

No. 24-394 Vide No. 24-396

IN THE
Supreme Court of the United States

OKLAHOMA STATEWIDE CHARTER SCHOOL BOARD, ET AL.,
Petitioners,

v.

GENTNER DRUMMOND, ATTORNEY GENERAL OF
OKLAHOMA, EX REL. OKLAHOMA,
Respondent.

ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL,
Petitioner,

v.

GENTNER DRUMMOND, ATTORNEY GENERAL OF
OKLAHOMA, EX REL. OKLAHOMA,
Respondent.

**On Writ of Certiorari to the
Supreme Court of Oklahoma**

**BRIEF OF *AMICI CURIAE* EDCHOICE,
AMERICANS FOR PROSPERITY FOUNDATION,
ATLANTIC LEGAL FOUNDATION,
AND YES. EVERY KID. FOUNDATION.
IN SUPPORT OF THE PETITIONERS**

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QUESTIONS PRESENTED

1. Whether the academic and pedagogical choices of a privately owned and run school constitute state action simply because it contracts with the state to offer a free educational option for interested students.
2. Whether a state violates the Free Exercise Clause by excluding privately run religious schools from the state's charter-school program solely because the schools are religious, or whether a state can justify such an exclusion by invoking anti-establishment interests that go further than the Establishment Clause requires.

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INTEREST OF AMICI CURIAE¹

EdChoice is a nonprofit, non-partisan organization organized under section 501(c)(3) of the Internal Revenue Code that serves as a national leader in education-choice research, fiscal analysis, policy development, training, outreach, and legal defense. The mission of EdChoice is to advance education freedom and choice for all as a pathway to successful lives and a stronger society. EdChoice supports policies that afford families financial access to educational opportunities that best fit the needs of their children—whether traditional public school, private school, charter school, home school or any other learning environment.

Americans for Prosperity Foundation (“AFPF”) is a 501(c)(3) nonprofit organization committed to educating and empowering Americans to address the most important issues facing our country, including civil liberties and constitutionally limited government. As part of this mission, it appears as amicus curiae before federal and state courts.

Established in 1977, the Atlantic Legal Foundation (ALF) is a national, nonprofit, nonpartisan, public interest law firm. ALF’s mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education,

¹ No party or its counsel authored any of this brief, and no person other than amici curiae, their members, or their counsel contributed monetarily to this brief.

including parental rights and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, ALF pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. On the crucial subject of parental school choice, ALF has continued to promote the effective education of the nation's young students on behalf of charter schools through ALF's *Leveling the Playing Field* series of state-specific guides for charter school leaders. See atlanticlegal.org.

yes. every kid. foundation. ("Yes Foundation") believes that each child is different and deserves access to programs, services, courses, and schools that are designed to meet their unique interests and aptitudes. The goal is not to standardize children: it is to allow every kid to discover, develop, and apply their talents to realize their full potential. Yes Foundation is devoted to unlocking the extraordinary potential of every kid. We promote education that empowers families, helps implement bottom-up solutions, and advances education freedoms.

As national organizations dedicated to ensuring families every available educational option for their children, amici are interested in the outcome of this case. Expansion of the state action doctrine could define private schools that participate in choice programs to be state actors, restricting student access to innovative schools, including religious schools.

SUMMARY OF THE ARGUMENT

The Court held in *Carson as next friend of O. C. v. Makin*, 596 U.S. 767 (2022), that the Free Exercise Clause prohibits discrimination in public benefits programs against religious schools providing religious education. But the Court's Establishment Clause precedents prohibit state entities from offering religious instruction. The line between the two turns on the operation of state action doctrine, which tells when a private entity must be treated as a state actor.

Here, no arm or agency of the State of Oklahoma (or one its local governments) seeks to provide religious instruction—or even to require others to do so. Rather, the theory embraced below by the Oklahoma Supreme Court is that granting a charter to the private, non-profit corporation St. Isidore of Seville Catholic Virtual School violates the Establishment Clause by alchemizing St. Isidore into a state actor engaged in the business of providing religious instruction. So, the critical question is whether private education providers become state actors in their instruction simply because they sign a contract with the state to provide education services in exchange for government grants.

The answer must be no, a charter does not convert a private entity into a state actor for all purposes, with the consequence that denying the charter to St. Isidore amounts to the same form of discrimination outlawed by the Free Exercise Clause per *Carson*. Because government neither creates Oklahoma charter schools nor controls their curriculum, such charter

schools do not satisfy the requirements for state action set forth in *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995). Government issuance of a charter—which is merely a written agreement—to a private entity does not create the entity or change its fundamental legal status. And because an Oklahoma charter school like St. Isidore retains autonomy over instruction (including religious instruction), it does not educate children as a state actor even if it carries out government admissions policy.

Furthermore, offering free education services to families on an all-comers basis is not a traditional and exclusive government function that justifies finding state action. The Court has previously held that education in gross is not an exclusive government function under state action doctrine. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982). Accordingly, assessment of whether a school's action is a state action must occur based on the particular action at issue.

Here, the critical question is not whether legally required admissions policies constitute state action when implemented by a charter school. (If they do, a person injured by those admissions policies might challenge them using the Bill of Rights.) The question, rather, is whether the legally protected instructional autonomy of Oklahoma charter schools constitutes state action—a question not answered by reference to admissions policies. And because the whole point of modern charter school programs is to foster a marketplace of state-supported schools that provide something *other* than state-mandated curriculum, it would make little sense for that instruction to be

deemed state action. Besides, free private schools do exist, and not even all government schools are open to all comers.

