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, v. Russell Spry, Stephanie Spry, Tim Tylicki, Kimberly Tylicki, Tim Fisher, Kristin Fisher, Stephan Hipskind, Stephanie Hipskind, Jerry Sneed, and Shanna Sneed, Defendants/Appellants.	Case No. 110,6[illegible] Tulsa County Case No: CV-2011-00890

PLAINTIFFS/APPELLEES' BRIEF IN CHIEF

Appeal from
District Court of Tulsa County,
Case No. CV-2011-00890
The Honorable Rebecca B. Nightingale
Nature of Action: Declaratory Judgment Action Regarding the Constitutionality of the Lindsey Nicole Henry Scholarships for Students With Disabilities Program Act

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INTRODUCTION

Appellants Russell and Stephanie Spry, Tim and Kimberly Tylicki, Tim and Kristin Fisher, Stephan and Stephanie Hipskind, and Jerry and Shanna Sneed (the "Parents") all have children with disabilites who live within the boundaries of Appellees Jenks Public Schools and Union Public Schools (the "School Districts"). The School Districts sued the Parents in the District Court for Tulsa County for accepting scholarships from the State of Oklahoma. The scholarships were awarded to help the Parents pay for tuition in private schools that the Parents selected to address the specific needs of their individual children. The district court's subsequent ruling that the scholarships are unconstitutional has no basis in law. The School Districts do not even have standing to challenging the State's scholarship program. Moreover, the scholarship program is entirely consistent with the Oklahoma Constitution. For these reasons, the Parents respectfully urge this Court to reverse the ruling below.

SUMMARY OF THE RECORD

This appeal arises from the district court's ruling striking as unconstitutional the "Lindsay Nicole Henry Scholarships for Students with Disabilities Program Act," 70 O.S. §§ 13.101.1 and 13.101.2 (2011 Supp.) (hereafter, the "Scholarship Act" or "Scholarship Program").

The Scholarship Act

Enacted in 2010, the Scholarship Act gives Oklahoma students with disabilities a scholarship to help pay tuition at an eligible private school of their choice. § 13-101.2(A). To receive the scholarship, a student must have attended public school in Oklahoma during the prior year and received an individualized education program (IEP) under the federal Individuals with Disabilities Education Act (IDEA). 70 O.S. § 13-101.2(A), (B)(1). The scholarship amount is determined based on the amount of State aid attributable to each student generally, multiplied by the grade and disability weights generated for the specific

applicant. 70 O.S. § 13-101.2(J)(2). The scholarship amount cannot exceed the cost of tuition at the private school. 70 O.S. § 13-101.2(J)(3).

Upon accepting a scholarship, the student's parents "assume full financial responsibility for the education of the student." 70 O.S. §13-101.2(F)(2). The parents forfeit any further rights under the IDEA, 70 O.S. § 13-101.2(F)(2), and the public schools are no longer "responsible for any additional costs associated with special education and related services." 70 O.S. § 13-101.2(J)(5).

Any private school may participate in the Scholarship Program as long as it "meets accreditation requirements set by the State Board of Education," 70 O.S. § 13-101.2(H)(1); "demonstrates fiscal soundness," 70 O.S. § 13-101.2(H)(2); and complies with a number of other restrictions imposed by the Scholarship Act, 70 O.S. § 13-101.2(H)(3)-(8). The school also must accept full accountability "for meeting the educational needs of the student," 70 O.S. § 13-101.2(H)(5), and ensure that the student is having "regular and direct contact with the private school teachers at the physical location of the private school," 70 O.S. § 13-101.2(D).

The School Districts' Disregard of the Scholarship Act

The Scholarship Act initially provided that scholarship payments would be made by the school districts to the recipients' parents, who in turn were required to restrictively endorse the payments to an eligible private school of their choice. R., Tab 6 at 2 ¶ 3 & Ex. A ¶ 2(F)(4). Several school districts, however—including the Union and Jenks School Districts—refused to comply with the law. *Id.* at 2 ¶ 4 & Ex. B. In response, the Oklahoma Attorney General, Scott Pruitt, notified the non-complying superintendants that state officials

are not allowed to ignore duly enacted laws and that doing so would expose them to legal liability. *Id.* at 2 ¶ 5 & Ex. D.

The Attorney General's letter caused the superintendants to rethink their position. They promised to start following the law, but also threatened to bring a declaratory judgment action against the Attorney General, challenging the Scholarship Act's constitutionality. *Id.* at 2-3 ¶ 6 & Exs. E-G. Three months later, no suit had been brought. *Id.* at 3 ¶ 7. Accordingly, a group of parents of children with disabilities—including the Parents in this lawsuit—filed a complaint in federal court to protect their rights under the Scholarship Act. *Id.* at 3 ¶¶ 7-8. Their complaint sought a permanent injunction requiring the defendant school districts to comply. The complaint also sought damages for the scholarship payments wrongfully withheld. *Id.*

The State Legislature reacted to the situation by amending the Scholarship Act in two significant respects. *Id.* at 3 ¶ 9. First, the amendments transferred responsibility for administering the Scholarship Program from the local school districts to the State Department of Education. *Id.* at 3 ¶ 10. Second, the amendments created a procedure through which parents could be reimbursed for earlier scholarship payments wrongfully withheld. *Id.* The deadline for seeking reimbursements expired on October 1, 2011. *Id.* at 3-4 ¶ 11.

In light of the proposed amendments to the Scholarship Act, the parents in the federal lawsuit sought and obtained a stay of the litigation. *Id.* at 4 ¶ 14. The stay was granted on July 18, 2011. *Id.* at 4 ¶ 15. On September 6, the Union and Jenks School Districts instigated the current state court litigation by filing a petition in the District Court for Tulsa County, seeking to have the Scholarship Act, as amended, declared unconstitutional. *Id.* at 5 ¶ 17. The state court petition named only five sets of the parents from the federal lawsuit as defendants.

R., Tab 2. Three sets of those parents have children in a secular private school. R., Tab 2 at 4-5, ¶¶ 5-6, 9; R., Tab 7 [Memo.] at 6, ¶ 1. The other two families have children in religiously-affiliated private schools. Id. at 4-5, ¶¶ 7-8.

On November 2, 2011, the parents in the federal lawsuit voluntarily dismissed the federal complaint, because the Scholarship Act, as amended, imposed no further obligations on the local school districts. R., Tab 6 at 5 ¶ 19.

