

No. 24-394 Vide No. 24-396

In the Supreme Court of the United States

OKLAHOMA STATEWIDE CHARTER SCHOOL BD., *ET AL.*,
Petitioners,

v.

GETNER DRUMMOND, ATTORNEY GENERAL FOR THE
STATE OF OKLAHOMA, EX REL. STATE OF OKLAHOMA,
Respondent.

ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL,
Petitioner,

v.

GETNER DRUMMOND, ATTORNEY GENERAL FOR THE
STATE OF OKLAHOMA, EX REL. STATE OF OKLAHOMA,
Respondent.

*On Petitions for Writs of Certiorari to the
Oklahoma Supreme Court*

**BRIEF OF THE MANHATTAN INSTITUTE AS
AMICUS CURIAE SUPPORTING PETITIONERS**

Ilya Shapiro
Counsel of Record
Tim Rosenberger
MANHATTAN INSTITUTE
52 Vanderbilt Ave.
New York, NY 10017
(212) 599-7000
ishapiro@manhattan.institute

October 31, 2024

QUESTIONS PRESENTED

1. Whether the academic and pedagogical choices of a privately owned and run school constitute state action simply because it contracts with the state to offer a free educational option for interested students.

2. Whether a state violates the Free Exercise Clause by excluding privately run religious schools from the state's charter school program solely because the schools are religious, or whether a state can justify such an exclusion by invoking anti-establishment interests that go further than the Establishment Clause requires.

TABLE OF CONTENTS

QUESTIONS PRESENTED..... i

TABLE OF AUTHORITIESiii

INTEREST OF *AMICUS CURIAE*..... 1

INTRODUCTION AND SUMMARY OF
ARGUMENT..... 1

ARGUMENT 4

I. THE OKLAHOMA SUPREME COURT’S
MISGUIDED STATE-ACTION
ANALYSIS SWEEPS IN A LOT OF
PRIVATE CONDUCT..... 4

A. Private entities regularly help states
fulfill important obligations..... 6

B. A vast array of private conduct
receives government funding. 9

C. Labeling private conduct “public” does
not transform it into state action..... 13

II. THE OKLAHOMA SUPREME COURT’S
RULING POSES SPECIAL THREATS
TO FAITH-BASED CHARITIES THAT
PROVIDE CRITICAL PUBLIC
SERVICES 14

III. THE OKLAHOMA SUPREME COURT’S
RULING UNDERMINES THIS COURT’S
RECENT JURISPRUDENCE ON THE
FREE EXERCISE CLAUSE..... 19

CONCLUSION 21

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Apao v. Bank of New York</i> , 324 F. 3d 1091(9th Cir. 2003)	6
<i>Bd. of Cnty. Comm’rs v. Umbehr</i> , 518 U.S. 668 (1996)	13
<i>Bd. of Educ. v. Grumet</i> , 512 U.S. 687 (1994)	14
<i>Blum v. Yaretsky</i> , 457 U.S. 991, 1004 (1982).....	5
<i>Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n</i> , 531 U.S. 288 (2001)	2,4
<i>Carson v. Makin</i> , 142 S. Ct. 1987 (2022)	3, 13, 20
<i>City of Detroit v. Murray Corp. of Am.</i> , 355 U.S. 489 (1958)	13
<i>Drummond ex rel. State v. Okla. Statewide Virtual Charter Sch. Bd.</i> , No. 121,694 2024 WL 3155937 (Okla., June 25, 2024).....	5, 8
<i>Espinoza v. Montana Dep’t of Revenue</i> , 140 S. Ct. 2261 (2020)	19–20
<i>Flagg Bros. v. Brooks</i> , 436 U.S. 149, 158 (1978)....	6, 7
<i>Fulton v. City of Philadelphia</i> , 141 S. Ct. 1868 (2021)	3, 4, 14, 15, 21
<i>Gilmore v. Salt Lake Cmty. Action Program</i> , 710 F.2d 632 (10th Cir. 1983)	12
<i>Gordon Coll. v. DeWeese-Boyd</i> , 142 S. Ct. 952 (2022)	14
<i>Grogan v. Blooming Grove Volunteer Ambulance Corps</i> , 768 F.3d 259 (2d Cir. 2014)	12

<i>Jackson v. Metro. Edison Co.</i> , 419 U.S. 345 (1974)	5, 6, 13
<i>Lansing v. City of Memphis</i> , 202 F.3d 821 (6th Cir. 2000)	12
<i>Luria Bros. & Co., Inc. v. Allen</i> , 672 F. 2d 347 (3d Cir. 1982).....	6
<i>Logiodice v. Trs. of Maine Cent. Inst.</i> , 296 F.3d 22, 29 (1st Cir. 2002).....	13
<i>Mildfelt v. Circuit Court of Jackson County</i> , 827 F.2d 343 (8th Cir.1987)	6
<i>Musso v. Suriano</i> , 586 F.2d 59 (7th Cir. 1978).....	12
<i>NFIB v. Sebelius</i> , 567 U.S. 519 (2012).....	13
<i>Our Lady of Guadalupe Sch. v. Morrissey-Berru</i> , 140 S. Ct. 2049 (2020)	3,14
<i>Polk County v. Dodson</i> , 454 U.S. 312 (1981)	13
<i>Rendell-Baker v. Kohn</i> , 457 U.S. 830 (1982)	1,4, 6, 7, 9–10
<i>Robert S. v. Stetson Sch., Inc.</i> , 256 F.3d 159 (3d Cir. 2001).....	12
<i>Sch. Dist. of Abington Twp. v. Schempp</i> , 374 U.S. 203 (1963)	7
<i>Trinity Lutheran Church of Columbia v. Comer</i> , 137 S. Ct. 2012 (2017)	19
<i>West v. Atkins</i> , 487 U.S. 42, 55 (1988)	7
 Statutory Provisions	
Col. Rev. State § 26-5 (2023)	9
Mass. Gen. Laws Ch. 23B, § 30 (2015)	8

