IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Clarence G. Oliver; et al.,	)	
	)	
Plaintiffs/Appellees,	)	No. 113267
vs.	)	
	)	Oklahoma County
Janet Barresi, et al.,	)	Case No. CV-2013-2072
	)	Hon. Bernard M. Jones
Defendants/Appellants.	)	

BRIEF OF INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS/APPELLANTS

Eddie Foraker (OBA #22564)
Stipe, Harper, Laizure, Uselton,
Belote, Maxcey & Thetford
P.O. Box 1369
McAlester, OK 74502-1369
Phone: (918) 423-0421

Richard D. Komer* (DC Bar #253146)
Institute for Justice
901 N. Glebe Rd., Ste. 900
Arlington, VA 22203
Phone: (703) 682-9320

Attorneys for Amicus Curiae Institute for Justice in Support of Defendants/Appellants

**Motion to Associate Counsel pending*

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INTEREST OF THE AMICUS

The Institute for Justice files this brief on its own behalf as *amicus curiae*. The Institute is a public interest law firm, based in Arlington, Virginia, and is a non-partisan tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code that represents all of its clients *pro bono*. The Institute litigates cases in four discrete areas of the law: private property rights, economic liberty, free speech, and school choice. As part of its school choice practice, the Institute often represents parents who wish to use scholarships made available under programs such as Oklahoma's Lindsey Nicole Henry Scholarships for Students with Disabilities program, when such programs are challenged as unconstitutional. In fact, the Institute has intervened on behalf of parents in 22 such lawsuits since 1991, including two U.S. Supreme Court cases, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) and *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436 (2011).

The Institute has also represented parents as intervenor-defendants in many school choice cases filed in state courts, including Arizona, Alabama, Colorado, Florida, Georgia, Illinois, Indiana, Louisiana, New Hampshire, North Carolina, Ohio, and Wisconsin. Most of these cases have arisen in states with provisions in their state constitutions that are very similar to the Oklahoma Constitution's Article II, § 5, the provision that the District Court held was violated in this case. The Institute has an institutional interest in the proper interpretation of these state constitutional provisions—which are known as "Blaine Amendments." The Institute also has unparalleled knowledge and expertise concerning such state Blaine Amendments. Improper interpretations of these provisions not only unnecessarily deprive families of much needed educational opportunities, but can also violate the federal Constitution's Religion and Equal Protection Clauses.

INTRODUCTION

The District Court held that the Lindsey Nicole Henry Scholarships for Students with Disabilities program violates Article II, § 5 of the Oklahoma Constitution insofar as the program allows parents to choose religious schools for their children.[1] The District Court therefore enjoined the state from providing scholarships to families that enroll their otherwise qualified students in religious schools. Article II, § 5 reads:

> 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.

This provision is what is known as a "Blaine Amendment," so named after former Speaker of the U.S. House of Representatives, U.S. Senator, and Secretary of State James G. Blaine, who proposed an amendment to the U.S. Constitution that was modeled on provisions already incorporated in a number of state constitutions. Blaine hoped to capture the Republican nomination for President by appealing to the widespread anti-Catholic prejudice that had spurred the pre-existing state Blaine Amendments he used as his model. When it narrowly failed to obtain the requisite supermajority to send it to the states for ratification, Congress began requiring new states entering the Union to include similar restrictions in their proposed state constitutions as a condition of statehood. As a result, virtually all state constitutions for new states adopted after 1876, the year the federal Blaine Amendment failed, contain state Blaine Amendments. This includes Oklahoma.

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[1] Nine states (Arizona, Florida, Georgia, Louisiana, Mississippi, North Carolina, Ohio, South Carolina, and Utah), several with Blaine Amendments similar to Article II, § 5 (Arizona, Georgia, Mississippi, South Carolina, and Utah), have also enacted scholarship programs to benefit students with disabilities. *See The ABC's of School Choice*, Friedman Found. for Educ. Choice, http://www.edchoice.org/School-Choice/The-ABCs-of-School-Choice.

