JOHN M. O'CONNOR
ATTORNEY GENERAL

ATTORNEY GENERAL OPINION
2022-7

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December 1, 2022

Dear Executive Director Wilkinson,

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following question:

> **Currently, an Oklahoma charter school must not be "affiliated with a nonpublic sectarian school or religious institution," and must "be nonsectarian in its programs, admission policies, employment practices, and all other operations" under 70 O.S.2021, § 3-136(A)(2).**
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> **After the U.S. Supreme Court's holdings in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), and *Carson v. Makin*, 142 S. Ct. 1987 (2022), construing the First Amendment's Free Exercise Clause, may the Statewide Virtual Charter School Board continue to enforce the nonsectarian requirements set forth in 70 O.S.2021, §3-136(A)(2)?**

I.
BACKGROUND

A. Charter schools in Oklahoma

In 1999, the State Legislature enacted the Oklahoma Charter Schools Act ("the Act") to increase learning opportunities, encourage "the use of different and innovative teaching methods," and provide "additional academic choices for parents and students." 70 O.S.2021, § 3-131(A). Nearly twenty-five years later, there are approximately 30 charter schools in Oklahoma that serve over 80,000 schoolchildren. *See* OKLA. STATE DEP'T OF EDUC., Okla. Charter School Report 2021 at 4, 10-11. Those children make up around 11.7% of public school students in Oklahoma. *Id.* at 11.

This number "has increased dramatically over the last few years as a result of the expansion of virtual charter schools" in 2012. *Id.* In terms of funding, the "total State Aid Allocation to charter schools in the 2020-21 school year" was around $420 million. *Id.* at 8.

A charter school, according to the Act, is a "public school established by contract . . . to provide learning that will improve student achievement . . . ." 70 O.S.2021, § 3-132(D). A sponsor and an operator partner together to form a charter school. Sponsors must be public entities such as school districts, state colleges, or the State Board of Education. *Id.* § 3-132(A). Sponsors have various powers and duties, including approving charter applications if they "meet identified educational needs and promote a diversity of educational choices." *Id.* § 3-134(I)(3). Before approving a new school, sponsors must consider factors such as an applicant's "strong and reliable record of academic success," "financial and operational success," and "ability to transfer successful practices to a potentially different context that includes reproducing critical cultural, organizational, and instructional characteristics." *Id.* § 3-132(C).

Operators who are authorized to establish a charter school may be public or private: this includes a "private college or university, private person, or private organization," although an existing private school is ineligible. *Id.* § 3-134(C). An entity seeking to operate a charter school must submit a written application to the sponsor that includes, *inter alia*, a "description of the instructional design of the charter school, including the type of learning environment, class size and structure, curriculum overview and teaching methods." *Id.* § 3-134(B)(14). Upon approval of the application, the sponsor and operator enter a contract. This contract must make the charter school "as equally free and open to all students as traditional public schools," it must require "the same academic standards and expectations as existing public schools," and it must contain a "description of the requirements and procedures for the charter school to receive funding in accordance with statutory requirements and guidelines for existing public schools." *Id.* § 3-135(A).

As the name indicates, a charter school is also required to adopt a charter that ensures compliance with certain requirements. *Id.* § 3-136(A). Under the charter, the school must participate in standardized testing and report test results as if it is a school district. *Id.* § 3-136(A)(4). The school must educate children with disabilities the same way a public school district does. *Id.* § 3-136(A)(7). The school cannot charge tuition or fees. *Id.* § 3-136(A)(10). The school is considered a school district for tort liability under The Governmental Tort Claims Act. *Id.* § 3-136(A)(13). In addition, charter school employees are authorized to participate in the Teachers' Retirement System of Oklahoma. *Id.* § 3-136(A)(14).

Charter schools have substantial flexibility in terms of curriculum. A "charter school may offer a curriculum which emphasizes a specific learning philosophy or style or certain subject areas such as mathematics, science, fine arts, performance arts, or foreign language." *Id.* § 3-136(A)(3). Indeed, from its inception, the Act has "exempt[ed] charter schools from the new core curriculum requirements for public schools found at 70 O.S.Supp.1999, § 11-103.6(B)." 1999 OK AG 64; *see also* 70 O.S.2021, § 3-136(A)(3) ("The charter of a charter school which offers grades nine through twelve shall specifically address whether the charter school will comply with the graduation requirements established in Section 11-103.6 of this title."). Nor are charter schools required "to adhere to the Teacher and Leader Effectiveness standards set by the state of Oklahoma." OKLA. STATE DEP'T OF EDUC., Okla. Charter Schools Program, https://sde.ok.gov/faqs/oklahoma-charter-

schools-program (last visited Nov. 28, 2022). Teachers at charter schools are not required to hold valid Oklahoma teaching certificates, either. *Id.* Overall, for curriculum and beyond, "[e]xcept as provided for in the Oklahoma Charter Schools Act and its charter, a charter school shall be exempt from all statutes and rules relating to schools, boards of education, and school districts." 70 O.S.2021, § 3-136(A)(5).

Funding for Oklahoma charter schools is primarily public, but also includes some private sourcing. Like public schools, charters are funded mostly through the State Aid allocation. *Id.* § 3-142(A). They also receive federal funds if they are eligible and qualify, "and any other state-appropriated revenue generated by [their] students for the applicable year." *Id.* A "Charter Schools Incentive Fund" also exists, which contains "all monies appropriated by the Legislature, gifts, grants, devises and donations from any public or private source." *Id.* § 3-144(A).

