Nos. 24-394 and 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 *AMICUS CURIAE* PROFESSOR S. ERNIE WALTON IN SUPPORT OF PETITIONERS

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Interest of *Amicus Curiae*

Amicus is the Associate Dean and an Assistant Professor at Regent University School of Law. He is a prominent lecturer and scholar on the intersection of the First Amendment, parental rights, and public schools. His publications include *Charter Schools and State Action: An Analysis Through the Lens of Agency Law*, 77 Okla. L. Rev. __ (2025 Forthcoming); *Religious Charter Schools: The Time Has Come*, Regent U. L. Rev. Pro Tempore (June 12, 2023); In Loco Parentis, *The First Amendment, and Parental Rights—Can They Coexist in Public Schools?*, 55 Tex. Tech L. Rev. 461 (2023); and *The Fundamental Right to Homeschool: A Historical Response to Professor Bartholet*, 25 Tex. Rev. L. & Pol. 377 (2021), among other law review articles and frequent opinion/editorial pieces in a variety of outlets. [1]

Summary of the Argument

The Oklahoma Supreme Court incorrectly found that St. Isidore of Seville Catholic Virtual School ("St. Isidore") was a state actor. It based its holding on an erroneous application of one state action test and a second test that is fundamentally

[1] Under Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or his counsel made a monetary contribution to its preparation or submission.

inconsistent with this Court's state action jurisprudence. Under the "public function test," the Oklahoma Supreme Court held that St. Isidore was a state actor because it would perform the traditionally exclusive public function of providing a "*free* public education." But education is not now, nor has it ever been, an exclusive governmental function. Parents—not the state—possess the primary educational right in the United States, and both parents and private organizations have educated students throughout the nation's history. Seeking to circumvent this history, the Oklahoma Supreme Court purported to reframe the function at issue as providing a "free public education." But this Court has consistently analyzed the "function" in state action analysis from a categorical perspective. The category at issue here is "education," and no amount of linguistic gymnastics changes that fact. Because educating students is not something that *only* the state has done, St. Isidore is not performing an activity that has been the exclusive prerogative of the state.

The Oklahoma Supreme Court also held that St. Isidore was a state actor under the so-called "entwinement" test. This vague test is fundamentally inconsistent with the core of this Court's state action jurisprudence and leaves far too much latitude to lower courts to find state action whenever they desire. Thus, it should be overruled. But even if it is not overruled, this Court should interpret the

entwinement test in light of the rest of this Court's state action jurisprudence, including the requirement that state action can only be found when the actor possesses actual authority conferred by the state over the specific matters challenged in the complaint. St. Isidore possesses no authority from the state of Oklahoma on any of the matters challenged in the complaint, namely its religious curriculum, personnel policies, and governance. To find state action where the state has expressly disclaimed all control would be to ignore this Court's directives and contort the state action doctrine beyond recognition.

Educational freedom has been a bedrock of American civilization since before the founding. The Oklahoma Supreme Court's holding in *Drummond* threatens to crack this bedrock and makes a mockery of this Court's state action jurisprudence. This Court should overrule the decision, lest Oklahoma, and other states, be permitted to restrict an area of "individual freedom" that has been reserved by the Constitution to the people.

Argument

As a preliminary matter, this Court should presume that St. Isidore is not a state actor because it is a private entity. *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th Cir. 1999). The Fourteenth Amendment presupposes a "dichotomy"

between state action and private conduct that is essential to preserving "individual freedom" and "avoid[ing] the imposition of responsibility on a State for conduct it could not control." *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988). Therefore, courts must be vigilant before finding that the conduct of a private actor is attributable to the state. The Oklahoma Supreme Court showed no such vigilance. Instead, it held that St. Isidore was a state actor based on an erroneous application of one test and a second test that is fundamentally inconsistent with this Court's state action jurisprudence.

I. Charter Schools Are Not State Actors Because Education Is Not a Traditionally Exclusive Public Function

There are several tests this Court utilizes to determine whether state action exists. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295–96 (2001). The Oklahoma Supreme Court relied on two of them to hold that St. Isidore is a state actor. *Drummond v. Okla. Statewide Virtual Charter Sch. Bd.*, 558 P.3d 1, 11 (2024) ("St. Isidore is a state actor under at least two tests—the entwinement and public function tests."). Under the "public function" test, it is not sufficient that a private actor is engaged in a "public function." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974). Instead, the performed

function must be "traditionally the exclusive prerogative of the State." *Id.* This effectively means that the function is one that only governments, by their very nature, can perform, like "running elections and operating a company town." *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 812 (2019) (collecting cases). "Very few" functions qualify under this exacting test. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978).

