

STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

November 25, 2025

Opinion No. 25-019

Constitutionality of Tennessee’s Restriction on Religious Charter Schools

Question 1

Does Tennessee’s ban on religious charter schools violate the Free Exercise Clause of the First Amendment to the U.S. Constitution?

Opinion 1

Likely yes. Tennessee Code Annotated § 49-13-111(a)(2) requires public charter schools to “[o]perate as ... nonsectarian[and] nonreligious.” In addition, § 49-13-104(16)(B) prohibits bodies that “promote the agenda of any religious denomination or religiously affiliated entity” from sponsoring a public charter school. Those restrictions exclude otherwise qualified religious entities from participating in a public benefit, and no compelling interest is apparent. So § 49-13-111(a)(2)’s and § 49-13-104(16)(B)’s restrictions on religious charter schools likely violate the Free Exercise Clause.

ANALYSIS

In October Term 2024, the U.S. Supreme Court considered whether the Free Exercise Clause of the First Amendment to the U.S. Constitution prevents States from excluding privately run religious schools from charter-school programs in *Oklahoma Statewide Charter School Board v. Drummond*, No. 24-394. But the judgment below was affirmed by an equally divided court (without a merits decision) after Justice Barrett recused herself. 605 U.S. 165 (2025). The question here tees up the issue *Drummond* left open.

That question, though, does not come on a blank slate. A trio of recent U.S. Supreme Court decisions—*Trinity Lutheran*, *Espinoza*, and *Carson*—held that excluding religious entities from a public benefit “solely because of their religious character” penalizes free exercise and triggers the “most exacting scrutiny.” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462 (2017); see also *Espinoza v. Mont. Dep’t of Revenue*, 591 U.S. 464, 475 (2020); *Carson v. Makin*, 596 U.S. 767, 780 (2022). And *Espinoza* and *Carson* applied these principles in the school context, confirming that a State transgresses the Free Exercise Clause by disqualifying religious schools from public programs “subsidiz[ing] private education.” *Espinoza*, 591 U.S. at 487.

Given that precedent and the Constitution’s original meaning, the Free Exercise Clause likely does not allow States to bar religious schools categorically from participating in a public charter school program like Tennessee’s. To explain why, this opinion discusses (A) Tennessee’s public charter school program and (B) the Supreme Court’s recent Free Exercise cases. Then, it

applies those decisions to (C.1) the Tennessee charter program's bar on religious sponsors and religious schools, as well as to (C.2) other less problematic provisions touching on religion. This Office concludes that the Tennessee program's exclusion of religious charter school sponsors and its bar on religious operation of charter schools likely violate the Free Exercise Clause. Both provisions prohibit otherwise qualified religious entities from participating in the charter school program, while allowing similarly situated non-religious entities to do so. As in *Trinity Lutheran, Espinoza*, and *Carson*, we anticipate (C.3) that the U.S. Supreme Court would be unlikely to find a sufficiently compelling justification for the religious penalty those provisions impose.

A. Public Charter Schools in Tennessee

The Tennessee Public Charter Schools Act of 2002, as amended, authorizes the creation of public charter schools to “[e]ncourage the use of different and innovative teaching methods” and “provide greater decision making authority to schools and teachers in exchange for greater responsibility for student performance.” Tenn. Code Ann. § 49-13-102(a)(3). The General Assembly intended public charters to serve as an “alternative means” of educating Tennessee children in a way that would “improve learning,” “close the achievement gap,” and provide more options for parents to meet their child’s unique needs. *Id.* § -102(a)-(b).

To achieve those purposes, the Act invites non-profit organizations to “sponsor” a public charter school. *Id.* § -104(16). The Act defines a public charter as a “public school in [Tennessee] that is established and operating under the terms of a charter agreement and in accordance with [the Act].” *Id.* § -104(14). The sponsor is the “proposed governing body” of such schools. *Id.* § -104(16). That non-profit sponsor “decid[es] matters” like “budgeting, curriculum and other operating procedures” for the public charter and “oversee[s its] management and administration.” *Id.* § -104(10). Public charter schools are “part of the state program of public education” and are funded primarily by state and local education dollars, not tuition. *Id.* §§ -106(a), (e)(1), -112(a)(1), (2). With certain exceptions, however, a charter may apply for a waiver from “any state board rule or statute that inhibits or hinders” the proposed school’s “ability to meet [its] goals or comply with [its] mission statement.” *Id.* § -111(p). That waiver provision furthers the Act’s goal of “allow[ing charters] maximum flexibility to achieve their goals.” *Id.* § -102(b).

