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LEGAL MEMORANDUM ON WHETHER OKLAHOMA CHARTER SCHOOLS MAY PROVIDE RELIGIOUS EDUCATION

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Introduction and Summary

On December 1, 2022, former Oklahoma Attorney General John O'Connor issued Attorney General Opinion 2022-7. The opinion asserts that the Free Exercise Clause of the U.S. Constitution's First Amendment renders unenforceable the Oklahoma Charter Schools Act's requirements that "[a] charter school shall be nonsectarian in its programs, admission policies, employment practices, and all other operations" and shall not be "affiliated with a nonpublic sectarian school or religious institution."[1] We explain in this memorandum why Mr. O'Connor's opinion is wrong in asserting that the U.S. Constitution supersedes the Act's requirement that "[a] charter school shall be nonsectarian in its programs, admission policies, employment practices, and all other operations."

Oklahoma charter schools are state actors. That is so because they are public schools—governmental entities—under the Charter Schools Act. Even if they could be properly classified as nongovernmental entities, they are still state actors because they are entwined with the state and because they perform a public function—provision of free, *public* education (as opposed to education in general)—that the state is constitutionally obligated to perform and has exclusively performed traditionally. Indeed, the U.S. Court of Appeals for the Tenth Circuit, whose decisions are controlling in Oklahoma, has concluded that charter schools are state actors. So have numerous other federal courts across the country.

As governmental entities, Oklahoma charter schools do not have rights of their own under the Free Exercise Clause or any other clause of the First Amendment. That is because First Amendment rights are rights *against* the government, not rights *of* government. And as state actors, Oklahoma charter schools must comply with the First Amendment's Establishment

[1] Okla. Stat. tit. 70, § 3-136(A)(2).

Clause, which prohibits public schools from teaching religion, sponsoring prayer, discriminating based on religion, or otherwise promoting religion or coercing students to take part in religious activities.

Even if charter schools were not state actors, the Establishment Clause prohibits Oklahoma from funding charter schools that teach religion. The Establishment Clause permits the use of public funds for religious education only when the funds are allocated to individuals who then direct them to religious schools solely through the individuals' independent choices, as in a school-voucher program. When that is not the case, the Establishment Clause prohibits the use of the funds to support religious activities. Here, state funds do not reach charter schools solely as a result of choices by parents or students; rather, governmental bodies decide which schools receive a charter, and funds flow directly from the government to those schools through a complex formula (also used to fund traditional public schools) that—though it includes the number of students served—additionally incorporates factors such as levels of teacher experience, how long a school has been in operation, and various characteristics of enrolled students.

For these reasons, the Charter Schools Act's requirement that "[a] charter school shall be nonsectarian in its programs, admission policies, employment practices, and all other operations" is constitutional and must be enforced. Indeed, the U.S. Constitution prohibits granting a charter to operate a charter school that provides religious education.

I. Oklahoma charter schools are state actors and so are constitutionally prohibited from teaching religion.

A. Oklahoma charter schools are state actors.

Whether an entity must comply with the requirements of the U.S. Constitution depends on whether the entity's conduct is state action.[2] To determine whether an entity is a state actor, the U.S. Supreme Court first considers whether the entity is a governmental entity itself.[3] If that is not the case—if the entity is a private one—the Supreme Court and the Tenth Circuit apply a variety of tests to assess whether the entity is a state actor, including what the Tenth Circuit has labeled "(1) the nexus test, (2) the symbiotic-relationship test, (3) the joint-action test, and (4) the public-

[2] *See, e.g.*, *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019).

[3] *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378–82 (1995).

function test."[4] If the entity is a state actor, then the Constitution's proscriptions apply to actions by the entity that constitute or arise from "the exercise of some right or privilege created by the State or . . . a rule of conduct imposed by the state or by a person for whom the State is responsible."[5]

Here, Oklahoma charter schools are public schools and thus are governmental entities. Even if they were not governmental entities, a private entity is a state actor if it qualifies as such under *any* of the four state-action tests that apply to private entities, and Oklahoma charter schools are state actors at least under the symbiotic-relationship and public-function tests. And their educational actions arise from a privilege granted by the state and therefore are subject to the constraints of the U.S. Constitution.

The Tenth Circuit has accordingly determined that charter schools are state actors. Numerous other federal courts across the nation have reached the same conclusion.

1. Oklahoma charter schools are state actors because they are governmental entities.

As Justice Scalia explained on behalf of the Supreme Court in *Lebron v. National Railroad Passenger Corp.*, when an actor is a governmental official or entity, that is sufficient to resolve whether the actor is a state actor, and it is unnecessary to consider the tests (such as symbiotic-relationship or public-function) that are used to assess whether a private entity or person is a state actor.[6] Thus, "when the claim of a constitutional deprivation is directed against a party whose official character is such as to lend the weight of the State to his decisions," the only remaining question is whether the "deprivation [was] caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state."[7]

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[4] *See, e.g.*, *VDARE Found. v. City of Colorado Springs*, 11 F.4th 1151, 1160 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 1208 (2022).

[5] *Janny v. Gamez*, 8 F.4th 883, 918 (10th Cir. 2021) (quoting *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982)), *cert. dismissed sub nom. Carmack v. Janny*, 142 S. Ct. 878 (2022).

[6] *See* 513 U.S. at 378–82.

[7] *See Janny*, 8 F.4th at 918–19 (quoting *Lugar*, 457 U.S. at 937).

Accordingly, without applying the tests used to analyze whether private entities are state actors, the Supreme Court has concluded that state universities,[8] a board created by a state to operate a privately endowed college,[9] state judges,[10] prosecutors,[11] and other public employees[12] are all state actors because they are governmental entities or officials. Similarly, without applying any of the state-action tests that are used with private entities, the Tenth Circuit concluded that the Utah State Bar is a state actor because it is "a governmental entity established by state law and created as an administrative agency of the Utah Supreme Court,"[13] and that a hospital in Oklahoma was a state actor because it was a "public trust" established by state statute and "its trustees [we]re public officers acting as an agency of the State of Oklahoma."[14]

Indeed, in *Lebron*, without applying traditional state-action tests for private entities, such as symbiotic-relationship and public-function, the Supreme Court concluded that Amtrak is a governmental entity to which the First Amendment applies, even though the statute that created Amtrak stated that it is a for-profit corporation and *not* "an agency or establishment of the United States government."[15] The Court explained that Amtrak was created by legislation, its purpose is to pursue governmental goals, and it is controlled by government-appointed officials.[16] Likewise, without applying traditional state-action tests, then-Judge Gorsuch concluded for the Tenth Circuit in *United States v. Ackerman* that a national clearinghouse for missing and exploited children that was originally created as a private, nonprofit organization was a governmental entity because it was given

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[8] *NCAA v. Tarkanian*, 488 U.S. 179, 192 (1988).

