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CHURCH-STATE ENTANGLEMENT AT RELIGIOUSLY AFFILIATED CHARTER SCHOOLS

*Janet R. Decker & Kari A. Carr**

Abstract: Several urban archdioceses across the U.S. have closed their Catholic schools and subsequently permitted charter schools to open in their places. This Article describes the possible church-state entanglement issues that arise at schools like these. We reviewed eighty-five relevant cases and found only seven cases involving existing or proposed religiously affiliated charter schools. While generalizations are difficult to draw from this small sample, trends and inferences inform the emerging research. Five of the cases arose when schools were connected with a particular religious organization, such as a church. The lawsuits alleged both explicit and implicit religious entanglement. Our analysis also found that the charter schools affiliated with Christianity typically prevailed; whereas, those affiliated with non-Christian religions were less successful. Additionally, we identified eleven cases that did not involve specific schools, but involved allegations about funding allocated to school choice programs such as charter schools and voucher programs. In each of these cases, courts held that funding did not offend the Establishment Clause. Based on our analysis, we speculate why more cases against religiously affiliated charter schools did not exist, predict that more lawsuits are probable, and provide recommendations to prevent future litigation involving religiously affiliated charter schools.

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I. INTRODUCTION

Clarissa begins her school day by bowing her head, dropping to her knees, and reciting the Lord's Prayer. Her teacher races over to her and explains, "We don't do that anymore," instructing Clarissa that she is to begin each school day by reciting the school's honor code: "I will arrive at school each day on time and ready to work. I will treat all with respect and dignity."¹ Over the summer, Clarissa's private Catholic school closed and reopened as a public charter school. While some activities have changed—for example, teacher-led prayer is no longer permissible—other aspects have remained the same. Most of her teachers and classmates are still at the school. Additionally, the school remains inside a Catholic church, but the space is now leased from the Archdiocese.

Clarissa's school is an example of a Catholic-affiliated charter school.² In recent years, to avoid being closed permanently, hundreds of Catholic schools preemptively closed their doors voluntarily, subsequently reopening as charter schools in the same space.³ These schools have not legally converted into charter schools. They just shut down and later opened as brand new charter schools in the same building. Indeed, one thousand Catholic private schools, the majority of which were located in city centers, have closed every decade since 1960.⁴ While the Catholic-affiliated charter schools may have eliminated religious programming, language, and iconography, most schools continue to enroll the same students, employ the same staff, and operate on church grounds. A multitude of complex entanglement issues exist at these new Catholic-affiliated charter schools, including the leasing of

¹ Vignette about Clarissa based on Javier C. Hernandez, *Secular Education, Catholic Values*, N.Y. TIMES, (Mar. 8, 2009), <http://www.nytimes.com/2009/03/09/nyregion/09charter.html>.

² Craig N. Horning, *The Intersection of Religious Charter Schools and Urban Catholic Education: A Literature Review*, 16 CATHOLIC EDUC.: J. INQUIRY & PRAC. 364 (2013).

³ JANET MULVEY, BRUCE COOPER & ARTHUR MALONEY, *BLURRING THE LINES: CHARTER, PUBLIC, PRIVATE AND RELIGIOUS SCHOOLS COMING TOGETHER* 1, 95 (2010); Dana Brinson, *Turning Loss into Renewal: Catholic Schools, Charter Schools, and the Miami Experience*, SETON EDUC. PARTNERS 1, 4 (2011), http://publicimpact.com/publications/Seton_Miami_Case_Study.pdf.

⁴ Andy Smarick, , *Catholic Schools Become Charter Schools: Lessons from the Washington Experience*, SETON EDUC. PARTNERS 1, 2 (2009), http://www.setonpartners.org/Seton_DC_Case_Study_FINAL.pdf.

church buildings, allocation of state funding to construct new buildings on church property, and offering after-school religion classes within the leased school buildings.⁵ These connections between the publicly funded charter schools and the Catholic Church raise potential church-state entanglement concerns, which make them vulnerable to litigation.

Similar religious entanglement issues exist with a growing subset of charter schools referred to as niche charter schools. Niche charter schools are usually designed around a particular theme, culture, language, or heritage.⁶ For instance, niche charter schools offer specialized programs for gifted students,⁷ students of color,⁸ Chinese language learners,⁹ and other students who subscribe to a particular culture¹⁰ or faith.¹¹ While research on niche charter schools remains in its infancy, a recurring theme in the existing literature suggests that these schools may be vulnerable to a variety of legal challenges.

⁵ Robert Fox, Nina Buchanan, Suzanne Eckes & Letitia Basford, *The Line Between Cultural Education and Religious Education: Do Ethnocentric Niche Charter Schools Have a Prayer?*, 36 REV. RES. EDUC. 289 (2012).

⁶ Within the broad classification of “niche charter schools,” researchers have identified subcategories such as “ethnocentric charter school” as coined by ROBERT A. FOX & NINA K. BUCHANAN, *THE GROWTH OF ETHNOCENTRIC CHARTER SCHOOLS, PROUD TO BE DIFFERENT: ETHNOCENTRIC NICHE CHARTER SCHOOLS IN AMERICA 1* (Robert A. Fox & Nina K. Buchanan eds., 2014); Suzanne E. Eckes, Robert A. Fox, & Nina K. Buchanan, *Legal and Policy Issues Regarding Niche Charter Schools: Race, Religion, Culture, and the Law*, 5 J. SCH. CHOICE 85 (2011).

⁷ *E.g.*, STARGATE SCH., <http://www.stargateschool.org> (last visited July 19, 2013); METROLINA REG'L SCHOLARS ACADEMY, <http://www.scholarsacademy.org/> (last visited July 19, 2013); SIGNATURE SCH., <http://www.signature.edu/> (last visited July 19, 2013).

⁸ *See, e.g.*, AISHA SHULE/W.E.B. DUBOIS PREPARATORY ACAD., <https://web.archive.org/web/20130810030928/http://www.aishashule-duboisprep.com/> (accessed using the Internet Archive index).

⁹ *See, e.g.*, *About Us*, ASIAN HUMAN SERVS. PASSAGES CHARTER SCH., <http://www.passagescharterschool.com/p/about-passages.html> (last visited Mar. 9, 2014); PIONEER VALLEY CHINESE IMMERSION CHARTER SCH., <http://www.pvcics.org/> (last visited Mar. 9, 2014); *Mission & History*, YINGHUA ACAD., <http://www.yinghuaacademy.org/about/mission-history/> (last visited Mar. 9, 2014); WASH.YU YING PUB. CHARTER SCH., <http://www.washingtonyuying.org/> (last visited Mar. 9, 2014); ACAD. OF THE PACIFIC RIM CHARTER PUB. SCH., <http://www.pacrim.org/> (last visited Mar. 9, 2014).

¹⁰ *See, e.g.*, TWIN CITIES INT'L ELEMENTARY SCH., <http://www.twincitiesinternationalschool.org/> (last visited July 19, 2013); KANU O KA 'ĀINA NEW CENTURY PUB. CHARTER SCH., <http://kanu.kalo.org/> (last visited July 19, 2013); *Who We Are*, NATIVE AMERICAN CMTY ACAD., <http://www.nacaschool.org/about/> (last visited Oct. 31, 2013).

¹¹ *E.g.*, HEBREW LANGUAGE ACAD. CHARTER SCH., <http://www.hlcharterschool.org/> (last visited July 19, 2013); HELLENIC CLASSICAL CHARTER SCH., <http://www.hccs-nys.org/> (last visited July 19, 2013).

Since some niche charter schools adopt a focus relating to a particular religion, such as Hebrew-language schools, researchers have noted possible church-state entanglement issues in violation of the First Amendment's Establishment Clause.¹²

Questions remain, however, as to whether religiously affiliated charter schools are likely to face litigation and, if so, what the nature of these legal challenges would be. Therefore, this Article contributes to the emerging niche charter school research by investigating if religiously affiliated charter schools are likely to face litigation and to analyze the implications of litigation for religiously affiliated charter schools.

In the following section, to provide a foundational background and explore the legal questions surrounding religiously affiliated charter schools, we explore one type of religiously affiliated charter school, Catholic-affiliated charter schools. Next, we present our findings about the existing litigation relevant to the broader subset of religiously affiliated charter schools. After reviewing eighty-five relevant cases, we identified eighteen cases related to Establishment Clause violations at charter schools. Seven of these cases addressed legal challenges to religiously affiliated charter schools, and an additional eleven cases involved peripheral issues relevant to our analysis.

