

THE EMERGING POSSIBILITY OF RELIGIOUS CHARTER SCHOOLS: A CASE STUDY OF ARIZONA AND MASSACHUSETTS

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In July 2022, Arizona became the first state to create a universal school-choice program by passing the Empowerment Scholarship Account Program, an education savings account (ESA) for all students outside the public school system.¹ Over the past thirty years, Arizona has expanded its school choice offerings, which includes one of the largest charter school systems in the nation.² Today, students in Arizona have many choices for school, including traditional public schools, charter schools, magnet schools, secular private schools, and religious private schools. In the future, could one of those options be a religious charter school?

Justice Breyer’s dissent in *Espinoza v. Montana Department of Revenue* warned of the emergence of religious charter schools: “What about charter schools? . . . [W]ould the majority’s rule . . . trigger[] a constitutional obligation to fund private religious schools?”³ Other scholars have considered this possibility,⁴ most earnestly since the Supreme

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1 *Arizona Enacts Universal ESA Program, Expanding School Choice for All K-12 Families*, GILA VALLEY CENT. (July 12, 2022), <https://gilavalleycentral.net/arizona-enacts-universal-esa-program-expanding-school-choice-for-all-k-12-families/> [https://perma.cc/N6KW-8SBE].

2 Anne Ryman, *20 Years of School Choice: How Arizona Has Evolved*, AZCENTRAL. (Nov. 1, 2015, 1:59 PM), <https://www.azcentral.com/story/news/local/phoenix/education/2015/10/30/arizona-education-school-choice-history/73409664/> [https://perma.cc/6BP4-XSHB].

3 *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2291 (2020) (Breyer, J., dissenting).

4 *E.g.*, Stephen D. Sugarman, *Is It Unconstitutional to Prohibit Faith-Based Schools from Becoming Charter Schools*, 32 J.L. & RELIGION 227, 227 & n.1 (2017); LAWRENCE D. WEINBERG,

Court's *Espinoza* decision in 2020,⁵ and one state attorney general proposed his own legal analysis last year.⁶ The Archdiocese of Oklahoma City and the Diocese of Tulsa have submitted an application for a Catholic virtual charter school in Oklahoma and received approval in June 2023 to open in fall of 2024, with litigation sure to follow.⁷

There are two constitutional questions at stake. First, are religious charter schools constitutionally permissible, and second, if allowed, are they constitutionally required? Although these questions have been explored by scholars in the federal context, less attention has been given within the setting of state constitutions. Given the variations of charter-school laws and state constitutions regarding religious funding, each state's fact-specific situation could provide a different answer. This Note intends to explore the possibility of religious charter schools in the context of two states: Arizona and Massachusetts. Both states have charter schools as well as language in their state constitutions prohibiting the governmental funding of private schools.⁸ However, each state's education system looks very different, especially concerning public funding for religious schools.⁹ Arizona's encouragement of school choice suggests the state is a strong candidate for religious charter schools, while Massachusetts's Democratic politics makes it unlikely that school choice would be expanded, and even more so for religious schools.

This Note will first explain the general context of charter schools and why religious charter schools could be beneficial. Then, the Note will establish the legal framework supporting religious charter schools, particularly legal precedent on the state action doctrine and religious school funding. Then, the analysis will focus on the possibility of

RELIGIOUS CHARTER SCHOOLS: LEGALITIES AND PRACTICALITIES 7–12 (Bruce S. Cooper ed., 2007). Here, religious charter schools are defined as charter schools that are explicitly religious, as opposed to charter schools founded by religious groups and informed by religious values but are not explicitly religious. See, e.g., Marcia J. Harr Bailey & Bruce S. Cooper, *The Introduction of Religious Charter Schools: A Cultural Movement in the Private School Sector*, 18 J. RSCH. ON CHRISTIAN EDUC. 272 (2009).

5 E.g., Joshua Dunn, *A Landmark Ruling for Religious Schools*, EDUC. NEXT, Winter 2021, at 48, 53–54; NICOLE STELLE GARNETT, MANHATTAN INST., RELIGIOUS CHARTER SCHOOLS: LEGALLY PERMISSIBLE? CONSTITUTIONALLY REQUIRED? 4 (2020).

6 Okla. Att'y Gen., Opinion Letter (Dec. 1, 2022). This letter was later withdrawn by the subsequent Oklahoma Attorney General. Mark Walsh, *A Major Reversal on Religious Charter Schools in Oklahoma*, EDUC. WEEK (Feb. 24, 2023), <https://www.edweek.org/policy-politics/a-major-reversal-on-religious-charter-schools-in-oklahoma/2023/02> [<https://perma.cc/ET9T-XAQ4>].

7 Sarah Mervosh, *Oklahoma Approves First Religious Charter School in the U.S.*, N.Y. TIMES (June 7, 2023), <https://www.nytimes.com/2023/06/05/us/oklahoma-first-religious-charter-school-in-the-us.html> [<https://perma.cc/FLM2-A25L>].

8 See *infra* subsections III.A.1, III.B.1.

9 See *infra* subsections III.A.1, III.B.1.

religious charter schools in Arizona and Massachusetts based on each state's political and legal context. Both states are likely required to support religious charter schools given their current secular charter school systems, but that outcome depends on the state constitutionality of each state's charter school system itself. Neither state is required to support religious charter schools if there are no secular charter schools. I argue that Massachusetts is more likely to act against religious charter schools, potentially by abolishing the existing charter school system, while Arizona would likely be required to have religious charter schools, assuming a resolution on its charter schools' legal status. This framework of analysis could be extended to other states, providing a starting point for the viability of religious charter schools elsewhere.

I. CHARTER SCHOOLS

Since the first charter-school law was passed in Minnesota in 1991,¹⁰ charter schools have become a significant part of the United States' education system.¹¹ Charter schools began as an effort to reform public education and provide public schools more flexibility and opportunity for innovation.¹² Supporters argued that if charter schools were independently managed, there would be more freedom to try new education and teaching strategies, which the public schools could then adopt.¹³ Charter schools are "public schools" by name, but they are regulated differently from traditional public schools. Although there are similarities and patterns in how states structure charter laws, the specifics vary by state. Generally, when a state creates a charter-school law, the state gives power to "authorizers" who may grant charters.¹⁴ The authorizers can grant charters to independent individuals or organizations that operate charter schools.¹⁵ The charter schools then form governing boards to oversee the school, which are usually

10 1991 Minn. Laws 943 (codified as amended at MINN. STAT. § 124E (2022)); *Charter Schools*, NAT'L CTR. FOR EDUC. STAT., <https://nces.ed.gov/fastfacts/display.asp?id=30> [<https://perma.cc/5XR5-45GH>].

11 See Priscilla Wohlstetter, Joanna Smith & Caitlin C. Farrell, *The Choices and Challenges of Charter Schools, Revisited*, 9 J. SCH. CHOICE 115, 115 (2015).

12 Gary Miron, *Description and Brief History of Charter Schools: What Are the Main Issues? What Do the Data Say About Their Effectiveness?*, in THE WILEY HANDBOOK OF SCHOOL CHOICE 224, 224 (Robert A. Fox & Nina K. Buchanan eds., 2017).

13 RICHARD D. KAHLBERG & HALLEY POTTER, A SMARTER CHARTER: FINDING WHAT WORKS FOR CHARTER SCHOOLS AND PUBLIC EDUCATION 1 (2014).

14 See D. Epple, R. Romano & R. Zimmer, *Charter Schools: A Survey of Research on Their Characteristics and Effectiveness*, in 5 HANDBOOK OF THE ECONOMICS OF EDUCATION 139, 141 (Eric A. Hanushek, Stephen Machin & Ludger Woessmann eds., 2016). The number and type of authorizers vary by state. See *id.* at 141–42.

15 *Id.* at 143.

composed of private individuals, though some public officials may be included.¹⁶ Charters are usually granted for a period of three to five years, and the state can revoke the charter if the school's objectives are not met.¹⁷ While there are different levels of state supervision, charter schools are typically not directly controlled by the state.¹⁸

In the last thirty years, charter schools have experienced significant growth. Charter schools are now present in forty-three states, as well as Guam, Puerto Rico, and Washington, D.C.¹⁹ As schools of choice, any student in the state may attend a charter school.²⁰ In 2022, more than 3.7 million students attended one of 7,800 charter schools.²¹ Over seven percent of public-school students attend a charter school,²² though in some school districts that percentage is considerably more.²³ Charter schools enroll a higher percentage of disadvantaged students than traditional public schools, including students of color and low-income students.²⁴ Some charter schools specifically target students from disadvantaged groups.²⁵ Many urban areas have a higher percentage of charter schools, and charter schools are less likely to be found in rural areas.²⁶ In the last fifteen years, the number of charter

16 See Miron, *supra* note 12, at 226.

17 *Id.* at 224–25.

18 *Id.* at 224.

19 *Charter Schools, supra* note 10; Yueting “Cynthia” Xu, *Where Are Charter Schools Located?*, NAT’L ALL. FOR PUB. CHARTER SCHS.: CHARTER SCH. DATA DIG. (Dec. 6, 2022, 3:21 PM), <https://data.publiccharters.org/digest/charter-school-data-digest/where-are-charter-schools-located/> [<https://perma.cc/VM6A-NJTE>].

20 See Miron, *supra* note 12, at 226.

21 Jamison White, *How Many Charter Schools and Students Are There?*, NAT’L ALL. FOR PUB. CHARTER SCHS.: CHARTER SCH. DATA DIG. (Dec. 6, 2022, 11:38 AM), <https://data.publiccharters.org/digest/charter-school-data-digest/how-many-charter-schools-and-students-are-there/> [<https://perma.cc/75KK-GRSF>].

