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RELIGIOUS CHARTER SCHOOLS:
Legally Permissible? Constitutionally Required?

Nicole Stelle Garnett
University of Notre Dame Law School

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About the Author

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Nicole Stelle Garnett is the John P. Murphy Foundation professor of law at the University of Notre Dame, where she also is a fellow of the Institute for Educational Initiatives and the senior policy advisor for the Alliance for Catholic Education, a program engaged in a wide array of efforts to strengthen and sustain K–12 Catholic schools. She is the co-author of *Lost Classroom, Lost Community: Catholic Schools' Importance in Urban America* (2014) and the author of *Ordering the City: Land Use, Policing and the Restoration of Urban America* (2009) as well as numerous articles on education policy, urban development, and land-use planning.

Before joining the faculty at Notre Dame in 1999, Garnett served as a law clerk for Associate Justice Clarence Thomas of the Supreme Court of the United States and Judge Morris S. Arnold of the U.S. Court of Appeals for the Eighth Circuit. She also practiced law at Institute for Justice, a nonprofit public-interest law firm in Washington, D.C., where she helped to defend the inclusion of faith-based schools in private school choice programs. She holds B.A. in political science, with distinction, from Stanford University and a J.D. from Yale Law School.

Garnett is an adjunct fellow of the Manhattan Institute.

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Executive Summary

On June 30, 2020, the U.S. Supreme Court held, in *Espinoza v. Montana*,[1] that the First Amendment's Free Exercise Clause precludes states from excluding religious schools from private school choice programs. Writing for the majority, Chief Justice John Roberts concluded: "A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious." But, as Justice Stephen Breyer asked in his dissenting opinion, "What about charter schools?" Can states prohibit religious charter schools? All states with charter schools currently do so. Are these restrictions constitutionally required, as is commonly assumed? Or, on the contrary, are they unconstitutional after *Espinoza*?

This report addresses these questions. Efforts to permit religious charter schools (by legislation and/or litigation) will likely be undertaken in the near future. This report discusses the legal issues raised by such efforts, examining whether the First Amendment's Establishment Clause permits religious charter schools and whether the First Amendment's Free Exercise Clause precludes states from prohibiting them.

These questions do not lend themselves to straightforward answers. Indeed, the answers may even vary from state to state. But the short answers to these questions are as follows: in most states, charter schools ought not to be considered, for federal constitutional purposes, "state actors" (which is to say that their actions are not reasonably attributable to the government). Since they are not state actors, they are effectively private schools and can be religious without running afoul of the Establishment Clause. And if they *can* be religious, states with charter schools must permit religious charter schools. In other words, for the reasons articulated in *Espinoza*, current laws prohibiting religious charter schools likely violate the Free Exercise Clause.

More complete answers to these questions involve the intersection of three federal constitutional doctrines: the "state action" doctrine, the Establishment Clause doctrine, and the Free Exercise doctrine. All three are complex and riddled with inconsistencies. The state action doctrine addresses the question of whether charter schools are, for federal constitutional purposes, public or private schools. This question is pivotal because the Supreme Court has made clear that "public" (or government) schools must be secular and that private religious schools can receive government funds. The state action question is complicated by the fact that charter schools are privately operated but designated "public" in all state laws. This report, however, concludes, that—despite their designation as public—charter schools are not state actors (at least in most states). Thus, they ought to be treated as private schools for federal constitutional purposes.

If charter schools are not state actors, the answers to questions about the Establishment Clause and the Free Exercise Clause are more straightforward. It has been clear for nearly two decades that the Establishment Clause does not prohibit the government from including religious schools in publicly funded parental choice programs. And *Espinoza* made clear that the government may not exclude schools from parental choice programs because they are religious. Thus, if charter schools are, for federal constitutional purposes, private schools, then charter school programs are programs of private choice and states cannot prohibit religious schools from participating in them.

Efforts to permit religious charter schools will likely be undertaken in the near future. This report concludes by outlining three paths for doing so—legislation, executive action, and litigation—and discussing the costs and benefits of each approach.

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Introduction

On June 30, 2020, the U.S. Supreme Court held, in *Espinoza v. Montana*, that the First Amendment's Free Exercise Clause precludes states from excluding religious schools from private school choice programs.[2] Writing for the majority, Chief Justice John Roberts concluded: "A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious."[3]

Espinoza is a momentous decision, affirming a principle that supporters of faith-based schools have fought to be recognized for over 150 years: that barring private schools from accessing public resources *because they are religious* is unjust and unconstitutional.

But, as Justice Stephen Breyer asked in his dissenting opinion, "What about charter schools?" Can states prohibit religious charter schools? All states with charter schools currently do so. All states (as well as federal law) require charter schools to be secular schools. Most prohibit charter schools from being operated by or affiliated with a religious organization. Are these restrictions also unconstitutional after *Espinoza*?

Justice Breyer is not the first to ask these questions. In the years leading up to *Espinoza*, education policy advocates and scholars argued that religious charter schools are not only constitutionally permissible but also that the legal prohibitions against them are unconstitutional.[4] After the *Espinoza* decision, efforts to permit religious charter schools are likely to be undertaken in the near future.[5] This report discusses the constitutional issues raised by such efforts, examining, first, whether the First Amendment's Establishment Clause permits religious charter schools, and, second, whether the First Amendment's Free Exercise Clause prohibits states from banning them.[6]

These questions do not lend themselves to straightforward answers. They involve the intersection of three federal constitutional doctrines, all of which are complex and riddled with inconsistencies. Answering these questions is further complicated by the fact that, as Justice Breyer observed in his *Espinoza* dissent: "States vary widely in how they permit charter schools to be structured, funded, and controlled." Thus, it is necessary to ask how the rule announced in *Espinoza* 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."[7] As a result of these complexities, any effort to legalize religious charter schools would undoubtedly be tied up in the courts, perhaps for years. Lower courts may—indeed, probably will—reach different conclusions about the underlying constitutional issues.

At the end of the day, efforts to pave a legal path to religious charter schools should prevail. This paper argues that religious charter schools are not only constitutionally permissible in most states but that, after *Espinoza*, where they are permissible, they may not be prohibited.