The Oklahoma Supreme Court's declaration that charter schools are state actors because they provide "public education" reintroduces Maine's failed argument in *Carson, supra*. The Court has already rejected a state's attempt to redefine private use of public benefits as the functional equivalent of state action; it should likewise reject the theory that open admissions makes charter education "public education."

Nor should the Court extend to charter schools the open-ended, impressionistic "entwinement" inquiry of *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 291 (2001). *Brentwood* undermines traditional as-applied state action tests and here allowed a state contract to convert a private entity into a state actor for all purposes. The Court should narrow *Brentwood* to its unique facts or at least conclude that *Brentwood* does not apply here.

Finally, expanding charter school pluralism to include religious curriculum would benefit students. Charter schools have achieved better outcomes for students with their existing flexibility in curriculum. Because Catholic options have succeeded in other school choice programs, including them in the pluralistic offerings of charter schools would likely advance the success of charter schools.

ARGUMENT

I. Issuing a Charter to St. Isidore Does Not Make it a State Actor

Three tests are potentially relevant to the state action inquiry. First, private actors are state actors if they are “Government-created and -controlled corporations.” *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995). Second, private actors can become state actors for some purposes “(i) when the private entity performs a traditional, exclusive public function, (ii) when the government compels the private entity to take a particular action, or (iii) when the government acts jointly with the private entity.” *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 809 (2019) (citations omitted). Third, the Court once found state action when a private entity was “entwined” with the state. *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 291 (2001). A state charter would not qualify St. Isidore as a state actor under any of these tests.

A. St. Isidore was not created by, nor is it controlled by, the state

Without analysis, the Oklahoma Supreme Court simply declared that a charter school is a “state-created entity.” Pet.App.21a.² This assumption is both factually inaccurate and legally mistaken. The Oklahoma legislature’s mere fiat that charter schools are “public” schools is not determinative of the state

² All appendix citations are to the Petitioner’s Appendix in No. 24-394.

action inquiry, which turns on the substance of the entity’s activities. Neither a statutory label nor a contract with the government—even one that denominates the school “public”—converts a private entity into a state actor.

1. St. Isidore is a private corporation

In *Lebron*, 513 U.S. at 394–99, the Court looked past statutory disclaimers of agency status and deemed Amtrak a state actor based on its legislative creation and executive branch control. Congress established Amtrak as a for-profit company incorporated under the District of Columbia Business Corporation Act. *See id.* at 384–85. The company had a nine-member board of directors, with the President of the United States appointing six members. *See id.* at 385. Holders of Amtrak’s preferred stock, a group that included only the United States at the time of the case, appointed two directors. *See id.* (The company president, chosen by the eight other directors, was the ninth. *See id.*) Such corporate structure, however, did not make Amtrak a private entity for advertising speech purposes; the Court concluded that the combination of congressional creation and presidential control (via the board) meant Amtrak must obey the First Amendment. *See id.* at 394–99.

In contrast, the State of Oklahoma did not create St. Isidore—by issuing it a charter or otherwise. Two private religious entities, the Archdiocese of Oklahoma City and the Diocese of Tulsa, formed the non-for-profit corporation St. Isidore of Seville Virtual Charter School, Inc. Pet.App.217a, 225a. The

corporation exists regardless of whether it obtains a charter, which merely opens a funding stream to finance the school.

Nor does St. Isidore carry the features of traditional public schools, which are typically organized as corporations for public purposes rather than as private non-profits. *See* Appendix. States use different names—variations on “body corporate and politic,” “local education agency,” “quasi-municipal-corporation,” etc.—but all are easily recognizable as government entities. *Id.* All are governed by boards that are either publicly elected or appointed by an elected official. *Id.* And nearly all possess some core government power of taxation. *Id.* In keeping with most states, Oklahoma’s traditional public schools are organized as bodies corporate and politic with at least some power to impose taxes (via the county excise board). Okla. Stat. tit. 70, § 5-155. St. Isidore is not.

A private entity cannot create a traditional public school district in Oklahoma the way it can create a charter school like St. Isidore. Naturally, since all areas of the state currently fall within a public school district, any new district may be created only by way of a formal and cumbersome consolidation or annexation process. *See* Okla. Stat. tit. 70, §§ 7-101–7-206. In a consolidation, either the boards of the affected districts or a majority of electors of each affected existing district must petition the State Board of Education. *See id.* § 7-105. Then, residents within the proposed district boundaries must vote to approve it. *See id.* With annexation, the boards of the affected districts may call for an election, or a

majority of electors in the affected areas may petition the State Superintendent for election. *See id.* § 7-101. The State Board of Education may also order mandatory annexation or consolidation. *See id.* § 7-101.1. Even after a successful annexation vote, a petition signed by 25% of eligible voters triggers judicial remonstrance. *See id.* § 7-101(c)(4). No such government, electoral, or citizen participation occurs in the creation of a charter school.

As these features of the Oklahoma government school system demonstrate, charter schools are not state schools in any sense material to the First Amendment. A state cannot merely deem an entity to be part of the state (or not) and have that label control. *See Lebron*, 513 U.S. at 392–93. What matters instead is whether the state creates or exerts meaningful control over the school.

2. A charter does not grant the state control of St. Isidore

Pivoting to a theory of state control, the Oklahoma Supreme Court equated contractual oversight with control over the entity performing the service. Pet.App.21a. But under that theory, *every* government contractor is a state actor when acting under a contract—an outcome squarely at odds with a long line of precedent holding that a mere contract or license from the government does not create a state actor. *Manhattan Cmty. Access Corp.*, 587 U.S. at 814 (collecting cites).

