FILED
SUPREME COURT
STATE OF OKLAHOMA
DEC 27 2023
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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

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| GENTNER DRUMMOND, Attorney General for the State of Oklahoma, ex rel. STATE OF OKLAHOMA,<br>Petitioner,<br>v.<br>OKLAHOMA STATEWIDE VIRTUAL CHARTER SCHOOL BOARD, et al.,<br>Respondents,<br>and<br>ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL,<br>Intervenor-Respondent. | No. 121,694<br>On Petitioner's application to assume original jurisdiction and petition for writ of mandamus and declaratory judgment against respondents Oklahoma Statewide Virtual Charter School Board and its members. |

# [PROPOSED] BRIEF, IN SUPPORT OF PETITIONER, OF *AMICI CURIAE* TAXPAYERS MELISSA ABDO, KRYSTAL BONSALL, BRENDA LENÉ, MICHELE MEDLEY, DR. BRUCE PRESCOTT, REV. DR. MITCH RANDALL, AND REV. DR. LORI WALKE

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## INDEX

*Statutes*

*Statutes*



*Other Authorities*

## INTRODUCTION

*Amici* Melissa Abdo, et al. supplement the Attorney General's briefing in five ways. First, *Amici* refute the Statewide Virtual Charter School Board's argument that Article I, § 5 of the Oklahoma Constitution merely requires the system of public schools as a whole—not each individual school—to be "free from sectarian control." Second, *Amici* provide additional argument demonstrating that St. Isidore of Seville Catholic Virtual School is a governmental entity and a state actor. Third, *Amici* explain that, for this reason, St. Isidore is precluded from asserting any federal constitutional right to violate state law. Fourth, *Amici* provide additional authority confirming that, as a governmental entity and a state actor, St. Isidore is prohibited by the federal Establishment Clause from teaching religion in the classroom or otherwise promoting religion to students. Finally, *Amici* provide additional argument refuting Respondents' contentions under the Oklahoma Religious Freedom Act.

## ARGUMENT AND AUTHORITIES

### I. Article I, § 5 of the Oklahoma Constitution prohibits public charter schools from teaching a religious curriculum.

Article I, § 5 of the state constitution requires the state to "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." Yet St. Isidore would be a public school that evangelizes its students and teaches a religious curriculum. (Application, Pet'r's App. Vol. I at 78, 92–95, 99, 115, 212–16, 264, 268, 276, 310–13.) Plainly, allowing St. Isidore to operate as a charter school would run afoul of the requirement that "public schools" be "free from sectarian control."

The Charter Board contends (Bd. Br. 13) that Article I, § 5 only requires that Oklahoma's "system of public schools" and not "each individual charter school" be free from sectarian control. The Board argues that the phrase "open to all the children of the state"—

and thus the subsequent phrase "free from sectarian control"—must apply only to the whole "system," not individual schools, because public schools typically serve only certain localities and grade levels. But Article I, § 5 cannot properly be interpreted to allow public schools to refuse admission on other grounds. The original 1907 version of Article I, § 5 had a clause, removed by amendment in 1978, that expressly authorized separate schools for White and Black children. *See* Okla. Const. of 1907, Art. I, § 5, https://bit.ly/3S1A2xW; *State Questions,* Oklahoma Secretary of State, https://bit.ly/3PWVOjJ (enter "526" into "State Question Number" search field and click "Submit"; then click on "526"). If the Board's interpretation of Article I, § 5 were correct, the inclusion of that segregationist clause would have been unnecessary, and Article I, § 5 would still permit segregated schools today.

Moreover, the "system of public schools" can be "free from sectarian control" only if *all* its schools are free from sectarian control. If even one public school is under sectarian control, then the system is partially under sectarian control.

