

11-6-2023

## St. Isidore of Seville Catholic Virtual School's Motion to Intervene

Michael H. McGinley  
*Dechert LLP*

Steven A. Engel  
*Dechert LLP*

M. Scott Proctor  
*Dechert LLP*

John A. Meiser  
*Notre Dame Law School, Religious Liberty Clinic, jmeiser@nd.edu*

Michael R. Perri  
*Perri Dunn, PLLC*

*See next page for additional authors*

Follow this and additional works at: [https://scholarship.law.nd.edu/sct\\_briefs](https://scholarship.law.nd.edu/sct_briefs)



Part of the [Courts Commons](#), and the [First Amendment Commons](#)

---

### Recommended Citation

McGinley, Michael H.; Engel, Steven A.; Proctor, M. Scott; Meiser, John A.; Perri, Michael R.; and Dooley, Socorro Adams, "St. Isidore of Seville Catholic Virtual School's Motion to Intervene" (2023). *Court Briefs*. 47.

[https://scholarship.law.nd.edu/sct\\_briefs/47](https://scholarship.law.nd.edu/sct_briefs/47)

This Brief is brought to you for free and open access by the Faculty Scholarship at NDLScholarship. It has been accepted for inclusion in Court Briefs by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

---

## **Authors**

Michael H. McGinley, Steven A. Engel, M. Scott Proctor, John A. Meiser, Michael R. Perri, and Socorro Adams Dooley

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED  
SUPREME COURT  
STATE OF OKLAHOMA

NOV - 6 2023

JOHN D. HADDEN  
CLERK

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

*Petitioner,* )

v. )

Case No. 121694

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

*Respondents.* )

**ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL'S  
MOTION TO INTERVENE**

St. Isidore of Seville Catholic Virtual School (“St. Isidore”) hereby respectfully moves the Court for an Order granting intervention in the above-captioned action. St. Isidore’s charter is challenged in this suit, and St. Isidore is a named defendant in a related matter in the District Court for Oklahoma County, *OKPLAC, Inc. v. Statewide Virtual Charter School Board*, CV-2023-1857.

In support of intervention, St. Isidore states as follows:

**INTRODUCTION**

In 1999, the Oklahoma legislature enacted the Oklahoma Charter Schools Act, inviting both public and private organizations to establish charter schools to “promote a diversity of

educational choices” for Oklahoma families. 70 O.S. § 3-134(I)(3). Through the charter school program, Oklahoma partners with these organizations to “[i]ncrease learning opportunities for students”; “[e]ncourage the use of different and innovative teaching methods”; and “[p]rovide additional academic choices for parents and schools.” 70 O.S. § 3-131(A). So that educators have the necessary freedom to accomplish these goals, the Act affords them substantial flexibility in crafting their curriculum, 70 O.S. § 3-136(A)(3), and running their schools, 70 O.S. § 3-136(A)(5). Thanks to this flexibility, the charter school program today supports a diverse array of educational options ranging from schools that focus on science, engineering, and math to those that promote fine arts or language immersion.

While the Act invites and encourages this abundance of educational models within charter schools, it purports to exclude *any and every* school that is religious. 70 O.S. § 3-136(A)(2) (limiting the program to “nonsectarian” schools). The First Amendment to the U.S. Constitution prohibits the State from enforcing this discriminatory exclusion. Just last year, the U.S. Supreme Court held for the third time in the past decade that the Free Exercise Clause of the U.S. Constitution prohibits a state from denying a religious school access to a generally available public benefit solely because the entity is religious. *Carson v. Makin*, 142 S. Ct. 1987, 2002 (2022). Indeed, as former Attorney General John O’Connor explained, the Supreme Court has made clear that “[t]he State cannot outsource operation of entire schools to private entities with ‘critical cultural, organizational, and institutional characteristics’ that the State desires to see reproduced . . . and then retain the ability to discriminate against private entities who wish to exercise their religious faith.”<sup>1</sup>

---

<sup>1</sup> 2022 Op. Att’y Gen. No. 2022-7, <https://oklahoma.gov/content/dam/ok/en/governor/documents/Attorney%20General%20Opinion%202022-7.pdf>.

