IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

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

Petitioner,

v.

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

Respondents.

Case No: #12169

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

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The Oklahoma Attorney General is compelled, as chief law officer of the State, to file this original action to repudiate the Oklahoma Statewide Virtual Charter School Board's ("the Board") Members' intentional violation of their oath of office and disregard for the clear and unambiguous provisions of the Oklahoma Constitution—one of which has been in place since statehood and was soundly reaffirmed by Oklahoma voters in 2016.[1] Specifically, the Attorney General seeks to undo the unlawful sponsorship of St. Isidore of Seville Virtual Charter School ("St. Isidore"). He is duty bound to file this original action to protect religious liberty and prevent the type of state-funded religion that Oklahoma's constitutional framers and the founders of our country sought to prevent.

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

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

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

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

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

BACKGROUND

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

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

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

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

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

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

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

ARGUMENT AND AUTHORITIES

I. This Court's Intervention is Appropriate and Necessary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

agency of the State and when it is entwined by governmental policies. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Assoc.*, 531 U.S. 288, 121 S. Ct. 924, 148 L. Ed. 2d 807.[5]

This is established here because the State brought charter schools into existence and exercises extensive oversight of public charter schools. To begin, the accreditation standards document for public charter schools sets forth more requirements for public charter schools than the application for traditional public junior high and middle schools.[6] Charter schools must meet the health, safety, civil rights and insurance requirements that are required of traditional public schools. OKLA. STAT. tit. 70 § 3-136(A)(1). According to the State Department of Education's interpretation, this ranges from the national fingerprint-based criminal history check under OKLA. STAT. tit. 70, § 5-142 to Oklahoma Employees Insurance and Benefits Act under OKLA. STAT. tit. 74, §§ 1301–1323.[7] Charter schools must also report a myriad of student and school performance information to the State. These reports support transparency in the public expenditure of funds and serve as the basis for State-issued school report cards. OKLA. STAT. tit. 70, § 3-136(A)(4), (6), (18); §§ 5-135, 5-135.2; §§1210.544-1210.545. Consequently, even if the Board were not relying on St. Isidore to perform one of the State's constitutional responsibilities, St. Isidore would still be a state actor because of the State's extensive oversight of public charter schools.[8]

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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

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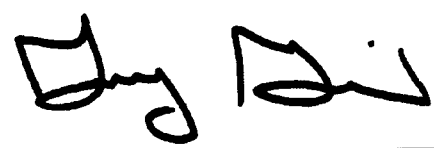

GARRY M. GASKINS, II

673 Fed.Appx. 822
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally
governing citation of judicial decisions issued on or after
Jan. 1, 2007. See also U.S.Ct. of App. 10th Cir. Rule 32.1.
United States Court of Appeals, Tenth Circuit.

Kim Fitzpatrick **COLEMAN**, an individual, Plaintiff-Appellant,

v.

UTAH STATE CHARTER SCHOOL BOARD; Marlies Burns, an individual; Brian Allen, an individual; Tom Morgan, an individual; Julie Adamic, an individual; Yolanda Francisco-Nez, an individual; Scott Smith, an individual; John Pingree, an individual; Tim Beagley, an individual; Carol Lear, an individual, Defendants-Appellees.

No. 15-4141
|
FILED December 16, 2016

Synopsis

Background: Former director and co-founder of **charter** school, that was publicly funded but operated by private nonprofit corporation, filed state court suit against **state charter** school board, asserting § 1983 claim for violation of due process preceding her nonrenewal, after board's investigation found that she had denied special education services to eligible students. Following removal, the United States District Court for the District of **Utah**, Tena Campbell, J., 2015 WL 5007931, granted board summary judgment and denied director's motion to amend complaint. Director appealed.

Holdings: The Court of Appeals, Gregory A. Phillips, Circuit Judge, held that:

[1] director lacked property interest protected by procedural due process;

[2] director was not deprived of due process protected liberty interest in her reputation; and

[3] government did not arbitrarily interfere with private employment as on-leave unpaid school board member.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (6)

[1] **Constitutional Law** ⇐ Termination or discharge

Education ⇐ **Charter** school employees

Public Employment ⇐ Property rights and interests

Although former director of **charter** school alleged that she had implied contract with **charter** school board that she would serve as director until new high school was built, she lacked protected property interest in her at-will employment at school, as required to support her procedural due process claim upon her nonrenewal; director signed and was bound by employment contract stating that she was at-will employee who could be terminated with or without cause or notice at any time and that contract controlled and superseded all other documents that could indicate her employment relationship was not at will, school's **charter stated** that all employees were at-will, and **Utah** law exempted **charter** school employees from for-cause status conferred on some public school employees. U.S. Const. Amend. 14; **Utah** Code Ann. § 53A-1a-512(3)(a).