The State of Oklahoma does not control St. Isidore's instruction by virtue of its charter. Under Oklahoma law, the "charter" issued by the state to a school does not do the work needed to convert private entities into state actors. The Oklahoma Constitution requires the state to grant charters to *all* corporations in Oklahoma as their formation document. Okla. Const. art. 9, § 1. Thus, the mere receipt of a state charter cannot convert a corporation into a state actor. The terms of a particular charter matter. Under the modern concept of a charter school, the fundamental idea is that a private entity executes a written contract with a chartering entity (often a government entity, but not always) to provide private instruction financed by public dollars.

Some history of charter schools may help illuminate the point. Use of the word "charter" for a school originated with a paper by Professor Ray Budde at the University of Massachusetts in 1974. *See* Ted Kolderie, Ray Budde and the origins of the 'Charter Concept,' education evolving, June 2005.³ Although his paper gained little traction then, he republished it in early 1988 and found greater popularity. *See id.*

Drawing on the historical use of charters more broadly, Budde explained eight features of educational charters. *See id.* at 49–52. First, "there is a *grantor*—a person or group in authority." *Id.* at 49. Second, "the charter was granted to the *grantee*—*someone with a vision or a plan.*" *Id.* Third, "[t]he

³ https://www.educationevolving.org/files/Ray_Budde.pdf

charter usually called for *exploration into unknown territory and involved a degree of risk to the persons undertaking the exploration.*” *Id.* Fourth, “[a] charter implied both *the idea of a franchise and the idea of competition.*” *Id.* Fifth, “[t]he grantor of the charter *provided the supplies and resources for the enterprise.*” *Id.* at 51. Sixth, “[t]he charter contained within it *specific directions for the grantee and a definite length of time for him to complete the activity.*” *Id.* Seventh, “[t]he charter spelled out in detail *the pay or rewards for the explorer.*” *Id.* Eighth, “[t]he charter provided a means for the explorer *to be accountable to the grantor for results in a very specific way.*” *Id.*

In more concrete terms, Professor Budde proposed that groups of teachers could receive educational charters so that they, not public school district management, would control decisions over curriculum and instruction. *See id.* at 8, 55. His proposal thus contemplates substantial autonomy for charter recipients over instructional content, both through his emphasis on the enterprise’s vision, plan, risk and competition, and through his model for teachers to run schools independent of public school district control.

Minnesota enacted the first charter school law on Budde’s model, following ideas laid out in a report by the Citizens League. *See Eugene Piccolo, Celebrating Chartering @ 30: Minnesota’s Story, MN Ass’n Charter Schs. 2024, at 1.*⁴ That report laid out a plan

⁴ https://mncharterschools.org/_uls/resources/Celebrating_Chartering_for_30_Years_-_Minnesotas_Story.pdf

for charter schools where “[t]he group receiving the charter would control the operation of the chartered public school” and “would organize themselves in a manner consistent with state law (as nonprofits, cooperatives, or for-profits).” *See* Chartered Schools = Choices for Educators + Quality for All Students, Citizens League, Nov. 17, 1988, at 24.⁵ The report states that a “chartered school” is “granted a ‘charter’ by either a school district to be different in the way it delivers education, and within broad guidelines, to be autonomous.” *Id.* at i. Here again, instructional autonomy was a key component of the charter school model.

From this history, one must infer that the central value of charter schools is to offer public school admissions paired with *alternative* curriculum and instruction. *See, e.g.,* Tong Tong, et al., Charter Schools: An Alternative Option in American Schooling, 3 Encyclopedia 362, 362 (2023).⁶ They are defined by “greater autonomy than traditional public schools over operations, curriculum, and instruction.” *Id.* In short, the whole point of charter schools is *not* to deliver government-generated instruction.

In line with this history and understanding of charter schools, the Oklahoma Charter Schools Act retains state control over finances but grants autonomy over curriculum and instruction. Okla. Stat. tit. 70, § 3-136(A)(1)–(3). They “may offer a

⁵ <https://citizensleague.org/wp-content/uploads/2017/07/PolicyReportEducationNov-1988.pdf>

⁶ https://www.researchgate.net/publication/369355858_Charter_Schools_An_Alternative_Option_in_American_Schooling

curriculum which emphasizes a specific learning philosophy or style” so long as the “programs, admission policies, employment practices, and all other operations” are nonsectarian. *Id.* While the state may control some policies (like the admissions policy) through regulation, that regulation does not grant total control over other aspects of the school—such as instruction. The only restrictions on curriculum and instruction are that it cannot be religious and that it cannot duplicate what is provided at the Oklahoma School for the Blind or Oklahoma School for the Deaf. *Id.* § 3-136(A)(3). Otherwise, the instruction only needs to align with Oklahoma academic standards. Okla. Admin. Code 777:10-3-3(b)(5)(G). Charter school students must learn core subjects like reading or math to succeed on assessments, but the instruction used to teach those subjects is left to the school’s discretion. Similar minimum instruction requirements are not unusual for private schools. *See* Ga. Code § 20-2-690(b)(4); Mont. Code § 20-5-109(4). Likewise, some states require state assessments for private schools in choice programs just as they do for charter schools. *See, e.g.*, Tenn. Code § 49-6-2606(a); Wis. Stat. § 118.30(1t).

The result is that Oklahoma charter schools offer a wide variety of instruction. For example, Harding Fine Arts Academy offers an arts-integrated curriculum with instruction from some of the finest artists and musicians in Oklahoma City. *See* About Us, Harding Fine Arts Academy.⁷ Another school, Le Monde International School, offers French and

⁷ <https://hardingfinearts.org/about-us/>

Spanish immersion curriculum that allows students to select either language and improve their academic excellence through bilingualism and the integration of cultural awareness in addition to rigorous instruction. *See* About Us, Le Monde International School.⁸ These schools integrate their respective arts and language training into core academic subjects, just as St. Isidore would be entitled to do with its religious lessons.

