IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

CLARENCE G. OLIVER, *et al.*, *Plaintiffs/Appellees*, v. JOY HOFMEISTER, in her official capacity as State Superintendent of Public Instruction, *et al*., *Defendants/Appellants.*	**Case No. 113,267**

BRIEF *AMICUS CURIAE* BY
THE BECKET FUND FOR RELIGIOUS LIBERTY,
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STEFAN HIPSKIND, STEPHANIE HIPSKIND,
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JANE JOHNSON, CURTIS JOHNSON, AND GERALD BUCKLEY

Appeal from
District Court of Oklahoma County
Case No. CV-2013-2072
The Honorable Bernard M. Jones
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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Dated February 27, 2015

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INTEREST OF AMICI CURIAE

The Becket Fund for Religious Liberty is a nonpartisan, public-interest law firm dedicated to protecting the free expression of all religious traditions and the equal participation of religious people and institutions in public life. It has long worked to educate courts about the religious biases inherent in state Blaine amendments, which had their genesis in anti-Catholic bigotry of the mid-19th Century. The Becket Fund seeks to correct the historical revisionism that would erase this shameful chapter in our nation's history.

The Becket Fund has filed three amicus briefs in the United States Supreme Court, detailing the history of Blaine amendments,[1] and numerous briefs in state courts—as both primary counsel and *amicus curiae*—seeking to protect the rights of individuals to be free from religion-based exclusion from educational benefits.[2] It defended the parents of state scholarship recipients in a prior iteration of this lawsuit brought against them by several Oklahoma school districts and ultimately dismissed by this Court for lack of standing. *See Indep. Sch. Dist. No. 5 v. Spry*, 2012 OK 98, 292 P.3d 19 (2012).

The individual amici include parents who were defendants in the prior lawsuit, as well as other parents of children with disabilities who have used, or are using, scholarship funds to send their children to secular and religiously-affiliated private schools that are specifically suited to their children's needs. They are all Oklahoma taxpayers who support the right of all individuals and institutions to participate in public programs on equal footing, regardless of their religious affiliation.

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1 *See Mitchell v. Helms*, 530 U.S. 793 (2000); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Locke v. Davey*, 540 U.S. 712 (2004).

2 *See, e.g.*, *Moses v. Skandera*, No. 33,002, 2014 WL 5454834 (N.M. Ct. App. Oct. 27, 2014), *cert. granted*, No. 34-974 (Jan. 26, 2015); *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013); *Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist.*, 2013 COA 20, 2013 WL 791140 (Colo. Ct. App. 2013), *cert. granted*, 2014 WL 1046020 (Colo. Mar. 17, 2014) (No. 13SC233).

The Becket Fund trusts that this brief, as well as the Becket Fund's special expertise in this area of the law, will aid the Court in the resolution of this appeal.

SUMMARY OF ARGUMENT

The district court's ruling that student recipients of Oklahoma scholarship funds may only use those funds at religiously-affiliated schools not deemed "sectarian" by the state runs grossly afoul of both state and federal law. The Oklahoma Blaine Amendment—Article 2, section 5 of the state constitution—does not prohibit the legislature from expending funds in ways that only incidentally benefit religious institutions. As long as funding is available to all individuals or institutions on equal footing, without regard to their religious affiliation, it poses no threat to the principles of church-state separation underlying that provision.

Holding otherwise would call into question a vast array of state programs intended to promote the health, safety, and education of Oklahoma's citizens. Moreover, construing Article 2, section 5 to permit such discrimination would give new life to the religious animus that first motivated Oklahoma's Blaine Amendment and provisions like it. The United States Supreme Court has long questioned the validity of the anti-Catholic Blaine Amendments, and Tenth Circuit law confirms that construing a Blaine Amendment like Oklahoma's to discriminate among religiously-affiliated institutions, or against all religiously-affiliated institutions generally, would violate the United States Constitution's Free Exercise and Establishment Clauses.

Both the plain language of Article 2, section 5 and this Court's interpretations of it require a different approach—one that does not discriminate among religions or overreact to neutral and incidental benefits to religious institutions. The district court's severe departure from that approach cannot be justified and must be overturned.

ARGUMENT

I. Blaine Amendments like Article 2, section 5 of the Oklahoma Constitution were "born of bigotry."

The history of Blaine Amendments—from the original failed amendment proposed to the federal Constitution in 1875 through the multiple variations subsequently enacted in dozens of state constitutions—is rooted in impermissible religious animus, the result of a shameful and sustained effort in the late 19th Century to target so-called "sectarian" faith groups for special disfavor.

A. The term "sectarian" in Blaine Amendments was intended to exclude disfavored religious institutions from public funding that was otherwise generally available.

