

# Religious Charter Schools Remain Unlawful in Oklahoma After Supreme Court Judgment

July 22, 2025

On May 22, 2025, the Supreme Court [affirmed](#) a [state court opinion](#) ruling that Oklahoma could not authorize or fund a religious charter school. The appeal in *Oklahoma Statewide Charter School Board v. Drummond* implicated a number of open constitutional questions, including whether charter schools qualify as governmental entities, whether funding religious charter schools would violate the U.S. Constitution’s Establishment Clause, and whether excluding religious schools from the charter school program would violate the Free Exercise Clause. Ultimately, however, the Supreme Court did not weigh in on these questions. Instead, the Court split 4–4 and affirmed the judgment below in a one-sentence order. (Justice Barrett had [recused](#) herself from the case, meaning only eight of the nine Justices were participating.) This Legal Sidebar discusses the outcome, the decision below, and the legal questions left open by the Supreme Court’s ruling—some of which implicate the [federal charter school program](#).

## Factual Background

As explained in a [CRS In Focus](#), charter schools are typically operated by private organizations under a contract with the government known as a charter. They are publicly funded and tuition free but often have greater flexibility in their operations than traditional public schools. Oklahoma adopted a charter school law in 1999. Among other conditions, Oklahoma [statute](#) requires a charter school to “be nonsectarian in its programs, admission policies, employment practices, and all other operations.” The statute also [prohibits](#) “a charter school or program that is affiliated with a nonpublic sectarian school or religious institution.”

At issue in *Drummond* was St. Isidore, a [nonprofit corporation formed by](#) the Archdiocese of Oklahoma City and the Diocese of Tulsa. In 2023, the St. Isidore corporation [applied](#) to Oklahoma’s Charter School Board to establish a religious virtual charter school. The [Charter School Board](#), which has the sole authority to sponsor virtual charter schools, voted to approve the application and executed a charter contract setting out the terms of sponsorship. The contract with St. Isidore differed from the model contract set out in a state manual. For instance, St. Isidore’s contract did not contain standard provisions requiring the school to be nonsectarian, and the contract [stated](#) that St. Isidore would have certain “certain rights, exemptions, or entitlements” as a religious organization.

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LSB11342

The Oklahoma Attorney General [claimed](#) that the Board’s decision was unlawful. Ultimately, the state filed a lawsuit seeking to rescind the St. Isidore contract, arguing that it violated both state and federal law. (At least one other private group raised state law [challenges](#) to the school in a separate [lawsuit](#) that was not at issue in the Supreme Court appeal.) In addition to arguing that the St. Isidore contract violated the [state constitution](#) and the [state statute](#) requiring charter schools to be nonsectarian, Oklahoma also argued that the creation of a religious public school violated the Establishment Clause of the U.S. Constitution. In response, St. Isidore and the Charter School Board argued that the U.S. Constitution’s Free Exercise Clause required the state to include religious schools in the charter school program.

## Constitutional Background

The [Religion Clauses](#) of the First Amendment to the U.S. Constitution state that the government “shall make no law respecting an *establishment* of religion, or prohibiting the *free exercise* thereof.” Government programs can implicate both provisions. The [Establishment Clause](#) limits the government’s ability to fund religious activities. At the same time, the Supreme Court has held that the [Free Exercise Clause](#) limits the government’s ability to exclude religious entities from general public programs.

In the 1947 case *Everson v. Board of Education*, the Supreme Court [concluded](#) that New Jersey could “pay the bus fares of parochial school pupils as a part of a general program” available to “pupils attending public and other schools” without violating the Establishment Clause. Since then, the Supreme Court has held that indirect support for religious entities not only might be permitted, but might sometimes be required. For instance, in 2022’s *Carson v. Makin*, the Supreme Court held that Maine had violated the Free Exercise Clause by excluding religious schools from a tuition assistance program, as discussed in a [separate Legal Sidebar](#). Nonetheless, the Supreme Court has also [held](#) that *directly* giving government [funds](#) to religious activity would [violate](#) the Establishment Clause. (*Carson* involved [indirect financial aid](#) to religious entities, which the Court has said is acceptable so long as the program [aids](#) “a broad class of citizens who, in turn, direct government aid to religious [entities] wholly as a result of their own genuine and independent private choice.”) In approving of New Jersey’s bus fare program, *Everson* [emphasized](#) that the state “contributes no money to the [parochial] schools.”

