IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

OKPLAC, INC., et al., Plaintiffs, v. STATEWIDE VIRTUAL CHARTER SCHOOL BOARD, et al., Defendants.	)	No. CV-2023-1857

PLAINTIFFS' CONSOLIDATED OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS FIRST AMENDED AND SUPPLEMENTAL PETITION

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INTRODUCTION

Because all children have the right to an education, public schools must be open to and welcoming of all students, and they must not indoctrinate students in any religion. These principles lie at the heart of our pluralistic democracy and are embodied in Oklahoma's constitution, statutes, and regulations. Yet, contrary to these principles, and in violation of Oklahoma law, the Oklahoma Statewide Virtual Charter School Board has approved the nation's first religious public charter school—St. Isidore of Seville Catholic Virtual School. St. Isidore, which plans to open this August, will discriminate against students and employees on a variety of grounds, indoctrinate its students in the Catholic faith, and operate in other respects in a manner prohibited by Oklahoma law.

Plaintiffs are taxpayers who object to the expenditure of their tax dollars to fund an unlawful religious public school. Plaintiffs seek injunctive and declaratory relief prohibiting the defendant state agencies and officials from continuing to sponsor St. Isidore as a charter school, implementing a contract with St. Isidore, or funding St. Isidore.

In their motions to dismiss, Defendants contend that Plaintiffs have no right to bring this lawsuit. But Oklahoma has a long tradition of permitting taxpayers to challenge prospective unlawful expenditures of public funds. Defendants also argue that this case is not ripe, suggesting that the Court should wait until St. Isidore is up and running to intervene. But Plaintiffs have a right to relief now, before their tax funds are unlawfully disbursed.

Defendants further argue that Plaintiffs fail to state a claim. On the contrary, all four of Plaintiffs' claims validly allege violations of the Oklahoma Constitution, the Oklahoma Charter Schools Act, or the Board's regulations: First, St. Isidore has refused to certify that it will comply with Oklahoma law, as is required by the Board's regulations and the Charter

Schools Act. Second, in violation of the Oklahoma Constitution, the Charter Schools Act, and a state anti-segregation statute, St. Isidore will discriminate in admissions, discipline, and employment based on religion, sexual orientation, gender identity, and other protected characteristics. Third, contrary to the Charter Schools Act and Board regulations, St. Isidore has not committed to fully serving students with disabilities. Fourth, in violation of the Oklahoma Constitution and the Charter Schools Act, St. Isidore will teach a religious curriculum and indoctrinate its students in Catholic religious beliefs.

Defendants assert that St. Isidore has a right under the First Amendment's Free Exercise Clause to receive state funding for its religious public school. But they erroneously rely on cases involving state funding of private schools. Oklahoma charter schools are governmental entities. As such, they have no federal constitutional rights to challenge the state laws and regulations that govern them. Even if they did have such rights, Defendants' free-exercise attacks on Plaintiffs' first through third claims fail because those claims are based on religion-neutral legal prohibitions. And Oklahoma's compelling interest in complying with the First Amendment's Establishment Clause satisfies any scrutiny that the prohibitions underlying Plaintiffs' fourth claim may trigger under the Free Exercise Clause. Because St. Isidore is a governmental entity and a state actor, the Establishment Clause prohibits it from inculcating students in religion. The Establishment Clause also bars states from setting up religious institutions or fusing governmental functions with religious ones, as the Board has done by chartering St. Isidore. Moreover, the Establishment Clause prohibits direct state aid to the religious activities of religious institutions, which is exactly what state funding of St. Isidore would be.

For these reasons, Defendants' motions to dismiss should be denied.

FACTS

The Oklahoma Charter Schools Act

Charter schools are "public school[s] established by contract with a board of education of a school district" or with certain other governmental entities to "provide learning that will improve student achievement." 70 O.S. § 3-132(D). Charter schools were created by the Oklahoma legislature through the Oklahoma Charter Schools Act, 70 O.S. §§ 3-130 *et seq.* They receive state funding (70 O.S. § 3-142) and must "be as equally free and open to all students as traditional public schools" (70 O.S. § 3-135(A)(9)). They are subject to the same academic standards as other Oklahoma public schools (70 O.S. § 3-135(A)(11)), as well as numerous other legal rules that govern public schools, including prohibitions on discrimination in admissions and employment (*see, e.g.*, 70 O.S. §§ 3-135(A)(9), 3-135(C), 3-136(A)(1), 3-136(A)(4), 3-136(A)(6), 3-136(A)(11)–(12), 3-136(A)(16)–(18), 3-141(A)). Charter schools are required to be "nonsectarian in [their] programs, admission policies, employment practices, and all other operations." 70 O.S. § 3-136(A)(2).

The Board authorizes, sponsors, and provides oversight to Oklahoma virtual charter schools. 70 O.S. §§ 3-145.1(A), 3-145.3(A)(1)–(2). The Board is responsible for "accepting, approving and disapproving statewide virtual charter school applications," as well as entering into, renewing, and revoking contracts with virtual charter schools. 70 O.S. §§ 3-135(A), 3-145.3(A)(1)–(2).

Charter-school applications are detailed documents that must include thirty-five statutorily enumerated categories of information. 70 O.S. § 3-134(B)(1)–(35). Applicants must provide "a set of policies and procedures governing administration and operation of the proposed . . . school." OAC § 777:10-3-3(b)(1). In evaluating applications, the Board must

"determine whether the applicant's proposal for sponsorship complies with the . . . provisions of the Oklahoma Charter Schools Act." OAC § 777:10-3-3(c)(3). If an application is accepted, "[t]he sponsor of a charter school shall enter into a written contract with the governing body of the charter school." 70 O.S. § 3-135(A). The "policies and procedures" set out in the application "shall be incorporated into the terms of the contract" (OAC § 777:10-3-3(b)(1)), and "[t]he contract shall incorporate the provisions of the charter of the charter school" (70 O.S. § 3-135(A)).

St. Isidore's Application and Its Approval

St. Isidore identifies itself as "an Oklahoma virtual charter school" (Ex. B at 1, ¶ 3 [PE429][1]) that "falls under the umbrella of the Oklahoma Catholic Conference comprised of the Archdiocese of Oklahoma City and the Diocese of Tulsa" (Ex. A at 91 [PE155]). On January 30, 2023, St. Isidore submitted an initial application to the Board for sponsorship as a statewide virtual public charter school. (*Id.* at 3 [PE54].) The Board rejected that application and sent a letter to St. Isidore outlining several "reasons for rejection," including a "[l]ack of detail regarding the proposed school's special education plan," as well as "[l]egal issues that may be applicable," such as "the legal basis for religious reason aligning to Oklahoma statute [and] the Oklahoma Constitution." (Ex. F at 1–2 [PE513–14].)

On May 25, 2023, St. Isidore submitted a revised application, asserting that it had addressed the identified deficiencies. (Ex. A [PE1–427].) Like the original application, the

[1] All exhibit citations are to exhibits to Plaintiffs' amended and supplemental petition, except that Exhibits Y to AH are attached hereto. The exhibits have been consecutively paginated with the numbering "PE__" in the lower right-hand corner. All exhibit citations provide both the "PE" numbering and the exhibit's letter and original page numbering.

revised application explains that St. Isidore plans to open a public charter school that would be "operate[d] . . . as a Catholic school." (*Id.* at 17 [PE70].)

St. Isidore's revised application makes plain that St. Isidore views itself as exempt from certain laws and regulations, including anti-discrimination laws. (*See, e.g.*, *id.* at 109 [PE195] (stating that "[t]he School complies with all applicable state . . . laws and statutes to the extent the teachings of the Catholic Church allow"; that "[t]he School complies with all applicable local [and] state . . . laws and regulations governing fair employment practices that are not inconsistent with the faith or moral teaching of the Catholic Church"; and that, "[t]o the extent that local [and] state . . . laws and regulations are inconsistent with the faith and moral teaching of the Catholic Church," St. Isidore views itself as exempt from the laws and regulations).)

The application further demonstrates that St. Isidore will discriminate in student admissions, student discipline, and employment based on religion, sexual orientation, gender identity, pregnancy outside of marriage, and sexual activity outside of marriage. (Am. Pet. ¶¶ 134–95.) For example, while St. Isidore states that it will accept students "of different faiths or no faith," it also states that "[a]dmission assumes the student and family willingness to adhere with respect to the beliefs, expectations, policies, and procedures of the school." (Ex. A at 38 [PE91].) St. Isidore will immerse students in instruction in its religious tenets, meaning that the school will not be truly open to students who would be prohibited by their own faiths from "adhering . . . to the beliefs" of or submitting to religious indoctrination in a different religion. (Am. Pet. ¶¶ 154–56.) Moreover, St. Isidore's approved application states that it will "operate a school in harmony with faith and morals, including sexual morality, as taught and understood by the Magisterium of the Catholic Church based upon Holy Scripture

and Sacred Tradition." (Ex. A at 18 [PE71].) As those teachings prohibit sexual acts between people of the same gender and bar transgender people from expressing their gender identities, St. Isidore will discriminate against LGBTQ+ students and employees. (Am. Pet. ¶¶ 157–79.)

What is more, St. Isidore's application states that the school will "comply with all applicable . . . [l]aws in serving students with disabilities" only "to the extent that it does not compromise the religious tenets of the school and the instructional model of the school." (Ex. A at 73–74 [PE133–34].) Thus "[s]tudent service plans" for students with disabilities "cannot contain accommodations or modifications that are in opposition of Church teaching." (Ex. C at 7 [PE442].) And St. Isidore's application indicates that the school will decline to serve students with disabilities that school officials deem to not be well-suited to being served virtually. (Ex. A at 43, 69 [PE96, 129].)

Finally, St. Isidore's application explains that the school will teach a religious curriculum and indoctrinate students in Catholic religious beliefs. (Am. Pet. ¶¶ 204–21.) The application is replete with statements describing the religious nature of St. Isidore's planned curriculum and programing. (*See, e.g.*, Ex. A at 5, 17–19, 24, 104–08, 156, 160, 168 [PE56, 70–72, 77, 190–94, 242, 246, 254]; *id.*, App. F, § 1, pp. 1–4 [PE288–91].) It states, for instance, that the school will "participate[] in the evangelizing mission of the Church and [be] the privileged environment in which Christian education is carried out." (*Id.* at 17 [PE70].) St. Isidore plans to fulfill its mission of evangelization by integrating Catholic doctrine into all its classes on otherwise secular subjects and by requiring students to take theology classes. (Am. Pet. ¶¶ 210–11.)

At its June 5, 2023 meeting, the Board approved St. Isidore's revised application by a vote of three to two. (Ex. M [PE590]; Ex. Q at 2:54:58.) While the Board now asserts that it determined that St. Isidore satisfied all applicable legal requirements except that the school be "nonsectarian" (Board Br. 1), there is no evidence that the Board's majority discussed those requirements or made any such determination. (Am. Pet. ¶ 238; Ex. Q.)

On October 9, 2023, the Board approved a charter contract with St. Isidore, and that contract was signed as of October 16, 2023. (Am. Pet. ¶¶ 130–31; Ex. P [PE597–618]; Ex. R.) The contract includes various provisions that purport to exempt St. Isidore on religious grounds from laws that apply to all charter schools. (Ex. P at 1–2, 12, 15, 18 ¶¶ 2.1, 3.1, 8.2, 8.11, 11.1 [PE598–99, 609, 612, 615].) The contract provides that St. Isidore's approved application is "incorporated by reference" in the contract, except that "[i]n the event of a conflict between the terms of this Contract and the approved terms in the Charter School's Application for Sponsorship, the terms of this Contract shall supersede." (*Id.* at 19, ¶ 11.9 [PE616].)

St. Isidore subsequently launched a website stating that "St. Isidore of Seville Catholic Virtual School is a[] newly approved virtual charter school in the state of Oklahoma." (Ex. N [PE592].) St. Isidore's website states that "St. Isidore of Seville Catholic Virtual School [p]lans to open in August of 2024 for the 2024–2025 school year." (*Id.*)

Plaintiffs' Lawsuit

Plaintiffs filed this suit on July 31, 2023. Plaintiffs are OKPLAC—a nonprofit committed to strengthening Oklahoma's public school system—and nine individual Oklahoma taxpayers. (Am. Pet. ¶¶ 9–19.) Defendants are the Board and its members, the

Oklahoma State Department of Education, the State Superintendent of Public Instruction, the Oklahoma State Board of Education and its members, and St. Isidore. (*Id.* ¶¶ 20–49.)

Plaintiffs challenge the approval of St. Isidore's application on four grounds. First, in violation of the Board's regulations and the Charter Schools Act, St. Isidore failed to commit to comply with Oklahoma law, including nondiscrimination requirements. (*Id.* ¶¶ 252–65.) Second, St. Isidore will violate prohibitions against discrimination in student admissions, student discipline, and employment in the Oklahoma Constitution, the Oklahoma Charter Schools Act, and a state anti-segregation statute. (*Id.* ¶¶ 266–93.) Third, St. Isidore has not complied with requirements in the Charter Schools Act and the Board's regulations that it agree to adequately serve students with disabilities. (*Id.* ¶¶ 294–305.) Fourth, St. Isidore will violate the Oklahoma Constitution's and the Charter Schools Act's prohibitions against a charter school teaching a religious curriculum and indoctrinating students in a religion. (*Id.* ¶¶ 306–22.)