Finally, at the center of this opinion request is 70 O.S.2021, § 3-136(A)(2), which provides: (1) that a "charter school shall be nonsectarian in its programs, admission policies, employment practices, and all other operations," and (2) that a "sponsor may not authorize a charter school or program that is affiliated with a nonpublic sectarian school or religious institution."

B. *Trinity Lutheran*, *Espinoza*, and *Carson*

The First Amendment to the U.S. Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The U.S. Supreme Court has "repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits." *Carson v. Makin*, 142 S. Ct. 1987, 1996 (2022). In the past five years alone, the U.S. Supreme Court has prevented officials in three States from excluding religious adherents from different types of public benefit programs relating to pre-K, primary, or secondary schools.

First, in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), the U.S. Supreme Court analyzed a Missouri policy barring churches, sects, or other religious entities from receiving financial grants to install softer playground surfaces made from recycled tires. Applying this policy, Missouri denied a grant to the Trinity Lutheran Church Child Learning Center. *Id.* at 2017-18. In doing so, Missouri relied upon a provision in the Missouri Constitution stating that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion . . . ." *Id.* (quoting MO. CONST. art. I, § 7).

The U.S. Supreme Court found Missouri's discriminatory behavior "odious" to the U.S. Constitution. *Id.* at 2025. Missouri, the Court held, had "expressly require[d] Trinity Lutheran to renounce its religious character in order to participate in an otherwise generally available public benefit program." *Id.* at 2024. Applying the "most rigorous" and strict judicial scrutiny to the policy, the Court held that there was a "clear infringement on free exercise" and no compelling anti-establishment interest that could justify such discrimination. *Id.* (citation omitted).

Second, in *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), the U.S. Supreme Court evaluated a program in which Montana gave a tax credit to a person who sponsored a scholarship for a child's tuition at any private school chosen by the child's family. The Montana

Constitution prohibits government aid to any "sectarian" school—*i.e.*, any school "controlled in whole or in part by any church, sect, or denomination." MONT. CONST. art. X, § 6(1). The Montana Department of Revenue cited this provision to prohibit families from using these scholarships at schools "owned or controlled in whole or in part by any church, religious sect, or denomination." *Espinoza*, 140 S. Ct. at 2252 (citation omitted). Montana's Attorney General disagreed, arguing that the discriminatory policy "very likely" violated the U.S. Constitution. *Id.* The Montana Supreme Court, on the other hand, dismantled the entire scholarship program because religious schools were required to be included. *Id.* at 2253-54.

On appeal, the U.S. Supreme Court reversed the Montana Supreme Court. "A State need not subsidize private education," the Court explained, "[b]ut once a State decides to do so, it cannot disqualify some private schools solely because they are religious." *Id.* at 2261. The Montana Supreme Court's application of the Montana Constitution wrongly barred "religious schools from public benefits solely because of the religious character of the schools." *Id.* at 2255. "Given the conflict between the Free Exercise Clause and the application of the no-aid provision here, the Montana Supreme Court should have 'disregard[ed]' the no-aid provision and decided this case 'conformably to the [C]onstitution' of the United States." *Id.* at 2262 (quoting *Marbury v. Madison*, 5 U.S. 137 (1803)). In sum, Montana's religious exclusion was "odious to our Constitution" and "cannot stand." *Id.* at 2262-63 (quoting *Trinity Lutheran*, 137 S. Ct. at 2025).

Third, in *Carson v. Makin*, 142 S. Ct. 1987 (2022), the U.S. Supreme Court evaluated a Maine program providing tuition assistance for parents in rural school districts that lacked a secondary school. "Under the program, parents designate the secondary school they would like their child to attend—public or private—and the school district transmits payments to that school to help defray the costs of tuition." *Id.* at 1993. To receive payments, Maine required private schools to be accredited, teach Maine history, and maintain a certain student-teacher ratio, although their teachers did not need to be certified by the state or utilize Maine's curricular requirements. *Id.* at 1993-94.

In 1981, Maine began to insist that any private school receiving tuition under this program must be "nonsectarian." *Id.* at 1994 (quoting ME. REV. STAT. ANN., tit. 20-A, § 2951(2)). This route was chosen "in response to an opinion by the Maine attorney general taking the position that public funding of private religious schools violated the Establishment Clause." *Id.* Maine considered "a sectarian school to be one that is associated with a particular faith or belief system and which, in addition to teaching academic subjects, promotes the faith or belief system with which it is associated and/or presents the material taught through the lens of this faith." *Id.* (quoting *Carson v. Makin*, 979 F.3d 21, 38 (1st Cir. 2020)).

Faced with a Free Exercise challenge to this discrimination, the First Circuit upheld Maine's "nonsectarian" prohibition. *Carson*, 979 F.3d at 25-26. Per the First Circuit, *Espinoza* meant Maine could not bar schools from receiving funding "based on their religious *identity*," but it could bar funding "based on the religious *use* that they would make of it in instructing children." *Id.* at 40 (emphases added). In addition, the First Circuit found that Maine's program was distinct from *Espinoza* because Maine sought to provide "a rough equivalent of the public school education that Maine may permissibly require to be secular." *Id.* at 44.

