

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 WRIT OF CERTIORARI
TO THE OKLAHOMA SUPREME COURT*

**BRIEF OF *AMICI CURIAE* ADVANCEMENT PROJECT,
ALLIANCE FOR EDUCATIONAL JUSTICE, JOURNEY
FOR JUSTICE ALLIANCE, AND GENDERS &
SEXUALITIES ALLIANCE NETWORK IN SUPPORT
OF RESPONDENT**

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STATEMENT OF INTEREST¹

Advancement Project is a national multi-racial civil rights organization with a long history of racial justice work in the field of education. Rooted in the great human rights struggles for equality and justice, Advancement Project exists to fulfill the United States' promise of a caring, inclusive, and just democracy. For over 25 years, Advancement Project has, *inter alia*, worked to dismantle the “school-to-prison pipeline” and to protect quality public education as a critical pillar to a functioning democracy.

The Alliance for Educational Justice is a national network of 35 youth and intergenerational organizing groups of color in 14 cities across 12 states, committed to dismantling systemic racism in schools, defending public education, and advancing a liberatory future driven by youth power.

The Journey for Justice Alliance (“J4J”) consists of Black- and Brown-led, grassroots community organizations in over 30 U.S. cities that use community organizing as the primary methodology to win equity in public education. J4J was launched in 2012 in response to the growing problem of school privatization, including the starving of neighborhood schools and school closures.

Genders & Sexualities Alliance Network (“GSA Network”) is a next-generation LGBTQ racial and

¹ No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

gender justice organization that empowers and trains queer, transgender, and allied youth leaders to advocate, organize, and mobilize an intersectional movement for safer schools and healthier communities. GSA Network includes GSA Network of California, which connects more than 1,100 clubs across the State, and the National Association of GSA Networks, which unites 25 statewide networks representing over 3,000 GSA clubs. GSA network supports student-led campaigns and days of action for transgender and queer youth across the country.

Amici submit this brief to provide their unique perspective as racial justice organizers and supporters of organizers on the issues presented. In particular, *amici* seek to highlight the importance of public education for students of color, students with disabilities, LGBTQ students, and poor students. *Amici* are concerned that requiring Oklahoma to approve, create, and fund sectarian schools as public schools will not only exacerbate the under-resourcing of public education, which will harm poor students, students of color, and students requiring additional services; it will subject students in Oklahoma to the distinct harms of state-sponsored discrimination.

INTRODUCTION AND SUMMARY OF ARGUMENT

Public education has long been recognized as an indispensable public good in the United States—by the framers of the Constitution, state and local officials, and the 50 million students in public school today, their families, and countless Americans who have attended public schools. Accordingly, public

schools were ground zero as our nation and society opened access to more people to participate in our democracy and sought to eradicate discrimination on the basis of race, color, national origin, sex, and disability.

As an increasingly diverse nation, public education that teaches young people to participate in a multiracial and multicultural society is essential to our democracy. In practice, sectarian schools have not provided such education. Accordingly, and consistent with our Constitution's Establishment Clause, sectarian institutions have historically been excluded from the public education system. Yet Petitioners seek to upend the Oklahoma Supreme Court's decision and centuries of jurisprudence and tradition. If successful in arguing that limited taxpayer funds must subsidize sectarian education, Petitioners would directly undermine public education—taking resources away from the schools that serve a supermajority of Black and Native American students in Oklahoma and returning the nation to a dark precedent in which vulnerable students are subjected to state-sponsored discrimination.²

In sum, the Court should affirm the Supreme Court of Oklahoma's holding that St. Isidore is a state actor and that the charter establishing St. Isidore

² *Norwood v. Harrison*, 413 U.S. 455, 467 (1973); *Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483, 492 (1954) (overturning the doctrine of separate but equal).

violates the Establishment Clause of the United States Constitution.³

ARGUMENT

I. Allowing States To Authorize Sectarian Charter Schools Would Undermine The Nation's Historical Commitment To Public Education.

Public schools play a fundamental role in our democratic society. Although Petitioners attempt to present a singular Free Exercise claim, the case implicates whether quality public education in this country must be free and open to all.

A. The Provision Of Public And Nonsectarian Education For All Children Is Fundamental To U.S. History And Democracy.

The U.S. has long recognized the importance of educating its children. Massachusetts was the first colony to require that children be educated and that all towns establish public schools.⁴ Many founding fathers believed “that an educated citizenry was necessary to produce competent citizens who had the

³ See *Drummond ex rel. State v. Oklahoma Statewide Virtual Charter Sch. Bd.*, 558 P.3d 1, 13 (Okla. 2024).

⁴ David Carleton, *Old Deluder Satan Act of 1647*, FIRST AMENDMENT ENCYCLOPEDIA (Jan. 1, 2009) [https://www.mtsu.edu/first-amendment/article/1032/old-deluder-satan-act-of-1647#:~:text=Old%20Deluder%20Satan%20Act%20of%201647%20\(1647\)&text=Bible%20for%20themselves.-.In%201642%20Massachusetts%20had%20required%20parents%20to%20ensure%20their%20children's,the%20state%20mandated%20community%20schooling.](https://www.mtsu.edu/first-amendment/article/1032/old-deluder-satan-act-of-1647#:~:text=Old%20Deluder%20Satan%20Act%20of%201647%20(1647)&text=Bible%20for%20themselves.-.In%201642%20Massachusetts%20had%20required%20parents%20to%20ensure%20their%20children's,the%20state%20mandated%20community%20schooling.)

knowledge and wherewithal to maintain American democracy.”⁵ Thomas Jefferson argued for “publicly supported elementary schools to foster a common cultural identity in a new and uncertain nation.”⁶ And even pre-colonial Native communities provided youth with practical, hands-on learning to pass on community skills and knowledge.⁷

During the nineteenth century, Horace Mann advocated for “common schools,” run and financed by local taxes and open for free to all students.⁸ Common schools proponents argued “that a public investment in education would benefit the whole nation by transforming children into literate, moral, and productive citizens.”⁹ By 1918, all forty-eight states in the union had compulsory education laws for white

⁵ Erika K. Wilson, *Racialized Religious School Segregation*, YALE L.J. FORUM 604 (Nov. 17, 2022), <https://www.yalelawjournal.org/forum/racialized-religious-school-segregation>.

⁶ CARA FITZPATRICK, *THE DEATH OF PUBLIC SCHOOL 6* (2023).

⁷ Stan Juneau, *History and Foundation of American Indian Education*, MONTANA OFF. OF PUB. INSTRUCTION 4–8 (Walter Fleming & Lance Foster eds., 2013), https://opi.mt.gov/Portals/182/Page%20Files/Indian%20Education/Indian%20Education%20101/History_FoundationAmindianEd.pdf.

