

Nos. 24-394, 24-396

**In The
Supreme Court of the United States**

OKLAHOMA STATEWIDE CHARTER SCHOOL BOARD,
ET AL.,

Petitioners,

v.

GENTNER DRUMMOND, ATTORNEY GENERAL OF
OKLAHOMA, EX REL. OKLAHOMA,

Respondent.

ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL,
Petitioner,

v.

GENTNER DRUMMOND, ATTORNEY GENERAL OF
OKLAHOMA, EX REL. OKLAHOMA,

Respondent.

*ON WRITS OF CERTIORARI
TO THE SUPREME COURT OF OKLAHOMA*

**BRIEF OF NATIONAL ALLIANCE FOR PUBLIC
CHARTER SCHOOLS AS *AMICUS CURIAE* IN
SUPPORT OF RESPONDENT**

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INTEREST OF *AMICUS CURIAE*¹

For two decades, the National Alliance for Public Charter Schools has been a leading organization in the public charter school movement. The Alliance partners with state charter school associations across 38 states and the District of Columbia, and its board features a distinguished and diverse group of nationally recognized figures from business, law, education, and public policy. There are currently public charter school laws in 46 states and additional U.S. territories, with more than 8,000 public charter schools and campuses employing more than 200,000 teachers and serving nearly 3.8 million students.

The Alliance champions the establishment of public charter schools—open, tuition-free, publicly funded institutions that exercise greater flexibility than district-run public schools yet remain under the control of public bodies. The Alliance plays a pivotal role in advocating for policies that support the growth and sustainability of these schools, ensuring they receive equitable funding and resources. By empowering families with the ability to choose the best public educational environment for their children, the Alliance fosters a landscape where academic excellence and opportunity are accessible to all.

The Alliance stresses that public charter schools are more than mere government aid. Public charter

¹ Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

schools are joint undertakings with the state, fully funded by the state, occupying a unique space within the public school system—and accepting of both the rights and responsibilities that come with that. In Oklahoma and elsewhere, public charter schools have always been subject to federal and state civil rights laws and gladly extend free speech, due process, religious accommodation, and equal protection rights to students and faculty to the same extent as any other public school. The Constitution has helped, not hindered, their success.

The Alliance has a strong interest in ensuring public charter schools are recognized as integral components of the public education system and operate within constitutional boundaries. Public charter schools are not mere tools for circumventing constitutional obligations; rather, they are designed to innovate within the framework of public education while maintaining accountability to state and federal law. Under the supervision of state-delegated sponsors, charter schools remain bound by their foundational role as public entities tasked with delivering public education in fulfillment of state constitutional duties to provide public schooling to all students. The Alliance is committed to defending that role and thereby preserving the integrity and purpose of public charter schools.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents an existential threat not just to the fabric of public charter schools, but to their continued existence. If charter schools are not public schools, their funding and character, as well as all the gains they have made over the last 30 years for millions of public school students, risk being lost.

The Alliance, the largest national advocate and support organization for public charter schools, embraces the constitutional and other legal arguments of the Oklahoma Attorney General. The Alliance files this brief to share its expertise and explain why charter schools nationwide—including Oklahoma’s—have always been part-and-parcel of the public school system, a fact that is fundamental to charter schools’ continuing vitality.

The term “public school” is not just a label. It reflects the original intent and current operation of every state charter school statute in the country. Charter schools were first conceived in the late 1980s as a way for states to inject innovation and competition into a flagging public education system. In line with that mission, proponents of charter schools insisted that charter schools be public schools and accountable to the public. Charter schools would be created by and remain answerable to public authorities, and they would be promptly shut down by such authorities if they failed to achieve agreed-upon outcomes. Charter school proponents rightly believed that states were not required to stick with a public school model that no longer produced satisfactory

results, but instead could act as laboratories of experimentation in public education. Such proponents also rightly believed that innovation could be part of, not antithetical to, the public school system—benefitting the millions of students that system serves.

Over time, states developed models for public chartering that met the twin goals of innovation and accountability. While states removed the tight top-down strictures that had for too long squelched diversification and competition within public education, they ensured charter schools remained public schools—dependent for their existence on and continuously accountable to the state. Without the state, public charter schools, like Petitioner St. Isidore of Seville Catholic Virtual School, simply do not exist. Charter schools' operations and performance measures are established in a joint undertaking with the state and its designated delegates. Statewide standardized testing ensures that charter school curricula follow state-mandated guideposts. Charter schools are subject to continuous review by states and their delegates, which have the power to revoke or refuse to renew a school's charter, including if the school fails to perform as the state expects. In every state where they operate, charter schools are bound by the oversight of state-delegated sponsors.

Oklahoma is no different. In Oklahoma, public charter schools cannot exist without the authorization of a state-delegated sponsor. To be authorized, a charter school applicant must describe at length the proposed school's instructional design and curriculum; external and internal criteria it will use to measure

student progress; tasks, timelines, and responsible individuals for the school's startup; and its proposed organizational structure and mission. Once up and running, charter schools participate in Oklahoma's statewide standardized testing, are subject to state curriculum requirements, and are evaluated annually by their sponsors. If a charter school fails to live up to the performance framework outlined in its contract, its charter can be revoked or not renewed, and the school will cease existence.

