IN THE DISTRICT COURT OF 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 OKLAHOMA STATE DEPARTMENT OF EDUCATION AND DEFENDANT STATE SUPERINTENDENT OF PUBLIC INSTRUCTION RYAN WALTERS REPLY IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

Plaintiffs, in their Consolidated Opposition, attempt to obfuscate binding precedent, confuse the facts, and resurrect legal doctrines laid to rest by the United States Supreme Court. But under current precedent, the issues presented in this case are simple. The Department cannot deny state aid to St. Isidore—a private actor—without violating the Free Exercise Clause of the United States Constitution, the Oklahoma Constitution, and the Oklahoma Religious Freedom Act. And, as pled, the Plaintiffs are yet to demonstrate a justiciable cause of action for this Court to act upon. Therefore, the Court should dismiss the Plaintiffs' Petition for failure to state a claim.

ARGUMENT

I. ST. ISIDORE IS NOT A STATE ACTOR.

The arguments in Plaintiffs Consolidated Opposition rely almost entirely on the classification of St. Isidore as a state actor. But, under United States Supreme Court precedent, simply labeling charter schools "government entities" or "public schools" does not suffice to transform St. Isidore into a state actor. *See* Pls. Cons. Opp'n at 39-42. The Plaintiffs argue that because the Charter Schools Act offers a mechanism for establishing charter schools, that St. Isidore itself is a "governmental entity." In *Carson v. Makin*, Maine attempted a similar mischaracterization to continue excluding religious institutions from its tuition assistance program. *See Carson v. Makin,* 596 U.S. 767, 782 (2022). Because many districts in Maine are too rural to operate school districts, the State, to comply with its constitutional obligations to provide public schools, offered tuition assistance to families for use at private schools—provided the school was not religious. *Carson,* 596 U.S. at 773. To eschew the precedent set in *Trinity Lutheran Church* and *Espinoza* that disallowed similar religious exclusions, Maine attempted to reframe its tuition assistance as "the rough equivalent of the public-school education that [it] may permissibly require

to be secular." *Id.* at 782. Maine argued that this outsourcing of a constitutional obligation allowed it to reframe its school choice program into "a free public education." *Id.*

The Plaintiffs are making the same arguments here that failed in *Carson* by recasting charter schools as "public." Labeling charter schools as "public" or "local education agenc[ies]" and arguing that Oklahoma is outsourcing the provision of free public education is irrelevant. Pls. Cons. Opp'n at 40-42, 45. The United States Supreme Court does not rely on labels but instead analyzes relevant functions. *Carson,* 596 U.S. at 783; *see also Rendell-Baker v. Kohn*, 457 U.S. 830, 839-843 (analyzing whether a private alternative school is a state actor) Indeed, "the definition of a particular program can always be manipulated," and forcing Oklahoma to "recast" charter schools as state actors "would be to see the First Amendment . . . reduced to a simple semantic exercise." *Carson,* 596 U.S. at 784 (quotations omitted). To avoid that consequence in *Carson,* the United States Supreme Court noted that "[t]he differences between private schools eligible to receive tuition assistance under Maine's program and a Maine public school are numerous and important." *Id.* at 783. These differences—or factors—are among the same present between public schools and charter schools in Oklahoma, including offering varied and unique curricula that are exempt from state requirements and hiring teachers outside of the typical state-certification rules. *Id.* at 783. Labels are irrelevant and meaningless.

