



**ORIGINAL**

FILED  
SUPREME COURT  
STATE OF OKLAHOMA

JAN - 8 2024

JOHN D. HADDEN  
CLERK

**IN THE SUPREME COURT OF THE STATE OF OKLAHOMA**

GENTER DRUMMOND, Attorney General for the  
State of Oklahoma, ex rel. STATE OF OKLAHOMA

*Petitioner,*

v.

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

*Respondents.*

Case No: 121,694

**BRIEF OF AMICUS CURIAE  
SETON EDUCATION PARTNERS IN SUPPORT OF RESPONDENTS**

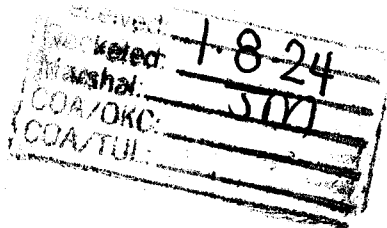
RICHARD D. WHITE, JR.\*  
JOE M. FEARS  
BARBER & BARTZ, P.C.  
525 South Main Street, Suite 800  
Tulsa, OK 7410  
(918) 599-7755  
rwhite@barberbartz.com

GORDON D. TODD (*pro hac vice*)  
DINO L. LAVERGHETTA (*pro hac vice*)  
MACKENZI J.S. EHRETT (*pro hac vice*)  
SIDLEY AUSTIN LLP  
1501 K Street, N.W.  
Washington, D.C. 20005  
(202) 736-8000  
gtodd@sidley.com

Mikayla Culbertson (*pro hac vice*)  
Sidley Austin LLP  
2021 McKinney Ave. #2000  
Dallas, TX 75201  
(214) 981-3300

*Counsel for Amicus Curiae*

\* Counsel of Record



January 4, 2024

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

GENTER DRUMMOND, Attorney General for the  
State of Oklahoma, ex rel. STATE OF OKLAHOMA

*Petitioner,*

v.

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

*Respondents.*

Case No: 121,694

**BRIEF OF *AMICUS CURIAE***  
**SETON EDUCATION PARTNERS IN SUPPORT OF RESPONDENTS**

RICHARD D. WHITE, JR.\*  
JOE M. FEARS  
BARBER & BARTZ, P.C.  
525 South Main Street, Suite 800  
Tulsa, OK 7410  
(918) 599-7755  
rwhite@barberbartz.com

GORDON D. TODD (*pro hac vice*)  
DINO L. LAVERGHETTA (*pro hac vice*)  
MACKENZI J.S. EHRETT (*pro hac vice*)  
SIDLEY AUSTIN LLP  
1501 K Street, N.W.  
Washington, D.C. 20005  
(202) 736-8000  
gtodd@sidley.com

Mikayla Culbertson (*pro hac vice*)  
Sidley Austin LLP  
2021 McKinney Ave. #2000  
Dallas, TX 75201  
(214) 981-3300

*Counsel for Amicus Curiae*

January 4, 2024

\* Counsel of Record

## INDEX

INTERESTS OF <i>AMICUS CURIAE</i> .....	1
SUMMARY OF ARGUMENT .....	2

### CASES

<i>Peltier v. Charter Day Sch., Inc.</i> , 37 F.4th 104 (4th Cir. 2022), <i>cert. denied</i> , 143 S. Ct. 2657 (2023) .....	3
<i>Rendell-Baker v. Kohn</i> , 457 U.S. 830 (1982) .....	2

### STATUTES

42 U.S.C. § 1983 .....	2
------------------------	---

ARGUMENT .....	4
----------------	---

I. FORTY YEARS OF PRECEDENT ESTABLISH THAT INDEPENDENT SCHOOLS ARE NOT STATE ACTORS.....	4
---	---

### CASES

<i>Am. Mfrs. Mut. Ins. Co. v. Sullivan</i> , 526 U.S. 40 (1999) .....	5
<i>Carson v. Makin</i> , 596 U.S. 767 (2022) .....	9
<i>Caviness v. Horizon Cmty. Learning Ctr., Inc.</i> , 590 F.3d 806 (9th Cir. 2010) .....	7
<i>Howell v. Father Maloney's Boys' Haven, Inc.</i> , 976 F.3d 750 (6th Cir. 2020) .....	6
<i>Jackson v. Metro. Edison Co.</i> , 419 U.S. 345 (1974) .....	9, 10, 11
<i>Lindke v. Freed</i> , 37 F.4th 1199 (6th Cir. 2022) .....	5, 6
<i>Logiodice v. Trs. of Me. Cent. Inst.</i> , 296 F.3d 22 (1st Cir. 2002) .....	7, 8, 12
<i>Lugar v. Edmondson Oil Co.</i> , 457 U.S. 922 (1982) .....	5

<i>Manhattan Cmty. Access Corp. v. Halleck</i> , 139 S. Ct. 1921 (2019) .....	5, 9
<i>Nat'l Coll. Athletic Ass'n v. Tarkanian</i> , 488 U.S. 179 (1988) .....	5
<i>Peltier v. Charter Day Sch., Inc.</i> , 37 F.4th 104 (4th Cir. 2022), <i>cert. denied</i> , 143 S. Ct. 2657 (2023) .....	4, 8, 9, 11
<i>Rendell-Baker v. Kohn</i> , 457 U.S. 830 (1982) .....	5, 6
<i>Robert S. v. Stetson Sch., Inc.</i> , 256 F.3d 159 (3d Cir. 2001).....	8
<i>West v. Atkins</i> , 487 U.S. 42 (1988) .....	11

**STATUTES**

42 U.S.C. § 1983 .....	5, 7, 11
------------------------	----------

**OTHER AUTHORITIES**

Dick M. Carpenter II & Krista Kafer, <i>A History of Private School Choice</i> , 87 Peabody J. of Educ. (2012) .....	10
W. JEYNES, AMERICAN EDUCATIONAL HISTORY: SCHOOL, SOCIETY, AND THE COMMON GOOD (2007).....	10
DONALD K. SHARPES, ADVANCED EDUCATIONAL FOUNDATIONS FOR TEACHERS: THE HISTORY, PHILOSOPHY, AND CULTURE OF SCHOOLING (2001).....	10
<b>II. REDUCING OKLAHOMA’S CHARTER SCHOOLS TO STATE ACTORS WOULD DESTROY THE INNOVATION THAT CHARTER SCHOOLS ARE INTENDED TO FOSTER.</b> ....	12

**CASES**

<i>Carson v. Makin</i> , 596 U.S. 767 (2022) .....	21
<i>Espinoza v. Mont. Dept. of Revenue</i> , 140 S. Ct. 2246 (2020).....	21
<i>Goss v. Lopez</i> , 419 U.S. 565 (1975) .....	19

<i>Logiodice v. Trs. of Me. Cent. Inst.</i> , 296 F.3d 22 (1st Cir. 2002).....	12
<i>Maboney Area Sch. Dist. v. B.L. ex rel Levy</i> , 141 S. Ct. 2038 (2021).....	19
<i>Patrick v. Success Acad. Charter Sch., Inc.</i> , 354 F. Supp. 3d 185 (E.D.N.Y. 2018).....	20
<i>Tinker v. Des Moines Ind. Cmty. Sch. Dist.</i> , 393 U.S. 503 (1969).....	19
<i>Trinity Lutheran Church of Columbia, Inc. v. Comer</i> , 137 S. Ct. 2012 (2017).....	21
<i>United States v. Virginia</i> , 518 U.S. 515 (1996).....	17

