2024 OK 53

ORIGINAL

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 Statewide Virtual Charter School Board for the First Congressional District; WILLIAM PEARSON, Member of the Oklahoma Statewide Virtual Charter School Board for the Second Congressional District; NELLIE TAYLOE SANDERS, Member of the Oklahoma Statewide Virtual Charter School Board for the Third Congressional District; BRIAN BOBEK, Member of the Oklahoma Statewide Virtual Charter School Board for the Fourth Congressional District; and SCOTT STRAWN, Member of the Oklahoma Statewide Virtual Charter School Board for the Fifth Congressional District,

Respondents,

and

ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL,

Intervenor.

No. 121,694

FOR OFFICIAL PUBLICATION

KUEHN, J., DISSENTING:

¶1 I dissent to the Majority's opinion. St. Isidore would not become a "state actor" merely by contracting with the State to provide a choice in educational opportunities. By allowing St. Isidore to operate a virtual charter school, the State would not be establishing, aiding, or favoring any particular religious organization. To the contrary: Excluding private entities from contracting for functions, based solely on religious affiliation, would violate the Free Exercise Clause of the First Amendment to the United States Constitution.

A. Allowing religious organizations to contract with the State to provide educational services violates neither the "no aid" provision of the Oklahoma Constitution, nor the Establishment Clause of the First Amendment.

¶2 "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof... ." U.S.Const. Amend. I. Article 2, Section 5 of the Oklahoma Constitution, commonly referred to as the "no aid" provision, *see Oliver v. Hofmeister*, 368 P.3d 1270, 2016 OK 15, ¶ 3, bars public assets from being "appropriated, applied, donated, or used, directly or indirectly," for the "use, benefit, or support of" any religious organization, institution, or position. The Majority erroneously concludes that allowing sectarian organizations to operate charter schools violates these provisions.

¶3 Petitioner concedes his argument is *not* based on the fact that St. Isidore would receive public funds. His argument is that St. Isidore would be an arm of the government, simply because it is designated as a "public school" in the

Act. But the reasoning that he, and the Majority, use to support that argument is circular. It goes something like this: (1) the State constitutionally must provide non-sectarian public education to all children; (2) publicly funded schools are, by definition, arms of the State; (3) under the Charter Schools Act, charter schools are defined as "public schools"; therefore, (4) charter schools are state actors and, as such, must be non-sectarian.

¶4 This argument is flawed. The Oklahoma Constitution requires the State to create a system of public schools, "free from sectarian control" and available to all children in the State. Okla.Const. Art. 1, § 5. It does not bar the State from contracting for education services with sectarian organizations, so long as a state-funded, secular education remains available statewide. St. Isidore would not be replacing any secular school, only adding to the options available, which is the heart of the Charter Schools Act. Simply put, requiring the state to fund non-sectarian education is not the same as allowing some funds to flow to sectarian education programs.

¶5 What about the "no aid" command in Article 2, Section 5 of our Constitution? As this Court has held many times, the "no aid" clause is not violated by contracts for services. The State contracts with private entities all the time for the performance of countless functions, from building roads to renewing motor-vehicle license tags. In contexts very similar to this one – involving public funds and religious organizations – this Court has held that public-private contracts are not invalid simply because a religious entity might

receive some tangential benefit. In *Oliver*, 2016 OK 15, we rejected a "no aid" challenge to a school-voucher scholarship program. In *Burkhardt v. City of Enid*, 1989 OK 45, 771 P.2d 608, we rejected a challenge to the use of public funds for a purchase and lease-back arrangement involving a sectarian university. And in *Murrow Indian Orphans Home v. Childers*, 1946 OK 187, 171 P.2d 600, we approved the use of public funds to contract with the Baptist Church to operate an orphanage. The guiding principle in these cases is this: "[A]s long as the services being provided 'involve the element of substantial return to the state and do not amount to a gift, donation, or appropriation to the institution having no relevancy to the affairs of the state, there is no constitutional provision offended.'" *Oliver*, 2016 OK 15, ¶ 19 (quoting *Morrow*, 1946 OK 187 at ¶ 9).[1] In short, contracts for services – including educational services – do not violate the "no aid" provision of our Constitution.

