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

REPLY BRIEF FOR PETITIONER ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL

JOHN A. MEISER
MEREDITH H. KESSLER
LINDSAY AND MATT MOROUN RELIGIOUS LIBERTY CLINIC
Notre Dame Law School
1338 Biolchini Hall of Law
Notre Dame, IN 46556

MICHAEL H. MCGINLEY
Counsel of Record
STEVEN A. ENGEL
DECHERT LLP
1900 K Street, NW
Washington, DC 20006
(202) 261-3378
michael.mcginley@dechert.com

MICHAEL R. PERRI
SOCORRO A. DOOLEY
PERRI DUNN, PLLC
100 N. Broadway
Suite 3280
Oklahoma City, OK 73102

BRIAN A. KULP
ANTHONY R. JADICK
JULIA M. FITZGERALD
CORY J. KOPICKI
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104

April 21, 2025

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

INTRODUCTION

Respondent's position exalts semantics over substance. He calls St. Isidore "public" and a "government entity." But the school was created by private actors, and it will be run by a board composed entirely of private actors. This Court has never held that such a privately created and privately controlled entity is part of the government. Nor has it ever held that the Establishment Clause applies to a privately operated school. The Free Exercise Clause therefore protects St. Isidore from religious discrimination.

Left with no substantive basis to justify excluding St. Isidore, Respondent rests on a "public school" label. But this Court rejected that "semantic exercise" in *Carson*—the very decision Respondent invokes. And Respondent's facile reference to "public schools" in this Court's Establishment Clause cases similarly ignores the substance of those decisions—which turned on the coercive effect of mandatory attendance at government-run schools.

Ultimately, Respondent provides no constitutional basis to deny St. Isidore equal access to Oklahoma's charter school program. That program invites "private organization[s]" to contract with the State for funding. 70 Okla. Stat. § 3-134(C). It offers those private applicants funds to support their efforts to "establish" schools of their own design under a charter contract. *Id.* And it leaves school "policies and operational decisions" to an applicant's privately chosen "governing" board. *Id.* § 3-136(A)(8). These "charter schools" are thus created by private actors, controlled by private actors, and managed by private actors in their daily operations.

Those features fundamentally distinguish St. Isidore from Oklahoma's government-run public schools. And they defeat Respondent's reliance on this Court's government-entity precedents. In those cases, the entity was created by special legislation and controlled by a government-appointed board. St. Isidore possesses neither of those essential attributes. The school was created through the private initiatives of two Catholic bishops, and it will be run by a private board and teachers that the State has no hand in staffing.

This case is thus controlled by *Trinity Lutheran*, *Espinoza*, and *Carson*. Nobody disputes that St. Isidore meets all the secular requirements for participating in Oklahoma's charter school program. Yet, Oklahoma law "exclude[s] otherwise eligible schools on the basis of their religious exercise." *Carson v. Makin*, 596 U.S. 767, 789 (2022). That discrimination violates the First Amendment.

Finally, Respondent devotes nearly ten pages to imagined hypotheticals. But his phantom concerns are overblown and not before this Court. Nor can they justify the very real religious discrimination in *this* case. Ruling for St. Isidore will increase educational options for students and their parents. Ruling against St. Isidore will open a loophole for States to nullify free exercise rights and this Court's precedents by affixing a "public school" label to recipients of education funding.

The decision below should be reversed.

ARGUMENT

In the first sentence of his brief, Respondent concedes the central First Amendment rule at issue: "The exclusion of religious institutions from generally available benefits programs based solely on religion is odious to the Constitution." Resp.Br.1. Thus, "when a State offers a generally available public benefit to private actors, it cannot deny that benefit to religious entities." Resp.Br.19. And "[n]o one questions that public funds can reach—and be used by—religious private schools." Resp.Br.24.

Those concessions are dispositive. Oklahoma offers "private organization[s]" the opportunity to apply for funding to operate charter schools that they independently design. 70 Okla. Stat. § 3-134(C). But Oklahoma's "nonsectarian" provisions deny that opportunity to one kind of "private organization"—religious organizations—solely *because* they are religious. *Id.* § 3-136(A)(2). The Free Exercise Clause "protects religious observers against [such] unequal treatment." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 458 (2017) (alteration adopted; citation omitted).

With that constitutional "common ground" firmly established, Resp.Br.1, Respondent devotes his brief to fleeing it. This Court should reject his ever-shifting efforts to recast St. Isidore—a privately formed religious non-profit organization—as an arm of Oklahoma's government with no constitutional rights.

