

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

OKLAHOMA STATEWIDE CHARTER SCHOOL)
BOARD, ET AL.,)
Petitioners,)
v.) No. 24-394
GENTNER DRUMMOND, ATTORNEY GENERAL)
OF OKLAHOMA, EX REL., OKLAHOMA,)
Respondent.)

----- and
ST. ISIDORE OF SEVILLE CATHOLIC)
VIRTUAL SCHOOL,)
Petitioner,)
V.) No. 24-396
GENTNER DRUMMOND, ATTORNEY GENERAL)
OF OKLAHOMA, EX REL., OKLAHOMA,)
Respondent.)

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P R O C E E D I N G S

(10:07 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 24-394, Oklahoma Statewide Charter School Board versus Drummond, and the consolidated case.

Mr. Campbell.

ORAL ARGUMENT OF JAMES A. CAMPBELL
ON BEHALF OF THE PETITIONERS IN CASE 24-394

MR. CAMPBELL: Thank you, Mr. Chief Justice, and may it please the Court:

Oklahoma's charter school program relies on private organizations to create more educational options, and it empowers those groups to innovate by giving them broad autonomy over their mission, curriculum, and operations. Fueled by private ingenuity, those schools are thriving as they specialize in diverse subjects like Native American culture and environmental stewardship.

But state law categorically bars religious groups and programs, deeming religion to be the wrong kind of diversity. That religious exclusion violates the Free Exercise Clause. This Court has held three times in the

1 last eight years that when a state creates a
2 public program and invites private actors, it
3 can't exclude people or groups because they're
4 religious.

5 The Oklahoma Statewide Charter School
6 Board is committed to this principle of
7 religious neutrality. That's why it approved
8 St. Isidore's application based on the strength
9 of its proposal, refusing to reject the court --
10 the group because of its faith.

11 But Respondent won't tolerate groups
12 like St. Isidore operating in the program, so he
13 sued to exclude them. He now argues that the
14 First Amendment, specifically the Free Exercise
15 Clause, is irrelevant because St. Isidore is
16 part of the government.

17 But it's not. St. Isidore was
18 privately created by two Catholic organizations,
19 and it is controlled by a privately selected
20 board of directors. Under this Court's tests,
21 St. Isidore is neither the government nor
22 engaged in state action.

23 There are already hundreds of families
24 that have signed up for St. Isidore. They're
25 part of Oklahoma's community too. They should

1 not be treated as second-class.

2 I welcome the Court's questions.

3 JUSTICE THOMAS: Well, the argument is
4 that either you are engaging in some sort of
5 state action, which is -- I'd like you to at
6 least discuss that because this is -- isn't the
7 normal context in which we see that -- and that
8 you are a state entity. You're a public school,
9 a public Catholic charter school. And I think
10 you should address that because those seem to be
11 at the crux of the -- of the differing opinions
12 and the argument.

13 MR. CAMPBELL: Yeah -- yes, Justice
14 Thomas. So, to start with governmental entity,
15 there are two requirements that this Court has
16 established. The first is state creation, and
17 the second is state control.

18 There's no state creation here because
19 St. Isidore was established by two private
20 Catholic organizations and they applied to
21 participate in a program. They built their own
22 charter school program. They came up with their
23 own startup funding, and they asked to be a
24 part.

25 That looks nothing like what this

1 Court has found to be state creation in cases
2 like Lebron, Biden, and Arkansas. In all of
3 those cases, the entity was created by name
4 through special legislation.

5 Nor is there government control here
6 because St. Isidore is operated by a privately
7 selected board. Again, in all three of the
8 cases that my friend on the other side cites,
9 there was a state-selected or a
10 government-selected board, and that's different
11 from this case because, as he admits, we don't
12 have that here.

13 Now why does that matter? It's
14 critical because a state-selected board has
15 government control within the organization. All
16 we have here is government oversight outside of
17 the organization. And this Court has been clear
18 in its state action cases that government
19 regulation from the outside is not sufficient to
20 constitute state control for -- or -- I'm
21 sorry -- is not sufficient to constitute state
22 action, let alone control, for purposes of
23 governmental entity analysis.

24 Now moving to the state action test --
25 JUSTICE JACKSON: Before --

1 MR. CAMPBELL: -- which my friend
2 on --

3 JUSTICE JACKSON: Before you move, can
4 I just ask you a question about that? Because I
5 understood that charter schools actually had to
6 be -- their -- their curriculum was reviewed by
7 the board and it has to be evaluated and
8 accepted. Is that not so?

9 MR. CAMPBELL: So, at the application
10 stage, there's just a curriculum overview that's
11 provided. You could -- the Court can find it in
12 the Joint Appendix on pages 19 through 20.

13 JUSTICE JACKSON: Mm-hmm.

14 MR. CAMPBELL: And you can see it's
15 very high-level. But, yes, the board reviews it
16 as part of the application to ensure that this
17 school is going to provide a quality education
18 to its students.

19 JUSTICE JACKSON: And so -- so -- so
20 how does the board do that if the curriculum
21 includes religious components? I mean, what --
22 what input or oversight or ability to actually
23 review that does the board have?

24 MR. CAMPBELL: It -- it's the same way
25 that the board would provide review for a school

1 that focuses on native American culture. It's
2 not going to dive into the details of the
3 subject matter-specific topic that the school
4 wants to focus on.

5 JUSTICE JACKSON: But it does have a
6 duty to sort of assess whether or not that
7 curriculum meets state standards. And when the
8 curriculum is religious, I'm just wondering,
9 don't we have the kinds of entanglement issues
10 that the Establishment Clause worries about?

11 MR. CAMPBELL: Not -- not at all,
12 because the state board does not get into the
13 details of the -- of the curriculum,
14 particularly any kind of subject matter
15 curriculum.

16 What the state board is looking for is
17 whether the state standards are satisfied. The
18 state standards require things like math and
19 reading and language arts. That's what the
20 state board is concerned with. It doesn't
21 second-guess those specific subject matter
22 details.

23 JUSTICE SOTOMAYOR: How about if a
24 religious school wanted to change its curriculum
25 to teach only creatism and not evolution? You'd

1 have to make a judgment, right, as to whether
2 that was a "quality education" because that's
3 your legal charge, isn't it, to evaluate the
4 curriculum?

5 MR. CAMPBELL: It is the legal charge
6 to evaluate the curriculum.

7 JUSTICE SOTOMAYOR: And they have to
8 teach enough to pass the national/state tests.
9 That's one of the requirements of a charter
10 school.

11 MR. CAMPBELL: It is one of the
12 requirements.

13 JUSTICE SOTOMAYOR: So, as much as you
14 want to say that you can't -- are not looking at
15 the substance, you're charged by law to do that
16 because you have to determine whether it's a
17 quality education to evaluate charter school
18 performance, to approve or reject any proposed
19 change to the curriculum, to consider whether to
20 renew or terminate one, and to oversee and
21 supervise the charter school. That's your
22 responsibility, correct?

23 MR. CAMPBELL: Those are a number of
24 the responsibilities.

25 JUSTICE SOTOMAYOR: So what would you

1 do with a charter school that doesn't want to
2 teach evolution or it doesn't want to teach
3 history including the history of slavery or
4 doesn't want to include having children of
5 another faith in them, as this one does?

6 This one does not say it won't exclude
7 children of other faiths, but it said, if you
8 want to attend this school, you have to attend
9 mass, you have to accept the teachings of the
10 church with respect to certain principles.

11 So is that something you look at?

12 MR. CAMPBELL: No, it isn't, and I --
13 I want to start at the back end of your
14 question, which talks about St. Isidore.

15 So St. Isidore allows exceptions for
16 anyone that doesn't want to attend mass. That's
17 on page 27 of the student handbook.

18 JUSTICE SOTOMAYOR: But --

19 MR. CAMPBELL: In addition, it does
20 not require students to affirm its religious
21 beliefs. I would point the Court specifically
22 to Respondent's appendix, page 322, where it
23 says point blank that there is no requirement
24 that a student affirm the beliefs of the school.

25 JUSTICE KAGAN: But what if it did,

1 Mr. Campbell?

2 MR. CAMPBELL: If -- if it required,
3 like, a statement of faith in order for
4 admission to the school?

5 JUSTICE KAGAN: Yeah, if it required a
6 statement of faith, if it said we only want to
7 educate children of our own faith, would --
8 would that be the same? You know, because --
9 because I could make the same arguments that you
10 just made: Oh, it was -- it was, you know,
11 created in some sense by private people and, you
12 know, it -- there's a private board.

13 But -- but -- but this -- let's just
14 hypothesize that this school goes further and
15 says we only want to educate children of our own
16 faith. We do insist on a statement of faith.
17 Would -- would your argument have to apply to
18 that too?

19 MR. CAMPBELL: I think the argument
20 and the analysis would be different because this
21 case involves a categorical religious exclusion
22 and facial religious discrimination.

23 So, under this Court's precedent in
24 Carson and the cases that came before it, we
25 have a lack of neutrality on the face of the

1 law, so we go straight to strict scrutiny. And
2 strict scrutiny isn't satisfied here because
3 Respondent only has anti-Establishment Clause
4 interests that have been rejected by this Court
5 in cases like Carson.

6 But, in that case --

7 JUSTICE KAGAN: I guess I'm just
8 not -- maybe I'm just being dense, but I'm not
9 understanding.

10 If -- if your argument is, look, this
11 is not a public entity, it's a private entity,
12 and so it has to be treated equivalently by the
13 government, that's still true in the
14 hypothetical I gave. So why would there be any
15 difference in outcome?

16 MR. CAMPBELL: Be -- because the
17 challenge here is to the facial religious
18 discrimination that says: If you have any
19 sectarian program, you can't be a part of the
20 program.

21 But there's a separate requirement to
22 get into the program, which requires that the
23 school be open to all. So, if a
24 religious school --

25 JUSTICE KAGAN: Well, I guess the

1 question is: Why is a school allowed to strike
2 some requirements but not strike other
3 requirements, right? Like, Oklahoma law has a
4 requirement of nonsectarianism, for example.
5 Essentially, what St. Isidore's did was it
6 struck that from the contract.

7 So the next school says: We want to
8 strike from the contract -- I mean, St. Isidore
9 did some other things too, right? It -- it
10 struck out the nondiscrimination provision
11 because of doctrines like the ministerial
12 exemption or church autonomy principles.

13 So the next school says: We also want
14 to strike from the contract the requirement that
15 we teach children of all faiths.

16 I would think that your argument would
17 have to apply the same way.

18 MR. CAMPBELL: It would be different
19 analysis in those cases.

20 And if -- if we just take a step back
21 and consider how Free Exercise Clause
22 jurisprudence works, whenever a litigant wants
23 to challenge a specific requirement by the
24 government, then it has to focus on that
25 requirement and show that it's either not

1 neutral or not generally applicable under the
2 case law in Smith.

3 So, if someone wanted to challenge the
4 requirement that the school be open to all, they
5 would have to show that that requirement is not
6 neutral or not generally applicable, and if they
7 can show that, then they would proceed to strict
8 scrutiny.

9 And, at that point, the State would
10 have a very different interest than it has here.
11 The State's only interests here are already
12 rejected antiestablishment interests. The
13 State's interest in that case would be very
14 different, the interest in ensuring that the
15 school is open to all.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 You rely heavily on -- in -- in your
19 brief on a number of cases, Trinity Lutheran,
20 Espinoza, Carson. Those involved fairly
21 discrete state involvement. In Trinity
22 Lutheran, they're going to pave -- pave the --
23 or -- or, you know, put wood chips on the -- on
24 the playground. In Espinoza, it was a tuition
25 credit. In Carson, again, tax -- tax credits.

1 I -- I mean, this does strike me as
2 a -- a much more comprehensive involvement, and
3 I wonder, what case do you think supports the
4 position with respect to that level of -- of
5 involvement?

6 MR. CAMPBELL: We -- we think Carson
7 does, because Carson established the principle
8 that when the state creates a program or a
9 public benefit, that it can't exclude groups or
10 people just because they're religious. And
11 that's exactly what we have here.

12 The State of Oklahoma has created a
13 charter school program and it's invited private
14 actors to participate, but it's telling
15 religious groups and religious groups alone that
16 they -- they don't belong.

17 Certainly, the facts here are
18 different than the facts in Carson, but the
19 principle is on all fours with what we're
20 arguing.

21 CHIEF JUSTICE ROBERTS: Thank you.
22 Justice Thomas?

23 JUSTICE THOMAS: How much different is
24 the -- how different is the involvement of the
25 board in -- in -- in the school operation as

1 compared to, say, an -- an accrediting
2 authority?

3 MR. CAMPBELL: And by "the board," do
4 you mean the state board?

5 JUSTICE THOMAS: Yeah. Yes.

6 MR. CAMPBELL: Yeah. So the -- the
7 state board acts in many ways like an
8 accrediting authority.

9 And so one of the things that my
10 friend on the other side talks about is that
11 there are opportunities for private religious
12 groups to get measures of public funding, but in
13 order to access any of those programs, those
14 private schools need to be accredited.

15 And accrediting organizations, they --
16 they -- they look at a high level at the
17 curriculum to ensure that things like state
18 standards are satisfied. That's all that our
19 board is doing.

20 I think one example to illustrate the
21 point is that if one of our charter schools came
22 to us and said: We want to entirely change our
23 mission, we want to go from being an
24 organization focused on Native American culture
25 and now we want to be a STEM school, that would

1 be the kind of -- of change that the board might
2 look at.

3 But the board is not going to dig into
4 the details of anyone's curriculum. That's not
5 their charge.

6 CHIEF JUSTICE ROBERTS: Justice Alito?

7 JUSTICE ALITO: The three cases the
8 Chief Justice referred to -- Trinity Lutheran,
9 Espinoza, and Carson -- involved grants and tax
10 credits. This involves a contract.

11 Is that a relevant constitutional
12 distinction?

13 MR. CAMPBELL: I don't believe it is.
14 In fact, if anything, I think this case is
15 potentially more dangerous because, if this
16 contract transforms St. Isidore into the
17 government, then I worry the same thing will
18 happen to other government contractors.

19 For instance, consider the faith-based
20 foster care agency in Fulton. That agency
21 entered into a contract with the City of
22 Philadelphia. And if this Court finds
23 government action here, then I worry that it
24 will bleed over and undermine religious
25 liberties in cases like that.

1 JUSTICE ALITO: One other question.
2 Respondent says that if you win, some students'
3 only free public school option will be a
4 religious charter school.

5 Is that true in Oklahoma? And if that
6 were the case, would that present an
7 Establishment Clause problem?

8 MR. CAMPBELL: It's definitively not
9 true in Oklahoma for two reasons.

10 One, no Oklahoma student is required
11 to go to any charter school.

12 Number two, there's a provision in the
13 Oklahoma Charter Schools Act that makes clear
14 that an entire school district cannot convert
15 into a charter school, and that's Provision
16 3-132.2, subsection (C)(2).

17 So it -- it can't happen in Oklahoma.
18 If it did happen, it would be a very different
19 case, and it would not be a reason -- the -- the
20 mere specter that that might result in the
21 future is not a reason to categorically exclude
22 religious groups on the front end. There could
23 be an as-applied challenge brought by a family
24 if that situation ever did result.

25 JUSTICE ALITO: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Sotomayor?

3 JUSTICE SOTOMAYOR: Counsel, if the
4 government wanted to paint its capital building
5 and it wanted to paint landscapes, would it be
6 violating your theory of contracting if it said:
7 We want a secular landscape, we don't want a
8 religious one?

9 How is this -- that different from
10 this case? Or is it?

11 Are you saying that anytime the
12 government contracts for anything, it must
13 include -- not a religious person, because your
14 charter school doesn't want to just give a
15 secular education, it wants to give a religious
16 education.

17 So what you're saying is that -- does
18 the government have to accept the religious
19 landscape?

20 MR. CAMPBELL: I -- I don't believe so
21 because it sounds like --

22 JUSTICE SOTOMAYOR: Why?

23 MR. CAMPBELL: -- they're hiring
24 someone to paint the government's own message on
25 the side of a building if I'm understanding

1 your --

2 JUSTICE SOTOMAYOR: Well, but that's
3 what --

4 MR. CAMPBELL: -- hypothetical.

5 JUSTICE SOTOMAYOR: There's a contract
6 here with the archdiocese, meaning the contract
7 is with a corporation that is run by the
8 Archdiocese of Oklahoma City and the Diocese of
9 Tulsa. They provide all the teachers. Their
10 handbook requires students to attend Catholic
11 mass. You say there's an exception for that.

12 But it requires students to -- to
13 support the school's mission. Part of that
14 mission is to participate in the evangelizing of
15 the church and to be a genuine instrument of the
16 church.

17 Your school doesn't want to be just a
18 charter school. It wants to be a religious
19 charter school. Correct?

20 MR. CAMPBELL: St. Isidore undoubtedly
21 is a religious organization --

22 JUSTICE SOTOMAYOR: All right.

23 MR. CAMPBELL: -- that wants to
24 provide religious education.

25 JUSTICE SOTOMAYOR: Now I thought that

1 the essence of the Establishment Clause was
2 that -- and Carson said this, Trinity said this,
3 and, basically, every religious court -- case we
4 have -- that the essence of the Establishment
5 Clause is that we're not going to support
6 people -- lay lead -- religious leaders in
7 teaching their religion.

