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; ROBERT FRANKLIN, Chairman of the Oklahoma Statewide Virtual Charter School Board for the First Congressional District; WILLIAM PEARSON, Member of the Oklahoma Statewide Charter School Board for the Second Congressional District; NELLIE TAYLOE SANDERS, Member of the Oklahoma Statewide Charter School Board for the Third Congressional District; BRIAN BOBEK, Member of the Oklahoma Statewide Charter School Board for the Fourth Congressional District; and SCOTT STRAWN, Member of the Oklahoma Statewide Charter School Board for the Fifth Congressional District,

Respondents,

ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL,

Intervenor.

Case No. MA-121694

INTERVENOR ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL'S BRIEF IN RESPONSE TO PETITIONER'S APPLICATION AND PETITION

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INTRODUCTION

In 1999, the Oklahoma legislature enacted the Oklahoma Charter Schools Act (the "Act"), inviting both public and private organizations to operate charter schools to "promote a diversity of educational choices" for Oklahoma families. 70 O.S. § 3-134(I)(3). Oklahoma partners with these organizations to "[i]ncrease learning opportunities for students"; "[e]ncourage the use of different and innovative teaching methods"; and "[p]rovide additional academic choices for parents and schools." 70 O.S. § 3-131(A). To free up educators to achieve these goals, the Act affords them substantial flexibility to craft curricula and run their schools. 70 O.S. § 3-136(A)(3), (5). The Act has fostered a diverse array of charter school options for families—from schools that focus on science, engineering, and math to those that promote fine arts or language immersion. Yet while the Act invites and encourages this abundance of educational models within charter schools, it purports to exclude *any and every* school that is religious. 70 O.S. § 3-136(A)(2). That exclusion is unlawful under both state and federal law and this Court must not accept Petitioner's invitation to enforce it.

First, the Oklahoma Constitution does not require any such exclusion, and Oklahoma law forbids it. As this Court has twice held, Article II, Section 5 prohibits the State from distributing *gratuitous* benefits to religious entities. But it does not prohibit the State from disbursing funds to private religious entities who in turn provide a substantial benefit to the State, such as a new charter-school opportunity for families in Oklahoma. And the Oklahoma Religious Freedom Act ("ORFA") affirmatively *prohibits* the State from depriving any entity of an otherwise available benefit solely because it is religious. *See* 70 O.S. § 254(B), (D).

Second, the First Amendment to the U.S. Constitution bars the State from enforcing any such discriminatory exclusion, regardless. Just last year, the U.S. Supreme Court held for the third time in the past decade that the First Amendment's Free Exercise Clause prohibits a state from denying a generally available public benefit to a school solely because it is religious. *Carson v. Makin*, 142 S. Ct. 1987, 2002 (2022). As former Attorney General John O'Connor explained, these cases make clear that "[t]he State cannot outsource operation of entire schools

to private entities with 'critical cultural, organizational, and institutional characteristics' that the State desires to see reproduced . . . and then retain the ability to discriminate against private entities who wish to exercise their religious faith." PA447 (citations omitted).[1]

Exercising that fundamental freedom, the Archdiocese of Oklahoma City and the Diocese of Tulsa applied to the Oklahoma Statewide Virtual Charter Board ("the Board") to operate St. Isidore of Seville Catholic Virtual School ("St. Isidore"), a school "dedicated to academic excellence" that would "educate the entire child: soul, heart, intellect, and body," for interested families across Oklahoma. PA078. In June, the Board exercised the authority granted to it by the State to approve the application. And, on October 16, the Board and St. Isidore executed the contract under which St. Isidore will operate. PA001–20. Petitioner now asks this Court to contort Oklahoma law, ignore the First Amendment, and nullify that contract.

The Petition is plainly wrong on the merits. St. Isidore is eligible to operate its virtual charter school under Oklahoma law and the U.S. Constitution. Text and precedent make plain that neither the Oklahoma Constitution nor the federal Establishment Clause bars St. Isidore from operating. And both ORFA and the U.S. Constitution's Free Exercise Clause prohibit Oklahoma law from excluding a private religious entity like St. Isidore from the generally available program created by the Act. Rather than eliminate this innovative educational opportunity for families, this Court should accept original jurisdiction, reject Petitioner's attack on St. Isidore's free exercise of religion, and dismiss the Petition.