In addition, the state constitution's clauses concerning religion were shaped by their framers' concern for the protection of religious minorities—"the rights of all denominations, however few the number of their respective adherents." *See* Albert H. Ellis, *A History of the Constitutional Convention of the State of Oklahoma* 134 (1923). The framers wished to prevent dominant religions from "exert[ing] an undue influence and becom[ing] . . . a menace to weaker denominations and ultimately destructive of religious liberty." *Id.* Ensuring that no public school, charter or otherwise, attempts to indoctrinate its students in any religion vindicates the framers' concerns and protects the rights of religious minorities.

**II. As a public charter school, St. Isidore is a governmental entity and a state actor.**

Whether St. Isidore's conduct would be state action is a critical issue in this case. To determine whether an entity is a state actor, the U.S. Supreme Court first considers whether

the entity is a governmental entity itself. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378–82 (1995). If that is not the case, the U.S. Supreme Court and the Tenth Circuit apply four principal tests (detailed below) to assess whether the entity is a state actor. *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). Here, Oklahoma charter schools are public schools and governmental entities. Even if they were not governmental entities, they are state actors under at least two of the four tests that apply to private entities—the symbiotic-relationship and public-function tests. (Meeting any of the tests is enough to make an entity a state actor.)

**A. Oklahoma charter schools are state actors because they are governmental entities.**

As Justice Scalia explained for the U.S. Supreme Court in *Lebron*, when a party is a governmental official or entity, that is sufficient to render the party a state actor, and it is thus unnecessary to consider the tests that are used to assess *private* entities. *See* 513 U.S. at 378–82. Accordingly, without applying the tests used to analyze whether private entities are state actors, the U.S. Supreme Court has concluded that various organizations and persons are state actors *because* they are governmental entities or officials. *See, e.g., NCAA v. Tarkanian*, 488 U.S. 179, 192 (1988) (state universities); *Pennsylvania v. Bd. of Dirs. of City Trs.*, 353 U.S. 230, 231 (1957) (board created by state to operate privately endowed college); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624 (1991) (state judges); *Georgia v. McCollum*, 505 U.S. 42, 50 (1992) (prosecutors). Similarly, without applying any of the state-action tests that are used with private entities, the Tenth Circuit concluded 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." *Tarabishi v. McAlester Reg'l Hosp.*, 827 F.2d 648, 652 (10th Cir. 1987).

Indeed, in *Lebron*, without applying traditional state-action tests for private entities, the U.S. 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." 513 U.S. at 383–86, 391, 397–400. The Court explained that Amtrak was created by legislation, its purpose is to pursue governmental goals, and it is controlled by government-appointed officials. *See id.* Likewise, without applying traditional state-action tests, then-Judge Gorsuch concluded for the Tenth Circuit in *United States v. Ackerman*, 831 F.3d 1292, 1295–1300 (10th Cir. 2016), that a clearinghouse for missing children that was originally created as a private, nonprofit organization was a governmental entity because it was given exclusive duties and powers by a federal statute and was funded primarily by the federal government.

As in these cases, Oklahoma charter schools are governmental entities. Charter schools were created by the Oklahoma legislature through the Charter Schools Act (70 O.S. § 130 *et seq.*), and they may be abolished by repeal of the Act. The Act expressly states that "'charter school' means a *public school* established by contract with a board of education of a school district" (70 O.S. § 3-132(D) (emphasis added)) or with certain other governmental entities (*see* 70 O.S. § 3-132(A)). Moreover, Oklahoma charter schools have numerous other characteristics that further confirm that they are public schools and governmental institutions.

For instance, Oklahoma charter schools must "be as equally free and open to all students as traditional public schools." 70 O.S. § 3-135(A)(9). They must "comply with all . . . laws relating to the education of children with disabilities in the same manner as a school district." 70 O.S. § 3-136(A)(7). They must not "charge tuition or fees." 70 O.S. § 3-136(A)(10). They are "subject to the same academic standards and expectations as existing

public schools." 70 O.S. § 3-135(A)(11). They receive state "funding in accordance with statutory requirements and guidelines for existing public schools." 70 O.S. § 3-135(A)(12). And they must comply with the same rules that govern other public schools on school-year length (70 O.S. § 3-136(A)(11)), bus transportation (70 O.S. § 3-141(A)), student testing (70 O.S. § 3-136(A)(4)), student suspension (70 O.S. § 3-136(A)(12)), and financial reporting and auditing (70 O.S. § 3-135(C); 70 O.S. §§ 3-136(A)(6), (18); 70 O.S. § 3-145.3(E)).

