No. 24-394 Vide No. 24-396

In the Supreme Court of the United States

OKLAHOMA STATEWIDE CHARTER SCHOOL BOARD, ET AL.,
Petitioners,

v.

GENTNER DRUMMOND, ATTORNEY GENERAL OF OKLAHOMA, EX REL. OKLAHOMA,
Respondent.

ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL,
Petitioner,

v.

GENTNER DRUMMOND, ATTORNEY GENERAL OF OKLAHOMA, EX REL. OKLAHOMA,
Respondent.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

BRIEF OF *AMICI CURIAE* FORMER OKLAHOMA ATTORNEYS GENERAL JOHN M. O'CONNOR & E. SCOTT PRUITT IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

John M. O'Connor served as the 19th Attorney General of Oklahoma. The Oklahoma Attorney General is the chief law-enforcement officer in the state. On December 1, 2022, he issued an official Attorney General Opinion concluding that the nonsectarian requirements set forth in 70 O.S.2021, §3-136(A)(2) likely violate the First Amendment. He thus has an important interest in this case.

E. Scott Pruitt served as the 17th Attorney General of Oklahoma. As a former Oklahoma officeholder, he provides an important perspective on this case and Oklahoma law.

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[1] Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In 2023, the Oklahoma Statewide Charter School Board approved St. Isidore of Seville Catholic Virtual School as the nation's first state-funded religious charter school. But shortly after taking office, Respondent (in his official capacity as the Oklahoma Attorney General) sought a writ of mandamus in the Oklahoma Supreme Court to terminate St. Isidore's contract. In a divided decision, the court ordered the Board to rescind the contract. In doing so, the Oklahoma Supreme Court held St. Isidore was a state actor, that the Supreme Court's recent Free Exercise jurisprudence didn't apply, and that St. Isidore's operation as a charter school violated the Establishment Clause. That decision warrants this Court's correction.

Private actors are subject to the Constitution's restraints only if such a "close nexus" exists "between the State and the challenged action" such that it "may be fairly treated as that of the State itself." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). Simply being regulated or funded by the state does not transform a private actor into a state one. St. Isidore—like many other charter schools—is not a state actor under this Court's precedents. The Court has held that private action constitutes state action only in limited circumstances—none of which apply here. And if doubt remained, the parental choice to send their children to charter schools breaks any potential link in the causal chain.

Oklahoma designed the Charter Schools Act to provide educational options. The Act is aimed at increasing learning opportunities, encouraging "the use of different and innovative teaching methods," and providing "additional academic choices for parents and students." Okla. Stat. tit. 70, §3-131(A) (2024). Charter schools must be "as equally free and open to all students as traditional public schools" and meet academic standards in their contract. *Id.* §3-136(A). St. Isadore met that and every other requirement. Oklahoma law expressly grants parents the option to access that education for their children, but the decision below foreclosed that option.

Nor is the Oklahoma Supreme Court's misguided reasoning limited to religious charter schools. States often provide public benefits through private entities, including those affiliated with churches or faith-based organizations. Indeed, government funds reach private religious entities through special education programs, public health programs like Medicare and Medicaid, foster care, nursing homes, homeless shelters, and refugee-assistance programs. If left uncorrected, the Oklahoma Supreme Court's decision will bring these well-established public-private partnerships into question.

Because St. Isidore is not a state actor, Oklahoma must treat it on equal footing with its secular counterparts. At first, it did: the Charter School Board granted St Isidore's application. But the current Attorney General quickly sought to rescind that approval solely because St. Isidore is a religious school. Such a penalty against religious exercise violates the

First Amendment's Free Exercise Clause. Once a state decides to provide a public benefit—such as alternatives to traditional public schools—it cannot withhold that benefit only from religious entities.

The Court should reverse the decision below.

ARGUMENT

I. Charter schools like St. Isidore are not transformed into state actors merely by accepting state funds.

The Constitution "constrains governmental actors and protects private actors." *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 804 (2019). "To draw the line between governmental and private, this Court applies what is known as the state-action doctrine." *Id.* This doctrine "enforces a critical boundary between the government and the individual." *Id.* at 818. Simply being regulated or funded by the state "does not make one a state actor." *Id.* at 816. St. Isidore—like many other charter schools—is not a state actor under this Court's precedents. The Court has held that private action constitutes state action only in limited circumstances—none of which apply here. And even if they otherwise might, parents' choice to send their children to charter schools breaks any potential link in the chain of causation.

