FILED IN DISTRICT COURT
OKLAHOMA COUNTY

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**IN THE DISTRICT COURT FOR OKLAHOMA COUNTY**
**STATE OF OKLAHOMA**

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

# DEFENDANT ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL'S MOTION TO DISMISS

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Defendant St. Isidore of Seville Catholic Virtual School ("St. Isidore") moves under 12 O.S. § 2012(b)(1) and (6) for an order dismissing all claims brought by Plaintiffs OKPLAC, Inc., d/b/a Oklahoma Parental Legislative Action Committee, Melissa Abdo, Krystal Bonsall, Leslie Briggs, Brenda Lené, Michele Medley, Dr. Bruce Prescott, Rev. Dr. Mitch Randall, Rev. Dr. Lori Walke, and Erika Wright (together, "Plaintiffs"). In support, St. Isidore states as follows:

## INTRODUCTION

In 1999, the Oklahoma legislature enacted the Charter Schools Act, inviting both public and private organizations to establish charter schools to "promote a diversity of educational choices" for Oklahoma families. 70 O.S. § 3-134(I)(3). Oklahoma's charter program supports independent educators who design unique schools that will "[i]ncrease learning opportunities for students," "[e]ncourage the use of different and innovative teaching methods," and "[p]rovide additional academic choices for parents and schools." 70 O.S. § 3-131(A). To free up educators to achieve these goals, the Act affords them substantial flexibility to craft curricula and run their schools. 70 O.S. § 3-136(A)(3), (5). The Act has fostered a diverse array of educational options—from schools that focus on science and math to those that promote fine arts to those that offer language immersion or an education grounded in the culture of particular Indigenous communities.

In January 2023, the Archbishop of Oklahoma City and the Bishop of Tulsa formed St. Isidore of Seville Catholic Virtual School ("St. Isidore"), with the hope of adding to Oklahoma's growing variety of charter school offerings. Their aim was, and is, a noble one—to bring the new educational opportunity of a Catholic school "to educate the entire child: soul, heart, intellect, and body," to interested families across Oklahoma, regardless of their faith, background, or income. Amend. Pet. Ex. A, App. § 2, at 5 [PE56]. Shortly after forming, St. Isidore applied to the Oklahoma Statewide Virtual Charter School Board ("the Board") to operate as a virtual charter school. That June, after a lengthy review process, the Board exercised its sovereign authority to approve St. Isidore's application and agreed to negotiate a contract that would enable the school to take part in the virtual charter program. And in October 2023, the parties executed a charter contract to govern this relationship, paving the way for the school to open to children this August.

But now, as St. Isidore administrators prepare to educate the school's first students in the fall, nine otherwise disinterested taxpayers and one legislative action committee representing other disinterested taxpayers (collectively, "Plaintiffs") ask this Court to extinguish St. Isidore preemptively, before the school has opened or any child has enrolled.

Plaintiffs, who have no interest in enrolling their children in St. Isidore and who have no grievance with anything the nascent school has ever done, seek to eliminate it for a simple reason: it is religious. They believe that the State of Oklahoma may *never* allow a religious organization to operate a charter school because (they contend) any faith-based school would violate the Charter Schools Act and the Oklahoma Constitution. They purport to raise other purely technical errors in the Board's decision to partner with St. Isidore; they baselessly speculate about ways in which they predict St. Isidore might run afoul of the law; and they conjure up hypothetical scenarios of discrimination that do not, and never will, exist. But those arguments are mixed in only to obscure the lamentable premise of their challenge: that religious believers cannot be trusted to participate in State programs to help educate children and serve the public good.

This Court should reject this effort and dismiss Plaintiffs' claims.

*First*, Plaintiffs have neither standing to pursue any of their claims nor, for their statutory and regulatory claims, a cause of action.

*Second*, Plaintiffs' attack against religious charter schools fails on its merits. Although the Charter Schools Act purports to exclude religious schools from participating in the program, 70 O.S. § 3-136(A)(2), that discriminatory exclusion violates both state and federal law and cannot be enforced. Under state law, the Oklahoma Religious Freedom Act ("ORFA") overrides any religious exclusion in Oklahoma's charter law and affirmatively prohibits the State from depriving a school the opportunity to participate in the charter program solely because it is religious. 51 O.S. § 253(D). Nor are Plaintiffs correct that Oklahoma's Constitution requires any such exclusion. The Oklahoma Supreme Court has twice held that Article II, Section 5 of the Oklahoma Constitution prohibits the State only from distributing *gratuitous* benefits to religious entities. It does not

prohibit the State from disbursing funds to religious entities who in turn provide a substantial benefit to the State—like the creation of a new school for families across Oklahoma.

More to the point, the First Amendment of the U.S. Constitution prohibits the State from enforcing any exclusion of religious charter schools. The U.S. Supreme Court has held three times in the past decade that the First Amendment's Free Exercise Clause prohibits a State from denying a religious school access to a generally available public benefit solely because the school is religious. *See Carson v. Makin*, 142 S. Ct. 1987, 2002 (2022). As former Oklahoma Attorney General John O'Connor explained, "The State cannot enlist private organizations to 'promote a diversity of educational choices,' . . . and then decide that any and every kind of religion is the wrong kind of diversity. This is not how the First Amendment works." Amend. Pet. Ex. A, App. § 13, App'x N at 14 [PE425] (quoting 70 O.S. § 3-134(I)(3)). Plaintiffs cannot nullify these rights by recasting a private school that *contracts with* the government as *part of* the government.

*Third*, Plaintiffs' scattershot of technical challenges—contending that St. Isidore may someday violate the law—are unripe, meritless, and seek a disproportionate and inequitable remedy that this Court must not countenance. Indeed, each of Plaintiffs' technical challenges is squarely and explicitly contradicted by materials that Plaintiffs themselves have attached to their Amended Petition. This Court must reject Plaintiffs' attempt to extinguish St. Isidore and decline their invitation to impose the very unlawful religious discrimination that the Board itself refused to countenance. The Amended Petition should be dismissed.

## FACTS

In January 2023, the Archbishop of Oklahoma City and the Bishop of Tulsa incorporated St. Isidore as an Oklahoma nonprofit corporation with the goal of opening an innovative, online, and statewide school that would be free to all interested children through the State's virtual charter program. Shortly thereafter, St. Isidore submitted an extensive application detailing the plans for this new school and requesting that the Board approve it to operate as part of the virtual charter program. Amend. Pet. Ex. A. The application explained that St. Isidore would "empower[] and prepare[] students for a world of opportunity and a lifetime of learning" through "an interactive

learning environment that is rooted in virtue, rigor and innovation," in accordance with the school's Catholic faith. Amend. Pet. Ex. A, App. § 2, at 5 [PE56]. It made clear that St. Isidore would offer this opportunity to "any and all students" who choose to attend, including "those of different faiths or no faith," and regardless of the student's personal background, income, or ability. Amend. Pet. Ex. A, App. § 7, at 38 [PE91], 73 [P133]. It pledged not to discriminate in its admissions, hiring, or disciplinary policies on the basis of a protected class. *Id.* at 43 [PE96]; § 9, at 73 [PE133]. And it guaranteed that it would comply with all applicable laws. Amend. Pet. Ex. A., App. § 12, at 93 [PE159].

Following a detailed review process, St. Isidore submitted a revised application on May 25, 2023, to address a few questions raised during the Board's initial review. Amend. Pet. Ex. A. That June, following further review and deliberation on St. Isidore's revised materials, the Board approved St. Isidore's application. And, in October 2023, the parties executed a charter contract confirming and detailing the Board's sponsorship of the school to begin on July 1, 2024. Amend. Pet. Ex. P ¶ 3.2 [PE600]. In the charter contract, St. Isidore again agreed to comply with the terms of the charter and all applicable state and federal law. *Id.* ¶ 3.1 [PE599–600]. It reiterated that "no student shall be denied admission to [St. Isidore] 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 hereof, income, aptitude, or academic ability." *Id.* ¶ 8.8 [PE611]. It further promised to "comply with all federal and state laws relating to the education of children with disabilities." *Id.* ¶ 8.6 [PE610–PE611]. And finally, the contract recognized that St. Isidore, as a private religious organization, is itself promised the right "to freely exercise its religious beliefs and practices consistent with" the "rights, exemptions[,] [and] entitlements" that the law affords religious organizations. Amend. Pet. Ex. P ¶¶ 2.1 [PE598–PE599], 8.2 [PE609].

