

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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OKLAHOMA STATEWIDE CHARTER SCHOOL )  
BOARD, ET AL., )  
Petitioners, )  
v. ) 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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Pages: 1 through 150  
Place: Washington, D.C.  
Date: April 30, 2025

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1 P R O C E E D I N G S

2 (10:07 a.m.)

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

7 Mr. Campbell.

8 ORAL ARGUMENT OF JAMES A. CAMPBELL

9 ON BEHALF OF THE PETITIONERS IN CASE 24-394

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

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

21 But state law categorically bars  
22 religious groups and programs, deeming religion  
23 to be the wrong kind of diversity. That  
24 religious exclusion violates the Free Exercise  
25 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 -- 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 -- to  
6 at least discuss that because this is -- isn't  
7 the normal context in which we see that -- and  
8 that you are a state entity. You're a public  
9 school, a public Catholic charter school. And I  
10 think you should address that because those seem  
11 to be at the crux of the -- of the differing  
12 opinions 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 starter schools. 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 this -- would your argument have to apply  
18 to 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 -- 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: Because the challenge  
17 here is to the facial religious discrimination  
18 that says: If you have any sectarian program,  
19 you can't be a part of the program.

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

24 JUSTICE KAGAN: Well, I guess the  
25 question is: Why is a school allowed to strike

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

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

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

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

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

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

1 case law in Smith.

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

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

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel.

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

25 I -- I mean, this does strike me as



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

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

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

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

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

22 JUSTICE THOMAS: How much different is  
23 the -- how different is the involvement of the  
24 board in -- in -- in the school operation as  
25 compared to, say, an -- an accrediting

1 authority?

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

4 JUSTICE THOMAS: Yeah. Yes.

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

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

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

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

1 look at.

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

5 CHIEF JUSTICE ROBERTS: Justice Alito?

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

10 Is that a relevant constitutional  
11 distinction?

12 MR. CAMPBELL: I don't believe it is.

13 In fact, if anything, I think this case is  
14 potentially more dangerous because, if this  
15 contract transforms St. Isidore into the  
16 government, then I worry the same thing will  
17 happen to other government contractors.

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

25 JUSTICE ALITO: One other question.

1 Respondent says that if you win, some students'  
2 only free public school option will be a  
3 religious charter school.

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

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

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

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

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

24 JUSTICE ALITO: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor?

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

8 How is this that different from this  
9 case? Or is it?

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

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

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

21 JUSTICE SOTOMAYOR: Why?

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

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

3 MR. CAMPBELL: -- hypothetical.

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

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

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

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

21 JUSTICE SOTOMAYOR: All right.

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

24 JUSTICE SOTOMAYOR: Now I thought that  
25 the essence of the Establishment Clause was

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

7                     Do you accept that proposition?

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

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

16                    MR. CAMPBELL:  That very well might  
17    violate it.

18                    JUSTICE SOTOMAYOR:  By -- all right.

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

22                    JUSTICE SOTOMAYOR:  All right.  If we  
23    pick and choose, as we did in one part of our  
24    history, only Catholic schools to teach Indian  
25    children so they can become Catholics, would

1     that violate the Establishment Clause?

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

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

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

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

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

19                JUSTICE SOTOMAYOR:   To teach their --

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

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



1 saying is the Free Exercise Clause trumps the  
2 essence of the Establishment Clause because the  
3 essence of the Establishment Clause was we're  
4 not going to pay religious leaders to teach  
5 their religion. That was, is, and has always  
6 been the essence.

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

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

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

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

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

25 MR. CAMPBELL: But, to --

1 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

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

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

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

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

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

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

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

19           One of the assumptions of your  
20   question as I'm understanding it is that the  
21   word "public" equals government-run. But it  
22   clearly doesn't, not under this Court's case  
23   law, where the Court has recognized that things  
24   like public access channels, public utilities,  
25   public defenders, public accommodations -- none

1 of those involve government-run entities. They  
2 all, at least in many instances, involve private  
3 actors.

4 JUSTICE KAGAN: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice  
6 Gorsuch?

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

15 MR. CAMPBELL: Yeah. One reaction is  
16 most of those examples that were provided in  
17 those amicus briefs came from the early 1800s,  
18 and no one understood --

19 JUSTICE GORSUCH: Right.

20 MR. CAMPBELL: -- the Establishment  
21 Clause to be incorporated against the states at  
22 that point.

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

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

1 right.

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

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

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

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

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

1 things like that.

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

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

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

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

18 JUSTICE GORSUCH: Yeah.

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

24 JUSTICE GORSUCH: Last question.  
25 You've emphasized the lack of creation and

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

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

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

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

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

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

25 JUSTICE GORSUCH: Thank you.



1 CHIEF JUSTICE ROBERTS: Justice  
2 Kavanaugh?

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

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

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

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

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

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

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

24 MR. CAMPBELL: There -- there's a vast  
25 array. There are some, as I mentioned in the

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

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

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

15 MR. CAMPBELL: That's correct.

16 JUSTICE KAVANAUGH: Okay.

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

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

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

1 JUSTICE KAVANAUGH: And you're not  
2 saying, I think, but confirm, that the state  
3 could say we're going to have charter schools  
4 but only religious charter schools?

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

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

11 MR. CAMPBELL: That's right.

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

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

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

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

25 So, in Rendell-Baker, the question

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

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

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

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

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

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

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

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

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

24 MR. CAMPBELL: Yeah. I -- I mean,  
25 it -- it primarily looks at the curriculum to

1     ensure that it's meeting minimum standards, to  
2     make sure that children are learning the basics  
3     of reading, writing, math, et cetera.

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

8             JUSTICE KAVANAUGH: Thank you.

9             CHIEF JUSTICE ROBERTS: Justice  
10    Jackson?

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

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

24            So your argument is that St. Isidore's  
25    is seeking the same public benefit as everyone

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

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

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

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

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

1 to establish a religious school.

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

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

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

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

19 JUSTICE JACKSON: But it's not --

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

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



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

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

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

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

24 MR. CAMPBELL: I -- I disagree. I  
25 think it's, again, exactly what Maine tried to

1 do in Carson. They tried to build in the notion  
2 that the benefit at issue there was by  
3 definition secular. That's exactly what the  
4 argument you just raised is trying to do.

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

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

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

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

1 reasons that I've articulated.

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

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

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

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

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

1 JUSTICE JACKSON: Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel.

4 Mr. McGinley?

5 ORAL ARGUMENT OF MICHAEL H. MCGINLEY  
6 ON BEHALF OF THE PETITIONER IN CASE 24-396

7 MR. MCGINLEY: Mr. Chief Justice, and  
8 may it please the Court:

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

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

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

24 Nor is St. Isidore exercising a  
25 traditional and exclusive government function.

1 American history is replete with examples of  
2 private organizations offering free education to  
3 the nation's youth with support from the public  
4 fisc.

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

13 I welcome the Court's questions.

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

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

1     it says is that in all of those cases where the  
2     Court found a government entity, there was  
3     creation particularly by special legislation  
4     where the government literally creates the body.

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

12            But, in Lebron -- and I would  
13    particularly point you, I think, to the analysis  
14    in Lebron where Justice Scalia does a really  
15    nice job of laying out all the different types  
16    of federal private -- or corporations where the  
17    government -- or the Congress has said at times  
18    we don't want this to be treated as the  
19    government.

20            But this Court has not always said  
21    that that's controlling for the constitutional  
22    reasons. In Lebron, it was a First Amendment  
23    claim. Then, in the follow-on Amtrak case, you  
24    had a private nondelegation claim. And in both  
25    cases, the Court said Amtrak was created by the

1 government and it was controlled by the  
2 government.

3 And it had distinguished other  
4 instances, including U.S. Olympic, but then also  
5 the regional rail cases, where you even had some  
6 control at some level by government-appointed  
7 board members. But the Court said it wasn't  
8 complete control and that wasn't enough. So  
9 those are the two defining features, Your Honor.

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

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

1 government funds. And so the question is not  
2 whether it's a government agency but whether  
3 it's a state actor.

4 Now, going to the West suggestion,  
5 your co-counsel or -- or brother on the -- on  
6 the same side said that there, there was -- you  
7 were -- the students -- the -- the -- I'm  
8 sorry -- the inmates were required to use this  
9 doctor, and this is different because no student  
10 is required to attend a charter school.

11 But that's not the point, is it? The  
12 point is whether you're acting for the  
13 government or not.

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

23 JUSTICE SOTOMAYOR: Well, the problem  
24 is that using history in this case is so crazy  
25 because the first thing is no one thought there



1     was an obligation of government at all to  
2     provide funding for most of the history -- the  
3     early history. It was around the time of the  
4     ratification of the Fourteenth Amendment that  
5     the idea that states would provide a  
6     constitutional right to educate and did was very  
7     different.

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

16                So I -- forget the history. Let's go  
17    to the basic point.

18                MR. MCGINLEY: Sure.

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

23                MR. MCGINLEY: So I have a very direct  
24    answer to you on that, and I would point you to  
25    Rendell-Baker because Rendell-Baker --

1 JUSTICE SOTOMAYOR: Well, the problem  
2 with Rendell-Baker is that the Carolina schools  
3 system didn't claim that was a constitutional  
4 obligation. They had not been educating  
5 maladjusted children ever. They had just  
6 decided that they would start doing that. But  
7 the Court didn't view that as a constitutional  
8 obligation. It was a contract obligation but  
9 not a constitutional obligation.

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

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

25 MR. MCGINLEY: So I disagree with

1     that, Your Honor. I'd point you to page 157a of  
2     the Petition Appendix in our petition, which  
3     point -- which is a declaration from -- called  
4     the Lusnia declaration that makes it very clear  
5     that the only way that funds will be provided to  
6     a -- to St. Isidore is if parents choose to do  
7     so. So that makes it no different than --

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

12            MR. MCGINLEY: Thank you.

13            CHIEF JUSTICE ROBERTS: Thank you,  
14    counsel.

15            Justice Thomas?

16            Justice Alito, anything further?

17            Justice Kagan?

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

23            Anything else -- was anything else  
24    struck out?

25            MR. MCGINLEY: So I just want to

1 clarify we didn't strike out the  
2 nondiscrimination clause. There still is the  
3 nondiscrimination clause. We had agreed to  
4 abide by all applicable law.

5 What we -- what we recognize and what  
6 the State recognized in contracting with us is  
7 that as a private --

8 JUSTICE KAGAN: You modified it to  
9 incorporate various church autonomy principles.

10 MR. MCGINLEY: Correct, but I would  
11 say, Your Honor, those are antidiscrimination  
12 principles that --

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

14 MR. MCGINLEY: Sure.

15 JUSTICE KAGAN: It's not the point of  
16 the question.

17 MR. MCGINLEY: Sure.

18 JUSTICE KAGAN: Anything else? Did  
19 you strike out anything else?

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

22 JUSTICE KAGAN: What if you had wanted  
23 to strike out other provisions, for example,  
24 curricular provisions, because the kind of  
25 religious education that you thought it was your

1 mission to provide were inconsistent with those  
2 curricular requirements?