**STATUTES**

34 C.F.R. § 106.34(C)(1).....	17
42 U.S.C. § 1983.....	17, 19

**OTHER AUTHORITIES**

Am. Ass'n of Univ. Women, <i>Why So Few?</i> (Feb. 2010), <a href="https://bit.ly/3T14pBR">https://bit.ly/3T14pBR</a> .....	16
Melinda D. Anderson, <i>The Resurgence of Single-Sex Education</i> , <i>The Atlantic</i> (Dec. 22, 2015), <a href="https://bit.ly/3V6n3d4">https://bit.ly/3V6n3d4</a> .....	16
Lyria Boast, et al., <i>Learning in Real Time: How Charter Schools Served Students During COVID-19 Closures</i> , Nat'l All. of Pub. Schs. (Aug 2020), <a href="https://bit.ly/3T0Vv7p">https://bit.ly/3T0Vv7p</a> .....	14
Gerald J. Brunetti, <i>Resilience Under Fire: Perspectives on the Work of Experienced, Inner City High School Teachers in the United States</i> <i>Teaching &amp; Teacher Edu.</i> 812 (2006).....	18
Dick M. Carpenter II & Krista Kafer, <i>A History of Private School Choice</i> , 87 <i>Peabody J. of Educ.</i> (2012).....	12
David S. Cohen & Nancy Levit, <i>Still Unconstitutional: Our Nation's Experiment With State Sponsored Sex Segregation in Education</i> , 44 <i>Seton Hall L. Rev.</i> 339 (2014).....	17
David J. Deming, <i>Does School Choice Reduce Crime?</i> <i>Educ. Next</i> 12, no. 2 (Spring 2012), <a href="https://bit.ly/3fMaYKd">https://bit.ly/3fMaYKd</a> .....	15
Will Dobbie & Roland G. Fryer, Jr., <i>The Medium-Term Impacts of High-Achieving Charter Schools</i> , <i>J. Pol. Econ.</i> 123, no. 5 (Oct. 2015), <a href="https://bit.ly/3fMaTWV">https://bit.ly/3fMaTWV</a> .....	15

William C. Duncan, <i>Social Benefits of Religious Schools Extend Beyond Education</i> , Sutherland Inst. (Aug. 12, 2021), <a href="https://sutherlandinstitute.org/social-benefits-of-religious-schools-extend-beyond-education/">https://sutherlandinstitute.org/social-benefits-of-religious-schools-extend-beyond-education/</a> .....	21
Max Eden, <i>Issues 2020: Charter Schools Boost Results for Disadvantaged Students and Everyone Else</i> , Manhattan Inst. (Jan. 28, 2020), <a href="https://bit.ly/3rQklvf">https://bit.ly/3rQklvf</a> .....	15
Crystal Amiel M. Estrada, <i>et al.</i> , <i>Religious Education Can Contribute to Adolescent Mental Health in School Settings</i> , Int'l J. of Mental Health Systems (2019).....	20
MILTON FRIEDMAN, <i>CAPITALISM AND FREEDOM</i> (1962) .....	12
Philip M. Gleason, <i>What's the Secret Ingredient? Searching for Policies and Practices that Make Charter Schools Successful</i> , Mathematica Policy Research Working Paper No. 47 (July 2016).....	18
Amy Robertson Hayes, <i>et al.</i> , <i>The Efficacy of Single-Sex Education: Testing for Selection and Peer Quality Effects</i> , in <i>Sex Roles</i> (Nov. 2011), <a href="https://bit.ly/3fjCVCl">https://bit.ly/3fjCVCl</a> .....	16
Teresa A. Hughes, <i>The Advantages of Single-Sex Education</i> , 23 Nat'l Forum of Educational Admin. & Supervision J. 2 (2006), <a href="https://bit.ly/2swFNGX">https://bit.ly/2swFNGX</a> .....	15
Int'l Coal. of Girls Schs., <i>Why Girls' Schools</i> , <a href="https://bit.ly/3M6SbW3">https://bit.ly/3M6SbW3</a> .....	17
Anthony Jackson, <i>et al.</i> , <i>Four Reasons Why You Should Teach About Religion in School</i> , Education Week (Apr. 5, 2014), <a href="https://www.edweek.org/teaching-learning/opinion-four-reasons-why-you-should-teach-about-religion-in-school/2014/04">https://www.edweek.org/teaching-learning/opinion-four-reasons-why-you-should-teach-about-religion-in-school/2014/04</a> .....	20
Zachary Jason, <i>The Battle Over Charter Schools</i> , Harv. Ed. Mag. (Summer 2017), <a href="https://bit.ly/3M69ExQ">https://bit.ly/3M69ExQ</a> .....	12, 13, 14, 15
Ted Kolderie, <i>Ray Buddee and the origins of the 'Charter Concept'</i> , Educ.   Evolving (June 2005), <a href="https://bit.ly/3fUvQPa">https://bit.ly/3fUvQPa</a> .....	13
Emily Langhorne, <i>Five Reasons Why Independent Charters Outperform In-District Autonomous Schools</i> , Forbes (Aug. 23, 2018), <a href="https://bit.ly/3T15UzF">https://bit.ly/3T15UzF</a> .....	14
The Leadership Conf. on Civ. & Human Rts., <i>Single-Sex Proposed Regulations Comments</i> (Apr. 23, 2004), <a href="https://bit.ly/3RFRjIS">https://bit.ly/3RFRjIS</a> .....	17
Anthony Martinez & Cheridan Christnacht, <i>Women Are Nearly Half of U.S. Workforce but Only 27% of STEM Workers</i> , U.S. Census Bureau (Jan. 26, 2021), <a href="https://bit.ly/3MaJfPj">https://bit.ly/3MaJfPj</a> .....	16
Laura McKenna, <i>Why Don't Suburbanites Want Charter Schools?</i> , The Atlantic (Oct. 1, 2015), <a href="https://bit.ly/3fMIOQj">https://bit.ly/3fMIOQj</a> .....	18

