IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

INDEPENDENT SCHOOL DISTRICT NO. 5 OF TULSA COUNTY, OKLAHOMA a/k/a JENKS PUBLIC SCHOOLS, and INDEPENDENT SCHOOL DISTRICT NO. 9 OF TULSA COUNTY, OKLAHOMA, a/k/a UNION PUBLIC SCHOOLS, Plaintiffs/Appellees, vs. RUSSELL SPRY, STEPHANIE SPRY, TIM TYLICKI, KIMBERLY TYLICKI, TIM FISHER, KRISTIN FISHER, STEPHAN HIPSKIND, STEPHANIE HIPSKIND, JERRY SNEED, and SHANNA SNEED, Defendants/Appellant.	)	No. 110,694 (cons. w/110,693)

BRIEF OF AMICUS CURIAE FRIEDMAN FOUNDATION FOR EDUCATIONAL CHOICE

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I. INTEREST OF THE AMICUS CURIAE

The Friedman Foundation for Educational Choice ("Foundation") is a 501(c)(3) nonprofit and nonpartisan organization, dedicated to advancing Milton and Rose Friedman's vision of school choice for all children. The Foundation, headquartered in Indianapolis, Indiana, and one of the nation's leading school-choice advocates, continues its founders' mission of promoting school choice as the most effective and equitable way to improve the quality of K-12 education in the United States. Lindsey Nicole Henry Scholarships and other school-reform efforts being embraced by states across the country enable parents to make a true private choice, using public funds set aside for the education of their children, to send their children to the school of their choice—public or private, near or far, religious or secular—whatever works best for their children." As explained below, the Foundation urges the Court to reverse the judgment below, to uphold the legality of Oklahoma's Lindsey

Nicole Henry Scholarships for Students with Disabilities Act, and to reject Plaintiffs' constitutional challenge.

II. INTRODUCTION

As a national advocacy organization dedicated to enhancing the freedom of families to select the best available education for their children, the Friedman Foundation wishes to offer its views on several of the issues presented by the Petition in Error filed by the petitioners, who were the defendants below and who are parents of minor children with disabilities receiving scholarships under the Lindsey Nicole Henry Scholarships for Students with Disabilities Program Act, 70 O.S. §§ 13-101.1 and 13-101.2 (the "Scholarship Program"). With the enactment of the Scholarship Program, Oklahoma joined a growing list of states that have created similar programs specifically for students with disabilities, part of a longer list of states (as well as the federal government) that have created scholarship programs for all students. States with scholarship programs specifically for students with disabilities include Arizona, Florida, Georgia, Louisiana, Ohio, and Utah.[1] States with broader-based scholarship programs in which children with disabilities also participate include both programs using state funds (Indiana, Louisiana, Ohio, and Wisconsin), and programs using private funds generated by state tax credits or deductions (Arizona, Florida, Georgia, Illinois, Indiana, Iowa, Minnesota, North Carolina, Pennsylvania, and Rhode Island).[2] The federal government has created an Opportunity Scholarship Program for the

[1] For descriptions of these programs, see Friedman Foundation for Educational Choice, "Rising Tide, 2012: the ABC's of School Choice," at www.edchoice.org or http://www.edchoice.org/CMSModules/EdChoice/FileLibrary/785/ABCs-of-School-Choice---2012.pdf.
[2] *Id.* Since publication, Virginia enacted a tax credit to generate scholarships for low-income students.

District of Columbia that provides federally-funded scholarships to students, including those with disabilities.[3]

The earliest of these programs, Florida's John M. McKay Scholarships for students with Disabilities, has been in effect since 1999 and now aids 22,861 students enrolled in 985 private schools.[4] It has served as a model for many of the later programs, and studies of it have shown: (1) a strong, positive relationship between the presence of private schools participating in the McKay program and learning gains for special-needs children in proximate public schools; (2) relatively much greater satisfaction among McKay voucher parents and former McKay voucher parents with their private school placements compared to their experiences in the public schools (3) public school exposure to McKay Scholarships constrains the expensive growth of special education enrollments in those public schools; (4) evidence that competition from McKay Scholarships decreased the likelihood that a student was diagnosed as having a mild disability and further confirmation that it was positively related to academic achievement in the public schools.[5]

Significantly for purposes of this case, many of the states that have enacted scholarship programs empowering families to send their children to private schools have similar state Blaine Amendments to Oklahoma's Article II, Section 5. Of the six other states with programs specifically designed for children with disabilities, Florida, Georgia and Utah

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[3] *Id.*

[4] *Id.* Latest numbers reported unofficially by Florida Commissioner of Education Gerard Robinson after printing of the ABC's of School Choice reflect over 23,600 students enrolled in 1,076 schools.

