NO. 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 of Oklahoma, ex rel. OKLAHOMA,
Respondents

ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL,
Petitioner,

v.

GENTNER DRUMMOND, Attorney General of Oklahoma, ex rel. OKLAHOMA,
Respondents.

On Writs of Certiorari to the Supreme Court of Oklahoma

BRIEF OF WORLD FAITH FOUNDATION AND NC VALUES INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae respectfully urge this Court to reverse the Oklahoma Supreme Court ruling.

World Faith Foundation ("WFF") is a California religious non-profit corporation established to preserve and defend the customs, beliefs, values, and practices of religious faith and speech, as guaranteed by the First Amendment, through education, legal advocacy, and other means. James L. Hirsen, WFF's founder, has served as professor of law at Trinity Law School and Biola University in Southern California and is the author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen is a frequent media commentator who has taught law school courses on constitutional law. WFF has made numerous appearances in this Court as *amicus curiae*.

NC Values Institute, formerly known as the Institute for Faith and Family, is a North Carolina nonprofit corporation that works in various arenas of public policy to protect faith, family, and freedom, including the right to school choice. See https://ncvi.org.

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[1] *Amici curiae* certify that 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, has made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Charter schools expand educational choices and facilitate the exercise of constitutional rights without evading the State's constitutional duties. Many parents are dissatisfied with traditional public schools and prefer to enroll their children in schools that align with their religious faith and values. But Oklahoma uses a nonsectarian mandate to exclude schools many would otherwise choose. The State uses statutory labels to warp the state action doctrine and exploits flawed, outdated Establishment Clause principles to obscure the reality of its charter school program and sharply curtail available school choices.

ARGUMENT

I. ST. ISIDORE IS NOT A STATE ACTOR.

The state-action doctrine "protects a robust sphere of individual liberty" by distinguishing and enforcing the boundary between government and private conduct. *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 808 (2019); *see Brentwood Academy v. Tennessee Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 295-296 (2001). There is no "bright-line rule" for this "highly fact-specific" inquiry. *Peltier v. Charter Day School, Inc.*, 37 F.4th 104, 116 (4th Cir. 2022). Even this Court's precedent "lacks a neat analytical structure." *Id.* at 141 (Quattlebaum, J., dissenting). There is "no one fact [that] can function as a necessary condition across the board" nor is "any set of circumstances absolutely sufficient." *Brentwood*

Academy, 531 U.S. at 295-296. State action is not established by extensive funding, regulations, or the existence of a government contract.

This Court has identified three major tests: (1) "exclusive public function," *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 352-354 (1974); (2) government coercion, *Blum v. Yaretsky*, 457 U.S. 991, 1004-1005 (1982); (3) joint participation between government and a private entity, *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941-942 (1982). *Manhattan*, 587 U.S. at 809. The Oklahoma Supreme Court discerned five tests – "significant encouragement," "willful participant in joint activity," "government control," "entwinement," and "public function." *Drummond ex rel. State of Okla. v. Okla. Statewide Virtual Charter Sch. Bd.*, 558 P.3d 1, 28 (Okla. 2024).

Until recently, when the Fourth Circuit found a North Carolina charter school to be a state actor for purposes of an alleged equal protection violation, "neither [this] Court nor any federal appellate court had concluded that a publicly funded private or charter school is a state actor under § 1983." *Peltier*, 37 F.4th at 137 (Quattlebaum, J., dissenting). The Oklahoma Supreme Court relied heavily on *Peltier* to disqualify St. Isidore, raising the added complications of the Religion Clauses because of the school's religious character.

None of these tests render St. Isidore a state actor. Education is not an exclusively public function. Oklahoma has not improperly delegated its own

constitutional duties to a private charter school. Oklahoma and St. Isidore do not have an interdependent, entwined relationship. The Charter Board's accommodation of St. Isidore's religious convictions does not constitute the coercion or substantial encouragement required for state action, nor does it enable Oklahoma to evade its constitutional duties. The charter school statutory scheme, applied equally to secular and religious schools, enhances choice and facilitates the exercise of parental and religious freedom rights.

A. Statutory labels do not control.

This Court has already clarified that "statutory designations do not make a private actor's conduct state action." *Peltier*, 37 F.4th at 145 (Quattlebaum, J., dissenting), citing *Jackson*, 419 U.S. at 350 n.7 (utility company); *Polk County v. Dodson*, 454 U.S. 312, 324 (1981) (public defender). The reverse is also true—the "nominally private character" of an entity may be "overborne by the pervasive entwinement of public institutions and public officials in its composition and workings." *Brentwood*, 531 U.S. at 298. Labeling "charter schools" as "public schools" established by contract (70 O.S. Supp. 2022, § 3-132(D)) is insufficient. The Fourth Circuit played the same word games in *Peltier*—"charter schools are *public schools*" and their employees are "*public school employees*." N.C.G.S. § 115C-218.90(a)(4) (emphasis added). *Peltier*, 37 F.4th at 117. The reality is that Oklahoma has extended "an invitation for *private* entities to *contract* to provide educational choices." *Drummond*, 558 P.3d at 17 (Kuehn, J., dissenting).

B. State action is not established by government funding, regulations, or contract.

A private entity's conduct may be state action "if, *though only if*, there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Brentwood,* 531 U.S. at 295 (emphasis added); *Jackson*, 419 U.S. at 351; *Perkins v. Londonderry Basketball Club*, 196 F.3d 13, 19 (1st Cir. 1999). This "close nexus" must exist between the state and the alleged violation, not merely between the government and a private actor. This is "[t]he one unyielding requirement." *Brentwood,* 531 U.S. at 295. Neither funding, nor regulation, nor the mere existence of a contract is sufficient. "That programs undertaken by the State result in substantial funding of the activities of a private entity is no more persuasive than the fact of regulation of such an entity in demonstrating that the State is responsible for decisions made by the entity in the course of its business." *Blum*, 457 U.S. at 1011.

