

OKLAHOMA
STATEWIDE CHARTER
SCHOOL BOARD, ET
AL., Petitioners, v.
GENTNER
DRUMMOND,
ATTORNEY GENERAL
OF OKLAHOMA, EX
REL., OKLAHOMA,
Respondent

Oral Argument – April 30, 2025

John G. Roberts, Jr.

We will hear argument this morning in Case 24–394, Oklahoma Statewide Charter School Board versus Drummond, and the consolidated case.

Mr. Campbell.

James A. Campbell

Thank you, Mr. Chief Justice, and may it please the Court: Oklahoma's charter school program relies on private organizations to create more educational options, and it empowers those groups to innovate by giving them broad autonomy over their mission, curriculum, and operations. Fueled by private ingenuity, those schools are thriving as they specialize in diverse subjects like Native American culture and environmental stewardship.

But state law categorically bars religious groups and programs, deeming religion to be the wrong kind of diversity.

That religious exclusion violates the Free Exercise Clause.

This Court has held three times in the last eight years that when a state creates a public program and invites private actors, it can't exclude people or groups because they're religious.

The Oklahoma Statewide Charter School Board is committed to this principle of religious neutrality.

That's why it approved St. Isidore's application based on the strength of its proposal, refusing to reject the court -- the group because of its faith.

But Respondent won't tolerate groups like St. Isidore operating in the program, so he sued to exclude them.

He now argues that the First Amendment, specifically the Free Exercise Clause, is irrelevant because St. Isidore is part of the government.

But it's not.

St. Isidore was privately created by two Catholic organizations, and it is controlled by a privately selected board of directors.

Under this Court's tests, St. Isidore is neither the government nor engaged in state action.

There are already hundreds of families that have signed up for St. Isidore.

They're part of Oklahoma's community too.

They should not be treated as second-class. I welcome the Court's questions.

Clarence Thomas

Well, the argument is that either you are engaging in some sort of state action, which is -- I'd like you to at least discuss that because this is -- isn't the normal context in which we see that -- and that you are a state entity.

You're a public school, a public Catholic charter school.

And I think you should address that because those seem to be at the crux of the -- of the differing opinions and the argument.

James A. Campbell

Yeah -- yes, Justice Thomas.

So, to start with governmental entity, there are two requirements that this Court has established.

The first is state creation, and the second is state control.

There's no state creation here because St. Isidore was established by two private Catholic organizations and they applied to participate in a program.

They built their own charter school program.

They came up with their own startup funding, and they asked to be a part.

That looks nothing like what this Court has found to be state creation in cases like Lebron, Biden, and Arkansas.

In all of those cases, the entity was created by name through special legislation.

Nor is there government control here because St. Isidore is operated by a privately selected board.

Again, in all three of the cases that my friend on the other side cites, there was a state-selected or a government-selected board, and that's different from this case because, as he admits, we don't have that here.

Now why does that matter? It's critical because a state-selected board has government control within the organization.

All we have here is government oversight outside of the organization.

And this Court has been clear in its state action cases that government regulation from the outside is not sufficient to constitute state control for -- or -- I'm sorry -- is not sufficient to constitute state action, let alone control, for purposes of governmental entity analysis.

Now moving to the state action test --

Ketanji Brown Jackson

Before --

James A. Campbell

-- which my friend on --

Ketanji Brown Jackson

Before you move, can I just ask you a question about that? Because I understood that charter schools actually had to be -- their -- their

curriculum was reviewed by the board and it has to be evaluated and accepted.

Is that not so?

James A. Campbell

So, at the application stage, there's just a curriculum overview that's provided.

You could -- the Court can find it in the Joint Appendix on pages 19 through 20.

Ketanji Brown Jackson

Mm-hmm.

James A. Campbell

And you can see it's very high-level.

But, yes, the board reviews it as part of the application to ensure that this school is going to provide a quality education to its students.

Ketanji Brown Jackson

And so -- so -- so how does the board do that if the curriculum includes religious components? I mean, what -- what input or oversight or ability to actually review that does the board have?

James A. Campbell

It -- it's the same way that the board would provide review for a school that focuses on native American culture.

It's not going to dive into the details of the subject matter -- specific topic that the school wants to focus on.

Ketanji Brown Jackson

But it does have a duty to sort of assess whether or not that curriculum meets state standards.

And when the curriculum is religious, I'm just wondering, don't we have the kinds of entanglement issues that the Establishment Clause worries about?

James A. Campbell

Not -- not at all, because the state board does not get into the details of the -- of the curriculum, particularly any kind of subject matter curriculum.

What the state board is looking for is whether the state standards are satisfied.

The state standards require things like math and reading and language arts.

That's what the state board is concerned with.

It doesn't second - guess those specific subject matter details.

Sonia Sotomayor

How about if a religious school wanted to change its curriculum to teach only creatism and not evolution? You'd have to make a judgment, right, as to whether that was a "quality education" because that's your legal charge, isn't it, to evaluate the curriculum?

James A. Campbell

It is the legal charge to evaluate the curriculum.

Sonia Sotomayor

And they have to teach enough to pass the national/state tests.

That's one of the requirements of a charter school.

James A. Campbell

It is one of the requirements.

Sonia Sotomayor

So, as much as you want to say that you can't -- are not looking at the substance, you're charged by law to do that because you have to determine whether it's a quality education to evaluate charter school performance, to approve or reject any proposed change to the curriculum, to consider whether to renew or terminate one, and to oversee and supervise the charter school.

That's your responsibility, correct?

James A. Campbell

Those are a number of the responsibilities.

Sonia Sotomayor

So what would you do with a charter school that doesn't want to teach evolution or it doesn't want to teach history including the history of slavery or doesn't want to include having children of another faith in them, as this one does? This one does not say it won't exclude children

of other faiths, but it said, if you want to attend this school, you have to attend mass, you have to accept the teachings of the church with respect to certain principles.

So is that something you look at?

James A. Campbell

No, it isn't, and I -- I want to start at the back end of your question, which talks about St. Isidore.

So St. Isidore allows exceptions for anyone that doesn't want to attend mass.

That's on page 27 of the student handbook.

Sonia Sotomayor

But --

James A. Campbell

In addition, it does not require students to affirm its religious beliefs.

I would point the Court specifically to Respondent's appendix, page 322, where it says point blank that there is no requirement that a student affirm the beliefs of the school.

Elena Kagan

But what if it did, Mr. Campbell?

James A. Campbell

If -- if it required, like, a statement of faith in order for admission to the school?

Elena Kagan

Yeah, if it required a statement of faith, if it said we only want to educate children of our own faith, would -- would that be the same? You know, because -- because I could make the same arguments that you just made: Oh, it was -- it was, you know, created in some sense by private people and, you know, it -- there's a private board. But -- but -- but this -- let's just hypothesize that this school goes further and says we only want to educate children of our own faith.

We do insist on a statement of faith. Would -- would your argument have to apply to that too?

James A. Campbell

I think the argument and the analysis would be different because this case involves a categorical religious exclusion and facial religious discrimination.

So, under this Court's precedent in Carson and the cases that came before it, we have a lack of neutrality on the face of the law, so we go straight to strict scrutiny.

And strict scrutiny isn't satisfied here because Respondent only has anti-Establishment Clause interests that have been rejected by this Court in cases like Carson.

But, in that case --

Elena Kagan

I guess I'm just not -- maybe I'm just being dense, but I'm not understanding.

If -- if your argument is, look, this is not a public entity, it's a private entity, and so it has to be treated equivalently by the government, that's still true in the hypothetical I gave.

So why would there be any difference in outcome?

James A. Campbell

Be -- because the challenge here is to the facial religious discrimination that says: If you have any sectarian program, you can't be a part of the program.

But there's a separate requirement to get in to the program, which requires that the school be open to all.

So, if a religious school --

Elena Kagan

Well, I guess the question is: Why is a school allowed to strike some requirements but not strike other requirements, right? Like, Oklahoma law has a requirement of nonsectarianism, for example. Essentially, what St. Isidore's did was it struck that from the contract.

So the next school says: We want to strike from the contract -- I mean, St. Isidore did some other things too, right? It -- it struck out the nondiscrimination provision because of doctrines like the ministerial exemption or church autonomy principles.

So the next school says: We also want to strike from the contract the requirement that we teach children of all faiths.

I would think that your argument would have to apply the same way.

James A. Campbell

It would be different analysis in those cases.

And if -- if we just take a step back and consider how Free Exercise Clause jurisprudence works, whenever a litigant wants to challenge a specific requirement by the government, then it has to focus on that requirement and show that it's either not neutral or not generally applicable under the case law in Smith.

So, if someone wanted to challenge the requirement that the school be open to all, they would have to show that that requirement is not neutral or not generally applicable, and if they can show that, then they would proceed to strict scrutiny.

And, at that point, the State would have a very different interest than it has here. The State's only interests here are already rejected antiestablishment interests.

The State's interest in that case would be very different, the interest in ensuring that the school is open to all.

John G. Roberts, Jr.

Thank you, counsel.

You rely heavily on -- in -- in your brief on a number of cases, Trinity Lutheran, Espinoza, Carson.

Those involved fairly discrete state involvement.

In Trinity Lutheran, they're going to pave -- pave the -- or -- or, you know, put wood chips on the -- on the playground.

In Espinoza, it was a tuition credit.

In Carson, again, tax -- tax credits. I -- I mean, this does strike me as a -- a much more comprehensive involvement, and I wonder, what case do you think supports the position with respect to that level of -- of involvement?

James A. Campbell

We -- we think Carson does, because Carson established the principle that when the state creates a program or a public benefit, that it can't exclude groups or people just because they're religious.

And that's exactly what we have here.

The State of Oklahoma has created a charter school program and it's invited private actors to participate, but it's telling religious groups and religious groups alone that they -- they don't belong. Certainly, the facts here are different than the facts in Carson, but the principle is on all fours with what we're arguing.

John G. Roberts, Jr.

Thank you. Justice Thomas?

Clarence Thomas

How much different is the -- how different is the involvement of the board in -- in -- in the school operation as compared to, say, an -- an accrediting authority?

James A. Campbell

And by "the board," do you mean the state board?

Clarence Thomas

Yeah.

Yes.

James A. Campbell

Yeah.

So the -- the state board acts in many ways like an accrediting authority.

And so one of the things that my friend on the other side talks about is that there are opportunities for private religious groups to get measures of public funding, but in order to access any of those programs, those private schools need to be accredited.

And accrediting organizations, they -- they -- they look at a high level at the curriculum to ensure that things like state standards are satisfied.

That's all that our board is doing.

I think one example to illustrate the point is that if one of our charter schools came to us and said: We want to entirely change our mission, we want to go from being an organization focused on Native American culture and now we want to be a STEM school, that would be the kind of -- of change that the board might look at.

But the board is not going to dig into the details of anyone's curriculum. That's not their charge.

John G. Roberts, Jr.

Justice Alito?

Samuel A. Alito, Jr.

The three cases the Chief Justice referred to -- Trinity Lutheran, Espinoza, and Carson -- involved grants and tax credits.

This involves a contract.

Is that a relevant constitutional distinction?

James A. Campbell

I don't believe it is. In fact, if anything, I think this case is potentially more dangerous because, if this contract transforms St. Isidore into the government, then I worry the same thing will happen to other government contractors.

For instance, consider the faith-based foster care agency in Fulton.

That agency entered into a contract with the City of Philadelphia.

And if this Court finds government action here, then I worry that it will bleed over and undermine religious liberties in cases like that.

Samuel A. Alito, Jr.

One other question. Respondent says that if you win, some students' only free public school option will be a religious charter school.

Is that true in Oklahoma? And if that were the case, would that present an Establishment Clause problem?

James A. Campbell

It's definitively not true in Oklahoma for two reasons.

One, no Oklahoma student is required to go to any charter school.

Number two, there's a provision in the Oklahoma Charter Schools Act that makes clear that an entire school district cannot convert into a charter school, and that's Provision 3-132.2, subsection (C)(2). So it -- it can't happen in Oklahoma. If it did happen, it would be a very different case, and it would not be a reason -- the -- the mere specter that that might result in the future is not a reason to categorically exclude religious groups on the front end.

There could be an as-applied challenge brought by a family if that situation ever did result.

Samuel A. Alito, Jr.

Thank you.

John G. Roberts, Jr.

Justice Sotomayor?

Sonia Sotomayor

Counsel, if the government wanted to paint its capital building and it wanted to paint landscapes, would it be violating your theory of contracting if it said: We want a secular landscape, we don't want a religious one? How is this -- that different from this case? Or is it? Are you saying that anytime the government contracts for anything, it must include -- not a religious person, because your charter school doesn't want to just give a secular education, it wants to give a religious education.

So what you're saying is that -- does the government have to accept the religious landscape?

James A. Campbell

I -- I don't believe so because it sounds like --

Sonia Sotomayor

Why?

James A. Campbell

-- they're hiring someone to paint the government's own message on the side of a building if I'm understanding your --

Sonia Sotomayor

Well, but that's what --

James A. Campbell

-- hypothetical.

Sonia Sotomayor

There's a contract here with the archdiocese, meaning the contract is with a corporation that is run by the Archdiocese of Oklahoma City and the Diocese of Tulsa.

They provide all the teachers.

Their handbook requires students to attend Catholic mass.

You say there's an exception for that.

But it requires students to --to support the school's mission.

Part of that mission is to participate in the evangelizing of the church and to be a genuine instrument of the church.

Your school doesn't want to be just a charter school.

It wants to be a religious charter school.

Correct?

James A. Campbell

St. Isidore undoubtedly is a religious organization --

Sonia Sotomayor

All right.

James A. Campbell

-- that wants to provide religious education.

Sonia Sotomayor

Now I thought that the essence of the Establishment Clause was that -- and Carson said this, Trinity said this, and, basically, every religious court --case we have --that the essence of the Establishment Clause is that we're not going to support people -- lay lead -- religious leaders in teaching their religion.

Do you accept that proposition?

James A. Campbell

I -- I don't accept it if it's part of a neutral and generally acceptable program.

Sonia Sotomayor

Well, that -- that's an interesting question.

So, if we decide to fund just a Christian school and no other school, you say that would violate the Establishment Clause, correct?

James A. Campbell

That very well might violate --

Sonia Sotomayor

By --all right.

