# Avoiding the Supreme Court's Religious Charter-School Trap: Governance Change for the New Legal Era

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## Executive Summary

Forty-six states and the District of Columbia permit charter schools to open. Of these jurisdictions, 33 states and the District of Columbia allow for the creation of independently governed and operated charter schools, entities that the Supreme Court may soon declare to be non-state actors and thus not bound by constitutional obligations. These states are now vulnerable to a one-two punch. First, the Supreme Court is likely to rule that denying institutions the opportunity to open religious charter schools amounts to unconstitutional anti-religious discrimination under the First Amendment's Free Exercise Clause. Second, the same clause has been invoked to exempt such religious school operators from basic laws governing public schools—including anti-discrimination statutes. This exemption could extend to open-meetings requirements, conflict-of-interest rules, due process protections, accountability frameworks, and transparency mandates—fundamental safeguards against fraud, mismanagement, and mistreatment.

State legislators who are troubled by public dollars flowing to schools that are exempt from the anti-discrimination and accountability standards required of traditional public schools have the power—and the responsibility—to act before these changes take hold. While the Supreme Court might prevent lawmakers from opposing religious charters because of religious practices such as prayer and devotional Bible reading that may occur during the school day, they can oppose religious charters because of that second punch: the very real risk that religious charters will use free-exercise arguments to avoid compliance with laws concerning anti-discrimination and

good governance. That is, lawmakers can step up to protect basic "publicness" elements of charter schools, maintaining their charter-school sectors by changing their governance structures.

Last year, in *Oklahoma State Virtual Charter School Board v. Drummond*, the U.S. Supreme Court deadlocked 4-4 (with Justice Barrett having recused herself) and thus fell just short of ruling that Oklahoma authorize the nation's first taxpayer-funded religious charter school. This (non)decision left intact a state supreme court ruling finding the school unconstitutional. But given that Justice Barrett is unlikely to recuse herself again, and given her record on similar free-exercise-clause cases, the Court is likely to resolve this question in favor of religious charter schools at the next opportunity—probably within the next two to three years, since new cases are already making their way through the federal court system. In fact, Florida's Attorney General has already greenlighted religious charter schools in his state.

The consequences for public education, taxpayer accountability, and civil rights protections of this new era will be profound. This brief explains those dangers and proposes a constitutional safe harbor for states seeking to preserve the public character of their charter schools. The most effective path forward is to convert states' "independent charter" laws into "district-governed charter" laws. That is, laws would shift from requiring independently governed, nonprofit-operated charter schools to requiring charter schools to be created, staffed, and governed by their authorizing school districts or another government entity.

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Several states have already adopted this more protective framework. Alaska, Kansas, Maryland, and Virginia have structured all of their charter schools to be governed by local school districts. In these states, no independent nonprofit corporation interposes itself as an ultimate governance entity between the authorizer and the school. Additional states, including California, Texas, and Wisconsin, have both independent and district-governed charter schools. Because district-governed charter schools are, when properly created and managed, unambiguously governmental entities, they are fully subject to constitutional requirements and civil rights laws. Under the First Amendment's Establishment Clause, governmental entities such as district-governed charters cannot be operated by a religious institution seeking faith-based exemptions.

A shift from independent charters to district-governed charters would bring meaningful governance and educational benefits. District-governed charters, subject to districtwide financial controls, procurement rules and professional auditing, would substantially reduce financial risk without sacrificing educational quality. When different states' charter school performance was ranked using the National Assessment of Educational Progress, the state that led all others was Alaska, where all charters

are governed by local school districts.

Our recommendation is that states with independent charter schools amend their charter-school law to shift to district governance. We outline a detailed set of provisions for such a state statute, including:

- Authorizers must be governmental entities subject to voter accountability or oversight by a democratically elected body;
- Authorizers must maintain governance authority over charter schools, including approval and control over each charter's budgets, fiscal policies, staffing plans, and core school policies;
- All charter-school staff and leaders must be employees of the authorizer or a designated governmental entity;
- Charter schools must fully comply with the state constitution and laws governing public schools, including open meetings, public records, ethics and conflicts, student rights, anti-discrimination and civil rights, due process, special education, procurement, and fiscal controls; and
- A transition pathway by which existing independent charters may convert within a defined period.

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## II. Introduction

Religious charter schools may soon be a reality—an unsettling truth. When parents send their children to U.S. public schools, they could generally trust that the children would not be presented with religious instruction. The U.S. Supreme Court in 1962 established this operational requirement in *Engel v. Vitale* by ruling that states cannot hold prayer in public schools.[1] Consistent with that understanding of what it means to be "public," federal and state laws define charter schools as "secular."

But in 2025, the U.S. Supreme Court came very close to upending this long-held belief by greenlighting the country's first religious charter school in the case of *Oklahoma State Virtual Charter School Board v. Drummond*.[2] St. Isidore of Seville Catholic Virtual Academy petitioned the Court to be governed and operated as a religious school by a local archdiocese and diocese, but with public taxpayer funding.

In an unsigned order, the justices reached a 4-4 (non)decision, leaving in place a state supreme court decision finding the school unconstitutional.[3] The Oklahoma Supreme Court's decision is soundly reasoned, explaining that charter schools are "governmental entities," even when they are governed by independent, nonprofit boards. The court correctly applied long-settled understandings of the U.S. Constitution's Establishment Clause.

But the current U.S. Supreme Court majority has exhibited a willingness to set aside prior understandings and precedent, including those related to the First Amend-

ment's religion clauses. In its recent rulings, the Court's majority has expansively viewed religious institutions and believers as entitled to maximal protections against perceived discrimination. As we describe in this brief, the Court has expanded protections for religious institutions, preventing enforcement of anti-discrimination and civil rights laws.[4] This reasoning now threatens to radically transform charter-school policies across the country, rejecting state laws that designate charters as "public schools" and that require these schools to remain secular and to comply with good-governance and anti-discrimination rules.

Just last month (April, 2026), the Supreme Court announced that it would review a lower court's decision holding that a publicly funded Catholic preschool must comply with Colorado's anti-discrimination laws.[5] If, as expected, the Court reverses that decision and rules in favor of the Catholic preschool, the reasoning will likely exempt other publicly funded religious schools from enforcement of anti-discrimination laws.

That reasoning would include any religious charter schools, and likely, the Court will not take long to open that door. Our expectation, and the transparent expectation of the law firms behind *Drummond* and similar litigation, is that the Supreme Court will agree to hear one or more of four cases that are already teed up: a proposed Christian brick-and-mortar charter in Knoxville, Tennessee, a proposed Jewish virtual statewide charter in Oklahoma, a Christian "contract" school in Colorado, and an independent study (homeschool) charter in California.[6] In addition, Florida's Attorney General released an office opinion in April 2026, greenlighted religious charter schools in his state, and stated that his office would not enforce legal restrictions on the opening of such schools.[7]

*The Court has expanded protections for religious institutions, preventing enforcement of anti-discrimination and civil rights laws.*

This maneuvering in Tennessee, Oklahoma, Colorado, California, and Florida is designed to force the issue. The Supreme Court has historically taken into account, in deciding whether to consider a case, the existence of disagreement and confusion about the state of the law—often called a "circuit split," in reference to varying decisions among U.S. Circuit Courts of Appeals.[8] We expect that the Supreme Court will hear one (or more) of these cases in the term that begins in October of 2027, with a decision handed down around June of 2028.[9] Such a ruling would raise and possibly answer the question: *Under what conditions must religious operators of independent charter schools comply with statutes and constitutional provisions that apply to district-operated public schools?*

The First Amendment to the U.S. Constitution includes two religion clauses: the Establishment Clause and the Free Exercise Clause. The Establishment Clause is the First Amendment provision that prohibits the government from "establishing" a religion. Earlier Supreme Court majorities spoke of the Clause as creating a "separa-

tion of church and state,"[10] but (as discussed later in this brief) the current Court's majority rejects that framing. The Free Exercise Clause is the First Amendment provision that protects individuals' right to practice their religion without government interference or penalty. The current Supreme Court majority has favored the Free Exercise Clause at the expense of the Establishment Clause. In other words, this Court has dramatically eased the way for claims alleging that the government has infringed on the free-exercise rights of a church or a believer. In doing so, it has created the conditions for two legal shifts that are relevant to this brief:

1. The Court appears ready to rule that states with charter schools governed by an independent private board cannot deny a charter application simply because the applicant wants to operate a religious school. Such rejections would, according to this reasoning, violate the Free Exercise Clause.