Plaintiffs seek injunctive and declaratory relief prohibiting the defendant state agencies and officials from continuing to sponsor St. Isidore as a charter school, implementing the charter contract with St. Isidore, or funding St. Isidore, as well as relief prohibiting St. Isidore from operating as a charter school or receiving or using state funds. (*Id.* ¶ 323.)

STANDARD OF REVIEW

To prevail on a motion to dismiss, Defendants must demonstrate "beyond any doubt that the litigant can prove no set of facts which would entitle the plaintiff to relief." *Ho v. Tulsa Spine & Specialty Hosp., L.L.C.*, 2021 OK 68, ¶ 10, 507 P.3d 673. The Court is required to "take as true all of the challenged pleading's allegations together with all

reasonable inferences which may be drawn from them." *Id.* ¶ 9. "Motions to dismiss are usually viewed with disfavor under this standard, and the burden of demonstrating a petition's insufficiency is not a light one." *Harwood v. Ardagh Grp.*, 2022 OK 51, ¶ 15, 522 P.3d 473.

ARGUMENT

I. Plaintiffs' claims are justiciable.

Defendants argue that Plaintiffs lack standing, that there is no private right of action for Plaintiffs' statutory and regulatory claims, that the case is not ripe, and that statutory immunity shields Defendants. All of these arguments are incorrect. Plaintiffs have standing as taxpayers. In that capacity, they have the right to challenge unlawful spending on any ground, regardless of whether the statutes and regulations that Defendants are violating authorize a private suit. This case is ripe, as the Board has approved St. Isidore's application, the Board and St. Isidore have signed a charter contract, St. Isidore has promulgated detailed school policies, and state funding of St. Isidore is inevitable absent court intervention. And the immunity statutes Defendants cite apply only to actions for damages, not suits that solely seek equitable relief, as this case does.

A. Plaintiffs have standing as taxpayers to challenge illegal public spending.

Oklahoma taxpayers have the right to seek equitable relief "to challenge the unlawful or unconstitutional expenditure of state funds." *Okla. Pub. Emps. Ass'n v. Okla. Dep't of Cent. Servs.* ("*OPEA*"), 2002 OK 71, ¶ 11, 55 P.3d 1072; *accord Immel v. Tulsa Pub. Facilities Auth.*, 2021 OK 39, ¶ 16, 490 P.3d 135. For more than a century, taxpayer standing has served as an important vehicle for suits challenging illegal governmental conduct. *See, e.g., Kellogg v. Sch. Dist. No. 10,* 1903 OK 81, 74 P. 110; *Immel*, 2021 OK 39, ¶ 12

(collecting cases). Courts have jurisdiction to decide taxpayer lawsuits as part of their "equitable powers to protect the public treasury from unlawful dissipation or management by those officially charged with the care and custody of public funds." *Murray County v. Homesales, Inc.*, 2014 OK 52, ¶ 16, 330 P.3d 519.

Plaintiffs' challenge to the funding of St. Isidore as a public charter school falls squarely within Oklahoma's well-established doctrine of taxpayer standing. Defendants' arguments to the contrary (Board Br. 7–9; St. Isidore Br. 7–8) are unavailing.

First, St. Isidore and the Board contend (Board Br. 7–8; St. Isidore Br. 7) that Plaintiffs lack standing because they do not allege that their personal tax liability will be impacted by the funding of St. Isidore. But Oklahoma courts have routinely held that taxpayers had standing in cases that did not include such allegations. *See, e.g., Stevens v. Fox*, 2016 OK 106, ¶ 15, 383 P.3d 269; *Thomas v. Henry*, 2011 OK 53, ¶ 3, 260 P.3d 1251; *OPEA*, 2002 OK 71, ¶ 10. Indeed, the Oklahoma Supreme Court has stated that a taxpayer need not show a "special or private interest" pertaining to the illegal use of public funds to have standing. *OPEA*, 2002 OK 71, ¶ 14 (quoting *Payne v. Jones*, 1944 OK 86, 146 P.2d 113, 117). The Board incorrectly cites (Board Br. 8) *Vette v. Childers*, 1924 OK 190, 228 P. 145, 146, as somehow requiring a showing of personal tax liability. In fact, *Vette* roundly rejected the defendant's argument that a taxpayer was required to "show some injury special in its nature and different from that inflicted upon the community or state at large." 228 P. at 145–46.

Second, the Board argues (Board Br. 8) that *McFarland v. Atkins*, 1979 OK 3, 594 P.2d 758, controls this case and precludes taxpayer standing. *McFarland* is inapposite, however. There, the plaintiff sought an injunction requiring the State Department of Health

to enforce certain legal requirements against Planned Parenthood. 1979 OK 3, ¶ 22. The Court held that taxpayer standing could not be used to require the Department of Health to enforce the law or to compel Planned Parenthood to comply with the law. *Id.* Here, by contrast, Plaintiffs are not seeking state enforcement of the law against St. Isidore. Rather, Plaintiffs argue that the state cannot lawfully contract with or fund a public charter school that has made clear that it will not comply with numerous state constitutional, statutory, and regulatory requirements. (*See* Am. Pet. ¶ 323.) The plaintiff in *McFarland* did not allege that the underlying financial relationship between the state and Planned Parenthood was unlawful. *See* 1979 OK 3, ¶ 22. Moreover, unlike Planned Parenthood, St. Isidore is a state actor, not a private body (*see infra* §§ III(A), III(D)), and so Plaintiffs have standing to challenge St. Isidore's own planned unlawful spending of state funds.

B. Taxpayers have a private right of action to challenge all illegal public spending.

Defendants argue (Board Br. 11–13; St. Isidore Br. 5–7) that Plaintiffs cannot challenge St. Isidore's funding on statutory and regulatory grounds because the statutes and regulations that Plaintiffs allege are being violated do not create a private right of action. But no statutory right of action is necessary when taxpayers sue to challenge unlawful spending. Instead, as taxpayers, Plaintiffs have a right to seek declaratory and injunctive relief to block funding of St. Isidore on any ground that makes that funding illegal.

As noted above, Oklahoma taxpayers have broad rights "to challenge the unlawful or unconstitutional expenditure of state funds." *OPEA*, 2002 OK 71, ¶ 10. Thus "a taxpayer possesses standing to seek equitable relief when alleging that a violation of a statute will result in an illegal expenditure of public funds." *Id.* A challenge to the legality of

governmental action affecting the use of public funds "is a matter of public right." *Fent v. Contingency Rev. Bd.*, 2007 OK 27, ¶ 8, 163 P.3d 512.

Oklahoma cases have never required taxpayer plaintiffs to identify a statute providing a private right of action, regardless of the grounds on which taxpayers sued. For example, in *Tulsa Industrial Authority v. City of Tulsa*, 2011 OK 57, ¶ 26, 270 P.3d 113, the Oklahoma Supreme Court ruled that, although a taxpayer lacked a "statutory remedy" under the statutes that he alleged were violated, "his allegation of unauthorized or unlawful expenditure of municipal taxes by a city . . . may be addressed by a proceeding brought by a taxpayer seeking equitable relief." *See also, e.g.*, *Immel*, 2021 OK 39, ¶¶ 1, 6, 9, 15, 19 (taxpayers alleging violation of common-law public trust doctrine, who did not assert a right of action created by any statute relating to public trusts, were permitted "to bring th[eir] action in equity to challenge the illegal expenditure of public funds via a declaratory judgment action"); *OPEA*, 2002 OK 71, ¶ 10 (permitting taxpayer suit seeking declaratory judgment and injunction preventing implementation of a governmental contract without requiring a statutory cause of action); *Kellogg*, 74 P. at 116 (permitting taxpayer suit seeking injunction to prevent illegal spending by a school district without requiring a statutory cause of action).

Ignoring the voluminous case law allowing taxpayers to seek equitable relief against illegal governmental spending, Defendants cite irrelevant cases—not involving taxpayer challenges—that required statutory causes of action. (*See* Board Br. 11–12; St. Isidore Br. 5–6.) There is no precedent for mandating a statutory cause of action in taxpayer suits, and doing so would eviscerate over a century of Oklahoma taxpayer-standing precedent.

C. Plaintiffs' claims are ripe.

Defendants argue (Board Br. 6–7; St. Isidore Br. 22–23) that this case is not ripe because St. Isidore has not yet commenced operations. But a case is ripe "if there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant consideration." *H & L Operating Co. v. Marlin Oil Corp.*, 1987 OK 39, ¶ 8, 737 P.2d 565. The ripeness doctrine under Oklahoma law parallels federal law, which requires an evaluation of two factors: (1) "the fitness of the issues for judicial decision," and (2) "the hardship to the parties of withholding court consideration." *See id.* (citing *Abbott Lab'ys v. Gardner*, 387 U.S. 136 (1967)). Plaintiffs' suit is ripe under this standard, as St. Isidore has made clear that it plans to operate unlawfully in multiple ways, and allowing state funds to support those unlawful operations would inflict irreparable harm upon Plaintiffs.

1. The issues presented are fit for judicial decision.

Defendants appear to argue that there are uncertainties about how St. Isidore will operate the school that render the case unripe. (*See* Board Br. 6–7; St. Isidore Br. 22–23.) But St. Isidore's approved application—which is more than 400 pages (Ex. A)—provides ample evidence as to how the school will operate, including that it will engage in the discrimination and religious indoctrination challenged in this suit. *See infra* § II. Moreover, in accordance with a Board regulation that requires that the "policies and procedures" described in a charter school's application "be incorporated into the terms of the contract" (OAC § 777:10-3-3(b)(1)), St. Isidore's charter contract incorporates St. Isidore's application wholesale. (Ex. P at 19 ¶ 11.9 [PE616].) In addition, like the application (*see, e.g.*, Am. Pet. ¶¶ 136–38), the contract has a variety of provisions that purport to allow St. Isidore to

disregard on religious grounds applicable laws and regulations (Ex. P at 1–2, 12, 15, 18 ¶¶ 2.1, 3.1, 8.2, 8.11, 11.1 [PE598–99, 609, 612, 615]).

Further, after Plaintiffs filed their amended and supplemental petition, St. Isidore released multiple documents (in February, March, and April 2024) that provide more details about the school's policies and practices and confirm Plaintiffs' allegations. (Courts may "rel[y] upon facts not appearing on the face of a plaintiff's petition" in deciding a motion to dismiss "based upon a jurisdictional ground" such as ripeness. *Farley v. City of Claremore*, 2020 OK 30, ¶ 12, 465 P.3d 1213.) Among other documents, St. Isidore issued a Parent & Student Handbook (Ex. Y [PE640–715]), a K–12 Curriculum Overview (Ex. Z [PE716–28]), a Curriculum Guide (Ex. AA [PE729–802]), a Special Education Handbook (Ex. AB [PE803–36]), an Employee Handbook (Ex. AC [PE837–98]), an employment application form (Ex. AD [PE899–900]), job descriptions and advertisements (Ex. AE [PE901–30]; Ex. AF [PE931–51]), and employment agreements (Ex. AG [PE952–67]). These documents verify that the school will discriminate based on religion, sexual orientation, and gender identity, including by (1) requiring most employees to be Catholic (Ex. AC at 7 [PE845]; Ex. AE [PE904, 908, 913, 918, 923, 926, 930]; Ex. AF [PE932–33, 938, 943, 949]); (2) requiring most employees to "be especially familiar with and adherent to the teachings of the Church on . . . holy matrimony" (Ex. AC at 9 [PE847]); and (3) requiring transgender students and employees to "follow the dress code expectation of their biological sex," to be addressed "by pronouns that correspond to their biological sex," and to "only use facilities that conform to the individual's biological sex" (Ex. Y at 36, 45, 66 [PE676, 685, 706]; Ex. AC at 26 [PE864]; *see also* Ex. Y at 42 [PE682]). The documents further confirm that "[s]tudent service plans" for students with disabilities "cannot contain accommodations or

modifications that are in opposition to Church teaching" and that St. Isidore will not serve students with disabilities whom it deems would not "benefit from a virtual program." (Ex. Y at 31 [PE671]; *see also id.* at 12 [PE652]; Ex. AB at 2, 10 [PE806, 814]; Ex. Z at 3 [PE720].) The documents also verify that St. Isidore's curriculum and operations will be permeated with religion, including through "worship, prayer, Religion classes, and the general climate of the school." (Ex. Y at 17 [PE657]; *see also id.* at 9, 14–15, 17–18, 21, 27–29, 54 [PE649, 654–55, 657–58, 661, 667–69, 694]; Ex. AA [PE729–802]; Ex. Z at 3, 6–10 [PE720, 723–27]; Ex. AC at 6–7, 46 [PE844–45, 884].)

In any event, Defendants' arguments about purported uncertainties in St. Isidore's policies pertain only to some of Plaintiffs' allegations. (*See* Board Br. 6–7; St. Isidore Br. 23.) And to the extent that some ambiguities and inconsistencies in St. Isidore's documents remain, any uncertainties about St. Isidore's policies warrant discovery to resolve them, not dismissal of the entire case as unripe. *See, e.g.*, *Fanning v. Brown*, 2004 OK 7, ¶ 22, 85 P.3d 841 (denying motion to dismiss because plaintiff "must be afforded an opportunity to complete discovery so that the court will have a fully developed factual record to determine the issue"). Accordingly, Plaintiffs filed on March 25 a Motion to Require Defendant St. Isidore to Produce Deponents for a 12 O.S. § 3230(C)(5) Deposition.

2. Withholding judicial review would cause hardship.

Though a showing of hardship is not required under *Abbott Laboratories* if the judicial fitness factor is met (*see Consol. Rail Corp. v. United States*, 896 F.2d 574, 577 (D.C. Cir. 1990)), Plaintiffs nonetheless make such a showing.