I. A "Public School" Label Cannot Supplant Federal Constitutional Rights.

In his effort to evade *Trinity Lutheran*, *Espinoza*, and *Carson*, Respondent engages in a facile labeling

game. He proclaims that "charter schools are public schools" because they provide a free education for all through public funding. Resp.Br.27. He insists that *all* schools with those features meet some Platonic definition of "public school." Resp.Br.27-30. And he claims that Oklahoma may therefore discriminate against religious operators of charter schools, citing *Carson*'s observation that a State "may provide a strictly secular education in its public schools." 596 U.S. at 785.

This latest "semantic exercise" cannot immunize Oklahoma's religious discrimination. *Id.* at 784 (citation omitted). *Carson* simply observed that many private schools receiving state tuition payments did not resemble Maine's government-run schools. St.Isidore.Br.45-46. Nowhere did this Court hold that the Free Exercise Clause falls away when a private party receives funds to educate all students for free. And nothing in *Carson* suggests that the constitutional calculus turns on Respondent's loosely defined conception of "public" education. Instead, *Carson* referenced the "public schools" that the *government* chose "to operate . . . o[n] its own," not a program in which the State invites *private organizations* to design and operate schools. 596 U.S. at 785. Indeed, government operation—which Respondent conspicuously omits from his defining features—is *the* central feature of traditional public schools. EdChoice.Br.8-9. Unlike those schools, St. Isidore is created and controlled by a private religious organization with free exercise rights. St.Isidore.Br.27-30.

Respondent gets no further with stray "public school" language from older Establishment Clause cases. Resp.Br.22-23. None of those decisions addressed a school operated by a private organization. Instead, they dealt with the "use of the State's compulsory public school machinery" to indoctrinate children in government-run schools. *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948); *see also Zorach v. Clauson*, 343 U.S. 306, 315 (1952) (emphasizing this limitation from *McCollum*); *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (highlighting "mandatory attendance requirements" in case involving government-taught creationism); *Wallace v. Jaffree*, 472 U.S. 38, 40, 60 & n.51 (1985) (similar, in case involving government-required moment of silence for prayer); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 205 (1963) (prohibiting "state action requiring that schools begin each day with [Bible] readings"); *Engel v. Vitale*, 370 U.S. 421, 422, 431 (1962) (addressing state-composed mandated prayer that created "coercive pressure"). In that context, inculcating religion "raises unique constitutional concerns." Resp.Br.22.

Those concerns are not present here. No child will be compelled to attend St. Isidore. St.Isidore.Br.13. Rather, the privately run school will provide an "additional academic choice[]" for interested students and their families. 70 Okla. Stat. § 3-131(A)(4). The Establishment Clause therefore has no role to play. St.Isidore.Br.47-49. Absent an *actual* Establishment Clause violation, Oklahoma cannot exclude St. Isidore and the students hoping to attend it "from an otherwise generally available public benefit because of their religious exercise." *Carson*, 596 U.S. at 781. The

Free Exercise Clause "condemns" such religious hostility. *Espinoza v. Mont. Dep't of Rev.*, 591 U.S. 464, 488 (2020).

II. St. Isidore Is Not A Government Entity.

Respondent's shifting theory for attributing St. Isidore's private religious activity to the State also fails. Below, he argued that, even though St. Isidore is "structural[ly] . . . separat[e] from the State," it would perform "state action" with Oklahoma's "encouragement." Pet.App.187-88. Now, he largely abandons the conduct-specific state-action analysis, arguing instead that the school is a distinct legal entity and part of the government itself—*i.e.*, a constitutional state actor in everything it does. That is wrong twice over. The school is not a separate legal entity. But, even if it were, it is still a *privately run* school, not an arm of the government.

A. St. Isidore Is A Single Private Entity.

Respondent's primary argument proceeds on a false premise. While acknowledging that Petitioner St. Isidore is a "private" religious institution, he calls it "a distinct entity" from the charter school that St. Isidore will operate. Resp.Br.35. That is incorrect.

St. Isidore did not splinter into a second entity when it contracted with the government. Indeed, the contract—which Respondent ignores—makes clear that "the school" and the private organization that applied to create that school are one and the same. The school is merely the program through which St. Isidore will perform the educational services it promised. Thus, the contract defines only one entity: St. Isidore the "Charter School," which is both the

school that will open under the contract and the private organization that sought (and signed) that contract in the first place. Pet.App.110, 152.