Maine parents appealed to the U.S. Supreme Court, which ruled in their favor and held that "[t]he 'unremarkable' principles applied in *Trinity Lutheran* and *Espinoza* suffice to resolve this case." *Carson*, 142 S. Ct. at 1997. By disqualifying schools from an open benefit solely because they are religious, Maine effectively penalized the free exercise of religion. *Id.* (citing *Trinity Lutheran*, 137 S. Ct. at 2021). Maine's program was not neutral, the Court emphasized, but clearly discriminatory. *Id.* at 1998. The "strictest scrutiny" therefore applied, whereby government action is invalid unless it advances compelling "interests of the highest order" and is "narrowly tailored in pursuit of those interests." *Id.* at 1997 (citations omitted).

As it did in *Trinity Lutheran* and *Espinoza*, the U.S. Supreme Court found that an "interest in separating church and state 'more fiercely' than the Federal Constitution . . . 'cannot qualify as compelling' in the face of the infringement of free exercise." *Carson*, 142 S. Ct. at 1998 (quoting *Espinoza*, 140 S. Ct. at 2260 & *Trinity Lutheran*, 137 S. Ct. at 2024). Only an actual Establishment Clause violation could suffice, according to the Court, and "a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause." *Id.* at 1997 (citing *Zelman v. Simmons-Harris*, 536 U.S. 639, 652-53 (2002)).

It did not matter that Maine said participating schools were required to provide the "rough equivalent" of a public school education, the Court held. *Id.* at 1998-2000 (quoting *Carson*, 979 F.3d at 44). For starters, the "differences between private schools eligible to receive tuition assistance under Maine's program and a Maine public school are numerous and important." *Id.* at 1999. Maine's program did "not have to accept all students," for example, whereas "[p]ublic schools generally do," and Maine public education is free whereas private schools typically cost money. *Id.* Moreover, "the curriculum taught at participating private schools need not even resemble that taught in the Maine public schools," and "[p]articipating schools need not hire state-certified teachers." *Id.* The label "public" did not control, either, since a discriminatory condition on funding is still discrimination, no matter how much a state might claim it is part of the "definition of a particular program." *Id.* at 1999-2000 (citation omitted).

That is to say, the U.S. Supreme Court looks at the "substance of free exercise protections, not on the presence or absence of magic words" like "public." *Id.* at 2000. To hold otherwise, the Court observed, would render "our decision in *Espinoza* . . . essentially meaningless," since Montana could have just claimed that its tax credit was limited to tuition payments for the "rough equivalent" of a secular public education. *Id.* at 2000. Put differently, the Free Exercise Clause applies to express discrimination *or* to "a party's reconceptualization of the public benefit." *Id.* By allowing state funds to go to private schools—a "decision [that] was not 'forced upon' it"—Maine could not "disqualify some private schools solely because they are religious.'" *Id.* (quoting *Espinoza*, 140 S. Ct. at 2261).

Carson also held, importantly, that a state could not justify discrimination by claiming it was just preventing organizations from *using* state aid in religious ways. Use-based religious discrimination, the U.S. Supreme Court emphasized, is just as "offensive to the Free Exercise Clause" as status-based discrimination. *Id.* at 2001. Maine's program was unconstitutional because, "[r]egardless of how the benefit and restriction are described, the program operates to identify and exclude otherwise eligible schools on the basis of their religious exercise." *Id.* at 2002.

In sum, *Carson* stands for the principle that "[a] State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise." *Id.* at 1998.

II.
DISCUSSION

You ask what effect, if any, the *Trinity Lutheran, Espinoza*, and *Carson* decisions have on the validity of the non-sectarian restrictions found in Section 3-136(A)(2) of the Oklahoma Charter School Act. That passage states as follows:

> A charter school shall be nonsectarian in its programs, admission policies, employment practices, and all other operations. A sponsor may not authorize a charter school or program that is affiliated with a nonpublic sectarian school or religious institution . . . .

We believe, based on the First Amendment and the *Trinity Lutheran, Espinoza*, and *Carson* line of decisions, that the U.S. Supreme Court would likely hold these restrictions unconstitutional. Because of the significant differences between the two sentences in Section 3-136(A)(2), we will address them separately.

A. "A sponsor may not authorize a charter school or program that is affiliated with a nonpublic sectarian school or religious institution"

The second sentence of Section 3-136(A)(2) is the most problematic, and very likely to be held unconstitutional. Under *Trinity Lutheran*, *Espinoza*, and *Carson*, it seems obvious that a state cannot exclude those merely "affiliated with" a religious or sectarian institution from a state-created program in which private entities are otherwise generally allowed to participate if they are qualified. And that is exactly what this provision does.

The Act expressly allows any qualified "private college or university, private person, or private organization" to establish a charter school. 70 O.S.2021, § 3-134(C). And once qualified private entities are invited into the program, Oklahoma cannot disqualify some private persons or organizations "solely because they are religious" or "sectarian." *Carson,* 142 S. Ct. at 1997 (quoting *Espinoza*, 140 S. Ct. at 2261). Even less so can the State exclude private persons or organizations that are merely "affiliated with" sectarian or religious institutions. *Cf. United States v. Brown*, 352 F.3d 654, 669 (2d Cir. 2003) ("Exercising peremptory strikes simply because a venire member affiliates herself with a certain religion is therefore a form of 'state-sponsored group stereotype[ ] rooted in, and reflective of, historical prejudice.'" (quoting *J.E.B. v. Alabama*, 511 U.S. 127, 128 (1994)). Both approaches evince clear hostility, not neutrality, to religion. Thus, the provision in question is highly likely to be found unconstitutional if the State continues to enforce it. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) (states have a "duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint").

