Nos. 24-394, 24-396

IN THE

Supreme Court of the United States

OKLAHOMA STATEWIDE
CHARTER SCHOOL BOARD, *et al.*,

Petitioners,

v.

GENTNER DRUMMOND, ATTORNEY GENERAL
OF OKLAHOMA, *ex rel.* OKLAHOMA,

Respondent.

ST. ISIDORE OF SEVILLE
CATHOLIC VIRTUAL SCHOOL,

Petitioner,

v.

GENTNER DRUMMOND, ATTORNEY GENERAL
OF OKLAHOMA, *ex rel.* OKLAHOMA,

Respondent.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

BRIEF OF PUBLIC CHARTER SCHOOL ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

Amici are twenty-three associations of public charter schools operating in twenty states and the District of Columbia.[1] Each is a non-profit organization dedicated to helping public charter schools thrive as bold, innovative components of the public educational system. *Amici* provide an array of services to their members and to public charter schools as a whole, including programs for professional development, timely information, and technical support. In addition, many of them review applications to establish new public charter schools, help applicants negotiate contracts, and support public charter schools as they get off the ground, serve their students, and seek renewal of their charters. *Amici* represent a large segment of the public charter school community. As of the 2022-2023 Academic Year, they served a total of 3466 public charter schools and 1,703,037 students nationwide.[2] Their broad familiarity with the law and best practices of public charter schools enable them to be of considerable help to the Court.

Amici are: (1) the California Charter Schools Association; (2) Charter Schools Development Center,

1. In accordance with Rule 37.6, counsel for *amici curiae* states that no counsel for a party wrote this brief in whole or in part, and that no party or counsel for a party made a monetary contribution intended to pay for the preparation or submission of this brief. No person or entity other than *amici curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

2. *See* National Alliance for Public Charter Schools, https://publiccharters.org/ (visited Mar. 31, 2025) (click on "Charter School Data" and then on individual states).

Inc. (also serving public charter schools in California); (3) the Colorado League of Charter Schools; (4) the Delaware Charter Schools Network; (5) the DC Charter School Alliance; (6) the Idaho Charter School Network; (7) the Iowa Coalition for Public Charter Schools; (8) the Massachusetts Charter Public School Association; (9) the Minnesota Association of Charter Schools; (10) the Charter School Association of Nevada; (11) Opportunity 180 (also serving public charter schools in Nevada); (12) the New Jersey Public Charter Schools Association; (13) Public Charter Schools of New Mexico; (14) The New York Center for Charter School Excellence (doing business as The New York City Charter School Center); (15) the North Carolina Association for Public Charter Schools; (16) NE Charter Schools Association (serving public charter schools in Connecticut and New York); (17) the Oklahoma Public Charter School Association; (18) the Rhode Island League of Public Charter Schools; (19) Philadelphia Charters for Excellence; (20) the Public Charter School Alliance of South Carolina; (21) the Utah Association of Public Charter Schools; (22) the Washington State Charter Schools Association; and (23) the Mountaineer Charter School Alliance (serving public charter schools in West Virginia).

Notably, these associations hail from a wide variety of states and political cultures—Northeastern, Midwestern, Southern, Prairie, Mountain, and Pacific. They serve an astonishing mixture of culturally conservative and culturally progressive states that have adopted the same basic strategy to address a need for innovation in our public schools. Despite the polarization of educational policy in the United States, *amici* stand united in their conviction that public charter schools can help move

the ball forward for our children, particularly the most needy. Without doubt, our public educational system is not serving every child as well as it could, especially students who live in difficult socio-economic circumstances. Public charter schools have demonstrated their ability over time to respond to this concern. As Petitioner Oklahoma Statewide Charter School Board notes, "multiple studies have found 'positive charter school impacts on student achievement' for schools serving minority students in urban and low-income areas." Brief for Petitioner Board at 9 (quoting Susan Dynarski et al., Brown Center on Education Policy at Brookings, Charter Schools: A Report on Rethinking the Federal Role in Education 3 (Dec. 16, 2010)). *Amici* join in their commitment to preserve one of the few educational reforms that consistently improves outcomes for public school students, and that may unravel if this Court should reverse the decision below.

SUMMARY OF THE ARGUMENT

As a matter of *stare decisis*, this Court has already resolved this case for affirmance. In *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), this Court twice classified "community schools" in Cleveland, Ohio —which are materially the same as Oklahoma's public charter schools—as public schools. *See id.* at 654. Nor was this dictum. Rather, this Court's classification of community schools as public in *Zelman* was central to its conclusion that parents in Cleveland had meaningful secular options, and that Ohio's Pilot Project Scholarship Program was therefore not an establishment of religion. *See id.* at 653.

