IN THE DISTRICT COURT FOR OKLAHOMA COUNTY
STATE OF OKLAHOMA

OKPLAC, INC., d/b/a Oklahoma Parent Legislative Action Committee, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. CV-2023-1857
STATEWIDE VIRTUAL CHARTER SCHOOL BOARD, et al.,	)	
Defendants.	)	

DEFENDANT ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL'S
MOTION TO DISMISS

Michael H. McGinley, *pro hac vice*
Steven A. Engel, *pro hac vice*
M. Scott Proctor, OBA No. 33590
DECHERT LLP
1900 K Street, NW
Washington, DC 20006
T: (202) 261-3308
michael.mcginley@dechert.com
steven.engel@dechert.com
scott.proctor@dechert.com

John A. Meiser, *pro hac vice*
NOTRE DAME LAW SCHOOL
RELIGIOUS LIBERY CLINIC
1338 Biolchini Hall of Law
Notre Dame, Indiana 46556
T: (574) 631-3880
jmeiser@nd.edu

Michael R. Perri, OBA No. 119
Socorro Adams Dooley, OBA No. 32716
PERRI DUNN, PLLC
100 N. Broadway, Suite 3280
Oklahoma City, OK 73102
T: (405) 724-8543
mrperri@perridunn.com
sadooley@perridunn.com

Attorneys for Defendant St. Isidore of Seville Catholic Virtual School

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Defendant St. Isidore of Seville Catholic Virtual School ("St. Isidore") hereby moves under 12 O.S. § 2012(b)(1) and (6) for an Order dismissing the five claims brought by Plaintiffs OKPLAC, Inc., d/b/a Oklahoma Parental Legislative Action Committee, Melissa Abdo, Krystal Bonsall, Leslie Briggs, Brenda Lené Michele Medley, Dr. Bruce Prescott, Rev. Dr. Mitch Randall, Rev. Dr. Lori Walke, and Erika Wright (together, "Plaintiffs"). In support of this Motion, St. Isidore states as follows:

INTRODUCTION

In 1999, the Oklahoma legislature enacted the Oklahoma Charter Schools Act, inviting both public and private organizations to establish charter schools to "promote a diversity of educational choices" for Oklahoma families. 70 O.S. § 3-134(I)(3). Through the charter school program, Oklahoma partners with these organizations to "[i]ncrease learning opportunities for students"; "[e]ncourage the use of different and innovative teaching methods"; and "[p]rovide additional academic choices for parents and schools." 70 O.S. § 3-131(A). So that educators have the necessary freedom to accomplish these goals, the Act affords them substantial flexibility in crafting their curriculum, 70 O.S. § 3-136(A)(3), and running their schools, 70 O.S. § 3-136(A)(5), which has succeeded in supporting a diverse array of charter school options for families—from schools that focus on science, engineering, and math to those that promote fine arts or language immersion. But, while the Act invites and encourages this abundance of educational models within charter schools, it purports to exclude *any and every* school that is religious. 70 O.S. § 3-136(A)(2).

The First Amendment to the U.S. Constitution prohibits the State from enforcing that discriminatory exclusion. Just last year, the U.S. Supreme Court held for the third time in the past decade that the Free Exercise Clause of the U.S. Constitution prohibits a state from denying a religious school access to a generally available public benefit solely because the entity is religious. *See Carson v. Makin*, 142 S. Ct. 1987, 2002 (2022). Indeed, as former Attorney General John O'Connor explained, the Supreme Court has made clear that "[t]he State cannot outsource operation of entire schools to private entities with 'critical cultural,

organizational, and institutional characteristics' that the State desires to see reproduced . . . and then retain the ability to discriminate against private entities who wish to exercise their religious faith." Pet. Ex. A, App. Section 13, App'x. N at 14 (quoting 70 O.S. § 3-132(C)(3)).

Exercising that fundamental freedom, the Archdiocese of Oklahoma City and the Diocese of Tulsa applied to the Oklahoma Statewide Virtual Charter Board ("the Board") to establish St. Isidore of Seville Catholic Virtual School ("St. Isidore"). Their aim was (and is) a noble one—to found a Catholic charter school "to educate the entire child: soul, heart, intellect, and body," for interested families across Oklahoma, wherever they might reside in the State. Pet. Ex. A, App. Section 2 (cover letter). In the year that followed, St. Isidore incorporated, crafted a several-hundred-page application, submitted the application to the Board, fielded the Board's concerns, and resubmitted the application. In June of this year, the Board exercised the authority granted to it by the State of Oklahoma, approved the application, and agreed to negotiate a charter with St. Isidore. Now, nine otherwise disinterested taxpayers and one legislative action committee representing other disinterested taxpayers (collectively, "Plaintiffs") ask this Court to extinguish St. Isidore preemptively, before any charter has been signed, any teacher has been hired, or any student has been enrolled.

This Court should reject this effort and dismiss Plaintiffs' claims. As a threshold matter, Plaintiffs' statutory and regulatory claims suffer from a host of justiciability problems, including the absence of a private cause of action, a ripe controversy, or standing. On the merits, St. Isidore is plainly eligible to operate its virtual charter school under Oklahoma law and the U.S. Constitution. Text and precedent make plain that neither Article II, Section 5's funding prohibition nor any other provision of the Oklahoma Constitution bars the State from funding St. Isidore. And both the Oklahoma Religious Freedom Act and the U.S. Constitution's Free Exercise Clause prohibit Oklahoma law from excluding a private religious entity like St. Isidore from the generally available program created by the Oklahoma Charter Schools Act. Without any valid basis to block St. Isidore's operation, Plaintiffs advance a number of wildly hypothetical technical challenges to St. Isidore's application and not-yet-

existent charter. Not only are those claims unripe and meritless, but they seek a disproportionate and inequitable remedy. This Court should reject Plaintiffs' effort to interfere with St. Isidore's free exercise of religion and dismiss the Petition.

FACTS

In January 2023, the Archbishop of the Archdiocese of Oklahoma City and the Bishop of the Diocese of Tulsa incorporated St. Isidore as an Oklahoma nonprofit corporation. *See* Pet. Ex. B. Shortly thereafter, St. Isidore submitted an application to the Board for it to sponsor St. Isidore's charter. The Board provisionally denied the application so that the school could answer some questions that the Board had following its review.

On May 25, 2023, St. Isidore submitted a revised application responding to the Board's questions. The revised application explained that St. Isidore was to be an avowedly Catholic charter school organized according to the tenets of its faith. Pet. Ex. A, App. Section 6. It further explained that St. Isidore would serve all students who choose to attend. It specifically promised to "admit any and all students" for whom it had seats, including "those of different faiths or no faith." Pet. Ex. A, App. Section 7, at 38. It pledged that its disciplinary policies would not discriminate "on the basis of a protected class, including but not limited to race, color, national origin, age, religion, disability that can be served by virtual learning, or biological sex." *Id.* at 43 (emphasis added). And it promised to "comply with all applicable State and Federal Laws in serving students with disabilities" and to provide the services that children with disabilities might need. Pet. Ex. A, App. Section 9, at 73–74.

The Board approved St. Isidore's application in early June of 2023, which triggered negotiations between the school and the Board to set the terms of the charter. Those negotiations are ongoing as of the time of this filing. In other words, all that currently exists is an approval to negotiate—there is no charter, and the school has not yet begun to operate.

Nevertheless, Plaintiffs filed this Petition seeking prospective declaratory and injunctive relief against St. Isidore, the Board, the Department of Education, and various government officials. Carefully weaving around the elephant in the room—the First

Amendment of the U.S. Constitution—the Petition asserts five claims predicated on state regulations, statutes, and constitutional provisions. None has merit.

