Nos. 24-394 and 24-396

IN THE

Supreme Court of the United States

OKLAHOMA STATEWIDE
CHARTER SCHOOL BOARD, *et al.*,
Petitioners,

v.

GENTNER DRUMMOND, ATTORNEY
GENERAL OF OKLAHOMA, *ex rel.* OKLAHOMA,
Respondent.

ST. ISIDORE OF SEVILLE
CATHOLIC VIRTUAL SCHOOL,
Petitioner,

v.

GENTNER DRUMMOND, ATTORNEY
GENERAL OF OKLAHOMA, *ex rel.* OKLAHOMA,
Respondent.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

BRIEF OF *AMICI CURIAE* GREAT HEARTS ACADEMIES AND TEXAS LEADERSHIP PUBLIC SCHOOLS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Great Hearts Academies is the leading provider of classical education in the country, operating 47 tuition-free K-12 charter schools, as well as a robust online program, throughout Arizona, Texas, and Louisiana, with over 25,000 students enrolled and more than 11,000 on the waitlist. Great Hearts exists to cultivate the hearts and minds of students through the pursuit of truth, goodness, and beauty by employing the Socratic method, and is dedicated to serving families in the moral and intellectual formation of their children. Its curriculum includes the great books of Western tradition, the Singapore math program, engagement with primary sources, and a well-rounded experience in music, art, and physical education.

Texas Leadership Public Schools is a network of open-enrollment charter schools. It was one of the first charter schools in West Texas, founded in 2009 by Dr. Walt Landers, senior pastor of The Life Church, and has since grown to serve more than 4,000 students and employ over 500 employees in five cities, including San Angelo, Midland, Abilene, Arlington, and Cedar Hill. Its mission is to serve all students, regardless of city-drawn attendance zones, at no cost. Its educational philosophy focuses on creating an environment where students can become leaders in all areas of life, with a focus on character, growth, servant leadership, empowerment, and commitment.

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1. In accordance with this Court's Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *Amici*, their members, or counsel, have made a monetary contribution to the preparation or submission of this brief.

This case is of interest to *Amici* because deeming private organizations operating charter schools to be state actors will hinder educational freedom, substantially undercut the very nature and purpose of charter schools, and abridge their Free Exercise rights.

SUMMARY OF ARGUMENT

In holding that charter schools are state actors, the Oklahoma Supreme Court got the matter exactly backward: it is because charter schools are *private* organizations—and not creatures of the state—that states invite those organizations to contract with them to deliver educational services. The history and rise of charter schools, and the diversity of state regulation, confirm that the character and function of these private entities is antithetical to being slapped with the label "public" and tagged government actors.

History shows that the impetus for charter schools was to provide an alternative to traditional public schools. The design was to be *different*. From the beginning, charter schools were privately incorporated—almost always as charitable nonprofits with particular visions for serving children where public schools were falling short. Independently organized and autonomous, charters were external sources of competition to the local school districts.

The movement grew, and charter schools embraced innovation, in large part thanks to their freedom as private entities. Meanwhile, states diversified in the way that they regulate charter schools. To be sure, where regulation was stricter, innovation was stifled. But the overall picture is

one of evolution, variety, creativity, and flexibility. All this, because charter schools were *authorized* by the state but not run by the state.

As the state laboratories developing charter-school systems reflect, the fact that state constitutions and statutes use the term "public" school when addressing state-supported education does not indicate a one-size-fits-all category. Nor does the label "public" convert charter schools into state actors or creations of the state. Substance, not form, is what matters. Historical interpretation of the terms "public" or "common" school has been plastic, although it has typically involved features like state licensing and regulation, support by taxation, and students' equal access to free education—features that apply to private nonprofit organizations like *Amici* and St. Isidore. But sharing some general features of government schools while performing on a contract to provide a public good is not the same as being an arm of the state.

This Court has said as much in *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982), holding that, when it comes to state-funded schools, "extensive regulation . . . by the State" plus "significant or even total engagement in performing public contracts" does not equal transformation into a government actor. "That a private entity performs a function which serves the public does not make its acts state action." *Id.* at 842. Indeed, accepting the state's invitation to contract to offer educational services cannot convert a private nonprofit corporation into a state actor. The Oklahoma Supreme Court erred in holding otherwise.

ARGUMENT

I. The history of charter schools shows that they have always been distinct from traditional public schools.

During the 1980s, traditional public schools met "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). The critique was amplified by *A Nation at Risk*, a damning report sounding the alarm on a U.S. public-school system that was failing fast. National Commission on Excellence in Education, *A Nation at Risk: The Imperative for Educational Reform*, 84 The Elementary Sch. J. 112 (1983). In response, parents and educators sought schools with the capability and autonomy to "design and tailor organizational structures, staffing[,] and instructional approaches to provide their students with an alternative to local district schools." Margaret E. Raymond et al., Center for Research on Education Outcomes, *As a Matter of Fact: The National Charter School Study III 2023* 26 (2023). Thus, "the idea of charter schools" "was very much a product of the [school] reform movement itself." Terry M. Moe, *Special Interest: Teachers Unions and America's Public Schools* 330 (2011). And "[t]he guiding principle of the charter movement [has been] to create new institutions that receive public revenues but function outside the existing structure of school districts." Tom Loveless & Andrew P. Kelly, *Comparing New School Effects in Charter and Traditional Public Schools*, 118 Am. J. of Educ. 427, 427 (2012).