The Present Litigation

Shortly after the state court petition was filed, on October 12, 2011, the district court issued an order calling for dispositive motions to be filed by November 15, 2011. R., Tab 17 at 7. On October 17, 2011, the Parents moved to dismiss for lack of jurisdiction. R., Tab 3. One month later, on November 15, 2011—before the district court had ruled on their motion to dismiss—the Parents also filed a motion for summary judgment, which reiterated the jurisdictional arguments raised in the earlier motion to dismiss. R., Tab 6. Two days later, on November 17, 2011, the district court issued a minute order, denying the motion to dismiss without prejudice. R., Tabs 5, 17 at 9. In the briefing on their cross-motions for summary judgment, the parties proceeded to fully address the jurisdictional issues that initially had been raised in the motion to dismiss. *See* R., Tabs 6-10, 12-14.

The cross-motions for summary judgment were heard by the district court on March 27, 2012. R., Tab 17 at 11. At the conclusion of the hearing, the court ruled as follows:

> First the issue as to whether the plaintiffs have standing under our declaratory judgment and the statutory scheme in Oklahoma. The Court believes that they do; the two districts do have standing to raise the issue here. They have raised it, by their selection, against individuals who are causing the districts to have less funding. So the Court believes that the districts have standing to assert their constitutional argument regarding the scholarship law in this case.

> With that, the Court is going to grant the plaintiffs' motion for summary judgment, striking down the law establishing the scholarship in this case, and deny the defendants' motion, cross motion for summary judgment.

R., Tab 15 at 53:4-16. The district court provided no further grounds for its ruling. A journal entry of judgment was entered on April 16, 2012. R., Tab 17 at 12. The Parents filed a petition in error, initiating this appeal, on May 16, 2012. Supp. R., Tab 4 at 13.

SUMMARY OF THE ARGUMENT

No one knows why the district court deemed the Scholarship Act unconstitutional. But whatever arguments the district court relied upon cannot be sustained on appeal.

The School Districts challenged the Scholarship Act's constitutionality under five separate provisions. First, they claimed the Act violates the Constitution's mandate for a State-wide system of free public schools. Okla. Const. art. I, § 5. There is no question, however, that the State continues to comply with that demand.

Second, the School Districts claimed the Scholarship Act violates the Constitution's prohibition against aid to "sectarian institution[s] as such." Okla. Const. art. II, § 5. But that provision only prohibits aid that is used by the State to promote religion or to discriminate on the basis of religion. The Scholarship Act does neither. It is religiously neutral in every respect. Children of any or no religion at all can use the scholarship money to attend a private school of any or no religion at all. It is only *excluding* religious individuals or organizations from the Scholarship Act that would offend the Constitution.

Third, the School Districts claimed that the Scholarship Act violates equal protection by favoring students on IEPs over other students with disabilities. But the Act's classification is rationally based on the federal IDEA. Thus, there is no equal protection violation.

Finally, the School Districts claimed that the scholarships are "gifts" that serve no public purpose in violation of Sections 14 and 15 of Article X of the Constitution. Again, these

arguments are unfounded. Meeting the special educational needs of students with disabilities unquestionably serves a legitimate public purpose. Moreover, the scholarships are not gifts because they are issued in exchange for private schools educating the children with disabilities. In addition, the State imposes significant controls to ensure that the funds are used for their intended purpose. For all these reasons, the district court's ruling below should be reversed.

Moreover, the School Districts lacked standing to sue in the first place. They have suffered no injury from the State's funding of scholarships for children with disabilities. And even if they had suffered an injury, it was not caused by the Parents' innocent participation in the Scholarship Program. For these reasons also, the district court's ruling below must be reversed.

PROPOSITION 1
The district court wrongly ignored governing authority when it granted the School Districts standing.

The district court's unexplained ruling on standing ignores *Oklahoma Education Association* v. *State of Oklahoma* ("*OEA*"), 2007 OK 30, 158 P.3d 1058. There, this Court held that school districts—including Appellee Jenks School District—lacked standing to sue for inadequate funding under Oklahoma Constitution Articles I § 5 and XIII § 1, which require the State to maintain a system of free public schools. *Id.* The Court held that any injury from insufficient funding was an injury to students, not the school districts, *id.* at ¶¶ 14-17, 158 P.3d at 1064-65, and that funding was—in any case—a non-justiciable political question left to the Legislature's discretion, *id.* at ¶¶ 18-25, 158 P.3d at 1065-66.

The School Districts' claims under the "free public schools" provisions in this litigation are indistinguishable. Although here the School Districts challenge the Legislature's decision to *redirect* funds from the initial appropriation to the State Department of Education, rather

than the initial appropriation itself, *see* R., Tab 15 at 47:23-48:6, that is a distinction without a difference. If the Legislature had simply reduced the initial appropriation based on the *estimated* costs of the Scholarship Program, the School Districts would be in the exact same position as in *OEA*. The fact that the Legislature instead funds the Program by diverting only the *exact* costs of the scholarships awarded provides no new grounds for standing. Any injury from inadequate funding would still belong to students, not school districts, and the amount of funding would remain within the Legislature's sole discretion.

The School District's reliance on *Independent School District No. 9* v. *Glass*, 1982 OK 2, 639 P.2d 1233, is similarly misguided. There, the school district sought to enjoin a refund of a tax overpayment to a single taxpayer on the ground that the refund violated a procedural statute. Although the Court ultimately denied the injunction, it first concluded that the school district had standing because the refund would cause a "direct and pecuniary" loss to the district. *Id.* at ¶ 11, 639 P.2d at 1237-38. No such finding has been, or could be, made here. The School Districts do not suffer a "direct and pecuniary" injury, because the loss of scholarship funds is offset by the fact that the scholarship recipient is no longer in the school district. Moreover, *Glass* did not involve a legislative appropriation of funds or the resulting legislative deference. And, while *OEA* speaks directly to claims by school districts challenging state funding—the precise issue here—*Glass* addresses unrelated facts regarding tax refunds.

Thus, there can be no question that *OEA* precludes standing, at least on the claims under Articles I, § 5 and XIII, § 1. But the School Districts also have not identified any grounds on which they would have standing to challenge a benefits program for disabled students under the "sectarian aid," "gifts," or "public purpose" provisions of the Oklahoma Constitution.

They cannot allege taxpayer standing, as they are not taxpayers. Indeed, as subordinate entities of the State, they have *no* grounds for suing the State or anyone else for alleged constitutional violations by the State in transferring public funds to a third-party for adequate consideration. And finally, any equal protection claim could only be brought by students claiming to suffer discrimination. The School Districts could not assert standing on behalf of such students even if they did exist (and they don't).