22 *Id.* In the world of school choice, this number is significantly more than the number of students who attend private schools through a voucher or similar program. See AM. FED’N FOR CHILD. GROWTH FUND, 2021 SCHOOL CHOICE GUIDEBOOK 8 (2021) (listing 604,619 students enrolled in private-choice programs for 2020–21 school year).

23 For example, almost all of New Orleans’ public schools are charter schools. Following Hurricane Katrina, the New Orleans public school system transitioned almost entirely to charter schools, with great success. DOUGLAS N. HARRIS & MATTHEW F. LARSEN, EDUC. RSCH. ALL. FOR NEW ORLEANS, WHAT EFFECT DID THE NEW ORLEANS SCHOOL REFORMS HAVE ON STUDENT ACHIEVEMENT, HIGH SCHOOL GRADUATION, AND COLLEGE OUTCOMES? (2018).

24 Yueting “Cynthia” Xu, *Who Attends Charter Schools?*, NAT’L ALL. FOR PUB. CHARTER SCHS.: CHARTER SCH. DATA DIG. (Dec. 6, 2022, 11:38 AM), <https://data.publiccharters.org/digest/charter-school-data-digest/who-attends-charter-schools/> [<https://perma.cc/RL98-UUT3>].

25 For example, Urban Prep educates young black men from high-need communities in Chicago with the goal of preparing them for college. URB. PREP ACADS., <https://www.urbanprep.org/> [<https://perma.cc/4QGV-QE6B>].

26 Xu, *supra* note 19.

schools has doubled, the number of charter-school students has tripled, and charter-school enrollment experienced one of its largest growth-rate increases during the COVID-19 pandemic.²⁷

The growth of charter schools reflects a growing demand for charter schools, and there are many reasons why a family may choose a charter school over a traditional public school. Some students are escaping failing public schools, or students may prefer the unique structure and opportunities that a charter school provides.²⁸ Parents may appreciate the parental involvement in the charter school or believe in the specific charter school's mission.²⁹ Today, there is a unique need for the characteristics that a charter school offers. Since 2020, school-children have experienced significant learning loss as the result of the pandemic, which calls for innovative strategies to correct this decline.³⁰ As schools with the independence to go beyond traditional approaches, charter schools have a distinct opportunity to use experimental and inventive education ideas to help students through this learning crisis. In particular, charter schools tend to disproportionately enroll minority and low-income students, especially in urban areas, which are groups that experienced the greatest learning losses.³¹ Reports and studies have found that charter schools report better outcomes for these groups of students, indicating that charter schools could play a valuable role, and have success, in addressing learning loss.³²

Despite their promises and potential, charter schools have not been without controversy. Those who object to charter schools argue

27 White, *supra* note 21; DEBBIE VENY & DREW JACOBS, NAT'L ALL. FOR PUB. CHARTER SCHS., VOTING WITH THEIR FEET: A STATE-LEVEL ANALYSIS OF PUBLIC CHARTER SCHOOL AND DISTRICT PUBLIC SCHOOL TRENDS I (2021).

28 See PAUL DiPERNA, ANDREW D. CATT & MICHAEL SHAW, EDCHOICE, 2019 SCHOOLING IN AMERICA: PUBLIC OPINION ON K-12 EDUCATION, BUSING, TECHNOLOGY, AND SCHOOL CHOICE 11, 13, 15-16 (2019).

29 *Id.*

30 Sarah Mervosh, *The Pandemic Erased Two Decades of Progress in Math and Reading*, N.Y. TIMES (Sept. 1, 2022), <https://www.nytimes.com/2022/09/01/us/national-test-scores-math-reading-pandemic.html> [<https://perma.cc/FAE6-WZEF>].

31 See *id.*; Xu, *supra* note 24. These students also are less likely to have the means to attend a private school, so charter schools may be the lone alternative to traditional public schools.

32 CTR. FOR RSCH. ON EDUC. OUTCOMES, CHARTER SCHOOL PERFORMANCE IN NEW YORK CITY 49 (2017); PHILIP GLEASON, MELISSA CLARK, CHRISTINA CLARK TUTTLE & EMILY DWOYER, NAT'L CTR. FOR EDUC. EVALUATION & REG'L ASSISTANCE, THE EVALUATION OF CHARTER SCHOOL IMPACTS 43, 72 (2010). Performance outcomes for other groups of students in charter schools, including high-income and high-achieving students, are either the same as similar students in public schools or even negative. *Id.* That statistic, however, does not take away the potential that charter schools have to help students most in need of educational intervention.

that the schools take money away from traditional public schools, are not properly held accountable, and diminish teacher bargaining power.³³ Others criticize charter schools' approach to students with disabilities or maintain that the privatization of public schools leads to corruption and poor educational outcomes.³⁴ While some charter-school operators are well renowned, like KIPP, others have been criticized for poor performance.³⁵ The fight against charter schools has influenced the policy and expansion of charter schools, limiting charter-school growth in some areas.³⁶

Charter schools have particularly been controversial for a subset known as religious charter schools or ethnocentric charter schools. In this context, "religious charter schools" refers to charter schools that are founded by religious organizations, may exist in buildings that were previously private religious schools, or are informed by religious values, even though the school is not explicitly religious.³⁷ "Ethnocentric charter schools" is perhaps a better name, describing charter schools that are founded with a cultural identity, such as Native Hawaiian, Latino, or Jewish.³⁸ There is an obviously close relationship between religion and culture, so that even if the school is not explicitly religious, the school's culture may reflect religious values.³⁹ Additionally, these cultural schools sometimes provide time or opportunities for students to incorporate prayer and religious practices throughout their school day, even if the school and staff do not participate.⁴⁰ Some schools have faced lawsuits under the assumption that a "public" charter school incorporating religion in this way violates the Establishment

33 Zachary Jason, *The Battle Over Charter Schools*, HARV. ED. MAG., Summer 2017, at 24, 26–27.

34 *Id.* at 27–29; F. Howard Nelson, *The Case Against Charter Schools*, in THE WILEY HANDBOOK OF SCHOOL CHOICE 252, 252 (Robert A. Fox & Nina K. Buchanan eds., 2017).

35 See Jason, *supra* note 33, at 27–28.

36 See *id.* at 28–29.

37 Janet R. Decker & Kari A. Carr, *Church-State Entanglement at Religiously Affiliated Charter Schools*, 15 BYU EDUC. & L.J. 77, 78 (2015); Robert A. Fox, Nina K. Buchanan, Suzanne E. Eckes & Letitia E. Basford, *The Line Between Cultural Education and Religious Education: Do Ethnocentric Niche Charter Schools Have a Prayer?*, REV. RSCH. EDUC., Mar. 2012, at 282, 284; see Bailey & Cooper, *supra* note 4, at 272–73.

38 Fox et al., *supra* note 37, at 283–84.

39 *Id.* at 294 (describing a Hawaiian charter school with the mission to "assist people of Hawaiian ancestry to achieve their highest potential as good and industrious men and women . . . grounded in spiritual and Christian values" (quoting KAMEHAMEHA SCHS., STUDENT AND PARENT HANDBOOK 5 (2021), https://www.ksbe.edu/assets/forms_and_resources/hawaii_campus/KSH_Kauwela_Handbook.pdf [<https://perma.cc/Q9V9-5XYZ>])).

40 *Id.* at 287–88 (describing students engaging in religious practices during school day at Kalsami Charter High School).

Clause.⁴¹ As a result, schools have closed or drastically changed their daily school practices to avoid legal action.⁴² These ethnocentric charter schools can be valuable for cultural groups to create an educational environment that reflects the group's cultural norms and exposes the next generation to its heritage, particularly for marginalized groups whose culture is not part of the mainstream.⁴³

Although ethnocentric charter schools can fill a certain cultural role, charter schools that are explicitly religious could also provide a benefit for students and families. Some parents prefer religious education for their students, as well as the moral education associated with a religious school. Religious private schools have historically played a significant role in education, especially for the benefit of minority students.⁴⁴ However, financial difficulties have led many religious schools to close; others have shed their religious identities and become charter schools.⁴⁵ Religious charter schools would expand access to those who cannot afford private tuition but desire religious education or a better academic experience.⁴⁶ The religious school could preserve its identity and mission, and continue a tradition of religious schools providing education opportunities to communities with struggling public schools. Although not every current religious school would want to

41 *E.g.*, *ACLU of Minn. v. Tarek ibn Ziyad Acad.*, 643 F.3d 1088, 1091 (8th Cir. 2011); Fox et al., *supra* note 37, at 298.

42 Fox et al., *supra* note 37, at 289; Herón Márquez, *ACLU and Ex-Director at TiZA Have a Settlement*, STARTRIBUNE (Apr. 12, 2012, 11:03 PM), <https://www.startribune.com/aclu-and-ex-director-at-tiza-have-a-settlement/147193435/> [<https://perma.cc/JFA5-5BA7>] (describing controversial ethnocentric charter school Tarek ibn Ziyad Academy as “now-defunct”).

43 Tammy Harel Ben Shahar, *Race, Class, and Religion: Creaming and Cropping in Religious, Ethnic, and Cultural Charter Schools*, 7 COLUM. J. RACE & L. 1, 14–18 (2016); Fox et al., *supra* note 37, at 288. This mirrors the role that parochial schools have historically played for immigrant groups. See Marvin Lazerson, *Understanding American Catholic Educational History*, 17 HIST. EDUC. Q. 297, 298–99 (1977).

44 Michael Bindas, *The Once and Future Promise of Religious Schools for Poor and Minority Students*, 132 YALE L.J.F. 529, 532–36 (2022). Additionally, scholars have argued based on studies that Catholic schools help prevent crime in urban neighborhoods. See, e.g., Margaret F. Brinig & Nicole Stelle Garnett, *Catholic Schools, Urban Neighborhoods, and Education Reform*, 85 NOTRE DAME L. REV. 887 (2010).