A. St. Isidore—like many other charter schools—is not a state actor under this Court's precedents.

1. St. Isidore is privately owned and operated. Yet the Oklahoma Supreme Court held that it is a "governmental entity" and "state actor" because the

Oklahoma legislature labels charter schools as "public school[s]." App.17a-19a.[2] But labeling a private actor as a public one does not make it so. The test for whether an entity is a state actor "turns on substance, not labels." *Lindke v. Freed*, 601 U.S. 187, 188 (2024); *see also Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 392-93 (1995) ("congressional label" did not control whether Amtrak was a governmental entity). Indeed, a state's "statutory characterization of a private entity as a public actor for some purposes" is not dispositive when it comes to the state-actor question under federal constitutional law. *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 814 (9th Cir. 2010) (referencing *Jackson*, 419 U.S. at 350).

2. "That a private entity performs a function which serves the public" does not "make its acts state action." *Rendell-Baker v. Kohn*, 457 U.S. 830, 843 (1982). Whether an entity is a state actor is a fact-specific question. *See Brentwood*, 531 U.S. at 295-96. As "articulated and applied" by this Court's precedents, private action may only be considered state action in limited circumstances. *Halleck*, 587 U.S. at 805. The Oklahoma Supreme Court held that St. Isidore would "still" be a state actor "under at least two" of the state-action tests this Court has applied "over the years." App.20a.

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[2] All citations to the Oklahoma Supreme Court's opinion below are to the Petition for Writ of Certiorari filed by St. Isidore of Seville Catholic Virtual School, No. 24-396.

The Court has held that a private entity may be a state actor (1) where a private company exercises powers traditionally and exclusively performed by the state (the "public function" exception); and (2) where the state affirmatively authorizes, encourages, or facilitates private conduct that violates the Constitution (the "entwinement" exception). *See, e.g.*, *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 358-59 (1974) (holding that providing public utilities was not an exclusive public function of the state); *Blum v. Yaretsky*, 457 U.S. 991, 1005 (1982) (holding that state-authorized nursing home transfers did not make the nursing homes entangled with the state such that they were state actors).[3] St. Isidore—a privately owned and operated entity—fits neither exception.

3. While governments have "traditionally performed" many functions, "very few" have been "exclusively reserved to the State." *Flagg Bros. Inc. v. Lefkowitz*, 436 U.S. 149, 158 (1978) (internal quotation marks omitted). Education is a key example. This Court has "refused to apply the public function exception" when "a private entity is managing or regulating schools." *See generally* Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 586-88 (7th ed.

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[3] This Court has also found state action when the state actor and private company exist in a "symbiotic relationship." *See, e.g.*, *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961). There are no facts to suggest a symbiotic relationship here, and *Rendell-Baker* forecloses that argument in this context. 457 U.S. at 843 (holding that the school in that case was "not different from that of many contractors performing services for the government [and thus that] [n]o symbiotic relationship … exists").

2023); *see Rendell-Baker*, 457 U.S. at 842 (establishing that though a private school was funded almost entirely by the state to "provide services for … students at public expense," the school was not a state actor). For good reason. Private schools and parents that homeschool their children have "always played a substantial role in our society as … alternative[s] [to] primary education." *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 144 (4th Cir. 2022) (Quattlebaum, J., dissenting in part).

Oklahoma has never exclusively regulated primary education. Even before Oklahoma became a state, private schooling and homeschooling supplemented public education. In 1889—before there were any public schools in Oklahoma City—a woman named L. H. North operated a private school, "conven[ing] classes under a cottonwood tree" for $1.50 per month. *See Early Public Schools in Oklahoma City*, Metropolitan Library System, perma.cc/MA5U-H3PP. "Classes were conducted inside a tent and students sat on nail kegs for seats." *Id.* That private school legacy has continued in Oklahoma for over a century. Today, during the 2024-25 school year, 227 private schools serve 41,518 students in Oklahoma. *See Best Oklahoma Private Schools (2024-25)*, Private Sch. Rev., perma.cc/64Y4-56SD. And 74% of those schools are religiously affiliated. *Id.*

Home schooling has also "been a feature of the American educational landscape since the colonial period." James C. Carper, *Homeschooling*, *in* Historical Dictionary of American Education 176 (Richard J. Altenbaugh ed. 1999). The U.S. Census Bureau

estimates that about 5.3% of K-12 students in Oklahoma are homeschooled today—one of the highest rates in the country. *See Oklahoma*, John Hopkins Sch. of Educ., Inst. for Educ. Pol'y, perma.cc/F5L6-3N85.