St. Isidore is now preparing for its first school year. It will welcome its first students in August 2024. Seeking to close St. Isidore's doors before they open, Plaintiffs filed this Amended Petition seeking prospective declaratory and injunctive relief against St. Isidore, the Board, the

Department of Education, and various government officials. The Amended Petition asserts four claims predicated on state regulations, statutes, and constitutional provisions. None has merit.

## STANDARD FOR DISMISSAL

A motion to dismiss "test[s] the law that governs the claim," not "the underlying facts." *May v. Mid-Century Ins. Co.*, 2006 OK 100, ¶ 10, 151 P.3d 132, 136 (Okla. 2006). The Court "must take as true all of the challenged pleading's allegations together with all reasonable inferences that may be drawn from them." *Id.* It will grant the motion if it finds a "lack of any cognizable legal theory to support the claim" or that there is "no set of facts in support of the claim which would entitle [the plaintiff] to relief." *Smith v. City of Stillwater*, 2014 OK 42, ¶¶ 12-13, 328 P.3d 1192, 1197 (Okla. 2014) (citations omitted). To survive a motion to dismiss, Plaintiffs must plead sufficient facts to show that they could win under a cognizable legal theory. *See id.*

A "copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." 12 O.S. § 2010(c). The "allegations of a petition must be construed in connection with the exhibits attached and referred to in the petition," and when there is "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, ¶¶ 13–14, 243 P.2d 701, 704 (Okla. 1952); *accord Eckel v. Adair*, 1984 OK 86, ¶ 4, 698 P.2d 921, 923 (Okla. 1984) ("the terms of the exhibits must control" over any conflicting allegation).

## ARGUMENT AND AUTHORITY

### I. PLAINTIFFS' CLAIMS LACK STANDING OR A CAUSE OF ACTION.

At the outset, none of Plaintiffs' claims is even justiciable. There is no cause of action for Plaintiffs to pursue their first three claims, and Plaintiffs lack standing to pursue any of their claims. Thus, even before addressing the merits, this Court should dismiss.

#### A. Plaintiffs Do Not Have A Private Cause Of Action To Pursue Their Statutory And Regulatory Claims.

In Oklahoma, not every "regulatory statute" gives private plaintiffs a cause of action. *Owens v. Zumwalt*, 2022 OK 14, ¶ 10, 503 P. 3d 1211, 1215 (Okla. 2022). Instead, a cause of

action exists only when (1) the plaintiff belongs to a class "narrower than the 'public at large'" for whose especial benefit the statute was enacted; (2) the statute shows an intent to create a private cause; and (3) the private cause is not inconsistent with the underlying purposes of the legislative scheme. *Walker v. Chouteau Lime Co.*, 1993 OK 35, ¶¶ 3–5, 849 P.2d 1085, 1086–87 (Okla. 1993); *Owens*, 503 P.3d at 1215. When assessing the second and third prongs, courts consider whether such a cause would undermine an administrative or other enforcement mechanism in the legislative scheme. *See, e.g.*, *Walker*, 849 P.2d at 1087; *Owens*, 503 P.3d at 1216.

None of the provisions of the Oklahoma Charter Schools Act on which Plaintiffs' claims rely—70 O.S. §§ 3-134, 3-135, 3-136, 3-140, and 3-145.3—satisfies this test. *First*, the Act exists for the "especial benefit" of charter schools and the students and families that they serve. *Walker*, 849 P.2d at 1086; *see* 70 O.S. § 3-131 (describing Act's purpose). No Plaintiff here alleges any interest in enrolling a child in St. Isidore. They are mere members of the "public at large." *Walker*, 849 P.2d at 1086. *Second*, the legislature gave no hint that it intended to create a private cause of action. None of the cited provisions creates one to challenge decisions by the Board. Nor do the provisions suggest a legislative intent to imply one. They merely explain a sponsor's powers to execute a charter contract, what must be included in a charter, whom a school must admit, and what general powers the Board has. *See* 70 O.S. §§ 3-134, 3-135, 3-136, 3-140, 3-145.3. Those provisions task State regulators—not private parties—with overseeing school compliance through the application, monitoring, and revocation process, and provide a means to seek judicial review of an adverse decision. *See, e.g.*, 70 O.S. §§ 145.3(A)(2), 3-145.3(K). *Finally*, "[t]o find a private cause of action would be inconsistent with the legislative intent" of the Act "to empower" the Board to promulgate certain regulations. *Nichols Hills Physical Therapy v. Guthrie*, 1995 OK CIV APP 97, ¶ 10, 900 P.2d 1024, 1026 (Civ. App. 1995) (analyzing Amusement Ride Safety Act). The Act charges the Board with establishing "a procedure for accepting, approving, and disapproving" as well as "renew[ing] or revo[king]" a charter. 70 O.S. § 145.3(A)(2). The Board did so here. *See* OAC § 777:1-1-9; 777:10-3-4, 10-3-5. There is no evidence that the Legislature

intended to allow private litigants to inject themselves into these procedures or to second-guess the Board's application of them.

In addition to the Oklahoma Charter Schools Act, Plaintiffs also rely on various Board regulations. *See, e.g.*, Amend. Pet. ¶¶ 252–265 [First Claim for Relief] (citing OAC § 777:10-3-3). But, like the Oklahoma Charter Schools Act, those regulations fail to supply a cause of action. Regulations are products of their authorizing statutes, and the relevant question is whether the Oklahoma legislature had the "intent to fashion a private right of action" when it passed the authorizing statute. *Helm v. Bd. of Cnty. Comm'rs of Rogers Cnty.*, 2019 OK CIV APP 68, ¶ 9, 453 P.3d 525 (Civ. App. 2019). Here, the Oklahoma Charter Schools Act evinces no such intent. And, on its own terms, OAC Title 777 also evinces no intent to create a private cause of action.

Nor can Plaintiffs rely on the Declaratory Judgment Act ("DJA"), 12 O.S. § 1651. The Act does not provide a standalone cause of action; "[i]t is merely a type of *remedy*" when a court otherwise has jurisdiction. *Conoco, Inc. v. State Dep't of Health*, 1982 OK 94, ¶ 18, 651 P.2d 125, 131 (Okla. 1982); *see also* 12 O.S. § 1651 (statute applies only "in cases of actual controversy"). Thus, the DJA cannot bail out Plaintiffs' deficient claims.

**B. Plaintiffs Lack Standing To Bring All Of Their Claims.**

Plaintiffs also lack standing to sue. *First*, the Plaintiffs lack standing to seek declaratory relief under 12 O.S. § 1651 because they lack a "case in actual controversy"—that is, "an actual, existing justiciable controversy between parties having opposing interests, which . . . must be direct and substantial, and involve an actual, as distinguished from a possible, potential or contingent dispute." *Stevens v. Fox*, 2016 OK 106, ¶ 9, 383 P.3d 269, 273 n.11 (Okla. 2016) (cleaned up). Plaintiffs, who bear the burden to establish such a controversy, *Okla. Educ. Ass'n v. State ex rel. Okla. Leg.*, 2007 OK 30, ¶ 7, 158 P.3d 1058, 1062–63 (Okla. 2007), fail to do so.

*Second*, even as taxpayers, Plaintiffs lack standing to enjoin St. Isidore's operation. Oklahoma taxpayers may "possess[] standing to seek injunctive relief to prevent an alleged unlawful expenditure of [public] funds." *Okla. Pub. Emps. Ass'n v. Okla. Dep't of Cent. Servs.*, 2002 OK 71, ¶ 14, 55 P.3d 1072, 1079 (Okla. 2002). But Oklahoma law does not provide private

taxpayers *carte blanche* to challenge any "public wrong[]"; it allows only a challenge to "the wrongful expenditure" of tax funds. *Id.* Private taxpayers do not have standing simply to "enforce" general compliance with "the law." *McFarland v. Atkins*, 1979 OK 3, ¶ 22, 594 P.2d 758, 762 (Okla. 1978).

