NO. 24-394

IN THE

Supreme Court of the United States

OKLAHOMA STATEWIDE CHARTER SCHOOL BOARD, et al.,

Petitioners,

v.

GENTNER DRUMMOND, Attorney General for the State of Oklahoma, ex rel. STATE OF OKLAHOMA,

Respondent.

On Writ of Certiorari to the Supreme Court of Oklahoma

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Respondent concedes that the Free Exercise Clause forbids a State from excluding a private organization from a generally available public program because of the group's religion. And he does not deny that if St. Isidore is a private actor not engaged in state action, the Board was right to approve its application. So this case turns on whether St. Isidore is a state actor without free-exercise rights.

There are two possible paths to state-actor status: the governmental-entity and state-action tests. But as cases like *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995), and *Rendell-Baker* v. *Kohn*, 457 U.S. 830 (1982), make clear, Respondent cannot satisfy either.

So he invents a third way, proffering an arbitrary, six-factor, universal definition of "public school" that he claims transforms privately operated charter schools into governmental entities. It does not. Such alchemy has no basis in constitutional text or this Court's cases. Embracing it would erode the "constitutional boundary between the governmental and the private" and shrink the "robust sphere of individual liberty" that line protects. *Manhattan Cmty. Access Corp.* v. *Halleck*, 587 U.S. 802, 808 (2019).

Unable to win on the law, Respondent resorts to fearmongering. But ruling for Petitioners won't have any of the effects Respondent imagines. Instead, it will ensure religious organizations have equal access to Oklahoma's charter-school program, opening life-changing educational opportunities for interested children and families, especially in low-income communities. The Court should reverse.

ARGUMENT

I. Respondent's public-school argument tries to evade the Court's established framework.

Respondent's lead argument is that Oklahoma may exclude religious charter schools because six features—"free, open to all, funded by the State, subject to state control, nondiscriminatory, and nonsectarian"—purportedly establish charter schools as "public schools" and thus governmental actors for federal constitutional purposes. Resp.Br.16–17, 27. The Court need not constitutionalize a universal public-school definition. Oklahoma law already defines "public school" to mean free and publicly funded. Okla. Stat. tit. 70, § 1-106. And the Court's governmental-entity and state-action tests—not Respondent's contrived public-school analysis—already provide the proper lenses for determining charter schools' governmental or private status for constitutional purposes.

Seeking a constitutional hook, Respondent seizes on a single line of dicta in *Carson* v. *Makin*: "Maine may provide a strictly secular education in *its* public schools." 596 U.S. 767, 785 (2022) (emphasis added); Resp.Br.2, 4, 16, 21, 24–25. But nothing suggests the Court had in mind privately run charter schools. In fact, the modifier "its" shows the Court was referring to Maine's government-run schools. And the same paragraph in *Carson* makes clear that a State cannot exclude religious groups from school-choice programs when it decides that, to meet specific educational needs, it will "*not* … operate schools of its own." 596 U.S. at 785.

Nor does *Carson* support Respondent's claim that universal features define public schools nationwide. Noting a few distinctions between Maine's traditional public schools and private schools, the Court discussed *some* of those features—like whether they charge "tuition" or admit "all students." *Id.* at 783. But the Court didn't mention many of them, much less constitutionalize a public-school definition.

Respondent's discussion of various statutes defining public schools illustrates the arbitrariness of his approach. Resp.Br.27–28. Oklahoma law defines "public school" using only two of Respondent's factors—free and public funding. Okla. Stat. tit. 70, § 1-106. And a federal statute he cites requires *either* "operat[ion] by a State" *or* "the use of governmental funds." 42 U.S.C. 2000c(c). Respondent would override those legislative choices by imposing his definition on the federal government and every State.

Further, Respondent's factors strategically omit common features of traditional public schools *not* shared by privately operated charter schools, such as governance by publicly appointed or elected boards and the power to levy taxes and issue bonds. EdChoice.Am.Br.8; Okla. Const. art. X, § 15(E) (allowing school districts to issue bonds guaranteed by the State); Okla. Stat. tit. 70, § 3-136(E) (2023) (§ 3-136(F) (2024)) (forbidding charter schools "to levy taxes or issue bonds").

By telling the Court it "need go no further" than his public-school argument, Resp.Br.17, Respondent tries to sidestep the governmental-entity and state-action questions, just like the plaintiffs attempted in *Manhattan Community Access*, 587 U.S. at 811. It's not hard to see why.

