NO. 24-394

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.

On Petition for Writ of Certiorari to the Supreme Court of Oklahoma

REPLY BRIEF OF PETITIONERS

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In conflict with many of this Court's free-exercise precedents, the Oklahoma Supreme Court ordered Petitioners to exclude a privately owned and operated school from Oklahoma's charter-school program solely because the school is religious.

Respondent's defense boils down to a single sentence: "Because Oklahoma's charter schools are public schools, Oklahoma 'may provide a strictly secular education in [them].'" Opp.4 (quoting *Carson ex rel. O. C.* v. *Makin*, 596 U.S. 767, 785 (2022)). What *Carson* actually says is that Oklahoma "may provide a strictly secular education in *its* public schools." *Carson*, 596 U.S. at 785 (emphasis added). But Oklahoma "has decided *not* to operate [charter] schools of its own." *Ibid.* And the Free Exercise Clause prohibits it from excluding privately run charter schools based solely on their religious exercise.

Respondent's opposition brief—which makes countless misstatements while contradicting itself and this Court's precedents—fails to insulate the state court's decision from review. Laws that violate the federal Constitution cannot be adequate state grounds that would impede this Court's jurisdiction. And Respondent has conceded that the state-action issue is the subject of an entrenched circuit split worthy of this Court's review. Finally, he does not deny the importance of the questions presented evinced by the eleven supporting amicus briefs.

The Court should grant certiorari.

ARGUMENT

I. This Court has jurisdiction because Oklahoma's unconstitutional laws are not adequate, independent state grounds for the decision below.

"[O]nly 'constitutionally proper' rules can create adequate and independent state grounds." *Wilson* v. *Hawaii*, No. 23-7517, 2024 WL 5036306, at *2 (U.S. Dec. 9, 2024) (statement of Thomas, J.) (quoting *Trevino* v. *Thaler*, 569 U.S. 413, 421 (2013)). Because the state constitutional provisions relied on by the court below—Oklahoma's little Blaine Amendments—violate the Free Exercise Clause, they are not adequate state grounds that can insulate the court's decision from review.

Espinoza v. *Montana Department of Revenue*, 591 U.S. 464 (2020), is instructive. There, the Montana Supreme Court similarly relied on the state's little Blaine Amendment when invalidating the state's scholarship program. *Id.* at 482. This Court held the decision could not "be defended … as resting on adequate and independent state law grounds" because that state constitutional provision violated the Free Exercise Clause. *Id.* at 464, 487–88. That is even more true here because the Oklahoma Supreme Court did not eliminate the statewide discriminatory system as the Montana Supreme Court had done in *Espinoza*.

Merely incanting "adequate-and-independent grounds" cannot insulate the lower court's decision from review, either. *E.g.*, Pet.App.25a. The Oklahoma Supreme Court has tried that tack once before, and this Court rejected it. See *Nitro-Lift Techs., L.L.C.* v. *Howard*, 568 U.S. 17, 19–20 (2012) (per curiam).

There, as here, it was enough that the state court's "reliance on Oklahoma law … depended upon a rejection of the federal claim, which was both properly presented to and addressed by the state court." *Ibid.* (cleaned up). When a state court puts state law over "this Court's jurisprudence," that "is all the more reason for this Court to assert jurisdiction." *Ibid.*[1]

II. The Oklahoma Supreme Court's state-action holding deepened a circuit conflict while flouting this Court's precedent.

A. There is a well-established circuit split over privately owned and operated schools and state action.

As Respondent and six circuit judges have recognized, Pet.22, lower courts are divided over whether the academic and pedagogical choices of a privately owned and operated school become state action when the school contracts with the state to offer a free educational option for interested students. Respondent acknowledged the split before this litigation, saying he was "hopeful that [this] Court [would] definitively rule on this unsettled issue." *Ibid.*

The opposition's backtracking falls flat. Decisions from the Ninth, First, and Third Circuits squarely conflict with the Oklahoma Supreme Court's state-action holding and with *Peltier* v. *Charter Day School, Inc.*, 37 F.4th 104 (4th Cir. 2022) (en banc), the Fourth Circuit decision on which the court below relied.

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[1] *Independent School District* v. *State Board of Education*, 2024 OK 39 (2024), is inapposite. Petitioners here did not seek "affirmative substantive relief" below so they did not need to file their "own application" to preserve the issues decided. *Id.* at ¶ 21.

