

March 17, 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, 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 application

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

We write to provide additional reasons to reject the application for charter-school sponsorship submitted to you by St. Isidore of Seville Catholic Virtual Charter School. As explained in our letter and memorandum of January 31, 2023, and our letter of February 10, 2023—copies of which are attached for the convenience of new Board members—approving St. Isidore’s application would violate the U.S. Constitution, the Oklahoma Constitution, the Oklahoma Charter Schools Act, and the Board’s regulations.

It is unconstitutional and unlawful for Oklahoma charter schools to teach a religious curriculum, as St. Isidore plans to. What is more, St. Isidore intends to violate legal prohibitions that have nothing to do with religion and apply to all Oklahoma charter schools, including prohibitions against discrimination in admissions and employment and rules prohibiting a charter

school's educational management organization from controlling the school or its board.

Statements by St. Isidore's representatives made at or after the February 14 Board meeting and other subsequent developments—such as Attorney General Drummond's withdrawal of his predecessor's erroneous opinion on religious charter schools—only bolster these points. We urge you to reject the application.

St. Isidore's Deeply Religious Curriculum Would Be Unconstitutional and Unlawful for a Charter School

Our prior correspondence explained that St. Isidore's curriculum and programming would be deeply religious, in violation of constitutional and statutory provisions that bar Oklahoma charter schools from indoctrinating their students in any religion.¹ At your February 14 meeting, St. Isidore's representative confirmed that “the Catholic faith is a required course all the way through.”²

St. Isidore Plans to Unlawfully Discriminate in Admissions and Employment

Our last letter explained that St. Isidore plans to violate constitutional and statutory prohibitions against discrimination in admissions and employment, including discrimination based on religion, sexual orientation, and gender identity.³ A St. Isidore representative confirmed to the media in February that, in making admissions decisions on LGBTQ students, “We would have to look at the specifics. It's not something we haven't dealt with

¹ See Letter from Americans United for Separation of Church and State to Oklahoma Statewide Virtual Charter School Board, at 2–4 (Feb. 10, 2023).

² Oklahoma Statewide Virtual Charter School Board meeting, at 51:50–52:06 (Feb. 14, 2023), <https://bit.ly/3ZOBTHp>.

³ See Feb. 10 Americans United letter at 5–12.

in our own Catholic schools before, because we have, and we do it on a case-by-case basis.”⁴

What does this mean? The statements in St. Isidore’s application and in the guidance on Catholic doctrine that it cites indicate that gay and lesbian students will, at the very least, need to be chaste to be enrolled.⁵ As for transgender students, the “Archdiocese of Oklahoma City Sexual Identity Policy”—which is available online in the handbook of one of the Archdiocese’s brick-and-mortar schools—states that any student who “reject[s] his or her body by social transition (dressing and identifying as the opposite sex or as non-binary), medical transition (use of puberty blockers or cross sex hormones), or surgical transition (removal of sexual organs or of secondary sex characteristics, or surgeries designed to create secondary sex characteristics of the opposite sex)” will be “choosing not to remain enrolled,” because any of those actions would be contrary to the Archdiocese’s interpretation of Catholic doctrine.⁶ As our first letter explained, Archdiocese policies that are based on the Archdiocese’s view of Catholic doctrine will govern St. Isidore.⁷

St. Isidore Will Not Adequately Serve Students with Disabilities

Under your regulations, a factor in deciding whether to approve a charter-school application is “[w]hether the charter school has adequate human resources, facilities, systems, and structures in place as necessary to evaluate the needs of and provide effective services to students with disabilities.”⁸ And, as our last letter explained, the Charter Schools Act requires Oklahoma charter schools to “comply with all federal and state laws relating to the

⁴ Andrea Eger, *Catholic Church in Oklahoma Seeking Government Sanctioning, Taxpayer Funding for First Religious Charter School in U.S.*, Tulsa World (updated Feb. 27, 2023), <https://bit.ly/3yEHh3W>.

⁵ See Feb. 10 Americans United letter at 8–9.

⁶ *Rosary Catholic School Archdiocese of Oklahoma City Parent / Student Handbook 2022–23*, at 24, <https://bit.ly/3YRE0Zw>.

⁷ See Feb. 10 Americans United letter at 12–13.

