Nos. 24-394 & 24-396

IN THE
Supreme Court of the United States

OKLAHOMA STATEWIDE CHARTER SCHOOL BOARD, ET AL.,
Petitioners,
v.
GENTNER DRUMMOND, ATTORNEY GENERAL FOR THE STATE OF OKLAHOMA, EX REL. STATE OF OKLAHOMA,
Respondent.

ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL,
Petitioner,
v.
GENTNER DRUMMOND, ATTORNEY GENERAL FOR THE STATE OF OKLAHOMA, EX REL. STATE OF OKLAHOMA,
Respondent.

On Petitions for Writs of Certiorari to the Oklahoma Supreme Court

BRIEF *AMICI CURIAE* OF THE GENERAL COUNCIL OF THE ASSEMBLIES OF GOD, THE COALITION FOR JEWISH VALUES, AND THE RELIGIOUS FREEDOM INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The General Council of the Assemblies of God (USA), together with Assemblies of God congregations around the world, is the world's largest Pentecostal denomination. It has approximately 86 million members and adherents worldwide. A voluntary cooperative fellowship, it has nearly 13,000 churches voluntarily affiliated in the United States. Twenty-two colleges and universities are endorsed by the Assemblies of God in the United States. The Assemblies of God seeks to foster a society in which religious adherents of all faiths may peaceably live out the dictates of their conscience.

The Coalition for Jewish Values (CJV) is the largest Rabbinic public policy organization in America, representing over 2,500 traditional, Orthodox rabbis. CJV promotes religious liberty, human rights, and classical Jewish ideas in public policy, and does so through education, mobilization, and advocacy, including by filing *amicus curiae* briefs in defense of equality and freedom for religious institutions and individuals.

The Religious Freedom Institute (RFI) is committed to achieving broad acceptance of religious liberty as a fundamental human right, a source of individual and social flourishing, the cornerstone of a successful society, and a driver of national and international

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[1] Counsel of record for all parties received timely notice of *amici*'s intent to file this brief as required by Rule 37. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation of submission of this brief.

security. Among its core activities, RFI equips students, parents, policymakers, professionals, faith-based organization members, scholars, and religious leaders through programs and resources that communicate the true meaning and value of religious freedom, and apply that understanding to contemporary challenges and opportunities. RFI works to secure religious freedom for everyone everywhere because human dignity and human nature demand it, and human flourishing depends on it.

Amici are concerned that the decision below takes an overbroad view of the state-action doctrine that could upend long-held understandings about the line separating private from governmental conduct. If that view of the state-action doctrine is allowed to stand, many religious entities from various faith traditions could be threatened with crippling liabilities and lawsuits reserved for government defendants alone.

SUMMARY OF ARGUMENT

Religious charter schools are now treated as unconstitutional in Oklahoma. That cannot be squared with the Free Exercise Clause, which forbids the states from "exclud[ing] religious persons from the enjoyment of public benefits on the basis of their anticipated religious use of the benefits." *Carson v. Makin*, 596 U.S. 767, 789 (2022).

In an attempt to evade that glaring Free Exercise violation, the Supreme Court of Oklahoma labeled St. Isidore—the private religious school at issue—a state actor. But in its attempt to avoid clashing with one constitutional doctrine, the court mangled another.

Under the Oklahoma Supreme Court's decision, a private entity becomes a state actor whenever it receives a charter from, is heavily regulated by, or contracts with a state. So too whenever it performs a duty constitutionally assigned to the state. All of that is in direct conflict with this Court's state-action precedents. Worse still, it threatens to turn a wide variety of private parties into state actors subject to a battery of liabilities ordinarily faced only by the government. That risk is serious for any private entity. But it is existential for most religious ones, who could run afoul of the Establishment Clause merely upon being classified as state actors.

And that threat is very real. Religious entities, St. Isidore included, regularly receive charters from federal, state, and local governments. They often run hospitals, schools, and other entities subject to extensive government regulation. And they frequently contract with governments at all levels of our federalist system to provide social services, including services those governments are obligated to provide under state or federal constitutional law. If the decision below is correct, all these entities may be designated state actors—and potentially sued out of existence.

Amici therefore ask the Court to grant the petitions and reverse the decision below. In doing so, the Court will vindicate the Free Exercise Clause by ensuring that charter schools and other entities are neither denied public benefits on the basis of their religious identity nor subjected to a host of new liabilities reserved for state actors.