3 MR. MCGINLEY: So if -- I think that  
4 would be part of the contracting process, and I  
5 do agree with my friend that the framework of  
6 analysis would be very different, right,  
7 because, here, there's no dispute that  
8 St. Isidore qualifies for the program for all  
9 purposes other than the sectarian requirement.  
10 And so we're dealing with the Carson, Trinity --

11 JUSTICE KAGAN: Right. But --

12 MR. MCGINLEY: -- Lutheran threshold.

13 JUSTICE KAGAN: -- but, like,  
14 sectarian means something. It involves a  
15 certain kinds of -- certain kind of exercise.  
16 So, you know, it's not just like you want to put  
17 the word "Catholic" up on the door.

18 MR. MCGINLEY: Right.

19 JUSTICE KAGAN: You want to teach  
20 certain things, as would any or most religious  
21 schools. So suppose a religious school came in  
22 and said, in addition to the modifications that  
23 you made, we want to make some further  
24 modifications with respect to the curricular  
25 requirements. I'll give you a hypothetical just

1       so we can focus the inquiry.

2                   MR. MCGINLEY:    Sure.

3                   JUSTICE KAGAN:   Let's say we're not in  
4       Oklahoma.  Let's say we're up in New York, and  
5       there's a Hasidic community that has a Yeshiva,  
6       and it's a very serious Yeshiva, and what that  
7       means is that almost all the instruction has to  
8       do with studying Talmud and other religious  
9       texts.  Very little of it has to do with secular  
10      subjects.  Almost none of the instruction is in  
11      English.  Almost all of it is in Yiddish or in  
12      various, like, ancient Hebrew/Aramaic kind of  
13      languages.  And that's the charter school that  
14      this Hasidic community wanted to qualify for.

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

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

1 JUSTICE KAGAN: Let's say the state is  
2 not fine with that. Let's say the state thinks  
3 it's great that you provide that education on  
4 your own, and it might be that if we have  
5 certain kinds of tuition assistance, you would  
6 be included in that. But the -- but -- but the  
7 state has this same idea, honestly, that  
8 Oklahoma has, which is these schools are  
9 supposed to be public, and -- and -- and they're  
10 supposed to sort of look like public schools,  
11 and this one really doesn't.

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

15 JUSTICE KAGAN: I'm not suggesting  
16 that.

17 MR. MCGINLEY: I -- I know.

18 JUSTICE KAGAN: Let's --

19 MR. MCGINLEY: But -- but -- so  
20 then to the -- then you would go to a different  
21 framework of analysis that would be under this  
22 Court's case law that includes Fulton, Smith,  
23 that line of cases that would say -- would ask  
24 all sorts of questions that would be highly  
25 fact-dependent, such as: Is it a neutral law of

1     general applicability? To what extent does it  
2     burden the religious beliefs, et cetera,  
3     et cetera? And is there a compelling interest  
4     potentially --

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

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

21            JUSTICE KAGAN: Well, I don't have to  
22    imagine very hard to come up with a hundred  
23    hypotheticals like this because religious  
24    communities are really different in this country  
25    and are often extremely different from secular



1 communities in terms of the education that they  
2 think is important for their young people and is  
3 critically important to their faith.

4 I mean, nobody would say that the kind  
5 of instruction that is -- that exists in the  
6 kind of school that I laid out, which are --  
7 there are many of --

8 MR. MCGINLEY: Right.

9 JUSTICE KAGAN: -- is not critically  
10 important to the faith and to the -- the -- the  
11 training of young people in the faith according  
12 to that community.

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

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

21 JUSTICE KAGAN: So a state has a --  
22 what it considered a charter school system which  
23 was, you know, basically offering a kind of  
24 education that it was familiar with, that it  
25 applied curricular and testing and standards to.

1 It wanted to increase curricular flexibility.  
2 It did not want to start funding every religious  
3 school in the country.

4 And now you're saying to that state,  
5 you know: Yes, you have to go fund the Yeshiva  
6 that I described; yes, you have to go fund the  
7 Madras; yes, you have to go fund da-da, da-da,  
8 da-da, da-da, da-da, if you want to have this  
9 program at all.

10 MR. MCGINLEY: Well, I'm not -- I  
11 don't think I'm saying that, Your Honor. I'm  
12 saying there's a different, you know, framework  
13 of analysis. That analysis would have to be  
14 applied.

15 But the other thing I would say is  
16 that a state doesn't have to open up an  
17 educational program to private organizations.  
18 That's -- the Court has said that consistently  
19 in this case law.

20 And so no one is saying that a state  
21 is compelled to open up these programs and to  
22 invite in the religious. What they're saying is  
23 that what the Free Exercise Clause says is that  
24 if you do open it up, then you can't exclude the  
25 religious because they're religious, neither

1     because of their status or because of their use.

2             JUSTICE KAGAN:   Thank you.

3             MR. MCGINLEY:   Thank you.

4             CHIEF JUSTICE ROBERTS:   Justice  
5     Gorsuch?

6             JUSTICE GORSUCH:   Just on some of  
7     those hypotheticals, Mr. McGinley, would it be a  
8     neutral and generally applicable rule and,  
9     therefore, compliant with Fulton and Smith to  
10    say:  If you want to be a charter school, you  
11    have to teach math, reading, science, and -- and  
12    specify testing at -- at grade level  
13    proficiency?

14            MR. MCGINLEY:   So I -- the way you've  
15    described it, I think so.  And, certainly, my  
16    client has not objected to those things.  The  
17    record indicates that that is certainly part of  
18    their curricular design.

19            JUSTICE GORSUCH:   And even absent  
20    Smith, I still have to ask whether -- in strict  
21    scrutiny, whether the government has a  
22    compelling interest.  Might it have one there?

23            MR. MCGINLEY:   I think it might have  
24    one there, sure.  Especially in a -- in a  
25    contracting setting, where the government is

1 providing funds for the education of youth and  
2 they want to make sure that certain minimum  
3 standards are met, I do think that that would  
4 probably be a compelling government interest.

5 JUSTICE GORSUCH: Thank you.

6 MR. MCGINLEY: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Kavanaugh?

9 JUSTICE KAVANAUGH: With Justice  
10 Kagan, I think you were talking about the  
11 nondiscrimination provision, and you said it  
12 wasn't -- you didn't strike it out, and you  
13 were -- you had more -- I mean, I think you had  
14 more to that answer, so --

15 MR. MCGINLEY: Yeah, sure.

16 JUSTICE KAVANAUGH: -- can you just  
17 tell us what happened?

18 MR. MCGINLEY: Yeah. So what happened  
19 was there -- you know, we agreed to abide by all  
20 applicable laws, which means federal and state  
21 laws, including antidiscrimination laws.

22 What was added to the contract is the  
23 essentially constitutional truism that as a  
24 private religious organization, we possess  
25 rights under the Free Exercise Clause, the

1 church autonomy doctrine, the ministerial  
2 exception, which this Court has rooted in the  
3 church autonomy doctrine.

4 And so all that we were trying to make  
5 clear and all the State was recognizing is that  
6 we were not giving away those rights by virtue  
7 of agreeing to this contract.

8 JUSTICE KAVANAUGH: A number of other  
9 states, in fact, I think all of them, have the  
10 similar kind of program. What should we make of  
11 that?

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

20 And so, if the state decides that it  
21 wants to have government entity charter schools,  
22 it can do so. And so I -- I don't think that in  
23 any way -- you're not deciding the platonic form  
24 of charter schools. You're not deciding the  
25 platonic form of public schools here.

1           States have the ability to design  
2    their program. This Court has repeatedly made  
3    clear that when they design it to invite private  
4    actors in, they can't exclude the religious.  
5    But it's also made clear in --

6           JUSTICE KAVANAUGH: But they've been  
7    around for a while without that.

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

14          JUSTICE KAVANAUGH: And on -- are  
15   there language-focused charter schools in  
16   Oklahoma that you're aware of or --

17          MR. MCGINLEY: There -- yes. Yes,  
18   there are -- there are language-immersion  
19   schools. I think one example is -- I believe  
20   it's called the Le Monde School.

21          JUSTICE KAVANAUGH: Thank you.

22          MR. MCGINLEY: Thank you.

23          CHIEF JUSTICE ROBERTS: Justice  
24   Jackson?

25          JUSTICE JACKSON: So I guess I'm still

1     stuck on trying to understand what you mean by  
2     the state has the ability to organize or set up  
3     the program in the way that it wants the  
4     program.

5                 So, apparently, they can't design the  
6     program to be funding schools that are  
7     nonsectarian.

8                 MR. MCGINLEY: That's correct. That's  
9     the teaching of this Court's case law.

10                JUSTICE JACKSON: I don't see that  
11     that's the teaching of the case law. I see that  
12     whatever the program is, it has to be available  
13     to religious people.

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

24                The state says: Here's our program,  
25     and we're laying out all the provisions in a

1 contract, and anyone who would like to have this  
2 contract, you're welcome, and we're not  
3 excluding religious people, we're not excluding  
4 any people, but here are the terms.

5 And you say: Ah, but there's a term  
6 in here that says you have to be nonsectarian.

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

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

24 MR. MCGINLEY: So, with respect, I  
25 think the -- the argument you're articulating is



1     precisely the one that was rejected in Carson,  
2     which says you can't, you know, define the  
3     program by saying it has to be something that's  
4     nonsectarian because that merely says that -- by  
5     doing so, you're essentially building into the  
6     definition a way to discriminate, in violation  
7     of the --

8                 JUSTICE JACKSON:   So the federal law  
9     is unconstitutional that sets up charter schools  
10    and includes as a term the nonsectarian status?

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

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

25                MR. MCGINLEY:   So my understanding of

1 the -- of Maine's law in Carson is that, like  
2 Oklahoma's law, it had a provision that said  
3 that no sectarian institution could participate,  
4 and -- and then Maine articulated that --

5 JUSTICE JACKSON: No, that's the --  
6 that's the no sectarian institution can have  
7 this contract.

8 MR. MCGINLEY: Right, but you --

9 JUSTICE JACKSON: Yeah, I agree with  
10 that.

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

17 JUSTICE JACKSON: Thank you.

18 MR. MCGINLEY: Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21 General Sauer?

22 ORAL ARGUMENT OF GEN. D. JOHN SAUER

23 FOR THE UNITED STATES, AS AMICUS CURIAE,

24 SUPPORTING THE PETITIONERS

25 GENERAL SAUER: Mr. Chief Justice, and

1     may it please the Court:

2                 Charter schools like St. Isidore are  
3     not part of the Oklahoma government, and they  
4     are not engaged in state action. They are  
5     created by private parties applying to public or  
6     private sponsors, and they are controlled by  
7     privately appointed directors.