Rebecca Mead, <i>Success Academy's Radical Educational Experiment</i> , <i>The New Yorker</i> (Dec. 4, 2017) .....	18, 19
Eva Moskowitz, <i>Turning Schools Into Fight Clubs</i> , <i>WSJ</i> (Apr. 1, 2015), <a href="https://on.wsj.com/3CAfPH9">https://on.wsj.com/3CAfPH9</a> .....	19
Nat'l All. for Pub. Charter Schs., <i>Research and Data</i> , <a href="https://bit.ly/3C4TPmm">https://bit.ly/3C4TPmm</a> (last visited Oct. 12, 2022) .....	13
Nat'l Comm'n on Excellence in Edu., <i>A Nation at Risk: The Imperative for Educational Reform</i> (Apr. 1983), <a href="https://bit.ly/3rxgMK1">https://bit.ly/3rxgMK1</a> .....	13
Nat'l Ctr. For Educ. Stats., <i>Public Charter School Enrollment</i> (2022), <a href="https://bit.ly/3yhxLEa">https://bit.ly/3yhxLEa</a> .....	13
Kim Parker, <i>What's Behind the Growing Gap Between Men and Women in College Completion?</i> , <i>Pew Research</i> (Nov. 8, 2021) <a href="https://pewrsr.ch/3EhYZ0W">https://pewrsr.ch/3EhYZ0W</a> .....	16
James E. Ryan, <i>A Choice Question: School Choice and Educational Equity</i> , <i>Edu. Week</i> (Mar. 29, 2016), <a href="https://bit.ly/3V59ESH">https://bit.ly/3V59ESH</a> .....	14
TheodoreSizer & Phillip Whitten, <i>A Proposal for a Poor Children's Bill of Rights</i> , <i>PSYCH. TODAY</i> 62 (Aug. 1968).....	13
STEM Women, <i>Women in STEM USA Statistics</i> (May 21, 2021), <a href="https://bit.ly/3RBPxZh">https://bit.ly/3RBPxZh</a> .....	16
Kate Taylor, <i>At Success Academy, Charter Schools, High Scores and Polarizing Tactics</i> , <i>NY Times</i> (Apr. 6, 2015), <a href="https://nyti.ms/3M9XCnd">https://nyti.ms/3M9XCnd</a> .....	19
Debbie Veney & Drew Jacobs, <i>Voting With Their Feet: A State-Level Analysis of Public Charter School and District Public School Trends</i> , <i>Nat'l All. for Pub. Charter Schs.</i> (Sept. 2021), <a href="https://bit.ly/3V8lOdt">https://bit.ly/3V8lOdt</a> .....	13
Elizabeth Weil, <i>Teaching Boys and Girls Separately</i> , <i>N.Y. Times Mag.</i> (Mar. 2, 2008), <a href="https://nyti.ms/3Mgfgpd">https://nyti.ms/3Mgfgpd</a> .....	17

## INTERESTS OF *AMICUS CURIAE*

Seton Education Partners is a national 501(c)(3) not-for-profit education organization whose mission is to ensure that children in underserved communities develop the knowledge, skills, and character traits necessary to excel academically and pursue lives of meaning and purpose. Seton Education Partners operates multiple school models, and currently serves over 4,000 students. The organization's Romero Academies are private Catholic schools serving preschool–8th grade students on two campuses in Cincinnati, Ohio. Seton also operates charter schools: the Brilla Schools Network which serves elementary and middle school aged children in New York City, and Brillante Academy in Mission, TX, which currently serves preschool through 1st grade students, with plans to expand up to 8th grade. Seton Education Partners' goal is to provide educational opportunities that honor each child, parent, and teacher's inherent dignity, while also nurturing the whole person: mind, body and spirit.

Seton Education Partners serves families in underserved communities, and provides opportunities for those families to choose an academically excellent, character rich, and—for those who seek it—vibrantly Catholic education for their children. Seton Education Partners cannot offer a full Catholic education in all the jurisdictions it serves, however, become some—as Attorney General Drummond would do—deny charter school status to sectarian institutions. In those jurisdictions, Seton Education Partners offers a secular school day, and also offers “wrap-around” religious-based programming before and/or after the school day. Given the opportunity, Seton Education Partners would also offer fully Catholic education in those jurisdictions.

As an operator of charter schools, and as one who struggles to offer quality charter school programming under religiously discriminatory regimes, Seton Education Partners has a deep interest in ensuring that charter schools across the United States continue to have the freedom and flexibility to offer innovative educational experiences for their students. As an operator of Catholic schools, Seton



Education Partners is profoundly aware of the benefits a religious education affords students. Given the opportunity, Seton Education Partners would make Catholic charter school education available to underserved students and their families.

### SUMMARY OF ARGUMENT

The education of American youth has never been entrusted exclusively to the government. Private actors have always played an important, if not dominant, role in educating our country's children. During colonial times and in the early republic, nearly all children were educated in independent schools financed by community groups, charities, and, most notably, churches. Government-run schools providing universal education did not take hold until the mid-1800s, and even then, only in some communities. While the percentage of children educated in state-run public schools increased dramatically during the 20th century, private, parochial, and charter schools have continued to serve as robust alternatives to government schools. It is against this historical backdrop—and the Supreme Court's decision in *Rendell-Baker*—that the Attorney General's Petition must be judged.

In *Rendell-Baker v. Kohn*, the Supreme Court was asked to determine whether an independent school for students with substance-abuse and behavioral problems constituted a state actor for purposes of 42 U.S.C. § 1983, where that school received 90% to 99% of its funding from the government. 457 U.S. 830 (1982). The Court held that the school was not a state actor, based on three factors: (1) the government did not compel or coerce the conduct at issue; (2) there was not a symbiotic relationship between the school and the government regarding the conduct; and (3) the education of children who cannot be served by traditional public schools is not historically the exclusive function of the state. The Court's decision was not impacted by the fact that the school received nearly all its funding from the state nor that state law required the state to provide the educational services offered by the school.

In the forty years since that decision, three United States Courts of Appeal—the First, Third, and Ninth Circuits—have faithfully applied the *Rendell-Baker* factors to hold that independent schools, including charter schools, are not state actors, even where schools receive nearly all their funding from the state. Last year, in *Peltier v. Charter Day School, Inc.*, the Fourth Circuit split from this path, and, on its way to ruling that a school dress code was unconstitutional, reasoned that the educational function served by charter schools is a function that has traditionally been reserved to the government—reasoning foreclosed by both *Rendell-Baker* and our nation’s history. 37 F.4th 104 (4th Cir. 2022) (*en banc*). That was a profound misstep, and the Attorney General’s reliance on *Peltier* is deeply misplaced.

Charter schools were created out of a bipartisan belief that government-run public schools *cannot* properly serve all their student populations. Whereas wealthier families can find alternatives to government education through private and parochial schools, poorer—and predominantly minority—families can not. Charter schools provide all students this alternative. By design and definition, charter schools are run by independent entities that provide an alternative to government-run education. That independence frees charter schools by allowing them to offer innovative curricula and environments that government-run schools do not. If this Court were to hold that charter schools are state actors, the consequences would extend well beyond the inability of less affluent parents being able to provide their children with the benefits of a sectarian education. Such a ruling would more generally stifle the very innovations that charter schools were meant to create.

The Attorney General’s Petition should be denied.

## ARGUMENT

### I. FORTY YEARS OF PRECEDENT ESTABLISH THAT INDEPENDENT SCHOOLS ARE NOT STATE ACTORS.

The lynchpin of the Attorney General’s Petition is that charter schools are *government* actors, and thus subject to the federal Constitution’s Establishment Clause. Pet. at 11–12. He concludes that Oklahoma Statewide Virtual Charter School Board’s sponsorship of St. Isidore of Seville Virtual Charter School “pave[s] the way for a proliferation of the direct public funding of religious schools whose tenets are diametrically opposed by most Oklahomans” and “annihilate[e] the Establishment Clause.” Pet. at 1, 14.

This is an erroneous over-simplification of federal precedent. In fact, until last year, federal appellate courts across the country, in a line of cases dating back to the Supreme Court’s decision in *Rendell-Baker*, concluded that state-funded schools—like the virtual charter school at issue here—are *not* state actors. The Fourth Circuit’s decision in *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104 (4th Cir. 2022) (*en banc*), *cert. denied*, 143 S. Ct. 2657 (2023) was the first to reach a different—and manifestly incorrect—conclusion that misapplied the factors for evaluating state action set forth in *Rendell-Baker*. Fortunately, this Court is not bound to follow the erroneous *Peltier* reasoning. Instead, it should follow the Supreme Court’s guidance from *Rendell-Baker*, and the First, Third, and Ninth Circuit’s faithful application of that precedent to state-funded schools.

