No. 24-394 and 24-396

IN THE

Supreme Court of the United States

OKLAHOMA STATEWIDE CHARTER SCHOOL BOARD, *et al.*,

Petitioners,

v.

GENTNER DRUMMOND, ATTORNEY GENERAL OF OKLAHOMA, EX REL. OKLAHOMA,

Respondent.

ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL,

Petitioner,

v.

GENTNER DRUMMOND, ATTORNEY GENERAL OF OKLAHOMA, EX REL. OKLAHOMA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

BRIEF OF *AMICUS CURIAE* LEPANTO INSTITUTE IN SUPPORT OF PETITIONERS IN CASES 24-394 AND 24-396

KEVIN B. MCCARTHY
5619 Surrey Hill Road
Indianapolis, Indiana 46226

GERARD V. BRADLEY
Counsel of Record
NOTRE DAME LAW SCHOOL
1100 ECK HALL OF LAW
Notre Dame, Indiana 46556
(574) 631-6627
gerard.v.bradley.16@nd.edu

Counsel for Amicus Curiae

379319

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES:

Page

STATUTES AND OTHER AUTHORITIES:

INTEREST OF AMICUS CURIAE

The amicus curiae who offers this brief is the Lepanto Institute, a Catholic lay apostolate dedicated to the defense of Catholic principles in Catholic charitable institutions throughout the world, founded on October 7, 2014, and organized on January 1, 2015 as a Virginia Nonprofit (Nonstock) Corporation. The work of the Institute includes extensive reviews and investigations of institutional integrity issues in Catholic Church entities. Michael D. Hichborn, its founder and President, holds an MA in Education and spent five years as a teacher in various non-public schools, and as an administrator, helping to open a Catholic high school in Fredericksburg, VA. Following this, he served as the director of St. Michael the Archangel High School, a new non-public school in Virginia, undertaking the administrative duties necessary for the school to open within a year. Hichborn is familiar with all aspects of Catholic school administration, teaching, Catholic teaching on education, and curricular needs for adolescent children.[1]

SUMMARY OF THE ARGUMENT

The Oklahoma Supreme Court erroneously applied its State Constitution and related statutes, disregarding the preemptive application of the 14th Amendment of the United States Constitution (and thus violating the rights of the parents as citizens, their privileges and immunities, due process and equal protection rights, including

1. Rule 37.6 statement: No party's counsel authored any part of this brief; no person other than amicus or its members made a monetary contribution to fund its preparation or submission.

property rights associated with the religious charter schools at issue). *Society of the Sisters of the Holy Names of Jesus and Mary v. Pierce*, 296 F. 928 (D. Or. 1924); affirmed in a unanimous decision of this Court *sub nom.*, *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 535, 45 Sup. Ct. 571, 69 L.Ed. 1070 (1925) (the "Oregon Schools Case") This Brief apprises the Court of how the prevailing thought of Christian U.S. citizenry on American civics regarding education, religion and the role of States correctly influenced the Supreme Court opinion in the 1925 Oregon Schools Case aiding in understanding the erroneous character of the argument of the Attorney General of Oklahoma and Oklahoma organic law as plainly unconstitutional. This brief, then, focuses on the American civic thought of a mere citizen, nonetheless highly educated, as well as the contemporaneous thought of the Chief Magistrate of the United States.

ARGUMENT

Whether more than a century ago prevailing thought on American civics regarding education, religion and the State apparently influenced Supreme Court jurisprudence and correctly explained the fallacies inherent in the argument of the Attorney General of Oklahoma suchwise that the Oregon Schools Case should control the outcome of this case?

More than a century ago prevailing thought of an American citizen on civics regarding education and the role of States apparently influenced Supreme Court jurisprudence and correctly explained fallacies inherent in the position of the Honorable Attorney General of Oklahoma. This amicus brief focuses on the

straightforward thought and holding in the Oregon Schools Case in the light of a February 1924 article in the *Atlantic Monthly* written as a common citizen by "James H. Ryan", who nonetheless also served as the Executive Secretary of the National Catholic Welfare Conference and as a professor of philosophy at the Catholic University of America in Washington, D.C. . Although this brief focuses on certain portions of the article which seem to have a more particular bearing on the outcome of the Oregon Schools Case, reading the entire article would be both informative and interesting.[2] Much of what Ryan had published in this longstanding American secular monthly periodical, not long before the District Court decision, resonates both in the case decision of the District Court and of this Court, and the Ryan article certainly seems to point to the judicial rationale used to resolve the instant matter. It seemingly had very wide circulation and fairly reflected the common sense of American citizen Christian faithful about State government treatment of religious schools and the rights of Christian parents. That a monthly periodical article could have influence on the rationale of this Court, whether directly or indirectly, is not a novel idea. [3] Multiple issues of a different monthly periodical apparently also had a reported influence on opinions of this Court, as indicated in one of its 1924 issues.[4] This Court