[5] Jay P. Greene and Marcus Winters, "The Effect of Special-Education Vouchers on Public School Achievement: Evidence from Florida's McKay Scholarship Program," Manhattan Institute, April 2008; Jay P. Greene and Greg Forster, "Vouchers for Special Education Students: An Evaluation of Florida's McKay Scholarship Program," Manhattan Institute, June 2003. For further confirmation of this finding, see Virginia R. Weidner and Carolyn D. Herrington, "Are Parents Informed Consumers: Evidence from the Florida McKay Scholarship Program," Peabody Journal of Education, Vol. 81, No. 1 (2006), pp. 27-56; Marcus A. Winters and Jay P. Greene, "How Special Ed Vouchers Keep Kids From Being Mislabeled as Disabled," Manhattan Institute, August 2009.

have such provisions in their constitutions.[6] In addition, of the four states with broader state scholarships programs that include students with and without disabilities, Indiana and Wisconsin have state Blaine Amendments similar to Article II, Section 5.[7] Of course, the federal constitution contains no Blaine Amendment, the Congress having rejected it in 1876. Proposed long before the U.S. Supreme Court applied the First Amendment's Religion Clauses to the states, the federal Blaine Amendment was modeled on early state constitutional provisions that prohibited state aid to sectarian institutions. The proponents of the federal Blaine argued that it was consistent with the Religion Clauses of the First Amendment, which we now know permits religiously-neutral scholarship programs like the Lindsey Nicole Henry Scholarships, based on the U.S. Supreme Court's ten-year-old decision in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).[8] Consequently, opponents of school choice programs now argue that particular state Blaine Amendments do not parallel the federal religion clauses and prohibit programs those Clauses permit. That is precisely the position the respondents are in this case.

Because in granting the respondents' motion for summary judgment the District Court provided no supporting rationale for its conclusions that respondents have standing to sue and that the Scholarship Program is unconstitutional,[9] Appellants and Amici supporting them have to assume that she agreed with all their claims of constitutional violations. The Friedman Foundation will not burden this Court with analysis of why all of her conclusions

[6] Florida Const. Art. I, Section 3; Georgia Const. Art. I, Section II, Para. VII; Utah Const. Art. I, Section 4, and Art. X, Section 9.
[7] Indiana Const. Art. I, Section 6; Wisconsin Const. Art. I, Section 18.
[8] Post-*Zelman,* opponents of school choice programs no longer include claims of Establishment Clause violations in their lawsuits; the respondents in this case are no exception.
[9] In neither the Journal Entry of Judgment nor in her oral remarks contained in the Transcript of oral argument on the cross-motions for summary judgment did Judge Nightingale indicate why she agreed that respondents had standing to sue the parents and whether her conclusion that respondents had shown the Scholarship Program to be unconstitutional was based on any of their many claims of violations. Therefore, petitioners are forced to rebut all such claims

are wrong but will limit itself to those issues it has encountered before in challenges to school choice programs and to which it believes it can add some broader perspective. The issues from the Petition in Error filed by Appellants, that the Foundation will address are Issues 1 and 7, those involving the role of the parents, and issues 4b, d, and e, those involving Article II, Section 5 and Article X, Sections 14 and 15.

III. ARGUMENT

A. Questions Presented Regarding the Role of the Parents.

1. In their Petition, the school districts challenged the constitutionality of the state scholarship program for students with disabilities by suing parents of scholarship recipients. Did the trial court err by entertaining suit against the parents, who have no authority over the statute or its operation?

   Yes.

7. The School Districts sued the parents instead of the State to avoid suing in Oklahoma County, where the petition properly should have been brought. 12 O.S. Section 133. Did the trial court err in accepting venue in Tulsa County as proper?

   Yes.

This case is unprecedented in school choice litigation going back at least to *Judd v. Board of Education*, 15 N.E.2d 576 (N.Y. 1938), *overruled by Board of Education v. Allen*, 228 N.E.2d 791 (N.Y. 1967), in which the New York Court of Appeals held that its state Blaine Amendment[10] invalidated a state program to transport private school students on public school buses. In the dozens of lawsuits opponents of school choice have filed since *Judd*, *not one* has sued the parents or children benefitting from the program. All such challenges have named the state that enacted the program and the officials charged with its administration. Whether brought in federal or state court, all preceding plaintiffs have recognized that the state is responsible for the alleged constitutional violations, and not the

[10] New York Const. Art. XI, Section 3.

parents. That parents and their children have received benefits under these presumptively constitutional programs has not led to their having to defend the constitutionality of the programs themselves. And while parents have oftentimes sought to intervene to assist the states in the defense of such programs, no plaintiff or judge has ever previously doubted that the proper defendant is the representative of the state that enacted the program.