Acknowledging that education "may not be a traditionally exclusive public function," the Oklahoma Supreme Court narrowed its analysis. App.15a. It framed the relevant question as not whether education was an exclusive public function, but whether "free public education" was an exclusive public function. App.21a. The opinion then simply announced that it was. *Id.*

That analysis is misguided. "By using outcome-determining adjectives such as 'free' and 'public,'" the court below "'ignore[d] the threshold state action question.'" *Peltier*, 37 F.4th at 147 (Quattlebaum, J., dissenting in part) (citing *Halleck*, 587 U.S. at 811). This Court saw through those word games in *Halleck*. 587 U.S. at 811. There, the Court rebuffed the plaintiff's argument that "the operation of a public forum for speech" was a traditional, exclusive government function. *Id.* The operation of public access channels on cable—not the operation of public forums for speech—was at issue. *Id.*; *see also Logiodice v. Trs. of Me. Cent. Inst.*, 296 F.3d 22, 27 (1st Cir. 2002). Semantics don't change the underlying inquiry. The threshold state-action question does not change by focusing on "free public" education instead of education.

4. The entwinement exception is also inapplicable to St. Isidore. The Oklahoma Supreme Court held that charter schools are "entwined with the State" because

"[g]overnmental entities" sponsor them, monitor and oversee their operations, and "decide whether to renew or revoke [their] charter[s]." App.21a. But under the entwinement exception,[4] a state is responsible for a private decision only when it has "exercised coercive power" over the private entity. *Blum*, 457 U.S. at 1004. Importantly, neither regulation, funding, nor chartering of a private entity suffices to establish coercion. And there is simply no evidence that Oklahoma has ever compelled unconstitutional behavior.

To start, extensive state regulation is insufficient to show coercion. *Jackson*, 419 U.S. at 350. "The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the [Constitution]." *Id.* Nor is regulation that is "extensive and detailed" enough. *Id.* (citation omitted); *see also Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52-53 (1999) (finding when state legislation authorized, but did not require, private insurers to withhold payments for disputed medical treatment,

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[4] This Court has, in one limited fact pattern, found that a private entity was a state actor based on "entwinement" with the state. *See Brentwood*, 531 U.S. at 304-05. *Brentwood* held that a private entity that regulated high school athletics was a state actor because 84% of the entity's members were public schools, the state delegated regulation of athletic competition to the entity, most of the entity's funds came from public schools, most of its officers came from the public schools, and most of its meetings took place on government property. *See id.* at 298-302. *Brentwood* is the only time this Court "found state action based upon mere 'entwinement,'" and *Brentwood* stands alone in its departure from the court's state-action jurisprudence. *Id.* at 305 (Thomas, J., dissenting).

there was no coercion by the state). Even total state funding is insufficient. "Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts." *See Rendell-Baker*, 457 U.S. at 841; *Blum*, 457 U.S. at 1008.

5. Finally, a private entity may—and often does—contract with a state without becoming a state actor. *See S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 543 (1987). This Court has found state action through a charter only when the state created the private company, owned all its stock, appointed its directors, and ultimately managed it. *See Lebron*, 513 U.S. at 397-400.

