

June 2, 2023

*Via email and U.S. mail*

Members of the Oklahoma Statewide Virtual Charter School Board:

Dr. Robert Franklin, Chairman

Barry Beauchamp, Clerk

William Pearson

Nellie Tayloe Sanders

Dr. Scott Strawn

Ryan Walters, State Superintendent of Public Instruction and ex-officio member

Dr. Katherine Curry, Oklahoma Secretary of Education and ex-officio member

Dr. Rebecca L. Wilkinson, Executive Director, Oklahoma Statewide Virtual Charter School Board

M.C. Connors Building

2501 N. Lincoln Blvd., Suite 301

Oklahoma City, OK 73105

Re: St. Isidore of Seville Catholic Virtual Charter School revised application

Dear Dr. Franklin, Mr. Beauchamp, Mr. Pearson, Ms. Sanders, Dr. Strawn, Mr. Walters, Dr. Curry, and Dr. Wilkinson:

We write to urge you to reject the revised application for charter-school sponsorship submitted to you by St. Isidore of Seville Catholic Virtual Charter School. All the unconstitutional and unlawful aspects of the original application remain, unchanged, in the revised application. St. Isidore still intends to teach a religious curriculum, discriminate in admissions and employment, and be controlled by its educational management organization. The school also still has not demonstrated that it is willing or able to adequately serve students with disabilities.

By approving the application, you would violate the U.S. Constitution, the Oklahoma Constitution, the Oklahoma Charter Schools Act, and the Board's

regulations. As a result, under Oklahoma’s *qui tam* statute, all Board members who vote to approve the application would face personal liability in the amount of *three times* the state funds paid to St. Isidore in the future—in other words, for tens of millions of dollars. Please follow the law and the advice of your Attorney General and refrain from such irresponsible action.

### **All the Unlawful Aspects of St. Isidore’s Original Application Remain in St. Isidore’s Revised Application**

The unconstitutional and illegal aspects of St. Isidore’s application remain, unchanged, in St. Isidore’s revised application. Indeed, the revised application repeats verbatim virtually all the language of the original application that we cited in our February 10 and March 17 letters as evidence of why the application is unlawful.

Specifically, the revised application confirms that St. Isidore still:

- Intends to teach a religious curriculum,<sup>1</sup> in violation of the Oklahoma Charter Schools Act,<sup>2</sup> the Oklahoma Constitution,<sup>3</sup> and the Establishment Clause of the First Amendment to the U.S. Constitution.<sup>4</sup>
- In violation of your regulations,<sup>5</sup> expressly refuses to agree to comply<sup>6</sup> with all applicable legal prohibitions against discrimination in student admissions.<sup>7</sup>

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<sup>1</sup> See, e.g., St. Isidore of Seville Catholic Virtual School, *Virtual Charter School Revised Application to the Oklahoma Statewide Virtual Charter School Board*, at 5, 17–20, 40, 105–08, 156, 168 (May 25, 2023).

<sup>2</sup> Okla. Stat. tit. 70, § 3-136(A)(2).

<sup>3</sup> Okla. Const. art. I, § 5; art. II, § 5.

<sup>4</sup> See also Letter from Americans United for Separation of Church and State to Oklahoma Statewide Virtual Charter School Board, at 2–4 (Feb. 10, 2023); Letter from Americans United for Separation of Church and State to Oklahoma Statewide Virtual Charter School Board, at 2 (Mar. 17, 2023).

<sup>5</sup> Okla. Admin. Code § 777:10-3-3(c)(1)(F).

<sup>6</sup> See Revised Application at 93; *id.*, Appendix F, Section 2; see also *id.* at 109; *id.*, Appendix F, Section 1, p. 4.

<sup>7</sup> See also Feb. 10 Americans United letter at 5–7.

