Nos. 24-396, 24-394

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.* STATE OF OKLAHOMA,
Respondent.

OKLAHOMA STATEWIDE CHARTER SCHOOL BOARD, et al.
Petitioners,

v.

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

On Writ of Certiorari to the Oklahoma Supreme Court

BRIEF FOR PETITIONER ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL

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QUESTIONS PRESENTED

This Court has repeatedly held that the Free Exercise Clause prohibits a State from denying generally available benefits to a school solely because it is religious. That principle should have resolved this case. Petitioner is a private religious institution. It seeks to partake in the benefits of Oklahoma's charter school program. But the court below invalidated Petitioner's contract with the charter school board on religious grounds. The lower court disregarded this Court's free exercise precedents because, in its view, Petitioner had become an arm of the government by virtue of that contract. It thus held that the Establishment Clause and various Oklahoma laws aimed at creating "a complete separation of church and state" compelled the court to deny Petitioner the benefits created by Oklahoma's Charter Schools Act.

The questions presented are:

1. Whether the academic and pedagogical choices of a privately owned and run school constitute state action simply because it contracts with the State to offer a free educational option for interested students.

2. Whether a State violates the Free Exercise Clause by excluding privately run religious schools from the State's charter school program solely because the schools are religious, or whether a State can justify such an exclusion by invoking anti-establishment interests that go further than the Establishment Clause requires.

PARTIES TO THE PROCEEDING

Petitioner St. Isidore of Seville Catholic Virtual School was an intervenor in the original proceeding below before the Oklahoma Supreme Court. Respondent Gentner Drummond was the petitioner before the Oklahoma Supreme Court. Oklahoma Statewide Virtual Charter School Board, Robert Franklin, William Pearson, Nellie Tayloe Sanders, Brian Bobek, and Scott Strawn were respondents before the Oklahoma Supreme Court. Since the Oklahoma Supreme Court rendered its decision, the respondents before that court were succeeded by Oklahoma Statewide Charter School Board, and Brian T. Shellem, Angie Thomas, Kathleen White, Damon Gardenhire, Becky Gooch, Jared Buswell, Ben Lepak, Ryan Walters, and Dr. Kitty Campbell, in their official capacities as members of the Oklahoma Statewide Charter School Board.

CORPORATE DISCLOSURE STATEMENT

St. Isidore of Seville Catholic Virtual School is a private, non-profit corporation operated by the Archdiocese of Oklahoma City and the Diocese of Tulsa. No publicly traded corporation owns 10% or more of its stock.

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INTRODUCTION

This case presents another instance of a State discriminating against religious educators in violation of the Constitution. Oklahoma has adopted a program to foster educational diversity through privately designed and operated charter schools. The State invites private organizations to participate in this program by contracting with the State for funding. But Oklahoma denies that opportunity to religious entities, solely because they are religious.

That discrimination is unconstitutional. The First and Fourteenth Amendments bar the States from infringing on the free exercise of religion. And that guarantee precludes the government from penalizing religious activity. As a result, this Court has "repeatedly" held that "a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits." *Carson v. Makin*, 596 U.S. 767, 778 (2022); *see also Espinoza v. Mont. Dep't of Rev.*, 591 U.S. 464, 486-87 (2020); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 466-467 (2017).

Yet, that is precisely what the State did here. Petitioner St. Isidore of Seville Catholic Virtual School ("St. Isidore") is a private religious institution. It applied to participate in Oklahoma's charter school program. But when the Oklahoma Statewide Virtual Charter School Board (the "Board") granted its application, Respondent sued to block St. Isidore's participation. And the lower court extinguished the valuable new educational opportunity that St. Isidore would offer interested families. In a split decision, it held that Oklahoma law barred "sectarian"

institutions like St. Isidore from participating in the charter school program or receiving any "expenditure of state funds." The court then applied those exclusionary provisions—notwithstanding the First Amendment—to discriminate against St. Isidore "based on the religious character of the school." *Espinoza*, 591 U.S. at 484. That ruling unconstitutionally "'punishe[d] the free exercise of religion' by disqualifying the religious from government aid." *Id.* at 478 (citation omitted).

To avoid this straightforward application of the Free Exercise Clause and this Court's cases, the lower court devised a loophole. It acknowledged that St. Isidore "was owned and controlled by a church" and will be "operated by the Catholic church." Yet, it treated St. Isidore as a "governmental entity and state actor," lacking any free exercise rights. The lower court based that contradictory holding on the Oklahoma legislature's choice to label charter schools "public" and to subject them to various regulations. In a similar move, the court opined that charter schools perform the "exclusively" public function of delivering "*free public* education"—even though the "provision of education" itself is not the exclusive prerogative of the State. Based on this semantic manipulation, the court recast St. Isidore as a "surrogate of the State." And it held that funding the privately run school would violate the Establishment Clause.

This Court's precedents refute those conclusions. St. Isidore, like the school in *Rendell-Baker v. Kohn*, "was founded as a private institution and is operated by a board of directors, none of whom are public officials or are chosen by public officials." 457 U.S.

830, 832 (1982). It contracts with the State to provide an educational service. But the "[a]cts of such private contractors do not become acts of the government." *Id.* at 841. Nor does stamping them with a "public" label alter their private nature or deprive them of constitutional rights. *See, e.g.*, *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 805 (2019). The state-action calculus "turns on substance, not labels." *Lindke v. Freed*, 601 U.S. 187, 197 (2024). And the education that St. Isidore will provide is not—and never has been—a "public function" that "has been 'traditionally the *exclusive* prerogative of the State.'" *Rendell-Baker*, 457 U.S. at 842 (citation omitted).

In short, St. Isidore is a private entity seeking to participate in Oklahoma's charter school program. It hopes to offer another educational *option* for Oklahomans, and no student will be compelled to attend St. Isidore. Rather, the school will receive students, and state funding, only through the private choices of families. And participation in the program will not transform St. Isidore into an arm of the government. The Establishment Clause thus has no role here. But the Free Exercise Clause prohibits the State from denying St. Isidore and its future students this opportunity solely because it is religious. This Court should reverse.

OPINION BELOW

The Oklahoma Supreme Court exercised original jurisdiction. Its decision is reported at 2024 OK 53 and reproduced at Pet.App.1-40.[1]

JURISDICTION

The Oklahoma Supreme Court issued its opinion on June 25, 2024. On September 19, 2024, Justice Gorsuch extended the time to file a petition for writ of certiorari to October 7, 2024. The petition was timely filed on that day and granted by this Court on January 24, 2025. The Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. The Fourteenth Amendment declares that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Relevant Oklahoma statutes and constitutional provisions include Okla. Const. art. I, § 5; Okla. Const. art. II, § 5; and various provisions of the Oklahoma

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[1] All "Pet.App." and "Res.App." citations herein are to the Petitioner's Appendix and Respondent's Appendix, respectively, in Case No. 24-396.

Charter Schools Act, *see* 70 Okla. Stat. §§ 3-131, 3-132, 3-134, 3-135, 3-136; *see also id.* § 1-106.[2] These state-law provisions are reproduced in the Petitioner's Appendix. *See* Pet.App.79-109.

STATEMENT OF THE CASE

A. Free Exercise And School Funding

"The Free Exercise Clause of the First Amendment, applicable to the States under the Fourteenth Amendment, provides that 'Congress shall make no law . . . prohibiting the free exercise' of religion." *Fulton v. City of Philadelphia*, 593 U.S. 522, 532 (2021) (alteration in original) (quoting U.S. Const. amend. I). That guarantee shields against "outright prohibitions" on religious beliefs or conduct. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988). It also prevents the government from burdening "religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Id.* at 449. After all, "to condition the availability of benefits upon [one's] willingness" to abandon her faith "effectively penalizes the free exercise of her constitutional liberties." *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). The Free Exercise Clause prohibits the States from putting the faithful to "such a choice." *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 716-17 (1981) (quoting *Sherbert*, 374 U.S. at 404); *see also McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (plurality

[2] Oklahoma amended the Charter Schools Act effective July 1, 2024. *See* 2023 Okla. Sess. Law Serv. Ch. 323 (S.B. 516) (West). All citations are to the provisions in effect prior to that date, which remain materially unchanged.

op.); *id.* at 633 (Brennan, J., concurring); *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 16 (1947).

This Court has applied that principle to religious schools three times over the past decade. In *Trinity Lutheran*, this Court held that Missouri could not require a Lutheran preschool "to renounce its religious character" in order to receive otherwise available public grant funding for playground resurfacing. 582 U.S. at 465-66. That hostility toward religion, even when offering a gratuitous "public benefit," was "odious to our Constitution." *Id.* at 467. This Court also rejected Missouri's effort to shelter behind anti-establishment concerns, holding that a State's preference for "skating as far as possible from religious establishment concerns" could not justify its religious discrimination. *Id.* at 466.

Three years later, in *Espinoza*, this Court held that the Free Exercise Clause barred a claim that closely mirrors Respondent's claim here. Like Oklahoma, Montana had established a program to help parents enroll their children in schools of their choice. *See* 591 U.S. at 467-68. And, like here, the ability of religious schools to participate in the program was challenged under a state constitutional provision that prohibited state funding of "sectarian" schools. *Id.* at 469-72. The Montana Supreme Court held that allowing religious schools to participate in the program violated the State's "no-aid" provision and invalidated the school-choice program. *Id.* at 472.