Consider how poorly each of Respondent's factors fares under the Court's relevant precedents:

- Providing "free" services doesn't create state action. *Id.* at 815.
- Being open to all comers doesn't create state action. *Ibid.* (providing services "on a first-come, first-served basis").
- Government funding doesn't create state action. *Rendell-Baker*, 457 U.S. at 840–41.
- Respondent's subject-to-state-control factor is a watered-down version of this Court's demanding governmental-entity test. *Lebron*, 513 U.S. at 394–99; pp. 9–11, *infra*.
- Nondiscrimination regulations, which often apply to private schools, 20 U.S.C. 1681(a), don't create state action, *Manhattan Cmty. Access*, 587 U.S. at 815.
- And smuggling the nonsectarian requirement into the list impermissibly "manipulate[s]" the program description "to subsume the challenged condition." *Carson*, 596 U.S. at 784.

Given all this, it's no wonder Respondent tries to constitutionalize his public-school definition and substitute it for this Court's governmental-entity and state-action tests. Accepting that maneuver will dilute and confuse the existing constitutional framework, invite others to invent more subject-specific governmental-entity tests, and allow States to use labels to strip away private rights. The Court should reject Respondent's gambit.

II. St. Isidore is not engaged in state action.

Despite previously relying on this Court's state-action tests, Pet.App.187a–92a (24-396), Respondent now concedes those tests don't "make[] sense here," Resp.Br.26. He instead insists that St. Isidore is a government entity. It is not.

A. St. Isidore is not a governmental entity for First Amendment purposes.

Respondent's new preference for governmental-entity analysis is perplexing because it requires him to show that St. Isidore—a privately created and operated organization—*is the government*. This Court has applied the dual requirements of state creation and state control stringently because if both are satisfied, the entity loses *all* constitutional rights. Respondent cannot make either showing here.

1. St. Isidore is not state-created.

Respondent's government-entity arguments rely on three of this Court's cases: *Biden* v. *Nebraska*, 600 U.S. 477, 489–94 (2023); *Lebron*, 513 U.S. at 394–99; and *Arkansas* v. *Texas*, 346 U.S. 368, 370–71 (1953). Yet Missouri's creation of the Missouri Higher Education Loan Authority (MOHELA), Congress's formation of Amtrak, and Arkansas's founding of its flagship university look nothing like St. Isidore's participation in Oklahoma's charter-school program.

a. St. Isidore was privately created.

Missouri's legislature created MOHELA by name through legislation, declaring it "a body politic." Mo. Rev. Stat. § 173.360; see *Biden*, 600 U.S. at 489 (citing that statute). Amtrak, too, "was created by a special

statute." *Lebron*, 513 U.S. at 397; accord *Department of Transp.* v. *Association of Am. R.R.s.*, 575 U.S. 43, 55 (2015) ("political branches created Amtrak"). As was the University of Arkansas. *Arkansas*, 346 U.S. at 370 & n.1 (citing Ark. Acts 1871, No. 44). No private actor did anything to create these governmental entities.

In contrast, far from passing special legislation forming St. Isidore, the State started a charter-school program and *invited* private organizations to apply. Okla. Stat. tit. 70, § 3-134(C). Two Catholic dioceses then founded St. Isidore, drafted an extensive proposal spanning hundreds of pages, submitted it to the State, and negotiated a contract. This participation in a government funding program is not state creation, and *Biden*, *Lebron*, and *Arkansas* do not suggest otherwise.

Inviting private organizations to apply for a funding program and enter a contract if approved would be a strange way to create a governmental entity. That is especially true considering the charter school must develop its own "[p]lans to acquire … start-up funding." Okla. Admin. Code 777:10-3-3(b)(6)(D); J.A.56 (mentioning St. Isidore's start-up plans). And Oklahoma's decision to authorize *non-governmental entities* to sponsor privately operated charter schools, Okla. Stat. tit. 70, § 3-132(A)(2) (2024), underscores the point because it would be odd if a contract between two *private* parties could somehow amount to *state* creation of a governmental entity.

b. St. Isidore is not two entities.

Because St. Isidore is not state-created, Respondent tries to split it in two: St. Isidore the applicant (an admittedly private organization, see Resp.Br.35); and St. Isidore the charter school (a supposedly separate governmental entity, Resp.Br.8–9). For support, he cites a few statutory provisions saying Oklahoma "charter schools" are "established by contract." Okla. Stat. tit. 70, § 3-132(D) (2023) (§ 3-132.2(C)(1) (2024)); see *id.* § 3-134(C) (similar); Resp.Br.8–9, 17, 35, 40. And from that, he posits that a charter school is a new and separate entity arising from the contract.