Before analyzing the constitutional rules undergirding these conclusions, a few words are in order regarding what the discussion below means (and does not mean) by "religious charter schools." For our purposes, religious charter schools are not simply secular charter schools operated by or affiliated with a religious organization. This practice is already permitted in a handful of states (although prohibited in many others by statutes that are, for reasons discussed below, likely unconstitutional). And religious charter schools are not charter schools that teach religion in a descriptive way, that incorporate cultural curricular themes that appeal to adherents of certain religious

traditions, or that permit religious organizations to offer catechetical instruction on-site before and after school. All these things are already occurring.[8] Rather, as used here, the term "religious charter schools" refers to charter schools that are religious in the same way that private faith-based schools are religious: they teach religion as the *truth*—going beyond the descriptive and cultural to the prescriptive and normative. In other words, the questions addressed here are: Does the U.S. Constitution permit charter schools that are *actually religious*? If so, does it preclude states with charter school laws from prohibiting them?

The Landscape of Parental Choice in the United States

Millions of American children attend elementary and secondary schools that are privately operated but receive some or all of their funding from the government. During the 2018–19 school year, approximately 520,000 students participated in a private school choice program.[9] An additional 3.3 million attended a privately operated charter school.[10] To understand the debate about whether religious charter schools are permissible and whether states that authorize charter schools must permit them, it is necessary to understand the distinctions between these funding mechanisms and consider whether these distinctions are constitutionally relevant.

Private School Choice Programs

Although private school choice has a much older intellectual pedigree, private school choice and charter school programs emerged on the American educational landscape at roughly the same time. In 1990, Wisconsin enacted the first modern private school choice program, and, a few months later, Minnesota enacted the first charter school law.[11] Since the enactment of the Wisconsin program—a modest voucher program that enabled approximately 500 students to attend a private school in Milwaukee—more than half the states and Washington, D.C., have adopted some version of private school choice.

There are, today, more than 50 private school choice programs in the United States. Roughly half are voucher programs, which provide publicly funded scholarships for children attending private schools. Most of the rest are scholarship tax-credit programs, which incentivize donations to nonprofits that provide private school scholarships. The largest private school choice programs measured by enrollment are scholarship tax-credit programs in Arizona, Florida, and Pennsylvania and voucher programs in Indiana, Ohio, and Wisconsin.

The scholarships that students receive often do not fully cover tuition; and, typically, participating private schools enroll a mix of privately and publicly funded students. Almost all private school choice programs are either means-tested or limit eligibility to students with special needs. The vast majority of schools participating in private school choice programs are religious, and none of the programs prohibits or regulates religious instruction.[12]

The U.S. Supreme Court has made clear that private school choice programs not only can, but must, include religious schools. In *Zelman v. Simmons-Harris*, it considered a challenge to the Cleveland Pilot Scholarship Program, a voucher program enabling disadvantaged children in the city to attend private schools. A 5–4 majority of the Justices rejected the claim that the program violated the First Amendment's Establishment Clause, despite the fact that 96% of program participants attended a religious school. The Court concluded that the program was constitutional for two reasons. First, it was "neutral in all respects toward religion," permitting the participation of secular and religious private schools as well as public schools from neighboring districts. Second, it was "a program of true private choice," which empowered parents to choose where to spend the public funds.[13]

Following *Zelman*, many commentators expected that the antiestablishment provisions in state constitutions would block the private school choice programs from serving religious schools. (These provisions are often referred to as "Blaine Amendments," after Senator James G. Blaine of Maine, who proposed an amendment to the U.S. Constitution prohibiting the funding of "sectarian" schools in 1876.) That prediction, however, proved largely incorrect. Only a handful of state courts have relied on their own antiestablishment provisions to invalidate a private school choice effort, including the Montana Supreme Court in the *Espinoza* litigation. *Espinoza*, which will be discussed in greater detail below, effectively precludes most state courts from doing so, going forward.

Charter School Programs

Forty-five states and Washington, D.C., authorize charter schools. Although designated as "public schools" in state and federal education laws, the vast majority of charter schools are privately operated. Most charter schools are operated by private nonprofit corporations,

although a few states permit for-profit charter school operators as well. Increasingly, charter schools are operated by "charter management organizations" that run multiple schools, some in more than one city or state. Like all corporations, most charter school operators are subject, in the first instance, to oversight by their corporate board of directors.

Across the U.S., 6% of all public school students now attend a charter school, although the proportion is much higher in many urban districts. In contrast to the pervasive, permissible participation of religious schools in private school choice programs, all charter schools must—by law—be secular. All states with charter programs (as well as federal statutes addressing charter schools) prohibit religious charter schools, and many prohibit religious entities from operating charter schools, even if they are secular. Charter schools may incorporate language, history, and cultural themes that appeal to religious parents. For example, there are Hebrew-, Arabic-, and even Aramaic-themed charter schools as well as charter schools that focus on classical education. Charter schools may also permit religious instruction in the school building before or after school, and various experiments with such wraparound religious instruction are ongoing. However, all charter schools are legally prohibited from teaching the tenets of any religion as the truth.[14]

Charter school and private school choice programs differ in a number of respects. Technically, while private school choice programs enable children to spend public resources at existing private schools, charter school programs authorize the creation of new public schools through an agreement (the charter) between a charter "authorizer" (which, in some states, includes a range of public and private entities) and a private operator. Several states allow religious organizations, especially religiously affiliated universities, to serve as charter school authorizers, although the schools that they authorize and supervise must be secular.[15] Moreover, in contrast to private school choice programs, charter school eligibility is universal, and charter schools must be tuition-free and must select students by lottery if demand exceeds supply. Although they enjoy blanket exemptions from many regulations, charter schools typically are subject to more regulatory oversight than schools participating in private school choice programs, both by their authorizers, which are charged by law with supervising all aspects of their operations, and by state regulators.[16] Charter schools must administer the same standardized tests as district public schools, and states must issue uniform school "report cards" for all charter and district public schools. Moreover, some states have laws mandating the closure of persistently failing charter schools (or requiring authorizers to close them).

