33-186

IN THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA

INDEPENDENT SCHOOL DISTRICT NO. 5 OF TULSA COUNTY, OKLAHOMA, a/k/a JENKS PUBIC SCHOOLS, *et al.*,	)	
Plaintiffs,	)	**Case No. CV 2011-00890**
vs.	)	**Judge Dana Lynn Kuehn**
RUSSELL SPRY, STEPHANIE SPRY, *et al.*,	)	
Defendants.	)	

PLAINTIFFS' REPLY TO ATTORNEY GENERAL'S BRIEF ON THE MERITS OF THE CONSTITUTIONAL CLAIMS

Although the Attorney General argues that the "Lindsey Nicole Henry Scholarships for Students with Disabilities Program Act," OKLA. STAT. tit. 70, §§ 13-101.1 and 13-101.2 (2011 Supp.) (the "Act"), is constitutional and should be upheld, he completely ignores *Board of Ed. for Independent School District No. 52 v. Antone*, 1963 OK 165, 384 P.2d 911, and *Gurney v. Ferguson*, 1941 OK 397, 122 P.2d 1002, the controlling decisions from the Oklahoma Supreme Court dealing with government aid to private religious schools. The Attorney General's failure even to mention these seminal decisions interpreting OKLA. CONST. art. II, § 5 reflects a complete failure to properly analyze this issue.

Argument and Authorities

The Attorney General Misstates the Test Applicable to a Facial Challenge to a Statute's Constitutionality. The Attorney General asserts that the Plaintiff School Districts "have over pled their case" by alleging that the Act is unconstitutional on its face. Although the Plaintiff School Districts have challenged the Act both facially and as applied, as the

Defendants correctly realize,[1] the Attorney General misstates the analysis utilized by courts when presented with a facial challenge to the constitutionality of a statute. The Attorney General asserts that a party making a facial challenge "must establish that no set of circumstances exists under which the Act would be valid." *Davis v. Fieker*, 1997 OK 156, ¶ 35, 952 P.2d 505, 514, quoting *United States v. Salerno*, 481 U.S. 739 (1987). Yet the Supreme Court and federal courts have consistently stated that the *Salerno* test is merely one alternative a litigant may use to mount a facial challenge. *See Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008) noting that "[w]hile some Members of the Court have criticized the *Salerno* formulation, all agree that a facial challenge must fail where a statute has a 'plainly legitimate sweep.'" The Court cited Justice Stevens's concurrence in *Washington v. Glucksberg*, 521 U.S. 702, 740 (1997), in which Justice Stevens rejected the *Salerno* test. Justice Stevens noted that "[i]n other cases and in other contexts, we have imposed a significantly lesser burden on the challenger," including requiring the plaintiff to prove that the invalid applications of the statute are substantial "judged in relation to the statute's plainly legitimate sweep." *Id.*, n.7.

Like the Court in *Washington State Grange*, federal courts generally state that a party making a facial challenge may succeed either by "'establish[ing] that no set of circumstances exists under which the Act would be valid,' ... or by demonstrating that a statute has no 'plainly legitimate sweep.'" *Preston v. Leake*, 660 F.3d 726, 738 (4th Cir. 2011). *See, also, Int'l Womens' Day March Pln. Cmtee. v. City of San Antonio*, 619 F.3d 346, 355 (5th Cir. 2010), and *Hoye v. City of Oakland*, 653 F.3d 835, 857 (9th Cir. 2011).

[1] *See* Defendants' Brief in Opposition to Plaintiffs' Motion for Summary Judgment, p. 11, noting that the Plaintiff School Districts "urge the Court to declare [the Act] unconstitutional both facially and as applied."

Most tellingly, in *Davis v. Fieker*, the Oklahoma Supreme Court itself did not apply the test urged by the Attorney General. *Davis* involved the constitutionality of a statute limiting the facilities at which abortions could be performed, and the court utilized the "undue burden" test applicable to facial attacks on abortion regulations from *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). *Davis*, ¶ 36, 952 P.2d at 514 (stating "we analyze the validity of the statutes under the undue burden test").

In this case, the Plaintiff School Districts can prevail on their facial challenge to the Act by showing that it has no plainly legitimate sweep. The undisputed facts establish that of the 40 private schools approved by the State Department of Education to receive public funding under the Act, all but two (2) are religious schools. Opening Brief in Support of Plaintiffs' Motion for Summary Judgment, filed November 17, 2011, undisputed material fact no. 1.[2] The fact that only two approved private schools may receive public financing without violating the no-funding provision of OKLA. CONST. art. II, § 5 establishes that the Act has no plainly legitimate sweep. Moreover, the Act's diversion of public funds to any private school – sectarian or secular – violates the Oklahoma Constitution's directive that the legislature establish and maintain a system of public schools, the Oklahoma Constitution's prohibition on making a gift of public funds, and the Oklahoma Constitution's guarantee of equal protection. It cannot be suggested that the Act's sweep is plainly legitimate.

