IN THE DISTRICT COURT FOR OKLAHOMA COUNTY
STATE OF OKLAHOMA

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

BOARD DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED AND SUPPLEMENTAL PETITION FOR LACK OF SUBJECT-MATTER JURISDICTION AND FAILURE TO STATE A CLAIM

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INTRODUCTION

On June 5, 2023, the Statewide Virtual Charter School Board (the "Board") approved St. Isidore of Seville Virtual Catholic School ("St. Isidore") to become a statewide virtual charter school. After rejecting St. Isidore's initial application and considering several public comments directed at the issue of religious charters, the Board determined St. Isidore's revised application satisfied all requirements for virtual charter schools, except the Charter Schools Act's ("Act") requirement that charter schools be "nonsectarian." 70 O.S. § 3-136(A)(2). The Board approved St. Isidore because it concluded that enforcing the Act's nonsectarian provision would violate the U.S. Constitution's Free Exercise Clause—a conclusion first provided by Oklahoma's former Attorney General, Am. Pet., Ex. A, Revised Appl., 2022 OK AG 7, PE410–26, and later seconded by Oklahoma's Governor, Ex. 1, Stitt Ltr. to Drummond (Feb. 27, 2023), DE1–4[1]. In October 2023, the Board and St. Isidore executed a charter contract.

Plaintiffs now seek to overturn the Board's actions. But Plaintiffs' First Amended and Supplemental Petition ("Amended Petition") should be dismissed because Plaintiffs are the wrong plaintiffs with the wrong claims at the wrong time. Specifically, Plaintiffs lack standing because they have no connection to St. Isidore and are suing to correct what they view as "purely public wrongs"—a kind of plaintiff the Oklahoma Supreme Court does "not recognize." *Tulsa Indus. Auth. v. City of Tulsa*, 2011 OK 57, ¶ 26, 270 P.3d 113, 126. Plaintiffs also allege harms that are entirely premature: They attack St. Isidore for discrimination in admissions before any student has applied, for unlawful discrimination in employment before any hiring has occurred, for failure to serve students with disabilities before any student has enrolled, and for indoctrination before any instruction has begun. And, in any event, the Board is immune from Plaintiffs' claims.

The Amended Petition also fails to state any cognizable claim. On top of lacking a private right of action to enforce the Act and the Board's rules, Plaintiffs make speculative allegations that are inconsistent with the very documents they attach to their Amended Petition. And Plaintiffs' final claim—which asserts the Board's sponsorship of a religious school violates the

[1] "DE_" is used to refer to the exhibits to this Motion, which have been consecutively paginated.

Oklahoma Constitution and the Act—misinterprets the Oklahoma Constitution and is squarely defeated by the Free Exercise Clause. That Clause prohibits states from "exclud[ing] religious observers from otherwise available public benefits." *Carson v. Makin*, 596 U.S. 767, 778 (2022). Excluding St. Isidore from Oklahoma's charter school system "solely because of [its] religious character," *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2249 (2020), would violate the U.S. Constitution because it cannot be justified by a compelling government interest. Contrary to Plaintiffs' assertions, the Establishment Clause would not give the Board a compelling interest to reject St. Isidore. As a privately owned and operated school whose religious mission is not "even influenced by any state regulation," *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982), St. Isidore is not a state actor for Establishment Clause purposes. For these reasons, the Court should dismiss the Amended Petition for lack of subject-matter jurisdiction under 12 O.S. § 2012(B)(1) and failure to state a claim under 12 O.S. § 2012(B)(6).

BACKGROUND

I. The Oklahoma Charter Schools Act and Statewide Virtual Charter Schools

The Act authorizes "private organization[s]" to operate charter schools by contracting with a public sponsor. § 134(C). Its purposes include "[i]ncreas[ing] learning opportunities," encouraging "different and innovative teaching methods," and "[p]rovid[ing] additional academic choices for parents and students." § 131. Each charter school must have a governing body "responsible for [its] policies and operational decisions." § 136(A)(8). It "may offer a curriculum which emphasizes a specific learning philosophy or style," § 136(A)(3), and adopt its own "personnel policies, personnel qualifications, and method of school governance," § 136(B). Apart from what is provided by the Act, a charter school is "exempt from all statutes and rules relating to schools, boards of education, and school districts." § 136(A)(5).

In 2012, the legislature created the Board, giving it "sole authority to authorize and sponsor statewide virtual charter schools." § 145.1(A).[2] Statewide virtual charter schools provide

[2] Senate Bill No. 516, signed by Gov. Stitt on June 5, 2023, will abolish the Board and replace it with the Statewide Charter School Board ("new Board") effective July 1, 2024. The new Board will "assume sponsorship of the virtual charter schools for the remainder of the term of the contracts." S.B. 516, 59th Leg., 1st Sess., § 1(I)(3) (Okla. 2023) (codified at 70 O.S. § 3-132.1(I)(3)).

online education to students across the State. § 145.3(B). The Act authorizes the Board to "[a]pprove quality charter applications that...promote a diversity of educational choices." § 134(I). If an application is approved, the Board and applicant then negotiate and execute "a contract for sponsorship." OAC § 777:10-3-3(a)(8). The contract "incorporate[s] the provisions of the [school's] charter," § 135(A), which should include "a description of the personnel policies, personnel qualifications, and method of school governance, and the specific role and duties of [the Board]," § 136(B). The contract should also address the school's "[a]dmission policies and procedures," "[m]anagement and administration," and "[a] description of how the charter school will comply with the charter requirements." § 135(A).

An approved contract for a statewide virtual charter school is effective for an initial term of five years and may then be renewed by the Board. § 137. Charter schools "may not charge tuition or fees." § 136(A)(10). The funding they receive is tied directly to student enrollment. Am. Pet., Ex. P, Cont., PE605–06, § 7.7; § 145.3(D).

In the 2022–23 school year, Oklahoma had 32 charter schools educating over 50,000 students.[3] This included 26 physical charters, and six virtual charters sponsored by the Board. Furthering the goal to "[p]rovide additional academic choices for parents and students," § 131(A), each of the virtual charters advances a different mission. But the Act categorically excludes one group in its push for diversity: all charter schools must be "nonsectarian in [their] programs, admission policies, employment practices, and all other operations" and cannot be "affiliated with a nonpublic sectarian school or religious institution." § 136(A)(2).

II. St. Isidore of Seville Catholic Virtual School

St. Isidore is a privately organized and operated non-profit corporation with two members—the Archbishop of Oklahoma City and the Bishop of Tulsa. Am. Pet., Ex. A, Revised Appl., PE292. Its privately appointed board of directors "manage and direct [its] business and affairs." *Id.* It has adopted bylaws setting forth its purpose to operate an Oklahoma virtual charter school "as a Catholic School." *Id.*, PE288. St. Isidore's application "envision[ed] a

[3] OPCSA, Oklahoma Charter Schools Enrollment 2022–23, (archived Sept. 22, 2023), https://web.archive.org/web/20230922173233/https://www.okcharters.org/our-schools.

learning opportunity for students who want and desire a quality Catholic education, but for reasons of accessibility ... or due to cost cannot currently make it a reality." *Id.*, PE72.

In June 2023, the Board (in a 3-to-2 vote) approved St. Isidore's revised application.[4] The Board determined that *but for* its religious character, St. Isidore was qualified. The Board concluded that disqualifying St. Isidore *because of* its religious character would violate the federal Free Exercise Clause, which all Board members took an oath to uphold. Ex. 2, Tr., DE10. As then-Board member Brian Bobek explained, relying on St. Isidore's religious nature "to justify a denial of the application ... would require [him] to ignore the U.S. Constitution and relevant U.S. Supreme Court cases applying it." *Id.*, DE10–11. The Board based this conclusion on AG Opinion 2022-7, which the former Attorney General issued in December 2022. That opinion advised "[t]he State cannot enlist private organizations to 'promote a diversity of educational choices,' and then decide any and every kind of religion is the wrong kind of diversity. This is not how the First Amendment works." Am. Pet., Ex. A, Revised Appl., 2022 OK AG 7, PE425. After taking office, the current Attorney General withdrew AG Opinion 2022-7. Am. Pet., Ex. D, Drummond Ltr. to Wilkinson (Feb. 23, 2023), PE504. That withdrawal prompted the Governor to issue a letter expressing his view that AG Opinion 2022-7 correctly interpreted the U.S. Constitution. Ex. 1, DE1–4.

In October 2023, the Board and St. Isidore executed a charter contract ("Contract"), setting forth the terms and conditions of the Board's sponsorship. The Contract recognizes that St. Isidore "is a privately operated religious non-profit organization" authorized to "provide a comprehensive program of instruction for grades K through 12." Am. Pet., Ex. P, Cont., PE598, 600, §§ 1.5, 4.1.1. The Contract provides that the school's governing board is "responsible for the policies and operational decisions of [St. Isidore]," *id.*, PE602, § 6.1, including St. Isidore's "Code of Ethics" and "Conflict of Interest policy," *id.*, PE604, § 6.3. And St. Isidore's Superintendent reports directly to this board. *Id.*, § 6.4.2. The Contract further provides:

- On admissions, "no student shall be denied admission ... on the basis of race, color,

[4] The Board rejected St. Isidore's initial application, citing eight areas of deficiency. Ex. 3, Wilkinson Ltr. to Schuler (Apr. 13, 2023), DE13–14. On May 25, St. Isidore submitted a revised application. PE3.

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.*, PE611, § 8.8.

- On 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.*, PE612, § 8.10.
- On employment, St. Isidore must "ensure that employment of [its] personnel is conducted in accordance with all Applicable Law." *Id.*, § 8.11.[5]
- On 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...." *Id.*, PE610, § 8.6.

The five-year contract begins on July 1, 2024. *Id.*, PE600, § 3.3.

