



ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

**FILED
SUPREME COURT
STATE OF OKLAHOMA**

Gentner Drummond, Attorney General for the State of
Oklahoma, *ex rel.* State of Oklahoma,

JAN 18 2024

**JOHN D. HADDEN
CLERK**

Petitioner,

v.

Sup. Ct. Case No. 121,694

Oklahoma Statewide Virtual Charter School Board, *et al.*,

Respondents,

Received	1-18-24
Booked	
Marshal	
COA/OKC	
COA/TUL	

and

St. Isidore of Seville Catholic Virtual School,

Intervenor.

**BRIEF OF AMICUS CURIAE THE OKLAHOMA COUNCIL OF
PUBLIC AFFAIRS IN SUPPORT OF RESPONDENTS**

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INTEREST OF AMICUS CURIAE

Amicus curiae Oklahoma Council of Public Affairs (“OCPA”) was founded in 1993 as an independent research and education institution—a “think tank”—to formulate and promote free-market public policy in the State of Oklahoma. The staff at OCPA accomplish the organization’s mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating sound free-market policies, and promoting those solutions for implementation in Oklahoma.

OCPA supports the principles of limited government, free enterprise, individual initiative, personal responsibility, and the importance of strong families. It also has a strong interest in ensuring the proper interpretation of the Constitution and laws of the State of Oklahoma. OCPA has long supported educational choice and believes that parents and families are best positioned to make determinations regarding their students’ education—whether that is public school, private school, charter school, home school, religious, non-religious, or any other learning environment.

INTRODUCTION

When schools closed in 2020 due to the COVID-19 pandemic, Oklahoma parents received a wake-up call. Many parents were shocked to find their children were not learning. Jonathan Small, Learning loss from COVID remains, OCPA (Oct. 11, 2022), <https://ocpathink.org/post/analysis/learning-loss-from-covid-remains>. Others were appalled at what their students *were* learning. Kevin D. Roberts & Mike Dunleavy, Parents Are “Sleeping Giants” Who Will Fix American Education, The Heritage Foundation (May 12, 2022), <https://www.heritage.org/education/commentary/parents->

are-sleeping-giants-who-will-fix-american-education. Parents all over Oklahoma responded by demanding their lawmakers provide different options for their children's education—culminating in the Parental Choice Tax Credit Act. 70 O.S. § 28-100, *et seq.* The status quo of sending their children off to the school assigned to them by ZIP code was no longer an option for many Oklahoma families.

Parents choose schools other than their local public school for a variety of reasons. Sadly, the primary reason parents choose charter schools is for safety reasons. Colyn Ritter, [The Top 10 Findings from EdChoice's 2023 Schooling in America Survey Series](https://www.edchoice.org/engage/the-top-10-findings-from-edchoices-2023-schooling-in-america-survey-series/), EdChoice (Aug. 1, 2023), <https://www.edchoice.org/engage/the-top-10-findings-from-edchoices-2023-schooling-in-america-survey-series/>. Other reasons include academic performance, location, extracurricular activities, and a number of other factors. *Id.* Relevant to this case is the fact that parents also choose between various education options for moral/character development and religious instruction. *Id.* And it is not just private schools or homeschooling that parents choose based on these factors. One quarter of parents choosing charter schools do so, at least in part, because of the moral and character development of those schools. *Id.*

Catholic schools are particularly known for their high academic standards. It is no coincidence that two thirds of the members of the United States Supreme Court were educated in Catholic schools. The Attorney General would deny parents the opportunity to *choose* to attend a charter school simply because it is Catholic. Not only is this unlawful as Respondents and others have argued. It also robs Oklahoma

parents of another option they can use in the search to find the best educational option for their individual children.

I. Charter schools, operating under lighter regulation, are an important part of Oklahoma's educational system.

For over forty years, the United States Supreme Court has held that education is not "traditionally the *exclusive* prerogative of the State." *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974)). To foster innovative teaching methods and educational diversity, States like Oklahoma have relied upon that rule to fund innovative independent schools that operate outside the State's government-run public-school system. No longer limited to private schools or homeschooling as alternatives to traditional public schools, charter schools have given countless Oklahoma parents alternatives when seeking the best for their children's education. This Court should rule in favor of Respondents to foster and grow the continued independence of charter schools in Oklahoma.

A. Charter schools are designed to allow educators to develop innovative teaching methods and improve opportunities and outcomes for students.