PROPOSITION 2
Even if the School Districts had standing, their suit could not properly be maintained against the parents of disabled children.

Even if they had standing—and they do not—the School Districts sued the wrong defendants, forcing the Parents to defend the Scholarship Act merely because their special-needs children benefitted from the law. Put simply, that is like suing Grandma because you think Medicare is unconstitutional.

Merely benefitting from a legislative enactment should not—and cannot—subject a private beneficiary to a lawsuit. Rather, a proper defendant would be one responsible for the enactment or enforcement of the law. In *Reed* v. *City of Bartlesville*, 1973 OK CIV APP 2, 510 P.2d 1013, the plaintiffs named the City in a suit challenging the validity of an airport zoning ordinance. The City demurred, in part because the beneficial owner of the nearby airport (who leased it from the City) had not been named as a defendant. The Court of Appeals rejected the demurrer because the owner had "no role in the . . . enactment" of the zoning ordinance and thus was not needed to defend the statute. *Id.* at ¶ 6, 510 P.2d at 1016; *accord Int'l Ladies' Garment Workers' Union* v. *Seamprufe Inc.*, 121 F. Supp. 165, 167-68 (E.D. Okla. 1954) ("Defendant corporation is not a proper party defendant in the instant case for the reason that said corporation has no duty or responsibility in connection with the

enforcement of the ordinance in question . . . ."); *Red Bird* v. *Berry*, 371 F. Supp 727, 730 (W.D. Okla. 1973) (Oklahoma Supreme Court was not a proper defendant in suit challenging constitutionality of jury selection process where Court had "no connection with the enactment or execution of the statutes").

Here, the Parents not only had no role in enacting or executing the Scholarship Act, they are not state actors of any kind. In other words, the School Districts have no standing to sue the Parents because their "injury"—assuming they had one—would be attributable to the State, not the Parents. *U.S. Bank, N.A.* v. *Alexander*, 2012 OK 43, ¶ 18, -- P.3d -- (standing test requires that the plaintiff have "suffered an injury *attributable to the defendant*" (emphasis added)). The Parents (and their children) are innocent private-party beneficiaries.

Condoning this suit against the Parents merely because they participated in a Scholarship Program duly enacted by the Legislature would unleash a tsunami of additional litigation. Any state program could then be challenged by suing its beneficiaries, rather than a proper state defendant, allowing plaintiffs to make an end run around sovereign immunity and other structural protections. The law's beneficiaries would be forced to expend their personal time and resources defending the Legislature. Mere notice to the Attorney General is not sufficient. A plaintiff should be required to name and serve a proper state actor to ensure the State's obligations are not unceremoniously dumped on innocent individuals, who lack the power and resources of the State.

Despite the obvious flaws in forcing the beneficiaries of a state law to shoulder its defense if challenged, the School Districts have justified suing the Parents by citing a statutory notice requirement. In relevant part, it provides as follows:

> In any action, suit, or proceeding to which the State of Oklahoma or any agency, officer, or employee thereof is not a party, wherein the

> constitutionality of any statute of this state affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the State of Oklahoma to intervene for presentation of evidence . . . .

12 O.S. § 2024. The School Districts claim that if suing a state actor were always necessary to challenge a state law, the notice requirement would be superfluous. There would be no circumstances when constitutional questions could be raised without the State already being a party. This argument is deeply flawed.

There are many instances in which the constitutionality of state statutes arises in suits properly brought between private parties. For example, an employer sued under a state anti-discrimination law might challenge the constitutionality of that law as a defense to the lawsuit. In that circumstance, the employee and employer would be the *only* proper parties and fully entitled to raise the constitutional question. Indeed, the plaintiff employee would even have the proper incentive to defend the law so as to obtain the relief being sought. And having brought the lawsuit in the first place, the employee would have no grounds for complaining of any costs in defending the law. Yet even in those circumstances, where the State might reasonably conclude that the law would be adequately defended without it, the notice provision still requires the court to give the Attorney General the opportunity to intervene. The obvious purpose of the notice requirement is thus to ensure that the State always has the opportunity to defend its own laws.

It would be a perversion of justice to twist the notice requirement to allow parties challenging a state law to harass the law's innocent private beneficiaries by suing them instead of the State. The fact that notice must be given to the State when it is not the proper defendant does not justify suing an improper defendant on the ground that the proper defendant will probably get notice anyway (assuming of course that the relevant court does

not overlook the notice requirement).[1] The School Districts have twisted the clear intent of the notice provision to sue the Parents in a transparent effort to avoid this Court's earlier ruling in *OEA* that school districts lack standing to sue the State on issues of education funding. The Jenks School District was a party in *OEA* and had to know that suing the Parents, instead of the State, was a gimmick to avoid the *OEA* conflict. The Court should not condone such gamesmanship, particularly when it burdens the parents of disabled children with litigation.

PROPOSITION 3
The district court erred by declaring the Scholarship Act unconstitutional.

With respect to the merits of this litigation, the district court failed in its most basic duty to expound the law. It gave no explanation why it deemed the Scholarship Act unconstitutional, or under which provision of the Constitution. Now, upon examination, its ruling cannot be sustained by any explanation or under any provision.

A. Article I, § 5: A system of free public schools.

The School Districts first claim that the Scholarship Act somehow violates the Constitution's mandate for a system of free public schools, but they have never explained how this could be. There is no allegation that the public schools have ceased to exist or that the State has ceased funding them. Nor is there any reason why the State cannot maintain both a system of free public schools and the Scholarship Program for students with disabilities. Indeed, Article V, § 36 of the Constitution expressly provides that the Legislature's authority "shall extend to all rightful subjects of legislation" and that a specific grant of authority "shall not work a restriction, limitation, or exclusion" on "any other subject

[1] Here, to their credit, the School Districts themselves notified the Attorney General. R., Supp. App. Tab 2. But that does not excuse their effort to avoid their lack of standing by suing the parents instead of a state actor.

or subjects whatsoever." Okla. Const. art. V, § 36. Thus, the Constitution's mandate for a system of free public schools works no restriction on the Legislature's ability to simultaneously enact and maintain other education-related laws like the Scholarship Program. The School Districts have cited no authority to the contrary, and the district court erred to the extent it relied on Article I, § 5 in declaring the Scholarship Act unconstitutional.

B. Article II, § 5: Restrictions on Aid to Sectarian Institutions

For multiple reasons, the district court's ruling also cannot be sustained under Article II, § 5, which provides as follows:

> No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.