⁸ MARK G. YUDOF ET AL., *EDUCATIONAL POLICY AND THE LAW* 1 (2012) (citation omitted).

⁹ Nancy Kober et al., Center on Education Policy, George Washington Univ., *History and Evolution of Public Education in the U.S.* 3 (2020), <https://files.eric.ed.gov/fulltext/ED606970.pdf>.

children.¹⁰ Today, every state constitution mandates a public education system.¹¹

Historically, even where such public schools existed, Black, Native American, Mexican, and Chinese children were often banned from attending public school by law, or alternatively segregated into blatantly under-resourced schools.¹² Girls and children with disabilities were also typically

¹⁰ See Emily Rauscher & Byeongdon Oh, *Going Places: Effects of Early U.S. Compulsory Schooling Laws on Internal Migration*, 20 POPUL. RES. POL. REV. 20 (Feb. 2024), <https://pmc.ncbi.nlm.nih.gov/articles/PMC8871595/pdf/nihms-1776042.pdf>; see also IRA KATZNELSON & MARGARET WEIR, *SCHOOLING FOR ALL: CLASS, RACE, AND THE DECLINE OF THE DEMOCRATIC IDEAL* 37-47 (1985) (history of state establishment of public schools systems in the late 19th Century).

¹¹ State Court Report, *Education*, <https://statecourtreport.org/issues/education> (last viewed Mar. 31, 2025). See also, Emily Parker, *50-State Review: Constitutional Obligations for Public Education*, EDUC. COMM. OF THE STATES (Mar. 2016), <https://files.eric.ed.gov/fulltext/ED564952.pdf>.

¹² See Kober et al., *supra* note 9, at 5. See generally *Brown*, 347 U.S. at 492 (repudiating history of separating Black children in education); *Gong Lum v. Rice*, 275 U.S. 78, 87 (1927) (rejecting challenge of Chinese American student against Mississippi's dual system under *Plessy*); *Plessy v. Ferguson*, 163 U.S. 537, 542 (1896) (upholding state-sanctioned discrimination and segregation under doctrine of separate but equal); *Westminster Sch. Dist. of Orange Cnty. v. Mendez*, 161 F.2d 774, 780 (9th Cir. 1947) (striking down policy of separate schools for Mexican American students and noting California laws requiring separate schools for Asian American and Native American children).

excluded.¹³ But that changed as our nation’s democracy evolved to become more inclusive and attempted to live up to the ideals promised by the Reconstruction Amendments.¹⁴ During Reconstruction, Black communities particularly understood that the right to education was most secure in the form of free, public schools open to all.¹⁵ Because of “the state[s]’ ability to] legislate racially integrated public schools” and the democratic design and common-good purpose of public education, public schools became the “preferable vehicle for imbuing students with the tools needed to be citizens and furthering America’s burgeoning multiracial democracy.”¹⁶ In the twentieth century equitable public schools for all became a central demand of the civil rights movement to promote a multi-racial democracy.¹⁷ In recognition of this aspiration, this Court acknowledged in *Brown v. Board of Education*

¹³ See Kober et al, *supra* note 8, at 5.

¹⁴ U.S. CONST. amend. XIII–XV.

¹⁵ JEFF BALE & SARAH KNOPP, EDUCATION AND CAPITALISM 46–47 (2012)(“After the [civil] war, [Black people] used every means at their disposal to press for the creation of a system of public schools.”).

¹⁶ Wilson, *supra* note 5, at 607.

¹⁷ See, e.g., VANESSA SIDDLE WALKER, THE LOST EDUCATION OF HORACE TATE: UNCOVERING THE HIDDEN HEROES WHO FOUGHT FOR JUSTICE IN SCHOOLS 273 (2018)(recounting debates among Black educator-activists in Georgia about whether and how to demand desegregation); JAMES T. PATTERSON, BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY 8–9 (2001)(recounting debates among Black civil rights activists and NAACP’s demand to integrate).

that “education is perhaps the most important function of state and local governments,”¹⁸ so important that, “where the state has undertaken to provide it, [public education] is a right which must be made available to all on equal terms.”¹⁹ Public education is no less important today, and is fundamental to “guaranteeing nondiscrimination, promoting civic virtue, refraining from indoctrination (religious or otherwise), and focusing on values that unite rather than divide.”²⁰

B. Public Education Is Necessary To Ensure the Education of All Students Regardless of Race, Color, National Origin, Sex, or Disability.

This Court has repeatedly recognized the “firm national policy to prohibit racial segregation and discrimination in public education,”²¹ and reiterated that the state must provide all public school students with an education free from discrimination.²² Thanks to these guarantees, public schools educate most U.S.

¹⁸ 347 U.S. 483, 493 (1954).

¹⁹ *Id.*

²⁰ Derek W. Black, *When Religion and the Public-Education Mission Collide*, YALE L.J. FORUM, 559, 587 (Nov. 17, 2022), https://www.yalelawjournal.org/pdf/F7.BlackFinalDraftWEB_gs_tabjbl.pdf.

²¹ *Bob Jones Univ. v. U.S.*, 461 U.S. 574, 593 (1983).

²² *See, e.g., Plyler v. Doe*, 457 U.S. 202, 230 (1982)(striking down Texas’ denial of free public education for undocumented children); 20 U.S.C. § 1701(a)(1)(“all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin”).

students,²³ endeavoring to provide services and resources that students of color, Indigenous students, LGBTQ students, students with disabilities, and other historically marginalized students need to thrive in schools.

Public education is particularly vital for students of color. More than nine in ten students of color (94%) attend public schools, including charter schools.²⁴ Students of color make up the majority (55%) of the 49.6 million students in public schools.²⁵

Access to public education is also essential for students with disabilities, whose right to a free public education is codified in federal law.²⁶ Additionally, the Americans with Disabilities Act of 1990 (“ADA”)²⁷ provides additional protections for students with

²³ See Nat’l Cen. Educ. Stat., Public School Enrollment, U.S. Dep’t of Educ., Institute of Education Sciences (May 2024), <https://nces.ed.gov/programs/coe/indicator/cga/public-school-enrollment>.

²⁴ To derive this figure, *amici* first calculated the total number of Black, Latine, Asian, and Native American students in public schools in the U.S. using fall of 2022 data, then calculated the total number of Black, Latine, Asian, and Native American students in private schools in the U.S. using data from the latest available semester, fall 2021. Data used are available on the National Center for Education Statistics website, *id*.

²⁵ Nat’l. Cen. Educ. Stat., *Racial/Ethnic Enrollment in Public Schools*, U.S. Dep’t of Educ., Institute of Education Sciences (2024), <https://nces.ed.gov/programs/coe/indicator/cge> (last visited April 1, 2025).

²⁶ See Individuals with Disabilities Education Act (“IDEA”) 20 U.S.C. § 1400(d)(1)(A).