STANDARD FOR DISMISSAL

A motion to dismiss "test[s] the law that governs the claim" rather than "the underlying facts." *May v. Mid-Century Ins. Co.*, 2006 OK 100, ¶ 10, 151 P.3d 132, 136 (Okla. 2006). When considering such a motion, the Court "must take as true all of the challenged pleading's allegations together with all reasonable inferences that may be drawn from them." *Id.* It will grant the motion if it finds a "lack of any cognizable legal theory to support the claim" or that there is "no set of facts in support of the claim which would entitle [the plaintiff] to relief." *Smith v. City of Stillwater*, 2014 OK ¶ 12, 328 P.3d 1192, 1197 (Okla. 2014) (citations omitted). Thus, to survive a motion to dismiss, Plaintiffs must plead sufficient facts to show that they could win under a cognizable legal theory. *See id.*

In Oklahoma, a "copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." 12 O.S. § 2010(C). The "allegations of a petition must be construed in connection with the exhibits attached and referred to in the petition," and when there is "conflict between the allegation of the petition and the attached exhibit, the provisions of the exhibit govern notwithstanding the allegations of the petition." *Turner v. Sooner Oil & Gas Co.*, 1952 OK 171, ¶ 14, 243 P.2d 701, 704 (Okla. 1952); *see also Tucker v. Cochran Firm—Crim. Defense Birmingham, L.L.C.*, 2014 OK 112, ¶ 30, 341 P.3d 673, 684–85 (Okla. 2014) (applying § 2010(C)).

ARGUMENT AND AUTHORITY

I. PLAINTIFFS' CLAIMS ARE NONJUSTICIABLE.

At the outset, none of Plaintiffs' claims is even justiciable. That is because there is no cause of action for Plaintiffs to pursue their first four claims, Plaintiffs lack standing to pursue any of their claims, and all but one Plaintiffs' claims are unripe. Thus, even before addressing the merits, this Court should dismiss.

A. Plaintiffs Do Not Have A Private Cause Of Action To Pursue Their Statutory And Regulatory Claims.

In Oklahoma, not every "regulatory statute" gives private plaintiffs a cause of action. *Owens v. Zumwalt*, 2022 OK 14, ¶ 10, 503 P. 3d 1211, 1215 (Okla. 2022). Instead, a cause of action exists only when (1) the plaintiff belongs to the class for whose especial benefit the statute was enacted and that class is "narrower than the 'public at large'"; (2) the statute shows a legislative intent to create a private cause; and (3) the private cause is not inconsistent with the underlying purposes of the legislative scheme. *Walker v. Chouteau Lime Co.*, 1993 OK 35, ¶¶ 3–5, 849 P.2d 1085, 1086–87 (Okla. 1993); *Owens*, 503 P.3d at 1215. When assessing the second and third prongs, courts consider whether such a cause would undermine an administrative or other enforcement mechanism that inheres in the legislative scheme. *See, e.g.*, *Walker*, 849 P.2d at 1087; *Owens*, 503 P.3d at 1216.

None of the four provisions of the Oklahoma Charter Schools Act on which Plaintiffs' claims rely—70 O.S. §§ 3-135, 3-136, 3-140, and 3-145.3—satisfies this test. *First*, the Act exists for the "especial benefit" of charter schools and the students and families that they serve. *See* 70 O.S. § 3-131 (describing Act's purpose). Certainly no Plaintiff alleges any interest in enrolling a child in St. Isidore. They are mere members of the "public at large." *Walker*, 849 P.2d at 1086–87. *Second*, the legislature gave no hint that it intended to create a private cause of action. None of the cited provisions explicitly creates one to challenge decisions by the Board. Nor do the provisions suggest a legislative intent to imply one. They merely explain what must be included in a charter, whom a school must admit, and what powers the Board has. *See* 70 O.S. §§ 3-135, 3-136, 3-140, 3-145.3. And they task State regulators—not private parties—with policing school compliance through the application, monitoring, and revocation process, and provide a means to seek judicial review of an adverse decision. *See, e.g.*, 70 O.S. §§ 145.3(A)(2), 3-145.3(K). *Finally*, "[t]o find a private action would be inconsistent with the legislative intent" of the Act "to empower" the Board to promulgate certain regulations. *Nichols Hills Physical Therapy v. Guthrie*, 1995 OK CIV APP 97, ¶ 10, 900 P.2d 1024, 1026

(Civ. App. 1995) (analyzing the Amusement Ride Safety Act). The Act charges the Board with establishing "a procedure for accepting, approving, and disapproving" as well as "renew[ing] or revo[king]" a charter. 70 O.S. § 145.3(A)(2). The Board did so here. *See* OAC § 777:1-1-9; 777:10-3-4, 10-3-5. There is no evidence that the Legislature intended to allow private litigants to second-guess those procedures and the Board's application of them.

Nor do Board regulations supply the missing cause of action. *See, e.g.*, Pet. ¶¶ 213–219 [First Claim for Relief] (citing only OAC § 777:10-3-3). Regulations are products of their authorizing statutes and the relevant question is whether the Oklahoma legislature had the "intent to fashion a private right of action" when it passed the authorizing statute. *Helm v. Bd. of Cnty. Comm'rs of Rogers Cnty.*, 2019 OK CIV APP 68, ¶ 9, 453 P.3d 525 (Civ. App. 2019). Here, the Oklahoma Charter Schools Act evinces no such intent. And, on its own terms, OAC Title 777 evinces no intent to create a private cause of action, either.

B. Plaintiffs' Claims Are Unripe.

Plaintiffs' claims are also unripe because they challenge hypothetical conduct. The ripeness doctrine "militat[es] against the decision of abstract and hypothetical questions." *French Petrol. Corp. v. Oklahoma Corp. Com'n*, 1991 OK 1, ¶ 7, 805 P.2d 650, 652–53 (Okla. 1991). It aims to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies," and "to protect agencies from judicial interference until their administrative decisions have been formalized and their effects felt in a concrete way by the parties." *French Petrol. Corp.*, P.2d at 653. To decide whether a claim is ripe, a court looks at the "fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.*

Plaintiffs' general discrimination, disability discrimination, management, and "nonsectarian" claims (Claims Two through Five, respectively) are premature. Those claims purport to challenge "administrative decisions" and payments of funds that have not yet "been formalized" and are entirely speculative. The Board and St. Isidore have not executed a charter, let alone begun operating. The earliest any of these claims might ripen "in a concrete

way," if ever, would be when the school commences operations and the State disburses funds. *Id.* Indeed, the rampantly hypothetical nature of these claims is illustrated by Plaintiffs' reliance on *another school's* handbook to speculate as to how St. Isidore might operate its school in the future. *See, e.g.*, Pet. ¶¶ 127, 140–143, 157 (citing Ex. C, Christ the King Catholic School Handbook).

For its part, the management claim (Claim Four) is doubly unripe. Plaintiffs cite no law or regulation that would require St. Isidore to contract with an educational management organization ("EMO"), which means the relevant relationship may never exist. And even if St. Isidore chooses to hire an EMO in the future, no such contract exists *now*, let alone one of the nature Plaintiffs allege. *See infra* Part III.D. There is no basis on which the court could evaluate whether that hypothetical relationship satisfies the cited regulations. Instead, that claim, which stacks several "abstract" and "hypothetical" questions atop one another, is not yet justiciable. *French Petrol. Co.*, 805 P.2d at 653–54.

C. Plaintiffs Lack Standing To Bring All Of Their Claims.

Plaintiffs also lack standing to sue. *First*, the Plaintiffs lack standing to seek declaratory relief under 12 O.S. § 1651 because they lack a "case in controversy"—that is, "an actual, existing justiciable controversy between parties having opposing interests, which interests must be direct and substantial, and involve an actual, as distinguished from a possible, potential or contingent dispute." *Stevens v. Fox*, 2016 OK 106, ¶ 9, 383 P.3d 269, 273 n.11 (Okla. 2016) (cleaned up). *Second*, even as taxpayers, Plaintiffs lack standing to seek injunctive relief. Their petition, which is based on generalized policy arguments common to every Oklahoma taxpayer, never explains how St. Isidore's funding will ever actually hit their pocketbook through their taxes. Pet. ¶¶ 11–21; *see Toxic Waste Impact Grp., Inc. v. Leavitt*, 1994 OK 148, ¶¶ 5–14, 890 P.2d 906, 910–12 (Okla. 1994). Absent *some* traceable injury, there is no standing.