The Plaintiffs additionally rely on the symbiotic relationship and public-function tests to argue that St. Isidore is a state actor. *See* Pls.' Cons. Opp'n. at 43-45. But their analysis neglects to mention that the Supreme Court considered and rejected state actor status under both of these tests in *Rendell-Baker,* the precedent governing whether schools operated by private boards are state actors. *See Rendell-Baker,* 457 U.S. at 842-843. No symbiotic relationship is present between a school and the government when "the school's fiscal relationship with the State is not different

from that of many contractors performing services for the government." *Rendell-Baker,* 457 U.S. at 843. St. Isidore's relationship with the State is established through execution of a contract with its sponsor, the Statewide Virtual Charter School, and fiscally, it receives funding though application of statutorily-defined formula. Additionally, simple accreditation and distribution of state aid does not "entwine[]", *Rendell-Baker,* 457 U.S. at 847 (Marshall, J., dissenting), the Department with a privately-operated charter school that "may offer a curriculum which emphasizes a specific learning philosophy or style or certain subject areas . . . ," 70 O.S. § 3-136(A)(3), is "exempt from all statutes and rules relating to schools, boards of education, and school districts," *id.* at § 3-136(A)(5), and is not required to hire state-certified teachers. More closely resembling a traditional private school, the stated goal of charter schools is to encourage "the use of different and innovative teaching methods," *id.* at § 3-131(A), and diversify options for Oklahoma families by providing "additional academic choices for parents and students." *Id.*

The *Rendell-Baker* Court also rejected the public-function analysis: "That a private entity performs a function which serves the public does not make its acts state action." *Rendell-Baker,* 457 U.S. at 842. The Court emphasized that the Massachusetts legislature's choice to provide public funding for students attending an alternative school "in no way makes these services the exclusive province of the State." *Id.* Similarly, Oklahoma's operation of traditional public schools, and its choice to offer funding to other contractors operating charter schools, does not make all education "traditionally the *exclusive* prerogative of the State." *Rendell-Baker,* 457 U.S. 842.

Lastly, Plaintiffs rely on *Brammer-Hoelter v. Twin Peaks Charter Academy, Coleman v. Utah State Charter School Board,* and *Dillon v. Twin Peaks Charter Academy* to argue that the Tenth Circuit views charter schools as state actors. Pls.' Cons. Opp'n at 45. But unlike courts in *Caviness, Logiodice,* and *Robert S.*, these Tenth Circuit decisions do not devote any analysis to

the issue of whether charter schools are state actors and therefore cannot be said to have meaningfully considered the state action analysis.

Under established precedent, St. Isidore is not a state actor. Therefore, two First Amendment principles apply: the Department may freely distribute state aid to St. Isidore without violating the Establishment Clause, and the Department must respect St. Isidore's rights as a private actor under the Free Exercise Clause.

II. THE FREE EXERCISE CLAUSE PROTECTS ST. ISIDORE'S RIGHT TO RECEIVE STATE AID FROM THE DEPARTMENT.

In their Consolidated Opposition brief, the Plaintiffs argue that compliance with the federal Establishment Clause satisfies strict scrutiny in a Free Exercise Clause analysis. *See* Pls.' Cons. Opp'n at 52. But this argument relies on the incorrect assumption that St. Isidore is a state actor and is bound by the Establishment Clause. The Establishment Clause serves as a structural restriction on the power of the government and applies with no force against private actors. In the alternative, Plaintiffs argue that Establishment Clause prevents the Department from funding religious institutions. This argument ignores the last six years of United States Supreme Court decisions holding otherwise. *See Trinity Lutheran Church, Inc. v. Comer*, 582 U.S. 449, 467 (2017) ("But the exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same and cannot stand."); *Espinoza v. Mont. Dep't of Revenue,* 140 S. Ct. 2246, 2262-63 (2020) ("[The Constitution] condemns discrimination against religious schools and the families whose children them. They are members of the community too, and their exclusion from the scholarship program here is odious to our Constitution and cannot stand." (cleaned up)); *Carson,* 596 U.S. at 789 ("Maine's 'nonsectarian' requirement for otherwise generally available tuition assistance payments violates the Free Exercise Clause of the First Amendment. Regardless of how the benefit and restriction

are described, the program operates to exclude otherwise eligible schools on the basis of their religious exercise."). And much like the program in *Zelman*, any funding will only reach St. Isidore if parents independently chose to enroll their students—without students, St. Isidore will not receive a dime. *See* 70 O.S. § 3-142.