3. St. Isidore is at most a government licensee, and state oversight of its license does not make it a state actor

Instead of a state-created and -controlled entity like Amtrak in *Lebron*, charter schools like St. Isidore are more analogous to a licensed entity. While government oversight of a licensee can be extensive, such oversight is not the sort of control that converts a licensee into a state actor. The Court in *Columbia Broad. Sys., Inc. v. Democratic Nat. Comm.*, 412 U.S. 94, 97–100, 118–121 (1973), for example, rejected the argument that the FCC became a “partner” or “engaged in a ‘symbiotic relationship’” with a radio station whose advertising policy it was asked to review.

The Oklahoma Statewide Charter School Board’s review of a proposed charter is not materially different. No one disputes that the Board is a state actor when approving a charter for St. Isidore, just as no one disputed that the FCC was a state actor when

⁸ https://www.lemondenorman.org/apps/pages/index.jsp?uREC_ID=3785579&type=d&pREC_ID=2449227

reviewing complaints about a radio licensee. So, just as radio licenses do not convert radio stations into state actors, written charters do not convert schools into state actors. *See also, e.g., Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 817 (9th Cir. 2010) (“the authority to approve and review the school’s charter” does not “convert its action into that of the State”) (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999)).

Oklahoma charter schools in no way fit the model of a “government created or controlled enterprise” constituting a state actor, especially in the instruction they offer. They are at most akin to government licensees—a status the Court’s precedents deem insufficient for state action.

B. Oklahoma charter schools do not perform exclusive public functions

Even if the Court looks beyond the “state creation and control” test set forth in *Lebron* and considers the exclusive government function inquiry entertained by the decision below, Oklahoma charter schools are not state actors. The Oklahoma Supreme Court said they were because charters offer a traditional and exclusive public function, *i.e.*, “public education.” But that attempt to define away the state action inquiry focuses on charter schools’ open admission policies rather than their more relevant activity—instruction. This is a substantive inquiry that cannot be resolved by inserting the word “public” before “education” and “public” before “function” to create a definitional fallacy based on a word “public” with no fixed legal

import. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974) (“In several of the decisions of this court wherein the expressions ‘affected with a public interest,’ and ‘clothed with a public use,’ have been brought forward as the criteria . . . it has been admitted that they are not susceptible of definition and form an unsatisfactory test” (citation omitted)).

Education writ large is not a traditional and exclusive public function, per *Rendell-Baker v. Kohn*, 457 U.S. 830, 832–33, 842 (1982), where the Court held that a private school funded almost entirely by government grants was not a state actor vis-à-vis teachers and counselors. The Court observed “[t]hat a private entity performs a function which serves the public does not make its acts state action.” *Id.* Even if “the State intends to provide services for such students at public expense,” that intent “in no way makes these services the exclusive province of the State.” *Id.* See also *Caviness*, 590 F.3d at 814–15 (rejecting the argument that “public educational services” are distinct from “educational services”); *Logiodice v. Trustees of Maine Cent. Inst.*, 296 F.3d 22, 27 (1st Cir. 2002) (concluding that publicly funded education of last resort is not exclusively a state function in view of town-tuitioning programs that contract with private schools); *Robert S. v. Stetson Sch., Inc.*, 256 F.3d 159, 164–65 (3d Cir. 2001) (concluding that a publicly funded school contracting with a state agency to serve sex offenders was not performing an exclusively public function).

The Oklahoma Supreme Court avoided that precedent by declaring the function at issue to be not merely “education” but “public education.” Yet, it said the defining characteristic of “public education” is not the content of instruction, but student admissions policy, *i.e.*, “free, universal” education. Pet.App.22a–23a (citing *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 116 (4th Cir. 2022) (en banc)). State action doctrine, however, focuses on the action at issue, not all potential actions of the actor in question. *Jackson*, 419 U.S. at 352–53. Here, the relevant action is *instruction*—specifically religious instruction, which is decidedly not an exclusive state activity (even if it once was a traditional one).

Even on its own terms, the reframed definition of services as “free and universal education” fails. Tuition-free private schools exist. *See, e.g.*, Serviam Girls Academy (tuition-free private school in Wilmington Supreme, DE)⁹; De Marillac Academy (tuition-free private Catholic school in San Francisco, CA).¹⁰ And no government school is open to the entire universe of students. Such schools have geographical boundaries, after all. Even with the advent of liberal inter-district transfer policies, government schools must exclude some transfer students once they reach capacity. Those real-world circumstances defeat the Oklahoma Supreme Court’s theory of what critical features constitute traditional and exclusive government activity. As recounted above, genuine public schools have a special government corporate

⁹ <https://serviamgirlsacademy.org/>

¹⁰ <https://www.demarillac.org/>

status, some measure of taxation authority, and public election accountability. *See supra* Part I.A.1.

Regardless, the “free and universal” nature of charter schools could at most justify treating admissions activities—but not instruction—as state action. It cannot, under *Jackson*, 419 U.S. at 352–53, justify treating charters as state actors in gross.

It bears observing that the Oklahoma Supreme Court’s “public education” theory echoes Maine’s failed argument in *Carson* that its “equivalent” of public education in rural areas was private education that bans religion. *Carson as next friend of O. C. v. Makin*, 596 U.S. 767, 784 (2022). The Court rejected Maine’s attempt to reframe the activity at stake by distinguishing between instruction purchased by the state (which must respect contractors’ free exercise rights) and instruction provided by the state in government-operated schools (which must respect the Establishment Clause). *See id.* at 785.

