NO. 24-394

IN THE

Supreme Court of the United States

OKLAHOMA STATEWIDE CHARTER SCHOOL BOARD, et al.,

Petitioners,

v.

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

Respondent.

On Writ of Certiorari to the Supreme Court of Oklahoma

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether the academic and pedagogical choices of a privately owned and run school constitute state action simply because it contracts with the state to offer a free educational option for interested students.

2. Whether a state violates the Free Exercise Clause by excluding privately run religious schools from the state's charter-school program solely because the schools are religious, or whether a state can justify such an exclusion by invoking anti-establishment interests that go further than the Establishment Clause requires.

PARTIES TO THE PROCEEDING

Petitioners are the Oklahoma Statewide Charter School Board and its nine board members—Brian T. Shellem, Angie Thomas, Kathleen White, Damon Gardenhire, Becky Gooch, Jared Buswell, Ben Lepak, Ryan Walters, and Dr. Kitty Campbell—all in their official capacities. A statutory change, effective July 1, 2024, created the Oklahoma Statewide Charter School Board to replace the Oklahoma Statewide *Virtual* Charter School Board. Okla. Stat. tit. 70, § 3-132.1(I). While the Virtual Charter School Board and its members were the original parties to this case, the Statewide Charter School Board and its members substituted themselves in the Oklahoma Supreme Court before filing the petition in this case.

St. Isidore of Seville Catholic Virtual School—Intervenor below—is Petitioner on a separately filed petition, No. 24-396, which was also granted, and the cases have been consolidated.

Respondent is Gentner Drummond, in his official capacity as Attorney General for the State of Oklahoma.

LIST OF ALL PROCEEDINGS

Oklahoma Supreme Court, No. 121,694, *Drummond* v. *Oklahoma Statewide Virtual Charter School Board*, judgment entered June 25, 2024.

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STATEMENT OF JURISDICTION

The Oklahoma Supreme Court issued its decision on June 25, 2024. After an extension, the petition was timely filed and then granted on January 24, 2025. This Court has jurisdiction under 28 U.S.C. 1257(a).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

Relevant portions of the United States and Oklahoma Constitutions and the Oklahoma Charter Schools Act appear at J.A.1 and Pet.App.44a–137a.

INTRODUCTION

This Court has "repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits" and programs. *Carson* v. *Makin*, 596 U.S. 767, 778 (2022). Three times in the last eight years, the Court has applied that principle to stop state efforts to exclude religious schools, parents, and students from generally available funding programs based solely on their religion. *Id.* at 778–79 (citing *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449 (2017); *Espinoza* v. *Montana Dep't of Revenue*, 591 U.S. 464 (2020)).

The Oklahoma Supreme Court has not gotten the message. It held below that the State may broadly invite anyone to apply to operate charter schools—yet exclude religious organizations. The court justified bypassing *Trinity Lutheran*, *Espinoza*, and *Carson* by characterizing privately created and operated charter schools as "state actors" and "governmental entities." But that move runs headlong into *Rendell-Baker* v. *Kohn*, 457 U.S. 830 (1982), which held that a privately created and operated school is *not* a state actor despite offering free publicly funded education subject to extensive state regulation.

The state-action doctrine protects individual freedom, but the decision below undermines it. As to charter schools, Oklahoma's program invites diverse applicants, subjects them to *less* regulation, and empowers them to innovate and expand options. The project is succeeding: Oklahoma's charter-school students are thriving. But the decision below removes options and—by subjecting the schools to *more* regulation and liability—jeopardizes the entire program.

More broadly, the lower court's state-action ruling would have devastating effects on religious organizations. Faith-based groups often provide vital public services in which they partner with the government or are subject to government regulation. Yet under the decision below, many of these organizations would be deemed state actors disqualified from providing broad-ranging social services—including foster care, adoption services, medical care, homeless shelters, and other aid to disadvantaged communities.

The Oklahoma Supreme Court's distortion of the First Amendment also threatens harm. Twisting the Establishment Clause, it forces States to exclude religious groups from generally available government programs—in direct conflict with *Trinity Lutheran*, *Espinoza*, and *Carson*. And it deprives low-income families of educational options they so desperately want and need, leaving them without the opportunities that affluent families enjoy.

The Free Exercise Clause "condemns" this kind of "discrimination against religious schools and the families" who want their children to attend them. *Espinoza*, 591 U.S. at 488. "They are members of the community too," and their exclusion from the charter-school program is "odious to our Constitution and cannot stand." *Id.* at 488–89 (cleaned up).

The Court should reverse.

STATEMENT OF THE CASE

I. Legal and historical background

A. History of education and public funding in early America

History informs this Court's interpretation of the Religion Clauses. During the founding and early 1800s, primary education in America was "private[] and almost invariably religious." Nathan S. Chapman & Michael W. McConnell, *Agreeing to Disagree: How the Establishment Clause Protects Religious Diversity and Freedom of Conscience* 119 (2023). Schools were "conducted under religious auspices, often by clergy," while state or local governments sometimes helped shoulder the costs. *Ibid.*

Every level of American government "provided financial support" to "denominational" schools. *Espinoza*, 591 U.S. at 480. "Far from prohibiting such support, the early state constitutions and statutes actively encouraged [it]." *Ibid.* (cleaned up). "Local governments provided grants to private schools, including religious ones, for the education of the poor." *Id.* at 480–81. Massachusetts and Maine granted public land to schools operated by churches. Richard J. Gabel, *Public Funds for Church and Private Schools* 185–87 (1937). And New York funded "Presbyterian, Episcopalian, Methodist, Quaker, Dutch Reformed, Baptist, Lutheran, and Jewish schools." Chapman & McConnell, *supra*, at 119.

Early federal funding for religious schools was also common. From the founding through Reconstruction, Congress funded schools that were "no less religious than those supported by the states." *Id.* at 120.

One example is Congress paying "churches to run schools for American Indians" from the founding "through the end of the 19th century." *Espinoza*, 591 U.S. at 481; accord *Reuben Quick Bear* v. *Leupp*, 210 U.S. 50, 78 (1908) (noting the government "made contracts for sectarian schools for the education of the Indians"). In 1803, President Jefferson approved a treaty with the Kaskaskia tribe providing financial support for "a priest of [the Catholic] religion" to perform "the duties of his office" and educate the tribe's children in literature. Treaty Between the United States of America and the Kaskaskia Tribe of Indians, art. III, 7 Stat. 78, 78–79 (Aug. 13, 1803). Later, Congress passed a statute that paid religious groups to teach Native American students "literacy and agriculture." Nathan S. Chapman, *Forgotten Federal-Missionary Partnerships: New Light on the Establishment Clause,* 96 Notre Dame L. Rev. 677, 701 (2020).

"[F]ederal aid (often land grants)" also "went to religious schools" in federal territories and enclaves. *Espinoza*, 591 U.S. at 481. The First Congress reenacted the Northwest Ordinance of 1787, which set aside land for schools, benefiting many "church-affiliated sectarian institutions." *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 862 (1995) (Thomas, J., concurring). The Ordinance expressly linked religion and education, stating that "[r]eligion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Ordinance for the Government of the Territory of the United States North-West of the River Ohio, art. 3 (July 13, 1787) ("Northwest Ordinance"). Consistent with this, congressional

spending supported "denominational schools" in the District of Columbia until at least 1848. *Espinoza*, 591 U.S. at 481.

"After the Civil War, Congress spent large sums on education for emancipated [children], often by supporting denominational schools in the South through the Freedmen's Bureau." *Ibid.* Congress directed the agency to partner with "private benevolent associations" through a grant program. Act of July 16, 1866, ch. 200, § 13, 14 Stat. 173, 176; Michael W. McConnell et al., *Religion and the Constitution* 323 (4th ed. 2016). One of the Bureau's principal partners was the American Missionary Association. Charles L. Glenn, *African-American/Afro-Canadian Schooling: From the Colonial Period to the Present* 54–56 (2011). Its schools were thoroughly religious in nature. Joe M. Richardson, *Christian Reconstruction: The American Missionary Association and Southern Blacks, 1861–1890* 44 (2008). In short, governments regularly funded religious schools throughout early American history.

B. Blaine Amendments, Oklahoma law, and Establishment Clause developments

In the mid-1800s, Horace Mann's common-school movement started its push for free public education. *Espinoza*, 591 U.S. at 502–03 (Alito, J., concurring). Those early public schools taught a "least-common-denominator Protestantism … accomplished with daily reading from the King James Bible," "an affront to many … Catholics." *Id.* at 503 (Alito, J., concurring) (cleaned up).

In the 1870s, Congressman James Blaine proposed a federal constitutional amendment to "prohibit[] States from aiding 'sectarian' schools"—the

word "sectarian" being "code for 'Catholic.'" *Id.* at 482 (majority opinion) (cleaned up). That proposal—which nearly passed—was "born of bigotry" during "a time of pervasive hostility to the Catholic Church and to Catholics in general." *Ibid.* (cleaned up).

"The resulting wave of state laws withholding public aid from 'sectarian' schools cannot be understood outside this context." *Id.* at 500 (Alito, J., concurring). That includes Oklahoma's Blaine Amendments—Article I, Section 5 and Article II, Section 5 of the Oklahoma Constitution—both of which were part of the State's original constitution in 1907. See *id.* at 507 & n.20 (Alito, J., concurring) (recognizing Oklahoma as one State that adopted "Blaine Amendments").

Article I, Section 5—Oklahoma's no-sectarian-control provision—requires "a system of public schools … free from sectarian control." This language is in the Oklahoma Constitution because Congress—continuing to push variations of the failed Blaine Amendment—mandated it in the 1906 Act enabling Oklahoma to become a State. See Act of June 16, 1906, ch. 3335, § 3, 34 Stat. 267, 270. It is part and parcel of the broader anti-Catholic Blaine efforts condemned in *Espinoza*. 591 U.S. at 482.