That sleight of hand doesn't work. The charter school "established by contract" refers to "the program that St. Isidore … applied to run," not a new entity. U.S.Br.23 n.3; Pet.App.113a–14a (24-396) (authorizing the program). Nothing in the Charter Schools Act requires *two* sets of corporate paperwork, boards of directors, or Secretary of State filings. The Act contemplates *one* "organizational structure" and *one* "governing board." Okla. Stat. tit. 70, § 3-134(B)(2). And the contract itself identifies the "Charter School" as the "privately operated religious non-profit organization." Pet.App.111a (24-396). Even the Oklahoma Supreme Court—which cited one of these statutes and noted its use of "established," Pet.App.17a (citing Okla. Stat. tit. 70, § 3-132(D) (2023))—didn't view St. Isidore as two distinct entities, Pet.App.7a. Nor did Respondent—at least not until the case reached this Court.

Respondent's new two-entity theory renders nonsensical other parts of the Charter Schools Act. Consider just one example. The Act states that "[i]f a charter is revoked or nonrenewed, *the charter school*

… shall disclose the revocation or nonrenewal in any subsequent application." Okla. Stat. tit. 70, § 3-137(K) (2024) (emphasis added). Under Respondent's view, though, once the contract ends, the charter school ceases to exist and would not be around to reapply.

Respondent's other alleged support for his two-entity theory doesn't help. He notes "private school[s]" cannot apply for the charter-school program. Resp.Br.9 (quoting Okla. Stat. tit. 70, § 3-134(C)). But that's because allowing a private school to participate would "provide a means by which to keep open a school that may otherwise be closed," Okla. Stat. tit. 70, § 3-131(B), and the Act's purpose is to provide "additional academic choices," not to prop up existing ones, § 3-131(A)(4).

Respondent also asserts that a charter school "'may enter into contracts and sue and be sued' (*as a distinct legal entity*)." Resp.Br.9 (quoting Okla. Stat. tit. 70, § 3-136(D) (2023) (§ 3-136(E) (2024)) (emphasis added). But the phrase "as a distinct legal entity" isn't in the Act because the Act doesn't purport to create a new entity. This provision merely clarifies that the private organization, like other government contractors, *retains* these powers after entering the contract.

Stretching further, Respondent cites a provision requiring multiple charter schools with common leadership to be "separate and distinct." Resp.Br.9 (citing Okla. Stat. tit. 70, § 3-136(B) (2024)). But that provision doesn't say a charter school is separate from an applicant. All it says is different schools must be separate from each other for issues like "accounting, budgeting, recordkeeping, [and] admissions." Okla. Stat. tit. 70, § 3-136(B) (2024). That makes sense because each school receives independent funding.

Respondent next cites a provision stating that charter-school "property bought with state funds reverts" to the sponsor upon closure. Resp.Br.9 (citing Okla. Stat. tit. 70, § 3-136(F) (2023) (§ 3-136(G) (2024))). The other side of that coin, though, is that the private party operating the school *keeps* property purchased with private funds. That shows the school is part of *the private organization*—not a separate state entity.

Regardless, Respondent's two-entity theory can't establish state creation. No matter the number of entities, the charter school is formed by private initiative. That's entirely unlike the governmental entities in *Biden*, *Lebron*, and *Arkansas*, each of which the government created unilaterally by statute with no private involvement.

2. St. Isidore is not state-controlled.

Respondent's governmental-entity argument fails for another reason: St. Isidore is not state-controlled. *San Francisco Arts & Athletics, Inc.* v. *U.S. Olympic Comm.*, 483 U.S. 522, 543 n.23, 545 n.27 (1987) (declining to treat a "federally created" corporation as "governmental" where the government couldn't "control [its] actions directly"). The state-control factor sets a high bar. It demands more than extensive state regulation, which doesn't even suffice for state action, *Manhattan Cmty. Access*, 587 U.S. at 815–16, much less government-entity status. Indeed, *Biden*, *Lebron*, and *Arkansas* teach that the State must exercise direct and ultimate control within the entity itself. And the State has no such control here.

a. The State does not select St. Isidore's board.

The key feature connecting *Biden*, *Lebron*, and *Arkansas* is that the government chose all—or, in *Lebron*, all but one—of the relevant entities' board members. *Biden*, 600 U.S. at 490 (MOHELA's board members were "state officials" or "appointed by the Governor and approved by the Senate"); *Lebron*, 513 U.S. at 385 (the President appointed six of Amtrak's nine board members; two were selected by the Secretary of Transportation; and the last was chosen by the other eight); *Arkansas*, 346 U.S. at 370 (the university was "governed by a Board of Trustees appointed by the Governor with consent of the Senate").