8                 Participation in charter schools is  
9     mediated through two layers of private choice,  
10    both of the applicants who create the schools  
11    and of the parents who choose to send their  
12    children to them.

13                Oklahoma does not control their  
14    programs, staffing, or curriculum. Providing  
15    education through charter schools is not a  
16    traditional and exclusive public function. And  
17    their control by privately appointed directors  
18    refutes any suggestion of public entwinement.

19                The values of private innovation,  
20    independence, and private choice lie at the  
21    heart of this charter school program, and they  
22    call for the application of the Free Exercise  
23    Clause here.

24                I welcome the Court's questions.

25                JUSTICE THOMAS: General, the -- below

1     the -- in -- in the state courts, state action  
2     seemed to play a considerable role, but in your  
3     brief, you said it's not -- it's not applicable  
4     here. Would you elaborate on that?

5                 GENERAL SAUER: Absolutely, Justice  
6     Thomas. We've taken the position that viewing  
7     this through the lens of private actors engaged  
8     in state action is not the appropriate kind of  
9     framework to view it under. And, actually, I  
10    think we have clear agreement from that from the  
11    Respondent at page 18 of their brief, where they  
12    say that is not the correct framework.  
13    Obviously, the Oklahoma Supreme Court did rely  
14    on those cases most as to entwinement and also  
15    as to traditional exclusive public function.

16                But the point that we make is there is  
17    not a clear mapping onto the two concepts of --  
18    of do you have constitutional rights of your own  
19    and are you engaged in state action with respect  
20    to the constitutional rights of others.

21                So, in Lindke, for example, recently  
22    and in Garcetti and that line of cases, there's  
23    a recognition that those are conceptually two  
24    distinct questions, and that's why we think that  
25    that's really not the proper framework the Court

1     should and the Respondents do kind of put all  
2     their chips on, so to speak, the question of are  
3     these actual governmental actors, are they  
4     governmental schools, sorry, not actors, are  
5     they, in fact, governmental schools. And there,  
6     you're dealing with the creation, control, and  
7     dissolution factors, which all favor a finding  
8     that they are not governmental act -- schools.

9             JUSTICE SOTOMAYOR: General, what do  
10    we do that two years ago in Peltier versus  
11    Charter School, the SG argued the opposite  
12    position you're taking today, that charter  
13    schools are public schools and state actors?

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

16            First of all, that case was not a  
17    religious free exercise case, so -- that  
18    analysis wasn't --

19            JUSTICE SOTOMAYOR: Doesn't matter.  
20    Why were they state actors there and not state  
21    actors here?

22            GENERAL SAUER: And -- and as to my  
23    second point, as I said to Justice Thomas, we  
24    don't think that that's really the correct  
25    framework to apply here. But, if it did -- if

1     it does --

2                   JUSTICE SOTOMAYOR:   So what changed?

3                   GENERAL SAUER:   -- we think that  
4     that's not conducive --

5                   JUSTICE SOTOMAYOR:   What changed?

6                   GENERAL SAUER:   Well, for example --  
7     I -- I -- I --

8                   JUSTICE SOTOMAYOR:   What changed is  
9     there's a new administration.   But tell me  
10    something.   Given your new framing, I presume  
11    the -- that you're conceding now publicly that  
12    the federal charter school program, as it's been  
13    run up until now, is unconstitutional?

14                  GENERAL SAUER:   Not exactly.   So there  
15    are four -- if I may describe that.   There are  
16    kind of four buckets in that statute.   There's  
17    programs and operations, which we think is this  
18    case, and there, we are conceding that our  
19    argument here implies that there has to be a  
20    free exercise exception for those two.

21                  Then there's a reference to employment  
22    policies, and we think that's already governed  
23    by the ministerial exception from Hosanna-Tabor  
24    and Our Lady of Guadalupe.

25                  Then the federal statute says you have

1 to be kind of open to all in your admissions  
2 policies, and we -- we do not concede that  
3 there's a constitutional problem there. We  
4 contend that that is defensible. If -- for  
5 example, if a religious school wanted to come in  
6 and say, you know, hey, our religion says we can  
7 only teach members of our own faith, we don't  
8 concede that that would be constitutionally  
9 mandated by Carson and -- and those.

10 JUSTICE KAGAN: And what's the  
11 difference?

12 GENERAL SAUER: The difference -- I  
13 would say there's three differences. One is, in  
14 that circumstance, you would have a Smith  
15 analysis that, as Mr. Campbell said, looks very  
16 different. Open to all comers is a neutral and  
17 generally applicable criteria.

18 Contrast that to the criteria in this  
19 case, where the discriminatory characteristic,  
20 no religious need apply, is right there in the  
21 discrimination. So we haven't even made a Smith  
22 argument here because of the problem --

23 JUSTICE KAGAN: No, it's -- it's not  
24 no religious need apply. It's nonsectarian  
25 instruction.

1                   GENERAL SAUER:  Nonsectarian to me  
2       means no religions.  But, in any event, our  
3       position is --

4                   JUSTICE KAGAN:  But the point is, to  
5       the extent it does mean that, it's because  
6       religious practice, religious exercise requires  
7       a certain -- you know, you -- because religious  
8       belief implies a certain kind of religious  
9       conduct, and, here, the same argument would be  
10      met.  My religious belief requires a certain  
11      kind of religious conduct, which is that I only  
12      teach members of my own faith.

13                  GENERAL SAUER:  Suffice to say that  
14      under the Smith analysis at least, those seem  
15      very, very different, and the government will  
16      argue that those are distinct cases.

17                  Secondly, even if the Court is not  
18      inclined to apply Smith, the argument that there  
19      would be a compelling state interest and that  
20      Oklahoma or the federal government could say  
21      this is open to every student where the options  
22      are being offered to every student across the  
23      board without any discrimination, there would be  
24      a strong argument that that would be a  
25      compelling state interest even if we weren't



1 looking at the neutral and generally applicable  
2 framework.

3 And, thirdly, if you look at it  
4 through the lens of the funding cases, like U.S.  
5 AID, the argument that what we're funding here  
6 is a program that's open to all is a much  
7 stronger argument than the argument that what  
8 we're funding here is a program where we don't  
9 let religious schools participate.

10 So, for those three reasons, we would  
11 continue to defend the -- the -- the open-to-all  
12 admissions policies that we set out in --

13 JUSTICE JACKSON: General Sauer, can I  
14 just ask you because, as I understood your  
15 response to Justice Sotomayor, you are saying  
16 that the portion of the federal law that  
17 indicates that to qualify as a charter school  
18 you have to be nonsectarian in your programs,  
19 you're saying there is a constitutional problem  
20 with that or at least there has to be a free  
21 exercise exception, is that right?

22 GENERAL SAUER: Exactly. We think  
23 that's the natural extension of the 2020 OLC  
24 opinion --

25 JUSTICE JACKSON: All right. So, if

1       there --

2                   GENERAL SAUER:  -- as to affiliation.

3       Sorry.

4                   JUSTICE JACKSON:  If there is a free  
5       exercise exception, then I think -- are you  
6       saying that strict scrutiny is triggered as a  
7       result of that, and can you speak to why  
8       avoiding an Establishment Clause problem would  
9       not be a compelling interest of the state in  
10      including this kind of clause in their charter  
11      school program?

12                  GENERAL SAUER:  As Mr. Campbell  
13      argued, we think that's squarely foreclosed by  
14      Carson.  Actually, by Trinity Lutheran and  
15      Espinoza and Carson, all of which say, you know,  
16      protecting establishment --

17                  JUSTICE JACKSON:  Say it's not a  
18      compelling state interest or?

19                  GENERAL SAUER:  To -- to -- to protect  
20      establishment interests more fiercely than the  
21      federal Establishment Clause actually protects  
22      them is not a compelling state interest that  
23      can take away free exercise rights.

24                  JUSTICE JACKSON:  I guess I -- I feel  
25      like that's completely circular, and maybe I'm

1 wrong about it, but I'm just trying to  
2 understand it.

3 So how does that account for a state's  
4 concern that unless they are setting up a series  
5 of nonsectarian programs, they would be funding  
6 religious activities in a way that the  
7 Constitution doesn't allow?

8 I don't -- I -- I appreciate the  
9 Trinity Lutheran scenario and it not being a  
10 compelling interest to prevent religious schools  
11 from doing exactly the same thing as everybody  
12 else is doing in this program, but I'm actually  
13 drawing a distinction, as you've heard me say  
14 before, that what the religious schools are  
15 asking for here is not exactly the same thing.

16 And so, to the extent that the state  
17 is saying we see a distinction between religious  
18 schools, which require all of these religious  
19 rights and proselytize and do whatever, it --  
20 it -- we see a distinction between those kinds  
21 of schools and public schools, and we only want  
22 to set up public schools because our compelling  
23 interest is to prevent the entanglement of the  
24 state with funding those kinds of schools.

25 GENERAL SAUER: To address that --

1 JUSTICE JACKSON: Yeah.

2 GENERAL SAUER: -- the Court should  
3 look and see whether there is an actual  
4 Establishment Clause violation here --

5 JUSTICE JACKSON: Okay.

6 GENERAL SAUER: -- because of its --  
7 the principle that governs here would be genuine  
8 and independent private choice asserted in  
9 Zelman and reaffirmed in Trinity Lutheran, in  
10 Espinoza, and Carson. Here, participation in  
11 the program is mediated through two layers of  
12 private choice, both the schools decide to  
13 participate or the private entities decide --  
14 decide to participate, and more fundamentally,  
15 the parents decide to send their kids there. As  
16 both I -- I think -- both attorneys argue,  
17 they -- there is the option, the backstop  
18 option, of the traditional government-run public  
19 schools.

20 Under that set of circumstances, there  
21 is, I think, not a plausible claim that there is  
22 an actual direct Establishment Clause violation,  
23 so much so that I believe that Respondents on  
24 this point hinge their Establishment Clause  
25 argument entirely on their government entity

1 argument. So they, I sense, as I read it,  
2 concede that there's only an Establishment  
3 Clause problem if these actually are government  
4 entities.

5 JUSTICE JACKSON: Okay.

6 GENERAL SAUER: There, they run into  
7 Lebron and they run into Rendell-Baker and they  
8 run into cases like that.

9 CHIEF JUSTICE ROBERTS: Counsel, to  
10 what extent can the state impose requirements on  
11 such schools? You know, you have to teach  
12 Oklahoma state history, you have to teach this,  
13 this, and this.

14 GENERAL SAUER: Those all appear to  
15 be -- obviously, there could be, you know,  
16 unique facts, but those in general would appear  
17 to be neutral, generally applicable criteria  
18 that they could impose. And if there was a free  
19 exercise claim in response to that that, oh, our  
20 religion doesn't -- doesn't allow us to teach  
21 evolution, if that's neutral and generally  
22 applicable, there would be a strong argument  
23 that there's no free exercise opt-out there.