Exercising that fundamental freedom, the Archdiocese of Oklahoma City and the Diocese of Tulsa applied to the Oklahoma Statewide Virtual Charter Board (“the Board”) to establish St. Isidore. Their aim was (and is) a noble one—to found a Catholic charter school “to educate the entire child: soul, heart, intellect, and body,” for interested families across Oklahoma, wherever they might reside in the State.<sup>2</sup> In the year that followed, St. Isidore incorporated, crafted a several-hundred-page application, submitted the application to the Board, fielded the Board’s concerns, and resubmitted the application. In June of this year, the Board exercised the authority granted to it by the State of Oklahoma, approved the application, and agreed to negotiate a charter with St. Isidore. In October, the Board and St. Isidore executed a charter contract. Now, the Attorney General for the State of Oklahoma (“Petitioner”) asks this Court to assume original jurisdiction and issue a writ of mandamus extinguishing St. Isidore’s charter.

This Court should grant St. Isidore’s motion to intervene. The original jurisdiction proceeding challenges St. Isidore’s charter. As a result, St. Isidore is a real party in interest to this suit. St. Isidore has an obvious and significant interest in the charter school contract it entered into with the Board. If the Court grants Petitioner’s application to assume original jurisdiction, the disposition of the action will, as a practical matter, impair or impede St. Isidore’s ability to protect the contract. Moreover, the rights at issue here, under the Free Exercise Clause of the First Amendment and the Oklahoma Religious Freedom Act (“ORFA”), belong to St. Isidore. As a result, St. Isidore is entitled to participate as a party to protect those rights, and it is not required to rely solely on the Board and its members to adequately represent St. Isidore’s interests. And this Motion to Intervene (“Motion”) is timely.

---

<sup>2</sup> Sarah Randazzo, *Nation's First Religious Charter School Approved in Oklahoma*, WALL ST. J. (Jun. 5, 2023, 7:06 PM), <https://www.wsj.com/articles/nations-first-religious-charter-school-approved-in-oklahoma-bb028e7b>.

## **FACTS**

In January 2023, the Archbishop of the Archdiocese of Oklahoma City and the Bishop of the Diocese of Tulsa incorporated St. Isidore as an Oklahoma nonprofit corporation. Shortly thereafter, St. Isidore submitted an application to the Board asking it to sponsor St. Isidore's charter. The Board approved St. Isidore's application in early June of 2023, which triggered negotiations between the school and the Board to set the terms of the charter. Shortly thereafter, several otherwise disinterested taxpayers and an organization representing other disinterested taxpayers challenged the Board's decision in the District Court for Oklahoma County, with St. Isidore among the named defendants. *See OKPLAC, Inc. v. Statewide Virtual Charter School Board*, CV-2023-1857. Nevertheless, the Board approved the charter school contract on October 9, and the contract was executed on October 16.

On October 20, 2023, Petitioner filed his Application to Assume Original Jurisdiction and Petition for Writ of Mandamus and Declaratory Judgment ("Application") and Brief in Support thereof. Petitioner requests that this Court issue a writ of mandamus compelling the Board members to cancel the Board's contract with St. Isidore. Further, Petitioners request this Court to issue additional relief, namely a declaratory judgment prohibiting the Board from entering into contracts with religious charter schools. If this Court were to grant Petitioner's requested relief, it would extinguish St. Isidore as a charter school before it ever enrolls any students.

## **STANDARD FOR INTERVENTION**

"Any person may be permitted to intervene in an action where they have or claim an interest in the controversy, and where their substantial rights are in litigation." *Franklin v. Margay Oil Corp.*, 1944 OK 316, 194 Okla. 519, 153 P.2d 486, 497. As this Court has explained, "courts favor intervention . . . as a convenient or pragmatic method of settling controversies relating to the same

subject matter.” *Brown v. Patel*, 2007 OK 16, ¶ 27, 157 P.3d 117, 127. In light of this preference, “[l]iberal rules of intervention prevail.” *Protest of Gulf Pipe Line Co. of Okla.*, 1934 OK 248, ¶ 7, 168 Okla. 136, 137, 32 P.2d 42, 43. “[P]arties whose rights may be adversely affected by the outcome of pending litigation may intervene in order to safeguard their interest” and to prevent “the reopening of old disputes which have been previously submitted to and decided by a court of competent jurisdiction.” *Id.* at 42–43. Consistent with those liberal rules, this Court has permitted parties to intervene in original jurisdiction actions. *See, e.g., Campbell v. White*, 1993 OK 89, ¶ 2 n.3, 856 P.2d 255, 257 n.3; *Phillips v. Okla. Tax Comm’n*, 1978 OK 34, 577 P.2d 1278; *Meder v. City of Okla. City*, 1960 OK 87, 350 P.2d 916.

