IN THE DISTRICT COURT FOR OKLAHOMA COUNTY
STATE OF OKLAHOMA

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

DEFENDANTS OKLAHOMA STATE DEPARTMENT OF EDUCATION, STATE SUPERINTENDENT OF PUBLIC INSTRUCTION RYAN WALTERS, OKLAHOMA STATE BOARD OF EDUCATION, AND MEMBERS OF THE OKLAHOMA STATE BOARD OF EDUCATION'S MOTION TO DISMISS

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Defendants Oklahoma State Department of Education; Ryan Walters, in his official capacity as State Superintendent of Public Instruction; Oklahoma State Board of Education; and Members of the Oklahoma State Board of Education, in their official capacities (collectively, "the Department"), by and through undersigned counsel, respectfully move this Court to grant the Department's Motion to Dismiss as Plaintiffs failed to state a claim upon which relief can be granted. *See* 12 O.S. § 2012(B)(6).

INTRODUCTION

Within the last six years, the United States Supreme Court has thrice told a state that its practice of excluding religious organizations from public benefits is "odious" to the United States Constitution. *Trinity Lutheran Church v. Comer,* 582 U.S. 449, 467 (2017) (Missouri); *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. ----, 140 S. Ct. 2246, 2263 (2020) (Montana); *see Carson v. Makin,* 596 U.S. 767 (2022) (Maine). In this case, Plaintiffs ask the Court to require the Department to engage in the exact behavior that the Supreme Court told Missouri, Montana, and Maine is unconstitutional. This Court should reject that request and uphold the Constitutions and laws of the United States and Oklahoma.

For multiple reasons, Plaintiffs fail to state a claim upon which relief can be granted. First, when distributing state aid, the Department must follow precedent of the United States Supreme Court. The Supreme Court's Free Exercise trilogy of *Trinity Lutheran Church, Espinoza,* and *Carson* mandates that the government cannot exclude religious institutions from generally available public benefits merely because of their religious nature. Therefore, the Department must consider St. Isidore's request for state aid in the same manner that it would consider a secular request.

Second, any Department action to fund St. Isidore will be consistent with Oklahoma law. Article II, § 5 of the Oklahoma Constitution does not apply when the circuit between government and religion is broken—as it is here. The State does not force any family to enroll their child at St. Isidore, which is one of many virtual and brick-and-mortar charter school options for Oklahomans. Nor may the Department discriminate against St. Isidore because of its religious character or substantially burden St. Isidore's religious practices in violation of the Oklahoma Constitution or Oklahoma Religious Freedom Act.

Third, Plaintiffs fail to state any cause of action *at all*, because no relevant cause of action even exists under Oklahoma law. Moreover, Plaintiffs' theoretical causes of action would be barred by sovereign immunity.

Therefore, the Court should dismiss Plaintiffs' Petition for failure to state a claim.

BACKGROUND

Oklahoma offers students a robust variety of educational opportunities, including charter schools, which are encouraged to use "different and innovative teaching methods." 70 O.S. § 3-131(A). In 1999, the Legislature enacted the Charter Schools Act to diversify options for Oklahoma families and provide "additional academic choices for parents and students." *Id.* The parties to a charter school contract include a public sponsor and operator. Charter school operators may be "[a] board of education of a public school district, public body, public or private college or university, private person, or private organization." *Id.* at § 3-134(C). In 2022, there were thirty-one charter schools in Oklahoma, including six fully virtual charter schools that enrolled 29,266 students. Okla. State Dep't of Educ., Okla. Charter School Report 2022 at 5–6, 9.[1]

[1] *Available at* https://sde.ok.gov/sites/default/files/2022%20OKLAHOMA%20CHARTER%20SCHOOL%20REPORT.pdf.

The Oklahoma State Department of Education is the "department of the state government . . . charged with the responsibility of determining the policies and directing the administration and supervision of the public school system of the state." 70 O.S. § 1-105(A). The "State Board of Education is that agency in the State Department of Education which shall be the governing board of the public school system of the state." *Id.* at § 1-105(B). Practically, the State Superintendent of Public Instruction, the Department of Education, and the State Board of Education all work together to administer, supervise, and fund schools in Oklahoma. *See* First Am. & Suppl. Pet. ¶¶ 38–39.

Charter schools enjoy substantial flexibility in operations and "may offer a curriculum which emphasizes a specific learning philosophy or style or certain subject areas . . . ." 70 O.S. § 3-136(A)(3). "[E]xempt from all statutes and rules relating to schools, boards of education, and school districts," *id.* at § 3-136(A)(5), charter schools primarily remain accountable to their public sponsor and governing boards but must be accredited by the Department, which ensures compliance with federal and state law, *Oklahoma Charter Schools Program*, Okla. State Dep't of Educ. (Apr. 25, 2022)[2].

Through the Office of State Aid, the Department allocates state aid funds calculated in accordance with the statutory state aid formula to both brick-and-mortar and virtual charter schools. State aid is a public obligation the Department administers to public and charter schools that serve the unique educational needs of Oklahoma's students and parents. Overall, the flexibility in operation and curricula, combined with the ample state aid available, renders Oklahoma's charter school system a significant public benefit for a private entity wishing to participate.