The contract does not establish a new certificate of incorporation, set forth new bylaws, or assemble a new governing board for the school. Rather, it repeatedly treats the school and the applying organization as one:

- "[T]he Charter School submitted an amended application for initial sponsorship." Pet.App.111.
- "[T]he Charter School's authorization application was approved." *Id.*
- "The Charter School is authorized to implement the program of instruction, curriculum, and other services as specified in the Application." Pet.App.114.
- "The Charter School agrees that it will begin operations on or before July 1, 2024." *Id.*
- "The Charter School agrees that enrollment in the Charter School shall be open to any student." Pet.App.139.

Respondent counters that, "[b]efore a contract is validly executed, no 'charter school' exists." Resp.Br.8. But that is just another way of saying that St. Isidore was not a government contractor until it executed a contract with the government. Nor would it matter if that contract were viewed as conferring a license needed to operate a school in a particular way. *See Fulton v. City of Phila.*, 593 U.S. 522, 548 (2021) (Alito, J., concurring) (discussing Philadelphia's "licensing system" whereby "no private charitable group" could provide foster services "without the City's approval").

Either way, St. Isidore remains a private entity with First Amendment rights. *See id.* at 536 (majority op.).

At bottom, the school was "establish[ed]" by St. Isidore as "the applicant" when it contracted to build and run the school. 70 Okla. Stat. § 3-134(B). The school did not then take on a separate legal status.[1] On the contrary, "the School" will operate under St. Isidore's preexisting "Certificate of Incorporation." Pet.App.201. Respondent himself embraced this understanding below. St.Isidore.Br.36 & n.5. And, critically, nobody disputes that St. Isidore's private board—not any governmental entity—will operate the school. Pet.App.110.

[1] The fact that an entity might create multiple charter schools does not change this. Resp.Br.9. Oklahoma requires each applicant's charter schools to be "separate and distinct" insofar as they "shall not combine accounting, budgeting, recordkeeping, admissions, employment, or policies and operational decisions." 70 Okla. Stat. § 3-136(B) (2024). None of that cleaves the schools from the entity that establishes and controls them. Nor does it make any difference that charter schools may enter into contracts or sue and be sued. Resp.Br.35. Again, the charter school is simply the program through which an applicant conducts business. St. Isidore's private board determines which contracts to execute and how to handle lawsuits. Moreover, corporations frequently contract and engage in legal proceedings under various "doing business as" names. That does not mean there are separate legal entities. Finally, even if an operator chose to establish distinct legal entities for each of its schools, those entities would not materialize from the contracting process, but would be formed in the same way as any other corporation under Oklahoma law.

B. Even If The School Were A Distinct Entity, It Still Would Not Be Part Of The State.

Even if, contrary to reality, the contracting process somehow spun off the school, that would not make it part of Oklahoma's government. Respondent again ignores the contract, which explicitly recognizes that "the Charter School is a privately operated religious non-profit organization"—not a government entity. Pet.App.111. That is no surprise. The hallmarks of a government entity are (1) "creat[ion] by an enabling statute," and (2) "manage[ment] by a board selected by the government." *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 624 (1983). But St. Isidore was created through private initiative. And the school is controlled by a governing board composed of private actors—the same private board that established the school. Pet.App.110-11, 120, 152. The school therefore possesses neither of the defining elements of "Government-created and -controlled corporations." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995).

1. The State Did Not Create St. Isidore.

The Oklahoma government did not create St. Isidore, let alone by special legislation. It exists because of the undertakings of a "privately operated religious non-profit organization" formed by two Catholic dioceses. Pet.App.111, 214-15. In fact, Respondent concedes that this private organization "[d]esign[ed]" the school. Resp.Br.13. He likewise acknowledges that this private organization "applied" to "establish" the school. Resp.Br.14. And the State had nothing to do with St. Isidore's religious affiliation, character, or curriculum. St.Isidore.Br.30.

At most, Respondent argues that the Board "grant[ed] an application" that St. Isidore's private leadership put together. Resp.Br.35. That "[m]ere approval of or acquiescence in the initiatives of a private party" does not make St. Isidore part of the State itself. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

Respondent thus finds no support in this Court's government-entity precedents. In *Biden v. Nebraska*, the Missouri legislature "created MOHELA as a nonprofit government corporation" by special law. 600 U.S. 477, 489 (2023) (citing Mo. Rev. Stat. § 173.360 (2016)). In *Lebron*, "Amtrak was created by a special statute, explicitly for the furtherance of federal governmental goals." 513 U.S. at 397; *see* 49 U.S.C. § 24301 *et seq*. And, in *Arkansas v. Texas*, the State University "was created by the Arkansas legislature." 346 U.S. 368, 370 (1953) (citing Ark. Acts 1871, No. 44). St. Isidore is nothing like those government-created entities. The school would not exist absent the initiative of St. Isidore's private leadership.

