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The Opened Door to Religious Charter Schools & How to Close It

Carla Williams-Pauley

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INTRODUCTION

Imagine a school that teaches its students to be models of the Catholic faith. The school emphasizes religious teachings in all aspects of the educational experience with the ultimate goal of helping students achieve eternal salvation.[1] A kindergartner learns about the Holy Trinity, the saints, and how to communicate with God through prayer.[2] A ninth grader learns a faith-based approach to biology emphasizing the "value of human life from the beginnings of cell, conception, and throughout the nine body systems."[3] The dress code requires modesty and appearance in accordance with one's biological sex.[4] School policy refers to gender identity as "identity-related confusion" and states that the only names and pronouns that will be used for students are those that correspond with their biological sex, even if a parent approves otherwise.[5] If you imagined the school to be a private Catholic school funded by student tuition, you would be wrong. The school is a public charter school located in Oklahoma which, like any other public school, is funded by the taxpayers.[6]

The U.S. Supreme Court in a series of decisions culminating in *Carson v. Makin* in 2022 changed Establishment Clause jurisprudence such that the public funding of religious schools is

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* B.A., University of Virginia, 2016; J.D. Candidate, Seton Hall University School of Law, 2024

[1] St. Isidore of Seville Catholic Charter School, *Parent & Student Handbook 2024-2025*, ST. ISIDORE OF SEVILLE CATHOLIC CHARTER SCHOOL 9 (Mar. 2024), https://files.ecatholic.com/34750/documents/2024/3/St.%20Isidore%20Parent%20Student%20Handbook%202024-25.pdf?t=1710898077000.

[2] St. Isidore of Seville Catholic Charter School, *Curriculum Guides*, Refer to subheading *Theology and Religious Studies*, ST. ISIDORE OF SEVILLE CATHOLIC CHARTER SCHOOL, https://stisidorevirtualschool.org/curriculum-guides (last visited Apr. 20, 2024).

[3] *Id.*

[4] *Supra* note 1 at pages 36-37.

[5] *Id.* at 45.

[6] *See* ST. ISIDORE OF SEVILLE CATHOLIC CHARTER SCHOOL, https://stisidorevirtualschool.org/, (last visited Apr. 20, 2024).

constitutionally required when the state provides funding to a secular private school. Funding schemes that were once required by the separation of church and state are now deemed to be unconstitutionally discriminatory towards religious groups. In this article, I argue that with *Carson*, the Court opened the door to what was once an oxymoron: religiously affiliated public (charter) schools.

Part I provides an overview of school choice options in the United States. The differences in school choice are important to understanding *Carson*'s decision and the cases leading up to it. While some cases focus on voucher programs, the decisions of these cases still have implications on other school choice programs like charter schools. Part II traces the cases leading up to *Carson* and reflects how the Court's Establishment Clause and Free Exercise jurisprudence changed over time. Part III explains the facts of *Carson* and its decision. Part IV argues that *Carson*'s ruling opened the door to the public funding of religious charter schools. While charter schools are statutorily public schools, there may be a way to argue that charter schools are private schools under the state action doctrine. Thus, a charter school could be religious, and *Carson* would require such school to receive any funding that a secular private school would receive. Part V illuminates the current political and legal context around the country's first religious charter school in Oklahoma. Part VI explores the possibility that progressive regulation and anti-discrimination statutes could be used to limit some of the harms that stem from the public funding of religious school and discourage religious groups from seeking to establish a religious charter school. Lastly, Part VII draws on the previous parts of the article to provide a basic blueprint of legislative, executive, and legal action to mitigate the harms of *Carson* and close the door to religious charter schools that *Carson* opened.

I. OVERVIEW OF SCHOOL CHOICE OPTIONS

School choice generally refers to the opportunity for parents to request a different school other than the public school assigned to them based on their residential address. School choice programs are generally divided into two categories: (1) public which includes district-wide open enrollment, charter schools, and magnet schools, and (2) private which includes voucher programs, tax credits or tax deductions, and homeschooling. For the purpose of this paper, the primary focus will be on charter schools, although a brief explanation of other options is provided for contextual understanding.

A. Public School Choice

Most often, a child's public school is dictated by their residential address and the child will attend the school that they are zoned for by their school district. However, depending on the locality, a family may have more public-school choices than their neighborhood zoned school.

1. Open Enrollment Policies

Open enrollment policies may allow a student to transfer to another school within their residential school district (intradistrict) or to a school in another district (interdistrict).[7] The parameters of open enrollment policies vary by state. As of 2019, thirty-three states plus the District of Columbia have policies that allow intradistrict choice, while forty-three states have policies that allow interdistrict choice.[8] More recently, the state of Kansas changed their open enrollment statute from allowing districts to set their own policy regarding whether they accept intradistrict transfer to requiring that all school districts develop plans for intradistrict enrollment

[7] *See* Micah Ann Wixom, *Policy Snapshot Open Enrollment*, EDUC. COMM'N OF THE STATES 1 (Jan. 2019), https://www.ecs.org/wp-content/uploads/Open-Enrollment.pdf.
[8] *Id.*

to be implemented in 2024.[9]

2. Charter Schools

Charter schools are public schools and do not charge tuition. Most states have a charter school statute authorizing the operation of charter schools. As of 2020, forty-five states and the District of Columbia have a charter school statute.[10] Charter school statutes vary from state-to-state but generally specify, among other things, procedures for establishing a charter school and what organization or body must authorize the charter contract.[11] A charter school operates under the terms of the charter agreement that is established with the approval of the charter authorizer (e.g., school district, state-wide public entity). Many state statutes and/or charter agreements specify that charter schools must be nonsectarian or must prohibit religious instruction.[12] To enroll in a charter school, a student generally must apply and may be subject to a lottery system.

3. Magnet Schools

Magnet schools are public schools that generally focus on a specific specialized subject area such as STEM or performing arts and may attract students from both inter and intradistrict. Some magnet schools are highly-competitive admissions based, while others may use a lottery system or some combination thereof.[13]

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[9] Katie Bernard and Kynala Phillips, *Gov. Kelly signed Kansas' school choice bill. Here's what that means for your student*, KANSAS CITY STAR (May 17, 2022, 1:22 PM), https://www.kansascity.com/news/local/education/article261389602.html.

[10] The five states that do not have a charter school law include Montana, Nebraska, North Dakota, South Dakota, and Vermont. *50 State Comparison*, EDUC. COMM'N OF THE STATES (Jan. 2020), https://reports.ecs.org/comparisons/charter-school-policies-01.