This Court also laid out a blueprint for states to experiment with new kinds of schools within the public

sector in *Carson v. Makin*, 596 U.S. 767 (2022), and Oklahoma's public charter schools conform to that blueprint. In *Carson*, this Court held that Maine could not exclude a religious school as an educational vendor if it was willing to do business with similarly situated non-religious vendors. In reaching this conclusion, the Court emphasized what Maine had *not* done—create an alternative kind of education *within* the public sector. Because Maine had adopted a vendor model, where it simply did business with an array of contractors, it could not discriminate against some of them because of their religious affiliation. Oklahoma, however, is not simply entering the market as a counter-party in a series of arm's-length contracts. Instead, it has adopted a program that meets the essential criteria of *Carson*. Not only is its program denominated as public, but it also works that way. Thus, even if *Zelman* does not resolve this case, which it should, this Court should ratify the blueprint it laid out in *Carson* and allow Oklahoma's alternative model of education within the public sector to proceed.

Acute concerns of federalism also support affirmance here. Forty-six states and the District of Columbia have enacted public charter school laws. All of these jurisdictions have firmly located public charter schools in the public sector. *See*, *e.g.*, Okla. Stat. tit. 70, § 3-132.2(C)(1); Ohio Rev. Code Ann. § 3314.041.[3] More to the point,

3. *See also* Ala. Code § 16-6F-4(16); Alaska Stat. § 14.03.255(a); Ariz. Rev. Stat. Ann. § 15-181(A); Ark. Code Ann. § 6-23-103(5), (9)(A); Cal. Educ. Code § 47615(a)(1), (2); Colo. Rev. Stat. § 22-30.5-104(1); Conn. Gen. Stat. § 10-66aa(1); Del. Code Ann. tit. 14, § 503; D.C. Code § 38–191(b)(2); Fla. Stat. § 1002.33(1); Ga. Code Ann. § 20-2-2062(3); Haw. Rev. Stat. § 302D-1; Idaho Code Ann. § 33-5202; 105 Ill. Comp. Stat. 5/27A-5; Ind. Code § 20-24-

if this Court were to reverse the decision below, many of these states might come to the conclusion that they would never have authorized public charter schools if they had anticipated such a development. *Amici* respectfully urge this Court not to take a step that could well undermine one of the most dynamic and salutary developments in public education in the last several decades.

A public charter school operating in Oklahoma is also a governmental entity for federal constitutional purposes—as much so, in fact, as any traditional school. Not only has the legislature of Oklahoma denominated such schools as public, but they function that way. They are required to take all comers as much as any traditional public school. This materially distinguishes them from private schools. They are also not allowed to charge tuition. This too differentiates them from private schools. Continuing, they

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1-4; Iowa Code § 256E.1(1); Kan. Stat. Ann. § 72-4206(a); Ky. Rev. Stat. Ann. § 160.1592(1); La. Rev. Stat. Ann. § 17:3973(2)(a); Me. Rev. Stat. tit. 20-A, § 2401(9); Md. Code Ann. Educ. § 9-102; Mass. Gen. Laws ch. 71, § 89(b); Mich. Comp. Laws § 380.501(1); Minn. Stat. § 124E.03(1); Miss. Code Ann. § 37-28-5(e); Mo. Rev. Stat. § 160.400(1); Mont. Code Ann. § 20-6-803(9); Nev. Rev. Stat. § 388A.153(2)(a); N.H. Rev. Stat. Ann. § 194-B:3(1)(a); N.J. Stat. Ann. § 18A:36A-2; N.M. Stat. Ann. § 22-8B-2(A); N.Y. Educ. Law § 2850(2)(e); N.C. Gen. Stat. § 115C-218.15(a); Or. Rev. Stat. § 338.015; 24 Pa. Cons. Stat. § 17-1703-A; R.I. Gen. Laws § 16-77-3.1(a); S.C. Code Ann. § 59-40-40(1); Tenn. Code Ann. § 49-13-104(14); Tex. Educ. Code Ann. § 12.001(a)(2); Utah Code Ann. § 53G-5-401(1)(a); Va. Code Ann. § 22.1-212.5(B); Wash. Rev. Code § 28A.710.010(5); W. Va. Code § 18-5G-3(a)(1); Wyo. Stat. Ann. § 21-3-302(a)(iv). *Cf.* Wis. Stat. § 40.02(55) (emphasis added) (defining "teacher" as "any employee engaged in the exercise of any educational function for compensation in the public schools, *including charter schools*").

receive funding through exactly the same mechanisms as traditional public schools. In addition, students at public charter schools in Oklahoma are required to take exactly the same assessment tests as students in traditional public schools. This ensures that public charter schools devise their programs with the same ultimate goals in mind as traditional schools. Finally, Oklahoma's Charter Schools Act includes elaborate provisions for the involuntary closure of public charter schools, on grounds not limited to solvency or endangerment. Such provisions would be unimaginable if St. Isidore (the hypothetical school) were truly private. Absent physical peril, and perhaps not even then, a religious school keeps its doors open as long as it wants to. *See Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Tandon v. Newsom*, 593 U.S. 61 (2021).

