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IN THE DISTRICT COURT FOR OKLAHOMA COUNTY
STATE OF OKLAHOMA

OKPLAC, INC., d/b/a Oklahoma Parent Legislative Action Committee, et al.,

Plaintiffs,

v.

STATEWIDE VIRTUAL CHARTER SCHOOL BOARD, et al.,

Defendants.

Case No. CV-2023-1857

DEFENDANT ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL'S
REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

Plaintiffs' opposition to the motions to dismiss distills their challenge to the State's approval of St. Isidore of Seville Catholic Virtual School ("St. Isidore") to its essence: Plaintiffs believe that the State of Oklahoma may *never* allow a religious organization to operate a charter school because (they contend) any faith-based school would violate the Charter Schools Act and the Oklahoma Constitution. They purport to raise other, purely technical errors in the Board's decision to partner with St. Isidore; they baselessly speculate about ways in which they predict St. Isidore might run afoul of the law; and they conjure up hypothetical scenarios of discrimination or conflicts of interest that do not, and never will, exist. But those arguments are just mixed in to obscure the basic—and lamentable—premise of their challenge: that religious believers cannot be trusted to participate in State programs to help educate children and serve the public good.

Neither their central argument nor the alleged technical errors can justify setting aside the contract that the Oklahoma Statewide Virtual Charter School Board (the "Board") properly approved on October 16. *First*, Plaintiffs have neither standing nor, for their statutory and regulatory claims, a cause of action. *Second*, Plaintiffs' claims fail on the merits. State and federal law emphatically reject efforts to exclude people of faith from the charter-school program. Plaintiffs cannot nullify these rights by recasting a private school that *contracts with* the government as *part of* the government. *Third*, Plaintiffs' scattershot of technical challenges—contending that St. Isidore may someday violate the law—are unripe, meritless, and seek a disproportionate and inequitable remedy. For these reasons, this Court must reject Plaintiffs' attempt to extinguish St. Isidore and dismiss the Petition.

ARGUMENT AND AUTHORITIES

I. PLAINTIFFS LACK STANDING AND A CAUSE OF ACTION.

Plaintiffs fail to establish threshold requirements. *First*, they fail to establish standing. To seek declaratory relief, Plaintiffs must show "an actual, existing justiciable controversy between parties having opposing interests, which . . . 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). They make essentially no effort to do so.

At best, Plaintiffs rely on a remarkably broad theory of taxpayer standing that cannot make up for their lack of a "case in controversy." *See* Opp. 9–13. Oklahoma taxpayers may "possess[] standing to seek injunctive relief to prevent an alleged unlawful expenditure of [public] funds." *Okla. Pub. Emps. Ass'n v. Okla. Dep't of Cent. Servs.*, 2002 OK 71, ¶ 14, 55 P.3d 1072, 1079 (Okla. 2002). But Oklahoma law does not provide private individuals *carte blanche* to challenge any "public wrong[]"; it allows only a challenge to "the wrongful expenditure" of taxpayer funds. *Id.*; *see also McFarland v. Atkins*, 1979 OK 3 ¶ 22, 594 P.2d 758, 762 (Okla. 1978) (taxpayer standing does not allow private individuals simply to "enforce" compliance with "the law"). Here, Plaintiffs have not explained how the Board's contract with St. Isidore will ever impact their tax dollars. *Cf. Stevens*, 383 P.3d at 275 (describing need for some concrete "evidence of expenditures").

Second, Plaintiffs fail to identify a cause of action to pursue their statutory and regulatory claims. They do not even argue that the Oklahoma Charter Schools Act or its implementing regulations satisfy the "test to determine if a private cause of action can be inferred from a regulatory or public-law statute." *Owens v. Zumwalt*, 2022 OK 14, ¶ 10, 503 P. 3d 1211, 1215 (Okla. 2022); *compare* St. Isidore MTD 5–6 *with* Opp. 11–13. Instead, Plaintiffs attempt to sidestep this basic requirement by arguing that "no statutory right of action is necessary when taxpayers sue to challenge unlawful spending." Opp. at 11. But they cite no case actually holding as much, and the Oklahoma Supreme Court has rejected the theory by holding that a cause of action is a distinct requirement separate from standing. *Owens*, 503 P.3d at 1216.