On the other hand, charter schools resemble private schools participating in parental choice programs in significant respects. They are privately operated and have wide-ranging autonomy over staffing, curriculum, mission, budget, and internal organization. Indeed, most states grant charter schools blanket waivers from many education regulations. They also often depend heavily on supplemental funds provided by philanthropists and other private donors. Like private schools, charters are schools of choice—that is, parents select them for their children, and public funding "follows the child" to the school, as with students attending a private school through a private school choice program.[17]

The legal questions of whether charter schools can be (and, if so, must be permitted to be) religious schools turn on whether these similarities transform what the law legally designates as a mechanism to create new public schools into the kind of "program of true private choice" that the Court has held can—and must—include religious schools.

Charter Schools and the Federal Establishment Clause

Although some scholars had begun to question it, the conventional wisdom held, pre-*Espinoza*, that the First Amendment's Establishment Clause prohibited religious charter schools for two related reasons. First, the argument was that charter schools are public schools because that is what state laws say that they are. Second, public funds flow *directly* to them, as a result of the government's decision to create them, rather than *indirectly*, as the result of parents' enrollment decisions.

This section examines these assumptions, as well as the arguments supporting them, and concludes that neither is correct. The first assumption—that charter schools are public schools for federal constitutional purposes—is wrong, at least in most states. The second assumption—that public funds flow to charter schools by virtue of a governmental, rather than a parental, decision—is wrong as well. Even if it were right, the distinction between the direct and indirect funding of religious activities appears to have been rendered constitutionally irrelevant in *Espinoza*.

Are Charter Schools Public Schools?

While the Supreme Court's Establishment Clause jurisprudence is riddled with inconsistencies, the Court's opinions make abundantly clear that schools operated by the government (which, in the U.S., are universally known as "public schools" but which will be referred to as "district schools" here to avoid confusion) must be secular.[18] Although charter laws call charter schools *public* schools, they are different in many respects from district schools. Importantly, most are privately operated and exempt from most regulations governing district schools. These differences raise the question: Are charter schools *different enough* from district schools to be treated, for federal constitutional purposes, as private, rather than public, schools? If they are, the same doctrines that permit (and, indeed, require) government funds to flow to private religious schools participating in private school choice programs also permit—indeed, require—religious charter schools.

The U.S. Supreme Court has made clear that only government entities, or private entities that are closely controlled by the government, are bound by the provisions of the federal constitution, including the Establishment Clause. In legal terms, such entities are called "state actors." District schools clearly are state actors because they are operated and controlled by local government entities. But most charter schools are neither operated nor controlled by the government.[19]

Most charter schools are privately operated and controlled by private (nonprofit and for-profit) corporate boards. If these charter schools are not state actors, they are, for federal constitutional purposes, private schools that can be (and must be permitted to be) religious.

The doctrine that governs whether an entity is a state actor, which is straightforwardly known as the "state action doctrine," is complicated and confusing. The doctrinal analysis is made more difficult by the fact that an entity may be a state actor with respect to some functions and a private actor for others. The Supreme Court has articulated a number of factors to determine whether a privately operated institution is a state actor for a given function. These factors include whether the private actor is performing a function that has been

"traditionally the exclusive prerogative of the State";[20] whether the government coerced or significantly encouraged the private action or controls the private actor to such an extent that it is appropriately characterized as a governmental agent;[21] and the degree of interdependence (or "entwinement") between the government and the private actor.[22] The overarching inquiry is whether there is a "sufficiently close nexus between the state and the challenged action" to attribute the action to the government. As the Supreme Court observed in *Blum v. Yaretsky*, "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."[23]

It is easier to explain which attributes of charter schools *do not* make them state actors than to explain which ones might:

- First, the fact that they are schools does not make them state actors. While the Supreme Court has observed that public education is a traditional government function, education clearly is not "traditionally the exclusive prerogative of the state" because 10% of American schoolchildren are educated in private schools and another 3% are home-schooled.

- Second, the fact that charter schools are called "public schools" by charter laws does not make them state actors. On the contrary, the Supreme Court has held that the legal categorization of an entity is not dispositive of the state action question. For example, in *Lebron v. National Railroad Passenger Corporation*, the Court found that Amtrak was a state actor despite the fact that federal law categorized it as a private entity.[24] Presumably, if a law designating an entity as "private" does not control the state action question, neither should a law designating an entity as "public."[25] At least one federal court has explicitly said as much.[26]

- Third, charter schools are not state actors simply because state laws enable their creation. On the contrary, the Supreme Court has ruled that entities directly created by government action (for example, the United States Olympic Committee) are not necessarily state actors.[27] Thus, charter schools are not state actors just because it is technically true that charter schools do not exist before they are granted a "charter" by their authorizer, which is often (but not always) a government entity. This logically must be the case. After all, most private schools (as well as most charter schools) are operated by private corporations, which are also creatures of state law that do not exist before a state grants their corporate charter. Issuing a corporate charter to a private corporation does not make it a state actor.

- Fourth, the fact that charter schools receive government funds and are subject to government regulations does not make them state actors. On the contrary, the Supreme Court has made clear that neither government regulation nor government funding transforms a private entity into a public one. For example, in *Rendell-Baker v. Kohn*, the Court held that a private school for special-needs students was not a state actor even though it was heavily regulated by, and received more than 90% of its funds from, the government. "The school," the Court observed, "is not fundamentally different from many private corporations whose business depends on [government] contracts. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts."[28] For this reason, even charter operators enlisted to operate failed district schools under the direct supervision of school boards may not be state actors, since they might fairly be categorized as government contractors.