We extracted the following four themes from the litigation: 1) most schools facing litigation were closely tied with a particular religious entity; 2) allegations involved both explicit and implicit religious entanglement; 3) charters schools affiliated with Christianity typically prevailed and remained open; and 4) courts have rejected all claims alleging that choice program funding—that is, governmental funding that is allocated to school choice program initiatives such as charter schools and vouchers—violates the Establishment Clause. In

¹² See, e.g., SUZANNE E. ECKES & KARI A. M. CARR, ETHNOCENTRIC NICHE CHARTER SCHOOLS: A VIEW THROUGH LEGAL AND POLICY LENSES, PROUD TO BE DIFFERENT: ETHNOCENTRIC NICHE CHARTER SCHOOLS IN AMERICA 167 (Robert A. Fox & Nina K. Buchanan eds., 2014); Fox, Buchanan, Eckes & Basford, *supra* note 5; Aaron Saiger, *Charter Schools, the Establishment Clause and the Neoliberal Turn in Education*, 34 CARDOZO L. REV. 1163 (2013); Maren Hulden, *Charting a Course to State Action: Charter Schools and § 1983*, 111 COLUM. L. REV., 1244 (2011); Benjamin Siracusa Hillman, Note, *Is There a Place for Religious Charter Schools?*, 118 YALE L.J. 554 (2008); Charles Russo & Gerald Cattaro, *Faith-Based Charter Schools: An Idea Whose Time is Unlikely to Come*, 13 CATHOLIC EDUC.: J. INQUIRY & PRAC. 509 (2010).

the final section, we conclude by speculating why relatively few lawsuits have been filed against religiously affiliated charter schools. We also predict that additional litigation is probable and provide recommendations to prevent Establishment Clause violations.

II. BACKGROUND AND POTENTIAL LEGAL ISSUES

To explore the background of religiously affiliated charter schools and their potential legal issues, it is helpful to apply the law to a specific type of charter school. Therefore, we describe the potential legal issues that could face Catholic-affiliated charter schools. Catholic schools have had a history of serving students in urban centers, and the percentages of students of color attending these schools has grown since the 1970s, even though the overall population of students attending Catholic schools has decreased.¹³ Catholic high schools have documented higher rates of high school graduation and college attendance, lower dropout rates, and higher academic achievement than non-religious schools (particularly for students of color and disadvantaged students).¹⁴ Catholic schools have also served as longstanding members of their parishes and the neighborhoods in which they are located, offering social support and cohesion to the surrounding communities.¹⁵ Thus, when faced with debt and closure, Catholic schools and their parishes found a potential solution by closing and reopening as public charter schools. Many Catholic school advocates hoped that the autonomy granted to charter schools might allow the Catholic schools to maintain their unique character, albeit with the religious symbols and curricula removed,¹⁶ and have the potential to accommodate families who subscribe to any religious belief

¹³ M. Shelia Nelson, *Catholic Elementary Schools in Chicago's Black Inner City: Four Modes of Adaptation to Environmental Change*, 23 *NONPROFIT & VOLUNTARY SECTOR Q.* 209, 214 (1994).

¹⁴ Joseph G. Altonji, Todd E. Elder & Christopher R. Taber, *Selection on Observed and Unobserved Variables: Assessing the Effectiveness of Catholic Schools*, 113 *J. POL. ECON.* 151, 156 (2005); James S. Coleman, *Families and Schools*, 16 *EDUC. RESEARCHER* 32, 36 (1987); William Jeynes, *Why Religious Schools Positively Impact the Academic Achievement of Children*, 3 *INT'L J. EDUC. & RELIGION* 16, 22 (2002).

¹⁵ Margaret F. Brinig & Nicole S. Garnett, *Catholic Schools, Urban Neighborhoods and Education Reform*, 85 *NOTRE DAME LAW REVIEW* 887, 891 (2010).

¹⁶ Smarick, *supra* note 4; Brinson, *supra* note 3.

system, including Catholicism.¹⁷ Despite the admirable motivations and parental support behind Catholic-affiliated charter schools, they face significant legal vulnerabilities.

While many new charter schools have emerged to take advantage of the flexibility and autonomy unavailable within the traditional public school district,¹⁸ faith-based schools that close and subsequently reopen as charter schools may embark on a slightly different mission. Many times faith-based schools are seeking charter school status in order to guarantee the survival of the preceding faith-based school. For example, Catholic churches and schools have recognized that when they become charter schools, they might be able to continue their mission of providing strong values and community-based education to urban families through character education and public funding.¹⁹ Their implementation of these goals for becoming charter schools may not violate the constitutional principle of church and state separation because the founders of Catholic-affiliated charter schools did not appear to be attempting to infiltrate the public school system in hopes of converting students to Catholicism. However, the ways in which the schools' former religious practices or ties to the parish persist in the newly opened charter schools present a source of potential legal conflict.²⁰

A. *Relevant Legal Doctrine*

At first glance, the mere existence of religiously affiliated charter schools may seem to be at odds with the American tradition of church and state separation.²¹ However, a review of the legal doctrine illustrates how blurred the line can become when discussing the parameters of the separation of church and state in school settings.²² The First Amendment of the U.S.

¹⁷ Horning, *supra* note 2.

¹⁸ Luis A. Huerta & Andrew Zuckerman, *An Institutional Theory Analysis of Charter Schools: Addressing Challenges to Scale*, 84 PEABODY J. EDUC. 414, 418 (2009).

¹⁹ Erik P. Goldschmidt & Mary E. Walsh, *Urban Catholic Elementary Schools: What are the Governance Models?*, 17 CATHOLIC EDUC.: J. INQUIRY & PRAC. 111, 126 (2013); Horning, *supra* note 2, at 376.

²⁰ Fox, Buchanan, Eckes, & Basford, *supra* note 5.

²¹ Horning, *supra* note 2, at 379.

²² The line also appears blurry in non-school settings. Religious entanglement remains a current and common topic in litigation today. See *Town of Greece v. Galloway*, 2014 WL 1757828 (2014) (holding opening town board meetings with clergy-led prayer does not violate the Establishment Clause).

Constitution provides two counterbalancing religious clauses. While the Establishment Clause prohibits state endorsement of religion, the Free Exercise Clause protects individual religious freedom. Some contend that the dichotomous tension between these two clauses is to blame for the muddled guidance on how to handle religion in public schools.²³ While the Establishment Clause prevents state-sponsored institutions, such as public schools, from establishing a religion, the Free Exercise Clause prevents public schools from creating any policy or practice that would disallow the free exercise of one's faith. The Free Speech Clause further complicates the issue because the U.S. Supreme Court has protected private religious expression in public schools²⁴ and government religious expression using a Free Speech analysis.²⁵

The U.S. Supreme Court has repeatedly been called upon to analyze whether certain governmental actions violate these constitutional principles. As a result of a long history of church-state litigation, the Court has developed three general tests to determine whether a church-state violation has occurred: 1) the *Lemon* test; 2) the Endorsement test; and 3) the Coercion test.

The *Lemon* test is a three-pronged inquiry derived from *Lemon v. Kurtzman* decided in 1971. In applying the *Lemon* test, courts must analyze whether the governmental practice or policy 1) has a secular purpose; 2) advances or inhibits religion; or 3) creates an excessive governmental entanglement with religion.²⁶ In the late 1980's, the Supreme Court began applying the Endorsement test, which examines whether a governmental practice or policy endorses or disapproves of religion.²⁷ Additionally, since 1992, the Court has applied the

²³ See, e.g., Fox, Buchanan, Eckes & Basford, *supra* note 5.

²⁴ Martha M. McCarthy, *When Government Expression Collides with the Establishment Clause*, 10 B.Y.U. EDUC. & L.J. 113, n.68 (2010) (identifying that the U.S. Supreme Court applied a Free Speech Clause analysis to prohibit public schools from discriminating against private religious expression in *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) and *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990)).

²⁵ See *id.* at 118–25 (discussing the implications of *Pleasant Grove City v. Summum* where the U.S. Supreme Court held a display of the Ten Commandments in a city park was protected government expression but a private religious group's request to erect a religious monument at the same park was not protected. 129 S. Ct. 1125 (2009)).

²⁶ *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971); See also, *Agostini v. Felton*, 521 U.S. 203 (1997) (holding that the state could conduct public programs (e.g., Title I) in parochial schools without excessive entanglement).

²⁷ See *Cnty. of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 599–601 (1989).

Coercion test that asks whether the governmental practice or policy coerces others to subscribe to or participate in a certain religious or faith-based tradition.²⁸ Although the Court has applied all three tests to determine whether a governmental action violates the Establishment Clause, the *Lemon* test appears to be losing favor, especially the “excessive entanglement” prong.²⁹

When these three tests are applied to public schools, it is generally accepted that the schools can accommodate students’ religious and cultural practices, but cannot be viewed as operating via an established religion or endorsing a particular faith therein.³⁰ To illustrate a situation in which public schools must accommodate religion, the U.S. Supreme Court has held that schools must allow students to leave early to attend religious instruction at religious schools,³¹ schools must allow religious student³² and community groups to meet when they permit facility access to other groups,³³ and public funding can be allocated to parochial schools when it benefits the individual child and not the nonpublic schools.³⁴ Yet, the Court has also held that public schools must respect the separation of church and state. For example, public schools cannot sponsor prayer (even when it is non-denominational³⁵ or at graduation³⁶), force

²⁸ *Lee v. Weisman*, 505 U.S. 577, 587–88 (1992).