Education is hardly a traditional *exclusive* public function. *See Robert S. v. Stetson Sch., Inc.*, 256 F.3d 159, 166 (3d Cir. 2001) (opinion of Alito, J.). "Parents, not the state, possess the primary educational right in the United States." S. Ernie Walton, *Religious Charter Schools: The Time Has Come*, Regent U. L. Rev. Pro Tempore (June 12, 2023). English common law recognized the natural law right of parents to educate their children. Sir William Blackstone called the parent-child relationship "the most universal relation in nature" from which spring three fundamental parental duties to children: to provide for "their maintenance, their protection, and their education." 1 William Blackstone, Commentaries on the Laws of England, at *434 (1765–1769). The educational right belonged "exclusively" to parents. S. Ernie Walton, In Loco Parentis, *The First Amendment, and Parental Rights—Can They Coexist in Public Schools?*, 55 Tex. Tech L. Rev. 461, 466 (2023). Indeed, "[s]o strong" was

the educational right of parents at common law that third parties could only educate another person's children if and when "parents chose to delegate that right to them." S. Ernie Walton, *The Fundamental Right to Homeschool: A Historical Response to Professor Bartholet*, 25 Tex. Rev. L. & Pol. 377, 402 (2021). "And even then, the third party stood '*in loco parentis*,' i.e., in place of the parents." *Id.* (quoting Blackstone, *supra*, at 441).

This tradition continued in America. Early American legal commentators like St. George Tucker, James Wilson, and James Kent recognized the natural law right of parents to educate their children. In Loco Parentis, *supra*, at 483. Children in the colonies and early American states were educated primarily at home and through "voluntary associations such as library companies and philosophical societies, circulating libraries, apprenticeships, and private study." Robert A. Petersen, Education in Colonial America, Foundation for Economic Education 2 Found. for Econ. Educ. (Sept. 1, 1983).

The rise of public education in the mid-eighteenth century in no way changed this fact. First, public education in the states was primarily designed to educate the poor—not to supplant education at home or through private entities. In Loco Parentis, *supra*, at 469–72 (2023). The Founders believed that

an educated citizenry was an essential component of a free republic. *The Fundamental Right to Homeschool*, *supra,* at 419. Accordingly, many of them "advocated for some form of public education at the local level that would *complement* the fundamental right of parents to direct their children's education." *Id.* (emphasis added). Second, state courts in the nineteenth century "applied the doctrine [of *in loco parentis*] to public schools to resolve conflicts when teachers enacted physical discipline on students." In Loco Parentis, *supra*, at 472–76 (discussing the use of *in loco parentis* by state courts both before and after the ratification of the Fourteenth Amendment and the adoption of compulsory attendance laws). By applying *in loco parentis* to the public school context, courts implicitly recognized that parents still retained the primary educational right, *i.e.*, that education was not the exclusive function of the state. In other words, the state acted on behalf of parents in educating their children, and only if and when the parents chose to send their children to public school could the state play a role in their education.

In short, "education is not and never has been a function reserved to the state," and "this has been so from the outset of this country's history." *Logiodice v. Trustees of Maine Cent. Inst.*, 296 F.3d 22, 26–27 (1st Cir. 2002). Despite this unambiguous historical record, the Oklahoma Supreme Court found the opposite. Seemingly aware of this history (and what

that meant for the court's decision), the court reframed the function at issue as providing a "*free public* education." *Drummond*, 558 P.3d at 11–12 (emphasis in original). Because the Oklahoma Constitution guarantees the provision of a free public education, and the Oklahoma legislature created charter schools, in part, to fulfill that duty, the court held that St. Isidore was performing "the traditionally exclusive government function of operating the State's free public schools." *Id.* at 12–13.