James A. Campbell

If the government's picking and choosing religions, then, yes, that would.

Sonia Sotomayor

All right.

If we pick and choose, as we did in one part of our history, only Catholic schools to teach Indian children so they can become Catholics, would that violate the Establishment Clause?

James A. Campbell

If the government is picking and choosing a particular religion and not agreeing to allow other religions into the program, then that would be an Establishment Clause violation.

Sonia Sotomayor

All right.

And, here, they're not teaching other religions, correct, they're only teaching the Catholic religion?

James A. Campbell

St. Isidore is, but the program is open to other religious applicants to apply to teach other beliefs.

Sonia Sotomayor

Sure, if they don't teach religion.

James A. Campbell

Well, under our theory, it would be open to other religious organizations that are willing to abide --

Sonia Sotomayor

To teach their --

James A. Campbell

-- by the other terms of the program.

Sonia Sotomayor

So what you're basically saying, there's no longer no play in the joints.

This has nothing to do -- there's no Establishment Clause really.

What you're saying is the Free Exercise Clause trumps the essence of the Establishment Clause because the essence of the Establishment Clause was we're not going to pay religious leaders to teach their religion.

That was, is, and has always been the essence.

And, here, we're paying Catholic leaders, Catholic teachers.

You can only be a teacher in this school if you're willing to accept the teachings of the Catholic Church. Then we're willing to say the free exercise provision trumps the Establishment Clause.

James A. Campbell

Well, one factual point.

It's not true that St. Isidore only hires Catholic teachers.

It hires teachers that aren't Catholic.

That's in the record in Respondent's --

Sonia Sotomayor

But they have to teach it within the morals of the Catholic Church?

James A. Campbell

That -- that -- that is correct.

Sonia Sotomayor

All right.

Thank you, counsel.

James A. Campbell

But, to --

John G. Roberts, Jr.

Justice Kagan?

Elena Kagan

Mr. Campbell, you -- you rely a good deal on Carson in your briefs, and it strikes me that this is a fair bit different from that case.

You know, when the Court was looking at that case, it said we just don't think that the state is, as it then professed to be, funding only public institutions.

We think that they're funding private institutions.

And we went through a litany of the ways in which the private schools differed from the public schools.

But, when I look at Oklahoma and its charter school program, these -- these schools look like regular public schools.

They accept everybody.

They're free.

They can be closed down by the state.

There's a good deal of curricular involvement by the state, approvals by the state.

They have to comply with all the state's standards.

I mean, if you just go point by point through all the things that we talked about in Carson, here, it comes out the opposite way, that these charter schools are in every respect equivalent to regular public schools.

So why shouldn't we take the state at its word and say the charter schools are, except for some things on the margin, equivalent to regular public schools, and, as we said in Carson, a state has the right to have its public schools system be non- -- to be nonreligious?

James A. Campbell

I disagree that these schools look just like traditional government -run schools.

They don't.

In fact, the baseline rule under the Oklahoma Charter Schools Act is that none of the rules that apply to government schools are applicable to charter schools unless the Act otherwise specifies.

So there are dozens of other requirements that charter schools are not subject to.

The baseline here is that charter schools have autonomy --

Elena Kagan

They're subject to the same financial audit and reporting requirements.

They're subject to the same state testing requirements.

All curricular changes have to be approved.

In the end, the curriculum can't go forward except for state approval.

Proficiency standards are set by the state.

Student suspension requirements are set by the state.

I mean, this is -- these are state-run institutions.

They give the charter schools a good deal of curricular flexibility because -- because that's thought to be a good educational thing, is to have curricular options in the school system.

But, with respect to a whole variety of things, the state is running these schools and insisting upon certain requirements.

James A. Campbell

The state is not running these schools.

These schools are run by the privately selected board of directors of each of the schools.

And, if you look in particular at the Oklahoma statutes, specifically Section 3-136, subsection 7, it says that all authority is vested in those govern -- in those governing boards of the schools.

All that the state is doing here is exercising contractual oversight.

One of the assumptions of your question as I'm understanding it is that the word "public" equals government-run.

But it clearly doesn't, not under this Court's case law, where the Court has recognized that things like public access channels, public utilities, public defenders, public accommodations, none of those involve government-run entities.

They all, at least in many instances, involve private actors.

Elena Kagan

Thank you.

John G. Roberts, Jr.

Justice Gorsuch?

Neil Gorsuch

Mr. Campbell, you made the point that, historically, states sometimes funded religious schools.

Some of the amici on the other side contend, however, that there are historic examples of funding being denied to religious schools and no free exercise claim followed.

I wanted to get your thoughts and reactions to that.

James A. Campbell

Yeah.

One reaction is most of those examples that were provided in those amicus briefs came from the early 1800s, and no one understood the Establishment Clause to be incorporated against the states at that point.

Neil Gorsuch

Or the free exercise -- I take that --

James A. Campbell

I'm sorry.

You're right.

Neil Gorsuch

I take -- I take that point, but there were state equivalents to the Free Exercise Clause under a state constitution, and their point is, even there, there -- there were no challenges.

James A. Campbell

And -- and I would say that this case doesn't involve those state equivalents.

It involves the Free Exercise Clause of the First Amendment.

Nevertheless, I do think the history that we cite is important for purposes of this case because it dispels any suggestion that there is an Establishment Clause violation.

And in terms of the free exercise issue, I think that's satisfied -- that that issue is foreclosed by Carson because this Court established the principle in Carson that said you can't create a program, invite everyone, but exclude the religious.

Neil Gorsuch

And then your friends on the other side and -- and amicus there too pointed out that it's important under state law for state charter schools to be considered state entities for -- for purposes of securing bonds, things like that. And I took your response in your reply brief to say they can continue to do so because what we're asking is whether it's a public entity for federal law purposes.

I think that's a fair summary of what your response is.

James A. Campbell

I think that's fair.

Neil Gorsuch

And I'm just -- I'm curious, do you have other examples of entities that might be treated as private for federal law purposes but public for state law purposes?

James A. Campbell

I -- I have -- I have one example that involved Congress treating an entity as private and this Court treating it as public.

So it's not a state-federal divide, but it is a separation-of-powers divide.

And that's in the Lebron case.

Neil Gorsuch

Yeah.

James A. Campbell

Congress declared Amtrak to be a private actor, but this Court looked at it from a constitutional perspective and said that it constituted an arm of the government.

Neil Gorsuch

Last question. You've emphasized the lack of creation and supervision on the board.

I -- I can imagine some states might respond to a decision in your favor by imposing more requirements on charter schools, in some states, to require public s to be on their board and -- and more involvement in the creation of these institutions.

Have you thought about that boomerang effect for charter schools?

James A. Campbell

We have thought about it, and that certainly is a decision that states are entitled to make.

They can set up their charter school programs as they see fit.

We think there are significant tradeoffs because part of what makes charter schools great is the autonomy that they're provided and the private ingenuity that they bring.

But, if a state wanted to assert more control over those entities, then it would be free to set up its program that way.

Neil Gorsuch

And it would yield potentially a different result in those cases.

James A. Campbell

It could potentially depending on how they set it up.

Neil Gorsuch

Thank you.

John G. Roberts, Jr.

Justice Kavanaugh?

Brett M. Kavanaugh

First, a few factual questions.

A student in Oklahoma is free to attend a public school if they choose, correct?

James A. Campbell

A government-run public school, yes, they are free to choose that.

Brett M. Kavanaugh

In other words, no student in Oklahoma is required, at least I -- as I understand it, to attend a charter school, correct?

James A. Campbell

That -- that's correct.

Brett M. Kavanaugh

And there are other charter schools in Oklahoma, correct?

James A. Campbell

In -- yes, indeed, there are 33, and there are seven virtual, which would be accessible to any student no matter where they're located in the state.

Brett M. Kavanaugh

And what are the -- some of the themes or focuses of those charter schools to the extent they have distinctive qualities?

James A. Campbell

There -- there's a vast array.

There are some, as I mentioned in the introduction, that focus on Native American culture and environmental stewardship.

There are others that focus on STEM curriculum, performing arts, foreign language immersion, et cetera, et cetera.

There are many other examples.

But, again, the problem here is there's one type of education that's off limits, and that's religion, and that can't be consistent with this Court's precedent.

Brett M. Kavanaugh

And if any other religious group wants to operate a charter school, they too can apply.

You're not saying that it's only Catholic schools, correct?

James A. Campbell

That's correct.

Brett M. Kavanaugh

Okay.

James A. Campbell

We would treat any other religious applicant the same way the state board treated St. Isidore.

Brett M. Kavanaugh

So -- this is in response to Justice Sotomayor and I just want to make sure this is clear.

You're not saying that the state can favor one religion over another?

James A. Campbell

We are not saying that at all.

Brett M. Kavanaugh

And you're not saying, I think, but confirm, that the state could say we're going to have charter schools but only religious charter schools?

James A. Campbell

We are not saying that at all.

Brett M. Kavanaugh

Right.

If you have charter schools, you can't favor religion.

Your point is you also can't disfavor religion, correct?

James A. Campbell

That's right.

Brett M. Kavanaugh

And then the case that I think the Respondent relies on pretty heavily is West versus Atkins, the -- the case about medical services in prison.

Can you respond to that? Because I think that's one they put a good deal of emphasis on.

James A. Campbell

Yeah, a couple of responses to that.

The first point I would emphasize is I think that outsourcing theory that they're relying on is entirely foreclosed by this Court's decision in Rendell-Baker. So, in Rendell-Baker, the question presented built in that idea of outsourcing.

It said that the school at issue there had a duty under state law to provide that education, and that's what transformed it into a state actor. And the dissent in that decision relied on that theory.

But, importantly, the majority looked at that same state law that put that duty on the -- the state to provide that education and it said that in no way amounted to state action.

So I think that argument's foreclosed by Rendell-Baker. A second point I would make is that the state here hasn't outsourced its obligation at all.

The state continues to provide free public education to all children in the state through its government-run schools. And the last point I would make is a factual distinction between West and our case, and that's because West involved a situation where the plaintiff had no option.

The plaintiff only had one choice for the orthopedic services that he was seeking.

In this case, no one is forced to go to St. Isidore or any other charter school in Oklahoma.

Brett M. Kavanaugh

And one last question to the extent you know.

What does the state oversight of private schools look like in Oklahoma to ensure that they meet certain standards? This is following up on Justice Kagan's question because that's another bucket of schools and I assume the state does something with private schools, but -- but what is that?

James A. Campbell

The state does have some oversight, particularly when a private school wants to participate in one of the school funding or school choice programs.

So Oklahoma has a tax credit program, but, in order for a school to participate in that, they need to be accredited.

And so that accreditation process does involve oversight, looking into the curriculum.

There is -- there are other scholarship --

Brett M. Kavanaugh

What else -- what else does the accreditation process for private schools entail? If you can kind of spell that out.

James A. Campbell

Yeah.

I mean, it -- it primarily looks at the curriculum to ensure that it's meeting minimum standards, to make sure that children are learning the basics of reading, writing, math, et cetera.

There is not a lot of a focus on how the -- how the schools operate, and so it primarily focuses on those curriculum issues at a high level.

Brett M. Kavanaugh

Thank you.

John G. Roberts, Jr.

Justice Jackson?

Ketanji Brown Jackson

So, as I understand it, your free exercise claim relies on the Trinity Lutheran Carson line of cases, and you've said several times here that

the argument is that when a state creates a public benefit, it can't tell religious groups they can't participate.

That's sort of basic law as we understand it today.

I guess what I'm confused about is whether what you are asking for in this case really maps on to that line of analysis, and so let me explain to you what I'm concerned about and then you can tell me why I'm wrong.

So your argument is that St. Isidore is seeking the same public benefit as everyone else, which is to start a charter school, but I think that actually might misunderstand the public benefit in this scenario because Oklahoma has been clear that what it wants to do is use the charter system to set up a system of secular public schools.

That's what the charter program does.

The -- the contract provides money and support for private entities, and so we can assume, we can start where you start, we can assume this is a private entity.

And Oklahoma says, fine, private entities come in, and we provide money and support if you want to establish a secular charter school in order to advance our goal of having that sort of system.

Importantly, I think, we've said in Carson that they are allowed to do that.

Carson says that a state can permissibly choose "to provide a strictly secular education in its public schools." And so that appears to be what Oklahoma is trying to do.

Now, in this case, St. Isidore doesn't want to establish a secular school, which is what the public benefit is.

Instead, they want to establish a religious school. So, as I see it, it's not being denied a benefit that everyone else gets.

It's being denied a benefit that no one else gets, which is the ability to establish a religious public school.

Can you explain to me why this is actually the same as Trinity Lutheran or Carson or whatnot?

James A. Campbell

Well, I -- I think building the secular requirement into the -- the definition of the benefit creates the same error that this Court corrected from -- that the lower court committed in Carson.

And what I mean by that is the Court used the phrase, did it -- it talked about semantic exercises.

And so, there, the State of Maine tried to build the concept of secular --

Ketanji Brown Jackson

But it's not --

James A. Campbell

-- into its definition --

Ketanji Brown Jackson

It's not actually not -- it's not a semantic exercise because I do think that you would have a Trinity Lutheran problem if St. Isidore's came in and said we would like to establish a secular public school. We want our school to look exactly like all of the other charter schools that are out there.

You're -- you're offering money to establish this kind of school, and here we are.

And if the state said, oh, but -- as they did in these other Trinity Lutheran, et cetera, cases, oh, but you're religious, and we think that if we give you money, that'll be an Establishment Clause violation or whatnot, you would totally be an all fours with Trinity Lutheran.

But, here, I think what Justice Kagan said is St. Isidore's wants to come in and not just get the same contract that everybody else gets because the contract has in it that you have to have a secular school.

What they want to do is come in and get a contract that is tailored to their own terms that includes religious education, and the State says that's not the benefit that we're offering here.

So you're actually not in Trinity Lutheran world, I think.

James A. Campbell

I disagree.

I think it's, again, exactly what Maine tried to do in Carson.

They tried to build in the notion that the benefit at issue there was by definition secular.

That's exactly what the argument you just raised is trying to do.

Ketanji Brown Jackson

Well, let me ask you another question.

This goes back to Justice -- to Justice Sotomayor's hypothetical.

