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.	)	

THE BOARD DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION AND FAILURE TO STATE A CLAIM

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Plaintiffs' Consolidated Opposition ("Opp.") confirms that they are the wrong plaintiffs with the wrong claims at the wrong time. It shows they are litigants with no connection to St. Isidore suing to correct what they view as "purely public wrongs"—the kind of plaintiffs the Oklahoma Supreme Court does "not recognize," *Tulsa Indus. Auth. v. City of Tulsa*, 2011 OK 57, ¶ 26, 270 P.3d 113, 126—and who lack a private right of action to boot. *See Owens v. Zumwalt*, 2022 OK 14, ¶ 9, 503 P.2d 1211, 1215 ("Without a cause of action, [Plaintiffs] cannot state a claim upon which relief can be granted."). It underscores that they are improperly suing about things that haven't yet happened, as it describes Plaintiffs' claims as alleging that St. Isidore "*will* discriminate in admissions, discipline, and employment," "*will* violate Board regulations," and has not committed that "it *will* provide adequate services to students with disabilities." Opp. 2 (emphasis added). And the Opposition fails to provide a plausible basis for any of their claims, hardly even trying to defend the third and fourth ones. *Id.* at 29–30.

The bulk of the Opposition is directed at defending Plaintiffs' fifth claim, which asserts that "direct state aid to the religious activities of [St. Isidore]" violates the Oklahoma Constitution and the Charter Schools Act ("Act"). *Id.* at 3. But this claim is squarely defeated by the Free Exercise Clause, which prohibits states from "exclud[ing] religious observers from otherwise available public benefits." *Carson v. Makin*, 596 U.S. 767, 778 (2022). Indeed, any state law that would disqualify charter-school applicants "solely because of their religious character" must be subject to "the most exacting scrutiny." *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2249 (2020). And "an interest in separating church and state more fiercely than the Federal Constitution" cannot suffice. *Carson*, 596 U.S. at 781 (cleaned up). While Plaintiffs argue that St. Isidore's status as a virtual charter school violates the Establishment Clause, St. Isidore is a privately owned and operated school whose religious mission is not "even influenced by any state regulation." *Rendall-Baker v. Kohn*, 457 U.S. 830, 841 (1982). Because St. Isidore's religious character is not "fairly attributable to the State," *id.* at 840, it is not a state actor for Establishment Clause purposes, and the Board properly refused to disqualify it "solely because of [its] religious character." *Espinoza*, 140 S. Ct. at 2249. Thus, Plaintiffs' fifth claim fails to state a claim upon which relief can be granted.

ADDITIONAL BACKGROUND

Two significant events occurred after the Board Defendants ("Board") filed their Motion to Dismiss:

First, on October 16, 2023, the Board and St. Isidore executed a Contract for Charter School Sponsorship, under which "[St. Isidore] is authorized by the [Board] to operate a state-wide virtual charter school that is free and supported by funds appropriated by the Legislature in accordance with the terms and conditions set forth in this Contract and the Applicable Law." Opp., Ex. P, at 2. The Contract defines "Applicable Law" to include "all federal and state statutes and rules and regulations applicable to virtual charter schools" and various "Religious Protections," including "[St. Isidore's] rights under the so-called 'ministerial exception' and other aspects of the 'church autonomy' doctrine; Article I, Section 2, of the Constitution of the State of Oklahoma; the Oklahoma Religious Freedom Act ["ORFA"]; the federal Religious Freedom Restoration Act ["RFRA"]; and the First Amendment to the Constitution of the United States." *Id.* at 1–2. The Contract specifies that "[St. Isidore's] compliance with Applicable Law shall be understood to mean compliance in a manner nonetheless consistent with [its] Religious Protections." *Id.* at 2.

The Contract provides that St. Isidore "agrees to comply with all Applicable Law," and the parties agree that as "a religious nonprofit organization, [St. Isidore] has the right to freely exercise its religious beliefs and practices consistent with its Religious Protections." *Id.* at 12. St. Isidore must "ensure that employment of [its] personnel is conducted in accordance with all Applicable Law," *id.* at 15, and "that no student shall be denied admission ... 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." *Id.* at 14. As for student discipline, St. Isidore "shall comply with the student suspension requirements set forth in 70 O.S. § 24-101.3, and in accordance with [its] student conduct, discipline, and due process policies and procedures." *Id.* at 15. And to accommodate students with disabilities, 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, including but not limited to the Individuals with Disabilities Education Act ("IDEA") in 20 U.S.C. § 1400 *et seq.*, Section 504 of the Rehabilitation Act of 1973 in 29 U.S.C. § 794, Title II of the Americans with Disabilities Act, and Policies and Procedures of the Oklahoma State Department of Education for Special Education in Oklahoma." *Id.* at 13–14.