BACKGROUND

In January 2023, the Archbishop of the Archdiocese of Oklahoma City and the Bishop of the Diocese of Tulsa incorporated St. Isidore as an Oklahoma nonprofit corporation. PA310. Shortly thereafter, St. Isidore submitted an application to the Board for it to sponsor St. Isidore as a charter school, and then a revised application on May 25, 2023. The application explained that St. Isidore would "empower[] and prepare[] students for a world of opportunity and a

[1] "PA" refers to Petitioner's Appendix.

lifetime of learning" through "an interactive learning environment that is rooted in virtue, rigor and innovation," in accordance with the school's Catholic faith. PA078, 092–93. It made clear that St. Isidore would offer this opportunity to "any and all students" who choose to attend, including "those of different faiths or no faith." PA113. On October 16, 2023, the parties executed a charter contract. The contract will commence on July 1, 2024. PA004.

Days later, the Attorney General filed this Petition against the Board. He seeks a judgment declaring the existence of a school like St. Isidore illegal under 70 O.S. § 3-136(A)(2) and a writ of mandamus ordering the Board to rescind the contract. According to the Attorney General, the Act and the Oklahoma Constitution bar St. Isidore from receiving state funds merely because it is religious. Moreover, he contends that St. Isidore is a state entity, or at least a private entity whose acts are attributable to the State, and therefore the Board's approval is barred by the federal Establishment Clause. Although St. Isidore was not initially named in this Court, this Court granted St. Isidore's motion to intervene on November 14, 2023.

ARGUMENTS AND AUTHORITIES

I. ST. ISIDORE'S CONTRACT IS VALID UNDER OKLAHOMA LAW.

The Petition fails on the merits. Nothing in the Oklahoma Constitution prohibits the State from contracting with a religious school to provide new educational opportunities. And any state law purporting to do so would violate ORFA and the First Amendment.

A. Oklahoma's Constitution Permits Funding For Religious Charter Schools.

Petitioner asserts that funding St. Isidore would violate the Oklahoma Constitution. But this Court's precedents show that the State may fund a privately operated religious school so long as the school provides a substantial service to the State—as St. Isidore will do here.

1. Article II, Section 5 does not prohibit funding St. Isidore.

Petitioner relies on Article II, Section 5, which states that Oklahoma will not appropriate, apply, donate, or use "public money" for the "use, benefit, or support of any sect, church, denomination, or system of religion" or "any priest, preacher, minister, or other

religious teacher or dignitary, or sectarian institution . . . ." Petitioner alleges that this bars the State from sponsoring or funding St. Isidore, "indirect[ly] or otherwise." Petr's Br. at 2–10.

That is incorrect. As former Attorney General John O'Connor has explained, Petitioner misunderstands Article II, Section 5. *See* PA434–48. This Court has long held that the provision only bars the State from providing gratuitous aid "for which no corresponding value was received." *Murrow Indian Orphans Home v. Childers*, 1946 OK 187, ¶ 5, 171 P.2d 600, 602. And this Court has twice held that Article II, Section 5 allows the State to disburse funds to a religious entity that provides substantial service in return. In *Murrow*, the Court held that the State was permitted to disburse funds to a Baptist orphanage "so long as [the terms of the contract] involve the element of substantial return," such as serving "needy children." 1946 OK 187, ¶ 9, 171 P.2d at 603. More recently, in *Oliver v. Hofmeister*, this Court reaffirmed *Murrow* while deciding that Article II, Section 5 allowed the State to provide tuition scholarships to private religious schools teaching students with disabilities. 2015 OK 15, ¶¶ 19–27, 368 P.3d 1270, 1271–72. Though it looked to several factors, this Court found it "determinative" that the funds were exchanged for a "substantial return"—the "special educational services" that the schools provided. *Id.*