45 See Decker & Carr, *supra* note 37, at 78–79.

46 For example, students at private Catholic schools scored the highest in the recent National Assessment of Educational Progress (NAEP) tests. Kathleen Porter-Magee, *Opinion, Amid the Pandemic, Progress in Catholic Schools*, WALL ST. J. (Oct. 27, 2022, 6:16 PM), <https://www.wsj.com/articles/amid-the-pandemic-progress-in-catholic-schools-partnership-naep-report-card-math-reading-public-charter-black-hispanic-11666902117> [<https://perma.cc/C58X-PRFT>]. Black and Hispanic Catholic school students' scores increased by ten and seven points respectively between 2019 and 2022, while the same groups of students' scores fell in public schools, including charter schools. *Id.*

become a charter school, the government funding could be a significant benefit if the school is willing to accept charter-school regulations.

II. THE CONSTITUTIONAL CASE FOR RELIGIOUS CHARTER SCHOOLS

Religious charter schools, as described here, differ from ethnocentric charter schools both in character and current constitutional status. While ethnocentric charter schools do not explicitly teach religion, religious charter schools would be able to include religious teachings and practices as part of the curriculum. Currently, all states that authorize charter schools require charter schools to be nonsectarian.⁴⁷ The general reasoning for this restriction is that charter schools are public schools, and religious public schools would be in violation of the Establishment Clause.⁴⁸ However, scholars have suggested pathways that would constitutionally allow, or even require, religious charter schools.⁴⁹ This idea assumes that, though nominally “public schools,” charter schools are not actually state actors, so the Establishment Clause does not apply, and therefore charter schools are not restricted to being secular schools.⁵⁰ Further, if charter schools are essentially private schools by way of not being state actors, then recent Supreme Court precedent requiring the public funding of religious schools in certain situations is applicable, opening the door for religious charter schools.⁵¹ This Part will review the state action doctrine and Supreme Court precedent of religious-school funding before turning to their application in Arizona and Massachusetts.

A. *The State Action Doctrine*

Charter schools are nominally public, designated as so in state statutes authorizing charter schools.⁵² There is an assumption that charter schools are state actors because they are “public.” However, charter schools are mostly run by independent management boards, not the state. The state performs a contracting role by granting the charters which authorize the school. Scholars and litigants have argued that

47 Sugarman, *supra* note 4, at 227 & n.1. Although the line can be blurry, ethnocentric charter schools are nonsectarian. Fox et al., *supra* note 37, at 283–84.

48 See Sugarman, *supra* note 4, at 249.

49 See, e.g., *id.* at 247–54; T.J. D’Agostino, *Religious Charter Schools: Are They Constitutionally Permissible?*, 12 J. SCH. CHOICE 506, 506–07 (2018); GARNETT, *supra* note 5, at 4; T.J. D’Agostino, *Religious Charter Schools: Are They Constitutionally Permissible?*, 12 J. SCH. CHOICE 506, 506–07 (2018).

50 GARNETT, *supra* note 5, at 8–9.

51 *Id.* at 12.

52 E.g., MASS. GEN. LAWS ch. 71, § 89(c) (2023) (“A commonwealth charter school shall be a public school . . .”).

this structure and organization of charter schools means that charter schools are actually private actors.⁵³ Any decision that definitively characterizes charter schools as state actors or not could create wide-ranging consequences in terms of charter-school operations,⁵⁴ but here the inquiry is how designating charter schools as “private” would allow religious charter schools.

The state action doctrine establishes that state action must comply with the Constitution, but private conduct need not.⁵⁵ There are limited exceptions where private actors are subject to the Constitution, when “there is such a ‘close nexus between the State and the challenged action’ that seemingly private behavior ‘may be fairly treated as that of the State itself.’”⁵⁶ These exceptions occur “when the private entity performs a traditional, exclusive public function,” “when the government compels the private entity to take a particular action,” or “when the government acts jointly with the private entity.”⁵⁷ Determining whether private action crosses the line into state action is difficult and not always clear-cut.⁵⁸

The issue of a charter school’s status as a state actor has come up in several lawsuits involving charter schools.⁵⁹ As states regulate charter schools differently, the relationship between the state and charter schools, and therefore state actor-status, may vary across jurisdictions. In 2010, the Ninth Circuit Court of Appeals held that an Arizona charter school was not a state actor in the context of employment.⁶⁰ The court emphasized the contracting agreement between the state and charter schools, the independence granted to charter schools by the state, and the status of charter schools as “alternatives to traditional public schools.”⁶¹ Although the state statute defined the charter

53 See, e.g., Brief of the Appellee at 11–14, *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806 (9th Cir. 2010) (No. 08-15245); GARNETT, *supra* note 5, at 8.

54 See generally Preston C. Green III, Bruce D. Baker & Joseph O. Oluwole, *Having It Both Ways: How Charter Schools Try to Obtain Funding of Public Schools and the Autonomy of Private Schools*, 63 EMORY L.J. 303 (2013).

55 U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law . . .”); *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001).

56 *Brentwood Acad.*, 531 U.S. at 295 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)).

57 *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019) (first citing *Jackson*, 419 U.S. at 352–54; then citing *Blum v. Yaretsky*, 457 U.S. 991, 1004–05 (1982); and then citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941–42 (1982)).

58 See Christopher W. Schmidt, *On Doctrinal Confusion: The Case of the State Action Doctrine*, 2016 BYU L. REV. 575, 576–77.

59 See, e.g., *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104 (4th Cir. 2022) (en banc), *petition for cert. filed*, No. 22-238 (Sept. 12, 2022); *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806 (9th Cir. 2010).

60 *Caviness*, 590 F.3d. at 808.

61 *Id.* at 808–09 (quoting ARIZ. REV. STAT. ANN. § 15-181(A) (2023)).

schools as “public schools,” that was not enough to establish the schools as state actors.⁶² The court cited to *Rendell-Baker v. Kohn*, a Supreme Court case, which also concerned a school and the state action doctrine.⁶³ There, a private school was nearly completely funded by the state, the students were often sent to the school by the state, and the school diplomas were “publicly certified.”⁶⁴ However, the school contracted with the state, was “founded as a private institution,” and was directed by “a board of directors who were neither public officials nor chosen by public officials.”⁶⁵ The Supreme Court found that the school was not a state actor, despite the state’s close involvement and financial support for the school.⁶⁶ *Caviness* concluded that the Arizona charter school was in the same position as the private school in *Rendell-Baker*, except the Arizona charter school was nominally called “public,” and that fact alone was not enough to prove that the school was a state actor.⁶⁷

The Fourth Circuit Court of Appeals, en banc, reached the opposite conclusion. In a recent decision, *Peltier v. Charter Day School, Inc.*, the court found that a North Carolina charter school was a state actor.⁶⁸ The court emphasized North Carolina’s statutory language calling the charter schools “public” and that the state delegated its responsibility of education to the charter schools.⁶⁹ By focusing on these two factors, the court diminished or ignored other acts that showed how the charter schools more closely represented a private school, or private actor.⁷⁰

Some have taken issue with *Peltier*’s reasoning. Oklahoma’s former Attorney General, for example, argued that the Supreme Court’s case *Rendell-Baker* controls in this area and requires a conclusion like *Caviness*, not *Peltier*.⁷¹ The former Oklahoma Attorney General used this analysis to conclude that Oklahoma charter schools are private, not state, actors.⁷² Another explanation for the *Peltier* decision is that

62 *Id.* at 812. The court goes on to say that “a state’s statutory characterization of a private entity as a public actor for some purposes is not necessarily dispositive with respect to all of that entity’s conduct.” *Id.* at 814 (citing *Jackson*, 419 U.S. at 350 & n.7). A private actor could also be a state actor in some aspects, but not all. *Id.*

63 *Id.* at 815 (citing *Rendell-Baker v. Kohn*, 457 U.S. 830, 832–42 (1982)).

64 *Id.* (quoting *Rendell-Baker*, 457 U.S. at 832).

65 *Id.* (quoting *Rendell-Baker*, 457 U.S. at 832).

66 *Rendell-Baker*, 457 U.S. at 842.

67 *Caviness*, 590 F.3d at 816–17.

68 *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104 (4th Cir. 2022) (en banc), *petition for cert. filed*, No. 22-238 (Sept. 12, 2022).

69 *Id.* at 118.

70 *See id.* at 145–49 (Quattlebaum, J., dissenting in part and concurring in part).

71 Oklahoma Att’y Gen., *supra* note 6, at 12–13.

72 *Id.*

a private actor could be a state actor in some aspects, but not all.⁷³ *Caviness* considered whether Arizona charter schools were state actors in the employment context, while *Peltier* was about student conduct. It is entirely possible that a charter school could be a state actor for one purpose but not another, depending on the extent of the state's role in each aspect.⁷⁴ For the purpose of religious charter schools, the most important issue is that charter schools are a private actor for curriculum purposes, so that the school could teach religion classes and incorporate religious concepts in other subjects without running afoul of the Establishment Clause. Without the ability to include religion in the curriculum, the school remains secular.⁷⁵ Although religious charter schools would obviously desire to be private actors in other aspects, charter schools could be a private actor for purposes of just curriculum and still potentially allow religious charter schools. Therefore, religious charter schools could still be constitutional, even if they are state actors in some regards.

Currently, there is a circuit split as to the question of charter schools' state-actor status, and the North Carolina charter school case has petitioned for certiorari. However, even if the Supreme Court resolves this split, the doctrine is so fact specific that a Supreme Court decision may not answer the question for charter schools in all states or in all aspects of charter schools. A general analysis applying *Caviness*, however, is favorable to find that most charter schools are not state actors.⁷⁶

B. State Funding of Religious Schools

Assuming charter schools are not state actors and therefore treated as private schools, the inquiry for the purposes of religious charter schools is whether the state may, or must, fund religious charter schools. The Supreme Court's recent decisions, including *Carson v. Makin*, *Espinoza v. Montana Department of Revenue*, and *Trinity Lutheran Church of Columbia, Inc. v. Comer*, make it clear that if a state funds secular private schools—which may include charter schools under the state action doctrine—then the state must also fund religious charter schools. This Section will also argue that status-use and direct-indirect funding distinctions are not applicable here, and do not constitutionally prevent religious charter schools.