Plaintiffs' arguments rely on a defunct understanding of the interaction between the Establishment Clause and the Free Exercise Clause. Pls.' Cons. Opp'n at 53. The cases used to support their argument: *Agostini v. Felton, Bowen v. Kendrick, Roemer v. Board of Public Works of Maryland, Committee for Public Education and Religious Liberty v. Nyquist,* and *Hunt v. McNair* all rely on the overturned *Lemon v. Kurtzman* framework. *Id.; see Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427 (2022) ("What the [school] District . . . overlooked . . . is that the shortcomings associated with [*Lemon*'s] ambitious, abstract, and ahistorical approach to the Establishment Clause became so apparent that this Court long ago abandoned *Lemon* and its endorsement test offshoot." (cleaned up)); *see also Groff v. Dejoy*, 600 U.S. 447, 460 (2023) ("Just over three weeks later, the Court had handed down its (now abrogated) decision in [*Lemon*] . . ." (citing *Kennedy,* 142 S. Ct. at 2427)). Dissenting from the *Kennedy* majority, Justices Sotomayor, Breyer, and Kagan all agreed that "overrul[ing]" *Lemon* "calls into question decades of subsequent precedents that [are] offshoots of that decision." *Kennedy,* 142 S. Ct. 2434 (Sotomayor, J., dissenting) (cleaned up). This Court should not be persuaded by the recently rejected holdings in these cases to satisfy strict scrutiny. Rather, the Court should follow the approach articulated in the free exercise trilogy to "decide[] this case conformably to the Constitution of the United States." *Espinoza,* 140 S. Ct. at 2262 (quotations omitted).

III. THE OKLAHOMA CONSTITUTION ALLOWS THE DEPARTMENT TO DISTRIBUTE AND PROTECTS ST. ISIDORE'S RIGHT TO RECEIVE STATE AID.

A. THE DEPARTMENT MUST PERFECTLY TOLERATE ST. ISIDORE'S RELIGIOUS CHARACTER.

The Plaintiffs argue that Article I, § 2 prevents St. Isidore from operating according to its plans because it would be "inculcate[ing] a particular religion in its students." Pls.' Cons. Opp'n at 31. By incorrectly labeling St. Isidore a state actor, the Plaintiffs ask this Court to tolerate everyone's religion *but* St. Isidore's. The reality is that, as a private actor, St. Isidore will receive "at least the same protections as the federal . . . Free Exercise Clause[]" under Article I, § 2. Pls.' Cons. Opp'n at 32. However "separate" the Framers envisioned church and state to be in Oklahoma, that separation cannot go so far as to violate the rights Oklahomans enjoy under the Free Exercise Clause of the United States Constitution.

The Oklahoma Constitution may be even more protective of free exercise of religion than its federal counterpart. *See Guinn v. Church of Christ of Collinsville,* 1989 OK 8, ¶ 5 n.4, 775 P.2d 766, 788 n.4 (Kauger, J., concurring in part) (comparing the Pennsylvania guarantee of religious freedom to Article I, § 2, as "another example of state constitutions providing more explicit guarantees of individual rights," despite differing in language from the federal Free Exercise Clause). "States, in the exercise of their sovereign power, may afford more expansive individual rights and liberties than those conferred by the United States Constitution," as "[t]he United States Constitution provides a floor of constitutional rights." *Id.* at ¶ 6; *see also De Hasque v. Atchison, Topeka, & Santa Fe. Ry. Co,* 1918 OK 292, 173 P. 73, 77 ("We find language which, either directly or by clear implication, recognizes a profound reverence for religion, and an assumption that its influence is essential to the well–being of the community."). In line with the Supremacy Clause, this Court should read Article I, § 2 in harmony with the Free Exercise Clause. Therefore, because

the United States Free Exercise Clause requires that the Department include St. Isidore in state aid distribution in the same way it includes secular charter schools, this Court should resist both Petitioners' attempts to recast the Oklahoma Constitution to require otherwise.