So too with Article II, Section 5—Oklahoma's broader no-use provision—which prohibits the use of "public money or property" for "any sect, church, denomination, or system of religion," "any priest, preacher, minister, or other religious teacher or dignitary," or any "sectarian institution as such." That language tracks much of the Senate version of the Blaine Amendment, which barred the use of "public revenue" and "public property" to support any

"institution under the control of any religious or anti-religious sect, organization, or denomination." 4 Cong. Rec. 5453 (Aug. 11, 1876). The Oklahoma language also targets "sect[s]," "priest[s]," and "sectarian institution[s]"—all terms used to describe Catholics—further betraying its anti-Catholic bias. Okla. Const. art. II, § 5.

Fast forward to the mid-1900s when this Court adopted an ahistorical and now-abandoned view of the Establishment Clause that stripped neutrally available state funding from religious schools. *E.g.*, *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) (stopping state funds from supplementing teacher salaries at religious schools); *Committee for Pub. Educ. and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973) (applying *Lemon* to forbid various state grants for religious schools). *Lemon* and its progeny bound the lower courts for decades. That cast a pall over much government funding for religious education until this Court recently clarified that *Lemon* has been "abandoned." *Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507, 534 (2022).

C. Rise of charter schools and choice

In the 1980s and 1990s, traditional public schools received "savage criticism for failing to meet the nation's educational needs." John E. Chubb & Terry M. Moe, *America's Public Schools: Choice Is a Panacea*, 8 Brookings Rev. 4, 4 (1990). Desperate for solutions, many argued that States should give qualified private groups broad autonomy and public funding to create and run new schools—an ingenious framework "built on decentralization, competition, and choice." *Id.* at 5–6. On that premise, the charter-school movement was born.

Minnesota approved the nation's first charter-school program in 1991, and within 10 years, 36 States jumped on board. Jessica P. Driscoll, *Charter Schools*, 8 Geo. J. on Poverty L. & Pol'y 505 (2001). Today, charter-school programs exist in 46 States, plus the District of Columbia. Bruno Manno, *Charter Schools Are Learning Communities and Sources of Community Rebirth*, Forbes (May 15, 2024), perma.cc/7KLW-8VUG.

"Charter schools are essentially hybrids of public and private schools, supported by public funding, but privately and largely independently operated." Katherine E. Lehnen, Comment, *Charting the Course: Charter School Exploration in Virginia*, 50 U. Rich. L. Rev. 839, 840–41 (2016). They are generally "not subject to the same laws and restrictions" as traditional public schools. *Id.* at 839. And this autonomy enables them to "enhance learning experiences, especially for underperforming students, through innovative" and diverse approaches. *Id.* at 867.

Charter schools have been particularly important for minority groups and underserved populations. That's because they "enroll more students of color and students from low-income families than traditional district schools" do. Bruno Manno, *Yes, Charter Schools Do Reduce Inequality*, Philanthropy Daily (Nov. 13, 2024), perma.cc/R7M7-5QY5. And multiple studies have found "positive charter school impacts on student achievement" for schools serving minority students in urban and low-income areas. Susan Dynarski et al., Brown Center on Education Policy at Brookings, *Charter Schools: A Report on Rethinking the Federal Role in Education* 3 (Dec. 16, 2010), perma.cc/2RXT-VFND.

II. Oklahoma's charter-school program

A. Nature of the program

In 1999, the Oklahoma Charter Schools Act created the State's charter-school program. Okla. Stat. tit. 70, § 3-130.* The application-based program seeks to "[i]mprove student learning," encourage "innovative teaching methods," and "[p]rovide additional academic choices for parents and students." § 3-131.

Recognizing that broad participation stimulates fresh ideas and diverse options, the State invites applications from "public bod[ies]," "private person[s], or private organization[s]" that want to run charter schools. § 3-134(C). Once approved, qualified applicants enter a "contract with a sponsor" and receive funding. *Ibid.* Eligible sponsors include the Statewide Charter School Board, school districts, Indian tribes, and (since July 1, 2024) accredited "private institution[s] of higher learning" in Oklahoma. § 3-132(A). The Act authorizes both brick-and-mortar and virtual charter schools. § 3-132.1(A) (2024).

The Statewide Charter School Board began on July 1, 2024. § 3-132.1 (2024). It replaced and assumed the powers of its predecessor—the Statewide *Virtual* Charter School Board—including "the sole authority to sponsor statewide virtual charter schools." § 3-132.1(A)&(I) (2024); see § 3-145.1(A) (2023). (References in this brief to the "Board" refer to the entity in place at the relevant time.)

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* Amendments to the Act that became effective July 1, 2024, adjusted the location of some relevant provisions. Citations to unchanged provisions will not denote a year. Citations to those that shifted location will indicate the new citations in parentheticals. And citations to only one version will specify the year.

To achieve the program's goal of innovation, the Act gives charter schools broad flexibility by exempting them "from all statutes and rules relating to schools, boards of education, and school districts," except as otherwise provided in the Act. § 3-136(A)(5) (2023) (§ 3-136(A)(1) (2024)).

This freedom encompasses curriculum choices. Charter schools "may provide a comprehensive program of instruction" or may select materials that "emphasize[] a specific learning philosophy or style or certain subject areas." § 3-136(A)(3). And the schools need not follow the State's Teacher and Leader Effectiveness standards or hire teachers with "a valid Oklahoma teaching certificate." Okla. State Dep't of Educ., *Oklahoma Charter Schools Program* (Apr. 25, 2022), perma.cc/4T8X-MEJH.

Each charter school selects its own governing board, which is "responsible for [its] policies and operational decisions." Okla. Stat. tit. 70, § 3-136(A)(8) (2023) (§ 3-136(A)(7) (2024)); accord Okla. Admin. Code 777:10-1-3(c)(1). That private board hires staff and adopts "personnel policies, personnel qualifications, and [a] method of school governance." § 3-136(B) (2023) (§ 3-136(C) (2024)). And it "may enter into private contracts" to borrow money—incurring debts that place no "obligat[ion]" on "the state or the sponsor" but are the school's "sole[] responsib[ility]." § 3-142(D) (2023) (§ 3-142(E) (2024)). For its part, the sponsor—which may be the Board, a private university, or another eligible entity—provides general "oversight" and "monitor[ing]" of the school's "performance" on its contractual obligations and "legal compliance." § 3-134(I)(1)&(6) (2023) (§ 3-134(I)(1)&(7) (2024)).

Charter schools must "comply with all federal regulations and state and local rules and statutes relating to health, safety, civil rights and insurance." § 3-136(A)(1). They also must be "as equally free and open to all students as traditional public schools," § 3-135(A)(9) (2023) (§ 3-136(A)(9) (2024)), and may "not charge tuition or fees," § 3-136(A)(10) (2023) (§ 3-136(A)(9) (2024)). State law labels charter schools as "public school[s] established by contract," § 3-132(D) (2023) (§ 3-132.2(C)(1) (2024)), and the term "public schools" simply means "free schools supported by public taxation," § 1-106.

Meanwhile, the Board must "[a]pprove quality charter applications that meet identified educational needs and promote a diversity of educational choices." § 3-134(I)(3). Selection criteria include "high quality academic programming" and "the collective experience and capacity" of the governing board "to operate the school." Okla. Admin. Code 777:10-3-3(c)(1). The Board must "give priority to opening charter schools that serve at-risk student populations or students from low-performing traditional public schools." Okla. Stat. tit. 70, § 3-132(B).

Though claiming to invite all qualified applicants, the Charter Schools Act excludes religious organizations and programs. When the Act passed in 1999, the legislature needed to navigate both *Lemon* and the State's Blaine Amendments. So the Act includes a religious-affiliation ban—excluding any applicant "affiliated with a nonpublic sectarian school or religious institution." § 3-136(A)(2). And it contains a sectarian-use ban—mandating that all "programs, admission policies, employment practices, and all other operations" be "nonsectarian." *Ibid.*

B. Need for the program

Oklahoma's charter-school program addresses pressing concerns facing its citizens. The State currently ranks in the bottom five in overall child well-being and second-to-last in education. Annie E. Casey Foundation, *2024 Kids Count Data Book* 21, 27, perma.cc/5NRZ-2BQH; U.S. News and World Report, *Education*, perma.cc/Z3X3-YAHV.

But amid these bleak numbers, Oklahoma's charter schools shine a beacon of hope. A recent study of student performance on national achievement tests in 35 states found that Oklahoma's traditional public schools were in the bottom half—while its charter schools ranked sixth, excelling in comparison. Paul E. Peterson & M. Danish Shakeel, *The Nation's Charter Report Card*, Education Next, at fig. 4 (Winter 2024), perma.cc/5VVR-G7NZ.

Currently, 33 charter schools operate in Oklahoma. Okla. State Dep't of Educ., *Current Charter Schools of Oklahoma*, perma.cc/L4Y9-L7ZJ (brick-and-mortar list); Pet.App.155a (24-396) (virtual list). Seven are virtual, each of which has its own tailored "approach to education." Pet.App.155a (24-396). In all, Oklahoma's charter schools educated over 50,000 students in the 2022–23 school year, which accounted for more than seven percent of all Oklahoma students at accredited schools. Okla. State Dep't of Educ., *Oklahoma Charter School Report 2023* at 9, perma.cc/HGB4-KHGE.