Okla. Const. art. II, § 5.

1. The provision's plain language precludes its application to the Scholarship Act.

On its face, the provision regarding sectarian aid cannot be read in the restrictive manner the School Districts advocate. The closing phrase "as such" modifies the broad list of religious organizations and individuals who are covered by the provision. Aid to any "sect, church, denomination, or system of religion, . . . priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution" is only prohibited in their capacities "as such." *Stump* v. *Cheek*, 2007 OK 97, ¶ 14, 179 P.3d 606, 613 ("A statute will be given a construction, if possible, which renders every word operative, rather than one which makes some words idle and meaningless."). If that phrase is to be given any meaning, it must limit the provision's application by prohibiting public assistance only when the State acts with the effect of actually promoting a religious organization's or individual's religious purposes.

Holding otherwise would not only contradict the "as such" language, it would lead to untenable results.

For example, if the "as such" proviso were ignored, ministers, Sunday school teachers, church elders, or any other "religious teacher or dignitary" could be denied any and all State benefits or services, including in those individuals' personal capacities. Even services like police and fire protection arguably would constitute

> public money . . . used, . . . indirectly, for the . . . benefit . . . of any priest, preacher, minister, or other religious teacher or dignitary.

Okla. Const. art. II § 5. Similarly, church groups could not use the public parks, water and sewage systems, or waste management facilities without running afoul of the provision's prohibition against

> public . . . property . . . be[ing] used, directly . . . for the . . . benefit . . . of any . . . sect, church, denomination, or system of religion.

Okla. Const. art. II § 5. Of course such readings are absurd and were never intended, not least because they would violate the federal Constitution. *See, e.g., McDaniel* v. *Paty*, 435 U.S. 618, 626 (1978) (State could not condition right to run for office on giving up religious identity). The "as such" language confirms that the benefits of public money and property are denied to religious organizations and individuals only "as such"—*i.e.*, in their religious capacities. A contrary reading not only defies the plain language (not to mention common sense), it would also violate the First Amendment to the United States Constitution by blatantly discriminating against religious organizations and individuals. *See Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533 (1993). These considerations confirm that the phrase "as such" must be given its plain meaning. Direct or indirect public assistance is only prohibited when it has the effect of promoting religion.

Finally, the Court should be aware that the United States Supreme Court has already noted its strong disapproval of state Blaine Amendments like Article II § 5, because they initially "arose at a time of pervasive hostility to the Catholic Church and to Catholics in general" when "it was an open secret that 'sectarian' was code for 'Catholic.'" *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality op. authored by Thomas, J., and joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.); *see also Colo. Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1258 (10th Cir. 2008) (stating that "the term 'sectarian' imparts a negative connotation"). This further supports giving the phrase "as such" in Article II § 5 its plain meaning, thereby avoiding unconstitutional enforcement of the provision's anti-Catholic origins. Indeed, applying Article II § 5 to uniquely disqualify religious people or institutions from participating in State contracting or benefits programs would violate federal equal protection law. *See, e.g.*, *Hunter* v. *Underwood*, 471 U.S. 222, 233 (1985) (discriminatory provision violates equal protection, even if groups discriminated against today differ from the original targets). The federal equal protection problem is exacerbated here since the School Districts are seeking to disqualify Catholic schools from participating in the Scholarship Program based on a category of law the Supreme Court has already said is "born of [anti-Catholic] bigotry" and "should be buried now." *Mitchell*, 530 U.S. at 829.

2. This Court's jurisprudence has consistently confirmed the plain reading of Article II, § 5.

The Court's jurisprudence under Article II, § 5 follows two lines of reasoning, both giving full credence to the phrase "as such."

a. This Court's cases directly analyzing the effects of state action restrict public aid only when it is used to promote religion.

In the first line of cases, commencing with *Connell* v. *Gray*, 1912 OK 607, 127 P. 417, the Court looks directly at the effect of state action. In *Connell*, for example, the Court

considered whether the state board of regents could impose a fee on college students to finance the campus Young Men's and Young Women's Christian Associations. *Id.* at ¶ 10, 127 P. at 421. In construing Article II, § 5, the Court noted that "it would not be permissible for [the board of regents] to use any funds appropriated by the state for the purpose of maintaining [the Christian Associations], *teaching and promulgating a system of religion.*" *Id.* (emphasis added). Thus, the Court concluded it was also impermissible for the board of regents "to require a fee to be paid by the student" for the same purpose. *Id.*

Subsequent cases following this line of analysis have confirmed that the prohibition is limited to state action that has the effect of promoting religion. The mere incidental alignment of state action with religious purposes does not trigger the provision's restrictions. In *State* v. *Williamson*, for example, the Court upheld the use of public funds to build a chapel on public property. 1959 OK 207, 347 P.2d 204.[2] Although the chapel was intended, "among other things, to provide a place for the voluntary worship of God by children of [an] Orphans Home" and for "non-sectarian, non-denominational religious services," *id.* at ¶ 14, 347 P.2d at 205, this Court concluded that its construction and maintenance on state property using state funds was no different than a myriad other public manifestations of our nation's historical recognition of God in a wide variety of public settings, *id.* at ¶ 13, 15, 347 P.2d at 207. Finding no promotion of any particular religion, the Court emphasized that "we should preserve separation of church and state, but that does not mean to compel or require separation from God." *Id.* at ¶13, 347 P.2d at 207.

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[2] Although the funds in *Williamson* came from a trust created by the will of a private individual, the trust funds were designated "to be used for public improvements in Mayes County, Oklahoma." *Id.* at ¶2, 347 P.2d at 205. The Court expressly held that "the money in this trust constitutes a type of public funds." *Id.* at ¶ 9, 347 P.2d at 206.

Similarly, in *Meyer* v. *Oklahoma City*, 1972 OK 45, 496 P.2d 789, the Court again distinguished state action that has the effect of benefitting religious organizations and individuals "as such"—*i.e.*, in their religious capacities—from state action that only incidentally aligns with religious belief. In that case, taxpayers sued the City of Oklahoma City for maintaining a 50-foot Latin cross on public land. *Id.* at ¶1, 496 P.2d at 790. The cross had been designed some time before by a Presbyterian architect at the request of an Oklahoma City employee. *Id.* The electricity for lighting the cross and the surrounding landscaping were provided at the city's expense. *Id.* Again, however, the Court found no violation of Article II, § 5. Specifically, the Court noted that

> [t]he alleged commercial setting in which the cross now stands and the commercial atmosphere that obscures whatever suggestions may emanate from its silent form, stultify its symbolism and vitiate any use, benefit or support for any sect, church, denomination, system of religion or sectarian institution ***as such***.