Second, on October 20, 2023, Oklahoma's Attorney General filed a related action in the Supreme Court asking the Court to assume original jurisdiction, cancel the Board's contract with St. Isidore, and declare that the Board's sponsorship violated the Act, the Oklahoma Constitution, and the Establishment Clause. On November 21, 2023, the Board and Intervenor St. Isidore each filed a response, agreeing that the Court should assume original jurisdiction to clarify that the Free Exercise Clause and ORFA compelled the Board to treat religious applicants equally, and that the Board's approval of St. Isidore did not offend the Establishment Clause or the Oklahoma Constitution.[1] On December 5, the Attorney General filed a reply.

If the Supreme Court assumes original jurisdiction—as all parties have requested—it will likely resolve many issues raised in the Board's Motion to Dismiss, including whether the Free Exercise Clause and ORFA compel equal treatment of religious virtual charter school applicants, whether St. Isidore is a state actor for Establishment Clause purposes, and whether the Board's sponsorship of St. Isidore violates the Oklahoma Constitution.

ARGUMENT

I. Plaintiffs' Claims Are Not Ripe.

Claims are not ripe for judicial consideration when they require "a prospective examination" by evaluating "future events," or when "subsequent events may sharpen the controversy or remove the need for decision of at least some aspects of the matter." *French Petrol. Corp. v. Okla. Corp. Comm'n*, 1991 OK 1, ¶ 7, 805 P.2d 650, 652–53. Plaintiffs readily admit that their Petition asserts claims about "future events"—claims that "St. Isidore *will discriminate* in admissions, discipline, and employment," St. Isidore "has not guaranteed that

[1] On November 14, 2023, some of the Plaintiffs here moved to intervene in the Supreme Court action. Their motion remains pending.

it will provide adequate services to students with disabilities," and St. Isidore "*will violate* Board regulations [in hiring an Educational Management Organization ('EMO')]." Opp. 2 (emphasis added). Because "future events" may "sharpen the controversy or remove the need for decision," these claims are simply not justiciable at this time.

Plaintiffs argue their "claims are ripe" because "the Board and St. Isidore did sign a charter contract." Opp. 13. But this contract does not make what *might happen* after St. Isidore begins operations in July 2024 any more or less likely. Moreover, Plaintiffs did not amend their Petition to reflect the contract, so the Petition still fails to identify any contract term underlying Plaintiffs' claims that St. Isidore's contract is somehow deficient under § 135(A) and § 136(A) of the Act. Because the Court must resolve this motion based on "the four corners of the petition," *Brock v. Thompson*, 1997 OK 127, ¶ 30, 948 P.2d 279, 292–93, Plaintiffs' bare citation of various contract provisions in their Opposition, *see* Opp. 14, has no significance.

Plaintiffs also contend they are *not* speculating about the terms of St. Isidore's admissions, student discipline, and employment policies because "the signed contract incorporates St. Isidore's application wholesale." Opp. 14. But that contention is clearly wrong. The application contained no employment policies, and it stated "the [St. Isidore] Board has not formally adopted a Discipline Policy." Pet., Ex. A, at 43. Further, the contract term that Plaintiffs cite, Ex. P § 11.9, says nothing about policies; rather, the contract elsewhere provides that St. Isidore will have its own student discipline and employment "policies and procedures" without any specification of what those will be. *Id.* §§ 8.10 & –11. Plaintiffs continue to speculate about the policies they are challenging. *See* Opp. 14 (different school handbook).