St. Isidore plans to begin instructing students in August 2024. (Ex. N [PE594].) Absent judicial intervention, St. Isidore will receive public funding by mid-August. (Am.

Pet. ¶ 251.) Plaintiffs would suffer irreparable harm from the unlawful payment of their tax dollars to St. Isidore and from the school's use of those tax payments to support its illegal operations, as illegal use of tax payments irreparably harms taxpayers. *See Indep. Sch. Dist. No. 9 v. Glass*, 1982 OK 2, ¶¶ 10–11, 639 P.2d 1233; *Rath v. City of Sutton*, 673 N.W.2d 869, 885 (Neb. 2004); *Idaho Cnty. Prop. Owners Ass'n, Inc. v. Syringa Gen. Hosp. Dist.*, 805 P.2d 1233, 1239 (Idaho 1991).

St. Isidore's and the Board's position (Board Br. 6; St. Isidore Br. 23) that this case will not be ripe until the school starts operating and receives state funds is thus not tenable—the harm will have already occurred at that point. To avoid that very situation, Oklahoma's taxpayer-lawsuit jurisprudence has repeatedly permitted challenges to expenditures that have not yet been made. *See, e.g., Immel*, 2021 OK 39, ¶ 9 (allowing challenge to sale of public land before sale was carried out); *Kellogg*, 74 P. at 110, 119 (allowing challenge to construction of schoolhouses before they were built). To force taxpayers to wait until funds have already been disbursed unlawfully by the state and spent unlawfully by St. Isidore would cause needless hardship and contradict the purpose of taxpayer suits: "[A] taxpayer . . . may bring an action in equity to challenge the *prospective* unauthorized expenditure of public funds or a *prospective* unauthorized act related to public funds." *Immel*, 2021 OK 39, ¶ 16 (emphases added).

D. Defendants are not immune from suit.

The Oklahoma Supreme Court abrogated common-law sovereign immunity in 1983. *Vanderpool v. State*, 1983 OK 82, ¶ 19, 672 P.2d 1153. Thus, sovereign immunity exists in Oklahoma only to the extent prescribed by statute. *See State ex rel. State Ins. Fund v. JOA, Inc.*, 2003 OK 82, ¶ 17, 78 P.3d 534. Because no Oklahoma immunity statute is applicable to

this case, Defendants' arguments (*see* Board Br. 10–11; Dep't Educ. Br. 19–22) that they are immune from suit fail.

Defendants argue (Board Br. 10–11; Dep't Educ. Br. 19–22) that this suit is barred by the Oklahoma Governmental Tort Claims Act, 51 O.S. §§ 151 *et seq.*, which renders the state "immune from liability for torts" (*id.* § 152.1(A)) except as provided by the statute. But the Tort Claims Act does not apply here, because Plaintiffs seek only injunctive and declaratory relief.

While the Tort Claims Act does not define "liability," elsewhere in the Oklahoma code "liability" is defined as "legal liability for damages." 36 O.S. § 6453(6). Under Oklahoma law, "[w]henever the meaning of a word . . . is defined in any statute, such definition is applicable to the same word . . . wherever it occurs," unless context indicates otherwise. 25 O.S. § 2. The word "liability," as used in the Tort Claims Act, thus excludes injunctive and declaratory relief.

Indeed, the Oklahoma Supreme Court has consistently concluded that the Tort Claims Act covers only suits for monetary damages. In *Barrios v. Haskell County Public Facilities Authority*, the Court stated that the Tort Claims Act does *not* "affect claims that fail to implicate the state's sovereign immunity, such as . . . those seeking only prospective injunctive relief." 2018 OK 90, n.13, 432 P.3d 233; *see also Abab, Inc. v. Midwest City*, No. CIV-20-0134-HE, 2020 WL 9073568, at *1 (W.D. Okla. Sept. 1, 2020) (citing *Barrios* for this proposition). In so concluding, the Court cited parallel federal precedent holding that the Eleventh Amendment allows state officials to be sued for injunctive relief. *See Barrios*, 2018 OK 90, n.13 (citing *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 436–37 (2004)).

Similarly, in *Sholer v. State*, 1995 OK 150, ¶ 14, 945 P.2d 469, the Court held that a suit seeking relief other than "compensation" was not covered by the Tort Claims Act. In support of this conclusion, the Court explained, "[t]he [Tort Claims Act] defines 'claim' as 'any written demand presented by a claimant or his authorized representative in accordance with this act to recover money from the state or political subdivision as compensation for an act or omission of a political subdivision or the state or an employee.'" *Id.* (quoting 51 O.S. § 152(3)). Thus, because the plaintiffs were "not seeking compensation . . . the [Tort Claims Act] provide[d] no bar to their action." *Id.* ¶ 15.

The limitation of immunity to monetary damages that was recognized in *Barrios* and *Sholer* follows from *Vanderpool*, 1983 OK 82. In that case—which prompted the passage of the Tort Claims Act—the Court stated that the abrogation of common-law sovereign immunity would make the state liable "for money damages." *See* 1983 OK 82, ¶ 21. The Court expressly authorized the legislature to "limit or prescribe conditions of liability, their insurance against loss, [and] the maximum monetary liability to be allowed" but did not suggest that the legislature could immunize the state against claims for declaratory or injunctive relief. *See id.* ¶ 26.

Consistent with *Barrios* and *Sholer*, the Oklahoma Supreme Court has routinely adjudicated cases seeking injunctive and declaratory relief against governmental entities without requiring compliance with the Tort Claims Act. *See, e.g., Ritter v. State*, 2022 OK 73, n.1, 520 P.3d 370 (rejecting sovereign-immunity argument asserted by State of Oklahoma in suit seeking injunctive and declaratory relief); *Toch, LLC v. City of Tulsa*, 2023 OK 69, ¶ 2, 532 P.3d 28; *Okla. Call for Reprod. Just. v. State*, 2023 OK 60, ¶ 7, 531 P.3d 117; *Hirschfeld v. Okla. Tpk. Auth.*, 2023 OK 59, ¶ 1, 541 P.3d 811; *Shellem v. Gruneweld*, 2023

OK 26, ¶ 4, 535 P.3d 1208; *Immel*, 2021 OK 39, ¶ 15; *see also Farley v. City of Claremore*, 2020 OK 30, ¶ 57, 465 P.3d 1213 (holding that Tort Claims Act barred claim seeking money damages, but not applying a Tort Claims Act analysis to plaintiff's claim for injunctive relief). Defendants' overbroad interpretation of the Tort Claims Act cannot be correct because it would bar an entire category of lawsuits frequently taken up by Oklahoma courts.

For similar reasons, Plaintiffs are not barred from suing the Board by the Charter Schools Act's clause that "[s]ponsors acting in their official capacity shall be immune from civil and criminal liability with respect to all activities related to a charter school with which they contract" (70 O.S. § 3-134(L) (cited in Board Br. 10)). Importantly, even if this clause were applicable here, only the Board Defendants, not the other defendants, would be covered by it. But regardless, the Charter Schools Act does not immunize the Board from suits for injunctions and declaratory judgments. Like the Tort Claims Act, the Charter Schools Act's immunity clause does not define "liability," so the definition in 36 O.S. § 6453(6)—"legal liability for damages"—is applicable. *See* 25 O.S. § 2. While the Charter Schools Act's immunity clause may prevent charter-school authorizers from being sued for damages for acts of the charter schools that they sponsor, it does not prevent Plaintiffs from suing for injunctive and declaratory relief to stop the illegal sponsorship and funding of an unlawful charter school. Defendants point to no case, in Oklahoma or elsewhere, that barred a suit seeking injunctive or declaratory relief against a charter-school sponsor. To prohibit such a suit would greatly expand the scope of governmental immunity in Oklahoma and would be inconsistent with the Oklahoma courts' approach to statutory immunity. *See Barrios*, 2018 OK 90, n.13; *Sholer*, 1995 OK 150, ¶¶ 14–15; *Vanderpool*, 1983 OK 82, ¶ 15.

II. Plaintiffs' causes of action all state claims.

Plaintiffs' amended and supplemental petition divides Plaintiffs' allegations into four causes of action: (1) that St. Isidore violated provisions in the Board's regulations and the Charter Schools Act requiring it to certify that it will comply with Oklahoma law; (2) that St. Isidore intends to discriminate in admissions, discipline, and employment in violation of the Oklahoma Constitution, the Charter Schools Act, and a state anti-segregation statute; (3) that St. Isidore failed to fully commit to serving students with disabilities as required by the Charter Schools Act and the Board's regulations; and (4) that St. Isidore intends to teach a religious curriculum and indoctrinate students in a religion in violation of the Oklahoma Constitution and the Charter Schools Act. (Am. Pet. ¶¶ 252–321.) All of these causes of action state valid claims. Defendants' arguments to the contrary have no merit. Indeed, Defendants devote substantial portions of their briefing to disputing Plaintiffs' factual allegations, ignoring that the allegations must be taken as true at the motion-to-dismiss stage.

A. First claim: failure to certify intent to comply with Oklahoma law.

Plaintiffs' first claim for relief explains that St. Isidore's revised application and the Board's approval of it were unlawful because St. Isidore willfully violated a Board regulation and provisions of the Charter Schools Act requiring charter-school applicants to certify that they will comply with state law. (Am. Pet. ¶¶ 252–65.) The regulation, OAC § 777:10-3-3(c)(1)(F), requires each application for sponsorship of a new charter school to "include signed and notarized statements from the Head of the School and the governing body members . . . showing their agreement to *fully comply* as an Oklahoma public charter school with *all* statute[s], regulations, and requirements of the . . . State of Oklahoma, Statewide Virtual Charter School Board, and Oklahoma Department of Education." (Emphases added.)

It also requires those statements to "[s]pecifically cite agreement . . . 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." *Id.*

St. Isidore's revised application did not comply with these requirements. Instead, it contains statements that demonstrate an agreement to comply with applicable laws, including antidiscrimination laws, *only to the extent that those laws do not conflict with St. Isidore's religious beliefs.* Specifically, the application's "Statements of Assurance" certify St. Isidore's intent to comply with the pertinent statutes and regulations only "to the extent required by law, including the First Amendment, religious exemptions, and the Religious Freedom Restoration Act, with priority given to the Catholic Church's understanding of itself and its rights and obligations pursuant to the Code of Canon law and the Catechism of the Catholic Church." (Ex. A at 93 [PE159].) The "Assurance[s]" then state that St. Isidore "[g]uarantees access to education and equity for all eligible students regardless of their race[,] ethnicity, economic status, academic ability, or other factors *subject to the provisions in [the sentence quoted] above.*" (*Id.* (emphasis added).)

Similarly to OAC § 777:10-3-3(c)(1)(F), the Charter Schools Act requires charter schools to adopt a charter and enter into a contract that ensures that the "charter school shall comply with all . . . state and local rules and statutes relating to health, safety, civil rights and insurance." 70 O.S. § 3-136(A)(1); *see also* 70 O.S. § 3-135(A)(5). Yet St. Isidore's contract with the Board, which doubles as St. Isidore's charter, purports to grant St. Isidore broad religious exemptions from those requirements. (Am. Pet. ¶¶ 141–45, 182–86 (citing Ex. P at 1–3, 12, 18 ¶¶ 1.5, 2.1, 3.1, 8.2, 11.1 [PE598–600, 609, 615]).)

Defendants argue (Board Br. 14–15; St. Isidore Br. 23–25) that St. Isidore was entitled to qualify its "Statements of Assurance" and charter/contract based on religious exemptions that they assert are legally applicable. But although St. Isidore could be entitled to certain religious exemptions from otherwise applicable laws if it were a private school, public charter schools are not entitled to any religious exemptions from legal requirements. *See infra* § III. Moreover, St. Isidore's approved application went beyond relying on law for its asserted religious exemptions. Rather, St. Isidore broadly stated that "[t]he School complies with all applicable state . . . laws and statutes to the extent the teachings of the Catholic Church allow" and that the school views itself as exempt from *any* "laws and regulations [that] are inconsistent with the faith and moral teaching of the Catholic Church." (Ex. A at 109 [PE195].)

B. Second claim: discrimination in admissions, discipline, and employment.

Plaintiffs' second claim for relief is that St. Isidore will discriminate in student admissions, student discipline, and employment based on religion, sexual orientation, gender identity, and other protected characteristics in violation of the Oklahoma Constitution, the Charter Schools Act, and a state anti-segregation statute. (Am. Pet. ¶¶ 266–93.)

The Oklahoma Constitution, through numerous clauses, broadly prohibits charter schools from engaging in discriminatory practices. As detailed below (*see infra* §§ III(A), III(D)), Oklahoma charter schools are public schools, governmental entities, and state actors and therefore must comply with the state constitution. And while Oklahoma courts interpret the state constitution independently of the federal one, they can consider for guidance federal interpretations of federal constitutional clauses that are analogous to state constitutional

clauses. *See, e.g.*, *Fair Sch. Fin. Council of Okla., Inc. v. State*, 1987 OK 114, ¶¶ 53–55 & nn.46, 48, 746 P.2d 1135.

Several provisions of the Oklahoma Constitution require that Oklahoma public schools serve *all* students. Article I, § 5 requires that the State "establish[] and maintain[] . . . a system of public schools, which shall be open to all the children of the state." Article XIII, § 1 similarly requires that the State "establish and maintain a system of free public schools, wherein all the children of the State may be educated." And Article XI, §§ 2 and 3 establish a "permanent school fund" and prohibit it from being used "for any other purpose than the support and maintenance of common schools for the equal benefit of all the people of the State."