2. The Court's free exercise rulings could go further, paving the way for faith-based exceptions and exemptions that shield religious charter schools from laws and rules that apply to all other public schools. Publicly funded charter schools governed and operated by religious organizations—as would generally be the case with religious charter schools—might claim a constitutional right to opt out of the rules that apply to every other public school, if courts accept this reasoning.

We contend in this brief that the Oklahoma Supreme Court's decision should have been affirmed last year, thereby ending the possibility of religious charter schools. Charter schools are fundamentally different from private schools in that, among other things, they are state-created entities that exist only at the discretion of the state. However, the inclusion of Justice Barrett, a champion of expansive free-exercise jurisprudence, in any future decision on a similar case will likely tilt the Court in favor of religious charter schools.[11]

For states that currently allow for the creation of independently governed charter schools formed and governed by a private nonprofit corporation, the message is clear. Lawmakers who are invested in public education, good governance, and equitable access and treatment should understand that they face a one-two punch that could transform their educational landscape. First, the Supreme Court could find that states with laws creating independent charter schools cannot constitutionally deny people and organizations the opportunity to open religious charter schools. Second, the Court could neuter the anti-discrimination, accountability, and good-governance laws that would otherwise apply to these taxpayer-funded schools.[12] In fact, as noted above, the Court will be hearing a case (*St. Mary Catholic Parish in Littleton v. Roy*) next term that will likely land this second punch before it lands the first.

There is, however, a straightforward solution for those states that want their charter schools to be truly "public." States can create charter schools that eliminate pri-

vate governance and that are staffed and managed by public employees or officials. This model already exists: A handful of states have already developed a blueprint for others to follow. Government-entity charter schools, often referred to as "instrumentality" or "dependent" charter schools, are governed by public officers within the public-school district that authorizes them. That is, these charter schools are *instruments*—tools used by school districts to create innovative approaches to areas such as curriculum, instruction, and staffing. While the independent-charter approach places private nonprofit companies between the authorizer and the school, district-governed charters minimize the role of the "middleman," pursuing the benefits of charter schools without establishing a marketplace for private corporations. This alternative avoids governance by an independent nonprofit board, which is what provides the legal hook upon which the Supreme Court would create religious charter schools.

Lawmakers should pursue this statutory shift from independent charters to district-controlled charters as a way to guarantee that these schools operate under the same good governance requirements that public schools must follow. But by no means should legislators act *out of any animus directed toward the religious elements of religious charter schools or out of a desire to build a wall of separation between church and state*.[13] In fact, if a state were to reform its charter-school law by targeting *the religious elements* of privately operated religious charter schools, that reform in itself might be treated as discrimination against believers and thus a free-exercise violation.[14] Proof of motive or intent (called "anti-religious animus") would be key to such a legal challenge.

However, the Establishment Clause does still prevent the government itself from directly operating religious schools. Public-school teachers and other government employees still cannot, for instance, proselytize or instruct students to pray. Therefore, reforms that pursue the goal of ensuring that all charter schools remain subject to anti-discrimination, accountability, and transparency laws should survive legal challenges.

In summary, the Establishment Clause prevents government coercion to adopt religious beliefs or practices, such as compelled prayer or devotional Bible reading. The government cannot directly operate public schools that engage in such religious teaching. But the current Court majority has interpreted the Free Exercise Clause to constrain governmental decisions beyond these directly coercive policies and practices. A state is in danger of violating the Free Exercise Clause if, for example, it seeks to deny religious institutions opportunities to participate fully in a government program—even if that participation would result in the sorts of serious complications (e.g., faith-based discrimination) we discuss regarding religious charter schools in this brief. Yet lawmakers can legitimately prefer to direct taxpayer funding toward governmental entities that *must comply fully with anti-discrimination, account-*

*ability, and good-governance laws*.[15] Reforming a state's charter-school system in ways that bring that system further within the public realm ensures those protections. This goal can be achieved without engaging in debates over religious entanglement or separation of church and state. The need and benefits of charter law reform are pressing well beyond the question of religiosity.

## III. Review of the Literature: The Supreme Court's Precedents

The Supreme Court's recent decisions have substantially strengthened free-exercise protections while narrowing the range of policies that states may justify on anti-establishment grounds, dramatically raising the stakes for how states structure their charter-school programs. This section of the brief examines how courts have applied the so-called state-action doctrine to charter schools, traces key additional constitutional developments, and analyzes the Oklahoma *Drummond* litigation.

### State Action Doctrine

Charter school operators that are not part of a governmental entity must comply with the Constitution only if they are "state actors." This legal concept arises out of the general rule that, while the government must follow the Constitution, many constitutional provisions do not apply to private entities.[16] There are exceptions to this rule whereby private entities can be state actors, but the cases where courts make this determination "have not been a model of consistency."[17] In fact, the state-action doctrine calls upon courts to apply the doctrine uniquely to each case, to each instance of unique facts.[18]

For example, students attending traditional public schools—ones that are governed and operated by government-appointed or elected school boards—must follow constitutional requirements for due process when suspending or expelling students. Private schools are, in contrast, not obligated to do so,[19] but the answer is not as clear in the case of privately governed, independent charter schools in the 33 states and the District of Columbia that require charter schools to be governed by charter boards that are independent of school districts.[20] Unless the "state actor" exception applies, these private corporations would not be required to comply with a wide array of constitutional mandates.[21]

Two federal circuit courts have examined whether nonprofit charter-school corporations are state actors. They reached different conclusions. In a 2010 employment dispute, a U.S. Court of Appeals (for the Ninth Circuit) held in *Caviness v. Horizon Community Learning Center* that an Arizona nonprofit corporation that ran a charter school was not a state actor.[22] A former teacher alleged that he was entitled to due process prior to nonrenewal of his contract and the school's refusal to provide a good reference as he sought

another teaching job. The court reasoned, among other things, that the nonprofit corporation was a private actor because it was not providing a traditional and exclusive governmental service, and it was merely a private entity that contracted with the state to provide educational services. In this case, then, the charter-school operator was not a state actor in its role as an employer.

In contrast, in a 2022 case involving students' allegations of sex discrimination, a different U.S. Court of Appeals (for the Fourth Circuit) held in *Peltier v. Charter Day School*[23] *that a North Carolina corporation that operated a charter school was a state actor under the Equal Protection Clause.*[24] In that case, the court held that the charter-school operator was engaged in state action. The court walked through a wide variety of factors that made the school alternatively more private (e.g., the operator's resemblance to a private contractor) or more public (e.g., "charter schools must design their educational programming to satisfy student performance standards adopted by the state board of education, a requirement not applicable to non-public schools"). A key factor was a provision in the state's enabling legislation providing that "employees of charter schools are public school employees" for purposes of benefits. And, of course, the corporation was carrying out the traditional and exclusive governmental function of providing a free public education under the state constitution.

In general, judges in charter-school cases will take into account the state's statutory designation of the schools as public as well as the public funding of the schools. But they also consider

> whether the private entity is fulfilling (or even replacing) a function that has been understood as public, . . . the degree to which the private entity is being regulated by the state, and the [specific terms set forth in] the contractual relationship between the state and the private entity.[25]

While we typically frame these cases as determining whether the private entity is a *state actor*, these two Circuit Court cases illustrate that a more helpful framing is whether the private entity is engaging in *state action*. This state-action framing is preferable because a private entity, such as a nonprofit operating a charter school, can be a state actor with regard to some types of actions but not a state actor with regard to other types of actions. For instance, the charter school involved in the *Caviness* case was found not to be a state actor in its employer role, but it could very well have been a state actor in its instructional or student-discipline roles.