Though the charter school concept has been around since the late 1980s, Oklahoma's Charter Schools Act went into effect in 1999. 70 O.S. § 3-130, *et seq.* The next year Independence Enterprise Middle School became Oklahoma's first charter school. [Charter: A New Era](https://www.oklahoman.com/story/news/2000/03/11/charter-a-new-era/62207385007/), *The Oklahoman* (March 11, 2000, 12:00 AM), <https://www.oklahoman.com/story/news/2000/03/11/charter-a-new-era/62207385007/>. The Act's constitutionality was subsequently challenged and upheld in *Indep. Sch. Dist. No. 1 of Tulsa Cnty*,

Oklahoma v. Oklahoma State Dep't of Educ. Order granting Defendant's Motion for Summary Judgment, May 29, 2009, CJ-2007-11116 (Okla. Cnty. Dist. Ct.). The Charter Schools Act's purpose listed seven goals:

1. Improve student learning;
2. Increase learning opportunities for students;
3. Encourage the use of different and innovative teaching methods;
4. Provide additional academic choices for parents and students;
5. Require the measurement of student learning and create different and innovative forms of measuring student learning;
6. Establish new forms of accountability for schools; and
7. Create new professional opportunities for teachers and administrators including the opportunity to be responsible for the learning program at the school site.

70 O.S. § 3-131. It was not just empty legislative language. As Judge Ricks pointed out in the Oklahoma County case mentioned above, "the purposes of the Charter School Act include providing additional academic choices for parents and students, encouraging the use of different, innovative teaching methods, and increasing learning opportunities for students. The establishment of charter schools under the Act clearly serves those purposes." *Indep. Sch. Dist. No. 1 of Tulsa Cnty, Oklahoma*, CJ-2007-11116.

B. Charter schools have become an important and successful part of Oklahoma's educational system.

While some schools have seen more success meeting these goals than others, the growth of charter schools in Oklahoma is a testament to the desire of Oklahoma parents to provide their students with an educational environment that best suits their needs. According to the Oklahoma State Department of Education's website, there are

now over 20 charter schools¹ and 7 virtual charter schools² in Oklahoma. And they deliver big results for Oklahoma parents and students.

Oklahoma charter schools have proven to be a great option for families and students, but especially for minority students. A recent report based on a ten-year study found Oklahoma charter schools near the top of educational achievement as compared to charter schools in other states. Paul E. Peterson & M. Danish Shakeel, The Nation's Charter Report Card, Education Next (Nov. 14, 2023) <https://www.educationnext.org/nations-charter-report-card-first-ever-state-ranking-charter-student-performance-naep/>. At the same time Oklahoma charter schools are performing near the top of their charter school peers in other states, their students have “the smallest disparities between white charter students and both Black and Hispanic charter students.” *Id.* In other words, Oklahoma charter schools are not only providing additional educational options for Oklahoma families—they are the best at reducing racial disparities in education. Remarkably, Oklahoma charter schools have achieved remarkable academic success and reduced educational disparities while funded at much lower amounts than their government-run counterparts—funded at only \$6,890 per pupil in 2019. *Id.*

Santa Fe South Pathways Middle College: One example of an Oklahoma charter school delivering for families and students is Santa Fe South Pathways Middle College (Pathways). Located in South Oklahoma City, Santa Fe South's student

¹ <https://sde.ok.gov/current-charter>

² <https://svcsb.ok.gov/>

population is over 95% Hispanic. Some of those students join Pathways which allows the student to begin taking classes on the Oklahoma City Community College campus for college credit. Students are able to earn an associate degree and high school diploma at local public school, Oklahoma City Community College (June 12, 2019) <https://www.occc.edu/news/2019/pathways/>.

The concurrent enrollment allows some of Santa Fe South's students to graduate high school with an associate degree. *Id.* Pathways students also give back to their community through community service hours. *Id.* Pathways is but one example of the many ways in which Oklahoma charter schools are innovative in ways that benefit Oklahoma students.

II. Catholic schools have also become an integral part of Oklahoma's educational landscape.

Catholic schools have been a part of the educational landscape in Oklahoma from the beginning. It is not hard to see why so many parents choose Catholic schools for their children. In the 2018-19 school year, Catholic high schools boasted a 98% graduation rate—well above the 86% average for public high schools. Anayat Durrani, Considering Catholic School? Here's What to Know, U.S. News (April 18, 2023), <https://www.usnews.com/education/k12/articles/considering-catholic-school-heres-what-to-know#>. Catholic schools in Oklahoma seem to do even better.

According to the Oklahoma City Archdiocese website, Catholic schools in its diocese

have a 100% graduation rate.³ And, contrary to popular belief, they accept anyone regardless of religious beliefs.

The slow decline of Catholic schools in Oklahoma and across the country has resulted in cultural decay. Regardless of whether one ascribes to the specific doctrines of the Catholic faith (the undersigned does not), there is no denying the deterioration of religious institutions in America—including Catholic schools—is detrimental to our communities. In his 2019 book, American Enterprise Institute Scholar Timothy Carney described the effect of Catholic school closures.

In neighborhoods where Catholic schools unexpectedly shut down, residents reported more public drinking, drug dealing, and drug use, and more teenagers causing disturbances. Graffiti, litter, and abandoned buildings became more prevalent. Most important, after a parish school closed unexpectedly, people in that neighborhood were less likely to agree that “people around here are willing to help their neighbors,” or “this is a close-knit neighborhood,” or “people in this neighborhood can be trusted.” Disorder, distrust, and fear all rise up when a Catholic school leaves an urban neighborhood.

