No. _____

In the Supreme Court of the United States

NEW MEXICO ASSOCIATION OF NONPUBLIC SCHOOLS,

Petitioner,

vs.

CATHY MOSES and PAUL F. WEINBAUM,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE

NEW MEXICO SUPREME COURT

RESPONDENTS' BRIEF IN OPPOSITION

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INTRODUCTION

Although Respondents previously notified this Honorable Court of their election not to file a "Brief In Opposition" to Petitioner's "Petition for a Writ of Certiorari," significant changes in circumstances have prompted Respondents to reconsider and to reverse their prior decision; and now to file, this their "Respondents' Brief in Opposition" within the permitted 30 day time period provided by Supreme Court Rule 15.3.

It is to be noted that neither Daniel Hill, General Counsel, New Mexico Department of Education, nor Sutin, Thayer & Browne (outside trial and appellate counsel for Defendant-Respondent, Hanna Skandera, Secretary of Education, New Mexico Public Education Department), nor Modrall, Sperling, Roehl, Harris & Sisk, P.A. (trial and appellate counsel for Defendants-Respondents-Intervenors, Albuquerque Academy, *et al*), nor the Honorable Hector Balderas, New Mexico Attorney General have joined in Petitioner's, New Mexico Association of Nonpublic Schools,' pending "Petition for a Writ of Certiorari."

ARGUMENT

Simply stated, Petitioner's "Petition for a Writ of Certiorari" ("Cert.Pet. at __") is long on religious fervor and paranoia and short on legal substance. Petitioner has framed the singular and narrow question presented here as "[w]hether applying a Blaine Amendment to exclude religious organizations from a state textbook lending program violates the First and Fourteenth Amendments." (Cert.Pet. at i.) Petitioner repeats the mischaracterization contained in its "Question Presented" (Cert.Pet. at i) in its opening

paragraph by boldly, although fallaciously, stating that "[w]hen state officials deny needed secular services to children *solely* based on their religious identity, the Blaine Amendments' ugly history repeats itself." (Cert.Pet. at 1; *emphasis supplied*.)

The New Mexico Supreme Court's unanimous opinion under attack by Petitioner here (*Moses, et al. v. Skandera, et al.*, 2015-NMSC-036, 367 P.3d 838), held on the sole basis of Article XII, Section 3, of the New Mexico Constitution that the lending of textbooks to all non-public schools under NMSA (1978) §§ 22-15-1 to 14 (the "Act") violated said Article and Section. As the New Mexico Supreme Court noted, the proposed, but failed to pass, Blaine Amendment of 1876 sought to provide:

> No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects and denominations.

(*Id.* at 843; Cert.Pet at 12a-13a.) To the contrary, the New Mexico Constitution, Article XII, Section 3, provides:

> The schools, colleges, universities and other educational institutions provided for by this constitution shall forever remain under the exclusive control of the state, and no part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational *or private* school, college or university.

(*Id.* at 841-42; Cert.Pet. at 10a; *emphasis supplied*.)

As aptly noted by the New Mexico Supreme Court in its unanimous decision, the language of the Blaine Amendment:

> . . is nearly identical to that of Article XII, Section 3, with two *critical* differences. The Enabling Act prohibits the use of 'proceeds arising from

> the sale or disposal of lands granted [in the Enabling Act] for educational purposes' to support sectarian schools. In contrast, the drafters of the New New Mrico New Mexico Constitution restricted the use of proceeds from *any* lands granted to New Mexico by Congress, not only those granted in the Enabling Act, and they also restricted the use of any funds appropriated, levied, or collected for educational purposes for the support of not only sectarian schools, but also for the broader support of private schools. Through these changes, the Constitutional Convention decided to provide for additional restrictions required by Section 8 of the Enabling Act.

(*Id.* at 845; Cert.Pet. at 16a-17a; *emphasis supplied*.)

The challenged Act was held unconstitutional by the New Mexico Supreme Court because Article XII, Section 3, "evince[s] a clear intent to restrict both direct and indirect support to sectarian, denominational, or private schools, colleges, or universities." (*Id.* at 846; Cert.Pet. at 19a.)

In addition to Article XII, Section 3, of the New Mexico Constitution, Respondents raised claims of unconstitutionality under Article IV, Section 31, and under Article IX, Section 14, which respectively provide, in relevant part:

> No appropriation shall be made for . . . educational purposes to any person, corporation, association [or] institution, not under the absolute control of the state . . .

(N.M. Const., Art. IV, Sect. 31); And

> Neither the state nor any county [or] school district . . . shall directly lend . . . make any donation to or in aid of any person, corporation, association or public or private corporation . . .

(N.M. Const., Art. IX, Sect. 14.)