State Blaine Amendments are characterized by prohibitions on appropriations of public funds for the benefit or support of "sectarian" schools. Oklahoma's Article II, § 5 is broader than some states' Blaine Amendments because it extends beyond schools to cover any sectarian "institution." What it does not cover, and should not be interpreted as covering, is benefits to families, even where that benefit is limited to educating the families' children. Other *amici* will address in greater detail the history of state Blaine Amendments and the benefits that educational choice programs offer to families and states. This brief limits its discussion of these issues to providing enough information to make a coherent presentation of its principal point: There is a genuine legal distinction to be made between providing benefits to families that may incidentally benefit religious institutions, on the one hand, and supporting, either directly or indirectly, religious or sectarian institutions on the other.

SUMMARY OF ARGUMENT

Understood in the proper historical context, the language of Blaine Amendments such as Oklahoma's was designed and intended to prohibit the institutional aid that the Catholic Church was seeking for its parochial schools and other institutions, such as hospitals and orphanages. It was never intended to address student assistance programs such as the Lindsey Nicole Henry Scholarships for Students with Disabilities program. In student assistance programs the parents are the beneficiaries of the program and use their state aid to purchase educational or other services from providers, some of which may be religiously-affiliated. But this relationship does not render the service providers as the "beneficiaries" of the program, nor are the service providers properly viewed as "benefited" or "supported" by the programs, either "directly" or "indirectly."

As an initial matter, under both a plain reading of Article II, § 5 and this Court's well-established test for determining whether a program is valid under Article II, § 5, *see Burkhardt v. City of Enid*, 1989 OK 45, 771 P.2d 608 (no violation if the program furthers a public purpose in exchange for adequate consideration), *Children's Home & Welfare Ass'n*, 1946 OK 180, 171 P.2d 613 (same), *Murrow Indian Orphans Home v. Childers*, 1946 OK 187, 171 P.2d 600 (same), no public funds are appropriated "for the use, benefit, or support of any . . . sectarian institution *as such*." Okla. Const. art. II, § 5 (emphasis added).

However, to the extent that this Court believes its two aberrant decisions in *Gurney v. Ferguson*, 1941 OK 397, 122 P.2d 1002, and *Board of Education v. Antone*, 1963 OK 165, 384 P.2d 911, contradict the public purpose/adequate consideration test laid out in this Court's other Blaine Amendment cases, this Court should seize this opportunity to correct those erroneous holdings and properly apply the plain language of Article II, § 5 to educational assistance programs. There are at least three reasons this Court should eschew the flawed reasoning of *Gurney* and *Antone*. First, *Gurney* and *Antone* were mistaken when they conflated aid to individuals with aid to institutions. The U.S. Supreme Court and many state courts, in cases interpreting their own state Blaine Amendments, recognize the distinction between aiding individuals and aiding institutions. Second, the New York Court of Appeals in *Board of Education v. Allen*, 228 N.E.2d 791 (N.Y. 1967), repudiated its erroneous decision in *Judd v. Board of Education*, 15 N.E.2d 576 (N.Y. 1938), upon which *Gurney* and *Antone* relied so heavily. And third, if the rationale of *Gurney* and *Antone* applies to public benefit programs, then many other Oklahoma programs are in jeopardy.

Moreover, this Court should join the U.S. Supreme Court and the Arizona Supreme Court in recognizing the religious bias underlying the creation and adoption of the Blaine

Amendment language and not allow these anti-Catholic enactments to be misapplied in a manner that transforms them into a vehicle for discrimination against religion in general.

Finally, properly interpreting Oklahoma's Blaine Amendment will avoid violating the federal Religion and Equal Protection Clauses, which do not allow states to advance *or inhibit* religion, something which the trial court's decision most assuredly does.