If, however, this Court should conclude that public charter schools are *not* governmental entities, they are still state actors, because they are thoroughly "'entwined with governmental policies.'" *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 296 (2001) (quoting *Evans v. Newton*, 382 U.S. 296, 299 (1966)). This begins with the policy of universal, free education. Like traditional public schools, and unlike typical private schools, public charter schools take all or virtually all comers and charge no tuition. Moreover, they are required to administer the exact same assessment tests to their students as are traditional public schools, thus aligning their ultimate pedagogical goals to those of the traditional public schools.

ARGUMENT

I. This Court held in *Zelman* that a public charter school is a public school.

In *Zelman v. Simmons-Harris*, this Court properly classified "community schools"—public charter schools by another name—as public schools. At issue in *Zelman* was the constitutionality of Ohio's Pilot Project Scholarship Program. Among other things, this program gave vouchers to eligible parents to send their children to private schools, including schools with a religious affiliation. The question was whether this was an establishment of religion. 536 U.S. 639, 644 (2002). To answer this question, the Court asked if parents who sent their children to religious schools under the program were making "genuine and independent private choice[s]." *Id.* at 652. To resolve this inquiry, the Court took a step back and looked at all the publicly funded options available to parents, asking whether there was "any perceptible difference between scholarship schools, community schools, or magnet schools from the perspective of Cleveland parents looking to choose the best educational option for their school-age children." *Id.* at 660 n.6. As noted, these options included "community schools," which it described as "schools [that] are funded under state law but are run by their own school boards, not by local school districts." *Id.* at 647. "These schools," it said, "enjoy academic independence to hire their own teachers and to determine their own curriculum." *Id.* The virtually identical nature of Ohio's "community schools" and Oklahoma's public charter schools could not be more clear. *See also* Ohio Department of Education & Workforce, Community Schools (emphasis added; capitalization altered) ("Community schools,

which are often called charter schools nationally and in other states, are public schools created in Ohio law; are independent of any school district; and are part of the state's education program.").[4]

Having identified the various publicly funded options available to parents, this Court then asked if Ohio's program were somehow "skewed" toward schools with a religious affiliation. *Id.* at 653 (quoting *Witters v. Washington Dept. of Servs. for Blind*, 474 U.S. 481, 487-88 (1986)) (cleaned up). If so, an establishment might have been present. The Court said no, however, substantially because parents had meaningful secular options. *Zelman*, 536 U.S. at 653. In surveying those options, the Court explicitly distinguished "private schools," which could have a religious affiliation, from "community schools," which could not. As the Court noted, "[t]he program here in fact creates financial *dis*incentives for religious schools, with *private schools* receiving only half the government assistance given to *community schools* and one-third the assistance given to magnet schools." *Id.* at 654 (first emphasis original, later emphasis added). The Court made a similar point later, when it again relied on the public status of community schools to support its conclusion that, if the program were skewed at all, it was skewed against schools with a religious affiliation. As the Court observed, "[p]arents that choose to participate in the scholarship program and then to enroll their children in a *private school* (religious or nonreligious) must copay a portion of the school's tuition. Families that choose a *community school*, magnet school, or traditional public school pay

4. https://education.ohio.gov/Topics/Community-Schools (visited Mar. 31, 2025).

nothing." *Id.* (emphasis added). The classification of a community school as a public school was thus a key component of this Court's rationale not once, but twice. As a matter of *stare decisis* alone, therefore, this Court should affirm the judgment below. Oklahoma's charter schools are public schools, just as Ohio's community schools are public schools.

II. Oklahoma's public charter school program adheres in every material sense to the blueprint for an alternative public option that this Court laid out in *Carson v. Makin*.

In *Carson v. Makin*, 596 U.S. 767 (2022), this Court laid out a blueprint for states that want to find ways to innovate entirely *within* the public educational system. Maine failed this test because it had created a voucher program for both public and private schools, much like the program in *Zelman*, with the simple (and unlawful) distinction that it excluded schools with a religious affiliation. Pointedly, however, Maine had *not* created an alternative system of schools within the public sector, as Oklahoma has here. As this Court recognized, Maine required any educational unit "without a secondary school of its own" to "'pay the tuition . . . at the public school *or the approved private school* of the parent's choice at which the student is accepted.'" *Carson*, 596 U.S. at 782 (quoting Me. Rev. Stat. Ann., Tit. 20-A, § 5204(4) (emphasis added)). In sharp contrast to Maine, Oklahoma explicitly excludes *all* private schools from its public charter school program, not just private schools with a religious affiliation. As its statute provides, "[a] private school *shall not be eligible* to contract for a charter school or virtual charter school under the provisions of the Oklahoma Charter Schools

Act." Okla. Stat. tit. 70, § 3-134(C) (emphasis added).[5] It also denominates its program as exclusively public. *See id.*, § 3-132.2(C)(1). Furthermore, Maine provided tuition payments to private schools "with no suggestion that the 'private school' must somehow provide a 'public' education," *Carson*, 596 U.S. at 783, whereas students in Oklahoma's charter schools must take the same assessment tests as students at traditional public schools, *see* Okla. Stat. tit. 70, § 3-136(A)(4).