Funding. Oklahoma charter schools receive funds according to "statutory requirements and guidelines for existing public schools," and employees receive benefits comparable to public school employees. *Drummond*, 558 P.3d. at 10; 70 O.S. Supp. 2021, § 3-135(A)(12), (14), (15). But even substantial government funding does not establish the required "close nexus." *See Rendell-Baker v. Kohn,* 457 U.S. 830, 80 (1982) ("[W]e conclude that the school's receipt

of public funds does not make the discharge decisions acts of the State.").

Even where a private entity receives virtually *all* its funding from the government, this Court has rejected the argument that there is an interdependent relationship giving rise to state action. *See, e.g., Blum*, 457 U.S. at 1027-1028 (Brennan, J., dissenting) ("The State subsidizes practically all of the operating and capital costs of the facility, and pays the medical expenses of more than 90% of its residents."); *Rendell-Baker*, 457 U.S. at 847 (Marshall, J., dissenting) ("The New Perspectives School receives virtually all of its funds from state sources."). This Court found an absence of state action and therefore rejected an employee's free speech challenge where a private school received *99% of its funding* from the government. *Rendell-Baker*, 457 U.S. at 836-837. Private schools do not morph into state actors no matter how much state funding flowed to them. "A private party cannot be transformed into a state actor simply because it is paid with government funds for providing a service." *Santiago v. Puerto Rico*, 655 F.3d 61, 72 (1st Cir. 2011).

Regulation. The Charter School Board "exercises significant ongoing oversight and evaluation of all sponsored virtual charter schools" and may remedy deficiencies or even close a school. *Drummond*, 558 P.3d. at 10. But extensive regulation per se is insufficient. *Blum*, 457 U.S. at 1004-05; *Rendell-Baker*, 457 U.S. at 840-841. In a leading case on point, the "fact that a business is subject to state regulation does not by itself convert its action into that of the

State." *Manhattan*, 815, quoting *Jackson*, 419 U.S. at 350. Even "a heavily regulated, privately owned utility, enjoying at least a partial monopoly in the providing of electrical service within its territory," is not a state actor. *Id.* at 358. The "mere existence" of a "regulatory scheme"—even if "extensive and detailed"—did not render the utility a state actor. *Id.* at 350 and n. 7.

The presence of state action may hinge on the availability of other options. A physician retained by the state to treat inmates was deemed a state actor because incarceration restricts the prisoners' ability to seek medical care elsewhere. *West v. Atkins,* 487 U.S. 42, 55 (1988); *see also Americans United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 425-426 (8th Cir. 2007) (prisoners had no alternatives to the religious rehabilitation program contracted by the state). But where a student enjoys a statutory right to transportation to and from school—yet has other options available—the actions of a private transportation company are not attributed to the state. *Santiago*, 655 F.3d at 70. Here, no student is coerced into attending a particular school. Many choices are available—the very purpose of creating charter schools.

Contract. Charter schools are "established by contract with a school district or other governmental entity. *See* 70 O.S. Supp. 2022, § 3-132(D)." *Drummond*, 558 P.3d. at 10. These schools are among the "[n]umerous private entities in America [that] obtain . . . government contracts." *Manhattan*, 587

U.S. at 814. "[I]f th[at] fact[] sufficed to transform a private entity into a state actor, a large swath of private entities in America would suddenly be turned into state actors . . . subject to a variety of constitutional constraints," but "that is not the law." *Id*. at 814-815. St. Isidore and other charter schools are private corporations that contract with Oklahoma to provide education to its citizens.

An instructive line of government contract cases addresses state action. *See, e.g., Rendell-Baker,* 457 U.S. at 838 (private school teacher terminated for her speech); *Blum,* 457 U.S. at 993 (nursing home transferred Medicaid patients); *Jackson,* 419 U.S. at 351 (private utility terminated services for non-payment); *West v. Atkins,* 487 U.S. at 54 (contract physician treated state inmates). The contractual relationship may generate litigation alleging that the private contractor's conduct should be attributed to the government. The common thread is the existence of a contract between the government and a private entity, raising the issue of whether the private contractor's conduct can be imputed to the state for constitutional purposes. To establish state action, the private party's conduct must be "fairly attributable to the state." The challenged actions in *Rendell-Baker* involved personnel decisions at a private institution, matters beyond the state's regulation and thus not "fairly attributable to the State." 457 U.S. at 841-42. "Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing" contractual services for government entities. *Id.* at 840-41.

II. OKLAHOMA HAS NOT DELEGATED AN EXCLUSIVELY PUBLIC FUNCTION.

St. Isisdore cannot be classified as a "state actor" under this Court's precedents unless the State has delegated an *exclusively* public function to it.

A. Education is not an *exclusively* public function.

Education existed in America long before the advent of public schools. "Education is not and never has been a function reserved to the state." *Logiodice v. Trustees of Maine Cent. Inst.*, 296 F.3d 22, 26-27 (1st Cir. 2002). This Court should affirm its own abundant precedent. "Supreme Court precedent is not like the green vegetables on a buffet line that we can simply pass by for more dessert." *Peltier*, 37 F.4th at 148 (Quattlebaum, J., dissenting). Very few functions meet the demanding test for exclusivity, and education is not among them.

