

Tulsa Law Review

Volume 59 | Number 2

Spring 2024

Saints, Satanists, and Religious Public Charter Schools

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Recommended Citation

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SAINTS, SATANISTS, AND RELIGIOUS PUBLIC CHARTER SCHOOLS

Allen Rostron *

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The Roman Catholic Archdiocese of Oklahoma City and the Diocese of Tulsa have announced plans to create a unique new school.¹ Unlike the traditional brick-and-mortar schools operated by the Catholic church in Oklahoma, the new St. Isidore of Seville Catholic Virtual School, named in honor of a medieval Christian philosopher who some regard as the patron saint of the internet, will provide online education.² But that is not what will make the proposed school exceptional and controversial. St. Isidore will be a public school, funded by the state and charging no tuition,³ but also “a fully Catholic school—Catholic in every way.”⁴ The organizers of the St. Isidore school thus seek to break new ground by creating the nation’s first religious public charter school.⁵

The proposal has been challenged and its fate remains uncertain. The Oklahoma Statewide Virtual Charter School Board approved the school’s application in June 2023.⁶ Several lawsuits have been filed that seek to overturn that Board’s decision and stop the opening of the school, and there is already speculation that the cases will wind up going to the U.S. Supreme Court.⁷ Oklahoma’s Attorney General Gentner Drummond, who brought one of those lawsuits, has argued that a legal opinion in the school’s favor,

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1. Andrea Eger, *Catholic Church in Oklahoma Seeking Government Sanctioning, Taxpayer Funding for First Religious Charter School in U.S.*, TULSA WORLD (Feb. 12, 2023), https://tulsaworld.com/news/local/catholic-church-in-oklahoma-seeking-government-sanctioning-taxpayer-funding-for-first-religious-charter-school-in/article_1141db0a-a98e-11ed-b87c-f7ae31ee167e.html.

2. *Id.*

3. Nuria Martinez-Keel, *Archdiocese of Oklahoma City Asks to Open Nation’s First Catholic Charter School*, THE OKLAHOMAN (Feb. 14, 2023, 9:09 PM), <https://www.oklahoman.com/story/news/education/2023/02/14/archdiocese-of-oklahoma-city-okc-catholic-charter-school-wants-found-first-in-nation/69890579007/>.

4. Eger, *supra* note 1 (quoting Brett Farley, Executive Director of the Catholic Conference of Oklahoma).

5. See Martinez-Keel, *supra* note 3.

6. Nuria Martinez-Keel, *Oklahoma Board Approves Nation’s First Religious Public Charter School*, THE OKLAHOMAN (June 6, 2023, 2:50 PM), <https://www.oklahoman.com/story/news/education/2023/06/05/catholic-charter-school-oklahoma-board-approves-first-nation/70289039007/>.

7. Dale Denwalt, *Oklahoma Judge Hearing Religious Charter School Suit Rejects Motion to Remove Himself from Case*, THE OKLAHOMAN (Dec. 22, 2023, 11:11 AM), <https://www.oklahoman.com/story/news/2023/12/22/st-isidore-catholic-charter-school-lawsuit-judge-rejects-motion-remove-himself-case/72003645007/>.

published by his predecessor, “misuse[d] the concept of religious liberty by employing it as a means to justify state-funded religion.”⁸ Attorney General Drummond warned that “the approval of a charter school by one faith will compel the approval of charter schools by all faiths, even those most Oklahomans would consider reprehensible and unworthy of public funding.”⁹

This article explores how constitutional law concerning religion has reached the point where the validity of a publicly funded religious school is even a debatable issue. It argues that the First Amendment provides a simple formula for achieving optimal protection of religious freedom, by maximizing religious rights in the private realm while minimizing the role of religion in public matters. For decades, the Supreme Court largely succeeded in maintaining this boundary line between the private and public spheres.¹⁰ A key turning point occurred in 2002 when the Court decided *Zelman v. Simmons-Harris* and upheld a program in which families received vouchers that could be used to pay for tuition at private religious schools.¹¹ That case posed a difficult issue, because it was about public money funding private choices.¹² It concerned a program in which families made private decisions about religious education for their children, but it opened the door for enormous amounts of money to flow from public sources to private religious uses.¹³ That decision led to a string of other rulings by the Supreme Court that have consistently and substantially dissolved the distinction between the private and public realms when it comes to religious freedom.¹⁴ Those rulings in turn have set the stage for further encroachments of religion into the public realm, such as the proposed Catholic charter school in Oklahoma.¹⁵ With the litigation concerning the Oklahoma school already underway, it may ultimately generate the next major Supreme Court decision concerning religion and education. This article analyzes the arguments that might persuade the Court not to give its blessing to the unprecedented blending of public education and sectarian religious interests.¹⁶

Some activists, alarmed about the improper expansion of religion into public matters, have embraced Satanism as a tactic for calling attention to their concerns.¹⁷ While not necessarily having any genuine belief in or devotion to Satan, these activists invoke Satanism as a way to make an important point: If we protect rights for religious interests in public matters, that means all religions, not just those we like. If Oklahoma opts to pay for charter schools based on the principles and traditions of Catholicism or other mainstream faiths, it will have to be prepared to do the same for Satanists and other unconventional religious perspectives.

Courts should avoid this dilemma by restoring and preserving the line between private and public matters with respect to religious liberty. That is the constitutionally prescribed means of ensuring that religious freedom can be strongly protected without creating the hazards of entangling religion and government in ways that ultimately hurt everyone, whether they are religious or not. Religion and government benefit when the government stays out of private religious matters and religion stays out of public matters.

8. Letter from Gentner Drummond, Okla. Att’y Gen., to Rebecca L. Wilkinson, Exec. Dir., Statewide Virtual Charter Sch. Bd. 2 (Feb. 23, 2023), https://www.oag.ok.gov/sites/g/files/gmc766/f/documents/2023/rebecca_wilkinson_ag_opinion_2022-7_virtual_charter_schools.pdf.

9. *Id.*

10. *See infra* Part I.

11. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

12. *Id.* at 650.

13. *See id.* at 714 (Souter, J., dissenting).

14. *See infra* Part II.

15. *See infra* Part III.

16. *See infra* Part IV.

17. *See infra* Part V.

Litigation concerning the proposed Oklahoma school is just getting started, and the scholarly debate over the issue is also in its early stages but will surely be heating up quickly. So far, most participants in that debate have taken the position that the constitutional door is open for religious charter schools, at least to some extent.¹⁸ A resistance is emerging, with a few writers opposing the slide toward allowing public schools to be religious.¹⁹ This article, the first that is focused specifically and directly on the Oklahoma situation, joins and builds on that resistance and warns about the perils of crossing the line into having public schools devoted to particular sets of religious beliefs.

Part I of this article looks back at the Supreme Court's handling of constitutional issues concerning religion in the twentieth century, an era when the Court protected religious freedom while appropriately limiting religion's role in the public sphere. Part II assesses what the Supreme Court has done over the past two decades and how it has gradually embraced the idea that preventing religion from intruding too far into public matters amounts to a form of unconstitutional discrimination against religion. Part III assesses the situation in Oklahoma and how that state may become the first to have a religious public charter school. Part IV analyzes the major issues raised by Oklahoma's approval of a religious charter school and argues that those challenging the proposed school will face an uphill battle but have persuasive grounds for distinguishing public funding of charter schools from the tuition vouchers and other educational support programs previously addressed by the Supreme Court. Finally, Part V warns that if all else fails and religious public schools become a reality, those seeking to dissolve the separation of church and state will have to be ready to respect demands for equal treatment from a wide range of religious denominations, including religious groups like the Satanic Temple that may be deeply disturbing to many people.

I. PROTECTING PRIVATE RELIGIOUS FREEDOM AND PUBLIC RELIGIOUS NEUTRALITY

There is inevitably some tension between the First Amendment's two provisions on religion. The Free Exercise Clause reflects the significance of religious beliefs and actions, and it suggests that religion should receive some amount of special consideration and protection.²⁰ Meanwhile, the Establishment Clause is a warning about the potential danger of giving special support and assistance to religion.²¹ The constitutional text thus

18. NICOLE STELLE GARNETT, MANHATTAN INST., RELIGIOUS CHARTER SCHOOLS: LEGALLY PERMISSIBLE? CONSTITUTIONALLY REQUIRED? 4 (2020); Preston Green, III, *Charter Schools and Religious Institutions: A Match Made in Heaven?*, 158 ED. L. REP. 1 (2001); Benjamin Siracusa Hillman, Note, *Is There a Place for Religious Charter Schools?*, 118 YALE L.J. 554, 562, 563, 576, 579 (2008); Kathleen C. Ryan, Note, *The Emerging Possibility of Religious Charter Schools: A Case Study of Arizona and Massachusetts*, 98 NOTRE DAME L. REV. 2257, 2264, 2285–86 (2023); *Church, Choice, and Charters: A New Wrinkle for Public Education?*, 122 HARV. L. REV. 1750, 1752, 1762, 1767, 1769–70 (2009); Aaron Saiger, *Charter Schools, the Establishment Clause, and the Neoliberal Turn in Public Education*, 34 CARDOZO L. REV. 1163, 1163 (2013); Stephen D. Sugarman, *Is It Unconstitutional to Prohibit Faith-Based Schools from Becoming Charter Schools?*, 32 J.L. & RELIGION 227, 227 (2017).

19. Derek W. Black, *Religion, Discrimination, and the Future of Public Education*, 13 U.C. IRVINE L. REV. 805, 805, 837–50, 853 (2023) (challenging arguments made by proponents of religious charter schools); Justin Driver, Comment, *Three Hail Marys: Carson, Kennedy, and the Fractured Détente over Religion and Education*, 136 HARV. L. REV. 208, 223–33 (2022) (arguing that charter schools are public entities and therefore religious public charter schools would violate the Establishment Clause); Ira C. Lupu & Robert W. Tuttle, *The Remains of the Establishment Clause*, 74 HASTINGS L.J. 1763, 1789–92 (2023) (noting the proposed creation of a Catholic charter school in Oklahoma and arguing that direct state funding of religious teaching violates the Establishment Clause).

20. U.S. CONST. amend. I.

21. *See id.* Technically, the rights concerning religion apply directly to the federal government through the First Amendment and apply to state and local governments through incorporation into the Fourteenth Amendment.

reflects the inescapable reality that religion is special. It is special in ways that make it extraordinarily valuable and worthy of protection, and it is special in ways that generate concerns about unfairness, conflict, and division.

For a long time, the Supreme Court reconciled these concerns by drawing a distinction between private and public matters. It tried to distinguish the private realm of life from the public sphere, seeking to strongly protect religious freedom in the former while suppressing the role of religion in the latter.²²

For example, all the way back in the 1920s, the Supreme Court established that parents have a right to arrange for the private education of their children. In *Meyer v. Nebraska*, the Court struck down a state law that prohibited teaching children to speak foreign languages.²³ That law was a product of the first “Red Scare” era, reflecting concerns about the subversive influence of foreign radical thinking.²⁴ A few years later in *Pierce v. Society of Sisters*, the Court struck down an Oregon law that required all children to attend public schools and effectively prohibited the operation of private schools.²⁵

In both cases, the Court vindicated the rights of parents to make decisions about private education and concluded that the laws at issue deprived people of their liberty without due process of law.²⁶ To some extent, the decisions were based on the idea that the Constitution provides strong protection for liberty of contract, so parents, teachers, and schools should be free to enter into whatever arrangements they desire with respect to providing and purchasing educational services.²⁷ The cases were products of the so-called “*Lochner* era,” with majority opinions in each case written by Justice James McReynolds, one of the “Four Horsemen” on the Court, who were most adamant about protecting economic freedom.²⁸ At the same time, the cases were also about liberty interests of a more personal and non-economic kind: the right of parents to make fundamental decisions and choices about the private lives of themselves and their children.²⁹ That strand of the *Meyer* and *Pierce* decisions would be highlighted many years later, when the Court cited them as precedent for substantive due process decisions about privacy, birth control, and abortion.³⁰

Concerns about religious freedom lurked in both cases as well. The challenger in *Meyer* was a teacher at a Lutheran parochial school who found himself charged and convicted for using a collection of Bible stories to teach the German language.³¹ The Oregon law at issue in *Pierce*, requiring all children to attend public schools, was passed in order

See *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 8, 15 (1947) (holding that the Establishment Clause applies to states through the Fourteenth Amendment); *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940) (holding that the Free Exercise Clause applies to states through the Fourteenth Amendment). For the sake of simplicity, this article simply talks about First Amendment rights without mentioning that they apply to state and local governments through the Fourteenth Amendment.

22. *See, e.g., Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971) (observing that “[t]he Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice”).

23. *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923).

24. *See* William G. Ross, *A Judicial Janus: Meyer v. Nebraska in Historical Perspective*, 57 U. CINN. L. REV. 125, 133–34 (1988).

25. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 530, 533–34, 536 (1925).

26. *Id.* at 533–36; *Meyer*, 262 U.S. at 399, 400, 403.

27. *Pierce*, 268 U.S. at 532 (noting that the operation of a Catholic school “is remunerative—the annual income from primary schools exceeds \$30,000—and the successful conduct of this requires long time contracts with teachers and parents”); *Meyer*, 262 U.S. at 399 (stating that due process rights protect “the right of the individual to contract, to engage in any of the common occupations of life”).

28. *See* Louise Weinberg, *The McReynolds Mystery Solved*, 89 DEN. U. L. REV. 133, 133–34, 140–41 (2011).

29. *Pierce*, 268 U.S. at 534–35 (concluding that the law “unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control”); *Meyer*, 262 U.S. at 399 (recognizing that due process rights protect freedom “to marry, establish a home and bring up children”).

30. *Roe v. Wade*, 410 U.S. 113, 152–53, 159 (1973), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022); *Griswold v. Connecticut*, 381 U.S. 479, 481–82 (1965).

31. *Meyer*, 262 U.S. at 397.

to shut down Catholic schools in the midst of a resurgence of support for the Ku Klux Klan and its anti-Catholic, anti-immigrant prejudices.³² The cases did not involve Free Exercise or Establishment Clause claims, for these provisions had not yet been applied to state and local governments through incorporation into the Fourteenth Amendment.³³ Nevertheless, in these cases, the Supreme Court stood up for religious freedom, recognizing that the Constitution gives people the right to make their own choices about private education.³⁴ Whatever arrangements one wanted to make for the education of one's children, religious or otherwise, was one's own private business and should be free of government interference.

The Supreme Court reached a similar conclusion in 1947 in *Everson v. Board of Education*, ruling that a local government could reimburse families for students' bus fare without violating the Establishment Clause, whether the students were riding the bus to get to a public school or a private religious school.³⁵ The local government's action was neutral, not favoring any one religion over another, and not favoring religion over non-belief.³⁶ The government's decision to cover the costs of bus transportation for all students helped religious families and religious schools in some sense, because it meant that "children are helped to get to church schools."³⁷ But so would general, neutral practices like having public roadways and sidewalks that enable parochial school students (and everyone else) to get where they choose to go.³⁸ The reimbursements for bus fare simply helped parents "get their children, regardless of their religion, safely and expeditiously to and from accredited schools"³⁹ and had no impact on what went on in the public schools.