24 In addition to that, if you're not  
25 applying the Smith framework, the State would

1 have to argue we have a compelling state  
2 interest in making sure people understand the  
3 theory of evolution so they could pass the  
4 standardized tests and so forth. And -- and the  
5 Court would have to assess it through that lens.

6 CHIEF JUSTICE ROBERTS: Does the  
7 extent of that involvement affect the analysis  
8 in terms of whether the -- whether there's too  
9 much state involvement to view it as a -- a  
10 truly private charter school or a truly  
11 religious charter school?

12 GENERAL SAUER: I don't think so if I  
13 understand the question. The way that I would  
14 frame it is, under Trinity Lutheran and Carson  
15 and Espinoza, you have a neutral and generally  
16 applicable program.

17 And what you're letting into that  
18 program is something that's very like the school  
19 in Rendell-Baker, where there is detailed and  
20 extensive regulation of that school, but,  
21 nevertheless, it is not a private actor.

22 CHIEF JUSTICE ROBERTS: Thank you.

23 GENERAL SAUER: Or, sorry, it is not a  
24 state actor.

25 CHIEF JUSTICE ROBERTS: Yeah.

1                   GENERAL SAUER: It is a private actor.

2                   CHIEF JUSTICE ROBERTS: Justice

3 Thomas?

4                   Justice Alito?

5                   JUSTICE ALITO: Well, on the issue of  
6 intensive state supervision, would you address  
7 the -- the entwinement argument that the  
8 Oklahoma Supreme Court thought was persuasive?

9                   GENERAL SAUER: We think that  
10 argument's quite unpersuasive, and here's why.  
11 The entwinement argument, for example, they rely  
12 solely on Brentwood Academy, and Brentwood  
13 Academy is a case where public officials were  
14 86 percent of the membership of the state  
15 athletic association, and they appointed other  
16 public officials to control it.

17                   So Brentwood Academy is very similar  
18 to the government-controlled cases like MOHELA  
19 and Amtrak, where the government's controlling  
20 everything. There was a little private  
21 involvement to the tune of 14 percent, but  
22 that's very different. Here, we're talking at  
23 the polar opposite of that, where every single  
24 director is privately controlled.

25                   And under the cases we cited, Cherry

1 Cotton Mills, Bank of the America -- or Bank of  
2 United States, all the way up through Biden  
3 against Nebraska, it's -- the situation is the  
4 opposite of what the Court -- the Court has held  
5 to be this is a governmental actor on that  
6 crucial control factor.

7 JUSTICE ALITO: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice  
9 Sotomayor?

10 JUSTICE SOTOMAYOR: No, thank you.

11 CHIEF JUSTICE ROBERTS: Justice Kagan?

12 JUSTICE KAGAN: General, do you -- I  
13 mean, do you agree that if -- thinking about the  
14 Chief Justice's question, that if the state can  
15 apply these various sort of curricular  
16 requirements and say, you know, yes, we're just  
17 going to insist that you do this,  
18 notwithstanding that it's against your religious  
19 belief, against your religious practice, I mean,  
20 what you're going to get at least in result is  
21 real distinctions between the religions that can  
22 and cannot benefit from what you're arguing.

23 Wouldn't you agree with that?

24 GENERAL SAUER: I don't know enough  
25 about the possible religious applicants to --



1 to -- to directly address that.

2 JUSTICE KAGAN: I mean, I've just got  
3 to think that there are religions that are going  
4 to have no problems dealing with all the various  
5 curricular requirements and religions that are  
6 going to have very severe problems dealing with  
7 all the curricular requirements.

8 And we're going to end up in a state  
9 of the world which has kind of, you know,  
10 accepted establishment religions and more  
11 different, more fundamentalist, more, you know,  
12 use the adjective you want, religions that seem  
13 peculiar to many eyes but are deeply felt.

14 GENERAL SAUER: I'd be very surprised  
15 if that were the practical outcome because I'd  
16 be surprised if there were religions who want to  
17 operate essentially charter schools who are  
18 unwilling to, you know, agree to teach math and  
19 science and so on.

20 JUSTICE KAGAN: But there's a big  
21 incentive to operating charter schools since  
22 everything is funded for you, I mean, so I think  
23 that there are going to be -- there's a line out  
24 the door if -- if -- if you -- you can do this  
25 consistent with your religious belief.

1           All I'm suggesting to you is this  
2    notion that the state can do this while still  
3    maintaining all its various curricular  
4    requirements, I mean, either that's sort of  
5    fantasy land given the state of religious belief  
6    and religious practice in this world, or, if  
7    it's not, it's only because what's -- what's  
8    going to result is treating, shall we call them,  
9    majoritarian religions very differently from  
10   minority religions.

11           GENERAL SAUER: First, I'd say that if  
12   there is, in fact, a line out the door, so to  
13   speak, that line out the door will increase the  
14   diversity of options for parents and students in  
15   states that have programs that are similar to  
16   Oklahoma.

17           Whether or not it will result in some  
18   kind of disfavorment for minor -- the --  
19   whatever the opposite of majoritarian is and  
20   non-majoritarian religions, I -- I -- I can't  
21   speak to that.

22           JUSTICE KAGAN: I -- let me just ask  
23   you one quick last question and make sure that I  
24   understand what part of the federal statute  
25   you're giving up today.

1           The -- as I understand it, the federal  
2   law conditions money on recipients being public  
3   schools that are nonsectarian in their programs,  
4   admissions policies, employment practices, and  
5   all other operations. So that's the part of the  
6   federal statute that I focused on.

7           And you're saying today that that is  
8   so patently unconstitutional that you will not  
9   defend that statute.

10          GENERAL SAUER: I -- I -- I would give  
11   the same qualifications I gave earlier. Our  
12   position today would be that programs and  
13   operations -- under the logic of Carson and  
14   Trinity Lutheran and Espinoza, programs and  
15   operations would need a free exercise exception.

16          The government's already determined in  
17   2020, after Trinity Lutheran, that affiliation  
18   that is referred to in that statute also can't  
19   survive after Trinity Lutheran.

20          When it comes to admissions policies,  
21   which is also referred to in the statute, we  
22   defend that.

23          JUSTICE KAGAN: Got it. Thank you.

24          CHIEF JUSTICE ROBERTS: Justice  
25   Gorsuch?

1 JUSTICE GORSUCH: If a state wanted to  
2 avoid the choice issue here by making charter  
3 schools government entities, what would it have  
4 to do?

5 GENERAL SAUER: Certainly, one way it  
6 could do it is create them directly by statute  
7 and have them controlled by directors who are  
8 themselves public officials.

9 My understanding is that California's  
10 system is somewhat like that. There may well be  
11 other states where they really are government  
12 entities, they're part of the government.

13 Here, where they're privately  
14 controlled directors, where they are created by  
15 a process that is initiated by a private  
16 applicant, and sometimes the application doesn't  
17 even go to a -- a public actor, we are, in a  
18 sense, the polar opposite of cases like MOHELA  
19 and Biden against Nebraska.

20 JUSTICE GORSUCH: So a holding here  
21 is -- may apply in some states and may not apply  
22 in others?

23 GENERAL SAUER: Exactly right. And  
24 states would have the option to restructure  
25 their programs if they wanted to, you know, have

1       these be government-run entities.

2                   JUSTICE GORSUCH:   Thank you.

3                   CHIEF JUSTICE ROBERTS:   Justice  
4       Kavanaugh?

5                   JUSTICE KAVANAUGH:   Just make sure I  
6       understand the limits of the federal  
7       government's position.

8                   The state can't favor one religion  
9       over another in approving or allowing charter  
10      schools, correct?

11                  GENERAL SAUER:   Absolutely correct.

12                  JUSTICE KAVANAUGH:   And also the state  
13      can't favor religion generally over secular  
14      counterparts in allowing or approving charter  
15      schools as well.   In other words, if it has  
16      charter schools, it must allow secular and  
17      religious, correct?

18                  GENERAL SAUER:   Correct.

19                  JUSTICE KAVANAUGH:   That's it.   Thank  
20      you.

21                  CHIEF JUSTICE ROBERTS:   Justice  
22      Jackson?

23                  JUSTICE JACKSON:   So I -- I'm just  
24      trying to understand your Establishment Clause  
25      "nothing to see here" position.

1           St. Isidore's was pretty clear about  
2   its mission -- its -- its mission. Its members,  
3   as you've said, are private individuals, an  
4   archbishop and a bishop. It would require the  
5   students to "spend time in religious instruction  
6   and activities and permit state spending in  
7   direct support of religious curriculum and  
8   activities."

9           So are -- are you saying that the  
10   religious charter school's use of public funds  
11   to support proselytization, which the school  
12   says it intends to do, is not an Establishment  
13   Clause problem?

14           Like, we wouldn't have to look at,  
15   like, where the funding is going? You -- even  
16   if the school says, yes, we're getting money  
17   from the state and we are turning around and  
18   buying Bibles and instructing the students and  
19   make -- you know, no Establishment Clause  
20   problem?

21           GENERAL SAUER: The principle of  
22   genuine and independent private choice that goes  
23   from Zelman to Carson would address that  
24   directly. Here, the parents are choosing with  
25   open eyes to take their kid to the religious

1 charter school. They are understanding we may  
2 be subject to proselytization or whatever would  
3 be --

4 JUSTICE JACKSON: Isn't -- isn't  
5 that -- so you're saying the Establishment  
6 Clause only -- only does work in a situation in  
7 which a person is being forced to engage in  
8 religious activities if there is a choice  
9 somehow?

10 GENERAL SAUER: No, I'm saying where  
11 state funding is going to religious schools on  
12 an even footing through --

13 JUSTICE JACKSON: Mm.

14 GENERAL SAUER: -- where public and  
15 private schools can apply for the funding, as  
16 you see here, and in addition to that, the  
17 decision whether or not to go to the -- the  
18 religious school or the nonreligious school lies  
19 in the hands of the parents, that is genuine and  
20 independent private choice, which I don't think  
21 is disputed in this case, and, therefore, that  
22 would not violate the Establishment Clause.

23 JUSTICE JACKSON: Okay.

24 GENERAL SAUER: Once you -- once  
25 that's the position, then --

1 JUSTICE JACKSON: Yeah. And one final  
2 question. So Justice Kavanaugh explored with  
3 you about favoring one religion over another.

4 I'm wondering whether, as a practical  
5 matter, that can happen in a situation like this  
6 one, where the board can only sponsor five  
7 charter schools in a year, for example.

8 I mean, doesn't the board have to  
9 determine -- what if we have six applicants or  
10 seven from different religions? Would we be in  
11 a situation in which the board is picking and  
12 choosing among them?