This Court reversed. Echoing *Trinity Lutheran*, the Court reiterated that, whenever a State denies a generally available benefit "because of [an organization's] religious character," it "imposes a

penalty on the free exercise of religion that triggers the most exacting scrutiny." *Id.* at 475 (citation omitted). Only "interests of the highest order," furthered by a "narrowly tailored" law, could support Montana's discrimination. *Id.* at 484 (citation omitted). And Montana came nowhere close to satisfying strict scrutiny. Its interest "in separating church and State 'more fiercely' than the Federal Constitution" requires could not "'qualify as compelling' in the face of the infringement of free exercise." *Id.* at 484-85 (citation omitted). Nor could Montana's claim that its carveout "protect[ed] the religious liberty of taxpayers by ensuring that their taxes [were] not directed to religious organizations." *Id.* at 485. Simply put, the State's interests could not justify the "burdens" imposed on "religious schools" and "the families whose children . . . hope[d] to attend them." *Id.* at 486.

Most recently, *Carson* held that these same principles apply even where religious schools will use state funding to "promote[]" and teach "through the lens of" a particular faith. 596 U.S. at 775, 789 (citation omitted). There, Maine offered a tuition-assistance program for families in rural areas that lacked access to public secondary schools. *See id.* at 773. The law, however, authorized the tuition payments to be expended only at "nonsectarian" schools. *Id.* at 775. In defending this requirement, Maine sought to characterize the "public benefit" it offered as providing rural students "the rough equivalent of a Maine public school education, an education that cannot include sectarian instruction." *Id.* at 782 (cleaned up). The State also tried to distinguish its program from those in *Trinity*

Lutheran and *Espinoza* as one that did not exclude institutions based on their "religious 'status,'" but rather, as a program that avoided "religious 'uses' of public funds." *Id.* (citation omitted). That is, Maine argued that it could exclude religious schools if the schools would use the funds to deliver a religious education. *See id.*

Neither argument persuaded this Court. It emphasized that a State may not avoid the Free Exercise Clause by reconceptualizing its public benefit as an exclusively "secular" one. *Id.* at 784-85. Nor may a State deny the right to "use" otherwise available funds for religious education, which is just as "offensive to the Free Exercise Clause" as denial based on the recipient's religious "status." *Id.* at 787.

B. Oklahoma's Law

Like Missouri, Montana, and Maine, Oklahoma has created a funding program to support private educational organizations through its Charter Schools Act. And, like those States, Oklahoma has denied the program's otherwise available "benefit[s] based on a recipient's religious exercise." *Carson*, 596 U.S. at 785.

Through the Act, Oklahoma generally welcomes any "private college or university, private person, or private organization" to apply for state funding to operate a charter school. 70 Okla. Stat. § 3-134(C). And the law affords these private institutions substantial flexibility to craft their curricula and run their schools free from government interference. *See id.* § 3-136(A)(3), (A)(5). In turn, Oklahoma families receive expanded choices for a cost-free education that meets the unique needs of their children. *See id.* §§ 3-

131(A), 3-134(I)(3). Parents may choose to send their children to a privately operated charter school, with a uniquely designed curriculum and mission, instead of a more homogenized school run by the government.

Educational freedom is the defining feature of this charter school program. By inviting private organizations to design and operate independent charter schools—and run them separately from the government-run public school system—Oklahoma's program promotes educational ingenuity and diversity. The express purpose of the Act reflects these aims to "[i]ncrease learning opportunities for students," to "[e]ncourage the use of different and innovative teaching methods," to "[i]mprove student learning," and to "[p]rovide additional academic choices for parents and students" alike. *Id.* § 3-131(A).

The Act's provisions bear out this commitment to autonomy. Each charter school has wide latitude to "provide a comprehensive program of instruction" and may "offer a curriculum which emphasizes a specific learning philosophy or style or certain subject areas." *Id.* § 3-136(A)(3). The State does not dictate academic and pedagogical choices: Each school's private "governing body," rather than a publicly appointed or elected school board, is "responsible for the policies and operational decisions of the charter school." *Id.* § 3-136(A)(8). Each school is also free to adopt its own "personnel policies, personnel qualifications, and method of school governance." *Id.* § 3-136(B). They need not hire State-certified teachers. Pet.App.141-42. And, except as specifically provided, "a charter school shall be exempt from all statutes and rules

relating to schools, boards of education, and school districts." 70 Okla. Stat. § 3-136(A)(5).

The Oklahoma legislature has labeled charter schools "public"—in the broadly defined sense that they are "free" to all students and "supported by public taxation." *See id.* §§ 1-106, 3-132(D); *see also id.* §§ 3-135(A)(9), 3-136(A)(10). But Oklahoma charter schools are not "public" in the sense that a state agency organizes and operates them. Instead, Oklahoma lets private contractors create and run charter schools. *See id.* §§ 3-134(C), 3-136(A)(8). And, unlike government-run public schools, no student is presumptively assigned to a charter school. Indeed, no child will attend a charter school unless his or her family chooses it. *See, e.g.*, *School Choice*, Okla. St. Dep't of Educ. (Feb. 28, 2025), https://bit.ly/4hOocBj.

In these ways and others, the Charter Schools Act sparks innovation and expands educational choice by funding a diverse array of private educators who choose to operate charter schools. By all accounts, this hands-off program has succeeded. Oklahoma families may now choose from charter schools offering a range of schooling options, including those focused on science, engineering, math, fine arts, language immersion, tribal identity, and more. *See Current Charter Schools of Oklahoma*, Okla. St. Dep't of Educ. (Nov. 12, 2024), https://bit.ly/4hOVccr.

But Oklahoma has forbidden one type of private entity—religious institutions—from participating in this program. Under the Act, the State has banned any and all charter schools "affiliated with a nonpublic sectarian school or religious institution." 70 Okla. Stat. § 3-136(A)(2). And the law further requires

charter schools to "be nonsectarian in [their] programs, admission policies, employment practices, and all other operations." *Id.*

Oklahoma's constitution imposes the same type of anti-religious discrimination. Embracing the Blaine Amendment movement of the late 1800s, Oklahoma's founders provided that state-funded schools shall be "free from sectarian control." Okla Const. art. I, § 5. And they resolved that "[n]o public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, . . . or sectarian institution." *Id.*, art. II, § 5.

As with other state Blaine Amendments, these constitutional provisions have a "shameful pedigree." *Espinoza*, 591 U.S. at 482 (citation omitted). They were "prompted by virulent prejudice against immigrants, particularly Catholic immigrants." *Id.* at 498 (Alito, J., concurring). When Oklahoma joined the Union in 1907, nativist Anti-Catholic bigotry pervaded public discourse—particularly surrounding schools. *See* Wisc.Inst.Cert.Amicus.Br.6-15. In fact, the State had "three anti-Catholic newspapers with statewide circulations" in the early twentieth century. Thomas Elton Brown, *Bible Belt Catholicism: A History of the Roman Catholic Church in Oklahoma, 1905-1945*, at 94 (1977). At the time, it was generally understood that "sectarian" was a pejorative codeword for "Catholic." *Espinoza*, 591 U.S. at 482 (majority op.) (citation omitted). And the State enshrined this bigoted code language into its constitution, reflecting many of its early residents' "pervasive hostility to the Catholic Church and to Catholics in general." *Id.*

(citation omitted); *see also, e.g.*, Oklahoman Editorial Board, *Blaine Amendment Bloodline Obvious in Oklahoma's Constitution*, Oklahoman (Aug. 4, 2015), https://bit.ly/3T44Zkw.

C. Factual Background

Petitioner St. Isidore is a "privately operated religious non-profit organization" formed in Oklahoma by the Catholic Church. Pet.App.111. The virtual school is named to honor St. Isidore of Seville, the patron saint of the internet, who was an archbishop and "encyclopedic" scholar in the early Church.[3]

St. Isidore is and always has been a private entity. Its two founding members—the Archbishop of Oklahoma City and the Bishop of Tulsa—are both undisputedly private actors. Pet.App.225. Driven by their faith and the Church's commitment to education, these religious leaders endeavored to create a school "dedicated to academic excellence" that would "educate the entire child: soul, heart, intellect, and body," in the Catholic tradition. Pet.App.197. To that end, they incorporated St. Isidore with the aim of operating a Catholic virtual school available to all interested Oklahoma families. Pet.App.217-22. They also appointed a private board of directors to "manage and direct the business and affairs of the School." Pet.App.226, 229.

In 2023, St. Isidore applied to participate in Oklahoma's charter school program. Pet.App.196-97. As its application explained, St. Isidore "envisions a learning opportunity for students who want and desire

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[3] Philip Kosloski, *Why Is St. Isidore of Seville Patron Saint of the Internet?*, Aleteia (Oct. 6, 2018), https://bit.ly/4iupvW3.