Article I, § 2 prohibits public schools from discriminating based on religion. That is evident from the clause's text: "Perfect toleration of religious sentiment shall be secured, and no inhabitant of the State shall ever be molested in person or property on account of his or her mode of religious worship; and no religious test shall be required for the exercise of civil or political rights." The same conclusion follows from state case law holding that the clause is at least as protective as the federal Free Exercise and Establishment Clauses (*see infra* at 31), both of which prohibit religious discrimination by governmental entities (*see, e.g.*, *Gillette v. United States*, 401 U.S. 437, 462 (1971); *Larson v. Valente*, 456 U.S. 228, 244 (1982); *Awad v. Ziriax*, 670 F.3d 1111, 1127 (10th Cir. 2012); *Glassroth v. Moore*, 335 F.3d 1282, 1293 (11th Cir. 2003)).

Article II, § 36A of the Oklahoma Constitution provides that "[t]he state shall not grant preferential treatment to, or discriminate against, any individual or group on the basis of . . . sex . . . in the operation of public employment, public education, or public

contracting." This prohibition encompasses discrimination based on sexual orientation and gender identity. *See, e.g.*, *Bostock v. Clayton County*, 590 U.S. 644, 660 (2020).

Finally, Article II, § 7 of the Oklahoma Constitution—which provides that "no person shall be deprived of life, liberty, or property, without due process of law"—"contain[s] [a] built-in anti-discrimination component[] which afford[s] protection against unreasonable or unreasoned classifications which serve no important governmental interests" and is similar to the U.S. Constitution's Equal Protection Clause. *See Okla. Ass'n for Equitable Tax'n v. Oklahoma City*, 1995 OK 62, ¶ 12, 901 P.2d 800. Article II, § 7 thus prohibits discrimination based on religion (*see United States v. Armstrong*, 517 U.S. 456, 464 (1996)), sexual orientation (*see Pavan v. Smith*, 582 U.S. 563, 566 (2017); *Obergefell v. Hodges*, 576 U.S. 644, 670–76 (2015)), and gender identity (*see Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608–09 (4th Cir. 2020); *Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011)). Collectively, the foregoing constitutional provisions prohibit public schools—including St. Isidore—from discriminating in admissions on any ground and from discriminating in student discipline and employment based on grounds that include religion, sexual orientation, and gender identity.

Similarly, the Charter Schools Act requires charter schools to "be as equally free and open to all students as traditional public schools" (70 O.S. § 3-135(A)(9)) and prohibits any admission preferences other than geographic ones (*see* 70 O.S. §§ 3-135(A)(10), 3-140, 3-145.3(J)). The Act also requires charter schools to be "nonsectarian in [their] . . . admission policies [and] employment practices." 70 O.S. § 3-136(A)(2). And a separate statute, 70 O.S. § 1210.201, provides that "[s]egregation of children in the public schools of the State of Oklahoma on account of race, *creed*, color or national origin is prohibited" (emphasis added),

meaning that no public school can be *de jure* or *de facto* open only to students of certain religions.

St. Isidore's revised application and contract show that the school will violate all of the foregoing prohibitions by discriminating in admissions, discipline, and employment.

For example, St. Isidore will not be open to students of all religions. (Am. Pet. ¶¶ 148–56.) While St. Isidore claims in its application that it will admit students "of different faiths or no faith," it qualifies that statement by warning that "[a]dmission assumes the student and family willingness to adhere with respect to the beliefs, expectations, policies, and procedures of the school." (Ex. A at 38 [PE91].) As St. Isidore will immerse students in instruction in its religious tenets, the school will not be truly open to students who follow other faiths or belief systems; indeed, some students would be prohibited by their own faiths from "adhering . . . to the beliefs" of or submitting to religious indoctrination in a different religion. (Am. Pet. ¶¶ 154–56.)

St. Isidore also will discriminate among prospective or enrolled students based on sexual orientation, gender identity, pregnancy outside of marriage, and sexual activity outside of marriage. (Am. Pet. ¶¶ 157–71.) St. Isidore's application states that St. Isidore will "operate a school in harmony with faith and morals, *including sexual morality*, as taught and understood by the Magisterium of the Catholic Church based upon Holy Scripture and Sacred Tradition." (Ex. A at 18 [PE71] (emphasis added).) According to the *Catechism of the Catholic Church* (which is the "authoritative exposition" of the Catholic faith (*see Catechism of the Catholic Church* xv (2d ed.), https://bit.ly/3Xm4Ub7) and which St. Isidore cites as an authority numerous times in its application (*see, e.g.*, Ex. A at 17, 18, 93, 107, 108 [PE70, 71, 159, 193, 194])), authoritative Catholic teaching prohibits people from engaging

in "homosexual acts," requires lesbian and gay people to be "chast[e]," requires that "[e]veryone—man and woman—should acknowledge and accept his or her sexual identity" as assigned at birth, and prohibits heterosexual activity outside of marriage. (Am. Pet. ¶¶ 160–62 (quoting and citing *Catechism of the Catholic Church* ¶¶ 2333, 2353, 2357–59).) Thus St. Isidore excludes sexual orientation and gender identity from the lists of characteristics protected under its antidiscrimination statements and policies. (Am. Pet. ¶¶ 163–64 (quoting Ex. A at 43, 168 [PE96, 254]).) And, per Archdiocese of Oklahoma City policy, St. Isidore will require "all students" to "follow the dress code expectations of their biological sex" (Am. Pet. ¶¶ 152 n.3, 165, 169 (quoting Ex. C at 10 [PE445])), thereby discriminating not only against transgender students but also against cisgender students whose clothing does not conform to religion-based expectations for their gender.

In addition, St. Isidore plans to discriminate in employment based on religion, sexual orientation, gender identity, pregnancy outside of marriage, and sexual activity outside of marriage. (Am. Pet. ¶¶ 172–81.) St. Isidore's revised application states that the school will "hire educators, administrators, and coaches as ministers committed to living and teaching Christ's truth as understood by the Magisterium of the Roman Catholic Church through actions and words, using their commitment to Christ and his teachings in character formation, discipline, and instruction, and to live this faith as a model for students." (Ex. A at 18 [PE71].) Thus, both "in their day-to-day work and personal lives," all St. Isidore employees are required to "adhere to the teachings of the Church" and "refrain from actions that are contrary to the teachings of the Church." (*Id.* at 105–06 [PE191–92].) As noted above, authoritative Catholic teaching prohibits LGBTQ people from expressing their sexual orientation or gender identity, and prohibits all people from having sex or becoming pregnant

outside of marriage. (Am. Pet. ¶ 176.) And, though St. Isidore's application asserts that not all school employees are required to be Catholic (Ex. A at 105 [PE191]), it expressly states that "[t]he School retains its right to consider religion as a factor in employment-related decisions" (*id.* at 109 [PE195]). For example, St. Isidore's principal must be a "[p]racticing Catholic in good standing," and St. Isidore's IT Director/Trainer must "[a]ctively participate[] as a member of a faith community." (Ex. W [PE654]; Ex. X [PE661].)

The Board Defendants and St. Isidore dispute that St. Isidore will discriminate on all the alleged grounds. (*See* Board Br. 16–17; St. Isidore Br. 26.) But, like all of their allegations, Plaintiffs' allegations about discrimination must be taken as true at the motion-to-dismiss stage (*see, e.g.*, *Harwood*, 2022 OK 51, ¶ 14) and have substantial documentary support, as described above and detailed further in Plaintiffs' petition (Am. Pet. ¶¶ 147–81). In any event, Defendants point to antidiscrimination policies that expressly omit religion, sexual orientation, gender identity, and pregnancy outside of marriage from their lists of protected categories. (*See* Board Br. 17; St. Isidore Br. 26.) They also point to a nondiscrimination clause concerning student admissions in St. Isidore's charter contract (Board Br. 17; St. Isidore Br. 26), but broad religious exemptions in the contract override that clause (Am. Pet. ¶¶ 182–95 (citing Ex. P at 1–3, 12, 18 ¶¶ 1.5, 2.1, 3.1, 8.2, 11.1 [PE598–600, 609, 615])). Indeed, the contract expressly provides that, as "a religious nonprofit organization," St. Isidore does not need to "be nonsectarian in its . . . admission policies [and] employment practices." (Ex. P at 12, ¶ 8.2 [PE609].) Moreover, even if the contract could be construed as prohibiting St. Isidore from refusing to enroll students who identify as non-Catholic or LGBTQ, St. Isidore's policies and practices result in St. Isidore *de facto* not being open to students of all religions and LGBTQ students. (Am. Pet. ¶¶ 188–92.)

C. Third claim: failure to fully commit to serve students with disabilities.

Plaintiffs' third claim is that St. Isidore has not adequately committed to serving students with disabilities as mandated by the Charter Schools Act and the Board's regulations. (Am. Pet. ¶¶ 294–305.) The Act requires charter schools to "comply with all . . . laws relating to the education of children with disabilities in the same manner as a school district," and the Act prohibits charter schools from denying admission based on "disabling condition." 70 O.S. §§ 3-136(A)(7), 3-140(D), 3-145.3(J). Moreover, the Board's regulations require virtual charter schools to appropriately serve students with disabilities even if the services cannot be provided virtually: As public schools, virtual charter schools must "ensure provision of free appropriate online *and other* educational and related services . . . to students with disabilities and/or other special needs." OAC § 777:10-3-3(b)(3)(C) (emphasis added).

Yet St. Isidore's revised application states that the school will only "comply with all applicable . . . [l]aws in serving students with disabilities . . . to the extent that it does not compromise the religious tenets of the school and the instructional model of the school." (Ex. A at 73–74 [PE133–34].) What is more, Archdiocese of Oklahoma City policy—which will govern St. Isidore—is that "[s]tudent service plans" for students with disabilities "cannot contain accommodations or modifications that are in opposition of Church teaching." (Am. Pet. ¶¶ 152 n.3, 199–200 (quoting Ex. C at 7 [PE442]).) And, in violation of the Charter Schools Act's prohibition against denying admission based on "disabling condition" (70 O.S. § 3-140(D)) and the requirement in OAC § 777:10-3-3(b)(3)(C) that virtual charter schools appropriately serve students with disabilities even if the services cannot be provided virtually, St. Isidore's application indicates that the school will decline to serve students with

disabilities that school officials deem to not be well-suited to being served virtually. Specifically, the application states that services for students with disabilities will be provided "to the maximum extent possible *through a virtual education program*," and that the school "shall not discriminate on the basis of . . . disability *that can be served by virtual learning*." (Ex. A at 43, 69 [PE96, 129] (emphases added).)

Defendants point to a provision in St. Isidore's charter contract that requires it to comply with laws concerning students with disabilities. (*See* Board Br. 18; St. Isidore Br. 27 (citing Ex. P at 13–14 ¶ 8.6 [PE611]).) But as explained above, the contract provides broad religious exemptions from its requirements (Ex. P at 1–3, 12, 18 ¶¶ 1.5, 2.1, 3.1, 8.2, 11.1 [PE598–600, 609, 615]), and the contract incorporates St. Isidore's approved application to the extent that it does not conflict with the contract (*id.* at 18, ¶ 11.1 [PE615]). Thus, the contract is properly understood as incorporating the caveat in St. Isidore's application that the school will provide services to students with disabilities only "to the extent that it does not compromise the religious tenets of the school and the instructional model of the school." (Ex. A at 73–74 [PE133–34].)

Plaintiffs have thus sufficiently alleged that St. Isidore has not agreed to fully comply with laws requiring it to serve students with disabilities.

D. Fourth claim: teaching a religious curriculum.

Plaintiffs' fourth claim is that St. Isidore will teach a religious curriculum, in violation of the Charter Schools Act and three provisions of the Oklahoma Constitution—Article I, § 2; Article I, § 5; and Article II, § 5. (Am. Pet. ¶¶ 306–22.) Defendants do not dispute that St. Isidore's plan to teach a religious curriculum is contrary to the Charter Schools Act's requirement that charter schools be "nonsectarian in [their] programs . . . and all other

operations" (70 O.S. § 3-136(A)(2)); and we refute below (*see infra* § III) Defendants' arguments that the Act is overridden by the federal Free Exercise Clause, the Oklahoma Constitution, and the state Religious Freedom Act. Defendants do contend (Board Br. 19–23; St. Isidore Br. 8–13) that nothing in the Oklahoma Constitution prohibits charter schools from inculcating religion. We explain in this Section II(D) why they are wrong.

1. Article I, § 2.

As stated earlier, Article I, § 2 of the Oklahoma Constitution provides: "Perfect toleration of religious sentiment shall be secured, and no inhabitant of the State shall ever be molested in person or property on account of his or her mode of religious worship; and no religious test shall be required for the exercise of civil or political rights." And as explained below (*see infra* §§ III(A), III(D)), St. Isidore is a public school, a governmental entity, and a state actor, and so it must comply with this constitutional mandate. Yet St. Isidore plans to "operate the School as a Catholic School" and "participate[] in the evangelizing mission of the Church." (Ex. A at 17 [PE70].) St. Isidore will indoctrinate students in the Catholic faith by suffusing its curriculum with Catholic religious doctrine and by requiring students to take theology classes. (Am. Pet. ¶¶ 210–14.) Indeed, as detailed in Plaintiffs' petition, St. Isidore's application is replete with statements that demonstrate the religious nature of its planned curriculum and programming. (*Id.* ¶¶ 205–17.)

