



*Go Make Disciples*

## OFFICE OF THE ARCHBISHOP

ARCHDIOCESE OF OKLAHOMA CITY

November 24, 2021

Dr. Robert Franklin  
Chairman  
Oklahoma Statewide Virtual Charter School Board  
2501 N. Lincoln Blvd.  
Suite 301  
Oklahoma City, OK 73105

Chairman Franklin:

I write to inform you that the Archdiocese of Oklahoma City intends to apply for authorization to form and operate a virtual charter school in the state. The Archdiocese has a long history of education in Oklahoma dating back to the nineteenth century, and we currently operate twenty-two schools, ranging from pre-kindergarten to high school.<sup>1</sup> Our rich experience with education in Oklahoma positions us well to administer a virtual charter school, and we are eager to continue our longstanding contribution to the public good through this new endeavor.

The Oklahoma Charter School Act outlines seven purposes for the state's charter schools and a virtual Archdiocesan school would serve each one.<sup>2</sup> Most importantly, a virtual Archdiocesan charter school would create new, innovative, and valuable learning opportunities for students and provide additional educational choices for Oklahoma families. Catholic schools in Oklahoma offer "an advanced curriculum that educates the total child."<sup>3</sup> We educate children with a global emphasis and strive to instill in them "a sense of moral responsibility that includes self-discipline and respect for themselves."<sup>4</sup> Unsurprisingly, our schools tend to produce graduates who are more civically engaged, more tolerant of diverse views, and more committed to a life of service than a typical student.

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<sup>1</sup> See James D. White, *Catholic Church*, Oklahoma Historical Society, <https://www.okhistory.org/publications/enc/entry.php?entry=CA072> (last visited Nov. 2, 2021); *School Finder*, Archdiocese of Oklahoma City, <https://archokc.org/schoolfinder> (last visited Nov. 2, 2021).

<sup>2</sup> See 70 Okla. Stat. Ann. § 3-131(A).

<sup>3</sup> *Why Should You Choose Catholic Schools?*, Archdiocese of Oklahoma City, <https://archokc.org/schools> (last visited Nov. 2, 2021).

<sup>4</sup> *Id.*

Catholic schools have long produced exceptional academic outcomes, as well. High schools operated by the Archdiocese of Oklahoma City, for example, regularly boast a sterling 100% graduation rate. And we are not alone. Nationwide, Catholic schools graduate students—and send them onto four-year colleges—at rates that far exceed our public-school counterparts.<sup>5</sup>

The uniquely beneficial educational opportunities offered by Catholic schools are especially needed among the state’s virtual charter schools. According to a recent study commissioned by the Virtual Charter School Board itself, “virtual charter schools significantly lag both brick-and-mortar charter and traditional public schools on multiple measures, including overall performance, student achievement, and student growth.”<sup>6</sup> Indeed, in Oklahoma’s key academic metric for student growth, the average virtual charter school lagged thirty-four percentage points behind the average non-virtual charter school score and twenty-four percentage points behind the average traditional school.<sup>7</sup> A virtual Archdiocesan charter school would be a valuable addition to help improve opportunities for students in this rapidly growing, yet still struggling, area of education.

So far as we are aware, the Board has not yet authorized any faith-based charter schools. Perhaps this is because the Oklahoma Charter School Act purports to ban religiously affiliated charter schools. The Act states that “[a] charter school shall be nonsectarian in its programs, admission policies, employment practices, and all other operations,” and it further provides that “[a] sponsor may not authorize a charter school or program that is affiliated with a nonpublic sectarian school or religious institution.”<sup>8</sup> Said otherwise, the Act allows private *secular* entities to operate charter schools but purports to prohibit charter schools from affiliating with any *religious* organization or integrating religion into their programs.

The first restriction—barring charter schools from affiliating with certain organizations because of their religious *status*—patently violates the First Amendment of the United States Constitution. Indeed, the Supreme Court of the United States recently made clear that a

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<sup>5</sup> Compare, e.g., Stephen P. Broughman, et al., Inst. of Educ. Scis., U.S. Dep’t of Educ., *Characteristics of Private Schools in the United States: Results from the 2018–2019 Private School Universe Survey*, at C-21 (2021) (reporting 98.9% graduation rate and 85.2% four-year college enrollment rate for Catholic schools in 2019), with Véronique Irwin, Inst. of Educ. Scis., U.S. Dep’t of Educ., *Report on the Condition of Education in 2021*, at 3, 22 (2021) (reporting 86% public high-school graduation rate and 66% overall four-year college enrollment rate in 2019).