²⁹ See MARTHA M. MCCARTHY, NELDA H. CAMBRON-MCCABE & SUZANNE E. ECKES, *PUBLIC SCHOOL LAW TEACHERS’ AND STUDENTS’ RIGHTS* 24–25 (7th ed. 2014).

³⁰ ECKES & CARR, *supra* note 12.

³¹ *Zorach v. Clauson*, 343 U.S. 306, 308 (1952).

³² *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 278 (1990). See also Todd A. DeMitchell & Richard Fossey, *Student Speech: School Boards, Gay/Straight Alliances, and the Equal Access Act*, 2008 B.Y.U. EDUC. & L.J. 89, 91–93. Ralph D. Mawdsley, *The Equal Access Act and Public Schools: What Are the Legal Issues Related to Recognizing Gay Student Groups?*, 2001 B.Y.U. EDUC. & L.J. 1, 1.

³³ *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 397–98 (1993).

³⁴ See *Cochran v. State Bd. of Educ.*, 281 U.S. 370, 375 (1930) (holding that a Louisiana statute that provided textbooks for public or nonpublic students was did not violate the Establishment Clause); *Everson v. Bd. of Educ.*, 330 U.S. 1, 7 (1947) (holding that a New Jersey law that permitted parents of Catholic school students to be reimbursed for public transportation expenses did not violate the Establishment Clause), *Mitchell v. Helms*, 530 U.S. 793, 808 (2000) (holding that instructional materials could be provided to nonpublic school students). See also Charles J. Russo & Ralph D. Mawdsley, *The Supreme Court and the Establishment Clause at the Dawn of the New Millennium: “Bristling with Hostility to All Things Religious” or Necessary Separation of Church and State?*, 2001 B.Y.U. EDUC. & L.J. 231.

³⁵ *Engel v. Vitale*, 370 U.S. 421, 445 (1962).

³⁶ *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

a student to recite the Pledge of Allegiance,³⁷ display the Ten Commandments,³⁸ or allow religious leaders to provide religious instruction at school.³⁹

Overall, school-sponsored religious expression is usually impermissible whereas student-initiated religious expression is typically protected. Thus, a teacher should not lead a class in prayer, but a teacher also should not prohibit a non-disruptive student from praying. Further, teachers can teach about the Bible and other religious texts from a historical, literary, or cultural perspective,⁴⁰ but they cannot proselytize to students.⁴¹

B. Entanglement Issues for Religiously affiliated Charter Schools

Despite the guidance from the relevant legal doctrine,⁴² religiously affiliated charter schools have become fertile ground for cultivating church-state tension.⁴³ In 2014, the U.S. Department of Education issued non-regulatory guidance that discusses six commonly identified entanglement issues at charter schools including: 1) leasing buildings from churches; 2) contracting with religious organizations for secular programming and teaching; 3) marketing charter schools at churches; 4) marketing church events at charter schools; 5) reopening private, parochial schools as charter schools; and 6) teaching religiously related concepts.⁴⁴

Catholic-affiliated charter schools are merely one type of religiously affiliated charter school that faces significant

³⁷ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *See also* Charles J. Russo, *The Supreme Court and Pledge of Allegiance: Does God Still Have a Place in American Schools?*, 2004 B.Y.U. EDUC. & L.J. 301.

³⁸ *Stone v. Graham*, 449 U.S. 39, 41 (1980).

³⁹ *Illinois ex rel. McCollum v. Board of Educ. of Sch. Dist. No. 71*, 333 U.S. 203, 209–11 (1948).

⁴⁰ *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963).

⁴¹ *See Marchi v. Bd. of Coop. Educ. Servs.*, 173 F.3d 469 (2d Cir. 1999); *Downing v. W. Haven Bd. of Educ.*, 162 F. Supp. 2d 19 (D. Conn. 2001).

⁴² Saiger, *supra* note 12, at 1198.

⁴³ ECKES & CARR, *supra* note 12 ; Eckes, Fox & Buchanan, *supra* note 6; Fox, Buchanan, Eckes & Basford, *supra* note 5; MULVEY, COOPER & MALONEY, *supra* note 3; Brinson, *supra* note 3; Lawrence D. Weinberg, *Religiously Affiliated Charter Schools: Gaining Ground Yet Still Undefined*, 18 J. RES. CHRISTIAN EDUC. 290 (2009).

⁴⁴ *See, e.g.*, U.S. DEP'T OF EDUC., TITLE V, PART B NONREGULATORY GUIDANCE: CHARTER SCHOOLS PROGRAM, 22–23 (2014), *available at* <https://www2.ed.gov/programs/charter/nonregulatory-guidance.html> (providing guidance about church-state entanglement issues to charter schools receiving federal funding through the Charter Schools Program).

obstacles in addressing these six problem areas. Consider the example of Catholic-affiliated charter schools which have continuing obligations to their former religiously centered communities. After an abrupt Catholic school closure and charter school opening, these charter schools bear striking similarities to the former Catholic schools that stood in their places.⁴⁵ Many of the original teachers, administrators, and families remain with the schools after they reopen as charter schools. Additionally, obligations stem from cultural traditions and expectations that formed a profound part of the community and school for decades. These cultural dimensions of the school organizations are difficult to change and continue to exert pressure on the Catholic-affiliated charter schools.⁴⁶ However, the new charter schools must now comply with the constitutional requirements set by the Establishment Clause and are no longer at liberty to endorse or support religion.

Transitioning from a parochial, autonomous school to a public school generates a number of questions. For example, when religiously affiliated charter schools rent facilities from churches, what specifications must be in the lease to avoid excessive financial entanglement? Must the schools remove all religious symbols from the premises? What about the religious symbols that cannot be removed, such as crosses that are central to the church's structure? What constitutional protections do their students and employees have now that the school is a public and not a private school?⁴⁷ When analyzing these questions, religiously affiliated charter school leaders could examine past precedent and apply the three Establishment Clause tests. However, they may find that no clear legal guidance exists for many of the legal quandaries they currently face. Several of their issues may present

⁴⁵ Russo & Cattaro, *supra* note 12, at 519.

⁴⁶ Kari A. Carr, *When Catholic Schools Close and Become Charter Schools: A Case Study of Organizational Narratives and Legitimacy* (June, 2014) (Unpublished dissertation manuscript, Indiana University).

⁴⁷ In many instances, private school employees do not have constitutional protection without proving the private school's behavior constituted state action. See Marka Fleming, Amanda Harmon Cooley & Gwendolyn McFadden Wade, *Morals Clauses for Educators in Secondary and Postsecondary Schools: Legal Applications and Constitutional Concern*, 2009 B.Y.U. EDUC. & L.J. 67, 89. However, private school employees' constitutional protections are often unclear. See *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S.Ct. 694 (2012) (finding that a Lutheran school teacher was covered by the ministerial exception and thus, her employment discrimination claim was unsuccessful).

questions of first impression on which courts have yet to offer guidance.⁴⁸

Religiously affiliated charter school leaders may be aware that they must not violate the Establishment Clause, yet they are left without adequate guidance as to how they should apply the constitutional mandates to their daily operations. They are not alone. Despite the existing legal doctrine, even traditional public schools struggle to understand the legal limits of religion in schools. Moreover, the separation of church and state has become increasingly blurred by recent decisions permitting public funding in the form of vouchers to be applied to parochial school tuition.⁴⁹

Further, these school leaders may be aware of their legal responsibility to ensure the religious curriculum and culture have been eradicated, but may also face stakeholders' opposition to the change. As noted above, cultural expectations on organizations such as schools exert powerful pressures on the ways such organizations act and make decisions. For example, though they understand the legal implications of church-state entanglement in becoming a public school, families and employees may be concerned that a loss of spirituality and religious identity will weaken the culture of the school and choose to leave. School leaders must mediate the simultaneous pressures for legal compliance and school survival amid desires for continuity of school mission, community, and expectations for school culture.⁵⁰ The various problem areas impacting religiously affiliated charter schools, combined with the lack of clear legal guidance, may make religiously affiliated charter schools likely targets for future litigation.

⁴⁸ Some cases are not published or available for review and other litigation results in confidential settlement agreements. *E.g.*, *ACLU of Minnesota v. TiZA*, ACLU OF MINNESOTA, <http://www.aclu-mn.org/legal/casedocket/aclumnvtiza/> (last visited March 3, 2014).

⁴⁹ The U.S. Supreme Court held that vouchers are a "program of true private choice" because the money for schooling, based on need and residence, was delivered by way of parents and individual choice which did not denote the governmental sponsorship of religion. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 653 (2002).

⁵⁰ Carr, *supra* note 46.

III CHURCH-STATE ENTANGLEMENT CHARTER SCHOOL LITIGATION

It is clear that religiously affiliated charter schools are, at least theoretically, prone to legal tensions, but previous research on charter schools has not focused on the extent and implications of the relevant litigation.

