
Approval of Nation's First Religious Based Charter School Opens Door to Contentious Constitutional Question

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On June 5, 2023, an Oklahoma charter school authorizer approved the nation's first religious charter school. The decision is certain to ignite litigation and open the possibility that higher courts may explore whether religious schools may be state sanctioned and publicly funded.

Background

The Oklahoma Statewide Virtual Charter School Board (the Board) is a statutorily created public entity with authority to authorize and sponsor Oklahoma statewide virtual charter schools. Schools approved by the Board are considered public schools and are publicly funded through the Oklahoma State Department of Education based on student enrollment. Recently, proponents of the St. Isidore of Seville Catholic Virtual School sought Board approval of their petition to establish the charter school, which would employ a religious curriculum and utilize religious considerations in admissions and hiring. Though St. Isidore's charter petition was initially denied, a recent change in the Board's composition resulted in a narrow approval of the petition by a 3-to-2 vote during reconsideration at a June 5, 2023 Board meeting. The school's approval was swiftly denounced by advocates of the Establishment Clause, and the Board's action has already been challenged by the American Civil Liberties Union (ACLU).

Trending Interpretations

As the ACLU lawsuit challenging the Board's action makes its way through the courts, the case seems an ideal vehicle for the Supreme Court to eventually consider whether taxpayer dollars may be used to directly fund religious schools, with St. Isidore's proponents inviting such analysis. This matter, should it reach the higher federal courts, would add to a recent string of high-profile cases redefining the application of the United States Constitution's religion clauses within the educational context. For example, in *Carson v. Makin* (2022) 596 U.S. ___, the U.S. Supreme Court found unconstitutional a Maine policy prohibiting the use of public funding for tuition assistance grants at sectarian schools. The Supreme Court reasoned that such a policy violated the Free Exercise Clause of the First Amendment. (See [2022 Client News Brief No. 35](#)) Prior to that, in a June 2020 decision, the Supreme Court held in *Espinoza v. Montana Department of Revenue* (2020) 591 U.S. ___ that a Montana policy excluding

religious schools from participation in a state scholarship program discriminated against students who wished to utilize such grants at sectarian schools and similarly ran afoul of their First Amendment free exercise rights. (See [2020 Client News Brief No. 63](#))

These cases highlight a fundamental and growing tension between the Free Exercise Clause, safeguarding an individual's right to freely exercise their religion, and the Establishment Clause, prohibiting government establishment or sanctioning of a religion or sect, with the Supreme Court displaying a recent trend towards favoring the expansion of protections for personal religious expression. (See [2022 Client News Brief No. 31](#)) The Board's recent action could provide an opportunity for the high court to ultimately consider the highly consequential question of whether taxpayer funding may be utilized to directly fund religious schools.

Takeaways

The Oklahoma Statewide Virtual Charter School Board took the momentous step of approving the first state-funded religious charter school in the nation. This decision has no impact on California charter school law or the funding of California schools at this time. However, the Board's action is already facing legal challenges and such litigation should be monitored in light of recent United States Supreme Court decisions redefining the contours of the First Amendment's religion clauses. Lozano Smith will monitor the pending litigation and provide relevant legal updates.

If you have any questions regarding your particular agency's actions in the context of the Free Exercise Clause and the Establishment Clause, or other constitutional questions common to governmental entities, please contact the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also subscribe to our [podcast](#), follow us on [Facebook](#), [Twitter](#) and [LinkedIn](#) or download our [mobile app](#).

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