Plaintiffs' argument that the Declaratory Judgment Act ("DJA"), 12 O.S. § 1651, provides an underlying cause of action fares no better. The Act does not provide a standalone cause of action; "[i]t is merely a type of *remedy*" when a court otherwise has jurisdiction. *Conoco, Inc. v. State Dep't of Health*, 1982 OK 92, ¶ 18, 651 P.2d 125, 131 (Okla. 1982); *see also* 12 O.S. § 1651 (statute applies only "in cases of actual controversy"). Because Plaintiffs have failed to identify a justiciable controversy in which they have an actual legal interest, the DJA cannot bail out their

claims. Plaintiffs' own authority confirms as much. *See Brandon v. Ashworth*, 1998 OK 20, 955 P.2d 233 (Okla. 1998) (allowing taxpayers' claims to proceed only after citing *both* the DJA and 70 O.S. § 5-126, which permits certain persons to "maintain any proper action at law or in equity").

II. PLAINTIFFS' CHALLENGE TO RELIGIOUS CHARTER SCHOOLS FAILS.

Even if Plaintiffs' claims were justiciable, their attack on St. Isidore's right to open a school that "teach[es] a religious curriculum," Opp. 30 (Fifth Claim), fails under state and federal law.

A. Oklahoma Law Does Not Require The Exclusion Of Religious Charter Schools.

Neither Oklahoma's Constitution nor statutory code prohibits it from funding St. Isidore.

1. The State Constitution allows the State to provide funds to St. Isidore.

First, the State's contract with St. Isidore does not run afoul of Article II, Section 5 of the Oklahoma Constitution. That provision bars the State from giving gratuitous aid "for which no corresponding value [i]s received." *Murrow Indian Orphans Home v. Childers*, 1946 OK 187, ¶ 5, 171 P.2d 600, 602 (Okla. 1946). It does not prohibit the State from providing funds to a religious school, like St. Isidore, in exchange for which the State will receive substantial benefit. *See id.*; *Oliver v. Hofmeister*, 2016 OK 15, ¶¶ 19–27, 368 P.3d 1270, 1275–77 (Okla. 2016).

Plaintiffs protest that the contract with St. Isidore will not benefit the State because it will not fulfill the State's "legal duty" to provide a "public education" resembling that taught in district public schools. Opp. 36. That argument cannot be reconciled with the purpose of the charter-school program, which aims to provide innovative and diverse educational options *different from* district public schools. *See infra* Part II.B. Further, Plaintiffs' argument cannot be squared with *Oliver*. There, the State Supreme Court considered whether Article II, Section 5 barred Oklahoma's private-school tuition scholarship program because it allows funds to go to religious schools. *Oliver*, 368 P.3d at 1276. Upholding the program, the Court did not require those schools to offer the same kind of education as district public schools, nor demand that they secularize.[1]

[1] Plaintiffs are also incorrect that the *way* charter schools are funded poses any problem. Opp. 36. Charter schools are funded based on the number of students who, through independent choice, elect to attend. *See* Opp. Ex. P. ¶ 7.7; 70 O.S. § 18.200.1. Regardless, the "determinative factor" under *Oliver* is whether an entity provides "substantial return" to the State. 368 P.3d at 1276.

Second, St. Isidore's contract does not run afoul of other constitutional provisions. Opp. 31–35, 54–55. As explained before, Article I, Section 2 protects, not prohibits, the school's religious exercise. St. Isidore MTD 11–12. Plaintiffs' only response—that St. Isidore is somehow a governmental entity—is unavailing. *Infra* Part II.B.1. And St. Isidore's operation will not stop the State from fulfilling Article I, Section 5 by maintaining a general system of public education.

Finally, Plaintiffs do not deny this Court's duty to interpret Oklahoma's Constitution to avoid conflict with the U.S. Constitution. Because any exclusion of religious charter schools would violate the First Amendment, *infra* Part II.B, this Court must apply existing precedent to avoid such a collision, *see* St. Isidore MTD 10–11.

2. ORFA bars enforcement of the Act's religious exclusion.

In fact, Oklahoma law *prohibits* the State from enforcing the Charter Schools Act's exclusion of religious schools. Under the Oklahoma Religious Freedom Act ("ORFA"), the government may not deny an entity generally available benefits because it is religious. 51 O.S. § 253(D); *see* St. Isidore MTD 12. The exclusion of St. Isidore would violate this straightforward command, and Plaintiffs identify no compelling interest that would justify that burden on St. Isidore's exercise of religion. *See Fulton v. City of Phila.*, 141 S. Ct. 1868, 1879 (2021).