[9] *Pennsylvania v. Bd. of Dirs. of City Trusts*, 353 U.S. 230, 230–31 (1957).

[10] *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624 (1991).

[11] *Georgia v. McCollum*, 505 U.S. 42, 50 (1992).

[12] *West v. Atkins*, 487 U.S. 42, 49 (1988).

[13] *Barnard v. Chamberlain*, 897 F.2d 1059, 1062 (10th Cir. 1990).

[14] *Tarabishi v. McAlester Reg'l Hosp.*, 827 F.2d 648, 652 (10th Cir. 1987).

[15] 513 U.S. at 391–94 (quoting 84 Stat. 1330); *accord Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 50–55 (2015).

[16] *Lebron*, 513 U.S. at 383–86, 397–400; *accord Ass'n of Am. R.Rs.*, 575 U.S. at 51–55.

exclusive duties and powers by a federal statute and was funded primarily by the federal government.[17]

As in these cases, Oklahoma charter schools are governmental entities. The Oklahoma Charter Schools Act expressly states, "'charter school' means a *public school* established by contract with a board of education of a school district"[18] or with certain other governmental entities.[19] And Oklahoma charter schools have numerous other characteristics that confirm that they are public schools and governmental institutions:

- They must "be as equally free and open to all students as traditional public schools."[20]
- They must "not charge tuition or fees."[21]
- They are "subject to the same academic standards and expectations as existing public schools."[22]
- They "receive funding in accordance with statutory requirements and guidelines for existing public schools."[23]
- They must "provide instruction each year for at least the number of days required" by law for traditional public schools.[24]
- They must "comply with all federal and state laws relating to the education of children with disabilities in the same manner as a school district."[25]

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[17] 831 F.3d 1292, 1295–1300 (10th Cir. 2016).

[18] Okla. Stat. tit. 70 § 3-132(D) (emphasis added).

[19] *See* Okla. Stat. tit. 70 §§ 3-132(A), (D).

[20] Okla. Stat. tit. 70 § 3-135(A)(9).

[21] Okla. Stat. tit. 70 § 3-136(A)(10).

[22] Okla. Stat. tit. 70 § 3-135(A)(11).

[23] Okla. Stat. tit. 70 § 3-135(A)(12); *see also* Okla. Stat. tit. 70 §§ 3-142(A)–(B), 3-145.3(C)–(D).

[24] *See* Okla. Stat. tit. 70 §§ 1-109, 3-136(A)(11).

[25] Okla. Stat. tit. 70 § 3-136(A)(7).

- They must provide bus transportation to their students to the same extent as traditional public-school districts.[26]

- They must participate in testing as required by the Oklahoma School Testing Program Act—which applies only to public schools—and in "the reporting of test results as is required of a school district."[27]

- They are "subject to the same reporting requirements, financial audits, audit procedures, and audit requirements as a school district."[28]

- They must submit to the governmental body that sponsored them performance data—"in the identical format that is required by the State Department of Education of all public schools"—on a variety of measures, including "[r]ecurrent enrollment from year to year as determined by the methodology used for public schools in Oklahoma" and, "[i]n the case of high schools, graduation rates as determined by the methodology used for public schools in Oklahoma."[29]

- They must "comply with the student suspension requirements" that apply to traditional public schools.[30]

- Their employees are eligible for the same retirement benefits that Oklahoma provides to teachers at traditional public-schools.[31]

- They "may participate in all health and related insurance programs available to the employees of" their governmental sponsor.[32]

- They must "comply with the Oklahoma Open Meeting Act and the Oklahoma Open Records Act."[33]

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[26] *See* Okla. Stat. tit. 70 §§ 3-141(A), 9-101–118.

[27] *See* Okla. Stat. tit. 70 §§ 3-136(A)(4), 1210.505–508-5.

[28] Okla. Stat. tit. 70 § 3-136(A)(6); *accord* Okla. Stat. tit. 70 § 3-145.3(E).

[29] Okla. Stat. tit. 70 § 3-135(C).

[30] *See* Okla. Stat. tit. 70 §§ 3-136(A)(12), 24-101.3.

[31] *See* Okla. Stat. tit. 70 § 3-136(A)(14); *Oklahoma Teachers' Retirement System Member Handbook* 6 (2022), https://bit.ly/3GvYqjJ.

[32] Okla. Stat. tit. 70 § 3-136(A)(15).

[33] Okla. Stat. tit. 70 § 3-136(A)(16).

- They "shall be eligible to receive current government lease rates" if they choose to lease property.[34]
- They must annually issue financial statements that meet requirements applicable to school districts.[35]
- They must have governing boards that hold public meetings at least quarterly.[36]
- Their governing boards are "subject to the same conflict of interest requirements as a member of a local school board."[37]
- Members of the governing board of a virtual charter school appointed after July 1, 2019, are "subject to the same instruction and continuing education requirements as a member of a local school board."[38]
- "A charter school shall be considered a school district for purposes of tort liability under The Governmental Tort Claims Act."[39]
- "A charter school shall be considered a local education agency for purposes of funding,"[40] and a "statewide virtual charter school shall be considered a separate local education agency for purposes of reporting and accountability."[41] A federal statute defines "local educational agency" as "a public board of education or other public authority legally constituted within a State."[42]
- If the number of students applying exceeds the space available in a charter school, a lottery must be used to select which students enroll,

[34] Okla. Stat. tit. 70 § 3-142(E).

[35] Okla. Stat. tit. 70 §§ 3-136(A)(18), 5-135.

[36] Okla. Stat. tit. 70 §§ 3-135(A)(3), 3-145.3(F).

[37] Okla. Stat. tit. 70 §§ 3-136(A)(17), 3-145.3(F).

[38] Okla. Stat. tit. 70 § 3-145.3(F).