On this score, the decision below cannot be squared with *Carson*. In the Oklahoma Supreme Court’s view, Maine could have enforced a ban on religious instruction by requiring that all schools accepting scholarships have an admissions policy of accepting any scholarship student. The admissions policy would make the curriculum “public education” without further analysis, requiring a ban on religion. Under that view, Maine’s error was not regulating enough to avoid the Free Exercise Clause. To say the least, that is an improbable reading of *Carson*.

In sum, the Oklahoma Supreme Court’s twist on state action doctrine erred by focusing on the wrong action. Courts cannot look to admissions policies to decide whether instruction constitutes state action. The Court should not countenance an attempt to evade *Carson* by manipulating state action doctrine in this manner.

C. The Court should limit *Brentwood*’s “entwinement” test for state action doctrine

The Oklahoma Supreme Court also held that charter schools are state actors by expanding the Court’s *Brentwood* entwinement test—a novel and alarming outcome for *any* private entity working with the government. The Court should cabin *Brentwood* to stop overreaching use of its open-ended, malleable standard.

Brentwood created the entwinement test to address the unusual phenomenon whereby a private, non-profit association controlled by traditional public schools governed nearly all high school athletics in the State of Tennessee. *Brentwood*, 531 U.S. at 291. Traditional public schools composed 84% of the Tennessee Secondary School Athletics Association’s membership, public school employees operated the association, and half the meetings took place during school hours. *See id.* at 298–99. When the association decided the athletic discipline at issue, “*all* the voting members of the board of control and legislative council were public school administrators.” *Id.* at 293 (emphasis added). Thus, although the association was

technically a private entity, its operation by school employees and often during school hours convinced the Court that it had a “pervasive entwinement to the point of largely overlapping identity” with the state. *Id.* at 303.

This “entwinement” test was both novel and ill-defined. As the four dissenting justices observed, the Court had “never found state action based upon mere ‘entwinement’” until that case. *Id.* at 305 (Thomas, J., joined by Rehnquist, C.J., Scalia, J., and Kennedy, J., dissenting). The Court did not apply the traditional tests for state action, *see id.* at 303 (majority opinion), nor would those tests have yielded a finding of state action, *see id.* at 308–311 (dissenting opinion). Instead, the Court applied “normative judgment” using “criteria lack[ing] rigid simplicity.” *Id.* at 295. The dissenting justices predicted that the “fact-specific analysis” might “have little bearing beyond this case.” *Id.* at 314 (dissenting opinion).

The decision below demonstrates how *Brentwood* can be misused if not cabined to its facts. Pet.App.20a–21a. The Oklahoma Supreme Court drew no parallels to the facts in *Brentwood*; instead, it performed a general search for government involvement, as if “entwinement” is a roving, “know it when we see it” standard. *See id.* The result recalls the discarded “excessive entanglement” test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which created an “insoluble paradox” dissuading states from *any* regulation that could affect sectarian institutions participating in government programs lest the mere act of regulation create an Establishment Clause

violation. *Wallace v. Jaffree*, 472 U.S. 38, 109–10 (1985) (Rehnquist, J., dissenting) (citations omitted).

Because the Court has not applied the entwinement test before or since *Brentwood*, it should expressly limit *Brentwood* to the context of high school athletic associations run entirely by public schools. The Court’s most recent state action decision, *Manhattan Community Access Corporation*, ignored *Brentwood* except for one general proposition. 587 U.S. at 808. And more generally, when a private entity is not (1) performing a traditional, exclusive public function, (2) acting under compulsion from the government, or (3) acting jointly with the government, it is unlikely otherwise to injure anyone in a way that demands accountability under the Bill of Rights.

In all events, the Court should not apply *Brentwood* here. *Columbia Broadcasting* forecloses any argument that the Statewide Charter School Board is part of St. Isidore’s religious instruction, and no evidence suggests some other hallmark of state action by St. Isidore.

D. States can create systems of charter schools that are state actors, but Oklahoma has not done so

As should be evident from reviewing state action doctrine and the nature of a charter above, states could create charter schools that are state actors. In Oklahoma, a “charter school” denotes a written agreement between the state and a private actor free

from government control over instruction. But other models are available, and the “charter school” label does not always have to mean the same thing.

A state could, for example, create stand-alone charter schools via legislation and subject them to the control of elected government officials, as happened in *Lebron*. See 513 U.S. at 384–85. Or, a state could have a system for creating charters by citizen petition and public election, with the resulting school governed by an elected board, akin to Oklahoma’s school consolidation system. See *supra* Part I.A.1. Or, a government charter sponsor could require that its officials control the board governing the school.

The Oklahoma Supreme Court’s solution of following the malleable *Brentwood* test undermines clarity for private entities regarding the terms of their contracts with the government. By applying the rules from *Lebron* and *Manhattan Community Access Corporation* and disavowing *Brentwood*, the Court would leave a path for states that so desire to design a charter system where the schools are state actors. Such a result would preserve the ability of states to adjust what constitutes a charter school while also retaining clarity for private entities on the terms of their arrangements with the government.

II. Students Benefit from Education Pluralism Provided by a Market of Private Providers, Including Religious Schools

Charter schools perform better than traditional public schools precisely because they are freed from the strict curriculum restrictions that apply to traditional public schools. Their pluralistic approach to curriculum has led to significant success as an education model. Catholic schools have also been valuable in promoting education in other school choice programs, and their participation in charter schools would contribute to the success of the pluralistic charter model.