Private entities may cooperate with government in providing education and receive funding without being deemed state actors. The encouragement of private schools is constitutional and furthers the goal of making quality education widely accessible. "An educated populace is essential to the political and economic health of any community," and accordingly, assisting families with the cost helps "ensur[e] that the State's citizenry is well educated." *Mueller v. Allen*, 463 U.S. 388, 395 (1983).

The Oklahoma Supreme Court admits that education "may not be a traditionally exclusive public function," but the court plays word games—"the Oklahoma Constitutional provision for *free public* education is exclusively a public function." *Drummond*, 558 P.3d at 12. The court fell down the slippery slope of the Fourth Circuit, which found a charter school, "operating a school that is part of the North Carolina public school system," was "perform[ing] a function traditionally and exclusively reserved to the state." *Peltier*, 37 F.4th at 119. This circular characterization "assum[es] the answer to the very question asked." *Id.* at 154 (Wilkinson, J., dissenting); *see Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 638 (1819) ("From the fact, then, that a charter of incorporation has been granted, nothing can be inferred, which changes the character of the institution, or transfers to the government any new power over it.")

Exclusivity is the critical qualifier. The "public function" test requires showing "the private entity performs a traditional, *exclusive* public function." *Manhattan*, 587 U.S. at 809 (emphasis added). The fact "that a private entity performs a function which serves the public . . . does not make its acts state action." *Rendell-Baker*, 457 U.S. at 842 (educating maladjusted students). The function must have traditionally been "the *exclusive* prerogative of the State." *Ibid.*, citing *Jackson,* 419 U.S. at 353; quoted in *Blum*, 457 U.S. at 1011 (emphasis added).

Exclusivity is a high bar that "very few" functions meet. *Manhattan*, 587 U.S. at 809. "While many

functions have been traditionally performed by governments, very few have been *exclusively reserved* to the State." *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 158 (1978) (internal quotation marks omitted) (emphasis added). Running elections is one. *Terry v. Adams*, 345 U.S. 461, 468-470 (1953). Operating a company town is another. *Marsh v. Alabama*, 326 U.S. 501, 505-509 (1946). But many functions fail—sports associations, insurance payments, nursing homes, special education, criminal defense (indigents), private dispute resolution, electricity. *Manhattan*, 587 U.S. at 810 (collecting cases).

The *absence* of exclusivity precludes state action: *Rendell-Baker*, 457 U.S. at 842 (education of maladjusted students); *Jackson*, 419 U.S. at 353 (regulated utilities); *Blum*, 457 U.S. at 1011 (nursing homes); *Santiago*, 655 F.3d at 70 (student transportation); *Perkins*, 196 F.3d at 19 (amateur sports program).

Even utilities, admittedly an "essential public service," are not the exclusive province of the state. *Jackson*, 419 U.S. at 352. Justice Douglas argued in dissent that the actions of a "monopolist providing an essential public service" were "sufficiently intertwined with those of the State" to find state action." *Id.* at 362 (Douglas, J., dissenting). Justice Marshall asserted that the private utility company "supplie[d] an essential public service that is in many communities supplied by the government." *Id.* at 371 (Marshall, J., dissenting). But the majority insisted state action requires that a private entity exercise

"powers traditionally *exclusively reserved* to the State." *Id.* at 352 (emphasis added). If the essential public services in *Rendell-Baker* (education) and *Jackson* (utilities) are not *exclusively* public functions, then surely the same is true of Oklahoma's charter schools.

B. The very purpose of charter schools is to enhance available educational choices. Public and private educational alternatives remain widely available.

Exclusivity, by definition, implies the absence of alternatives. Even a cursory look at the Oklahoma Charter Schools Act reveals that creating alternatives is at the core of its purposes—"increase learning opportunities," "encourage the use of different and innovative teaching methods," "provide additional academic choices for parents and students," and other similar goals. 70 O.S. Supp. 2021, § 3-131(A). Charter schools are not *alternatives* to public schools if they *are* public schools. Both religious and independent private schools "by their very nature provide diverse alternative curriculums and methods." *Peltier,* 37 F.4th at 144 (Quattlebaum, J., dissenting). The Oklahoma Supreme Court and Fourth Circuit rulings threaten to "transform[] all charter schools . . . into state actors." *Id.* at 137 (Quattlebaum, J., dissenting). That would squelch "innovative alternatives to traditional public education," limiting choices available to parents—not only in one or two states but across the nation. *Ibid*. Such an expansive view of state action would "drape a pall of orthodoxy over charter schools and shift educational choice and

diversity into reverse." *Id.* at 150 (Wilkinson, J., dissenting).

The goal of charter schools is to "[p]rovide parents and students with expanded choices in the types of educational opportunities that are available within the public school system." *Peltier,* 37 F.4th at 138 (Quattlebaum, J., dissenting), citing N.C.G.S. § 115C-218(a)(5). In *Peltier*, any child eligible for public school had the option to select a charter school, "*but no one had to attend one*." *Id.* § 115C-218.45(a)-(b) (emphasis added). The same is true in Oklahoma. Private nonprofit corporations, not local public school boards, operate charter schools according to each school's charter—the *contract* between the school and the state, incorporating federal and state constitutional protections.

This Court once stated that "[a]uthority over public schools belongs to the State." *Bd. of Educ. of Kiryas Joel Village School District v. Grumet,* 512 U.S. 687, 698 (1994). But the special school district in *Grumet* subjected *all* families in the district to a religiously controlled *public* school system. Oklahoma families have a wide spectrum of choices with no coercion on the horizon. The uncoordinated choices of parents are hardly tantamount to exclusive government authority over *public* education.