Id. at ¶ 11, 496 P.2d at 792-93 (emphasis added).

The School Districts' reading of Article II, § 5, would not recognize these distinctions. Chapels or crosses financed with public money on public land could easily be said to "directly"—or at least "indirectly"—benefit a "system of religion" (Christianity, for example) or "any priest, preacher, minister, or other religious teacher or dignitary." Okla. Const. art. II, § 5. But the "as such" language confirms that the prohibition is focused on state action that has the purpose or effect of promoting a religion. The mere incidental overlap of state action with religious purpose is insufficient to offend Article II, § 5. *Murrow Indian Orphans Home* v. *Childers*, 1946 OK 187, ¶ 7, 171 P.2d 600, 602 ("It is not the exposure to

religious influence that is to be avoided; it is the adoption of sectarian principles or the monetary support of one or several or all sects that the State must not do.").[3]

b. This Court's cases looking at state contractual relationships with private entities confirm the plain meaning of Article II § 5.

The second line of cases confirms the first, identifying contract-like arrangements between the state and private organizations as falling generally outside the scope of Article II, § 5. The first of those cases—*Sharp* v. *City of Guthrie*—was decided in 1915, not long after the Constitution's ratification in 1907. 1915 OK 768, 152 P. 403. In *Sharp*, the city sold a public park to a religiously-affiliated university for $1.00. *Id.* at ¶ 1, 152 P. at 403. Although the transaction clearly included public land benefitting a religiously-affiliated organization, the Court was not concerned that the university might be a "sectarian institution":

> The city having the right to sell the property, and the consideration being adequate, *it would make no difference whether the grantee be a sectarian institution or not*, for a sale upon a sufficient consideration *would not be within the prohibition* of section 5, art. 2, of the Constitution.

Id. at ¶ 30, 152 P. at 408 (emphasis added).

The Court has repeatedly reaffirmed this principle. In *Murrow Indian Orphans Home*, the Court addressed whether the state could pay a Baptist-owned and -operated orphanage to care for children in the state's custody. 1946 OK 187, 171 P.2d 600. The institution's sectarian nature was undisputed—the home made "no pretense of denying its religious background or sectarian character." *Id.* at ¶ 2, 171 P.2d at 601. The children were encouraged

[3] As set forth in the following section, the phrase "monetary support" does not include the transfer of funds in exchange for value. *Murrow* itself makes this clear. 1946 OK 187, ¶ 9, 171 P.2d 600, 603 (holding there is no violation of Article II, § 5 if there is "the element of substantial return to the State").

to attend Baptist services—and most did—although they were "free to attend any church services they desire[d]." *Id.* Again, the Court found no grounds for invoking Article II, § 5:

> The State is fulfilling a duty to needy children. The institution can render a service that goes far toward the fulfillment of this duty, and for a compensation that is a matter of contract and public record. The matter of the wisdom of the terms of these contracts is for the Legislature and the agency upon which it thrusts the performance of its commands, and so long as they involve the element of substantial return to the State and do not amount to a gift, donation, or appropriation to the institution having no relevancy to the affairs of the State, there is no constitutional provision offended.

Id. at ¶ 9, 171 P.2d at 603 (emphases added).[4]

Finally, most recently, in *Burkhardt* v. *City of Enid*, 1989 OK 45, 771 P.2d 608, the Court upheld a public trust created to aid a religiously-affiliated university, because "sufficient consideration was exchanged in the transaction." *Id.* at ¶ 20, 771 P.2d at 613. Although the Court alternatively held that "voluntary and court-ordered measures" implemented in the course of the litigation had removed the university's sectarian elements, its ruling categorically upheld the principle that transactions involving sufficient consideration do not implicate Article II, § 5. Such transactions comprise an exchange for value, not aid to sectarian institutions "as such," *i.e.*, in their religious capacities.[5]

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[4] The School Districts attempt to distinguish *Murrow* on the ground that, while the Constitution requires the State to care for orphans, it "does not specify how." R., Tab 9, at 11. Thus, the School Districts argue that the State is free "to choose whatever method it believes is most expedient," essentially exempt from any restrictions on contracting with a "private religious organization." R., Tab 15, at 24:6-12; R., Tab 9, at 11. But *Murrow* expressly rejects this argument. 1946 OK 187, ¶ 6, 171 P.2d at 602 (stating that the Legislature "may care for needy children through any scheme that seems appropriate to them, *omitting, of course, to offend other constitutional provisions*"). Thus, the analysis of Article II, § 5 in *Murrow* is fully applicable in the present context as well.

[5] The School Districts have contended that adopting the "adequate return" or "consideration" analysis under Article II, § 5 improperly renders that provision duplicative of Article X, § 15's prohibition against gifts of State funds. But under Article II, § 5, the "adequate return" analysis is essentially a short-cut analysis that works most, but not all, of the time. For example, a state contract for private entities to instill religious faith in State citizens

3. The Scholarship Program falls well within the realm of permissible state action under Article II, § 5.

Striking the Scholarship Program cannot be justified under the plain meaning of Article II, § 5 or this Court's earlier case law. There has been no argument, let alone evidence, that the Scholarship Act has the effect of "teaching or promulgating a system of religion" like the funds collected for the Christian Associations in *Gray*. Indeed, the Act itself is not only non-sectarian and non-denominational in its purpose and effect, it is completely neutral as between religion and non-religion. The Act does nothing more than make scholarships available for students with disabilities to use at a private school of *their* choice, be it secular or of any religion at all. *See School Dist. No. 52* v. *Antone*, 1963 OK 165, ¶ 9, 384 P.2d 911, 913 (noting that construction of chapel at state-owned orphans home of "non-sectarian, non-denomination, unrequired religious worship, did not involve any violation of Art. II Sec. 5" (citing *State* v. *Williamson*, 347 P.2d at 204)).

Notably, only two of the families the School Districts have sued have used their scholarships at religiously-affiliated schools. Three have used them at a strictly secular school. The only preference of the Act is that any school must meet the State's *secular* accreditation standards. *See* 70 O.S. § 13-101.2(H)(1).