Respondents argued that it was sufficient that they notified the state that their declaratory judgment action raised the question of the constitutionality of a state statute, and that the state participated in the proceedings below. That begs the question, however, of whether the state was always a necessary party to the proceedings and should have been named a defendant *ab initio*. If they were a necessary party, then because they should have been the named defendant venue was only proper in Oklahoma County and not Tulsa County. By failing to recognize this fact, the trial court has countenanced blatant forum shopping by the respondents and violated the policy against suing the state outside of Oklahoma County.

Respondents may argue that petitioners' and amicus' position means that whenever the constitutionality of a state statute is at issue venue is limited to Oklahoma County, but that would be setting up a straw man. Challenges to the constitutionality of a state statute can arise in a multitude of contexts, but Amicus' argument is limited to the special context of a challenge to a state grant program like the Scholarship Program where the state is an active and essential participant as the source of the funds involved. The gravamen of respondents' case has always been that the constitution prohibits the state from enacting and administering the Scholarship Program. There can be absolutely no doubt that had the respondents sued the state in Oklahoma County to enjoin the Scholarship Program without naming a single parent

or child receiving a scholarship that the suit would have proceeded with no claim from the state that a real party in interest had been excluded from the suit. That is the path these school choice lawsuits have followed for at least 75 years throughout the country.

Nothing the parents have done has violated any rights of the respondent school districts. Under *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), they have merely exercised their federal constitutional right to send their children to private schools, a decision that their school districts may not like but which they have no legal right to prevent. It is certainly true that the state's enactment of the scholarship program has enabled them to actually exercise their right to choose private education, but that is hardly the fault of the parents. If it is anyone's fault, it is the fault of the Oklahoma legislature that passed the Scholarship Program, the Governor who signed it into law, and the state officials who provide the scholarships to the eligible families. They are the entities the school districts should have sued but did not, because if they had they would have had to do so in Oklahoma County.

There are tactical reasons why school choice opponents like the School District respondents in this case do not usually want to name parents and their children as the defendants in these lawsuits alleging violations of state Blaine Amendments such as Article II, Section 5. First, in cases involving scholarships for families with children with disabilities, suing parents can result in parents exposing in court exactly why they want out of the respondents' schools. This Court has merely to read the affidavits supplied by the parents to sense the desperation parents with limited financial resources face when their children with disabilities are bullied and mistreated in public schools. And the parents make no claim that these are generally bad public schools, just that they have consistently and for long periods of time failed to adequately educate their children who face significant educational

challenges. These are the sorts of facts that lead legislatures to offer this class of families additional educational options over and above those provided in the public schools, and normally school choice opponents would rather not have such stories surfaced in litigation.

School choice opponents such as the respondents would usually much rather focus the courts' attention on the private schools the families choose, because oftentimes (but not always) those schools are religious or religiously-affiliated,[11] allowing the opponents to argue that religious schools are being aided or benefitted in violation of state Blaine Amendments. They hope the Courts will be misled by the fact the state funds end up in religious schools' coffers into believing that the purpose of the program is to aid the schools themselves rather than the families enabled to buy an education from those schools. Although school choice programs are legally indistinguishable in structure from the Food Stamp program that aids low-income families in buying food from grocery stores and where no one seriously believes the program was enacted to benefit grocery stores, school choice opponents want the focus to be on the private schools that are the grocery stores of a school choice program. But even given the greater logic supporting naming the religious schools chosen by parents as the defendants in this lawsuit, these respondents choose to put parents to the time, expense and stress of defending a program the state enacted for their relief. These parents had every right to treat this program as presumptively constitutional, as indeed the trial court had the duty to do, and were not the proper parties to be forced to the task of defending it.