8 Do you accept that proposition?

9 MR. CAMPBELL: I -- I don't accept it
10 if it's part of a neutral and generally
11 acceptable program.

12 JUSTICE SOTOMAYOR: Well, that --
13 that's an interesting question. So, if we
14 decide to fund just a Christian school and no
15 other school, you say that would violate the
16 Establishment Clause, correct?

17 MR. CAMPBELL: That very well might
18 violate --

19 JUSTICE SOTOMAYOR: By -- all right.

20 MR. CAMPBELL: If the government's
21 picking and choosing religions, then, yes, that
22 would.

23 JUSTICE SOTOMAYOR: All right. If we
24 pick and choose, as we did in one part of our
25 history, only Catholic schools to teach Indian

1 children so they can become Catholics, would
2 that violate the Establishment Clause?

3 MR. CAMPBELL: If the government is
4 picking and choosing a particular religion and
5 not agreeing to allow other religions into the
6 program, then that would be an Establishment
7 Clause violation.

8 JUSTICE SOTOMAYOR: All right. And,
9 here, they're not teaching other religions,
10 correct, they're only teaching the Catholic
11 religion?

12 MR. CAMPBELL: St. Isidore is, but the
13 program is open to other religious applicants to
14 apply to teach other beliefs.

15 JUSTICE SOTOMAYOR: Sure, if they
16 don't teach religion.

17 MR. CAMPBELL: Well, under our theory,
18 it would be open to other religious
19 organizations that are willing to abide --

20 JUSTICE SOTOMAYOR: To teach their --

21 MR. CAMPBELL: -- by the other terms
22 of the program.

23 JUSTICE SOTOMAYOR: So what you're
24 basically saying, there's no longer no play in
25 the joints. This has nothing to do -- there's

1 no Establishment Clause really. What you're
2 saying is the Free Exercise Clause trumps the
3 essence of the Establishment Clause because the
4 essence of the Establishment Clause was we're
5 not going to pay religious leaders to teach
6 their religion. That was, is, and has always
7 been the essence.

8 And, here, we're paying Catholic
9 leaders, Catholic teachers. You can only be a
10 teacher in this school if you're willing to
11 accept the teachings of the Catholic Church.
12 Then we're willing to say the free exercise
13 provision trumps the Establishment Clause.

14 MR. CAMPBELL: Well, one factual
15 point. It's not true that St. Isidore only
16 hires Catholic teachers. It hires teachers that
17 aren't Catholic. That's in the record in
18 Respondent's --

19 JUSTICE SOTOMAYOR: But they have to
20 teach it within the morals of the Catholic
21 Church?

22 MR. CAMPBELL: That -- that -- that is
23 correct.

24 JUSTICE SOTOMAYOR: All right. Thank
25 you, counsel.

1 MR. CAMPBELL: But, to --

2 CHIEF JUSTICE ROBERTS: Justice Kagan?

3 JUSTICE KAGAN: Mr. Campbell, you --
4 you rely a good deal on Carson in your briefs,
5 and it strikes me that this is a fair bit
6 different from that case. You know, when the
7 Court was looking at that case, it said we just
8 don't think that the state is, as it then
9 professed to be, funding only public
10 institutions. We think that they're funding
11 private institutions. And we went through a
12 litany of the ways in which the private schools
13 differed from the public schools.

14 But, when I look at Oklahoma and its
15 charter school program, these -- these schools
16 look like regular public schools. They accept
17 everybody. They're free. They can be closed
18 down by the state. There's a good deal of
19 curricular involvement by the state, approvals
20 by the state. They have to comply with all the
21 state's standards.

22 I mean, if you just go point by point
23 through all the things that we talked about in
24 Carson, here, it comes out the opposite way,
25 that these charter schools are in every respect

1 equivalent to regular public schools.

2 So why shouldn't we take the state at
3 its word and say the charter schools are, except
4 for some things on the margin, equivalent to
5 regular public schools, and, as we said in
6 Carson, a state has the right to have its public
7 schools system be non- -- to be nonreligious?

8 MR. CAMPBELL: I disagree that these
9 schools look just like traditional
10 government-run schools. They don't. In fact,
11 the baseline rule under the Oklahoma Charter
12 Schools Act is that none of the rules that apply
13 to government schools are applicable to charter
14 schools unless the Act otherwise specifies.

15 So there are dozens of other
16 requirements that charter schools are not
17 subject to. The baseline here is that charter
18 schools have autonomy --

19 JUSTICE KAGAN: They're subject to the
20 same financial audit and reporting requirements.
21 They're subject to the same state testing
22 requirements. All curricular changes have to be
23 approved. In the end, the curriculum can't go
24 forward except for state approval. Proficiency
25 standards are set by the state. Student

1 suspension requirements are set by the state.

2 I mean, this is -- these are state-run
3 institutions. They give the charter schools a
4 good deal of curricular flexibility because --
5 because that's thought to be a good educational
6 thing, is to have curricular options in the
7 school system. But, with respect to a whole
8 variety of things, the state is running these
9 schools and insisting upon certain requirements.

10 MR. CAMPBELL: The state is not
11 running these schools. These schools are run by
12 the privately selected board of directors of
13 each of the schools. And, if you look in
14 particular at the Oklahoma statutes,
15 specifically Section 3-136, subsection 7, it
16 says that all authority is vested in those
17 govern -- in those governing boards of the
18 schools. All that the state is doing here is
19 exercising contractual oversight.

20 One of the assumptions of your
21 question as I'm understanding it is that the
22 word "public" equals government-run. But it
23 clearly doesn't, not under this Court's case
24 law, where the Court has recognized that things
25 like public access channels, public utilities,

1 public defenders, public accommodations, none of
2 those involve government-run entities. They
3 all, at least in many instances, involve private
4 actors.

5 JUSTICE KAGAN: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Gorsuch?

8 JUSTICE GORSUCH: Mr. Campbell, you
9 made the point that, historically, states
10 sometimes funded religious schools. Some of the
11 amici on the other side contend, however, that
12 there are historic examples of funding being
13 denied to religious schools and no free exercise
14 claim followed. I wanted to get your thoughts
15 and reactions to that.

16 MR. CAMPBELL: Yeah. One reaction is
17 most of those examples that were provided in
18 those amicus briefs came from the early 1800s,
19 and no one understood the Establishment Clause
20 to be incorporated against the states at that
21 point.

22 JUSTICE GORSUCH: Or the free
23 exercise -- I take that --

24 MR. CAMPBELL: I'm sorry. You're
25 right.

1 JUSTICE GORSUCH: I take -- I take
2 that point, but there were state equivalents to
3 the Free Exercise Clause under a state
4 constitution, and their point is, even there,
5 there -- there were no challenges.

6 MR. CAMPBELL: And -- and I would say
7 that this case doesn't involve those state
8 equivalents. It involves the Free Exercise
9 Clause of the First Amendment.

10 Nevertheless, I do think the history
11 that we cite is important for purposes of this
12 case because it dispels any suggestion that
13 there is an Establishment Clause violation.

14 And in terms of the free exercise
15 issue, I think that's satisfied -- that that
16 issue is foreclosed by Carson because this Court
17 established the principle in Carson that said
18 you can't create a program, invite everyone, but
19 exclude the religious.

20 JUSTICE GORSUCH: And then your
21 friends on the other side and -- and amicus
22 there too pointed out that it's important under
23 state law for state charter schools to be
24 considered state entities for -- for purposes of
25 securing bonds, things like that.

1 And I took your response in your reply
2 brief to say they can continue to do so because
3 what we're asking is whether it's a public
4 entity for federal law purposes. I think that's
5 a fair summary of what your response is.

6 MR. CAMPBELL: I think that's fair.

7 JUSTICE GORSUCH: And I'm just -- I'm
8 curious, do you have other examples of entities
9 that might be treated as private for federal law
10 purposes but public for state law purposes?

11 MR. CAMPBELL: I -- I have -- I have
12 one example that involved Congress treating an
13 entity as private and this Court treating it as
14 public. So it's not a state-federal divide, but
15 it is a separation-of-powers divide. And that's
16 in the Lebron case.

17 JUSTICE GORSUCH: Yeah.

18 MR. CAMPBELL: Congress declared
19 Amtrak to be a private actor, but this Court
20 looked at it from a constitutional perspective
21 and said that it constituted an arm of the
22 government.

23 JUSTICE GORSUCH: Last question.
24 You've emphasized the lack of creation and
25 supervision on the board. I -- I can imagine

1 some states might respond to a decision in your
2 favor by imposing more requirements on charter
3 schools, in some states, to require public
4 officials to be on their board and -- and more
5 involvement in the creation of these
6 institutions.

7 Have you thought about that boomerang
8 effect for charter schools?

9 MR. CAMPBELL: We have thought about
10 it, and that certainly is a decision that states
11 are entitled to make. They can set up their
12 charter school programs as they see fit. We
13 think there are significant tradeoffs because
14 part of what makes charter schools great is the
15 autonomy that they're provided and the private
16 ingenuity that they bring.

17 But, if a state wanted to assert more
18 control over those entities, then it would be
19 free to set up its program that way.

20 JUSTICE GORSUCH: And it would yield
21 potentially a different result in those cases.

22 MR. CAMPBELL: It could potentially
23 depending on how they set it up.

24 JUSTICE GORSUCH: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Kavanaugh?

2 JUSTICE KAVANAUGH: First, a few
3 factual questions. A student in Oklahoma is
4 free to attend a public school if they choose,
5 correct?

6 MR. CAMPBELL: A government-run public
7 school, yes, they are free to choose that.

8 JUSTICE KAVANAUGH: In other words, no
9 student in Oklahoma is required, at least I --
10 as I understand it, to attend a charter school,
11 correct?

12 MR. CAMPBELL: That -- that's correct.

13 JUSTICE KAVANAUGH: And there are
14 other charter schools in Oklahoma, correct?

15 MR. CAMPBELL: In -- yes, indeed,
16 there are 33, and there are seven virtual, which
17 would be accessible to any student no matter
18 where they're located in the state.

19 JUSTICE KAVANAUGH: And what are
20 the -- some of the themes or focuses of those
21 charter schools to the extent they have
22 distinctive qualities?

23 MR. CAMPBELL: There -- there's a vast
24 array. There are some, as I mentioned in the
25 introduction, that focus on Native American

1 culture and environmental stewardship. There
2 are others that focus on STEM curriculum,
3 performing arts, foreign language immersion,
4 et cetera, et cetera. There are many other
5 examples.

6 But, again, the problem here is
7 there's one type of education that's off limits,
8 and that's religion, and that can't be
9 consistent with this Court's precedent.

10 JUSTICE KAVANAUGH: And if any other
11 religious group wants to operate a charter
12 school, they too can apply. You're not saying
13 that it's only Catholic schools, correct?

14 MR. CAMPBELL: That's correct.

15 JUSTICE KAVANAUGH: Okay.

16 MR. CAMPBELL: We would treat any
17 other religious applicant the same way the state
18 board treated St. Isidore.

19 JUSTICE KAVANAUGH: So -- this is in
20 response to Justice Sotomayor and I just want to
21 make sure this is clear. You're not saying that
22 the state can favor one religion over another?

23 MR. CAMPBELL: We are not saying that
24 at all.

25 JUSTICE KAVANAUGH: And you're not

1 saying, I think, but confirm, that the state
2 could say we're going to have charter schools
3 but only religious charter schools?

4 MR. CAMPBELL: We are not saying that
5 at all.

6 JUSTICE KAVANAUGH: Right. If you
7 have charter schools, you can't favor religion.
8 Your point is you also can't disfavor religion,
9 correct?

10 MR. CAMPBELL: That's right.

11 JUSTICE KAVANAUGH: And then the case
12 that I think the Respondent relies on pretty
13 heavily is West versus Atkins, the -- the case
14 about medical services in prison.

15 Can you respond to that? Because I
16 think that's one they put a good deal of
17 emphasis on.

18 MR. CAMPBELL: Yeah, a couple of
19 responses to that.

20 The first point I would emphasize is I
21 think that outsourcing theory that they're
22 relying on is entirely foreclosed by this
23 Court's decision in Rendell-Baker.

24 So, in Rendell-Baker, the question
25 presented built in that idea of outsourcing. It

1 said that the school at issue there had a duty
2 under state law to provide that education, and
3 that's what transformed it into a state actor.
4 And the dissent in that decision relied on that
5 theory.

6 But, importantly, the majority looked
7 at that same state law that put that duty on
8 the -- the state to provide that education and
9 it said that in no way amounted to state action.

10 So I think that argument's foreclosed
11 by Rendell-Baker.

12 A second point I would make is that
13 the state here hasn't outsourced its obligation
14 at all. The state continues to provide free
15 public education to all children in the state
16 through its government-run schools.

17 And the last point I would make is a
18 factual distinction between West and our case,
19 and that's because West involved a situation
20 where the plaintiff had no option. The
21 plaintiff only had one choice for the orthopedic
22 services that he was seeking. In this case, no
23 one is forced to go to St. Isidore or any other
24 charter school in Oklahoma.

25 JUSTICE KAVANAUGH: And one last

1 question to the extent you know. What does the
2 state oversight of private schools look like in
3 Oklahoma to ensure that they meet certain
4 standards? This is following up on Justice
5 Kagan's question because that's another bucket
6 of schools and I assume the state does something
7 with private schools, but -- but what is that?

8 MR. CAMPBELL: The state does have
9 some oversight, particularly when a private
10 school wants to participate in one of the school
11 funding or school choice programs. So Oklahoma
12 has a tax credit program, but, in order for a
13 school to participate in that, they need to be
14 accredited. And so that accreditation process
15 does involve oversight, looking into the
16 curriculum.

17 There is -- there are other
18 scholarship --

19 JUSTICE KAVANAUGH: What else -- what
20 else does the accreditation process for private
21 schools entail? If you can kind of spell that
22 out.

23 MR. CAMPBELL: Yeah. I mean, it -- it
24 primarily looks at the curriculum to ensure that
25 it's meeting minimum standards, to make sure

1 that children are learning the basics of
2 reading, writing, math, et cetera.

3 There is not a lot of a focus on how
4 the -- how the schools operate, and so it
5 primarily focuses on those curriculum issues at
6 a high level.

7 JUSTICE KAVANAUGH: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Jackson?

10 JUSTICE JACKSON: So, as I understand
11 it, your free exercise claim relies on the
12 Trinity Lutheran Carson line of cases, and
13 you've said several times here that the argument
14 is that when a state creates a public benefit,
15 it can't tell religious groups they can't
16 participate. That's sort of basic law as we
17 understand it today.

18 I guess what I'm confused about is
19 whether what you are asking for in this case
20 really maps on to that line of analysis, and so
21 let me explain to you what I'm concerned about
22 and then you can tell me why I'm wrong.

23 So your argument is that St. Isidore
24 is seeking the same public benefit as everyone
25 else, which is to start a charter school, but I

1 think that actually might misunderstand the
2 public benefit in this scenario because Oklahoma
3 has been clear that what it wants to do is use
4 the charter system to set up a system of secular
5 public schools. That's what the charter program
6 does.

7 The -- the contract provides money and
8 support for private entities, and so we can
9 assume, we can start where you start, we can
10 assume this is a private entity.

11 And Oklahoma says, fine, private
12 entities come in, and we provide money and
13 support if you want to establish a secular
14 charter school in order to advance our goal of
15 having that sort of system.

16 Importantly, I think, we've said in
17 Carson that they are allowed to do that. Carson
18 says that a state can permissibly choose "to
19 provide a strictly secular education in its
20 public schools." And so that appears to be what
21 Oklahoma is trying to do.

22 Now, in this case, St. Isidore doesn't
23 want to establish a secular school, which is
24 what the public benefit is. Instead, they want
25 to establish a religious school.

1 So, as I see it, it's not being denied
2 a benefit that everyone else gets. It's being
3 denied a benefit that no one else gets, which is
4 the ability to establish a religious public
5 school.

6 Can you explain to me why this is
7 actually the same as Trinity Lutheran or Carson
8 or whatnot?

9 MR. CAMPBELL: Well, I -- I think
10 building the secular requirement into the -- the
11 definition of the benefit creates the same error
12 that this Court corrected from -- that the lower
13 court committed in Carson.

14 And what I mean by that is the Court
15 used the phrase, did it -- it talked about
16 semantic exercises. And so, there, the State of
17 Maine tried to build the concept of secular --

18 JUSTICE JACKSON: But it's not --

19 MR. CAMPBELL: -- into its
20 definition --

21 JUSTICE JACKSON: It's not actually
22 not -- it's not a semantic exercise because I do
23 think that you would have a Trinity Lutheran
24 problem if St. Isidore's came in and said we
25 would like to establish a secular public school.

1 We want our school to look exactly like all of
2 the other charter schools that are out there.
3 You're -- you're offering money to establish
4 this kind of school, and here we are.

5 And if the state said, oh, but -- as
6 they did in these other Trinity Lutheran,
7 et cetera, cases, oh, but you're religious, and
8 we think that if we give you money, that'll be
9 an Establishment Clause violation or whatnot,
10 you would totally be an all fours with Trinity
11 Lutheran.