The plain text of Article I, § 2 prohibits St. Isidore from operating as it plans. A public school that requires its students to submit to religious indoctrination in one faith is inherently intolerant of other beliefs, molests students based on their religious beliefs, and imposes a religious test on the civil right to receive a public education.

The historical background of Article I, § 2 leads to the same conclusion. "The Oklahoma Constitutional Convention members . . . advocated for the toleration of all religious beliefs and complete separation of church and state . . . ." *Prescott v. Okla. Capitol Pres. Comm'n*, 2015 OK 54, ¶ 6, 373 P.3d 1032 (Taylor, J., concurring in denial of rehearing). Albert H. Ellis, the Second Vice President of the Oklahoma Constitutional Convention, explained that the approach to religion of the framers of the state constitution was shaped by their concern for the protection of religious minorities—"the rights of all denominations, however few the number of their respective adherents." *See* Albert H. Ellis, *A History of the Constitutional Convention of the State of Oklahoma* 134 (1923). The framers wished to prevent dominant religions from "exert[ing] an undue influence and becom[ing] . . . a menace to weaker denominations and ultimately destructive of religious liberty." *Id.* Ensuring that no public school, charter or other, attempts to indoctrinate its students in any religion vindicates the framers' concerns and protects the rights of religious minorities.

Furthermore, Article I, § 2 provides at least the same protections as the federal Establishment and Free Exercise Clauses. *See Prescott*, 2015 OK 54, ¶ 6 (Taylor, J., concurring); *McMasters v. State*, 207 P. 566, 568 (Okla. Crim. App. 1922) ("[B]oth the federal and state Constitutions forbid the abridging of the freedom of conscience and religious liberty."); *Guinn v. Church of Christ of Collinsville*, 1989 OK 8, ¶ 6, 775 P.2d 766 (Kauger, J., concurring in part). The federal Establishment Clause prohibits state actors from teaching religion in the classroom (*see, e.g., Edwards v. Aguillard*, 482 U.S. 578, 591–94 (1987); *Hall v. Bd. of Sch. Comm'rs*, 656 F.2d 999, 1001–03 (5th Cir. 1981)), leading students in prayer or presenting prayer at school events (*see, e.g., Santa Fe Indep. Sch. Dist.*

v. Doe, 530 U.S. 290, 309–10 (2000); *Lee v. Weisman*, 505 U.S. 577, 587 (1992); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 224 (1963); *Engel v. Vitale*, 370 U.S. 421, 430 (1962)), displaying religious texts or symbols to students (*see, e.g.*, *Stone v. Graham*, 449 U.S. 39, 42 (1980)), or otherwise coercing students to take part in religious activity (*see, e.g.*, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2429 (2022)) or promoting religion to students (*see, e.g.*, *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948)). Moreover, the federal Establishment Clause prohibits the government from setting up religious institutions (*Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947)) or creating a "fusion of governmental and religious functions" (*Schempp*, 374 U.S. at 222; *accord Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126 (1982); *Bd. of Educ. v. Grumet*, 512 U.S. 687, 696–97 (1994) (plurality opinion)). In addition, the federal Free Exercise Clause prohibits state actors from "coerc[ing] participation in religious programming." *Janny v. Gamez*, 8 F.4th 883, 911–12, 916–18 (10th Cir. 2021).

The Board Defendants argue (Board Br. 23) that *Murrow Indian Orphans Home v. Childers*, 1946 OK 187, 171 P.2d 600, which upheld state funding of a religiously affiliated orphanage, allows St. Isidore to proselytize and indoctrinate. But *Murrow* did not even consider Article I, § 2; there was no allegation that the orphanage there was a state actor; and the orphanage did not proselytize its children but instead allowed them complete freedom of worship (*see* 1946 OK 187, ¶ 2).

That attendance at St. Isidore may be voluntary (*cf.* Board Br. 22) does not matter. All attendance at public schools is, in one manner of speaking, voluntary: Public-school students could choose to enroll in private schools or be home-schooled. But once students exercise their constitutionally protected right to attend a public school—whether it is a

district, magnet, or charter school, or an in-person or virtual school—no authority permits the school, which is a governmental entity and a state actor, to disregard its constitutional obligations on the ground that the students could have gone elsewhere. No matter what public school they choose to attend, students still have the right under Article I, § 2 to be free from school-sponsored religious indoctrination. Moreover, the federal Establishment Clause prohibits public schools from promoting or inculcating religion regardless of whether participation in the religious activities is voluntary. *See, e.g.*, *Engel*, 370 U.S. at 430; *McCollum*, 333 U.S. at 207–12. Both the state constitution and the Charter Schools Act require St. Isidore to accept all students (*see supra* § II(B)), and once students enroll St. Isidore must respect their constitutional rights.

2. Article I, § 5.

Article I, § 5 requires the state to "establish[] and maint[ain] . . . a system of public schools, which shall be open to all the children of the state and free from sectarian control." Yet St. Isidore would be a public school that evangelizes its students and teaches a religious curriculum. Plainly, allowing St. Isidore to operate as a charter school would run afoul of the requirement that "public schools" be "free from sectarian control."

The Board Defendants contend (Board Br. 21) that Article I, § 5 only "requires that Oklahoma's 'system of public schools'" and not "each and every school" be free from sectarian control." They argue (Board Br. 21–22) that the phrase "open to all the children of the state"—and thus the subsequent phrase "free from sectarian control"—must apply only to the whole "system," not individual schools, because public schools typically serve only certain localities and grade levels. But Article I, § 5 cannot properly be interpreted to allow public schools to refuse admission on other grounds. The original 1907 version of Article I,

§ 5 had a clause, removed by amendment in 1978, that expressly authorized separate schools for White and Black children. *See* Okla. Const. of 1907, Art. I, § 5, https://bit.ly/3S1A2xW; *State Questions,* Oklahoma Secretary of State, https://bit.ly/3PWVOjJ (enter "526" into "State Question Number" search field and click "Submit"; then click on "526"). If the Board's interpretation of Article I, § 5 were correct, the inclusion of that segregationist clause would have been unnecessary, Article I, § 5 would still permit segregated schools today, and it would be permissible for a public school to deny admission to Black students so long as there were other public schools that admitted them.

In any event, the "system of public schools" can only be "free from sectarian control" if *all* its schools are free from sectarian control. If even one school is under sectarian control, then the system is partially under sectarian control.

Oliver v. Hofmeister, 2016 OK 15, 368 P.3d 1270 (cited at Board Br. 22) is inapplicable to Plaintiffs' Article I, § 5 claim. The Oklahoma Supreme Court did not consider Article I, § 5 in that case. Moreover, the school-voucher program that the Court upheld in *Oliver* funded only private schools (2016 OK 15, ¶ 26), not public schools, and thus did not present the question of whether a public charter school can indoctrinate its students in a religion.

3. Article II, § 5.

Article II, § 5 of the Oklahoma Constitution provides: "No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such." The "plain intent of Article 2, Section 5 is to ban State

Government, its officials, and its subdivisions from using public money or property for the benefit of any religious purpose." *Prescott*, 2015 OK 54, ¶ 4. As St. Isidore will provide a religious education, Article II, § 5 prohibits the state from funding St. Isidore. Moreover, because St. Isidore is a governmental entity and a state actor (*see infra* §§ III(A), III(D)), Article II, § 5 bars St. Isidore itself from using public funds to pay for its program of religious education.

Relying on *Murrow* and *Oliver*, Defendants argue (Board Br. 19–21; St. Isidore Br. 8–11) that state funding of St. Isidore would not violate Article II, § 5 because the state will receive a benefit from St. Isidore in exchange, in the form of provision of education. To be sure, in *Murrow* and *Oliver*, the Court upheld (respectively) state funding of a religiously affiliated orphanage and a school-voucher program for children with disabilities partly because each funding arrangement relieved the state of a legal duty—to take care of needy children (*see Murrow*, 1946 OK 187, ¶ 9), or to provide legally required special-education services, as children who exit the public-school system waive special-education rights (*see Oliver*, 2016 OK 15, ¶ 24). But here, though the state constitution imposes a duty upon Oklahoma to provide public education, the constitutional provisions that create that duty also require public schools to be open to all the children of the state and free from sectarian control. *See* Okla. Const. Art. I, § 5; Art. XI, §§ 2–3; Art. XIII, § 1. Because St. Isidore is neither open to all Oklahoma children nor free from sectarian control, funding the school will not benefit the state or help the state fulfill a duty.

In addition, the principal reason that the Court upheld the school-voucher program in *Oliver* was that program funds went to parents, not directly to religious schools, and reached religious schools only "at the sole and independent choice and direction of the parent and *not*

the State." 2016 OK 15, ¶¶ 21–22. Here, by contrast, the state will pay public funds directly to St. Isidore. *See* 70 O.S. §§ 3-135(A)(12), 3-142(A)–(B), 3-145.3(C)–(D). And the funds will not reach St. Isidore solely as a result of choices by parents. Rather, state funds flow to charter schools through a complex formula that—though it includes the number of students served—also incorporates factors such as levels of teacher experience, how long a school has been in operation, the population density of the area that the school serves, and various characteristics of enrolled students. *See* 70 O.S. §§ 3-135(A)(12), 3-142(A)–(B), 3-145.3(C)–(D), 18-200.1, 18-201.1.

The Board Defendants also contend that the Board's decision was not based on a religious preference and argue that therefore, under *Oliver*, state funding of St. Isidore would not violate Article II, § 5. (Board Br. 21.) In *Oliver*, however, the religious neutrality of the voucher program at issue was merely one of eight factors that supported upholding the program. *See* 2016 OK 15, ¶ 17. Nothing in *Oliver* suggests that the religious neutrality of state funding is sufficient by itself to satisfy Article II, § 5. Indeed, in *Gurney v. Ferguson*, 1941 OK 397, ¶¶ 2, 12, 122 P.2d 1002, the Oklahoma Supreme Court struck down a student-transportation program as violative of Article II, § 5 even though the program was neutral with regard to religion.

The Department of Education Defendants attempt (Br. 12) to tie Article II, § 5 to an 1875 proposed federal constitutional amendment referred to by some as the "Blaine Amendment," which they contend was motivated by anti-Catholic sentiment. But the Oklahoma Supreme Court Justices who have considered the issue have explained that Article II, § 5, which was enacted in 1907, was not based on the Blaine Amendment and was not motivated by anti-Catholic animus. *See Prescott*, 2015 OK 54, ¶ 1 (Edmonson, J.,

concurring in denial of rehearing); *id.* ¶¶ 17–20 (Taylor, J., concurring in denial of rehearing); *id.* ¶¶ 16–24 (Gurich, J., concurring in denial of rehearing); *id.* ¶ 12 (Combs, V.C.J., dissenting to denial of rehearing). Rather, "[t]he Oklahoma Constitutional Convention members . . . were religious men . . . who advocated for the toleration of all religious beliefs." *Id.* ¶ 6 (Taylor, J., concurring).

E. No deference is owed to the Board.

With respect to Plaintiffs' statutory and regulatory claims, Defendants contend (Board Br. 15; St. Isidore Br. 28–29) that the Court should defer to the Board's interpretation of its regulations and the Charter Schools Act. But no deference is due to agency interpretations when a regulation or statute is unambiguous (*cf. Bell v. Phillips Petroleum Co.*, 1982 OK 28, ¶ 24, 641 P.2d 1115; *In re Okla. Tpk. Auth.*, 2023 OK 84, ¶ 27, 535 P.3d 1248), and here the Board's and St. Isidore's actions and policies plainly violate the unambiguous language of the relevant regulations and statutes. Moreover, there is no evidence that the Board actually interpreted the regulations and statutes at issue in any manner, as opposed to negligently or even willfully ignoring the regulations and statutes when it approved St. Isidore's application. (*See* Am. Pet. ¶¶ 238, 240–41.) And even if there were some ambiguity in the regulations or statutes and the Board had actually interpreted them, deference to the Board would be appropriate only if the Board was "(1) acting in its area of expertise or (2) applying a longstanding administrative construction" of the regulation or statute. *Okla. Gas & Elec. Co. v. State ex rel. Okla. Corp. Comm'n*, 2023 OK 33, ¶ 8, 535 P.3d 1218; *accord Oral Roberts Univ. v. Okla. Tax Comm'n*, 1985 OK 97, ¶ 10, 714 P.2d 1013. Here, the Board would not have been acting in its area of expertise but rather "making legal conclusions, which are the expertise of the Court." *Okla. Gas & Elec. Co.*, 2023 OK 33, n.17; *see also* Am. Pet. ¶ 242.

In addition, Defendants point to no longstanding agency interpretation of the regulations or statutes at issue. For these reasons, Defendants' administrative-deference argument fails.

III. Defendants have no valid "religious freedom" defense.

Defendants argue that the U.S. Constitution's Free Exercise Clause, Article I § 2 of the Oklahoma Constitution, and the Oklahoma Religious Freedom Act override the state constitutional provisions, statutes, and regulations on which Plaintiffs' claims are based. But, as a public charter school, St. Isidore is a governmental entity. It therefore is precluded from asserting any federal constitutional right to violate state law.