Mont. Const. art II, § 3	9
Okla. Const. art. XIII, § 1	6
Okla. Stat. tit. 70, § 3-130 (1999)	5
Seattle, Wash., Ordinance 124509 (June 30, 2014) ...	8
Wy. Const. art. III, § 20	9
Washington, D.C., Code § 38-273.01 (2022)	9

Other Authorities

Byron Johnson et al., <i>Assessing the Faith-Based Response to Homelessness in America: Findings from Eleven Cities</i> (2017)	16
Cong. Rsch Serv., <i>Child Welfare: Purposes, Federal Programs, and Funding</i> (Oct. 7, 2022)	12
Child Welfare Info. Gateway, <i>State Laws on Child Welfare</i>	8
Dan Kosten, <i>The President’s Budget Request for Refugee and Asylum Services: Fiscal Year 2021</i> , Nat’l Immigr. F. (Mar. 3, 2020)	12
David L. Archer, Essay, <i>Will Catholic Hospitals Survive Without Government Reimbursements?</i> , 84 <i>Linacre Q.</i> 23 (2017)	17
Educ. Comm’n of the States, <i>50-State Review: Constitutional Obligations for Public Education</i> (Mar. 2016)	8
Elizabeth Leonard, <i>State Constitutionalism and the Right to Health Care</i> , 12 <i>U. Pa. J. Const. L.</i> 1325 (2010)	8
Emily Parker et al., <i>How States Fund Pre-K: A Primer for Policymakers</i> 4 (2018)	16, 17

<i>EWG’s Farm Subsidy Database</i>	11
Emilie Kao, <i>Religious Discrimination Makes Children Pay the Price</i> , Heritage Found. (Nov. 16, 2020)	15
Ga. Dep’t of Early Care and Learning, 25 Year Anniversary	9
Good Jobs First, <i>Subsidy Tracker</i>	10–11
<i>History</i> , Trinity Health.....	18
HHS, Off. of Child Care, <i>Resources for Child Care Providers</i>	12
<i>HUD Renews Funding for Thousands of Local Homeless Programs</i> (Jan. 29, 2021)	12
Jessica Eby et al., <i>The Faith Community’s Role in Refugee Resettlement in the United States</i> , 24 J. Refugee Stud. 586 (2011)	19
Joseph Robert Fuchs, <i>Patient Perspectives on Religiously Affiliated Care in Rural and Urban Colorado</i> , 12 J. Primary Care & Cmty. Health (Jan.–Dec. 2021)	18
Mary Bryna Sanger, <i>When the Private Sector Competes: Providing Services to the Poor in the Wake of Welfare Reform</i> , Brookings Inst. (Oct. 1, 2001)	9
Maryam Guiahi et al., <i>Patient Views on Religious Institutional Health Care</i> , JAMA Network Open 2 (Dec. 2019)	18
Met Council, <i>Virtual Listening Session on Food Insecurity in Kosher- and Halal-Observant Communities</i> (2022)	17

Michael W. McConnell, <i>Scalia and the Secret History of School Choice, in Scalia's Constitution</i> (Peterson & McConnell eds., 2018).....	7
Multnomah Cnty. Dep't of County Human Servs., <i>Preschool for All</i>	8
Nat'l Ass'n of Cmty. Health Ctrs, <i>Federal Grant Funding</i>	12
Nat'l All. to End Homelessness, <i>Faith-Based Organizations: Fundamental Partners in Ending Homelessness</i> (2017)	16
Natalie Goodnow, <i>The Role of Faith-Based Agencies in Child Welfare</i> , Heritage Found. (May 22, 2018)	15
<i>Our History</i> , Bon Secours Mercy Health	18
Natalie D. Riediger et al., <i>A Descriptive Analysis of Food Pantries in Twelve American States</i> (2022)	17
<i>R&P Affiliate Directory</i> , Refugee Processing Center	18–19
<i>Role of Faith-Based Child Care</i> , Bipartisan Policy Center (May 2021)	16
Stephanie J. Nawyn, <i>Faithfully Providing Refuge: The Role of Religious Organizations in Refugee Assistance and Advocacy</i> (April 2005)	18
Suzann Morris & Linda K. Smith, <i>Examining the Role of Faith-Based Child Care</i> , Bipartisan Policy Center (May 2021)	16
Tess Solomon et al., <i>Bigger and Bigger: The Growth of Catholic Health Systems</i> , Community Catalyst (2020).....	18

*The Callahan Legacy: Callahan v. Carey and the
Legal Right to Shelter,
Coalition for the Homeless* 8

*USDA, Fact Sheet: USDA Support for Food Banks
and the Emergency Food System* 12

INTEREST OF *AMICUS CURIAE*¹

The Manhattan Institute for Policy Research (“MI”) is a nonpartisan public policy research foundation whose mission is to develop and disseminate ideas that foster greater economic choice and individual responsibility. To that end, it has historically sponsored scholarship and filed briefs supporting constitutionally protected liberties and educational opportunities and opposing governmental overreach.

