

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

GENTNER DRUMMOND, Attorney General)
for the State of Oklahoma, ex rel. STATE OF)
OKLAHOMA,)

Petitioner,)

v.)

OKLAHOMA STATEWIDE VIRTUAL)
CHARTER SCHOOL BOARD; ROBERT)
FRANKLIN, Chairman of the Oklahoma)
Virtual Charter School Board for the First)
Congressional District; WILLIAM PEARSON,)
Member of the Oklahoma Virtual Charter)
School Board for the Second Congressional)
District; NELLIE TAYLOE SANDERS,)
Member of the Oklahoma Virtual Charter)
School Board for the Third Congressional)
District; BRIAN BOBEK, Member of the)
Oklahoma Virtual Charter School Board for)
the Fourth Congressional District; and SCOTT)
STRAWN, Member of the Oklahoma Virtual)
Charter School Board for the Fifth)
Congressional District,)

Respondents.)

Case No. 121,694

**MOTION TO INTERVENE BY MELISSA ABDO, KRYSTAL BONSTALL, BRENDA
LENÉ, MICHELE MEDLEY, DR. BRUCE PRESCOTT, REV. DR. MITCH
RANDALL, AND REV. DR. LORI WALKE**

Oklahoma taxpayers Melissa Abdo, Krystal Bonsall, Brenda Lené, Michele Medley,
Dr. Bruce Prescott, Rev. Dr. Mitch Randall, and Rev. Dr. Lori Walke (collectively,
“Taxpayers”) move to intervene in this case as petitioners. Taxpayers further move for leave
to file the accompanying proposed Application and Petition in Intervention; proposed Brief in
Support of Application and Petition in Intervention; and proposed Appendix in Support of
Application and Petition in Intervention.

Taxpayers’ motion should be granted for six reasons. First, Taxpayers are plaintiffs in a district-court action that challenges the same transaction that is challenged here: the Statewide Virtual Charter School Board’s approval of and contracting with St. Isidore of Seville Catholic Virtual School as a public charter school. Second, Taxpayers have a legal interest—recognized by more than a century of caselaw—in preventing unlawful spending of their tax dollars, and St. Isidore will unlawfully be funded with public money absent judicial relief. Third, Taxpayers are educators, education advocates, parents of school-age children (some of whom are LGBTQ or have disabilities), and clergy who would provide the Court with diverse perspectives and information on the ways in which allowing St. Isidore to operate would harm a wide range of Oklahomans. Fourth, Taxpayers would provide additional factual and legal grounds for a ruling in petitioner Attorney General’s favor. Fifth, Taxpayers’ counsel are experts in church-state and education law, and that expertise would benefit the Court. Sixth, two sets of proposed intervenors—who are defendants in the district-court action filed by Taxpayers—have moved to intervene as respondents, and Taxpayers’ participation would help ensure that the Court hears a balanced set of arguments, from all parties in the district-court litigation.

FACTS

This action challenges the Board’s approval of and contracting with St. Isidore as a public charter school that will be funded with state tax dollars. As detailed in Taxpayers’ proposed Application and Petition, St. Isidore will indoctrinate students in particular religious beliefs; will discriminate in student admissions, student discipline, and employment based on religion, sexual orientation, gender identity, and other protected grounds; has not committed to fully serve students with disabilities as required by law; and has otherwise refused to agree

to fully comply with the law. *See* Taxpayers’ Pet. ¶¶ 18–28, 36–51. For these reasons, operation and taxpayer funding of St. Isidore as a public charter school would violate numerous state constitutional, statutory, and regulatory provisions. *See* Taxpayers’ Pet. ¶¶ 18, 24–35, 50.

Taxpayers are educators, education advocates, parents of school-age children (some of whom are LGBTQ or have disabilities), and clergy who pay taxes that provide revenue for public charter schools. Specifically, Melissa Abdo is a Catholic, a current member of the Jenks Public Schools Board of Education, a current member of the Board of Directors of the Oklahoma State School Boards Association, a former member of the Oklahoma State Superintendent’s Parent Advisory Committee, and a former member of the Governor’s Education Subcommittee on Parent Engagement. Krystal Bonsall is a parent of a child attending an Oklahoma public school who is a student with disabilities and is classified to receive special-education and related services in school. Brenda Lené is a parent of a child attending a public school and created and runs Oklahoma Education Needs / Donations, a Facebook group of over 25,000 members dedicated to helping public-school teachers obtain donations of school supplies. Michele Medley is the mother of three children, two of whom are children with autism and attend public schools and one of whom is LGBTQIA+, and she has been a staunch advocate at the State Capitol on behalf of children with autism. Dr. Bruce Prescott is a retired Baptist minister and a retired educator who has taught at the University of Oklahoma, Southwestern Baptist Theological Seminary, Phillips Theological Seminary, a public junior college, and a public high school. Rev. Dr. Mitch Randall is a citizen of the Muscogee (Creek) Nation, is currently the chief executive officer of Good Faith Media, and previously served as pastor of NorthHaven Church in Norman and as the executive director

