

Nos. 24-394, 24-396

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IN THE  
**Supreme Court of the United States**

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

*Petitioners,*

v.

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

*Respondent.*

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ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL,

*Petitioner,*

v.

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

*Respondent.*

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**On Writ of Certiorari to the  
Oklahoma Supreme Court**

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**BRIEF OF *AMICUS CURIAE*  
NATIONAL ASSOCIATION OF  
CHARTER SCHOOL AUTHORIZERS  
IN SUPPORT OF RESPONDENT  
GENTNER DRUMMOND**

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## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
INTEREST OF <i>AMICUS CURIAE</i> .....	1
ARGUMENT.....	3
I. Charter Schools Are Public Schools Entwined With State Actors .....	5
A. Charter Schools Are Government Entities That Provide a Quality Public Education to All Citizens.....	6
1. Charter Schools Are Public Schools .....	6
2. The Public Charter School Board and Its Members Are Public Officials.....	12
3. Public Schools and Public Officials May Not Adopt a Religious Educa- tional Program Without Violating the Establishment Clause.....	14
B. Public School Chartering Necessarily Involves Ongoing Entwinement Between Charter Operators, Authorizers, and the State .....	15
C. Public School Chartering of Religious Charter Schools Would Obligate Authorizers to Engage in Evaluation, Consideration, and Approval of Religious Doctrine .....	22

TABLE OF CONTENTS—Continued

	Page
II. States Do Not Violate the Free Exercise Clause By Choosing to Provide a Secular Education In Their Public Schools.....	24
CONCLUSION .....	26
APPENDIX	

## TABLE OF AUTHORITIES

CASES	Page(s)
<i>Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet,</i> 512 U.S. 687 (1994).....	14-15
<i>Biden v. Nebraska,</i> 600 U.S. 477 (2023).....	5-9
<i>Blum v. Yaretsky,</i> 457 U.S. 991 (1982).....	6, 22
<i>Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n,</i> 531 U.S. 288 (2001).....	5-7, 15, 21
<i>Carson as next friend of O.C. v. Makin,</i> 596 U.S. 767 (2022).....	23-26
<i>El Centro de la Raza v. State,</i> 428 P.3d 1143 (Wash. 2018) .....	23
<i>Espinoza v. Mont. Dep’t of Revenue,</i> 591 U.S. 464 (2020).....	23, 25
<i>Graham v. Bd. of Educ.,</i> 8 F.4th 625 (7th Cir. 2021) .....	13
<i>Lebron v. Nat’l R.R. Passenger Corp.,</i> 513 U.S. 374 (1995).....	7
<i>Rendell-Baker v. Kohn,</i> 457 U.S. 830 (1982).....	9
<i>Trinity Lutheran Church of Columbia, Inc. v. Comer,</i> 582 U.S. 449 (2017).....	25

## TABLE OF AUTHORITIES—Continued

CONSTITUTION	Page(s)
U.S. Const. amend. I .....	4-5, 14-15, 21, 24, 26
Okla. Const. art. I, § 5 .....	7, 24
Okla. Const. art. XIII, § 1 .....	7, 9, 24
STATUTES AND REGULATIONS	
Ala. Code 16-6F-7 .....	16, 17, 21
Ala. Code. § 16-6F-9(d)(4) .....	13
Ariz. Rev. Stat. Ann. § 15-189.02 .....	13
Cal. Educ. Code § 47615(a)(1)-(2) .....	10
Colo. Code Regs. § 301-88:2.1 .....	16
Colo. Code Regs. § 88.3.0 .....	16-17, 19, 21
Conn. Gen. Stat. § 10-66bb(d) .....	13
D.C. Code § 38-1802.04(b)(1) .....	11
14 Del. Admin. Code § 275 .....	16-17, 19
Haw. Rev. Stat. § 302D .....	17
Ill. Comp. Stat. 105 ILCS 5/27A-5(g)(3) .....	14
Ind. Code. § 20-24-9-4 .....	17, 20
La. Stat. Ann. § 17:3981(4) .....	16
Me. Rev. Stat. Ann. tit. 20-A § 2409 ...	8, 17, 19, 21
Me. Stat. tit. 20-A, § 2410 .....	19
Md. Code Ann., Educ. § 9-106(a) .....	10-11
Miss. Code Ann. § 37-16-3(1)(b) .....	7
Miss. Code Ann. § 37-28-31 .....	17, 21
Nev. Rev. Stat. § 388A.273 .....	19

## TABLE OF AUTHORITIES—Continued

	Page(s)
Nev. Rev. Stat. § 388A.229.....	19
N.J. Stat. Ann. § 18A:36A-11(a) .....	7, 10
N.C. Gen. Stat. Ann. § 115C-218.15(a).....	11
N.M. Stat. Ann. § 22-8B.....	16, 19
Ohio Rev. Code Ann. § 3314.016(B)(3) .....	16
Ohio Rev. Code Ann. § 3314.023(B).....	19
Okla. Stat. tit. 25, § 304(1).....	13
Okla. Stat. tit. 51, § 24A.3(2) .....	13
Okla. Stat. tit. 70, § 3-132(A).....	10
Okla. Stat. tit. 70, § 3-134(C).....	9, 10, 25
Okla. Stat. tit. 70, § 3-134(I)(7).....	8
Okla. Stat. tit. 70, § 3-136(A)(4).....	7, 8
Okla. Stat. tit. 70, § 3-136(A)(5).....	7, 8
Okla. Stat. tit. 70, § 3-136(A)(6).....	7
Okla. Stat. tit. 70, § 3-136(A)(9).....	7
Okla. Stat. tit. 70, § 3-136(A)(12).....	13, 14
Okla. Stat. tit. 70, § 3-136(A)(18).....	8
Okla. Stat. tit. 70, § 3-140(D).....	8
24 Pa. Stat. and Cons. Stat. § 17-1715-A(a)(11).....	13
24 Pa. Stat. and Cons. Stat. § 17-1727-A ....	14
24 Pa. Stat. and Cons. Stat. § 17-1728-A(a)...	7
S.C. Code Ann. § 59-40-55, 60.....	16
Tenn. Code Ann. § 49-13-109.....	13