This case is consistent with cases involving religious schools. In *Mueller*, 463 U.S. 388, *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986), and *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) "[t]he incidental advancement of a

religious mission, or the perceived endorsement of a religious message, [was] reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits." *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002). Oklahoma authorizes the creation of charter schools, thereby enabling parental choices—but then takes its hands off the wheel.

This case is analogous to *Pierce v. Soc'y of Sisters,* 268 U.S. 510 (1925), where the choice was between public and private (or parochial) schools. *Pierce*, *Peltier,* and this case all "stand for the baseline proposition that parents have some right 'to choose how and in what manner to educate their children.'" *Peltier*, 37 F.4th at 154 (Wilkinson, J., dissenting), quoting *Zelman*, 536 U.S. at 680 n.5 (Thomas, J., concurring). Oklahoma offers families many choices.

III. OKLAHOMA'S ACCOMMODATION OF RELIGIOUS CHARTER SCHOOLS DOES NOT EVADE THE STATE'S CONSTITUTIONAL DUTIES BUT RATHER FACILITIES THE EXERCISE OF CONSTITUTIONAL RIGHTS.

A. Oklahoma has not improperly delegated any of its constitutional duties.

"[A] State may not delegate its civic authority to a group chosen according to a religious criterion." *Grumet,* 512 U.S. at 698, quoting *Larkin v. Grendel's Den, Inc.,* 459 U.S. 116, 126 (1982). This thread runs consistently throughout relevant federal case law.

The delegation cases involve more than "mere acquiescence" or accommodation. Each one implicates a legal mandate that some exclusively public function be delegated to an organization or person on the basis of religious identity: *Grumet*, 512 U.S. at 690 (state statute); *Larkin*, 459 U.S. at 122 (state statute); *Barghout v. Bureau of Kosher Meat & Food Control,* 66 F.3d 1337, 1338-39 (4th Cir. 1995) (city ordinance); *Commack Self-Service Kosher Meats, Inc. v. Weiss,* 294 F.3d 415, 418 (2d Cir. 2002) (state statutory scheme). This case involves no comparable mandate.

In *Grumet*, the government intentionally drew village boundaries to exclude all but the religious enclave of Satmar Hasidim, thus carving out a special school district to serve solely this religious community. 512 U.S. at 690. This Court found that action "tantamount to an allocation of political power on a religious criterion." *Ibid*. The government had "delegat[ed] the State's discretionary authority over public schools to a group defined by its character as a religious community." *Id*. at 696.

In *Larkin*, a statute expressly delegated zoning powers to *churches* by granting them absolute veto power over liquor license applications. 459 U.S. at 125. The zoning function, including the "power to veto certain liquor license applications," is "a power ordinarily vested in agencies of government." *Id*. at 121-122.

In *Barghout*, "investigative, interpretive, and enforcement power" was vested "in a group of individuals [ordained Orthodox Rabbis] based on their

membership in a specific religious sect." *Barghout,* 66 F.3d at 1342 (bureau created to enforce prohibition on fraudulent sale of kosher food).

In *Commack*, a New York statute prohibited the fraudulent sale of kosher food, tying its definition to religious doctrine—"prepared in accordance with the orthodox Hebrew religious requirements." *Commack,* 294 F.3d at 418.

Oklahoma's case is not like these or other cases where civic authority is delegated to an organization because of its religious identity, creating a "fusion" of church and state that violates the Establishment Clause. There is no "fusion of church and state" in Oklahoma's charter school scheme—"the difference lies in the distinction between a government's *purposeful delegation on the basis of religion* and a *delegation on principles neutral to religion*, to individuals whose religious identities are incidental to their receipt of civic authority." *Grumet,* 512 U.S. at 699 (emphasis added).

Religious organizations may serve the public and even use government funds to do so. They need not be quarantined or disabled from participating in government-financed programs, including education. *Bowen v. Kendrick,* 487 U.S. 589, 609 (1988); *Roemer v. Bd. of Pub. Works of Md.,* 426 U.S. 736, 746 (1976) ("[T]he State may send a cleric . . . to perform a wholly secular task."). On the contrary, exclusion sends a message of "callous indifference" never intended by the Establishment Clause. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984), citing *Zorach v. Clauson,* 343

U.S. 306, 314 (1952). The Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Ibid.*

It is only when a private religious entity performs an *exclusively* public function that its conduct may morph into state action and risk violating the Establishment Clause. State action is easily identified in *Grumet*, *Larkin*, *Barghout*, and *Commack,* where an *exclusively* public function is delegated to a group defined by religious criteria. St. Isidore was not granted its charter *because* of its religious affiliation; the critical *exclusivity* factor is absent. The public function test ensures that government does not avoid its constitutional duties. Accommodation of a religious organization's doctrine does not obstruct that purpose but rather facilitates First Amendment principles.

Religious accommodation stands in stark contrast to a state's avoidance of its constitutional duties. The Charter Board negotiated terms with St. Isidore based on its ability to effectively administer the charter school program—not its religious identity. Although the act of awarding the contract and granting the accommodation are state actions, the private conduct being accommodated is not thereby imputed to the government. The contract merely allows St. Isidore to perform in a manner consistent with its religious doctrine. This static position departs from the ongoing exercise of discretion that doomed the laws at issue in *Grumet*, *Larkin*, *Barghout*, and *Commack*. Treating St. Isidore differently because of its religious status would spark hostility the Establishment Clause was never meant to create.