So suppose we had a state that wanted to have murals of landscapes on its public buildings around, and so it was offering money for painters to come in to do that.

And it wanted no messaging, no nothing, just the mountains, landscapes.

That was a term of the benefit of the money that they were providing.

Would it be a free exercise violation if a particular painter came in and said, here's my proposed sketch, it has, you know, religious symbols in it, that's important to me because I'm a, you know, religious painter and this is what I would like to do, and the state said, I'm sorry, we're not going to do that? Now, I mean, yes, they'd be rejecting him because the product that he was offering had religious symbols, but I doubt that that would be a -- a free exercise violation for the reasons that I've articulated.

James A. Campbell

Well, that case would turn on whether it was government speech or whether the government created a forum for anyone to participate.

Ketanji Brown Jackson

No, I'm -- I'm -- forget the speech.

That's just the framing.

The point is: Would that person say you are rejecting me as a painter because of my religion in a way that triggers Trinity Lutheran when, really, what the state is doing is saying we are offering a particular public benefit and the particular benefit is a nonsectarian mural, a secular mural, and to the extent that you're not wanting that, we're -- we're rejecting your proposal?

James A. Campbell

I -- I think that case is very different from this case because, in that case, the government is trying to speak its own message on its own buildings.

Here, it's giving broad autonomy to the schools to come up with their own mission and their own curriculum, and so this involves that private entity being a part of the process.

Ketanji Brown Jackson

Thank you.

John G. Roberts, Jr.

Thank you, counsel.

Mr. McGinley?

Michael H. McGinley

Mr. Chief Justice, and may it please the Court: The Free Exercise Clause bars a state from inviting private parties to participate in an educational funding program while excluding those who exercise their faith.

But that is precisely what Oklahoma law does here.

Respondent seeks to justify that religious discrimination by recasting St. Isidore as a government entity or state actor with no constitutional rights.

That is incorrect.

St. Isidore is a private religious nonprofit.

It was created by private actors and it is -- and it is controlled by a private board that consists of entirely private actors.

It thus lacks the essential elements of a government entity.

Nor is St. Isidore exercising a traditional and exclusive government function. American history is replete with examples of private organizations offering free education to the nation's youth with support from the public fisc.

All that leaves is the fact that Oklahoma law labels charter schools as public schools.

But constitutional analysis turns on substance, not labels, and casting the cloak of state action too broadly risks intruding on individual liberty.

The Establishment Clause does not restrain St. Isidore and the Free Exercise Clause protects it.

I welcome the Court's questions.

Clarence Thomas

You say St. Isidore is not a state actor.

What would -- what features would you add to convert St. Isidore into a state actor?

Michael H. McGinley

So, Justice Thomas, what the Court has said particularly for government entity analysis, which is what I take my friend on the other side to really be focused on at this point, is that it requires government creation and control.

And so I'd point you to this Court's cases in *Lebron*, U.S. Olympic Committee, *Nebraska*, *Arkansas*.

And what it says is that in all of those cases where the Court found a government entity, there was creation particularly by special legislation where the government literally creates the body.

But the Court has also said that's not enough.

That's what the U.S. Olympic Committee case says.

It says just because the U.S. Olympic Committee was created by special legislation, a charter from Congress, it wasn't controlled by the government because its board was not controlled by the government.

But, in *Lebron* -- and I would particularly point you, I think, to the analysis in *Lebron* where Justice Scalia does a really nice job of laying out all the different types of federal private corporations where the government -- or Congress has said at times we don't want this to be treated as the government. But this Court has not always said that that's controlling for the constitutional reasons.

In *Lebron*, it was a First Amendment claim.

Then, in the follow-on *Amtrak* case, you had a private nondelegation claim.

And in both cases, the Court said *Amtrak* was created by the government and it was controlled by the government. And it distinguished other instances, including U.S. Olympic, but then also the regional rail cases, where you even had some control at some level by government-appointed board members.

But the Court said it wasn't complete control and that wasn't enough.

So those are the two defining features, Your Honor.

Sonia Sotomayor

Counsel, there's been private education and, you're right, there's been free private education to a variety of different groups, but none of them are government supported, meaning they weren't using government money to do this.

They were using donations or whatever -- whatever sources of income they could find.

The hallmark of public education is that taxpayers are paying for it, not private donations.

The government's doing this.

And that has never been something that other people did for the government, meaning charter schools are a creation of contract, which is the question, the point that Justice Thomas -- Alito made, which is charter schools are using only government funds.

And so the question is not whether it's a government agency but whether it's a state actor.

Now, going to the West suggestion, your co-counsel or -- or brother on the -- on the same side said that there, there was -- you were -- the students -- the -- the -- I'm sorry -- the inmates were required to use this doctor, and this is different because no student is required to attend a charter school.

But that's not the point, is it? The point is whether you're acting for the government or not.

Michael H. McGinley

So I'll take both your questions in order, Your Honor.

With -- with respect, I disagree regarding the history.

I would point you to our opening brief, pages 41 through 45 and 50 through 53.

But I'd also point you to the USCCB brief, the Glenn -- the Professor Glenn brief, all of which provide examples where the government was providing funding sometimes --

Sonia Sotomayor

Well, the problem is that using history in this case is so crazy because the first thing is no one thought there was an obligation of government at all to provide funding for most of the history -- the early history.

It was around the time of the ratification of the Fourteenth Amendment that the idea that states would provide a constitutional right to educate and did was very different.

Number two, I think the other side admitted we don't use the history of segregation to interpret the Equal Protection Clause now.

I doubt very much we use -- we would use that history of the federal government funding the -- the churches to teach Indian children and convert them as proving anything about the Free Exercise or Establishment Clause now.

So forget the history.

Let's go to the basic point.

Michael H. McGinley

Sure.

Sonia Sotomayor

And let's come to more modern times, West, which is the issue is not who's doing it but whether the government is outsourcing to that person their own obligation.

Michael H. McGinley

So I have a very direct answer to you on that, and I would point you to Rendell-Baker because Rendell-Baker --

Sonia Sotomayor

Well, the problem with Rendell-Baker is that the Carolina schools system didn't claim that was a constitutional obligation.

They had not been educating maladjusted children ever.

They had just decided that they would start doing that.

But the Court didn't view that as a constitutional obligation.

It was a contract obligation but not a constitutional obligation.

Michael H. McGinley

I -- I'm not sure about that, but I -- but I think, in Carson, Maine viewed it as a constitution -- state constitutional obligation to provide free public education, and one of the ways that they did that was through the program that was upheld in Carson versus Makin.

I would point out there was --

Sonia Sotomayor

Oh, but all of those programs had an intermediary, someone else who was making the choice, not the government. Here, the government is the actual creator of the charter school because the charter school does not exist without government funding.

So it is -- if it's not a government actor, it is still creating a religious institution.

Michael H. McGinley

So I disagree with that, Your Honor.

I'd point you to page 157a of the Petition Appendix in our petition, which point -- which is a declaration from -- called the Losnia declaration that makes it very clear that the only way that funds will be provided to a -- to St. Isidore is if parents choose to do so.

So that makes it no different than --

Sonia Sotomayor

Then we go back to who -- who defines it, the parents or the state, in being the one who says you can do what I would do.

All right.

Thank you, counsel.

Michael H. McGinley

Thank you.

John G. Roberts, Jr.

Thank you, counsel.

Justice Thomas? Justice Alito, anything further? Justice Kagan?

Elena Kagan

Mr. McGinley, you struck out as I talked to Mr. Campbell about the requirement in the standard contract that insisted on nonsectarianism and also the one that insisted on nondiscrimination.

Anything else -- was anything else struck out?

Michael H. McGinley

So I just want to clarify we didn't strike out the nondiscrimination clause.

There still is the nondiscrimination clause.

We had agreed to abide by all applicable law.

What we -- what we recognize and what the State recognized in contracting with us is that as a private --

Elena Kagan

You modified it to incorporate various church autonomy principles.

Michael H. McGinley

Correct, but I would say, Your Honor, those are antidiscrimination principles that --

Elena Kagan

That -- that's fine.

Michael H. McGinley

Sure.

Elena Kagan

It's not the point of the question.

Michael H. McGinley

Sure.

Elena Kagan

Anything else? Did you strike out anything else?

Michael H. McGinley

In terms of striking out, I -- I -- I don't believe so.

I think --

Elena Kagan

What if you had wanted to strike out other provisions, for example, curricular provisions, because the kind of religious education that you thought it was your mission to provide were inconsistent with those curricular requirements?

Michael H. McGinley

So I think that would be part of the contracting process, and I do agree with my friend that the framework of analysis would be very different, right, because, here, there's no dispute that St. Isidore qualifies for the

program for all purposes other than the sectarian requirement. And so we're dealing with the Carson, Trinity --

Elena Kagan

Right.

But --

Michael H. McGinley

-- Lutheran threshold.

Elena Kagan

-- but, like, sectarian means something.

It involves a certain kinds of -- certain kind of exercise. So, you know, it's not just like you want to put the word "Catholic" up on the door.

Michael H. McGinley

Right.

Elena Kagan

You want to teach certain things, as would any or most religious schools.

So suppose a religious school came in and said, in addition to the modifications that you made, we want to make some further modifications with respect to the curricular requirements.

I'll give you a hypothetical just so we can focus the inquiry.

Michael H. McGinley

Sure.

Elena Kagan

Let's say we're not in Oklahoma.

Let's say we're up in New York, and there's a Hasidic community that has Yeshiva, and it's a very serious Yeshiva, and what that means is that almost all the instruction has to do with studying Talmud and other religious texts.

Very little of it has to do with secular subjects.

Almost none of the instruction is in English.

Almost all of it is in Yiddish or in various, like, ancient Hebrew-Aramaic kind of languages.

And that's the charter school that this Hasidic community wanted to qualify for.

Does New York have to say yes even though those -- that curriculum is super-different from the curriculum that we provide in our regular public schools? Yes, come join our -- our completely taxpayer-funded charter school program?

Michael H. McGinley

So the first thing I would say is that given the nature of charter school programs, it very well might be that the state wants that or is fine with that because it's a -- it provides a different --

Elena Kagan

Let's say the state is not fine with that.

Let's say the state thinks it's great that you provide that education on your own, and it might be that if we have certain kinds of tuition assistance, you would be included in that.

But the -- but -- but the state has this same idea, honestly, that Oklahoma has, which is these schools are supposed to be public, and -- and -- and they're supposed to sort of look like public schools, and this one really doesn't.

Michael H. McGinley

So the first thing I would say is just the label of "public school" clearly can't do the work.

That's --

Elena Kagan

I'm not suggesting that.

Michael H. McGinley

I -- I know.

Elena Kagan

Let's --

Michael H. McGinley

But -- but -- so then to the -- then you would go to a different framework of analysis that would be under this Court's case law that includes *Fulton*, *Smith*, that line of cases that would say -- would ask all

sorts of questions that would be highly fact-dependent, such as: Is it a neutral law of general applicability? To what extent does it burden the religious beliefs, et cetera, et cetera? And is there a compelling interest potentially --

Elena Kagan

Well, this definitely burdens the religious beliefs.

I mean, this is what this community thinks an education is all about, and this is what this community thinks is critically important to train their young people in the tenets of their religious practice and so forth.

Michael H. McGinley

Sure.

And so I -- I can't tell you standing here today exactly how that or any other hypothetical case would come about.

But what I can tell you is that Carson and Espinoza and a whole series of cases, including Zelman, say you can't take imagined, hypotheticalal downstream questions and let them drive and justify front-end religious discrimination.

Elena Kagan

Well, I don't have to imagine very hard to come up with a hundred hypotheticals like this because religious communities are really different in this country and are often extremely different from secular communities in terms of the education that they think is important for their young people and it's critically important to their faith. I mean, nobody would say that the kind of instruction that is -- that exists in the kind of school that I laid out, which are -- there are many of -- is not critically important to the faith and to the -- the -- the training of young people in the faith according to that community.

Michael H. McGinley

Sure.

And that was true in Carson, and what this Court said is that when you open a program to other private organizations, you have to -- you can't exclude the religious.

And so, you know, that's how the Court dealt with it in Carson.

The other thing I would point out, and my friend Mr. Campbell pointed this out --

Elena Kagan

So a state has a -- what it considered a charter school system which was, you know, basically offering a kind of education that it was familiar with, that it applied curricular and testing and standards to. It wanted to increase curricular flexibility. It did not want to start funding every religious school in the country.

And now you're saying to that state, you know: Yes, you have to go fund the Yeshiva that I described; yes, you have to go fund the ^ Madras; yes, you have to go fund da-da, da-da, da-da, da-da, da-da, if you want to have this program at all.

Michael H. McGinley

Well, I'm not -- I don't think I'm saying that, Your Honor.

I'm saying there's a different, you know, framework of analysis.

That analysis would have to be applied.

But the other thing I would say is that a state doesn't have to open up an educational program to private organizations. That's -- the Court has said that consistently in this case law.

And so no one is saying that a state is compelled to open up these programs and to invite in the religious.

What they're saying is that what the Free Exercise Clause says is that if you do open it up, then you can't exclude the religious because they're religious, neither because of their status or because of their use.

Elena Kagan

Thank you.

Michael H. McGinley

Thank you.

John G. Roberts, Jr.

Justice Gorsuch?

Neil Gorsuch

Just on some of those hypotheticals, Mr. McGinley.

Would it be a neutral and generally applicable rule and, therefore, compliant with *Fulton* and *Smith* to say: If you want to be a charter school, you have to teach math, reading, science, and -- and specify testing at -- at grade level proficiency?

Michael H. McGinley

So the way you've described it, I think so.

And, certainly, my client has not objected to those things.

The record indicates that that is certainly part of their curricular design.

Neil Gorsuch

And even absent Smith, I still have to ask whether -- in strict scrutiny, whether the government has a compelling interest.

Might it have one there?

Michael H. McGinley

I think it might have one there, sure.

Especially in a -- in a contracting setting, where the government is providing funds for the education of youth and they want to make sure that certain minimum standards are met, I do think that that would probably be a compelling government interest.

Neil Gorsuch

Thank you.

Michael H. McGinley

Thank you.

John G. Roberts, Jr.

Justice Kavanaugh?

