Nos. 24-394, 24-396

IN THE
Supreme Court of the United States

ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL, ET AL.,

Petitioners,

v.

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

Respondent.

OKLAHOMA STATEWIDE CHARTER SCHOOL BOARD, ET AL.,

Petitioners,

v.

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

Respondent.

On Writ of Certiorari to the Supreme Court of Oklahoma

BRIEF OF *AMICUS CURIAE* HON. PETER DEUTSCH SUPPORTING PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

Peter Deutsch is a former congressman, lawyer, and founder of the Ben Gamla charter school in Hollywood, Florida.[2] Ben Gamla opened in 2007 as the first Hebrew-English charter school in the United States. The school initially enrolled 400 students, and later expanded to five campuses serving 2,000 students from grades K-12.

Mr. Deutsch remains active in the development of Hebrew-English charter schools across the United States. He is committed to providing an educational alternative to parents interested in teaching their children Hebrew language and culture. Mr. Deutsch became aware of this case while evaluating the feasibility of founding a Jewish charter school in Oklahoma.

This case provides the Court with an opportunity to recognize the rich history of educational partnerships between private and public entities in the United States. This history shows that charter schools, although publicly funded, are not state actors. Accordingly, *Amicus* urges the Court to hold that St. Isidore is not a state actor and instead is protected by the Free Exercise Clause.

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici* and their counsel, made any monetary contribution toward the preparation or submission of this brief. This brief is prepared by a clinic operated by Yale Law School but does not purport to present the School's institutional views, if any.

[2] Mr. Peter Deutsch submits this brief in his personal capacity and not as a representative of Ben Gamla.

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision below misreads both the law and the facts. Loading the dice, the Oklahoma Supreme Court defined the work of charter schools as the "provi[sion] [of] *free public* education." Pet. App. 19a (emphasis added). The court then held that this task was "traditionally the exclusive prerogative of the State" and thus concluded that St. Isidore was a state actor under this Court's precedent. *See* Pet. App. 19a, 36a.

That's wrong twice over. First, the court asked the public function question at too narrow a level of generality. Under *Rendell-Baker* v. *Kohn*, 457 U.S. 830 (1982), the correct question is whether the provision of education is traditionally the exclusive prerogative of the government—without the court's attendant train of adjectives. So framed, the answer is clear: since the Founding, education has been the province of private actors no less than public ones.

Second, the court erred even accepting its narrowing construction of the public-function test. Since the seventeenth century, state laws have recognized a governmental obligation to educate children, often for free. But, tellingly, throughout the colonial and antebellum periods towns, colonies, and states discharged that obligation in partnership with private, independent schools. So, even providing "free and public" education was not the exclusive prerogative of the government and cannot justify holding that St. Isidore is a state actor here.

The Oklahoma Supreme Court's errors will have serious real-world costs. For decades, charter schools have spurred educational innovation and offered parents and their children unique educational opportunities previously available only to those able to

afford private school tuition. And, looking forward, charter schools remain engines of innovation and opportunity—opening STEM education to more girls and providing students in low-income neighborhoods a safe, structured learning environment. If charter schools are deemed state actors, these programs will be at risk.

ARGUMENT

I. UNDER THIS COURT'S PRECEDENTS, CHARTER SCHOOLS ARE NOT STATE ACTORS.

A. *Rendell-Baker's* public-function test governs the state action inquiry here.

Ordinarily, a plaintiff may succeed on a § 1983 claim only if a defendant acts "under color of" state law. 42 U.S.C. § 1983. "Merely private conduct," no matter how "wrongful," cannot support a § 1983 suit. *Am. Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 50 (1999). The state-action requirement promotes federalism, because it prevents federal courts from "impos[ing] . . . responsibility on a State for conduct it could not control." *Nat'l Coll. Athletic Ass'n* v. *Tarkanian*, 488 U.S. 179, 191 (1988).

But sometimes, ostensibly private parties actually function as state actors. The key question in such cases is whether the "actions of [the private actor] may be fairly treated as that of the State itself." *Jackson* v. *Metropolitan Edison*, 419 U.S. 345, 351 (1974). This Court has generally based the state-action determination on one of three inquiries: (1) "the public function test," (2) "the "'state compulsion' test," and (3) "the 'nexus' test." *Lugar* v. *Edmonson Oil Co., Inc*, 457 U.S. 922, 939 (collecting cases). These inquiries are exacting, and "a private party can qualify as a state

actor in a few limited circumstances." *Manhattan Cmty. Access Co.* v. *Halleck*, 587 U.S. 802, 809.

As this Court's precedent shows, the "public function" test is most relevant here. The leading case in the educational context is *Rendell-Baker*, which considered whether a private school "whose income is derived primarily from public sources and which is regulated by public authorities" was a state actor for purposes of § 1983. 457 U.S. at 831. There, the school at issue received between 90% and 99% of its funding from the state; was subject to a detailed code of regulations governing records, student-teacher ratios, and personnel matters; and almost exclusively enrolled students recommended to it by the state. *Id.* at 831–33. Despite such significant government support, this Court readily rejected application of both the coercion and nexus tests. *Id.* at 841–44.