of the Baptist Center for Ethics. Rev. Dr. Lori Walke is the Senior Minister of Mayflower Congregational United Church of Christ in Oklahoma City. (Taxpayers’ Decls., Intervenors’ Appendix (“IA”) at 2–16.)

All of the Taxpayers object to the use of their tax payments to fund St. Isidore because doing so would be unlawful. Further, as educators and education advocates, they fear that state funding of St. Isidore would harm public education by taking public funding away from existing public schools. As parents of school-age children who are non-Catholic, LGBTQ, or have disabilities, they oppose the operation and state funding of a public charter school that would not be open to or adequately serve their children. As clergy, they deeply value religious freedom and the separation of church and state, and believe that those fundamental principles would be gutted by the operation and state funding of a discriminatory, religious public charter school. (Taxpayers’ Decls., IA2–16.)

On July 31, 2023, Taxpayers and several other plaintiffs filed a lawsuit in the District Court of Oklahoma County, *OKPLAC, Inc. v. Statewide Virtual Charter School Board*, No. CV-2023-1857. That lawsuit seeks injunctive and declaratory relief prohibiting (1) continued state sponsorship of St. Isidore as a charter school, (2) implementation of the contract between the Board and St. Isidore, and (3) state funding of St. Isidore. The defendants in that lawsuit filed three motions to dismiss on September 20; Taxpayers filed a consolidated opposition brief on October 23; and a hearing on the motions is set for December 21, 2023. The defendants in the district-court lawsuit also have all been named or sought to intervene as respondents in this case. The docket and all filings in the district-court lawsuit are available at <https://bit.ly/3ShlMkF>.

ARGUMENT

This Court has liberally allowed intervention in original-jurisdiction actions, including in circumstances similar to those here. For example, in *Phillips v. Oklahoma Tax Commission*, 1978 OK 34, ¶¶ 1, 5–6, 46, 577 P.2d 1278, the Court permitted taxpayers who had already filed a lawsuit challenging the constitutionality of a tax to intervene in an original-jurisdiction action that would be determinative of the issue and to present arguments against the tax that the existing parties had not made. Similarly, in *Findley v. State Election Board*, 1958 OK 137, ¶¶ 1–2, 325 P.2d 1037, this Court allowed intervention in an original-jurisdiction action concerning which candidates could be on a ballot, where the action sought a ruling contrary to a decision in favor of the intervenor that had been issued in a separate administrative proceeding. In *Campbell v. White*, 1993 OK 89, ¶ 2 & n.3, 856 P.2d 255, the Court authorized intervention in an original-jurisdiction action by a public official because he had “an interest in the constitutionality of the challenged” legislation, and the Court also allowed him to challenge related legislation that the existing parties had not challenged. In *Meder v. Oklahoma City*, 1960 OK 87, ¶¶ 2, 38, 42, 43, 350 P.2d 916, the Court granted a taxpayer’s motion to intervene in an original-jurisdiction action challenging a city’s performance of certain lease and bond-indenture agreements, and the Court permitted the taxpayer to make legal arguments that the existing parties had not made. In *Fent v. Henry*, 2011 OK 10, ¶ 6, 257 P.3d 984, the Court allowed intervention in an original-jurisdiction action challenging a measure that had been enacted through referendum, because the intervenor had an “interest in the matter as a member of the Senate who voted on the measure.” In *Ethics Commission v. Cullison*, the Court permitted intervention in an original-jurisdiction action by a person who raised a legal issue that had not been presented by the

existing parties. *See* 1993 OK 37, ¶¶ 3, 8, 850 P.2d 1069; *id.* n.31 (Opala, J., concurring in the result). And in *Morgan v. Daxon*, the Court granted a motion to intervene in an original-jurisdiction action by a person who brought to the Court’s attention relevant facts that the parties had not presented. *See* 2001 OK 104, ¶ 2, 49 P.3d 687; *id.* ¶ 23 (Summers, J., dissenting on other grounds).