12 But, here, I think what Justice Kagan
13 said is St. Isidore's wants to come in and not
14 just get the same contract that everybody else
15 gets because the contract has in it that you
16 have to have a secular school. What they want
17 to do is come in and get a contract that is
18 tailored to their own terms that includes
19 religious education, and the State says that's
20 not the benefit that we're offering here.

21 So you're actually not in Trinity
22 Lutheran world, I think.

23 MR. CAMPBELL: I disagree. I think
24 it's, again, exactly what Maine tried to do in
25 Carson. They tried to build in the notion that

1 the benefit at issue there was by definition
2 secular. That's exactly what the argument you
3 just raised is trying to do.

4 JUSTICE JACKSON: Well, let me ask you
5 another question. This goes back to Justice --
6 to Justice Sotomayor's hypothetical.

7 So suppose we had a state that wanted
8 to have murals of landscapes on its public
9 buildings around, and so it was offering money
10 for painters to come in to do that. And it
11 wanted no messaging, no nothing, just the
12 mountains, landscapes. That was a term of the
13 benefit of the money that they were providing.

14 Would it be a free exercise violation
15 if a particular painter came in and said, here's
16 my proposed sketch, it has, you know, religious
17 symbols in it, that's important to me because
18 I'm a, you know, religious painter and this is
19 what I would like to do, and the state said, I'm
20 sorry, we're not going to do that?

21 Now, I mean, yes, they'd be rejecting
22 him because the product that he was offering had
23 religious symbols, but I doubt that that would
24 be a -- a free exercise violation for the
25 reasons that I've articulated.

1 MR. CAMPBELL: Well, that case would
2 turn on whether it was government speech or
3 whether the government created a forum for
4 anyone to participate.

5 JUSTICE JACKSON: No, I'm -- I'm --
6 forget the speech. That's just the framing.

7 The point is: Would that person say
8 you are rejecting me as a painter because of my
9 religion in a way that triggers Trinity Lutheran
10 when, really, what the state is doing is saying
11 we are offering a particular public benefit and
12 the particular benefit is a nonsectarian mural,
13 a secular mural, and to the extent that you're
14 not wanting that, we're -- we're rejecting your
15 proposal?

16 MR. CAMPBELL: I -- I think that case
17 is very different from this case because, in
18 that case, the government is trying to speak its
19 own message on its own buildings.

20 Here, it's giving broad autonomy to
21 the schools to come up with their own mission
22 and their own curriculum, and so this involves
23 that private entity being a part of the process.

24 JUSTICE JACKSON: Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Mr. McGinley?

3 ORAL ARGUMENT OF MICHAEL H. MCGINLEY

4 ON BEHALF OF THE PETITIONER IN CASE 24-396

5 MR. MCGINLEY: Mr. Chief Justice, and
6 may it please the Court:

7 The Free Exercise Clause bars a state
8 from inviting private parties to participate in
9 an educational funding program while excluding
10 those who exercise their faith. But that is
11 precisely what Oklahoma law does here.

12 Respondent seeks to justify that
13 religious discrimination by recasting
14 St. Isidore as a government entity or state
15 actor with no constitutional rights.

16 That is incorrect. St. Isidore is a
17 private religious nonprofit. It was created by
18 private actors and it is -- and it is controlled
19 by a private board that consists of entirely
20 private actors. It thus lacks the essential
21 elements of a government entity.

22 Nor is St. Isidore exercising a
23 traditional and exclusive government function.
24 American history is replete with examples of
25 private organizations offering free education to

1 the nation's youth with support from the public
2 fisc.

3 All that leaves is the fact that
4 Oklahoma law labels charter schools as public
5 schools. But constitutional analysis turns on
6 substance, not labels, and casting the cloak of
7 state action too broadly risks intruding on
8 individual liberty. The Establishment Clause
9 does not restrain St. Isidore and the Free
10 Exercise Clause protects it.

11 I welcome the Court's questions.

12 JUSTICE THOMAS: You say St. Isidore
13 is not a state actor. What would -- what
14 features would you add to convert St. Isidore
15 into a state actor?

16 MR. MCGINLEY: So, Justice Thomas,
17 what the Court has said particularly for
18 government entity analysis, which is what I take
19 my friend on the other side to really be focused
20 on at this point, is that it requires government
21 creation and control. And so I'd point you to
22 this Court's cases in Lebron, U.S. Olympic
23 Committee, Nebraska, Arkansas. And what it says
24 is that in all of those cases where the Court
25 found a government entity, there was creation

1 particularly by special legislation where the
2 government literally creates the body.

3 But the Court has also said that's not
4 enough. That's what the U.S. Olympic Committee
5 case says. It says just because the U.S.
6 Olympic Committee was created by special
7 legislation, a charter from Congress, it wasn't
8 controlled by the government because its board
9 was not controlled by the government.

10 But, in Lebron -- and I would
11 particularly point you, I think, to the analysis
12 in Lebron where Justice Scalia does a really
13 nice job of laying out all the different types
14 of federal private corporations where the
15 government -- or Congress has said at times we
16 don't want this to be treated as the government.
17 But this Court has not always said that that's
18 controlling for the constitutional reasons. In
19 Lebron, it was a First Amendment claim. Then,
20 in the follow-on Amtrak case, you had a private
21 nondelegation claim. And in both cases, the
22 Court said Amtrak was created by the government
23 and it was controlled by the government.

24 And it distinguished other instances,
25 including U.S. Olympic, but then also the

1 regional rail cases, where you even had some
2 control at some level by government-appointed
3 board members. But the Court said it wasn't
4 complete control and that wasn't enough. So
5 those are the two defining features, Your Honor.

6 JUSTICE SOTOMAYOR: Counsel, there's
7 been private education and, you're right,
8 there's been free private education to a variety
9 of different groups, but none of them are
10 government supported, meaning they weren't using
11 government money to do this. They were using
12 donations or whatever -- whatever sources of
13 income they could find.

14 The hallmark of public education is
15 that taxpayers are paying for it, not private
16 donations. The government's doing this. And
17 that has never been something that other people
18 did for the government, meaning charter schools
19 are a creation of contract, which is the
20 question, the point that Justice Thomas -- Alito
21 made, which is charter schools are using only
22 government funds. And so the question is not
23 whether it's a government agency but whether
24 it's a state actor.

25 Now, going to the West suggestion,

1 your co-counsel or -- or brother on the -- on
2 the same side said that there, there was -- you
3 were -- the students -- the -- the -- I'm
4 sorry -- the inmates were required to use this
5 doctor, and this is different because no student
6 is required to attend a charter school.

7 But that's not the point, is it? The
8 point is whether you're acting for the
9 government or not.

10 MR. MCGINLEY: So I'll take both your
11 questions in order, Your Honor. With -- with
12 respect, I disagree regarding the history. I
13 would point you to our opening brief, pages 41
14 through 45 and 50 through 53. But I'd also
15 point you to the USCCB brief, the Glenn -- the
16 Professor Glenn brief, all of which provide
17 examples where the government was providing
18 funding sometimes --

19 JUSTICE SOTOMAYOR: Well, the problem
20 is that using history in this case is so crazy
21 because the first thing is no one thought there
22 was an obligation of government at all to
23 provide funding for most of the history -- the
24 early history. It was around the time of the
25 ratification of the Fourteenth Amendment that

1 the idea that states would provide a
2 constitutional right to educate and did was very
3 different.

4 Number two, I think the other side
5 admitted we don't use the history of segregation
6 to interpret the Equal Protection Clause now. I
7 doubt very much we use -- we would use that
8 history of the federal government funding the --
9 the churches to teach Indian children and
10 convert them as proving anything about the Free
11 Exercise or Establishment Clause now.

12 So forget the history. Let's go to
13 the basic point.

14 MR. MCGINLEY: Sure.

15 JUSTICE SOTOMAYOR: And let's come to
16 more modern times, West, which is the issue is
17 not who's doing it but whether the government is
18 outsourcing to that person their own obligation.

19 MR. MCGINLEY: So I have a very direct
20 answer to you on that, and I would point you to
21 Rendell-Baker because Rendell-Baker --

22 JUSTICE SOTOMAYOR: Well, the problem
23 with Rendell-Baker is that the Carolina schools
24 system didn't claim that was a constitutional
25 obligation. They had not been educating

1 maladjusted children ever. They had just
2 decided that they would start doing that. But
3 the Court didn't view that as a constitutional
4 obligation. It was a contract obligation but
5 not a constitutional obligation.

6 MR. MCGINLEY: I -- I'm not sure about
7 that, but I -- but I think, in Carson, Maine
8 viewed it as a constitution -- state
9 constitutional obligation to provide free public
10 education, and one of the ways that they did
11 that was through the program that was upheld in
12 Carson versus Makin. I would point out there
13 was --

14 JUSTICE SOTOMAYOR: Oh, but all of
15 those programs had an intermediary, someone else
16 who was making the choice, not the government.
17 Here, the government is the actual creator of
18 the charter school because the charter school
19 does not exist without government funding. So
20 it is -- if it's not a government actor, it is
21 still creating a religious institution.

22 MR. MCGINLEY: So I disagree with
23 that, Your Honor. I'd point you to page 157a of
24 the Petition Appendix in our petition, which
25 point -- which is a declaration from -- called

1 the Losnia declaration that makes it very clear
2 that the only way that funds will be provided to
3 a -- to St. Isidore is if parents choose to do
4 so. So that makes it no different than --

5 JUSTICE SOTOMAYOR: Then we go back to
6 who -- who defines it, the parents or the state,
7 in being the one who says you can do what I
8 would do. All right. Thank you, counsel.

9 MR. MCGINLEY: Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Justice Thomas?

13 Justice Alito, anything further?

14 Justice Kagan?

15 JUSTICE KAGAN: Mr. McGinley, you
16 struck out as I talked to Mr. Campbell about the
17 requirement in the standard contract that
18 insisted on nonsectarianism and also the one
19 that insisted on nondiscrimination.

20 Anything else -- was anything else
21 struck out?

22 MR. MCGINLEY: So I just want to
23 clarify we didn't strike out the
24 nondiscrimination clause. There still is the
25 nondiscrimination clause. We had agreed to

1 abide by all applicable law.

2 What we -- what we recognize and what
3 the State recognized in contracting with us is
4 that as a private --

5 JUSTICE KAGAN: You modified it to
6 incorporate various church autonomy principles.

7 MR. MCGINLEY: Correct, but I would
8 say, Your Honor, those are antidiscrimination
9 principles that --

10 JUSTICE KAGAN: That -- that's fine.

11 MR. MCGINLEY: Sure.

12 JUSTICE KAGAN: It's not the point of
13 the question.

14 MR. MCGINLEY: Sure.

15 JUSTICE KAGAN: Anything else? Did
16 you strike out anything else?

17 MR. MCGINLEY: In terms of striking
18 out, I -- I -- I don't believe so. I think --

19 JUSTICE KAGAN: What if you had wanted
20 to strike out other provisions, for example,
21 curricular provisions, because the kind of
22 religious education that you thought it was your
23 mission to provide were inconsistent with those
24 curricular requirements?

25 MR. MCGINLEY: So I think that would

1 be part of the contracting process, and I do
2 agree with my friend that the framework of
3 analysis would be very different, right,
4 because, here, there's no dispute that
5 St. Isidore qualifies for the program for all
6 purposes other than the sectarian requirement.
7 And so we're dealing with the Carson, Trinity --
8 JUSTICE KAGAN: Right. But --
9 MR. MCGINLEY: -- Lutheran threshold.
10 JUSTICE KAGAN: -- but, like,
11 sectarian means something. It involves a
12 certain kinds of -- certain kind of exercise.
13 So, you know, it's not just like you want to put
14 the word "Catholic" up on the door.
15 MR. MCGINLEY: Right.
16 JUSTICE KAGAN: You want to teach
17 certain things, as would any or most religious
18 schools. So suppose a religious school came in
19 and said, in addition to the modifications that
20 you made, we want to make some further
21 modifications with respect to the curricular
22 requirements. I'll give you a hypothetical just
23 so we can focus the inquiry.
24 MR. MCGINLEY: Sure.
25 JUSTICE KAGAN: Let's say we're not in

1 Oklahoma. Let's say we're up in New York, and
2 there's a Hasidic community that has Yeshiva,
3 and it's a very serious Yeshiva, and what that
4 means is that almost all the instruction has to
5 do with studying Talmud and other religious
6 texts. Very little of it has to do with secular
7 subjects. Almost none of the instruction is in
8 English. Almost all of it is in Yiddish or in
9 various, like, ancient Hebrew-Aramaic kind of
10 languages. And that's the charter school that
11 this Hasidic community wanted to qualify for.

12 Does New York have to say yes even
13 though those -- that curriculum is
14 super-different from the curriculum that we
15 provide in our regular public schools? Yes,
16 come join our -- our completely taxpayer-funded
17 charter school program?

18 MR. MCGINLEY: So the first thing I
19 would say is that given the nature of charter
20 school programs, it very well might be that the
21 state wants that or is fine with that because
22 it's a -- it provides a different --

23 JUSTICE KAGAN: Let's say the state is
24 not fine with that. Let's say the state thinks
25 it's great that you provide that education on

1 your own, and it might be that if we have
2 certain kinds of tuition assistance, you would
3 be included in that. But the -- but -- but the
4 state has this same idea, honestly, that
5 Oklahoma has, which is these schools are
6 supposed to be public, and -- and -- and they're
7 supposed to sort of look like public schools,
8 and this one really doesn't.

9 MR. MCGINLEY: So the first thing I
10 would say is just the label of "public school"
11 clearly can't do the work. That's --

12 JUSTICE KAGAN: I'm not suggesting
13 that.

14 MR. MCGINLEY: I -- I know.

15 JUSTICE KAGAN: Let's --

16 MR. MCGINLEY: But -- but -- so
17 then to the -- then you would go to a different
18 framework of analysis that would be under this
19 Court's case law that includes *Fulton*, *Smith*,
20 that line of cases that would say -- would ask
21 all sorts of questions that would be highly
22 fact-dependent, such as: Is it a neutral law of
23 general applicability? To what extent does it
24 burden the religious beliefs, et cetera,
25 et cetera? And is there a compelling interest

1 potentially --

2 JUSTICE KAGAN: Well, this definitely
3 burdens the religious beliefs. I mean, this is
4 what this community thinks an education is all
5 about, and this is what this community thinks is
6 critically important to train their young people
7 in the tenets of their religious practice and so
8 forth.

9 MR. MCGINLEY: Sure. And so I -- I
10 can't tell you standing here today exactly how
11 that or any other hypothetical case would come
12 about. But what I can tell you is that Carson
13 and Espinoza and a whole series of cases,
14 including Zelman, say you can't take imagined,
15 hypothetical downstream questions and let them
16 drive and justify front-end religious
17 discrimination.

18 JUSTICE KAGAN: Well, I don't have to
19 imagine very hard to come up with a hundred
20 hypotheticals like this because religious
21 communities are really different in this country
22 and are often extremely different from secular
23 communities in terms of the education that they
24 think is important for their young people and
25 it's critically important to their faith.

1 I mean, nobody would say that the kind
2 of instruction that is -- that exists in the
3 kind of school that I laid out, which are --
4 there are many of -- is not critically important
5 to the faith and to the -- the -- the training
6 of young people in the faith according to that
7 community.

8 MR. MCGINLEY: Sure. And that was
9 true in Carson, and what this Court said is that
10 when you open a program to other private
11 organizations, you have to -- you can't exclude
12 the religious. And so, you know, that's how the
13 Court dealt with it in Carson.

14 The other thing I would point out, and
15 my friend Mr. Campbell pointed this out --

16 JUSTICE KAGAN: So a state has a --
17 what it considered a charter school system which
18 was, you know, basically offering a kind of
19 education that it was familiar with, that it
20 applied curricular and testing and standards to.
21 It wanted to increase curricular flexibility.
22 It did not want to start funding every religious
23 school in the country.

24 And now you're saying to that state,
25 you know: Yes, you have to go fund the Yeshiva

1 that I described; yes, you have to go fund the ^
2 Madras; yes, you have to go fund da-da, da-da,
3 da-da, da-da, da-da, if you want to have this
4 program at all.

5 MR. MCGINLEY: Well, I'm not -- I
6 don't think I'm saying that, Your Honor. I'm
7 saying there's a different, you know, framework
8 of analysis. That analysis would have to be
9 applied.

10 But the other thing I would say is
11 that a state doesn't have to open up an
12 educational program to private organizations.
13 That's -- the Court has said that consistently
14 in this case law.

15 And so no one is saying that a state
16 is compelled to open up these programs and to
17 invite in the religious. What they're saying is
18 that what the Free Exercise Clause says is that
19 if you do open it up, then you can't exclude the
20 religious because they're religious, neither
21 because of their status or because of their use.

22 JUSTICE KAGAN: Thank you.

23 MR. MCGINLEY: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Gorsuch?

1 JUSTICE GORSUCH: Just on some of
2 those hypotheticals, Mr. McGinley.

3 Would it be a neutral and generally
4 applicable rule and, therefore, compliant with
5 Fulton and Smith to say: If you want to be a
6 charter school, you have to teach math, reading,
7 science, and -- and specify testing at -- at
8 grade level proficiency?