Instead, the Court's state-action analysis focused on the public-function test. Under this test, the central inquiry is "whether the function performed has been 'traditionally the *exclusive* prerogative of the State.'" *Id.* at 842. The "feature of exclusivity" is this test's hallmark. *Flagg Bros. Inc.* v. *Brooks*, 436 U.S. 150, 160 (1978). Accordingly, the inquiry is strict: "'very few' functions" are the *exclusive* preserve of the government. *Halleck*, 587 U.S. at 802. In *Rendell-Baker*, the Court confirmed that educating children who cannot be served by a traditional public school does not make the grade. *Rendell-Baker*, 457 U.S. at 842. History shows that the same is true here.

B. Secondary education is not traditionally the exclusive prerogative of the State.

As this Court and the majority of lower courts have correctly concluded, the question to ask is whether providing primary and secondary education to students is traditionally the *exclusive* prerogative of the State. History demonstrates that it is not.

In *Rendell-Baker*, this Court looked at whether the "education of maladjusted high school students" was traditionally the exclusive prerogative of the State when applying the public-function test. 457 U.S. at 842. Importantly, the Court did not limit this analysis to only "publicly funded" or "free" education of maladjusted high school students. The question of public funding, it concluded, was instead a "legislative policy choice" which could not make its "services the exclusive province of the state." *Id.*

When it comes to secondary education, most circuits have applied the public-function test in the same way. In *Caviness* v. *Horizon Cmty. Learning Center, Inc.*, the Ninth Circuit applied the "public function" test to a charter school. It evaluated the public function of a charter school at a general level: "provid[ing] students with educational services," rejecting the narrower category of "public educational services." 590 F.3d 806, 815 (9th Cir. 2010). As that court similarly explained, "*[p]ublic* education" simply refers to a "legislative policy choice"—a difference in funding, not in function. *Id.* (emphasis added). And in *Logiodice* v. *Trustees of Maine Cent. Inst.*, the First Circuit too rejected a narrow inquiry into whether "publicly funded education of last resort" was traditionally an exclusive

government function. 296 F.3d 22, 27 (1st Cir. 2002). The court explained that this narrowing of the inquiry was little more than "tailoring by adjectives." *Id.* The Third Circuit in *Robert S.* v. *Stetson Sch., Inc.* took a similar line. 256 F.3d 159, 166 (3d Cir. 2001) (Alito, J.) (rejecting attempt to distinguish private actors performing similar services on the basis of public funding).

The Oklahoma Supreme Court, however, eschewed this line of precedent in favor of a jurisprudential gerrymander: although education can certainly be private, "*free public* education," it concluded, "is exclusively a public function." Pet. App. 21a. State law, the court reasoned, created a "duty to provide free, universal schools." *Id.* at 22a. And Oklahoma created charter schools to carry out that "traditionally exclusive government function." *Id.* at 21a. Unsurprisingly, this legal error led to an anomalous result. Charter schools were deemed state actors, and St. Isidore's contract became constitutionally infirm.

The Oklahoma Supreme Court erred by creating an artificial distinction based on St. Isidore's source of funding. St. Isidore is plainly not engaged in conduct that was traditionally the exclusive prerogative of the State. To the contrary, provision of secondary education in this country has *never* been a traditional and exclusive public function. From the colonial period onward, private parties took the lead, producing an astonishingly diverse variety of schooling arrangements.

As one prominent historian has put it, "[n]othing is more striking about these institutions than the variety in the modes of sponsorship and support" for colonial schools. Lawrence Cremin, *American Education: The*

Colonial Experience, 1607–1783 183 (1970) [hereinafter Cremin, *Colonial Experience*]. As a result, "[p]arents who decided in favor of formal schooling had a variety of educational options," ranging from private tutors to village schools and private academies. George M. Woytanowitz, *Parents, Preachers, and Pedagogues: Education in Colonial America*, 47 Contemp. Educ. 125, 127 (1976). Although some colonial governments "participated in organizing and financing schools," *see* Robert Middlekauff, *Before the Public School: Education in Colonial America*, 62 Current Hist. 279 (1972) [hereinafter Middlekauff, *Public School*], most of them took a backseat to "independent schools financed by local communities, churches, and charities." Dick M. Carpenter II & Krista Kafer, *A History of Private School Choice*, 87 Peabody J. Educ. 336, 337 (2012). Churches played an especially prominent role. *See id.* (noting that churches "were the administrative centers for the vast majority of educational undertakings" during the colonial era). As a result, by the end of the colonial period there already existed the "peculiar blend of public and private, classical and vocational, religious and secular" that still marks American education today. Middlekauff, *Public School*, at 307.