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." Pet.App.206. St. Isidore would fulfill this need with an "interactive learning environment that is rooted in virtue, rigor, innovation, and integrity"—and which "prepares students for a world of opportunity and a lifetime of learning" in accordance with the school's Catholic faith. Pet.App.208. St. Isidore also committed to offering this opportunity to "any and all students" who choose to attend. Pet.App.213. "All students are welcome," including "those of different faiths or no faith." *Id.*

When St. Isidore applied, the Oklahoma Attorney General had recently issued an opinion advising the Board that the U.S. Constitution requires it to allow religious schools to participate in the charter school program. Pet.App.73. That opinion recognized that Oklahoma charter schools "are not state actors." Pet.App.69. Rather, the State "has decided to let private organizations establish and operate charter schools." Pet.App.71. "And once qualified private entities are invited into the program, Oklahoma cannot disqualify some private persons or organizations 'solely because they are religious.'" Pet.App.53 (quoting *Carson*, 596 U.S. at 780). Oklahoma would therefore violate the First Amendment if it denied a religious school's application based on the "nonsectarian" provisions of Oklahoma law. Pet.App.52-73. The opinion further explained that "[n]o student is forced to attend a charter school—it is one option among several for parents." Pet.App.54. So, as in *Carson*, *Espinoza*, and *Trinity Lutheran*, the fact that "public funds could be sent to

religious organizations" poses no conceivable Establishment Clause concerns. *Id.*

In June 2023, the Board voted to approve St. Isidore's application. Pet.App.170-71. As one Board member emphasized, using the State's discriminatory law "to justify a denial of the application" would require the Board "to ignore the [U.S.] Constitution and relevant [U.S.] Supreme Court cases applying it." Pet.App.164. It is "undisputed" that St. Isidore meets the secular "requirements for operating a charter school." Pet.App.34. And because St. Isidore was otherwise qualified, the First Amendment forbade the Board from denying its application on religious grounds. Pet.App.164-65.

A few months later, St. Isidore executed a charter contract with the Board. Pet.App.110-53. That agreement reaffirmed that the "Charter School is a privately operated religious non-profit organization" and that the "governing board of the Charter School shall be responsible for the policies and operational decisions of [St. Isidore]." Pet.App.111, 120. The contract also recognized St. Isidore's "right to freely exercise its religious beliefs and practices consistent with" all "Religious Protections" provided by state and federal law. Pet.App.135. And it confirmed that St. Isidore, like other charter schools, would "ensure that no student shall be denied admission" on the basis of any protected characteristic, including "religious preference or lack thereof." Pet.App.138. St. Isidore thus expected to welcome students for the 2024 school year. Pet.App.114.

D. Procedural History

The school was not allowed to open. Respondent Gentner Drummond took over as Oklahoma's Attorney General in 2023. Unlike his predecessor, Respondent sought to bar St. Isidore from the charter school program. In his view, approving St. Isidore's application would "[u]nfortunately" require "the approval of charter schools by all faiths, even those most Oklahomans would consider reprehensible and unworthy of public funding." Pet.App.77. Or as he later put it more pointedly: it "will require the State to permit extreme sects of the Muslim faith to establish a taxpayer funded public charter school teaching Sharia Law." Pet.App.174.

Determined to exclude religious adherents of all stripes, Respondent sought a writ of mandamus from the Oklahoma Supreme Court to cancel St. Isidore's contract. Pet.App.2. St. Isidore intervened to protect its interests. *See id.* Before the court, Respondent argued that providing state funding to a Catholic school would violate the nonsectarian provisions of Oklahoma's constitution and Charter Schools Act, as well as the federal Establishment Clause. Pet.App.181-92. And he insisted that St. Isidore had relinquished its free exercise rights and been "turned . . . into a state actor" by dint of executing its contract with the Board. Pet.App.194. St. Isidore countered that it is not a state actor and that the Free Exercise Clause prohibits Oklahoma from excluding religious applicants from the State's charter school program. Res.App.339, 349-59.

A divided Oklahoma Supreme Court agreed with Respondent. The majority concluded that Oklahoma

law prohibited the State from expending "funds for the benefit and support of the Catholic church." Pet.App.11. And it held that state law also prohibits the Board from sponsoring a charter school "affiliated with a . . . religious institution." Pet.App.12.

The court then rejected St. Isidore's free exercise defense to the enforcement of these discriminatory laws. According to the court, this Court's recent free exercise precedents did not apply because St. Isidore had become "a governmental entity and state actor." Pet.App.14, 24-27. As the lower court saw things, "St. Isidore will be acting as a surrogate of the State in providing free public education." Pet.App.17. It emphasized that St. Isidore fell within the statutory "definition of a public school." Pet.App.15. And it characterized St. Isidore as closely "entwined with the State" because the Board sponsored its contract and would supervise St. Isidore's performance under that contract. Pet.App.18. The lower court admitted that "[t]he provision of education may not be a traditionally exclusive public function." *Id.* But, it said, "the Oklahoma Constitutional provision for *free public* education is exclusively a public function." Pet.App.18-19. Based on these conclusions, the lower court held that St. Isidore is a state actor for all purposes. Pet.App.17, 19. From there, the lower court reasoned that funding St. Isidore would violate the federal Establishment Clause "[b]ecause it is a governmental entity and a state actor" that will "incorporate Catholic teachings into every aspect of the school." Pet.App.24.

Justice Kuehn dissented.[4] As she explained, "St. Isidore would not become a 'state actor' merely by contracting with the State to provide a choice in educational opportunities." Pet.App.30. Accordingly, excluding St. Isidore "based solely on religious affiliation[] would violate the Free Exercise Clause." *Id.* Justice Kuehn criticized the majority's rote deference to a statutory "label[]" as improperly exalting "form over substance." Pet.App.33. And she recognized that the "realities belie such labeling." Pet.App.34. Indeed, this Court's precedents make clear that regulation alone—even if "'extensive and detailed'"—does not transform private entities "into arms of the state." Pet.App.33-34 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 (1974)). Nor could the majority "reframe" the relevant function as "publicly-funded education" to avoid the obvious fact that "education is not a 'traditionally exclusive public function.'" Pet.App.33 & n.2 (quoting Pet.App.18). Because St. Isidore is a private entity with free exercise rights, the State could not bar it from "applying to operate a charter school" simply because it is religious. Pet.App.38. "By reaching the opposite conclusion," Justice Kuehn submitted, "the Majority's decision is destined for the same fate as the Montana Supreme Court's opinion in *Espinoza*." *Id.*

[4] Then-Vice Chief Justice Rowe also dissented in relevant part. Pet.App.40.

SUMMARY OF ARGUMENT

The decision below contravenes the Constitution and this Court's precedents several times over. It spurned the free exercise guarantees this Court has repeatedly upheld. It violated the state-action doctrine by treating a privately run religious school as an arm of the government. And it distorted the Establishment Clause beyond recognition.

I. This Court has repeatedly held that the Free Exercise Clause bars a State from excluding religious adherents from government programs solely because of their faith. That basic non-discrimination principle prohibits the State from denying applicants based on their religious status. And it likewise forbids the State from withholding otherwise available funds based on their anticipated use for religious purposes. Both forms of discrimination violate the First Amendment.

That straightforward rule should have resolved this case. Oklahoma invites private organizations to participate in its charter school program and thereby receive funding to provide additional educational options for students. Yet, as in *Trinity Lutheran*, *Espinoza*, and *Carson*, the State's laws categorically deny religious organizations access to this program. The Board rightly disregarded those unconstitutional provisions, allowed St. Isidore to participate in the program, and executed a contract with it to support the school St. Isidore would open. But the lower court applied the State's discriminatory laws to cut off St. Isidore from that government aid—simply because it is "operated by the Catholic church." The First Amendment prohibits that religious hostility.

II. The Oklahoma Supreme Court sought to justify its free exercise violation by devising a loophole. It tried to reconceptualize St. Isidore as a governmental entity and state actor, bereft of constitutional rights. But that flipped the state-action doctrine on its head. St. Isidore is a private religious organization operated by private parties. Neither its Catholic affiliation nor the Catholic educational model that it independently designed are attributable to the State.

A. Privately operated entities can qualify as state actors only in a few narrow circumstances. They do not become surrogates of the State because of regulation or the receipt of statutory benefits. Nor do they engage in state action by performing a function that serves the public or by doing something that the government merely approves or allows. Instead, the State typically must have coerced or significantly influenced the specific conduct at issue.

Applying those principles, this Court in *Rendell-Baker* held that a privately operated school did not engage in state action when it contracted with the State to provide a free education that the State was legally obligated to provide. The same is true here. St. Isidore was formed as a private institution by the Archbishop of Oklahoma City and the Bishop of Tulsa. It is "operated by a board of directors, none of whom are public officials or are chosen by public officials." *Rendell-Baker*, 457 U.S. at 832. And it alone is responsible for the academic and pedagogical choices that Respondent attacks in this case. The fact that St. Isidore contracted with the State to expand educational choices for Oklahoma students does not transform its private educational initiatives into state

action. Those matters remain protected by the Free Exercise Clause.

B. The lower court's efforts to transmute St. Isidore into an arm of the Oklahoma government all fail. And Respondent's efforts to salvage the lower court's misguided decision similarly fall flat.

1. St. Isidore is not "a governmental entity." It is not part of the government merely because the Oklahoma legislature designated charter schools "public." This Court has long refused to allow state-law labels to defeat federal constitutional guarantees. The Constitution deals in substance, not slogans.