III. Course of Proceedings and the Attorney General's Mandamus Action

On July 31, 2023, after the Board had voted to approve St. Isidore's revised application, but before the Board and St. Isidore executed the Contract, Plaintiffs filed the Original Petition, seeking to enjoin the Board from entering into a charter contract with St. Isidore. On September 20, the Board, St. Isidore, and the State Defendants moved to dismiss the Original Petition on several grounds, including lack of ripeness, standing, and a private right of action, governmental immunity, and failure to state a claim. On January 26, 2024, more than three months after the Board and St. Isidore executed the Contract, Plaintiffs moved to file the Amended Petition to add allegations relating to the Contract.

Days after the Contract was executed, Oklahoma's Attorney General filed a mandamus action in the Oklahoma Supreme Court, asking the Supreme Court to assume original jurisdiction, cancel the Board's Contract with St. Isidore, and declare that the Board's sponsorship violated the Charter Schools Act, the Oklahoma Constitution, and the Establishment Clause. *Drummond v. Okla. Statewide Virtual Charter Sch. Bd.*, Case No. MA-121694 (Okla.). Plaintiffs sought to intervene in that matter, but the Oklahoma Supreme Court denied Plaintiffs'

[5] 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; the federal Religious Freedom Restoration Act; and the First Amendment to the Constitution of the United States." *Id.*, PE598–99, § 2.1.

intervention. Order at 1.

The Supreme Court has scheduled argument in the *Drummond* action for April 2, 2024. If the Supreme Court assumes original jurisdiction—as all parties have requested—it may resolve many issues raised in the Amended Petition, including whether the Free Exercise Clause and Oklahoma's Religious Freedom Act ("ORFA"), 51 O.S. § 251 *et seq.*, 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. The Amended Petition should be dismissed for lack of subject-matter jurisdiction.

A. Plaintiffs' claims are not ripe.

Foremost among the Amended Petition's defects is lack of ripeness. Plaintiffs' claims are not ripe because they "raise[] nothing but pure speculation," *Carlock v. Workers' Comp. Comm'n*, 2014 OK 29, ¶ 3, 324 P.2d 408, 409 (Taylor, J., concurring), and "subsequent events" will either obviate or "sharpen the controversy," *French Petrol. Corp. v. Okla. Corp. Comm'n*, 1991 OK 1, ¶ 7, 805 P.2d 650, 653. Specifically, Plaintiffs claim unlawful discrimination in admissions before any student has applied, unlawful discrimination in employment before any hiring has occurred, a failure to serve students with disabilities before any student has enrolled, and indoctrination before any instruction has begun. Illustrating the speculation in these claims is Plaintiffs' reference to the handbook of a *different* Catholic school whose policies they assume St. Isidore will adopt. *See* Am. Pet. ¶ 152 & Ex. C (referencing Student-Parent Handbook of Christ the King Catholic School). Only when St. Isidore begins operations could Plaintiffs possibly bring claims based on non-hypothetical facts. Plaintiffs should wait for "subsequent events" that will sharpen or could obviate this controversy.

Plaintiffs have also failed to allege they will suffer any harm from waiting until St. Isidore begins operation to bring their claims. *See French Petrol. Corp.*, 805 P.2d at 653 (one factor is "hardship to the parties of withholding court consideration."). Indeed, Plaintiffs do not even claim a connection with St. Isidore. Plaintiffs will not be burdened by waiting until an alleged

discriminatory or other improper act occurs before suing over it. *See id.* (noting parties suffer no hardship when court withholds decision "depending on uncertain future events").

In short, Plaintiffs' claims are not ripe, and this Court lacks subject-matter jurisdiction over them. *See Dutton v. City of Midwest,* 2015 OK 51, ¶ 32, 353 P.3d 532, 547 n.69 (holding justiciability requires controversy be "ripe for judicial determination").

B. Plaintiffs lack standing.

Plaintiffs were not harmed by the Board's approval of or contract with St. Isidore, and they therefore lack standing to sue the Board. "The irreducible constitutional minimum of standing" requires "an injury in fact"—which is a "concrete and particularized," "actual or imminent, not conjectural or hypothetical," "invasion of a legally-protected interest," "as contemplated by statutory or constitutional provisions." *Toxic Waste Impact Grp., Inc. v. Leavitt,* 1994 OK 148, ¶¶ 8–9, 890 P.2d 906, 910–11 (cleaned up). Plaintiffs have the burden to establish standing, *Oklahoma Education Association v. State ex rel. Oklahoma Legislature*, 2007 OK 30, ¶ 7, 158 P.3d 1058, 1062–63, and even under the State's taxpayer-standing doctrine, Plaintiffs have failed to meet that burden. [6]

First, Plaintiffs' "belie[f]" that funds *may* be reallocated from other public schools to St. Isidore, Am. Pet. ¶¶ 9–14, 16–18, does not establish any fact sufficient to support standing. *See Toxic Waste Impact Grp., Inc.*, 890 P.2d at 910 (noting that an injury in fact cannot be "conjectural or hypothetical" in nature). In any event, Plaintiffs' claim does not show an "increase of the burden of taxation upon their property" that justifies "interfere[nce] directly in their own names." *Kellogg v. Sch. Dist. No. 10 of Comanche Cnty.*, 1903 OK 81, 74 P. 110, 114–115. The basis for taxpayer standing is that individual taxpayers may be liable to replenish the treasury if it is unlawfully diminished and thus have an interest in challenging unconstitutional appropriations. *Vette v. Childers*, 1924 OK 190, 228 P. 145, 146 ("Because of their equitable ownership of the funds in the state treasury, and their liability to replenish the treasury for a deficiency which would be caused by a misappropriation, taxpayers may maintain a bill in

[6] Because no individual has standing, the Association lacks standing as well. *See Okla. Educ. Ass'n,* 158 P.3d at 1063 (finding association's standing is based on members of that association "possessing standing to sue in their own right").

equity to restrain the payment from the state treasury of moneys appropriated by the General Assembly on the ground that such appropriations are unconstitutional.") (quoting *Fergus v. Russel*, 270 Ill. 304 (1915)). No such basis exists here. Reallocating funds does not affect an individual taxpayer. Courts "d[o] 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. v. City of Tulsa*, 2011 OK 57, ¶ 26, 270 P.3d 113, 126. Plaintiffs have failed to show a "special interest... distinct from that of the general public," *Kellogg,* 74 P. at 115, making them no different from the class of public avengers whom Oklahoma courts do not recognize.

Second, *McFarland v. Atkins*, controls this case. 1979 OK 3, 594 P.2d 758. In *McFarland*, the plaintiffs argued they had taxpayer standing to seek injunctive relief prohibiting the Department of Health from distributing funds to Planned Parenthood under a contract. They sought to "enforce the applicable laws and rules" and prohibit the Department of Health from funding its contract until Planned Parenthood complied with state law. *Id.* at 762. But the Oklahoma Supreme Court held taxpayer status does not grant standing to "compel [another] to follow all applicable laws and regulations... [or to] enforce the law," even when the law relates to a contract. *Id.* A plaintiff cannot "circumvent her lack of standing by alleging that unlawful expenditures of State funds are involved." *Id.* Specifically, individuals do not have taxpayer standing to challenge an expenditure when the state agency has "express statutory authority to contract with a non-governmental agency to provide certain services." *Okla. Pub. Emps. Ass'n v. Okla. Dep't of Cent. Servs.*, 2002 OK 71, ¶ 14, 55 P.3d 1072, 1079 (citing *McFarland*). The "appropriation and expenditure of funds" to the contractor are "not unlawful nor unauthorized" when a statute authorizes them—even if the contractor allegedly violates "specific laws and regulations" governing the provision of services. *McFarland*, 594 P.2d at 762.

Here, the Board has statutory authority to enter contracts with entities like St. Isidore. § 145.1(A) (giving Board "sole authority to authorize and sponsor statewide virtual charter schools"). Like the plaintiffs in *McFarland*, Plaintiffs lack standing to bring claims based on alleged statutory or regulatory violations because the decision to sponsor St. Isidore was

authorized by statute and Plaintiffs merely disagree with the Board's interpretation of its own enforcement powers.

Lastly, Plaintiffs' lack standing for the same reasons their claims are not ripe. For standing, an injury "must be direct, substantial and immediate, rather than contingent on some possible remote consequence or possibility of some unknown future eventuality." *Toxic Waste Impact Grp.*, 890 P.2d at 911; *see also Richardson v. State ex rel. Okla. Tax Comm'n*, 2017 OK 85, ¶ 5, 406 P.3d 571, 573 (finding matter not justiciable "[b]ecause it is unclear at this time whether [challenged acts] will increase [or decrease] revenue in Oklahoma."). With school operations having yet to begin and no allegations of a specific impact on the public fisc, Plaintiffs have not alleged a cognizable injury.

C. The Board is immune from suit on Plaintiffs' claims.

The Board is exempt from liability on Plaintiffs' claims under the immunity conferred upon it by the Governmental Tort Claims Act ("GTCA"), 51 O.S. § 151 *et seq.*, the Charter Schools Act, 70 O.S. § 3-130 *et seq.*, and the doctrine of sovereign immunity. Because the Board is immune from suit, the Court lacks subject-matter jurisdiction over Plaintiffs' claims. *See State ex rel. State Ins. Fund v. JOA, Inc.*, 2003 OK 82, ¶ 7, 78 P.3d 534, 536 n.5.