Indeed, the sheer variety of educational arrangements among the many colonies shows that secondary education was never a task exclusively performed by the government. Start with the southern colonies. There, the colonists "did not . . . invest the state with a responsibility for general school support" but viewed education as "an entirely private matter." Edward J. Power, *The Advent of Education in Colonial America*, in *A Legacy of Learning: A History of Western Education* 239 (1991). Across the South, "most families . . . either taught their children themselves or

hired tutors to do the teaching[.]" William Jeynes, *American Educational History: School, Society, and the Common Good* 11 (2007). And the schools that did exist were private academies, often founded precisely because the colonial authorities were slow to establish schools and reluctant to fund them. *See* Cremin, *Colonial Experience*, at 176. That was how Virginia's first schools, Syms and Eaton, came to be: created by private bequest, incorporated as private organizations, and headed by private trustees. *Id.* at 530. While both schools were free to poor students (and Syms was free to all), *see id*., it was typically left to churches to found schools for the teaching of "poor, neglected, and orphaned children." Power, *supra*, at 240.

Heading north, secondary education in New York, New Jersey, and Pennsylvania during the colonial era was also a predominantly private and ecclesiastical function. In Pennsylvania, churches were the prime movers on the American educational scene, with Quakers, Anglicans, Lutherans and Moravians all operating schools for their own children and for the poor throughout the eighteenth century. Middlekauff, *Public School*, at 280. Similarly, in New York and New Jersey, churches sponsored most education and "did their best to enable poor children to go to school for free." Jeynes, *supra*, at 10. By the eighteenth century, "it was the private entrepreneurial schoolmaster who carried an increasing share of the formal education[,]" whether as a tutor or a schoolmaster. Cremin, *Colonial Experience*, at 537. While there are some exceptions, *see, e.g., New York Act to Encourage a Publick School in the City of New York*, 1732 no. 19, (Oct. 14, 1732) https://www.colonialamerica.amdigital.co.uk/Documents/Details/CO_5_1155_069 (establishing the first public grammar school in New York City), as a rule government came late to a market already clogged

with private actors. It remained that way through the end of the Revolution: until 1783, there were a mere 27 parochial and town-sponsored instructors in New York City, compared to 206 private schoolmasters. *See* Cremin, *Colonial Experience* at 538. Private parties supplied almost eight times as many schoolmasters as did the state. Philadelphia's numbers are only slightly less stark, with 76 town and parish instructors vying with 207 private ones. *Id.*

Postcolonial history likewise shows that secondary education was never the exclusive province of the state. "[C]hurches . . . were the administrative centers for the vast majority of educational undertakings" into the early 1900s. Carpenter II & Kafer, *supra*, at 337. "The Revolutionary War set in motion a vast expansion of these private and charity schools on a wider scale than during the colonial period, and states and communities increasingly adopted compulsory education laws, which were fulfilled by attendance at the private and charity schools." *Id.*

When government-run public schools did arrive on the scene, they remained the exception, not the rule. The first state-run public schools "would not be established until the middle of the nineteenth century, and then only in scattered communities." Donald K. Sharpes, *Advanced Educational Foundations for Teachers: The History, Philosophy, and Culture of Schooling* 253 (2001). And even still, "from their inception as a part of a national movement, these schools sparked controversy and political division." Jeynes, *supra*, at 145. Until state-run public schools received widespread acceptance in the late 1800s, it was private and parochial schools that were responsible for the education of American schoolchildren. Given such overwhelming historical evidence, it is no surprise that even the Oklahoma

Supreme Court conceded that "[t]he provision of education may not be a traditionally exclusive public function." Pet. App. at 21a.

C. Even "free public education" was never traditionally the exclusive prerogative of the State.

The historical record demonstrates that, even under the erroneously cramped application of the public-function test employed by the Oklahoma Supreme Court, public funding of free secondary education was not limited exclusively to government-run schools. Privately operated schools have, in partnership with the government, offered "free, public education" since the colonial era. Thus, even "free public education" should not be considered a traditionally *exclusive* prerogative of the State.

1. Private and religious schools have long assisted the government in providing a "free public" education.

Among the American colonies, those in New England uniquely prioritized education. Starting in the 1640s, Massachusetts experimented with a range of private and public schools: town-funded free schools, grammar schools controlled and funded by trustees, and a system of private tutors. Cremin, *Colonial Experience*, at 180–82. Some of the oldest public schools in Massachusetts, like the Boston Latin School, originated as voluntary schooling arrangements funded at town expense. Power, *supra*, at 237. And, unlike schools in many southern colonies, schools in New England were often free: "[b]y about 1730 [fire]wood, paper, and pens represented the sum of parental contributions in all but a few towns." Robert Middlekauff, *Ancients and Axioms: Secondary Education in Eighteenth Century New England* 25–26

(1971) [hereinafter Middlekauff, *Ancients and Axioms*].

