5-17-2024

Defendant St. Isidore of Seville Catholic Virtual School's Reply Brief in Support of Motion to Dismiss

Michael H. McGinley

Steven A. Engel

M. Scott Proctor

John A. Meiser

Michael R. Perri

See next page for additional authors

Authors

Michael H. McGinley, Steven A. Engel, M. Scott Proctor, John A. Meiser, Michael R. Perri, and Socorro Adams Dooley

IN THE DISTRICT COURT FOR OKLAHOMA COUNTY
STATE OF OKLAHOMA

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

DEFENDANT ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL'S
REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

Michael H. McGinley, *pro hac vice*
Steven A. Engel, *pro hac vice*
M. Scott Proctor, OBA No. 33590
DECHERT LLP
1900 K Street, NW
Washington, DC 20006
T: (202) 261-3308
michael.mcginley@dechert.com
steven.engel@dechert.com
scott.proctor@dechert.com

John A. Meiser, *pro hac vice*
NOTRE DAME LAW SCHOOL
RELIGIOUS LIBERY CLINIC
1338 Biolchini Hall of Law
Notre Dame, Indiana 46556
T: (574) 631-3880
jmeiser@nd.edu

Michael R. Perri, OBA No. 11954
Socorro Adams Dooley, OBA No. 32716
PERRI DUNN, PLLC
100 N. Broadway, Suite 3280
Oklahoma City, OK 73102
T: (405) 724-8543
mrperri@perridunn.com
sadooley@perridunn.com

Attorneys for Defendant St. Isidore of Seville Catholic Virtual School

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Plaintiffs' opposition to the motions to dismiss distills their challenge to the State's approval of St. Isidore of Seville Catholic Virtual School to its essence: Plaintiffs believe that Oklahoma may *never* allow a religious organization to operate a charter school because (they contend) any faith-based school would violate the Charter Schools Act and the Oklahoma Constitution. Their other arguments—alleging technical errors in the State's decision to contract with St. Isidore and baseless speculation about how they predict the school might one day violate the law—grow from this same basic challenge to religious charter schools.

None of their claims can justify setting aside the contract that the Statewide Virtual Charter School Board properly approved. *First*, Plaintiffs have neither standing nor, for their statutory and regulatory claims, a cause of action. *Second*, their claims fail on the merits. State and federal law emphatically reject efforts to exclude people of faith from participating in the charter-school program. And Plaintiffs cannot nullify these rights by recasting a private school that *contracts with* the government as *part of* the government. *Third*, Plaintiffs' technical challenges are unripe, meritless, and seek a disproportionate and inequitable remedy. This Court must reject Plaintiffs' attempt to extinguish St. Isidore and it should dismiss the Amended Petition with prejudice.

ARGUMENT AND AUTHORITIES

I. PLAINTIFFS LACK STANDING AND A CAUSE OF ACTION.

Plaintiffs fail to establish necessary threshold requirements to pursue their claims.

First, they fail to establish standing. To seek declaratory relief, Plaintiffs must show "an actual, existing justiciable controversy" that is "direct and substantial" and "involve[s] an actual . . . dispute." *Stevens v. Fox*, 2016 OK 106, ¶ 9, 383 P.3d 269, 273 n.11 (Okla. 2016) (cleaned up). They make essentially no effort to do so. At best, Plaintiffs rely on a remarkably broad theory of taxpayer standing that cannot make up for their lack of a "case in controversy." *See* Opp. 9–12. Private taxpayers do not enjoy standing simply to "enforce" compliance with "the law." *McFarland v. Atkins*, 1979 OK 3, ¶ 22, 594 P.2d 758, 762 (Okla. 1978). Taxpayers may not challenge any perceived "public wrong[]"; they may, at most, seek to prevent "the wrongful

expenditure" of taxpayer funds. *Okla. Pub. Emps. Ass'n v. Okla. Dep't of Cent. Servs.*, 2002 OK 71, ¶ 14, 55 P.3d 1072, 1079 (Okla. 2002). But Plaintiffs still have not explained how the Board's contract with St. Isidore will ever impact their tax dollars. *Cf. Stevens*, 383 P.3d at 275.

Second, Plaintiffs have failed to identify a cause of action for their statutory and regulatory claims. They do not even argue that the Charter Schools Act or its regulations satisfy the "test to determine if a private cause of action can be inferred from a regulatory or public-law statute." *Owens v. Zumwalt*, 2022 OK 14, ¶ 10, 503 P.3d 1211, 1215 (Okla. 2022); *compare* St. Isidore MTD 5–7 *with* Opp. 11–12. Instead, they try to sidestep this requirement by arguing that it is not "necessary when taxpayers sue to challenge unlawful spending." Opp. at 11. But they cite no case actually holding as much, and the Oklahoma Supreme Court has rejected the theory by holding that a cause of action is a distinct requirement separate from standing. *Owens*, 503 P.3d at 1216.