In any event, even government creation does not make an entity part of the government. That has been settled for over two centuries. *See, e.g.*, *Bank of United States v. Planters' Bank of Ga.*, 22 U.S. (9 Wheat.) 904, 907 (1824); *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 152 (1974). An entity does not become part of the State even if "it is erected by the sanction of public authority" and has "objects and operations [that] partake of a public nature." Joseph K. Angell & Samuel Ames, *Treatise on the Law of Private Corporations Aggregate* 25 (11th ed. 1882). Instead, "[t]he main distinction between public and private corporations is, that over the former, the legislature"

has "exclusive and unrestrained control" to "create," "modify," and "destroy" the entity. *Id.* at 23.

This Court reaffirmed these principles when it held that the U.S. Olympic Committee was "not a governmental actor." *S.F. Arts & Ath., Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 547 (1987). Congress "'established'" the USOC through special legislation and "granted the USOC a corporate charter." *Id.* at 543 (citation omitted); *see* 36 U.S.C. § 220501 *et seq.* It also "imposed certain requirements on the USOC," mandated that the "federally created" entity "report on its operations and expenditures of grant moneys to Congress each year," and provided the USOC funding "through direct grants." *S.F. Arts*, 483 U.S. at 543 & nn.23, 24. Still, this Court held that the USOC did not lose its "essentially private character" because it lacked "the additional element of governmental control." *Id.* at 544 & n.27. Respondent does not acknowledge that decision at all, much less square his theory with it.

2. The State Does Not Control St. Isidore.

Respondent fares no better on the critical element of government control. He admits that charter schools are "privately operated" and "managed on a day-to-day level by private contractors." Resp.Br.7, 35. Rightly so. No member of St. Isidore's board is either appointed or removable by the State. Thus, "[i]n contrast to the corporations that ha[ve] in the past been deemed part of the Government," St. Isidore's governing "board [is] to be controlled" by private actors. *Lebron*, 513 U.S. at 390.

That further distinguishes St. Isidore from the few government entities that Respondent invokes. Those

entities were all "under the direction and control" of "governmental appointees." *Id.* at 398. MOHELA's "board consists of two state officials and five members appointed by the Governor." *Biden*, 600 U.S. at 490. Amtrak's "board of directors" is "controlled by Government appointees." *Lebron*, 513 U.S. at 391. And the University of Arkansas was similarly "governed by a Board of Trustees appointed by the Governor." *Arkansas*, 346 U.S. at 370.

Never has this Court found an entity to be part of the State absent governmental board appointments. That makes sense. A board of directors is the body that governs a corporation and its affairs. *See* 2 William Meade Fletcher et al., *Cyclopedia of the Law of Corporations* § 505 (2024). That is the case for Oklahoma charter schools as well: A charter school's board of directors is the "governing" body "responsible for the [school's] policies and operational decisions." 70 Okla. Stat. § 3-136(A)(8); *see also* Pet.App.110. Respondent neglects this straightforward provision, which confirms that control of St. Isidore resides with the school's privately appointed board.

Respondent next contends that the State may "unilaterally shut down" St. Isidore. Resp.Br.11, 34. That is not true. The State may terminate the charter contract, and it may do that only for failure to meet minimal academic standards or other "good cause," such as violation of the contract or applicable law. 70 Okla. Stat. § 3-137(F), (H) (2024); *see* Pet.App.146. The State's ability to terminate a contract does not render its counterparty a government entity. Termination rights are common in private and government contracts. *See* 13 Corbin on Contracts

§ 68.9 (Matthew Bender ed., 2024); *5860 Chi. Ridge, LLC v. United States*, 104 Fed. Cl. 740, 757 (2012).

Not only that, but consistent with a *private* party's due process rights, the State cannot exercise its limited termination rights without navigating an arduous process. It must give 90 days' notice to the school's board, which has the right to a hearing. 70 Okla. Stat. § 3-137(F). The sponsor must outline the "reasons for possible closure." *Id.* § 3-137(J)(1). And it must afford the school an opportunity to submit evidence at "a public hearing challenging the rationale for closure." *Id.* § 3-137(J)(3).

The private contractor's rights do not end there. If the State revokes a charter contract, the aggrieved party is "entitled to certain, speedy, adequate and complete judicial review" to challenge that determination. 75 Okla. Stat. § 318(A)(1). Even if that fails, the sponsor must follow a complicated winding-up process in coordination with the school's board. *See* 70 Okla. Stat. § 3-137(I). And the "charter school" can in many cases apply for funding later, *id.* § 3-137(K)-(L), and retain its own property, *id.* § 3-136(G). The State's limited ability to terminate its contracts with private parties is worlds apart from Missouri's unilateral ability to "abolish MOHELA and set the terms of [its] dissolution." Resp.Br.36 (alteration adopted) (quoting *Biden*, 600 U.S. at 491).