On its face, the term "sectarian" is not synonymous with "religious" but instead refers to a narrower subcategory, connoting one or more "sects"—or denominations—of religion.[3] Although that distinction may be blurred in common usage today, it was not when Blaine Amendments first came into law. Indeed, the history of Blaine Amendments makes clear that use of the term "sectarian" was a common legal device to target for special disadvantage those who resisted the "common religion" then taught in the "common schools." In other words, the meaning of "sectarian" can only be understood by reference to the "nonsectarian" religion to which it was opposed at the time.

In the mid-19th Century, the emerging principle of universal education and the desire to eliminate strife among increasingly varied religious groups gave rise to the movement for publicly funded "common schools." Early proponents of this movement emphatically denied that the

[3] For example, "nonsectarian prayer" is unmistakably religious but is not tied to any one religious group. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 581-82, 588-89 (1992).

common schools were intended to, or could effectively, function without religious instruction.[4] Indeed, one of the primary purposes of the common schools was to instill in all American children the same "common religion," a form of Protestantism designed initially to be acceptable to Unitarian and Orthodox Congregationalists.[5] Those who resisted this publicly funded religion—at this early stage, mostly evangelical Protestants—were maligned as "sectarian."[6]

However, with the surge of Irish, German, and other European Catholic immigrants later in the 19th Century, "sectarian" took on a more precise, and more pejorative, meaning. Popular backlash against these immigrants gave rise to the nativist movement, which found various forms of expression, including the Know-Nothing party[7] and the American Protective Association.[8] Even

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[4] Horace Mann, often called the "Father of Public Education," vehemently denied any attempt "to exclude religious instruction from school" and affirmed as "eternal and immutable truths" that the public schools' "grand result in practical morals is a consummation of blessedness that can never be attained without religion, and that no community will ever be religious without a religious education." Horace Mann, *Life and Works: Annual Reports of the Secretary of the Board of Education of Massachusetts for the Years 1845-1848*, at 292, 311 (1891).

[5] Mann, *supra*, at 311 (emphasizing that public school system "earnestly inculcates all Christian morals; it founds its morals on the basis of religion; it welcomes the religion of the Bible"); *see* E.I.F. Williams, *Horace Mann: Educational Statesman* 266 (1937); *Attorney Gen. ex rel. Abbot v. Town of Dublin*, 38 N.H. 459 (1859) (describing conflicts among Unitarian and Orthodox Congregationalists in New England).

[6] *See* R. Michaelsen, *Piety in the Public School* 69 (1970) ("Horace Mann scorned sectarianism. By that he meant chiefly the sectarianism of the evangelical Protestant denominations.").

[7] Abraham Lincoln wrote of that party:

> As a nation, we began by declaring that "all men are created equal." We now practically read it "all men are created equal, except negroes." When the Know-Nothings get control, it will read "all men are created equal, except negroes, and foreigners, and catholics." When it comes to this I shall prefer emigrating to some country where they make no pretense of loving liberty.

Letter from Abraham Lincoln to Joshua Speed (Aug. 24, 1855), *in* 2 *The Collected Works of Abraham Lincoln* 320, 323 (R. Basler ed. 1953).

[8] Oath number four of the American Protective Association or APA began:

President Ulysses S. Grant, calling for an end to all funding for "sectarian" schools in 1875, spoke of the Catholic Church as a source of "superstition, ambition and ignorance."[9]

Nativists used the law to target Catholic education in two primary ways: (1) by requiring daily, devotional reading of the King James Version of the Bible in the common schools,[10] and (2) by withdrawing all government support from "sectarian" schools.[11]

The most prominent attempt at the latter came in 1875, when nativist Representative James G. Blaine—in response to President Grant's call—introduced a proposed federal constitutional

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> I do most solemnly promise and swear that I will always, to the utmost of my ability, labor, plead and wage a continuous warfare against ignorance and fanaticism; that I will use my utmost power to strike the shackles and chains of blind obedience to the Roman Catholic Church from the hampered and bound consciences of a priest-ridden and church-oppressed people; that I will never allow any one, a member of the Roman Catholic Church, to become a member of this order, I knowing him to be such; that I will use my influence to promote the interest of all Protestants everywhere in the world that I may be; that I will not employ a Roman Catholic in any capacity if I can procure the services of a Protestant.

Humphrey J. Desmond, *The A.P.A. Movement, A Sketch* 36 (1912).

[9] President Ulysses S. Grant, Address to the Army of Tennessee at Des Moines, Iowa (quoted in Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 Emory L.J. 43, 51 (1997)).

[10] *See Lemon v. Kurtzman*, 403 U.S. 602, 628, 629 (1971) (Douglas, J., concurring) (noting that "Protestants obtained control of the New York school system and used it to promote reading and teaching of the Scriptures as revealed in the King James Version of the Bible," and that the Know-Nothing party "included in its platform daily Bible reading in the schools") (citation omitted); *see, e.g.*, Lloyd P. Jorgenson, *The State and the Non-Public School*, 1825-1925, at 88 (1987) (describing Massachusetts' Know-Nothing party's passage of law requiring reading of King James Bible in common schools). *See also State ex rel. Finger v. Weedman*, 226 N.W. 348, 351 (S.D. 1929) ("The King James version is a translation by scholars of the Anglican church bitterly opposed to the Catholics, apparent in the dedication of the translation, where the Pope is referred to as 'that man of sin.'"); *People ex rel. Ring v. Bd. of Educ. of Dist. 24*, 92 N.E. 251, 254 (Ill. 1910) ("Catholics claim that there are cases of willful perversion of the Scriptures in King James' translation.").