[2] *Available at* https://sde.ok.gov/faqs/oklahoma-charter-schools-program.

Hoping to participate in this public benefit, St. Isidore of Seville Catholic Virtual School ("St. Isidore"), an Oklahoma not-for-profit corporation, applied to serve as a charter school operator. St. Isidore is "under the umbrella of the Oklahoma Catholic Conference comprised of the Archdiocese of Oklahoma City and the Diocese of Tulsa." Pls. Ex. A. at PE155. In June 2023, the Oklahoma Statewide Virtual Charter School Board ("SVCSB"), a state agency, approved St. Isidore's charter school sponsorship. Because it is a religious entity, St. Isidore's sponsorship application included notarized statements that the school will comply with all legal requirements to the extent they do not conflict with St. Isidore's religious beliefs. Pls. Ex. A. at PE1–427; *see also* First Am. & Suppl. Pet. ¶¶ 50–123; 136–147. In October 2023, the SVCSB and St. Isidore executed a charter contract. Pls. Ex. P. at PE597–618.

The Department intends to hold St. Isidore accountable to all state constitutional provisions, statutory laws, and administrative regulations to the extent they do not require the school to abandon its sincerely held religious beliefs.

ARGUMENT

A motion to dismiss for failure to state a claim may be granted if "it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of the claim[s] which would entitle relief." *Gens v. Casady Sch.*, 2008 OK 5, ¶ 8, 177 P.3d 565, 569; *see also* 12 O.S. § 2012(B)(6). Plaintiffs must state a cognizable legal theory to support their claims or plead sufficient facts under a cognizable theory. *See Gens*, 2008 OK 5, ¶ 8, 177 P.3d at 569. The moving party bears the burden of demonstrating the insufficiency of the pled facts. *Id.* Here, Plaintiffs do not plead a legally cognizable case against the State for the reasons discussed below, and their Petition against the Department should be dismissed in its entirety.

I. THE FREE EXERCISE CLAUSE PREVENTS THE DEPARTMENT FROM WITHHOLDING STATE AID ALLOCATIONS OR OTHER STATE FUNDING FROM ST. ISIDORE SOLELY BECAUSE OF ITS RELIGIOUS CHARACTER.

The Department intends to hold St. Isidore accountable to all statutes and regulations as required under Oklahoma law—a fact recognized by the Plaintiffs—that do not require St. Isidore to sacrifice its religious beliefs. *See* First Am. & Suppl. Pet. ¶ 146. Moreover, when distributing state aid, the Department must act in a manner that complies with the United States Constitution. Under the Free Exercise trilogy, the Department will violate the Free Exercise Clause if it is ordered to withhold state aid to St. Isidore solely because it is a religious institution. *See Trinity Lutheran Church,* 582 U.S. at 462–63; *Espinoza,* 140 S. Ct. at 2256; *Carson,* 596 U.S. at 789. "[S]tate courts . . . 'must not give effect to state laws that conflict with federal law[].'" *Espinoza,* 140 S. Ct. at 2262.Therefore, when distributing state aid, the Department is not bound by Title 70, § 3-136(A)(2)'s non-sectarian and non-religious requirements, as that provision is unconstitutional in light of the Free Exercise trilogy.

A. BECAUSE THE OKLAHOMA CHARTER SCHOOLS ACT CREATES GENERALLY AVAILABLE PUBLIC BENEFITS, THE DEPARTMENT CANNOT EXCLUDE ST. ISIDORE FROM RECEIVING THOSE BENEFITS WITHOUT VIOLATING THE FREE EXERCISE TRILOGY.

In the Free Exercise trilogy, the United States Supreme Court repeatedly held that religious organizations like St. Isidore are eligible for generally available public benefits. Indeed, to exclude them would violate the First Amendment. This trifecta of cases "repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion" that triggers and fails strict scrutiny. *Trinity Lutheran Church*, 582 U.S. at 458. A state cannot use its powers to handicap or otherwise treat religious organizations with hostility. *See id.*; *Am. Legion v. Am. Humanist Ass'n,* 588 U.S. ----, 139 S. Ct. 2067, 2074 (2019) (stating "a hostility toward religion . . . has no place in our Establishment Clause traditions").

Accordingly, the Supreme Court has long held that the Establishment Clause permits religious organizations to receive generally available government benefits. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995) (stating "the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse").

In each instance of the Free Exercise trilogy, the Court reaffirmed that allowing religious organizations to receive such benefits alongside their secular counterparts is permissible under the Establishment Clause. First, in *Trinity Lutheran Church*, the Court considered a Missouri state agency's denial of a Christian church's application to a generally available grant program to help resurface the church's playground. 582 U.S. at 454. The Court not only held that allowing the church to receive such a benefit was allowed under the Establishment Clause, but also that the state's alleged antiestablishment interest was insufficient to justify the state's denial. *See id.* at 465–66. Second, in *Espinoza*, the Court evaluated a Montana program that gave a tax credit to anyone who sponsored a scholarship for a child's tuition at any private school chosen by the child's family. *Espinoza,* 140 S. Ct. at 2251. The Court held that "the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs." *Id.* at 2254. Third, in *Carson*, the Court analyzed a Maine tuition assistance program permitting parents to direct state funds to private schools so long as those school were not religious. *Carson,* 596 U.S. at 771–73. The Court, in striking down the religious exclusion, once again reaffirmed that "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." *Id.* at 781.