Under the GTCA, the Board is "immune from liability for torts" except as therein provided. 51 O.S. § 152.1(A).[7] The GTCA broadly defines "torts" to include any "legal wrong, independent of contract, involving violation of a duty imposed by general law, statute, the Constitution of the State of Oklahoma, or otherwise, resulting in a loss to any person, association or corporation as the proximate result of an act or omission of a political subdivision or the state of an employee acting within the scope of employment." *Id.* § 152(14); *see Barrios v. Haskell Cnty. Pub. Facilities Auth.*, 2018 OK 90, ¶ 10, 432 P.3d 233, 238 (noting legislature amended GTCA to extend immunity to "tort claims arising from alleged violations of constitutional duties"). Consistent with that definition, Plaintiffs charge the Board with legal wrongs

[7] The GTCA extends immunity to "[t]he State, its political subdivisions, and all of their employees acting within the scope of their employment," 51 O.S. § 152.1(A), with "State" defined to include "any office, department, agency, authority, commission, board ... or other instrumentality thereof," *id.* § 152(13).

in violation of alleged duties under statute, regulation, and the Oklahoma Constitution resulting in losses (use of "tax dollars," Am. Pet. ¶ 19). Yet Plaintiffs do not seek any remedy available under the GTCA. Indeed, the GTCA expressly confers immunity for any alleged "failure to ... enforce a law," 51 O.S. § 155(4), which is the gravamen of Plaintiffs' Amended Petition. GTCA immunity thus applies here.

Likewise, the Charter Schools Act provides that sponsors such as the Board "shall be immune from civil and criminal liability with respect to *all activities* related to a charter school with which they contract." § 134(L) (emphasis added). In short, the legislature has determined that charter school sponsors such as the Board are immune from suit in connection with the sponsorship of charter schools, and "the Legislature has the final say in defining the scope of the State's sovereign immunity from suit." *Barrios*, 432 P.3d at 236–37.

Finally, under the doctrine of sovereign immunity, "the State cannot be sued without its consent." *Freeman v. State ex rel. Dep't of Hum. Servs.*, 2006 OK 71, ¶ 0, 145 P.3d 1078, 1078 (holding Department of Human Services immune from private enforcement action under Fair Labor Standards Act). Here, no legislative enactment has authorized suit against the Board on the claims that Plaintiffs seek to bring. Without an express waiver of sovereign immunity, the Board is immune from Plaintiffs' claims.

II. The Amended Petition should be dismissed for failure to state a claim.

Under § 2012(B)(6), a petition should be dismissed for lacking "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. Here, dismissal is proper under § 2012(B)(6) because, even assuming the Amended Petition's allegations are true, Plaintiffs advance no "cognizable legal theory."

A. Plaintiffs have no private right of action on their non-constitutional claims.

All Plaintiffs' claims allege the Board's approval of and contract with St. Isidore violated the Act, 70 O.S. §3-130 *et seq.*, and the Board's rules, OAC § 777:1-1-1 *et seq.*, Am. Pet. ¶¶ 265, 293, 305 & 322. But neither the Act nor the rules provide Plaintiffs with a private right of action. "Without a cause of action, [Plaintiffs] cannot state a claim upon which relief can be

granted." *Owens v. Zumwalt,* 2022 OK 14, ¶ 9, 503 P.2d 1211, 1215.

1. The Charter Schools Act does not create a private right of action.

When a regulatory statute is silent on whether it contains a private right of action, such a right may be implied only if: "(1) the plaintiff is one of the class for whose especial benefit the statute was enacted; (2) some indication of legislative intent, explicit or implicit, suggests that the Legislature wanted to create a private remedy and not to deny one; and (3) implying a remedy for the plaintiff would be consistent with the underlying purposes of the legislative scheme." *Id.* at 1215 (citing *Holbert v. Echeverria*, 1987 OK 99, ¶¶ 7–8, 744 P.2d 960, 963). The Oklahoma Supreme Court adopted this three-pronged test from the U.S. Supreme Court's decision *in Cort v. Ash*, 422 U.S. 66 (1975). *See Holbert*, 744 P.2d at 963 (holding Consumer Protection Act did not create private right of action).

In *Owens*, the Oklahoma Supreme Court applied the *Holbert* test to determine § 4-313 of the Oklahoma Employment Security Act (OESA) did not provide a private right of action to challenge Governor Stitt's termination of COVID-related unemployment benefits. 503 P.3d at 1215–16. The Supreme Court observed "[n]othing in 40 O.S. § 4-313 indicates the Legislature intended, either explicitly or implicitly, to create a private remedy to enforce the OESA." *Id.* at 1215. Similarly, in *Shattuck Pharmacy Management, P.C. v. Prime Therapeutics, LLC*, the court dismissed claims under the Pharmacy Audit Integrity Act, 59 O.S. § 356 *et seq.*, and the Patient's Right to Pharmacy Choice Act, 36 O.S. § 6958 *et seq.*, on grounds that those statutes created no private right of action. 2021 WL 2667518 at *6–7 (W.D. Okla. June 29, 2021). The court concluded that "[w]ithout a private cause of action created by either act," the plaintiffs' claims for declaratory and injunction relief "are improper requests for fact-finding not tethered to any underlying law." *Id.* at *7; *see also Engels v. Kirkes*, 2013 WL 3367254, at *3 n.2 (E.D. Okla. July 3, 2013) (finding "no private right of action may be implied" under § 635 of the Oklahoma Highway Code); *Elliot Plaza Pharm., LLC v. Aetna U.S. Healthcare, Inc.*, 2009 WL 702837 at *3 (N.D. Okla. Mar. 16, 2009) (finding Oklahoma Third-Party Prescription Act "does not provide a private cause of action").

Here, the Act fails to mention any private right of action, and each of the *Holbert* factors

shows no private remedy can be implied. First, plaintiffs are not in "the class for whose especial benefit the statute was enacted." *Owens*, 503 P.3d at 1215. The statute was enacted primarily to "[i]ncrease learning opportunities for students" and "[p]rovide additional academic choices for parents and students," and so is designed to benefit the students and the parents of students attending charter schools. § 131(A). Another purpose was to "[c]reate new professional opportunities for teachers and administrators including the opportunity to be responsible for the learning program at the school site." *Id.* But no Plaintiff alleges he or she has any interest in sending their children to St. Isidore; indeed, none claims to have any children attending a charter school. Am. Pet. ¶¶ 9–19. And none claims any intent to work at St. Isidore or another charter school. Plaintiffs simply point to their status as Oklahoma taxpayers, *id.* ¶ 19, but when a statute "is for the benefit of the general public, no special class is established for whose especial benefit it was created" as required by *Holbert*. 744 P.2d at 963.

Second, there is no indication the Legislature wanted to create a private right of action under the Act. *Owens*, 503 P.3d at 1215. To the contrary, the Legislature was not silent when it intended to create remedies under the Act. The statute provides rejected applicants with express administrative remedies, and it provides for "binding arbitration" in the event a sponsor terminates a charter school's contract during its term. §§ 134(E) & (G). Indeed, decisions by the Board to deny, not renew, or terminate the contract of a virtual charter school "may be appealed to the State Board of Education." § 145.3(K). In light of the administrative scheme established by the Legislature, "[a] fair reading of the language enacted by the legislature does not lead to the conclusion that the legislature intended (expressly or by implication) to create a private right of action." *Shattuck Pharm. Mgmt.*, 2021 WL 2667518, at *6.

Third, implying a remedy for Plaintiffs to challenge the Board's actions under the Act would not be "consistent with the underlying purposes of the legislative scheme." *Owens*, 503 P.3d at 1215. Administrative oversight of the Board's decisions in sponsoring virtual charter schools is vested in the State Board of Education, which is authorized to conduct "financial, program or compliance audits." § 145.3(E). And the State Board is directed in turn to "issue an annual report to the Legislature and the Governor outlining the status of charter schools in the

state." § 143. That the Legislature placed the operation of charter schools under the aegis of the State Board and the Board shows it did not at the same time intend for taxpayers to enforce the Act in civil actions before state courts. Without a private right of action, Plaintiffs cannot state a claim under the Act. *Owens*, 503 P.2d at 1215.

2. The Board's rules do not create a private right of action.

Plaintiffs' claims under the Board's rules fare no better. Any private right of action under those rules also depends on legislative intent. *See Holbert*, 744 P.2d at 963 n.9 (noting "central inquiry" in considering private right of action is legislative intent); *Schmeling v. NORDAM*, 97 F.3d 1336, 1344 (10th Cir. 1996) (looking solely to congressional intent to assess private right of action to enforce Federal Aviation Administration's drug-testing rules).

In conferring authority on the Board to "promulgate rules as may be necessary to implement the provisions of [the Act]," § 145.4, there is no indication the legislature intended those rules to be enforced by private litigants. Indeed, the legislature designated the Board as "the sole authority to authorize and sponsor statewide virtual charter schools in [the] state," §145.1(A); and in assuming that authority, the Board's rules acknowledge the Board itself is the entity responsible for ensuring services are provided to "students enrolled in statewide virtual charter schools in a manner that is safe, consistent, effective and appropriate." OAC § 777:1-1-4(a). It is thus not surprising that the Board's extensive rules governing statewide virtual charter schools make no mention of private enforcement.

Although the Oklahoma Administrative Procedures Act provides "[t]he validity or applicability of a rule may be determined in an action for declaratory judgment," 75 O.S. § 306(A), such a determination can be made only "if it is alleged the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff." *Id.* Here, Plaintiffs make no such allegation. Moreover, declaratory relief under § 306 is unavailable to review the kind of administrative action challenged here—one that applies to "named persons or specific situations." *Waste Connections, Inc. v. Okla. Dep't of Env't Quality*, 2002 OK 94, ¶ 11, 61 P.3d 219, 224. Without a private right of action, Plaintiffs cannot state a cognizable claim under either the Board's rules or the Act itself.

B. Claim I fails to state a claim because St. Isidore certified its intent not to discriminate and the Board has authority to interpret its own rules.

Plaintiffs' First Claim asserts that the Board violated the Act and its own rule by approving St. Isidore's application and charter contract. Am. Pet. ¶¶ 253–65. The Board's rule requires virtual charter school applicants to include a "signed and notarized statement ... 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). Plaintiffs also allege that the Board violated its duty to decline "inadequate charter applications," § 134(I)(4), because St. Isidore's application and charter allegedly fail to certify compliance with federal and state civil-rights laws. Am. Pet. ¶¶ 253–65 (citing § 136(A)(1)). Plaintiffs further allege that St. Isidore's application and charter fail to explain how the school will comply with the Act and "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.* (citing § 135(A)(5)). Plaintiffs' First Claim fails for three reasons.