The dissenters in *Everson* were even more adamant about the importance of the public/private distinction in religious freedom cases. Justice Rutledge's dissent stressed that the Constitution "does not deny the value or the necessity of religious training, teaching or observance,"⁴⁰ but it requires that religious education and religious beliefs "should be kept inviolately private" and not "confounded with what legislatures legitimately may take over into the public domain."⁴¹ In Rutledge's view, the Free Exercise Clause and the Establishment Clause worked hand in hand to protect religious freedom, including the right to choose religious education, by making that choice "exclusively a private affair."⁴²

In *Wisconsin v. Yoder*, the Court similarly ruled in favor of letting families make religious choices about education where those choices had no effect on public schools or the children attending them.⁴³ In that case, Amish families challenged Wisconsin laws requiring all children to attend school until the age of sixteen.⁴⁴ These families asserted that it would violate their religious beliefs to expose their children to improper "worldly" influences by sending them to school past the eighth grade level.⁴⁵ The Court respected the Amish families' sincere religious beliefs and found that the state did not have a sufficient

32. Paula Abrams, *The Little Red Schoolhouse: Pierce, State Monopoly of Education and the Politics of Intolerance*, 20 CONST. COMMENT. 61, 66–70 (2003).

33. See *supra* note 21.

34. *Pierce*, 268 U.S. at 533–36; *Meyer*, 262 U.S. at 399–403.

35. *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 17–18 (1947).

36. *Id.*

37. *Id.* at 17.

38. See *id.* at 17–18.

39. *Id.* at 18.

40. *Everson*, 330 U.S. at 52 (Rutledge, J., dissenting).

41. *Id.* at 58.

42. *Id.* at 53; see also *id.* at 52 (arguing that the First Amendment's provisions about religion makes religious functions "altogether private" and they "cannot be made a public one by legislative act").

43. See *Wisconsin v. Yoder*, 406 U.S. 205, 205–06 (1972).

44. *Id.* at 208–09.

45. *Id.* at 210–11.

need to override those beliefs.⁴⁶ The families did not object to school attendance through eighth grade, and the state had not shown that forcing the children to attend school for an additional one or two years beyond that point before dropping out would make a dramatic difference for the children.⁴⁷ Allowing the Amish families to follow their religious principles would not have an impact on the public schools or the children attending them.⁴⁸

These cases were not about claiming a right to shape what went on in the public schools. They were about being able to make private choices for one's own family, and the Supreme Court strongly protected that interest.

On the other hand, when the Court faced cases dictating what happens in public schools, religious interests generally did not prevail. Most famously and controversially, the Court prohibited official or organized prayers in public schools.⁴⁹ Students nevertheless still have the right to make an individual decision to pray privately, such as before eating lunch in the cafeteria.⁵⁰ But the Court held that prayers planned and led by teachers or other public school officials are unconstitutional because "it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by government."⁵¹ The Court emphasized the importance of simultaneously protecting religious liberty in the private realm while keeping religion from having an improper role in public matters, saying that "[i]t is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance."⁵² The decision thus kept religion from unnecessarily entering the public sphere, without undermining its protection in private affairs.

The Court also prohibited organized readings of Bible verses or recitations of the Lord's Prayer in public school classrooms.⁵³ Eventually, the Court extended this prohibition of organized exercises of religion in public schools when it struck down Alabama legislation providing for public school students to have a one-minute moment of silence for "meditation or voluntary prayer."⁵⁴ The Court noted that nothing should prevent a student from making a voluntary personal choice to use a moment of silence during the school day for prayer,⁵⁵ but Alabama's legislature had gone too far by endorsing prayer and recommending that students pray during their moment of silence at school.⁵⁶ Further, when disputes arose about public school curriculum, particularly over issues like the teaching of theories about evolution, creation science, and intelligent design, the Supreme Court rejected religiously-motivated attempts to modify the curriculum or educational content offered in public schools.⁵⁷

46. *Id.* at 216–29.

47. *Id.* at 224.

48. *Yoder*, 406 U.S. at 224 (noting that the Amish families' practice "interferes with no rights or interests of others").

49. *Engel v. Vitale*, 370 U.S. 421 (1962).

50. John M. Swomley, *Myths About Voluntary School Prayer*, 35 WASHBURN L.J. 294, 297 (1996) (observing that Supreme Court "did not attempt to prohibit individual silent prayer, or grace before meals or audible prayer in informal settings such as a cafeteria or in the halls so long as students did not expect or compel other students to listen or to participate").

51. *Engel*, 370 U.S. at 425.

52. *Id.* at 435.

53. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963).

54. *Wallace v. Jaffree*, 472 U.S. 38, 40 (1985).

55. *See id.* at 40–41, 59 (noting that the case did not involve a challenge to a portion of the Alabama law authorizing a moment of silence "for meditation" and that portion of the statute "contain[ed] nothing that prevented any student from engaging in voluntary prayer during a silent minute of meditation").

56. *Id.* at 60.

57. *Edwards v. Aguillard*, 482 U.S. 578, 593–94 (1987).

The legal standards or rules developed for religion cases reflected the distinction between private and public matters. In particular, the Court crafted the *Lemon* test for Establishment Clause cases and used it to prevent what it saw as improper intrusions of religion into the public realm.⁵⁸ That test required that government actions must have a secular purpose, must not have the principal or primary effect of advancing or inhibiting religion, and must not foster excessive entanglement with religion.⁵⁹ The third prong of the test, concerning the need to avoid entanglement of government and religion, was crucial. The Court sought to keep religion strongly protected in the private sphere while avoiding the hazards of religion becoming entangled in public matters.⁶⁰

For decades, the Court consistently adhered to that approach. It was not perfect. In some instances, the Court drew fine lines that seemed to generate different outcomes in substantially similar situations, particularly in Establishment Clause cases. For example, time could be set aside during the day for religious instruction of public school children, but only if the students left the public school building and went elsewhere for the instruction, rather than having the religious instruction occur on public school grounds.⁶¹ While it was fine for the government to pay the bus fares of children riding to and from religious schools, it was unconstitutional for the government to provide bus transportation for field trips for students at religious schools.⁶² It was permissible for the government to cover the costs of standardized testing at religious schools, but only if the test was written by the government.⁶³ While these kinds of distinctions drew criticism and even scorn,⁶⁴ making subtle and often debatable distinctions is an inherent part of applying legal rules and deciding difficult cases.⁶⁵

The Court generally gave strong protection to religious rights through the Free Exercise Clause, but with one major lapse. The Court concluded that a generally applicable, religiously-neutral law can never violate the Free Exercise Clause, no matter how severely it burdens sincere religious beliefs.⁶⁶ In other words, no one is entitled to a religious exemption from a law that adversely affects religious practices but does not discriminate against them.⁶⁷ Although that approach significantly undercut Free Exercise rights, it has

58. See *Lemon v. Kurtzman*, 403 U.S. 602, 642–43 (1971).

59. *Id.* at 657–58, 661.

60. See Stephen M. Feldman, *Divided We Fall: Religion, Politics, and the Lemon Entanglements Prong*, 7 FIRST AMEND. L. REV. 253, 260, 277 (2009) (defending the entanglements prong as a mechanism for avoiding “religiously-inspired political divisiveness”).

61. Compare *Zorach v. Clausen*, 343 U.S. 306, 311–15 (1952) (upholding “release time” program where students left school grounds for religious instruction or worship), with *Illinois ex rel. McCollum v. Bd. of Educ. of Sch. Dist. No. 71*, 333 U.S. 203, 205, 211–12 (1948) (striking down program in which religious teachers came into public school buildings to provide religious instruction for thirty minutes per week).

62. Compare *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947) (allowing city to pay for bus transportation for students traveling from their homes to religious schools), with *Wolman v. Walter*, 433 U.S. 229, 252–54 (1977) (preventing state from paying for bus transportation for field trips for students at religious schools).

63. Compare *Wolman*, 433 U.S. at 239 (permitting state to provide standardized tests for use in religious schools), with *Levitt v. Comm. for Pub. Educ. & Religious Liberty*, 413 U.S. 472 (invalidating statute allowing state to reimburse religious schools for costs of tests prepared by teachers).

64. See, e.g., Daniel O. Conkle, *The Establishment Clause and Religious Expression in Governmental Settings: Four Variables in Search of a Standard*, 110 W. VA. L. REV. 315, 315 (2007) (describing legal doctrine under the Establishment Clause as “a muddled mess”).

65. See, e.g., *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 104 (1928) (Andrews, J., dissenting) (“We draw an uncertain and wavering line, but draw it we must as best we can.”).

66. *Emp. Div., Dep’t of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 878–79 (1990).

67. *Id.* at 883–84, 890.

been overridden to some extent by federal legislation⁶⁸ and by the provision of stronger Free Exercise rights under state law.⁶⁹

While making difficult decisions about extraordinarily sensitive and controversial subjects, the Court was not hostile to religion, but instead recognized its extraordinary importance and value. The Court simply sought to keep religious issues in the proper lane, with everyone able to make their own private decisions and choices about them. As the Court expressed it, “[t]he place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church, and the inviolable citadel of the individual heart and mind.”⁷⁰ By maximizing the protection of religion interests in the private realm while also allowing little room for them to cause unfairness and divisiveness in the public sphere, the Court properly and effectively pursued the objectives of the First Amendment provisions concerning religion.

II. SCHOOL VOUCHERS, PRAYERS, AND PLAYGROUNDS

Although the Court’s overall approach in that era was sound, that did not mean that all cases were easy to properly decide. It also did not mean that the Court’s efforts won universal praise. The Court’s decisions about religion often generated intense controversy and strong criticism.⁷¹ Nevertheless, for a long time, the Court managed to maintain a reasonable balance of the interests at stake, giving strong protection to religion in appropriate circumstances while pushing back when it was neither necessary nor appropriate for religion to be involved.

This balanced approach eventually broke down. In recent decades, the Supreme Court has taken substantial steps toward erasing the distinction between private and public matters in religion cases. If this development can be traced back to one issue, that issue was school vouchers. A string of states created voucher programs, in which governments provided funds to families that could be used to pay for tuition, including tuition at private, religious schools.⁷²

The Supreme Court addressed the constitutionality of voucher programs in the 2002 case, *Zelman v. Simmons-Harris*.⁷³ The *Zelman* case focused on a program that gave tuition assistance to families in Cleveland, where the public schools were among the worst in the nation.⁷⁴ Families could choose to keep their children enrolled in the public schools and receive tutorial aid, or they could receive tuition assistance that would cover most of the cost of sending children to a private school.⁷⁵ Religious schools could participate in

68. See Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141 (codified at 42 U.S.C. § 2000bb-1); Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274 (codified at 42 U.S.C. §§ 2000cc, 2000cc-1).

69. Through legislation or court decisions, most states have provided some form of protection for Free Exercise rights that goes beyond what the Supreme Court has provided under the federal Constitution. See Juliet Eilperin, *31 States Have Heightened Religious Freedom Protections*, WASH. POST (Mar. 1, 2014, 2:13 PM), <https://www.washingtonpost.com/news/the-fix/wp/2014/03/01/where-in-the-u-s-are-there-heightened-protections-for-religious-freedom/>.

70. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 226 (1963).

71. See, e.g., Lauren Maisel Goldsmith & James R. Dillon, *The Hallowed Hope: The School Prayer Cases and Social Change*, 59 ST. LOUIS L.J. 409, 424–29 (2015) (describing hostile criticism of Supreme Court’s decisions about prayer in public schools).

72. For some discussion of the history behind voucher programs, see Christine Cooke Fairbanks, *History of Parent-Driven Education: Part 6 – Vouchers, ESAs and Pre-Pandemic Private School Choice*, SUTHERLAND INST. (Aug. 9, 2023), <https://sutherlandinstitute.org/history-of-parent-driven-education-part-6-vouchers-esas-and-pre-pandemic-private-school-choice/>.

73. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

74. *Id.* at 644.

75. *Id.* at 646. For low-income families, the voucher program covered ninety percent of private school tuition and up to \$2,250 per student per year. *Id.* For other families, the program covered seventy-five percent of tuition

the program, provided they agreed not to discriminate or teach hatred on the basis of race, religion, or ethnic background.⁷⁶ Most of the private schools participating in the program were religious schools, and the vast majority of the families receiving the voucher funding sent their children to religious schools.⁷⁷

The case posed genuinely difficult issues. From a pragmatic standpoint, it would be hard not to sympathize with parents who wanted their children to receive a decent education. The majority of the children in the Cleveland schools were “from low-income and minority families,” few had the financial ability “to send their children to any school other than an inner-city public school,” and the Cleveland school district was not meeting any of the state’s minimum standards for acceptable performance.⁷⁸ It therefore would be quite tempting to stretch constitutional doctrine, if necessary, to make it possible for these children to obtain better educational opportunities.

But even setting aside those practical concerns and focusing entirely on legal doctrine, the case was a close call. Courts should maximize the extent to which people remain free to make their own decisions about religion in private matters, while minimizing unnecessary involvement of religion in public affairs.⁷⁹ The voucher program involved private choices.⁸⁰ It gave families in Cleveland the opportunity to get funding for their children’s education, and they could choose to use it for a religious school or a non-religious one. Suppose, for example, that the government sent checks to all Americans, in an effort to stimulate the economy and avoid a recession.⁸¹ People would use the money for a wide range of purposes, some of which would relate to religion, such as making a donation to a religious organization or leader, purchasing scriptures or other religious items, or paying tuition for religious education. While one might favor or criticize such a program on many grounds, no one could reasonably contend that it would be unconstitutional because of its connection to religion. If the government distributes money and some people choose to use their share on religion, that is a personal choice and not a constitutional concern. One could argue that the voucher program was not materially different. It was narrower in the sense that the money given to Cleveland families was specifically earmarked for education, but each family nevertheless chose what to do with the money and whether to direct it to a religious school.

However, that analogy makes the issue seem easier than it really is. The government has distributed stimulus checks several times in recent years.⁸² There is limited data on how people spent the money, but no indication that families directed a substantial portion of the funds to religious purposes,⁸³ or that the stimulus programs radically changed the relationship between religion and any significant aspect of American society. Rather

and up to \$1,875. *Id.* The program also permitted families to use the voucher funds to send their children to participating public schools in neighboring districts, but none of those public schools opted to participate in the program and accept the vouchers. *Id.* at 645, 647.

76. *Id.* at 644–45.

77. *Id.* at 647 (stating that eighty-two percent of the private schools in the program were religious and ninety-six percent of the students in the program enrolled in religious schools).

78. *Zelman*, 536 U.S. at 644.

79. *See supra* Part I.

80. *See Zelman*, 536 U.S. at 653.

81. *See* Clay Halton, *What Is a Stimulus Check? Definition, How It Works, and Criticism*, INVESTOPEDIA (Apr. 24, 2021), <https://www.investopedia.com/terms/s/stimulus-check.asp>.

82. *Id.*

83. A large survey found that most Americans who received funds in the first round of stimulus checks distributed during the COVID-19 pandemic used the money for sayings or paying down debts, so only about forty percent of the money was spent in other ways. *See* Olivier Coibion et al., *How Did U.S. Consumers Use Their Stimulus Payments?* 16 (Nat’l Bureau of Econ. Rsch., Working Paper No. 27693, 2020), <https://www.nber.org/papers/w27693>. Another survey found that only seven percent of households used stimulus money for “[d]onations or giving to friends.” THESIA I. GARNER ET AL., U.S. BUREAU OF LAB. STAT., RECEIPT AND USE OF STIMULUS PAYMENTS IN THE TIME OF THE COVID-19 PANDEMIC 1, 6 (2020).

than being a key element of the stimulus programs, religion was just one of many things that incidentally could have been affected by them. In contrast, the voucher program in *Zelman* was specifically focused on subsidizing the costs of educating children, and it was no secret or surprise that the voucher program would have a dramatic impact on religious education in Cleveland.⁸⁴ Indeed, ninety-six percent of the voucher money went to religious schools, meaning that the ultimate effect of the voucher program was almost exclusively a matter of transferring tax dollars to religious schools.⁸⁵ If that kind of program was widespread, an enormous amount of public money would constantly be flowing to religious institutions. While the religious schools would purport to be private, the ultimate source of their funding would differ little from that of public schools. Meanwhile, the voucher programs inevitably would have a substantial impact on the public schools as well, by drawing away large numbers of students and massive amounts of money that otherwise would have been available for public education.