Besides, Respondent's closure argument proves too much. "All corporations act under charters granted by a government, usually by a State." *S.F. Arts*, 483 U.S. at 543-44. And nearly all States may dissolve corporations after affording them process and showing cause. James D. Cox & Thomas Lee Hazen, *Treatise*

on the Law of Corporations § 26:4-5 (4th ed. 2024); *see, e.g.*, Del. Code Ann. tit. 8, § 284(a)-(b). That does not render all corporations government entities.

* * *

Lacking any way to show government creation or control, Respondent again reverts to labeling exercises. He argues that "Oklahoma explicitly *claims* charter schools as its own" because it has designated them "public schools." Resp.Br.34. But a "label" cannot dictate "what the Constitution regards as the Government." *Lebron*, 513 U.S. at 392-93. Further, the "public school" designation here means only that Oklahoma charter schools are "free schools supported by public taxation." 70 Okla. Stat. § 1-106. All agree charter schools fit that definition, but that is beside the point.[2] Indisputably private schools often share these features too. *See* EdChoice.Br.17; *infra* pp.18-19. And the "legislative policy choice" to fund such alternative schooling options does not transform privately run charter schools into the State. *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982).

Reaching further, Respondent declares that Oklahoma "consider[s] charter school boards" to be "'[g]overnmental.'" Resp.Br.36 (quoting Okla. Judicial Ethics Op. 2023-3, 538 P.3d 572, 572 (Okla. Jud. Eth. Adv. Pan. Oct. 16, 2023)). His reliance on a three-sentence judicial ethics analysis is misplaced. Indeed, that advisory opinion focused solely on the "public school" label for charter schools. *See* 538 P.3d at 572.

---

[2] Respondent's argument conveniently ignores that many charter schools are themselves heavily funded by private donations or "philanthropic investments," on top of government aid. Charter.Sch.Growth.Fund.Br.1.

Even if that "state law label[]" suffices to make charter school boards "governmental" for purposes of a state judicial ethics rule, it does not cut it for purposes of the U.S. Constitution. *Bd. of Cnty. Comm'rs, Wabanusee Cnty. v. Umbehr*, 518 U.S. 668, 679 (1996). Respondent himself agrees that such "labels are not enough." Resp.Br.3.

Finally, the limited ways that charter schools might be treated similar to governmental schools does not mean they *are* such schools. Resp.Br.9-11, 30. Respondent ignores the baseline rule "exempt[ing]" charter schools "from all statutes and rules" relating to Oklahoma's government-run schools. 70 Okla. Stat. § 3-136(A)(5). His suggestion that Oklahoma's widely divergent charter schools materially resemble traditional public schools blinks reality. *See infra* note 5. And the handful of regulations and benefits that do apply to charter schools merely evince the *terms* on which Oklahoma has chosen to contract with private charter school operators. U.S.Br.26. Regardless, "being regulated by the State does not make one a state actor," even where the regulations are "'extensive and detailed.'" *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 815-16 (2019) (citation omitted). Nor does a privately operated entity become part of the government by receiving "Government-conferred advantages." *Lebron*, 513 U.S. at 390; *see* St.Isidore.Br.40 & n.6. The key question remains one of operational control. *See S.F. Arts*, 483 U.S. at 543-44; *Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 55 (2015). Here, there is no dispute that St. Isidore is "operated by a board of directors, none of whom are public officials or are chosen by public officials."

Rendell-Baker v. Kohn, 457 U.S. at 832. That is fatal to Respondent's claim.

III. St. Isidore Is Not A State Actor.

Flipping from his position below, Respondent now concedes that, if St. Isidore is a private entity, the "state action" doctrine "doesn't" make sense here. Resp.Br.26. He nonetheless searches this Court's state-action precedents for another way to deprive St. Isidore of its free exercise rights. Resp.Br.36-40. Those passing efforts fail too.

First, this case is nothing like *West v. Atkins*, 487 U.S. 42 (1988). The State there "ha[d] a constitutional obligation, under the Eighth Amendment, to provide adequate medical care" to those it "incarcerated." *Id.* at 54. The plaintiff "was not free" to "see a different physician of his own choosing." *Id.* at 44. He was left at the State's mercy, "with no means for vindication" of his rights outside the care "provided by the State." *Id.* at 55, 56 n.14.

