



ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

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

Petitioner,

v.

OKLAHOMA STATEWIDE VIRTUAL CHARTER SCHOOL BOARD; ROBERT FRANKLIN, Chairman of the Oklahoma Statewide Virtual Charter School Board for the First Congressional District; WILLIAM PEARSON, Member of the Oklahoma Statewide Charter School Board for the Second Congressional District; NELLIE TAYLOE SANDERS, Member of the Oklahoma Statewide Charter School Board for the Third Congressional District; BRIAN BOBEK, Member of the Oklahoma Statewide Charter School Board for the Fourth Congressional District; and SCOTT STRAWN, Member of the Oklahoma Statewide Charter School Board for the Fifth Congressional District,

Respondents,

ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL,

Intervenor.

FILED
SUPREME COURT
STATE OF OKLAHOMA

DEC -5 2023

JOHN D. HADDEN
CLERK

Case No. 121,694

Filed _____
Docketed 12-5-23
Marshal JAA
OTA/OKC _____
SAC/HR _____

PETITIONER'S REPLY TO RESPONDENTS' AND INTERVENOR'S
BRIEFS IN RESPONSE

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Try as they might, the Oklahoma Statewide Virtual Charter School Board (“SVCSB”) and St. Isidore of Seville Catholic Virtual School (“St. Isidore”) cannot successfully reframe St. Isidore as “a privately organized and operated school.” Resp. Br. at 1; Int. Br. at 2 and 11 (in which St. Isidore refers to itself as “a private religious entity” and “St. Isidore is self-evidently not a public entity.”). On one hand, St. Isidore used the Oklahoma Charter Schools Act (“Act”) to obtain a Contract for Charter School Sponsorship (“Contract”). On the other hand, St. Isidore wants this Court to ignore the fact that the Act unequivocally defines charter schools as public schools and that private schools are ineligible to apply. *See* OKLA. STAT. tit. 70, §§ 3-132(D), 3-134(C). Essentially, St. Isidore and SVCSB seek to utilize rules in the Act that benefit them and cry foul on those that undermine their position. *Cf.* Pet. Appx. Vol. I at 2–3, § 2.1 (caveating “Applicable Laws” as controlling only where St. Isidore believes them to be consistent with its myriad and general “Religious Protections.”). This Court should not allow them to have it both ways. St. Isidore’s and SVCSB’s arguments amount to a house of cards; if this Court does not buy St. Isidore’s proposed duality—a private religious entity that is at the same time a public charter school—the rest of the arguments come tumbling down.

The SVCSB and St. Isidore make no attempt to explain how sponsorship of public virtual charter schools pursuant to the Act is a “public benefit” as understood in recent U.S. Supreme Court Free Exercise cases. *See* Resp. Br. at 10–11; Int. Br. at 9–11. The Archdiocese of Oklahoma City and the Diocese of Tulsa willingly petitioned for St. Isidore to be an organ of the State and assume part of the State’s traditional responsibility of providing a public education to Oklahoma students. Int. Br. at 2. And yet, St. Isidore is a religious organization. *See id.* (St. Isidore complains that “St. Isidore’s free exercise of religion” will be violated if this Court does not allow it to be a public school.). But U.S. Supreme Court precedent decidedly prohibits state funding of the religious experience based on the Establishment Clause as outlined in *Everson v. Bd. of Educ. of*

Ewing Twp., 330 U.S. 1 (1947), which SVCSB and St. Isidore ignore. The Oklahoma Constitution and the Act embrace the wisdom of keeping separate church and state. If this Court does not rescind the unlawful Contract between the SVCSB and St. Isidore, the narrowing of that separation will not amount to the “short step[s]” of incremental control of religious schools by the government, but rather a giant leap to state-sponsored religious experience. *See Gurney v. Ferguson*, 1941 OK 397, ¶ 16, 122 P.2d 1002, 1004–05.