[11] *E.g.,* N.J. Stat. Ann. § 18A:36A-3; N.J. Stat. Ann. § 18A:36A-4.

[12] *E.g.,* New Jersey statute states that the charter school "shall prohibit religious instruction, events, and activities that promote religious views, and the display of religious symbols." N.J. Stat. Ann. § 18A:36A-4.1.

[13] For example, the Thomas Jefferson High School for Science and Technology is a prestigious magnet school located in Alexandria, VA serving inter and intradistrict children. Admission is based on a holistic review of a student including grade point average, essays, etc. TJHSST Freshman Application Process, FCPS, https://www.fcps.edu/registration/thomas-jefferson-high-school-science-and-technology-admissions/tjhsst-freshman.

B. Private School Choice

Some families choose to enroll their children in private schools by paying for tuition out-of-pocket. Vouchers, tax credits, tax deductions, or Education Savings Accounts may be available in the state to provide financial support for private school choice. Some families may also opt for homeschooling, the requirements of which vary widely by state.

1. Vouchers

Voucher programs, also called scholarship programs, allow families to choose a private school for their child using taxpayer public funding. School voucher programs are available in thirteen states and the District of Columbia.[14] On average, vouchers provide about $4,600 per year per eligible student.[15] Any remaining tuition costs not covered by the voucher generally have to be borne by the family. Eligibility for voucher programs vary by program but often require the family to be within a certain percentage of the federal poverty line.[16]

Vouchers can be used to fund tuition at private religious schools. As will be discussed in more detail, per *Carson v. Makin*, states cannot exclude religious schools from a generally available program without violating the Free Exercise Clause.[17] However, two decades prior to *Carson*, the Supreme Court addressed this issue in relation to the Establishment Clause. In *Zelman v. Simmons-Harris*, the Supreme Court held that a private school voucher program must include religious schools.[18] In *Zelman*, the issue was whether using a voucher to attend a private religious school violated the Establishment Clause. The court in a five to four ruling held that it

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[14] Jacob Fischler, *What Parents Need to Know About School Vouchers*, U.S. NEWS AND WORLD REPORT (Oct. 22, 2021, 10:16 AM), https://www.usnews.com/education/k12/articles/what-parents-need-to-know-about-school-vouchers.
[15] *Id.*
[16] *50-State Comparison*, EDUC. COMM'N OF THE STATES (Jan. 2024), https://www.ecs.org/50-state-comparison-private-school-choice-2024/.
[17] *Carson as next friend of O. C. v. Makin*, 596 U.S. 767, 781 (2022).
[18] *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

does not.[19] Here, the city of Cleveland, Ohio established a program that provided financial assistance to low-income families in school districts that were failing.[20] Almost all of the participants used the program to enroll in religious schools that were nearly entirely fully paid for by the voucher.[21] The court held that there was no Establishment Clause issue since the voucher was given to the parents who then used the funds, rather than the voucher being provided to the schools directly.[22] Therefore, private individuals, and not the state, were making the "true private choice" to fund a religious school.[23] The statute itself authorizing the voucher program was facially neutral with respect to religion, and thus constitutionally valid.[24]

In the aftermath of *Zelman*, many states passed or reinforced their "Blaine Amendments" that explicitly forbade state funding of religious education even though such funding was permitted by the Establishment Clause per the *Zelman* ruling.[25] However, after *Espinoza*, discussed below, the relevance of the Blaine Amendments to prohibit public funding of religious private choice efforts is nill.

2. Tax Credits/Deductions and Saving Accounts

State tax credit and tax deductions may be offered by a state to support private school education. A state tax credit reduces an individual's tax liability while a deduction provides a reduction in taxable income.[26] As of February 2024, twenty-two states offer tax credits and four

[19] *Id.* at 663.
[20] *Id.* at 644-45.
[21] Ninety-six percent of the 3,700 participants enrolled in religiously affiliated schools. Additionally, between 75% to 90% of the tuition was covered depending on the family's income level. *Id.* at 646-47.
[22] *Zelman*, 536 U.S. at 652-53.
[23] *Id.* at 662.
[24] *Ibid.*
[25] Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 Fordham L. Rev. 493 (2003).
[26] Rebecca Skinner & Isobel Sorenson, CONG. RSCH. SERV., IF10713, OVERVIEW OF PUBLIC AND PRIVATE SCHOOL CHOICE OPTIONS 2 (Feb. 29, 2024).

states offer tax deductions.[27]

State funded Education Savings Accounts (ESAs) are state-funded accounts controlled by parents for the purpose of purchasing educational services such as textbooks, tutoring, private school tuition, etc.[28] The amount of funding provided in an ESA varies by state but generally is associated with the state's per-pupil amount that they would receive from a public school district.[29] As of February 2024, nine states are operating state-funded ESAs and four other states plan to begin operating programs in 2024.[30]

II. CASES SETTING THE FOUNDATION FOR *CARSON*

The ruling in *Carson* was predictable considering the cases in the years immediately preceding *Carson* that degraded the separation of church and state. Prior to the cases explained below (*Trinity Lutheran* and *Espinoza*), the general rule from the Supreme Court was that a state may deny government funding to religious organizations without running afoul of the Free Exercise Clause.[31] However, in a span of less than a decade, the Supreme Court changed their jurisprudence to holding that denying government funding to religious organizations while funding analogous secular programs is paramount to religious discrimination in violation of the Free Exercise Clause.[32] The cases preceding *Carson* are important in the context of the possibility of religious charter schools because it shows the doctrinal constitutional developments that opened the door to increasingly using public money to fund private religiously-affiliated education. While *Zelman* held that states *could* include religious schools in

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[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] The nine states currently operating ESAs are Arizona, Florida, Indiana, Iowa, Mississippi, New Hampshire, North Carolina, Tennessee, and West Virginia. The four states that will begin ESAs in 2024 are Arkansas, Montana, South Carolina, and Utah. *Id.*
[31] *Locke v. Davey*, 540 U.S. 712 (2004).
[32] *See* discussion *infra* Part III.

private school choice programs, the following cases leading up to *Carson* show the court's transition to *requiring* religious schools to be included.[33]

A. Early "Public Benefit" Cases

The foundation for the cases leading up to *Carson* were primarily regarding the extent to which public benefits funded with taxpayer money could be denied to religious groups. Here, the tension is seen between the state's desire to abide by the Establishment Clause and religious groups' desire to freely exercise their religion. As such, the U.S. Supreme Court generally held that the state could not deny a generally available benefit solely on the basis of one's religious status.