In some government contract cases, Establishment Clause violations have occurred because of express religious content. *Cooper v. U.S. Postal Service* involved a religious display in a contract postal unit. 577 F.3d 479 (2d Cir. 2009). "Article I, Section 8 of the Constitution provides that Congress shall have power . . . [t]o establish Post Offices and post Roads" (*id*. at 485) and "Congress granted to the USPS the exclusive duty to create and operate Post Offices. . ." (*id*. at 492). *Prison Fellowship Ministries* implicated a Christian rehabilitation program operated inside a state prison. "[T]he state effectively gave InnerChange its 24-hour power to incarcerate, treat, and discipline inmates." 509 F.3d at 423. In both cases, a private entity performed an exclusively government function.

Unlike these cases, St. Isidore's relationship with the State is contractual—not the prohibited "fusion of governmental and religious functions" that forms the "core rationale underlying the Establishment Clause." *Larkin,* 459 U.S. at 126-127, quoting *Abington School District v. Schempp,* 374 U.S. 203, 222 (1963). Such a contract does not "enmesh churches in the exercise of substantial governmental powers. . . ." *Larkin,* 459 U.S. at 126.

B. Oklahoma has not evaded any of its constitutional duties.

"The public function analysis is designed to flush out a State's attempt to evade its responsibilities by delegating them to private entities." *Perkins*, 196 F.3d at 18-19. *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961) is a template for such evasion. The

government tried to evade its constitutional responsibilities by leasing a restaurant to a private entity rather than operating it directly. The restaurant's racial discrimination was attributed to the government. "[N]o State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be . . . ." *Burton*, 365 U.S. at 725. The government may not "accommodate" racial discrimination. Here, Oklahoma's accommodation of religion facilitates the exercise of constitutional rights, including religious liberty and parental rights to direct the education of their children. Oklahoma did not evade its responsibility for education because it "never stopped providing a public school system free to all. . . . *Providing an option of charter schools does not mean that [Oklahoma] delegated its obligation to provide a public education system*." *Peltier*, 37 F.4th at 146-147 (Quattlebaum, J., dissenting) (emphasis added).

Unlike past cases that facilitated practices like racial segregation—in defiance of the Constitution—Oklahoma accommodates religious freedom and parental rights. The broad array of choices permitted to families serves the Establishment Clause goal of protecting against coerced financial support of religion. "[W]here the state law is genuinely directed *at enhancing a recognized freedom of individuals* . . . such as the right of parents to send their children to private school . . . the Establishment Clause no longer has a prohibitive effect." *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 802 (1973) (Burger, C.J., dissenting) (emphasis added).

Oklahoma's charter school scheme facilitates the *exercise* of parental and religious rights, not the *denial* of rights like equal protection and freedom from discrimination. Decades ago, "[t]he prospect of subsidized private schools threatened to aggravate the difficulties of desegregation by expanding the avenues for white flight." Douglas Laycock, *Why the Supreme Court Changed Its Mind About Government Aid to Religious Institutions: It's a Lot More than Just Republican Appointments*, 2008 BYU L. Rev. 275, 285 (2008). This Court rightly struck down schemes to deny equal protection and access to public education by diverting public funds to racially discriminatory private schools. *Griffin v. County School Board*, 377 U.S. 218, 233 (1964) (injunction against tuition grants and tax credits to such schools). In *Griffin*, tax credits enabled *denial* of rights to public education and equal protection. In Oklahoma, the broad range of charter schools enables the *exercise* of parental and religious rights without trampling any other rights.

Education is compulsory for school-aged children, but "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce,* 268 U.S. at 535. Many families cannot afford the tuition for an education compatible with their beliefs. Oklahoma's program is a permissible accommodation that opens doors for such families. Ever since the initiation of public schooling and compulsory education laws, it has been desirable to facilitate choices. Jonathan D. Boyer, *Education Tax Credits: School Choice Initiatives Capable of Surmounting*

Blaine Amendments, 43 Colum. J.L. & Soc. Probs. 117, 119 (2009). Justices in both *Everson* and *Nyquist* expressed sympathy for the double burden borne by parents who place children in private schools while supporting public schools with their taxes. *Everson v. Bd. of Educ.,* 330 U.S. 1, 18 (1947) (Jackson, J., dissenting); *see Nyquist*, 413 U.S. at 788-789. "[I]t is no more than simple equity to grant partial relief to parents who support the public schools they do not use." *Nyquist,* 413 U.S. at 803 (Burger, J., concurring in part and dissenting in part). It is true today that "many parents of many different faiths still believe that their local schools inculcate a worldview that is antithetical to what they teach at home." *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 508 (2020) (Alito, J., concurring). Charter schools and other innovative options "help[] parents of modest means do what more affluent parents can do: send their children to a school of their choice." *Ibid.*

Contrary to this Court's precedent, the Oklahoma Supreme Court insists that approval of St. Isidore's charter would improperly delegate the state's constitutional duty to provide free public education—in other words, evade the State's constitutional duties. That position is more consistent with dissenting opinions in *Rendell-Baker* and *Jackson* than the Court's affirmative rulings. The *Rendell-Baker* dissent argued that "[t]he State ha[d] delegated . . . its statutory duty to educate children." *Rendell-Baker*, 457 U.S. at 844 (Marshall, J., dissenting). The majority was not persuaded, even though "the State is *required* to provide a free education to all children, including those with special needs." *Id.* at 848

(Marshall, J., dissenting). The Oklahoma Supreme Court tracks these dissents—"the Oklahoma Legislature has a constitutional duty to establish a system of free public schools." *Drummond*, 558 P.3d at 3; Okla. Const. art. 13, § 1. "St. Isidore will implement a religious curriculum and activities that directly impact the school's core education function." *Drummond*, 558 P.3d at 13. Characterizing St. Isidore as a "surrogate of the State," the court branded the school as "a governmental entity and state actor." *Id.* at 11.