#### A. Since *Rendell-Baker*, Federal Courts Have Employed a Consistent Framework to Determine Whether a School Engaged in State Action.

Here, the question is simple: Is St. Isidore a state actor if the State has zero involvement in compelling or coercing the school’s intent to “create, establish, and operate the School as a Catholic School”? *see* Pet. at 3–4 (quoting St. Isidore application). The Supreme Court’s decision in *Rendell-Baker* requires that the question be answered a resounding “no.”

*Rendell-Baker* and its progeny arose as claims under 42 U.S.C. § 1983 for alleged constitutional violations by state actors. A plaintiff may succeed on a § 1983 claim only if a defendant acts “under color of” state law. 42 U.S.C. § 1983. Section 1983’s state-action requirement ensures that it does not cover “merely private conduct, [...] how[ever] discriminatory or wrongful.” *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999). “Careful adherence” to the requirement “preserves an area of individual freedom by limiting the reach of federal law and federal judicial power,” *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982), and promotes federalism by “avoid[ing] the imposition of responsibility on a State for conduct it could not control.” *Nat’l Coll. Athletic Ass’n v. Tarkanian*, 488 U.S. 179, 191 (1988). For these reasons, among others, a private entity can only “qualify as a state actor in a few limited circumstances.” *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019).

In *Rendell-Baker*, the Court explained that, to determine whether a private actor has engaged in state action for the purposes of § 1983, a court must ascertain whether “the alleged infringement of federal rights [is] fairly attributable to the State.” 457 U.S. at 838. The Court held that a school for children with drug, alcohol, behavioral problems and other special needs was not a state actor, despite the fact that: (1) the school received between 90% and 99% of its funding from the government; (2) nearly all the students were referred by the public school system or drug courts; (3) the public school systems paid the tuition for the students they referred; (4) the school issued diplomas certified by the public school system; and (5) the school was required to comply with detailed regulations concerning recordkeeping, student-teacher ratios, and personnel matters. *Id.* at 831–33.

Although the Court has recognized that making the “fairly attributable” determination requires a fact-specific inquiry, it has generally employed three tests: (1) “the ‘public function’ test,” (2) “the ‘state-compulsion’ test,” and (3) “the ‘nexus’ test.” *Lugar*, 457 U.S. at 939 (collecting cases); see *Lindke*

*v. Freed*, 37 F.4th 1199 (6th Cir. 2022) (Thapar, J.) (same); cf. *Howell v. Father Maloney’s Boys’ Haven, Inc.*, 976 F.3d 750, 752 (6th Cir. 2020) (Sutton, J.).

Under the “public function” test, the “question is not simply whether a private group is serving a “public function.”” *Rendell-Baker*, 457 U.S. at 842. Rather, the “question is whether the function performed has been ‘traditionally the *exclusive* prerogative of the State.’” *Id.* (emphasis added, citation omitted). The *Rendell-Baker* Court held that the education provided by the school—the provision of education to those who could not be served by traditional public school—was not such a function.

Under the “state compulsion” test, the question is whether the conduct at issue was compelled or coerced by the state. The *Rendell-Baker* Court held that the school’s determination to discharge the plaintiffs was not compelled by the state or influenced by state regulation.

Under the “nexus test,” the question is whether the conduct is “entwined with governmental policies” or subject to the government’s “management or control,” *Lindke*, 37 F.4th at 1203, such that there is a “symbiotic relationship” between the private actor and the state, *Rendell-Baker*, 457 U.S. at 843. The *Rendell-Baker* Court held that the “school’s fiscal relationship with the State is not different from that of many contractors performing services for the government.” *Id.* at 843.

The *Rendell-Baker* Court’s opinion was not changed by the fact that the school was subject to “extensive” regulation *unrelated* to the challenged conduct, nor by the fact that “virtually all of the school’s income was derived from government funding.” *Id.* at 840.

Prior to the Fourth Circuit’s *Peltier* decision, three circuit courts addressed whether conduct by privately-operated but a publicly funded schools constituted state action under the *Rendell Baker* framework. As in Oklahoma, none of the challenged conduct was compelled by the state. Thus, the core inquiry in each case was whether the schools were state actors under the “public function” test. All three concluded that there was no state action.

In *Caviness v. Horizon Community Learning Center, Inc.*, 590 F.3d 806 (9th Cir. 2010), the Ninth Circuit considered whether a private, non-profit charter school in Arizona engaged in state action under Section 1983 when it “took certain employment-related action with respect to a former teacher.” *Id.* at 808. Just as here, the relevant statute designated the charter school a “public” school and charged the publicly funded charter schools with providing learning that will “improve pupil achievement.” *Id.* at 808 n.1. Nonetheless, the court held the school was not a state actor.

Applying the “public function” test, the court held that education has never been the exclusive province of the state. In so holding, the court—citing *Rendell-Baker*—rejected plaintiff’s argument that the function at issue was the provision of “public educational services,” rather than simply “educational services.” *Id.* at 814–15. The plaintiff reasoned that, though “education in general” can be provided by anyone, “public educational services” are traditionally and exclusively the province of the state. *Id.* at 815. But the court explained that this argument was “foreclosed” by *Rendell-Baker*. *Id.* The court reasoned that, just as in *Rendell-Baker*, the “legislative policy choice” to “provide alternative learning environments at public expense” in “no way makes these services the exclusive province of the State.” *Id.* (quoting *Rendell-Baker*, 457 U.S. at 842). The court further held that the state’s statutory characterization of charter schools as “public” was not controlling. *Id.* at 815–16.

In *Logiodice v. Trustees of Maine Central Institute*, 296 F.3d 22 (1st Cir. 2002), the First Circuit considered whether a private corporation that contracted with a Maine public-school district to operate the *only* high school in the district—which had to “accept and educate all the school district’s students”—engaged in state action when it disciplined a student. *Id.* at 24–25. Again, the court held that the school was not a state actor because the function served by the school was not the exclusive province of the state.

The court reasoned that “[o]bviously, education is not and never has been a function reserved to the state. In Maine, as elsewhere, schooling, including high school education, is regularly and widely

performed by private entities; this has been so from the outset of this country’s history.” *Id.* at 26–27 (citation omitted). Like in *Caviness*, the court rejected the plaintiff’s arguments that attempt to “narrow and refine” the function that should be the subject of the court’s inquiry. *Id.* Specifically, the plaintiff argued that the court should consider only whether it has historically been the exclusive province of the state to provide “publicly funded education available to all students” in a “school of last resort.” *Id.* at 27. In rejecting this argument, the court held that “[t]here is no indication that the Supreme Court [in *Rendell*] had this kind of tailoring by adjectives in mind when it spoke of functions ‘exclusively’ provided by government.” *Id.*

Finally, in *Robert S. v. Stetson School, Inc.*, 256 F.3d 159 (3d Cir. 2001), the Third Circuit—in an opinion for the court by then-Judge Alito—held that a publicly-funded school that educated juvenile sex offenders did not engage in state action in its alleged mistreatment of a student. The Third Circuit held that the “public function” test was not satisfied, as the education of juvenile sex offenders has historically been provided only by private entities. *Id.* at 166. The court rejected the plaintiff’s argument that a different conclusion should be reached because the services the school provided were required by state law. *Id.* The court held that *Rendell-Baker* foreclosed this argument because the school in that case also provided services that a state statute required the state to provide. *Id.*

**B. The *Peltier* Decision Diverges from *Rendell-Baker*.**

Last year, in an outlier opinion, the Fourth Circuit concluded that a charter school qualified as a state actor based on: (1) an improper reformulation of the “public function” test; and (2) a consideration of additional factors that this Court has rejected. *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 120–21 (4th Cir. 2022) (en banc). In reaching that decision, the court conceded that neither *Rendell-Baker*’s “state-compulsion” test nor its “nexus” test were satisfied. *Id.* at 115.