Also, employees of Oklahoma charter schools are eligible for the same retirement benefits that Oklahoma provides to teachers at other public schools (70 O.S. § 3-136(A)(14)) and for the same insurance programs that are available to employees of the charter schools' governmental sponsors (70 O.S. § 3-136(A)(15)). Oklahoma charter schools must "comply with the Oklahoma Open Meeting Act and the Oklahoma Open Records Act." 70 O.S. § 3-136(A)(16). They are "eligible to receive current government lease rates" if they choose to lease property. 70 O.S. § 3-142(E). They must have governing boards that hold public meetings at least quarterly (70 O.S. §§ 3-135(A)(3), 3-145.3(F)) and that are "subject to the same conflict of interest requirements as a member of a local school board" (70 O.S. §§ 3-136(A)(17), 3-145.3(F)).

What is more, each Oklahoma charter school is considered a separate "local education agency" (70 O.S. §§ 3-142(C), 3-145.3(C)), which is "a public board of education or other public authority legally constituted" for "administrative control or direction" of public schools (*see* 20 U.S.C. § 7801(30)(A)). Oklahoma charter schools are "considered . . . school district[s] for purposes of tort liability under The Governmental Tort Claims Act." 70 O.S. § 3-136(A)(13). And 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." Hon. Al McAffrey, OAG Op. No. 07-23, 2007 WL 2569195, at *7 (2007).

In sum, Oklahoma charter schools were created by legislation; Oklahoma law defines and treats them as public schools and governmental bodies; they have the same responsibilities and privileges as other public schools; and they must comply with myriad legal requirements that govern other public schools. Because Oklahoma charter schools are governmental entities, there is no question that they are state actors, and "this ends the inquiry." *See Riester v. Riverside Cmty. Sch.*, 257 F. Supp. 2d 968, 972 (S.D. Ohio 2002).

**B. Even if Oklahoma charter schools were not governmental entities, they are still state actors under the symbiotic-relationship and public-function tests.**

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." *See VDARE*, 11 F.4th at 1160. "If any one of the tests indicates a party is a state actor, that alone is sufficient to find the party a state actor." *Anaya v. Crossroads Managed Care Sys., Inc.*, 195 F.3d 584, 596 (10th Cir. 1999). Oklahoma charter schools are state actors under at least two of the tests—the symbiotic-relationship and public-function tests.

***Symbiotic relationship.*** 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.'" *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)). The U.S. Supreme Court has similarly 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.'" *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. *See Wittner v. Banner Health*, 720 F.3d 770, 778 (10th Cir. 2013).

Applying this test, the U.S. 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." *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). Similarly, the U.S. 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. *See Burton*, 365 U.S. at 724.

Here too, Oklahoma charter schools have a symbiotic relationship with and are entwined with the state. Only governmental entities may serve as sponsors for a charter school and grant a charter. *See* 70 O.S. §§ 3-132(A), 3-145.1. The governmental sponsors must then "[p]rovide oversight of the operations of charter schools," "monitor . . . the performance and legal compliance of charter schools," and decide whether to renew or revoke charter contracts. *See* 70 O.S. § 3-134(I). The charter schools must comply with numerous legal and reporting requirements. *See supra* § II(A). At the same time, the schools (so long as they—unlike St. Isidore—comply with applicable legal requirements) provide a variety of benefits to the state. *See* 70 O.S. § 3-131(A). As in *Brentwood*, 531 U.S. at 302, "entwinement to the degree shown here requires" that Oklahoma charter schools "be charged with a public character and judged by constitutional standards."