Finally, in arguing that dismissal of their unripe claims will cause them hardship, Opp. 16, Plaintiffs make no mention of their actual claims—and of course there is no hardship in requiring Plaintiffs to wait until an alleged discriminatory or other improper act occurs before suing over it. *See French Petrol. Corp.*, 805 P.2d at 653 (noting parties suffer no hardship when court withholds decision "depending on uncertain future events") (citing *H & L Operating Co. v. Marlin Oil Corp.*, 1987 OK 39, ¶ 10, 737 P.2d 565, 567–68). Plaintiffs assert only that the funding of St. Isidore is a hardship. Opp. 16–17. But they make no argument that their flawed

claims of future discrimination, failure to serve disabled students, and improper EMO relationship could even affect St. Isidore's funding. And if cancellation of funding is not an available judicial remedy for those claims, it can provide no basis for any claim of hardship.

II. Plaintiffs Lack Standing.

Plaintiffs' Opposition fails to show how the Board's approval of St. Isidore caused them a concrete and particularized injury in fact. They do not dispute that they have failed to "allege facts that establish their tax liability will be impacted" and allege only that "they believe funds may be reallocated from other charter schools to St. Isidore." *Compare* Mot. 8, *with* Opp. 9–11. Plaintiffs' "conjectural [and] hypothetical" allegation that funds *may be* reallocated is insufficient to establish standing. *Toxic Waste Impact Grp., Inc. v. Leavitt*, 1994 OK 148, ¶¶ 8–9, 890 P.2d 906, 910–11.

Plaintiffs set up a strawman by misstating the Board's reliance on *Vette v. Childers*, 1924 OK 190, 228 P. 145. The Board does not contend that taxpayers have standing *only* if they can show that their individual tax bill "is higher than it would be, but for the allegedly unlawful government action." *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 619 (2007) (Scalia, J., concurring). Rather, Plaintiffs must show how the Board's approval of St. Isidore is an injury "inflicted upon the community or state at large," *Vette*, 228 P. at 145–46, that "immediately affect[s]" taxpayers to justify "interfere[nce] directly in their own names." *Kellogg v. Sch. Dist. No. 10 of Comanche Cnty.*, 1903 OK 81, 74 P. 110, 114.

Kellogg does not give taxpayers carte blanche to bring suits to enjoin public actions. There, the Supreme Court held that a taxpayer "may invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the municipality, or the illegal creation of a debt which he, in common with other property owners, may otherwise be compelled to pay." 74 P. at 116. But the Supreme Court "did not recognize a general class of [public avengers] who are allowed to bring public actions for the vindication of public rights and the correction

of purely public wrongs of whatever nature." *Tulsa Indus. Auth.*, 270 P.3d at 126.[2] Rather, a taxpayer may only "use equity to correct a public wrong by [a] public body *when the wrong involved the creation of illegal debts of, and the wrongful expenditure of moneys of, the taxpayers*." *Id.* (emphasis added); *accord Farrimond v. Coalgate Sch. Dist.*, 1910 OK 67, 108 P. 371, 371–72 (same); *Thompson v. Haskell*, 1909 OK 140, 102 P. 700, 704–05 (same). These taxpayers, the Court reasoned, are distinct from public avengers because they "constitute a class specially damaged by the unlawful act, in the increase of the burden of taxation upon their property." *Kellogg*, 74 P. at 115. Failure to make this showing means that plaintiffs lack this "special interest ... distinct from that of the general public," *id.*, making them no different from the class of public avengers whom the Supreme Court does not recognize.

Plaintiffs' claims fall outside the realm of taxpayer standing. Plaintiffs do not allege that the Board will spend state funds that will adversely impact them as taxpayers. Instead, they merely allege that they "believe[]" funds may be reallocated from other public schools to St. Isidore. Pet. ¶¶ 1, 13, 16, 18–20. Reallocating funds does not affect tax liability. And fear of fund reallocation raises "nothing but pure speculation." *Carlock v. Workers' Comp. Comm'n*, 2014 OK 29, ¶ 3, 324 P.3d 408, 409 (Taylor, J., concurring). Indeed, funding of St. Isidore may never occur, as state funding will depend entirely on how many students attend. *See* 70 O.S. § 3-142(B)(2) ("[F]ull-time virtual charter school shall receive revenue equal to that which would be generated by the estimated weighted average daily membership calculated pursuant to this paragraph"). Plaintiffs have failed to make the showing necessary for taxpayer standing.