This case interests *amicus* because MI works to promote educational freedom, including in the context of the fundamental right to religious liberty.

**INTRODUCTION AND
SUMMARY OF ARGUMENT**

The Oklahoma Supreme Court’s gross misapplication of state-action doctrine contradicts decades of precedent and expands the doctrine beyond its breaking point. If not corrected, that analysis would also endanger many vital public services provided by religious charitable groups and undermine this Court’s recent free-exercise jurisprudence.

1. It is “fundamental” that the Constitution “applies to acts of the [government], not to acts of private persons or entities.” *Rendell-Baker v. Kohn*, 457 U.S. 830, 837–38 (1982). Acts of a private entity may be subject to constitutional constraint “if, though only if, there is such a close nexus between the State and the challenged action that [it] may be fairly treated as that

¹ Rule 37 statement: No party’s counsel authored any part of this brief; no person other than *amicus* or its members made a monetary contribution to fund its preparation or submission. All parties received timely notice of *amicus*’s intent to file this brief.

of the State itself.” *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001) (quotation omitted). State-action analysis thus asks: Who is “*responsible* for the specific conduct of which the plaintiff complains”? *Id.*

The answer here is simple: the state had no role in designing or administering the charter school program challenged here, and, thus, the program was not the result of “state action.” But the Oklahoma Supreme Court held the opposite. In doing so, that court ignored the central question and, instead, focused on artificial indicia of state action. Such artificial indicia included that the school generally helps the state fulfill an important obligation, that the school is supported by state funding, and that the school has been given the label “public.”

These factors have no place in state-action analysis, and they have been rejected by this Court and most circuit courts that have considered the issue. Worse, the decision below knows few bounds. If left to stand, the opinion would sweep well beyond this case and would designate as “state action” an array of quintessentially private conduct. Governments partner with nearly countless private groups to serve important public goals—often with the state’s extensive financial support. But that does not turn private charities into arms of the state. Nor is the problem alleviated by inviting states to pick and choose how constitutional doctrine applies by attaching the label “public” to private groups when it wishes.

2. The Oklahoma Supreme Court’s capacious state-action analysis creates especially grave consequences for the many religious organizations that partner with

the government to serve the public. For a religious entity, a state-actor designation poses an existential threat. Because the government must exercise its authority in a way that is religiously neutral, declaring the programs of a religious group to be “state action” forces that group to choose between secularizing those programs or ceasing to participate in state initiatives that support and fund them. In many cases, that means either denying the religious identity of their charitable programs or ending them. Many faith-based organizations will choose the latter, rather than attempt to divorce their beliefs—“the very reason for [their] existence”—from the ways in which they serve. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020). That would be devastating—both for the groups that close and for the public. Communities across the country depend on a multitude of faith-based groups to provide vital services related to child welfare, healthcare, shelter, and much more. If religious organizations are required to retreat from public service, these resources will be lost to those who need them most.

3. Finally, the decision below is also at odds with this Court’s recent decisions. The Court has repeatedly made clear that the Free Exercise Clause forbids the government from “exclud[ing] some members of the community” from a public benefit program because of “their anticipated religious use of the benefits.” *Carson v. Makin*, 142 S. Ct. 1987, 1998, 2002 (2022). Nor may “the government . . . discriminate against religion when acting in its managerial role” or overseeing a government contractor. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021).

But the Oklahoma Supreme Court’s expansive state-action analysis reopens the door to such discrimination. Any state could exclude religious groups from a program that subsidizes private activity by simply designing a model contract so that it bears the same superficial signs of state action that the court found relevant here. And because those signs do not require states actually to exert any control over the entity in question, a state that is hostile to religious organizations need not assume any greater management of its public-benefit programs to do so.

This Court has gone to great lengths to ensure that governments do not force religious believers to either “[g]ive up [their] sincerely held religious beliefs or give up serving” their communities or participating in public life. *Fulton*, 141 S. Ct. at 1930 (Gorsuch, J., concurring). The Court should grant *certiorari* to ensure that states may not do indirectly what the Constitution prevents them from doing explicitly.

ARGUMENT

I. THE OKLAHOMA SUPREME COURT’S MISGUIDED STATE-ACTION ANALYSIS SWEEPS IN A LOT OF PRIVATE CONDUCT

It is “fundamental” that the Constitution generally “applies to acts of the [government], not to acts of private persons.” *Rendell-Baker*, 457 U.S. at 837–38. As this Court has explained, “state action [by a private entity] may be found if, though only if, there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself.” *Brentwood Acad.*, 531 U.S. at 296 (quotation omitted). The government must be “responsible for the specific conduct of which

the plaintiff complains.” *Id.* (quotation omitted). Normally, this means that the state “has exercised coercive power or provided such significant encouragement . . . that the choice must in law be deemed to be that of the State.” *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Or, if such direct control cannot be shown, the Court has sometimes found state action where a private entity exercises powers that are “traditionally exclusively reserved to the State.” *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974).