II. PLAINTIFFS' CLAIMS FAIL BECAUSE THEY CANNOT SHOW THAT FUNDING ST. ISIDORE IS UNLAWFUL.

At the heart of Plaintiffs' Petition is an array of statutory and constitutional provisions that, Plaintiffs contend, would bar the State from funding St. Isidore. None presents a claim upon which relief can be granted. Indeed, nothing in the Oklahoma Constitution prohibits the State from funding or contracting with a religious school that falls outside the normal public-school "system" so long as the State receives a substantial benefit from the relationship. And any state law—be it constitutional, statutory, or otherwise—that *would* bar a religious school from the charter school program would violate the Oklahoma Religious Freedom Act ("ORFA") and the First Amendment of the U.S. Constitution. The Board's approval of St. Isidore's application recognized these fundamental restraints on its authority to enforce the kind of religious discrimination that Plaintiffs now encourage.

A. Oklahoma's Constitution Permits Funding For Religious Charter Schools.

Plaintiffs assert that funding St. Isidore would violate the Oklahoma Constitution. But the mishmash of state constitutional provisions they cite do not prohibit the State from funding a private religious school so long as it provides a substantial service to the State.

1. Article II, Section 5 does not prohibit funding St. Isidore.

Claim Five relies largely on Article II, Section 5 of the Oklahoma Constitution. That provision mandates that Oklahoma will not appropriate, apply, donate, or use "public money or property" for the "use, benefit, or support of any sect, church, denomination, or system of religion" or "any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such." According to Plaintiffs, the provision bars the State from signing a contract with or giving funds to St. Isidore, or permitting St. Isidore to operate as a charter school within the State. Pet. ¶ 265. But binding precedent forecloses that argument.

As former Attorney General John O'Connor has explained, Plaintiffs misunderstand what Article II, Section 5 prohibits. *See* Pet. Ex. A, App. Section 13, App'x. N at 7–8. The provision stops the State from providing gratuitous aid "for which no corresponding value was

received." *Murrow Indian Orphans Home v. Childers*, 1946 OK 187, ¶ 5, 171 P.2d 600, 602 (Okla. 1946). But Article II, Section 5 does *not* prohibit the State from providing funds to a religious entity in exchange for services. On the contrary, the Oklahoma Supreme Court has held that the State may disburse funds to a religious entity so long as the entity provides a "substantial return to the State." *Oliver v. Hofmeister*, 2015 OK 15, ¶¶ 19–27, 368 P.3d 1270, 1275–77 (Okla. 2016).

Two analogous cases establish this foundational rule. *First*, in *Murrow Indian Orphans Home v. Childers*, the State contracted with a Baptist-affiliated orphanage to take in the State's orphans despite its religious affiliation. The orphanage made "no pretense of denying its religious background or sectarian character insofar as its organization and management [was] concerned." 171 P.2d at 601. Later, when the State refused to pay for the services on the view that Article II, Section 5 prohibited the payments, the Oklahoma Supreme Court rejected that argument. *Id.* at 601–02. It held that the State could disburse funds to a religious entity "so long as [the terms of the contract] involve the element of substantial return to the affairs of the State," such as serving "needy children." *Id.* at 603. Merely contracting with a religious entity to house and educate children did not offend the Constitution.

Second, in *Oliver v. Hofmeister*, the Oklahoma Supreme Court recently reaffirmed this interpretation of Article II, Section 5. There, the Court considered whether Article II, Section 5 barred a law authorizing the payment of tuition scholarships to private religious schools teaching students with disabilities. 368 P.3d at 1271–72. The Court explained that it had to decide "whether under the conditions outlined in the Act, . . . the deposit of scholarship funds to a private sectarian school constitute[s] 'public money' being 'applied, donated, or used, directly or indirectly, for the use, benefit, or support' of a sectarian institution." *Id.* at 1275 (emphasis omitted) (quotations omitted). And it applied a multifactor test focused on whether the parents and school system chose to participate, whether the scholarship program was religiously neutral, and whether the State received a substantial return for the funds. According to the Court, the "determinative factor" was whether the religious entity provided a

service that involved the element of "substantial return to the state and [did] not amount to a gift, donation, or appropriation to the institution having no relevancy to the affairs of the State." *Id.* at 1275 (quoting *Murrow*, 171 P.2d at 603). The program survived Article II, Section 5 scrutiny because each scholarship provided a "substantial return" by helping the State "provide special educational services to the scholarship recipient." *Id.*

Funding St. Isidore would fall squarely within these precedents. The State of course has a strong interest in—and receives substantial benefit from—the development of a diverse set of educational options for children. The State may contract with a religious institution to help serve that goal, just as the State contracted with the religious orphanage in *Murrow* to care for and educate orphans. Here, St. Isidore, like other charter schools, will deliver a new and innovative learning opportunity for families across Oklahoma, and the State will "receive[] [that] substantial benefit" in exchange for its funds. *Oliver*, 368 P.3d at 1276. Meanwhile, other schools—of any religion, or none—will remain free to charter with the State as well. Students and parents will be able to choose freely among the rich array of schools that which best suits the needs of their own children. This religiously neutral program, driven not by state action but intervening private choice, passes muster under Article II, Section 5.

If there were any doubt on this question (which there is not), the Court has a duty to interpret Article II, Section 5 to avoid running afoul of the First Amendment of the U.S. Constitution. Out of respect for the legislature that passed the law, Oklahoma courts "interpret statutes so as to avoid constitutional issues." *O'Connor v. Okla. St. Conf. of NAACP*, 2022 OK CR 21, ¶ 5, 516 P.3d 1164, 1166 (Okla. 2022). Oklahoma courts should accord the same respect to the People of Oklahoma who ratified Oklahoma's Constitution and amendments, as at least one other State Supreme Court has ruled. *See Moses v. Ruzkowski*, 2019-NMSC-003, ¶ 45, 458 P.3d 406, 420 (N.M. 2019). That apparently was the approach the Oklahoma Supreme Court took in *Oliver v. Hofmeister* when it reaffirmed its construction of Article II, Section 5 while noting that the other construction would lead to a "religiosity distinction" that violated the First Amendment. 368 P.3d at 1271–77. As explained below, Plaintiffs invite this

Court to do what the Oklahoma Supreme Court has refused to do. Rather than set up a collision between the State and U.S. Constitutions, this Court should apply existing precedent to hold that St. Isidore may join the State's charter school program, like any other eligible school.

2. No other constitutional provision prohibits the State from executing a charter with St. Isidore.

With no claim under Article II, Section 5, Plaintiffs cite a scattershot of other constitutional provisions that do not apply here. *See* Okla. Const. Art. I, § 2 (barring religious intolerance); Art. I, § 5 (requiring Oklahoma to maintain a "system of public schools . . . open to all the children of the state and free from sectarian control"); Art. II, § 7 (Oklahoma Due Process Clause); Art. II, § 36A (barring "sex" discrimination"); Art. XI, §§ 2–3 (requiring "permanent school fund" that may not be "used for any other purpose than the support and maintenance of common schools for the equal benefit of all the people of the State"); Art. XIII, § 1 (requiring a "system" of schools for "all [] children"). Plaintiffs do not offer any coherent explanation as to how these provisions apply to St. Isidore. On the contrary, each of them places a limit or responsibility on the State, either to maintain a general system of public education or not to burden certain individual rights under the Oklahoma Constitution. Those constitutional duties do not apply to St. Isidore because it is not a state actor but instead a private entity. *See infra* Part II.B.3. And, in any event, the State has violated none of these provisions by approving St. Isidore—which *will* be free and open to all students, *infra* Part III—to participate in its program to "promote a diversity of educational choices" through a network of "different and innovative" charter schools, 70 O.S. §§ 3-131, 3-134.[1]

If anything, these provisions *protect* St. Isidore against the discrimination Plaintiffs seek to impose on it. For instance, Article I, Section 2, Oklahoma's free exercise protection, provides "an additional guarantee of religious freedom" beyond the First Amendment. *N.H. v. Presbyterian Church (U.S.A.)*, 1999 OK 8, ¶ 2, 998 P.2d 592, 594 n.2 (Okla. 1999). It

[1] St. Isidore anticipates the State Defendants, including the Board, to argue that they did not violate any of these provisions. St. Isidore incorporates those arguments by reference to the extent they provide additional defenses to St. Isidore.

promises "[p]erfect toleration of religious sentiment," that no one in the State "shall ever be molested in his person or property on account of his or her mode of religious worship," and that "no religious test shall be required for the exercise of civil or political rights." Okla. Const. Art. I, § 2. But Plaintiffs would have the Oklahoma Charter Schools Act impermissibly impose a "religious test" barring religious entities from participating in a generally available state program. *Id.*; *cf. Carson*, 142 S. Ct. at 1997 (noting that a "law that targets religious conduct for distinctive treatment" typically will not survive scrutiny (citation and quotation omitted)).