II. PLAINTIFFS' CHALLENGE TO RELIGIOUS CHARTER SCHOOLS FAILS.

Even if Plaintiffs' claims were justiciable, their attack on St. Isidore's right to open a school that "teach[es] a religious curriculum," Opp. 29 (Fourth Claim), fails under state and federal law.

A. Oklahoma Law Does Not Require The Exclusion Of Religious Charter Schools.

Neither Oklahoma's Constitution nor statutory code prohibits it from funding St. Isidore.

1. The State Constitution allows the State to provide funds to St. Isidore.

First, the State's contract with St. Isidore does not run afoul of Article II, Section 5 of the Oklahoma Constitution. That provision bars the State from giving gratuitous aid "for which no corresponding value [i]s received." *Murrow Indian Orphans Home v. Childers*, 1946 OK 187, ¶ 5, 171 P.2d 600, 602 (Okla. 1946). It does not prohibit the State from providing funds to a religious school, like St. Isidore, in exchange for which the State will receive substantial benefit. *See id.*; *Oliver v. Hofmeister*, 2016 OK 15, ¶¶ 19–27, 368 P.3d 1270, 1275–77 (Okla. 2016).

Plaintiffs protest that the contract with St. Isidore will not benefit the State because it will not fulfill the State's "legal duty" to provide a "public education" resembling that taught in district public schools. Opp. 35. That argument cannot be reconciled with the purpose of the charter-school program, which is to provide innovative and diverse educational options *different from* district

public schools. *See infra* III.B.2. Oklahoma—like the more than 40 other states with charter-school programs—may of course determine that such educational pluralism provides a tremendous benefit to the State and its residents. And Plaintiffs' argument cannot be squared with *Oliver*, which upheld a private-school tuition scholarship program that allows funds to go to religious schools. *Oliver*, 368 P.3d at 1276. As the Court recognized, the private schools participating in that program provide substantial benefit to Oklahoma families, regardless whether they offer the same education as district public schools, and even if that education is religious.[1] *See id.*

Second, St. Isidore's contract does not run afoul of other constitutional provisions. Opp. 30–34, 56–57. If anything, these provisions *protect* St. Isidore against the discrimination Plaintiffs seek to impose. For instance, Article I, Section 2 provides "an additional guarantee of religious freedom" beyond the First Amendment. *N.H. v. Presbyterian Church (U.S.A.)*, 1999 OK 88, ¶ 2, 998 P.2d 592, 594 n.2 (Okla. 1999). It promises that "no religious test shall be required for the exercise of civil or political rights." Okla. Const. Art. I, § 2. But Plaintiffs would have the Charter Schools Act impermissibly impose such a "religious test" barring religious entities from participating in a generally available state program. *Id.*; *see also Carson v. Makin*, 596 U.S. 767, 780–81 (2022). Plaintiffs' only response—that St. Isidore is somehow part of the government—is unavailing. *Infra* Part II.B. Plaintiffs' reliance on Article I, Section 5 fares no better. That provision, which obligates the State to maintain a general system of public education, does not apply to St. Isidore because it is not a state actor but instead a private entity. *See id.*

Finally, Plaintiffs do not deny the need to interpret Oklahoma's Constitution to avoid conflict with the U.S. Constitution. St. Isidore MTD 10–11. Excluding religious charter schools violates the First Amendment. *Infra* Part II.B. This Court must apply the law to avoid that collision.

2. ORFA bars enforcement of the Act's religious exclusion.

In fact, Oklahoma law *prohibits* the State from enforcing the Charter Schools Act's

[1] Nor does the *way* charter schools are funded pose any problem. Opp. 35–36. As in *Oliver*, charter schools are funded based on the number of students who choose to attend. *See* Am. Pet. Ex. P. ¶ 7.7 [PE605–PE606]; 70 O.S. § 18.200.1. Regardless, the "determinative factor" under *Oliver* is whether an entity provides "substantial return" to the State. 368 P.3d at 1276.

exclusion of religious schools. Under the Oklahoma Religious Freedom Act ("ORFA"), the government may not deny a generally available benefit to an organization simply because it is religious. 51 O.S. § 253(D). Excluding St. Isidore from the charter-school program would violate this basic command, and Plaintiffs identify no compelling interest that would justify that burden on St. Isidore's religious exercise. *See Fulton v. City of Phila.*, 141 S. Ct. 1868, 1879 (2021).

Plaintiffs' efforts to evade ORFA fail. *First*, Plaintiffs contend that the law prevents only denials of funding based on an entity's "religious character" but not its religious *activity* or *use* of funds. Opp. 58. But ORFA prohibits the State from "inhibit[ing] or curtail[ing]" any "religiously motivated *practice*." 51 O.S. § 252(7) (emphasis added). And, as the U.S. Supreme Court has held, religious "character" cannot be separated from religious "conduct." *Carson*, 596 U.S. at 788 (2022) (that distinction "lacks a meaningful application not only in theory, but in practice as well"); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 469 (2017) (Gorsuch, J., concurring). Plaintiffs' reference to comments by a single legislator, Opp. 58–59, does not show otherwise.