A. *Methods*

To contribute to the existing literature on niche charter schools, we used a novel research design intended to capture a comprehensive sample of the religiously affiliated charter school cases. First, we conducted six key-word searches on the electronic legal database Westlaw.⁵¹ We searched over two decades of published state and federal cases from 1991—the year charter schools originated—to 2014. Initially, we conducted a broad search in hopes of not only identifying the cases that specifically involved church-state entanglement issues at charter schools, but also, because we hoped to find peripheral cases that would inform our findings and analysis. A total of eighty-five relevant cases were identified which was a large enough pool of cases to identify meaningful insights.

Next, we reviewed the eighty-five cases to analyze how they related to church state entanglement issues. If the case was no longer “good law,”⁵² did not relate to church-state entanglement

⁵¹ Between February 20–26, 2014, we conducted six, separate key-word searches. The terms used were 1) “establishment clause” and “charter school”; 2) sectarian religio! /s “charter school” & da(aft 1/1991) % adea “title vii”; 3) sectarian religio! /s “community school” & ohio & da(aft 1/1991) % adea “title vii”; 4) “equal protection clause” & “charter school”; 5) discriminat! & “charter school” & “admissions policy” “admissions practice” & da(aft 1/1991); & 6) discriminat! & “community school” & Ohio & “admissions policy” “admissions practice” & da(aft 1/1991). The term “community school” was used in some searches because this is the term Ohio uses for charter schools. OHIO REV. CODE ANN. § 3314.01 (West 2013). All of the searches were of the “all state and federal cases” database with a date restriction after 1991 because that is the year of the first charter school law. Cases that appeared in more than one search were only counted once. A limitation of our search is that we did not do an additional search on LexisNexis. Additionally, it is possible that there are cases and unpublished decisions relevant to our research questions that were not captured in this search.

⁵² To determine whether each case was no longer “good law,” they were keycited using Westlaw. To identify whether a case has been overturned, reaffirmed, questioned, or cited by subsequent courts, legal researchers “shepardize” or “keycite.” These terms are trademarks of the companies who created the systems. Shephardizing describes using Shepard’s publications and citatory services which traditionally appeared in book form, but are now online through LexisNexis; whereas, keyciting

issues at charter schools, or only included procedural issues, it was excluded from our dataset. If the case was a lower court decision and its appellate counterpart was in the data set, it was also excluded. Once sixty-seven cases were excluded from the sample for these reasons, the total number of cases in the dataset equaled eighteen.

We entered the eighteen cases into a spreadsheet and color coded them to indicate whether they involved a religiously affiliated charter school, an allegation of church-state entanglement at charter schools, or peripheral issues that would nonetheless inform our research questions. Next, we conducted a legal analysis of the existing litigation by grouping cases together based on color code and similarity in the following variables: facts and procedural history, holding, rationale, dissenting opinion(s), concurring opinion(s), status, and lessons learned.

Of the eighteen church-state entanglement cases, seven cases involved specific charter schools where church-state entanglement violations were alleged.⁵³ Eleven additional cases involved peripheral issues, such as litigation challenging voucher programs on Establishment Clause grounds.⁵⁴ We extracted three themes from our analysis of the seven cases involving specific charter schools: 1) five of the seven charter schools were closely tied to a particular religious organization, such as a church; 2) allegations involved both explicit and implicit religious entanglement; and 3) charter schools

refers to the system that Westlaw employs.

⁵³ *Daugherty v. Vanguard Charter Sch. Acad.*, 116 F. Supp. 2d 897 (W.D. Mich., 2000); *Nampa Classical Acad. v. Goesling*, 447 Fed.Appx. 776 (9th Cir. 2011); *Am. Civil Liberties Union of Minn. v. Tarek Ibn Ziyad Acad.*, Civil 09–138 DWF/JJG, 2010 WL 1840301 (D. Minn. May 7, 2010)(aff'd sub nom. *Am. Civil Liberties Union of Minn. v. Tarek ibn Ziyad Acad.*, 643 F.3d 1088 (8th Cir. 2011)); *Pocono Mountain Charter Sch. v. Pocono Mountain Sch. Dist.*, No. 1308 C.D.2013, 2014 WL 717951 (Pa. Commw. Ct. Feb. 26, 2014); *Porta v. Klagholz*, 19 F. Supp. 2d 290 (D.N.J. 1998); *Shelby Sch. v. Ariz. State Bd. of Educ.*, 962 P.2d 230 (Ariz. Ct. App. 1998); *Brookwood Presbyterian Church v. Ohio Dept. of Educ.*, No. 12AP–487, 2013 WL 3875300 (Ohio Ct. App. July 25, 2013).

⁵⁴ *Niehaus v. Huppenthal*, 310 P.3d 983 (Ariz. Ct. App. 2013); *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998); *Winn v. Ariz. Christian Sch. Tuition Org.*, 586 F.3d 649 (9th Cir. 2009); *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Green v. Garriot*, 212 P.3d 96 (Ariz. Ct. App. 2009); *Giacomucci v. Se. Delco Sch. Dist.*, 742 A.2d 1165 (Pa. Commw. Ct. 1999); *Taxpayers for Pub. Educ. v. Douglas Cnty Sch. Dist.*, Nos. 11CA1856 & 11CA1857, 2013 WL 791140 (Colo. App. Feb. 28, 2013); *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999) (en banc); *Wilson v. State Bd. of Educ.*, 89 Cal. Rptr. 2d 745 (Cal. Ct. App. 1999); *Council of Orgs. and Others for Educ. About Parochial, Inc. v. Governor*, 566 N.W.2d 208 (Mich. 1997).

affiliated with Christianity typically prevailed and remained open; whereas, those affiliated with non-Christian religions were less successful. Additionally, a general trend surfaced from the eleven peripheral cases. Namely, courts have rejected every claim alleging that funding devoted choice programs such as charter schools and vouchers violates the Establishment Clause.

B. Litigation Arose When Schools Were Tied to a Particular Religious Entity

Of the seven cases involving allegations of church-state entanglement violations at charter schools, five included schools with ties to a particular religious organization.⁵⁵ These schools had a special relationship with an existing church or religious entity and were not freestanding schools with a general mission to provide religious education (e.g., a charter school that generally teaches world religions or a religiously-based language).

Since the mission of many religious entities, such as churches, is to spread religious messages, practice religious customs, and to sometimes convert nonbelievers, one may think that whenever a charter school is generally affiliated with religious entities or has a special connection to one it would raise suspicions of illegal church-state entanglement. On the contrary, charter schools affiliated with a certain religion, but not with a specific religious organization, may be less likely to be sued because they do not appear overly entangled with religious practices and/or entities. Some religiously affiliated charter schools may avoid litigation if they are viewed as merely teaching religion from a cultural, historical, or literary perspective, which would survive judicial scrutiny.⁵⁶ For example, numerous Hebrew charter schools exist across the country.⁵⁷ They have been harshly scrutinized in the public

⁵⁵ *Shelby Sch. v. Ariz. State Bd. of Educ.*, 962 P.2d 230 (Ariz. Ct. App. 1998); *Porta v. Klagholz*, 19 F. Supp. 2d 290, 303 (D.N.J. 1998); *Am. Civil Liberties Union of Minn. v. Tarek Ibn Ziyad Acad.*, Civ.09-138 DWF/JJG, 2010 WL 1840301 *3 (D. Minn. May 7, 2010)(aff'd sub nom. *Am. Civil Liberties Union of Minn. v. Tarek ibn Ziyad Acad.*, 643 F.3d 1088 (8th Cir. 2011)); *Brookwood Presbyterian Church v. Ohio Dept. of Educ.*, No. 12AP-487, 2013 WL 3875300 (Ohio Ct. App. July 25, 2013); *Pocono Mountain Charter Sch. v. Pocono Mountain Sch. Dist.*, No. 1308 C.D.2013, 2014 WL 717951 (Pa. Commw. Ct. Feb. 26, 2014).

⁵⁶ *Se Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963).

⁵⁷ *Our Mission*, HARLEM HEBREW LANGUAGE ACAD. CHARTER SCH.,

discourse, but their doors remain open. Perhaps they do not appear in the existing litigation because they emphasize and publicize that they are Hebrew *language* schools with a focus on teaching language, not religion.⁵⁸

Of the five cases where charter schools were connected to a specific religious entity such as a church, three involved schools leasing facilities from religious organizations. In the first case, *Porta v. Klagholz*, a federal district court found no Establishment Clause violation when a taxpayer alleged that one charter school illegally held classes and leased space from the All Saints Episcopal Church and another school held classes and leased space from Riverside Assembly of God Church.⁵⁹ Applying the *Lemon* test, the court held that the leasing of space did not violate the Establishment Clause.⁶⁰ It reasoned that the lease was not a per se violation of the Establishment Clause,⁶¹ concluding that both schools had a secular purpose of educating children which did not have “a principal or primary effect that either advances or inhibits religion.”⁶² The two charter schools from this 1998 case remain open today.⁶³

The second case, *Pocono Mountain Charter School v. Pocono Mountain School District*, has a long history of legal woes.⁶⁴

<http://www.harlemhebrewcharter.org/> (last visited May 15, 2014); HATIKAVAH INT'L ACAD. CHARTER SCH., <http://hatikvahcharterschool.com/> (last visited May 15, 2014); HEBREW LANGUAGE ACAD. CHARTER SCH., <http://hlcharterschool.org/> (last visited May 15, 2014); KAVOD ELEMENTARY CHARTER SCH., <http://kavodelementary.org/> (last visited May 15, 2014); SELA PUBLIC CHARTER SCH., <http://www.selpacs.org/> (last visited May 15, 2014); BEN GAMLA CHARTER SCH., <http://www.bengamla-charter.com/> (last visited May 15, 2014).