In the case of religious charter schools, the most pertinent constitutional provision restricting state actors is the Establishment Clause. Among other restrictions, this provision forbids governmental entities and state actors from operating religious schools. For purposes of the core question of the Establishment Clause's prohibition of religious public schools, a court should first consider the question of whether the charter school is a governmental entity. If that court determines that the school is

not a governmental entity, then the question becomes whether it is engaging in state action. A court following the *Caviness* (Fourth Circuit) path would not require the private company to operate only secular schools. But if the court follows the *Peltier* (Ninth Circuit) path, then the private entity must operate only secular schools. The Oklahoma Supreme Court in *Drummond*, after concluding that the charter school would be a governmental entity, reached the additional conclusion that the school would—even if not a governmental entity—be a state actor.

## Free Exercise Clause

If the Supreme Court decides in one of these upcoming cases that independent charter schools are not governmental entities and that a private charter-school operator is not a state actor for Establishment Clause purposes, it will very likely hold that a state law prohibiting religious charter schools violates the Free Exercise Clause, which prevents the government from unduly infringing on religious beliefs and practices. This section details the precedents setting the stage for such an upcoming Supreme Court ruling.

### *A. Removing Anti-Establishment Justifications*

In a 2002 decision, the Court ruled in *Zelman v. Simmons-Harris*[26] that a voucher program for Cleveland students did not violate the Establishment Clause. The Court reached this conclusion even though most participating students used the voucher to attend religiously affiliated schools. The Court reasoned that there was no constitutional violation because parents, not the government, chose for students to attend religious schools using the public funding the voucher provided.[27]

Fifteen years later, in 2017, the Court held in *Trinity Lutheran Church of Columbia v. Comer*[28] that a Missouri agency violated the Free Exercise Clause when it denied a playground-resources grant to a church-run day care center. The Court reasoned that the state was discriminating against religious entities by categorically excluding them from the program. In *Espinoza v. Montana Department of Revenue* (2020),[29] the Court found that a Montana tax-credit-scholarship (voucher) program, which prohibited voucher recipients from using the funding at religious schools, violated the Free Exercise Clause—again because the exclusion was based on religious status. And finally, in *Carson v. Makin* (2022),[30] the Court ruled that the state of Maine ran afoul of the Free Exercise Clause by excluding schools that refused to offer nonsectarian instruction from its tuition assistance program. The program funded students' private school attendance in areas of the state with no available public-school option. While the program allowed schools operated by religious institutions, the public funding could not be used for religious purposes, such as worship, religious instruction, and proselytizing. That is, while *Trinity Lutheran* and *Espinoza* concerned laws that excluded funding based on religious identity or status, the Court

held in *Carson* that Maine could not prohibit religious uses of that funding.

In each of these three most recent cases, the Court rejected the state's anti-establishment justification. Consequently, concerns about the separation of church and state or about the entanglement of the state with religious institutions are now considered illegitimate discrimination against the faithful—unless the policy is necessary to avoid a violation of the Establishment Clause.[31] As Justice Sotomayor concluded in her dissent in the *Carson* case,[32] "Today, the Court leads us to a place where separation of church and state becomes a constitutional violation."[33]

### *B. Granting Religious Institutions and Believers "Most-Favored-Nation" Status*

In a 1990 decision called *Employment Division v. Smith*,[34] the Supreme Court held that generally applicable and neutral laws that incidentally burden religion are only subject to rational basis analysis. This level of scrutiny is much less onerous than strict scrutiny, requiring only a rational relationship between the policy and a legitimate governmental purpose. (Strict scrutiny requires the government to show that the policy satisfies a compelling governmental interest and is narrowly tailored to achieve that interest.) For the next few decades, this *Smith* decision allowed the government to enforce laws that did not target religion but that did incidentally place burdens on religion—burdens comparable to those of larger society.

However, the Court adopted a very different meaning of *Smith*'s "generally applicable" and "neutral" language in a 2021 case called *Tandon v. Newsom*[35] that was decided on the Supreme Court's emergency (or "shadow") docket.[36] The Court stated, "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise."[37] The "comparable secular activity" was defined broadly by the Court, meaning that if a policy has any exceptions for roughly comparable secular institutions or people, it will be subject to strict scrutiny. This rule does not work the other way around: A policy can safely benefit religious institutions and discriminate against secular ones. The Court's approach gives religious institutions and individuals what commentators call "most-favored-nation" status.[38]

### *C. Claimed Protections for Faith-Based Discrimination and Other Activities*

State leaders aligned with the core goals of good governance will want to apply anti-discrimination laws, open meeting laws, competitive bidding and conflict-of-interest laws, due process protections, testing and accountability laws, transparency laws, privacy laws, and the like to their independent charter schools. In each instance, they will have to defend that application against free-exercise challenges if the Supreme Court opens the door for religious charter schools. In fact, the lawyer representing St. Isidore during the *Drummond* oral argument expressly stated that

religious charter schools are entitled to free-exercise protections for faith-based discrimination.[39]

One pertinent legal concept is the "ministerial exception," which protects against governmental interference in the employment relationship between religious institutions and their ministers. In *Our Lady of Guadalupe School v. Morrissey-Berru,* the Court defined "ministers" to include teachers in private religious schools, preventing them from pursuing employment discrimination claims.[40] (One plaintiff teacher had alleged age discrimination, and the second alleged that she was discharged because she had requested a leave of absence to obtain treatment for breast cancer.) As long as a teacher's duties include "[e]ducating and forming students in the . . . faith," the exception generally applies.[41]

Privately operated religious schools enjoy a variety of other protections against state interference, sometimes because of entanglement concerns and sometimes due to concerns that a given state policy would burden religious practice. It is not clear how these protections will play out when the context is shifted from private schools operated and governed by religious institutions to charter schools operated and governed by religious institutions.

But the Supreme Court will be deciding, in the summer of 2027, a case out of Colorado called *St. Mary Catholic Parish in Littleton v. Roy*.[42] Colorado has a publicly funded preschool program that uses a "mixed delivery system," meaning that both public and private preschools are welcome to participate and receive taxpayer funding, including private religious schools. A Catholic preschool filed a free-exercise challenge to the state's requirement that preschools receiving state funds sign a nondiscrimination agreement. All participating schools are required to comply with nondiscrimination rules for the following categories: race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability.[43] As the case has been framed for the Supreme Court, the decision will focus on how the *Employment Division v. Smith* rule should be applied, in light of the *Carson v. Makin* decision.[44]

*Lawmakers in states with independent charter schools face a choice.*

Setting aside the legal machinations, the crucial policy fact is that this Supreme Court has decided free-exercise cases consistently in favor of plaintiffs like St. Mary Catholic Parish. It would therefore be an enormous surprise for the Court to disrupt that pattern here. Combining the *St Mary* case with a likely charter-school case in the following year, this means that lawmakers in states with independent charter schools face a choice. They can either (a) wait passively for the Court to radically transform their charter-school landscape or (b) preserve their charter-school sectors by changing governance structures. The latter approach maintains the basic "publicness" elements of charter schools; the former places key charter-school laws (involving anti-discrimination, accountability, trans-

parency and good governance) at risk.

## IV. *Drummond* and Bringing Charters Further Into the Public Realm

### A. The Oklahoma State Supreme Court Decision

In the Oklahoma charter-school controversy that resulted in the *Drummond* decision, the state supreme court examined whether the proposed religious charter school is a public entity and/or a state actor under the state constitution and the federal Establishment Clause. The Oklahoma attorney general, Gentner Drummond, challenged a state authorizing agency's approval of the proposed St. Isidore Virtual Charter School, alleging that the charter contract with the local archdiocese and diocese violated the Establishment Clause.

The state's supreme court agreed, finding that the school was a public entity and, in the alternative, a state actor. In reaching this conclusion, the court found *Peltier* to be instructive about the various features that make charter schools state actors. Among other things, the school could not exist without being created by the state, and it would perform the traditional, exclusive function of providing free public education under the state constitution. Comparable to the policy at issue in *Peltier*, St. Isidore's decision to operate as a religious school would implicate and impact the school's core educational function, which in turn, impacted the constitutional responsibility that the state delegated to the school.

