliott@ffrf.org

Alex J. Luchenitser*
Kenneth D. Upton, Jr., OBA No. 12906
Kalli A. Joslin*
Jenny Samuels*
Sarah Taitz*
AMERICANS UNITED FOR
SEPARATION OF CHURCH AND
STATE
1310 L Street NW, Suite 200
Washington, DC 20005
(202) 466-7306 / (202) 898-2133
luchenitser@au.org
upton@au.org
joslin@au.org
samuels@au.org
taitz@au.org

Daniel Mach*
Heather L. Weaver*
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
915 15th Street, NW, Suite 600
Washington, DC 20005
(202) 675-2330
dmach@aclu.org
hweaver@aclu.org

* *Pro hac vice* application pending or forthcoming.

Attorneys for Petitioners-Intervenors

CERTIFICATE OF SERVICE

I certify that on November 14, 2023, a true and correct copy of the foregoing document was served by mail to the counsel whose mailing addresses are set forth below and by email to the counsel whose email addresses are set forth below.

Counsel for petitioner Attorney General Gentner Drummond:

Gentner Drummond, Attorney General (*Gentner.Drummond@oag.ok.gov*)
Garry M. Gaskins, II, Solicitor General (*Garry.Gaskins@oag.ok.gov*)
Brad Clark, Deputy General Counsel (*Bradley.Clark@oag.ok.gov*)
Kyle Pepler, Assistant Solicitor General (*Kyle.Pepler@oag.ok.gov*)
William Flanagan, Assistant Solicitor General (*William.Flanagan@oag.ok.gov*)
Office of Attorney General, State of Oklahoma
313 N.E. 21st Street
Oklahoma City, OK 73105

Counsel for respondents Statewide Virtual Charter School Board and its members:

Cheryl Plaxico (*cplaxico@plaxico.law*)
Plaxico Law Firm, PLLC
923 N. Robinson Ave., 5th Floor
Oklahoma City, OK 73102

Philip A. Sechler (*psechler@adflegal.org*)
Caleb Dalton (*cdalton@adflegal.org*)
Hailey Sexton (*hsexton@adflegal.org*)

Counsel for proposed intervenor-respondents Oklahoma State Department of Education and State Superintendent of Public Instruction:

Bryan Cleveland (*Bryan.Cleveland@sde.ok.gov*)
Oklahoma State Department of Education
Oliver Hodge Building
2500 North Lincoln Boulevard
Oklahoma City, OK 73105

Hiram Sasser (*hsasser@firstliberty.org*)
Holly M. Randall (*hrandall@firstliberty.org*)
Anthony J. Ferate (*ajferate@spencerfane.com*)
Andrew W. Lester (*alester@spencerfane.com*)

Counsel for defendant St. Isidore of Seville Catholic Virtual School:

Michael H. McGinley (*michael.mcginley@dechert.com*)

Steven A. Engel (*steven.engel@dechert.com*)

M. Scott Proctor (*scott.proctor@dechert.com*)

Dechert LLP

1900 K Street, NW

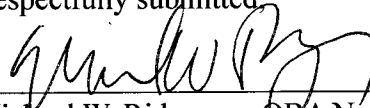
Washington, DC 20006

John Meiser (*jmeiser@nd.edu*)

Michael R. Perri (*mrperri@perridunn.com*)

Socorro Adams Dooley (*sadooley@perridunn.com*)

Respectfully submitted:



Michael W. Ridgeway, QBA No. 15657

ODOM & SPARKS, PLLC

2500 McGee Drive, Suite 140

Norman, OK 73072

(405) 701-1863

Fax: (405) 310-5394

ridgewaym@odomsparks.com