

# **NEPC Review: Religious Charter Schools: Legally Permissible? Constitutionally Required? (Manhattan Institute, December 2020)**



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# Acknowledgements

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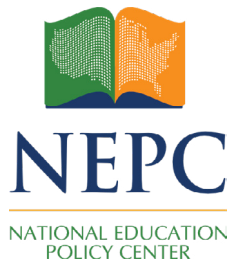
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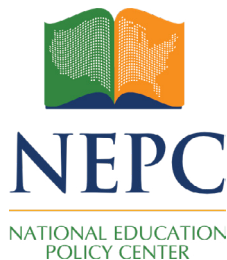
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## Executive Summary

The Manhattan Institute recently published the report, *Religious Charter Schools: Legally Permissible? Constitutionally Required?* The report concludes that the Supreme Court's 2020 decision in *Espinoza v. Montana Department of Revenue* requires states to grant charters to religious organizations, including those that intend to deliver an explicitly religious curriculum that teaches religion as truth. While *Espinoza* involved a publicly financed private school tuition (voucher-like) program, the report reasons that its logic applies in full force to charter schools as well. Although this report does raise an important question and identifies the key issues for answering it, it excludes key federal and state case law necessary to fully and fairly analyze the issues. Similarly, it fails to acknowledge extensive key expert analysis on matters left unresolved by courts. The result is a one-sided analysis of the issue that is not a reliable basis for state action.



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## I. Introduction

In *Espinoza v. Montana Department of Revenue*, the Supreme Court held that excluding religious organizations from the state’s private school tuition assistance program violated the Free Exercise Clause of the First Amendment.<sup>1</sup> The Court’s holding raises the possibility that state and federal laws excluding religious organizations from operating charters are unnecessary or unconstitutional.

A Manhattan Institute report authored by Nicole Stelle Garnet, *Religious Charter Schools: Legally Permissible? Constitutionally Required?* concludes that, after *Espinoza*, state laws and policies that exclude religious organizations from operating as charter schools are unconstitutional.<sup>2</sup> It further concludes that those religious organizations can do more than just operate schools. They can teach an explicitly pro-religious curriculum—what the report calls “religion as the truth.” The report also specifies alternative legislative, executive, and litigation strategies to force states to authorize religious charter schools.

This analysis and proposal could, if correct, substantially rebalance the private and public education sectors. The financial pressures and enrollment trends in portions of the private sector could, for example, make transitioning to charter status an attractive option. This would lead to substantial charter school growth and a rebalancing of available funding for traditional public schools, particularly to the extent that religious charter schools enroll students who would not have otherwise attended a public school or charter. Religious charter schools, even if constitutional, would also raise additional issues regarding the application of various federal anti-discrimination and equity statutes.

## II. Findings and Conclusions of the Report

The report provides a basic empirical assessment of charter schools and the laws under which they operate, pointing out the number of states that authorize them, the private entities that operate the charter schools, and the fact that some of these charters offer religious instruction before or after the regular school day. But state and federal laws prohibit these charters from teaching religion as the truth as part of their regular school day curriculum.

The report examines the similarities and dissimilarities between charter schools and other private school choice programs, such as vouchers, education savings accounts, and tax credits. It finds that charter schools and private choice programs are similar in that both a) are exempt from many state education regulations, b) depend on private philanthropy and donors, c) have wide-ranging autonomy, and d) are schools of choice. Charter schools are distinct from other private choice programs in that charter schools a) only exist as a result of a charter agreement between the state and a private operator, b) must be secular under current law, c) must be open to all students and tuition-free, d) must comply with regulatory oversight and accountability, and e) can be closed for academic or regulatory failures. These distinctions lead to the conclusion that charter schools are more similar to private tuition programs than public schools.