- Plans to discriminate in student admissions based on sexual orientation, gender identity, pregnancy, and other personal reproductive choices,<sup>8</sup> in violation of the Charter Schools Act,<sup>9</sup> the Oklahoma Constitution,<sup>10</sup> and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.<sup>11</sup>
- Intends to operate in a manner that will result in discrimination in student admissions based on religion,<sup>12</sup> in violation of the Charter Schools Act,<sup>13</sup> the Oklahoma Constitution,<sup>14</sup> and the Establishment and Free Exercise Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.<sup>15</sup>
- In violation of the Charter Schools Act,<sup>16</sup> expressly refuses to agree to comply with all federal and state laws relating to the education of children with disabilities in the same manner as school districts, instead reiterating that the school “will comply with all applicable State and Federal Laws in serving students with disabilities . . . to the extent that it does not compromise the religious tenets of the school and the instructional model of the school.”<sup>17,18</sup>
- Has not demonstrated that it is actually willing or able to adequately serve students with disabilities, as the school’s revised application retains numerous other deficiencies on that issue that a disability-education expert highlighted in a March 18 letter to you,<sup>19</sup> including (1)

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<sup>8</sup> See Revised Application at 38, 43, 168.

<sup>9</sup> Okla. Stat. tit. 70, §§ 3-135(A)(9)–(10), 3-140, 3-145.3(J).

<sup>10</sup> Okla. Const. art. I, § 5; art. II, § 36A(A).

<sup>11</sup> See also Feb. 10 Americans United letter at 8–9; Mar. 17 Americans United letter at 2–3.

<sup>12</sup> See Revised Application at 18, 38, 104.

<sup>13</sup> Okla. Stat. tit. 70, §§ 3-135(A)(9)–(10), 3-136(A)(2), 3-140, 3-145.3(J).

<sup>14</sup> Okla. Const. art. I, §§ 2, 5.

<sup>15</sup> See also Feb. 10 Americans United letter at 7–8.

<sup>16</sup> Okla. Stat. tit. 70, § 3-136(A)(7).

<sup>17</sup> See Revised Application at 73–74.

<sup>18</sup> See also Feb. 10 Americans United letter at 10; Mar. 17 Americans United letter at 3–4.

<sup>19</sup> See Letter from Andrea Kunkel to Robert Franklin, et al. (Mar. 18, 2023).

a statement that the school “shall not discriminate on the basis of a protected class, including but not limited to . . . disability *that can be served by virtual learning* . . . in its discipline policy and practices”<sup>20</sup>; (2) a non-discrimination statement that identifies “physical disability or impairment” but not mental impairment as a protected characteristic (and that is, in any event, qualified by a claim of religious exemptions)<sup>21</sup>; (3) a statement that “[s]tudents enrolled in St. Isidore . . . will receive a Free and Appropriate Public Education in the Least Restrictive Environment *to the maximum extent possible through a virtual education program*”<sup>22</sup>; (4) a misstatement of the timeline required to adopt an existing or create a new individual education program for a new student<sup>23</sup>; and (5) a failure to describe the discipline policies that will be applicable to students with disabilities.<sup>24</sup>

- Plans to discriminate in employment based on religion, sexual orientation, gender identity, and other personal reproductive choices,<sup>25</sup> in violation of the Charter Schools Act,<sup>26</sup> the Oklahoma Constitution,<sup>27</sup> and the Establishment, Free Exercise, and Equal Protection Clauses of the U.S. Constitution.<sup>28</sup>
- Plans to give siblings of previously enrolled students preference in admissions,<sup>29</sup> in violation of the Charter Schools Act.<sup>30,31</sup>

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<sup>20</sup> Compare Revised Application at 43 (emphasis added) *with* Kunkel letter at 3.

<sup>21</sup> Compare Revised Application, Appendix F, Section 1, p. 16 *with* Kunkel letter at 4.

<sup>22</sup> Compare Revised Application at 69 (emphasis added) *with* Kunkel letter at 5 *and* United States Department of Education Office of Special Education and Rehabilitative Services Office of Special Education Programs, *Guidance OSEP QA 20-01*, at 2 (Sept. 28, 2020), <https://bit.ly/45FsPYC>.

<sup>23</sup> Compare Revised Application at 74 *with* Kunkel letter at 7.

<sup>24</sup> Compare Revised Application at 42–43, 69–85 *with* Kunkel letter at 7.

<sup>25</sup> See Revised Application at 18, 104–05, 109, 115–16, 136.