---

2. James H. Ryan, *Atlantic Monthly* (February 1924), "The Proposed Monopoly in Education", pages 172 to 179 https://cdn.theatlantic.com/media/archives/1924/02/133-2/132356069.pdf

3. See, for example, *Operation Rescue v. Planned Parenthood*, 975 S.W.2d 546 (1998), and the Gonzalez, J. concurring and dissenting opinion citing the September 1995 *Atlantic Monthly*

4. Paul A. Fisher, *Behind the Lodge Door* (Rockford, Illinois: Tan Books and Publishers, Inc.), page 242: "In 1924, the Grand

decided the Oregon Schools Case, affirming the March 31, 1924 decision of the Federal District Court three-judge panel, on June 1, 1925.

That June 1st Supreme Court unanimous decision in the Oregon Schools Case impresses the reader with its summary, if not stunning, language:

> "As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 535, 45 Sup. Ct. 571, 69 L.Ed. 1070 (1925)

Commander informed the Brethren: 'Through the activities of our state organizations, the *New Age* Magazine, our clip service and News Bureau, we are stimulating the public interest and furnishing much valuable material to speakers and writers, and thereby can reasonably claim much credit for the growing interest in favor of compulsory education by the state.' " [citing note 40 of Chapter 11: *New Age*, October 1924, Grand Commander's "Allocution" at the Supreme Council's Session at Charleston, S.C., September 24, 1924, pp. 594-95.]; see also, e,g., the introduction, "Amazing Discovery" and Chapters 7 and 8.

Because of the relative brevity of that 1925 unanimous opinion, for further understanding, we turned to the decision by the *nisi prius* panel below which opinion was so strongly approved by this Court.

> "It can scarcely be contended that complainants' right to carry on their schools, whether parochial or private, is not a property right, and the right of parents and guardians to send their children and wards to such schools as they may desire, if not in conflict with lawful requirements, is a privilege they inherently are entitled to enjoy." *Society of the Sisters of the Holy Names of Jesus and Mary v. Pierce*, *supra*, at 933

Consider, then, the concluding paragraphs from the article by Ryan and how its content and tenor resonate with the language of the subsequent court opinions. (For example: "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."):

> "The child belongs to the parent. He is not 'a national child.' Neither must his education be 'first national and after that personal.' If our democracy is to endure, it must respect, especially in its schools, the qualities which alone can save it — individualism, variety, personal initiative. These things demand freedom — not only freedom for the individual to work out his life in the way the individual thinks it must be worked out, but also freedom

> to accept the educational objectives which he deems vital to his own development.
>
> "The making of this world a better place to live in is the task of education. To that end all forces must cooperate, each one bringing its specific contribution to the attainment of human welfare. A democratic Government, to be successful, must rely on private initiative, on individuals, on religious groups to supplement what it is doing. But to suppress the endeavors of all non-State groups, in the supposed interests of a higher loyalty, will always be regarded by right-thinking men as an act of the grossest tyranny, the final result of which can be nothing short of the destruction of the social organism itself." [Ryan article, p. 179]

Both this article by Ryan in the *Atlantic Monthly* and the immediate subsequent first instance opinion of the *nisi prius* Federal Court highlight economic considerations and various rights, but especially in terms of property rights, being adversely impacted by the State of Oregon legislating a monopoly over the education of children to the damage of religious and private school owners, as well as the parents (customers) of these schools. This brief reviews the content of the article in relation to the instant case and in light of the 1925 resolution by this honorable court of that "Oregon Schools Case" to support the position of the Petitioners.[5] It is noteworthy that neither the opinion

5. In addition to citing *Meyer v. Nebraska*, 262 U.S. 390, 43 Sup. Ct. 625, 67 L.Ed. 1042 (1923), the three-judge District Court opinion cites 14th Amendment cases about business property rights,

of the U.S. District Court in Oregon nor the Supreme Court opinion by Justice McReynolds specifically mention a "Religion Clause", the "Free Exercise Clause", or the "Establishment Clause". The more recent jurisprudential contrivances or methodologies which postulate and analyze various "suspect criteria" and degrees of "scrutiny" likewise pay little attention to specific recognition of the unique character and significance of First Amendment phraseology, regarding religion and its "free exercise".