Brett M. Kavanaugh

With Justice Kagan, I think you were talking about the nondiscrimination provision, and you said it wasn't -- you didn't strike it out, and you were -- you had more -- I mean, I think you had more to that answer, so --

Michael H. McGinley

Yeah, sure.

Brett M. Kavanaugh

-- can you just tell us what happened?

Michael H. McGinley

Yeah.

So what happened was there -- you know, we agreed to abide by all applicable laws, which means federal and state laws, including antidiscrimination laws.

What was added to the contract is the essentially constitutional truism that as a private religious organization, we possess rights under the Free Exercise Clause, the church autonomy doctrine, the ministerial exception, which this Court has rooted in the church autonomy doctrine.

And so all that we were trying to make clear and all the State was recognizing is that we were not giving away those rights by virtue of agreeing to this contract.

Brett M. Kavanaugh

A number of other states, in fact, I think all of them, have a similar kind of program.

What should we make of that?

Michael H. McGinley

So what you should make of it is every single state has a choice as to whether or not they want to have the program, whether or not they want to invite private organizations in, and how they design the program, particularly the extent to which they exercise control, state control, over any charter schools.

And so, if the state decides that it wants to have government entity charter schools, it can do so.

And so I -- I don't think that in any way -- you're not deciding the platonic form of charter schools.

You're not deciding the platonic form of public schools here.

States have the ability to design their program.

This Court has repeatedly made clear that when they design it to invite private actors in, they can't exclude the religious. But it's also made clear in --

Brett M. Kavanaugh

But they've been around for a while without that.

Michael H. McGinley

But I think that's, I mean, in part a result of this Court's case law that suggested that it wouldn't be permissible. But, you know, after Trinity

Lutheran and Espinoza and then Carson, you know, I think there's a different outcome.

Brett M. Kavanaugh

And on -- are there language-focused charter schools in Oklahoma that you're aware of or --

Michael H. McGinley

Yes.

Yes, there are -- there are language-immersion schools.

I think one example is -- I believe it's called the Le Monde School.

Brett M. Kavanaugh

Thank you.

Michael H. McGinley

Thank you.

John G. Roberts, Jr.

Justice Jackson?

Ketanji Brown Jackson

So I guess I'm still stuck on trying to understand what you mean by the state has the ability to organize or set up the program in the way that it wants the program.

So, apparently, they can't decide the program to be funding schools that are nonsectarian.

Michael H. McGinley

That's correct.

That's the teaching of this Court's case law.

Ketanji Brown Jackson

I don't see that that's the teaching of the case law.

I see that whatever the program is, it has to be available to religious people.

But what if the state says: My program is, you know, murals that are not religious or schools that are not religious? That's the part that I'm really confused about, because your free exercise argument is based on this discrimination principle, which I totally get, but if you're striking out

provisions of the contract, then it seems to me that you are not seeking the same public benefit that everyone else is getting.

The state says: Here's our program, and we're laying out all the provisions in a contract, and anyone who would like to have this contract, you're welcome, and we're not excluding religious people, we're not excluding any people, but here are the terms.

And you say: Ah, but there's a term in here that says you have to be nonsectarian.

And I -- I do want to point out that that term is actually in the federal law because the State of Oklahoma defines its charter school on the basis of what federal law has defined as a charter school.

It's a public school created or adapted by a developer, private organization.

And to qualify, the school must not charge tuition and must be nonsectarian in its programs, admissions, policies, employment practices, and all other operations.

And so that's a -- that's, like, what it is. And so it just seems to me very hard to accept the discrimination principle that you're putting forward when you come in and say: We don't want that contract.

We want one that we've tailored to strike out some of the terms that you have put in here.

Michael H. McGinley

So, with respect, I think the -- the argument you're articulating is precisely the one that was rejected in Carson, which says you can't, you know, define the program by saying it has to be something that's nonsectarian because that merely says that -- by doing so, you're essentially building into the definition a way to discriminate, in violation of the --

Ketanji Brown Jackson

So the federal law is unconstitutional that sets up charter schools and includes as a term the nonsectarian status?

Michael H. McGinley

So I won't speak for my friend, who I think will be up here shortly, but my understanding is that -- is that their view is that that particular term is no longer enforceable.

And I think there's an OLC opinion that essentially says as much after Trinity Lutheran.

Ketanji Brown Jackson

When -- when Carson -- I -- I have to go back and take a close look at Carson, but were they changing the terms of the actual benefit that was being offered, or were they saying that religious people have to have access to that benefit as it exists?

Michael H. McGinley

So my understanding of the -- of Maine's law in Carson is that, like Oklahoma's law, it had a provision that said that no sectarian institution could participate, and --and then Maine articulated that --

Ketanji Brown Jackson

No, that's the -- that's the no sectarian institution can have this contract.

Michael H. McGinley

Right, but you --

Ketanji Brown Jackson

Yeah, I agree with that.

Michael H. McGinley

Right, but you may remember that one of the critical questions in Carson is whether there's a status use distinction, and this Court -- you very definitively said that there's not.

And I think that goes directly to Your Honor's questions.

Ketanji Brown Jackson

Thank you.

Michael H. McGinley

Thank you.

John G. Roberts, Jr.

Thank you, counsel.

General Sauer?

D. John Sauer

Mr. Chief Justice, and may it please the Court: Charter schools like St. Isidore are not part of the Oklahoma government, and they are not engaged in state action.

They are created by private parties applying to public or private sponsors, and they are controlled by privately appointed directors. Participation in charter schools is mediated through two layers of private choice, both of the applicants who create the schools and of the parents who choose to send their children to them. Oklahoma does not control their programs, staffing, or curriculum.

Providing education through charter schools is not a traditional and exclusive public function.

And their control by privately appointed directors refutes any suggestion of public entwinement.

The values of private innovation, independence, and private choice lie at the heart of this charter school program, and they call for the application of the Free Exercise Clause here.

I welcome the Court's questions.

Clarence Thomas

General, the -- below the -- in -- in the state courts, state action seemed to play a considerable role, but in your brief, you said it's not -- it's not applicable here.

Would you elaborate on that?

D. John Sauer

Absolutely, Justice Thomas.

We've taken the position that viewing this through the lens of private actors engaged in state action is not the appropriate kind of framework to view it under.

And, actually, I think we have clear agreement from that from the Respondent at page 18 of their brief, where they say that is not the correct framework. Obviously, the Oklahoma Supreme Court did rely on those cases both as to entwinement and also as to traditional exclusive public function.

But the point that we make is there is not a clear mapping onto the two concepts of do you have constitutional rights of your own and are you

engaged in state action with respect to the constitutional rights of others.

So, in *Lindke*, for example, recently and in *Garcetti* and that line of cases, there's a recognition that those are conceptually two distinct questions, and that's why we think that that's really not the proper framework the Court should and the Respondents do kind of put all their chips on, so to speak, the question of are these actual governmental actors, are they governmental schools, sorry, not actors, are they, in fact, governmental schools.

And there, you're dealing with the creation, control, and dissolution factors, which all favor a finding that they are not governmental act -- schools.

Sonia Sotomayor

General, what do we do that two years ago in *Peltier versus Charter School*, the SG argued the opposite position you're taking today, that charter schools are public schools and state actors?

D. John Sauer

I'd say two things -- three things in response to that.

First of all, that case was not a religious free exercise case, so that analysis wasn't --

Sonia Sotomayor

Does it matter? Why were they state actors there and not state actors here?

D. John Sauer

And as to my second point, as I said to Justice Thomas, we don't think that that's really the correct framework to apply here.

But, if it did -- if it does --

Sonia Sotomayor

So what changed?

D. John Sauer

-- we think t hat that's not --

Sonia Sotomayor

What changed?

D. John Sauer

Well, for example --

Sonia Sotomayor

What changed is there's a new administration.

But tell me something.

Given your new framing, I presume that you're conceding now publicly that the federal charter school program, as it's been run up until now, is unconstitutional?

D. John Sauer

Not exactly.

So there are four -- if I may describe that.

There are kind of four buckets in that statute.

There's programs and operations, which we think is this case, and there, we are conceding that our argument here implies that there has to be a free exercise exception for those two.

Then there's a reference to employment policies, and we think that's already governed by the ministerial exception from Hosanna-Tabor and Our Lady of Guadalupe.

Then the federal statute says you have to be kind of open to all in your admissions policies.

And we -- we do not concede that there's a constitutional problem there.

We contend that that is defensible.

If -- for example, if a religious school wanted to come in and say, you know, hey, our religion says we can only teach members of our own faith, we don't concede that that would be constitutionally mandated by Carson and -- and those.

Elena Kagan

And what's the difference?

D. John Sauer

The difference -- I would say there's three differences.

One is, in that circumstance, you would have a Smith analysis that, as Mr. Campbell said, looks very different.

Open to all comers is a neutral and generally applicable criterion.

Contrast that to the criteria in this case where the discriminatory characteristic, no religious need apply, is right there in the discrimination.

So we haven't even made a Smith argument here because of the problem --

Elena Kagan

No, it's -- it's not no religious need apply.

It's nonsectarian instruction.

D. John Sauer

Nonsectarian to me means no religions.

But, in any event, our position is --

Elena Kagan

But the point is, to the extent it does mean that, it's because religious practice, religious exercise requires a certain -- you know, you -- because religious belief implies a certain kind of religious conduct, and, here, the same argument would be met.

My religious belief requires a certain kind of religious conduct, which is that I only teach members of my own faith.

D. John Sauer

Suffice to say that under the Smith analysis at least, those seem very, very different, and the government will argue that those are distinct cases.

Secondly, even if the Court is not inclined to apply Smith, the argument that there be a compelling state interest and that Oklahoma or the federal government could say this is open to every student where the options are being offered to every student across the board without any discrimination, there would be a strong argument that that would be a compelling state interest even if we weren't look at the neutral and generally applicable framework.

And, thirdly, if you look at it through the lens of the funding cases, like U.S. AID, the argument that what we're funding here is a program that's open to all is a much stronger argument than the argument that what we're funding here is a program where we don't let religious schools participate.

So, for those three reasons, we would continue to defend the -- the -- the open-to-all admissions policies that we --

Ketanji Brown Jackson

General Sauer, can I just ask you because, as I understood your response to Justice Sotomayor, you are saying that the portion of the federal law that indicates that to qualify as a charter school you have to be nonsectarian in your programs, you're saying there is a constitutional problem with that or at least there has to be a free exercise exception, is that right?

D. John Sauer

Exactly.

We think that's the natural extension of the 2020 OLC opinion --

Ketanji Brown Jackson

All right.

So, if there --

D. John Sauer

-- as to affiliation. Sorry.

Ketanji Brown Jackson

If there is a free exercise exception, then I think -- are you saying that strict scrutiny is triggered as a result of that, and can you speak to why avoiding an Establishment Clause problem would not be a compelling interest of the state in including this kind of clause in their charter school program?

D. John Sauer

As Mr. Campbell argued, we think that's squarely foreclosed by Carson. Actually, by Trinity Lutheran and Espinoza and Carson, all of which say, you know, protecting establishment --

Ketanji Brown Jackson

Say it's not a compelling state interest or?

D. John Sauer

To -- to protect establishment interests more fiercely than the federal Establishment Clause actually protects them is not a compelling state interest that can take away free exercise rights.

Ketanji Brown Jackson

I guess I feel like that's completely circular, and maybe I'm wrong about it, but I'm just trying to understand it.

So how does that account for a state's concern that unless they are setting up a series of nonsectarian programs, they would be funding religious activities in a way that the Constitution doesn't allow? I don't -- I -- I appreciate the Trinity Lutheran scenario and it not being a compelling interest to prevent religious schools from doing exactly the same thing as everybody else is doing in this program, but I'm actually drawing a distinction, as you've heard me say before, that what the religious schools are asking for here is not exactly the same thing. And so, to the extent that the state is saying we see a distinction between religious schools, which require all of these religious rights and proselytize and do whatever, we see a distinction between those kinds of schools and public schools, and we only want to set up public schools because our compelling interest is to prevent the entanglement of the state with funding those kinds of schools.

D. John Sauer

To address that --

Ketanji Brown Jackson

Yeah.

D. John Sauer

-- the Court should look and see whether there is an actual Establishment Clause violation here --

Ketanji Brown Jackson

Okay.

D. John Sauer

-- because of its -- the principle that governs here would be genuine and independent private choice asserted in *Zelman* and reaffirmed in *Trinity Lutheran*, in *Espinoza*, and *Carson*.

Here, participation in the program is mediated through two layers of private choice.

Both the schools decide to participate or the private entities decide -- decide to participate, and more fundamentally, the parents decide to send their kids there.

As both I -- I think -- both attorneys argue, they -- there is the option, the backstop option, of the traditional government -- run public schools. Under that set of circumstances, there is, I think, not a plausible claim that there is an actual direct Establishment Clause violation, so much so that I believe that Respondents on this point hinge their Establishment Clause argument entirely on their government entity argument.

So they, I sense, as I read it, concede that there's only an Establishment Clause problem if these actually are government entities.

Ketanji Brown Jackson

Okay.

D. John Sauer

There, they run into Lebron and they run into Rendell-Baker and they run into cases like that.

John G. Roberts, Jr.

Counsel, to what extent can the state impose requirements on such schools? You know, you have to teach Oklahoma state history, you have to teach this, this, and this.

D. John Sauer

Those all appear to be -- obviously, there could be, you know, unique facts, but those in general would appear to be neutral, generally applicable criteria that they could impose.

And if there was a free exercise claim in response to that that, oh, our religion doesn't -- doesn't allow us to teach evolution, if that's neutral and generally applicable, there would be a strong argument that there's no free exercise opt-out there. In addition to that, if you're not applying the Smith framework, the State would have to argue we have a compelling state interest in making sure people understand the theory of evolution so they could pass the standardized tests and so forth.

And -- and the Court would have to assess it through that lens.

John G. Roberts, Jr.

Does the extent of that involvement affect the analysis in terms of whether the -- whether there's too much state involvement to view it as a -- a truly private charter school or a truly religious charter school?

D. John Sauer

I don't think so if I understand the question.

The way that I would frame it is, under Trinity Lutheran and Carson and Espinoza, you have a neutral and generally applicable program.

And what you're letting into that program is something that's very like the school in Rendell – Baker, where there is detailed and extensive regulation of that school, but, nevertheless, it is not a private actor.