[11] In the case at bar, two of the five families have been sued by respondents have their children in religious schools and three have them in non-religious schools. Oklahoma's Blaine Amendment, Art. II, Section 5, is only violated if religious schools are "aided," raising the repugnant possibility that families choosing non-religious schools can be aided while those choosing religious schools cannot. As the U.S. Supreme Court recognized long ago in its first modern foray into school choice legislation, *Everson v. Board of Education*, 330 U.S. 1 (1947), the federal Religion Clauses prohibit discrimination against religion and well as discrimination in favor of religion. See also *Lemon v. Kurtzman*, 403 U.S. 602 (1971), establishing the *Lemon* test, a part of which is that no program shall have a primary effect of advancing *or inhibiting* religion.

Because the respondents failed to name the proper defendants and because those proper defendants were the state and state officials charged with the administration of the program, venue was only proper in Oklahoma City, and the decision of the trial court should be reversed on that basis alone.

B. Questions Presented in Declaring the Act Unconstitutional.

4. Did the trial court err in summarily declaring the act unconstitutional without finding that it violated any specific provision of the Oklahoma Constitution, including those expressly raised by the School Districts?

   For purposes of argument, Amicus assumes the trial court found all specific provisions were violated.

   b. Article II, Section 5 of the Oklahoma Constitution prohibits the transfer of public funds for the use, benefit, or support of any sectarian institution "as such." Is that provision violated where public funds are paid to religiously-affiliated schools for a public purpose, with adequate consideration, and under neutral criteria?

      No.

   d. Article X, Section 14 of the Oklahoma Constitution provides that taxes shall be levied for public purposes only. Is that provision violated where public funds are transferred to a private school for educating an Oklahoma student with disabilities?

      No.

Alternatively, did the court err in summarily declaring the Act unconstitutional without determining whether it serves a public purpose?[12]

   e. Article X, Section 15 of the Oklahoma Constitution prohibits gifts of public funds to private entities. Is that provision violated where public funds are transferred for adequate consideration?

      No.

Alternatively, did the trial court err in summarily declaring the Act unconstitutional without determining whether the state receives adequate consideration in exchange for the scholarship funds?[13]

[12] Having answered the first alternative in the negative it is unnecessary to address the second alternative.
[13] *Id.*

1. The Act Does Not Violate the Oklahoma Constitution.

Properly construed, Article II, Section 5 does not prevent the Oklahoma legislature from providing parents of children with disabilities additional options outside the public schools for their children. Section 5 should be construed narrowly in light of its origins in anti-Catholic bigotry, as a prohibition on funding sectarian schools themselves, not as a prohibition on permitting parents to choose the best available education for their children, whether they choose a religious school or not. The precedents of this Court are contradictory, and it is impossible to reconcile them all. Amicus urges this Court to choose the interpretation outlined above because it best comports with the plain language of Section 5, and while avoiding the unpersuasive analysis of the two cases that equates aid to students with aid to the schools they choose. Such analysis plainly jeopardizes the constitutionality of other educational programs of Oklahoma, such as grants for college students, to say nothing of other sorts of social welfare programs.

a. Article II, Section 5, of the Oklahoma Constitution Should Be Construed in Light of Its History as a Blaine Amendment.

Article II, Section 5 is unquestionably a state Blaine Amendment. Without understanding the history of such amendments and their relationship to the public school systems maintained by each state, as required in Oklahoma by enabling legislation enacted by the U.S. Congress, one will almost certainly assume that they were an effort to create a separation of church and state and thus compatible with the federal Religion Clauses contained in the First Amendment. Such an assumption would be wrong.

Far from being religiously-neutral provisions designed to prevent the state from directly aiding a state-established religion, such state Blaine Amendments were, like the federal counterpart from which their name derives, in fact designed to rebuff efforts of the

Catholic Church for a share in the funds provided to public schools,[14] which were at the time nondenominationally Protestant in orientation. It is simply impossible to understand the proper interpretation of such provisions without first understanding that the common schools (as public schools used to be known) were originally intended to be, and functioned as, religious schools.[15] It is because the common schools were unabashedly Protestant in orientation, and indeed intended to inculcate in all children attending them a generic Protestantism acceptable to most if not all Protestant denominations, that the Catholic authorities felt compelled to create their parochial schools as an escape for their co-

[14] As Professor Joseph Viteritti has written, "The history of the original Blaine Amendment and its progeny in the States underscore one of the most incredible ironies in American constitutional law. Strict separationists often point to these local provisions as safeguards of religious freedom, using them to prevent objectionable interaction between governmental and religious institutions. In fact, the Blaine Amendment is a remnant of nineteenth century religious bigotry promulgated by nativist political leaders who were alarmed at the growth of immigrant populations and who had a particular disdain for Catholics." Joseph Viteritti, "Blaines's Wake: School Choice, the First Amendment, and State Constitutional Law," 21 Harv. J.L. & Pub. Pol'y 657, 659 (1998).