[39] Okla. Stat. tit. 70 § 3-136(A)(13).

[40] Okla. Stat. tit. 70 § 3-142(C).

[41] Okla. Stat. tit. 70 § 3-145.3(C).

[42] 20 U.S.C. § 7801(30)(A).

and no admission preferences are permitted other than geographic ones.[43]

- The State Board of Education must "identify charter schools in the state that are ranked in the bottom five percent (5%) of all public schools as determined pursuant" to a statutory formula, and charter schools that are so ranked over a three-year period are subject to closure by their sponsor or the State Board.[44]

In sum, Oklahoma charter schools are defined as public schools and governmental bodies by statute; they have the same responsibilities and privileges as traditional public schools; and they must comply with numerous legal requirements that govern traditional public schools. Thus, the U.S. District Court for the Western District of Oklahoma has described Oklahoma charter schools as "political subdivision[s]" of the State.[45] A 2007 Oklahoma Attorney General opinion states that "charter schools . . . are part of the public school system," "are under the control of the Legislature," and further the Legislature's "mandate of establishing and maintaining a system of free public education."[46] The Oklahoma Department of Education states on its website that "[c]harter schools are public schools"; that, "[l]ike any public school, charter schools receive state funding through the State Aid funding formula, set by law"; and that, "[l]ike any other public school, charters must go through an accreditation process which is run through the [Department's] Office of Accreditation."[47] And the Statewide Virtual Charter School Board declares on its website that "[v]irtual charter schools are Oklahoma public schools," that they "have the same rights and responsibilities of other public schools in the State of Oklahoma," and that they are "subject to all laws and regulations and to the reporting requirements of the State Department of Education."[48]

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[43] *See* Okla. Stat. tit. 70 §§ 3-135(A)(10), 3-140, 3-145.3(J).

[44] *See* Okla. Stat. tit. 70 §§ 3-137(G), 1210.545.

[45] *See Ford v. Just. Alma Wilson Seeworth Acad.*, No. CIV-08-1015-D, 2010 WL 545872, at *3 (W.D. Okla. Feb. 9, 2010); *Wright v. KIPP Reach Acad. Charter Sch.*, No. CIV-10-989-D, 2011 WL 1752248, at *5–6 (W.D. Okla. May 6, 2011).

[46] Hon. Al McAffrey, Okla. Op. Att'y Gen. No. 07-23, 2007 WL 2569195, at *7 (2007).

[47] Oklahoma State Department of Education, *Oklahoma Charter Schools Program*, https://bit.ly/3Bl9zCc (last visited Jan. 26, 2023).

[48] Oklahoma Statewide Virtual Charter School Board, *Frequently Asked Questions*, https://svcsb.ok.gov/faq (last visited Jan. 26, 2023).

Because Oklahoma charter schools are governmental entities, there is no question that they are state actors. As a federal district court stated in concluding that Ohio charter schools are state actors, "this ends the inquiry,"[49] and it is unnecessary to apply any of the tests that are used to determine whether private entities are state actors.

2. Even if Oklahoma charter schools were not governmental entities, they are still state actors.

Even if Oklahoma charter schools were not governmental entities and the state-action tests pertinent to private entities were then to apply, Oklahoma charter schools are still state actors. As noted earlier, the Tenth Circuit applies four principal tests to determine whether private entities are state actors: "(1) the nexus test, (2) the symbiotic-relationship test, (3) the joint-action test, and (4) the public-function test."[50] "If any one of the tests indicates a party is a state actor, that alone is sufficient to find the party a state actor."[51] Oklahoma charter schools are state actors under at least two of the tests—the symbiotic-relationship test and the public-function test.

a. Oklahoma charter schools are state actors under the symbiotic-relationship/entwinement test.

Under the "[s]ymbiotic [r]elationship" test, "[s]tate action is . . . present if the state 'has so far insinuated itself into a position of interdependence' with a private party that 'it must be recognized as a joint participant in the challenged activity.'"[52] The Supreme Court has also stated that "a nominally private entity [i]s a state actor . . . when it is 'entwined with governmental policies,' or when government is 'entwined in [its] management or control.'"[53]

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[49] *Riester v. Riverside Cmty. Sch.*, 257 F. Supp. 2d 968, 972 (S.D. Ohio 2002).

[50] *See, e.g.*, *VDARE Found. v. City of Colorado Springs*, 11 F.4th 1151, 1160 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 1208 (2022).

[51] *Anaya v. Crossroads Managed Care Sys., Inc.*, 195 F.3d 584, 596 (10th Cir. 1999).

[52] *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1451 (10th Cir. 1995) (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961)).

[53] *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001) (quoting *Evans v. Newton*, 382 U.S. 296, 299, 301 (1966) (alteration in *Brentwood*)).

The Tenth Circuit has explained that the "symbiotic relationship" test and the "entwinement" analysis are the same test.[54]

Applying the test, the Supreme Court and the Tenth Circuit have held that the Tennessee and Oklahoma state athletic associations are state actors because of the "pervasive entwinement of public institutions and public officials in [their] composition and workings," as the associations are principally composed of public schools and principally controlled by public employees.[55] The Supreme Court ruled that a private restaurant that leased space in a city parking-garage building from a city authority was a state actor because the relationship between the city and the restaurant conferred a "variety of mutual benefits" on both, including that the restaurant's presence induced more people to use the city's parking garage and that the city maintained the restaurant's space.[56] The Supreme Court concluded that private trustees of a public park were state actors in part because a city maintained the park.[57] And the Tenth Circuit determined, partly on symbiotic-relationship/entwinement grounds, that a private entity that managed a public hospital was a state actor.[58]

Here too, Oklahoma charter schools have a symbiotic relationship with and are entwined with the State. Governmental bodies exercise substantial control over Oklahoma charter schools, and the State and charter schools provide substantial benefits to each other, as shown by the facts discussed in Section I.A.1 above and the following additional facts:

- The purposes of the Oklahoma Charter Schools Act are to provide a variety of benefits to the State, including to (1) "[i]mprove student learning," (2) "[i]ncrease learning opportunities for students," (3) "[e]ncourage the use of different and innovative teaching methods," (4) "[p]rovide additional academic choices for parents and students," (5) "[r]equire the measurement of student learning and create different

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[54] *See Wittner v. Banner Health*, 720 F.3d 770, 778 (10th Cir. 2013); *Johnson v. Rodrigues*, 293 F.3d 1196, 1204–05 (10th Cir. 2002).