That principle applies with equal force in the state-action context. This Court has squarely rejected the idea that labeling an entity "public" turns it into a state actor. And this Court has consistently refused to allow semantics to determine the scope of substantive First Amendment protections. The Oklahoma legislature's "public" labeling thus provides no basis to discriminate against St. Isidore because it is religious.

Nor is St. Isidore a "creature[] of state law" or "state-created entity." On the contrary, two Catholic dioceses created St. Isidore—which is not directed by, and does not employ, a single public official. Nor is the charter school that St. Isidore plans to open a creature of special legislation or government design. Rather, St. Isidore seeks to participate in a statutory program that invites private organizations to plan, establish, and operate innovative schools *under contract* with the government. This Court has made clear that corporations do not lose their private nature or rights merely because they contract with the government or act under charters granted by it. St. Isidore was

created by private actors, and control of St. Isidore remains in private hands.

2. The lower court also erred in holding that, even if St. Isidore is not a government entity, it engages in state action because it is constitutionally "entwined with the State." Such entwinement exists only when public officials overwhelmingly pervade an institution's composition and workings. That is not the case here. Far from it. St. Isidore is operated by a wholly private board and will implement the curriculum that it independently designed through its own privately hired teachers. And Oklahoma law leaves the school's operations, curricular choices, and policies to these private individuals. State actors do not dictate them.

It makes no difference that Oklahoma regulates St. Isidore or that the Board will supervise its compliance with the charter school contract. That is what a government typically does with its contractors. But that does not transform those contractors' conduct into state action. At most, the Board can be said to have approved or acquiesced in St. Isidore's private initiatives. That does not make St. Isidore's religious educational model attributable to the State.

3. Moreover, St. Isidore has not been delegated any "traditional" and "exclusive" public function. It seeks to educate school children. Private entities have widely and continuously fulfilled that function from the Founding to the present day—often with the support of government funding.

The lower court tried to dodge that conclusion by treating the relevant "function" as the provision of "*free public* education." But that semantic trick only

begs the state-action question. This Court rejected it in *Carson*. And a State's decision to fund tuition-free alternative schools "at public expense" in "no way makes the[ir] services the exclusive province of the State." *Rendell-Baker*, 457 U.S. at 842.

4. Lacking any support in this Court's state-action precedents, Respondent resorts to misreading *Carson*. Contrary to his suggestion, that case did not analyze whether a school is public or private for purposes of the Constitution, much less set forth a test for doing so. What *Carson* does make clear, though, is that Oklahoma law unconstitutionally "operates to identify and exclude otherwise eligible schools on the basis of their religious exercise." 596 U.S. at 789. That violates the Free Exercise Clause, and the lower court erred in holding otherwise.

III. The lower court's Establishment Clause ruling was equally flawed. The Oklahoma Supreme Court thought it would violate the Establishment Clause if St. Isidore were to operate a Catholic school because it wrongly viewed St. Isidore as an arm of the government. As already explained, St. Isidore is not a state actor; it is a private entity "operated by the Catholic church."

It does not violate the Establishment Clause when private religious institutions benefit from neutral government programs. Nor can the lower court's errant view of the state-action doctrine and Establishment Clause justify its infringement on Petitioner's religious liberty. This Court has repeatedly held that overbroad anti-establishment views cannot excuse free exercise violations.

The lower court also thought that *directly* funding St. Isidore would violate the Establishment Clause. But this argument is triply flawed. *First*, this Court rejected that view in *Trinity Lutheran*. *Second*, the distinction between direct and indirect funding is a false one here, because St. Isidore will receive government funds based on the independent decisions of families who choose to send their children to the school. *Third*, this Nation's history and tradition confirm that direct government aid to religious schools presents no constitutional problem.

For all these reasons, funding St. Isidore would not violate the Establishment Clause. But denying it equal access to the State's charter school program—as the lower court did—would run afoul of the Free Exercise Clause. This Court should reverse.

ARGUMENT

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. But the Oklahoma Supreme Court defied that straightforward command. It enforced discriminatory state laws to bar St. Isidore from participating in Oklahoma's charter school program because it is religious. And, in its haste to skirt the Free Exercise Clause, the lower court violated this Court's state-action precedents by recasting St. Isidore into an arm of the Oklahoma government. That misguided decision should be reversed.

I. A State Cannot Deny Generally Available Funding To A School Because It Is Religious.

Oklahoma cannot exclude St. Isidore from its charter school program merely because it is religious. Rather, "[t]he Free Exercise Clause 'protects religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities.'" *Trinity Lutheran*, 582 U.S. at 458 (alteration adopted; citation omitted). This Court has consistently applied that "basic" and "unremarkable" principle to prohibit the States from "denying a generally available benefit solely on account of religious identity." *Id.* at 458, 462. That means the States cannot "exclude[] schools from government aid solely because of religious status." *Espinoza*, 591 U.S. at 476. Nor can they deny otherwise qualified religious schools access to funding "on the basis of [its] anticipated religious use." *Carson*, 596 U.S. at 789.

The Board faithfully heeded these principles by granting St. Isidore's application to participate in the charter school program. The lower court should have done the same to uphold the Board's decision. But, like the lower courts in *Trinity Lutheran*, *Espinoza*, and *Carson*, the Oklahoma Supreme Court chose instead to enforce the "nonsectarian" provisions of Oklahoma law to "bar[] [a] religious school[] from public benefits solely because of [its] religious character." *Espinoza*, 591 U.S. at 476. Indeed, "[i]t is undisputed that, aside from its religious affiliation, St. Isidore meets the requirements for operating a charter school." Pet.App.34. Nevertheless, because St. Isidore is "operated by the Catholic church," the

court below refused to allow the "expenditure of state funds" for St. Isidore's "benefit and support" in creating educational opportunities for Oklahoma children. Pet.App.10-11.

"That is discrimination against religion." *Carson*, 596 U.S. at 781. Oklahoma law "singles out schools based on their religious character" for disfavored treatment and "excludes schools from government aid solely because of religious status." *Espinoza*, 591 U.S. at 476. By enforcing that law, the lower court required St. Isidore to "disavow its religious character" as a condition of receipt. *Trinity Lutheran*, 582 U.S. at 463. The First Amendment forbids Oklahoma from discriminating in this way. *See id.*; *Espinoza*, 591 U.S. at 487; *Carson*, 596 U.S. at 789.

Of course, Oklahoma "need not subsidize" a privately operated charter school program in the first place. *Espinoza*, 591 U.S. at 487. But, once it has, "[t]he State cannot enlist private organizations to 'promote a diversity of educational choices,' and then decide that any and every kind of religion is the wrong kind of diversity." Pet.App.71 (quoting 70 Okla. Stat. § 3-134(I)(3)); *see Espinoza*, 591 U.S. at 487. That flouts the Free Exercise Clause's basic commitments to "religious tolerance" and "governmental neutrality." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 584 U.S. 617, 638-39 (2018) (quotation marks omitted); *see Carson*, 596 U.S. at 781.

Nor can the Establishment Clause justify Oklahoma's hostility toward religious charter schools. This Court has "repeatedly held that the Establishment Clause is not offended when religious observers and organizations benefit from neutral

government programs." *Espinoza*, 591 U.S. at 474. And any Establishment Clause objection would be "particularly unavailing" here "because the government support makes its way to religious schools only as a result of [Oklahomans] independently choosing" to attend them. *Id.*

That is because Oklahoma charter schools contract with the State to provide "*additional* academic choices for parents and students." 70 Okla. Stat. § 3-131(A)(4) (emphasis added). Nobody is forced to attend them, and the funding St. Isidore would receive is based on the number of families who decide to enroll their children. Pet.App.157. In other words, "government aid reaches religious schools" here "only as a result of the genuine and independent choices of private individuals." *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002). "With no students, State Aid [to St. Isidore] would be zero." Pet.App.157; *see* Pet.App.126-27. The State's "antiestablishment interest" thus cannot justify excluding St. Isidore from this "otherwise generally available public benefit because of [its] religious exercise." *Carson*, 596 U.S. at 781.

The Oklahoma Supreme Court had no good answer to this blackletter First Amendment law. Its lone response was to eschew this Court's free exercise precedents by redefining St. Isidore (a privately created and operated entity) as a state actor—with no constitutional protections whatsoever. Pet.App.25-26. As explained below, that ruling was foreclosed by this Court's state-action precedents. *See infra* Section II. Those decisions make clear that St. Isidore is not an arm of the Oklahoma government. Nor are its

academic or pedagogical choices attributable to the State. St. Isidore is a private religious institution with free exercise rights. And the lower court violated those rights by blocking St. Isidore from the charter school program because it is religious.

II. St. Isidore Is A Private Entity And Its Conduct Is Not State Action.

The lower court's conception of state action was deeply flawed. St. Isidore is a private corporation operated by a private board. And it alone crafted the Catholic educational model that it intends to offer interested families. Its contract to receive funding to facilitate that endeavor does not render its private actions attributable to the State. Nor does that contract morph St. Isidore into a government entity. Rather, St. Isidore and its religious educational initiatives remain protected by the First Amendment.