9 MR. MCGINLEY: So the way you've
10 described it, I think so. And, certainly, my
11 client has not objected to those things. The
12 record indicates that that is certainly part of
13 their curricular design.

14 JUSTICE GORSUCH: And even absent
15 Smith, I still have to ask whether -- in strict
16 scrutiny, whether the government has a
17 compelling interest. Might it have one there?

18 MR. MCGINLEY: I think it might have
19 one there, sure. Especially in a -- in a
20 contracting setting, where the government is
21 providing funds for the education of youth and
22 they want to make sure that certain minimum
23 standards are met, I do think that that would
24 probably be a compelling government interest.

25 JUSTICE GORSUCH: Thank you.

1 MR. MCGINLEY: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Kavanaugh?

4 JUSTICE KAVANAUGH: With Justice
5 Kagan, I think you were talking about the
6 nondiscrimination provision, and you said it
7 wasn't -- you didn't strike it out, and you
8 were -- you had more -- I mean, I think you had
9 more to that answer, so --

10 MR. MCGINLEY: Yeah, sure.

11 JUSTICE KAVANAUGH: -- can you just
12 tell us what happened?

13 MR. MCGINLEY: Yeah. So what happened
14 was there -- you know, we agreed to abide by all
15 applicable laws, which means federal and state
16 laws, including antidiscrimination laws.

17 What was added to the contract is the
18 essentially constitutional truism that as a
19 private religious organization, we possess
20 rights under the Free Exercise Clause, the
21 church autonomy doctrine, the ministerial
22 exception, which this Court has rooted in the
23 church autonomy doctrine.

24 And so all that we were trying to make
25 clear and all the State was recognizing is that

1 we were not giving away those rights by virtue
2 of agreeing to this contract.

3 JUSTICE KAVANAUGH: A number of other
4 states, in fact, I think all of them, have a
5 similar kind of program. What should we make of
6 that?

7 MR. MCGINLEY: So what you should make
8 of it is every single state has a choice as to
9 whether or not they want to have the program,
10 whether or not they want to invite private
11 organizations in, and how they design the
12 program, particularly the extent to which they
13 exercise control, state control, over any
14 charter schools.

15 And so, if the state decides that it
16 wants to have government entity charter schools,
17 it can do so. And so I -- I don't think that in
18 any way -- you're not deciding the platonic form
19 of charter schools. You're not deciding the
20 platonic form of public schools here.

21 States have the ability to design
22 their program. This Court has repeatedly made
23 clear that when they design it to invite private
24 actors in, they can't exclude the religious.
25 But it's also made clear in --

1 JUSTICE KAVANAUGH: But they've been
2 around for a while without that.

3 MR. MCGINLEY: But I think that's, I
4 mean, in part a result of this Court's case law
5 that suggested that it wouldn't be permissible.
6 But, you know, after Trinity Lutheran and
7 Espinoza and then Carson, you know, I think
8 there's a different outcome.

9 JUSTICE KAVANAUGH: And on -- are
10 there language-focused charter schools in
11 Oklahoma that you're aware of or --

12 MR. MCGINLEY: Yes. Yes, there are --
13 there are language-immersion schools. I think
14 one example is -- I believe it's called the
15 Le Monde School.

16 JUSTICE KAVANAUGH: Thank you.

17 MR. MCGINLEY: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Jackson?

20 JUSTICE JACKSON: So I guess I'm still
21 stuck on trying to understand what you mean by
22 the state has the ability to organize or set up
23 the program in the way that it wants the
24 program.

25 So, apparently, they can't decide the

1 program to be funding schools that are
2 nonsectarian.

3 MR. MCGINLEY: That's correct. That's
4 the teaching of this Court's case law.

5 JUSTICE JACKSON: I don't see that
6 that's the teaching of the case law. I see that
7 whatever the program is, it has to be available
8 to religious people.

9 But what if the state says: My
10 program is, you know, murals that are not
11 religious or schools that are not religious?
12 That's the part that I'm really confused about,
13 because your free exercise argument is based on
14 this discrimination principle, which I totally
15 get, but if you're striking out provisions of
16 the contract, then it seems to me that you are
17 not seeking the same public benefit that
18 everyone else is getting.

19 The state says: Here's our program,
20 and we're laying out all the provisions in a
21 contract, and anyone who would like to have this
22 contract, you're welcome, and we're not
23 excluding religious people, we're not excluding
24 any people, but here are the terms.

25 And you say: Ah, but there's a term

1 in here that says you have to be nonsectarian.

2 And I -- I do want to point out that
3 that term is actually in the federal law because
4 the State of Oklahoma defines its charter school
5 on the basis of what federal law has defined as
6 a charter school. It's a public school created
7 or adapted by a developer, private organization.
8 And to qualify, the school must not charge
9 tuition and must be nonsectarian in its
10 programs, admissions, policies, employment
11 practices, and all other operations. And so
12 that's a -- that's, like, what it is.

13 And so it just seems to me very hard
14 to accept the discrimination principle that
15 you're putting forward when you come in and say:
16 We don't want that contract. We want one that
17 we've tailored to strike out some of the terms
18 that you have put in here.

19 MR. MCGINLEY: So, with respect, I
20 think the -- the argument you're articulating is
21 precisely the one that was rejected in Carson,
22 which says you can't, you know, define the
23 program by saying it has to be something that's
24 nonsectarian because that merely says that -- by
25 doing so, you're essentially building into the

1 definition a way to discriminate, in violation
2 of the --

3 JUSTICE JACKSON: So the federal law
4 is unconstitutional that sets up charter schools
5 and includes as a term the nonsectarian status?

6 MR. MCGINLEY: So I won't speak for my
7 friend, who I think will be up here shortly, but
8 my understanding is that -- is that their view
9 is that that particular term is no longer
10 enforceable. And I think there's an OLC opinion
11 that essentially says as much after Trinity
12 Lutheran.

13 JUSTICE JACKSON: When -- when
14 Carson -- I -- I have to go back and take a
15 close look at Carson, but were they changing the
16 terms of the actual benefit that was being
17 offered, or were they saying that religious
18 people have to have access to that benefit as it
19 exists?

20 MR. MCGINLEY: So my understanding of
21 the -- of Maine's law in Carson is that, like
22 Oklahoma's law, it had a provision that said
23 that no sectarian institution could participate,
24 and -- and then Maine articulated that --

25 JUSTICE JACKSON: No, that's the --

1 that's the no sectarian institution can have
2 this contract.

3 MR. MCGINLEY: Right, but you --

4 JUSTICE JACKSON: Yeah, I agree with
5 that.

6 MR. MCGINLEY: Right, but you may
7 remember that one of the critical questions in
8 Carson is whether there's a status use
9 distinction, and this Court -- you very
10 definitively said that there's not. And I think
11 that goes directly to Your Honor's questions.

12 JUSTICE JACKSON: Thank you.

13 MR. MCGINLEY: Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 General Sauer?

17 ORAL ARGUMENT OF GEN. D. JOHN SAUER

18 FOR THE UNITED STATES, AS AMICUS CURIAE,

19 SUPPORTING THE PETITIONERS

20 GENERAL SAUER: Mr. Chief Justice, and
21 may it please the Court:

22 Charter schools like St. Isidore are
23 not part of the Oklahoma government, and they
24 are not engaged in state action. They are
25 created by private parties applying to public or

1 private sponsors, and they are controlled by
2 privately appointed directors.

3 Participation in charter schools is
4 mediated through two layers of private choice,
5 both of the applicants who create the schools
6 and of the parents who choose to send their
7 children to them.

8 Oklahoma does not control their
9 programs, staffing, or curriculum. Providing
10 education through charter schools is not a
11 traditional and exclusive public function. And
12 their control by privately appointed directors
13 refutes any suggestion of public entwinement.

14 The values of private innovation,
15 independence, and private choice lie at the
16 heart of this charter school program, and they
17 call for the application of the Free Exercise
18 Clause here.

19 I welcome the Court's questions.

20 JUSTICE THOMAS: General, the -- below
21 the -- in -- in the state courts, state action
22 seemed to play a considerable role, but in your
23 brief, you said it's not -- it's not applicable
24 here. Would you elaborate on that?

25 GENERAL SAUER: Absolutely, Justice

1 Thomas. We've taken the position that viewing
2 this through the lens of private actors engaged
3 in state action is not the appropriate kind of
4 framework to view it under. And, actually, I
5 think we have clear agreement from that from the
6 Respondent at page 18 of their brief, where they
7 say that is not the correct framework.

8 Obviously, the Oklahoma Supreme Court did rely
9 on those cases both as to entwinement and also
10 as to traditional exclusive public function.

11 But the point that we make is there is
12 not a clear mapping onto the two concepts of do
13 you have constitutional rights of your own and
14 are you engaged in state action with respect to
15 the constitutional rights of others.

16 So, in *Lindke*, for example, recently
17 and in *Garcetti* and that line of cases, there's
18 a recognition that those are conceptually two
19 distinct questions, and that's why we think that
20 that's really not the proper framework the Court
21 should and the Respondents do kind of put all
22 their chips on, so to speak, the question of are
23 these actual governmental actors, are they
24 governmental schools, sorry, not actors, are
25 they, in fact, governmental schools. And there,

1 you're dealing with the creation, control, and
2 dissolution factors, which all favor a finding
3 that they are not governmental act -- schools.

4 JUSTICE SOTOMAYOR: General, what do
5 we do that two years ago in Peltier versus
6 Charter School, the SG argued the opposite
7 position you're taking today, that charter
8 schools are public schools and state actors?

9 GENERAL SAUER: I'd say two things --
10 three things in response to that.

11 First of all, that case was not a
12 religious free exercise case, so that analysis
13 wasn't --

14 JUSTICE SOTOMAYOR: Does it matter?
15 Why were they state actors there and not state
16 actors here?

17 GENERAL SAUER: And as to my second
18 point, as I said to Justice Thomas, we don't
19 think that that's really the correct framework
20 to apply here. But, if it did -- if it does --

21 JUSTICE SOTOMAYOR: So what changed?

22 GENERAL SAUER: -- we think that
23 that's not --

24 JUSTICE SOTOMAYOR: What changed?

25 GENERAL SAUER: Well, for example --

1 JUSTICE SOTOMAYOR: What changed is
2 there's a new administration. But tell me
3 something. Given your new framing, I presume
4 that you're conceding now publicly that the
5 federal charter school program, as it's been run
6 up until now, is unconstitutional?

7 GENERAL SAUER: Not exactly. So there
8 are four -- if I may describe that. There are
9 kind of four buckets in that statute. There's
10 programs and operations, which we think is this
11 case, and there, we are conceding that our
12 argument here implies that there has to be a
13 free exercise exception for those two. Then
14 there's a reference to employment policies, and
15 we think that's already governed by the
16 ministerial exception from Hosanna-Tabor and Our
17 Lady of Guadalupe.

18 Then the federal statute says you have
19 to be kind of open to all in your admissions
20 policies. And we -- we do not concede that
21 there's a constitutional problem there. We
22 contend that that is defensible. If -- for
23 example, if a religious school wanted to come in
24 and say, you know, hey, our religion says we can
25 only teach members of our own faith, we don't

1 concede that that would be constitutionally
2 mandated by Carson and -- and those.

3 JUSTICE KAGAN: And what's the
4 difference?

5 GENERAL SAUER: The difference -- I
6 would say there's three differences. One is, in
7 that circumstance, you would have a Smith
8 analysis that, as Mr. Campbell said, looks very
9 different. Open to all comers is a neutral and
10 generally applicable criterion.

11 Contrast that to the criteria in this
12 case where the discriminatory characteristic, no
13 religious need apply, is right there in the
14 discrimination. So we haven't even made a Smith
15 argument here because of the problem --

16 JUSTICE KAGAN: No, it's -- it's not
17 no religious need apply. It's nonsectarian
18 instruction.

19 GENERAL SAUER: Nonsectarian to me
20 means no religions. But, in any event, our
21 position is --

22 JUSTICE KAGAN: But the point is, to
23 the extent it does mean that, it's because
24 religious practice, religious exercise requires
25 a certain -- you know, you -- because religious

1 belief implies a certain kind of religious
2 conduct, and, here, the same argument would be
3 met. My religious belief requires a certain
4 kind of religious conduct, which is that I only
5 teach members of my own faith.

6 GENERAL SAUER: Suffice to say that
7 under the Smith analysis at least, those seem
8 very, very different, and the government will
9 argue that those are distinct cases.

10 Secondly, even if the Court is not
11 inclined to apply Smith, the argument that there
12 be a compelling state interest and that Oklahoma
13 or the federal government could say this is open
14 to every student where the options are being
15 offered to every student across the board
16 without any discrimination, there would be a
17 strong argument that that would be a compelling
18 state interest even if we weren't look at the
19 neutral and generally applicable framework.

20 And, thirdly, if you look at it
21 through the lens of the funding cases, like U.S.
22 AID, the argument that what we're funding here
23 is a program that's open to all is a much
24 stronger argument than the argument that what
25 we're funding here is a program where we don't

1 let religious schools participate.

2 So, for those three reasons, we would
3 continue to defend the -- the -- the open-to-all
4 admissions policies that we --

5 JUSTICE JACKSON: General Sauer, can I
6 just ask you because, as I understood your
7 response to Justice Sotomayor, you are saying
8 that the portion of the federal law that
9 indicates that to qualify as a charter school
10 you have to be nonsectarian in your programs,
11 you're saying there is a constitutional problem
12 with that or at least there has to be a free
13 exercise exception, is that right?

14 GENERAL SAUER: Exactly. We think
15 that's the natural extension of the 2020 OLC
16 opinion --

17 JUSTICE JACKSON: All right. So, if
18 there --

19 GENERAL SAUER: -- as to affiliation.
20 Sorry.

21 JUSTICE JACKSON: If there is a free
22 exercise exception, then I think -- are you
23 saying that strict scrutiny is triggered as a
24 result of that, and can you speak to why
25 avoiding an Establishment Clause problem would

1 not be a compelling interest of the state in
2 including this kind of clause in their charter
3 school program?

4 GENERAL SAUER: As Mr. Campbell
5 argued, we think that's squarely foreclosed by
6 Carson. Actually, by Trinity Lutheran and
7 Espinoza and Carson, all of which say, you know,
8 protecting establishment --

9 JUSTICE JACKSON: Say it's not a
10 compelling state interest or?

11 GENERAL SAUER: To -- to protect
12 establishment interests more fiercely than the
13 federal Establishment Clause actually protects
14 them is not a compelling state interest that
15 can take away free exercise rights.

16 JUSTICE JACKSON: I guess I feel like
17 that's completely circular, and maybe I'm wrong
18 about it, but I'm just trying to understand it.

19 So how does that account for a state's
20 concern that unless they are setting up a series
21 of nonsectarian programs, they would be funding
22 religious activities in a way that the
23 Constitution doesn't allow?

24 I don't -- I -- I appreciate the
25 Trinity Lutheran scenario and it not being a

1 compelling interest to prevent religious schools
2 from doing exactly the same thing as everybody
3 else is doing in this program, but I'm actually
4 drawing a distinction, as you've heard me say
5 before, that what the religious schools are
6 asking for here is not exactly the same thing.

7 And so, to the extent that the state
8 is saying we see a distinction between religious
9 schools, which require all of these religious
10 rights and proselytize and do whatever, we see a
11 distinction between those kinds of schools and
12 public schools, and we only want to set up
13 public schools because our compelling interest
14 is to prevent the entanglement of the state with
15 funding those kinds of schools.

16 GENERAL SAUER: To address that --

17 JUSTICE JACKSON: Yeah.

18 GENERAL SAUER: -- the Court should
19 look and see whether there is an actual
20 Establishment Clause violation here --

21 JUSTICE JACKSON: Okay.

22 GENERAL SAUER: -- because of its --
23 the principle that governs here would be genuine
24 and independent private choice asserted in
25 Zelman and reaffirmed in Trinity Lutheran, in

1 Espinoza, and Carson. Here, participation in
2 the program is mediated through two layers of
3 private choice. Both the schools decide to
4 participate or the private entities decide --
5 decide to participate, and more fundamentally,
6 the parents decide to send their kids there. As
7 both I -- I think -- both attorneys argue, they
8 -- there is the option, the backstop option, of
9 the traditional government-run public schools.

10 Under that set of circumstances, there
11 is, I think, not a plausible claim that there is
12 an actual direct Establishment Clause violation,
13 so much so that I believe that Respondents on
14 this point hinge their Establishment Clause
15 argument entirely on their government entity
16 argument. So they, I sense, as I read it,
17 concede that there's only an Establishment
18 Clause problem if these actually are government
19 entities.

20 JUSTICE JACKSON: Okay.

21 GENERAL SAUER: There, they run into
22 Lebron and they run into Rendell-Baker and they
23 run into cases like that.

24 CHIEF JUSTICE ROBERTS: Counsel, to
25 what extent can the state impose requirements on

1 such schools? You know, you have to teach
2 Oklahoma state history, you have to teach this,
3 this, and this.

4 GENERAL SAUER: Those all appear to
5 be -- obviously, there could be, you know,
6 unique facts, but those in general would appear
7 to be neutral, generally applicable criteria
8 that they could impose. And if there was a free
9 exercise claim in response to that that, oh, our
10 religion doesn't -- doesn't allow us to teach
11 evolution, if that's neutral and generally
12 applicable, there would be a strong argument
13 that there's no free exercise opt-out there.