Writing his *Atlantic Monthly* article as a mere citizen, the Reverend Father James H. Ryan[6] provided a thoroughgoing rationale for religious schools in the United States in a discussion of the American cultural and political situation back then. His thoughts seem so remarkably to resonate in the Supreme Court decision by Justice McReynolds while also being remarkably prescient about the attitudes, characteristics and conditions which prevail in the United States today. This article by Father Ryan would certainly seem to have had very wide circulation and to have fairly reflected the common sense of American Christian faithful about State government treatment of religious schools and the rights of Christian parents. The thought of James H. Ryan provided context

---

such as *Southern Railway Co. v. Greene*, 216 U.S. 400, 416, 30 Sup. Ct. 287, 54 L.Ed. 536 (1910); *Chicago, Milwaukee & St. Paul R.R. Co. v. Wisconsin*, 238 U.S. 491, 35 Sup. Ct. 869, 59 L.Ed. 1423 (1915)

6. James Hugh Ryan was both a priest in the Catholic Church hierarchy at Indianapolis, Indiana, and a clergyman with substantial academic credentials having received a doctorate in Philosophy in 1908 and a doctorate in Sacred Theology in 1909. At the time this article was published, Father James Ryan was Executive Secretary of the National Catholic Welfare Council.

for the decision in this Oregon Schools Case, not as an inert historical backdrop, but rather as a narrative affording salient points both remarkably resonant in the current American situation and as relevant background for the application of 1st and 14th Amendment jurisprudence, both then and now.[7]

In short, this 1924 Ryan article is about the best of the American people, culture and polity evincing a consistent validation and perennial toleration of religious schools alongside, yet, apart from secular public schools, by fairly accommodating the "free exercise of religion" without an unwarranted concern for the "establishment of religion". In this vein, we summarize the February 1924 *Atlantic Monthly* commentary of James H. Ryan extensively by extracting salient excerpts, beginning with initial quotation of a sentence attributed to the President of the United States.

---

7. In contrast to this monthly periodical literature resonating in the Supreme Court of the 1920's, we know from the thorough exposé on the Supreme Court authored by Paul A. Fisher that an American anti-religious faction effectively used, among other means, a monthly periodical to influence opinions by a majority of the justices from 1941 to 1971. See, Paul A. Fisher, *Behind the Lodge Door, supra.* at pages 1-6; and, page 16: "Because so many of the Justices and other high government officials, including President Roosevelt, were known to be members of the Scottish Rite of the Southern Jurisdiction, it seemed appropriate to search for the Journal used by that organization to communicate with its members on a regular basis. That publication is the *New Age* magazine, a monthly periodical. In one issue of that journal, a member of the Rite said the *New Age* is 'generally recognized as the most influential and widely read Masonic publication in the world'. " [citing the introduction, "Amazing Discovery", Note 67: J. Allen, 'The New Age Dawns', *New Age*, October 1959, page 553]

James Ryan began his essay on monopoly in education by quoting this sentence attributed to President Calvin Coolidge:

> "The thing which the world needs most is a proper spiritual conception of human relationships."

In researching to find a source of this quotation, one can find language redolent of this single sentence in a speech by President Coolidge, some months after the publication of the *Atlantic Monthly* article, in which the Chief Magistrate discusses the same subject of his quotation. Here are excerpts of that Presidential address on "Authority and Religious Liberty" delivered to the Holy Name Society National Convention, Washington, D. C., on September 21, 1924:[8]

> "The importance of the lesson which this Society was formed to teach would be hard to overestimate. Its main purpose is to impress upon the people the necessity for reverence. This is the beginning of a proper conception of ourselves, of our relationship to each other, and our relationship to our Creator. Human nature cannot develop very far without it. The mind does not unfold, the creative faculty does not mature, the spirit does not expand, save under the influence of reverence. It is the chief motive of an obedience. It is only by a correct attitude of