Although commonly associated with conservative policies, the charter school movement traces its origins

to two progressive educators. Massachusetts educator and administrator Ray Budde introduced the broad concept of charter schools in his 1988 book, *Education by Charter: Restructuring School Districts*.[2] *See* Judith Johnson & Alex Medler, *The Conceptual and Practical Development of Charter Schools*, 11 Stan. L. & Pol'y Rev. 291, 292 (2000). Budde's idea involved local school boards restructuring departments or disciplines by giving small teams of teachers within the school a contract, or "charter," granting discretion to direct instruction in the department or within each discipline. *Id.* (citing Ray Budde, *The Evolution of the Charter Concept,* Phi Delta Kappan, Sept. 1996, at 72). During the term of the charter, originally suggested as three to five years, the teams of educators would operate independently from the school's principal and staff. *Id.*

Later that year, Albert Shanker, former president of the American Federation of Teachers, brought the idea of charter schools to the public attention in his speech before the National Press Club in Washington, D.C. *Id.* But Shanker's proposal extended the idea of charters to entire schools themselves, arguing that "the creative potential of teachers, long stifled by bureaucracy, should be unleashed to drive education reform and improve education." Moe, *supra*, at 331. To that end, he proposed that rather than creating new programs within existing schools, local school districts would grant innovative teachers charters to create their own autonomous schools where they could "do things that are very different from the rest of the system and . . . move out of a lock-step

2. Ray Budde, *Education by Charter: Restructuring School Districts* (1988).

situation. . . ." Johnson & Medler, *supra*, at 292 (quoting Albert Shanker, Address at the National Press Club 12 (Mar. 31, 1988)); *see also id.* (citing Albert Shanker, *Where We Stand,* N.Y. Times, July 10, 1988, at E7; Albert Shanker, *Restructuring Our Schools*, 65 Peabody J. of Educ. 88, 88-100 (1988)).

Minnesota education reformers Ted Kolderie and Joe Nathan built upon Shanker's charter school concept. In their book *Charter Schools: Creating Hope and Opportunity for American Education*, Kolderie and Nathan proposed allowing people from outside the education system to apply for and operate under charters. Johnson & Medler, *supra* at 292 (citing Joe Nathan, *Charter Schools: Creating Hope and Opportunity for American Education* 64-65 (1996)). They also proposed, against opposition from school districts, that a public body other than local school districts be authorized to grant charters. *Id.* (citing Nathan, *supra*, at 4, 65-67). Nathan believed his model would "add an element of appropriately constrained competition while still protecting all students' right to a free and appropriate public education." *Id.* at 292-93.

Minnesota adopted the nation's first charter-school law in 1991. *Id.* at 293 (citing Minn. Stat. § 120.064 (West 1991)). The law implemented Shanker's model of charters approved and controlled by school districts, while incorporating Kolderie's and Nathan's idea to allow applicants from outside the existing public schools. Johnson & Medler, *supra* at 293. It allowed for only eight charter schools in the entire state. *Id.* But it also expressly codified the impetus for the charter-school movement—that charters should promote innovation in education—which served as a model for state laws that came later. *Id.*

California followed Minnesota's lead and enacted its own charter-school legislation in 1992. Moe, *supra*, at 333; Charter Schools Act of 1992, Ch. 92-781, Laws of Cal. That bill permitted 100 schools statewide, with no more than ten in any one school district. Moe, *supra*, at 333. It gave schools more autonomy, freeing them from both union consent for charter approval and collective bargaining for teacher contracts. *Id.*

As the charter school movement grew, schools embraced innovation, largely due to their inherent freedom as private entities and the autonomy provided under charter agreements. Indeed, a survey of state statutes authorizing charter schools found "innovation" as an explicit policy goal, outnumbering any other legislative goals referenced. Christopher Lubienski, *Innovation in Education Markets: Theory and Evidence on the Impact of Competition and Choice in Charter Schools*, 40 Am. Educ. Rsch. J. 395, 399 (2003). That makes sense, given the recognized historical objective of charter schools to innovate, and the common understanding charter schools, while part of the public sector, do not fit into the box of government-run schools. *See Peltier* v. *Charter Day Sch., Inc.*, 37 F.4th 104, 150 (4th Cir. 2022) (Wilkinson, J., dissenting) ("The whole purpose of charter schools is to encourage innovation and competition within state school systems.").

Then and now, "charters employ diverse approaches that often distinguish them from other schools in their area." Lubieski, *supra*, at 413. For example, more than two decades ago, "on-line charter schools [began] introducing new types of delivery . . . representing an innovation in school organization with a great potential for significant

educational innovations." *Id.* Charters also liberally "use individualized education planning or instruction for all students" and offer a "smaller size and favorable student–staff ratios, which in turn are related to their administrative flexibility for directing resources as they see fit." *Id.* And they are universally known for having "novel and diverse approaches to schooling," including "[e]ducational philosophy, governance, curriculum, teacher recruitment and compensation, instructional strategies, and disciplinary policies." Loveless & Kelly, *supra*, at 428.

