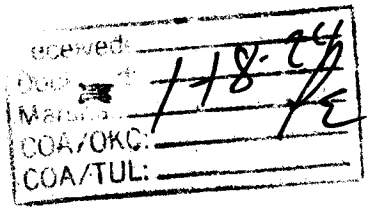
ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

GENTNER DRUMMOND, Attorney General for the State of Oklahoma, ex rel. STATE OF OKLAHOMA, Petitioner, v. OKLAHOMA STATEWIDE VIRTUAL CHARTER SCHOOL BOARD; *et al.*, Respondents, -AND- ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL, Intervenor.	**FILED** SUPREME COURT STATE OF OKLAHOMA JAN 18 2024 JOHN D. HADDEN CLERK Sup. Ct. No. 121,694



NATIONAL ALLIANCE FOR PUBLIC CHARTER SCHOOLS' AMICUS BRIEF

RANDALL J. YATES, OBA #30304
CROWE & DUNLEVY
A Professional Corporation
222 North Detroit Avenue, Suite 600
Tulsa, Oklahoma 74120
(918) 592-9866
randall.yates@crowedunlevy.com

ATTORNEY FOR NATIONAL ALLIANCE FOR PUBLIC CHARTER SCHOOLS

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As *amicus curiae*, the National Alliance for Public Charter Schools, a national nonprofit committed to advancing the public charter school movement, which has served students for more than 30 years, stresses that public charter schools are more than mere government aid.

This case is not about the exclusion of a religious enterprise from government aid; it is about the government's creation of a new religious enterprise. While the former implicates the Free Exercise Clause, the latter violates the Establishment Clause. The Oklahoma Attorney General's request for declaratory relief should be granted because the state's creation of a public church school violates the Establishment Clause. Government acts that violate the Establishment Clause cannot be compelled by the Free Exercise Clause.

BACKGROUND

All charter schools formed under the Oklahoma Charter Schools Act ("the Act") are public schools. The Oklahoma Statewide Virtual Charter School Board ("the State Board") is the state body with sole authority to form virtual public charter schools under this Act. On June 5, 2023, the State Board established the nation's first religious public charter school.

The State Board issued the charter that established St. Isidore of Seville Virtual Charter School ("St. Isidore") during an open public meeting. The new public charter school is a joint endeavor between a private nonprofit corporation associated with the Catholic Church and the State Board as its government sponsor.

St. Isidore is a religious school. And, as a public charter school, St. Isidore would receive full funding by the state. Like other public schools, it is subject to applicable state

and federal laws. But, unlike other public schools, it is exempt from laws that it determines conflict with religious tenets.

ARGUMENT

The state's establishment of St. Isidore constitutes government sponsorship of a religious institution and thus violates the First Amendment's Establishment Clause.

I. Under the Establishment Clause, the Government Cannot Create Public Religious Institutions.

The First Amendment's Religious Clause "encompasses two distinct guarantees—the government shall make no law respecting an establishment of religion or prohibiting the free exercise thereof—both with the common purpose of securing religious liberty."[1] Thomas Jefferson described these guarantees as a "wall" separating church and state.[2] Within the Religious Clause, the Supreme Court employs a different analogy, recognizing that its "jurisprudence in th[e] area [of balancing the guarantees of the Establishment Clause and Free Exercise Clause] is of necessity one of line-drawing."[3] This case is about where the First Amendment draws that line.

Under the Establishment Clause, no doubt the state cannot "pass laws which aid one religion, aid all religions, or prefer one religion over another."[4] Nor can the state force anyone "to go to or to remain away from church ... [or] religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."[5] And yet, while eliminating state religious coercion[6] and maintaining

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[1] *Lee v. Weisman*, 505 U.S. 577, 605 (1992); *see also Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 8 (1947) (citing *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105 (1943)).
[2] *Everson*, 330 U.S. at 16.
[3] *Lee*, 505 U.S. at 598.
[4] *Everson*, 330 U.S. at 15.
[5] *Id.* at 15-16.
[6] *See, e.g., Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989).

government neutrality on religious matters are key concerns of the Establishment Clause, they are not essential elements of a claim. *Lee v. Weisman* instructs that a showing of state religious coercion may be sufficient but, under Supreme Court precedent, not necessary.[7]

Nor can notions of neutrality swallow up the Establishment Clause.[8] The Supreme Court warns against extreme views of either the Establishment Clause or the Free Exercise Clause as taking either to their extremes would cause the constitutional guarantees found in each to "clash."[9] After all, the Establishment Clause itself is not perfectly neutral on religion. It singles out religion as the thing that the government cannot establish.[10] Undoubtedly, states may set up various state institutions, such as schools, boards, commissions, and agencies, but they cannot set up religious institutions.