8. President Calvin Coolidge and James Hugh Ryan were acquaintances in Washington society. The Catholic Standard and Times [Catholic Archdiocese of Philadelphia], Volume 34, Number 3, 17 November 1928, page 1, thecatholicnewsarchive.org.

mind begun early in youth and carried through maturity that these desired results are likely to be secured. It is along the path of reverence and obedience that the race has reached the goal of freedom, of self-government, of a higher morality, and a more abundant spiritual life . . . . Obedience is not for the protection of someone else, but for the protection of ourselves. It needs to be remembered that it has to be secured not through the action of others, but through our own actions. Liberty is not collective, it is personal. All liberty is individual liberty . . . . Coincident with the right of individual liberty under the provisions of our Government is the right of individual property. The position which the individual holds in the conception of American institutions is higher than that ever before attained anywhere else on earth. It is acknowledged and proclaimed that he has sovereign powers. It is declared that he is endowed with inalienable rights which no majority, however great, and no power of the Government, however broad, can ever be justified in violating. The principle of equality is recognized. It follows inevitably from belief in the brotherhood of man through the fatherhood of God. When once the right of the individual to liberty and equality is admitted, there is no escape from the conclusion that he alone is entitled to the rewards of his own industry. Any other conclusion would necessarily imply either privilege or servitude. Here again the right of individual property is for the protection of society. When service is performed, the

> individual performing it is entitled to the compensation for it. His creation becomes a part of himself. It is his property. "To attempt to deal with persons or with property in a communistic or socialistic way is to deny what seems to me to be this plain fact. Liberty and equality require that equal compensation shall be paid for equal service to the individual who performs it. Socialism and communism cannot be reconciled with the principles which our institutions represent. They are entirely foreign, entirely un-American. We stand wholly committed to the policy that what the individual produces belongs entirely to him to be used by him for the benefit of himself, to provide for his own family and to enable him to serve his fellow men.
>
> "Of course we are all aware that the recognition of brotherhood brings in the requirement of charity. But it is only on the basis of individual property that there can be any charity. Our very conception of the term means that we deny ourselves of what belongs to us, in order to give it to another."[9]

After the President's one-sentence quotation at the outset of his article (which lead us to this longer Presidential passage just quoted), James Ryan goes on to discuss a number of features and aspects of his reporting on the then-existing cultural conditions

9. https://founding.com/founders-library/american-political-figures/calvin-coolidge/

and political issues and how they bear upon the then-proposed monopoly in education, including the spectre of dictators and dystopian governments, the pessimism of progressive liberals, the importance of "correct thinking" about legislation and education, the primacy of the individual without government adversely affecting the basic purpose in education "to equip the child for the duties and obligations that lie before him" which include religious and social training, and related statements having a content and tenor remarkably compatible with what Justice McReynolds wrote in his opinion deciding the Oregon Schools Case.

Here below are quoted the selected excerpts from the *Atlantic Monthly* article:

> "Not liberty, but a strong-armed authority, is what these peoples appear to want; and a Lenin, a Mussolini, and a Rivera are endeavoring to give them what they want. In England and the United States, democracy has fared somewhat better. In spite of its defects, we still maintain unbroken our faith in the workability of those principles which have come down to us from the fathers . . . ." [James H. Ryan, *Atlantic Monthly* (February 1924), "The Proposed Monopoly in Education" (hereinafter "Ryan article"), p. 172]

> "Political progressives are demanding a radical change in government policies. Communists would overthrow everything and begin anew. Enlightened liberals shake their heads, and see nothing but misfortune before us. Some have already prophesied disaster." [Ryan article, p. 172]

"There are two principal forces which make for the ultimate success of democratic endeavor. One is legislation, and the other education. In the process of its actualization, democracy must look to these two activities, more than to any others, for aid and comfort. If law observance breaks down; if public officials become corrupt or negligent; if the making of laws falls under the control of any one group, thinking only of the advantages which will accrue to it from a domination of this function of government; if the people themselves fail to take an intelligent interest in the working of their government or become actively hostile to it, then we can with safety predict the near-collapse of democratic institutions. If, on the other hand, education fails to measure up to the requirements of the democratic state, if its administration is bad, its upkeep too expensive, its curriculum not fashioned to meet the growing demands made upon it, we have reached a situation fraught with the direst possible consequences. Correct thinking, and nothing but correct thinking, about both legislation and education, will bring us salvation." [Ryan article, pp. 172-173]