Plaintiffs also fail to distinguish *McFarland v. Atkins,* 1979 OK 3, 594 P.2d 758. There, the taxpayer-appellants' "true complaint" was that Planned Parenthood was "not complying with certain laws and rules" and thus could not receive state funds. *Id.* at 762. The Supreme Court held that taxpayer status did not grant plaintiffs standing to "compel [another] to follow

[2] The Court referred to these unrecognized litigants as "non-Hohfeldian plaintiffs." *Tulsa Indus. Auth.*, 270 P.3d at 126. "A non-Hohfeldian plaintiff sues to secure judicial relief that would benefit a public entity or the community as a whole. A Hohfeldian plaintiff seeks to adjudicate a claimed right, privilege, immunity, or power with respect to another party." *Id.* at 126 n.47 (citations omitted).

all applicable laws and regulations," and a plaintiff cannot "circumvent her lack of standing by alleging that unlawful expenditures of State funds are involved." *Id.* That is precisely the case here: Plaintiffs seek to restrain expenditure of state funds on allegations that St. Isidore will not comply with the law. Plaintiffs' claim that they are challenging the "underlying financial relationship" between the State and St. Isidore, Opp. 11, is the argument that the Supreme Court considered and rejected in *McFarland.*

III. Plaintiffs Have No Private Right of Action on Their Non-Constitutional Claims.

In their Opposition, Plaintiffs make no argument that they have a private right of action under the Act or the Board's rules. *See* Opp. 11–13. Thus, the Board's argument that Plaintiffs have no such right under the standards of *Owens*, 503 P.2d 1211, and *Holbert v. Echeverria*, 1987 OK 99, 744 P.2d 960, remains undisputed. And the two arguments that Plaintiffs advance to defend their right to bring their non-constitutional claims are wholly without merit.

Plaintiffs first argue that they need no right of action because taxpayers may challenge public spending "on any ground that makes that funding illegal." Opp. 11. But the cases they cite *all* involve standing. The Supreme Court rejected a similar tactic in *Owens*, calling the plaintiffs' reliance on a standing case "misplaced," because the case "does not support a private right of action" and "is about standing." 503 P.3d at 1216. Moreover, Plaintiffs here seek to enforce their views of numerous provisions in the Act and the Board's rules, Pet. ¶¶ 218, 231, 233, 247 & 254—a fundamentally different set of claims than an attempt generally to restrain a "wrongful expenditure." *Tulsa Indus. Auth.*, 270 P.3d at 126. Finally, the taxpayer-intervenor in *Tulsa Industrial Authority* was pursuing a legislatively authorized remedy, 12 O.S. § 1397. As the Supreme Court later explained, "[w]hen a legal proceeding is brought for injunctive relief because of a public official's failure to comply with law, then *the plaintiff must possess a legal interest or cause of action arising from this failure personal to the plaintiff* and apart from the public generally, unless the legislature has expressly authorized the equitable remedy, such as [a § 1397] injunction to restrain an illegal tax ...." *Farley v. City of Claremore*, 2020 OK 30, ¶ 64, 465 P.2d 1213, 1242 (citing *Tulsa Indus. Auth.*, 270 P.3d at 125–26). "Without a cause of action, [Plaintiffs] cannot state a claim upon which relief can be granted." *Owens*, 503

P.3d at 1215.

Alternatively, Plaintiffs point to the Declaratory Judgment Act, 12 O.S. § 1651, as supplying a cause of action for their claims for declaratory relief. But "[t]he Declaratory Judgment Act ... does not provide a separate theory of recovery, it is a procedural statute providing a remedy in certain circumstances." *Tyree v. Cornman*, 2019 OK CIV APP 66, ¶ 36, 453 P.3d 497 (citing *Conoco, Inc. v. State Dep't of Health*, 1982 OK 94, ¶ 18, 651 P.2d 125, 131). To obtain that remedy, "a claim of right [must be] asserted" by one with a "legally protectible interest." *City of Blackwell v. Wooderson*, 2017 OK CIV APP 33, ¶ 8, 397 P.3d 491, 494–95 (quoting *Gordon v. Followell*, 1964 OK 74, ¶ 8, 391 P.2d 242, 244). Because Plaintiffs have no right to bring claims under the Act or Board rules, those claims must be dismissed.