In *Everson v. Board of Education of Ewing*, the New Jersey legislature authorized its local school districts to makes rules related to school bus transportation for children.[34] The Ewing township then authorized reimbursement to parents of children for funds to send their children to school, including Catholic schools, on public buses.[35] A local taxpayer challenged the township arguing that using public money to subsidize families that choose parochial schools is state support of a religious institution in violation of the Establishment Clause.[36] The U.S. Supreme Court held that the state cannot exclude faith members from receiving the benefits of public welfare legislature that is generally available to all parents.[37] In deciding this, the Court found it relevant that bus fares were going to parents, as opposed to the parochial schools directly.[38] Additionally, the Court compared bus fares to police or fire protection services that are for general public benefit and cannot be withheld from religious institutions.[39]

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[33] *See* discussion on *Zelman supra* Part I.
[34] *Everson v. Bd. of Ed. of Ewing Twp.,* 330 U.S. 1, 3 (1947).
[35] *Ibid.*
[36] *Id.* at 5.
[37] *Id.* at 17.
[38] *Id.* at 18.
[39] *Everson*, 330 U.S. at 18.

In *Sherbert v. Verner*, the Court reaffirmed *Everson* again holding that generally available public benefits, such as unemployment benefits, cannot be withheld from an individual based on the dictates of their faith.[40] Here, Sherbert, a member of the Seventh-day Adventist Church was discharged by her employer because she refused to work on Saturday, the Sabbath Day of her faith.[41] Sherbert then filed for state unemployment compensation, but was denied because the state found that she had refused suitable work without good cause.[42] Sherbert challenged the denial arguing that it violated the Free Exercise Clause.[43] The Court determined that any law that substantially abridges an individual's ability to act upon a sincere religious belief must be justified by a compelling government interest.[44] In applying this standard, the Court held that Sherbert's free exercise rights were violated as the state lacked a compelling interest to deny her unemployment claim.[45]

The U.S. Supreme Court continued to affirm *Everson*'s and *Sherbert*'s public benefit analysis in *Thomas v. Review Bd. of Ind. Employment Security Div.* again concerning the denial of unemployment benefits.[46] Thomas, a Jehovah's Witness, quit his job at a machinery company and filed for unemployment benefits stating that he could not conscientiously produce turrets used in military tanks without violating his religious principles.[47] Citing *Sherbert*, the Court ultimately held that Thomas' religious liberty was burdened without a compelling state interest.[48]

The early public benefit cases stand for the principle that a person cannot be compelled to choose between the exercise of their religion and participation in an otherwise available public

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[40] *See Sherbert v. Verner*, 374 U.S. 398, 409-10 (1963).
[41] *Id.* at 399.
[42] *Id.* at 401.
[43] *Ibid.*
[44] *Id.* at 403.
[45] *Sherbert*, 374 U.S. at 410.
[46] *Thomas v Review Bd. of Indiana Empl. Sec. Div.,* 450 US 707, 719-20 (1981).
[47] *Id.* at 709-10.
[48] *Id.* at 719.

program. The most recent cases leading up to *Carson* build on this underlying foundational principle.

B. *Trinity Lutheran*

In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the state of Missouri provided state-funded grants to help public and private schools, daycare centers, and other nonprofits purchase rubber playgrounds.[49] Trinity Church, which operated a religious preschool and daycare program, applied for the grant, and was denied based on the state's policy of denying grants to religiously affiliated applicants.[50] Trinity Church then sued arguing that the denial and the state's policy violated the Free Exercise Clause.[51] The Supreme Court reasoned that the state of Missouri discriminated against otherwise eligible recipients solely on the basis that they are religiously affiliated, thus warranting a strict scrutiny analysis.[52] In applying strict scrutiny, the court held that the state had not offered a substantial state interest in their discriminatory policy to justify the different treatment of religious organizations.[53] Therefore, the state's policy of denying public grant money to religious organizations violated the Free Exercise Clause.[54]

Trinity Lutheran's ruling means that a state's concern in violating the Establishment Clause is not a compelling state interest for strict scrutiny purposes when the state's money is not being used for an inherently religious purpose (e.g., constructing a playground).

C. *Espinoza*

In *Espinoza v. Montana Department of Revenue*, the Montana state legislature passed a program whereby taxpayers could pay into the program and receive a state tax credit to support

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[49] *Trinity Lutheran Church of Columbia, Inc. v. Comer,* 582 U.S. 449, 454 (2017).
[50] *Id*. at 455-56.
[51] *Id.* at 456.
[52] *Id.* at 463.
[53] *Trinity Lutheran*, 582 U.S. at 466.
[54] *Ibid.*

the funding of scholarships for low-income families to pay for private schools.[55] Pursuant to their state constitution, the Montana Department of Revenue issued a rule that the scholarship money could only be used at secular private schools.[56] A group of parents whose children attended a Christian school filed suit alleging that the rule violated the Free Exercise Clause.[57] The Supreme Court agreed with the parent plaintiffs reasoning that the Department of Revenue was penalizing parents by denying them benefits for the sole reason that they chose a religious school instead of a secular one.[58] Therefore, the state was inhibiting free exercise of religion because the program conditioned benefits upon rejecting any religious affiliation.[59] In effect, once a state subsidizes private education, the state cannot then disqualify some schools solely because of their religious status.[60]

Notably, in dissent, Justice Breyer questioned how the majority's ruling would impact charter schools.[61] Justice Breyer asked how the majority would "distinguish between those States in which support for charter schools is akin to public school funding and those in which it triggers a constitutional obligation to fund private religious schools?"[62] Justice Breyer stated that the majority's ruling provided no clear guidance for states with charter schools that want to support free exercise but also honor the Establishment Clause.[63] Two years after *Espinoza* was decided, the court ruled in *Carson* concerning a similar private choice program. The implications of

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[55] *Espinoza v. Montana Dep't of Revenue,* 140 S. Ct. 2246, 2251 (2020).
[56] The Department of Revenue sought to ensure compliance with Montana's state constitution that forbade the state to "make any direct or indirect appropriation or payment from any public fund" to aid any "school . . . controlled in whole or in part by any church, sect, or denomination." *Id.* at 2252 (quoting Mont. Const. art. X, § 6(1)). This portion of Montana's state constitution is also known as a Blaine Amendment.
[57] *Espinoza*, 140 S. Ct. at 2252.
[58] *Id.* at 2261.
[59] *Ibid.*
[60] *Ibid.*
[61] *Espinoza*, 140 S. Ct. at 2291.
[62] *Ibid.*
[63] *Ibid.*

Carson track with Justice Breyer's concerns regarding a possible constitutional obligation to fund religious charter schools.