The similarity to private tuition programs raises the question of whether the creation of religious charter schools would violate the federal constitutional prohibition on establishment of religion. The report concludes they would not violate the Establishment Clause because, “in almost all states,” charter schools are not “state actors” for federal constitutional purposes.<sup>3</sup> This conclusion is based on findings that a) state laws characterizing charter schools as public schools are not dispositive on this question, b) federal court decisions have, under certain circumstances, treated charters as private actors (though other courts have disagreed), and c) differences in court decisions may be a function of the variances amongst states in charter school structure. These state-level variables include: the level of autonomy charters have, the number and diversity of charter school authorizers, whether the state mandates closure of low-performing charter schools, and whether the state places caps on the growth of charters.

The fact that states directly fund charters, according to the report, is no longer of constitutional significance. Far more important is that charter schools operate as a “program of true private choice” and receive public funds as a function of families’ private choices.<sup>4</sup> Because charter schools are programs of private choice and not state actors, states can authorize religious charter schools without violating the Establishment Clause.

If religious charter schools do not violate the Establishment Clause, the report finds that states lack the discretion to exclude religious organizations from operating charter schools. To do so would violate the Free Exercise Clause. While *Espinoza* acknowledged a potential distinction between laws that discriminate based on religious status and laws that only prohibit the use of public money for religious purposes, the report concludes this distinction is not dispositive and that any restriction on religious charter schools is unconstitutional.

Based on these findings and conclusions, the Report proposes that a) states change their

laws to allow religious charters, b) state attorneys general advise state officers to stop enforcing restrictions on religious charters, and/or c) religious organizations bring litigation to challenge the restrictions. The report indicates the results of these strategies could vary by state.

### **III. The Report's Rationale for Its Finding and Conclusions**

The report reasons that the legal doctrine in *Espinoza* regarding private school tuition programs extends directly to charter schools because, like those programs, charter schools are programs of private choice and not state actors. Thus, state and federal restrictions on religious charter schools are unconstitutional.

### **IV. The Report's Use of Case Law and Literature**

Important case law and literature is absent from the report and negatively impacts its analysis.

#### **Case Law**

The report appropriately focuses the majority of its analysis on the Supreme Court's recent decisions in *Espinoza* and *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017), but its analysis of lower court decisions that address issues unresolved by the Supreme Court is incomplete. First, it does not include a recent First Circuit opinion holding that while *Espinoza* precludes religious status discrimination, a state may limit religious uses of public funds, particularly when the state's purpose was to provide instruction that was equivalent to that of public schools (*Carson as next friend of O.C. v. Makin*, 979 F.3d 21, 25 (1st Cir. 2020)). The holding in *Carson* contradicts many of the report's conclusions. The omission, however, may have been unintentional, given that the opinion was issued only four weeks before the report's publication.

Second, while the report devotes substantial attention to distinguishing Supreme Court precedent regarding the direct funding of private religious education, it does not distinguish or address Supreme Court precedent prohibiting the coercive effects of religious activities within the public sphere or the messages of endorsement religious activities may send. In *Lee v. Weisman*, 505 U.S. 577 (1992), for instance, the Court held that allowing a private party to lead a prayer at graduation was unconstitutional because it had the effect of coercing students to participate in religious activity. Religious charters, even if private, would operate under the authority of the state and potentially have similar effects. Likewise, state creation of and funding for a religious charter could send the message that government is "endorsing" religion, which the Court has previously relied upon as a basis for striking down state activities.<sup>5</sup>

Third, the fact that all 50 state constitutions obligate states to deliver public education and a robust body of state supreme precedent applies to that obligation is missing from the report.<sup>6</sup> That precedent includes cases addressing whether charter schools qualify as public schools that can draw on funds that are constitutionally reserved for public schools.<sup>7</sup> Those cases directly intersect with the question of whether charter schools are state actors that would be subject to the Establishment Clause. The state statutes on which the report relies are subservient to these state constitutional principles.