***Public function.*** To satisfy the "public function" test, it is sufficient to show that "the private entity performs a traditional, exclusive public function." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019). For example, when private groups run elections or operate company towns, they are state actors. *See id.* at 1929. As public schools, Oklahoma charter schools provide free, public education. 70 O.S. §§ 3-132(D), 3-135(A)(9)–(11). Though provision of education may not be a traditionally exclusive public function, provision of *free, public* education is. *Peltier v. Charter Day Sch.*, 37 F.4th 104, 119 (4th Cir. 2022) (en banc), *cert. denied*, 143 S. Ct. 2657 (2023).

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 department or police department that traditionally serves the community." *See Evans*, 382 U.S. at 302. Similarly, while 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." *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)).

But even if the provision of free, 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. *Halleck*, 139 S. Ct. at 1929 n.1. For example, in *West v. Atkins*, 487 U.S. 42, 56 (1988), the U.S. Supreme Court held that a physician who contracted with the state to provide medical services to incarcerated individuals was a state actor even though he was not a state employee, because the state had

"delegated" to the doctor "its constitutional duty to provide adequate medical treatment to those in its custody." Several provisions of the Oklahoma Constitution obligate the state to provide free, public education. *See* Art. I, § 5; Art. XI, §§ 2, 3; Art. XIII, § 1. As Oklahoma charter schools perform a duty that the State is constitutionally mandated to perform—the provision of free, public education—they are state actors.

### C. The Tenth Circuit and numerous other courts have concluded that charter schools are governmental entities and state actors.

Consistent with the analysis above, the Tenth Circuit has treated charter schools as governmental entities. *See Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1188 (10th Cir. 2010) (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); *Coleman v. Utah State Charter Sch. Bd.*, 673 F. App'x 822, 830 (10th Cir. 2016) (employees of charter school were "government officials"); *accord Dillon v. Twin Peaks Charter Acad.*, 241 F. App'x 490, 496–97 (10th Cir. 2007); *see also Milonas v. Williams*, 691 F.2d 931, 939–40 (10th Cir. 1982). Many other federal courts across the country, including the en banc Fourth Circuit and panels of the Third and Ninth Circuits, have treated charter schools as governmental entities or other state actors as well. *See Peltier*, 37 F.4th at 115–23; *Fam. C.L. Union v. Dep't of Child. & Fams.*, 837 F. App'x 864, 869 (3d Cir. 2020); *Nampa Classical Acad. v. Goesling*, 447 F. App'x 776, 777–78 (9th Cir. 2011).[1]

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[1] *See also 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); *Riester*, 257 F. Supp. 2d at 972–73; *Daugherty v. Vanguard Charter*

Ignoring most of these authorities, Respondents rely on *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), to assert that Oklahoma charter schools are not state actors. But there, the U.S. 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. 457 U.S. at 832–35, 843. As discussed above, Oklahoma charter schools are public schools, not private ones. 70 O.S. § 3-132(D). They are created through governmental action (*see* 70 O.S. §§ 3-132(A), 3-145.1), unlike the school in *Rendell-Baker* (*see* 457 U.S. at 832). They perform the traditionally exclusive public function of providing free *public* education (*see Peltier*, 37 F.4th at 119), 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" (457 U.S. at 842). Moreover, the educational functions of Oklahoma charter schools are heavily regulated (*see supra* § II(A)), 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 (*see* 457 U.S. at 841–42).

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*Sch. Acad.*, 116 F. Supp. 2d 897, 906 (W.D. Mich. 2000); *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 Acads., Inc.*, No. 1:14-cv-00223-REB, 2016 WL 4745171, at *2, 6 (D. Idaho Sept. 12, 2016); *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); *Jordan v. N. Kane Educ. Corp.*, No. 08 C 4477, 2009 WL 509744, at *2–3 (N.D. Ill. Mar. 2, 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); *Matwijko v. 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); *Irene B. v. Phila. Acad. Charter Sch.*, No. Civ.A. 02-1716, 2003 WL 24052009, at *11 (E.D. Pa. Jan. 29, 2003).