⁵⁸ See, e.g., MULVEY, COOPER & MALONEY, *supra* note 3 (discussing that the ACLU monitored, but did not bring legal action against the Ben Gamla Charter School located in Hollywood, Florida because it does not teach Judaism, and instead focused on Israeli culture and Hebrew language); See also Hebrew CHARTER SCHOOL CENTER, <http://new.dnieciecki.webfactional.com/> (last visited May 15, 2014) (stating that they are “building a movement of academically-rigorous dual-language charter schools across America that teach children from all backgrounds to become fluent and literate in Modern Hebrew”).

⁵⁹ *Porta v. Klagholz*, 19 F. Supp. 2d 290, 303 (D.N.J. 1998).

⁶⁰ *Id.* at 301 (D.N.J. 1998) (applying the modified *Lemon* test articulated in *Agostini v. Felton*, 521 U.S. 203, 234–35 (1997)).

⁶¹ *Id.* at 302.

⁶² *Id.* at 297.

⁶³ SOARING HEIGHTS CHARTER SCH., <http://www.soaringheightscharterschool.com/> (last visited May 15, 2014); *Welcome*, GALLOWAY CMY CHARTER SCH., gcescharterschool.org (last visited May 15, 2014). Both schools appear to be located in new facilities.

⁶⁴ *Pocono Mountain Charter Sch. v. Pocono Mountain Sch. Dist.*, No. 1308

Much of the litigation history involves Reverend Dennis Bloom, who simultaneously served as the school's CEO while he was pastor of the Shawnee Tabernacle Church.⁶⁵ He is currently in prison for pleading guilty to tax evasion.⁶⁶ Yet, the main issue in the pending litigation is whether the school district illegally revoked the school's charter in 2008 due to religious entanglement and financial improprieties.⁶⁷

The charter school is located on the grounds of the Shawnee Tabernacle Church and leases its facilities from the church. The school's 2007 lease indicated that the school paid the church approximately \$19,000 per month for a space that was under construction and uninhabitable, \$33,000 per month for the building space, and \$36,000 per year for use of the athletic fields.⁶⁸ In addition to former CEO Bloom receiving a salary of approximately \$108,000 and employing his wife and children, he oversaw the construction of a new \$125,000 gymnasium that bore the name of the church imprinted on its floor.⁶⁹ After the district's revocation of the charter, the State Charter School Appeals Board ("CAB") upheld the revocation citing improper religious entanglement as well as other issues (e.g., paying more than fair market value rates for rent).⁷⁰ In a recent court decision, however, the Pennsylvania Commonwealth Court determined that CAB improperly considered some evidence in its revocation of the school's charter.⁷¹ The court remanded the case to CAB with orders to reexamine the evidence to

C.D.2013, 2014 WL 717951 (Pa. Commw. Ct. Feb. 26, 2014).

⁶⁵ *Id.* at *1. 278–79

⁶⁶ Terrie Morgan-Besecker, *Appeals Court Overturns Revocation of Pocono Charter School Charter*, SCRANTON TIMES-TRIBUNE (Feb. 28, 2014), <http://thetimes-tribune.com/news/appeals-court-overturns-revocation-of-pocono-charter-school-charter-1.1642341>; Peter Hall, *Judge Appoints Lawyer to Run Pocono Mountain Charter School*, MORNING CALL (Apr. 19, 2013), http://articles.mcall.com/2013-04-19/news/mc-pocono-mountain-charter-under-court-control-20130419_1_shawnee-tabernacle-church-dennis-bloom-pocono-mountain-charter-school; Jenna Ebersole, *Shawnee Tabernacle's Rev. Bloom begs for a Break in Tax Fraud Sentencing*, POCONO RECORD (Sept. 9, 2013), <http://www.pocorecord.com/apps/pbcs.dll/article?AID=/20130909/NEWS/309090320>; Peter Hall, *Founder of Pocono Mountain Charter School Faces Tax Charges*, MORNING CALL (Mar. 26, 2013), http://articles.mcall.com/2013-03-26/news/mc-pocono-mountain-charter-school-bloom-indictment-20130326_1_pocono-mountain-charter-school-shawnee-tabernacle-church-dennis-bloom..

⁶⁷ *Pocono Mountain Charter Sch. v. Pocono Mountain Sch. Dist.*, No. 1308 C.D.2013, 2014 WL 717951, at *1 (Pa. Commw. Ct. Feb. 26, 2014).

⁶⁸ *Id.* at *3. 280–81

⁶⁹ *Id.* at *4. At 281

⁷⁰ *Id.* at *2–3. At 282

⁷¹ *Id.* at *17. At 284

determine whether there was sufficient evidence supporting a revocation of the school's charter.⁷² In June 2014, CAB unanimously affirmed its previous vote to rescind the school's charter due to excessive entanglement.⁷³ Despite the long-standing litigation, the school remained open and, because of a stalemate between two factions of the school's board of trustees, has a court-appointed custodian leading the charter school.⁷⁴ The school considered appealing CAB's latest decision, but ultimately closed in June 2014.⁷⁵

Similar to other charter schools that leased space from a religious organization, *ACLU of Minnesota v. Tarek ibn Ziyad Academy* involved an allegation that the charter school's connection with a religious organization was in violation of the Establishment Clause.⁷⁶ Tarek ibn Ziyad Academy (TiZA) was closed in 2011 after facing two years of litigation.⁷⁷ In 2009, the American Civil Liberties Union of Minnesota (ACLU) filed suit alleging that TiZA, its sponsor, Islamic Relief, and many of its employees had advanced, endorsed, and preferred Islam.⁷⁸ To support this claim, the ACLU argued that TiZA had close connections to the Muslim American Society of Minnesota and was located in facilities leased from the religious entity. In 2011, a federal district court denied TiZA's motion for summary

⁷² *Pocono Mountain Charter Sch. v. Pocono Mountain Sch. Dist.*, No. 1308 C.D.2013, 2014 WL 717951, at 295 (Pa. Commw. Ct. Feb. 26, 2014).

⁷³ Jenna Ebersole, *Embattled Charter School Preparing for Future Without Students* (June 5, 2014), THE MORNING CALL, http://articles.mcall.com/2014-06-05/news/mc-pocono-mountain-charter-revocation-20140605_1_pocono-mountain-charter-school-shawnee-tabernacle-church-charter-appeal-board; Peter Hall, *Pocono Mountain Charter School Loses Another Round to Stay Open*, THE MORNING CALL (June 3, 2014), http://articles.mcall.com/2014-06-03/news/mc-pocono-charter-school-20140603_1_shawnee-tabernacle-church-pocono-mountain-charter-school-appeal-board.

⁷⁴ *Pocono Mountain Charter Sch. v. Pocono Mountain Sch. Dist.*, No. 1308 C.D.2013, 2014 WL 717951, at 279. *Board Meetings*, POCONO MOUNTAIN CHARTER SCH., <http://poconomountaincharter.org/boardoftrustees/2014boardmeetings.html> (last visited May 14, 2014) (explaining that the school appeared before CAB on April 29, 2014).

⁷⁵ Ebersole, *supra* note 73; Hall, *supra* note 73; Amanda Kelly, *Pocono Mountain Charter School Closing*, WNEP.COM (June 17, 2014), <http://wnep.com/2014/06/17/pocono-mountain-charter-school-closing/>.

⁷⁶ *Am. Civil Liberties Union of Minn. v. Tarek Ibn Ziyad Acad.*, Civ.09-138 DWF/JJG, 2010 WL 1840301 *3 (D. Minn. May 7, 2010)(aff'd sub nom. *Am. Civil Liberties Union of Minn. v. Tarek ibn Ziyad Acad.*, 643 F.3d 1088 (8th Cir. 2011)).

⁷⁷ Mila Koumpilova, *Bankruptcy, Court Defeat Spell the End for TiZA*, ST. PAUL PIONEER PRESS (June 30, 2011), http://www.twincities.com/ci_18385236.