The voucher case thus posed a thorny dilemma, because it was about using large amounts of public money to fund private choices, with the expectation that the vast majority of those private choices would be made in favor of religious education. The majority of the Supreme Court voted to uphold the program, concluding that the program involved “true private choice.”⁸⁶ The fact that almost all of the money in the program went to religious schools was due to circumstances that happened to exist, not because the government had designed the program to achieve that result.⁸⁷ Most of the schools opting to accept the vouchers were religious, and most parents who used the vouchers chose to send their children to those religious schools.⁸⁸ These were parts of the context in which the voucher program operated, not features of the program.

The dissenting Justices emphasized that size matters. Under the Cleveland program, taxpayers’ money would be used “to pay for the indoctrination of thousands of grammar school children in particular religious faiths.”⁸⁹ Although the funds arrived via choices made by families, the substantive reality was that “[t]he scale of the aid to religious schools approved today is unprecedented, both in the number of dollars and in the proportion of systemic school expenditure supported.”⁹⁰ In the dissenters’ view, the “substantiality” of the money involved should be considered,⁹¹ because the massive amount of money at stake exacerbated the risk of social division and conflict resulting from the program.⁹²

The majority in *Zelman* thus emphasized the value of letting each individual family make its own decisions about private schooling, while the dissenters focused more broadly on how that would affect the use of public funds and the operation of public-school systems. Neither is clearly the right or wrong way to look at the problem. They are both plausible ways of resolving the dilemma posed by questions about public money that funds private choices.

The *Zelman* case was decided in 2002, not long after the start of the new millennium.⁹³ In retrospect, it could be seen as an omen of things to come, a sign that a dramatic shift was underway for constitutional law concerning religion. In the years since *Zelman*, the Supreme Court has made a series of decisions that consistently and meaningfully

84. *Zelman*, 536 U.S. at 647.

85. *Id.*

86. *Id.* at 653.

87. *Id.* at 653–56.

88. *Id.* at 647.

89. *Zelman*, 536 U.S. at 684 (Stevens, J., dissenting).

90. *Id.* at 708 (Souter, J., dissenting).

91. *Id.* at 695.

92. *Id.* at 727 (Breyer, J., dissenting).

93. *See supra* note 73.

dissolved the distinction between the public and private realms that previously helped guide decisions in religion cases.⁹⁴ This shift was reinforced by changes in Supreme Court membership, with the Court becoming decisively more conservative with the retirement of Justice Anthony Kennedy in 2018 and the death of Justice Ruth Bader Ginsburg in 2020.⁹⁵ But even before those changes occurred, the Court’s approach to religious issues had already begun to move toward allowing religion to have a larger role in public matters.

The Court now allows religious expression and religious activities in public settings in ways that were not permitted in the past. In *Town of Greece v. Galloway*, the Court allowed a town to have prayers at the beginning of its monthly board meetings.⁹⁶ The prayers were not merely the sort of generic, non-denominational prayers that one might consider more ceremonial than truly religious in nature.⁹⁷ For example, some of the prayers were distinctly Christian and referred to important aspects of those beliefs, such as “the saving sacrifice of Jesus Christ on the cross” and the resurrection.⁹⁸ These prayers were clearly a solemn religious exercise being incorporated into a public event, so it would have been easy for the Court to justify a ruling against them. But the Court’s majority made it clear that it was no longer committed to a principle of maximizing individual religious rights while minimizing entanglements of religion and public matters. The Court declared that rather than deciding cases based on such abstract logic or general principles, constitutional decisions about religion should be based first and foremost on history.⁹⁹ The meaning of the Establishment Clause should be derived by looking at “historical practices and understandings.”¹⁰⁰ If something was permitted in the late 1700s or early 1800s, it should be permitted now.¹⁰¹ Using that historical lens, the Court went on to approve the town board’s practice of opening its meetings with prayers, even though some of the prayers were sectarian and most were delivered by Christian ministers.¹⁰²

The Court extended this practice to the setting of public schools in *Kennedy v. Bremerton School District*, ruling in favor of a high school football coach who had a practice of praying on the field after football games.¹⁰³ The coach initially prayed alone, but eventually students joined him, including most of his school’s team and sometimes players from the opposing team.¹⁰⁴ The school disciplined the coach on the ground that his actions violated school district policies and declined to renew the coach’s contract for the next season.¹⁰⁵ Under the approach used in the Supreme Court’s past cases about school prayer,¹⁰⁶ the *Kennedy* case simply would have turned on factual questions. Was the coach

94. See *infra* notes 96–120 and accompanying text.

95. Nina Totenberg, *Supreme Court Loses Its Swing Voter: Justice Anthony Kennedy to Retire*, NPR (June 27, 2018, 2:17 PM), <https://www.npr.org/2018/06/27/533997482/supreme-court-to-lose-its-swing-voter-justice-anthony-kennedy-to-retire>; Nina Totenberg, *Justice Ruth Bader Ginsburg, Champion of Gender Equality, Dies at 87*, NPR (Sept. 18, 2020, 7:28 PM), <https://www.npr.org/2020/09/18/100306972/justice-ruth-bader-ginsburg-champion-of-gender-equality-dies-at-87>.

96. *Town of Greece v. Galloway*, 572 U.S. 565, 570, 591–92 (2014).

97. *Id.* at 571–72. The Court had previously upheld prayers by chaplains in state legislatures, where the prayers did not advance any particular faith or belief. See *Marsh v. Chambers*, 463 U.S. 783, 794–95 (1983).

98. *Town of Greece*, 572 U.S. at 572.

99. *Id.* at 576.

100. *Id.* (quoting *Cnty. of Allegheny v. Am. Civ. Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part)).

101. *Town of Greece*, 572 U.S. at 577 (“A test that would sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent.”).

102. *Id.* at 578–86 (finding “[t]hat nearly all of the congregations in town turned out to be Christian does not reflect an aversion or bias on the part of town leaders against minority faiths”).

103. *Kennedy v. Bremerton Sch. Dist.*, 592 U.S. 507, 543–44 (2022).

104. *Id.* at 514–15.

105. *Id.* at 520.

106. See *supra* notes 49–56 and accompanying text.

punished for engaging in a personal, individual, private act of prayer? As the school had recognized, allowing the coach to exercise his religious freedom in that manner would not raise constitutional concerns.¹⁰⁷ Or was the coach effectively leading a prayer that was problematic because it had an organized, official quality? Was he in trouble for leading a ceremony that crossed the line from private religious choice into public celebration of religion?

The Supreme Court discussed the case in that framework, and the majority ruled in the coach's favor.¹⁰⁸ In some ways, the decision was extremely narrow and fact specific, finding only that the coach had a right to do a "short, private, personal prayer" on the field that would not involve any students.¹⁰⁹ Although there had been occasions when a large number of football players and others had joined the coach in praying on the field, the majority noted that technically the discipline imposed by the school was not based on those events and instead related only to three subsequent incidents where the coach prayed briefly and quietly on the field without anyone else joining him.¹¹⁰

At the same time, the majority's opinion contained sweeping and vitally important pronouncements about how the Court now decides Establishment Clause issues. The majority made it unequivocally clear that the *Lemon* test is no longer good law.¹¹¹ Establishment Clause cases now must turn on historical practices and understandings.¹¹² The majority did not mention any historical evidence specifically bearing on its decision about coaches praying on the field after football games but did mention that America has a more general long tradition of respecting religious expression and teaching tolerance of "diverse expressive activities."¹¹³

The prayer cases thus represent one area that is clearly changing, with the Supreme Court now more willing to allow religious practices in public settings. It seems quite possible that the Court eventually will go further and overrule the older cases that prohibited organized prayer in public schools. The majority avoided the need to consider that in *Kennedy*, because they deemed the coach's prayer to be personal and private, not organized and official.¹¹⁴ But if one adopts the methodology of deciding Establishment Clause issues based on historical practice and understanding, it is easy to imagine the Court going further and allowing the return of more general, widespread forms of prayer in public schools. For example, the Court could decide that having a moment of silence at the beginning of the school day does not endorse religion and merely creates an opportunity for each student to make a personal choice about praying. Or the Court could allow prayers led by students, on some kind of rotating basis akin to what the Court allowed for local government meetings in the *Town of Greece* case.¹¹⁵ Or the Court could extend the logic of the *Kennedy* case from football fields to classrooms and say that teachers should be permitted to pray before or after teaching as long as students are not compelled to participate.

107. *Kennedy*, 597 U.S. at 519. The school did not seek to stop the coach from praying after games but took the position that he would have to do so in a private setting where he was not seen by students or others attending the games. *Id.*

108. *Id.* at 544.

109. *Id.* at 525.

110. *Id.* at 525–26.

111. *Id.* at 534. The Court claimed that it had "long ago abandoned *Lemon*," but, as proof of that, it cited a plurality opinion, *see* *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2079–81 (2019) (plurality opinion), and a majority opinion that did not mention *Lemon*, *see* *Town of Greece v. Galloway*, 572 U.S. 565, 575–77 (2014).

112. *Kennedy*, 597 U.S. at 535.

113. *Id.* at 541.

114. *See supra* notes 109–110 and accompanying text.

115. *See supra* note 96–102 and accompanying text.

The other noteworthy type of case in recent years involves governments distributing money or other resources. The Court has shifted ground in these cases, going further to prevent religious individuals or organizations from being excluded when it comes to receiving public largesse. A key example of this was *Trinity Lutheran Church of Columbia v. Comer*, where the Court faulted Missouri for excluding churches and other religious institutions from a state program that provided playground surfaces (made of recycled tires) for nonprofit organizations.¹¹⁶ Missouri barred religious organizations from the program on the ground that a provision in its state constitution prevents the state from financially assisting religious entities.¹¹⁷ The Supreme Court held that letting a church have a free surface for its playground would not violate the Establishment Clause, but categorically excluding the church from seeking benefits from the program would violate the church's Free Exercise rights.¹¹⁸ No one can be required "to renounce its religious character in order to participate in an otherwise generally available public benefit program."¹¹⁹

In subsequent cases about the distribution of financial benefits, the Supreme Court has applied the same reasoning. In *Espinoza v. Montana Department of Revenue*, the Court held that if a state gives tax credits to people who donate money for private school scholarships, those who donate for scholarships at religious schools cannot be excluded.¹²⁰ And in *Carson v. Makin*, the Court concluded that where a state provides tuition assistance for families to send their children to private schools, in areas where the population is too small to maintain a high school, those attending religious schools cannot be excluded from receiving this assistance.¹²¹

Whether the government is giving out playground surfaces, tax credits, or tuition subsidies, the Supreme Court has now made it clear that religious schools can and must be included in these programs. Free exercise rights thus continue to expand, while Establishment Clause restrictions are taken down. If one wonders what will come next in this line of cases, the answer may lie in Oklahoma.

III. OKLAHOMA!

Oklahoma is on track to have the nation's first religious charter school.¹²² The proposed school is a novel and ambitious venture, but also a logical progression of the path the Supreme Court has recently charted in religion cases.¹²³ Litigation concerning the proposed school is underway, and it may reveal much about the extent to which the quest

116. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 454–55, 467 (2017).

117. *Id.* at 455.

118. *Id.* at 462–67.

119. *Id.* at 466.

120. *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2251, 2262–63 (2020).

121. *Carson v. Makin*, 596 U.S. 767, 785 (2022).

122. Martinez-Keel, *supra* note 3. Controversies have arisen in the past about charter schools devoted to teaching Arabic or Hebrew and the cultures surrounding those languages, but those schools purposely avoided teaching Islam or Judaism in order to avoid Establishment Clause concerns. See Gabrielle Marie D'Adamo, Comment, *Separatism in the Age of Public School Choice: A Constitutional Analysis*, 58 EMORY L.J. 547, 548 (2008); Tammy Harel Ben Shahr, *Race, Class, and Religion: Creaming and Cropping in Religious, Ethnic, and Cultural Charter Schools*, 7 COLUM. J. RACE & L. 1, 32 (2016). In addition, a significant number of private Catholic schools have closed and reopened as religiously affiliated public charter schools, but they have "eliminated religious programming, language, and iconography." Janet R. Decker & Kari A. Carr, *Church-State Entanglement at Religiously Affiliated Charter Schools*, B.Y.U. EDUC. & L.J. 77, 78 (2015).

123. See *Espinoza*, 140 S. Ct. at 2291 (Breyer, J., dissenting) (noting that the majority's decision raised serious questions about the whether the Constitution would permit or require states to fund religious charter schools).

to protect free exercise of religion now trumps any limitations on establishment of religion.¹²⁴

According to Oklahoma’s legislature and its State Department of Education, “[c]harter schools are public schools that are allowed greater flexibility for greater accountability.”¹²⁵ Oklahoma’s legislature authorized the creation of charter schools in order to encourage educational experimentation and diversify educational choices for parents and students.¹²⁶ Unlike the conventional public schools, which are part of systems overseen by the district’s school board, each charter school has its own board of governance.¹²⁷ A charter school is accountable to that board, the sponsoring institution that created the school, and the State Department of Education.¹²⁸ Charter schools are generally not subject to the laws and requirements that govern other public schools in Oklahoma.¹²⁹ For example, the “additional flexibilities and de-regulations afforded to charter schools” means that these schools can hire teachers who do not have Oklahoma teaching certificates.¹³⁰

Charter schools in Oklahoma are funded by the state, and each receives the same base funding per student as the other public schools in the district where the charter school is located.¹³¹ Charter schools may also receive up to \$50,000 for startup costs from the state’s Charter Schools Incentive Fund, and they may seek additional funding from other public or private sources.¹³² Charter schools cannot charge tuition or other fees.¹³³

Creating a charter school in Oklahoma requires the cooperation of a sponsor and an operator.¹³⁴ The sponsor may be a school district, a college or university, a federally recognized Indian tribe, or the Statewide Charter School Board.¹³⁵ The operator of a charter school may be a public entity or a private individual or organization.¹³⁶

The idea of opening a religious charter school in Oklahoma first surfaced in 2021, when the Archbishop of Oklahoma City contacted state officials about the possibility of applying for permission to operate a Catholic virtual charter school.¹³⁷ The Archbishop suggested the school would “continue our longstanding contribution to the public good.”¹³⁸

124. Sean Murphy, Oklahoma Attorney General Sues to Stop US’s First Public Religious School, AP (Oct. 20, 2023, 5:36 PM), <https://apnews.com/article/catholic-public-religious-charter-school-oklahoma-drummond-d7f320f80427517ecfbedf54a4d07567>.

125. Okla. State Dep’t of Educ., *Oklahoma Charter Schools Program*, OK.GOV (last updated Apr. 25, 2022), <https://sde.ok.gov/faqs/oklahoma-charter-schools-program>; see also OKLA. STAT. tit. 70, § 3-132(D) (defining a charter school as “a public school established by contract” in order “to provide learning that will improve student achievement”).

126. OKLA. STAT. tit. 70, § 3-131(A)(3)–(4).

127. Okla. State Dep’t of Educ., *supra* note 125.

128. *Id.*

129. OKLA. STAT. tit. 70, § 3-136(A)(5).

130. Okla. State Dep’t of Educ., *supra* note 125.

131. *Id.* (“Like any public school, charter schools receive state funding through the State Aid funding formula, set by law.”). In national rankings of how much states spend on education per student, Oklahoma tends to be near the bottom. See, e.g., Yasmeen Saadi, *The State of Oklahoma’s Teacher Salary and Per-Pupil Expenditures*, OKLAHOMA WATCH (July 27, 2023), <https://oklahomawatch.org/newsletter/the-state-of-oklahomas-teacher-salary-and-per-pupil-expenditures/> (reporting that Oklahoma spent \$10,951 per student enrolled in 2021-2022, placing it 46th in national rankings of the states).