The Fourth Circuit reached similar conclusions in a case heavily relied on in *Drummond*. "The state bears 'an affirmative obligation' under the state constitution to educate North Carolina's students," which it has partially "delegated . . . to charter school operators." *Peltier*, 37 F.4th at 118. "[S]uch a delegation of a state's responsibility renders a private entity a state actor . . . and leave[s] its citizens with no means for vindication of [their] constitutional rights." *Ibid.*, citing *West v. Atkins,* 487 U.S. at 56-57 & n. 14 (citations omitted). But *West* is inapposite. That case involved an injured state prisoner who indeed had no other means to vindicate his right to adequate medical treatment, and it was thus appropriate to hold that a physician hired by the state was a state actor. Under these circumstances, the state could not evade its constitutional duty to provide medical care. But for Oklahoma in this case and North Carolina in *Peltier*, charter schools expand opportunities for families to vindicate their right to free public education. It is incomplete and misleading to conclude that "a private entity is a state actor when

the government has outsourced one of its constitutional obligations to the entity." *Drummond*, 558 P.3d at 12, citing *Manhattan*, 587 U.S. at 810 n. 1. The *Manhattan* footnote states that "a private entity *may, under certain circumstances*, be deemed a state actor when the government has outsourced one of its constitutional obligations to a private entity" (emphasis added). The italicized words, omitted by the Oklahoma Supreme Court, reveal that "certain circumstances" must be present before a private entity becomes a state actor.

The contract with St. Isidore is insufficient to create the "symbiotic relationship" present in *Burton*, where "the State had so far insinuated itself into a position of interdependence with the restaurant that it was a joint participant in the enterprise." *Jackson*, 419 U.S. at 357-358 (finding no "symbiotic relationship" between government and a private utility company). The private restaurant in *Burton* was located on government premises and its lease payments made it financially viable to operate the public parking garage. *Rendell-Baker*, 457 U.S. at 842-843, citing *Burton*, 365 U.S. at 723. In both *Rendell-Baker* (private school) and *Jackson* (private utility company) this Court "found no symbiotic relationship between the [private entity] and the state that would have been similar to the relationship in *Burton*." *See Peltier*, 37 F.4th at 142 n. 6 (Quattlebaum, J., dissenting).

C. Accommodation of religious charter schools aligns with this Court's trend toward nondiscrimination principles in Establishment Clauses cases.

The Establishment Clause is a structural limitation on government—not private actors. The state action doctrine helps courts draw "the crucial dividing line" between *protected* private conduct and *prohibited* government action, a critical distinction "enshrined in the Constitution's two Religion Clauses." *Developments in the Law: State Action and the Public/Private Distinction: The State Action Doctrine and the Establishment Clause*, 123 Harv. L. Rev. 1278, 1284 (2010). Constitutional rights are protected against state interference—not private conduct. *Jackson,* 419 U.S. at 349.

This Court's ongoing trend is to apply nondiscrimination principles in Establishment Clause cases, promoting the "benevolent neutrality" that "permit[s] religious exercise to exist without sponsorship [or] interference." *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 669 (1970). This represents a shift from its prior strict "no aid" position to a flexible standard grounded in nondiscrimination principles. Facilitating parental choice in education aligns with that trend. Providing for charter schools like St. Isidore is far removed from "[t]he coercion that was a hallmark of historical establishments . . . coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 19, 75 (2019), citing *Lee v.*

Weisman, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting).

This nation's robust protection for religious liberty guards against both government compulsion and interference. Since absolute separation is neither wise nor feasible, courts have tried to flesh out the appropriate church-state relationship through the fires of litigation. Government aid to religion has generated heated debate over the course of American history. A strict "no-aid" position prevailed after this Court inaugurated *Lemon*'s tripart test in 1973. This Court hesitated to approve anything but remote, incidental, indirect, inconsequential benefits. *See, e.g., Lynch v. Donnelly,* 465 U.S. at 683; *Widmar v. Vincent,* 454 U.S. 263, 273-274 (1981); *Nyquist*, 413 U.S. at 771. That approach was slowly replaced by a growing trend to revive and strengthen the weak nondiscrimination principle evident in earlier cases, particularly *Everson*, 330 U.S. 1. Since *Witters*, this Court gradually progressed from a strict "no aid" stance to a point where "federal constitutional restrictions on funding religious institutions have collapsed." Douglas Laycock, Comment, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty,* 118 Harv. L. Rev. 155, 156 (2004). This trend has key implications for resolving this case, as it did in *Trinity Lutheran*, *Espinoza*, and *Carson v. Makin*, 596 U.S. 767 (2022).

Exclusion is the antithesis of religious liberty and equal protection. The Oklahoma Charter Schools Act requires that all charter schools be nonsectarian in

their programs, admission policies, and other operations. 70 O.S. Supp. 2022, § 3-132. This mandate is neither benevolent nor neutral and cannot survive a nondiscrimination analysis. Oklahoma fails to "respect[] the religious nature of our people and accommodate[] the public service to their spiritual needs." *Zorach,* 343 U.S. at 313. Its exclusion of St. Isidore is based solely on the school's religious viewpoint and implies that a religious education is inferior to a religion-free, secular education. This is classic viewpoint discrimination, easily wielded against parents who choose a religious education for their children. Parents have both the responsibility and constitutional right to direct the education of their children. Oklahoma's full range of school choices is available for families that have no interest in religious education. Yet the system discriminates not only against religious schools *but also parents* who take their faith seriously. There is no constitutionally valid rationale for such discrimination.