The Free Exercise trilogy demonstrates that religious schools may receive generally available public funds from the state without offending the Establishment Clause. Any remaining doubt was dispelled in *Kennedy v. Bremerton School District* when the Supreme Court overruled *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and its three-part strict separationist test for interpreting the Establishment Clause. *See* 597 U.S. 507, 534–35 (2022); *see also id.* at 546 (Sotomayor, J., dissenting) (stating the Supreme Court has overruled *Lemon*). *Cf. Groff v. DeJoy*, 600 U.S. 447, 460 (2023) (labeling the Court's decision in *Lemon* as "now abrogated"). In place of *Lemon*, courts now interpret the Establishment Clause by looking to "historical practices and understandings" of the practice at issue. *Kennedy*, 597 U.S. at 535. As the Court explained in *Espinoza*, "early state constitutions and statutes actively encouraged" policies that provided financial support to religious schools. 140 S. Ct. at 2258.

Here, the Department cannot withhold this publicly available benefit from St. Isidore without violating the Free Exercise trilogy and inviting constitutional reprimand from the United States Supreme Court. Like Missouri, Montana, and Maine, the Department would violate the First Amendment if it excluded St. Isidore from this public benefit because of its religious identity. *See Trinity Lutheran Church,* 582 U.S. at 462–63; *Espinoza,* 140 S. Ct. at 2256; *Carson,* 596 U.S. at 789. Indeed, as in *Shurtleff v. City of Boston*, in which Boston tried to "avoid a spurious First Amendment problem" and "wound up inviting a real one," the Department must not be forced to violate the Free Exercise Clause under the guise of promoting strict separation of church and state. 596 U.S. 243, 280 (2022) (Gorsuch, J., concurring) ("Call it a *Lemon* trade."). As the United States Supreme Court held in *Kennedy*, "in no world may a government entity's concerns about phantom constitutional violations justify actual violations of . . . First Amendment rights." *Kennedy,* 597 U.S. at 543. This court can avoid such a "*Lemon* trade" by dismissing the Petition and allowing

the Department to fulfill its statutory obligation to administer state aid in a manner compliant with the Constitution of the United States. *Shurtleff*, 596 U.S. at 280. (Gorsuch, J., concurring).

B. THE OKLAHOMA CHARTER SCHOOL ACT'S NON-SECTARIAN AND NON-RELIGIOUS REQUIREMENT UNCONSTITUTIONALLY DISCRIMINATES AGAINST ST. ISIDORE AND TARGETS ITS RELIGIOUS CHARACTER.

Title 70, § 3-136(A)(2) of the Oklahoma Charter School Act requires that "[a] charter school shall be nonsectarian in its programs, admission policies, employment practices, and all other operations. A Sponsor may not authorize a charter school or program that is affiliated with a nonpublic sectarian school or religious institution[.]" This requirement is facially discriminatory and targets religious exercise, triggering strict scrutiny.

In *Trinity Lutheran Church,* Missouri's "policy expressly discriminate[d] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." *Trinity Lutheran Church,* 582 U.S. at 462. The Supreme Court held that "such a policy imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny." *Id.* In *Carson,* the Supreme Court applied the same prohibition on facial discrimination. *See Carson,* 596 U.S. at 780 (finding that a "law that operates" to "disqualify some private schools from funding solely because they are religious . . . must be subjected to the strictest scrutiny"). Like Maine, Oklahoma's statute expressly disqualifies religious entities solely because of their religious character, subjecting it to strict scrutiny.

Similarly, in *Church of the Lukumi Babalu Aye,* the Supreme Court held that "[a] law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 546 (1993). And in *Carson,* the Court held that a sectarian exclusion from public funding "is not one of them." *Carson,*

596 U.S. at 781. And neither is this statute. As in *Lukumi*, § 3-136(A)(2) singles out religious entities for special disadvantage, subjecting it to strict scrutiny.

"To satisfy strict scrutiny, government action 'must advance "interests of the highest order" and must be narrowly tailored in pursuit of those interests.'" *Carson,* 596 U.S. at 780 (quoting *Lukumi,* 508 U.S. at 546.). It is not sufficient to say that the Department has a compelling interest in vague notions of strict separation; on the contrary, "Maine's decision to continue excluding religious schools from its tuition assistance program . . . promotes stricter separation of church and state then the Federal Constitution requires." *Id.* at 781. *Carson* was the Supreme Court's third time to explain that "such 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.'" *Id.* (quoting *Espinoza,* 140 S. Ct. at 2260 (quoting *Trinity Lutheran Church*, 582 U.S. at 466)).

This Court should avoid Missouri, Montana, and Maine's constitutional mistake and recognize that the Oklahoma Charter School Act's non-sectarian and non-religious requirement violates the Free Exercise Clause. In our unique constitutional order, the United States "Constitution . . . shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Law of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. In many instances, the United States Supreme Court has found a state law or constitutional provision to be inconsistent with the United States Constitution and held it unconstitutional. *See Carson,* 596 U.S. at 788–89; *New York State Rifle & Pistol Ass'n, Inc. v. Bruen,* 597 U.S. 1, 71 (2022) (holding a New York law requiring proper cause for a license to carry a firearm unconstitutional under the Second Amendment). And the "'*supreme* law of the

land' condemns discrimination against religious schools and families who attend them." *Espinoza*, 140 S. Ct. at 2262. (emphasis in original) (quoting *Marbury,* 1 Cranch at 180).