The court's reasoning conflicts with both this Court's directives and sound logic. The function at issue is the provision of education generally, not the provision of a "free public education," and no amount of linguistic gymnastics can change that fact. By qualifying the real activity at issue, education, with the adjectives "public" and "free," the Oklahoma Supreme Court skirted the threshold state action question. Indeed, if the word "public" were added to every "function" before considering whether it was an exclusive public function, every activity would inevitably be found to be an exclusive state function. But "[t]here is no indication that the Supreme Court had this kind of tailoring by adjectives in mind when it spoke of functions 'exclusively' provided by government." *Logiodice*, 296 F.3d at 27. Instead, when describing the public function test, this Court has examined the "activity" itself from a categorical standpoint. *See Halleck*, 587 U.S. at 812. Because

educating students "is not an activity that only governmental entities have traditionally performed," *id.*, the Oklahoma Supreme Court misapplied this Court's precedents and constitutionalized an area of individual freedom that is reserved by the Constitution for the people.[2]

Drummond's logic also threatens to upend basic norms of constitutional law. If a state can turn a private actor into a state actor by enacting a statute calling it a "public entity," reframing the actual function at issue by labeling it "public," and attaching conditions to state funding, no area of "individual freedom" is safe from the constraints of the Constitution. For this reason and others, this Court has repeatedly stated that what a state labels something is not dispositive in state action analysis. *See Jackson*, 419 U.S. at 350 n.7 (holding that a privately operated utility company that the state designated as a "public utility" was not a state actor). If labels were dispositive, states could manipulate a variety of public benefits and flout the First Amendment by denying that benefit to religious organizations. *Carson v. Makin*, 596 U.S. 767, 785 (2022); *Religious Charter Schools*, *supra* (noting that

[2] Consider further that if all parents chose to homeschool their children or send them to private school, a right guaranteed by the Constitution, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the state would have no one to educate. How could something be a traditionally exclusive public function when the possibility exists that it could be performed entirely by private actors?

the First Amendment and this Court's precedents "are not paper tigers that cower to easily manipulated state labels"). Constitutional protections depend on substance, not "the presence or absence of magic words." *Makin*, 596 U.S. at 785. Just as the state cannot use the label "public" to exclude religious organizations from receiving a public benefit, *id.*, it cannot use that same label to transform a private actor into a state entity.[3]

In conclusion, the Oklahoma Supreme Court erred when it held that charter schools were state actors because they were performing a function that is exclusively performed by the state. This nation's history belies that notion. Education, the real function at issue, has always been a function that begins with private parties, namely parents. To allow the Oklahoma Supreme Court to redefine the function by adding the label "public" would be to give states authority to constitutionalize an area of individual

[3] Even if the function at issue was the provision of a free, public education, the state is not the only entity to provide such an education. "Free schools," which existed at the founding, were funded by private endowment and free to attend. The Inst. for Educ. Equity and Opportunity, *Education in the 50 States: A Deskbook of the History of State Constitutions and Laws About Education* 21 (2008). Further, labeling state education as "free" is misleading. State education is not free; it is funded by taxes. Simply because a private school funds its education through tuition and the state funds its education through taxes is a distinction without a difference.

freedom that has been a bedrock of this nation and a bulwark against tyranny.

II. Charter Schools Are Not State Actors Because They Do Not Possess Actual Authority to Act on the State's Behalf Regarding the Issues Being Challenged in the Complaint

The Oklahoma Supreme Court also held that St. Isidore was a state actor under the so-called "entwinement test," first articulated in *Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001). *Drummond*, 558 P.3d at 11. Citing the government's sponsorship and oversight of charter schools, along with the state's ability to terminate the charter, the court concluded that "[t]he State's entwinement expands to the internal operations and affairs of the charter schools." *Id.* Therefore, St. Isidore was a state actor. This holding is wrong for two reasons.

A. *Brentwood*'s Entwinement Test Should Be Overruled

As a threshold matter, it is doubtful that the entwinement test accurately reflects this Court's precedents. *See Brentwood Academy*, 531 U.S. at 312 (Thomas, J., dissenting) ("[W]hatever this new

'entwinement' theory may entail, it lacks any support in our state-action jurisprudence."). "Entwinement" is a vague term that fails to address the core of every state action inquiry: whether an action "can be fairly attributed to the state." *Id.* (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)). Attribution is only "fair" where the state has authority to "control" the contested action. *Nat'l Collegiate Athletic Assn. v. Tarkanian*, 488 U.S. 179, 191 (1988). The entwinement test does not address that question. Moreover, "entwinement" is also quite similar to "extensive regulation," which this Court has made clear does *not* transform a private entity into a state actor. *Jackson*, 419 U.S. at 350. And what are "sponsorship" and "oversight" if not forms of regulation? Under one test, then, the relationship between Oklahoma and St. Isidore is not sufficient to transform it into a state actor, but under the elusive entwinement test, it is.