B. Any State Law Excluding Religious Charter Schools From The Charter School Program Is Unlawful.

Plaintiffs fare no better by citing the provision of the Oklahoma Charter Schools Act purporting to limit funding to "nonsectarian" schools. 70 O.S. § 3-136(A)(2). That exclusion violates the Oklahoma Religious Freedom Act ("ORFA"). And, in all events, any exclusion—be it statutory or constitutional—would violate the First Amendment of the U.S. Constitution.

1. ORFA precludes the State from excluding religious charter schools.

As threshold matter, Oklahoma law itself precludes Plaintiffs from attempting to enforce the Oklahoma Charter Schools Act's exclusion of religious charter schools. ORFA mandates that no Oklahoma governmental entity—including the Board—shall "substantially burden a person's free exercise of religion," even through a "rule of general applicability." 51 O.S. § 253(A); *see also Beach v. Okla. Dept. Pub. Safety*, 2017 OK 40, ¶ 12, 398 P.3d 1, 5 (Okla. 2017). ORFA's sweep is both broad and powerful. It restrains the government from "inhibit[ing] or curtail[ing]" any "religiously motivated practice." 51 O.S. § 252(7). Like its federal counterpart, the Religious Freedom Restoration Act,[2] ORFA prohibits the government from denying an entity generally available benefits because it is religious. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693–94, 695 n.3 (2014); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 467 (2017). Indeed, ORFA was recently amended to

[2] Cases interpreting RFRA and the federal Religious Land Use and Institutionalized Persons Act (RLUIPA) inform the interpretation of ORFA, which "contain[s] almost identical language." *Beach*, 398 P.3d at 6 n.20.

make this nondiscrimination rule explicit: The government may not "exclude any person or entity from participation in or receipt of governmental funds, benefits, programs, or exemptions based solely on the religious character or affiliation of the person or entity." Okla. S.B. No. 404, § 1 (May 2, 2023) (to be codified on November 1 at 51 Okla. Stat. § 253(D)).

ORFA is an insurmountable barrier to Plaintiffs' claim that 70 O.S. § 3-136(A)(2) prohibits funding religious schools. Enforcing that exclusion would undoubtedly impose a substantial burden on St. Isidore's free exercise of religion, which the State could not justify under the exacting standards that ORFA demands. *See* 51 Okla. Stat. § 253(B); Okla. S.B. No. 404, § 1 (May 2, 2023). The nonsectarian requirement in 70 O.S. § 3-136(A)(2) must therefore yield to ORFA, as the overriding rule and most recently enacted law. *City of Sand Springs v. Dep't of Pub. Welfare*, 1980 OK 36, ¶ 28, 608 P.2d 1139, 1151–52 (Okla. 1980); *see also Bostock v. Clayton Cnty, Ga.*, 140 S. Ct. 1731, 1754 (2020) (describing federal counterpart as a "super statute" able to "displac[e]" other statutes). By approving St. Isidore, the Board upheld ORFA's command, and Plaintiffs' attempt to invalidate that decision is without merit.

2. The Federal Free Exercise Clause invalidates *any* state law prohibiting St. Isidore from participating in the program.

Even if Plaintiffs' claims did not fail under state law (which they do), the U.S. Constitution would require this Court to dismiss Plaintiffs' Second and Fifth Claims. "The Free Exercise Clause of the First Amendment, applicable to the States under the Fourteenth Amendment, provides that 'Congress shall make no law . . . prohibiting the free exercise' of religion." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021). St. Isidore is a private religious entity with First Amendment rights, as are the members working to establish it as a charter school. Plaintiffs claim that several state laws bar St. Isidore from participating in the generally available charter school program because of its religious identity or exercise. But, if construed as Plaintiffs suggest, those laws would violate St. Isidore's Free Exercise rights under a series of recent Supreme Court precedents.

"The Free Exercise Clause of the First Amendment protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.'" *Carson*, 142 S. Ct. at 1996 (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988)). As a result, the Supreme Court has "repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits." *Id.* (citing cases). Such religious disfavor "can be justified only by a state interest of the highest order." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 458 (2017) (quotation marks omitted). And rarely can a State satisfy that "stringent standard." *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2260 (2020) (citation omitted).

A trio of recent decisions illustrates the point. First, in *Trinity Lutheran*, the Supreme Court held that Missouri could not require a church-owned preschool "to renounce its religious character in order to participate in an otherwise generally available public benefit program" for playground resurfacing. 582 U.S. at 466. Even that subtle and indirect hostility toward religion, the Court explained, "is odious to our Constitution." *Id.* at 467.

Three years later, in *Espinoza*, the Court held that the Free Exercise Clause barred exactly the kind of claim that Plaintiffs raise here. Like Oklahoma, Montana had established a program to help parents enroll their children in schools of their choice (there, through a system of school-choice scholarships rather than charter schools). *See* 140 S. Ct. at 2251. And, like here, Montana's decision to allow religious schools to participate in the program was challenged under a state constitutional provision that denies public funding to "sectarian" schools. *See* Mont. Const. art. X § 6(1). In response, the Montana Supreme Court did just what the Plaintiffs urge here: it invalidated the school-choice program because it violated the provision barring aid to "sectarian" schools. *Espinoza*, 140 S. Ct. at 2251–52. On review, the U.S. Supreme Court made clear that the Federal Constitution does not tolerate that result.

Echoing *Trinity Lutheran*, the Court reiterated that any time a state denies a generally available benefit "solely because of [an organization's] religious character" it "imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny." *Espinoza*,

140 S. Ct. at 2255. Montana's use of the "no-aid" provision "to discriminate against [religious] schools" was therefore "subject to the strictest scrutiny" and could only be justified by "interests of the highest order." *Id.* at 2255–57, 2260. Montana's provision failed that test. The Court rejected a plethora of justifications offered to support Montana's choice to deny funding to religious schools, including that Montana had "an interest in separating church and State more fiercely than the Federal Constitution," that the no-aid provision "actually *promotes* religious freedom" by keeping taxpayer money from going to religious organizations, and that the provision "advances Montana's interests in public education." *Espinoza*, 140 S. Ct. at 2260–61 (emphasis in original). None of those interests could justify the significant "burden" the no-aid provision imposed on "religious schools" and "the families whose children attend[ed] or hope[d] to attend them." *Id.* at 2261. As the Court explained, a "State need not subsidize private education." *Id.* But, once it does, the State "cannot disqualify some private schools solely because they are religious." *Id.*

Then, in *Carson v. Makin*, 142 S. Ct. 1987 (2022), the Supreme Court held that states cannot exclude religious schools from programs like these, even if they "promote[] a particular faith" or "present[] academic material through the lens of that faith." *Id.* at 2001. Maine offered a tuition-assistance program for families in rural school districts that had no access to public secondary schools. *Id.* at 1993. However, the law provided that parents could direct the State's tuition payments only to approved, "nonsectarian" schools. *Id.* at 1994. In defending this requirement, Maine sought to recharacterize the "public benefit" it offered "as the rough equivalent of a Maine public school education, an education that cannot include sectarian instruction." *Id.* at 1998 (cleaned up). It also attempted to distinguish its program from those in *Trinity Lutheran* and *Espinoza* as one that did not exclude institutions based on the recipient's "religious 'status,'" but rather, as a program that avoided "religious 'uses' of public funds"—namely, the use of public money to deliver a religiously grounded education. *Id.* (citation omitted). Neither argument persuaded the Court, which held that a State cannot avoid strict scrutiny under the Free Exercise Clause by reconceptualizing its public benefit as

an exclusively "secular" one. *Id.* at 1999. Nor does "the prohibition on status-based discrimination under the Free Exercise Clause" give states license "to engage in use-based discrimination." *Id.* at 2001. The latter is just as "offensive to the Free Exercise Clause." *Id.*

Carson, *Espinoza*, and *Trinity Lutheran* make clear that any "nonsectarian" provision of the Oklahoma Charter Schools Act, and any "nonsectarian" provision of the Oklahoma Constitution, cannot be applied to bar St. Isidore from participating in Oklahoma's charter school program. *See* Pet. ¶¶ 256–65 (citing 70 O.S. § 3-136(A)(2)). Oklahoma has established a program that invites any qualified "private college or university, private person, or private organization" to establish a charter school. 70 O.S. § 3-134(C). Under the U.S. Constitution, Oklahoma cannot then deny this generally available benefit to applicants like St. Isidore "solely because they are religious." *Carson*, 142 S. Ct. at 1997 (quoting *Espinoza*, 140 S. Ct. at 2261); *see* 70 O.S. § 3-136(A)(2); Okla. Const. art. I, § 5. Nor can it require St. Isidore to "disavow its religious character" as a condition of receipt, *Trinity Lutheran*, 582 U.S. at 463, or justify any exclusion "on the basis of the[] anticipated religious use of the benefits," *Carson*, 142 S. Ct. at 2002; *see* Pet. ¶ 260 (citing Okla. Const. art. II, § 5).