Following the established jurisprudential practice and custom of ruling only upon those constitutional issues necessary to reach the intended outcome, while avoiding additional, unnecessary rulings as to other challenged provisions, the New Mexico

Supreme Court chose to rely solely upon Article XII, Section 3. Clearly, the end result would have been the same finding of unconstitutionality of the challenged Act, had either or both Article IV, Section 31, or Article IX, Section 14, of the New Mexico Constitution been applied. Neither of these latter two New Mexico Constitutional provisions have any relationship, real or imagined, to the Blaine Amendment.

The decision of the New Mexico Supreme Court, *Moses*, *supra*, in this cause is not unique in American Jurisprudence. At least nine other state Supreme Courts have reached the same conclusion of unconstitutionality, based on their own respective, state constitutional provisions, similar to Article XII, Section 3, of the New Mexico Constitution. *See*: *California Teachers Ass'n v. Riles*, 29 Cal.3d 794 (1981), 632 P.2d 953 (Cal. Const., Art. IX, § 8); *Spears v. Honda*, 51 Haw. 1 (1968), 449 P.2d 130 (Haw. Const., Art. I, § 3 and Art. IX, § 1); *Bloom v. School Committee of Springfield*, 376 Mass. 353 (1978), 79 N.E.2d 578 (Mass. Const., Art. 46 of the Amendments to the Constitution of the Commonwealth); *In re Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich. 41 (1975), 228 N.W.2d 129 (Mich. Const., Art. VIII, § 2); *Paster v. Tussey*, 512 S.W.2d 97 (Mo. 1974) (Mo. Const., Art. IX, § 8); *Gaffney v. State Department of Education of the State of Nebraska*, 192 Neb. 358 (1974), 220 N.W.2d 550 (Neb. Const., Art. VII, § 11); *Dickman v. School District No. 62C, Oregon City, of Clackamas County, Oregon*, 232 Ore. 238 (1961), 366 P.2d 53 (Ore. Const., Art. VIII, § 2); *In the Matter of the Certification of a Question of Law from the U.S. District Court*, 372 N.W.2d 113 (S.D. 1985) (S.D. Const., Art. VI, § 3, and Art. VIII, § 16); And *People* ***ex rel.*** *Klinger v. Howlett*, 56 Ill.2d 1 (1973), 305 N.E.2d 129 (Ill. Const., Art. X, § 3).

Petitioner attempts to ride on the coattails of *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779 (8th Cir. 2015) (United States Supreme Court, No. 15-577, in which this Honorable Court recently granted plenary review). *Trinity Lutheran*, *supra*, is dissimilar to the present cause, inasmuch as Article IX, Section 8 of the Missouri Constitution also prohibits "aid . . . to support or sustain any private . . . school . . . or other institution of learning controlled by any religious creed, church or sectarian denomination." (*Trinity Lutheran*, *id*. at 783.) To the contrary, Article XII, Section 3, of the New Mexico Constitution provides, in addition, that the "schools . . . provided for by this constitution shall forever remain under the exclusive control of the state, and no [funds] . . . shall be used for the support of any sectarian . . . or private school . . ." (Cert.Pet. at 4.)

In addition, the funds under review in *Trinity Lutheran*, *supra*, were federal funds devoted to solid waste management, which Trinity Lutheran Church sought to utilize for resurfacing its playground on church property. (*Trinity Lutheran*, *id*. at 781.) To the contrary, the use by the New Mexico Department of Education of Mineral Lands Leasing Act ("MLLA") (30 U.S.C., §§ 181 to 287) funds to finance the challenged Act are not restricted by any federal laws or regulations as to the states' use of such funds. It has been held that § 195(a)(1)(c) of the MLLA "places responsibility for civil enforcement in the hands of the Attorney General." *Cuba Soil and Water Conservation District v. Lewis*, 527 F.3d 1061, 1063-64 (10th Cir. 2008). As succintly noted in *Moses*, *supra*, "Intervenors' argument that funds from the MLLA that are used for the Instructional Material Fund are federal funds which are 'not subject to state constitutional limitations' is without merit." (*Id.* at 846; Cert.Pet. at 19a.)

Despite the fact that Catholics remain today, as they have since the founding of and the adoption of the State of New Mexico and its Constitution in 1911, overwhelmingly the largest religious denomination in the State of New Mexico; a constitutional amendment "to provide free textbooks to all students, including those who attend private schools" was rejected by the voters. (*Moses*, *id.* at 846; Cert.Pet. at 20a-21a.)

Petitioner relies upon *Hunter v. Underwood*, 471 U.S. 222 (1985), *United States Department of Agriculture v Moreno*, 413 U.S. 528 (1973) and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). (Cert.Pet. at 15-16.) In each of these three cases, the United States Supreme Court found that a distinct group of citizens had been selectively and unfairly targeted: African-Americans, unrelated household members, and a particular religious sect, respectively. Without any evidence or factual support and in furtherance of its zealous crusade to provide equal, public funding and support to private schools on a parity with public schools, Petitioner asserts "[t]hus the attempted facial neutrality of Article XII, section 3 cannot save it, because 'no aid' provisions like this one were adopted out of anti-Catholic animus and in fact had an intended disparate impact on Catholic schools, which now had to compete with public schools infused with Protestantism." (Cert.Pet. at 16.)