Thus, the Scholarship Act does not come close to the level of church/state interaction that was *upheld* in the public chapel and cross cases, where the State funded inherently religious structures on public land. The Scholarship Act is also more neutral than the payments made in *Murrow Indian Orphans Home*, where the state itself was directing children to the

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unquestionably *would* violate Article II, § 5, but not Article X, § 15, because it would have the effect of benefitting a system of religion "as such," despite the existence of consideration. But as long as the contracted services fall within the scope of the State's legitimate affairs (education, welfare, health and safety, etc.), the existence of adequate consideration satisfies both the "sectarian aid" and "gift" provisions.

admittedly sectarian orphanage, which undisputedly "proselyte[d] its inmates," albeit ultimately allowing them "complete freedom of worship." 1946 OK 187, ¶ 2, 171 P.2d at 601. Here, in contrast, the State—through the Scholarship Act or any other means—does not put so much as a hair on the scales to influence the disabled students' choices of where to use the scholarship funds. Any exposure to religion is merely incidental and the result of parental, not state, action. *Cf. Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002) (program of "true private choice" by parents did not offend federal constitution).

Finally, the contractual relationship created by the Scholarship Act further removes any possible suggestion that the scholarship constitutes aid to sectarian institutions "as such." The scholarships are awarded to the families of disabled students, who thereby forfeit their right to an education by the public schools, as well as the rights they may have under the federal IDEA for additional funding from the State. 70 O.S. 13-101.2(F)(1)-(2), (J)(5). Similarly, any school that accepts the funds from the parents must agree to submit to the accreditation and other eligibility requirements that the State imposes, as well as agree to educate the child, relieving the State of that obligation. 70 O.S. § 13-101.2(H)(1)-(8). Thus, the Scholarship does nothing more than facilitate an exchange of value, with the State providing funding in exchange for the private school providing educational services. As noted in *Murrow Indian Orphans Home*, the exchange is "a matter of contract and public record." 1946 OK 187, ¶ 9, 171 P.2d at 603. Thus, the "wisdom of the terms of these contracts is for the Legislature" to determine. *Id.* "[S]o long as they involve the element of substantial return," Article II, § 5 is not violated. *Id.*

4. The School Districts' efforts to distinguish the Scholarship Act are flawed.

The School Districts rely almost exclusively on this Court's rulings in *Gurney* and *Antone*. These cases, however, do not support the district court's ruling, but rather are

consistent with upholding the Scholarship Act. In *Gurney*, the Court struck down a statute that gave students attending private schools (both secular and religious) the right to ride any public school bus along the way. *Gurney* v. *Ferguson*, 1941 OK 397, ¶ 2, 122 P.2d 1002, 1003. The Court struck the statute as violating Article II, § 5, but provided very little analysis. In essence the Court reasoned that "[i]f the maintenance and operation of the bus and the transportation of pupils is in aid of the public schools, then it would seem necessarily to follow that when pupils of a parochial school are transported that such service would likewise be in aid of that school." *Id.* at ¶ 10, 122 P.2d at 1004.[6] Notably, however, the Court never addressed whether such aid was for the benefit of the sectarian school "as such," as opposed to aiding the school's educational functions.

The Court, however, clarified the confusion from *Gurney* in *Antone*. There, the Court addressed essentially the same issue as in *Gurney* after a local school district adopted its own bussing policy for students attending private schools. While reaching the same conclusion as in *Gurney,* the *Antone* Court expressly reaffirmed the holding of *Murrow Indian Orphans Home* that "consideration, or a return to the State," eliminates any "offense to constitutional provisions," including Article II, § 5. *Id.* at ¶ 9, 385 P.2d at 913. The bussing statutes were struck down because they lacked such consideration. *Id.* Significantly, the Court also distinguished *State* v. *Williamson*, the publicly funded chapel case, implicitly re-affirming the standard that state action using public funds or property in a manner that incidentally intersects with religion, but without the purpose of promoting religion, raises no constitutional concerns. *Id.*

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[6] The Court also quoted language from Article I § 5 that the public schools must be "free from sectarian control," leading it to conclude there was "no doubt" that Article II § 5 "prohibits the use of public money or property for sectarian or parochial schools." Since control of the public schools was not at issue, the intent of this analysis is unclear.

Gurney and *Antone* thus can serve only to uphold the Scholarship Act, since—unlike the bussing policies—the Scholarship Act authorizes a transfer of public funds only in exchange for adequate consideration. At most, *Gurney* and *Antone* stand for the proposition that where there is no exchange for consideration—a concern not at issue here—any transfer of a public benefit to religious institutions is more susceptible to being viewed as having an improper effect of promoting religion.[7]

The School Districts grasp onto a final quote from *Antone* to support their argument that the Scholarship Act violates Article II, § 5:

> The law leaves to every man the right to entertain such religious views as appeal to his individual conscience, and to provide for the religious instruction and training of his own children to the extent and in the manner he deems essential or desirable. When he chooses to seek for them educational facilities that combine secular and religious instruction, he is faced with the necessity of assuming the financial burden which that choice entails.

Antone, 1963 OK 165, ¶ 11, 384 P.2d at 913. Again, however, this quote speaks at most to circumstances not at issue here—where there is no exchange for consideration. *Antone* itself expressly makes that distinction. *Id.* at ¶ 9, 384 P.2d at 913. Here, there is adequate consideration on the part of the parents, who—in exchange for the scholarship money—expressly forfeit their right to an education by the public schools and take all further financial

[7] Since the bussing policies were religiously neutral, the outcome of *Gurney* and *Antone* might better have been supported under the Constitution's provisions barring gifts of public money. A statute can be struck as unconstitutional on its face, only when unconstitutional in all instances of application. *Davis* v. *Fieker*, 1997 OK 156, ¶ 35, 952 P.2d 505, 514 ("A facial challenge to a Legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." (citation omitted)). The same concern is present in this case. The district court could not have properly struck the Act under Article II, § 5, because it is undisputed that three sets of Parents have used their scholarship funds at a secular school. *See* R., Tab 2 at 4-5, ¶¶ 5-6, 9; R., Tab 7 [Memo.] at 6, ¶ 1. And as for the other two families, there has been no finding that their specific school of choice is "sectarian" in nature. *See also infra* at page 25 (noting that such findings would, in any case, violate the First Amendment). Thus, the district court could not have properly concluded that the Scholarship Act is unconstitutional in *all* of its applications.

responsibility for educating their child upon themselves. There is likewise adequate consideration on part of the private schools, which agree to comply with state standards and relieve the state's burden of providing the education. 70 O.S. § 13-101.2(H).

