IN THE DISTRICT COURT FOR OKLAHOMA COUNTY
STATE OF OKLAHOMA

OKPLAC, INC., d/b/a Oklahoma Parent Legislative Action Committee, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. CV-2023-1857
STATEWIDE VIRTUAL CHARTER SCHOOL BOARD, et al.,	)	
Defendants.	)	

THE BOARD DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION AND FAILURE TO STATE A CLAIM

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**Pro Hac Vice Application Pending*
***Pro Hac Vice Application Forthcoming*

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INTRODUCTION

On June 5, 2023, the Statewide Virtual Charter School Board (the "Board") approved St. Isidore of Seville Virtual Catholic School ("St. Isidore") to become a statewide virtual charter school. The Board took this action after rejecting St. Isidore's original application, considering numerous public comments directed at the issue of religious charters, and ultimately concluding that St. Isidore's revised application satisfied all but one of the provisions in the Oklahoma Charter Schools Act (the "Act"), 70 O.S. §3-130 *et seq.*, and the Board's rules, OAC § 777:1-1-1 *et seq*. The Board determined that enforcing that one provision, which requires that a charter school be "nonsectarian in its programs, admission policies, employment practices, and all other operations," §136(A)(2), would violate the Free Exercise Clause of the U.S. Constitution—a conclusion first provided by Oklahoma's former Attorney General in Formal Opinion No. 2022-7, Op. Okla. Att'y Gen. 2022-7 (2022) (*see* Pet., Ex. A, App. N), and later seconded by Oklahoma's Governor. Letter from K. Stitt to G. Drummond (Feb. 27, 2023) (attached hereto as Ex. 1).

Plaintiffs now seek to overturn the Board's action. But this case is entirely premature. Plaintiffs challenge the Board's approval of St. Isidore before even knowing whether the Board will enter a contract with St. Isidore or what it will say. They attack St. Isidore's "policies," although no policies have yet been enacted—leading them to speculate about St. Isidore's operations and attack the policies of an entirely different school. Furthermore, Plaintiffs lack standing, because they have not credibly alleged any harm from the Board's actions. And the Board, in any event, is immune from Plaintiffs' claims. For all these reasons, the Court should dismiss the Petition for lack of subject-matter jurisdiction under 12 O.S. § 2012(B)(1).

Plaintiffs' Petition also fails to state a cognizable claim. Plaintiffs bring claims under the Act and the Board's rules, but neither provides a private right of action. They make speculative allegations inconsistent with the very documents they attach to their Petition and thus are insufficient to state a claim. They also misconstrue the Oklahoma Constitution and fail to mention the Free Exercise Clause and Oklahoma's Religious Freedom Act, either of

which dooms any possible claim under § 136(A)(2) of the Charter Schools Act. Accordingly, the Petition should be dismissed for failure to state a claim under 12 O.S. § 2012(B)(6).

BACKGROUND

I. The Oklahoma Charter Schools Act and Statewide Virtual Charter Schools

The Act authorizes private entities such as a "private college or university, private person, or private organization" to operate charter schools in the State by contracting with a public sponsor. §§ 132(A) & 134(C). A charter school must "be as equally free and open to all students as traditional public schools," § 135(A)(9), and "may not charge tuition or fees." § 136(A)(10). The legislature enabled charter schools for several purposes, including to "[i]ncrease learning opportunities," "[e]ncourage the use of different and innovative teaching methods," and "[p]rovide additional academic choices for parents and students." § 131.

To enhance online learning options, the legislature in 2012 created the Board, giving it "sole authority to authorize and sponsor statewide virtual charter schools in this state." § 145.1(A). Unlike physical charter schools, statewide virtual charter schools provide online education to students and families across the state, and enrollment is not limited to any particular district or geographic area. § 145.3(B). The Act directs the Board to "[p]rovide oversight of the operations of statewide virtual charter schools in this state," § 145.3(A)(1), and "promulgate rules as may be necessary to implement the provisions of this [A]ct." § 145.4.

To establish a virtual charter school, an applicant must submit an application to the Board, § 134(B), and make a "[p]ublic presentation" at a "regularly scheduled [Board] meeting." OAC § 777:10-3-3(a)(3). The Act empowers the Board to "[a]pprove quality charter applications that meet identified educational needs and promote a diversity of educational choices" and "[d]ecline to approve weak or inadequate" applications. § 134(I)(3) & -(4); *see* OAC § 777:10-3-3(c)(3) (listing review criteria). The Board provides "written notification of [its] decision" on an application, along with the "reasons for [any] rejection." *Id.* § 10-3-3(c)(4). If an application is rejected, "[t]he applicant may submit a revised application" within 30 days, and the Board will consider the revised application within 30 days. § 134(E).

If an application is approved, the Board and applicant then negotiate and execute "a contract for sponsorship." OAC § 777:10-3-3(a)(8). The contract must "incorporate the provisions of the [school's] charter," § 135(A), which should include "a description of the personnel policies, personnel qualifications, and method of school governance, and the specific role and duties of [the Board]." § 136(B). The contract must also address the "[a]dmission policies and procedures," "[m]anagement and administration" of the school, and "[a] description of how the charter school will comply with the charter requirements." § 135(A); *see* OAC § 777:10-3-3(d)(5) ("The policies and procedures governing administration and operation of the statewide virtual charter school shall be incorporated into the terms of the contract."). "No charter school may begin serving students without a charter contract executed in accordance with the provisions of the [Act] and approved in an open meeting of [the Board]." § 135(B).

An approved contract for a statewide virtual charter school is effective for an initial term of five years and may thereafter be renewed by the Board. § 137(A). Once established, the Board "provide[s] ongoing oversight of the charter schools through data and evidence collection, site visits, attendance of governing board meetings, compliance checks, and school performance reviews." OAC § 777:10-3-4(a). Apart from what is provided by the Act, a charter school is *"exempt from all statutes and rules* relating to schools, boards of education, and school districts." § 136(A)(5) (emphasis added).

II. The Board's Approval of St. Isidore's Revised Application

The Board received St. Isidore's application to be a virtual charter school on January 30, 2023. Pet., Ex. A at 3. The application made clear that St. Isidore would be "create[d], establish[ed], and operate[d] ... as a Catholic school." *Id.* at 17. St. Isidore "envision[ed] a learning opportunity for students who want and desire a quality Catholic education, but for reasons of accessibility to a brick-and-mortar location or due to cost cannot currently make it a reality." *Id.* at 19.

As required, St. Isidore submitted for "initial consideration" a "set of policies and procedures governing administration and operation of the proposed statewide virtual charter

school" including "[s]tudent admission and enrollment policies and procedures." OAC § 777:10-3-3(b). The admissions policy stated: "As a statewide school, [St. Isidore] will admit any and all students who reside in the state, provided there is capacity to serve that student's grade level per the annual enrollment goals for each year. All students are welcome, those of different faiths or no faith." Pet., Ex. A at 38. The application further stated that if interest exceeds capacity, a random selection lottery would determine admissions. *Id.* at 38 & Ex. N.

The Board rejected St. Isidore's initial application, citing eight areas of deficiency, mostly lack of detail and clarity. Pet. ¶ 113.[1] In its rejection letter, for example, the Board cited "[l]ack of detail regarding the proposed school's special education plan," "[l]ack of clarity regarding the proposed school's pedagogical approach," and "[c]oncerns with proposed governance and school management structure." *Id.*, Ex. F.

On May 25, St. Isidore submitted a revised application addressing the Board's concerns. Pet., Ex. A at 3. The first 50 pages described St. Isidore's revisions, including a 17-page explanation of the school's plan for accommodating students with disabilities, a 14-page review of the school's pedagogical approach, and additional information explaining that St. Isidore and any educational management organization ("EMO") would be separate entities and that, as non-profits, neither would receive pecuniary gain from a charter. *See* Pet., Ex. A.

On June 5, after St. Isidore made a second presentation of its application, the Board approved it. But before St. Isidore can "begin serving students," it must enter into a charter contract with the Board. § 135. Since no contract has been entered, no policies, including those governing special education, admissions, discipline, and employment, have been adopted.