132. Okla. State Dep’t of Educ., *supra* note 125.

133. OKLA. STAT. tit. 70, § 3-136(A)(10).

134. Okla. State Dep’t of Educ., *supra* note 125.

135. OKLA. STAT. tit. 70 § 3-132(A). An amendment to this statute, effective on July 1, 2024, will allow private institutions of higher learning to sponsor charter schools. See *id.* § 3-132(A)(2); 2023 Okla. Sess. Laws 323.

136. OKLA. STAT. tit. 70, § 3-134(C).

137. Martinez-Keel, *supra* note 3. The Catholic leaders in Oklahoma were consulting with Notre Dame Law School’s Religious Liberty Initiative. See Eger, *supra* note 1.

138. Martinez-Keel, *supra* note 3. According to a Pew Research Center study conducted in 2014, eight percent of Oklahoma residents are Catholic. *Religious Landscape Study: Catholics*, PEW RSCH. CTR., <https://www.pewresearch.org/religion/religious-landscape-study/religious-tradition/catholic> (last visited Mar. 19, 2024).

In response, the executive director of the Oklahoma Statewide Virtual Charter School Board asked John O'Connor, Oklahoma's attorney general at the time, to provide an opinion on the legality of such a school.¹³⁹ The attorney general responded in December 2022 with a detailed analysis of the issues raised by the Archbishop's inquiry.¹⁴⁰

The attorney general began by acknowledging that Oklahoma law plainly prohibits the creation of a religious charter school.¹⁴¹ The Oklahoma statute concerning charter schools provides that "[a] charter school shall be nonsectarian in its programs, admission policies, employment practices, and all other operations," and it does not permit any "charter school or program that is affiliated with a nonpublic sectarian school or religious institution."¹⁴² The attorney general went on to consider whether that Oklahoma law is now invalid and should be disregarded because of the Supreme Court's decisions holding that religious individuals and institutions cannot be excluded when the government distributes money or other resources (such as playground surfaces, tax credits, or tuition assistance).¹⁴³

The attorney general concluded that it was "very likely" that the Supreme Court would strike down the portion of the Oklahoma law that prohibited charter schools affiliated with religious institutions.¹⁴⁴ In other words, assume for a moment that a religious institution sought to establish and operate a charter school that would be non-religious in all respects, such as in its curriculum and other educational practices. Oklahoma's law would prohibit that charter school, despite the non-religious nature of the school, because the law does not permit charter schools to be affiliated with a religious institution.¹⁴⁵ In the attorney general's opinion, that part of Oklahoma's law is highly problematic because it excludes organizations based on the fact that they are religious, regardless of what they would do in operating a charter school.¹⁴⁶ Relying on the logic of the Supreme Court's decision in *Zelman* to uphold Cleveland's school voucher program because it involved parental choice,¹⁴⁷ the attorney general saw no constitutional problem in having a religious institution receive substantial amounts of public funds to pay for the operation of a charter school.¹⁴⁸ Parents would decide whether to send their children to the charter school, which "breaks the circuit between government and religion."¹⁴⁹

The attorney general recognized that the other part of Oklahoma's law, which requires charter schools to be operated in a "non-sectarian" manner, raises more complex issues.¹⁵⁰ Here, it would seem the attorney general faced an uphill battle because Oklahoma has expressly declared that its charter schools are public schools.¹⁵¹ In the United States,

139. Martinez-Keel, *supra* note 3.

140. Okla. Att'y Gen. Op. No. 2022-7 (Dec. 1, 2022), <https://oklahoma.gov/content/dam/ok/en/governor/documents/Attorney%20General%20Opinion%202022-7.pdf>. This opinion was later withdrawn by Oklahoma's next Attorney General. See *infra* note 199 and accompanying text.

141. Okla. Att'y Gen. Op. No. 2022-7, *supra* note 140, at 1.

142. OKLA. STAT. tit. 70, § 3-136(A)(2). Oklahoma's state constitution also provides that public schools shall be "free from sectarian control." OKLA. CONST. art I, § 5.

143. Okla. Att'y Gen. Op. No. 2022-7, *supra* note 140, at 1, 3–6 (citing *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017); *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246 (2020); *Carson v. Makin*, 596 U.S. 767, 781, 787, 789, 794–95 (2022)). For discussion of those cases, see *supra* notes 116–121 and accompanying text.

144. Okla. Att'y Gen. Op. No. 2022-7, *supra* note 140, at 6.

145. *Id.*

146. *Id.* at 8.

147. *Zelman v. Simmons-Harris*, 536 U.S. 639, 662–63 (2002); see *supra* notes 73–92 and accompanying text.

148. Okla. Att'y Gen. Op. No. 2022-7, *supra* note 140, at 7.

149. *Id.* (quoting *Oliver v. Hofmeister*, 368 P.3d 1270, 1274 (Okla. 2016)).

150. OKLA. STAT. tit. 70, § 3-136(A)(2); Okla. Att'y Gen. Op. No. 2022-7, *supra* note 140, at 8.

151. See *supra* note 125 and accompanying text.

there are no public schools with religious affiliations.¹⁵² Yet Oklahoma's attorney general was undaunted by this and unafraid to break new ground. His opinion made two principal points. First, the attorney general argued that strict scrutiny should apply to Oklahoma's law because it "expressly targets" the free exercise of religion.¹⁵³ If someone's religion inspires them to start a charter school in Oklahoma and run it in a way that is devoted to those religious principles, the Oklahoma statute would prevent them from doing so.¹⁵⁴ The attorney general saw no compelling reason for the state to prevent someone from operating a sectarian public charter school and, indeed, the attorney general felt that the Supreme Court would protect the constitutional right to create and run such a school.¹⁵⁵

Second, the attorney general's opinion questioned whether an Oklahoma charter school would even be subject to constitutional restraints like the Establishment Clause.¹⁵⁶ Most constitutional rights, including those provided by the Establishment Clause, can be violated only by government actions, not private actions.¹⁵⁷ Given that Oklahoma charter schools are public schools, one might think that they are clearly government actors. Not so fast, the attorney general warned. In his view, labels like "public school" or "private school" do not control, and the fact that Oklahoma considers its charter schools to be public schools for many purposes does not mean their actions can be attributed to the state for purposes of constitutional claims about establishment of religion.¹⁵⁸

The attorney general's opinion thus concluded that Oklahoma's laws against religious charter schools should not be enforced because the state likely had a constitutional obligation to allow charter schools to be sectarian institutions run by religious groups.¹⁵⁹ Oklahoma's governor and other state officials generally applauded that conclusion,¹⁶⁰ and it was consistent with their ongoing efforts to establish voucher systems and "pivot Oklahoma toward more expansive policies for educational options outside of traditional public schools."¹⁶¹ Asked about the issue at a press conference, the Oklahoma governor said that he supports parental choices about education, and he would be pleased to see other religious charter schools, such as Jewish and Muslim schools, established in the state.¹⁶² On the other side of the issue, the Oklahoma Education Association spoke out against the

152. David Leonhardt, *A Religious School That's Also a Public School*, N.Y. TIMES (June 6, 2023), <https://www.nytimes.com/2023/06/06/briefing/oklahoma-religious-school.html> (citing experts who say the Catholic public charter school in Oklahoma would be "the first explicitly religious public school in the U.S. in modern times").

153. Okla. Att'y Gen. Op. No. 2022-7, *supra* note 140, at 9.

154. *Id.*

155. *Id.* at 9–11.

156. *Id.* at 11–14.

157. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991) ("With a few exceptions, such as the provisions of the Thirteenth Amendment, constitutional guarantees of individual liberty and equal protection do not apply to the actions of private entities.").

158. Okla. Att'y Gen. Op. No. 2022-7, *supra* note 140, at 13–14.

159. *Id.* at 15.

160. Jana Hayes, *Oklahoma Attorney General: Law Against Religious Charter Schools May Be Unconstitutional*, THE OKLAHOMAN (Dec. 2, 2022, 5:35 PM), <https://www.oklahoman.com/story/news/education/2022/12/02/oklahoma-ag-releases-opinion-on-religious-charter-schools/69695429007>. Shortly before the religious charter school issue came before the Oklahoma Statewide Virtual Charter School Board, a new member, Nellie Tayloe Sanders, was appointed to the board. Sanders works for a care facility founded by a Catholic men's organization, and her children attend a Catholic school. Asked whether the timing of her appointment to the board was a coincidence, she acknowledged that "it's absolutely not a coincidence." Eger, *supra* note 1.

161. Martinez-Keel, *supra* note 3. Upon winning re-election in 2022, Oklahoma's governor prayed on the steps of the state capitol, dedicated every square inch of the state to Jesus Christ, and asked God to "have his way" with Oklahoma's education system. Samuel L. Perry, *How Oklahoma Became Ground Zero in the War Over Church-State Separation*, TIME (Aug. 1, 2023, 2:57 PM), <https://time.com/6300200/how-oklahoma-became-ground-zero-in-the-war-over-church-state-separation>.

162. Andrea Eger, *Religious Charter School Question Likely to Be Decided in Court, Former AG Says*, TULSA WORLD (Nov. 1, 2023), https://tulsaworld.com/news/local/education/religious-charter-school-question-likely-to-be-decided-in-court-former-ag-says/article_9a55d796-b45d-11ed-ae2c-efae2cac11f1.html.

proposed school, stating that the Supreme Court’s decisions cited by the attorney general “are not contextually similar” to the idea of allowing religious charter schools.¹⁶³ In other words, it is a big leap from letting a church’s daycare center have a new playground surface to having taxpayers fund entire schools devoted to teaching a particular religion’s perspectives.

Having secured a favorable opinion from the attorney general, representatives of the Archdiocese of Oklahoma City and the Diocese of Tulsa formally announced in February 2023 their plan to create the nation’s first religious charter school.¹⁶⁴ They made a presentation asking the Oklahoma Statewide Virtual Charter School Board to approve the opening of the new school.¹⁶⁵ The school would provide education online, rather than in person, in hopes of reaching students in rural communities too small to have a traditional Catholic school, in addition to drawing some students from cities where traditional Catholic schools already exist.¹⁶⁶ Plans called for the school to have 400 to 500 students in its first year, which would begin in the fall of 2024, with the school increasing its enrollment to 1,500 students within five years.¹⁶⁷

Like other charter schools in Oklahoma, the school would be funded by the state, so families would pay no tuition to send their children there.¹⁶⁸ The St. Isidore school estimated that it would need \$5.2 million to fund its first year of operation,¹⁶⁹ with its total state funding over its first five years projected to be \$26 million.¹⁷⁰ The officials seeking to create the school acknowledged that state funding was the reason they sought charter school status. At a presentation about the proposed school, the chairman of the Oklahoma Statewide Virtual Charter School Board asked why the school would not simply open as a private school, “without the oversight of our bureaucratic board.”¹⁷¹ The senior director of Catholic education at the Oklahoma City archdiocese explained that being a charter school would enable the school to receive state funding rather than charging tuition, making it more competitive with other online charter schools that are free of charge for families.¹⁷² She noted that “taxpayer dollars” are funding other virtual charter schools, “but our parents are paying taxes, too.”¹⁷³ The school would seek grant funding to supplement the money it would receive from the state.¹⁷⁴

The school would be called the St. Isidore of Seville Catholic Virtual School.¹⁷⁵ Isidore was the Archbishop of Seville and a scholar whose works included an influential encyclopedia of information drawn from a vast array of classical sources.¹⁷⁶ Although St. Isidore lived and died 1,300 years before the existence of computers, some have

163. Hayes, *supra* note 160.

164. Martinez-Keel, *supra* note 3.

165. *Id.*

166. *Id.* The school also hopes to provide supplemental online courses to enrich the curricula of traditional brick-and-mortar Catholic schools. See Eger, *supra* note 1.

167. Martinez-Keel, *supra* note 3.

168. *Id.*

169. *Id.*

170. Nuria Martinez-Keel, *How Much Would a Catholic Charter School Cost Oklahoma Taxpayers? It Could Be Millions*, THE OKLAHOMAN (June 8, 2023, 5:45 AM), <https://www.oklahoman.com/story/news/education/2023/06/08/how-much-would-catholic-charter-school-cost-oklahoma-taxpayers/70294428007>.

171. Martinez-Keel, *supra* note 3 (quoting Robert Franklin, Chairman of the Oklahoma Statewide Virtual Charter School Board).

172. *Id.* (quoting Lara Schuler, Senior Director for Catholic education at the Archdiocese of Oklahoma City).

173. *Id.*

174. *Id.*

175. *Id.*

176. See THE ETYMOLOGIES OF ISIDORE OF SEVILLE (Stephen A. Barney et al. trans., 2010).

unofficially dubbed him the patron saint of the internet.¹⁷⁷ Although some sources suggest that Pope John Paul II officially conferred that title on St. Isidore, those reports seem to be apocryphal, for there is no official record of that patronage designation being made.¹⁷⁸ Whether or not his link to the internet ever becomes official, St. Isidore will have the legacy of the virtual Catholic charter school in Oklahoma being named in his honor.¹⁷⁹

The creators of the St. Isidore school are unequivocal about its religious character. The school will provide education based on Catholic doctrine¹⁸⁰ and serve as a place for “evangelization.”¹⁸¹ It “would fully embrace Catholic teachings on sanctity of marriage, sexual orientation and gender identity.”¹⁸² The school would make hiring decisions based on its religious beliefs,¹⁸³ which might include hiring faculty and staff who are not Catholics but requiring them to act “in a manner consistent with the discipline and teachings of the Catholic church.”¹⁸⁴ The organizers of the school affirmed that “[w]e think we can be a fully Catholic school—Catholic in every way: Catholic in teaching, Catholic in employment—and take public funding.”¹⁸⁵ They stated that “religious indoctrination” would be incorporated into instruction at the school every day, such as by integrating theology into history and social studies classes.¹⁸⁶ Ultimately, “[r]eligion is ‘baked into everything [they] do.’”¹⁸⁷

The school will accept students of other religious faiths or students who are not religious, instead of requiring students to be Catholic.¹⁸⁸ When asked whether the school would welcome students who are openly gay or transgender, a school representative said it was “too early to even say”¹⁸⁹ and that they “would have to look at the specifics” and “do it on a case-by-case basis.”¹⁹⁰ According to the school’s website, these “beliefs, expectations, policies, and procedures” will be presented in a school handbook, which will be made available before enrollment, and the school assumed all families choosing to send their children to the school would be willing to adhere to them.¹⁹¹

From the start, the proposed school drew opposition.¹⁹² National organizations like Americans United for Separation of Church and State argued that having a religious charter school funded by taxpayers would be “a sea change in the law.”¹⁹³ Local public-school advocates also criticized the proposal, fearing that it would pull state funding away from the state’s other public schools.¹⁹⁴

177. Tom Kington, *A Patron Saint of the Internet? The Pope Is on It*, L.A. TIMES (June 28, 2020, 4:00 AM), <https://www.latimes.com/world-nation/story/2020-06-28/vatican-says-italian-teenager-could-be-patron-saint-internet>.

178. *Id.*

179. Martinez-Keel, *supra* note 3.

180. *Id.*

181. Moriah Balingit, *Okla. Catholics Want a Religious Charter School*, WASH. POST, Mar. 13, 2023, at A2.

182. Martinez-Keel, *supra* note 3.

183. Eger, *supra* note 1.

184. Martinez-Keel, *supra* note 3.

185. Eger, *supra* note 1.

186. Andrea Eger, *State Board Hears from Proponents, Critics of Catholic Online Charter School Proposal*, TULSA WORLD (May 10, 2023), https://tulsa-world.com/news/local/education/state-board-hears-from-proponents-critics-of-catholic-online-charter-school-proposal/article_7f10173a-ac10-11ed-a47e-1b6adec5314c.html.