Clearly, Petitioner's advocacy position, if successful, would not stop with textbooks and other instructional materials, but would be equally applicable to funding busing, teachers, school buildings, *etc.* for all private schools and would devastate the financial support base of public schools systems, which struggle today nationwide for adequate funding from state legislatures.

In the most recent case cited by Petitioner (*Church of the Lukumi Babulu Aye, supra*), this Honorable Court laid out the appropriate legal standards for consideration:

> [A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.
>
> . . .
>
> In *Fowler v. Rhode Island* [345 U.S. 67 (1953)] . . . we found that a municipal ordinance was applied in an unconstitutional manner when interpreted to prohibit preaching in a public park by a Jehovah's Witness but to permit preaching during the course of a Catholic mass or Protestant church service . . . state statute[s] that treat some religious denominations more favorably than others violate the Establishment Clause.

Id., at 531, 533.

Here Article XII, Section 3, does not favor one religion over any others, rather it more broadly applies equally across the board to all private schools, sectarian or non-sectarian. It cannot seriously be argued, as Petitioner maintains, that a failure to fund private schools of every stripe, equally with the public schools which "shall remain under the exclusive control of the state" (N.M. Const., Art. XII, Sect. 3; Cert.Pet. at 10a.) is discriminatory.

The expressly stated purpose of Article XII, Section 3, is to preserve all "proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes" for the State of New Mexico's *public* schools. It can not seriously be suggested that private schools within the State of New Mexico are entitled to equal funding for buses, teachers, school buildings or a host of other educational necessities.

Petitioner's claim that "[t]his protection [the challenged Act] existed for 80 years without controversy" is also untrue. (Cert.Pet. at 17.) *See Zellers v. Huff*, 1951-NMSC-072, 55 N.M. 501, in which the District Court held:

> That the furnishing of free textbooks to schools other than tax supported schools of this State, violates Section 14, Article 9 . . . and Section 3, Article 12, of the Constitution of the State of New Mexico.

Id., at ¶ 18, 55 N.M. at 512. The New Mexico Supreme Court in *Zellers*, *supra*, held: "The judgment of the District Court will be affirmed in all things with the following exceptions . . . [none of which are applicable here]." *Id.*, at ¶ 83, 501 N.M. at 531.

Petitioner has not cited to a single case, in which this Honorable Court has accepted for review and reversed the interpretation of a state statute, as construed and applied by that state's Supreme Court.

No party to these proceedings ever pleaded, argued or relied upon any provision of the United States Constitution in asserting its position. As the New Mexico Supreme Court has aptly noted:

> Neither [federal law] nor the federal authorities upholding the constitutionality of [federal law] bar this Court from affording greater protection of the rights . . . under our state constitution . . . Under this Court's 'interstitial approach' to state constitutional interpretations, we 'may diverge from federal precedent for three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics' . . . this Court [has expressed] 'willingness to undertake independent analysis of our state constitutional guarantees when federal law begins to encroach on the sanctity of those guarantees.'

New Mexico Right to Choose/NARAL v. Johnson, 1999-NMSC-005, ¶ 28, 126 N.M. 788, 798.

CONCLUSION

Petitioner continues to carp vehemently at language it considers to be religious animosity in New Mexico Constitution Artricle XII, Section 3, making specific reference to "sectarian" and "denominational" schools, while ignoring the specific catchall language referring to "private" schools of every stripe.

Petitioner further ignore entirely New Mexico Constitution Article IV, Section 31, and Article IX, Section 14 which make no mention of "sectarian" or "denominational" schools, but would require the same findings of unconstitutionality of the challenged Act.

The relevant Articles and Sections of the New Mexico Constitution are neither ambiguous nor unclear. As the New Mexican Supreme Court was quick to note in *Harrington v. Atteberry*, 1915-NMSC-058, at ¶ 6, 126 N.M. 50, 54 and as applicable here, "The language of the constitutional provision is so clear and explicit that it does not require construction; all that need be done is to read it and apply the language in its ordinary sense."

In other words, the language in the New Mexico Constitution says what it means and means what it says.

Petitioner's desperate plea to keep alive the current litigation, longer than the four years it has already consumed, by erroneous claims of an identity of issues with *Trinity Lutheran*, *supra*, should neither be condoned nor sanctioned.

WHEREFORE, Respondents pray that Petitioner's "Petition for a Writ of Certiorari" be denied forthwith.

Respectfully submitted,

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