Federal courts have divided over the question of whether charter schools are state actors. In *Caviness v. Horizon Community Learning Center, Inc.*, the United States Court of Appeals for the Ninth Circuit answered that question in the negative. The case arose after a teacher in an Arizona charter school was fired and sued his employer, alleging that his dismissal violated the Fourteenth Amendment's Due Process Clause. The Ninth Circuit held that the school was not a state actor for purposes of the teacher's employment. The court rejected the teacher's assertion that Arizona law's designation of charter schools as "public schools" was dispositive of the state action question. It also rejected the claim that the school was a state actor because it was performing a traditional state function (public education). The court reasoned that whatever the legal designation of the privately operated charter school, there was an insufficient nexus between the state and the school's decision to fire the teacher to characterize the school as a state actor. The court rejected the argument that this nexus was established when Arizona initially reviewed and approved the school's charter, which included the school's self-created personnel policies. Instead, citing *Rendell-Baker*, the court concluded that the termination decision was in no way related to the actions of the state but was the purely private action of a private corporation following privately created termination procedures.[29]

Relying on *Caviness*, two federal district courts have separately ruled that California charter schools are not

state actors. Most recently, in *I.H. v. Oakland School for the Arts*, the court dismissed the student's equal protection claim after finding that the student failed to establish that the school was a state actor. The court explicitly rejected the argument that the charter school was a state actor because California law designated charter schools "public schools."[30] In an earlier decision, *Sufi v. Leadership High School*, a federal district judge dismissed a teacher's First Amendment claim against a California charter school.[31] The judge reasoned that, although the charter school's dismissal of a teacher (allegedly for speaking out about the unfair distribution of health benefits) was enabled in some way by the state law authorizing the creation of charter schools, the connection between the decision to authorize the school and the school's dismissal decision was too attenuated to be fairly classified as "state action." In other decisions, however, federal courts have taken a more formalistic approach, holding that charter schools are state actors because they are designated as public schools by state law and/or because public education is a traditional function of state governments. For example, federal district courts in Illinois, Ohio, and New York have (incorrectly, in my view) relied upon the state law designations of charter schools as "public schools" to conclude that they are state actors.[32]

State charter school laws are sufficiently diverse that the question of whether charter schools are state actors conceivably might vary from state to state (or possibly even from school to school). Since the analysis is functional, the question of whether charter schools can permissibly include religious instruction presumably turns on whether charter schools are state actors when functioning in their instructional capacity. Logically, the most important variable in making that determination is how closely charter schools are controlled in their instructional capacity by the government. That is to say, does the government so closely control the curriculum of a charter school that the school's curricular decisions are fairly attributable to the government?

In almost all states, the answer is no, since most states grant charter schools broad autonomy to adopt unique educational programs, the contours of which are outlined in the charters approved by their authorizers. Most important, these waivers usually exempt charter schools from complying with the same curricular mandates that govern public schools (although all states must, under federal law, require charter schools to administer the same standardized tests as public schools).[33] Put differently, if it cannot be fairly said that the actions of a Montessori charter school, a STEM charter school, or an arts charter school are fairly attributable to the state, it cannot be said that the actions of a religious charter school are.[34]

Three other factors may be relevant to the state action question.

One factor is the number and diversity of charter authorizers available in a state. Seven states permit nongovernmental entities—including private universities and nonprofit organizations—to authorize charter schools. It is easier to make the case that charter schools are private schools in states that permit private authorizers, including religious authorizers, as several states do, rather than in states that limit the authorization function to school districts.[35] The second factor is whether the state mandates the closure of failing charter schools (or requires authorizers to close them).[36] The third factor is whether the state places limits on the growth of charter schools. Some states cap the number of new charters per year, others limit the total number of charter schools, and still others limit charter schools' geographic locations.[37]

None of these factors is dispositive. The state action doctrine is not a mathematical formula, and it may be the case that charter schools are not state actors even in states with more restrictive charter laws. As previously noted, the fact that an entity is created by the government does not make it a state actor—neither does government regulation or government funding. It is telling that, in two cases, federal courts have held that California charter schools are not state actors, despite the fact that California regulates charter schools more extensively than many states.

As with charter schools, all states regulate private schools to some extent—for example, by requiring standardized testing, minimum instructional hours, and curricular content. Many also place conditions on the "approval" to operate, usually in the form of private accreditation. States with private school choice programs often place additional regulatory requirements on participating schools, including the requirement that the schools administer the same standardized assessments as public and charter schools. While no state mandates the closure of private schools for academic underperformance, some do exclude persistently underperforming schools from parental choice programs.[38]

Are Charter Schools a "Program of True Private Choice"?

The first reason why it is commonly assumed that the Establishment Clause prohibits religious charter schools is that they are designated "public schools" in state and federal laws. The second reason turns on

what is known as the "direct-indirect" funding distinction in the Supreme Court's Establishment Clause jurisprudence. As the Court observed in *Zelman*, "our decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." These decisions reason that, in the "indirect funding" context, the relevant decision-maker is the private individual who directs the funds to a religious entity (in the case of school-age children, the recipients' parents), not the government. In *Zelman*, for example, the Court reasoned that private religious schools were but one among a wide range of educational options available in Cleveland and that funds flowed to religious schools as the result of parents' independent decisions. Thus, the court concluded, the program was one of "true private choice."[39]

By contrast, in a series of older cases, the Court had limited *direct* government assistance to secular aspects of a religious organization's activities. The prohibition on direct funding of religious activities extends through a long line of cases addressing the constitutionality of programs providing secular aid to religious institutions—for example, transportation for religious school students, textbooks, educational equipment and computers, tutors for secular remedial instruction, and capital expenditures for the construction of buildings at religious colleges.[40]

This assumption, however, may no longer hold true. The indirect-direct aid distinction arguably has been eroding for a number of years and is being gradually replaced by a rule requiring government neutrality toward religious institutions only in government-benefit programs.

In *Espinoza*, Chief Justice Roberts suggested that neutrality alone was dispositive of the Establishment Clause inquiry when he observed: "We have repeatedly held that the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs." Roberts then suggested that, when neutrality is present, the distinction between direct and indirect funding is effectively irrelevant: "Any Establishment Clause objection to the scholarship program here is particularly unavailing because the government support makes its way to religious schools only as a result of Montanans independently choosing to spend their scholarships at such schools."[41] The Chief Justice also approvingly cited numerous historical examples of state and federal government directly funding religious schools, including congressional appropriations to support mission schools for Native Americans and, in the Reconstruction Era, for freed slaves. In other words, it is no longer clear that it matters—for federal Establishment Clause purposes—whether charter schools are directly or indirectly funded by states.[42]

Even if it remains relevant, the indirect-direct funding distinction does not represent an impediment to religious charter schools. This is because the prevailing wisdom—which holds that the funding of charter schools is direct aid, made by virtue of the government's authorization decision—is simply wrong. The Supreme Court has been divided about what constitutes a program of private choice. For example, in *Mitchell v. Helms*, the Court considered an Establishment Clause challenge to the use of federal funds to purchase instructional equipment for religious schools. The Court had previously rejected nearly identical expenditures, largely because it characterized them as providing direct, rather than indirect, aid to religious schools. In approving the expenditures at issue in *Mitchell*, a plurality of the Court characterized the program at issue as one of private choice since the religious schools benefited only because parents enrolled eligible children in them.[43]

The arguments in favor of categorizing charter schools as a "program of private choice" are much stronger than they were for the program at issue in *Mitchell*, which provided computers to schools for use by multiple students. The vast majority of public funds received by charter schools are calculated on a per-pupil basis. In this way, funds flow to charter schools in the same way and for the same reason as funds flowing to private schools participating in private school choice programs—because of parents' enrollment decisions. Like charter schools, private schools must be authorized by the government to participate in private school choice programs, and like charter schools, participating schools receive government funding on a per-pupil basis only when parents choose to enroll their children.