Even if St. Isidore could assert federal free-exercise rights, they would not supersede the state prohibitions at issue. Plaintiffs' first through third claims are based on religion-neutral prohibitions, so any free-exercise attack on them easily fails. In any event, those three claims are based on legal prohibitions that advance compelling state interests—including preventing discrimination—and so would survive even strict scrutiny under the Free Exercise Clause. The free-exercise argument also cannot defeat Plaintiffs' fourth claim, because operation and funding of St. Isidore as a public charter school would violate the federal Establishment Clause, and complying with the Establishment Clause is a compelling governmental interest that satisfies any level of scrutiny under the Free Exercise Clause. As St. Isidore is a governmental entity and a state actor, the Establishment Clause prohibits it from teaching a religious curriculum and indoctrinating students in a religion. In addition, the Establishment Clause bars states from setting up religious institutions or fusing governmental functions with religious ones, but that is exactly what the Board has done by chartering St. Isidore. Further, the Establishment Clause bars Oklahoma from providing

direct state aid to institutions for religious activities, such as St. Isidore's planned religious instruction.

Finally, the Article I, § 2 and Religious Freedom Act arguments fail for similar and related reasons.

A. As a public charter school, St. Isidore is a governmental entity and a state actor.

Whether an entity must comply with the requirements of the U.S. Constitution depends on whether the entity's conduct is state action. *See, e.g., Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019). To determine whether an entity is a state actor, the U.S. Supreme Court first considers whether the entity is a governmental entity itself. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378–82 (1995). If that is not the case, the Supreme Court and the Tenth Circuit apply four principal tests (detailed below) to assess whether the entity is a state actor. *See, e.g., VDARE Found. v. City of Colorado Springs*, 11 F.4th 1151, 1160 (10th Cir. 2021). Here, Oklahoma charter schools are public schools and governmental entities. Even if they were not governmental entities, they are state actors under at least two of the four state-action tests (meeting any of the four tests is sufficient to render an entity a state actor) that apply to private entities—the symbiotic-relationship and public-function tests.

1. Oklahoma charter schools are state actors because they are governmental entities.

As Justice Scalia explained for the Court in *Lebron*, when a party is a governmental official or entity, that is sufficient to resolve whether the party is a state actor, and it is unnecessary to consider the tests that are used to assess private entities. *See* 513 U.S. at 378–82. Accordingly, without applying the tests used to analyze whether private entities are state actors, the Supreme Court has concluded that various organizations and persons are state

actors because they are governmental entities or officials. *See, e.g., NCAA v. Tarkanian*, 488 U.S. 179, 192 (1988) (state universities); *Pennsylvania v. Bd. of Dirs. of City Trs.*, 353 U.S. 230, 231–32 (1957) (board created by state to operate privately endowed college); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624 (1991) (state judges); *Georgia v. McCollum*, 505 U.S. 42, 50 (1992) (prosecutors). Similarly, without applying any of the state-action tests that are used with private entities, the Tenth Circuit concluded that the Utah State Bar is a state actor because it is "a governmental entity established by state law and created as an administrative agency of the Utah Supreme Court" (*Barnard v. Chamberlain*, 897 F.2d 1059, 1062 (10th Cir. 1990)), and that a hospital in Oklahoma was a state actor because it was a "public trust" established by state statute and "its trustees [we]re public officers acting as an agency of the State of Oklahoma" (*Tarabishi v. McAlester Reg'l Hosp.*, 827 F.2d 648, 652 (10th Cir. 1987)).

Indeed, in *Lebron*, without applying traditional state-action tests for private entities, the Supreme Court concluded that Amtrak is a governmental entity to which the First Amendment applies, even though the statute that created Amtrak stated that it is a for-profit corporation and *not* "an agency or establishment of the United States government." 513 U.S. at 383–86, 397–400. The Court explained that Amtrak was created by legislation, its purpose is to pursue governmental goals, and it is controlled by government-appointed officials. *See id.* Likewise, without applying traditional state-action tests, then-Judge Gorsuch concluded for the Tenth Circuit in *United States v. Ackerman*, 831 F.3d 1292, 1295–1300 (10th Cir. 2016), that a national clearinghouse for missing children that was originally created as a private, nonprofit organization was a governmental entity because it was given exclusive duties and powers by a federal statute and was funded primarily by the federal government.

As in these cases, Oklahoma charter schools are governmental entities. Charter schools were created by the Oklahoma legislature through the Charter Schools Act (70 O.S. § 130 *et seq.*), and they could be abolished by repeal of the Act. The Act expressly states that "'charter school' means a *public school* established by contract with a board of education of a school district" (70 O.S. § 3-132(D) (emphasis added)) or with certain other governmental entities (*see* 70 O.S. § 3-132(A)). The Act could not be more clear on this point, but Oklahoma charter schools have numerous other characteristics that further confirm that they are public schools and governmental institutions.

For instance, Oklahoma charter schools must "be as equally free and open to all students as traditional public schools." 70 O.S. § 3-135(A)(9). They must "comply with all . . . laws relating to the education of children with disabilities in the same manner as a school district." 70 O.S. § 3-136(A)(7). They must not "charge tuition or fees." 70 O.S. § 3-136(A)(10). They are "subject to the same academic standards and expectations as existing public schools." 70 O.S. § 3-135(A)(11). They receive state "funding in accordance with statutory requirements and guidelines for existing public schools." 70 O.S. § 3-135(A)(12). Like all other public schools, charter schools must annually submit accreditation applications to the State Department of Education. OAC § 210:35-3-201(a). And they must comply with the same rules that govern traditional public schools on school-year length (70 O.S. § 3-136(A)(11)), bus transportation (70 O.S. § 3-141(A)), student testing (70 O.S. § 3-136(A)(4)), student suspension (70 O.S. § 3-136(A)(12)), financial reporting and auditing (70 O.S. §§ 3-135(C); 70 O.S. § 3-136(A)(6), (18); 70 O.S. § 3-145.3(E)), and insurance coverage and fidelity bonding (OAC § 210:40-87-6(a)–(b)).

Also, employees of Oklahoma charter schools are eligible for the same retirement benefits that Oklahoma provides to teachers at other public schools (70 O.S. § 3-136(A)(14)) and for the same insurance programs that are available to employees of their employers' governmental sponsors (70 O.S. § 3-136(A)(15)). Oklahoma charter schools must "comply with the Oklahoma Open Meeting Act and the Oklahoma Open Records Act." 70 O.S. § 3-136(A)(16). They are "eligible to receive current government lease rates" if they choose to lease property. 70 O.S. § 3-142(E). They must have governing boards that hold public meetings at least quarterly (70 O.S. §§ 3-135(A)(3), 3-145.3(F)) and that are "subject to the same conflict of interest requirements as a member of a local school board" (70 O.S. §§ 3-136(A)(17), 3-145.3(F)).

What is more, each Oklahoma charter school is considered a separate "local education agency" (70 O.S. §§ 3-142(C), 3-145.3(C)), which is "a public board of education or other public authority legally constituted" for "administrative control or direction" of public schools (*see* 20 U.S.C. § 7801(30)(A)). Oklahoma charter schools are "considered . . . school district[s] for purposes of tort liability under The Governmental Tort Claims Act." 70 O.S. § 3-136(A)(13). The Oklahoma Judicial Ethics Advisory Panel recently determined that service on the board of an Oklahoma charter school "would be considered an appointment to a 'Governmental committee, board, commission, or other governmental position.'" Okla. Jud. Ethics Op. 2023-3, 2023 OK JUD ETH 3 ¶ 4, 538 P.3d 572 (quoting Okla. Code Jud. Conduct R. 3.4). And a 2007 Oklahoma Attorney General opinion states that "charter schools . . . are part of the public school system," "are under the control of the Legislature," and further the Legislature's "mandate of establishing and maintaining a system of free

public education." Hon. Al McAffrey, Okla. Op. Att'y Gen. No. 07-23, 2007 WL 2569195, at *7 (2007).

In sum, Oklahoma charter schools were created by legislation; Oklahoma law defines and treats them as public schools and governmental bodies; they have the same responsibilities and privileges as other public schools; and they must comply with myriad legal requirements that govern other public schools. Because Oklahoma charter schools are governmental entities, there is no question that they are state actors, and "this ends the inquiry." *See Riester v. Riverside Cmty. Sch.*, 257 F. Supp. 2d 968, 972 (S.D. Ohio 2002).

2. The Tenth Circuit and numerous other courts have concluded that charter schools are governmental entities and state actors.

Consistently with the analysis above, the Tenth Circuit has treated charter schools as governmental entities. *See Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1188 (10th Cir. 2010) (charter school was "a local governmental entity" and therefore was subject to the same legal rules that apply to other governmental entities in lawsuits alleging violations of constitutional rights); *Coleman v. Utah State Charter Sch. Bd.*, 673 F. App'x 822, 830 (10th Cir. 2016) (employees of charter school were "government officials"); *accord Dillon v. Twin Peaks Charter Acad.*, 241 F. App'x 490, 496–97 (10th Cir. 2010); *see also Milonas v. Williams*, 691 F.2d 931, 939–40 (10th Cir. 1982) (private school for behaviorally troubled boys was state actor because it received substantial public funding, it was significantly regulated by state, and many of boys were placed at school by school districts or juvenile courts). Many other federal courts across the country—including the en banc Fourth Circuit, panels of the Third and Ninth Circuits, and numerous district courts—have treated charter schools as governmental entities or other state actors as well. *See Peltier*, 37 F.4th at

115–23; *Fam. C.L. Union v. Dep't of Child. & Fams.*, 837 F. App'x 864, 869 (3d Cir. 2020); *Nampa Classical Acad. v. Goesling*, 447 F. App'x 776, 777–78 (9th Cir. 2011).[2]

Ignoring most of these authorities, Defendants rely on the Supreme Court's decision in *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), to assert that Oklahoma charter schools are not state actors. (Board Br. 26–27; Dep't Educ. Br. 15–17; St. Isidore Br. 17–21.) But there, the Supreme Court ruled that a *private* school for troubled youths was not a state actor for purposes of employment-related claims. 457 U.S. at 832–35, 843. As discussed above, Oklahoma charter schools are public schools, not private ones. 70 O.S. § 3-132(D). They are created through governmental action (*see* 70 O.S. §§ 3-132(A), 3-145.1), unlike the school in *Rendell-Baker* (*see* 457 U.S. at 832). Charter schools perform the traditionally exclusive public function of providing free *public* education (*see Peltier*, 37 F.4th at 119), while the school in *Rendell-Baker* was for "students who could not be served by traditional public schools," a function "that until recently the State had not undertaken" (457 U.S. at

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[2] *See also Patrick v. Success Acad. Charter Schs.*, 354 F. Supp. 3d 185, 209 n.24 (E.D.N.Y. 2018); *United States v. Minn. Transitions Charter Schs.*, 50 F. Supp. 3d 1106, 1120 (D. Minn. 2014); *Pocono Mountain Charter Sch. v. Pocono Mountain Sch. Dist.*, 908 F. Supp. 2d 597, 604–05 (M.D. Pa. 2012); *Riester*, 257 F. Supp. 2d at 972–73; *Daugherty v. Vanguard Charter Sch. Acad.*, 116 F. Supp. 2d 897, 906 (W.D. Mich. 2000); *Jones v. Sabis Educ. Sys., Inc.*, 52 F. Supp. 2d 868, 876, 879 (N.D. Ill. 1999); *Blanco v. Success Acad. Charter Sch., Inc.*, No. 23-CV-01652 (LJL), 2024 WL 965001, at *15 (S.D.N.Y. Mar. 6, 2024); *J.R. v. Bd. of Educ.*, No. 19 C 8145, 2023 WL 1928166, at *5 n.2 (N.D. Ill. Feb. 10, 2023); *Lengele v. Willamette Leadership Acad.*, No. 6:22-cv-01077-MC, 2022 WL 17057894, at *4 (D. Or. Nov. 17, 2022); *Falash v. Inspire Acads., Inc.*, No. 1:14-cv-00223-REB, 2016 WL 4745171, at *2, 6 (D. Idaho Sept. 12, 2016); *Meadows v. Lesh*, No. 10-CV-00223(M), 2011 WL 4744914, at *1–2 (W.D.N.Y. Oct. 6, 2011); *ACLU of Minn. v. Tarek Ibn Ziyad Acad.*, No. 09-138 (DWF/JJG), 2009 WL 2215072, at *9–10 (D. Minn. July 9, 2009); *Jordan v. N. Kane Educ. Corp.*, No. 08 C 4477, 2009 WL 509744, at *2–3 (N.D. Ill. Mar. 2, 2009); *Scaggs v. N.Y. Dep't of Educ.*, No. 06-CV-0799 (JFB)(VVP), 2007 WL 1456221, at *12–13 (E.D.N.Y. May 16, 2007); *Matwijko v. Bd. of Trs. of Glob. Concepts Charter Sch.*, No. 04-CV-663A, 2006 WL 2466868, at *3–5 (W.D.N.Y. Aug. 24, 2006); *Irene B. v. Phila. Acad. Charter Sch.*, No. Civ.A. 02-1716, 2003 WL 24052009, at *11 (E.D. Pa. Jan. 29, 2003).

842). Moreover, the educational functions of Oklahoma charter schools are heavily regulated (*see supra* § III(A)(1)), but "regulators showed relatively little interest in the [*Rendell-Baker*] school's personnel matters," and the Supreme Court's holding in the case addressed only whether the school was a state actor with respect to employment claims (*see* 457 U.S. at 841–42).

Other cases that Defendants cite are inapposite for similar reasons. In *Caviness v. Horizon Community Learning Center, Inc.*, 590 F.3d 806, 812–14, 817–18 (9th Cir. 2010), the court held that a charter school's employment decisions were not state action—without deciding whether performance of its educational functions was state action—based on an analysis of Arizona statutory and constitutional provisions that are substantially different from Oklahoma's. *Logiodice v. Trustees of Maine Central Institute*, 296 F.3d 22, 24–25 (1st Cir. 2002), and *Bittle v. Oklahoma City University*, 2000 OK CIV APP 66, ¶ 18, 6 P.3d 509, were lawsuits against private schools, not charter schools. *Robert S. v. Stetson School, Inc.*, 256 F.3d 159, 162, 166 (3d Cir. 2001), was also a suit against a private school, and far from performing a traditionally exclusive public function, the school performed services provided *only* by private schools.