The Board's approval of St. Isidore falls squarely within these precedents. The State has a strong interest in—and receives substantial benefit from—the development of diverse educational options. The State may contract with a religious entity to further that goal, just as the State contracted with the religious orphanage in *Murrow*. St. Isidore, like other charter schools, will provide a new learning opportunity for families across Oklahoma, and the State will "receive[] [that] substantial benefit" in exchange for its funds. *Oliver*, 2015 OK 15, ¶ 24, 368 P.3d at 1276. Meanwhile, other schools—of any religion, or none—will be free to participate in the charter program as well. Families can choose freely among the array of schools, based on the unique needs of their children. This religiously neutral program—which creates opportunities driven by the private choice of parents and families—passes muster under Article II, Section 5. There is nothing unusual about Oklahoma cooperating with religious

entities to provide services like these—and both *Murrow* and *Oliver* confirm that, for over 80 years, this Court has held that such endeavors are permitted under the Oklahoma Constitution.[2]

Ignoring these precedents, Petitioner relies on two inapposite decisions instead. *First*, Petitioner cites *Gurney v. Ferguson*, 1941 OK 397, 122 P.2d 1002, which held that Article II, Section 5 prohibits religious schools from receiving gratuitous transportation funds. *Id.* at ¶¶ 1-18, 1003–05. But he neglects to mention that this Court soon explicitly limited *Gurney*'s holding to cases in which "[the] public money was being spent to furnish a service to a parochial school for which no corresponding value was received." *Murrow*, 1946 OK 187, ¶ 5, 171 P.2d at 602. By contrast, Article II, Section 5 does not prohibit the State from, as here, "contracting with some third party, sectarian or secular, to perform [a] service." *Id.* The two scenarios are in "complete distinction," *id.*, as this Court reaffirmed in *Oliver*, 2015 OK 15, ¶¶ 20–24, 368 P.3d at 1276.

Second, Petitioner cites, extensively, Justice Taylor's concurrence in *Prescott v. Capitol Preservation Comm'n*, 2015 OK 54, 373 P.3d 1032, 1036 (Taylor, J. concurring). In *Prescott*, this Court held that Article II, Section 5 prohibited the State from displaying a privately gifted Ten Commandments statue on the grounds of the State Capitol. But both the controlling *per curiam* opinion and Justice Taylor's concurrence explain that *Prescott* merely reiterates the same point as *Gurney*. *See id.* at ¶¶ 10–12, 1038–39. In *Prescott*, the State gratuitously donated public space upon which to display the statue, while there was "not even a hint . . . that Oklahoma received any benefit for allowing the use of state property for this monument." *Id.* at ¶ 12, 1039 (Taylor, J., concurring). Thus, *Murrow* "ha[d] no application" and *Gurney* controlled. *Id.* at ¶¶ 12, 1039. In sharp contrast, St. Isidore *will* provide a significant benefit. *See supra*. *Murrow* and *Oliver* apply—and *Prescott* and *Gurney* do not.[3]

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[2] Petitioner himself recognizes this, acknowledging that there "are already numerous public funds St. Isidore is eligible to receive—directly or indirectly—as a Catholic private school." Petr's Br. at 15. He does not even try to reconcile his facile reading of Article II, Section 5 with these existing programs.

[3] Petitioner further suggests that Article I, Section 5, which mandates that Oklahoma establish and maintain "a system of public schools . . . open to all children of the state and free from sectarian control," applies to St. Isidore. But that provision merely places a responsibility on the State to maintain a general

2. This Court should avoid a collision with the First Amendment.

If any doubt remained (and it does not), the Court has a duty to interpret Article II, Section 5 to avoid contradicting the First Amendment. Out of respect for the legislature that passed the law, Oklahoma courts "interpret statutes so as to avoid constitutional issues." *O'Connor v. Okla. St. Conf. of NAACP*, 2022 OK CR 21, ¶ 5, 516 P.3d 1164, 1166. This Court should accord the same respect to the People of Oklahoma who ratified Oklahoma's Constitution, as at least one other State Supreme Court has done, *see Moses v. Ruzkowski*, 2019-NMSC-003, ¶ 45, 458 P.3d 406, 420 (N.M. 2019), by applying its precedents to hold that St. Isidore may join in the State's charter school program. The Petition's contrary view would place this State's Constitution on a collision course with the U.S. Constitution.