Scholarly research confirms these anecdotal examples of charter schools promoting innovative education practices.[3] For instance, an early survey of California charter schools discovered that they reported implementing education reforms more frequently than regular public schools in their area. *Id.* at 294 (citing Southwest Reg'l Lab., *Freedom and Innovation in California's Charter Schools* xvii (Ronald G. Corwin & John F. Flaherty eds. 1995)). Likewise, regional studies in the 1990s found that charter schools could implement reforms more quickly and with more flexibility than traditional public schools. *Id.* (citing Jo Ann Izu et al., *The Findings and Implications of Increased Flexibility and Accountability: An Evaluation of Charter Schools in Los Angeles Unified School District* 27-30 (1998)). As one study of Los Angeles charter schools explained, "[a]lthough having the authority to make decisions about curriculum instruction may exist through other site-based

3. *See, e.g.*, Bruno V. Manno et al., *Charter Schools: Accomplishments and Dilemas,* 99 Tchrs. Coll. Rec. 537, 543-45 (1998).

decision-making reforms, charter school operators find that having maximum fiscal autonomy allows them to act on those decisions almost immediately." *Id.*

The differences between charter schools and traditional public schools were intended to run deep. As the MN Association of Charter Schools describes the inaugural history, "[f]rom the beginning, chartered public schools were designed by the Legislature to be unique organizations: a non-profit operating a public school (every charter school is a school district); employees that are at-will, but public employees for retirement purposes; schools focused on innovation and accountability in exchange for autonomy; public schools that cannot use public funds to purchase or build facilities; and governance boards whose majority of members were teachers employed by the [charter] school." *Minnesota's Charter School Story*, MN Ass'n of Charter Schs., https://perma.cc/97S8-6K7A (last visited Mar. 10, 2025). Thus, the aim of charters—for "decentralization, competition, and choice"—was evident from the beginning, in both design and implementation. Chubb & Moe, *supra*, at 5-6. A new civic form for providing education was born—one granting private actors, not state actors, charters to deliver a public good.

As of 2022, approximately 3.7 million U.S. students were enrolled in charter schools in 46 states and the District of Columbia. Paul E. Peterson & M. Danish Shakeel, *The Nation's Charter Report Card: A New Ranking of States by Charter Student Performance*, 18 J. of Sch. Choice 30, 30 (2023); *see also* Bruno V. Manno, *Charter Schools Are Learning Communities and Sources Of Community Rebirth*, Forbes (May 15, 2024, 12:32 PM), https://perma.cc/2EMW-NMNJ.

II. The national rise of charter schools shows that states employ a variety of systems to regulate and innovate.

The charter movement's emphasis on innovation guarantees that there is no cookie-cutter charter-school model. That said, the movement shares a common purpose: providing an alternative to traditional public schools. And the schools themselves generally share a common operating structure.

At their most basic level, "[c]harter schools are essentially hybrids of public and private schools." Katherine E. Lehnen, *Chartering the Course: Charter School Exploration in Virginia*, 50 U. Rich. L. Rev. 839, 840-841 (2016). They accept public funding, but "operate outside the authority of local school boards, and have greater flexibility than traditional public schools in areas of policy, hiring and teaching techniques." Diana Jean Schemo, *Charter Schools Trail in Results, U.S. Data Reveals*, N.Y. Times (Aug. 17, 2004), https://tinyurl.com/3wnzfbhu. Both public and private, and for- and non-profit entities, can run charter schools; this includes charitable organizations, community organizations, and teacher and parent groups. *See Church, Choice, and Charters: A New Wrinkle for Public Education?*, 122 Harv. L. Rev. 1750, 1753 (2009); Caroline M. Hoxby & Jonah E. Rockoff, *The Impact of Charter Schools on Student Achievement* 1 (May 2004) (unpublished study), https://perma.cc/3P7P-V72X.

Nationwide, charter schools operate pursuant to a charter agreement with the governing public body. *See* Aaron Saiger, *Charter Schools, the Establishment Clause,*

and the Neoliberal Turn in Public Education, 34 Cardozo L. Rev. 1163, 1178 (2013). Most states have allowed local education agencies or school districts to sponsor and approve the charter agreements, but a few require the state education agency to approve the arrangement. Nat'l Inst. on Educ. Governance, Fin., Policymaking, and Mgm't., *The Charter School Roadmap* 11 (Sept. 1998), https://perma.cc/9EC2-YGGG. Historically, very few states have given local school districts exclusive control over approving charter school applications. *See* Johnson & Medler, *supra*, at 293.

Charter agreements outline the school's "mission, program, goals, students served, methods of assessment, and ways to measure success." Leland Ware & Cara Robinson, *Charters, Choice, and Resegregation,* 11 Del. L. Rev. 1, 3 (2009). Operators agree to abide by the terms and goals of the charter in exchange for autonomy and relief from portions of state rules and regulations governing traditional public schools. Johnson & Medler, *supra*, at 291. But "if the [charter] school fails to attract students, breaks remaining laws, rules, and regulations, or violates other terms of its charter," the governing body has the exclusive power to revoke or refuse to renew the charter after a specified time period. *Id.*; Jessica P. Driscoll, Student Research, *Charter Schools*, 8 Geo. J. on Poverty L. and Pol'y 505, 505-06 (2001).

In effect, charter agreements operate as performance contracts offering charter schools regulatory freedom in exchange for increased accountability. Johnson & Medler, *supra*, at 291; *see also* Deana R. Peterson, *Leaving No Child Behind: Why Were Charter Schools Formed and What Makes Them Successful*, 12 J. Gender Race & Just.

377, 378 (2009); Nat'l Inst. on Educ. Governance, Fin., Policymaking, and Mgm't., *supra*, at 13.

Despite the common structures underlying charter schools, states take diverse approaches to regulating them. *See* Ian Kingsbury et al., *The Relationship Between Regulation and Charter School Innovation*, 28 Educ. Rsch. & Evaluation 25, 28 (2023) ("[R]egulatory charter school authorizing regimes . . . vary considerably from state to state. . . .").

1. Some states create charter schools as a form of public schools that give their local school boards strict control over their operations.