As these cases do not set out a comprehensive test for intervention in original-jurisdiction cases, Taxpayers suggest that—in addition to considering factors that supported intervention in these cases—this Court consider as guidance 12 O.S. § 2024, which governs intervention in district-court proceedings (*see* 12 O.S. § 2001). Under 12 O.S. § 2024(A), “[u]pon timely application anyone shall be permitted to intervene in an action . . . [w]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest.” Moreover, 12 O.S. § 2024(B) provides that “[u]pon timely application anyone may be permitted to intervene in an action . . . [w]hen an applicant’s claim or defense and the main action have a question of law or fact in common.” The Committee Comment to 12 O.S. § 2024 further notes that “[i]f a person has an interest that may be impaired and wants to intervene, the court should not force him to rely on someone else to protect his interest.” The Comment explains that—unlike under the analogous federal rule—whether “the applicant’s interest is adequately represented by existing parties” is *not* a relevant factor. *Id.* (quoting with *disapproval* Fed. R. Civ. P. 24(a)).

Both under the factors noted in the cases granting intervention in original-jurisdiction actions and under the standards of 12 O.S. § 2024, Taxpayers should be allowed to intervene, for a host of reasons.

Taxpayers’ interest in their district-court action. First, as in *Phillips*, 1978 OK 34, ¶¶ 1, 5–6, and *Findley*, 1958 OK 137, ¶¶ 1–2, Taxpayers should be permitted to intervene because this action could be determinative of or supersede another proceeding that the proposed intervenors filed. A decision by this Court in this case could control the outcome of Taxpayers’ district-court case. The requirement for intervention under 12 O.S. § 2024(A) is satisfied, for “the disposition of [this] action may as a practical matter impair or impede the applicant[s]’ ability to protect th[eir] interest[s]” in the district-court case. And the standard of 12 O.S. § 2024(B) is met as well, for the “applicant[s]’ claim or defense and the main action have a question of law or fact in common.” Indeed, Taxpayers and the Attorney General challenge the same thing—the Board’s approval of and contracting with St. Isidore as a public charter school—based on overlapping legal grounds. *Compare* Att’y General’s Appl. & Pet. *with* Taxpayers’ Proposed Appl. & Pet.

Taxpayers’ interest in preventing illegal use of their tax payments. Second, as in *Phillips*, 1978 OK 34, ¶¶ 1, 6, and *Meder*, 1960 OK 87, ¶ 2, the proposed intervenors have an interest as taxpayers in preventing illegal taxation or spending. More than a century of precedent recognizes that Oklahoma taxpayers have a right “to challenge the unlawful or unconstitutional expenditure of state funds.” *Okla. Pub. Emps. Ass’n v. Okla. Dep’t of Cent. Servs.*, 2002 OK 71, ¶ 11, 55 P.3d 1072; *see, e.g., Immel v. Tulsa Pub. Facilities Auth.*, 2021 OK 39, ¶ 16, 490 P.3d 135; *Fent v. Contingency Rev. Bd.*, 2007 OK 27, ¶ 8, 163 P.3d 512; *Kellogg v. Sch. Dist. No. 10*, 1903 OK 81, 74 P. 110. Taxpayers contend that state funding of

St. Isidore would be unlawful (*see* Taxpayers’ Pet. ¶¶ 18–51), and “the disposition of [this] action may as a practical matter impair or impede” (12 O.S. § 2024(A)) their ability to protect their interests in preventing that funding.

Taxpayers’ interests and perspectives as educators, parents, and clergy. Relatedly, Taxpayers have additional interests in this litigation as educators, education advocates, parents of school-age children (some of whom are LGBTQ or have disabilities), and clergy; and they would provide the Court with valuable perspectives as members of groups that will be particularly affected if St. Isidore is allowed to operate as a public charter school. Taxpayers include educators and education advocates who do not want state funding of St. Isidore to harm public education by taking public funding away from existing public schools. (Taxpayers’ Decls., IA2, 6–9.) Taxpayers include parents of school-age children who are non-Catholic, LGBTQ, or have disabilities—children who would not be able to attend St. Isidore due to the school’s discriminatory policies or its failure to commit to adequately serve children with disabilities. (*See* Taxpayers’ Decls., IA4–5, 8–9; Taxpayers’ Pet. ¶¶ 36–44, 50.) And Taxpayers include clergy who deeply value religious freedom and the separation of church and state, and believe that those fundamental principles would be gutted by the operation and state funding of a discriminatory, religious public charter school. (Taxpayers’ Decls., IA10–16.)