<sup>26</sup> Okla. Stat. tit. 70, § 3-136(A)(2).

<sup>27</sup> Okla. Const. art. I, § 2; art. II, § 36A(A).

<sup>28</sup> See also Feb. 10 Americans United letter at 10–11.

<sup>29</sup> See Revised Application at 38–39.

<sup>30</sup> Okla. Stat. tit. 70, §§ 3-135(A)(10), 3-140.

<sup>31</sup> See also Feb. 10 Americans United letter at 11.

- Intends to offer instruction to students who are concurrently enrolled in other schools,<sup>32</sup> despite the lack of any legal authority to do so under the Charter Schools Act or otherwise.<sup>33</sup>
- Intends to hire an educational management organization that will have control over the school,<sup>34</sup> in violation of your regulations.<sup>35,36</sup>
- Has board members who stand to receive pecuniary gain from the earnings of the school’s intended educational management organization,<sup>37</sup> in violation of your regulations.<sup>38,39</sup>

With respect to the last two of these illegalities, the revised application’s response is that St. Isidore’s planned educational management organization, the Archdiocese of Oklahoma City Department of Catholic Education, “is a non-profit” (though the revised application uses the term “Office of Catholic Education” there).<sup>40</sup> But the revised application provides no evidence that the Archdiocese’s Department (or “Office”) of Catholic Education is an entity that is independent from the Archdiocese. Rather, the revised application describes the “Department of Catholic Education” as “an entity within the Archdiocese of Oklahoma City.”<sup>41</sup> And the revised application still has all the same language from the original application,<sup>42</sup> cited in our February 10 letter,<sup>43</sup> that demonstrates that the Archdiocese and its Archbishop (together with the Diocese of Tulsa and its Bishop) will have ultimate control over St. Isidore.

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<sup>32</sup> See Revised Application at 19.

<sup>33</sup> See Mar. 17 Americans United letter at 5.

<sup>34</sup> See Revised Application at 25, 45–46, 91; *id.*, Appendix F, Section 1, pp. 5, 11.

<sup>35</sup> Okla. Admin. Code § 777:10-1-4(1).

<sup>36</sup> See *also* Feb. 10 Americans United letter at 12–13; Mar. 17 Americans United letter at 4–5.

<sup>37</sup> See Revised Application, Appendix F, Section 1, p. 7; *id.*, Appendix F, Sections 3 and 4.

<sup>38</sup> Okla. Admin. Code § 777:10-3-3(d)(4)(I).

<sup>39</sup> See *also* Feb. 10 Americans United letter at 13.

<sup>40</sup> Revised Application at 48.

<sup>41</sup> *Id.* at 46.

<sup>42</sup> See *id.* at 91; *id.*, Appendix F, Section 1, pp. 5, 11.

<sup>43</sup> See Feb. 10 Americans United letter at 12–13.

Thus, St. Isidore’s educational management organization, as part of the Archdiocese, will still improperly have control over the school. And one of St. Isidore’s board members will still be the director of that educational management organization<sup>44</sup> and so will still stand to improperly benefit financially from the management organization’s earnings.<sup>45</sup>

### **St. Isidore’s Legal Arguments Are Meritless**

The legal discussion in St. Isidore’s revised application<sup>46</sup> largely consists of arguments that we addressed and refuted in our prior correspondence.<sup>47</sup> For example, we have explained at great length that Oklahoma charter schools are governmental entities and state actors, and that they are therefore constitutionally prohibited from teaching a religious curriculum and from discriminating in admissions or employment based on religion.<sup>48</sup> Similarly, we have explained in detail that because Oklahoma charter schools are *not* funded through a school-voucher-like “true private choice” program, they must comply with the federal Establishment Clause’s prohibition against use of public funds for religious activities.<sup>49</sup>

The main issue that we did not previously address is the effect of the recent amendment to the Oklahoma Religious Freedom Act.<sup>50</sup> The Religious Freedom Act provides that “no governmental entity shall substantially burden a person’s free exercise of religion . . . unless it demonstrates that application of the burden to the person is [1] [e]ssential to further a compelling governmental interest; and [2] [t]he least restrictive means of furthering that compelling governmental interest.”<sup>51</sup> The recent amendment provides that “[i]t shall be deemed a substantial burden to exclude any person or entity from participation in or receipt of governmental funds,

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<sup>44</sup> See Revised Application at 3, 45; *id.*, Appendix F, Sections 3 and 4; *id.*, Appendix M, page 815 of excerpt from *The Official Catholic Directory*.