Charter schools now face a critical moment. If this Court concludes that charter schools are not public schools, many charter schools—8% of public schools—risk losing all state funding due to state constitutional bans on public funding for private schools (sectarian or not). Charter schools across the board will face a crisis of identity. Unable or unwilling to sponsor private charter schools, some states may decide to place charter schools under the type of uniform, top-down oversight that stifled public school innovation in the first place.

Then millions of public school students will lose out. Public charter schools have been the most significant innovation in public education in the past 30 years. Not only do charter schools outperform district-run public schools, but they also improve district-run public school performance, acting as a rising tide lifting all boats. If this Court concludes charter schools are not public schools, America's public school students will be relegated to a public education system that cannot innovate lest it turn private.

ARGUMENT**I. CHARTER SCHOOLS HAVE ALWAYS BEEN CONCEIVED OF AND STRUCTURED AS PUBLIC SCHOOLS****A. Charter Schools Originated as a New Type of Innovative and Accountable Public School**

In 1983, President Reagan’s National Commission on Excellence in Education published *A Nation at Risk*, sounding a clarion call for public education reform. The report found “declines in educational performance” nationwide that were “in large part the result of disturbing inadequacies in the way the educational process itself [wa]s often conducted.”² The United States was “committing an act of unthinking, unilateral educational disarmament” that put at risk the country’s “once unchallenged preeminence in commerce, industry, science, and technological innovation.”³ The report challenged the country to engage in systematic reform of public education and called on an expansive set of stakeholders—from “parents, teachers, and school boards[]” to “local, State, and Federal officials[]” and

² David P. Gardner, et al., *A Nation at Risk: The Imperative for Educational Reform*, NAT’L COMM’N ON EXCELLENCE IN EDUC. (1983), at 18.

³ *Id.* at 5.

“teachers’ and administrators’ organizations”—to advance that mission.⁴

Numerous state stakeholders supported diversification of the nation’s public education offerings to allow for greater flexibility and innovation within public schools to achieve better results. Putting federalism into action, they were willing to turn their state education systems into laboratories to test out new educational approaches in the hopes of achieving better results. In 1986, Lamar Alexander—then chairman of the National Governors’ Association and later Secretary of Education under President George H.W. Bush—described the nation’s governors as open to “some old-fashioned horse-trading”: Governors would give up “heavy-handed state control” of public schools in exchange for higher quality output.⁵ The National Governors’ Association doubled down on this theme in 1989, describing the need for a “restructur[ed]” education system that would give public schools “more discretion and authority to achieve results” but also hold them “accountable” by “clearly link[ing] rewards and incentives to student performance at the building level.”⁶

Key policy leaders posited the way to achieve a results-oriented reform of the public education system was by creating an entirely new type of public school: a “charter school.” In 1988, the president of the

⁴ *Id.* at 36.

⁵ Lamar Alexander, *Summary of “Time for Results”*, EDUC. WEEK, Sept. 10, 1986, at 2.

⁶ Nat’l Governors’ Ass’n, *Results in Education: 1989* (1989), at 1.

American Federation of Teachers, Albert Shanker, first popularized the idea of creating this “new type of school” that would move public education “out of a lock-step situation.”⁷ Such public schools would be innovative yet accountable to their communities, with each “announc[ing] in advance *** what it is that it’s trying to achieve and *** how it’s going to test it, how it wants to prove what it can do.”⁸

Charter schools moved from theory to practice first in Minnesota, which in 1991 passed the country’s original charter school law. In the years leading up to that passage, a Minnesota policy organization, the Citizens League, called for “the creation of new public schools”—“chartered schools.”⁹ Such schools would be located “within the existing public education system,” but they would be “freed from the constraints of an excessively rigid public school-management system” so they could “adapt to children’s needs.¹⁰ They would serve all children, be free to all, receive general education revenue in the same way as other Minnesota public schools, and be nonsectarian.¹¹ And while school districts would no longer enjoy “exclusive control” over “the creation of [such] new public schools,” the schools would be held “accountable for meeting the needs of the children they serve”: They

⁷ Albert Shanker, President, American Federation of Teachers, National Press Club Speech 11-12 (Mar. 31, 1988).

⁸ *Id.* at 12-13, 16.

⁹ Citizens League, *Chartered Schools = Choices for Educators + Quality for All Students* (Nov. 17, 1988), at 13.

¹⁰ *Id.* at i, 13.

¹¹ *Id.* at 14-16.

would be regularly evaluated and face closure if they failed to meet expectations.¹²

A Minnesota state senator, Ember Reichgott Junge, likewise began to ask: “*Could* chartered schools be th[e] research and development sector for public education? Could chartered schools be a way of creating new choices for students and parents, without turning the public school system upside down?”¹³ Junge came to believe that charter schools would be even more accountable to the public than district-run public schools. A state-delegated sponsor “would require chartering leaders to deliver quality education results. If they did not do so—or their innovation did not work—they would be closed.”¹⁴ Junge asked: “How many district public schools close for accountability reasons? They don’t.”¹⁵

Junge introduced “a bill authorizing outcome-based schools” in the Minnesota Senate.¹⁶ When it passed in 1991, it became the first charter school legislation in the country. The United States Senator from Minnesota, David Durenberger, celebrated its passage in Washington, elevating public charter schools to the national stage. He told his colleagues: “[O]ne big lesson in what Minnesota is now doing—a lesson that we can learn from in Washington—is that

¹² *Id.* at 13-14.