¶6 For the same reasons, St. Isidore's operation of a charter school would not violate the Establishment Clause. There is no Establishment Clause issue if the action in question is not "state action." Petitioner's argument – and the Majority's analysis – depend on labeling all charter schools as "public schools," which is equivalent to "state actors." Again, this places form over substance.

[1] Even if Petitioner *did* focus on the fact that State funds would go directly to St. Isidore, that argument would be meritless. The funds are not a donation, but compensation for services rendered. Whether payment goes to the student/parent, or the school directly, is of no practical difference under this scheme; if a student does not enroll, the school does not receive funds related to that additional student.

¶7 A private entity, such as a religious organization, may be deemed a state actor if it performs a function traditionally considered the *exclusive* realm of the state. *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974). But the Majority concedes that education is not a "traditionally exclusive public function." Majority at ¶ 30. It may be the State's prerogative to create a new, hybrid class of educational institutions called "charter schools," but that is not the same as claiming that *education itself* has traditionally been the exclusive prerogative of the State.[2]

¶8 Nor can charter schools be considered state actors simply because the State regulates them. It hardly needs to be said that regulation alone does not transform a private entity into a public one. *Jackson, id.* at 350. Even an "extensive and detailed" regulatory scheme does not automatically transform an entity into a state actor. *Id.* The Charter Schools Act can place relevant requirements on prospective charter-school operators without thereby turning them into arms of the state. Ironically, one of the aims of the Act is to place *fewer* regulations on charter schools compared to traditional schools.[3] It is

[2] Instead, the Majority tries to reframe the relevant 'function' as something like, 'a state-wide system of publicly-funded education,' which of course by definition is a state function.

[3] Charter schools are exempt from statutes and rules relating to schools, boards of education, and school districts. 70 O.S. § 3-136(A)(5). They are not required to hire teachers with state teaching certificates. https://sde.ok.gov/faqs/oklahoma-charter-schools-program.

undisputed that, aside from its religious affiliation, St. Isidore meets the requirements for operating a charter school.

¶9 Petitioner claims the Legislature made the analysis "easy" by labeling charter schools as public schools. 70 O.S. § 3-132(D). To the contrary, the analysis is easy because the realities belie such labeling. Regardless of how the State chooses to label charter schools, the Charter Schools Act is clearly an invitation for *private* entities to *contract* to provide educational choices. "[T]he definition of a particular program can always be manipulated to subsume the challenged condition," and allowing the State to "recast" a condition on funding in this manner would result in "the First Amendment ... reduced to a simple semantic exercise." *Carson v. Makin,* 142 S.Ct. 1987, 1999 (2022) (citations omitted). A similar instance of semantic legerdemain was attempted in *Espinoza v. Montana Dept. of Revenue*, 591 U.S. 464, 487 (2020), discussed below.

¶10 Contracting to provide educational alternatives is not the same as a wholesale outsourcing of a government function.[4] The virtual charter school

[4] Petitioner's brief ends with an analogy that demonstrates the flaw in his argument:

> [I]f the State decided to allocate public funds for private entities to beef up security, the State would of course be precluded from preventing the Catholic Church and other sectarian organizations from receiving those funds. However, if the State decided to start authorizing private entities to take over operations of the Oklahoma Highway Patrol, it would violate the Establishment Clause for the State to authorize a "Catholic Church Highway Patrol."

St. Isidore seeks to undertake would simply be a choice for students and parents. It would not be the only virtual charter school. It would not be the only charter school. But most important, it would not supplant any state-mandated sectarian public school.

¶11 By choice, the State created a new type of educational entity – the charter school. By design, the very purpose of the Charter Schools Act is to allow *private* entities to experiment with innovative curricula and teaching methods, and to give students and parents "additional academic choices." 70 O.S. § 3-131(A). The State is not required to partner with private entities to provide common education. But if it does, it cannot close the door to an otherwise qualified entity simply because it is sectarian. *Espinoza*, 591 U.S. at 487; *see also Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 16 (1947) (a State cannot exclude individuals "because of their faith, or lack of it, from receiving the benefits of public welfare legislation"). Contracting with private entities to provide such educational choices does not violate Article 2, § 5 of the Oklahoma Constitution.