Accordingly, in *Walz v. Tax Commission of New York*, the Supreme Court observed that "[t]he course of constitutional neutrality in this area cannot be an absolutely straight line." Such "rigidity could well defeat the [clause's] basic purpose," which, as it relates to the Establishment Clause, is "to insure that no religion be sponsored or favored" by the government.[11] Sometimes the line is thin. At the margins, the Supreme Court has ruled on both sides of public prayer,[12] public religious displays,[13] and public funds to religious institutions[14] depending on the circumstances of the case.

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[7] *Lee*, 505 U.S. at 619.
[8] *Walz v. Tax Commission of New York*, 397 U.S. 664, 668-69 (1970).
[9] *Walz*, 397 U.S. at 668-69.
[10] *See also School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 216 (1963).
[11] *Id.* at 669.
[12] *Compare Engel v. Vitale*, 370 U.S. 421 (1962) *with Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022).
[13] *Compare Stone v. Graham*, 449 U.S. 39 (1980) *with Van Orden v. Perry*, 545 U.S. 677 (2005).
[14] *Compare Levitt v. Committee for Public Ed. and Religious Liberty*, 413 U.S. 472 (1973) *with Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

But, regardless of the margins, the government crosses the line when—and many cases have turned on whether—the "government ... sponsor[s] a manifestly religious exercise."[15] At bottom, while precedent has not always "drawn perfectly straight lines,"[16] "[t]he [Establishment Clause] means at least this: Neither a state nor the Federal Government can set up a church."[17] This prohibition on setting up churches extends to church schools. In *Kiryas Joel Village School District v. Grumet*, for example, the Supreme Court held that a New York state statute creating a special school district to serve a religious enclave of Satmar Hasidim, a strict form of Judaism, violated the Establishment Clause.[18]

Against this legal backdrop, this much is plain: when the government sponsors the creation of a religious institution, including a religious school, it violates the Establishment Clause.

A. The Oklahoma Statewide Virtual Charter School Board sponsored the creation of St. Isidore of Seville Virtual Charter School as a public charter school.

Public charter schools are tuition-free, open enrollment public schools that operate under a contract (or charter) with a state or local government. This alternative form of public school provides students, parents, and school administrators flexibility with curriculum and academic focus. "While they tend to operate separately from local public

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[15] *Wallace v. Jaffree*, 472 U.S. 38, 72 (1985).
[16] *Lee*, 505 U.S. at 619.
[17] *Everson*, 330 U.S. at 15.
[18] *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 698 (1994); *see also Everson*, 330 U.S. at 14 ("[S]o far as the provision against the establishment of a religion is concerned, the question has most frequently arisen in connection with proposed state aid to church schools.").

school districts (and often have private management), they're creations of state law, highly regulated and publicly funded."[19]

In Oklahoma, public charter schools are entities created by the state. The ordinary meaning of the term "charter," as is used here, is "[a]n instrument that ***establishes*** ... [an] organization."[20] Here, that organization is a school—and more specifically, since all charter schools in Oklahoma are "public schools," it is a "public charter school." Each public charter school operates as its own "local education agency,"[21] and is covered under the Governmental Tort Claims Act as its own "school district."[22]

Sections 3-132 – 3-134 of Title 70 outline the process to "***establish***" a new public charter school. Public charter schools are "formed and operated" under the Oklahoma Charter School Act.[23] An indispensable step in forming a public charter school—virtual or otherwise—is "sponsor[ship]" by the government.[24] As the State Board's own manual acknowledges, it "was created to have sole authority 'to authorize and sponsor statewide virtual charter schools in this state.'"[25]

St. Isidore acknowledges that it "applied to the [State Board] to ***establish*** St. Isidore"[26] and accepts that it "can operate as a virtual charter school in Oklahoma only pursuant to a contract with the [State Board]."[27] In general, that contract between the