3 Cases that cite this headnote

[2] **Constitutional Law** ⇐ Termination or discharge

Education ⇐ **Charter** school employees

Public Employment ⇐ Property rights and interests

Utah Schools Act, imposing only procedural restrictions that **state charter** school board was required to follow if **charter** school did not comply with **Utah** law or its own **charter**,

but that did not impose substantive restrictions on termination of employees, did not create protected property interest for school's director in her at-will employment, as required to support director's procedural due process claim upon her nonrenewal after board's investigation found that she had denied special education services to eligible students. U.S. Const. Amend. 14; Utah Code Ann. § 53A-1a-509(1).

3 Cases that cite this headnote

[3] **Constitutional Law** Reputational interests, protection and deprivation of

Education Charter school employees

Public Employment Rights, Interests, and Privileges in General

State charter school board's internal sharing with charter school board members initial investigatory findings by state board that school's director denied special education services to eligible students did not constitute publishing of findings, as required to support director's claim for deprivation of liberty interest in her reputation by state board's allegedly defamatory statements that injured her reputation and foreclosed other employment opportunities, since charter school was public school, and meetings with state board's members, who were government officials, and members of school board in order to share investigatory findings retained fundamental character of intra-governmental meetings as they concerned nothing but application and enforcement of regulations binding both boards. U.S. Const. Amend. 14; Utah Code Ann. § 53A-1a-501 et seq.

4 Cases that cite this headnote

[4] **Constitutional Law** Reputational interests, protection and deprivation of

Education Charter school employees

Public Employment Rights, Interests, and Privileges in General

Former director of charter school merely speculated that members of state charter school board anonymously gave newspaper reporter allegedly defamatory statements, about her financial mismanagement and conflicts of interest at school following board's investigation, which was insufficient to support her claim for deprivation of liberty interest in her reputation by purportedly defamatory statements that injured her reputation and foreclosed other employment opportunities, since director failed to tie any board member to statements published in newspaper article. U.S. Const. Amend. 14.

9 Cases that cite this headnote

[5] **Constitutional Law** Reputational interests, protection and deprivation of

Education Charter school employees

Public Employment Rights, Interests, and Privileges in General

There was no evidence that former director of charter school lost employment opportunities due to public impact of state charter school board's publication of minutes of meeting that contained allegedly defamatory statements reaffirming that director had denied special education services to eligible students and directing that she be removed from her position, as required to support director's claim for deprivation of her liberty interest in her reputation by allegedly defamatory statements, where director remained employable and had obtained numerous subsequent positions in education field following nonrenewal of her employment at school. U.S. Const. Amend. 14.

4 Cases that cite this headnote

[6] **Constitutional Law** Termination or discharge

Education Charter school employees

Public Employment Rights, Interests, and Privileges in General

State charter school board's actions in investigating director of charter school, while she was on leave from her unpaid position as board member for school, and directing that she be removed due to her denial of special education to eligible students, did not constitute arbitrary

interference with her private employment in violation of her due process or equal protection rights; state government had strong interest in management of charter school that was publicly funded, and Utah Board of Education and Utah State Office of Education ratified state charter school board's removal decision. U.S. Const. Amend. 14.

2 Cases that cite this headnote

*824 (D.C. No. 2:10-CV-01186-TC) (D. Utah)

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Before BRISCOE, MURPHY, and PHILLIPS, Circuit Judges.

ORDER AND JUDGMENT *

Gregory A. Phillips, Circuit Judge

Kim Fitzpatrick Coleman alleges that members of the Utah State Charter School Board ("the State Charter Board") and its staff director violated her due-process rights preceding her nonrenewal as the director of the Monticello Academy charter school. The district court granted summary judgment against her public-employment claims and denied her motion to amend her complaint to add a new claim that the government had interfered with her private employment as an on-leave board member of the school. We affirm.

BACKGROUND

In 2006, Coleman co-founded the Monticello Academy, a charter school in West Valley City, Utah run by the private nonprofit Monticello Academy, Inc. Initially, she served on the Monticello Academy's board of directors, but in 2008 she took a leave of absence from the board to become the paid director of the school. [1] Her initial term of employment was for fifteen *825 months. After that, the Monticello Academy board had two one-year renewal options. Monticello Academy's charter states that all employees serve at will, and Coleman's contract was explicit that she "is an at-will employee" and that "this Agreement will control and supersede such other material." [2] Appellant's App. at 1251. Among other job duties, Monticello Academy board members told Coleman that the board expected her to work on getting a high school built for the charter school.