[11] *See, e.g.*, Mass. Const. amend. art. XVIII (superseded by Mass. Const. amend. art. XLVI) (passed in 1854, immediately after local ascendancy of Know-Nothing party, and providing that "all moneys which may be appropriated by the state for the support of common schools . . . shall never be appropriated to any religious sect for the maintenance exclusively of its own schools").

amendment in the U.S. House of Representatives to bar states from funding "sectarian" schools.[12] Although the Blaine language narrowly failed as a federal constitutional amendment, it had gained enough support in Congress that Congress thereafter required new states to adopt similar language in their state constitutions as a condition of admittance to the Union.[13]

Oklahoma is one such state. The Oklahoma Enabling Act required inclusion of a Blaine Amendment in the new state constitution as a condition of Oklahoma's statehood. Okla. Enabling Act of June 16, 1906, § 8, 34 Stat. 273. The Enabling Act proposed language prohibiting "proceeds arising from the sale or disposal of any lands . . . granted for educational purposes" from being "used for the support of any religious or sectarian school, college or university."[14] And, in addition to states like Oklahoma that were required to adopt Blaine Amendments, several states voluntarily adopted their own versions as part of the same movement, wrongly giving root to impermissible

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[12] The original Blaine Amendment provided:

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

H.R.J. Res. 1, 44th Cong., 1st Sess., 4 Cong. Rec. 205 (1875).

[13] The measure passed in the House by a margin of 180-7, 4 Cong. Rec. 5191 (1876), but fell four votes short of the supermajority required in the Senate. 4 Cong. Rec. 5595 (1876).

[14] *See* 20 Cong. Rec. 2100-01 (1889) (statement of Sen. Blair) (arguing in favor of Enabling Act requirement that state constitutions guarantee "public schools . . . free from sectarian control," in part because requirement would accomplish purposes of failed federal Blaine Amendment). Other states required to adopt Blaine Amendments in their enabling acts include North Dakota, Montana, South Dakota, Washington, Arizona, New Mexico, and Idaho. *See* Act of Feb. 22, 1889, 25 Stat. 676, ch. 180 (1889) (enabling act for North Dakota, Montana, South Dakota, and Washington); Act of June 20, 1910, 36 Stat. 557 § 26 (1910) (enabling act for Arizona and New Mexico); Act of July 3, 1890, 26 Stat. 215 § 8, ch. 656 (1890) (enabling act for Idaho); S.D. Const. art. VIII, § 16; N.D. Const. art. 8, § 5; Mont. Const. art. X, § 6; Wash. Const. art. IX, § 4, art. I, § 11; Ariz. Const. art. IX, § 10; Idaho Const. art. IX, § 5.

religious animus.[15] The legal and historical scholarship confirming the discriminatory intent of the Blaine Amendments is overwhelming.[16]

B. The U.S. Supreme Court has consistently recognized that use of the term "sectarian" in Blaine Amendments was animated by anti-Catholic nativism.

The basic history of Blaine Amendments and their basis in anti-Catholic bigotry is largely undisputed. It has been outlined in U.S. Supreme Court opinions written or joined by nine Supreme Court justices, including five current justices. In *Mitchell v. Helms*, a plurality of four justices acknowledged and condemned the nativism that gave rise to the federal and state Blaine Amendments. 530 U.S. 793, 828-29 (2000) (plurality opinion of Thomas, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.). The opinion criticized the Court's prior use of the term "sectarian" in Establishment Clause jurisprudence, because "hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow." *Id.* at 828. The opinion continued:

> Opposition to aid to "sectarian" schools acquired prominence in the 1870's with Congress' consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general,

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[15] *See, e.g.*, Del. Const. art. X, § 3 (adopted 1897); N.Y. Const. art. XI, § 3 (adopted 1894); Ky. Const. § 189 (adopted 1891); Fla. Const. art. I, § 3 (adopted 1885); Mo. Const. art. IX, § 8 (adopted 1875); Ala. Const. art. XIV, § 263 (adopted 1875).