Because Title 70, § 3-136(A)(2) facially discriminates under *Carson,* targets religious institutions for unfavorable treatment under *Lukumi*, and cannot survive strict scrutiny, this Court should not give effect to that provision of Oklahoma law.

II. THE OKLAHOMA CONSTITUTION AND OKLAHOMA LAW ALLOWS THE DEPARTMENT TO DISTRIBUTE STATE AID TO ST. ISIDORE.

The Oklahoma Constitution and the laws of Oklahoma present no impediment to the Department's funding St. Isidore in the same manner that it funds a large set of secular choices for Oklahoma students. In fact, both the Constitution and the laws of Oklahoma prevent the Department from discriminating against St. Isidore's religious character when providing state aid and other funding.

A. IF THE DEPARTMENT ULTIMATELY PROVIDES FUNDING FOR ST. ISIDORE, IT WILL BE IN COMPLIANCE WITH ARTICLE II, SECTION 5 AND ITS OBLIGATIONS UNDER THE FEDERAL CONSTITUTION.

The Oklahoma Supreme Court previously interpreted Article II, § 5 of the Oklahoma Constitution to be inapplicable in a situation similar to this case. *See Oliver v. Hofmeister*, 2016 OK 15, 368 P.3d 1270. Religious schools may receive public aid when participation in the relevant program is the result of "*parents* and not the *government* . . . determining which private school offers the best learning environment for their child." *Id.* ¶ 13, 368 P.3d at 1274 (emphasis in original). In *Oliver,* the Oklahoma Supreme Court analyzed whether Article II, § 5 prevented families participating in the Lindsey Nicole Henry Scholarship, a program allowing families of disabled students to use state funds to attend approved private schools, from contracting with a "sectarian" school. *Id.* ¶ 11, 368 P.3d at 1274. Participation in the program was "*entirely voluntary*" and allowed each family to "independently decide[] without influence from the State

whether to enroll their child." *Id.* ¶ 8, 368 P.3d at 1273 (emphasis in original). The Court unanimously held that the program did not violate Article II, § 5. *Id.* ¶ 27, 368 P.3d at 1277. Because of the "neutrality of the scholarship program" and the "private choice exercised by families," "the circuit between government and religion [was] broken," and the scholarship did not violate the no-aid provision. *Id.* ¶ 13, 368 P.3d at 1274 (citing *Zelman v. Simmons-Harris,* 536 U.S. 639, 641 (2002)).

Oliver is instructive—and binding—here. St. Isidore will join six other virtual charter schools, along with twenty-five brick-and-mortar schools, that parents may voluntarily choose for their children to attend based on their family's educational needs. In light of such abundant choices, the presence of one religiously affiliated charted school—operated by a private actor—does not shirk the State's constitutional duty to operate a system of public schools that are not religiously affiliated. *See* Okla. Const. art. I, § 5; First Am. & Suppl. Pet. ¶¶ 54–56. Enrollment in a charter school is entirely voluntary, which breaks the circuit between the government and religion. Beyond the broken circuit, allowing St. Isidore to receive state aid or other funding is the religiously neutral option under *Oliver*. Withholding funds from St. Isidore because it is religious while distributing state aid to secular charter schools is hostility to religion that neither the Oklahoma Constitution nor the United States Constitution will tolerate. *See id.* ¶ 26, 368 P.3d at 1277 (finding that the Lindsey Nicole Henry scholarship was "completely neutral with regard to religion" by allowing funds to go to any private school, both sectarian and non-sectarian); *Carson*, 596 U.S. at 781 (citing *Zelman,* 536 U.S. at 652–53) (finding that "a neutral benefit program in which public funds flow to religious organizations through independent choices of private benefit recipients does not offend the Establishment Clause").

The Court should interpret Article II, § 5 in a manner that does not conflict with the federal Constitution and the Free Exercise trilogy. *See Okla. Coal. For Reprod. Just. v. Cline*, 2012 OK 102, ¶ 2, 292 P.3d 27, 27 ("Thus, this Court is duty bound by the United States and Oklahoma Constitutions to 'follow the mandate of the United States Supreme Court on matters of federal constitutional law.'"). No-aid provisions like Oklahoma's "arose in the second half of the 19th century" in more than thirty states out of "pervasive hostility to the Catholic Church and to Catholics in general." *Espinoza,* 140 S. Ct. at 2258–59; *see also* Br. of Amicus Curiae Wisconsin Institute for Law & Liberty at 4–13 (Nov. 21, 2023), *Drummond v. Okla. Statewide Virtual Charter Sch. Bd.* (No. MA-121694). "[M]any of the no-aid provisions belong to a more checkered tradition shared with the Blaine Amendment of the 1870s" by sharing a "similarly 'shameful pedigree.'" *Espinoza,* 140 S. Ct. at 2259 (quoting *Mitchell v. Helms*, 530 U.S. 793, 828 (2000)). In fact, "it was an open secret that 'sectarian' was code for 'Catholic.'" *Id.* (quoting *Mitchell,* 530 U.S. at 828–29). According to the United States Supreme Court, these "no-aid provisions of the 19th century hardly evince a tradition that should inform our understanding of the Free Exercise Clause." *Id.* The Supreme Court reiterated that any tradition of not funding religious institutions due to no-aid or similar constitutional clauses was "odious" to our Constitution in the Free Exercise trilogy. *See Trinity Lutheran Church,* 582 U.S. at 467; *Espinoza*, 140 S. Ct. at 2262–63. Thus, it would be unlawful for the Department to base any decision to deny funding to St. Isidore on a provision of the Oklahoma Constitution that is constitutionally "odious" to the Free Exercise Clause of the federal Constitution. As such, this Court should not interpret Article II, § 5 in a manner that would conflict with the federal Constitution.