Second, Plaintiffs distract by arguing that the recent modification of *other* provisions of charter-school law means that the longstanding exclusion of religious charter schools should prevail as more recently enacted than ORFA. Opp. 59. They cite nothing to support this bizarre theory that the legislature's amendment of one provision of law somehow "updates" or "reenacts" every other related provision. Regardless, Plaintiffs do not dispute that ORFA acts broadly as a "super statute" that displaces that discriminatory exclusion in any event. *See* St. Isidore MTD 13.

B. Any Exclusion Of Religious Charter Schools Violates The First Amendment.

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

Plaintiffs do not dispute that the First Amendment prohibits a State from excluding schools from generally available funding programs simply because they are religious or provide a faith-based education. *See Carson*, 596 U.S. at 767; *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246 (2020); *Trinity Lutheran*, 582 U.S. at 449. Plaintiffs cannot dodge this basic command of the First Amendment by arguing that St. Isidore—a privately operated school—is part of the

government itself or that the Establishment Clause somehow prohibits the State from allowing religious educators to equally participate in the charter-school program.

1. Oklahoma charter schools are not "the Government" and the design and operation of a charter school is not "state action."

Plaintiffs ask this Court to ignore St. Isidore's First Amendment rights by arguing that the school *has no* constitutional rights, but is instead part of the government. They are ambivalent as to exactly how St. Isidore is a "state actor," suggesting that St. Isidore is either itself "a governmental entity," Opp. 39–43, or instead a private entity that will teach a religious curriculum at the behest and under the close direction of the State, *id.* at 47–50. Neither theory is correct.

First, St. Isidore is not a governmental entity. Contrary to Plaintiffs' claim, St. Isidore was not "created by the Oklahoma legislature." Opp. 41. St. Isidore is a private nonprofit corporation and its members undoubtedly are private actors. Oklahoma's charter-school law is explicit on this point, allowing a "private person, or private organization" to "contract with" the State to operate a charter school, 70 O.S. § 3-134(C), and permitting even *for-profit* businesses to manage their operations, OAC § 777:10-1-2. Thus, the Charter Schools Act did not create St. Isidore or appoint the individuals who operate it, a point the Plaintiffs appear to concede elsewhere—admitting that St. Isidore was "initially created by private entities." Opp. 46.

Those private entities do not become "part of" the government simply by contracting with it. *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982); *Fulton*, 141 S. Ct. at 1878. St. Isidore's contract makes this clear, stating that the school remains "a privately operated religious non-profit organization entitled to" constitutional rights. Am. Pet. Ex. P. ¶ 1.5; ¶ 2.9 [PE598–PE599]. And the school is still "operated by a board of directors, none of whom are public officials or are chosen by public officials." *Rendell-Baker*, 457 U.S. at 832; *see* 70 O.S. §§ 3-136(A)(8), 3-145.3(F). Plaintiffs catalog inapposite cases in which courts have recognized the governmental nature of entities that were explicitly created by law, given sovereign functions, or run by government

employees. Opp. 39–40.[2] None of that is true here.

Nor does it matter that Oklahoma law refers to charter schools as "public schools" or that such schools receive a charter from the State. Opp. 41–43, 46. Plaintiffs do not dispute that private entities regularly operate under state-issued charters, and that this does not transform them into arms of the government. *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 542–44 (1987). Instead, Plaintiffs circularly assert that the "charter issued here created a public school," Opp. 46, which only raises the question to be answered: What is the consequence of that label? Nor can Plaintiffs dispute the answer: Labeling an entity "public" does not make it part of the government. Here, that is explicit in St. Isidore's contract and the charter law, which state that "public school" simply means one "that is free and supported by funds appropriated by the Legislature"—not one that is *part of* the government. Am. Pet. Ex. P. ¶ 2.9 [PE599]; 70 O.S. § 1-106. And Plaintiffs cannot deny that "state law labels" do not control federal rights, *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 679 (1996), and calling an entity "public" does not make it a state actor, *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 n.7, 352–54 (1974). Labels aside, St. Isidore lacks the "calling card of a governmental entity": It does not exercise any "public, political, or sovereign function" that "flow[s] from the sovereign authority" of the State. *Ackerman*, 831 F.3d at 1295 (Gorsuch, J.) (quotation omitted).[3]

Second, Plaintiffs cannot attribute St. Isidore's private operation and "religious

---

[2] *Com. of Pennsylvania v. Bd. of Dirs. of City Trusts*, 353 U.S. 230, 231 (1957) (per curiam) (board created by statute to run college donated to city); *NCAA v. Tarkanian*, 488 U.S. 179, 183 (1988) (state university "organized and operated" by state law); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624 (1991) (state judge); *Georgia v. McCollum*, 505 U.S. 42, 50 (1992) (state prosecutor); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 384-85 (1995) (Amtrak created by law and run by government-appointed board); *Tarabishi v. McAlester Reg'l Hosp.*, 827 F.2d 648, 652 (10th Cir. 1987) (trust statutorily created as "an agency of the State" and run by public officials); *Barnard v. Chamberlain*, 897 F.2d 1059, 1062 (10th Cir. 1990) (state bar "established by state law" as "agency of the Utah Supreme Court"); *United States v. Ackerman*, 831 F.3d 1292, 1296 (10th Cir. 2016) (entity statutorily granted exclusive "law enforcement duties and powers").