When parents complained to it about Coleman's not providing required special-education services at Monticello Academy, the State Charter Board stepped in and investigated. It found the parental complaints warranted. The State Charter Board drafted findings, including that Coleman had created a school environment in which special-education services were withheld from students legally entitled to them. [3] Based on the State Charter Board's findings, it directed that the Monticello Academy board remove Coleman from all school operations and bar her from campus in any potentially-disruptive capacity. But the Monticello Academy board did its own investigation, placing Coleman on paid administrative leave until June 30, 2009, when her employment contract expired. Coleman contests the State Charter Board's findings about her stewardship of the school.

During Monticello Academy's investigation, the Salt Lake Tribune newspaper published a 270-word article saying that "state education officials" had ordered that Coleman "be placed on paid administrative leave pending an investigation into allegations of financial mismanagement" at Monticello Academy. Appellant's App. at 2110. The article said this action arose from parental complaints "about low teacher morale and efforts to block parental involvement in the school's management." *Id.* The sole quote from a named source was from Brian Allen, the State Charter Board's chairman, who offered praise, saying that "[w]e have a very capable principal and assistant principal running the school," and advising that "[t]he board has it well under control. I think they're trying to do the right thing." *Id.* In February 2009, the Monticello Academy board appealed the State Charter Board's initial findings to state education officials. Even before it began its self-investigation of Coleman, the Monticello Academy board advised the State Charter Board that it would appeal unless the initial findings were withdrawn. In April 2009, Coleman sued the State Charter Board in state court for violating the Utah Open and Public Meetings Act, codified in Utah Code. Ann. §§ 52–4–101 to -305. After concluding its investigation, the Monticello Academy board found no wrongdoing by Coleman. Coleman demanded that the State Charter Board provide her with the bases for its ***826** decision, but she says that the State Charter Board did not do so.

Eight months after it issued them, the State Charter Board voided its preliminary findings about Coleman's deficiencies running the school as its director;[4] but after meeting again, it issued new findings reaffirming that Coleman had denied required special-education services to Monticello Academy students, and directing that she be removed as the school's director. The State Charter Board made those findings public according to its usual practice.[5] The Utah Board of Education and the Utah State Office of Education ratified the second version of the findings. When Coleman's term of employment expired, the Monticello Academy board did not renew her contract.

In response to the later findings, Coleman filed a second state-court suit against the State Charter Board, its members, and its staff director, pleading thirteen claims for relief. The defendants removed the case to federal court, where the district court dismissed all but one of Coleman's claims. Later, the district court granted summary judgment on the sole remaining claim, one asserting a violation of 42 U.S.C. § 1983 based on an alleged procedural-due-process violation.[6] The district court also denied Coleman's motion to amend her complaint to add a claim for governmental interference with private employment—which she identified as her position on Monticello Academy's board of directors and potential future jobs, not her public position as director of Monticello Academy. Coleman appealed.

DISCUSSION

On appeal, Coleman argues that the district court misapplied the summary-judgment standard in disposing of her procedural-due-process claims premised on asserted property rights and liberty interests. We conclude that the district court properly applied the summary-judgment standard in rejecting her property-interest claim based on continued employment and her liberty-interest claim based on defamation. Coleman also argues that the district court wrongly denied her motion to amend her complaint to claim governmental interference with her private employment, that being her unpaid position on the Monticello Academy board and her future employment in the education field. We conclude that the district court correctly determined that our circuit has not yet recognized a claim for governmental interference with private employment with charter schools, meaning that Coleman could not show that the defendants had violated a clearly established constitutional right.

I. Standard of Review

We review de novo a district court's grant of summary judgment and, in doing so, use the same standard that applies in ***827** the district court. *Cillo v. City of Greenwood Vill.*, 739 F.3d 451, 461 (10th Cir. 2013). Under this standard, we view facts most favorably to the nonmoving parties, and we resolve all factual disputes and reasonable inferences in their favor. *Id.* We grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P 56(a). "To avoid summary judgment, the nonmovant must make a showing sufficient to establish an inference of the existence of each element essential to the case." *Hulsey v. Kmart, Inc.*, 43 F.3d 555, 557 (10th Cir. 1994) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). But the nonmovant "may not rest upon the mere allegations or denials of his pleading,

but ... must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). We normally review a denial of a motion to amend a pleading for abuse of discretion, but if the district court based the denial on futility, we review de novo the legal basis of the futility. *Cohen v. Longshore*, 621 F.3d 1311, 1314 (10th Cir. 2010). An amendment is futile if the amended complaint would be subject to dismissal for any reason, including summary judgment. *Watson ex rel. Watson v. Beckel*, 242 F.3d 1237, 1239–40 (10th Cir. 2001).