Other cases that Respondents cite are inapposite for similar reasons. In *Caviness v. Horizon Community Learning Center, Inc.*, 590 F.3d 806, 812–14, 817–18 (9th Cir. 2010), the court held that a charter school's employment decisions were not state action—without deciding whether performance of its educational functions is state action—based on an analysis of Arizona statutory and constitutional provisions that are substantially different from Oklahoma's. *Logiodice v. Trustees of Maine Central Institute*, 296 F.3d 22, 24–25 (1st Cir. 2002), was a lawsuit against a private school, not a charter school. *Robert S. v. Stetson School, Inc.*, 256 F.3d 159, 162, 166 (3d Cir. 2001), was also a suit against a private school, and far from performing a traditionally exclusive public function, the school performed services provided *only* by private schools.

Respondents also rely on *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), and *Polk County v. Dodson*, 454 U.S. 312 (1981), for the proposition that an entity is not automatically a state actor just because it is labelled as "public." In *Jackson*, the U.S. Supreme Court ruled that "a utility company which [was] privately owned and operated" and merely received from the state a certificate allowing it to deliver electricity to a particular geographic area was not a state actor. 419 U.S. at 346, 350. Oklahoma charter schools, by contrast, are statutorily treated as—and function as—governmental bodies in numerous ways. *See supra* § II(A). In *Polk*, the Court concluded that a public defender is not a state actor when acting as counsel in a criminal proceeding—for the unique reason that they are acting as an adversary to the state—but indicated that a public defender could be a state actor when "performing certain administrative and possibly investigative functions." *See* 454 U.S. at 318–20, 325. Public charter schools, on the other hand, fulfill the state's educational functions (70 O.S. § 3-131(A)) and are not charged with obstructing them.

Finally, Respondents contend that the state has not encouraged St. Isidore to be religious and that therefore the "nexus" test for state action is not satisfied. But demonstrating that the state encouraged St. Isidore to teach religion is not necessary because, as a public charter school, St. Isidore is a governmental entity itself. *See supra* § II(A). Moreover, the "nexus" test is just one of four tests through which a private party can be held a state actor, and the question of state encouragement is not relevant under the symbiotic-relationship and public-function tests applied above. *See Brentwood*, 531 U.S. at 302–03; *VDARE*, 11 F.4th at 1160–61; *Wittner*, 720 F.3d at 775–77; *Anaya*, 195 F.3d at 596.

## III. Because St. Isidore is a governmental entity and a state actor, it may not challenge under the Free Exercise Clause state law that governs the school.

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 U.S. Constitution to present programming—religious or other—that state constitutional provisions or statutes prohibit. Oklahoma charter schools are created by state law through charters granted by other governmental entities to which the schools are subordinate. *See* 70 O.S. §§ 3-132(A), (D). "[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.'" *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 363 (2009) (quoting *Williams v. Mayor of Baltimore*, 289 U.S. 36, 40 (1933)). 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 of sectarian or denominational texts in public schools." *See Nampa Classical*, 447 F. App'x at 777–78.

In addition, when a state actor speaks in the course of exercising their official duties, their speech is government speech. *See Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006);

*Nampa Classical*, 447 F. App'x at 778. A person delivering government speech has no right under the First Amendment, including its Free Exercise Clause, to present speech that a statute or a governmental policy prohibits. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009); *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).

## IV. Even if St. Isidore could assert Free Exercise Clause rights, they do not supersede the prohibitions on which the Attorney General relies.