John G. Roberts, Jr.

Thank you.

D. John Sauer

Or, sorry, it is not a state actor.

John G. Roberts, Jr.

Yeah.

D. John Sauer

It is a private actor.

John G. Roberts, Jr.

Justice Thomas? Justice Alito?

Samuel A. Alito, Jr.

Well, on the issue of intensive state supervision, would you address the -- the entwinement argument that the Oklahoma Supreme Court thought was persuasive?

D. John Sauer

We think that argument's quite unpersuasive, and here's why. The entwinement argument, for example, they rely solely on Brentwood Academy, and Brentwood Academy is a case where public officials were 86 percent of the membership of the state athletic association, and they appointed other public officials to control it.

So Brentwood Academy is very similar to the government-controlled cases like MOHELA and Amtrak, where the government's controlling everything.

There was a little private involvement to the tune of 14 percent, but that's very different.

Here, we're talking at the polar opposite of that, where every single director is privately controlled.

And under the cases we cited, Cherry Cotton Mills, Bank of America -- or Bank of United States, all the way up through Biden against Nebraska, it's -- the situation is the opposite of what the Court -- the Court has held to be this is a governmental actor on that crucial control factor.

Samuel A. Alito, Jr.

Thank you.

John G. Roberts, Jr.

Justice Sotomayor?

Sonia Sotomayor

No, thank you.

John G. Roberts, Jr.

Justice Kagan?

Elena Kagan

General, do you -- I mean, do you agree that if -- thinking about the Chief Justice's question, that if the state can apply these various sort of curricular requirements and say, you know, yes, we're just going to insist that you do this, notwithstanding that it's against your religious belief, against your religious practice, I mean, what you're going to get at least in result is real distinctions between the religions that can and cannot benefit from what you're arguing.

Wouldn't you agree with that?

D. John Sauer

I don't know enough about the possible religious applicants to -- to -- to directly address that.

Elena Kagan

I mean, I've just got to think that there are religions that are going to have no problems dealing with all the various curricular requirements and religions that are going to have very severe problems dealing with all the curricular requirements.

And we're going to end up in a state of the world which has kind of, you know, accepted establishment religions and more different, more fundamentalist, more, you know, use the adjective you want, religions that seem peculiar to many eyes but are deeply felt.

D. John Sauer

I'd be very surprised if that were the practical outcome because I'd be surprised if there were religions who want to operate essentially charter schools who are unwilling to, you know, agree to teach math and science.

Elena Kagan

There's a big incentive to operating charter schools since everything is funded for you, I mean, so I think that there are going to be -- there's a line out the door if --if -- if you -- you can do this consistent with your religious belief.

All I'm suggesting to you is this notion that the state can do this while still maintaining all its various curricular requirements, I mean, either that's sort of fantasy land given the state of religious belief and religious practice in this world, or, if it's not, it's only because what's -- what's going to result is treating, shall we call them, majoritarian religions very differently from minority religions.

D. John Sauer

First, I'd say that if there is, in fact, a line out the door, so to speak, that line out the door will increase the diversity of options for parents and students in states that have programs that are similar to Oklahoma.

Whether or not it will result in some kind of disfavorment for minor -- the -- whatever the opposite of majoritarian is and nonmajoritarian religions, I -- I -- I can't speak to that.

Elena Kagan

Let me just ask you one quick last question and make sure that I understand what part of the federal statute you're giving up today.

As I understand it, the federal law conditions money on recipients being public schools that are nonsectarian in their programs, admissions policies, employment practices, and all other operations.

So that's the part of the federal statute that I focused on.

And you're saying today that that is so patently unconstitutional that you will not defend that statute.

D. John Sauer

I -- I -- I would give the same qualifications I gave earlier.

Our position today would be that programs and operations -- under the logic of Carson and Trinity Lutheran and Espinoza, programs and operations would need a free exercise exception.

The government's already determined in 2020, after Trinity Lutheran, that affiliation that is referred to in that statute also can't survive after Trinity Lutheran.

When it comes to admissions policies, which is also referred to in the statute, we defend that.

Elena Kagan

Got it.

Thank you.

John G. Roberts, Jr.

Justice Gorsuch?

Neil Gorsuch

If a state wanted to avoid the choice issue here by making charter schools government entities, what would it have to do?

D. John Sauer

Certainly, one way it could do it is create them directly by statute and have them controlled by directors who are themselves public officials.

My understanding is that California's system is somewhat like that.

There may well be other states where they really are government entities, they're part of the government. Here, where they're privately controlled directors, where they are created by a process that is initiated by a private applicant, and sometimes the application doesn't even go to a -- a public actor, we are, in a sense, the polar opposite of cases like MOHELA and Biden against Nebraska.

Neil Gorsuch

So a holding here is -- may apply in some states and may not apply in others?

D. John Sauer

Exactly right.

And states would have the option to restructure their programs if they wanted to, you know, have these be government-run entities.

Neil Gorsuch

Thank you.

John G. Roberts, Jr.

Justice Kavanaugh?

Brett M. Kavanaugh

Just make sure I understand the limits of the federal government's position.

The state can't favor one religion over another in approving or allowing charter schools, correct?

D. John Sauer

Absolutely correct.

Brett M. Kavanaugh

And also the state can't favor religion generally over secular counterparts in allowing or approving charter schools as well.

In other words, if it has charter schools, it must allow secular and religious, correct?

D. John Sauer

Correct.

Brett M. Kavanaugh

That's it.

Thank you.

John G. Roberts, Jr.

Justice Jackson?

Ketanji Brown Jackson

So I'm just trying to understand your Establishment Clause, nothing to see here, position.

St. Isidore's is pretty clear about its mission -- its -- its mission.

Its members, as you've said, are private individuals, an archbishop and a bishop.

It would require the students to "spend time in religious instruction and activities and permit state spending in direct support of religious curriculum and activities." So are -- are you saying that the religious

charter schools' use of public funds to support proselytization, which the school says it intends to do, is not an Establishment Clause problem? Like, we wouldn't have to look at, like, where the funding is going? You -- even if the school says, yes, we're getting money from the state and we are turning around and buying Bibles and instructing the students and make -- you know, no Establishment Clause problem?

D. John Sauer

The principle of genuine and independent private choice that goes from Zelman to Carson would address that directly.

Here, the parents are choosing with open eyes to take their kid to the religious charter school.

They are understanding we may be subject to proselytization or whatever would be --

Ketanji Brown Jackson

Isn't -- isn't that -- so you're saying the Establishment Clause only -- only does work in a situation in which a person is being forced to engage in religious activities if there is a choice somehow?

D. John Sauer

No, I'm saying where state funding is going to religious schools on an even footing through -- where public and private schools can apply for the funding as you see here, and in addition to that, the decision whether or not to go to the religious school or the nonreligious school lies in the hands of the parents, that is genuine and independent private choice, which I don't think is disputed in this case and, therefore, that would not violate the Establishment Clause.

Ketanji Brown Jackson

Okay.

D. John Sauer

Once you -- once that's the position, then --

Ketanji Brown Jackson

Yeah.

And one final question.

So Justice Kavanaugh explored with you about favoring one religion over another.

I'm wondering whether, as a practical matter, that can happen in a situation like this one where the board can only sponsor five charter schools in a year, for example.

I mean, doesn't the board have to determine -- what if we have six applicants or seven from different religions? Would we be in a situation in which the board is picking and choosing among them?

D. John Sauer

The board would have to use religiously neutral criteria.

And my understanding is the board says it does that. So it would --

Ketanji Brown Jackson

But --but wouldn't --

D. John Sauer

-- pick the best qualified, but --

Ketanji Brown Jackson

-- wouldn't -- wouldn't it -- I -- I understand their criteria for picking, but at the end of the day, to the extent that we only have established charter schools for certain religions, wouldn't the effect of that be to establish a certain religion --do you see what I'm saying?

D. John Sauer

The effect would not be constitutionally problematic if the board uses, as it says it does, religiously neutral criteria in selecting who are the best applicants.

Ketanji Brown Jackson

Thank you.

John G. Roberts, Jr.

Thank you, counsel.

Mr. Garre?

Gregory G. Garre

Thank you, Mr. Chief Justice, and may it please the Court: Three considerations distinguish this case from the Trinity Lutheran trilogy and require affirmance. First, charter schools are public schools.

They bear all the hallmarks of the criteria this Court recognized in Carson, are established, just like the Court said in Carson states could, to expand educational opportunities within the public schools system, and have been recognized as and indeed are required to be public schools by the Congress of the United States and the legislatures of 47 states.

Second, teaching religion in -- in -- as truth in public schools is not allowed. St. Isidore has made clear that that's exactly what it wants to do in infusing its school day with the teachings of Jesus Christ.

Oklahoma respects and promotes through vouchers and other means the abilities of families to secure such an education in a private school. But this Court in -- this Court has held in a series of landmark precedents not challenged by anyone here that the Establishment Clause bars such devotional teaching in public schools. And, third, Petitioners are not seeking access to Oklahoma's program on equals terms.

They seek a special status: the right to establish a religious charter school plus an exemption from the nondiscrimination requirements that apply to every other charter school and that distinguish public schools from private schools.

The charter schools movement is one of the modern -day success stories of public education.

Presidents, governors, and legislators from -- from across the country have recognized that charter schools have improved educational opportunities and outcomes for millions of Americans, especially those from disadvantaged backgrounds, within the public schools system.

A ruling for Petitioners would not only lead to the creation of the nation's first religious public school, it would render unconstitutional, as my friend from -- the Solicitor General acknowledged, the federal charter school program and immediately the laws of 47 states across this country, and it would result in the astounding rule that states not only may but must fund and create public religious schools, an astounding reversal from this Court's time-honored precedents. I welcome the Court's questions.

Clarence Thomas

Mr. Garre, would you elaborate on your statement that public -- charter schools must by force be public?

Gregory G. Garre

Of course, Your Honor. They -- they bear all the hallmarks this Court has recognized.

They're free, open to all, funded by taxpayers, controlled by the state with respect to their curriculum.

And I hope we can talk about that during this argument. They're -- they're required to meet nondiscrimination laws, and they're nonsectarian, all the features that this Court recognized in Carson and had little difficulty applying.

Clarence Thomas

So, in -- in your -- in the way you look at this case, there is no way that St. Isidore can participate in the charter program and be -- and remain private?

Gregory G. Garre

That's right.

That's a matter -- that's not me saying it.

It's the state saying it.

I mean -- and -- and the Oklahoma Supreme Court made this clear.

I mean, we've had a lot of statements that St. Isidore is a private institution and not a public school.

I mean, what -- what the Oklahoma Supreme Court said was St. Isidore, I'm quoting here, "came into existence through the charter with the state and will function as a component of the state's public schools system." That's at page 30a of the appendix.

The -- the court also -- the state court also said that this is a legislature-created entity.

It's a surrogate of the state.

It's a public school.

I -- this Court has a lot of authority, but I don't think it has the authority to second-guess --

Clarence Thomas

So I think the argument that St. Isidore and the board has made -- are making is that it's a private entity that is participating in a state program.

It was not created by the state program.

Gregory G. Garre

Right.

And state law, as interpreted by the Oklahoma Supreme Court, refutes that.

And I don't -- with respect, I don't think this Court can second -- guess that. And -- and let me talk about the state law.

I mean, to put aside what the Oklahoma Supreme Court said, state law in 3-132.2 says that charter schools are established as an entity.

The Oklahoma Administrative Code 210:40 - 87-5(b) says:

"Establishment of a new charter school.

A new charter school is established when a charter school application is approved." And -- and there were a question about how St. Isidore has changed the application here.

I mean, it did so with respect to the nondiscrimination requirements, and let me quote in a couple ways.

On pages 295 to 96 of the Respondent appendix, in a statement of assurance, it said it would apply with federal and state law, "with priority given to the Catholic Church's understanding of itself and its rights and its obligations pursuant to the Code of Canon Law and the catechism of the Catholic Church." That's one. And then, on page 332a of the Respondent's appendix: The -- "The school complies with all applicable state and federal laws and statutes to the extent the teachings of the Catholic Church allow." And then, with respect, another important change is they completely changed the definition of public schools.

If you look at page 521a of Respondent's appendix, that's the charter school template that the state provides, and it defines a public school as a school "established by the legislature that's free and supported by the state." And what they described it as, at page 4a in their application of the Respondent's appendix, is that charter schools are privately operated not-for-profit entities.

So that's what they're making up.

Under state law, just -- not only Oklahoma.

North Dakota just became the fortieth state in the Union to recognize charter schools as public schools, as the Congress of the United States has recognized this.

John G. Roberts, Jr.

What do you do with Fulton? You have a state agency that refused to deal with the religious adopted -- adoption services, and we held they couldn't engage in that discrimination.

Gregory G. Garre

Sure.

John G. Roberts, Jr.

How is -- how is that different from what we have here?

Gregory G. Garre

I think --

John G. Roberts, Jr.

You have an education program, and you want to not -- not allow them to participate with a religious -- a religious entity.

Gregory G. Garre

So I think it's fundamentally different.

I mean -- and our position doesn't threaten faith-based contractors at all.

The -- the -- the -- the adoption agency in Fulton wasn't established by the -- the state through legislative action.

It wasn't fully funded by the state.

It wasn't controlled by the state. I mean, the -- the charter schools here are controlled in -- in fundamental ways that my friends have glossed over this morning. I mean, with respect to curriculum, there's front-end and back-end requirements.

They have to show as part of their application that -- that they will meet the state's academic standards, which are, you know, highly reticulated down to the point that they have to teach Reagan's "Tear Down the Wall" speech in -- in U.S. history or dangling modifiers in ninth grade English.

They can't teach what other public schools can't teach, which is critical race or -- or gender theories --

Brett M. Kavanaugh

I don't think -- you're a little far afield, I think, from the Chief's question at least as I understand it because I think a concern here is that religiously operated senior homes or food banks or foster care agencies or adoption agencies or homeless shelters, many of which get substantial funding from the government, would potentially, under your theory, this is the concern, be -- become state actors and, thus, not be able to exercise their religion.

So can you explain why the -- the principle that you're articulating would not have that result?

Gregory G. Garre

So in none of those cases do you have contractees that actually become a part of the state as -- as charter schools do.