73 *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 814 (9th Cir. 2010).

74 *Id.*

75 A school without the ability to incorporate religion into curriculum would be similar to current ethnocentric charter schools.

76 See GARNETT, *supra* note 5, at 8–10.

The Supreme Court's recent decisions regarding religious school funding have been landmark rulings in the world of school choice and religious-education funding.⁷⁷ The Court has established both the constitutionality of state funding for religious schools and determined where states are required to fund religious schools.⁷⁸ Although the jurisprudence of the Free Exercise and Establishment Clauses is vast and complicated, the scope of this Note will restrict itself to three significant cases that have a direct connection to the constitutionality of religious charter schools: *Trinity Lutheran*, *Espinoza*, and *Carson*. These cases, particularly the Court's most recent decision in *Carson*, demonstrate the constitutionality of religious charter schools.

In *Trinity Lutheran*, the Supreme Court held that Missouri unconstitutionally disqualified a religious organization from a state-funded grant program.⁷⁹ The program at issue provided governmental funds to public and private schools to purchase playground equipment made from recycled tires.⁸⁰ Trinity Lutheran Church applied for its preschool and daycare center, but was denied for being a religious institution, though it met all other criteria for the program.⁸¹ The Court held that such policies disqualifying "otherwise eligible recipients . . . solely because of their religious character" violate the Free Exercise Clause.⁸² Further, when "a generally available benefit" is denied "solely on account of religious identity," the denial is only appropriate under the Free Exercise Clause when it "can be justified only by a state interest 'of the highest order.'"⁸³ The Court found no state interest "of the highest order" to support Missouri's policy of refusing churches this grant, so it declared the law unconstitutional.⁸⁴

Following *Trinity Lutheran*, the Supreme Court applied its holding in the private-school choice context in *Espinoza*. This case involved a

77 See Dunn, *supra* note 5, at 48; Nick Reaves, *Religious Autonomy in Carson v. Makin*, HARV. J.L. & PUB. POL'Y PER CURIAM, Summer 2022, at 1, 1; Charles J. Russo & William E. Thro, *The Demise of the Blaine Amendment and a Triumph for Religious Freedom and School Choice: Espinoza v. Montana Department of Revenue*, 46 U. DAYTON L. REV. 131, 132–33 (2021).

78 See *Carson v. Makin*, 142 S. Ct. 1987, 2002 (2022) (holding that voucher program excluding religious schools violated Free Exercise Clause); *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2262–63 (2020) (holding that tax-scholarship program restricting religious schools violated Free Exercise Clause); *Trinity Lutheran Church of Columbia, Inc., v. Comer*, 137 S. Ct. 2012, 2025 (2017) (holding that grant program restricting religious institutions violated Free Exercise Clause); *Zelman v. Simmons-Harris*, 536 U.S. 639, 644–45 (2002) (holding that voucher program allowing religious schools did not violate Establishment Clause).

79 *Trinity Lutheran*, 137 S. Ct. at 2024–25.

80 *Id.* at 2017.

81 *Id.* at 2017–18.

82 *Id.* at 2021–22.

83 *Id.* at 2019 (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978) (plurality opinion)).

84 *Id.* at 2024–25.

tax-credit scholarship program in Montana which allowed parents to use the governmental funds at any private nonsectarian school, a rule based in Montana's "no-aid" provision of its constitution.⁸⁵ The Supreme Court held that such an exclusion of religious schools from the program was unconstitutional.⁸⁶ As the Court made clear, "[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."⁸⁷ While the Court made clear that Montana's "no-aid" provision of its constitution could not apply in this context, the Court's decision did not address if other states' similar amendments, known as Blaine Amendments, are still constitutionally permissible.⁸⁸

Carson likewise applied *Espinoza's* reasoning to a Maine voucher program.⁸⁹ The program allowed students in school districts without a high school to receive state funding to attend a private, nonsectarian high school.⁹⁰ The Supreme Court held that the "'unremarkable' principles applied in *Trinity Lutheran* and *Espinoza* suffice to resolve" *Carson*.⁹¹ Maine offered a public benefit in terms of school-tuition assistance but disqualified religious schools "solely because they are religious."⁹² Therefore, the Maine program was subject to strict scrutiny, and as the Court found no countervailing government interest, the restriction against religious schools was unconstitutional.⁹³

Applying the Court's reasoning in *Trinity*, *Espinoza*, and *Carson*, if charter schools are private actors, then once a state funds secular charter schools, it must also fund religious charter schools.⁹⁴ However, *Espinoza* and *Carson* represent indirect school-funding cases, and religious charter schools would involve direct funding from the state. In *Espinoza* and *Carson*, the parent made the choice to send the funds to the religious school rather than a nonreligious private school; it was not the government that made the decision to fund the religious institution.⁹⁵ Although the Supreme Court has not explicitly ruled on whether direct funding to religious schools is permissible in this context, language from its opinions suggests the distinction may not

85 *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2251–52 (2020) (citing MONT. CONST. art. X, § 6(1)).

86 *Id.* at 2262–63.

87 *Id.* at 2261.

88 See Russo & Thro, *supra* note 77, at 156–57.

89 *Carson v. Makin*, 142 S. Ct. 1987, 1997 (2022).

90 *Id.* at 1993.

91 *Id.* at 1997 (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017)).

92 *Id.* at 1997 (quoting *Espinoza*, 140 S. Ct. at 2261).

93 *Id.* at 2002.

94 See GARNETT, *supra* note 5, at 12.

95 *Carson*, 142 S. Ct. at 1994; *Espinoza*, 140 S. Ct. at 2251.

constitutionally matter. For example, *Trinity Lutheran* concerned direct government funding for a religious institution, though the funding supported a nonreligious activity. Justice Sotomayor’s dissent in the case argued that previous Court precedent had allowed “direct government funding of religious institutions” only when “the funding in those cases came with assurances that public funds would not be used for religious activity.”⁹⁶ Sotomayor took issue with the majority requiring *Trinity Lutheran* to be included in the program, because “[t]he Church has not and cannot provide such assurances” that the funding would not be used for religious activity.⁹⁷ In that vein, Justice Gorsuch’s concurrence advised that such assurances would never be appropriate, given that the nature of a religious institution and its religious character are so intertwined.⁹⁸ Therefore, *Trinity Lutheran* could be read to allow direct funding of religious activity, not just the indirect-funding situations where a parent acts as a middleman.

An argument against religious charter schools may also invoke the status-use distinction, which constitutionally prohibits discrimination against religious status but authorizes discrimination based on religious use.⁹⁹ However, the Court in *Carson* appeared to discard the status-use distinction: “*Trinity Lutheran* and *Espinoza* . . . held that the Free Exercise Clause forbids discrimination on the basis of religious status. But those decisions never suggested that use-based discrimination is any less offensive to the Free Exercise Clause.”¹⁰⁰ The Court acknowledged that “general funds” for religious schools “could be used for religious ends by some recipients, particularly schools that believe faith should ‘permeate[]’ everything they do.”¹⁰¹ Further, the Court invoked *Locke v. Davey* to show an example of religious use (minister training) that could not receive governmental funding under the Constitution.¹⁰² Therefore, this language creates a pathway for government funding of religious schools, even if the funding would sponsor religious use.

The *Trinity Lutheran* Court’s analysis that exclusion from “a public benefit . . . solely because it is a church” is also instructive to support the constitutionality of religious charter schools.¹⁰³ Charter school

96 *Trinity Lutheran*, 137 S. Ct. at 2029 (Sotomayor, J., dissenting) (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 875–76 (1995) (Souter, J., dissenting)).

97 *Id.*

98 *Id.* at 2025 (Gorsuch, J., concurring).

99 See GARNETT, *supra* note 5, at 12–13.

100 *Carson*, 142 S. Ct. at 2001.

101 *Id.* (alteration in original) (quoting *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2256 (2020)).

102 *Id.* at 2001–02 (citing *Locke v. Davey*, 540 U.S. 712, 725 (2004)).

103 *Trinity Lutheran*, 137 S. Ct. at 2025, 2024–25.

funding is a public benefit provided by the government, so a religious charter school applicant denied based on religious status would mirror facts very similar to *Trinity Lutheran*,¹⁰⁴ where such direct funding was not only permissible but constitutionally required. If charter schools are wholly state actors, then there are complicated Establishment Clause issues that likely result in religious charter schools violating the Constitution.¹⁰⁵ However, if charter schools are private, or even private actors in some aspects, then the analysis combining the direct funding of *Trinity Lutheran* with school funding in *Espinoza* and *Carson* suggests that religious charter schools must be funded under the Constitution.

The decisions by the Court discussed above have been highly controversial, especially in the public-education context.¹⁰⁶ However, it is important to note that direct federal funding of private religious schools by the federal government has occurred for decades. Eligible schools can receive various title funding and money from the federal government.¹⁰⁷ Additionally, private religious schools received significant sums of money from the federal government during the COVID-19 pandemic.¹⁰⁸ Although the use of the funds was limited, it shows that there is not a clean line, as some advocates may wish, between religious schools and financial support from the government. Rather, this amount of support demonstrates the importance of religious schools in education.¹⁰⁹

III. STATE ANALYSIS

Religious charter schools and the issues surrounding them are hotly debated and contested in law, education, and politics. Following the Supreme Court's religious school-funding cases, however, it is not an issue that is going away. The state action doctrine and the Supreme

104 The best example would be a private religious school applying to receive a charter, which meets all the requirements except for its religious status.