ARGUMENT

I. THE DECISION BELOW DISTORTS THE STATE-ACTION DOCTRINE.

Recognizing that "the bigger the government, the smaller the individual," this Court's "state-action doctrine enforces a critical boundary between the government and the individual," thereby preserving a "robust sphere of individual liberty." *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 818 (2019). The "circumstances" in which a "private entity can qualify as a state actor" are therefore "limited" and "few." *Id.* at 809.

The Oklahoma Supreme Court nevertheless concluded that St. Isidore—a private religious school and non-profit corporation—qualified as one of these rare birds. In doing so, it initially pointed to a state-law classification of charter schools as "public," before conceding that this "legislative designation" was not controlling. Pet. App. 17a-20a.[2] Wisely so, for "[t]he distinction between private conduct and state action turns on substance, not labels." *Lindke v. Freed*, 601 U.S. 187, 197 (2024). That is why this Court has treated "public utilities," *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 & n.7 (1974), "public defenders," *Polk Cnty. v. Dodson*, 454 U.S. 312, 319-20 (1981), and operators of "public access channels" as "private actor[s]" under the state-action doctrine, *Halleck*, 587 U.S. at 816. States cannot "evade … the Constitution" either by labeling a state actor a private one or a private actor a state one. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995).

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[2] "Pet. App." refers to the petition appendix in No. 24-394.

Instead, the Oklahoma Supreme Court ultimately relied on "two tests" it drew from state-action precedents: the (1) "entwinement" and (2) "public function" tests. Pet. App. 20a. Neither applies here.

A. St. Isidore and Oklahoma are not "entwined."

The court below first invoked this Court's cases treating "a nominally private entity as a state actor … when it is entwined with governmental policies, or when government is entwined in its management or control." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001) (cleaned up); *see* Pet. App. 20a-21a. Applying this framework, the Oklahoma Supreme Court briefly flagged a mishmash of reasons why St. Isidore was entwined with the state. Pet. App. 21a. Whether taken individually or together, these various factors are not up to snuff.

First, the court below noted that Oklahoma's Charter School Board "sponsors" charter schools within the state. *Id.* But state sponsorship of a private entity is not enough under this Court's precedents. To the contrary, "[a]ction taken by private entities with the mere approval or acquiescence of the State is not state action." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999).

By the same token, the Oklahoma Supreme Court's claim that Oklahoma charter schools are "state-created" through "charters" is both misleading and irrelevant. Pet. App. 19a, 21a. It is misleading because St. Isidore was already "created" by *another* state charter—its charter as an Oklahoma non-profit corporation. *See* 24-396 Pet. 29. The charter at issue here does not "create" St. Isidore.

And it is irrelevant because "the fact that the government licenses, contracts with, or grants a monopoly to a private entity does not convert the private entity into a state actor." *Halleck*, 587 U.S. at 814. The same goes for granting "charters." *Id.* (citing *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 638-39 (1819)). Indeed, "[a]ll corporations act under charters granted by a government," but no one seriously claims this strips "their essentially private character." *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 543-44 (1987).

Second, the Oklahoma Supreme Court noted that the Charter School Board will "provide oversight of" St. Isidore's "operation," "monitor its performance and legal compliance, and decide whether to renew or revoke [its] charter." Pet. App. 21a. But a state's involvement in a school's "internal operations and affairs" does not make the school a state actor. *Id.* This Court has made clear that "state regulation" of a private school or other entity—"even if 'extensive and detailed'"—does "not make" that entity's conduct "state action." *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982). Indeed, "the 'being heavily regulated makes you a state actor' theory of state action is entirely circular and would significantly endanger individual liberty." *Halleck*, 587 U.S. at 816.

Finally, the fact that St. Isidore will "receive many of the same legal protections and benefits as [its] government sponsor" does not move the needle. Pet. App. 21a. Apparently, the court below thought it significant that charter school employees "are eligible for the same State retirement benefits that Oklahoma provides teachers at other public schools." *Id.* at 18a.

But "[p]ermitting charter schools to participate in the state's retirement plan" just "provides additional compensation to entities that operate charter schools by relieving them from pension or retirement obligations they might otherwise face." *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 817 (9th Cir. 2010); *see Johnson v. Pinkerton Acad.*, 861 F.2d 335, 339 (1st Cir. 1988) (similar). And the state-action doctrine permits states to "subsidize[] the operating and capital costs" of private entities without transforming them into arms of the state. *Rendell-Baker*, 457 U.S. at 840.