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[19] David French, NEW YORK TIMES, *Oklahoma Breaches the Wall Between Church and State* (June 8, 2023).
[20] CHARTER, Black's Law Dictionary (11th ed. 2019) (emphasis added).
[21] 70 O.S. §§ 3-142(C), 3-145.3(C); *see also* 10 O.S. § 601.42(6).
[22] 70 O.S. § 3-136(A)(13).
[23] *Id.* §§ 3-132(A), 3-134(C).
[24] *Id.*
[25] *See* OKLAHOMA VIRTUAL CHARTER SCHOOL BOARD, *Virtual Charter School Authorization and Oversight Process* (July 2020) (*quoting* 70 O.S. § 3-145.1).
[26] *See* St. Isidore of Seville Catholic Virtual School Motion to Intervene ("St. Isidore's Brief") (Nov. 6, 2023) at 3.
[27] *Id.* at 8.

government sponsor and a private entity serves as the school's organic document, its charter. As further acknowledged, "the [State Board] exercised the authority granted to it by the State of Oklahoma"[28] and contracted with a private nonprofit corporation (also named "St. Isidore") to form a new entity: a public charter school known as St. Isidore of Seville Virtual Charter School.

The endeavor cannot exist without the government as evidenced by St. Isidore's recognition that if the charter were rescinded, it would "extinguish" that new entity.[29] Of course, nothing prevents the nonprofit St. Isidore from starting a *private* Catholic school—and receiving generally available government aid.[30] But, in Oklahoma, all charter schools are "public schools,"[31]—thus the need to create the new public entity.

To be clear, while they bear the same name, the creation of the school, not the nonprofit, is what matters. Indeed, a finding that St. Isidore (the private nonprofit) was already a school before it received the charter independently resolves the case because a private school is ineligible to contract for a virtual charter school.[32]

B. St. Isidore of Seville Virtual Charter School is a religious institution.

This new entity, a government-sponsored public charter school, is a religious institution. That fact is apparent from the charter application. In it, St. Isidore petitioned the State Board to sponsor it "[t]o create, establish, and operate the School as a Catholic

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[28] *Id.*
[29] *Id.* at 4.
[30] *See, generally*, Petitioner's Brief in Support of Application to Assume Original Jurisdiction and Petition for Writ of Mandamus and Declaratory Judgment ("Attorney General's Brief") (describing public aid available to religious schools).
[31] 70 O.S. § 3-134(C).
[32] *Id.*

School."[33] In Catholic schools, religion "occup[ies] the first place."[34] Under Catholic canons, "[t]he instruction and education in a Catholic school must be grounded in the principles of Catholic doctrine."[35] Catholic canons further instruct that "[r]eligious institutes whose proper mission is education, retaining their mission faithfully, are also to strive to devote themselves to Catholic education through their schools."[36]

St. Isidore does not deny that it is a religious institution. Far from it, in moving to intervene, St. Isidore repeatedly acknowledges that it is a "school that is religious" and "faith-based."[37] Admittedly, the "aim [of the charter] was ... to found a Catholic charter school."[38] In all, St. Isidore describes itself as a "religious charter school[]," notes that the State Board correctly recognized that "it is religious," and argues that not creating the school would "curtail[] ... religiously motivated practice."[39] Moreover, St. Isidore confirms in no ambiguous terms that forming and operating the church school is manifestly "exercising its religion."[40]

C. St. Isidore of Seville Virtual Charter School's charter violates the Establishment Clause.

These two things taken together demonstrate an unmistakable violation of the Establishment Clause. The state action here was taken by the State Board—no doubt a "state actor." By establishing a church school, the State Board is in every way "sponsor[ing] a manifestly religious exercise."[41] The Establishment Clause is generally

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[33] *See* Attorney General's Brief at 3.
[34] *Everson*, 330 U.S. at 22.
[35] Can. 803, § 2.
[36] Can. 801.
[37] *See* St. Isidore's Brief at 3.
[38] *Id.* at 3.
[39] *Id.* at 6-7.
[40] *Id.* at 7.
[41] *Wallace*, 472 U.S. at 72.

not concerned with government acts that, though benefiting religion, are "not aimed at establishing, sponsoring, or supporting religion."[42] But the aim here is expressly the sponsorship, establishment, and government support of a new religious endeavor: the nation's first religious public charter school—"an establishment rarely found in such straightforward form in modern America."[43]

Except for the New York public school district created for the religious enclave in *Kiryas Joel Village*, which the Supreme Court struck down, modern Establishment Clause cases have not dealt with the outright state creation of a religious public school. Rather, the focus has been on religious acts in public schools or public benefits to religious schools. Lack of precedent on this exact situation is unsurprising because Oklahoma's act is unprecedented. That is not to say that Supreme Court precedent provides no instruction, it does so in spades. Like the public school district in *Kiryas Joel Village*, Oklahoma deems its charter schools their own "local education agency," which is defined as a special "school district."[44] That alone is enough to void the charter.