Here, Plaintiffs' petition is based on generalized policy arguments common to every Oklahoma taxpayer. It never explains how St. Isidore's funding will actually affect their own tax payments. Amend. Pet. ¶¶ 9–19; *see Toxic Waste Impact Grp., Inc. v. Leavitt*, 1994 OK 148, ¶¶ 5–14, 890 P.2d 906, 910–12 (Okla. 1994). Absent *some* traceable injury, Plaintiffs lack standing.

## II. PLAINTIFFS' CHALLENGE TO RELIGIOUS CHARTER SCHOOLS FAILS.

Even if Plaintiffs claims were justiciable, their attack on St. Isidore's right to open a religious charter school fails under state and federal law. Plaintiffs' Fourth Claim mounts several constitutional and statutory challenges in an attempt to bar St. Isidore from participating in Oklahoma's charter-school program. None presents a claim upon which relief can be granted.

*First,* nothing in Oklahoma's Constitution prohibits the State from providing funds to St. Isidore in exchange for the substantial benefit that the school will provide to the State. *Second*, any state law—be it constitutional, statutory, or otherwise—that *would* bar a religious school from the charter school program violates ORFA and the First Amendment of the U.S. Constitution. The Board's approval of St. Isidore's application recognized these fundamental restraints on its authority to enforce the kind of religious discrimination that Plaintiffs now encourage.

### A. The Oklahoma Constitution Allows The State To Provide Funds To St. Isidore.

Plaintiffs argue that funding St. Isidore violates the Oklahoma Constitution. But the mishmash of state constitutional provisions they cite do not prohibit the State from funding a private religious school that, like St. Isidore, will provide a substantial benefit to the State.

#### 1. Article II, Section 5 Allows The State To Provide Funds To St. Isidore.

Plaintiffs' Fourth Claim relies largely on Article II, Section 5 of the Oklahoma Constitution. That provision prohibits Oklahoma from giving "public money or property" for the "use, benefit, or support of any sect, church, denomination, or system of religion" or "any priest,

preacher, minister, or other religious teacher or dignitary, or sectarian institution as such." Okla. Const. Art. II, § 5. According to Plaintiffs, this bars the State from contracting with St. Isidore or offering it funds to operate a charter school for Oklahoma families. Amend. Pet. ¶ 310, 322.

Binding precedent forecloses these arguments. As former Oklahoma Attorney General John O'Connor has explained, Plaintiffs misunderstand what Article II, Section 5 prohibits. *See* Amend. Pet. Ex. A, App. § 13, App'x. N, at 7–8 [PE418–PE419]. The provision bars the State from giving gratuitous aid "for which no corresponding value was received." *Murrow Indian Orphans Home v. Childers*, 1946 OK 187, ¶ 5, 171 P.2d 600, 602 (Okla. 1946). Article II, Section 5 does *not* prohibit the State from providing funds to a religious school in exchange for beneficial services. As the Oklahoma Supreme Court recently held, the State may disburse funds to a religious organization so long as the organization provides a "substantial return to the State." *Oliver v. Hofmeister*, 2016 OK 15, ¶¶ 19–27, 368 P.3d 1270, 1275–77 (Okla. 2016).

Two analogous cases demonstrate this foundational rule. First, in *Murrow Indian Orphans Home v. Childers*, the State contracted with a Baptist orphanage to take in the State's orphans despite its religious affiliation. 171 P.2d at 601. The orphanage made "no pretense of denying its religious background or sectarian character." *Id.* Later, the State refused to pay for the services on the view that Article II, § 5 prohibited the payments. The Oklahoma Supreme Court rejected that argument. *Id.* at 601–02. It held that the State could disburse funds to a religious entity "so long as [the contract] involve[d] the element of substantial return to the State," such as serving "needy children." *Id.* at 603. In short, contracting with a religious institution to house and educate children did not offend the Constitution.

In *Oliver v. Hofmeister*, the Oklahoma Supreme Court recently reaffirmed this interpretation of Article II, Section 5. There, the Court considered whether Article II, Section 5 barred a law authorizing the payment of tuition scholarships to religious schools teaching students with disabilities. 368 P.3d at 1271–72. The Court explained that it had to decide "whether under the conditions outlined in the Act, . . . the deposit of scholarship funds to a private sectarian school constitute[s] 'public money' being 'applied, donated, or used, directly or indirectly, for the use,

benefit, or support' of a sectarian institution." *Id.* at 1275 (emphasis omitted) (quotations omitted). The Court held that allowing these funds to go to religious schools did *not* offend the State's Constitution. As the Court reiterated, the "determinative factor" was whether the religious entity provided a service that involved the element of "substantial return to the state and [did] not amount to a gift, donation, or appropriation to the institution having no relevancy to the affairs of the State." *Id.* at 1276 (quoting *Murrow*, 171 P.2d at 603).[1] The program survived Article II, Section 5 scrutiny because each scholarship provided a "substantial return" by helping the State "provide special educational services to the scholarship recipient." *Id.*

Funding St. Isidore falls squarely within these two precedents. The State has a strong interest in—and receives substantial benefit from—the development of a diverse set of educational options for children in Oklahoma. *See* Amend. Pet. ¶¶ 67, 97. The State may contract with a religious institution to help serve that goal, just as the State contracted with the religious orphanage in *Murrow* to care for and educate orphans. Here, St. Isidore, like other charter schools, will deliver a new and innovative learning opportunity to families across Oklahoma, and the State will "receive[] [that] substantial benefit" in exchange for its funds. *Oliver*, 368 P.3d at 1276. Meanwhile, other schools—of any religion, or none—remain free to similarly contract with the State. Families will be able to choose freely among the rich array of schools that which best suits their needs. This religiously neutral program, driven by the private choices of families, passes muster under Article II, Section 5.

If there were any doubt on this question (which there is not), the Court has a duty to interpret Article II, Section 5 to avoid running afoul of the First Amendment of the U.S. Constitution. Out of respect for the legislature that passed a law, Oklahoma courts "interpret statutes so as to avoid constitutional issues." *O'Connor v. Okla. St. Conf. of NAACP*, 2022 OK CR

[1] Other factors the court considered included whether the scholarship program itself was religiously neutral and whether parents and the school system themselves chose to participate in it. *See Oliver*, 368 P.3d at 1275. Much like Oklahoma's charter-school program, the answer to both was yes: the scholarship program was available to children attending both secular and religious schools alike, and the choice of where to enroll was made by their own families. *See id.*

21, ¶ 5, 516 P.3d 1164, 1166 (Okla. 2022). Oklahoma courts should give the same respect to the People of Oklahoma who ratified Oklahoma's Constitution and amendments, as at least one other State Supreme Court has ruled. *See Moses v. Ruzkowski*, 2019-NMSC-003, ¶ 45, 458 P.3d 406, 420 (N.M. 2019). The Oklahoma Supreme Court apparently took that approach in *Oliver v. Hofmeister* when it reaffirmed its construction of Article II, Section 5. There, the Court explained that a construction leading to a "religiosity distinction" would violate the First Amendment of the U.S. Constitution. *Oliver*, 368 P.3d at 1271–77. As explained below, Plaintiffs invite this Court to do what the Oklahoma Supreme Court has refused to do. Rather than set up a collision between the State and U.S. Constitutions, this Court should apply existing precedent to hold that St. Isidore may join the State's charter school program, like any other eligible school. *See infra* Part II.B.