The Act generally allows any non-profit 501(c)(3) entity to file an application for the establishment of a public charter. *Id.* §§ -104(16), -111(a)(1). But a sponsor may not be a for-profit entity, nonpublic school, other “private, religious or church school,” a postsecondary institution that is not regionally accredited, or a body that “promote[s] the agenda of any religious denomination or religiously affiliated entity.” *Id.* §§ -104(16), 49-6-3001(3)(A). Subsection 106(c) affirms: “A nonpublic school ... or other private, religious, or church school, shall not establish a public charter school.” In short, a sponsor must generally be a private, non-profit, non-religious entity that is not a pre-existing school or an unaccredited postsecondary institution. With parental support, a pre-existing traditional public school may apply to convert to a public charter school, but a pre-existing “private, parochial, cyber-based, or home-based school” may not attain charter status. *Id.* § 49-13-106(j)(3), (7).

Local education agencies (LEAs), the Achievement School District, and the Tennessee Public Charter School Commission may each authorize a public charter school in specified

circumstances. *Id.* §§ -104(4), -105(a), -108.¹ Approval of a charter takes the form of a written charter agreement between the sponsor and the authorizing entity. *Id.* § -110(a). That agreement must include “all material components” of the approved application. *Id.* The application includes a statement of “missions and goals,” including the proposed charter’s “academic focus,” an academic plan, a plan for tracking and addressing student performance, rules and policies for governing the school, and other financial and sponsorship information, among other components. *Id.* § -107(b). A charter agreement generally “expires” ten academic years “after the first day of instruction.” *Id.* § -110(b).

Public charters are subject to ongoing oversight by state and local agencies. After approval, a public charter sponsor must prepare and produce annual financial reports, apply to the authorizer to amend its charter, seek renewal every ten years and report on school performance during that period, and undergo an interim review by the authorizer in the fifth year of every ten-year operation period. *Id.* §§ -110(c), -111(m), -121(a)-(c), (k). Charter schools must also meet state performance standards, provide education services for students with disabilities and other needs, administer state assessments, operate within the boundaries of the authorizing school district, and comply with all applicable health and safety standards and state and federal non-discrimination laws. *Id.* § -111(a)(3), (5), (6), (7), (b), (c). Like all other public schools, *id.* §§ 49-5-101, -108, charter schools must follow the state board of education’s rules and regulations governing employee licensure and must employ teachers holding a Tennessee educator license, *id.* § 49-13-111(i), (j). And public charter schools are subject to state audit requirements. *Id.* § -111(k).

A charter school’s authorizer must “enforce compliance” with the charter agreement and the Act’s requirements. *Id.* § -111(d). If an authorizer determines that a sponsor has violated its charter or the school has been designated as a low-performing priority school, the authorizer may revoke the charter agreement after providing notice and following certain procedures. *Id.* § -122(a)-(g). Most revocation decisions may be appealed to the Tennessee Public Charter School Commission, unless the Commission is the authorizer. *Id.* § -122(h).

The Act also subjects public charter schools to public oversight. A public charter school’s records are “open for personal inspection and duplication” by any state citizen “to the same extent” as those of traditional public schools. *Id.* § -111(g). Also, the meetings of a public charter school’s governing body are “deemed public business” and must be held in compliance with Tennessee’s Open Meetings Act. *Id.* § -111(h).

Despite this governmental and public oversight, a public charter school has significant curricular and managerial freedom, as well as other characteristics that set it apart from traditional public schools. It can define its own “mission and goals.” *Id.* § -107(b)(1). And it has “control of instruction,” meaning it can develop its own curriculum, except that it “shall ... operate” as a “nonsectarian, nonreligious” school. *Id.* § -111(a)(2). Public charter schools may limit enrollment and may give enrollment preferences to economically disadvantaged students or children of the school’s employees or governing body members. *Id.* § -113(d)(5), (6). Public charters may also

¹ Subsection -141 provides that a local education agency “may ... sponsor” a public charter school, with the Commission as authorizer, but the Commission’s website lists no LEA-sponsored schools. *See* Tenn. Pub. Charter School Comm’n, Commission Schools, <https://bit.ly/4r8eyyo>.

select students through a lottery when applications exceed capacity. *Id.* § -113(d)(3)-(4). Participation in a public charter school “shall be based on parental choice,” and any student in the LEA where the charter school is located may apply. *Id.* § -113(a)-(b).

B. The Supreme Court’s Recent Free-Exercise Trilogy

The First Amendment to the U.S. Constitution prohibits the government from making a law that “prohibit[s] the free exercise” of religion. U.S. Const. amend. I. That language has long been understood to “‘protect[] religious observers against unequal treatment’ and subject[] to the strictest scrutiny laws that target the religious for ‘special disabilities’ based on their ‘religious status.’” *Trinity Lutheran*, 582 U.S. at 458 (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533, 542 (1993)).