¹³ EMBER REICHGOTT JUNGE, ZERO CHANCE OF PASSAGE: THE PIONEERING CHARTER SCHOOL STORY 54 (2012).

¹⁴ *Id.* at 7-8.

¹⁵ *Id.*

¹⁶ *Id.* at 93.

we must begin to redefine what constitutes a ‘public school.’”¹⁷

B. Public Charter School Legislation Proliferates Nationwide

Numerous states took up the call. What began in Minnesota rapidly expanded across the country throughout the 1990s. In 1992, California became the second state to pass public charter school legislation, permitting “the founding of 100 charter schools statewide and up to 10 in any district.” *Wilson v. State Bd. of Educ.*, 89 Cal. Rptr. 2d 745, 748 (Cal. Ct. App. 1999). Other states soon followed suit. By the end of 1993, charter school laws had been enacted in Colorado, Georgia, Massachusetts, Michigan, and New Mexico.¹⁸ By the end of the decade, 36 states and the District of Columbia had enacted public charter school laws.¹⁹

Federal legislation gave public charter schools an important boost during that formative period. Having vowed that Washington needed to “redefine what constitutes a ‘public school,’” Senator Durenberger got to work, teaming up with Senators Joseph Lieberman

¹⁷ *Id.* at 180.

¹⁸ REBECCA R. SKINNER, CONG. RSCH. SERV. R43493, CHARTER SCHOOL PROGRAMS AUTHORIZED BY THE ELEMENTARY AND SECONDARY EDUCATION ACT (ESEA TITLE V-B): A PRIMER 1 (2014).

¹⁹ *Id.*

and Ted Kennedy to advance bipartisan legislation that would fund grants for public charter schools.²⁰

When questioned whether charter schools were in fact accountable public schools, Senator Durenberger pointed out that “each chartered school must have a multiyear contract with its sponsor that sets out specific outcomes it must achieve, how those outcomes will be monitored, and how all the requirements of chartered schools will be met.”²¹ Such performance contracts “would have to be periodically renewed for the charter to remain in force. So, if the chartered school does not live up to its obligations, its contract will not be renewed.”²² He challenged his colleagues: “Show me a public school that has to have its right to exist renewed every 3 years, *** and I will show you an accountable public school.”²³

The federal Charter School Program was included in the 1994 reauthorization of the Elementary and Secondary Education Act.²⁴ The Program defined charter schools as “public schools *** exempted from significant state or local rules and *** committed to the achievement of specific educational

²⁰ JUNGE, *supra* note 13, at 180; OFF. OF U.S. SEN. DAVE DURENBERGER, BACKGROUND INFORMATION ON CHARTER PUBLIC SCHOOLS AND THE PUBLIC SCHOOL REDEFINITION ACT OF 1993, S.429/H.R.1113 2 (Feb. 25, 1993), *available at* <https://charterlibrary.org/library/background-information-on-charter-public-schools-and-the-public-school-redefiniton-act-of-1993-02-25-1993/>.

²¹ 138 CONG. REC. 431, at 467 (1992).

²² *Id.*

²³ *Id.*

²⁴ SKINNER, *supra* note 18, at 16.

objectives,” and authorized the Secretary of Education to make grants of up to three years to support such schools.²⁵ The Program specified that the schools had to be newly created or converted from an existing district-run public school and authorized by a public entity.²⁶ They had to be free, open to all students, in compliance with specified civil rights statutes, and nonsectarian.²⁷ Today, the federal Charter School Program still describes itself as helping “create promising new public charter schools[.]”²⁸

In the decades since, the number of public charter schools and students has continued to grow. During the 2002-2003 school year, there were 2,583 charter schools, serving about 667,000 students.²⁹ Twenty years later, those numbers grew to 8,150 charter schools, serving nearly 3.8 million students, with public charter school laws in 46 states, as well as the District of Columbia, Guam, and Puerto Rico.³⁰ Today, charter schools comprise over 8% of all public schools in the United States. In Philadelphia, 37% of public school students attend a charter school; in

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ U.S. Dep’t of Educ., *Charter School Programs*, <https://perma.cc/N89V-8TZV> (last visited Apr. 2, 2025).

²⁹ Jameson White, *How Many Charter Schools and Students Are There?*, NAT’L ALL. FOR PUB. CHARTER SCHS. (Nov. 20, 2024), <https://data.publiccharters.org/knowledge-base/1-how-many-charter-schools-and-students-are-there/>.

³⁰ *Id.*; Cynthia Xu, *Where Are Charter Schools Located?*, NAT’L ALL. FOR PUB. CHARTER SCHS. (Nov. 20, 2024), <https://data.publiccharters.org/knowledge-base/3-where-are-charter-schools-located/>.

Washington, D.C., 45% do.³¹ By 2021, public charter school enrollment in Kansas City, Missouri had surpassed enrollment in the city's district-run schools.³²

C. Charter Schools Bear the Critical Features of Public Schools

In line with the intent behind their founding, charter schools bear the critical features of public schools. *See Carson ex rel. O.C. v. Makin*, 596 U.S. 767, 782-783 (2022). Contrary to petitioners' refrain, charter schools thus function as part of the public school system in substance, not just in name.