[55] *See Brentwood*, 531 U.S. at 298–302; *Christian Heritage Acad. v. Okla. Secondary Sch. Activities Ass'n*, 483 F.3d 1025, 1030–31 (10th Cir. 2007).

[56] *See Burton*, 365 U.S. at 724.

[57] *See Evans*, 382 U.S. at 301.

[58] *See Milo v. Cushing Mun. Hosp.*, 861 F.2d 1194, 1195–97 (10th Cir. 1988); *see also Wasatch Equal. v. Alta Ski Lifts Co.*, 820 F.3d 381, 388 (10th Cir. 2016).

and innovative forms of measuring student learning," (6) "[e]stablish new forms of accountability for schools," and (7) "[c]reate new professional opportunities for teachers and administrators."[59]

- Only governmental entities—such as school districts, state universities and colleges, the State Board of Education, and the Statewide Virtual Charter School Board—may serve as sponsors for a charter school and grant a charter.[60]

- Applicants for charters must take state-mandated training before applying.[61]

- To obtain a charter, applicants must submit detailed applications that provide thirty-five statutorily enumerated categories of information.[62]

- Charter-school sponsors may grant or deny applications based on the quality of the applications.[63]

- Charter-school sponsors may approve a charter only at "an open meeting of the sponsor."[64]

- Charter-school sponsors must also (1) "[p]rovide oversight of the operations of charter schools"; (2) "[n]egotiate and execute sound charter contracts with each approved public charter school"; (3) "[m]onitor . . . the performance and legal compliance of charter schools"; and (4) "[d]etermine whether each charter contract merits renewal, nonrenewal or revocation."[65]

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[59] Okla. Stat. tit. 70 § 3-131(A).

[60] *See* Okla. Stat. tit. 70 §§ 3-132(A), 3-145.1; *see also* Oklahoma State Department of Education, *Oklahoma Charter Schools Program*, https://bit.ly/3Bl9zCc (last visited Jan. 26, 2023).

[61] Okla. Stat. tit. 70 § 3-134(A).

[62] *See* Okla. Stat. tit. 70 § 3-134(B).

[63] *See* Okla. Stat. tit. 70 §§ 3-134(I)(3)–(4).

[64] *See* Okla. Stat. tit. 70 § 3-135(B).

[65] Okla. Stat. tit. 70 §§ 3-134(I)(1), (5), (6), (7); *see also* Okla. Stat. tit. 70 § 3-145.3(A).

- Charter schools must seek renewal of their charters every five years.[66] A charter-school sponsor may deny renewal of a charter or terminate a charter during a five-year term for poor performance or other good cause.[67]

- Virtual charter schools must comply with special rules concerning attendance and truancy and must "keep a full and complete record of the attendance of all students enrolled in the virtual charter school in one of the student information systems approved by the State Department of Education."[68]

As the Supreme Court stated in holding that a state athletic association was a state actor, "entwinement shown to the degree here requires" that Oklahoma charter schools "be charged with a public character and judged by constitutional standards."[69]

b. Oklahoma charter schools are state actors under the public-function test.

To satisfy the "public function" test, it is sufficient to show that "the private entity performs a traditional, exclusive public function."[70] For example, when private groups run elections or operate a company town, they are state actors.[71] As public schools, Oklahoma charter schools provide public education.[72] Though provision of education is not a traditionally exclusive public function, provision of *public* education is.[73]

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[66] Okla. Stat. tit. 70 § 3-137(C)(1).

[67] Okla. Stat. tit. 70 §§ 3-137(D)–(G).

[68] Okla. Stat. tit. 70 § 3-145.8.

[69] *See Brentwood*, 531 U.S. at 302.

[70] *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019).

[71] *See id.* at 1929 (citing *Terry v. Adams*, 345 U.S. 461, 468–70 (1953); *Marsh v. Alabama*, 326 U.S. 501, 505–09 (1946); and other cases).

[72] *See* Okla. Stat. tit. 70 §§ 3-132(D), 3-135(A)(9)–(11).

[73] *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 119 (4th Cir. 2022) (en banc), *petition for cert. docketed*, No. 22-238 (Sept. 12, 2022); *Riester v. Riverside Cmty. Sch.*, 257 F. Supp. 2d 968, 972 (S.D. Ohio 2002); *see also Tryon Dependent Sch. Dist. No. 125 of Lincoln Cnty. v. Carrier*, 474 P.2d 131, 133 (Okla. 1970).

For instance, though not all parks have traditionally been operated by the government, the Supreme Court concluded that private trustees of a *public* park were state actors partly because a *public* park is "like a fire or police department that traditionally serves the community."[74] Similarly, though private entities often operate hospitals, the Tenth Circuit ruled that a private company that managed a *public* hospital was a state actor in part because the government "cannot escape liability by delegating responsibility" for "'a public purpose'" "to another party."[75] The Tenth Circuit also held that a Tulsa nonprofit organization that oversaw a federal preschool-education program for children of lower-income families was a state actor because it was "acting for the government in carrying out a government program,"[76] notwithstanding that preschool education is often provided wholly privately.

But even if provision of public education were not a traditionally exclusive public function, a private entity also is "a state actor when the government has outsourced one of its constitutional obligations to" the entity.[77] The leading case on this principle is *West v. Atkins*, in which the Supreme Court held that a physician who contracted with the state to provide medical services to prison inmates was a state actor even though he was not a state employee, for the state "delegated" to the doctor "its constitutional duty to provide adequate medical treatment to those in its custody."[78]

Though cases have not been consistent as to whether *West*'s principle is an aspect of the public-function test or a separate state-action test,[79] the nomenclature does not matter, as the Supreme Court and the Tenth Circuit have relied on the principle to find state action on other occasions. For example, the Supreme Court held that criminal defendants are state actors when they exercise peremptory challenges during jury selection, in part because "selection of a jury in a criminal case fulfills a unique and

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[74] *See Evans v. Newton*, 382 U.S. 296, 302 (1966).

[75] *See Milo v. Cushing Mun. Hosp.*, 861 F.2d 1194, 1197 (10th Cir. 1988) (quoting *Jatoi v. Hurst-Euless-Bedford Hosp. Auth.*, 807 F.2d 1214, 1221–22 (5th Cir.), *modified on other grounds*, 819 F.2d 545 (5th Cir. 1987)).