St. Isidore demands this Court “accord the same respect to the People of Oklahoma who ratified Oklahoma’s Constitution, as at least one other State Supreme Court has done” Int. Br. at 6. It does this by arguing that the only way to avoid a collision with the First Amendment is to allow St. Isidore to maintain its public-school charter. *Id.*¹ Undoubtedly this Court will not miss the irony. The SVCSB, against the clear and persistent legal advice of the duly elected Oklahoma Attorney General, nevertheless sponsored a charter for the Nation’s first religious public charter school. This begs the obvious question: whose “view” (or actions) “place[s] [Oklahoma’s] Constitution on a collision course with the U.S. Constitution[?]” *Id.* What the SVCSB and St. Isidore are really demanding of this Court is that it ignore the Legislature’s broad powers, the Oklahoma Constitution, and the Establishment Clause and to engage in an extremely strained

¹ St. Isidore points to the New Mexico Supreme Court in *Moses v. Ruzkowski*, 2019-NMSC-003, ¶ 45, 458 P.3d 406, 420 (N.M. 2019) as the “other State Supreme Court” that accorded respect to the state’s people when it held “loaning secular textbooks to private school students under the [Instructional Material Law] does not violate” a provision of the New Mexico Constitution that “serves the dual purposes of ensuring that the state maintains control over the public education system and that the public schools do not become religious schools.” *Id.* at ¶ 46. “The [Instructional Material Law] neither divests the state of control over the public schools nor affects the non-religious character of the public schools.” *Id.* Choosing this case as support is strange. Clearly, loaning secular textbooks to private schools is factually distinct from a state board sponsoring a religious school as a public charter school. The New Mexico Supreme Court was not faced with the pickle the SVCSB’s and St. Isidore’s chosen action created for this Court. What is more, the New Mexico Supreme Court in *Moses* referenced its respect of the state’s constitution by noting a previous holding in which it, in part, held that the relevant state constitutional provision “serves the . . . purpose[] of ensuring . . . that the public schools do not become religious schools.” *Id.* (citation omitted). So too does OKLA. CONST. art. I, § 5. New Mexico’s Supreme Court was able to avoid implication of the First Amendment based on the factual circumstances it faced, but the SVCSB’s and St. Isidore’s creation of a religious charter school leaves this Court with no other choice.

interpretation of the Free Exercise Clause. It is the SVCSB's and St. Isidore's undertaking that leads this Court to this historic crossroads, and it is imperative that this Court issue a writ of mandamus to stop the SVCSB's intentional disregard of Oklahoma law.

ARGUMENT AND AUTHORITIES

I. **This Court should assume original jurisdiction to reverse the SVCSB's unlawful act of sponsoring the Nation's first religious public charter school.**

The SVCSB and St. Isidore agree with Petitioner's request that this Court assume original jurisdiction in this highly-important matter. *See* Resp. Br. at 15 ("This Court should assume original jurisdiction"); Int. Br. at 15 ("[T]his Court should grant original jurisdiction"). And Petitioner again urges his arguments that this matter entails strong public interest and urgency. *See* Pet. App. at 3–5.

Moreover, the SVCSB and St. Isidore acknowledge that the sponsorship of St. Isidore as a public virtual charter school violates state law.² *See* Resp. Br. at 1, Int. Br. at 1. The Act clearly proscribes the chartering of a religious organization. Specifically, a "charter school shall be nonsectarian in its programs, admission policies, employment practices, and all other operations. A sponsor may not authorize a charter school or program that is affiliated with a nonpublic sectarian school or religious institution" OKLA. STAT. tit. 70, § 3-136(A)(2). It is clear St. Isidore intends to be a religious school and is affiliated with a religious organization. Therefore, the assumption of original jurisdiction and the issuance of a writ of mandamus is appropriate to remedy the willful violation of the Act.

² SVCSB's strained suggestion that OKLA. CONST. art. I, § 5 is directed solely at the Legislature and not at any individual school is ultimately immaterial. The Legislature followed this constitutional mandate by prescribing in the Act that a "charter school shall be nonsectarian in its programs, admission policies, employment practices, and all other operations. A sponsor may not authorize a charter school or program that is affiliated with a nonpublic sectarian school or religious institution" OKLA. STAT. tit. 70, § 3-136(A)(2). There is no dispute by any party that SVCSB has violated this statute.