Three times in the past decade, the U.S. Supreme Court has confirmed that “denying a generally available benefit” to a religious entity “solely on account of religious identity imposes” just such an impermissible “penalty on the free exercise of religion”—one that “can be justified only by a state interest ‘of the highest order.’” *Id.* at 458 (citation omitted); *see also Espinoza*, 591 U.S. at 475, 479; *Carson*, 596 U.S. at 780-81. It has clarified that “achieving greater separation of church and State” than the Establishment Clause “already ensure[s]” is not a “‘highest order’” interest. *Trinity Lutheran*, 582 U.S. at 466 (citation omitted). And the Court has reiterated that the Establishment Clause “is not offended when religious observers and organizations benefit from neutral government programs.” *Espinoza*, 591 U.S. at 474; *see also Carson*, 596 U.S. at 781.

First, in *Trinity Lutheran*, the Court held that Missouri violated the Free Exercise Clause by excluding religious entities from a reimbursement program for non-profit organizations that resurfaced their playgrounds. 582 U.S. at 462, 466. The Court explained that the State’s policy “put[the plaintiff church] to a choice”: It could participate in the reimbursement program, or it could “remain a religious institution.” *Id.* at 462. By conditioning a public benefit on religious status, the Court held, Missouri had “punished the free exercise of religion.” *Id.* And that punishment could not “withstand the strictest scrutiny” because the only interest Missouri offered—“skating as far as possible from religious establishment concerns”—did not qualify as compelling. *Id.* at 463, 466. Rather, the Free Exercise Clause limits any effort to “achiev[e] greater separation of church and State” than is constitutionally required. *Id.* at 466 (citation omitted). And “the exclusion of [a church school] from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution.” *Id.* at 467.

Next, in *Espinoza*, the Court held that Montana violated the Free Exercise Clause by excluding religious schools from a scholarship program for private school students. 591 U.S. at 484, 487. Montana law “bar[red] religious schools from public benefits solely because of the religious character of the schools.” *Id.* at 476. It thereby “‘impose[d] special disabilities on the basis of religious status’ and ‘condition[ed] the availability of benefits upon a recipient’s willingness to surrender [its] religiously impelled status.’” *Id.* at 478 (third alteration in original) (quoting *Trinity Lutheran*, 582 U.S. at 461-62). “Such status-based discrimination is subject to ‘the strictest scrutiny,’” and the State’s proffered justifications, including an interest in separating church and State “‘more fiercely’” than the U.S. Constitution, failed such scrutiny. *Id.* at 478, 484-87 (citations omitted).

Finally, in *Carson*, the Court held that Maine violated the Free Exercise Clause by barring religious schools from receiving public tuition-assistance funds. 596 U.S. at 780-81. There, the Court applied the same reasoning adopted in *Espinoza*: The Maine program, like the Montana one, “disqualif[ied] some private schools’ from funding ‘solely because they are religious.’” *Id.* at 780 (quoting *Espinoza*, 591 U.S. at 487). That triggered “the strictest scrutiny.” *Id.* (quoting *Espinoza*, 591 U.S. at 478). And Maine’s “antiestablishment interest d[id] not justify enactments that exclude[d] some members of the community from an otherwise generally available public benefit because of their religious exercise.” *Id.* at 781.

Carson also rejected any distinction between discrimination based on religious status and discrimination based on religious use—i.e., the use of funds for religious purposes such as promoting a particular faith or providing religious instruction. *Id.* at 786-87. Use-based restrictions in the school context are no less “offensive to the Free Exercise Clause,” the Court reasoned, because “[e]ducating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school.” *Id.* at 787 (quoting *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 753-54 (2020)). “Any attempt to give effect” to a status-versus-use “distinction by scrutinizing whether and how a religious school pursues its educational mission,” the Court explained, “would also raise serious concerns about state entanglement with religion and denominational favoritism.” *Id.* Thus, “[r]egardless of how the benefit and restriction [were] described,” the program impermissibly “operate[d] to identify and exclude otherwise eligible schools on the basis of their religious exercise.” *Id.* at 789.

C. Tennessee’s Public Charter School Program Likely Offends Free Exercise.

Because some of the Tennessee Public Charter Schools Act’s provisions exclude religious entities from participation solely on the basis of religious status or use, they would likely trigger strict scrutiny. Others bar religious schools from participation along with other private schools, meaning they likely comport with the Free Exercise Clause. The relevant provisions fall into three categories:

- (1) The “Sponsor Provision” provides that public charter school sponsors may not include a “religious[] or church school” or a body that “promote[s] the agenda of any religious denomination or religiously affiliated entity,” Tenn. Code Ann. § 49-13-104(16);
- (2) the “Operation Provision” provides that a “public charter school shall ... [o]perate as a public, nonsectarian, nonreligious public school,” *id.* § -111(a)(2); and
- (3) the “Schools Provisions” provide that “religious[] or church school[s] shall not establish a public charter school” and that a “parochial” school shall not be allowed to convert to charter status, *id.* § -106(c), (j)(7).

We address each category in turn. While the Sponsor and Operation Provisions impose special disabilities on religious entities, the Schools Provisions do not. If subjected to strict scrutiny, the Sponsor and Operation Provisions would be unlikely to survive review.