III. The Petition

Plaintiffs' Petition seeks to overturn the Board's approval of St. Isidore. No Plaintiff claims any connection with St. Isidore, but all ten "object to the use of their tax dollars to fund St. Isidore's ... operations." Pet. ¶ 7. Although the Board has not yet negotiated a contract with

[1] The Board also expressed concerns about "[l]egal issues that may be applicable" to approval of St. Isidore as a religious charter, including the "legal basis for... approval." Pet., Ex. F.

St. Isidore and thus no policies have been adopted, the Petition claims that St. Isidore will discriminate based on religion and LGBTQ status, will not adequately serve disabled students, and "will teach a religious curriculum and indoctrinate students into a religion." *Id.* ¶ 21.

ARGUMENT

I. The Petition Should Be Dismissed for Lack of Subject-Matter Jurisdiction.

A. Plaintiffs' Claims Are Not Ripe.

Plaintiffs' efforts to challenge the Board's approval of St. Isidore are premature because many of the steps necessary to establish St. Isidore as a school have not occurred: no contract has been negotiated; no charter containing St. Isidore's actual policies has been adopted; and no final contract has been approved by the Board at a public meeting—all of which are required by statute before St. Isidore can begin operations. Without a charter contract, Plaintiffs have no basis to allege that the Act's charter contract requirements have been violated. Moreover, the Court would greatly benefit from further factual development—namely, enactment of St. Isidore's *actual* admissions, employment, and special education policies. Indeed, the Board is currently negotiating contract terms with St. Isidore. And if St. Isidore does not successfully enter a charter contract on terms that the Board approves, this lawsuit becomes unnecessary. In short, Plaintiffs' claims are not ripe for judicial review, and this Court therefore lacks subject-matter jurisdiction over them. *Dutton v. City of Midwest,* 2015 OK 51, ¶ 32, 353 P.3d 532, 547 n.69 (justiciability requires controversy be "ripe for judicial determination").

"The ripeness doctrine is a part of judicial policy militating against the decision of abstract or hypothetical questions." *French Petrol. Corp. v. Okla. Corp. Comm'n*, 1991 OK 1, ¶ 7, 805 P.2d 650, 652–53; *see also Richardson v. State ex rel. Okla. Tax Comm'n*, 2017 OK 85, ¶ 5, 406 P.3d 571, 573 ("This Court will not decide abstract or hypothetical questions."). One "basic rationale of the ripeness doctrine is ... to prevent the courts ... from entangling themselves in abstract disagreements." *French Petrol. Corp.*, 805 P.2d at 653.

To assess whether issues are fit for judicial decision, courts consider whether they would "benefit from further factual development of the issues presented." *Ohio Forestry Ass'n,*

Inc. v. Sierra Club, 523 U.S. 726, 733 (1998). The Oklahoma Supreme Court has thus found claims are not ripe where "[s]ubsequent events may sharpen the controversy," *French Petrol. Corp.*, 805 P.2d at 653, or when claims "raise[] nothing but pure speculation," *Carlock v. Workers' Comp. Comm'n*, 2014 OK 29, ¶ 3, 324 P.3d 408, 409 (Taylor, J., concurring). Here, Plaintiffs' claims are premature for several reasons:

First, they assert deficiencies in a contract that has not been negotiated and a charter that has not been adopted. Section 135(A) of the Act—the statute Plaintiffs cite as the primary basis for their Second Claim—provides what "*[t]he contract shall ... contain.*" (Emphasis added). Likewise, § 136(A), which Plaintiffs cite as a basis for their Third and Fifth Claims, specifies requirements when a charter school "*adopt[s] a charter.*" (Emphasis added). And OAC § 777:10-3-3(d), one of the bases for Plaintiffs' Fourth Claim, sets forth "[r]equirements of the sponsorship contract." To date, no contract has been entered, and no charter has been adopted. Therefore, Plaintiffs' claims alleging deficiencies in non-existent documents are plainly speculative and not ripe for judicial consideration.

Second, Plaintiffs' claims make numerous allegations on matters presently unknown. On admissions, for example, Plaintiffs question St. Isidore's statement that it will admit students "of different faiths or no faith" by pointing to language in its application that "[a]dmission assumes the student and family['s] willingness to adhere [] to the beliefs, expectations, policies and procedures of the school *as presented in the handbook.*" Pet. ¶ 124 (quoting Ex. A at 38) (emphasis added). Plaintiffs omit the italicized language from their Petition, but that omission is significant because Plaintiffs fail to cite any "handbook" from St. Isidore and so quote a different handbook from a different Catholic school. *See* Pet. ¶¶ 127, 140–43, 157 & Ex. C (referencing Student-Parent Handbook of Christ the King Catholic School). That Plaintiffs cite a different school's handbook to compensate for uncertainty over St. Isidore's operations underscores the prematurity of their claims.

Indeed, all of Plaintiffs' allegations concerning St. Isidore's admissions, student discipline, and employment policies, *see* Pet. ¶¶ 122, 123–53, 154–57, 166–67, 221–29, 231–

39, 241–42, 245, 246, are speculative, because no policies will be final until a charter is adopted and a sponsorship contract (into which the charter will be incorporated) is approved. Although some of St. Isidore's policies were submitted for "initial consideration," the Act provides that the school's policies must be set forth in the charter contract. §§ 135(A) & -(B); § 136(B). Plaintiffs thus ask the Court to weigh in on *proposed* policies—"a process which today lies without the scope of the Court's jurisdiction." *Dank v. Benson*, 2000 OK 40, ¶ 7, 5 P.3d 1088, 1091.

The same problem applies to Plaintiffs' claims regarding St. Isidore's plans for serving students with disabilities and its EMO. In their Third Claim, for example, Plaintiffs allege St. Isidore's *application* contains a timeline for adopting individualized education programs ("IEPs") for new students that does not comply with state rules, Pet. ¶¶ 166–67 & 246, but the Act provides that the school's *charter* "will ensure compliance with ... all federal and state laws relating to the education of children with disabilities." § 136(A)(7). Likewise, in their Fourth Claim, Plaintiffs allege that St. Isidore's *application* contains statements at odds with a rule prohibiting school board members from "receiv[ing] pecuniary gain ... from the earnings of the [EMO] or school," but the governing rule addresses "[r]equirements of the sponsorship contract" and thus specifies terms "[t]he contract shall contain." OAC § 777:10-3-3(d). Plaintiffs' focus on St. Isidore's *application,* rather than its not-yet-entered contract, shows their claims are not "fit[] ... for judicial decision." *French Petrol. Corp.*, 805 P.2d at 653.

Third, "[n]o charter school may begin serving students without a charter contract executed in accordance with [its] provisions ... and approved in an open meeting of the sponsor." § 135(B). Plaintiffs' claims assume that St. Isidore and the Board will negotiate, and the Board will approve, a charter contract so that St. Isidore can begin operations. But such events may not take place. Plaintiffs' claims thus "ask[] the Court to address a hypothetical situation which may or may not arise." *Dank*, 5 P.3d at 1091.

Finally, Plaintiffs will not suffer hardship from the Court dismissing their claims unless and until they become ripe. *See French Petrol. Corp.*, 805 P.2d at 653 (one factor is "hardship

to the parties of withholding court consideration."). St. Isidore has not operated as a charter school and cannot do so until it adopts a charter and enters a contract with the Board. If those events occur, Plaintiffs can bring claims based on non-hypothetical facts. There is no allegation that any harm will be suffered in the interim; indeed, Plaintiffs do not even claim a connection with St. Isidore. In light of the "uncertain future events," *id.*, there is no justification for the Court to intervene on the basis of incomplete and speculative allegations.

B. Plaintiffs Lack Standing.

Plaintiffs were not harmed by the Board's approval of St. Isidore, and therefore lack standing to sue the Board. "The irreducible constitutional minimum of standing" requires that Plaintiffs show they suffered "an injury in fact"—which is a "concrete and particularized," "actual or imminent, not conjectural or hypothetical," "invasion of a legally-protected interest," "as contemplated by statutory or constitutional provisions." *Toxic Waste Impact Grp., Inc. v. Leavitt*, 1994 OK 148, ¶¶ 8–9, 890 P.2d 906, 910–11 (cleaned up).