[15] See Carl F. Kaestle, Pillars of the Republic: Common Schools and the American Republic, 1780-1860 (1983) at 98 ("The growing antagonism between Protestants and Catholics may have helped Protestants to close ranks on the issue of religion in the public schools. Education officials, legislators, and essayists agreed on the propriety of Christian Bible reading in the public schools. Predominantly Protestant themselves, they endorsed the notion there was a common core of scripture and belief among Christians, and they had no qualms about supporting a common-school policy that was openly Christian, avowedly nonsectarian, and implicitly Protestant."); David Tyack, Thomas James, and Aaron Benavot, Law and the Shaping of Public Education, 1785-1954 (1987) at 131 ("Throughout most of American history, local majorities seemed to have their way with religious elements in the curriculum. These local majorities were typically Protestant, and the "compromise" they favored—teaching the King James Bible without comment—was hardly fair to Catholics, Jews, or non-believers."); Charles Leslie Glenn, Jr., The Myth of the Common School (1987) at 9 ("The common school was intended, by its proponents, above all as the instrumentality by which the particularities of localism and religious tradition and (in the United States) of national origin would be integrated into a single sustaining identity."); *id*. at 14 (The common school that [Horace] Mann and others sought to create was profoundly and explicitly religious and saturated with moral purpose".); Lloyd P. Jorgenson, The State and the Non-Public School: 1825-1925 (1987) at 38 ("Although he had abandoned the Puritanism of his forebears, [Horace} Mann's writings bear eloquent witness to his burning conviction that non-sectarian [protestant] religion was an essential element of education…. An Episcopalian layman with orthodox religious views, [Henry] Barnard [father of the public school systems of Connecticut and Rhode Island and founder and long-time editor of the Common School Journal] was entirely convinced of the necessity of religious instruction in the schools, and he admonished his readers that Christ was the first great teacher."); Joseph P. Viteritti, Choosing Equality: School Choice, the Constitution, and Civil Society (1999) at 148 ("Nobody so personified the essence of the common school as did Horace Mann, the secretary to the board of the nation's first public school system, in Massachusetts….In truth, Mann's claim of [religious] neutrality was a veneer to cover a political agenda that used the public school system to promote the teachings of mainstream Protestantism, which he believed would rescue the souls of his subjects as well as the fortunes of the republic."). *id*. at 150 ("The common school was meant to function as an instrument for the acculturation of immigrants, making them good, productive citizens in the image of the governing majority. The Bible, the Protestant Bible was a sacred implement to their noble cause.").

religionists from the common schools.[16] They demanded an equal share of the school funds for their nascent schools, and it was to rebuff those demands that the earliest state Blaine Amendments were adopted, such as that which Massachusetts adopted in 1855 in the midst of the anti-Catholic hysteria of the Know Nothing movement.[17] Thus, while such state Blaine Amendments now serve to reserve direct appropriations to the currently secular public schools, that outcome was neither their original intent nor actual effect.

As the U.S. Supreme Court has come to recognize, "hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow…. Consideration of the [Blaine] Amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general. And it was an open secret that 'sectarian' was a code word for 'Catholic.'" *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion of Thomas, J). By the time the federal Blaine Amendment went down to defeat by narrowly failing to obtain the supermajority required for a federal constitutional amendment, 14 states already had enacted legislation or constitutional amendments prohibiting the use of public funds for non-public religious schools.[18] The federal Blaine Amendment was an effort to impose a similar requirement on all states.

Support for the public schools, as a means of acculturating the growing and predominately Catholic immigrant population, and prohibition of any subsidies for sectarian

[16] Viteritti notes that the content of the common school curriculum had evolved from "its open embrace of mainstream Protestantism to a blatant anti-Catholicism, citing to a study of more than a thousand of the most commonly used elementary school textbooks of the nineteenth century public schools that found two prevalent themes, cultivation of an American cultural tradition defined in terms of patriotism, capitalism, and Protestantism and "a fierce anti-Catholicism in which the church was portrayed as a national threat, loyal to a foreign power in Rome. Viteritti, *supra* note 13, at 152.

[17] See Richard D. Komer, "School Choice and State Constitutions' Religion Clauses," 3 Journal of School Choice 331 (2009) and sources cited therein. Joseph Viteritti writes that "As legal historian Douglas Laycock has explained, aid to religious schools did not become a controversial subject until the Catholics started to demand the same support for their schools." Viteritti, *supra* note 13, at 152 (internal footnote omitted).