14 In addition to that, if you're not
15 applying the Smith framework, the State would
16 have to argue we have a compelling state
17 interest in making sure people understand the
18 theory of evolution so they could pass the
19 standardized tests and so forth. And -- and the
20 Court would have to assess it through that lens.

21 CHIEF JUSTICE ROBERTS: Does the
22 extent of that involvement affect the analysis
23 in terms of whether the -- whether there's too
24 much state involvement to view it as a -- a
25 truly private charter school or a truly

1 religious charter school?

2 GENERAL SAUER: I don't think so if I
3 understand the question. The way that I would
4 frame it is, under Trinity Lutheran and Carson
5 and Espinoza, you have a neutral and generally
6 applicable program.

7 And what you're letting into that
8 program is something that's very like the school
9 in Rendell-Baker, where there is detailed and
10 extensive regulation of that school, but,
11 nevertheless, it is not a private actor.

12 CHIEF JUSTICE ROBERTS: Thank you.

13 GENERAL SAUER: Or, sorry, it is not a
14 state actor.

15 CHIEF JUSTICE ROBERTS: Yeah.

16 GENERAL SAUER: It is a private actor.

17 CHIEF JUSTICE ROBERTS: Justice
18 Thomas?

19 Justice Alito?

20 JUSTICE ALITO: Well, on the issue of
21 intensive state supervision, would you address
22 the -- the entwinement argument that the
23 Oklahoma Supreme Court thought was persuasive?

24 GENERAL SAUER: We think that
25 argument's quite unpersuasive, and here's why.

1 The entwinement argument, for example, they rely
2 solely on Brentwood Academy, and Brentwood
3 Academy is a case where public officials were
4 86 percent of the membership of the state
5 athletic association, and they appointed other
6 public officials to control it.

7 So Brentwood Academy is very similar
8 to the government-controlled cases like MOHELA
9 and Amtrak, where the government's controlling
10 everything. There was a little private
11 involvement to the tune of 14 percent, but
12 that's very different. Here, we're talking at
13 the polar opposite of that, where every single
14 director is privately controlled.

15 And under the cases we cited, Cherry
16 Cotton Mills, Bank of America -- or Bank of
17 United States, all the way up through Biden
18 against Nebraska, it's -- the situation is the
19 opposite of what the Court -- the Court has held
20 to be this is a governmental actor on that
21 crucial control factor.

22 JUSTICE ALITO: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Sotomayor?

25 JUSTICE SOTOMAYOR: No, thank you.

1 CHIEF JUSTICE ROBERTS: Justice Kagan?

2 JUSTICE KAGAN: General, do you -- I
3 mean, do you agree that if -- thinking about the
4 Chief Justice's question, that if the state can
5 apply these various sort of curricular
6 requirements and say, you know, yes, we're just
7 going to insist that you do this,
8 notwithstanding that it's against your religious
9 belief, against your religious practice, I mean,
10 what you're going to get at least in result is
11 real distinctions between the religions that can
12 and cannot benefit from what you're arguing.

13 Wouldn't you agree with that?

14 GENERAL SAUER: I don't know enough
15 about the possible religious applicants to --
16 to -- to directly address that.

17 JUSTICE KAGAN: I mean, I've just got
18 to think that there are religions that are going
19 to have no problems dealing with all the various
20 curricular requirements and religions that are
21 going to have very severe problems dealing with
22 all the curricular requirements.

23 And we're going to end up in a state
24 of the world which has kind of, you know,
25 accepted establishment religions and more

1 different, more fundamentalist, more, you know,
2 use the adjective you want, religions that seem
3 peculiar to many eyes but are deeply felt.

4 GENERAL SAUER: I'd be very surprised
5 if that were the practical outcome because I'd
6 be surprised if there were religions who want to
7 operate essentially charter schools who are
8 unwilling to, you know, agree to teach math and
9 science.

10 JUSTICE KAGAN: There's a big
11 incentive to operating charter schools since
12 everything is funded for you, I mean, so I think
13 that there are going to be -- there's a line out
14 the door if -- if -- if you -- you can do this
15 consistent with your religious belief.

16 All I'm suggesting to you is this
17 notion that the state can do this while still
18 maintaining all its various curricular
19 requirements, I mean, either that's sort of
20 fantasy land given the state of religious belief
21 and religious practice in this world, or, if
22 it's not, it's only because what's -- what's
23 going to result is treating, shall we call them,
24 majoritarian religions very differently from
25 minority religions.

1 GENERAL SAUER: First, I'd say that if
2 there is, in fact, a line out the door, so to
3 speak, that line out the door will increase the
4 diversity of options for parents and students in
5 states that have programs that are similar to
6 Oklahoma.

7 Whether or not it will result in some
8 kind of disfavorment for minor -- the --
9 whatever the opposite of majoritarian is and
10 nonmajoritarian religions, I -- I -- I can't
11 speak to that.

12 JUSTICE KAGAN: Let me just ask you
13 one quick last question and make sure that I
14 understand what part of the federal statute
15 you're giving up today.

16 As I understand it, the federal law
17 conditions money on recipients being public
18 schools that are nonsectarian in their programs,
19 admissions policies, employment practices, and
20 all other operations. So that's the part of the
21 federal statute that I focused on.

22 And you're saying today that that is
23 so patently unconstitutional that you will not
24 defend that statute.

25 GENERAL SAUER: I -- I -- I would give

1 the same qualifications I gave earlier. Our
2 position today would be that programs and
3 operations -- under the logic of Carson and
4 Trinity Lutheran and Espinoza, programs and
5 operations would need a free exercise exception.

6 The government's already determined in
7 2020, after Trinity Lutheran, that affiliation
8 that is referred to in that statute also can't
9 survive after Trinity Lutheran.

10 When it comes to admissions policies,
11 which is also referred to in the statute, we
12 defend that.

13 JUSTICE KAGAN: Got it. Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch?

16 JUSTICE GORSUCH: If a state wanted to
17 avoid the choice issue here by making charter
18 schools government entities, what would it have
19 to do?

20 GENERAL SAUER: Certainly, one way it
21 could do it is create them directly by statute
22 and have them controlled by directors who are
23 themselves public officials.

24 My understanding is that California's
25 system is somewhat like that. There may well be

1 other states where they really are government
2 entities, they're part of the government.

3 Here, where they're privately
4 controlled directors, where they are created by
5 a process that is initiated by a private
6 applicant, and sometimes the application doesn't
7 even go to a -- a public actor, we are, in a
8 sense, the polar opposite of cases like MOHELA
9 and Biden against Nebraska.

10 JUSTICE GORSUCH: So a holding here
11 is -- may apply in some states and may not apply
12 in others?

13 GENERAL SAUER: Exactly right. And
14 states would have the option to restructure
15 their programs if they wanted to, you know, have
16 these be government-run entities.

17 JUSTICE GORSUCH: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Kavanaugh?

20 JUSTICE KAVANAUGH: Just make sure I
21 understand the limits of the federal
22 government's position.

23 The state can't favor one religion
24 over another in approving or allowing charter
25 schools, correct?

1 GENERAL SAUER: Absolutely correct.

2 JUSTICE KAVANAUGH: And also the state
3 can't favor religion generally over secular
4 counterparts in allowing or approving charter
5 schools as well. In other words, if it has
6 charter schools, it must allow secular and
7 religious, correct?

8 GENERAL SAUER: Correct.

9 JUSTICE KAVANAUGH: That's it. Thank
10 you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Jackson?

13 JUSTICE JACKSON: So I'm just trying
14 to understand your Establishment Clause, nothing
15 to see here, position.

16 St. Isidore's is pretty clear about
17 its mission -- its -- its mission. Its members,
18 as you've said, are private individuals, an
19 archbishop and a bishop. It would require the
20 students to "spend time in religious instruction
21 and activities and permit state spending in
22 direct support of religious curriculum and
23 activities."

24 So are -- are you saying that the
25 religious charter schools' use of public funds

1 to support proselytization, which the school
2 says it intends to do, is not an Establishment
3 Clause problem?

4 Like, we wouldn't have to look at,
5 like, where the funding is going? You -- even
6 if the school says, yes, we're getting money
7 from the state and we are turning around and
8 buying Bibles and instructing the students and
9 make -- you know, no Establishment Clause
10 problem?

11 GENERAL SAUER: The principle of
12 genuine and independent private choice that goes
13 from Zelman to Carson would address that
14 directly. Here, the parents are choosing with
15 open eyes to take their kid to the religious
16 charter school. They are understanding we may
17 be subject to proselytization or whatever would
18 be --

19 JUSTICE JACKSON: Isn't -- isn't
20 that -- so you're saying the Establishment
21 Clause only -- only does work in a situation in
22 which a person is being forced to engage in
23 religious activities if there is a choice
24 somehow?

25 GENERAL SAUER: No, I'm saying where

1 state funding is going to religious schools on
2 an even footing through -- where public and
3 private schools can apply for the funding as you
4 see here, and in addition to that, the decision
5 whether or not to go to the religious school or
6 the nonreligious school lies in the hands of the
7 parents, that is genuine and independent private
8 choice, which I don't think is disputed in this
9 case and, therefore, that would not violate the
10 Establishment Clause.

11 JUSTICE JACKSON: Okay.

12 GENERAL SAUER: Once you -- once
13 that's the position, then --

14 JUSTICE JACKSON: Yeah. And one final
15 question. So Justice Kavanaugh explored with
16 you about favoring one religion over another.

17 I'm wondering whether, as a practical
18 matter, that can happen in a situation like this
19 one where the board can only sponsor five
20 charter schools in a year, for example.

21 I mean, doesn't the board have to
22 determine -- what if we have six applicants or
23 seven from different religions? Would we be in
24 a situation in which the board is picking and
25 choosing among them?

1 GENERAL SAUER: The board would have
2 to use religiously neutral criteria. And my
3 understanding is the board says it does that.
4 So it would --

5 JUSTICE JACKSON: But -- but
6 wouldn't --

7 GENERAL SAUER: -- pick the best
8 qualified, but --

9 JUSTICE JACKSON: -- wouldn't --
10 wouldn't it -- I -- I understand their criteria
11 for picking, but at the end of the day, to the
12 extent that we only have established charter
13 schools for certain religions, wouldn't the
14 effect of that be to establish a certain
15 religion -- do you see what I'm saying?

16 GENERAL SAUER: The effect would not
17 be constitutionally problematic if the board
18 uses, as it says it does, religiously neutral
19 criteria in selecting who are the best
20 applicants.

21 JUSTICE JACKSON: Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Mr. Garre?

25

1 ORAL ARGUMENT OF GREGORY G. GARRE

2 ON BEHALF OF THE RESPONDENT

3 MR. GARRE: Thank you, Mr. Chief

4 Justice, and may it please the Court:

5 Three considerations distinguish this
6 case from the Trinity Lutheran trilogy and
7 require affirmance.

8 First, charter schools are public
9 schools. They bear all the hallmarks of the
10 criteria this Court recognized in Carson, are
11 established, just like the Court said in Carson
12 states could, to expand educational
13 opportunities within the public schools system,
14 and have been recognized as and indeed are
15 required to be public schools by the Congress of
16 the United States and the legislatures of 47
17 states.

18 Second, teaching religion in -- in --
19 as truth in public schools is not allowed.
20 St. Isidore has made clear that that's exactly
21 what it wants to do in infusing its school day
22 with the teachings of Jesus Christ. Oklahoma
23 respects and promotes through vouchers and other
24 means the abilities of families to secure such
25 an education in a private school.

1 But this Court in -- this Court has
2 held in a series of landmark precedents not
3 challenged by anyone here that the Establishment
4 Clause bars such devotional teaching in public
5 schools.

6 And, third, Petitioners are not
7 seeking access to Oklahoma's program on equals
8 terms. They seek a special status: the right
9 to establish a religious charter school plus an
10 exemption from the nondiscrimination
11 requirements that apply to every other charter
12 school and that distinguish public schools from
13 private schools.

14 The charter schools movement is one of
15 the modern-day success stories of public
16 education. Presidents, governors, and
17 legislators from -- from across the country have
18 recognized that charter schools have improved
19 educational opportunities and outcomes for
20 millions of Americans, especially those from
21 disadvantaged backgrounds, within the public
22 schools system.

23 A ruling for Petitioners would not
24 only lead to the creation of the nation's first
25 religious public school, it would render

1 unconstitutional, as my friend from -- the
2 Solicitor General acknowledged, the federal
3 charter school program and immediately the laws
4 of 47 states across this country, and it would
5 result in the astounding rule that states not
6 only may but must fund and create public
7 religious schools, an astounding reversal from
8 this Court's time-honored precedents.

9 I welcome the Court's questions.

10 JUSTICE THOMAS: Mr. Garre, would you
11 elaborate on your statement that public --
12 charter schools must by force be public?

13 MR. GARRE: Of course, Your Honor.
14 They -- they bear all the hallmarks this Court
15 has recognized. They're free, open to all,
16 funded by taxpayers, controlled by the state
17 with respect to their curriculum. And I hope we
18 can talk about that during this argument.

19 They're -- they're required to meet
20 nondiscrimination laws, and they're
21 nonsectarian, all the features that this Court
22 recognized in Carson and had little difficulty
23 applying.

24 JUSTICE THOMAS: So, in -- in your --
25 in the way you look at this case, there is no

1 way that St. Isidore can participate in the
2 charter program and be -- and remain private?

3 MR. GARRE: That's right. That's a
4 matter -- that's not me saying it. It's the
5 state saying it. I mean -- and -- and the
6 Oklahoma Supreme Court made this clear. I mean,
7 we've had a lot of statements that St. Isidore
8 is a private institution and not a public
9 school. I mean, what -- what the Oklahoma
10 Supreme Court said was St. Isidore, I'm quoting
11 here, "came into existence through the charter
12 with the state and will function as a component
13 of the state's public schools system." That's
14 at page 30a of the appendix.

15 The -- the court also -- the state
16 court also said that this is a
17 legislature-created entity. It's a surrogate of
18 the state. It's a public school. I -- this
19 Court has a lot of authority, but I don't think
20 it has the authority to second-guess --

21 JUSTICE THOMAS: So I think the
22 argument that St. Isidore and the board has
23 made -- are making is that it's a private entity
24 that is participating in a state program. It
25 was not created by the state program.

1 MR. GARRE: Right. And state law, as
2 interpreted by the Oklahoma Supreme Court,
3 refutes that. And I don't -- with respect, I
4 don't think this Court can second-guess that.

5 And -- and let me talk about the state
6 law. I mean, to put aside what the Oklahoma
7 Supreme Court said, state law in 3-132.2 says
8 that charter schools are established as an
9 entity. The Oklahoma Administrative Code
10 210:40-87-5(b) says: "Establishment of a new
11 charter school. A new charter school is
12 established when a charter school application is
13 approved."

14 And -- and there were a question about
15 how St. Isidore has changed the application
16 here. I mean, it did so with respect to the
17 nondiscrimination requirements, and let me quote
18 in a couple ways. On pages 295 to 96 of the
19 Respondent appendix, in a statement of
20 assurance, it said it would apply with federal
21 and state law, "with priority given to the
22 Catholic Church's understanding of itself and
23 its rights and its obligations pursuant to the
24 Code of Canon Law and the catechism of the
25 Catholic Church." That's one.

1 And then, on page 332a of the
2 Respondent's appendix: The -- "The school
3 complies with all applicable state and federal
4 laws and statutes to the extent the teachings of
5 the Catholic Church allow."

6 And then, with respect, another
7 important change is they completely changed the
8 definition of public schools. If you look at
9 page 521a of Respondent's appendix, that's the
10 charter school template that the state provides,
11 and it defines a public school as a school
12 "established by the legislature that's free and
13 supported by the state."

14 And what they described it as, at page
15 4a in their application of the Respondent's
16 appendix, is that charter schools are privately
17 operated not-for-profit entities. So that's
18 what they're making up. Under state law,
19 just -- not only Oklahoma. North Dakota just
20 became the fortieth state in the Union to
21 recognize charter schools as public schools, as
22 the Congress of the United States has recognized
23 this.

24 CHIEF JUSTICE ROBERTS: What do you do
25 with Fulton? You have a state agency that

1 refused to deal with the religious adopted --
2 adoption services, and we held they couldn't
3 engage in that discrimination.

4 MR. GARRE: Sure.

5 CHIEF JUSTICE ROBERTS: How is -- how
6 is that different from what we have here?

7 MR. GARRE: I think --

8 CHIEF JUSTICE ROBERTS: You have an
9 education program, and you want to not -- not
10 allow them to participate with a religious -- a
11 religious entity.

12 MR. GARRE: So I think it's
13 fundamentally different. I mean -- and our
14 position doesn't threaten faith-based
15 contractors at all. The -- the -- the -- the
16 adoption agency in Fulton wasn't established by
17 the -- the state through legislative action. It
18 wasn't fully funded by the state. It wasn't
19 controlled by the state.