Operationally as well, Oklahoma's program adheres to *Carson*'s blueprint. Whereas Maine did not require participating private schools to admit all students on the same basis as a traditional public school, Oklahoma does. *Compare Carson*, 596 U.S. at 783 (noting that private schools in Maine "do not have to accept all students"), *with* Okla. Stat. tit. 70, § 3-136(A)(9) ("A charter school or virtual charter school shall be as equally free and open to all students as traditional public schools. . . ."). Similarly, whereas participating private schools in Maine did not have to cap tuition at the level of public assistance, public charter schools in Oklahoma are every bit as free to students as traditional public schools. *Compare Carson*, 596 U.S. at 783 (noting that "the free public education that Maine insists it is providing through the tuition assistance program is often *not* free") *with* Okla. Stat. tit. 70, § 3-136(A)(9) (forbidding "[a] public charter school or virtual charter school [to] charge tuition or fees"). The explanation for this fiscal reality is simple: public charter schools in Oklahoma are funded through exactly the same mechanisms as traditional public schools. *See* Okla. Stat.

5. Oklahoma amended its Public Charter Schools Act effective July 1, 2024. All citations herein are to the statute as amended.

tit. 70, § 3-142(D). Although Oklahoma's statute precedes *Carson* in time, the State has done exactly what this Court invited it to do in that case, and its choice should be validated as a choice within the public sector.

III. Compelling issues of federalism call for affirming the decision below.

Respect for federalism also compels affirmance. In a healthy system of shared governance, states should be able to decide between: (1) adopting the kind of voucher system that this Court upheld in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); and (2) simply expanding the menu of options within the public sector, as this Court outlined in *Carson v. Makin*, 596 U.S. 767 (2022). And they should be able to do so without having to worry that the second option will morph into the first. To be sure, some states may be in trajectory toward *Zelman*'s model. But others may not. It would not be unreasonable to suppose that, if this Court were to reverse the decision below, some states would take the drastic option of terminating their public charter school programs entirely. That is, they might decide that, if no middle ground exists between the traditional public model and *Zelman*, they will go exclusively with the traditional model. The harm that this could inflict upon the hundreds of thousands—and perhaps millions—of students whose parents and guardians who have chosen public charter schools as the best option for their children could be devastating, not to mention the chaos that would ensue for districts where public charter schools are closed.[6]

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6. *See* National Alliance for Public Charter Schools, https://publiccharters.org/ (click on "Charter School Data" for nationwide statistics) (visited Apr. 3, 2025).

Query as well whether the many states that have enacted public charter school laws would want to be in the position of having to shut down explicitly religious schools for reasons having nothing to do with health or safety. Imagine that St. Isidore (the hypothetical school) actually were a private school, jointly operated by the Archbishop of Oklahoma City and the Bishop of Tulsa. Imagine too that it existed independently of Oklahoma's Charter Schools Act, as Petitioners suggest (although this is not the case). As we all know, this imagined school not only *could* exist in our constitutional order, but only "interests of the highest order" would permit Oklahoma to shut it down. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). *See Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."). *See also Tandon v. Newsom*, 593 U.S. 61 (2021).

Now imagine that the school wanted to qualify as a public charter school under Oklahoma's statute. If so, it would be obligated to accept numerous conditions. To some of these it might not object. It might not object to having to procure goods and services in a particular way. *See* Okla. Stat. tit. 70, § 3-136(A)(5). It might not even object to being subject to audit by the State Department of Education or the State Auditor and Inspector. *See id.* And it might not object to having to open its meetings and records to the public. *See id.*, § 3-136(A)(15). But query whether it would object to being closed down for "failure to meet the requirements for student performance contained in the contract and performance framework, failure to meet the standards of fiscal management, violations of the law, or

other good cause." *Id.*, § 3-137(F). Query as well if it would object to being closed down if it is "identified as being among the bottom five percent (5%) of public schools in the state." *Id.*, § 3-137(H)(2).