Take Virginia. As of 2023, only seven charter schools operated in the state—down from eight in 2020. *Charter Schools,* Va. Dep't of Educ., https://tinyurl.com/2brm5yka (last visited Mar. 10, 2025); *compare* Va. State Bd. of Educ., *2023 Annual Report on the Condition and Needs of Public Schools in Virginia* 57 (2023), https://tinyurl.com/3y7hua32, *with* Va. State Bd. of Educ., *2020 Annual Report on the Condition and Needs of Public Schools in Virginia* 98 (2020), https://tinyurl.com/muv8hmev. That is largely because Virginia's charter law grants all power to authorize charter schools to the local school boards, who "often view charter schools as competition for funding and reject applications based on political reasons rather than on merit." Lehnen, *supra*, at 862. Virginia does not permit independent or multiple authorizers to approve charter schools. Va. Code Ann. § 22.1-212.9 (West).

The local school boards review applications for charters in tandem with the Virginia Board of Education,

but the Board's review is limited to whether the application meets the required criteria. Va. Code Ann. § 22.1-212.9-10 (West). The school boards alone make the final decision. *Id.* They can even deny applications that were approved by the Board of Education. *See* Lehnen, *supra*, at 859. And while school boards must explain why they denied an application and provide a mechanism for applicants to seek reconsideration, their decision upon reconsideration is final and not subject to appeal. Va. Code Ann. § 22.1-212.10 (West).

Likewise, Virginia school boards have wide discretion to revoke charters and deny applications for renewal. *Id.* § 22.1-212.12(C) (West). Local school boards can outline funding conditions in their charter agreements, *id.* § 22.1-212.14(B) (West), and may take away charters from schools that don't specify certain terms in their applications, fail to make "reasonable progress" towards state standards, or don't meet "generally accepted standards of fiscal management," *id.* § 22.1-212.12(B) (West).

Lastly, Virginia's charter-school framework gives the schools somewhat limited discretion over their curriculum or accountability from their authorizing school board. As to curriculum, Virginia's charter law provides that although charter schools need not follow school-division policies and state regulations outlined in the charter agreements, they remain subject to state standards of learning and accreditation. *Id.* § 22.1-212.6(B) (West). As to accountability, the charter law requires local school boards applying for charters to report to the Board of Education annually, but does not create an oversight body with the power to sanction or remove members. *See id.* § 22.1-212.15 (West). School boards need not notify charter

schools of problems or give them a chance to fix them before ruling on their application. Lehnen, *supra*, at 860. And while school boards must base renewal decisions on the school's performance, the law does not require them to provide renewal guidance or allow charter schools to supplement their performance records with plans for improvement. *Id.* at 861 (citing Va. Code Ann. § 22.1-212.10 (Cum. Supp. 2015)).

2. Other states' regulatory regimes "authoriz[e] these publicly funded schools to run largely or completely free of district oversight." Lubienski, *supra*, at 399.

Take the District of Columbia and its 134 charter schools. *See About Us,* D.C. Pub. Charter Sch. Bd., https://perma.cc/S9SC-PUZC (last visited Mar. 10, 2025). The District, despite its high regulatory burden in other areas, has a particularly generous charter law that facilitates creating schools without imposing "inherent roadblocks to using charter schools to meet identified educational needs." Lehnen, *supra*, at 867.

Specifically, the District's charter law establishes a "Public Charter School Board" that acts as an independent authorizer of new charter schools. D.C. Code Ann. § 38-1802.14(a)(1) (West). The Board consists of seven members appointed by the Mayor and who possess knowledge and expertise in areas relevant to charter schools, including budgeting and accounting skills, research on "student learning, quality teaching, and evaluation of and accountability in successful schools," and the "educational, social, and economic development needs" of the District and its students and parents. D.C. Code Ann. § 38-1802.14(a)(2)(A)-(D) (West). The District holds

the Board accountable through independent audits. *Id.* at § 38-1802.14(f) (West).

The District also grants charter schools significant autonomy. Its charter law provides each school "exclusive control over its expenditures, administration, personnel, and instructional methods." *Id.* at § 38-1802.04(c)(3)(A) (West). And it explicitly exempts charter schools from "statutes, policies, rules, and regulations established for public schools, further enhancing educational freedom." Lehnen, *supra*, at 866 (citing *id.* at § 38-1802.04(c)(3)(B)). For these reasons, the National Alliance for Public Charters ranked D.C. in the top ten for charter schools, praising the District for its independent charter board authorizer and the degree of freedom its law provide both the schools and authorizers. *Id.*

States imposing a light touch on their charter schools tend to produce better outcomes. For instance, District of Columbia's charter schools have created the equivalent of an astonishing 72 more days per year in reading and 101 more days in math than the District's traditional public schools. *See Health of the Public Charter School Movement: A State-by-State Analysis*, National Alliance For Public Charter Schools 8 (Sept. 29, 2014), https://perma.cc/NAW7-9YM3. There is also evidence that D.C. charter-school students outperform students in traditional D.C. public schools. Lehnen, *supra*, at 867 (citing Off. of The State Superintendent of Educ., *2014 District Of Columbia Comprehensive Assessment System Results* 24-26 (July 31, 2014), https://perma.cc/BN6J-PM4Q).