[76] *See Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1198, 1216 (10th Cir. 2003).

[77] *Manhattan Cmty. Access*, 139 S. Ct. at 1929 n.1.

[78] 487 U.S. 42, 56 (1988).

[79] *Compare, e.g.*, *Manhattan Cmty. Access*, 139 S. Ct. at 1929 n.1, *with Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 55 (1999).

constitutionally compelled governmental function."[80] And the Tenth Circuit ruled that a nonemployee contractor who directed a department at a governmental hospital was a state actor with respect to his supervision of subordinate employees because "hiring a private doctor . . . to perform supervisory duties does not relieve the State of its constitutional duty to provide equal protection under the 14th Amendment to its employees."[81]

In Oklahoma, the State Constitution obligates the State to provide public education. Section 1 of Article 13 mandates that "[t]he Legislature shall establish and maintain a system of free public schools wherein all the children of the State may be educated." Likewise, Section 5 of Article 1 requires that "[p]rovisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of the state and free from sectarian control." And Sections 2 and 3 of Article 11 require the establishment and maintenance of a "permanent school fund" that, under the latter section, must be used for "the support and maintenance of common schools for the equal benefit of all the people of the State."

As Oklahoma charter schools perform a duty that the State is constitutionally mandated to perform—provision of public education[82]—they are state actors under *West*.

3. Oklahoma charter schools' performance of their educational function is state action.

As noted earlier, in addition to asking whether the entity at issue is a state actor, state-action analysis asks whether the conduct at issue constitutes or arises from "the exercise of some right or privilege created by the State or . . . a rule of conduct imposed by the state or by a person for whom the State is responsible."[83] The conduct of a state employee or other state actor might not satisfy this requirement in rare circumstances,[84] such

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[80] *See Georgia v. McCollum*, 505 U.S. 42, 52 (1992).

[81] *Nieto v. Kapoor*, 268 F.3d 1208, 1216 (10th Cir. 2001).

[82] *See* Okla. Stat. tit. 70 §§ 3-132(D), 3-135(A)(9)–(11).

[83] *Janny v. Gamez*, 8 F.4th 883, 918 (10th Cir. 2021) (quoting *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982)), *cert. dismissed sub nom. Carmack v. Janny*, 142 S. Ct. 878 (2022).

[84] *See Hall v. Witteman*, 584 F.3d 859, 866 (10th Cir. 2009).

as when the actor engages in conduct that is outside of their duties and unrelated to governmental goals,[85] or when the actor—the prototypical example is a state-employed public defender—plays the role of an adversary to the state.[86] But a state actor's conduct is state action when it "is related to a governmental objective"[87] or is made possible by the provision of authority from the state.[88]

There can be no question that, at least with respect to their educational functions, the conduct of Oklahoma charter schools is state action. Oklahoma charter schools perform those functions in pursuit of Oklahoma's objectives of providing and improving free public education.[89] And they can do so only because of a privilege—their charter—provided to them by a governmental body.[90]

4. The Tenth Circuit and numerous other courts have concluded that charter schools are state actors.

Consistently with the analysis above, numerous courts—including the Tenth Circuit—have ruled that charter schools are state actors. In *Brammer-Hoelter v. Twin Peaks Charter Academy*, the Tenth Circuit concluded that a Colorado charter school was "a local governmental entity" and therefore was subject to the same legal rules that apply to other governmental entities in lawsuits alleging violations of constitutional rights.[91] The Tenth Circuit reached the same conclusions in *Dillon v. Twin Peaks Charter Academy*.[92] And in *Coleman v. Utah State Charter School Board*, the Tenth Circuit

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[85] *See, e.g.*, *Screws v. United States*, 325 U.S. 91, 111 (1945); *D.T. v. Indep. Sch. Dist. No. 16*, 894 F.2d 1176, 1186 (10th Cir. 1990).

[86] *See Polk County v. Dotson*, 454 U.S. 312, 320 (1981); *see also West v. Atkins*, 487 U.S. 42, 51–52 (1988).

[87] *See Gilmore v. Salt Lake Cmty. Action Program*, 710 F.2d 632, 638 n.13 (10th Cir. 1983).

[88] *See Nieto v. Kapoor*, 268 F.3d 1208, 1217 (10th Cir. 2001).

[89] *See* Okla. Stat. tit. 70 §§ 3-131(A), 3-132(D), 3-135(A)(9)–(11).

[90] *See* Okla. Stat. tit. 70 §§ 3-132(A), 3-145.1; *see also* Oklahoma State Department of Education, *Oklahoma Charter Schools Program*, https://bit.ly/3Bl9zCc (last visited Jan. 26, 2023).

[91] 602 F.3d 1175, 1188 (10th Cir. 2010); *accord Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1210 (10th Cir. 2007).

[92] *See* 241 F. App'x 490, 496–97 (10th Cir. 2007).

concluded that employees of a Utah charter school were "government officials," emphasizing that "charter schools are public schools using public funds to educate school children."[93] Federal district courts within the Tenth Circuit have also treated charter schools as governmental entities and state actors.[94] In addition, in *Milonas v. Williams*, the Tenth Circuit ruled that a private school for behaviorally troubled boys was a state actor with respect to its conduct toward the boys because it received substantial public funding, it was significantly regulated by the state, and many of the boys were placed at the school by school districts or juvenile courts.[95]

Many other federal courts across the country, including the U.S. Courts of Appeals for the Fourth and Ninth Circuits, have concluded that charter schools are state actors for purposes of their conduct toward students.[96] And a number of federal courts have ruled that charter schools are also state actors for purposes of their conduct toward their employees.[97]

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[93] 673 F. App'x 822, 830 (10th Cir. 2016).

[94] *See Doe v. Rocky Mountain Classical Acad.*, No. 1:19-cv-03530-DDD-NYW, 2022 WL 16556255, at *6 (D. Colo. Sept. 30, 2022); *King v. United States*, 53 F. Supp. 2d 1056, 1065–69 (D. Colo. 1999), *rev'd in part on other grounds*, 301 F.3d 1270 (10th Cir. 2002).

[95] 691 F.2d 931, 940 (10th Cir. 1982).