A. A public virtual charter schools is a state actor.

To be sure, the SVCSB and St. Isidore attempt to conflate St. Isidore and a private entity created in preparation of St. Isidore's chartering.³ They try to hide the ball by repeatedly characterizing St. Isidore and its board as private entities. *See* Resp. Br. at 1 ("St. Isidore is a privately organized and operated school . . ."); *id.* at 3 ("St. Isidore is a privately organized and operated non-profit corporation . . ."); *see also* Int. Br. at 1 (characterizing St. Isidore as a "private religious entit[y] . . ."); *id.* at 2 (explaining St. Isidore was "incorporated . . . as an Oklahoma nonprofit corporation."); *id.* at 11 (claiming St. Isidore "is a private, not-for-profit corporation."); *id.* at 11-12 (arguing the board and its directors are private actors). Yet they make no attempt to square these equivocations with the Act, which makes it abundantly clear that a charter school is a public school. To be certain, the term "public school" is defined in the Oklahoma School Code to include:

all free schools supported by public taxation [] shall include nurseries, kindergartens, elementary, which may include either K-6 or K-8, secondary schools and technology center schools, not to exceed two (2) years of junior college work, night schools, adult and other special classes, vocational and technical instruction and such other school classes and instruction as may be supported by public taxation or otherwise authorized by laws which are now in effect or which may hereafter be enacted.

at OKLA. STAT. tit. 70, § 1-106 (Emphasis added).

³ Petitioner notes that St. Isidore was not a virtual charter school under the Act until it was sponsored by the SVCSB via the Contract. *See* OKLA. STAT. tit. 70, § 3-145.1(A); *also compare id.* at §§ 3-132(D) and 3-134(D) (public or private business entities may *apply* and *contract* with an eligible sponsor, but once *established*, the charter school is a public school). If the SVCSB's and St. Isidore's claim is that St. Isidore was a private school before its petition for sponsorship with the SVCSB, this only provides another reason for why the SVCSB violated its duties and the law: "A . . . private organization may contract with a sponsor to establish a charter school," but "[a] private school shall not be eligible to contract for a charter school under the provisions of [the Act]." OKLA. STAT. tit. 70, § 3-134(C).

As a result, absent this Court’s intervention, St. Isidore will be a free public school that is supported by public taxation. It will, undoubtedly, be a public school as defined in OKLA. STAT. tit. 70, §§ 1-106 and 3-132(D).

Even if the Act did not define charter schools as public schools, St. Isidore would nevertheless qualify as a “state actor” due to “significant encouragement.” *See Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 122 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 2657 (2023); Pet. Br. at 10–14. A very brief survey of the Act—in its current form and amendments becoming effective July 1, 2024—displays the various ways in which the Act provides “significant encouragement” to charter schools and confirms that charter schools are public schools:

1. Charter Schools “and their respective governing boards shall comply with the Oklahoma Open Meeting Act and the Oklahoma Open Records Act.” Charter schools, 2023 Okla. Sess. Laws 323, § 7, 15;
2. Charter schools must “comply with all . . . laws relating to the education of children with disabilities in the same manner as a school district.” OKLA. STAT. tit. 70, § 3-136(A)(7);
3. Charter schools must “be equally free and open to all students as traditional public schools” *Id.* at § 3-136(A)(9);
4. Charter schools may not charge tuition or fees. *See id.* at § 3-136(A)(10);
5. Charter schools are “subject to the same academic standards and expectations as existing public schools.” *Id.* at § 3-135(A)(11);
6. Charter schools are funded the same way the Legislature set forth for “existing public schools.” *Id.* at § 3-135(A)(12).