[18] See Viteritti, *supra* note 13, at 673. By 1890 the number had grown to 29, *id*., largely because the Congress required inclusion in new states' constitutions through the enabling legislation setting the process for territories to become states.

(read Catholic) schools were two planks of the Know Nothing Party platform in the mid-1850's,[19] and as previously noted, resulted in Massachusetts' addition of a Blaine Amendment to its state constitution in 1855. The Know Nothing Party disappeared in the late 1950's, absorbed into the new Republican Party. The federal Blaine Amendment was introduced by James G. Blaine in response to a speech by President Grant vowing to "[e]ncourage free schools, and resolve that not one dollar be appropriated to support any sectarian schools."[20] Grant revealed in his memoirs that he had been a Know Nothing, and both of his vice presidents, Schuyler Colfax of Indiana and Henry Wilson of Massachusetts, had been prominent Know Nothings.[21]

Despite their success in getting state Blaine Amendments into the constitutions of every state to enter the union after the failure of the federal Blaine Amendment in 1876, as well as the constitutions of some of the older states like New York, public school advocates also sought to require all students to attend the generically-Protestant public schools. This effort failed in Massachusetts, but succeeded legislatively in Wisconsin and Illinois in 1889, in the guise of legislation requiring compulsory attendance at schools approved by the local schools boards, which were unlikely to approve Catholic schools. Once the true import of these laws became known, reaction in both Wisconsin and Illinois was swift, with the sponsoring party swept from office and the laws repealed.[22]

Public school advocates continued their efforts, achieving their greatest success by initiative in Oregon in 1922, where the people passed a law requiring attendance at public school. Threatened with being put out of business, two schools, one of them Catholic, sued

[19] Tyler Anbinder, Nativism and Slavery: the Northern Know Nothings and the Politics of the 1850's (1992).
[20] Viteritti, *supra* note 11, at 670.
[21] Anbinder, *supra* note 17, at 274.
[22] Jorgenson, *supra* note 12, at 186-204.

in federal court, ultimately prevailing in 1925 in the U.S. Supreme Court in *Pierce v. Society of Sisters*, which affirmed the constitutional right of parents to direct the education and upbringing of their children and their right to do so by using private schools. It is this constitutional right that programs such as the Lindsey Nicole Henry Scholarships for students with Disabilities seek to vindicate, by recognizing that for many families a lack of financial resources serves to trap them in the public schools.

State Blaine Amendments such as Oklahoma's Article II, Section 5 thus derive from a longstanding anti-Catholic animus and were designed to preserve a monopoly over direct funding for generically-Protestant public schools. While the U.S. Supreme Court has within our lifetimes removed the Protestant orientation of the public schools, the discriminatory animus underlying the initial creation of state Blaine Amendments should not be allowed to become an engine of discrimination against religion in general. Such was never its intent, and its origins in religious bigotry against Catholics should counsel extreme caution in its interpretation, lest it infringe religious liberties more generally. This was the approach taken by the Arizona Supreme Court when asked to interpret its Blaine Amendment to invalidate a school choice program there. *Kotterman v. Killian*, 972 P.2d 606, 627 (1999).

b. Article II, Section 5, of the Oklahoma Constitution is Not Violated Where Public Funds are Paid to Religiously-Affiliated Schools for a Public Purpose, with Adequate Consideration, and Under Criteria Neutral to Religion.

The plain language of Section 5 addresses the use of public resources to aid churches or sectarian institutions "as such." This latter phrase is unique among state Blaine amendments and limits the applicability of decisions from other states construing language that lacks this clause. While Section 5 obviously prevents the state from appropriating, applying, donating and using money "directly or indirectly" for the use, benefit or support of

any sect or church, or for the use, benefit, or support of any priest, minister, or sectarian institution, it only prevents such actions where the aid is intended to help a prohibited recipient "as such." Religiously-neutral programs that distribute their benefits without consideration of religion or the religious nature of an institution or person do not violate this provision because their benefits are not received by virtue of their religious nature. For example, if the state paid for repairs to be made to buildings damaged in the Oklahoma City bombing of the Murrah Federal Building, payment for repairs to a church so damaged would not be made to the church as a church, but to the church as a building damaged by the bombing.[23] Similarly, if the state provided compensation to the families of the dead and injured in the bombing, such compensation could be awarded on behalf of priests or ministers killed or injured in the bombing, because it was not awarded on the basis of their religious status, i.e., to "priests or ministers as such." Applying this analysis to the facts of the case at bar, plainly the state provides the scholarships to the families with children with disabilities, who are not among the list of prohibited recipients, and so long as the aid is not provided to them because of any benefits the prohibited entities receive it is not provided to a prohibited entity "as such."