## TABLE OF AUTHORITIES—Continued

	Page(s)
Tenn. Code Ann. § 49-13-143(a).....	8
Tex. Educ. Code Ann. § 12.1051 .....	13
Wash. Rev. Code § 28A.710.100(3) .....	16
Wash. Rev. Code § 28A.710.170.....	19
Wis. Stat. 118.40(3m)(b).....	16

## OTHER AUTHORITIES

Douglas N. Harris & Matthew Larsen, <i>The Effects of the New Orleans Post-Katrina School Reforms on Student Academic Outcomes</i> (Feb. 10, 2026).....	23
Jamison White, National Alliance for Public Charter Schools, <i>How are Charter Schools Held Accountable</i> (Nov. 20, 2024) .	1
Legislative Analyst’s Office, <i>Review of the Funding Determination Process for Nonclassroom-Based Charter Schools</i> , State of California (Feb. 29, 2024) .....	12
NACSA, <i>Authorizer Types Across the Country</i> , available at <a href="https://qualitycharters.org/authorizer-types/">https://qualitycharters.org/authorizer-types/</a> (last accessed March 31, 2025) .....	19
NACSA, <i>Principles &amp; Standards for Quality Charter School Authorizing</i> (2023), available at <a href="https://qualitycharters.org/wp-content/uploads/2023/02/Principles-and-Standards.pdf">https://qualitycharters.org/wp-content/uploads/2023/02/Principles-and-Standards.pdf</a> .....	11, 16-19

## TABLE OF AUTHORITIES—Continued

	Page(s)
Sarah Favot, <i>LA Unified Explores Becoming an All-Charter School District</i> , L.A. Daily News (Aug. 28, 2017), <a href="https://www.dailynews.com/2015/11/17/la-unified-explores-becoming-an-all-charter-school-district/">https://www.dailynews.com/2015/11/17/la-unified-explores-becoming-an-all-charter-school-district/</a> .....	23-24



## **INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

The National Association of Charter School Authorizers (NACSA) is a nonprofit organization with a mission dedicated to advancing and strengthening the practices by charter school authorizers to ensure high-quality charter schools. NACSA works with policymakers, authorizers, and education leaders to ensure that high-quality public charter schools are opened and then held accountable for meeting standards of performance. “Authorizers” (also known in some states as sponsors) are the entities that decide who can open a new charter school and then set academic and operational expectations, oversee school performance, and ensure compliance with applicable law and policy. Authorizers also decide whether a charter school remains open or must close at the end of its contract. Nearly 92% of authorizers are local or state educational agencies: school boards, school districts, and state departments of education. Jamison White, National Alliance for Public Charter Schools, *How are Charter Schools Held Accountable* (Nov. 20, 2024). The remaining authorizers, who are also delegated their authority by the state, are comprised of independent state boards and commissions, colleges and universities, and other entities deputized by the state to serve as an authorizer.

NACSA has a strong interest in the outcome of this case because a decision in Petitioners’ favor would place authorizers, the entities by which all 46 states ensure charter schools operate as public schools, in the position of evaluating the qualifications of religious

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<sup>1</sup> In accordance with Supreme Court Rule 37.6, no counsel for any party authored any portion of this brief, in whole or in part, and no party made any monetary contributions regarding the preparation or submission of this brief.

education providers, assessing a range of religious traditions for alignment with applicable state performance standards. An authorizer's decision would be subject to substantial litigation when they make merit-based decisions to deny approval of religious charter schools. If states are allowed to establish religious public charter schools, NACSA and the authorizers it represents will be the boots-on-the-ground left to implement a decision by this Court. A retreat from the long-established understanding that charter schools are *public* schools, and that states have the right to require that their public schools provide a secular education, would dramatically change how authorizers do their work.

Outstanding private schools, including religious schools, play a vital role in the education of millions of students across the country. NACSA respects and deeply appreciates their role. Nothing in NACSA's arguments precludes states from implementing other policies that can help private schools effectively educate students. Public charter schools, as a part of a state's public education system, serve a different role. NACSA serves as an independent voice for thoughtful public charter school authorizing practices and policies, working with authorizers that oversee more than two-thirds of charter schools in the country. An even greater number of authorizers have engaged with NACSA and utilized its resources in some way.

Its interest in the outcome of this case is shared by a broad cross-section of authorizers and education stakeholders who play a role in advocating for quality charter school authorizing, including each of the organizations and authorizers listed below: National Network for District Authorizing (NN4DA), which supports state-level partnerships promoting school

district authorizing in California, Colorado, Florida, Georgia, Maryland, Oklahoma, Pennsylvania, South Carolina, Tennessee, and Wisconsin; Colorado Association of Charter School Authorizers; California Charter Authorizing Professionals; Ohio Association of Charter School Authorizers; Indianapolis Mayor's Office (Indiana); Minnesota Association of Charter School Authorizers; and Washington State Charter School Commission. These authorizers span the nation and include authorizers who serve schools and students in blue states and red, and in urban, rural, and suburban communities.

For the reasons set forth in this brief, NACSA urges this Court to affirm the decision of the Oklahoma Supreme Court.

### ARGUMENT

Charter schools in Oklahoma and across the country are *public* schools. They are tuition-free, open to all students, cannot discriminate or selectively admit students, are subject to state academic performance standards, and must comply with public accommodation laws to the same extent as other public schools.