[16] *See, e.g.*, Philip Hamburger, *Separation of Church and State* 335 (2002) ("Nativist Protestants also failed to obtain a federal constitutional amendment but, because of the strength of anti-Catholic feeling, managed to secure local versions of the Blaine amendment in the vast majority of the states."); *See generally* Ray A. Billington, *The Protestant Crusade, 1800-1860: A Study of the Origins of American Nativism* (1938); Charles L. Glenn, Jr., *The Myth of the Common School* (1988); Lloyd Jorgenson, *The State and the Non-Public School, 1825-1925* (1987); Carl F. Kaestle, *Pillars of the Republic: Common Schools and American Society, 1780-1860* (1983); Paul Kleppner, *The Cross of Culture: A Social Analysis of Midwestern Politics, 1850-1900* (1970); Ward M. McAfee, *Religion, Race and Reconstruction: The Public School in the Politics of the 1870s* (1998); John T. McGreevy, *Catholicism and American Freedom* (2003); Diane Ravitch, *The Great School Wars: New York City, 1805-1973* (1974); William G. Ross, *Forging New Freedoms: Nativism, Education, and the Constitution 1917-1927* (1994); Joseph P. Viteritti, *Choosing Equality: School Choice, the Constitution, and Civil Society* (1999).

> and it was an open secret that "sectarian" was code for "Catholic." *See generally* Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38 (1992).

Mitchell, 530 U.S. at 828. The plurality concluded that "the exclusion of pervasively sectarian schools from otherwise permissible aid programs"—precisely the purpose and effect of the Blaine Amendments—represented a "doctrine, born of bigotry, [that] should be buried now." *Id.* at 829.

In *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), three justices provided a detailed account of the relevant history in dissent. *See id.* at 720-21 (Breyer, J., joined by Stevens and Souter, JJ.). Not only did they recognize that the Blaine Amendment movement was a form of backlash against "political efforts to right the wrong of discrimination against religious minorities in primary education," they explained how the term "sectarian" functioned within that movement. *Id.* at 721.

> [H]istorians point out that during the early years of the Republic, American schools—including the first public schools—were Protestant in character. Their students recited Protestant prayers, read the King James version of the Bible, and learned Protestant religious ideals. *See, e.g.*, D. Tyack, *Onward Christian Soldiers: Religion in the American Common School, in History and Education* 217-226 (P. Nash ed. 1970). Those practices may have wrongly discriminated against members of minority religions, but given the small number of such individuals, the teaching of Protestant religions in schools did not threaten serious social conflict.

Zelman, 536 U.S. at 720. The Justices recounted how the wave of Catholic and Jewish immigration starting in the mid-19th Century increased the number of those suffering from this discrimination, and correspondingly the intensity of religious hostility surrounding the "School Question":

> Not surprisingly, with this increase in numbers, members of non-Protestant religions, particularly Catholics, began to resist the Protestant domination of the public schools. Scholars report that by the mid-19th century religious conflict over matters such as Bible reading "grew intense," as Catholics resisted and Protestants fought back to preserve their domination. Jeffries & Ryan, [*A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279,] 300 [(Nov. 2001)] "Dreading Catholic domination," native Protestants "terrorized Catholics." P. Hamburger, *Separation of Church and State* 219 (2002). In some States "Catholic students suffered beatings or expulsions for refusing to read from the Protestant Bible, and crowds . . . rioted over whether Catholic children could be released from the classroom during Bible reading." Jeffries & Ryan, 100 Mich. L. Rev. at 300.

Zelman, 536 U.S. at 720-21. Finally, the Justices detailed how Catholic efforts to correct this increasingly severe discrimination elicited a reaction in the form of the proposed federal Blaine Amendment and its successful state progeny:

> Catholics sought equal government support for the education of their children in the form of aid for private Catholic schools. But the "Protestant position" on this matter, scholars report, "was that public schools must be 'nonsectarian' (which was usually understood to allow Bible reading and other Protestant observances) and public money must not support 'sectarian' schools (which in practical terms meant Catholic.)" [Jeffries & Ryan] at 301. And this sentiment played a significant role in creating a movement that sought to amend several state constitutions (often successfully), and to amend the United States Constitution (unsuccessfully) to make certain that government would not help pay for "sectarian" (*i.e.*, Catholic) schooling for children. [Jeffries & Ryan] at 301-305. *See also* Hamburger, *supra*, at 287.

Zelman, 536 U.S. at 721 (citing Jeffries & Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. at 301).

Finally, even the majority in *Locke v. Davey*, including Justices Kennedy, Breyer and Ginsburg, acknowledged the basic conclusion that Blaine Amendments are "linked with anti-Catholicism." 540 U.S. 712, 723 n.7 (2004) (citing *Mitchell* plurality). It is now widely recognized that, when used in the context of these late 19th-Century constitutional amendments, the term "sectarian" does not merely connote some subset of all religions, but Catholicism in particular. *See Zelman*, 536 U.S. at 721 (noting purpose of federal and state Blaine amendment movements "to make certain that government would not help pay for 'sectarian' (*i.e.*, Catholic) schooling for children.") (quotations omitted) (dissenting opinion); *Mitchell*, 530 U.S. at 282 ("[I]t was an open secret that 'sectarian' was code for 'Catholic.'") (plurality opinion). The Arizona Supreme Court has reached a similar conclusion. *Kotterman v. Killian*, 972 P.2d 606, 624 (Ariz. 1999) ("The Blaine amendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a growing 'Catholic menace.'"). These judicial decisions simply reflect the fact that the weight of scholarly

authority in support of this historical narrative is nothing short of crushing.[17] The text and origins of Blaine Amendments reflect impermissible religious *animus*.