A. St. Isidore Is A Private Entity That Independently Develops And Delivers Its Unique Educational Model.

This Court has long cautioned that "a private entity can qualify as a state actor" only "in a few limited circumstances." *Halleck*, 587 U.S. at 809; *see e.g., Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158-66 (1978). The Court has also emphasized that a finding of state action for some purposes does not necessarily render the private entity a government functionary for others. *See Polk County v. Dodson*, 454 U.S. 312, 324-25 (1981). The inquiry instead turns on whether "the State is responsible for the *specific conduct* of which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (emphasis shifted).

Rarely will that be the case for a private entity's decisions. State action typically exists only where the government "exercised coercive power" or "provided such significant encouragement" that the private act "must in law be deemed to be that of the State." *Id.* "Mere approval of or acquiescence in the initiatives of a private party" by the government do not suffice. *Id.*; *see Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999) (collecting cases). "[E]xtensive regulation by the State" does not cut it. *Jackson*, 419 U.S. at 358. Nor does "a private entity perform[ing] a function which serves the public" transform that conduct into state action. *S.F. Arts & Ath., Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 544 (1987) (citation omitted).

This Court applied those principles to a privately operated school like St. Isidore in *Rendell-Baker*. There, the New Perspectives School contracted with the State to educate "maladjusted high school students" at "public expense." 457 U.S. at 831-32, 842. As in this case, no student "paid tuition" at the school. *Id.* at 832. The State provided "virtually all" of the school's funding to "pay for the students' education," as required by Massachusetts law. *Id.* at 832 & n.1, 840. The State also subjected the school to "detailed regulations concerning" everything "from recordkeeping to student-teacher ratios." *Id.* at 833. This Court nevertheless held that the conduct at issue (the school's personnel decisions) was not state action. As it explained, the school was a "private institution" that was "operated by a board of directors, none of whom [were] public officials or [were] chosen by public officials." *Id.* at 832. That privately run school did not become a state actor merely because it "depended" on government contracts for funding. *Id.* at 840. Nor did

it matter that the school performed the "public function" of helping educate a population of students "at public expense." *Id.* at 842. Rather, what mattered was whether the school's decisions were "compelled" by the State. *Id.* at 841. Because the decisions were "made by private management," there was no state action. *Id.* at 842.

So too here. St. Isidore is a "privately operated religious non-profit organization." Pet.App.111. It was formed by "the Archdiocese of Oklahoma City and the Diocese of Tulsa"—both undisputedly private actors. Pet.App.214-15; *see* Pet.App.225. And its founding members appointed St. Isidore's board to "manage and direct the business and affairs of the School," in accordance with the Catholic educational model that they designed. Pet.App.226. No member of that board is a government official or appointed by one. And the charter contract reiterates that this privately appointed board is the "governing authority" of the school. Pet.App.110. That private board alone is "responsible for the policies and operational decisions of the Charter School," including the implementation of the Catholic educational model that Respondent hopes to deny interested Oklahoma families. Pet.App.120; *see* 70 Okla. Stat. § 3-136(A)(8).

Thus, as in *Rendell-Baker*, St. Isidore is a private educational institution, and it—not the State—is responsible for the religious conduct challenged here. Indeed, St. Isidore would "not [be] fundamentally different from many private corporations whose business depends primarily on contracts" with the government. *Rendell-Baker*, 457 U.S. at 840-41. "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." *Id.* at 841 (emphasis added); *see Blum*, 457 U.S. at 1011. The key point instead is that the religious aspects of St. Isidore's curriculum are not "dictated by any rule of conduct imposed by the State." *Blum*, 457 U.S. at 1009. And because "[t]here is no evidence" that Oklahoma "coerced or encouraged" the academic and pedagogical choices that Respondent complains of, those private decisions cannot qualify as actions "of the Government." *S.F. Arts & Ath.*, 483 U.S. at 547.

At bottom, nothing that Respondent attacks is "attributable to the state." *Sullivan*, 526 U.S. at 51. The State did not design the school. It did not create or encourage St. Isidore's religious character. It did not appoint any member of St. Isidore's board. It did not instruct the school to offer an education in the Catholic tradition. And it will not hire or supervise the school's teachers and administrators. Rather, Oklahoma has taken a deliberately hands-off approach to these matters, which rest with St. Isidore and its leaders, who are all private parties.

Accordingly, the Free Exercise Clause protects, and the Establishment Clause does not forbid, St. Isidore's right to participate in the charter school program.

B. The Lower Court's Attempts To Portray St. Isidore As A State Actor All Fail.

The lower court's contrary holding conflicts with this Court's precedents and the Constitution. The decision below treated St. Isidore's actions as the government's—but could not settle on the reason why. Instead, the court offered three flawed justifications for its finding of state action: (1) Oklahoma charter

schools are *themselves* "governmental entit[ies]," largely because the state legislature has labeled them "public schools," Pet.App.15-17; (2) even if not, the education charter schools provide is attributable to the State because they are closely "entwined" with the government, Pet.App.18; and (3) charter schools deliver "*free public* education," which the court viewed as "exclusively a public function," Pet.App.19.

Each argument runs straight into this Court's precedents. And Respondent's attempts to salvage the decision below by advancing different arguments at the petition stage fare no better. St. Isidore remains a private actor with free exercise rights.

1. St. Isidore Is Not A Government Entity.

To start, St. Isidore is self-evidently not *part of* the Oklahoma government. None of the lower court's arguments to the contrary holds weight.

a. The Oklahoma Supreme Court fixated on the simple fact that Oklahoma law calls charter schools "public school[s]." Pet.App.15. But that label has nothing to do with whether a school is (or is run by) a governmental entity. Rather, under Oklahoma law, a "public school" is defined broadly as any school that is "free" to all students and "supported by public taxation." 70 Okla. Stat. §§ 1-106, 3-132(D).

More fundamentally, this Court has long held that federal constitutional rights do not depend on "state law labels." *Bd. of Cnty. Comm'rs, Wabanusee Cnty. v. Umbehr*, 518 U.S. 668, 679 (1996). Even Respondent concedes—contrary to the decision below—that a statutory designation is "not dispositive." BIO.25. Were it otherwise, States could

manipulate their laws to defeat federal guarantees. *See O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 721-22 (1996). That is why this Court has always trained its "focus on substance" when adjudicating constitutional questions. *McElrath v. Georgia*, 601 U.S. 87, 96 (2024); *see also, e.g.*, *Harris v. Quinn*, 573 U.S. 616, 641 n.10 (2014); *United States v. Craft*, 535 U.S. 274, 279 (2002); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 392-93 (1995); *NAACP v. Button*, 371 U.S. 415, 429 (1963); *Carpenter v. Shaw*, 280 U.S. 363, 367-68 (1930); *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 235 (1897).

The state-action inquiry is no different. This Court has consistently rejected the facile notion that labeling an entity "public" makes it an arm of the government. In *Jackson*, for example, this Court held that state legislation defining a privately owned and operated electric company as a "public utility" did not transform the company's conduct into state action. *See* 419 U.S. at 350 n.7, 352-54. In *Polk County*, this Court rebuffed the argument that a "public defender" paid by the State had acted under color of state law. 454 U.S. at 317-20. In *Halleck*, this Court concluded that an operator of "public access channels" retained its rights and protections as a "private actor." 587 U.S. at 805. And, in *Lindke*, this Court reaffirmed that "[t]he distinction between private conduct and state action turns on substance, not labels." 601 U.S. at 197. Preserving that substantive "constitutional boundary between the governmental and the private" is indeed vital to maintaining "a robust sphere of individual liberty." *Halleck*, 587 U.S. at 808.

Similarly, this Court has held that the "substance of free exercise protections" does not hang "on the presence or absence of magic words." *Carson*, 596 U.S. at 785. And it has refused to reduce the scope of First Amendment protections "to a simple semantic exercise." *Id.* at 784 (citation omitted); *see also Fulton*, 593 U.S. at 538-40 (rejecting argument that "a private religious foster agency" provided a "public accommodation"); *Lebron*, 513 U.S. at 392-93 (holding that a "congressional label" could not alter "what the Constitution regards as the Government" for First Amendment purposes).

The Oklahoma Supreme Court thus erred by relying on the "legislative designation of public school." Pet.App.17. St. Isidore is a private actor with First Amendment rights, regardless of the label the State stamps on it.

b. The lower court was also wrong to deem St. Isidore a "state-created entity" and "creature[] of state law." Pet.App.16-18. On the contrary, St. Isidore is "a privately operated religious non-profit organization." Pet.App.111. It was incorporated by two Catholic dioceses. Pet.App.214-15, 225. And its founding members appointed everyone on the school's governing board. Pet.App.226, 228.

That private creation and control fundamentally distinguishes St. Isidore from entities that *are* creatures of the State. St. Isidore looks nothing like Oklahoma public schools operated by local school districts—governmental bodies run by publicly elected boards. *See* 70 Okla. Stat. §§ 1-108, 5-106, 5-107A. And St. Isidore does not resemble the few arguably private corporations that have qualified as

government instrumentalities. This Court regarded Amtrak as "part of the Government," for example, because Congress directly created it—by name via "special law"—and "retain[ed] for itself permanent authority to appoint a majority of the directors of that corporation." *Lebron*, 513 U.S. at 400. What mattered was the "practical reality" of where "control and supervision" of the corporation resided, and whether private or state officials dictated the entity's "day-to-day operations." *Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 55 (2015). There, operational control remained with public officials. *See id.*

Not so here. Oklahoma did not "create[]" St. Isidore through special legislation, does not "control its Board," does not "define its mission," and does not dictate its "day-to-day operations." *Id.* Those matters and the school's educational initiatives remain with St. Isidore's private leadership. Not a single member of St. Isidore's controlling board, nor any employee that board might hire, is a government official. And Oklahoma law tellingly does not vest "political power" or any other "duties which flow from the sovereign authority" in St. Isidore. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 634 (1819).