1. Charter schools are not new in American K-12 education. The first charter school in America opened its doors in 1992. Claudio Sanchez, *From A Single Charter School A Movement Grows*, Nat'l Pub. Radio, Aug. 31, 2012.¹¹ And in thirty-plus years since, forty-six states and the District of Columbia have adopted charter school laws, 7,998 charter schools have opened, and in the 2022–2023 school year (the most recent year with available data) charter schools educated over 3.7 million American students. U.S. Dep't of Educ., Nat'l Ctr. for Educ. Stats., Digest of Education Statistics, Table 216.10: Number of public elementary and secondary schools, by school level, type, and charter, magnet, and virtual status: School

¹¹ <https://www.npr.org/2012/09/02/160409742/from-a-single-charter-school-a-movement-grows>

years 2012-13 through 2022-23;¹² *Id.* Table 216.20: Enrollment of public elementary and secondary schools, by school level, type, and charter, magnet, and virtual status: School years 2012-13 through 2022-23.¹³ This long history has provided much data on the innovation and success of charter schools.

Many researchers have analyzed academic performance and other key indicators for students attending charter schools. Compared with their non-charter school peers, students attending charter schools have seen increases in learning gains, higher standardized test scores, better high school graduation rates, higher college enrollment and persistence rates, and higher earnings. In a recent 2023 study, researchers at the Center for Research on Education Outcomes (“CREDO”) found that despite “flat performance” for the nation generally, charter school students saw “large and positive” learning gains. Margaret E. Raymond, Ph.D., et al., *As a Matter of Fact: The National Charter School Study III 2023*, Center for Research on Education Outcomes, Stanford University, (“2023 CREDO Study”) at 149 (June 16, 2023).¹⁴

2. The data supporting comparative charter school success arises from many facets of education research. For example, data show the longer a student

¹² https://nces.ed.gov/programs/digest/d23/tables/dt23_216.10.asp

¹³ https://nces.ed.gov/programs/digest/d23/tables/dt23_216.20.asp

¹⁴ <https://ncss3.stanford.edu/wp-content/uploads/2023/06/Credo-NCSS3-Report.pdf>

attends a charter school the greater the student's academic growth compared with traditional public-school peers. Specifically, students attending urban charter schools "had an additional 29 days of growth per year in reading and 28 additional days in math." *Id.* at 60.

Charter schools also have been particularly successful in addressing and closing achievement gaps for their students. *Id.* at 69. For example, in reading, seven to nineteen percent of schools both exceeded the state average achievement and saw growth among disadvantaged students equal to or greater than their non-disadvantaged peers in the same school. *Id.* (showing the following percentage of schools meeting both criteria for students by subpopulation groups: 7.3% Black students; 12.6% Hispanic students; 19.3% students in poverty; 14.1% English Language Learners).

Another national study found elementary and middle school students' reading test scores improved by three percentage points and math scores improved by six percentage points in districts with at least ten percent enrollment in charter schools. Douglas N. Harris & Feng Chen, *The Bigger Picture of Charter School Results*, Educ. Next (last updated April 18, 2022).¹⁵ High school graduation rates also increased by 2.8 percent in these districts. *Id.*

¹⁵ <https://www.educationnext.org/bigger-picture-charter-school-results-national-analysis-system-level-effects-test-scores-graduation-rates/>

The benefits of attending a charter school follow students to postsecondary education. Charter school students are more likely than their non-charter school peers to enroll and remain in college. Tim Sass, *Charter High Schools' Effects on Long-Term Attainment and Earnings*, 35 J. Pol'y Analysis and Mgmt. 683, 692–93 (2016).¹⁶

The gains that result from charter school attendance go beyond students' academic achievement. Former charter school students experience higher earnings as early as their mid-20s. *Id.* at 694–95. And in multiple separate studies, researchers concluded that students participating in school choice programs showed reductions in criminal activity. See Will Dobbie & Roland G Fryer Jr., *The Medium-Term Impacts of High-Achieving Charter Schools*, 123 J. Pol. Econ. 985, 1012 (2015) (finding males who attended charter school were 4.4 percentage points less likely to be incarcerated);¹⁷ Andrew McEachin, et al., *Social returns to private choice? Effects of charter schools on behavioral outcomes, arrests, and civic participation*, 76 Econ. Educ. Rev., Article No. 101983, at 9–10 (2020) (finding students who attended secondary charter schools were less likely to be chronically absent, suspended, be convicted of a crime as an adult);¹⁸ see also Benjamin Scafidi, Ph.D., & Jonathan Butcher, *The Fiscal Effects of Expanding Mississippi's*

¹⁶ <https://onlinelibrary.wiley.com/doi/10.1002/pam.21913>

¹⁷ <https://www.journals.uchicago.edu/doi/abs/10.1086/682718>

¹⁸ <https://www.sciencedirect.com/science/article/abs/pii/S0272775719303668>

Education Savings Accounts, Working Paper No. 15, EdChoice, at 21 (Dec. 2023).¹⁹

3. These positive academic results occurred in states where charter schools can innovate in curriculum without being confined to state requirements affecting traditional public schools. For example, Idaho charter schools experienced strong academic growth in reading compared to traditional public schools. 2023 CREDO Study, *supra*, at 49. Based on this success, Idaho has continued advancing laws that make charter schools easier to operate. See *Idaho Sets a Strong Example by Enhancing Charter Schools*, Mtn. States Pol’y Ctr (Mar. 2, 2024).²⁰ Like Idaho, Missouri also had positive academic outcomes with charter schools, as it experienced overwhelmingly strong results in both reading and math in its charter schools compared to its traditional public schools. 2023 CREDO Study, *supra*, at 49–50.

4. The success of private Catholic schools suggests that Catholic curriculum would continue advancing the success of charter schools. A charter school system presupposes meaningful choices, *i.e.*, choices among providers of educational content not available in traditional public schools.