4. States with tighter regulatory control of their charter schools, however, did not see the same positive

outcomes. For example, during the 2000s, "states strengthened regulations to professionalize charter authorization processes," such as limiting authorizing agencies, capping new charters, and requiring extensive board member training. Ian Kingsbury, et al., *Charter School Regulation as a Disproportionate Barrier to Entry*, 58 Urb. Educ. 2031, 232 (2023). Scholars analyzing the data from this period found "strong empirical evidence that authorization reforms [i.e., government strictures on charters] . . . impose barriers to aspiring Black and Latino candidates and to standalone (as compared with networked) charter operators, thus undermining the empowerment and community control-related goals of chartering." *Id.*

Overall, stricter regulation tends to stifle charter-school innovation. Studies bear this out. For example, a statistical analysis of a state's regulatory burdens and their schools' ability to innovate demonstrates that stringent regulation of charter authorization "hampers charter innovation." Kingsbury et al., *supra,* 28 Educ. Rsch. & Evaluation, at 36.

Nonetheless, regardless of the regulatory regime, charter schools on the whole produce better educational outcomes than traditional public schools. Indeed, a large national study showed that, when measuring academic progress over a recent five-year span, "the typical charter school student . . . had reading and math gains that outpaced their peers in the traditional public schools . . . they otherwise would have attended." Raymond et al., *supra*, at 5. These effects carry "across all students, all schools, for all time periods," showing "accelerated learning gains for tens of thousands of [charter] students

across the country." *Id.* In fact, between 2009 and 2023, "against a backdrop of flat performance for the nation as a whole, the trend of learning gains for students enrolled in charter schools is both large and positive." *Id.* at 12.

And charter schools have also been particularly helpful for minority groups and underserved populations. This is because charter schools "enroll more students of color and students from low-income families than traditional district schools." Bruno Manno, *Yes, Charter Schools Do Reduce Inequality,* Philanthropy Daily (Nov. 13, 2024), perma.cc/R7M7-5QY5. Indeed, 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 Ctr. on Educ. Pol'y at Brookings, *Charter Schools: A Report on Rethinking the Federal Role in Education* 3 (Dec. 16, 2010), perma.cc/2RXT-VFND. In fact, the aforementioned national study shows notably "large margins in both math and reading" for black and Hispanic charter students as well as "stronger growth" for students who are non-native English speakers or in poverty. Raymond et al., *supra*, at 6.

* * *

Each state's charter-school laws are different, and the spectrum of government interaction runs light to heavy on several dimensions. As was the original ambition, charter schools have proliferated into organic creatures that are privatized and responsive to unique needs of different communities. Whatever the states' various charter laws do in terms of particular regulation, they still preserve autonomy in a way that does not "entwine" charter schools

"to the point of largely overlapping identity" with the school district itself. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 303 (2001).

III. The label "public school" means more than "state-run school."

This Court has recently observed that substantive constitutional rights of a private, taxpayer-funded school do no depend on "the presence or absence of magic words" like "public education." *Carson as next friend of O. C. v. Makin*, 596 U.S. 767, 785 (2022). The terms "public school" and "common school" are generally synonymous. Courts and scholars have typically interpreted these terms to imply several features, including authorization and regulation by the state, support by taxation, and equal access to free education by all children regardless of their economic class, religion, or background—features that apply to nonprofit private organizations like *Amici* and St. Isidore. So these definitions do not definitively exclude schools that are operated by private entities, including faith-based ones, while regulated and funded by the state. Nor does applicability of the term "public school" convert a private organization into a creature of the state.

1. The terms "public" or "common" school in state constitutions

Each state's constitution contains an "education clause" discussing public education. Aaron Jay Saiger, *School Choice and States' Duty to Support "Public" Schools*, 48 B.C. L. Rev. 909, 930-31 n.130 (2007) (collecting

citations).[4] In 39 states, the education clauses require support for "public" schools. *See id.* Four of those states refer to both "public" and "common" schools. Ariz. Const. art. XI, § 1; Cal. Const. art. IX, §§ 5-6; Ohio Const. art. VI, §§ 2-3; Wash. Const. art. IX, § 2. Seven other states use the term "common" instead of "public." Ind. Const. art. VIII, § 1; Iowa Const. art. IX 2d, § 3; Ky. Const. § 183; Neb. Const. art. VII, § 1; Nev. Const. art. XI, § 2; N.Y. Const. art. XI, § 1; Or. Const. art. VIII, § 3.

The other four states—Alabama, Vermont, West Virginia, and Wisconsin—use neither "common" nor "public." *See* Ala. Const. art. XIV, § 256; Vt. Const. ch. 2, § 68; W. Va. Const. art. XII, § 1; Wis. Const. art. X, § 3. But courts in those jurisdictions have interpreted their

4. *See* Ala. Const. art. XIV, § 256; Alaska Const. art. VII, § 1; Ariz. Const. art. XI, § 1; Ark. Const. art. XIV, § 1; Cal. Const. art. IX, §§ 5-6; Colo. Const. art. IX, § 2; Conn. Const. art. VIII, § 1; Del. Const. art. X, § 1; Fla. Const. art. IX, § 1; Ga. Const. art. VIII, § 1; Haw. Const. art. X, § 1; Idaho Const. art. IX, § 1; Ill. Const. art. X, § 1; Ind. Const. art. VIII, § 1; Iowa Const. art. IX 2d, § 3; Kan. Const. art. VI, § 1; Ky. Const. § 183; La. Const. art. VIII, § 1; Me. Const. art. VIII, § 1; Md. Const. art. VIII, § 1; Mass. Const. pt. 2, ch. 5, § 2; Mich. Const. art. VIII, § 2; Minn. Const. art. XIII, § 1; Miss. Const. art. VIII, § 201; Mo. Const. art. IX, § 1(a); Mont. Const. art. X, § 1; Neb. Const. art. VII, § 1; Nev. Const. art. XI, § 2; N.H. Const. pt. 2, art. 83; N.J. Const. art. VIII, § 4(1); N.M. Const. art. XII, § 1; N.Y. Const. art. XI, § 1; N.C. Const. art. IX, § 2; N.D. Const. art. VIII, § 1; Ohio Const. art. VI, §§ 2-3; Okla. Const. art. XIII, § 1; Or. Const. art. VIII, § 3; Pa. Const. art. III, § 14; R.I. Const. art. XII, § 1; S.C. Const. art. XI, § 3; S.D. Const. art. VIII, § 1; Tenn. Const. art. XI, § 12; Tex. Const. art. VII, § 1; Utah Const. art. X, § 1; Vt. Const. ch. 2, § 68; Va. Const. art. VIII, § 1; Wash. Const. art. IX, § 2; W. Va. Const. art. XII, § 1; Wis. Const. art. X, § 3; Wyo. Const. art. VII, § 1.