Virtual charter schools, in particular, offer a lifeline to economically disadvantaged families in poor-performing rural school districts. Jeff Kwitowski & Fiona Hogan, *School Choice in Rural America: How Online Schooling Helps Bridge the Accessibility Gap*,

EdChoice (Mar. 15, 2018), perma.cc/45TU-F5NY. For many of those families, alternatives such as private schools, far-away brick-and-mortar charter schools, or homeschooling aren't realistic choices. Virtual charter schools are their only alternative to traditional public schools. Kelly Robson et al., National Comprehensive Center, *Portfolio of Choice: School Choice in Rural Communities* 17 (2020), perma.cc/QC4D-SRCE. Yet Oklahoma law denies these much-needed virtual options if the applicant is religious.

III. Factual background

A. St. Isidore's application

The Archdiocese of Oklahoma City and Diocese of Tulsa—two private religious entities—formed St. Isidore of Seville Virtual Charter School, Inc., a private, not-for-profit corporation. Pet.App.216a–17a, 225a (24-396). St. Isidore has two members—the Archbishop of the Archdiocese of Oklahoma City and the Bishop of the Diocese of Tulsa. *Id.* at 225a. Those members have selected a board to "manage and direct" St. Isidore's "business and affairs." *Id.* at 226a, 230a. Its organizational mission is to provide "a learning opportunity for students who want and desire a quality Catholic education, but for reasons of accessibility to a brick-and-mortar location or due to cost cannot currently make it a reality." *Id.* at 206a.

In early 2023, St. Isidore submitted its charter-school application. Pet.App.197a (24-396). It was upfront about its affiliation with the two Catholic dioceses, *id.* at 225a, its purpose to operate a statewide virtual charter school "as a Catholic School" for "young people of different religions and social backgrounds," *id.* at 218a, its intent to "integrate" religion

into the "curriculum," *id.* at 198a, and its plan to "provide rigorous high-quality educational opportunities," *id.* at 221a. St. Isidore promised to welcome "any and all students," including "those of different faiths or no faith." *Id.* at 213a.

To satisfy the application criteria, St. Isidore demonstrated its commitment to a first-rate academic program. It planned to obtain state-recognized accreditation and to draw its programs from existing Catholic schools operated by St. Isidore's members. J.A.13–16, 24–25. Those schools "are known for producing quality students from the elementary to the high school level." *Id.* at 14. "With a 100% graduation rate in the Archdiocese of Oklahoma City and the Diocese of Tulsa, and 98% [of students] being accepted to one or more colleges," St. Isidore's members have a proven record of academic success. *Id.* at 15. The School projected an initial enrollment of 500 students, half of whom would come from economically disadvantaged families. Pet.App.158a (24-396).

B. The Board's approval

The Board faced a dilemma. It had a high-quality applicant in St. Isidore. But Oklahoma law barred the School because it's religious.

The Board had also received conflicting opinions from the Oklahoma Attorney General's office. Based on "the *Trinity Lutheran*, *Espinoza*, and *Carson* line of decisions," Attorney General John M. O'Connor determined that this Court "would likely hold [the religious] restrictions unconstitutional." Pet.App.52a (24-396). State-action considerations could not save those restrictions, he explained, because this Court's decision in *Rendell-Baker* "counsel[s] strongly toward … finding that Oklahoma charter schools are not state

actors." *Id.* at 68a–69a. "The State cannot enlist private organizations to promote a diversity of educational choices and then decide that … religion is the wrong kind of diversity." *Id.* at 71a (cleaned up).

After Respondent took office, he withdrew that opinion letter, saying he was not "comfortable" advising the Board to follow *Trinity Lutheran*, *Espinoza*, and *Carson*. *Id.* at 74a–78a. He also complained that General O'Connor's position would "compel the approval of charter schools by all faiths," including minority religions he believed "most Oklahomans would consider reprehensible." *Id.* at 77a.

Persuaded by General O'Connor's view, the Board approved St. Isidore's application in June 2023. *Id.* at 157a. As one Board member said, excluding St. Isidore because of its religious character would have violated the Free Exercise Clause, *id.* at 164a, which each member had pledged to uphold, *id.* at 163a.

C. The contract

In October 2023, the Board and St. Isidore executed a charter-school contract. It affirms that "the Charter School is a privately operated religious nonprofit organization" with constitutional and statutory rights. *Id.* at 111a–12a. It recognizes that St. Isidore's governing board is "responsible for" the School's "policies and operational decisions." *Id.* at 120a. And it acknowledges that St. Isidore "may enter into contracts, sue and be sued," *id.* at 142a, and raise its own funds through "private donations," *id.* at 128a–29a.

St. Isidore cannot "bind the [Board] to any third person or entity." *Id.* at 125a. But the Board may inspect the School's records to provide "oversight" and monitor St. Isidore's "use of public funds." *Id.* at 132a.

The parties also agreed St. Isidore will not deny admission to any student based on "race, color, national origin, sex, sexual orientation, gender identity, gender expression, disability, age, proficiency in the English language, religious preference or lack thereof, income, aptitude, or academic ability." *Id.* at 138a.

D. St. Isidore's state funding

St. Isidore's state funding under the Charter Schools Act depends on student enrollment. Pet.App.157a (24-396); Okla. Stat. tit. 70, § 3-142(A), (B)(2) (2023) (§ 3-142(A), (C) (2024)). As the Act explains, a charter school's available state funds consist of "the State Aid allocation … and any other state-appropriated revenue *generated by its students* for the applicable year." § 3-142(A) (emphasis added).

Here, the only state funding that St. Isidore projected in its initial five-year budget is State Aid allocation. J.A.94. "The full amount" of that allocation "is based on pupil count" and "is subject to adjustment" based on changes in enrollment. Pet.App.156a (24-396). "Because the number of enrolled students in a school is a requisite component in the calculation," St. Isidore's receipt of "State Aid depends upon the enrollment of students." *Id.* at 157a. "With no students, State Aid would be zero." *Ibid.*

Oklahoma's total State Aid allocation to all charter schools was over $314 million for the 2022–23 school year, with one virtual charter school alone receiving over $171 million. Okla. State Dep't of Educ., *Oklahoma Charter School Report 2023* at 7, perma.cc/HGB4-KHGE. St. Isidore's projected State Aid allocation for its first year is less than $2.7 million. Pet.App.158a (24-396). St. Isidore would not receive any "local tax revenue." *Id.* at 157a.

IV. Procedural history

Days after the Board executed the St. Isidore contract, Respondent filed a mandamus action against the Board in the Oklahoma Supreme Court, asking the court to assume original jurisdiction, declare the contract unlawful, and direct the Board to cancel it. J.A.2–12. St. Isidore intervened.

Respondent warned that the Board had "pave[d] the way for an onslaught of sectarian applicants for charter[]" schools, *id.* at 7, which could include "extreme sects of the Muslim faith," Pet.App.174a (24-396). He insisted the Board had violated not only the Charter Schools Act's affiliation and sectarian-use bans but also the State's Blaine Amendments. *Id.* at 181a–86a. And he raised a federal Establishment Clause claim, denouncing "[g]overnment spending" for "religious education." *Id.* at 187a–92a.

The Oklahoma Supreme Court assumed original jurisdiction, issued the writ of mandamus, and ordered the Board to cancel the contract.

In reaching that decision, the court below began with the State's Blaine Amendments. It held that the Board violated the no-use provision's ban on "any sect … of religion" or "sectarian institution" using "public money." Pet.App.10a–14a (quoting Okla. Const. art. II, § 5). Denying that the provision "is a Blaine Amendment," the court declared that it creates "a complete separation of church and state," *id.* at 11a–12a, and bars "public money" to "sectarian institution[s]" like St. Isidore, *id.* at 13a. The court then held that the Board also violated the no-sectarian-control provision, Okla. Const. art. I, § 5, and the Charter Schools Act's affiliation and sectarian-use bans, § 3-136(A)(2). Pet.App.14a–15a.

Turning to state action, the court concluded that St. Isidore—a nonprofit organization run by its own private board—is somehow a "state actor" and "governmental entity." *Id.* at 17a–24a. The court based that conclusion on the statute labeling charter schools as "public school[s] established by contract." *Id.* at 17a (quoting Okla. Stat. tit. 70, § 3-132(D)).

St. Isidore should "be deemed a state actor," the court thought, under this Court's state-action tests. *Id.* at 20a–24a. First, "charter schools are entwined with the State" because "[g]overnmental entities" oversee their operations and "monitor [their] performance." *Id.* at 21a. Second, the court acknowledged that "[t]he provision of education may not be a traditionally exclusive public function," but it focused instead on the provision of "*free public* education," which it said "is exclusively a public function." *Ibid.* Third, the court mentioned that "a private entity is a state actor when the government has outsourced one of its constitutional obligations to the entity." *Ibid.*

Next, the court brushed aside this Court's holding in *Rendell-Baker* that a privately operated school providing free publicly funded education was not a state actor. Pet.App.21a–22a. Once again, the court invoked the statutory label, calling it "the key difference." *Id.* at 22a. Having dispatched *Rendell-Baker*, the court endorsed the Fourth Circuit's deeply divided decision in *Peltier* v. *Charter Day School, Inc.*, 37 F.4th 104 (4th Cir. 2022) (en banc), which held that North Carolina charter schools are state actors. Pet.App.22a–24a.

Based on its view that St. Isidore is "a governmental entity and a state actor," the court said the Free Exercise Clause was "not implicated." *Id.* at 26a–

27a (capitalization omitted). *Trinity Lutheran*, *Espinoza*, and *Carson* did not apply because "St. Isidore is a state-created school" with no constitutional rights. *Id.* at 27a–28a. And "[e]ven if St. Isidore could assert free exercise rights," complying with the Establishment Clause "is a compelling governmental interest that satisfies strict scrutiny." *Id.* at 29a. That's because, in the court's view, the Clause "prohibits government spending in direct support of any religious activities or institutions." *Id.* at 25a.