In point of fact, however, the real question is not whether St. Isidore (the hypothetical school) might be willing to accept these conditions. As a matter of *federalism*, the real question is whether the legislature of Oklahoma, in enacting this statute, would have *wanted* to enact a law that would set in motion these events. Would Oklahoma actually *want* to micromanage and occasionally shut down an explicitly Roman Catholic school? After all, this is a standard aspect of how public charter schools work. *See*, *e.g.*, Nevada State Public Charter School Authority, Minutes of Meeting, August 2-3, 2024, at 2 (capitalization altered) (unanimously approving motion to find "that Eagle Charter School has failed to comply with generally accepted standards of fiscal management").[7] *See generally* New Jersey Department of Education, Closure Process (listing charters "[r]evoked," "[s]urrendered," and "[n]ot [r]enewed").[8] If Oklahoma's legislators had foreseen closing an explicitly Roman Catholic school for its fiscal policies, or for failure to achieve its pedagogical goals, would they have enacted the statute at issue here? Might not their better lights have dictated staying away from such "'political interference with religious affairs'"?

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7. https://charterschools.nv.gov/uploadedFiles/CharterSchoolsnvgov/content/News/2024/240823-August-2-3,-2024-SPCSA-Board-Hearing-Minutes-FINAL2.pdf (visited Mar. 31, 2025).

8. https://www.nj.gov/education/chartsch/accountability/closure.shtml (visited Mar. 31, 2025).

Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. 171, 184 (2012) (quoting Letter from James Madison to Bishop Carroll (Nov. 20, 1806), reprinted in 20 Records of the American Catholic Historical Society 63 (1909)). More to the point, should not this Court, as a matter of federalism, give them a chance to decide that for themselves? After all, we have a robust tradition in the United States of permissive legislation to accommodate religious practices. *See Employment Div. v. Smith*, 494 U.S. 872, 890 (1990). We also have a robust tradition of leaving the field of education largely to the states. *See United States v. Lopez*, 514 U.S. 549, 564 (describing education as an "area[] . . . where States historically have been sovereign"). *Cf. Rodriguez v. San Antonio Indep. School Dist.*, 411 U.S. 1, 58 (1973) ("The consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various States, and we do no violence to the values of federalism and separation of powers by staying our hand."). In fact, the constitutions of many states charge their legislatures to maintain a system of free schools. *See, e.g.*, Okla. Const. art. XIII, § 1 ("The Legislature shall establish and maintain a system of free public schools wherein all the children of the State may be educated."); Cal. Const. art. IX, § 5. Shoe-horning St. Isidore (the hypothetical school) into Oklahoma's existing process might well be inconsistent with what the legislature hoped to do, and could easily compel the state to take draconian measures it never wanted to take.

IV. Petitioners' proposed school would be a governmental entity for purposes of the federal Constitution.

Despite Petitioners' assertions to the contrary, a public charter school operating in Oklahoma is a

governmental entity for federal constitutional purposes, as much as any traditional school. The evidence for this proposition is overwhelming. First, the legislature said so. *See* Okla. Stat. tit. 70, § 3-132.2(C)(1). *See also supra* n.3 and accompanying text (listing comparable legislation in every state that has public charter schools). Admittedly, labels are not everything. But they are not nothing either, because they help explain what the legislature is trying to do, which in turn can help explain why an entity belongs in the public sector. In *Lebron v. National Railroad Passenger Corp.*, for example, Justice Scalia discussed Congress' policy-based "'goals for Amtrak'" on the way to deciding that Amtrak was a federal entity. 513 U.S. 374, 384 (1995) (quoting the statute). Because Congress' myriad goals in establishing Amtrak did not necessarily conduce to Amtrak's bottom line, its natural home in the public sector was all the more apparent. Justice Kennedy made a similar observation in *Department of Transportation v. Association of American Railroads*, 575 U.S. 43 (2015). "[R]ather than advancing its own private economic interests," he wrote, "Amtrak is required to pursue numerous, additional goals defined by statute." *Id.* at 53. This included, he went on to note, the retention of certain routes, regardless their economic feasibility. *See id.* In other words, Congress' express goals for Amtrak made the public sector its most logical abode.

So too with public charter schools in Oklahoma. As *amici* explain, public charter schools are an integral part of Oklahoma's overall approach to public education. They do this, most importantly, by helping the state fulfill its constitutional obligation to provide universal, free education. *See* Okla. Const. art. XIII, § 1; Okla. Stat. tit. 70, § 3-136(A)(9). They also serve the state's

goal of combining comprehensive standardized tests with innovative teaching methods. *See* Okla. Stat. tit. 70, § 3-136(A)(4) (requiring public charter schools to participate in the state's testing program); *id.*, § 3-131(A)(3) (identifying as one purpose of the Oklahoma Charter Schools Act to "[e]ncourage the use of different and innovative teaching methods"). For these reasons, public charter schools in Oklahoma are not just the result of a series of arm's-length transactions, as Petitioners contend. As a consequence, the legislature's denomination of them as "public" has a strong basis in substance.