Because the state court found that St. Isidore was a "governmental entity" (and, as a backup argument, also concluded that St. Isidore was engaging in state action), it followed that the school must comply with the Establishment Clause.[45] St. Isidore violated this provision because it would fully incorporate Catholic teaching into every operation of the school, require students to participate in religious instruction and activities, and use state funding to directly support the school's religious curriculum and activities.

The court further found that the Free Exercise Clause and the Supreme Court's recent *Trinity Lutheran*, *Espinoza*, and *Carson* cases were inapplicable to the case because St. Isidore was a public school, not a private school. Additionally, unlike the private entities in the free-exercise cases, St. Isidore was created to carry out the state's constitutional objectives.

### B. U.S. Supreme Court

The Supreme Court decision to hear the case on appeal raised concerns that it would

greenlight religious charter schools governed and operated by private entities. However, the case also presented an opportunity for the Court to clarify the conditions under which charter schools are truly "governmental entities" for constitutional purposes.

The April 30, 2025, oral arguments[46] in *Oklahoma State Virtual Charter School Board v. Drummond* reveal approaches states could adopt that would establish charter schools as state actors for *all* constitutional purposes. Consider the following exchange between Justice Gorsuch and U.S. Solicitor General Sauer during the *Drummond* oral arguments, in which the Solicitor General explains the characteristics of a government entity school[47]:

> JUSTICE GORSUCH: If a state wanted to avoid the choice issue here by making charter schools government entities, what would it have to do?
>
> U.S. SOLICITOR GENERAL SAUER: Certainly, one way it could do it is create them directly by statute and have them **controlled by directors who are themselves public officials**.
>
> My understanding is that California's system is somewhat like that.[48] There may well be other states where they really are government entities, they're part of the government. . . .
>
> JUSTICE GORSUCH: So a holding here is – may apply in some states and may not apply in others?
>
> U.S. SOLICITOR GENERAL SAUER: Exactly right. And **states would have the option to restructure their programs if they wanted to, you know, have these be government-run entities**.

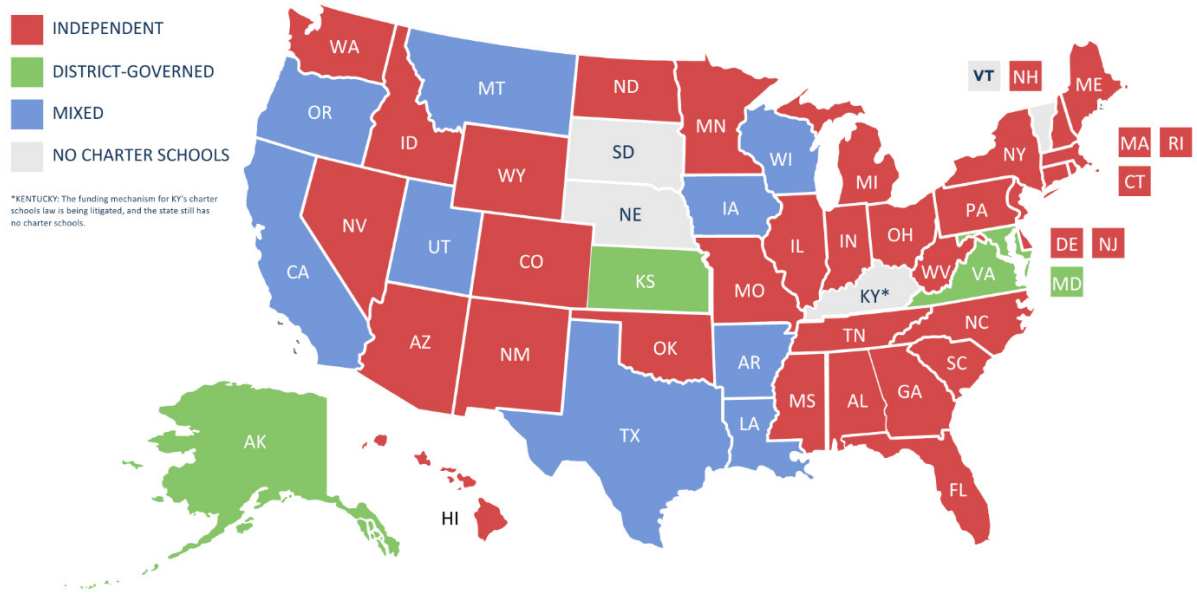
As the Solicitor General clearly states, a holding that opened the door for religious charters schools would not apply to states that restructure their charter-school systems to be controlled by public officials. Those schools would be "government-run" entities.[49] (Again, the Court in the *Drummond* case deadlocked 4-4, which meant that the Oklahoma Supreme Court decision was left undisturbed and the St. Isidore charter school did not open.)

## V. Recent Developments: Charter-School Variations: Illustrating the Importance of Creation and Governance

The above exchange regarding the governance of charter schools highlights the importance of fully understanding states' different approaches to charter schools across the nation. Figure 1 illustrates the present landscape of charter-school governance by state. States colored red only allow charter schools that are governed by indepen-

dent boards. States colored green mandate district-governed charter schools. States colored blue allow both independent and district-governed charter schools. Finally, those in gray do not have a charter-school law.

**Figure 1: State Law Approaches to Charter Schools**




Source: Authors' review of each state's laws.

As Figure 1 shows, 33 states and the District of Columbia require charter schools to be governed and operated by independent governing boards.[50] The Supreme Court will, in all likelihood, require these states to allow religious charter schools. In states with both independent and district-governed charters, independent charter schools could be religious. These states will very likely soon be barred from mandating that independent governing boards be secular or to operate secular charter schools.[51] Also, we predict that these new religious charters will receive faith-based exemptions from a variety of good governance and anti-discrimination laws.

As noted in Figure 1, four states—Alaska, Kansas, Maryland, and Virginia—require all charter schools to be district-governed charter schools. For example, Maryland statutes specify that only local boards of education can authorize and issue charters.[52] Charter-school employees are considered district employees and are part of the district's bargaining units. The district superintendent is responsible for approving budgets and personnel, and students are reassigned by the district if a charter school closes. Governance and operational control remain firmly with the local education agency. Because charter schools in these states are governed by school boards, they would qualify as government entities and would therefore have to comply with the Establishment Clause.[53]

According to our review of state charter laws, nine states employ *mixed systems* in which some charter schools are created and governed by districts, while others are governed independently by private operators. For example, Wisconsin's charter statute explicitly distinguishes between what it calls instrumentality (district-governed) charter schools and non-instrumentality and independent charter schools.[54] This designation matters. Wisconsin may, after the next Supreme Court decision, be required to allow religious entities to operate non-instrumentality and independent schools, which could mean that some of the state's charter schools will fall outside of public oversight and anti-discrimination laws.[55]

While district-governed charter schools in these states appear to comfortably fit within the legal constraints that the Supreme Court has created and is still creating, we strongly recommend that legislators carefully review the state statutes themselves—including in Alaska, Maryland, Kansas and Virginia—to ensure that they are worded to avoid giving rise to any discretion to reinsert elements of independent charter schools. That discretion could be exploited in litigation by those attempting to create religious charter schools.

## VI. Discussion and Analysis: Advantages of District-Governed Charter Schools

To avoid the radical transformation that we believe is coming in the next two to three years, states should create district-governed charters. The approach offers a variety of advantages over independent charter schools, even beyond the legal safe haven in that it adheres to the original vision of charters as schools of innovation and choice.

When charter-school advocates sought to use scores from the Nation's Report Card (the "National Assessment of Educational Progress," or NAEP) to rank states' performance, the state that emerged as clearly in front was Alaska[56]—one of the states that uses the district-governed approach. While the academic outcomes from charter schools on the whole are about the same as outcomes in conventional public schools,[57] this NAEP study suggests that shifting to a district-governed approach might be one way to promote overall sector improvement.[58]

Democratic accountability is strengthened when governance rests with elected school boards answerable to the full community. Student stability is enhanced because districts can intervene before a school fails, preventing abrupt closures that disproportionately harm low-income students, students with disabilities, and English learners. Equitable access to services is better assured when charter schools share districtwide obligations for special education and student support. Teachers benefit from standardized credentials, salary schedules, and collective bargaining rights that reduce the high turnover undermining instructional quality in many in-

dependent charter schools.