<sup>6</sup> Elisa Westapher, et al., Nat’l Ass’n of Charter Sch. Authorizers, *Oklahoma Virtual Charter School Funding Study 1* (2021).

<sup>7</sup> *Id.*

<sup>8</sup> 70 Okla. Stat. Ann. § 3-136(A)(2).

government policy which “expressly discriminates against otherwise eligible recipients . . . solely because of their religious character” imposes “a penalty on the free exercise of religion that triggers the most exacting scrutiny.”<sup>9</sup> Stated simply: such a policy is “odious to our Constitution.”<sup>10</sup>

Barring a religious organization from forming and operating a charter school because of the religious *activity* of the proposed school would also violate the Constitution. Although the Supreme Court technically left open the question “whether there is a meaningful distinction between discrimination based on [religious] use or conduct and that based on [religious] status,”<sup>11</sup> the First Amendment and the logic of the Court’s recent decisions permit no such distinction. Whether a school is described as religious in “character” or as one that pursues religious “programs,” in the words of Justice Gorsuch, the school is engaging in its constitutional right to “free exercise either way.”<sup>12</sup> Indeed, the supposed line between religious identity and religious activity “blurs in much the same way the line between acts and omissions can blur when stared at too long.”<sup>13</sup> For this reason, the Supreme Court has agreed to hear a case this year which directly challenges the notion that any such distinction is constitutionally significant.<sup>14</sup>

Nor does the fact that Oklahoma law designates all charter schools as “public schools” justify the discrimination against religious entities, like the Archdiocese of Oklahoma City, that wish to operate a charter school. The relevant question to determine whether charter schools, like traditional public schools, are bound by the First Amendment’s “Establishment Clause” and therefore must be secular, is whether charter schools are “state actors” for purposes of federal constitutional law. They are not. Notwithstanding their receipt of public funds and their nominally “public” designation, charter schools in Oklahoma are private entities operated by private—including even *for profit*—organizations. And private entities may be treated as state actors only in narrow circumstances not present here.

The Supreme Court has held 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.’”<sup>15</sup> Such a finding is typically reserved for

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<sup>9</sup> *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017).

<sup>10</sup> *Id.* at 2025.

<sup>11</sup> *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2257 (2020).

<sup>12</sup> *Trinity Lutheran*, 137 S. Ct. at 2026 (Gorsuch, J., concurring).

<sup>13</sup> *Id.* at 2025.

<sup>14</sup> See *Carson v. Makin*, 979 F.3d 21 (1st Cir. 2020), *cert. granted*, 141 S. Ct. 2883.

<sup>15</sup> *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)) (emphasis added).

circumstances in which private entities exercise powers that are “traditionally exclusively reserved to the State.”<sup>16</sup> Otherwise, private entities will be treated as state actors only where they engage in conduct that is so entwined with government conduct that the two cannot be meaningfully separated.<sup>17</sup> Again, these circumstances are narrowly construed, and it is not enough that a private entity is funded by the state, acts pursuant to a government contract, is subject to extensive state regulation, or undertakes activities in which the public and the state have a significant interest.<sup>18</sup>

Oklahoma charter schools are not “state actors” under either of these concepts. In Oklahoma and throughout the United States, the education of children has never been an activity reserved exclusively to the state; private schools, including religious schools, undertook that mission long before the creation of the public education system as we know it today.<sup>19</sup> Nor are Oklahoma charter schools operated in any meaningful way by the state. Oklahoma charter schools are subject only to broad oversight by the state, and control over their curriculum, activities, and day-to-day operations is exclusively the task of their private operators. Indeed, the state makes clear that charter schools are “not required to adhere to the Teacher and Leader Effectiveness standards set by the state of Oklahoma” and that the state’s primary method of control over any given school is its ability to terminate its charter—not to alter its curriculum or methods of operation.<sup>20</sup> In short, the state may choose to award or to end a contract with a charter school, but the state does not run it.

In a variety of contexts, federal courts have held that charter schools organized under similar laws in other states are not state actors. The Ninth Circuit, for instance, has held that an Arizona charter school’s employment decisions were not the result of state action because they “turn[ed] on judgments made by private parties without standards established by the

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<sup>16</sup> *Jackson*, 419 U.S. at 352.