105 See GARNETT, *supra* note 5, at 8.

106 See Naaz Modan, *What Does Carson v. Makin Mean for Ed Leaders?*, K-12 DIVE (June 22, 2022), <https://www.k12dive.com/news/what-does-carson-v-makin-mean-for-ed-leaders/625886/> [<https://perma.cc/2377-TALD>].

107 See *Equitable Services for Private Nonprofit Schools*, EDUC. SERV. CTR., <https://title1.esc2.net/node/15> [<https://perma.cc/AHC5-3NG6>].

108 *E.g.*, U.S. CONF. OF CATH. BISHOPS, FEDERAL EMERGENCY COVID ASSISTANCE TO K-12 CATHOLIC SCHOOLS SUMMARY (2020).

109 For example, Catholic schools have been historically good at educating immigrant and low-income populations. Bindas, *supra* note 44, at 532-36. In the recent data on student achievement, Catholic schools did comparatively well, partly because Catholic schools on average opened in person earlier than other schools during the pandemic. Kevin Clarke, *Catholic Schools Outperform Public and Charter Counterparts in First Post-Covid National Assessment*, AM.: JESUIT REV. (Oct. 25, 2022), <https://www.americamagazine.org/politics-society/2022/10/25/catholic-schools-naep-244026> [<https://perma.cc/4YTM-5AKW>].

Court cases discussed above give guidance for the constitutionality and legal establishment of religious charter schools. If charter schools are not state actors, then they are treated under federal law in the same way as private schools, not public schools. Consequently, the line of Supreme Court cases illustrates when it is permissible, or even required, for a state to provide funding to a religious private school. If states provide funding to nonreligious charter schools that are not state actors, then based on *Espinoza* and *Carson*, the states must make the same funding opportunities available to religious charter schools.¹¹⁰ Whether or not charter schools are state actors is highly factual, and thus state dependent. Additionally, it is valuable to consider the political and state constitutional factors that could encourage or dissuade religious charter schools in a particular state. In order to better understand religious charter schools and the issues underpinning it, the following sections will analyze the possibility of religious charter schools in two states. These states, Arizona and Massachusetts, are meant to represent polar opposites in terms of their likeliness of embracing religious charter schools. At first glance, one state would potentially be an amenable place for religious charter schools, while the other would not. The goal is that this focused perspective will provide insight for the possibility of religious charter schools in the United States as a whole.

The analysis of each state is taken in two parts. First, an analysis of the state's political context, particularly in terms of school choice and any existing religious school funding. Second, an analysis of the legal context of religious charter schools, particularly in tandem with the state's constitution and charter-school laws. The political context provides helpful insight into whether an attempt to open a religious charter school would occur, and if that effort would be supported by the state's voters and leaders. Although it is not a legal factor, the political context helps to show the environment in which state laws and interpretations are created. If the state is hostile to religious charter schools, for example, then it is more likely the state laws and the interpretations of those laws would be hostile to a finding that religious charter schools are permissible, though not impossible. The political context analysis will include the strength of the state's school-choice infrastructure and any current state public funding for religious schools. The legal possibility of religious charter schools depends on each state's laws and interpretations, in addition to the federal laws. This legal analysis will consider the state's constitutional restrictions on

110 That is not to say that charter school authorizers could never reject a religious charter school. Applying the reasoning in *Trinity Lutheran*, if a religious charter school fails to meet the requirements to be authorized, and its religious nature is not the sole reason for the rejection, then that rejection would be okay.

state funding for religious schools, whether the state's charter schools are state actors, and how the Supreme Court's religious-funding cases affect the state. Taken together, the political and legal contexts give an answer to how religious charter schools would be treated in Arizona and Massachusetts. The nuances in each state indicate how other states and the United States in general may respond to religious charter schools in the future.

A. Arizona

1. Political Context

Arizona's education system is one of the strongest school-choice programs in the country, including charter schools, universal education savings accounts (ESAs), three tax-credit scholarship programs, and universal public-school choice.¹¹¹ Arizona is a leader in charter schools, with over 500 schools, and charter schools educate nearly one in five public school students in the state.¹¹² For the first time this school year, Arizona established universal ESAs, which permit parents who send their children to private schools to use the money for educational expenses, including private-school tuition and more.¹¹³ The funds can be used at any private school, secular or religious.¹¹⁴ The program has been wildly popular¹¹⁵ and state legislators have discussed increasing the scholarship amount.¹¹⁶ While this program does not directly relate to charter schools, the inclusion of religious schools in the program reflects a state culture that is open to including private religious school in public-funding benefits. In fact, former Governor

111 AM. FED'N FOR CHILD. GROWTH FUND, *supra* note 22, at 14; Nicole Stelle Garnett, *A Radical Step in the Right Direction*, CITY J. (Oct. 2, 2022), <https://www.city-journal.org/arizona-embraces-universal-school-choice> [<https://perma.cc/GB49-MHLY>] (describing Arizona's new universal ESA program and other school choice options in Arizona).

112 *Impact: Charter Schools – Transforming Public Education*, ARIZ. CHARTER SCHS. ASS'N, <https://azcharters.org/impact/> [<https://perma.cc/K5Z6-PDN9>]. Arizona has the highest number of charter schools in the United States relative to its population. White, *supra* note 21.

113 Andrew Campanella, *A Parent's Guide to Navigating Arizona's Expanded Empowerment Scholarship Accounts (ESA) Program*, NAT'L SCH. CHOICE WK. (Sept. 30, 2022), <https://school-choiceweek.com/navigating-arizonas-empowerment-scholarship-accounts/> [<https://perma.cc/72NN-LWPM>]; *Empowerment Scholarship Account (ESA) Program*, ARIZ. DEP'T OF EDUC. (Dec. 14, 2022), <https://www.azed.gov/esa> [<https://perma.cc/5EJG-P9GW>].

114 See Campanella, *supra* note 113.

115 Garnett, *supra* note 111.

116 Mary Jo Pitzl, *After Expanding School Vouchers to All Arizona Students, Backers Now Seek Bigger Payments*, AZCENTRAL. (Dec. 6, 2022, 10:29 AM), <https://www.azcentral.com/story/news/politics/arizona-education/2022/12/06/arizona-school-voucher-program-proponents-seek-larger-payouts/69703375007/> [<https://perma.cc/LZW8-RQ4N>].

Ducey ceremonially signed the universal ESA program at Phoenix Christian Preparatory School, reflecting the prominent educational role that religious private schools hold in Arizona.¹¹⁷

In Arizona, religious private schools receive funding from the government through ESAs and tax-credit scholarships, even though the state constitution includes two constitutional articles prohibiting public funding for religious schools.¹¹⁸ The Arizona Constitution has been interpreted to permit religious schools in school-choice programs,¹¹⁹ an interpretation that is not far from funding religious schools in the charter school context. In 2016, it was alleged that public funds were in fact being used to teach religion at a charter school. Heritage Academy, an Arizona charter school, was sued for teaching religion to students.¹²⁰ Although the case was eventually dismissed,¹²¹ the allegations illustrate a school resembling a Christian ethnocentric charter school. The complaint alleged that the charter school taught the Ten Commandments, instructed that the proper form of government is informed by religion, and used religious practices throughout many areas of the school.¹²² The school's website discusses a "moral" education based in the "values" held by the Founding Fathers.¹²³ Even if the school did nothing wrong, these could be references to religious values held by the Founding Fathers, and perhaps reflect a theme in some of Arizona's charter schools.¹²⁴

The strength of Arizona's school-choice system shows that Arizona is a state, legally and politically, that is open to the innovation and experimentation of education within the state, potentially even with

117 See News Release, Off. of the Governor, Governor Ducey, Parents, Kids Celebrate the Most Expansive School Choice Initiative in the Nation (Aug. 16, 2022), <https://azgovernor.gov/governor/news/2022/08/governor-ducey-parents-kids-celebrate-most-expansive-school-choice-initiative> [<https://perma.cc/6ZP6-2RDY>].

118 ARIZ. CONST. art. II, § 12 (prohibiting funding for religious institutions); *id.* art. IX, § 10 (prohibiting funding for private secular or religious schools).

119 See *Niehaus v. Huppenthal*, 310 P.3d 983, 985–89 (Ariz. Ct. App. 2013).

120 Howard Fischer, *Charter School Accused of Using State Money to Teach Religious Doctrine*, ARIZ. CAPITOL TIMES (Sept. 7, 2016), <https://azcapitoltimes.com/news/2016/09/07/charter-school-accused-of-using-state-money-to-teach-religious-doctrine/> [<https://perma.cc/X786-5YVD>].

121 The plaintiff, a parent at the school, filed the action under a pseudonym. See *Doe v. Heritage Acad., Inc.*, No. CV-16-03001-PHX, 2017 WL 4922059, at *1 (D. Ariz. Oct. 31, 2017). The court ordered the plaintiff to refile with his real name, but the plaintiff declined to do so. *Id.* at *1–2. As a result, the case was dismissed. *Id.* at *3–4.

122 See First Amended Complaint at 3–4, *Doe*, 2017 WL 4922059.

123 *About Us*, HERITAGE ACADEMY, <https://heritageacademyaz.com/about-us/> [<https://perma.cc/YUA3-MCH5>].

124 See also *Classical Christian Schools: What Happens When Christianity Is Silenced?*, CLASSICAL DIFFERENCE, Winter 2016, at 18 (referencing Great Hearts, a classical charter school with locations in Arizona, and questioning how classical schools can be secular).

religious charter schools.¹²⁵ Arizona's former Governor Doug Ducey embraced the options that school choice provides for families, declaring, "There is no one-size-fits-all model to education [Some] groups will try to tell you that this legislation will diminish our public education system. They couldn't be more wrong. Public education means educating the public."¹²⁶ This understanding of education has led Arizona to become "a leading laboratory for school choice ideas."¹²⁷ Arizona's encouragement of school-choice policies and openness to new ideas implies a willingness to explore new schooling models like religious charter schools. Additionally, although the current Arizona Democratic governor has spoken out against school-choice programs, other state leaders are likely to protect, if not expand, school-choice options.¹²⁸ These factors together suggest the likelihood that Arizona's political context would acknowledge or even support the introduction of religious charter schools into its school infrastructure.