Applying strict scrutiny, both the statutory "nonsectarian" provision in the Oklahoma Charter Schools Act, and any provision of the Oklahoma Constitution that this Court would view as barring funding for St. Isidore, is invalid. An "interest in separating church and state more fiercely than the Federal Constitution cannot qualify as 'compelling' in the face of the infringement of free exercise." *Carson*, 142 S. Ct. at 1998 (cleaned up); *see also Espinoza*, 140 S. Ct. at 2260–61 ("interests in public education" or in protecting taxpayer money from going to religious uses are insufficient). "Regardless of how the benefit and restriction are described," 70 O.S. § 3-136A(2)'s "nonsectarian" provision, along with any constitutional provision that might bar funding to St. Isidore, would "operate[] to identify and exclude otherwise eligible schools on the basis of their religious exercise." *Carson*, 142 S. Ct. at 2002. The Free Exercise Clause forbids such discrimination.

3. St. Isidore is not a "state actor" for purposes of the U.S. Constitution.

The dictates of *Trinity Lutheran*, *Espinoza*, and *Carson* are clear: when a state chooses to subsidize schools operated by private organizations, it cannot refuse to subsidize a school operated by a religious organization like St. Isidore. Plaintiffs attempt to elude these basic constitutional rights because the Oklahoma Charter Schools Act refers to charter schools as "public schools." Pet. ¶ 68 (emphasis omitted) (quoting 70 O.S. § 3-132(D)). But the guarantees of the federal Constitution do not turn on what Oklahoma law labels charter schools. Rather, whether the operation of a charter school is private conduct protected by the Free Exercise Clause turns on how those schools are actually run and who is responsible for their day to day affairs—private groups or the government itself. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001). The answer here is plainly the former. Neither St. Isidore nor any other privately operated charter school in Oklahoma is a state actor under the U.S. Constitution, and no statutory label can change that fact.

The Constitution generally "applies to acts of the [government], not to acts of private persons." *Rendell-Baker v. Kohn*, 457 U.S. 830, 831–36 (1982). A private entity will be treated as a state entity under the U.S. Constitution "only if[] there is such a close nexus" between the State and the private party's actions that "seemingly private behavior may be fairly treated as that of the State itself." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n,* 531 U.S. 288, 295 (2001).

That bar is a high one that cannot be met here. Certainly, the fact that the State will fund and regulate St. Isidore does not satisfy the test. Indeed, in *Rendell-Baker v. Kohn*, the U.S. Supreme Court held that a private school that received 99% of its funding from the State and was subject to "detailed regulations concerning" everything from "recordkeeping to student-teacher ratios" to "personnel policies" did not qualify as a state actor under the Fourteenth Amendment. 457 U.S. 830, 831–36 (1982). That is because the school "was founded as a private institution" and "operated by a board of directors, none of whom are

public officials or chosen by public officials." *Id.* at 832. Its actions were not "compelled" by or "fairly attributable to the state" simply because it was highly regulated, taught students, and "depend[ed] primarily on contracts" with the State for funds. *Id.* at 840–41; *see also Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001).

For the same reasons, St. Isidore is not a state entity here. It was established as a private, not-for-profit corporation that "falls under the umbrella of the Oklahoma Catholic Conference comprised of the Archdiocese of Oklahoma City and the Diocese of Tulsa." Pet. ¶¶ 41, 43; Pet. Ex. B (incorporating documents). It "is operated by a board of directors, none of whom are public officials or are chosen by public officials." *Rendell-Baker*, 457 U.S. at 832; *see* 70 O.S. §§ 3-136(A)(8), 3-145.3(F). And St. Isidore's members—the Archbishop of the Archdiocese of Oklahoma City and the Bishop of the Diocese of Tulsa—undoubtedly are private actors. Pet. Ex. B (incorporating documents). The Oklahoma Charter Schools Act gives "private person[s]" like them the right to "contract with a sponsor to establish a charter school." 70 O.S. § 3-134(C).

More to the point, the entire Act is designed to empower and encourage privately operated schools like St. Isidore to design and implement their own unique curricula and teaching philosophies with minimal state interference. The law generally "exempt[s]" charter schools "from all statutes and rules relating to schools, boards of education, and school districts." 70 O.S. § 3-136(A)(5). Charter schools are free to shape a curriculum "which emphasizes a specific learning philosophy or style or certain subject areas" ranging from math to fine arts. *Id.* § 3-136(A)(3). They are likewise free with respect to student discipline: Although the Act requires charter schools to comply with a narrow set of student disciplinary procedures, it does not require schools to adopt any particular set of rules or code of student conduct. *Id.* § 3-136(A)(12). Charter schools need not adhere to the "Teacher and Leader Effectiveness Standards" established by the State or require teachers "to hold valid Oklahoma teacher certificates." Okla. Dep't of Educ., *Oklahoma Charter Schools Program*, https://sde.ok.gov/faqs/oklahoma-charter-schools-program (last visited Sept. 19, 2023). And

they can even contract with for-profit or nonprofit organizations to handle their administration. *See* OAC § 777:10-1-4. In short, although the State may choose to execute or to terminate a contract with a charter school, the State does not run it. Thus, St. Isidore's operations are not attributable to the State, and the school is not a state actor under the Fourteenth Amendment.

Nor does the fact that St. Isidore has "contracted with the state to provide students with educational services that are funded by the state" convert it into a state actor. *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 815 (9th Cir. 2010) (holding that a charter school was not a state actor). Again, "[a]cts of such private contractors do not become acts of the government by reason of their significant *or even total* engagement in performing public contracts." *Rendell-Baker*, 457 U.S. at 841 (emphasis added); *see Blum v. Yaretsky*, 457 U.S. 991, 1011 (1982). This remains true even if the contractor "is subject to extensive state regulation." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 (1974); *see Rendell-Baker*, 457 U.S. at 833, 835–36, 841–42. Indeed, just two years ago the U.S. Supreme Court reaffirmed that the government may not "discriminate against religion when acting in its managerial role" or overseeing a government contractor. *Fulton*, 141 S. Ct. at 1878.

Nor does it matter that the State might partner with charter schools like St. Isidore to perform a service that "is aimed at a proper public objective" or that benefits the public good. *Brentwood*, 531 U.S. at 302–03. States routinely partner with private organizations to serve the public; that does not render those organizations "part of" the government itself. Indeed, "education is not and never has been a function reserved to the state." *Logiodice v. Trs. of Me. Cent. Inst.*, 296 F.3d 22, 26 (1st Cir. 2002) (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925)); *see Rendell-Baker*, 457 U.S. at 842; *Robert S. v. Stetson Sch., Inc.*, 256 F.3d 159, 166 (3d Cir. 2001) (Alito, J.). Rather, schooling has been "regularly and widely performed by private entities . . . from the outset of this country's history." *Logiodice*, 296 F.3d at 26–27; *see also Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 239 n.7 (1963) (Brennan, J., concurring) (well into nineteenth century "education was almost without exception under private sponsorship and supervision").