II. Property Interest

Because the defendants asserted qualified immunity in the district court, the burden shifts to **Coleman** to show both that the defendants violated her rights and that clearly established law protected those rights at the time of the violation. *Bowling v. Rector*, 584 F.3d 956, 964 (10th Cir. 2009). **Coleman** claims that the **State Charter** Board members violated her Fourteenth Amendment property interest in continued employment with Monticello Academy. Faced with explicit at-will employment language in her employment contract, **Coleman** provides two arguments to override it. First, she relies on an implied understanding between her and the Monticello Academy board that she would remain the director for several years. Second, she relies on the **Utah Charter** Schools Act ("the Schools Act"), **Utah** Code Ann. §§ 53A–1a–501 to -524, which sets out procedures that the **State Charter** Board must follow before it takes certain actions. We reject both arguments and hold that **Coleman** had no protected property interest in her employment with Monticello Academy.

A. Implied Understanding

Procedural due process flows from the Fourteenth Amendment's protection against deprivations of life, liberty, or property "without due process of law." U.S. Const. amend. XIV, § 1; *Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir. 2000). But procedural due process protects only certain property interests. *See* ***Bd.*** *of Regents of State Colls. v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). A plaintiff must show a right to continued employment to establish a property interest in public employment that due process protects. *Cleveland* ***Bd.*** *of Educ. v. Loudermill*, 470 U.S. 532, 538, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); *see* *Roth*, 408 U.S. at 576, 92 S.Ct. 2701. The Constitution does not create the protected property interest or the right to continued employment. *Teigen v. Renfrow*, 511 F.3d 1072, 1079 (10th Cir. 2007). Rather, independent sources, including state law, contracts, or other "mutually explicit understandings," create the interest. *Teigen*, 511 F.3d at 1079 (quoting ***828** *Robbins v. Bureau of Land Mgmt.*, 438 F.3d 1074, 1085 (10th Cir. 2006)). "At-will employees lack a property interest in continued employment." *Darr v. Town of Telluride, Colo.*, 495 F.3d 1243, 1252 (10th Cir. 2007).

[1] Here, **Coleman** argues that a mutually explicit understanding between her and the Monticello Academy board should trump the written language of both her contract and the school's **charter**. **Coleman**'s contract states unambiguously that the "Employee recognizes that he or she is an at-will employee, meaning that his or her employment can be terminated by Employer, with or without cause or notice, at any time." Appellant's App. at 1251. The agreement also "control[s] and supersede[s]" all other material that might indicate a relationship that is not at will. *Id.* **Coleman** signed and dated the contract. Seeking to avoid her agreed employment terms, **Coleman** protests that her employment contract was a form agreement drafted by a third-party human-resources firm. But **Coleman** signed it and is bound by it. And any suggestion that **Coleman**'s at-will employment was accidental faces other insurmountable hurdles. First, Monticello Academy's **charter states** that "[a]ll employees are 'at-will.' " *Id.* at 1254. And second, **Utah** exempts **charter**-school employees from the for-cause status conferred on some public-school employees. **Utah** Code Ann. § 53A–1a–512(3)(a).[7]

But **Coleman** insists that she and the Monticello Academy board had a mutual understanding, amounting to an implied contract, that she would serve as director until a new high school was built. Though the board members wanted **Coleman** to get a high school built in the next several years, that desire does nothing to rebut the explicit at-will language in **Coleman**'s employment contract and the school's **charter**. Employers hire employees to do tasks. But employees do not get to ignore their contract terms to complete their tasks.

Coleman relies heavily on *Kingsford v. Salt Lake City School District*, 247 F.3d 1123 (10th Cir. 2001), in which we enforced a mutual understanding between a high-school

football coach and the school district that he could be fired as the coach only for cause, despite his written contract not saying one way or the other. *Id.* at 1129–30, 1133. **Coleman** is right that *Kingsford* is an example of a situation in which we were willing to recognize the power of implicit contract terms. But *Kingsford* differs from **Coleman**'s case in a critical, obvious way: in *Kingsford*, the coach had no explicitly at-will contract that covered his coaching position. *Id.* at 1129–30. Rather than override explicit contractual language, which **Coleman** asks us to do, the court used the conduct of school administrators to fill a gap. *Id.* at 1132. Thus, **Coleman**'s case lacks the kind of legally relevant, conflicting evidence that prevented summary judgment in *Kingsford*. *See id.* **Coleman**'s efforts to build a new high school could not enlarge her at-will employment when faced with the unambiguous at-will language of her contract. As a matter of law, then, **Coleman** was always an at-will employee without a right to continued employment and procedural due process protection.