B. THE OKLAHOMA CONSTITUTION REQUIRES THE DEPARTMENT TO PERFECTLY TOLERATE ST. ISIDORE'S RELIGIOUS CHARACTER.

Article I, § 2 of the Oklahoma Constitution "secure[s]" the "[p]erfect toleration of religious sentiment" for Oklahomans. And yet, the Plaintiffs ask this Court to require the Department to tolerate everyone's religion *but* St. Isidore's. The reality is that, as a private actor, St. Isidore will receive *at minimum* the protections of the federal Free Exercise Clause, but the Oklahoma Constitution may be even *more protective* of free exercise of religion than its federal counterpart. *See Guinn v. Church of Christ of Collinsville,* 1989 OK 8, ¶ 5 n.4, 775 P.2d 766, 788 n.4 (Kauger, J., concurring in part) (comparing the Pennsylvania guarantee of religious freedom to Article I, § 2, as "another example of state constitutions providing more explicit guarantees of individual rights," by differing in language from the federal Free Exercise Clause). "States, in the exercise of their sovereign power, may afford more expansive individual rights and liberties than those conferred by the United States Constitution," as "[t]he United States Constitution provides a floor of constitutional rights." *Id.* at ¶ 6 (Kauger, J., concurring in part); *see also De Hasque v. Atchison, Topeka, & Santa Fe. Ry. Co,* 1918 OK 292, ¶ 22, 173 P. 73, 77 ("We find language which, either directly or by clear implication, recognizes a profound reverence for religion, and an assumption that its influence is essential to the well–being of the community."). In line with the Supremacy Clause of the United States Constitution, this Court should read Article I, § 2 in harmony with the Free Exercise Clause. Therefore, because the United States Free Exercise Clause requires that the Department include St. Isidore in state aid distribution in the same way it includes secular charter schools, this Court should resist the Plaintiffs' attempts to recast the Oklahoma Constitution to require otherwise.

C. THE OKLAHOMA RELIGIOUS FREEDOM ACT PROHIBITS RELIGIOUS DISCRIMINATION.

The Oklahoma Religious Freedom Act ("ORFA") provides that "[n]o governmental entity shall substantially burden a person's free exercise of religion unless it demonstrates that application of the burden to the person is: [e]ssential to further a compelling governmental interest; and [t]he least restrictive means of furthering that compelling governmental interest." 51 O.S. § 253. This rule applies even when "the burden results from a rule of general applicability." *Beach v. Okla. Dep't of Pub. Safety,* 2017 OK 40, ¶ 12, 398 P.3d 1, 5. "Exercise of religion" under ORFA "means the exercise of religion under Article 1, Section 2, of the Constitution of the State of Oklahoma . . . and the First Amendment to the Constitution of the United States." 51 O.S. § 252. If the Department were to deny state aid or other funding to St. Isidore, it would pose a substantial burden on St. Isidore's free exercise of religion. This burden would be more than incidental because failure to receive state aid would effectively prevent St. Isidore's operation as a school. *See Steele v. Guilfoyle,* 2003 OK CIV APP 70, ¶ 8, 76 P.3d 99, 102 (citing *Lyng v. Nw. Indian Cemetery Protective Ass'n,* 485 U.S. 439 (1988)). Therefore, the Department would be required to prove that it has a compelling interest in discriminating against St. Isidore and is using the least restrictive means of doing so. *See Wisdom Ministries, Inc. v. Garrett,* No. 22-cv-0477, 2023 WL 4919660, at *9 (N.D. Okla. Aug. 1, 2023). As discussed, the Department cannot assert a compelling interest in vague notions of strict separation of church and state. Therefore, under ORFA, the Department is prohibited from discrimination against St. Isidore because of its religious identity when distributing state aid or other funding.

D. ACCEPTING STATE AID DOES NOT TRANSFORM ST. ISIDORE INTO A STATE ACTOR.

Mere participation in a government program does not transform a private party into a state actor. *See Blum v. Yaretsky,* 457 U.S. 991, 1004 (1982) (quoting *Jackson v. Metro. Edison Co,* 419

U.S. 345, 350 (1974)) ("[T]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment."); *see also* First Am. & Suppl. Pet. ¶¶ 46, 49. To be considered a state actor, a private entity's action must "fairly be attributed to the state," *Blum*, 457 U.S. at 1004, and that action must be "traditionally the *exclusive* prerogative of the State," *Rendell-Baker v. Kohn,* 457 U.S. 830, 842 (1982).