B. DISTRIBUTION OF STATE AID TO ST. ISIDORE DOES NOT VIOLATE ARTICLE I, §5.

The Plaintiffs argue that Oklahoma's constitutional command to administer public education prevents the Department from funding St. Isidore. Article I, § 5 of the Oklahoma Constitution states that "Provisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of the state and free from sectarian control." But because charter schools supplement and do not replace the standard public school in every part of the state, there is an established system of public schools free from sectarian control. The Plaintiffs' argument suffers from the fallacy of composition, or "that an attribute of a 'whole' must exist because the attribute appears in a 'part' of that whole." *State ex rel. Bd. of Regents of Univ. of Oklahoma v. Lucas,* 2013 OK 14, ¶ 30 n.26, 297 P.3d 378, 392 n.26. *see* Pls.' Cons. Opp'n at 35 ("If even one school is under sectarian control, then the system is partially under sectarian control."). There are over 500 public school districts across the state of Oklahoma, all of which are free from sectarian control. Consistent with the Oklahoma Constitution, every student in this state—from Boise City to Haworth—has access to a nonsectarian public school. Any distribution of state aid to St. Isidore, a single virtual charter school with voluntary attendance, will not change that fact.

C. DISTRIBUTION OF STATE AID IS ALLOWED UNDER ARTICLE II, §5 AND *OLIVER.*

The Plaintiffs attempt to distinguish *Oliver* by emphasizing the element of parental choice present for parents under the Lindsey Nicole Henry Scholarship and minimizing the role of parental choice for parents in attendance at St. Isidore. *See* Pls.' Cons. Opp'n at 36. The amount

of state aid distributed to St. Isidore is tied to the number of students. *See* 70 O.S. § 3-142. Just like the Lindsey Nicole Henry Scholarship, without parents choosing to enroll their student at St. Isidore, the school would not receive any state aid. *See Oliver v. Hofmeister,* 2016 OK 15, ¶ 21, 368 P.3d 1270, 1276 ("The scholarship program does not directly fund religious activities because *no* funds are dispersed to any private *sectarian* school until there is a *private independent selection* by the parents or legal guardian of an eligible student." (emphasis in original)).

IV. THE DEPARTMENT MUST FOLLOW THE OKLAHOMA RELIGIOUS FREEDOM ACT WHEN DISTRIBUTING STATE AID TO ST. ISIDORE.

Because St. Isidore is a private actor, it is protected under the Oklahoma Religious Freedom Act. ORFA explicitly provides that exclusion of a religious entity based solely on religious character is a substantial burden. 51 O.S. § 253(D). To eschew this strong protection, Plaintiffs attempt to argue that it would not be a substantial burden to deny funding to St. Isidore, because teaching religious curriculum is *religious conduct* rather than *religious character.* Pls.' Cons. Opp'n at 56. But these are distinction without difference. It should not surprise the Plaintiffs, some of whom are themselves clergy members or ministers, *see* Pet. ¶ 17, 18, 19, or this Court, that entities of a religious character engage in religious conduct. This argument mirrors another outdated understanding of the Constitution's religious clauses known as the "status/use distinction" derived from *Locke v. Davey. See* 540 U.S. 712 (1990). In *Locke*, a student sought to use state scholarship funds to receive training in devotional theology to become a church pastor. 540 U.S. at 717. Because the student was pursing vocational religious instruction, denial of the scholarship did not violate the Constitution. *Id.* at 725. This decision led to a Constitutional distinction between denial of public funds based on religious status and denial based on religious use—the same argument the Plaintiffs' attempt to resurrect here when interpreting the Oklahoma Religious Freedom Act. In *Espinoza,* Montana attempted to rely on *Locke* to deny families wanting