II. The District Court unnecessarily construed Article 2, section 5 to invoke the anti-Catholicism inherent in state Blaine Amendments.

On its face, the text of Article 2, section 5 bears the watermark of a true Blaine Amendment by using the term "sectarian" to describe persons and institutions excluded from government funding that is otherwise generally available. Prompted by Appellees, the district court embraced the original animus-based perspective, adopting a reading of the provision that resurrects the most reprehensible aspects of Blaine Amendments. Indeed, the district court explicitly distinguished between "sectarian" and "religiously affiliated" institutions, suggesting that Article 2, section 5 would disfavor the former, but not the latter. Tr. of Proceedings, App. 11 at 27.

Drawing from his own college and law school experience, as well as his personal views of what it means to be religious, the district court judge opined that a school like Southern Methodist University is "Methodist in name only" and although "[c]ertainly . . . influenced by the teachings

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[17] *See, e.g.*, Philip Hamburger, *Separation of Church and State* 335 (2002) ("Nativist Protestants also failed to obtain a federal constitutional amendment but, because of the strength of anti-Catholic feeling, managed to secure local versions of the Blaine amendment in the vast majority of the states."); Ira C. Lupu, *The Increasingly Anachronistic Case Against School Vouchers*, 13 Notre Dame J.L. Ethics & Pub. Pol'y 375, 386 (1999) ("From the advent of publicly supported, compulsory education until very recently, aid to sectarian schools primarily meant aid to Catholic schools as an enterprise to rival publicly supported, essentially Protestant schools."); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 Emory L.J. 43, 50 (1997) ("Although there were legitimate arguments to be made on both sides, the nineteenth century opposition to funding religious schools drew heavily on anti-Catholicism."). *See generally* Joseph P. Viteritti, *Choosing Equality: School Choice, the Constitution, and Civil Society* (Brookings 1999); Charles L. Glenn, Jr., *The Myth of the Common School* (U. Mass. 1988); Ward M. McAfee, *Religion, Race and Reconstruction: The Public School in the Politics of the 1870s* (1998); Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J.L. & Pub. Pol'y 551 (Spring 2003); Jeffries & Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279 (2001); Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 Va. L. Rev. 117 (2000).

and principles of the United Methodist Church" does not exist "to advance the Methodist Church," *id*. at 28, while Notre Dame, in contrast, is "a Catholic institution through and through" where "religion influences every aspect" of a student's education.[18] *Id.* at 28. Thus concluding that Southern Methodist is merely "religious-affiliated," while Notre Dame is "more of a sectarian" institution, the district court ironically gave new life to the exact same animosity and discrimination that favored Protestantism over Catholicism in the mid-19th Century. Leaving no doubt as to the significance the district court placed on this artificial and constitutionally-suspect distinction, it explicitly confirmed that its injunction against the Lindsay Nicole Henry Scholarship Program "would only apply to sectarian institutions," allowing peer institutions perceived as being merely "religiously affiliated" to continue matriculating scholarship awardees. *Id.* at 40-41.

To its credit, the district court enjoined the Scholarship Program with respect to "sectarian" institutions "reluctantly," apparently because it felt constrained by the supposedly "unambiguous language" in Article 2, section 5. *Id.* at 38. But a closer look at that provision shows that its language is not unambiguous, but in fact more persuasively supports a reading that avoids the repugnant discrimination originally associated with the Blaine Amendments. This constitutionally-saving reading is apparent in both the history of Article 2, section 5 and in this Court's interpretation of that provision, which has consistently eschewed discriminatory efforts to distinguish between "sectarian" and "religiously-affiliated" institutions and focused instead on whether there is consideration for any benefit provided and whether there is state support for religious entities in their religious capacities.

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[18] It is no secret that not everyone shares the district court's view of Notre Dame's vitality as a specifically Catholic institution. *See, e.g.*, http://www.projectsycamore.com/ (last visited Feb. 26, 2015) (alumni organization animated by concern that Notre Dame has lost its Catholic identity). In any case, it should be clear that the state has no business deciding which religious institutions are "sufficiently" religious.