5. Striking the Scholarship Act under Article II, § 5 would jeopardize numerous other State benefit programs.

As detailed in the briefing in the district court, *see, e.g.*, R., Tab 8 at 6, and in the Attorney General's brief on appeal, there are numerous State programs that would be adversely affected by a ruling striking the Scholarship Act under Article II, § 5. State social welfare programs, scholarships for higher education, and state-subsidized medical services, among others, all contemplate transfers of public funds to private organizations—including religiously-affiliated organizations—in exchange for services to Oklahoma residents. *See, e.g.*, R., Tab 8 at 6 & Exs. 2-4. The School Districts respond by suggesting that religiously-affiliated primary and secondary schools are inherently sectarian in nature, while other religiously-affiliated organizations are not. *See Appellees' Mot. To Retain at 2*. But this argument cannot stand for several reasons.

First, there is simply no basis for concluding that religiously-affiliated universities, colleges, hospitals, or other medical and social services providers, or religious individuals, are *necessarily* any more or less sectarian in nature than some religiously-affiliated primary and secondary schools. Indeed, the School Districts submitted no evidence, and the district court made no findings, that would support such a distinction. To the contrary, this Court may take judicial notice that many religiously-affiliated medical and higher education institutions are expressly maintained to promote specific religious values. *See, e.g.*, St. Francis Health System Home Page, *http://www.saintfrancis.com/about/vis-mis-prr.aspx* (identifying mission of "reflect[ing] the presence of Christ in every personal and corporate

encounter"; "extend[ing] the presence and healing ministry of Christ in all we do"; and "collaborat[ing] with others who share its values" in delivering "quality Catholic health care services"); Oklahoma Baptist College Home Page, *http://www.oklahomabaptistcollege.com/about.php* ("We are evangelistic. We believe that soul winning is near the heart of God. All teachers are required to go soul-winning weekly. All students are required to witness for Christ. . . . Absolutely no drinking, smoking, dancing, card-playing, moviegoing, or other questionable activities are allowed."). There simply is no basis for distinguishing the Scholarship Act from other State benefit programs merely because it engages religiously-affiliated primary and secondary schools instead of universities and hospitals. All State benefit programs may result in public funds being transferred to religious institutions and thus are subject to the same treatment under Article II, § 5 as the Scholarship Act. Thus, striking the Act under Article II, § 5 likewise calls into question the other State programs. *Accord Meredith* v. *Daniels*, Marion Superior Court, Civil Division, Cause No. 49D07-1107-PL-025402 (Jan. 13, 2012) ("[I]nterpreting [Indiana's Constitution] to prohibit the [Choice Scholarship Program] would cast doubt on the validity of a host of longtime religion-neutral state programs whereby taxpayer funds are ultimately paid to religious institutions by way of individual choice.").

Similarly, under the School Districts' interpretation, the State violates Article II, § 5 because it provides benefits to many religious *individuals*—"priest[s], preacher[s], minister[s], or other religious teacher[s] or dignitary[ies]" who benefit from State-run healthcare programs, or may receive educational loans, or receive disability payments. Indeed, some religious people—including, for example, prison chaplains—presumably receive wages from the State. Under the School Districts' strained interpretation of Article II

§ 5, these wages and benefits programs all violate the Oklahoma Constitution because they benefit religious individuals. This interpretation is simply untenable under Oklahoma precedent.

Furthermore, attempting to distinguish between religiously-affiliated organizations and individuals based on their "degree of religiosity" and "the extent to which that religiosity affects [their] operations" would be a clear violation of the First Amendment to the U.S. Constitution. *Colo. Christian Univ.* v. *Weaver*, 534 F.3d at 1259. Not only would accepting "religiously-affiliated" organizations while rejecting "sectarian institutions" constitute religious discrimination, the process of distinguishing between the two would necessarily "entail[] intrusive governmental judgments regarding matters of religious belief and practice." *Id.* at 1256. Such picking and choosing of which religious organizations are acceptable to the State would be impermissible.[8]

This Court's existing jurisprudence already avoids these constitutional infirmities by construing Article II, § 5 in accordance with its plain terms to apply only where the challenged state action seeks to promote religious organizations and individuals "as such," that is, in their religious capacities. When the State engages the private sector for the provision of services, both the Oklahoma and federal constitutions are upheld by ensuring neutrality between religious and secular organizations, as well as among the various

[8] The School Districts' reliance on *Locke* v. *Davey*, 540 U.S. 712 (2004) to support their theory of discrimination is unfounded. In that case, the United States Supreme Court upheld a state scholarship program that precluded students from using the scholarships to pursue "a degree in devotional theology." *Id.* at 715. As noted by the Tenth Circuit, however, the statute in *Locke* did not discriminate among religious organizations based on their degree of religiosity—which would be a clear violation of the Establishment Clause. *Colorado Christian Univ.*, 534 F.3d at 1256, 1257. And the identification of which degrees were "degree[s] in devotional theology" was made by the institution of higher education, not by the state, thus eliminating improper entanglement. *Id.* at 1256. *Locke* therefore provides no protection for the discriminatory construction of Article II § 5 the School Districts propose.

religions. And that is what the Scholarship Act does. Any disabled student and any private school can participate, without regard to religiosity. Any benefits to religious organizations or individuals are merely incidental and directed by parental choice, not State influence. There are simply no grounds under Article II, § 5 for striking down the Scholarship Act.

6. The School Districts' arguments about the risks of public aid to religious liberty are flawed.

The School Districts argue that there is a slippery slope between public aid to religious institutions and state control of those institutions. R., Tab 15 at 15-19. To support this point, the School Districts quote *Gurney*, where this Court stated, with respect to the state providing free bussing to students of religious schools, that if any aid were deemed permissible, "it would be a short step forward at another session [of the Legislature] to increase such aid, and only another short step to some regulation and at least partial control of such schools by successive legislative enactment. From partial control to an effort at complete control might well be the expected development." Gurney, 1941 OK 397, ¶ 16, 122 P.2d at 1005.

But incidental aid to *all* private schools via free bussing for students is a fairly tenuous step toward total control of religious schools, just as in this case, treating religious schools the same as all other private schools with respect to scholarship funds would not result in state control of religious schools. As discussed above, this Court's jurisprudence has consistently permitted public aid to religious individuals and institutions when the state received consideration and when the aid did not serve to promote the organization's or individual's religious purposes. Courts across the nation, including the U.S. Supreme Court, have consistently embraced the principle that "religious institutions need not be quarantined from public benefits that are neutrally available to all." *Roemer* v. *Bd. of Public Works of Md.*, 426 U.S. 736, 746 (1976) (upholding a state statute that provided annual subsidies to

qualifying state colleges and universities, including religiously-affiliated institutions). *See also Bowen* v. *Kendrick*, 487 U.S. 589 (1988) (upholding Adolescent Family Life Act despite the fact that it encouraged participation by religious groups and had provided grants to organizations with religious ties); *Tilton* v. *Richardson*, 403 U.S. 672 (1971) (upholding federal statute that provided construction grants to all colleges and universities regardless of affiliations with religion). None of these examples of public aid in Oklahoma or across the nation have led to the slippery slope the School Districts warn about. Nor would such aid extinguish other protections that already exist, such as those found in the First Amendment to the U.S. Constitution.