1. *The Sponsor and Operation Provisions penalize the free exercise of religion.*

Both the Sponsor and Operation Provisions “put[]” otherwise qualified religious sponsors “to a choice between being religious or receiving government benefits.” *Espinoza*, 591 U.S. at 480. Thus, the Supreme Court would likely subject those provisions to the strictest scrutiny.

The Act generally allows any 501(c)(3) non-profit organization to apply to become a public charter school sponsor and promote a mission. Tenn. Code Ann. §§ 49-13-104(16)(A); -111(a)(1). The Act grants the sponsor “maximum flexibility to achieve [its] goals” and allows it to seek exemption from many state board rules and statutory provisions that “hinder[]” the charter school’s “ability to meet [those] goals or comply with [its] mission statement.” *Id.* §§ -102(b), -111(p). And sponsors have considerable freedom to develop a public charter school’s “mission and goals” and “academic plan.” *Id.* § -107(b). Public charter schools are subject to the same academic standards as public schools, *id.* § -111(a)(3), and must generally “ensure that instructional materials align with [those] standards,” Tenn. Pub. Charter Sch. Comm’n, Policy No. 4400. But the authorizer may approve the use of different textbooks and instructional materials. *See* Tenn. Dep’t of Educ., Local Education Agency and Public Charter School Waiver Guidance at 3-4 (July 2025), bit.ly/3KLHA6g. Indeed, the charter model intentionally gives individual schools the opportunity to pursue innovative instructional methods—whether that’s a “child-led” Montessori curriculum or a curriculum oriented around “read[ing] the classics.”² *See* Tenn. Code Ann. § 49-13-102(a)(3). In short, the sponsor has “control of instruction.” *Id.* § 49-13-111(a)(2).

But the Act treats religion differently. A sponsor may not be a “proposed governing body” that “promote[s] the agenda of any religious denomination or religiously affiliated entity.” *Id.* § -104(16)(B). And the only express limitation the Act imposes on a public charter school’s curriculum or mission is that it “shall ... [o]perate” as a “nonsectarian, nonreligious” school—it cannot include religious instruction in its curriculum or otherwise promote a religious mission. *Id.* § -111(a)(2). The upshot is that religious entities are uniquely singled out for exclusion from participating in Tennessee’s public charter school system.³

The Act, then, “expressly discriminates against otherwise eligible” participants “by disqualifying them from a public benefit solely because of their religious character.” *Trinity Lutheran*, 582 U.S. at 462; *see also Carson*, 596 U.S. at 779. The Sponsorship Provision excludes sponsors “solely because of religious status.” *Espinoza*, 591 U.S. at 476. And the Operation

² *See, e.g., Our Program, Invictus Nashville Charter School* (last visited Oct. 13, 2025), <https://www.invictus-nash.org/our-curriculum>; *Classical Education*, Nashville Classical (last visited Oct. 13, 2025), <https://nashvilleclassical.org/about/>.

³ *Cf. Tenn. Op. Atty. Gen. No. 03-046*, April 16, 2003 (opining that a church could be a sponsor of a public charter school only in the unlikely circumstance that the church (1) was not a pre-existing church or religious school, (2) did not promote the agenda of any religious denomination or religiously affiliated entity, (3) was a not-for-profit entity, and (4) engaged a not-for-profit entity to operate the school as “a public, nonsectarian, non-religious school”), <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2003/op03-046.pdf>. That opinion obviously predates the major recent developments in free exercise law discussed herein.

Provision denies entities access to funding “on the basis of [its] anticipated religious use.” *Carson*, 596 U.S. at 789. Both provisions, then, “put [religious entities] to a choice,” *Trinity Lutheran*, 582 U.S. at 462: They may participate in the public charter school program if they check their religious mission at the school door, or they must turn down the public funding associated with operating a public charter school. That kind of “penalty on the free exercise of religion ... can be justified only by a state interest ‘of the highest order.’” *Id.* at 458 (citation omitted).

2. *The Schools Provisions do not impose special religious disabilities.*

The Schools Provisions do not single out religious entities for special treatment. *Cf. Espinoza*, 591 U.S. at 478. While “religious[] or church school[s] shall not establish a public charter school,” nor shall any “other private ... school” or “home school.” Tenn. Code Ann. § 49-13-106(c); *id.* § 49-6-3001(c)(3)(A). Similarly, though the Act does not allow conversion of a “parochial” school to charter status, it also does not permit the “conversion of any private, ... cyber-based, or home-based school.” *Id.* § 49-13-106(j)(7). And the Act only allows traditional public schools to convert to public charter schools in narrow circumstances, and even then, the converted schools are subject to different requirements and conditions. *Id.* § -106(j)(3), (5). So these provisions do not treat religious entities “unequal[ly]” from similarly situated non-religious entities. *Cf. Trinity Lutheran*, 582 U.S. at 458 (quoting *Church of Lukumi Babalu Aye*, 508 U.S. at 533). Likewise, the Sponsor Provision excludes not just “religious” or “church school[s]” but all “private schools” from sponsorship, Tenn. Code Ann. § 49-13-104(16)(A), so it does not “impose special disabilities on the basis of religious status.” *Espinoza*, 591 U.S. at 475 (quoting *Trinity Lutheran*, 582 U.S. at 461). Instead of religion, the target of all of these provisions appears to be pre-existing schools. The legislature may have reasonably concluded that one way to accomplish the Act’s purpose of providing *more* educational opportunities was to prevent already existing private schools from converting to public charter schools. *See* Tenn. Code Ann. § 49-13-102(a)-(b).