Plaintiffs have the burden to establish standing, *Okla. Educ. Ass'n v. State ex rel. Okla. Leg.*, 2007 OK 30, ¶ 7, 158 P.3d 1058, 1062–63, and even under the State's taxpayer-standing doctrine, Plaintiffs have failed to meet it. First, Plaintiffs do not allege facts that establish their tax liability will be impacted. Instead, a few Plaintiffs merely allege that they "believe[]" funds may be reallocated from other public schools to St. Isidore. Pet. ¶¶ 13, 16, 18–20. But reallocating funds does not affect an individual taxpayer. The basis for taxpayer standing is that individual taxpayers may be liable to replenish the treasury if it is unlawfully diminished and thus have an interest in challenging unconstitutional appropriations. *Vette v. Childers*, 1924 OK 190, 228 P. 145, 146 ("Because of their equitable ownership of the funds in the state treasury, and their liability to replenish the treasury for a deficiency which would be caused by a misappropriation, taxpayers may maintain a bill in equity to restrain the payment from the state treasury of moneys appropriated by the General Assembly on the ground that such appropriations are unconstitutional.") (quoting *Fergus v. Russel*, 270 Ill. 304 (1915)). No such basis exists here for any claim.

Second, *McFarland v. Atkins* controls this case. 1979 OK 3, ¶¶ 20–22, 594 P.2d 758, 762. In *McFarland*, plaintiffs argued they had taxpayer standing to seek injunctive relief prohibiting the Department of Health from distributing funds to Planned Parenthood under a contract because Planned Parenthood was violating statutory requirements governing the contract. They sought to "enforce the applicable laws and rules" and prohibit the Department of Health from funding its contract until Planned Parenthood complied with state law. *Id.* But the Oklahoma Supreme Court held that taxpayer status does not grant standing to "compel [another] to follow all applicable laws and regulations ... [or to] enforce the law," even when the law relates to a contract. *Id.* A plaintiff cannot "circumvent her lack of standing by alleging that unlawful expenditures of State funds are involved." *Id.* Specifically, individuals do not have taxpayer standing to challenge an expenditure when the state agency has "express statutory authority to contract with a non-governmental agency to provide certain services." *Okla. Pub. Emps. Ass'n v. Okla. Dep't of Cent. Servs.*, 2002 OK 71, ¶ 14, 55 P.3d 1072, 1079 (citing *McFarland*). This is so because the "appropriation and expenditure of funds" to the contractor are "not unlawful nor unauthorized" when a statute authorizes them—even if the contractor allegedly fails to comply with "specific laws and regulations" governing the provision of services. *McFarland*, 594 P.2d at 762.

Here, the Board has statutory authority to sponsor and enter a contract with entities like St. Isidore. § 145.1 (giving Board "sole authority to authorize and sponsor statewide virtual charter schools"). Plaintiffs lack standing to bring claims based on alleged statutory or regulatory violations, because the decision to sponsor St. Isidore was authorized by statute and Plaintiffs merely disagree with the Board's interpretation of its own enforcement powers.[2]

Lastly, the same reasons that Plaintiffs' claims are not ripe establish that they lack standing. For standing, an injury "must be direct, substantial and immediate, rather than contingent on some possible remote consequence or possibility of some unknown future

[2] Because no individual has standing, the Association lacks standing as well. *Okla. Educ. Ass'n,* 158 P.3d at 1063 (association's standing is based upon members of that association "possessing standing to sue in their own right").

eventuality." *Toxic Waste Impact Grp.*, 890 P.2d at 911; *see also Richardson*, 406 P.3d at 573 (matter not justiciable "[b]ecause it is unclear at this time whether [challenged acts] will increase [or decrease] revenue in Oklahoma."). With no contract in place and no allegations of a specific impact on the public fisc, Plaintiffs have not alleged a cognizable injury.

C. The Board Is Immune from Suit on Plaintiffs' Claims.

The Board is exempt from liability on Plaintiffs' claims under the immunity conferred upon it by the Governmental Tort Claims Act ("GTCA"), 51 O.S. § 151 *et seq.*, the Charter Schools Act, 70 O.S. § 3-130 *et seq.*, and the doctrine of sovereign immunity. Because the Board is immune from suit, the Court lacks subject-matter jurisdiction over Plaintiffs' claims. *See State ex rel. State Ins. Fund v. JOA, Inc.*, 2003 OK 82, ¶ 7, 78 P.3d 534, 536 n.5.

Under the GTCA, the Board is "immune from liability for torts" except as therein provided. 51 O.S. § 152.1(A).[3] The GTCA broadly defines the term "torts" to include any "legal wrong, independent of contract, involving violation of a duty imposed by general law, statute, the Constitution of the State of Oklahoma, or otherwise, resulting in a loss to any person, association or corporation as the proximate result of an act or omission of a political subdivision or the state of an employee acting within the scope of employment." *Id.* § 152(14); *see Barrios v. Haskell Cnty. Pub. Facilities Auth.*, 2018 OK 90, ¶ 10, 432 P.3d 233, 238 (noting legislature amended GTCA to extend immunity to "tort claims arising from alleged violations of constitutional duties"). Plaintiffs charge the Board with legal wrongs in violation of alleged duties under statute, regulation, and the Oklahoma Constitution resulting in losses (use of "tax dollars," Pet.¶ 21). Yet Plaintiffs do not seek any remedy available under the GTCA. Indeed, the GTCA expressly confers immunity for any alleged "failure to ... enforce a law," 51 O.S. § 155(4), which is the gravamen of Plaintiffs' Petition. GTCA immunity thus applies here.

Likewise, the Charter Schools Act provides that sponsors such as the Board "shall be immune from civil and criminal liability with respect to *all activities* related to a charter school

[3] The GTCA extends immunity to "[t]he State, its political subdivisions, and all of their employees acting within the scope of their employment," 51 O.S. § 152.1(A), with "State" defined to include "any office, department, agency, authority, commission, board . . . or other instrumentality thereof." *Id.* § 152(13).

with which they contract." § 134(L) (emphasis added). In short, the legislature has determined that charter school sponsors such as the Board are immune from suit in connection with the sponsorship of charter schools, and "the Legislature has the final say in defining the scope of the State's sovereign immunity from suit." *Barrios*, 432 P.3d at 236–37.

Finally, under the doctrine of sovereign immunity, "the State cannot be sued without its consent." *Freeman v. State ex re. Dep't of Hum. Servs.*, 2006 OK 71, ¶ 0, 145 P.3d 1078, 1078 (holding Department of Human Services immune from private enforcement action under Fair Labor Standards Act). Here, there has been no legislative enactment authorizing suit against the Board on the claims Plaintiffs seek to bring. Without an express waiver of sovereign immunity, the Board is immune from Plaintiffs' claims.

II. The Petition Should Be Dismissed for Failure to State a Claim.

The purpose of a § 2012(B)(6) motion to dismiss "is to test the law that governs the claim," and a petition should be dismissed if it lacks "any cognizable legal theory to support the claim[s] or for insufficient facts under a cognizable legal theory." *May v. Mid-Century Ins. Co.*, 2006 OK 100, ¶ 10, 151 P.3d 132, 136. Here, dismissal is proper under § 2012(B)(6) because, even assuming the Petition's allegations are true, Plaintiffs fail to advance any "cognizable legal theory," and the Petition fails as a matter of law.

A. Plaintiffs Have No Private Right of Action on Their Non-Constitutional Claims.

All of Plaintiffs' claims are based on allegations that the Board's vote to approve St. Isidore violated the Act, 70 O.S. §3-130 *et seq.*, and the Board's rules, OAC § 777:1-1-1 *et seq*. Pet. ¶¶ 219, 239, 248, 255 & 265. But neither the Act nor the rules provide Plaintiffs with a private right of action. "Without a cause of action, [Plaintiffs] cannot state a claim upon which relief can be granted." *Owens v. Zumwalt,* 2022 OK 14, ¶ 9, 503 P.2d 1211, 1215.