Catholic school participation has made a critical difference in the success of other educational choice programs. For starters, Catholic schools have for

¹⁹ https://www.edchoice.org/wp-content/uploads/2023/12/ESA-Fiscal-Impact-12_19_23.pdf

²⁰ <https://www.mountainstatespolicy.org/idaho-sets-a-strong-example-by-enhancing-charter-schools>

decades pursued a social-justice mission to educate disadvantaged urban students, regardless of whether they are Catholic. See Julie Trivitt & Patrick Wolf, *School Choice and the Branding of Catholic Schools*, 6 Educ. Fin. & Pol’y 202, 207 (2011). As one study concluded, “[t]here is little doubt that [Catholic schools] are a pivotal element of the supply side of voucher-fueled education markets.” *Id.* Indeed, that same study (which surveyed participants in a Washington, D.C. pilot voucher program) found that Catholic schools offer so many desirable characteristics—including academic rigor, discipline, and non-proselytizing religious instruction—that “Catholic schools . . . draw large numbers of voucher students from non-Catholic families.” *Id.* at 231.

Catholic schools also provide a critical education option for all parents because they inculcate political tolerance and civic engagement. A recent statistical meta-analysis examining the association between private schools and four civic outcomes (political tolerance, political participation, civic knowledge and skills, and voluntarism and social capital) showed that private schools boost civic outcomes for students over comparably situated public school students. See M. Danish Shakeel, Patrick J. Wolf, *et al.*, *The Public Purposes of Private Education: A Civic Outcomes Meta-Analysis*, 36 Ed. Psych. Rev. 40 at 19–23 (2024).

Critically, religious private schools were particularly more likely to be associated with better civic outcomes. See *id.* at 23. And some studies included in the meta-analysis even showed a “Catholic school civic advantage.” *Id.* at 33 (citing

James S. Coleman & Thomas Hoffer, *Public and Private High Schools: The Impact of Communities* (1987); Stephen Macedo, *Diversity and Distrust: Civic Education in a Multicultural Democracy* (2000); and Joseph Prud'homme, *The Potential of Catholic Schools: Public Virtues Through Private Voucher*, 25 *J. Cath. Educ.* 109 (2022)).

In addition to positive civic outcomes, Catholic school students outperform their public-school peers in academics and higher education attainment. One recent study found that Catholic school K-8 students scored higher in both math and reading, across grade levels, than public school students. Julia W. Dallavis, Megan Kuhfeld, *et al.*, *Achievement Growth in K-8 Catholic Schools Using NWEA Data*, 24 *J. Cath. Educ.* 1, 13 (2021).

Other studies have shown that students who attended Catholic high schools were more likely to graduate, attend college and graduate from college than students who attended public high schools. David J. Fleming, Stephane Lavertu, *et al.*, *High School Options and Post-Secondary Student Success: The Catholic School Advantage*, 21 *J. Cath. Educ.* 1, 6 (2018) (citing, *e.g.*, Joseph G. Altonji *et al.*, *Selection on observed and unobserved variables: Assessing the effectiveness of Catholic schools*, 113 *J. Pol. Econ.* 151 (2005); William N. Evans & Robert M. Schwab, *Finishing high school and starting college: Do Catholic schools make a difference?*, 110 *Q. J. Econ.* 941 (1995); Derek Neal, *The effects of Catholic secondary schooling on educational achievement*, 15 *J. Lab. Econ.* 98 (1997); Anh Ngoc Nguyen *et al.*, *The*

estimated effect of Catholic schooling on educational outcomes using propensity score matching, 58 Bull. Econ. Rsch. 285 (2006)). In fact, students who had attended Catholic high schools had the highest college GPAs, total college graduation rate, and four-year college graduation rate compared to students who attended *all* other high school types. *Id.* at 10. The benefits of attending Catholic schools were particularly significant for students from “minority or low-income families, students from urban areas, and students with low ACT scores.” *Id.* at 20.

Thus, meaningful education pluralism—which includes traditional Catholic providers—improves student test scores, attainment, and socialization alike. Such concrete results indicates that building on the success of curriculum innovation in charter schools by including Catholic providers will continue advancing the education achievements of charter school students.

CONCLUSION

The Court should reverse the judgment of the Oklahoma Supreme Court.

Respectfully submitted,

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APPENDIX

Core Features of Public-School Districts				
	Type	Local Board Selection	Tax Power?	Citations
AL	City, County Local Board of Education	Elected	Yes	AL Code 16-1-41.1; 16-11-3; 16-13 et seq.
AK	City And Borough School Districts; Regional Education Attendance Areas	Elected	No	AK Stat. 14.12.010 14.12.030; 14.12.070; 14.17.410; 14.33.120
AZ	County Local Education Agency	Elected	No	AZ Rev. Stat. 15-301; 15-302; 15-421; 15-424; 15-992
AR	Body Corporate	Elected	Yes	AR Const. art 14 § 3; Ark. Code 6-13-102; 6-13-634
CA	Quasi-municipal corporation	Elected	Yes	CA Educ. Code 35012; 35160–35162; Cal. Rev. & Tax. Code 95; California, Tchrs. Assn. v. Hayes, 7 Cal. Rptr. 2d. 699 (Cal. Ct. Appl., 3 rd Dist., 1992)