The Act Violates the No-Funding Principle of OKLA. CONST. art. II, § 5. The Attorney General argues that the no-funding prohibition of article II, § 5 "is not nearly as absolute as the Plaintiff School Districts claim." Attorney General's Brief, p.3. It is clear that the Attorney General's predecessors do not agree with him:

[2] The Defendants have acknowledged that this fact is undisputed.

> It is difficult to imagine how the framers of our constitution could more completely and expressly state that public money shall not be directly or indirectly used for any sectarian purpose. The provision of the Constitution [Article II, § 5] has been interpreted by the Supreme Court of the State of Oklahoma on numerous occasions and in every instance given a strict interpretation so as to preclude the use of public funds for sectarian purposes in any manner.

1979 OK AG 132, ¶ 3.

The Attorney General argues that the Act is no different than Oklahoma's Medicaid program, scholarship programs administered by the State Regents for Higher Education, or the faith-based and community service initiatives administered by the Department of Human Services. Attorney General's Brief, p.6. The Attorney General's argument is flatly wrong.

In *Burkhardt v. City of Enid*, 1989 OK 45, 771 P.2d 608, the Oklahoma Supreme Court emphasized the distinction between institutions affiliated with religion and "sectarian institutions." *Id.* at ¶ 18, 771 P.2d at 612-13. The court reiterated that a "sectarian institution" includes "a school or institution of learning which is controlled by a church and which is avowedly maintained and conducted so that the children of parents of that particular faith would be taught in that school the religious tenets of the church." *Id.* at ¶ 17, 771 P.2d at 612, quoting *Gurney*, ¶ 7, 122 P.2d at 1003. Religiously-affiliated colleges, universities, and hospitals are not "sectarian institutions" because they are not avowedly maintained and conducted for the purpose of inculcating children with a particular set of religious beliefs. But the Oklahoma Supreme Court has made it abundantly clear that private religious schools, which are maintained and conducted for that specific purpose, are sectarian institutions.

The foregoing illustrates why the Attorney General's reliance on 2008 OK AG 10 is misplaced. That opinion addressed faith-based organizations that used state funding to deliver services to assist convicted prisoners in re-entering society. Unlike 1979 OK AG 132

and the other Attorney General opinions cited by the Plaintiff School Districts, 2008 OK AG 10 had absolutely nothing to do with funding private religious schools.

The Arizona Supreme Court and the Kentucky Supreme Court have recently invalidated expenditures of public funds on the grounds that they violated the no-funding provision of each of their states' constitutions. *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009), and *University of the Cumberlands v. Pennybacker*, 308 S.W.3d 668 (Ky. 2010). Indeed, in *Cain*, the Arizona Supreme Court invalidated a "scholarship" program for disabled children virtually identical to the Act. The court in *Cain* pointed out that the Arizona Constitution is not violated when the state contracts with a religious organization to provide non-religious services to members of the public. In such a situation, the religious entity "merely acts as a conduit and receives no financial aid or support" from the expenditure of public funds. *Cain*, 202 P.2d at 1184. The Attorney General fails to understand this distinction.

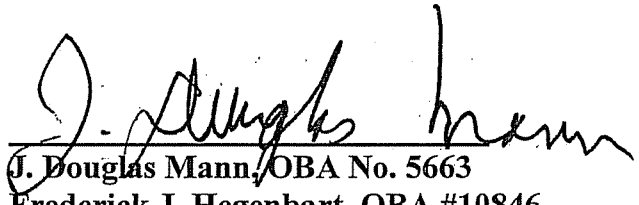
Finally, the Attorney General argues that the Act gives the state "adequate controls over the activities of the schools receiving scholarship monies." Attorney General's Brief, p.8. This is clearly untrue, as the language of OKLA. STAT. tit. 70, § 13-101.2(H) makes clear. But the Attorney General's comment illustrates why the Oklahoma Supreme Court has emphasized that our constitution's no-funding provision guarantees religious liberty:

> [W]e must not overlook the fact that if the Legislature may directly or indirectly aid or support sectarian or denominational schools with public funds, then it would be a short step forward at another session to increase such aid, and only another short step to some regulation and at least partial control of such school by successive legislative enactment. From partial control to an effort at complete control might well be the expected development. The first step in any such direction should be promptly halted, and is effectively halted, and is permanently barred by our Constitution.

Gurney at ¶ 16, 122 P.2d at 1004-05 (emphasis added).

Respectfully submitted,

ROSENSTEIN, FIST & RINGOLD

by 

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CERTIFICATE OF MAILING

I hereby certify that on the 21st day of December, 2011, I caused a true and correct copy of the above and foregoing instrument to be mailed, via certified mail, return receipt requested, with sufficient postage prepaid thereon, to:

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