First, St. Isidore's statements—included in Exhibit A to the Amended Petition—satisfy the requirements of the Act and § 10-3-3(c)(1)(F). They state that St. Isidore:

1. Fully complies with the Oklahoma public charter school regulations, including, but not limited to, 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 to the extent required by law, including the First Amendment, religious exemptions, and the Religious Freedom Restoration Act, with priority given to the Catholic Church's understanding of itself and its rights and obligations pursuant to the Code of Canon Law and the Catechism of the Catholic Church ...
3. Guarantees access to education and equity for all eligible students regardless of their race ethnicity, economic status, academic ability, or other factors.

PE159. The charter contract confirms that St. Isidore "agrees to comply with all Applicable Law," which is broadly defined to include all relevant federal and state law. Am. Pet., Ex. P, PE598–99, §§ 8.1, 2.1. These words express affirmative commitments that satisfy the Act and the Board's rule. The Court's inquiry can—and should—end here.

Second, Plaintiffs' claim rests on an erroneous theory: that St. Isidore nullified its

commitments 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].... " Am. Pet. ¶¶ 135–36. 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. *See* PE159 (tracking requirements of § 10-3-3(c)(1)(F)). Plaintiffs' Amended Petition quotes the Act's language requiring compliance with state and local law but notably omits language in the same sentence requiring *compliance with federal* law. Am. Pet. ¶¶ 134, 253. Likewise, ORFA *is among* the state laws 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 not 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 ORFA "prohibit[s] laws or regulations that place a 'substantial burden' on a person's free exercise of religion").

Third, 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. The Amended Petition baldly asserts that the charter contract's legal compliance is outside the Board's area of expertise, Am. Pet. ¶ 242, but this assertion contradicts Plaintiffs' argument that the Board must know and follow its governing statutes and regulations. In fact, the Board acted squarely within the scope of its exclusive competence and expertise. *See* § 145.1(A) (stating Board is "sole authority to authorize and sponsor statewide virtual charter schools"); § 145.3(A)(2) (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.

C. Claim II fails to state a claim because St. Isidore's application complies with Oklahoma non-discrimination law.

Plaintiffs' Second Claim asserts that the Board unlawfully approved St. Isidore's application and contract because Plaintiffs fear the school will discriminate in admissions and employment on the basis of certain protected classes. Am. Pet. ¶¶ 267–93. But Plaintiffs' bare allegations and citations to sources outside St. Isidore's application are contradicted by the application and contract. "[I]n case of conflict between the allegations of the petition and the attached exhibit, the provisions of the exhibit govern[] notwithstanding the allegations of the petition." *Turner v. Sooner Oil & Gas Co.*, 1952 OK 171, ¶ 14, 243 P.2d 701, 704. Instead of focusing on the application and contract themselves, Plaintiffs suggest that the Board should have explored Catholic doctrine outside the record and assumed that St. Isidore was lying when it said it will not discriminate. The law does not require such hostility to religion—it forbids it.

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, ORFA, and Art. I § 2 of the Oklahoma Constitution. The Amended Petition does not allege a cognizable claim because St. Isidore has committed to comply with applicable law, including law protecting religion.

Second, the approved application and contract comply with all admissions non-discrimination requirements. Plaintiffs claim that the Board violated various non-discrimination provisions in Oklahoma law when it approved St. Isidore because St. Isidore will not be open to all students or might discriminate against some. But St. Isidore's application (Am. Pet., Ex. A) states the opposite:

- "As a statewide school, St. Isidore ... will admit any and all students who reside in the state, provided there is capacity to serve that student's grade level per the annual enrollment goals for each year." *Id.*, PE91. If the number of applicants exceeds the capacity, St. Isidore will conduct a lottery to fill the spots. *Id.*
- "All students are welcome, those of different faiths or no faith." *Id.* And students are not required to affirm Catholic beliefs to attend. *Id.*, PE190. "People of other faiths or no faith are welcome to attend our Catholic schools. They will not be required to affirm our beliefs." *Id.*

- "St. Isidore of Seville Catholic Virtual School shall not discriminate on the basis of a protected class." *Id.*, PE96. "The School strictly prohibits and does not tolerate any unlawful discrimination, harassment, or retaliation that is also inconsistent with Catholic teaching 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." *Id.*, PE254 (emphasis added).

The approved contract also contradicts Plaintiffs' allegations:

- The Charter School shall ensure 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. Am. Pet. Ex. P, Cont., PE611, § 8.8.

On their face, the application and contract meet all requirements of Oklahoma law. Plaintiffs' allegations that St. Isidore might engage in admissions discrimination contrary to its application are based on 1) citing *other school's* policies and 2) Plaintiffs' own reading of Catholic doctrine and speculation about how it might apply. *See* Am. Pet. ¶¶ 153–69 (citing Catechism and other Archdiocese policies not included in the application). The Board lawfully approved the *application* as it meets all admissions requirements on its face; and the application overrides Plaintiffs' speculation. *Turner*, 243 P.2d at 704.

The same is true for employment. The application's proposed employee handbook states that St. Isidore "complies with all applicable local, state and federal laws and regulations governing fair employment practices" and does not discriminate in employment based on "race, sex, color, national origin, citizenship, age, veteran status or mental or physical ability." Am. Pet., Ex. A, Revised Appl., PE195. Further, it "[r]ecogniz[es] that non-Catholic employees are called to serve" and simply requires its non-Catholic employees "to have an understanding of the Catholic Church and to refrain from actions that are contrary to the teachings of the Church." *Id.*, PE191. Thus, on its face, the application complied with Oklahoma's non-discrimination requirements. The only caveat was that St. Isidore did not waive its First Amendment right to consider religion in employment decisions. *Id.*, PE195. But the Board could not deny the application on grounds that St. Isidore preserved its First Amendment rights. *See Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2069 (2020) (holding ministerial

exception prohibits state interference with religious school's hiring practices).

The Board did not violate any constitutional or statutory non-discrimination provision when it approved St. Isidore's application and contract.[8] Thus, Claim II fails to state a claim upon which relief can be granted.

D. Claim III fails to state a claim because Plaintiffs have no plausible basis to allege St. Isidore will not adequately serve students with disabilities.

Plaintiffs' Third Claim alleges that the Board's approval and contract with St. Isidore was unlawful because the school will not adequately serve students with disabilities. But this claim is based entirely on conclusory allegations that fail to allege that any student with disabilities will receive insufficient services from St. Isidore.

Plaintiffs first allege that St. Isidore failed to satisfy § 136(A)(7) of the Act requiring it to adopt a charter that ensures compliance with "all [federal and state] laws relating to the education of children with disabilities in the same manner as a school district," because St. Isidore stated it would follow disability laws "to the extent that it does not compromise the religious tenets of the school." Am. Pet. ¶¶ 295, 299. But St. Isidore's contract plainly states that it will comply with relevant disability laws:

> The Charter School 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.

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[8] Plaintiffs' Second Claim also misstates the law. Although the application says St. Isidore will not discriminate based on sex, Plaintiffs assert "sex" includes "sexual orientation and gender identity," Am. Pet. ¶ 273, and hypothesize that St. Isidore will discriminate on those grounds. But 1) the application states the school does not discriminate in admissions or employment based on "sex" (which should foreclose this claim), and 2) Oklahoma courts have never interpreted discrimination on the basis of "sex" to include "sexual orientation" or "gender identity." In fact, Oklahoma has elected not to interpret "sex" to mean sexual orientation and gender identity in certain instances. *See* 2020 OK AG 13 (opining that sexual orientation non-discrimination not required for participation in Lindsey Nicole Henry Scholarship Program); 70 O.S. § 27-106 (Save Women's Sports Act categorizing students based on biological sex, not gender identity). Likewise, Oklahoma courts have never interpreted "gender" to mean "gender identity," "sexual activity outside of marriage," or "pregnancy outside of marriage." The only additional non-discrimination requirements for charter schools, beyond those stated in the Act, are those found in certain federal statutes, *see* § 136(A)(1)—none of which include Plaintiffs' new categories.

Am. Pet. Ex. P, Cont., PE610–11, § 8.6. St. Isidore's reference to its First Amendment rights does not plausibly establish unlawful conduct, particularly when Plaintiffs fail to point to any legal requirement relating to children with disabilities that conflicts with St. Isidore's "religious tenets." Plaintiffs' claim is as conclusory as it is speculative.

To be sure, St. Isidore's application stated that services to "students with disabilities" will be provided "to the maximum extent possible through a virtual education program." Am. Pet., Ex. A, Revised Appl., PE4. This language simply acknowledges the unassailable fact that a *virtual* charter school is differently situated from a brick-and-mortar school for purposes of accommodating disabilities. It does not shirk the requirement to serve students with disabilities. And Plaintiffs ignore that St. Isidore affirmed it would consider "[a]lternative placements" for students who "need[] more intensive support and programming than what a virtual program can offer," *id.*, PE133, and that no law prevents St. Isidore from contracting out services.

Plaintiffs finally assert that the Board violated a regulation that sets forth a factor to be considered "in deciding whether the Board should approve a charter-school application." Am. Pet. ¶¶ 117, 302 (citing OAC § 777:10-3-3(c)(3)(D)). But Plaintiffs do not allege that the Board actually failed to consider this factor, which in any event is a factor the Board "may"—not must—consider in reviewing an application. These allegations do not support a claim.

III. Claim IV fails to state a claim because the Oklahoma Constitution does not prohibit religious virtual charter schools.

Plaintiffs' Fourth Claim alleges the Board violated three provisions of the Oklahoma Constitution relating to religion. As explained below, these arguments stumble out of the gate because the Oklahoma Constitution declares the U.S. Constitution to be "the supreme law of the land" (Art. I § 1); and the Free Exercise Clause of the U.S. Constitution prohibited the Board from rejecting St. Isidore's application because of its religious character. In any event, the Board has not violated these provisions.