**2. No Other Constitutional Provision Prohibits The State From Executing A Charter With St. Isidore.**

With no claim under Article II, Section 5, Plaintiffs rely on a scattershot of other constitutional provisions that do not apply here. *See* Okla. Const. Art. I, § 2 (barring religious intolerance); Art. I, § 5 (requiring Oklahoma to maintain a "system of public schools . . . open to all the children of the state and free from sectarian control"); Art. II, § 7 (Oklahoma Due Process Clause); Art. II, § 36A (barring "sex" discrimination"); Art. XI, §§ 2–3 (requiring "permanent school fund" that may not be "used for any other purpose than the support and maintenance of common schools for the equal benefit of all the people of the State"); Art. XIII, § 1 (requiring a "system" of schools for "all . . . children"). Plaintiffs do not offer any coherent explanation as to how these provisions apply to a privately operated school like St. Isidore. On the contrary, each of them places a limit or responsibility on the State, either to maintain a general system of public education or not to burden certain individual rights under the Oklahoma Constitution. Those constitutional duties do not apply to St. Isidore because it is not a state actor but instead a private entity. *See infra* Part II.B.2. And, in any event, the State has violated none of these provisions by allowing St. Isidore—which *will* be free and open to all students, *infra* Part III—to participate in

its program to "promote a diversity of educational choices" through a network of "different and innovative" charter schools, 70 O.S. §§ 3-131, 3-134.[2]

**3. ORFA Bars Enforcement Of The Charter Schools Act's Religious Exclusion.**

Aside from the Oklahoma Constitution, Plaintiffs' Fourth Claim alleges that the approval of St. Isidore violates the Charter Schools Act itself, which purports to allow only "nonsectarian" schools to participate in the program, 70 O.S. § 3-136(A)(2). This claim fares no better, as the Charter Schools Act's exclusion of religious schools plainly violates and is overridden by ORFA.

ORFA prohibits the State from enforcing the Charter Schools Act's exclusion of religious schools. Under ORFA, the government—including the Board—shall not "substantially burden a person's free exercise of religion," even through a "rule of general applicability." 51 O.S. § 253(A); *see also Beach v. Okla. Dept. Pub. Safety*, 2017 OK 40, ¶ 12, 398 P.3d 1, 5 (Okla. 2017). ORFA's sweep is both broad and powerful. It restrains the State from "inhibit[ing] or curtail[ing]" any "religiously motivated practice." 51 O.S. § 252(7). Like its federal counterpart, the Religious Freedom Restoration Act (RFRA),[3] ORFA prohibits the government from denying an entity generally available benefits because it is religious. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693–94, 695 n.3 (2014); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 467 (2017). In fact, ORFA was recently amended to make this nondiscrimination rule explicit: The government may not "exclude any person or entity from participation in or receipt of governmental funds, benefits, programs, or exemptions based solely on the religious character or affiliation of the person or entity." 51 O.S. § 253(D) (effective Nov. 1, 2023).

ORFA is an insurmountable barrier to Plaintiffs' claim that the Charter Schools Act prohibits religious schools. The exclusion of St. Isidore from the charter-school program would

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[2] St. Isidore anticipates the State Defendants, including the Board, to argue that they did not violate any of these provisions. *See* Board Motion to Dismiss (Document No. 1056570577). St. Isidore incorporates those arguments by reference to the extent they provide additional defenses to St. Isidore.

[3] Cases interpreting RFRA and the federal Religious Land Use and Institutionalized Persons Act (RLUIPA) inform the interpretation of ORFA, which "contain[s] almost identical language." *Beach*, 398 P.3d at 6 n.20.

violate ORFA's straightforward command that a government may not deny an entity generally available benefits because it is religious. Enforcing ORFA's exclusion would undoubtedly impose a substantial burden on St. Isidore's free exercise of religion, and Plaintiffs identify no compelling interest that would justify that burden. *See* 51 Okla. Stat. § 253(B), (D). The nonsectarian requirement in Section 3-136(A)(2) must yield to ORFA, as the overriding rule and most recently enacted law. *City of Sand Springs v. Dep't of Pub. Welfare*, 1980 OK 36, ¶ 28, 608 P.2d 1139, 1151–52 (Okla. 1980); *see also Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020) (describing RFRA as a "super statute" able to "displac[e]" other statutes). By approving St. Isidore, the Board upheld ORFA's command, and Plaintiffs' attempt to invalidate that decision is without merit.

### B. Any State Law Excluding Religious Schools From The Charter-School Program Violates The U.S. Constitution.

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

#### 1. The Federal Free Exercise Clause Invalidates Any State Law Prohibiting Religious Schools From Participating In The Charter-School Program.

"The Free Exercise Clause of the First Amendment, applicable to the States under the Fourteenth Amendment, provides that 'Congress shall make no law . . . prohibiting the free exercise' of religion." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021). St. Isidore is a private religious entity with First Amendment rights. Plaintiffs claim that several state laws bar St. Isidore from participating in the generally available charter school program because of its religious character. But, if construed as Plaintiffs suggest, those laws would violate St. Isidore's Free Exercise rights under a series of recent U.S. Supreme Court decisions.

The Supreme Court has "repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits." *Carson*, 142 S. Ct. at 1996 (citing cases). Such religious disfavor "can be justified only by a state interest of the highest order." *Trinity Lutheran*, 582 U.S. at 458 (quotation marks omitted). And rarely can a State satisfy

that "stringent standard." *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2260 (2020) (citation omitted).

Three recent decisions demonstrate that the First Amendment forbids Oklahoma from excluding religious schools from participating in the charter-school program. First, in *Trinity Lutheran*, the Supreme Court held that Missouri could not require a church-owned preschool "to renounce its religious character in order to participate in an otherwise generally available public benefit program" that offered grants for playground improvements. 582 U.S. at 466. That discrimination against religious schools, the Court explained, "is odious to our Constitution" and "cannot stand." *Id.* at 467.

Three years later, in *Espinoza*, the Court held that the Free Exercise Clause barred exactly the kind of claim that Plaintiffs raise here. Like Oklahoma, Montana had established a program to help parents enroll their children in schools of their choice (there, through a system of school-choice scholarships rather than charter schools). *See* 140 S. Ct. at 2251. And, like here, Montana's decision to allow religious schools to participate in the program was challenged under a state constitutional provision that denies public funding to "sectarian" schools. *See* Mont. Const. art. X § 6(1). In response, the Montana Supreme Court invalidated the school-choice program so that no aid would flow to "sectarian" schools. *Espinoza*, 140 S. Ct. at 2251–52. On review, the U.S. Supreme Court made clear that the Federal Constitution does not tolerate that result.

Echoing *Trinity Lutheran*, the Court reiterated that any time a State denies a generally available benefit "solely because of [an organization's] religious character" it "imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny." *Espinoza*, 140 S. Ct. at 2255 (cleaned up). Montana's use of the "no-aid" provision "to discriminate against [religious] schools" was therefore "subject to the strictest scrutiny" and could only be justified by "interests of the highest order." *Id.* at 2255–57, 2260. Montana's action failed that test. The Court rejected a plethora of justifications offered to support Montana's choice to deny funding to religious schools, including that Montana had an "interest in separating church and State more fiercely than the Federal Constitution," that the no-aid provision "actually *promotes* religious freedom" by keeping

taxpayer money from going to religious organizations, and that the provision "advances Montana's interests in public education." *Id.* at 2260–61 (internal quotations omitted). None of those interests could justify the significant "burden" the no-aid provision imposed on "religious schools" and "the families whose children attend[ed] or hope[d] to attend them." *Id.* at 2261. As the Court explained, a "State need not subsidize private education," but once it does, the State "cannot disqualify some private schools solely because they are religious." *Id.*

Then, in *Carson v. Makin*, the Supreme Court held that states cannot exclude religious schools from programs like these, even if they "promote[] a particular faith" or "present[] academic material through the lens of that faith." 142 S. Ct. at 2001. Maine offered a tuition-assistance program for families in rural school districts that lacked public secondary schools. *Id.* at 1993. That law allowed families to access state money to pay the cost of attending public or private schools of their choice—but only if the school was "nonsectarian." *Id.* at 1994. In defending this requirement, Maine sought to recharacterize the benefit its program offered as one to pay for "the rough equivalent of a Maine public school education, an education that cannot include sectarian instruction." *Id.* at 1998 (cleaned up). It also attempted to distinguish its program from those in *Trinity Lutheran* and *Espinoza* as one that did not exclude institutions based on the recipient's "religious 'status,'" but rather, as a program that avoided "religious 'uses' of public funds"—namely, the use of public money to deliver a religiously grounded education. *Id.* (citation omitted). Neither argument persuaded the Court. The Court held that a State cannot avoid strict scrutiny under the Free Exercise Clause by reconceptualizing its public benefit as an exclusively "secular" one. *Id.* at 1999. Nor may a State deny recipients the right to "use" public funds to receive a religious education, which is just as "offensive to the Free Exercise Clause" as discrimination based on the recipient's religious identity. *Id.* at 2001.