Here, St. Isidore—like many other Oklahoma charter schools—has great freedom. Had it been allowed to operate, St. Isidore would have its own certificate of incorporation, its own board of directors—not government-appointed—and its own facilities, bank accounts, and equipment—none of which are government-owned. *See* St. Isidore Bylaws, Art. I, II, IV, VII, VIII. It would create its own curriculum, disciplinary policies, and educational structure. *See* St. Isidore Charter Contract, §4. It could raise its own funds, form contracts, and hire and fire its own employees—completely independent of state oversight. *See id.* at §§6, 8; St. Isidore Bylaws, Art. VI, VIII. And Oklahoma charter schools are exempt from nearly all statutes that would otherwise regulate them if they were public schools. Okla. Stat. tit. 70, §3-136(A)(1) (2024). They have their own governing bodies that are "responsible for policies and operational decisions." §3-

136(A)(7). And though the state can monitor schools for "legal compliance," §3-134(I)(7) (2024), it does the same thing for ordinary government contractors, like private hospitals and nursing homes.

In short, extensive regulation, funding, and chartering are insufficient to establish that, under the entanglement exception, private action is state action. These characteristics all fall short of the coercion required to transform St. Isidore into a state actor.

B. Parents' choice to send their children to charter schools breaks any state-action causation chain in any event.

Under this Court's state-action exceptions, Oklahoma charter schools like St. Isidore are not state actors. But the parental decision to send children to charter schools eliminates any doubt.

Participation in Oklahoma's charter school program is a "true private choice." *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002). For a charter school to receive state funding, parents must enroll their children. Funding is based entirely on student enrollment. *See* Okla. Stat. tit. 70, §3-142(A) (2024). Thus, parents break any potential state-action link when they choose where to direct program funding. *See id.* Whether the funds flow through a private scholarship program or directly from the state to the schools, the parents' choice in the matter disrupts any claim that the *state* is the one acting. *See Carson v. Makin*, 596 U.S. 767, 789 (2022); *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 469 (2020).

Oklahoma has previously recognized that parental choice can interrupt state action. *See Oliver v. Hofmeister*, 368 P.3d 1270 (Okla. 2016). In that case, the Oklahoma Supreme Court unanimously upheld a scholarship program that allowed "[a]ny private school, whether sectarian or non-sectarian," to participate. *Id.* at 1271-72, 1274. Relying on *Zelman*, the court concluded that the scholarship program did not violate the law because the choice to use scholarship funds at a religious school was a "private choice exercised by the families." *Id.* at 1274 (citing *Zelman*, 536 U.S. at 641). Indeed, "*no* funds" were "dispersed to any private *sectarian* school until" there was a "*private independent selection* by the parents or legal guardian of an eligible student." *Id.* at 1276 (emphasis in original). "When the parents and not the government are the ones determining which private school offers the best learning environment for their child," the Oklahoma Supreme Court emphasized, "the circuit between government and religion is broken." *Id.*

On top of that, undermining parents' ability to send their children to a religious charter school defeats the Charter Schools Act's core purpose: to provide educational options. Oklahoma enacted the Charter Schools Act to increase learning opportunities, encourage "the use of different and innovative teaching methods," and provide "additional academic choices for parents and students." Okla. Stat. tit. 70, §3-131(A) (2024). Charter schools must be "as equally free and open to all students as traditional public schools" and meet academic standards in their contract. *Id.* §3-136(A). St. Isidore met that and every other requirement. *See* St. Isidore Charter

Application §6 (The school "envisions a learning opportunity for students who want and desire a quality Catholic education, but for reasons of accessibility to a brick-and-mortar location or due to cost cannot currently make it a reality."). Oklahoma law expressly grants parents the option to access that education for their children.

Put simply, charter schools across the country have flourished because they provide "diverse educational options" to parents and students. *Peltier,* 37 F.4th at 155 (Wilkinson, J., dissenting). Expanding charter school options gives children the chance to find a supportive primary school environment in their most formative years. Denying parents and children access to certain charter schools because of their religious character undermines the availability of choices that Oklahoma intends to promote. *See* Okla. Stat. tit. 70, §3-131(A) (2024).

* * *

St. Isidore—like many other charter schools—is not a state actor. This Court should make that clear.

II. If uncorrected, the decision below threatens the existence of and provision of public benefits through private entities affiliated with religious organizations.

Practice confirms what this Court's precedents show—government funding alone does not transform a private entity into a state actor. *Rendell-Baker*, 457 U.S. at 841; *see Polk Cnty. v. Dodson*, 454 U.S. 312, 325 (1981) (holding that a public defender, paid by the state and providing free legal services to indigent

defendants, was not a state actor); *Sullivan*, 526 U.S. at 58 (holding that private companies that reimbursed injured workers through workers compensation programs were not state actors). That is no less true when those private actors are religious.

