



J. Kevin Stitt  
Office of the Governor  
State of Oklahoma

February 27, 2023

Dear Attorney General Drummond:

I write to express my strong disagreement with your letter of February 23, 2023, withdrawing Attorney General Opinion 2022-7. In that opinion, your predecessor, Attorney General John O'Connor, concluded – in my view correctly – that provisions of Oklahoma law prohibiting charter schools from being “affiliated with a nonpublic sectarian school or religious institution,” and requiring them to “be nonsectarian in [their] programs, admission policies, employment practices, and all other operations,” 70 O.S.2021, § 3-136(A)(2), likely violate the First Amendment’s prohibition on religious discrimination.

Your letter seems to have been prompted by the pending application before the Statewide Virtual Charter School Board for St. Isidore of Seville Catholic Virtual School. You contend that the United States and the Oklahoma Constitutions permit, and indeed require, the state to discriminate against religious organizations seeking authorization to operate charter schools. In fact, the opposite is true. You state that “religious liberty is one of our most fundamental freedoms” that protects the “right to worship according to our faith” and to be “free from any duty that conflicts with our faith.” That is certainly true.

But religious liberty does more. Religious liberty also precludes the government from singling out believers for disfavor or preventing them from fully participating in public life, including in public-benefits programs. As Chief Justice Roberts explained in *Espinoza v. Montana*, 140 5. Ct. 2246 (2020), the First Amendment “protects religious observers against unequal treatment and against laws that impose special disabilities on the basis of religious status.” As a result, the Constitution prohibits states from “putting [a] school to a choice between being religious or receiving government benefits.” *Id.* at 2257. Yet that is exactly what the provisions of Oklahoma law prohibiting religious charter schools do: They put religious believers and organizations to a choice between being religious – in the case of St. Isidore of Seville School, being “a fully Catholic school” – and receiving funds that the state has chosen to allocate to privately operated charter schools.

I have previously expressed my strong [agreement](#) with Attorney General O'Connor's conclusion that prohibitions on religious charter schools are unconstitutional. These prohibitions run afoul of the non-discrimination principle articulated by the U.S. Supreme Court in recent cases, including *Espinoza, Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 5. Ct. 2012 (2017), and *Carson v. Makin*, 142 5. Ct. 1987 (2022). These cases make clear that when the government creates a program to support private organizations who help serve the public good, including by providing education, it may not bar religious organizations from participating. Your letter's attempt to distinguish these opinions by arguing that they have "little precedential value" because they concern "private schools" rather than "charter schools" fails. The principle driving these cases applies with equal force to privately operated charter schools. Just as Maine had done in the program invalidated in *Carson v. Makin*, Oklahoma has chosen to enlist private organizations to create privately operated schools, to promote educational pluralism for the benefit of the children of Oklahoma. And, as Attorney General O'Connor correctly concluded, following *Carson*, "[t]he State cannot enlist private organizations to 'promote a diversity of educational choices,' 70 O.S. 2021 § 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."

The question of whether a ban on religious charter schools is unconstitutional religious discrimination turns on whether charter schools are, for federal constitutional purposes, "state actors" or private actors. If they are state actors, then excluding religious charter schools is constitutionally permitted – indeed, probably required. But if they are private actors, excluding religious ones is constitutionally forbidden. As the U.S. Supreme Court stated in *Espinoza*, "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." And the schools subsidized by Oklahoma charter school laws *are* private. Although charter schools are *labeled* as "public schools" in Oklahoma law, they are – in contrast to district public schools – privately operated. And privately operated organizations, including charter schools, are state actors only when their actions are "fairly attributable" to the government, rather than merely authorized or encouraged by it. *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40 (1999). In Oklahoma, the actions of privately operated charter schools are certainly not attributable to the government. On the contrary, these schools are freed – by design – from government control in order to foster educational pluralism. Their actions are not "fairly attributable" to the government because operational autonomy is one of their reasons for existing.

The mere fact that charter schools are publicly funded, and designated as "public schools" by Oklahoma law, does not transform them into state actors. The Supreme Court has already made that clear. More than 40 years ago, the Court held that a privately operated school for special needs students was not a state actor even though "virtually all of the school's income was derived from government funding" and it was required to "comply with a variety of regulations." *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982). And the Court has also rejected the notion that a private entity is transformed into a state actor merely because it was created by the government or is formally

designated “public.” See *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Commission*, 483 U.S. 522 (1987); *Jackson v. Metro Edison Co.*, 419 U.S. 345 (1974).

You note that the issue may be “definitively resolved” by the U.S. Supreme Court in a pending case having nothing to do with religion – an Equal Protection challenge to a North Carolina charter school's dress code. See *Peltier v. Charter Day School*,” 37 F.4th 104 (4th Cir. 2022), cert. pending, no. 2022-238. The Court has not yet decided whether to hear the case, which would require it to address the question whether charter schools are state actors. But the factors that the Court will apply to make that determination (*if* it chooses to take the case) all clearly support the conclusion that they are not. In any event, the state of Oklahoma has the independent constitutional obligation to uphold the Constitution of the United States *now*, not to act on a guess that the Court might in a future case go against the thrust of its own precedents.

As for the merits of the state action issue, ten states – Texas, Alabama, Alaska, Arkansas, Kansas, Mississippi, Nebraska, South Carolina, Tennessee, and Virginia – have filed a brief in the *Peltier* case supporting the argument that charter schools are not state actors. In their brief, these states argue that the very point of charter school laws – to enable educational innovation and pluralism by freeing private providers of education to operate without undue government interference – is undercut by the argument that charter schools are state actors. I agree strongly with the arguments articulated in these states’ brief.

I see even broader threats to religious liberty in your suggestion that Attorney General O’Connor’s opinion “misuse[d] the concept of religious liberty by employing it to justify state-funded religion,” including “tax-payer funded religious schools.” As you know, the [Lindsey Nicole Henry Scholarship for Students with Disabilities Program](#), which the Oklahoma Supreme Court upheld in *Oliver v. Hoffmeister*, 368 P.3d 1270 (Okla. 2016), provides publicly funded scholarships to enable children with special learning needs to attend private and religious schools. Any concerns about “tax-payer funded religious schools” would seem to apply with equal force to religious schools participating in this important program. Outside of the education context, the state *regularly* partners with religious organizations to provide public services. For example, the Oklahoma Department of Human Services maintains an “[Office of Faith Based and Community Initiatives](#)” whose stated mission is to “build[] partnerships between government offices and faith and community groups to address social service needs.” Religious organizations partnering with the government through this program “are not required to alter their forms of internal governance, their religious character or remove religious art, icons, scripture or other symbols.” See “Ask OKDHS - Office of Faith Based and Community Initiatives.” The State also contracts with religious organizations, including the two Catholic dioceses seeking approval to operate St. Isidore of Seville Virtual Catholic School, to provide [refugee resettlement](#) and [foster care](#) services. The concerns expressed in your letter would seem to apply with equal force to these critical public-private partnerships as well.

Finally, I am troubled by the allegation that approval of the SISCVS application portends a “slippery slope” that might open the door to charter schools sponsored by all faiths. Oklahomans support religious liberty for *all*, Christian and non-Christian alike. And so do I. Oklahomans also support an increasingly innovative and pluralistic educational system freed from undue government interference. Again, so do I. As Governor, I wish to make clear that I support not only the pluralism promoted by Oklahoma charter school laws but also the religious liberty of all Oklahomans and to express my confidence that the people of Oklahoma do as well.

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin Stitt". The letters are stylized and cursive.

J. Kevin Stitt  
Governor of Oklahoma