Fourth, the analysis of lower federal court decisions regarding charter schools and the state actor doctrine is uneven. The report discusses those federal lower court cases favoring its conclusion at length but relegates those federal cases at odds with its conclusion to a single sentence and footnote.

Fifth, federal education disability statutes (Individuals with Disabilities in Education Act and Section 504 of the Rehabilitation Act) currently apply to charter schools in roughly the same ways as traditional public schools. The report does not address those laws or how its desired change would impact those statutes and the children they protect.

## Literature

The report focuses and relies on federal case law, with little use of secondary literature. The limited reliance on secondary literature is appropriate as to those issues on which the Supreme Court or lower courts have clearly spoken. Courts, however, have either disagreed or not addressed two key issues in the report: whether charter schools are state actors and how the courts' school voucher precedent applies to charters. On these questions, a discussion of other experts' analysis would be helpful. Extensive literature exists on those questions, but the report cites only two scholars whose articles are generally consistent with the report's conclusions<sup>8</sup> and the author's own work. The report fails to cite the considerable literature that contradicts its conclusion.<sup>9</sup>

## V. Review of the Report's Methods

The report is thorough and logically strong in many respects. Its structure and analysis are clear and facially forceful. It identifies the two key constitutional questions that control its analysis—whether religious charters violate the Establishment Clause and whether the prohibition of religious charters violates the Free Exercise Clause. It effectively separates the analysis of each, even though they are substantively intertwined. Within those distinct analyses, it explains the Supreme Court's central holdings and rationales in a manner that makes the application of those holdings to other contexts straightforward. The policy preferences and analysis are also separate from its legal analysis. In most respects, the language in the report is facially evenhanded and transparent. Most non-experts will easily follow its logic and may be convinced by its conclusions.

The report's facial strength, however, is a function of its omissions. First, it does not alert

readers to the contested factual assumptions upon which its logic rests, particularly those regarding whether charters are private choice programs. Second, it minimizes—sometimes to the point of exclusion—unfavorable case law. Third, literature contrary to the report’s conclusion is fully absent. Fourth, it does not address the inconsistency of charter schools claiming to be public schools when doing so is advantageous and claiming to be private schools when doing so is advantageous—an important concern that other scholars have raised.<sup>10</sup>

## **VI. Review of the Validity of the Findings and Conclusions**

The report’s conclusion that religious organizations should be able to apply to operate secular charter schools (i.e. ones that effectively teach the same curriculum as public schools and no more) is well supported and likely valid under existing case law. Its conclusion that religious organizations should also be able to operate religious charter schools that teach religion as truth is less well supported and highly questionable.

First, the report dismisses the distinction between religious use prohibitions and religious classification discrimination too quickly. While the distinction may, in fact, prove to be inconsequential in the future, the report reaches its current position based on the opinion of two Justices, not established law. The First Circuit Court of Appeals, which has issued the only direct precedent on the issue, hinges its entire analysis on the distinction.<sup>11</sup>

Second, the conclusion that charters are not state actors is based on a one-sided assessment of the law that fails to engage unfavorable federal case law. The report does not confront the argument that charters should be considered state actors given that they are discharging the state’s constitutional duty to deliver public education and that the state imposes several statutory responsibilities on them consistent with that duty.

Third, the report’s conclusion that charter schools are sufficiently similar to private tuition programs to escape the state actor doctrine overlooks the state constitutional law context in which charters exist. State constitutions obligate states to maintain a public education system, and they impose qualitative, financing, oversight, and equity standards.<sup>12</sup> In so far as charter schools replace, supplement, draw resources from, or substantially affect traditional public schools, charter school law and regulations should conform to state constitutional constraints.<sup>13</sup> While the report is likely correct in asserting that state statutes are not conclusive on questions of whether charters are public, state constitutions are far more important and thus could be conclusive. This is particularly true as to “state actor” status, on which the Supreme Court evaluates, among other things, whether a private entity is displacing or performing a public function.<sup>14</sup>

