A License to Discriminate: The Risky Next Step of Religious Charter Schools

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Abstract

From 2017 to 2022, the Supreme Court strengthened its First Amendment Free Exercise jurisprudence by deciding that states can provide aid to religious educational institutions through general benefit programs. Six months after the Court's most recent religious aid case, Carson v. Makin, Oklahoma's Attorney General stated that he would no longer enforce the nonsectarian provision of the state's public charter statute because it was unconstitutional under Carson and its progeny. That opinion initiated the application and 2023 approval of the first religious charter school, St. Isidore of Seville Catholic Virtual School by Oklahoma's Virtual Schoolboard. Immediately, state litigation ensued, and in 2024 the Oklahoma Supreme Court held that the St. Isidore violated state and federal requirements of separation between church and state. The school plans to appeal the decision to the United States Supreme Court.

In preparation for that appeal, this Article examines the legal and policy questions presented by religious charter schools. It argues that Carson does not apply to charter schools as public schools funded directly by the state. Further, the Article argues that even if Carson did apply, the Court should be hesitant to extend constitutionality to religious charter schools because of religious schools' unique ability to discriminate against LGBTQ+ and disabled students via admissions, employment, and curriculum. Thus, religious charter schools, as the next step in the Court's religious aid jurisprudence, will have serious implications for not only the Establishment Clause but also for constitutional commitments to equality.

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Introduction

Religious and nonreligious school choice frameworks are a prominent method of state and local school reform, a development the Supreme Court has aided via its recent religious aid jurisprudence. From 2016 through 2022, the Court has decided a series of cases that allow for public funding to go to private religious schools if parental choice is present to sever the connection between the state and the private religious institution.[2] In their most recent 2022 decision, *Carson v. Makin*, the Court held that a state must fund religious private schools when it otherwise provides funding for private education.[3]

Dissenting in that case, Justice Sotomayor prophetically warned of what was coming next. She notes that the Court's jurisprudence has led "to a place where separation of church and state becomes a constitutional violation."[4] No less than six months later, Oklahoma's attorney general took the next step in embracing state-sponsored religious charter schools.[5]

Charter schools are a complicated part of the school choice legacy that started with resistance to *Brown v. Board of Education*.[6] These schools initially shared bipartisan support as an innovative way to remedy some of the shortcomings of traditional public schools.[7] Minnesota passed the first charter school act in 1991, and in the last 30 years, charters have expanded.[8] Like traditional public schools, charters are public institutions—free and open to all and accountable to state districts. Yet, charter schools are also unique because

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[2] *See* Carson v. Makin, 596 U.S. 767 (2022); Espinoza v. Montana Department of Revenue 591 U.S. 464 (2020); Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449 (2017). For the purposes of this Article, I use the term "religious aid cases" to refer to these three cases as a unit.

[3] *Carson*, 596 U.S. at 789.

[4] *Id.* at 810.

[5] Okla. Att'y Gen. Op. No. 2022-7 (December 1, 2022), 6. Justice Breyer foreshadowed this development in his dissent in Espinoza. *See Espinoza*, 591 U.S. at 538 (arguing that the decision fails to provide guidance on balancing the competing interests "that underlie the Free Exercise and Antiestablishment Clauses" in the charter school context).

[6] Brown v. Board of Education, 374 U.S. 483, 495 (1954) (holding that in the "field of public education" segregation could not stand); *see also* Steve Suitts, Overturning Brown: the segregationist legacy of the modern school choice movement (2020)

[7] *See Are Charter Schools a viable educational model as an alternative to public education?*, *in* Alternative Schooling and School choice 3 (Allan G. Osborne, Charles J. Russo, & Gerald Michael Cattaro, eds., 2012); *see also* Jon Hale, The Choice We Face: How Segregation, Race, and Power Shaped America's Most Controversial Education Reform Movement 142 (2021) (for the argument that Black people also initially championed charter schools). *But see* Mercedes K. Schneider, School choice: the end of public education? 59 (2016) for the argument that while initially there was bipartisan support for charter schools, they have become a conservative idea; *see also* Noliwe M. Rooks, Cutting School: Privatization, Segregation, and the End of Public Education (who argues that Black parents shifted their support after being disappointed with the results of charters).

[8] *See* Schneider, *supra* note 7, at 59; *see also* Wayne D. Lewis, The Politics of Parent Choice in Public Education: The Choice Movement in North Carolina and the United States 41 (2013).

the state gives them flexibility in matters of employment, operations, and curriculum so that charter schools can innovate—a luxury not afforded to traditional public schools.[9] With their inception, charter schools promised that this flexibility would lead to better innovation in education[10] and more racial diversity.[11]

Whether they have fulfilled this promise is up for debate.[12] What is not up for debate is the popular role charter schools play in state public education systems today.[13] From 2010 until 2021, the number of charter school students doubled, while traditional public school attendance decreased by 4%.[14] Forty-five states and the District of Columbia have charter school legislation, and as of 2021, around 3.5 million K-12 age public school students attend charter schools.[15] In contrast, other school choice reforms, like vouchers or tax credits, make up only 1.3% (700,000) of K-12 private school students, making charter schools the most potent weapon in the school choice arsenal.[16] The 2020 Covid pandemic led to a huge increase in charter school enrollment, and charter schools remain the "fastest growing parent choice reform model in the United States."[17]

States understand charter schools to be public schools, even if they have different rules and guidelines than traditional public schools; thus, historically states required charter schools to be nonsectarian or nonreligious.[18]

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[9] Osborne, *supra* note 7, at 4–5; *see also* Chester E. Finn, Bruno V. Manno & Brandon L. Wright, Charter Schools At the Crossroads: Predicaments, Paradoxes, Possibilities 7–8 (2016); Kevin S. Huffman, *Charter Schools, Equal Protection Litigation, and the School Reform Movement*, 73 N.Y. U. L. Rev. 1290, 1294 (1998).

[10] *See* Osborne, *supra* note 7, at 4–5.

[11] *See* Hale, *supra* note 7, at 129*; see also* Preston C. Green III, Erica Frankenberg, Steven L. Nelson, & Julie Rowland, *Charter Schools, Students of Color, and the State Action Doctrine: Are the Rights of Students of Color Sufficiently Protected?,* 18 Wash. & Lee J. Civ. Rts. & Soc. Just. 253, 254–55 (2012) (for the argument that proponents of charter schools see them as better equipped to handle needs of students of color).

[12] *See generally* Raynard Sanders, David Stovall & Terrenda White, Twenty-First Century Jim Crow Schools: The Impact of Charters and Vouchers on Public Education (2018) 3, 24–25, 42 (arguing that charter schools have been less helpful than anticipated in Black and Brown Communities); Rooks, *supra* note 6, at 132–138 (arguing that initial Black support for charters had declined over the years because charters have not proven to be better at achieving results); Lewis, *supra* note 8, at 47 (stating that no research shows that charter schools provide a significant advantage to their students). *But see generally* Finn, *supra* note 9 (arguing that the successes of charter schools are worth replicating).

[13] Osborne, *supra* note 7, at 10, 17 (stating that "charter schools cannot be easily dismissed due to the wide support and popularity they enjoy with businesses, foundations, and politicians"); *see also* Green, *supra* note 11, at 254.

[14] *See Fast Facts: Charter Schools*, Nat'l Center for Educ. Stats., https://nces.ed.gov/fastfacts/display.asp?id=30 [https://perma.cc/T36K-BDL5] (last visited Apr. 13, 2024).

[15] *Id.*; *see also* Nicole Stelle Garnett, *Supreme Court Opens A Path to Religious Charter Schools: But the Trail Ahead Holds Twists and Turns*, 23 Educ. Next 8, 11 (Spring 2023); *see also* Todd Ziebarth, *Measuring Up to the Model: A Ranking of State Public Charter School Laws*, Nat'l All. for Pub. Charter Schs. 1, 3 (2022).

[16] Garnett, *supra* note 15, at 11.

[17] Ziebarth, *supra* note 15, at 1; *see also* Lewis, *supra* note 8, at 41.

[18] *See* Hale, *supra* note 7, at 128 (defining charter schools as nonsectarian public schools); *see also* Nicole Stelle Garnett, *Time for Religious Charter Schools*, City J. (2022), https://www.city-journal.org/article/time-for-religious-charter-schools/ [https://perma.cc/ZEN2-WZQ9] (noting that all state charter school laws require charter schools to be secular). In fact, scholars originally were more supportive of charters because they did not require giving public money to private institutions. *See* Scott Franklin Abernathy, School-Choice and the Future

Oklahoma's attorney general, John O'Connor, released an opinion, however, arguing that religious institutions must be allowed to participate in creating charter schools. Relying on the Supreme Court's religious aid jurisprudence, O'Connor argued that Oklahoma's charter school act could not exclude religious charter schools without violating the First Amendment's Free Exercise Clause.[19] As such, his office would no longer enforce the prohibition against sectarian charter schools.[20]

Litigation on this issue reached the Oklahoma Supreme Court—which held that religious charter schools violated Oklahoma's constitutional prohibition on taxpayer aid to religious institutions.[21] The decision was not unanimous, however, and it is expected that the decision will be appealed to the United States Supreme Court.[22] The central issue will be whether charter schools are public/state actors or private/non-state actors, a question that federal circuits have decided both ways.[23] If charter schools are private, then the Court's Free Exercise Jurisprudence would require states to allow religious charter schools, regardless of any state constitutional provision. If these schools are public, then it is likely that the approval of religious charter schools would violate the Establishment Clause of the First Amendment. Thus, this Article looks ahead to this next frontier and argues not only that Charter schools are public, but also that even if they were considered private, the Supreme Court should be hesitant to extend its current religious aid jurisprudence to religious charter schools for policy reasons. [24]

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of American Democracy 73 (2005). But this support among scholars was not unanimous. *See* Michael W. Apple, Educating the "right" way: markets, standards, God, and inequality 259 (2nd ed. 2006).

[19] Okla. Att'y Gen. Op., *supra* note 5, at 4–6. Journalists suggest that this opinion pushes the religious education debate into new territory. *See* Charles J. Russo, *Plans for Religious Charter School, though Rejected for Now, are Already Pushing Church-State Debates into New Territory*, The Conversation, Apr. 17, 2023. http://theconversation.com/plans-for-religious-charter-school-though-rejected-for-now-are-already-pushing-church-state-debates-into-new-territory-203541 [https://perma.cc/T4EM-HFRC]. Academic arguments for and against religious charter schools, however, existed before the Oklahoma incident. *See Should Faith-Based Charter Schools Survive Constitutional Scrutiny?*, *in* Alternative Schooling and School Choice 36–45 (Allan G. Osborne, Charles J. Russo & Gerald Michael Cattero eds., 2012).

[20] Okla. Att'y Gen. Op., *supra* note 5, at 15.

[21] *See* Drummond ex rel. State v. Okla. Statewide Virtual Charter School Board, No. 121.694, 2024 WL 3155937, at *10 (Okla. 2024).

[22] *See* Ray Carter, *Oklahoma Supreme Court Blocks Religious Charter School, But Reinforces Private School Choice Legality*, Okla. Council of Pub. Affs., https://ocpathink.org/post/independent-journalism/oklahoma-supreme-court-blocks-religious-charter-school-but-reinforces-private-school-choice-legality# [https://perma.cc/2BXY-2QGL] (last visited June 28, 2024).

[23] *See* Peltier v. Charter Day School, Inc., 37 F. 4th 104, 122 (4th Cir. 2022) (holding that charter schools in North Carolina are state actors regarding their dress code requirements); *but see* Caviness v. Horizon Community Learning Center, Inc., 590 F.3d 806, 818 (9th Cir. 2010) (holding that the charter schools in Arizona were not state actors regarding employment decisions). *See also* Mark Walsh, *A Proposed Catholic Charter School Is New Test for Religion and Public Education*, Ed. Week (2023), https://www.edweek.org/policy-politics/a-proposed-catholic-charter-school-is-new-test-for-religion-and-public-education/2023/02 [https://perma.cc/H9CN-NPBC]; Garnett, *supra* note 14, at 12. This remains an open question because the Supreme Court denied the petition to review the Fourth Circuit's decision in 2023. *See* Charter Day School, Inc. v. Peltier, 143 S. Ct. 2657 (2023) (denying the petition for writ of certiorari).

[24] *See* Walsh, *supra* note 23. The existence of religious charter schools is just the most recent point in the Court's long history of trying to balance between religion and public schools. *See*

In doing so, this Article is the first to highlight some of the unique features of religious charter schools like the experiment attempted in Oklahoma. Unlike the prior religious aid decisions, the religious charter school issue will be complicated by the unique structure of charter schools as hybrid public and private entities.[25] This Article seeks to highlight this complication. It argues both that charter schools do not legally fall under the *Carson* religious aid cases as well as suggest some policy reasons for why, regardless of the legal arguments, extending *Carson* to religious charter schools would protect discrimination in education.

This Article is separated into two parts. Part I argues that religious charter schools are legally outside of the applicability and scope of *Carson* because the direct distribution of funds necessary to create charter schools and the non-existence of private choice makes charter schools different from *prior cases* in terms of the Establishment clause.

Part II then argues that not only is *Carson* inapposite, but that there are very significant policy reasons for the Court to avoid extending *Carson* to religious charter schools. I will argue that religious schools, whether private or charter, have the unique ability to preserve discrimination via their First Amendment protections that other private and public institutions do not.[26] To build this argument, this Section includes a deep dive in both historical and modern-day policies surrounding religious education.

First, I examine the differences between how the Court desegregated non-religious private schools in *Runyon v. McCrary* and how they desegregated religious private schools in *Bob Jones University v. United States*.[27] Using this legacy of religious private school desegregation, I will highlight the hurdles facing legal solutions to religious discrimination in admissions against LGBTQ+ identifying students and disabled students in religious charter schools.

While neither gender/sexuality discrimination nor disability discrimination are unique to religious schools, what *is* unique is the extra protection that religious institutions have under the First Amendment to protect their

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Justin Driver, The schoolhouse gate: public education, the Supreme Court, and the battle for the American mind 362 (2018) (for a more detailed narrative of that history).

[25] Charter schools differ in that their funding goes directly to the school and not to the school via parents as in prior cases, meaning this situation would be the first time that public education would be religious and fully funded by taxpayers. *See* Russo, *supra* note 18.

[26] Others have discussed the potential problems that religious charter schools might have regarding following specific state standards such as racial, disability, and LGBTQ+ standards, but usually from the perspective of how it might complicate the religious beliefs of the school—not from the perspective of how the religious school could defend against standard compliance. *See* Garnett, *supra* note 14, at 14; *see also* Russo, *supra* note 19.

[27] Runyon v. McCrary, 427 U.S. 160, 172 (1976); *see also* Bob Jones University v. United States, 461 U.S. 574, 605 (1984). While this section is not explicitly concerned with racial discrimination in these schools, I do want to note that levels of segregation in religious private schools remain at an all-time high, suggesting that while LGBTQ+ and disability discrimination are more explicit, the history of racial discrimination continues to have relevance in the present. *See* Suitts, *supra* note 6, at 74; *see also* Jongyeon Ee et al., *Private Schools in American Education: A Small Sector Still Lagging in Diversity*, UCLA Civ. Rts. Project 1–46 (2018), http://escholarship.org/uc/item/6213b2n5 [https://perma.cc/L4VL-6DNK] (describing that private schools today are still majority white).

discriminatory choices. Admissions might be one area where religious charter schools might discriminate against students, but the existence of the ministerial exception opens the door for these schools to exclude their teachers and possibly other employees from the federal antidiscrimination protections of the ADA and Title VII.[28] I argue that the Court's most recent decision on this topic in *Our Lady of Guadalupe Sch. v. Morrisey-Berru* signifies an expansive application of the ministerial exception to antidiscrimination laws.[29] The existence of religious charter schools will at most fall under that expansive definition or—at the very least—increase the volume of litigation in lower courts on the subject.[30]

Lastly, this Article will unearth the present-day discrimination against LGBTQ+ students in current private religious schools. Using a textbook from *Abeka*, one of the leading Christian curriculum companies, I will argue that current religious curriculum explicitly advocates for heterosexual normativity. [31] Due to the flexibility of charter school curricula and Free Speech protections, I argue that religious charter schools could implement this type of discriminatory curriculum with the backing of the state, fostering environments of religious indoctrination on the states' dime.