When a school is operated by a private board, it is not necessarily a state actor even when "virtually all of the school's income [is] derived from government funding," the school must "comply with a variety of regulations," and the school's diplomas are certified by a local public school. *See id.* at 832–33, 840. In *Rendell-Baker,* the Supreme Court held that a nonprofit institution, operated by a board of directors, that specialized in dealing with "students who have experienced difficulty completing public high schools" was not a state actor, even when "nearly all of the students at the school have been referred to it" by a public school district or the state department of mental health. *Id.* at 831–32. Notably, the *Rendell-Baker* decision involved a First Amendment challenge. Since the decision in *Rendell-Baker,* three United States Courts of Appeals have held that charter schools are not state actors. *See Caviness v. Horizon Cmty. Learning Ctr., Inc.,* 590 F.3d 806 (9th Cir. 2010) (finding no state action for Arizona charter schools that are funded by the state); *Logiodice v. Trs. of Maine Cent. Inst.,* 296 F.3d 22 (1st Cir. 2002) (finding no state action in Maine because education is not a function reserved to the state); *Robert S. v. Stetson Sch., Inc.,* 256 F. 3d 159 (3d Cir. 2001) (finding no state action for a publicly-funded, contract-based school in Pennsylvania); *but see Peltier v. Charter Day Sch.,* 37 F.4th 104 (4th Cir. 2022) (finding state action where a charter school implemented a dress code).

Under current Supreme Court precedent, St. Isidore is not a state actor—a fact that labeling the school "public" or "local education agenc[ies]" or distributing state aid will not change. *See* First Am. & Suppl. Pet. ¶¶ 51–53, 67–68, 94. The United States Supreme Court does not rely on labels but instead analyzes relevant functions. *See Carson,* 596 U.S. at 783; *see also Rendell-Baker*, 457 U.S. at 839–843 (analyzing whether a private alternative school is a state actor). Indeed, "the definition of a particular program can always be manipulated," and forcing Oklahoma to "recast" charter schools as state actors "would be to see the First Amendment . . . reduced to a simple semantic exercise." *Carson,* 596 U.S. at 784 (quotations omitted). In *Carson*, Maine attempted a similar mischaracterization to continue excluding religious institutions from its tuition assistance program. *See id.* at 782. Because many districts in Maine are too rural to operate school districts, the State, to comply with its constitutional obligations to provide public schools, offered tuition assistance to families for use at private schools—provided the school was not religious. *Id.* at 773. To eschew the precedent set in *Trinity Lutheran Church* and *Espinoza* that disallowed similar religious exclusions, Maine attempted to reframe its tuition assistance as "the rough equivalent of the public school education that [it] may permissibly require to be secular." *Id.* at 782. Maine argued that this outsourcing of a constitutional obligation allowed it to reframe its school choice program into "a free public education." *Id.* The Plaintiffs are making the same arguments here that failed in *Carson* by recasting charter schools as "public" in their Petition. In *Carson,* the United States Supreme Court noted that "[t]he differences between private schools eligible to receive tuition assistance under Maine's program and a Maine public school are numerous and important." *Id.* at 783. These differences—or factors—are among the same present between public schools and charter schools in Oklahoma, including offering varied and unique

curricula that are exempt from state requirements and hiring teachers outside of the typical state-certification rules. *See id.*

Because the United States Supreme Court looks not to labels or legislative definitions but to actual substance, a closer look must be taken at the functions of the charter school in comparison to binding precedent. The Charter School Act expressly authorizes private organizations—like St. Isidore—to establish charter schools. 70 O.S. § 3-134(C). Similar to Massachusetts's distribution of state funds to the alternative school in *Rendell-Baker*, the Department will not transform St. Isidore into a state actor by distributing state aid. Application of basic health, safety, and insurance laws, as well as simple accreditation compliance forms do not "entwine[]," *Rendell-Baker,* 457 U.S. at 847 (Marshall, J., dissenting), the Department with a privately operated charter school that "may offer curriculum which emphasizes a specific learning philosophy or style or certain subject areas . . . ," 70 O.S § 3-136(A)(3), is "exempt from all statutes and rules relating to schools, boards of education, and school districts," *id.* at § 3-136(A)(5), and is not required to hired state-certified teachers. *See* Pls. Ex. S at PE622–24 (list of basic health, safety, civil rights, and insurance laws applied to charter schools). In fact, the stated goal of charter schools is to "[e]ncourage the use of different and innovative teaching methods" and diversify options for Oklahoma families by providing "additional academic choices for parents and students." 70 O.S. § 3-131(A).