A state-selected board gives rise to state control for two reasons. First, the State wields control from inside the entity rather than merely regulating or monitoring it from the outside. Second, by selecting the people at the top of the organization, the State maintains direct and ultimate control over the entity's internal decision-making and activities—ranging from big-picture "mission" setting to fine details like dictating "day-to-day operations." *Association of Am. R.R.s.*, 575 U.S. at 55.

Respondent concedes "the State does not select charter schools' governing boards." Resp.Br.35. Nor can the State remove board members. So Respondent can only argue that "the Court has never described governmental board appointments as a *necessary* condition of a government entity." Resp.Br.36. Yet *all* the cases he cites involved government-selected boards, and nothing in the Court's caselaw supports finding the test satisfied when that key feature is missing.

At a minimum, other facts must show that the State has injected itself into a charter school's internal decision-making and exercised direct and ultimate control over its operations. No facts establish that here. So state control does not exist even assuming a government-selected board is not required.

b. Contracting and oversight do not equal state control.

Oklahoma charter schools possess broad autonomy on a host of issues:

- Setting the school's "mission," Okla. Stat. tit. 70, § 3-134(B)(1); contra *Association of Am. R.R.s.*, 575 U.S. at 55 (government "define[d] [Amtrak's] mission");
- Choosing "the organizational structure," Okla. Stat. tit. 70, § 3-134(B)(20) (2023) (§ 3-134(B)(19) (2024));
- Establishing "hiring" and other "employment policies," § 3-134(B)(4)&(22) (2023) (§ 3-134(B)(4)&(21) (2024));
- Addressing "personnel" issues, § 3-136(B) (2023) (§ 3-136(C) (2024));
- Selecting "the academic program," "learning environment, class size and structure, curriculum," and "teaching methods," § 3-134(B)(13)–(14) (2023) (§ 3-134(B)(12)–(13) (2024));
- Creating "student discipline policies," § 3-134(B)(19) (2023) (§ 3-134(B)(18) (2024));
- Adopting other "policies" and making "operational decisions," § 3-136(A)(8) (2023) (§ 3-136(A)(7) (2024)); Pet.App.120a (24-396);

- Exercising "fiscal control over the [public] funds received," Okla. Admin. Code 210:40-87-3(a)(3);
- And "manag[ing] on a day-to-day level," as Respondent himself acknowledges, Resp.Br.35; contra *Association of Am. R.R.s.*, 575 U.S. at 55 (government "specif[ied] many of [Amtrak's] day-to-day operations").

Though the State reviews some of these decisions during the contracting process and monitors others to ensure legal and contractual compliance, it does not dictate them. See Okla. Admin. Code 777:10-3-3(e)(6)(E) (allowing "negotiation of contract terms"). As with other government contractual relationships, review and supervision do not equal state control.

Respondent takes several shots at minimizing charter schools' broad autonomy and questioning their nongovernmental character. None hit the mark.

1. He first downplays the admitted "flexibility" given charter schools "in designing their curricula" because the Board reviews the initial curriculum overview and approves subsequent "material" changes. Resp.Br.9–10, 15. But the Board's deferential review simply ensures core "state standards" are met; it does not second-guess the school's overall focus or the details of its curricular choices. Okla. Stat. tit. 70, § 3-134(B)(13) (2023) (§ 3-134(B)(12) (2024)). So while the Board might tell a music-focused charter school to teach a core math skill, it cannot order the school to change its focus from music to math. Ultimately, Respondent concedes there's only outside-looking-in "regulation and oversight as to curriculum." Resp.Br.3. That doesn't establish state control. *Manhattan Cmty. Access*, 587 U.S. at 815–16.

2. Respondent next dismisses charter schools' conceded "flexibility over their personnel and governance policies" because the schools' board members must follow "conflict-of-interest" and "continuing-education" rules. Resp.Br.11, 30–31. Yet these commonplace requirements often apply to private individuals. *E.g.*, Okla. Stat. tit. 36, § 6220.1 (conflict-of-interest rule for insurance adjusters); Okla. Stat. tit. 59, § 1616.1 (continuing education for speech pathologists). Nothing about them amounts to state control or somehow transforms the obligated individuals into government actors.

As for charter-school employees, Respondent says "personnel matters largely track the requirements for traditional public schools." Resp.Br.32. Not so. Charter-school boards set their own "hiring" and "employment policies." Okla. Stat. tit. 70, § 3-134(B)(4)&(22) (2023) (§ 3-134(B)(4)&(21) (2024)); § 3-136(B) (2023) (§ 3-136(C) (2024)).