13 GENERAL SAUER: The board would have  
14 to use religiously neutral criteria. And my  
15 understanding is the board says it does that.  
16 So it would --

17 JUSTICE JACKSON: But -- but  
18 wouldn't --

19 GENERAL SAUER: -- pick the best  
20 qualified, but --

21 JUSTICE JACKSON: -- wouldn't --  
22 wouldn't it -- I -- I understand their criteria  
23 for picking, but at the end of the day, to the  
24 extent that we only have established charter  
25 schools for certain religions, wouldn't the



1 effect of that be to establish a certain  
2 religion -- do you see what I'm saying?

3 GENERAL SAUER: The effect would not  
4 be constitutionally problematic if the board  
5 uses, as it says it does, religiously neutral  
6 criteria in selecting who are the best  
7 applicants.

8 JUSTICE JACKSON: Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11 Mr. Garre?

12 ORAL ARGUMENT OF GREGORY G. GARRE  
13 ON BEHALF OF THE RESPONDENT

14 MR. GARRE: Thank you, Mr. Chief  
15 Justice, and may it please the Court:

16 Three considerations distinguish this  
17 case from the Trinity Lutheran trilogy and  
18 require affirmance.

19 First, charter schools are public  
20 schools. They bear all the hallmarks of the  
21 criteria this Court recognized in Carson, are  
22 established, just like the Court said in Carson  
23 states could, to expand educational  
24 opportunities within the public schools system,  
25 and have been recognized as and, indeed, are

1 required to be public schools by the Congress of  
2 the United States and the legislatures of 47  
3 states.

4 Second, teaching religion in -- in --  
5 as truth in public schools is not allowed.  
6 St. Isidore has made clear that that's exactly  
7 what it wants to do in infusing its school day  
8 with the teachings of Jesus Christ. Oklahoma  
9 respects and promotes through vouchers and other  
10 means the abilities of families to secure such  
11 an education in a private school.

12 But this Court in this -- this Court  
13 has held in a series of landmark precedents not  
14 challenged by anyone here that the Establishment  
15 Clause bars such devotional teaching in public  
16 schools.

17 And, third, Petitioners are not  
18 seeking access to Oklahoma's program on equals  
19 terms. They seek a special status: the right  
20 to establish a religious charter school plus an  
21 exemption from the nondiscrimination  
22 requirements that apply to every other charter  
23 school and that distinguish public schools from  
24 private schools.

25 The charter schools movement is one of

1 the modern-day success stories of public  
2 education. Presidents, governors, and  
3 legislators from the coast -- from across the  
4 country have recognized that charter schools  
5 have improved educational opportunities and  
6 outcomes for millions of Americans, especially  
7 those from disadvantaged backgrounds, within the  
8 public schools system.

9 A ruling for Petitioners would not  
10 only lead to the creation of the nation's first  
11 religious public school, it would render  
12 unconstitutional, as my friend from -- the  
13 Solicitor General acknowledged, the federal  
14 charter school program and immediately the laws  
15 of 47 states across this country, and it would  
16 result in the astounding rule that states not  
17 only may but must fund and create public  
18 religious schools, an astounding reversal from  
19 this Court's time-honored precedents.

20 I welcome the Court's questions.

21 JUSTICE THOMAS: Mr. Garre, would you  
22 elaborate on your statement that public --  
23 charter schools must by force be public?

24 MR. GARRE: Of course, Your Honor.  
25 They -- they bear all the hallmarks this Court

1 has recognized. They're free, open to all,  
2 funded by taxpayers, controlled by the state  
3 with respect to their curriculum. And I hope we  
4 can talk about that during this argument.  
5 They're -- they're required to meet  
6 nondiscrimination laws, and they're  
7 nonsectarian, the -- all the features that this  
8 Court recognized in Carson had -- and had little  
9 difficulty applying.

10 JUSTICE THOMAS: So, in -- in your --  
11 in the way you look at this case, there is no  
12 way that St. Isidore can participate in the  
13 charter program and be -- and remain private?

14 MR. GARRE: That's right. That's a  
15 matter -- that's not me saying it. It's the  
16 state saying it. I mean -- and -- and the  
17 Oklahoma Supreme Court made this clear. I mean,  
18 we've had a lot of statements that St. Isidore  
19 is a private institution and not a public  
20 school. I -- I mean, what -- what the Oklahoma  
21 Supreme Court said was St. Isidore, I'm quoting  
22 here, "came into existence through the charter  
23 with the state and will function as a component  
24 of the state's public schools system." That's  
25 at page 30a of the appendix.

1           The -- the court also -- the -- the  
2     state court also said that this is a  
3     legislature-created entity. It's a surrogate of  
4     the state. It's a public school. I -- this  
5     Court has a lot of authority, but I don't think  
6     it has the authority to second-guess --

7           JUSTICE THOMAS: So I think the  
8     argument that St. Isidore and the board are --  
9     has made -- are making is that it's a private  
10    entity that is participating in a state program.  
11    It was not created by the state program.

12           MR. GARRE: Right. And state law, as  
13    interpreted by the Oklahoma Supreme Court,  
14    refutes that. And I don't -- with respect, I  
15    don't think this Court can second-guess that.

16           And -- and I -- let me talk about the  
17    state law. I mean, to put aside what the  
18    Oklahoma Supreme Court said, state law in  
19    3.132.2 says that charter schools are  
20    established as an entity. The Oklahoma  
21    Administrative Code 210:40-87-5(b) says:  
22    "Establishment of a new charter school. A new  
23    charter school is established when a charter  
24    school application is approved."

25           And -- and there were a question about

1     how St. Isidore has changed the application  
2     here. I mean, it did so with respect to the  
3     non-discrimination requirements, and let me  
4     quote in a couple ways. On pages 295 to 96 of  
5     the Respondent appendix, in a statement of  
6     assurance, it was -- it said it would apply with  
7     federal and state law, "with priority given to  
8     the Catholic Church's understanding of itself  
9     and its rights and its obligations pursuant to  
10    the Code of Canon Law and the catechism of the  
11    Catholic Church." That's one.

12                 And then, on page 332a of the  
13    Respondent's appendix: The -- "The school  
14    complies with all applicable state and federal  
15    laws and statutes to the extent the teachings of  
16    the Catholic Church allow."

17                 And then, with respect, another  
18    important change is they completely changed the  
19    definition of public schools. If you look at  
20    page 521a of Respondent's appendix, that's the  
21    charter school template that the state provides,  
22    and it defines a public school as a school  
23    "established by the legislature that's free and  
24    supported by the state."

25                 And what they described it as, at page

1     4a in their application of the Respondent's  
2     appendix, is that charter schools are privately  
3     operated not-for-profit entities. So that's  
4     what they're making up. Under state law,  
5     just -- not only Oklahoma. North Dakota just  
6     became the fortieth state in the Union to  
7     recognize charter schools as public schools, as  
8     the Congress of the United States has recognized  
9     this.

10           CHIEF JUSTICE ROBERTS: What do you do  
11     with Fulton? You have a state agency that  
12     refused to deal with the religious adopted --  
13     adoption services, and we held they couldn't  
14     engage in that discrimination.

15           MR. GARRE: Sure.

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

18           MR. GARRE: I think --

19           CHIEF JUSTICE ROBERTS: You have an  
20     education program, and you want to not -- not  
21     allow them to participate with a religious -- a  
22     religious entity.

23           MR. GARRE: So I -- I think it's  
24     fundamentally different. I mean -- and -- and  
25     our position doesn't threaten faith-based

1 contractors at all. The -- the -- the -- the  
2 adoption agency in Fulton wasn't established by  
3 the -- the state through legislative action. It  
4 wasn't fully funded by the state. It wasn't  
5 controlled by the state.

6 I mean, the -- the charter schools  
7 here are controlled in -- in fundamental ways  
8 that my friends have glossed over this morning.  
9 I mean, with respect to curriculum, there's  
10 front-end and back-end requirements. They have  
11 to show as part of their application that --  
12 that they will meet the state's academic  
13 standards, which are, you know, highly  
14 reticulated, down to the point that they have to  
15 teach Reagan's "Tear Down the Wall" speech in --  
16 in U.S. history or dangling modifiers in ninth  
17 grade English. They can't teach what other  
18 public schools can't teach, which is critical  
19 race or -- or gender theories --

20 JUSTICE KAVANAUGH: I don't -- I don't  
21 think -- you're a little far afield, I think,  
22 from the Chief's question at least as I  
23 understand it because I think a concern here is  
24 that religiously operated senior homes or food  
25 banks or foster care agencies or adoption



1 agencies or homeless shelters, many of which get  
2 substantial funding from the government, would  
3 potentially, under your theory, this is the  
4 concern, be -- become state actors and, thus,  
5 not be able to exercise their religion.

6 So can you explain why the -- the  
7 principle that you're articulating would not  
8 have that result?

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

12 JUSTICE KAVANAUGH: When you say --

13 MR. GARRE: They're established --  
14 sorry.

15 JUSTICE KAVANAUGH: Keep -- I just  
16 want you to come back -- when you say a part of  
17 the state, I want to drill down on that. What  
18 do you mean?

19 MR. GARRE: Well, that they're  
20 established by the state, the legislature, that  
21 they become a components of the state system,  
22 which is what the Oklahoma Supreme Court --

23 JUSTICE GORSUCH: Well, I want to  
24 drill down on that --

25 MR. GARRE: -- held here.

1                   JUSTICE GORSUCH: -- a little further  
2     too if it's all right. So, in Fulton, you had  
3     Catholic Charities, which had to be  
4     incorporated. It was incorporated, separately  
5     incorporated under state law, and could only  
6     provide adoption services with incredible  
7     oversight from the city. I mean, they can't --  
8     they can't take foster children in. They can't  
9     place them without comprehensive governmental  
10    involvement.

11                   What's the -- again, what's the  
12    difference? How do we draw that line so that we  
13    capture public schools on your account but we  
14    don't capture, and you seem to say we shouldn't  
15    capture, entities like Fulton?

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

19                   (Laughter.)

20                   MR. GARRE: Right. So, again,  
21    Your Honor, the adoption agencies and other  
22    faith-based contractors are not being  
23    established by the state --

24                   JUSTICE GORSUCH: Well, they --  
25    they -- they --

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

2 JUSTICE GORSUCH: Well, there -- they  
3 have to be incorporated, and they have to be  
4 approved, and every parent has to be -- that  
5 they come forward with has to be -- satisfy  
6 certain criteria that the state -- I mean, it's  
7 comprehensive regulation.

8 MR. GARRE: I mean, Oklahoma has a  
9 general corporations law too, Your Honor, and  
10 what is going on in the charter school program  
11 is fundamentally different. And, look, even in  
12 the --

13 JUSTICE GORSUCH: What's the test, I  
14 guess, is what I'm asking, Mr. Garre, that you'd  
15 have us apply? Because, you know, we have to  
16 have a test to distinguish these two buckets of  
17 cases, right --

18 MR. GARRE: Well, I think, here, I  
19 think to --

20 JUSTICE GORSUCH: -- between Fulton  
21 and -- what -- what's the test?

22 MR. GARRE: Right. I think, first of  
23 all, here, we're dealing with public schools,  
24 and -- and I think, you know, we can talk about  
25 the other examples, but, I mean, I think we're

1 dealing with public schools. This Court in  
2 Carson just a couple years ago --

3 JUSTICE GORSUCH: I -- I appreciate --  
4 I appreciate that point, but you -- you --  
5 you've -- you've urged us to say public schools  
6 are different from other contractors like  
7 Catholic Charities in Fulton, and so we need a  
8 test, a law -- legal test. Is it Lebron? Is --  
9 is that where you'd have us look?