For one, charter schools are open to all comers, without selective admission. Where applications exceed capacity, states typically instruct charter schools to hold random lotteries for spots, with weight generally given only to siblings of current students, students residing within the relevant school district, or economically disadvantaged and high-risk students. *See, e.g.*, D.C. CODE ANN. § 38-1802.06(a); IDAHO CODE ANN. § 33-5206(9); IND. CODE ANN. § 20-24-5-5(c); N.M.

³¹ M. Danish Shakeel & Paul E. Peterson, *Charter Schools Show Steeper Upward Trend in Student Achievement than District Schools: First nationwide study of trends shows large gains for African Americans at charters*, EDUC. NEXT (2021), at 40, available at <https://www.educationnext.org/charter-schools-show-steeper-upward-trend-student-achievement-first-nationwide-study/>.

³² Maria Benevento, *Charter school enrollment surpasses KCPS for the first time*, THE BEACON (Nov. 26, 2021), <https://thebeaconnews.org/stories/2021/11/26/kansas-city-charter-school-enrollment/>.

STAT. ANN. § 22-8B-4.1; WYO. STAT. ANN. § 21-3-307(a)(vii).

Charter schools are also free. In fact, they often receive state funding through the same algorithm as district-run public schools. *See, e.g.*, ALA. CODE § 16-6F-10(b)(1)b-c; CAL. EDUC. CODE § 47630; FLA. STAT. ANN. § 1002.33(17); IND. CODE ANN. § 20-24-7-2.

Although charter schools are given room for innovation, they remain subject to state testing and other academic requirements, which provide guideposts for charter school curricula. *See, e.g.*, FLA. STAT. ANN. § 1002.33(7)(a)(4) (“Students in charter schools shall, at a minimum, participate in the statewide assessment program created [for public schools.]”); N.H. REV. STAT. ANN. § 194-B:8(V) (charter school students shall be evaluated annually, including under “the New Hampshire statewide education improvement and assessment program”).

Perhaps most significantly, unlike the typical private school—or government contractor—charter schools’ very existence depends on authorization by the state or one of its agents. *See, e.g.*, ALA. CODE § 16-6F-6(a); FLA. STAT. ANN. § 1002.33(5)(a); W. VA. CODE ANN. § 18-5G-2(2). Without a state charter, a charter school simply cannot exist. Not only do the state and its delegates have the power to set the terms of a charter school’s structure through its contract, but charter schools must also repeatedly seek renewal, undertake statewide standardized testing, hold board meetings open to the public pursuant to state open meetings laws, abide by financial transparency and solvency requirements, and maintain particular

student academic performance levels lest their charters be revoked.

In Alaska, for instance, a charter school can be shut down for failure “to meet educational achievement goals or fiscal management standards, or for other good cause.” ALASKA STAT. ANN. § 14.03.255(c)(12). In Missouri, a sponsor is typically required to intervene if a charter school fails to consistently maintain a graduation rate of at least 70% or if the charter school’s annual performance report results are below those of the district. MO. ANN. STAT. § 160.405(8)(1)(a). A sponsor in Missouri moreover must revoke the school’s charter if there is consistent and clear evidence of underperformance. *Id.* § 160.405(8)(1)(b). And in some states—including Oklahoma—a charter school may be terminated if the school performs in the bottom 5% of a specified set of public schools. *See* NEV. REV. STAT. ANN. § 388A.330(1)(f); OKLA. STAT. ANN. tit. 70, § 3-137(H)(2).

On top of all that, charter schools face regular review and renewal, requiring them to justify their existence on a continuous basis. *See, e.g.*, D.C. CODE ANN. § 38-1802.12(a)(3) (requiring a charter school to be reviewed “once every 5 years to determine whether the charter should be revoked”); MISS. CODE ANN. § 37-28-33(1) (a “charter may be renewed for successive five-year terms of duration”).

It is thus unsurprising that state courts have consistently held in the face of state constitutional challenges that charter schools are public schools. The Michigan Supreme Court, for instance, concluded that

Michigan’s charter schools are public schools because they are “under the ultimate and immediate control of the state and its agents.” *Council of Orgs. & Others for Educ. About Parochial, Inc. v. Governor*, 566 N.W.2d 208, 216 (Mich. 1997). The Ohio Supreme Court held that the state’s constitution did “not prevent the General Assembly from creating additional schools that are located within city school districts but are not part of the district.” *State ex rel. Ohio Congress of Parents & Tchrs. v. State Bd. of Educ.*, 857 N.E.2d 1148, 1162 (Ohio 2006); *see also Boulder Valley Sch. Dist. RE-2 v. Colorado State Bd. of Educ.*, 217 P.3d 918, 928 (Colo. App. 2009) (finding no reason Colorado could not create “different types of [public] schools,” with “some controlled by school districts while others are not”). And a California state court underscored that “charter schools are *strictly* creatures of statute,” even if “the apron springs of bureaucracy” are loosened. *Wilson*, 89 Cal. Rptr. 2d at 751-752. In concluding that charter schools were public schools, it reasoned: “[W]hat level of control could be more complete than where *** the very destiny of charter schools lies solely in the hands of public agencies and offices, from the local to the state level: school districts[] [and] county boards of education.” *Id.* at 754.