Two justices dissented from the majority's state-action and federal-constitutional holdings. *Id.* at 31a–43a. Justice Kuehn would have held that (1) St. Isidore did "not become a 'state actor' merely by contracting with the State to provide a choice in educational opportunities," (2) "allowing St. Isidore to operate a virtual charter school … would not be establishing, aiding, or favoring any particular religious organization," and (3) "[e]xcluding private entities from contracting for functions, based solely on religious affiliation, would violate the Free Exercise Clause." *Id.* at 32a (Kuehn, J., dissenting). Looking ahead, she predicted that the majority's "decision is destined for the same fate as the Montana Supreme Court's opinion in *Espinoza*"—reversal. *Id.* at 41a.

SUMMARY OF THE ARGUMENT

Trinity Lutheran, *Espinoza*, and *Carson* forbid the exclusion of St. Isidore from Oklahoma's charter-school program. To avoid that conclusion, the decision below twisted this Court's state-action doctrine.

Controlling precedent establishes that St. Isidore is not engaged in state action. *Rendell-Baker* found no such action where, as here, a privately operated school provided free publicly funded education through a contract with the government. The court below sidestepped that precedent because Oklahoma charter schools bear the label "public." But that label merely conveys that charter schools are publicly funded and don't charge tuition. Those features, as cases like *Rendell-Baker* prove, don't establish state action.

None of this Court's state-action tests are satisfied here. The State is not organizationally entwined with St. Isidore. Nor has the State coerced or significantly encouraged the School's religious status and conduct. What's more, St. Isidore's function—providing K–12 education—has never been the exclusive province of the government. Nor does the State's decision to provide more educational options through charter schools constitute the complete delegation of a state duty that might trigger government action.

Moreover, St. Isidore is not a governmental entity for First Amendment purposes. That issue poses a federal question that cannot be settled by state labels. For an organization to qualify as a governmental entity, the State must create it and direct its operations through a government-selected board of directors. St. Isidore doesn't fit that mold: it was created by two private religious members without

state input; and it is run by a private board that those members select.

On free exercise, *Trinity Lutheran*, *Espinoza*, and *Carson* forbid excluding religious applicants from generally available state programs simply because of their religious status or intended religious use of public funds. Oklahoma's affiliation ban—which bars any applicant affiliated with a religious institution—illegally discriminates based on religious status. And the sectarian-use ban—which bars any charter school with sectarian programs or operations—unlawfully discriminates based on intended religious use. Both are unconstitutional.

The Establishment Clause doesn't excuse this religious discrimination. Our history is replete with examples of governments funding religious schools from the founding through Reconstruction. And no Establishment Clause concerns arise when States administering generally available funding programs treat secular and religious groups alike. This is especially true when the money from those programs flows to religious schools because of private parental choice.

The court below got the law wrong from top to bottom. This Court should reverse.

ARGUMENT

I. St. Isidore is not engaged in state action.

The court below premised its First Amendment analysis on its belief that St. Isidore is engaged in state action. Pet.App.17a–24a. It held that the School satisfies this Court's state-action tests and qualifies as a "governmental entity." *Ibid.* But all that is wrong. So the court's First Amendment discussion went off the rails before it began.

A. St. Isidore does not satisfy this Court's state-action tests.

The Fourteenth Amendment's text limits its reach to the actions of a "State." U.S. Const. amend. XIV, § 1. "In accord with [that] text" and the "structure of the Constitution, this Court's state-action doctrine distinguishes the government from individuals and private entities." *Manhattan Cmty. Access Corp.* v. *Halleck*, 587 U.S. 802, 808 (2019). That doctrine, when properly applied, "protects a robust sphere of individual liberty." *Ibid.*

"Faithful adherence to the 'state action'" doctrine "requires careful attention to the gravamen" of the complaint. *Blum* v. *Yaretsky*, 457 U.S. 991, 1003 (1982). And the touchstone inquiry is whether the complained-of conduct is "fairly attributable to the State." *NCAA* v. *Tarkanian*, 488 U.S. 179, 199 (1988).

"Under this Court's cases, a private entity can qualify as a state actor in a few limited circumstances." *Manhattan Cmty. Access*, 587 U.S. at 809. Most relevant here, these include: (1) when a private organization is "entwine[d]" with the government "to the point of largely overlapping identity," *Brentwood*

Acad. v. *Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 303 (2001); (2) "when the government compels" or significantly encourages a "private entity to take a particular action," *Manhattan Cmty. Access*, 587 U.S. at 809 (citing *Blum*, 457 U.S. at 1004–05); (3) when a "private entity performs a traditional, exclusive public function," *ibid.* (citing *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 352–54 (1974)); and (4) when, in "certain circumstances," "the government has outsourced one of its constitutional obligations to a private entity," *id.* at 810 n.1 (discussing *West* v. *Atkins*, 487 U.S. 42, 56 (1988)).

St. Isidore is not engaged in state action under any of these tests. This Court's analysis should start with *Rendell-Baker*, which held that a privately operated school providing free publicly funded education is not a state actor. The fact that Oklahoma labels its charter schools "public"—which simply means that they, like the school in *Rendell-Baker*, are publicly funded to provide free education—doesn't warrant a different outcome. Proceeding to the state-action tests, not one is satisfied. St. Isidore is not entwined with the State. Nor has the government compelled or significantly encouraged St. Isidore's religious status or conduct. Additionally, the service that St. Isidore offers—K–12 education—is not an exclusive public function. And the State's choice to afford more educational options through charter schools is not a complete outsourcing of the State's duty to provide free public schools. The lower court's reasoning, which threatens to transform vast swaths of government contractors and regulated entities into state actors, should be reversed.

1. *Rendell-Baker*'s principles guide the analysis.

The plaintiffs in *Rendell-Baker* brought First Amendment claims against the defendant school, and the threshold question was whether the school qualified as a state actor. That school, which was privately operated, had contracted with the government to provide free publicly funded education to troubled high-school students. 457 U.S. at 831–35. In holding that the school was not a state actor, the Court discussed three key points that guide the analysis here. *Id.* at 839–43.

First, public funding and contracts don't create state actors. Although the school in *Rendell-Baker* "depended on the State" for its funding—up to 99% of it was public—its decisions as a "private contractor[]" did not "become acts of the government" simply because of its "total engagement in performing public contracts." *Id.* at 840–41. The same is true here of St. Isidore.

Second, heavy regulations do not transform regulated entities into state actors unless the regulations compel or significantly encourage the complained-of conduct. *Rendell-Baker* observed that even "extensive and detailed" regulations—"ranging from recordkeeping to student-teacher ratios" to "job descriptions"—didn't make the school's decisions "state action." *Id.* at 833, 841–42. That's because the employment decisions challenged there "were not compelled or even influenced by any state regulation." *Id.* at 841. Likewise, here, the State has neither compelled nor significantly encouraged St. Isidore's decision to operate as a religious school.

Third, providing free education—including education that the State has a duty to provide—does not qualify as an exclusive public function. *Id.* at 842. Though education serves the public, it has not "been traditionally the *exclusive* prerogative of the State." *Ibid.* (cleaned up). That holding applies equally here, as discussed more fully below. See pp. 32–34, *infra*.

2. Labeling charter schools "public" doesn't make them state actors.

The court below swept aside *Rendell-Baker* by invoking the "public" label attached to Oklahoma's charter schools, saying the school there was private while St. Isidore is "public." Pet.App.21a–22a. But as Respondent has conceded, statutory labels are "not dispositive" of constitutional state-action questions. Opp.25. And the substance behind the label falls far short of establishing state action here.

a. Labels don't control.

"The distinction between private conduct and state action turns on substance, not labels." *Lindke* v. *Freed*, 601 U.S. 187, 197 (2024); accord *Crowell* v. *Benson*, 285 U.S. 22, 53 (1932) (noting that "where constitutional limits are invoked," courts must assess not "mere matters of form, but … the substance of what is"). That's why state-action "cases are unequivocal in showing that the character of a legal entity" is not determined solely by its "characterization in statutory law." *Brentwood*, 531 U.S. at 296. Otherwise, States could strip private actors of their constitutional rights—and expose them to liability under 42 U.S.C. 1983—by legislative fiat, abridging their liberty with the stroke of a pen.

This Court's state-action cases show that labels don't control. In *Jackson*, the state legislature labeled the defendant company a "public utility." 419 U.S. at 350 n.7. But the Court did not give that label any weight, dismissing it in a footnote. *Ibid.* Rather, the Court discussed the various state-action tests and held that the "heavily regulated, privately owned" corporation "empower[ed]" by the State "to deliver electricity to a service area" was not engaged in state action. *Id.* at 346, 358. Similarly, *Polk County* v. *Dodson* looked beyond the label "public defender" and held that the public employee at issue there was not engaged in state action when representing indigent defendants. 454 U.S. 312, 318–19 (1981).

That makes sense. When constitutional rights are at stake, "it is not for [the legislature] to make the final determination of [an organization's] status as a Government entity." *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995). "It surely cannot be that government, state or federal, is able to [manipulate] the most solemn obligations imposed in the Constitution" by resorting to labels. *Id.* at 397; accord *Department of Transp.* v. *Association of Am. R.R.s.*, 575 U.S. 43, 55 (2015) (noting that "the practical reality … prevails over" statutory labels).

Indeed, this Court has recognized that the free-exercise protections secured in *Trinity Lutheran*, *Espinoza*, and *Carson* don't depend "on the presence or absence of magic words." *Carson*, 596 U.S. at 785; see also *Board of Cnty. Comm'rs* v. *Umbehr*, 518 U.S. 668, 679 (1996) (rejecting a rule that "would leave First Amendment rights unduly dependent on … state law labels"). That principle should apply no less to the threshold state-action question than it does to the merits of the claim.

b. The substance of the "public" label shows St. Isidore is not a state actor.