[3] Nor does it matter that charter schools agree to certain obligations—or to be *treated* in certain ways like public schools—when contracting with the government, Opp. 41–43. *See Rendell-Baker*, 457 U.S. at 841; *U.S. Olympic Comm.*, 483 U.S. at 542–44.

curriculum" to the State. Opp. 47–50. The Constitution constrains "acts of the [government], not . . . acts of private persons." *Rendell-Baker*, 457 U.S. at 837–38. A private entity's conduct is treated as that of the State "only if" there is a "close nexus" between the two. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). The government must be "*responsible* for the specific conduct of which the plaintiff complains." *Id.* (quotation omitted) (emphasis in original); *see also Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Plaintiffs hardly dispute the lack of such a nexus between the State and the design and operation of a charter school. Opp. 47–50. They do not dispute that law is constructed to *avoid* creating such a nexus, so that private groups may develop "different and innovative teaching methods," "create different and innovative forms of measuring student learning," and "[p]rovide additional academic choices." Okla. Stat. tit. 70 § 3-131. Instead, they suggest that two other "tests" prove state action. Opp. 47. Neither succeeds.

Plaintiffs first engage in empty semantic games, arguing that the State has established a "symbiotic-relationship" with charter-school operators by "entwin[ing]" charter schools with "government policies" and enmeshing the State in charter schools' "management or control." Opp. 47 (quoting *Brentwood Acad.*, 531 U.S. at 296). But this simply repackages the same question of whether there *is* a close nexus between the State and the challenged activity. Indeed, in the primary case Plaintiffs cite, the Supreme Court observed that "state action may be found if, *though only if*, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself."[4] *Brentwood Acad.*, 531 U.S. at 295 (emphasis added) (quotation omitted). Regardless of formulation, the "test" remains whether the private action should be treated "as if a State had caused it to be performed." *Id.*

There can be no serious argument that the State effectively "caused" St. Isidore to design

[4] In *Brentwood*, the court found state action by an interscholastic athletic association composed of "public schools represented by their officials acting in their official capacity." 531 U.S. at 299–300; *see Christian Heritage Acad. v. Okla. Secondary Sch. Activities Ass'n*, 483 F.3d 1025, 1030 (10th Cir. 2007). No such entwinement of public officials and institutions exists here. St. Isidore is a private entity operated by private individuals not selected by the government.

a religious school, nor that the State will exercise close control over its operation. St. Isidore MTD 16–21. The fact that charter schools are subject to various regulations certainly cannot satisfy this "test."[5] Opp. 48; *see Rendell-Baker*, 457 U.S. at 831–36 (contractor's compliance with "detailed regulations" does not create state action). Indeed, Plaintiffs specifically challenge St. Isidore's right to "teach a religious curriculum," Opp. 29, yet their list of charter-school regulations includes *none* that relate to curriculum design, Opp. 41–43, 48. Rather, charter schools craft their own curricula, which may "emphasize[] a specific learning philosophy or style or certain subject areas." 70 O.S. § 3-136(A)(3). The State no more designed St. Isidore's Catholic educational model than it designed the STEM, fine arts, classical, language immersion, or many other unique educational models of other charter schools. Nor will the State teach that curriculum. St. Isidore will hire its own teachers, who are not subject to the State's "Teacher and Leader Effectiveness Standards" nor required to have State teaching certificates. St. Isidore MTD 19. In short, the State is not "*responsible* for the specific conduct" about which Plaintiffs complain. *Brentwood Acad.*, 531 U.S. at 295 (emphasis in original); *see also Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 815 (9th Cir. 2010) (charter school not a state actor).[6]

Second, Plaintiffs point out that a private entity's performance of a duty that is *solely*

---

[5] At least one of the cited regulations does not even apply to charter schools. 70 O.S. § 1210.544(B)(1) permits the State to "assum[e] control of" underperforming district public schools. That provision says nothing about charter schools, which are generally "exempt from all statutes and rules relating to schools, boards of education, and school districts." 70 O.S. § 3-136(A)(1). While the State's identification of an underperforming charter school allows it to *rescind its contract*, 777 OAC § 10-3-3(f), Plaintiffs cite no law giving any equivalent "takeover" authority. And any suggestion of the State assuming control over a charter school conflicts with the extensive process otherwise established for terminating a charter school's contract and then closing the school down. 70 O.S. § 3-137; 777 OAC § 10-3-3(f); Am. Pet. Ex. P § 10.3 [PE614].