Federal, state, and local governments routinely provide public benefits through private, religiously affiliated institutions. That funding does not turn those entities into state actors. Indeed, if government licenses, contracts, funding, or regulation could transform a private entity into a state actor, "a large swath of private entities in America would suddenly be turned into state actors and be subject to a variety of constitutional constraints on their activities." *Halleck*, 587 U.S. at 814-15. That is "not the law." *See id.* at 815. And if left to stand, the Oklahoma Supreme Court's decision would have devastating consequences for religiously affiliated hospitals, charities, and other private entities that partner with the government. The following provides only a sample of such programs.

Take special education services, for example. Many states—including Oklahoma—provide special education services through private school-choice programs for students with disabilities. These programs are critical for students whose public schools cannot meet their needs. *See, e.g.*, Okla. Stat. tit. 70, §13-101.1 (2010); O.C.G.A §20-2-2110 (Georgia's Special Needs Scholarship Program); La. Rev. Stat. §17:4031 (Louisiana's School Choice Program for Students with Exceptionalities); Miss. Code Ann. §37-173-3 (Mississippi's Dyslexia Therapy Scholarship for Students

with Dyslexia Program); Ohio Rev. Code Ann. §3310.41 (Ohio's Autism Scholarship Program); Utah Code Ann. §53F-4-302 (Utah's Carson Smith Special Needs Scholarship Program); Wis. Stat. §115.7915 (Wisconsin's Special Needs Scholarship Program). Under these programs, parents may direct state funds to a state-approved private, even religious, institution. The loss of such funding would devastate these students and their ability to obtain an education.

Private schools also play a role providing special education services under federal law. The Individuals with Disabilities Education Act (IDEA) provides federal funding to states that ensure a "free appropriate public education is available to all children with disabilities." 20 U.S.C. §1412(a)-(a)(1). For many students with disabilities, however, a traditional public school cannot meet their unique needs. In this scenario, a state may place a student in a private school or facility that best serves the student and at no cost to her parents. Doing so fulfills the state's obligation to provide the free appropriate public education required under the IDEA, even though the student may be placed at a private school, including a religious private school. *See* 20 U.S.C. §1412(a)(10)(B); *see also Zobrest v. Catalina*, 509 U.S. 1, 13 (1993).

In fact, the Ninth Circuit recently addressed the role of religious schools in the IDEA context. *See Loffman v. Cal. Dep't of Educ.*, No. 23-55714, 2024 WL 4586970 (9th Cir. Oct. 28, 2024). Under its IDEA regime, California certified private schools that could

contract with public schools to provide special education services. *Id.* at *6. But California certified only so-called nonsectarian schools. *Id.* Faithfully applying this Court's precedents, the Ninth Circuit held that California's nonsectarian requirement failed to satisfy strict scrutiny. *See id.* at *18.

Special education services are not the only area in which the government funds private entities to provide public benefits. In recent years, for example, "an influx of federal money spurred states and local governments to take a more active role" in funding private organizations that care for children without homes. *Fulton v. City of Philadelphia*, 593 U.S. 522, 548 (2021) (Alito, J., concurring). That led to state and local funds flowing to religious entities through contracts with religious foster agencies, *see id.* at 529 (Catholic foster agency), and orphanages, *see* App.32a (Kuehn, J., dissenting) (Baptist orphanage).

"Federal dollars also reach religiously affiliated organizations through public health programs" like Medicare and Medicaid "to pay for the healthcare of the elderly and the poor." *Zelman*, 536 U.S. at 666-67 (O'Connor, J., concurring). In the U.S., the average hospital "receives 40-50 percent of its net revenues from governmental sources." David L. Archer, Essay, *Will Catholic Hospitals Survive Without Government Reimbursements?*, 84 Linacre Q. 23 (2017). And a growing number of those hospitals are religiously affiliated. *Id.* Catholic hospitals make up the largest group of not-for-profit health care providers in the United States, with more than 650 hospitals serving nearly one in seven patients in the country each day.