Pivoting, Respondent insists that charter-school employees "participate" in the State's "retirement and insurance programs." Resp.Br.30; *id.* at 44–45. But those programs are optional and thus cannot reflect state control. See Pet.App.157a (24-396) (most Oklahoma virtual charter schools don't participate). Even when charter schools opt in, this additional contractual "compensation" doesn't make them governmental entities. *Caviness* v. *Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 817 (9th Cir. 2010) (making this point for state-action analysis).

3. Waving off Petitioners' illustrative list of statutory demands imposed on traditional public schools but not charter schools, Respondent claims "many … concern the administrative functioning of local school

boards." Resp.Br.32. But *most* do not. *E.g.*, Okla. Stat. tit. 70, §§ 6-101.20–6-101.31 ("Teacher Due Process Act of 1990"). And those that Respondent says "could not logically apply to charter schools," Resp.Br.32, only underscore the autonomy given to charter-school boards. *E.g.*, Okla. Stat. tit. 70, § 5-107A (prescribing number and terms of local school board members and election procedures).

4. Analogizing to *Biden*, Respondent invokes the Board's narrow power to terminate a charter contract for "failure to meet" performance or "fiscal management" requirements, "violations of the law, or other good cause." § 3-137(F)–(G) (2023) (§ 3-137(F), (H) (2024)); Resp.Br.11–12, 17, 34, 36. But Missouri's authority to "dissolve[]" MOHELA was unfettered and unilateral, *Biden*, 600 U.S. at 491, while the Board's power to terminate a charter contract is entirely different:

- Far from unfettered, it's carefully constrained to the limited circumstances just mentioned. Okla. Stat. tit. 70, § 3-137(F)–(G) (2023) (§ 3-137(F), (H) (2024)).
- The school receives notice and an opportunity for "a public hearing" with "representation by counsel." § 3-137(I) (2023) (§ 3-137(J) (2024)).
- The school can close itself by not renewing its contract, § 3-137(C), a power starkly at odds with state control.
- And terminating the contract doesn't dissolve the entity; it only removes the school's authority to operate as a charter school. See § 3-137(K) (2024) (allowing the "charter school" to reapply).

Also, in *Biden*, all MOHELA's assets would pass to Missouri upon dissolution. But here, only charter-school "property purchased with state or local funds" reverts to the "sponsor"—which might be a private university, § 3-132(A)(2) (2024)—while the private entity keeps the rest, § 3-136(F) (2023) (§ 3-136(G) (2024)). The State's inability to claim all charter-school property proves that it lacks true control.

5. Respondent also cites a provision stating that charter schools are "considered a local education agency for purposes of funding." Resp.Br.8 (quoting Okla. Stat. tit. 70, § 3-142(C) (2023) (§ 3-142(D) (2024))). Yet this provision, which serves the sole purpose of securing public funding, does not address whether—let alone establish that—the State has control over charter schools.

6. The same goes for the Oklahoma judicial-ethics advisory opinion summarily declaring that charter-school boards are "governmental" and judges need approval to serve on them. Resp.Br.11, 36 (citing Okla. Jud. Ethics Op. 2023-3, 538 P.3d 572 (Okla. Jud. Eth. Adv. Pan. 2023)). That short, conclusory opinion—which cites *only* the statute labeling charter schools "public," Okla. Stat. tit. 70, § 3-132(D) (2023) (§ 3-132.2(C)(1) (2024))—adds nothing to the constitutional governmental-entity analysis.

7. Finally, Respondent cites a few lower-court cases deeming other States' charter schools "government entities" for varying purposes. Resp.Br.34. Those cases did not apply the constitutional test from *Lebron* and *Biden*. *E.g.*, *Graham* v. *Board of Educ.*, 8 F.4th 625, 627–30 (7th Cir. 2021) (interpreting "governmental plan" under ERISA); *McNaughton* v. *Charleston Charter Sch. for Math & Sci., Inc.*, 768

S.E.2d 389, 398–99 (S.C. 2015) (assessing state action in state fee-shifting statute). And other—better-reasoned—decisions go the other way. *E.g.*, *Voices for Int'l Bus. & Educ., Inc.* v. *NLRB*, 905 F.3d 770, 773–78 (5th Cir. 2018) (holding that Louisiana charter schools are not "political subdivisions" because the State doesn't "select [their] board members").

In sum, a private organization operated by a private board is not state-controlled simply because it enters a government contract and is subject to general oversight. Declaring St. Isidore a governmental entity would transform *many* other government contractors, including religious groups providing charitable services, into arms of the State. Pet.Br.38–39. Nothing in this Court's caselaw requires that result.

B. The Court's state-action tests are not satisfied.

Turning to the state-action tests, Respondent raises only his delegation theory and the exclusive-public-function test, but neither of them can save him.