<sup>45</sup> See Feb. 10 Americans United letter at 13.

<sup>46</sup> Revised Application at 10–15.

<sup>47</sup> See Americans United for Separation of Church and State, *Legal Memorandum on Whether Oklahoma Charter Schools May Provide Religious Education* (Jan. 31, 2023); Feb. 10 Americans United letter at 11–12.

<sup>48</sup> See Jan. 31 Americans United memorandum § I.

<sup>49</sup> See *id.* § II.

<sup>50</sup> Okla. S.B. No. 404 (May 2, 2023) (amending Okla. Stat. tit. 51, §§ 251–58).

<sup>51</sup> Okla. Stat. tit. 51, § 253.

benefits, programs, or exemptions based solely on the religious character or affiliation of the person or entity.”<sup>52</sup>

But the amendment is currently irrelevant because it does not take effect until November 1, 2023.<sup>53</sup> Even if it were currently relevant, it would not support granting St. Isidore’s application for several reasons.

First, most of the legal prohibitions we rely on—including the prohibitions against a public charter school teaching a religious curriculum or discriminating based on religion in admissions and employment—are mandated by the U.S. and Oklahoma Constitutions. A state statute cannot override the federal or state constitutions.<sup>54</sup>

Second, the amendment provides that it is a “substantial burden to exclude any person or entity from participation in or receipt of governmental funds, benefits, programs, or exemptions based *solely* on the religious character or affiliation of the person or entity.” (Emphasis added.) Conversely, therefore, it is *not* a substantial burden to deny a religious entity public funding on a basis other than the entity’s religious affiliation or character. Denying St. Isidore state funding because of its plans to teach a religious curriculum would be based on its intended *conduct*, not on its “religious character or affiliation,” as an entity can be religious without engaging in religious indoctrination of the people whom it serves. Similarly, denying St. Isidore’s application on any of the other grounds we have raised—such as the school’s intent to discriminate and to be controlled by its educational management organization—would plainly not be a denial “based solely on the religious character or affiliation” of the school.

Third, the amendment’s legislative history confirms that it was intended to apply *only* to denials of funding based *solely* on an entity’s religious status. The bill’s House sponsor, Representative Jon Echols (R-90), repeatedly made this clear during floor debate in the House. He explained that a governmental official considering an application for public funding “can’t solely discriminate based on religion, but there are a million other reasons

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<sup>52</sup> S.B. No. 404 § 1.

<sup>53</sup> *Id.* § 3.

<sup>54</sup> See, e.g., Okla. Const. art. I, § 1; *Muskogee Indus. Dev. Co. v. Ayres*, 154 P. 1170, 1171 (Okla. 1916).

you can say no.”<sup>55</sup> He gave examples of grounds on which public officials can still deny funding under the amendment: “You can discriminate based on proselytization. You can discriminate based on they don’t have the right system set in place to follow whatever the rules are. . . . You absolutely could deny someone who violated some other antidiscrimination law that existed.”<sup>56</sup> He emphasized that “[t]here is nothing” in the amendment “that says [religious entities] don’t have to abide by the same rules as everybody else.”<sup>57</sup> Similarly, before the State Powers Committee, Representative Echols noted that religious entities would have to “follow the same rules as everyone else.”<sup>58</sup> St. Isidore’s desire to disregard those rules on religious grounds thus is not protected by the amendment to the Religious Freedom Act.