education clauses to generally refer to "public" schools. *See Brigham v. State*, 692 A.2d 384, 392 (Vt. 1995) ("[p]ublic education is a constitutional obligation of the state"); *State ex rel. Brotherton v. Blankenship*, 207 S.E. 2d 421, 436 (W. Va. 1973) (interpreting "free schools" to mean "public schools"); *Vincent v. Voight*, 614 N.W. 2d 388, 397 n.4 (Wis. 2000) (characterizing the Wisconsin constitution's references to "district schools" as "public schools").

2. General use and meaning of "common" and "public" schools

The term "common school" was predominantly used before the term "public school" became popular. Both colloquial and legal use historically regarded "common school" and "public school" as synonyms. *See* Saiger, *supra*, 48 B.C. L. Rev., at 932 (citing L. S. Tellier, *What Is Common or Public School Within Contemplation of Constitutional or Statutory Provisions*, 113 A.L.R. 697, 697 (1938)); *Bd. of Educ. of Lawrence v. Dick*, 78 P. 812, 814 (Kan. 1904) ("The phrase 'common schools' is synonymous with 'public schools.' "); *State v. O'Dell*, 118 N.E. 529, 530 (Ind. 1918) (same).

Because the term "common school" has largely fallen out of ordinary use, its continued presence in state constitutions has generated some text, history, and tradition arguments that the term "public school" has not. *See State ex rel. Moodie v. Bryan*, 39 So. 929, 958 (Fla. 1905) ("Sometimes [the term 'public schools'] is used as synonymous with common or primary schools; at other times it is used in a far more comprehensive sense"). For example, a dissent in an Ohio Supreme Court case argued that charter schools aren't compatible with

"common" schools because they "proliferat[e] variety of available schools, competition among schools for tax support, and attendance by parental selection, rather than public assignment." *See State ex rel. Ohio Cong. of Parents & Tchrs. v. State Bd. of Educ.*, 857 N.E. 2d 1148, 1167 (Ohio 2006) (Resnick, J., dissenting). That said, the terms "common school" and "public school" are generally interchangeable.

Scholars reviewing education clauses and their judicial interpretation have summarized that the fundamental features of "common" and "public" schools are (1) state regulation and authorization, (2) support through taxes, and (3) equally available access to free schooling for every child regardless of economic status, religion, or background. Saiger, *supra*, 48 B.C. L. Rev., at 933 (citing Molly O'Brien & Amanda Woodrum, *The Constitutional Common School*, 51 Clev. St. L. Rev. 581, 638-40 (2004); Paul Dimond, *School Choice and the Democratic Ideal of Free Common Schools*, *in* The Public Schools 323, 335 (Susan Fuhrman & Marvin Lazerson eds., 2005)); *see Sch. Dist. No. 20, Spokane Cnty., v. Bryan*, 99 P. 28, 30 (Wash. 1909); *Bd. of Educ. of Lawrence v. Dick*, 78 P. 812, 814 (Kan. 1904); *Jenkins v. Inhabitants of Andover*, 103 Mass. 94, 96-97 (Mass. 1869); *Merrick v. Inhabitants of Amherst*, 94 Mass. (12 Allen) 500, 508-09 (Mass. 1866); *Roach v. Bd. of President & Dirs. of St. Louis Pub. Schs.*, 77 Mo. 484, 487-88 (Mo. 1883); *Collins v. Henderson*, 74 Ky. (11 Bush) 82-83 (Ky. 1875); *Irvin v. Gregory*, 13 S.E. 120, 122 (Ga. 1891); *People ex rel. Roman Catholic Orphan Asylum Soc'y in Brooklyn v. Bd. of Educ. of Brooklyn*, 13 Barb. 400, 410 (N.Y. Gen. Term 1851); *Harris v. Draper*, 109 N.Y.S. 983, 986 (N.Y. Supp. Ct. 1908); *Jeffries v. Bd. of Trs. of Columbia Graded Common Schs.*, 122 S.W. 813, 816-17 (K.Y. 1909).

In their own words, courts in several states have interpreted "common" or "public" schools to include these same three shared features:

> • "The terms 'public schools' or 'common schools' are used in our Constitution to denote that such schools are open to all persons within the approved ages rather than to indicate the grade of a school, or what may or may not be taught therein. There is a great difference in the extent of education that may be, and often is, taught in our common or public schools. This subject is confided to the care and discretion of the directors, and in the exercise thereof they may establish and maintain grades in the public schools." *Special Sch. Dist. No. 65, Logan Cnty. v. Bangs*, 221 S.W. 1060, 1060 (Ark. 1920).
>
> • "Public schools are usually defined as schools established under the laws of the state, usually regulated in matters of detail by the local authorities of the various districts, towns, or counties, and maintained at the public expense by taxation, and open without charge to the children of all the residents of the town or other district." *Litchman v. Shannon*, 155 P. 783, 785 (Wash. 1916).
>
> • "'The essential characteristics, therefore, of a common school are: (1) They must be maintained at public expense; (2) they must provide a course of elementary education for children of all classes and people.' [. . .] The system must [also] be uniform in that every

child shall have the same advantages and be subject to the same discipline as every other child. A system of control through school boards and county superintendents is provided for, their duties defined, and a method supplied to secure, in theory at least, efficient teachers and instructors." *Sch. Dist. No. 20, Spokane Cnty.*, 99 P. at 29.