Charter schools are also inherently intertwined with public officials. A public charter school cannot exist as a charter school unless and until action is taken by an authorizer, acting on behalf of the state, to recognize the school and permit it to enroll public school students. Authorizers are overwhelmingly state and local educational agencies—government bodies—that are empowered by the state to decide whether to approve a charter school application and open a new public school. After a charter school has been formed, the authorizers monitor the charter school's performance and hold charter school operators accountable.

Charter school authorizers decide whether a charter school remains open or closes at the end of its contract, ceasing operation as a public school. The fact that the applicant is a private organization does not alter this analysis. Even when a private organization applies to operate a public charter school, the ultimately approved school is a public school; the board that runs that school is a public entity; and the public charter school is run and continues operating at the direction of authorizers.

Because a public charter school is a public school intertwined with public officials, it is a “state actor.” When the public charter school and its officials adopt a religious education program that permeates the school’s teachings, they violate the Establishment Clause. By the same token, when a state elects to provide its citizens an education free of any particular religious doctrine, as Oklahoma has done here, it does not violate the Free Exercise Clause.

To hold otherwise would require authorizers to evaluate religious educational programs. Each authorizer would need to develop expertise in a wide range of religious educational approaches and the capacity to discern which religious educational programs warrant the establishment of a public charter school. In schools where religious identity is central to the school’s mission and approach, authorizers would need to understand how the day-to-day plans for religious instruction would lead to desired academic outcomes and meet state standards, and devise metrics that reliably measure whether schools are properly executing those plans. If an authorizer approves one particular religious educational program over another that it decides does not satisfy, or is inconsistent with, state

educational requirements, it would risk violating the Free Exercise Clause when it rejects that application.

This Court’s precedent weighs in favor of affirming the Oklahoma Supreme Court and recognizing that a state is not required to provide a religious education as part of its public school system.

### **I. Charter Schools Are Public Schools Entwined With State Actors**

Allowing states to approve the operation of a public charter school that provides a religious educational program to its students runs afoul of the Establishment Clause because the operation of a public charter school is an instrument of the state on at least three levels.

*First*, the charter school itself is a government entity because it is a public school “created by the State to further a public purpose,” is “governed by state officials and state appointees” “report[s] to the State,” and could “be dissolved by the State.” *Biden v. Nebraska*, 600 U.S. 477, 491 (2023). Even when a private organization submits an application to operate a public charter school, the ultimately approved school is a public school, and the board that runs that school is a public entity comprised of public officials.

*Second*, when a private entity seeks authorization to operate a charter school, it is “entwine[d],” *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 301-02 (2001), with the state through, among other state actors, the authorizing entity. A public charter school cannot exist as a charter school unless and until action is taken by an authorizer, acting on behalf of the state, to recognize the school and permit it to enroll public school students. Once approved by an authorizer to operate a public charter school, a

private entity's operation of that school necessarily involves entwinement with government actors and yielding to government directives as part of the overall system of public schools. Authorizers are created by the State, and cannot do their jobs without being first empowered by the State to authorize charter schools.

*Third*, the authorizer's decision to approve or deny a religious charter school, and its monitoring of that school, is itself a state action that requires the approval of a particular religious education and amounts to "such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *See Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

### **A. Charter Schools Are Government Entities That Provide a Quality Public Education to All Citizens**

A charter school is a government entity for constitutional purposes because it is "created by the State to further a public purpose", is "governed by state officials and state appointees," "report[s] to the State," and could "be dissolved by the State." *Biden*, 600 U.S. at 491. Once approved, a charter school becomes a state actor that "engag[es] in [the] traditional and exclusive public function," of providing a quality public education system for the benefit of its citizens. *Brentwood*, 531 U.S. at 294.

#### **1. Charter Schools Are Public Schools.**

Public charter schools are "created by the State to further" the "public purpose" of providing a quality system of free public schools that are open to all, tuition-free, and nondiscriminatory. *Biden*, 600 U.S. at 491; *see Brentwood*, 531 U.S. at 294, 299-300 (noting that an entity is a state actor when it is created by state

legislatures to fulfill a “traditional and exclusive public function”); *see also* *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 399 (1995) (holding that private entity was a government entity where it was created by the government to fulfill governmental objectives). In that system, charter schools co-exist alongside other forms of public schooling, such as alternative schools, virtual schools, magnet schools, and state-specialized schools like a state school for the deaf.

Under Oklahoma law, for example, charter schools are tuition-free, publicly funded, and subject to non-discrimination requirements. Okla. Stat. tit. 70, § 3-136(A)(5), (6), (9). The formation of charter schools satisfies Oklahoma’s state constitutional obligation to provide public education. Okla. Const. art. I, § 5, art. XIII, § 1. Students who enroll in and attend a public charter school satisfy state compulsory attendance rules. In school systems that maintain a universal enrollment system, charter schools are treated as a public-school option for purposes of creating a single enrollment process for all public school students in a district.<sup>2</sup> Charter schools are required to participate in state-wide tests and assessments. Okla. Stat. tit. 70, § 3-136(A)(4); *see also* N.J. Stat. Ann. § 18A:36A-11(a) (New Jersey); Miss. Code Ann. § 37-16-3(1)(b) (Mississippi); 24 Pa. Stat. and Cons. Stat. § 17-1728-A(a) (Pennsylvania).

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<sup>2</sup> A number of school districts that authorize public charter schools utilize a system of universal enrollment whereby public school students select a school to attend from among traditional public, public charter and other schools as part of a single process. Those districts include those in Newark, Chicago, and Washington, D.C., and in Colorado, Denver Public Schools, Boulder Valley School District, Jefferson County Public Schools, and Douglas County Public Schools.