What is more, New England's colonies were the first to mandate the provision of secondary education. In 1647, the Massachusetts General Court passed the tellingly-named "Old Deluder Satan Act," which required towns of fifty or more families to appoint a writing school master and towns of one hundred or more to establish a grammar school that provided instruction in Latin and Greek. David Hackett Fisher, Albion's Seed, *Four British Folkways In America* 132-33 (1989). Almost immediately, Puritan communities labeled the schools established in response to this statute "public schools." *Id.* at 133. Towns that failed to comply with the law were punished with steep fines, which the legislature periodically doubled. Similar laws were passed in New Hampshire and Connecticut by 1700. *See* Jeynes, *supra*, at 14. While compliance with these laws varied, "it is clear that, before 1700, many New England towns tried to maintain schools[.]" Power, *supra*, at 238.

Indeed, the need to fund a bigger school often justified colonists' petitions "to form new towns during this period[.]" Cremin, *Colonial Experience*, at 525. In New England, we thus find the closest analogy to modern American schooling: towns were obliged to create schools, and often operated those schools at no charge. In other words, as in Oklahoma, town governments in New England had a legal obligation to make education available to all children, for free or at an affordable rate.

To carry out this government mandate, however, independent and privately funded schools often led the way. Take the Hopkins School in Hadley, Massachusetts. Less than two decades after the "Old Deluder Satan Act," the Hopkins School was created

by private bequest. Middlekauff, *Ancients and Axioms*, 17. Five years later, a Board of Trustees was appointed to manage the school and its funds, with the executor of the estate appointing the majority of the Trustees. *Id.* at 18. The town of Hadley even made attendance at the school mandatory for all children, enforced by a fine. *Id.* Then, in 1687, the town seized the endowment from the trustees to exert greater government control. *Id.* at 19. The trustees sued to get it back. They won, and soon after asserted their sole authority to appoint the schoolmaster. *Id.* Hadley's government reluctantly acquiesced. Funded primarily from its endowment and occasional town contributions, *id.* at 26, the Hopkins school remained privately controlled throughout the eighteenth century. *Id.* at 19.

The Hopkins School was not unique. Similar stories could be told about the independent school in Ipswich and schools in other towns across Massachusetts. *See, e.g.*, Mass. Act for Regulating the Grammar School in Ipswich, 1765, ch. 5, https://perma.cc/C799-5XSP; Middlekauff, *Ancients and Axioms*, at 16–17. Thus, across colonial Massachusetts, history shows that private and independent schools frequently carried out a governmental obligation to provide secondary education—often for free—to the children of their town. And evidence suggests they kept their private character in the process.

Massachusetts was no outlier. To its south, the Connecticut Colony enacted a similar law requiring the four largest towns (New Haven, New London, Hartford, and Fairfield) to create grammar schools. Middlekauff, *Ancients and Axioms*, at 39. A private bequest funded New Haven's grammar school. *Id.* at 40–41. And when joint control over the school between the funder's estate and the city proved unworkable, the executor sequestered the trust until the town

yielded full control of the school to an "independent and self-perpetuating Board of Trustees[.]" *Id.* at 40. This arrangement—fulfilling New Haven's mandatory schooling obligation—lasted for the remainder of the colonial period. And even after the colonial period, secondary education did not become solely a government function. Instead, Connecticut passed a law that "took control of the schools away from the towns and put it into the hands of churches[,]" while still mandating that each town have a school. Jeynes, *supra,* at 15. Connecticut is thus a good example of how private and public actors jointly fulfilled a state-imposed legal obligation to provide secondary education.

In colonial America, then, even free and public education was not traditionally the exclusive prerogative of the government. Like Oklahoma today, towns in Massachusetts and Connecticut were under a legal obligation to provide secondary education. Almost from the moment these laws passed, towns permitted independent boards of trustees to fund and operate independent schools to fulfill this statutory obligation. And those schools remained open to all the children, typically at little or no cost. Towns occasionally made contributions to these schools or had a representative on their board, but control often remained in private hands.

This trend continued after American independence. Government financial support for private and parochial schools, "so common during the colonial period, continued well into the national period." Lloyd P. Jorgenson, *The State and the Non-Public School, 1825-1925* 4 (1987). "Far from prohibiting such support, the early state constitutions and statutes actively encouraged this policy." *Id.* In fact, this aid "actually increased until about 1820 and persisted in

diminishing but still-significant amounts until well after the Civil War." *Id.*; *see also* Richard J. Gabel, *Public Funds for Church and Private Schools* 147-262 (1937). "The same blending of state and denominational resources was present in the founding and support of the early colleges." Jorgenson, *supra*, at 4. While "the interconnected nature of the private and public sector" in the education of children "might be difficult for contemporary Americans to comprehend," throughout the late-eighteenth and nineteenth centuries "there was not such a rigid distinction between the two sectors." Jeynes, *supra*, at 49. The reason for this joint effort was that "Americans believed that the presence of education was so important that it was imperative that the private and public sectors support one another for the greater good of the country." *Id.* Accordingly, "churches often intervened to support struggling state universities, and state and city funds were frequently used to help private schools." *Id.* Through this collaboration, the state discharged its obligation to educate the public.