B. St. Isidore does not perform a traditional and exclusive public function.

Relying on the Fourth Circuit's decision in *Peltier v. Charter Day School, Inc.*, 37 F.4th 104 (4th Cir. 2022) (en banc), *cert. denied*, 143 S. Ct. 2657 (2023) (No. 22-238), the Oklahoma Supreme Court also held that St. Isidore qualifies as a state actor under what the court called "the 'public-function' test." Pet. App. 21a; *see id.* at 21a-24a. But as this Court has emphasized, "the relevant question" here "is not simply whether a private group is serving a 'public function.'" *Rendell-Baker*, 457 U.S. at 842. Rather, "to qualify as a traditional, exclusive public function" relevant to the state-action doctrine, "the government must have traditionally *and* exclusively performed the function." *Halleck*, 587 U.S. at 809. "It is not enough that" the relevant "government exercised the function in the past, or still does," or "that the function serves the public good or the public interest in some way." *Id.* Given these requirements, "'very few' functions" will "fall into th[is] category." *Id.*

While conceding that this narrow class of functions does not include the state's "provision of education," the Oklahoma Supreme Court ruled that the state's provision of "*free public* education" through charter schools could qualify. Pet. App. 21a. But this Court's tightly-confined exception for "functions 'exclusively' provided by government" would quickly swallow the rule if "this kind of tailoring by adjectives" were allowed. *Logiodice v. Trs. of Maine Cent. Inst.*, 296 F.3d 22, 27 (1st Cir. 2002) (rejecting attempt to "refine" the relevant function from the provision of "education" to "providing a publicly funded education available to all students generally").

Accordingly, courts can neither "widen" nor narrow "the lens" to define "the relevant function" in a manner that renders it traditionally and exclusively public. *Halleck*, 587 U.S. at 811 (rejecting argument that the function at issue "is not simply the operation of public access channels on a cable system, but rather is more generally the operation of a public forum for speech"); *cf. Carson*, 596 U.S. at 782 (rejecting Maine's argument that "[t]he public benefit Maine is offering is a free public education"). And in any event, "publicly funded education" at no cost to students is "not provided exclusively by government." *Logiodice*, 296 F.3d at 27; *see* 24-394 Pet. 27 (discussing availability of free, publicly funded education in Oklahoma outside of charter schools). The Oklahoma Supreme Court's gerrymander thus fails even on its own terms.

The court below fared no better in trying to shore up its state-action analysis by claiming Oklahoma "has outsourced one of its constitutional obligations" to charter schools. Pet. App. 21a. In making this

assertion, the court was invoking *West v. Atkins*, 487 U.S. 42 (1988), without citing it. But as this Court has explained, *West* was just applying the traditional-and-exclusive-public-function category to "the delegation" of a "traditionally exclusive public function"—namely, the state's constitutional duty "to provide medical treatment to injured inmates." *Sullivan*, 526 U.S. at 55. That is why *Halleck* treated *West* as "[r]elated[]" to the traditional-and-exclusive-public-function test and meriting mention only in a footnote. 587 U.S. at 810 n.1. Because Oklahoma has not delegated a function *that is traditionally and exclusively public*, *West* is beside the point.

In addition, *West* involved a plaintiff who "was literally a prisoner of the state (and therefore a captive to whatever doctor the state provided)," not a student free "to attend" public schools rather than St. Isidore or other charter options. *Logiodice*, 296 F.3d at 29. That lack of choice was critical to the state-action analysis in *West*: Because the inmate could turn "only" to "those physicians authorized by the State," any constitutional injury from his treatment "was caused … by the State's exercise of its right … to deny him a venue independent of the State to obtain needed medical care." 487 U.S. at 55; *see Howell v. Father Maloney's Boys' Haven, Inc.*, 976 F.3d 750, 754 (6th Cir. 2020) (Sutton, J.) (declining to extend *West* beyond the "'correctional setting'"). Here, by contrast, parents who "object to" sending their children to St. Isidore or any other charter school may turn to "public school" at no cost (or pay for another "private school"). *Rendell-Baker*, 457 U.S. at 832 n.1.