2. Legal Context

Two articles in the Arizona Constitution nominally prohibit the public funding of religious schools, the Religion Clause and the Aid Clause.¹²⁹ Arizona state courts found that the Aid Clause forbids a voucher program which sends money to any private school, but education savings account programs are permissible.¹³⁰ In *Cain v. Horne*, the Arizona Supreme Court noted that Arizona's voucher program did not necessarily violate the Religion Clause,¹³¹ but it did violate Arizona's Aid Clause.¹³² The court concluded that "[f]or all intents and purposes, the voucher programs do precisely what the Aid Clause prohibits. These programs transfer state funds directly from the state treasury to private schools. That the checks or warrants first pass through the hands of parents is immaterial."¹³³ For ESAs, however, the Arizona

125 See Harry Bruinius, *How Arizona Became America's School Choice Lab*, CHRISTIAN SCI. MONITOR (Sept. 15, 2022), <https://www.csmonitor.com/USA/Education/2022/0915/How-Arizona-became-America-s-school-choice-lab> [<https://perma.cc/D59Q-UHDC>].

126 *Id.*

127 *Id.*

128 See Kayla Jimenez, *School Choice Motivated Midterm Voters in Superintendent Races. What That Means for Students*, PHYS.ORG (Nov. 18, 2022), <https://phys.org/news/2022-11-school-choice-midterm-voters-superintendent.html> [<https://perma.cc/TV5Q-7KDS>].

129 ARIZ. CONST. art. II, § 12 (Religion Clause); *id.* art. IX, § 10 (Aid Clause).

130 See *Cain v. Horne*, 202 P.3d 1178, 1183–84 (Ariz. 2009); *Niehaus v. Huppenthal*, 310 P.3d 983, 987–89 (Ariz. Ct. App. 2013).

131 *Cain*, 202 P.3d at 1181.

132 *Id.* at 1182–84.

133 *Id.* at 1184.

Court of Appeals distinguished the program from vouchers in that “[t]he specified object of the ESA is the beneficiary families, not private or sectarian schools,” and so ESAs are constitutional under the Aid Clause.¹³⁴ Accordingly, Arizona’s constitutional context is different than what was addressed in *Espinoza*, so the analysis is slightly different. In Montana’s Constitution, the constitutional clauses only prohibited sectarian schools from receiving funding, but Arizona’s constitution restricts any private school.¹³⁵ If Arizona’s charter schools are private, not state, actors then the entire Arizona charter school system could be declared unconstitutional under the Aid Clause.

The legal status of Arizona’s existing charter schools and the possibility of religious charter schools, therefore, depends on charter schools’ status as private actors. This analysis is highly factual and depends on the state’s relationship with charter schools. However, it is not necessary that Arizona charter schools are wholly state actors or not; the charter schools could be state actors in some contexts and not in others.¹³⁶ Arizona’s charter-school laws provide insight into the state’s relationship with charter schools. The charter-school law allows several types of authorizers for charter schools in Arizona, called “sponsors,” who are made up of state and private actors.¹³⁷ These sponsors “contract” with the “public body, private person or private organization” establishing the charter school and supervise those schools.¹³⁸ Arizona also has a state board which has “general supervision over charter schools,” and is made up of both state officials and private individuals.¹³⁹ Regulations of charter schools include fingerprinting and running background checks on teachers,¹⁴⁰ complying with rules “relating to health, safety, civil rights and insurance,”¹⁴¹ having a curriculum,¹⁴² measuring student progress,¹⁴³ having a governing body,¹⁴⁴ and following certain admissions requirements.¹⁴⁵ Although the state does

134 *Niehaus*, 310 P.3d at 987.

135 ARIZ. CONST. art. IX, § 10 (Aid Clause); *Espinoza v. Mont. Dep’t. of Revenue*, 140 S. Ct. 2246, 2252 (2020).

136 *See supra* Section II.A.

137 ARIZ. REV. STAT. ANN. § 15-183(C) (2023).

138 *Id.* § 15-183(B), (E).

139 *Id.* § 15-182.

140 *Id.* § 15-183(C)(f)(4), (5)(b)–(c), (5)(e)–(f).

141 *Id.* § 15-183(E)(1).

142 *Id.* § 15-183(E)(3). The law does not specify what needs to be in the curriculum and allows schools to focus “on a specific learning philosophy or style or certain subject areas.” *Id.*

143 *Id.* § 15-183(E)(4).

144 *Id.* § 15-183(E)(8).

145 *Id.* § 15-184.

provide some oversight, these laws illustrate a generally weak relationship between the charter schools and state.

In 2010, the Ninth Circuit Court of Appeals ruled that an Arizona charter school was not a state actor in the context of employment discrimination.¹⁴⁶ Although Arizona's charter law calls charter schools "public," the court found that Arizona's contractual relationship with charter schools and its regulation structure meant the schools were private, not state, actors.¹⁴⁷ Particularly, the court compared the charter school to the private school in *Rendell-Baker*. There, the entirely state-funded private school contracted with the state to provide education, but that was not a close enough relationship to create state action, nor did it matter that the state historically provides education to the public.¹⁴⁸ The factual similarities between Arizona's charter schools and *Rendell-Baker's* private school supported the Ninth Circuit's decision that Arizona charter schools were not state actors.¹⁴⁹

The facts described by the *Caviness* court and its comparison to *Rendell-Baker* is not necessarily exclusive to the employment context. These similarities can apply to other aspects of charter-school operations in Arizona: Arizona's charter-school regulations show little state oversight overall, provide wide leeway in conducting school activities (including curriculum), and give private actors a large role in supervising the schools.¹⁵⁰ Other courts have followed the reasoning from *Caviness* to find that charter schools are not state actors in a context other than employment.¹⁵¹ As previously mentioned, if Arizona's charter schools are not state actors in the curriculum context, that provides an opportunity for religious charter schools.¹⁵² Given that the state's involvement with charter school curriculum is limited to ensuring that schools *have* a curriculum, without dictating what the curriculum must require, this conclusion seems likely.¹⁵³ Although *Peltier v. Charter Day School* ruled that charter schools are state actors for student conduct, the Fourth Circuit's decision carries no weight in Arizona, while

146 *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806 (9th Cir. 2010).

147 *Id.* at 814–16.

148 *Id.* at 815; *see also supra* notes 63–66 and accompanying text.

149 *Caviness*, 590 F.3d at 815.

150 *See supra* notes 137–45 and accompanying text.

151 *See, e.g., I.H. ex rel. Hunter v. Oakland Sch. for the Arts*, 234 F. Supp. 3d 987, 992 (N.D. Cal. 2017) (“[U]nder *Caviness*, it is unlikely that California law characterizing charter schools as ‘public schools’ will suffice to prove state action.” (first citing *Caviness*, 590 F.3d at 813–14; and then citing CAL. EDUC. CODE § 47615(a) (West 2023))). This case was in the context of employee conduct toward students. *Id.* at 990.

152 *See supra* Section II.A.

153 ARIZ. REV. STAT. ANN. § 15-183(E)(3) (2023). The law does not specify what needs to be in the curriculum and allows schools to focus “on a specific learning philosophy or style or certain subject areas.” *Id.*

Caviness is binding precedent for the state. Therefore, it is likely that Arizona charter schools would be found as private, not state, actors even outside the employment context.

If Arizona charter schools are not state actors and ought to be considered “private” schools, then Arizona’s charter schools may violate the state’s constitution, which prohibits state funding for private schools.¹⁵⁴ In a different context, the Washington Supreme Court found that Washington’s charter-school law violated the state constitution, and the legislature responded by revising the charter-school law.¹⁵⁵ However, Arizona could get around the state constitution by using the state action doctrine. If Arizona’s charter schools are state actors in at least one context, perhaps as the recipients of state funding, then the schools are not necessarily private schools under the state constitution. Arizona charter schools could be private actors for the purposes of curriculum, employment, and federal law—thus allowing religious charter schools—but still state actors under the Arizona Constitution. Additionally, it could be enough, for the purpose of the state constitution, that Arizona’s charter schools are nominally “public” schools, even if they are not state actors in other aspects.

Arizona’s constitution aside, if the charter schools are private actors, even in limited contexts, then the federal law would likely treat them as private schools.¹⁵⁶ Then, the Supreme Court’s precedents of *Trinity Lutheran*, *Espinoza*, and *Carson* apply, requiring the state to allow and fund religious charter schools if the state already funds secular charter schools.¹⁵⁷ This conclusion holds, even if Arizona treats the charter schools as “public” or state actors for the purpose of the state constitution, as long as the charter schools are not entirely state actors.

Together, Arizona’s political context and legal structure would likely allow, and require, religious charter schools. This conclusion assumes that Arizona charter schools are not state actors in the contexts necessary for religious charter schools, and that Arizona’s charter school system remains constitutional. Given the extent of the charter school system and the strong political support in the state, it is hard to imagine charter schools disappearing from Arizona. When Arizona

154 ARIZ. CONST. art. IX, § 10 (Aid Clause).

155 League of Women Voters of Wash. v. State, 355 P.3d 1131, 1133 (Wash. 2015) (en banc); see 2016 Wash. Sess. Laws 1207 (amending WASH. REV. CODE §§ 28A.710.010–230, 28A.710.250 (2015)). The Washington Supreme Court found the revised law constitutional. *El Centro de la Raza v. State*, 428 P.3d 1143, 1145–46 (Wash. 2018).