The statutory definition of "public schools"—"free schools supported by public taxation," Okla. Stat. tit. 70, § 1-106—reveals that the term "public" refers only to matters of *funding*. The legislature's decision to label a school "public" simply means that the State funds it and that students don't pay tuition. But state funding for free education—even "total" financial support for a school—does not equate to state action, as *Rendell-Baker* established. 457 U.S. at 840–41. That "the government funds … a private entity" does not make it "a state actor." *Manhattan Cmty. Access*, 587 U.S. at 814.

Digging further into the statutory scheme, the legislature defines a "charter school" not merely as "a public school," but as "a public school established by contract" with an authorized sponsor. Okla. Stat. tit. 70, § 3-132(D) (2023) (§ 3-132.2(C)(1) (2024)). That statute—when read alongside the provision inviting "private organization[s]" to enter those "contract[s]," § 3-134(C)—shows that private entities will operate charter schools as contractors. Yet "the fact that the government … contracts with … a private entity does not convert the private entity into a state actor." *Manhattan Cmty. Access*, 587 U.S. at 814.

These statutes thus reveal two features of Oklahoma charter schools: (1) they are publicly funded to provide free education; and (2) they operate as contractors. But under this Court's caselaw, those features don't create state action.

3. The State is not entwined with St. Isidore.

The court below invoked the "entwinement test." Pet.App.20a–21a. But it relied exclusively on *Brentwood*, and *Brentwood* is nothing like this case.

The plaintiff school in *Brentwood* challenged an ostensibly private athletic association's rule restricting student recruitment, arguing that the association was a state actor. 531 U.S. at 293. The Court held that the organizational entwinement between the association and the government amounted to state action because it was "pervasive … to the point of largely overlapping identity." *Id.* at 303. Government officials ran the association: they were part of its "management," "composition[,] and workings." *Id.* at 297–98. In fact, the association was "overwhelmingly composed of public school officials" who, together with the representatives they chose, "adopt[ed] and enforce[d]" the challenged rule. *Id.* at 299.

Here, there is *no* organizational overlap between the State and St. Isidore. Not a single St. Isidore member or board member is a state official or employee acting in that capacity. Nor does the State otherwise run St. Isidore. More broadly, the Charter Schools Act allows other charter schools to contract with non-governmental sponsors, see Okla. Stat. tit. 70, § 3-132(A)(2) (2024), showing that the legislature is not aiming for organizational entwinement between the State and charter schools.

The court below focused its entwinement analysis solely on the Board's "oversight" and "monitor[ing]" of St. Isidore. Pet.App.21a. But that outside-looking-in gaze is not "entwinement." It's the everyday government work of contracting and regulating, which

Brentwood itself recognized is *not* entwinement. 531 U.S. at 299 (contrasting the athletic association with private contractors providing services on behalf of the State and citing the school in *Rendell-Baker* as an example). The lower court's oversight-based entwinement reasoning effectively embraces "the 'being heavily regulated makes you a state actor' theory of state action." *Manhattan Cmty. Access*, 587 U.S. at 816. But that theory would transform countless private contractors and regulated entities into state actors, "endanger[ing] individual liberty and private enterprise." *Ibid.*

With no entwinement, Respondent must prove that the State's regulatory supervision "compel[s]" or significantly encourages St. Isidore's challenged conduct, *Rendell-Baker*, 457 U.S. at 841, by effectively "ordering it," *Jackson*, 419 U.S. at 357. But as discussed below, Respondent cannot satisfy that demanding standard.

4. The State does not compel or encourage St. Isidore's religious status or conduct.

State action arises when a government "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 52 (1999) (cleaned up). This compulsion analysis must connect the State directly to "the challenged action of the regulated entity." *Jackson*, 419 U.S. at 351.

The action challenged here is St. Isidore's religious status and conduct, which the School established through independent decisions about its members,

governing board, curriculum, policies, and programs. Whether through its regulatory oversight or otherwise, the State neither coerced nor encouraged any of those decisions. In fact, the Charter Schools Act gives St. Isidore broad leeway to make its own membership, governance, curriculum, and programming decisions. Okla. Stat. tit. 70, §§ 3-136(A)(3), (A)(5), (A)(8), (B) (2023) (§ 3-136(A)(1), (A)(3), (A)(7), (C) (2024)).

By declining to enforce the unconstitutional affiliation and sectarian-use bans, the Board "authorize[d], but [did] not require," St. Isidore's religious choices. *American Mfrs. Mut. Ins.*, 526 U.S. at 52. Those underlying religious decisions "turn[ed] on … judgments made by private parties" without state compulsion. *Ibid.* (cleaned up). Such private choices "with the mere approval or acquiescence of the State [are] not state action." *Ibid.* Quite the opposite, the Board's "decision to allow" St. Isidore to operate as a religious charter school "can just as easily be seen as" a "decision not to intervene" in the School's religious choices. *Id.* at 53.

Because the regulatory monitoring that the lower court referenced did not compel or encourage St. Isidore's religious status or conduct, the court's reliance on that oversight is a dead-end. Additionally, because the decision below did not point to any other state conduct coercing St. Isidore's religious character, this Court's compulsion principles cut in Petitioners' favor.

5. Education is not and has never been an exclusive public function.

To satisfy the exclusive-public-function test, "the government must have traditionally *and* exclusively performed the function" at issue. *Manhattan Cmty. Access*, 587 U.S. at 809. "While many functions have been traditionally performed by governments, very few have been exclusively reserved to the State." *Flagg Bros.* v. *Brooks*, 436 U.S. 149, 158 (1978) (cleaned up). Only two—"running elections and operating a company town"—have met this Court's exclusivity requirement. *Manhattan Cmty. Access*, 587 U.S. at 809–10 (collecting cases).

Our nation's history leaves no doubt that education has never been the exclusive domain of the government. See pp. 4–6, *supra*. Attempting to avoid this "commonsense conclusion," the court below "gerrymander[ed]" the analysis. *Peltier*, 37 F.4th at 154 (Wilkinson, J., dissenting). It characterized the relevant function as providing "*free public* education," which it declared to be "exclusively a public function." Pet.App.21a. But the court was doubly wrong—in both its framing and its views about free publicly funded education.

This "circular" framing—which built in ostensibly "outcome-determining adjectives such as 'free' and 'public,'" *Peltier*, 37 F.4th at 147 (Quattlebaum, J., dissenting in part)—cannot be squared with this Court's caselaw. See *Logiodice* v. *Trustees of Me. Cent. Inst.*, 296 F.3d 22, 27 (1st Cir. 2002) ("There is no indication that the Supreme Court ha[s] this kind of tailoring by adjectives in mind when it [speaks] of functions 'exclusively' provided by government.").

Take one example: *Polk County*. There, the Court characterized the public defender's function as "representing … indigent defendant[s]," a traditionally "private function." 454 U.S. at 314, 319. It did not focus myopically on the "*free public* representation of indigent defendants." If it had, the outcome would have been different.

Here, the relevant function is providing K–12 education—the precise service St. Isidore offers. Alternatively, the Court could narrow the inquiry to the group of students who would be educated at St. Isidore, as *Rendell-Baker* did. 457 U.S. at 842. Doing that would focus the analysis on educating K–12 students whose parents believe they are not best "served by traditional public schools." *Ibid.*

Under any of these framings, the exclusive-public-function test is not satisfied. In early America, private groups educated children long before the government started operating schools, see Chapman & McConnell, *supra*, at 119, including in Oklahoma, where the "earliest schools … were private," *Early Public Schools in Oklahoma City*, Metropolitan Library System, perma.cc/MA5U-H3PP. And today, non-state education options like private schools proliferate, including for children who aren't best served in traditional public schools. See Katherine Schaeffer, *U.S. Public, Private and Charter Schools in 5 Charts*, Pew Research Center (June 6, 2024), perma.cc/SC3D-R9DP ("Private school students have consistently made up about 10% of school enrollment").

Even spotting Respondent his "free public education" framing, he would still lose. As mentioned, the legislature has defined "public" education in Okla-

homa as "free" and "supported by public taxation." Okla. Stat. tit. 70, § 1-106. But *Rendell-Baker* says that a "legislative policy choice" to "provide [educational] services for … students at public expense" "in no way makes [such] services the exclusive province of the State." 457 U.S. at 842. And more to the point, *Rendell-Baker* itself involved free publicly funded education: "none" of the students there "paid tuition." *Id.* at 832. So that case already establishes that free publicly funded education is not an exclusive state function. See *Caviness* v. *Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 814–15 (9th Cir. 2010) (finding "foreclosed by *Rendell-Baker*" the argument that "'*public* educational services' are traditionally and exclusively the province of the state").

History confirms this: private actors have long provided free publicly supported education. These include the churches that Congress "paid … to run schools for American Indians" (including in Oklahoma), the "denominational schools" that Congress funded "in the District of Columbia," and the "denominational schools in the South" that Congress bankrolled after Reconstruction. *Espinoza*, 591 U.S. at 481. Even now, Oklahoma provides a tax credit for private education up to $7,500, see Okla. Stat. tit. 70, § 28-101(C)(1), which is enough to cover the tuition at some private schools, *e.g.*, Grace and Truth Christian Acad., *Admissions Process 2025–26*, perma.cc/C9GW-M7GY. Thus, education—even free publicly funded education—has never been the government's exclusive province. No matter the framing, the exclusive-public-function test is not satisfied here.