Consider New Orleans, where parents of modest means have two choices: (1) enroll their children in a charter school, after which Louisiana directs the per-pupil allocation of funds to the charter school according to a formula based on the amount of state and local funding that a public school would receive to educate that child; or (2) enroll them in a private school, after which Louisiana directs a public "scholarship" to the private school based on a similar formula. Arguably,

the per-pupil allocation of charter school funds and the scholarship provided by the Louisiana Scholarship Program is a distinction without a difference.

Religious Charter Schools and the Free Exercise Clause

In the end, the answer to the question, Are religious charter schools constitutionally permissible? is somewhat unsatisfying: probably, at least in most states. To summarize: whatever state laws call them, charter schools are, *for federal Establishment Clause purposes*, probably (in most states) private, not public, schools that receive government funds by virtue of independent, private decisions. And as programs of private choice, charter school programs may include religious schools.

But must they include them? Enter, again, *Espinoza v. Montana*. That case squarely raises the question: If religious charter schools are *constitutional*, are statutes prohibiting them *unconstitutional*? The answer to that question—which almost certainly will be tested in litigation in the near future—is more straightforward than the answer to the previous one: yes. If charter schools are permissible, religious charter schools must be permitted.

In *Espinoza*, the U.S. Supreme Court held that the Montana Supreme Court violated the Free Exercise Clause when it invalidated, on state constitutional grounds, a statute giving a $150 tax credit for contributions to organizations that provide scholarships to students who attend private schools. The Montana court had concluded that, because some of the participating students attended faith-based schools, the program violated the state's Blaine Amendment, which forbids "any direct or indirect appropriation or payment" for "any sectarian purpose or to aid any church, school, academy . . . controlled in whole or in part by any church, sect, or denomination."[44] Before the U.S. Supreme Court, Montana acknowledged that the tax credit did not violate the federal Establishment Clause; but the state argued that it had an important interest in maintaining a greater degree of church-state separation than required by the federal constitution. The majority in *Espinoza* disagreed. The Court instead held that all discrimination against religious organizations is subject to the most exacting constitutional scrutiny and that Montana's interest in enforcing its antiestablishment provision was not a compelling one. The *Espinoza* decision clears away major legal hurdles to expanding private school choice, since the constitutions of 37 states contain some version of a Blaine Amendment.

But does *Espinoza* require states with charter school laws to permit religious charter schools?[45] My tentative answer is that if charter schools are private, not state, actors, the answer is yes.

Espinoza and the Status-Use Distinction

Assuming that charter schools are private schools, the Court's ruling—that a state may not exclude a school from receiving public funds because it is religious—would seem to squarely apply to laws prohibiting religious charter schools. But there are two legal complications.

The first is the majority's persistence in relying on the enigmatic distinction between "religious status" and "religious use." To understand this complication, it is necessary to turn to the precursor to *Espinoza*, the Court's decision in *Trinity Lutheran Church v. Comer*. In *Trinity Lutheran*, the Court invalidated, on Free Exercise grounds, Missouri's decision to exclude a religious preschool from a state program that provided recycled tires for playground resurfacing.[46]

Trinity Lutheran held that the Free Exercise Clause prohibits the government from discriminating based on the religious status of a recipient. A plurality of the Court declined to decide whether the holding would extend to religious uses of government benefits, observing in a footnote: "This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination."[47] Justices Thomas and Gorsuch refused to join that portion of the opinion, based on the distinction between "status" and "use," rejecting it as inconsequential and unworkable.

In his concurrence, Justice Gorsuch argued that the majority opinion "leaves open the possibility a useful distinction might be drawn between laws that discriminate on the basis of religious status and religious use. . . . I harbor doubts about the stability of such a line."[48]

The majority opinion in *Espinoza* also characterized the Montana Supreme Court's decision as discrimination based on religious status, observing: "This case also turns expressly on religious status and not religious use. The Montana Supreme Court applied the no-aid provision solely by reference to religious status." The

Court repeatedly explained that the no-aid provision bars aid to "schools controlled in whole or in part by churches," "sectarian schools," and "religiously-affiliated schools." However, while the majority opinion declined to reach a conclusion about whether the holding extended to religious uses, it raised questions about the relevance of the status-use distinction. "None of this is meant to suggest that we agree … that some lesser degree of scrutiny applies to discrimination against religious uses of government aid," the Chief Justice wrote for the majority. "Some Members of the Court, moreover, have questioned whether there is a meaningful distinction between discrimination based on use or conduct and that based on status. We acknowledge the point but need not examine it here. It is enough in this case to conclude that strict scrutiny applies under *Trinity Lutheran* because Montana's no-aid provision discriminates based on religious status."[49]

Nevertheless, it is doubtful that the constitutionality of laws prohibiting religious charter schools turns on the ephemeral distinction between religious status and religious use. States defending laws requiring charter schools to be secular undoubtedly will argue that these laws do not discriminate on the basis of religious status but rather seek to prevent government funds from being diverted to religious uses. But these arguments should fail.

Espinoza itself rejected Montana's argument that the exclusion of religious schools from the tax credit program was justified by the state's interest in preventing the expenditure of government funds for religious use. "Status-based discrimination remains status based even if one of its goals or effects is preventing religious organizations from putting aid to religious uses," Chief Justice Roberts wrote.[50] Moreover, as discussed previously, in rejecting the argument that Montana had a significant interest in preventing state funds from flowing to religious schools, the majority opinion cited with approval the historical examples of government funding religious education, none of which prohibited expenditures on religious instruction. Finally, it is worth noting that, as mentioned previously, some states prohibit religious organizations from operating *secular* charter schools. These laws unquestionably discriminate on the basis of religious status.