Plaintiffs' efforts to evade ORFA fail. *First*, Plaintiffs contend that the law prevents only denials of funding based on an entity's "religious character or affiliation" but not its religious *activity* or *use* of funds. Opp. 56. But such semantic parsing does not help. ORFA prohibits the State from "inhibit[ing] or curtail[ing]" any "religiously motivated *practice*." 51 O.S. § 252(7) (emphasis added). And, as the U.S. Supreme Court has held, religious "character" cannot be separated from religious "conduct." *See Carson v. Makin*, 596 U.S. 767, 788 (2022) (that distinction "lacks a meaningful application not only in theory, but in practice as well"); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 469 (2017) (Gorsuch, J., concurring). Plaintiffs' reference to comments by a single legislator, Opp. 56–57, does not show otherwise.

Second, Plaintiffs distract by arguing that the recent modification of *other* provisions of charter-school law means that the longstanding exclusion of religious charter schools should

prevail as more recently enacted than ORFA. Opp. 57. They cite nothing to support this bizarre theory that the legislature's amendment of one provision of law somehow "updates" or "reenacts" every other related provision. Regardless, Plaintiffs do not dispute that ORFA acts broadly as a "super statute" that displaces that discriminatory exclusion in any event. *See* St. Isidore MTD 13.

B. Any Exclusion Of Religious Charter Schools Violates The First Amendment.

Even if Oklahoma law did exclude religious schools from the charter program, enforcement of such a prohibition would violate the First Amendment to the U.S. Constitution.

Plaintiffs do not dispute that the First Amendment prohibits a State from excluding schools from generally available funding programs simply because they are religious or provide a faith-based education. *See Carson*, 596 U.S. at 767; *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246 (2020); *Trinity Lutheran*, 582 U.S. at 449. That rule resolves this case. As former Attorney General O'Connor explained, "The State cannot enlist private organizations to 'promote a diversity of educational choices,' 70 O.S. [] § 3-134(I)(3), [through its charter-school program] and then decide that any and every kind of religion is the wrong kind of diversity. This is not how the First Amendment works." Pet. Ex. A, App. § 13, App'x. N at 14.

Plaintiffs attempt to dodge the First Amendment by arguing that St. Isidore—a privately-operated school—is part of the government itself. Alternatively, they argue that the Establishment Clause prohibits the funding of a private religious charter school. Neither contention succeeds.

1. Oklahoma charter schools are not "the Government" and the design and operation of a charter school is not "state action."

Plaintiffs ask this Court to ignore St. Isidore's First Amendment rights by arguing that the school *has no* constitutional rights, but is instead part of the government. They are ambivalent as to exactly how St. Isidore is a "state actor," suggesting that St. Isidore is either itself "a governmental entity," Opp. 38–42, or instead a private entity that will teach a religious curriculum at the behest and under the close direction of the State, *id.* at 42–45. Neither theory is correct.

First, St. Isidore is self-evidently not a governmental entity. Contrary to Plaintiffs' claim, St. Isidore was not "created by the Oklahoma legislature." Opp. 40. St. Isidore is a private, not-

for-profit corporation and its members undoubtedly are private actors. The school "is operated by a board of directors, none of whom are public officials or are chosen by public officials." *Rendell-Baker v. Kohn*, 457 U.S. 830, 832 (1982); *see* 70 O.S. §§ 3-136(A)(8), 3-145.3(F).

Plaintiffs catalog a number of inapposite cases in which courts have recognized the governmental nature of entities that were explicitly created by law, authorized to exercise sovereign functions, or run by government employees. Opp. 39–40.[2] None of that is true here. The Charter Schools Act did not create St. Isidore or appoint the individuals who operate it. It simply gave "private person[s]" like them the right to "contract with a sponsor to establish a charter school." 70 O.S. § 3-134(C). Indeed, St. Isidore's contract says that the school "is a privately operated religious non-profit organization entitled to" constitutional rights. Opp. Ex. P. ¶ 1.5; *see id.* ¶ 2.9. Private entities do not lose those rights or become "part of" the government by contracting with it and Plaintiffs cite no case suggesting otherwise. *See, e.g.*, *Rendell-Baker*, 457 U.S. at 841; *Fulton*, 141 S. Ct. at 1878. Nor does it matter that the State "charters" approved schools, which is true of many private entities. *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 542–44 (1987) ("[T]hat Congress granted it a corporate charter does not render the [Olympic Committee] a Government agent. All corporations act under charters granted by a government, usually by a State. They do not thereby lose their essentially private character.").

