No. 24-396

In the
Supreme Court of the United States

ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL
Petitioner,

v.

GENTNER DRUMMOND, Attorney General of Oklahoma, *ex rel.* OKLAHOMA,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

INTRODUCTION

The Free Exercise Clause protects St. Isidore's right to participate in Oklahoma's charter school program. But the Oklahoma Supreme Court barred Petitioner from doing so solely on religious grounds. To reach that result, it contorted this Court's precedents to treat St. Isidore as a state actor. Then it held that funding the privately run school would violate the Establishment Clause. That misguided decision warrants this Court's review.

First, the decision deepens a significant split over whether private entities that contract with the government to educate students are state actors. The Oklahoma Supreme Court joined the Fourth Circuit to hold that they are. Those decisions squarely conflict with decisions of the First, Third, and Ninth Circuits holding that they are not. Only this Court can resolve that divide.

Second, the decision below violates the Free Exercise Clause. This Court has repeatedly held that a state cannot assert an overbroad view of the Establishment Clause to justify Free Exercise infringements. And a state may not employ "semantic exercise[s]" to evade Free Exercise protections. *Carson v. Makin*, 596 U.S. 767, 782 (2022). The decision below does both.

Respondent fails to muster any reason to deny review. While attempting to obscure the split, he ignores the fundamental similarities between the cases. He defies blackletter law when attempting to transform St. Isidore into a state actor to extinguish its constitutional rights. He tacitly concedes the

importance of the questions presented. And his tortured effort to manufacture vehicle issues falls flat.

Indeed, this case is a prime candidate for review. It presents important constitutional questions that have divided lower courts. It provides a clean vehicle to resolve those questions. And the decision below is profoundly wrong. The Court should grant certiorari and reverse.

ARGUMENT

I. Both Questions Presented Warrant Review.

By attributing a private educational contractor's actions to the state, the court below deepened a now-entrenched split. And, by excluding St. Isidore from an otherwise available benefit because of its religion, the court violated Petitioner's Free Exercise rights. To resolve the split and uphold the First Amendment, this Court should grant review.

A. The Decision Below Entrenches A Split.

There is a plain split of authority implicated here. In each of the five cases cited in the Petition, (1) the state contracted (2) with a private entity (3) to provide publicly funded education and (4) did not coerce the action challenged in the lawsuit. Pet.19-27. Yet, the courts reached different results.

Following the Fourth Circuit's lead in *Peltier v. Charter Day School, Inc.*, 37 F.4th 104 (4th Cir. 2022) (en banc), the court below held that St. Isidore, a private corporation, was a "state actor" because it was statutorily labeled a "public" school and would provide a free education under government contract. Pet.App.19-21. Like *Peltier*, the Oklahoma Supreme Court sidestepped this Court's precedents, elevated

the state-law label, and gerrymandered an exclusive "public function" that transforms all charter schools into state actors. *Id.*

That directly conflicts with decisions from the First, Third, and Ninth Circuits. Those courts have held that an educational contractor's private actions are not attributable to the state—even where there is significant state funding or regulation. *See Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 814-16 (9th Cir. 2010); *Logiodice v. Trs. of Me. Cent. Inst.*, 296 F.3d 22, 26-29 (1st Cir. 2002); *Robert S. v. Stetson Sch., Inc.*, 256 F.3d 159, 161-65 (3d Cir. 2001). Those cases correctly focused on substance rather than state-imposed labels, and they properly defined the relevant function. Pet.21-24.

Respondent struggles to obscure this clean split with irrelevant or question-begging assertions. He tries to distinguish *Caviness* from the "almost identical" *Peltier* case. 37 F.4th at 142 (Quattlebaum, J., dissenting). In his view, the courts reached "different outcomes" because the function in *Peltier* (dress code) was more strictly regulated than that in *Caviness* (employment). BIO.18-19. That mischaracterizes *Peltier*. There, the court recognized that the state "was not involved in the challenged conduct" and did not coerce that conduct through close regulation. 37 F.4th at 116 (majority op.). The Fourth Circuit instead found state action by creating a novel exclusive "public function"—the "provision of a free, public education." *Id.* at 114, 119. And it held that the privately operated charter school became a state actor because it performed that function and was statutorily labeled "public." *Id.* at 122. *Peltier* and the

decision below thus directly conflict with *Caviness*, which held that a privately operated charter school providing a free education was not a state actor despite the same "public" label. *See* 590 F.3d at 808, 814-17.

