

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

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

Petitioner,

v.

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

Respondents.

Case No: _____

**PETITIONER'S BRIEF IN SUPPORT OF APPLICATION TO ASSUME ORIGINAL
JURISDICTION AND PETITION FOR WRIT OF MANDAMUS AND
DECLARATORY JUDGMENT**

The Oklahoma Attorney General is compelled, as chief law officer of the State, to file this original action to repudiate the Oklahoma Statewide Virtual Charter School Board's ("the Board") Members' intentional violation of their oath of office and disregard for the clear and unambiguous provisions of the Oklahoma Constitution—one of which has been in place since statehood and was soundly reaffirmed by Oklahoma voters in 2016.¹ Specifically, the Attorney General seeks to undo the unlawful sponsorship of St. Isidore of Seville Virtual Charter School ("St. Isidore"). He is duty bound to file this original action to protect religious liberty and prevent the type of state-funded religion that Oklahoma's constitutional framers and the founders of our country sought to prevent.

Make no mistake, if the Catholic Church were permitted to have a public virtual charter school, a reckoning will follow in which this State will be faced with the unprecedented quandary of processing requests to directly fund all petitioning sectarian groups. *See Prescott v. Oklahoma Capitol Pres. Comm'n*, 2015 OK 54, ¶ 3, 373 P.3d 1032, 1045 (Gurich, J., concurring) (in which Justice Gurich acknowledged an onslaught of threatened litigation and applications from groups to erect their own symbols following the installation of the Ten Commandments on Capitol grounds.). For example, this reckoning will require the State to permit extreme sects of the Muslim faith to establish a taxpayer funded public charter school teaching Sharia Law. Consequently, absent the intervention of this Court, the Board members' shortsighted votes in violation of their oath of office and the law will pave the way for a proliferation of the direct public funding of religious schools whose tenets are diametrically opposed by most Oklahomans.

¹ *See* State Question Number 790, the results of which are publicly available here: <https://www.sos.ok.gov/documents/questions/790.pdf>. Of note, over 57% of Oklahoma voters in 2016 rejected State Question 790 that would have repealed Section 5, Article II of the Oklahoma Constitution, i.e., the constitutional prohibition against directing public money to sectarian institutions. *Id.*

As to the merits, this case is simple: Oklahoma’s Constitution disallows sectarian control of its public schools and the support of sectarian practices—indirect or otherwise. It is undeniable that the framers of Oklahoma’s Constitution wished to memorialize religious liberty. *See* OKLA. CONST. art. I, § 2. But it is no coincidence that Section 5 of Articles I and II follow shortly thereafter. Article I, § 5 requires the State “establish[] and maint[ain] . . . a system of public schools, which shall be open to all the children of the state and free from sectarian control” Just as important, Article II, § 5 demands that “[n]o public money . . . shall ever be appropriated . . . or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion . . . or sectarian institution” These constitutional provisions are an inviolable safeguard to ensuring a strong separation of church and state.

The law requiring the Board to establish procedures “for accepting, approving and disapproving statewide virtual charter school applications,” *see* OKLA. STAT. tit. 70, § 3-145.3(A)(2), mandates that those procedures comply with the Oklahoma Charter Schools Act. *Id.* That act, consistent with constitutional directives, prescribes that a “charter school shall be nonsectarian in its programs, admission policies, employment practices, and all other operations. A sponsor may not authorize a charter school or program that is affiliated with a nonpublic sectarian school or religious institution” *Id.* at § 3-136(A)(2). These sections of Oklahoma’s Constitution and associated laws decidedly preclude the Board’s challenged action.

In sum, despite the clear and unambiguous language of Oklahoma’s Constitution and statutes, the will of Oklahoma’s voters who soundly rejected amending Oklahoma’s Constitution in 2016 to allow public money to be applied to sectarian organizations, and the legal advice by the chief law officer of this State, the Board members violated their plain legal duty to deny sponsorship of St. Isidore. Accordingly, this Court must remediate the Board’s unlawful action.