[6] Plaintiffs cite several cases they claim say otherwise, Opp. 43–44, but none change the analysis. Most do not analyze whether charter schools are government entities or operating them is state action. Plaintiffs cite *no* Tenth Circuit case that meaningfully engages with those questions. And their reliance on *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104 (4th Cir. 2022) (en banc), hardly demonstrates that their argument is settled law. *See, e.g.*, Brief for the States of Texas et al. as Amici Curiae in Support of Petitioner, *Charter Day Sch. v. Peltier*, No. 22-238 (U.S. Oct. 14, 2022) (10 states arguing that *Peltier* is wrong and their charter schools are not state actors).

governmental is sometimes deemed state action, *see, e.g.*, *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978) (running elections). They suggest that St. Isidore will take "state action" because the school will perform a "traditionally exclusive public function." Opp. 49. But the question is not whether a private actor supports "a proper public objective"; it is whether he does something "exclusively and traditionally public." *Brentwood*, 531 U.S. at 302–03. "[V]ery few [functions] have been exclusively reserved" to the government. *Flagg Bros.*, 436 U.S. at 158 (cleaned up). Certainly, "education is not and never has been" such a function. *Logiodice v. Trs. of Me. Cent. Inst.*, 296 F.3d 22, 26 (1st Cir. 2002); *Rendell-Baker*, 457 U.S. at 842; St. Isidore MTD 21.

Plaintiffs do not dispute this. Instead, they beg the question by narrowing the relevant function to the provision of a "free, *public* education." Opp. 49. As St. Isidore has explained, the U.S. Supreme Court recently rejected this very tactic. *See* St. Isidore MTD 21 n.4. In *Carson*, Maine sought to justify its exclusion of religious schools from a tuition-assistance program by characterizing the program's benefit as providing the equivalent of a *public* education for students who lacked access to district public schools. 596 U.S. at 782. The Court repudiated this effort, observing that education offered by the schools in *Carson*—like that in Oklahoma's charter schools—"need not even resemble that taught" in local public schools. *Id.* at 783. This Court must likewise reject Plaintiffs' attempt to "gerrymander[] a category of free, public education that it calls a traditional state function." *Peltier*, 37 F. 4th at 154 (Wilkinson, J., dissenting).

2. Religious charter schools do not violate the Establishment Clause.

Finally, Plaintiffs suggest that the federal Establishment Clause bars a school like St. Isidore, even if it is a private actor. Opp. 53–56. But Plaintiffs conspicuously declined to raise any Establishment Clause violation in their Petition or Amended Petition, and no supposed violation of that clause can sustain the claims they actually alleged. Their argument is meritless, regardless.

First, many of Plaintiffs' Establishment Clause arguments rest on the errant premise that St. Isidore *is* a state actor. Opp. 54 (state actors may not promote religion or combine governmental and religious functions). These fail for the reasons discussed above. *Supra* Part II.B.1.

Second, Plaintiffs contend that the Establishment Clause would prohibit the State from

"directly" funding "religious activities, including religious instruction" even in a private school. Opp. at 54. But the point is both wrong and irrelevant. It is wrong because the Court made clear in *Carson*, *Espinoza*, and *Trinity Lutheran* that "the Establishment Clause is not offended when religious [schools] benefit from neutral government programs." *Espinoza*, 140 S. Ct. at 2254. That analysis did not turn on the *method* of funding schools. Instead, the simple fact that the State *offered* funding to privately operated schools meant it could not exclude religious ones. *Id.* at 2261. In fact, in *Trinity Lutheran*, the Court rejected Missouri's asserted interest in refusing "direct[]" grants to religious schools. 582 U.S. at 463; *id.* at 474 (Sotomayor, J., dissenting) (arguing against allowing State to "directly fund religious exercise"). And the Court has since rejected Plaintiffs' suggestion that the answer would change if schools put such funding "to religious uses" rather than secular ones, Opp. 56. *See Carson*, 596 U.S. at 786–89 (state cannot "exclude religious persons from the enjoyment of public benefits on the basis of their anticipated religious use of the benefits").

And the point is irrelevant because the Establishment Clause unquestionably allows "neutral benefit program[s] in which public funds flow to religious [schools] through *the independent choices* of" families. *Carson*, 596 U.S. at 768 (emphasis added). Thus, states may fund programs that allow students to attend secular or religious schools of their choice. *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002). Oklahoma's charter-school program does exactly that. Schools of any kind may participate, and families may choose based on their children's needs. Just like the schools in *Zelman*, *Carson*, and *Espinoza*, St. Isidore will receive funds based on how many families independently choose it. Am. Pet. Ex. P. ¶ 7.7 [PE604–PE605]; 70 O.S. § 18.200.1.

III. PLAINTIFFS HAVE NO MERITORIOUS CLAIM THAT ST. ISIDORE HAS VIOLATED OR WILL VIOLATE ANY OTHER LAW.

Plaintiffs' allegations of technical deficiencies and hypothetical conduct fare no better.