²⁷ 42 U.S.C. §§ 12101–12213.

disabilities, prohibiting any “public entity” from discriminating due to disability status.²⁸ Many states have further codified protections for students with disabilities in their state laws.²⁹

LGBTQ students also depend on public education for the applicability of federal antidiscrimination protections as well as states’ legal obligation to provide a nondiscriminatory education to all students.³⁰ LGBTQ students face unique discriminatory harms: nearly 30% of LGBTQ students were bullied in school in the 2023 school year, and nearly 20% reported missing school because of safety concerns.³¹ Public schools provide LGBTQ students

²⁸ 42 U.S.C. §§ 12131–12132.

²⁹ *See, e.g.*, Alabama School Choice and Student Opportunity Act, Ala. Code §§ 16-6F-1, *et seq.* (2015); Arizona Civil Rights Act, A.C.A. §§ 41-1401-1493.02 (2017); Arkansas Civil Rights Act of 1993, Ark. Code Ann. § 16-123-107 (2017); Colorado Anti-Discrimination Act, Colo. Rev. Stat. Ann. §§ 24-34-801, *et seq.* (2014).

³⁰ *See, e.g.*, Molly A. Hunter, State Constitution Education Clause Language, Education Law Center (updated Jan. 2011), <https://edlawcenter.org/assets/files/pdfs/State%20Constitution%20Education%20Clause%20Language.pdf> (language of education clause from all 50 state constitutions, which all, at minimum, mandate a system of free public schools).

³¹ *See* Centers for Disease Control and Prevention, *Youth Risk Behavior Survey Data Summary & Trends Report: 2013-2023*, U.S. Dep’t of Health and Human Services, 40 (2024), <https://www.cdc.gov/yrbs/dstr/pdf/YRBS-2023-Data-Summary-Trend-Report.pdf>.

and their families legal protections through federal³² or state antidiscrimination and anti-bullying laws,³³ and having school policies supportive of LGBTQ students is “significantly associated with improved psychosocial health outcomes among both LGB and heterosexual students.”³⁴

In short, despite historical exclusions of certain groups from states’ public education systems, today public education “is indispensable to moving America’s democracy away from its exclusionary origins and into a well-functioning, racially inclusive democracy.”³⁵ As this Court pointed out in *Carson v. Makin*, unlike public schools, private schools “do not have to accept all students.”³⁶ Indeed, in Oklahoma and every other state, most students attend public

³² See, e.g., 20 U.S.C. 1681; 85 FR 30179 (Title IX protections against sexual and gender-based harassment applies to gay and lesbian students); *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020)(Title IX’s prohibition on sex discrimination includes treating a student inconsistent with their gender identity) (cert. denied).

³³ See Family Equality, *Safe School Laws*, <https://familyequality.org/resources/safe-schools-laws/>, (last visited April 2, 2025)(24 states, the District of Columbia and several territories have anti-bullying laws or regulations that explicitly protect LGBTQ students from discrimination).

³⁴ Wojciech Kaczkowski et al., *Examining the Relationship Between LGBTQ-Supportive School Health Policies and Practices and Psychosocial Health Outcomes of Lesbian, Gay, Bisexual, and Heterosexual Students*, LGBT HEALTH Vol. 9, No. 1 (Jan. 2022), <https://doi.org/10.1089/lgbt.2021.0133>.

³⁵ Wilson, *supra* note 5, at 607.

³⁶ 596 U.S. 767, 783 (2022).

schools,³⁷ which are disproportionately attended by Black, Native, and Latine students, and students with disabilities.³⁸

C. Allowing Or Requiring A State To Authorize Or Fund Sectarian Charter Schools Would Defund The Public Education States Are Obligated To Provide.

This Court has repeatedly emphasized the critical role that public schools play in our functioning democracy.³⁹ Yet, it is the families who rely on public

³⁷ See Nat'l Cen. Educ. Stat., Digest State Dashboard; Oklahoma, <https://nces.ed.gov/programs/digest-dashboard/state/oklahoma> (last visited April 2, 2025)(in 2022, 701,301 students in Oklahoma attended public schools, and 40,640 attended private).

³⁸ See Nat'l Cen. Educ. Stat., Private School Enrollment (May 2024), <https://nces.ed.gov/programs/coe/indicator/cga/public-school-enrollment> (comparing percentages of racial categories of students enrolled in public versus private school); Nat'l Cen. Educ. Stat., Students With Disabilities (May 2024), <https://nces.ed.gov/programs/coe/indicator/cgg/students-with-disabilities> (95% of students served under IDEA enrolled in public school).

³⁹ See, e.g., *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 594 U.S. 180, 190 (2021) (“America’s public schools are the nurseries of democracy. Our representative democracy only works if we protect the ‘marketplace of ideas.’”); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986)(emphasizing that public education reinforces fundamental democratic values); *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 864 (1982)(recognizing that public education is vital to citizenship and democracy); *Plyler*, 457 U.S. at 221 (Court has often observed the importance of public education in promoting democracy and opportunity); *Ambach v. Norwick*, 441 U.S. 68, 77 (1979) (“perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a

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schools—particularly those in poor communities, rural communities, and communities of color—who would be hit hardest by the funding consequences of overruling the decision below.

Despite incontrovertible evidence that robust investment in public education leads to better student outcomes,⁴⁰ states have historically under-funded

democratic political system have been confirmed by the observations of social scientists”); *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 230 (1963)(Brennan, J., concurring)(“Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government.”); *Brown*, 347 U.S. at 493 (“[E]ducation is perhaps the most important function of state and local governments.”); *Ill. ex rel. McCollum v. Bd. of Ed. of Sch. Dist. No. 71, Champaign Cnty., Ill.*, 333 U.S. 203, 231 (1948)(“The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny.”).

⁴⁰ See generally, e.g., *Data: Breaking Down the Where and Why of K-12 Spending*, EDUC. WEEK (September 24, 2019), <https://www.edweek.org/policy-politics/data-breaking-down-the-where-and-why-of-k-12-spending/2019/09>; Julien Lafortune et al., *School Finance Reform and the Distribution of Student Achievement*, 10 AM. ECON. J., 1–26 (July 2016), <https://www.nber.org/papers/w22011>(finding increased test scores in low-income districts where states implemented progressive funding reforms); C. Kirabo Jackson et al., *The Effects Of School Spending On Educational And Economic Outcomes: Evidence From School Finance Reforms*, QUARTERLY J. OF ECON. 157, 218 (2016), https://gsppi.berkeley.edu/~ruckerj/QJE_resubmit_final_version.pdf (“Our findings show that increased per pupil spending induced by state SFR policies did improve student outcomes and helped reduce the intergenerational transmission of poverty.”); C. Kirabo Jackson et al., *Money Does Matter After All*, EDUC. NEXT (JUL. 17, 2015), <https://www.educationnext.org/money-matter/>.

public schools by relying on individual school districts to raise money with local tax revenue and declining to equalize the vast disparities the scheme creates.⁴¹ As a result, poor students, and particularly poor students of color on average receive *less* funding for their education than their wealthier counterparts.⁴² Charter schools have worsened that divide without improving student outcomes⁴³ or the quality of

⁴¹ See, e.g., Ivy Morgan, *Funding Gaps: An Analysis of School Funding Equity Across the U.S. and Within Each State*, EDUC. TRUST 11 (2022), <https://edtrust.org/wp-content/uploads/2014/09/Equal-Is-Not-Good-Enough-December-2022.pdf> (maps of state and local revenue gaps between high- and low-need districts).