1. Contracting with private entities to provide educational options does not delegate a state duty.

Respondent has no answer to Petitioners' point that *Rendell-Baker* "already rejected [his] delegation argument." Pet.Br.36. There, the Court spurned the view that state action exists when a privately operated and publicly funded school "provides a service that the State is required to provide." *Rendell-Baker*, 457 U.S. at 849–50 (Marshall, J., dissenting). That by itself forecloses Respondent's delegation theory.

Respondent assumes Oklahoma "has outsourced" its duty "to provide a system of free, publicly funded schools." Resp.Br.18. But Oklahoma "long ago fulfilled that mandate by establishing a comprehensive system of *traditional* public schools." U.S.Br.32–33 (emphasis added). Charter schools simply "supplement, rather than supplant, those … schools." *Ibid.*

West v. *Atkins*, 487 U.S. 42 (1988), doesn't control here because the delegation there was total and left the plaintiff without alternatives. Pet.Br.35–36. That the State also employed "a full-time physician," Resp.Br.38, doesn't change the fact that, *for the plaintiff*, the State's delegation was total because he "was not free to … see a different physician." *West*, 487 U.S. at 44. And though Respondent dismisses the total delegation and lack of choice in *West* as irrelevant, Resp.Br.38, the only other context in which this Court has applied the delegation principle also involved those features. *Edmonson* v. *Leesville Concrete Co., Inc.,* 500 U.S. 614, 627–28 (1991) (finding state action in private litigants' use of peremptory challenges because (1) peremptory challenges delegate that aspect of jury selection *entirely* to the litigant and (2) jurors whose presence is "required by summons" are forced to endure "discrimination as a condition of their participation").

Respondent's expansive delegation theory would revolutionize state-action doctrine. He doesn't even deny that it would transform faith-based foster agencies into state actors, contrary to *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 535–36 (2021). See also Pet.Br.37 (listing other examples). The Court need not—and should not—accept that sea change.

2. Educating K–12 students is not an exclusive public function.

St. Isidore's function—educating K–12 students—is not, and has never been, exclusively performed by the government. So Respondent gerrymanders the relevant function to providing "a free, public education open to all," and then claims *Rendell-Baker* demands this. Resp.Br.37–39. All that is wrong.

Rendell-Baker looked at the service the school provided: "education of maladjusted high school students." 457 U.S. at 842. Here, St. Isidore's service is K–12 education, so the Court should focus on that. Pet.Br.33. Under its narrowest reasonable reading, *Rendell-Baker* permits framing the function not as Respondent does but as educating K–12 students whose parents determine they are not best "served by traditional public schools." 457 U.S. at 842. That is not the government's exclusive domain. Pet.Br.33.

To evade *Rendell-Baker*, Respondent tries to limit it to controlling a school's "*termination decisions*." Resp.Br.39. But the Court did not mention personnel decisions in its exclusive-public-function discussion. *Rendell-Baker*, 457 U.S. at 842. That part of the opinion examined only the function of education, *ibid.*, which is what the Court should do here.

Respondent then invokes the compulsion portion of *Rendell-Baker*'s analysis, suggesting that state action exists because the State has "forbidden exactly what St. Isidore … would like to do"—operate "a sectarian … charter school." Resp.Br.39–40. That gets it exactly backward. Compulsion gives rise to state action when the State *compels* the complained-of conduct. *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 51–52 (1999). Here, Oklahoma law *forbids* it.

That's the opposite of compulsion. For these reasons, Respondent cannot satisfy any state-action test, and St. Isidore retains its free-exercise rights.

III. The Free Exercise Clause requires the State to include St. Isidore, and the Establishment Clause does not forbid it.

Respondent concedes that "when a State offers a generally available public benefit to private actors," the Free Exercise Clause prohibits it from "deny[ing] that benefit to religious entities." Resp.Br.19. Because St. Isidore is a private actor not engaged in state action, this rule controls, and strict scrutiny applies. Crucially, Respondent doesn't deny that if St. Isidore is engaged in private action, the State cannot exclude it.

Still, Respondent raises various Establishment Clause points that warrant a brief response. His main argument, Resp.Br.22–24, discusses cases involving government-run schools with compulsory attendance. But no one is compelled to attend any Oklahoma charter school. See p. 23, *infra*. So those cases don't help him.

He also appeals to the so-called "play in the joints between the Religion Clauses." Resp.Br.24. But "an interest in separating church and state more fiercely than the Federal Constitution cannot qualify as compelling." *Carson*, 596 U.S. at 781 (cleaned up).