to us state tax credits at private religious schools, but the majority held that "A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious." *Espinoza,* 140 S. Ct. at 2261. In *Carson,* the Court explicitly stated that status/use distinction was "of no help" to a state attempting to deny public benefits to a private religious school outside of the specific context of vocational religious education. *Carson,* 596 U.S. at 788. "*Locke* cannot be read beyond its narrow focus on vocational religious degrees to generally authorize the State to exclude religious persons from the enjoyment of public benefits on the basis of their anticipated religious use of the benefits." *Id.* a 788–89. This Court should not depart from the Supreme Court's sound reasoning and resurrect the status/use distinction beyond the narrow and peculiar fact pattern of training future clergy by reading it into the Oklahoma Religious Freedom Act, nor should it look to legislative history when a statute is clear. *See Heath v. Guardian Interlock Network, Inc.*, 2016 OK 18, ¶ 13, 369 P.3d 374, 378. Because St. Isidore would be substantially burdened if the Department denied state aid based on its religious conduct and character, it must satisfy strict scrutiny. For the reasons articulated above and in the Department's Motion to Dismiss, it cannot.

V. AS PLED, PLAINTIFFS' CLAIMS ARE NOT JUSTICIABLE.

A. PLAINTIFFS' MUST PLEAD 42 U.S.C. § 1983 AS RIGHT OF ACTION.

The Plaintiffs argue that "[a] challenge to the legality of government action affecting the use of public funds is 'a matter of public right.'" Pls.' Cons. Opp'n at 11 (quoting *Fent v. Contingency Rev. Bd.*, 2007 OK 27, ¶ 8, 163 P.3d 512). But to make this argument, the Plaintiffs conflate the presence of a private right of action, or a party's "right to bring [that] specific case to court," with the jurisdictional concept of standing, or "a party's right to make a legal claim or seek judicial enforcement of a duty or right." *Right of Action, Standing, Black's Law Dictionary* (11th ed. 2019). In every lawsuit, the plaintiff must plead a right of action as a vehicle for the plaintiff

to bring the specific facts and legal argument to court. Once a claim is properly brought pursuant to a legal right of action, a Plaintiff must then allege that he or she has standing as the proper party to make such legal claims. The Plaintiffs' citations to *Fent, Immel,* and *Oklahoma Public Employees Association* reflect their confusion of these two concepts. *See* Pls.' Cons. Opp'n at 11-12. The discussion cited by the Plaintiffs in *Fent* is relevant to the plaintiff's standing as an "Oklahoma resident taxpayer, citizen and voter" to challenge what he views as constitutionally infirm expenditures. *Fent,* 2007 OK 27, ¶¶ 6-8. In *Immel*, the relevant analysis cited by the Plaintiffs comes from a discussion of standing and *qui tam* statutes. *Immel v. Tulsa Pub. Facilities Auth.,* 2021 OK 39, ¶¶ 12-15, 490 P.3d 135, 141-42. *Oklahoma Public Employees Association* concerned whether the "Plaintiffs, as taxpayers, possess standing to challenge an alleged unlawful expenditure of public funds." *Okla. Pub. Emps. Ass'n v. Okla. Dep't of Cent. Servs.,* 2002 OK 71, ¶ 1, 55 P.3d 1072, 1076. Plaintiffs' reliance on *Tulsa Industrial Authority* to argue that courts do not require plaintiffs to identity a right of action is equally misguided and procedurally distinct. *See* Pls.' Cons. Opp'n at 12. In *Tulsa Industrial Authority v. City of Tulsa*, the Court's analysis focused on a *qui tam* taxpayer's intervention in an existing lawsuit between a public trust and a city requesting a declaratory judgment regarding the legality of an economic development project plan. 2011 OK 57, ¶¶ 1-6, 270 P.3d 113, 116-17.