Indeed, as governments across the country looked to educate their burgeoning populations, public funding of private schools—including religious schools—was common. Local governments provided grants to private schools for the education of the poor, and early federal aid (in the form of land grants) was specifically directed to religious schools. *See* Michael W. McConnell et al., *Religion and the Constitution* 318-19 (4th ed. 2016). As this Court too has noted, "[e]ven States with bans on government-supported clergy, such as New Jersey, Pennsylvania, and Georgia, provided various forms of aid to religious schools." *Espinoza* v. *Montana Dep't of Revenue*, 591 U.S. 464, 481 (2020); *see also* Carl F. Kaestle, *Pillars of the Republic: Common Schools and American Society,*

1780-1860 166–67 (1983); Gabel, *supra*, at 215–18, 241–45, 372–74. In New York, the state helped finance church-run charity schools "as early as 1795." Jeynes, *supra*, at 51. Shortly thereafter, "[t]he first Roman Catholic school in New York was established in connection with St. Peter's Church in 1801 and the second in connection with St. Patrick's in 1815; both schools received a share of the city's state school subsidy[.]" Lawrence Cremin, *American Education: The National Experience, 1783–1876* 166 (1980) [hereinafter Cremin, *National Experience*]. The Catholic schools in New York City continued to receive funding until 1825, along with schools run by Methodists, Episcopalians, and other denominations. Kaestle, *supra*, at 166–67.

New York wasn't alone: "Public funds were also granted to Catholic schools in Lowell, Massachusetts, in the 1830s and 1840s, in Milwaukee, Wisconsin, in the 1840s, and in Hartford and Middletown, Connecticut, in the 1860s." *Id.* at 166. New Jersey continued apportioning "public funds to denominational schools . . . until 1866." *Id.* at 167. Indeed, in Massachusetts, the legislature "regularly chartered and provided initial funding to private schools, usually at the secondary level, which were invariably religious." Richard D. Komer, *School Choice and State Constitutions' Religion Clauses*, 3 J. Sch. Choice 331, 338 (2009).

These examples barely scratch the surface—more evidence abounds. Throughout the Midwest in the 1830s and 1840s, Catholic schools "received public aid from municipal and state governments." Timothy Walch, *Parish School* 49–50 (1996). Maine too provided public funds to private schools throughout the 1800s to facilitate a free secondary education. *Logiodice,* 296 F.3d at 27. North Carolina also

provided some public funding to private schools. *Peltier* v. *Charter Day Sch., Inc.*, 37 F.4th 104, 144 (Quattlebaum, J., dissenting in part and concurring in part).

Nor was this public funding of private education limited to state and local governments. Congress financially supported religious schools in the District of Columbia until 1848. *Espinoza*, 591 U.S. at 481. And it repeatedly appropriated public funds to operate religious schools for American Indians throughout the eighteenth and nineteenth centuries. *See Quick Bear* v. *Leupp*, 210 U.S. 50, 78 (1908); Gabel, *supra*, at 521–23. Even President Thomas Jefferson convinced Congress to ratify an 1803 treaty with the Kaskaskia Indians that provided annual funds for the Tribe's Catholic priest to "instruct as many of their children as possible, in the rudiments of literature" as well as for the "erection of a church." 7 Stat. 79 (Aug. 13, 1803). Indeed, Congress continued to provide aid to religious schools serving American Indians until 1897, at which point Congress was annually appropriating $500,000 for this purpose. 30 Stat. 62, 79. And, at the same time, Congress spent large sums on the education of emancipated freedmen by supporting religious schools in the South through the Freedmen's Bureau. McConnell, *supra*, at 323.

2. The prevalence of Blaine Amendments provides further evidence that the provision of "free public education" was never an exclusive state prerogative.

Despite evidence of some continued public funding of private religious schools following the Civil War, the primacy of independent and religious schools began to wane in the latter half of the nineteenth century. Carpenter II & Kafer, *supra*, at 336. One likely driver

of this change was increasing anti-Catholic animus and corresponding support for a "Blaine Amendment" in the 1870s. *Id.* at 338. Initially proposed by Representative James Blaine of Maine, this proposal (which nearly passed in Congress) would have amended the federal Constitution to prohibit state aid to "sectarian" schools. *See Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality opinion). "[I]t was an open secret that 'sectarian' was code for 'Catholic.'" *Id*. As this Court has recognized, "[t]he Blaine Amendment was 'born of bigotry' and 'arose at a time of pervasive hostility to the Catholic Church and to Catholics in general'; many of its state counterparts have a similarly 'shameful pedigree.'" *Espinoza*, 591 U.S. at 482.