1. The Charter Schools Act Does Not Create a Private Right of Action.

When a regulatory statute is silent on whether it contains a private right of action, such a right may be implied only if: "(1) the plaintiff is one of the class for whose especial benefit

the statute was enacted; (2) some indication of legislative intent, explicit or implicit, suggests that the Legislature wanted to create a private remedy and not to deny one; and (3) implying a remedy for the plaintiff would be consistent with the underlying purposes of the legislative scheme." *Owens*, 503 P.3d at 1215 (citing *Holbert v. Echeverria*, 1987 OK 99, ¶¶ 7–10, 744 P.2d 960, 963). The Oklahoma Supreme Court adopted this three-pronged test from the U.S. Supreme Court's decision *in Cort v. Ash*, 422 U.S. 66 (1975). *See Holbert*, 744 P.2d at 963 (holding Consumer Protection Act did not create private right of action).

In *Owens*, the Oklahoma Supreme Court applied the *Holbert* test to determine that § 4-313 of the Oklahoma Employment Security Act (OESA) did not provide a private right of action to challenge Governor Stitt's May 2021 termination of COVID-related unemployment benefits. The plaintiffs claimed that the Governor's action violated state law and sought declaratory and injunctive relief to reinstate COVID benefits. 503 P.3d at 1215–16. But the Supreme Court observed that "[n]othing in 40 O.S. § 4-313 indicates the Legislature intended, either explicitly or implicitly, to create a private remedy to enforce the OESA." *Id.* at 1215. Accordingly, the Supreme Court held that the trial court had abused its discretion by entering a preliminary injunction and directed that the case be dismissed with prejudice. *Id.* at 1216.

Similarly, in *Shattuck Pharm. Mgmt, P.C. v. Prime Therapeutics, LLC*, 2021 WL 2667518 (W.D. Okla. June 29, 2021), the court dismissed claims for declaratory and injunctive relief under the Pharmacy Audit Integrity Act, 59 O.S. § 356 *et seq.*, and the Patient's Right to Pharmacy Choice Act, 36 O.S. § 6958 *et seq.*, on grounds that those statutes created no private right of action. 2021 WL 2667518, at *6–7. The court concluded that "[w]ithout a private cause of action created by either act," plaintiffs' claims for declaratory and injunction relief "are improper requests for fact-finding untethered to any underlying law." *Id.* at *7; *see Engels v. Kirkes*, 2013 WL 3367254, at *3 n.2 (E.D. Okla. July 3, 2013) (finding "no private right of action may be implied" under § 635 of the Oklahoma Highway Code); *Elliot Plaza Pharm., LLC v. Aetna U.S. Healthcare, Inc.*, 2009 WL 702837 (N.D. Okla. Mar. 16, 2009) (finding Oklahoma Third-Party Prescription Act "does not provide a private cause of action").

Here, the Act fails to mention any private right of action, and each of the *Holbert* factors shows no private remedy can be implied. First, plaintiffs are not in "the class for whose especial benefit the statute was enacted." *Owens*, 503 P.3d at 1215. The statute was enacted primarily to "[i]ncrease learning opportunities for students" and "[p]rovide additional academic choices for parents and students," and so is designed to benefit the students and the parents of students attending charter schools. § 131(A). Another purpose was to "[c]reate new professional opportunities for teachers and administrators including the opportunity to be responsible for the learning program at the school site." *Id.* But no Plaintiff alleges he or she has any interest in sending their children to St. Isidore; indeed, none claims to have any children attending a charter school. Pet. ¶¶ 11-21. And none claims any intent to work at St. Isidore or another charter school. Plaintiffs simply point to their status as Oklahoma taxpayers, *id.* ¶ 21, but when a statute "is for the benefit of the general public, no special class is established for whose especial benefit it was created" as required by *Holbert*, 744 P.2d at 963.

Second, there is no indication the Legislature wanted to create a private right of action under the Act. *Owens*, 503 P.3d at 1215. To the contrary, the Legislature was not silent when it intended to create remedies under the Act. The statute provides rejected applicants with express administrative remedies, and it provides for "binding arbitration" in the event a sponsor terminates a charter school's contract during its term. §§ 134(E) & (G). Indeed, decisions by the Board to deny, nonrenew, or terminate the contract of a virtual charter school "may be appealed to the State Board of Education." § 145.3(K). In light of the administrative scheme established by the Legislature, "[a] fair reading of the language enacted by the legislature does not lead to the conclusion that the legislature intended (expressly or by implication) to create a private right of action." *Shattuck Pharm. Mgmt.*, 2021 WL 2667518, at *6.

Third, implying a remedy for Plaintiffs to challenge the Board's actions under the Act would not be "consistent with the underlying purposes of the legislative scheme." *Owens*, 503 P.3d at 1215. Administrative oversight of the Board's decisions in sponsoring virtual charter schools is vested in the State Board of Education, which is authorized to conduct "financial,

program or compliance audits," § 145.3(E). And the State Board is directed in turn to "issue an annual report to the Legislature and the Governor outlining the status of charter schools in the state." § 143. That the Legislature placed the operation of charter schools under the aegis of the State Board and the Board shows it did not at the same time intend for taxpayers to enforce the Act in civil actions before state courts. Without a private right of action, Plaintiffs cannot state a claim under the Act. *Owens*, 503 P.2d at 1215.

2. The Board's Rules Do Not Create a Private Right of Action.

Plaintiffs' claims under the Board's rules fare no better. Any private right of action under those rules also depends on legislative intent. *See Holbert*, 744 P.2d 960, 963 n.9 (noting "central inquiry" in considering private right of action is legislative intent); *Schmeling v. NORDAM*, 97 F.3d 1336 (10th Cir. 1996) (looking solely to congressional intent to assess private right of action to enforce Federal Aviation Administration's drug-testing rules).

In conferring authority on the Board to "promulgate rules as may be necessary to implement the provisions of [the Act]," § 145.4, there is no indication that the legislature intended those rules to be enforced by private litigants. Indeed, the legislature designated the Board as "the sole authority to authorize and sponsor statewide virtual charter schools in the state," §145.1(A); and in assuming that authority, the Board's rules acknowledge that the Board itself is the entity responsible for ensuring services are provided to "students enrolled in statewide virtual charter schools in a manner that is safe, consistent, effective and appropriate." OAC § 777:1-1-4(a). It is thus not surprising that the Board's extensive rules governing statewide virtual charter schools make no mention of private enforcement.

Although the Oklahoma Administrative Procedures Act provides that "[t]he validity or applicability of a rule may be determined in an action for declaratory judgment," 75 O.S. § 306(A), such a determination can be made only "if it is alleged the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff." *Id.* Here, Plaintiffs make no such allegation. Moreover, declaratory relief under § 306 is unavailable to review the kind of administrative action

challenged here—one that applies to "named persons or specific situations." *Waste Connections, Inc. v. Okla. Dep't of Env't Quality*, 2002 OK 94, ¶ 11, 61 P.3d 219, 224. Without a private right of action, Plaintiffs cannot state a cognizable claim under either the Board's rules or the Act itself.

B. Claim I Fails to State a Claim Because St. Isidore Certified Its Intent Not to Discriminate and the Board Has Authority to Interpret Its Own Rules.

Plaintiffs' First Claim alleges that the Board violated its own rule when it approved St. Isidore's revised application, because St. Isidore failed to certify an intent not to discriminate. Pet. ¶¶ 216–19. The rule requires virtual charter school applicants to "include signed and notarized statements ... showing their agreement to fully comply as an Oklahoma public charter school with all statute[s], regulations, and requirements of the United States of America, State of Oklahoma, Statewide Virtual Charter School Board, and Oklahoma Department of Education." OAC § 777:10-3-3(c)(1)(F). These statements of assurances must "guarantee access to education and equity for all eligible students regardless of their race, ethnicity, economic status, academic ability, or other factors as established by law." *Id.*

St. Isidore's statements—included in Exhibit A to the Petition (App. F)—plainly satisfy § 10-3-3(c)(1)(F). They state that St. Isidore:

1. Fully complies with the Oklahoma public charter school regulations, including, but not limited to, all statutes, regulations, and requirements of the United States of America, the State of Oklahoma, the Oklahoma Statewide Virtual Charter School Board, and the Oklahoma Department of Education to the extent required by law, including the First Amendment, religious exemptions, and the Religious Freedom Restoration Act, with priority given to the Catholic Church's understanding of itself and its rights and obligations pursuant to the Code of Canon Law and the Catechism of the Catholic Church ...