⁸ Okla. Admin. Code § 777:10-3-3(c)(3)(D).

education of children with disabilities in the same manner as a school district.”⁹

But St. Isidore’s application states only 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.”¹⁰ In addition, at the February 14 meeting, when asked about St. Isidore’s capacity to educate children with significant learning-related disabilities, the school’s representative responded, “that is something that we will need to develop,” explaining that “we don’t see that very often” in the Archdiocese’s brick-and-mortar schools.¹¹ St. Isidore’s representative also stated that speech therapy, occupational therapy, physical therapy, and testing for special-education services “will be contracted out” and that “we have contacts right now that we’re working with to get going with that.”¹²

Thus, St. Isidore has not shown that it is willing or able to adequately serve students with disabilities.

St. Isidore Plans to Violate Rules Prohibiting Its Educational Management Organization from Controlling It

We explained in our last letter that St. Isidore plans to violate provisions of your regulations that prohibit a charter school’s educational management organization from controlling or improperly influencing the school or its board members: St. Isidore’s application states that the Archdiocese of Oklahoma City Department of Catholic Education will be the school’s educational management organization and makes clear that the Archdiocese will ultimately control the school.¹³ At your February 14 meeting, St. Isidore’s representative confirmed that the Archdiocese would be the school’s

⁹ Okla. Stat. tit. 70 § 3-136(A)(7).

¹⁰ St. Isidore of Seville Catholic Virtual School, *Virtual Charter School Application to the Oklahoma Statewide Virtual Charter School Board*, at 52 (Jan. 30, 2023).

¹¹ Oklahoma Statewide Virtual Charter School Board meeting, at 55:30–56:15 (Feb. 14, 2023), <https://bit.ly/3ZOBTHp>.

¹² *Id.* at 1:30:12–1:30:55.

¹³ See Feb. 10 Americans United letter at 12–13.

educational management organization¹⁴ and that it would have “academic oversight” over the school.¹⁵

St. Isidore Plans to Operate a Dual-Enrollment Program That May Be Unlawful

St. Isidore states in its application that it “envisions the ability to offer to students who wish to supplement their current school program the option of various accelerated courses or courses that will accelerate the student beyond their current status.”¹⁶ A St. Isidore representative explained to the media: “for example, if we can pipe German into a school—in that sense it is an existing school we are already operating, like Bishop Kelley (a Catholic high school in Tulsa)—we could offer that in a designated classroom there through Isidore.”¹⁷ But there is nothing in the Charter Schools Act or your regulations that authorizes charter schools to operate such dual-enrollment programs, and—as the Board knows well from its experience with Epic Charter School—there are substantial questions about whether doing so is legal.¹⁸

Approving St. Isidore’s Application May Deprive All Oklahoma Charter Schools of Federal Funding

The federal Charter Schools Program provides grants to states to award subgrants for opening and expanding charter schools.¹⁹ To qualify for a grant under the Program, a charter school must be “nonsectarian in its programs, admissions policies, employment practices, and all other operations.”²⁰ A Program guidance explains: “As public schools, charter schools must be non-religious in their programs, admissions policies, governance, employment

¹⁴ See Feb. 14 meeting at 1:07:55–1:08:25, 1:19:55–1:20:25, 1:29:50–1:30:00.

¹⁵ *Id.* at 1:19:55–1:20:25.

¹⁶ St. Isidore Application at 12.

¹⁷ Andrea Eger, *Catholic Church in Oklahoma Seeking Government Sanctioning, Taxpayer Funding for First Religious Charter School in U.S.*, Tulsa World (updated Feb. 27, 2023), <https://bit.ly/3yEHh3W>.

¹⁸ See *Virtual Charter School Board Verifies Epic Is Not Following Law Regarding Enrollment Reporting*, Oklahoma Senate (Jan. 30, 2020), <https://bit.ly/40b8oz6>.

¹⁹ See 20 U.S.C. §§ 7221–7221j.

²⁰ 20 U.S.C. § 7221i(2)(E).

practices and all other operations, and the charter school’s curriculum must be completely secular.”²¹

We understand that Oklahoma’s current five-year grant under the Program is at the end of its term, meaning that Oklahoma should be eligible to receive a new grant.²² And while Oklahoma has excluded virtual charter schools from eligibility for Program funding under its current grant,²³ there is nothing in the law that precludes Oklahoma from funding virtual schools under a new grant.²⁴ If Oklahoma approves St. Isidore’s application but then denies it funding under any future Program grant, St. Isidore will likely sue the State based on the same wrong arguments it is making now.²⁵ Yet if Oklahoma grants Program funds to St. Isidore, the State will be in violation of federal law and could lose the balance of any future Program grant.²⁶ Thus, approving St. Isidore’s application could result in *all* charter schools in Oklahoma becoming ineligible to receive Program funds.