Moving charter schools further into the public realm would also align with public opinion. The only national survey that has asked about religious charter schools revealed clear public opposition. The survey was conducted last June, in the wake of the Supreme Court's 4-4 decision in the Oklahoma *Drummond* case. AP-NORC asked respondents whether they favor or oppose "allowing religious schools to become tax-funded public charter schools."[59] The results show almost two-to-one opposed: 23% to 43%. The disaggregated numbers show an even starker opposition among those expressing strong opinions: 10% strongly favor, but 26% strongly oppose.[60]

Below, we briefly explain eight advantages of the district-governed approach, beyond the immediate need to protect against the public funding of schools that are relieved from the anti-discrimination and good governance laws that public schools must follow.

### A. Democratic Accountability

Public education is a civic institution, not a private enterprise. District governance ensures that charter schools remain accountable to voters and communities. When charter schools operate under school districts, they are governed by the same democratic structures as other public schools. They are overseen by school boards or, in some cases, mayors, elected by all members of the community, not self-perpetuating private boards.[61] Decisions about budgets, leadership, school openings or closures, capital projects, and academic performance are made in public meetings, subject to open-records laws and public comment. These protections have, in the past, been challenged as inapplicable by some charter schools.[62] Community members who are dissatisfied with decisions should have a clear line of accountability through school board or mayoral elections.

### B. Stronger Financial Oversight and Fewer Conflicts of Interest

Many of the most serious charter scandals—fraud, embezzlement, inflated leases, and sweetheart contracts—arise from weak oversight and conflicted governance. District oversight better protects public funds. District-governed charter schools are subject to districtwide financial controls, procurement rules, auditing requirements, and ethics policies. These safeguards limit opportunities for self-dealing, related-party transactions, and opaque contracting with management companies or real-estate affiliates. Districts also bring professional finance capacity that many individual charter boards lack.

### C. Stability and Continuity for Students and Families

Charter schools housed within districts benefit from district intervention and support when enrollment, finances, or leadership falter. Rather than closing abruptly, districts can reorganize, provide temporary management, or transition students smoothly into other district schools while preserving records and services. Failed charter schools are often reincorporated into districts as public schools.

### D. Equitable Access to Student Services

Fragmented systems can lead to inequities. A unified district structure helps ensure that all students—regardless of need—receive appropriate services. District-governed charter schools share responsibility for special education, English learner services, transportation, food services, and student supports under districtwide policies. This structure reduces incentives to avoid enrolling high-need students and ensures consistent service delivery.

### E. Teacher Stability, Professionalism, and Workforce Protections

High teacher turnover undermines instructional quality and school culture. Stable, professional working conditions help attract and retain experienced educators and reinforce teaching as a public profession rather than as a disposable labor force. Teachers in district-governed charter schools are more likely to work under standardized salary schedules, credentialing requirements, due process protections, and professional norms consistent with the district. This reduces turnover, supports career longevity, and strengthens professional collaboration across schools. If the school closes, they are assigned to a district school in accordance with collective bargaining agreements.

### F. Better Coordination and Systemwide Planning

Uncoordinated charter expansion can drain resources and enrollment from existing schools, with both public and charter schools competing for students. Under-enrollment is the primary cause of charter-school closure.[63] Systemwide planning strengthens the public-school ecosystem as a whole. Charter schools within districts can be planned and sited in coordination with enrollment trends, facility capacity, and community needs. District oversight prevents oversaturation, duplication of programs, and destabilization of neighborhood schools.

### G. Student Protections and Fair Discipline Practices

District governance of charter schools ensures that discipline is fair, transparent,

and consistent with state law, federal civil-rights protections, and constitutional due process—protecting students while maintaining orderly schools. When charter schools operate within a school district under the authority of an elected school board, they are subject to districtwide student discipline codes, all state regulations regarding suspension and expulsion, due process protections, and grievance procedures. Disciplinary decisions must also follow established policies governing suspensions, expulsions, manifestation determinations for students with disabilities, and parents' rights to appeal.

### H. Alignment With the Original Charter Vision

Innovation should strengthen public education, not fragment it. Early charter school advocates envisioned schools operating within the public system—innovative, accountable, and collaborative.[64] District governance allows successful practices to be shared systemwide rather than isolated in parallel systems.

## What a Shift to District-Governed Charter Schools Would Look Like

The legal issues discussed at the outset of this brief describe the threats facing states with independent charter schools. Bringing charter schools safely within the public realm will ensure the continued applicability of current rules and protections regarding anti-discrimination, accountability, transparency and good governance.

The recommended approaches set forth below in Tables 1 and 2 describe the steps that states can take to create this safe haven and thus to meet the definition of a charter school as a "governmental entity" even under the most constrained interpretation by the current Supreme Court majority. If such steps were taken, charter schools would maintain constitutional and statutory protections for students, teachers, and others in the school community. A more detailed version of these steps is set forth in the online Appendix to this brief.[65]

Most fundamentally, the governmental entities that serve as authorizers (typically and preferably school districts) should maintain governance authority over charter schools, including approval and control over each charter's budgets, fiscal policies, staffing plans, and school policies. If that authority is delegated to a different body, that second body must be majority-controlled by the original governmental entity or a similar governmental entity. In addition, all charter-school staff and leaders must be employees of the authorizer or a similar, designated governmental entity. Finally, the charter schools must fully comply with the same set of anti-discrimination, accountability, and transparency laws that other public schools are subject to. The Appendix provides more detailed provisions that are central to the reform, as well as

some that would also be helpful.

State legislators should approach charter-reform legislation with an understanding that any concerns about separation of church and state, beyond what is required by the Establishment Clause itself, are currently viewed by this Supreme Court as a form of discrimination against religious people and religious institutions. Instead, the goal of state charter law reform must be to advance interests around nondiscrimination and access, local democratic control, transparency and accountability, curricular standards, and good governance. Religious charter operators are likely to claim broad exemptions from public accountability requirements. They may argue that free-exercise protections shield them from state curriculum, testing, and instructional standards. They may invoke the same protections to avoid open-meetings laws, conflict-of-interest rules, and fiscal-transparency requirements. And they will likely assert the ministerial exception and related interests to sidestep oversight of employment discrimination, hiring, teacher qualifications, and professional development.

The enforceability of anti-discrimination protections is paramount, since schools that are operated by churches already have active litigation seeking court determinations that the Free Exercise Clause can make these laws unenforceable—including the *St. Mary* case that the U.S. Supreme Court will hear in the term that begins in October.[66]

**Table 1: Core Legislative Framework**

| | |
|---|---|
| 1.DEFINITION AND STATUS | Instrumentality charter schools are public schools created, operated, and governed as instrumentalities of local school districts. They are governmental entities for all constitutional and statutory purposes. |
| 2.AUTHORIZER REQUIREMENTS | Authorizers must be local school districts or other governmental entities, subject to voter accountability. (For shorthand, we refer here simply to school districts as authorizers.) |
| 3.GOVERNANCE STRUCTURE | • Under ultimate control of district board of education<br>• School Advisory Council for school and community input and day-to-day operations<br>• Board approves budgets, staffing, contracts, and core policies<br>• Subject to open meetings and public records laws<br>• Provided with freedom to innovate pursuant to the charter contract<br>• Schools cannot contract out for governance, employment control, fiscal decision-making, or school management |
| 4.EMPLOYMENT | • District public employees and participate in public retirement systems<br>• Covered by district collective bargaining agreements<br>• Same credentialing and evaluation requirements as staff at other district schools |
| 5.ADMISSIONS | Open enrollment, with no selective criteria, as with other district schools |
| 6. STUDENT PROTECTIONS | • Follow the district discipline code, with same due process protections<br>• Compliance with constitutional rights and civil rights laws |
| 7. SPECIAL EDUCATION | • Full IDEA and Section 504 compliance<br>• Serve students with disabilities at similar levels to other district schools |
| 8. FINANCIAL CONTROLS | • Funding flows through the district<br>• Subject to public procurement rules, including bidding rules<br>• Annual independent audits<br>• All assets purchased with public funds are owned by the school district |
| 9. ACCOUNTABILITY | • Participate in state/district accountability systems<br>• Time-limited contract waivers allowed only for innovation, not core protections |
| 10. TRANSPARENCY | • Same public reporting on enrollment, achievement, and finance as other district schools<br>• Same ethics and conflict-of-interest compliance as other district schools |