Tellingly, Blaine and his contemporaries (many of them drafters or ratifiers of the Fourteenth Amendment) argued that their constitutional amendment was necessary precisely because the Fourteenth Amendment had *not* prohibited government funding of religious schools. Jorgenson, *supra* at 140–41. And, while ultimately unsuccessful, Blaine's proposal was defeated on states'-rights grounds, instead of on any suggestion that the Fourteenth Amendment rendered his proposal redundant. *Id.* Indeed, no member of Congress expressed the belief that the Establishment Clause and the Fourteenth Amendment already prohibited public aid to church schools.

Following the defeat of Blaine's resolution, the Republicans added a similar proposal to their 1876 platform, and on six separate occasions similar amendments were proposed by Senator Henry William Blair through 1890. *Id.* at 141–44. In short, these proposals provide further evidence that, at the time,

Congress did not consider providing public funding to religious schools unconstitutional.

A similar phenomenon played out in the states. In the late nineteenth century, numerous state legislatures considered state-level Blaine Amendment analogues. Unlike the original Blaine Amendment, however, thirty-seven of these state constitutional amendments were adopted (and likely contributed to the shift towards government-run public schools that continued into the twentieth century). Carpenter II & Kafer, *supra*, at 338. Here too, the adoption of these "baby Blaines" showed that states did not consider public funding of private religious schools already verboten.

3. Designation as a "public" school does not mean the school is necessarily a government-run state actor.

Oklahoma attempts, by *ipse dixit*, to classify all "free schools" as state actors under state law. *See* Okla. Stat. Ann. tit. 70, § 1-106 (West 2024). But this Court is the final word on the constitutional understanding of who is a state-actor—regardless of Oklahoma law. As a historical matter, designating a school as a free "public" school did not mean that the school was necessarily government-run. Rather, privately run and cooperative schools (operated through a partnership between the state and a private party) were consistently called "public" schools because they received public funds. Thus, designating a school as "a free public school" is not dispositive as to whether the school is performing a function that is traditionally and *exclusively* the prerogative of the State.

Private schools providing a nominally "free public" education were established in several states during the nineteenth century. One early example is the New

York Free School Society, founded in 1805 and later renamed the Public School Society in 1825. Jeynes, *supra*, at 49; Kaestle, *supra*, at 52. Despite being free, open to all children, and called a public school, "the Society was until 1853 run by a self-perpetuating board of trustees and was supported by both public grants and private benevolence[.]" *Id.* Similarly, in Lowell, Massachusetts during the 1840s, the local government arranged for Roman Catholic parochial schools, "which Catholic children only attended" and which were "taught by [Irish-]Catholic teachers." Michael R. Smith & Joseph E. Bryson, *Church-State Relations: The Legality of Using Public Funds for Religious Schools* 10 (1972); Cremin, *National Experience*, at 172. These schools were fully publicly funded and "actually incorporated into the public school system and reported as public schools" even though they remained exclusively operated by the Catholic Church and Catholics had the right to "use the buildings for religious exercises." Smith & Bryson, *supra,* at 10.

Similarly, in 1856, the Texas legislature passed a law designating "any and all schools to which parents might choose to send their children as 'free public schools,' and therefore entitled to receive their pro rata share of the state school fund[.]" Jorgenson, *supra*, at 6. This law remained in effect "until after the Civil War." *Id.* The Texas State Treasurer, whom the law designated as the *ex officio* Superintendent of Schools, affirmed that "[b]y a compliance with the law, all schools are declared 'free public Schools.' This, of course, would include Colleges, Universities, Academies and Institutions of the highest grade . . . as well as the County Schools." Frederick Eby, *Education in Texas: Source Materials*, 1824 U. Tex. Bull. 306–07 (1918).

Numerous other private schools operating in the postcolonial period were likewise designated as "public" schools, including: the "William Penn Charter School" (described in its 1701 charter as a "public school" even though it was founded and operated by the Quakers); a Congregationalist secondary school "styled the Hartford (Connecticut) Public High School as late as 1871"; and virtually all the "public" schools of Washington and Georgetown, D.C. "until the middle of the nineteenth century." Jorgenson, *supra*, at 5.

Thus, even looking only at schools which have been labeled "public," post-colonial history reveals that this was a flexible designation and that privately operated schools sometimes also provided "free public" education with the support of their state and local governments. This evidence confirms that—far from being a traditionally *exclusive* prerogative of the State—even the provision of "free public" education historically was undertaken in part by private entities.

II. DEEMING CHARTER SCHOOLS STATE ACTORS UNDERMINES INNOVATION AND DENIES EDUCATIONAL OPPORTUNITIES TO DISADVANTAGED CHILDREN.

True to their names, charter schools reflect a transactional agreement between state and non-state actors. The charter school helps carry out the state's obligation to educate children. The state grants to charter schools broad pedagogical discretion and control over the school's day to day operation. This structure allows charter schools to implement educational ideas that are novel or tailored to the needs of particular students or families.

Over the last 50 years, America has witnessed an unprecedented growth in charter school formation. Fueled in part by a movement toward greater school

choice, charter schools provide parents with an accessible alternative to public schools.