II. OKLAHOMA’S CHARTER SCHOOLS ARE PUBLIC SCHOOLS

Like charter schools in every other state, Oklahoma’s charter schools bear the key features of a public school. They are open to all comers, with Oklahoma law mandating that “[a] charter school or virtual charter school shall be as equally free and open

to all students as traditional public schools.” OKLA. STAT. ANN. tit. 70, §3-136(A)(9). They are also free and funded through the same formula as district-run public schools. *See id.* §3-136(A)(9); *id.* §3-142(A) (“A charter school shall receive the State Aid allocation, federal funds to which it is eligible and qualifies for, and any other state-appropriated revenue generated by its students for the applicable year.”).

The very existence of an Oklahoma charter school depends on sponsorship by a state-delegated sponsor—in this case, the Statewide Virtual Charter School Board. OKLA. STAT. ANN. tit. 70, § 3-132. Under Oklahoma law, an application to become a charter school must provide extraordinarily detailed explanations of the charter school’s operations across 35 different categories, including the school’s mission statement, proposed organizational structure, and governing board; a financial plan for its first five years of operation; “a description of the academic program aligned with state standards”; a “description of the instructional design of the charter school *** including the type of learning environment, class size and structure, curriculum overview, and teaching methods”; the criteria designed to measure the charter school’s effectiveness; a “plan for using internal and external assessments to measure and report student progress”; and a “detailed school start-up plan” identifying “tasks, time lines, and responsible individuals.” *Id.* § 3-134(B).

The charter school contract itself must “include performance provisions based on a performance framework that clearly sets forth the academic and operational performance indicators that shall be used

by charter school *** sponsors to evaluate their respective schools.” OKLA. STAT. ANN. tit. 70, § 3-136(A)(18). The sponsor is required to evaluate the charter school under that framework on an annual basis. *Id.* In addition, charter schools must “participate in the testing as required by the Oklahoma School Testing Program Act and the reporting of test results as is required of a school district.” *Id.* § 3-136(A)(4) (footnote omitted). On top of all that, Oklahoma law requires charter schools to implement “subject matter standards for instruction” that have been adopted by the State Board of Education. *Id.* § 11-103.6(A)(i)-(ii). And the State has implemented specific curricular standards that apply equally to all public schools, including charter schools. *See Resp. Br.* 10.

Oklahoma charter schools also face periodic renewal. *See* OKLA. STAT. ANN. tit. 70, § 3-137(A). A sponsor may deny renewal if it determines that the charter school “has failed to complete the obligations of the contract,” which include the contract’s performance indicators. *Id.* § 3-137(D). A sponsor also “may close a charter school site *** identified as being among the bottom five percent (5%) of public schools in the state.” *Id.* § 3-137(H)(2). Finally, a sponsor may terminate a contract “during the term of the contract for failure to meet the requirements for student performance contained in the contract and performance framework, failure to meet the standards of fiscal management, violations of the law, or other good cause.” *Id.* § 3-137(F).

Compare this treatment of charter schools with Oklahoma’s hands-off approach to regulating the

state's private schools. Private grade and secondary schools may, but are not required to, seek accreditation from the state. *See* OKLA. STAT. ANN. tit. 70, § 3-104(A)(7). Such schools need licensing from the state only if they provide a vocational education. *See id.* § 21-101(2) (for purposes of licensing, defining “[p]rivate school” to be either an institution that provides “postsecondary education” or “vocational-technical education prior to the person obtaining a high school diploma or its equivalency”). And private schools are not required to adopt any state curricular standards or participate in statewide standardized testing. *See id.* § 11-103.6(A)(i)-(ii); *id.* § 1210.508.

Accordingly, were petitioner St. Isidore a private school, it would require almost no interaction with or oversight by the state. But as a public charter school, St. Isidore's founding, the shape of its curriculum, its vision of success, and its very existence all depend on and are continuously controlled by the state.

III. LOSING PUBLIC SCHOOL STATUS THREATENS CHARTER SCHOOLS AND THE OPPORTUNITIES THEY AFFORD

A. Charter School Funding and Autonomy Are at Risk

If public charter schools are deemed private, countless numbers could lose their state funding due to express state constitutional bans on public funding for private schools (sectarian or not), constitutional limitations restricting the use of state school-aid funds to public schools, or political decisions to terminate funding for all charter schools because a state does not wish to fund a sectarian charter school. Other charter

schools will likely be required to submit to greater oversight from public bodies due to legal or political pressure, returning such public charter schools to the type of close oversight by a limited range of public actors that stifled public school innovation in the past. Charter schools thus risk losing either their funding or their autonomy, dealing a significant blow to a decades-long project of improving and innovating public education.