7. Charter schools must follow the same rules as public schools relating to student suspension, length of school year, student testing, bus transportation, and financial reporting and auditing. *Id.* at §§ 3-136(A)(4), (A)(11), (A)(12), 3-141(A), 3-135(C), 3-136(A)(6), 3-145.3(E).⁴

8. The Legislature even recently decided to bring charter school governing boards in line with school district boards of education, including with respect to public officer ethics, conflicts of interest, and continuing education requirements. *See* Charter schools, 2023 Okla. Sess. Laws 323, § 7, 7.⁵

The significant encouragement does not end there as the State's entanglement extends to the internal operations and affairs of public charter schools. First, the State can overrule a public charter school board's decision to deny a student's request to transfer to the charter school. OKLA. STAT. tit. 70, § 8-101.2(E). For schools in need of improvement under 20 U.S.C. § 6301 *et seq.*, including public charter schools, the State can assume control of the public charter school and make decisions on governance and staffing. OKLA. STAT. tit. 70, § 1210.544. This Court even recently affirmed the State's authority to supervise the instruction in the public schools of Oklahoma, including requiring an "interim or temporary superintendent as a necessary solution to

⁴ Of note, the charter Contract, perhaps inadvertently, even uses the same definition for "Public School" and the entity (St. Isidore) authorized by the SVCSB: a "school that is free and supported by funds appropriated by the Legislature . . ." Pet. Appx. Vol. I at 3, §§ 2.9, 3.1.

⁵ St. Isidore's claim that members of a public charter school board of education are not public officers. However, under the well-settled factors enumerated in *Oklahoma City v. Century Indemnity, Co.*, 1936 OK 589, ¶21, 62 P.2d 94, 97, this conclusory statement likely fails. First, governing bodies of public charter schools are created or authorized by law. OKLA. STAT. tit. 70, §§ 3-132, 3-134, 3-136. Second, the law imposes definite duties on a public charter school's board of education. *Id.* at §§ 3-134 and 3-136 (quarterly meetings, compliance with the Open Meeting Act and Open Records Act; responsible for the policies and operational decisions of the charter school; and complying with conflict of interest requirements). Finally, St. Isidore's board of education intends to exercise some portion of the State's sovereign power when it issues diplomas to students meeting or exceeding the state graduation requirements under OKLA. STAT. tit. 70, § 11-103.6, and in contracting with teachers, who are public employees. *Id.* at § 3-136(A)(3) and Sponsorship Contract, Pet. App. Vol. I at 4 and 8. After all, charter schools are school district political subdivisions under the Governmental Tort Claims Act. OKLA. STAT. tit. 70, § 3-136(A)(13); 51 O.S. § 152(11).

preserve a school district's accreditation." *Western Heights Indep. Sch. Dist. No. I-41, et al., v State*, 2022 OK 79, ¶ 87, 518 P.3d 531, 557.

It is hard to imagine the State providing more "encouragement" to a type of entity than it does to public charter schools. It is absurd for the SVCSB and St. Isidore to claim that St. Isidore is not a state actor when St. Isidore's decisions and operations can be overruled and taken over by State, and St. Isidore is subject to, among other things, the Oklahoma Open Meeting Act, the Oklahoma Open Records Act, and the same academic standards and expectations as existing public schools. Therefore, even if the Act did not define charter schools as public schools, St. Isidore would still obviously qualify as a "state actor" due to "significant encouragement."

In its brief, St. Isidore misleadingly suggests that "charter schools are 'exempt from all statutes and rules relating to schools, boards of education, and school districts.' 70 O.S. § 3-136(A)(5)." Int. Br. at 14. But this Court need only turn to the preceding phrase to observe the important qualifier left off by St. Isidore: "**Except as provided for in the [Act] and its charter**, a charter school shall be exempt from all statutes and rules relating to schools, boards of education, and school districts . . ." OKLA. STAT. tit. 70, § 3-136(A)(5) (emphasis added to display the missing portion). As a result, this Court should not be misled by St. Isidore's deployed sleight of hand. The unlawful Contract has made St. Isidore a public school, and thus a state actor.⁶

B. St. Isidore is not a *religious entity* providing a substantial service.

⁶ Denied Respondent-Intervenor, Ryan Walters, the State Superintendent of Public Instruction, in a recent interview, appeared to characterize St. Isidore as a public school. He even reiterated the substantial oversight his agency has over a public charter school: "We're going to challenge [the denial] . . . when you look at a public school, when you look at accreditation, when you look at how funding actually gets to the school, it goes through the state Board of Education. It goes through our board. Our agency has oversight as well." Murray Evans, THE OKLAHOMAN (Dec. 1, 2023) <https://www.oklahoman.com/story/news/education/2023/12/01/ryan-walters-oklahoma-supreme-court-legal-battle-religious-charter-school/71757873007/>.