First, Petitioner suggests that "a state can always restrict its government's powers beyond the limits imposed on state action by the federal constitution," *Prescott*, 2015 OK 54, ¶ 22, 373 P.3d at 1041, and thus Article II, Section 5 may bar the State from distributing funds to a religious entity even when the federal Establishment Clause does not. Petr's Br. at 6–9. He is wrong. St. Isidore has a free exercise right to receive state benefits, which the State can deny only if necessary to fulfill a compelling interest. *See Carson v. Makin*, 142 S. Ct. 1987, 1996–97 (2022); *infra* Section II. The U.S. Supreme Court has three times rejected any suggestion that a state may override that right by imposing limitations beyond the federal Establishment Clause. Indeed, "an interest in separating church and state 'more fiercely' than the Federal Constitution . . . *cannot qualify* as compelling in the face of the infringement of free exercise." *Carson*, 142 S. Ct. at 1998 (emphasis added, cleaned up) (collecting cases). The Court rejected exactly Petitioner's argument when raised by the dissent in *Carson*. *See id.* at 2002 (Breyer, J., dissenting) (arguing that a "play in the joints" between Free Exercise and Establishment Clauses gave Maine "some degree of legislative leeway . . . to further antiestablishment interests by withholding aid from religious institutions"). Simply, the State

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system of public education, and the State's choice to contract with St. Isidore does not undermine that responsibility. 70 O.S. §§ 3-131, 3-134.

may not deny benefits to a religious entity through a constitutional provision that sweeps more broadly than the Establishment Clause. *Infra* Section II.

Second, the Attorney General's outmoded view would transform Article II, Section 5 into the pernicious Blaine Amendment that members of this Court have stressed that it is not. In 1875, motivated by "pervasive hostility to the Catholic Church," Speaker James Blaine unsuccessfully tried to amend the U.S. Constitution to prohibit "any aid" to "sectarian" schools. *Espinoza v. Mont. Dep't of Rev.*, 140 S. Ct. 2246, 2268 (2020) (Alito, J., concurring) (cleaned up); *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality op.) ("[I]t was an open secret that 'sectarian' was code for 'Catholic.'"). When Blaine's effort failed, several states amended their constitutions with facsimiles aimed at the same end—cutting Catholic schools off from state funds *because* they were Catholic. *Espinoza*, 140 S. Ct. at 2268–70 (Alito, J., concurring). While Article II, Section 5 shares the textual hallmarks of the invidious Blaine movement, several members of this Court have opined that it is *not* a true Blaine Amendment. *See Prescott*, 2015 OK 54, ¶¶ 17–20, 373 P.3d at 1040–41 (Taylor, J., concurring); *id.* at ¶¶ 15-27, 1050–53 (Gurich, J., concurring); *id.* at ¶¶ 11–12, 1057 (Combs, V.C.J., dissenting).

Ignoring that history, the Attorney General now asks this Court to wield Article II, Section 5 to discriminate against and suppress disfavored religious groups. He argues that "a reckoning will follow" if this Court does not nullify St. Isidore's charter contract because, in his view, the State would also have to "permit extreme sects of the Muslim faith to establish a taxpayer funded public charter school teaching Sharia Law." Petr's Brief at 1. His animus against religion is so strong that he invites this Court to enforce Article II, Section 5 against *all* religious entities to stop the practice of the one he disfavors. Not only has this Court rejected that discriminatory view of Oklahoma law, but the U.S. Supreme Court has held that this approach is incompatible with the U.S. Constitution. *See, e.g.*, *Espinoza*, 140 S. Ct. at 2259. Rather than wield Article II, Section 5 as an unconstitutional Blaine Amendment, this Court must adhere to *Murrow* and *Oliver* and hold that St. Isidore may charter with the State.

B. ORFA Precludes The State From Excluding Religious Charter Schools.

Petitioner alternatively relies on the Oklahoma Charter Schools Act purporting to limit funding to "nonsectarian" schools. 70 O.S. § 3-136(A)(2). But the exclusion violates ORFA. That law mandates that no Oklahoma governmental entity—including the Board—shall "substantially burden a person's free exercise of religion," even through a "rule of general applicability." 51 O.S. § 253(A); *see also Beach v. Okla. Dep't Pub. Safety*, 2017 OK 40, ¶ 12, 398 P.3d 1, 5. ORFA's sweep is both broad and powerful. Under it, the government may not "inhibit or curtail" any "religiously motivated practice." 51 O.S. § 252(7). Like its federal counterpart, the Religious Freedom Restoration Act (RFRA),[4] ORFA prohibits the government from denying an entity generally available benefits simply because it is religious. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693–94, 695 n.3 (2014). Indeed, as recently amended, ORFA explicitly says that the state may not "exclude any . . . entity from participation in or receipt of governmental funds, benefits, programs, or exemptions based solely on [its] religious character or affiliation." 51 O.S. § 253(D).