Likewise, the fact that the State grants St. Isidore's charter does not make it part of the government. "All corporations act under charters granted by a government, usually by a State," but they "do not thereby lose their essentially private character." *S.F. Arts & Ath.*, 483 U.S. at 543-44. This Court thus held that the U.S. Olympic Committee ("USOC") is not a state actor—even though Congress "created" it,

"granted it a corporate charter," "imposed certain requirements" upon it, and provided it direct funding. *Id.* at 542-44 & n.23. None of that was "enough to make the USOC's actions those of the Government." *Id.* at 547. The same goes for St. Isidore.

The lower court also suggested that charter schools are "treat[ed] as . . . governmental bodies" in limited ways—seizing on scattered regulations that give them some "privileges, responsibilities, and legal requirements that govern traditional public schools." Pet.App.16. "[B]eing regulated by the State," however, "does not make one a state actor." *Halleck*, 587 U.S. at 816 (collecting cases). And even those regulations cited below are narrow exceptions to the general rule that charter schools are *free* "from all statutes and rules" that apply to State-run schools. 70 Okla. Stat. § 3-136(A)(5). None of them alters St. Isidore's private nature. Nor is there anything unusual about a State applying—or a private contractor accepting—certain privileges and responsibilities like these as part of a contractual bargain. *See, e.g.*, 51 Okla. Stat. §§ 152, 152.2 (listing broad array of entities conferred immunity under Oklahoma's Governmental Tort Claims Act, including contractors providing various services); 2002 OK AG 02-37, ¶ 19 ("A contract may, of course, contain a provision which makes a private organization subject to [Oklahoma's Open Meetings Act]."); *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 813-14 (9th Cir. 2010) (holding charter school not a state actor despite application of open meetings law). Entering a contract with the Board did not transform St. Isidore into the government itself.

c. Respondent cannot deny any of this. So, at the petition stage, he artificially tried to cleave St. Isidore the "corporation" from St. Isidore the "school" that the corporation will operate. BIO.1, 10 n.5, 25.[5] That too is mistaken. The school is not a separate legal entity created by the contract, let alone a standalone arm of the Oklahoma government. The school is merely the facility through which St. Isidore will perform the educational services that it applied and contracted to perform. This understanding is reflected throughout the charter contract. *See* Pet.App.111 ("[T]he Charter School submitted an . . . application[.]"); *id.* ("[T]he Charter School is a privately operated religious nonprofit organization[.]"); Pet.App.113 (similar).

Even if there were two separate entities, that would make no difference. Either way, St. Isidore "the school" is privately formed and operated, exactly like St. Isidore "the corporation." The school (like the corporation) was not created by special legislation. The school (like the corporation) is not directed by and does not employ a single public official. And the school is run by the same private board as that founding corporation. *See, e.g.*, Pet.App.110, 120. In other

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[5] Respondent never made this puzzling distinction below. If anything, he argued the opposite. He maintained that when "St. Isidore executed a contract" with the Board, it "*became* an illegally sponsored public virtual charter school." Pet.App.176 (emphasis added). And he consistently referred to "St. Isidore" as "a sectarian school seeking to receive public money." Pet.App.182; *see also* Pet.App.177, 187, 191-92, 194 (similar). Even at the petition stage, Respondent contradicted himself. At one point, he stated that St. Isidore *the corporation* executed the charter contract, *see* BIO.25, and at another he claimed that St. Isidore *the school* executed the charter, *see* BIO.10.

words, the charter school remains "privately owned and operated," with a religious educational model that was devised and will be implemented by private actors. *Rendell-Baker*, 457 U.S. at 840; *see S.F. Arts & Ath., Inc.* 483 U.S. at 542-43; *Jackson*, 419 U.S. at 350. Whether viewed as two entities or one, the school is not part of the State. And excluding St. Isidore from the charter school program based on its religion would violate the First Amendment.

2. The State Is Not Closely Entwined With St. Isidore's Private Operations.

The Oklahoma Supreme Court next suggested that, even if St. Isidore is not *part of* the government, its provision of a Catholic education is attributable to the government because the school is closely "entwined with the State." Pet.App.18. That is incorrect. There is no "pervasive entwinement of state school officials in the structure" of the school that would warrant classifying its operation or curricular design as "state action." *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 291 (2001). No "state actors [are] involved in [St. Isidore's] governing board," and no state official "played any role in the [religious educational model] of the school." *Caviness*, 590 F.3d at 816 n.6; *see Logiodice v. Trs. of Me. Cent. Inst.*, 296 F.3d 22, 28 (1st Cir. 2002) (finding "no entwinement" where state-funded school was "run by private trustees and not public officials").

The lower court's reliance on *Brentwood* therefore misses the mark. *Brentwood* concerned a constitutional challenge to the actions of a statewide athletics "organization overwhelmingly composed of public school officials." 531 U.S. at 299. State-run

schools comprised 84% of the membership, and their respective designees in turn "select[ed] members of the governing legislative council and board of control" while "acting in their official capacity." *Id.* at 298-300. Others were assigned to these governing bodies by the Tennessee Board of Education. *Id.* at 300. These public officials did "not merely control but overwhelmingly perform[ed] all but the purely ministerial acts by which the Association exist[ed] and function[ed]." *Id.* And "all" voting members who participated in the relevant action "were public school administrators." *Id.* at 293, 299. That "overwhelming" and "pervasive entwinement of public institutions and public officials" in the "composition and workings" of the Association led the Court to find state action. *Id.* at 298, 302.

Here, by contrast, St. Isidore "is operated by a board of directors, none of whom are public officials or are chosen by public officials." *Rendell-Baker*, 457 U.S. at 832; *see* Pet.App.225-31. And the State does not meddle in the school's "policies and operational decisions." Pet.App.120. Oklahoma law instead leaves those matters to St. Isidore's private "governing body." 70 Okla. Stat. § 3-136(A)(8). It also generally "exempt[s]" St. Isidore "from all statutes and rules relating to schools, boards of education, and school districts." *Id.* § 3-136(A)(5).

Even more importantly, the State is not responsible for the specific acts that Respondent has challenged—St. Isidore's religious character and its choice to educate in the "Catholic intellectual tradition." Pet.App.206; *see* Pet.App.181-86. To the contrary, the Charter Schools Act explicitly frees "private

organization[s]" like St. Isidore to develop their own curricula *without* state interference, so they can offer "different and innovative teaching methods" that "emphasize[] a specific learning philosophy or style or certain subject areas." 70 Okla. Stat. §§ 3-131(A)(3), 3-134(C), 3-136(A)(3). In other words, St. Isidore's Catholic "initiative comes from [its private leadership] and not from the State," even if the Board approved St. Isidore's application to operate with state funding. *Jackson*, 419 U.S. at 357. "Such permission of a private choice cannot support a finding of state action." *Sullivan*, 526 U.S. at 54.

Nor will any state officials implement St. Isidore's privately developed curriculum in the classroom. Oklahoma charter schools hire their own teachers, who are not subject to the State's "Teacher and Leader Effectiveness Standards" and are not required to have state teaching certificates. *Oklahoma Charter Schools*, Okla. St. Dep't of Educ. (Jan. 17, 2025), https://bit.ly/4h93VVZ; *see also* Pet.App.141-42.

The lower court ignored all of this. Instead, it divined constitutional entwinement from the Board's "monitor[ing]" and "oversight" of St. Isidore. Pet.App.18. But "this degree of involvement is too slim a basis on which to predicate a finding of state action." *Blum*, 457 U.S. at 1010. Indeed, the decision below pointed only to *general* oversight measures typical of many government contracts—like accreditation review, financial audits, and compliance monitoring. Pet.App.15-16, 18. The State's general supervision and regulation of a government contractor does not entwine the State in the creation or delivery of St. Isidore's educational model. As already

explained, those are wholly private undertakings. No one could reasonably think that Oklahoma "compelled or even influenced" St. Isidore to affiliate with the Catholic Church or teach in the Catholic tradition. *Rendell-Baker*, 457 U.S. at 841. "At most," the Board "can be said to [have] exercise[d] 'mere approval of or acquiescence in the initiatives'" of St. Isidore and its private leadership. *S.F. Arts & Ath.*, 483 U.S. at 547 (citation omitted). "This is not enough to make [St. Isidore's] actions those of the Government." *Id.*

Nor does it matter that St. Isidore will receive "legal protections and benefits" by partaking in the charter school program. Pet.App.18. It is beyond cavil that the "[p]rivate use of state-sanctioned private remedies or procedures does not rise to the level of state action." *Sullivan*, 526 U.S. at 53 (citation omitted). In addition, none of the benefits that the lower court identified—such as a defense under the Governmental Tort Claims Act[6] or access to retirement and insurance programs for teachers, *see* Pet.App.16—is implicated in this case. They thus cannot support a finding of state action, particularly not with respect to

[6] Oklahoma makes this defense available to many other private institutions and contractors. *See, e.g.*, 51 Okla. Stat. § 152.2(3) (charitable health care providers); *id.* § 152.3(3) (community health care providers); *id.* § 152(11)(f) (non-profit rural water supply organizations); *id.* § 152(11)(k) (emergency services providers); *id.* § 152(11)(o) (youth services agencies); *id.* § 152(11)(q) (child-placing agencies). And granting such "immunity from liability" is just another way of providing a "favorable regulatory environment." *Children's Health Def. v. Meta Platforms, Inc.*, 112 F.4th 742, 761 (9th Cir. 2024). "If that were enough for state action, every large government contractor would be a state actor," but that, of course, "is not the law." *Id.*; *see, e.g.*, *Sullivan*, 526 U.S. at 53.