The SVCSB and St. Isidore suggest “this Court twice held that Article II, Section 5 allows the State to disburse funds to a **religious entity** that provides a substantial service in return.” Int. Br. at 4 (emphasis added) (referencing *Murrow Indian Orphans Home v. Childers*, 1946 OK 187, 171 P.2d 600, and *Oliver v. Hofmeister*, 2016 OK 15, 368 P.3d 1270). However, the present case does not involve a religious institution unaffiliated with the State providing the State a substantial benefit. Rather, the present scenario involves St. Isidore, a public charter school, being funded by the State—like any other public school, *see supra* 3—to discharge the State’s constitutional mandate of providing a free public education to all children, *see* OKLA. CONST. art. I, § 5. Because any funding goes directly to St. Isidore and never to the parent, St. Isidore and all other Oklahoma public schools are clearly distinct from the program under review in *Oliver*. 2016 OK 15 at ¶ 22. This distinction matters because the lack of directness in *Oliver* meant there was no encouragement or endorsement from the State.

Here, however, the State would be directly funding a religious school—thereby encouraging students to attend it. Therefore, the result of the Contract is leaps and bounds beyond what this Court feared would be a slippery slope if Article II, Section 5 were ignored. *See Gurney v. Ferguson*, 1941 OK 397, ¶ 16, 122 P.2d 1002, 1005 (warning of “at least partial control of [religious] schools by successive legislative enactment” if the “no aid” provision is not honored).

Besides, *Murrow* and *Oliver* are procedurally different than the present matter. For example, in *Oliver*, the plaintiffs challenged the legislatively authorized disbursements of funds, and this Court noted the heavy burden to overcome the legislative act’s presumption of constitutionality. *Oliver*, 2016 OK 15 at ¶ 5. Here, unlike plaintiffs in *Murrow* and *Oliver*, Petitioner seeks to defend the wisdom of the Legislature in defining charter schools as public schools. Moreover, Petitioner seeks a writ to compel the SVCSB to honor this legislative prerogative. Petitioner need not shoulder the heavy burden of overcoming the Act’s presumption of constitutionality—that is the

SVCSB's and St. Isidore's insurmountable responsibility. Thus, the "substantial benefit" test cannot save the Contract.

C. The Oklahoma Religious Freedom Act does not overrule the prohibition on sectarian schools found in OKLA. STAT. tit. 70, § 3-136(A)(2).

The SVCSB's and St. Isidore's claims relating to the Oklahoma Religious Freedom Act ("ORFA") are easily refuted. ORFA is used by these parties to soften their actual argument—that is, that this Court should encourage the SVCSB to continue to violate state law to allow a public charter school to freely exercise religion. St. Isidore claims that OKLA. STAT. tit. 70, § 3-136(A)(2) violates the ORFA and that ORFA implicitly overrides that section as the "most recently enacted law." Int. Br. at 8. St. Isidore is wrong on both counts. "[R]epeals by implication" are not favored. *Smith v. State Bd. of Educ.*, 1942 OK 188, ¶ 8, 126 P.2d 241, 242.

Further, even if ORFA and the Act's provision forbidding religious charter schools were in conflict—which they are not—St. Isidore is wrong that ORFA overrides conflicting portions of the Act because the Act was amended after the most recent amendment to ORFA. "Where statutes conflict in part, the one last passed, which is the later declaration of the Legislature, should prevail, superseding and modifying the former statute only to the extent of such conflict." *City of Sand Springs v. Dep't of Pub. Welfare*, 1980 OK 36, ¶ 28, 608 P.2d 1139, 1151 (citations omitted); 2006 OK AG 3, ¶ 10 (Interpreting reasoning from *Cities Service Oil Co. v Oklahoma Tax Commission*, 1942 OK 307, ¶ 15, 129 P.2d 597, 599, to determine "[a]n effective date does not determine which of two conflicting statutes controls."); *see also* OKLA. STAT. tit. 75, § 22. This is true "even where both sections were enacted in the same official codification." *City of Sand Springs*, 1980 OK 36, at ¶ 28.