156 See GARNETT, *supra* note 5, at 8–10.

157 See *supra* Section II.B.

funds secular charter schools, then, Supreme Court precedent requires that the state also fund religious charter schools.¹⁵⁸

B. Massachusetts

I. Political Context

Massachusetts has a reputation for educational excellence in the United States, outperforming almost every other state in academic tests and consistently ranking as one of the best public school systems in the country.¹⁵⁹ Massachusetts's education system has some school choice, though less than Arizona's. The state has traditional public schools, charter schools, magnet schools, vocational schools, parochial schools, and private schools.¹⁶⁰ Massachusetts does not have a voucher program, tax-credit scholarship, or education savings accounts.¹⁶¹ The lack of school-choice policies can at least partly be explained by the political context of Massachusetts. The majority of Massachusetts voters are Democratic, and the state is known for advancing liberal and progressive initiatives.¹⁶² State leaders are Democrats, including the recently elected Governor, the state legislature, congressional representatives, and the Boston mayor.¹⁶³ As a result, initiatives that are

158 In contrast, Montana's no-aid provision in the state constitution only applied to nonsectarian schools. See *supra* note 86 and accompanying text. So, if Montana had charter schools (it doesn't, see White, *supra* note 21), then it would not run into the constitutionality problem of its charter schools that Arizona does. In that situation, it would be clear that the religious charter schools would be constitutionally required under *Trinity*, *Espinoza*, and *Carson*.

159 See Press Release, Mass. Exec. Off. of Educ., Massachusetts Remains Top-Ranked State on the National Assessment of Educational Progress (Oct. 24, 2022), <https://archives.lib.state.ma.us/bitstream/handle/2452/863417/ocn898221826-2022-10-24.pdf?sequence=1&isAllowed=y> [<https://perma.cc/NJ2R-A2SV>].

160 See *Choosing a School: A Family Guide to Educational Options in Massachusetts*, MASS. DEP'T ELEMENTARY & SECONDARY EDUC. (Aug. 5, 2022), <https://www.doe.mass.edu/finance/schoolchoice/choice-guide.html> [<https://perma.cc/LNL5-DKZH>].

161 EDUC. COMM'N OF THE STATES, PRIVATE SCHOOL CHOICE: STATE PROFILE - MASSACHUSETTS (2021), <https://reports.ecs.org/comparisons/view-by-state/288/MA> [<https://perma.cc/SN29-6WF6>].

162 See Hannah Green, *Massachusetts Legislature Ranks Most Liberal Nationwide, Conservative Groups Say*, GBH (Oct. 28, 2021), <https://www.wgbh.org/news/politics/2021/10/28/massachusetts-legislature-ranks-most-liberal-nationwide-conservative-groups-say> [<https://perma.cc/WSL8-7MT8>] ("Only 16% of votes cast by Massachusetts state legislators in 2020 aligned with conservative positions on issues . . ."); *Party Affiliation Among Adults in Massachusetts*, PEW RSCH. CTR., <https://www.pewresearch.org/religion/religious-landscape-study/state/massachusetts/party-affiliation/> [<https://perma.cc/4U84-QBGH>].

163 See Adam Reilly, *What Will One-Party Rule Mean for Massachusetts?*, GBH (Nov. 11, 2022), <https://www.wgbh.org/news/politics/11/11/2022/what-will-one-party-rule-mean-for-massachusetts> [<https://perma.cc/JLJ9-S8NG>]; Kimmy Yam, *Michelle Wu Becomes First Woman and Person of Color Elected Mayor of Boston*, AP Projects, NBC NEWS (Nov. 3, 2021, 7:38

considered “conservative” or “Republican” measures, like the expansion of charter schools and state funding of religious organizations, have not been popular in the state.¹⁶⁴

Massachusetts was an early adopter of charter schools in 1993.¹⁶⁵ There are two types of charter schools in Massachusetts: Commonwealth charter schools and Horace Mann charter schools.¹⁶⁶ Commonwealth charter schools have more independence, while Horace Mann charter schools are more closely connected to the local school district.¹⁶⁷ Massachusetts had seventy-six charter schools in 2022–23: seventy Commonwealth charter schools across the state and six Horace Mann charter schools in Boston.¹⁶⁸ About 5.3% of public school students in 2021–22 attended a charter school, over 48,000 students, which is close to the maximum amount of students that can attend based on currently authorized charters.¹⁶⁹ Over 15,000 individual students are on the waitlist for a charter school, as of October 2021.¹⁷⁰ Today, support for charter schools is not widespread in the state, and a 2016 initiative to expand charter schools was rejected by voters, despite a clear student interest in more schools.¹⁷¹ The lack of school-choice programs and the opposition to charter schools reflects an environment where traditional public schools are highly valued and advocates have concerns about school choice taking away public-school funding.¹⁷² As a result, despite the existence of a charter school system,

AM), <https://www.nbcnews.com/politics/boston-mayor-race-2021-michelle-wu-rcna4373> [<https://perma.cc/7CVW-HVMN>].

164 See, e.g., Louise Kennedy & Tonya Mosley, *Mass. Voters Say No to Charter School Expansion*, WBUR (Nov. 9, 2016), <https://www.wbur.org/news/2016/11/08/charter-school-ballot-question-results> [<https://perma.cc/UP4E-WTFZ>].

165 *About Charter Schools*, MASS. DEP’T OF ELEMENTARY & SECONDARY EDUC. (May 17, 2023), <https://www.doe.mass.edu/charter/about.html> [<https://perma.cc/S2RG-SLV6>]; Massachusetts Education Reform Act of 1993, ch. 71, 1993 Mass. Acts 159, 214–18 (codified as amended at MASS. GEN. LAWS ch. 71, § 89 (2023)).

166 See MASS. GEN. LAWS ch. 71, § 89 (2023).

167 KELLY ROBSON FOSTER, LYNNE GRAZIANO & JULIET SQUIRE, *BELLWETHER EDUC. PARTNERS, HORACE MANN CHARTER SCHOOLS: THEIR PAST, PRESENT, AND PROMISE* 4, 6–7 (2022).

168 *Charter School Fact Sheet, Directory and Application History*, MASS. DEP’T OF ELEMENTARY & SECONDARY EDUC. (Apr. 18, 2023), <https://www.doe.mass.edu/charter/factsheet.html> [<https://perma.cc/T3G3-B2FM>].

169 *Id.*

170 *Id.*

171 Bich Thi Ngoc Tran, *Which Townships Support Charter Schools? A Study of the 2016 Massachusetts Charter Referendum*, 102 SOC. SCI. Q. 865, 867, 873–74, 877–78 (2021); *Charter School Fact Sheet, Directory and Application History*, *supra* note 168 (over 15,000 students on waitlist for charter schools).

172 For example, Maura Healey won the Massachusetts Governor’s race last year campaigning to strengthen the traditional public school system and highlighted her opposition

Massachusetts' school structure is not supportive of religious charter schools from a political context. There would have to be a significant shift in order to support such an expansion in Massachusetts.

Another obstacle in Massachusetts' political context is the funding for private schools. Unlike Arizona, Massachusetts does not generally provide any direct funding to private schools, religious or not. The Massachusetts Constitution limits state funding of private schools, both secular and religious, and the law has been interpreted strictly. Private schools cannot receive funds for textbooks or curriculum, and vouchers to private schools are also prohibited.¹⁷³ One of few exceptions, for example, is that local school committees may be required to spend money on transportation for private-school students.¹⁷⁴ Since there is no current culture of state funds going to religious schools, Massachusetts would be a challenging political environment to introduce religious charter schools.

Religious charter schools are a new, unexplored educational concept, even though the idea is rooted in traditions of parochial schools and charter schools. Therefore, states must be willing to try new concepts and experiment with the schooling system in order to embrace religious charter schools. However, leaders in Massachusetts appear largely committed to the traditional structure of public schools, even distancing themselves from charter schools.¹⁷⁵ Within the public school system, the Boston Public Schools Superintendent recently described her five-year plan as going "back to basics."¹⁷⁶ As a result, it is more difficult to propose a new, state-dependent concept like religious charter schools, especially where state funding for private and religious schools is mostly nonexistent. Overall, Massachusetts' political environment is unlikely to support religious charter schools.

2. Constitutional Context

Massachusetts constitutionally prohibits state funding of any private school, secular or religious,¹⁷⁷ and the law has not been

to the expansion of charter schools. *Education*, MAURA HEALEY FOR GOVERNOR, <https://maurahealey.com/issues/education/> [<https://perma.cc/Z9G4-97HH>].

173 Op. of the Justs. to the Senate, 514 N.E.2d 353, 356 (Mass. 1987); *Bloom v. Sch. Comm. of Springfield*, 379 N.E.2d 578, 580–82 (Mass. 1978); Op. of the Justs. to the House of Representatives, 259 N.E.2d 564, 566 (Mass. 1970).

174 *Att'y Gen. v. Sch. Comm. of Essex*, 439 N.E.2d 770, 776 (Mass. 1982).

175 See *Education*, *supra* note 172.

176 Jeff Saperstone, *Boston Public Schools Superintendent Mary Skipper Talks 5-Year Plan for District*, NBC BOS. (Nov. 28, 2022, 1:00 AM), <https://www.nbcboston.com/news/local/boston-public-schools-superintendent-mary-skipper-talks-5-year-plan-for-district/2904543/> [<https://perma.cc/C82V-Z89Z>].