6. Contracting with private entities to provide more educational options does not delegate a state duty.

The court below categorically asserted that "a private entity is a state actor when the government has outsourced one of its constitutional obligations to the entity." Pet.App.21a (citing *Manhattan Cmty. Access*, 587 U.S. at 810 n.1). But this Court has never declared such a broad rule. Instead, it has recognized that outsourcing of obligations "may, under certain circumstances," create state action. *Manhattan Cmty. Access*, 587 U.S. at 810 n.1 (discussing *West*, 487 U.S. at 56). Those circumstances are absent here.

The key case—*West*—held that a doctor was engaged in state action when he contracted with the State to fulfill its Eighth Amendment obligation "to provide adequate medical care to those … incarcerated." 487 U.S. at 54. *West* applied basic state-action principles to conclude that the doctor's conduct "in treating [the patient's] injury … is fairly attributable to the State." *Ibid.* The requisite nexus between the complained-of conduct and the State existed because "[i]t is only those physicians authorized by the State to whom the inmate may turn." *Id.* at 55. Accordingly, any harm the doctor inflicted "was caused … by the State's exercise of its right … to deny [the inmate] a venue independent of the State to obtain needed medical care." *Ibid.*

This case is unlike *West* for two reasons. First, the State in *West* fully delegated its constitutional obligation to provide the plaintiff inmate with orthopedic services. But here, Oklahoma hasn't completely outsourced its duty to provide free education to children. See Okla. Const. art. XIII, § 1 (requiring "a system of

free public schools wherein all the children of the State may be educated"). The State continues to provide access to its state-run public schools for *all* families—charter schools simply expand overall educational choice. See Pet.App.37a (Kuehn, J., dissenting) ("Contracting to provide educational alternatives is not the same as a wholesale outsourcing of a government function.").

Second, the State left the inmate in *West* without any choice but to "rely on prison authorities to treat his medical needs." 487 U.S. at 54. Yet no one in Oklahoma is forced to choose St. Isidore. Every family is free to make a different choice. See *Robert S.* v. *Stetson Sch., Inc.*, 256 F.3d 159, 168 (3d Cir. 2001) (Alito, J.) (distinguishing for state-action purposes a situation where a student was "involuntarily placed in [a privately run] school by state officials" and one where a student "was enrolled … by his legal custodian").

Notably, *Rendell-Baker* has already rejected this delegation argument. See *id.* at 166 (explaining this point about *Rendell-Baker*). The question presented in *Rendell-Baker* asked whether a school "to which local governments [had] delegated their statutory obligation to provide public education" was engaged in state action. Br. for Pet'rs at I, *Rendell-Baker* v. *Kohn*, 457 U.S. 830 (1982) (No. 80-2102), 1981 WL 390341. Justice Marshall's dissent found that delegation point persuasive, explaining that "[w]hen an entity … provides a service that the State is required to provide"—"fulfill[ing] the State's obligations"—"there is a very close nexus with the State." 457 U.S. at 849–50 (Marshall, J., dissenting). Unpersuaded, the majority discussed the specific state law creating the duty and held that it "in no way" established state action. *Id.* at 842.

Reading delegation principles as broadly as the lower court did would result in innumerable government contractors and licensed entities becoming state actors. For instance, many governments owe legal duties to "[c]hildren in foster care." 11 Pa. Stat. and Cons. Stat. § 2633. So private, faith-based foster-care agencies working with those governments—and perhaps even the foster parents they license—would be considered state actors, contrary to this Court's precedent. See *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 535–36 (2021) (upholding free-exercise rights of Catholic foster-care agency contracting with the government). That, in turn, would exclude those groups from the foster-care work they pioneered. See *id.* at 547–48 (Alito, J., concurring). As another example, some States have a constitutional duty "to conserve, develop, and utilize [their] natural resources" and "public lands." Va. Const. art. XI, § 1. Thus, every private contractor working on minerals, timber, water quality, or public property would become a state actor. The state-action doctrine is not so all-encompassing.

7. Countervailing reasons weigh against finding state action.

This Court has cautioned against finding state action where "countervailing reason[s]" weigh "against attributing activity to the government." *Brentwood*, 531 U.S. at 296. Such caution is warranted here.

First, "[c]harter schools are expressly designed to be freer from state control." *Peltier*, 37 F.4th at 155 (Wilkinson, J., dissenting). But as state actors, they would be subject to additional legal obligations and exposed to wide-ranging liability under 42 U.S.C. 1983. See Am. Br. Classical Charter Schools et al. in

Supp. of Cert. 6–7, 9–11 ("Public schools, in short, are wellsprings of constitutional litigation."). That would destabilize the entire charter-school movement by undermining "their very reason for being" and leaving them "more vulnerable" to lawsuits. *Peltier*, 37 F.4th at 155–56 (Wilkinson, J., dissenting). It would also jeopardize some charter-school practices—such as single-sex schools—that meet the needs of the families who choose them. *Id.* at 149 (Quattlebaum, J., dissenting in part); *e.g.*, *United States* v. *Virginia*, 518 U.S. 515, 519 (1996) (invalidating single-sex admissions policy at Virginia Military Institute).

Second, the lower court's logic would convert a vast array of regulated entities and government contractors into state actors. It found entwinement through garden-variety government "oversight," effectively removed exclusivity from the exclusive-public-function test, and declared that all delegated government duties create state action. Pet.App.20a–21a. That any one of these theories would sweep in many private actors shows how far the lower court's analysis went astray. See *San Francisco Arts & Athletics, Inc.* v. *U.S. Olympic Comm.*, 483 U.S. 522, 543 n.23 (1987) (rejecting reasoning when "the consequences would be far reaching"); *Jackson*, 419 U.S. at 350 n.7 (rejecting reasoning that would treat as state actors "all companies engaged in providing gas, power, or water," "storage companies," and "taxicabs").

The impact would be particularly harsh on faith-based organizations. Many of them provide critical public services subject to government oversight, licensing, or contracting. See generally Am. Br. Gen. Council of Assemblies of God et al. in Supp. of Cert. 10–21. Under the lower court's reasoning, they could

be barred from providing essential social services such as foster care, adoption services, medical care, homeless shelters, and miscellaneous aid to disadvantaged communities. *Ibid.*

Simply put, the decision below threatens to shrink the "robust sphere of individual liberty" that the state-action doctrine is designed to protect. *Manhattan Cmty. Access*, 587 U.S. at 808. The Court should preserve liberty by reversing that decision.

B. St. Isidore is not a governmental entity for First Amendment purposes.

The court below also held that St. Isidore is part of the government. Pet.App.17a–19a. Assessing a party's governmental status for First Amendment purposes is ultimately a constitutional question—asking "what the *Constitution* regards as the Government." *Lebron*, 513 U.S. at 392 (emphasis added). Yet without reference to any of this Court's relevant decisions, the court below pronounced St. Isidore to be a governmental entity. This Court's caselaw shows it is not.

1. An apparently private entity is "part of the Government for purposes of the First Amendment" when "the Government creates [the] corporation by special law … *and* retains for itself permanent authority to appoint a majority of the directors." *Id.* at 399 (emphasis added). Amtrak is a case in point. Congress created Amtrak by name via "a special statute." *Id.* at 397; see also *id.* at 383–84. Amtrak is "under the direction and control of … governmental appointees" because the President and his administration select eight of Amtrak's nine board members. *Id.* at 385, 398. And the government "de-

fine[s]" Amtrak's "mission" and determines "its day-to-day operations." *Association of Am. R.R.s.*, 575 U.S. at 55.

St. Isidore looks nothing like that. Start with its creation. The Oklahoma legislature did not "create[]" St. Isidore—let alone by special statute. Contra Pet.App.19a. Rather, the School's private members—two leaders of Catholic dioceses—established it.

No new "St. Isidore" entity was created when the Board and St. Isidore entered the charter contract. Contra Opp.1. The Charter Schools Act recognizes that the "private organization … contract[s] with a sponsor," Okla. Stat. tit. 70, § 3-134(C), and it nowhere says that a new entity appears once that happens. On the contrary, the contract itself confirms that "the Charter School is [the] privately operated religious non-profit organization." Pet.App.111a (24-396). And Respondent never argued below that the charter contract creates a new entity. See *id.* at 176a (characterizing St. Isidore and the charter school as the same entity before and after the contract).

All the contract did was "authori[ze]" St. Isidore—a preexisting entity—to operate a charter school. Pet.App.19a. That the State "authorized [St. Isidore] to provide [a free] service to the community" did not make it a state actor. *Manhattan Cmty. Access*, 587 U.S. at 815. Nor does it matter that the State gave St. Isidore authority that "only" 33 other Oklahoma organizations have. See *id.* at 814 (granting a "monopoly" does not create a state actor); *San Francisco Arts & Athletics*, 483 U.S. at 544 (same for granting "exclusive use" of a word); *Jackson*, 419 U.S. at 358 (same for granting a "partial monopoly"). None of that amounts to state action.

What's more, the State did not select the School's board and will not dictate its day-to-day operations. The School's members chose its board without any state input. And it is St. Isidore's board—which does not include a single state official or employee—that (1) "govern[s]" the organization, Okla. Admin. Code 777:10-1-3(c); (2) is "responsible for [its] policies and operational decisions," Okla. Stat. tit. 70, § 3-136(A)(8) (2023) (§ 3-136(A)(7) (2024)); (3) adopts its "method of school governance," § 3-136(B) (2023) (§ 3-136(C) (2024)); and (4) sets its mission, Pet.App.217a–22a (24-396).