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

A key fact obscured by Plaintiffs' arguments cannot be overlooked: St. Isidore has not yet educated a single student. Plaintiffs' claims alleging what the school *might* do once it opens

challenge mere hypothetical conduct and must be rejected as unripe. *See French Petrl. Corp. v. Okla. Corp. Com'n*, 1991 OK 1, ¶ 7, 805 P.2d 650, 652–53 (Okla. 1991).

Plaintiffs ask this Court to decide their hypothetical claims anyway, insisting that St. Isidore will do something wrong to somebody someday. Opp. 13–15. And they argue that this Court should order discovery to help them find something more concrete to challenge. Opp. 15. But discovery is meant to *substantiate* allegations of misconduct. It is not a fishing expedition to *search for* (nonexistent) violations to allege. This Court should not countenance these abusive tactics born of Plaintiffs' unjustified suspicion of the Catholic Church.

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

Plaintiffs are no more justified in challenging the sufficiency of St. Isidore's many assurances to comply with applicable law. Those claims ignore Plaintiffs' own contradictory exhibits, *compare* Opp. 20–22, 24–29 *with* St. Isidore MTD 23–28, and any ambiguity in the sufficiency of these promises must be resolved in deference to the Board, St. Isidore MTD 28–29.

1. Assurances to comply with the law (First and Third Claims).

Plaintiffs' First and Third Claims allege that St. Isidore failed adequately to promise that it will comply with particular laws as it operates the school. Both are patently untrue.

First, Plaintiffs do not dispute that St. Isidore has repeatedly promised to follow all relevant law. The First Claim contends that St. Isidore's application must "certify that [it] will comply with" various provisions of law. Opp. 20–21 (citing 70 O.S. §§ 3-135(A)(5), 3-136(A)(1); OAC § 777:10-3-3(c)(1)(F)). St. Isidore's application included notarized assurances stating exactly that. Am. Pet. Ex. A, App. § 12, at 93 [PE159]. And St. Isidore's contract reiterates that the school "agrees to comply with" and must operate "in accordance with" all "Applicable Law," which "means all federal and state statutes and rules and regulations application to virtual charter schools." Am. Pet. Ex. P. ¶¶ 2.1, 3.1, 8.1 [PE598–PE609]; *see also id.* ¶¶ 2.1, 3.1, 7.1, 8.1, 8.3, 8.6, 8.7, 8.8.5, 8.9, 8.10, 8.11, 8.12, 8.15 [PE598–PE613]. The Third Claim contends that St. Isidore must agree to "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). Again, the school

unquestionably has. St. Isidore promised to do so in the application process, Am. Pet. Ex. A., App. § 9, at 73 [PE133], and the contract states *verbatim* what Plaintiffs demand,[7] Am. Pet. P. ¶ 8.6 [PE610] (St. Isidore "shall comply with all federal and state laws relating to the education of children with disabilities in the same manner as an Oklahoma Public School district . . . .").

Plaintiffs contest none of this. Instead, they complain that St. Isidore has consistently noted that applicable law includes certain rights that pertain to religious organizations. Opp. 20–22, 28–29; *see* Am. Pet. Ex. A, App. § 12, at 93 [PE159] (guaranteeing legal compliance "to the extent required by law, including the First Amendment, religious exemptions, and the Religious Freedom Restoration Act"); *id.* App. § 9 at 73–74 [PE133–PE134] (similar for disability law). But, critically, Plaintiffs now *concede* that such reservations of rights are consistent with an obligation to follow the law. They admit that if St. Isidore is not a state actor, it "could be entitled to certain religious exemptions from otherwise applicable laws." Opp. 22.

That concession alone dooms their claims. Perhaps aware of this, Plaintiffs instead mischaracterize what St. Isidore actually said, alleging that the St. Isidore promised to follow the law only when it aligns with "St. Isidore's religious beliefs." Opp. 21. This is demonstrably false. St. Isidore has promised to follow the law consistent with whatever *legally defined rights* it holds, not its religious preferences. St. Isidore MTD 25 n.5. St. Isidore explicitly clarified this point in its revised charter application, and it then signed a contract that requires the same. *See* Am. Pet. Ex. A [PE50] ("[W]e write to clarify and reiterate what is stated in the application: we . . . will comply with all applicable laws, consistent with the rights guaranteed to religious institutions under those laws, the Constitution, or other relevant legal authorities. The application merely recognizes that

[7] In their Amended Petition, Plaintiffs abandoned their false allegations that St. Isidore will fail to serve students with "mental disabilities," offer required non-virtual disability services, or meet certain timelines. Plaintiffs now attempt to revive those claims in their opposition briefing, arguing that St. Isidore has preemptively refused to offer *non-virtual* services to students with disabilities. Opp. 28–29. Setting aside their failure to allege such a claim, Plaintiffs' contention fails for the same reasons discussed. St. Isidore has promised to do exactly what the regulation requires a "virtual" school to do. Am. Pet. Ex. A., App. § 9, at 73 [PE129, PE133]. And nowhere does St. Isidore say that it will not provide requisite "educational and related services," virtual or otherwise, should a student with a disability need them. OAC §§ 777:10-3-3(b)(3)(C).