The Fourth Circuit recognized that the “public function” test is satisfied only where the conduct at issue is “exclusively a state function.” *Id.* at 117. But the court then defined the conduct

in a manner that was outcome determinative. The court erroneously held that the appropriate question was whether “free,” “universal,” and “public” education has historically been an exclusive function of the state. *Id.* at 118. Essentially, the court held that operating a state-run public school is the exclusive province of the state. While that may be true, nothing in *Rendell-Baker* or cases applying that precedent support such a gerrymander. *Cf. Carson v. Makin*, 596 U.S. 767, 783–86 (2022) (“Maine’s formulation does not answer the question in this case; it simply restates it.”).

The Supreme Court “has stressed that ‘very few’ functions fall into” the category of exclusive state actions. *Halleck*, 139 S. Ct. at 1929 (quoting *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978)). Those few functions include “running elections and operating a company town.” *Id.* (collecting cases); *see Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974) (noting that the function must be “traditionally associated with sovereignty, such as eminent domain”). That means most functions “do not fall into that category”—including “running sports associations and leagues, administering insurance payments, operating nursing homes, providing special education, representing indigent criminal defendants, resolving private disputes, and supplying electricity.” *Halleck*, 139 S. Ct. at 1929.

Thus, in the context of schools, *Rendell-Baker* and its progeny require that courts analyze the *function* that the school fulfills without normative judgments or outcome-determinative modifiers. In *Rendell-Baker*, the Supreme Court held that the function was “education for students who could not be served by traditional public schools.” In *Caviness* and *Logiodice*, the courts held that the function was providing education or educational services. In *Robert S.*, the court held that the function was providing education to juvenile sex offenders. In *Peltier* too, the debate was whether the proper function the court should have analyzed was “education” or “alternative method[s] of primary education.” *Compare Peltier*, 37 F.4th at 119 (employing the former approach), *with Peltier*, 37 F.4th at 143–44 (Quattlebaum, J., concurring in part and dissenting in part) (arguing for the latter approach).



Either way, it is clear that the function has never been the exclusive province of the state and has not been “traditionally associated with sovereignty.” *Jackson*, 419 U.S. at 353.

“School choice predates America’s founding. Children in the colonial era and early republic were educated through a variety of independent schools financed by local communities, churches, and charities.” Dick M. Carpenter II & Krista Kafer, *A History of Private School Choice*, 87 Peabody J. of Educ., 337 (2012). Indeed, “churches . . . were the administrative centers for the vast majority of educational undertakings during” the Colonial Era all the way to the 1900s. *Id.* Most schools financed their operation through charity or tuition, which meant all children, no matter their socioeconomic level, could attend school.” *Id.*

“Although most Americans take for granted the presence of public schools, from their inception as a part of a national movement, these schools sparked controversy and political division.” W. JEYNES, *AMERICAN EDUCATIONAL HISTORY: SCHOOL, SOCIETY, AND THE COMMON GOOD* 145 (2007). “Common, public schools supported by general taxes for all students would not be established until the middle of the nineteenth century, and then only in scattered communities.” DONALD K. SHARPES, *ADVANCED EDUCATIONAL FOUNDATIONS FOR TEACHERS: THE HISTORY, PHILOSOPHY, AND CULTURE OF SCHOOLING* 253 (2001).

The availability of private and religious school choices for families “began to disappear [. . .] as ‘free’ public schooling displaced independent schools.” Carpenter II & Kafer, *supra* at 336. Nonetheless, homeschooling and private, parochial, and charter schools have continued to provide a robust alternative to state-run schools. As discussed in Section II, charter schools are just the most recent manifestations of school choice, intended to give poorer students the same choice available to middle-class and wealthy families via private and parochial schools.

This determination—that education has never been the exclusive province of the state and that there have always been alternatives to government-run schools—demonstrates the error of the

Fourth Circuit's decision. Contrary to the reasoning in *Peltier*, the conclusion that the State offers financial support or backing to an alternative to government-run schools is *not* impacted by the fact that:

- A charter school is almost exclusively funded by the state. *See Peltier*, 37 F.4th at 118. To the contrary, the *Rendell-Baker*, *Caviness*, *Logiodice*, and *Robert S.* courts all held that the schools were not state actors, despite receiving all or nearly all of their funding from the government.
- The State Constitution requires the state to provide free public schools. *See id.* at 117–18. In *Rendell-Baker* and *Robert S.*, the schools were not state actors, despite state laws requiring the states to offer the educational services provided by the schools. The fact that the states made the “legislative policy choice” to partially fulfill their obligations through private entities did not somehow transform those private entities into state actors.
- State law designates charter schools as “public.” *Id.* at 117. It is true that charter schools are state partners who subject themselves to a state regulatory regime. But that does not make them public actors under Section 1983, as Supreme Court precedent make clear. For example, in *Jackson*, the Court disregarded a state's statutory designation of a utility as “public” and instead found that the utility was not a state actor based on the fact that supplying a utility was not traditionally the exclusive prerogative of the state. *Jackson*, 419 U.S. at 353. Following such precedent, the *Caviness* court eschewed the statutory labeling of charter schools as public and instead faithfully analyzed the factors set forth in *Rendell-Baker*. The Fourth Circuit should have employed the same reasoning.

Finally, the Fourth Circuit's reliance on *West v. Atkins*, 487 U.S. 42 (1988), was misplaced. That case involved a prisoner who claimed that a doctor employed by the prison inflicted upon him cruel and unusual punishment. As the *Logiodice* court held, *Atkins'* reasoning is inapplicable here. “The

[*Atkins*] decision emphasized both that the plaintiff was literally a prisoner of the state (and therefore a captive to whatever doctor the state provided) and that the state had an affirmative constitutional obligation to provide adequate medical care to its prisoners [...].” 296 F.3d at 29. “By contrast,” the court continued, “the plaintiff in our case is not required to attend [the school]; and the Supreme Court has rejected any federal constitutional obligation on the state to provide education.” *Id.*

## II. REDUCING OKLAHOMA’S CHARTER SCHOOLS TO STATE ACTORS WOULD DESTROY THE INNOVATION THAT CHARTER SCHOOLS ARE INTENDED TO FOSTER.

Charter schools are, by design, alternatives to state-run public schools operated by private (*i.e.*, non-government) parties. This design gives charter schools greater independence and flexibility than State-run schools, and allows charter schools to adapt more quickly to their students’ individual needs. Although the Attorney General’s Petition raises only the question of sectarian charter schools, a ruling from this Court that Oklahoma’s charter schools are state actors would have far-reaching ramifications on the independence and flexibility the State’s charter schools otherwise enjoy.

### A. Charter Schools are Key to Education Innovation.

“The concept of private school choice—that is, government-sponsored school choice programs that allow families to choose private schools—is not new. The longest running of such programs originated more than 100 years ago in Maine and Vermont.” *Carpenter II & Kafer, supra* at 336. Charter schools, however, are relatively new players in the Nation’s education system.