The Religion Clauses’ application to charter schools such as St. Isidore likely requires the resolution of an important underlying issue: whether charter schools are private or government entities. The Religion Clauses only restrict government activity, and the Free Exercise Clause [only protects](#) private entities. St. Isidore’s status will therefore determine whether it is restricted or protected by the Religion Clauses. As *Everson* suggested, a “[tension](#)” potentially exists between the Religion Clauses. Older cases [establish](#) that the government may not directly fund religious activity, while more recent cases have [held](#) that the government may not deny financial support on the basis of a recipient’s religious character. Thus, if charter schools are government actors, the Establishment Clause would limit their ability to support religious activity, and, moreover, it is unlikely they would enjoy Free Exercise Clause protections. If, however, charter schools are viewed as private entities, the schools might not be subject to Establishment Clause restrictions, and the Free Exercise Clause might limit the government’s ability to exclude them from general programs. Even if the charter schools are considered private, though, the Establishment Clause might prevent the government from giving direct financial aid to the schools’ religious activity.

Determining whether an entity is private or governmental is often a fact-specific inquiry, and the answer is not always clear. The Supreme Court has used two different analyses to determine whether an entity should be treated like the government and therefore must operate within the confines of the Constitution. In one scenario, an entity may be deemed the government itself and [bound by the Constitution’s requirements](#) in all of its operations. In [determining](#) whether an entity is “not a private entity but Government itself,” the Supreme Court has [evaluated](#) the extent to which an entity is “created by the Government, is controlled by the Government, and operates for the Government’s benefit.” In making this

determination, the Court has examined [several factors](#) that arose from decisions involving the status of Amtrak, a federally chartered corporation. In one of those decisions, *Lebron v. National Railroad Passenger Corporation*, the Court held that Amtrak was a government entity for purposes of a First Amendment challenge. The Court concluded that even though Congress had specified in Amtrak's authorizing statute that Amtrak was not an "agency or establishment of the United States Government," that statutory label alone was not a final determination of Amtrak's status as a government entity for constitutional purposes. Instead, the Court reviewed Amtrak's history and operations and [concluded that](#) when "the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment."

While *Lebron* and related cases are helpful in evaluating whether an entity is the government, the Supreme Court has also held that in some cases, certain conduct of a private entity may be fairly attributable to the government and thus subject to the Constitution. Under what is often referred to as the "state-action doctrine," a private entity may be considered a state actor, and therefore liable for constitutional violations, if the specific circumstances of the case [demonstrate that](#) "the State is *responsible* for the specific conduct of which the plaintiff complains." While the state-action doctrine inquiry is also fact specific, the Court has developed a variety of tests to help evaluate whether private action should be attributed to the state, [including](#) (1) whether the private entity performs a traditional, exclusive public function; (2) whether the government has compelled the private entity to take specific action; or (3) whether the government acts jointly with the private entity or the government is sufficiently "entwined" in the private entity's management or control. Under the state-action doctrine, it is possible for a private entity [to be a](#) "state actor for some purposes but not for others." For example, the Ninth Circuit [held](#) that a public subdivision of the state that was owned and operated by private individuals but was authorized to exercise some governmental power was not acting as the state when it terminated an employee. The court concluded that the entity acted in a sovereign capacity in limited circumstances such as levying taxes or exercising eminent domain, but it did not exercise government power when it hired or fired employees.

Regardless of what test a court utilizes, if an entity is acting as the government, it is subject to the Constitution's requirements, including the Religion Clauses of the First Amendment.

## Oklahoma Supreme Court Opinion

In 2024, the Oklahoma Supreme Court sided with the state and [ruled](#) that St. Isidore's contract with the Charter School Board was unlawful. The court first considered the state law issues. Among other rulings, it [held](#) that the contract violated requirements in the state constitution and the charter school act that schools must be nonsectarian.

Next, the state court considered whether St. Isidore qualified as a public school. St. Isidore [argued](#) that it was a private corporation contracting with the state, and as such, was not subject to these state law restrictions on public schools. The state court rejected these claims, [holding](#) instead that the St. Isidore virtual charter school met the state law definition of a public school. The state court also applied at least two of the state-action doctrine tests discussed above to [conclude](#) that St. Isidore was a state actor for federal constitutional purposes.

The [ruling](#) that St. Isidore was a governmental entity under state law and a state actor for constitutional purposes set the stage for the Oklahoma Supreme Court to consider the federal constitutional claims. The Oklahoma Supreme Court [ruled](#) that the St. Isidore contract violated the federal Establishment Clause. The court reasoned that while the U.S. Supreme Court had not squarely considered the constitutionality of a religious public school, its cases led to the [conclusion](#) that "the Establishment Clause prohibits public schools (state actors) from requiring or expecting students to participate in religious activities."