BACKGROUND

The Board has the sole authority to authorize and sponsor statewide virtual charter schools in Oklahoma. *See* OKLA. STAT. tit. 70, § 3-145.1(A). The Board is vested with regulatory oversight over the schools it charters, through state laws, administrative regulations, and contracts it executes. *See id.* at 3-145.3. The Board’s oversight of charter schools is broad and comprehensive as shown in its nearly 250-page authorization and oversight process manual updated as of July 2023. *See* Pet. App. Vol. II at 454–702. For example, once a charter school is sponsored, the Board “provides ongoing oversight and evaluation of sponsored schools through the following practices: Data and evidence collection []; Site visits; Audits; Attendance at governing board meetings; Performance Framework reports []; [and] External school performance review(s).” Pet. App. Vol. II at 471.

On June 5, 2023, the Board took the unprecedented action—contrary to the advice of the Oklahoma Attorney General—of approving St. Isidore’s revised application for sponsorship (the “Application”). *See* Pet. App. Vol. II at 452. Following the approved Application, the Board’s sponsorship of St. Isidore was not yet complete until the Board and St. Isidore executed a contract for sponsorship on October 16, 2023. *See* Pet. App. Vol. I at 2–22; *see also* OKLA. ADMIN. CODE 777: 10-3-3(a)(1–8). Thus, on October 16, 2023, St. Isidore became an illegally sponsored public virtual charter school.

St. Isidore, by its own admission, is a sectarian school. It made its intent pointedly clear in its voluminous Application:

To create, establish, and operate the School as a Catholic School. It is from its Catholic identity that the school derives its original characteristics and its structure as a genuine instrument of the Church, a place of real and specific pastoral ministry. The Catholic school participates in the evangelizing mission of the Church and is the privileged environment in which Christian education is carried out. In this way Catholic schools are at once places of evangelization, of complete formation, of inculturation, of apprenticeship in a lively dialogue between young people of different religions and social backgrounds.

Pet. App. Vol. I at 92 (citation and quotations omitted). In its words, St. Isidore intends to conduct its charter school in the same way the Catholic Church operates its schools and educates its students. The key difference is St. Isidore will have the direct financial backing and authorization of the State as a sponsored public virtual charter school barring this Court’s intervention.

The Board’s sponsorship of St. Isidore, and the conditions set forth in the contract for sponsorship, solidify the sectarian nature of the school. Section 1.5 of the contract dictates that St. Isidore “is a privately operated religious non-profit organization” Pet. App. Vol. I at 2. Even more, section 12.2 sets forth St. Isidore’s warranty “that it is affiliated with a nonpublic sectarian school or religious institution.” *Id.* at 20. If these provisions leave any doubt, section 4.1 authorizes St. Isidore “to implement the program of instruction, curriculum, and other services as specified in the Application [approved as revised on June 5, 2023]” *Id.* at 4.

A sponsored statewide virtual charter school receives State Aid, among other funding sources. *See e.g.*, OKLA. STAT. tit. 70, §§ 3-145.3(D), 3-142. The contract for sponsorship specifies that it commences on July 1, 2024. Pet. App. Vol. I at 4; § 3.2. Therefore, St. Isidore will begin receiving public money imminently if this Court does not assume original jurisdiction and compel the Board to follow its plain legal duty and rescind its illegal contract with St. Isidore.²

ARGUMENT AND AUTHORITIES

I. This Court’s Intervention is Appropriate and Necessary

Original jurisdiction of this Court “shall extend to a general superintending control over all . . . Agencies, Commissions and Boards created by law.” OKLA. CONST. art. VII, § 4. The pressing concerns relevant to this matter—imminent redistribution of public funding to a religious

² There is precedent for rescinding unlawful board action relating to charter schools. *See* May 24, 2021, meeting agenda and minutes, respectively, for the State Board of Education. Available at: <https://sde.ok.gov/sites/default/files/Agenda%20May%2024%2C%202021%20Special%20Meeting.pdf> ; <https://sde.ok.gov/sites/default/files/May%2024%2C%202021%20SPECIAL%20Mtg.pdf>.

sect based on an unlawful State board action and inter-governmental legal claims—certainly merit this Court’s exercise of its original jurisdiction. *See e.g., Indep. Sch. Dist. # 52 of Okla. Cnty. v. Hofmeister*, 2020 OK 56, ¶ 60, 473 P.3d 475, 500, *as corrected* (July 1, 2020) (finding that a public school funding conflict was one of *publici juris* because “[i]t present[ed] for adjudication public law issues relating to the internal conduct of government or the proper functioning of the State as such relates to proper accounting and expenditure of State funds.”) (citations omitted); *Ethics Comm’n of State of Okla. v. Cullison*, 1993 OK 37, ¶ 7, 850 P.2d 1069, 1073–74 (determining it proper and consistent with its precedent to exercise its discretionary superintending jurisdiction and provide declaratory relief to resolve “a claimed intolerable conflict between” a State agency and the legislature). The present conflict is consistent with those in which this Court has determined is a matter of public interest.