⁴² See, e.g., *id.*; Cory Turner et al., *Why America's Schools Have A Money Problem*, NPR (Apr. 18, 2016), <https://www.npr.org/2016/04/18/474256366/why-americas-schools-have-a-money-problem>; Natasha Ushomirsky & David Williams, *Funding Gaps 2015: Too Many States Still Spend Less on Educating Students Who Need the Most*, EDUC. TRUST 1 (2015), <https://files.eric.ed.gov/fulltext/ED566665.pdf> (in national analysis of school funding, funding gaps of \$1,200 per pupil for schools in lowest poverty districts and gaps of \$2,000 per pupil for schools serving most students of color). See also Liz Sablich, *7 Findings That Illustrate Racial Disparities in Education*, BROOKINGS (June 6, 2016), <https://www.brookings.edu/blog/brown-center-chalkboard/2016/06/06/7-findings-that-illustrate-racial-disparities-in-education> (summarizing seven studies that illustrate impacts of racialized school funding in U.S.).

⁴³ See, e.g., Julie W. Dallavis & Mark Berends, *Charter Schools After Three Decades: Reviewing the Research on School Organizational and Instructional Conditions*, EDUC. POL. ANALYSIS ARCHIVES (Jun. 17, 2023), <https://epaa.asu.edu/index.php/epaa/article/view/7364/3026#con> (footnote continued on next page)

education that working- and middle-class families receive.⁴⁴

[tent/citation reference 161](#) (comprehensive review of peer-reviewed studies of charter school effects); Philip Gleason et al., *The Evaluation of Charter School Impacts*, U.S. Dep't Educ., INST. EDUC. SCI. 1 (Jun. 2010), <https://ies.ed.gov/ncee/2025/01/20104030-pdf> (“On average, charter middle schools that hold lotteries are neither more nor less successful than traditional public schools in improving student achievement, behavior, and school progress.”).

⁴⁴ See, e.g., Lorraine Blatt & Elizabeth Votruba-Drzal, *District-Level School Choice and Racial/Ethnic Test Score Gaps*, 58 AM. EDUC. RES. J. 1178 (2021)(finding “that higher charter school enrollment is associated with larger White-Black test score gaps”); Melissa A. Clark et al., *Do Charter Schools Improve Student Achievement?* 37 AM. EDUC. RES. J. 419 (Dec. 2015), <https://eric.ed.gov/?id=EJ1084494> (studying 33 charter middle schools across 13 states and finding that “impacts of charter middle schools on student achievement were negative but not statistically significant, regardless of whether we examined the impact of the offer of admission or actual attendance at these schools”); see also Journey for Justice Alliance, *Death By a Thousand Cuts; Voices from America’s Affected Communities of Color* 13 (May 2014), https://dignityinschools.org/wp-content/uploads/2018/07/J4J_1000_Cuts.pdf (“It has become disturbingly common for charter schools to receive extensive, glowing media coverage for their supposedly exceptional graduation and college attendance rates.”). In fact, multiple studies have pointed to charter schools as a cause of the racial resegregation of schools since the 1980s. See Erica Meltzer, *Study Finds Segregation Increasing In Large Districts — And School Choice Is A Factor*, CHALKBEAT (May 6, 2024), <https://www.chalkbeat.org/2024/05/06/school-segregation-increasing-study-finds-charters-are-one-factor/>. See, e.g., Mark Weber, *Evaluating Research That Alleges Funding Disparities Between Charter And District Schools*, NATIONAL EDUCATION POLICY CENTER 11 (Sept. 2023),
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Furthermore, charter schools vary in quality—with many predatory charter schools taking public money while delivering a substandard education to students.⁴⁵ Virtual charter schools, such as the one petitioners seek to establish, are not only inaccessible to rural and tribal communities that lack fast and reliable internet service,⁴⁶ but also some of the worst culprits of the volatile and predatory charter landscape.⁴⁷ In Oklahoma, recent audits revealed

https://nepc.colorado.edu/sites/default/files/publications/PM%20Weber_1.pdf.

⁴⁵ See, e.g., Eli Hager, *Arizona Regulators Closed a Failing Charter School. It Reopened as a Private Religious School Funded by Taxpayers*, PRO PUBLICA (Dec. 31, 2024), <https://www.propublica.org/article/arizona-private-school-vouchers-no-transparency>.

⁴⁶ See Daniela Mejía, *American Indian and Alaska Natives in Tribal Areas Have Among Lowest Rates of High-Speed Internet Access*, U.S. CENSUS BUREAU (Jun. 18, 2024), [https://www.census.gov/library/stories/2024/06/broadband-access-tribal-areas.html#:~:text=From%202016%20to%202021%2C%20the,percentage%20points%20to%206%20points.&text=Compared%20to%20the%20national%20average,%25\)%20households%20in%20nontribal%20areas](https://www.census.gov/library/stories/2024/06/broadband-access-tribal-areas.html#:~:text=From%202016%20to%202021%2C%20the,percentage%20points%20to%206%20points.&text=Compared%20to%20the%20national%20average,%25)%20households%20in%20nontribal%20areas).

⁴⁷ See, e.g., Alex Molnar, *Virtual Schools in the U.S. 2023*, NAT'L EDUC. POL. CEN. 11, 41 (May 2023), https://nepc.colorado.edu/sites/default/files/publications/Complete%202023%20Virtual%20Schools_0.pdf; Paul Y. Yoo et al., *Virtual Charter Students Have Worse Labor Market Outcomes as Young Adults*, CEN. ECON. STUDIES 2 (May 2023), <https://www2.census.gov/library/working-papers/2023/adrm/ces/CES-WP-23-32.pdf> (attending virtual charter school in Oregon associated with “worse high school graduation rates, college enrollment rates, bachelor’s degree
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flagrant mismanagement of public education dollars by charter school operators⁴⁸—emphasizing the importance of the state’s oversight role that Petitioners seek to eradicate.