Ignoring all this, the court below zeroed in on the Board's "oversight and evaluation" of St. Isidore and its "power to place the school on probation" or close it for unaddressed "deficiencies." Pet.App.18a–19a. But those powers don't reflect the kind of government control that would render St. Isidore a governmental entity. Overseeing, evaluating, and imposing penalties on private actors—including "revok[ing]" or "forfeit[ing]" a corporation's charter, Okla. Stat. tit. 18, § 1104, or terminating its government contract—are hallmarks of government regulation and contracting that do not give rise to state action. *Manhattan Cmty. Access*, 587 U.S. at 814.

2. The decision below didn't even mention this Court's caselaw on governmental-entity status. The only reference to federal law in that part of the decision was a footnote citing *Tarkanian* and *United States* v. *Ackerman*, 831 F.3d 1292, 1295–1300 (10th Cir. 2016) (Gorsuch, J.). Pet.App.19a n.10. But those cases don't advance the lower court's position.

The actual holding in *Tarkanian*—that the NCAA was *not* engaged in state action—cuts against what the lower court held. 488 U.S. at 199. And the passing observation that a public university created and controlled by the State is a governmental agency has no bearing here. See *id.* at 192.

Ackerman's treatment of the National Center for Missing and Exploited Children (NCMEC) as a governmental entity is similarly unavailing. Unlike here, "government officials enjoy[ed] a sizeable presence on [NCMEC's] board," and the government exercised "'day-to-day' statutory control over its operations." 831 F.3d at 1297–98.

3. The court below included a few other passing observations in its governmental-entity discussion. None changes the result.

For one, the court thought that charter schools are governmental entities because they are subject to some of the same regulatory requirements as traditional public schools. Pet.App.18a–19a. But this overlooks that Oklahoma's default rule—consistent with its goal of fostering innovation by reducing regulatory burdens—exempts charter schools "from all statutes and rules relating to schools, boards of education, and school districts," except as otherwise provided. Okla. Stat. tit. 70, § 3-136(A)(5) (2023) (§ 3-136(A)(1) (2024)). The omitted requirements that apply to traditional public schools—as a representative sample demonstrates—are voluminous. *E.g.*, §§ 5-107A, 5-107B, 5-115, 5-115b, 5-119, 5-120, 5-121, 5-122, 5-141, 5-141.2, 6-101.2, 6-101.10, 6-101.20–6-101.31, 6-101.40, 6-101.43, 6-101.46, 6-101.47, 6-105, 6-127, 10-101, 10-103.2, 10-105.2, 11-101.3, 11-102. That charter schools bear only a fraction of the tidal wave

of regulations imposed on traditional public schools underscores that charter schools are not governmental entities.

Also important to the court below was the statutory provision subjecting charter schools to the Oklahoma Open Meeting and Open Records Acts. Pet.App.19a (quoting Okla. Stat. tit. 70, § 3-136(A)(16) (2023) (§ 3-136(A)(15) (2024)). But those statutes already apply to some private actors "supported in whole or in part by public funds or entrusted with the expending of public funds." Okla. Stat. tit. 25, § 304(1) (Meetings Act); Okla. Stat. tit. 51, § 24A.3(2) (similar language in Records Act); Op. Okla. Att'y Gen. 02-37 (construing this language to reach "private organizations"). That these Acts apply to St. Isidore thus says nothing about whether the School is the government. Notably, the Ninth Circuit held that Arizona charter schools are *not* state actors despite being "subject to [the State's] Open Meetings Act." *Caviness*, 590 F.3d at 813–14.

The lower court similarly overread the significance of charter schools' immunity under the Oklahoma Governmental Tort Claims Act. Pet.App.19a (citing Okla. Stat. tit. 70, § 3-136(A)(13) (2023) (§ 3-136(A)(12) (2024)). The Act's plain terms afford immunity to many other undisputably private actors. *E.g.*, Okla. Stat. tit. 51, § 152.2(A)(3) ("charitable health care provider[s]"); § 152(11)(o) ("youth services agenc[ies]"); § 152(11)(q) ("child-placing agenc[ies]"). Just months before deciding this case, the Oklahoma Supreme Court held that the Act applies to a nonpublic "emergency medical district" "organized by … private citizen[s]," "governed by its own board," and performing functions unrelated to "the administration of government." *Jackson Cnty. Emergency Med.*

Serv. Dist. v. *Kirkland*, 543 P.3d 1219, 1227 (Okla. 2024). Invoking this immunity to convert St. Isidore into the government would similarly transform the other private actors—like faith-based adoption agencies—covered by the Act. See Okla. Stat. tit. 51, § 152(11)(q).

II. The Free Exercise Clause forbids the State from excluding St. Isidore because of its religious character.

St. Isidore is a private religious organization with free-exercise rights. This Court has "repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits" or programs. *Carson*, 596 U.S. at 778. That "effectively penalizes the free exercise of religion," *id.* at 780 (cleaned up), by forcing people of faith "to choose between the exercise of a First Amendment right and participation in an otherwise available public program," *Thomas* v. *Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 716 (1981). It "puts the same kind of burden" on free exercise "as would a fine imposed" on the exercise itself. *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963).

Oklahoma law inflicts such a penalty twice over. First, the two Blaine Amendments and the Charter Schools Act collectively impose an affiliation ban that penalizes religious groups seeking to operate charter schools solely because of their religious status—which also harms the parents who want to choose those schools. That ban applied simply because St. Isidore disclosed its relationship to the Catholic Church. Pet.App.225a (24-396). That's unlawful status-based discrimination.

Second, those same state provisions create a sectarian-use ban that excludes religious applicants and parents solely because of their intended religious uses of the funds. That ban was triggered when St. Isidore revealed that it would "integrate … religion" into its curriculum, programs, and operations. *Id.* at 198a. That's illegal use-based discrimination.

The "unremarkable principles" this Court applied in *Trinity Lutheran*, *Espinoza*, and *Carson* "suffice to resolve this case." *Carson*, 596 U.S. at 780 (cleaned up). The First Amendment forbids Oklahoma from discriminating against St. Isidore based on religious status or use.

A. The affiliation ban discriminates based on religious status.

Trinity Lutheran struck down Missouri's attempt to exclude "any applicant owned or controlled by a church, sect, or other religious entity" from a publicly available grant program for playground resurfacing materials. 582 U.S. at 455. Refusing to allow a church that ran a preschool—"solely because it [was] a church—to compete with secular organizations for a grant" violated the Free Exercise Clause. *Id.* at 463.

Three years later, *Espinoza* invalidated Montana's Blaine Amendment-based exclusion of faith-based schools from a school-choice program "solely because of [their] religious character." 591 U.S. at 476. Equally troubling, that state law "bar[red] parents who wish[ed] to send their children to a religious school from those same benefits, again solely because of the religious character of the school." *Ibid.* "Such status-based discrimination," this Court held, must be "subject[ed] to the strictest scrutiny," a standard it could not satisfy. *Id.* at 478 (cleaned up).

These principles doom Oklahoma's affiliation ban, as Justice Kuehn observed below. Pet.App.39a–41a. Starting with the burden on religious groups desiring to operate charter schools, the affiliation ban puts them "to a choice between being religious" or participating in an otherwise available government program. *Espinoza*, 591 U.S. at 480. "At the same time," the ban "penalizes" religious parents who want to choose faith-based charter schools "by cutting [them] off" from those options. *Id.* at 480, 486. Many of those parents—"who pay taxes" to support traditional public schools—"disagree with the teaching" in those schools but are unable to choose a different option. *Id.* at 508 (Alito, J., concurring). Excluding faith-based organizations from the program prevents religious "parents of modest means" from doing "what more affluent parents can do: send their children to a school of their choice." *Ibid.*

Respondent's reliance on the affiliation ban is especially pernicious. That prohibition is rooted in the State's Blaine Amendments, which arose from a national anti-Catholic movement. See pp. 6–8, *supra*. And now Respondent is using those Amendments to exclude a Catholic organization from a generally available public program.

Worse, Respondent's filings emphasize his desire to exclude certain minority religions, such as "extreme sects of the Muslim faith," Pet.App.174a (24-396), and other religions he thinks "most Oklahomans would consider reprehensible," *id.* at 77a. The Free Exercise Clause forbids such religious hostility. *E.g.*, *Masterpiece Cakeshop* v. *Colorado C.R. Comm'n*, 584 U.S. 617, 638–39 (2018) (calling for close inspection "upon even slight suspicion that proposals for state intervention stem from animosity to religion or dis-

trust of its practices"); see also Am. Br. Jewish Coalition for Religious Liberty et al. in Supp. of Cert. 4–10 (explaining Respondent's "explicit discrimination against religious minorities").

The lower court's attempts to evade this Court's controlling caselaw fall flat. The court dismissed *Trinity Lutheran* and *Espinoza* primarily based on its belief that St. Isidore is a state actor. Pet.App.27a–28a. That was wrong, as explained above. The court next tried to distinguish *Trinity Lutheran* because the "funding [there] was for a non-religious use." *Id.* at 28a. But *Carson* made clear that *Trinity Lutheran*'s protections also apply to funding for religious uses. 596 U.S. at 787.

The court then dismissed *Espinoza* because the scholarship recipients there "determined" where the state funding would go. Pet.App.28a. But St. Isidore's budgeted state funding is calculated based on the number of students who enroll. J.A.94; Pet.App.156a–57a (24-396); Okla. Stat. tit. 70, § 3-142(A), (B)(2) (2023) (§ 3-142(A), (C) (2024)). So parental decision-making triggers the state funding here just as it did in *Espinoza*.

The court also erred in minimizing St. Isidore's free-exercise interests merely because it "contracted with the State." Pet.App.28a. *Fulton* confirmed that governments may not "discriminate against religion" when contracting. 593 U.S. at 536. Yet that is exactly what the decision below forces the State to do.