Many states constitutionally limit the use of state school-aid funds in ways that would exclude charter schools if deemed private. *See, e.g.*, FLA. CONST. art. IX, § 6 (“The income derived from the state school fund shall *** be appropriated, but only to the support and maintenance of free public schools.”); GA. CONST. art. VIII, § 6, ¶ I(b) (“School tax funds shall be expended only for the support and maintenance of public schools, public vocational-technical schools, public education, and activities necessary or incidental thereto, including school lunch purposes.”). Other state constitutions expressly prohibit the use of public funds to support private schools. Alaska’s constitution provides that “No money shall be paid from public funds for the direct benefit of any *** private educational institution.” ALASKA CONST. art. VII, § 1. California’s provides that “No public money shall ever be appropriated for the support of *** any school not under the exclusive control of the officers of the public schools.” CAL. CONST. art. IX, § 8. And under the South Carolina Constitution, “No money shall be paid from public funds *** for the direct benefit of any ***

private educational institution.” S.C. CONST. art. XI, § 4.³³

The above states all currently view their charter schools as public schools and fund their charter schools from public funds. *See, e.g.*, ALASKA STAT. ANN. § 14.03.260 (funding for charter school students “to be determined in the same manner as it would be for a student enrolled in another public school in that school district”); CAL. EDUC. CODE § 47630 (“It is the intent of the Legislature that each charter school be provided with operational funding that is equal to the total funding that would be available to a similar school district serving a similar pupil population[.]”); FLA. STAT. ANN. § 1002.33(17) (“Students enrolled in a charter school *** shall be funded *** the same as students enrolled in other public schools in a school district.”); GA. CODE ANN. § 20-2-2068.1 (“The local board and the state board shall treat a start-up

³³ *See also* COLO. CONST. art V, § 34 (“No appropriation shall be made for *** educational *** purposes to any person, corporation or community not under the absolute control of the state[.]”); HAWAII CONST. art. X, § 1 (“[P]ublic funds [shall not] be appropriated for the support or benefit of any *** private educational institution” except for the proceeds of certain special purpose revenue bonds); MASS. CONST. amend. XLVIII, § 2 (“No grant, appropriation or use of public money or property or loan of credit shall be made or authorized *** for the purpose of founding, maintaining or aiding any *** primary or secondary school *** which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents authorized by the Commonwealth or federal authority or both[.]”); *cf.* PENN. CONST. art. III, § 30 (“No appropriation shall be made to any *** educational institution not under the absolute control of the Commonwealth *** except by a vote of two-thirds of all the members elected to each House.”).

charter school no less favorably than other local schools within the applicable local system with respect to the provision of funds for instruction, school administration, transportation, food services, and, where feasible, building programs.”); S.C. CODE ANN. § 59-40-140(A) (establishing formula for distributing “state, county, and school district funds to a charter school”).

But if no longer considered public, as petitioners urge, charter schools in these and other states will lose all access to government funding—threatening their very existence. Because prohibitions against public funding of private schools are embedded in state constitutions, no legislative act can save them; it will take a constitutional amendment and significant political will and process. Any theoretical daylight between this Court’s negation of public school status for federal constitutional purposes and state-law denominations of charter schools as public for state constitutional funding would be cold comfort to the millions of charter school students and parents at risk.

Beyond those existing state constitutional funding consequences, a Free Exercise ruling in petitioners’ favor could cause at least some states to proactively terminate funding for *all* charter schools. They might do so, for instance, because they are uncomfortable with the idea of publicly funding a sectarian school in its entirety. Private funding would be insufficient to keep most, if not all, charter schools free and open to all students. Even federal funding would be at risk. The federal Charter School Program after all limits its funding to “public school[s]” that are “operated under public supervision and direction” and

are “nonsectarian.” 20 U.S.C. §§ 7221b(b)(1), 7221c(e), 7221d(b)(1), 7221i(2)(E), (F).

The loss of all this funding means charter schools would be unable to make payroll or pay their bills, forcing them to close their doors and leaving millions of parents to find new public school spots for their children. Because many charter schools do not have a long runway of funds in their bank accounts, charter schools could be forced to shut down almost immediately.

To keep their charter schools “public,” some states might respond by placing charter schools under the same tight, direct government control as district-run public schools—with public officials or employees sitting on their boards and closely controlling curricula, schedules, budgets, and hiring. But such a response would turn charter schools back into district-run public schools, stripping them of the advantages that produced their better outcomes. *See infra*, pp. 26-31. The lesson states would learn: Give public schools a longer leash at your peril—there is little room in public education for autonomy, diversification, and competition.

B. Religious Liberties and Other Rights of Charter School Students and Employees Are at Risk

Being open to all comers and conforming to the Constitution are features, not bugs, of public charter schools. But if charter schools are deemed private schools for federal constitutional purposes, charter school students and employees would lose federal constitutional protections against discrimination on

the basis of religion and viewpoint, while other significant federal law protections governing education would be at risk.