We live in a pluralistic society in which religion plays a key part.[32] The fact that the First Amendment includes both the Free Exercise Clause and the Establishment Clause, however, highlights that religion's role in society has constitutional protections *and* limitations. Admittedly, the current Supreme Court has reduced the scope of those limitations, but not so heavily in the realm of public education—a realm that the Court has consistently required to be "free from religious affiliation or indoctrination."[33] Charter schools have their own problems, but they are intended to be the product of local and state desires to innovate the traditional public education system in ways that made

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[28] By ministerial exception, I refer to the Court's doctrine stating that, under the First Amendment, religious institutions are exempted from federal antidiscrimination laws when it comes to the ministers they employ. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 591 U.S. 732, 746–47 (2020). The Court's recent decision expanding Title VII to cover sexual orientation and gender identity makes this evaluation even more relevant. *See* Bostock v. Clayton County, 590 U.S. 644 (2020).

[29] *Our Lady of Guadalupe School*, 591 U.S. 732.

[30] The question of how to apply the ministerial exception is far from settled. *See infra* Part II.B. This Article hopes to add to that conversation considering the creation and possible constitutionality of religious charter schools.

[31] For Abeka as a leading Christian curriculum company, *see* Paul F. Parsons, Inside America's Christian Schools 40 (1987); Rebecca Klein, *The Rightwing US Textbooks that Teach Slavery as 'Black Immigration'*, The Guardian (Aug. 12, 2021), https://www.theguardian.com/education/2021/aug/12/right-wing-textbooks-teach-slavery-black-immigration [https://perma.cc/4LNY-WDWR]; *Why Choose Abeka?*, Abeka (2024) https://www.abeka.com/christianschool/whyabeka/ [https://perma.cc/FLR6-UM4F]. The examples come from volumes 1 and 2 of *United States History: Heritage of Freedom*, a Christian history book that Abeka recommends for eleventh grade students. *See* Michael Lowman, United States History: Heritage of Freedom, vol. 1 and 2 (4th ed., 2021).

[32] *See* Osborne, *supra* note 7, at 38.

[33] *See* Carson v. Makin, 596 U.S. 767, 800 (2022) (Breyer, J., dissenting); *see also* Engel v. Vitale, 370 U.S. 421 (1962) (holding that formalized school prayer had no place in public schools); Abington Township, Pennsylvania v. Schempp, 374 U.S. 203 (1963) (holding that official bible reading had no place in public schools); Edwards v. Aguillard, 482 U.S. 578 (1987) (holding that creationism had no place in public schools).

public education better, not worse.[34] Extending access to charter schools to religious institutions would change public education with the added detriment of allowing race, sex, gender, and disability discrimination to continue with heightened constitutional protection, warranting Justice Sotomayor's concern of where the Court would "lead us next."[35]

I. Religious Charter Schools and The Establishment Clause

Charter schools are a product of the school choice movement's long history, which was led by Milton Friedman and accompanied by southern racism.[36] Unlike other school choice initiatives that seek to fund alternatives to public schools, the charter school movement stands alone as a reform aimed at rehabilitating the public school system through innovation and entrepreneurial competition.[37] Minnesota passed the first charter school act in 1991, followed by California in 1992.[38] In the thirty years since these acts passed, forty-three states and the District of Columbia have created charter school legislation.[39] Today charter schools come in a variety of forms, including virtual charter schools and for-profit charters.[40] The vast umbrella of charter schools makes this type of education reform one of the most popular and expansive school choice options.[41]

Thus, charter schools reshape how states structure their public educational institutions.[42] From the beginning, legislatures have understood charter schools as public schools with private management, meaning that charter schools are able to reshape the boundaries between public and private schooling.[43] In this way, charter schools are unique because localities fund and support them like traditional public schools, but the schools are given more leeway in their management, employment, and curriculum.[44] This uniqueness allows charter schools to be public schools guided by special statutory frameworks instead of the standard educational restrictions.

In that way, charter schools are creatures of statute. State legislatures pass charter acts that provide the guidelines for the creation and funding of charter

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[34] Debating the utility or effectiveness of charter schools is outside of the scope of this Article, however some scholars adamantly argue that charter schools make public education worse not better. *See* Diane Ravitch, Slaying Goliath: the Impassioned Fight to Defeat the Privatization Movement and Save America's Public Schools 146–158 (2020). For-profit charters are the primary evidence pointed to by scholars who argue that charter schools are a negative and not a positive. *See* Rooks, *supra* note 7, at 30–35.

[35] *Carson,* 596 U.S. at 810.

[36] *See* Finn, *supra* note 9, at 13; *see also* Hale, *supra* note 6, at 128-131.

[37] Huffman, *supra* note 9, at 1300.

[38] *Id.* at 1293; *see also* Finn, *supra* note 9, at 17.

[39] *See* Ziebarth, *supra* note 15, at 3.

[40] Lewis, *supra* note 8, at 64; *see also* Rooks, *supra* note 7, at 140.

[41] Lewis, *supra* note 8, at 64. Yet, even with the expansion of type, states still refer to charter schools as public schools. *Id.* at 87.

[42] Finn, *supra* note 9, at 1, 33; *see also* Lewis, *supra* note 8, at 41 (arguing that "Charter schools are the fastest growing parent choice reform model in the United States").

[43] Finn, *supra* note 9, at 7; *see also* Lewis, *supra* note 8, at 44.

[44] Osborne, *supra* note 19, at 35; *see also* Lewis, *supra* note 8, at 42–44.

schools.[45] These acts provide complete and direct funding for charter schools via the state—but charter schools may accept outside funding via grants and donations. Though the specifics of charter acts vary from state to state, in general, the statutes required charter schools to follow the academic testing and reporting standards like traditional public schools and be open to all students, free of charge.[46]

The day-to-day management of charter schools is where a real difference exists between charter schools and traditional public schools. Elected or appointed school boards manage traditional public schools, but separate entities—public or private—manage charter schools.[47] The idea behind this difference was that management by an entity other than a school board could allow for public school innovation especially in employment, curriculum, and management policies.[48] Thus, the day-to-day of charter schools differs based on state, locality, and organizational management.[49]

Whereas scholarship has understood these innovative differences as ways to make charter schools more autonomous and accountable public institutions,[50] some recent scholarship has argued that these differences evidence that charter schools are autonomous entities, not state actors.[51] Despite this current debate, the original hope of this hybrid system was that innovation would close gaps and shortcomings of traditional public schools because there would be less bureaucratic red tape to restrict educational progress.[52] This, however, has not necessarily been the case, as no evidence shows that charter schools eradicate educational inequality, and, in some cases, studies find that they can exasperate inequality.[53] Nevertheless, the schools continue to exist as a piece of the *public education* system, designed to improve and innovate traditional public education.[54]

As such, states constrained this hope for innovation to secular schools. States did not allow charter schools to be sectarian or religious because of the limitations of the Establishment Clause of the First Amendment. In Oklahoma, however, this nonsectarian rule briefly changed after the Supreme Court's recent religious aid jurisprudence case in 2022, *Carson v. Makin*.[55] Based on that decision, the 2022 Oklahoma attorney general released an opinion that the state ban on sectarian charter schools was unconstitutional.[56]

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[45] *See* Lewis, *supra* note 8, at 41–42.

[46] It is the combination of funding and openness to all students that makes charters "public." Finn, *supra* note 9, at 7.

[47] *Id.* at 8.

[48] Osborne, *supra* note 19, at 36 (for ability to have specialized curriculum at charter schools).

[49] *Id.* at 18.

[50] *See* Huffman, *supra* note 9, at 1294–96.

[51] *See* Garnett, *supra* note 18.

[52] Huffman, *supra* note 9, at 1291.

[53] Finn, *supra* note 9, at 1 (arguing that "charters have performed spectacularly unevenly in many ways, sometimes succeeding wonderfully and other times faltering badly.").

[54] *Id.* at 208; *see also* Huffman, *supra* note 9, at 1291, 1294 (demonstrating that the scholarship often discusses charter schools as public schools).

[55] Carson v. Makin, 596 U.S. 767 (2022).

[56] Okla. Att'y Gen. Op., *supra* note 5, at 6.

Three months later, the subsequent attorney general retracted the 2022 opinion as incorrect.[57]

Yet, Roman Catholics put this new argument to the test by applying to the Oklahoma State Virtual Charter School Board to create St. Isidore of Seville Catholic Virtual School ("St. Isidore").[58] In April 2023, the Board unanimously rejected the application. They rejected the application not on constitutional grounds, but rather on procedural ones, leaving the constitutionality of religious charter schools an open question.[59] St. Isidore resubmitted their application in June 2023; this time, the board approved the revised application by a vote of three to two.[60] The school planned to open in August 2024,[61] but is no longer accepting applications after the Oklahoma Supreme Court, in *Drummond ex rel. State v. Oklahoma Statewide Virtual Charter School Board*, held the school to be unconstitutional.[62]

In *Drummond*, the Oklahoma Supreme Court held that St. Isidore's contract violated the Oklahoma constitution because state charter schools are "public schools" and as such are required to be nonsectarian.[63] They also agreed with petitioners, the Oklahoma Parent Legislative Action Committee ("OKPLAC"), that Oklahoma charter schools were government entities and state actors both under Oklahoma standards and federal standards.[64] Further, the court found that there was no violation of the Free Exercise clause because charter schools do not implicate "fair treatment of a private religious institution [] receiving a generally available benefit," the subject of the Supreme Court's recent religious aid cases.[65] Had the Oklahoma Supreme Court allowed St. Isidore to open, it would have been the first state-approved religious charter school.[66] While the case is currently resolved, it is likely that its appeal will

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[57] For the retraction of the 2022 opinion, *see* Letter from Gentner Drummond, Okla. Att'y Gen., to Rebecca L. Wilkinson, Statewide Virtual Charter Sch. Bd. Exec. Dir. (Feb. 23, 2023).

[58] Brad Brooks, *Oklahoma Board Rejects First Taxpayer-funded Religious School in US,* Reuters (Apr. 11, 2023), https://www.reuters.com/world/us/oklahoma-vote-first-religious-charter-school-us-2023-04-11/ [https://perma.cc/R72H-3C22].

[59] *Id.*; Russo, *supra* note 19. This application was not without controversy. The organization Americans United for Separation of Church and State submitted both a letter and a legal memorandum to the board before the decision detailing why they believed religious charter schools would violate the Establishment clause and be unconstitutional. *See* Americans United for Separation of Church and State, *Americans United Letter to Oklahoma Statewide Virtual Charter School Board* (2023) [hereinafter Americans United Letter]; Americans United for Separation of Church and State, *Legal Memorandum on Whether Oklahoma Charter Schools May Provide Religious Education* (2023).

[60] Complaint, OKPLAC, Inc. v. Statewide Virtual Charter Sch. Bd., CV-2023-1857, at 3 (Okla. Cty. Dist. Ct., July 31, 2023).

[61] *Frequently Asked Questions*, St. Isidore of Seville Catholic Virtual Charter School, https://stisidorevirtualschool.org/faqs [https://perma.cc/4QUK-X5HF] (last visited Nov. 27, 2023).

[62] No. 121.694, 2024 WL 3155937 (Okla. 2024). For the school's pause on applications, *see About Us,* St. Isidore of Seville Catholic Virtual Charter School, https://stisidorevirtualschool.org/ [https://perma.cc/N9TA-ZTZV] (last visited June 28, 2024).

[63] *Drummond*, 2024 WL 3155937, at *1.

[64] *Id.* at *5.

[65] *Id.* at *10.

[66] *See* Brooks, *supra* note 60; *see also* Carter, *supra* note 22.

become the test case for the Supreme Court to determine the constitutionality of religious charter schools. [67]

From the release of the 2022 Attorney General opinion to the rejection of the Oklahoma Supreme Court, government officials,[68] organizations,[69] and the public[70] have debated whether a religious charter school can survive federal constitutional scrutiny. The long-held understanding is that charter schools are public schools.[71] Oklahoma's previous attorney general however, argued that charter schools are no different than the private schools discussed in *Carson* and its precursors; thus, religious institutions must be able to participate in creating charter schools.[72] Anticipating this future constitutional debate, this Article sketches the federal constitutional arguments for whether religious charter schools should survive constitutional inquiry.[73]

A. The Supreme Court and Aid to Religious Institutions

The First Amendment contains two provisions related to religion.[74] The first, the Establishment Clause, prohibits Congress from making any law establishing religion; the second, is the Free Exercise Clause, prohibits Congress from making any law that prohibits the free exercise of religion.[75] The application of both of these clauses has led to constant tension, but the Supreme Court has long considered there to be "room for play in the joints" between them.[76] Public education has been one of the main battlegrounds for deciphering how precisely that play in the joints can (or should) operate.

In the twentieth century, the Court decided a series of cases that elevated Establishment Clause concerns over an individual's right to exercise their faith public spaces.[77] They decided each of these decisions based on a principle

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[67] Russo, *supra* note 19 (arguing that the success of the Oklahoma religious charter school will "encourage similar approaches elsewhere").

[68] For government officials, *see* Okla. Att'y Gen. Op., *supra* note 5, at 6; Okla. Att'y Gen. letter, *supra* note 59.

[69] For organizational opinions against approval, *see* Americans United Letter, *supra* note 61.

[70] For public responses, *see* Russo, *supra* note 19.

[71] *See* Walsh, *supra* note 23 (for the argument that charter schools have historically been a part of the public sector (quoting education and legal scholar Derek Black)).

[72] Okla. Att'y Gen. Op., *supra* note 5, at 4–6; *see also* Garnett, *supra* note 18 (for the argument that charter schools are more like the private schools in *Carson* and its precursors).

[73] The following section will make clear that the federal analysis will be fact-specific, so—while the details of the Oklahoma constitution and charter school act are relevant—I will reference them only when necessary to flesh out the federal arguments.

[74] U.S. Const. amend. I.

[75] *Id.*

[76] *See* Locke v. Davey, 540 U.S. 712, 719 (2004) (quoting Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 669 (1970)).

[77] *See, e.g.,* Illinois ex rel. McCollum v. Board of Ed. of School Dist. No. 71, Champaign Cnty., 333 U.S. 203 (1948) (holding that using public school buildings during regular school hours for religious instruction violated the Establishment Clause); Engel v. Vitale 370 U.S. 421, 436 (1962) (holding that state prayer in schools violated the Establishment Clause); School Dist. Of Abington Twp., Pa. v. Schempp, 374 U.S. 203 (1963) (holding that school sponsored Bible reading violated the Establishment Clause); Wallace v. Jaffree, 472 U.S. 38 (1985) (holding that voluntary school prayer statute violated the Establishment Clause); Edwards v. Aguillard, 482 U.S. 578 (1987) (holding that teaching creationism violated the Establishment Clause); Lee v.

of religious neutrality—and not hostility toward religion.[78] Yet, this does not mean that religious supporters did not view these decisions as hostile.[79] In response to the religious education decisions of the twentieth century, religious supporters fought vigorously to regain access to stronger Free Exercise protections in the public school setting.[80]

Arguably, in the twenty-first century, religious supporters became successful in regaining those protections through the Court's changing understanding of neutrality. When balancing between the Free Exercise and the Establishment Clauses, neutrality no longer meant that the state must stay out of religious exercise. Instead, it meant the state could be involved with religious exercise —so long as it did not preference religion.[81] One of the earliest indications of this change was in *Zelman v. Simmons-Harris*, a 2002 case foundational to the recent religious aid cases that culminated in *Carson*.[82] In *Zelman*, the Court was faced with the question of whether state money could go to religious schools without violating the Establishment clause.[83]

Ohio created a program that allowed parents to apply for scholarships to aid them in sending their children to private schools or obtaining tutorial aid if their children remained in public schools.[84] Importantly, the money went directly to the parents, who then could choose to use that money to pay for tuition at private schools, including religious private schools.[85] Taxpayers in Ohio challenged the program as a violation of the Establishment Clause because when parents used the money to send their children to religious private schools, public money essentially paid for religious instruction.[86] Using the principle of neutrality, Chief Justice Rehnquist's majority opinion held that the program did not violate the Establishment Clause because there was a secular, neutral reason for enacting the program, and the aid could go to either religious or nonreligious private schools.[87]

Weisman, 505 U.S. 577 (1992) (holding that clerical members praying at school graduations violated the Establishment Clause).