III. UNDERSTANDING *CARSON*

In rural Maine, some school districts do not have public high schools.[64] Maine's legislature created a tuition-assistance program for families in these school districts to allow parents to choose a public school or a private high school whose tuition would be subsidized by the local school district.[65] To receive the funding, the private school had to be accredited and "nonsectarian" meaning one that is not "associated with a particular faith or belief system."[66] Parents of students that wanted to send their children to Christian private schools argued that the program's nonsectarian requirement violated the Free Exercise Clause and the Establishment Clause.[67]

Applying the principles of *Trinity Lutheran* and *Espinoza*, the Supreme Court held that the program's nonsectarian requirement violated the Free Exercise Clause. Since the nonsectarian requirement conditioned benefits solely on a school's status as a religious institution, the program was subject to strict scrutiny.[68] In applying strict scrutiny, the court held that the program failed because it is a status-based restriction akin to religious discrimination.[69] Essentially, *Carson* makes the distinction between a program denying funds due to religious affiliation (i.e., status) and a program denying funds due to religious conduct (i.e., use) less constitutionally relevant than in prior years. The majority noted that the dissent was wrong to say that Maine's nonsectarian requirement was constitutionally permissible because it regulates only

[64] *Carson*, 596 U.S. at 771.
[65] *Id.* at 772.
[66] *Id.* at 774-75.
[67] *Id.* at 775-76.
[68] *Id.* at 780.
[69] *Id.* at 787-88.

the use of public money, rather than the religious status of the organization that the money goes to.[70]

The majority also noted that their decision does not necessarily force Maine to fund religious education.[71] Rather, Maine could "expand the reach of its public school system, increase the availability of transportation, provide some combination of tutoring, remote learning, and partial attendance, or even operate boarding schools of its own."[72] Thus, the court reiterated its holding from *Espinoza* that once a state subsidizes private education, it cannot disqualify religious private education providers solely due to their religious status.[73] This holding opens the door to religious charter schools and begs the question—can a charter school be a private school?

IV. *Carson*'s Implications on the State Action Doctrine & The Opened Door

Carson's holding opens the door to the public funding of religious charter schools. *Carson* requires that states that fund private choice program for secular private schools must also extend those same benefits to private religious education. Therefore, the argument is that if charter schools are designated as private schools, then any laws that prohibits religious charter schools are unconstitutional.

Whether charter schools should be treated as private schools for constitutional purposes depends on the state action doctrine. Under the state action doctrine, private entities are not bound by the constitution except when their actions are effectively the government's actions.[74] If charter schools are state actors, then state laws requiring them to be secular are constitutionally permissible. But if charter schools are not state actors, then they are private schools that states

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[70] *Carson*, 596 U.S. at 787-88.
[71] *Id.* at 785.
[72] *Ibid.*
[73] *Ibid.*
[74] U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law . . . .").

cannot constitutionally prohibit after *Carson*, thus the door is opened to the public funding of religious charter schools.

The Supreme Court has identified a number of different factors that can bear on the whether an entity is a state actor. Some of these factors include: whether the activity results from the state's exercise of coercive power; whether the state provides significant encouragement; whether a private actor is acting jointly with the state; whether the actor is controlled by an agency of the state; whether the actor engages in a public function; and whether the actor is entwined with governmental policies.[75]

In the context of charter schools, federal courts are divided on the state-action question. The fact that state statutes generally label charter schools as public schools has not been dispositive in these cases.[76] States have different charter school statutes and regulations; therefore, the issue of whether a charter school is a state actor may vary across jurisdictions. The Ninth Circuit in *Caviness v. Horizon Community Learning Center, Inc*. held that the charter school in question was not a state actor.[77] In this case, Horizon, the non-profit corporation that operates a charter school in Arizona, refused to renew a contract with a teacher, Caviness.[78] Caviness then brought a § 1983 complaint arguing that Horizon violated due process by making false statements about him causing damage to his employment prospects and reputation.[79] In order to be entitled to any relief, Caviness had to prove that Horizon was a state actor.[80] Ultimately, the Ninth Circuit held that Horizon was not a state actor due to various factors: Horizon had "self-created personnel

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[75] *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001) (first citing *Blum v. Yaretsky*, 457 U.S. 991, 1004–05 (1982); then citing *Lugar v. Edmondson Oil Co*., 457 U.S. 922, 941–42 (1982); then citing *Pennsylvania v. Board of Directors of City Trusts of Philadelphia* 353 U.S. 230, 231 (1957); and then citing *Evans v. Newton*, 382 U.S. 296, 299, 301 (1966).
[76] *E.g.*, N.J.S.A 18A:36A-2 ("charter schools are part of this State's program of public education…").
[77] *Caviness v. Horizon Community Learning Ctr., Inc.,* 590 F.3d 806, 818 (9th Cir. 2010).
[78] *Id.* at 811.
[79] *Ibid.*
[80] *Id.* at 812-13.

policies"; the fact that Horizon is a public school under Arizona law was not controlling; the fact that Caviness received a state retirement plan was mere subsidy of a private entity; and employment decisions made by the school were the result of internal decision-making, not state mandate.[81]

More recently, the Fourth Circuit in *Peltier v. Charter Day School, Inc.* held that the charter school in question was a state actor.[82] Charter Day School in North Carolina had a policy that required female students to wear skirts to school to teach that "girls are 'fragile vessels' deserving 'gentle' treatment by boys."[83] Parents on behalf of their female children filed suit alleging that Charter Day School's dress policy violated the Equal Protection Clause and Title IX.[84] The school argued that it was not a state actor for purpose of the Equal Protection claim and therefore not liable for any violations.[85] Ultimately, the Fourth Circuit using a totality of the circumstances test held that the school was a state actor due to various facts which showed that the state of North Carolina delegated its duty to provide public education to students to the charter school.[86] Facts that the court deemed relevant to finding that the school was a state actor included: North Carolina law designates charter schools as public schools delegated to fulfill the state's duty to provide schooling; charter schools are overseen by a state board and must adhere to their standards while non-public schools do not have the same requirements; Charter Day School receives 95% of its funding from public sources; and the school's charter requires compliance with state and federal constitutions which constitutes a delegation of state duty.[87] The court reasoned that if it were to hold that Charter Day was not a state actor, "North Carolina