Stepping back, the real issue is not about the government restricting money flow to an admittedly religious institution, but that the government cannot create such a religious institution in the first place. This case can thus resolve under the "establish" prong of Establishment Clause analysis. Yet, while the state's creation of a religious endeavor is violation enough, the Supreme Court also looks at the level of "support[]" that the state provides to religious endeavors.[45] Consider the sequence here. The state first sponsors and forms the religious establishment, and then guarantees *full* funding

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[42] *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 12 (1989).
[43] *Cf. Kiryas Joel Vill. Sch. Dist.*, 512 U.S. at 697.
[44] 70 O.S. §§ 3-142(C), 3-145.3(C); *see also* 10 O.S. § 601.42(6).
[45] *Texas Monthly*, 489 U.S. at 12.

to it. This combination of facts separates the present case from precedent dealing with mere public aid finding its way to existing religious institutions.

In *Espinoza*, for example, the focal point was state scholarships, where the recipients had the discretion to use them to "subsidize" private education. At the outset, the Supreme Court held that the Establishment Clause did not prohibit awarding such scholarships to individuals who chose to apply them to payments for private religious schools.[46] Similarly, in *Makin*, the Supreme Court observed that Maine's tuition assistance was accessible at private schools charging significantly more than the maximum benefit Maine was willing to provide. The Court highlighted this as one of the "numerous and important" distinctions between *private* schools eligible for tuition assistance under Maine's program and a Maine *public* school. Notably, Maine did not provide "free public education" through this form of assistance.[47]

Unlike private schools, public charter schools are "entities that perform their functions under and with the appearance of state authority."[48] As the Supreme Court recognized in *Makin*, the differences between private schools and public schools are "numerous and important." Private schools may hold regular religious teachings, conduct Bible study, pray openly to the deity of their choosing, and design religiously tailored curriculum. By contrast, according to a series of Supreme Court cases each of these things if done in public school would independently violate the Establishment Clause, much less done all at once.[49]

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[46] *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2254, 2275 (2020).
[47] *Carson as next friend of O. C. v. Makin*, 596 U.S. 767, 783 (2022).
[48] *See* Congressional Research Service, *Fourth Circuit Says Public Charter Schools are State Actors, Supreme Court Declines to Weigh In* (updated July 19, 2023).
[49] *McCollum v. Board of Ed. of School Dist. No. 71, Champaign Cty.*, 333 U.S. 203, 211 (1948) (no weekly religious teachings in public schools); *Engel v. Vitale*, 370 U.S. 421 (1962) (no

St. Isidore is a public school. To the extent that is disputed, the Oklahoma Charter School Act does not authorize the State Board to sponsor private schools or nonprofits, only public schools. So any attempt to form a private school or nonprofit under the Act would be *ultra vires*. Still, the plain text of 70 O.S. § 3-132(D), which says charter schools are "public schools," should be enough. Consider the context. When Title 70 uses the word "public" to modify "school," "public" invariably means "[o]f, relating to, or involving [the] state"[50] as in "[t]he public schools of Oklahoma shall consist of all free schools supported by public taxation ... authorized by law[]."[51] But if plain text does not do it, charter schools also bear all the hallmarks of public institutions. Among other things, they are created under state law; fully funded by the state; subject to state law governing other public entities generally, such as the Open Meetings Act; and may take advantage of state discounts and benefits.[52] As for the local-exemption statute applicable to charter schools, it merely swaps one set of state rules with another.[53]

That said, all the focus on whether St. Isidore is a "state actor" misses the point. While the Alliance disagrees that public charter schools are constitution-free zones, the Court need not even reach that issue here. By law, charter schools require a government sponsor. Here, it is the State Board that voted on a contract for religious instruction. *That is state action.* No more "nexus" to government is needed beyond the charter-contract's

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state-led prayers in public schools); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963) (no Bible study in public schools); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (no religiously tailored curriculum in public schools).

[50] PUBLIC, Black's Law Dictionary (11th ed. 2019).

[51] 70 O.S. § 1-106; *see also Id.* at § 1-102 (stating purpose of Code is "to provide for ... the establishment, organization, ... and support of [a state system of public school education].").

[52] *See* AG's Reply Brief (Dec. 5, 2023) at 5-7.