187. Laura Meckler, *Okla. Catholic School Set to Become Nation’s First Religious Charter*, WASH. POST. (June 5, 2023, 8:07 PM), <https://www.washingtonpost.com/education/2023/06/05/catholic-charter-school-oklahoma/>.

188. Martinez-Keel, *supra* note 3.

189. *Id.*

190. Eger, *supra* note 1.

191. *Frequently Asked Questions*, ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL, <https://stisidorevirtu-alschool.org/faqs> (last visited Mar. 19, 2024).

192. Martinez-Keel, *supra* note 3.

193. *Id.*

194. Balingit, *supra* note 181.

The Catholic church officials seeking to create the school realized from the outset that their proposal would generate a long and difficult fight.¹⁹⁵ The executive director of the Catholic Conference of Oklahoma said, “[n]o matter what happens here, our intention is to see this through,” and “[w]e’re prepared for that long road. This is a major priority to us.”¹⁹⁶

By the time the proposal to create the school reached the state board, the legal landscape in Oklahoma had shifted somewhat. The Oklahoma attorney general who had issued an opinion forcefully supporting the proposed school was no longer in office, having been defeated in the Republican primary in 2022.¹⁹⁷ The new attorney general, Gentner Drummond, vowed to be more independent of the governor’s office than his predecessor.¹⁹⁸

Displaying that independent streak, the new attorney general announced that he opposed the proposed religious charter school and withdrew his predecessor’s opinion concerning it.¹⁹⁹ The new attorney general began by pointing out that Oklahoma charter schools are public schools.²⁰⁰ While there was some legal uncertainty about the extent to which charter schools are state actors for constitutional purposes, he hoped that uncertainty might soon be resolved by court decisions.²⁰¹ Until then, he was uncomfortable with the state approving the creation of a school that would plainly violate the requirements of Oklahoma law.²⁰² He emphasized that he was “a strong supporter of religious liberty,” but opposed the creation of religious schools funded by taxpayers.²⁰³ He feared an inevitable “slippery slope” leading to Oklahoma taxpayers being forced to pay for the operation of religious schools “diametrically opposed to their own faith.”²⁰⁴

In June 2023, Oklahoma’s Statewide Virtual Charter School Board approved the application for the St. Isidore school by a vote of three to two.²⁰⁵ Drama and controversy surrounded the vote.²⁰⁶ A few days before the vote occurred, a longtime member of the board was abruptly replaced by a new appointee, who cast the decisive vote to approve the school, raising questions about whether the new appointee’s vote was valid.²⁰⁷ Immediately after the vote, the board’s chair—who had voted against the school’s application—announced that he would resign.²⁰⁸

With the board’s approval in hand, the creators of the school prepared to move forward with the next steps in the school’s formation, knowing that legal battles lie

195. Martinez-Keel, *supra* note 3.

196. *Id.*

197. See Ben Felder, *Gentner Drummond Ousts John O’Connor as Oklahoma Attorney General in GOP Primary*, THE OKLAHOMAN (June 30, 2022, 6:01 AM), <https://www.oklahoman.com/story/news/2022/06/30/gentner-drummond-ousts-john-oconnor-oklahoma-attorney-general-primary/7769016001/#>. For discussion of the predecessor attorney general’s opinion, see *supra* notes 139–159 and accompanying text.

198. Felder, *supra* note 197; Martinez-Keel, *supra* note 3.

199. Letter from Gentner Drummond, *supra* note 8, at 1.

200. *Id.*

201. *Id.*

202. *Id.* at 2.

203. *Id.*

204. Letter from Gentner Drummond, *supra* note 8, at 2.

205. Andrea Eger, *Catholic Charter School Proposal Greenlighted for Oklahoma State Sanctioning, Taxpayer Funding*, TULSA WORLD (June 6, 2023), https://tulsaworld.com/news/state-regional/education/catholic-charter-school-proposal-greenlighted-for-oklahoma-state-sanctioning-taxpayer-funding/article_cbe22bda-03bc-11ee-939f-dbc4f2440cde.html#:~:text=OKLAHOMA%20CITY%20—%20The%20Statewide%20Virtual,funding%20for%20a%20Catholic%20school.

206. *Id.*

207. Andrea Eger, *Ineligibility of Newly Installed Member Could Invalidate Oklahoma Board Vote on Catholic School Sponsorship*, TULSA WORLD (June 7, 2023), https://tulsaworld.com/news/state-regional/education/ineligibility-of-newly-installed-member-could-invalidate-oklahoma-board-vote-on-catholic-school-sponsorship/article_f71f83c6-0478-11ee-93a2-bb85100c09e0.html.

208. *Id.*

ahead.²⁰⁹ The first lawsuit seeking to block the school from opening was filed in an Oklahoma state court in July 2023 by an Oklahoma nonprofit organization and nine individuals, including Oklahoma parents, religious leaders, and public education advocates.²¹⁰ The lawsuit asserted claims under state law, including claims that the St. Isidore school would violate Oklahoma's Constitution and charter school statutes.²¹¹ A few months later, Oklahoma's attorney general joined the fray, claiming that public funding of the proposed school would infringe the religious freedom of Oklahoma taxpayers.²¹² He asked Oklahoma's Supreme Court to weigh in on the matter in a case brought under the Court's original jurisdiction.²¹³ The attorney general warned that if Oklahoma is required to fund a Catholic school, "tomorrow we may be forced to fund radical Muslim teachings like Sharia law."²¹⁴

The legal battle was underway, and it is now up to Oklahoma courts to decide if the St. Isidore of Seville Catholic Virtual School will be able to open its online doors.²¹⁵

IV. THE ISSUES RAISED BY RELIGIOUS CHARTER SCHOOLS

The litigation concerning the St. Isidore school obviously raises interesting and controversial First Amendment issues. It also raises questions about ancillary matters such as how to define state actions and state actors, a subject that can be important but sounds much less exciting than hot button topics like religious liberty and separation of church and state.

Prior to litigation about the St. Isidore school, the school's proponents revealed their legal position and arguments. Oklahoma's former attorney general, John O'Connor, laid out these details in the opinion he issued in December 2022.²¹⁶ O'Connor argued that recent Supreme Court decisions establish that when the government distributes benefits, it cannot exclude religious individuals or organizations from being eligible to receive those benefits.²¹⁷ For example, O'Connor reasoned, if the government gives away playground surfaces, it cannot prohibit churches from receiving them.²¹⁸ Similarly, O'Connor noted, if the government gives tax credits or other financial assistance relating to private

209. Martinez-Keel, *supra* note 6.

210. Complaint at 5–13, *OKPLAC, Inc. v. Statewide Virtual Charter Sch. Bd.*, CV-2023-1857 (Okla. Dist. Ct. July 31, 2023).

211. *Id.* at 4.

212. See *Drummond Files Lawsuit Against State Virtual Charter Board Members for Violating Religious Liberty of Oklahoma Taxpayers*, GENTNER DRUMMOND, OKLA. ATT'Y GEN. (Oct. 20, 2023), <https://www.oag.ok.gov/articles/drummond-files-lawsuit-against-state-virtual-charter-board-members-violating-religious> [hereinafter *Drummond Files Lawsuit*]; Andrea Eger, *Oklahoma Attorney General Enters Fight Against Would-Be First Religious Charter School*, TULSA WORLD (Oct. 20, 2023), https://tulsa-world.com/news/state-regional/education/oklahoma-attorney-general-enters-fight-against-would-be-first-religious-charter-school/article_39fc60e6-6ebf-11ee-ae43-cbb402791b9f.html#:~:text=Oklahoma%20attorney%20general%20enters%20fight%20against%20would%20be%20first%20religious%20charter%20school,-Oct%202023&text=Attorney%20General%20Gentner%20Drummond%27s%20office,of%20Seville%20Catholic%20Virtual%20School.

213. *Drummond Files Lawsuit*, *supra* note 212; Eger, *supra* note 212.

214. *Drummond Files Lawsuit*, *supra* note 212.

215. In April 2024, the Oklahoma Supreme Court heard arguments in the lawsuit brought by the state's attorney general. Laura Meckler, *Okla. Supreme Court Considers Nation's First Religious Charter School*, WASH. POST, Apr. 2, 2024 (reporting that "some justices voic[ed] skepticism that a proposed Catholic charter school could pass constitutional muster but others suggest[ed] there may be little difference between such a school and other instances of tax dollars supporting religious entities").

216. Okla. Att'y Gen. Op. No. 2022-7, *supra* note 140, at 1; see *supra* notes 140–163 and accompanying text. That opinion was withdrawn in February 2023 by Oklahoma's new attorney general. See *supra* note 199 and accompanying text.

217. Okla. Att'y Gen. Op. No. 2022-7, *supra* note 140, at 3.

218. *Id.*

education, it cannot exclude those who choose a religious private school.²¹⁹ Therefore, if Oklahoma funds charter schools, it cannot bar a religious institution from creating one.²²⁰ Excluding religious individuals and organizations from receiving such public benefits is not required by the Establishment Clause, and it is a form of discrimination that violates the Free Exercise Clause.²²¹

The Free Exercise argument is potent and may carry the day if a case about the St. Isidore school reaches the Supreme Court. Those challenging Oklahoma's approval of the school face an uphill battle. While they can try to work around and distinguish the precedent set by the Supreme Court's recent decisions, that will not be an easy task. They also face the reality that the Supreme Court currently has six members who are conservative,²²² Catholic,²²³ and generally favor robust Free Exercise rights while taking a relaxed approach to separation of church and state.²²⁴ One can never be certain about what the future holds, but if one had to set odds, it would be hard not to make the St. Isidore school a heavy favorite to prevail over its opponents. It is nevertheless worth thinking about what it might take to pull off an upset.

A. Government Action

Before analyzing the First Amendment issues at the heart of the case, the analysis requires a short detour into the issue of state action. There is some uncertainty about whether charter schools like St. Isidore are state actors for constitutional purposes. Oklahoma's former attorney general took the position that they are "unlikely" to be considered state actors,²²⁵ while the state's current attorney general described the issue as "unsettled."²²⁶

The question arises because the Establishment Clause and the Free Exercise clause can only be violated by government actions.²²⁷ These provisions give rights to private individuals and entities, and those rights can be violated by the actions of governments.²²⁸ Thus, if the operation of the St. Isidore school is determined to be a private action for these purposes, the school and the religious entities sponsoring it have Free Exercise rights but would be incapable of violating the Establishment Clause.²²⁹ If the operation of the school is a form of state action, then that action would not be protected by the Free Exercise Clause and could violate the Establishment Clause.²³⁰

Distinguishing private action from government action is not always as simple as one might guess. Courts must determine whether conduct that allegedly infringes a

219. *Id.* at 3–4.

220. *See id.* at 6.

221. *Id.* at 14.

222. *See* Nina Totenberg, *The Supreme Court Is the Most Conservative in 90 Years*, NPR (July 5, 2022, 7:04 AM), <https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative>.

223. Marci A. Hamilton & Leslie C. Griffin, *How Did Six Conservative Catholics Become Supreme Court Justices Together?*, JUSTIA (May 3, 2023), <https://verdict.justia.com/2023/05/03/how-did-six-conservative-catholics-become-supreme-court-justices-together>.

224. *See* Lee Epstein & Eric A. Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait*, SUP. CT. REV., at 18 (2021) ("The quantitative results dovetail with doctrinal analysis that suggests that the Court has weakened the Establishment Clause and strengthened the Free Exercise clause.").

225. Okla. Att'y Gen. Op. No. 2022-7, *supra* note 140, at 11.

226. Letter from Gentner Drummond, *supra* note 8, at 1.

227. *See supra* note 157 and accompanying text.

228. *See* *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982) (explaining that most constitutional rights can be infringed only by governments).

229. Okla. Att'y Gen. Op. No. 2022-7, *supra* note 140, at 5.

230. *Id.* at 11.

constitutional right is “fairly attributable to the State.”²³¹ That can occur when the infringement is “caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible.”²³² Or it can occur where the party who infringed the right “may fairly be said to be a state actor . . . because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.”²³³ These tests are wordy and far from crystal clear,²³⁴ but they communicate that there are two ways for something to be state action.²³⁵ The first prong relates to the character of the violation of constitutional rights.²³⁶ It’s about what happened, and whether it emanates from the government.²³⁷ The second prong is about who did it and whether that party has a sufficiently close connection to the government.²³⁸

The argument for treating charter schools as state actors is simple and strong: Charter schools are public schools.²³⁹ They are created by state law,²⁴⁰ and they are funded by the state.²⁴¹ It does not require any subtle, lawyerly sleight of hand to make the case that charter schools are plainly engaged in state action.

The counterargument is that we should not get too hung up on the fact that charter schools are public schools. Calling them “public schools” is merely a superficial label: One must look beyond that term and consider how they operate and the ways in which charter schools are more independent and separate from the government than a traditional public school would be.²⁴² Charter schools can be operated by private entities,²⁴³ they may seek private grant funding,²⁴⁴ they are subject to less regulation, they have more flexibility than traditional public schools when it comes to curriculum and educational approaches,²⁴⁵ and they can hire teachers who do not have state certification.²⁴⁶ They are public schools, but with a high degree of independence. Rather than being considered state actors, charter schools could be regarded as non-governmental entities that have entered into contracts with states under which they provide educational services in exchange for state funding.²⁴⁷

The Supreme Court has not ruled on whether charter schools are state actors or the extent to which engage in state action.²⁴⁸ In his opinion supporting religious charter schools, Oklahoma’s former attorney general relied heavily on the Supreme Court’s decision in *Rendell-Baker v. Kohn*, but that case concerned a private school.²⁴⁹ The school was “a private institution” that educated students who had previously attended public schools but had difficulties there.²⁵⁰ The public school systems would refer the students to the

231. *Lugar*, 457 U.S. at 937.

232. *Id.*

233. *Id.*

234. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001) (“the criteria lack rigid simplicity”).

235. *Id.* at 295–96.

236. *Id.*

237. *Id.* at 296.

238. *Id.*

239. Okla. State Dep’t of Educ., *supra* note 125.

240. *See supra* note 126 and accompanying text.

241. *See supra* notes 131 and accompanying text. A state board has the exclusive authority to sponsor statewide virtual charter schools in Oklahoma. *See* OKLA. STAT. tit. 70, § 3-132.1(A) (effective July 1, 2024).

242. *See* Okla. Att’y Gen. Op. 2022-7, *supra* note 140, at 13 (arguing that determining state action requires “eschewing labels for relevant functions”) (citing *Carson v. Makin*, 596 U.S. 767, 789 (2022)).

243. *See supra* note 136 and accompanying text.

244. *See supra* note 132 and accompanying text.

245. OKLA. STAT. tit. 70, § 3-136(A)(1), (3) (effective July 1, 2024).

246. *See supra* note 130 and accompanying text.

247. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 840–41 (1982).

248. Letter from Gentner Drummond, *supra* note 8, at 1.

249. *See* Okla. Att’y Gen. Op. No. 2022-7, *supra* note 140, at 11–12 (citing *Rendell-Baker*, 457 U.S. 830).