⁷⁸ *Tarek Ibn Ziyad Acad.*, 2010 WL 1840301, at *2.

judgment, reasoning that “a reasonable juror could conclude that TiZA’s practices establish a pervasively sectarian atmosphere for the purpose of promoting Islam.”⁷⁹ For example, the school brochures stated that the school provides “Islamic learning,” the curriculum materials contained religious instruction, and the school logo incorporated religious symbolism.⁸⁰ In 2012, the court approved a settlement agreement where one school leader had to reimburse the state \$17,500 and three school leaders agreed to not serve in leadership positions in Minnesota charter schools for three years.⁸¹

The final two cases involving charter schools being tied to a particular religious entity did not involve leasing issues. In *Brookwood Presbyterian Church v. Ohio Department of Education*, the Ohio Court of Appeals affirmed the lower court’s decision that the Ohio Department of Education (DOE) could deny a church’s application to become a sponsor of charter schools.⁸² The church argued that the denial was facially discriminatory toward religious entities, however, the court considered the DOE’s rationale that the church was not an “education-oriented entity” as a sufficient cause for the DOE’s denial of the church’s application to become a sponsor.⁸³

In *Shelby School v. Arizona State Board of Education*, the Arizona State Board of Education’s (Board) refusal to grant a charter to the Shelby School was affirmed in part, reversed in part, and remanded by the Arizona Court of Appeals.⁸⁴ A predecessor of the Shelby School had been formed by the Church of Immortal Consciousness, which is a small religious organization located in Arizona.⁸⁵ The court held that the

⁷⁹ Am. Civil Liberties Union of Minn. v. Tarek ibn Ziyad Acad., 788 F. Supp. 2d 950, 965 (D. Minn. 2011).

⁸⁰ *Id.* at 964.

⁸¹ *Stipulated Settlement Agreement Between Plaintiff and Defendant Asad Zaman*, UNITED STATES DISTRICT COURT DISTRICT OF MINNESOTA, available at http://www.aclu-mn.org/files/6213/4402/2990/Settlement_agreement_with_Zaman.pdf. A bankruptcy court is presiding over the only remaining issues in the case, but the religious entanglement portion of the case has been dismissed.

⁸² *Brookwood Presbyterian Church v. Ohio Dept. of Educ.*, No. 12AP-487, 2013 WL 3875300 (Ohio Ct. App. July 25, 2013).

⁸³ *Id.* at *2.

⁸⁴ *Shelby Sch. v. Ariz. State Bd. of Educ.*, 962 P.2d 230 (Ariz. Ct. App. 1998).

⁸⁵ *Id.* at 235. See also *Church of Immortal Consciousness*, CULT EDUCATION INSTITUTE, <http://www.culteducation.com/group/1262-church-of-immortal-consciousness.html> (last visited June 3, 2014).

Board's investigation into the religious affiliation of the Shelby School's leader, and the school's constituents did not violate their free exercise, association, or privacy rights.⁸⁶ Rather, the Board had a responsibility to ensure the charter school was nonsectarian and the Board was at liberty to investigate the unsolicited allegations that the school had ties with the church.⁸⁷ Further, the court remanded the decision of whether the school would be granted a charter back to the Board, but held that the Board could deny the charter based on the applicant's financial history.⁸⁸ The Shelby School was granted a charter in 2000 and remains open today. In 2012, a local newspaper article alleged that its leaders were affiliated with a religious cult, claims that the leaders vehemently denied.⁸⁹

C. *Implicit and Explicit Religious Entanglement Allegations*

Of the seven cases involving charter schools alleged to have violated the Establishment Clause, three cases involved allegations of explicit entanglement such as school-sponsored prayer or a religiously affiliated curriculum whereas the other four involved implicit religious entanglement such as merely leasing space from churches.

ACLU is the first of the three cases in which explicit entanglement was alleged. In addition to issues with the leasing arrangement, the *ACLU* claimed that *TiZA* allowed prayer to be posted in the entryway of the school, religious materials to be posted in the classrooms by teachers, and prayer sessions to occur during school hours with teacher participation. Further, the *ACLU* alleged that the school endorsed Muslim dress and dietary practices.⁹⁰ The school received negative publicity as a result of the case,⁹¹ adversely impacting the school's reputation. Additionally, in 2011, Minnesota enacted a law requiring charter authorizers to be located within the state. The authorizer of *TiZA*, Islamic Relief

⁸⁶ *Shelby Sch. v. Ariz. State Bd. of Educ.*, 962 P.2d 230, 238 (Ariz. Ct. App. 1998).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ See *Charter School Offers Lessons*, PAYSON ROUNDUP (Dec. 7, 2012), <http://www.paysonroundup.com/news/2012/dec/07/charter-school-offers-lessons>; Tony Ortega, *Hush, Hush, Sweet Charlatans*, PHOENIX NEW TIMES (Nov. 30, 1995), <http://www.phoenixnewtimes.com/1995-11-30/news/hush-hush-sweet-charlatans/full>.

⁹⁰ Tarek Ibn Ziyad Acad., 2010 WL 1840301, at *2.

⁹¹ See, e.g., Koumpilova, *supra* note 77.

USA, was located out of state at that time, thus prompting further loss of funding.⁹² As noted above, the totality of the allegations alleged against *TiZA*, when coupled with a reputational hit and community backlash, proved too significant and the school closed.

In a case arousing similar suspicions, *Daugherty v. Vanguard Charter School Academy*, a charter school prevailed after parents of current students alleged that its management “created a culture in which expressions of Christian belief were and are tolerated and even encouraged.”⁹³ Although the school was not affiliated with a particular religious organization, the following seven questionable practices were alleged: 1) allowing a “Moms’ Prayer Group” to use the school’s parent room during school hours; 2) permitting teachers to pray together before school, sometimes in the presence of students; 3) distributing flyers from religious organizations to students; 4) including religious content at a professional development session for staff; 5) including religious music at school functions; 6) teaching morality from a religious viewpoint; and 7) teaching Creationism.⁹⁴

Daugherty is similar to *ACLU* because religious activities occurring at school were challenged. Yet, in *Daugherty*, the federal district court held that these practices did not offend the Establishment Clause because the school was not promoting or endorsing any one religion, but, rather, allowing for the free expression of its employees, parents, students, and community members. In this way, individual actors were permitted their free exercise of religious faith.⁹⁵ To support its reasoning, the court cited the famous quote, “Teachers do not shed their constitutional rights at the schoolhouse gate,” from the landmark Supreme Court case, *Tinker v. Des Moines Independent School District*.⁹⁶ In response to the charter school teaching morality from a religious viewpoint, the court discussed a school policy specifying that the teaching was to be

⁹² Tiffany G. Lewis, *Can Religion, charter Schools Coexist*, DESERET NEWS, (Dec. 14, 2011), <http://www.deseretnews.com/article/700207926/Can-religion-charter-schools-coexist.html?pg=all>.

⁹³ *Daugherty v. Vanguard Charter Sch. Acad.*, 116 F. Supp. 2d 897, 906 (W.D. Mich. 2000).

⁹⁴ *Id.* at 907–16.

⁹⁵ *Id.* at 910

⁹⁶ *Id.*

about religion and not *indoctrination* into religion.⁹⁷ In response to the allegation about Creationism, the Court explained that no evidence was presented that the school taught Creationism or restricted the teaching of evolution.⁹⁸

Nampa Classical Academy v. Goesling also involved parents and religious curriculum, however, in *Nampa*, the parents, along with students, teachers, and the charter school alleged that a new statewide charter school policy violated the Establishment Clause because religiously affiliated books were *not* permitted as part of the curriculum.⁹⁹ The charter school was centered on providing a “classical, liberal arts format, and focuse[d] its study not on textbooks but rather on primary sources as a method of educating its students.”¹⁰⁰ To that end, the charter school incorporated a variety of religious texts, including the Bible, the Book of Mormon, the Koran, and the teachings of Confucianism.¹⁰¹ These plans were thwarted when the state charter board commission adopted a policy prohibiting the use of religious texts in the classroom.¹⁰² The Ninth Circuit Court of Appeals affirmed the lower court’s decision that the commission may disallow religious books from its curriculum, and both courts focused more on the state board of education’s legal authority to dictate the curriculum taught in schools than on the church-state entanglement issues.¹⁰³ As mentioned previously, this charter school no longer exists. When it opened, the charter school was one of the largest in Idaho, but after the lawsuit, the commission cited financial instability as the reason for the charter’s revocation.¹⁰⁴

D. Schools Affiliated with Christianity Typically Prevailed

Of the seven cases, five included challenges to existing charter schools whereas two cases involved proposed charter

⁹⁷ *Id.* at 914.

⁹⁸ *Id.* at 916.

⁹⁹ *Nampa Classical Acad. v. Goesling*, 447 F. App’x. 776, 776 (9th Cir. 2011).

¹⁰⁰ *Nampa Classical Acad. v. Goesling*, 714 F. Supp. 2d 1079, 1085 (D. Idaho 2010).

¹⁰¹ 447 F. App’x. at 776.

¹⁰² *Id.*

¹⁰³ 714 F. Supp. 2d at 1079; 447 F. App’x. at 776.