**Table 2: Transition Provisions for States With Existing Independent Charter Schools**

| | |
|---|---|
| 1.IMMEDIATE ACTIONS | • Stop authorizing new independent charters<br>• No renewals except as conversions to district-governed status |
| 2.CONVERSION TIMELINE | • Existing independent charters have 24 months to apply for conversion<br>• Must address: governance changes, staff employment, asset transfers, contract obligations |
| 3.DISTRICT ASSUMPTION OF CONTRACTS AND LEASES | • At or below fair market value<br>• Free of conflicts of interest<br>• Compliant with procurement laws<br>• Beneficial to school operation |
| 4.SUPPORT | • State provides technical assistance<br>• Transitional funding available<br>• Priority for special education and facility needs |
| 5.REQUIRED CHARTER SCHOOL CONTRACT TERMS | • Performance standards<br>• Audit access rights<br>• Conflict-of-interest disclosures<br>• Data privacy protections<br>• Termination-for-cause clauses<br>• Five-year renewal limit |

## VI. Conclusion

Our overarching recommendation is that states with independent charter schools amend their charter-school laws to shift to the district-governed approach in order to advance interests around nondiscrimination and access, local democratic control, transparency and accountability, curricular standards, and good governance. This brief has therefore outlined the legal basis and implications of such a change. We also note that the district-governed approach is in line with popular opinion about how our education system should develop school choice options while maintaining public control over tax dollars.

Among the most significant provisions that should be included in revised state statutes are the following:

- Authorizers must be governmental entities subject to voter accountability or oversight by a democratically elected body;
- Authorizers must maintain governance authority over charter schools, includ-

ing approval and control over each charter's budgets, fiscal policies, staffing plans, and core school policies;

- All charter-school staff and leaders must be employees of the authorizer or a designated governmental entity;
- Charter schools must fully comply with the state constitution and laws governing public schools, including open meetings, public records, ethics and conflicts, student rights, anti-discrimination and civil rights, due process, special education, procurement, and fiscal controls; and
- A transition pathway by which existing independent charters may convert within a defined period.

## Notes and References

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

2 *Oklahoma State Charter School Board v. Drummond*, 605 U.S. 165 (2025).

3 *Drummond ex rel. State v. Oklahoma Statewide Virtual Charter School Board*, 558 P.3d 1 (2024). Justice Amy Coney Barrett recused herself from the case, probably because of one or both of two factors: (1) her former employer, the University of Notre Dame, ran a law clinic representing the proposed school, and (2) a close friend of hers played a large role in creating the Catholic charter school.

4 See, for example, *Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U.S. 732 (2020), holding that anti-discrimination laws do not apply to teachers who engage in religious instruction at religious schools.

5 *St. Mary Catholic Parish in Littleton v. Roy*. The lower-court opinion, which the Supreme Court will be reviewing, is reported at 154 F.4th 752 (10th Cir., 2025).

6 Jacobson, L. (2025, December 5). After deadlocked supreme court case, more states jump on religious charter bandwagon. *The 74*. Retrieved March 1, 2026, from https://www.the74million.org/article/after-deadlocked-supreme-court-case-more-states-jump-on-religious-charter-bandwagon/. The Colorado case involves a Christian elementary school that was created through a contract between the school's operators and a "Board of Cooperative Educational Services," or BOCES, which are typically created by school districts to help in providing professional development opportunities, technical assistance, advocacy, and research. Education reEnvisioned, the particular BOCES that entered into the religious-school contract, specifically intended to create a test case for the U.S. Supreme Court. See Schimke, A. (2025, November 12). Christian law firm's search for test case led to religious public school in Colorado, emails suggest. *Chalkbeat Colorado*. Retrieved March 1, 2026, from https://www.chalkbeat.org/colorado/2025/11/12/alliance-defending-freedom-sought-religious-public-school-emails-suggest/. Because the underlying legal principles are very similar, a resolution of the Colorado "contract school" arguments could easily create a clear precedent regarding charter schools. A lawsuit in the Tennessee dispute was filed in federal court on November 30, 2025; a lawsuit in the Colorado dispute was filed in federal court on February 13, 2026; and a lawsuit in the Oklahoma dispute was filed on March 24, 2026. The California case is the most advanced, with a petition for *certiorari* at the Supreme Court expected to be filed soon. The case could therefore be heard in the term beginning in October 2026. The plaintiffs in that case are Christian homeschoolers who challenged the state's rule that prohibited them from using the school's resources to purchase and use sectarian curricular materials for instruction in the independent study charter-school programs. *Woolard v. Thurmond*, 152 F.4th 1050 (9th Cir. 2025), Amended and Superseded on Denial of Rehearing en banc by *Woolard v. Thurmond* (9th Cir., 2026), 2025 WL 4662285 (2026).

7 Uthmeier, J. (2026, April 2). *Letter stating attorney general's official opinion*. Retrieved April 3, 2026, from https://www.myfloridalegal.com/sites/default/files/From%20the%20desk%20documents/opinion-4.2.26.pdf. Florida already has five Classical charter schools that are members of Hillsdale Christian College K-12 project as well as Ben Gamla charters which requested to open a Jewish online charter school in Oklahoma. It is likely that these charter schools, as well as other

charter schools in the state, will request to teach a religious curriculum.

8 See Dallas, K. (2026, February 17). *The art of the circuit split: An explainer*. SCOTUSblog. Retrieved March 1, 2026, from https://www.scotusblog.com/2026/02/the-art-of-the-circuit-split-an-explainer/

9 Just a couple months after the Supreme Court's 4-4 tie in *Drummond*, advocates at the American Enterprise Institute had sketched out the likely quick return of the issue to the Court. After explaining the Court's clear direction, the AEI authors wrote, "A Drummond successor should thus confirm, at least with the Court's current composition, that excluding religious schools from charter programs violates the free exercise clause." Shapiro, I. & Rosenberger, T. (2025). *The tie goes to school choice? Public funding of parochial schools after the Drummond deadlock. Sketching a new conservative education agenda*. American Enterprise Institute. Retrieved March 1, 2026, from https://files.eric.ed.gov/fulltext/ED677906.pdf

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

11 See the discussion of the current Court, including Justice Barrett, in Vladeck, S. (2021). 15 N.Y.U. J.L. & Liberty 699. *The most-favored right: COVID, the Supreme Court, and the (New) Free Exercise Clause* (pp. 699-750). As Vladeck explains, Justice Barrett facilitated the Court's "dramatic expansion in the Supreme Court's interpretation of the Constitution's Free Exercise Clause" (p. 703).

12 If the Supreme Court determines that independent charter schools are neither governmental entities nor state actors—as expected—states will be forced to create religious charter schools. Lawmakers who prefer their current system will have no choice: the transformation of their charter-school sectors will be imposed on them. This is true even where state laws expressly designate charter schools as public schools and part of the public-school system—a designation that may feel reassuring but will offer no legal protection. These lawmakers may wish to retain their current system of charter schools, being disinclined to make any modifications of their charter-school laws. After all, these laws expressly state that the charter schools are public schools and are part of the state's public-arschool system. The lawmakers may want to take comfort in that clear designation. That choice, however, is not going to be available if, as expected, the Supreme Court determines that independent charter schools are neither governmental entities nor state actors. By doing so, the Court would require states with independent charters to open to door to religious charter schools. That is, the transformation of charter-school sectors will be forced upon most of our states.

13 Until recently, states could indeed draft laws that furthered so-called "separation of church and state" interests set forth in their state constitutions and in the founding documents for the nation. Those interests were historically treated by courts as accomplishing valuable goals, such as preventing entanglement between government and religious institutions. The current Supreme Court majority has, however, firmly rejected these ideas.

14 See *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982). Advocates for the expansion of public funding for private religious schools have been aggressive in recent years in asserting that facially neutral policies denying such funding were in fact adopted with religious animus, in violation of the Free Exercise Clause. See, e.g., *Hile v. Michigan*, 86 F.4th 269 (6th Cir. 2023).