"The plain man does know something of education, and he rightly conceives of it as the surest means which has been developed to make certain the preservation of himself and his children. Now, both philosophers and statesmen must never lose sight of this point of view, lowly as it seems to be. Education is for the welfare, first of the individual, and then of the

species of which each individual is a personal representative. Government may be of many kinds, for it too is a human institution. But government for its own purposes, however lofty or praiseworthy these may be, must not attempt to change or distort the underlying principle of all education, which is to equip the child for the duties and obligations that lie before him . . . ." [Ryan article, p. 173]

"Now, a true democracy seeks, as its primary objective, the education of the individual, first and foremost for his own welfare and for the development of his inherent powers and faculties, and secondly, for the welfare of the body social. It is quite true that no individual lives to himself alone in a democracy; that he must also live with people and for people. But this he cannot do if education minimizes, or fails to recognize, the fact that what it must do primarily is to train the individual not only as a political, but as a religious and social, unit as well.

A democracy is supposed to be peculiarly sensitive to the needs of the individual. It is so essentially a personal process that, if it fails to recognize the sanctity inherent in the possession of a personality, as well as the rights which follow from the same, it becomes *eo ipso* tyrannical, an oppressor rather than a protector of individual rights. A democracy, to fulfill its mission, must never drift away from the moorings to which it is tied — the individual

man. Moreover, it can go forward only as the individual goes forward. Laws imposed from without may make a people industrious, happy, perhaps moral. But in this case, as is evident, it is not the people who have grown into a better social state. In a democracy, the people must create by individual devotion to high ideals a better and universal social condition of living. Nothing but education can effect such an outcome. And it must be, first, last, and all the time, an education of the individual; otherwise government 'of the people, by the people, for the people' becomes a meaningless phrase." [Ryan article, pp. 173-174]

"It is a philosophical fallacy pure and simple to envisage the State as a species of super-organism, with a life all its own, to which we owe other responsibilities than those we owe to ourselves, and to our neighbors. Hegel, the most undemocratic thinker who ever lived, is responsible for what has been called the 'organic' conception of the State. This view cannot be defended from the standpoint either of logic, or of practical consequences. For although it is true that the State possesses a certain unity, and that the good of the whole quite universally reacts to the good of the individuals who make up the whole, yet this unity is purely mechanical. It has no resemblance at all to the unity possessed by a living organism, since it does not exist divorced from the units which go to make it up." [Ryan article, p. 174]

"Democracy is essentially a religious ideal. Thou shalt love the Lord thy God; thou shalt love thy neighbor as thyself. One would have to go a great distance in search of a better expression of our democratic faith. Love spells democracy, and love, at bottom, is freedom. No nation needs to ponder this truth more than America. We possess freedom to-day — it is our proud boast. But how long shall we have it, if democracy becomes recreant to its trust by conceiving its task as one of suppressing individual freedom in the supposed interests of a phantom individual, called the State?" [Ryan article, p. 175]

"But what will puzzle the critics is the proposal to mend the situation by driving all our children into the very same educational boiling-pot. One is reminded of the teacher who gave as an excuse for the disorder among the forty children in her room the fact that one small boy out in the street could not be brought into the school. No one questions the right of the State to educate, or its duty to provide equal educational opportunity for all. But that is quite a different thing from looking to the State as the final source and sanction of all educational objective. We are witnessing to-day, in the name of patriotism, a gradual turning of the public school into an instrument for the fostering of the narrowest nationalism. In the minds of many well-meaning pe'ople [sic], the sole function of education is to turn out citizens like Fords, so many every minute of the working day. It would seem that

the policy of Germany before the war, which prostituted the school to such base national aims, would be sufficient proof of the falsity of this philosophy. The State undoubtedly has the right to determine the objectives which it wishes attained by its own schools. But without the circle of these aims and purposes there must remain secure for individual initiative and experiment, whether religious or not, a field which outsiders may freely cultivate. And what is this field? That of the individual soul. If the State fails to recognize, for any reason whatsoever, the claims of the individual for moral and spiritual development, then it should not put obstacles in the way of those whose sole purpose is to supply this deficiency, and in the interests of the State itself.