This Court has identified a “theme running through most” of the cases that it assumes original jurisdiction, which entails “that the matter must be affected with the public interest and there must be some urgency or pressing need for an early determination of the matter.” *Keating v. Johnson*, 1996 OK 61, ¶ 10, 918 P.2d 51, 56. As is self-evident and established above, issues relating to the accounting and expenditure of public State Aid funds is a matter of public interest—even more so when appropriated public money will directly support a sectarian institution. Moreover, the nature of this claim, involving a dispute between two State agencies, justifies this Court’s exercise of its superintending control. This matter is urgent and pressing because the conflict between the parties persists, and the sponsored public virtual charter school, assuming this Court does not exercise its discretionary jurisdiction, will be the first ever sectarian charter school to be directly funded with public money. Furthermore, without this Court’s intervention, **the Board has put at risk the billion plus dollars in federal education funds the State receives on a**

yearly basis.³ In sum, it is appropriate for this Court to assume original jurisdiction and necessary to resolve the unprecedented pressure on the separation of church and state.

II. Oklahoma’s Constitution, Statutes, and the Board’s Regulations Strictly Prohibit the Sponsorship of a Sectarian Virtual Charter School

The Board violated Oklahoma law when it approved St. Isidore’s Application on June 5, 2023 and executed a contract for sponsorship with the applicant on October 16, 2023. This Court’s issuance of a writ of mandamus is necessary to compel the Board to rescind its unlawful contract with St. Isidore.⁴ The Oklahoma Legislature established the Board and provided it “the sole authority to authorize and sponsor statewide virtual charter schools in the state.” OKLA. STAT. tit. 70, § 3-145.1. Moreover, the Legislature set forth a duty requiring the Board to “[e]stablish a procedure for accepting, approving and disapproving statewide virtual charter school applications” OKLA. STAT. tit. 70, § 3-145.3. That procedure, set forth in Okla. Admin. Code 777, includes several provisions under which the Board is required to comply with Oklahoma law. *See e.g.*, OKLA. ADMIN. CODE § 10-3-3(b)(1)(F) (requiring that new sponsorship applications include “[a]ny other

³ A state that wishes to obtain federal education funds for its public schools must submit a plan to the Secretary of the United States Department of Education, with certain assurances, stating that the state will comply with all applicable laws and regulations. 20 U.S.C. §§ 6311, 7842. Under the Elementary and Secondary Education Act, a charter school must be “nonsectarian in its programs, admissions policies, employment practices, and all other operations.” 20 U.S.C. § 7221i(2)(E). Additionally, federal law authorizes the Secretary of Education to withhold funds or take other enforcement action if a state fails to comply with its approved state plan or any applicable laws and regulations. 20 U.S.C. §§ 1234c, 6311(a)(7). The State of Oklahoma has elected to participate in covered federal education programs and has an approved plan on file with the United States Department of Education. <https://sde.ok.gov/ok-essa-state-plan>. According to the National Center for Education Statistics—the primary statistical agency within the United States Department of Education—Oklahoma received \$1,130,566,000 in fiscal year 2021. <https://nces.ed.gov/pubs2023/2023301.pdf>.

⁴ “Generally, a discretionary writ of mandamus issues to compel the performance of an act by a respondent when a petitioner: has a clear legal right to have the act performed; the act arises from a duty of the respondent arising from an office, trust, or station; the act does not involve the exercise of discretion; the respondent has refused to perform the act; and the writ will provide adequate relief and no other adequate remedy at law exists.” *Kelley v. Kelley*, 2007 OK 100, ¶ 2 n.5, 175 P.3d 400, 403 (citations omitted). The Oklahoma Attorney General, as Petitioner, has a clear legal right to have the act performed because he is “the proper party to maintain litigation to enforce a matter of public interest.” *State ex rel. Howard v. Okla. Corp. Comm’n*, 1980 OK 96, ¶ 35, 614 P.2d 45, 52.