Accordingly, the fact that "the services" charter schools offer are ones Oklahoma "was required by state law to provide" makes no difference. *Robert S. v. Stetson Sch., Inc.*, 256 F.3d 159, 166 (3d Cir. 2001) (Alito, J.); *see* Pet. App. 21a-24a (emphasizing the Oklahoma Constitution requires the state to provide free, universal education). Indeed, "[t]his very argument" was "rejected in *Rendell-Baker*." *Robert S.*, 256 F.3d at 166. In response to the dissent's observation that under state law, "the State is *required* to provide a free education to all children, including those with special needs," *Rendell-Baker*, 457 U.S. at 849 (Marshall, J., dissenting), the majority explained this "policy choice in no way makes these services the exclusive province of the State," *id.* at 842 (majority). So too here.

II. THE DECISION BELOW THREATENS RELIGIOUS FREEDOM.

The decision below is not just fundamentally wrong, but fundamentally dangerous for a broad array of religious organizations. Indeed, its capacious understanding of state action not only puts religious charter schools in jeopardy; it threatens to brand as a state actor *any* religious entity that receives a charter from the government, is subject to heavy regulation, contracts with the government to provide services to the public, or carries out a public function. And this is a real problem, because state-actor status comes with the potential for crippling new liabilities, including (as this case shows) under the Establishment Clause. The decision below thus poses an existential threat to the ability of religious entities to operate in the public sphere.

A. The lower court's overbroad conception of the entwinement and public-function tests threatens to classify a host of religious entities as state actors.

If left undisturbed, the Oklahoma Supreme Court's sweeping view of "the entwinement and public function tests" could be used against a host of religious entities, many of which share some, if not all, of the characteristics the court used to designate St. Isidore as a state actor. Pet. App. 20a. That would not only threaten the religious organizations themselves, but the many Americans of all faiths or no faith who depend on them for a variety of services.

1. Start with the Oklahoma Supreme Court's "entwinement" analysis. Many religious entities could meet one or more of the various factors the court below held may transform a private actor into a state one.

To start, the court below relied on what it called St. Isidore's "state-created" status through the "charter" process. Pet. App. 21a. But nearly every entity, religious ones included, must secure a government charter or license of some sort to operate. For example, American University, originally a Methodist institution, was created in 1893 by a congressional charter.[3]

In fact, even *churches* require charters to function. To enjoy basic legal protections, such as holding and disposing real property, churches must obtain corporate charters from state governments. *See, e.g.*, *Balt. & P.R. Co. v. Fifth Baptist Church*, 108 U.S. 317,

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[3] Charter, American University Act of Incorporation, AMERICAN UNIVERSITY, https://tinyurl.com/2hrybn8u.

330 (1883) (explaining that a church incorporated so it could "hold and use an edifice, erected by it, as a place of public worship"); *Vaughn v. Faith Bible Church of Sudlersville*, 241 A.3d 1028, 1034 (Md. App. Ct. 2020) ("Churches in Maryland formally organize as religious corporations" in order to "attend more readily and efficiently to their temporal affairs"); K.S.A. 17-1701 ("Any religious society … may … become [a] bod[y] corporate under this act, by filing the charter required by this act[.]"). Indeed, courts have held that the First Amendment *requires* states to issue corporate charters to churches. *See Hope Cmty. Church v. Warner*, 2024 WL 4310866, at *2 (N.D. W. Va. Sept. 26, 2024) (holding invalid provision of West Virginia Constitution stating that "[n]o charter of incorporation shall be granted to any church or religious denomination"); *Falwell v. Miller*, 203 F. Supp. 2d 624, 633 (W.D. Va. 2002) (holding invalid similar provision of Virginia Constitution).

Relatedly, religious entities often must obtain government licenses to operate in the public arena. For instance, Oklahoma, like other states, requires all Oklahoma childcare facilities—many of which are operated by religious groups—to be licensed by the state. 10 Okla. Stat. § 405; *see Rebirth Christian Acad. Daycare, Inc. v. Brizzi*, 835 F.3d 742, 744 (7th Cir. 2016) ("Indiana statutes provide that, to operate a child care ministry lawfully, a religious organization must either obtain a license from or register with the Bureau [of Child Care]."). The same is true for religiously affiliated private schools. 70 Okla. Stat. § 21-103(A) (making it unlawful to operate a private school without a license). So too for religious organizations that serve the public in other ways. *See,*

e.g., 63 Okla. Stat. § 1-1118(B)(1) (permitting licensure of "religious organization[s] that use[ ] unpaid persons to sell or offer food on a more frequent basis than the occasional fundraising event").