*Carson*, *Espinoza*, and *Trinity Lutheran* make clear that any "nonsectarian" provision of the Oklahoma Charter Schools Act, and any "nonsectarian" provision of the Oklahoma Constitution, cannot be applied to bar St. Isidore from participating in the charter school program. Oklahoma has established a program that invites any qualified "private college or university,

private person, or private organization" to establish a charter school. 70 O.S. § 3-134(C). Under the U.S. Constitution, Oklahoma cannot then deny this generally available opportunity to applicants like St. Isidore "solely because they are religious." *Carson*, 142 S. Ct. at 1997 (quoting *Espinoza*, 140 S. Ct. at 2261); *see* 70 O.S. § 3-136(A)(2); Okla. Const. art. I, § 5. Nor can it require St. Isidore to "disavow its religious character" as a condition of participation, *Trinity Lutheran*, 582 U.S. at 463, or justify any exclusion based on the school's "anticipated religious use of the benefits" to provide a faith-based education, *Carson*, 142 S. Ct. at 2002; *see* Amend. Pet. ¶ 310.

Applying strict scrutiny, both the statutory "nonsectarian" provision in the Oklahoma Charter Schools Act, and any provision of the Oklahoma Constitution that this Court would view as barring funding for St. Isidore, is invalid. An "interest in separating church and state more fiercely than the Federal Constitution cannot qualify as 'compelling' in the face of the infringement of free exercise." *Carson*, 142 S. Ct. at 1998 (cleaned up). Likewise, any asserted "interests in public education" or in protecting taxpayer money from going to religious uses are insufficient. *Espinoza*, 140 S. Ct. at 2260–61. "Regardless of how the benefit and restriction are described," section 3-136A(2)'s "nonsectarian" provision, along with any constitutional provision that might bar funding to St. Isidore, would "operate[] to identify and exclude otherwise eligible schools on the basis of their religious exercise." *Carson*, 142 S. Ct. at 2002. The Free Exercise Clause forbids exactly that discrimination.

**2. Oklahoma Charter Schools Are Not "The Government" And The Design And Operation Of A Charter School Is Not "State Action."**

The rule of *Carson*, *Espinoza*, and *Trinity Lutheran* is clear: When a State chooses to subsidize schools operated by private organizations, it cannot refuse to subsidize a school operated by a religious organization. Plaintiffs attempt to elude these basic constitutional protections by suggesting that St. Isidore has *no* constitutional protections and is instead to be treated as part of the State itself. They broadly allege that St. Isidore is a "state actor," suggesting that St. Isidore is either a "governmental entity," or instead a private entity that somehow performs state action.

Amend. Pet. ¶ 46. No theory of state action, however, can transform St. Isidore into an arm of the State of Oklahoma.

*First*, St. Isidore is self-evidently not a governmental entity. As St. Isidore's charter contract recognizes, St. Isidore "is a privately operated religious non-profit organization entitled to" constitutional rights. Amend. Pet. Ex. P. ¶ 1.5 [PE598]. Contrary to Plaintiffs' claim, St. Isidore is not a "creature" of the Oklahoma Legislature. Amend. Pet. ¶ 112. Rather, St. Isidore is a private organization that falls "under the umbrella of the Oklahoma Catholic Conference comprised of the Archdiocese of Oklahoma City and the Diocese of Tulsa." Amend. Pet. ¶¶ 41, 43. The government did not create St. Isidore and it does not select the individuals who operate it. *See* 70 O.S. §§ 3-136(A)(8), 3-145.3(F); *see also Rendell-Baker v. Kohn*, 457 U.S. 830, 832 (1982) (school "operated by a board of directors, none of whom are public officials or are chosen by public officials" not a state actor). Private entities, like St. Isidore, do not lose their constitutional rights or become "the government" by contracting with the State. *See, e.g.*, *id.* at 841; *Fulton*, 141 S. Ct. at 1878. Nor does it matter that the State "charters" approved schools, which is true of many private entities. *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 542–44 (1987) ("[T]hat Congress granted it a corporate charter does not render the [Olympic Committee] a Government agent. All corporations act under charters granted by a government, usually a State. They do not thereby lose their essentially private character.").

It makes no difference that the Oklahoma Charter Schools Act refers to charter schools as "public school[s]." Amend. Pet. ¶ 68 (emphasis omitted) (quoting 70 O.S. § 3-132(D)). That label simply means a school "that is free and supported by funds appropriated by the Legislature"—not one that is *part of* the government. 70 O.S. § 1-106; Amend. Pet. Ex. P. ¶ 2.9 [PE599]. As the charter contract states, St. Isidore is nonetheless "a privately operated not-for-profit entity operating a school consistent with the terms of this Contract." *Id.* Indeed, the Oklahoma Charter Schools Act elsewhere makes clear that a "private person, or private organization" may found a charter school, 70 O.S. § 3-134(C), and it allows even *for-profit* businesses to manage their

operations, OAC § 777:10-1-2.

More importantly, federal rights do not turn on "state law labels." *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 679 (1996). The Supreme Court has specifically rejected the notion that labeling an entity "public" makes it a state actor. *See, e.g., Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 n.7, 352–54 (1974) ("public utility" subject to "extensive and detailed" regulation not a state actor). The Court has also held that the "substance of free exercise protections" does not turn "on the presence or absence of magic words." *Carson*, 142 S. Ct. at 2000. And, regardless of label, St. Isidore lacks the central "calling card of a governmental entity": It does not exercise any "public, political, or sovereign function" that "flow[s] from the sovereign authority" of the State. *United States v. Ackerman*, 831 F.3d 1292, 1295 (10th Cir. 2016) (Gorsuch, J.) (quotation omitted).

*Second*, Plaintiffs cannot attribute St. Isidore's private operation to the State. The Supreme Court has explained that a private entity's conduct will be treated as that of the State only in rare circumstances: "if, though only if, there is such a close nexus" between the State and the private entity's actions so that "seemingly private behavior may be fairly treated as that of the State itself." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). The government must be "responsible for the specific conduct of which the plaintiff complains." *Id.* (quotation omitted). Normally, this means that the State "has exercised coercive power or has provided such significant encouragement . . . that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); *see also Rendell-Baker*, 457 U.S. at 841 (holding that the government must compel or coerce the conduct to attribute it to the State).

The educational design and operation of a charter school is not "state action." Indeed, the Charter Schools Act is purposely structured for the State to take a hands-off approach in these areas. These privately operated schools are given substantial freedom from state interference with curriculum design and implementation so that they will have wide latitude to experiment with new and unique pedagogical ideas. They are empowered and encouraged to "use . . . different and innovative teaching methods," "create different and innovative forms of measuring student learning," and "[p]rovide additional academic choices for parents and students." 70 O.S. § 3-131.

The law generally "exempt[s]" charter schools "from all statutes and rules relating to schools, boards of education, and school districts" with which government-run schools must comply. *Id.* § 3-136(A)(5). Charter schools are free to shape a curriculum "which emphasizes a specific learning philosophy or style or certain subject areas" ranging from math to fine arts. *Id.* § 3-136(A)(3). They are likewise free with respect to student discipline. Although the Act requires charter schools to comply with a narrow set of student disciplinary procedures, it does not require schools to adopt any particular set of rules or code of student conduct. *Id.* § 3-136(A)(12). Nor must charter schools abide by the State's "Teacher and Leader Effectiveness Standards" or require teachers to "hold[] a valid Oklahoma teaching certificate." Okla. Dep't of Educ., *Oklahoma Charter Schools Program*, https://sde.ok.gov/faqs/oklahoma-charter-schools-program (last visited Mar. 25, 2024). And they can even contract with *other* private organizations to handle their administration. OAC § 777:10-1-4. As a result, Oklahoma's hands-off approach has led to a wide diversity of charter-school designs and pedagogical methods, from schools that focus on science and math to those that promote fine arts to those that offer language immersion or an education grounded in the culture of particular Indigenous communities. *See* Okla. Dep't Educ., *Current Charter Schools of Oklahoma*, https://sde.ok.gov/current-charter (last visited Mar. 17, 2024).