Respondent's reliance on *West* founders at the outset because no federal duty is at stake here. *West* prohibits States from evading the federal Constitution's demands by outsourcing those obligations to a private entity. *See id.* at 55-56. But it is unclear why the federal Constitution would be similarly implicated by a State's chosen means of carrying out various *state-law* obligations. *Cf.* Manhattan.Inst.Br.8. Tellingly, Respondent cites no case in which outsourcing a state-law duty created "state action" for purposes of the federal Constitution.

Even looking to state-law duties, Oklahoma "has not abdicated [any] constitutional obligation." *Peltier*

v. Charter Day Sch., Inc., 37 F.4th 104, 146 (4th Cir. 2022) (en banc) (Quattlebaum, J., dissenting in part). Respondent suggests that St. Isidore has been tasked with carrying out Oklahoma's duty to maintain a "system of free public schools wherein all the children of the State may be educated." Okla. Const. art. XIII, § 1; *id.* art. I, § 5. But Oklahoma provides that through its system of government-run public schools. Charter schools do not replace that system; they "exist alongside state-mandated secular options." Pet.App.35 n.4. Parents and students "have a choice" to remain in government-run schools or go elsewhere, something "the inmate in *West* never had." *Peltier*, 37 F.4th at 147 (Quattlebaum, J., dissenting in part).

Respondent has no meaningful response. He proclaims, by *ipse dixit*, that West's "lack of choice" did not matter. Resp.Br.38. That is simply wrong. The State in *West* fully outsourced its federal constitutional obligation because "the only medical care West could receive" was "that provided by the State." 487 U.S. at 55. West's injury was thus "caused, *in the sense relevant for state-action inquiry*, by the State's exercise of its right to punish West by incarceration and to deny him a venue independent of the State to obtain needed medical care." *Id.* (emphasis added). That lack of choice was the crux of this Court's analysis. West "was literally a prisoner of the state," and so he was "captive to whatever doctor the state provided." *Logiodice v. Trs. of Me. Cent. Inst.*, 296 F.3d 22, 29 (1st Cir. 2002). By contrast, Oklahoma does not compel any student to attend a charter school, let alone St. Isidore.

Second, Respondent's misreading of *West* infects his fallback argument that St. Isidore performs a traditional and exclusive government function. While Respondent tacitly concedes that educating children is not such a function, he tries to redefine the relevant function with ostensibly outcome-determining adjectives. He gerrymanders the function as providing a "free, public education open to all," a ruse he insists "is critical" because that is "the obligation Oklahoma has delegated." Resp.Br.37-38. Yet, as explained, Oklahoma did not delegate any such obligation to St. Isidore.

The problems with Respondent's framing do not stop there. This Court rejected a similar effort to circularly define the activity funded by the State as a "public" education in *Carson*. 596 U.S. at 782-85. And the education provided in *Rendell-Baker* was free to students and delivered at "public expense," but this Court refused to incorporate those features into its definition of the relevant function. *See* 457 U.S. at 842. Respondent never explains why this Court should take a different approach here.

Respondent's framing also fails on its own terms. It is hard to see how a free and open school is an exclusive state prerogative. Any privately run school can—and some do—take all-comers.[3] Those schools may also be free. EdChoice.Br.17. In fact, the early settlers of Oklahoma *did* regularly erect free, private schools for all. *See* G.D. Moss, *A History of the*

---

[3] *See, e.g.*, *Admissions*, Sudbury Valley School, https://bit.ly/3EeyjRf (last visited Apr. 21, 2025); *Admissions*, Academy of Christian Education, https://bit.ly/3G50suA (last visited Apr. 21, 2025).

Development of Rural Schools in Oklahoma 21-25 (1931). As did many other States. Duetsch.Br.10-16. Thus, even that narrowly defined form of education is not one of the "'very few'" functions the government has "traditionally *and* exclusively performed." *Halleck*, 587 U.S. at 809 (citation omitted).

Respondent's framing also proves far too much. With the expansion of school-choice programs, many private schools receive significant state funding to provide an education like that here.[4] If Respondent's view were correct, that would make St. Isidore a state actor even if it opened the same school with state tuition vouchers instead of charter-school funding. Respondent cannot seriously believe that.

* * *

In short, St. Isidore is not a governmental entity or state actor. It is a private religious institution, and it undisputedly satisfies all secular requirements for Oklahoma's charter school program. The State may not require St. Isidore "to renounce its religious character in order to participate in [that] otherwise generally available public benefit program." *Trinity Lutheran*, 582 U.S. at 466. The lower court erred by enforcing that unconstitutional requirement.