Timothy P. Carney, Alienated America: Why Some Places Thrive While Others Collapse 144 (2019). Of course, the inverse is also true. A community can be improved by the opening of a new Catholic School.

Cristo Rey: One school already changing the lives of its students is Cristo Rey in Oklahoma City. Opening its doors in 2018, Cristo Rey serves low-income students by providing them with a college preparatory education while also instilling values of hard work. Staci Elder Hensley, Cristo Rey showing inner-city students the path to

³ <https://archokc.org/schools>

success, OCPA (Sept. 19, 2018), <https://ocpathink.org/post/independent-journalism/cristo-rey-showing-inner-city-students-the-path-to-success>. “Cristo Rey students spend four days a week in class and the fifth in a tailored work-study program where they’re placed in a professional environment with one of the school’s multiple corporate partners.” *Id.* Cristo Rey students are given a robust academic instruction that prepares them for college as well as religious instruction that works to form the whole person. *Id.*

Charter schools are known for innovative educational methods. Catholic schools, on the other hand, are most-commonly known for their adherence to a time-tested educational model that has served centuries of scholars. Schools like Cristo Rey blend the enduring value of Catholic education with the innovation charter schools are known for. Parents need more options like these schools—not less.

III. Denying a charter to a Catholic school leads to peculiar results in light of recent education cases decided by the United States Supreme Court.

In 2017, the United States Supreme Court decided *Trinity Lutheran Church of Columbia, Inc. v. Comer*. In that case, the Court held the state cannot “deny[] a qualified religious entity a public benefit solely because of its religious character.” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 466 (2017). Two years later, the Court extended the holding in *Trinity Lutheran*—requiring the denial of a scholarship program on the basis of religion to overcome strict scrutiny. *Espinoza v. Montana Dep’t of Revenue*, 140 S. Ct. 2246, 2257 (2020). And contrary to claims by the Attorney General of Oklahoma, the *Espinoza* Court could not see “how

the no-aid provision promotes religious freedom.” *Id.* at 2261. Finally, in 2022, the United States Supreme Court held Maine’s “‘nonsectarian’ requirement for its otherwise generally available tuition assistance payments violates the Free Exercise Clause of the First Amendment.” *Carson v. Makin*, 596 U.S. 767, 789 (2022). Of course, by the time *Trinity Lutheran* was decided, this Court had already upheld the constitutionality of the Lindsey Nicole Henry Scholarship for Students with Disabilities Act against a similar attack under Oklahoma’s so-called “no-aid” clause. *Oliver v. Hofmeister*, 2016 OK 15, ¶ 27, 368 P.3d 1270, 1277.

With this legal framework in mind, it is not difficult to see what a peculiar result the Attorney General’s position puts the state in. The trio of United States Supreme Court cases, as well as the *Oliver* decision from this Court, prohibit states from denying faith-based schools from participating in school-choice programs—and rightfully so. But to deny a charter based on religious affiliation creates an odd situation as Andy Smarick has pointed out.

We now have some largely autonomous, nonprofit-run, government-funded schools we call “public” and some largely autonomous, nonprofit-run, government-funded schools we call “private.” The former are charters; the latter can be faith-based schools supported by voucher-style programs. In practice, this means a Montessori, project-based-learning, or classical-education organization could run a school in either category. A faith-based group, however, can only be found in the latter. To put a fine point on it, a faith-based school can receive substantial public funding (e.g., via vouchers) while remaining free of most government oversight, but it can’t join the charter sector and accept more public accountability.

Andy Smarick, The extended case for faith-based charter schools, Thomas Fordham Institute (April 13, 2012), <https://fordhaminstitute.org/national/commentary/extended-case-faith-based-charter-schools>.

Furthermore, the Attorney General's position would prohibit one of the oldest and most successful educational institutions in the world from even *applying* to run a charter school. One of the benefits of charter schools is that anyone willing to put in the work can theoretically apply for a charter. Under Oklahoma law, the only qualification to apply for a charter is to take 10 hours of instruction. Under the Attorney General's interpretation of the law, almost anyone off the street can apply to start a charter school, but the Catholic Church, which has an impressive and enduring track record of academic success would be prohibited.

Of course, understood rightly, the recent trio of cases discussed above from the United States Supreme Court demonstrate that the Oklahoma Statewide Virtual Charter School Board was justified in refusing to deny a charter to St. Isidore of Seville Catholic Virtual Charter School simply because it is nonsectarian. To paraphrase the United States Supreme Court in *Espinoza*, a "State need not [allow for charter schools]. But once a State decides to do so, it cannot disqualify some [charter schools] solely because they are religious." Doing so is not only contrary to law, but bad education policy.

CONCLUSION

For the foregoing reasons, the Attorney General's Petition should be denied.

Respectfully submitted,



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I hereby certify that on this ¹⁸~~17~~th day of January, 2024, a true and correct copy of

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