The State, of course, regulates charter schools—just as it does all government contractors. But even subjecting a government contractor to "detailed regulations" does not convert that entity's conduct into state action. *Rendell-Baker*, 457 U.S. at 831–36. Indeed, the acts of "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 (emphasis added); *see Blum*, 457 U.S. at 1011. That is true even if the contractor "is subject to extensive state regulation." *Jackson*, 419 U.S. at 350; *see also Gilmore v. Enogex, Inc.*, 878 P.2d 360, 367 (Okla. 1994). And the U.S. Supreme Court recently made clear that the government may not "discriminate against religion when acting in its managerial role" or when overseeing a contractor. *Fulton*, 141 S. Ct. at 1878.

In fact, the U.S. Supreme Court has long held that these features—receiving public funding, operating under a public contract to help educate children, and submitting to public regulation—

do not render the conduct of a privately operated school "state action." In *Rendell-Baker v. Kohn*, the Court held that a privately operated school which received 99% of its funding from the State to help educate "maladjusted" high school students did not qualify as a state actor, even though it was subject to "detailed regulations concerning" everything from "recordkeeping to student-teacher ratios" to "personnel policies." 457 U.S. at 831–36. The same is true here. Like the school in *Rendell-Baker*, St. Isidore "was founded as a private institution" and is "operated by a board of directors, none of whom are public officials or chosen by public officials." *Id.* at 832. As in *Rendell-Baker*, the State simply authorized its agents to contract with St. Isidore to provide educational opportunities pursuant to certain regulations. But, like in *Rendell-Baker*, St. Isidore's design, curriculum, and operations are not "compelled" by those regulations or in any other way "fairly attributable to the state"—and the school did not surrender its constitutional rights merely by agreeing to that contract. 457 U.S. at 840–41; *see also Brentwood Acad.*, 531 U.S. at 295; *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 815 (9th Cir. 2010) (Arizona charter school not a state actor).

Nor does it matter that the State might contract with charter schools like St. Isidore to perform a service that is "aimed at a proper public objective" or that benefits the public good. *Brentwood*, 531 U.S. at 302–03. That was true in *Rendell-Baker*. And governments bear obligations to provide a tremendous variety of services, from education to healthcare, shelter, foster care, and much more. States have long worked with a wide variety of private organizations to help serve the public in these areas and many others. That does not transform every private organization who helps accomplish these goals into "part of" the State. Indeed, in both *Murrow* and *Oliver*, the Oklahoma Supreme Court upheld the distribution of funds to religious groups who were helping the State fulfill duties like these. *See Oliver*, 368 P.3d at 1276 ("In *Murrow*, the State was fulfilling its duty to provide care for the needy . . . [and here it is] being relieved of the duty to provide special educational services . . . ."). To be sure, when a State delegates an "*exclusively* and *traditionally* public" function to a private actor, that may signal state action. *Brentwood*, 531 U.S. at 302–03 (emphasis added). But "very few [functions] have been exclusively reserved" to

the government. *Flagg Bros. Inc. v. Brooks*, 436 U.S. 149, 158 (1978) (quotation omitted). Certainly, "education is not and never has been" an exclusive government function. *Logiodice v. Trs. of Me. Cent. Inst.*, 296 F.3d 22, 26 (1st Cir. 2002) (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925)); *see Rendell-Baker*, 457 U.S. at 842; *Robert S. v. Stetson Sch., Inc.*, 256 F.3d 159, 166 (3d Cir. 2001) (Alito, J.). "[F]rom the outset of the country's history," private entities have "regularly and widely" operated schools. *Logiodice*, 296 F.3d at 26–27; *see also Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 239 n.7 (1963) (Brennan, J., concurring) (noting that into the nineteenth century "education was almost without exception" private). St. Isidore will provide an education to elementary, middle, and high school students. That is not, and never has been, an exclusive state function.[4]

* * *

St. Isidore is a private religious entity, not part of the Oklahoma government. And the operation of St. Isidore is not attributable to the State. Accordingly, ORFA and the First Amendment's Free Exercise Clause protect St. Isidore from any state law that would bar it from receiving a generally available benefit solely because of its religious character. To enforce these protections, this Court must dismiss Plaintiffs' Fourth Claim.

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[4] Nor should this Court accept any suggestion by Plaintiffs that the relevant state function is the provision of a "public" education—a gerrymandered characterization which only begs the question. *See* Amend. Pet. ¶¶ 68, 69; *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 154 (4th Cir. 2022) (Wilkinson, J., dissenting) (rejecting the majority's efforts to "gerrymander[] a category of free, public education that it calls a traditional state function"); *see also Logiodice*, 296 F.3d at 27 (rejecting efforts to "narrow and refine the category [of education] as that of providing a publicly funded education"). The Supreme Court recently rejected this same tactic. In *Carson*, the Court rejected Maine's efforts to characterize the scholarship program's benefit as helping fund the equivalent of a *public* education. 142 S. Ct. at 1998–99. The Court observed that Maine's argument merely sought to narrowly define its benefit in the way that would require it to be a *secular* education, observing that such gamesmanship would nullify the First Amendment. *Id.* at 784. Rather than "tailor[] by adjective" the operative category, *id.*, courts must assess what actual function the private entity performs, then decide whether it is traditionally exclusive to the State. Here, that function is the education of children, and it is not the exclusive domain of the government. *See Rendell-Baker*, 457 U.S. at 842 (educating children); *see also, e.g., Johnson v. Pinkerton Acad.*, 861 F.2d 335, 338 (1st Cir. 1988) (same); *Robert S.*, 256 F.3d at 165–66 (same).

## III. PLAINTIFFS' STATUTORY AND REGULATORY CLAIMS FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Unable to bar St. Isidore from Oklahoma's charter-school program because it is religious, the First, Second, and Third Claims mount several technical challenges that (Plaintiffs contend) otherwise prevent the school from opening. As explained above, these claims are nonjusticiable. *Supra* Part I. But even if Plaintiffs could pursue these claims, the Amended Petition fails to plead sufficient facts to support any claim that partnering with St. Isidore will result in an "illegal . . . expenditure of public funds" that must be enjoined. *Immel v. Tulsa Pub. Facilities, Auth.*, 2021 OK 39, ¶ 15, 490 P.3d 135, 142 (Okla. 2021).

Many of the allegations contained in the First, Second, and Third Claims are plainly unripe. They rely on wildly hypothetical speculation about how Plaintiffs predict St. Isidore *might* operate. To the extent these claims take issue with anything that has actually occurred, they quibble with supposed technical failures in certain guarantees that St. Isidore has made during the application and contracting process. But each of those alleged deficiencies is contradicted by Plaintiffs' own exhibits and cannot be credited. *Eckel*, 698 P.2d at 923. Nor would any of these claims ever warrant the disproportionate and inequitable relief that Plaintiffs request.

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

First, Plaintiffs' many claims challenging hypothetical conduct are unripe. The ripeness doctrine "militat[es] against the decision of abstract or hypothetical questions." *French Petrol. Corp. v. Okla. Corp. Comm'n*, 1991 OK 1, ¶ 7, 805 P.2d 650, 652–53 (Okla. 1991). It aims to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies," and "to protect agencies from judicial interference until their administrative decisions have been formalized and their effects felt in a concrete way by the parties." *Id.* at 653. To decide whether a claim is ripe, a court looks at the "fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.*

Plaintiffs' First, Second, and Third Claims are all built on speculative allegations that St. Isidore will—but has not yet—violate the law or impermissibly discriminate in student admissions, student discipline, or employment. *See* Amend. Pet. ¶¶ 252–305. Such claims are entirely premature. These claims merely allege what the school *might* do once it begins educating students. They are broad and hypothetical accusations that the school will do something wrong to somebody someday. Indeed, the rampantly speculative nature of these claims is illustrated by Plaintiffs' reliance on *another school's* handbook to guess as to how St. Isidore might operate. *See, e.g.*, Amend. Pet. ¶¶ 152, 166–69 (citing Ex. C, Christ the King Catholic School Handbook). At the end of the day, Plaintiffs' allegations that St. Isidore will operate unlawfully do not preemptively challenge events that will simply follow in due course. Rather, they challenge illusory, hypothetical conduct of a school that has yet to teach a single student. This court must not countenance such patently unripe claims. *French Petrol. Corp.*, P.2d at 652–53.