IV. Respondent's Consequentialist Arguments Are Overblown And Irrelevant.

Unable to defend the judgment below, Respondent spends nearly a third of his argument trying to catastrophize "what comes next" if this Court rules

---

[4] *See, e.g.*, Aleksandra Appleton & Mia Hollie, *Vouchers Nearly Universal at Half of Indiana Private Schools that Take Them, Data Shows*, Chalkbeat (Sept. 24, 2024), https://bit.ly/42OfVbd.

against him. Resp.Br.45. His hypothetical concerns are invented and overblown. They are not before this Court. And they provide no license to discriminate against St. Isidore.

Respondent first argues that ruling for St. Isidore would threaten the federal charter school program's "nonsectarian limitation." Resp.Br.41. After *Trinity Lutheran*, though, the Department of Justice concluded that this provision "discriminates on the basis of religious status in violation of the Free Exercise Clause." *Exclusion of Religiously Affiliated Schools from Charter-School Grant Program*, 44 Op. O.L.C. 131, 131 (2020). This Court has since clarified that discrimination based on religious *uses* of funds likewise violates the Free Exercise Clause. *Carson*, 596 U.S. at 788. Accordingly, the federal nonsectarian restrictions are already unenforceable. U.S.Br.4.

Respondent questions how this constitutional violation could have escaped the 1994 Congress or the States with similar discriminatory laws. Resp.Br.1-2, 6-7, 28-29. But that question has an easy answer. When these charter school laws were enacted decades ago, lawmakers were legislating under the influence of the now-defunct regime of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Thus, the federal nonsectarian restriction and its state-law counterparts reflect an "abandoned" understanding of the Religion Clauses. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534 (2022). The Court clarified these principles over the ensuing decades, and *Trinity Lutheran*, *Espinoza*, and *Carson* have removed any ambiguity.

Ignoring these developments, Respondent asserts that ruling for St. Isidore would "bring grants under

the federal [law] to a grinding halt." Resp.Br.41. That is wrong too. A ruling for Petitioners would simply allow St. Isidore to participate in Oklahoma's charter school program. And reaffirming this Court's precedents to prohibit religious discrimination would *expand* access to federal charter school funds for otherwise eligible religious institutions. It would not deny those funds to secular institutions.

Nor would ruling for Petitioners pose "an existential threat to *all* charter schools." Resp.Br.42. Respondent roots this supposed concern in state constitutions that restrict funding of schools outside the "public school system." *Id.* (citation omitted). But States independently craft their "public school system" as matters of *state law* not presented here. Respondent fails to cite any state law that hinges the funding of charter schools on the federal state-action questions presented in this case. The "chaos" that he and his amici concoct is fiction. Resp.Br.42.

Respondent's fearmongering that religious charter schools will become the only free option for some students is even more fanciful. Resp.Br.43. He cannot explain how *expanding* the pool of organizations qualified to run charter schools would *reduce* any student's educational opportunity. Even in the unlikely event that Respondent's conjecture came to pass, the potential "compuls[ion]" to attend a religious school would obviously pose different concerns than those here. *Id.* In *this* case, St. Isidore will simply provide an additional option for students who *choose* the school.

Drifting further from this case, Respondent warns of "a host of new disputes" that could occur down the

road. *Id.* But hypothetical future disputes cannot distract from the very real discrimination that Oklahoma law inflicts on St. Isidore now. That "kind of raw consequentialist calculation plays no role in [this Court's] decision." *Niz-Chavez v. Garland*, 593 U.S. 155, 171 (2021). And there "will be time enough" to address these issues "if and when they arise." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196 (2012). The issue before this Court now is whether Oklahoma can categorically exclude St. Isidore from the charter school program solely because of its religion. This Court's precedents make clear that it cannot. St.Isidore.Br.24-27.

Respondent also insinuates that "religious charter schools will enjoy a special status" because they might deny students admission or take personnel action on religious grounds. Resp.Br.46. That is just more speculation about future cases not before this Court. At St. Isidore—as at any other Oklahoma charter school—"[a]ll students are welcome," including "those of different faiths or no faith." Pet.App.213; *see also* Pet.App.138 ("The Charter School shall be as equally free and open to all students as a traditional Public School.").[5] As to personnel, Respondent ignores that

---

[5] Respondent notes that students could be "disciplined" for violating school policies. Resp.Br.44. But that is true for all schools, and St. Isidore will "take all-comers," even if the school might not be the best fit for everyone. *Id.*

That is the point of the charter school program—to give families more choices to find schools that meet their needs. Some will prefer a traditional public school. Others will choose St. Isidore. Or a "language immersion environment" that focuses on "International Mindedness." Le Monde International School,

all Oklahoma charter schools are free to adopt their own "personnel policies, personnel qualifications, and method of school governance." 70 Okla. Stat. § 3-136(B). St. Isidore simply seeks equal access to a program for which it is otherwise qualified. By contrast, Respondent's position singles out the faithful for "special disfavor." *Kennedy*, 597 U.S. at 514.