Finally, the Supreme Court has squarely rejected the notion that labeling an entity "public" converts its conduct and decisions into state action. *Jackson*, 419 U.S. at 350 n.7, 352–54 (public utility); *Polk County v. Dodson*, 454 U.S. 312 (1981) (public defender). It has recently reiterated that the "substance of free exercise protections" does not turn "on the presence or absence of magic words." *Carson*, 142 S. Ct. at 2000; *see also Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 679 (1996) (observing that constitutional claims do not depend on "state law labels" and collecting cases). That is especially true here, where the Oklahoma Charter Schools Act and its enacting regulations themselves dispel any idea that the phrase "public school" has an alchemic effect that transforms private entities into state actors. The Act largely exempts charter schools from state oversight. It makes clear that a "private person, or private organization" may found a charter school. 70 O.S. § 3-134(C). And the implementing regulations contemplate allowing private educational management organizations to run charter schools day-to-day. *See* OAC § 777:10-1-2.

St. Isidore is a private entity and enjoys all of the protections that come with that status.

III. PLAINTIFFS' STATUTORY AND REGULATORY CLAIMS FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Without any basis under the Oklahoma or U.S. Constitution to bar St. Isidore from participating in the State's charter school program, Plaintiffs resort to a number of technical statutory and regulatory challenges to St. Isidore's application and not-yet-existent charter. For the reasons set forth above, those claims are nonjusticiable and, in many instances, preempted by the U.S. Constitution's Free Exercise Clause. But, even if Plaintiffs could somehow pursue them, Plaintiffs' Petition (including its attached exhibits) fails to plead sufficient facts to support any allegation that the Defendants arranged an "illegal . . . expenditure of public funds." *Immel v. Tulsa Pub. Facilities, Auth.*, 2021 OK 39, ¶ 15, 490 P.3d 135, 142 (Okla. 2021). Most claims rely on wildly hypothetical speculation about how St. Isidore *might* operate. All are grounded on fundamental misapprehensions of Oklahoma law. And none of them warrant the disproportionate and inequitable relief Plaintiffs request.

A. St. Isidore's Statement of Assurances (First Claim).

The first claim is the only one that alleges a problem with St. Isidore's application. It argues that the application failed to include a notarized statement assuring "access to education and equity for all eligible students regardless of their race, ethnicity, economic status, academic ability, or other factors as established by law." OAC § 777:10-3-3(c)(1)(F). But Plaintiffs' own exhibits show that the application included exactly those assurances. Pet. ¶ 119 (citing Pet. Ex. A, App. Section 12 at 93). The application contained notarized statements assuring the Board that St. Isidore would abide by federal and state law and that St. Isidore would "[g]uarantee access to education and equity for all eligible students regardless of" the grounds listed in OAC § 777:10-3-3(c)(1)(F). Pet. Ex. A, App. Section 12 at 93.

Plaintiffs allege that this explicit assurance did not satisfy OAC § 777:10-3-3(c)(1)(F) because St. Isidore also noted and reserved its legal rights as a religious organization. Pet. ¶¶ 118–119, ¶ 216. Namely, the school guaranteed to follow all legal requirements "to the extent required by law, including the First Amendment, religious exemptions, and the Religious Freedom Restoration Act." Pet. Ex. A., App. Section 12, At 93. According to Plaintiffs, this reference to laws protecting the school's religious rights prospectively renders "any contract . . . unlawful" and subject to nullification by this Court. *Id.* ¶ 219.

As an initial matter, the U.S. Constitution itself would prohibit the State from requiring St. Isidore to relinquish its constitutional rights as a religious organization in order to participate in the charter-school program, as the Plaintiffs claims would seem to demand. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013) ("[T]he unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them.").

More to the point, the relevant regulation in no way suggests that St. Isidore's assurances were deficient. That regulation requires the school simply to agree to "fully comply" with the laws "of the United States of America, State of Oklahoma, Statewide Virtual Charter School Board, and Oklahoma Department of Education." OAC § 777:10-3-3(c)(1)(F).

As noted above, St. Isidore did exactly that. Those same laws "of the United States of America [and] State of Oklahoma," of course, grant certain rights to St. Isidore as a religious institution. Likewise, the regulation requires the school to "cite agreement [sic] . . . to guarantee access to education and equity for all eligible students regardless of their race, ethnicity, economic status, academic ability, or other factors *as established by law*"—namely, the laws "of the United States of America, State of Oklahoma, Statewide Virtual Charter School Board, and Oklahoma Department of Education" mentioned before. *Id.* (emphasis added). Again, this is exactly what St. Isidore did. The applicants assured the Board that they would comply with all guarantees recited in OAC § 777:10-3-3(c)(1)(F) "as established by law"—that is, to the extent those guarantees do not conflict with St Isidore's legally established religious rights. *Id.* That is all OAC § 777:10-3-3(c)(1)(F) required them to do—indeed, all it *could* require them to do consistent with applicable law.

While the rule's plain text refutes Plaintiffs' claim, any ambiguity results in deference to the Board. Oklahoma courts "show great deference to an agency's interpretation of its own rules." *Estes v. ConocoPhillips Co.*, 2008 OK 21, ¶ 12, 184 P.3d 518, 524 (Okla. 2008). Here, Oklahoma delegated rulemaking authority to the Board, *see* 70 O.S. § 3-145.4, which the Board exercised when promulgating OAC § 777:10-3-3. The Board is charged with "accepting, approving and disapproving statewide virtual charter school applications" pursuant to those rules. 70 O.S. § 3-145.3(A)(1)–(2). The Board approved St. Isidore's application, including the notarized statements, under that authority. *See* Pet. Ex. A, App. Section 12, at 93. That is a decision the Board—not Plaintiffs—is entrusted with making. And the Board's approval shows that it interpreted OAC § 777:10-3-3 to permit St. Isidore's notarized statement. Neither private plaintiffs nor this Court should second-guess that conclusion.

B. St. Isidore's Non-Discrimination Policies (Second Claim).

Next, Plaintiffs baselessly speculate that St. Isidore will unlawfully discriminate against students or employees on a variety of bases. Pet. ¶ 236. But Plaintiffs' own exhibits flatly refute that claim. Far from stating that it will discriminate, St. Isidore's application

makes clear that "[a]ll students are welcome, those of different faiths or no faith." Pet. Ex. A, App. Section 7, at 38. The school pledged not to discriminate "on the basis of a protected class, including *but not limited* to race, color, national origin, age, religion, disability that can be served by virtual learning, or biological sex." *Id.* at 43 (emphasis added). So too with employment, affirming that "[r]ecruitment, employment, transfer, promotion and administration of personnel policies will be done without regard to race, sex, color, national origin, citizenship, age, veteran status or mental or physical ability[.]" Pet. Ex. A, App. Section 13, App'x C at 109. These exhibits eliminate Plaintiffs' contrary and unsupported speculation, leaving no viable claim. *Turner*, 243 P.2d at 704. Moreover, all students who will attend St. Isidore and all employees who work there will do so voluntarily, and the Oklahoma Charter Schools Act empowers each charter school's governing body to set "policies" and to make "operational decisions" on behalf of the school. 70 O.S. § 3-136(A)(8). Plaintiffs point to no constitutionally viable statute or rule mandating otherwise.[3] *See supra* Part II.

C. St. Isidore's Disability Policies (Third Claim).

Next, Plaintiffs claim that St. Isidore has failed to ensure it will serve students with disabilities in the way that Oklahoma's charter laws demand. Once again, their claim is directly contradicted by their own exhibits and fabricated out of whole cloth.

1. St. Isidore's non-discrimination assurances.

Plaintiffs claim that St. Isidore "asserts a right to discriminate against students on the basis of a disability," in violation of 70 O.S. § 3-136(A)(7), and that St. Isidore "failed to comply with Board regulations requiring the school to demonstrate that it would provide

[3] Once again, to the extent that Plaintiffs take issue with the fact that law promises St. Isidore certain rights as a religious organization, the First Amendment would bar the State from any attempt to deny those rights. *Koontz*, 570 U.S. at 606 (cannot condition benefit on abandonment of constitutional rights). Among other things, this would include St. Isidore's First Amendment right to "select[] those individuals who play certain key roles" within the school, including its "educators, administrators and coaches," Pet. Ex. A at 18. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020); *see also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 186 (2012)).

adequate services to students with disabilities." Pet. ¶ 4; *see also id.* ¶¶ 243, 244 (citing OAC §§ 777:10-3-3(b)(3)(C), (c)(3)(D)). But Plaintiffs' own exhibit shows just the opposite. St. Isidore explicitly promised *not* to discriminate and instead to "comply with all applicable State and Federal laws in serving students with disabilities." Pet. Ex. A, App. Section 9 at 73.