- "[Common schools] [a]ll have the one main essential—that they are free schools, open to all the children of proper school age residing in the locality, and affording, so long as the term lasts, equal opportunity for all to acquire the learning taught in the various common school branches." *City of Louisville v. Commonwealth*, 121 S.W. 411, 412 (Ky. 1909).

- "The constitution of this state requires the general assembly to establish and maintain a thorough and efficient system of free public schools. This means that the schools must be open to all without expense. The right is given to the whole body of the people." *State ex rel. Clark v. Md. Inst. for Promotion of Mechs. Arts*, 41 A. 126, 129 (Md. 1898).

- "The term 'common' when applied to schools, is used to denote that they are open and public to all, rather than to indicate the grade of the school or what may or may not be taught therein. In the legislation on this subject they are called 'public' as often as common schools. These terms seem to be used interchangeably

as meaning one and the same thing." *Roach*, 77 at 487.

- "[Under the Mississippi constitution, the] system of common schools was to be under the general supervision of the superintendent of public education . . . [and] supported out of the common-school fund, as far as it would go, and, in addition, by taxes to be levied for that purpose." *Otken v. Lamkin*, 56 Miss. 758, 761-62 (Miss. 1879).

- "What are we to understand by the language 'common schools?' Unquestionably, that the schools are common, or open to all, in a certain locality . . . [and the city of Buffalo] had power and authority to raise, by tax, such sums as it might deem necessary to maintain schools. . . ." *Le Couteulx v. City of Buffalo*, 33 N.Y. 333, 337 (N.Y. 1865).

So despite the proliferation of varied charter-school-system models across states, charter schools have fallen into the general bucket meeting the basic shared characteristics of what courts have deemed "common" or "public" schools across state laws.

3. Divergences in the use of "common" or "public" school

But these "public" or "common" labels do not mean the same thing in every instance, as states use them differently. *See supra* Part II. Scholars have noted the inherent difficulty in interpreting the terms "common"

or "public" school, which are used in varied ways and embedded in a range of contexts. "[I]n every state, the primary question with respect to the permissibility of [school] choice is how to interpret the requirement that states support 'public' or 'common' schools." Saiger, *supra*, 48 B.C. L. Rev., at 930-31. "The question is difficult because 'public school' denotes an agglomeration of ambiguous features rather than a single concept." *Id.* "Some of these features are crucial to 'publicness' while others are accidental." *Id.* at 931. "Moreover, the aspects of 'publicness' correlate imperfectly." *Id.* "And because they are also continuous rather than binary characteristics, even were it obvious which meaning or meanings of 'public school' should control, drawing necessary lines would remain far from straight-forward." *Id.*

Certain theoretical premises have affected the interpretation of these terms. Scholars have identified "two major competing paradigms in the literature regarding what makes a 'public' or 'common' school system public or common." *Id.* at 912. "One is a 'statist' understanding, which emphasizes that public schooling should be directly provided by the polity," common to all members of the public, and provided tuition-free. *Id.* In contrast, a "pluralist approach contends that a liberal and diverse society best serves the public [or common] good by permitting individuals to choose educational options that best match their own goals and preferences." *Id.*

Where courts have considered the "public"-ness of charters, they have frequently limited it to certain aspects or features of charters. *E.g.*, *Grossmont Union High Sch. Dist. v. Diego Plus Educ. Corp.*, 316 Cal. Rptr. 3d 721, 744 (Cal. Ct. App. 2023) ("Though independently

operated, charter schools fiscally are part of the public school system. . . .") (citation omitted); *Acad. for Positive Learning, Inc. v. Sch. Bd. of Palm Beach Cnty.*, 315 So. 3d 675, 676 (Fla. Dist. Ct. App. 2021) (recognizing charters as "public" but distinct from district schools, noting that Florida law states charters "[p]rovide rigorous competition within the public school district") (citation omitted); *Neighborhood Ctrs. Inc. v. Walker*, 544 S.W.3d 744, 754 (Tex. 2018) ("an open-enrollment charter school is as immune from liability and suit as a school district"); *Baltimore City Bd. of Sch. Comm'rs v. City Neighbors Charter Sch.*, 929 A.2d 113, 116 (Md. 2007) ("Charter schools are in the nature of semi-autonomous public schools that operate under a contract with a State or local school board."); *Moore v. Lift for Life Acad., Inc.*, 489 S.W.3d 843, 846 (Mo. Ct. App. 2016) (charters "are public schools for purposes of sovereign immunity"); *see also Sugar Creek Charter Sch., Inc. v. State*, 712 S.E.2d 730, 742 (N.C. Ct. App. 2011) ("A charter school might be considered legally to be . . . created outside of and in addition to the uniform system of public schools.")