Respondent then tries to paper over *Logiodice* and *Robert S.* by arguing that they addressed "purely private schools," not "state-sponsored public school[s]." BIO.19-20. That semantic trick "mistakenly ignores"—indeed begs—"the threshold state-action question." *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 811 (2019). Like *Peltier* and the decision below, *Logiodice* and *Robert S.* squarely considered whether a private operator of a school became a state actor when it contracted to provide an education that the state otherwise would have provided. Pet.23-24. The only material difference between those cases and this one is the result.

In short, the Oklahoma Supreme Court now stands on the wrong side of a clean split implicating four federal circuits. This Court should restore uniformity in the law.

B. The Decision Below Defies This Court's Precedents.

The decision below is also wrong. The Free Exercise Clause forbids a state from penalizing religious exercise. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 458 (2017). That "basic" and "unremarkable" principle means a state cannot disqualify a private religious entity from a generally available funding program solely because it is religious. *Espinoza v. Mont. Dep't of Rev.*, 591 U.S. 464, 475 (2020) (citation omitted). Oklahoma did

just that here. It wielded state law to block St. Isidore from receiving funding for which it would qualify if it were not religious. Pet.18. "That is discrimination against religion" and cannot stand. *Carson*, 596 U.S. at 781.

Like the Oklahoma Supreme Court, Respondent has no answer to these precedents. In fact, this Court has roundly rejected each of his primary arguments.

First, Respondent argues that St. Isidore has no constitutional rights because it is part of the state. That is self-evidently wrong. As Respondent concedes, states cannot evade constitutional protections merely by labeling private entities "public." BIO.25; Pet.28-29 (collecting cases). St. Isidore is a private institution incorporated by, and operated under the supervision of, two Catholic dioceses. Pet.2, 27. It is private, no matter what label the state stamps on it.

Lacking support in this Court's state-action precedents, Respondent suggests that *Carson* established "factors" to test whether a school is public or private, and that those factors support his view. BIO.26-28. But *Carson* did not apply—let alone alter—the state-action calculus. Nor did it hold that these factors could morph a private contractor into a public agency. *Carson* merely rejected Maine's argument that private schools receiving state funds were providing the "rough equivalent" of a public education by observing ways they differed from Maine's public schools. 596 U.S. at 783. In any case, many of those factors cut against Respondent. The "curriculum taught" at charter schools "need not even resemble that taught in [Oklahoma's] public schools."

Id.; *see* Pet.9-10, 30. Oklahoma charter schools "need not hire state-certified teachers." *Carson*, 596 U.S. at 784; *see* Pet.30. And they are generally "exempt from all statutes and rules relating to" public schools. 70 Okla. Stat. § 3-136(A)(5); *see Carson*, 596 U.S. at 783-84.

Nor can Respondent distinguish *Carson* and *Espinoza* because they concerned benefits offered to "private schools," whereas existing private schools are "excluded from [Oklahoma's] charter program." BIO.33. The provision Respondent cites simply reinforces that the state's program enables any "private person" or "private organization" to design and open *new* schools—as opposed to providing alternative means for funding already operating private schools. 70 Okla. Stat. § 3-134(C). That hardly suggests that those new privately operated schools are "part of" the government.

Respondent fares no better in suggesting that St. Isidore's contract with the Board created a separate *governmental* entity.[1] BIO.1, 10 n.5. The school is not a standalone arm of Oklahoma's government. It is merely the program that St. Isidore, a private organization, applied and contracted to operate—much as any firm might contract to

[1] This is the first time Respondent has suggested some meaningful distinction exists between St. Isidore the "corporation" and St. Isidore the "school." BIO.1. If anything, Respondent argued the opposite below, maintaining that when "St. Isidore executed a contract" it "*became* an illegally sponsored public virtual charter school." Pet.App.176 (emphasis added). Even now, Respondent contradicts himself by stating both that St. Isidore *the corporation* executed the charter contract, BIO.25, and that St. Isidore *the school* did, BIO.10.

establish a program or open a facility. This is reflected throughout St. Isidore's contract. *See* Pet.App.110 ("St. Isidore of Seville Board of Directors is the governing authority of the St. Isidore of Seville Catholic Virtual School[.]"); Pet.App.111 ("[T]he Charter School is a privately operated religious non-profit organization[.]"); *id.* ("[T]he Charter School submitted an . . . application[.]").