Plaintiffs' real gripe seems to be that the law provides certain rights to religious organizations. They contend that St. Isidore didn't adequately promise to educate students with disabilities because it agreed to comply with all laws "to the extent that [compliance] does not compromise the religious tenets of the school and the instructional model of the school." Pet. ¶ 4, 245. Once again, this simply acknowledges that applicable state or federal laws may regulate St. Isidore in particular ways as a religious entity with legal rights the State could not require the school to forfeit. *Koontz*, 570 U.S. at 606. Recognition of this basic legal truism does not declare any intention to discriminate, and to say otherwise is mere speculation that this Court need not credit.

Plaintiffs then baselessly suggest that St. Isidore's assurances are incomplete because the school still might ignore students with (in their words) "mental disabilities," based entirely on one quote plucked from St. Isidore's bylaws—which says St. Isidore will not discriminate based on "physical disability or impairment," *see* Pet. ¶¶ 163–64, 246 (quoting Pet. Ex. A, App. Section 13, App'x F, § 10.3). Plaintiffs illogically insist that, by failing to mention "mental" disabilities alongside physical ones, St. Isidore implicitly promised to discriminate against children with such disabilities.

Aside from being unwarranted on its face, Plaintiffs' inference ignores the many places where the application directly contradicts their allegation. Plaintiffs ignore that St. Isidore did not distinguish between types of disability in its non-discrimination promises, instead referring to "disabilities" generally. *See, e.g.*, Pet. Ex. A, App. Section 9, at 73–74 (promising to "comply with all applicable State and Federal Laws in serving students with disabilities"). The application specifically articulates non-physical criteria used to determine whether a child qualifies for disability services. *See, e.g.*, *id.* at 74 (mentioning "[s]ocial/emotional status,"

"[g]eneral intelligence," "[m]otor abilities," and "[c]ommunications status (speech/language functioning)," among others). And Plaintiffs blatantly ignore portions of the application that plan for specific cognitive disabilities like "dyslexia, dysgraphia, [and] dyscalculia," *id.* Ex. A, App. Revisions, at 18, or contemplate providing access to specific mental-health resources "such as a school psychologist and/or speech language pathologist." *Id.* Ex. A, App. Section 9, at 74; *see also id.* Ex. A, App. Revisions at 5–7 (listing counseling, psychological, and learning disability resources). Even a cursory read of the application shows that their inference lacks merit. Because the exhibit controls, Plaintiffs' claim must fail.

Moreover, Plaintiffs' assertions about the non-discrimination demands of Oklahoma's Charter Schools Act fail to state a claim because those laws do not concern charter school *applications*, but instead *charters* or *operations*—neither of which even exist yet. *See* 70 O.S. § 3-136(A)(7) (describing charter requirements); 70 O.S. § 3-140(D) (describing admissions requirements). There is no theory or set of facts about an *application* that can state a claim based on statutes that regulate what a non-existent charter should say or a not-yet-operating school must do. See *supra* Part I.B (on ripeness).

2. St. Isidore's disability services.

Plaintiffs also wrongly contend that St. Isidore will fail to provide all necessary disability services. First, they bizarrely suggest that St. Isidore preemptively refuses to offer *non-virtual* services to students with disabilities. OAC § 777:10-3-3(b)(3)(C) mandates that schools provide "free appropriate online and other educational and related services, supplementary aids and services, modifications, accommodations, supports for personnel, and other technical supports provided in the least restrictive environment to students with disabilities and/or other special needs." St. Isidore—a virtual school—in turn promised that it will provide children with disabilities "Free and Appropriate Public Education in the Least Restrictive Environment to the maximum extent possible through a virtual education program." Pet. Ex. A, App. Section 9, at 69. In other words, it promised to do exactly what the regulation requires a "virtual" school to do. Nowhere does St. Isidore say that it will not

provide requisite "educational and related services," virtual or otherwise, should a student with a disability need them. OAC §§ 777:10-3-3(b)(3)(C). Other parts of the application attached by Plaintiffs as an exhibit make that clear. For example, in a section labeled "Special Education, Support for diverse learners," St. Isidore contemplates "[a]lternative placements" when the "student needs more intensive support and programming than what a virtual program can offer," including "center-based programs, approved private placements and/or home and hospital instruction." Pet. Ex. A, App. Section 9, at 73. Once again, Plaintiffs' exhibit defeats their allegation and any claim predicated on it. *Turner*, 243 P.2d at 704.

Plaintiffs then nitpick the timeline by which St. Isidore will provide an individualized education program to in-state transfer students. Pet. ¶ 246. They observe that a Department of Education guidance document says that, should a transfer student already have an individualized education program, then the program "must be in effect and finalized" 10 school days after the student's first day. Pet. ¶ 166 (citing Joy Hofmeister, *Special Education Policies and Procedures* 150 (2022), https://bit.ly/3XV5RJA). They then note that the application promises to review such a program within "10 instructional days of obtaining the IEP," Pet. Ex. A, App. Section 9 at 74, which Plaintiffs ominously allege "could be far later," Pet. ¶ 167.

The Petition picks at an imaginary nit. The school does not yet have formal procedures with which to deal with transfer students with disabilities because there is no charter and the school is not operating. Besides, the allegation is facially implausible. Students must apply to attend St. Isidore, so the school will know of their arrival in advance of their first day, be able to request any record they might have, *see* Hofmeister at 151 (citing 70 O.S. § 24-101.4's three-day record delivery requirement), and have the IEP ready when the student arrives.

3. Deference to the Board's approval.

In any event, if doubt remains, the Board is owed deference. Again, Oklahoma courts owe deference to an agency's interpretation of its own regulations. *See Estes*, 184 P.3d at 524. And Oklahoma courts accord "the highest respect" to an agency's interpretation of an ambiguous statute it is charged with administering. *Matter of Okla. Turnpike Auth.*, 2023 OK

84, ¶ 27, --P.3d--, 2023 WL 4881238, at *7 (Okla. Aug. 1, 2023). Here, the Board is the agency responsible for implementing the Oklahoma Charter Schools Act. It promulgated these regulations and is entrusted to administer them. The Board reviewed the application, requested supplementary information, reviewed that information, and then showed that it determined St. Isidore had met its standard by voting to approve. This Court owes deference to the Board's interpretation and enforcement of its own statute and regulations.

D. St. Isidore's Management Structure (Fourth Claim).

Next, Plaintiffs allege that the Board's approval of St. Isidore's application "was unlawful" because St. Isidore will (they speculate) at some point hire an educational management organization ("EMO") that violates the regulations governing such relationships. The deficiencies of this claim are manifold and there are "insufficient facts" pled to support "any cognizable theory" by which Plaintiffs might prevail on it. *Guilbeau v. Durant H.M.A., LLC*, 2023 OK 80, ¶ 7, 533 P.3d. 764, 767 (Okla. 2023).

First, nothing in St. Isidore's application or the Board's approval shows that the school will ever enter an improper EMO contract (or any EMO contract at all). Despite the Petition's references to "St. Isidore's educational management organization," no such EMO exists. An "educational management organization" is defined as an "organization that receives public funds to provide administration and management services for a . . . statewide virtual charter school, or traditional public school." 777 OAC § 10-1-2; *see also* 70 O.S. §§ 5-200(A), (B). The Petition does not allege that St. Isidore has any contract to pay an organization as an EMO, because it does not. Indeed, *no organization*—including St. Isidore itself—has received public funds to manage St. Isidore, given that the school does not have a charter.