Even in public education, courts must balance the government's obligation to neither "press religious observances upon [its] [students] . . . nor evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage." *Van Orden v. Perry*, 545 U.S. 677, 683-684 (2005). This Court, upholding a program allowing students to be released for off-campus religious exercises, explained: "We are a religious people whose institutions presuppose a Supreme Being." *Zorach,* 343 U.S. at 313.

Charter schools facilitate religious education for families that choose it – without coercing financial support from those who do not. This "follows the best of our traditions, . . . respects the religious nature of our people and accommodates the public service to their spiritual needs." *Zorach,* 343 U.S. at 313. Oklahoma's nonsectarian mandate defies those traditions and discourages instruction officials consider "too" religious. It would be "most bizarre" for this Court to "reserve special hostility for those who take their religion seriously, who think that their religion should affect the whole of their lives, or who make the mistake of being effective in transmitting their views to children." *Mitchell v. Helms*, 530 U.S. 793, 827-828 (2000). Oklahoma can allow both secular and religious options for charter schools while continuing to offer traditional public education. Oklahoma is not supporting *churches*, but *education*. Religious schools are not "centers of indoctrination" but "genuine institutions of education." William W. Bassett, *Changing Perceptions of Private Religious Schools: Public Money and Public Trust in the Education of Children*, 2008 BYU L. Rev. 243, 270 (2008).

The Establishment Clause limits government but complements the Free Exercise Clause, guarding religious liberty. Taken to extremes and wrenched from its context, the clause morphs into a sword attacking religion instead of a shield protecting it. A school choice program that accommodates religious options "appear[s] unconstitutional only to those who would twist the Fourteenth Amendment against itself by expansively incorporating the Establishment

Clause," twisting that Amendment so that, instead of being a "guarantee of opportunity," it becomes "an obstacle against education reform [that] distorts our constitutional values and disserves those in the greatest need." *Zelman,* 536 U.S. at 683-684 (Thomas, J., concurring). *Zelman* and other cases are demonstrate that "government decisions which do not utilize religion as a standard for action or inaction do not violate the Establishment Clause." Ryan A. Doringo, *Comment: Revival: Toward a Formal Neutrality Approach to Economic Development Transfers to Religious Institutions*, 46 Akron L. Rev. 763, 794 (2013).

Parents have not only the right to have their children educated in public school — but also the right to direct their children's studies. "The school board," despite broad discretion over curriculum, "cannot make the surrender of the second a condition of the enjoyment of the first." *People ex rel. Vollmar v. Stanley*, 255 P. 610, 614 (Colo. 1864). Many parents are increasingly dissatisfied with public schools. Religion has been systematically expelled. *Engel v. Vitale*, 370 U.S. 421 (1962) (prayer); *Schempp,* 374 U.S. 203 (Bible reading); *Stone v. Graham*, 449 U.S. 39 (1980) (Ten Commandments); *Lee v. Weisman*, 505 U.S. 577 (graduation prayers); *Santa Fe. Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (student-led prayer at athletic events). When mandatory curriculum clashes with faith, parents have little recourse—either subject their children to objectionable material or get out of the public schools. *Epperson v. Arkansas*, 393 U.S. 97 (1968) (evolution); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (same). Evangelical parents face

the same dilemma as their Catholic counterparts years ago, "paying taxes for public schools they [cannot] use in good conscience, and also paying tuition to fund religiously acceptable private schools." *Why the Supreme Court Changed Its Mind,* 2008 BYU L. Rev. at 289.

Accommodation. This Court should refuse to attribute St. Isidore's private conduct to a government agency that merely accommodated its religious character by incorporating certain long-established legal doctrines in its charter, including the "ministerial exception" and "church autonomy." *Drummond*, 558 P.3d at 7. Such acquiescence is the essence of accommodation. The religiously inspired policies and practices of institutions that receive public funds do not become, for constitutional purposes, the government's own policies and practices. Even where "the State has *specifically authorized* and approved" a private party's practices—as in negotiating the terms of St. Isidore's charter—that does not establish state action. *Jackson*, 419 U.S. at 354 (emphasis added).

The government's "mere approval or acquiescence in the initiatives of a private party is not sufficient" to generate state action. *Blum*, 457 U.S. at 1004-05; *Perkins*, 196 F.3d at 19. The bar is much higher. The State must "exercise[] coercive power" or "provide[] such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum*, 457 U.S. at 1004-05. By accommodating St. Isidore, the State did not exercise

the "coercive power" or "significant encouragement" required for state action.

A private party's acts may be "fairly attributable to the state" on some occasions when that party has "acted in concert" with state actors. *Rendell-Baker*, 457 U.S. at 838 n. 6. Here, neither parents nor schools have acted "in concert" with Oklahoma to advance religion. Oklahoma enacted legislation that set in motion a series of disconnected private choices—parents choosing schools for their own children—with unpredictable results. The actions of private parties (parents) rupture any connection between the State and religious teaching. The *"government itself"* is sufficiently removed from any religious instruction. "A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose." *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 337 (1987).