[96] *See Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 115–23 (4th Cir. 2022) (en banc), *petition for cert. docketed*, No. 22-238 (Sept. 12, 2022); *Nampa Classical Acad. v. Goesling*, 447 F. App'x 776, 777–78 (9th Cir. 2011); *Patrick v. Success Acad. Charter Schs.*, 354 F. Supp. 3d 185, 209 n.24 (E.D.N.Y. 2018); *United States v. Minn. Transitions Charter Schs.*, 50 F. Supp. 3d 1106, 1120 (D. Minn. 2014); *Pocono Mountain Charter Sch. v. Pocono Mountain Sch. Dist.*, 908 F. Supp. 2d 597, 604–05 (M.D. Pa. 2012); *Daugherty v. Vanguard Charter Sch. Acad.*, 116 F. Supp. 2d 897, 906 (W.D. Mich. 2000); *Meadows v. Lesh*, No. 10-CV-00223(M), 2011 WL 4744914, at *1–2 (W.D.N.Y. Oct. 6, 2011); *ACLU of Minn. v. Tarek Ibn Ziyad Acad.*, No. 09-138 (DWF/JJG), 2009 WL 2215072, at *9–10 (D. Minn. July 9, 2009); *Scaggs v. N.Y. Dep't of Educ.*, No. 06-CV-0799 (JFB)(VVP), 2007 WL 1456221, at *12–13 (E.D.N.Y. May 16, 2007); *Irene B. v. Phila. Acad. Charter Sch.*, No. Civ.A. 02-1716, 2003 WL 24052009, at *11 (E.D. Pa. Jan. 29, 2003).

[97] *See Riester v. Riverside Cmty. Sch.*, 257 F. Supp. 2d 968, 972–73 (S.D. Ohio 2002); *Jones v. Sabis Educ. Sys., Inc.*, 52 F. Supp. 2d 868, 876, 879 (N.D. Ill. 1999); *Lengele v. Willamette Leadership Acad.*, No. 6:22-cv-01077-MC, 2022 WL 17057894, at *4 (D. Or. Nov. 17, 2022); *Falash v. Inspire Academics, Inc.*, No. 1:14-cv-00223-REB, 2016 WL 4745171, at *2, 6 (D. Idaho Sept. 12, 2016); *Jordan v. N. Kane Educ. Corp.*, No. 08 C 4477, 2009 WL 509744, at *2–3 (N.D. Ill. Mar. 2, 2009); *Matwijko v.*

Ignoring virtually all these authorities, former Attorney General O'Connor's Opinion 2022-7 relies principally[98] on the Supreme Court's decision in *Rendell-Baker v. Kohn*[99] to assert that Oklahoma charter schools are not state actors. In *Rendell-Baker*, the Supreme Court ruled that a private school for troubled youths was not a state actor for purposes of employment-related claims even though it received substantial governmental funding, was heavily regulated, and obtained most of its students through referrals from public schools.[100] But Oklahoma charter schools are public schools, not private ones.[101] They are created through governmental action,[102] unlike the school in *Rendell-Baker*.[103] They perform the traditionally exclusive public function of providing *public* education,[104] while the school in *Rendell-Baker* was for "students who could *not* be served by traditional public schools," a function "that until recently the State had not undertaken."[105] Moreover, the educational functions of Oklahoma charter schools are heavily regulated,[106] but "regulators showed relatively little interest in the [*Rendell-Baker*] school's personnel matters," and the Supreme Court's holding in the case addressed only whether the school was a state actor with respect to employment claims.[107] *Rendell-Baker* therefore does not affect the conclusions that Oklahoma charter schools are state actors because they are governmental entities, and that they are state actors under the symbiotic-relationship/entwinement and public-function tests at least for purposes of their educational functions.

Bd. of Trs. of Glob. Concepts Charter Sch., No. 04-CV-663A, 2006 WL 2466868, at *3–5 (W.D.N.Y. Aug. 24, 2006).

[98] Op. 2022-7 at 11–12.

[99] 457 U.S. 830 (1982).

[100] *Id.* at 832–35, 843.

[101] Okla. Stat. tit. 70 § 3-132(D).

[102] *See* Okla. Stat. tit. 70 §§ 3-132(A), 3-145.1; *see also* Oklahoma State Department of Education, *Oklahoma Charter Schools Program*, https://bit.ly/3Bl9zCc (last visited Jan. 26, 2023).

[103] *See* 457 U.S. at 832.

[104] *Peltier*, 37 F.4th at 119; *Riester*, 257 F. Supp. 2d at 972; *see also Tryon Dependent Sch. Dist. No. 125 of Lincoln Cnty. v. Carrier*, 474 P.2d 131, 133 (Okla. 1970).

[105] 457 U.S. at 842 (emphasis added).

[106] *See supra* §§ I.A.1, I.A.2.a.

[107] *See* 457 U.S. at 841–42.

Opinion 2022-7 makes a critical error of law in asserting that *Rendell-Baker* and a case decided on the same day, *Blum v. Yaretsky*, require that "the State must coerce or significantly encourage the specific conduct being challenged" for the conduct to be state action.[108] Both the Supreme Court and the Tenth Circuit have made clear that demonstrating that the state coerced or encouraged the challenged conduct is only *one way* to establish state action.[109] Coercion/encouragement is an element of what the Tenth Circuit characterizes as the "nexus" test, and the Tenth Circuit has also suggested that it may be relevant under the "joint action" test.[110] But this memorandum does not rely on either of those two tests. Coercion/encouragement is not required under the symbiotic-relationship/entwinement or public-function tests,[111] which establish that Oklahoma charter schools are state actors.[112] And the question whether the government has coerced or encouraged a private entity's conduct is not even relevant to the lead point in this memorandum—that Oklahoma charter schools are state actors because they are governmental entities themselves.[113]

The other cases that Opinion 2022-07 cites[114] in support of its argument that Oklahoma charter schools aren't state actors are inapplicable for reasons similar to why *Rendell-Kohn* is inapposite. In *Caviness v. Horizon Community Learning Center*, the court emphasized that the claims against the charter school there were employment-law claims, and that "a private entity may be designated a state actor for some purposes but still function as a private actor in other respects."[115] *Logiodice v. Trustees of Maine Central*

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[108] Opinion 2022-7 at 12 (citing *Rendell-Baker*, 457 U.S. at 840; *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)).

