U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

May 20, 2025

The Honorable Mike Johnson
Speaker
U.S. House of Representatives
Washington, DC 20515

Re: Exclusion of Religiously Affiliated Schools and Nonsectarian Limitations in the Federal Charter-School Program

Dear Mr. Speaker:

Consistent with 28 U.S.C. 530D, I write to advise you that the Department of Justice has determined that the statutory exclusion barring religiously affiliated schools from participating in the Expanding Opportunity Through Quality Charter Schools Program ("Charter Schools Program"), 20 U.S.C. 7221-7221j, is unconstitutional. The Department has also determined that the statutory requirements that participating schools be nonsectarian in their programs and operations are likewise unconstitutional, and that the statutory requirement that participating schools be nonsectarian in their employment practices is subject to First Amendment constraints. The Department is continuing to defend the statutory requirement that admissions policies be nonsectarian in nature. The Solicitor General articulated those positions on April 30, 2025, in the oral argument in *Oklahoma Statewide Charter School Board* v. *Drummond*, No. 24-394 (U.S.), and *St. Isidore of Seville Catholic Virtual School* v. *Drummond*, No. 24-396 (U.S.).

The Charter Schools Program was added to the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27, by the No Child Left Behind Act of 2001, Pub. L. No. 107-110, sec. 501, §§ 5201-5211, 115 Stat. 1425, 1788-1800 (2002). The statute defines a "charter school" as a "public school" that is "exempt from significant State or local rules that inhibit the flexible operation and management of public schools." 20 U.S.C. 7221i(2)(A). As a condition of receiving federal funding, the statute requires a charter school to be "nonsectarian in its programs, admissions policies, employment practices, and all other operations" and "not affiliated with a sectarian school or religious institution." 20 U.S.C. 7221i(2)(E). Under the program, the Department of Education provides grants to entities such as state educational agencies or charter-school support organizations. 20 U.S.C. 7221b(a)-(b). Those entities in turn make subgrants to "eligible applicants" so that they can create or operate charter schools. 20 U.S.C. 7221b(b)(1). An "'eligible applicant,'" or "developer," can be "an individual or group of individuals (including a public or private nonprofit organization)." 20 U.S.C. 7221i(5)-(6). Thus, while a "charter school" is operated under "public supervision and direction," 20 U.S.C. 7221i(2)(B), it may be created and operated by an individual or private nonprofit organization.

In recent years, the Supreme Court has reaffirmed that the Constitution forbids States from attempting to carve out religious schools from programs that generally permit private schools to receive public funds. The Court has held that such restrictions "effectively penalize[] the free exercise" of religion and cannot stand. *Carson* v. *Makin*, 596 U.S. 767, 780 (2022) (citation omitted). In *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449 (2017), the Court held that Missouri had violated the Free Exercise Clause by offering grants to local schools to improve their playgrounds but disqualifying church schools from participation. *Id.* at 453-454, 467. In *Espinoza* v. *Montana Department of Revenue*, 591 U.S. 464 (2020), the Court held that the Free Exercise Clause likewise "precluded the Montana Supreme Court from applying Montana's no-aid provision"—a provision of the Montana Constitution "barring government aid to sectarian schools"—to exclude religious schools from a scholarship program that used "tax credits to 'subsidize tuition payments' at private schools." *Id.* at 469, 472, 474 (citation omitted). And most recently, in *Carson*, the Court applied these "'unremarkable' principles" to Maine's program to pay tuition at the "approved private school of the parent's choice" in localities with no public secondary school, invalidating Maine's requirement that "any school receiving tuition assistance payments" be "'nonsectarian.'" 596 U.S. at 773-774, 780, 787-789 (citation omitted).

Accordingly, the Office of Legal Counsel has determined that the restriction in 20 U.S.C. 7221i(2)(E) barring religiously affiliated schools from participating in the federal charter-school grant program violates the Free Exercise Clause. See *Exclusion of Religiously Affiliated Schools from Charter-School Grant Program*, 44 Op. O.L.C. 131, 137 (2020). Recognizing that a charter school "may be created or operated by an individual or private nonprofit organization," the opinion explained that "[f]orbidding charter schools under the program from affiliating with religious organizations discriminates on the basis of religious status." *Id.* at 132, 137.

The Department has determined that the requirements in 20 U.S.C. 7221i(2)(E) that participating schools be nonsectarian in their programs and operations are likewise unconstitutional. Like a State, the federal government "need not subsidize" charter schools, but once it "decides to do so, it cannot disqualify" some schools "solely because they are religious," including in their programs and operations. *Carson*, 596 U.S. at 785 (citation omitted). As the Supreme Court explained in *Carson*, "exclud[ing] religious persons from the enjoyment of public benefits on the basis of their anticipated religious *use* of the benefits" is no less "offensive to the Free Exercise Clause" than excluding persons based on "religious *status*." *Id.* at 787, 789 (emphases added). And the requirement that charter schools be nonsectarian in their employment policies is subject to the ministerial exception, which bars courts from "interven[ing] in employment disputes involving teachers at religious schools who are entrusted with the responsibility of instructing their students in the faith." *Our Lady of Guadalupe School* v. *Morrissey-Berru*, 591 U.S. 732, 736-737 (2020).

The requirement in 20 U.S.C. 7221i(2)(E) that charter schools be nonsectarian in their "admissions policies," however, is distinct. As the Solicitor General explained in last week's oral argument, under *Employment Division* v. *Smith*, 494 U.S. 872 (1990), the requirement that a charter school be "[o]pen to all comers" is "neutral and generally applicable." Nos. 24-394, 24-396 Tr. 70. And even beyond *Smith*, the federal government likely has a compelling interest in requiring that publicly funded education be "offered to every student across the board without

any discrimination." *Id.* at 71. That is particularly so when the program that the federal government has decided to fund is a charter-school system "that's open to all." *Ibid.* Accordingly, the Department will continue to defend 20 U.S.C. 7221i(2)(E)'s restriction on admission policies.

Please let me know if we can be of any further assistance in this matter.

Sincerely,

D. John Sauer
Solicitor General