Fourth, the report treats autonomy and choice as synonymous with private schools and antithetical to public schools. While the former may be true, the latter is not. Public magnet schools, for instance, are schools of choice and autonomous in many respects, but they are also indisputably state actors.<sup>15</sup>



Fifth, the report severely discounts and does not fully explore the fact that charters, unlike private schools, exist solely as a function of states' decision to create and regulate them. The fact that the state allows private choice to function within the system of charter schools that it creates does not eliminate the state's role in and responsibility for these schools. Private actors, moreover, could retain their private status while acting within that system while the state remains subject to the constitution in oversight of those private actors. For instance, schools are not automatically liable for the discriminatory acts of teachers, but when a school ignores, perpetuates, or authorizes the private discrimination, it is.<sup>16</sup> Thus, the report's conclusion that charter school operators are private entities does not answer the question of whether the state can hire a private operator to run a religious charter school.

## **VII. Usefulness of the Report for Guidance of Policy and Practice**

The report is useful in clearly identifying the key issues to be resolved regarding religious charter schools, but its conclusions and proposals lack an adequate foundation upon which states should act. States that follow the report's recommendations run a high risk of violating the federal Constitution.

## Notes and References

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- 1 Espinoza v. Montana Department of Revenue, 140 S. Ct. 2246 (2020).
- 2 Garnett, N.S. (2020, December). *Religious charter schools: Legally permissible? Constitutionally required?* (p. 6). New York, NY: Manhattan Institute. Retrieved December 16, 2020, from <https://media4.manhattan-institute.org/sites/default/files/religious-charter-schools-legally-permissible-NSG.pdf>
- 3 Garnett, N.S. (2020, December). *Religious charter schools: Legally permissible? Constitutionally required?* (p. 10). New York, NY: Manhattan Institute. Retrieved December 16, 2020, from <https://media4.manhattan-institute.org/sites/default/files/religious-charter-schools-legally-permissible-NSG.pdf>
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- 5 Wallace v. Jaffree, 472 U.S. 38, 61 (1985); Edwards v. Aguillard, 482 U.S. 578, 593 (1987); see also Lee v. Weisman, 505 U.S. 577, 618-20 (1992).
- 6 Calabresi, S.G. & Perl, M.W. (2014). Originalism and Brown v. Board of Education. *Michigan State Law Review*, 2014(3), 429-573 (458-59 n.132). Connecticut became the fiftieth state when it amended its constitution following desegregation.  
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- 7 Wilson v. State Bd. of Education, 89 Cal. Rptr. 2d 745 (Cal. Ct. App. 1999); League of Women Voters v. State, 355 P.3d 1131 (Wash. 2015).
- 8 Sugarman, S. (2017, July). Is it unconstitutional to prohibit religious charter schools?, *Journal of Law and Religion*, 32(2), 227-62.  
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- 9 This literature is catalogued in:  
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- 10 Green III, P.C., Baker, B.D., & Oluwole, J.O. (2013). Having it both ways: How charter schools try to obtain funding of public schools and the autonomy of private schools, *Emory Law Journal*, 63(2), 303-337.
- 11 Carson as next friend of O.C. v. Makin, 979 F.3d 21 (1st Cir. 2020).
- 12 Black, D.W. (2016). The constitutional challenge to teacher tenure, *California Law Review*, 104(1), 75-148 (109-21).
- 13 Black, D.W. (2018). Preferring educational choice: The constitutional limits, *Cornell Law Review*, 103(6), 1359-1430.
- 14 See, e.g., Nixon v. Condon, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984 (1932) (election); Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953) (election); Marsh v. Alabama, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946) (company town); Evans v. Newton, 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966) (municipal park).
- 15 Comfort v. Lynn School Committee, 418 F.3d 1, 7-9 (1st Cir. 2005).
- 16 Gebser v. Lago Vista Independent School District, 524 U.S. 274 (1998).