Here, the most recent amendment to ORFA was enrolled by the House on April 26, 2023, and signed by the Governor on May 2, 2023.⁷ On the other hand, the Legislature amended the Act in its 2023 Session, enrolled by the house on May 25, 2023, and signed by the Governor on June 5, 2023,⁸ leaving the claimed overridden section untouched.⁹ Charter schools, 2023 Okla. Sess. Laws 323, § 7, (A)(2). Thus, the Act was amended after the OFRA. Therefore, the Act controls over the OFRA.

Accordingly, this Court should exercise original jurisdiction and issue a writ of mandamus requiring the SVCSB to rescind its illegal Contract with St. Isidore.

II. SVCSB's reliance on a withdrawn opinion by the former Attorney General is misplaced.

In their briefs, the SVCSB and St. Isidore fail to recognize this Court's limited role in deciding novel federal constitutional questions. Specifically, "[t]he limited role of this Court as with all state courts, is to apply federal constitutional law, not to make it nor to guess what it may become." *Burns v. Cline*, 2016 OK 121, ¶ 7, 387 P.3d 348, 351 (citation and quotations omitted).

Specifically, SVCSB relies heavily on a withdrawn opinion penned by the former appointed Oklahoma Attorney General issued in his waning days in office. But this withdrawn opinion does not carry the day for the SVCSB. At most, the withdrawn opinion is simply a guess as to how the former Attorney General believed the U.S. Supreme Court would rule on this issue in the future. Pet. Appx. Vol. I at 439 (stating that the former Attorney General believes "the U.S. Supreme Court would likely hold these restrictions unconstitutional."). This guess falls outside this Court's recognized limited role of simply applying federal constitutional law as it currently exists.

⁷ <http://www.oklegislature.gov/BillInfo.aspx?Bill=SB404&Session=2300>.

⁸ <http://www.oklegislature.gov/BillInfo.aspx?Bill=sb516&Session=2300>.

⁹ Also, of note, the amended Act set to take effect July 1, 2024 doubles down on the categorization of charter schools as public schools: "For purposes of the Oklahoma Charter Schools Act, 'charter school' means:" "a public school established by contract . . ." Charter schools, 2023 Okla. Sess. Laws 323, § 2, (C)(1)(a-b).

Regardless, the withdrawn opinion primarily focuses on the Free Exercise Clause in the First Amendment, i.e., arguments related to funding religious organizations. However, the Petitioner has made it clear that he is not challenging the funding of private religious organizations. Instead, the federal constitutional question presented is whether the SVCSB's sponsorship of a religious public virtual charter school violates the Establishment Clause. The answer to this question is clear, *see supra* 2–6, and even if the SVCSB's and St. Isidore's characterization of St. Isidore as a private not-for-profit organization were accepted, St. Isidore is still a state actor based on the concept of "significant encouragement." *See* Pet. Br. at 10–15.

On this point, the former Attorney General recognized that "[n]ot all courts have agreed" whether charter schools are state actors. Pet. Appx. Vol. I at 445. The most recent federal appellate court to address this issue, the Fourth Circuit in *Peltier v. Charter Days Sch., Inc.*, concluded that a charter school operator was a state actor. 37 F.4th 104, 122 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 2657 (2023). Notably, the U.S. Supreme Court denied *certiorari* on this *en banc* opinion. Thus, the most recent authority on this issue remains undisturbed and supports the Petitioner.

Much to the SVCSB's chagrin, the Fourth Circuit ultimately found that the state action inquiry was "not complicated" because:

- (1) North Carolina is required under its constitution to provide free, universal elementary and secondary schooling to the state's residents;
- (2) North Carolina has fulfilled this duty in part by creating and funding the public charter school system;
- and (3) North Carolina has exercised its sovereign prerogative to treat these state-created and state-funded schools as public institutions that perform the traditionally exclusive government function of operating the state's public schools.