A. Art. II § 5 ("no aid" provision)

Plaintiffs claim the Board's approval of and contract with St. Isidore violates Art. II § 5, which states "[n]o public money or property shall ever be appropriated, applied, donated, or

used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion...." But the Board did not violate this provision for at least three reasons.

First, when the State receives a benefit from a payment to a religious organization, the payment does not violate the "no aid" provision. As long as payment to a religious institution "involve[s] the element of substantial return to the State and do[es] not amount to a gift, donation, or appropriation to the institution having no relevancy to the affairs of the State, there is no constitutional provision offended." *Murrow Indian Orphans Home v. Childers*, 1946 OK 187, ¶ 9, 171 P.2d 600, 603; *see also Burkhardt v. City of Enid*, 1989 OK 45, ¶¶ 15–16, 771 P.2d 608, 612 (noting key factor in applying "no aid" provision is whether State entity making payment to religious institution receives benefit in return). The Oklahoma Supreme Court has thus upheld programs under which the State funds religious organizations to deliver services the State has an obligation to provide. In *Murrow*, for example, the Court found State payments to a Baptist orphanage for the care of children did not violate the "no aid" provision because the State was required to provide such services and thus benefited from the orphanage's care. 171 P.2d at 601–03. Similarly, in *Oliver v. Hofmeister*, the Court held the Lindsay Nicole Henry scholarship program, under which students with disabilities can attend sectarian schools using public funds, did not violate the "no aid" provision. 2016 OK 15, ¶ 26, 368 P.3d 1270, 1277. "Oklahoma public school districts are required to provide education and related services to all children with disabilities." *Id.* at 1272–73. The State was "simply contracting with private schools to perform a service (education of children with special needs) for a fee. The State receive[d] great benefit from this arrangement." *Id.* at 1278 (Taylor, J., concurring). Here, too, the Board is simply contracting with a religious organization to provide education to Oklahoma children, an "element of substantial return to the state." *Id.* at 1275.

Second, any public money that flows to St. Isidore will result from the voluntary choices of parents. When a funding program is "*entirely voluntary* with respect to eligible students and their families" and "[w]hen the *parents* and not the *government* are the ones determining which private school offers the best learning environment for their child, the circuit between government and religion is broken." *Id.* at 1273–74. In *Oliver*, "[b]ecause the *parent* receive[d] and

direct[ed] the funds to the private school, *sectarian* or *non-sectarian*, ... the State [wa]s not actively involved in the adoption of sectarian principles or directing monetary support to a sectarian institution." *Id.* at 1276. Likewise, Oklahoma's virtual charter schools are voluntary, and any State funding for St. Isidore will depend on parents' voluntary decisions to enroll their children. *See* § 142(B)(2).

Third, the Board's criteria for determining whether to approve St. Isidore are "void of any suggestion or inference to favor religion or any particular sect." *Oliver*, 368 P.3d at 1277. In *Oliver*, the Court found that because the statute creating the scholarship program was "void of any preference between a *sectarian* or *non-sectarian* private school," "there [wa]s no influence being exerted by the State for any sectarian purpose with respect to whether a private school satisfie[d] the[] requirements." *Id.* at 1274. "Approved schools [we]re determined without regard to religious affiliation and [we]re based on statewide educational standards, health and safety regulations." *Id.* at 1276. Here, the Board approves virtual charter schools "without regard to religious affiliation," and the standards for approving virtual charter schools are "void of any suggestion or inference to favor religion or any particular sect." *Id.* at 1276–77.

B. Art. I § 5 ("free from sectarian control")

Plaintiffs next claim that the Board's approval of and contract with St. Isidore violates Art. I § 5, which states that "[p]rovisions 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.*" (emphasis added). But this section simply requires Oklahoma's "system of public schools" be free from sectarian control; it does not say *each and every school* in Oklahoma must be free from sectarian influence.

The text supports this reading. The clause "free from sectarian control" modifies a single object: "a system of public schools," not each individual school in isolation. *See Fair Sch. Fin. Council of Okla., Inc. v. State*, 1987 OK 114, ¶ 59, 746 P.2d 1135, 1149 (noting Art. I § 5 "merely mandate[s] actions by the Legislature to establish and maintain a system of free public schools" and does not impose obligations at the level of each district). Notably, the framers used the singular form of the word "system" and a singular article—"a"—to describe the object.

See Pitco Prod. Co. v. Chaparral Energy, Inc., 2003 OK 5, ¶ 16, 63 P.3d 541, 546 (finding singular word and modifying article show intent to refer to singular entity). And the other clause modifying that object—"shall be open to all the children of the state"—proves both clauses modify the singular "system of public schools," because each individual school is clearly not "open to all the children of the state." District schools limit enrollment to district residency and also by age and grade level. 70 O.S. § 1-113 (residency requirements); *id.*, § 1-114 (age requirement); *id.* § 8-101.2 (school transfer dependent upon capacity); OAC § 210:10-1-17 (residency). Oklahoma's school voucher program, moreover, allows parents to use public funds as tuition at private religious schools. 70 O.S. § 28-103. It is the *system* that must be open to all children of the State and free from sectarian control. There are no plausible allegations in the Amended Petition that the Board's approval of or contract with St. Isidore somehow puts Oklahoma's "system of public schools" under sectarian control.

In *Oliver*, the plaintiffs also raised this provision, arguing the scholarship program allowing students with disabilities to use State funds to attend sectarian schools violated Art. I § 5. But the District Court rejected that argument, and the Supreme Court did not overturn its ruling. *See Oliver*, 368 P.3d at 1277; *Oliver, Jr. v. Barresi*, 2014 WL 12531242, at *1 (Okla. Dist. Ct. Sept. 10, 2014). As in *Oliver*, Art. I § 5 is not offended here simply because State funds are flowing to a religious school.

C. Art. I § 2 ("toleration" provision)

Plaintiffs finally claim the Board's approval of and contract with St. Isidore violates Art. I § 2, which provides "[p]erfect toleration of religious sentiment shall be secured, and no inhabitant of the State shall ever be molested in person or property on account of his or her mode of religious worship." But the Board has not "molested," or disturbed, anyone on account of their religion for at least three reasons.

First, attendance at St. Isidore will be voluntary. Parents can choose to send their child to St. Isidore, a different charter school, or a traditional district school. No student, including any of Plaintiffs' children, will be required or coerced to attend.

Second, students who choose to attend St. Isidore will be free to practice their own faith

because "[a]ll students are welcome, those of different faiths or no faith." Am. Pet., Ex. A, Revised Appl., PE91; *see also id.*, PE190 ("People of other faiths or no faith are welcome to attend our Catholic schools. They will not be required to affirm our beliefs."). St. Isidore will even promote "lively dialogue between young people of different religions and social backgrounds." *Id.*, PE70.

Third, despite what Plaintiffs imply, "proselytizing" or "indoctrinating"—terms that appear nowhere in Art. I § 2—are not prohibited by this provision. Am. Pet. ¶ 309. If "proselytizing" or "indoctrinating" means teaching religion, that is not forbidden by this section because "[i]t is not the exposure to religious influence that is to be avoided." *See Murrow*, 171 P.2d at 602–03 (holding State could contract with Baptist orphanage even if it promoted Baptist faith).

IV. Claim IV fails to state a claim because the Board could not lawfully enforce the Charter Schools Act's non-sectarian provision.

Plaintiffs' Fourth Claim also claims the Board's approval of St. Isidore violated the Act's requirement that a charter school be "nonsectarian in [its] programs ... and all other operations." Am. Pet. ¶¶ 312–22 (citing § 136(A)(2)). But imposing that requirement would violate both the First Amendment's Free Exercise Clause and Oklahoma's Religious Freedom Act. Plaintiffs thus cannot state a claim for the Board's decision not to enforce that requirement.

A. The First Amendment's Free Exercise Clause bars enforcement of the Act's non-sectarian provision.

Because the Board is obligated to uphold and protect the U.S. Constitution, the Board could not enforce the Act's non-sectarian requirement. Denying St. Isidore's application based on the school's religious character or exercise would have excluded St. Isidore from an otherwise available public benefit in violation of the Free Exercise Clause.

The U.S. Supreme Court has "repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits." *Carson,* 596 U.S. at 778. The Court recently applied that principle "in the context of [three] state efforts to withhold otherwise available public benefits from religious organizations." *Id.*

First, in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the Court struck down a Missouri program that provided grants to nonprofit organizations to install cushioned

playground surfaces but denied those grants to otherwise qualified religious organizations. 582 U.S. 449, 454 (2017). The Court held the Free Exercise Clause did not permit Missouri to "expressly discriminate[] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." *Id.* at 462.

Second, in *Espinoza,* the Court held "the Free Exercise Clause precluded the Montana Supreme Court from applying Montana's no-aid provision to bar religious schools from [a] scholarship program" "solely because of the religious character of the schools." 140 S. Ct. at 2254–55. The Court held that "once a State decides to" provide financial support for education, "it cannot disqualify some private schools solely because they are religious." *Id.* at 2261. Montana's application of its no-aid provision put "school[s] to a choice between being religious or receiving government benefits" in violation of the Free Exercise Clause. *Id.* at 2257.

Third, in *Carson*, the Court invalidated a Maine program that paid tuition for students whose school district did not provide a public secondary school. 596 U.S. at 779–80. Private schools were eligible to receive the tuition payments, but sectarian schools were not. *Id.* at 773. Because sectarian schools were "disqualified from this generally available benefit 'solely because of their religious character,'" the program "'effectively penalize[d] the free exercise' of religion." *Id.* at 780. The Court held the Free Exercise Clause prohibited discrimination against a school's religious conduct—not just its religious status—because "use-based discrimination is [no] less offensive." *Id.* at 769.