It makes no difference that Oklahoma law refers to charter schools as "public schools." Opp. 40–42. That label simply refers to a school "that is free and supported by funds appropriated

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[2] *Pennsylvania v. Bd. of Dirs. of City Trusts*, 353 U.S. 230, 231 (1957) (per curiam) (board created by statute to run college donated to Philadelphia); *NCAA v. Tarkanian*, 488 U.S. 179, 183 (1988) (state university "organized and operated pursuant to provisions of [state] Constitution, statute, and regulations"); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624 (1991) (state judge); *Georgia v. McCollum*, 505 U.S. 42, 50 (1992) (state prosecutor); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 384–85 (1995) (Amtrak created by statute to "relieve private railroads of their passenger-service obligations" and run by board appointed by statute or President); *Tarabishi v. McAlester Reg'l Hosp.*, 827 F.2d 648, 652 (10th Cir. 1987) (trust statutorily created as "an agency of the State" and administered by public officials); *Barnard v. Chamberlain*, 897 F.2d 1059, 1062 (10th Cir. 1990) (state bar "established by state law and created as an administrative agency of the Utah Supreme Court"); *United States v. Ackerman*, 831 F.3d 1292, 1296 (10th Cir. 2016) (entity statutorily empowered to exercise exclusive "law enforcement duties and powers").

by the Legislature"—not one that is *part of* the government. Opp. Ex. P. ¶ 2.9; *see* 70 O.S. § 1-106. More importantly, federal rights do not turn on "state law labels," *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 679 (1996), and the Supreme Court has rejected the notion that labeling an entity "public" makes it a state actor, *see, e.g.*, *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 n.7, 352–54 (1974). Despite that label, St. Isidore lacks the "calling card of a governmental entity": It does not exercise any "public, political, or sovereign function" that "flow[s] from the sovereign authority" of the State. *Ackerman*, 831 F.3d at 1295 (Gorsuch, J.) (quotation omitted). Running a school that no child is assigned to attend certainly is not that.[3]

Second, Plaintiffs cannot attribute St. Isidore's private operation and "religious curriculum" to the State. Opp. 38. The Constitution constrains "acts of the [government], not . . . acts of private persons." *Rendell-Baker*, 457 U.S. at 831–37. The Supreme Court has explained that a private entity's conduct will be treated as that of the State only where there is "a close nexus" between the two. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). The government must be "responsible for the specific conduct of which the plaintiff complains." *Id.* (quotation omitted). Normally, this means that the State "has exercised coercive power or has provided such significant encouragement . . . that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

The design and operation of a charter school is not state action. Oklahoma charter schools are not run by the State but are instead subject only to broad oversight. Indeed, the entire Charter Schools Act is constructed to *avoid* establishing any close nexus between the design and operation of a charter school and the State in order to "[e]ncourage the use of different and innovative teaching methods," "create different and innovative forms of measuring student learning," and "[p]rovide additional academic choices for parents and students." Okla. Stat. tit. 70 § 3-131.

Plaintiffs fail to refute this. *First*, Plaintiffs refer to various regulations that apply to charter

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[3] Nor does it matter that charter schools agree to certain obligations—or to be *treated* in certain ways like public schools—when contracting with the government, Opp. 41–42. *See Rendell-Baker*, 457 U.S. at 841; *U.S. Olympic Comm.*, 483 U.S. at 542–44.

schools, Opp. 43, none of which show that the State is closely involved in the design, management, or operation of the school and its curriculum. To be sure, the State regulates charter schools (as it does all government contractors). But subjecting a contractor to "detailed regulations" does not convert that entity's conduct into State action. *Rendell-Baker*, 457 U.S. at 831–36. And Oklahoma does not direct or "compel" the daily operations of charter schools. *Id.* at 840–41. Rather, charter schools are generally "exempt from all statutes and rules relating to schools, boards of education, and school districts," 70 O.S. § 3-136(A)(5), a reality Plaintiffs do not even acknowledge.