Charter schools are also “governed by state officials and state appointees.” *Biden*, 600 U.S. at 491. The Oklahoma Statewide Charter School Board (the “State Board”) “[m]onitor[s]” the charter schools it sponsors, ensuring the school operates “in accordance with charter contract terms.” Okla. Stat. tit. 70, § 3-134(I)(7). Oklahoma Charter schools are held to the same academic standards as other public schools and are subject to the same accountability systems as other public schools. Okla. Stat. tit. 70, § 3-136(A)(4), (5). Charter schools must submit data “in the identical format that is required by the State Department of Education of all public schools,” and they are evaluated by the State Board according to a statutory “performance framework.” *Id.* § 3-136(A)(18); *see also* Me. Rev. Stat. Ann. tit. 20-A, § 2409 (Maine) (requiring that a charter contract’s performance provisions “be based on a performance framework developed by the authorizer that sets forth the academic and operational performance indicators that will guide the authorizer’s evaluations of each public charter school”); Tenn. Code Ann. § 49-13-143(a) (Tennessee) (same).

Charter schools are subject to discrimination laws and “shall not limit admission based on ethnicity, national origin, gender, income level, disabling condition, proficiency in the English language, measures of achievement, aptitude, or athletic ability.” Okla. Stat. tit. 70, § 3-140(D). In other words, the charter school must operate as a **public** school, and authorizers like the State Board ensure on an ongoing basis that charter schools meet public education standards. The authorizers enforce these obligations as a condition of maintaining a public charter school, and if a school fails to satisfy its statutory obligations, the authorizer can terminate the charter and force the school to cease operations.



The nature of Oklahoma’s public charter school law, and the active role of the State Board in the supervision of charter schools, makes sense. Authorizers like the State Board maintain responsibility for the delivery of education to public school students that meets state constitutional standards. Thus, authorizers have ultimate decision-making authority over the establishment and continued operation of charter schools to ensure that they meet Oklahoma’s mandate to “establish and maintain a system of free public schools wherein all the children of the State may be educated.” Okla. Const. art. XIII, § 1. Authorizers have the power to “dissolve” a charter school by revoking its contract if a charter school fails to meet any of its state obligations. *Biden*, 600 U.S. at 491.

For these reasons, charter schools are not private schools. In Oklahoma, private schools are barred from operating public charter schools. *See, e.g.*, Okla. Stat. tit. 70, § 3-134(C) (“A private school shall not be eligible to contract for a charter school or virtual charter school under the provisions of the Oklahoma Charter Schools Act.”). Private schools generally are not subject to public funding requirements, can charge tuition for enrollment, can selectively enroll or deny admission to students based upon the school’s own policies, and are not subject to state-mandated accountability standards. While some private schools receive funding from contracts with the government to provide private, ancillary educational services or to serve a select group of private school students, that is not the arrangement for public charter schools. *Cf. Rendell-Baker v. Kohn*, 457 U.S. 830, 832, 843 (1982) (addressing a private institution operated on private property by a private board of directors that received funds pursuant to contracts with public entities).

Unlike private schools, a public charter school cannot exist as a charter school unless and until action is taken by an authorizer, acting on behalf of the state, to recognize the school and permit it to enroll public school students. The state, through authorizers, actively regulates and oversees the provision of public education in charter schools to ensure that the charter schools meet standards for performance and comply with their charter contracts, state charter school and non-discrimination laws, and the state constitution.

The fact that the charter school is a **public** school remains true even when a “private” nonprofit organization contracts with a government sponsor to establish a charter school. *See* Okla. Stat. tit. 70, § 3-132(A); Okla. Stat. tit. 70, § 3-134(C). The charter school, formed when a government sponsor authorizes its operation, is a **public** school that must follow the requirements of a public school.

The treatment of charter schools as part of the public school system is not unique to Oklahoma. It is a persistent feature of charter school programs across the country. *See, e.g.*, Cal. Educ. Code § 47615(a)(1)-(2) (providing that “[c]harter schools are part of the Public School System, as defined in Article IX of the California Constitution” and that they “are under the jurisdiction of the Public School System and the exclusive control of the officers of the public schools”); N.J. Stat. Ann. § 18A:36A-11(a) (“A charter school shall operate in accordance with its charter and the provisions of law and regulation which govern other public schools” except upon specific exemption from the state commissioner, but in no event shall the exemption relate to “assessment, testing, civil rights and student health and safety . . . .”); Md. Code Ann., Educ. § 9-106(a) (unless provided an express waiver, “a

public charter school shall comply with the provisions of law and regulation governing other public schools,” but prohibiting waiver of “assessments required for other public schools,” among other categories); N.C. Gen. Stat. Ann. § 115C-218.15(a) (“A charter school that is approved in accordance with this Article shall be a public school within the local school administrative unit in which it is located. All charter schools shall be accountable to the State Board and the Review Board for ensuring compliance with applicable laws and the provisions of their charters.”); D.C. Code § 38-1802.04(b)(1) (requiring a charter school to “adopt a name . . . but only if the name selected includes the words ‘public charter school’”). State charter laws do not just label charter schools as “public.” The rules legislatures set to govern charter schools treat them like other public schools and make them publicly accountable—all in keeping with the public purpose of providing a public education.