ORFA bars this Court from enforcing the Charter School Act's prohibition of religious charter schools. *See* 51 O.S. § 253(B), (D). And, to the extent these statutes are in conflict, the provisions requiring charter schools to be "nonsectarian" must yield to ORFA, as the overriding rule and most recently enacted law. *City of Sand Springs v. Dep't of Pub. Welfare*, 1980 OK 36, ¶ 28, 608 P.2d 1139, 1151–52; *see also Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1754 (2020) (federal RFRA is a "super statute" that "displac[es]" other laws).

II. ST. ISIDORE'S CONTRACT IS VALID UNDER THE U.S. CONSTITUTION.

Even if the Petition did not fail under state law, it would fail under the U.S. Constitution. "The Free Exercise Clause . . . , applicable to the States under the Fourteenth Amendment, provides that 'Congress shall make no law . . . prohibiting the free exercise' of religion." *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1876 (2021). St. Isidore is a private

[4] Cases interpreting RFRA and the Religious Land Use and Institutionalized Persons Act inform the interpretation of ORFA, which "contain[s] almost identical language." *Beach*, 2017 OK 40, ¶ 14 n.20, 398 P.3d at 6 n.20.

religious entity with First Amendment rights. If construed as Petitioner demands, both the Oklahoma Constitution and the Charter Schools Act would violate those rights.

A. The Free Exercise Clause Bars Oklahoma From Excluding St. Isidore.

"The Free Exercise Clause of the First Amendment protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.'" *Carson*, 142 S. Ct. at 1996 (quotation omitted). As a result, the Supreme Court has "repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits." *Id.* (citing cases). Such religious disfavor "can be justified only by a state interest of the highest order." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 458 (2017) (quotation marks omitted). A State can rarely satisfy that "stringent standard"—and it can *never* do so on based on any interest in separating church and State more than the federal Constitution requires. *Espinoza*, 140 S. Ct. at 2260 (citation omitted).

Three recent decisions illustrate the point. *First*, in *Trinity Lutheran*, the Supreme Court held that Missouri could not require a church-owned preschool "to renounce its religious character in order to participate in an otherwise generally available public benefit program" for playground resurfacing. 582 U.S. at 466. That bare hostility toward religion, the Court explained, "is odious to our Constitution." *Id.* at 467. And the Court rejected Missouri's suggestion that a state's preference for "skating as far as possible from religious establishment concerns" could justify such discrimination against religious schools. *Id.* at 466.

Second, in *Espinoza*, the Court held that the Free Exercise Clause barred exactly the kind of claim that Petitioner raises here. Like Oklahoma, Montana had established a program to help parents enroll their children in schools of their choice (there, through a system of tax-credit-funded scholarships rather than charter schools). *See* 140 S. Ct. at 2251. And, like here, Montana's decision to allow religious schools to participate in the program was challenged under a state constitutional provision that prohibited the state from funding "sectarian" schools. *See* Mont. Const. art. X § 6(1). In response, the Montana Supreme Court

did essentially what the Petitioner asks of this Court, invalidating the school-choice program under that state constitutional provision. *Espinoza*, 140 S. Ct. at 2251–52. On review, the U.S. Supreme Court made clear that the First Amendment does not tolerate such a result.

Echoing *Trinity Lutheran*, the Court reiterated that whenever a state denies a generally available benefit "because of [an organization's] religious character," it "imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny." *Id.* at 2255. Montana's use of the "no-aid" provision "to discriminate against [religious] schools" therefore could be justified only by "interests of the highest order." *Id.* at 2255–57, 2260. Montana failed that test. The Court rejected a plethora of justifications Montana offered to support its denial of funding to religious schools—justifications which mirror those asserted by Petitioner here. Specifically, the Court rejected arguments that Montana had "an interest in separating church and State more fiercely than the Federal Constitution," that the no-aid provision "actually *promotes* religious freedom" by keeping taxpayer money from religious organizations, and that the provision "advances Montana's interests in public education." *Id.* at 2260–61 (emphasis in original). None of those interests could justify the burden the exclusion imposed on "religious schools" and "the families whose children . . . hope[d] to attend them." *Id.* at 2261.