topics deemed necessary by the [Board] to assess the applicant’s capability to administer and operate the charter school in compliance with all applicable provisions of federal and state laws”); § 10-3-3(c)(1)(F) (setting forth application format requirements, including that there be “signed and notarized statements from the Head of the School and the governing body members, as applicable, showing their agreement to fully comply as an Oklahoma public charter school with all statute[s], regulations, and requirements of the United States of America, State of Oklahoma”); § 10-3-3(d)(8) (requiring that contracts for sponsorship “shall contain any other terms necessary to ensure compliance with applicable provisions of state and/or federal law.”); § 10-3-3(g) (setting forth that adoption of a model sponsorship contract “shall not prohibit the Board from further negotiation of contract terms or addition of terms to the contract for sponsorship prior to execution of the contract so long as such terms are in compliance with applicable state, federal, local . . . law”). The Board is thus abundantly aware that its formal actions must comply with State law.

State law clearly bans the Board’s action of sponsoring a sectarian organization. Sponsorship of St. Isidore—a sectarian school seeking to receive public money—violates the Oklahoma Charter Schools Act. *See* OKLA. STAT. tit. 70, § 3-136(2) (“[a] sponsor may not authorize a charter school or program that is affiliated with a nonpublic sectarian school or religious institution.”). It matters not whether St. Isidore claims it is a private school or how it otherwise chooses to define itself. It is unavoidably a “sectarian school or religious institution,” which unlawfully obtained a charter sponsorship to conduct the business of the State as a public virtual charter school. Thus, the Board has a clear duty to follow the above unambiguous State law, and this Court must compel its action in conformity therewith. *See supra*, n.5. Any argument that the Board acted within its discretion fails because “[t]he discretion must be exercised under the established rules of law” *State Highway Comm’n v. Green-Boots Const. Co.*, 1947 OK 221, ¶ 21,

187 P.2d 209, 214 (citations omitted). As supported herein, the Board clearly violated its own regulations and Oklahoma law when it voted to sponsor a sectarian institution. It cannot escape this Court's mandate to compel rescission of the contract for sponsorship by arguing it acted within its discretion.

The wisdom of these statutes and regulations flows from and is anchored in the Oklahoma Constitution. Indeed, Section 5 of Articles I and II of the Oklahoma Constitution, concomitant to the relevant statutes and regulations, forbid the public sponsorship of St. Isidore. Article I, Section 5 unambiguously requires the provision of "a system of public schools . . . [that] shall be open to all the children of the state and free from sectarian control . . ." OKLA. CONST. art. I, § 5. Seven sections following, Article II, Section 5 requires that "[n]o public money . . . shall ever be appropriated . . . or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such." OKLA. CONST. art. II, § 5. Years ago, this Court acknowledged that it is "commonly understood that the term 'sectarian institution' includes a school or institution of learning which is owned and controlled by a church and which is avowedly maintained and conducted so that the children of parents of that particular faith would be taught in that school the religious tenets of the church." *Gurney v. Ferguson*, 1941 OK 397, ¶ 7, 122 P.2d 1002, 1003. The Board's sponsorship of St. Isidore is obviously the type of harm to religious liberty that these sections prohibit. This scenario is not simply one which involves the chartering of a school, but one in which the State of Oklahoma is explicitly granting state authority to a school that proudly touts its intent to teach the "religious tenets of the church."

These sections do not interfere with religious liberty. On the contrary, the framers of Oklahoma's Constitution thoughtfully included these safeguards as believers themselves. "The Oklahoma Constitutional Convention members started their proceedings with a prayer and the

invocation of God’s guidance and prefaced the Oklahoma Constitution by invoking God’s guidance, all this showing that they were religious men who believed in God.” *Prescott v. Okla. Capitol Pres. Comm’n*, 2015 OK 54, ¶ 4, 373 P.3d 1032, 1037 (Taylor, J. concurring, with whom Gurich, J. joins)). Justices in *Prescott* noted that the framers “intended [Article II, Section 5] to be one of the safest of our safeguards,” *id.* at ¶ 26 and that the “[Oklahoma Constitutional Convention] wrote Article II, Section 5 knowing the history of the union of Church and State in Europe and in New England in Colonial days, and utilized the lessons learned in those situations.” *Id.* at ¶ 4 (quotations and citation omitted). Justices found that the framers’ structure of the relevant safeguards no coincidence, and that, while men of God,