Here, the Act allows any qualified "private college or university, private person, or private organization ... to establish a charter school." § 134(C). Were the Board to reject St. Isidore because of its religious character, it would violate the Free Exercise Clause in the same way the states did in *Trinity Lutheran*, *Espinoza*, and *Carson*. Because the State has opened its charter school program to private organizations, the Board may not "disqualify some private [organizations from participating] because they are religious," *Espinoza*, 140 S. Ct. at 2261, unless the disqualification can withstand "the strictest scrutiny," *Carson*, 596 U.S. at 768. But such blatant religious discrimination does not survive strict scrutiny.

B. Because St. Isidore is not a state actor, the Board had no Establishment Clause interest in denying St. Isidore's application.

The Act's nonsectarian provision does not satisfy strict scrutiny. To satisfy strict scrutiny, "the government must demonstrate its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 508 (2022). "A law that targets religious conduct ... will survive strict scrutiny only in rare cases." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993).

To establish a compelling interest, Plaintiffs will likely claim that approving St. Isidore violates the Establishment Clause because private schools like St. Isidore become state actors when they operate as charter schools. This is wrong for at least four reasons.

First, St. Isidore is a private entity, Am. Pet., Ex. P, Cont., PE598, § 1.5, and its actions are not attributable to the government. Private organizations are state actors only when their challenged actions are "fairly attributable" to the government. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999). There must be "a sufficiently close nexus between the State and the challenged action of the regulated entity *so that the action of the latter may be fairly treated as that of the State itself.*" *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) (emphasis added). This requirement ensures "that constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). In Oklahoma, charter schools are "freed—by design—from government control in order to foster educational pluralism." Ex. 1, Stitt Ltr. to Drummond, DE2. They are private entities, and "[t]heir actions are not 'fairly attributable' to the government because operational autonomy is one of their reasons for existing." *Id.*

The Act and corresponding regulations prove this. Charter schools maintain their "own board of governance" and have substantial flexibility over curriculum. Okla. Charter Schools Program, Okla. State Dep't of Educ., https://perma.cc/WU35-MEJP. Charter schools "may offer a curriculum which emphasizes a specific learning philosophy or style or certain subject areas," § 136(A)(3), and they are exempt "from the new core curriculum requirements for public schools," Am. Pet., Ex. A, Revised Appl., 2022 OK AG 7, PE413 (citing 1999 OK AG 64; § 136(A)(3)). Charter schools also adopt their own "personnel policies, personnel

qualifications, and method of school governance." § 136(B). And charter schools are not required "to adhere to the Teacher and Leader Effectiveness standards set by the state of Oklahoma"; nor are charter school teachers required to hold valid Oklahoma teaching certificates. Okla. Charter Schools Program, Okla. State Dep't of Educ., https://perma.cc/WU35-MEJP.

Most importantly, the "specific conduct of which [P]laintiff[s] complain[]," *Blum*, 457 U.S. at 1004—St. Isidore's religious curriculum and operation—is not fairly attributable to the government. "[A] practice initiated by [a contracted entity] and approved by the [state]" but not "order[ed]" by the state is not "state action." *Jackson*, 419 U.S. at 357. The Board has not ordered or encouraged St. Isidore to engage in any religious affiliation or activity; it has merely treated St. Isidore's application neutrally under the law. St. Isidore's "exercise of the choice allowed by state law" of its own curriculum, pedagogy, and affiliation, "where the initiative comes from it and not from the State, does not make its action in doing so 'state action.'" *Id.*

Second, neither a contract with the State, the receipt of public funds or other public benefits, nor substantial government regulation makes private schools state actors. In *Rendell-Baker*, the U.S. Supreme Court held a private school under contract with the State to educate maladjusted students was not a state actor, even though the school was heavily regulated by, and received more than 90% of its operating budget and other benefits from, the State. 457 U.S. at 832–33, 843. "Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts." *Id.* at 841. And even though "virtually all of the school's income was derived from government funding," "the school's receipt of public funds d[id] not make [its actions or decisions] acts of the State." *Id.* at 840–41; *accord Blum*, 457 U.S. at 1011 (finding nursing homes that "depended on the State for funds" were not state actors). Finally, because the school's challenged actions "were not compelled or even influenced" by state regulations, "extensive regulation" did not make the school a state actor. *Rendell-Baker*, 457 U.S. at 841; *see also Jackson*, 419 U.S. at 350 ("The mere fact that a business is subject to state regulation does not by itself convert its

action into that of the State.").[9]

Similarly, here, contracting with and receiving benefits from the State does not render St. Isidore a state actor. And because the regulations Plaintiffs cite (*e.g.*, statutes and regulations related to anti-discrimination, disabilities, academics, attendance, finances, accreditation, and insurance) did not "compel[] or even influence[]" St. Isidore's religious character, they do not render the school a state actor. *Rendell-Baker*, 457 U.S. at 841.[10] What's more, Oklahoma charter schools are regulated *far less* than Oklahoma's public schools. Oklahoma charter schools are exempt "from all statutes and rules relating to schools, boards of education, and school districts." § 136(A)(5). This shows Oklahoma intended charter schools to be freed from traditional constraints.

Third, Oklahoma charter schools do not perform a "traditionally exclusive" function of the State. Am. Pet. ¶ 67. In *Rendell-Baker*, the Court concluded the private school at issue was not a state actor simply because it performed a "public function." 457 U.S. at 842. Instead, the Court said, "the question is whether the function performed [is] the *exclusive* prerogative of the State." *Id.* "'[V]ery few' functions fall into that category." *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 809 (2019). And *Rendell-Baker* "foreclosed" the argument that "'public educational services' are traditionally and exclusively the province of the state." *Caviness*, 590 F.3d at 815; *Logiodice*, 296 F.3d at 26 (same). Oklahoma's "legislative policy choice" to

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[9] Applying *Rendell-Baker*, the Ninth, Third, and First Circuits have all held that regulated schools chartered by or contracting with the state and receiving significant public funds are not state actors. *See Caviness v. Horizon Cnty. Learning Ctr., Inc.*, 590 F.3d 806 (9th Cir. 2010) (Arizona charter school was not state actor even when designated as "public school" under state law); *Logiodice v. Trustees of Me. Cent. Inst.*, 296 F.3d 22 (1st Cir. 2002) (high school that contracted to serve all students in district was not state actor); *Robert S. v. Stetson Sch., Inc.*, 256 F.3d 159 (3d Cir. 2001) (school for juvenile sex offenders was not state actor because it did not perform traditionally exclusive state function). Splitting from those circuits, the Fourth Circuit ruled in a ten-to-six en banc opinion that a North Carolina charter school was a state actor subject to § 1983 claims. *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 115 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 2657 (2023). But, unlike Oklahoma, North Carolina law expressly makes North Carolina charter schools subject to constitutional obligations. *See* N.C. Stats. § 115C-390.2(a).

[10] At least one Oklahoma court has agreed that "[t]he mere fact that a private educational institution may be regulated under state law, or receives direct and indirect federal assistance, does not elevate the acts of the private institution to 'state action.'" *Bittle v. Okla. City Univ.*, 2000 OK CIV APP 66, ¶ 18, 6 P.3d 509, 516.

"provide alternative learning environments at public expense" in "no way makes these services the exclusive province of the State." *Caviness*, 590 F.3d at 815.

Finally, the descriptor "public" in the Act does not designate charter schools as state actors or government entities. The U.S. Supreme Court has explained that a law's characterization of an entity does not control its state-actor status for constitutional purposes. In *Jackson*, the statutory term "public utilities" did not make the utility a state actor. 419 U.S. at 350 & n.7. In *Polk County v. Dodson*, "public" defenders, though employed by the state to meet constitutional obligations, were not state actors when acting as attorneys. 454 U.S. 312, 325 (1981). And in *Lebron v. National Railroad Passenger Corporation*, a "congressional label" did not control whether Amtrak was a state actor. 513 U.S. 374, 392–93 (1995). Following these cases, other courts have held charter schools *are not* state actors despite being called "public." *See Caviness*, 590 F.3d at 813–14 (finding charter school did not engage in state action, even when designated as "public school" under state law); *I.H. ex rel. Hunter v. Oakland Sch. for Arts*, 234 F. Supp. 3d 987, 992 (N.D. Cal. 2017) (noting it "unlikely that California law characterizing charter schools as 'public schools' will suffice to prove state action"). Here, too, the legislature's description of a charter school as "a public school established by contract" does not transform charter schools like St. Isidore into state actors. If mere labels were determinative, the Act could "be manipulated" to "reduc[e]" the First Amendment "to a simple semantic exercise." *Carson,* 596 U.S.at 784.

Indeed, the Oklahoma legislature has never indicated it intended the phrase "public school established by contract" to turn charter schools into state actors subject to constitutional constraints. If anything, that phrase distinguishes charter schools from schools that the government itself establishes while recognizing they are "free schools supported by public taxation." 70 O.S. § 1-106; *see also* Am. Pet., Ex. P, Cont., PE599, § 2.9. Notably, in declaring that "[a] charter school shall comply with all federal regulations and state and local rules and statutes relating to ... civil rights," § 136(A)(1), the legislature did not mention constitutional obligations, demonstrating it did not intend charter schools to bear the burdens of state actors.

In sum, St. Isidore is a private entity, and its challenged actions are not fairly attributable

to the government. Oklahoma charter schools differ from Oklahoma public schools in nearly every respect. "[T]he most significant factors—such as private operation and curriculum flexibility"—establish that charter schools are private entities. Am. Pet., Ex. A, Revised Appl., 2022 OK AG 7, PE425. And the Board has not compelled or influenced St. Isidore's challenged actions—its religious affiliation, curriculum, or operation.