St. Isidore's creation or delivery of its religious curriculum.

3. Education Is Not A Traditional And Exclusive Public Function.

That leaves only the lower court's misconception that St. Isidore has been tasked with a "traditional" and "exclusively" public prerogative. Pet.App.18-21. This Court "has stressed that 'very few' functions fall into that category." *Halleck*, 587 U.S. at 809 (citation omitted). For a function to qualify, "[i]t is not enough that the federal, state, or local government exercised the function in the past, or still does." *Id.* Nor does it suffice "that the function serves the public good or the public interest in some way." *Id.* Rather, "the government must have traditionally *and* exclusively performed the function." *Id.*

That is not the case here. St. Isidore seeks to provide educational services to Oklahoma children. "Obviously," though, "education is not and never has been a function reserved to the state." *Logiodice*, 296 F.3d at 26 (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925)); *see also Rendell-Baker*, 457 U.S. at 842 (similar); *Caviness*, 590 F.3d at 816 (similar). Both private schools and homeschooling have always "played a substantial role in our society." *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 144 (4th Cir. 2022) (en banc) (Quattlebaum, J., dissenting in part).

Indeed, schools "controlled by the government" were "essentially unknown to the Framers of the First Amendment." Michael W. McConnell et al., *Religion and the Constitution* 318 (4th ed. 2016). "Outside of New England, education was entirely private and almost all schools were religious schools." Michael W.

McConnell, *Scalia and the Secret History of School Choice*, in *Scalia's Constitution* 72 (Peterson & McConnell eds., 2018) (hereafter, "Secret History"). Many of these privately operated religious schools "received public funding through tuition support." *Id.* at 73. Others "financed their operation through charity or tuition," so that "all children" in the area could attend the school and receive an education. Dick M. Carpenter II & Krista Kafer, *A History of Private School Choice*, 87 Peabody J. of Educ. 336, 337 (2012).

This widespread private education persisted up through the Fourteenth Amendment's ratification. And much of it continued to be publicly funded. *See* Secret History, *supra*, at 74. Just as private education often is today. *See* Libby Stanford et al., *Which States Have Private School Choice?*, EducationWeek (Feb. 28, 2025), https://bit.ly/4jSveGs (observing that over half the States have some private school choice program).

Oklahoma's history tells a similar story. Well before Oklahoma's statehood, mission schools were "operated by [religious organizations] on a contract basis" in the territory, "with the tribes and Federal government supplying the necessary funds and the church agreeing to administer the schools." Joe C. Jackson, *The History of Education in Eastern Oklahoma from 1898 to 1915*, at 32 (1950). Private schools known as "subscription schools" also "provided children an education until public schools could be built." Linda D. Wilson, *Schools, Subscription*, Encyclopedia of Okla. Hist. & Culture, https://bit.ly/3EvNEg2 (last visited Mar. 5, 2025). Even as the system of State-run schools grew, privately operated schools remained alongside them.

To this day, private parties educate roughly 16% of Oklahoma's more than 700,000 school-aged children. *See EdChoice Share 2025*, EdChoice (Dec. 22, 2024), https://bit.ly/4gEzab9. All this shows that the provision of educational services has "not traditionally *and* exclusively been performed by government." *Halleck*, 587 U.S. at 810 (emphasis added).

The decision below sought to wriggle free from that conclusion by redefining the relevant "function" as the provision of "*free public* education." Pet.App.19. Yet that "is nothing but a circular characterization assuming the answer to the very question asked." *Peltier*, 37 F.4th at 154 (Wilkinson, J., dissenting). "By using outcome-determining adjectives such as 'free' and 'public,'" the Oklahoma Supreme Court all but "'ignore[d] the threshold state-action question.'" *Id.* at 147 (Quattlebaum, J., dissenting in part) (quoting *Halleck*, 587 U.S. at 811).

This Court rejected the same basic ruse in *Carson*. Maine there argued that its tuition-assistance program subsidized the equivalent of a "free public education," which the State required to be secular. 596 U.S. at 782. But this Court saw through that "semantic exercise," and it rejected Maine's effort to "manipulate[]" the definition of its program in order to "subsume" the very religious discrimination being challenged. *Id.* at 784 (citation omitted). The Court should do the same here.

Moreover, the decision below defies *Rendell-Baker* by defining the relevant "function" based on funding source. The State in that case likewise funded a privately operated school, just as Oklahoma has chosen through the Charter Schools Act to fund

alternative schooling options "at public expense." *Rendell-Baker*, 457 U.S. at 842. As in *Rendell-Baker*, "[t]hat legislative policy choice in no way makes these services the exclusive province of the State." *Id.* The Oklahoma Supreme Court erred by reaching the opposite result.

The lower court's suggestion that St. Isidore became a state actor through "outsourc[ing]" of the State's educational obligations similarly conflicts with *Rendell-Baker*. Pet.App.19. In that case, too, "the State [was] *required*" by its own law "to provide a free education to all children." 457 U.S. at 849 (Marshall, J., dissenting); *see id.* at 832 & n.1 (majority op.). But "the Court was not persuaded" that this made a difference. *Robert S. v. Stetson Sch., Inc.*, 256 F.3d 159, 166 (3d Cir. 2001) (Alito, J.) (citing *Rendell-Baker*, 457 U.S. at 842). And rightly so. The relevant state-action question is not whether a private actor supports "a proper public objective" but, instead, whether it performs one of the few functions that qualify as "exclusively and traditionally public." *Brentwood*, 531 U.S. at 302-03. Education is not such a function.

At any rate, Oklahoma's charter schools do not supplant the State's actual system of government-operated public schools. That system remains available to all Oklahoma students. Pet.App.35. And no student is compelled to attend St. Isidore. Like any other charter school, St. Isidore merely provides an "additional" schooling option for interested students and their parents. 70 Okla. Stat. § 3-131(A)(4).

This case is thus markedly different from the situation in *West v. Atkins*, 487 U.S. 42 (1988). That case concerned a State's effort to fully outsource its

constitutional duty of medical care owed to prisoners held in state custody. *Id.* at 55-56. The doctors there were deemed state actors because the captive inmates they treated could turn "*only* [to] those physicians." *Id.* at 54-55 (emphasis added). In those circumstances, this Court found state action from "the State's exercise of its right to punish [the petitioner] by incarceration and to deny him a venue independent of the State to obtain needed medical care." *Id.* at 55.

The private choice to attend an independently designed charter school is nothing like that situation. And the State's "[c]ontracting to provide educational alternatives" through the charter school program is "not the same as a wholesale outsourcing of a government function," Pet.App.34-35, let alone one that the government has "traditionally *and* exclusively performed," *Halleck*, 587 U.S. at 809.

4. Respondent's Invocation Of *Carson* Likewise Fails.

Respondent tellingly made little effort to defend the lower court's ill-conceived arguments at the petition stage. Nor could he ground the decision below in this Court's state-action precedents. Instead, he suggested that this Court established "factors" in *Carson* to test whether a school is formally "public" or "private." BIO.26-28.

That argument fails too. *Carson* did not purport to apply—let alone alter—the state-action calculus. Nor did it hold that any of the factors it discussed could morph a private contractor into a public agency. *Carson* merely rejected Maine's argument that its funding of only secular private schools provided students the "rough equivalent" of a public education,

because those schools differed from Maine's government-run schools in many ways. 596 U.S. at 782 (citation omitted). Those differences only further exposed Maine's effort to manipulate "the definition of [its] program" to produce an impermissible religious gerrymander. *Id.* at 784 (citation omitted).

In any case, many of the "factors" discussed in *Carson* cut against Respondent. The "curriculum taught" at charter schools "need not even resemble that taught in [Oklahoma's State-run] public schools." *Id.* at 783; *see* 70 Okla. Stat. § 3-136(A)(3), (A)(8). Oklahoma charter schools "need not hire state-certified teachers." *Carson*, 596 U.S. at 784; *see* Pet.App.141-42; *Oklahoma Charter Schools*, *supra*. And charter schools are generally "exempt from all statutes and rules relating to" schools operated by the government. 70 Okla. Stat. § 3-136(A)(5); *see Carson*, 596 U.S. at 783-84.