The continued diversion of public education funds toward sectarian and nonpublic institutions has led to a resurgence of public school closures across the

attainment, employment rates, and earnings than students in traditional public schools”); U.S. Gov’t Accountability Off., *Department of Education Should Help States Address Student Testing Issues and Financial Risks Associated with Virtual Schools, Particularly Virtual Charter Schools* (Jan. 2022), <https://www.gao.gov/assets/gao-22-104444.pdf> (“Virtual charter schools had significantly lower proficiency rates on states tests compared to other school types.”).

⁴⁸ A state audit of Epic Charter Schools of Oklahoma ordered in 2019 found, *inter alia*, that the for-profit management company spent \$3 million in advertising, had paid \$80 million to a “Student Learning Fund” managed by the co-founders, that 28% of its entire budget went to management fees, and state dollars earmarked for student instruction went to founding a California offshoot. See Cindy Byrd, *Epic Charter Schools, Special Investigative Audit*, Okla. St. Auditor & Inspector, (Oct. 1, 2020), <https://www.sai.ok.gov/Search%20Reports/database/Epic%20Charter%20Schools%20Investigative%20Audit%20-%20Part%20One.pdf>. Following the release of the auditor’s findings, the Oklahoma State Board of Education demanded that Epic return \$11.2 million. See Robby Korth, *Oklahoma State Board Of Education Demands Epic Virtual Charter Schools Return \$11.2 Million*, KOSU (Oct. 12, 2020), <https://www.kosu.org/education/2020-10-12/oklahoma-state-board-of-education-demands-epic-virtual-charter-schools-return-11-2-million>.

country,⁴⁹ to the detriment of rural, working- and middle-class students who rely on public schools.⁵⁰ This scheme particularly harms Oklahoma’s poor students (62% of the state’s students), and students of color (55% of the state’s student population).⁵¹ Nationwide, Native American students who represent a significant share of Oklahoma’s student population⁵² stand to lose tremendously from the

⁴⁹ See Jessica Alcantara & Laura Petty, *Project 2025’s Plan to Eliminate Public Schools Has Already Started*, TIME (Jul. 22, 2024), <https://time.com/7001264/project-2025-public-school-closure/>.

⁵⁰ For instance, in its first full year, Arizona’s universal voucher program cost the state \$708.5 million, see Michael Griffith & Dion Burns, *Understanding the Cost of Universal School Vouchers: An Analysis of Arizona’s Empowerment Scholarship Account Program*, Learning Policy Inst. (Feb. 2024), https://learningpolicyinstitute.org/media/4193/download?inline&file=Universal_School_Vouchers_REPORT.pdf (taking up 11.3% of the state’s education budget though only serving 6.3% of its students). See Save Our Schools Arizona, *Voucher Accounts Balloon as State Budget Starves* (Sept. 24, 2024), <https://www.sosaznetwork.org/2024/voucher-accounts-balloon-as-state-budget-starves/#:~:text=A%20shocking%20new%20study%20by,public%20school%20parents%20cannot%20access>.

⁵¹ Nat’l. Cen. Educ. Stat., *2024 Reading Snapshot Report: Oklahoma*, <https://nces.ed.gov/nationsreportcard/subject/publications/stt2024/pdf/2024220OK8.pdf> (last visited April 2, 2025).

⁵² Native students make up 12% of the state’s public school students. See National Indian Education Association, *Data on Native Students*, [https://www.niea.org/native-student-data#:~:text=The%20five%20states%20with%20the%20largest%20proportions,South%20Dakota%20\(10.7\)%2C%20and%20N](https://www.niea.org/native-student-data#:~:text=The%20five%20states%20with%20the%20largest%20proportions,South%20Dakota%20(10.7)%2C%20and%20N)
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school closures that follow divestment of public schools. Public schools are the only schools available in 84% of school districts with significant populations of Native students,⁵³ and 24% of Native students “attend rural schools, a rate more than 2.5 times that of any other racial or ethnic group.”⁵⁴

In sum, public schools are already severely underfunded, and expanded private school voucher schemes and charter schools have further siphoned off funding, leading to a wave of school closures nationwide.⁵⁵ Allowing a new class of sectarian charter schools to enter a landscape already plagued by waste and fraud would further drain the pot and lead to even more school closures, infringing on access to quality public education for those who rely on it most.

[ew%20Mexico%20\(10.3%\).&text=In%202019%2C%20TCUs%20had%20a%20total%20enrollment,80%20of%20those%20students%20\(12%2C210\)%20were%20AI/AN](https://www.ncrc.org/racial-wealth-snapshot-native-americans/#:~:text=According%20to%20the%202010%20US,inequality%20is%20a%20consistent%20characteristic.) (last visited April 2, 2025). Dedrick Asante-Muhammad *et al.*, *Racial Wealth Snapshot: Native Americans*, NATIONAL COMMUNITY REINVESTMENT COALITION (Feb. 14, 2022), [https://ncrc.org/racial-wealth-snapshot-native-americans/#:~:text=According%20to%20the%202010%20US,inequality%20is%20a%20consistent%20characteristic.](https://www.ncrc.org/racial-wealth-snapshot-native-americans/#:~:text=According%20to%20the%202010%20US,inequality%20is%20a%20consistent%20characteristic.)

⁵³ National Indian Education Association, *supra* note 52 (“significant” defined as 25% or more Native American students).

⁵⁴ *Id.*

⁵⁵ See Alcantara & Petty, *supra* note 49.

II. Allowing Or Requiring Oklahoma To Authorize Sectarian Charter Schools Or Holding That Such Schools Are Not State Actors Would Particularly Harm Black, Latine, And Native Students And Other Marginalized Students.

Oklahoma’s exclusion of sectarian schools from its public charter school system is both constitutional and necessary to avoid subjecting students to the distinct harms associated with state-sponsored discrimination. Petitioner seeks to further erode the institution of public education, replacing it with an explicitly sectarian education that would entrench discriminatory practices in education.

A. Many Schools That Provide Sectarian Education Were Founded For Discriminatory Reasons.

Sectarian schools have existed in the United States since before the founding of the country. In the colonial era, the Catholic Church operated more sectarian schools than all other religious groups combined.⁵⁶ These schools were founded with explicit goals to control and “civilize” Native American people.⁵⁷ Catholic schools further proliferated around the country in the nineteenth century as European

⁵⁶ Nancy Marie Spears, *New Archive Sheds Light on Indian Boarding Schools Run by the Catholic Church*, THE IMPRINT (Jun. 8, 2023), <https://imprintnews.org/top-stories/new-archive-sheds-light-on-indian-boarding-schools-run-by-the-catholic-church/242011>.