religious schools are exempted from or entitled to accommodations under particular provisions of some laws."); Am. Pet. Ex. P. ¶ 2.1 [PE599] ("[C]ertain rights, exemptions or entitlements are applicable to [St. Isidore] as a religious organization under federal, state, or local law, rules, and regulations . . . . [C]ompliance with Applicable Law shall be understood to mean compliance in a manner nonetheless consistent with [such rights]."). At bottom, a promise to follow all law consistent with its legal rights is not *contrary* to the law; it is *part of* the law. St. Isidore has said repeatedly—in the application process, in its charter contract, and now several times in this litigation—that it understands it will be required to follow all applicable law consistent with its legal rights, not its religious preferences. Plaintiffs cannot manufacture a technical error through their own baseless assertion that St. Isidore should not be bound to those assurances.

2. St. Isidore's anti-discrimination policies (Second Claim).

The Second Claim fails for much the same reasons. Plaintiffs argue that St. Isidore's approval must be nullified because the school has signaled that it "will violate" various laws. Opp. 25. Plaintiffs speculate that St. Isidore "will discriminate in student admissions, student discipline, and employment" based on some legally "protected characteristics" that St. Isidore will supposedly fail to safeguard. Opp. 22. But Plaintiffs do not allege that St. Isidore has *actually* discriminated against any student or employee. In short, this claim is unripe.

The materials attached to the Petition also contradict the claim. St. Isidore's application made clear that "[a]ll students are welcome," including "those of different faiths or no faith," and that the school will not discriminate "on the basis of a protected class." Am. Pet. Ex. A., App. § 7, at 38, 43 [PE91, 96]. And in its contract, St. Isidore agreed to follow all applicable law, including in its employment policies and by "ensur[ing] that no student shall be denied admission to the Charter School on the basis of race, color, national origin, sex, sexual orientation, gender identity, gender expression, disability, age, proficiency in the English language, religious preference or lack thereof, income, aptitude, or academic ability." Am. Pet. Ex. P. ¶¶ 3.1, 8.8, 8.11 [PE599–PE612].

Perhaps recognizing that their own exhibits belie their claims, Plaintiffs now speculate that St. Isidore—despite its repeated promises—will not *actually* admit all students because the school

will require enrolled students to observe certain rules. Am. Pet. § 188; Opp. at 27. This argument again misses the mark. All schools have rules. And Oklahoma affords charter schools the freedom to shape their own, so that they might pursue "different and innovative teaching methods" to "[p]rovide additional academic choices for parents and students." 70 O.S. § 3-131; St. Isidore MTD 19. St. Isidore, like any of Oklahoma's many unique charter schools, will offer a new educational option to all students in the State. And, like any other charter school, some students will find its school design an appealing fit and some might not. But this does not mean that those students who choose to learn in a different environment have somehow been unlawfully *denied admission* to St. Isidore, which has repeatedly asserted its openness to all.

Plaintiffs' real retort is resorting to calumny against Catholics, lobbing a volley of unfounded accusations about discriminatory conduct that *Plaintiffs* assert "authoritative Catholic teaching" requires. Opp. 25–26. But Plaintiffs offer no *actual* reason to doubt that St. Isidore will fulfill its many promises to follow all law and serve all students. This Court must not credit their thinly veiled bigotry as a basis for Plaintiffs' petition.[8]

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

At bottom, Plaintiffs' regulatory claims suggest that St. Isidore must relinquish its constitutional rights to participate in the charter-school program. But any effort to force St. Isidore to waive those rights—*i.e.*, to comply with "all" law *except* any legal rights for religious schools—is unconstitutional. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013). A State cannot "condition the availability of benefits upon a recipient's willingness to surrender his religiously impelled." *See, e.g.*, *Trinity Lutheran*, 582 U.S. at 462 (cleaned up); *see Carson*, 142 S. Ct. at 1997; *Espinoza*, 140 S. Ct. at 2257.

Plaintiffs' counterarguments fail. First, Plaintiffs contend that their arguments raise no free exercise concern because the laws with which St. Isidore must comply are "religion-neutral." Opp.

[8] To the extent the Second Claim relies on constitutional restraints on *government* actors, such provisions do not apply to St. Isidore. St. Isidore MTD 16–21.

52. This is pure misdirection. Again, St. Isidore *has agreed* to comply with these laws. Plaintiffs, however, attempt to force an additional condition: that St. Isidore *also* abandon its legal rights as a religious organization. That additional requirement is not "neutral" to religion—it is intentionally hostile to it. Next, Plaintiffs argue that there is no First Amendment problem because St. Isidore can exercise its faith elsewhere. Opp. 53. The Supreme Court has rejected this very argument. Even if St. Isidore is "free to continue operating as" a religious organization in other ways, the State cannot use its faith to exclude it "from the benefits of a public program for which [it] is otherwise fully qualified." *Trinity Lutheran*, 482 U.S. at 462; *see Fulton*, 141 S. Ct. at 1878.