It is not a problem that, under this interpretation, a substantial amount of public funds could be sent to religious organizations or their affiliates. As the U.S. Supreme Court emphasized in *Carson*, "a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause." 142 S. Ct. at 1997. No student is forced to attend a charter school—it is one option among several for parents. *See, e.g.*, OKLA. STATE DEP'T OF ED., School Choice, https://sde.ok.gov/schoolchoice (last visited Nov. 29, 2022). The Establishment Clause therefore provides no cover for a clear Free Exercise Clause violation here.

The Oklahoma Constitution provides no hurdle, either. To be sure, Article II, Section 5 of the Oklahoma Constitution states that "[n]o public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such." However, the Oklahoma Supreme Court has interpreted this restriction in a way that makes it inapplicable here. *See Oliver v. Hofmeister* 2016 OK 15, 368 P.3d 1270.

Starting in 1993, the Oklahoma Legislature gave school districts the option to provide services to children with disabilities or "enter into a written agreement with a private institution to provide the mandated services." *Id.* ¶ 7, 368 P.3d at 1273 (emphasis omitted). In 2010, the Legislature crafted the Lindsey Nicole Henry Scholarships for Students with Disabilities Act, a program that "simply allowed parents and legal guardians the same right that school districts already enjoyed, the choice to use state funds to contract with an approved private institution for special education services." *Id.* (emphases omitted). Participation in the program "is entirely voluntary," as "[e]ach family independently decides without influence from the State whether to enroll their child." *Id.* ¶ 8, 368 P.3d at 1273 (emphasis omitted).

Because the Lindsey Nicole Henry scholarship program allowed "[a]ny private school, whether sectarian or non-sectarian," to participate, several taxpayers sued, arguing that the program violated Article II, Section 5. *Id.* ¶¶ 1, 11-12, 368 P.3d at 1271-72, 1274. The Oklahoma Supreme Court unanimously disagreed, reversing the district court. *Id.* ¶ 27, 368 P.3d at 1277. Relying on U.S. Supreme Court precedent pre-dating *Trinity Lutheran*, *Espinoza*, and *Carson*, the Oklahoma Supreme Court considered "the neutrality of the scholarship program" to be an important factor, as well as the "private choice exercised by the families." *Id.* ¶ 13, 368 P.3d at 1274 (citing *Zelman*, 536 U.S. at 641). "When the *parents* and not the *government* are the ones determining which private school offers the best learning environment for their child," the Oklahoma Supreme Court emphasized, "the circuit between government and religion is broken." *Id.* (emphases in original).

Utilizing those principles, the Oklahoma Supreme Court found that the Lindsey Nicole Henry scholarship program was "completely neutral with regard to religion" and therefore unobjectionable under Article II, Section 5. *Id.* ¶ 26, 368 P.3d at 1277. "Scholarship funds deposited to a private sectarian school occur only as the result of private independent choice by the parent or legal guardian." *Id.* ¶ 14, 368 P.3d at 1274. "[T]his independence of choice by the parent breaks the circuit between government and religion," the Court held. *Id.* ¶ 15, 368 P.3d at 1274. It was not unconstitutional for a public school district to "fulfill its state mandated duty to provide educational services to children by . . . entering into a written agreement with an eligible

private institution in the public school district," even a sectarian institution. *Id.* ¶¶ 23-24, 368 P.3d at 1276. This holding, the Court pointed out, flowed directly from previous decisions concerning Article II, Section 5. Those cases had "clarified that as long as the services being provided 'involve the element of substantial return to the state and do not amount to a gift, donation, or appropriation to the institution having no relevancy to the affairs of the state, there is no constitutional provision offended.'" *Id.* ¶ 19, 368 P.3d at 1275 (quoting *Murrow Indian Orphans Home v. Childers*, 1946 OK 187, ¶ 9, 171 P.3d 600, 603).[1]

Applying *Oliver*'s principles here, allowing religiously affiliated participants to "provide educational services to children by … entering into a written agreement" with a charter school sponsor would not violate the Oklahoma Constitution. *Id.* ¶ 24, 368 P.3d at 1276. This is because charter schools are entirely optional for parents, "break[ing] the circuit between government and religion." *Id.* ¶ 15, 368 P.3d at 1274. And allowing the religious or religiously affiliated to participate would make the system neutral rather than hostile to religion. *See id.* ¶ 26, 368 P.3d at 1277. Thus, the Oklahoma Constitution does not prohibit religiously affiliated charter schools.[2]

In conclusion, the second sentence of Section 3-136(A)(2) of the Oklahoma Charter Schools Act is highly likely to be found unconstitutional under the Free Exercise Clause if it is enforced. In Oklahoma, so long as the Act permits private persons and organizations to establish and operate charter schools—and assuming the private applicant is otherwise qualified pursuant to neutral rules found elsewhere in the Act—sponsors should not disqualify an applicant solely based on the applicant's religion, "sectarianism," or religious affiliation, as this would in all probability be deemed "odious" to the United States Constitution.

B. "A charter school shall be nonsectarian in its programs, admission policies, employment practices, and all other operations"

The more complex question here is whether a religiously affiliated applicant must be allowed to establish and operate a charter school in conformance with that applicant's "sectarian" or "religious" traditions. In our view, the answer under the United States Constitution is likely yes, as well, for the following reasons.