Even once St. Isidore begins receiving public funds, Plaintiffs point to no law that would require it to pay those funds to an EMO rather than manage the school itself. At best, Plaintiffs overread St. Isidore's statement that it planned to "initially" "work closely with" the Archdiocese of Oklahoma City's Department of Catholic Education to help start the school. Pet. Ex. A, App. Section 7 at 25. To be sure, St. Isidore's revised application referred to this

as "the EMO that the School will contract with." Pet. Ex. A., App. Revision at 35. But this hardly shows that St. Isidore has committed to pay public money to this office for ongoing school management in the way necessary to render it an EMO within the meaning of the law. Nor could Plaintiffs show that St Isidore, once established, *will in fact* pay the Archdiocese's Department of Catholic Education in this way—as opposed to contracting with a different EMO or none at all.

Even if St. Isidore were to hire an EMO someday, Plaintiffs' misgivings about the nature of that hypothetical relationship are unfounded. Plaintiffs suggest that an EMO relationship will necessarily violate 777 OAC § 10-3-3(d)(4)(1), which bars the school's governing board members from receiving "pecuniary gain" from an EMO, and 777 OAC § 10-1-4-(1), which requires that the school and any EMO be separate entities with a relationship "of a customer and vendor." As noted, there is no guarantee that St. Isidore will agree to work with *any* EMO, let alone any idea what the terms of such a hypothetical agreement would be or who (if anyone) would receive pecuniary gain from it. Further, the school's bylaws require that *if* the school "contracts with an Education Management Organization ('EMO') the [school] Board shall ensure compliance by the EMO and School with the provisions" of Oklahoma law. Pet. Ex. A, App. Bylaws § 8.11. Plaintiffs give no reason to assume the school won't uphold this obligation to ensure that any EMO relationship will comply with the law.

Second, there would be no legal problem if St. Isidore were to engage the Archdiocese's Department of Catholic Education as an EMO. That department is a separate legal entity that could enter into an appropriate "customer and vendor" relationship with St. Isidore—a point explained in detail during the application process. Pet. Ex. A., App., Resp. to Question 3Indeed, St. Isidore's application made clear that this organization will "assist" the school but the school's "Principal/Director" will operate the school. *Id.* The school's bylaws say the same. Pet. Ex. A, Bylaws § 4.1 (school board shall "retain the ultimate oversight and responsibility of the affairs of the School" in any EMO relationship). Relatedly, Plaintiffs speculate that at least one of St. Isidore's board members will impermissibly receive

"pecuniary gain" from this "EMO" because she will be employed by it. Pet. ¶¶ 170–80, 251–52. This is doubly speculative, requiring the Court to suppose: (1) that this person would necessarily remain on St. Isidore's board at some unstated point in the future when an EMO contract is executed; and (2) that if she did, she would necessarily receive improper "pecuniary gain" from the arrangement. There is no reason that either, let alone both, of these circumstances would come true—particularly if that relationship would run afoul of Oklahoma law, given the school's promise to uphold that law.

Third, like the First Claim, Plaintiffs' EMO claim relies entirely on regulations that the Board promulgated and is authorized to administer. Yet the Board specifically inquired into any potential interaction between St. Isidore and the Archdiocese's Department of Catholic Education at the time of St. Isidore's application. It received further information about any such relationship in St. Isidore's revised application—information that the Board considered and discussed before ultimately approving St. Isidore's application. The Board is owed deference in the interpretation and application of its own regulations. *See Estes*, 184 P.3d at 524. This Court should dismiss the EMO claim.

* * *

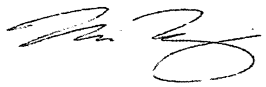
Finally, and fatally, Plaintiffs' statutory and regulatory claims seek a disproportionate and inequitable remedy. As a threshold matter, any remedy must match the scope of the relevant claim. *See Salazar v. Buono*, 559 U.S. 700, 714–15 (2010). None of these technical claims go to St. Isidore's ability to exist as a virtual charter school. Instead, each is an imagined foot fault that could easily be remedied (if at all) by ordering Defendants to comply with the applicable statutory or regulatory provision going forward. This basic legal principle is especially true here, where Plaintiffs invoke the Court's equitable authority. A court in equity may shape remedies that "are more flexible" than those available at law, *Johnston v. Byars State Bank*, 1930 OK 43, ¶ 16, 284 P. 862, 865 (Okla. 1930), and it must use that flexibility to "adjust remedies in a feasible and practical way to eliminate the conditions or redress the injuries caused by unlawful action" to ensure "fairness and precision," *Freeman v. Pitts*, 503

U.S. 467, 487 (1992). Plaintiffs' requested relief, which seeks a permanent injunction extinguishing the school's existence based on hypothetical and technical quibbles with the school's application and not-yet-existent charter, is wildly disproportionate and unjust. If this Court ever were to conclude that these statutory and regulatory provisions require relief, the appropriate remedy would be to order the parties to comply with the provisions—not to bar the school from existence.

CONCLUSION

For the foregoing reasons, the Plaintiffs' five claims against Defendant St. Isidore of Seville Catholic Virtual School should be dismissed because they are nonjusticiable, fail to state a claim, and are barred by the U.S. Constitution.

Respectfully submitted,



Michael H. McGinley, *pro hac vice*
Steven A. Engel, *pro hac vice*
M. Scott Proctor, OBA No. 33590
DECHERT LLP
1900 K Street, NW
Washington, DC 20006
T: (202) 261-3308
michael.mcginley@dechert.com
steven.engel@dechert.com
scott.proctor@dechert.com

and

John A. Meiser, *pro hac vice*
NOTRE DAME LAW SCHOOL
RELIGIOUS LIBERY CLINIC
1338 Biolchini Hall of Law
Notre Dame, Indiana 46556
T: (574) 631-3880
jmeiser@nd.edu

Michael R. Perri, OBA No. 11954
Socorro Adams Dooley, OBA No. 32716
PERRI DUNN, PLLC
100 N. Broadway, Suite 3280
Oklahoma City, OK 73102
T: (405) 724-8543
Michael R. Perri
mrperri@perridunn.com
Socorro Adams Dooley
sadooley@perridunn.com

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of September, 2023, I caused a true and correct copy of the above and forgoing Motion to Dismiss to be served by electronic mail pursuant to this Court's Stipulation Concerning Electronic Service entered on September 7th, 2023 upon:

For plaintiffs:

Alex J. Luchenitser (luchenitser@au.org)

Kenneth D. Upton, Jr. (upton@au.org)

Kalli A. Joslin (joslin@au.org)

Daniel Mach (dmach@aclu.org)

Heather L. Weaver (hweaver@aclu.org)

Robert Kim (RKim@edlawcenter.org)

Jessica Levin (JLevin@edlawcenter.org)

Wendy Lecker (WLecker@edlawcenter.org)

Patrick Elliott (pelliott@ffrf.org)

Karen Heineman (kheineman@ffrf.org)

Benjamin H. Odom (odomb@odomsparks.com)

John H. Sparks (sparksj@odomsparks.com)

Michael W. Ridgeway (ridgewaym@odomsparks.com)

Lisa M. Millington (millingtonl@odomsparks.com)

Alyssa Kirkham (kirkhama@odomsparks.com)

Cody Serna (sernac@odomsparks.com)

J. Douglas Mann (douglassmann66@icloud.com)

For defendants Statewide Virtual Charter School Board and its members:

Phillip A. Sechler (psechler@adflegal.org)

Caleb Dalton (cdalton@adflegal.org)

Hailey Sexton (hsexton@adflegal.org)

Cheryl Plaxico (cplaxico@plaxico.law)

For defendants Oklahoma State Department of Education and State Superintendent of Public Instruction:

Bryan Cleveland (Bryan.Cleveland@sde.ok.gov)

Hiram Sasser (hsasser@firstliberty.org)

Anthony J. Ferate (AJFerate@spencerfane.com)

For defendant St. Isidore of Seville Catholic Virtual School:

Michael H. McGinley (michael.mcginley@dechert.com)

Steven A. Engel (steven.engel@dechert.com)

M. Scott Proctor (scott.proctor@dechert.com)

John Meiser (jmeiser@nd.edu)

Michael R. Perri (mrperri@perridunn.com)

Socorro Adams Dooley (sadooley@perridunn.com)

I further certify that pursuant to Local Rule 37(D), I caused a true and correct copy of the above and forgoing Motion to Dismiss to be served via first class mail, postage prepaid to:

Oklahoma Office of the Oklahoma Attorney General
313 NE 21st Street
Oklahoma City, OK 73105

Respectfully submitted,