B. Utah Statute

Nor does the Schools Act create a protected property interest for **Coleman**. Not every violation of state law is a violation of federal due process. *Guttman v. Khalsa*, 669 F.3d 1101, 1115 (10th Cir. 2012). Specifically, if a state law mandates only procedure, rather than for-cause termination or other substantive restrictions, it does ***829** not create a property interest that federal due process protects. *Hennigh v. City of Shawnee*, 155 F.3d 1249, 1254 (10th Cir. 1998); *Asbill v. Housing Auth. of Choctaw Nation of Okla.*, 726 F.2d 1499, 1502 (10th Cir. 1984).

[2] **Coleman** argues that the Schools Act establishes a property interest because it mandates certain procedures that the **State Charter** Board must follow. If a **charter** school does not comply with state law or its own **charter**, the **State Charter** Board must notify the school of the problem in writing and give it a "reasonable time to remedy the deficiency." **Utah** Code Ann. § 53A–1a–509(1). Only if the school does not remedy the problem within that reasonable amount of time can the **State Charter** Board take actions, such as removing the school's director. *Id.* § 509(2). **Coleman** cites *Copelin–Brown v. New Mexico State Personnel Office*, 399 F.3d 1248, 1254 (10th Cir. 2005), where we held that regulatory restrictions on termination can create a property interest. But again, not all restrictions create protected property interests. The restrictions in *Copelin–Brown* were decidedly substantive: before it could act, the government employer had to make such content-intensive findings as the extent of an employee's disability and the availability of other jobs. *Id.* In contrast, the Schools Act restrictions do not force the **State Charter** Board to adjust the reasons for its actions, only the timing. These are procedural restrictions. As such, they do not trigger federal due process.

III. Liberty Interest Defamation

Coleman claims that the defendants made three statements that defamed her reputation and foreclosed other employment opportunities, thus violating her liberty interest under the Due Process Clause of the Fourteenth Amendment. **Coleman** first relies on statements made in the **State Charter** Board's initial findings issued on January 20, 2009 ("the initial findings"). She next relies on statements made in the Salt Lake Tribune newspaper article. And finally she relies on statements from the **State Charter** Board's August 13, 2009 board-meeting minutes, at which the **State Charter** Board developed its second set of findings against **Coleman** that it later published online ("the August minutes"). We find that each statement lacks at least one necessary element required to show a defamatory statement that violates **Coleman**'s due process liberty interest.

A. The Initial Findings

Under the Due Process Clause, public employees have a liberty interest in their reputations, but only in the context of their employment. *Paul v. Davis*, 424 U.S. 693, 701, 706, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976); *McDonald v. Wise*, 769 F.3d 1202, 1212 (10th Cir. 2014). At-will status does not preclude the interest. *McDonald*, 769 F.3d at 1212 n.2. In this circuit, claims based on liberty interests require proof not only of defamatory statements injuring an employee's reputation, but also proof of harm that forecloses other employment opportunities. *Stidham v. Peace Officer Standards & Training*, 265 F.3d 1144, 1153–54 (10th Cir. 2001). The statement must also be false, made in the course of an employee's termination, and published. *Workman v. Jordan*, 32 F.3d 475, 481 (10th Cir. 1994).

None of the initial findings deprived Coleman of a liberty interest because no one published them. To prove that statements were published, a plaintiff must prove more than mere sharing with other persons. For instance, internal governmental sharing of information is not publishing. *Asbill*, 726 F.2d at 1503; *see also* *830 *Bishop v. Wood*, 426 U.S. 341, 348, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976) (holding that being "made public" is the operative test for whether someone has published a defamatory statement).

[3] Coleman claims that Brian Allen, as a State Charter Board member, published the State Charter Board's initial findings by sharing them with the Monticello Academy board members. Further, she claims that Marlies Burns, the State Charter Board staff director, published the initial findings by e-mailing them to Monticello Academy board members. Coleman reasonably infers that the e-mail recipients read them. And the Monticello Academy board members, unlike Monticello Academy's employees, are not, strictly speaking, government officials. But charter schools are public schools using public funds to educate school children. As this case and the Schools Act amply demonstrate, charter schools are not free-floating entities unmoored from state governmental oversight and control. *See* Utah Code Ann. §§ 53A–1a–501 to -524. Meetings between government officials and those who oversee a charter school, especially concerning the application and enforcement of the regulations that bind the two groups together, retain the fundamental character of intra-governmental meetings. Thus, the defendants' sharing of the findings, which concern nothing but charter-school regulations and enforcement, is not publishing and does not implicate Coleman's liberty interest under the Due Process Clause.

B. The Newspaper Article

[4] [5] Coleman's liberty-interest claims based on the newspaper article fail because she fails to tie any defendant to the newspaper article's statements that she argues defamed her. Instead, Coleman asks the court to assume that one or more of the defendants anonymously gave the newspaper reporter the allegedly defamatory statements. The one defendant quoted in the article, Brian Allen, voiced support for Monticello Academy: "The [Monticello Academy] board has it well under control. I think they're trying to do the right thing." Appellant's App. at 2110. Coleman first blamed Brian Allen, and later Marlies Burns, for the article's statements about financial mismanagement and conflicts of interest at Monticello Academy.