Apart from formal denomination, an entity's governmental status can be discerned from how much the legislature requires it to behave like part of the government. Here, the statute is replete with supporting data. Most importantly of all—and unlike private schools—public charter schools in Oklahoma must "be as equally free and open to all students as traditional public schools." Okla. Stat. tit. 70, § 3-136(A)(9). Such schools may not "charge tuition or fees." *Id.* In these respects, public charter schools operate like neighborhood schoolhouses. In fact, one provision of the Oklahoma Charter Schools Act contemplates a direct translation of a traditional public school into a public charter school "in order to access any or all flexibilities afforded to a charter school." *Id.*, § 3-132.2(D)(1). This easy translation further demonstrates the natural home of Oklahoma's public charter schools in the public sector.

Of equal significance, students in public charter schools take the same assessment tests as students at traditional public schools. *See* Okla. Stat. tit. 70, § 3-136(A)(4) ("A charter school or virtual charter school shall participate

in the testing as required by the Oklahoma School Testing Program Act and the reporting of test results as is required of a school district."). As a matter of educational policy, this requirement integrates public charter schools with traditional public schools. As this Court is probably aware, there is an important debate going on today in the world of education about "metrics," that is, ways to assess what goes on in that world. This debate centers on two kinds of metrics: inputs and outputs. An input metric looks at what goes into the process. This can be dollars spent, hours of instruction provided, and so on. An output metric, by contrast, looks at results. "Can Johnny read?" is a classic output metric. Comprehensive, standardized assessment tests are indispensable to an output-based approach. Because teachers are mindful of the test, they will necessarily organize their courses around what they know will be on it. And Oklahoma's statute is not reticent on this point. Okla. Stat. tit. 70, § 1210.507(D), requires "[t]he State Board of Education [to] seek to establish and post on the Internet a sample assessment item bank that will be made available to teachers and will allow them to create and deliver classroom assessments throughout the school year to check for student mastery of key concepts assessed by the assessments administered to students pursuant to the Oklahoma School Testing Program Act." Oklahoma also provides for publication of the results of these assessments. *See id.*, § 1210.531(B) ("Reports of all tests administered pursuant to the Oklahoma School Testing Program Act shall be a part of the Oklahoma Educational Indicators Program and shall be provided for each grade and each test subject or set of competencies."). Doing so (in sanitized form, of course) enables parents to make apples-to-apples, informed decisions for their children among various options in the public sector,

including both traditional public schools and public charter schools. Inclusion of public charter schools in Oklahoma's statewide assessment program demonstrates how fully the state embraces public charter schools as part of its public school system.

Yet another datum lies in Oklahoma's elaborate provisions for the involuntary closure of public charter schools. *See Biden v. Nebraska*, 600 U.S. 477, 491 (2023) (Missouri Higher Education Loan Authority is an entity of the state in part because it "may be dissolved by the State."). Notably, such grounds are not limited to insolvency or physical peril, as would be typical for a truly private school. Under Okla. Stat. tit. 70, § 3-137(F) (emphasis added), "[a] sponsor [an "authorizer" in many other states] may terminate a contract *during the term of the contract* for failure to meet the requirements for student performance contained in the contract and performance framework, failure to meet the standards of fiscal management, violations of the law, or other good cause." This is typical for public charter schools. In California, for example, the California State Board of Education is authorized to revoke a charter if it finds a "[s]ubstantial and sustained departure from measurably successful practices such that continued departure would jeopardize the educational development of the charter school's pupils," Cal. Educ. Code § 47604.5(c), or a "[f]ailure to improve pupil outcomes across multiple state and school priorities identified in the charter," *id.* § 47604.5(d). Likewise, Okla. Stat. tit. 70, § 3-137(H)(2), provides that "a sponsor may close a charter school site or virtual charter school identified as being among the bottom five percent (5%) of public schools in the state." It would be unthinkable (and unconstitutional) for a state to put a private school

out of business for the equivalent of failing to live up to a business plan or having a bad report card.

The state of affairs is similar in Oklahoma when a school seeks renewal of its charter. Thus, Okla. Stat. tit. 70, § 3-137(D), authorizes a sponsor to "deny [a] request for renewal if it determines the charter school or virtual charter school has failed to complete the obligations of the contract or comply with the provisions of the Oklahoma Charter Schools Act." *See also* Okla. Admin. Code § 777:10-3-4(a) ("The performance framework sets forth the performance indicators for authorization of virtual charter schools in the State. Schools shall meet or show evidence of significant progress toward meeting the required standard accountability indicators as a condition of continued authorization.").