The Oklahoma Supreme Court ignored these bedrocks of state-action analysis to focus instead on circumstances that say little about whether the challenged conduct is actually the state’s. Here, Oklahoma did not direct, coerce, or influence St. Isidore’s educational programming. Indeed, the state’s charter-school system is explicitly designed to expand educational choice by providing “additional academic choices,” and the State does not design or approve school budgeting decisions, curriculum, or operating policies and procedures. Okla. Stat. tit. 70, § 3-130 (1999). Also, educating children is hardly the exclusive domain of the government. Yet the Oklahoma Supreme Court found that the school was nonetheless a state actor because: (1) it is the state’s exclusive “public function” to provide free education; (2) St. Isidore would receive direct state funding; (3) St. Isidore would receive state “sponsorship”; and (4) the State’s charter school program labels such schools “public.” *See generally Drummond ex rel. State v. Okla. Statewide Virtual Charter Sch. Bd.*, No. 121,694 2024 WL 3155937 (Okla., June 25, 2024) (unreported decision).

These factors have no place in state-action analysis. Indeed, this Court and federal circuits across the

country have rejected similar factors in other cases. *See, e.g., Flagg Bros. v. Brooks*, 436 U.S. 149, 158 (1978) (state delegation of the sale of repossessed goods does not turn private conduct into state action); *Rendell-Baker*, 457 U.S. at 840–41 (school's receipt of public funds does not transform its discharge decisions into state actions); *Jackson*, 419 U.S. at 353-54; *Luria Bros. & Co., Inc. v. Allen*, 672 F. 2d 347 (3rd Cir. 1982) (where no exclusive state function is delegated, there is an absence of state action); *Apao v. Bank of New York*, 324 F. 3d 1091(9th Cir. 2003) (state regulation of the mortgage industry does not convert acts of individual lenders into state action); *Mildfelt v. Circuit Court of Jackson County*, 827 F.2d 343, 346 (8th Cir.1987) (no state action where power of sale was conferred by contract and merely recognized by statute). The Oklahoma Supreme Court's analysis knows few bounds. It sweeps in far more than charter schools and threatens to designate as "public" a vast array of quintessentially private conduct.

A. Private entities regularly help states fulfill important obligations.

The Oklahoma Supreme Court grounded its state-action analysis in an observation that is entirely beside the point: that the Oklahoma Constitution places an affirmative duty on the state to provide free public education. Okla. Const. art. XIII, § 1; *Drummond ex rel. State* at ¶ 26, ¶ 30. The simple fact that the state has an obligation to ensure access to education says nothing about whether the state is responsible for the policies and operations of any particular school. Indeed, here the state surely is not.

The Oklahoma Supreme Court seems to have confused the situation in which a state is obliged to provide some service *generally* with the question of whether that service is *exclusively* the prerogative of the State. See *Rendell-Baker*, 457 U.S. at 842 (“legislative policy choice in no way makes these services the exclusive province of the State”). To be sure, the state’s delegation of a function that is solely the government’s to perform can signal state action. See, e.g., *West v. Atkins*, 487 U.S. 42, 55 (1988) (doctor hired to provide constitutionally required medical care to state prisoners); *Flagg Bros.*, 436 U.S. at 158 (discussing administration of elections). But the appropriate question is not whether a private actor performs a service that is “aimed at a proper public objective” or that “confer[s] a public benefit”—it is whether that service “was exclusively and traditionally public.” *Brentwood*, 531 U.S. at 302–03. And “very few [functions] have been exclusively reserved” to the government. *Flagg Bros.*, 436 U.S. at 158 (quotation omitted).

Although the Oklahoma Constitution makes clear that education is important to the state, educating children is far from the exclusive domain of the government.² Thus, when a state partners with private organizations to expand educational options, the state is

² This point is laid bare by the many thousands of private K-12 schools that have operated across the country for centuries. Indeed, well into the nineteenth century, “American education was almost without exception under private sponsorship and supervision.” *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 238 n.7 (1963) (Brennan, J., concurring); see also Michael W. McConnell, *Scalia and the Secret History of School Choice*, in *Scalia’s Constitution* 72–73 (Peterson & McConnell eds., 2018) (discussing the history of education in America).

not delegating power over an area of exclusive state control. The fact that a privately run school—*which no children are compelled to attend*—helps accomplish the state’s goals does not mean its actions should be treated as the state’s.

The Oklahoma Supreme Court’s transformation of a general state duty into an exclusive state prerogative would sweep well beyond this case. Governments bear legal obligations to provide a tremendous variety of services for their citizens. Every state constitution includes an educational provision similar to Oklahoma’s. *See* Educ. Comm’n of the States, *50-State Review: Constitutional Obligations for Public Education* (Mar. 2016), <https://bit.ly/3rYVHIN>. At least a dozen include a duty to provide healthcare. *See* Elizabeth Leonard, *State Constitutionalism and the Right to Health Care*, 12 U. Pa. J. Const. L. 1325, 1402–06 (2010) (14 state constitutions list healthcare as a right or a “public concern”). States and cities bear obligations to provide shelter,³ foster care,⁴ universal pre-K,⁵ or even a “clean

The state supreme court sidestepped this point by concluding that operating “free public schools” is an exclusively public function. *Drummond*, 2024 WL 3155937 at *7. But that begs the question; the entire inquiry is designed to assess whether St. Isidore meaningfully operates as a “public school” in the first place.