Third, in *Carson v. Makin*, 142 S. Ct. 1987 (2022), the Supreme Court held that states cannot exclude religious schools from programs like these, even if they "promote[] a particular faith" or "present[] academic material through the lens of that faith." *Id.* at 2001. Maine offered private-school tuition assistance to families without access to public secondary schools, provided that these funds were expended at "nonsectarian" schools. *Id.* at 1993–94. In defending this requirement, Maine sought to recharacterize the "public benefit" it offered "as the rough equivalent of a Maine public school education, an education that cannot include sectarian instruction." *Id.* at 1998 (cleaned up). The Court rejected that argument, holding that a State cannot avoid strict scrutiny under the Free Exercise Clause by reconceptualizing its public benefit as an exclusively "secular" one. *Id.* at 1999. The Court also rejected Maine's attempt to defend its program because it did not exclude institutions based on their "religious

'status,'" but instead avoided "religious 'uses' of public funds"—namely, the use of public money to deliver a religiously grounded education. *Id.* (citation omitted). Excluding religious "uses" of public funds like these is just as "offensive to the Free Exercise Clause." *Id.*

Carson, *Espinoza*, and *Trinity Lutheran* make clear that any "nonsectarian" provision of the Charter Schools Act, and any "nonsectarian" provision of the Oklahoma Constitution, cannot be applied to bar St. Isidore from participating in Oklahoma's charter school program. Oklahoma's program invites any qualified "private college or university, private person, or private organization" to operate a charter school. 70 O.S. § 3-134(C). Oklahoma cannot deny this benefit to applicants like St. Isidore "solely because they are religious," *Carson*, 142 S. Ct. at 1997 (quotation omitted); it cannot require St. Isidore to "disavow its religious character" as a condition of receipt, *Trinity Lutheran*, 582 U.S. at 46; and it cannot justify any exclusion on the basis of St. Isidore's "anticipated religious use of the benefits," *Carson*, 142 S. Ct. at 2002.

B. St. Isidore Is Not a "State Actor" For Purposes Of The U.S. Constitution.

The dictates of these cases are clear: when a state funds students attending schools operated by private organizations, it cannot refuse to extend these funds to religious schools like St. Isidore. *Espinoza*, 140 S. Ct. at 2261. Petitioner attempts to elude St. Isidore's basic constitutional rights by suggesting that the school *has no rights*, but is instead part of the government itself. He is ambivalent as to exactly *how* St. Isidore is a state actor, suggesting that the school is either a religious government entity that the federal Establishment Clause prohibits, Petr's Br. at 10, or instead a private entity acting on behalf of the State to fulfill "constitutional obligations" that the State "outsourced" to it, *id.* at 11. Neither is correct.

First, St. Isidore is self-evidently not a public entity. Contrary to Petitioner's claim, Petr's Brief at 12–13, St. Isidore is not "state created." It is a private, not-for-profit corporation that "falls under the umbrella of the Oklahoma Catholic Conference comprised of the Archdiocese of Oklahoma City and the Diocese of Tulsa." PA177 (application); 309–27 (bylaws). It "is operated by a board of directors, none of whom are public officials or are

chosen by public officials." *Rendell-Baker v. Kohn*, 457 U.S. 830, 832 (1982); *see* 70 O.S. §§ 3-136(A)(8), 3-145.3(F). And St. Isidore's members—the Archbishop of the Archdiocese of Oklahoma City and the Bishop of the Diocese of Tulsa—undoubtedly are private actors. The Oklahoma Charter Schools Act gives "private person[s]" like them the right to "contract with a sponsor to establish a charter school." 70 O.S. § 3-134(C). Indeed, the contract between St. Isidore and the State explicitly recognizes that the school "is a privately operated religious non-profit organization entitled to" constitutional rights. Contract ¶ 1.5; *see also id.* ¶ 2.9.