ARGUMENT

I. The Lindsey Nicole Henry Scholarships for Students with Disabilities Program Passes Constitutional Muster.

This Court need not go beyond the plain language of Article II, § 5, or its well-established test for determining when a violation of Article II, § 5 has occurred, in order to uphold the Lindsey Nicole Henry Scholarships for Students with Disabilities program. The program provides parents a genuine, independent choice as to which schools to enroll their children, with no reference to religion, meaning that the public funds appropriated to pay for those scholarships are not "for the use, benefit, or support of any . . . sectarian institution *as such*." Okla. Const. art. II, § 5 (emphasis added). Moreover, this Court's test for measuring programs against the constraints of Article II, § 5 is met here because the scholarship program serves a legitimate public interest and provides substantial benefits to the state.

A. The Plain Text of Oklahoma's Blaine Amendment Is Addressed to Institutional Aid, Not Aid to Individuals.

Article II, § 5's plain language simply does not apply to publicly funded educational assistance programs like the one at issue here. The provision plainly deals with *government actors*. It does not constrain the private choices of private individuals. For example, "appropriating" public money obviously refers to the Legislature's power of appropriating money. It is not a word used to describe the act of private individuals paying for the

education of their children. Moreover, there is no use of public funds for the "benefit" or "support" of religious institutions "as such." From the perspective of the state, the scholarship program appropriates funds to benefit parents. Those parents use the scholarship funds to obtain the best available education for their children, while simultaneously relieving the state of its duty to provide educational services to those children. The state does not—and could not—view religious institutions as the beneficiaries of the scholarship program because the state takes no action to influence parents' genuine and independent choice between nonreligious and religious schools. From the parents' perspective, the scholarship funds are provided to help them pay for educational services—not to benefit or support private schools (religious or nonreligious).[2] Any other conclusion would suggest that programs like food stamps are in aid of grocery stores and not in aid of indigent families.

B. The Challenged Scholarship Program Serves a Public Purpose and Provides Ample Public Benefits.

The state defendants have more than adequately briefed the issue of whether the scholarship program satisfies the public purpose and adequate consideration test established by this Court's decisions in *Burkhardt v. City of Enid*, 1989 OK 45, 771 P.2d 608, *Children's Home & Welfare Ass'n v. Childers*, 1946 OK 180, 171 P.2d 613, and *Murrow Indian Orphans Home v. Childers*, 1946 OK 187, 171 P.2d 600. Those arguments will not be repeated here. It suffices to say there is no constitutional breach here because state officials remain entirely neutral and allow parents to freely decide where to use their scholarships.

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[2] Pursuant to 70 Okl. St. Ann. § 13-101(3), school districts may contract out special education students to private schools in order to provide those students with a free and appropriate public education. The districts pay the schools to educate the children, but this is not regarded as "benefitting" or "supporting" the private schools, because those schools are simply providing services under a procurement contract. The scholarship program empowers parents to do the same thing.

The District Court's order extends the reach of Article II, § 5, which limits the conduct of government actors, to a restriction on how private citizens can use their government benefits, which have been provided to them for a valid public purpose with more than adequate consideration to the state. To the extent the District Court's order may find support in *Gurney* and *Antone*, those cases should be overruled.

II. If This Court Reads the Decisions in *Gurney* and *Antone* to Prohibit the Scholarship Program, Those Cases Should Be Overruled.

If this Court cannot reconcile its public-purpose/public-benefits precedents with the divergent cases of *Gurney v. Ferguson*, 1941 OK 397, 122 P.2d 1002, and *Board of Education v. Antone*, 1963 OK 165, 384 P.2d 911, then those cases should be discarded because (1) they erroneously conflate aid to individuals as aid to institutions; (2) the principle precedent upon which those cases relied has been overturned; and (3) resuscitating the reasoning in those cases would jeopardize other state programs.