³ *See, e.g.*, Mass. Gen. Laws Ch. 23B, § 30 (2015); *The Callahan Legacy: Callahan v. Carey and the Legal Right to Shelter*, Coalition for the Homeless, <https://bit.ly/3UrrP4P> (last visited Oct. 16, 2024) (discussing New York right to shelter).

⁴ *See generally* Child Welfare Info. Gateway, *State Laws on Child Welfare*, <https://bit.ly/3SUIIKA> (last visited Oct. 16, 2024).

⁵ *See, e.g.*, Seattle, Wash., Ordinance 124509 (June 30, 2014); Washington, D.C., Code § 38-273.01 (2022) (“Expansion to Universal Pre-K”); Multnomah Cnty. Dep’t of County Human Servs., *Preschool for All*, <https://bit.ly/3g8Hx4W> (last visited Oct. 16,

and healthful environment.”⁶ The state of Wyoming has the even broader obligation to protect the “health and morality of the people.” Wy. Const. art. III, § 20.

Countless private organizations provide services toward these important ends—often with the state’s encouragement and financial support. *See, e.g.,* Mary Bryna Sanger, *When the Private Sector Competes: Providing Services to the Poor in the Wake of Welfare Reform*, Brookings Institution (Oct. 1, 2001), <https://brook.gs/3MjHeQR> (discussing shift toward “private firms and nonprofit agencies . . . delivering more and more of the nation’s public services, especially in programs designed to help families and children living in poverty”). Indeed, a vast network of private hospitals, clinics, daycares, homeless shelters, halfway houses, foster care agencies, environmental groups, and many other organizations partner with governments to serve critical public goals and further states’ affirmative obligations. But that does not transform these many groups into arms of the government.

B. A vast array of private conduct receives government funding.

The Oklahoma Supreme Court’s observation that St. Isidore receives direct public funding is equally unremarkable and should receive equally little attention in state-action analysis. This Court long ago determined that whether the government funds an action says little about whether that action is the state’s. *Rendell-Baker*, 457 U.S. at 840-41. Indeed, in *Rendell-Baker*, the Court held that “dependen[ce] on the State

2024); Ga. Dep’t of Early Care and Learning, 25 Year Anniversary, <https://bit.ly/3SUG2dF>; Col. Rev. State § 26-5 (2023).

⁶ Mont. Const. art II, § 3.

for funds” does not demonstrate state action and concluded that even a school which received 99% of its funding from the state was not a public actor. 457 U.S. at 840–41, 843. The unmistakable lesson here is that state funding—even significant state funding—carries little weight in state-action analysis.

And for good reason. Focusing on state funding is not only wrong under *Rendell-Baker*, but it makes no sense in light of the way governments spend their money. Governments subsidize numerous aspects of private enterprise today. Indeed, governments lack the capacity to perform every function that furthers the public interest. Therefore, a state may reasonably conclude that private organizations are better situated to do so in many areas. Accordingly, governments regularly fund entities that never have been—and never should be—considered state actors.

Consider, for example, the vast sums of public money that facilitate private, for-profit industry, including funding given to: oil and gas companies like Valero Energy and Phillips 66;⁷ financial services providers like JPMorgan Chase, Wells Fargo, and PNC;⁸ automotive manufacturers like Ford, General Motors,

⁷ Good Jobs First’s Subsidy Tracker tracks public subsidies received by private industry from 2000 until the present. For example, Valero Energy received \$1.05 billion, and Phillips 66 received \$5.3 million in state, local, and federal subsidies. *See* Good Jobs First, *Subsidy Tracker*, <https://tinyurl.com/ku5zt7uy> (accessed Oct. 19, 2024); <https://tinyurl.com/28ym2z3a> (accessed Oct. 19, 2024).

⁸ The federal government awarded the following in loans/loan guarantees, and bailouts: JPMorgan Chase received \$1.3 trillion, Wells Fargo received \$3.4 trillion, and PNC received \$51 billion. *See id.*

and Volvo;⁹ retailers like Amazon, Walmart, and Macy's;¹⁰ healthcare providers like Centene and Mayo Clinic;¹¹ information technology companies like IBM, Google, and Facebook;¹² airlines like United and American;¹³ agribusinesses like Archer Daniels Midland, Deere, Cargill, and countless individual farmers and ranchers;¹⁴ and nearly every other imaginable area of commerce.

Governments also provide substantial and critical funding to non-profit groups that help perform important public services. Governments supply needed

⁹ Ford received \$1,325,230,761, General Motors received \$169,881,943, and Volvo received \$87,469,425. *See id.*

¹⁰ Amazon.com received \$22,880,000 from various states, Walmart received 3,000,000 from Kentucky, and Macy's received \$1,855,000 from Ohio. *See id.*

¹¹ Centene received \$450,000,000 from North Carolina, and Mayo Clinic received \$2,110,431 the federal government. *See id.*

¹² IBM received \$49,276,525, Google received \$54,335,376, and Facebook received an undisclosed amount from the State of Oregon. *See id.*

¹³ United Airlines received \$32,267,444, and American Airlines received \$25,855,237. *See id.*

¹⁴ In 2021, Archer Daniels Midland received \$417,705,586. In 2020, Deere received \$12,821,163 from Iowa, and Cargill received \$11,660,318. *See id.*; *see also* EWG, *EWG's Farm Subsidy Database*, <https://bit.ly/3fFNtCn> (last visited Oct. 16, 2024).

funding to groups like homeless shelters,¹⁵ refugee assistance organizations,¹⁶ childcare providers,¹⁷ medical facilities,¹⁸ foster-care agencies,¹⁹ food pantries,²⁰ and many other social welfare organizations.