Authorizers play a critical role in ensuring that charter schools operate as public schools and perform according to state requirements. Authorizers ensure that public charter schools “fulfill[] fundamental public education obligations to all students, which includes providing [n]on-selective, nondiscriminatory access to all eligible students; [f]air treatment in admissions and disciplinary actions for all students; and [a]ppropriate services for all students, including those with disabilities and English learners, in accordance with applicable law.” NACSA, *Principles & Standards for Quality Charter School Authorizing* 5 (2023) [hereinafter “NACSA P&S”].<sup>3</sup> Authorizers also hold schools accountable for “[s]ound governance,

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<sup>3</sup> Available at <https://qualitycharters.org/wp-content/uploads/2023/02/Principles-and-Standards.pdf>.

management, and stewardship of public funds” and for providing “[p]ublic information and operational transparency in accordance with [the] law,” all while ensuring that their own work reflects “[c]larity, consistency, and public transparency in authorizing policies, practices, and decisions” as well as “effective and efficient public stewardship.” *Id.* If the public charter school fails to meet its obligations, its charter is revoked, and the school is closed.

State legislatures have included charter schools as part of their systems of public schooling as a means to build new schools when there is a need, just as districts may open new public schools that they operate to meet growing or changing demands in their community. In keeping with that public purpose and the delegation of a traditionally public function, charter schools and their governing boards are government entities.

## 2. The Public Charter School Board and Its Members Are Public Officials.

Contrary to Petitioners’ claim, Pet. Br. at 33, the public charter school’s board and its members are also treated as public officials. Under most state charter school laws, including Oklahoma’s, charter school governing boards operate as public school boards.<sup>4</sup> The governing board’s purchases on behalf of the school

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<sup>4</sup> In California, some charter schools are established and governed directly by local school district boards of education themselves, without a nonprofit organization as the charter school governing board. See Legislative Analyst’s Office, *Review of the Funding Determination Process for Nonclassroom-Based Charter Schools* at 9 (Feb. 29, 2024) (noting 255 charter schools, 21 percent of California charter schools, were locally funded in 2023).

may be subject to public competitive bidding requirements. *See, e.g.*, Ariz. Rev. Stat. Ann. § 15-189.02 (Arizona); Ala. Code. § 16-6F-9(d)(4) (Alabama). The composition of the governing board is often regulated by the state to require representation from various groups, including parents. *See, e.g.*, Conn. Gen. Stat. § 10-66bb(d) (Connecticut); Tenn. Code Ann. § 49-13-109 (Tennessee); *see also* 24 Pa. Stat. and Cons. Stat. § 17-1715-A(a)(11) (“Trustees of a charter school entity are public officials for the purposes of 65 Pa.C.S. Ch. 11 (relating to ethics standards and financial disclosure) . . .”).

Both charter school governing board members and traditional school board members may be private citizens, but they are often subject to requirements that apply to public officials. Their conduct is regulated by conflicts of interest and ethics rules; their communications are subject to freedom of information act requests; and their board meetings must be conducted according to sunshine and open meetings act laws. *See, e.g.*, Okla. Stat. tit. 51, § 24A.3(2) (Open Records Act), Okla. Stat. tit. 25, § 304(1) (Open Meeting Act); *see also* 24 Pa. Stat. and Cons. Stat. § 17-1715-A(a)(11) (applying Pennsylvania ethics rules to trustees of charter schools); Tex. Educ. Code Ann. § 12.1051 (applying open meetings and public information requirements to all boards of open-enrollment charter schools).

Charter school governing boards are also extended benefits and tort immunities traditionally reserved to state actors. Okla. Stat. tit. 70, § 3-136(A)(12). Charter school employees are usually included in the state retirement or pension system. *See, e.g., Graham v. Bd. of Educ.*, 8 F.4th 625, 630 (7th Cir. 2021) (“[C]overage of the charter-school teachers is another indicator that

they are ‘public’; it is how Illinois ensures that their pensions and other fringe benefits are paid, even if a given charter school decides to close its doors.”). And state legislators customarily extend the tort immunity privilege to charter schools under the charter school law. Okla. Stat. tit. 70, § 3-136(A)(12); *see also* 24 Pa. Stat. and Cons. Stat. § 17-1727-A (“For purposes of tort liability . . . the board of trustees shall be considered the public employer in the same manner as political subdivisions and local agencies.”). That immunity also extends to the governing bodies and board members that operate those schools. *See, e.g., id.*; 105 Ill. Comp. Stat. 5/27A-5(g)(3) (Illinois) (extending Local Government and Governmental Employees Tort Immunity Act to charter schools).

3. Public Schools and Public Officials May Not Adopt a Religious Educational Program Without Violating the Establishment Clause.

The character and treatment of charter schools in Oklahoma and elsewhere compels this Court to treat them as state actors exercising authority over a public function—the public education system. When a public charter school and its officials adopt a religious education program that permeates the school’s teachings, they violate the Establishment Clause. The decision to authorize a charter school to provide a religious education “delegat[es] the State’s discretionary authority over public schools to a group defined by its character as a religious community, in a legal and historical context that gives no assurance that governmental power has been or will be exercised neutrally.” *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 696 (1994) (Souter, J., joined by Blackmun, Stevens, and Ginsburg, JJ.). Here, unlike in

*Kiryas*, the intent to operate a religious school is *express*, and violates the Establishment Clause.

**B. Public School Chartering Necessarily Involves Ongoing Entwinement Between Charter Operators, Authorizers, and the State**

Public charter schools are necessarily entwined with the state “to the point of largely overlapping identity.” *Brentwood*, 531 U.S. at 303. Charter school authorizers in particular are entwined with the structure of public charter schools. An authorizer has no power to approve a public charter school unless and until that power is delegated to it by the state. A public charter school cannot exist as a charter school unless and until action is taken by an authorizer, acting on behalf of the state, to recognize the school and permit it to enroll public school students. In other words, the decision to authorize a public charter school is most often made by public officials with a vested interest in ensuring that charter schools operate in accordance with state laws that govern public education. Chartering a religious public charter school under existing state charter laws would require state education agencies and local school districts and other governmental bodies across the country to evaluate and supervise religious educational programs.