[109] *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 303 (2001); *Wittner v. Banner Health*, 720 F.3d 770, 776 (10th Cir. 2013); *accord Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019).

[110] *See VDARE Found. v. City of Colorado Springs*, 11 F.4th 1151, 1160–61 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 1208 (2022); *Wittner*, 720 F.3d at 775, 777; *Johnson v. Rodrigues*, 293 F.3d 1196, 1203 (10th Cir. 2002).

[111] *See Brentwood*, 531 U.S. at 302–03; *Wittner*, 720 F.3d at 776–77.

[112] *See supra* § I.A.2.

[113] *See supra* § I.A.1.

[114] Op. 2022-07 at 12.

[115] *See* 590 F.3d 806, 814 (9th Cir. 2010).

Institute was a lawsuit against a private school, not a charter school.[116] *Robert S. v. Stetson School, Inc.* was also a suit against a private school; moreover, far from performing a traditionally exclusive public function, the school performed services that were provided only by private schools.[117] None of these cases render Oklahoma charter schools private actors for purposes of their educational functions.

B. Because they are state actors, Oklahoma charter schools have no free-exercise right to teach religion, and the Establishment Clause prohibits them from doing so.

Opinion 2022-7 contends[118] that the First Amendment's Free Exercise Clause gives Oklahoma charter schools a right to provide religious education to their students and overrides the Charter Schools Act's requirement that "[a] charter school shall be nonsectarian in its programs, admission policies, employment practices, and all other operations."[119] But because Oklahoma charter schools are governmental entities and state actors, they have no right under the Free Exercise Clause or any other provision of the First Amendment to present programming—religious or other—that state law prohibits. And in all events, the First Amendment's Establishment Clause bars schools that are state actors from infusing religion into their education program.

Oklahoma charter schools are governmental entities created by state law through charters granted by other governmental entities to which the schools are subordinate.[120] "[S]ubordinate unit[s] of government . . . 'ha[ve] no privileges or immunities under the federal constitution which [they] may invoke in opposition to the will of [their] creator.'"[121] For this reason, the Ninth Circuit ruled that an Idaho charter school had no right to assert federal constitutional claims against an Idaho policy that prohibited "the use

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[116] *See* 296 F.3d 22, 24–25 (1st Cir. 2002).

[117] *See* 256 F.3d 159, 162, 166 (3d Cir. 2001).

[118] Op. 2022-7 at 8–15.

[119] Okla. Stat. tit. 70, § 3-136(A)(2).

[120] *See supra* §§ I.A.1, I.A.2.a.

[121] *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 363 (2009) (quoting *Williams v. Mayor of Baltimore*, 289 U.S. 36, 40 (1933)); *accord Nampa Classical Acad. v. Goesling*, 447 F. App'x 776, 777–78 (9th Cir. 2011).

of sectarian or denominational texts in public schools."[122] And a Pennsylvania federal district court ruled that a Pennsylvania charter school had no right to bring federal constitutional claims against the school district that chartered it.[123] Likewise, Oklahoma charter schools have no right to challenge under the U.S. Constitution provisions of Oklahoma law that govern them, including the Charter Schools Act's prohibition against religious programming and operations.

In addition, when a state actor speaks in the course of exercising their official duties, their speech is government speech, and so the instruction presented in public educational institutions is government speech.[124] A person delivering government speech has no right under the First Amendment, including its Free Exercise Clause, to deliver speech that a statute or a governmental policy prohibits.[125] As Oklahoma charter schools are public schools and state actors, the First Amendment does not give them any right to present a religious educational program to their students in contravention of Oklahoma law.

But even if the Free Exercise Clause were implicated here—indeed, even if Opinion 2022-7 were correct that strict scrutiny applies under the Clause[126]—compliance with the Establishment Clause is a compelling governmental interest that satisfies even strict scrutiny under other provisions of the First Amendment.[127] As public schools and state actors, Oklahoma charter schools

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[122] *See Nampa Classical*, 447 F. App'x at 777–78.

[123] *See Pocono Mountain Charter Sch. v. Pocono Mountain Sch. Dist.*, 908 F. Supp. 2d 597, 606–14 (M.D. Pa. 2012).

[124] *See Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006); *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1202–03 (10th Cir. 2007); *Nampa Classical*, 447 F. App'x at 778; *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1010 (9th Cir. 2000); *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491–92 (3d Cir. 1998).

[125] *See Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009); *Garcetti*, 547 U.S. at 421; *Brammer-Hoelter*, 492 F.3d at 1202; *Nampa Classical*, 447 F. App'x at 778; *Gundy v. City of Jacksonville*, 50 F.4th 60, 80–81 (11th Cir. 2022); *Fields v. Speaker of Pa. House of Representatives*, 936 F.3d 142, 158–60 (3d Cir. 2019); *Downs*, 228 F.3d at 1015–16; *Edwards*, 156 F.3d at 491–92.

[126] *See* Op. 2022-7 at 5.

[127] *See Cap. Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 761–62 (1995) (plurality opinion of Scalia, J., joined by Rehnquist, C.J., Kennedy, J., and Thomas, J.); *accord id.* at 783 (O'Connor, J., concurring in part and concurring in the

must adhere to the requirements of the U.S. Constitution,[128] including those of the First Amendment and its Establishment Clause.[129] And the Establishment Clause prohibits them from teaching religion in the classroom,[130] leading students in prayer or presenting prayer at school events,[131] displaying religious texts or symbols to students,[132] segregating students based on religion,[133] or otherwise promoting religion to students[134] or coercing students to take part in religious activity.[135] Indeed, the Free Exercise Clause also prohibits state actors from "coerc[ing] participation in religious programming."[136]

In sum, because Oklahoma charter schools are state actors, the Constitution not only provides them with no right to inculcate religion in their students but also prohibits them from doing so.

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judgment, joined by two other Justices); *Widmar v. Vincent*, 454 U.S. 263, 271 (1981); *see also Lee v. Weisman*, 505 U.S. 577, 587 (1992).

[128] *See, e.g.*, *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019).

[129] *See, e.g.*, *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985); *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 210–11 (1948).

[130] *See*, *e.g.*, *Edwards v. Aguillard*, 482 U.S. 578, 591–94 (1987); *Doe v. Porter*, 370 F.3d 558, 562–64 (6th Cir. 2004); *Hall v. Bd. of Sch. Comm'rs*, 656 F.2d 999, 1002–03 (5th Cir. 1981).