⁵⁷ *Id.*

immigrants sought schooling free of Protestant characteristics in public schools.⁵⁸

The next sharp rise in the founding of sectarian schools occurred in the mid-twentieth century due to the “perceived threat to the white Christian way of life that included, but was not limited to desegregation” and massive resistance to school integration following *Brown*. During this time, white segregationists established schools outside the public school system rather than share schools with Black children.⁵⁹ So-called “segregation academies,” many of which were sectarian, proliferated to “preserve...racial segregation.”⁶⁰ Some white communities converted public schools to sectarian schools to defy the Supreme Court’s order to desegregate schools.⁶¹ Many sectarian schools in this country trace their founding to this era, and enrollment in these schools exploded in the years leading up to and after *Brown*.⁶² Many of

⁵⁸ FITZPATRICK, *supra* note 6, at 34.

⁵⁹ Chris Ford et al., *The Racist Origins of Private School Vouchers*, CTR. FOR AM. PROGRESS 2 (July 12, 2017), <https://ampr.gs/3jnvdwP>.

⁶⁰ Southern Educ. Found., *A History of Private Schools & Race in the American South*, <https://bit.ly/3lJKXvE> (last visited April 2, 2025).

⁶¹ Preston Green et al., *The Potential for Race Discrimination in Voucher Programs in a Post-Carson World*, 99 PEABODY J. OF EDUC. 403 (Jul. 12, 2024) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4893060.

⁶² See Bekah McNeel, *Some Christian schools are finally grappling with their racist past and segregated present*, THE HECHINGER REPORT (Aug. 26, 2020), <https://bit.ly/2YT320Y>.

these schools defended their racist policies under the guise of religious freedom.⁶³

Sectarian schools also have a sordid history of discrimination against Native American people. Beginning in the late 1800s, Native American children across the country were forcibly sent to boarding schools, more than 300 of which were run by sectarian groups.⁶⁴ Education for Native Americans was “built upon the premise that the Indian had a great deal to learn from the white man,”⁶⁵ and according to Richard Henry Pratt, the founder of “one of the most infamous institutions,” the goal of these schools was to “[k]ill the Indian... and save the man.”⁶⁶

Native American children at boarding schools were not only neglected and abused; they were “punished for speaking their native language, banned from acting in any way that might be seen to represent traditional or cultural practices, stripped of traditional clothing, hair and personal belongings and

⁶³ *Id.*; see also *Bob Jones Univ.*, 461 U.S. at 583 (“Since its incorporation in 1963, Goldsboro Christian Schools has maintained a racially discriminatory admissions policy based upon its interpretation of the Bible.”).

⁶⁴ Allison Winter, *Federal Investigation Seeks To Uncover Painful History Of Native American Boarding Schools*, MAINE BEACON (July 9, 2021), <https://bit.ly/3mYRIej>.

⁶⁵ Juneau, *supra* note 7, at 14.

⁶⁶ Maine Wabanaki-State Child Welfare Truth & Reconciliation Commission, *Beyond the Mandate: Continuing the Conversation* 12 (June 14, 2015), <https://bit.ly/3BL29Gr>.

behaviors reflective of their native culture.”⁶⁷ In Oklahoma, many Native American children who were forced into these boarding schools are currently elders in their tribal communities.⁶⁸ Their experiences are a reminder of the misconception that religious freedom grants sectarian institutions the right to promote discriminatory beliefs and practices.

B. Many Sectarian Schools Currently Have Discriminatory Policies And Practices.

The dissent in *Carson* warned that the Court’s direction to states to fund sectarian education gives preferential treatment to some religions and may result in endorsing discrimination in the education system under the guise of religious freedom.⁶⁹ One troubling consequence of expanding Free Exercise rights at the expense of the Establishment Clause and Equal Protection rights as Petitioners envision, is

⁶⁷ National Native American Boarding School Healing Coalition, *US Indian Boarding School History*, <https://boardingschoolhealing.org/education/us-indian-boarding-school-history/> (last visited Mar. 26, 2025).

⁶⁸ Bah-he-toya-mah Davenport, *Oklahoma has a tragic history when it comes to Indian education. Here’s how we’re turning it around*. OKLAHOMA POLICY INSTITUTE (updated May 2, 2019), <https://okpolicy.org/oklahoma-has-a-tragic-history-when-it-comes-to-indian-education-heres-how-were-turning-it-around/>.

⁶⁹ *Carson*, 596 U.S. at 809 (Sotomayor, J., dissenting) (“[W]hile purporting to protect against discrimination of one kind, the Court requires Maine to fund what many of its citizens believe to be discrimination of other kinds.”); *see also* Black, *supra* note 20, at 582 (“The broader context suggests *Carson* just handed religion an advantage in an escalating contest over public-education resources and antidiscrimination protections.”); Green et al., *supra* note 61, at 412.

that, unlike Christians and other sectarians, “Black students and women have little to no constitutional leverage to dictate and change the terms of public education programs simply because those programs might exert some exclusionary or unwanted effect on them.”⁷⁰

Meanwhile, discrimination that would be illegal in public schools is commonplace in sectarian schools, and is often explicit when it targets people based on race, religion, ability, English language proficiency, sex, sexual orientation, and gender identity.⁷¹ The long history of exploiting sectarian beliefs to justify race discrimination, coupled with the resurgence in popular culture of white Christian nationalism⁷² suggests that explicit discrimination,

⁷⁰ Black, *supra* note 20, at 583 (comparing evolving Free Exercise doctrine to the Court’s intentional-discrimination standard for race and sex) (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977); *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

⁷¹ See, e.g., Kimberly Quick, *Second-Class Students: When Vouchers Exclude*, CENTURY FOUNDATION (Jan. 11, 2017), <https://tcf.org/content/commentary/second-class-students-vouchers-exclude/>.

⁷² See, e.g., Simon Clark, *How White Supremacy Returned to Mainstream Politics*, CEN. AM. PROGRESS (Jul. 1, 2020), <https://www.americanprogress.org/article/white-supremacy-returned-mainstream-politics/>; Southern Poverty Law Center, Christian Identity, <https://www.splcenter.org/fighting-hate/extremist-files/ideology/christian-identity> (last visited April 2, 2025); Kimberlé Williams Crenshaw, *Race, Reform, And Retrenchment: Transformation and Legitimization in Antidiscrimination Law*, 101 HARV. L. REV., 1331, 1334 (1988), https://scholarship.law.columbia.edu/faculty_scholarship/2866/

(footnote continued on next page)

often condoned in the name of religion, will gain a stronger foothold in schools if the Court holds that sectarian charter schools, funded with public dollars, are constitutionally permissible.

While sectarian justifications for racism are older than our nation, they continue in the modern day,⁷³ including to maintain racially segregated and unequally resourced systems of education.⁷⁴ Sectarian schools receiving taxpayer dollars routinely use textbooks that teach inaccurate and overtly racist histories.⁷⁵ For example, one of the most popular textbooks used in private schools provides this account of Reconstruction, an era in which Black people were finally able to hold elected office and this

(arguing that the quest for civil rights is a “long, steady march toward social transformation”).