[81] *Id.* at 815-18.
[82] *Peltier v. Charter Day Sch., Inc.,* 37 F.4th 104, 130 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 2657 (2023).
[83] *Id.* at 112.
[84] *Id.* at 113-14.
[85] *Id.* at 116-17.
[86] *Id.* at 122.
[87] *Peltier*, 37 F.4th at 116-20.

could outsource its educational obligation to charter school operators, and later ignore blatant, unconstitutional discrimination committed by those schools."[88] Furthermore, the court distinguished this case from *Caviness* noting that such cases are fact-specific and dependent on the governing state law.[89]

Peltier applied a totality of the circumstances test. Meanwhile, the First, Third, and Ninth Circuit Courts have applied something more akin to a state "encouragement" or "coercion" test to determine whether charters are state actors.[90] Some, like Oklahoma's former Attorney General, have taken issue with *Peltier*'s reasoning, arguing instead that a conclusion like that in *Caviness* should have been the outcome.[91] In his opinion letter, the former Oklahoma Attorney General concluded that Oklahoma charter schools are private, and therefore, not state actors.[92] The state of Oklahoma has approved the country's first religious charter school which is set to open in 2024.[93]

In the context charter schools, the state action question is not clear. One possible reason for the variation between *Caviness* and *Peltier* may be that *Caviness* was in the employment context, while *Peltier* was about school policy for student conduct, thus suggesting that perhaps a charter school is a state actor in the former, but not the latter. In the context of religious charter schools, the state action question becomes particularly important. In the employment context, if a religious charter school is not a state actor, then the school may not be subject to the same anti-

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[88] *Id.* at 114.
[89] *Id.* at 121.
[90] *See Logiodice v. Trustees of Maine Central Institute*, 296 F.3d 22 (1st Cir. 2002); *Robert S. v. Stetson Sch., Inc.*, 256 F.3d 159 (3d Cir. 2001); *Caviness*, 590 F.3d at 816.
[91] Okla. Att'y Gen., Opinion Letter (Dec. 1, 2022). This letter was later withdrawn by the subsequent Oklahoma Attorney General Gentner Drummond.
[92] *Id.*
[93] Adam Kemp, *In Oklahoma, a new test of religion in public schools*, PBS (Aug. 4, 2023, 5:45 PM), https://www.pbs.org/newshour/nation/a-new-lawsuit-is-trying-to-block-the-nations-first-religious-public-charter-school.

discrimination laws, thus permitting discrimination against LGBTQ teachers and staff.[94] Similarly, a religious charter school may seek to bar LGBTQ students from admission.[95] Religious charter schools would also seek to be a private actor for curriculum so that they could teach religious concepts without violating the Establishment Clause's disallowance of religious instruction in public schools.

In my view, courts should follow *Peltier*'s guidance using a totality of the circumstance test to determine whether a charter school is a state actor. There are quite a few attributes of charter schools that make them state actors. First, charter schools are the equivalent of public schools. While the fact that a law calls a charter school a public school is not dispositive, like in *Peltier*, it certainly is relevant.[96] Furthermore, the fact that charter schools receive almost their entire funding from taxpayer funds, often allocated on a per-pupil basis the same as public schools, indicates that charter schools are public.[97] While many private companies rely on government contracts to fund their business, the fact that a charter school is not a business, but a non-profit entity for the purpose of tuition-free publicly funded education means that they are much more akin to a state actor. Second, as *Peltier* recognized, schools often are state actors when the state government delegates their constitutional duty to educate children to an entity funded and regulated by them. Third, the state, whether they exercise it or not, generally has substantial regulatory power over charter schools from initial implementation to ongoing performance. Charter schools should generally be a state actor when a public school is a state actor under the state action doctrine.

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[94] This is not a far-fetched theory. Both Christian schools at issue in *Carson v. Makin* admitted that they would not hire homosexual teachers. Joint Appendix, *Carson*, No. 20-1088, September 3, 2021.
[95] For example, both schools at issue in *Carson* stated they would not admit homosexual students. *Id.*
[96] *Peltier*, 37 F.4th at 117.
[97] *See, e.g., id.* at 118.

V. THE CURRENT BATTLEGROUND FOR RELIGIOUS CHARTER SCHOOLS

Oklahoma is on track to become the first state to have a religious charter school. In December 2022, the then-Attorney General of Oklahoma issued an opinion that Oklahoma's charter school law that prohibits sectarian schools constitutes religious discrimination and would be unconstitutional if enforced.[98] The current Attorney General has since rescinded the prior Attorney General's opinion and issued a letter to the state board that authorizes charter schools stating his fear that a religious charter school violates the First Amendment and the state constitution and that religious liberty should not be used "as a means to justify state-funded religion."[99] Nonetheless, the Archdiocese of Oklahoma City was approved in 2023 by the Oklahoma Statewide Virtual Charter School Board (hereinafter "Board") to establish a virtual religious charter school called St. Isidore of Seville Catholic Virtual School (hereinafter "St. Isidore").[100]

In response to the Board's approval of the charter school, the ACLU, Americans United for Separation of Church and State, Education Law Center and Freedom From Religious Foundation filed suit representing the Oklahoma-based plaintiffs that include a nonprofit organization, OKPLAC, and various members and parents of the state community.[101] The complaint in *OKPLAC, Inc., v. Statewide Virtual Charter School Board* alleges a that the Board violated the Oklahoma Constitution, Oklahoma Charter Schools Act, and the board's own regulations by

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[98] Naaz Modan, *Oklahoma attorney general walks back predecessor's religious charter approval*, K-12 DIVE (Dec. 12, 2022), https://www.k12dive.com/news/religious-charter-schools-Supreme-Court/638477/.
[99] Letter from Genter Drummond, Okla. Att'y Gen., to Rebeca L. Wilkinson, Exec. Dir., Statewide Virtual Charter Sch. Bd. (Feb. 23, 2023), https://www.oag.ok.gov/sites/g/files/gmc766/f/documents/2023/rebecca_wilkinson_ag_opinion_2022-7_virtual_charter_schools.pdf.
[100] Nuria Martinez-Keel, *Oklahoma board approves nation's first religious public charter school*, THE OKLAHOMAN (Jun. 5, 2023, 2:53 PM), https://www.oklahoman.com/story/news/education/2023/06/05/catholic-charter-school-oklahoma-board-approves-first-nation/70289039007/.
[101] *Complaint, OKPLAC, Inc., v. Statewide Virtual Charter School Board*, CV-2023-1857, (Filed Jul. 31, 2023).