After state-run schools became the primary mode of education in the United States, conservative “economists and liberal academics alike argued for school choice[.]” Zachary Jason, *The Battle Over Charter Schools*, Harv. Ed. Mag. (Summer 2017), <https://bit.ly/3M69ExQ>. Conservatives framed the argument in favor of allowing market forces, not government bureaucracies, to shape education. *E.g.*, MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 86–89 (1962). Liberals argued for the need to “decentraliz[e]” public schools, thereby “promot[ing] diversity, pluralism, responsiveness

to the needs of the community being served and, [...] greater efficiency.” Theodore Sizer & Phillip Whitten, *A Proposal for a Poor Children’s Bill of Rights*, PSYCH. TODAY 62 (Aug. 1968).

Charter schools were first proposed by Ray Buddee in the 1970s. Ted Kolderie, *Ray Buddee and the origins of the ‘Charter Concept’*, Educ. | Evolving (June 2005), <https://bit.ly/3fUvQPa>. But the movement did not take hold until the 1980s, after “think tanks and the federal government released a series of damning reports on public schools, most notably the Reagan Administration’s *A Nation at Risk: The Imperative for Education Reform*, [a] 1983 report that warned of a ‘rising tide of mediocrity.’” Jason, *supra*.

That report determined that the Nation’s education system was in crisis, cataloguing metrics showing that educational results were in a free-fall. For example, the Commission detailed a continuous and dramatic decline in test scores, a widening achievement gap between US students and foreign competitors, and a functional illiteracy rate among minority youth approaching 40%. Nat’l Comm’n on Excellence in Edu., *A Nation at Risk: The Imperative for Educational Reform* (Apr. 1983), <https://bit.ly/3rxgMK1>.

In 1991, Minnesota passed the first law allowing the formation of public charter schools. Nat’l Ctr. for Educ. Stats., *Public Charter School Enrollment* (2022), <https://bit.ly/3yhxLEa>. Currently, 45 States and the District of Columbia authorize the formation of public charter schools. *Id.* By the fall of 2019 (*i.e.*, pre-COVID-19), 3.4 million students were enrolled in charter schools. *Id.* Since the Pandemic, charter schools have experienced a 7% enrollment surge. Debbie Veney & Drew Jacobs, *Voting With Their Feet: A State-Level Analysis of Public Charter School and District Public School Trends*, Nat’l All. for Pub. Charter Schs. (Sept. 2021), <https://bit.ly/3V8lOdt>. Today, an estimated 3.6 million students are enrolled in charter schools. Nat’l All. for Pub. Charter Schs., *Research and Data*, <https://bit.ly/3C4TPmm> (last visited Oct. 12, 2022).

State laws governing charter schools vary widely, but the schools all have one thing in common: though state partners, “[by] their very nature, charter schools are independent” because they “operate outside the school district.” Lyria Boast, et al., *Learning in Real Time: How Charter Schools Served Students During COVID-19 Closures*, Nat’l All. of Pub. Schs. 2 (Aug 2020), <https://bit.ly/3T0Vv7p>. The schools’ charters grant them autonomy to develop curricula, policies, and budgets free from many of the regulations that bind state-run schools. Emily Langhorne, *Five Reasons Why Independent Charters Outperform In-District Autonomous Schools*, Forbes (Aug. 23, 2018), <https://bit.ly/3T15UzF>. Indeed, this is the primary purpose of charter schools: to give students the option to attend schools that are different—and hopefully better—than government schools. *Id.*

One goal of charter schools is to put poorer students on equal footing with their wealthier counterparts. The modern “propulsion toward school choice [...] has always been that way too few kids in America have been able to pick their schools, and way too many have been stuck in bad schools that they have no alternative to.” Jason, *supra* (quotation omitted). While wealthy and middle-class families can opt out of traditional public schools, sending their children to private and parochial schools, poorer families cannot. Charter schools—which are free to attend—provide these families an alternative to state-run public schools. See, e.g., James E. Ryan, *A Choice Question: School Choice and Educational Equity*, Edu. Week (Mar. 29, 2016), <https://bit.ly/3V59ESH>.

Because they are state partners yet remain independent, charter schools are free to craft a tailored learning experience that meets their students’ needs. Boast et al., *supra*. For some charter schools, this flexibility means designing a curriculum around a particular subject or skill set—such as college prep, STEM, or the Arts. *Id.* For others, the school is organized around a teaching method—such as Montessori—or have longer school days and calendars to accommodate working parents. *Id.* Through these innovations, charter schools are “finding better ways to serve students who have traditionally been underserved, and [are] delivering exceptional results.” *Id.* at 3.

Because charter schools can cater to students' unique needs, they offer a host of proven educational and social benefits to students. The greatest beneficiaries tend to be low-income and minority students. Jason, *supra*. According to one study, charter school offer low-income Black students 59 more days of math learning and 44 more days of reading education per year compared to government school counterparts. Max Eden, *Issues 2020: Charter Schools Boost Results for Disadvantaged Students and Everyone Else*, Manhattan Inst. (Jan. 28, 2020), <https://bit.ly/3rQklvf>. Another study found that among a group of charter schools in New York City, admission corresponded with decreased rates of teen pregnancy and likelihood of incarceration. Will Dobbie & Roland G. Fryer, Jr., *The Medium-Term Impacts of High-Achieving Charter Schools*, J. Pol. Econ. 123, no. 5 (Oct. 2015), <https://bit.ly/3fMaTWV>. A third study found that charter school attendance correlates with a significant decrease in arrests for drug and violent felonies. David J. Deming, *Does School Choice Reduce Crime?* Educ. Next 12, no. 2 (Spring 2012), <https://bit.ly/3fMaYKd>.

## **B. Characterizing Charter Schools as State Actors Stifles Innovation.**

Granting the Attorney General's Petition reduces all of Oklahoma's charter schools—not just St. Isidore—to state actors, and will have an unwelcome ripple effect on charter schools' ability to provide innovative educational choices and opportunities. Unfortunately, the students most impacted by such a decision will be students who otherwise lack the freedom of educational choice available to their more affluent peers. Reducing charter schools to an arm of the State quenches charter schools' ability to engage in innovative practices that have proven effective in affording students a superior education to that available in state-run schools. A few examples—unrelated to sectarian education—illustrate this point.

### **1. Single-Sex Charter Schools**

Single-sex schools provide enormous benefits to their students. *E.g.*, Teresa A. Hughes, *The Advantages of Single-Sex Education*, 23 Nat'l Forum of Educational Admin. & Supervision J. 2, 13 (2006),

<https://bit.ly/2swFNGX> (“[I]n single-sex settings teachers are able to design the curriculum to tailor to the individual needs of each sex.”); Amy Robertson Hayes, et al., *The Efficacy of Single-Sex Education: Testing for Selection and Peer Quality Effects*, in *Sex Roles* (Nov. 2011) at 10, <https://bit.ly/3fJCVCl> (“Girls attending a single-sex school outperformed those girls attending coeducational schools”). Accordingly, “since the 1990s, there has been a resurgence of interest in single-sex education in public schools [.]” Melinda D. Anderson, *The Resurgence of Single-Sex Education*, *The Atlantic* (Dec. 22, 2015), <https://bit.ly/3V6n3d4>.