IV. The Board is Immune from Suit on Plaintiffs' Claims.

"The State of Oklahoma ... adopt[ed] the doctrine of sovereign immunity" in the Governmental Tort Claims Act ("GTCA"), 51 O.S. § 152.1. Plaintiffs do not dispute that the GTCA's "immun[ity] from liability for torts," *id.*, applies to the Board; nor do they dispute that their claims fall squarely within § 152(14)'s broad definition of "tort." *Compare* Pet. 10, *with* Opp. 17–19. Rather, Plaintiffs contend that sovereign immunity does not apply because "[t]he word 'liability, as used in the [GTCA], ... excludes injunctive and declaratory relief." Opp. 18. But Plaintiffs offer no basis for narrowing the immunity plainly conferred by statute.

Although the Act does not define it, "[t]he word 'liability' is a broad legal term" and includes the "condition of being actually or potentially subject to an obligation." Black's Law Dictionary 823 (5th ed. 1979). It is a word used throughout the GTCA, including in the key provision specifying that "[t]he *liability* of the state ... under [the GTCA] shall be exclusive and shall constitute the extent of tort *liability* of the state." 51 O.S. § 153 (emphasis added). There would be a sizable hole in the GTCA if litigants could obtain injunctive and declaratory relief in addition to their "exclusive" tort remedies. *Id.* But "liability" includes *any* relief sought in a judgment entered against a defendant, including the relief that Plaintiffs seek here. *See* Pet. ¶ 266 (requesting a judgment imposing prohibitions and obligations, including costs and fees).

The authorities cited in the Opposition are not to the contrary. Most—such as Plaintiffs'

citation to the wholly inapplicable Risk Retention Act, 36 O.S. § 6453—do not address the GTCA.[3] In *Sholer v. State ex rel. Dep't of Pub. Safety*, the Supreme Court held that the GTCA was no bar to a class action seeking recovery of driver's license fees because the alleged wrong was not a "tort"—something plaintiffs do not argue. 1997 OK 89, ¶ 14, 945 P.2d 469, 472. And in *Barrios v. Haskell Cnty. Pub. Facilities Auth.*, the Supreme Court recognized that in 2014 the legislature "amended the definition of 'tort' to include tort claims arising from alleged violations of constitutional duties," 2018 OK 90, ¶ 10, 432 P.3d 233, 238, just like the claims Plaintiffs assert here.[4] In short, the GTCA provides the Board with immunity from "liability" on all of Plaintiffs' claims.

The Board is also immune from "civil ... liability" under the Act itself. 70 O.S. § 3-134(L). Once again, Plaintiffs do not dispute that their claims fall within the scope of this immunity provision. *See* Opp. 19–20. They simply repeat the meritless argument that "liability" does not cover injunctions and declaratory judgments without any analysis of that statute at all. On both immunity statutes, Plaintiffs' arguments fail.

V. Plaintiffs Fail to State Any Cognizable Claim for Relief.

Plaintiffs' Opposition ignores many deficiencies identified in the Board's Motion, and its remaining arguments miss the mark. St. Isidore's application contained signed and notarized statements unambiguously certifying its commitment to comply with all applicable legal requirements, often tracking statutory or regulatory language. And the school restated these obligations in its charter contract. Desperate to find a problem where none exists, Plaintiffs urge this Court to disregard St. Isidore's substantial commitments based on speculation that the school will not keep its word. The law prohibits this Court from indulging that speculation, and

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[3] Only one of the eight cases cited on page 19 involved the GTCA, and that case, *Farley,* held that the GTCA barred the plaintiff's wrongful death action. 465 P.3d at 1240. That the plaintiff also lacked standing to pursue injunctive relief hardly shows the GTCA did not apply.

[4] Footnote 13 in *Barrios,* on which Plaintiffs rely, merely discussed the history of the GTCA before the legislature amended it in 2014 and did not consider the definition of "liability." 432 P.3d 233. Likewise, *Abab, Inc. v. City of Midwest City*, which addressed compliance with the GTCA's notice requirements, did not address the scope of the term "liability." 2020 WL 9073568, at *1 (W.D. Okla. Sept. 1, 2020).

Plaintiffs' hyperbolic doubt of St. Isidore's certifications reflects hostility toward religion. The Petition should be dismissed under § 2012(B)(6) because it lacks "any cognizable legal theory to support the claim[s] or for insufficient facts under a cognizable legal theory." *May v. Mid-Century Ins. Co.*, 2006 OK 100, ¶ 10, 151 P.3d 132, 136.