The Legal Arguments in the Governor’s Letter Are Incorrect

You are undoubtedly aware that, on February 23, 2023, Attorney General Drummond withdrew his predecessor’s Opinion 2022-7 that had erroneously argued that it would be lawful to approve a religious charter school,²⁷ and that Governor Stitt several days later sent a letter taking the same positions as Opinion 2022-7.²⁸ The arguments in Governor Stitt’s letter largely parrot those of the discredited Opinion 2022-7 and are wrong for the reasons set

²¹ U.S. Department of Education, *Charter Schools Program, Title V, Part B of the ESEA, Nonregulatory Guidance 22* (Jan. 2014), <https://bit.ly/40bGKSv>.

²² See Ben Felder, *Feds Send \$16.5M to Oklahoma for Charter Schools*, *Oklahoman* (Sept. 29, 2017), <https://bit.ly/3FmrSc8>.

²³ See *CSP Grant Information*, Oklahoma Public School Resource Center, <https://bit.ly/3FuupRB> (last visited Mar. 15, 2023).

²⁴ See 20 U.S.C. §§ 7221–7221j.

²⁵ See, e.g., Reagan Reese, ‘Gonna Blow Up’: Oklahoma Seeks to Open First-Of-Its-Kind Religious Virtual Charter School as Court Cases Loom, *Daily Caller* (Mar. 12, 2023), <https://bit.ly/3mP04Xr>.

²⁶ See 20 U.S.C. § 7221b(d)(3)(A)(ii).

²⁷ Letter from Gentner Drummond, Oklahoma Attorney General, to Rebecca L. Wilkinson, Executive Director, Statewide Virtual Charter School Board (Feb. 23, 2023), <https://bit.ly/3Jiq1pW>.

²⁸ Letter from J. Kevin Stitt, Oklahoma Governor, to Gentner Drummond, Oklahoma Attorney General (Feb. 27, 2023), <https://bit.ly/3LmpAxy>.

forth in our January 31 legal memorandum²⁹ and in General Drummond’s February 23 letter. We address here several cases and assertions made in Governor Stitt’s letter that were not included in Opinion 2022-7.

Governor Stitt’s letter cites *American Manufacturers Mutual Insurance Co. v. Sullivan* for the proposition that private entities “are state actors only when their actions are ‘fairly attributable’ to the government.”³⁰ But *Sullivan* did not change the test for who is a state actor; it merely used “whether the allegedly unconstitutional conduct is fairly attributable to the State” as a synonym for whether “the party charged with the deprivation [is] a person who may fairly be said to be a state actor.”³¹ As explained in our January 31 memorandum, conduct by Oklahoma charter schools is fairly attributable to the government because they are governmental entities themselves, and—even if that were not the case—they are state actors under the state-action tests applicable to private entities.³²

Governor Stitt’s letter also cites *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*³³ for the proposition “that a private entity is [not] transformed into a state actor merely because it was created by the government.”³⁴ In that case, the Supreme Court held that the U.S. Olympic Committee was not a state actor.³⁵ The Court explained that the Olympic Committee was a “private corporation,” and that it did not matter that Congress had granted it a corporate charter, because “[a]ll corporations act under charters granted by a government, usually by a State.”³⁶ The Court noted that the Olympic Committee “is an independent body, and nothing in its chartering statute gives the federal government the right to control that

²⁹ See Americans United for Separation of Church and State, *Legal Memorandum on Whether Oklahoma Charter Schools May Provide Religious Education* § I (Jan. 31, 2023).

³⁰ Stitt letter at 2 (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999)).

³¹ See *Sullivan*, 526 U.S. at 50 (quoting *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982)).

³² See Jan. 31 Americans United Memorandum § I(A).

³³ 483 U.S. 522 (1987).

³⁴ Stitt letter at 2–3.

³⁵ *S.F. Arts & Athletics*, 483 U.S. at 547.