Espinoza and Locke v. Davey

The second legal complication is the Supreme Court's 2004 opinion in *Locke v. Davey*, which rejected a Free Exercise challenge to a Washington program that provided college scholarships that could be used at religious colleges but not used to pursue devotional theology degrees. In *Locke*, as in *Espinoza*, the state asserted that this exclusion was required by Washington's Blaine Amendment, which was more restrictive than the federal Establishment Clause. In contrast to *Espinoza*, however, the *Locke* majority agreed with the state that compliance with the state constitution was an interest substantial enough to justify the prohibition on using state scholarships to pursue ministerial training (even though the prohibition was not required by the federal Establishment Clause). Citing historical tradition, the *Locke* majority reasoned that there are unique "antiestablishment interests" at stake when state funds are used to support members of the clergy.[51]

The majority in *Espinoza* declined to overturn *Locke* but did distinguish it in two ways that suggest that *Locke* does not control the religious charter schools' question. First, *Espinoza* observed that the program at issue in *Locke* permitted the participation of religious colleges and universities, including pervasively religious ones, and the prohibition applied only to a "particular course of study" for ministerial training. Second, *Espinoza* noted that the *Locke* court relied on a long history of states refusing to support ministerial training—a tradition not present in the context of K–12 religious schools. Indeed, the *Espinoza* majority took care to point out that the opposite tradition in the elementary and secondary education context. Thus, as with the status-use distinction, while states undoubtedly will turn to *Locke* in their defense of laws prohibiting religious charter schools, *Espinoza*'s reliance on that history undermines these arguments.[52]

Three Paths Forward

Even if religious charter schools are constitutionally permissible—and laws prohibiting them are unconstitutional—the fact remains that religious charter schools are, at present, prohibited in every state with a charter school law. No amount of expert opinion will change that fact; legal change is required.

Accomplishing that change could occur in one of three ways, all of which would entail litigation and legal uncertainty. The first path, and the one that is prudentially the wisest, is legislative: a state could amend an existing charter school law to permit religious charter schools, or a state without a charter school law could enact one that allows them. These legislative changes would, without question, be challenged on Establishment Clause grounds and defended on Free Exercise grounds. The second path is executive action: a state attorney general could issue an opinion letter explaining that, after *Espinoza*, existing bans on

religious charter schools are unconstitutional and will no longer be enforced. This executive action would also be challenged on Establishment Clause grounds and perhaps state law grounds, as well, and defended on Free Exercise grounds. The third path is litigation. A lawyer representing a school operator wishing to open a religious charter school (or perhaps an existing charter school that wishes to incorporate religion into its curriculum) could challenge the constitutionality of laws prohibiting it from doing so on Free Exercise grounds. The state would likely defend its prohibition on Establishment Clause grounds.

In all cases, the legality of religious charter schools will be tied up in litigation, perhaps for years, until the Supreme Court weighs in to resolve the issue. In the short term, many lower courts—faced with interpreting decades of state action and First Amendment cases—will uphold laws prohibiting religious charter schools. And, since the state action analysis may vary by state, even the Supreme Court's resolution of a single case may not be dispositive of future litigation.

The Legislative Path

Addressing the question of religious charter schools by legislation would enable the careful consideration of a number of important issues, including factors relevant to the determination of state action. Legislation enabling religious charter schools could specify that they are not to be considered state actors, which, while not dispositive, would be relevant. The new charter law might even eliminate the designation of charter schools as public schools, although accomplishing this change undoubtedly would require the navigation of a complicated political minefield.

Legislation permitting religious charter schools might further clarify that charter schools' instructional programs are not dictated by the government but rather are controlled by chartering agreements between schools and authorizers, might provide for multiple authorizer options (including private authorizers where they are not available), and might clarify that the authorizer, not the state, is the primary regulator of charter schools. A legislative solution would also offer the opportunity to address questions about the religious liberty of school operators as well as other factors, discussed below, that might influence a religious organization's decision to operate a charter school.

While provisions making clear(er) that charter schools are not state actors and clarifying their substantial autonomy from government regulators will increase the likelihood that reforms permitting them will withstand Establishment Clause scrutiny, provisions requiring charter schools to sequester state funds to prevent their expenditure on religious instruction are neither needed nor wise. Prudentially, these provisions likely would deter many religious schools, including some of the highest-performing ones, from seeking charter status. Nor are such restrictions constitutionally required. No private school choice program precludes participating schools from spending public dollars on religious instruction. And there is little question that religion pervades the school day at many, if not most, private schools participating in these programs. The Supreme Court has made clear that the Constitution does not require such limits, nor would it require them were it to approve religious charter schools. Indeed, rules requiring funding sequestration might raise constitutional concerns of their own, since the Court has made clear that the Establishment Clause sometimes prohibits the kind of "entanglement" between government and religion that would be entailed in monitoring whether public funds are being used for religious instruction.[53]

While the legislative process would provide the opportunity to iron out the kinks in the transition to religious charter schools, the political impediments are significant. Long the darling of education reformers from across the political spectrum, charter schools have, in recent years, become intensely controversial (at least as controversial in some circles as private school choice, if not more). During the presidential primaries, almost all the Democrats expressed hostility to charters, including Joe Biden, a previous supporter. Some opponents have recently gone so far as to accuse charter schools of being engines of systemic racism, despite their admirable record of helping minority students succeed. As a result of this backlash, which has generated vocal demands to reduce the number of charter schools, the enacting of any law permitting religious charter schools will be a herculean challenge.[54]

The Executive Path

A more expedient alternative to legislation would be for a state to declare that it will no longer enforce laws requiring charter schools to be secular. State attorneys general routinely issue legal opinions on a range of issues, including the constitutionality and enforceability of state laws. A state attorney general might issue an opinion letter explaining his or her conclusion that laws requiring charter schools to be secular are not enforceable after *Espinoza* and directing authorizers to henceforth consider applications for religious charter schools.