U.S. Catholic Health Care, Catholic Health Association of the United States, perma.cc/BKJ3-UR8M. In a single year, Catholic hospitals will discharge nearly one million Medicaid patients. *See id.* And Catholic hospitals have expanded over the past two decades, even while the number of other hospitals has dwindled. Tess Solomon et al., *Bigger and Bigger: The Growth of Catholic Health Systems*, Community Catalyst 13 (2020).

Government funding also flows to private, faith-based homeless shelters. The Department of Housing and Urban Development has even implemented an "Equal Treatment Initiative" that "exists to place faith-based" organizations "on a level playing field" with secular ones in accessing grant funding. *See* HUD, *Frequently Asked Questions (FAQS) on Equal Treatment and the Faith-Based Initiative*, perma.cc/3WRX-AX3L. By funding religiously affiliated organizations, HUD has "expand[ed]" and "enhanc[ed]" the delivery of services to the homeless. *Id.* Despite receiving government funding, HUD specifies that "[a]ny religious organization that receives" funding to participate in its efforts to end homelessness "[r]etains its independence from federal, state, and local governments." HUD Exchange, *Are faith-based organizations eligible recipients and sub-recipients of the CoC and ESG Programs?*, perma.cc/3CHX-TE7N.

Religiously affiliated refugee assistance organizations also receive substantial government funding. For decades, religious groups like the United States Conference of Catholic Bishops and the Episcopal Migration Ministries have received federal and state

funding to resettle and assist refugees. *See Catholic Ministries Serving Migrants and Refugees*, USCCB (June 2023), perma.cc/S5AJ-LJLH; Episcopal Migration Ministries Annual Report (2020), perma.cc/7E2D-8FXB.

These programs and others like them "are well-established parts of our social welfare system," and religiously affiliated entities play an integral role in their administration. *Zelman*, 536 U.S. at 667-68 (O'Connor, J., concurring). Yet, the Oklahoma Supreme Court's decision pretends these well-established public-private partnerships do not exist and would exclude them as vehicles for delivering public benefits.

III. The decision below disregards this Court's recent Free Exercise jurisprudence.

As a private entity, St. Isidore is protected by the First Amendment. Under the Free Exercise Clause, a state may not penalize religious belief or exercise. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462 (2017). That principle is "basic" and "unremarkable." *Id.* at 458, 462. Under this framework, the Oklahoma Charter School Board's initial decision to approve St. Isidore's application was more than justified—it was required. St. Isidore has the right to participate in a government benefit program on equal footing with secular charter schools. Yet by deeming St. Isidore a state actor, the Oklahoma Supreme Court wholly dismissed this Court's Free Exercise Clause jurisprudence as inapposite and ordered the Charter School Board to rescind St. Isidore's contract. App.27a. That decision is plainly wrong.

This Court's First Amendment jurisprudence applies here. Indeed, *Trinity Lutheran*, *Espinoza*, and *Carson* are all instructive. *Trinity Lutheran* makes clear that a state that excludes an entity "from a public benefit for which it is otherwise qualified, solely because it is [religious]," acts in a way that is "odious to our Constitution." 582 U.S. at 467. *Espinoza* explains that while a state has no duty to subsidize private education, once it chooses to do so, it cannot "disqualify some private schools solely because they are religious." 591 U.S. at 487. And *Carson* clarifies that a state cannot "exclude some members of the community" from a public-benefit program "because of their religious exercise" or because of their "anticipated religious use of the benefits." 596 U.S. at 781, 789.

The Oklahoma Supreme Court's declaration that this Court's "Free Exercise Trilogy" cases "do not apply" is misguided. App.27a, 29a. And it requires this Court's correction. Allowing that decision to stand would remove whole swaths of private religious schools, hospitals, foster-care programs, and the like, from the protection of the Free Exercise Clause.

When a conflict arises between a religiously discriminatory provision of state law and the Free Exercise Clause, a state has a duty to "disregard" the provision and "conform[] to the [C]onstitution." *Marbury v. Madison*, 5 U.S. 137, 178 (1803). The Oklahoma Supreme Court's decision upholding the religious exclusion of St. Isidore "cannot stand." *Espinoza*, 591 U.S. at 489. This Court should reverse.

CONCLUSION

For these reasons, the Court should reverse the decision below.

Respectfully submitted,

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