To begin, it is helpful to remember that, when analyzing certain legal challenges under the U.S. Constitution, the U.S. Supreme Court employs various "tiers" or "levels" of scrutiny depending on the context. If "strict scrutiny" applies, the law or governmental practice in question must be "narrowly tailored to serve a compelling interest." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444

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[1] The plaintiffs in *Oliver* also sued under Article I, Section 5, which states that "[p]rovisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of the state and free from sectarian control …." The district court granted summary judgment to the State on this claim, *Oliver v. Barresi*, No. CV-2013-2072, 2014 WL 12531242, at *1 (Okla. Cnty. Sep. 10, 2014), and the Oklahoma Supreme Court did not, in *Oliver*, cite this provision or indicate that it would somehow change its analysis.

[2] Of course, even if *Oliver* held otherwise, the U.S. Supreme Court has clearly explained that State officials must first follow the federal Constitution in these types of cases. *See Espinoza*, 140 S. Ct. at 2253-54, 2262-63.

(2015). Only in "rare cases" will a law survive a court's strict scrutiny analysis. *Id.* A far less rigorous and more government-friendly approach is "rational basis review," which merely requires a law to "be rationally related to a legitimate governmental purpose." *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *see also Sklar v. Byrne*, 727 F.2d 633, 640 (7th Cir. 1984) ("most legislative enactments survive the rational basis test"). Thirdly, "[b]etween these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny." *Clark*, 486 U.S. at 461. "To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective." *Id.*

In the context of the First Amendment's Free Exercise Clause, laws that "incidentally burden[] religion are ordinarily not subject to strict scrutiny … so long as they are neutral and generally applicable." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) (citing *Emp't Div. v. Smith*, 494 U.S. 872, 878-882 (1990)). In such instances, courts apply "only … rational-basis scrutiny." *United States v. Wilgus*, 638 F.3d 1274, 1279 (10th Cir. 2011). The U.S. Supreme Court has for many years made it clear, however, that a "law targeting religious beliefs as such is never permissible," and a law prohibiting religious *practices* is subject to strict scrutiny as well, if it "discriminate[s] on its face" or its object "is to infringe upon or restrict practices because of their religious motivation." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).

Here, the first sentence of Section 3-136(A)(2) does both—it expressly targets religion, and its object is clearly to restrict religiously motivated practices. Thus, for the same reasons already discussed, this provision lacks neutrality and "the strictest scrutiny" would be applied by a federal court. *Carson*, 142 S. Ct. at 1997. And if generic "strict scrutiny" means a law will be upheld only in "rare" circumstances, *Williams-Yulee*, 575 U.S. at 444, it would stand to reason that a law will almost never survive when it is subjected to the "strictest scrutiny."

In the wake of *Trinity Lutheran, Espinoza*, and *Carson*, the only conceivable way to show an interest compelling enough to survive the strictest judicial scrutiny in this context would be to argue that the Establishment Clause requires or at least permits Oklahoma to prohibit charter schools from being operated in accordance with religious principles. In *Locke v. Davey*, for instance, the U.S. Supreme Court held that the State of Washington did not violate the Free Exercise Clause by forbidding college students from using a state-granted scholarship "at an institution where they are pursuing a degree in devotional theology." 540 U.S. 712, 715 (2004). This prohibition, the Court held, was permissible because of the "State's antiestablishment interests," even though funding these types of degrees would not actually be a federal Establishment Clause violation. *Id.* at 718-19, 722.

Having reviewed the relevant case law, however, we see little reason to believe the Supreme Court would divert from its recent precedent and hold that Oklahoma can rely on the Establishment Clause to justify discrimination in this context. There are multiple reasons to believe otherwise.

First, to hold that religiously affiliated organizations must be allowed to establish and operate a charter school but may be barred from acting in any way religious or "sectarian" in doing so, would be to embrace the distinction between religious "status" and "use" that the U.S. Supreme Court just rejected in *Carson*. Use-based religious discrimination, *Carson* explained, is just as "offensive

to the Free Exercise Clause" as status-based discrimination. *Carson*, 142 S. Ct. at 2001. To convey to a religious adherent that she can participate in a government program alongside other private entities but cannot act out her religious beliefs shows hostility to religion, not neutrality. *See Fulton*, 141 S. Ct. at 1877 ("Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts *practices* because of their religious nature." (emphasis added)).

Second, Missouri, Montana, and Maine all attempted to rely on *Locke* and the Establishment Clause to justify their religious discrimination, and the Court rebuffed their attempts with explanations that apply here. We see no reason why the Court would change course now.

In *Trinity Lutheran,* the Court distinguished *Locke* in part because the Washington scholarship program in question "went 'a long way toward including religion in its benefits.'" 137 S. Ct. at 2023 (quoting *Locke*, 540 U.S. at 724). Indeed, "[s]tudents in the program were free to use their scholarships at 'pervasively religious schools.'" *Id.* The program at issue in Missouri, in contrast, put Trinity Lutheran "to the choice between being a church and receiving a government benefit" with a "simple" rule: "No churches need apply." *Id.* at 2024. The Oklahoma provisions in question are much more like the latter restriction than *Locke*: they tell any religious or religiously affiliated private entities that they "need [not] apply" and that there will be no benefits whatsoever bestowed on anything pertaining to religious identity or use.