Consequently, because St. Isidore would “require students to spend time in religious instruction and activities, as well as permit state spending in direct support of the religious curriculum and activities within St. Isidore,” the contract [violated](#) the Establishment Clause.

The court further rejected St. Isidore’s [argument](#) that excluding the school from the charter school program violated the Free Exercise Clause. In the court’s [view](#), St. Isidore was a state-created school, not a private school “seeking to be treated equally with other private entities.” Thus, the court [said](#) the relief St. Isidore sought was “beyond the fair treatment of a private religious institution in receiving a generally available benefit, implicating the Free Exercise Clause.” The court [held](#) that St. Isidore’s assertion of free exercise protections could not “override” the prohibitions of the Establishment Clause and allow the state to create and fund a religious public school.

## Supreme Court Appeal

[St. Isidore](#) and the [Charter School Board](#) both appealed the state court’s ruling to the Supreme Court. The Oklahoma Attorney General continued to [argue](#) on behalf of the state of Oklahoma that the charter violated state law and that Oklahoma can require charter schools to be nonsectarian. The United States also joined the case in [support](#) of St. Isidore and the Charter School Board. The Supreme Court consolidated the cases and heard oral argument on April 30, 2025. Less than a month later, on May 22, the Court issued a [per curiam order](#) stating that the judgment below was affirmed by an equally divided court. As is traditional in this type of ruling, the Court did not explain its reasoning. Nonetheless, oral argument revealed a number of difficult questions raised by the case.

One recurring question raised by the Justices at oral argument involved St. Isidore’s status as a governmental entity. St. Isidore, the Charter School Board, and the United States continued to assert that St. Isidore was a private entity. At the same time, the United States and Oklahoma [were seemingly in agreement](#) that the state-action doctrine tests used by the Oklahoma Supreme Court were not the appropriate framework to analyze whether Oklahoma’s charter schools are public schools. Instead, these parties asserted that the Court should look to its “government entity” precedents such as *Lebron* to decide whether charter schools such as St. Isidore qualify as governmental entities. Under this line of cases, according to Oklahoma and the United States, the Court should focus on factors such as [government creation and government control](#).

In explaining why the government entity precedents were a better fit for the case, Oklahoma suggested that the Court’s state-action doctrine tests are normally used to evaluate whether a private entity was acting under the color of state law with respect to certain conduct being challenged. For example, in a 2023 case, *Peltier v. Charter Day School*, the Fourth Circuit used state-action doctrine tests and held that a public charter school was a state actor for purposes of the plaintiffs’ Fourteenth Amendment Equal Protection Clause challenge to the school’s dress code. In *Drummond*, however, the question was not whether St. Isidore was acting on behalf of the state when it engaged in specific conduct violating an individual’s rights. Instead, the relevant inquiry was whether St. Isidore should broadly be characterized as a public school or private entity.

Whether St. Isidore was a public school or private entity was central to evaluating the application of the First Amendment’s Religion Clauses. Some Members of the Court asked about the Establishment Clause implications that could result from granting St. Isidore a charter. The Charter School Board [claimed](#) that St. Isidore was a private entity, and it was acceptable for the government to directly fund private religious education so long as the funding was part of a neutral and generally applicable program. The Board believed that Establishment Clause concerns would result only if the state solely funded religious schools. Along these same lines, the United States [implicitly argued](#) that the Supreme Court should extend its prior cases approving of *indirect* funding to hold that Oklahoma can also *directly* provide funds to religious

schools, so long as the program is available to both public and private schools and parents choose where to send their children.

Justices Jackson and Sotomayor [asked](#) whether including St. Isidore in the charter school program would require the state to engage in inquiries that would create an unconstitutional [entanglement](#) with religion. Specifically, the state generally reviews a charter school's curriculum to ensure it meets state standards. In St. Isidore's case, Justices Jackson and Sotomayor asked whether this would require the state to assess the quality of the school's religious teachings. Chief Justice Roberts [suggested](#) that St. Isidore's contract would require "a much more comprehensive involvement" of the state with religion than prior cases holding that the government could include religious schools in generally available benefits programs.

Potentially relevant to the question of whether the state was extending a neutral benefit to St. Isidore, Justice Jackson also [asserted](#) that the charter school program was offering support to establish a secular school, but St. Isidore was attempting to establish a religious school outside the scope of that public benefit. Justice Kagan [raised](#) the fact that St. Isidore struck certain requirements from the model contract to create an agreement that, in Justice Jackson's [view](#), was "tailored to . . . religious education."