This executive action option makes the most sense in states with charter school laws that raise the fewest state action concerns (that is, where charter schools enjoy substantial operational autonomy and perhaps where private authorizers are available). Politically, this option makes the most sense where the attorney general's decision is supported by other state executive officers, including, especially, the governor and the state education superintendent. Doing so, however, would likely result in political backlash and perhaps in additional litigation.

The Litigation Path

An operator wishing to open a religious charter school or convert a religious private school into a charter school, or an existing charter school seeking to incorporate religious instruction into its curriculum might challenge, on Free Exercise grounds, laws requiring charter schools to be secular. A would-be school operator might apply for a charter to open a religious charter school and challenge the denial decision. Or the operator might seek clarification regarding the permissibility of religious charter schools and sue on the grounds that an application would be futile. Or an existing charter school might simply begin to teach religion and then challenge an enforcement action on Free Exercise grounds. (Such a decision likely would also prompt an Establishment Clause challenge by opponents of religious charter schools.) Under certain circumstances (beyond the scope of the current discussion), a charter operator (or even a parent) might challenge laws prohibiting religious charter schools as unconstitutional on their face.

As with the executive option, litigation is most advisable in states where charter schools look most like private schools—that is, where the extent of state control over their operations is most attenuated. Regardless, it is likely that lawsuits challenging charter school laws will be filed in some states in the near future.

Religious Charter Schools and the Continued Importance of Private School Choice

If religious charter schools are constitutionally permissible, then justice—as well as the Constitution—

demands that they must be permitted. But that does not mean that all religious schools should become charter schools. The possibility undoubtedly appeals to many religious schools, even in states with private school choice programs, since charter schools in most states receive substantially more funding than private schools participating in choice programs. In states without private school choice, the charter option is even more attractive for religious schools, since the alternative to becoming a charter school is no public funding at all. For this reason, some religious schools have opted to secularize in order to secure charter school funds.

The situation, for many religious schools, is a matter of life and death. Over the past several decades, even as the footprint of private school choice has expanded, thousands of faith-based schools have closed, with the losses concentrated especially among Catholic schools serving disadvantaged children in states without parental choice. Covid-19 has dealt a death blow to many hundreds more and sparked bitter, heated debates about whether federal recovery funds should be shared in equal measure with private and faith-based schools.

The option of becoming charter schools makes sense for some existing religious schools—and perhaps even more sense for private operators seeking to open new religious schools. But school operators should carefully weigh other factors before seeking charter status, should it become available. One factor is that any effort to secure approval for an authentically religious charter school will likely be tied up in litigation for years, with the outcome in no way guaranteed.

Even if religious charter schools become permissible, the reality is that charter laws will impose additional regulatory burdens. First, a religious charter school would have to submit to the authority of a charter authorizer charged by law not only with initially reviewing the charter application but also monitoring the school's compliance with, and fidelity to, the mission and plan of instruction set out in the charter. The precise nature of this supervision in the religious charter school context remains uncertain. Would, for example, the authorizer be obligated to ensure that the school was faithfully adhering to its religious mission, assuming that is a core element of the school's charter? Is a religious school operator comfortable with that level of oversight?

Second, a religious charter school would face more stringent accountability requirements, including those that require that all charter schools administer the state exam and be evaluated according to a standard "report card" format applied to all public and charter schools. For better or worse, private schools typically do not administer the same standardized tests as public and charter schools (although some states require those participating in private school choice programs to do so), and few report academic results at the school level.

Third, a religious charter school would have to comply with the requirement that students be selected randomly if demand exceeds supply, without regard to admissions criteria that religious schools are accustomed to applying (including the preference for coreligionists).

Fourth, the applicability of nondiscrimination provisions to charter schools may run afoul of the religious tenets of certain religious schools. There is also uncertainty about whether religious charter schools enjoy the protection of the First Amendment's "ministerial exception," which guarantees that private religious schools have complete autonomy over the employment of personnel engaged in religious formation.

These trade-offs weigh in favor of continuing to push legislatively for an expansion of private school choice in addition to eliminating prohibitions on religious charter schools. In part, this is because private school choice programs provide greater autonomy for participating schools, making them attractive to a broader range of religious schools, even if religious charter schools do become a live option.

Still, while private school choice programs are in place in more than half of states and the District of Columbia, many programs are poorly designed, and all are more restricted in scope and eligibility than charter school programs. Most private school choice programs are means-tested, and some are limited to students attending failing schools. Others admit only students with disabilities, sometimes specific ones (e.g., autism, dyslexia). All of them provide only a small fraction of the funding received by charter schools, which, in turn, tend to receive less funding than traditional district public schools. As a result, they enroll only a small fraction of the students that charter schools do. Preserving faith-based schools as an option, especially for those serving disadvantaged students, will require a dramatic expansion of the public resources available to them in the relatively near term. Authorizing religious charter schools is only one way to accomplish that goal.

Endnotes

1 *Espinoza v. Montana*, 140 S. Ct. 2246 (2020).

2 *Id.*

3 *Id.* at 2261.

4 Nicole Stelle Garnett, "Sector Agnosticism and the Coming Transformation of Education Law," *Vanderbilt Law Review* 70, no. 1 (January 2017): 1–66; Stephen Sugarman, "Is It Unconstitutional to Prohibit Religious Charter Schools?" *Journal of Law and Religion* 32, no. 2 (July 2017): 227–62; Aaron J. Saiger, "Charter Schools, the Establishment Clause, and the Neoliberal Turn in Public Education," *Cardozo Law Review* 34 (2013): 1163–1225.

5 "Religious Charter Schools: Legally Possible and Politically Advisable?" Manhattan Institute for Policy Research, webinar, Aug. 4, 2020; Andy Smarick, "Religious Charter Schools Will Test Limits of *Espinoza* Decision," *Education Next* (blog), Aug. 4, 2020; Evie Blad, "What the Supreme Court's Ruling on Religious Schools Means in Practice," *Education Week* (blog), June 30, 2020.

6 Constitution of the United States, Amendment I: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

7 140 S. Ct. 2246, at 2291 (Breyer, J., dissenting).

8 Margaret F. Brinig and Nicole Stelle Garnett, *Lost Classroom, Lost Community: Catholic Schools' Importance in Urban America* (Chicago: University of Chicago Press, 2014), pp. 33–56.