In short, governments heavily subsidize all manner of private activity, and the fact of such funding is neither remarkable nor entitled to any weight in state-action analysis. Most courts of appeals have come to this same conclusion.²¹ The law in Oklahoma should be brought into line, as well.

¹⁵ See HUD, *HUD Renews Funding for Thousands of Local Homeless Programs* (Jan. 29, 2021), <https://bit.ly/3TdMN5O>.

¹⁶ See Dan Kosten, *The President's Budget Request for Refugee and Asylum Services: Fiscal Year (FY) 2021*, Nat'l Immigr. F. (Mar. 3, 2020), <https://bit.ly/3EtHVoZ>.

¹⁷ See HHS, Off. of Child Care, *Resources for Child Care Providers*, (updated May 19, 2022), <https://bit.ly/3MmgfUO>; HHS, Off. of Child Care, *Federal and State Funding for Child Care and Early Learning*, (Dec. 2014), <https://bit.ly/3EuUp9>.

¹⁸ See Nat'l Ass'n of Cmty. Health Ctrs, *Federal Grant Funding*, <https://bit.ly/3TawTcj> (last visited Oct. 16, 2024).

¹⁹ See Cong. Rsch Serv., *Child Welfare: Purposes, Federal Programs, and Funding* (Oct. 7, 2022).

²⁰ See USDA, *Fact Sheet: USDA Support for Food Banks and the Emergency Food System*, <https://bit.ly/3eoLq5y> (last visited Oct. 16, 2024).

²¹ See, e.g., *Logiodice v. Trs. of Maine Cent. Inst.*, 296 F.3d 22, 29 (1st Cir. 2002); *Grogan v. Blooming Grove Volunteer Ambulance Corps*, 768 F.3d 259, 268–69 (2d Cir. 2014); *Robert S. v. Stetson Sch., Inc.*, 256 F.3d 159, 166 (3d Cir. 2001) (Alito, J.); *Lansing v. City of Memphis*, 202 F.3d 821, 830 (6th Cir. 2000); *Musso v. Suriano*, 586 F.2d 59, 61 n.4 (7th Cir. 1978); *Gilmore v. Salt Lake Cmty. Action Program*, 710 F.2d 632, 637 (10th Cir. 1983).

C. Labeling private conduct “public” does not transform it into state action.

Finally, the Oklahoma Supreme Court’s observation that St. Isidore was nominally a “public” school does nothing to rectify or constrain its analysis.

Just two years ago, this Court reiterated that the substance of constitutional law does not turn “on the presence or absence of magical words.” *Carson*, 142 S. Ct. at 2000. Indeed, the Court has rejected the importance of labels in a variety of constitutional areas. *See, e.g., NFIB v. Sebelius*, 567 U.S. 519, 564 (2012) (statutory label “penalty” does not “determine whether the payment may be viewed as an exercise of Congress’s taxing power”); *Bd. of Cnty. Comm’rs v. Umbehr*, 518 U.S. 668, 679 (1996) (observing that constitutional claims do not depend on “state law labels” and collecting cases); *City of Detroit v. Murray Corp. of Am.*, 355 U.S. 489, 492 (1958) (“[I]n determining . . . constitutional immunity we must look . . . behind labels to substance.”). And the Court has specifically rejected the notion that the label “public” should control whether an entity performs state action. *See Jackson*, 419 U.S. at 353–54 (public utility); *Polk County v. Dodson*, 454 U.S. 312 (1981) (public defender).

As this Court has cautioned, deference to such labels would be ripe for abuse, as it would allow a state to simply pick and choose how constitutional doctrines apply based on the names it attaches to its actions. *See Carson*, 142 S. Ct. at 2000; *Umbehr*, 518 U.S. at 679. The Court must again make clear that critical constitutional underpinnings—such as the requirement of state-action for constitutional torts—cannot be so easily manipulated.

II. THE OKLAHOMA SUPREME COURT'S RULING POSES SPECIAL THREATS TO FAITH-BASED CHARITIES THAT PROVIDE CRITICAL PUBLIC SERVICES

The Oklahoma Supreme Court's expansive state-action analysis presents especially grave consequences for the many thousands of religious organizations that serve the public. For a religious entity, a state-actor designation does not simply open up new possibilities for tort liability; it poses an existential threat. The government, this Court has held, must exercise its "civil power . . . in a manner neutral to religion." *Bd. of Educ. v. Grumet*, 512 U.S. 687, 704 (1994). Thus, declaring the programs of a religious organization to be "state action" forces it to choose between stripping those programs of their religious character or ceasing to participate in state initiatives that support and fund them. In many cases, that will mean choosing between denying the religious identity of their charitable programs or ending them. *See, e.g., Fulton*, 141 S. Ct. at 1876.