Consider *Caviness* v. *Horizon Community Learning Center, Inc.*, 590 F.3d 806 (9th Cir. 2010), which reached the opposite conclusion on each aspect of the court's state-action analysis below.

First, the Ninth Circuit rejected the argument that a "public" statutory label could render a charter school a "state actor for all purposes." *Id.* at 813–14. The court below held the opposite, Pet.App.17a–19a, as did the Fourth Circuit, *Peltier*, 37 F.4th at 117.

Second, the Ninth Circuit concluded that *Rendell-Baker* v. *Kohn*, 457 U.S. 830 (1982), foreclosed the argument that a privately owned and operated school engages in state action under the "public function" test simply because it offers "public educational services." *Caviness*, 590 F.3d at 814–16; see also *Logiodice* v. *Trs. of Maine Cent. Inst.*, 296 F.3d 22, 27 (1st Cir. 2002) (same); *Robert S.* v. *Stetson Sch., Inc.*, 256 F.3d 159, 165–66 (3d Cir. 2001) (Alito, J.) (same). But the court below, following the Fourth Circuit, held that St. Isidore was a state actor because providing "*free public* education is exclusively a public function." Pet.App.21a; see also Pet.App.23a (citing *Peltier*, 37 F.4th at 119).

Finally, the Ninth Circuit held that "extensive government regulation" was insufficient to establish state action under the "entwinement" test when "the challenged conduct was not compelled or even influenced by any state regulation." *Caviness*, 590 F.3d at 816–18 (cleaned up). Conversely, the court below held that St. Isidore was sufficiently "entwined" with the State based solely on state regulation, Pet.App.21a, without addressing whether St. Isidore's "challenged conduct was … compelled or even influenced" by the state, *Caviness*, 590 F.3d at 816 (cleaned up).

These diametrically opposed decisions are not "align[ed]" and cannot be chalked up to differing facts or state laws. Contra Opp.17.[2] Charter schools in Arizona, like those in Oklahoma and North Carolina, are labeled "public school[s]" by statute, offering open-to-all, state-funded education. *Caviness*, 590 F.3d at 808–09; Pet.App.6a; *Peltier*, 37 F.4th at 117. Arizona gives "oversight and administrative responsibility" over charter schools to state sponsors, just like Oklahoma and North Carolina. *Caviness*, 590 F.3d at 809 (cleaned up); Pet.App.18a–19a; *Peltier*, 37 F.4th at 117. And just as "Arizona law exempt[s] charter schools 'from all statutes and rules relating to schools, governing boards[,] and school districts,'" including any statutes governing the challenged conduct at issue, Opp.17 (quoting *Caviness*, 590 F.3d at 810), so do Oklahoma and North Carolina, Okla. Stat., Tit. 70, § 3-136(A)(3), (5); N.C. Gen. Stat. Ann. § 115C-218.10.

This 3–2 split is entrenched and ripe for review. Respondent argues for delaying resolution because the other contractor schools in this split were not religious. But more decisions involving religious schools will not help the Court resolve the question presented because the religious or secular nature of schools' academic and pedagogical choices is immaterial to the circuit conflict. If anything, St. Isidore's religious choices make it easy to conclude the school is *not* a state actor because those choices are not compelled by the state. See Pet.26. There is no cause for delay, which will only harm charter schools and children who want to attend them.

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[2] Nor can an unpublished, non-state-action opinion limit *Caviness*'s "reach." Contra Opp.18 (relying on *Nampa Classical Acad.* v. *Goesling*, 447 F. App'x 776 (9th Cir. 2011) (unpublished)).

B. Respondent's attempts to evade this Court's precedent reveal the faulty reasoning of the decision below.

Respondent ignores nearly every state-action precedent of this Court the petition cites. Instead, the opposition brief defends the proposition that charter schools in Oklahoma qualify as "public schools."[3] But Respondent never answers the petition's argument that such a label cannot control the state-action analysis. Pet.23–24.

As this Court has repeatedly held, a state statute labeling an entity "public" does not control its state-actor status for federal constitutional purposes. *E.g.*, *Jackson* v. *Metro. Edison Co.*, 419 U.S. 345, 350 & n.7 (1974); *Polk Cnty.* v. *Dodson*, 454 U.S. 312, 325 (1981); see also *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 392–93 (1995).[4] Otherwise, states could nullify entities' constitutional rights with the stroke of a pen.