[78] *See* Driver, *supra* note 24, at 363–64 (arguing that in the public education and religion cases, the Court has coherently vindicated a principle of religious neutrality).

[79] *See* Adam Laats, Fundamentalism and Education in the Scopes Era 192–96 (2012) (arguing that fundamentalists continued to fight back against Court decisions in the twentieth century that they believed threatened protestant control of public education).

[80] *Id.* at 196.

[81] The decisions from the last seven years (2017–23) reflect this change in the definition of neutrality the most. It would be inaccurate to say that a neutrality that favored including religious exercise shaped the early period of the twenty-first century because cases exist like Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000) (where the Court still held that neutrality meant prohibiting expressions of religious activity in the public school setting to not violate the Establishment Clause). Contrast that with the most recent school prayer case, Kennedy v. Bremerton School District, 597 U.S. 507 (2022), decided 22 years after *Santa Fe*, where neutrality means *not* prohibiting individual expression of religious activity in the public school setting to avoid violating the Free Exercise clause.

[82] Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

[83] *Id.* at 644.

[84] *Id.* at 643–44.

[85] *Id.* at 645–46.

[86] *Id.* at 648.

[87] *Id.* at 649. Interestingly, the majority opinion dismisses the fact that, in application, almost all the scholarship money goes to religious schools; it was enough that the statute did not formally seem to inhibit or advance religion. *Id.* at 649–50.

Further, the effect of the law was neutral because the aid was indirect.[88] The aid reached "religious schools only as a result of the genuine and independent choice of private individuals."[89] Thus, *Zelman* marked a shift in Establishment Clause jurisprudence, where neutrality and individual choice broke the link between state endorsement and religious exercise—even when state money or aid unequivocally reached religious educational institutions.[90]

Zelman is not the only relevant early twenty-first century religious aid to education case. *Locke v. Davey*, decided two years after *Zelman* and also written by Chief Justice Rehnquist, is foundationally important for understanding the recent religious aid cases.[91] *Locke*, like *Zelman*, dealt with a state education funding program and the limits that the program placed (or could place) on religious participation in it.[92]

Davey challenged the program under the Free Exercise Clause due to the exclusion of religion from the program.[93] Specifically, the funding program prohibited scholarship winners from using funds at religious institutions where they would be pursuing a degree in theology.[94] Although the Court reiterated its holding in *Zelman*[95]—that private choice breaks the establishment link between the state and religion—they held that excluding funding for religious training did not violate the Free Exercise Clause.[96] This is because the program did not unilaterally exclude religious participants, but excluded a particular use of the funding: ministerial training.[97] Chief Justice Rehnquist carefully articulated why this specific use of government funds was historically connected to the state's antiestablishment interests.[98] Reading *Zelman* and *Locke* together, there was an understanding that, when playing in the joints between the Religion Clauses, a distinction existed between exclusion based on status and exclusion based on use.[99]

This distinction remained unquestioned until 2017, when the first of the recent religious aid cases, *Trinity Lutheran v. Comer*, came before the Court. [100] Unlike the earlier religious aid cases, *Trinity Lutheran* dealt with a state grant for school playground equipment, rather than state funding for education.[101] Trinity Lutheran Church applied for a grant from Missouri's Department of Natural Resources so that they could purchase rubber playground surfaces for their church daycare.[102] Missouri disqualified churches from this particular

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[88] *Id.* at 649.
[89] *Id.*
[90] *Id.* at 652–55.
[91] Locke v. Davey, 540 U.S. 712 (2004).
[92] *Id.* at 715.
[93] *Id.*
[94] *Id.*
[95] *Id.* at 719.
[96] *Id*, at 725.
[97] *Id.* at 724.
[98] *Id.* at 722.
[99] The Court would later abandon this distinction in *Carson. See* Carson v. Makin, 596 U.S. 767, 786 (2022).
[100] Trinity Lutheran Church v. Comer, 582 U.S. 449, 464 (2017).
[101] *Id.* at 453.
[102] *Id.*

grant program citing Establishment Clause concerns.[103] The state argued that these antiestablishment interests were sufficient to overcome strict scrutiny, the Court's most "rigorous" standard of review.[104] The Court disagreed, holding that Missouri was calling for a greater separation of church and state than is necessary under the First Amendment.[105]

The Court in *Trinity Lutheran* also considered the status/use distinction, but quickly dismissed it as irrelevant, holding instead that the facts of the case satisfied status-based exclusion—meaning the state excluded Trinity Lutheran from the benefit program simply because it was a church.[106] The Free Exercise Clause prohibits this type of exclusion, so there was no need to inquire into the use-exclusion analysis, leaving the durability and precedential value of *Locke* for a future day.[107] Instead, the case relied heavily on *Zelman*, and it decided that any state government benefit program that excludes a religious actor solely because they are religious is not neutral.[108] Thus, excluding a religious entity from an otherwise generally available benefit solely because of its religious character violated the Free Exercise Clause unless the law can survive strict scrutiny.[109]

This same issue soon rose before the Court in the education context, first in *Espinoza v. Montana* in 2020 and then in *Carson v. Makin* in 2022, the most recent religious aid cases.[110] Although similar, the funding programs in each case differ. In *Espinoza*, Montana provided tuition assistance via tax credit scholarships to parents who sent their students to private schools—but prohibited parents from choosing religious private schools.[111] In *Carson*, Maine provided tuition assistance to private schools for parents who lived in districts without a traditional public school. The assistance went directly to the school that the parents chose but could not go to a religious private school.[112]

In both cases, the Court used the standard in *Trinity Lutheran* and held that exclusion from a program that is available to public and private institutions cannot exclude religious institutions simply because they are religious, regardless of any perceived Establishment Clause violations.[113] *Trinity Lutheran*, while unambiguous in its balance of the Free Exercise Clause over the Establishment Clause, still left open question of how states should

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[103] *Id.* at 466.
[104] *Id.*
[105] *Id.*
[106] *Id.* at 451 (holding that in this case there was "no question that Trinity Lutheran was denied a grant simply because of what it is—a church").
[107] But even in *Trinity Lutheran*, the Court begins to narrow *Locke* to its specific facts—i.e., *Locke* applies only to training of clergy, which happens to be one of the clear violations of the Establishment Clause. *Id.*
[108] *Id.* at 465.
[109] *Id.* at 466.
[110] Espinoza v. Montana Department of Revenue, 591 U.S. 464, 467 (2020); Carson v. Makin, 596 U.S. 767, 773 (2022).
[111] *Espinoza*, 591 U.S. at 467.
[112] *Carson*, 596 U.S. at 771–75.
[113] *Espinoza*, 591 U.S. at 483–485; *Carson*, 596 U.S. at 785–86.

maintain the intricate balance between their antiestablishment interests and protecting religious exercise, particularly in the context of public money.[114]

Both *Espinoza* and *Carson* built upon the "non-discrimination" approach initiated by *Trinity Lutheran*, arguing that the Establishment Clause ceases to be a concern when the law is neutral and private choice is present to break the establishment link between the state and the religious institution.[115] In this trilogy of cases, the Court viewed neutrality from the perspective of who the state includes and excludes, instead of viewing neutrality from the perspective of the state staying out of religious involvement completely.[116] The rule is now that if a state chooses to have a general funding program, it will not satisfy constitutionally mandated religious neutrality if it excludes religious institutions because they are religious institutions.[117] Further, *Carson* explicitly dealt with the status/use distinction left open by *Trinity Lutheran* by limiting *Locke* to its specific facts, holding that outside of the scope of *Locke*, status and use discrimination both violate the Free Exercise Clause.[118]

The Court, however, did not disregard the Establishment Clause completely. There are still situations in which the Establishment Clause would likely prevent funding to religious institutions.[119] Such situations include when a state provides money *directly* to a religious private school or when the state directly funds a religious public school.[120] Although Chief Justice Roberts emphasized in *Carson* that "a State need not subsidize private education, [b]ut once a State decides to do so, it cannot disqualify some private schools solely because they are religious," he tells us little about whether a state must fund religious public education simply because it funds public education.[121]

In the religious aid education cases, private choice remained an important factor. Both *Espinoza* and *Carson* specifically dealt with programs like the program in *Zelman*—these programs gave money either directly to parents or directed money to private schools based on the instruction of parents.[122]

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[114] Trinity Lutheran v. Comer, 582 U.S. 449, 465–467 (2017) (holding that, in this case, the state's antiestablishment concerns were not compelling—but not that antiestablishment concerns could never be sufficiently compelling to prevent requiring state aid to religious institutions).

[115] *Espinoza*, 591 U.S. at 474; *Carson*, 596 U.S. at 768.

[116] Legal scholar Nicole Stelle Garnett argues that these cases signal an understanding of the Free Exercise and Establishment clause that equates government exclusion of religion to hostility towards religious believers and institutions. Garnett, *supra* note 15, at 8.

[117] Carson, v. Makin, 596 U.S. 767, 784 (2022); *Espinoza*, 591 U.S at 475; *Trinity Lutheran*, 582 U.S. at 446.

[118] *Carson*, 596 U.S. at 788–89.

[119] For example, money towards clergy still stands as a violation. *Id.* (citing Locke v. Davey, 540 U.S. 712 (2004)).

[120] Those who support constitutional protection for religious charter schools are essentially hoping for a way to allow public religious schools, which is a step beyond taxpayers supporting the choice for religious education via private education. *See* Russo, *supra* note 19.

[121] *Carson*, 596 U.S. at 768 (citing *Espinoza*, 591 U.S. at 487). Additionally, Chief Justice Roberts does not specify what it means to subsidize private education. *See* Garnett, *supra* note 15, at 10. Depending on that definition, these cases could have huge implications for what we currently understand as public education. Justice Breyer's dissents in both *Espinoza* and *Carson* foreshadow the possibility that this line of cases may affect public education. *See Espinoza*, 591 U.S. at 537–38 (Breyer, J., dissenting) (discussing the impact these decisions might have on charter schools); *Carson*, 596 U.S. at 800 (Breyer, J., dissenting) (discussing the impact these decisions have on a state's role in providing civic education in a nonsectarian way).

[122] *Carson*, 596 U.S. at 771–75; *Espinoza*, 591 U.S. at 467–68.

Thus, while the Establishment Clause might not be a sufficiently compelling state interest to override Free Exercise strict scrutiny standards in private choice/indirect funding cases, it is possible that the Establishment Clause becomes compelling when the question is exclusively about direct funding and public programs. Oklahoma's recent controversy regarding the possibility of religious charter schools brings this question to the table.

B. Charter Schools: Outside the Applicability and Scope of Carson

Oklahoma Attorney General John O'Connor's 2022 opinion argued that religious charter schools inevitably fall under the Supreme Court's recent religious aid cases.[123] He argued that to prohibit religious institutions from managing and creating charter schools amounts to status-based discrimination, which the Supreme Court found unconstitutional in *Carson*.[124] General O'Connor's interpretation of the religious aid cases led him to believe that two sections of Oklahoma's Charter School Act violated the U.S. Constitution.[125]

The first section prohibits charter sponsors from being affiliated with religious institutions.[126] He argues that on its face, this provision is unconstitutional under the current religious aid cases because it excludes religious entities from a "state-created program in which private entities are otherwise generally allowed to participate."[127] O'Connor used a similar argument with the second provision which required charter schools to be non-religious in all its operations.[128] Though he noted that this particular requirement might be more complex, he concludes that because strict scrutiny applies to Free Exercise claims, this prohibition must also fail because it targets religion without a compelling government interest.[129] This conclusion is only possible because O'Connor dismissed any possibility that the Establishment Clause matters in this case, relying exclusively on the fact that the Court did not except the Establishment Clause as a compelling interest in the religious aid cases.[130]

Yet, what the attorney general failed to appreciate is that charter schools are fundamentally different than the schools in question in the religious aid cases. His argument falls apart when one appreciates that unlike the schools in question in the religious aid cases, charter schools exist as public entities, which bring them under the Establishment Clause, not the Free Exercise Clause.[131] Thus, these cases do not apply to the legal question of whether a

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[123] Okla. Att'y Gen. Op., *supra* note 5, at 1.
[124] *Id.* at 5–6 (citing *Carson*, 596 U.S. at 789).
[125] *Id.* at 6–7.
[126] *Id.* at 6.
[127] *Id.*
[128] *Id.* at 8.
[129] *Id.* at 9.
[130] *Id.* at 10.
[131] For example, in both *Engel v. Vitale* and *Abington v. Schempp*, the Court held that public school prayer and scripture reading policies were unconstitutional because they equated to a state establishment of religion. Engel v. Vitale, 370 U.S. 421, 430–432 (1962); Abington v. Schempp, 374 U.S. 203, 223–25 (1963). Of course, the Court has recently affirmed the right of individuals to pray in public schools and non-state-sponsored public- school activities. *See* Kennedy v.

religious institution can create or manage a charter school. In evidence of this conclusion, this Section argues three points: (1) under *Carson's* application, religious charter schools would violate the Establishment Clause because the funding goes directly to schools; (2) *Carson* does not apply because charter schools are public government entities; and lastly, (3) even if charter schools were not public government entities, they are state actors, which is sufficient to render *Carson* inapposite.

The structure of charter school funding excludes religious charter schools from taking advantage of the religious aid cases' framework. When it comes to excluding religious institutions from state benefits, the Court applies strict scrutiny because of the possible Free Exercise Clause violation.[132] In the three religious aid cases, the Court disregarded any states antiestablishment interest.[133] The Court in *Carson* and *Espinoza* reiterated that the antiestablishment interest served by excluding religious institutions from general state benefits is "stricter" than "the Federal Constitution require[d]." [134] The Court held that this stricter interest failed to be compelling when it infringed on Free Exercise.[135]

Even without the antiestablishment interest, states can still satisfy strict scrutiny when targeting religious institutions, but only in rare circumstances.[136] Indirect funding channeled through private choice is not one of those circumstances.[137] For the Court, the presence of private choice breaks "the circuit between government and religion," [138] and when true private choice is present, it frustrates any chance of the state's exclusion of religion surviving strict scrutiny.[139] Parental choice satisfies this choice requirement when it flows from the independence of private individuals.[140] The state funds charter schools per pupil just like traditional public schools instead of providing any tuition assistance or credit to the parents. [141] Thus, for religious charter

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Bremerton Sch. Dist., 597 U.S. 507, 542–44 (2022). It is possible to read *Bremerton* as contrary to *Vitale* and *Schempp*, but it is the author's position that the distinction between individual behavior and school policy distinguishes these cases.

[132] *See, e.g.,* Carson v. Makin, 596 U.S. 767, 779–81; Espinoza v. Montana Department of Revenue, 591 U.S. 464, 475–76, 484 (2020); Trinity Lutheran Church of Columbia v. Comer, 582 U.S. 449, 466 (2017).

[133] *See Carson*, 596 U.S. at 781; *Espinoza*, 591 U.S. at 484–85; *Trinity Lutheran*, 582 U.S. at 465–66.

[134] *See Carson*, 596 U.S. at 781; *Espinoza*, 591 U.S. at 485.

[135] *Carson*, 596 U.S. at 781.

[136] *Id.*

[137] *Id.*

[138] *Id.* at 652; *see also* Locke v. Davey, 540 U.S. 712, 719 (2004) ("Under our Establishment Clause precedent, the link between government funds and religious training is broken by the independent and private choice of recipients").

[139] *See Carson*, 596 U.S. at 780–81.

[140] Zelman v. Simmons-Harris, 536 U.S. 639, 649 (2002).

[141] *See Huffman*, *supra* note 9, at 1291 (stating that "charter schools, like any other public school, receive their funding from the local or state education system"). The factual realities of per pupil funding vary by state and can be complicated. *See* Finn, *supra* note 9, at 102; *see also How Are Charter Schools Funded?*, Ctr. for Educ. Reform, https://edreform.com/2011/09/how-are-charter-schools-funded/ [https://perma.cc/HQ9P-2662] (last visited June 17, 2024). These sources highlight the similarities in funding structure between traditional public schools and charter schools.

schools, there would be no parental admission choice that breaks the chain between direct government funds and establishment of religion.