3. *The Sponsor and Operation Provisions likely would not survive strict scrutiny.*

The U.S. Supreme Court’s free-exercise trilogy has rejected the likeliest interest supporting the Sponsor and Operation Provisions’ religious exclusions—the interest in avoiding an Establishment Clause violation.

When analyzing constitutional challenges under the U.S. Constitution, the U.S. Supreme Court employs differing tiers of scrutiny. If “strict scrutiny” applies, the challenged governmental law or policy must be “narrowly tailored to serve a compelling interest.” *William-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015). To justify a religion-based restriction on participation in a public benefit, the government almost invariably asserts an interest in avoiding an Establishment Clause violation. No such compelling interest exists here.

a. The Establishment Clause directs that “Congress shall make no law respecting an establishment of religion.” U.S. Const. amend. I. By its text, the Clause applies only to “Congress,” not the States. *Id.* And indeed, Founding-era States maintained established churches even after ratification of the First Amendment. *See* Philip Hamburger, *Separation of Church and State* 89-91 (2002). Far from separating church from State, the Establishment Clause operated as

“a federalism provision intended to prevent Congress from *interfering with state establishments.*” *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49 (2004) (Thomas, J., concurring in judgment) (emphasis added). While the Supreme Court has departed from the text and history to incorporate the Establishment Clause against the States, *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 8 (1947), it recently “instructed that the Establishment Clause must be interpreted by reference to historical practices and understandings,” *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 535 (2022) (cleaned up). A strict adherence to that approach would nullify any Establishment Clause limitations on States (while still guaranteeing robust free exercise, associational, and expressive rights to protect Tennesseans’ diverse religious commitments). But even accepting the Clause’s incorporation against the States, the history-driven test from *Kennedy* makes clear that the Establishment Clause poses no barrier to religious charter schools.

No Founding-era “‘historic and substantial’ tradition supports [the] decision to disqualify religious schools from government aid.” *Espinoza*, 591 U.S. at 480 (citation omitted). As the Court explained in *Espinoza*, Founding-era governments “provided various forms of aid to religious schools.” *Id.* at 481. In large American cities, public aid helped support private schools run by various religious denominations for the education of the poor. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2173-74 (2003). At the federal level, Congress supported “denominational schools in the District of Columbia until 1848” and “paid churches to run schools for American Indians through the end of the 19th century.” *Espinoza*, 591 U.S. at 481. And even later, after the Civil War, Congress “spent large sums on education for emancipated freedmen, often by supporting denominational schools in the South.” *Id.*

These publicly supported schools were far from “secular”; “all [colonial] schools used curriculum that was embued [sic] with religion.” McConnell, *supra*, at 2171. In Massachusetts, for example, colonial law required public support for education; towns generally bore “[f]inancial responsibility” for educating “the poor,” while “the clergy generally were charged with conducting or controlling the schools.” *Id.* at 2172. New Hampshire and Connecticut had similar policies. *Id.* While the provision of education was less structured in the middle and southern colonies, “the roles of preacher and schoolmaster,” as in New England, “were often one and the same.” *Id.* at 2173. The “largest system of schools in the colonial period” was established by the Church of England’s missionary arm, which provided free or subsidized education for the poor, often with the support of public funds from colonial governments. *Id.*

Even after northern and western States established public school systems in the antebellum era, the character of the education provided remained religious. *Id.* at 2174; *see also Espinoza*, 591 U.S. at 502-05 (Alito, J., concurring). “Most early school superintendents were Protestant clergymen.” McConnell, *supra*, at 2174. In fact, the “aim” of the common school movement, which produced the predecessors of many modern public school systems, was “to establish a system that would inculcate a form of ‘least-common-denominator Protestantism.’” *Espinoza*, 591 U.S. at 503 (Alito, J., concurring) (quoting John C. Jeffries & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev., 279, 298 (2001)). “This was accomplished with daily reading from the King James Bible.” *Id.*

A practice of prohibiting public support of “sectarian” schools emerged in the second half of the 19th century. *Espinoza*, 591 U.S. at 482. At that time, “‘sectarian’ was code for ‘Catholic.’” *Id.* (quoting *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion)). And many of the bars on state funding of sectarian schools were “‘born of bigotry’ and ‘arose at a time of pervasive hostility to the Catholic Church and to Catholics in general.’” *Id.* (quoting *Mitchell*, 530 U.S. at 828-29 (plurality opinion)). Those late-in-time provisions, with their “‘shameful pedigree,’” do not “‘evinced a tradition that” “inform[s]” the U.S. Supreme Court’s “understanding of the Free Exercise Clause.” *Id.* (citation omitted).