There are numerous single-sex charter schools, many of which emphasize STEM education for girls.<sup>1</sup> Although women make up a majority of college applicants and incoming college students, they earn only 36% of STEM degrees. Kim Parker, *What’s Behind the Growing Gap Between Men and Women in College Completion?*, Pew Research (Nov. 8, 2021) <https://pewrsr.ch/3EhYZ0W>; STEM Women, *Women in STEM USA Statistics* (May 21, 2021), <https://bit.ly/3RBPxZh>. Because of this pipeline problem, although women make up *nearly half* of the Nation’s workforce, they account for *only 27%* of STEM workers. Anthony Martinez & Cheridan Christnacht, *Women Are Nearly Half of U.S. Workforce but Only 27% of STEM Workers*, U.S. Census Bureau (Jan. 26, 2021), <https://bit.ly/3MajfPj>. “By graduation, men outnumber women in nearly every science and engineering field, and in some, such as physics, engineering, and computer science, the difference is dramatic, with women earning only 20 percent of bachelor’s degrees.” Am. Ass’n of Univ. Women, *Why So Few?* (Feb. 2010) xiv, <https://bit.ly/3T14pBR>.

Girls-only STEM-based charter schools aim to fix this problem. And it works. “Graduates of girls’ schools are six times more likely to consider majoring in math, science, and technology and

---

<sup>1</sup> E.g., Girls Leadership Academy of Wilmington (NC); Chattanooga Girls Leadership Academy (TN); Hawthorn Leadership School for Girls (MO); Young Women’s Leadership Academy (TX).

three times more likely to consider engineering compared to girls who attend coed schools.” Int’l Coal. Of Girls Schs., *Why Girls’ Schools*, <https://bit.ly/3M6SbW3>.

If charter schools are state actors under Section 1983, there is a strong likelihood that they would face lawsuits and adverse decisions holding their single-sex policies impermissible. In 1996, this Court held that the categorical exclusion of women from the Virginia Military Institute (“VMI”)—then a public all-male college—violated the 14th Amendment’s equal protection guarantee. *United States v. Virginia*, 518 U.S. 515, 534 (1996). In dissent, Justice Scalia noted that the logic of the holding rendered “single-sex public education . . . unconstitutional.” *Id.* at 595 (Scalia, J., dissenting).

Notwithstanding Justice Scalia’s warning, the Department of Education has since adopted regulations allowing public single-sex education, provided that a “substantially equal” school is also operated for the opposite sex. 34 C.F.R. § 106.34(c)(1). It seems only a matter of time before advocates challenge the Department’s regulations and ask this Court to hold that its *VMI* decision renders single-sex primary and secondary schools unconstitutional. See David S. Cohen & Nancy Levit, *Still Unconstitutional: Our Nation’s Experiment With State Sponsored Sex Segregation in Education*, 44 Seton Hall L. Rev. 339 (2014); Elizabeth Weil, *Teaching Boys and Girls Separately*, N.Y. Times Mag. (Mar. 2, 2008), <https://nyti.ms/3Mgfgpd> (noting that the ACLU opposes all single-sex education); The Leadership Conf. on Civ. & Human Rts., *Single-Sex Proposed Regulations Comments* (Apr. 23, 2004), <https://bit.ly/3RFRjIS> (opposing single-sex public schools as unconstitutional, citing *VMI*). Based on the reasoning in *VMI*, there is a strong possibility that those challenges would be successful. And, if determined to be state actors, charter schools would be the subject to the courts’ decisions. The risk is clear: while wealthy and middle-class students would continue to reap the perceived benefits of single-sex education in private and parochial schools, their disadvantaged peers would not.



## 2. Charter Schools Emphasizing Stricter Discipline

Charter schools play a particularly important role in inner cities, where they offer a viable alternative to government-run schools. See Philip M. Gleason, *What's the Secret Ingredient? Searching for Policies and Practices that Make Charter Schools Successful*, Mathematica Policy Research Working Paper No. 47 at 9–10 (July 2016). Indeed, “[t]he greatest demand for charters comes from parents in urban areas like Newark and D.C. that have struggled with low-performing traditional public schools.” Laura McKenna, *Why Don't Suburbanites Want Charter Schools?*, *The Atlantic* (Oct. 1, 2015), <https://bit.ly/3fMIOQj>. In such areas, violence, lawlessness, and apathy often prevent motivated students from receiving the education that they deserve. E.g., Gerald J. Brunetti, *Resilience Under Fire: Perspectives on the Work of Experienced, Inner City High School Teachers in the United States*, 22 *Teaching & Teacher Edu.* 812, 812 (2006).

In such areas, charter schools offer demanding curricula and safe environments where inner-city students can learn. To operationalize that mission, the schools often employ strict rules and stringent discipline. This may involve tightly regulated codes of conduct, restrictions or prohibitions on cell phones or other electronic devices, and other restrictions that remove distractions from the formation experience. This approach has shown great success. The network of Success Academy Charter Schools is one example. Success Academy opened its first campus in Harlem in 2006, but today it operates four dozen New York City campuses that serve more than 10,000 students, most of them from traditionally disadvantaged socioeconomic groups.

Parents flock to the Academy, hoping to provide their children a path to success. With good reason. Among other things, Success Academy students outscore other students in the City by more than two-fold. Rebecca Mead, *Success Academy's Radical Educational Experiment*, *The New Yorker* (Dec. 4, 2017), <https://bit.ly/3CAeXCr> (“[N]inety-five per cent of Success Academy students achieved proficiency in math, and eighty-four per cent in English Language Arts; citywide, their respective rates

were thirty-six and thirty-eight per cent.”). Academy students are “testing dynamo[s]” who outscore even many of their counterparts in wealthy suburbs. Kate Taylor, *At Success Academy, Charter Schools, High Scores and Polarizing Tactics*, NY Times (Apr. 6, 2015), <https://nyti.ms/3M9XCnd>.

Part of the Academy’s recipe for success is a strict disciplinary policy. For example, in 2015, the schools suspended 11% of their students over the course of the school year, compared to the 4% suspension rate of the City’s public schools. Eva Moskowitz, *Turning Schools Into Fight Clubs*, WSJ (Apr. 1, 2015) <https://on.wsj.com/3CAfPH9>. In some Academy schools, up to 20% of students may be suspended at least once during the school year. Mead, *supra*.

The Academy and the thousands of families who choose to attend deem this discipline necessary to achieve the schools’ (undeniably) stellar results. Eva Moskowitz, the founder of Success Academy, explains that “we have found that when rules are clearly established and are fairly and consistently enforced, the learning environment is purposeful and joyful.” Moskowitz, *supra*. It also teaches children real-life skills: “In [the real world], when you assault your co-worker or curse out your boss, you don’t get a ‘restorative circle,’ you get fired.” *Id.* Accordingly, “[s]uspensions convey the critical message to students and parents that certain behavior is inconsistent with being a member of the school community.” *Id.*

Deeming charter schools state actors hinders the implementation of such disciplinary philosophies. This Court and the lower courts have heard numerous Section 1983 cases regarding school suspensions and expulsions, including cases alleging violation of free speech and due process rights. *E.g.*, *Goss v. Lopez*, 419 U.S. 565 (1975); *Mahoney Area Sch. Dist. v. B.L. ex rel Levy*, 141 S. Ct. 2038 (2021); *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). If adopted, the erroneous logic employed by the Fourth Circuit’s decision risks opening the floodgates to litigation against

charter schools, now deemed state actors.<sup>2</sup> Such litigation will cause poor and minority families to suffer the greatest loss. Middle-class and wealthy families will have the option to send their children to private schools with stricter codes of conduct if they deem such an environment necessary or beneficial. Poor and minority students will lack such an option.