This direct funding structure makes state funding of charter schools very different than the scholarship program in *Espinoza*. In *Espinoza*, parents could apply for scholarship money that they could then use for private education.[142] Importantly, the scholarship money went directly to the parents, and they could in turn use that money at a private school,[143] making their choice the circuit breaker between government and religion. No such money transfers to parents in the charter school context.

This is not to say that no element of parental choice exists with charter schools: Parents do make the choice to apply to charter schools as an alternative to their designated traditional public school. For those wishing to equate charter schools with private schools, this choice might be enough to argue that charter school funding is the same as the tuition assistance in *Carson*.[144] This is because in *Carson* the money did go directly to the school; however, the Court still identified parental choice enough to break the circuit because parents could direct the tuition to "public or private schools of *their* choice."[145]

State charter school funding goes directly to charter schools and only to charter schools.[146] It is not a program where parents can direct the per pupil funding to another school if the student does not get into the charter school or if no charter school is available. Thus, the parent choice present in this context exists in a very miniscule way.[147] This type of choice is more akin to a parent being able to choose to move districts so that their child might attend a different public school. It is a choice, but it is not an independent choice of a private benefit like in the religious aid cases.

This lack of genuine independent parental choice in the direction of funds for charter schools means there is nothing present to break the flow of government funding to religion in the case of religious charter schools. Thus, unlike the religious aid cases, the Establishment Clause would be a sufficiently compelling government interest to survive the application of strict scrutiny to the prohibition of religious charter schools.[148] To accept otherwise would render the Establishment Clause useless because any consumer market choice

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[142] Espinoza v. Montana Department of Revenue, 591 U.S. 464, 467–69 (2020).
[143] *Id.*
[144] *See* Garnett, *supra* note 15, at 11–13.
[145] Carson v. Makin, 596 U.S. 767, 785 (2022) (emphasis in original).
[146] *See, e.g.*, Huffman, *supra* note 9, at 1291, 1308.
[147] The fact that charter schools have great flexibility in determining which students to enroll further mediates this idea of true parental choice. *See generally* Wagma Mommandi & Kevin Welner, *Shaping Charter Enrollment and Access: Practices, Responses, and Ramifications*, *in* Choosing Charters: Better Schools or More Segregation? 61–81 (Iris C. Rothberg & Joshua L. Glazer eds. 2018) (for a comprehensive argument about the ways charter schools' control which students they admit); *see also* Ravitch, *supra* note 34, at 149. For a state specific example, *see* 70 Okl. St. Ann. §3-135(A) (allowing charters to set the procedures for admission).
[148] *See, e.g.*, Espinoza v. Montana Department of Revenue, 591 U.S. 464, 474 (2020) (where the Court dismisses the Establishment Clause concern because the program is neutral and inclusive of private institutions and because there is parental choice).

would be enough to separate the connection between the state and a religious institution.[149]

The Court, however, need not engage with its religious aid jurisprudence in the first place because religious charter schools are also outside of the scope of *Carson* due to their nature as government entities. In *Lebron v. National Railroad Passenger Corp.*, the Court held that when the government creates a corporation by special law to facilitate government objectives and retain permanent authority to appoint most of the directors, then the corporation is "part of the Government for purposes of the First Amendment."[150]

Although charter schools are not corporations, they are entities created by state governments through special charter school act laws that facilitate public education—a government objective. Arguably, states also retain the authority to appoint directors of charter schools because state charter laws direct what groups are allowed to create charter schools.[151] Thus, the standard in *Lebron* indicates that charter schools are part of the government for the purposes of the First Amendment; as such, the Establishment Clause directly applies.[152] Nothing in the religious aid cases suggest that the government can directly create religious public schools.

Yet, even if the nature of charter schools as government entities is questionable, *Carson* would still not apply to charter schools because they are, at the very least, state actors.[153] The Supreme Court has considered whether private entities are state actors in a variety of contexts. Those circumstances include situations where there is significant encouragement, pervasive entanglement, or coercion from the state to the private actor.[154] State action can also

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[149] Even outside of the choice analysis, allowing religious charter school would frustrate the Court's legacy from the 1960s, which opposed state religious indoctrination of public students. *See* Driver, *supra* note 24, at 379–82. Allowing religious charter schools is especially problematic when religious charter schools are potentially protected from legal challenges alleged that they are discriminating against LGBTQ+ and disabled individuals. *See infra* Part II.

[150] *See* Lebron v. National Railroad Passenger Corp., 513 U.S. 374, 400 (1995).

[151] The latter condition of *Lebron*—that the state maintain authority to appoint the majority of directors— is the most likely to be questioned in the charter school context. *Id.* It would not be difficult to argue that because charter school boards—not appointed by the state—regulate management and day to day activities, charters do not satisfy this standard. For that reason, this Article spends a significant amount of time discussing how charter schools, whether government entities or not, satisfy the state actor test.

[152] Currently, even in Oklahoma, all states require charter schools to be secular and prohibit religious institutions from operating charters. *See* Garnett, *supra* note 15, at 11. Additionally, the Tenth Circuit, which includes Oklahoma, has repeatedly found charter schools to be public governmental entities. *See* Brammer-Hoelter v. Twin Peaks Charter Academy, 602 F.3d 1175, 1188 (10th Cir. 2010) (holding that the academy involved in the was a "local government entity"); *see also* Coleman v. Utah State Charter School Board, 673 F. App'x 822, 830 (10th Cir. 2016) (holding that a teacher at a charter school was a public employee).

[153] Admittedly, some scholars believe that charter schools are private schools and that the state action conclusion is not straightforward. *See* Garnett, *supra* note 15, at 12 (arguing that charter schools are not state actors and that their public characteristics can be disregarded). It is my argument, however, that the state action inquiry is straightforward if the court adopts the rationale of the Fourth Circuit because the action of creating a public school is in the exclusive purview of the state.

[154] *See* Blum v. Yaretsky, 457 U.S. 991, 1004 (1982). Coercion is not a required element, however. *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001).

be present when the involvement between the state and the private actor is so significant that "the choice must in law be deemed to be that of the state."[155]

Since this test concerns evaluating relationships, there is no bright line rule, and each determination is extremely fact specific.[156] For this reason, circuit courts have developed general rules for determining whether circumstances give rise to state action. Circuits often use the nexus test which finds state action when there is a close nexus between the private entity and the state that requires the Court to treat the purportedly private action as state action.[157] While there are differing approaches to finding a close nexus,[158] recently in *Peltier v. Charter Day School*, the Fourth Circuit has exemplified how the public function approach could work best for an analysis of whether charter schools are state actors.[159]

In *Peltier*, the court held that charter schools were state actors on the issue of a dress code policy connected to the general education policy of the school.[160] Like the First Amendment inquiry in *Lebron*, the central issue in *Peltier* was whether the charter school was a state actor and thus under the jurisdiction of the Fourteenth Amendment.[161] The Fourth Circuit concluded that they were by relying on the public function test to determine whether the dress code for girls at a public charter school in North Carolina violated the Fourteenth Amendment's equal protection guarantee against sex-based discrimination.[162]

The public function test examines whether the function of the entity is an activity traditionally left to the *exclusive* realm of the state.[163] Exclusivity is essential because a private entity may be engaged in a public function without that translating to the entity being a state actor. It is the activity's historical connection to sole purview of the state that renders the entity a state actor.[164] Additionally, the state must do more than fund the action, even if the state is the only source of funding.[165]

The charter school in North Carolina received over 95% of its funding from the state. They argued, however, that the funding was not enough to make them a state actor instead of a private contractor.[166] The *Peltier* Court took this funding into account even if funding is not conclusive in the state actor analysis.[167] It was the full funding *in conjunction* with the charter school's

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[155] *See* Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982) (citing *Blum,* 457 U.S. at 1004)).
[156] Peltier v. Charter Day School, 37 F.4th 104, 116 (4th Cir. 2022).
[157] *See id.* at 115; *see also* Caviness v. Horizon Community Learning Center, 590 F.3d 806, 812 (9th Cir. 2010); *see also* Garnett, *supra* note 15, at 12.
[158] Courts might also look at the entwinement or coercion tests. *See infra* notes 161–163 and accompanying text.
[159] *See Peltier,* 37 F.4th at 118.
[160] *Id.*
[161] *Id.*
[162] *Id.* at 116.
[163] *See* Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982).
[164] *Id.*; *see* Peltier v. Charter Day School, 37 F.4th 104, 116 (4th Cir. 2022).
[165] *Rendell-Baker*, 457 U.S. at 842.
[166] *Id.* at 116–18.
[167] While appreciating that funding was not enough to make the charter school a state actor, under a totality of the circumstances standard, the *Peltier* Court found the details of the funding made the "public" categorization of the charter more plausible. 37 F.4th at 118.

role in providing free and open education that had to comply with state programming and be overseen by a state board that led the Fourth Circuit to conclude that the North Carolina charter was a state actor.[168] They rationalized that the charter schools' general education policy was a delegation of the state's traditional public education responsibility, thus satisfying the state actor test.[169] To hold otherwise, the Court concluded, would allow North Carolina to "outsource its educational obligation to charter school operators, and later ignore blatant, unconstitutional discrimination committed by these schools."[170]

The public function is just one example of how courts determine if there is a close nexus between a private entity and the state. Another example is the entwinement test.[171] The entwinement test examines whether the state has "coerced, or has provided 'significant encouragement' to, a private actor, or if there is 'pervasive entwinement of public institutions and public officials' with a private entity."[172] Under this test, state action exists when the involvement of the state in the entity is so undistinguishable that the court has no choice but to understand the close relationship as attributed to the state.[173]

As these differing approaches show, the state action inquiry varies by circumstance, but satisfying either the public function test or the entwinement test (or both) is enough for a court to find that a private entity is a state actor.[174] While the Fourth Circuit found that the public function test led to a determination that charter schools were state actors, other circuits have come to different conclusions on whether charter schools satisfy the state actor test.[175] For example, in 2010, the Ninth Circuit held in *Caviness v. Horizons Community Learning Center, Inc.* that a charter school's decision to terminate a teacher's employment did not satisfy the state actor standard.[176]

As a part of that holding, the Ninth Circuit rejected the teacher's argument that they could distinguish the Supreme Court's decision in *Rendell-Baker v. Kohn* due to the public nature of charter schools. [177] In *Rendell-Baker*, the Court was faced with the question of whether a private school that received public funds satisfied the state action doctrine in its employment choices.[178]

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[168] *See id.* at 117–19.
[169] *See id.* at 118.
[170] *Id.*
[171] Garnett, *supra* note 14, at 12.
[172] *Peltier*, 37 F.4th at 115 (citing Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (holding that nursing homes where not state actors even though they used a state program like Medicaid) and Brentwood Academy v. Tennessee Secondary School Athletic Association, 531 U.S. 288, 298 (2001) (holding that a statewide athletic association was a state actor regarding its regulatory activity because of the pervasive entwinement of state school officials in the program)).
[173] *See, e.g.*, *Brentwood Acad.*, 531 U.S. at 301–02.
[174] *See Peltier*, 37 F.4th at 115–116 (describing that "the Supreme Court has identified various circumstances in which a private actor may be found to have engaged in state action").
[175] *See* Garnett, *supra* note 15, at 13 (noting that it is possible charter schools might be state actors in some states but not in others because of the case-by-case analysis); Green, *supra* note 11, at 260–67 (listing a comprehensive set of federal courts of appeals decisions regarding charter schools and state action).
[176] *See* Caviness v. Horizon Community Learning Center, 590 F.3d 806, 814–17 (9th Cir. 2010). *But see* Green, *supra* note 9, at 267 (finding the Ninth Circuit's decision to be an outlier).
[177] *Caviness*, 590 F.3d at 814–15.
[178] *See* Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982).

It held that the private school was not a state actor for four reasons: (1) public funding was not alone enough to satisfy the standard; (2) there was very little state regulation over personnel matters; (3) education, in general, has not been the exclusive function of the state; and (4) no symbiotic relationship existed between the state and the private school.[179] Based on the third reason, the Ninth Circuit found *Rendell-Baker* to foreclose the public function test when it came to charter schools.[180] This integration of *Rendell-Baker* in the charter school context provides religious charter school advocates with the hope that the creation of charter schools is outside the scope of state action.[181]

Their hope is misguided, however, because—as the Fourth Circuit highlights—the facts of *Rendell-Baker*[182] are distinguishable. The Fourth Circuit held that that *Rendell-Baker* applied only to private schools, not to public schools—and charter schools are public schools.[183] Further, the *Rendell-Baker* Court's holding about education and the public function test dealt only with education as a general principle and not with the specifics of free and open public schools. The latter has historically been the sole function of the state, even if education in general has not been.[184] The specific history of public schools and the state is different from the relationship of education and the state generally.[185]

The recent religious aid cases support this conclusion because the Court's entire "non-discrimination" standard relies on the existence of a distinction between public and private schools.[186] For example, Justice Roberts's assertion that a "[s]tate need not subsidize private education" makes sense only if one considers the requirement that the state must fund public education.[187] Thus, the Ninth Circuit's failure to take into account the public nature of charter schools makes their holding on charter schools and state action problematic.

Additionally, both *Rendell-Baker* and *Caviness* involve employment and personnel matters, which do not implicate a state's relationship with

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[179] *Id.* at 840–42.
[180] *Caviness*, 590 F.3d at 815.
[181] *See, e.g.*, Okla. Att'y Gen. Op., *supra* note 5, at 12–13.
[182] 457 U.S. 830.
[183] Peltier v. Charter Day School, 37 F.4th 104, 120–122 (4th Cir. 2022).
[184] *Id.*
[185] *See, e.g.*, *id.* at 119. Granted, advocates of religious charter schools will likely argue that charter schools are private and not public, but as mentioned in Part I.B., that is not the general understanding of charter schools. In fact, some scholars argue that if charter schools were not public schools, they would likely violate state constitutional requirements. *See* Huffman, *supra* note 9, at 1309.
[186] *See* Carson v. Makin, 595 U.S. 767, 782–83 (2022) (holding that it mattered that Maine's program provided funding to students at non-religious private schools as opposed to only those at public schools); Espinoza v. Montana Department of Revenue, 591 U.S. 464, 485–86 (2020) (holding that a state's decision to fund private education is a choice, because they only must fund public education). Justice Breyer's dissent in *Carson* spends a considerable time discussing the benefits of public schools, which makes sense only if a public designation changes the outcome. *See Carson*, 596 U.S. at 800 (Breyer, J., dissenting). Breyer uses the religious free nature of public schools to critique the court's allowance of funding to religious private schools, which reiterates that there is a fundamental difference between the two types of education. *Id.*
[187] *Espinoza*, 591 U.S. at 487. *See also Carson*, 596 U.S. at 785 (where the Court explicitly states that it is not saying that states must fund religious schools, but that they cannot refuse funding for private religious schools solely on the basis that they are religious if states choose to extend their funding to private schools).

education, whether private or public.[188] It mattered tremendously in *Caviness* that while charter schools were subject to significant state regulation, they were exempt from teacher certification requirements and dismissal policies.[189] Thus, it is not inconceivable to understand both *Rendell-Baker* and *Caviness* as decisions that solely determine no state action in private and charter school employment matters and not as decisions concerning the state action of charter schools generally.[190]

Nevertheless, this supposed circuit split between the Fourth Circuit and the Ninth Circuit makes the question of whether religious charter schools are constitutional a question ripe for the Supreme Court. Oklahoma's pending case will likely be the case that brings that question forward. While both the Fourth and Ninth Circuit cases shed light on how federal courts have applied the state actor standard to charter schools, neither dealt explicitly deal with whether the initial creation of a charter school constitutes state action. Yet, the Fourth Circuit does argue that the delegations of the state's constitutional duty to provide "free, universal elementary and secondary education" to charter schools renders them state actors for equal protection purposes.[191] For this reason, I argue that it is the Fourth Circuit's rationale, not the Ninth Circuit's, which should apply to whether a state can constitutionally allow religious charter schools.