10 MR. GARRE: I think you can look at --  
11 I mean, look, I think that public schools bear  
12 all the hallmarks of government entities, and we  
13 can go down the list.

14 JUSTICE GORSUCH: So is it --

15 MR. GARRE: They're clearly --

16 JUSTICE GORSUCH: -- is it -- is it  
17 creation and control? Are -- are those the  
18 correct things that we should be looking at? I  
19 know you say we shouldn't look at state action  
20 doctrine. I mean, is it -- is it -- is it those  
21 two factors?

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

25 JUSTICE GORSUCH: Okay. So --

1                   MR. GARRE: Creation, which I think is  
2 clearly met here because the Oklahoma Supreme  
3 Court has interpreted Oklahoma law --

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

6                   MR. GARRE: Okay.

7                   JUSTICE GORSUCH: -- cut you off.  
8 I -- I just want to make sure we're on the same  
9 page to start with, which is we should look to  
10 Lebron to make -- to make that -- this -- this  
11 decision -- this distinction.

12                  MR. GARRE: I think this Court can  
13 decide this case by saying that charter schools  
14 are public schools in all the ways that people  
15 have always recognized and that this Court has  
16 recognized and that you can't fund an entity to  
17 teach religion as truth in public schools.

18                  I also think you can look at the  
19 government entity precedents and the state actor  
20 precedents and come to the same conclusion. And  
21 if -- and I'll go through the factors in  
22 government --

23                  JUSTICE GORSUCH: Please. I didn't  
24 mean to stop you.

25                  MR. GARRE: Okay. Creation. In the

1 Oklahoma Supreme Court decision in this case,  
2 Oklahoma law answers that. The public charter  
3 schools are created by the legislature. They  
4 come into existence and they become part of the  
5 state public schools system. That's what the  
6 Oklahoma Supreme Court said at page 30.

7 There's -- there's --

8 JUSTICE SOTOMAYOR: But this is not  
9 the Catholic Church who's being given this.

10 MR. GARRE: Excuse me?

11 JUSTICE SOTOMAYOR: This is not the  
12 Catholic Church who's being given this. It's  
13 the created new charter school?

14 MR. GARRE: That's exactly right.  
15 That's exactly right.

16 Number two, state supervision and  
17 control.

18 And maybe I can bracket that, we can  
19 come back to that, because that's an important  
20 one.

21 The state can repeal or close the  
22 institution, which this Court acknowledged in  
23 the Biden case and other cases, and that's  
24 clearly the case here. The state can close  
25 charter schools, unlike private schools.

1                   And -- number four, the state has  
2     denominated the entity as a public entity.  
3     We're not saying that labels decide this case,  
4     but it's -- it's significant that the state has  
5     regarded charter schools as public schools, as  
6     has the Congress of the United States and the  
7     legislatures of every other state. It would be  
8     sort of remarkable for this Court to say that  
9     everyone else was wrong on that.

10                  And five, the Court in Biden looked  
11     to -- and Lebron looked to public understanding.  
12     And, here, again, public understanding is that  
13     charter schools are public schools, just as  
14     Congress and every state has recognized.

15                  JUSTICE JACKSON: Mr. --

16                  MR. GARRE: So going back to state  
17     control --

18                  JUSTICE JACKSON: -- Mr. Garre, can I  
19     just --

20                  MR. GARRE: Yes.

21                  JUSTICE JACKSON: So drilling down on  
22     that because I think --

23                  JUSTICE SOTOMAYOR: Let him finish on  
24     supervision and -- and control.

25                  JUSTICE JACKSON: Sorry?

1 JUSTICE SOTOMAYOR: Just let him  
2 finish on supervision and control.

3 JUSTICE JACKSON: Go ahead.

4 MR. GARRE: So supervision and  
5 control, there -- there's extensive oversight of  
6 curriculum in a way that doesn't remotely exist  
7 for private schools.

8 At the front end, in terms of the  
9 application process, where you have to identify  
10 the curriculum, applications are often rejected  
11 because of the curriculum. Then you have to --  
12 you have to lay out that you'll meet a number of  
13 performance indicators that are set forth at  
14 pages 18, 19 to 20 of our statutory addendum,  
15 and you have to show that your -- your  
16 curriculum will align with the state's academic  
17 standards, which are highly reticulated.

18 And then, once you do that, every year  
19 you are evaluated for compliance with those  
20 factors, academic performance, you're evaluated  
21 for financial performance, you're audited, all  
22 in ways in which doesn't remotely resemble  
23 what's going on with a private school, which is  
24 hands off.

25 The board itself -- and there have



1     been a lot of -- there's been a lot of  
2     discussion about the governing board. That  
3     governing board is reviewed at the outset in the  
4     application, what it's going to be like, who's  
5     going to be on it, and then it's evaluated every  
6     year as to board compliance. Boards that are  
7     deficient or malfeasant can and have been  
8     removed.

9             There's -- there's -- they're also  
10    subject to the general assessment test that  
11    apply to public schools, which doesn't apply to  
12    private schools.

13            JUSTICE JACKSON: So, Mr. --  
14    Mr. Garre, can I just sort of summarize this by  
15    saying that I think what you're saying is  
16    that -- or just like traditional public schools,  
17    charter schools are a creation and creature of  
18    the state that distinguish them from things like  
19    the other very interesting and good examples  
20    that were raised, you know, nursing homes,  
21    adoption agencies, hospitals.

22            Those things can actually exist  
23    outside of the state, although they have to be  
24    licensed in the state, just like a private  
25    school would have to be licensed. You know,

1 obviously, there's going to be some state  
2 involvement to authorize these private people to  
3 set up this private entity.

4 But it seems to me that you're saying  
5 with all of these different factors and the way  
6 in which you're conceiving of this, a public  
7 school and these charter schools are creatures  
8 of the state in a different way.

9 MR. GARRE: Yes. And I don't think,  
10 when this Court decided *Fulton*, it thought it  
11 was imposing new requirements on public schools.

12 And -- and with respect to supervision  
13 and control, if I could just make one more  
14 point. Federal law requires this. The charter  
15 school program requires that charter schools "be  
16 operated under public supervision and  
17 direction." This is at 7221(i)(2)(B) of the  
18 statute. And this is really important.

19 I mean, the federal charter school  
20 program has been implemented for decades.  
21 Billions of dollars have been dispensed by the  
22 federal government.

23 JUSTICE KAVANAUGH: All -- all the  
24 religious school is saying is don't exclude us  
25 on account of our religion. I mean, if you go

1     and apply for -- to be a charter school and  
2     you're an environmental studies school or you're  
3     a science-based school or you're a Chinese  
4     immersion school or you're a English  
5     grammar-focused school, you can get in.

6                 MR. GARRE:   Of --

7                 JUSTICE KAVANAUGH:   And then you come  
8     in and you say, oh, we're a religious school.  
9     It's like, oh, no, can't do that, that's too  
10    much.   That's scary.   We're not going to do  
11    that.

12                And our cases have made very clear,  
13    and I think those are some of the most important  
14    cases we've had, of saying you can't treat  
15    religious people and religious institutions and  
16    religious speech as second-class in the  
17    United States.

18                And when you have a program that's  
19    open to all comers except religion, no, we can't  
20    do that, we can do everything else, that seems  
21    like rank discrimination against religion, and  
22    that's the concern that I think you need to deal  
23    with here.

24                MR. GARRE:   Sure.   And -- and,  
25    certainly, we -- as we've said in our brief, we

1 recognize that principle and we respect it.  
2 But, as this Court itself said in the Carson  
3 case, states may maintain strictly secular  
4 public schools. And that's all the State of  
5 Oklahoma has done here.

6 All we're saying is that we're not  
7 going to create --

8 JUSTICE KAVANAUGH: Well --

9 MR. GARRE: -- fund, and control the  
10 curriculum of schools that want to teach --

11 JUSTICE KAVANAUGH: As -- as --

12 MR. GARRE: -- religion as truth.

13 JUSTICE KAVANAUGH: I think, as  
14 Justice Gorsuch pointed out earlier, a state  
15 could easily design a different kind of charter  
16 schools system where they really were  
17 government-run, government-controlled,  
18 government-created, government-established  
19 private charter schools.

20 That's not what -- some states have.  
21 They open it up to private people to apply, and  
22 then, when you say to someone, you're no good  
23 because you're religious, they're not asking --  
24 and to make the point, they're not asking for  
25 special treatment. They're not asking for

1 favoritism. They're just saying don't treat us  
2 worse because we're religious.

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

8 MR. GARRE: Well, in terms of creation  
9 and control, Oklahoma -- Oklahoma has that, as  
10 do all the other states with charter schools.  
11 And -- and if you have any questions about  
12 control, let me go through that.

13 I mean, I think the one thing that has  
14 been seized upon is board governance, and on  
15 that, I don't think that that can be -- make the  
16 difference because, under Lebron and those  
17 cases, the ultimate question is state control.  
18 Here, you have state control. States are  
19 auditing charter schools, are involved in  
20 curriculum. They -- they're -- they have to  
21 be -- material changes have to be approved.

22 With respect to the boards, those  
23 boards are also monitored. The -- the  
24 application has to describe the board. The  
25 board is evaluated each year for board

1 governance. Boards that don't operate correctly  
2 can and have been removed. Charter school board  
3 members themselves have to sit on the governing  
4 board meetings. The governing boards for  
5 charter schools are regarded as government  
6 bodies under state, as we've shown in opinions.

7 CHIEF JUSTICE ROBERTS: Counsel --

8 MR. GARRE: So the state retains  
9 complete control up to the point that they can  
10 close it.

11 JUSTICE SOTOMAYOR: Mr. Garre --

12 CHIEF JUSTICE ROBERTS: Counsel, I  
13 don't understand really the -- this created and  
14 creature of the state. The pavement or wood  
15 chip program in Trinity Lutheran was created and  
16 controlled by the state, yet we held that you  
17 couldn't exclude religious schools. The tuition  
18 program in Espinoza, a creature and created by  
19 the state. You couldn't exclude religious  
20 participants. The same in Carson, the same in  
21 Fulton.

22 Is your test it's -- it's a creation  
23 and creature of the state? Because all of those  
24 were and we held that under the First Amendment,  
25 you couldn't exclude people because of their

1 religious belief.

2 MR. GARRE: Well -- well, the --  
3 the -- the programs were, of course, but what  
4 we're talking about is the applicants. And --  
5 and -- and, here, I think that the creation  
6 point goes to the government entity point.