Defendants also rely (Board Br. 26–27; St. Isidore Br. 20) on *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), and *Polk County v. Dodson*, 454 U.S. 312 (1981), for the proposition that an entity is not automatically a state actor just because it is labelled as "public." In *Jackson*, the U.S. Supreme Court ruled that "a utility company which [was] privately owned and operated" and merely received from the state a certificate allowing it to deliver electricity to a particular geographic area was not a state actor. 419 U.S. at 346, 350. Oklahoma charter schools, by contrast, are statutorily treated as—and function as—

governmental bodies in numerous ways. *See supra* § III(A)(1). In *Polk*, the Court concluded that a public defender is not a state actor when acting as counsel in a criminal proceeding—for the unique reason that they are acting as an adversary to the state—but indicated that a public defender could be a state actor when exercising administrative functions. *See* 454 U.S. at 318–20, 325. Public charter schools, on the other hand, fulfill the state's educational functions (70 O.S. § 3-131(A)) and do not act as adversaries to the state.

St. Isidore further cites (Br. 17) *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee,* 483 U.S. 522, 542–44 (1987), for the proposition that the issuance of a charter by government does not automatically make the recipient a state actor. But the charter issued there was a corporate charter to create a private corporation. *Id.* at 543. The charter issued here created a public school, which is a governmental entity. *See supra* § III(A)(1).

Defendants contend that the state has not encouraged St. Isidore to be religious and that therefore the "nexus" test for state action is not satisfied. (St. Isidore Br. 18; Board Br. 25–26.) But demonstrating that the state encouraged St. Isidore to teach religion is not necessary because, as a public charter school, St. Isidore is a governmental entity itself. *See supra* § III(A)(1). Moreover, the "nexus" test is just one of four tests through which a private party can be held a state actor, and the question of state encouragement is not relevant under the symbiotic-relationship and public-function tests applied above. *See Brentwood*, 531 U.S. at 302–03; *VDARE*, 11 F.4th at 1160–61; *Wittner*, 720 F.3d at 775–77; *Anaya*, 195 F.3d at 596.

St. Isidore further notes that it was initially created by private entities and asserts that it is privately operated. (St. Isidore Br. 17.) But even if it were true that St. Isidore was a private entity when it submitted its charter application, once that application was approved it

became a governmental entity (*see supra* § III(A)(1)), and the members of its governing board became public officials (*see* Okla. Jud. Ethics Op. 2023-3, 2023 OK JUD ETH 3 ¶ 4). This was similar to what happens when private residents of an unincorporated community decide to organize a town: The governmental entity—the town—comes into being upon being approved by election, and the persons elected to the town's board of trustees become public officials. *See* 11 O.S. §§ 3-101–107, 12-102.

3. Even if Oklahoma charter schools are not governmental entities, they are still state actors under the symbiotic-relationship and public-function tests.

The Tenth Circuit applies four principal tests to determine whether private entities are state actors: "(1) the nexus test, (2) the symbiotic-relationship test, (3) the joint-action test, and (4) the public-function test." *See VDARE*, 11 F.4th at 1160. "If any one of the tests indicates a party is a state actor, that alone is sufficient to find the party a state actor." *Anaya v. Crossroads Managed Care Sys., Inc.*, 195 F.3d 584, 596 (10th Cir. 1999). Oklahoma charter schools are state actors under at least two of the tests—the symbiotic-relationship and public-function tests.

Symbiotic relationship. Under the "[s]ymbiotic [r]elationship" test, "[s]tate action is . . . present if the state 'has so far insinuated itself into a position of interdependence' with a private party that 'it must be recognized as a joint participant in the challenged activity.'" *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1451 (10th Cir. 1995) (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961)). The Supreme Court has similarly stated that "a nominally private entity [i]s a state actor . . . when it is 'entwined with governmental policies,' or when government is 'entwined in [its] management or control.'" *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001) (quoting *Evans v. Newton*, 382 U.S. 296, 299, 301 (1966) (alteration in *Brentwood*)). The Tenth

Circuit has explained that the "symbiotic relationship" test and the "entwinement" analysis are the same test. *See Wittner v. Banner Health*, 720 F.3d 770, 778 (10th Cir. 2013).

Applying this test, the Supreme Court and the Tenth Circuit have held that the Tennessee and Oklahoma state athletic associations are state actors because of the "pervasive entwinement of public institutions and public officials in [their] composition and workings." *See Brentwood*, 531 U.S. at 298–302; *Christian Heritage Acad. v. Okla. Secondary Sch. Activities Ass'n*, 483 F.3d 1025, 1030–31 (10th Cir. 2007). Similarly, the Supreme Court ruled that a private restaurant that leased space in a city parking-garage building from a city authority was a state actor because the relationship between the city and the restaurant conferred a "variety of mutual benefits" on both. *See Burton*, 365 U.S. at 724.

Here too, Oklahoma charter schools have a symbiotic relationship with and are entwined with the state. Only governmental entities may serve as sponsors for a charter school and grant a charter. *See* 70 O.S. §§ 3-132(A), 3-145.1. The governmental sponsors must then "[p]rovide oversight of the operations of charter schools," "monitor . . . the performance and legal compliance of charter schools," and decide whether to renew or revoke charter contracts. *See* 70 O.S. § 3-134(I); OAC § 777:10-3-4(b), (i). The State Board and Department of Education also regularly evaluate the compliance of charter schools with state accreditation requirements (70 O.S. §§ 3-104.4(I)–(J)), and the Board of Education "may exercise the option of assuming control" of a poorly performing charter school (70 O.S. § 1210.544(B)(1)). The charter schools must additionally comply with the numerous legal and reporting requirements described above. *See supra* § III(A)(1). At the same time, the schools (so long as they—unlike St. Isidore—comply with applicable legal requirements) provide a variety of benefits to the state. *See* 70 O.S. § 3-131(A). As in *Brentwood*, 531 U.S.

at 302, "entwinement to the degree shown here requires" that Oklahoma charter schools "be charged with a public character and judged by constitutional standards."

Public function. To satisfy the "public function" test, it is sufficient to show that "the private entity performs a traditional, exclusive public function." *Halleck*, 139 S. Ct. at 1928. For example, when private groups run elections or operate company towns, they are state actors. *See id.* at 1929. As public schools, Oklahoma charter schools provide free, public education. 70 O.S. §§ 3-132(D), 3-135(A)(9)–(11). Though provision of education may not be a traditionally exclusive public function, provision of free, *public* education is. *Peltier v. Charter Day Sch.*, 37 F.4th 104, 119 (4th Cir. 2022) (en banc), *cert. denied*, 143 S. Ct. 2657 (2023).

For instance, though not all parks have traditionally been operated by the government, the Supreme Court concluded that private trustees of a *public* park were state actors partly because a *public* park is "like a fire department or police department that traditionally serves the community." *See Evans*, 382 U.S. at 302. Similarly, while private entities often operate hospitals, the Tenth Circuit ruled that a private company that managed a *public* hospital was a state actor in part because the government "cannot escape liability by delegating responsibility" for "'a public purpose'" to "another party." *See Milo v. Cushing Mun. Hosp.*, 861 F.2d 1194, 1197 (10th Cir. 1988) (quoting *Jatoi v. Hurst-Euless-Bedford Hosp. Auth.*, 807 F.2d 1214, 1221–22 (5th Cir.), *modified on other grounds*, 819 F.2d 545 (5th Cir. 1987)).

Moreover, even if the provision of free, public education were not a traditionally exclusive public function, a private entity also may be "deemed a state actor when the government has outsourced one of its constitutional obligations to" the entity. *Halleck*, 139 S. Ct. at 1929 n.1. For example, in *West v. Atkins*, 487 U.S. 42, 56 (1988), the Supreme Court

held that a physician who contracted with the state to provide medical services to prison inmates was a state actor even though he was not a state employee, because the state had "delegated" to the doctor "its constitutional duty to provide adequate medical treatment to those in its custody." Several provisions of the Oklahoma Constitution obligate the state to provide free, public education. *See* Art. I, § 5; Art. XI, §§ 2, 3; Art. XIII, § 1. As Oklahoma charter schools perform a duty that the State is constitutionally mandated to perform—provision of free, public education—they are state actors.

B. Because St. Isidore is a governmental entity and a state actor, it may not challenge under the Free Exercise Clause state law that governs the school.

Because Oklahoma charter schools are governmental entities and state actors, they have no right under the Free Exercise Clause to present programming—religious or other—that state law prohibits. Oklahoma charter schools are created by state law through charters granted by other governmental entities to which the schools are subordinate. *See* 70 O.S. § 3-132(A), (D). "[S]ubordinate unit[s] of government . . . 'ha[ve] no privileges or immunities under the federal constitution which [they] may invoke in opposition to the will of [their] creator.'" *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 363 (2009) (quoting *Williams v. Mayor of Baltimore*, 289 U.S. 36, 40 (1933)). For this reason, the Ninth Circuit ruled that an Idaho charter school had no right to assert federal constitutional claims against an Idaho policy that prohibited "the use of sectarian or denominational texts in public schools." *See Nampa Classical*, 447 F. App'x at 777–78.

In addition, when a state actor speaks in the course of exercising their official duties, their speech is government speech. *See Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006); *Nampa Classical*, 447 F. App'x at 778. A person delivering government speech has no right under the First Amendment, including its Free Exercise Clause, to deliver speech that a

statute or a governmental policy prohibits. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009); *Gundy v. City of Jacksonville*, 50 F.4th 60, 80–81 (11th Cir. 2022); *Fields v. Speaker of Pa. House of Representatives*, 936 F.3d 142, 158–60 (3d Cir. 2019).

Thus, as governmental entities and state actors, Oklahoma charter schools have no right to challenge under the Free Exercise Clause provisions of Oklahoma law that govern them, including state constitutional and statutory prohibitions against religious programming.

C. Even if St. Isidore could assert Free Exercise Clause rights, they do not supersede the state prohibitions on which Plaintiffs rely.

Even if St. Isidore could assert federal free-exercise rights, they would not override any of the legal prohibitions that Plaintiffs invoke. Because Plaintiffs' first through third claims are all based on constitutional provisions, statutes, and regulations that are neutral with respect to religion, the Free Exercise Clause cannot defeat those claims. And with respect to Plaintiffs' fourth claim, the Free Exercise Clause cannot help St. Isidore either. For the federal Establishment Clause (as well as the Free Exercise Clause itself!) prohibits public schools from indoctrinating students in a religion, bans states from setting up religious institutions or fusing governmental functions with religious ones, and bars states from sending institutions direct funding for religious activity.

1. Plaintiffs' first through third claims rely solely on religion-neutral prohibitions.

As the Supreme Court recently reaffirmed, the Free Exercise Clause "does not mean that religious institutions enjoy a general immunity from secular laws." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). Thus, laws that are neutral toward religion and generally applicable do not violate the Free Exercise Clause even if they burden religious conduct. *Emp. Div. v. Smith*, 494 U.S. 872, 879 (1990). As Justice Scalia explained for the Court in *Smith*, a contrary rule would render "professed doctrines of

religious belief superior to the law of the land," which would "in effect . . . permit every citizen to become a law unto himself." *Id.* (quoting *Reynolds v. United States*, 98 U.S. 145, 166–67 (1878)). All the prohibitions on which Plaintiffs rely in their first through third claims are religion-neutral and generally applicable, so the Free Exercise Clause cannot give St. Isidore any right to disregard them.

In any event, even if the prohibitions raised in Plaintiffs' first through third claims did somehow trigger strict scrutiny under the Free Exercise Clause, they would survive that scrutiny. For those prohibitions—such as the ones against discrimination in admissions and employment—serve compelling state interests through the least restrictive means. *See, e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624, 628–29 (1984); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733 (2014).

Invoking the unconstitutional-conditions doctrine, Defendants assert (Board Br. 17; St. Isidore Br. 29) that Oklahoma may not require St. Isidore to relinquish its free-exercise rights as a condition of charter-school funding. But this doctrine does not apply here for two reasons. First, for the doctrine to apply, the claimant must establish that the condition at issue is actually in conflict with the claimant's constitutional rights. *See Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013). As explained above, the legal prohibitions raised in Plaintiffs' first through third claims are all religion-neutral and therefore do not violate St. Isidore's free-exercise rights. Second, even if the conditions in a governmental funding program restrict the exercise of a funded entity's otherwise-existing constitutional rights, the unconstitutional-conditions doctrine only prohibits the government from using a funding or benefits program to regulate a recipient's constitutionally protected activity *outside* that program. *See id.* at 214–17; *Rust v. Sullivan*, 500 U.S. 173, 196–98

(1991); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 544–45 (1983). Here, St. Isidore was created by and is controlled by two entities—the Archdiocese of Oklahoma City and the Diocese of Tulsa (*see* Am. Pet. ¶¶ 43–44, 151; Ex. A, App. F, § 1, pp. 5, 11 [PE292, 298])—and those real parties in interest are free to exercise their religious rights through their many private schools without needing to comply with the rules applicable to public charter schools.