⁷³ See, e.g., P.R. Lockhart, *A Venue Turned Down an Interracial Wedding, Citing “Christian Belief.” It’s Far From The First To Do So*, VOX, (Sept. 3, 2019), <https://www.vox.com/identities/2019/9/3/20847943/mississippi-event-hall-interracial-couple-wedding-religious-exemption>.

⁷⁴ Julie F. Mead & Suzanne E. Eckes, *Vouchers as a Mechanism for State-Sanctioned Private Discrimination*, in *THE SCHOOL VOUCHER ILLUSION; EXPOSING THE PRETENSE OF EQUITY* 90 (Kevin Welner, Gary Orfield, & Luis Huerta eds., 2023) (“Research has demonstrated that the student demographics of voucher schools do not mirror the communities in which they are located.”).

⁷⁵ See, e.g. Mark Maxwell, *Pritzker: Bailey’s private school curriculum includes ‘ancient ideas, racist ideas,’* KSDK, (Oct. 4, 2022) <https://www.ksdk.com/article/news/politics/jb-pritzker-darrenbailey-private-school-curriculum-campaign-ad/63-bec4ce03-7634-4042-aa39-66847e331678>.

country endeavored to right the atrocities of the Confederacy:

Under radical reconstruction, the south suffered. Great southern leaders and much of the old aristocracy were unable to vote or hold office. The result was that state legislatures were filled with illiterate or incompetent men. Northerners who were eager to make money or gain power during the crisis rushed to the south . . . For all these reasons, reconstruction led to graft and corruption and reckless spending. In retaliation, many southerners formed secret organizations to protect themselves and their society from anarchy. Among these groups was the Ku Klux Klan, a clandestine group of white men who went forth at night dressed in white sheets and pointed white hoods.⁷⁶

Many private schools also discriminate against students with disabilities by denying them

⁷⁶ Rebecca Klein, *The Rightwing US Textbooks that Teach Slavery as "Black Immigration,"* GUARDIAN (Aug. 12, 2021), <https://www.theguardian.com/education/2021/aug/12/right-wing-textbooks-teach-slavery-black-immigration>.

admission.⁷⁷ Both data and abundant anecdotal accounts support the conclusion that private schools systemically under-enroll students with disabilities.⁷⁸ Even though students with disabilities in private schools may avail themselves of the protections in Title III of the ADA, sectarian schools are exempt and are free to discriminate against students with disabilities in a manner that private schools are not.⁷⁹

⁷⁷ See, e.g., Anya Kamenetz, *For Families With Special Needs, Vouchers Bring Choices, Not Guarantees*, NPR (May 17, 2017), <https://www.npr.org/sections/ed/2017/05/17/527938057/for-families-with-special-needs-vouchers-bring-choices-not-guarantees> (“There is no public data collection on how well private schools in Florida are serving . . . students with special needs. These schools can refuse entry to any child they wish. Or, accept them, take their tuition and later ask them to leave.”); Cory Turner et al., *The Promise And Peril Of School Vouchers*, NPR (May 12, 2017), <https://www.npr.org/sections/ed/2017/05/12/520111511/the-promise-and-peril-of-school-vouchers> (surveying recipients of voucher dollars in Indiana and finding “Voucher-accepting schools often serve special education students at a lower rate than the public school districts they draw from”); Suzanne Eckes et al., *Dollars to Discriminate: The (Un)intended Consequences of School Vouchers*, 91 PEABODY J. OF EDUC. 537, 544 (Aug. 11, 2016)(describing a DOJ complaint against a voucher program which enrolled only “1.6% of students with disabilities compared to 19.5% of the students with disabilities in the [public school district]”). Charter schools systematically under-enroll students with disabilities. See, e.g., National Council on Disability, *Charter Schools—Implications for Students with Disabilities* 12 (Nov. 15, 2018), <https://www.ncd.gov/assets/uploads/reports/2018/ncd-charter-schools-2018.pdf>.

⁷⁸ *Id.*

⁷⁹ See 42 U.S.C. § 12182, 12181(7)(J), and 12187.

Likewise, sectarian schools continue to routinely discriminate based on sex while often explicitly invoking statements of faith as the reason for discrimination.⁸⁰ For example, discriminatory sex-based dress codes are a common feature of sectarian schools nationwide,⁸¹ as are explicitly anti-LGBTQ policies that deny admissions or threaten expulsion to students who are LGBTQ⁸² or support LGBTQ causes.⁸³

Finally, this Court's decision in *Carson* has led some courts to hold that state anti-discrimination laws cannot be applied to sectarian schools funded by public vouchers without running afoul of the Free Exercise Clause.⁸⁴ Thus, there is a need for the Court

⁸⁰ See, e.g., Alex Morris, *The Hidden War Against Gay Teens*, ROLLING STONE (Oct. 10, 2013), <https://www.rollingstone.com/culture/culture-news/the-hidden-war-against-gay-teens-66383/>.

⁸¹ See, e.g., Zeke Hartner, *Rockville Catholic School's hairstyle policies face scrutiny for racial discrimination*, WTOP (July 8, 2021), <https://bit.ly/30t0oQB>.

⁸² See Annie Martin & Leslie Postal, *Anti-LGBT Florida Schools Getting School Vouchers*, ORLANDO SENTINEL (Feb. 5, 2020), <https://www.orlandosentinel.com/2020/01/23/anti-lgbt-florida-schools-getting-school-vouchers/> (investigation of voucher recipients in Florida found 83 schools with policies that allowed the schools to deny admission or expel LGBTQ students and 73 referred to being gay or transgender as a "biblical sin.").

⁸³ *Id.*

⁸⁴ For instance, following *Carson*, some academics recommended that states update their anti-discrimination laws. See, e.g., (footnote continued on next page)

to clarify how state and local governments should balance Free Exercise protections against other constitutional protections from discrimination, or, at the very least, make clear that state-sponsored sectarian schools do not have a free pass to discriminate or deprive students of their constitutionally protected rights.