250. *See Rendell-Baker*, 457 U.S. at 832.

private school, the students would enroll in the private school, and the public school systems would pay the private school for educating those students.²⁵¹ The school at issue in *Rendell-Baker* was unquestionably a private school, albeit one that had contracts with and received most of its funding from public school systems and therefore was subject to some regulation under the contracts.²⁵² The school fired a counselor and several teachers, and the Supreme Court had to decide whether the terminated employees could bring claims against the school for violating their constitutional rights.²⁵³ It concluded that the firing of the school employees was not an action that could be fairly attributed to the state.²⁵⁴

Rendell-Baker provides little support for the St. Isidore school and its backers, as it was about a school that was “privately owned and operated.”²⁵⁵ Charter schools are public schools, and they therefore have a substantially greater connection to and association with the state than the private school in *Rendell-Baker* did.²⁵⁶ As public schools, charter schools are part of the state, not merely private entities doing business with the state.²⁵⁷

Moreover, *Rendell-Baker* is also poor precedent for the St. Isidore situation because the case was about an employment matter, not about the education being provided to students.²⁵⁸ The Court in *Rendell-Baker* emphasized that the decision to fire some personnel was not required by any government, not influenced by any state regulation, and not something in which any government took any interest.²⁵⁹ The key connection between governments and the *Rendell-Baker* school were the contracts under which the public school districts paid for the school to educate troubled students.²⁶⁰ The constitutional claims asserted in *Rendell-Baker* had nothing to do with that connection, but with a fired employee’s due process rights.²⁶¹ In contrast, the crucial connection between Oklahoma and the St. Isidore school is that the former has approved the operation of the latter as a charter school, and so claims about the constitutionality of having a religious charter school are all about the very thing that links St. Isidore to the state.

Federal courts of appeal have made several decisions about charter schools and state action, but they also do little to clarify the issues surrounding religious charter schools. In *Caviness v. Horizon Community Learning Center*, an Arizona charter school did not renew a teacher’s contract and declined to recommend him for another teaching position.²⁶² The teacher claimed that the school had violated his constitutional rights, but a panel of the Ninth Circuit decided that the school’s actions could not be fairly attributed to the state.²⁶³ The court held that the school’s actions could not be attributed to the state because the constitutional claims in that case were about the school’s actions “as an employer.”²⁶⁴ The court explained that an entity may be a state actor for some purposes or functions and not others, and it emphasized that it was merely saying that a charter school does not engage in state action when it acts as an employer.²⁶⁵ The court’s decision strongly implied that there must be some other purposes or functions for which a charter

251. *Id.*

252. *Id.* at 831–33.

253. *Id.* at 837.

254. *Id.* at 837–38, 841, 843.

255. *See id.* at 840.

256. *See supra* note 125 and accompanying text.

257. *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 145, 149 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 2657 (2023).

258. *Rendell-Baker*, 457 U.S. at 844.

259. *Id.* at 841.

260. *Id.* at 831–32, 846–47.

261. *Id.* at 834, 837.

262. *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 811 (9th Cir. 2010).

263. *Id.* at 811, 815, 818.

264. *Id.* at 813 (quoting *George v. Pacific-CSC Work Furlough*, 91 F.3d 1227, 1229 (9th Cir. 1996)).

265. *Caviness*, 590 F.3d at 813.

school's conduct could be state action.²⁶⁶ And it is certainly quite plausible that a charter school could be deemed to engage in state action when acting as a school, even if it is not a state actor when acting as an employer.²⁶⁷ When states authorize the creation and operation of charter schools, their focus is on the functioning and acts of the school as a school.²⁶⁸ The constitutional issues surrounding the proposed St. Isidore school are about its actions as a school.²⁶⁹

On the other side, critics of religious charter schools can invoke *Peltier v. Charter Day School*, where the Fourth Circuit held that a North Carolina charter school would be considered a state actor for purposes of a lawsuit claiming that the school had an unconstitutionally discriminatory dress code.²⁷⁰ The school required girls to wear skirts to school, as part of the school's philosophy of teaching "traditional values" and chivalry.²⁷¹ The court rejected the school's argument that "it merely is a private actor providing a service under its charter contract with the state."²⁷² The court noted all the ways in which charter schools have public functions: They are public schools, they are funded by the state, and they help the state carry out its mission to provide free, universal education.²⁷³ As a "component unit" of the state's educational system, a charter school could not reasonably deny that its actions were fairly attributable to the state.²⁷⁴

That was particularly true given the nature of the constitutional claims brought against the school. The dress code requirement that was the subject of the constitutional dispute was not some incidental aspect of the school's operation, far removed from what really mattered for the educational function being provided by the school on behalf of the state.²⁷⁵ The skirts requirement was "a central component of the public school's *educational* philosophy, pedagogical priorities, and mission of providing a 'traditional school with a traditional curriculum, traditional manners[,] and traditional respect.'"²⁷⁶ Similarly, the constitutional concerns about the proposed St. Isidore school are all about the educational philosophy and mission that is at the core of the school's existence.²⁷⁷

The charter school in *Peltier* sought to take its case to the Supreme Court, contending that the issue had vitally important, national implications and that the Fourth Circuit's position posed "an existential threat" to the continuation of charter schools.²⁷⁸ If the Supreme Court had agreed to decide the case, its decision may have provided some significant guidance for the litigation about the St. Isidore school. But the Court denied the certiorari petition,²⁷⁹ leaving questions about charter schools and state action for another day.

The litigation concerning the St. Isidore school may wind up side-stepping the state action issue, simply because other defendants in the case are clearly state actors. The lawsuit by Oklahoma's attorney general was brought against Oklahoma's Statewide

266. *Id.* at 814–15.

267. *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 145, 149 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 2657 (2023).

268. *Id.* at 145, 149; *see supra* note 126 and accompanying text.

269. Complaint, *supra* note 210, at 2.

270. *Peltier*, 37 F.4th at 112–14, 123.

271. *Id.* at 113, 125.

272. *Id.* at 117.

273. *Id.* at 119.

274. *Id.*

275. *Peltier*, 37 F.4th at 104.

276. *Id.* at 120.

277. *Id.* at 104; *see* Complaint, *supra* note 210, at 4.

278. Petition for Writ of Certiorari at 30, *Charter Day Sch., Inc. v. Peltier*, 37 F.4th 104 (4th Cir. 2022), 2022 WL 4279737 (U.S. Sept. 12, 2022).

279. *Charter Day School, Inc. v. Peltier*, 143 S. Ct. 2657 (2023).

Virtual Charter School Board and its members.²⁸⁰ The St. Isidore school has joined the case as an intervenor.²⁸¹ In the other lawsuit underway, *OKPLAC, INC. v. Statewide Virtual Charter School Board*, the challengers have sued Oklahoma’s Department of Education, its State Superintendent of Public Instruction, the Statewide Virtual Charter School Board, and all of that board’s members, in addition to naming the St. Isidore school itself as a defendant.²⁸² There should be no dispute that state government officials and governmental entities like the Department of Education and the Statewide Virtual Charter School Board engaged in state action when they approved the creation of the religious charter school and entered into a charter school contract with it. Rather than seeking relief against the school, these challengers can seek to stop the state from proceeding and claim that the state’s approval and financial support for the school are unconstitutional.

The state action issue therefore seems unlikely to derail the litigation concerning the St. Isidore school. One way or another, courts should be able to reach the First Amendment issues.

B. Free Exercise of Religion

To prevail on the First Amendment issues, the challengers will need to distinguish the Supreme Court’s recent decisions in *Trinity Lutheran*, *Espinoza*, and *Carson*.²⁸³ Those cases establish that when the government makes benefits available, it cannot exclude religious individuals or organizations from the chance to receive those benefits.²⁸⁴ Even if the government bears no hostility to religion, and instead simply wants to maintain a healthy distance between church and state, it lacks sufficient justification for discriminating against those who are religious or would use the benefits for religious purposes.²⁸⁵ Once the government decides to offer benefits, it must not try to stop the benefits from flowing to those who are religious.²⁸⁶

It is easy to see why those in favor of religious charter schools would rely on these cases. In their view, Oklahoma offers the benefit of an opportunity to operate a charter school but restricts it to those with nonsectarian aims.²⁸⁷ Oklahoma has effectively said, “[n]o churches need apply.”²⁸⁸

The argument that Oklahoma should not discriminate against religious charter schools is strong, but there is an opening through which to attack it. The counterargument will require convincing judges that there is a special and vital interest in maintaining the American tradition of nonsectarian public education. Private education and public education are both important, but a distinction between them should be maintained, so that religious freedom in the private education sector can flourish while public education remains free of sectarian division.

The seeds for such a distinction are planted in the Supreme Court’s decisions.²⁸⁹ The Court has condemned governments for trying to exclude religious individuals and

280. See Respondent’s Brief in Response to Petitioner’s Application and Petition at 1, *Drummond v. Okla. Statewide Virtual Charter Sch. Bd.*, No. MA-121694 (Okla. Nov. 21, 2023).

281. *Id.*

282. See Complaint, *supra* note 210, at 2.

283. See generally *Carson v. Makin*, 596 U.S. 767 (2022); *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246 (2020); *Trinity Lutheran Church of Columbia v. Comer*, 582 U.S. 449 (2017).

284. *Carson*, 596 U.S. at 789; *Espinoza*, 140 S. Ct. at 2261; *Trinity Lutheran*, 582 U.S. at 467.

285. *Espinoza*, 140 S. Ct. at 2260 (rejecting state’s justification that it wanted to maintain separation of church and state “more fiercely” than the Constitution demands).

286. *Id.* at 2261.

287. OKLA. STAT. tit. 70, § 3-136(A)(2) (effective July 1, 2024).

288. *Trinity Lutheran*, 582 U.S. at 464–65.

289. *Carson*, 596 U.S. at 778, 789; *Trinity Lutheran*, 582 U.S. at 453–54; *Espinoza*, 140 S. Ct. at 2252–53.

organizations from obtaining benefits relating to private education.²⁹⁰ *Trinity Lutheran* was about a private preschool and daycare center.²⁹¹ It simply wanted the chance to get a new, softer playground surface, not to be converted into a public school.²⁹² *Espinoza* was about parents who wanted their children to be able to use scholarships at private religious schools and who wanted tax credits to be available to the donors who funded such scholarships.²⁹³ The parents wanted their children to attend a private school that taught the same religious values they taught at home, not to have those values taught in the public schools.²⁹⁴ *Carson* was about parents who wanted tuition assistance for sending their children to private religious schools.²⁹⁵ They wanted their children to attend private sectarian schools “because the school’s Christian worldview aligns with their sincerely held religious beliefs.”²⁹⁶ They did not seek to have the public schools adopt their religious worldview or to have their preferred school become public rather than private.²⁹⁷ They simply did not want to be excluded from the financial benefits that the state offered to other families who sent their children to non-religious private schools.²⁹⁸ Every one of these cases was about private education and how the government’s support for non-religious private education should be extended to cover religious private education as well.

Those cases were monumentally different from what is at stake in the fight over whether Oklahoma can have religious charter schools. The creators of the St. Isidore school are not merely saying that they should be able to have a religious private school that gets the same benefits as other private schools.²⁹⁹ They contend that they should be able to have a public school that is devoted to the teachings and beliefs of their religion.³⁰⁰ There is a world of difference between seeking to equalize the treatment of private schools and seeking to eliminate the longstanding and here-to-fore universally accepted proposition that American public schools are not sectarian institutions.

Another way to frame this argument is to say that one must be precise in talking and thinking about the benefits at stake in each situation. The Supreme Court’s cases have talked about how “benefits” should not be denied to anyone on religious grounds.³⁰¹ Even if that is true as a general matter, it may be possible to conceive of benefits for which it would not hold true. The benefit at stake in *Trinity Lutheran* was a reimbursement grant for a playground surface.³⁰² In *Espinoza*, the benefits at issue were scholarships and tax credits.³⁰³ In *Carson*, the benefits were tuition assistance payments.³⁰⁴ Each case was essentially about money in one form or another.

The benefits at stake in the St. Isidore situation are more complex. By seeking approval as a charter school, the organizers of the St. Isidore school seek state funding, to be sure, but they also seek the authority to operate as a public school, with all the practical and symbolic rights and responsibilities associated with that.³⁰⁵ That makes the benefit

290. *Carson*, 596 U.S. at 778, 789 (citing *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)).

291. *Trinity Lutheran*, 582 U.S. at 453–54.

292. *Id.* at 453–54, 472.

293. *Espinoza*, 140 S. Ct. at 2252–53 (2020).

294. *Id.* at 2252, 2275.

295. *Carson*, 596 U.S. at 775–76.

296. *Id.*

297. *See id.* at 776.

298. *Id.* at 767.

299. *See* Complaint, *supra* note 210, at 4.

300. *Id.*

301. *Carson*, 596 U.S. at 778, 789 (citing *Everson v. Bd. of Ed. of Ewing*, 330 U.S. 1, 16 (1947)); *Espinoza*, 140 S. Ct. at 2254–55 (citing *Everson*, 330 U.S. at 16); *Trinity Lutheran*, 582 U.S. at 459–61, 464–66 (citing *Everson*, 330 U.S. at 16; *Church of Lukumi Babalu Ave v. City of Hialeah*, 508 U.S. 520, 532 (1993)).

302. *Trinity Lutheran*, 582 U.S. at 454.

303. *Espinoza*, 140 S. Ct. at 2251–53.

304. *Carson*, 596 U.S. at 773–74.

305. *See supra* notes 122–136 and 168–174 and accompanying text.

quite different from what was at stake in any previous case.³⁰⁶ And Oklahoma has legitimate and even compelling grounds for withholding that benefit on religious grounds, if one accepts the value of maintaining the long American tradition of non-sectarian public schools.³⁰⁷

Recognizing that there is a special and worthy interest in maintaining the non-sectarian nature of public education would echo what the Supreme Court has done regarding the issue of state-funded training of clergy. In *Locke v. Davey*, decided in 2004, the Supreme Court upheld a Washington state scholarship program even though the program barred the scholarship funds from being used to pursue a devotional theology degree.³⁰⁸ Scholarship recipients could use the scholarship money at religious or non-religious schools, and they could even use the scholarship money to take theology courses at “pervasively religious schools.”³⁰⁹ But they could not use their scholarship to pursue a degree that is “devotional in nature or designed to induce religious faith.”³¹⁰

In *Locke*, Joshua Davey challenged this restriction because he wanted to use his scholarship to prepare for a career as a church pastor.³¹¹ The Supreme Court held that this restriction did not violate his Free Exercise rights, because states have longstanding “anti-establishment interests” in not using taxpayers’ money for the training or support of clergy.³¹²

In the more recent cases, the Supreme Court struggled to explain and reconcile *Locke* with its assertions about how government can never deny benefits on the ground of religion. In *Trinity Lutheran*, the majority tried to distinguish *Locke* on the ground that it merely involved a restriction on use of scholarship funds, not a disqualification based on someone’s religious character or status.³¹³ Seeming to sense that the distinction between limits based on use and status could be problematic, the majority in *Espinoza* and *Carson* added further emphasis on the idea that *Locke* depended on the existence of “a ‘historic and substantial’ state interest in not funding the training of clergy.”³¹⁴ In the Founding Era, there was strong opposition to government funding of clergy, and so that deserved a special carve-out from the general principle that governments cannot disqualify religious individuals or institutions from receiving government benefits.³¹⁵ The historical tradition justified making a *sui generis* exception to the principle that otherwise drove the Court’s decisions.

Following that lead, courts should recognize and embrace the same kind of historic and substantial interest in America’s tradition of non-sectarian public education. Nothing in the Supreme Court’s past decisions runs counter to this. The past cases addressed benefits relating to resources for private education.³¹⁶ The Court did not need to consider or discuss the interest in keeping public schools non-sectarian, because no one in past cases tried to breach the traditional line between private and public schools. No one in those cases tried to make the unprecedented leap from seeking non-discriminatory support for private education, without regard to religion, to claiming a constitutional basis for sectarian public education.³¹⁷

306. See *supra* notes 283–304 and accompanying text.

307. See *infra* notes 308–341 and accompanying text.

308. *Locke v. Davey*, 540 U.S. 712, 725 (2004).

309. *Id.* at 721, 724–25.

310. *Id.* at 716.

311. *Id.* at 717–18.

312. *Id.* at 719, 722.

313. *Trinity Lutheran Church of Columbia*, 582 U.S. 449, 464 (2017).

314. *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2257–58 (2020) (quoting *Locke*, 540 U.S. at 725); *Carson v. Makin*, 596 U.S. 767, 788 (2022).