[131] *See, e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309–10 (2000); *Lee*, 505 U.S. at 587; *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 224 (1963); *Engel v. Vitale*, 370 U.S. 421, 430 (1962).

[132] *See, e.g.*, *Stone v. Graham*, 449 U.S. 39, 42 (1980); *Roberts v. Madigan*, 921 F.2d 1047, 1058 (10th Cir. 1990); *Washegesic v. Bloomingdale Pub. Schs.*, 33 F.3d 679, 684 (6th Cir. 1994).

[133] *See Evans v. Newton*, 382 U.S. 296, 300 (1966); *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 728 (1994) (Kennedy, J., concurring in the judgment).

[134] *See, e.g.*, *McCollum*, 333 U.S. at 212; *Roberts*, 921 F.2d at 1057–58; *Marchi v. Bd. of Coop. Educ. Servs.*, 173 F.3d 469, 477 (2d Cir. 1999); *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994).

[135] *See, e.g.*, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2429 (2022); *Lee*, 505 U.S. at 587.

[136] *See Janny v. Gamez*, 8 F.4th 883, 911 (10th Cir. 2021), *cert. dismissed sub nom. Carmack v. Janny*, 142 S. Ct. 878 (2022).

II. The Establishment Clause prohibits Oklahoma from funding religious education at charter schools.

Even if Oklahoma charter schools were not state actors, the Establishment Clause would still prohibit Oklahoma from funding religious education or activity at a charter school. The Establishment Clause has long barred governmental bodies from directly providing public funds to institutions that use those funds to support religious activities, including religious instruction.[137] To be sure, there is a narrow exception to this rule: public funds may support religious education when "a government aid program is neutral with respect to religion, and provides assistance *directly to a broad class of citizens* who, in turn, direct government aid to religious schools *wholly* as a result of their own genuine and independent private choice."[138] For this "true private choice" exception to apply, "government aid" must "reach[ ] religious schools *only* as a result of the genuine and independent choices of private individuals."[139]

Oklahoma charter schools are funded in a manner that does not satisfy the "true private choice" exception. The state does not provide any funds, vouchers, or other aid directly to parents or students; rather the funding goes directly from the government to the schools.[140] Nor does the funding reach particular charter schools solely as a result of choices by parents or students. Instead, funds flow to charter schools through a complex formula that—though it includes the number of students served—also incorporates factors such as levels of teacher experience, how long a school has been in operation,

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[137] *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 228–30 (1997); *Bowen v. Kendrick*, 487 U.S. 589, 621 (1988); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 755 (1976) (plurality opinion); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 780 (1973); *Hunt v. McNair*, 413 U.S. 734, 743 (1973); *accord Mitchell v. Helms*, 530 U.S. 793, 857 (2000) (concurring opinion of O'Connor, J., held controlling under *Marks v. United States*, 430 U.S. 188, 193 (1977), by *Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1058 (9th Cir. 2007); *Columbia Union Coll. v. Oliver*, 254 F.3d 496, 504 n.1 (4th Cir. 2001); *DeStefano v. Emergency Hous. Grp., Inc.*, 247 F.3d 397, 418 (2d Cir. 2001); and *Johnson v. Econ. Dev. Corp.*, 241 F.3d 501, 510 n.2 (6th Cir. 2001)).

[138] *See Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002) (emphasis added); *accord Carson ex rel. O.C. v. Makin*, 142 S. Ct. 1987, 1994, 1997 (2022).

[139] *See Zelman*, 536 U.S. at 649 (emphasis added); *accord Mitchell*, 530 U.S. at 842–44 (controlling concurrence of O'Connor, J.).

[140] *See* Okla. Stat. tit. 70 §§ 3-135(A)(12), 3-142(A)–(B), 3-145.3(C)–(D).

the population density of the area that the school serves, and various characteristics of enrolled students.[141] And what charter schools can come into being in the first place is itself determined by governmental entities, which make discretionary decisions on whether to approve applications to create charter schools based on criteria such as the quality of the application, the level of community support for the proposed school, whether the school serves at-risk student populations, the applicant's track record, and the applicant's finances.[142]

The three principal cases on which Opinion 2022-07 relies[143]—*Carson ex rel. O.C. v. Makin*,[144] *Espinoza v. Montana Department of Revenue*,[145] and *Trinity Lutheran Church of Columbia, Inc. v. Comer*[146]—are thus inapplicable here, for in each case the funding at issue would *not* have violated the Establishment Clause. In *Carson* and *Espinoza*, the programs in controversy satisfied the "true private choice" exception.[147] In *Trinity Lutheran*, the funding would not have been for religious uses.[148]

Because the Establishment Clause prohibits Oklahoma from funding religious education or activity, and the "true private choice" exception to that rule does not apply here, the Establishment Clause bars the Virtual Charter School Board from approving charter schools that would teach students religion or otherwise inject religious practices into their programming.

Conclusion

Far from violating the U.S. Constitution, the Charter Schools Act's requirement that "[a] charter school shall be nonsectarian in its programs, admission policies, employment practices, and all other operations"[149] is

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[141] *See* Okla. Stat. tit. 70 §§ 3-135(A)(12), 3-142(A)–(B), 3-145.3(C)–(D), 18-200.1, 18-201.1.

[142] *See* Okla. Stat. tit. 70 §§ 3-132(A)(9), 3-132(B)–(C), 3-134(I)(3)–(4).

[143] *See* Op. 2022-7 at 3–11.

[144] 142 S. Ct. 1987.

[145] 140 S. Ct. 2246 (2020).

[146] 137 S. Ct. 2012 (2017).

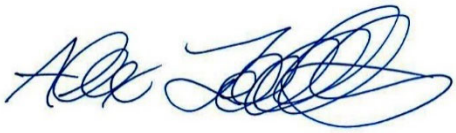
[147] *See Carson*, 142 S. Ct. at 1994, 1997; *Espinoza*, 140 S. Ct. at 2254.

[148] *See* 137 S. Ct. at 2017–19, 2024 n.3.

[149] Okla. Stat. tit. 70, § 3-136(A)(2).

mandated by the Constitution. We would be happy to discuss our legal analysis with interested persons.

By:



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