20 I mean, the -- the charter schools
21 here are controlled in -- in fundamental ways
22 that my friends have glossed over this morning.
23 I mean, with respect to curriculum, there's
24 front-end and back-end requirements. They have
25 to show as part of their application that --

1 that they will meet the state's academic
2 standards, which are, you know, highly
3 reticulated down to the point that they have to
4 teach Reagan's "Tear Down the Wall" speech in --
5 in U.S. history or dangling modifiers in ninth
6 grade English. They can't teach what other
7 public schools can't teach, which is critical
8 race or -- or gender theories --

9 JUSTICE KAVANAUGH: I don't think --
10 you're a little far afield, I think, from the
11 Chief's question at least as I understand it
12 because I think a concern here is that
13 religiously operated senior homes or food banks
14 or foster care agencies or adoption agencies or
15 homeless shelters, many of which get substantial
16 funding from the government, would potentially,
17 under your theory, this is the concern, be --
18 become state actors and, thus, not be able to
19 exercise their religion.

20 So can you explain why the -- the
21 principle that you're articulating would not
22 have that result?

23 MR. GARRE: So in none of those cases
24 do you have contractees that actually become a
25 part of the state as -- as charter schools do.

1 JUSTICE KAVANAUGH: When you say --

2 MR. GARRE: They're established --
3 sorry.

4 JUSTICE KAVANAUGH: Keep -- I just
5 want you to come back -- when you say a part of
6 the state, I want to drill down on that. What
7 do you mean?

8 MR. GARRE: Well, that they're
9 established by the state, the legislature, that
10 they become components of the state system,
11 which is what the Oklahoma Supreme Court --

12 JUSTICE GORSUCH: I want to drill down
13 on that --

14 MR. GARRE: -- held here.

15 JUSTICE GORSUCH: -- a little further
16 too if it's all right. So, in Fulton, you had
17 Catholic Charities, which had to be
18 incorporated. It was incorporated, separately
19 incorporated under state law, and could only
20 provide adoption services with incredible
21 oversight from the city. I mean, they can't --
22 they can't take foster children in. They can't
23 place them without comprehensive governmental
24 involvement.

25 What's the -- again, what's the

1 difference? How do we draw that line so that we
2 capture public schools on your account but we
3 don't capture, and you seem to say we shouldn't
4 capture, entities like Fulton?

5 And, by the way, I'm delighted to hear
6 they're -- they're still teaching the problems
7 of dangling modifiers in Oklahoma's schools.

8 (Laughter.)

9 MR. GARRE: Right. So, again,
10 Your Honor, the adoption agencies and other
11 faith-based contractors are not being
12 established by the state --

13 JUSTICE GORSUCH: Well, they --

14 MR. GARRE: -- as part of a system.

15 JUSTICE GORSUCH: Well, they have to
16 be incorporated, and they have to be approved,
17 and every parent has to be -- that they come
18 forward with has to be -- satisfy certain
19 criteria that the state -- I mean, it's
20 comprehensive regulation.

21 MR. GARRE: I mean, Oklahoma has a
22 general corporations law too, Your Honor, and
23 what is going on in the charter school program
24 is fundamentally different. And, look, even in
25 the --

1 JUSTICE GORSUCH: What's the test, I
2 guess, is what I'm asking, Mr. Garre, that you'd
3 have us apply? Because, you know, we have to
4 have a test to distinguish these two buckets of
5 cases, right?

6 MR. GARRE: Well, I think, here, I
7 think to --

8 JUSTICE GORSUCH: -- between Fulton
9 and -- what -- what's the test?

10 MR. GARRE: Right. I think, first of
11 all, here, we're dealing with public schools,
12 and -- and I think, you know, we can talk about
13 the other examples, but, I mean, I think we're
14 dealing with public schools. This Court in
15 Carson just a couple years ago --

16 JUSTICE GORSUCH: I appreciate -- I
17 appreciate that point, but you -- you --
18 you've -- you've urged us to say public schools
19 are different from other contractors like
20 Catholic Charities in Fulton, and so we need a
21 test, a law -- legal test. Is it Lebron? Is
22 that where you'd have us look?

23 MR. GARRE: I think you can look at --
24 I mean, look, I think that public schools bear
25 all the hallmarks of government entities, and we

1 can go down the list.

2 JUSTICE GORSUCH: So is it --

3 MR. GARRE: They're clearly --

4 JUSTICE GORSUCH: -- is it -- is it
5 creation and control? Are -- are those the
6 correct things that we should be looking at? I
7 know you say we shouldn't look at state action
8 doctrine. I mean, is it -- is it -- is it those
9 two factors?

10 MR. GARRE: I think it's those. I can
11 give you the five -- the five factors that this
12 Court looked to in Lebron.

13 JUSTICE GORSUCH: Okay. So --

14 MR. GARRE: Creation, which I think is
15 clearly met here because the Oklahoma Supreme
16 Court has interpreted Oklahoma law --

17 JUSTICE GORSUCH: I'll let you go
18 through that. I don't mean to --

19 MR. GARRE: Okay.

20 JUSTICE GORSUCH: -- cut you off.
21 I -- I just want to make sure we're on the same
22 page to start with, which is we should look to
23 Labron to make -- to make that -- this -- this
24 decision -- this distinction.

25 MR. GARRE: I think this Court can

1 decide this case by saying that charter schools
2 or public schools in all the ways that people
3 have always recognized and that this Court has
4 recognized and that you can't fund an entity to
5 teach religion as truth in public schools.

6 I also think you can look at the
7 government entity precedents and the state actor
8 precedents and come to the same conclusion. And
9 if -- and I'll go through the factors in
10 government --

11 JUSTICE GORSUCH: Please. I didn't
12 mean to stop you.

13 MR. GARRE: Okay. Creation. In the
14 Oklahoma Supreme Court decision in this case,
15 Oklahoma law answers that. The public charter
16 schools are created by the legislature. They
17 come into existence and they become part of the
18 state public schools system. That's what the
19 Oklahoma Supreme Court said at page 30.

20 There's -- there's --

21 JUSTICE SOTOMAYOR: This is not the
22 Catholic Church giving this.

23 MR. GARRE: Excuse me?

24 JUSTICE SOTOMAYOR: This is not the
25 Catholic Church who's being given this. It's

1 the created new charter school?

2 MR. GARRE: That's exactly right.

3 That's exactly right.

4 Number two, state supervision and
5 control.

6 And maybe I can bracket that, we can
7 come back to that, because that's an important
8 one.

9 The state can repeal or close the
10 institution, which this Court acknowledged in
11 the Biden case and other cases, and that's
12 clearly the case here. The state can close
13 charter schools, unlike private schools.

14 Number four, the state has denominated
15 the entity as a public entity. We're not saying
16 that labels decide this case, but it's -- it's
17 significant that the state has regarded charter
18 schools as public schools, as has the Congress
19 of the United States and the legislatures of
20 every other state. It would be sort of
21 remarkable for this Court to say that everyone
22 else was wrong on that.

23 And five, the Court in Biden looked
24 to -- and Lebron looked to public understanding.
25 And, here, again, public understanding is that

1 charter schools are public schools, just as
2 Congress in every state has recognized.

3 JUSTICE JACKSON: Mr. --

4 MR. GARRE: So going back to state
5 control --

6 JUSTICE JACKSON: -- Mr. Garre, can I
7 just --

8 MR. GARRE: Yes.

9 JUSTICE JACKSON: So drilling down on
10 that because I think --

11 JUSTICE SOTOMAYOR: Let him finish on
12 supervision and -- and control.

13 JUSTICE JACKSON: Sorry?

14 JUSTICE SOTOMAYOR: Just let him
15 finish on supervision and control.

16 JUSTICE JACKSON: Go ahead.

17 MR. GARRE: So supervision and
18 control, there -- there's extensive oversight of
19 curriculum in a way that doesn't remotely exist
20 for private schools.

21 At the front end, in terms of the
22 application process, where you have to identify
23 the curriculum, applications are often rejected
24 because of the curriculum. Then you have to --
25 you have to lay out that you'll meet a number of

1 performance indicators that are set forth at
2 pages 18, 19 to 20 of our statutory addendum,
3 and you have to show that your -- your
4 curriculum will align with the state's academic
5 standards, which are highly reticulated.

6 And then, once you do that, every year
7 you are evaluated for compliance with those
8 factors, academic performance. You're evaluated
9 for financial performance. You're audited. All
10 in ways in which doesn't remotely resemble
11 what's going on with a private school, which is
12 hands off.

13 The board itself -- and there have
14 been a lot of -- there's been a lot of
15 discussion about the governing board. That
16 governing board is reviewed at the outset in the
17 application, what it's going to be like, who's
18 going to be on it, and then it's evaluated every
19 year as to board compliance. Boards that are
20 deficient or malfeasant can and have been
21 removed.

22 There's -- there's -- they're also
23 subject to the general assessment test that
24 apply to public schools, which doesn't apply to
25 private schools.

1 JUSTICE JACKSON: So, Mr. --
2 Mr. Garre, can I just sort of summarize this by
3 saying that I think what you're saying is that
4 un -- or just like traditional public schools,
5 charter schools are a creation and creature of
6 the state that distinguish them from things like
7 the other very interesting and good examples
8 that were raised, you know, nursing homes,
9 adoption agencies, hospitals.

10 Those things can actually exist
11 outside of the state, although they have to be
12 licensed in the state, just like a private
13 school would have to be licensed. You know,
14 obviously, there's going to be some state
15 involvement to authorize these private people to
16 set up this private entity.

17 But it seems to me that you're saying
18 with all of these different factors and the way
19 in which you're conceiving of this, a public
20 school and these charter schools are creatures
21 of the state in a different way.

22 MR. GARRE: Yes. And I don't think,
23 when this Court decided Fulton, it thought it
24 was imposing new requirements on public schools.

25 And with respect to supervision and

1 control, if I could just make one more point.
2 Federal law requires this. The charter school
3 program requires that charter schools "be
4 operated under public supervision and
5 direction." This is at 7221(i)(2)(B) of the
6 statute. And this is really important.

7 I mean, the federal charter school
8 program has been implemented for decades.
9 Billions of dollars have been dispensed by the
10 federal government.

11 JUSTICE KAVANAUGH: All -- all the
12 religious school is saying is don't exclude us
13 on account of our religion. I mean, if you go
14 and apply for -- to be a charter school and
15 you're an environmental studies school or you're
16 a science-based school or you're a Chinese
17 immersion school or you're a English
18 grammar-focused school, you can get in.

19 And then you come in and you say, oh,
20 we're a religious school. It's like, oh, no,
21 can't do that, that's too much. That's scary.
22 We're not going to do that.

23 And our cases have made very clear,
24 and I think those are some of the most important
25 cases we've had, of saying you can't treat

1 religious people and religious institutions and
2 religious speech as second-class in the
3 United States.

4 And when you have a program that's
5 open to all comers except religion, no, we can't
6 do that, we can do everything else, that seems
7 like rank discrimination against religion, and
8 that's the concern that I think you need to deal
9 with here.

10 MR. GARRE: Sure. And -- and,
11 certainly, we -- as we've said in our brief, we
12 recognize that principle and we respect it.
13 But, as this Court itself said in the Carson
14 case, states may maintain strictly secular
15 public schools. And that's all the State of
16 Oklahoma has done here.

17 All we're saying is that we're not
18 going to create, fund, and control the
19 curriculum of schools that want to teach --

20 JUSTICE KAVANAUGH: As -- as --

21 MR. GARRE: -- religion as truth.

22 JUSTICE KAVANAUGH: I think, as
23 Justice Gorsuch pointed out earlier, a state
24 could easily design a different kind of charter
25 schools system where they really were

1 government-run, government-controlled,
2 government-created, government-established
3 private charter schools. That's not what some
4 states have.

5 They open it up to private people to
6 apply, and then, when you say to someone, you're
7 no good because you're religious, they're not
8 asking -- and to make the point, they're not
9 asking for special treatment. They're not
10 asking for favoritism. They're just saying
11 don't treat us worse because we're religious.

12 And that just seems like a core
13 principle. Again, you could redesign this
14 pretty easily, as Justice Gorsuch was talking
15 about, and the California example I don't know
16 the details of, but that's not how it's done.

17 MR. GARRE: Well, in terms of creation
18 and control, Oklahoma -- Oklahoma has that, as
19 do all the other states with charter schools.
20 And if you have any questions about control, let
21 me go through that.

22 I mean, I think the one thing that has
23 been seized upon is board governance, and on
24 that, I don't think that that can make the
25 difference because, under Lebron and those

1 cases, the ultimate question is state control.
2 Here, you have state control. States are
3 auditing charter schools, are involved in
4 curriculum. They -- they're -- they have to
5 be -- material changes have to be approved.

6 With respect to the boards, those
7 boards are also monitored. The -- the
8 application has to describe the board. The
9 board is evaluated each year for board
10 governance. Boards that don't operate correctly
11 can and have been removed. Charter school board
12 members themselves have to sit on the governing
13 board meetings. The governing boards for
14 charter schools are regarded as government
15 bodies under state, as we've shown in opinions.

16 CHIEF JUSTICE ROBERTS: Counsel --

17 MR. GARRE: So the state retains
18 complete control up to the point that they can
19 close it.

20 JUSTICE SOTOMAYOR: Mr. Garre --

21 CHIEF JUSTICE ROBERTS: Counsel, I
22 don't understand really the -- this created and
23 creature of the state. The pavement or wood
24 chip program in Trinity Lutheran was created and
25 controlled by the state, yet we held that you

1 couldn't exclude religious schools. The tuition
2 program in Espinoza, a creature and created by
3 the state. You couldn't exclude religious
4 participants. The same in Carson, the same in
5 Fulton.

6 Is your test it's -- it's a creation
7 and creature of the state? Because all of those
8 were and we held that under the First Amendment,
9 you couldn't exclude people because of their
10 religious belief.

11 MR. GARRE: Well -- well, the --
12 the -- the programs were, of course, but what
13 we're talking about is the applicants. And --
14 and -- and, here, I think that the creation
15 point goes to the government entity point.

16 CHIEF JUSTICE ROBERTS: Well, I'm
17 sorry. Just -- I'm not following. The
18 applicants in those cases were religiously
19 affiliated.

20 MR. GARRE: Well, religious -- I mean,
21 they're parents, for example, in Carson or
22 Espinoza. In -- in Trinity Lutheran, it was the
23 church itself. But, I mean, the -- the -- as to
24 creation, this goes to whether or not this is a
25 government entity, and under state law, charter

1 schools come into existence when they are
2 approved and become part of the state and
3 they're established by the legislature.

4 I mean, that's what Oklahoma Supreme
5 Court interpreted Oklahoma law to mean. And
6 that's the way that, you know, virtually every
7 state in the country and the Congress have
8 understood charter schools to be. And that
9 makes --

10 JUSTICE ALITO: Mr. Garre --

11 MR. GARRE: Yes?

12 JUSTICE ALITO: I'm sorry. Finish
13 your sentence.

14 MR. GARRE: I'm sorry, Justice Alito.

15 JUSTICE ALITO: No. This is really a
16 point of information to start out at least.

17 The point of the charter school
18 program as I understand it is to confer a lot of
19 flexibility on the charter schools so that they
20 offer a real alternative to the private -- to
21 the public schools, to what you call the public
22 schools, isn't that true?

23 MR. GARRE: Yes and no. I mean, I
24 think a real alternate -- there's no question
25 that charter schools want to harness private

1 ingenuity, and they do that -- they say you can
2 come to us with the applications, but we're
3 going to rigorously scrutinize those
4 applications, we're going to make sure that you
5 meet our curriculum requirements, we're going to
6 evaluate you every year, and if you try to
7 change your curriculum, you have to come back
8 and get approval. And --

9 JUSTICE ALITO: Well, but -- but
10 they -- they offer -- they're allowed to offer a
11 curriculum. Yes, it has to meet certain state
12 requirements, but the focus of the curriculum
13 can be quite different from the public school,
14 and I thought that was understood to be one of
15 their virtues.

16 MR. GARRE: They -- the charter
17 schools have to meet the academic standards that
18 public schools have to meet, again, down to the
19 level of dangling modifiers in ninth grade
20 English class.

21 I mean, I think what's different is
22 you can imagine a school that's built around
23 performing arts or sports, as some charter
24 schools are, or language. You can build a
25 school around that model --

1 JUSTICE ALITO: Well --

2 MR. GARRE: -- but it has to have all
3 the same academic curriculum requirements.

4 JUSTICE ALITO: -- can -- can a -- can
5 a charter school seek to inculcate a secular
6 viewpoint, a -- not -- not just a secular
7 viewpoint, a particular secular viewpoint?

8 MR. GARRE: I mean, I don't -- I
9 don't -- with respect, I don't know what you
10 mean by that. I mean, to the --

11 JUSTICE ALITO: All right. I'll take
12 your -- I'll take your example --

13 MR. GARRE: I mean, to the extent
14 traditional public schools can, yes.

15 JUSTICE ALITO: I'll take your example
16 of a school that focuses on music. So could a
17 school that focuses on music teach only the
18 music composed by dead white men, Brahms --
19 Bach, Beethoven, and Brahms, and all the rest?
20 Could they do that?

21 MR. GARRE: I think like a traditional
22 public school could. But -- but what charter
23 schools can't --

24 JUSTICE ALITO: All right. Could a --
25 could a school that focuses on music say, no,

1 we're not going to do that; we're going to
2 include jazz and hip-hop and rap and music from
3 non-European countries? Could they do that?