We agree with the district court that Coleman infers too much in arguing that Brian Allen and Marlies Burns must have given the newspaper reporter defamatory statements because they had investigated her actions as director of Monticello Academy. Allen denies that he was the source. And Coleman never asked the Tribune's reporter to identify her sources. In short, Coleman builds her liberty-interest claim from speculation, which is insufficient to survive summary judgment. *Self v. Crum*, 439 F.3d 1227, 1236 (10th Cir. 2006) ("Inferences supported by conjecture or speculation will not defeat a motion for summary judgment.").

C. The August Board Minutes

Nothing in the State Charter Board's August minutes deprived Coleman of a liberty interest. Simply put, Coleman failed to offer sufficient evidence that the board's publication of those minutes foreclosed Coleman's employment opportunities in the education field. To prevail on her liberty-interest claim based on defamation, the defamation "must occur in the course of terminating the employee *or* must foreclose other employment opportunities." *Workman*, 32 F.3d at 481 (emphasis added). But we have later held that the "or" really means "and." *Renaud v. Wyo. Dep't of Family Servs.*, 203 F.3d 723, 728 n.1 (10th Cir. 2000) ("At first blush, it appears that this prong of the test can be met either by statements made in the course of terminating an employee or, in the alternative, by any other statements *831 that might foreclose other employment opportunities.... [But] we conclude that the *Workman* court did not intend to create a test under which a liberty interest might be infringed by any defamatory statement that might foreclose future employment opportunities.") Coleman admits that she can provide no evidence of specific job opportunities that she lost because of the public impact of the August minutes.

Coleman counters that she need show only that a statement is defamatory enough to make its victim "an unlikely candidate for employment by a future employer." *Melton v. City of Oklahoma City*, 928 F.2d 920, 927 n.11 (10th Cir. 1991). But Coleman's reputation is more resilient than she gives it credit for. The record shows that she remains employable in the education field. After all, Monticello Academy continued to give her project-based job offers, and, after the State Charter Board approved, she even accepted one for pay. In addition, she has also worked as a private contractor for the West Ridge Academy—a treatment center and private school that

was applying to open a public charter school. And, more generally, she managed a successful Congressional campaign and later won a seat in the Utah House of Representatives, where she sits on the Education Committee.

IV. Arbitrary Governmental Interference with Private Employment

No clearly established right protects a private board member of a charter school from regulation by government agencies. To overcome qualified immunity, Coleman must establish both that she suffered a constitutional-right violation and that the violation was against clearly established law, meaning that existing precedent placed it "beyond debate" that the State Charter Board had violated Coleman's constitutional rights. *Mullenix v. Luna*, — U.S. —, 136 S.Ct. 305, 308, 193 L.Ed.2d 255 (2015) (quoting *Ashcroft v. al–Kidd*, 563 U.S. 731, 741, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011)). The relevant case law need not prohibit the exact same action or involve the same facts as the alleged violation, *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002), but neither can it merely contain a general legal proposition that does not advise every reasonable official that the challenged conduct violates the constitution, *see Mullenix*, 136 S.Ct. at 308; *al–Kidd*, 563 U.S. at 741, 131 S.Ct. 2074. "[Q]ualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.' " *Mullenix*, 136 S.Ct. at 308 (quoting *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)).

The Supreme Court has long held that the government may not arbitrarily interfere with private employment. The precise nature of the right has evolved over the past century, with some iterations of it now on firmer ground than others,[8] but the right has found a modern home in procedural ***832** due process. One of the first cases to declare the right casts it as arising under due process. *Dent v. West Virginia*, 129 U.S. 114, 123–24, 9 S.Ct. 231, 32 L.Ed. 623 (1889). "It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose...." *Id.* at 121, 9 S.Ct. 231. But the Court has always permitted some regulation. In *Dent*, for instance, the Court upheld a state licensing system for the medical profession. *Id.* at 128, 9 S.Ct. 231.

The Court invigorated the right against governmental interference with employment in *Truax v. Raich*, 239 U.S. 33, 35, 42–43, 36 S.Ct. 7, 60 L.Ed. 131 (1915), in which an Austrian-born cook in an Arizona restaurant challenged the constitutionality of a state employment statute after it caused his termination. The Court struck down the state law, which had mandated that "[a]ny company, corporation, partnership, association or individual who is, or may hereafter become an employer of more than five (5) workers at any one time" employ at least "eighty (80) per cent qualified electors or native-born citizens." *Id.* at 35, 36 S.Ct. 7. The Court invoked the Fourteenth Amendment's Equal Protection Clause rather than its Due Process Clause. *Id.* at 39, 41–42, 36 S.Ct. 7. The Court also extended employment protection from governmental interference to all employees, including those serving at will. *Id.* at 38, 36 S.Ct. 7.