Further, Plaintiffs specifically challenge St. Isidore's right to "teach a religious curriculum," Opp. 30, which the State neither designs nor implements. Indeed, Plaintiffs' list of charter-school regulations includes *none* that relate to curriculum design. Opp. 41–44. Rather, charter schools craft their own curricula, which may "emphasize[] a specific learning philosophy or style or certain subject areas." 70 O.S. § 3-136(A)(3). The State no more designed St. Isidore's Catholic educational model than it designed the STEM, fine arts, classical, language immersion, or many other unique educational models of other charter schools. Nor will the State teach that curriculum. St. Isidore will hire its own teachers, who are not subject to the State's "Teacher and Leader Effectiveness standards" nor required to have State teaching certificates. Okla. Dep't of Educ., Okla. *Charter Schools Program*, https://sde.ok.gov/faqs/oklahoma-charter-schools-program (last visited Nov. 20, 2023). In other words, the State is not "responsible for the specific conduct" about which Plaintiffs complain. *Brentwood Acad.*, 531 U.S. at 295; *see also Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 815 (9th Cir. 2010) (charter school not a state actor).[4]

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[4] Plaintiffs cite several cases they claim say otherwise, Opp. 45–46, but none change the analysis. Most do not even analyze whether charter schools are government entities or whether operating them is state action. Plaintiffs cite *no* Tenth Circuit case that meaningfully engaged with either of those questions. And their reliance on *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104 (4th Cir. 2022) (en banc), hardly demonstrates that their argument is settled law. Ten states argued to the Supreme Court that *Peltier* was wrongly decided and that charter schools are not state actors. Brief for the States of Texas et al. as Amici Curiae in Support of Petitioner, *Charter Day Sch. v. Peltier*, No. 22-238 (U.S. Oct. 14, 2022).

Second, Plaintiffs are wrong that St. Isidore will perform a service "traditionally exclusive" to the State. Opp. 44. True, delegation of a role that is *solely* governmental can signal state action. *See, e.g.*, *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978) (running elections). But the question is not whether a private actor supports "a proper public objective"; it is whether he does something "exclusively and traditionally public." *Brentwood*, 531 U.S. at 302–03. "[V]ery few [functions] have been exclusively reserved" to the government. *Flagg Bros.*, 436 U.S. at 158 (quotation omitted). Certainly, "education is not and never has been" such a function. *Logiodice v. Trs. of Me. Cent. Inst.*, 296 F.3d 22, 26 (1st Cir. 2002); *see Rendell-Baker*, 457 U.S. at 842.

Plaintiffs do not dispute this, but instead beg the question by narrowing the relevant function to the provision of a "free, *public* education." Opp. 44. The U.S. Supreme Court recently rejected this same tactic. In *Carson*, Maine justified its exclusion of religious schools from a tuition-assistance program by characterizing the program's benefit as providing the equivalent of a *public* education. 596 U.S. at 782. The Court interred the argument. Like here, the education offered by the schools in *Carson* "need not even resemble that taught in . . . public schools." *Id.* at 783. The Court observed that Maine's argument actually sought to define its benefit as provision of a *secular* education and explained that allowing such gamesmanship would nullify the First Amendment: "[T]he definition of a particular program can always be manipulated to subsume the challenged condition." *Id.* at 784. This Court should likewise reject Plaintiffs' attempt to "gerrymander[] a category of free, public education that it calls a traditional state function." *Peltier*, 37 F. 4th at 154 (Wilkinson, J., dissenting).

2. Religious charter schools do not violate the Establishment Clause.

Finally, Plaintiffs suggest that the First Amendment's Establishment Clause would outlaw a school like St. Isidore, even if it is a private actor. Opp. 52. They argue that the State may not "directly provid[e] public funds . . . to support religious activities, including religious instruction." *Id.* at 52–53. That argument is both wrong on the law and beside the point.

First, Plaintiffs' argument obscures a critical point: The Establishment Clause *does not* prohibit the State from offering a "neutral benefit program in which public funds flow to religious

[schools] through the independent choices of" families. *Carson*, 596 U.S. at 768. The Supreme Court has long held that states may fund programs that allow students to attend secular or religious schools of their choice. *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002). Oklahoma's charter-school program does exactly that. Schools of any religion (or none) may participate in the program, and families may choose among the options based on their children's needs. Just like the schools in *Zelman*, *Carson*, and *Espinoza*, Oklahoma charter schools receive state funds based on how many families make that "independent choice." Opp. Ex. P. ¶ 7.7; 70 O.S. § 18.200.1.