C. Permitting Sectarian Charter Schools Would Subject Students To The Distinct Harm Of Publicly Funded Discrimination.

Requiring Oklahoma or any other state to support a sectarian school as part of its public charter school system raises serious concerns about state-sponsored discrimination. Although not every sectarian school discriminates against its students, sectarian *education* is far more likely to result in discrimination because such education, as described above, is more likely to conflict with state and federal anti-discrimination laws that prohibit discrimination

Aaron Tang, *Who's Afraid of Carson v. Makin?*, 132 YALE L.J. 504, 507 (Nov. 17, 2022), https://www.yalelawjournal.org/pdf/F7.TangFinalDraftWEB_uc2niseq.pdf (citing Me. Rev. Stat. Ann. tit. 5, § 4602(1), (5)(C) (2022)). But after Maryland requested the return of its voucher funds from a sectarian school whose parent/student handbook denounced same-sex marriage and required students, faculty, and staff to dress according to sex stereotypes, the school challenged the anti-discrimination enforcement. In 2022, in *Bethel Ministries, Inc. v. Salmon*, the Maryland District Court held that enforcing the non-discrimination provision violated the school's Free Exercise rights. No. CV SAG-19-1853, 2022 WL 111164, at *12 (D. Md. Jan. 12, 2022).

on the basis of race, color, national origin, sex, or disability status.

This Court held that States must “steer clear, not only of operating the dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination.”⁸⁵ “[D]iscriminatory treatment exerts a pervasive influence on the entire educational process.”⁸⁶ Discrimination has a proven negative impact on student educational achievement and wellbeing.⁸⁷ Researchers have found, for example, that racial discrimination triggers physical and psychological stress responses that affect academic achievement.⁸⁸ The negative impact of discrimination on students is unquestionably “greater when it has the sanction of the law.”⁸⁹ That is because students inevitably interpret state-sanctioned discrimination

⁸⁵ *Norwood v. Harrison*, 413 U.S. 455, 467 (1973).

⁸⁶ *Id.* at 469.

⁸⁷ See Dorainne J. Levy et al., *Psychological and Biological Responses to Race-Based Social Stress as Pathways to Disparities in Educational Outcomes*, 71 AM. PSYCHOLOGIST 455 (Sept. 2016), <https://doi.org/10.1037/a0040322>; Shelley L. Craig & Mark S. Smith, *The Impact of Perceived Discrimination and Social Support on the School Performance of Multiethnic Sexual Minority Youth*, 46 YOUTH & SOCIETY 30 (2014), <https://journals.sagepub.com/doi/abs/10.1177/0044118x11424915>; see also Melinda D. Anderson, *How the Stress of Racism Affects Learning*, THE ATLANTIC (Oct. 11, 2016), <https://www.theatlantic.com/education/archive/2016/10/how-the-stress-of-racism-affects-learning/503567/>.

⁸⁸ See Levy et al., *supra* note 87.

⁸⁹ *Brown*, 347 U.S. at 494.

as “denoting the inferiority” of the targeted groups, which can affect their “educational and mental development” in myriad ways.⁹⁰ There is no question that authorizing a sectarian charter school means that the state will directly fund that school’s existence, particularly in this case, where the school does not exist but for its authorized creation by the state. The State has a compelling interest in withholding its stamp of approval from discriminatory educational institutions that affirmatively harm students.

III. Charter Schools Are Public Schools And Thus Subject To Anti-Discrimination Laws.

The Oklahoma Legislature, like every state legislature, has a constitutional duty to establish a system of free public schools.⁹¹ Historically, Americans “[d]efined public school as one that is operated by the government, paid for with tax dollars, accountable to voters, and free of religious instruction.”⁹² Charter schools were conceived as “a new kind of *public* school where teachers could experiment with fresh and innovative ways of reaching students.”⁹³

⁹⁰ *Id.*

⁹¹ Okla. Const. art. XIII § 1.

⁹² FITZPATRICK, *supra* note 6, at 2.

⁹³ See Richard D. Kahlenberg & Halley Potter, *The Original Charter School Vision*, N.Y. TIMES (Aug. 30, 2014), <https://www.nytimes.com/2014/08/31/opinion/sunday/albert-shanker-the-original-charter-school-visionary.html> (emphasis (footnote continued on next page))

Additionally, charter schools, like all public schools, are distinct from private school voucher schemes in that “their funding goes directly to the school” from the state rather than the parent.⁹⁴ Thus, a sectarian charter school would have “no parental admission choice that breaks the chain between direct government funds and establishment of religion.”⁹⁵ Families attending charter schools have seen it that way, and have counted on being afforded the same rights as other public school students.⁹⁶

Even if petitioners are successful on their assertion that, contrary to well-established state constitutional law, charter schools are not public schools, the Court should maintain that charter

added)(describing Al Shaker’s vision of charter schools); *see also* JON HALE, THE CHOICE WE FACE: HOW SEGREGATION, RACE, AND POWER SHAPED AMERICA’S MOST CONTROVERSIAL EDUCATION REFORM MOVEMENT 128 (2021)(defining charter schools as nonsectarian public schools).

⁹⁴ Vania Blaiklock, *A License to Discriminate: The Risky Next Step Of Religious Charter Schools*, 19 HARV. L. & POL’Y REV. 235 n.25 (2024), <https://journals.law.harvard.edu/lpr/wp-content/uploads/sites/89/2024/10/19.1-LicenseToDiscriminate.pdf>.

⁹⁵ *Id.* at 250–51 (citing sources).

⁹⁶ *See, e.g., Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 123 (4th Cir. 2022)(charter school, state actor for § 1983 purposes, violated Equal Protection Clause); *ACLU v. Tarek ibn Ziyad Acad.*, 643 F.3d 1088, 1091 (8th Cir. 2011)(Establishment Clause claim that public charter school preferred or promoted Islam through its practices); *Daugherty v. Vanguard Charter Sch. Acad.*, 116 F. Supp. 2d 897 (W.D. Mich. 2000)(Establishment Clause analysis to assess a public charter school’s practices).

schools are state actors and thus subject to the Fourteenth Amendment’s Equal Protection Clause.⁹⁷ A contrary holding would be detrimental to the 3.5 million charter school students nationwide (15% of public school students)⁹⁸—particularly students of color, students with disabilities, girls, and LGBTQ students—who would lose protections under the Equal Protection Clause of the Fourteenth Amendment and the rights Congress created via the Individuals with Disabilities Education Act and the Equal Educational Opportunity Act of 1974.⁹⁹

CONCLUSION

The judgment should be affirmed.

⁹⁷ Oklahoma charter schools are state actors for § 1983 purposes because of the “pervasive entwinement of public institutions and officials in [their] composition and workings.” *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 298 (2001).

⁹⁸ Kevin G. Welner, *The Outsourcing Of Discrimination: Another SCOTUS Earthquake?*, NAT’L EDUC. POL. CEN. 7 (May 2022), https://nepc.colorado.edu/sites/default/files/publications/PM%20Welner%20Carson%20v%20Makin_0.pdf.

⁹⁹ *Id.* at 92–93. Of course, any charter school receiving federal funds would still be bound by federal anti-discrimination laws, including Title VI, Title IX, and Section 504. *See* Mead & Eckes, *supra* note 74, at 91–93 (chart comparing applicability of federal Constitutional provisions and laws in public and private schools).

Respectfully submitted.

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