While they are often free to the student, charter schools depend on the state for funding. A significant portion of their state funding is based on the number of students they enroll. Thus, charter schools must innovate to attract prospective students. Two such innovations in the charter school movement are single-sex and strict discipline schools.

A. An adverse decision will expose single-sex charter schools to constitutional liability, undermining STEM education for girls.

Single-sex schools can provide enormous benefits to their students. *E.g.*, Teresa A. Hughes, *The Advantages of Single-Sex Education*, 23 Nat'l Forum of Educ. Admin. & Supervision J. 2, 13 (2006), https://bit.ly/2swFNGX ("[I]n single-sex settings teachers are able to design the curriculum to tailor to the individual needs of each sex."); Amy Robertson Hayes et al., *The Efficacy of Single-Sex Education: Testing for Selection and Peer Quality Effects*, in Sex Roles at 10 (Nov. 2011), https://bit.ly/3fJCVCl ("[G]irls attending a single-sex school outperformed those girls attending coeducational schools"). Accordingly, "since the 1990s, there has been a resurgence of interest in single-sex education in public schools [.]" Melinda D. Anderson, *The Resurgence of Single-Sex Education*, The Atlantic (Dec. 22, 2015), https://bit.ly/3V6n3d4.

There are numerous single-sex charter schools, and many of them emphasize STEM education for girls. Although women make up a majority of college applicants and incoming college students, they earn only 36% of STEM degrees. Because of this pipeline problem, while women make up nearly half of the

nation's workforce, they account for only 27% of STEM workers. Anthony Martinez & Cheridan Christnacht, *Women Are Nearly Half of U.S. Workforce but Only 27% of STEM Workers,* U.S. Census Bureau (Jan. 26, 2021), https://bit.ly/3MaJfPj. "By graduation, men outnumber women in nearly every science and engineering field, and in some, such as physics, engineering, and computer science, the difference is dramatic, with women earning only 20 percent of bachelor's degrees." Am. Ass'n of Univ. Women, *Why So Few?* (Feb. 2010) xiv, https://bit.ly/3T14pBR.

Girls-only STEM-based charter schools aim to fix this problem. And their approach works. "Graduates of girls' schools are six times more likely to consider majoring in math, science, and technology and three times more likely to consider engineering compared to girls who attended coed schools." Int'l Coal. Of Girls Schs., *Why Girls' Schools*, https://bit.ly/3M6SbW3 (last visited Mar. 10, 2025).

Deeming charter schools state actors under Section 1983 could expose these single-sex schools to lawsuits and decisions that hold their policies unconstitutional. In 1996, this Court held that the exclusion of women from the Virginia Military Institute, then an all-male public college, violated the Fourteenth Amendment's Equal Protection Clause. There, the Court reasserted its "strong presumption that gender classifications are invalid." *United States* v. *Virginia*, 518 U.S. 515, 532 (1996) (citations omitted) [hereinafter *VMI*]. Justice Scalia, in dissent, recognized the logical implication: the *VMI* decision would render "single-sex public education . . . unconstitutional." *Id.* at 595 (Scalia, J., dissenting).

That prophecy has not yet come to pass. In the years since, the Department of Education has adopted regulations allowing public single-sex education,

provided that a "substantially equal" school is also operated for the opposite sex. 34 C.F.R. § 106.34(c)(1). But scholars have long argued that *VMI* makes single-sex primary and secondary schools unconstitutional. *See* David S. Cohen & Nancy Levit, *Still Unconstitutional: Our Nation's Experiment With State Sponsored Sex Segregation in Education*, 44 Seton Hall L. Rev. 339 (2014). And leading advocacy groups have signaled their constitutional objections to single-sex public schools. See Elizabeth Weil, *Teaching Boys and Girls Separately*, N.Y. Times Mag. (Mar. 2, 2008), https://nyti.ms/3Mgfgpd (noting that the ACLU opposes all single-sex education); The Leadership Conf. on Civ. & Hum. Rts., *Single-Sex Proposed Regulations Comments* (Apr. 23, 2004), https://bit.ly/3RFRjIS (opposing single-sex public schools as unconstitutional, citing *VMI*).

It is entirely foreseeable that such a challenge could reach this Court. Under *VMI*, those challenges may well prevail on the merits. Deeming St. Isidore a state actor, then, will deprive single-sex charter schools of their best defense. As a result, these schools will become subject to constitutional constraints ill-suited to their innovative purposes. And, perversely, losing the educational opportunities these schools provide will primarily harm those who most need help. Wealthier families can continue to pay for private single-sex education. Lower-income families will be deprived of yet another opportunity afforded to their more affluent peers.