A. Claim I Fails Because St. Isidore Certified Its Intent Not to Discriminate.

The Board's rules require virtual charter school applicants to "include signed and notarized statements ... showing their agreement to fully comply as an Oklahoma public charter school with all statute[s], regulations, and requirements 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). These statements must "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." *Id.* Plaintiffs' First Claim alleges that St. Isidore failed to include such statements, but the Opposition shows that claim fails for three reasons.

First, Plaintiffs do not deny that St. Isidore's application included statements tracking the rule's required language. *See* Opp. 21–23; Pet., Ex. A (App. F). St. Isidore certified that it "[f]ully complies with ... all statutes, regulations, and requirements of the United States of America, the State of Oklahoma, the Oklahoma Statewide Virtual Charter School Board, and the Oklahoma Department of Education," and confirmed that it "[g]uarantees access to education and equity for all eligible students regardless of their race ethnicity, economic status, academic ability, or other factors...." Pet., Ex. A (App. F, Sec. 2). These words express affirmative commitments that satisfy the Board's rule. The Court's inquiry can—and should—end here.

Second, Plaintiffs' entire claim rests on an erroneous theory: that St. Isidore stepped out of compliance by clarifying that it would comply with the listed requirements "to the extent required by law, including the First Amendment, religious exemptions, and the Religious Freedom Restoration Act...." *Id.* But the First Amendment and its religious exemptions *are among* the "requirements of the United States of America" with which St. Isidore agreed to comply. Indeed, in quoting the Board's rule, Plaintiffs notably omit reference to "requirements of the United States," thereby obscuring the harmony between the rule's text and St. Isidore's

clarifying statement. Opp. 21. Likewise, ORFA *is among* the "statutes [of] the State of Oklahoma," 51 O.S. § 253, that St. Isidore promised to follow. Because the listed legal requirements include—and are necessarily constrained by—these religious protections, St. Isidore's clarifying statement did nothing to nullify its commitments to comply with the law. *See In re Initiative Pet. No. 349, State Question No. 642*, 1992 OK 122, ¶ 12, 838 P.2d 1, 7 (noting that Oklahoma Constitution and Supreme Court are constrained by U.S. Constitution); *Steele v. Guilfoyle*, 2003 OK CIV APP 70, ¶ 7, 76 P.3d 99, 102 (holding that ORFA "prohibit[s] laws or regulations that place a 'substantial burden' on a person's free exercise of religion").

Third, Plaintiffs fail to overcome the deference to which the Board is entitled. The Board is generally entitled to deference when interpreting its own rules, particularly when "(1) acting in its area of expertise or (2) applying a longstanding administrative construction" of its regulation. *Okla. Gas & Elec. Co. v. State ex rel. Okla. Corp. Comm'n*, 2023 OK 33, ¶ 8, 535 P.3d 1218, 1222–23. Here, the Petition fails to include any allegation that the Board acted outside its area of expertise, *id.*, and the absence of such allegations are a deficiency in the Petition, not the Board's Motion to Dismiss. Indeed, the Board acted squarely within the scope of its exclusive competence and expertise. *See* 70 O.S. § 3-145.1 (Board is "sole authority to authorize and sponsor statewide virtual charter schools"); *Id.* § 145.3 (empowering Board to "[e]stablish a procedure for accepting, approving and disapproving statewide virtual charter school applications"). Because St. Isidore's statements satisfy the Board's rules, this Court should dismiss Claim I.

B. Claim II Fails Because St. Isidore's Application Complies With Oklahoma Non-Discrimination Law.

Plaintiffs' Second Claim alleges that the Board unlawfully approved St. Isidore because Plaintiffs speculate that the school *will unlawfully discriminate* in student admissions, student discipline, and employment, despite St. Isidore's certifications to the contrary. Pet. ¶¶ 236–38. Apart from being premature, *see supra* Part I, this claim fails for four reasons.

First, Plaintiffs ignore St. Isidore's religious protections. As the Board acknowledged in its Contract with St. Isidore, when a charter school is religious, "Applicable Law" includes

non-discrimination laws *and* "Religious Protections" like the First Amendment, RFRA, ORFA, and Art. I § 2 of the Oklahoma Constitution. Plaintiffs' Opposition cites numerous laws concerning discrimination but notably omits reference to these protections. Opp. 23–28. Yet Plaintiffs do not deny that St. Isidore is entitled to the ministerial exception when making employment decisions as a private entity; they simply (and wrongly) assert St. Isidore is a state actor. Opp. 51; *see Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1929 (2019) (listing "very few" functions that the state has "traditionally *and* exclusively" performed).[5] The Petition does not allege a cognizable claim because St. Isidore has committed to comply with applicable law, including applicable religious protections.