Then there is the Oklahoma Supreme Court's emphasis on the state's "oversight of the operation" of charter schools, its monitoring of their "performance and legal compliance," and its involvement in their "internal operations and affairs." Pet. App. 21a. Again, this is not unique to charter schools. Many religious entities are subject to heavy regulation by federal and state authorities. Healthcare providers, in particular, are among the most heavily regulated entities in the country. And many of them are run by religious organizations, whether hospitals such as Cedars-Sinai and Adventist Health in Los Angeles, nursing homes like Catholic Community Health in Kansas City, and counseling services like Sparrow House in Dallas, to name just a few.[4]

Basing state action on heavy regulation would also pose a particular threat to religious schools. Even if they do not participate in a voucher or tuition-assistance program, these schools—in Oklahoma and elsewhere—must comply with various requirements. *See, e.g.*, W. Va. Code § 18-28-2 (requiring West Virginia religious schools to observe a 180-day school term with an average of five hours of instruction per day, maintain attendance and immunization records,

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[4] *See About*, CEDARS-SINAI, https://tinyurl.com/jehp7jx9; *Our Affiliations*, ADVENTIST HEALTH WHITE MEMORIAL, https://tinyurl.com/mvhxbk4n; *About*, CATHOLIC COMMUNITY HEALTH, https://tinyurl.com/bdd79fb6; *About Us,* SPARROW HOUSE COUNSELING, https://tinyurl.com/4e5hsf5z.

provide names and addresses of all students between seven and sixteen years old upon request, and comply with bus safety regulations and fire, health, and safety codes); Tenn. Code. § 49-50-801(b), (d) (imposing term-length requirements on "church-related schools"); 70 Okla. Stat. § 3-104(A)(7) ("Private and parochial schools may be accredited and classified in like manner as public schools."). Religiously-affiliated childcare facilities, too, are subject to extensive regulation. *See Rebirth Christian*, 835 F.3d at 743 ("Child care ministries are extensively regulated by the State of Indiana").

Similarly, federal, state, and local governments often partner with religious entities to accomplish important objectives, in turn subjecting those entities to extensive regulation. After all, these organizations have played a vital role in providing for the poor and destitute throughout our Nation's history, especially when the government is unable to do so. That includes the "care of orphaned and abandoned children," leading many governments to contract with religious nonprofits to provide adoption and foster care placement. *Fulton v. City of Philadelphia*, 593 U.S. 522, 547-48 (2021) (Alito, J., concurring in the judgment) (discussing history). Prisons also partner with ministries like Prison Fellowship or Aleph Institute to offer religiously based classes, support groups, and counseling to incarcerated individuals.[5] Localities likewise contract with organizations like Jewish Family Services to provide community support

[5] *In-Prison Programs,* PRISON FELLOWSHIP, https://tinyurl.com/yc4hs273; *Prison Programs*, ALEPH INSTITUTE, https://tinyurl.com/54t7jhkf.

and counseling services to their constituencies.[6] And nonprofits like the Salvation Army partner with FEMA to provide disaster relief.[7] The list goes on.

2. The ramifications of Oklahoma Supreme Court's view of "the 'public function' test" are equally breathtaking. Pet. App. 21a. If merely carrying out a "constitutional obligation[]"—including a duty under a *state* constitution—is enough to qualify as a state actor, all sorts of religious entities are in jeopardy. *Id.*

For example, the Fourth Circuit has (wrongly) applied its expansive theory of state action by constitutional obligation, adopted by the court below, to hold that private adoption agencies are state actors. *See E.R.L. by & through Doe v. Adoption Advoc., Inc.*, 2023 WL 1990300, at *2-3 (4th Cir. Feb. 14, 2023). And a federal court recently held that "transition age foster youth have the right to the 'basic human needs,'" such as "'food, clothing, shelter, medical care, and reasonable safety'"—things that many religious organizations regularly provide. *Ocean S. v. Los Angeles Cnty.*, 2024 WL 3973047, at *16 (C.D. Cal. June 11, 2024). The many religious nonprofits that offer adoption and foster care services could therefore end up qualifying as state actors under the Oklahoma Supreme Court's theory.