Finally, even if a denial of funding to St. Isidore were a “substantial burden” under the amended statute (which it is not), the denial would not violate the amended statute so long as it furthered a compelling governmental interest through the least restrictive means.<sup>59</sup> As noted above, most of the legal prohibitions we rely on are *mandated* by the federal and Oklahoma constitutions, and adhering to federal and state constitutional provisions is a compelling governmental interest that cannot be pursued through any means other than actually complying with the provisions.<sup>60</sup> Statutory and regulatory prohibitions upon which we rely, such as the prohibitions against discrimination in admissions and employment, also serve compelling state interests through the least restrictive means.<sup>61</sup>

Separately, St. Isidore alleges that the Oklahoma Constitution’s prohibitions against public funding of religious institutions and religious control of public schools were motivated by anti-Catholic animus.<sup>62</sup> But the sources that St. Isidore cites for this contention provide no Oklahoma-specific

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<sup>55</sup> *House Floor Afternoon Session*, 59 Legis., 2:20:10–2:20:17 (Apr. 25, 2023, 1:30 p.m.), <https://bit.ly/3MOfPY7>.

<sup>56</sup> *Id.* at 2:20:25–2:20:32, 2:29:36–2:29:42.

<sup>57</sup> *Id.* at 2:34:15–2:34:18.

<sup>58</sup> *State Powers Committee*, 9:10:37–9:10:42 (Apr. 5, 2023, 9:00 a.m.), <https://bit.ly/3MOfPY7>.

<sup>59</sup> Okla. Stat. tit. 51, § 253(B).

<sup>60</sup> *See, e.g., Widmar v. Vincent*, 454 U.S. 263, 271 (1981).

<sup>61</sup> *See, e.g., Roberts v. U.S. Jaycees*, 468 U.S. 609, 624, 628–29 (1984); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733 (2014).

<sup>62</sup> *See Revised Application* at 13–14.



evidence of anti-Catholic animus in connection with the adoption of these constitutional provisions.<sup>63</sup> Rather, St. Isidore attempts to tie the constitutional provisions to an 1875 failed proposed amendment to the U.S. Constitution referred to as the “Blaine Amendment,” which St. Isidore contends was motivated by anti-Catholic sentiment.<sup>64</sup> But historical evidence demonstrates that it is far from true that all state constitutional provisions similar to the Oklahoma ones at issue here are related to the Blaine Amendment or associated with anti-Catholicism.<sup>65</sup> And all Oklahoma Supreme Court Justices who have considered the issue have explained that the relevant Oklahoma constitutional provisions, which were enacted in 1907, were *not* based on the Blaine Amendment and were *not* motivated by anti-Catholic animus.<sup>66</sup> Instead, the historical record shows that these constitutional provisions were intended to protect religious minorities—especially Native Americans—from religious proselytization in public and other government-funded schools.<sup>67</sup>

### **Board Members Who Vote to Approve St. Isidore’s Application Will Face Tens of Millions of Dollars in Personal Liability**

Oklahoma has what is known as a “*qui tam*” statute, which provides that any state official who authorizes payment of public funds pursuant to an unlawful contract can be held personally liable for triple the amount of the funds paid under the contract. The statute, in relevant part, states:

Every officer of the state . . . who shall hereafter order or direct the payment of any money . . . belonging to the state . . . in pursuance of any

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<sup>63</sup> See *id.* at 14 (citing Kyle Duncan, *Secularism’s Laws: State Blaine Amendments and Religious Persecution*, 72 Fordham L. Rev. 493, 514–15 (2003); The Oklahoman Editorial Board, *Blaine Amendment Bloodline Obvious in Oklahoma’s Constitution*, The Oklahoman (Aug. 4, 2015), <https://bit.ly/3OPGztG>).

<sup>64</sup> See *id.* at 13–14.

<sup>65</sup> See, e.g., Jill Goldenziel, *Blaine’s Name in Vain?: State Constitutions, School Choice, and Charitable Choice*, 83 Denv. U. L. Rev. 57, 66–68 (2005).

<sup>66</sup> See *Prescott v. Oklahoma Capitol Pres. Comm’n*, 373 P.3d 1032, 1036 (Okla. 2015) (Edmonson, J., concurring in denial of rehearing); *id.* at 1040–41 (Taylor, J., concurring in denial of rehearing); *id.* at 1050–53 (Gurich, J., concurring in denial of rehearing); *id.* at 1057 (Combs, V.C.J., dissenting to denial of rehearing).