The fact that the state grants St. Isidore's school charter makes no difference. All corporate entities "act under charters granted by a government," but "[t]hey do not thereby lose their essentially private character." *S.F. Arts & Ath., Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 543-44 (1987). Nor does it matter whether the state "imposed certain requirements" upon St. Isidore or funded it. *Id.* at 542-44 & n.23.

Second, Respondent parrots the decision below by arguing that state regulations constitutionally "entwine[]" the state in charter schools' curricular and operational choices. BIO.11, 20-21, 28-30. That is incorrect. Respondent points only to *general* state oversight seen in many contracts—like accreditation review, financial audits, and compliance monitoring. *See id.* That does not entwine the state in designing or delivering St. Isidore's particular educational model. Pet.30-31. Nor can Respondent dispute that St. Isidore is a "private institution" controlled by a "board of directors, none of whom are public officials or are chosen by public officials," that has contracted to "perform[] services for the government." *Rendell-Baker v. Kohn*, 457 U.S. 830, 832, 843 (1982) (cleaned up); *see* Pet.App.120. It "is not fundamentally

different from many private corporations whose business depends primarily on [government] contracts." *Rendell-Baker*, 457 U.S. at 840-41. Like any other contractor, St. Isidore's private choices are not attributable to the government, even if it is "engage[d] in performing public contracts," and even if it is subject to "extensive and detailed" regulation. *Id.* at 841.

Third, Respondent distracts with an argument that did not feature in the decision below, arguing that the Board controls St. Isidore through a supposed contractual "veto" power, requiring approval for "material" curricular changes. BIO.30. He imagines that the Board might use this provision to evaluate questions of "ever-changing" Catholic doctrine. BIO.30-32. Aside from revealing ignorance about the teachings of the Catholic Church, that argument fails for several reasons.

To start, this Court's precedents refute it. States often require regulated entities to "obtain [government] approval for practices" they undertake. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357 (1974). But that "does not transmute a practice initiated by" the entity "into 'state action.'" *Id.*; *accord Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982). Respondent's capacious theory would seemingly transform *all* activity of government contractors (and more) into state action, simply because government contracting involves state approval.

Moreover, Respondent misconstrues the nature of Oklahoma's charter school program. The program invites "private organization[s]" to "[p]rovide additional academic choices for parents and students"

that use "different and innovative teaching methods" unhindered by state interference. 70 Okla. Stat. §§ 3-134(C), 3-131(A)(3)-(4); *see also id.* § 3-136(A)(5) (exemption from educational laws). The state neither crafts those educational models nor micromanages schools' curricular plans and teaching methods. *See* Walters.Amicus.Br.9-10; Former.AGs.Amicus.Br.10-11. Thus, Oklahoma charter schools remain free to develop an educational approach independent of government interference. That is why St. Isidore's Board—not any state official—"is the governing authority" of the school. Pet.App.110.

Respondent also distorts what the contract provides. The curriculum agreed upon is one that St. Isidore designed, and the contract otherwise makes plain that the state may not dictate its religious character. Section 8.2 recognizes St. Isidore's "right to freely exercise its religious beliefs and practices consistent with its Religious Protections." Pet.App.135. Those protections safeguard (among other things) "the right of churches and other religious institutions," like St. Isidore, "to decide matters 'of faith and doctrine' without government intrusion." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 746 (2020) (citation omitted). When reviewing any material changes to St. Isidore's instructional model—like when evaluating the school's initial proposal—the state would be constitutionally prohibited from wading into the theological questions Respondent imagines. *Accord* No. 24-394, Reply.Br.10. Respondent cannot justify his current effort to violate St. Isidore's Free Exercise rights by hypothesizing *other* ways a state official might try to violate them later.

II. This Case Provides A Clean Vehicle To Resolve The Questions Presented.

Respondent fails to refute the split. And he cannot square the decision below with this Court's precedents. So he attempts to distract with alleged vehicle issues, none of which holds weight, and none of which justifies a ruling that will prevent St. Isidore from fulfilling its mission to serve students in Oklahoma.

A. The Decision Below Does Not Rest On Adequate And Independent State Grounds.

Respondent first contends that the decision below rests on "adequate and independent state law grounds." BIO.14-16. That is plainly wrong. The court below held that Oklahoma law prohibits religious charter schools. Yet the question remains "whether the Free Exercise Clause *precluded* the [Oklahoma] Supreme Court from applying [that law] to bar" St. Isidore from the program. *Espinoza*, 591 U.S. at 474 (emphasis added). That is a federal issue, which, in turn, hinges on the federal state-action inquiry. Pet.36-37. The lower court's construction of state law is not an *obstacle* to this Court reviewing whether St. Isidore's exclusion is "consistent with the Federal Constitution." *Espinoza*, 591 U.S. at 474. Rather, it is what *presents* that federal question.