But this is really no choice at all. For many faith-based social-service groups, their religious convictions are "the very reason for [their] existence." *Our Lady of Guadalupe*, 140 S. Ct. at 2055. Many such organizations therefore *cannot* divorce their religious beliefs from the ways in which they serve. *See id.*; *see also, e.g., Fulton* 141 S. Ct. at 1884–85 (Alito, J., concurring) (discussing religious missions to care for orphaned and abandoned children); *Gordon Coll. v. DeWeese-Boyd*, 142 S. Ct. 952, 954 (2022) (Alito, J., concurring in denial of cert.) (discussing integration of religion into education at some religious colleges). If religious organizations like these are stripped of that core reason for their work, many might cease to perform it.

The consequences of the Oklahoma Supreme Court’s misguided state-action analysis for faith-based social service providers are therefore immense. And they are for the general public, as well. If religious organizations are required to retreat from public service, critical resources will be lost in places and for people who depend on their partnership in public-service programs. These, to name only a few, include:

Adoption and Foster Care Agencies: Since the 20th century, “an influx of federal money spurred states and local governments to take a more active role” in funding or licensing the centuries-old work of private organizations who care for children in need of homes. *Fulton*, 141 S. Ct. at 1885 (Alito, J., concurring). States regularly rely on religious organizations in particular to perform this critical work. *See id.* (discussing long history of “care of orphaned and abandoned children” by religious organizations). According to one count, there are more than 8,000 faith-based foster care and adoption agencies in the United States,²² which in some states are responsible for facilitating more than 25 percent of foster care adoptions.²³

Childcare and Early Learning Centers: Faith-based organizations also serve families by caring for and educating young children. Indeed, one recent poll found that, of the 31 percent of working-parent households who depend on center-based childcare, more than half send their children to one that is affiliated

²² Emilie Kao, *Religious Discrimination Makes Children Pay the Price*, Heritage Found. (Nov. 16, 2020), <https://herit.ag/3rImZ5Q>.

²³ Natalie Goodnow, *The Role of Faith-Based Agencies in Child Welfare*, Heritage Found. (May 22, 2018), <https://herit.ag/3RKcPwg>.

with a faith-based organization.²⁴ Many states specifically fund and rely on these providers to serve at-risk or underprivileged children.²⁵ And across the country, states are increasingly partnering with private and religiously affiliated schools to establish a universal pre-K network that will provide all children with access to early learning resources.²⁶

Emergency Shelters: Faith-based organizations also “serve as the backbone of the emergency shelter system in this country.”²⁷ Faith-based groups are estimated to operate between 30 and 60 percent of emergency shelter beds in the United States—what one report describes as the “safety net of all safety nets for the homeless.”²⁸ In some cities, like Omaha, Nebraska, faith-based groups provide as many as 90 percent of beds.²⁹ As in other areas of service, the government provides millions of dollars in funding to support these organizations—which ultimately results, according to one study, in an estimated \$9.42 in taxpayer savings for every dollar of government spending.³⁰

²⁴ Suzann Morris & Linda K. Smith, *Examining the Role of Faith-Based Child Care*, Bipartisan Policy Center 3 (May 2021).

²⁵ *See id.*; Emily Parker et al., *How States Fund Pre-K: A Primer for Policymakers* 4 (2018); *see also* Goodnow, *supra* n.23.

²⁶ *See generally* Parker, *supra* n.25.

²⁷ Nat’l All. to End Homelessness, *Faith-Based Organizations: Fundamental Partners in Ending Homelessness* 1 (2017).

²⁸ Byron Johnson et al., *Assessing the Faith-Based Response to Homelessness in America: Findings from Eleven Cities* 20 (2017) (estimating nearly 60%); *see also* Nat’l All. to End Homelessness, *supra* n.27, at 1 (estimating 30%).

²⁹ Johnson, *supra* n.28, at 20.

³⁰ Johnson, *supra* n.28, at 25.

Food Pantries: Governments regularly subsidize and rely on private organizations—and especially religious organizations—to provide food to those in need. Indeed, a recent study of food pantries across twelve states found that nearly two-thirds of them are operated by faith-based organizations, a number that the authors cautioned might be an underestimate.³¹ The study further found that “volunteerism in food banks and pantries is often motivated by faith and has an important role in building community.”³² And faith-based food pantries may be particularly important for food security in religious communities that must observe strict dietary guidelines, such as those pantries that provide kosher or halal certified meals.³³

Healthcare Providers: Governments at all levels rely overwhelmingly on the work of private medical facilities to provide much-needed access to healthcare. According to one recent report, the average U.S. hospital receives nearly half of its funding from the government.³⁴ And a significant portion of those facilities is faith-based. Nearly one in five hospitals in the United States is religiously affiliated, and in many rural states or in geographically isolated communities, the reliance on religious healthcare providers is even

³¹ Natalie D. Riediger et al., *A Descriptive Analysis of Food Pantries in Twelve American States* 6-8 (2022).

³² *Id.* at 7.

³³ See generally Met Council, *Virtual Listening Session on Food Insecurity in Kosher- and Halal-Observant Communities* (2022), <https://bit.ly/3CpzOqL>.