15 The U.S. Supreme Court has unambiguously stated, "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." *Espinoza v. Montana Department of Revenue*, 591 U.S. 464, 487 (2020). That first statement—that a state is not required to subsidize private education—is rendered meaningless if it cannot modify its laws to end or avoid such subsidies. That is, if courts routinely impute religious animus to a statutory modification designed to ensure the publicness of publicly funded education, then the state is indeed required to provide these subsidies.

16 Welner, K.G. (2024). Charting the path to the outsourcing of discrimination through school choice. *Peabody Journal of Education*, *99*(4), 416-432. Retrieved April 27, 2026, from https://doi.org/10.1080/0161956X.2024.2381378

17 *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 632 (1991) (O'Connor, J. dissenting).

18 Courts have used no fewer than five different "tests" to determine whether an entity is a state actor: the "significant encouragement" test, the "willful participant in joint activity" test, the "government control" test, the "entwinement" test, and the "public function" test. See the discussion in *Drummond*, 558 P.3d 1 (2024).

19 *Hernandez v. Don Bosco Preparatory High*, 730 A.2d 365 (N.J. Super. App. Div., 1999).

20 Burris, C. (2025, May 13). This Supreme Court decision could determine the future of charter schools. *The Progressive*. Retrieved March 1, 2026, from https://progressive.org/public-schools-advocate/this-supreme-court-decision-could-determine-the-future-of-charter-schools-burris-20250513/

21 The details here can get a little confusing, since multiple entities are involved. The charter school itself could be held to be a governmental entity, as the Oklahoma Supreme Court held in the *Drummond* case. The private corporations that operate the schools are not governmental entities, but they can be held to be engaging in state action.

22 *Caviness v. Horizon Community Learning Center, Inc.*, 590 F.3d 806 (9th Cir. 2010).

23 *Peltier v. Charter Day School, Inc.*, 37 F.4th 104 (4th Cir. 2022).

24 The nonprofit contracted with a for-profit company to manage the school, and the court held that this second corporation was not a state actor for purposes of the students' equal protection claim.

25 Welner, K.G. (2022). *The outsourcing of discrimination: Another SCOTUS earthquake?* National Education Policy Center. Retrieved March 1, 2026, from http://nepc.colorado.edu/publication/carson-makin

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

27 The Court's reasoning in *Zelman* relied on several other aspects of the Cleveland program, but subsequent cases have elevated only the parental-decision rationale.

28 *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017).

29 *Espinoza v. Montana Department of Revenue*, 591 U.S. 464 (2020).

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

31 Recall that the Supreme Court, even given its reinterpretations of the two religion clauses, still enforces a narrow band of core Establishment Clause violations. For example, mandatory prayer or devotional Bible reading in public schools would still qualify as violations.

32 *Carson v. Makin*, 596 U.S. 767 (2022) (Sotomayor, J., dissenting).

33 As a technical legal matter, the Court in these cases was called upon to decide whether the state policy required courts to apply a "strict scrutiny" analysis. Very few policies survive a strict scrutiny analysis, leading commentators to remark that the approach is "strict in theory, fatal in fact."

34 *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

35 *Tandon v. Newsom*, 593 U.S. 61 (2021).

36 Shadow-docket cases are not subjected to full briefing or hearing and generally yield opinions that are not fully explained. See this *New York Times* article explaining the problematic origins of the current Court's increased reliance on the shadow docket. Kantor, J. & Liptak, A. (2026, April 18). The inside story of five days that remade the Supreme Court. *The New York Times*. Retrieved April 20, 2026, from https://www.nytimes.com/2026/04/18/us/politics/supreme-court-shadow-docket.html

37 *Tandon v. Newsom*, 593 U.S. at 62 (2021).

38 Brownstein, A.E. & Amar, V.D. (2023). Locating free exercise most-favored-nation status (MFN) reasoning in constitutional context. *Loyola University Chicago Law Journal*, *54*(3). Retrieved March 1, 2026, from https://loyola-chicago-law-journal.scholasticahq.com/article/81999. The reference is based on an analogy to most-favored nation trade agreements.

39 "[A]s a private religious organization, we possess rights under the Free Exercise Clause, the church autonomy doctrine, the ministerial exception, which this Court has rooted in the church autonomy doctrine. … [W]e were not giving away those rights by virtue of agreeing to this [charter school] contract." *Oklahoma State Charter School Board v. Drummond, No. 24-394 (U.S. 2025). Oral argument transcript. U.S. Supreme Court,* pp. 59-60. Retrieved March 1, 2026, from https://www.supremecourt.gov/oral_arguments/argument_transcripts/2024/24-394_3135.pdf

40 *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732 (2020)

41 *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. at 756 (2020).

42 *St. Mary Catholic Parish in Littleton v. Roy*. The lower-court opinion, which the Supreme Court will be reviewing, is reported at 154 F.4th 752 (10th Cir., 2025). A similar case was brought by a conservative Protestant school in Maine, concerning a nondiscrimination requirement that is now included in the same state policy that was at issue in *Carson v. Makin*. *Crosspoint Church v. Makin*, 719 F.Supp.3d 99 (D. Maine, 2024).

43 The Catholic preschool interests challenging the law point out that the law does allow some admissions preferences. They contend that this gives the state too much discretion and that, pursuant to the MFN approach, they should therefore be allowed to engage in faith-based discrimination against LGBTQ+ families. Most notably, they argue that the following gives the state a great deal of discretion: "Participating preschool providers may grant preference to an eligible child based: on the child and/or family being a part of a specific community; having specific competencies or interests; having a specific relationship to the provider, provider's employees, students, or their families; receiving specific public assistance benefits; or participating in a specific activity."

44 As worded in the Catholic preschool's petition to the Court, a key question is, "Whether *Carson v.*

*Makin* displaces the rule of *Employment Division v. Smith* only when the government explicitly excludes religious people and institutions." Put another way, since the Colorado nondiscrimination rules do not expressly address religious people or institutions or practices, does *Smith* (presumably in its MFN form) apply or does the *Carson* precedent apply. The lower court in the *St. Mary* case applied *Smith* and concluded that the Colorado rule was indeed neutral and generally applicable.

45 *Drummond ex rel. State v. Oklahoma Statewide Virtual Charter School Board*, 558 P.3d 1 (2024).

46 *Oklahoma State Charter School Board v. Drummond, No. 24-394 (U.S. 2025). Oral argument transcript. U.S. Supreme Court.* Retrieved March 1, 2026, from https://www.supremecourt.gov/oral_arguments/argument_transcripts/2024/24-394_3135.pdf

47 *Oklahoma State Charter School Board v. Drummond, No. 24-394 (U.S. 2025). Oral argument transcript. U.S. Supreme Court*, pp. 83-84. Retrieved March 1, 2026, from https://www.supremecourt.gov/oral_arguments/argument_transcripts/2024/24-394_3135.pdf

48 Approximately twenty percent of California's charter schools are "dependent" charter schools (which we generally refer to in this brief as "district-governed" charters). See Burris, C. (2025, May 13). This Supreme Court decision could determine the future of charter schools. *The Progressive*. Retrieved March 1, 2026, from https://progressive.org/public-schools-advocate/this-supreme-court-decision-could-determine-the-future-of-charter-schools-burris-20250513/. As we discuss in the next section of this brief, these schools are governed by the school district's board of education, which oversees operations and ensures compliance with applicable laws and policies. The district generally serves as the employer of record for staff, performs many managerial functions, and channels funding to the school.

49 Additional exchanges with the lawyers representing the Oklahoma Statewide Charter School Board (Mr. Campbell) and representing St. Isidore (Mr. McGinley) confirmed that states could, by ensuring that charter schools are created and controlled by government officials, place their systems outside the scope of a religious-charter-school ruling.

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

Have you thought about that boomerang effect for charter schools?

MR. CAMPBELL: We have thought about it, and that certainly is a decision that states are entitled to make. They can set up their charter school programs as they see fit. … [I]f a state wanted to assert more control over those entities, then it would be free to set up its program that way.

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

MR. CAMPBELL: It could potentially depending on how they set it up.