¹⁰⁴ George Prentice, *Nampa Classical Academy Loses Appeal, Will Close*, BOISE WEEKLY (Aug. 17, 2010), <http://www.boiseweekly.com/CityDesk/archives/2010/08/17/nampa-classical-academy-loses-appeal-will-close>.

schools. Of the five existing charter school cases, three cases involved schools affiliated with Christianity,¹⁰⁵ one affiliated with Islam,¹⁰⁶ and one unaffiliated with a particular religion but seeking to incorporate the use of a variety of religious texts.¹⁰⁷ With the exception of the Pocono Mountain charter school, whenever the challenged religion was Christianity, the schools prevailed in the litigation and three of the four challenged Christian-affiliated charter schools remain open today.¹⁰⁸

Conversely, the Islam-affiliated charter school in *ACLU* and the charter school wishing to use a variety of religious texts in *Nampa* did not prevail and have both been closed.¹⁰⁹ While there are distinct differences among all cases, the facts of *Daugherty* and *ACLU* present the most similarities among the five cases. In both cases, prayer occurred on school grounds and religious doctrine appeared in the curriculum. In *Daugherty*, the religious practices were found to have been a result of individuals' or groups' free exercise of religion. . In *ACLU*, the alleged entanglement issues never reached a final ruling. On one hand, the facts of the two cases differ considerably, thus preventing an exact comparison. Further, it may not signal any religious bias that the two non-Christian-affiliated charter schools did not prevail and were closed, whereas three

¹⁰⁵ *Daugherty v. Vanguard Charter Sch. Acad.*, 116 F. Supp. 2d 897 (W.D. Mich. 2000); *Pocono Mountain Charter Sch., Inc. v. Pocono Mountain Sch. Dist.*, 88 A.3d 275 (Pa. Commw. Ct. 2014); *Porta v. Klagholz*, 19 F. Supp. 2d 290 (D.N.J. 1998).

¹⁰⁶ *Am. Civil Liberties Union of Minn. v. Tarek Ibn Ziyad Acad.*, Civ.09-138 DWF/JJG, 2010 WL 1840301 *3 (D. Minn. May 7, 2010)(aff'd sub nom. *Am. Civil Liberties Union of Minn. v. Tarek ibn Ziyad Acad.*, 643 F.3d 1088 (8th Cir. 2011)).

¹⁰⁷ Plaintiff's Amended Verified Complaint at ¶ 89, *Nampa Classical Acad. v. Goesling*, 447 F. App'x. 776, 776 (9th Cir. 2011) (No. 1:09-cv-00427-EJL), 2009 WL 4379711 (school planned to use "Bible, the Koran, the Book of Mormon, the Hadieth, the Epic of Gilgamesh, Hesiod Theogony Works and Days (Greek gods), the Code of Hammurabi (Babylonian), teachings of Confucianism, Hinduism, ancient Egyptian religions, Assyrian religions, Roman gods, Eastern religions, Mesopotamian religions, etc.").

¹⁰⁸ *Daugherty v. Vanguard Charter Sch. Acad.* involved the Vanguard Charter Academy, whose website may be found at <http://www.nhaschools.com/schools/vanguard/en/pages/default.aspx>; *Pocono Mountain Charter Sch. v. Pocono Mountain Sch. Dist.* involved the Pocono Mountain Charter School (<http://poconomountaincharter.org/>); *Porta v. Klagholz* involved two charter schools: Galloway Kindergarten Charter School (www.gccscharterschool.org) and Soaring Heights Charter School (<http://www.soaringheightscharterschool.com/>).

¹⁰⁹ Mike Mullen, *TiZa, Islamic-themed Charter School, Closes for Good*, MINNEAPOLIS CITYPAGES (Aug. 3, 2011, 11:57 AM), http://blogs.citypages.com/blotter/2011/08/tiza_closes_islamic_charter_school_aclu_lawsuit.php; Prentice, *supra* note 104.

Christian-affiliated schools prevailed and remain open.

Clearly, narrow conclusions cannot be made from this very limited sample of five cases and the cases may have been decided differently for a number of reasons that we have not examined. However, it is worth noting that the two non-Christian-affiliated schools did not fare well in the event that subsequent rulings establish a pattern of bias against non-Christian religiously affiliated charter schools. In *Van Orden v. Perry*, Justice Stevens warned in his dissent that applying the Establishment Clause differently based on the type of religion that was at issue

[W]ould replace Jefferson's 'wall of separation' with a perverse wall of exclusion—Christians inside, non-Christians out. It would permit States to construct walls of their own choosing—Baptists inside, Mormons out; Jewish Orthodox inside, Jewish Reform out. A Clause so understood might be faithful to the expectations of some of our Founders, but it is plainly not worthy of a society whose enviable hallmark over the course of two centuries has been the continuing expansion of religious pluralism and tolerance.¹¹⁰

While religious bias may not be at issue here, Steven's warning is a reminder to consider the possibility that religiously affiliated charter schools may be treated differently based on the religion with which they are affiliated.

E. Courts Rejected Every Claim that Choice Program Funding Violated the Establishment Clause

Finally, of the eighteen church-state entanglement cases, eleven cases did not involve specific charter schools, but discussed challenges to funding allocated to charter schools, tax credit, and voucher programs because of potential Establishment Clause violations. The unifying argument in these cases was that public funding allocated to school choice programs improperly funded sectarian organizations. Six cases involved challenges to state voucher programs,¹¹¹ three

¹¹⁰ 545 U.S. 677, 730 (2005) (Stevens, J., dissenting).

¹¹¹ *Niehaus v. Huppenthal*, 310 P.3d 983 (Ariz. Ct. App. 2013); *Winn v. Ariz. Christian Sch. Tuition Org.*, 586 F.3d 649 (9th Cir. 2009); *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Giacomucci v. Se Delco Sch. Dist.*, 742 A.2d 1165 (Pa. Commw. Ct. 1999); *Taxpayers for Pub. Educ. v. Douglas Cnty Sch. Dist.*, Nos. 11CA1856 & 11CA1857, 2013 WL 791140 (Colo. App. Feb. 28, 2013).

involved challenges to state charter school legislation,¹¹² and two involved litigation surrounding a state tax credit.¹¹³ When these peripheral cases are analyzed as a whole, they illustrate a general trend among the courts in not finding Establishment Clause violations in school choice program funding.¹¹⁴ In fact, all eleven courts in these cases, including the U.S. Supreme Court,¹¹⁵ held that the governmental policy being challenged did not violate the Establishment Clause.

IV. CONCLUSIONS

Despite the legal vulnerabilities of religiously affiliated charter schools, relatively few cases involving issues of church-state entanglement at charter schools exist.¹¹⁶ In this section, we speculate why the litigation has been so limited. We also predict that future litigation is likely to occur in this area. Finally, based on our emerging results thus far, we provide recommendations to avoid Establishment Clause violations from arising at religiously affiliated charter schools.

A. *Reasons for Limited Litigation*

We embarked on this study because past research about culturally- or ethnically-centered charter schools identified the potential church-state violations. We were interested in identifying if litigation had occurred and if so, what it entailed. Our study revealed only seven substantive, published cases where Establishment Clause violations were at issue in charter schools, but the question remains, why were there not more cases or any cases involving religiously affiliated schools?

Despite the relative blurriness of the legal doctrine related to the separation of church and state, it is possible that

¹¹² *Wilson v. State Bd. of Educ.*, 89 Cal. Rptr. 2d 745 (Cal. Ct. App. 1999); *Council of Orgs. and Others for Educ. About Parochiaid, Inc. v. Governor*, 566 N.W.2d 208 (Mich. 1997); *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998).

¹¹³ *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999) (en banc); *Green v. Garriot*, 212 P.3d 96 (Ariz. Ct. App. 2009).

¹¹⁴ See also Preston C. Green III & Peter L. Moran, *The State Constitutionality of Voucher Programs: Religion is Not the Sole Determinant*, 2010 B.Y.U. EDUC. & L.J. 275 (suggesting that challenges to vouchers could be made on a variety of state constitutional grounds including funding provisions).

¹¹⁵ *Zelman*, 536 U.S. at 639.

¹¹⁶ That said, we reviewed only the published case law. Additional lawsuits that were settled or that were not published could exist.

religiously affiliated charter schools are becoming better informed and perhaps extra cautious to avoid obvious church-state entanglement. For instance, they may prioritize removing religious symbols from classrooms. They may also take extra precautions to ensure their employees are not outwardly endorsing religion. For example, *Alzubi v. American Islamic Institute of Antelope Valley* involved a teacher who had been fired at an Islam-affiliated charter school because he was teaching religion.¹¹⁷ The ACLU had previously contacted the school to encourage it to remedy issues of church-state entanglement.¹¹⁸ One of the founders of the school was quoted in the *Los Angeles Times* admitting, “We were ignorant. . . about mixing religion with the state.”¹¹⁹ Therefore, it is possible that some religiously affiliated charter schools have illegally violated the Establishment Clause in the past. However, these schools have become more informed through media accounts and watchdog organizations like the ACLU and are now taking special precautions to avoid church-state entanglement issues.