Looking behind the veil of state statutory labels, this Court's state-action doctrine makes plain that privately owned and operated charter schools are not engaged in state action when they make and carry out

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[3] Respondent doesn't explain the significance of his claim that St. Isidore and its charter school are distinct legal entities. Opp.1, 10 n.5, 25. First, he waived this argument by taking the opposite position below. No. 24-396, Pet.App.176a (characterizing St. Isidore and the school as the same entity before and after the contract). Second, the charter contract contradicts it. No. 24-396, Pet.App.111a (describing the school as "a privately operated religious non-profit organization"). Third, it's not clear why that legal fiction matters. Two entities or one, the charter school is still privately owned and operated and does not engage in state action under this Court's tests.

[4] Respondent does not acknowledge any of these precedents, all cited in the petition.

their academic and pedagogical choices. Pet.23–27. Respondent does not engage with *any* of this Court's state-action tests—including those applied below and discussed at length in the petition.

Respondent does acknowledge one of the many state-action precedents the petition cites, *Rendell-Baker*, 457 U.S. 830, and he gives it short shrift. He says *Rendell-Baker* is inapposite because the school in that case was not labeled "public." Opp.33–34. But that's a distinction without a difference. *Rendell-Baker* held that even total state funding does not establish state action. 457 U.S. at 841. In contrast, the court below rested its state-action holding solely on the fact that St. Isidore is "supported by public taxation." Okla. Stat., Tit. 70, § 1-106. See Pet.24.

Similarly, *Rendell-Baker* explained that a state law mandating free public education "in no way makes these services the exclusive province of the state." 457 U.S. at 842. The court below said the opposite. Pet.App.21a ("the Oklahoma Constitutional provision for *free public* education is exclusively a public function").

Lastly, *Rendell-Baker* held that, despite "extensive regulation of the school generally," the challenged conduct was not state action because it was not "compelled or even influenced by any state regulation." 457 U.S. at 841. But the court below held Oklahoma's charter-school regulation sufficient to prove state action without acknowledging that the entwinement test requires that a regulation "compel" the specific challenged conduct. *Id.* at 841–42.

In short, the lower court's state-action holding contradicts this Court's cases and must be reversed.

III. The decision below flouts this Court's Free-Exercise decisions.

This Court has "repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits." *Carson*, 596 U.S. at 778 (citations omitted). Since St. Isidore is not a state actor, the Free Exercise Clause forbids Oklahoma from excluding it from the otherwise available public benefit of running a state-funded charter school based on its religious character. Pet.28–31. Respondent's counterarguments fail.

First, Respondent tries to embrace *Carson*, arguing that "Oklahoma's charter schools are public schools under the factors outlined … in *Carson*." Opp.26. But as explained in § II.B., labeling a privately run charter school as "public" does not transform it into a state actor. And *Carson* only distinguished between traditional public schools and private schools to reject the argument that secular private schools offered the "rough equivalent" of a "free public education." 596 U.S. at 782–85 (cleaned up). Nothing in *Carson* suggests that privately run schools sharing some traits with traditional public schools magically become state actors or otherwise lose their free-exercise rights.[5]

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[5] Respondent also overstates the similarities between Oklahoma charter schools and traditional public schools: He cites a repealed statute for the claim that the schools have the same academic standards, Opp.27, a statute governing *adjunct* teachers for the claim that the schools have the same freedom to hire uncertified teachers, *id.*, and a provision that charter schools have access to "locally charged ad valorem taxes, *id.* at 8, when virtual schools like St. Isidore do not, Okla. Stat., Tit. 70, § 3-104(B)(3).

Second, Respondent argues the Charter Schools Act and St. Isidore's charter contract give the Statewide Charter School Board "extensive control over … all significant aspects of the charter school." Opp.29. But the opposite is true. Except as provided in the Act, charter schools have extensive autonomy and are "exempt from all statutes and rules relating to schools, boards of education, and school districts." Okla. Stat., Tit. 70, § 3-136(A)(1). Respondent's attempts to disprove that autonomy are flawed.

For example, Respondent says, Opp.26, that "each charter school's curriculum must be approved by the State before it is taught," but cites Okla. Stat., Tit. 70, § 3-136(B)(13), which does not exist. Perhaps he meant § 3-134(B)(13), but that provision requires only that a charter-school application include a "curriculum overview," not that the school submit the full curriculum for Board approval.