All of this makes clear that “historical practices and understandings” are consistent with public support of religious schools, *Kennedy*, 597 U.S. at 535 (citation omitted), and thus no antiestablishment interest could spare the Act’s exclusions of religious sponsors and school operation from invalidation on free exercise grounds, *see Espinoza*, 591 U.S. at 484-87.

b. The U.S. Supreme Court’s recent decisions confirm as much. Under the Court’s free-exercise trilogy, distributing public dollars to religious schools through the neutral administration of the public charter school program would not violate the Establishment Clause. The Court has “repeatedly held that the Establishment Clause is not offended when,” as would be true here, “religious observers and organizations benefit from neutral government programs.” *Espinoza*, 591 U.S. at 474; *see also Carson*, 596 U.S. at 781. Religious charter sponsors would apply to the program and enter into a charter agreement with a governmental authorizer, just like non-religious ones. That religious neutrality is all that matters for Establishment Clause purposes. *Trinity Lutheran*, 582 U.S. at 463. And the trilogy cases make clear that any state interest in separating church and State more stringently than required by the Establishment Clause “‘cannot qualify as compelling’ in the face of [an] infringement of free exercise.” *Espinoza*, 591 U.S. at 484-85 (quoting *Trinity Lutheran*, 582 U.S. at 466).

“Any Establishment Clause objection” to state funds going to religious charters would be “particularly unavailing because the government support [would] make[] its way to religious schools only as a result of [Tennesseans’] independently choosing to [enroll at] such schools.” *Id.* (citing *Locke v. Davey*, 540 U.S. 712, 719 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639, 649-53 (2002)). Participation in a public charter school “shall be based on parental choice,” Tenn. Code Ann. § 49-13-113(a), and public charter schools receive state funding *based on the number of students they enroll*, *id.* § -112(a)-(b). So even if the Establishment Clause precluded direct funding of religious entities, the “independent and private choice[s]” of Tennessee parents to enroll their children in a religious charter school would “br[ea]k” “the link between government funds and religious [instruction]” for Establishment Clause purposes. *Locke*, 540 U.S. at 719.

c. The contrary arguments lack merit. *See* Respondent’s Brief, *Okla. Statewide Charter Sch. Bd. v. Drummond*, 605 U.S. 165 (No. 24-394). In *Drummond*, the challenger advanced two primary arguments for cancelling a Catholic charter school’s contract with Oklahoma: One, *Carson* stated that Maine “may provide a strictly secular education in its public schools,” 596 U.S. at 785, and Oklahoma’s public charter schools are public schools under “all of the traditional criteria.” *Id.* at 21, 33. Two, “as public schools,” Oklahoma’s public charter schools are

government entities that lack free-exercise rights. *Id.* at 33-36.⁴ That two-step gets the analysis backwards: First, public charter schools (at least Tennessee’s) are not government entities for constitutional purposes under the Court’s government-entity analysis, and second, *Carson* did not establish a new framework for determining whether privately run schools have free exercise rights.

First, “public” charter schools are not governmental entities that lack protection under the Free Exercise Clause. For constitutional purposes, the divide between private and government entities generally turns on two considerations: whether a body is “Government-created” and whether it is Government-“controlled.” *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 394-95 (1995). In *Biden v. Nebraska*, for example, the Court treated the non-profit corporation at issue as governmental for Article III standing purposes because the body was “created by the State to further a public purpose, [was] governed by state officials and state appointees, report[ed] to the State and [could] be dissolved by the State.” 600 U.S. 477, 491 (2023). By contrast, in the *Regional Rail Reorganization Act Cases*, the court held that a statutorily created body was “not a [governmental] instrumentality,” despite the presence of federally appointed members on its board, because government control was temporary and served a private purpose—shareholder welfare. 419 U.S. 102, 152 (1974); see also *Bank of the U.S. v. Planters’ Bank of Ga.*, 22 U.S. (9 Wheat. 904, 906-08 (1824) (similar). Indeed, in applying the state action doctrine, the Court has made clear that granting a corporate charter by statute does not cause the resulting body to “lose [its] essentially private character.” *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 544 (1987).

Applying these principles here, Tennessee public charter schools are neither State-created nor State-controlled.