If charter schools are private schools (sectarian or not), their students and employees lose their First Amendment right to the free exercise of religion. Henceforth, a Christian student could be disciplined for saying grace before a meal or a Muslim teacher fired for praying at midday. *See Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022). A Jewish teacher could be prohibited from wearing a yarmulke, a Sikh student from wearing a turban, and a Catholic student from coming to school on Ash Wednesday with a cross of ashes on her forehead. Students and employees could likewise be compelled to engage in practices that violate their religious beliefs. For instance, the student handbook for St. Isidore requires attendance at mass because “[c]oming together as a community in prayer is an integral part of the Catholic mission to form the students of the School” and notes that “[i]rreverence toward the Holy Eucharist is irreverence toward Christ himself” and, as such, a cause for discipline. St. Isidore Seville Catholic Virtual Sch., *Parent & Student Handbook 2024-2025* (Mar. 18, 2024), at 27, 42-43, 45, <https://tinyurl.com/33k8fhck>. Charter schools could thus require their students to attend school on important religious holidays, like Yom Kippur or Eid al-Adha, to participate in sex education classes that violate their religious beliefs, or to recite prayers and pledges that conflict with their belief system.

If charter schools are not public schools, they also would have no obligation to “protect the marketplace

of ideas” pursuant to the First Amendment. *Mahanoy Area Sch. Dist. v. B. L. ex rel. Levy*, 594 U.S. 180, 190 (2021) (internal quotation marks omitted). Public schools cannot regulate “all the speech a student utters during the full 24-hour day,” *id.* at 189—but a private school can. Henceforth, charter school students could be disciplined for criticizing school policies on social media, wearing armbands in protest of government conduct, or forming a religious or political club. Teachers could be disciplined for complaining to co-workers about the school’s working conditions, publishing an op-ed in the local paper supporting a political candidate, or reporting a child’s mistreatment to his or her parents.

Other federal law protections would also be jeopardized. The Individuals with Disabilities in Education Act, which ensures that students with disabilities receive a free appropriate public education, currently applies to public charter schools. *See, e.g.*, 20 U.S.C. § 1401(6), (27). But its same requirements do not apply to private schools. *See* 34 C.F.R. § 300.137(a) (“No parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school.”). Charter schools likewise may no longer be expected to admit or provide services to all students with disabilities, no matter their needs, pursuant to other important federal statutes. Students could be barred admission, for example, if their disabilities required more than “reasonable modifications” under the Americans with Disabilities Act (“ADA”) or “minor adjustments” under Section 504

of the Rehabilitation Act. *See* 42 U.S.C. § 12182(b)(2)(A)(ii); 34 C.F.R. § 104.39(a). A religious charter school that received no federal funding—and is thus not subject to Section 504 of the Rehabilitation Act—could be under no federal obligation to admit students with disabilities at all. *See* 42 U.S.C. § 12187; 28 C.F.R. § 36.102(e); *see also* 28 C.F.R. pt. 36, app. C (“[A] parochial school, having religious doctrine in its curriculum and sponsored by a religious order, could be exempt [from the ADA] either as a religious organization or as an entity controlled by a religious organization, even if it has a lay board.”).

Contrary to the unsupported representations of certain *amici* supporting petitioners, recognizing the federal constitutional and statutory rights of students and teachers has been part of the mission of charter schools from the beginning. *Contra* Brief of Amici Curiae Classical Charter Schools of America, Inc., Pinnacle Classical Academy, and North Carolina Coalition for Charter Schools Supporting Petitioners, at 10-11; *see supra*, pp. 7-13 (describing how charter schools have always been conceived of as public schools). Those federal protections have not impeded the significant achievements of public charter schools and their students over the last three decades.

C. Public Charter Schools’ Track Record of Outperforming District-Run Public Schools Is at Risk

Charter schools were founded to produce better outcomes within the public school system, and they have fulfilled that promise. A recent nationwide study comparing student achievement trends over time

between public charter and district schools found that charter school students made greater academic gains from 2005 to 2017 than district school students, with particularly significant gains for Black and low-income charter students.³⁴ A 2023 national study found that the “typical charter school student *** has statistically significant positive year-over-year growth in both math and reading compared to” a similar student attending a district-run public school.³⁵

Other studies show public charter school students outperforming their district-run public school peers in various measurements. A recent study from Florida, for instance, found in 61 of 77 comparisons of student achievement “students enrolled in charter schools demonstrated higher rates of grade level performance” than students enrolled in district-run public schools.³⁶ A 2017 study found that charter school students in Los Angeles likewise outperformed their district-run public school counterparts overall, particularly in middle school.³⁷ And although charter schools make up just about 8% of public schools, 21 of the top 100 best high schools in

³⁴ M. Danish Shakeel & Paul E. Peterson, *supra* note 31, at 40.

³⁵ Credo, *As a Matter of Fact: The National Charter School Study 2023* (June 19, 2023), at 45, <https://ncss3.stanford.edu/wp-content/uploads/2023/06/Credo-NCSS3-Report.pdf>.

³⁶ Fla. Dep’t of Educ., *Student Achievement in Florida’s Charter Schools*, at v, <https://www.fldoe.org/core/fileparse.php/7778/urlt/SAR2021.pdf> (last visited Apr. 2, 2025).