7 CHIEF JUSTICE ROBERTS: Well, I'm  
8 sorry. Just -- I'm not following. The  
9 applicants in those cases were religiously  
10 affiliated.

11 MR. GARRE: Well, religious -- I mean,  
12 they're parents, for example, in Carson or  
13 Espinoza. In -- in Trinity Lutheran, it was the  
14 church itself. But, I mean, the -- the -- as to  
15 creation, this goes to whether or not this is a  
16 government entity, and under state law, charter  
17 schools become into existence when they are  
18 approved and become part of the state and  
19 they're established by the legislature.

20 I mean, that's what Oklahoma Supreme  
21 Court interpreted Oklahoma law to mean. And  
22 that's the way that, you know, virtually every  
23 state in the country and the Congress have  
24 understood charter schools to be. And that  
25 makes --

1 JUSTICE ALITO: Mr. Garre --

2 MR. GARRE: Yes?

3 JUSTICE ALITO: I -- I'm sorry.

4 Finish your sentence.

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

6 JUSTICE ALITO: No. I -- I -- this is

7 really a point of information to start out at

8 least.

9 I -- the point of the charter school

10 program as I understand it is to confer a lot of

11 flexibility on the charter schools so that they

12 offer a real alternative to the private -- to

13 the public schools, to what you call the public

14 schools, isn't that true?

15 MR. GARRE: I -- yes and no. I mean,

16 I think a real alternate I -- I -- there's no

17 question that charter schools want to harness

18 private ingenuity, and they do that -- they say

19 you can come to us with the applications, but

20 we're going to rigorously scrutinize those

21 applications, we're going to make sure that you

22 meet our curriculum requirements, we're going to

23 evaluate you every year, and if you try to

24 change your curriculum, you have to come back

25 and get approval. And --



1 JUSTICE ALITO: Well, the -- but --  
2 but they -- they offer -- they're allowed to  
3 offer a curriculum. Yes, it has to meet certain  
4 state requirements, but the focus of the  
5 curriculum can be quite different from the  
6 public school, and I thought that was understood  
7 to be one of their virtues.

8 MR. GARRE: They -- the charter  
9 schools have to meet the academic standards that  
10 public schools have to meet, again, down to the  
11 level of dangling modifiers in ninth grade  
12 English class.

13 And I think what's different is you  
14 can imagine a school that's built around  
15 performing arts or sports, as some charter  
16 schools are, or language. You can build a  
17 school around that model --

18 JUSTICE ALITO: Well --

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

21 JUSTICE ALITO: -- can -- can a -- can  
22 a charter school seek to inculcate a secular  
23 viewpoint, a -- not -- not just a secular  
24 viewpoint, a particular secular viewpoint?

25 MR. GARRE: I mean, I don't -- I

1     don't -- with respect, I don't know what you  
2     mean by that. I mean, to the --

3             JUSTICE ALITO: All right. I'll take  
4     your -- I'll take your example --

5             MR. GARRE: I mean, to the extent  
6     traditional public schools can, yes.

7             JUSTICE ALITO: I'll take your example  
8     of a school that focuses on music. So could a  
9     school that focuses on music teach only the  
10    music composed by dead white men, Brahms --  
11    Bach, Beethoven, and Brahms, and all the rest?  
12    Could they do that?

13            MR. GARRE: I think like a traditional  
14    public school could. But -- but what charter  
15    schools can't --

16            JUSTICE ALITO: All right. Could a --  
17    could a school that focuses on music say, no,  
18    we're not going to do that; we're going to  
19    include jazz and hip-hop and rap and music from  
20    non-European countries? Could they do that?

21            MR. GARRE: I think they probably  
22    could do that.

23            JUSTICE ALITO: All right. Could a  
24    school say we're going to be a LG -- LGBTQ-plus  
25    friendly school so that the books that

1 elementary schoolchildren are going to read are  
2 going to have lots of LGBTQ-plus characters,  
3 same-sex couples, and they are going to send the  
4 message that this is a perfectly legitimate  
5 lifestyle? They -- they're going to tell the  
6 little kids, if you -- your parents may say  
7 you're a boy or a girl, but that doesn't mean  
8 you really are a boy or a girl. Could they do  
9 that?

10 MR. GARRE: No. And the reason why  
11 they couldn't is because state law prohibits the  
12 teaching of gender studies or race in public  
13 schools, traditional public schools and charter  
14 schools. And -- and, you know, that reminds --

15 JUSTICE ALITO: All right. I'll give  
16 you another example. Could a school say we're a  
17 progressive school and we're going to do  
18 everything the state wants you to do, but we're  
19 going to teach history from the 1619 Project  
20 standpoint.

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

24 JUSTICE ALITO: Why would that not  
25 be -- why would not be -- that not be allowed?

1 We're going to put a lot of -- we're going to  
2 make sure students know about -- know a lot  
3 about slavery and Jim Crow and the treatment of  
4 Native Americans.

5 MR. GARRE: Just like a traditional --

6 JUSTICE ALITO: They can't do that?

7 MR. GARRE: Just like a --

8 JUSTICE ALITO: They can't -- they  
9 can't emphasize that?

10 MR. GARRE: Just like a traditional  
11 public school, there would be some leeway there,  
12 but, with respect, they could -- certainly  
13 couldn't set -- focus their curriculum just on  
14 that. And -- and -- and let me give you the  
15 citation so you can look at the academic  
16 standards.

17 JUSTICE ALITO: Well, on the other  
18 hand, I don't want this to be one-sided. So  
19 suppose a school says we're going to teach  
20 American history like the way it was taught in  
21 1955, so we're going to celebrate the founding  
22 fathers and we're not going to say anything  
23 about their short -- their shortcomings and  
24 we're not going to make -- we're not going to  
25 say a whole lot about the -- the dark episodes

1 in American history. Could they do that?

2 MR. GARRE: No. Traditional Oklahoma  
3 public schools could not do that and charter  
4 schools cannot do that because --

5 JUSTICE ALITO: Where does it say  
6 that?

7 MR. GARRE: So it says it in --  
8 3-34(B)(12) of the charter schools statute says  
9 that -- that curriculum must be aligned with  
10 state academic standards. And then, if you go  
11 to Oklahoma Administrative Code 210:15-3-1, it  
12 spells out in detail the criteria for  
13 curriculum. And we've got other cites in our  
14 brief on that.

15 And -- and they're controlled in the  
16 same way that public schools are. And that's  
17 the point, Justice Alito. Charter schools are  
18 like public schools, traditional public schools.  
19 When it comes to curriculum, they're controlled  
20 as to curriculum. And that completely  
21 distinguishes private schools.

22 My friend had -- was asked how are  
23 private schools different. I -- I -- I think  
24 his answer left a lot to be desired here on  
25 that, and -- and let me just walk -- walk

1 through how they're different, Justice  
2 Kavanaugh.

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

20           I mean, private schools are  
21 fundamentally different. What we're talking  
22 about here is a school that is closely regulated  
23 that is part of the public schools system. And  
24 this Court, again, in Carson said that states  
25 can expand their public schools. That's what

1 charter schools are. They were meant to expand  
2 the public school options for families across  
3 the country, and they've been successful,  
4 especially from families from disadvantaged  
5 backgrounds.

6 And if this Court holds that the  
7 Oklahoma program is unconstitutional, then it  
8 immediately renders the charter school law --  
9 laws in 47 states unconstitutional --

10 JUSTICE KAVANAUGH: Well, that --  
11 that's a little bit -- this would be expanding  
12 the options, not contracting the options. So I  
13 don't know if I --

14 MR. GARRE: I -- with respect, that's  
15 not the right way to look at it because  
16 charter --

17 JUSTICE KAVANAUGH: Well, why not?

18 MR. GARRE: Because charter schools  
19 were built on the premise that they're public  
20 schools, and that was by design because people  
21 wanted to expand access to public schools and  
22 people understand that religion cannot be  
23 taught.

24 JUSTICE KAVANAUGH: I thought they  
25 were built on the idea that innovative --

1 innovative approaches to education would  
2 increase the quality of education in a  
3 particular community or at least provide  
4 options --

5 MR. GARRE: I --

6 JUSTICE KAVANAUGH: -- for particular  
7 focuses and -- and overall improve the --

8 MR. GARRE: Right.

9 JUSTICE KAVANAUGH: -- educational  
10 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,  
14 the -- the 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 -- or to that public school because  
10    I 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 -- 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 a -- 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:  I -- people can choose  
12    among public schools as well.  You can transfer  
13    among public schools if -- if the teaching in  
14    that school is offensive to you.

15                I mean, the -- the -- going back to  
16    the school prayer cases, I mean, in that --  
17    there was a suggestion in the brief here that  
18    those cases are different because you were  
19    compelled to go to a public school.  That's  
20    wrong.  Compulsory attendance laws since this  
21    Court's 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 That's not what we're talking about.

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

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel.

17 Any questions, Justice Thomas?

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

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

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

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

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

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

16           JUSTICE THOMAS: That's what I mean.

17           MR. GARRE: -- the -- the law.

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

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

1 to make that position.

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

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

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

13 CHIEF JUSTICE ROBERTS: Justice Alito?

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

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

25 "While many Oklahomans undoubtedly

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

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

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

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

17 MR. GARRE: That's in -- that's  
18 entirely incorrect, Your Honor, and if I can  
19 answer that in two different levels, one, the  
20 Master Keys -- piece Cake piece and, two, the  
21 comments which I'll begin with.

22 And I think the right way to  
23 understand those comments is the attorney  
24 general was simply making a point that members  
25 of this Court have made, which is that once you



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

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

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

16 JUSTICE ALITO: But, here, we have --  
17 we have statement after statement by the  
18 attorney general that reeks of hostility toward  
19 Islam. And then we have the provision of the  
20 Oklahoma constitution, on which the Oklahoma  
21 Supreme Court relied, that has its own unsavory  
22 discriminatory history.

23 Would you at least agree with that?

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

1 JUSTICE ALITO: Absolutely not? That  
2 wasn't motivated by the Blaine movement?

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

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

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

18 And, again, I think --

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

24 MR. GARRE: I think, Your Honor, I --  
25 I -- of 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, I mean -- as to  
12    the 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  
5 are jurisdictions in the country, New Orleans  
6 being the main one, where the only public  
7 schools 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 to say:  
17 No, I don't want to participate in prayer today.  
18 And --

19 JUSTICE ALITO: All right. Well,  
20 thank you, Mr. Garre.

21 MR. GARRE: And -- and just --

22 JUSTICE ALITO: I -- I may just have  
23 one more question. I will -- I -- I will study  
24 the record carefully, but, boy, the way that you  
25 portray these charter schools, it -- it

1 doesn't -- I -- I don't see what the virtue of  
2 the charter schools are.