It is also likely that more lawsuits have not been filed because neither traditional public school districts nor parents are motivated to challenge the current reality. Parents may appreciate additional choices that charter schools provide. Some parents may not be concerned about church-state violations as long as their children are receiving a quality education. Other parents may appreciate that their children can receive an education at a religiously affiliated public school, tuition-free. Additionally, the school choice movement gives parents, who may not agree with religious practices occurring at charter schools, more options to simply enroll their children elsewhere. The current reality differs from the past when a parent who disagreed with an aspect of a child’s schooling faced the difficult choice of either remaining dissatisfied at the neighborhood school, paying tuition at a private school, homeschooling, or filing a lawsuit to escape the unwanted situation. In fact, of the seven cases involving allegations of religious entanglement at charter schools, only

¹¹⁷ *Alzubi v. Am. Islamic Inst. of Antelope Valley*, No. B187431, 2006 WL 3334416, at *1 (Cal. Ct. App. Nov. 17, 2006).

¹¹⁸ Richard Fausset, *Charter Schools and Wall of Separation*, LOS ANGELES TIMES (Jan. 27, 2002), <http://articles.latimes.com/2002/jan/27/local/me-charter27>.

¹¹⁹ *Id.*

one was filed by parents.¹²⁰ This is understandable, considering the immense financial and emotional drain involved in waging a risky legal battle.

B. More Litigation is Probable

While a number of reasons suggest why more litigation has not ensued, a review of the current case law leads us to believe that more charter school lawsuits are probable. Specifically, since two cases in our dataset were filed by traditional public school districts against charter schools¹²¹ and because of the current uneasiness created by the competition for students between traditional public schools and charter schools, we predict that, as limited public funding continues to be divided between traditional public schools and charter schools, an increasing number of traditional public school districts will file lawsuits against charter schools. Since litigation alleging improper funding has been unsuccessful,¹²² it is likely that traditional public school districts will identify additional ways to allege legal violations at charter schools. Additionally, if districts do not actually file future lawsuits, it is possible that advocacy groups supporting the separation of church and state or watchdog organizations such as the ACLU may file more lawsuits. For example, critics highlight the number of charter schools that exist despite their religious ties and unconstitutional practices.¹²³ Additionally, opponents who

¹²⁰ Daugherty v. Vanguard Charter Sch. Acad., 116 F. Supp. 2d 897 (W.D. Mich. 2000).

¹²¹ Pocono Mountain Charter Sch. v. Pocono Mountain Sch. Dist., No. 1308 C.D.2013, 2014 WL 717951 (Pa. Commw. Ct. Feb. 26, 2014); *In re Grant of Charter Sch. Application of Englewood on Palisades Charter Sch.*, 727 A.2d 15 (N.J. Super. App. Div. 1999).

¹²² See, e.g., Niehaus v. Huppenthal, 310 P.3d 983 (Ariz. Ct. App. 2013); Winn v. Ariz. Christian Sch. Tuition Org., 586 F.3d 649 (9th Cir. 2009); Green v. Garriot, 212 P.3d 96 (Ariz. Ct. App. 2009); Taxpayers for Pub. Educ. v. Douglas Cnty Sch. Dist., Nos. 11CA1856 & 11CA1857, 2013 WL 791140 (Colo. App. Feb. 28, 2013); Council of Orgs. & Others for Educ. about Parochiaid, Inc. v. Governor, 566 N.W.2d 208 (Mich. 1997).

¹²³ See, e.g., Emmy L. Partin, *Churches and Charters What Do You Think?*, THOMAS B. FORDHAM INSTITUTE FLYPAPER (Oct. 27, 2009), <http://www.edexcellence.net/commentary/education-gadfly-daily/flypaper/2009/churches-and-charters-what-do-you-think.html>; Morgan Smith, *When Charters are in Churches, Conflict is in the Air*, N.Y. TIMES (Aug. 10, 2013), http://www.nytimes.com/2013/08/11/us/when-charter-schools-are-in-churches-conflict-is-in-the-air.html?pagewanted=all&_r=0; Steven A. Rosenberg, *Turkish Charter Schools Growing as Some Question Cleric Ties*, BOSTON GLOBE (Feb. 21, 2013), <http://www.bostonglobe.com/metro/2013/02/21/turkish-born-educators-seek-expand>

generally oppose the charter school movement may create test cases to highlight and challenge church-state entanglement issues at charter schools.¹²⁴

C. *Recommendations to Prevent Future Litigation*

Though forming a charter school to receive public funding may be an attractive option for financially struggling parochial schools, religiously affiliated charter schools are vulnerable to potential legal violations. Policymakers, researchers, charter school employees, and education attorneys should be aware of and responsive to these distinct challenges. Legislators may need to provide explicit legal requirements for religiously affiliated charter schools, and some have already done so. For example, a New Hampshire law provides guidance about how to avoid religious entanglement at charter schools.¹²⁵ Many other states have laws that explicitly prohibit private schools from converting into charter schools.¹²⁶

With little guidance from the judiciary, policymakers should clarify what religiously affiliated charter schools can and cannot do, especially considering that charter school policy is often determined at the state level.¹²⁷ However, state legislators should embark with caution considering the large number of state statutes that the U.S. Supreme Court has found unconstitutional due to Establishment Clause

charter-schools-massachusetts/SmJnApodZogoT1esK2NQVN/story.html.

¹²⁴ See, e.g., Sharon Higgins, CHARTER SCHOOL SCANDALS, <http://charterschoolscandals.blogspot.com/> (last visited May 14, 2014) (publicizing negative media coverage of charter schools, including an allegation that the “Gülen Movement [is] a secretive and controversial cult-like religious group” that runs 135 charter schools).

¹²⁵ N.H. REV. STAT. ANN. § 194-B:7 (2013).

¹²⁶ E.g., CAL. EDUC. CODE § 47602(b) (West 2012); DEL. CODE ANN. Tit. 14, § 502 (West 2013); GA. CODE ANN. § 20-2-2062(2) (West 2013); 105 ILL. COMP. STAT. 5/27A-4(c) (West 2013); MASS. GEN. LAWS Ch. 71, § 89(d) (West 2013); OHIO REV. CODE ANN. § 3314.01(A)(2) (West 2013); 24 PA. CONS. STAT. ANN. § 17-1717-A(a) (2013); R.I. GEN. LAWS ANN. § 16-77-3.1(d) (West 2013); TENN. CODE ANN. § 49-13-106(c)(1) (West 2013); WIS. STAT. ANN. § 118.40(3)(c)(2) (West 2013); WYO. STAT. ANN. § 21-3-303(c) (West 2013). See also U.S. DEPT OF EDUC., TITLE V, PART B NONREGULATORY GUIDANCE: CHARTER SCHOOLS PROGRAM 11 (2014) (explaining that “any newly created public charter school” receiving Charter School Program funds “may not be a continuation of a private school under a different guise”).

¹²⁷ See Kevin P. Brady, Regina R. Umpstead & Suzanne E. Eckes, *Unchartered Territory: The Current Legal Landscape of Cyber Charter Schools*, 2010 B.Y.U. EDUC. & L.J. 191, 209-210 (2010) (providing a similar recommendation that state legislators provide clarity about cyber charter schools).

violations.¹²⁸ In 2014, the U.S. Department of Education issued non-regulatory guidance to charter schools receiving federal funding through the Charter Schools Program that included a one-page section discussing how charter schools could avoid church-state entanglement violations.¹²⁹ Perhaps the U.S. Department of Education could expand upon this guidance and focus specifically on issues facing religiously affiliated charter schools.

Researchers should conduct additional studies investigating the extent of legal violations at religiously affiliated charter schools. While our dataset is comprised of a comprehensive set of judicial decisions, much could be learned from supplementing this information with data collected from surveys, interviews, and/or observation. While a legal analysis provides insights that a purely qualitative analysis may be unable to provide, this study does not uncover the underlying descriptions about what is occurring at religiously affiliated charter schools. In order to reveal these valuable insights, future research should utilize qualitative methods to seek input from administrators, educators, and parents. Further, we only examined published court opinions, but much could be learned from disputes in which lawsuits were settled, dropped, or appear in unpublished court opinions.

Based on the results of our study, we suggest the following considerations for religiously affiliated charter school leaders. First, perhaps they can be less anxious about legal challenges because very few lawsuits appear in the published litigation. Second, it is possible that religiously affiliated charter schools *may* be more heavily scrutinized if they are not affiliated with Christianity. Third, religiously affiliated charter school leaders should exercise caution to avoid being closely tied with a particular religious entity (e.g., a church on whose property the charter school is located). Fourth, employees of religiously affiliated charter schools should only teach about religion from a historical, literary, or cultural perspective. Fifth, school leaders should be aware that explicit and implicit entanglement could be challenged (e.g., prayer on campus, lease agreements with churches, and relationships with

¹²⁸ *E.g.* *Stone v. Graham*, 449 U.S. 39 (1980); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994).

¹²⁹ U.S. DEP'T OF EDUC., TITLE V, PART B NONREGULATORY GUIDANCE: CHARTER SCHOOLS PROGRAM 22–23 (2014).

religious organizations). Finally, attorneys should educate school leaders and staff about the nuanced issues involved with church/state entanglement in order to avoid public and judicial scrutiny as well as potential lawsuits. Since religiously affiliated charter schools are under scrutiny and the legal doctrine is less than clear, policymakers, administrators, employees, attorneys, and other interested parties should work together to ensure compliance with the principles of church/state doctrine.