Start with creation. While it is true that the Act authorizes public charter schools in Tennessee, each individual school owes its creation to the school’s sponsor. That follows from the language of the Act, which refers to “a sponsor seek[ing] to establish a new public charter school,” Tenn. Code Ann. § 49-13-106(i); see also *id.* § -107(b) (similar), and which forbids nonpublic schools from “establish[ing] a public charter school,” *id.* § -106(c). Even when an “existing public school” converts to a public charter school under the Act, the “sponsor” must “submit the *sponsor’s* application for conversion to the local board of education.” *Id.* § -106(j)(3), (4) (emphasis added). A state or local governmental entity may authorize the creation of a public charter school, *id.* §§ -104(4), -105(a), -108, but it is the sponsor that does the creating. The sponsor, not the State, designs and applies to run a public charter school—one based on the sponsor’s definition of the school’s “mission and goals” and the sponsor’s proposed curriculum and other plans. *Id.* § -107(b)(1), (2). Indeed, the school has no existence apart from the sponsor:

⁴ Respondent also argued that Oklahoma’s public charter schools are state actors, but all parties and the United States agreed that the court’s state-action jurisprudence was “an awkward fit for the question presented here, which does not ask whether [the public charter sponsor] took a particular action that violated someone else’s rights.” Brief of the United States as Amicus Curiae in support of Petitioners, at 19, *Okla. Statewide Charter Sch. Bd. v. Drummond*, 605 U.S. 165 (No. 24-394). Rather, the “central question” is whether a public charter school “itself wholly lacks constitutional protections that ordinarily protect private entities—specifically, Free Exercise protections—by virtue of its character as a government entity.” *Id.*

Charter agreements typically refer to the charter school and the sponsor or governing body “interchangeably.” *See, e.g.*, 2024 Amended Charter Agreement with Invictus Nashville Charter School (TPCSC Contract #0017), <https://bit.ly/3K3ZZv1>; MNPS Contract# 2-158009-02 with Valor Collegiate Academy, <bit.ly/4p91DdF>. The State merely provides the conditions for public charter schools and invites private entities to bring them into existence.

Next, governance. Tennessee public charter schools are governed by privately appointed governing bodies associated with the non-profit sponsor. Tenn. Code Ann. § 49-13-104(10), (15); *see also id.* § -109. The Act specifies that the governing body “shall include” a parent representative and specifies additional composition requirements for schools that have an “advisory school council,” instead of a governing body. *Id.* § -109(a)(1). Unlike the bodies *Lebron* and *Biden* found to be governmental entities, however, no governing body must have members who are publicly elected or appointed by a public official, *cf. Lebron*, 513 U.S. at 385; *Biden*, 600 U.S. at 490—even accepting the notion that appointment bears on the nature of the entity. Tennessee charter school governing bodies are entirely private. Tenn. Code Ann. § 49-13-109.

And those private governing bodies control the operation of a public charter school.⁵ To be sure, a local education agency or state-run entity must authorize a public charter school, enforce compliance with the charter agreement and the Act, and provide other ongoing oversight. *See supra* pp. 2-3. But that supervisory role does not amount to the level of control exercised by the government in *Lebron* and *Biden*. *Cf. S.F. Arts*, 483 U.S. at 544 (“extensive regulation” alone “does not transform the actions of the regulated entity into those of the government”). Rather, governmental entities’ participation in a public charter school is closer to Congress’s in granting the United States Olympic Committee a corporate charter with certain statutory requirements or the State of Georgia’s in chartering a bank. *See S.F. Arts*, 483 U.S. at 543-44; *Bank of U.S.*, 22 U.S. at 906-08. Here, it is the charter agreement and the Act that govern the public charter school’s relationship with its governmental authorizer, and that charter does not cause the school to “lose [its] essentially private character.” *S.F. Arts*, 483 U.S. at 543-44. Nor does any governmental entity “exercise[] [any] power or privilege” over the school “not derived from [that] charter” and the Act. *See Bank of U.S.*, 22 U.S. at 908; *see also* Tenn. Code Ann. § 49-13-104(14) (a public charter “operat[es] under the terms of a charter agreement and in accordance with [the Act]”).

Nor does the statutory process for dissolving a public charter school indicate that charter schools are government entities. A charter school’s authorizer may revoke a public charter school agreement for a limited number of statutorily specified reasons, including a “material violation of . . . the charter agreement.” Tenn. Code Ann. § 49-13-122(a)-(b); *cf. Biden*, 600 U.S. at 491 (noting the State could “set the terms of [the body’s] dissolution” (citation omitted)). But the authorizer can do so only after providing the school written notice thirty days prior to decision, a written explanation of reasons, and an opportunity to appeal to the Commission (unless the authorizer is the Commission). Tenn. Code Ann. § 49-13-122(e)-(h). Moreover, except in emergency situations, the authorizer must first provide the charter an opportunity to “remedy the issue.” *Id.* § -122(c)-(d). These terms are consistent with termination rights in private and government contracts. *See LJL Transp., Inc. v. Pilot Air Freight Corp.*, 962 A.2d 639, 649-50 (Pa. 2009). They

⁵ The one exception to this rule is that an LEA may sponsor a public charter school, Tenn. Code Ann. § 49-13-141, though it does not appear that any LEA has done so, *see supra* p. 3 n.1.

also provide the due process rights typically afforded a private party, but not a governmental entity. *See Ysursa v. Pocatello Educ. Ass’n*, 555 U.S. 353, 363-64 (2009).