Because St. Isidore is a private entity that has not engaged in state action, the Board had no Establishment Clause interest in denying St. Isidore's application based on St. Isidore's religious character. "[A] neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause." *Carson*, 596 U.S. at 768. And "an 'interest in separating church and state more fiercely than the [Establishment Clause] ... cannot qualify as compelling in the face of the infringement of free exercise.'" *Id.* at 781 (cleaned up). "[I]n no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights." *Kennedy*, 597 U.S. at 543. Simply put, the Board had no "antiestablishment interest" that would have "justif[ied] ... exclud[ing] some members of the community from an otherwise generally available public benefit because of their religious exercise." *Carson*, 596 U.S. at 781.

Because applying the Act's non-sectarian requirements to deny St. Isidore's application would have violated the Free Exercise Clause, the Board's actions were not only proper, but mandated. Accordingly, Plaintiffs fail to state a claim under the Act.

C. Oklahoma's Religious Freedom Act bars enforcement of the Act's non-sectarian provision.

The Board is also bound by ORFA, which—like its federal counterpart—"operates as a kind of super statute" and "displac[es] the normal operation of" and "supersede[s]" the Act. *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 682 (2020); *see also Beach v. Okla. Dep't of Pub. Safety*, 2017 OK 40, ¶ 14, 398 P.3d 1, 6, n.20 (pointing to federal Religious Freedom Restoration Act cases in interpreting ORFA). Because applying the Act's non-sectarian provision to deny St. Isidore's application would have violated ORFA, the Board's refusal to do so

was proper, and Plaintiffs' Fourth Claim must be dismissed.

ORFA provides that "[n]o governmental entity shall substantially burden a person's free exercise of religion," 51 O.S. § 253(A), unless the burden is "[e]ssential to further a compelling governmental interest" and the "least restrictive means of furthering that compelling governmental interest," *id.* § 253(B). ORFA applies "even if the burden results from a rule of general applicability." *Id.* § 253(A). What's more, after a recent amendment, ORFA further states that "it shall be deemed a substantial burden to exclude any ... entity from participation in or receipt of governmental funds, benefits, programs, or exemptions *based solely on the religious character of the person or entity*." Okla. Religious Freedom Act, S.B. 404, 59th Leg., 1st Sess., § 1 (Okla. 2023) (codified at 51 O.S. § 253(D)) (emphasis added).[11] The Board thus could not burden St. Isidore's religious exercise by excluding it from the State's virtual charter school program based on its religious character, unless the Board had a compelling interest in doing so. But, as explained above, the Board had no compelling interest to reject St. Isidore, and therefore properly refused to enforce the Act's nonsectarian provision for this reason as well.

CONCLUSION

For these reasons, and the reasons set forth in the other defendants' motions to dismiss, the Amended Petition should be dismissed.

[11] Because St. Isidore's contract "commence[s] on July 1, 2024,"Am. Pet., Ex. P, Cont., PE600, § 3.2, this amendment, which took effect on November 1, 2023, applies. Even before this amendment, ORFA would have triggered strict-scrutiny because the prior version excluded "the denial of government funding" from the "[g]ranting governmental funds" exception in 51 O.S. § 255(B), subjecting a funding denial to strict-scrutiny.

Dated: March 25, 2024

Respectfully submitted,

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**Admitted Pro Hac Vice*

*** Application for Pro Hac Vice representation of Defendant Statewide Virtual Charter School Board forthcoming*

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was emailed on the 25th day of March, 2024, at or before 5:00 p.m. to:

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**Admitted Pro Hac Vice*

Dated: March 25, 2024

Cheryl Plaxico

J. Kevin Stitt
Office of the Governor
State of Oklahoma

February 27, 2023

Dear Attorney General Drummond:

I write to express my strong disagreement with your letter of February 23, 2023, withdrawing Attorney General Opinion 2022-7. In that opinion, your predecessor, Attorney General John O'Connor, concluded – in my view correctly – that provisions of Oklahoma law prohibiting charter schools from being "affiliated with a nonpublic sectarian school or religious institution," and requiring them to "be nonsectarian in [their] programs, admission policies, employment practices, and all other operations," 70 0.S.2021, § 3-136(A)(2), likely violate the First Amendment's prohibition on religious discrimination.

Your letter seems to have been prompted by the pending application before the Statewide Virtual Charter School Board for St. Isidore of Seville Catholic Virtual School. You contend that the United States and the Oklahoma Constitutions permit, and indeed require, the state to discriminate against religious organizations seeking authorization to operate charter schools. In fact, the opposite is true. You state that "religious liberty is one of our most fundamental freedoms" that protects the "right to worship according to our faith" and to be "free from any duty that conflicts with our faith." That is certainly true.

But religious liberty does more. Religious liberty also precludes the government from singling out believers for disfavor or preventing them from fully participating in public life, including in public-benefits programs. As Chief Justice Roberts explained in *Espinoza v. Montana*, 140 5. Ct. 2246 (2020), the First Amendment "protects religious observers against unequal treatment and against laws that impose special disabilities on the basis of religious status." As a result, the Constitution prohibits states from "putting [a] school to a choice between being religious or receiving government benefits." *Id.* at 2257. Yet that is exactly what the provisions of Oklahoma law prohibiting religious charter schools do: They put religious believers and organizations to a choice between being religious – in the case of St. Isidore of Seville School, being "a fully Catholic school" – and receiving funds that the state has chosen to allocate to privately operated charter schools.

I have previously expressed my strong agreement with Attorney General O'Connor's conclusion that prohibitions on religious charter schools are unconstitutional. These prohibitions run afoul of the non-discrimination principle articulated by the U.S. Supreme Court in recent cases, including *Espinoza, Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 5. Ct. 2012 (2017), and *Carson v. Makin*, 142 5. Ct. 1987 (2022). These cases make clear that when the government creates a program to support private organizations who help serve the public good, including by providing education, it may not bar religious organizations from participating. Your letter's attempt to distinguish these opinions by arguing that they have "little precedential value" because they concern "private schools" rather than "charter schools" fails. The principle driving these cases applies with equal force to privately operated charter schools. Just as Maine had done in the program invalidated in *Carson v. Makin*, Oklahoma has chosen to enlist private organizations to create privately operated schools, to promote educational pluralism for the benefit of the children of Oklahoma. And, as Attorney General O'Connor correctly concluded, following *Carson*, "[t]he State cannot enlist private organizations to 'promote a diversity of educational choices,' 70 O.S. 2021 § 3-134(I)(3), and then decide that any and every kind of religion is the wrong kind of diversity. This is not how the First Amendment works."

The question of whether a ban on religious charter schools is unconstitutional religious discrimination turns on whether charter schools are, for federal constitutional purposes, "state actors" or private actors. If they are state actors, then excluding religious charter schools is constitutionally permitted – indeed, probably required. But if they are private actors, excluding religious ones is constitutionally forbidden. As the U.S. Supreme Court stated in *Espinoza*, "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." And the schools subsidized by Oklahoma charter school laws *are* private. Although charter schools are *labeled* as "public schools" in Oklahoma law, they are – in contrast to district public schools – privately operated. And privately operated organizations, including charter schools, are state actors only when their actions are "fairly attributable" to the government, rather than merely authorized or encouraged by it. *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40 (1999). In Oklahoma, the actions of privately operated charter schools are certainly not attributable to the government. On the contrary, these schools are freed – by design – from government control in order to foster educational pluralism. Their actions are not "fairly attributable" to the government because operational autonomy is one of their reasons for existing.

The mere fact that charter schools are publicly funded, and designated as "public schools" by Oklahoma law, does not transform them into state actors. The Supreme Court has already made that clear. More than 40 years ago, the Court held that a privately operated school for special needs students was not a state actor even though "virtually all of the school's income was derived from government funding" and it was required to "comply with a variety of regulations." *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982). And the Court has also rejected the notion that a private entity is transformed into a state actor merely because it was created by the government or is formally

designated "public." *See San Francisco Arts & Athletics, Inc. v. U.S. Olympic Commission*, 483 U.S. 522 (1987); *Jackson v. Metro Edison Co.*, 419 U.S. 345 (1974).

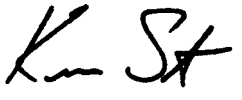
You note that the issue may be "definitively resolved" by the U.S. Supreme Court in a pending case having nothing to do with religion – an Equal Protection challenge to a North Carolina charter school's dress code. *See Peltier v. Charter Day School*," 37 F.4th 104 (4th Cir. 2022), cert. pending, no. 2022-238. The Court has not yet decided whether to hear the case, which would require it to address the question whether charter schools are state actors. But the factors that the Court will apply to make that determination (*if* it chooses to take the case) all clearly support the conclusion that they are not. In any event, the state of Oklahoma has the independent constitutional obligation to uphold the Constitution of the United States *now*, not to act on a guess that the Court might in a future case go against the thrust of its own precedents.

As for the merits of the state action issue, ten states – Texas, Alabama, Alaska, Arkansas, Kansas, Mississippi, Nebraska, South Carolina, Tennessee, and Virginia – have filed a brief in the *Peltier* case supporting the argument that charter schools are not state actors. In their brief, these states argue that the very point of charter school laws – to enable educational innovation and pluralism by freeing private providers of education to operate without undue government interference – is undercut by the argument that charter schools are state actors. I agree strongly with the arguments articulated in these states' brief.

I see even broader threats to religious liberty in your suggestion that Attorney General O'Connor's opinion "misuse[d] the concept of religious liberty by employing it to justify state-funded religion," including "tax-payer funded religious schools." As you know, the Lindsey Nicole Henry Scholarship for Students with Disabilities Program, which the Oklahoma Supreme Court upheld in *Oliver v. Hoffmeister*, 368 P.3d 1270 (Okla. 2016), provides publicly funded scholarships to enable children with special learning needs to attend private and religious schools. Any concerns about "tax-payer funded religious schools" would seem to apply with equal force to religious schools participating in this important program. Outside of the education context, the state *regularly* partners with religious organizations to provide public services. For example, the Oklahoma Department of Human Services maintains an "Office of Faith Based and Community Initiatives" whose stated mission is to "build[] partnerships between government offices and faith and community groups to address social service needs." Religious organizations partnering with the government through this program "are not required to alter their forms of internal governance, their religious character or remove religious art, icons, scripture or other symbols." *See* "Ask OKDHS - Office of Faith Based and Community Initiatives." The State also contracts with religious organizations, including the two Catholic dioceses seeking approval to operate St. Isidore of Seville Virtual Catholic School, to provide refugee resettlement and foster care services. The concerns expressed in your letter would seem to apply with equal force to these critical public-private partnerships as well.