4 MR. GARRE: I think they probably
5 could do that.

6 JUSTICE ALITO: All right. Could a
7 school say we're going to be a LG -- LGBTQ-plus
8 friendly school so that the books that
9 elementary schoolchildren are going to read are
10 going to have lots of LGBTQ-plus characters,
11 same-sex couples, and they are going to send the
12 message that this is a perfectly legitimate
13 lifestyle? They're going to tell the little
14 kids, if you -- your parents may say you're a
15 boy or a girl, but that doesn't mean you really
16 are a boy or a girl. Could they do that?

17 MR. GARRE: No. And the reason why
18 they couldn't is because state law prohibits the
19 teaching of gender studies or race in public
20 schools, traditional public schools and charter
21 schools. And -- and, you know, that reminds --

22 JUSTICE ALITO: All right. I'll give
23 you another example. Could a school say we're a
24 progressive school and we're going to do
25 everything the state wants you to do, but we're

1 going to teach history from the 1619 Project
2 standpoint.

3 MR. GARRE: No, because they'd have to
4 meet the state's academic standards, and that
5 would not be allowed, I mean, as --

6 JUSTICE ALITO: Why would that not
7 be -- why would not be -- that not be allowed?
8 We're going to put a lot of -- we're going to
9 make sure students know about -- know a lot
10 about slavery and Jim Crow and the treatment of
11 Native Americans.

12 MR. GARRE: Just like a traditional --

13 JUSTICE ALITO: They can't do that?

14 MR. GARRE: Just like a --

15 JUSTICE ALITO: They can't -- they
16 can't emphasize that?

17 MR. GARRE: Just like a traditional
18 public school, there would be some leeway there,
19 but, with respect, they could -- certainly
20 couldn't set -- focus their curriculum just on
21 that. And -- and -- and let me give you the
22 citation so you can look at the academic
23 standards.

24 JUSTICE ALITO: Well, on the other
25 hand, I don't want this to be one-sided. So

1 suppose a school says we're going to teach
2 American history like the way it was taught in
3 1955, so we're going to celebrate the founding
4 fathers and we're not going to say anything
5 about their short -- their shortcomings and
6 we're not going to make -- we're not going to
7 say a whole lot about the -- the dark episodes
8 in American history. Could they do that?

9 MR. GARRE: No. Traditional Oklahoma
10 public schools could not do that and charter
11 schools cannot do that because --

12 JUSTICE ALITO: Where does it say
13 that?

14 MR. GARRE: So it says it in --
15 3-34(B)(12) of the charter schools statute says
16 that curriculum must be aligned with state
17 academic standards. And then, if you go to
18 Oklahoma Administrative Code 210:15-3-1, it
19 spells out in detail the criteria for
20 curriculum. And we've got other cites in our
21 brief on that.

22 And -- and they're controlled in the
23 same way that public schools are. And that's
24 the point, Justice Alito. Charter schools are
25 like public schools, traditional public schools.

1 When it comes to curriculum, they're controlled
2 as to curriculum. And that completely
3 distinguishes private schools.

4 My friend had -- was asked how are
5 private schools different. I think his answer
6 left a lot to be desired here on that, and --
7 and let me just walk -- walk through how they're
8 different, Justice Kavanaugh.

9 Number one, private schools can open
10 without any state approval. They don't even
11 have to be accredited. Number two, there are no
12 requirements or supervision of curriculum for
13 private schools. The only practical limit is
14 what employers want or what colleges want.
15 Number three, they can charge tuition. Number
16 four, they can restrict admissions. Number
17 five, they're not subject to general state
18 assessment tests. Number six, they're not
19 subject to nearly the reporting requirements or
20 oversight as public schools. Number seven,
21 they're not subject to state rules regarding
22 student discipline, civil rights, health, and on
23 down the line. And, number eight, there's no
24 process for closing them short of consumer fraud
25 or fraud.

1 I mean, private schools are
2 fundamentally different. What we're talking
3 about here is a school that is closely regulated
4 that is part of the public schools system. And
5 this Court, again, in Carson said that states
6 can expand their public schools. That's what
7 charter schools are. They were meant to expand
8 the public school options for families across
9 the country, and they've been successful,
10 especially for families from disadvantaged
11 backgrounds.

12 And if this Court holds that the
13 Oklahoma program is unconstitutional, then it
14 immediately renders the charter school laws in
15 47 states unconstitutional --

16 JUSTICE KAVANAUGH: Well, that --
17 that's a little bit -- this would be expanding
18 the options, not contracting the options. So I
19 don't know if I --

20 MR. GARRE: With respect, that's not
21 the right way to look at it because charter --

22 JUSTICE KAVANAUGH: Well, why not?

23 MR. GARRE: Because charter schools
24 were built on the premise that they're public
25 schools, and that was by design because people

1 wanted to expand access to public schools and
2 people understand that religion cannot be
3 taught.

4 JUSTICE KAVANAUGH: I thought they
5 were built on the idea that innovative --
6 innovative approaches to education would
7 increase the quality of education in a
8 particular community or at least provide options
9 for particular focuses and -- and overall
10 improve the educational quality in the state.

11 MR. GARRE: You don't have to believe
12 me. You can just look at the fact that Congress
13 from the beginning of the federal charter school
14 program in 1994 and every single state has made
15 clear that charter schools are to be public
16 schools and run as public schools. And that's
17 the way it's always been understood.

18 And -- and if this Court rules in
19 favor of Petitioners here, there are going to be
20 some states that ramp it up, no question, but
21 there are going to be other states that say we
22 want out. And, you know, each state can make
23 its own decision.

24 But this is going to have a dramatic
25 effect on charter schools across the country.

1 And just think of the federal charter school
2 program on its own. I don't think -- you can't
3 just say, like, oh, we'll just, you know, grant
4 a --

5 JUSTICE KAVANAUGH: Well, it's
6 not going to -- that would -- the premise of
7 that was that at that point, it was considered
8 constitutional to discriminate against religious
9 entities and that, you know, that's -- some of
10 our case law has changed that and said no, it's
11 not constitutional to discriminate against
12 private religions.

13 MR. GARRE: And that's -- I mean, the
14 theory is, if this is a --

15 JUSTICE KAVANAUGH: And you'll
16 probably disagree with my characterization
17 there. I understand that, but --

18 MR. GARRE: Well, I mean --

19 JUSTICE KAVANAUGH: -- it's a
20 different constitutional understanding.

21 MR. GARRE: I encourage you to read
22 the OLC opinion because what that opinion says
23 is it focuses on the affiliation requirement,
24 that you could have a school that potentially is
25 a religious entity, wants to run a secular

1 program, and that that wouldn't be allowed.

2 The OLC opinion itself goes -- goes
3 out of its way to make clear that it wasn't
4 saying that you could have charter schools
5 running religious programs. And I think it's
6 obvious that the result would be different there
7 because of the Establishment Clause problems.

8 This Court rejected --

9 JUSTICE KAVANAUGH: But how --

10 MR. GARRE: -- the use/status
11 distinction in Carson with respect to the Free
12 Exercise Clause. But the use distinction, of
13 course, makes a difference with respect to the
14 Establishment Clause.

15 JUSTICE KAVANAUGH: In terms of the
16 principles, how is it different from a choice
17 program in the -- in the sense that no student
18 is compelled to go to a religious charter
19 school? And I would, of course, agree with you,
20 you know, if that were the case, that would be a
21 huge problem. No one's compelled to go. You
22 have a choice to go to the traditional public
23 school, or you can go to a charter school of
24 your choice that you can obtain admittance to,
25 or you can go to a private school. No one's

1 being compelled to go to any school. It's just
2 another option that is available.

3 MR. GARRE: That's right. And this
4 Court had a case last week in Mahmoud where it
5 involved, you know, story time with certain
6 offensive messaging. No parent was required to
7 send their child to that charter school, and I
8 don't think that case would come out
9 differently -- to that public school because I
10 don't think it would come out differently
11 because they could have picked a charter school.

12 And, similarly, no -- no -- no family
13 in America has to send their kid to a
14 traditional public school. They could send them
15 to a private school. They could home-school
16 them. They could send them --you know, other
17 options. But this Court has never said that
18 because you have the option of not sending your
19 child to a traditional public school, public
20 schools can teach religion as truth. I mean,
21 we -- what --

22 JUSTICE KAVANAUGH: Well, that's
23 loading traditional public school into this, but
24 I -- I get the --

25 MR. GARRE: No, I'm just taking

1 your -- the premise of your question is what's
2 the problem, you have the option of going to a
3 different school, and that's --

4 JUSTICE KAVANAUGH: No, it's the
5 option -- you have a public school to go to, and
6 you have private schools to go to, and you have
7 charter schools to pick from. You may not like
8 the environmental studies one, but you have
9 other options. And this increases the options
10 at least theoretically.

11 MR. GARRE: People can choose among
12 public schools as well. You can transfer among
13 public schools if -- if the teaching in that
14 school is offensive to you.

15 I mean, the -- going back to the
16 school prayer cases, I mean, in that -- there
17 was a suggestion in the brief here that those
18 cases are different because you were compelled
19 to go to a public school. That's wrong.
20 Compulsory attendance laws since this Court's
21 decision in Pierce have not applied to
22 students -- parents who want to send their
23 children to private schools or home-school them.
24 So everyone has a choice in that respect.

25 I mean, I think, if the Court crosses

1 a line in this case --

2 JUSTICE KAVANAUGH: The -- the -- the
3 other options in the Mahmoud were not free,
4 okay, so that's a big difference. It was
5 telling the parents there, oh, don't go to the
6 public school if you don't like it; go pay
7 \$10,000. Well, that's a pretty big burden.

8 MR. GARRE: Well, I don't think
9 Mahmoud would come out differently if you had --
10 in jurisdictions where parents had the option to
11 send them to a charter school, Your Honor.
12 Maybe the Court will say otherwise, but I doubt
13 it.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Any questions, Justice Thomas?

17 JUSTICE THOMAS: Mr. Garre, just a
18 brief explanation as to why the board is on the
19 other side. You seem so certain that this is a
20 public school and yet the board's on the other
21 side of this.

22 MR. GARRE: Well, it went rogue,
23 Your Honor. The membership of the board was
24 changed.

25 Initially there was a resistance to

1 granting this -- this application, because it
2 flouted Oklahoma law. And there was a change in
3 the board that -- that we challenged, you know,
4 right on the eve of a second vote, and -- and
5 the charter was passed 3-2.

6 And that's why my client stood up to
7 defend Oklahoma law and federal law under the
8 Establishment Clause.

9 JUSTICE THOMAS: Well, would the board
10 say the same about you?

11 MR. GARRE: Well, our composition
12 hasn't changed on the eve of the vote. And, I
13 mean, I -- of course they disagree with our
14 characterization of --

15 JUSTICE THOMAS: That's what I mean.

16 MR. GARRE: -- the -- the law.

17 But, I mean, on Oklahoma law, I mean,
18 you have what the Oklahoma Supreme Court said,
19 which I think is binding, even on this Court, as
20 to what the state law means.

21 We obviously disagree on the
22 Establishment Clause, but that disagreement is
23 really premised on the notion that this is a
24 private entity. And they've rewritten state law
25 to make that position.

1 JUSTICE THOMAS: Well, it just seems
2 as though the board can also read the Supreme
3 Court opinion and, yet, give it a different
4 meaning or weight than you do.

5 MR. GARRE: Well, we can all read it.
6 And I'll quote it. "St. Isidore came into
7 existence to the charter system with the" --
8 "with the state and will function as a component
9 of the state's public school system."

10 That's at page 38. I don't think
11 there's any ambiguity there.

12 CHIEF JUSTICE ROBERTS: Justice Alito?

13 JUSTICE ALITO: I want to give you a
14 chance to respond to an argument that is made by
15 the Petitioners, and that has to do with the
16 motivation for the position that provided the
17 prompting for the decision that you're defending
18 here today.

19 This is what the attorney general of
20 the state said in an opinion, an official
21 opinion of the attorney general, when he changed
22 the position that his office was going to take.
23 So these are not extemporaneous comments.

24 "While many Oklahomans undoubtedly
25 support charter schools sponsored by various

1 Christian faiths, the precedent created by
2 approval of the application will compel approval
3 of similar applications by all faiths. I doubt
4 most Oklahomans would want their tax dollars to
5 fund a religious school whose tenets are
6 diametrically opposed to their own."

7 And this is not an isolated statement.
8 There are -- are many.

9 MR. GARRE: So thank you for asking
10 that, Your Honor --

11 JUSTICE ALITO: Isn't that a master --
12 isn't that a very serious Masterpiece Cakeshop
13 problem? This whole position that you're
14 defending seems to be motivated by hostility
15 toward particular religions.

16 MR. GARRE: That's -- that's entirely
17 incorrect, Your Honor. And if I could answer
18 that in two different levels. One, the
19 Masterpiece Cake piece and, two, the comments
20 which I'll begin with.

21 And I think the right way to
22 understand those comments is the attorney
23 general was simply making a point that members
24 of this Court have made, which is that once you
25 open up government programs and bring people in

1 to becoming part of the government, and approve
2 one religion, not another religion, or this
3 religion, there's going to be strife that comes
4 from that.

5 I mean, Justice Breyer emphasized that
6 in his various opinions. They didn't carry the
7 day from this Court, but I think that that is a
8 way that in the real world religious divisions
9 and -- and strife have manifested itself. It's,
10 frankly, one of the reasons why we have a
11 religion clause in the Constitution to begin
12 with.

13 With respect to the Masterpiece case,
14 Attorney General --

15 JUSTICE ALITO: Don't we have -- we
16 have statement after statement by the attorney
17 general that reeks of hostility towards Islam.
18 And then we have the provision of the Oklahoma
19 constitution, on which the Oklahoma Supreme
20 Court relied, that has its own unsavory
21 discriminatory history.

22 Would you at least agree with that?

23 MR. GARRE: Absolutely not. You're
24 referring --

25 JUSTICE ALITO: Absolutely not? That

1 wasn't motivated by the Blaine movement?

2 MR. GARRE: No, it wasn't, Your Honor.
3 And -- and members of the Oklahoma Supreme Court
4 has explained that. The brief from the legal
5 historians explains that.

6 It was motivated by clause -- by
7 clauses that predated the Blaine amendments, as
8 well as motivated by the Sequoyah Constitution
9 and the results of the Christianization of
10 Americans. That's all laid out historically.

11 This case, too -- Oklahoma came into
12 the union in 1906, and -- and the provision
13 you're referring to is 1907, which is, you know,
14 long after the Blaine amendments and the Montana
15 constitution. So no, it's not a Blaine
16 Amendment.

17 And again, I think --

18 JUSTICE ALITO: I think you're
19 rewriting history. Do you think that
20 anti-Catholic bigotry had disappeared from
21 Oklahoma by 1907, or, what's more pertinent,
22 from the Congress of the United States from
23 1907?

24 MR. GARRE: I think, Your Honor, of
25 course there were those who held that

1 distasteful and odious bigotry, but the laws
2 that the Oklahoma constitution provision is
3 based on long predated that.

4 And I don't think that the Court could
5 treat any prohibition on funding that's similar
6 as simply motivated by bigotry, and so we're not
7 going to respect it. If you did, then I think,
8 you know, frankly, the Establishment Clause
9 jurisprudence with respect to public schools
10 would come tumbling down.

11 And -- and I think as to the
12 Masterpiece case, I just want to make this
13 clear, the attorney general was not involved in
14 the creation of the charter school system. He
15 wasn't involved in the application in this case.
16 So there's no Masterpiece component. In fact,
17 the application was approved.

18 And I think if -- if your concern is
19 the treatment of Islam or Muslims, then the
20 concern should be the Muslim family whose only
21 practical option is the religious charter school
22 that happens to teach the Catholic faith as
23 truth. That's --

24 JUSTICE ALITO: Why would that be --
25 why would that be the only option of such a

1 parent? The parent could always send his or her
2 child to the schools that you characterize as
3 the public schools.

4 MR. GARRE: So first of all, there are
5 jurisdictions in the country, New Orleans being
6 the main one, where the only public schools
7 are -- are charter schools. In other
8 jurisdictions it's 50 percent, Denver and D.C.

9 There are jurisdictions in Oklahoma
10 where your default public school that you're
11 assigned to is a charter school. You can get
12 out of that, but you've got to raise your hand
13 and say: No, I don't want to go to the Catholic
14 charter school. I want to go somewhere else.

15 And that raises the same problem as
16 raising your hand in the public school and
17 saying: No, I don't want to participate in
18 prayer today. And --

19 JUSTICE ALITO: Thank you, Mr. Garre.

20 MR. GARRE: And it just --

21 JUSTICE ALITO: I just have one more
22 question. I will -- I will study the record
23 carefully, but, boy, the way that you portray
24 these charter schools, it -- it doesn't -- I
25 don't see what the -- the virtue of the charter

1 schools are.

2 I thought the whole point of charter
3 schools what was to offer something different
4 from the so-called public schools. And you've
5 made it sound like, no, they're just going to be
6 exactly like the public schools.