Unlike employment actions, the creation of religious charter schools implicates the delegation of the state's constitutional duty to provide free and universal public education. Charter schools everywhere are authorized by state charter school acts as innovative and alternative public schools.[192] Their initial creation speaks directly to the relationship that occurs between these schools and the states that legislate their existence. Thus, the rationale in *Peltier* is the correct way to determine the nexus between charter schools and the state for

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[188] *See* Rendell-Baker v. Kohn, 457 U.S. 830, 831 (1982); *see also* Caviness v. Horizon Community Learning Center, Inc., 590 F.3d. 806, 813 (9th Cir. 2010). School discipline is another area where circuit courts have found the state action doctrine might not to apply to charter schools. *See* Logiodice v. Trustees of Maine Central Institute, 296 F.3d 22, 31 (1st Cir. 2002). But like the reasoning in *Caviness*, the non-state actor holding is because of the specific characteristics of the conduct in question, which, like *Rendell-Baker*, dealt with a contracted private school not a charter school in the traditional sense—as the Court decided it before Maine even had a Charter School Act. *Id.* at 26. For Maine's charter school act passed in 2011, see *About*, Maine Charter Sch. Comm'n, https://www.maine.gov/csc/about#:~:text=The%20Maine%20Charter%20School%20Commission,public%20charter%20schools%20in%20Maine [https://perma.cc/ZHG2-LJFE] (last visited November 28, 2023).

[189] *Caviness*, 590 F.3d at 810.

[190] This is especially true considering that the court in *Caviness* recognized the public-school status of charter schools, but it did not stop there because a private corporation was responsible for the action in question, and the action was outside the scope of the public function of free and open education. *See Caviness*, 590 F.3d at 812–13 (recognizing that "'an entity may be a state actor for some purposes but not for others'"). This is not markedly different from the argument given by the Fourth Circuit; rather, it is merely that the action in question in the Ninth Circuit did not implicate state action, whereas the action in the Fourth Circuit did. Thus, when the action is more akin to that in the Fourth Circuit case (as I argue the creation of charter schools is), it is more likely that that action satisfies the state action standard.

[191] Peltier v. Charter Day School, Inc., 37 F. 4th 104, 118–119 (4th Cir. 2022).

[192] Finn, *supra* note 9, at 21.

the state action test.[193] And applying that rationale results in finding that the act of creating a charter school is a state action.[194]

For example, in Oklahoma, where the question of religious charter schools was first raised, there is abundant evidence of the close nexus between the state and the general educational structure of Oklahoma charter schools. The Charter School Act in Oklahoma, like that in North Carolina, provides very strict guidelines on what a charter school can and cannot do to exist as a public charter, and Oklahoma's constitution required the state to provide public education.[195] These guidelines in conjunction with the public nature of the schools and their almost exclusive state funding suggest that the Supreme Court should consider charter schools to be state actors. As such, the state cannot create a religious public school without violating the Establishment Clause of the First Amendment.[196] Nothing in the religious aid cases exempt religious charter schools from this application of the First Amendment, as those decisions deal exclusively with preventing state discrimination against religious private action.

II. The Potential Consequence: Protecting Discrimination

While the legal argument that religious charter schools fall outside of the Court's expansive religious freedom cases is convincing, there is also a policy reason that the Court should hesitate to extend its *Carson* rationale to religious charter schools: the issue of discrimination.[197] Due to the robust protection of the First Amendment's Free Exercise Clause, religious institutions—and if allowed, religious charters—are uniquely able to discriminate against certain groups with constitutional protection.[198] In this Part, I argue that religious charter schools, with the help of the First Amendment, will be able to (1) use the Free Exercise Clause to discriminate against LGBTQ+ identifying

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[193] Particularly, the Fourth Circuit's assertion that when it is an action concerning education itself and not a personnel decision or school discipline, charter schools satisfy state action standard. *Peltier*, 37 F.4th at 122. Additionally, there is scholarship that elaborates on the dangers of the Ninth Circuit's decision especially when it comes to students of color and Fourteenth Amendment concerns. *See* Green, *supra* note 11, at 275 (discussing how if charter schools are not state actors, then "students of color may be unwittingly surrendering protections guaranteed under the Constitution in order to enroll in charter schools"). While this implication is outside the scope of this Article, it is relevant to shed light on additional unfavorable implications of the Ninth Circuit's reasoning.

[194] The Fourth Circuit is not the only authority that draws this conclusion; it is present in charter school scholarship as well. *See* Huffman, *supra* note 9, at 1308.

[195] *See* 70 Okla. Stat. Ann. §3-130-§3-145 (2021); *see also* Okla. Const. art. 1, §5; 13, §1.

[196] As the Fourth Circuit eloquently reminds us, "[c]ourts may not subjugate the constitutional rights . . . to the facade of school choice." *Peltier,* 37 F.4th at 123.

[197] Future consequences are one of the biggest worries opponents of these schools have. *See* Brooks, *supra* note 60. One of the goals of this section of the Article is to highlight some of those consequences that might not be explicitly obvious.

[198] The Oklahoma lawsuit made this exact claim in the petition against St. Isidore Catholic Charter School. *See* Compl. at 2, OKPLAC, Inc. v. Statewide Virtual Charter Sch. Bd., CV-2023-1857 (Okla. Cty. Dist. Ct., July 31, 2023). This is not the first time that schools have used religion used to protect discriminatory motivations in education. *See* Apple, *supra* note 18, at 164.

students and disabled students in admissions; (2) use the ministerial exemption along with the flexibility of charter school hiring requirements to discriminate against their employees; and (3) use the Free Speech Clause to protect curriculum that discriminates against LGBTQ+ students via heteronormative gender/sex indoctrination. Thus, religious charter schools not only amplify the problems of educational inequality, but they would also do so with the unmatched protection of the First Amendment as a constitutional shield.

A. The Legacy of Bob Jones*: Discriminating against Disabled and LGBT+ Students in Admissions*

Charter schools, unlike traditional public schools, generally use lottery systems for admissions.[199] Under the guise of choice, parents can apply to charter schools with the hope that the charter will accept their child. Yet even though charter schools are considered an option of parental "choice," they generally can be selective in their enrollment process.[200] For example, charter schools will often accept students only at a certain grade level, and if the charter does not accept at the preferred grade level, the students are "waitlisted."[201] This waitlist policy allows charter school operators to game the school system by accepting all applications, but approving only those who conform to the enrollment characteristics the school desires.[202]

This policy and other access policies undermine the claim that charter schools do not have special entrance requirements.[203] To the contrary, charter schools can be very selective in who they allow to enroll in their schools, which is highly relevant to the creation of religious charter schools because religious charter schools could potentially discriminate against disabled and LGBTQ+ students in admissions. Thus, this Section examines the legacy of religious school desegregation in the past to highlight the difficulties facing disabled students and LGBTQ+ identifying students, should religious charter schools discriminate against them in admissions.[204]

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[199] Valerie Strauss, *Yes, some charter schools do pick their students. It's not a myth.*, Washington Post, Jan. 17, 2021, https://www.washingtonpost.com/education/2021/01/17/yes-some-charter-schools-do-pick-their-students-its-not-myth/ [https://perma.cc/6ANC-N7EM]. Although the majority of charters use lotteries, some states use geographical or subject area preferences for admissions. *See* Danny Weil, Charter Schools: A Reference Handbook 70 (2000).

[200] *See* Schnieder, *supra* note 7, at 95 (arguing that "in the name of autonomy, the charter school gets to choose its students, not the parents or students"); Alejandra Lopez, Amy Stuart Wells, and Jennifer Jellison Holme, "Creating Charter School Communities: Identity Building, Diversity, and Selectivity," in Where Charter School Policy Fails: The Problems of Accountability and Equity 129 (Amy S. Wells ed. 2002) (arguing that charter school operators have more control than traditional public schools in determining who "fits" into the school); Strauss, *supra* note 204 (arguing that charter schools engage in "cherry-picking" their students).

[201] Schneider, *supra* note 7, at 92–93.

[202] *Id.* at 93–94.

[203] For a qualitative study on charter schools' selective enrollment practices, see generally Mommandi & Welner, *supra* note 149.

[204] Potential for LGBTQ+ discrimination is not a hypothetical assertion: Opponents to the Oklahoma religious charter school already allege the presence of these types of discrimination.

In 2024, we celebrate the 70th anniversary of *Brown v. Board of Education* and the desegregation of public schools via judicial fiat.[205] It has been only a little over 40 years, however, since the judiciary mandated desegregation of religious educational institutions.[206] What happened in the 30 years from *Brown* to *Bob Jones* provides a blueprint of how religious freedom provided and continues to provide a legal loophole for discrimination—one not easily tackled by the Court.

Once *Brown* declared that "in the field of *public* education the doctrine of 'separate but equal' has no place," segregationists began to construct new places where separate racial education could freely exist.[207] At the same time that southern segregationists used collective physical violence to resist *Brown*, they were also laying the groundwork to legally avoid *Brown* with private segregation academies as well as private church schools.[208] This period, known as "Massive Resistance" created an influx of private education, but also adopted the rhetoric of school choice and the tools needed to publicly fund that choice such as vouchers and tax credits.[209] These private education policies "left segregated patterns of schooling largely untouched."[210] It took time, but in the first few decades after *Brown*, the Court fought back against this resistance and tried to close the loopholes to *Brown* created by the public education limitation.[211]

Yet, even if the spirit of *Brown* implied that the Court should desegregate private educational institutions, *Brown* itself could not lead to that conclusion. *Brown's* ruling relies on the Fourteenth amendment, which begins its mandates with "[n]o *State* shall." [212] This language is the foundation for the state action doctrine, which states that only state or public action implicates

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See Compl. at 2, OKPLAC, Inc. v. Statewide Virtual Charter Sch. Bd., CV-2023-1857 (Okla. Cty. Dist. Ct., July 31, 2023).

[205] The Court decided Brown I in 1954. *See generally* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[206] The Court essentially desegregates private religious schools in 1983 in Bob Jones Univ. v. United States, 461 U.S. 574, 585 (1983). Though as the rest of this Section will argue, they do so indirectly by enforcing tax law concerning tax-exempt status. *Id.* at 593–95.

[207] *Brown*, 374 U.S. at 495 (emphasis added). For segregationist strategy, *see, e.g.*, Joseph Crespino, In Search of Another Country: Mississippi and the Conservative Counterrevolution 173 (2007) (detailing Mississippi's freedom-of-choice plans as a main weapon of southern Massive Resistance).

[208] Quite a bit of literature conflates these two. *See* Crespino, *supra* note 209, at 248–49; *see also* Suitts, *supra* note 6, at 70–71. I have argued, however, that segregation academies and church schools are definitionally different, even if their purpose of maintaining white spaces is the same. *See* Vania Blaiklock, *The Unintended Consequences of the Court's Religious Freedom Revolution: A History of White Supremacy and Private Christian Church Schools*, 117 Nw. U. L. Rev. Colloquy 46, 57–62 (2022).

[209] *See* Hale, *supra* note 7, at 19–25; *see also* Suitts, *supra* note 6, at 12–13; Apple, *supra* note 18, at 109.

[210] Crespino, *supra* note 209, at 173.

[211] *See, e.g.*, Runyon v. McCrary, 427 U.S. 160, 161 (1976) (where the Court desegregates private schools); *see also Bob Jones*, 461 U.S. at 574–75 (where the Court desegregated private religious schools). The Court did not stop at admissions; during this period, it also rejected other school policies designed to avoid *Brown*, such as state-sponsored vouchers and school-system shutdowns. *See id.* at 580 (for racially discriminatory polices); *see also* Griffin v. Cnty. Sch. Bd., 377 U.S. 218, 221–25 (1964) (Virginia case on private schools and vouchers).

[212] *See* U.S. Const. Amend. XIV. *See also* Brown v. Bd. of Educ. 347 U.S. 483, 488 (1954).

the Fourteenth amendment.[213] Thus, the constitution restricted the Court to countering state racial discrimination in education, not private discrimination. For that reason, when desegregating private schools, the Court had to rely on legal authority outside of the constitution such as federal contract law.

For example, in the case that desegregated private schools, *Runyon v. McCrary,* the Court relied on 42 U.S.C. §1981.[214] Under §1981, the Court could reach private discrimination because the statute prohibits racial discrimination in the making and enforcement of private contracts.[215] Private schools are institutions built on contracts. Thus, prohibiting Black students from attending private schools is a "classic violation of §1981."[216]

Yet, in *Runyon*, the Court acknowledges that their ability to prohibit racial discrimination in private education might have limits if the school in question was a religious institution.[217] Instead of looping religious private schools in with other private schools under 42 U.S.C. §1981, the Court chooses to leave the question of religious school desegregation for another day.[218]

That day came seven years later in a different context with the combined case that became *Bob Jones University v. United States.*[219] Primarily a tax case, *Bob Jones* examined whether the Internal Revenue Service ("IRS") could revoke a charities' tax-exempt status for racially discriminatory admission policies.[220] The two schools involved in the case, Bob Jones University and Goldsboro Christian Schools, had racially discriminatory policies designed to discourage and prevent Black students from attending. Based on their interpretation of the Bible, Goldsboro Christian exclusively admitted white students, thus never accepting Black students.[221] Bob Jones allowed for Black students to attend, but they had strict rules about how they could socialize and exist in the school community, such as not accepting single Black students due to their concern about interracial marriage.[222]

The Court held that these schools violated the well-established public policy on racial discrimination in education and as such, it was legal for the IRS to revoke their charitable tax-exempt status.[223] Relying on English

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[213] For early state action discussion, *see* Shelley v. Kramer, 334 U.S. 1, 14–16 (1948).

[214] *Runyon*, 427 U.S. at 163.

[215] *Id.* 169–170.

[216] *Id.* at 172. The Court dismissed the argument that the First Amendment's guarantee of freedom of association protects private racial discrimination. *Id.* at 176.

[217] *Id.* at 167. I use the term "might" because the Court chose not to engage with this line of reasoning because the specific facts of *Runyon* did not include any racial exclusion on religious grounds. *Id.*at 167 n.6.

[218] *Id.* at 167. Avoiding the religious school desegregation in *Runyon* suggested that religious schools are different than other private schools due to their protection under the First Amendment. *See e.g.*, Green v. Connally, 330 F. Supp. 1150, 1169 (1971) (precursor to *Runyon* that explicitly notes that that religion sanctioned racial discrimination would be a different situation and require more scrutiny than religious discrimination by a religious school).

[219] Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

[220] *Id.* at 577. For the specific IRS policy, *see* IRS Revenue Proc. 75-50 (originally issued in 1975).

[221] *Id.* at 583.

[222] *Id.* at 580.

[223] *Id.* at 604 (holding that "the Government has a fundamental overriding interest in eradicating racial discrimination in education" and that that interest "substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs").

common law, the Court noted that the tax-exempt privilege is rooted in an understanding that the institution is a charity doing work that benefits the public.[224] Thus, it is proper to limit that privilege when the institution goes against public policy.

Practically, *Bob Jones* desegregates only religious institutions because their tax-exempt status is enough of a benefit that they will choose desegregation over losing the benefit. Yet, there is nothing in *Bob Jones* that forces a religious institution to desegregate if they can afford to be tax-exempt.[225] The process of using the tax code, however, is informative because it highlights how hesitant the Court was to arbitrarily interfere in the policies of religious educational institutions, even when it came to racial discrimination.[226]

While this case primarily focuses on tax law, the Court was not silent on the implications of the First Amendment's Free Exercise clause. It is precisely because this IRS policy would apply to religious institutions that the Court spent time elaborating on the overwhelming precedent concerning racial discrimination in education.[227] The First Amendment required the Court to qualify their ruling in *Bob Jones* by establishing that eradicating racial discrimination in education was an interest compelling enough to justify burdening religious exercise.[228]

That evidence, according to the Court, resided in the precedent that flowed from *Brown* and the acts of Congress and the Executive that "attest a firm national policy to prohibit racial segregation and discrimination in public education."[229] When both the First Amendment religion rights and the Fourteenth Amendment equality rights conflict, courts try to find a harmonious balance between the two.[230] There are occasions, however, where harmony is impossible and the government's Fourteenth Amendment equality interests may transcend burdens to religious freedom.[231] In 1983, the government's "fundamental, overriding interest in eradicating racial discrimination in education," was such an occasion where equality rights trumped any damage to religious freedom.[232] The legacy of slavery, reconstruction, and the civil rights

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[224] *Id.* at 585–86.