315. See *Carson*, 596 U.S. at 788–89; *Espinoza*, 140 S. Ct. at 2257–58.

316. See *Trinity Lutheran*, 582 U.S. at 453–54; *Carson*, 596 U.S. at 773–774; *Espinoza*, 140 S. Ct. at 2257–58.

317. See *supra* note 290–296 and accompanying text.

The majority opinion in *Espinoza* discussed historical tradition with respect to public support of private religious education.³¹⁸ The opinion described various examples of how “[i]n the founding era and the early 19th century, governments provided financial support to private schools, including denominational ones.”³¹⁹ This support was relevant, of course, for cases like *Espinoza* (as well as *Trinity Lutheran* and *Carson*), which involved constitutional claims about religious private education, but has no bearing on issues about religious public education, as in the controversy over the proposed St. Isidore school.³²⁰

While history is never simple and many different spins can be put on it, there are strong grounds for finding that America has an important historical tradition of keeping public schools non-sectarian. Free, publicly-funded schools existed in early America as early as 1635, with the establishment of Boston Latin, the first public school in the American colonies,³²¹ but in the seventeenth and eighteenth centuries, no widespread, systematic public education existed.³²² Instead, education was a haphazard “hodgepodge of arrangements,” including private schools run by churches, elite private academies for children of wealthy families, homeschooling, and private tutoring.³²³ Early American public schools like Boston Latin had clear religious intent and content, but not an official religious affiliation.³²⁴ By the time the American colonies gained independence, “some cities and towns in the Northeast had free local schools paid for by all town residents, but this was not the norm.”³²⁵ The founders argued that the new republic needed “a more systematic approach” to education, and prominent leaders such as Thomas Jefferson and John Adams “proposed the creation of a more formal and unified system of publicly funded schools,” but their vision did not advance during their lifetime.³²⁶ Thus, at the time of the First Amendment’s adoption, public education was still so rare that there could not be any well-formed national consensus about it.³²⁷

That changed with the emergence of the “Common School Movement.”³²⁸ Horace Mann, appointed as the Secretary of Education in Massachusetts in 1837, sparked this extraordinarily influential reform movement.³²⁹ He called for the establishment of school systems that would provide free education to children of all social classes and backgrounds, with professional teachers, and public funding and control.³³⁰ Non-sectarianism

318. *Espinoza*, 140 S. Ct. at 2257–58.

319. *Id.*

320. *See id.*; *Trinity Lutheran*, 582 U.S. at 453–54; *Carson*, 596 U.S. at 773–74.

321. *Boston Latin School Founded*, MASS MOMENTS, <https://www.massmoments.org/moment-details/massachusetts-passes-first-education-law/submoment/boston-latin-school-founded.html> (last visited Mar. 20, 2024).

322. CTR. ON EDUC. POL’Y, HISTORY AND EVOLUTION OF PUBLIC EDUCATION IN THE US 1–2 (2020).

323. *Id.* at 1.

324. Boston Latin, the nation’s first public school, had a heavy Puritan influence, but “[u]nlike most schools in England, Boston Latin was not established by a church; it was created by the Boston Town Meeting.” *Boston Latin School Founded*, MASS MOMENTS, <https://www.massmoments.org/moment-details/massachusetts-passes-first-education-law/submoment/boston-latin-school-founded.html> (last visited Mar. 24, 2024).

325. *See* CTR. ON EDUC. POL’Y, *supra* note 322, at 1.

326. *Id.* at 2.

327. *Id.*

328. Graham Warder, *Horace Mann and the Creation of the Common School*, SOC. WELFARE HIST. PROJECT, <https://socialwelfare.library.vcu.edu/programs/education/horace-mann-creation-common-school/#:~:text=The%20most%20influential%20post%20he,of%20education%20as%20social%20redemption> (last visited Mar. 20, 2024).

329. Ian Bartrum, *The Political Origins of Secular Public Education: The New York School Controversy, 1840-1842*, 3 N.Y.U. J. L. & LIBERTY 267, 281 (2008) (describing Horace Mann as “the generally acknowledged father of the common school”).

330. MELISSA WELLS & COURTNEY CLAYTON, FOUNDATIONS OF AMERICAN EDUCATION: A CRITICAL LENS (2021) (discussing the professionalization of teaching and formalization of teacher training); CTR. ON EDUC. POL’Y, *supra* note 322, at 3 (discussing public funding and control); Bartrum, *supra* note 329, at 281 (discussing how “unlike charity schools that served only the poor, the common schools were designed to teach *all* children, including diverse economic, religious and ethnic groups, in the same classroom”).

in public schools became a core principle of the Common School Movement.³³¹ Mann maintained that “our Public Schools are not Theological Seminaries” and “they are debarred by law from inculcating the peculiar and distinctive doctrines of any one religious denomination.”³³²

From its starting point in New England, the Common School Movement gradually spread across the country.³³³ It moved westward as the nation expanded and took root in the South after the Civil War.³³⁴ By the end of the 1800s, school systems providing free, publicly funded, non-sectarian education had become the national standard.³³⁵

Mann certainly did not believe in completely excluding religion from the public schools.³³⁶ He thought the public schools should teach general Christian values, a sort of “least-common-denominator Protestantism,” but not the specific tenets of particular denominations.³³⁷ That was good for mainstream Protestants, but not others such as Jews, Catholics, and evangelical Protestants.³³⁸ The Common School Movement reflected and reinforced prejudices of the times, particularly anti-Catholic bigotry.³³⁹ Nevertheless, the principle that public schools should not be splintered along religious lines, and should avoid acting “as an umpire between hostile religious opinions,” took hold.³⁴⁰ It was a sound ideal, even if Americans did not always implement it in a well-intentioned or even-handed way.

Since Mann’s day, there has obviously been much debate, variation, and change over time with respect to the role that religions should have in public schools. But the principle that public schools should be non-sectarian, not affiliated with or controlled by a particular religious denomination, has continued to be a solid and unbroken tradition. The nation does not have Baptist public schools, Catholic public schools, Jewish public schools, Muslim public schools, and so on. It simply has public schools.

Indeed, the proposed St. Isidore school has gained so much attention precisely due to this tradition. It would become the nation’s first public school run by and devoted to a particular set of religious beliefs.³⁴¹ The St. Isidore school represents a dramatic change from the American tradition. Any judge, particularly those favoring a conservative approach and cautious about change, should be wary of overthrowing such a tradition deeply rooted in American society and its laws.

As an alternative way of framing the same basic argument, Oklahoma’s laws requiring charter schools to be non-sectarian should survive strict scrutiny. That form of judicial scrutiny requires the government to show that it has an interest “of the highest

331. Joanne M. Marshall, *Common Schools Movement*, in *ENCYCLOPEDIA OF DIVERSITY IN EDUC.* (2012).

332. HORACE MANN, *TWELFTH ANNUAL REPORT* 116 (Horace Mann League 1952) (1849).

333. See Marshall, *supra* note 331.

334. *Common School Movement*, *ENCYCLOPEDIA.COM* (May 29, 2018), <https://www.encyclopedia.com/history/united-states-and-canada/us-history/common-school-movement>.

335. See Marshall, *supra* note 331.

336. See MANN, *supra* note 332, at 116 (denying accusations that he would exclude religious instruction, Christian morals, or the Bible from public schools).

337. See *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2271 (2020) (Alito, J., concurring) (quoting John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 298, 301 (2001)).

338. Marshall, *supra* note 331.

339. *Espinoza*, 140 S. Ct. at 2271–74 (Alito, J., concurring) (discussing how Horace Mann and the Common School Movement favored mainstream Protestantism and were biased against Catholicism and Judaism).

340. MANN, *supra* note 332, at 117; see also Lloyd P. Jorgenson, *Historical Origins of Non-Sectarian Public Schools: The Birth of a Tradition*, 44 PHI DELTA KAPPAN 407, 408 (explaining how Mann believed “religious instruction was an indispensable part of the work of the school” but that schools should be non-sectarian because “the inclusion of the doctrines unique to any one sect would alienate all other sects”).

341. See *supra* note 5 and accompanying text.

order” and be narrowly tailored to serve that interest.³⁴² The Supreme Court applied strict scrutiny in cases like *Trinity Lutheran*, *Espinoza*, and *Carson*, but treated such scrutiny as an easy call to make in favor of those challenging government benefit programs that excluded religious people and institutions.³⁴³ For example, Missouri had no urgent need to keep religious preschools from having new playground surfaces and simply wanted to “skat[e] as far as possible from religious establishment concerns.”³⁴⁴

Courts should not apply strict scrutiny in a way that makes it impossible to survive. States have an interest of the highest order in maintaining the longstanding and deeply rooted tradition that public schools are not sectarian religious institutions. They have a compelling interest in avoiding the inevitable frictions, conflicts, and entanglements of government and religion that will arise from having public schools devoted to particular religious faiths. What obligation will the government have with respect to how a religious charter school handles issues concerning students who are gay, lesbian, bisexual, or transgender?³⁴⁵ Or issues about race, or the roles of women? Or the extent to which religious beliefs can be permitted to affect the teaching of subjects like history and science? The nation is already polarized and deeply divided.³⁴⁶ That polarization is “especially multifaceted” compared to that of other countries, because people are divided along religious, racial, ideological, and political lines which “renders America’s divisions unusually encompassing and profound.”³⁴⁷ The last thing needed at this time is for courts to decide that we should take a step toward segregating ourselves by religion in the public schools.

State and local governments also have a compelling interest in maintaining popular support for public schools. Elementary and secondary education accounts for over twenty percent of all the dollars spent by state and local governments each year.³⁴⁸ These governments need taxpayers to remain willing to pay the hundreds of billions of dollars that go into education. As Oklahoma’s attorney general warned, “I doubt most Oklahomans would want their tax dollars to fund a religious school whose tenets are diametrically opposed to their own faith.”³⁴⁹ The number of Americans who are not religious has increased significantly in recent years, with about thirty percent now describing themselves as not having any particular religious identity.³⁵⁰ It would be easy to understand many of those people becoming disillusioned and unwilling to continue paying for public schools run by religious institutions and organized around religious beliefs they do not share.

Opening the door for religious charter schools raises serious concerns but offers little benefit to religious individuals or entities beyond what constitutional law already allows. If the people of a state and their elected representatives want to fund religious education, through private schools, the Supreme Court’s existing decisions already enable them to do so. Under *Zelman v. Simmons-Harris*, states can fund the payment of tuition

342. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993); *McDaniel v. Paty*, 435 U.S. 618, 628 (1978).

343. See *Carson v. Makin*, 596 U.S. 767, 780 (2022); *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2260–61 (2020); *Trinity Lutheran Church of Columbia v. Comer*, 582 U.S. 449, 466 (2017).

344. *Trinity Lutheran*, 582 U.S. at 466.

345. See *supra* notes 189–190 and accompanying text.

346. See Thomas Carothers & Andrew O’Donohue, *How Americans Were Driven to Extremes*, FOREIGN AFFS. (Sept. 25, 2019), <https://www.foreignaffairs.com/articles/united-states/2019-09-25/how-americans-were-driven-extremes>.

347. *Id.*

348. See *State and Local Backgrounders, State and Local Expenditures*, URBAN INST. (Dec. 29, 2023), <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/state-and-local-expenditures>.

349. Letter from Gentner Drummond, *supra* note 8, at 2.

350. Gregory A. Smith, *About Three-in-Ten U.S. Adults Are Now Religiously Unaffiliated*, PEW RESEARCH CTR. (Dec. 14, 2021), <https://www.pewresearch.org/religion/2021/12/14/about-three-in-ten-u-s-adults-are-now-religiously-unaffiliated>.

for private school, including religious private schools, by simply giving the money directly to families in the form of vouchers or other tuition assistance.³⁵¹

Oklahoma's legislature created such a program by enacting a universal school choice bill shortly after St. Isidore applied to start a public charter school.³⁵² This bill gives parents up to \$7,500 per child per year for private school tuition.³⁵³ Oklahoma's governor was unsuccessful in getting such a bill passed in the previous legislative session, but made it a key issue in his reelection campaign, and the legislature passed the bill in 2023.³⁵⁴ To the extent that access to public funding was an impetus for St. Isidore to be a charter school,³⁵⁵ public funding would now be available to it as a private school under the new legislation, through the funding for tuition available to families of St. Isidore students. If Oklahoma's legislature wants to raise the amount of tuition support to some amount greater than \$7,500, it is free to do so. The Supreme Court's existing precedent thus makes it possible for states to fund private religious education to the extent they want to do so,³⁵⁶ so there is no need for the Court to go further and take the unprecedented, harmful step of allowing the establishment of religious public schools.

If the Supreme Court makes the unfortunate decision to rule in favor of the proposed St. Isidore school—striking down laws that require charter schools to be non-sectarian—states unhappy with that decision could circumvent it by eliminating all charter schools. If a state did not give anyone the option of having a charter school, then no one could complain that they were being excluded from this opportunity on religious grounds.³⁵⁷ Some states might choose to do that, and it would be unfortunate for the Supreme Court to put them in the position of doing so. Charter schools offer potential benefits to public school education by introducing competition, experimentation, and diversification of approaches.³⁵⁸ The Supreme Court can maintain those benefits, while still allowing religious education to flourish in private schools, by concluding that laws requiring charter schools to be non-sectarian do not violate the Constitution.

C. Reconsidering *Zelman*

In retrospect, the Supreme Court's decision to uphold the voucher program for Cleveland in *Zelman v. Simmons-Harris* was a remarkable turning point.³⁵⁹ The case was a tough one. The poor performance of the Cleveland public school system made it

351. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); see *supra* notes 73–92 and accompanying text.

352. See Ben Felder, *Governor Signs Private- and Home-School Tax Credit Bill, One of His Top Priorities*, THE OKLAHOMAN (May 25, 2023, 5:30 PM), <https://www.oklahoman.com/story/news/politics/government/2023/05/25/oklahoma-private-school-tax-credits-governor-kevin-stitt-signs-bill/70257151007/>; Ananya Bhattacharya, *An Oklahoma School Has Become the First to Dismantle the Wall Between Church and State*, QUARTZ (June 6, 2023), <https://qz.com/an-oklahoma-school-has-become-the-first-to-dismantle-the-wall-between-church-and-state-1850509401>.

353. OKLA. STAT. tit. 70, § 28-101(C)(1). The amount of the refundable tax credit is reduced for families with incomes above \$75,000, but the credit is \$5,000 even for Oklahoma families with the highest incomes. *Id.* The average private school tuition in Oklahoma in 2023-2024 is \$7,226 per year. *Oklahoma Private Schools by Tuition Cost*, PRIVATE SCH. REV., <https://www.privateschoolreview.com/tuition-stats/oklahoma> (last visited Mar. 20, 2024).

354. Felder, *supra* note 352.

355. See *supra* notes 171–174 and accompanying text.

356. See *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020).

357. See *Carson v. Makin*, 596 U.S. 767, 785 (2022) (noting that Maine could avoid providing tuition assistance payments for students attending religious private schools by doing away with the payments for all students and all schools).