Finally, I am troubled by the allegation that approval of the SISCVS application portends a "slippery slope" that might open the door to charter schools sponsored by all faiths. Oklahomans support religious liberty for *all*, Christian and non-Christian alike. And so do I. Oklahomans also support an increasingly innovative and pluralistic educational system freed from undue government interference. Again, so do I. As Governor, I wish to make clear that I support not only the pluralism promoted by Oklahoma charter school laws but also the religious liberty of all Oklahomans and to express my confidence that the people of Oklahoma do as well.

Sincerely,



J. Kevin Stitt
Governor of Oklahoma

SPECIAL MEETING OF THE

STATEWIDE VIRTUAL CHARTER SCHOOL BOARD

OKLAHOMA HISTORY CENTER

800 NAZIH ZHUDI DR.

OKLAHOMA CITY, OKLAHOMA 73105

Monday, June 5, 2023, 12:00 p.m.

Excerpt

Transcript Position Counter

1:35 to 4:23

Alliance Defending Freedom

15100 N. 90th St.

Scottsdale, AZ 85260

(480) 444-0025

(Begin portion designated for transcription.)

1:35 CHAIRMAN FRANKLIN: This moves us to Item 4 on our agenda, which is Public Comments.

4. Public Comment.

The public comments will be limited to only those subject matters listed in the current meeting agenda. A sign-up sheet's posted at least fifteen (15) minutes prior to the scheduled start and time of the meeting. Only individuals who have signed up so they can be recognized during the public comment period and will be recognized in the order in which they have signed.

Each speaker will be allocated three (3) minutes for presentation. And Skyler, if you'll help us keep the time. The Board Chairperson may interrupt and/or terminate any presentation during public comment, which does not conform to the procedures outlined under this section.

I understand we have several friends here. So we'll start with Doug Mann. And then Erica Wright would be after that, and then Andrea Kunkel right after that. So Doug Mann, we'll allow you to begin and welcome.

building with no guardrails. I asked you all last time what are the guardrails going to be. And I didn't hear anything go into it at the end of the meeting. Because maybe you haven't seen this personally or haven't had a friend of yours blow their head off over all this stuff.

It's real. The guardrails are real. They have historically have the worst reputation I have ever heard of on, on this planet of taking care of this. Country to country to country to country. Now is the Notre Dame Religious Liberty Association going to come down and fight every one of those lawsuits?

Are you ready for that? I think with all of this being explained, people have a right to sue you down the line for what you've decided on. That's all I've got to say. Thank you.

CHAIRMAN FRANKLIN: Thank you, Mr. Cummings. Thank you everybody for speaking what was on their minds and hearts today and for abiding by what we asked you to speak to and the limits that we set forth.

So that moves us then to Item 5, which is Chairman Franklin.

And so what I would like to begin with, with my opening comments is welcome to Ryan Bobek. We're glad you're here. We've tried to do our backgrounds. I happen to know you. I know that you served on the State Board of Education before. I know that you served on the Department of Career Tech Board. So you understand what board service is all about and we're grateful for you being here.

Second, I'd like to express gratitude to Barry Beauchamp for three years of service that he spent to this Board. Had he not invested that kind of energy for us, this Board would have been stymied and would have not been able to serve the functions that were before us.

He drove from Lawton through really nasty weather, inclement conditions. It's always windy in Lawton. So that's not a condition. That's just the state of affairs that are there. But he routinely came and served in a quiet and humble, but informed manner. And I just want to say thank you to Barry. He was, he's a champion. Also served four decades to public education, so.

I find it ironic today that we find ourselves sandwiched between Americas' two most patriotic celebrations, Memorial Day that we celebrated last week, July 4th, Independence Day coming up, of which many of us are going to get a chance to spend time with our families and do amazing things as a result of what's happened throughout our country.

Our nation was founded and has been defended by legions of dedicated Americans who have been devoted to upholding and guiding the principles which we have codified in constitutions and national and state laws.

As appointed members of the Statewide Virtual Charter Board, we each have signed an oath that reads, and I'll just read you mine:

"I, Robert Franklin, do solemnly swear and affirm that I will support, obey, and defend the Constitution of the United States and the Constitution of the State of Oklahoma, and that I will not knowingly receive directly or indirectly any money or valuable thing to performance or nonperformance of any act or duty pertaining to my office other than the compensation allowed by law."

CHAIRMAN FRANKLIN: -- why we were doing this. So I appreciate the reminder of that. Thank you. Okay. Any other points of discussion? Sir?

MR. BOBEK: Yeah, I, thank you for welcoming me as your newest member. So I wanted to kind of let you folks know where I was coming from on this and put together some notes I'm just going to share with you before we move into the vote during this discussion section. Thank you, Chairman.

So I've been diligently reviewing the relevant authority materials and I'm convinced that in context of Oklahoma State law at issue in today's discretionary decision, namely Section 3-136(a)(2) of Title 70, the Oklahoma statutes, does violate the free exercise clause of the First Amendment of the US Constitution, and that an affirmative vote is consistent with the establishment clause of the First Amendment to the US Constitution.

While I'm aware of the language in Section 3-136(a)(2) of Title 70, Oklahoma statutes, it could hardly be clearer to me that reliance on that provision to justify a denial of the application before us would

require me to ignore the US Constitution and relevant US Supreme Court cases applying it.

Said differently, the referenced statutory language cannot be said clearly established in a way that would support a no vote today. And to the contrary, what seems most clearly established are the rights thoroughly outlined in the letter that was submitted by First Liberty Institute.

And as a board member, I'm duly bound to support, obey, and defend the United States Constitution which in my view leads to a single conclusion in this instance, that I must vote yes in favor of the application of St. Isidore of Seville Catholic Virtual School.

So I wanted to share that with you all to let you know where I stood as we go into the vote.

CHAIRMAN FRANKLIN: Thank you. Appreciate the clarity.

DR. STRAWN: Mr. Chairman, if I could make a few comments as well? Just first of all, thank you for your grace. I can't even imagine trying to chair all this. When I think about all the things you guys have

AFFIDAVIT OF PENNY KNIGHT

I, Penny Knight, state under oath, after being duly sworn, as follows:

1. The transcript was prepared by me from electronic recording, file named OKSVCSB Meeting 06 05 23, presented by Alliance Defending Freedom for transcription. The transcript accurately reflects the recording.

2. I am in no way related to any of the parties to this suit nor am I in any way interested in the outcome of this suit.

FURTHER AFFIANT SAYETH NAUGHT.

Penny Knight
Penny Knight
Transcripts, Ltd.

State of Arizona)
County of Maricopa)

The foregoing instrument was acknowledged before me this 21 day of June, 2023.

Notary Public
My commission expires: 6/22/2026

OKLAHOMA
Statewide Virtual
Charter School Board

April 13, 2023

Ms. Lara Schuler
Director of Catholic Education
Secretariat for Evangelization and Catachesis
P.O. Box 32180
Oklahoma City, OK 73123-0380

Dear Ms. Schuler,

In compliance with 70 OK Stat § 3-134 and Oklahoma Administrative Code § 777: 10-3-3, the Statewide Virtual Charter School Board (SVCSB) met on Tuesday, April 11, 2023 at 2:00 p.m. in a regular open meeting session held at the Oklahoma History Center located at 800 Nazih Zuhdi Drive in Oklahoma City, Oklahoma to consider the St. Isidore of Seville Catholic Virtual School Application for Initial Authorization.

Strengths of the proposed school application, including the Catholic Church's history of education success and the funding commitment by the Archdiocese of Oklahoma City for the successful launch of the proposed school, were acknowledged in the meeting. However, the SVCSB voted unanimously to disapprove the St. Isidore of Seville Catholic Virtual School Application for Initial Authorization. The following reasons for rejection were cited:

1. Lack of detail regarding the proposed school's special education plan, specifically its programs, services, and legal compliance,

2. Lack of clarity regarding the proposed school's pedagogical approach,

3. Concerns with proposed governance and school management structure, specifically the lack of clarity and consistency regarding board membership, duties, responsibilities, and residency and the potential conflict of interest and lack of proper control between the two entities,

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4. Concerns regarding connectivity, access, and technology support for students, particularly for rural Oklahoma and including the lack of a cited and appropriate budget for such services,

5. Concerns regarding the proposed school's funding structure, particularly as it relates to the potential commingling of private donations and public dollars,

6. Concerns regarding projected overall student and school outcomes and deliverables over a five-year trajectory,

7. Legal issues that may be applicable to the consideration of the St. Isidore of Seville Catholic Virtual School Application for Initial Authorization as an Oklahoma charter school, including the legal basis for religious reason aligning to Oklahoma statute, the Oklahoma Constitution, and the United States Constitution for approval of the application, and

8. Consistency issues throughout the application, including needed corrections and readability across the different sections of the St. Isidore of Seville Catholic Virtual School Application for Initial Authorization.

The governing board for the proposed school may address the disapproval of the St. Isidore of Seville Catholic Virtual School Application for Initial Authorization through the revision, resubmission and reconsideration of the application provision allowed for in Oklahoma statute and administrative code. For reconsideration, an amended application must be received by the Statewide Virtual Charter School Board within thirty (30) days of receipt of notification of the rejection of the application. The SVCSB would then have an additional thirty (30) days from receipt of the revised application for review and reconsideration. Clarity regarding this process may be found in the Oklahoma Charter School Act. Should you have questions, I am also available to discuss those with you.

Sincerely,

Rebecca Wilkinson

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