The truth is that *Brentwood*'s entwinement test is fundamentally inconsistent with the core of this Court's state action jurisprudence and leaves far too much latitude for lower courts to find state action whenever they desire. *See* S. Ernie Walton, *Charter Schools and State Action: An Analysis Through the Lens of Agency Law*, 77 Okla. L. Rev. __, at *12–13 (2025 Forthcoming), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4912082. Accordingly, it should be overruled or at

least confined to its facts. *Brentwood Academy*, 531 U.S. at 314 (Thomas, J., dissenting) ("If we are fortunate, the majority's fact-specific analysis will have little bearing beyond this case."). This case provides that opportunity. It also provides the opportunity to articulate a "neat analytical structure" that this Court's state action jurisprudence currently lacks. *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 141 (4th Cir. 2022) (*en banc*) (Quattlebuam, J., dissenting in part and concurring in part), *cert denied*, 143 S. Ct. 2657 (2023). The good news is that this Court is already moving in that direction. *Charter Schools and State Action*, *supra*, at 13.

B. If *Brentwood* Is Not Overruled, This Court Should Interpret the Entwinement Test in Light of *Lindke v. Freed* and This Court's Other Precedents

1. *Lindke v. Freed*

Even if *Brentwood* is not overruled, this Court should interpret the entwinement test in light of *Lindke v. Freed*, decided less than one year ago. 601 U.S. 187, 198 (2024). In that case, this Court articulated a simple, straightforward, and common-sense approach to state action, at least in the context of a "public official's social media activity." *Id.* at 198. The Court held that "a public official's social-media

activity constitutes state action under § 1983 only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media." *Id.* In crafting this test, this Court explicitly rejected Lindke's argument—and that of the Ninth and Second Circuits—that would find state action based merely on appearances.[4] Action is only attributable to the state, this Court said, when the actor actually possesses state authority and there is a direct "tie between the official's authority and 'the gravamen of the plaintiff's complaint.'" *Id.* (quoting *Blum*, 457 U.S. at 1003).

2. Charter Schools Possess No Actual Authority to Act on Behalf of the State in the Matters Being Challenged

[4] The "appearances" and "entwinement" tests are similar in that both are highly dependent on the facts of the case. *Compare Brentwood*, 531 U.S. at 295–96 ("[N]o one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government."); *with Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 236 (2d Cir. 2019), *cert. granted, judgment vacated sub nom. Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220 (2021), *and abrogated by Lindke v. Freed*, 601 U.S. 187 (2024) ("Whether First Amendment concerns are triggered when a public official uses his account in ways that differ from those presented on this appeal will in most instances be a fact-specific inquiry.").

Although *Lindke's* two-part test was articulated in the context of a public official's social-media use, it is still instructive for the charter-school question. *Charter Schools and State Action*, *supra*, at 15–16. Oklahoma Charter schools have no actual authority to act on the state's behalf, let alone actual state authority to act on the specific issues being challenged in the complaint.

First, it is arguable whether charter schools are even acting on the state's "behalf." "While charter schools are certainly performing a function that the state desires" by educating Oklahoman children, they are private organizations established with one purpose: "to educate students according to a specific educational mission and agenda that the governing board establishes." *Id.* at 19. From the state's perspective, it enters into charters with private entities to promote innovation and competition within state school systems and provide parents and students with additional choices. 70 O.S. § 3-131(A). "Charter schools, on the other hand, are entering into the charter to educate their own students according to their mission without regard to how that affects the traditional public school system." *Charter Schools and State Action*, *supra*, at 19.

Second, even if Oklahoma charter schools are acting on the state's behalf, they must possess actual state authority over "'the specific conduct of which the

plaintiff complains.'" *Lindke*, 601 US. at 199 (quoting *Blum*, 457 U.S. at 1004). The specific conduct complained of in this case is that St. Isidore is a "religious organization" and therefore "has the right to freely exercise its religious beliefs and practices consistent with its religious protection." *Drummond*, 558 P.3d at 7. "Among other things, this means that St. Isidore will teach its students a Roman Catholic curriculum, hire Roman Catholic teachers and staff, and be governed by Roman Catholic doctrine." *Charter Schools and State Action*, *supra*, at 24. St. Isidore does not have actual state authority to operate as a religious organization in any of these matters.