Second, this claim fails because the statements in St. Isidore's application, on their face, satisfied all legal requirements. The Petition challenges the Board's approval of St. Isidore's *application*, but Plaintiffs' Opposition does not dispute that the application expressed St. Isidore's commitment to forbid "any unlawful discrimination, harassment, or retaliation... on the basis of a person's race, color, national origin, disability, genetic information, sex, pregnancy (within church teaching), biological sex (gender), age, military status, *or any other protected classes recognized by applicable federal, state, or local law* in its programs and activities." Pet., Ex. A at 168 (emphasis added). The Opposition does not deny that St. Isidore promised to welcome students regardless of religious affiliation. *Id.* at 104 ("People of other faiths or no faith are welcome to attend our Catholic schools," and "[t]hey will not be required to affirm our beliefs"). Nor does the Opposition deny that the application certified compliance with "all applicable local, state and federal laws and regulations governing fair employment practices." *Id.* at 109. These statements plainly satisfied all legal requirements.

Third, Plaintiffs cannot disregard St. Isidore's non-discrimination statements simply because the application *also* sought to preserve the school's Catholic identity. Opp. 26–27. Non-Catholic students and employees are welcome and "will not be required to affirm our

[5] Among other critical errors, Plaintiffs ignore the requirement that they "show ... a sufficiently close nexus between the State and the challenged action of [St. Isidore] so that the action of the latter may be fairly treated as that of the State itself." *Blum v. Yaretsky,* 457 U.S. 991, 1004 (1982) (internal quotation omitted).

beliefs," Pet., Ex. A at 104, but neither may they undermine or violate those beliefs. The school's prohibition against religious discrimination in employment is wholly consistent with its requirement that all employees have a basic "understanding of the Catholic Church and ... refrain from actions that are contrary to the teachings of the Church." *Id.* at 105. Similarly, St. Isidore welcomes students "of different faiths or no faith," *id.* at 38, while asking that they respect to the beliefs, expectations, policies, and procedures of the school. *Id.* Simply put, St. Isidore's non-discrimination statements satisfy Oklahoma law, and they are not to be ignored simply because the school maintains its religious identity.

Finally, Plaintiffs double down on their theological and ecclesiastical speculation, citing the Catechism of the Catholic Church to infer that St. Isidore's fidelity to doctrine will result in unlawful policies, and citing handbooks of *other schools* to conjecture that the Archdiocese of Oklahoma might mandate certain policies for St. Isidore. Opp. 28. As explained above, *see supra* Part I, these claims are premature, and the best evidence of St. Isidore's intentions when the Board approved it is the application; the Board was not required to search for external material that might contradict the application. Plaintiffs' speculative allegations cannot eclipse the application's unambiguous statements that the school will not unlawfully discriminate. *Turner v. Sooner Oil & Gas Co.*, 1952 OK 171, ¶ 14, 243 P.2d 701, 704 (holding that language of source document attached to petition overrides petition's contradictory allegations). The Court should dismiss Claim II for failure to state a cognizable claim.

C. Claim III Fails Because St. Isidore Certified It Will Adequately Serve Students with Disabilities.

In a single paragraph that fails to engage the Board's Motion, Plaintiffs' Opposition merely repeats the Third Claim that St. Isidore will not serve students with disabilities. Opp. 29. This claim fails for two reasons.

First, the Opposition fails to refute that St. Isidore's reference to the First Amendment and the virtual "instructional model of the school" did not abrogate the school's stated commitment to comply with applicable disability laws. *Id.* Mere reference to the First Amendment does not plausibly establish unlawful conduct, and the Petition fails to identify any legal

requirement relating to children with disabilities that conflicts with St. Isidore's religious tenets. St. Isidore's application also stated that services for disabled students will be provided "to the maximum extent possible through a virtual education program." Pet. ¶ 160. The Opposition fails to respond to the Motion's explanation that virtual charter schools necessarily accommodate disabilities differently than brick-and-mortar schools, Opp. 29, and ignores the fact that St. Isidore will consider "[a]lternative placements" for children who "need[] more intensive support and programming than what a virtual program can offer." Pet., Ex. A at 73.