Second, Plaintiffs are wrong that the result would change if the State funded schools more "directly." Opp. 53. In *Carson*, *Espinoza*, and *Trinity Lutheran*, the Court made clear that "the Establishment Clause is not offended when religious [schools] benefit from neutral government programs." *Espinoza*, 140 S. Ct. at 2254. That analysis did not turn on the *method* of funding schools. Instead, the simple fact that the State *offered* funding to privately operated schools meant it could not exclude religious ones. *Id.* at 2261. In fact, in *Trinity Lutheran*, the Court rejected Missouri's asserted interest in refusing "direct[]" grants to religious schools. 582 U.S. at 463; *id.* at 474 (Sotomayor, J., dissenting) (arguing against allowing State to "directly fund religious exercise"). The Court has also rejected Plaintiffs' effort to ignore that ruling because St. Isidore would put state funding "to religious uses," Opp. 54, holding that such an argument "misreads our precedents," *Carson*, 596 U.S. at 787. The very point of *Carson* is that States have no special leeway to "discriminat[e] against religious uses of government aid." *Id.* at 786 (quotation omitted).

III. PLAINTIFFS HAVE NO MERITORIOUS CLAIM THAT ST. ISIDORE HAS VIOLATED OR WILL VIOLATE ANY OTHER LAW.

Unable to bar St. Isidore from the charter-school program because it is religious, Plaintiffs grouse about alleged technical deficiencies during St. Isidore's approval. All are premised on the idea that St. Isidore will one day violate some provision of Oklahoma law. None has merit.

A. Allegations Of Unlawful Operations By St. Isidore Must Be Dismissed As Unripe.

A key fact obscured by Plaintiffs' arguments cannot be overlooked: St. Isidore has not begun to operate. St. Isidore has been *approved* to run a charter school and it has *executed a*

contract with the State. But nothing else. It has not hired any teachers, contracted with any educational management organization, promulgated any policies, or admitted any students. Plaintiffs' numerous claims alleging what the school *might* do once it is operating challenge mere hypothetical conduct. Those speculative claims are unripe and must be rejected. *See French Petrl. Corp. v. Okla. Corp. Com'n*, 1991 OK 1, ¶ 7, 805 P.2d 650, 652–53 (Okla. 1991).

Plaintiffs ask this Court to decide their speculative claims anyway, insisting that St. Isidore's application suggests that the school will do something wrong to somebody someday. Opp. 14. They argue that this Court should order discovery rather than dismiss their claims. Opp. 15. But Plaintiffs' desperate plea for factual discovery is absurd. St. Isidore has not begun operating, which means there can be no evidence of any violation. And there is no reason to think that Plaintiffs' fanciful claims will *ever* occur. St. Isidore repeatedly agreed to comply with all law cited by Plaintiffs. *See infra* Part III.B; St. Isidore MTD III.D. At the end of the day, Plaintiffs do not preemptively challenge events that will simply follow in due course—they challenge mere illusions born of their unjustified suspicion of the Catholic Church.

B. Plaintiffs Allege No Legal Defect That Invalidates The State's Approval.

Plaintiffs mount several technical challenges that (they contend) prevent St. Isidore from opening. Plaintiffs insist—despite submitting contradictory record materials—that St. Isidore has failed to ensure its compliance with various laws or regulations. This Court need not credit such allegations. *Turner v. Sooner Oil & Gas Co.*, 1952 OK 171, ¶ 14, 243 P.2d 701, 704 (Okla. 1952).

1. Assurances to comply with the law (First and Third Claims).

Plaintiffs' First and Third Claims allege that St. Isidore failed adequately to promise that it will comply with particular laws as it operates the school. Both are patently untrue.

The First Claim broadly alleges that St. Isidore failed in its application to "certify that [it] will comply with" various provisions of state law. Opp. 21. But St. Isidore's application included notarized assurances from the school's Board members stating exactly that. Pet. Ex. A, App. § 12, at 93. Even if there was any doubt about those assurances, it has been erased by St. Isidore's contract with the Board. That contract reiterates that the school "agrees to comply with" and must

operate "in accordance with" all "Applicable Law," which "means all federal and state statutes and rules and regulations application to virtual charter schools." Opp. Ex. P. ¶¶ 2.1, 3.1, 8.1. This promise is repeated throughout the contract. *See, e.g.*, *id.* ¶¶ 2.1, 3.1, 7.1, 8.1, 8.3, 8.6, 8.7, 8.8.5, 8.9, 8.10, 8.11, 8.12, 8.15. Thus, there can be no doubt St. Isidore has promised to, and will, "fully comply" with all relevant laws. OAC § 777:10-3-3(c)(1)(F).