Finally, Respondent doesn't deny that *every* level of American government historically funded private organizations that provided religious education. Pet.Br.4–6, 51–52. Instead, he denies any "history" of funding public schools that taught religion. Resp.Br.25. But by the time the Fourteenth Amend-

ment was ratified, public schools were widely operating and pervasively religious. John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich L. Rev. 279, 297–98 (2001). Government funding of religious education is deeply rooted in our nation's history. The Establishment Clause doesn't justify excluding St. Isidore.

IV. Respondent distorts the implications of ruling for Petitioners.

When all else has failed, Respondent resorts to fearmongering. He claims ruling for Petitioners will (A) end charter-school programs, (B) grant a "special status" to religious organizations, and (C) "revolutionize" this Court's religious-funding jurisprudence. Resp.Br.41–49. None of that is right.

A. Respondent imagines that if Petitioners prevail, the federal CSP will come "to a grinding halt." Resp.Br.41. That is so, he thinks, because "charter schools could no longer meet" two CSP requirements: (1) its bans on affiliating with religious institutions or implementing sectarian programs, and (2) its mandate to be a "public school … operated under public supervision and direction." *Ibid.* (quoting 20 U.S.C. 7221i(2)(B), (E)). He's wrong on both counts.

Start with the religious bans. Secular charter schools will continue to comply with them. And for religious charter schools, the federal government will follow its Biden-era regulations and Trump-era OLC guidance directing officials to apply these bans consistent with *Carson*, *Espinoza* v. *Montana Department of Revenue*, 591 U.S. 464 (2020), and *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449 (2017). *E.g.*, *Application for New Awards*, 88 Fed.

Reg. 65980, 65983 n.5 (Sept. 26, 2023) (making that commitment); *Exclusion of Religiously Affiliated Schools from Charter-School Grant Program*, 44 Op. O.L.C. 131, 131 (2020) (applying *Trinity Lutheran* to the CSP). That won't "halt" the CSP. It will *expand* it to include religious groups on equal terms.

Respondent downplays the OLC opinion because it condemned the affiliation ban yet "did not question" the sectarian-use ban. Resp.Br.41–42 n.11. But the opinion—issued before *Espinoza* and *Carson*—didn't resolve the sectarian-use ban either way. Now that *Carson* confirmed the Free Exercise Clause extends to religious-use discrimination, 596 U.S. at 787, the OLC opinion's logic equally condemns the sectarian-use ban—a result Congress and the Bush administration unsurprisingly overlooked before *Trinity Lutheran*, *Espinoza*, and *Carson*, contra Resp.Br.2.

Next consider the CSP requirement to be a "public school … operated under public supervision and direction." 20 U.S.C. 7221i(2)(B). Charter schools that are neither governmental entities nor state actors for constitutional purposes can still satisfy this requirement.

The term "public school" demands no additional showing beyond public supervision and direction because it refers to schools "under the administrative *supervision* or control of a government other than the Federal government." *Application for New Awards*, 90 Fed. Reg. 7119, 7123 (Jan. 21, 2025) (citing 34 C.F.R. 77.1) (emphasis added). "Supervision" and "direction" involve "overseeing" and "guidance," not control or compulsion. *Supervision*, Black's Law Dictionary (12th ed. 2024) ("overseeing"); *Direction*, Black's Law Dictionary ("guidance").

Further confirming that the CSP doesn't demand state control over charter schools are its many provisions *requiring* States to give charter schools "autonomy and flexibility," 20 U.S.C. 7221b(f)(1)(C)(i)(III); exemptions "from significant State or local rules that inhibit … flexible operation and management," 7221i(2)(A); and "a high degree of autonomy over budget and operations, including … personnel decisions," 7221b(f)(2)(A). In short, Oklahoma's oversight of charter schools satisfies the "supervision and direction" requirement without making them state actors.

Turning to state law, Respondent insists that ruling for Petitioners will render "the laws of 45 other States … unconstitutional." Resp.Br.18. But Respondent already told this Court the opposite, emphasizing that "each state has [its] own unique constitutional and statutory regime for regulating charter schools." Opp.21–22 & n.8. To the extent other States are affected by a ruling for Petitioners, the result will not be "chaos," Resp.Br.18, but equal access for religious organizations.

Respondent next contends that accepting Petitioners' arguments "could pose an existential threat" to charter schools in some States that prohibit education funding outside a single public-school system. Resp.Br.42 & n.12 (citing four cases). He's mistaken. A ruling for Petitioners would mean that Oklahoma charter schools are not governmental entities or state actors for *federal* constitutional purposes. It won't change how *state* law defines a public-school system.