Brett M. Kavanaugh

When you say --

Gregory G. Garre

They're established -- sorry.

Brett M. Kavanaugh

Keep -- I just want you to come back -- when you say a part of the state, I want to drill down on that.

What do you mean?

Gregory G. Garre

Well, that they're established by the state, the legislature, that they become components of the state system, which is what the Oklahoma Supreme Court --

Neil Gorsuch

I want to drill down on that --

Gregory G. Garre

-- held here.

Neil Gorsuch

-- a little further too if it's all right.

So, in Fulton, you had Catholic Charities, which had to be incorporated.

It was incorporated, separately incorporated under state law, and could only provide adoption services with incredible oversight from the city.

I mean, they can't -- they can't take foster children in.

They can't place them without comprehensive governmental involvement.

What's the -- again, what's the difference? How do we draw that line so that we capture public schools on your account but we don't capture, and you seem to say we shouldn't capture, entities like Fulton? And, by the way, I'm delighted to hear they're -- they're still teaching the problems of dangling modifiers in Oklahoma's schools.

(Laughter.)

Gregory G. Garre

Right.

So, again, Your Honor, the adoption agencies and other faith-based contractors are not being established by the state --

Neil Gorsuch

Well, they --

Gregory G. Garre

--as part of a system.

Neil Gorsuch

Well, they have to be incorporated, and they have to be approved, and every parent has to be -- that they come forward with has to be -- satisfy certain criteria that the state -- I mean, it's comprehensive regulation.

Gregory G. Garre

I mean, Oklahoma has a general corporations law too, Your Honor, and what is going on in the charter school program is fundamentally different.

And, look, even in the --

Neil Gorsuch

What's the test, I guess, is what I'm asking, Mr. Garre, that you'd have us apply? Because, you know, we have to have a test to distinguish these two buckets of cases, right?

Gregory G. Garre

Well, I think, here, I think to --

Neil Gorsuch

-- between Fulton and -- what -- what's the test?

Gregory G. Garre

Right.

I think, first of all, here, we're dealing with public schools, and -- and I think, you know, we can talk about the other examples, but, I mean, I think we're dealing with public schools.

This Court in Carson just a couple years ago --

Neil Gorsuch

I appreciate -- I appreciate that point, but you -- you -- you've -- you've urged us to say public schools are different from other contractors like Catholic Charities in Fulton, and so we need a test, a law -- legal test.

Is it Lebron? Is that where you'd have us look?

Gregory G. Garre

I think you can look at -- I mean, look, I think that public schools bear all the hallmarks of government entities, and we can go down the list.

Neil Gorsuch

So is it --

Gregory G. Garre

They're clearly --

Neil Gorsuch

-- is it -- is it creation and control? Are -- are those the correct things that we should be looking at? I know you say we shouldn't look at state action doctrine.

I mean, is it -- is it -- is it those two factors?

Gregory G. Garre

I think it's those.

I can give you the five -- the five factors that this Court looked to in Lebron.

Neil Gorsuch

Okay.

So --

Gregory G. Garre

Creation, which I think is clearly met here because the Oklahoma Supreme Court has interpreted Oklahoma law --

Neil Gorsuch

I'll let you go through that.

I don't mean to --

Gregory G. Garre

Okay.

Neil Gorsuch

-- cut you off. I -- I just want to make sure we're on the same page to start with, which is we should look to Labron to make -- to make that -- this -- this decision -- this distinction.

Gregory G. Garre

I think this Court can decide this case by saying that charter schools or public schools in all the ways that people have always recognized and that this Court has recognized and that you can't fund an entity to teach religion as truth in public schools.

I also think you can look at the government entity precedents and the state actor precedents and come to the same conclusion.

And if -- and I'll go through the factors in government --

Neil Gorsuch

Please.

I didn't mean to stop you.

Gregory G. Garre

Okay.

Creation.

In the Oklahoma Supreme Court decision in this case, Oklahoma law answers that.

The public charter schools are created by the legislature.

They come into existence and they become part of the state public schools system.

That's what the Oklahoma Supreme Court said at page 30.

There's -- there's --

Sonia Sotomayor

This is not the Catholic Church giving this.

Gregory G. Garre

Excuse me?

Sonia Sotomayor

This is not the Catholic Church who's being given this.

It's the created new charter school?

Gregory G. Garre

That's exactly right. That's exactly right. Number two, state supervision and control.

And maybe I can bracket that, we can come back to that, because that's an important one.

The state can repeal or close the institution, which this Court acknowledged in the Biden case and other cases, and that's clearly the case here.

The state can close charter schools, unlike private schools.

Number four, the state has denominated the entity as a public entity.

We're not saying that labels decide this case, but it's -- it's significant that the state has regarded charter schools as public schools, as has the Congress of the United States and the legislatures of every other state.

It would be sort of remarkable for this Court to say that everyone else was wrong on that.

And five, the Court in Biden looked to -- and Lebron looked to public understanding. And, here, again, public understanding is that charter schools are public schools, just as Congress in every state has recognized.

Ketanji Brown Jackson

Mr.

--

Gregory G. Garre

So going back to state control --

Ketanji Brown Jackson

-- Mr. Garre, can I just --

Gregory G. Garre

Yes.

Ketanji Brown Jackson

So drilling down on that because I think --

Sonia Sotomayor

Let him finish on supervision and -- and control.

Ketanji Brown Jackson

Sorry?

Sonia Sotomayor

Just let him finish on supervision and control.

Ketanji Brown Jackson

Go ahead.

Gregory G. Garre

So supervision and control, there -- there's extensive oversight of curriculum in a way that doesn't remotely exist for private schools.

At the front end, in terms of the application process, where you have to identify the curriculum, applications are often rejected because of the curriculum.

Then you have to -- you have to lay out that you'll meet a number of performance indicators that are set forth at pages 18, 19 to 20 of our statutory addendum, and you have to show that your -- your curriculum will align with the state's academic standards, which are highly reticulated.

And then, once you do that, every year you are evaluated for compliance with those factors, academic performance.

You're evaluated for financial performance.

You're audited.

All in ways in which doesn't remotely resemble what's going on with a private school, which is hands off.

The board itself -- and there have been a lot of -- there's been a lot of discussion about the governing board.

That governing board is reviewed at the outset in the application, what it's going to be like, who's going to be on it, and then it's evaluated every year as to board compliance.

Boards that are deficient or malfeasant can and have been removed.

There's -- there's -- they're also subject to the general assessment test that apply to public schools, which doesn't apply to private schools.

Ketanji Brown Jackson

So, Mr. -- Mr. Garre, can I just sort of summarize this by saying that I think what you're saying is that un -- or just like traditional public schools, charter schools are a creation and creature of the state that distinguish them from things like the other very interesting and good examples that were raised, you know, nursing homes, adoption agencies, hospitals.

Those things can actually exist outside of the state, although they have to be licensed in the state, just like a private school would have to be licensed.

You know, obviously, there's going to be some state involvement to authorize these private people to set up this private entity.

But it seems to me that you're saying with all of these different factors and the way in which you're conceiving of this, a public school and these charter schools are creatures of the state in a different way.

Gregory G. Garre

Yes.

And I don't think, when this Court decided *Fulton*, it thought it was imposing new requirements on public schools. And with respect to supervision and control, if I could just make one more point. Federal law requires this.

The charter school program requires that charter schools "be operated under public supervision and direction." This is at 7221(i)(2)(B) of the statute.

And this is really important.

I mean, the federal charter school program has been implemented for decades. Billions of dollars have been dispensed by the federal government.

Brett M. Kavanaugh

All -- all the religious school is saying is don't exclude us on account of our religion.

I mean, if you go and apply for -- to be a charter school and you're an environmental studies school or you're a science-based school or you're a Chinese immersion school or you're a English grammar-focused school, you can get in. And then you come in and you say, oh, we're a religious school.

It's like, oh, no, can't do that, that's too much.

That's scary. We're not going to do that.

And our cases have made very clear, and I think those are some of the most important cases we've had, of saying you can't treat religious people and religious institutions and religious speech as second-class in the United States.

And when you have a program that's open to all comers except religion, no, we can't do that, we can do everything else, that seems like rank discrimination against religion, and that's the concern that I think you need to deal with here.

Gregory G. Garre

Sure.

And -- and, certainly, we -- as we've said in our brief, we recognize that principle and we respect it. But, as this Court itself said in the Carson case, states may maintain strictly secular public schools.

And that's all the State of Oklahoma has done here.

All we're saying is that we're not going to create, fund, and control the curriculum of schools that want to teach --

Brett M. Kavanaugh

As -- as --

Gregory G. Garre

-- religion as truth.

Brett M. Kavanaugh

I think, as Justice Gorsuch pointed out earlier, a state could easily design a different kind of charter schools system where they really were government –run, government –controlled, government –created, government –established private charter schools.

That's not what some states have.

They open it up to private people to apply, and then, when you say to someone, you're no good because you're religious, they're not asking – and to make the point, they're not asking for special treatment.

They're not asking for favoritism.

They're just saying don't treat us worse because we're religious.

And that just seems like a core principle.

Again, you could redesign this pretty easily, as Justice Gorsuch was talking about, and the California example I don't know the details of, but that's not how it's done.

Gregory G. Garre

Well, in terms of creation and control, Oklahoma -- Oklahoma has that, as do all the other states with charter schools. And if you have any questions about control, let me go through that.

I mean, I think the one thing that has been seized upon is board governance, and on that, I don't think that that can make the difference because, under *Lebron* and those cases, the ultimate question is state control. Here, you have state control.

States are auditing charter schools, are involved in curriculum.

They -- they're -- they have to be -- material changes have to be approved. With respect to the boards, those boards are also monitored.

The -- the application has to describe the board.

The board is evaluated each year for board governance.

Boards that don't operate correctly can and have been removed.

Charter school board members themselves have to sit on the governing board meetings.

The governing boards for charter schools are regarded as government bodies under state, as we've shown in opinions.

John G. Roberts, Jr.

Counsel --

Gregory G. Garre

So the state retains complete control up to the point that they can close it.

Sonia Sotomayor

Mr. Garre --

John G. Roberts, Jr.

Counsel, I don't understand really the -- this created and creature of the state.

The pavement or wood chip program in Trinity Lutheran was created and controlled by the state, yet we held that you couldn't exclude religious schools.

The tuition program in Espinoza, a creature and created by the state.

You couldn't exclude religious participants.

The same in Carson, the same in Fulton.

Is your test it's -- it's a creation and creature of the state? Because all of those were and we held that under the First Amendment, you couldn't exclude people because of their religious belief.

Gregory G. Garre

Well -- well, the -- the -- the programs were, of course, but what we're talking about is the applicants.

And -- and -- and, here, I think that the creation point goes to the government entity point.

John G. Roberts, Jr.

Well, I'm sorry.

Just -- I'm not following.

The applicants in those cases were religiously affiliated.

Gregory G. Garre

Well, religious -- I mean, they're parents, for example, in Carson or Espinoza.

In -- in Trinity Lutheran, it was the church itself.

But, I mean, the -- the -- as to creation, this goes to whether or not this is a government entity, and under state law, charter schools come into

existence when they are approved and become part of the state and they're established by the legislature.

I mean, that's what Oklahoma Supreme Court interpreted Oklahoma law to mean.

And that's the way that, you know, virtually every state in the country and the Congress have understood charter schools to be.

And that makes --

Samuel A. Alito, Jr.

Mr. Garre --

Gregory G. Garre

Yes?

Samuel A. Alito, Jr.

I'm sorry.

Finish your sentence.

Gregory G. Garre

I'm sorry, Justice Alito.

Samuel A. Alito, Jr.

No.

This is really a point of information to start out at least.

The point of the charter school program as I understand it is to confer a lot of flexibility on the charter schools so that they offer a real alternative to the private -- to the public schools, to what you call the public schools, isn't that true?

Gregory G. Garre

Yes and no.

I mean, I think a real alternate -- there's no question that charter schools want to harness private ingenuity, and they do that -- they say you can come to us with the applications, but we're going to rigorously scrutinize those applications, we're going to make sure that you meet our curriculum requirements, we're going to evaluate you every year, and if you try to change your curriculum, you have to come back and get approval.

And --

Samuel A. Alito, Jr.

Well, but -- but they -- they offer -- they're allowed to offer a curriculum.

Yes, it has to meet certain state requirements, but the focus of the curriculum can be quite different from the public school, and I thought that was understood to be one of their virtues.

Gregory G. Garre

They -- the charter schools have to meet the academic standards that public schools have to meet, again, down to the level of dangling modifiers in ninth grade English class.

I mean, I think what's different is you can imagine a school that's built around performing arts or sports, as some charter schools are, or language.

You can build a school around that model --

Samuel A. Alito, Jr.

Well --

Gregory G. Garre

-- but it has to have all the same academic curriculum requirements.

Samuel A. Alito, Jr.

-- can -- can a -- can a charter school seek to inculcate a secular viewpoint, a -- not -- not just a secular viewpoint, a particular secular viewpoint?

Gregory G. Garre

I mean, I don't -- I don't -- with respect, I don't know what you mean by that.

I mean, to the --

Samuel A. Alito, Jr.

All right.

I'll take your -- I'll take your example --

Gregory G. Garre

I mean, to the extent traditional public schools can, yes.

Samuel A. Alito, Jr.

I'll take your example of a school that focuses on music.

So could a school that focuses on music teach only the music composed by dead white men, Brahms -- Bach, Beethoven, and Brahms, and all the rest? Could they do that?

Gregory G. Garre

I think like a traditional public school could.

But -- but what charter schools can't --

Samuel A. Alito, Jr.

All right.

Could a -- could a school that focuses on music say, no, we're not going to do that; we're going to include jazz and hip-hop and rap and music from non-European countries? Could they do that?

Gregory G. Garre

I think they probably could do that.

Samuel A. Alito, Jr.

All right.

Could a school say we're going to be a LG -- LGBTQ-plus friendly school so that the books that elementary schoolchildren are going to read are going to have lots of LGBTQ-plus characters, same-sex couples, and they are going to send the message that this is a perfectly legitimate lifestyle? They're going to tell the little kids, if you -- your parents may say you're a boy or a girl, but that doesn't mean you really are a boy or a girl.

Could they do that?

Gregory G. Garre

No.