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[6] *The New JFS Program That's Changing How We Talk About Mental Health*, JFS BLOG, https://tinyurl.com/3zdts9d2.

[7] *A Federal Assistance for Hurricane Helene Exceeds $210 Million, FEMA Prepares for Dual Response with Hurricane Milton Strengthening as it Moves Toward Gulf Coast of Florida,* FEMA, https://tinyurl.com/3ezta77t.

Many state constitutions include a duty to provide healthcare, so religious healthcare providers could find themselves in a similar boat. *See* Elizabeth Leonard, *State Constitutionalism and the Right to Health Care*, 12 U. PA. J. CONST. L. 1325, 1402-06 (2010) (noting 14 state constitutions list healthcare as a right or a "public concern"). Religious entities that provide shelter to the homeless face the same threat, as some jurisdictions have recognized "a right to shelter" as a matter of state constitutional law. *Jenkins v. New York City Dep't of Homeless Servs.*, 643 F. Supp. 2d 507, 512 (S.D.N.Y. 2009). Under the decision below, a state's decision to "outsource[]" any of these responsibilities to religious organizations will be enough to saddle them with state-actor status. Pet. App. 21a.

B. Religious entities that are deemed state actors would be threatened with new, destructive liabilities.

State-actor status is not just a theoretical construct. It comes with real-world consequences. Chief among them is the threat of lawsuits and liabilities currently reserved for the government. Indeed, these lawsuits already occur—they just regularly fail under the state-action doctrine. *See, e.g.*, *Rogers v. HHS*, No. 19-cv-01567, Dkt. 278 (D.S.C. Nov. 17, 2022) (religious foster agencies); *Uhuru v. Moskowitz*, 2009 WL 2020758, at *6-9 (C.D. Cal. July 6, 2009) (Jewish prison chaplain); *Rockwell v. Roman Cath. Archdiocese of Bos.*, 2002 WL 31432673, at *2 (D.N.H. Oct. 30, 2002) (Roman Catholic diocese). But under the Oklahoma Supreme Court's overly broad conception of the state-action doctrine, these suits might prevail, or at least may not fail so easily.

As a result, religious entities would face a litany of new liabilities that could chill their activities and force them to withdraw from the public sphere. *See Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 738 (2020) (noting that the religious mission of entities is often "the very reason for the[ir] existence"). And that would be detrimental not only to religious groups, but also to the countless individuals—of various faith backgrounds or none at all—that depend on their services.

1. For example, the consequences of state-actor designation are "far reaching" because that status comes with the possibility of "suits under the Equal Protection Clause." *San Francisco Arts & Ath.*, 483 U.S. at 543 n.23. This Court has interpreted that provision to mean that, in some contexts, government entities may not distinguish between men and women. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 534 (1996). Yet some religions hold different views. *See, e.g.,* CODEX IURIS CANONICI (1983) c.1024 (Code of Canon Law) (Roman Catholic Priesthood reserved to men); *Partner Shuls*, YAD YEHUDA OF GREATER WASHINGTON, https://tinyurl.com/5drw8hjc, accessed Nov. 1, 2024 (list of male Rabbis who serve as liaisons for Jewish food insecurity charity in the Washington, D.C. area); *Sura An-Nisa* 4:34, THE QUR'AN (discussing men's roles as "caretakers of women").

Likewise, some religious groups and practices are rooted in ethnic distinctions forbidden under the Equal Protection Clause. *See Hernandez v. New York*, 500 U.S. 352, 360 (1991); *see, e.g., Church History*, UKRAINIAN ORTHODOX CHURCH OF THE USA,

https://tinyurl.com/2rc5dshd (noting the Ukrainian Orthodox Church of the USA began because its founders believed that Ukrainian Americans should have their own church because of their "distinctive ethnic identity"); Tzvi Freeman & Yehuda Shurpin, *Why is Jewishness Matrilineal? Maternal Descent in Judaism*, CHABAD.ORG, https://tinyurl.com/45ta8pdt (explaining that under Jewish law, a person is not fully Jewish unless born to a Jewish mother).