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

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

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

23 JUSTICE ALITO: Well, do you have  
24 inspectors who say I -- we want to see the  
25 teaching plan for the tenth grade English class

1 in the charter school because we want to make  
2 sure that the books that the students are  
3 reading are the right books? 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 to 19 of the Oklahoma Supreme Court's  
9 decision, it talks about how charter schools are  
10 audited. Again, charter school -- the members  
11 of 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 ninth 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?

1 MR. GARRE: Right.

2 JUSTICE SOTOMAYOR: You win under  
3 either, correct?

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

8 JUSTICE SOTOMAYOR: And -- and what do  
9 you -- how do you deal with the compulsion issue  
10 of West? Meaning the -- or the access issue.

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

18 JUSTICE SOTOMAYOR: They don't come  
19 into creation without state law.

20 MR. GARRE: Exactly. And they're  
21 heavily regulated by the -- by the state --  
22 state.

23 JUSTICE SOTOMAYOR: They don't come  
24 into creation -- Catholic Charities came into  
25 creation under straight law but not as a charter



1 school.

2 MR. GARRE: That's exactly right.

3 And -- and -- and I want to correct one thing  
4 that my friend said in terms of discussing  
5 Rendell-Baker versus West. West came after  
6 Rendell-Baker. So Rendell-Baker didn't resolve  
7 anything or correct anything that West held.

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

15 JUSTICE SOTOMAYOR: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

25 MR. GARRE: First, every charter

1 school law in the federal charter school program  
2 is unconstitutional because they all require  
3 that charter schools be public schools and that  
4 they be nonsectarian. So we're dealing with the  
5 confusion and uncertainty that's created by that  
6 to begin with.

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

19 There's another piece to this, which  
20 is that under the federal law, the IDEA statute,  
21 charter schools are covered because they're  
22 understood to be public schools. If this Court  
23 holds that charter schools are not public  
24 schools, then there's a question as to whether  
25 children with disabilities who go to charter

1 schools would be covered by the IDEA, and that's  
2 another problem that'll have to be sorted out.

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

17 JUSTICE KAGAN: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice  
19 Gorsuch?

20 Justice Kavanaugh?

21 JUSTICE KAVANAUGH: A couple  
22 questions. Are single-sex charter schools  
23 constitutional?

24 MR. GARRE: There are different  
25 policies on that. They -- they -- they do

1     exist. I mean, I think that would -- there  
2     would be one way in which they wouldn't be like  
3     traditional public schools, but -- in Oklahoma,  
4     there are not single-sex charter schools, there  
5     aren't single-sex public schools.

6             JUSTICE KAVANAUGH: But your theory  
7     would mean they are constitutional or not  
8     constitutional?

9             MR. GARRE: Well, I -- I mean, our  
10    theory as -- as to the constitutionality goes to  
11    the teaching of religion as truth in charter  
12    schools. I mean, we --

13            JUSTICE KAVANAUGH: They would be  
14    state actors, so they would -- it would be  
15    analyzed the same.

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

1           I mean, as to the -- the single-sex, I  
2       mean, I don't think that's a hard issue for --  
3       for the -- the State of Oklahoma. I don't think  
4       that that would be unconstitutional.

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

16           And I think you're missing a portion  
17      of the country when you say strife would not  
18      result from that kind of outcome.

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

1 decades.

2           The strife that I'm referring to is  
3 the picking and choosing that is inevitably  
4 going to occur when people line up to become,  
5 you know, a fully funded charter school. And so  
6 I -- I think it's -- it's quite different.

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

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

17           MR. GARRE: Yes. So, I mean, I'd give  
18 you to --

19           JUSTICE KAVANAUGH: Maybe the rule  
20 would just be schools are different, but --

21           MR. GARRE: Well, schools are --

22           JUSTICE KAVANAUGH: -- I would like to  
23 have -- a principle behind that --

24           MR. GARRE: I mean -- yeah.

25           JUSTICE KAVANAUGH: -- would be

1 helpful.

2 MR. GARRE: I mean, I think this  
3 Court's own precedents recognize that public  
4 schools are different in important ways. But,  
5 on your question, I mean, they're not  
6 outsourcing constitutional obligations. There's  
7 no constitutional obligation of governments that  
8 I'm aware of, states that I'm aware of, to  
9 provide adoption services or the like. It's not  
10 a traditional exclusive function. I mean,  
11 Justice Alito's opinion in Fulton went to great  
12 lengths to say that adoption services were not a  
13 traditional or exclusive public function.

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

24 JUSTICE KAVANAUGH: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Jackson?

2 JUSTICE JACKSON: So I think that at  
3 its heart, your argument really begins with the  
4 statement in Carson that a state can permissibly  
5 choose to provide a strictly secular education  
6 in its public schools. And if you start there,  
7 then I think you're saying that charter schools  
8 is one model that a state can choose to provide  
9 that kind of secular education. Charter schools  
10 is a subset of the public school right that  
11 Carson recognizes to provide a strictly secular  
12 education.

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

22 MR. GARRE: That's exactly right.  
23 And -- and I think it's an important point. I  
24 mean, Justice Kavanaugh last week referred to  
25 the Court trying to find a win-win in the area



1 of religion.

2 JUSTICE JACKSON: Right.

3 MR. GARRE: I think the win-win here  
4 is that states can, through vouchers and the  
5 like, promote the availability of religious  
6 education for those who choose it in a private  
7 setting but that states are not required to  
8 promote or fund, create the teaching of religion  
9 as truth in public schools.

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

16 MR. GARRE: Yeah. Can I just --

17 JUSTICE JACKSON: Yes, please.  
18 Please.

19 MR. GARRE: I mean, that -- that's  
20 exactly right.

21 JUSTICE JACKSON: Yeah.

22 MR. GARRE: And that's what the  
23 Congress of the United States and 47 state  
24 legislatures have understood. So it would be  
25 for this Court to upset that understanding.

1 JUSTICE JACKSON: It would be a really  
2 big change --

3 MR. GARRE: It would be --

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

6 MR. GARRE: -- it's hard to overstate  
7 it.

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

22 In this case, it seems to me it would  
23 be as if the church was saying we see you're  
24 giving out money to schools for building  
25 playgrounds, we would like that same allocation

1 of money, and we want to use it for something  
2 else. We want to buy Bibles. And, you know,  
3 they would say, look, you know, it's not fair  
4 because you're giving money to schools anyway,  
5 like you're giving charter contracts to schools  
6 anyway, and it doesn't matter to us or we don't  
7 think it's relevant that you're giving it for a  
8 reason. And as I said in my diagram, the -- the  
9 state here is giving it for the reason of being  
10 a public school within the non -- within the  
11 nonsectarian world. They say, no, we want to  
12 use that money or that charter contract for a  
13 religious purpose.

14 Am I thinking about this correctly?  
15 Because I don't see that as unfair. I see that  
16 as the state saying we're giving it in a  
17 particular way for a particular reason, and  
18 you're not asking us for that.

19 MR. GARRE: I -- I think that that's  
20 right if I understand the question, Justice  
21 Jackson. Clearly, what the state is doing is  
22 saying we're creating -- we're expanding our  
23 public education opportunities, and like public  
24 education has always been, we're -- we're not  
25 allowing the funding and creation of teaching

1 religion as truth.

2 I mean, this case presents a question  
3 of a state that's conscientiously trying to  
4 avoid the separation between church and state.  
5 But imagine a state that said, you know, we  
6 really want more religion in our public schools,  
7 and so what we're going to do is we're going to  
8 go to the traditional public school and we're  
9 going to fire all the teachers and  
10 administrators, and we're going to replace them  
11 with the staff of the archdiocese.

12 I don't think that would be a hard  
13 Establishment Clause problem. And I think this  
14 case is -- is, you know, basically just this --  
15 the flip side of the coin.

16 But, I mean, as to the unfairness,  
17 what the State of Oklahoma has done is simply  
18 maintain the system that this Court has upheld  
19 for decades, which is that we don't allow the  
20 teaching of religion as truth in public schools.

21 JUSTICE JACKSON: Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel.

24 Rebuttal, Mr. McGinley?

25

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

3           MR. MCGINLEY: A few points.

4           Justice Gorsuch, you asked whether  
5    Lebron should control here. The answer is yes.  
6    And what Lebron teaches is that the -- the key  
7    criterion are creation and control.

8           Here, my friend is simply wrong that  
9    the state created St. Isidore. I'd point you to  
10   page 7 of our reply. The same bylaws, same  
11   board controlled St. Isidore before and after  
12   the contract.

13          On control, it's a private board that  
14   has neither government appointment nor removal.  
15   I'd point you to page 110 and 120 of the  
16   Petition Appendix, as well as Section 316(a)(8)  
17   of state law, which makes that clear.

18          You also asked whether the label can  
19   be different for constitutional purposes and  
20   either state law or statutory purposes. Lebron  
21   makes it very clear that can be true. Umbehr is  
22   the leading case on state law on that.

23          Mr. Chief Justice, you asked whether  
24   regulation can -- can occur with regard to these  
25   charter schools. Clearly, it can, just like

1 with voucher programs. We would know that  
2 that's not enough. Halleck, Jackson, and  
3 Rendell-Baker teaches that.

4 My friend also vastly overstates the  
5 extent to which the state can "shut down a  
6 school." I'd point you to both of the  
7 Petitioners' reply briefs, which show that it  
8 cannot unilaterally shut down a school, but  
9 there's a number of procedural steps that apply.

10 Also, the U.S. Olympic Committee case  
11 makes clear that that alone is not enough  
12 either. Virtually every corporation in America  
13 operates under a charter that was granted by a  
14 state, and the state can often dissolve that  
15 charter. That's not enough to make it a  
16 government entity.

17 I do think that this Fulton point is  
18 very important because my friend does not have a  
19 good answer for it. Nobody believes that  
20 Philadelphia could have just labeled foster --  
21 foster care services to be state foster care  
22 services and excluded Catholic Social Services  
23 in that setting.

24 By contrast, a ruling for us will only  
25 increase choice. I completely agree with you on

1     that, Justice Kavanaugh. No student will be  
2     compelled or placed in a charter school except  
3     by private choice.

4             So then the governing question is the  
5     same one that this Court confronted in Carson,  
6     Espinoza, and Trinity Lutheran: Has the state  
7     invited private actors into a government funding  
8     program? If so, it cannot categorically exclude  
9     the religious.

10            It's crystal-clear that that's what  
11     Oklahoma has done here. Everyone agrees that  
12     St. Isidore met all of the other requirements,  
13     and its charter was extinguished only because of  
14     the nonsectarian requirement.

15            We completely agree with you, Justice  
16     Kavanaugh, that that treats them as second-class  
17     citizens. The Free Exercise Clause prohibits  
18     that. We ask you to reverse.

19            Thank you.

20            CHIEF JUSTICE ROBERTS: Thank you,  
21     counsel.

22            The case is submitted.

23            (Whereupon, at 12:19 p.m., the case  
24     was submitted.)

25

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