Petitioner's only response is to observe that Oklahoma law refers to charter schools as "public schools." Petr's Br. at 11–12 (citing 70 O.S. § 3-132(D)). But federal rights do not turn on "state law labels." *Bd. of Cnty. Comm'rs, Wabanusee Cnty., Kan. v. Umbehr*, 518 U.S. 668, 679 (1996). The Supreme Court has squarely rejected the notion that labeling an entity "public" makes it a state actor. *See, e.g., Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 n.7, 352–54 (1974) (public utility). And the "substance of free exercise protections" does not turn "on the presence or absence of magic words." *Carson*, 142 S. Ct. at 2000.[5]

Second, the operation of St. Isidore or any other charter school is not "state action" that is attributable to the government. The Constitution generally "applies to acts of the [government], not to acts of private persons." *Rendell-Baker*, 457 U.S. at 831–36 (1982). Conduct by a private entity will be treated as that of the State "only if[] there is such a close nexus" between the State and the private party's actions so that "seemingly private behavior may be fairly treated as that of the State itself." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). The question here is how a charter school is run and

[5] Cases in which courts have found allegedly private entities to be public are inapposite, and relate to laws that directly created or empowered the *specific entity*. *E.g., Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 383–85 (1995) (law creating Amtrak); *NCAA v. Tarkanian*, 488 U.S. 179, 192 (1988) (state university); *United States v. Ackerman*, 831 F.3d 1292 (10th Cir. 2016) (empowering National Center for Missing & Exploited Children to exercise police powers). The Act did not specifically create or empower St. Isidore; it authorized the State to contract with private groups to run new schools. St. Isidore did not become a public entity by accepting that offer. *See Rendell-Baker*, 457 U.S. at 840–41.

who designs and delivers the learning environment it offers—private groups or the government itself? The answer is clearly the former.

Petitioner points to nothing that shows that the design or operation of St. Isidore shares such a nexus with the State. Certainly, the fact that the State will "fund[]" and "regulate[]" St. Isidore is not enough. Petr's Brief at 12–13. In *Rendell-Baker*, the U.S. Supreme Court held that a private school that received 99% of its funding from the State and was subject to "detailed regulations concerning" everything from "recordkeeping to student-teacher ratios" to "personnel policies" did not qualify as a state actor. 457 U.S. at 831–36. Indeed, the "[a]cts of such private contractors do not become acts of the government by reason of their significant *or even total* engagement in performing public contracts." *Id.* at 841 (emphasis added); *see Blum v. Yaretsky*, 457 U.S. 991, 1011 (1982). This remains true even if the contractor "is subject to extensive state regulation." *Jackson*, 419 U.S. at 350.

The same is true here. Like the school in *Rendell-Baker*, St. Isidore "was founded as a private institution" and is "operated by a board of directors, none of whom are public officials or chosen by public officials." *Id.* at 832; *see* PA310–27 (describing St. Isidore's bylaws). As in *Rendell-Baker*, the State authorized its agents to contract with entities like St. Isidore to provide educational opportunities pursuant to certain regulations. But St. Isidore's actions are not "compelled" by or "fairly attributable to the state"—and it did not surrender its constitutional rights—merely by agreeing to that contract. *Rendell-Baker*, 457 U.S. at 840–41; *see also Brentwood Acad.*, 531 U.S. at 295; *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 815 (9th Cir. 2010) (charter school not a state actor). Indeed, the U.S. Supreme Court has held that a government may not "discriminate against religion when acting in its managerial role" or overseeing a contractor. *Fulton*, 141 S. Ct. at 1878.