³⁷ Hyo Jeong Shin at al., *Heterogeneous Effects of Charter Schools: Unpacking Family Selection and Achievement Growth in Los Angeles*, 11 J. OF SCH. CHOICE 60, 60 (2017).

the 2023-24 U.S. News & World Best High School Report were public charter schools.³⁸

Studies have shown that public charter school students are more likely than other public school students to graduate high school, enroll in college, and earn a higher income after graduating. In Texas—which is “ground zero for English-Learner education in the U.S.”—English learners who enroll in a charter school in 8th or 10th grade are four to five percentage points more likely to graduate high school, seven to ten percentage points more likely to enroll in four-year postsecondary education, and will on average make more money after they graduate college.³⁹ Charter students in Massachusetts are significantly more likely to enroll in a four-year college and obtain a degree than their non-charter public school peers.⁴⁰ And in Florida, attending a charter school increased the probability of earning a standard high school diploma by six percentage points, the probability of attending college by nine percentage points, and

³⁸ U.S. News & World Rep., *2024 Best Charter High Schools*, <https://www.usnews.com/education/best-high-schools/national-rankings/charter-school-rankings> (last visited Apr. 2, 2025).

³⁹ Deven Carlson & David Griffith, *Charter Schools and English Learners in the Lone Star State*, THOMAS B. FORDHAM INST. (May 9, 2023), <https://fordhaminstitute.org/national/research/charter-schools-and-english-learners-lone-star-state#results>.

⁴⁰ Sarah Cohodes & Astrid Pineda, *Different Paths to College Success: The Impact of Massachusetts’ Charter Schools on College Trajectories* 10 (Nat’l Bureau of Econ. Rsch., Working Paper No. 32732, 2024), <https://www.nber.org/papers/w32732>.

college persistence by twelve percentage points; it also increased annual earnings by age 25 by \$2,300.⁴¹

Numerous studies, moreover, show public charter schools act as a rising tide lifting all boats: “[T]he arrival of new charter schools increases the achievement of students who remain in traditional public schools,” particularly when they are in direct competition with district-run public schools.⁴² For example, cities that have expanded public charter school offerings have seen low-income students, whether in charter or district schools, close performance gaps and approach statewide achievement levels.⁴³ The presence of public charter schools in New York City—especially those located in close proximity to or within a district-run public school—“significantly increase[d] [district-run public school] student performance in both English Language

⁴¹ Tim R. Sass, Ron W. Zimmer, Brian P. Gill & T. Kevin Booker, *Charter High Schools’ Effects on Long-Term Attainment and Earnings*, J. OF POL’Y ANALYSIS & MGMT. 1, 10-13 (2016).

⁴² David Griffith & Heena Kuwayama, *Does competition from charter schools help or hurt traditional public schools?* THOMAS B. FORDHAM INST. (Aug. 29, 2024), <https://fordhaminstitute.org/national/commentary/does-competition-charter-schools-help-or-hurt-traditional-public-schools>.

⁴³ Tress Pankovits, *Searching for the Tipping Point: Scaling Up Public School Choice Spurs Citywide Gains*, PROGRESSIVE POL’Y INST. (Oct. 2024), at P8, https://www.progressivepolicy.org/wp-content/uploads/2024/10/PPI_Searching-for-the-Tipping-Point.pdf.

Arts and math, and decrease[d] the probability of grade retention.”⁴⁴

It is no surprise, then, that public charter schools have become increasingly popular with students and their families. Between 2002-2003 and 2022-2023, enrollment in charter schools increased from under 700,000 students to nearly 3.8 million students.⁴⁵ In the past five years, despite the growth and expansion of private school choice programs in many states, public charter schools have gained nearly 400,000 students while district-run schools have lost 1.8 million students, and enrollment growth in public charter schools has outpaced child population growth in 36 states.⁴⁶ Reflecting charter schools’ growing popularity, 77% of parents have indicated they would like more public charter school offerings in their area,

⁴⁴ Sarah A. Cordes, *In Pursuit of the Common Good: The Spillover Effects of Charter Schools on Public School Students in New York City*, 13 EDUC. FIN. & POL’Y 484, 484 (2018).

⁴⁵ Nat’l All. for Pub. Charter Schs., *Charter School Enrollment*, <https://data.publiccharters.org/> (last visited Apr. 2, 2025).

⁴⁶ Drew Jacobs & Debbie Veney, *Do You Know Where the Children Are? A Five-Year Analysis of Public School Enrollment*, NAT’L ALL. FOR PUB. CHARTER SCHS. (2024), at 3, 23, https://info.publiccharters.org/hubfs/2024%20Enrollment%20Report/2024%20Final%20Enrollment%20Report.pdf?_gl=1*1a1haz8*_gcl_au*MjA5ODQ2OTAyOS4xNzQxNTIwNDMz*_ga*MjA5NzY1ODE5Ny4xNzQxNTIwNDMz*_ga_0F6HHPFY9L*MTc0MTUyMDQzMi4xLjAuMTc0MTUyMDQzMi42MC4wLjA.

while 81% of parents support expanding the number of slots available in existing public charter schools.⁴⁷

These hard-won achievements are now at serious risk. As outlined above, if charter schools are deemed private schools, they risk either losing their state funding or facing a tight yoke that stifles their innovation and competitiveness—the very characteristics that for over 30 years have benefited millions of the nation’s public school students.

CONCLUSION

This Court should affirm the decision below.

Respectfully submitted.

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⁴⁷ Nat’l All. for Pub. Charter Schs., *Never Going Back: An Analysis of Parent Sentiment in Education* (Aug. 2022), at 28, https://publiccharters.org/wp-content/uploads/2023/01/Never-Going-Back-2022-Harris-Poll-Report_v5.pdf.