<sup>67</sup> See Brief of *Amici Curiae* Americans United for Separation of Church and State, et al., at 5–14, 22, *Oliver v. Hofmeister*, 368 P.3d 1270 (Okla. 2016), <https://bit.ly/42j3MaP>.

unauthorized, unlawful or fraudulent contract or agreement made, for the state . . . by any officer thereof, known to such officer to be fraudulent or void, and every person, having notice of the facts, with whom such unauthorized, unlawful or fraudulent contract shall have been made . . . shall be jointly and severally liable to the state . . . for triple the amount of all such sums of money so paid . . . as a penalty, to be recovered at the suit of the proper officers of the state . . . or of any resident taxpayer thereof . . . ; provided, however, no action for personal liability shall lie against any such officer for a transaction approved in good-faith reliance on advice of legal counsel for the public entity authorizing the transaction . . . .<sup>68</sup>

A 2009 Attorney General opinion explains that the *qui tam* statute “appl[ies] if a government entity enters into a contract resulting in the illegal expenditure of public funds or otherwise transfers money illegally”; that “[e]very person who enters into such contract with knowledge of the facts . . . is jointly and severally liable to all innocent persons for triple the amount of money paid”; that the statute is “applicable to state, county and municipal officials”; and that the statute “hold[s] the governmental official liable for the illegal expenditure.”<sup>69</sup>

The Oklahoma Supreme Court has held that “public officers may not be held civilly liable under the *qui tam* statute[] when they act in conformity with an opinion of the Attorney General that their actions are lawful.”<sup>70</sup> But “a public officer’s failure to heed the Attorney General’s advice . . . can result in civil penalties.”<sup>71</sup> In other words, “[p]ublic officials act at their peril when their action is in contravention of an opinion by the attorney general.”<sup>72</sup> And as you well know, the Attorney General’s office has advised you, in writing, that “approval of this proposed virtual charter school [would be] in direct violation of Oklahoma law.”<sup>73</sup>

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<sup>68</sup> Okla. Stat. tit. 62, § 372.

<sup>69</sup> Hon. Todd G. Lamb, Okla. Op. Att’y Gen. No. 09-7, 2009 WL 1103672, at \*5–6 (2009).

<sup>70</sup> *State ex rel. Fent v. State ex rel. Oklahoma Water Res. Bd.*, 66 P.3d 432, 440 (Okla. 2003) (capitalization removed).

<sup>71</sup> *Id.* at 441.

<sup>72</sup> *Democratic Party of Oklahoma v. Estep*, 652 P.2d 271, 274–75 (Okla. 1982).

<sup>73</sup> Letter from Niki S. Batt, Deputy Attorney General and Counsel for the Statewide Virtual Charter School Board, to Dr. Robert Franklin, Chairman, Statewide Virtual Charter School Board, at 4 (Apr. 11, 2023); *see also* Letter from Gentner

Given St. Isidore's budget projections,<sup>74</sup> Board members who vote to approve St. Isidore's application would face personal liability in the amount of tens of millions of dollars under the *qui tam* statute. Please be forewarned that we and allied organizations (whose counsel, in addition to the Attorney General, are cc'd below) are in contact with Oklahoma taxpayers who are interested in filing an action under the *qui tam* statute if St. Isidore's application is approved.

We urge you to act lawfully, sensibly, and in accordance with your oaths of office and deny the application.

Very truly yours,



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Cc (via email only):

The Hon. Gentner Drummond, Oklahoma Attorney General

J. Douglas Mann, counsel for Oklahoma Parent Legislative Action Committee

Daniel Mach, American Civil Liberties Union Foundation

Heather L. Weaver, American Civil Liberties Union Foundation

Jessica Levin, Education Law Center

Wendy Lecker, Education Law Center

Patrick Elliot, Freedom From Religion Foundation

Karen Heineman, Freedom From Religion Foundation

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Drummond, Oklahoma Attorney General, to Rebecca L. Wilkinson, Executive Director, Statewide Virtual Charter School Board (Feb. 23, 2023), <https://bit.ly/3Jiq1pW>.

<sup>74</sup> See Revised Application, Appendix H.