approving St. Isidore.[102] The plaintiffs are asking the court to prohibit the Board from continuing to sponsor, contract, or fund St. Isidore.[103]

The plaintiffs are particularly concerned that St. Isidore will discriminate against LGBTQ students and employees in violation of Oklahoma's constitution which requires the state to provide public schools for all children, and not discriminate based on sex which includes sexual orientation and gender identity.[104] The plaintiffs cite St. Isidore's own policies which prohibit unlawful discrimination when it is "also inconsistent with Catholic teaching" and notes that St. Isidore's charter application cites "biological sex" but not sexual orientation or gender identity as protected characteristics.[105] Furthermore, the plaintiffs cite that St. Isidore has only agreed to extend spousal employee benefits to opposite sex couples and may use religion as a factor in employment decisions.[106] The plaintiffs refer to the school's acceptance of mainstream Catholic teachings from the *Catechism of the Catholic Church*, which prohibits homosexuality and requires acceptance of one's biological sex, to assert that St. Isidore will discriminate in admissions, student discipline, and employment related decisions.[107]

The plaintiffs also assert that St. Isidore will discriminate against students with disabilities in violation of the Charter Schools Act.[108] The plaintiffs argue that St. Isidore has indicated that it will only serve those with disabilities to the extent that they can via virtual learning.[109] Further, the plaintiffs note that St. Isidore's charter application only cites physical disability, not mental disability as a protected characteristic, thus indicating the limits of their willingness to adhere to

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[102] *Id.* at 3.
[103] *Id.* at 4.
[104] *Id.* at 56-60.
[105] *Id.* at 38.
[106] *Complaint* at 41-42.
[107] *Id.* at 37-38.
[108] *Id.* at 42.
[109] *Id.* at 44.

nondiscrimination policies.[110]

The plaintiffs also argue that the Archdiocese of Oklahoma City will improperly have control over St. Isidore in violation of the Board's own requirement that a charter school and its educational management organization are separate.[111] St. Isidore's charter application shows a high level of involvement from the Archdiocese of Oklahoma City in school governance including over the school's mission, teachings, and discipline.[112]

Lastly, the plaintiffs assert that St. Isidore will religiously indoctrinate children in violation of Oklahoma's Constitution and the state's Charter Schools Act which requires schools to be nonsectarian.[113] To support this, the plaintiffs cite to St. Isidore's charter application which plainly lays out a comprehensive Catholic education in all aspects of the school including its mission, curriculum, social teachings, co-curricular activities, and physical environment.[114]

Professor of Law at Notre Dame Law School, Nicole Stelle Garnett, argues in favor of St. Isidore's status as a religious charter school and appears hopeful that the Supreme Court of the United States will pick up the state action issue.[115] In particular, Professor Garnett argues that charter schools are private actors; therefore, the "state is bound by the Free Exercise Clause's nondiscrimination mandate to permit them to be religious."[116] In other words, it amounts to impermissible religious discrimination to deny funding to St. Isidore, while funding other secular charter schools. Professor Garnett's law school clinic represents St. Isidore in a current lawsuit by Oklahoma's Attorney General where the state action doctrine is likely to become a central

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[110] *Ibid.*
[111] *Id.* at 46-47.
[112] *Complaint* at 46.
[113] *Id.* at 64-65.
[114] *Id.* at 48-50.
[115] Nicole Stelle Garnett, *Oklahoma's Approval of America's First-Ever Religious Charter School is Cause for Celebration*, EDUCATION NEXT (Jun. 7, 2023), https://www.educationnext.org/oklahomas-approval-of-americas-first-ever-religious-charter-school-is-cause-for-celebration/.
[116] *Id.*

issue to the case.[117]

Separate from *OKPLAC*, the Oklahoma's Attorney General filed suit against the Oklahoma Statewide Virtual Charter School Board that approved St. Isidore as a charter school in the state.[118] The Attorney General filed suit in Oklahoma's Supreme Court directly challenging the Board's approval of the school for being prohibited by the state constitution's ban on sectarian schools and for violating the Establishment Clause.[119] The Attorney General's brief anticipates that the Board will argue that St. Isidore is a private non-state actor, and cites to *Peltier* to argue that St. Isidore is a state actor since it will act to educate students which is a traditional function of the state.[120] Furthermore, the Attorney General argues that *Trinity Lutheran*, *Espinoza*, and *Carson* are all irrelevant to this case because those cases stand for the proposition that benefits given to private secular schools must also be given to private non-secular schools, but here, St. Isidore is not a private school at all.[121] The Attorney General also distances the case from these three recent U.S. Supreme Court decisions by arguing that the issue is less about school funding and more about the fact that the state has authorized the Catholic Church to act as a state actor in violation of the Establishment Clause.[122] After oral arguments on April 2, 2024, it was reported that the Attorney General appeared optimistic that the Oklahoma Supreme Court will rule in his favor.[123]

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[117] NOTRE DAME LAW SCHOOL, *Drummond v. Statewide Virtual Charter Board (Okla.),* https://religiousliberty.nd.edu/clinic/cases/drummond-v-statewide-virtual-charter-board-okla/#:~:text=On%20October%2020%2C%202023%2C%20the,Isidore%20is%20faith%2Dbased (last visited Apr. 2, 2024).

[118] *Petitioner's Br. In Support of Application to Assume Original Jurisdiction and Petition for Writ of Mandamus and Declaratory Judgment at 11, Drummond v. Statewide Virtual Charter Board*, (Filed Oct. 20, 2023), https://religiousliberty.nd.edu/assets/547622/drummond_v._ok_svcsb_complaint_1_.pdf.

[119] *See id.* at 6-14.

[120] *Id.* at 10-11.

[121] *Id.* at 14-15.

[122] *Id.* at 15.

[123] Bennett Brinkman, *'Used as a test': OK Supreme Court questions attorneys in Catholic charter school case*, NONDOC (Apr. 2, 2024), https://nondoc.com/2024/04/02/oklahoma-supreme-court-hears-catholic-charter-school-case/.