B. Insofar as it denies religious organizations the chance to operate charter schools, the Charter Schools Act violates the Free Exercise Cla use of the First Amendment.

The logical flaw is that, unlike law enforcement, enrollment in a charter school is fundamentally a choice for parents to make. St. Isidore would not be "taking over" any function that is traditionally the exclusive realm of the State. It would exist alongside state-mandated secular options.

¶12 The latter part of the First Amendment, known as the "Free Exercise Clause," protects those who practice religion from laws that "impose special disabilities on the basis of ... religious status." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012, 2021 (2017). Specifically, laws that disqualify otherwise eligible recipients from a public benefit, based solely on their religious character, impose "a penalty on the free exercise of religion that triggers the most exacting scrutiny." *Id*. To pass constitutional muster under the so-called "strict scrutiny" test, the State must advance a compelling interest that justifies the action in question. The State's interests must be of the "highest order," and the means used must be narrowly tailored in pursuit of those interests. *Trinity, id*. at 2024.

¶13 *Espinoza v. Montana Dept. of Revenue*, decided quite recently, involved a very similar tension between the Free Exercise Clause and a "no aid" provision in the Montana Constitution. The issue in *Espinoza* was whether students who received a state-funded scholarship to be used at private schools could use those funds at sectarian schools. Shortly after creation of the scholarship program, the Montana Department of Revenue promulgated a rule that, for purposes of the program, purported to redefine "qualified education provider" to exclude sectarian schools. The Department explained that the rule was necessary to reconcile the scholarship program with the "no aid" provision of the state's constitution. *Espinoza*, 591 U.S. at 467-470.

¶14 When parents sued for the right to apply scholarship funds to attend a sectarian school, the Montana Supreme Court approved of the exclusion as consistent with the state constitutional command to give "no aid" to sectarian schools via public funds. The United States Supreme Court reversed. The question presented was "whether the Free Exercise Clause precluded the Montana Supreme Court from applying Montana's no-aid provision to bar religious schools from the scholarship program." 591 U.S. at 474. Because the scholarship program discriminated on the basis of religion, it was subjected to the strictest scrutiny. *Id.* at 484. The Court found unconvincing the Department of Revenue's claim that such an interpretation of the "no aid" provision actually promoted religious liberty. And as for the argument that diverting public funds to sectarian schools served to rob public schools of funds, the Court simply noted that any such effect was a direct consequence of the scholarship program as a whole – not to the fact that sectarian schools could take part. *Id.* at 485-86.

¶15 Similarly, the only compelling interest advanced by Petitioner in the instant case, to justify barring a religious organization from operating a charter school, is the "no aid" provision in our own Constitution. But as demonstrated above – under the long-standing line of authority from *Murrow*, to *Burkhardt*, to *Oliver* – that provision is not violated here. Contracting with a private entity that has religious affiliations, by itself, does not establish a State religion, nor does it favor one religion over another. Allowing St. Isidore

to operate a charter school does not give it any preference over any other qualified entity, sectarian or otherwise.

¶16 I find nothing in the State or Federal Constitutions barring sectarian organizations, such as St. Isidore, from applying to operate charter schools. To the extent Section 3-136(A)(2) of the Charter Schools Act bars such organizations from even applying to operate a charter school, I would find it inconsistent with the Free Exercise Clause of the First Amendment.[5] By reaching the opposite conclusion, the Majority's decision is destined for the same fate as the Montana Supreme Court's opinion in *Espinoza*.

[5] The Act's requirement that charter schools be nonsectarian (70 O.S. § 3-136(A)(2)) also violates the Oklahoma Religious Freedom Act (OFRA), which mandates that the State shall not "substantially burden a person's free exercise of religion" – even if the law or rule in question is one of general applicability. 51 O.S. § 253(A). As amended in November 2023, this statute specifies that the State may not exclude any entity from participating in a government program "based solely on [its] religious character or affiliation." 51 O.S. § 253(D). Aside from the fact that the Act's "nonsectarian" requirement violates the Free Exercise Clause, it is also a dead letter under Oklahoma law, as the ORFA is the more recent expression of legislative intent. *City of Sand Springs v. Dep't. of Pub. Welfare*, 1980 OK 36, ¶ 28, 608 P.2d 1139, 1151.