Going further, in *Espinoza* the Court pointed out that *Locke* was based on a "'historic and substantial' state interest in not funding the training of clergy." 140 S. Ct. at 2257-58 (quoting *Locke*, 540 U.S. at 725). And that interest, the Court emphasized, did *not* extend to denying public funds to religious schools in general. To the contrary, "[i]n the founding era and the early 19th century, governments provided financial support to private schools, including denominational ones." *Id.* at 2258. For example, "[a]fter the Civil War, Congress spent large sums on education for emancipated freedmen, often by supporting denominational schools in the South through the Freedmen's Bureau." *Id.*

Certainly, there was a trend of "no-aid" provisions that "more than 30 states" adopted starting in the mid-to-late 1800s. *Id.* But the Supreme Court rejected reliance on this trend. "[M]any of the no-aid provisions belong to a more checkered tradition shared with the Blaine Amendment of the 1870s," the Court observed, which would "have added to the Federal Constitution a provision … prohibiting States from aiding 'sectarian' schools." *Id.* at 2259. The Court criticized the Blaine Amendment as being "born of bigotry" and having arisen "at a time of pervasive hostility to the Catholic Church and to Catholics in general." *Id.* (quoting *Mitchell v. Helms*, 530 U.S. 793, 828-29 (2000) (plurality opinion)). And, the Court observed, "[i]t was an open secret that 'sectarian' was code for 'Catholic.'" *Id.* (quoting *Mitchell*, 530 U.S. at 828). State counterparts to the Blaine Amendment were not spared the Court's ire: "many" of them "have a similarly 'shameful pedigree.'" *Id.* (quoting *Mitchell*, 530 U.S. at 828-29).[3] As a result, "[t]he no-aid provisions of the

[3] Several state justices have argued that Article II, Section 5 of the Oklahoma Constitution did not originate with the Blaine Amendment. *See Prescott v. Okla. Capitol Pres. Comm'n*, 2015 OK 54, ¶ 1, 373 P.3d 1032, 1036 (Edmondson, J., concurring); *id.* ¶¶ 17-20, 373 P.3d at 1040-41

19th century hardly evince a tradition that should inform our understanding of the Free Exercise Clause." *Id.* In the end, the Court emphasized, "it is clear that there is no 'historic and substantial' tradition against aiding such [religious] schools comparable to the tradition against state-supported clergy invoked by *Locke*." *Id.*

Third, the Supreme Court has routinely deployed broad language in this area, especially when describing basic constitutional law principles surrounding the First Amendment, schools, and school-choice programs that include private participants and operators. Even if one can discern factual distinctions between Oklahoma charter schools and the state regulations at issue in *Trinity Lutheran*, *Espinoza*, and *Carson*, the Court's expansive phrasing—*e.g.*, the "strictest scrutiny"—signals loud and clear that the Court is not willing to uphold state discrimination in this arena.

Carson is particularly prominent in this regard. There, the Court concluded that *Locke* "cannot be read beyond its narrow focus on vocational religious degrees to generally authorize the State to exclude religious persons from the enjoyment of public benefits on the basis of their *anticipated religious use* of the benefits." *Carson*, 142 S. Ct. at 2002 (emphasis added). *Carson* also emphasized that "a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause." *Id.* at 1997 (citing *Zelman*, 536 U.S. at 652-53). These principles apply here, clearly.

Fourth, that Oklahoma law considers charter schools to be public schools for various purposes does not mean that religious discrimination must be allowed. Indeed, plaintiffs may not even be able to bring a federal Establishment Clause challenge against religious charter schools, much less prevail on one. A bedrock principle of federal law is that certain statutory and constitutional claims may only be brought against the government or state. To determine whether an entity is acting "under color of" state law, 42 U.S.C. § 1983,[4] or performing a "state action" such that a lawsuit can avoid being dismissed, courts analyze whether the action in question "can fairly be attributed to the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); *see also id.* at 1009 n.20. Here, U.S. Supreme Court precedent indicates that actions taken by charter schools are unlikely to fit this bill.

Most significantly, the U.S. Supreme Court held in *Rendell-Baker v. Kohn* that a school for special needs students, operated by a private board, was not a state actor for purposes of an employment lawsuit brought under § 1983, the First Amendment, and other laws. 457 U.S. 830 (1982). The Court explained, point-by-point, why the school was not a state actor in this instance even though it had contracted with public schools, "virtually all of the school's income was derived from government funding," the school "must comply with a variety of regulations … common to all

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(Taylor, J., concurring); *id.* ¶¶ 16-24, 373 P.3d at 1050-52 (Gurich, J., concurring); *id.* ¶¶ 11-12, 373 P.3d at 1057 (Combs, J., dissenting). One such justice conceded, however, that the language in Article I, Section 5 stating that public schools must be "free from sectarian control" does trace back to "the failed Blaine Amendment." *Id.* ¶¶ 18-19, 373 P.3d at 1051 (Gurich, J., concurring). This is an additional reason to conclude that Article I, Section 5 would not alter the analysis presented here. *See also supra* nn.1 & 2.