[the framers] **were also men who advocated for the toleration of all religious beliefs and complete separation of church and state by going further than the federal constitution.** Closely following the preamble is Article I, Section 2 of the Oklahoma Constitution, which is entitled “Religious liberty—Polygamous or plural marriages.” Section 2 secures “[p]erfect toleration of religious sentiment” and provides “no inhabitant of the State shall ever be molested in person or property on account of his or her mode of religious worship” Okla. Const. Art. I, § 2. Then only three sections later, the Constitutional Convention provided for public schools “free from sectarian control.” Okla. Const. art. I, § 5. Seven sections later, they prohibited the use of state property, directly or indirectly, for the use, benefit, or support of religious group. Okla. Const. art. II, § 5. **While the constitutional framers may have been men of faith, they recognized the necessity of a complete separation of church and state and sought to prevent the ills that would befall a state if they failed to provide for this complete separation in the Oklahoma Constitution.**

Id. at ¶ 6 (emphasis added). These “ills” Oklahoma’s constitutional framers sought to prevent will certainly befall the State if this Court does not intervene to compel the Board to follow its plain legal duty and rescind the unlawful contract for sponsorship with St. Isidore. *See supra*, n.5.

In an earlier case involving publicly funded bussing for a sectarian institution, this Court correctly determined that “there is no doubt that section 5, article 2 [] prohibits the use of public money or property for sectarian or parochial schools.” *Gurney*, 1941 OK 397 at ¶ 8, 122 P.2d at

1003. This principle logically flows from the necessity of churches to remain free from state control. Indeed, this Court acknowledged that:

we must not overlook the fact that if the Legislature may directly or indirectly aid or support sectarian or denominational schools with public funds, then it would be a short step forward at another session to increase such aid, and only another short step to some regulation and at least partial control of such schools by successive legislative enactment.

Id. at ¶ 16. Here, St. Isidore specifically petitioned the Board to authorize its sectarian goals. The Board’s Members, in violation of their oath of office, acquiesced in granting St. Isidore’s request and made it a public school with the benefit of public money. This arrangement ensures that the State will have a level of regulatory authority over St. Isidore. Such union of church and state is what the Justices in *Prescott* knew and what this Court must prohibit.

III. The Board’s Actions Also Violate the Establishment Clause of the First Amendment.

Government spending in direct support of religious education violates the Establishment Clause. *See Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1 (1947). The Establishment Clause applies to the states by incorporation through the Fourteenth Amendment. *Id.* at 14. St. Isidore, an admittedly sectarian school in its “instruction, curriculum, and other services,” Pet. App. Vol. I at 4, § 4.1, unabashedly requested a public virtual school charter from the Board—a legislatively created State board having the sole authority to sponsor Oklahoma’s virtual charter schools, OKLA. STAT. tit. 70, § 3-145.1. The Board’s authorization is in direct contravention of the Establishment Clause, and as discussed above, Oklahoma’s Constitution, statutes, and regulations.

The Board will likely argue that St. Isidore possesses a structural degree of separation from the State—a virtual charter contract held by a private entity—allowing it to ignore the constitutionally required separation of church and state. But the United States Supreme Court has held that a private entity’s action is that of the state when the state has authorized that entity to act in the state’s place with the state’s authority—a concept referred to as “significant

encouragement.” See *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982) (citation omitted). Such encouragement exists where “the government has outsourced one of its constitutional obligations to a private entity.” *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921 n.1 (2019). Like in *West v. Atkins*, where the United States Supreme Court held a state’s contractual delegation of its duty to provide prisoners healthcare to a physician rendered that physician a state actor. 487 U.S. 42, 56 (1988).

Similarly, when the function performed by the private organization is one that has been “traditionally the exclusive prerogative” of the state, the private entity performing that function for the state is engaged in state action. *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (citation omitted). The *en banc* Fourth Circuit recently utilized this analysis, concluding that a charter school operator was a state actor. See *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 122 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 2657 (2023).

Fortunately, the Oklahoma Legislature made the analysis easy in this case by defining “charter school[s]” as “public school[s].” OKLA. STAT. tit. 70, § 3-132(D). A state’s designation of an entity as a state actor is generally accepted when analyzing the U.S. Constitution. For example, the Fourth Circuit, in addressing whether a public charter school was a state actor, recently held: “It was North Carolina’s sovereign prerogative to determine whether to treat these state-created and state-funded entities as public. Rejecting the state’s designation of such schools as public institutions would infringe on North Carolina’s sovereign prerogative, undermining fundamental principles of federalism.” *Peltier*, 37 F.4th at 121.