[53] *See* 70 O.S. § 3-136(A)(5); *see also* AG's Reply Brief (Dec. 5, 2023) at 7.

plain terms. Because the state-issued charter expressly contemplates—even calls for—religious instruction, religious instruction is "fairly attributable to the state."[54]

Contrast this with cases outside the Establishment Clause context considering whether private entities contracting with the government are "state actors." For instance, in *Rendell-Baker v. Kohn*, it was decided that a private school, contracted by Massachusetts to provide schooling to "maladjusted" students, is not necessarily a state actor. The private school in *Rendell-Baker* filled a gap missing in the public school system. The Supreme Court likened the private school to a private contractor whose every act "do[es] not become acts of the government by reason of [its] ... engagement in performing public contracts."[55]

The analogy of a "private contractor" is of little use when, as here, we are dealing with the public entity itself. But even if we were to use the analogy, the result would be the same. If the state felt that there was a gap in providing religious instruction at public schools, the Establishment Clause does not allow the state to then contract for religious instruction. Certainly the Establishment Clause does not sanction the government setting up a church so long as it does so through an independent contractor.

Nor is there any doubt that a joint endeavor with the government formed the school: no school existed on June 5, 2023, then the State Board issued the charter at its meeting, and now there is a school. The resulting school, St. Isidore, is neither all church nor all state, but a blend of church and state. The joint endeavor goes beyond the

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[54] *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982).
[55] *Id.* at 841.

"symbolic union" of church and state, which once concerned the Supreme Court.[56] The charter forms an actual union of church and state.

Unconstitutional entanglement is undeniable and inescapable. Public charter schools are subject to the strictures of state law, including the provisions of the Charter School Act and its accompanying regulations, which are vast and entwining.[57] The charter documents set forth more than 100 pages of rights, responsibilities, and assurances. Paragraph 11.1 of the St. Isidore contract however purports to give St. Isidore *de facto* (if not *de jure*) veto power over state laws that conflict with religious tenets. Of note, no other public school in Oklahoma has veto power over state law.

This veto power also cuts against the charter's constitutionality. So it was held in *Larkin v. Grendel's Den* where the Supreme Court struck down a Massachusetts statute that "vest[ed] in the governing bodies of churches ... the power effectively to veto applications for liquor licenses."[58] Even with this veto power, because the government created it, the government can shut St. Isidore down. One ground to do so is "violations of the law."[59] Law refers to laws of the state, unless they be laws of the church. But, from what can be gathered, which is which must be resolved in arbitration.[60]

Law, regulation, and contract results in a web of entanglement where both the state and the religious institution exercise a measure of control over one another. This is contrary to the well-established constitutional principle against the state meddling "in the affairs of any religious organization" and "vice versa."[61] Granted, public charter

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[56] *Lee*, 505 U.S. at 619.
[57] AG's Reply Brief (Dec. 5, 2023) at 6-7.
[58] *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 117 (1982).
[59] 70 O.S. § 3-137(F).
[60] *Id.* at § 3-134.
[61] *Lee*, 505 U.S. at 600.

schools operate outside local school districts, and some state laws do not apply.[62] But it does not follow that the Establishment Clause therefore does not apply to the State Board. State sponsorship by contract is no less entangling than state sponsorship by statute. Perhaps more so.

To be sure, "the very idea that a religious institution should be either clothed with state authority or subject to state control—let alone both—is antithetical to the constitutional balance struck by the First Amendment's establishment clause and free exercise clause."[63] In the end, St. Isidore is a religious institution; the state sponsored it, established it, fully supports it, and—by law, regulation, and contract—heavily entangles itself in St. Isidore's affairs (and vice versa).

For this reason, the State Board's sponsorship of St. Isidore as a public charter school violates the Establishment Clause.

II. Government Acts that Violate the Establishment Clause Cannot Simultaneously be Compelled by the Free Exercise Clause.

A government act that violates the Establishment Clause cannot simultaneously be compelled by the Free Exercise Clause. That is, there is no overlap in the Venn Diagram of what the Establishment Clause forbids and what the Free Exercise Clause compels. To the contrary, the Supreme Court has recognized daylight between the clauses, leaving the states to experiment with the "play in the joints."[64] Thus, once the government crosses the line into what the Establishment Clause forbids, the inquiry ends. It makes little sense to apply Free Exercise standards to Establishment questions

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[62] *See* 70 O.S. § 3-136(A)(5).
[63] David French, NEW YORK TIMES, *Oklahoma Breaches the Wall Between Church and State* (June 8, 2023).
[64] *Espinoza*, 140 S. Ct. at 2254 (citation omitted).

because, if taken to the "extreme,"[65] the former might swallow the latter based purely on level of abstraction and "simple semantic exercise[s]."[66]

Though the daylight between the clauses might have narrowed in recent years, there are numerous and significant differences between the establishment of St. Isidore here and the issues addressed in the "Free Exercise trilogy"—*Trinity Lutheran*, *Espinoza*, and *Makin*. Those cases addressed the distinct question of whether the state may withhold generally available public aid from private religious schools based solely on their religious use or status. It cannot. But that has no bearing here.