Relatedly, this Court should also bear in mind the degree of supervision to which public charter schools are typically subject. In Oklahoma, for example, the sponsor of a public charter school is empowered to impose a "corrective action plan and corresponding timeline to remedy any weaknesses, concerns, violations, or deficiencies" that it "perceive[s] . . . concerning the charter school or virtual charter school that may jeopardize its position in seeking renewal [of its charter]." Okla. Stat. tit. 70, § 3-137(B). In New York, similarly, a "charter entity [an "authorizer" in many states] or the board of regents may place a charter school [that fails to meet certain metrics, among other things] on probationary status to allow the implementation of a remedial action plan." N.Y. Educ. Law § 2855(3). To be sure, various entities outside the public sector are also closely regulated, but the degree to which public charter schools are subject to oversight,

combined with their vulnerability to involuntary closure, provides an additional strong datum in support of their status as governmental entities for purposes of the federal Constitution.

Petitioners stress the fact that a *contract* ultimately connects a public charter school to its sponsor under Oklahoma's statute. But they miss the point. Public charter schools operate according to contracts, *i.e.*, charters, because contracts facilitate innovation. By its very nature, no one is compelled to enter into a contract. Because no one has to propose a public charter school in the first place, *a fortiori* proponents can negotiate for a school that reflects their pedagogical vision, subject to their ability to attract and retain students and meet the state's requirements for public charter schools. In other words, if the applicant and the sponsor cannot reach terms, the school does not exist. But this Court should not confuse inessential with essential facts. Although the *mechanism* for standing up a public charter school involves a contract, the school that results is firmly located in the public sector, as explained above. The school is not simply the result of "a trade of pepper and coffee, callico or tobacco," as Petitioners suggest. Edmund Burke, Reflections on the Revolution in France 194 (1790) (Conor Cruise O'Brien ed. 1968).

Petitioners also stress the fact that members of the governing boards of public charter schools in Oklahoma are not formally identified as public servants, but this is largely a red herring. First, this Court did not identify this as a concern in *Carson*. More to the point, members of the governing boards of public charter schools *are* public servants in numerous functional ways. As petitioners

emphasize, substance matters more than form here. *See* Brief of Petitioner St. Isidore of Seville Catholic Virtual School at 32 (quoting *McElrath v. Georgia*, 601 U.S. 87, 96 (2024)). For example, all members of such boards must reside in Oklahoma. *See* Okla. Stat. tit. 70, § 3-136(A)(7). *See also* D.C. Code §38–1802.05(a)(1) (requiring a majority of the members of a public charter school's board to be "residents of the District of Columbia"). This would be an unusual, and possibly unconstitutional, requirement for a member of a private board. *See United Building & Construction Trades Council v. Camden*, 465 U.S. 208, 222-23 (1984). Members of Oklahoma boards are also compelled to meet in public session ten months of the year. *See* Okla. Stat. tit. 70, § 3-136(A)(7). Relatedly, their work is subject to both the Oklahoma Open Meeting Act and the Oklahoma Open Records Act. *See* Okla. Stat. tit. 70, § 3-136(A)(15). This is true in other states as well. *See*, *e.g.*, Cal. Educ. Code § 47604.1(b) (subjecting public charter schools in California to open meetings and open records requirements). Members of Oklahoma charter school boards are also "subject to the same conflict of interest requirements as a member of a school district board of education," and they are "subject to the same instruction and continuing education requirements as a member of a school district board of education," Okla. Stat. tit. 70, § 3-136(A)(7). Petitioners may be correct to argue that at least some of these attributes are not unique to public servants, but the coincidence of these many requirements is highly improbable unless these people are in fact public servants.

To be sure, this Court in both *Lebron* and *Association of American Railroads* discussed in detail the composition of Amtrak's board, noting that almost all of its members

were appointed by the President. *See Lebron*, 513 U.S. at 385-86, 397-98; *Association of American Railroads*, 575 U.S. at 51-52. But this Court at no point indicated in these cases that the provenance of Amtrak's board was necessary to Amtrak's status as a governmental entity. This fact helped underscore Amtrak's public status, but so too did Congress' heterogeneous objectives for the system, many of which prevented it from making a profit. *See Lebron*, 513 U.S. at 384-85. *See also Association of American Railroads*, 575 U.S. at 53 ("It is significant that, rather than advancing its own private economic interests, Amtrak is required to pursue numerous, additional goals defined by statute."). The essential test of *Lebron* and *Association of American Railroads* is whether an entity is constituted to be part of the public sector, and behaves accordingly. This is demonstrably true for public charter schools.

Petitioners also underscore the fact that teachers at public charter schools in Oklahoma need not be certified, and that public charter schools are exempted from a significant number of regulations that apply to traditional public schools. This mistakes a virtue for a flaw. The whole purpose of a public charter school is to encourage bold innovation within the public sector. Requiring such schools to hire the same kind of teachers and follow the same rules as traditional public schools would defeat the purpose of the legislation. Two of the seven stated purposes of the Oklahoma Charters Schools Act are to "[e]ncourage the use of different and innovative teaching methods," Okla. Stat. tit. 70, § 3-131(A)(3), and to "[c]reate new professional opportunities for teachers and administrators including the opportunity to be responsible for the learning program at the school site," *id.*, § 3-131(A)(7). In any case, under

Oklahoma's Empowered Schools and School Districts Act, traditional public schools in the state are authorized to seek a waiver from certification requirements in certain circumstances. *See id.*, § 3-129.7(A).