The other “governmental” characteristics of charter schools cannot overcome the lack of government control. For example, the Tennessee Code uses the descriptor “public” to reference a variety of private “individual[s]” and “corporat[e]” structures that operate utilities. Tenn. Code Ann. § 65-4-101(6)(A). And many non-profit corporations are treated like public bodies whose meetings must be open to the public. Tenn. Code Ann. §§ 8-44-102(a)-(b), -107. In addition, many non-public schools must, like charter schools, employ teachers with an active Tennessee educator license. Tenn. Comp. R. & Regs. § 0520-07-02.02(d). And many non-public schools must administer a nationally standardized test every year, which may include the same test administered in Tennessee public schools. *See* Tenn. Dep’t of Educ., FAQ: Standardized Testing for Non-Public Schools, <https://bit.ly/4nYUqvJ>. As these examples illustrate, statutory labels and characteristics are too imprecise to define whether an entity is public or private. And while statutory provisions may be “dispositive” of an entity’s “status as a [g]overnment entity for purposes of matters that are within [the legislature’s] control,” “it is not for [the legislature]” to say “what the Constitution regards as the Government.” *Lebron*, 513 U.S. at 392.

In sum: Tennessee’s public charter schools are not government entities for constitutional purposes and may assert free exercise rights.

Second, *Carson*’s statement that States “may provide a strictly secular education in its public schools” did not establish an alternative framework for assessing whether an entity has free exercise rights. 596 U.S. at 785. In *Carson*, Maine argued that the tuition-assistance program (which parents could use to pay tuition for secular private schools but not religious schools) was providing the “rough equivalent of the public school education that Maine [could] permissibly require to be secular.” *Carson*, 596 U.S. at 782 (citation omitted). The Court’s passing observation that Maine could provide a secular education in its *public* schools—and its discussion of the differences between those schools and the private program participants—only underlined Maine’s efforts to “manipulate[]” the “‘definition’” of the challenged program to avoid First Amendment problems. *Id.* at 784 (citation omitted). *Carson* did not suggest, much less hold, that its discussion of those differences displaced the government-entity analysis for determining whether a school may assert free exercise rights.

To the contrary, *Carson* made clear that the free exercise trilogy cases “turn[] on the substance of free exercise protections, not on the presence or absence of magic words.” 596 U.S. at 785. It explained that States could always recharacterize “‘a particular program ... to subsume the challenged condition,’” and it said that “to allow States to ‘recast a condition on funding’ in this manner would be to see ‘the First Amendment ... reduced to a simple semantic exercise.’” *Id.* (quoting *Agency for Int’l Dev. v. Alliance for Open Soc. Int’l, Inc.*, 570 U.S. 205, 215 (2013)). Said otherwise, a State may not simply “redefin[e]” a private party’s participation in a public benefit as a governmental activity to avoid constitutional restraints. *See id.* at 786; *cf. Jackson v. Metrop. Edison Co.*, 419 U.S. 345 & n.7, 350-54 (1974) (rejecting argument that statutorily labeled “public utility” was a state actor, despite its private ownership and operation). So long as the beneficiaries of a public educational program are private—that is, non-government—entities, a State may not exclude religious entities from the benefit. *See Carson*, 596 U.S. at 785.

And here, “[i]n order to provide” Tennesseans with “education[al]” alternatives to traditional public schools, “[Tennessee] has decided *not* to operate schools of its own, but instead to” contract with non-profit entities to establish such schools. *See id.*; *see also* Tenn. Code Ann. § 49-13-102 (describing the Act’s innovative purposes). “[Tennessee’s] administration of that benefit is subject to the free exercise principles governing any such public benefit program—including the prohibition on denying the benefit based on a recipient’s religious exercise.” *Carson*, 596 U.S. at 785. That’s true, even though operating a public charter school comes with significant strings attached—some of which resemble statutory requirements imposed on Tennessee public schools. “All corporations act under charters granted by a government, usually by a State,” but they “do not thereby lose their essentially private character.” *S.F. Arts*, 483 U.S. at 543-44.

* * *

Tennessee “need not subsidize” privately run charter schools, but having “decide[d] to do so, it cannot disqualify” some schools “solely because they are religious.” *Carson*, 596 U.S. at 785 (quoting *Espinoza*, 591 U.S. at 487). Under current U.S. Supreme Court precedent, then, Tennessee’s bar on religious charter schools likely violates the Free Exercise Clause of the First Amendment.

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