And the reason why they couldn't is because state law prohibits the teaching of gender studies or race in public schools, traditional public schools and charter schools.

And -- and, you know, that reminds --

Samuel A. Alito, Jr.

All right.

I'll give you another example.

Could a school say we're a progressive school and we're going to do everything the state wants you to do, but we're going to teach history from the 1619 Project standpoint.

Gregory G. Garre

No, because they'd have to meet the state's academic standards, and that would not be allowed, I mean, as --

Samuel A. Alito, Jr.

Why would that not be -- why would not be -- that not be allowed? We're going to put a lot of -- we're going to make sure students know about -- know a lot about slavery and Jim Crow and the treatment of Native Americans.

Gregory G. Garre

Just like a traditional --

Samuel A. Alito, Jr.

They can't do that?

Gregory G. Garre

Just like a --

Samuel A. Alito, Jr.

They can't -- they can't emphasize that?

Gregory G. Garre

Just like a traditional public school, there would be some leeway there, but, with respect, they could -- certainly couldn't set -- focus their curriculum just on that.

And -- and -- and let me give you the citation so you can look at the academic standards.

Samuel A. Alito, Jr.

Well, on the other hand, I don't want this to be one-sided.

So suppose a school says we're going to teach American history like the way it was taught in 1955, so we're going to celebrate the founding fathers and we're not going to say anything about their short -- their shortcomings and we're not going to make -- we're not going to say a whole lot about the -- the dark episodes in American history.

Could they do that?

Gregory G. Garre

No.

Traditional Oklahoma public schools could not do that and charter schools cannot do that because --

Samuel A. Alito, Jr.

Where does it say that?

Gregory G. Garre

So it says it in -- 3-34(B)(12) of the charter schools statute says that curriculum must be aligned with state academic standards.

And then, if you go to Oklahoma Administrative Code 210:15-3-1, it spells out in detail the criteria for curriculum.

And we've got other cites in our brief on that.

And -- and they're controlled in the same way that public schools are.

And that's the point, Justice Alito.

Charter schools are like public schools, traditional public schools. When it comes to curriculum, they're controlled as to curriculum.

And that completely distinguishes private schools.

My friend had -- was asked how are private schools different.

I think his answer left a lot to be desired here on that, and -- and let me just walk -- walk through how they're different, Justice Kavanaugh.

Number one, private schools can open without any state approval.

They don't even have to be accredited.

Number two, there are no requirements or supervision of curriculum for private schools.

The only practical limit is what employers want or what colleges want.

Number three, they can charge tuition.

Number four, they can restrict admissions.

Number five, they're not subject to general state assessment tests.

Number six, they're not subject to nearly the reporting requirements or oversight as public schools.

Number seven, they're not subject to state rules regarding student discipline, civil rights, health, and on down the line.

And, number eight, there's no process for closing them short of consumer fraud or fraud. I mean, private schools are fundamentally different.

What we're talking about here is a school that is closely regulated that is part of the public schools system.

And this Court, again, in Carson said that states can expand their public schools.

That's what charter schools are.

They were meant to expand the public school options for families across the country, and they've been successful, especially for families from disadvantaged backgrounds.

And if this Court holds that the Oklahoma program is unconstitutional, then it immediately renders the charter school laws in 47 states unconstitutional --

Brett M. Kavanaugh

Well, that -- that's a little bit -- this would be expanding the options, not contracting the options.

So I don't know if I --

Gregory G. Garre

With respect, that's not the right way to look at it because charter --

Brett M. Kavanaugh

Well, why not?

Gregory G. Garre

Because charter schools were built on the premise that they're public schools, and that was by design because people wanted to expand access to public schools and people understand that religion cannot be taught.

Brett M. Kavanaugh

I thought they were built on the idea that innovative -- innovative approaches to education would increase the quality of education in a particular community or at least provide options for particular focuses and -- and overall improve the educational quality in the state.

Gregory G. Garre

You don't have to believe me.

You can just look at the fact that Congress from the beginning of the federal charter school program in 1994 and every single state has made clear that charter schools are to be public schools and run as public schools.

And that's the way it's always been understood.

And -- and if this Court rules in favor of Petitioners here, there are going to be some states that ramp it up, no question, but there are going to be other states that say we want out.

And, you know, each state can make its own decision.

But this is going to have a dramatic effect on charter schools across the country. And just think of the federal charter school program on its own.

I don't think -- you can't just say, like, oh, we'll just, you know, grant a --

Brett M. Kavanaugh

Well, it's not going to -- that would -- the premise of that was that at that point, it was considered constitutional to discriminate against religious entities and that, you know, that's -- some of our case law has changed that and said no, it's not constitutional to discriminate against private religions.

Gregory G. Garre

And that's -- I mean, the theory is, if this is a --

Brett M. Kavanaugh

And you'll probably disagree with my characterization there.

I understand that, but --

Gregory G. Garre

Well, I mean --

Brett M. Kavanaugh

-- it's a different constitutional understanding.

Gregory G. Garre

I encourage you to read the OLC opinion because what that opinion says is it focuses on the affiliation requirement, that you could have a school

that potentially is a religious entity, wants to run a secular program, and that that wouldn't be allowed.

The OLC opinion itself goes -- goes out of its way to make clear that it wasn't saying that you could have charter schools running religious programs.

And I think it's obvious that the result would be different there because of the Establishment Clause problems.

This Court rejected --

Brett M. Kavanaugh

But how --

Gregory G. Garre

--the use/status distinction in Carson with respect to the Free Exercise Clause.

But the use distinction, of course, makes a difference with respect to the Establishment Clause.

Brett M. Kavanaugh

In terms of the principles, how is it different from a choice program in the -- in the sense that no student is compelled to go to a religious charter school? And I would, of course, agree with you, you know, if that were the case, that would be a huge problem.

No one's compelled to go.

You have a choice to go to the traditional public school, or you can go to a charter school of your choice that you can obtain admittance to, or you can go to a private school.

No one's being compelled to go to any school.

It's just another option that is available.

Gregory G. Garre

That's right.

And this Court had a case last week in Mahmoud where it involved, you know, story time with certain offensive messaging.

No parent was required to send their child to that charter school, and I don't think that case would come out differently -- to that public school because I don't think it would come out differently because they could have picked a charter school.

And, similarly, no -- no -- no family in America has to send their kid to a traditional public school.

They could send them to a private school.

They could home-school them.

They could send them --you know, other options.

But this Court has never said that because you have the option of not sending your child to a traditional public school, public schools can teach religion as truth.

I mean, we -- what --

Brett M. Kavanaugh

Well, that's loading traditional public school into this, but I -- I get the --

Gregory G. Garre

No, I'm just taking your -- the premise of your question is what's the problem, you have the option of going to a different school, and that's --

Brett M. Kavanaugh

No, it's the option -- you have a public school to go to, and you have private schools to go to, and you have charter schools to pick from.

You may not like the environmental studies one, but you have other options.

And this increases the options at least theoretically.

Gregory G. Garre

People can choose among public schools as well.

You can transfer among public schools if -- if the teaching in that school is offensive to you.

I mean, the -- going back to the school prayer cases, I mean, in that -- there was a suggestion in the brief here that those cases are different because you were compelled to go to a public school.

That's wrong. Compulsory attendance laws since this Court's decision in *Pierce* have not applied to students -- parents who want to send their children to private schools or home-school them. So everyone has a choice in that respect.

I mean, I think, if the Court crosses a line in this case --

Brett M. Kavanaugh

The -- the -- the other options in the Mahmoud were not free, okay, so that's a big difference.

It was telling the parents there, oh, don't go to the public school if you don't like it; go pay \$10,000.

Well, that's a pretty big burden.

Gregory G. Garre

Well, I don't think Mahmoud would come out differently if you had -- in jurisdictions where parents had the option to send them to a charter school, Your Honor. Maybe the Court will say otherwise, but I doubt it.

John G. Roberts, Jr.

Thank you, counsel.

Any questions, Justice Thomas?

Clarence Thomas

Mr. Garre, just a brief explanation as to why the board is on the other side.

You seem so certain that this is a public school and yet the board's on the other side of this.

Gregory G. Garre

Well, it went rogue, Your Honor.

The membership of the board was changed.

Initially there was a resistance to granting this -- this application, because it flouted Oklahoma law.

And there was a change in the board that -- that we challenged, you know, right on the eve of a second vote, and -- and the charter was passed 3-2. And that's why my client stood up to defend Oklahoma law and federal law under the Establishment Clause.

Clarence Thomas

Well, would the board say the same about you?

Gregory G. Garre

Well, our composition hasn't changed on the eve of the vote.

And, I mean, I -- of course they disagree with our characterization of --

Clarence Thomas

That's what I mean.

Gregory G. Garre

-- the --the law. But, I mean, on Oklahoma law, I mean, you have what the Oklahoma Supreme Court said, which I think is binding, even on this Court, as to what the state law means.

We obviously disagree on the Establishment Clause, but that disagreement is really premised on the notion that this is a private entity.

And they've rewritten state law to make that position.

Clarence Thomas

Well, it just seems as though the board can also read the Supreme Court opinion and, yet, give it a different meaning or weight than you do.

Gregory G. Garre

Well, we can all read it. And I'll quote it. "St. Isidore came into existence to the charter system with the" -- "with the state and will function as a component of the state's public school system." That's at page 38.

I don't think there's any ambiguity there.

John G. Roberts, Jr.

Justice Alito?

Samuel A. Alito, Jr.

I want to give you a chance to respond to an argument that is made by the Petitioners, and that has to do with the motivation for the position that provided the prompting for the decision that you're defending here today.

This is what the attorney general of the state said in an opinion, an official opinion of the attorney general, when he changed the position that his office was going to take. So these are not extemporaneous comments. "While many Oklahomans undoubtedly support charter schools sponsored by various Christian faiths, the precedent created by approval of the application will compel approval of similar applications by all faiths.

I doubt most Oklahomans would want their tax dollars to fund a religious school whose tenets are diametrically opposed to their own."

And this is not an isolated statement. There are -- are many.

Gregory G. Garre

So thank you for asking that, Your Honor --

Samuel A. Alito, Jr.

Isn't that a master -- isn't that a very serious Masterpiece Cakeshop problem? This whole position that you're defending seems to be motivated by hostility toward particular religions.

Gregory G. Garre

That's -- that's entirely incorrect, Your Honor.

And if I could answer that in two different levels.

One, the Masterpiece Cake piece and, two, the comments which I'll begin with.

And I think the right way to understand those comments is the attorney general was simply making a point that members of this Court have made, which is that once you open up government programs and bring people in to becoming part of the government, and approve one religion, not another religion, or this religion, there's going to be strife that comes from that.

I mean, Justice Breyer emphasized that in his various opinions.

They didn't carry the day from this Court, but I think that that is a way that in the real world religious divisions and -- and strife have manifested itself.

It's, frankly, one of the reasons why we have a religion clause in the Constitution to begin with.

With respect to the Masterpiece case, Attorney General --

Samuel A. Alito, Jr.

Don't we have -- we have statement after statement by the attorney general that reeks of hostility towards Islam. And then we have the provision of the Oklahoma constitution, on which the Oklahoma Supreme Court relied, that has its own unsavory discriminatory history.

Would you at least agree with that?

Gregory G. Garre

Absolutely not.

You're referring --

Samuel A. Alito, Jr.

Absolutely not? That wasn't motivated by the Blaine movement?

Gregory G. Garre

No, it wasn't, Your Honor. And --and members of the Oklahoma Supreme Court has explained that.

The brief from the legal historians explains that.

It was motivated by clause --by clauses that predated the Blaine amendments, as well as motivated by the Sequoyah Constitution and the results of the Christianization of Americans.

That's all laid out historically.

This case, too --Oklahoma came into the union in 1906, and -- and the provision you're referring to is 1907, which is, you know, long after the Blaine amendments and the Montana constitution.

So no, it's not a Blaine Amendment.

And again, I think --

Samuel A. Alito, Jr.

I think you're rewriting history.

Do you think that anti-Catholic bigotry had disappeared from Oklahoma by 1907, or, what's more pertinent, from the Congress of the United States from 1907?

Gregory G. Garre

I think, Your Honor, of course there were those who held that distasteful and odious bigotry, but the laws that the Oklahoma constitution provision is based on long predated that.

And I don't think that the Court could treat any prohibition on funding that's similar as simply motivated by bigotry, and so we're not going to respect it.

If you did, then I think, you know, frankly, the Establishment Clause jurisprudence with respect to public schools would come tumbling down.

And -- and I think as to the Masterpiece case, I just want to make this clear, the attorney general was not involved in the creation of the charter school system.

He wasn't involved in the application in this case. So there's no Masterpiece component.

In fact, the application was approved.

And I think if -- if your concern is the treatment of Islam or Muslims, then the concern should be the Muslim family whose only practical option is the religious charter school that happens to teach the Catholic faith as truth.

That's --

Samuel A. Alito, Jr.

Why would that be -- why would that be the only option of such a parent? The parent could always send his or her child to the schools that you characterize as the public schools.

Gregory G. Garre

So first of all, there are jurisdictions in the country, New Orleans being the main one, where the only public schools are -- are charter schools.

In other jurisdictions it's 50 percent, Denver and D.C.

There are jurisdictions in Oklahoma where your default public school that you're assigned to is a charter school.

You can get out of that, but you've got to raise your hand and say: No, I don't want to go to the Catholic charter school.

I want to go somewhere else.

And that raises the same problem as raising your hand in the public school and saying: No, I don't want to participate in prayer today.

And --

Samuel A. Alito, Jr.

Thank you, Mr. Garre.

Gregory G. Garre

And it just --

Samuel A. Alito, Jr.

I just have one more question.

I will -- I will study the record carefully, but, boy, the way that you portray these charter schools, it -- it doesn't -- I don't see what the -- the virtue of the charter schools are.

I thought the whole point of charter schools what was to offer something different from the so-called public schools.

And you've made it sound like, no, they're just going to be exactly like the public schools.

Gregory G. Garre

No, that's not our position, Your Honor.

And I think, you know, again, what the states are trying to do is to harness ingenuity in terms of teaching, teaching methods, and you come do the application and say we want to run a charter school like this: language, performing arts, sports –focused, or whatnot.

But at that point, there's a rigorous application process.

Curriculum is scrutinized. You have to meet state standards.