Free Exercise. Over the years, this Court reached a "new middle ground to *permit* most funding but to *require* hardly any." Laycock, *Theology Scholarships,* 118 Harv. L. Rev. at 161 (emphasis added). This "maximize[d] government discretion and judicial deference" but "threaten[ed] religious liberty" and expanded government power. *Id.* Cases failed to articulate exactly if or when the state *must* include religious organizations among eligible recipients. But recently, this Court's non-discrimination trend culminated in a series of opinions that apply nondiscrimination principles to forbid government exclusion of religious options. Unlike cases that addressed what government *may* do, this "Free

Exercise trilogy"—*Trinity Lutheran*, *Espinoza*, and *Carson*—considered what government *must* do.

This Court has long "prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity." *Mitchell*, 530 U.S. at 828; *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 458 (2017) ("religious identity"); *Espinoza*, 591 U.S. at 484 ("religious character"). Discrimination "solely because of . . . religious character" "*punish[es]* the free exercise of religion" and imposes a penalty that warrants "the most exacting scrutiny." *Id.* at 475; *Trinity Lutheran*, 582 U.S. at 462; *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533, 542 (1993) (strict scrutiny applies to laws that target religion for "special disability"). The freedom to continue operating as a religious organization must not "come[] at the cost" of "exclusion from the benefits of a public program . . . for which the [organization] is otherwise fully qualified." *Trinity Lutheran*, 582 U.S. at 462. The government may not force a choice between "participation in a public program" and the "right to free exercise of religion." *Id.* at 469 (Thomas, J., concurring); *see Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981); *Everson*, 330 U.S. at 16. Yet that forced choice is exactly what the Oklahoma Supreme Court and the Fourth Circuit propose.

The charter school program does not lead to *government* indoctrination. When government aid is available to religious schools, the question of indoctrination "is ultimately . . . whether any religious indoctrination that occurs in those schools could

reasonably be attributed to governmental action." *Mitchell*, 530 U.S. at 809; *see also Agostini v. Felton*, 521 U.S. 203, 230 (1997). In *Zobrest*, a sign-language interpreter in a religious school was not inculcating religious teachings herself, so "no *government* indoctrination took place." *Agostini*, 521 U.S. at 224 (emphasis added). Where the state aid *itself* is not "unsuitable for use in the public schools because of religious content . . . any use of that aid to indoctrinate cannot be attributed to the government and is thus not of constitutional concern." *Mitchell*, 530 U.S. at 820 (internal citations and quotations omitted). In earlier cases (*Zobrest*, *Witters*, *Mueller*), this Court did not demand that the state demonstrate the aid was "only for the costs of education in secular subjects." *Mitchell*, 530 U.S. at 821.

In *Mitchell*, this Court emphasized "the principle of neutrality," where aid is "offered to a broad range of groups or persons without regard to their religion." 530 U.S. at 809. In *Carson*, "[j]ust like the wide range of nonprofit organizations eligible to receive grants in *Trinity Lutheran*, a wide range of private schools [we]re eligible to receive Maine tuition assistance payments." 596 U.S. at 780. Where recipients "provide . . . a broad range of indoctrination, the *government itself* is not thought responsible for any particular indoctrination." *Mitchell*, at 809-810 (emphasis added). That succinctly describes the situation with the charter schools.

"[A] state need not subsidize private education," but once it does, "it cannot disqualify some private schools solely because they are religious." (*Espinoza*,

591 U.S. at 487. That is precisely what Montana did in *Espinoza*, Maine did in *Carson*, and Oklahoma does here.

Entanglement is a potential danger in enforcing the nonsectarian mandate. Oklahoma does not explain how it determines whether a school is sufficiently "sectarian" to be disqualified. But the State must adopt some procedure to identify "sectarian" schools, risking the very entanglement the Establishment Clause was designed to prevent and simultaneously threatening the Free Exercise rights of families who would choose religious education.

The Oklahoma Supreme Court misses the point in concluding this case is "about the State's *creation* and funding of a new religious institution" rather than its "*exclusion* of a religious entity." *Drummond*, 558 P.3d at 14, 15 (emphasis added). The State negotiated a contract with a previously created private entity—it did not *create* a religious entity out of whole cloth. The State has not made a "gift, donation, or appropriation" because the contract is supported by valid consideration—a "substantial return to the state." *Id.* at 16 (Kuehn, J., dissenting). The State's duty to provide free non-sectarian education (Okla.Const. art. 1, § 5) "does not bar the State from contracting for education services with sectarian organizations, so long as a state-funded, secular education remains available statewide." *Drummond*, 558 P.3d at 16 (Kuehn, J., dissenting). Indeed, "[e]xcluding private entities from contracting for functions, based solely on religious affiliation, would violate the Free Exercise Clause." *Id.* at 15 (Kuehn, J., dissenting).

Finally, the Petition cites evidence of hostility to religion in Respondent's concern that the State could be forced to "fund all petitioning sectarian groups," including "extreme sects of the Muslim faith." Pet. 24-394, 31. A free exercise violation may be established where "official expressions of hostility" to religion accompany laws or policies burdening religious exercise. In such cases, this Court has "set aside" the offending policies "without further inquiry." The same should be done here. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525 n. 1 (2022), citing *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n*, 584 U.S. 617 (2018).

This Court should continue to apply the nondiscrimination principles affirmed in the Free Exercise Trilogy. "The State is not required to partner with private entities to provide common education. But if it does, it cannot close the door to an otherwise qualified entity simply because it is sectarian." *Drummond*, 558 P.3d at 17 (Kuehn, J., dissenting), citing *Espinoza*, 591 U.S. at 487.

CONCLUSION

This Court should reverse the Oklahoma Supreme Court.

Respectfully submitted,

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