Contrary to the School Districts' assertions, programs like the Scholarship Act actually encourage, rather than discourage religious and other forms of liberty by encouraging diversity and reducing political strife. All persons, religious or not, and of any background, are allowed to participate on equal footing in the Scholarship Program. None can claim a particular advantage or disadvantage. The School Districts, in contrast, would exclude people from participating solely because of their religious background or beliefs. It is this approach that would violate both the federal and State Constitutions and defeat the State's interest in preserving the diversity and equal protection of all its citizens. *See Tulsa Area Hosp. Council, Inc. v. Oral Roberts Univs.*, 1981 OK 29, ¶ 13, 626 P.2d 316 at 320-21 ("[T]he State and its agencies are not required to be hostile adversies [with religious organizations]. . . . The combined efforts of the private sector and state and federal [governments] results in construction of hospitals and health care for the common good. The coincidence of secular and religious purposes does not threaten those evils which promote interdependence of Church and State."); *see also id.* at ¶ 16, 626 P.2d at 322 ("The fact that some religious group

might receive some incidental benefit as the result of construction of the hospital is not controlling. The primary effect achieved by construction of medical facilities is the promotion of the public welfare, not the advancement or inhibition of religion. The focus of the test is the *function*, secular or religious, which the government aid subsidizes not the nature of the *institution*, secular or religious, which receives the aid." (emphasis added)).

C. Article II § 7: Equal Protection

The district court presumably did not strike the Scholarship Act on equal protection grounds. The School Districts never contested that the highly deferential rational basis standard applies. *See Fair Sch. Finance Council of Okla., Inc.* v. *State*, 1987 OK 114, 746 P.2d 1135. Under this standard, a statutory classification is constitutional "so long as 'there is any reasonably conceivable state of facts that would provide a rationale basis for the classification.'" *Gladstone* v. *Bartlesville Indep. Sch. Dist. No. 30*, 2003 OK 30, ¶ 12, 66 P.3d 442, 447. The Parents and the Attorney General have identified a number of rational bases for limiting participation in the Scholarship Program to students on IEPs. *See, e.g.*, R., Tab 8 at 12; R., Tab 10 at 18-19. Indeed, the fact that the Scholarship Act simply follows the *federal* classification of students who are eligible for, and have obtained, an IEP is itself a sufficient rational basis for upholding the Scholarship Act.

D. Article X, §§ 14-15: Public Purpose Requirement and Restrictions on Gifts

To satisfy the public purpose requirement of Article X, § 14, expenditures of public money must be for the public good and be controlled "by the public agency directly or by a contractual agreement." *Orthopedic Hosp. of Okla.* v. *Okla. State Dep't of Health*, 2005 OK CIV APP 43, ¶ 7, 118 P.3d 216, 221 (citing *Veterans of Foreign Wars* v. *Childers*, 1946 OK 211, ¶¶ 18, 24, 171 P.2d 618, 622, 624). Here, the Scholarship Act serves to ensure that students with disabilities have an opportunity to receive an education specifically tailored to

their needs, thereby maximizing their potential to overcome their disabilities and contribute fully to society. This unquestionably serves the greater public good.

In addition, the Scholarship Act imposes restrictions on the use of scholarship funds that are more than sufficient to ensure that the funds are used for their designated purpose. The funds are initially issued by State warrant made payable to a student's parents or legal guardians and delivered to the private school of choice. 70 O.S. § 13-101.2(J)(4). The parents are then required to "restrictively endorse the warrant" for "deposit into the account of the private school." *Id.*; *see also* 70 O.S. § 13-101.2(I)(1)(e). This ensures both that the parents' choice of school is honored and that the funds are actually delivered to the school. In addition, each year, the private school must demonstrate fiscal soundness by submitting a statement of a certified public accountant or a surety bond or letter of credit for an amount equal to the scholarship funds for any quarter. 70 O.S. § 13-101.2(H)(2). The students must have "regular and direct contact with the private school teachers at the physical location of the private school." 70 O.S. § 13-101.2(D). And the private school must meet state accreditation standards, be academically accountable to the parents, and comply with a host of other requirements set forth in the Act. 70 O.S. § 13-101.2(H). If any of these requirements are not met, the State may revoke the private school's eligibility and suspend payment of scholarship funds. 70 O.S. § 13-101.2(K)(1), (5). All of these requirements serve to ensure that the public funds are used for the purpose for which they are designated. The Legislature's determination that the public purpose and controls built into the Act are adequate is entitled to great deference. *State ex rel. Brown* v. *City of Warr Acres*, 1997 OK 117, ¶ 18, 946 P.2d 1140, 1144. For these reasons, the district court's ruling cannot be sustained under Article X, § 14.

The same factors preclude a finding that the Scholarship Act violates Article X, § 15. That provision bars the State from making a gift of public funds. Okla. Const. art. X, § 15. Gifts are defined as "gratuitous [transfers] of the property of the state voluntarily and without consideration." *Childrens Home & Welfare Ass'n* v. *Childers*, 1946 OK 180, ¶ 5, 171 P.2d 613, 614. "[W]here the State receives property or service in return for the payment of its money," however, "it is not to be treated as a gift." *Id.*

There can be no legitimate dispute that the State receives significant service in return for the scholarship funds it issues. The State is relieved of any further financial obligations toward the student, as well as its obligation to educate the student. 70 O.S. § 13-101.2(F)(2), H(5). The parents and private school, in turn, assume those obligations on behalf of the State. *Id.* This fact alone removes any question as to whether the scholarship funds constitute gifts. They do not.

In sum, the district court's failure to provide any explanation of why it struck the Scholarship Act is understandable because there is no possible explanation. The Scholarship Act complies fully with the Oklahoma Constitution.

CONCLUSION

For all the foregoing reasons, the Appellant Parents respectfully urge the Court to reverse the district court's ruling and permanently reinstate the Scholarship Act.

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