"But the key manner in which" Oklahoma charter schools and government-run public schools "*are* required to be 'equivalent' is that they must both be secular." *Carson*, 596 U.S. at 784. Like the unlawful program in *Carson*, Oklahoma's charter school program "operates to identify and exclude otherwise eligible schools on the basis of their religious exercise." *Id.* at 789. The Free Exercise Clause forbids such discrimination.

* * *

Simply put, St. Isidore is not a state actor. It is a private entity that accepted Oklahoma's invitation to foster educational diversity through a charter school program. The First Amendment protects St. Isidore from discriminatory state laws that would bar it from

participating in that program or receiving funding solely because the school it has designed is religious.

The lower court was thus wrong to hold that the "Free Exercise Clause is not implicated in this case." Pet.App.24 (capitalization altered). Its enforcement of discriminatory state laws violated that fundamental protection. The court "should have 'disregarded'" the State's nonsectarian provisions "and decided this case 'conformably to the Constitution' of the United States." *Espinoza*, 591 U.S. at 488 (alterations adopted) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803)).

III. The Establishment Clause Does Not Require The State To Violate St. Isidore's Free Exercise Rights.

Finally, the lower court expressed broad anti-establishment concerns that St. Isidore would "operate . . . as a Catholic school." Pet.App.24. But this Court has "repeatedly held that the Establishment Clause is not offended" when private religious entities "benefit from neutral government programs." *Espinoza*, 591 U.S. at 474. To avoid that conclusion, the Oklahoma Supreme Court "hinge[d]" its Establishment Clause analysis on the errant premise that the "religious activity" challenged here "involve[d] a 'state actor' or constituted 'state action.'" Pet.App.23. As already explained, St. Isidore is *not* a state actor. It is a privately incorporated entity, operated by a private board, that will provide a Catholic education that it independently designed. *See supra* Section II.A.

Such private religious activity cannot violate the Establishment Clause. That is because the First

Amendment inhibits only "Congress" from making a "law respecting an establishment of religion." U.S. Const. amend. I. And the mechanism for incorporating that promise against the States likewise "prohibits only state action" "by its very terms." *United States v. Morrison*, 529 U.S. 598, 621 (2000); *see* U.S. Const. amend. XIV, § 1 ("No State shall . . . ."). The Fourteenth Amendment "erects no shield against merely private conduct." *Morrison*, 529 U.S. at 621 (citation omitted).

The lower court also suggested that providing "direct" funding to St. Isidore would violate the Establishment Clause, even if the school's actions are private. Pet.App.24, 27. That argument fails for three reasons.

First, this Court's precedent refutes it. In *Trinity Lutheran*, Missouri asserted a similar "antiestablishment objection"—that allowing religious schools to participate in the State's grant program would result in "providing funds directly to a church." 582 U.S. at 463. But that did not matter. Disregarding Missouri's "discriminatory policy" would have merely returned the State's program to the religious neutrality that the Free Exercise Clause requires. *Id.* at 466. And that neutrality poses no Establishment Clause concerns. *See Espinoza*, 591 U.S. at 474. For, "[i]f the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government." *Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (plurality op.). In other words, the "government itself is not thought responsible" for

any particular recipient's teachings if it funds a "broad range" of participants on religiously neutral terms. *Id.* at 809-10.

That is what the Board did in this case by granting St. Isidore's application. The relevant question under the Establishment Clause is whether the educational instruction it funded is state or private action. *See id.* at 809; *Agostini v. Felton*, 521 U.S. 203, 230 (1997); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993). And the challenged religious education here falls squarely within the latter camp; it was devised and would be taught by St. Isidore as a private actor. *See supra* Section II.A.

Second, the distinction between direct and indirect aid is a false one in this case. As in *Espinoza*, "the link between government and religion is attenuated by private choices." 591 U.S. at 485. The "amount of State Aid received by [St. Isidore] is 'generated by students enrolled in the virtual charter school for the applicable year.'" Pet.App.157 (quoting 70 Okla. Stat. § 3-145.3(D)). Indeed, St. Isidore's "receipt of *any* State Aid" will "depend[] upon the enrollment of students." *Id.* (emphasis added). In that way, Oklahoma's relationship to charter schools is "very much like" that between the States and schools in the programs in *Espinoza* (and *Carson*): "[I]n both instances the government is putting up money so as to facilitate the choice by families of privately run schools they prefer for their children." Stephen D. Sugarman, *Is it Unconstitutional to Prohibit Faith-Based Schools from Becoming Charter Schools?*, 32 J.L. & Relig. 227, 250 (2017).

At the same time, the State's charter school program "creates no financial incentive for students to undertake sectarian education." *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 488 (1986). Nor has the Board "provide[d] greater or broader benefits for recipients who apply their aid to religious education." *Id.* Execution of the charter contract simply enabled St. Isidore to participate on a level playing field. The lower court's decision, on the other hand, enforced Oklahoma's "nonsectarian" provisions to "single out private religious" affiliation and activity "for special disfavor." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 514 (2022). The First Amendment does not tolerate such religious hostility when distributing government benefits.

Third, "history and tradition" play an important role "when considering the scope of the First Amendment." *Vidal v. Elster*, 602 U.S. 286, 301 (2024); *see Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014). Direct government aid to religious schools traces back to the earliest days of the Republic. *See, e.g.*, Mark Storslee, *Church Taxes and the Original Understanding of the Establishment Clause*, 169 U Pa. L. Rev. 111, 163-69 (2020). In fact, the Framers affirmatively promoted the funding of religious education. "The same Congress that enacted the Bill of Rights re-enacted the Northwest Ordinance, which provided that [because] 'Religion, morality and knowledge [are] necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.'" Nathan S. Chapman & Michael W. McConnell, *Agreeing to Disagree: How the Establishment Clause Protects Religious Diversity and Freedom of Conscience* 120

(2023) (quoting Northwest Ordinance Act, Art. III, ch. 8, 1 Stat. 50, 52 (1789)). Religion and education went hand in hand.

Federal funding of private religious education was therefore commonplace in the Founding era. For example, "the federal government worked with tribal governments to send paid Christian missionaries to build and operate schools." *Id.* And "federally funded schools in the District of Columbia included basic instruction in Christianity and were often run by religious organizations." *Id.* Congress provided significant federal aid to these religious schools, and nobody appears to have raised constitutional objections. *See* Secret History, *supra*, at 73. Nor was this practice regarded as controversial in the States "with state-level establishment clauses." *Id.* To the contrary, "early state constitutions and statutes actively encouraged this policy." *Espinoza*, 591 U.S. at 480 (quoting Lloyd P. Jorgenson, *The State and the Non-Public School, 1825-1925,* at 4 (1987)).

Direct government funding of religious schools continued unabated through the Reconstruction era. After the Civil War, Congress appropriated money for education of newly freed slaves in the South, *see id.* at 481, and it gave preference to private charitable educators, *see* Freedmen's Bureau Act, ch. 200, § 13, 14 Stat. 173, 176 (1866). As a result, many religious denominations "operated missionary society schools and received government money from the same Congress that passed the Fourteenth Amendment." Secret History, *supra*, at 74. Many States likewise provided public funds to church-sponsored schools. *See, e.g.*, Richard J. Gabel, *Public Funds for Church*

and Private Schools 574-75, 583-85, 601-02, 606, 608-09, 614-15, 661-62, 685-88 (1937). And "[s]ecular instruction" around this time "was largely anathema to schools both public and private." Robert N. Gross, *Public vs. Private: The Early History of School Choice in America* 2 (2018).

This demonstrates that any "application of the Establishment Clause to [the] states was not understood to prohibit government aid to educational institutions operated by religious groups." Secret History, *supra*, at 74; *see also Carson*, 596 U.S. at 788. The direct funding of religious education here thus poses no constitutional problem, particularly because that funding results from the private choices of individual Oklahomans.

The "phantom" Establishment Clause concerns expressed by the lower court cannot justify its infringement of St. Isidore's free exercise rights. *Kennedy*, 597 U.S. at 543. Nor does a mistaken reading of the Establishment Clause provide "a compelling governmental interest that satisfies strict scrutiny." Pet.App.27; *see Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993). On the contrary, a State's "interest in separating church and State 'more fiercely' than the Federal Constitution" requires "'cannot qualify as compelling' in the face of the infringement of free exercise." *Espinoza*, 591 U.S. at 484-85 (citation omitted). And that, again, is precisely what occurred here. Oklahoma "violate[d] the Free Exercise Clause" by "denying a qualified religious entity a public benefit solely because of its religious character." *Trinity Lutheran*, 582 U.S. at 466.

* * *

The First Amendment's text and history, as well as this Court's precedents, make clear that funding St. Isidore would not violate the Establishment Clause. But denying St. Isidore that opportunity solely because it will exercise its religious beliefs would violate the Free Exercise Clause. The Oklahoma Supreme Court was wrong on both fronts. As in *Trinity Lutheran*, *Espinoza*, and *Carson*, the lower court enforced exclusionary state laws to block St. Isidore from partaking in an otherwise available program—simply because it is "operated by the Catholic church." Pet.App.10. That discrimination "is 'odious to our Constitution' and 'cannot stand.'" *Espinoza*, 591 U.S. at 489 (citation omitted).

CONCLUSION

This Court should reverse the judgment below.

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