3. Guarantees access to education and equity for all eligible students regardless of their race ethnicity, economic status, academic ability, or other factors.

St. Isidore's additional comment that it will comply with laws that guarantee religious freedom, and that it will exercise that freedom, did not negate its compliance with § 10-3-3(c)(1)(F). And if there is any ambiguity, the Board is entitled to deference when interpreting its own

regulations. *Estes v. ConocoPhillips Co.*, 2008 OK 21, ¶ 12, 184 P.3d 518, 524 ("Th[e] [Supreme] Court will show great deference to an agency's interpretation of its own rules."); *Oral Roberts Univ. v. Okla. Tax Comm'n*, 1985 OK 97, ¶ 19, 714 P.2d 1013, 1014–15 (agency has deference to interpret statute it administers). Plaintiffs' First Claim thus fails to state a cognizable claim for relief.

C. Claim II Fails to State a Claim Because St. Isidore's Application Complies With Oklahoma Non-Discrimination Law.

Plaintiffs' Second Claim asserts that the Board unlawfully approved St. Isidore because Plaintiffs fear the school will discriminate in admissions and employment on the basis of certain protected classes. Pet. ¶¶ 236–38. But Plaintiffs' bare allegations and citations to sources outside St. Isidore's application to conjure up potential discrimination are contradicted by the application. "[I]n case of conflict between the allegations of the petition and the attached exhibit, the provisions of the exhibit govern[] notwithstanding the allegations of the petition." *Turner v. Sooner Oil & Gas Co.*, 1952 OK 171, ¶ 14, 243 P.2d 701, 704. Here, Plaintiffs' own exhibits show that the application meets the non-discrimination requirements of Oklahoma law. Instead of focusing on the application itself, Plaintiffs suggest that the Board should have explored Catholic doctrine outside the record and assumed that St. Isidore was lying when it said it will not discriminate. Oklahoma law does not require such hostility to religion—it forbids it.

The approved application complies with all admissions non-discrimination requirements. Plaintiffs claim that the Board violated various non-discrimination provisions in Oklahoma law when it approved St. Isidore because St. Isidore will not be open to all students or might discriminate against some. But St. Isidore's application (Pet., Ex. A) states the opposite:

- "As a statewide school, St. Isidore ... will admit any and all students who reside in the state, provided there is capacity to serve that student's grade level per the annual enrollment goals for each year." *Id.* at 38. If the number of applicants exceeds the capacity, St. Isidore will conduct a lottery to fill the spots. *Id.*
- "All students are welcome, those of different faiths or no faith." *Id.* And students are not required to affirm Catholic beliefs in order to attend. *Id.* at 104 ("People of other faiths or no faith are welcome to attend our Catholic schools. They will

not be required to affirm our beliefs.").

- "St. Isidore of Seville Catholic Virtual School shall not discriminate on the basis of a protected class." *Id.* at 43. "The School strictly prohibits and does not tolerate any unlawful discrimination, harassment, or retaliation that is also inconsistent with Catholic teaching on the basis of a person's race, color, national origin, disability, genetic information, sex, pregnancy (within church teaching), biological sex (gender) age, military status, *or any other protected classes recognized by applicable federal, state, or local law* in its programs and activities." *Id.* at 168 (emphasis added).

On its face, the approved application meets all requirements of Oklahoma law. Plaintiffs' allegations that St. Isidore might engage in admissions discrimination contrary to its application are based on 1) citing *other school's* policies and 2) Plaintiffs' own reading of Catholic doctrine and speculation about how it might apply. Pet. ¶¶ 131–45 (citing Catechism and other Archdiocese policies not included in the application). The Board lawfully approved the *application* as it meets all admissions requirements on its face; and the application overrides Plaintiffs' speculation. *Turner*, 243 P.2d at 704.

The same is true as to employment. The application's proposed employee handbook states that St. Isidore "complies with all applicable local, state and federal laws and regulations governing fair employment practices" and does not discriminate in employment based on "race, sex, color, national origin, citizenship, age, veteran status or mental or physical ability." Pet., Ex. A at 109. Further, it "[r]ecogniz[es] that non-Catholic employees are called to serve" and simply requires its non-Catholic employees "to have an understanding of the Catholic Church and to refrain from actions that are contrary to the teachings of the Church." *Id.* at 105. Thus, on its face, the application complied with Oklahoma's non-discrimination requirements. The only caveat was that St. Isidore did not waive its First Amendment right to consider religion in employment decisions. *Id.* at 109. But the Board could not deny the application on grounds that St. Isidore preserved its First Amendment rights. *See Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2069 (2020) (ministerial exception prohibits state interference with religious school's hiring practices).

The Board did not violate any constitutional or statutory non-discrimination provision

when it approved St. Isidore's application because the application on its face complies with all applicable laws.[4] Thus, Claim II fails to state a claim upon which relief can be granted.

D. Claim III Fails to State a Claim Because Plaintiffs Have No Plausible Basis to Allege St. Isidore Will Not Adequately Serve Students with Disabilities.

Plaintiffs' Third Claim alleges that the Board's approval of St. Isidore was unlawful because the school will not adequately serve students with disabilities. But this claim is based entirely on conclusory allegations that fail to allege that any student with disabilities will receive insufficient services from St. Isidore.

Plaintiffs first allege that St. Isidore will fail to satisfy § 136(A)(7) of the Act requiring it to adopt a *charter* that ensures compliance with "all [federal and state] laws relating to the education of children with disabilities in the same manner as a school district," because St. Isidore's *application* (not its charter) stated it would follow disability laws "to the extent that it does not compromise the religious tenets of the school." Pet. ¶ 245. But the Petition contains no allegation regarding any terms in St. Isidore's charter because the charter has not been adopted and so for that reason fails to state a claim. Further, St. Isidore's reference to its First Amendment rights does not plausibly establish unlawful conduct, particularly when Plaintiffs fail to point to any legal requirement relating to children with disabilities that conflicts with St. Isidore's "religious tenets." Plaintiffs' claim is as conclusory as it is speculative.

Plaintiffs next allege St. Isidore failed to fulfill the Board's rule requiring virtual charter school applicants to show they have policies in place to ensure sufficient services to "students

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[4] Plaintiffs' Second Claim also misstates the law. Although the application says St. Isidore will not discriminate based on sex, Plaintiffs assert "sex" includes "sexual orientation and gender identity," Pet. ¶ 227, and hypothesize that St. Isidore will discriminate on those grounds. But 1) the application states the school does not discriminate in admissions or employment based on "sex" (which should foreclose this claim), and 2) Oklahoma courts have never interpreted discrimination on the basis of "sex" to include "sexual orientation" or "gender identity." In fact, Oklahoma has elected not to interpret "sex" to mean sexual orientation and gender identity in certain instances. *See* Op. Okla. Att'y Gen. 2020-13 (2020) (reflecting AG's opinion that sexual orientation non-discrimination not required for participation in Lindsey Nicole Henry Scholarship Program); 70 O.S. § 27-106 (Save Women's Sports Act categorizing students based on biological sex, not gender identity). Likewise, Oklahoma courts have never interpreted "gender" to mean "gender identity," "sexual activity outside of marriage," or "pregnancy outside of marriage." The only additional non-discrimination requirements for charter schools, beyond those stated in the Act, are those found in certain federal statutes, *see* § 136(A)(1)—none of which include Plaintiffs' new categories.

with disabilities," because St. Isidore's application stated such services will be provided "to the maximum extent possible through a virtual education program." Pet. ¶ 160. But the "to the maximum extent possible" language simply acknowledges the unassailable fact that a *virtual* charter school is differently situated from a brick-and-mortar school for purposes of accommodating disabilities. It does not shirk the requirement to serve students with disabilities. And Plaintiffs ignore that St. Isidore affirmed it would consider "[a]lternative placements" for students who "need[] more intensive support and programming than what a virtual program can offer," Pet., Ex. A at 73, and that no law prevents St. Isidore from contracting out services.[5]

Plaintiffs finally assert that the Board violated a regulation that sets forth a factor to be considered "in deciding whether the Board should approve a charter-school application." Pet. ¶¶ 158, 244 (citing OAC § 777:10-3-3(c)(3)(D)). But Plaintiffs do not allege that the Board actually failed to consider this factor, which in any event is a factor the Board "may"—not must—consider in reviewing an application. These allegations do not support a claim.