A. The plain language of Article 2, section 5 supports a narrow reading that does not prohibit the Scholarship Program.

While the Oklahoma Enabling Act passed by Congress required Oklahoma to include a Blaine Amendment in its constitution before being admitted into the United States, Oklahoma ultimately rejected the specific language proposed by Congress. *See* Okla. Enabling Act of June 16, 1906, § 8, 34 Stat. 273. In its proposed form, the Oklahoma Blaine Amendment would have prohibited "proceeds arising from the sale or disposal of any lands" that had been "granted for educational purposes" from being "used for the support of any religious or sectarian school, college or university." *Id.* But Oklahoma adopted a revised version that more broadly restricted use of any "public money or property" in aid of a broader range of institutions and individuals:

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

Art. 2, § 5. But the enlarging aspects of the final version were counterbalanced by the closing phrase "as such," which modifies the broad list of religious organizations and individuals covered by the provision. Thus, aid to the listed religious individuals and entities is only prohibited in their capacities "as such." These words—if they are to be given any meaning—must limit the provision's application by prohibiting public assistance only when the State acts directly to promote a religious organization for a religious purpose, not when the State's secular aims incidentally benefit religious individuals or organizations on equal footing with all others. *Estes v. ConocoPhillips Co.*, 2008 OK 21, ¶ 16, 184 P.3d 518, 525 ("A statute will be given a construction, if possible, which renders every word operative, rather than one which makes some words idle and meaningless."). Holding otherwise would not only contradict the "as such" language, it would lead to absurd and 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 their non-religious capacities. Absent the "as such" limitation, earned wages and benefits, contractual payments, tax deductions, and social services benefits for "any priest, preacher, minister, or other religious teach or dignitary" arguably would constitute "public money . . . used, . . . indirectly" for their benefit. Okla. Const. Art. 2, § 5. Church groups could not use the public parks or recreational 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." *Id.* Public funding for social welfare programs, scholarships for higher education, and state-subsidized medical services, among others, would also all violate the provision to the extent they subsidized the many social-service, educational, and medical providers that are religiously affiliated.

Of course such readings are absurd and were never intended. 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. This Court has consistently held that state funding that is neutrally available for a legitimate secular purpose does not violate this standard.

B. This Court's jurisprudence has consistently confirmed that Article 2, section 5 does not prohibit funding that incidentally benefits religious individuals and institutions on equal footing with their secular peers.

This Court's jurisprudence under Article 2, section 5 follows two lines of reasoning, both giving full credence to the phrase "as such."

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

In the first line of cases, the Court has considered the effect of the proposed state action in cases involving religion, and consistently finds that the mere incidental overlap of state action with

religious purpose is insufficient to offend Article 2, section 5. In the first case of this kind, *Connell v. Gray*, 1912 OK 607, 127 P. 417, 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 2, section 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*. at ¶ 12, 127 P. at 421 (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 funding given to religious institutions in their religious capacity. The mere incidental alignment of legitimate 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.[19] 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 ¶ 4, 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

[19] 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.

church and state, but that does not mean to compel or require separation from God." *Id*. at ¶ 13, 347 P.2d at 207.

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 *Meyer*, 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 2, section 5. Specifically, the Court noted as follows:

> The 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).

Appellees' reading of Article 2, section 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 direct purpose or effect of promoting a religion. *See 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.").[20]

2. This Court's cases involving state contractual relationships with religious entities confirm the plain meaning of Article 2, section 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 2, section 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 involved public land benefitting a religiously-affiliated organization, the Court held that under Article 2, section 5 "it would make no difference whether the grantee [was] a sectarian institution or not," because "the consideration [was] adequate." *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 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 2, section 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,

[20] 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 2, section 5 if there is "the element of substantial return to the State").

and for a compensation that is a matter of contract and public record." *Id*. at ¶ 9, 171 P.2d at 603 (emphases added).[21] Again, so long as there was consideration in the deal, there was no violation of the Constitution.

Finally, in *Burkhardt v. City of Enid*, the Court upheld a public trust created to aid a religiously-affiliated university, because "sufficient consideration was exchanged in the transaction." 1989 OK 45 at ¶ 20, 771 P.2d 608, 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 2, section 5. *Id.* Such transactions comprise an exchange for value, not aid to sectarian institutions "as such."[22] Here, just as in *Murrow*, private schools receiving scholarship students provide consideration for any benefits they receive by "render[ing] a service that goes far toward the fulfillment of [the State's] duty" to provide education. *Murrow*, 1946 OK 187 ¶ 9, 171 P.2d at 603.

This Court is not alone in its approach. Courts across the nation, including the U.S. Supreme Court, have consistently embraced the principle that "religious institutions need not be quarantined

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[21] *Murrow* cannot be distinguished on the ground that the Constitution requires the State to care for orphans without specifying how. *Murrow* expressly noted that the duty remained subject to other constitutional limitations, which would include Article 2, section 5. 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*").