Presentation of additional grounds for a ruling in the Attorney General’s favor. Taxpayers would—in five ways—supplement the Attorney General’s petition and brief by presenting in their proposed petition and brief additional legal and factual grounds for a ruling in the Attorney General’s favor, similarly to the intervenors in *Phillips*, 1978 OK 34, ¶¶ 5, 46; *Meder*, 1960 OK 87, ¶¶ 2, 38, 42, 43; *Ethics Commission*, 1993 OK 37, ¶¶ 3, 8

(majority opinion), n.31 (Opala, J., concurring in the result); and *Morgan*, 2001 OK 104, ¶ 2 (majority opinion), ¶ 23 (Summers, J., dissenting on other grounds). First, Taxpayers provide additional arguments demonstrating that St. Isidore is a governmental entity and a state actor. Second, Taxpayers explain that, because St. Isidore’s educational program will indoctrinate students in a particular religion, operation of St. Isidore as a state-funded public charter school is barred by Article I, Section 2 of the Oklahoma Constitution in addition to the state constitutional and statutory prohibitions identified by the Attorney General. Third, Taxpayers explain that St. Isidore’s approved application for charter-school sponsorship violated a Board regulation requiring charter-school applicants to certify that they will comply with state law, and that St. Isidore’s charter and contract with the Board violate similar statutory requirements. Fourth, Taxpayers explain that funding and operation of St. Isidore as a public charter school would violate numerous state constitutional provisions and statutes because St. Isidore will discriminate in student admissions, student discipline, and employment based on religion, sexual orientation, gender identity, and other protected characteristics. Fifth, Taxpayers explain that St. Isidore has not committed to fully serving students with disabilities as required by the Oklahoma Charter Schools Act.

Expertise of Taxpayers’ counsel. Allowing Taxpayers to intervene would also benefit the Court because their attorneys have great expertise in church-state and education law. The legal team for Taxpayers is led by an attorney who has exclusively practiced church-state and religious-freedom law for the last twenty-three years, and includes attorneys who have done so for the last eighteen years, the last seventeen years, and the last thirteen years, as well as one who has done so for the last five years and practiced LGBTQ-rights law for the preceding thirteen years. (Luchenitser Decl., IA18.) The Taxpayers’ legal team

further includes an attorney who has engaged in litigation, policy, and advocacy related to civil rights, civil liberties, and public education for the last twenty-five years, as well as an attorney who has practiced education law for the last twenty years and another who has done so for the last nine years. (Luchenitser Decl., IA18–19.)

Balancing the other intervenors. Two sets of proposed intervenors—St. Isidore; and the State Department of Education and Superintendent Walters—have moved to intervene as respondents. Both sets of proposed respondents-intervenors are defendants in the district-court case filed by Taxpayers, as are the existing respondents. Thus, if the proposed respondents-intervenors are allowed to participate, all the defendants in the district-court case would be parties to this original-jurisdiction proceeding. Permitting Taxpayers to intervene as well would help balance the scales by ensuring that all parties to the district-court case—on both sides of the controversy—are allowed to present their arguments to this Court.

* * * * *

In addition to allowing them to intervene, Taxpayers respectfully ask that the Court allow them to file the accompanying proposed Application and Petition in Intervention; proposed Brief in Support of Application and Petition in Intervention; and proposed Appendix in Support of Application and Petition in Intervention. In district-court interventions, a motion to intervene must be accompanied by “a pleading setting forth the claim or defense for which intervention is sought.” 12 O.S. § 2024(C). Thus, a petitioner-intervenor in a district-court case would need to file a petition in intervention. While only a petition is required to initiate a district-court case, initiating an original-jurisdiction proceeding in this Court requires filing an application and petition and a brief in support, which may be accompanied by an appendix. *See* Rule 1.191. Accordingly, Taxpayers submit

a proposed application and petition, a proposed brief, and a proposed appendix. Allowing these documents to be filed now would give the respondents more time to respond and help speed the progress of this action.

CONCLUSION

For the foregoing reasons, Taxpayers respectfully ask that this motion be granted.

Respectfully submitted on November 14, 2023.

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* *Pro hac vice* application pending or forthcoming.

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CERTIFICATE OF SERVICE

I certify that on November 14, 2023, a true and correct copy of the foregoing document was served by mail to the counsel whose mailing addresses are set forth below and by email to the counsel whose email addresses are set forth below.

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