OKPLAC and the Attorney General's lawsuit are important cases for the future of religious charter schools. If Attorney General Drummond of Oklahoma loses in his state's Supreme Court, then it is likely that he would appeal to the U.S. Supreme Court.[124] Considering the U.S. Supreme Court's decisions in *Trinity Lutheran*, *Espinoza*, and *Carson*, it is not inconceivable that a court so amenable to religious liberty would allow the country's first religious charter school.

VI. CLOSING THE DOOR VIA REGULATION?

The events in Oklahoma evidence that the door to religious charter schools have been blown open after *Carson*. However, *Carson* did not address what regulations can be imposed on charter schools and other school choice programs. Private schools, in general, are less regulated than public schools. For private schools participating in school choice programs, states often do impose some modest regulations and requirements. For example, states often require that a private school participating in a voucher program have educated teachers, criminal background checks on school staff, and provide instruction in core subjects.[125] For states that want to close the door to publicly funded religious charters, perhaps regulatory control is a means to such end. As the plaintiffs in *OKPLAC* argue, religious charter schools may seek to not abide by the variety of protections in place for public schools concerning employees, the disabled, and the LGBTQ population. It could be possible that firm imposition of certain conditions on religious charter schools would inhibit one's desire to create such schools in the first place. In some circumstances, public funds may be able to be conditioned on the adoption of certain constraints.

A. Regulations and Funding Conditions

Certain regulations and conditions on public funding may particularly discourage

[124] Reportedly, Drummond said he would appeal if he lost the case. *Id.*
[125] *See, e.g.,* DC ST § 38–1853.07.

religious charter schools. While *Carson* prohibits states from excluding religious schools from voucher programs when secular private schools can participate, the case says nothing about the limits of the state's ability to regulate schools that participate in school-choice programs. For example, could a state condition public funds by requiring that the school teach certain topics (e.g., evolution, evidence-based sexual health, etc.) in their curriculum? Even if a law burdens religious freedom, it is constitutional if it is a neutral law of general applicability.[126] If a state were to require that *all* schools that receive state-funding have certain curricular requirements, then it would be less likely that a group would seek to start a religious charter. At the same time, such a law would not affect truly private religious schools that do not receive public funding because they would not be required to abide by the regulation and could therefore still have substantial control over their curriculum. Even if religious charter schools were to succeed in claiming that they are private schools and not state-actors, a statute that conditions public funding on the teaching of certain subjects would likely frustrate the intent of the organizers of religious charters.

Similarly, there are a host of reasonable regulations that could be conditioned on the receipt of public funding. For example, a state could require that all states that receive public funding administer a state competency test, meet certain teacher certification requirements, or meet certain accreditation requirements. Generally, public schools already have such requirements in place, while private schools may not be subject to the same standards.[127] By requiring only schools that receive public funding to abide by requirements that public schools

[126] *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 885 (1990). *Smith* is the current standard in Free Exercise jurisprudence which held that generally applicable and religious neutral laws that burden religious practice are valid and do not require a strict scrutiny analysis.

[127] *See, e.g., Mo. Rev. Stat*. §168.071. Missouri does not require teacher certification for teachers in non-public schools, but does require such certification for teachers in public schools.

already abide by, truly private school will not be affected, but any charter school would be.

Note that there are limitations to what a state can regulate. For example, the state cannot directly regulate a religious schools' employment decisions when that employee is a "minister."[128] Generally, this is not an issue for charter schools since states require that charter schools are nonsectarian. However, in the case of St. Isidore in Oklahoma, since the state Board has approved a religious charter school despite the state constitution that requires public schools to be non-sectarian,[129] the state likely would be unable to dictate the requirements for employees that teach or lead the Catholic faith.[130] This underscores the importance of a state's ability to preempt the existence of a religious charter school in the first place.

While regulations and conditions on public funding may be a vehicle to suppress the existence of religious charter schools, the effort depends on the efficacy and politics of state legislatures. To that end, progressive state legislatures may be the most successful in closing the door to religious charters that *Carson* has opened.

B. LGBTQ Protections

Carson's decision is troubling for the LGBTQ student population; however, it may be possible to protect LGBTQ students and, in effect, discourage the creation of religious charters or at least one harm they pose. The harm to the LGBTQ community that *Carson* poses is not simply theoretical. The two religious schools at issue in *Carson* admitted that they would not hire homosexual teachers, and would not admit homosexual or transgender students.[131] In *OKPLAC, Inc., v. Statewide Virtual Charter School Board*, the plaintiffs contend that St. Isidore will

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[128] *See Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171, 188-89 (2012).
[129] Okla. Const. Art. I, § 5 states that public schools must be "free from sectarian control."
[130] The ministerial exception applies to school teachers, not just faith leaders. *See, e.g., Our Lady of Guadalupe Sch. v. Morrissey-Berru,* 140 S. Ct. 2049, 2066 (2020).
[131] *See supra* text accompanying notes 94 and 95.

discriminate against LGBTQ students and employees as evidenced by their religious tenants and written policies.[132] Some conservative state legislatures have also limited the rights of LGBTQ students and minors, thus indicating a troubling pattern of acceptance towards discriminating against this vulnerable population. For example, in 2022, Florida passed a statute to prohibit discussion of gender identity and sexual orientation in schools.[133] Considering the propensity of religious schools to deny admission or otherwise discriminate against LGBTQ students, states should seek to limit the effects of *Carson* by bolstering LGBTQ anti-discrimination protections.

The events surrounding *Carson* point to a possible solution to limit the effect that the decision has on LGBTQ students. Shortly before *Carson*'s ruling, Maine's legislature amended their Human Rights Act to forbid any school that accepts public funds from discriminating based on a student's sexual orientation or gender identity.[134] After *Carson*'s ruling, reportedly few religious private schools opted into the state's voucher program likely due to the amendments to the state's Human Rights Act.[135] In 2023, one of the Christian schools at issue in *Carson*, Bangor Christian School, filed suit in federal district court in Maine arguing that the state was unconstitutionally discriminating against them by amending the Human Rights Act because the amendment deters religious schools from participating in the state tuition program.[136] The school's request for a preliminary injunction was denied.[137] This issue reflects the tension between anti-discrimination law and the views of certain religious groups. Ultimately, here, the

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[132] *See supra* notes 104 to 107.
[133] Since the law passed in 2022, subsequent litigation regarding the "Don't Say Gay" law resulted in a settlement that clarified the limits of what can be discussed in the classroom setting. THE ASSOCIATED PRESS, *Florida teachers can discuss LGBTQ topics under 'Don't Say Gay' law, settlement says* (Mar. 11, 2024), https://www.npr.org/2024/03/11/1237730819/florida-dont-say-gay-law-settlement-lgbtq.
[134] ME. REV. STAT. ANN. tit. 5, § 4602(1), (5)(C) (2022).
[135] *See* David Sharp, *Religious Schools Shun State Funding Despite Maine Victory*, RELIGION NEWS SERV. (Aug. 30, 2022), https://religionnews.com/2022/08/30/religious-schools-shun-state-funding-despite-maine-victory.
[136] *Crosspoint Church v. Makin*, 1:23-cv-00146-JAW (D. Me. Feb. 27, 2024).
[137] *Id.* at 46.

power of the state legislature to protect its students won out, thus reflecting a model for other states to protect LGBTQ students.