More to the point, the entire Charter School Act is constructed *not* to create a close nexus between the design and operation of a charter school and the State. The Act empowers and encourages privately operated schools to implement their own curricula with minimal interference. To be sure, charter schools are subject to various regulations—as are all

government contractors. But charter schools are "exempt from all statutes and rules relating to schools, boards of education, and school districts." 70 O.S. § 3-136(A)(5). They are free to design a school "which emphasizes a specific learning philosophy or style or certain subject areas" ranging from math to fine arts. *Id.* § 3-136(A)(3). They are not constrained by the State's "Teacher and Leader Effectiveness standards" and need not hire teachers with state teaching certificates. Okla. Dep't of Educ., *Oklahoma Charter Schools Program*, https://sde.ok.gov/faqs/oklahoma-charter-schools-program (last visited Nov. 20, 2023). They can even contract with outside organizations to handle administration. OAC § 777:10-1-4. And they craft their own codes of student conduct. 70 O.S. § 3-136(A)(12). In short, although the State regulates charter schools to some degree, the entire system is designed to avoid "entwinement of public institutions and public officials in [the school's] composition and workings" in the manner required for state action. *Brentwood Acad.*, 531 U.S. at 298.

Nor does it matter that the State partners with charter schools to perform a service that is "aimed at a proper public objective" or "confer[s] a public benefit." *Id.* at 302–03. States routinely work with private organizations to serve the public; that does not render those organizations "part of" the government. The answer is no different simply because Oklahoma has a duty to provide for schools. *See* Petr's Br. at 11 (State cannot "outsource" governmental prerogatives). To be sure, the State's delegation of a function that is *solely* the government's to perform can signal state action. *See, e.g.*, *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978) (administration of elections). But that question is not whether a private actor supports "a proper public objective"; it is whether the actor has been deputized to do something "exclusively and traditionally public." *Brentwood*, 531 U.S. at 302–03. "[V]ery few [functions] have been exclusively reserved" to the government. *Flagg Bros.*, 436 U.S. at 158 (quotation omitted). Certainly, "education is not and never has been." *Logiodice v. Trs. of Me. Cent. Inst.*, 296 F.3d 22, 26 (1st Cir. 2002) (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925)); *see Rendell-Baker*, 457 U.S. at 842; *Robert S. v. Stetson Sch., Inc.*, 256 F.3d 159, 166 (3d Cir. 2001) (Alito, J.). "[F]rom the outset of this country's history," private entities have

"regularly and widely" taught students. *Logiodice*, 296 F.3d at 26–27; *see Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 239 n.7 (1963) (Brennan, J., concurring) (into 19th century "education was almost without exception" private).

This Court should ignore Petitioner's attempt to evade this realty by "gerrymander[ing] a category of free, public education that it calls a traditional state function." *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 154 (4th Cir. 2022) (Wilkinson, J., dissenting) (decrying circular characterization . . . assuming" the result). "There is no indication that the Supreme Court had this kind of tailoring by adjectives in mind when it spoke of functions 'exclusively' provided by the government." *Logiodice*, 296 F.3d at 27. Rather, courts must assess what function the private entity actually performed, then decide whether it is traditionally exclusive to the State. *See Rendell-Baker*, 457 U.S. at 842 (educating children); *see also, e.g., Johnson v. Pinkerton Acad.*, 861 F.2d 335, 338 (1st Cir. 1988) (same); *Robert S. v. Stetson Sch., Inc.*, 256 F.3d 159, 165–66 (same). St. Isidore will provide an education to elementary, middle, and high school students. That is not, and never has been, a traditionally exclusive state function.[6]

* * *

St. Isidore is a private religious entity. Neither its religious character nor its curriculum is attributable to the State. ORFA and the Free Exercise Clause protect it from any state law that would bar it from receiving a generally available benefit solely because it is religious. To enforce those protections, this Court should deny the Petition.

CONCLUSION

For the foregoing reasons, this Court should grant original jurisdiction, reject the Petitioner's arguments, and deny the Petition.

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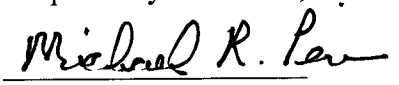
[6] Petitioner's argument proves far too much. Governments bear obligations to provide a tremendous variety of services, from education to healthcare, shelter, foster care, and much more. This does not transform every private organization who helps accomplish these goals into an arm of the state itself. Indeed, in both *Murrow* and *Oliver* this Court upheld the distribution of funds to religious groups who were helping the State fulfill duties like these. *See Oliver*, 2015 OK 15, ¶ 23, 368 P.3d at 1276 ("In *Murrow*, the State was fulfilling its duty to provide care for the needy . . . [and here it is] being relieved of the duty to provide special educational services . . . .").

Respectfully submitted,



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