In contrast to Justice Jackson's apparent view that the charter school was seeking an unequal benefit, other Justices [suggested](#) that the state seemed to be [discriminating](#) against St. Isidore and other religious schools because of their beliefs—treating them worse than comparable secular charter schools. If true, the Justices asserted, this would violate the Free Exercise Clause.

## Outcome and Considerations for Congress

Most immediately, the Supreme Court's affirmance of the Oklahoma ruling means that Oklahoma cannot authorize St. Isidore to operate as a religious charter school for the time being. However, the lack of an opinion leaves open jurisprudential questions about the state-action doctrine and when the government can fund religious activity. At oral argument, the Justices [recognized](#) that their ruling in this case could have implications for other states' charter school programs, as well as federal law.

Like the challenged Oklahoma law, a provision of federal statute, 20 U.S.C. § 7221i (Section 7221i), [defines](#) a charter school as "a public school that . . . is nonsectarian in its programs, admissions policies, employment practices, and all other operations." At oral argument, the United States [claimed](#) that Section 7221i was partially unconstitutional under the Free Exercise Clause. Specifically, the Solicitor General, arguing on behalf of the United States, said the Free Exercise Clause requires an "exception" allowing covered schools to be sectarian in their programs and operations. Further, he said that a related constitutional doctrine—the [ministerial exception](#)—might allow schools to make religious decisions with respect to their employment practices. Finally, however, he conceded that the federal government could require a covered charter school's admission policies to be nonsectarian. Neither the Supreme Court nor the Oklahoma court ultimately weighed in on the constitutionality of Section 7221i. In 2020, the Department of Justice's Office of Legal Counsel (OLC) issued an [opinion](#) concluding that a different aspect of the federal charter school definition was unconstitutional. Specifically, like the Oklahoma provision mentioned earlier, federal law [bars](#) charter school affiliation with a sectarian school or religious institution. OLC believed that this provision unconstitutionally discriminated against religion. OLC [suggested](#) that the Department of Education might "establish a policy not to enforce this provision"—but that if it did establish such a policy, it should report that decision to Congress as required by [statute](#). The executive branch might take a similar position in the future with respect to Section 7221i's requirements for nonsectarian programs, operations, and employment. If Congress agreed with the Solicitor General's free exercise concerns, it could amend federal law to remove the requirement that charter schools be nonsectarian.



Alternatively, if Congress wanted to ensure the federal charter school provisions apply only to public schools, it could amend the federal definition. During oral argument, some Justices asked whether states could alter charter school statutes so that they apply only to government entities—allowing the states to continue prohibiting the state schools from engaging in sectarian activity. St. Isidore [reiterated](#) that Supreme Court precedent focuses on whether an entity is created and controlled by the government. The Solicitor General [suggested](#) that states could “create [charter schools] directly by statute and have them controlled by directors who are themselves public officials.” The Supreme Court did not weigh in on this issue, and therefore the status of charter schools remains unresolved; however, Congress could choose to incorporate some of the elements of government creation and control from Supreme Court caselaw to ensure that charter schools operate as government entities.

Another issue raised in oral argument related to the [Individuals with Disabilities Education Act](#) (IDEA). The IDEA provides federal funding for the education of children with disabilities. As a condition of receiving funds, the statute requires states to provide a [free appropriate public education](#). In its [brief](#) and at [oral argument](#), Oklahoma argued that if the Supreme Court held that charter schools are not public schools, it could raise questions as to whether students at charter schools will be entitled to the IDEA’s protections, as private schools are not covered by the IDEA. Certain provisions of the IDEA already address the inclusion of charter schools. For example, the IDEA’s [definitions](#) of elementary school and secondary school expressly include “public” elementary and secondary charter schools. If Congress believed that there was ambiguity in whether certain charter schools are currently covered under the IDEA, it could amend this law.

Finally, as discussed in an [earlier Legal Sidebar](#) on *Carson*, open questions remain regarding the constitutionality of government support for religious activity. At oral argument in *Drummond*, some of the Justices expressed [concern](#) that granting St. Isidore a charter would violate the Establishment Clause under existing jurisprudence, either by [entangling](#) the government with religion or by directly funding religious activity. Other Justices, however, [asked](#) whether, in line with more recent Supreme Court cases, the state would violate the Free Exercise Clause by excluding the school from the program because of its religious character. These questions about which line of cases controls will likely arise again in future litigation.

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