E. Claim IV Fails to State a Claim Because St. Isidore's Proposed EMO Is a "Separate Entity" and No Board Member Will Receive Pecuniary Gain.

Plaintiffs' Fourth Claim alleges that the Board's approval of St. Isidore violated two of the Board's own rules—one requiring the school and its EMO be "separate entities in all aspects," OAC § 777:10-1-4(1), and another providing that no board member of the school shall "receive pecuniary gain, incidentally or otherwise, from the earnings of the [EMO] or school," *id.* § 10-3-3(d)(4)(I). But the allegations in the Petition fail to spell out a violation of either rule. Indeed, although the Board is entitled to considerable deference in interpreting its rules, *Estes,* 184 P.3d at 524, no such deference is here required as the Plaintiffs' Fourth Claim so badly misses the mark.

Plaintiffs' allegation that St. Isidore and its EMO are not "separate entities" targets St.

[5] Plaintiffs also nitpick St. Isidore's reference to "physical disability or impairment" as excluding a mental disability or impairment, Pet. ¶ 164, but overlook St. Isidore's statements elsewhere indicating its plan to accommodate students with disabilities in accordance with the law and with no limitation on its understanding of "disability." *See* Pet., Ex. A at 73 (St. Isidore "will comply with all applicable State and Federal Laws in serving students with disabilities"), *id.* at 83–85 (addressing plan for mental disability including "neurodiverse learners-dyslexia, dysgraphia, dyscalculia").

Isidore's reference to the Archdiocese of Oklahoma City's Department of Catholic Education ("DCE") as its proposed EMO. *See* Pet., Ex. A. But Plaintiffs acknowledge that St. Isidore is a separate Oklahoma non-profit entity, with its own Certificate of Incorporation, Pet. ¶ 41, its own bylaws, *id.* ¶ 174, and its own governing board of directors, *id.* ¶ 178. St. Isidore and DCE are thus "separate entities in all respects." OAC § 777:10-1-4(1). Although Plaintiffs point out that St. Isidore "falls under the umbrella of the Oklahoma Catholic Conference" and that St. Isidore's two organizing members (as distinguished from its board of directors) are the Archbishop of Oklahoma City and the Bishop of Tulsa, *id.* ¶¶ 173–75, these affiliations do not come close to plausibly alleging that St. Isidore and DCE are not separate entities, even if DCE ends up being St. Isidore's EMO—something not yet established.

Plaintiffs' allegation of improper "pecuniary gain" fares no better. They assert that the Director of Catholic Education for the Archdiocese of Oklahoma City, who sits on St. Isidore's board, will "receive pecuniary gain" from St. Isidore's and its EMO's operations. Pet. ¶¶ 179–80. But the Petition fails to contain any allegations as to how that board member will *personally* and *financially* benefit from those operations. *See Ponca City Welfare Ass'n v. Ludwigsen*, 1994 OK 110, ¶ 12, 882 P.2d 1062, 1066 (for "pecuniary gain[,] the purpose ... must be profit"). St. Isidore's application quite clearly represented the opposite: "[St. Isidore] does not afford pecuniary gain, incidentally or otherwise, to its members." Pet., Ex. B at 2. The Board was entitled to rely on that representation when approving St. Isidore.

F. Claim V Fails to State a Claim Because the Oklahoma Constitution Does Not Prohibit Religious Virtual Charter Schools.

Plaintiffs' Fifth Claim alleges that the Board violated three separate provisions of the Oklahoma Constitution relating to religion, but none of those provisions has been violated. The Board's approval of St. Isidore did not violate Art. II § 5 (the "no aid" provision), because funding St. Isidore as a virtual charter school bestows a direct benefit on the State and the State itself is not adopting sectarian principles. Nor has the Board violated Art. I § 5 ("free from sectarian control"), because its approval of St. Isidore does not put Oklahoma's "system of

public schools" under sectarian control. And the Board's approval of St. Isidore did not offend Art. I § 2 (the "toleration" provision), because attendance at St. Isidore will be voluntary and no student will be coerced to share St. Isidore's Catholic faith.

1. Art. II § 5 (the "no aid" provision)

Plaintiffs' primary claim is that the Board's approval of St. Isidore violated Art. II § 5, which states that "[n]o public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, of support of any sect, church, denomination or system of religion ...." But the Board did not violate this provision for at least three reasons.

First, when the State receives a benefit from a payment to a religious organization, the payment does not violate the "no aid" provision. The Oklahoma Supreme Court thus has upheld programs under which the State funds religious organizations delivering services that the State itself has an obligation to provide, because the State benefits from those programs. In *Murrow Indian Orphans Home v. Childers*, 1946 OK 187, 171 P.2d 600, for example, the Court found that state payments to a Baptist orphanage for the care of children did not violate the "no-aid" provision because the State was required to provide such services and so it benefited from the orphanage's care. *Id.* at 601–03. As long as payment to a religious institution "involve[s] the element of substantial return to the State and do[es] not amount to a gift, donation, or appropriation to the institution having no relevancy to the affairs of the state, there is no constitutional provision offended." *Id.*; *see also Burkhardt v. City of Enid*, 1989 OK 45, ¶¶ 15-16, 771 P.2d 608, 612 (noting key factor in applying "no-aid" provision is whether state entity making payment to religious institution receives benefit in return). Similarly, in *Oliver v. Hofmeister*, the Court held that the Lindsay Nicole Henry scholarship program, under which students with disabilities can attend sectarian schools using public funds, did not violate the "no-aid" provision. 2016 OK 15, ¶ 27, 368 P.3d 1270, 1277. "Oklahoma public school districts are required to provide education and related services to all children with disabilities." *Id.* at 1272–73. The State was "simply contracting with private schools to perform a service (education of children with special needs) for a fee. The State receive[d] great benefit from

this arrangement." *Id.* at 1278 (Taylor, J., concurring). Here, if St. Isidore enters a contract and operates as a charter school, the State, through the Board, will simply be contracting with a religious organization to provide education to Oklahoma children, an "element of substantial return to the state." *Id.* at 1275.

Second, the Board's approval of St. Isidore did not constitute "adoption of sectarian principles or the monetary support of one or several or all sects." *Murrow*, 171 P.2d at 602. In *Murrow*, the Court explained "[i]t is not the exposure to religious influence that is to be avoided; it is the adoption of sectarian principles or the monetary support of one or several or all sects that the state must not do." *Id.* Thus, in *Oliver*, the Court noted that the scholarship program at issue was "*entirely voluntary* with respect to eligible students and their families" and found that "[w]hen the *parents* and not the *government* are the ones determining which private school offers the best learning environment for their child, the circuit between government and religion is broken." 368 P.3d at 1273–74 (emphasis in original). "Because the *parent* receive[d] and direct[ed] the funds to the private school, *sectarian* or *non-sectarian*, ... the State [wa]s not actively involved in the adoption of sectarian principles or directing monetary support to a sectarian institution." *Id.* at 1276 (emphasis in original). Likewise, virtual charter schools are entirely voluntary, and state funding for St. Isidore will depend largely on how many students attend. *See* § 142(B)(2) ("[F]ull-time virtual charter school shall receive revenue equal to that which would be generated by the estimated weighted average daily membership calculated pursuant to this paragraph."). Because funding for St. Isidore will be at the "independent choice ... of the parent and not the State," *Oliver*, 368 P.3d at 1276, "the circuit between government and religion is broken," *id.* at 1274, and the Board's approval of St. Isidore does not constitute unconstitutional monetary support of a religious sect.