Similarly, state actors must comply with the Due Process Clause, which this Court has read to bar undue government interference in decisions regarding marriage, contraception, and childrearing. *See Obergefell v. Hodges*, 576 U.S. 644, 666-76 (2015); *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 533-35 (1925). But many religions have deeply held beliefs in these areas as well. *See, e.g.*, *Zubik v. Burwell*, 578 U.S. 403 (2016) (religious opposition to certain forms of contraception); *Wisconsin v. Yoder*, 406 U.S. 205, 209-13 (1972) (Amish educational practices); Imen Gallala-Arndt, *The Impact of Religion in Interreligious Custody Disputes: Middle Eastern and Southeast Asian Approaches*, 63 AM. J. COMP. L. 829, 831 (2015) (certain interpretations of Islamic law teach that Muslims may not marry non-Muslims).

Of course, religious entities will wish to promote these elements of their faiths as they provide services to the public. *See, e.g.*, *Fulton*, 593 U.S. at 530 (Catholic Social Services' belief that "marriage is a sacred bond between a man and a woman" informs its work with Philadelphia's foster system); *Sklar v. Comm'r*, 549 F.3d 1252, 1254 (9th Cir. 2008) (noting

plaintiffs had a "deeply held religious belief that as Jews they have a religious obligation to provide their children with an Orthodox Jewish education"). If deemed state actors, religious organizations could not act in accordance with these deeply held beliefs without risking crippling liability under the Fourteenth Amendment.

2. Religious entities classified as state actors would also face new *statutory* liabilities. Title VII, for example, prohibits certain employers from engaging in religious discrimination. *See* 42 U.S.C. § 2000e-2. Title IX likewise forbids educational institutions from engaging in sex discrimination. *See* 20 U.S.C. § 1681. Of course, both statutes—as well as the First Amendment—exempt from liability private religious organizations that draw otherwise impermissible lines based on their faith. *See id.* § 1681(a)(3); 42 U.S.C. § 2000e-1(a); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012) (recognizing "ministerial exception").

But these exemptions protect only *religious* organizations. 42 U.S.C. § 2000e-1(a); 20 U.S.C. § 1681(a)(3); *see Our Lady of Guadalupe*, 591 U.S. at 737 (ministerial exception covers "religious institutions"). Treating a religious organization as an arm of the state could create confusion over the viability of the exemptions and thus spawn new theories of statutory liability. A former employee might sue a religious organization under Title VII for its decision to employ only those who practice the faith. *See, e.g.*, *Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc.*, 41 F.4th 931, 945-47 (7th Cir. 2022) (Easterbrook, J., concurring) (discussing scope

of Title VII's religious organization exemption). Or a former student might sue a religious organization under Title IX for its decision to adhere to religious doctrine drawing distinctions based in sex. *See, e.g.*, *Maxon v. Fuller Theological Seminary*, 549 F. Supp. 3d 1116, 1119, 1128 (C.D. Cal. 2020), *aff'd*, 2021 WL 5882035 (9th Cir. Dec. 13, 2021). Although these types of suits are currently nonstarters, the decision below, with its sweeping view of state action, threatens to change the legal landscape—and with it the clarity these exemptions provide.

3. Finally, as this case reveals, designating religious entities as state actors could immediately expose them to liability under the Establishment Clause. *See Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 537 (2022); *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 36-38 (2019).

The Establishment Clause issues associated in treating a religious entity as a state actor abound. For instance, could the entity maintain its particular religious affiliation? *See Larson v. Valente*, 456 U.S. 228, 244 (1982) ("[O]ne religious denomination cannot be officially preferred over another."). Could it require its employees to share its religious affiliation or beliefs? *See Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (government cannot "force [anyone] to profess a belief or disbelief in any religion"). Could it engage in the types of overt religious activities that are central to the identity of many religious organizations, schools included? *See Lee v. Weisman*, 505 U.S. 577, 589 (1992) (public school could not require students to engage in a "formal religious exercise").

Given the reach of this Court's precedents interpreting the Establishment Clause—and the litigation they could spawn—state-actor status could imperil thousands of religious entities across the country.

* * *

This case is not just about one Catholic school in Oklahoma. Nor is merely about the viability of religious schools more generally. It is about the ability of religious entities of all stripes to interact with the government and participate in the public square. The decision below threatens that ability, in violation of the Free Exercise Clause. This Court should grant review and reverse the Oklahoma Supreme Court.

CONCLUSION

This Court should grant the petitions and reverse the decision below.

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