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

The First, Second, and Third Claims also fail on their merits. Putting aside wanton speculation about future misdeeds, Plaintiffs allege that, during the application and contracting process, St. Isidore failed to sufficiently promise that it will operate in accordance with a variety of laws. They contend that the Board was compelled to reject St. Isidore's supposedly "weak or inadequate charter application[]" as a result. Amend. Pet. ¶¶ 258, 287, 301 (quoting 70 O.S. § 3-134(I)(4)). But all of these claims rest on gross mischaracterizations of St. Isidore's application and charter contract—mischaracterizations that are explicitly contradicted by Plaintiffs' own exhibits. And any possible ambiguity in the validity of St. Isidore's guarantees or the "strength" of its application must be resolved in deference to the Board, which is delegated the authority to receive, review, and approve such applications.

**1. St. Isidore's Statement Of Assurances (First Claim).**

The First Claim alleges that St. Isidore's charter contract must be invalidated because the school's application failed to include a notarized statement assuring "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," as specified under OAC § 777:10-3-3(c)(1)(F). Amend. Pet. ¶ 136. That contention is patently untrue, as demonstrated by Plaintiffs' own exhibits, and it must therefore be rejected, *see Eckel*, 698 P.2d at 923.

Plaintiffs' exhibits show that the application (and now the school's charter contract) included exactly the assurances that Plaintiffs demand. Indeed, the application contained notarized statements explicitly promising that St. Isidore would abide by federal and state law and that St. Isidore would "[g]uarantee access to education and equity for all eligible students regardless of" the grounds listed in OAC § 777:10-3-3(c)(1)(F). Amend. Pet. Ex. A., App. § 12, at 93 [PE159]. Even if there was any doubt about the application's assurances, it has been erased by St. Isidore's charter contract, which reiterates that the school "agrees to comply with" and must operate "in accordance with" all "Applicable Law," which "means all federal and state statutes and rules and regulations application to virtual charter schools." Amend. Pet. Ex. P ¶ 2.1 [PE598–PE599], 3.1 [PE599–PE600], 8.1 [PE609]. This promise is repeated throughout the contract. *See, e.g., id.* ¶¶ 2.1, 3.1, 7.1, 8.1, 8.3, 8.6, 8.7, 8.8.5, 8.9, 8.10, 8.11, 8.12, 8.15 [PE598–PE613]. Thus, there can be no confusion: St. Isidore repeatedly promised to, and will, "fully comply" with all relevant laws. OAC § 777:10-3-3(c)(1)(F).

Plaintiffs can dispute none of this. Instead, the Petition alleges that these explicit assurances are somehow invalid because—when promising to follow all law—St. Isidore noted that the law includes certain rights that pertain to it as a religious organization. *See* Amend. Pet. ¶¶ 134–36, 255. Namely, in its application, St. Isidore agreed to follow all legal requirements "to the extent required by law, including the First Amendment, religious exemptions, and the Religious Freedom Restoration Act." Amend. Pet. Ex. A., App. § 12, at 93 [PE159]. St. Isidore's charter contract reiterates and enforces this guarantee to follow all law consistent with the school's legal rights as a religious organization. Amend. Pet. Ex. P. ¶ 2.1 [PE598–PE599] ("The parties to this Contract recognize [that] certain rights, exemptions or entitlements are applicable to [St. Isidore] as a religious organization under federal, state, or local law, rules, and regulations . . . . [C]ompliance with Applicable Law shall be understood to mean compliance in a manner nonetheless consistent

with [such rights]."). According to Plaintiffs, these references to laws protecting the school's religious rights somehow render St. Isidore's application, approval, contract, and future operation "unlawful" and subject to nullification. Amend. Pet. ¶ 265.

No law supports Plaintiffs' effort to undo St. Isidore's entire operations merely because the school and the Board have consistently recognized St. Isidore's legal rights as a religious organization. The regulation relied upon by Plaintiffs simply requires that the school agree to "fully comply" with the laws "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). As laid out above, St. Isidore did exactly that. Those same laws "of the United States of America [and] State of Oklahoma" grant certain rights to St. Isidore as a religious institution. St. Isidore's promise to follow all law consistent with such legal rights is not *contrary* to the law; it is *part of* the law.[5] Likewise, the regulation requires the school to agree "to 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*"—namely, the laws "of the United States of America, State of Oklahoma, Statewide Virtual Charter School Board, and Oklahoma Department of Education" mentioned before. *Id.* (emphasis added). Again, this is exactly what St. Isidore did. St. Isidore assured the Board—and the charter requires—that it will comply with the full scope of OAC § 777:10-3-3(c)(1)(F) "as established by law," *i.e.*, in the way consistent with St. Isidore's legally established rights. *Id.* That is all OAC § 777:10-3-3(c)(1)(F) required it to do. And any attempt by Plaintiffs to distort that rule to require that St. Isidore *surrender* its religious rights in order to participate in the charter program would itself be unlawful. *See infra* Part III.C.

[5] In large part, the Amended Petition misrepresents St. Isidore's promise as one to follow the law "only to the extent that the requirements do not conflict with its religious beliefs." Amend. Pet. ¶ 256. Not so. As detailed above, and as made clear in Plaintiffs' exhibits, St. Isidore has not reserved an ability to ignore the law simply based on its religious views; it has instead explicitly promised to follow the law consistent with its *legal rights* as a religious organization. *See, e.g.*, Amend. Pet. Ex. A., App. § 12, at 93 [PE159]; Amend. Pet. Ex. A, App. Revisions, at Question 7 [PE45–PE51]; Amend. Amend. Pet. Ex. P. ¶ 2.1 [PE598–PE99].

### 2. St. Isidore's Non-Discrimination Guarantees (Second Claim).

Plaintiffs' Second Claim contends that St. Isidore failed in its application and charter contract to guarantee that the school will not unlawfully discriminate against students or employees on a variety of bases. Amend. Pet. ¶¶ 284–93. Again, the Plaintiffs' exhibits refute their allegations.

As demonstrated in Plaintiffs' exhibits, the school has at all times made clear that it will not discriminate on any unlawful basis and that it will comply with all applicable legal requirements. The school's application made clear that "[a]ll students are welcome" at St. Isidore, including "those of different faiths or no faith." Amend. Pet. Ex. A, App. § 7, at 38 [PE91]. The school pledged not to discriminate "on the basis of a protected class, including *but not limited* to race, color, national origin, age, religion, disability that can be served by virtual learning, or biological sex." *Id.* at 43 [PE96] (emphasis added). So too with employment, as the school affirmed that "[r]ecruitment, employment, transfer, promotion and administration of personnel policies will be done without regard to race, sex, color, national origin, citizenship, age, veteran status or mental or physical ability[.]" Amend. Pet. Ex. A, App. § 13, App'x C at 109 [PE195]. St. Isidore's contract with the Board reinforces these assurances. In that contract, the school agreed to follow all applicable law, including in its employment policies and by "ensur[ing] that no student shall be denied admission to the Charter School on the basis of race, color, national origin, sex, sexual orientation, gender identity, gender expression, disability, age, proficiency in the English language, religious preference or lack thereof, income, aptitude, or academic ability." Amend. Pet. Ex. P. ¶¶ 8.8, 8.11 [PE611–PE612]. Both the application and the charter contract plainly show that St. Isidore has promised not to discriminate. These exhibits eliminate Plaintiffs' contrary and unsupported speculation, leaving no viable claim. *Eckel*, 698 P.2d at 923.