In their Third Claim, Plaintiffs contend that St. Isidore has not adequately agreed to "comply with all . . . laws relating to the education of children with disabilities in the same manner as a school district," 70 O.S. § 3-136(A)(7).[5] Again, this is manifestly false. St. Isidore explicitly promised to do so in the application process. Pet. Ex. A., App. § 9, at 73. And, in its charter contract, St. Isidore agreed *verbatim* to do what Plaintiffs demand. Opp. Ex. P. ¶ 8.6 ("[St. Isidore] shall comply with all federal and state laws relating to the education of children with disabilities in the same manner as an Oklahoma Public School district . . . .").

Plaintiffs dispute none of this. Instead, they quibble that, when promising to follow all law, St. Isidore has noted that the law includes certain rights that pertain to it as a religious organization. Opp. 21–23, 39; *see* Pet. Ex. A, App. § 12, at 93 (guaranteeing compliance with all legal requirements "to the extent required by law, including the First Amendment, religious exemptions, and the Religious Freedom Restoration Act"); *id.* App. § 9 at 73–74 (similar for disability law). Plaintiffs mischaracterize this as agreeing to follow the law only if consistent with "St. Isidore's religious beliefs." Opp. 21. St. Isidore has not reserved an ability to ignore the law based on its religious views. It has instead promised to follow the law consistent with its *legal rights* as a religious organization. Opp. Ex. P. ¶ 2.1 ("The Parties to this Contract recognize [that] certain rights, exemptions or entitlements are applicable to [St. Isidore] as a religious organization under federal, state, or local law, rules, and regulations . . . . [C]ompliance with Applicable Law shall be understood to mean compliance in a manner nonetheless consistent with [such rights].").

[5] Plaintiffs hardly defend the Third Claim and have abandoned its demonstrably false allegations that St. Isidore will fail to serve students with "mental disabilities," offer required non-virtual disability services, or meet certain requisite timelines. St. Isidore MTD 23–26.

The promise to follow all law consistent with one's legal rights is not *contrary* to the law; it is *part of* the law. Instead, it is Plaintiffs who step outside the law by arguing that St. Isidore must be compelled to follow all laws *except* any provision that confers rights upon religious organizations. They cite nothing to suggest that a charter school is obliged to abandon its religious liberty rights. And any attempt to enforce that demand would be unconstitutional. *Infra* Part III.C.

2. St. Isidore's anti-discrimination policies (Second Claim).

The Second Claim fails for much the same reasons. Plaintiffs argue that St. Isidore's approval must be nullified because the school has signaled that it "will violate" various laws. Plaintiffs speculate that St. Isidore "will discriminate in student admissions, student discipline, and employment" based on some legally "protected characteristics" that St. Isidore will supposedly fail to safeguard. Opp. 23. Plaintiffs cannot allege that St. Isidore has *actually* discriminated against any student or employee (neither of which exist). In short, this claim is unripe.

The record also contradicts Plaintiffs' claims. The application made clear that "[a]ll students are welcome," at St. Isidore, including "those of any faith or no faith," and that the school will not discriminate against students or employees "on the basis of a protected class." Pet. Ex. A., App. § 7, at 38, 43. And, in its contract, St. Isidore agreed to follow all applicable law, including in its employment policies and by "ensur[ing] that no student shall be denied admission to the Charter School on the basis of race, color, national origin, sex, sexual orientation, gender identity, gender expression, disability, age, proficiency in the English language, religious preference or lack thereof, income, aptitude, or academic ability." Opp. Ex. P. ¶¶ 3.1, 8.8, 8.11.

Plaintiffs' only retort is resorting to calumny against Catholics. But Plaintiffs allege no reason to doubt that St. Isidore will fulfill its promises. Instead, Plaintiffs lob a volley of unfounded accusations about discriminatory conduct that St. Isidore will one day exhibit based on what *Plaintiffs* assert "authoritative Catholic teaching" requires. Opp. 27–28. This Court must not credit this thinly veiled bigotry as a basis for Plaintiffs' petition.[6]

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[6] To the extent the Second Claim relies on constitutional restraints on *government* actors, such provisions do not even apply to St. Isidore. *See* St. Isidore MTD 11–12; *supra* Part II.B.