First, unlike here, the state neither sponsored, nor entered a contract, nor voted to establish any of the trilogy schools—the schools existed independent of any government act.

Second, unlike here, the government did not provide *guaranteed, complete,* and *direct* financial support to the private religious schools. *Makin* explicitly observed that the state did not cover the full costs. And *Espinoza* emphasized that the individual receiving the state scholarship, not the government, determined its allocation—a sharp distinction from the current scenario, where funding is mandated by law and written contract. True, the raw amount of money that goes to public charter schools is calculated in part by voluntary admission, but the mechanics that the Supreme Court found significant are not replicated when the state commits to complete support. In *Makin*, for example, even if none of the scholarship recipients used them on existing religious schools, those schools would continue to exist.

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[65] *Walz*, 397 U.S. 668-69.
[66] *Makin*, 596 U.S. at 784.

Third, unlike here, the trilogy cases presented situations characterized by little to no intermingling of the government with the religious school—certainly not a contractual relationship forming the school.

Whatever lessons learned from the Free Exercise trilogy, the mandate for Oklahoma to establish St. Isidore is not one of them. Indeed, the trilogy's capstone says it is "*wrong* [to read these cases to suggest that] ... [the state] *'must'* fund religious education" and emphasizes that states "may provide a strictly secular education in its public schools."[67] Still yet, even if we treat St. Isidore as private, the state cannot single out one private religious school and pick up the tab. What if all private religious schools chose to convert to charter schools? By the State Board's reasoning, they "*must*" then, upon their oaths, pay for all of them or run afoul of the Free Exercise Clause. Exactly what the Supreme Court said was the "*wrong*" message to take from the trilogy.

* * *

Ultimately, it is enough to say that the state cannot create, set up, establish, or sponsor to establish a church school, whether labeled *public* or *private*. The Court thus need not now or ever venture into what financing mechanics or levels are proper, how much church-state entanglement is too much, where the law stops and religion takes over, the merits of government-coordinated religious gerrymandering, or whether the school can discriminate against Muslims, gays, or Jews.

CONCLUSION

The State Board crossed the line here. The state-issued charter forming a religious public charter school should be declared unconstitutional.

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[67] *Id.* at 785.

Respectfully submitted,

RANDALL J. YATES, OBA #30304
CROWE & DUNLEVY
A Professional Corporation
222 North Detroit Avenue, Suite 600
Tulsa, Oklahoma 74120
(918) 592-9866
randall.yates@crowedunlevy.com

ATTORNEY FOR NATIONAL ALLIANCE FOR PUBLIC CHARTER SCHOOLS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above was mailed this 18th day of January, 2024, by depositing it in the U.S. Mail, postage prepaid, to:

Gentner Drummond
Garry M. Gaskins, II
Brad Clark
Kyle Peppler
William Flanagan
Office of Attorney General
State of Oklahoma
313 Northeast 21st Street
Oklahoma City, Oklahoma 73105

Michael H. McGinley
Steven A. Engel
M. Scott Proctor
DECHERTLLP
1900 K Street, NW
Washington, DC 20006

Michael R. Perri
Socorro Adams Dooley
PERRI DUNN, PLLC
100 N. Broadway Ave., Suite 3280
Oklahoma City, Oklahoma 73102

Cheryl Plaxico
PLAXICO LAW FIRM, PLLC
923 North Robinson Avenue, 5th Floor
Oklahoma City, Oklahoma 73102

Philip A. Sechler
ALLIANCE DEFENDING FREEDOM
44180 Riverside Parkway
Lansdowne, Virginia 20176

Robert Franklin
William Pearson
Nellie Tayloe Sanders
Brian Bobek
Scott Strawn
Oklahoma Statewide Virtual
Charter School Board
M.C. Connors Building
2501 North Lincoln Boulevard, Suite 301
Oklahoma City, Oklahoma 73105

John A. Meiser
NOTRE DAME LAW SCHOOL
RELIGIOUS LIBERY CLINIC
1338 Biolchini Hall of Law
Notre Dame, Indiana 46556