Third, the Board's criteria for determining whether to approve St. Isidore are "void of any suggestion or inference to favor religion or any particular sect." *Id.* at 1277. In *Oliver*, the Court found that because the statute creating the scholarship program was "void of any preference between a *sectarian* or *non-sectarian* private school," "there [wa]s no influence

being exerted by the State for any sectarian purpose with respect to whether a private school satisfie[d] the[] requirements." *Id.* at 1274 (emphasis in original). "Approved schools [we]re determined without regard to religious affiliation and [we]re based on statewide educational standards, health and safety regulations." *Id.* at 1276. Here, too, the Board approves virtual charter schools "without regard to religious affiliation," and the standards for approving them are "void of any suggestion or inference to favor religion or any particular sect," *id.* at 1276 – 77. For these reasons, Plaintiffs are unable to state a claim that the Board's approval of St. Isidore violated the "no aid" provision in Art. II § 5 of the Oklahoma Constitution.

2. Art. I § 5 ("free from sectarian control")

Plaintiffs next claim that the Board's approval of St. Isidore violated Art. I § 5, which states that "[p]rovisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of the state and *free from sectarian control.*" (Emphasis added). This section simply requires that Oklahoma's "system of public schools" be free from sectarian control. It does not say that *each and every school* in Oklahoma must be free from sectarian influence. The school voucher program in Oklahoma, which allows parents to use public funds as tuition at private religious schools, attests to this interpretation. 70 O.S. § 28-103.

In *Oliver*, the plaintiffs also raised this provision, arguing that the scholarship program allowing students with disabilities to use state funds to attend sectarian schools violated Art. I § 5. But the District Court rejected that argument, and the Supreme Court did not overturn its ruling. *See Oliver,* 368 P.3d at 1277; *Oliver, Jr. v. Barresi*, 2014 WL 12531242, *1 (Okla. Dist. Ct. Sept. 10, 2014). As in *Oliver*, Art. I § 5 is not offended here because attendance at St. Isidore will be entirely optional, "break[ing] the circuit between government and religion." *Oliver*, 368 P.3d at 1274. There is no "system of public schools" under sectarian control.

Indeed, the words in Art. I § 5 that precede the phrase "free from sectarian control"—namely, "shall be open to all the children of the state"—prove that the entire clause modifies "system of public schools," not each and every school. Plainly, each and every school is not

"open to all the children of the state." District schools limit enrollment to district residency and also by age and grade level. 70 O.S. § 1-113 (residency requirements); § 1-114 (age requirement); § 8-101.2 (school transfer dependent upon capacity); OAC § 210:10-1-17 (residency). It is the *system* that must be open to all children of the State and free from sectarian control. There are no plausible allegations in the Petition that the Board's approval of St. Isidore somehow puts Oklahoma's "system of public schools" under sectarian control.

3. Art. I § 2 (the "toleration" provision)

Plaintiffs finally claim that the Board's approval of St. Isidore violated Art. I § 2, which provides that "[p]erfect toleration of religious sentiment shall be secured, and no inhabitant of the State shall ever be molested in person or property on account of his or her mode of religious worship." But the Board's approval of St. Isidore did not "molest," or disturb, anyone on account of their religion for three reasons.

First, attendance will be voluntary. Parents can choose to send their child to St. Isidore, a different charter school, or a traditional district school. No student, including any of Plaintiffs' children, will be required or coerced to attend.

Second, students who choose to attend St. Isidore will be free to practice their own faith because "[a]ll students are welcome, those of different faiths or no faith." Pet., Ex. A at 38; *see also id.* at 104 ("People of other faiths or no faith are welcome to attend our Catholic schools. They will not be required to affirm our beliefs."). St. Isidore will even promote "lively dialogue between young people of different religions and social backgrounds." *Id.* at 17.

Third, despite what Plaintiffs imply, "proselytizing" or "indoctrinating"—terms that appear nowhere in Art. I § 2—are not prohibited by this provision. *See* Pet. ¶ 259. If "proselytizing" or "indoctrinating" means teaching religion, as Plaintiffs suggest, that is not forbidden by this section because "[i]t is not the exposure to religious influence that is to be avoided." *See Murrow*, 171 P.2d at 602–03 (state could contract with Baptist orphanage even if it promoted Baptist faith).

G. Claim V Fails to State a Claim Because the Board Could Not Lawfully Enforce the Charter Schools Act's Non-Sectarian Provision.

Plaintiffs' Fifth Claim also claims that the Board's approval of St. Isidore violated the Act's requirement that a charter school be "nonsectarian in [its] programs ... and all other operations." Pet. ¶¶ 262–65 (citing § 136(A)(2)). But imposing that requirement would violate both the First Amendment's Free Exercise Clause and Oklahoma's Religious Freedom Act. Plaintiffs thus cannot state a claim for the Board's decision not to enforce that requirement.

1. St. Isidore Is a Private Actor Protected by the Free Exercise Clause.

Oklahoma charter schools are private actors and retain their constitutional rights. Because such schools are private actors, denying religious schools participation in the state's charter school regime is unconstitutional. *See infra* § G.2. To avoid a Free Exercise Clause violation, Plaintiffs argue that private schools, including St. Isidore, become state actors when they operate as charter schools. But this is wrong for at least four reasons.

First, St. Isidore, like all Oklahoma charter schools, are privately operated entities, and their actions are not attributable to the government. Privately operated organizations are state actors only when their actions are "fairly attributable" to the government. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999). In Oklahoma, charter schools are "freed—by design—from government control in order to foster educational pluralism." Ex. 1, at 2. "Their actions are not 'fairly attributable' to the government because operational autonomy is one of their reasons for existing." *Id.*

The Act and corresponding regulations prove this. For example, charter schools maintain their "own board of governance" and have substantial flexibility over curriculum. Okla. Charter Schools Program, Okla. State Dep't of Educ., https://perma.cc/WU35-MEJP. Charter schools are not required "to adhere to the Teacher and Leader Effectiveness standards set by the state of Oklahoma"; nor are charter school teachers required to hold valid Oklahoma teaching certificates. *Id.* Moreover, a charter school "may offer a curriculum which emphasizes a specific learning philosophy or style or certain subject areas," § 136(A)(3), and they are exempt "from the new core curriculum requirements for public schools," Op. Okla. Att'y Gen.

2022-7 (2022) at 2 (citing 1999 OK AG 64; § 136(A)(3)).

Second, neither the receipt of public funds nor substantial government regulation makes private schools state actors. In *Rendell-Baker v. Kohn*, the Supreme Court held that a private school for special-needs students was not a state actor even though it was heavily regulated by, and received more than 90% of its operating budget from, the government. 457 U.S. 830, 832–33, 843 (1982); *see also Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 (1974) ("The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State."). At least one Oklahoma court has agreed. *Bittle v. Okla. City Univ.*, 2000 OK CIV APP 66, ¶ 18, 6 P.3d 509, 516. ("The mere fact that a private educational institution may be regulated under state law, or receives direct and indirect federal assistance, does not elevate the acts of the private institution to 'state action.'"). What's more, Oklahoma charter schools are regulated *far less* than Oklahoma's public schools. Oklahoma charter schools are exempt "from all statutes and rules relating to schools, boards of education, and school districts." § 136(A)(5). This is telling because if charter schools were public-school equivalents, they would be subject to the same laws and regulations.[6]

Third, the U.S. Supreme Court has specifically rejected the notion that a private entity is transformed into a state actor merely because it was created by the government. In *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, the Court explained that although the United States Olympic Committee was created by the government, it was not a state actor. 483 U.S. 522, 542–47 (1987). The same is true here. That the Act authorizes charter schools does not transform these private entities into state actors.