Finding that St. Isidore—and any charter school generally—is a state actor not only threatens to dismantle educational innovation and diversity in Oklahoma but jeopardizes the existence and purpose of a statutorily created state board: the SVCSB and its successor the Statewide Charter School Board. *See* 70 O.S. § 3-132.1. Supervision of public schools is vested solely in the Department and State Board of Education. *See* Okla. Const. art. XIII, § 5 ("The supervision of instruction in the public schools shall be vested in a Board of Education, whose

powers and duties shall be prescribed by law. The Superintendent of Public Instruction shall be the President of the Board."); *see also* 70 O.S. § 1-105 ("The State Board of Education is that agency in the State Department of Education which shall be the governing board of the public school system of the state."). If this Court deems charter schools to be state actors for all purposes, then the SVCSB and its successor would be superfluous, which is contrary to the legislature's purpose for creating these boards. If the legislature, in choosing to label charter schools "public," thought of them as state actors, there would simply be no purpose for allowing separate state boards, institutions of higher education, or federally recognized Indian Tribes to sponsor charter schools. *See* 70 O.S. § 3-132(A). In the current legislative scheme governing charter schools and creating separate state board to serve as sponsors, the Court cannot bright-line label charter schools as state actors without threatening the independence of the SVCSB.

III. PLAINTIFFS FAILED TO PLEAD A JUSTICIABLE CAUSE OF ACTION UNDER OKLAHOMA LAW.

To maintain a claim for relief, Plaintiffs must assert a valid cause of action. *See Lafalier v. Lead-Impacted Cmtys. Relocation Assistance Tr.*, 2010 OK 48, ¶ 20, 237 P.3d 181, 190 ("Public protection falls within the Legislature's authority, as does the authority to define what constitutes an actionable wrong . . . ."); *see also Barrios v. Haskell Cnty. Pub. Facilities Auth.*, 2018 OK 90, ¶ 4, 432 P.3d 233, 242 (Edmondson, J., concurring) ("Any alleged federal or state right must be adjudicated within the remedial framework of a legally cognizable action . . . ."). On a motion brought under § 2012(B)(6), a court "may determine [a] petition suffers from a non-existence of a cause of action making an opportunity to amend futile for a plaintiff's case." *Berkson v. State ex rel. Askins*, 2023 OK 70, ¶ 24, 532 P.3d 36, 47. Plaintiffs failed to plead their claims pursuant to a cause of action recognized by the Oklahoma Legislature, and Plaintiffs' allegations of constitutional violations are barred by sovereign immunity.

A. PLAINTIFFS DO NOT PLEAD A RECOGNIZED CAUSE OF ACTION FOR THEIR CLAIMS.

Plaintiffs' Petition asserts four claims for relief, *see* First Am. & Suppl. Pet. ¶¶ 252–322, alleging various violations of the Oklahoma Administrative Code, the Oklahoma Constitution, and the Oklahoma Charter Schools Act. These claims are based on what Plaintiffs title the "legal requirements applicable to Oklahoma Charter Schools." *See* First Am. & Suppl. Pet. ¶¶ 50–123. And while Plaintiffs identify nearly fifteen pages worth of legal requirements for charter schools, their Petition fails to identify *any* private causes of action authorized by the Legislature. *Id.* In short, Plaintiffs bring their claims for relief with no statutory basis or vehicle that provides them with a cause of action. Plaintiffs do not identify any causes of action because no such private causes of action exist under which Plaintiffs can challenge the actions of the Department. *See* First Am. & Suppl. Pet. ¶¶ 267–276, 307–310 (constitutional claims); 75 O.S. § 250 *et seq.* (Oklahoma Administrative Procedures Act) (First Am. & Suppl. Pet. ¶¶ 253–55, 257, 298, 302, 304); 70 O.S. § 3-130 *et seq.* (Oklahoma Charter Schools Act) (First Am. & Suppl. Pet. ¶¶ 258–262, 264, 277–280, 287–89, 295–97, 301, 303, 304, 312–13, 316–18). Because Plaintiffs do not identify a private cause of action under which to assert their legal and constitutional rights before this Court, they do not state a claim upon which relief can be granted.

B. PLAINTIFFS' CONSTITUTIONAL CLAIMS ARE BARRED BY SOVEREIGN IMMUNITY.

Not only do Plaintiffs fail to identify any relevant causes of action, but they also fail to acknowledge that sovereign immunity bars their claims against the Department. In 2014, the Legislature amended the Governmental Tort Claims Act ("GTCA") to "specify that the State's immunity from suit extended even to torts arising from alleged deprivation of constitutional rights." *Barrios*, 2018 OK 90, ¶ 10, 432 P.3d at 238; *see also* 51 O.S. § 152(17) ("'Tort' means a legal wrong . . . involving violation of a duty imposed by . . . the Constitution of the State of

Oklahoma . . ."). Therefore, the GTCA governs any asserted violations of the Oklahoma Constitution. This is true even if there were an implied cause of action. *Barrios,* 2018 OK 90, ¶ 12, 432 P.3d at 238 ("The Legislature's amendment of the GTCA to specify that the GTCA applies even to tort suits alleging violations of constitutional rights was an exercise of the Legislature's long-recognized power to define the scope of the State's sovereign immunity, which forecloses [this Court's] ability to expand the common law in a manner that would conflict with statutory law.").

Through the GTCA, the Legislature has the "final say" in defining the scope of the State's sovereign immunity. *Barrios,* 2018 OK 90, ¶ 7, 432 P.3d at 237. "Accordingly, in cases including tort claims against the State and state actors, the Court begins with the understanding that the State is statutorily immune from tort suit unless the Legislature has expressly waived that immunity." *Id.* at ¶ 8; *see also* 51 O.S. § 152.1(A) ("The State of Oklahoma does hereby adopt the doctrine of sovereign immunity. The state . . . shall be immune from liability for torts."). The Legislature waived the State's immunity only to the extent provided in the GTCA. 51 O.S. § 152.1(B). "The liability of the state . . . under the [GTCA] shall be exclusive and shall constitute the extent of tort liability of the state . . . arising from . . . the Oklahoma Constitution." *Id.* at § 153(B).