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JUSTICE THOMAS: You say St. Isidore is not a state actor. What would – what features would you add to convert St. Isidore into a state actor?

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

*Oklahoma State Charter School Board v. Drummond, No. 24-394 (U.S. 2025). Oral argument transcript. U.S. Supreme Court*, p. 31 (Gorsuch/Campbell) and p. 44 (Thomas/McGinley). Retrieved March 1, 2026, from https://www.supremecourt.gov/oral_arguments/argument_transcripts/2024/24-394_3135.pdf

50 The number of states was determined by a review of state laws.

51 People of faith can and should have equal access to participation in advisory or operating councils or "middleman" corporations in district-governed charters—the operating entities that contract with authorizers and that collaborate with governing school districts. But the role and composition of these councils or corporations is institutionally different, given the lack of governance authority. That is, the councils or corporations would not be acting as "secular" or "religious" decision-making bodies; the individuals involved would simply be bringing themselves (religious or secular) to the work.

52 Prince George's County Public Schools. (n.d.). *Board policy 3506: Public charter schools*. Retrieved March 1, 2026, from https://www.pgcps.org/offices/ograc/board-policies/board-policies-3000---business-and-other-non-instructional-operations/bp-3506---public-charter-schools

53 Similarly, in Alaska all charters must be authorized by a local school board and operate as schools within the district. State law explicitly provides that "a charter school operates as a school in the local school district." AK Stat § 14.03.255 (2025). Teachers and staff are district employees and are covered by the same collective-bargaining agreements unless a waiver is granted. Although each charter has an academic policy committee that provides a measure of school-level autonomy, ultimate governance, staffing authority, and oversight remain with the district. Kansas vests all charter-school authority in local school boards. Charters must be approved by and operate under the district, and there is no provision for governance by an independent charter board. Local boards retain full governing authority, and teachers remain district employees. Virginia law requires charter schools to be approved and overseen by the local school board of the division in which they operate. The law does not permit independent nonprofit governing boards separate from the district. Although charters must have a management committee and operate pursuant to a charter contract, the local school board retains ultimate authority, including the power to revoke the charter.

54 Wis. Stat. § 118.40(7)(a). See also Wisconsin Department of Public Instruction (2025), Statutory Report Series: Legislative Report on Charter Schools 2023-2024. Retrieved March 1, 2026, from https://files.eric.ed.gov/fulltext/ED672987.pdf. Note that while Wisconsin uses this term "instrumentality," other states use different terms to refer to the same approach. In California, for instance, they are known as "dependent" charters. Texas uses the term "campus" or "campus program."

55 In Wisconsin, the policy has evolved to shape a subset of charter schools that appear to have all necessary district-governed elements. But it is not clear that all schools called instrumentality-charters in the state include the necessary elements. In any case, we recommend that Wisconsin and other states clearly articulate the elements in their charter school statutes that we recommend in this brief.

56 Peterson, P.E. & Shakeel, M.D. (2021). The nation's charter report card: First-ever state ranking of charter student performance on NAEP. *Education Next, 24*(1). Retrieved March 1, 2026, from

https://www.educationnext.org/nations-charter-report-card-first-ever-state-ranking-charter-student-performance-naep/

57 Cohodes, S.R. & Parham, K.S. (2021). *Charter schools' effectiveness, mechanisms, and competitive influence*. In Oxford Research Encyclopedia of Economics and Finance.

58 As discussed in this section of the brief, this improvement would also rein in some of the fraud, mismanagement, access restrictions, and other abuses that have been documented in the independent-charter sector. Many independent charters have suffered from governance failures. More than one in four charter schools close before completing five years of operation, often with little notice to families; forty percent of these closures occur in the summer before a new school year or abruptly mid-year (see National Center for Charter School Accountability and Network for Public Education (2024). *Doomed to fail: An analysis of charter school closures from 1998 to 2022*. Retrieved March 1, 2026, from https://networkforpubliceducation.org/wp-content/uploads/2024/11/DTM-Final.pdf). Fraud and gross mismanagement account for more than one in five such closures. Weak charter laws that allow insider dealing, related-party transactions, too much leeway for operators, and insufficient oversight of and by authorizers have been identified as causes of charter failures (see National Center for Charter School Accountability and Network for Public Education (2025). *Charter school reckoning: Disillusionment*. Retrieved March 1, 2026, from https://networkforpubliceducation.org/part-ii-charter-school-reckoning-disillusionment/). Further, private charter school operators have exploited lax oversight to use public funds to overpay for facilities at the expense of student services (see Black, D.W., Baker, B., & Green, P. (2019, February 19). Charter schools exploit lucrative loophole that would be easy to close. *The Conversation*. Retrieved March 1, 2026, from https://theconversation.com/charter-schools-exploit-lucrative-loophole-that-would-be-easy-to-close-111792). The financial vulnerabilities inherent in small, independently governed nonprofit corporations — combined with lax oversight and insider dealing — have cost students, families, and taxpayers dearly. Meanwhile, charter schools have found very troubling ways to restrict access to students with disabilities and other students treated as less desirable. Mommandi, W. & Welner, K.G. (2021). *School's choice: How charter schools control access and shape enrollment*. New York: Teachers College Press. Of course, the decades-long record of privately governed charter schools includes many successes along with such failures. The successes include three charter schools that the National Education Policy Center recognized as Schools of Opportunity. See Clark Street Community School (https://schoolsofopportunity.org/recipient-details/clark-street-community-school), Native American Community Academy (https://schoolsofopportunity.org/recipient-details/native-american-community-academy) and Broome Street Academy Charter School (https://schoolsofopportunity.org/recipient-details/broome-street-academy-charter-high-school). (All hyperlinks retrieved March 1, 2026.) But the overall record of the sector points to the need for reform.

59 The Associated Press-NORC Center for Public Affairs Research (2025). *The June 2025 AP-NORC center poll*. Retrieved March 1, 2026, from https://apnorc.org/wp-content/uploads/2025/07/June-2025-Topline.pdf

60 Interestingly, the same survey showed that public opposition to religious charter schools is substantially greater than the opposition to taxpayer-funded vouchers for private schools, which only 35% to 38% of respondents opposed. This greater opposition cannot be accounted for by religious animus; rather, the difference is the transformation of charter schools, which have always been defined as public schools. Our working assumption is that this resistance is in part because

respondents do not want these presumptively public schools to be allowed to engage in faith-based discrimination and other forms of non-accountable, non-transparent practices.

61 Only South Carolina and Minnesota mandate that charter board members be elected. Elected members include parents and staff only.

62 See Levin, K. (2021, June 22). Michigan's school board wants to know how charter schools spend public dollars. It might not find out. *Chalkbeat*. Retrieved March 1, 2026, from https://www.chalkbeat.org/detroit/2021/6/22/22545962/michigan-board-charter-schools-public-dollars/. Yet several states do have explicit statutory provisions stating that charter school governing boards are subject to open-meetings or open-records acts. Moreover, when the resistance to open-records requests occasionally leads to litigation, the resistant charter schools have not been successful; the courts have required the charter schools to comply with open records acts. *See Attorney General v. Mystic Valley Regional Charter School*, 497 Mass. 251 (2026). Future faith-based resistance to these transparency laws will, however, rely on the Free Exercise Clause, so these precedents will be of limited use.

63 National Center for Charter School Accountability and Network for Public Education. (2024). *Doomed to fail: An analysis of charter closures from 1998–2022*. Retrieved March 1, 2026, from https://networkforpubliceducation.org/doomed-to-fail-an-analysis-of-charter-closures-from-1998-2022/

64 Kahlenberg, R.D. & Potter, H. (2014). The original charter school vision. *New York Times*. Retrieved March 1, 2026, from https://www.nytimes.com/2014/08/31/opinion/sunday/albert-shanker-the-original-charter-school-visionary.html

65 The Appendix can be accessed at https://nepc.colorado.edu/publication/religious-charters

66 See *Crosspoint Church v. Makin*, 719 F.Supp.3d 99 (D. Maine, 2024); *St. Mary Catholic Parish in Littleton v. Roy*, 154 F.4th 752 (10th Cir. 2025).