In this case, the Plaintiffs' Petition dedicates nine pages to alleging standing, *see* Pet. ¶ 11-21, while neglecting to cite a single statue that allows them to bring this case before this Court. To be sure, a taxpayer that meets the necessary elements for standing to sue may bring a claim for equitable relief against the state. Even still, a right of action is needed to bring a case for equitable relief before the court.

Consequently, the Plaintiffs could solve both the right of action infirmity and resolve the sovereign immunity issue with a simple amendment to their petition. As pled, Plaintiffs' claims are also barred by sovereign immunity. *See* Def. Okla. State Dep't of Educ. & Def. State Superintendent of Public Instruction Ryan Walters' Mot. to Dismiss at 15-17. The Department agrees with the Plaintiffs that the state officials may be sued for injunctive relief, but only when the proper right of action is pled. Fortunately, in *Barrios*, the Oklahoma Supreme Court clarified that "[a]ny federal or state right must be adjudicated within the remedial framework of a legally cognizable action" and thus, the "remedy of 42 U.S.C. § 1983 is available in any Oklahoma state court regardless of state statutory sovereign immunity." *Barrios v. Haskell Cnty. Pub. Facilities Auth.*, 2018 OK 90, ¶ 4, 432 P.3d 233, 242 (Edmondson, J., concurring). Plaintiffs cannot refuse to plead the private right of action at issue in similar precedent, 42 U.S.C. § 1983, and then insist they have a right of action and pierce sovereign immunity.

B. PLAINTIFFS' CLAIMS ARE NOT RIPE.

Presently, this case is not ripe for judicial determination—a fact acknowledged by the Plaintiffs' response itself. The Plaintiffs argue that "[u]nless the Court intervenes, St. Isidore will receive state funding and operate unlawfully as a public school." Pls.' Cons. Opp'n at 13. Plaintiffs' response dedicates ten pages to defending unripe claims they posit are "based on religion-neutral prohibitions." Pls.' Cons. Opp'n at 38; *see* Pls.' Cons. Opp'n at 20–30 (discussing Claims 1-4 of Plaintiffs' Petition). Before any state aid is distributed to St. Isidore, the Department must ensure compliance with all federal and state laws and intends to hold St. Isidore accountable to the relevant state antidiscrimination requirements, Pet. ¶¶ 213–239, regulations concerning children with disabilities, Pet. ¶¶ 240–248, and rules concerning educational management organizations, Pet. ¶¶ 249–255, to the maximum extent possible without infringing on St. Isidore's religious beliefs. As discussed above, the Department must respect St. Isidore's free exercise

rights, meaning it plans to hold St. Isidore accountable to all state and federal laws that do not require St. Isidore to compromise or forfeit its sincerely held religious belief. *See Trinity Lutheran Church,* 582 U.S. at 462 ("[W]hen the State conditions a benefit [on sacrificing religious beliefs], . . . the State has punished the free exercise of religion: '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.'" (quoting *McDaniel v. Paty,* 435 U.S. 618, 626 (1978)). As Plaintiffs acknowledge, "*approved* charter schools [are funded] pursuant to a statutory formula." Pls.' Cons. Opp'n at 15 (emphasis added). But, at present, the Department has made no evaluation on St. Isidore's eligibility to receive state aid, nor received any request to evaluate it.

The Plaintiffs rely on Tenth Circuit case law to argue that this case is ripe despite St. Isidore not currently receiving any state aid. Pls.' Cons. Opp'n at 16. Their analogy asks this Court to imagine state aid funding as a bullet in a loaded gun and the Department with a finger on the trigger. Despite the provocative imagery, the Office of Accreditation of the Department has had no involvement with St. Isidore. Any number of issues might arise that no party could anticipate. Therefore, this case is unripe.

CONCLUSION

For the foregoing reasons, this Court should dismiss the Plaintiffs' Petition in its entirety.

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CERTIFICATE OF MAILING

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