177 MASS. CONST. amend. art. XVIII, § 2.

interpreted with many exceptions.¹⁷⁸ The Massachusetts Constitution states that no “use of public money . . . shall be made . . . by the Commonwealth . . . for the purpose of founding, maintaining or aiding any . . . primary or secondary school . . . or religious undertaking which is not publicly owned.”¹⁷⁹ Massachusetts also constitutionally prohibits public funding for religious organizations: “[N]o such grant, appropriation or use of public money . . . shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society.”¹⁸⁰ These clauses create a clear restriction on state funding for religious schools.¹⁸¹ Notably, if charter schools are private actors and therefore treated as private schools, the Massachusetts Constitution clearly prohibits state funding for any private schools, religious or otherwise. In that case, the entire Massachusetts charter school system could violate the state constitution. However, if charter schools are private actors and the state-constitutionality issue is resolved in a way that permits secular charter schools, then religious charter schools would be permissible, and even required, in Massachusetts.

Since Massachusetts has two types of charter schools, it is necessary to consider each structure in the context of the state action doctrine. Both Commonwealth charter schools and Horace Mann schools are statutorily “public,”¹⁸² but that does not automatically mean they are state actors, and the schools could be state actors in some contexts but not others. The state requires both charter types to provide the state with the school’s recruitment and retention plan,¹⁸³ operate in accordance with other public-school laws with an exception to some

178 *But see Bloom*, 439 N.E.2d at 774–76 (allowing state funding for some student transportation to private schools).

179 MASS. CONST. amend. art. XVIII, § 2.

180 *Id.*

181 However, the Massachusetts Supreme Judicial Court has recognized situations where religious organizations must receive state funding. In a recent case, *Caplan v. Town of Acton*, the Massachusetts Supreme Judicial Court concluded that the anti-aid provision did not categorically ban a church from receiving public funds and invoked a three-factor test that evaluated “the grant’s purpose, effect, and the risk that its award might trigger the risks that prompted the passage of the anti-aid amendment.” *Caplan v. Town of Acton*, 92 N.E.3d 691, 704 (Mass. 2018) (citing to *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025 (2017), for idea that amendment did not create a “categorical ban on the grant of public funds to a church ‘solely because it is a church’”). This reasoning could potentially provide a pathway for religious-school funding, if it was not for the constitutional prohibition against public funding for all private schools. Since the restriction against funding religious schools is not solely based on religious status, but rather private status, it does not violate the Free Exercise Clause.

182 MASS. GEN. LAWS ch. 71, § 89(c) (2023).

183 *Id.* § 89(f).

employment sections,¹⁸⁴ have students meet the same standards as public schools,¹⁸⁵ and hire certified teachers.¹⁸⁶ A Commonwealth charter school is “operated under a charter granted by the board, which operates independently of a school committee and is managed by a board of trustees.”¹⁸⁷ Given this level of supervision of the school by the state, Commonwealth charter schools have much in common with Arizona charter schools and the school in *Rendell-Baker*. Although Commonwealth charter schools have some more oversight than Arizona charter schools, the differences are not significant enough to suggest that the Commonwealth charter schools’ behavior is fairly attributable to the state. Rather, the oversight by a board of private individuals, the contracting relationship between the school and state, and the general school independence is, on the whole, very similar to the determining facts in *Caviness* and *Rendell-Baker*.¹⁸⁸ Importantly, the state gives Commonwealth charter schools wide leeway in determining curriculum,¹⁸⁹ so the schools would be mostly likely private actors in that context, which is essential for religious charter schools.¹⁹⁰

Horace Mann charter schools must follow additional regulations and requirements. These charter schools “operate[] under a charter approved by the school committee and the local collective bargaining unit” and must “have a memorandum of understanding with the school committee of the district . . . which . . . defines the services and facilities to be provided by the district.”¹⁹¹ The Horace Mann school “shall be operated and managed by a board of trustees independent of the school committee,” though the board “may include a member of the school committee.”¹⁹² This category of charter schools was “[d]esigned to be a hybrid between the charter and district sectors” and the approval process of the Horace Mann charters “was designed to ensure a close and mutually agreeable partnership between a Horace Mann school and its local district.”¹⁹³ Horace Mann schools are exempt from local collective-bargaining agreements, but Horace Mann teachers are still members of the union and receive at least the same salary and benefits as traditional public-school teachers.¹⁹⁴

184 *Id.* § 89(s).

185 *Id.* § 89(v).

186 *Id.* § 89(ii).

187 *Id.* § 89(c).

188 *See supra* notes 60–67.

189 MASS. GEN. LAWS ch. 71, § 89(m), (w) (2023).

190 *See supra* Section II.A.

191 MASS. GEN. LAWS ch. 71, § 89(c) (2023).

192 *Id.*

193 FOSTER, GRAZIANO & SQUIRE, *supra* note 167, at 4, 6–7.

194 MASS. GEN. LAWS ch. 71, § 89(t) (2023).

Because of the close relationship between a Horace Mann charter school and the school district, here the school's actions could be so entwined with the state that it may be a state actor. The district itself provides certain services for the school, approves the charter, and is more involved with the school's operations than Commonwealth charter schools. However, Horace Mann schools are still governed by an independent board, the local-bargaining agreement does not apply to charter-school teachers, the state's regulations still give the school broad discretion for enacting policies, and the district is more involved in the approval process rather than later operations of the school. The Horace Mann charter schools may have some areas where they are state actors, such as the specific services that the state provides for the school. However, the state still allows the charter school freedom to determine its curriculum,¹⁹⁵ which suggests the school could be a private actor at least for curriculum, if not other, purposes.

Massachusetts faces the same problem as Arizona if its charter schools are private actors and therefore "private schools." In Massachusetts, the state constitutional prohibition against state funding for private schools has been interpreted more strictly than Arizona's, resulting in almost no public funding for any private schools. Massachusetts' charter schools could be state actors in the context of the state constitution, even if they are private actors in other contexts, but that argument may be less persuasive given Massachusetts' legal context and history regarding public funding for private schools. Therefore, the possibility arises that Massachusetts' charter schools violate the state constitution and could be shut down.

In Massachusetts, it is unlikely that religious charter schools would appear in the near future. If Horace Mann charter schools are state actors, then any potential religious Horace Mann charter school becomes a complicated issue rooted in the Establishment Clause, and it is clear that true public schools cannot be religious schools.¹⁹⁶ Another possibility is that Massachusetts charter schools disappear. If Massachusetts Commonwealth charter schools are private actors, then courts may find that the charter schools violate the state's constitutional prohibition of governmental aid for private schools. The state may simply shut down its Commonwealth charter school system. Or, Massachusetts could transition all its Commonwealth charter schools to Horace Mann schools, if Horace Mann charter schools are state actors. However, if Horace Mann schools are private actors, or even private actors in some contexts, then they likely face the same result as the Commonwealth charter schools. Charter school advocates could rally and

195 *Id.* § 89(m), (w).

196 *See* GARNETT, *supra* note 5, at 8.

convince the state legislature to save charter schools through a new charter law or alteration to the state constitution, but the political context suggests this would be an uphill battle. Even a definitive ruling by the United States Supreme Court that religious charter schools are constitutionally required would not necessarily result in religious charter schools in Massachusetts. Regardless of state constitutionality, Massachusetts may choose to close its charter schools instead of permitting religious charter schools. There is one potential outcome where religious charter schools in Massachusetts would be required: if secular charter schools remain and are private actors, then Massachusetts would be constitutionally required to fund religious charter schools under Supreme Court precedent.¹⁹⁷

IV. LOOKING FORWARD

Religious charter schools appear to be on the horizon, and litigation is certainly likely in the future.¹⁹⁸ In December, the Oklahoma Attorney General issued an opinion that Oklahoma's charter-school law prohibiting religious charter schools was unconstitutional.¹⁹⁹ The opinion used similar reasoning as described here, relying on the Supreme Court's decisions in *Trinity Lutheran*, *Espinoza*, and *Carson*, as well as the conclusion that Oklahoma's charter schools are private actors.²⁰⁰ Unlike Arizona and Massachusetts, Oklahoma does not have a constitutional provision prohibiting the governmental funding of private schools in general. Oklahoma only has a clause prohibiting the funding of religious schools, like Montana.²⁰¹ Therefore, by declaring the charter schools private schools, Oklahoma does not run into the same problem as Arizona and Massachusetts, where a similar declaration results in its charter school system potentially in violation of the state constitution.

Going forward, it will be easiest for states that have a constitutional restriction only against state funding for religious schools to introduce

197 See, e.g., Mervosh, *supra* note 7 (“Within minutes of the [Oklahoma virtual charter school] vote [approving the first religious charter school], Americans United for Separation of Church and State announced that it was preparing legal action to fight the decision.”)

198 See, e.g., Walsh, *supra* note 6 (“As [the Oklahoma Statewide Virtual Charter School] state board weighs a [religious school] charter application, the issue may yet end up in the courts.”).

199 Okla. Att’y Gen., *supra* note 6. Although the opinion was later retracted by the subsequent Attorney General, the opinion’s reasoning is still valuable and, as I have argued, correct.

200 *Id.* at 14–15.

201 OKLA. CONST. art. II, § 5 (“No public money . . . shall ever be appropriated . . . directly or indirectly, for the use, benefit, or support of any . . . church . . . or for the use, benefit, or support of any . . . religious teacher . . . or sectarian institution as such.”).

religious charter schools. In states that prohibit governmental funding of private schools generally, legislatures and courts will need creative solutions to circumvent or eliminate the state constitutional obstacle. Depending on the state's political context, the constitutionality of religious charter schools could be acknowledged by the state, or interested parties could simply submit an application to open a religious charter school, both of which happened in Oklahoma. Additionally, there could be litigation challenging the charter school laws restricting religious charter schools. If a state does not want religious charter schools, then it is clear that its charter schools need to be state actors, or the state cannot have a charter school system. In states where charter school systems already exist, however, this choice to eliminate charter schools would be undesirable and harm students. Ultimately, the goal is to provide students schooling options where they can best succeed. For some students, that best option may be religious charter schools, and enrollment could be just around the corner.