A. *Gurney* and *Antone* Erroneously Conflate Aid to Individuals with Aid to Institutions.

This Court has interpreted Article II, § 5 a number of times, but the *Gurney* and *Antone* precedents stand at stark odds with the others. The *Gurney* decision came six years before the U.S. Supreme Court's decision in *Everson v. Board of Education*, 330 U.S. 1 (1947), which, for the first time, applied the First Amendment's Establishment Clause to the states. At the time *Gurney* was decided, this Court tacitly assumed that Article II, § 5 was merely a more concrete expression of the "separation of church and state" accomplished in the federal constitution by the Establishment Clause. There was no recognition or awareness that this provision had its genesis in religious discrimination against Catholics. *Gurney* involved virtually the same issue subsequently addressed by the U.S. Supreme Court in

Everson, whether parochial school students could be transported to their schools along with public school students. Justice Welch, writing for this Court in *Gurney*, said that such transportation violated Article II, § 5. The U.S. Supreme Court in *Everson*, however, held the opposite under the Establishment Clause. This Court's decision in *Antone* involved precisely the same issue. There, this Court, in a decision again authored by Justice Welch, declined to follow the U.S. Supreme Court's lead.

The core of Justice Welch's opinions in *Gurney* and *Antone* is his rejection of the idea that the benefit of the transportation programs "accrues to the benefit of the individual child or to a group of children as distinguished from the school as an organization." *Gurney*, 1941 OK 397, ¶ 9, 122 P.2d 1002. In *Gurney*, he stated that:

> A similar argument was said to be "utterly without substance" in *Judd v. Board of Education.* It is true this use of public money and property aids the child, but it is no less true that practically every proper expenditure for school purposes aids the child. We are convinced that this . . . is an expenditure in furtherance of the constitutional duty or function of maintaining schools as organizations or institutions.

Id. (citation omitted). Similarly, in *Antone*, Justice Welch stated that:

> As we pointed out in *Gurney v. Ferguson*, *supra*, if the cost of school buses and the maintenance and operation thereof is in aid of the public schools, then it would seem to necessarily follow that when pupils of parochial schools are transported by them such service is in aid of that school.

1963 OK 165, ¶ 12, 384 P.2d 911.

The U.S. Supreme Court, however, has not found the idea of distinguishing between programs "accru[ing] to the benefit of the individual child" and programs benefiting schools as institutions "utterly without substance." *Gurney*, 1941 OK 397, ¶ 9, 122 P.2d 1002. Rather, it is this very idea—that programs may accrue to the benefit of individuals and not to

the benefit of institutions—that forms the foundation for the holding in *Everson* and a long line of cases in which the U.S. Supreme Court has ever more clearly recognized this critical distinction. *Everson* was succeeded by *Board of Education v. Allen*, 392 U.S. 236 (1968), upholding New York's provision of free textbooks to private school students; *Mueller v. Allen*, 463 U.S. 388 (1983), upholding Minnesota's provisions of tax deductions for education expenses, virtually all taken for private school tuition; *Witters v. Washington Department of Services For the Blind,* 474 U.S. 481 (1986), upholding Washington's payment of college tuition for a student at a religious college; *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), upholding Arizona's provision of a sign language interpreter to a student at a religious high school; and culminating in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), upholding Ohio's tuition scholarship program for Cleveland students, the vast majority of whom attended religious schools. These U.S. Supreme Court cases can be contrasted with the Court's long line of cases treating institutional aid differently, such as *Lemon v. Kurtzman*, 403 U.S. 602 (1971), striking down subsidies for private school teachers' salaries; *Tilton v. Richardson*, 403 U.S. 672 (1971), permitting aid to secular functions only at religious colleges; and *Mitchell v. Helms*, 530 U.S. 793 (2000), upholding provision of secular library books and computer programs to religious schools. Moreover, the U.S. Supreme Court is not alone in recognizing the distinction between student assistance and institutional assistance. Numerous state courts have interpreted their own Blaine Amendments as permitting educational assistance programs because they "aid" or "benefit" individuals—not institutions.[3]

[3] *Meredith v. Pence*, 984 N.E.2d 1213, 1228-29 (Ind. 2013) ("The direct beneficiaries under the voucher program are the families of eligible students and not the schools selected by the parents . . . ."); *Niehaus v. Huppenthal*, 310 P.3d 983, 987, ¶ 15 (Ariz. Ct. App. 2013) ("The