Regarding curriculum, the Charter School Act "specifically disclaims any [state] authority over a charter school's choice of curriculum and educational philosophy, giving schools freedom to 'offer a curriculum which emphasizes a specific learning philosophy or style or certain subject areas.'" *Id.* (quoting 70 O.S. § 3-136(A)(3)). St. Isidore, not the state, is "responsible" for adopting and teaching its curriculum. *Blum*, 457 U.S. at 1004.

As for teachers and staff, charter schools have complete "autonomy to establish their own 'personnel policies,' including 'personnel qualifications,' and 'methods of governance.'" *Charter Schools and State Action*, *supra*, at 24. (quoting § 3-136(C)). In other words, charter schools, not the state, "establish what

criteria to use in hiring and supervising teachers." *Charter Schools and State Action*, *supra*, at 24; *see also Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 813 (9th Cir. 2010) (noting that "the relevant inquiry" was "whether [the charter school's] role as an employer was state action" when the complaint alleged the school had failed to grant the plaintiff rights he alleged he was owed as an employee). When St. Isidore hires teachers and staff that agree with and will teach Roman Catholic doctrine, it is doing so "solely by [the authority of] St. Isidore's board of directors," not that of the state of Oklahoma. *Charter Schools and State Action*, *supra*, at 24.

The same is true of charter schools' overall governance. Although the sponsoring government agency is required to provide "ongoing oversight" of the approved charter school through site visits, attendance at board meetings, compliance checks, and an annual performance review, Okla. Admin. Code § 777:10-3-4(a), the Charter School Act makes clear that charter schools are ultimately governed by their own board of directors. 70 O.S. § 10-1-3(b)(1); Okla. Admin. Code § 777:10-1-3(b).

Accordingly, in every challenged matter, St. Isidore possesses no state authority. Stated differently, Oklahoma does not "control" charter schools in any matter challenged in the complaint.

Tarkanian, 488 U.S. at 191. Moreover, it is not sufficient that the state, through the charter, mandates that charter schools adopt their own curriculum or personnel policies. *See Kerl v. Dennis Rasmussen, Inc.*, 682 N.W.2d 328, 342 (Wis. 2004) (holding that a franchise agreement did not constitute an agency relationship even though provisions in the franchise agreement obligated the franchisee to adopt personnel policies and complete training because the franchisee maintained "sole control over the hiring and supervision of its employees"). Indeed, "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives." *Blum*, 457 U.S. at 1004–05.

Yet it was exactly these types of provisions that led the Oklahoma Supreme Court to conclude that St. Isidore was a state actor under the entwinement test. *Drummond*, 558 P.3d at 11. Sponsoring, overseeing, and monitoring, *see id.*, are a far cry from "coercing," controlling, or granting authority in the challenged matters.[5] *Blum*, 457 U.S. at 1004. *Lindke* and this

[5] Nor is the fact that the state can terminate the charter relevant to whether the state has granted charter schools actual authority. *Drummond*, 558 P.3d. at 11 (noting that the state will "decide whether to renew or revoke St. Isidore's charter"). Possessing the right to terminate a contract is not the same as controlling the charter school in its choice of curriculum or personnel policies. *Kerl*, 682 N.W.2d at 328 ("Arby's right to terminate the relationship because of an uncured violation of the

Court's state action jurisprudence demand more. To find state action where the state of Oklahoma has explicitly disclaimed all authority over the specific issues being challenged in the complaint would be to ignore the central inquiry of every state action analysis**.**

In conclusion, "charter schools in Oklahoma have nearly complete autonomy" regarding governance, curriculum, and teacher qualifications. *Charter Schools and State Action*, *supra*, at 18. This means they possess no actual authority to act for the state in any of the specific issues being challenged in the complaint. Charter schools are therefore not state actors, and this Court should reverse the decision of the Oklahoma Supreme Court.

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agreement is not the equivalent of a right to control the daily operation of the restaurant or actively manage DRI's work force.").

Respectfully Submitted,

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