Thus, ambiguities in the precise scope of the label exist. But the common denominator across states is that "public" school means accepting funds from the state fisc. And even the least generous view leaves room for charter schools like St. Isidore and *Amici* to be part of "public" education while remaining autonomous private entities. *See Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 812 (9th Cir. 2010) (although "a private nonprofit corporation [was] running a charter school that is defined as a 'public school' by state law," it was not a state actor for constitutional purposes); *Robert S. v. Stetson School, Inc.*, 256 F.3d 159, 164-66 (3d Cir. 2001) (Alito, J.) (a private

school run predominantly on public funding, subject to state regulations, and engaged in government contracts did not "perform[] a function that has been traditionally the exclusive province of the state" and was not a state actor).

4. Like many states, Oklahoma law broadly defines "public" or "common" schools to include all instruction supported by taxation or authorized by law.

Oklahoma's regulation of charters is toward the loose end of the spectrum, and its definition of "public" is generic. The Oklahoma Constitution provides that "[t]he Legislature shall establish and maintain a system of free public schools wherein all the children of the State may be educated." Okla. Const. art. XIII, § 1. The Legislature enacted the Oklahoma School Code of 1971 "to provide for a state system of public school education and for the establishment, organization, operation and support of such state system." Okla. Stat. Ann. tit. 70, § 1-102 (West).

The Oklahoma School Code broadly defines "public schools" to include "all free schools supported by public taxation . . . and such other school classes and instruction as may be supported by public taxation or otherwise authorized by laws which are now in effect or which may hereafter be enacted." Okla. Stat. Ann. tit. 70, § 1-106 (West). And while the definition "include[s]" enumerated creatures of the state like government-operated grade schools, the term is not limited to them. *Id.* Ultimately, the term "consists" of "all" free schools supported by taxation or authorized by law. *Id.* The Oklahoma Attorney General's Office has issued opinions recognizing the state's

"broad definition of public schools." Okla. Atty. Gen. Op. No. 83-135 (granting service credit for years teaching in a state institution); *see* Okla. Atty. Gen. Op. No. 69-162 (concluding that a school in a reformatory was a public school due to public funding).

Oklahoma previously referred to public schools as "common schools," but the meaning of the term appears to be identical to the state's later definition of "public" schools. *See Chicago, R.I. & P. Ry. Co. v. Lane*, 170 P. 502, 502 (Okla. 1917) (citing the definition of "common school" as "all the schools of this state receiving aid from the state out of the common school fund"); *see also State v. Cummings*, 147 P. 161, 161 (Okla. 1915) (court syllabus quoting Oklahoma session law referring to "common schools of Oklahoma"). References to "common schools" remain in some current state laws, with a definition similar to "public schools." *See* Okla. Stat. Ann. tit. 70, § 23-104 (West) (defining "common schools" for the Oklahoma Educational Television Authority to mean "all private schools and all schools supported by public taxation, and including elementary and secondary schools, the first two (2) years of junior college, night school, adult and other special classes, and vocational instruction").

As in most states, an element of state control and oversight remains a defining feature of "public" schools in Oklahoma. The Oklahoma School Code provides that the "public school system in Oklahoma shall be administered by the State Department of Education, State Superintendent of Public Instruction, boards of education of school districts, and superintendents of school districts." Okla. Stat. Ann. tit. 70, § 1-115 (West).

One Oklahoma Supreme Court case sheds particular light on the meaning of "common" or "public" schools. In *Bd. of Ed. of Sapulpa v. Corey*, 163 P. 949, 953 (Okla. 1917), the Oklahoma Supreme Court evaluated whether high schools were included in the state's common or public school system. The defining features the court noted are broad and evidently apply to private charters like St. Isidore:

> The word "common," as ordinarily applied to schools, bears the broadest and most comprehensive significance. They are "common" to children in the sense that "public" highways are common to all persons who choose to ride or drive thereon, observing only the law of the road. *People ex rel. Brooklyn Children's Aid Society v. Hendrickson*, 54 Misc. Rep. 337, 104 N. Y. Supp. 122; *v. of Education of the City of Brooklyn*, 13 Barb. (N. Y.) 400. "Common schools" means, ordinarily, free common schools; the phrase "common schools" being synonymous with "public schools." Both have been defined by lexicographers and by judicial interpretation to mean free schools.
>
> In 25 A. & E. Enc. Law, it is said: "Common or public schools are, as a general rule, schools supported by general taxation, open to all of suitable age and attainments, free of expense, and under the control of agents appointed by the voters."
>
> In Black's Law Dictionary, common schools are defined to be: "Schools maintained at the public

> expense, and administered by a bureau of the state, district or municipal government, for the graded education of the children of all citizens without distinction."
>
> Mr. Anderson, in his Law Dictionary, says: "Common or public schools are schools supported by general taxation, open to all, free of expense, and under the control of agents appointed by the voters."
>
> Bouvier, in his Law Dictionary, says that "common schools" are schools for general elementary instruction, free to all the public. Rapalje & Lawrence defined "common schools" to be public or free schools, maintained at public expense, for the elementary education of children of all classes.

Bd. of Ed. of Sapulpa, 163 P. at 953.

* * *

"Under this Court's cases, a private entity can qualify as a state actor in a few limited circumstances." *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 809 (2019). The diversity among states' approaches to regulating charter schools, as well as complexities in the conception of what makes a school "public," defy a uniform label for charter schools with such sweeping legal ramifications as "state actor." Although *Amici* and St. Isidore may well be offering "public" education, the mere adjective should not distort the substance of the public-function analysis. The Oklahoma Supreme Court erred in holding that St. Isidore's activities are state action.

CONCLUSION

The Oklahoma Supreme Court's judgment should be reversed.

Respectfully submitted,

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