[22] Adopting an "adequate return" or "consideration" analysis under Article 2, section 5 does not render that provision duplicative of the prohibition against gifts of state funds under Article 10, section 15. The "adequate return" analysis is simply one mode of analysis that works most, albeit not all, of the time. For example, a state contract for private entities to instill religious faith in State citizens unquestionably *would* violate Article 2, section 5 but not Article 10, section 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 "no aid" and "no gift" provisions.

from public benefits that are neutrally available to all." *Roemer v. Bd. of Pub. 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); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding educational funding that could be used at a private, charter, or public school of each student's choice); *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); *Moses v. Skandera*, --- P.3d ---, 2014 WL 5454834 (N.M. Ct. App. Oct. 27, 2014), *cert. granted*, No. 34-974 (Jan. 26, 2015) ("[W]e do not interpret Article XII, Section 3 to prohibit indirect and incidental benefit when the legislative purpose does not focus on support of parochial or private schools."); *Meredith v. Pence*, 984 N.E.2d 1213, 1227 (Ind. 2013) ("We first find it inconceivable that the framers and ratifiers intended to expansively prohibit any and all government expenditures from which a religious or theological institution derives a benefit . . . ."); *Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist.*, 2013 COA 20, ¶ 83, 2013 WL 791140 (Colo. Ct. App. 2013), *cert. granted*, 2014 WL 1046020 (Colo. Mar. 17, 2014) (No. 13SC233) (holding that "because the program was intended to benefit parents and their children, any indirect benefit to the schools was not 'in aid of' any religious organization.").

This Court has always employed the correct approach to Article 2, section 5 and should maintain that approach here as well.[23]

[23] The rulings in *Gurney v. Ferguson*, 1941 OK 397, ¶ 2, 122 P.2d 1002, and *School Dist. No. 52 v. Antone*, 1963 OK 165, ¶ 9, 384 P.2d 911, are distinguishable. In *Gurney*, the Court ruled with almost no analysis and never addressed whether the aid in question was for the benefit of religiously-affiliated schools "as such." While reaching the same conclusion as in *Gurney*, the

C. Discriminating among or against religious organizations would violate the First Amendment's Religion Clauses.

An interpretation of the scholarship program—like the one adopted by the district court—that discriminates between scholarships used at "sectarian" schools and "religiously affiliated" schools also violates the First Amendment of the federal constitution. "[N]o State can 'pass laws which aid one religion' or that 'prefer one religion over another.'" *Larson v. Valente*, 456 U.S. 228, 246 (1982) (citation omitted). Indeed, "neutral treatment of religions [is] '[t]he clearest command of the Establishment Clause.'" *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008) (citing *Larson*, 456 U.S. at 244). The judge below was aware of this conflict, but failed to acknowledge that he was "bound to accept an interpretation that avoids constitutional doubt." *Calvey v. Daxon*, 2000 OK 17, ¶ 24, 997 P.2d 164, 172; *see* Tr. of Proceedings, App. 11 at 31 ("Well, that's not my concern."). Instead, he posited that some religious schools would fit into the "sectarian" category and thus be ineligible to accept student scholarship recipients, while others would be deemed "religiously affiliated" and thus able to continue participating in the Scholarship program. Tr. of Proceedings, App. 11 at 27-28. This constitutes blatant religious discrimination.

In *Larson*, the U.S. Supreme Court struck down a state law that imposed registration and reporting requirements upon only those religious organizations that solicited more than fifty per cent of their funds from nonmembers. According to the Court, these requirements impermissibly distinguished between "well-established churches," which had strong support from their members, and "churches which are new and lacking in a constituency," which had to rely on solicitation from

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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 2, section 5. *Id*. at ¶ 9, 385 P.2d at 913. The bussing law at issue was struck down because it lacked such consideration. *Id*. Significantly, the *Antone* 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*.

nonmembers. *Larson*, 456 U.S. at 246 n.23; *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 536 (1993) ("differential treatment of two religions" might be "an independent constitutional violation.").

In *Weaver*, the Tenth Circuit applied this principle to find that the "'pervasively' sectarian" standard was unconstitutional, because it "exclude[d] some but not all religious institutions . . . ." 534 F.3d at 1258. Other courts have followed *Larson* and *Weaver* in striking laws that single out "pervasively sectarian" religious organizations. In *Spencer v. World Vision, Inc.*, the Ninth Circuit considered whether a religious ministry run as a nonprofit organization could claim the "religious employer" exemption from Title VII even though it was not technically a church. The court agreed that it could, explaining that "discrimination between institutions on the basis of the pervasiveness or intensity of their religious beliefs" would be "constitutionally impermissible." 633 F.3d 723, 729 (9th Cir. 2010) (O'Scannlain, J., concurring in the judgment) (internal quotation marks omitted); *see also Univ. of Great Falls v. N.L.R.B.*, 278 F.3d 1335, 1342 (D.C. Cir. 2002) ("[A]n exemption solely for 'pervasively sectarian' schools would itself raise First Amendment concerns—discriminating between kinds of religious schools."). The district court did exactly the same thing in distinguishing between "sectarian" schools and "religiously affiliated" schools.