Courts generally recognize four requirements an applicant must satisfy for a motion to intervene by right. *First*, the motion to intervene must be “timely.” *Brown*, 157 P.3d at 124. *Second*, the intervenor must possess a “significant protectable interest relating to the property or transaction that is the subject of the action.” *Id.* *Third*, the intervenor must demonstrate that “the disposition of the action may, as a practical matter, impair or impede the applicant’s ability to protect its interest.” *Id.* *Finally*, the Court must find “the existing parties may not adequately represent the applicant’s interest.” *Id.* Because St. Isidore meets these requirements, this Court should permit intervention. And even if all of those factors are not met, a court may still permit intervention when “an applicant’s claim or defense and the main action have a question of law or fact in common.” *Id.* at 127 (quotation omitted).

### **ARGUMENT AND AUTHORITY**

This Motion to Intervene is both timely and amply supported. Courts assess the timeliness of a motion to intervene “in light of all the circumstances,” including “the length of time since the movant knew of its interests in the case; prejudice to the existing parties; prejudice to the movant;

and the existence of any unusual circumstances.” *Tulsa Indus. Auth. v. City of Tulsa*, 2011 OK 57, ¶ 31, 270 P.3d 113, 128 (citation omitted) (looking to federal case law for guidance). Courts have cautioned that “[t]he analysis is contextual; absolute measures of timeliness should be ignored.” *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994). As such, courts allow intervention “where no one would be hurt and greater justice could be attained.” *Id.*

St. Isidore’s intervention request is plainly timely. Petitioner filed the Application on October 20, mere weeks before this Motion. The Court directed the Respondents (which did not include St. Isidore) to respond no later than November 21, 2023. St. Isidore would file its own response by that same deadline. The Court originally directed an Oral presentation to a Referee of the Court on November 28, 2023, but withdrew that Order on November 2. Thus, this Court has yet to make *any* meaningful disposition in this case, and one does not appear imminent. Granting intervention will neither delay the response date, nor impact this Court’s ability to schedule oral argument for a later date. Finally, Petitioner has already filed his Application and Brief and the current Respondents have not yet filed their response. So, Petitioner will suffer no prejudice if St. Isidore is permitted to intervene.

Moreover, this Court’s resolution of Petitioner’s Application will affect St. Isidore’s substantial religious liberty rights. “The Free Exercise Clause of the First Amendment, applicable to the States under the Fourteenth Amendment,” bars the State from passing any law “‘prohibiting the free exercise’ of religion.” *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021). Relevant here, the Supreme Court has “repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits.” *Carson v. Makin*, 142 S. Ct. 1987, 1996 (2022) (collecting cases). Reflecting the same principle, Oklahoma law precludes Petitioner’s attempt to prohibit religious charter schools. ORFA mandates that no



Oklahoma governmental entity—including the Board—shall “substantially burden a person’s free exercise of religion.” 51 O.S. § 253(A); *see also Beach v. Okla. Dept. Pub. Safety*, 2017 OK 40, ¶ 12, 398 P.3d 1, 5 (Okla. 2017). ORFA bars the government from “inhibit[ing] or curtail[ing]” any “religiously motivated practice.” 51 O.S. § 252(7). Like its federal counterpart, the Religious Freedom Restoration Act,<sup>3</sup> ORFA prohibits the government from denying an entity generally available benefits because it is religious. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693–94, 695 n.3 (2014).

Disposition of Petitioner’s Application turns in large part on these state and federal religious liberty rights—which belong to St. Isidore. St. Isidore is a private institution that qualifies for funding through the charter school program. Both the Free Exercise Clause and ORFA prohibit Oklahoma law from excluding St. Isidore from that benefit solely because it is religious, which the Board recognized when it approved St. Isidore’s application. Yet, before this Court, Petitioner argues that Oklahoma’s Constitution, statutes, and regulations bar St. Isidore from participating in the generally available charter school program solely because it is religious. If this Court sides with Petitioner, then it will have interpreted and applied Oklahoma law in a way that violates St. Isidore’s rights, under both the First Amendment to the U.S. Constitution and ORFA. It is difficult to imagine a “protectable interest” more “significant” to a private religious school than its right against government-sponsored discrimination while exercising its religion. *Brown*, 157 P.3d at 124.

St. Isidore also has an obvious protectable interest arising from the contract it executed with the Board—which Petitioner’s application seeks to nullify. Indeed, St. Isidore is a named

---

<sup>3</sup> Cases interpreting Religious Freedom Restoration Act and the federal Religious Land Use and Institutionalized Persons Act (RLUIPA) inform the interpretation of ORFA, which “contain[s] almost identical language.” *Beach*, 398 P.3d at 6 n.20.

defendant in a related matter in the District Court for Oklahoma County, where it is defending against similar challenges to this very contract. *See OKPLAC, Inc. v. Statewide Virtual Charter School Board*, CV-2023-1857. St. Isidore can operate as a virtual charter school in Oklahoma only pursuant to a contract with the Board. Petitioner’s Application asks this Court to declare that contract illegal and order the Board to rescind it. If the Court grants Petitioner’s Application, the contract will no longer exist—nullifying St. Isidore’s participation in the charter-school program. Thus, St. Isidore is a real party in interest, and in fact no other party has such a vital stake in the outcome of Petitioner’s Application.