Like in Maine, states should tie public funding to anti-discrimination provisions based on sexual orientation and gender identity. Unfortunately, of the twenty-six jurisdictions that permit religious schools to accept public funds independently from *Carson*'s ruling, Maine and Maryland are the only two states that currently prohibit publicly funded schools from discriminating against LGBTQ students.[138] Put another way, there are currently twenty-four states where an LGBTQ student may be denied admission into a religious private school despite the fact that the school receives some level of public funding.

No state should allow publicly funded schools to discriminate against LGBTQ students. Maine's legislation is a model for state legislatures to use moving forward to combat the effect that *Carson* has on religious private schools and to preempt the establishment of religious charters. Unfortunately, students in conservative states that are unwilling to protect the LGBTQ population will be the victims of *Carson*'s mandates and discriminatory state politics.

VII. LOOKING AHEAD

Carson's decision leaves the possibility that religious charter schools could become more of a commonplace reality. While proponents of religious charter schools still have various challenges to overcome, namely the state-action doctrine, the degradation of the Establishment Clause by the U.S. Supreme Court in *Carson* and its precedent cases leaves the door open for more required public funding of religious schools. With that said, there are various actions that states and others can take to limit the effects of *Carson* and preclude the establishment of religious charters.

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[138] *See Md. Code, ED* 26-704(c)(2); *see also* Aaron Tang, *Who's Afraid of Carson v. Makin?*, 132 Yale L.J. Forum 504, 523-24 (2022).

A. Legislative

Progressive legislation is perhaps the most useful tool for limiting *Carson*. While all states already require public schools to be nonsectarian, and in most cases explicitly designate charter schools as public schools, that is not enough to protect against religious charters. Legislators should seek to review and update their regulations regarding charter schools making sure that there is an express prohibition against using public funding for sectarian charter schools. Additionally, legislators should tie public funding to reasonable regulations that, in many cases, already apply to public schools. For example, legislators should tie public funding to curriculum, state assessment tests, and other neutral regulations.

Legislators should seek to follow Maine's lead in amending their anti-discrimination law which would have the effect of simultaneously protecting LGBTQ students while discouraging the existence of religious charter schools. All states, especially those with existing political will, should immediately amend their anti-discrimination law to prohibit any private school that receives state funding from discriminating based on a student's sexual orientation or gender identity. An anti-discrimination provision like Maine's works because it treats secular private schools the same as religious private schools, thus not discriminating against religion in the way that *Carson* defines it. Furthermore, free exercise doctrine is not implicated here because the doctrine allows some burden to religious believers when the statute is a neutral rule of general applicability.[139] From a public policy standpoint, this approach is sound as any discrimination toward LGBTQ students is unacceptable.

The most effective way for state legislators to preempt the existence of religious charter schools is to do exactly what *Carson* says—if states do not give benefits to private secular

[139] *Smith*, 494 U.S. at 885.

schools, then they do not have to give the same benefits to religious schools. There can be no religious discrimination a la *Carson* when no private schools benefit from public funding. This approach would work to block funding to religious charter schools even if they were considered private actors under the state action doctrine. The issue with this approach, of course, is the lack of political will in many states to oppose the flow of benefits to religious schools, much less, secular private schools.

Overall, there are various approaches that state legislators can and should take to limit *Carson*'s harms and deter groups that want to start religious charter schools.

B. Executive

State Attorney Generals have considerable power to enforce laws that are already on the books requiring public schools to be secular. As we have seen in Oklahoma, the current Attorney General is suing the state board that approved St. Isidore arguing that charter schools are public; therefore, the state cannot establish a Catholic charter school.[140] On the flip side, the actions of the previous Attorney General in Oklahoma show at least one executive's willingness to not enforce state statutes and to push public funding into religious schools in direct reliance on *Carson*.[141] States that will be most successful are likely those where other members of the executive branch, such as the Governor and state education department, also support secular public education as required by state law.

C. Litigation

As discussed, litigation regarding religious charter schools is already ongoing. In the future, there will likely be groups seeking to start religious charter schools that will challenge state laws requiring charter schools to be secular. These challenges will likely come from states where the

[140] *See supra* notes 118-122 and accompanying text.
[141] *See supra* note 98 and accompanying text.

state action doctrine presents the least issue for them due to the charter school having significant control and little oversight from the state.

States and progressive groups should focus on the mandates of their state constitution and charter school statutes which do not allow taxpayer funding of sectarian schools. In challenges regarding the state action doctrine, states should analogize their present situation to *Peltier* and distinguish it from *Caviness*. Furthermore, opponents of religious charter schools should present the argument that a religious charter school will result in discrimination towards LGBTQ students, and others, where appropriate. Opponents can look to the religious charter school's application and their religious tenants for evidence that discrimination would likely occur.

CONCLUSION

After *Carson*, the Establishment Cause means less in society than it ever has before. The U.S. Supreme Court has deemed that not providing taxpayer funds to religious schools when secular private schools receive it is tantamount to religious discrimination. *Carson* opened the door to a taxpayer funded Catholic charter school, St. Isidore, in Oklahoma which is on track to open as the first religious charter school in the nation the fall of 2024. If religious charter schools succeed in arguing that they are constitutionally permissible, then *Carson* would require them to be permitted. To this end, proponents of religious charter schools will argue that charter schools are private non-state actors; and therefore, must receive any funding that a secular private school would receive. Nevertheless, states and organizations that support the anti-establishment of religion in taxpayer funded schools have multiple avenues to try to close the door to religious charters and limit the harms that *Carson* causes. State legislatures, executive actors, and various legal strategies should be employed to this end.