The day-to-day responsibilities of authorizers underscore the entwinement issues. NACSA has developed and published *Principles & Standards for Quality Charter School Authorizing* (2023) to ensure that authorizers’ work is based on best practices and widely accepted standards. States have adopted standards for authorizing based on NACSA’s *Principles and Standards*, including Alabama, Delaware, New Mexico, and South Carolina, among others. In Colorado,

Louisiana, Ohio, Washington, and Wisconsin, NACSA's *Principles & Standards* are expressly referenced in the relevant regulations and statutes. *See* Colo. Code Regs. § 301-88:3.0; La. Stat. Ann. § 17:3981(4); Ohio Rev. Code Ann. § 3314.016(B)(3); Wash. Rev. Code § 28A.710.100(3); Wis. Stat. 118.40(3m)(b).<sup>5</sup>

When first considering a charter school application, authorizers develop detailed plans for the examination of the charter school's educational program. They examine whether a school operator proposing to establish a public charter school has presented "a clear and compelling mission, a quality educational program, a solid business plan, effective governance and management structures and systems, evidence of community and/or family demand and need . . . and clear evidence of the applicant's capacity to execute its plan successfully." NACSA P&S, *supra*, at 8. *See also* Ala. Code 16-6F-6(p) (providing authorizers "essential power[] and dut[y]" to "solicit[] and evaluat[e]" applications); La. Stat. Ann. §17:3981(4); N.M. Stat. Ann. § 22-8B-5.3; S.C. Code Ann. §§ 59-40-55, 60. They develop comprehensive charter school applications and pre-opening requirements that usually make a proposed charter school governing board submit its bylaws and articles of incorporation, its conflicts of interest and ethics policies, and the resumes or bios of proposed board members and administrators who will operate the school. *See, e.g.*, Ala. Code 16-6F-7(8) (application must include all "essential elements of the proposed school plan"); Colo. Code Regs. § 301-88:2.1 (addressing conflict of interest policy and rules regarding nepotism, and excessive compensation); 14 Del. Admin. Code § 275(3.9-4.0) (requiring charter school founders

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<sup>5</sup> A full list of the states that have adopted standards based on NACSA's *Principles* and *Standards* can be found at Appendix A.



and board members to complete financial interest disclosures); Haw. Rev. Stat. § 302D-12 (rules applying to Hawaii charter school governing boards and board members). They often interview proposed board members and administrators and conduct visits to the proposed school campus. *See* Colo. Code Regs. § 301-88:3.03(D); Haw. Rev. Stat. § 302D-13 (setting applicant and application process requirements).

In keeping with NACSA’s *Principles and Standards*, a quality authorizer must execute a charter contract that “[d]efine[s] performance standards, criteria, and conditions for renewal, intervention, revocation, and non-renewal, while establishing the consequences for meeting or not meeting standards or conditions.” NACSA P&S at 9; *see also* Ala. Code 16-6F-7(e); Colo. Code Regs. § 301-88:3.4; Ind. Code § 20-24-9-4 (corrective action; revocation of charter); Me. Stat. tit. 20-A, § 2409 (public charter school performance framework); Miss. Code Ann. § 37-28-31 (describing authorizer oversight responsibilities). NACSA’s *Principles and Standards* also call on authorizers to “[d]efine[] and communicate[] to schools the process, methods, and timing of gathering and reporting school performance and compliance data,” “[v]isit[] each school as appropriate and necessary for collecting data,” “[e]valuate[] each school annually,” “[r]equire[] and review[] annual financial audits of schools,” “[p]rovide[] an annual written report to each school,” and “enforce[] stated consequences for failing to meet performance expectations or compliance requirements.” NACSA P&S at 11. A quality authorizer establishes charter school contracts that also accommodate special educational models and include “clear, measurable, performance standards to judge the effectiveness of alternative schools and virtual schools, if applicable—requiring appropriately weighted,

rigorous, mission-specific performance measures and metrics that credibly demonstrate each school's success in fulfilling its mission and serving its special population." NACSA P&S at 10. Every authorizer—including local school districts, state education agencies, and state boards and commissions—must evaluate and weigh an operator's proposed mission, educational program, financial planning and viability, and operational execution plans to determine when it merits approval.

Thus, a private entity like St. Isidore cannot become a charter school operator unless and until it is endorsed by a state authorized actor and recognized by the state as a public school. Without that endorsement, it is just a private entity aspiring to be a school. It cannot enroll public school students. It cannot enjoy the benefits and immunities that accompany status as a public school. It cannot obtain the per-student general state aid that funds public schools (or access the federal funding reserved for public schools). Only after authorization can the charter school enroll public school students and collect the public dollars allocated under the state law to all public schools. Once approved by a government sponsor to operate a public charter school, the private nonprofit organization applicant becomes a public school, and it is treated as such under the law.

Once approved, authorizers regularly gather data on a school's performance and analyze it against the goals and standards set for the school. Authorizers implement a standards-based evaluation process that identifies "objective and verifiable measures of student achievement" and targets that the school must meet as a condition of renewal. *Id.* Authorizers must use "multiple measures to evaluate school quality and

student success which include long-used and normed measures of academic performance and rigorous, credible mission-specific performance measures that assess each school's success in fulfilling its mission.” *Id.*; see also Me. Stat. tit. 20-A, §§ 2409, 2410; Nev. Rev. Stat. § 388A.229 (sponsor duty to collect and analyze data); Wash. Rev. Code § 28A.710.170. They must define the sources of academic, financial and organizational data that will form the evidence base for ongoing and renewal evaluation. *Id.*; see also 14 Del. Admin. Code § 275(4.2-4.5); Nev. Rev. Stat. § 388A.273; N.M. Stat. Ann. § 22-8B-12. The academic data includes “state-mandated and other standardized assessments, student academic growth measures, internal assessments, qualitative reviews, and performance comparisons with other public schools in the district and state.” NACSA P&S at 10.; see also Colo. Code Regs. § 301-88:3.3.04(C); 14 Del. Admin. Code § 275(4.2)-(4.3) (requiring Delaware charter schools comply with the State Public Education Assessment and Accountability System); Ohio Rev. Code Ann. § 3314.023(B).