³⁶ *Id.* at 542–44.

body or its officers,”³⁷ and that the Olympic Committee’s charter provides that the Committee “must be autonomous and must resist all pressures of any kind whatsoever, whether of a political, religious or economic nature.”³⁸ By contrast, Oklahoma charter schools are governmental entities themselves, and they are subject to substantial oversight and control by the superior governmental entities that charter them and that can revoke their charters.³⁹

Governor Stitt’s letter further relies on *Jackson v. Metropolitan Edison Co.*⁴⁰ for the proposition “that a private entity is [not] transformed into a state actor merely because it . . . is formally designated ‘public.’”⁴¹ But *Jackson* holds no such thing. Rather, in *Jackson*, the Supreme Court ruled that “a utility company which [was] privately owned and operated” was not a state actor.⁴² Nothing in *Jackson* indicates that the utility company was “formally designated ‘public.’”⁴³ Rather, the utility merely received from the state a certificate allowing it to deliver electricity to a particular geographic area.⁴⁴ On the other hand, Oklahoma charter schools are defined as “public school[s]” and governmental bodies by statute.⁴⁵

Governor Stitt’s letter additionally notes that Oklahoma state funds flow to religious organizations in certain circumstances.⁴⁶ But there is no evidence that any of the funding recipients he describes are governmental actors; Oklahoma charter schools are.⁴⁷ Moreover, Governor Stitt provides no evidence that the funding programs he describes violate applicable constitutional rules, which allow use of public funds to support religious activities only when the funds reach religious institutions solely “as a result of the genuine and independent choices of private individuals” (as in the case

³⁷ *Id.* at 545 n.27 (quoting *DeFrantz v. U.S. Olympic Comm.*, 492 F. Supp. 1181, 1194 (D.D.C.), *aff’d mem.*, 701 F.2d 221 (D.C. Cir. 1980)).

³⁸ *Id.* at 547 n.28 (quoting Olympic Charter Rule 24).

³⁹ See Jan. 31 Americans United Memorandum §§ I(A)(1), I(A)(2)(a).

⁴⁰ 419 U.S. 345 (1974).

⁴¹ Stitt letter at 2–3.

⁴² *Jackson*, 419 U.S. at 350.

⁴³ *Cf.* Stitt letter at 2–3.

⁴⁴ *Jackson*, 419 U.S. at 346.

⁴⁵ See Jan. 31 Americans United Memorandum at 5–8 (quoting Okla. Stat. tit. 70 § 3-132(D)).

⁴⁶ See Stitt letter at 3.

⁴⁷ See Jan. 31 Americans United Memorandum § I.

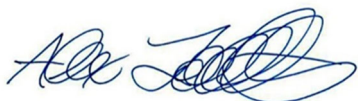
of a school-voucher program).⁴⁸ As explained in our January 31 memorandum, funding for Oklahoma charter schools is not distributed solely based on choices of parents or students; instead, it is allocated by the State through a complex formula that is based on a variety of factors.⁴⁹

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A St. Isidore representative has made clear to the media that the purpose of St. Isidore’s application is to generate a test case designed to result in legalization of religious charter schools nationwide: “No matter what happens with the board, someone’s going to file a lawsuit against the state. . . . I think we’re gonna see this hopefully go to the Supreme Court”⁵⁰ He added, “This situation is gonna blow up pretty big”⁵¹

You should not approve an application that—instead of improving educational options for Oklahoma children of all religions, sexual orientations, gender identities, and ability levels—is intended to create a legal test case aimed to “blow up pretty big.” As we have repeatedly explained, approving St. Isidore’s application would violate constitutional and statutory prohibitions on charter schools that teach a religious curriculum. But you do not even need to reach that issue, because the application has numerous deficiencies that are unrelated to St. Isidore’s planned religious curriculum. Please vote to deny the application.

Very truly yours,



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⁴⁸ See *id.* at 22 (quoting *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002)).

⁴⁹ See *id.* at 22–23.

⁵⁰ Reagan Reese, ‘Gonna Blow Up’: Oklahoma Seeks to Open First-Of-Its-Kind Religious Virtual Charter School as Court Cases Loom, Daily Caller (Mar. 12, 2023), <https://bit.ly/3mP04Xr>.

⁵¹ *Id.*

Cc: The Hon. Gentner Drummond, Oklahoma Attorney General

Enclosures:

February 10 Americans United letter

January 31 Americans United letter

January 31 Americans United legal memorandum