Faced with that threat to its legal rights, St. Isidore should not be forced to rely on the current Respondents, including the Board and its members, to adequately represent St. Isidore’s particular interests. Petitioner is specifically seeking relief challenging the constitutionality of St. Isidore’s contract with the Board. As a private entity who holds the religious liberty rights and charter at issue here, St. Isidore should not have to rely exclusively on a government entity—and the counterparty to St. Isidore’s contract—to protect its interests in a suit brought by another government official. The Board’s membership may change, or the Board might at some point alter its position in this litigation. Indeed, Petitioner has already made a number of public statements aimed at applying political and public pressure on the Board.<sup>4</sup> St. Isidore should not be required to hope that these political efforts will fail or assume that the Board will defend St. Isidore’s right to operate a faith-based school in the same way as the school itself.

---

<sup>4</sup> *See, e.g.*, Oklahoma Attorney General’s Office, *Drummond Files Lawsuit Against State Virtual Charter Board Members for Violating Religious Freedom* (Oct. 20, 2023), <https://www.oag.ok.gov/articles/drummond-files-lawsuit-against-state-virtual-charter-board-members-violating-religious> (fearmongering by warning the public that Oklahomans may soon “be forced to fund radical Muslim teachings like Sharia law” if St. Isidore is allowed to open).

At a bare minimum, this Case justifies intervention because of the issues it shares with those St. Isidore intends to brief. The Application argues that the State may ignore St. Isidore's religious liberty rights by denying it an otherwise available public benefit. *See supra*. And St. Isidore's defense to that argument presents a "question of law or fact in common" with the arguments that the Board will present. *See Brown*, 157 P.3d at 127.

### **CONCLUSION**

For the foregoing reasons, St. Isidore of Seville Catholic Virtual School has a substantial interest in the subject of Petitioner's Application and therefore should be allowed to intervene.

Respectfully submitted,



Michael H. McGinley, *pro hac vice* (to be filed)  
Steven A. Engel, *pro hac vice* (to be filed)  
M. Scott Proctor, OBA No. 33590  
DECHERT LLP  
1900 K Street, NW  
Washington, DC 20006  
T: (202) 261-3308  
michael.mcginley@dechert.com  
steven.engel@dechert.com  
scott.proctor@dechert.com

*and*

John A. Meiser, *pro hac vice* (to be filed)  
NOTRE DAME LAW SCHOOL  
RELIGIOUS LIBERTY CLINIC  
1338 Biolchini Hall of Law  
Notre Dame, Indiana 46556  
T: (574) 631-3880  
jmeiser@nd.edu

Michael R. Perri, OBA No. 11954  
Socorro Adams Dooley, OBA No.  
32716  
PERRI DUNN, PLLC  
100 N. Broadway, Suite 3280  
Oklahoma City, OK 73102  
T: (405) 724-8543  
Michael R. Perri  
mrperri@perridunn.com  
Socorro Adams Dooley  
sadooley@perridunn.com

### CERTIFICATE OF SERVICE

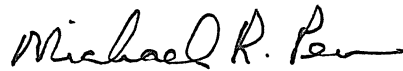
I hereby certify that on the 6th day of November, 2023, I caused a true and correct copy of the above and foregoing Motion to Intervene to be mailed via U.S. Mail, postage prepaid, to the following:

Robert Franklin  
William Pearson  
Nellie Tayloe Sanders  
Brian Bobek  
Scott Strawn  
Oklahoma Statewide Virtual  
Charter School Board  
M.C. Connors Building  
2501 N. Lincoln Blvd., Suite 301  
Oklahoma City, OK 73105

#### *Respondents*

Gentner Drummond  
Garry M. Gaskins  
Brad Clark  
Kyle Pepler  
William Flanagan  
Office of Attorney General  
State Of Oklahoma  
313 N.E. 21st St  
Oklahoma City, OK 73105

#### *Counsel for Petitioner*

A handwritten signature in black ink, reading "Michael R. Perri". The signature is fluid and cursive, with a horizontal line drawn underneath it.

MICHAEL R. PERRI