Moreover, Respondent badly misconstrues St. Isidore's policies and its demonstrated commitment to educating students of all faiths. He is wrong that students must "adhere to 'the belief[]' that 'Christ is present in the Holy Eucharist'" and "attend at least one all-School Catholic mass." Resp.Br.14. Rather, St. Isidore's handbook simply explains the school's religious beliefs and requires students to refrain from "[d]isrespectful behavior during School liturgies." *Parent & Student Handbook 2024-2025*, at 45, St. Isidore of Seville Catholic Virtual School (Mar. 18, 2024), https://bit.ly/3GhhiXq. Students need "not participate fully in the Mass as Catholics," and the handbook explicitly offers "[e]xemptions" from

---

Student and Family Handbook 5-6 (2024), https://bit.ly/3RO0JVa. Or a strict classical education that punishes "[a]ny departure from proper decorum." Tulsa Classical Academy, *Family Handbook* 20 (2023), https://bit.ly/3XVfnh1. Or a Comanche education that resolves issues through "Peacemaking" that incorporates "spiritual assistance" and involves "tribal courts." Comanche Academy, *Family Handbook* 14-16 (2021), https://bit.ly/43YFZ4K. Or a "nature-based" education where students celebrate "the bounty of the land" through the annual "Festival of Courage." *Celebrations and Festivals*, Under the Canopy School (2025), https://bit.ly/4lBglZQ.

None of these schools is *for* everyone, but all are open *to* everyone.

attending the school's biannual Mass. *Id.* at 27. St. Isidore welcomes all students, Catholic or not. Pet.App.138. Conversely, it is *Respondent's* repeated anti-Muslim hostility that demonstrates disfavor of certain religious beliefs. St.Isidore.Br.15.

Switching gears, Respondent says that allowing St. Isidore to receive funds "directly" from the State would "revolutionize this Court's religious-funding jurisprudence." Resp.Br.46. Not so. Like schools receiving vouchers or tuition credits, St. Isidore will receive government funds on a per-pupil basis, according to the independent choices of families. St.Isidore.Br.26, 49-50. The fact that pupil numbers might be calculated on a rolling average for efficiency's sake is of no constitutional significance. Respondent also fails to address the overwhelming evidence of "[d]irect government aid to religious schools" throughout this Nation's history. St.Isidore.Br.50-52; *see Espinoza*, 591 U.S. at 480-81; Senators.Br.4-9; USCCB.Br.10-15; Glenn.Br.5-28; CLS.Br.5-10. And he ignores that this Court has already rejected an "antiestablishment objection to providing funds directly to a church" through a neutral benefit program. *Trinity Lutheran*, 582 U.S. at 450; *see also Carson*, 596 U.S. at 785; *Mitchell v. Helms*, 530 U.S. 793, 815-16 (2000) (plurality op.). There is no Establishment Clause problem with St. Isidore receiving funding like other private organizations that create and operate charter schools.

Finally, Respondent apparently believes that accepting St. Isidore's position would mean a State "*must*" establish "religious public schools" if it funds other schools on a per-pupil basis. Resp.Br.48. That

is wrong again. A State "need not subsidize" a program that invites *private* organizations to participate. *Espinoza*, 591 U.S. at 487. "But once a State decides to do so," it cannot exclude religious entities "solely because they are religious." *Id.* The Free Exercise Clause forbids such discrimination.

CONCLUSION

The Court should reverse.

Respectfully submitted,

JOHN A. MEISER
MEREDITH H. KESSLER
LINDSAY AND MATT MOROUN RELIGIOUS LIBERTY CLINIC
Notre Dame Law School
1338 Biolchini Hall of Law
Notre Dame, IN 46556

MICHAEL H. MCGINLEY
Counsel of Record
STEVEN A. ENGEL
DECHERT LLP
1900 K Street, NW
Washington, DC 20006
(202) 261-3378
michael.mcginley@dechert.com

MICHAEL R. PERRI
SOCORRO A. DOOLEY
PERRI DUNN, PLLC
100 N. Broadway
Suite 3280
Oklahoma City, OK 73102

BRIAN A. KULP
ANTHONY R. JADICK
JULIA M. FITZGERALD
CORY J. KOPICKI
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104

Counsel for Petitioner

April 21, 2025