Core Features of Public-School Districts				
	Type	Local Board Selection	Tax Power?	Citations
CO	Body Corporate	Elected	Yes	CO Const. art. IX, 15; C.R.S. 22-32-101; 22-54-106
CT	Body Corporate	Elected	Yes	CT Gen. Stat. 9-203; 10-241
DE	Local Education Agency	Elected	Yes	DE Code tit. 14:402; 1051; 1052
DC	Cabinet-Level Agency Within DC Government	Elected	No	DC Code 38-171; 38-2651
FL	Body Corporate	Elected	Yes	FL Const. art. IX, 4; FL Stat. 1001.34
GA	County; Entities created by special school law	Elected	Yes	GA Code 20-2-50; 20-2-51; 20-2-370; 48-5-405
HI	State Board/ State Department of Education	Appointed by Governor	No	HI Rev. Stat. 4-1; 302A-121; 302A-125; 302A-1110; 302A-1128
ID	Body Corporate and Politic	Elected	Yes	ID Code 33-301; 33-501; 33-802
IL	Body Politic and Corporate	Elected	Yes	105 IL Comp. Stat. 5/10-1; 5-10/2; 5/10-22.22c
IN	Community School Corporation	Elected	Yes	IN Code 20-26-2-4; 20-23-4-27; 20-46-1

Core Features of Public-School Districts				
	Type	Local Board Selection	Tax Power?	Citations
IA	Body Politic	Elected	Yes	IA Code 274.1; 277.23; 298.4
KS	Corporation for Public Purposes	Elected	Yes	KS Stat. 72-1072; 72-1131; 72-1141
KY	Body Politic and Corporate	Elected	Yes	KY Stat. 160.160; 160.460
LA	Body Corporate	Elected	Yes	LA Rev. Stat. 17:51; 17:52; 17:1371.2; 17:1372
ME	Municipal or Quasi-Municipal Corporation	Elected	Yes	M.R.S. 20-A: 1(26); 1251; 1505; 2302
MD	State Program of Public Education; Public Agency	Appointed by Governor or Elected	No	MD Code, Educ. 3-105; 3-108.1; 4-101; 4-109; 4-131; 5-104; 7-1101
MA	Body Politic and Corporate	Elected	No	MA Gen. Laws Ch. 53: 122; Ch. 71: 16
MI	Body Corporate	Elected	Yes	MI Comp. Laws 380.11a; 380.1211; 380.384
MN	Body Corporate and Politic	Elected	Yes	MN Stat. 123B.02; 123B.09; 471.70

Core Features of Public-School Districts				
	Type	Local Board Selection	Tax Power?	Citations
MS	Political Subdivision	Elected	Yes	MS Code 37-6-5; 37-7-203; 37-7-333
MO	Body Corporate	Elected	Yes	MO Rev. Stat. 162.211; 162.461; 162.471; 162.563; 164.013
MT	Body Corporate	Elected	Yes	MCA 20-6-101; 20-9-353; 30-3-301
NE	Body Corporate	Elected	Yes	Neb. Rev. Stat. 77-3442; 79-407-409; 79-543-552
NV	Body Corporate	Elected	Yes	Nev. Rev. Stat. 386.110; 386.120-260; 387.195
NH	Town Districts Organized as Corporations	Elected	Yes	N.H. Rev. Stat. 189:1-a; 194:1; 194:2; 194:5; 194:7; 198:5
NJ	Body Corporate	Elected or Appointed by Mayor or Chief Executive Officer of Municipality	Yes	NJ Stat. 18A:10-1; 18A:12-11, 17; 18A:7F-39
NM	Political Subdivision	Elected	Yes	NM Stat. 22-1-2; 22-5-1.1; 22-25-1; 22-25-11

Core Features of Public-School Districts				
	Type	Local Board Selection	Tax Power?	Citations
NY	Body Corporate	Elected	Yes	NY Educ. Law 2023; 2101-2119; 2502
NC	Body Corporate	Elected	Yes	NC Gen. Stat. 115C-37; 115C-40; 115C-511
ND	Body Corporate	Elected	Yes	ND Cent. Code 15.1-09-01; 15.1-07-01; 57-15-13
OH	Body Politic and Corporate	Elected	Yes	OH Rev. Code 3313.01; 17; 5705.21
OK	Body Corporate	Elected	Yes	OK Stat. tit. 70: 5-105; 5-107A; 5-155
OR	Body Corporate	Elected	Yes	OR Rev. Stat. 328.26; 332.030; 332.072
PA	Body Corporate	Elected	Yes	24 PA Stat. 2-211; 3-301; 6-672
RI	Body Politic and Corporate	Elected	Yes	16 RI Gen. Laws 16-2-5; 16-3-11; 16-7.2-1
SC	Body Politic and Corporate	Appointed by County Board of Education	Yes	SC Code 59-17-10; 59-19-20; 59-73-60
SD	School Corporation	Elected	Yes	SD Codified Laws 10-12-43; 13-8-1; 13-5-15

Core Features of Public-School Districts				
	Type	Local Board Selection	Tax Power?	Citations
TN	Incorporated Municipality	Elected	Yes	TN Code 49-2-201; 49-2-401; 49-3-315
TX	Body Corporate	Elected	Yes	TX Educ. Code 11.051; 11.054; 11.151; 45.002
UT	Bodies Corporate	Elected	Yes	UT Code 20A-14-202; 53G-4-401; 59-2-902
VT	Town; Corporation with power of municipality	Elected	No	VT Stat. tit. 16: 423; 491; 563
VA	Body Corporate	Elected or Appointed by a Commission	Yes	VA Code 22.1-35; 22.1-57.3; 22.1-71; 22.1-95
WA	Body Corporate	Elected	Yes	WA Rev. Code 28A. 310.030; 28A.320.0; 84.52.053
WV	County Board Organized as a Corporation	Elected	Yes	WV Code 11-8-6c; 11-8-6f; 18-5-1; 18-5-1b; 18-5-5
WI	Body Corporate	Elected	Yes	WI Stat. 120.42; 120.44
WY	Body Corporate	Elected	Yes	WY Stat. 21-3-101; 21-3-108; 21-13-102