More than 9,000 school districts in 34 states are potential charter school authorizers. See NACSA, *Authorizer Types Across the Country* (last accessed March 31, 2025) (identifying 34 states that permit local educational agencies, e.g., school districts, to be authorizers).<sup>6</sup> If Petitioners are successful, any number of these school districts and state boards across the country could be called upon to authorize religious charter schools. That would require local school officials throughout the country to undergo this process and establish standards for evaluating

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<sup>6</sup> Available at <https://qualitycharters.org/authorizer-types/>.

religious educational programs, each designed to teach a particular religious or faith tradition.

Each authorizer would need to develop expertise in a wide range of religious educational approaches, especially when the school's religious identity is a central part of its mission, and the capacity to discern which religious educational programs qualify as a high-quality program of instruction for a public charter school. They would have to examine the plans for religious instruction and assess the evidence that those approaches would meet applicable state standards and lead to desired academic outcomes for students. They would also have to design and deploy metrics that make it possible to measure whether schools are properly executing those plans. Then, those authorizers would have to monitor and observe each religious charter school's implementation of its educational plan, including its religious elements. Authorizers would also have to approve any material changes to the school's programs or operations.

Evaluating the proposals and setting expectations for religious charter school proposals and the resulting religious charter schools will require these state actors to judge the proposed school's religious mission and scrutinize the customs and practices enrolled students will be required to observe in service of that mission. Authorizers will be called upon to ask numerous complicated questions about any charter school where the religious nature of the school is central to the school's mission: Is the religious doctrine advanced by the proposed school consistent with public education requirements? Is there a track record of success in delivering the proposed religious instruction to students? Does the program of religious instruction include customs or practices that infringe upon the constitu-

tional rights of public school students who enroll, and if so, how are those challenges resolved? Does the proposed religious program of instruction align with state educational or achievement standards, including in math, science, and reading?

Without established standards for performance, how will authorizers assess the extent to which a religious charter school satisfies goals for religious instruction and thereby hold the school responsible? Must the authorizer develop standards for religious instruction that are endorsed by the state like math, science, and reading standards? For quality authorizing to take place, the answer to these questions is uniformly “yes.”

Like any other charter school applicant seeking to open a religious charter school, the nominally private character of Petitioner, St. Isidore—which is based on its initial corporate formation rather than the substantive nature of its mission as a public charter school—is completely “overborne by the pervasive entwinement of public institutions and public officials in its composition and workings.” *Brentwood*, 531 U.S. at 298. It is eminently fair to apply constitutional standards to the proposed charter school’s educational program and conclude that a decision to allow the delivery of religious instruction to public school students violates the Establishment Clause. *See* Ala. Code 16-6F-7(e); Colo. Code Regs. § 301-88:3.1-3.6; Ind. Code § 20-24-9-4 (corrective action; revocation of charter); Me. Stat. tit. 20-A, § 2409 (public charter school performance framework); Miss. Code Ann. § 37-28-31 (describing authorizer oversight responsibilities).

**C. Public School Chartering of Religious  
Charter Schools Would Obligate  
Authorizers to Engage in Evaluation,  
Consideration, and Approval of  
Religious Doctrine**

This Court's state action inquiry also asks whether the state has exercised coercive power over a private actor or provided "such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *See Blum*, 457 U.S. at 1004. Public school chartering regularly mandates that charter school authorizers acting on behalf of the state direct actions taken by charter schools. Although authorizers do not have control over a charter school's delivery of instruction day-to-day, they do control the entity's ability to operate as a public school and determine its ability to remain open. Authorizers control whether a private entity will be empowered to do the very thing it was created to do: operate as a public charter school that enrolls students for free and provides those students instruction.

If the Court sides with the Petitioners, the very nature of authorizing will require government-endorsed sponsors to evaluate and approve the religious teachings espoused by each charter school operator that elects to run a religious charter school. Authorizers are required to make judgments between high-quality and low-quality educational approaches. Approval of some religious charter school proposals but not others risks constant litigation and exposure to regular accusations of animosity to one particular religion or another. Even when the rejection of a charter school application is based on generally applicable educational standards, such rejection could be challenged as biased, discriminatory, or a reflection

of the state actor's purported distrust of a particular religious practice.

Petitioners argue that St. Isidore's receipt of state aid is not impermissible endorsement because it is dependent on the enrollment of students, an action that reflects choices made by individual parents and students. Pet. Br. at 9. However, before those choices can be made, the critical choice is made by a government-endorsed actor to approve the operator as a religious public school in the first instance. Unlike in *Espinoza* and *Carson*, the state does not simply facilitate families' choices by providing aid. Here, the government itself, through its authorizers, affirmatively approves the religious public school. Pet. Br. at 49.<sup>7</sup> And, in some cases, enrollment in public charter schools is not voluntary. In some communities, the only public school choice is a public charter school. *See generally* Douglas N. Harris & Matthew Larsen, *The Effects of the New Orleans Post-Katrina School Reforms on Student Academic Outcomes* (Feb. 10, 2026) (describing New Orleans's "all charter" approach).<sup>8</sup>

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<sup>7</sup> In fact, a determination by this Court that public charter schools are not state actors, a product of statutory delegation, or otherwise an instrumentality of the state could lead to the elimination of charter laws under certain state constitutions. *Cf. El Centro de la Raza v. State*, 428 P.3d 1143, 1148-51 (Wash. 2018) (en banc) (holding that charter school act establishing up to forty charter schools designated as public schools satisfied the state constitution's requirement of a "general and uniform system of public schools").