358. See, e.g., *The Evidence in Favour of Charter Schools in America Has Strengthened*, THE ECONOMIST (Feb. 1, 2024), <https://www.economist.com/leaders/2024/02/01/the-evidence-in-favour-of-charter-schools-in-america-has-strengthened>. The National Alliance of Public Charter Schools opposes the push to allow religious charter schools. Balingit, *supra* note 181. Its president, Nina Rees, stated that “this movement was never about private education. It was about public schools and making them more responsive to the needs of families.” *Id.*

359. *Zelman v. Simmons-Harris*, 536 U.S. 639, 662–63 (2002).

appealing to provide better options for the families there.³⁶⁰ And the case presented a difficult issue in theory as well as practice, because the voucher program steered a lot of public money to religious private schools, but it did so through individual choices made by families.³⁶¹

Whatever one thinks about the decision, its impact on Free Exercise doctrine has been immense, even though it was not a Free Exercise case. By deciding that the Establishment Clause is not a barrier to government programs that may provide enormous amounts of funding to private religious education, the decision set the stage for the subsequent Free Exercise cases like *Trinity Lutheran*, *Espinoza*, and *Carson*.³⁶² And in those cases, the Court held that a government is not merely allowed to provide resources that will benefit religious interests, but it will be obligated to do so if it chooses to have any programs supporting private education.³⁶³ The Court's holdings cleared the way for even more government support flowing to private religious education. And now, the next stop on this path may be a decision that strikes down laws requiring charter schools to be non-sectarian, which would represent an unprecedented incursion of religion into public education across the country.

The slippery slope may not end there. If the St. Isidore school prevails in the litigation, Oklahoma ultimately may wind up with many religious charter schools, for various Christian denominations as well as other religions.³⁶⁴ Once the state has a bevy of religious charter schools, and the legal fortifications against sectarian public schools have been swept away, the next step may be a push to fragment public school systems along religious lines. If charter schools can be sectarian, why not permit this for other forms of public schools? Non-sectarian public schools could become the exception rather than the rule.

In his dissent in *Zelman*, Justice John Paul Stevens warned that “[w]hen we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy.”³⁶⁵ Perhaps he had a point.

V. THE SATANIC PANIC

Concerned about the gradual dismantling of the wall separating religion and government, some activists have employed a seemingly sinister stratagem. They have embraced the cause of Satan, or at least pretended to do so.

This came up at the hearings on the St. Isidore charter school application before the Oklahoma Statewide Virtual Charter School Board.³⁶⁶ A concerned Oklahoma resident warned that if the board approved the creation of religious charter schools, the board would soon be hearing from the Satanic Temple, which would seek approval to start a publicly-funded religious charter school of its own.³⁶⁷ That prediction was correct, because within

360. *Id.* at 644–45.

361. *Id.* at 647.

362. *See id.* at 662–63; *Carson v. Makin*, 596 U.S. 767 (2022); *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246 (2020); *Trinity Lutheran Church of Columbia v. Comer*, 582 U.S. 449 (2017).

363. *See supra* Part II.

364. Carla Hinton, *Reading, Math, Hindu Scripture, Baphomet — Non-Christians, Others Explore Charter Schools*, THE OKLAHOMAN (June 13, 2023, 3:22 PM), <https://www.oklahoman.com/story/news/2023/06/13/the-satanic-temple-twitter-hindu-oklahoma-religious-charter-school-creation/70313454007/> (discussing the possibility of Hindu, Muslim, Jewish, Baha’i, Buddhist, Sikh, and Christian denominations being interested in starting charter schools in Oklahoma).

365. *Zelman*, 536 U.S. at 686 (Stevens, J., dissenting).

366. *See* Kaelan Deese, *Devil in the Detail: Oklahoma Parks Catholic Charter School After Satanic Temple Warning*, WASH. EXAM’R (Apr. 11, 2023, 9:57 PM), <https://www.washingtonexaminer.com/?p=1110116>.

367. *Id.*

days of the vote to approve the St. Isidore application, the Satanic Temple had reached out to the board to obtain an application form.³⁶⁸

Founded in 2013 and headquartered in what was formerly a funeral home in Salem, Massachusetts,³⁶⁹ the Satanic Temple is an organization that uses legal and political action as well as satire to promote an agenda that includes adamant support for separation of church and state.³⁷⁰ The Satanic Temple is not based on a belief that Satan exists, but instead uses the concept of Satan as an attention-grabbing metaphor emphasizing the need for rational skepticism and rebellion against authority.³⁷¹

While many people may regard the group's efforts as blasphemous or at least in poor taste, the Satanic Temple has been effective in calling attention to a crucial fact: When legislators and judges allow religion to have a larger presence in public affairs, they create an obligation to do so for all religions, even those they may despise.³⁷²

A bill that would allow prayer in Florida schools inspired the group's formation.³⁷³ The founders of the Satanic Temple held a mock demonstration in support of Florida's governor, pretending they "were coming out to say how happy we were because now our Satanic children could pray to Satan in school."³⁷⁴

The Satanic Temple has challenged government officials who allow prayers at public meetings but refuse to give the Satanists a turn.³⁷⁵ The Supreme Court's decision in *Town of Greece* allows local governments to have prayers at events like city council or town board meetings, as long as they refrain from discriminating in selecting which religions can participate.³⁷⁶ When Satanic Temple members ask to pray at such meetings, their goal is to force officials to face a dilemma—to either stop having prayers or let the Satanic Temple have its chance to deliver the prayer. The tactic has achieved mixed results. In Phoenix, for example, the city council opted to replace prayers with a moment of silence rather than let Satanists deliver a prayer.³⁷⁷ In Boston and Scottsdale, judges ruled against the Satanic Temple, concluding that denial of the Satanists' requests to give prayers was based on their insufficient involvement in the community, not bias against its religious beliefs.³⁷⁸ Whatever the outcome, the Satanic Temple's challenges attract a great deal of media attention and deeply outrage many people, in part because it might be easy for some

368. Hinton, *supra* note 364.

369. La Carmina, *Salem's Satanic Temple Hosts Macabre Art and Movie Nights in a Former Funeral Home*, ROADTRIPPERS (Jan. 22, 2021), <https://roadtrippers.com/magazine/satanic-temple-salem-art-gallery/>.

370. See JOSEPH P. LAYCOCK, SPEAK OF THE DEVIL: HOW THE SATANIC TEMPLE IS CHANGING THE WAY WE TALK ABOUT RELIGION 114–18, 123–25 (2020) (discussing whether the Satanic Temple should be considered a parody, a religion, or a mixture of both).

371. See *Frequently Asked Questions*, THE SATANIC TEMPLE, <https://thesatanictemple.com/pages/faq> (last visited Mar. 20, 2024).

372. See Mark Oppenheimer, *A Mischievous Thorn in the Side of Conservative Christianity*, N.Y. TIMES (July 10, 2015), <https://www.nytimes.com/2015/07/11/us/a-mischievous-thorn-in-the-side-of-conservative-christianity.html>.

373. *Id.*

374. *Id.*

375. *E.g.*, Peter Holley, *How the Satanic Temple Forced Phoenix Lawmakers to Ban Public Prayer*, WASH. POST (Feb. 5, 2016, 7:30 AM), <https://www.washingtonpost.com/news/acts-of-faith/wp/2016/02/05/how-the-satanic-temple-forced-phoenix-lawmakers-to-ban-public-prayer/>.

376. *Town of Greece v. Galloway*, 572 U.S. 565, 567, 570, 591–92 (2014) (warning that town must have "a policy of nondiscrimination" in selecting those who give prayers at its meetings).

377. Holley, *supra* note 375.

378. See *Satanic Temple, Inc. v. City of Bos.*, No. 21-CV-10102-AK, 2023 WL 4868944, at *6–9 (D. Mass. July 31, 2023); *Satanic Temple v. City of Scottsdale*, No. CV-18-00621-PHX-DGC, 2020 WL 1808603, at *3 (D. Ariz. Apr. 9, 2020), *aff'd*, 856 F. App'x 724 (9th Cir. 2021).

to miss the satirical aspect of the Satanic Temple's approach and assume they genuinely believe in and worship Satan.³⁷⁹

The Satanic Temple asserts the same principle of religious neutrality with respect to public monuments and other displays. For example, when Oklahoma installed a Ten Commandments monument at the state's capitol building, the Satanic Temple submitted a request to install a statue of Satan in the form of Baphomet, "a goat-headed demon with horns, wings and a long beard."³⁸⁰ The Satanic Temple withdrew its request after the Oklahoma Supreme Court found the display of the Ten Commandments monument was unconstitutional and ordered its removal.³⁸¹ Similar controversies have arisen over the Satanic Temple's requests to participate where governments host nativity scenes or other religious displays for holidays.³⁸² And in Indiana, a band affiliated with the Satanic Temple successfully pressed for the chance to perform a show in Indiana's capitol building after a Christian music and prayer rally occurred there.³⁸³

While the Satanic Temple has not previously sought to start a charter school, it has pursued equal treatment with respect to after school activities.³⁸⁴ The Supreme Court has held that if public schools make their facilities available to be used by community groups, they cannot discriminate against religious groups.³⁸⁵ The Supreme Court decided that issue in a case about The Good News Club, a Christian after-school program.³⁸⁶ The Satanic Temple seeks to have the same legal rule applied to the After School Satan Club, its extracurricular program focused on science, creativity, and rational thinking.³⁸⁷

The basic legal premise of the Satanic Temple's efforts is solid. While there is much about constitutional law concerning religion that can be debated, there should be no doubt that the First Amendment precludes the government from embracing and favoring one religious denomination or viewpoint over another.³⁸⁸ No matter how provocative the Satanic Temple's efforts may be, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."³⁸⁹ As the separation of church and state diminishes and religion takes a greater place in a wide

379. See Ramón Escamilla, *Whose Satan? U.S. Mainstream Media Depictions of The Satanic Temple*, 34 DISCOURSE & SOC'Y 54, 55–56, 59, 61–63 (2023) (discussing the sensationalistic portrayal of The Satanic Temple in news articles and videos).

380. Carla Hinton, *Religious Leaders in Oklahoma, Satanist Spokesman Weigh In*, THE OKLAHOMAN (July 2, 2023, 12:00 AM), <https://www.oklahoman.com/story/news/religion/2015/06/30/religious-leaders-in-oklahoma-satanist-spokesman-weigh-in/60737473007/>.

381. *Id.*; see *Prescott v. Okla. Capitol Preservation Comm'n*, 373 P.3d 1032, 1043 (Okla. 2015).

382. See Karl Etters, *Satanic Temple Display Comes to Florida Capitol*, TALLAHASSEE DEMOCRAT (Dec. 22, 2014, 1:02 PM) <https://www.tallahassee.com/story/news/2014/12/22/satanic-temple-display-comes-florida-capitol/20764841/>; Scott McFetridge & Jim Salter, *A Mississippi House Candidate is Charged After a Satanic Temple Display Is Destroyed at Iowa Capitol*, LA CROSSE TRIB. (Dec. 15, 2023), https://lacrossetribune.com/news/nation-world/a-mississippi-house-candidate-is-charged-after-a-satanic-temple-display-is-destroyed-at-iowa/article_ce663f50-bc0b-506c-8e40-ee4f0fa28837.html; Victor Morton, *Satanic Temple Installs Holiday Display Featuring Baby Baphomet at Illinois Capitol*, THE WASH. TIMES (Dec. 21, 2021), <https://highergroundtimes.com/higher-ground/2021/dec/21/satanic-temple-installs-holiday-display-featuring-/>.

383. Leslie Bonilla Muñoz, *Satanic Planet to Perform at Indiana Statehouse Following Religious Freedom Spat*, IND. CAPITAL CHRON. (Sept. 8, 2023 7:00 AM), <https://indianacapitalchronicle.com/2023/09/08/satanic-planet-to-perform-at-indiana-statehouse-following-religious-freedom-spat/>.

384. *After School Satan*, THE SATANIC TEMPLE, <https://thesatanictemple.com/pages/after-school-satan> (last visited Mar. 20, 2024); see, e.g., *Satanic Temple, Inc. v. Saucon Valley Sch. Dist.*, No. 5:23-cv-01244-JMG, 2023 WL 3182934 (E.D. Pa. May 1, 2023) (finding that public school violated constitutional rights by rescinding approval for After School Satan Club's use of facilities).

385. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119–20 (2001) (holding that public school district violated freedom of speech by excluding religious groups from using school facilities for afterschool meetings).

386. *Id.*

387. See *After School Satan*, *supra* note 384.

388. See *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (recognizing the principle that "the First Amendment forbids an official purpose to disapprove of a particular religion").

389. *Thomas v. Rev. Bd. Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981).

range of public matters, it will become even more vital for courts to demand neutrality and steadfastly require equal treatment for all religions.

It may not be feasible for the Satanic Temple to follow through on its interest in starting a charter school in Oklahoma. It is one thing to show up and give a prayer at a city council meeting, create a Satanic holiday display, or even commission an artist to make a nine-foot-tall bronze statue of a goat-headed demon.³⁹⁰ Establishing and operating a charter school would require a much more extensive and sustained effort. But even if the Satanic Temple's expression of interest in establishing a charter school is more of a publicity stunt than a realistic possibility, it is a valuable reminder of the constitutional imperative of treating religions equally and the risks of allowing public schools to be created and run as religious institutions. If courts open the doors for religious public charter schools, they may not like everyone who comes through those doors.

VI. CONCLUSION

When Oklahoma's Statewide Virtual Charter School Board met to consider the application to create the St. Isidore school, it heard from the state's education superintendent, who is a nonvoting member of the board.³⁹¹ He told the board that they were making an important decision, and that they should approve the school's application "to provide more opportunities for kids and show Oklahoma as a state that truly values religious freedom."³⁹² Those are certainly reasonable arguments. But the superintendent also "accused 'radical leftists' blinded by their hatred of the Catholic Church of trying to stop the charter school from coming to fruition."³⁹³ The board's chair gently noted that in fact no one had taken a radical position.³⁹⁴

A few months later, after the board's narrow vote to approve the St. Isidore application, the head of the Satanic Temple vented his frustration, tweeting that "We'll consider opening an alternative school if the courts uphold a flagrantly self-serving & uneducated, utterly unqualified & ignorant school board's vote to overturn the constitution."³⁹⁵

These examples illustrate the divisive rhetoric that unfortunately makes issues about religion and the Constitution even harder than they inevitably need to be. Most people can agree that the nation has strong interests in having good educational opportunities for every child and robust protection of religious freedom.³⁹⁶ Reasonable people can disagree about how best to reconcile Free Exercise rights and Establishment Clause concerns in shaping governments' relationships to private schools, charter schools, and other public schools.

The Supreme Court has already gone a long way toward expanding the extent to which governments can provide support for religious private education.³⁹⁷ Legislatures can decide to create programs that channel an array of resources to religious private schools, from minor matters like helping a church's daycare center pay for a new playground

390. Tom Greenwood, *Video Captures Satanic Statue's Unveiling*, DETROIT NEWS (July 27, 2015, 2:55 PM), <https://www.detroitnews.com/story/news/local/detroit-city/2015/07/27/video-captures-unveiling-satanic-statue-detroit/30741773/>.

391. Carmen Forman, *Oklahoma Board Rejects Catholic Charter School Request but Gives 30 Days to Revise Application*, TULSA WORLD (Apr. 11, 2023), https://tulsaworld.com/news/local/education/oklahoma-board-rejects-catholic-charter-school-request-but-gives-30-days-to-revise-application/article_88a79f64-d7a5-11ed-a2ba-2785507825df.html.

392. *Id.*

393. *Id.*

394. *Id.* A reporter observed that all members of the public who had taken the opportunity to comment at the meeting "were calm, brief and polite in their remarks." *Id.*

395. Hinton, *supra* note 364.

396. *See supra* Part I.

397. *See supra* Part II.

surface, to major efforts like school voucher programs that give millions of dollars to families for religious private school tuition.³⁹⁸ The courts should stop there, and not take the unprecedented further step of allowing the creation of religious charter schools or other public schools. The St. Isidore of Seville Catholic Virtual School can be an excellent new option for the Oklahoma families who choose its educational and religious approach but do so as a private school rather than as a public one. The nation currently has enough things that divide it and does not need to start down the path to fragmenting public schools along religious lines.

398. *Trinity Lutheran Church of Columbia v. Comer*, 582 U.S. 449, 449 (2017); *see* OKLA. STAT. tit. 70, § 28-101.