The district court's ruling conflicts with the United States Constitution for another reason: by allowing government intrusion into religious decisions made by religiously-affiliated institutions. Originally, the term "sectarian" referred to any religion outside of mainstream Protestantism, requiring courts to judge, based on the conduct of fund recipients, whether their religious practices met the standard. Today, even with the term's broader (albeit still pejorative) meaning, it still would require the government to determine just how religious a religious organization is. Here, for example, the district court suggested that the state could distinguish between schools that are

"sectarian" and those that are merely "religiously affiliated" by examining the amount of "church control" over the institution and any "require[ments] to advance the tenants (sic) of [a particular] faith." Tr. of Proceedings, App. 11 at 27. But it is the inquiry into these very questions that violates the Religion Clauses. *See N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979) ("the very process of inquiry" into a "school's religious mission" violates the Constitution); *Spencer*, 633 F.3d at 731 ("very act" of determining "what does or does not have religious meaning" violates Establishment Clause). "It is well established . . . that courts should refrain from trolling through a person's or institution's religious beliefs." *Weaver*, 534 F.3d at 1261. The First Amendment does not permit courts to determine whether an organization is too "sectarian."[24]

The district court's interpretation of the scholarship program subjects the law to strict scrutiny, which requires that a law must have a compelling governmental interest, and must be narrowly tailored to pursue that interest. *Lukumi*, 508 U.S. at 546; *see also Weaver*, 534 F.3d at 1266 (laws involving religious discrimination are subject to strict scrutiny, but laws involving excessive entanglement are "unconstitutional without further inquiry"). But there can be no compelling interest in withholding state funding from disfavored religious groups. Contrary to appellees' suggestions, the Supreme Court's decision in *Locke v. Davey* does not permit the religious discrimination suggested by the district court's interpretation for three reasons. First, *Locke* involved a narrow ban on funding for the training of ministers; its logic "does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and

[24] Allowing the government to determine whether a school is "controlled" by a religious organization also violates the Religion Clauses by giving the government power to make "individualized exemptions" depending on the particular religious practices of the institution or individual. *See Lukumi*, 508 U.S. at 537. Such a law is subject to strict scrutiny because it "creates the opportunity for a facially neutral and generally applicable standard to be applied in a way that discriminates against religiously motivated conduct." *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004).

generally available government support." *Weaver*, 534 F.3d at 1255. *Weaver* explained that *Locke*'s allowance of limited restrictions on public aid to religious institutions was confined "to certain 'historic and substantial state interest[s]'" *Id.* (citing *Locke* 540 U.S. at 725). In *Locke*, the only approved interest was in avoiding funding for historical "hallmarks of an 'established' religion"—specifically, state-supported clergy. *Locke*, 540 U.S. at 722. No such interest is present here.

Second, *Locke* did not involve the "discrimination among religions" that is inherent in the district court's opinion. *See* 540 U.S. at 723 n.7 (noting that "the provision in question" was "not a Blaine Amendment."). Rather, discrimination against religious institutions imposed by the district court's order is directly analogous to the discrimination program struck down in *Weaver*, which provided for state scholarships to students attending any accredited college, except schools deemed "pervasively sectarian." 534 F.3d at 1250. The Tenth Circuit rejected the lower court's reliance on *Locke* because the program at issue permitted discrimination "*among* religions," exactly the scenario that the district court required. *Id*. at 1256.

Finally, *Locke* expressly held that "[t]he State's interest in not funding the pursuit of devotional degrees" was only "substantial"—not compelling. *Locke*, 540 U.S. at 725. Thus, the program at issue was not "inherently constitutionally suspect" and thus, there was no "presumption of unconstitutionality." *Id*. But here, if scholarships are provided to schools based on their religiosity, the state must defend that discrimination under strict scrutiny, which requires a "compelling" and not just a "substantial" interest. Considering the United States Supreme Court's upholding of programs similar to the Scholarship Program at issue here, *see Zelman*, 536 U.S. 639, it is unlikely to find that Oklahoma has a "compelling" interest in excluding religious institutions from indirect government funding that is available to peer secular institutions.

Nor could the constitutional conflict be resolved by interpreting the Oklahoma Blaine amendment to bar aid to *all* religiously-affiliated institutions, regardless of their degree of religiosity. That interpretation would far exceed the scope of permissible action under the First Amendment. Again in *Weaver*, the Tenth Circuit explicitly emphasized that *Locke*'s holding allowing a narrow limitation on funding for a subset of religious training "does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." *Weaver*, 534 F.3d at 1255 (citing *Locke*, 540 U.S. at 725). A ruling that no religiously-affiliated institution could receive state benefits—even indirect aid that, as here, is neutrally available—would have sweeping ramifications, rendering religious individuals and institutions second-class citizens, and accomplishing a "religious gerrymander" within the state. *Lukumi*, 508 U.S. at 534; *see also Locke*, 540 U.S. at 724 (laws "evincing . . . hostility toward religion" are impermissible).

CONCLUSION

For all the foregoing reasons, the district court's ruling should be reversed, and the Lindsay Nicole Henry Scholarship Program should be upheld as constitutional.

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Respectfully submitted,

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