Finally, Plaintiffs do not identify any compelling interest that could justify excluding religious schools. "[B]roadly formulated" interests in inhibiting theoretical discrimination hardly satisfy strict scrutiny. *Fulton*, 141 S. Ct. at 1881. Again, the point of *Carson* and its predecessors is that the State may not directly condition participation in a benefit program upon the surrender of religious exercise. This Court must likewise reject Plaintiffs' invitation to do so indirectly.

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

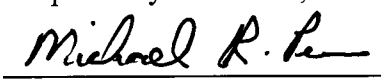
Finally, even if Plaintiffs could prevail on these claims, this Court must reject their request for a grossly disproportionate remedy. St. Isidore MTD 29–30. Plaintiffs do not dispute that courts must craft remedies "in a feasible and practical way" to ensure "fairness and precision." *Freeman v. Pitts*, 503 U.S. 467, 487 (1992). Plaintiffs seek to extinguish St. Isidore if they succeed on any of their allegations regarding its supposed conduct. That remedy is sweeping, impractical, and unjust. If this Court were to conclude that any of these claims require relief, the appropriate remedy would be to enjoin the harmful conduct itself, not to cease the school's operation altogether.

CONCLUSION

For these reasons, Plaintiffs' claims against St. Isidore are nonjusticiable, fail to state a claim, and are barred by the U.S. Constitution. The petition should be dismissed with prejudice.[9]

[9] To the extent Plaintiffs' passing reference to another round of amendments suffices as a motion for leave to amend, *see* Opp. at 60 n.3, the Court should deny Plaintiffs' request. *See Rawdon v. Starwood Capital Grp.*, 2019 OK CIV APP 70, 453 P.3d 516 (Okla. Civ. App. 2019).

Respectfully submitted,



Michael H. McGinley, *pro hac vice*
Steven A. Engel, *pro hac vice*
M. Scott Proctor, OBA No. 33590
DECHERT LLP
1900 K Street, NW
Washington, DC 20006
T: (202) 261-3308
michael.mcginley@dechert.com
steven.engel@dechert.com
scott.proctor@dechert.com

and

John A. Meiser, *pro hac vice*
NOTRE DAME LAW SCHOOL
RELIGIOUS LIBERY CLINIC
1338 Biolchini Hall of Law
Notre Dame, Indiana 46556
T: (574) 631-3880
jmeiser@nd.edu

Michael R. Perri, OBA No. 11954
Socorro Adams Dooley, OBA No. 32716
PERRI DUNN, PLLC
100 N. Broadway, Suite 3280
Oklahoma City, OK 73102
T: (405) 724-8543
mrperri@perridunn.com
sadooley@perridunn.com

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of May, 2024, I caused a true and correct copy of the above and forgoing Reply Brief in Support of Motion to Dismiss to be served by electronic mail pursuant to this Court's Stipulation Concerning Electronic Service entered on May 17, 2024 upon:

For plaintiffs:

Alex J. Luchenitser (luchenitser@au.org)

Daniel Mach (dmach@aclu.org)

Heather L. Weaver (hweaver@aclu.org)

Robert Kim (RKim@edlawcenter.org)

Jessica Levin (JLevin@edlawcenter.org)

Wendy Lecker (WLecker@edlawcenter.org)

Patrick Elliott (pelliott@ffrf.org)

Karen Heineman (kheineman@ffrf.org)

Benjamin H. Odom (odomb@odomsparks.com)

John H. Sparks (sparksj@odomsparks.com)

Michael W. Ridgeway (ridgewaym@odomsparks.com)

Lisa M. Millington (millingtonl@odomsparks.com)

Alyssa Kirkham (kirkhama@odomsparks.com)

Cody Serna (sernac@odomsparks.com)

J. Douglas Mann (douglassmann66@icloud.com)

For defendants Statewide Virtual Charter School Board and its members:

Phillip A. Sechler (psechler@adflegal.org)

Caleb Dalton (cdalton@adflegal.org)

Hailey Sexton (hsexton@adflegal.org)

Cheryl Plaxico (cplaxico@plaxico.law)

For defendants Oklahoma State Department of Education and State Superintendent of Public Instruction:

Erin Smith (erin.smith@sde.ok.gov)

Hiram Sasser (hsasser@firstliberty.org)

Anthony J. Ferate (AJFerate@spencerfane.com)

For defendant St. Isidore of Seville Catholic Virtual School:

Michael H. McGinley (michael.mcginley@dechert.com)

Steven A. Engel (steven.engel@dechert.com)

M. Scott Proctor (scott.proctor@dechert.com)

John Meiser (jmeiser@nd.edu)

Michael R. Perri (mrperri@perridunn.com)

Socorro Adams Dooley (sadooley@perridunn.com)

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

Oklahoma Office of the Oklahoma Attorney General
313 NE 21st Street
Oklahoma City, OK 73105

Michael R. Perri