[225] *See generally id.*

[226] While both *Runyon* and *Green* dealt with private desegregation, both included language from courts being hesitant to make a general rule regarding racial discrimination on religious grounds. *See* Runyon v. McCrary, 427 U.S. 160, 167 (1976) (stating that religious schools were outside the scope of the case); Green v. Connally, 330 F. Supp. 1150, 1169 (D.C. Dist. 1971) (finding that racial discrimination on religious grounds was a "hypothetical" not within the scope of the case).

[227] *See Bob Jones,* 461 U.S. at 603–04.

[228] *Id.* at 603–05.

[229] *Id.* at 593.

[230] For the rationale behind balancing the different rights, *see Green*, 330 F. Supp. at 1169 ("The freedoms of the Bill of Rights must be read not in opposition to the safeguards of the Amendments adopted after the Civil War, but in harmony with them . . . .").

[231] *Bob Jones,* 461 U.S. at 604 (holding that eradicating racial discrimination is a "governmental interest [that] substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs.").

[232] *Id.* at 604.

movement helped tip the scale in favor of eradicating racial discrimination over preserving religious freedom.[233]

Yet, even with this overwhelming history and shift in public policy, it still took the Court 30 years after *Brown* to desegregate religious schools.[234] The *Bob Jones* decision does ultimately required religious school desegregation, but it is important that they did so by restricting a tax benefit and not through a proscriptive law like the secular private school desegregation in *Runyon*.[235] Thus, implied in *Bob Jones* is the argument that to counter protected First Amendment religious discrimination, such discrimination must violate an overwhelming national public policy.

The current Court is even more likely to make that conclusion since they have made preserving religious freedom a prime directive. For example, both *Espinoza* (2020) and *Carson* (2022) speak to an increased protection of state funded private religious education. [236] Based on this shift in the Court, it would not be difficult to conclude that the precarious balance in *Bob Jones* is limited to its time and facts.[237] Thus, explicit racial discrimination in charter school admissions would likely still be a compelling enough governmental interest to overcome religious freedom protections. However, other group admission discrimination, such as that against disabled and LGBTQ+ identifying students, would likely succumb to the sanctuary of the Free Exercise Clause.[238]

Disability and sexual orientation discrimination do not share the same overwhelming national history and policy protection that racial discrimination had in 1984. While both disability and sexual orientation classifications have legal protections, these protections have already proven to be optional for religious institutions.[239] Religious charter schools would be no exception. Thus, it is likely that for disabled and LGBTQ+ students, any challenge to

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[233] After Brown v. Board of Education, the education context is the key battleground for eradicating racial discrimination. *Id.* at 593–96 (holding that *Brown* signaled an end to any era supporting racial discrimination in education).

[234] *Id.* at 604–05.

[235] Runyon v. McCrary, 427 U.S. 160 (1976).

[236] *See generally* Carson v. Makin, 596 U.S. 767 (2022); Espinoza v. Montana Department of Revenue, 591 U.S. 464 (2020).

[237] Especially considering the Court's 2007 decision in Parents Involved v. Seattle School District 1, 555 U.S. 701 (2007), which considered only remedying past, not present, racial discrimination in education as a compelling government interest.

[238] Of course, *Bob Jones* did not settle the issue of racial discrimination in charter schools or religious private schools. To the contrary, recent scholarship has shown that these schools tend to be either majority white spaces—in the case of private schools—or heavily segregated, in the case of charter schools. *See* Suitts, *supra* note 6, at 74, 83 (for private schools); *see also* Osborne, *supra* note 19, at 16 (for charter schools). Due to the appearance of legally resolving segregation, however, it is unlikely that schools will be explicit in their racial discrimination as they are with their sexual orientation and disability discrimination.

[239] For disability, *see* American with Disabilities Act of 1990, 42 U.S.C. § 12187 (2008) (exempting religious institutions from Title III); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 196 (2012) (recognizing a ministerial exception from ADA employment discrimination claims); *see also* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 591 U.S. 732, 747–48 (2020) (expanding the ministerial exception). For sexual orientation protections, *see* Obergefell v. Hodges, 576 U.S. 644 (2015) (protecting gay marriage); Bostock v. Clayton County, 590 U.S. 644 (2020) (protecting sexual orientation under Title VII). *But see* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617 (2018); 303 Creative, LLC v. Elenis, 600 U.S. 570 (2023) (allowing religious discrimination so long as it is an expression of a sincere religious belief).

discriminatory admissions in religious charter schools would result in the *Bob Jones* balancing test favoring religious freedom.[240]

For example, the American Disability Act (the "ADA") would be the statutory protection for disability equivalent to the Civil Rights Act referenced in both *Runyon* and *Bob Jones*.[241] Prior to the ADA, people who experienced disability discrimination "often had no legal recourse to redress such discrimination."[242] Now Title I protects disabled individuals from discrimination in the workplace and Title III protects disabled individuals from discrimination in places of public accommodations.[243]

This statutory protection offers little recourse against disability discrimination conducted by religious institutions, however, because religious organizations are exempt from Title III by the plain language of the statute and can be exempt by the court from Title I via the ministerial exemption.[244] Even if disabled students could generally rely on the ADA to prove a compelling government interest against disability discrimination, like individuals claiming racial discrimination rely on §1981 of the Civil Rights Act—such an argument would not apply to religious institutions, including religious charter schools. Thus, unlike the eradicating of racial discrimination in *Bob Jones,* disabled students who faced discrimination in religious charter schools would have little hope in providing a compelling government interest sufficient to outweigh religious freedom under the Free Exercise Clause.

While there is no federal ADA equivalent for sexual orientation discrimination, most states have passed public accommodation laws that protect against sexual orientation discrimination.[245] Additionally, the Supreme Court has recently found that Title VII's protection against sex discrimination includes sexual orientation.[246] Extending Title VII's protection to sexual orientation coincides with the Court's increasingly expansive protection for some sexual orientation rights in the beginning of the twenty-first century.[247] Yet, the Court's recognition of statutory and constitutional protection has not been

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[240] Or in other words, religious charter schools would have a free pass to discriminate against these groups. *See, e.g.*, Arlene Kanter, *Turning Their Back on People with Disabilities in the Name of Religious Freedom*, Jurist https://www.jurist.org/commentary/2020/07/arlene-kanter-ada30-st-james-v-biel/ [https://perma.cc/37VU-KLBM] (making this argument in the disability context).

[241] For the references to the Civil Rights Act in the desegregation cases, *see* Runyon v. McCrary, 427 U.S. 160, 164 (1967); Bob Jones Univ. v. United States, 461 U.S. 574, 594 (1983).

[242] American with Disabilities Act of 1990, 42 U.S.C. §12101(a)(4) (2008).

[243] *Id.* at §12111–17, §12181–89.

[244] For plain language exemption, *see* American with Disabilities Act of 1990, 42 U.S.C. § 12187. For Supreme Court exemption, *see* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 591 U.S. 732, 747–48 (2020) (citing *Hosanna-Tabor Evangelical Lutheran Church and School*, 565 U.S. at 171, for the position that the ministerial exception is expansive, and when it applies—as it usually does in the education context—it exempts religious institutions from Title I of the ADA).

[245] *See* Christy Mallory et al., *Legal Protections for LGBT People after* Bostock v. Clayton County, UCLA Sch. of L. Williams Inst. 1 (2020).

[246] *See generally* Bostock v. Clayton Cnty., 590 U.S. 644, 660 (2019) (holding that for the purposes of Title VII of the Civil Rights Act, being gay or trans falls under the sex provision).

[247] *See e.g.*, Obergefell v. Hodges, 576 U.S. 644, 675–76 (2015) (holding that bans on gay marriage were unconstitutional); Lawrence v. Texas, 539 U.S. 558 (2003) (overruling *Bowers* and protecting gay sexual activity); *see also* Romer v. Evans, 517 U.S. 620 (1996) (holding that the law could not single LGBT people out from rights everyone else has access to).

enough for them to recognize a fundamental national public policy compelling enough to completely overcome individual religious freedom.[248] At the same time that the Court began to recognize constitutional rights for sexual orientation, they also strengthened protections for a private organization to discriminate against the same.[249] That protection is even stronger when the private organization discriminates out of a deeply held religious belief.[250]

For example, in *Masterpiece Cake Shop v. Elenis*, the Free Exercise Clause protects the rights of an individual cakemaker who refuses to make a wedding cake for a same-sex couple because it is against his religious beliefs.[251] The Colorado Civil Rights Commission argued that the cakemaker violated Colorado's public accommodation law, which prohibited discrimination against LGBTQ+ people, when he refused to service the gay couple.[252] Using comments and examples from the commission, the Court rejected this argument and says that the commissioners hostility to the cakemaker's religious beliefs violated the Free Exercise Clause requirement for neutrality, even if it was only a subtle departure.[253] And while the Court ruled in favor of the religious individual due to the lack of neutrality in the original commission's adjudication, they also recognized that "religious and philosophical objections to gay marriage are protected forms of expression."[254] Such protected forms of expression cannot be discouraged by the government simply because they are unpopular.[255]

Thus, while one could argue that LGBTQ+ identifying individuals have had success in the Court akin to the success Black people had following *Brown*, the Court has not recognized that success as shifting the balance between First Amendment and Fourteenth Amendment rights to prohibit private discrimination, especially when such discrimination comes from a sincerely held religious belief. Religious charter schools, though technically public schools, would have the support of recent case law to discriminate against individuals based on sexual orientation with very little fear of successful legal challenges. Especially because the Court's most recent decisions suggest that sexual orientation—despite our society's increasing recognition that LGBTQ+ people cannot be "treated as social outcasts or inferior in dignity or worth"[256]—is not a compelling enough governmental interest adequate to overcome religious freedom under the First Amendment.

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[248] *See* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts, Comm'n, 584 U.S. 617, 631–32 (2018).

[249] *See* Boy Scouts of America v. Dale, 530 U.S. 640, 658, 661 (2000) (holding that state accommodation laws for gay people did not trump an organization's freedom to associate with the type of people that aligned with their viewpoints).

[250] *See generally Masterpiece Cakeshop*, 584 U.S. 617.

[251] *Id.* at 621.

[252] *Id.* at 621–22.

[253] *Id.* at 634–36 (citing Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 534 (1993)). Additionally, the Court specifically highlighted that deeply held religious beliefs that object to gay persons or couples are constitutionally protected regardless of society's recognition that LGBTQ+ people are not "inferior in dignity or in worth." *Id.* at 631.

[254] *Id.* at 631.

[255] 303 Creative LLC v. Elenis, 600 U.S. 570, 584–85 (2023).

[256] Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 584 U.S. 617, 631 (2018).

B. Maintaining Discrimination: The Use of the Ministerial Exemption

Charter school hiring, like charter school admissions, exist as sites of flexibility. By design, charter schoolteachers have more flexibility in their decision-making than traditional public schools.[257] Although the specific requirements vary by state, generally teachers in charter schools can participate in public retirement and healthcare but decisions regarding their employment rest in the managing group, not the district.[258] Thus, the price for this autonomy is less oversight from the district/state.[259]

Control of teachers and other employees rest exclusively with the private managing group of charters.[260] Employment policies of charter schools are generally exempt from state education regulations not specified in charter laws.[261] For this reason, some courts consider charter school employment policies and practices outside the scope of state action.[262] Regardless of state actor status, charter school management groups still have to comply with federal antidiscrimination laws, unless exempted constitutionally or statutorily. This Section focuses on two discrimination acts, the American with Disabilities Act of 1990, and Title VII of the Civil Rights Act of 1964, as they will be the most relevant for any disability and LGBTQ discrimination by religious charter schools, respectively.

While regular charter schools do not have access to significant exemptions from these laws, religious charter schools by their very nature of being religious institutions, will have access to different exemptions.[263] The most

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[257] S*ee* Zachary W. Oberfield, Are Charters Different?: Public Education, Teachers and the Charter School Debate 65–66, 72 (2017).

[258] *Id.* at 66; *see also*, Lewis, *supra* note 8, at 42. For a state-specific example, *see* Okla. State Charter Act §1-136(11)-(14). Interestingly, in Oklahoma charter teachers are not required to adhere to teacher standards or have valid Oklahoma teaching certificates. *See* Okla. Att'y Gen. Op., *supra* note 5, at 2–3. Arizona also has the same provision. *See* Caviness v. Horizon Community, 590 F.3d 806, 810 (9th Cir. 2010).

[259] *See* Oberfield, *supra* note 259, at 98 (summarizing their findings on teachers in charter schools as "one of the major concerns about charter schools is being realized: they are creating teaching climates with greater autonomy and innovation but are doing so at the cost of oversight").

[260] Employment choices is one of the ways that charters operate like private entities. *See* Wagma Mommandi & Kevin Welner, School's Choice: How Charter Schools Control Access and Shape Enrollment 2 (2021). For a state example, see Caviness v. Horizon Community Learning Center, Inc., 590 F.3d 806, 809 (9th Cir. 2010).

[261] Only three states (Minnesota, Indiana, and Kentucky) extend some employment requirements to charter schools. *See Charter School Policies: What Rules are Waived For Charter Schools?*, Educ. Comm'n of the United States, Jan. 2020, https://reports.ecs.org/comparisons/charter-school-policies-14 [https://perma.cc/X6TH-6UT8].

[262] *See, e.g.*, *Caviness*, 590 F.3d at 818 (holding that a charter school was not a state actor concerning an employment issue). For a more detailed state actor analysis, *see supra* Part I.B.

[263] While this Article will focus primarily on the ministerial exception, courts have also expressed that religious organizations might make use of statutory exemptions like RFRA as ways of exempting themselves out of Title VII specifically. *See, e.g.*, Bostock v. Clayton Cty., 590 U.S. 644, 682 (2020); *see also* Braidwood Management v. EEOC, 70 F.4th 914, 936 (5th Cir. 2023) (holding that RFRA exempted a religious company from Title VII sexual orientation/gender identity protections). But importantly this defense might only be available when the government is a party to the lawsuit. *See* Billard v. Charlotte Catholic High School, 2021 WL 4037431, 2021 U.S. Dist. LEXIS 167418, *17 (W.D.N.C. 2021) (arguing that the circuits are for the most part in agreement that RFRA does not extend to private parties).

useful exemption in the religious school toolkit for protecting discriminatory employment decisions is the ministerial exception.[264] This exception is an affirmative defense rooted in both the Free Exercise and the Establishment Clause of the First Amendment that exempts religious employers from federal employment laws concerning ministers in the organization.[265]

The exception speaks directly to the historical and modern belief that the state and the church should not be intertwined in a way that allows for coercion.[266] Although the Supreme Court did not formally recognize the exception in the employment context until 2012 in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*,[267] circuit courts have recognized the doctrine in employment as early as 1972.[268] *Hosanna-Tabor*, however sets the framework for how generously courts should apply the exception.

Hosanna-Tabor involved a teacher at a Lutheran school who went on disability and was told she had been replaced when she wanted to return to work.[269] The church asked her to resign, she said no and returned to work once she was physically able to and threatened to sue if not allowed to return.[270] After her appearance and refusal to resign the church told her she would likely be fired.[271] The church and congregation voted to remove her and cited "insubordination and disruptive behavior" along with her damage to her working relationship due to her threat of legal action.[272]

Subsequently, the teacher filed a claim with the EEOC arguing that the termination violated the ADA.[273] Hosanna-Tabor moved to have the case dismissed arguing that the ministerial exception exempted them from the ADA.[274] The Court agreed, holding that the very purpose of the ministerial exception is to protect internal church decisions concerning the mission of the church itself.[275] However, the Court stopped short of giving a specific formula to guide lower courts in applying the exception.[276]

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[264] *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 565 U.S. 171, 190 (2012); Our Lady of Guadalupe Sch. v. Morrissey-Berru, 591 U.S. 732, 746–47 (2020). *See also* Geoffrey A. Mort, *Freedom to Discriminate: The Ministerial Exception Is Not for Everyone—Or is It?*, N.Y. State Bar Assoc. (Oct. 2022), https://nysba.org/freedom-to-discriminate-the-ministerial-exception-is-not-for-everyone-or-is-it/#_ednref36 [https://perma.cc/LKH2-FPX3].