9 American Federation for Children, "2019 School Choice Guidebook," p. 6.

10 National Alliance for Public Charter Schools, "National Charter School Facts," 2020.

11 Nicole Stelle Garnett, "Why We Still Need Catholic Schools," *City Journal,* Summer 2020.

12 "2019 School Choice Guidebook", p. 5.

13 *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002).

14 Garnett, "Sector Agnosticism."

15 National Association of Charter School Authorizers, "Charter School Authorizers by State."

16 Education Commission of the States, "50 State Comparison: What Rules Are Waived for Charter Schools?" January 2020.

17 Nicole Stelle Garnett, "Post-Accountability Accountability," *University of Michigan Journal of Law Reform* 52, no. 1 (2018): 184–88.

18 *See, e.g., Lee v. Weisman,* 505 U.S. 577 (1992) (invalidating prayer before public school graduation); *Edwards v. Aguillard,* 482 U.S. 578 (1987) (invalidating Louisiana law mandating the teaching of "creation science" in public schools); *Wallace v. Jaffree,* 472 U.S. 38 (1985) (invalidating moment of silence statute); *School District of Abington Township v. Schempp,* 374 U.S. 203 (1963) (invalidating Bible reading and school prayer as a violation of the Establishment Clause).

19 The small minority of charter schools that are directly controlled by public school boards may well be state actors. That complication is left to one side here, although a case can be made that those schools are more properly considered private government contractors. Either way, the fact that the government directly controls a minority of charter schools supports the conclusion that the vast majority of charter schools are not state actors.

20 *See Jackson v. Metropolitan Edison Company,* 419 U.S. 345, 351 (1974).

21 *See Blum v. Yaretsky,* 457 U.S. 991, 1004 (1982).

22 *See Brentwood Academy v. Tennessee Secondary School Athletic Association,* 531 U.S. 288, 299–301 (2001).

23 *Blum v. Yaretsky,* 457 U.S. 991, 1004 (1982).

24 *Lebron v. National Railroad Passenger Corporation,* 513 U.S. 374 (1995).

25 The same can presumably be said of state statutes that designate individual charter schools and charter networks "local educational agencies" (another term for school districts) in order to enable them to collect certain federal education funds directly.

26 *I.H. v. Oakland School for the Arts,* 234 F. Supp. 3d 987, 992 (N.D. Cal. 2017) (finding that the student failed to establish that a California charter school was a state actor).

27 *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Commission,* 483 U.S. 522, 542–47 (1987).

28 *Rendell-Baker v. Kohn,* 457 U.S. 830, 840–41 (1982). *See also Jackson v. Metropolitan Edison Company,* 419 U.S. 345 (1974) (holding that government regulation of a utility that possessed a state-granted monopoly did not make the utility a state actor); *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972) (holding that a state grant of a liquor license to a private club was not sufficient entanglement to make the club a state actor).

29 *Caviness v. Horizon Community Learning Center, Inc.,* 590 F.3d 806, 808, 812 (9th Cir. 2010).

30 *I.H. v. Oakland School for the Arts,* 234 F. Supp. 3d 987 (N.D. Cal. 2017)

31 *Sufi v. Leadership High School,* 2013 WL 3339441, at *9 (N.D. Cal. July 1, 2013).

32 *See Jordan v. Northern Kane Education Corp.,* No. 08 C 4477, 2009 WL 509744, at *3 (N.D. Ill. Mar. 2, 2009); *Matwijko v. Board. of Trustees of Global Concepts Charter School,* WL 2466868, at *1 (W.D. N.Y. Aug. 24, 2006); *Riester v. Riverside Community School,* 257 F. Supp. 2d 968, 972 (2002).

33 Education Commission of the States, "50 State Comparison: What Rules Are Waived for Charter Schools?"; Garnett, "Post-Accountability Accountability."

34 Smarick, "Religious Charter Schools Will Test Limits."

35 National Association of Charter School Authorizers, "Charter School Authorizers by State."

36 Education Commission of the States, "50 State Comparison: Charter Schools—Does the State Set a Threshold Beneath Which a School Must Automatically Be Closed?" January 2018.

37 Center for Education Reform, "2018 National Charter School Laws Ranking and Scorecard."

38 Garnett, "Post-Accountability Accountability."

39 *Zelman v. Simmons-Harris,* 536 U.S. 639, 649 (2002).

[40] In large part because the Court has assumed that most religiously affiliated elementary and secondary schools are "pervasively sectarian"—i.e., that religion pervades all aspects of instruction—the long-standing assumption has been that financial assistance can flow to religious elementary and secondary schools only indirectly, as the result of an intervening private choice. *Bowen v. Kendrick,* 487 U.S. 589, 621–22 (1988) (observing that the Court has held "parochial schools" to be "pervasively sectarian"); *Meek v. Pittenger,* 421 U.S. 349, 363 (1975) ("[I]t would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools"); *Lemon v. Kurtzman,* 403 U.S. 602, 636–37 (1971) ("A school which operates to commingle religion with other instruction plainly cannot completely secularize its instruction. Parochial schools, in large measure, do not accept the assumption that secular subjects should be unrelated to religious teaching").

[41] *Espinoza v. Montana,* 140 S. Ct. 2246, at 2254.

[42] *Id.* at 2258.

[43] *Mitchell v. Helms,* 530 U.S. 793 (2000).

[44] *Espinoza v. Montana,* 140 S. Ct. 2246, at 2253.

[45] *Espinoza* in no way requires states to establish charter school programs or private school choice programs, so the question of whether states must permit charter schools is a live one only in states with charter school laws.

[46] *Trinity Lutheran Church v. Comer,* 137 S. Ct. 2012 (2017).

[47] *Id.* at 2024, fn. 3.

[48] *Id.* at 2025 (Gorsuch, J., dissenting).

[49] *Espinoza v. Montana,* 140 S. Ct. 2246, at 2257.

[50] *Id.* at 2256.

[51] *Locke v. Davey,* 540 U.S. 712, 722 (2004).

[52] *Espinoza v. Montana,* 140 S. Ct. 2246, at 2257–58.

[53] *Lemon v. Kurtzman,* 430 U.S. 602 (1971).

[54] Garnett, "Why We Still Need Catholic Schools."

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