In *Greene v. McElroy*, 360 U.S. 474, 508, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959), the Court again found that the government had interfered with a private employee's rights, under the Fifth Amendment's Due Process Clause. The employee worked for a defense contractor and the federal government revoked his security clearance without a hearing, all but destroying his ability to find work in the defense industry. *Id.* at 492, 79 S.Ct. 1400. Relying on the employee's liberty and property interests under the Due Process Clause, the Court found that the summary revocation violated "the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference." *Id.*

Finally, in *Federal Deposit Insurance Corp. v. Mallen*, 486 U.S. 230, 240, 108 S.Ct. 1780, 100 L.Ed.2d 265 (1988), the Court recognized a right against governmental interference with employment in the context of regulated banking. The plaintiff was the president and a director of a federally insured bank. *Id.* at 233, 108 S.Ct. 1780. He had been indicted on federal charges of making false statements to the FDIC. *Id.* at 236, 108 S.Ct. 1780. Before the president was convicted, the FDIC issued an *ex parte* order suspending him from his duties and prohibiting him from working for any FDIC-insured bank. *Id.* at 238, 108 S.Ct. 1780. The bank president demanded a hearing and the FDIC granted him one, but he sued before it could occur. *Id.* at 238–39, 108

S.Ct. 1780. The Court held that it was "undisputed" that the FDIC could not arbitrarily interfere with the employment of a regulated-bank's employee, but also that the action in this case was not arbitrary and that the process that the FDIC had been prepared to give—a relatively prompt post-deprivation hearing—was sufficient. *Id.* at 240, 248, 108 S.Ct. 1780.

[6] But the Tenth Circuit has yet to extend this right beyond the circumstances *833 encountered by the Supreme Court.[9] Three district courts in this circuit have recognized that arbitrary governmental interference with private employment can be a plausible claim based on a recognized constitutional theory.[10] That type of claim is certainly not foreclosed in this circuit,[11] but we have never explicitly recognized it. And the Supreme Court cases that established and developed the right against employment interference do not clearly establish its applicability to **Coleman**. None of the settings in those cases—regulation of business, defense contracting, and banking—concern education in our public and **charter** schools. To extend those cases to the **charter**-school setting would go too far, especially given the Supreme Court's admonition to avoid precisely that kind of expansive holding. *See al-Kidd*, 563 U.S. at 742, 131 S.Ct. 2074 ("We have repeatedly told courts ... not to define clearly established law at a high level of generality."). Even so, we acknowledge that the Supreme Court has established a right against arbitrary governmental interference with private employment and that it is a recognized constitutional theory through which claims can plausibly be brought. The right is heavily fact-dependent, though, and to overcome any claim of qualified immunity, a plaintiff would have to plead facts far more similar to Supreme Court precedent than those that **Coleman** has presented.

The specifics of the **charter**-school setting also argue against us stretching to establish a new right in this context. The government has a strong interest in the management of publicly-funded schools. Indeed, few government interests are so strong. The Schools Act vests the **State Charter** Board with power to review **charter**-school operations—an especially necessary power when school officials are as closely tied to their own oversight boards as **Coleman** was to Monticello Academy's. *834 Moreover, here, the **Utah** Board of Education and the **Utah** State Office of Education ratified the **State Charter** Board's decision. The **State Charter** Board's actions were not arbitrary. The district court, therefore, was correct to hold that the **State Charter** Board members were entitled to qualified immunity, and to disallow **Coleman**'s proposed amended complaint.

CONCLUSION

We affirm the district court's grants of summary judgment and its denial of **Coleman**'s motion to amend the complaint.

All Citations

673 Fed.Appx. 822, 343 Ed. Law Rep. 25, 2016 IER Cases 418,510

Footnotes

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

1 **Coleman**'s husband, Joel **Coleman**, was on the Monticello Academy board when it voted to hire her, but he recused himself.

2 The full "At-Will Employment" section of **Coleman**'s contract reads as follows:

> Employee recognizes that he or she is an at-will employee, meaning that his or her employment can be terminated by Employer, with or without cause or notice, at any time. No promise of employment for a definite duration is given by this Agreement or by any other material received by Employee from Employer or from A-Plus. This Agreement in no way modifies the at-will nature of Employee's employment. In the

event of any contrary provisions contained in other materials received by Employee and this Agreement relative to at-will employment status, this Agreement will control and supersede such other material.

Appellant's App. at 1251 (all text capitalized in original).