Id.

Similarly, here, (1) Oklahoma's Constitution mandates "the establishment and maintenance of a system of public schools, which shall be open to all the children of the state," OKLA. CONST. art. I, § 5; (2) Oklahoma has fulfilled this duty in part with the passage of the Act, OKLA. STAT. tit. 70, § 3-130, *et seq.*, which sets forth the procedure for the creation and funding

of public charter schools; and (3) Oklahoma has exercised its sovereign prerogative to treat these state-created and state-funded schools as public institutions that perform the traditionally exclusive government function of operating the state's public schools. *See supra* pp. 4–6. Therefore, the SVCSB's unlawful action has made St. Isidore a public institution, and even if characterized as a private organization, St. Isidore is nevertheless a state actor. This “is not complicated.”

The SVCSB's and former Attorney General's reliance on the dissent's view in *Peltier* does not help the SVCSB and St. Isidore in this case. This Court's acceptance of the dissenting opinion would clearly constitute the creation of new federal constitutional law or be a guess that the U.S. Supreme Court will one day overrule *Peltier* (despite the U.S. Supreme Court's denial of *certiorari* in that case). Therefore, the SVCSB's advocacy in favor of a dissenting view does not fall under this Court's recognized limited role in deciding federal constitutional issues.

The only contrary authority discussed in the withdrawn opinion involving a charter school (as opposed to a private school) is *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806 (9th Cir. 2010). *See* Pet. Appx. Vol. I at 445. But this case does not support the SVCSB or St. Isidore in this case. The Ninth Circuit in *Caviness* correctly recognized that “an entity may be a state actor for some purposes but not for others.” 590 F.3d at 813 (citation omitted). The Ninth Circuit ultimately concluded that the fact the entity was a charter school alone was not sufficient to render it a state actor for the purpose of making personnel decisions. *Id.* at 813, 818. Importantly, the Ninth Circuit did not foreclose a charter school from being a state actor for any purpose. *Id.* at 813. The *Peltier* court recognized this when it held that it will “not read the decisions of our sister circuits as establishing bright-line rules applicable to every case, but instead as evaluating the specific conduct challenged by the plaintiffs in the context of the governing state law.” 37 F.4th at 121.

Unlike the personnel decisions involved in *Caviness*, in *Peltier*, “the plaintiffs challenge[d] a dress code provision that is central to the educational philosophy of a charter school deemed public under North Carolina law and funded accordingly.” *Id.* at 121–22. Under that challenge the Fourth Circuit refused to “permit North Carolina to delegate its educational responsibility to a charter school operator that is insulated from the constitutional accountability borne by other North Carolina public schools.” *Id.* at 122. Thus, while the Ninth Circuit determined a charter school may not be a state actor when dealing with internal personnel decisions, the Fourth Circuit found a charter school is certainly a state actor when it implements its educational philosophy.

Here, St. Isidore’s educational philosophy is at the heart of the Establishment Clause violation. St. Isidore told the SVCSB that its intent is “[t]o create, establish, and operate the School as a Catholic School.”¹⁰ Pet. Appx. Vol. I at 92. The executive director of the Catholic Conference of Oklahoma has summarized this as meaning that St. Isidore intends to “be a fully Catholic school—Catholic in every way: Catholic in teaching, Catholic in employment” Andrea Eger, TULSA WORLD, *Catholic Church in Oklahoma seeking government sanctioning, taxpayer funding for first religious charter school in U.S.* (Feb. 13, 2023).¹¹ To the extent there is any doubt, St. Isidore’s application, which is fully incorporated into the Contract, provides:

[SISCVS] is a Catholic faith-based community providing students with exceptional Christ-centered Catholic formation and education. Rooted in the Catholic understanding of the human person and her or his relationship with God and neighbor, the School fully embraces the teachings of the Catholic Church’s Magisterium, and the School fully incorporates these into every

¹⁰ See *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. ___, 142 S.Ct. 2407, 2431–32 (2022), for example the U.S. Supreme Court reasons that the following similar situations can violate the Establishment Clause: requiring or persuading students to spend time in religious instruction (citing *Zorach v. Clauson*, 343 U.S. 306 (1952)); reciting prayers as part of an official graduation ceremony because the school practically compelled attendance and participation (citing *Lee v. Weisman*, 505 U.S. 577 (1992)); or broadcasting prayer over the public address system and activities where students are required or expected to participate. (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000)).