Trying another tack, Respondent alleges that "some students' only free, public-school option … could become a religious [charter] school." Resp.Br.43. That claim is far-fetched. Respondent admits that New

Orleans—the lone community where "charter schools [were once] the *only* public-school option"—has begun moving away from that model. Resp.Br.7–8. And in the unlikely event Respondent's speculation came to pass, the legal analysis would be very different than it is here, where St. Isidore is one option among many and no one will be compelled to attend it.

Pressing further, Respondent cites websites from two Oklahoma charter schools—Western Gateway and John Rex—and claims they are "presumptively assigned" students. Resp.Br.12–13. But the websites tell a different story: students within certain boundaries are *entitled* to enroll, but families must take *action* to register, and no one is *required* to attend. Western Gateway Elementary, *Admissions*, perma.cc/HMY3-47TX (students "can enroll … AFTER receiving a … lottery seat offer"); John Rex Charter Schools, *How to Apply*, perma.cc/QR8R-Z6LV (residents in certain zones who have no kids attending the school "will have access to a registration form"). Oklahoma does not assign unwilling students to charter schools.

B. Respondent then asserts that Petitioners seek "a special status" for "religious charter schools." Resp.Br.4. Not so. Petitioners want religious groups to have the same access to the program as secular groups.

Respondent implies that St. Isidore has smuggled in a faith requirement for admission. Resp.Br.44. It hasn't. St. Isidore explicitly promised to welcome students of "different faiths or no faith," Pet.App.213a (24-396), and not to deny admission based on "religious preference," *id.* at 138a.

Respondent also objects that St. Isidore expects its students to adhere to its policies and refrain from disrespecting its beliefs. Resp.Br.44. But other charter schools may require students to comply with their policies and respect their distinctive features. A performing-arts charter school could discipline a student who refuses to attend school performances. The State cannot subject St. Isidore to worse treatment because its distinctive feature is religion.

Respondent next suggests that applying the ministerial exception to religious charter schools will violate the Establishment Clause because their employees "are paid with state tax dollars." Resp.Br.44–45. But tax dollars already reach private religious-school teachers through voucher programs, tax credits, and federal funding. That hasn't stopped this Court from applying the ministerial exception to religious schools. *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 591 U.S. 732, 762 (2020). And Oklahoma law gives charter schools autonomy over their employment matters. See p. 13, *supra*. So withholding the ministerial exception from religious groups while affording broad discretion to other charter schools would create its own constitutional concerns.

C. Respondent also asserts that a win for Petitioners will "revolutionize this Court's religious-funding jurisprudence." Resp.Br.46. It won't. This case poses no establishment problem because (1) public money passes to private religious entities through a neutral funding program and (2) the amount depends on the private choices of parents. Pet.Br.52–53. The Court has already approved this several times over. *Carson*, 596 U.S. at 781; *Espinoza*, 591 U.S. at 474; *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 662–63 (2002).

Respondent misunderstands the distinction between direct aid and private choice. Resp.Br.46–47. That distinction turns on which decisionmaker—the government or a private actor—directs the funds, not whether the funds physically pass through private hands. To hold otherwise would "exalt form over substance." *Mitchell* v. *Helms*, 530 U.S. 793, 818 (2000) (plurality opinion). The government in *Carson* "transmit[ted] payments" directly to the school. 596 U.S. at 772. But that didn't matter because the "independent choices" of parents directed the money, just as it does here. *Id.* at 781.

Questioning whether St. Isidore seeks only per-pupil funding, Respondent notes that healthcare benefits for employees in the state program don't "depend[] on student enrollment." Resp.Br.47–48. But St. Isidore hasn't said whether it's seeking those optional benefits. And even if it does, those funds are "based on the number of eligible … employees"—a figure that roughly corresponds to student enrollment. Okla. Stat. tit. 70, § 26-104(A). Respondent also complains that per-pupil funding isn't tied to a specific student because the calculation is based on an average figure. Resp.Br.48. But an administrable system requires some line like that. None of that changes the constitutional calculus.

Most dubious is Respondent's claim that Petitioners' arguments will force States to establish *government*-run schools that teach religion. Resp.Br.48. This case asks only that privately run religious schools be allowed to participate in a school-choice program. Oklahoma can still provide "a strictly secular education" in its government-run schools. *Carson*, 596 U.S. at 785.

* * *

A ruling for Petitioners will promote parental choice, individual liberty, educational diversity, and student achievement. It will also improve the lives of economically disadvantaged families and children by creating high-quality educational opportunities that are currently out of their reach. Excluding religious groups from Oklahoma's charter-school program denies these opportunities and causes real harm. The Court should uphold the First Amendment and end this discrimination.

CONCLUSION

The judgment of the Oklahoma Supreme Court should be reversed.

Respectfully submitted,

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APRIL 2025