[4] Section 1983 is "a remedial vehicle for raising claims based on the violation of constitutional rights," and "[t]here can be no 'violation' of § 1983 separate and apart from the underlying constitutional violations." *Brown v. Buhman*, 822 F.3d 1151, 1161 n.9 (10th Cir. 2016).

schools," it took "nearly all" of its students from public school referrals, and it issued high school diplomas certified by nearby public schools. *Id.* at 831-33, 840-843. For state action, the Court emphasized that the State must coerce or significantly encourage the specific conduct being challenged, *id.* at 840 (citing *Blum*, 457 U.S. at 1004), and that it is not enough to show that the school merely performed a "public function." *Id.* at 842. Rather, the function must have "been 'traditionally the *exclusive* prerogative of the State.'" *Id.* (emphasis in original) (citations omitted). And serving "maladjusted high school students … who could not be served by traditional public schools" did not qualify. *Id.*

Relying on *Rendell-Baker,* the Ninth Circuit Court of Appeals has held that an Arizona charter school was not a state actor for employment law purposes. *See Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806 (9th Cir. 2010). In reaching this conclusion, the Ninth Circuit found that various public aspects of Arizona charter schools—aspects that also exist in Oklahoma charter schools, such as public funding—did not mean charter schools were state actors under federal law for all purposes. *See id.* at 808-18 (citations omitted). The Ninth Circuit concluded that the school in *Rendell-Baker* was very much like the charter school in Arizona: both involved "a private entity that contracted with the state to provide students with educational services that are funded by the state." *Caviness*, 590 F.3d at 815 (citing *Rendell-Baker*, 457 U.S. 830). "The Arizona legislature chose to provide alternative learning environments at public expense, but, as in *Rendell-Baker*, that 'legislative policy choice in no way makes these services the exclusive province of the State." *Id.* (quoting *Rendell-Baker*, 457 U.S. at 842). The Ninth Circuit also held that the fact that the charter school's "sponsor has the authority to approve and review the school's charter" did not change its decision because "[a]ction taken by private entities with the mere approval or acquiescence of the State is not state action." *Id.* at 817 (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999)).

Other circuits have reached similar results interpreting *Rendell-Baker*, albeit not directly in the charter school context. *See Logiodice v. Trs. of Maine Cent. Inst.*, 296 F.3d 22, 24-26 (1st Cir. 2002) (finding no state action for a privately operated school that contracted into the Maine public school system later described in *Carson*, in part because "[e]ducation is not and never has been a function reserved to the state"); *Robert S. v. Stetson Sch., Inc.*, 256 F.3d 159, 166 (3d Cir. 2001) (Alito, J., writing for the panel) (holding that a publicly funded and contract-based school for juvenile sex offenders was not a state actor in part because it did not perform "a function that has been traditionally the exclusive province of the state").

Not all courts have agreed, however, two of which deserve a mention here. The first is *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104 (4th Cir. 2022), where the Fourth Circuit held *en banc* that the operator of a North Carolina charter school performed a state action in implementing a school dress code. Without dissecting that lengthy decision in full, our view is that the Ninth Circuit and the six dissenters in *Peltier* have the better of the argument, as their reading of *Rendell-Baker* is far more faithful to that decision's facts and principles than the Fourth Circuit's. *See, e.g.*, *Peltier*, 37 F.4th at 137, 142-43 (Quattlebaum, J., dissenting in part) ("[T]he majority misconstrues and ignores guidance from the Supreme Court and all of our sister circuits that have addressed either the same or very similar issues. … These principles the Supreme Court articulated in *Rendell-Baker* … make clear that [the charter school] is not subject to liability under § 1983."). For example, *Rendell-Baker* held that for state action to exist, the government "must compel or at least

significantly encourage the conduct" in question, a critical point the Fourth Circuit ignored in its state action analysis even though it "properly conclude[d] that North Carolina did not coerce or compel the dress code . . . ." *Id.* at 148 (Quattlebaum, J., dissenting in part) (citing *Rendell-Baker*, 457 U.S. at 840). Applied to Oklahoma, any religious practice in charter schools would *not* be compelled or even significantly encouraged by the State. *See Blum*, 457 U.S. at 1004 ("[O]ur precedents indicate that a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."). Thus, it would not be state action challengeable under the Establishment Clause.

The other decision worth mentioning is from 1982, where the Tenth Circuit Court of Appeals held that the owners and operators of a private school and detention facility for troubled boys were state actors under Section 1983. *See Milonas v. Williams*, 691 F.2d 931 (10th Cir. 1982). We agree with Justice Alito, then writing for the Third Circuit, that the "*Milonas* court's reliance on 'significant state funding of tuition' and the detailed contracts between the school and local school districts appears to us to be squarely inconsistent with *Rendell–Baker*." *Robert S.*, 256 F.3d at 168. Regardless, *Milonas* is distinguishable because the Tenth Circuit also "relied on the *involuntary* commitment of some students" to the detention facility—students sent by the state—to find state action. *Id.* at 167-68 (emphasis added); *see Milonas*, 691 F.2d at 940 ("Many of the members of the class were placed at the school involuntarily by juvenile courts and other state agencies acting alone ...."). No such involuntary commitment occurs in Oklahoma charter schools, which are entirely optional for parents.

Much like *Trinity Lutheran*, *Espinoza*, and *Carson* overwhelmingly indicate that the Oklahoma provisions in question violate the Free Exercise Clause, *Rendell-Baker* and *Caviness* counsel strongly toward a federal law finding that Oklahoma charter schools are not state actors and thus not vulnerable as an initial matter to an Establishment Clause challenge. *See also* Nicole Stelle Garnett, *Religious Charter Schools: Legally Permissible? Constitutionally Required?*, MANHATTAN INSTITUTE at 4 (Dec. 2020) ("[I]n most states, charter schools ought not to be considered, for federal constitutional purposes, 'state actors'").[5] Indeed, it should not be overlooked that *Rendell-Baker* itself involved the dismissal of a challenge brought under the First Amendment. *See Rendell-Baker*, 457 U.S. at 837.