Here, Oklahoma chose to define charter schools as public schools. Clearly, the choice to treat charter schools as public schools is valid. See *Wentz v. Thomas*, 1932 OK 636, ¶ 87, 15 P.2d 65, 80 (“[T]he power of the Legislature to enact a law is subject to no restriction, except those imposed by state or Federal Constitution,” thus “a legislative act is valid unless prohibited”).

Oklahoma’s Constitution certainly supports the Legislature’s choice. *See* OKLA. CONST. art. I, § 5; art. II, § 5. Consequently, Oklahoma’s sovereign prerogative to designate charter schools as public schools, and thus treat them as state actors, should be accepted.

Moreover, Oklahoma is required under OKLA. CONST. art. I, § 5 to “establish and maintain . . . a system of public schools, which shall be open to all the children of the state and free from sectarian control” Oklahoma, in part, through the legislative creation of the Oklahoma Charter Schools Act, fulfills that constitutional duty. *See* OKLA. STAT. tit. 70, § 3-130, *et seq.* As already mentioned, the Oklahoma Legislature went a step further and statutorily defined charter schools—state created, funded, and regulated institutions—as public schools. *Id.* at § 3-132(D). Thus, St. Isidore, in fulfilling its object of creating, establishing, and operating its school “as a Catholic School” to participate in the “evangelizing mission of the Church” does so as an exercise of “power possessed by virtue of state law and made possible only because the [school] is clothed with the authority of state law.” *West v. Atkins*, 487 U.S. 42, 49 (1988) (citation and internal quotation marks omitted); *see also Coleman v. Utah State Charter Sch. Bd.*, 673 F. App’x 822, 830 (10th Cir. 2016) (unpublished) (stating “charter schools are public schools using public funds to educate school children” and “charter schools are not free-floating entities unmoored from state governmental oversight and control”).

In addition to the State relying on St. Isidore to fulfill one of the State’s constitutional responsibilities (i.e., establishing a system of free public schools), St. Isidore is *alternatively* considered a state actor because the State provides “significant encouragement [to charter schools] . . . that the choice must in law be deemed that of the state.” *Rendell-Baker*, 457 U.S. at 840. For example, the Supreme Court has treated a private entity as a state actor when it is controlled by an

agency of the State and when it is entwined by governmental policies. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Assoc.*, 531 U.S. 288, 121 S. Ct. 924, 148 L. Ed. 2d 807.⁵

This is established here because the State brought charter schools into existence and exercises extensive oversight of public charter schools. To begin, the accreditation standards document for public charter schools sets forth more requirements for public charter schools than the application for traditional public junior high and middle schools.⁶ Charter schools must meet the health, safety, civil rights and insurance requirements that are required of traditional public schools. OKLA. STAT. tit. 70 § 3-136(A)(1). According to the State Department of Education’s interpretation, this ranges from the national fingerprint-based criminal history check under OKLA. STAT. tit. 70, § 5-142 to Oklahoma Employees Insurance and Benefits Act under OKLA. STAT. tit. 74, §§ 1301–1323.⁷ Charter schools must also report a myriad of student and school performance information to the State. These reports support transparency in the public expenditure of funds and serve as the basis for State-issued school report cards. OKLA. STAT. tit. 70, § 3-136(A)(4), (6), (18); §§ 5-135, 5-135.2; §§1210.544-1210.545. Consequently, even if the Board were not relying on St. Isidore to perform one of the State’s constitutional responsibilities, St. Isidore would still be a state actor because of the State’s extensive oversight of public charter schools.⁸

⁵ The Tenth Circuit previously determined the Oklahoma Secondary School Activities Association (the “OSSAA”), is a state actor due to its entwinement of public institutions and public officials, namely because its officials are public employees, and certain of its functions are authorized by statute. *Christian Heritage v. Oklahoma Secondary School Activities Ass’n*, 483 F.3d 1025, 1030-31 (10th Cir. 2007); *see also Scott v. Oklahoma Secondary School Activities Ass’n*, 2013 OK 84, 313 P.2d 891.