As a fallback, Respondent urges this Court to ignore the central federal issues because Petitioner did not "seek a declaration" that Oklahoma's religiously exclusionary laws "violate the U.S. Constitution." BIO.16. That is wrong again. St. Isidore expressly raised the Free Exercise Clause

as a defense to Respondent's action and implored the lower court to rule that "the First Amendment to the U.S. Constitution bars the State from enforcing any such discriminatory exclusion." Res.App.339; *see also* Res.App.349-59 (briefing this issue); Pet.App.187-94 (same); OKSC.Reply.Br.1-3, 10-15, bit.ly/4fpn05o (same). "When a party to a state proceeding asserts" that federal law "renders the contemplated relief unenforceable," the state court "must examine the claim and refrain from ordering relief that would violate federal law." *Hathorn v. Lovorn*, 457 U.S. 255, 269-70 (1982); *see* Wright & Miller, *Federal Practice and Procedure* § 4024 (3d ed. 2024). The court below thus had an obligation to—and did, at great length—address the federal questions presented here. Pet.App.17-21, 24-27. It got the answers wrong, but those questions are plainly preserved and presented here.

B. Respondent's Other Vehicle Arguments Are Meritless.

Respondent's other attempts to paint this case as a "poor vehicle" likewise fail. BIO.21.

Respondent says that because St. Isidore is the first religious charter school, these questions should "percolate." *Id.* But the issues presented have been brewing for decades. Since 2001, at least four federal circuits and one state supreme court have squarely addressed whether the decisions of privately operated schools that contract with a state constitute state action. Pet.20-26. And this Court has repeatedly held that states may not exclude private entities from otherwise available benefits solely because they are

religious. Pet.17-19. The issues are ripe for review and resolution.

Next, Respondent claims that any ruling would provide "little guidance" because each state's charter school laws are "unique." BIO.21. That, too, is mistaken. The dispositive issue here—whether the operational decisions of a contractor like St. Isidore are constitutionally attributable to the state—reaches far outside Oklahoma. Pet.29-31. As in Oklahoma, charter schools across the country operate independently under state contracts. *See Caviness*, 590 F.3d at 807; States.Amicus.Br.2, 5-6. While the exact level of oversight may vary, "charter school curriculum" is almost invariably "privately determined." Stephen D. Sugarman, *Is It Unconstitutional to Prohibit Faith-Based Schools from Becoming Charter Schools?*, 32 J.L. & Relig. 227, 237-38 (2017). Indeed, the *very point* of charter schools is to encourage innovation by funding schools free from close state control. *See id.*; *Peltier*, 37 F.4th at 155 (Wilkinson, J., dissenting); No.24-394, Classical.Charter.Schs.Amicus.Br.7-13. A decision in this case will provide much-needed guidance for similar disputes and for educational policymakers nationwide, *see* States.Amicus.Br.2, 24-25; Buckeye.Inst.Amicus.Br.25-29; JCRL.Amicus.Br.14-16, as well as for government contractors well beyond schools, *see* Manhattan.Inst.Amicus.Br.14-19; Assemblies.of.God.Amicus.Br.10-21.

Finally, Respondent suggests this case is too "fact-bound." BIO.22. But in the same breath he acknowledges that a fact-bound inquiry "was not undertaken" here. *Id.* The Oklahoma Supreme Court

instead decided that *any* act in furtherance of St. Isidore's "core education function" is attributable to the state. *Id.* (quoting Pet.App.21). The Court ruled against St. Isidore based on that legally mistaken understanding of state action and broad anti-establishment concerns that sweep far beyond the Establishment Clause. *See* Pet.27-34; Pet.App.18-24. Those holdings decided the case and are cleanly presented.

In truth, the posture of this case makes it an especially *good* vehicle for deciding these issues. The record is small and devoid of complicating factual disputes. The issues were exhaustively briefed. And the state high court issued dueling opinions taking opposing positions on federal constitutional questions that have split the lower courts. This Court should grant review to resolve these important questions, provide guidance to lower courts, and vindicate Petitioner's Free Exercise rights.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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