Fifth, the preferred method for determining state action in these cases—eschewing labels for relevant functions—dovetails with the substantive approach the U.S. Supreme Court took in *Carson*. There, the Court emphasized that a state's decision to classify or label privately operated schools as public schools does not control the Court's First Amendment analysis. "Regardless of how the benefit and restriction are described," the Court explained, "the program operates to identify and exclude otherwise eligible schools on the basis of their religious exercise." *Carson*, 142 S. Ct. at 2002. Maine's program was therefore unconstitutional. To hold otherwise would render *Espinoza* "essentially meaningless," since Montana could have claimed that its tax credit was limited to tuition payments for the "rough equivalent" of a public education. *Id.* at 2000.

[5] *Available at* https://www.manhattan-institute.org/religious-charter-schools-legally-permissible-constitutionally-required.

Admittedly, *Carson* walked through factors that can be used to distinguish private and public schools, and, unlike in *Carson*, those factors here would fall on both sides of the public/private ledger. *Compare, e.g.*, *id.* at 1999 ("[P]rivate schools … do not have to accept all students. Public schools generally do."), *with* 70 O.S.2021, § 3-135(A)(9) (requiring charter schools to "be as equally free and open to all students as traditional public schools"), *and Carson*, 142 S. Ct. at 1999 ("Participating [private] schools need not hire state-certified teachers."), *with* OKLA. STATE DEP'T OF EDUC., Okla. Charter Schools Program, https://sde.ok.gov/faqs/oklahoma-charter-schools-program (last visited Nov. 30, 2022) ("[Oklahoma] charter schools are not required to employ an individual who holds a valid Oklahoma teaching certificate.").

But that is unsurprising, as it is most certainly *not* our contention that Oklahoma's description of charter schools as "public" is an empty or incorrect label. *See, e.g.*, 2012 OK AG 12 ("The Act authorized the creation of charter schools, which *are public schools* established by contract." (emphasis added)). The analysis here is limited solely to determining how the two "Religion Clauses" of the First Amendment apply to charter schools, and nothing more. And in that context *and that context alone*, the most significant factors—such as private operation and curriculum flexibility—point to a violation of the Free Exercise Clause and the inapplicability of the Establishment Clause, under current U.S. Supreme Court jurisprudence. That is as far as the reasoning in this opinion goes.

Oklahoma, in short, has decided to let private organizations establish and operate charter schools. In *Carson*, the Supreme Court treated the situation very nearly as a tautology: if schools are operated by private organizations, then the First Amendment prohibits status *and* use discrimination. And this makes sense in the First Amendment context. The State cannot outsource operation of entire schools to private entities with "critical cultural, organizational, and institutional characteristics" that the State desires to see reproduced, 70 O.S.2021, § 3-132(C)(3), allow them to innovate in terms of curriculum, and then retain the ability to discriminate against private entities who wish to exercise their religious faith. The State cannot enlist private organizations to "promote a diversity of educational choices," *id.* § 3-134(I)(3), and then decide that any and every kind of religion is the wrong kind of diversity. This is not how the First Amendment works.

* * *

In sum, we do not believe the U.S. Supreme Court would accept the argument that, because charter schools are considered public for various purposes, that a state should be allowed to discriminate against religiously affiliated private participants who wish to establish and operate charter schools in accordance with their faith alongside other private participants. Almost nothing in the text or trajectory of *Trinity Lutheran*, *Espinoza*, or *Carson* would lead one to that conclusion, nor does the Supreme Court's Establishment Clause or state actor jurisprudence point in that direction. Thus, the limitations found in Section 3-136(A)(2) are likely to be found unconstitutional insofar as they single out religiously affiliated organizations based solely on their "sectarian" status or their anticipated use of public funds for religious purposes.

It is important to emphasize, however, that to the extent that neutral and generally applicable limitations may be found elsewhere in the Act, those limitations can likely be applied to religious

charter schools, so long as they are truly neutral and applied equally to all charter schools alike. *See Fulton*, 141 S. Ct. at 1876-77. In other words, just because the provision prohibiting charter schools from being sectarian "in its programs, admission policies, employment practices, and all other operations" is likely unconstitutional does *not* mean that religious or religiously affiliated charter schools can necessarily operate however they want in regard to "programs, admission policies, employment practices," and the like. The constitutional problem is singling out religion, not necessarily the provisions found elsewhere regulating various aspects of charter schools. For instance, as it currently stands federal law does not in all likelihood prohibit Oklahoma from enforcing requirements like those indicating that charter schools must be "as equally free and open to all students as traditional public schools," 70 O.S.2021, § 3-135(A)(9), or must not charge tuition or fees, *id.* § 3-136(A)(10), so long as hostility to religion is not present.

It is, therefore, the official Opinion of the Attorney General that:

> **Pursuant to the conclusions of the United States Supreme Court in *Trinity Lutheran*, *Espinoza*, and *Carson*, the non-sectarian and non-religious requirements found in 70 O.S.2021, § 3-136(A)(2) of the Oklahoma Charter Schools Act likely violate the First Amendment to the U.S. Constitution and therefore should not be enforced.[6]**

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ATTORNEY GENERAL OF OKLAHOMA
APPROVED IN CONFERENCE
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[6] It has long been recognized that an Attorney General opinion finding an "act of the legislature is unconstitutional should be considered advisory only, and thus not binding until finally so determined by an action in the District Court of this state." *State ex rel. York v. Turpen,* 1984 OK 26, ¶ 12, 681 P.2d 763, 767. Accordingly, this opinion should be deemed advisory only.