\* \* \*

In sum, it is difficult to reliably predict the consequences facing charter schools if they are reduced to state actors. But one thing is certain: the likely result is an immediate risk of litigation that would threaten the very independence and innovation that charter schools need, that parents demand, and that students deserve.

**C. The Time is Ripe to Embrace Religious Charter Schools.**

There is no reason that charter school innovation could not expand to embrace explicitly sectarian charter schools. Families may prefer to enroll their children in religious schools for a host of reasons. For example, some families believe that “[r]eligious literacy is key to a well-rounded education,” that teaches students to “function as globally competent citizens” who “understand religion’s profound impact on history, politics, society, and culture.” Anthony Jackson, *et al.*, *Four Reasons Why You Should Teach About Religion in School*, Education Week (Apr. 5, 2014), <https://www.edweek.org/teaching-learning/opinion-four-reasons-why-you-should-teach-about-religion-in-school/2014/04>. Other research suggests that a religious education can be “instrumental” to improving adolescents’ mental health. Crystal Amiel M. Estrada, *et al.*, *Religious Education Can Contribute to Adolescent Mental Health in School Settings*, 13-28 *Int’l J. of Mental Health Systems* (2019). And, there is some evidence that students educated in religious school are more engaged citizens who

---

<sup>2</sup> In fact, in recent years, Success Academy has been sued for alleged due process violations related to suspensions and expulsions. The district courts have allowed those suits to proceed as a result of district court precedent employing the same flawed logic adopted by the Fourth Circuit. *See Patrick v. Success Acad. Charter Sch., Inc.*, 354 F. Supp. 3d 185, 209 (E.D.N.Y. 2018).

both vote and volunteer at higher rates than their peers. *See* William C. Duncan, *Social Benefits of Religious Schools Extend Beyond Education*, Sutherland Inst. (Aug. 12, 2021), <https://sutherlandinstitute.org/social-benefits-of-religious-schools-extend-beyond-education/>.

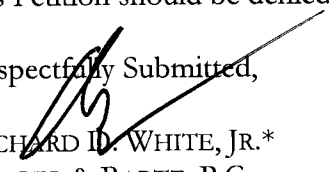
Indeed, Seton Education Partners, which operates both private Catholic schools and secular charter schools, recognizes the myriad academic and civic benefits that result from a religious education. It is Seton Education Partner's firm belief that the benefits of religious education would only multiply if religious charter schools—like St. Isidore's—are allowed to take root as the next phase of educational innovation.

Expanding charter schools to include religious schools is consistent with the trend in recent Supreme Court precedent. In the past decade alone, the Court has repeatedly struck down state laws excluding religions persons and entities from participating in otherwise generally available public benefits solely on the basis of their religion. *See Carson v. Makin*, 142 S Ct. 1987 (2022); *Espinoza v. Montana Dept. of Revenue*, 140 S. Ct. 2246 (2020); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). The Court has not yet specifically addressed the question of whether the Establishment Clause prohibits a State from directing funds toward a religious charter school. However, *Rendell Baker* and the Court's recent Free Exercise precedent suggest that the Court would rule that not only are sectarian charter schools permissible, but that, depending upon the circumstance, prohibition of sectarian charter schools may be unconstitutional.

### CONCLUSION

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

Respectfully Submitted,

  
RICHARD D. WHITE, JR.\*  
BARBER & BARTZ, P.C.  
525 South Main Street, Suite 800  
Tulsa, OK. 74103  
(918) 599-7755  
rwhite@barberbartz.com

GORDON D. TODD (*pro hac vice*)  
DINO L. LAVERGHETTA (*pro hac vice*)  
MACKENZI J.S. EHRETT (*pro hac vice*)  
SIDLEY AUSTIN LLP  
1501 K Street, N.W.  
Washington, D.C. 20005  
(202) 736-8000  
gtodd@sidley.com

MIKAYLA CULBERTSON (*pro hac vice*)  
SIDLEY AUSTIN LLP  
2021 McKinney Ave. #2000  
Dallas, TX 75201  
(214) 981-3300

\* Counsel of Record

*Counsel for Seton Education Partners*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was mailed on this 5<sup>th</sup> day of January 2024 by depositing it in the U.S. Mail, postage prepaid to:

Gentner Drummond  
Garry M. Gaskins, II  
Brad Clark  
Kyle Pepler  
William Flanagan  
Office of the Attorney General  
State of Oklahoma  
313 Northeast 21<sup>st</sup> Street  
Oklahoma City, OK 73105

*Attorneys for Petitioner*

Bryan Cleveland  
Oklahoma State Dept. of Education  
Oliver Hodge Building  
2500 North Lincoln Blvd.  
Oklahoma City, OK 73105

Anthony J. Ferate  
Andrew W. Lester  
Spencer Fane, LLP  
9400 North Broadway Extension, Ste 600  
Oklahoma City, OK 73114

Hiram Sasser  
Holly M. Randall  
First Liberty Institute  
2001 West Plano Parkway, Suite 1600  
Plano, TX 75075

*Attorney for Oklahoma state Department of  
Education and State Superintendent of Public  
Instruction, Ryan Walters, in his official  
capacity.*

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

*Attorneys for Oklahoma Statewide Virtual  
Charter School Board*

Cheryl Plaxico  
Plaxico Law Firm, PLLC  
923 North Robinson Ave., 5<sup>th</sup> Floor  
Oklahoma City, OK 73102

Philip a. Sechler  
Caleb Dalton  
Alliance Defending Freedom  
44180 Riverside Parkway  
Lansdowne, Virginia 20176

*Attorneys for Statewide Virtual Charter School  
Board*

Benjamin Odom  
John H. Sparks  
Michael W. Ridgeway  
Lisa M. Millington  
Odom & Sparks, PLLC  
2500 McGee Drive, Suite 140  
Norman, OK 73072

Patrick Elliot  
Freedom from Religion Foundation  
P.O. Box 750  
Madison, WI 53701

Alex J. Luchenitser  
Kenneth D. Upton, Jr.  
Kalli A. Joslin  
Jenny Samuels  
Sarah Taitz  
Americans United for Separation  
of Church and State  
1310 L. Street NW, Suite 200  
Washington, DC 20005

Daniel Mach  
Heather L. Weaver  
American Civil Liberties Union Foundation  
915 15<sup>th</sup> Street NW, Suite 600  
Washington DC 20005

Robert Kim  
Jessica Levin  
Wendy Lecker  
Education Law Center  
60 Park Place, Suite 300  
Newark, NJ 07102

*Attorneys for Melissa Abdo, Krystal Bonsall,  
Brenda Lene, Michele Medley, Dr. Bruce  
Prescott, Rev. Mitch Randall, and Rev. Dr.  
Lori Walker*

Randall J. Yates  
Crowe & Dunlevy  
222 north Detroit Ave., Suite 600  
Tulsa, OK 74120

Melanie Wilson Rughani  
Crowe & Dunlevy  
324 N. Robinson Ave., Suite 100  
Oklahoma City, OK 73102

*Attorneys for National Alliance for Public  
Charter Schools*

M. Scott Proctor  
Dechert LLP  
1900 K Street, NW  
Washington, DC 20006

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

*Attorneys for Intervenor St. Isidore of Seville  
Catholic Virtual School*



---

Richard D. White, Jr.