3 The **State Charter** Board also found that **Coleman** had exhibited "unprofessional behavior" at staff meetings and had created an "atmosphere of intimidation." Appellant's App. at 1517.

4 This action resolved **Coleman**'s state-court lawsuit.

5 The **State Charter** Board posts minutes from its meetings—as far back as 2004—on its website.

6 The district court dismissed with prejudice these claims: the § 1983 claims against the **State Charter** Board and **state** officials acting in their official capacity; the First Amendment intimate-association claim; the freedom-of-speech retaliation claim; the substantive-due-process claim; the Fourteenth Amendment equal-protection claim; the **Utah** Constitution uniform-operation-of-laws claim; the **Utah** Constitution open-courts claim; the intentional-infliction-of-emotional-distress claims against all defendants except Marlies Burns; and the intentional-interference-with-economic-advantage claim. **Coleman** voluntarily withdrew her state claims based on property takings, defamation, slander, and libel.

7 Specifically, this section exempts **charter**-school employees from the Public Education Human Resource Management Act. *See* **Utah** Code Ann. § 53A–8a–501.

8 In *Prudential Insurance Co. of America v. Cheek*, 259 U.S. 530, 42 S.Ct. 516, 66 L.Ed. 1044 (1922), the Court upheld a Missouri law mandating that companies provide letters of reference to departing employees. But the Court noted that the same mandate on individuals likely would be impermissible because "freedom in the making of contracts of personal employment ... is an elementary part of the rights of personal liberty and private property, not to be ... arbitrarily interfered with." *Id.* at 536, 42 S.Ct. 516. The freedom-of-contract language echoes the economic substantive-due-process holding of *Lochner v. New York*, 198 U.S. 45, 64, 25 S.Ct. 539, 49 L.Ed. 937 (1905), *overruled in part by* *Ferguson v. Skrupa*, 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963), and relies partly on two other *Lochner*-era cases that the Court later overturned, *see* *Coppage v. Kansas*, 236 U.S. 1, 35 S.Ct. 240, 59 L.Ed. 441 (1915), *overruled in part by* *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 61 S.Ct. 845, 85 L.Ed. 1271 (1941); *Adair v. United States*, 208 U.S. 161, 28 S.Ct. 277, 52 L.Ed. 436 (1908) (same).

9 Other circuit courts have extended the right against arbitrary governmental interference with private employment to circumstances beyond the Supreme Court's cases. *See, e.g.*, *Stidham v. Texas Comm'n on Private Sec.*, 418 F.3d 486, 487, 491–92 (5th Cir. 2005) (state licensing regulators threatening to prosecute the clients of an unlicensed motorcycle-funeral-escort business); *Trifax Corp. v. District of Columbia*, 314 F.3d 641, 644 (D.C. Cir. 2003) (recognizing the general right); *Korb v. Lehman*, 919 F.2d 243, 248 (4th Cir. 1990) (same); *Chernin v. Lyng*, 874 F.2d 501, 502, 505–06 (8th Cir. 1989) (federal regulators refusing inspection services to a meat-packing company unless it terminated one of its employees); *Merritt v. Mackey*, 827 F.2d 1368, 1373 (9th Cir. 1987) (state and federal government agents refusing funds to a nonprofit corporation unless it terminated a particular employee).

10 In *Barrett v. Fields*, 924 F.Supp. 1063 (D. Kan. 1996), the district court recognized that the Supreme Court had established a right "to hold specific private employment and to follow a chosen profession free from

unreasonable government interference," as protected by due process. *Id.* at 1073 (quoting *Greene*, 360 U.S. at 492, 79 S.Ct. 1400). But the court rejected the claim on the case's specific facts. *Id.* at 1074. In *Fernandez v. Taos Municipal Schools Board of Education*, 403 F.Supp.2d 1040, 1043 (D.N.M. 2005), the district court held that the plaintiff had stated a valid claim based on the government's arbitrary interference with his employment. The plaintiff, a bus driver, alleged that a school transportation director had threatened his employer with negative contract consequences if he allowed the driver to continue working. *Id.* at 1042. Finally, the district court in the instant case agreed with *Fernandez* that arbitrary interference with employment "is a recognized constitutional theory." ***Coleman*** *v.* ***Utah State Charter Sch. Bd.***, No. 2:10–cv–1186–TC, 2012 WL 1914072, at *5 (D. **Utah** May 25, 2012).

11 The Tenth Circuit once denied a procedural-due-process claim of an employee because he served at will, but the court did not deal with this specific claim and so did not foreclose such claims. *Lenz v. Dewey*, 64 F.3d 547, 551 (10th Cir. 1995); *see* *Fernandez*, 403 F.Supp.2d at 1043 n.1.

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