Second, the Opposition abandons theories rebutted by the Board's Motion. For example, the Petition alleges that the Board violated § 136(A)(7) of the Act, which requires St. Isidore to adopt a *charter* ensuring compliance with laws governing the education of children with disabilities. Pet. ¶¶ 154–68. Plaintiffs failed to respond to the Board's argument that the Petition only addresses St. Isidore's *application*, and Plaintiffs have not amended their Petition to include any allegation regarding the terms of any charter. The Opposition ignores this deficiency, even though the charter contract now exists. Opp. 29. Similarly, OAC § 777:10-3-3(c)(3)(D) provides that the Board "may" consider disability factors when evaluating a charter school application, but the Petition does not allege that the Board failed to consider any necessary factor. Pet. ¶¶ 158, 244. The Opposition also ignores this deficiency. Opp. 29.

D. Claim IV Fails Because St. Isidore's Proposed EMO Is a "Separate Entity" and No Board Member Will Receive Pecuniary Gain.

Plaintiffs' Fourth Claim alleges that the Board's approval of St. Isidore violated two rules—one requiring that the school and its EMO be "separate entities in all aspects," OAC § 777:10-1-4(1), and another providing that no board member of the school shall "receive pecuniary gain, incidentally or otherwise, from the earnings of the [EMO] or school." *Id.* § 10-3-3(d)(4)(I). This claim fails for two reasons.

First, St. Isidore is a separate entity from its EMO, the Archdiocese of Oklahoma City's Department of Catholic Education. On this point, the Opposition merely restates the Petition's allegations, Opp. 29–30, and Plaintiffs do not dispute that St. Isidore is a separate Oklahoma non-profit entity with its own Certificate of Incorporation, Pet. ¶ 41, its own bylaws, *id.* ¶ 174,

and its own governing board of directors, *id.* ¶ 178. That both may participate in the same conferences or share some of the same board members does not make them the same.

Second, the Opposition parrots the Petition's allegations of improper "pecuniary gain" without responding to the Board's Motion. Opp. 30. Plaintiffs merely reassert that the Director of Catholic Education for the Archdiocese of Oklahoma City, who sits on St. Isidore's board, will "receive pecuniary gain" from the operations of St. Isidore and its EMO, *id.*, but they do not address the Petition's failure to allege how any board member will *personally* and *financially* benefit. *See Ponca City Welfare Ass'n v. Ludwigsen*, 1994 OK 110, ¶ 12, 882 P.2d 1062, 1066 (for "pecuniary gain[,] the purpose ... must be profit"). Indeed, St. Isidore's application confirmed that the school "does not afford pecuniary gain, incidentally or otherwise, to its members." Pet., Ex. B at 2. The Court should dismiss Claim IV for failure to state a claim.

E. Claim V Fails Because the Board Could Not Lawfully Discriminate Against St. Isidore Because of its Religious Character.

Plaintiffs' Fifth Claim alleges that the Board violated both the Oklahoma Constitution and the Act when it approved St. Isidore as a virtual charter school. If the Supreme Court assumes original jurisdiction of the AG's pending action, however, the Supreme Court will likely resolve these issues. The Board thus reiterates the arguments in its Motion and refrains from further briefing those issues here.[6]

CONCLUSION

For the foregoing reasons, the reasons in the Board's opening memorandum, and the reasons in the opening and reply briefs of the other Defendants, Plaintiffs' Petition should be dismissed.

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[6] One of Plaintiffs' arguments warrants brief mention. They insist that "even if St. Isidore were not a state actor, the Establishment Clause would still prohibit Oklahoma from funding religious education or activity at a charter school." Opp. 52. This is meritless. The U.S. Supreme Court has confirmed that direct state funding to religious schools does not violate the Establishment Clause, *Carson,* 596 U.S. at 781, and "there is no 'historical and substantial' tradition against aiding [religious] schools comparable to the tradition against state-supported clergy." *Espinoza*, 140 S. Ct. at 2259.

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Respectfully submitted,

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**Admitted Pro Hac Vice Application*
***Pro Hac Vice Application Forthcoming*

CERTIFICATE OF SERVICE

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