7 MR. GARRE: No, that's not our
8 position, Your Honor. And I think, you know,
9 again, what the states are trying to do is to
10 harness ingenuity in terms of teaching, teaching
11 methods, and you come do the application and say
12 we want to run a charter school like this:
13 language, performing arts, sports-focused, or
14 whatnot.

15 But at that point, there's a rigorous
16 application process. Curriculum is scrutinized.
17 You have to meet state standards. And then
18 charter schools are regulated extensively, every
19 year evaluated. And they can be closed if they
20 get off the rails, because they are public
21 schools.

22 JUSTICE ALITO: Well, do you have
23 inspectors who say we want to see the teaching
24 plan for the 10th grade English class in the
25 charter school, because we want to make sure

1 that the books that the students are reading are
2 the right books?

3 Do you do that?

4 MR. GARRE: They -- they can be,
5 Your Honor.

6 JUSTICE ALITO: Really?

7 MR. GARRE: I mean, if you look at
8 pages 18 and 19 of the Oklahoma Supreme Court's
9 decision, it talks about how charter schools are
10 audited. Again, charter school -- members of
11 the charter school board participate in
12 governing board meetings.

13 And you look at those academic
14 standards that they have to be aligned with,
15 and -- and it goes down to the -- the level of
16 dangling modifiers in 9th grade English class.

17 JUSTICE ALITO: All right. Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Sotomayor?

20 JUSTICE SOTOMAYOR: Counsel, Justice
21 Gorsuch pointed out that if charter schools
22 wanted to, they could change their governing
23 body more directly. And, I don't know, we'll
24 get into a whole lot of litigation as to whether
25 they should appoint the board members, can they

1 get -- solicit recommendations from the
2 applicant, et cetera.

3 But Justice Alito's question suggests
4 that if they decide to change their operation
5 because they don't want to become religious,
6 because they want a secular education, that he's
7 open to an attack that they're being motivated
8 by hostility to religion.

9 So you'll be back in another free
10 exercise claim, correct, of discrimination?

11 MR. GARRE: There's no question that
12 if this Court rules in favor of Petitioner, it's
13 ushering in a new breed of constitutional
14 litigation. I mean, it's already -- the Court
15 has already dealt with all comers.

16 And the Court's decision in Christian
17 Legal Society v. Martinez is just a, you know,
18 sort of taste of what's to come.

19 JUSTICE SOTOMAYOR: Now, with
20 respect -- we've spent a lot of time on is this
21 a state entity or not. But your second theory
22 was that it's a state actor, and that hasn't
23 been discussed that much.

24 How do you deal with West and
25 Rendell-Baker in answering that question? You

1 win under either, correct?

2 MR. GARRE: We win under either. In
3 West, you outsource the constitutional duty,
4 which is what the state did here in -- in
5 allowing charter schools to operate --

6 JUSTICE SOTOMAYOR: And -- and what do
7 you -- how do you deal with the compulsion issue
8 of West? Meaning that -- the access issue.

9 MR. GARRE: Right. That just went to
10 the underlying federal constitutional violation.
11 I mean, in terms of the state action question,
12 the question is whether they're acting under
13 color of state law. And here charter schools
14 are acting under color of state law --

15 JUSTICE SOTOMAYOR: They don't come
16 into creation without state law.

17 MR. GARRE: Exactly. And they're
18 heavily regulated by the -- by the state.

19 JUSTICE SOTOMAYOR: They don't come
20 into creation -- Catholic Charities came into
21 creation under state law but not as a charter
22 school.

23 MR. GARRE: That's exactly right. And
24 -- and -- and I want to correct one thing that
25 my friend in terms of discussing Rendell-Baker

1 versus West. West came after Rendell-Baker. So
2 Rendell-Baker didn't resolve anything or correct
3 anything that West held.

4 And West, as this Court recognized in
5 the Haaland case just recently, recognized that
6 we were outsourcing constitutional functions,
7 and here on top of that, you have an exclusive
8 and traditional state function, which is the
9 function of providing public -- free public
10 education open to all.

11 JUSTICE SOTOMAYOR: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice Kagan?

13 JUSTICE KAGAN: If this Court were to
14 rule for Petitioners, what would happen in
15 Oklahoma, in those 40-plus other states with
16 laws of a similar kind that declare charter
17 schools to be public schools? What kind of
18 issues would they have to confront in the
19 future? What do you think the range of choices
20 they would make is likely to be?

21 MR. GARRE: First, every charter
22 school law and the federal charter school
23 program is unconstitutional because they all
24 require that charter schools be public schools
25 and that they be nonsectarian. So we're dealing

1 with the confusion and uncertainty that's
2 created by that to begin with.

3 States may react differently. Some
4 may reenact charter schools under the -- the
5 details this -- this Court might lay -- lay out
6 as to how to legislate. Or, you know, many
7 schools will just be -- will just say, you know,
8 no, with respect, in our state, our -- our
9 traditions are not to allow the teaching of
10 religion in our public schools. We don't know.
11 This is going to create uncertainty, confusion,
12 and disruption for, you know, potentially
13 millions of school children and families across
14 the country.

15 There's another piece to this, which
16 is that under federal law, the IDEA statute,
17 charter schools are covered because they're
18 understood to be public schools. If this Court
19 holds that charter schools are not public
20 schools, then there's a question as to whether
21 children with disabilities who go to charter
22 schools would be covered by the IDEA. And
23 that's another problem that will have to be
24 sorted out.

25 In terms of litigation, you will get

1 litigation over who can be admitted. They say
2 they'll take all-comers. Surely, there'll be
3 schools that want to test the next limit. There
4 will be questions about who can be teaches. Can
5 you have a gay teacher or not? There will be
6 questions about the application of the
7 ministerial exception. And then there are going
8 to be questions about curriculum. This Court is
9 going to be superintending curriculum. You
10 know, maybe they would go too far in saying you
11 can't -- you can't teach evolution; you have to
12 teach creationism. But there are going to be a
13 lot of line-drawing problems in between.

14 JUSTICE KAGAN: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Gorsuch?

17 Justice Kavanaugh?

18 JUSTICE KAVANAUGH: A couple
19 questions. Are single-sex charter schools
20 constitutional?

21 MR. GARRE: There are different
22 policies on that. They -- they -- they do
23 exist. And I think there would -- there would
24 be one way in which they wouldn't be like
25 traditional public schools, but Oklahoma -- in

1 Oklahoma there are not single-sex charter
2 schools or single-sex --

3 JUSTICE KAVANAUGH: But your theory
4 would mean they are constitutional or not
5 constitutional?

6 MR. GARRE: Well, I mean, our theory
7 as -- as to the constitutionality goes to the
8 teaching of religion as truth in charter
9 schools.

10 JUSTICE KAVANAUGH: They would be
11 state actors so they would -- it would be
12 analyzed the same.

13 MR. GARRE: Well, I think the -- I
14 mean, I think the state action question, it's
15 important to understand that this Court has
16 always considered state action with respect to
17 the -- the conduct being challenged. And here
18 the conduct, to the extent it's relevant, is the
19 very existence of the school. And there's no
20 question the state regulates that. It can't
21 come into existence without the state.

22 And as to the -- the single-sex, I
23 mean, I don't think that's a hard issue for --
24 for the -- the State of Oklahoma. I don't think
25 that that would be unconstitutional.

1 JUSTICE KAVANAUGH: And your comment
2 about strife, I just want to explore that for a
3 second, because it seems like strife could also
4 come when people who are religious feel like
5 they're being excluded because they're
6 religious, whether it's the Muslim family who is
7 aware of the comments that were made here, or
8 the Catholic school group that says, gee, we
9 just want to have a charter school like -- like
10 the environmental group and the Chinese
11 immersion group and this math group.

12 And I think you're missing a portion
13 of the country when you say strife would not
14 result from that kind of outcome.

15 MR. GARRE: Well, I think if the rule
16 is that charter schools are public -- are -- are
17 public schools and just like traditional public
18 schools, they -- you cannot have the teaching of
19 religion as truth in charter schools, I don't
20 think that would create any new strife because
21 that's the regime that we've lived in for -- for
22 decades.

23 The strife that I'm referring to is
24 the picking and choosing that is inevitably
25 going to occur when people line up to become,

1 you know, a fully funded charter school. And so
2 I -- I think it's -- it's quite different.

3 JUSTICE KAVANAUGH: And then last,
4 we've covered this a bit, but I just want to
5 make sure I have it nailed down.

6 If you prevail in this case, the
7 senior homes, food banks, hospitals that
8 participate -- receive government funding,
9 participate in government programs, like a
10 foster care program, they would not become state
11 actors because -- can you succinctly -- or maybe
12 just we would have a --

13 MR. GARRE: Yes. So, I mean, I'd give
14 you --

15 JUSTICE KAVANAUGH: Maybe the rule
16 would just be schools are different, but --

17 MR. GARRE: Well, schools are --

18 JUSTICE KAVANAUGH: -- I would like to
19 have a -- a principle behind that --

20 MR. GARRE: Yeah.

21 JUSTICE KAVANAUGH: -- would be
22 helpful.

23 MR. GARRE: I mean, I think this
24 Court's own precedents recognized that public
25 schools are different in important ways. But on

1 your question, I mean, they're not outsourcing
2 constitutional obligations. There's no
3 constitutional obligation of governments that
4 I'm aware of, states that I'm aware of, to
5 provide adoption services or the like. It's not
6 a traditional exclusive function. In Justice
7 Alito's opinion in *Fulton* went to great lengths
8 to say that adoption services were not a
9 traditional or exclusive public function.

10 And so I think that the -- the -- the
11 government contractor scenario, I mean, that's
12 what they try to bait this Court with concerns,
13 but the government contractors are completely
14 different. They're not created by the state in
15 the way that the charter schools are. They're
16 not fully funded by the state. They're not
17 controlled by the state in the way that charter
18 schools are. It's an easy distinction.

19 JUSTICE KAVANAUGH: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Jackson?

22 JUSTICE JACKSON: So I think that at
23 its heart, your argument really begins with the
24 statement in *Carson* that a state can permissibly
25 choose to provide a strictly secular education

1 in its public schools. And if you start there,
2 then I think you're saying that charter schools
3 is one model that a state can choose to provide
4 that kind of secular education. Charter schools
5 is a subset of the public school right that
6 Carson recognizes to provide a strictly secular
7 education.

8 So one -- one point of clarification
9 just on facts is, doesn't Oklahoma provide
10 vouchers for parents who would like to have a
11 religious education for their child? Those --
12 those parents don't have to be in the public
13 school we're providing strictly secular public
14 school column. They can ask the state and they
15 do get vouchers for religious public -- I mean
16 religious private schools; is that right?

17 MR. GARRE: That's exactly right. And
18 I think it's an important point. I mean,
19 Justice Kavanaugh last week referred to the
20 Court trying to find a win-win in the area of
21 religion.

22 JUSTICE JACKSON: Right.

23 MR. GARRE: I think the win-win here
24 is that states can, through vouchers and the
25 like, promote the availability of religious

1 education for those who choose it in a private
2 setting, but that states are not required to
3 promote or fund, create the teaching of religion
4 as truth in public schools.

5 JUSTICE JACKSON: Right. So your --
6 in your, like, diagram of this, we're in the
7 public secular scenario, charter schools are a
8 subset of that; outside of that column, we have
9 private religious schools, which the state
10 allows for and funds. All right. Now --

11 MR. GARRE: Can I just --

12 JUSTICE JACKSON: Yes, please.
13 Please.

14 MR. GARRE: I mean, that's exactly
15 right.

16 JUSTICE JACKSON: Yeah.

17 MR. GARRE: And that's what the
18 Congress of the United States and 47 state
19 legislatures have understood. So it would be
20 for this Court to upset ^ Check: that --

21 JUSTICE JACKSON: It would be a really
22 big change --

23 MR. GARRE: It would be --

24 JUSTICE JACKSON: -- if that's sort of
25 how it's structured right now.

1 MR. GARRE: -- hard to overstate it.

2 JUSTICE JACKSON: With respect to the
3 Trinity Lutheran and -- the -- the Chief Justice
4 asks about unfairness, Justice Kavanaugh asked
5 about unfairness, and I just want to explore
6 that for a second, because, as I understood it,
7 Trinity Lutheran -- in Trinity Lutheran, the
8 state was offering grants to build playgrounds,
9 and the problem was that Trinity Lutheran was
10 prohibited from accessing that benefit because
11 they were religious. The -- the church in
12 Trinity Lutheran wanted to use the money to
13 build a playground, and they said no we can't
14 give you the money. And that was
15 constitutionally problematic.

16 In this case, it seems to me it would
17 be as if the church was saying we see you're
18 giving out money to schools for building
19 playgrounds, we would like that same allocation
20 of money, and we want to use it for something
21 else. We want to buy Bibles. And, you know,
22 they would say, look, you know, it's not fair
23 because you're giving money to schools anyway,
24 like you're giving charter contracts to schools
25 anyway, and it doesn't matter to us or we don't

1 think it's relevant that you're giving it for a
2 reason. And as I said in my diagram, the -- the
3 state here is giving it for the reason of being
4 a public school within the non -- within the
5 nonsectarian world. They say, no, we want to
6 use that money or that charter contract for a
7 religious purpose.

8 Am I thinking about this correctly?
9 Because I don't see that as unfair. I see that
10 as the state saying we're giving it in a
11 particular way for a particular reason, and
12 you're not asking us for that.

13 MR. GARRE: I -- I think that that's
14 right, if I understand the question, Justice
15 Jackson. Clearly, what the state is doing is
16 saying we're creating -- we're expanding our
17 public education opportunities, and like public
18 education has always been, we're -- we're not
19 allowing the funding and creation of teaching
20 religion as truth.

21 I mean, this case presents a question
22 of a state that's conscientiously trying to
23 avoid the separation between church and state.
24 But imagine a state that said, you know, we
25 really want more religion in our public schools,

1 and so what we're going to do is we're going to
2 go to the traditional public school and we're
3 going to fire all the teachers, administrators,
4 and we're going to replace them with the staff
5 of the archdiocese.

6 I don't think that would be a hard
7 Establishment Clause problem. And I think this
8 case is -- is, you know, basically just the flip
9 side of the coin.

10 But, I mean, as to the unfairness,
11 what the state of Oklahoma has done is simply
12 maintain the system that this Court has upheld
13 for decades, which is that we don't allow the
14 teaching of religion as truth in public schools.

15 JUSTICE JACKSON: Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Rebuttal, Mr. McGinley?

19 REBUTTAL ARGUMENT OF MICHAEL H. MCGINLEY
20 ON BEHALF OF THE PETITIONER IN CASE 24-396

21 MR. MCGINLEY: A few points.

22 Justice Gorsuch, you asked whether
23 Lebron should control here. The answer is yes.
24 And what Lebron teaches is that the -- the key
25 criteria in our creation and control.

1 Here, my friend is simply wrong that
2 the state created St. Isidore. I'd point you to
3 page 7 of our reply. The same bylaws, same
4 board controlled St. Isidore before and after
5 the contract.

6 On control, it's a private board that
7 has neither government appointment nor removal.
8 I would point you to page 110 and 120 of the
9 Petition Appendix, as well as Section 316(a)(8)
10 of state law, which makes that clear.

11 You also asked whether the label can
12 be different for constitutional purposes in
13 either state law or statutory purposes. Lebron
14 makes it very clear that can be true. Umbehr is
15 the leading case on state law on that.

16 Mr. Chief Justice, you asked whether
17 regulation can -- can occur with regard to these
18 charter schools. Clearly it can, just like with
19 vouchers programs. We know that that's not
20 enough. Halleck, Jackson, and Rendell-Baker
21 teach us that.

22 My friend also vastly overstates the
23 extent to which the state can, quote, "shut down
24 a school." I would point you to both of the
25 Petitioners reply briefs which show that it

1 cannot unilaterally shut down a school, but
2 there's a number of procedural steps that apply.

3 Also, the U.S. Olympic Committee case
4 makes clear that that alone is not enough
5 either. Virtually every corporation in America
6 operates under a charter that was granted by a
7 state, and the state can often dissolve that
8 charter. That's not enough to make it a
9 government entity.

10 I do think that this Fulton point is
11 very important, because my friend does not have
12 a good answer for it. Nobody believes that
13 Philadelphia could have just labeled foster --
14 foster care services to be state foster care
15 services and excluded Catholic Social Services
16 in that setting.

17 By contrast, a ruling for us will only
18 increase choice. I completely agree with you on
19 that, Justice Kavanaugh. No student will be
20 compelled or placed in a charter school except
21 by private choice.

22 So then the governing question is the
23 same one that this Court confronted in Carson,
24 Espinoza, and Trinity Lutheran: Has the state
25 invited private actors into a government funding

1 program? If so, it cannot categorically exclude
2 the religious.

3 It's crystal clear that that's what
4 Oklahoma has done here. Everyone agrees that
5 St. Isidore met all of the other requirements,
6 and its charter was extinguished only because of
7 the nonsectarian requirement.

8 We completely agree with you, Justice
9 Kavanaugh, that that treats them as second-class
10 citizens. The Free Exercise Clause prohibits
11 that. We ask you to reverse.

12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 The case is submitted.

16 (Whereupon, at 12:19 p.m., the case
17 was submitted.)

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