Finally, Petitioners emphasize the provenance of their proposed school, suggesting that it exists independently of, and without reference to, the Oklahoma Charter Schools Act. There are two flaws to this analysis. First, Petitioners repeatedly conflate *the applicant* seeking to establish the school with *the school itself*, suggesting that both are private. This is not accurate. The applicant in this case, St. Isidore of Seville Virtual Charter School, Inc., is a private entity. And, to be sure, Oklahoma authorizes private entities to apply to establish public charter schools. *See* Okla. Stat. tit. 70, § 3-134(C). But the proposed school itself—St. Isidore of Seville Virtual Charter School—would be the result of a contract between the applicant and the sponsor. It is not the same as the applicant. This is evident from the words of the statute. Under § 3-134(C), a "private organization," such as St. Isidore of Seville Virtual Charter School, Inc., is authorized to "contract with a sponsor *to establish a charter school or virtual charter school*." (Emphasis added.) This contemplates creation of a new enterprise, not transformation of an existing one. *See also id.*, § 3-136(E) (authorizing public charter schools in Oklahoma to "sue and be sued" in their own name). Petitioners are also slightly off the mark in suggesting that the applicant would exist in the absence of Oklahoma's statute. Its very name, St. Isidore of Seville *Virtual Charter School*, Inc., suggests that it was formed for the specific purpose of interacting with that statute.

V. Even if petitioners' proposed school is not a governmental entity, it is a state actor because it is thoroughly "entwined with governmental policies."

As noted above, public charter schools in Oklahoma are governmental entities. *A fortiori*, then, they are state actors. If, however, this Court should conclude that public charter schools are *not* governmental entities, they are still state actors, because their operations are thoroughly "'entwined with governmental policies.'" *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 296 (2001) (quoting *Evans v. Newton*, 382 U.S. 296, 299 (1966)).

The basis for this conclusion is amply demonstrated above. Not only do public charter schools stand shoulder-to-shoulder with traditional public schools in taking virtually all comers and charging no tuition, Okla. Stat. tit. 70, § 3-136(A)(9), but they are also required to administer the exact same assessment tests to their students. *See* Okla. Stat. tit. 70, § 3-136(A)(4). This makes their ultimate pedagogical goals virtually identical to those of the traditional public schools.

Public charter schools are also overseen by their sponsors to an extent that would be unthinkable for a truly private entity. As noted previously, grounds for the involuntary closure of a public charter school in Oklahoma are not limited to insolvency or physical peril, as would be the case for a truly private school. For example, "[a] sponsor may terminate a contract during the term of the contract for failure to meet the requirements for student performance contained in the contract and performance framework, failure to meet the standards of fiscal

management, violations of the law, or other good cause." Okla. Stat. tit. 70, § 3-137(F). A sponsor may also "deny [a] request for renewal [of a contract] if it determines the charter school or virtual charter school has failed to complete the obligations of the contract or comply with the provisions of the Oklahoma Charter Schools Act." *Id.*, § 3-137(D). Last, "a sponsor may close a charter school site or virtual charter school identified as being among the bottom five percent (5%) of public schools in the state." *Id.*, § 3-137(H)(2). In other words, a sponsor is authorized to take steps to close a public charter school for failure to meet a variety of metrics, much as a parent corporation is empowered to close out a non-performing subsidiary. To be sure, a public charter school that faces non-renewal of its charter or closure has some degree of recourse, *see id.*, § 3-137, but that does not make them any less entwined with the state.

In their arguments to the contrary, Petitioners rely heavily on *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), and *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). In particular, they rely on these cases for the proposition that neither extensive regulation nor extensive (or even complete) dependence on public funds necessarily renders an entity a state actor. But nothing in the facts of either *Rendell-Baker* or *Jackson* approaches the kind of policy-based or fiscal micromanagement evidenced by Oklahoma's Charter Schools Act. As noted above, a sponsor is empowered under that statute to effect the involuntary closure of a public charter school, on a wide variety of grounds and at multiple points in the cycle of a contract. To be sure, the various public bodies that supported the New Perspectives School in *Rendell-Baker* could have functionally asphyxiated it by cutting off its funding.

And, just as surely, the Pennsylvania Utility Commission could have taken steps to wind up Metropolitan Edison's affairs for insolvency, public endangerment, or perhaps gross misconduct. But that is a far cry from being able to close down an ostensibly private entity for failure to live up to a series of policy-based goals, or for merely performing poorly. Yet that is exactly what Oklahoma's Charter Schools Act allows.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully ask this Court to affirm the decision below.

Respectfully submitted,

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