

LEGAL UPDATE FOR THE COLORADO LEAGUE OF CHARTER SCHOOLS

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By Eric V. Hall

Title: *Does the Constitution require religious charter schools?*

On January 24, 2025, the U.S. Supreme Court agreed to decide whether the Free Exercise Clause requires states to allow religious charter schools. The Supreme Court will hold oral argument on April 30 and issue a decision by the end of June 2025. The two cases giving rise to this appeal are *St. Isidore of Seville Catholic Virtual School v. Drummond* and *Oklahoma Statewide Charter School Board v. Drummond*, and they involve review of a decision by the Oklahoma Supreme Court in which it held that St. Isidore, a Catholic online school, could not be authorized as an Oklahoma charter school because it was a public school and, therefore, it would be a violation of the Establishment Clause to allow a public school to endorse a specific religious viewpoint.

The U.S. Supreme Court will consider two questions. First, are Oklahoma charter schools “state actors” or “private actors”? Second, if they are private actors, then does Oklahoma violate the Free Exercise Clause by prohibiting private religious charter schools?

As to the first question, it asks whether Oklahoma charter schools are more like traditional public schools or whether they are more like private contractors that receive public funds pursuant to government contracts, just like private corporations working in aerospace (e.g., Lockheed Martin), defense contracting (e.g., Northrop Grumman), or construction (e.g., Kiewit). If the Supreme Court finds that Oklahoma charter schools have “such a close nexus” with the State that their “behavior may be fairly treated as that of the State itself,” *Brentwood Academy v. Tenn. Secondary Schools Athletic Association*, 531 U.S. 288, 295 (2001), then it will likewise agree with the Oklahoma Supreme Court that the Establishment Clause prohibits religious

charter schools because that would be tantamount to “sponsorship, financial support, and active involvement of the sovereign in religious activity.” *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 668 (1970).

On the other hand, if the Supreme Court holds that Oklahoma charter schools are private entities, then it will reach the second question and almost certainly conclude that the Free Exercise Clause requires the State of Oklahoma to permit religious charter schools. Over the past eight years, the Supreme Court has handed down three cases in which it has held that “a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits.” *Carson v. Makin*, 596 U.S. 767, 778 (2022) (Maine could not prohibit religious private schools from participating in a tuition assistance program for parents who live in school districts that do not operate a secondary school of their own); *see also Trinity Lutheran Church v. Comer*, 582 U.S. 449 (2017) (Missouri could not prohibit a Lutheran church from receiving publicly available grants for playground resurfacing materials); *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464 (2020) (Montana could not prohibit religious private schools from participating in a tuition assistance program funded by tax credits).

Does this mean that religious charter schools will soon be coming to Colorado? Not likely. Even if the Supreme Court finds that Oklahoma charter schools are private actors, and therefore religious schools must be allowed there, the Colorado Charter Schools Act has numerous provisions that make clear that Colorado charter schools are just as “public” as the public schools operated by school districts. *See* C.R.S. § 22-30.5-103(2) (defining “charter schools” as “public schools”); *id.* -104(1) (defining a “charter school” as “a public, nonsectarian, nonreligious...school which operates within a public school district”); *id.* -104(4.5)(a) (for purposes of tax-exempt financing, “a charter school, as a public school, is a governmental

entity”); *id.* -104.9(2)(a) (“A charter school has the same public status as a public school that is geographically located in the same school district.”); *id.* -104.9(2)(b) (“Board directors and school leaders, by virtue of their roles within a public charter school, are deemed public servants.”); *id.* -104.9(2)(c) (“A school leader of a charter school has the same or similar authority as a school district superintendent.”); *id.* -111(3) (requiring charter school employees to pay into Colorado’s Public Employees’ Retirement Association (PERA)).

In sum, charter school advocates in all fifty states will be carefully monitoring the Supreme Court’s decision in this pair of Oklahoma cases because it could have a seismic impact on charter schools across the country. While it does not appear it will affect Colorado charter schools, the League and others will be monitoring it closely.