³⁴ See David L. Archer, Essay, *Will Catholic Hospitals Survive Without Government Reimbursements?*, 84 *Linacre Q.* 23 (2017).

greater.³⁵ Indeed, because they view their service as a religious ministry rather than a profit-seeking venture, religious doctors and healthcare organizations are often motivated to serve in areas where for-profit facilities find little financial incentive.³⁶

Refugee Assistance Organizations: The State Department relies on and provides significant funding to support private organizations that serve and help resettle new refugees in the country, including by providing housing, food, clothing, medical services, training in English or job skills, and connections with refugees or others in the local community. Religious communities have, for centuries, led this vital cause to welcome and support refugees, and today the majority of these organizations are religiously affiliated.³⁷ According to one report, faith-based organizations have

³⁵ Maryam Guiahi et al., *Patient Views on Religious Institutional Health Care*, JAMA Network Open 2 (Dec. 2019). In five states (each with large rural populations) more than 40% of acute care hospital beds are religiously affiliated and in another five states, more than 30% are. See Joseph Robert Fuchs, *Patient Perspectives on Religiously Affiliated Care in Rural and Urban Colorado*, 12 J. Primary Care & Cmty. Health (Jan.–Dec. 2021). Further, the Centers for Medicare and Medicaid Services has identified 52 Catholic hospitals as the “sole community hospital” for their regions. Tess Solomon et al., *Bigger and Bigger: The Growth of Catholic Health Systems*, Community Catalyst 16 (2020).

³⁶ See, e.g., *History*, Trinity Health, <https://bit.ly/3EHmMb2> (last visited Oct. 16, 2024) (describing Catholic health system’s historical commitment to serving poor and disadvantaged communities); *Our History*, Bon Secours Mercy Health, <https://bit.ly/3RZn5V> (last visited Oct. 16, 2024) (same).

³⁷ See Stephanie J. Nawyn, *Faithfully Providing Refuge: The Role of Religious Organizations in Refugee Assistance and Advocacy* (April 2005), <https://bit.ly/3exnP2o>; *R&P Affiliate Directory*,

been instrumental in resettling 70% of all refugees arriving in the United States today, including individuals from all geographic, ethnic, and religious backgrounds.³⁸

Governments at all levels—and people in all communities—depend on the charitable work of these and many other faith-based organizations. It is not simply religious believers who would suffer if such groups were driven away from public service. This Court should ensure that the Oklahoma court’s unbound state-action analysis does not compel such a retreat.

III. THE OKLAHOMA SUPREME COURT’S RULING UNDERMINES THIS COURT’S RECENT JURISPRUDENCE ON THE FREE EXERCISE CLAUSE

Finally, the Oklahoma Supreme Court’s decision not only conflicts with settled state-action doctrine but it is also at odds with this Court’s recent decisions interpreting the Free Exercise Clause.

In recent years, the Court has made clear that the Free Exercise Clause forbids the government from requiring religious entities to “choose between their religious beliefs and receiving a government benefit.” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2023 (2017) (quotation omitted). Once a state elects to fund private activity, “it cannot disqualify some [organizations] solely because they are religious.” *Espinoza v. Montana Dep’t of Revenue*, 140

Refugee Processing Center, <https://bit.ly/3EhWtHZ> (last visited Oct. 16, 2024).

³⁸ See Jessica Eby et al., *The Faith Community’s Role in Refugee Resettlement in the United States*, 24 J. Refugee Stud. 586 (2011).

S. Ct. 2246, 2261 (2020). In short, a state cannot “exclude some members of the community” from a public benefit program “because of their religious exercise” or because of “their anticipated religious use of the benefits.” *Carson*, 142 S. Ct. at 1998, 2002.

Nor may the government discriminate against organizations that contract to perform important public services merely because they are religious. Just three years ago, the Court unanimously rejected the argument that “the government may discriminate against religion when acting in its managerial role.” *Fulton*, 141 S. Ct. at 1878. It made clear that the government has no more ability to discriminate on the basis of religious exercise when overseeing a contractor than when distributing government benefits. *Id.*

But the Oklahoma Supreme Court’s expansive state-action analysis reopens the door to exactly that kind of discrimination. As described above, many programs through which states partner with private groups may already require secularization under the Oklahoma court’s theory—whether the state wishes to do so or not. And, certainly, any state that *did* wish to exclude religious organizations from a program that subsidizes private activity could do so by simply designing the program so that it bears the same superficial signs of state action that the Oklahoma court found relevant here. Because those signs do not require the state to exert any control over the entity in question, a state that is hostile to religious organizations need not assume any greater management of its public-benefit programs to engage in discrimination.

In recent years, this Court has gone to great lengths to ensure that governments do not force religious believers to either “give up [their] sincerely held

religious beliefs or give up serving” their communities or participating in public life. *Fulton*, 141 S. Ct. at 1930 (Gorsuch, J., concurring in the judgment). It should grant *certiorari* here to ensure that states do not now do indirectly what the Constitution prevents them from doing explicitly.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the Court should grant *certiorari* and reverse.

Respectfully submitted,

Ilya Shapiro
Counsel of Record
Tim Rosenberger
MANHATTAN INSTITUTE
52 Vanderbilt Ave.
New York, NY 10017
(212) 599-7000
ishapiro@manhattan.institute

October 31, 2024