¹¹ Available at: https://tulsa-world.com/news/local/catholic-church-in-oklahoma-seeking-government-sanctioning-taxpayer-funding-for-first-religious-charter-school-in/article_1141db0a-a98e-11ed-b87c-f7ae31ee167e.html?utm_medium=social&utm_source=email&utm_campaign=user-share.

aspect of the School, including but not limited to its curriculum and co-curricular activities. The physical environment of the School has external signs of the Catholic tradition including images, symbols, icons, crucifixes in every classroom, liturgical celebrations, and other sacramental reminders of Catholic life. In short, every aspect of the School's life reminds students, parents, faculty and staff to intentionally consider the implications Catholic teaching has for their lives and for the formation and education of the School's students . . .

Pet. Appx. Vol. I at 276. *See also* Pet. Appx. Vol. I at 92–93 and 212–217.

Therefore, while there may be some limited situations where St. Isidore could assert that it is not a state actor, it is certainly a state actor when it comes to its educational philosophy, *e.g.*, its curriculum. Accordingly, *Caviness* does not support St. Isidore's position that it has not been made a state actor at least as it relates to its educational philosophy.

Moreover, the U.S. Court of Appeals for the Tenth Circuit recognizes that charter schools are state actors. *See Bremmer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1188 (10th Cir. 2010) (“That is, because the Academy is a local governmental entity, it cannot be held for the acts of its employees on a theory of *respondeat superior*.”); *see also Coleman v. Utah State Charter Sch. Bd.*, 673 F. App'x 822, 830 (10th Cir. 2016) (unpublished) (stating “charter schools are public schools using public funds to educate school children” and “charter schools are not free-floating entities unmoored from state governmental oversight and control.”). Therefore, the most recent federal appellate decision, *Peltier*, and the Tenth Circuit agree that charter schools are state actors.

Finally, the SVCSB and the former Attorney General fail to grapple with the Establishment Clause's prohibition of government spending in direct support of religious education. *See* Pet. Br. at 10; *see also Mitchell v. Helm*, 530 U.S. 793, 861–66 (2000) (O'Connor, J. concurring, with whom Breyer, J. joins);¹² *contra* Resp. Br. at 5. In essence, they champion Oklahoma's direct finding of the religious experience in public virtual charter schools within which

¹² There was no majority in *Helm*, and because the concurrence is the narrowest opinion, it is controlling law. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

funds will be used and applied toward a Catholic education. Rather than answer how this direct public funding is not an Establishment Clause violation, they lean on the trilogy of U.S. Supreme Court cases in support of their Free Exercise arguments. *See* Resp. Br. at 10–11; Int. Br. at 9–11. But these are not the silver bullet for elimination of the Establishment Clause that they make them out to be. The SVCSB and former Attorney General make no attempt to argue how the sponsorship of a public virtual charter school is a “public benefit” as contemplated by the *Trinity Lutheran-Espinoza-Carson* trilogy. Nor do they sort out how the State’s creation and funding of public charter schools equates to the funding at issue in the trilogy. St. Isidore is a public institution, and even if the SVCSB and St. Isidore were granted great latitude in their characterization of St. Isidore as a private corporation, it is still a state actor and thus the Establishment Clause prohibits the funding they seek to use for a religious education.

Accordingly, SVCSB’s reliance on a withdrawn opinion by the former appointed Attorney General is misplaced.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner’s requested relief to correct the Board’s unlawful action to prevent a religious institution from becoming an organ of the State.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of December 2023 a true and correct copy of the foregoing instrument was mailed by depositing it in the U.S. Mail, postage prepaid to the following:

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