⁶ These are available on the Oklahoma State Department of Education’s official government website. *Compare, e.g.*, 2015-2016 Application for Accreditation: Junior High/Middle School Available at: <https://sde.ok.gov/sites/ok.gov.sde/files/documents/files/Mid-Jr%20Combined%20%202016-2017.pdf>. *with* 2015-2016 Application for Accreditation: Charter School Available at: <https://sde.ok.gov/sites/ok.gov.sde/files/documents/files/Charter%20Combined%202016-2017.pdf>.

⁷ *See also* Pet. App. Vol. II at 704–15, Oklahoma State Department of Education Accreditation Compliance Review Sheet.

⁸ Moreover, the executed contract for sponsorship between the Board and St. Isidore demonstrates additional ways in which the State will be involved in the Catholic School’s affairs. *See e.g.*, Pet. App. Vol. I at 7–19; §§ 6.1.6, 6.1.8, 6.4, 7.2, 7.3, 7.9, 7.13, 7.14, 7.16, 7.17, 8.11.5, 9.2, 9.2.1, and 11.7.

The Board will likely attempt to distance St. Isidore from what St. Isidore has become through its contract with the Board—a public school. But this is nothing more than an exercise in word play. This Court should not allow St. Isidore to avail itself of the benefits of being a public school, while it cherry picks rules that apply to it (conveniently not to include the separation of church and state). These types of word play are precisely what Article II, Section 5 prevents: “circumvention based upon mere form and technical distinction.” *Prescott v. Oklahoma Capitol Preservation Commission*, 2015 OK 54, ¶ 5, 373 P.3d 1032.

If this Court were to adopt the Board’s likely position—that a sectarian charter school may maintain its private status, i.e., not become a state actor, even though it is a public school under Oklahoma law—it would leave “[Oklahoma’s] citizens with no means for vindication of [constitutional] rights.” *See West*, 487 U.S. at 56–57 & n.14 (citation omitted). Such an outcome would allow Oklahoma to “outsource its educational obligation[s] to charter school operators, and later ignore blatant, unconstitutional discrimination committed by those schools.” *Peltier*, 37 F.4th 104 at 118. Accordingly, this Court should follow the rule rendering “a private entity a state actor” when the state delegates its responsibility to that entity and prevent the Board from annihilating the Establishment Clause. *Id.* citing *West*, 487 U.S. at 56.

IV. Recent U.S. Supreme Court Cases Do Not Invalidate Oklahoma’s Prohibition Against Sectarian Control of Public Schools, Including Public Charter Schools.

It is also anticipated that the Board will cite to recent U.S. Supreme Court cases such as *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), *Espinoza v. Montana Dep’t of Revenue*, 140 S. Ct. 2246 (2020), and *Carson v. Makin*, 142 S. Ct. 1987 (2022), for the proposition that the State cannot disqualify religious institutions from operating charter schools. But these cases have no application here. These U.S. Supreme Court cases are about the basic directive that: “A State need not subsidize private education. But once a State decides to do so, it cannot

disqualify some **private schools** solely because they are religious.” *Espinoza*, 140 S. Ct. at 2261 (emphasis added).

Here, St. Isidore is not a “private school.” Under Oklahoma law, it is public school. OKLA. STAT. tit. 70, § 3-132(D). Therefore, these recent U.S. Supreme Court cases have no relevance to this dispute.

Moreover, this case is not about St. Isidore being precluded from receiving a public benefit. There are already numerous public funds St. Isidore is eligible to receive—directly or indirectly—as a Catholic private school. *See e.g.* 70 O.S. §§ 13-101.2 and 28-100–28-103. The problem with the St. Isidore contract is that the State has gone a step further and made St. Isidore a state actor. By way of analogy, if the State decided to allocate public funds for private entities to beef up security, the State would of course be precluded from preventing the Catholic Church and other sectarian organizations from receiving those funds. However, if the State decided to start authorizing private entities to take over operations of the Oklahoma Highway Patrol, it would violate the Establishment Clause for the State to authorize a “Catholic Church Highway Patrol.” Consequently, the issue here is not the public funds going to St. Isidore, it is the fact that the State has turned the Catholic Church into a state actor. The latter clearly violates the Establishment Clause and must be stopped.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner’s requested relief to correct the Board’s unlawful actions.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of October 2023 a true and correct copy of the foregoing instrument was mailed by depositing it in the U.S. Mail, postage prepaid to the following:

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