Fourth, the descriptor "public" in the Act does not designate charter schools as state

[6] Applying *Rendell-Baker*, the Ninth, Third, and First Circuits have all held that schools chartered by or contracting with the state and receiving significant public funds are not state actors. *Caviness v. Horizon Cnty. Learning Ctr., Inc.*, 590 F.3d 806 (9th Cir. 2010) (Arizona charter school was not state actor even when designated as "public school" under state law); *Logiodice v. Trustees of Me. Cent. Inst.*, 296 F.3d 22 (1st Cir. 2002) (high school that contracted to serve all students in district was not state actor); *Robert S. v. Stetson Sch., Inc.*, 256 F.3d 159 (3d Cir. 2001) (school for juvenile sex offenders was not state actor because it did not perform traditionally exclusive state function). Splitting from those circuits, the Fourth Circuit ruled in a ten-to-six *en banc* opinion that a North Carolina charter school was a state actor subject to § 1983 claims. *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 115 (4th Cir. 2022). The Supreme Court declined to resolve this circuit split. 143 S. Ct. 2657 (2023).

actors. The U.S. Supreme Court has explained that a law's characterization of an entity does not control its state-actor status for constitutional purposes. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995) (finding Amtrak was state actor despite federal law categorizing it as private entity); *I.H. ex rel. Hunter v. Oakland Sch. for Arts,* 234 F. Supp. 3d 987, 992 (N.D. Cal. 2017) (noting it "unlikely that California law characterizing charter schools as 'public schools' will suffice to prove state action"). Consider *Carson v. Makin* as an example. There, Maine argued that its non-sectarian requirement was permissible because *private* schools were essentially required to provide a *public* education. 142 S. Ct. 1987, 1998 (2022). The Court rejected the argument, noting the many differences between *private* and *public* schools in the state, even though private schools were required to provide a "rough equivalent" to a public education. *Id.* at 1998–2000. Same here: the legislature's description of charter schools as "public" does not transform schools like St. Isidore into state actors. If mere labels were determinative, the Act could "be manipulated" to "reduc[e]" the First Amendment "to a simple semantic exercise." *Id.* at 1999.

In sum, Oklahoma charter schools differ from Oklahoma public schools in nearly every respect. Charter schools can be operated and established by private organizations or persons; they have substantial flexibility in terms of curriculum; they need not hire state-certified teachers; and they are exempt from all statutes and regulations that apply to public schools. *See* § 136(A)(5). As former Oklahoma Attorney General O'Connor explained, "the most significant factors—such as private operation and curriculum flexibility"—establish that charter schools are private entities. Op. Okla. Att'y Gen. 2022-7 (2022) at 14.

2. The First Amendment's Free Exercise Clause Bars Enforcement of the Act's Non-Sectarian Provision.

Because St. Isidore is a private entity protected by the Free Exercise Clause, and because the Board is obligated to uphold and protect the Constitution, the Board could not deny St. Isidore's application because of the school's religious character or exercise. Doing so would have violated the First Amendment. So Plaintiffs' Fifth Claim fails as a matter of law.

The U.S. Supreme Court has "repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits." *Carson*, 142 S. Ct. at 1996. The Court recently applied that principle "in the context of [three] state efforts to withhold otherwise available public benefits from religious organizations," including religious schools. *Id.*

First, in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017), the Court struck down a Missouri program that provided grants to nonprofit organizations to install cushioned playground surfaces but denied those grants to otherwise qualified religious organizations. *Id.* at 454. The Court held that the Free Exercise Clause did not permit Missouri to "expressly discriminate[] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." *Id.* at 462.

Second, in *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246 (2020), the Court held that "the Free Exercise Clause precluded the Montana Supreme Court from applying Montana's no-aid provision to bar religious schools from [a] scholarship program" "solely because of the religious character of the schools." *Id.* at 2254–55. The Court held that "[a] State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious." *Id.* at 2261. Montana's application of its no-aid provision put "school[s] to a choice between being religious or receiving government benefits" in violation of the Free Exercise Clause. *Id.* at 2257.

Third, in *Carson*, the Court invalidated a Maine program that paid tuition for students whose school district did not provide a public secondary school. 142 S. Ct. at 1997. Private schools were eligible to receive the tuition payments, but sectarian schools were not. *Id.* at 1993–94. Because sectarian schools were "disqualified from this generally available benefit 'solely because of their religious character,'" the program "'effectively penalize[d] the free exercise' of religion." *Id.* at 1997. The Court held that the Free Exercise Clause prohibited discrimination against a school's religious conduct—not just its religious status—because "use-based discrimination is [no] less offensive." *Id.* at 2001.

Here, the Act allows any qualified "private college or university, private person, or private organization ... to establish a charter school," § 134(C). If the Board were to reject St. Isidore because of its religious character, it would be violating the Free Exercise Clause in the same way the States did in *Trinity Lutheran*, *Espinoza*, and *Carson*. The Board may not "disqualify some private [organizations from the funding] because they are religious." *Espinoza*, 140 S. Ct. at 2261.

Strict scrutiny does not justify such blatant religious discrimination. *Carson*, 142 S. Ct. at 1997. "To satisfy strict scrutiny, government action 'must advance interests of the highest order and must be narrowly tailored in pursuit of those interests.'" *Id.* (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993) (internal citation omitted)). Here, the Board had no compelling interest to deny St. Isidore's application. "[A]n 'interest in separating church and state more fiercely than the [Establishment Clause] ... cannot qualify as compelling in the face of the infringement of free exercise.'" *Id.* at 1998 (citations omitted). And "a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause." *Id.* at 1997. "[I]n no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022). Simply put, the Board had no "antiestablishment interest" that would have "justif[ied] ... exclud[ing] some members of the community from an otherwise generally available public benefit because of their religious exercise." *Carson,* 142 S. Ct. at 1998.

Because applying the Act's non-sectarian requirements to deny St. Isidore's application would have violated the Free Exercise Clause, the Board's actions were not only proper, but mandated. As such, Plaintiffs fail to state a claim under the Act.

3. Oklahoma's Religious Freedom Act Bars Enforcement of the Act's Non-Sectarian Provision.

The Board is also bound by Oklahoma's Religious Freedom Act ("ORFA"), 51 O.S.

§ 251, *et seq.*, which—like its federal counterpart—"operates as a kind of super statute" and "displac[es] the normal operation of" and "supersede[s]" the Act. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020); *see also Beach v. Okla. Dep't of Pub. Safety,* 2017 OK 40, ¶ 14, 398 P.3d 1, 6, n.20 (pointing to federal Religious Freedom Restoration Act Cases in interpreting ORFA). Because applying the Act to deny St. Isidore's application would have violated ORFA, the Board's action was proper, and Plaintiffs' Fifth Claim must be dismissed.

ORFA prohibits the Board from substantially burdening St. Isidore's free exercise of religion "even if the burden results from a rule of general applicability." 51 O.S. § 253(A). ORFA thus prohibited the Board from denying St. Isidore's application unless the Board could satisfy strict scrutiny. *Id.* § 253(B). But as the Supreme Court has repeatedly made clear, prohibiting religious schools from participation in "neutral benefit program[s]"—like Oklahoma's charter school regime—falls well short of that demanding test. *Carson,* 142 S. Ct. at 1997. So the Board was compelled to approve St. Isidore's application.

What's more, just this year the legislature increased ORFA's protections by amending the law to declare it a "substantial burden" on religious exercise "to exclude any ... entity from participation in or receipt of governmental funds, benefits, programs, or exemptions based solely on the religious *character* or *affiliation* of the ... entity." Okla. Religious Freedom Act, S.B. 404 § 1 (May 2, 2023) (to be codified at 51 O.S. § 253(D)) (emphasis added). That's precisely the case here. St. Isidore is affiliated with the Catholic Church and intends to operate according to its religious beliefs, and ORFA prohibits the Board from burdening the school's religious exercise by denying it a charter under the Act. Because the Board was obligated to follow ORFA in applying the Act and ORFA trumps the Act as applied to St. Isidore, Plaintiffs' claim that the Act's non-sectarian requirement prohibited the Board's action fails as a matter of law.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the other defendants' motions to dismiss the Petition, which are incorporated herein, the Petition should be dismissed.

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Respectfully submitted,

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***Pro Hac Vice Application Forthcoming*

CERTIFICATE OF SERVICE

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