Nor does the "direct or indirectly" language require a different result. That "indirectly" plainly encompasses aid that is provided for someone or something's benefit but not transmitted directly to that intended beneficiary. Thus, for example, if instead of reimbursing the Oklahoma church directly for repairs made after the bombing, the state reimbursed the contractor who made the repairs, the church is still the intended beneficiary of the aid, even though the payment is made to the contractor. Whether the payment for repairs

[23] While Amicus does not know if the state paid for such repairs to buildings damaged in the bombing, the federal government certainly did, including at least one church.

is made directly to the church or indirectly by satisfying its debt to the contractor the church is still the recipient of the aid and it still does not violate Section 5, because it still was not provided to the church for being a church, but for being a building damaged by a deranged lunatic.

Examples of such indirect benefits abound in the modern welfare state, where it is often the case that the intended beneficiaries of government aid never receive the aid directly. Under the SoonerCare program, medical service providers are paid by the state for medical care provided to eligible individuals, even if those providers are religious. The beneficiaries are the patients, the providers are contractors reimbursed for services rendered, and not "directly or indirectly" beneficiaries of the program. Similarly, Oklahoma college students are beneficiaries of both state and federal college student assistance programs, which they use to buy educational services from the colleges they choose to attend. Even though the funds are transmitted directly to the colleges, they are not provided for the colleges benefit but in satisfaction of the debt owed to them by the students they educate.

This is precisely the case with the Henry Scholarship Program also. The parents are the beneficiaries of the program and while the program funds may be sent to the schools the parents choose, including any religious ones, the funds are sent to them for one use and one use only, satisfaction of the debt owed to the schools by the parents who have contracted with the school for the provision of educational services to their children with disabilities. The payments are not made to the schools for the schools' benefit, but for the children's benefit, just the same as when the School Districts themselves contract with a private school to provide educational services to students the districts have placed there. In that case the

District is responsible for paying its contractor, but the contractor has not directly or indirectly received benefits, just payments for services rendered.

Murrow Indian Orphans Home v. Childers, 171 P.2d 600 (OK 1946), is consistent with this reading of Section 5. *Gurney v. Ferguson*, 1941 OK 397, 122 P.2d 1002, and *Board of Education v. Antone*, 1963 OK 165, 384 P.2d 911, are not. These latter two cases held that Section 5 was violated by transporting private school students to religious schools at public expense, because such transportation "benefitted" the religious schools. Both decisions are poorly reasoned and should not be followed. *Antone* relied on *Gurney* and *Gurney* relied in part on the New York Court of Appeals decision in *Judd v. Board of Education*, 15 N.E.2d 576 (N.Y. 1938), in rejecting the argument that the transportation subsidies aided the student rather than the school as an organization. The Court in *Gurney* reasoned that if operation of bus transportation is in aid of public schools then such transportation provided to students in religious schools is in aid of the religious schools.

This reasoning fails to understand that the legislature has sufficient power under the police and welfare powers to aid public school students regardless of the mandate to maintain a public school system and that private education is not a system at all but a market. In the private education market, schools are businesses providing educational services in exchange for tuition payments made by the parents. Parents rather than schools pay the costs of incidentals like bus transportation and textbooks, but even if such costs are included in the cost of tuition the parents are paying for them. Public schools, on the other hands, are required to be free of charge and are only supported by government funding, state, local and federal.

Perhaps not surprisingly, the New York Court of Appeals recognized the flaws in the *Judd* case on which *Gurney* relied so heavily, and poor *Judd* is now dead.[24] Despite the fact that in response to *Judd*, the people of New York amended their state Blaine Amendment to specifically allow the provision of the transportation of religious school students, the Court of Appeals overruled *Judd* when it faced the question of whether a state program lending free secular textbooks to religious school students among others directly or indirectly aided the religious schools. The Court held that such aid neither directly nor indirectly aided the schools the children attended, but at most "incidentally" aided those schools. Accordingly, the New York interpretation of its very similar Blaine amendment is now that where the aid is provided for the students' benefit, any aid to the schools they attend is received incidentally and not indirectly. Amicus suggests that the presence of "as such" in the Oklahoma Blaine Amendment renders the analysis in *Gurney* and *Antone* as wrong as the New York Court of Appeals found the similar reasoning in *Judd* to be.

c. Article X, Section 14, of the Oklahoma Constitution is Not Violated Where Public Funds are Transferred to a Private School for Educating an Oklahoma Student with Disabilities.