Similarly, Respondent insists that St. Isidore's charter contract "gives the Board full veto power over material changes to the charter school's Catholic curriculum," and Respondent imagines that could require the Board to weigh in on the supposedly "ever-changing landscape of Catholic doctrine" and "approve[] of the Church's new teachings." Opp.30. That argument appears to reflect a basic ignorance of Catholic teaching. See No. 24-396 Reply 8. Regardless, the contract gives the Board no such power. The Board's review of curriculum changes merely ensures the inclusion of core academics; it does not second-guess the charter school's pedagogical choices, especially when those choices implicate religious teachings. Okla. Stat., Tit. 70, § 3-136(B)(13). The whole point of charter schools is to allow methodological innovation.

Moreover, the contract makes clear that St. Isidore is entitled to certain rights and exemptions as a religious organization, including its rights under the "'ministerial exception' and other aspects of the 'church autonomy' doctrine" guaranteed by the federal Constitution. Res.App.2a–3a. The Board is contractually—and constitutionally—required to respect those rights, and it will do so. Respondent is not a party to that contract, and he cannot rewrite its terms in litigation to create "constitutional issues" where none exist. Opp.30.

Finally, Respondent insists St. Isidore was excluded not because of its religious status but because of its "religious teachings and activities." Opp.32 (quoting Pet.App.30a). But this Court already rejected that spurious status–use distinction in *Carson*. 596 U.S. at 786–88 ("the prohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use-based discrimination."). So Respondent's claim that St. Isidore "is not prohibited from operating a *secular* public charter school" does not undo the constitutional violation that has been committed. Opp.33 (emphasis added).[6]

[6] It's also wrong under the plain language of the Act. Okla. Stat., Tit. 70, § 3-136(2) (prohibiting charter schools affiliated with a "religious institution").

IV. Respondent does not refute the importance of the questions presented, and his attempts to erect vehicle issues fail.

As the eleven amicus briefs filed in support of Petitioners confirm, the decision below will have a devastating impact if allowed to stand. The position embraced by the Fourth Circuit and the court below poses an existential threat to charter schools, Br. of Classical Charter Schools of America, 7–13, and to *all* private parties that contract with the government, particularly religious charities, Br. of the General Council of the Assemblies of God 10–21; Br. of the Manhattan Inst. 14–19. The ruling also impairs the education of "children who stand to benefit most from the diverse educational opportunities provided by charter schools," "especially those … who are most disadvantaged." Br. of Oklahoma Superintendent 6, 10; accord Br. of Governor Stitt 8 (56% of Oklahoma public school students "come from economically disadvantaged households"); Br. of South Carolina 19 (60% of charter school students nationwide "are in poverty").

Respondent tries to conjure up an impediment to this Court's review, arguing that the mere involvement of unique state laws counsels against certiorari. Opp.21–22. But the questions presented turn on the federal Constitution, not state statutes. *Supra*, §§ I, II.B. Indeed, at least 45 other states have the same statutory language as Oklahoma, classifying charter schools as "public." App. of Br. of Classical Charter Schools of America. This Court's resolution of the questions presented will provide much-needed clarity to government officials nationwide and all private entities that contract with them—including charter schools. Br. of South Carolina 18–25 (eight states pleading for clarity on this issue).

Nor can Respondent's aspirations of raising new arguments for the first time on remand inhibit this Court's review. Respondent says a remand might be necessary because "the typical 'fact-bound inquiry' on whether state action occurred was not undertaken" here. Opp.22 (citing *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 939 (1982)). But in the preceding section of his brief, Respondent said the opposite, admitting that "the Oklahoma Supreme Court conducted the same fact-based inquiry as the cases cited by Petitioner to determine" whether St. Isidore could "be considered a state actor." Opp.20; Opp.17 (also citing *Lugar*, 457 U.S. at 939). Respondent was right the first time. See Pet.App.20a–24a. The parties fully briefed the available arguments below, and the state court passed on all material points of law.

Nor would remand be appropriate to address Respondent's new argument that the charter contract's modified terms violate state statute. Waiver aside, the Free Exercise Clause *required* those contract modifications, and the Constitution's guarantees supersede any contrary state law. *Supra*, § III.

The record is fully developed, the facts are undisputed, and the relevant federal questions were fully briefed and decided below. The petition presents a clean vehicle for two vital constitutional issues that are ripe for review.

CONCLUSION

For these reasons, and those discussed in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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