As with the First Claim, Plaintiffs' true complaint is that St. Isidore retains certain rights under the law as a religious organization. *See* Amend. Pet. ¶ 291 (citing Ex. P. ¶ 8.2 [PE609]) (faulting contract for recognizing that St. Isidore "is a religious nonprofit organization [with] the right to freely exercise its religious beliefs and practices consistent with its Religious Protections" defined under the law). But, again, the promise to follow all law consistent with one's legal rights

does not violate the law; it simply reflects the full scope of the law. *See supra* Part III.B.1. Nor could the State require St. Isidore to surrender those rights as a condition to participating in the charter program, even if it wished to do so. *Infra* Part III.C.

**3. St. Isidore's Assurances Of Disability Services (Third Claim).**

Finally, Plaintiffs' Third Claim contends that, during the application and contracting process, St. Isidore failed to "agree[] to fully comply with all laws relating to the education of children with disabilities," and failed to "ensure compliance" with "all . . . laws relating to the education of children with disabilities in the same manner as a school district," as stated in 70 O.S. § 3-136(A)(7). Amend. Pet. ¶¶ 295, 296, 299. Plaintiffs allege that St. Isidore failed to demonstrate that it is committed to serving students with disabilities "in compliance with applicable . . . state laws and regulations" and suggest that St. Isidore might even "deny admission based on 'disabling conditions.'" Amend. Pet. ¶ 297 (quoting 70 O.C. §§ 3-140(D), 3-145.3(J)); Amend. Pet. ¶ 298 (quoting OAC § 777:10-3-3(b)(3)(C)).

Yet again, these allegations are manifestly false as demonstrated by Plaintiffs' own exhibits. In its application, St. Isidore promised to "comply with all applicable State and Federal Laws in serving students with disabilities." Amend. Pet. Ex. A, App. § 9, at 73 [PE133]. And, in its charter contract, St. Isidore agreed *verbatim* to do what Plaintiffs demand. The contract states that "[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." Amend. Pet. Ex. P. ¶ 8.6 [PE610–PE611]. The contract likewise reiterates St. Isidore's guarantee to not to deny admission to any child based on (among other things) "disability." Amend. Pet. Ex. P. ¶ 8.8 [PE612].

At bottom, just like the First and Second Claims, Plaintiffs' real gripe is that the law provides certain rights to religious organizations. The Amended Petition alleges that St. Isidore's guarantees to fully comply with all law relating to students with disabilities were deficient because those pledges reflected "this caveat"—i.e., that St. Isidore promised to follow all law consistent with its legal rights as a religious organization. Amend. Pet. ¶¶ 202–203, 300. Once again, Plaintiffs

are simply wrong that the promise to follow the law consistent with one's legally granted rights—which the State could not require St. Isidore to forfeit, *infra* Part III.C—is somehow contrary to the law. *Supra* Part III.B.1. Recognition of this basic truism does not declare any intention to discriminate against students with disabilities and it does not undermine any promise to serve such students in full accordance with the law. To say otherwise is mere speculation that this Court need not credit.

**4. Deference To The Board's Interpretation And Application Of Charter Law.**

A straightforward reading of the law and of St. Isidore's many explicit assurances to comply with that law defeats Plaintiffs' fanciful claims of technical error. But even if it did not, any ambiguity must be resolved through deference to the Board's considered decision to approve St. Isidore's application and to execute a contract to sponsor its charter. Oklahoma courts "show great deference to an agency's interpretation of its own rules." *Estes v. ConocoPhillips Co.*, 2008 OK 21, ¶ 12, 184 P.3d 518, 524 (Okla. 2008). Likewise, Oklahoma courts accord "the highest respect" to an agency's interpretation of an ambiguous statute it is charged with administering. *Matter of Okla. Turnpike Auth.*, 2023 OK 84, ¶ 27, 535 P.3d 1248, 1255 (Okla. 2023). Here, the Board is the agency responsible for the implementing the Oklahoma Charter Schools Act. It is charged with "accepting, approving and disapproving statewide virtual charter school applications" pursuant to those rules. 70 O.S. § 3-145.3(A)(1)–(2). And Oklahoma delegated rulemaking authority to the Board, *see* 70 O.S. § 3-145.4, which the Board exercised when promulgating all relevant regulatory provisions governing charter-school applications and contracts. It promulgated these regulations and is entrusted to administer them.

Exercising that delegated authority, the Board carefully reviewed and considered St. Isidore's initial application, requested supplementary information regarding a variety of matters, received and then carefully reviewed that additional information in St. Isidore's revised application, and engaged St. Isidore officials in detailed conversation regarding the school's design at two separate public meetings. The Board was well aware of St. Isidore's operational plans, the details of its written application materials and charter contract, and the many explicit legal

assurances contained in both. Ultimately, the Board demonstrated that it found that St. Isidore's materials met all relevant legal requirements and that St. Isidore would be a school worthy of the State's virtual charter program by approving the application and entering into a charter contract with the school. That is a decision that the Board—not Plaintiffs—is entrusted with making, and this Court should not second-guess the Board's reasoned conclusion.

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

In the end, each of Plaintiffs' regulatory claims suggests that St. Isidore must be required to relinquish its First Amendment rights in order to participate in the charter-school program. But any effort to force St. Isidore to waive those rights—that is, to comply with "all" law *except* any legal rights for religious schools—is itself unconstitutional. As the Supreme Court has held, "the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013). Indeed, "[t]o condition the availability of benefits upon a recipient's willingness to surrender his religiously impelled status effectively penalizes the free exercise of his constitutional liberties." *Trinity Lutheran*, 582 U.S. at 462 (cleaned up); *see also Carson*, 142 S. Ct. at 1997; *Espinoza*, 140 S. Ct. at 2257. The Supreme Court has made it abundantly clear that the State cannot directly condition St. Isidore's participation in the charter program upon the surrender of its religious identity. *See supra* Part II.B. This Court must reject Plaintiffs' effort to impose that same condition indirectly.

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

Finally and fatally, even if Plaintiffs *could* prevail on any of these claims, this Court must reject their request for the utterly disproportionate and inequitable remedy of invalidating St. Isidore's charter or enjoining the operation of the school. It is fundamental that any judicial remedy must match the scope of the underlying claim. *See Salazar v. Buono*, 559 U.S. 700, 714–15 (2010). None of these technical challenges go to the State's general authority to contract with a religious charter school or St. Isidore's ability to operate one. Instead, each is an imagined foot fault that

could easily be remedied (if at all) by ordering St. Isidore to comply with the applicable statutory or regulatory provision when it operates.

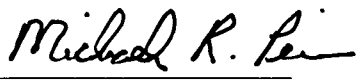
This basic legal principle is especially true here, where Plaintiffs invoke the Court's equitable authority. A court in equity may shape remedies that "are more flexible" than those available at law. *Johnston v. Byars State Bank*, 1930 OK 43, ¶ 16, 284 P. 862, 865 (Okla. 1930). And it must use that flexibility to "adjust remedies in a feasible and practical way to eliminate the conditions or redress the injuries caused by unlawful action" to ensure "fairness and precision." *Freeman v. Pitts*, 503 U.S. 467, 487 (1992). Plaintiffs request a permanent injunction to shutter the school before it can even open. This relief, predicated on hypothetical and technical quibbles with phrasing in the application or charter contract, is both disproportionate and fundamentally unjust.

If this Court ever were to conclude that these statutory and regulatory provisions require relief, the appropriate remedy would be to order the parties to comply with the provision at issue, not to bar the school from existence.

## CONCLUSION

For the foregoing reasons, the Plaintiffs' four claims against Defendant St. Isidore of Seville Catholic Virtual School should be dismissed because they are nonjusticiable, fail to state a claim, and are barred by the U.S. Constitution.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of March, 2024, I caused a true and correct copy of the above and forgoing Motion to Dismiss to be served by electronic mail pursuant to this Court's Stipulation Concerning Electronic Service entered on September 7th, 2023 upon:

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

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