B. An adverse decision will hobble strict-discipline charter schools that serve underprivileged and at-risk youth.

Charter schools play a particularly important role in inner cities, where they offer a viable alternative to government-run schools. *See* Philip M. Gleason,

What's the Secret Ingredient? Searching for Policies and Practices that Make Charter Schools Successful, Mathematica Policy Research Working Paper No. 47 at 9–10 (July 2016). Indeed, "[t]he greatest demand for charters comes from parents in urban areas like Newark and D.C. that have struggled with low-performing traditional public schools." Laura McKenna, *Why Don't Suburbanites Want Charter Schools?*, The Atlantic (Oct. 1, 2015), https://bit.ly/3fMlOQj. In such areas, violence and lawlessness often prevent motivated students from receiving the education that they deserve. *See*, *e.g.*, Gerald J. Brunetti, *Resilience Under Fire: Perspectives on the Work of Experienced, Inner City High School Teachers in the United States*, 22 Teaching & Teacher Edu. 812, 812 (2006).

Responding to parent demand, charter schools can offer demanding curricula and safe environments where inner-city students can thrive. To achieve those goals, the schools often employ strict rules and stringent discipline. This may involve tightly regulated codes of conduct, restrictions or prohibitions on cell phones or other electronic devices, and other restrictions that remove distractions. This approach has shown great promise. The network of Success Academy Charter Schools is one example. Success Academy opened its first campus in Harlem in 2006, but today it operates four dozen New York City campuses that serve more than 10,000 students, most of them from traditionally disadvantaged socioeconomic groups.

Parents flock to the Academy, hoping to provide their children a path to success—with good reason. Among other things, Success Academy students outscore other New York City students on standardized tests by more than two-fold. Rebecca

Mead, *Success Academy's Radical Educational Experiment*, The New Yorker (Dec. 4, 2017), https://bit.ly/3CAeXCr ("[N[inety-five per cent of Success Academy students achieved proficiency in math, and eighty-four per cent in English Language Arts; citywide, their respective rates were thirty-six and thirty-eight per cent."). Academy students are "testing dynamo[s]" who outscore even many of their counterparts in wealthy suburbs. Kate Taylor, *At Success Academy, Charter Schools, High Scores and Polarizing Tactics*, NY Times (Apr. 6, 2015), https://nyti.ms/3M9XCnd.

Part of the Academy's recipe for success is a strict disciplinary policy. For example, in 2015, the schools suspended 11% of their students over the course of the school year, compared to the 4% suspension rate of the City's public schools. Eva Moskowitz, *Turning Schools Into Fight Clubs*, WSJ (Apr. 1, 2015) https://on.wsj.com/3CAfPH9. In some Academy schools, up to 20% of students may be suspended at least once during the school year. Mead, *supra*.

The Academy and the thousands of families who choose to attend deem this discipline necessary to achieve the schools' (undeniably) stellar results. Eva Moskowitz, the founder of Success Academy, explains that "we have found that when rules are clearly established and are fairly and consistently enforced, the learning environment is purposeful and joyful." Moskowitz, *supra*. It also teaches children the value of accountability: "In [the real world], when you assault your co-worker or curse out your boss, you don't get a 'restorative circle,' you get fired." *Id*. Accordingly, "[s]uspensions convey the critical message to students and parents that certain behavior is inconsistent with being a member of the school community." *Id*. Publicly-funded charter schools like Success Academy make

this disciplinary system available to low-income families who would not otherwise have the option to send their children to private schools with stricter codes of conduct, if they deem such an environment necessary or beneficial for their children.

Adopting the Oklahoma Supreme Court's erroneous logic could threaten schools with these disciplinary philosophies by opening the floodgates to litigation. Indeed, this Court and the lower courts have heard numerous Section 1983 cases regarding school suspensions and expulsions, including cases alleging violations of free speech and due process rights, as well as cases alleging violations of the right against unreasonable searches and seizures, including as pertains to cell phone searches. *See, e.g.*, *Goss* v. *Lopez*, 419 U.S. 565 (1975); *Mahoney Area Sch. Dist.* v. *B.L. ex rel Levy*, 594 U.S. 180 (2021); *Tinker* v. *Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *New Jersey* v. *T.L.O.*, 469 U.S. 325 (1985); *G.C.* v. *Owensboro Pub. Schs.*, 711 F.3d 623 (6th Cir. 2013). Courts once declined to expand these claims to charter schools, *see, e.g.*, *Logiodice*, 296 F.3d 22, but some have more recently begun unleashing the tidal bore of Section 1983 suits. *See*, *e.g.*, *Patrick* v. *Success Acad. Charter Sch., Inc.*, 354 F. Supp. 3d 185 (E.D.N.Y. 2018) (holding that charter school was a state actor for purposes of bringing Fourteenth Amendment due process claims). Those most likely to suffer from this change are the minority and low-income families who cannot afford to pay for private education.

In sum, reducing charter schools to state actors creates a certain and immediate risk of litigation that would eviscerate the very independence and innovation that charter schools need, that parents demand, and that students deserve. Charter schools are precisely the kind of "individual liberty and private

enterprise[,]" *Halleck*, 587 U.S. at 818, that the state action doctrine ought to protect.

CONCLUSION

The decision below should be reversed.

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