No one, at least in the United States, would deny that a democracy without morality is soulless. It is so essentially a spiritual process that in the absence of those moral qualities, like self-reliance, self-control, bravery, justice, and generosity, which alone make an individual upright and strong, it be comes unthinkable. In the philosophy of those who hold for religious training, religion and morality are not thought of as in contrast to democracy; on the contrary, they are considered the life blood of democracy, the stuff out of which any lasting democracy must be fashioned. No less an American than George Washington saw this truth most clearly. He openly favored religious training, for he understood that religious values must

be regarded as fundamental in every scheme of government built upon democratic principles. Nor can there be any question of the possibility of a religious education becoming narrowly sectarian and, as a result, a menace to the maintenance of democratic thought. But. we are not dealing with theories or possibilities now. The testimony of American history is that the religious school, no less than the public, was established to train citizens, not sectarian groups. And the only safe criterion for judging whether the religious school has measured up to its profession of faith in democracy, and to the purposes of its founders, is the lives of those who have gone from its doors. That these men have been Americans, in the highest sense of the word, no one can deny without questioning the loyalty of the leading scientists, writers, ministers, and statesmen whom our country has produced. Many of these men belonged, if you wish, to sects; they were trained under sectarian influences; but they were not less worthy Americans because they happened to be professing Christians." [Ryan article, pp. 175-176]

"The uniformitarians demand a system of schools in which the State alone shall say what may be taught and how it shall be taught, and which every child must attend." [Ryan article, p. 177]

"Class or religious prejudices should have no place in determining our educational

objectives. Catholic and Protestant, believer and nonbeliever, have lived in peace so far. Is this the time for any one class, with its particular loyalties, to impose on the nation its own conception of what American education must be, even though it claims to be actuated by motives of patriotism and national well-being?" [Ryan article, p. 177]

"It is very difficult to behold in the tendency toward State control of education, represented by the recent enactment in Oregon, which closes all schools except the public, a healthy expression of our democracy, or one that reflects the best public thought on the education question. Such laws are so foreign to American ideals, so contrary to the past dealings of the State as represented by the history of the aid given to private educational initiative, so destructive of the spirit of fair play and tolerance which has always characterized us as a people, that it is with chagrin, mixed with fear for the future of democracy itself, that we view this invasion of a domain always thought of as peculiarly free from attacks or interference on the part of the State." [Ryan article, pp. 177-178]

"It has often been remarked that the best sign of the possession of wisdom is to profit by the mistakes of the past. The history of Government-controlled education in some of the European countries teaches a lesson the significance of which needs no emphasis for our American democracy." [Ryan article, pp. 178-179]

This Court may then wish to consider the extent to which the outcome of the Oregon Schools Case resonates with much of the outlook and thought prevailing in our Republic in that time (and this), both in the *Atlantic Monthly* article and in related sources, how that common sense prevailing thought reinforces a judgment that the Oregon Schools Case, by-and-large, remains correct today, and how the instant case should reach substantially the same conclusion, the 1925 decision of this Court really controlling the outcome of its 2025 decision.

In this case the Court is not "dealing with the exercise by" the Oklahoma Catholic charter school "of some power delegated to it by the State which is traditionally associated with sovereignty". *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974) To the contrary, this Court has already recognized limits on states in its Oregon Schools Case opinion which makes it indelibly clear that: "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only." *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, *supra*, at 535. This rationale should preclude and prevent the State of Oklahoma from forcing its children to accept "non-sectarian" irreligious instruction from public teachers only in order to receive the State funding otherwise generally available.

This assessment of the lack of power by the States likewise precludes "entwinement" because there is no State government entity action being challenged, but rather an attempt to characterize routine independent private acts of a religious charter school to be misnomered

as State action simply because of the infringing and overreaching effort of the Oklahoma State Attorney General to enforce its own historic anti–religious organic law.

> "Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so 'state action' for purposes of the Fourteenth Amendment." *Jackson v. Metropolitan Edison Co.*, *supra*, at 357 (1974); see also, *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982): ("That a private entity performs a function which serves the public does not make its acts state action.")

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Oklahoma Supreme Court.

Respectfully submitted,

KEVIN B. MCCARTHY
5619 Surrey Hill Road
Indianapolis, Indiana 46226

GERARD V. BRADLEY
Counsel of Record
NOTRE DAME LAW SCHOOL
1100 ECK HALL OF LAW
Notre Dame, Indiana 46556
(574) 631-6627
gerard.v.bradley.16@nd.edu

Counsel for Amicus Curiae