Even if St. Isidore could assert federal free-exercise rights, they would not override any of the legal prohibitions that the Attorney General invokes. If Respondents were correct that the state constitutional and statutory provisions that prohibit charter schools from teaching a religious curriculum trigger strict scrutiny under the Free Exercise Clause, those provisions would satisfy such scrutiny. Compliance with the federal Establishment Clause is a compelling governmental interest that satisfies strict scrutiny under other provisions of the First Amendment. *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 judgment); *Widmar v. Vincent*, 454 U.S. 263, 271 (1981). The Establishment Clause prohibits state actors from instilling religion in the classroom or otherwise promoting religion to students or coercing them to take part in religious activity. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309–10 (2000); *Lee v. Weisman*, 505 U.S. 577, 587 (1992); *Edwards v. Aguillard*, 482 U.S. 578, 591–94 (1987); *Stone v. Graham*, 449 U.S. 39, 42 (1980); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 224 (1963); *Engel v. Vitale*, 370 U.S. 421, 430 (1962); *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948); *Roberts v.*

*Madigan*, 921 F.2d 1047, 1057–58 (10th Cir. 1990); *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).

Because St. Isidore is a state actor, the federal Establishment Clause's prohibitions against public schools teaching a religious curriculum apply to it and defeat any argument that the Free Exercise Clause gives it a right to do so. Accordingly, the three principal cases on which Respondents rely for their free-exercise argument—*Carson ex rel. O.C. v. Makin*, 596 U.S. 767 (2022); *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020); and *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017)—are inapplicable here. The religious schools involved in those three cases were not state actors, and there was no Establishment Clause violation in any of the three cases. *See Carson*, 596 U.S. at 781; *Espinoza*, 140 S. Ct. at 2254; *Trinity Lutheran*, 582 U.S. at 458.

**V. The Oklahoma Religious Freedom Act does not override the Charter Schools Act.**

Respondents contend that the Oklahoma Religious Freedom Act ("OFRA") overrides the Charter Schools Act's requirement that a "charter school . . . be nonsectarian in its programs . . . and all other operations" (70 O.S. § 3-136(A)(2)). ORFA provides that "[n]o 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." 51 O.S. § 253(B). Respondents specifically rely on a recent amendment to ORFA, which states that "[i]t shall be deemed 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." S.B. No. 404, § 1, 59 Legis., Reg. Sess. (Okla. 2023) (adding 51 O.S. § 253(D)).

As the Attorney General explains, because the Charter Schools Act's prohibition on religious programming was re-enacted after ORFA was amended, that prohibition controls. (Pet'r's Reply 9–10.) Moreover, ORFA's amendment prohibits denial of state funding "based *solely* on the religious character or affiliation of the person or entity." 51 O.S. § 253(D) (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 status. 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. Indeed, the ORFA amendment's House sponsor explained during floor debate that, under the amendment, a governmental official considering an application for public funding "can't solely discriminate based on religion, but there are a million other reasons you can say no," including "based on proselytization." House Floor Afternoon Session, 59 Legis., 2:20:10–2:20:27 (Apr. 25, 2023, 1:30 p.m.), https://bit.ly/48s5Pgn. And even if a denial of state funding to St. Isidore were a "substantial burden" under ORFA, the Charter Schools Act's prohibition against religious programming does not violate ORFA because the prohibition is necessary to further the state's compelling governmental interest in complying with the above-described constitutional provisions that bar religious indoctrination by public charter schools. *See* 51 O.S. § 253(B); *Muskogee Indus. Dev. Co. v. Ayres*, 1916 OK 125, 154 P. 1170, 1171.

## CONCLUSION

For the foregoing reasons, the Court should grant the relief requested by the Petition.

Respectfully submitted on December 27, 2023.

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I certify that on December 27, 2023, a true and correct copy of the foregoing document was served by mail to the counsel whose mailing addresses are set forth below and by email to the counsel whose email addresses are set forth below.

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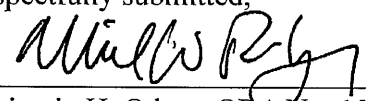

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