[265] *Hosanna-Tabor*, 565 U.S. at 181 (recognizing that this is a rare instance where the two clauses are not in conflict but work together to "bar the government from interfering with the decision of a religious group to fire one of its ministers"); *see also* Mort, *supra* note 266.

[266] *Hosanna-Tabor,* 561 U.S. at 186–87.

[267] *Id.* at 188.

[268] *See* Damonta D. Morgan & Austin Piatt, "Making Sense of the Ministerial Exception in the Era of Bostock," 2022 U. Ill. L. Rev. Online 26, 31 (2022).

[269] *Hosanna-Tabor*, 561 U.S. at 178–79.

[270] Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 565 U.S. 171, 178–79 (2012).

[271] *Id.*

[272] *Id.* at 179.

[273] *Id.* at 179–80.

[274] *Hosanna-Tabor,* 565 U.S. at 180.

[275] *Id.* at 189-190 (holding that the ministerial exception exists to prohibit interference "with the internal governance of the church" which would deprive "the church of control over the selection of those who will personify its beliefs").

[276] Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 565 U.S. 171, 190 (2012).

Instead, they look at the facts of that specific case and argue that the circumstances were sufficient to find that the exception applied.[277] Even if not a formula, the Court focuses on four elements: (1) the teacher's title; (2) the substance reflected in the title; (3) her own use of the title; and (4) the important religious functions she performed for the church.[278] Although the Court in *Hosanna-Tabor* specifically states that these factors do not create a rigid formula,[279] the Ninth Circuit did use these elements as a guiding standard for whether or not the exception applied.[280]

The use of these factors as a test became the issue in *Our Lady of Guadalupe Sch. v. Morrisey-Berru*, eight years later, where the Court reiterated that its *Hosanna-Tabor* decision *did not* create any rigid test or formula that objectively determined when the ministerial exception applied.[281] They offer a more expansive case-by-case circumstantial standard for the ministerial exception and in this case focused solely on the circumstance of employee's actions.[282] Like *Hosanna-Tabor*, the consolidated cases making up *Our Lady of Guadalupe* concern teachers at religious schools who argue that their termination violated federal employment antidiscrimination laws.[283]

Again, the Court reiterated that "The First Amendment protects the right of religious institutions 'to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'"[284] According to the Court, teaching is uniquely connected to the religious mission of religious schools so even without specific titles or specified religious training, teachers in religious schools likely satisfy the ministerial exception.[285] The majority does not go as far as Justice Thomas' concurrence in arguing that courts should always defer to religious schools in deciding who is a minister, but they do say that what matters is what an employee *does*.[286] It does not even matter if the employee practices the religion.

Teachers are a key demographic for understanding the standard for what makes a minister. According to the Court, "when a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith," the ministerial exception applies.[287] The ministerial exception is necessary in this context to prevent "judicial intervention into

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[277] *Id.* 191-192.

[278] *Id.* at 191-192.

[279] *Id.* at 190 ("We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister.").

[280] *See* Morgan & Piatt, *supra* note 270, at 33 (arguing that this test became known as the totality of the circumstances test).

[281] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 591 U.S. 732, 751–52 (2020).

[282] *Id.* at 753-4; *see also* Morgan & Piatt, *supra* note 270, at 34–35.

[283] The teacher in *Our Lady of Guadalupe* alleged a violation of age discrimination. *Our Lady of Guadalupe*, 591 U.S. at 742. The teacher in St. James v. Biel (the consolidated case) alleged a violation of the ADA like the teacher in Hosanna-Tabor. *Id.* at 745.

[284] *Id.* at 737 (citing Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. America, 344 U.S. 94, 116 (1952)).

[285] *Id.* at 738.

[286] *Id.* at 753. For Thomas' concurrence, *see id.* at 762 (Thomas, J. concurring). *See also* Arthur S. Leonard, *Supreme Court Broadens "Ministerial Exception" Laws, Leaving Many LGBTQ Employees of Religious Schools Without Title VII Protection*, LGBT Law Notes 1 (2020).

[287] *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 591 U.S. 732, 762 (2020).

disputes between the school and the teacher" in ways that "the First Amendment does not allow."[288] To the extent that religious managing groups of charters require their schoolteachers to incorporate the mission of the specific religious institution into their job, the schools can make a compelling argument that the ministerial exception applies to religious charter teachers.[289] Thus, these schools would be exempt from complying with the ADA and sex discrimination under Title VII of the Civil Rights Act of 1964 for their teachers—a benefit that other charter schools cannot access.

Even though both ministerial exception cases deal with the ADA, the battleground for applying the ministerial exception to religious charter schools will likely rise out of LGBTQ+ discrimination under Title VII.[290] Three weeks before *Our Lady of Guadalupe*, the Court decided *Bostock v. Clayton County* which held that employers who fire individuals for being homosexual or transgender violate Title VII's prohibition of discrimination on the basis of sex.[291] Prior to *Bostock*, circuits split on whether Title VII's sex provision included sexual orientation or gender identity discrimination.[292] Bostock actually consolidates three cases from three different circuits to resolve these different outcomes.[293]

In each case an employee was fired for being gay or transgender.[294] Gorsuch writing for the majority argues that the ordinary public meaning of the term "sex" leads to the straightforward rule that "[a]n employer violates Title VII when it intentionally fires an individual employee based in part on sex."[295] Even if other factors beyond the employee's sex are relevant, the Court held that any decision based on homosexuality or transgender status "necessarily entails discrimination based on sex."[296] *Bostock* settles the Title VII sex discrimination debate, but immediately creates a new question: what does the decision mean for religious employers?

Both the majority and dissent in *Bostock* recognize that the decision had implications for religious employers.[297] The majority is content to leave that question for another day, hinting that religious organizations might have access to laws and doctrines that will exempt them out of this application of Title VII.[298] Justice Alito and Justice Thomas are more straightforward in their concern about the impact of *Bostock* on religious employers.[299] They focus

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[288] *Id.*

[289] Further, as noted in the Abeka case study, otherwise secular subjects—like history—can be embedded with religious doctrine. *See infra* Part II.C.

[290] Most of the action in the lower court currently revolves around Title VII and the ministerial exception for religious employers. *See* Morgan & Piatt, *supra* note 270, at 36–37.

[291] Bostock v. Clayton Cty., 590 U.S. 644, 649–52 (2020).

[292] *Id.* at 654.

[293] *Id.*

[294] *Id.* at 653.

[295] *Id.* at 659.

[296] *Id.* at 669.

[297] For the majority's position, *see* Bostock v. Clayton Cnty., 590 U.S. 644, 681–82 (2020). For the dissent's perspective, *see id.* at 728–29 (Alito, J., dissenting).

[298] *Id.* at 682 (majority opinion) (including the ministerial exception).

[299] *Id.* at 728–29 (Alito, J., dissenting).

specifically on teachers in religious schools and argue that this decision may impact religious schools the most.[300]

As this decision came before *Our Lady of Guadalupe*, Justices Thomas and Alito were not convinced that the ministerial exception will be sufficient to protect religious schools as employers.[301] Even after *Our Lady of Guadalupe*, circuits differ on how liberally to apply the ministerial exception in LGBTQ+ Title VII cases.[302] Some religious employers have already argued that all of their employees—including janitorial staff and IT workers—fall under the definition of a minister.[303] In the school context, religious employers have argued that all teachers—regardless of the level of religious involvement in their duties as teacher satisfy the minister definition.[304]

At least one district court in the Fourth Circuit had resisted such a broad definition of minister in the education context.[305] In *Billard v. Charlotte Catholic High School*, the court refused to grant the catholic school an exemption to Title VII when they fired a substitute male drama teacher (Billard) for marrying another man.[306] The court held that neither the statutory religious exemptions of Title VII nor RFRA applied to this situation.[307]

The district court stipulated that the ministerial exception could have applied if the teacher satisfied the minister definition.[308] The parties stipulated that the drama teacher was not a minister, but the court held that even without that concession as "a substitute teacher of a purely secular subject," the drama teacher would not be a minister.[309] This district Court may have refused to blanketly include all religious schoolteachers as ministers, however, the Fourth Circuit reversed that holding and instead held the drama teacher did fall under the ministerial exception.[310]

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[300] *Id* at 729.

[301] *See id.* at 729–30. One might argue that *Our Lady of Guadalupe* (of which Thomas and Alito are in the majority) weakens this concern for both sexual orientation and disability discrimination. The initial public reaction to Our Lady of Guadalupe was that the decision weakens protection for disabled employees and LGBTQ+ employees. *See* Leonard, *supra* note 288, at 1–2; *see also* Kanter, *supra* note 242 (arguing that *Our Lady of Guadalupe* "abandon[ed] people with disabilities under the guise of protecting religious freedom").

[302] *See* Morgan & Piatt, *supra* note 270, at 36–37.

[303] *See* Mort, *supra* note 266.

[304] *Id.* (arguing that religious employers not only prefer an expansive definition of minister, but that such a question "will probably soon be before the courts").

[305] *See* Billard v. Charlotte Catholic High School, 2021 WL 4037431 (W.D.N.C. 2021). Other courts have shown some unwillingness to extend the exception to secretarial or back-office workers. *See* Mort, *supra* note 266.

[306] *Billard*, 2021 WL 4037431 at *7.

[307] The statutory provisions did not apply because they apply only to religious discrimination not sex discrimination. *Id.* at *8. RFRA did not apply because this case was a suit between private parties where the government was not a party. *Id.* at *15.

[308] *See id.* at *13.

[309] *Id.*

[310] *See* Billard v. Charlotte Catholic High Sch., 2024 WL 2034860, at *6 (2024). This case is especially relevant because the parties involved waived the ministerial exception, but both the district court and the Fourth Circuit held that courts are not bound by a waiver of the ministerial exception and have discretion to enforce it as a constitutional defense even with a waiver. *Id.* at *18–22.

Unlike the district court that found that Billard's role as a drama and English teach was purely secular subjects,[311] the Fourth Circuit reasoned that, even without a specified responsibility to educate students on religion, the school's general commitment to "integrating faith throughout its curriculum" was enough to satisfy the ministerial exception.[312] The Fourth Circuit held that Billard's job at Charlotte Catholic High school resembled the lay teachers in *Our Lady of Guadalupe* in almost every respect.[313] Key to their rationale was that Charlotte Catholic High's educational mission centered on the Catholic faith and that the school expected all teachers to "model faith in the teaching of all subjects, including the non-religious subjects."[314] Even though the Fourth Circuit recognized that Billard was not regularly tasked with religious instruction, it was enough for him to do so in small portions, including filling in occasionally for religion classes.[315] Thus, despite the fact that Billard had no title and was not required to be Catholic or even Christian, his proximity to conveying the religion by merely existing as a teacher was enough for the ministerial exception to apply.

This broad approach to the ministerial exception by the Fourth Circuit is just one example of the varying outcomes faced by religious institutions claiming the exception for teachers.[316] In a district court in California, the court held that a teacher was not a minister even though she had a minister title and ministerial functions.[317] In New Jersey, a religious department chair at a school was a minister even though he had no religious duties.[318] These are just a few examples of the conflicting district opinions applying this ministerial exception to LGBTQ+ sex discrimination claims.[319] Until the Supreme Court is faced with a case seeking to apply the ministerial exception to LGBTQ+ Title VII discrimination, these cases suggests that results for LGBTQ+ employees in religious institutions will be fact specific and vary depending on the court.

Justice Alito—joined by three other Justices—wrote a concurrence to a recent denial of certiorari in *DeWeese-Boyd v. Gordon College*, expressing skepticism of any narrow version of the ministerial exception in the education context.[320] For these four judges, religious education necessarily encompasses the mission of the religious institution; therefore, teachers at religious schools are part of that mission, regardless of whether their class centers religious doctrine. [321] This concurrence is consistent with the public perception that

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[311] *Id.* at *14 (W.D.N.C. 2021).
[312] *Id.* at *10 (2024).
[313] *Id.* at *31 (2024)
[314] *Id.* at *31.
[315] *Id.* at *32–33.
[316] For a general discussion on the lower courts' application of *Our Lady of Guadalupe*'s standard after *Bostock*, see Morgan & Piatt, *supra* note 270, at 36–37.
[317] *Id.* at 37 (citing Ostrander v. St. Columba Sch., 2021 WL 3054877 (S.D. Cal. 2021)).
[318] *Id.* at 37 (citing Simon v. Saint Dominic Acad., 2021 WL 1660851 (D.N.J. 2021)).
[319] For more examples outside of the teacher context, see *id.* at 36.
[320] *See* Gordon College v. Margaret DeWeese-Boyd, 142 S. Ct. 952 (2022) (Alito, J., concurring) (denying a petition for writ of certiorari)); *see also* Morgan & Piatt, *supra* note 258, at 36.
[321] *Gordon College*, 142 S. Ct. at 954–55; *see also* Morgan & Piatt, *supra* note 270, at 36.

the Supreme Court will eventually perceive the exception "more and more broadly…for at least the immediate future."[322]

The approval of religious charter schools would be another litigation battleground for this question. Not only would religious charter schools stress the need for a clearer approach to deciding whether religious schoolteachers fall under the ministerial exception, they would also raise questions about what constitutes a religious institution under the exception. With traditional private religious schools, courts must ask only if the employee is a minister. The hybrid nature of charter schools would raise the question of whether a religious charter school employer satisfies the religious institution definition. Is the religious organization the employer, or the state?

With that question religious charter schools embody and enhance the complexity of the apparent tension between *Bostock* and *Our Lady of Guadalupe*. [323] Still, it is likely that religious charter schools will assume – like many religious educational institutions since *Hosanna-Tabor*—that their teachers fall under the ministerial exception. Even without a broad reading of *Our Lady of Guadalupe*, one can imagine religious charter schools compellingly arguing that their teachers are ministers under current, not future, Supreme Court precedent. If courts accept this argument, religious charter schools would be free to fire LGBTQ+ teachers without any judicial intervention.

C. Promoting Discriminatory Speech: A Curriculum Case Study

The possibility of discrimination in admissions and employment are not the only consequence opened by the creation of religious charter schools. There is also the fact that charter school law and the First Amendment would protect the curriculum of these schools without significant state oversight.[324] Already, states provide charter schools with considerable flexibility when it comes to curriculum.[325] Inventive curriculum is one of the many justifications for creating charter schools in the first place.[326]

As the law currently stands, there are compelling arguments for why charter school's flexibility in curriculum should not equate to allowing religious-based instruction. As the Ninth Circuit held in an unpublished opinion, *Nampa Classical Acad. v. Goseling,* public school curriculum is likely excluded from scrutiny under the Free Speech Clause.[327] Nampa Classical Academy was a charter school with a primary source based curriculum which included religious texts.[328] The plaintiffs in *Nampa* challenged the Idaho law that

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[322] *See* Mort, *supra* note 266.

[323] *See, e.g.*, Morgan & Piatt, *supra* note 270, at 27.

[324] *See* Apple, *supra* note 18, at 199. For a state-specific example, *see* 70 Okl. St. Ann. 2021 §1-134 (allowing charters a wide net when developing curriculum so long as they comply with state reporting requirements).

[325] *See* Huffman, *supra* note 9, at 1291; *see also* Osborne, *supra* note 7, at 4–5.

[326] Osborne, *supra* note 7, at 4–5.

[327] Nampa Classical Acad. v. Goesling, 477 Fed. Appx. 776, 778 (9th Cir. 2011) (unpublished), *cert. denied*, 566 U.S. 905 (2012).

[328] Nampa Classical Acad. v. Goesling, 714 F. Supp. 2d 1079, 1085–86 (D. Idaho 2010).

prohibited sectarian or denominational text in public schools alleging that it violated the First Amendment's Free Speech Clause.[329]

The Ninth Circuit disagreed, holding that charter schools were government entities and as such the curriculum was "the government's own speech" and not that of the charter school employees, students, or student parents.[330] Unlike private speech, the Court held that the government's own speech "is not subject to the First Amendment."[331]

The argument that charter school curriculum is government speech will cease to be compelling if the Court extends *Carson* to apply to religious charter schools because that would suggest that charter schools are private entities, not public institutions. The curriculum would then be private speech subject to the First Amendment, contrary to the rationale presented in *Nampa Classical.* As such, religious charter schools could use both the flexibility already given to charter schools regarding curriculum and the protections of the First Amendment's Free Speech clause to amplify discrimination against LGBTQ+ people with rhetoric that uplifts heteronormativity and demonizes queerness.