<sup>8</sup> Additionally, California has set forth a process by which school districts can become "all-charter districts." *See* Sarah Favot, *LA Unified Explores Becoming an All-Charter School District*, L.A. Daily News (Aug. 28, 2017), <https://www.dailynews.com/2015/11/17/la-unified-explores-becoming-an-all-charter-school-district/> (describing the process for a California school

Petitioners and their amici point to the success public charter schools have had to date in improving academic outcomes for students across the nation. That record of performance stems in part from the hard work charter school authorizers do to identify high-quality charter school proposals and to hold those charter school operators responsible for performance. A decision in Petitioners' favor would undoubtedly complicate that work by forcing authorizers to grapple with the state's authority to permit a public school to make religious educational programming a core feature of its schooling.

## **II. States Do Not Violate the Free Exercise Clause By Choosing to Provide a Secular Education In Their Public Schools**

Article I, Section 5 of the Oklahoma Constitution requires the state to “establish[] and maint[ain] . . . a system of public schools, which shall be open to all the children of the state and free from sectarian control[.]” Okla. Const. art. I, § 5. Article 13, Section I further provides that “[t]he Legislature shall establish and maintain a system of free public schools wherein all the children of the State may be educated. *Id.* art. XIII, § 1. As set forth, *supra*, and in the Respondent’s Brief at 27-36, the charter schools that are formed and maintained are public schools by statutory design.

In *Carson as next friend of O.C. v. Makin*, 596 U.S. 767, 785 (2022), this Court recognized that “Maine may provide a strictly secular education in its public schools” without running afoul of the Free Exercise Clause. That is exactly what Oklahoma has done here.

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district to become an all-charter district and noting eight districts as “all-charter”).



Other state laws that govern charter school authorizers would compel them to do the same if they were presented with a charter school application for a religious educational program.

Oklahoma's and many other states' charter school programs are therefore different than the programs this Court addressed in *Carson*, *Espinoza*, and *Trinity Lutheran*. In those cases, the states "subsidize[d] private education" and, once they chose to do so, could not "disqualify some private schools solely because they [were] religious." *Carson*, 596 U.S. at 785 (quoting *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 487 (2020)). The programs at issue were "otherwise generally available public benefit program[s]." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 466 (2017). Here, by contrast, Oklahoma has not created an otherwise generally available public benefit program, nor has it subsidized private education.

Charter school laws do not create a "generally available public benefit program." They create public schools. As noted *supra* I.A.1, public school chartering reflects a state's exercise of its constitutional duty to establish a system of free public schools for all of its students. Nor are charter schools, in Oklahoma or elsewhere, simply vehicles for the provision of subsidies to private schools. In fact, Oklahoma law prohibits entities formed as private schools from applying to operate a public charter school. *See* Okla. Stat. tit. 70, § 3-134(C) ("A private school shall not be eligible to contract for a charter school or virtual charter school under the provisions of the Oklahoma Charter Schools Act."). Also, as noted *supra* I.A.2, charter schools become public entities by virtue of authorizer approval. That decision by an authorizer is what enables the school to enroll public school

students tuition-free and to acquire the benefits and burdens of other public schools created by the state.

Through the chartering of public schools, states promote and grow their *public* education system. Neither Oklahoma, nor any other state that insists its public education system be “strictly secular,” *Carson*, 596 U.S. at 785, violates the Free Exercise Clause.

### CONCLUSION

NACSA respectfully requests that this Court affirm the decision of the Oklahoma Supreme Court. To hold otherwise would entwine authorizers, the entities authorized by states to approve the creation of public charter schools, ensure public charter schools are high-quality, free, open to all, and nondiscriminatory, and empowered to require public charter schools to cease operations and dissolve, in the business of evaluating, approving, and rejecting religious education—the very result that the First Amendment was designed to prevent.

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April 7, 2025

## **APPENDIX**

## APPENDIX TABLE OF CONTENTS

	Page
APPENDIX A: STATES THAT HAVE ADOPTED AUTHORIZING STANDARDS BASED ON NACSA PRINCIPLES & STANDARDS.....	1a

**APPENDIX A****STATES THAT HAVE ADOPTED  
AUTHORIZING STANDARDS BASED ON  
NACSA PRINCIPLES & STANDARDS**

Alabama	Ala. Code 16-6F-6
Colorado	Colo. Code Regs. § 301-88:3.0
Delaware	14 Del. Admin. Code § 275(1.1)
Hawaii	Haw. Rev. Stat. § 302D-6
Illinois	105 Ill. Comp. Stat. 5/27A-7.10(e)
Indiana	Ind. Code § 20-24-2.2-1.5
Louisiana	La. Stat. Ann. §17:3981(4)
Maine	Me. Stat. tit. 20-A, § 2405(3)
Mississippi	Miss. Code Ann. § 37-28-9(1)(a)
Nevada	Nev. Rev. Stat. § 388A.223(2)
New Mexico	N.M. Stat. Ann. § 22-8B-5.3(H)
Ohio	Ohio Rev. Code Ann. § 3314.016(B)(3)
Oklahoma	Okla. Stat. tit. 70, § 3-134(K)
South Carolina	S.C. Code Ann. § 59-40-55(A)
Tennessee	Tenn. Code Ann. § 49-13-108(f)
Washington	Wash. Rev. Code § 28A.710.100(3)
Wisconsin	Wis. Stat. § 118.40(3m)(b)