The respondent School Districts have argued that the Scholarship Program violates Article X, Section 14 of the Oklahoma constitution because taxes can only be levied and collected for a public purpose and aiding students to attend private schools, including religious ones, lacks a public purpose. Private schools oftentimes do a good job of educating students with disabilities, so much so that respondent School Districts can and do contract with private schools to educate some of their disabled students, in fulfillment of their obligation under state and federal law (the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq*. The Scholarship Program merely allows parents to make

[24] Apologies to Rodgers and Hammerstein.

the same decision on behalf of their children and to use the scholarship to help defray the cost. Unless the respondents are correct in their unstated assumption that Article I, Section 5's requirement that Oklahoma maintain a system of free public schools means that it can do *nothing else* for children in the K-12 years, this argument is plainly wrong. Because Article I, Section 5 nowhere states or implies that the legislature's otherwise plenary authority is limited to maintaining the public school system,[25] the legislature is free to assist students attending private schools, as furthering the exact same ends served by maintenance of the public school system, namely the provision of a quality education to all the school children in the state. If the state can require that students attend some school, as it does in Article XIII, Section 4, then surely it satisfies a public purpose when it decides to offer families additional educational options.

d. Article X, Section 15, of the Oklahoma Constitution is Not Violated Where Public Funds are Transferred to a Private School for Adequate Consideration.

Respondents have also argued that it offends Article X, Section 15 to offer scholarships to disabled students because this provides gifts to private entities, namely the private and religious schools participating families select. This argument is merely another application of respondents' mistaken notion that the "gifts" under the Scholarship Program are to the schools where the parents spend the scholarship, rather than the parents who are able to afford to choose a private school for the first time. Section 15 does not prohibit gifts to individuals,[26] and even if it did, in this context the scholarships do not constitute gifts.

[25] Nor does Article XIII, Section 1, which also requires the state to maintain a system of free public schools.

[26] Oklahoma's higher education student assistance grants are far more clearly gifts, because the state has not undertaken by constitution or statute to provide a free education for post-secondary students the way it has for elementary and secondary students. Any finding that the Scholarship Program constitutes prohibited gifts to private schools would of necessity render these higher education student assistance programs unconstitutional as well as gifts to private colleges.

This is because the parents, by choosing to use the scholarships voluntarily waive their entitlement to use the free public schools (provided by Article I, Section 5, and Article XIII, Section 1). They also waive their entitlement to a free and appropriate public education and all the procedural rights and remedies under the IDEA. For the cost of the scholarship the state no longer has to educate the eligible children itself. This constitutes adequate consideration for the scholarship, and thus takes it out of the category of gift.

IV. CONCLUSION

In enacting the Lindsey Nicole Henry Scholarship for students with Disabilities Program Act, Oklahoma leapt to the forefront of states seeking to provide greater educational opportunities to some of its most vulnerable students. As the affidavits filed by the parent-appellants in this case attest, even generally well-managed school districts can fail students with disabilities, substantially and repeatedly. If allowed to continue, the Scholarship Program promises to provide an additional safety valve for families facing serious challenges that even the best education cannot wholly ameliorate. If perchance it happens to spur public school districts to make greater efforts to satisfy the parents of children with disabilities in order to retain them in the public school system, all the better. But what those school districts should not be allowed to do is sue their own clients for trying to escape their clutches and to force them to send their children back to the public schools that have failed them, on the pretext that the Scholarship Program aids the schools the parents choose rather than the parents themselves. Rather than sue the state itself, which enacted the program and funds it, the School Districts chose to make examples of a few families bold enough to reject their services in pursuit of a better education for their vulnerable children. The trial court has given the imprimatur of the judiciary to this travesty and the respondents ask this Court to

add its approval. The Friedman Foundation for Educational Choice respectfully requests this Court to reverse the decision of the trial court holding that the scholarship program is unconstitutional, or in the alternative, reverse the trial court for failing to dismiss the suit for the School Districts' lack of standing to sue the plaintiffs, for failure to join the state as a party defendant, and for the consequent lack of proper venue to consider the claims.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing was e-mailed and mailed by U.S. Mail, postage prepaid this ___ day of June, 2012, to the following:

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