The Court has a long history of not weighing in on the content of religious schools' curriculum because of the First Amendment.[332] In *Runyon v. McCrary*, the Court reiterates that private schools can teach their ideas and dogma, including ideas about segregation, without intervention from the court.[333] This protection is likely stronger when it comes to religious curriculum based on deeply held religious tenets.[334] In *Bob Jones*, even while desegregating religious private schools, the Court still reiterated its inability to touch any racially discriminatory teachings of religious institutions.[335]

The Court's current use of the Free Speech Clause to protect religious objections to LGBTQ+ people's existence reinforces this long history.[336] Recently, in *303 Creative LLC v. Elenis*, the Court held that the Free Speech clause protects unpopular speech about LGBTQ+ peoples even if it is discriminatory.[337] The unpopular speech in *303 Creative* was the appellant's refusal

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[329] *Nampa*, 477 Fed. Appx. at 777.

[330] *Id.* at 778.

[331] *Id.*

[332] *See, e.g.*, Runyon v. McCrary, 427 U.S. 160, 176 (1976) (holding that the Court could prevent discriminatory admissions but could not regulate what the school taught).

[333] *Id.*

[334] *See* Bob Jones Univ. v. United States, 461 U.S. 574, 603–04 (1983) (holding that "[d]enial of tax benefits will inevitably have a substantial impact on the operation of private religious schools but will not prevent those schools from observing their religious tenets"). *See also* Ravitch, *supra* note 31, at 160–61 (arguing that private school curriculum, including religious private schools, is unregulated).

[335] *Bob Jones*, 461 U.S. at 603–04.

[336] A detailed analysis of Supreme Court's comprehensive Free Speech Clause jurisprudence is outside the scope of this paper, but it is necessary to highlight that the Free Speech Clause is becoming a catch-all for religious freedom. For more information on this topic, see Timothy Zick, The Dynamic Free Speech Clause: Free Speech and its Relation to Other Constitutional Rights 105–36 (2018).

[337] 303 Creative LLC v. Elenis, 600 U.S. 570, 586 (2023) (holding that "the First Amendment protects an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply 'misguided'" (internal citations omitted)).

to make wedding websites for gay couples based on her religious beliefs.[338] If statements on a website are sufficient to implicate the protection of the Free Speech Clause, it is hard to imagine that school curriculum—historically deferred to under the First Amendment—would not also fall under protected speech.[339]

Religious charter schools, like their private school counterparts, will likely adopt curriculum that coincides with their religious doctrine. That is precisely the intention of St. Isidore, the proposed religious charter school in Oklahoma.[340] This Section argues that allowing religious charter schools also creates the unintended consequence of indoctrinating students with discriminatory beliefs on the state's dime.[341] To exemplify my argument, I examine a sample of Christian school curriculum from Abeka Book, LLC ("Abeka")—a self-proclaimed leader in religious education for discussions about the LGBTQ+ community.[342] As early as the 1980s, Abeka books were being used by over 300,000 students.[343] These numbers have increased as Abeka has extended its reach beyond Christian private schools to homeschoolers across the nation.[344] While not illustrative of every Christianity-based textbook, Abeka is a useful case study as an example of what can be expected in the books that "dominate the market."[345]

Abeka's catalog includes textbooks that "teach history from an evangelical perspective."[346] Catering toward first- through twelfth-grade students, the textbooks allegedly provide students with "a realistic view of time, government, geography, and economics, 'based on eternal truths.'"[347] While the intensity of this worldview varies by grade level, the culmination of the history textbooks indicate a history of the United States that is guided by Christian

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[338] This case dealt with future speech, as the plaintiff's company had not even begun to make wedding websites yet. *Id.* at 580.

[339] *See e.g.*, Runyon v. McCrary, 427 U.S. 160, 176 (1976); *Bob Jones*, 461 U.S. at 603–04.

[340] *See* Compl. at 50, OKPLAC, Inc. v. Statewide Virtual Charter Sch. Bd., CV-2023-1857) (Okla. Cty. Dis. Ct. July 31, 2023); *see also Frequently Asked Questions*, *supra* note 63. Oklahoma, like many other states, gives charter schools a wide net when it comes to curriculum. *See* 70 Okl. St. Ann. §3-134 (2021).

[341] Recent discussions about race, equity, and history in public schools has led to conversations about how private schools teach these subjects. *See* Klein, *supra* note 31 (arguing that private school textbooks "tell a version of history that is racially biased and often inaccurate").

[342] *Id.*; *see also* Parsons, *supra* note 31, at 40 (noting that Abeka is one of the three largest Christian textbook publishers). Future work on this subject could also access Bob Jones University curriculum, another leader in the religious education field. *See Our Story*, BJU Press, https://www.bjupress.com/about/ [https://perma.cc/FS85-32RG] (last visited on Jan. 10, 2023).

[343] Parsons, *supra* note 31, at 41.

[344] *See, e.g.*, *Homeschool*, Abeka, https://www.abeka.com/Homeschool/ [https://perma.cc/794M-TKHG] (last visited Jan. 10, 2023). Additionally, Dr. Arlin Horton and his wife, Beka, founded Abeka in 1954. *See About Us*, Abeka, https://www.abeka.com/AbekaDifference.aspx [https://perma.cc/6KQ9-XSB9] (last visited Jan. 10, 2023). During the same time, desegregation was making its way through the courts and culminating in Brown v. Bd. of Educ., 374 U.S. 483 (1954). Thus, it is not a stretch to argue that the creation of this company falls into the broader history of choice as resistance to *Brown*. *See generally* Hale, *supra* note 7 (for this broader history of school choice as resistance to *Brown*).

[345] Parsons, *supra* note 31, at 40.

[346] *See* Klein, *supra* note 31.

[347] Abeka Christian School Catalog: Excellence in Education from a Christian Perspective since 1972 10, 46 (2023) [hereinafter "Abeka Catalog"]

Nationalism.[348] This is precisely the framing that structures both volumes of the Grade 11 History Textbook, *United States History: Heritage of Freedom.* Separated into eight units, *Heritage of Freedom* purports to tell the chronological story of the nation's history "beginning at the age of exploration through the impeachment of President Trump."[349] Key to this Christian Nationalist worldview is the desire to instill and emphasize patriotism and dedication to America as a great nation, including describing events and circumstances that counter "traditional morality."[350]

It is no surprise, then, that the book goes to great lengths to explicitly categorize events and matters related to the LGBTQ+ community and other gender/sex issues that do not comply with a specific Christian worldview as contributing to and responsible for the alleged downfall of America.[351] Abeka's curriculum explicitly characterizes LGBTQ+ relationships and identities as immoral and threatening to the fabric of American society.[352] Throughout *Heritage of Freedom*, all references to homosexuality and other deviations from heteronormativity include negative connotations that explicitly articulate LGBTQ+ identities as both against God and against nature. The book specifically describes the "gay liberation movement" of the 1960s and 1970s as a "lifestyle" that goes "directly against what the Bible" teaches.[353]

Further, in the section labeled "Cultural revolution," the book considers progress for LGBTQ+ individuals as a key reason that young people in the late twentieth century were rebelling against "traditional morality."[354] Attached to this observation is the normative claim that these young people who engaged in a LGBTQ+ lifestyle were more likely to be promiscuous and more likely to contract a disease or be clinically depressed.[355] The book consistently equates divergence from gender and sex normativity to "pain, suffering, and

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[348] For the purposes of this paper, "Christian Nationalism" means the belief that the creation of America is indebted to the Christian God and that only through Christian leadership and control can the nation of America thrive and be great. *See, e.g.*, *id.* at 25, 27 (describing primary history books as focusing on God and Country); *see also* Lowman, *supra* note 28, at 525 (concluding that America can only be great if it gets back to God). In other words, "Christian Nationalism" is the political weaponization of Christian religion. *See, e.g.,* Katherine Stewart, The Power of Worshippers: Inside the Dangerous Rise of Religious Nationalism 3 (2022) (arguing that Christian nationalism has a political goal, not simply a cultural one). History is not the only area where Christian nationalism guides Abeka's educational efforts. It is present in their language arts textbooks as well as in their government textbook for Grade 12. *See* Abeka Catalog, *supra* note 349, at 32, 49.

[349] *Overview*, Abeka, https://www.abeka.com/abekaonline/bookdescription.aspx?sbn=377961&childSbn=318744 [https://perma.cc/4CSF-9EC3] (last visited Jan. 10, 2023).

[350] *See, e.g.*, Abeka Catalog, *supra* note 349, at 32 (for a Language Arts book that seeks to encourage patriotism via studying famous Americans in the first volume and emphasizing citizenship, dedication, and patriotism in the second volume); *see also* Lowman, *supra* note 31, at 465–67.

[351] For LGBT+ issues, *see* Lowman, *supra* note 31, at 520; for women's issues, *see id.* at 465 (arguing that "feminists" of the 60s and 70s are responsible for "at least fifteen million babies" being murdered via abortion access). *See also* Klein, *supra* note 31 (noting that most religious textbooks indicate same-sex couples as a symptom of American "cultural decay").

[352] *See, e.g.*, Abeka Catalog, *supra* note 349, at 11 (for a science and health book that states the human body will only be taught as it is under the "design and laws of nature").

[353] Lowman, *supra* note 31, at 467.

[354] *Id.* at 466–67.

[355] *Id.* at 467.

dissatisfaction" and argues that individuals who are part of the LGBTQ+ community experience these things because they are searching for "the fulfillment that can be found only in God."[356]

It is not enough that the book argues that LGBTQ+ people are against God, they also argue that most Americans subscribe to this view, suggesting that any political assistance to advance gay rights comes from a small group that pushes the gay agenda.[357] For example, the book describes both President Clinton and President Obama as advancing the homosexual agenda over many objectors. Clinton tries to accomplish this by urging Congress to lift the ban on homosexuals in the U.S. military, a decision that the book says would have destroyed "the morale and effectiveness of the armed forces."[358]

Yet, President Obama received the most critique due to his acceptance of the Supreme Court's 2015 decision, *Obergefell v. Hodges*, which legalized same-sex marriage.[359] It is no surprise that *Heritage of Freedom* disputes *Obergefell*'s legitimacy throughout the section on "Continuing Moral Decline,"[360] calling it an "activist" decision that "instantly overturned states laws intended to protect the *correct* definition of marriage."[361] The idea that the president of the United States would support LGBTQ+ individuals as "normal and constitutionally protected" is used as evidence of a gross departure for American morality.[362] Instead, *Heritage of Freedom* teaches students, that the common and correct belief for over a millennia is that homosexuality is "perverse and even criminal."[363]

While the book spends most of its discussion about LGBTQ+ issues focused on homosexuality, the book also talks about transgender people as another example of increased immorality and cultural decay.[364] It articulates transgender identities as the next immoral progression after approval of same-sex marriage, stating that "as the immorality of same-sex marriage became normalized, gender dysphoria became a household term."[365] Acceptance again leads to a negative outcome, in this case it is the so-called encouragement of "dangerous surgeries" as opposed to "biblical counseling in addition to God's grace."[366] This framing continues the narrative that not only are people in the LGBTQ+ community spiritual deviants, they are also a danger to themselves.

As if it were not enough to frame LGBTQ+ people and relationships as perverse and immoral, the book extensively discusses how the acceptance of homosexuality has been the foremost reason for American cultural and moral decay.[367] The implicit and explicit conclusion is that America can return to

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[356] *Id.* at 469.
[357] *Id.* at 489, 511.
[358] *Id.* at 489.
[359] *Id.* at 511.
[360] *Id.* at 467.
[361] *Id.* at 511 (emphasis added).
[362] *Id.* at 511, 520.
[363] *Id.*
[364] *Id.* at 521.
[365] *Id.* at 521.
[366] *Id.* at 521.
[367] *Id.* at 520 (stating that "during the Obama administration, American culture began to stress tolerance toward the sin of homosexuality . . . .").

greatness only if it curtails the expression of LGBTQ+ identities and removes the protections currently afforded to individuals in this group.[368] There is no doubt that these examples align with Abeka's theological and religious beliefs and to the extent that it is in curriculum used by a private Christian school, it is constitutionally protected.[369] A religious charter school, however, would be authorized to use and implore such a textbook in their public state-sponsored school.

State endorsement of religious charter schools would be problematic because any person harmed by their discrimination faces high barriers in obtaining any legal remedy.[370] While the examples in this Section might be objectionable, they are also arguably rooted in deeply held religious beliefs triggering all the protections of the First Amendment's Free Exercise Clause.[371] Thus, the existence of religious charter schools would, intentionally or not, extend state approval of individual religious beliefs surrounding disability, sexual orientation, and gender normativity.

Conclusion

For some, school choice initiatives have been a welcomed solution to the issues of modern public schools.[372] According to the Supreme Court, religious schools have a constitutional right to be part of that solution.[373] Free, and open schools, however, are still a necessary part of a democratic society.[374] As Justice Breyer reminds us in *Carson*, public schools "seek first and foremost to provide a primarily civic education" and to accomplish this goal they must be "religiously neutral, neither disparaging nor promoting any one particular system of religious beliefs."[375] Religious charter schools, as public schools, jeopardize that mission.

Once faced with the constitutionality of religious charter schools, the Court should hold them outside the scope and applicability of *Carson* and

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[368] *Id.* at 525.

[369] *See* Runyon v. McCrary, 427 U.S. 160, 176 (1976).

[370] *See supra* Part II.

[371] Consistently, the Court has understood the Free Exercise Clause to protect religious behavior and conduct from being targeted, even if objectionable by large portions of a community. *See, e.g.*, Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 532 (1993) (holding that a law targeting animal sacrifice violated the Free Exercise Clause because it targeted one specific religion) (affirmed in Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 461 (2017)).

[372] *See, e.g.*, *About Us*, American Fed'n for Child., https://www.federationforchildren.org/about-us/ [https://perma.cc/33BR-NVXW] (last visited Jan. 18, 2023). This belief has not, however, been universal. Many scholars see school choice as the single most threat to education. *See, e.g.*, Derek W. Black, Schoolhouse Burning: Public Education and the Assault on American Democracy 17–18 (2020) (arguing that school choice policies are a threat to American democracy); Ravitch, *supra* note 31, at 5–6 (arguing that school choice reforms seek to destroy not fix the education system); Robert Asen, School Choice and the Betrayal of Democracy: How Market Based Reform Fails Our Communities 1–3 (2021).

[373] *See, e.g.*, Carson v. Makin, 596 U.S. 767 (2022); Espinoza v. Montana Department of Revenue, 591 U.S. 464 (2020).

[374] *See* Black, *supra* note 374, at 12–17 (2020)

[375] *Carson*, 596 U.S. at 800 (Breyer, J., dissenting).

the rest of the Court's religious aid jurisprudence. Even if *Carson* were to apply, the absence of true parental choice in the creation of charter schools makes them unconstitutional under the Establishment Clause. Additionally, the extra protection that the Free Exercise Clause of the First Amendment affords religious schools would lead to religious charter schools being able to engage in state sponsored discrimination, which is otherwise objectionable.[376]

Thus, even though the Court's non-discrimination approach to public benefit programs required the state to aid private religious educational institutions when the state chooses to aid other private institutions, that approach cannot plausibly extend to public charter schools without ending the Establishment Clause. The delicate balance of the First Amendment's protection *and* limitation of religious freedom is one of the most complex but necessary tensions in our constitution.[377] This Article demonstrates how religious charter schools would put that delicate balance at risk while simultaneously encouraging state endorsement of religious discrimination of marginalized groups.

[376] Even though not discussed in this Article, there a variety of live controversies regarding religious exercise and LGBTQ+ rights that religious charter schools might complicate, such as school bathroom policies. *See, e.g.*, Grimm v. Gloucester Cty. Sch. Bd., 972 F.3d 586 (4th Cir. 2020); Parents for Privacy v. Barr, 949 F.3d 1210 (9th Cir. 2020) (both cases dealing with transgender high school bathroom policies). Future research on religious charter schools should examine how their existence would complicate these LGBTQ+ policy issues.

[377] *See* Locke v. Davey, 540 U.S. 712, 718–19 (2004) (stating that judges must play in the joints of the Establishment and Free Exercise protections).