<sup>17</sup> *See, e.g., Johnson v. Rodrigues*, 293 F.3d 1196, 1202–03 (10th Cir. 2002) (describing various tests to determine whether the relevant conduct was sufficiently connected to action of the state itself).

<sup>18</sup> *See, e.g., Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (holding that a school which received 99% of its funding from the state and which performed the unquestionably “public function” of “educat[ing] maladjusted high school students” was not a state actor); *Johnson*, 293 F.3d at 1204 (“[E]xtensive state regulation, the receipt of substantial state funds, and the performance of important public functions do not necessarily establish . . . state action.” (internal quotation marks omitted)).

<sup>19</sup> *See, e.g., Rendell-Baker*, 457 U.S. at 842; Mark Storslee, *Church Taxes and the Original Understanding of the Establishment Clause*, 169 U. Pa. L. Rev. 111 (discussing history of religious schools in early America, including schools that received public funding).

<sup>20</sup> *See Oklahoma Charter Schools Program*, Oklahoma State Department of Education, <https://sde.ok.gov/faqs/oklahoma-charter-schools-program> (last visited Nov. 2, 2021).

State.”<sup>21</sup> Even though the school was defined by statute as a “public” entity, performed an important “function which serves the public,” and was subject to various state regulations, the court held that the school did not “act[] under the color of state law” in making such decisions—and thus could not be sued for them as a state actor.<sup>22</sup>

Likewise, the Fourth Circuit recently held that that a charter school in North Carolina did not behave as a state actor in setting school policies like its dress code.<sup>23</sup> Even though the charter school in question was nominally a “public school” under North Carolina law, “receive[d] nearly all [its] funding from the state,” and was run by “private actors that contract with the state,” the court observed that the state was not entwined in the day-to-day administration of the school itself.<sup>24</sup> Rather, the state had designed its charter school program to “improve learning and educational options by offering *different and innovative* teaching methods . . . as an *alternative* method[] of education *outside* the traditional state school system.”<sup>25</sup> Thus, the state took a largely “hands-off approach in deciding or supervising the school’s policies,” leaving those to the judgment of the individual school operators (though subject, of course, to broad oversight by the state).<sup>26</sup> A number of federal district courts have likewise found that charter schools in other states have acted as private entities in a variety of capacities.<sup>27</sup>

Here, the Oklahoma Charter School Act similarly promotes educational experimentation by facilitating private entities’ ability to operate innovative and non-traditional schools outside the state’s close control of its public-school system. This is explicit in the law itself, the

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<sup>21</sup> *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 818 (9th Cir. 2010) (internal quotation marks omitted).

<sup>22</sup> *Id.* at 815–18 (internal quotation marks omitted).

<sup>23</sup> *Peltier v. Charter Day Sch., Inc.*, 8 F.4th 251 (4th Cir. 2021), *reh’g granted*, 2021 WL 4892153 (4th Cir. Oct. 19, 2021).

<sup>24</sup> *Id.* at 263.

<sup>25</sup> *Id.* at 265 (emphasis added) (internal quotation marks omitted).

<sup>26</sup> *Id.* at 266.

<sup>27</sup> *See, e.g., I.H. v. Oakland Sch. for the Arts*, 234 F. Supp. 3d 987, 993 (N.D. Cal. 2017) (dismissing federal discrimination claims against a California charter school for failure to prove the school is a state actor); *Schwarz v. The Villages Charter Sch., Inc.*, 165 F. Supp. 3d 1153, 1199–1201 (M.D. Fla. 2016) (finding that Florida charter school operator was not a state actor for purposes of the Americans with Disabilities Act); *Sufi v. Leadership High Sch.*, No. C-13-01598, 2013 WL 3339441, at \*9 (N.D. Cal. July 1, 2013) (finding that directors and officers of a California charter school were not state actors for purposes of First Amendment retaliation claims); *see also United States v. Minn. Transitions Charter Schs.*, 50 F. Supp. 3d 1106, 1119–20 (D. Minn. 2014) (holding that Minnesota charter schools are not “arms of the state”); *N.Y. Charter Schs. Ass’n, Inc. v. DiNapoli*, 914 N.E.2d 991, 996 (N.Y. Ct. App. 2009) (“[C]harter schools are not political subdivisions of the State [of New York] . . .”).