B. The sectarian-use ban discriminates based on religious use.

Oklahoma's sectarian-use ban also violates the Free Exercise Clause. While the affiliation ban discriminates based on status against all religions, the sectarian-use ban discriminates based on use against and among religions—weeding out those who follow their faith by integrating "sectarian" content into their programs. Both are unconstitutional. *Carson*, 596 U.S. at 787–88.

Carson held that the "nonsectarian" requirement in Maine's tuition-assistance program violated free-exercise rights. *Id.* at 772–773, 781. When defending its law, Maine emphasized that it did not ban schools just for being "affiliated with or controlled by a religious organization." *Id.* at 787 (quoting respondent's brief). It excluded them based on their planned religious use—to "promote[] a particular faith and present[] academic material through the lens of that faith." *Ibid.* (quoting respondent's brief). Such "use-based discrimination is [no] less offensive to the Free Exercise Clause." *Ibid.* It unlawfully "identif[ies] and exclude[s] otherwise eligible schools on the basis of their religious exercise." *Id.* at 789. Oklahoma's sectarian-use ban operates the same way, so it too is unlawful.

Enforcing Oklahoma's ban raises "serious concerns" about "denominational favoritism." *Id.* at 787. It poses "no obstacle" to groups and individuals who practice "only a tepid, civic version of faith" or who keep their religious precepts out of their day-to-day activities. *Locke* v. *Davey*, 540 U.S. 712, 733 (2004) (Scalia, J., dissenting). Its exclusion instead falls on those "whose belief in their religion is so strong" that

they work daily to teach it to the next generation. *Ibid.* Governments cannot enforce a standard that "reserve[s] special hostility for those … who think that their religion should affect the whole of their lives" or who seek to "transmit[] their views to [their] children." *Mitchell* v. *Helms*, 530 U.S. 793, 827–28 (2000) (plurality opinion). The First Amendment forbids "preferr[ing]" some "religious denomination[s]" over others. *Larson* v. *Valente*, 456 U.S. 228, 244 (1982).

The lower court's rejection of *Carson* misses the mark. Pet.App.28a. *Carson* distinguished traditional public schools from private schools to reject Maine's argument that private schools offer the "rough equivalent" of a "free public education." 596 U.S. at 782–85 (cleaned up). It did not say—or even imply—that privately created and operated charter schools would fall outside the free-exercise protection the Court announced there.

The court below also suggested that Maine "did not cover the full cost of the private secondary schools." Pet.App.28a. That's not quite right. *Carson* said that *some* of the private schools charged more than the maximum benefit—it didn't say *all* of them did. 596 U.S. at 783. No matter, the amount of per-pupil state funding in *Carson* exceeds that at issue here. The *Carson* record showed that Maine was willing to pay a maximum benefit of $8,771.41 for K–8 students and $11,539.70 for secondary students. See Stipulated R., Ex. 2 at 10–11, *Carson* v. *Makin*, No. 1:18–cv–327 (D. Me. Mar. 12, 2019), ECF No. 24–2. Those numbers well exceed the $5,118.51 in state funding that St. Isidore was projected to receive per enrolled student. See J.A.88 (calculated by dividing the total Base Funding amount by 500 enrolled students).

In sum, *Trinity Lutheran*, *Espinoza*, and *Carson* control this case. "Regardless of how the benefit and restriction are described," the charter-school program cannot "exclude otherwise eligible schools on the basis of their religious exercise." *Carson*, 596 U.S. at 789. The Free Exercise Clause forbids it.

III. Neutrally administering the charter-school program does not violate the Establishment Clause.

The court below also held that Respondent's anti-establishment goals provide "a compelling governmental interest that satisfies strict scrutiny" and overcomes any free-exercise rights. Pet.App.29a. But *Trinity Lutheran*, *Espinoza*, and *Carson* prove otherwise. They all affirmed that "an interest in separating church and state more fiercely than the Federal Constitution cannot qualify as compelling in the face of the infringement of free exercise." *Carson*, 596 U.S. at 781 (quoting *Espinoza*, 591 U.S. at 484–85 (quoting *Trinity Lutheran*, 582 U.S. at 466)) (cleaned up).

To prevail, then, Respondent must show that the Establishment Clause itself forbids the Board from administering its charter-school program in a neutral manner. He cannot make that showing.

First, public funding for religious schools is deeply rooted in our nation's historical practices and understandings. And second, the Establishment Clause does not prohibit government dollars from flowing to religious schools through neutrally administered government programs. This is particularly true when private choice directs government dollars to religious schools.

A. Historical practices support public funding for religious schools.

"[T]he Establishment Clause must be interpreted by 'reference to historical practices and understandings.'" *Kennedy*, 597 U.S. at 535 (quoting *Town of Greece* v. *Galloway*, 572 U.S. 565, 576 (2014)). The "line … courts and governments must draw between the permissible and the impermissible has to accord with history and faithfully reflect the understanding of the Founding Fathers." *Id*. at 535–36 (cleaned up).

Our early national practices and historical understandings are replete with government funding for religious schools. As this Court has recognized, "[i]n the founding era and the early 19th century, governments provided financial support" to "denominational" schools. *Espinoza*, 591 U.S. at 480. Indeed, from the Bill of Rights until the late 1800s, every level of American government funded religious schools and education. See pp. 4–6, *supra*. Early Americans did not think such support was unconstitutional even when "the education had religious components and was conducted under denominational auspices." Chapman & McConnell, *supra*, at 119.

As the lone entity subject to the Establishment Clause before incorporation, the federal government's funding of religious education—particularly during the First Congress—sheds compelling light on the proper historical understanding. *Consumer Fin. Prot. Bureau* v. *Community Fin. Servs. Ass'n of Am., Ltd.*, 601 U.S. 416, 432 (2024) ("The practice of the First Congress … provides contemporaneous and weighty evidence of the Constitution's meaning.") (cleaned up); *Marsh* v. *Chambers*, 463 U.S. 783, 790–91 (1983) (same). Far from perceiving a legal impediment, the

First Congress "encouraged" religious schools—giving land grants that benefitted "church-affiliated sectarian institutions," *Rosenberger*, 515 U.S. at 862 (Thomas, J., concurring)—precisely because Congress thought both religion and knowledge "necessary to good government," Northwest Ordinance, art. 3.

Extending from the founding through the end of the 1800s, Congress continued to approve funding for religious education. This included "public moneys in support of sectarian Indian education carried on by religious organizations," *Wallace* v. *Jaffree*, 472 U.S. 38, 103 (1985) (Rehnquist, J., dissenting), and support for "denominational schools" in the District of Columbia until at least 1848, *Espinoza*, 591 U.S. at 481. And the same Congress that framed the Fourteenth Amendment created the Freedmen's Bureau, which supported "denominational schools" that educated recently emancipated children. *Ibid.* These historical practices demonstrate that it does not violate the Establishment Clause to include St. Isidore in the charter-school program.

B. The Establishment Clause does not forbid the neutral administration of generally available public programs.

Trinity Lutheran, *Espinoza*, and *Carson* confirm that distributing public dollars to religious schools through the neutral administration of public programs does not violate the Establishment Clause. In each case, the Court ordered the State to allow religious schools to participate on equal terms, which resulted in public money flowing to those schools, and the Establishment Clause did not prohibit any of it. *Carson*, 596 U.S. at 781; *Espinoza*, 591 U.S. at 484–85; *Trinity Lutheran*, 582 U.S. at 466.

That's because "the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs." *Espinoza*, 591 U.S. at 474. Indeed, "nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible [government] programs," including school-funding programs. *Mitchell*, 530 U.S. at 829 (plurality opinion); accord *Shurtleff* v. *City of Bos.*, 596 U.S. 243, 261 (2022) (Kavanaugh, J., concurring) (similar); *Rosenberger*, 515 U.S. at 861 (Thomas, J., concurring) (similar).

That principle is especially strong for neutral "program[s] in which public funds flow to religious [schools] through the independent choices" of parents. *Carson*, 596 U.S. at 781. *Zelman* v. *Simmons-Harris* is the seminal case. 536 U.S. 639 (2002). The Court there reviewed an Ohio scholarship project that—much like Oklahoma's charter-school program—provided per-pupil funding to religious schools selected by families. *Id.* at 644–48. Because the program allowed parents "to exercise genuine choice among options … secular and religious," it did not violate the Establishment Clause. *Id.* at 662–63.

Oklahoma's charter-school program is cut from the same cloth. First, as in *Zelman*, no parents are "coerc[ed] … into sending their children" to St. Isidore or any other religious school. *Id.* at 655–56. Second, state funds go to St. Isidore "as a result of [parents'] own … choice" to send their children there. *Id.* at 652. The State Aid allocation that St. Isidore seeks "is based on pupil count," which means that "[w]ith no students, State Aid would be zero." Pet.App.156a–57a (24-396).

A contrary rule excluding religious groups from generally available funding and benefit programs would put the Establishment Clause—which forbids "hostility to religion," *Rosenberger*, 515 U.S. at 846—at war with itself. Rejecting St. Isidore because of its religious character, which harms the families who want to send their kids there, manifests a deep mistrust of and hostility toward faith. "[N]o historically sound understanding of the Establishment Clause" requires "government to be hostile to religion in this way." *Kennedy*, 597 U.S. at 541 (cleaned up).

In short, the court below premised its ruling on "a misconstruction of the Establishment Clause," *id.* at 543—namely, that the Clause bars religious schools from generally available government-aid programs. That misguided view, "born of [a] bigotry" that permeated the Blaine Amendment era, "should be buried now." *Mitchell*, 530 U.S. at 829 (plurality opinion).

CONCLUSION

The judgment of the Oklahoma Supreme Court should be reversed.

Respectfully submitted,

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