The scope of the State's waiver of sovereign immunity under the GTCA does not cover Plaintiffs' claims. "The state . . . shall be liable for loss resulting from its torts . . . subject to the limitations and exceptions specified [t]he [GTCA] and only where the state . . . , if a private person or entity, would be liable for *money damages* under the laws of the state." *Id.* at § 153(A) (emphasis added).

Plaintiffs' Second Claim for Relief alleges violations of the Oklahoma Constitution and Oklahoma statutory prohibitions on discrimination in student admissions, student discipline, and

employment. *See* First Am. & Suppl. Pet. ¶¶ 266–293. The Fourth Claim for Relief similarly alleges violations of constitutional and statutory prohibitions against teaching religious curriculum. *See* First Am. & Suppl. Pet. ¶¶ 306–322. However, these claims are not within the scope of the GTCA's waiver of Oklahoma's sovereign immunity because Plaintiffs do not seek money damages and the asserted violations are not of the sort that, if they had been done by a private individual, would result in money damages. Instead, Plaintiffs seek a temporary injunction, a permanent injunction, a declaratory judgment, and costs and attorneys' fees. *See* First Am. & Suppl. Pet. ¶ 323. Under the GTCA, the Department can be liable *only where* it would also be liable for money damages if it were a private person. Therefore, even if Plaintiffs' claims and prayer for relief had been properly pled with a cause of action under the GTCA, they will still fail, as they are not within the scope of the Legislature's waiver of sovereign immunity.

The GTCA aside, Plaintiffs are not left without an avenue for injunctive relief. "The remedy of 42 U.S.C. § 1983 is available in an Oklahoma state court regardless of state statutory sovereign immunity." *Barrios,* 2018 OK 90, ¶ 4 (Edmondson, J., concurring). "Any alleged . . . state right," which the Plaintiffs here seek to vindicate,

> must be adjudicated within the remedial framework of a legally cognizable action, and the [GTCA] does not provide a remedy or recognize a cause of action when that Act expressly prohibits a party using a state constitutional right . . . as a basis *for any tort liability against the state when the cause of action is otherwise prohibited by that Act.*

Id. (Edmondson, J., concurring) (emphasis in original). In contrast, 42 U.S.C. § 1983 *does* provide a remedy to Plaintiffs. However, Plaintiffs do not assert this necessary cause of action to proceed with their litigation. *See* First Am. & Suppl. Pet. ¶ 6 ("The plaintiffs' claims for relief are brought solely under the state constitution, state statutes, and state regulations."). Presumably, Plaintiffs made this strategic choice to avoid any removal to federal court. *See e.g.*, Defs.' Notice of Removal

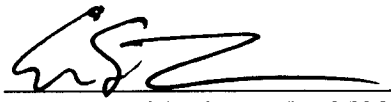
at 2, *Doe v. Walters*, No. 5:24-cv-34 (W.D. Okla. Jan. 1, 2024), ECF No. 1 ("Because Plaintiff has asserted claims under [42 U.S.C. § 1983], . . . this action is removable and the United States District Court for the Western District of Oklahoma has jurisdiction."); *see also, e.g.*, Order, *Doe v. Walters*, No. 5:24-cv-34 (W.D. Okla. Mar. 12, 2024), ECF No. 20 (remanding the case to state court post-removal after Plaintiff "eliminated all claims brought under federal law."). Nevertheless, Plaintiffs remain free to amend their Petition to fix this constitutional infirmity regarding injunctive relief.

At the same time, the deficiency in Plaintiffs' request for declaratory relief is not so easily cured. While it is true that "[a] declaratory judgment may be sought to determine the validity of any statute, municipal ordinance, or other governmental regulation," that is not what the Plaintiffs ask this Court to do. *Osage Nation v. Bd. of Comm'rs of Osage Cnty*, 2017 OK 34, ¶ 58, 394 P.3d 1224, 1243. A district court may "determine rights, status, or other legal relations, including but not limited to a determination of the construction or validity of . . . any statute . . . or other governmental regulation." 12 O.S. § 1651. Plaintiffs' prayer for relief asks for "[a] declaratory judgment under 12 O.S. § 1651 that the Oklahoma Constitution, the Charter Schools Act, and the Board's regulations, and 70 O.S. § 1210.201 bar the provision of any State Aid allocations or other state funding to St. Isidore." First Am. & Suppl. Pet. ¶ 323(B). In effect, the Plaintiffs are not asking this Court to determine the validity of the Constitution, the Charter Schools Act, or any specific Board regulation. Rather, they are asking this Court to determine the validity of any future action the Department might take *in light of* those regulations. By its plain terms, § 1651 does not waive sovereign immunity for the Department under these circumstances for this case.

CONCLUSION

For these reasons, the Department requests that this Court dismiss Plaintiffs' Petition in its entirety.

Respectfully submitted,



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CERTIFICATE OF MAILING

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