purpose of which is to “[e]ncourage the use of different and innovative teaching methods,” “create different and innovative forms of measuring student learning,” and “[p]rovide additional academic choices for parents and students.”<sup>28</sup> Thus, Oklahoma, like many other states, has taken a “hands-off” approach to charter-school administration, exercising only broad oversight. Schools participating in this program to “promote experimentation and school choice through deregulation,”<sup>29</sup> are, at bottom, private actors.<sup>30</sup>

In sum, Oklahoma has made a policy choice to subsidize new and innovative forms of private education through its charter school program. That is not a choice that the Constitution requires the state to make, but as directed by the Supreme Court, “once a State decides to do so it cannot disqualify some private schools solely because they are religious.”<sup>31</sup> To prohibit the Archdiocese from establishing a virtual charter school solely because of its religion would be a clear violation of this command and of the First Amendment.<sup>32</sup>

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<sup>28</sup> 70 Okla. Stat. Ann. § 3-131(A).

<sup>29</sup> *Peltier*, 8 F.4th at 263.

<sup>30</sup> See also Nicole Stelle Garnett, *Religious Charter Schools: Legally Permissible? Constitutionally Required?* 7–10 (Dec. 2020) (“The U.S. Supreme Court has made clear that only government entities, or private entities that are closely controlled by the government, are bound by the provisions of the federal constitution, including the Establishment Clause . . . [b]ut most charter schools are neither operated nor controlled by the government . . . . If these charter schools are not state actors, they are, for federal constitutional purposes, private schools that can be (and must be permitted to be) religious.”).

<sup>31</sup> *Espinoza*, 140 S. Ct. at 2261.

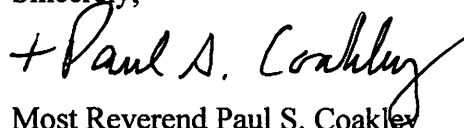
<sup>32</sup> Reinforcing these constitutional rights, recent federal regulations expressly prohibit entities from discriminating on the basis of religion in the distribution of federal grants. Specifically, 2 C.F.R. § 3474.15 prohibits grantees and subgrantees from discriminating against religious contractors for direct federal services under a Department of Education program and 34 C.F.R. § 76.52 prohibits state entities from discriminating in their selection of subgrantees of federal funds on the basis of religion. These regulations apply equally to direct funding and the use of pass-through or flow-through entities. 34 C.F.R. § 76.52(c)(3)(iv).

It appears that the Oklahoma State Department of Education distributes Individuals with Disabilities Education Act and other federal funds to charter schools as a flow-through entity. See Okla. State Dep’t of Educ., *2015 Joint Federal Programs Summit: Charter/Virtual Schools and Equitable Participation Provisions for Private School Students* 9 (2015); see also Okla. State Dep’t of Educ., *Oklahoma Special Education Funding Manual IDEA Part B; Federal Programs—Charter Schools* 19–20 [https://sde.ok.gov/sites/default/files/Funding%20Manual%20with%20Cover\\_0.pdf](https://sde.ok.gov/sites/default/files/Funding%20Manual%20with%20Cover_0.pdf) (last visited Nov. 2, 2021). Accordingly,

For these reasons, we urge the Board not to enforce the Act in a way that will bar the Archdiocese or other religious organizations from operating virtual charter schools—an exclusion that would both limit the promise of Oklahoma’s charter school program and violate federal law. The Archdiocese is enthusiastic about sponsoring a virtual charter school to improve educational opportunities for children and families in the state. Yet we cannot ignore the reality that, regrettably, the discriminatory and unlawful exclusion of religious schools remains at least formally on the books of the state’s Charter School Act.

Before the Archdiocese undertakes the necessary time and expense to prepare a charter school application, I request your confirmation that such an application will not be denied because of our religious affiliation or because of the integration of religion into our schools’ operations and programs. I look forward to your reply, and please do not hesitate to contact me with any questions.

Sincerely,

A handwritten signature in black ink that reads "Paul S. Coakley". The signature is written in a cursive style with a large initial "P".

Most Reverend Paul S. Coakley  
Archbishop of Oklahoma City

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prohibiting religious entities from operating charter schools—and thus receiving these federal funds—may violate federal regulations in addition to the Constitution itself.