And then charter schools are regulated extensively, every year evaluated.

And they can be closed if they get off the rails, because they are public schools.

Samuel A. Alito, Jr.

Well, do you have inspectors who say we want to see the teaching plan for the 10th grade English class in the charter school, because we want to make sure that the books that the students are reading are the right books? Do you do that?

Gregory G. Garre

They --they can be, Your Honor.

Samuel A. Alito, Jr.

Really?

Gregory G. Garre

I mean, if you look at pages 18 and 19 of the Oklahoma Supreme Court's decision, it talks about how charter schools are audited.

Again, charter school --members of the charter school board participate in governing board meetings.

And you look at those academic standards that they have to be aligned with, and -- and it goes down to the -- the level of dangling modifiers in 9th grade English class.

Samuel A. Alito, Jr.

All right.

Thank you.

John G. Roberts, Jr.

Justice Sotomayor?

Sonia Sotomayor

Counsel, Justice Gorsuch pointed out that if charter schools wanted to, they could change their governing body more directly.

And, I don't know, we'll get into a whole lot of litigation as to whether they should appoint the board members, can they get -- solicit recommendations from the applicant, et cetera.

But Justice Alito's question suggests that if they decide to change their operation because they don't want to become religious, because they want a secular education, that he's open to an attack that they're being motivated by hostility to religion.

So you'll be back in another free exercise claim, correct, of discrimination?

Gregory G. Garre

There's no question that if this Court rules in favor of Petitioner, it's ushering in a new breed of constitutional litigation.

I mean, it's already -- the Court has already dealt with all comers.

And the Court's decision in *Christian Legal Society v. Martinez* is just a, you know, sort of taste of what's to come.

Sonia Sotomayor

Now, with respect -- we've spent a lot of time on is this a state entity or not.

But your second theory was that it's a state actor, and that hasn't been discussed that much.

How do you deal with *West* and *Rendell-Baker* in answering that question? You win under either, correct?

Gregory G. Garre

We win under either.

In West, you outsource the constitutional duty, which is what the state did here in -- in allowing charter schools to operate --

Sonia Sotomayor

And -- and what do you -- how do you deal with the compulsion issue of West? Meaning that -- the access issue.

Gregory G. Garre

Right.

That just went to the underlying federal constitutional violation. I mean, in terms of the state action question, the question is whether they're acting under color of state law.

And here charter schools are acting under color of state law --

Sonia Sotomayor

They don't come into creation without state law.

Gregory G. Garre

Exactly.

And they're heavily regulated by the -- by the state.

Sonia Sotomayor

They don't come into creation -- Catholic Charities came into creation under state law but not as a charter school.

Gregory G. Garre

That's exactly right.

And -- and -- and I want to correct one thing that my friend in terms of discussing Rendell-Baker versus West.

West came after Rendell-Baker.

So Rendell-Baker didn't resolve anything or correct anything that West held.

And West, as this Court recognized in the Haaland case just recently, recognized that we were outsourcing constitutional functions, and here on top of that, you have an exclusive and traditional state function, which is the function of providing public -- free public education open to all.

Sonia Sotomayor

Thank you.

John G. Roberts, Jr.

Justice Kagan?

Elena Kagan

If this Court were to rule for Petitioners, what would happen in Oklahoma, in those 40-plus other states with laws of a similar kind that declare charter schools to be public schools? What kind of issues would they have to confront in the future? What do you think the range of choices they would make is likely to be?

Gregory G. Garre

First, every charter school law and the federal charter school program is unconstitutional because they all require that charter schools be public schools and that they be nonsectarian.

So we're dealing with the confusion and uncertainty that's created by that to begin with.

States may react differently.

Some may reenact charter schools under the -- the details this -- this Court might lay -- lay out as to how to legislate.

Or, you know, many schools will just be -- will just say, you know, no, with respect, in our state, our -- our traditions are not to allow the teaching of religion in our public schools.

We don't know. This is going to create uncertainty, confusion, and disruption for, you know, potentially millions of school children and families across the country.

There's another piece to this, which is that under federal law, the IDEA statute, charter schools are covered because they're understood to be public schools.

If this Court holds that charter schools are not public schools, then there's a question as to whether children with disabilities who go to charter schools would be covered by the IDEA.

And that's another problem that will have to be sorted out.

In terms of litigation, you will get litigation over who can be admitted.

They say they'll take all -comers.

Surely, there'll be schools that want to test the next limit.

There will be questions about who can be teaches.

Can you have a gay teacher or not? There will be questions about the application of the ministerial exception.

And then there are going to be questions about curriculum.

This Court is going to be superintending curriculum.

You know, maybe they would go too far in saying you can't -- you can't teach evolution; you have to teach creationism.

But there are going to be a lot of line-drawing problems in between.

Elena Kagan

Thank you.

John G. Roberts, Jr.

Justice Gorsuch? Justice Kavanaugh?

Brett M. Kavanaugh

A couple questions.

Are single-sex charter schools constitutional?

Gregory G. Garre

There are different policies on that.

They -- they -- they do exist.

And I think there would -- there would be one way in which they wouldn't be like traditional public schools, but Oklahoma -- in Oklahoma there are not single-sex charter schools or single-sex --

Brett M. Kavanaugh

But your theory would mean they are constitutional or not constitutional?

Gregory G. Garre

Well, I mean, our theory as -- as to the constitutionality goes to the teaching of religion as truth in charter schools.

Brett M. Kavanaugh

They would be state actors so they would -- it would be analyzed the same.

Gregory G. Garre

Well, I think the -- I mean, I think the state action question, it's important to understand that this Court has always considered state action with respect to the -- the conduct being challenged.

And here the conduct, to the extent it's relevant, is the very existence of the school.

And there's no question the state regulates that.

It can't come into existence without the state.

And as to the -- the single-sex, I mean, I don't think that's a hard issue for -- for the -- the State of Oklahoma.

I don't think that that would be unconstitutional.

Brett M. Kavanaugh

And your comment about strife, I just want to explore that for a second, because it seems like strife could also come when people who are religious feel like they're being excluded because they're religious, whether it's the Muslim family who is aware of the comments that were made here, or the Catholic school group that says, gee, we just want to have a charter school like -- like the environmental group and the Chinese immersion group and this math group.

And I think you're missing a portion of the country when you say strife would not result from that kind of outcome.

Gregory G. Garre

Well, I think if the rule is that charter schools are public -- are -- are public schools and just like traditional public schools, they -- you cannot have the teaching of religion as truth in charter schools, I don't think that would create any new strife because that's the regime that we've lived in for -- for decades.

The strife that I'm referring to is the picking and choosing that is inevitably going to occur when people line up to become, you know, a fully funded charter school.

And so I -- I think it's -- it's quite different.

Brett M. Kavanaugh

And then last, we've covered this a bit, but I just want to make sure I have it nailed down.

If you prevail in this case, the senior homes, food banks, hospitals that participate -- receive government funding, participate in government

programs, like a foster care program, they would not become state actors because -- can you succinctly -- or maybe just we would have a --

Gregory G. Garre

Yes.

So, I mean, I'd give you --

Brett M. Kavanaugh

Maybe the rule would just be schools are different, but --

Gregory G. Garre

Well, schools are --

Brett M. Kavanaugh

-- I would like to have a -- a principle behind that --

Gregory G. Garre

Yeah.

Brett M. Kavanaugh

-- would be helpful.

Gregory G. Garre

I mean, I think this Court's own precedents recognized that public schools are different in important ways.

But on your question, I mean, they're not outsourcing constitutional obligations.

There's no constitutional obligation of governments that I'm aware of, states that I'm aware of, to provide adoption services or the like.

It's not a traditional exclusive function.

In Justice Alito's opinion in *Fulton* went to great lengths to say that adoption services were not a traditional or exclusive public function.

And so I think that the -- the -- the government contractor scenario, I mean, that's what they try to bait this Court with concerns, but the government contractors are completely different.

They're not created by the state in the way that the charter schools are.

They're not fully funded by the state.

They're not controlled by the state in the way that charter schools are.

It's an easy distinction.

Brett M. Kavanaugh

Thank you.

John G. Roberts, Jr.

Justice Jackson?

Ketanji Brown Jackson

So I think that at its heart, your argument really begins with the statement in Carson that a state can permissibly choose to provide a strictly secular education in its public schools.

And if you start there, then I think you're saying that charter schools is one model that a state can choose to provide that kind of secular education.

Charter schools is a subset of the public school right that Carson recognizes to provide a strictly secular education.

So one -- one point of clarification just on facts is, doesn't Oklahoma provide vouchers for parents who would like to have a religious education for their child? Those -- those parents don't have to be in the public school we're providing strictly secular public school column.

They can ask the state and they do get vouchers for religious public -- I mean religious private schools; is that right?

Gregory G. Garre

That's exactly right.

And I think it's an important point.

I mean, Justice Kavanaugh last week referred to the Court trying to find a win-win in the area of religion.

Ketanji Brown Jackson

Right.

Gregory G. Garre

I think the win-win here is that states can, through vouchers and the like, promote the availability of religious education for those who choose it in a private setting, but that states are not required to promote or fund, create the teaching of religion as truth in public schools.

Ketanji Brown Jackson

Right.

So your -- in your, like, diagram of this, we're in the public secular scenario, charter schools are a subset of that; outside of that column, we have private religious schools, which the state allows for and funds.

All right.

Now --

Gregory G. Garre

Can I just --

Ketanji Brown Jackson

Yes, please. Please.

Gregory G. Garre

I mean, that's exactly right.

Ketanji Brown Jackson

Yeah.

Gregory G. Garre

And that's what the Congress of the United States and 47 state legislatures have understood.

So it would be for this Court to upset ^ Check: that --

Ketanji Brown Jackson

It would be a really big change --

Gregory G. Garre

It would be --

Ketanji Brown Jackson

-- if that's sort of how it's structured right now.

Gregory G. Garre

--hard to overstate it.

Ketanji Brown Jackson

With respect to the Trinity Lutheran and --the -- the Chief Justice asks about unfairness, Justice Kavanaugh asked about unfairness, and I just want to explore that for a second, because, as I understood it, Trinity Lutheran -- in Trinity Lutheran, the state was offering grants to build

playgrounds, and the problem was that Trinity Lutheran was prohibited from accessing that benefit because they were religious.

The -- the church in Trinity Lutheran wanted to use the money to build a playground, and they said no we can't give you the money.

And that was constitutionally problematic.

In this case, it seems to me it would be as if the church was saying we see you're giving out money to schools for building playgrounds, we would like that same allocation of money, and we want to use it for something else.

We want to buy Bibles.

And, you know, they would say, look, you know, it's not fair because you're giving money to schools anyway, like you're giving charter contracts to schools anyway, and it doesn't matter to us or we don't think it's relevant that you're giving it for a reason.

And as I said in my diagram, the -- the state here is giving it for the reason of being a public school within the non -- within the nonsectarian world.

They say, no, we want to use that money or that charter contract for a religious purpose.

Am I thinking about this correctly? Because I don't see that as unfair.

I see that as the state saying we're giving it in a particular way for a particular reason, and you're not asking us for that.

Gregory G. Garre

I -- I think that that's right, if I understand the question, Justice Jackson.

Clearly, what the state is doing is saying we're creating -- we're expanding our public education opportunities, and like public education has always been, we're -- we're not allowing the funding and creation of teaching religion as truth.

I mean, this case presents a question of a state that's conscientiously trying to avoid the separation between church and state. But imagine a state that said, you know, we really want more religion in our public schools, and so what we're going to do is we're going to go to the traditional public school and we're going to fire all the teachers, administrators, and we're going to replace them with the staff of the archdiocese.

I don't think that would be a hard Establishment Clause problem.

And I think this case is -- is, you know, basically just the flip side of the coin.

But, I mean, as to the unfairness, what the state of Oklahoma has done is simply maintain the system that this Court has upheld for decades, which is that we don't allow the teaching of religion as truth in public schools.

Ketanji Brown Jackson

Thank you.

John G. Roberts, Jr.

Thank you, counsel.

Rebuttal, Mr. McGinley?

Michael H. McGinley

A few points. Justice Gorsuch, you asked whether Lebron should control here.

The answer is yes. And what Lebron teaches is that the -- the key criteria in our creation and control. Here, my friend is simply wrong that the state created St. Isidore.

I'd point you to page 7 of our reply.

The same bylaws, same board controlled St. Isidore before and after the contract.

On control, it's a private board that has neither government appointment nor removal. I would point you to page 110 and 120 of the Petition Appendix, as well as Section 316(a)(8) of state law, which makes that clear.

You also asked whether the label can be different for constitutional purposes in either state law or statutory purposes.

Lebron makes it very clear that can be true.

Umbehrr is the leading case on state law on that.

Mr. Chief Justice, you asked whether regulation can -- can occur with regard to these charter schools.

Clearly it can, just like with vouchers programs.

We know that that's not enough.

Halleck, Jackson, and Rendell-Baker teach us that.

My friend also vastly overstates the extent to which the state can, quote, "shut down a school." I would point you to both of the Petitioners reply briefs which show that it cannot unilaterally shut down a school, but there's a number of procedural steps that apply.

Also, the U.S. Olympic Committee case makes clear that that alone is not enough either.

Virtually every corporation in America operates under a charter that was granted by a state, and the state can often dissolve that charter.

That's not enough to make it a government entity.

I do think that this Fulton point is very important, because my friend does not have a good answer for it.

Nobody believes that Philadelphia could have just labeled foster -- foster care services to be state foster care services and excluded Catholic Social Services in that setting.

By contrast, a ruling for us will only increase choice.

I completely agree with you on that, Justice Kavanaugh.

No student will be compelled or placed in a charter school except by private choice.

So then the governing question is the same one that this Court confronted in Carson, Espinoza, and Trinity Lutheran: Has the state invited private actors into a government funding program? If so, it cannot categorically exclude the religious.

It's crystal clear that that's what Oklahoma has done here.

Everyone agrees that St. Isidore met all of the other requirements, and its charter was extinguished only because of the nonsectarian requirement.

We completely agree with you, Justice Kavanaugh, that that treats them as second-class citizens.

The Free Exercise Clause prohibits that.

We ask you to reverse.

Thank you.

John G. Roberts, Jr.

Thank you, counsel.

The case is submitted.