The Board Defendants further contend (Board Br. 17–18) that the "ministerial exception" defeats Plaintiffs' claims concerning St. Isidore's plans to discriminate in employment. But that exception has never applied to public employment; nor could it. The ministerial exception, rooted in the First Amendment's Religion Clauses, forecloses certain employees of *private* religious organizations from bringing employment discrimination claims against their employers. *See Morrissey-Berru*, 140 S. Ct. at 2061. But because St. Isidore is a governmental entity and a state actor, it must comply with the U.S. Constitution. The U.S. Constitution's Free Exercise and Establishment Clauses bar state actors from discriminating based on religion, and its Equal Protection Clause bars them from discriminating based on religion, sexual orientation, and gender identity. *See supra* at 23–24.

2. Even if the prohibitions underlying Plaintiffs' fourth claim trigger strict scrutiny under the Free Exercise Clause, the prohibitions satisfy it.

Even if the constitutional provisions and statutes raised in Plaintiffs' fourth claim—which challenges St. Isidore's plan to teach a religious curriculum—result in strict scrutiny under the Free Exercise Clause, they meet it. Compliance with the federal Establishment Clause is a compelling governmental interest that satisfies strict scrutiny under other provisions of the First Amendment. *See Cap. Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 761–62 (1995) (plurality opinion of Scalia, J., joined by Rehnquist, C.J., Kennedy,

J., and Thomas, J.); *accord id.* at 783 (O'Connor, J., concurring in part and concurring in the judgment, joined by two other Justices); *Widmar v. Vincent*, 454 U.S. 263, 271 (1981); *see also Lee*, 505 U.S. at 587. The Establishment Clause prohibits state actors from inculcating religion in the classroom or otherwise promoting religion to students or coercing them to take part in religious activity. *See supra* at 31–32. In addition, the Free Exercise Clause itself prohibits state actors from "coerc[ing] participation in religious programming." *Janny*, 8 F.4th at 911; *see also id.* at 912, 916–18. Because St. Isidore is a state actor, the federal constitutional prohibitions against public schools imposing any religion on students apply to it and defeat the argument that the Free Exercise Clause gives it a right to do so.

What is more, the Establishment Clause bars states from establishing religious institutions: "Neither a state nor the Federal Government can set up a church." *Everson*, 330 U.S. at 15. It also bars "a fusion of governmental and religious functions." *Schempp*, 374 U.S. at 222; *accord Larkin*, 459 U.S. at 126; *Grumet*, 512 U.S. at 696–97 (plurality opinion). In clear contravention of these principles, the Board has established a religious public school, which will exercise and combine governmental and religious functions.

And, even if St. Isidore were not a governmental entity or state actor, the Establishment Clause would still prohibit Oklahoma from funding religious education or activity at a charter school. The Establishment Clause has long barred governmental bodies from directly providing public funds to institutions that use those funds to support religious activities, including religious instruction. *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 228–30 (1997); *Bowen v. Kendrick*, 487 U.S. 589, 621 (1988); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 755 (1976) (plurality opinion); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 780 (1973); *Hunt v. McNair*, 413 U.S. 734, 743 (1973).

To be sure, there is a narrow exception to the Establishment Clause bar against tax funding of religious activity: Public funds may support religious education when "a government aid program is neutral with respect to religion, and provides assistance directly *to a broad class of citizens* who, in turn, direct government aid to religious schools *wholly* as a result of their own genuine and independent private choice." *See Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002) (emphases added). For this "true private choice" exception to apply, "government aid" must "reach[] religious schools *only* as a result of the genuine and independent choices of private individuals." *Id.* at 649 (emphasis added). But the funding of Oklahoma charter schools does not satisfy the "true private choice" exception, because the funds are paid directly from the state to the schools, and the funding amounts are not based solely on the number of students served and are instead determined through a complex formula that incorporates a number of other factors. *See supra* at 36.

Contrary to what the Department of Education Defendants' brief suggests (at 7), the Establishment Clause's ban against direct public funding of religious instruction was not disturbed by the Supreme Court's statement in *Kennedy* that "the Establishment Clause must be interpreted by 'reference to historical practices and understandings'" in a manner that "'faithfully reflec[ts] the understanding of the Founding Fathers'" (142 S. Ct. at 2428–29 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576–77 (2014)). The Establishment Clause's prohibition against direct state aid to the religious activities of religious institutions was first recognized in *Everson*, 330 U.S. at 8–16, based on extensive historical analysis. *Kennedy* did not overrule *Everson* or any of the later cases—such as *Bowen*, 487 U.S. at 621, and *Agostini*, 521 U.S. at 228–30—that reaffirmed that direct public funding of religious activities is unconstitutional. Furthermore, under *Agostini*, only the Supreme Court can

overrule its own precedents, even when there is an argument that a precedent's underpinnings have been undermined by a later Supreme Court decision. *See* 521 U.S. at 237.

Thus, the need to comply with the Establishment Clause here satisfies any level of scrutiny under the Free Exercise Clause for three reasons: the Establishment Clause prohibits governmental entities and state actors, including public charter schools, from inculcating religion; the Establishment Clause bars states from setting up religious institutions or fusing governmental and religious functions; and the Establishment Clause bans direct public funding of religious instruction. Accordingly, the three principal cases on which Defendants rely for their free-exercise argument—*Carson ex rel. O.C. v. Makin*, 142 S. Ct. 1987 (2022); *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020); and *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017)—are inapplicable here because the funding upheld in each of those cases would *not* have violated the Establishment Clause. The religious schools involved in the three cases were all private schools; none of them were governmental entities, other state actors, or government-established institutions. In *Carson* and *Espinoza*, the programs in controversy satisfied the "true private choice" exception. *See Carson*, 142 S. Ct. at 1994, 1997; *Espinoza*, 140 S. Ct. at 2254. And in *Trinity Lutheran*, the funding would not have been put to religious uses. *See* 137 S. Ct. at 2017–19, 2024 n.3.

D. Article I, § 2 of the Oklahoma Constitution does not provide a defense.

The Department of Education Defendants' argument (Br. 13) that Article I, § 2 of the Oklahoma Constitution overrides Plaintiffs' claims fails for the same reasons as Defendants' Free Exercise Clause argument. Oklahoma courts, though they are not bound by it, generally look to federal case law to determine whether an entity is a state actor under state law. *See, e.g., Oklahomans for Life, Inc. v. State Fair of Okla., Inc.*, 1981 OK 101, ¶¶ 16–18 & nn.13–

15, 634 P.2d 704. The same analysis that demonstrates that St. Isidore is a state actor under federal law shows that it is a state actor under state law as well. As explained above, because St. Isidore is a state actor under state law, multiple provisions of the Oklahoma Constitution—including Article I, § 2 itself—prohibit St. Isidore from discriminating in admissions and employment and from indoctrinating its students in a religion. *See supra* §§ II(B), II(D).

E. The Oklahoma Religious Freedom Act does not provide a defense.

Defendants also rely on the Oklahoma Religious Freedom Act ("OFRA"). (Board Br. 29–30; St. Isidore Br. 12–13; Dep't Educ. Br. 14.) ORFA provides that "no governmental entity shall substantially burden a person's free exercise of religion . . . unless it demonstrates that application of the burden to the person is [1] [e]ssential to further a compelling governmental interest; and [2] [t]he least restrictive means of furthering that compelling governmental interest." 51 O.S. § 253(A)–(B). ORFA was recently amended by S.B. 404, which Governor Stitt signed into law on May 2, 2023. The amendment provides that "[i]t shall be deemed a substantial burden to 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." S.B. No. 404, § 1, 59 Legis., Reg. Sess. (Okla. 2023) (adding 51 O.S. § 253(D)). For several reasons, ORFA provides no defense here.

First, the Oklahoma Constitution prohibits the existence of a charter school that discriminates in admissions, discipline, and employment and presents a religious curriculum. *See supra* §§ II(B), II(D). Of course, a state statute cannot override the state constitution. *See, e.g.*, *Muskogee Indus. Dev. Co. v. Ayres*, 1916 OK 125, 154 P. 1170, 1171.

Second, the ORFA amendment prohibits denial of state funding "based *solely* on the religious character or affiliation of the person or entity." S.B. No. 404, § 1 (emphasis added). Conversely, therefore, it is not a substantial burden to deny a religious entity public funding on a basis other than the entity's religious status. Denying St. Isidore state funding because of its plans to teach a religious curriculum would be based on its intended *conduct*, not on its "religious character or affiliation." Similarly, enjoining the funding of St. Isidore based on any of the other grounds Plaintiffs present—such as the school's intent to discriminate—would plainly not be a denial "based solely on the religious character or affiliation" of the school.

Indeed, the ORFA amendment's legislative history confirms that it was intended to apply *only* to denials of funding based *solely* on an entity's religious status. The bill's House sponsor, Representative Jon Echols (R-90), repeatedly made this clear during floor debate in the House. He explained that a governmental official considering an application for public funding "can't solely discriminate based on religion, but there are a million other reasons you can say no." House Floor Afternoon Session, 59 Legis., 2:20:10–2:20:17 (Apr. 25, 2023, 1:30 p.m.), https://bit.ly/3MOfPY7 (access recording by selecting Apr. 25, 2023, on the calendar and selecting afternoon session). He gave examples of grounds on which public officials can still deny funding under the amendment: "You can discriminate based on proselytization. You can discriminate based on they don't have the right system set in place to follow whatever the rules are. . . . You absolutely could deny someone who violated some other antidiscrimination law that existed." *Id.* at 2:20:25–2:20:32, 2:29:36–2:29:42. Likewise, before the State Powers Committee, Representative Echols noted that religious entities would have to "follow the same rules as everyone else." State Powers Committee,

9:10:37–9:10:42 (Apr. 5, 2023, 9:00 a.m.), https://bit.ly/3MOfPY7 (access recording by selecting Apr. 5, 2023, on the calendar and selecting "State Powers"). St. Isidore's desire to disregard those rules on religious grounds thus is not protected by the amendment to ORFA.

Third, even if a denial of state funding to St. Isidore were a "substantial burden" under the amended statute (which it is not), the denial would not violate the amended statute so long as it furthered a compelling governmental interest through the least restrictive means. 51 O.S. § 253(B). Adhering to the state constitutional provisions on which Plaintiffs rely is a compelling governmental interest that cannot be pursued through any means other than actually complying with the provisions. *Cf., e.g., Muskogee Indus.*, 154 P. at 1171. And the statutory and regulatory prohibitions on which Plaintiffs rely, such as the prohibitions against discrimination, also serve compelling state interests through the least restrictive means. *See, e.g., Roberts*, 468 U.S. at 624, 628–29; *Burwell*, 573 U.S. at 733.

Finally, "[w]here statutes conflict in part, the one last passed, which is the later declaration of the Legislature, should prevail." *Okla. Call for Reprod. Just. v. Drummond*, 2023 OK 24, ¶ 14, 526 P.3d 1123. The Charter Schools Act was amended by S.B. 516 on June 5, 2023, one month *after* the ORFA amendment. The amendment to the Charter Schools Act modified several provisions of 70 O.S. § 3-136(A) but reenacted the requirement that "[a] charter school shall be nonsectarian in its programs, admission policies, employment practices, and all other operations." S.B. No. 516, § 7, 59 Legis., Reg. Sess. (Okla. 2023). If the Legislature believed that the ORFA amendment superseded this requirement, it would not have reenacted the requirement one month later.

IV. Plaintiffs' requested relief is not overbroad.

St. Isidore argues (St. Isidore Br. 29–30) that Plaintiffs' request for relief that would prevent St. Isidore from receiving state funding and operating as a charter school is overbroad because the Court could order St. Isidore to fix some of the deficiencies that Plaintiffs identify. But the deficiencies in St. Isidore's application are so fundamental and widespread that is it inconceivable that they could all be fixed. In any event, the scope of relief is properly addressed at the remedy stage, and it is premature to address it on a motion to dismiss. *See, e.g.*, *Dingxi Longhai Dairy, Ltd. v. Becwood Tech. Grp. L.L.C.*, 635 F.3d 1106, 1108 (8th Cir. 2011) ("[T]he selection of an improper remedy in the . . . demand for relief will not be fatal to a party's pleading if the statement of the claim indicates the pleader may be entitled to relief of some other type." (quoting 5 Wright & Miller, *Federal Practice & Procedure: Civil* § 1255, at 508–09 (3d ed. 2004))); *Bontkowski v. Smith*, 305 F.3d 757, 762 (7th Cir. 2002) ("[E]ven if . . . [the plaintiff] is seeking relief to which he's not entitled, this would not justify dismissal of the suit.").

CONCLUSION

For the foregoing reasons, Defendants' three Motions to Dismiss should be denied. Alternatively, should the Court identify any deficiencies in Plaintiffs' Amended and Supplemental Petition, Plaintiffs should be given leave to amend their petition.[3]

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[3] In particular, as discussed in the section about ripeness (*see supra* at 14–15), St. Isidore released many documents after the Amended and Supplemental Petition was filed that strongly support Plaintiffs' allegations. While Plaintiffs view the Amended and Supplemental Petition as sufficient—and the new documents as supporting evidence that does not need to be detailed in a petition—if the Court disagrees, the new documents also support granting leave to amend.

Respectfully submitted on April 26, 2024.

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CERTIFICATE OF SERVICE

Pursuant to the Stipulation Concerning Electronic Service filed on September 15, 2023, this is to certify that on April 26, 2024, a true and correct copy of the foregoing document has been served via email to the following:

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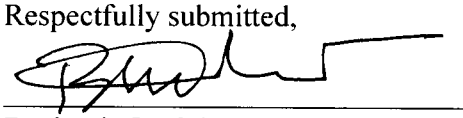

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