3. St. Isidore's management structure (Fourth Claim).

Finally, Plaintiffs briefly restate their claim that St. Isidore cannot be allowed to operate because it supposedly "intends to enter into a relationship with an educational management organization [EMO] that is prohibited by the Board's regulations." Opp. 29. It fails for several reasons, none of which Plaintiffs meaningfully engage with, including: (1) it is unripe as St. Isidore does not have a contract with any EMO (and Plaintiffs have alleged nothing to show that it ever will), St. Isidore MTD 6–7; (2) the very relationship that Plaintiffs speculate about would be valid, as recognized by the Board at the time of St. Isidore's approval, *id.* 8–20, 26–27; and (3) any speculation about improper EMOs *again* ignores St. Isidore's promises *not* to enter into any prohibited EMO relationship, *id.* 27–29; Opp. Ex. P. ¶ 6.4.

C. Any Claim That St. Isidore Must Surrender Its First Amendment Rights To Participate In The Charter-School Program Fails.

At bottom, Plaintiffs' regulatory claims suggest that St. Isidore must be required to relinquish its constitutional rights to participate in the charter-school program. But any effort to force St. Isidore to waive those rights—that, is to comply with "all" law *except* any legal rights for religious schools—is unconstitutional. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013). "To condition the availability of benefits upon a recipient's willingness to surrender his religiously impelled status effectively penalizes the free exercise of his constitutional liberties." *Trinity Lutheran*, 582 U.S. at 462 (cleaned up); *see also Carson*, 142 S. Ct. at 1997; *Espinoza*, 140 S. Ct. at 2257. None of Plaintiffs' arguments to the contrary are persuasive. *First*, Plaintiffs respond that the legal requirements underlying their claims cannot violate St. Isidore's religious exercise because those laws are "religion-neutral." Opp. 51. This is pure misdirection. Again, St. Isidore *has agreed* to comply with these supposedly neutral requirements. *Supra* Part III.B. Plaintiffs' allegations attempt to force an additional condition that St. Isidore *also* abandon any legal rights it has as a religious organization. Plaintiffs' additional requirement is not "neutral" to religion—it is intentionally hostile to it. *Next*, Plaintiffs argue that, because St. Isidore can simply exercise its religion elsewhere, the unconstitutional conditions doctrine is inapplicable.

Opp. 51. The Supreme Court has rejected this very argument. While St. Isidore may be "free to continue operating as" a religious organization in other ways, the State still cannot impose the "automatic and absolute exclusion from the benefits of a public program for which [it] is otherwise qualified." *Trinity Lutheran*, 482 U.S. at 462; *see also Fulton*, 141 S. Ct. at 1878 (government may not "discriminate against religion when acting in its managerial role" over a contractor).

Finally, Plaintiffs fail to identify any compelling interest that could justify excluding religious schools. "[B]roadly formulated" interests in inhibiting theoretical discrimination hardly suffice to satisfy strict scrutiny. *Fulton*, 141 S. Ct. at 1879. Again, the point of *Carson* and its predecessors is that the State may not directly condition participation in a benefit program upon the surrender of religious exercise. This Court must likewise reject Plaintiffs' invitation to do so indirectly.

D. Plaintiffs' Claims Cannot Justify The Disproportionate Remedy They Seek.

Finally, even if Plaintiffs could prevail on any of these claims, this Court must reject their request for a grossly disproportionate and inequitable remedy. St. Isidore MTD 29–30. Plaintiffs do not dispute that courts must craft remedies "in a feasible and practical way" to ensure "fairness and precision." *Freeman v. Pitts*, 503 U.S. 467, 487 (1992). Yet, Plaintiffs seek to extinguish St. Isidore's very existence if they succeed on any of their allegations regarding St Isidore's conduct. That remedy is sweeping, impractical, and unjust. If this Court were to conclude that any of these claims require relief, the appropriate remedy would be to enjoin the harmful conduct itself, such as by invalidating an improper EMO relationship or ordering the modification of policies. In no event would such claims necessitate the school to cease operation altogether.

CONCLUSION

For the foregoing reasons, Plaintiffs' claims against St. Isidore are nonjusticiable, fail to state a claim, and are barred by the U.S. Constitution. The petition should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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

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