In the private school context, institutional assistance supports the entity as a whole by defraying its costs of doing business. Thus, the expenses that Justice Welch noted that include the costs of erecting, equipping, and maintaining school buildings, and the payment of teachers are all institutional expenses of operating a school, and for the state to pay for them, directly or indirectly, constitutes institutional support.[4]

Justice Welch's most obvious error was not recognizing the business aspects of private education, which are rarely provided for free. Thus, parents typically bear the expense of paying for transportation, textbooks, and, of course, tuition. When they buy textbooks from their schools, or pay for transportation on a private school's buses, or buy an education from the school for a child, they are procuring goods and services from the school in what is essentially a contractual relationship of exchanging value for value. They are not "supporting" the school, in the sense of making a gift, and when the state defrays the parents' cost of buying services from the school, it is not "supporting" the school either. The state is

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specified object of the ESA is the beneficiary families, not private or sectarian schools."); *Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist.*, No. 11CA1856, 2013 WL 791140, at *14, ¶ 67 (Colo. App. Feb. 28, 2013) ("[T]he purpose of the [Choice Scholarship Program] is to aid students and parents, not sectarian institutions"); *Griffith v. Bower*, 747 N.E.2d 423, 426 (Ill. Ct. App. 2001) ("[T]he Act . . . seeks to assist . . . parents in meeting the rising costs of educating their children"); *Toney v. Bower*, 744 N.E.2d 351, 360-63 (Ill. Ct. App. 2001) (finding persuasive the reasoning in *Zobrest*, 509 U.S. at 12, that "to the extent that sectarian schools benefitted at all from the aid, they were only incidental beneficiaries"); *Kotterman v. Killian*, 972 P.2d 606, 620, ¶ 46 (Ariz. 1999) ("[Any] benefits to religious schools are sufficiently attenuated to foreclose a constitutional breach."); *Simmons-Harris v. Goff*, 711 N.E.2d 203, 211 (Ohio 1999) ("The primary beneficiaries of the School Voucher Program are children, not sectarian schools."); *Jackson v. Benson*, 578 N.W.2d 602, 626-27, ¶¶ 81-82 (Wis. 1998) (describing the scholarships as "life-preservers" that have "been thrown" to students participating in the program).

[4] Paying teachers' salaries is one example of "indirectly" supporting the schools as institutions, because the salaries would be paid directly to the teachers and relieve the schools of the cost of paying those salaries. Similarly, if the state paid for the construction of private school buildings directly, the private school would reap an indirect institutional benefit.

quite simply helping the parents, who choose to buy goods and services from the school that best meets their child's unique educational needs.

B. The Key State Precedent Upon Which *Gurney* and *Antone* Rely Has Been Overturned.

The New York Court of Appeals—whose 1938 decision in *Judd v. Board of Education*, 15 N.E.2d 576 (N.Y. 1938), Justice Welch stated "fully supported" this Court's conclusion in *Gurney* in 1941 and from which he took the phrase "utterly without substance" in characterizing the distinction between aid to individuals and aid to institutions—overruled *Judd* in 1967, four years after this Court reaffirmed *Gurney* in *Antone*. *Bd. of Educ. v. Allen*, 228 N.E.2d 791 (N.Y. 1967). New York's highest court explicitly rejected the reasoning of the *Judd* case in upholding a program providing all students, including those in religious schools, with free secular textbooks. Thus, shortly after Oklahoma reaffirmed its precedent that was based in part on the *Judd* case, poor *Judd* was dead.

In *Gurney*, Justice Welch correctly characterized the New York Blaine Amendment, N.Y. Const. art. XI, § 3, as a constitutional provision "of no material difference from our own in the instant respect." *Gurney*, 1941 OK 397, ¶ 14, 122 P.2d 1002. The New York provision contains the same "directly or indirectly" language as Oklahoma's Blaine Amendment, and in overruling *Judd* the New York Court held that aid to students does not constitute indirect assistance to the schools they attend, but at most can be considered an incidental benefit to the schools, i.e., incidental to the fact that families have chosen to send their children to those schools. *Allen*, 228 N.E.2d at 794. This comports with the plain language of both New York's and Oklahoma's constitutional provisions, which are focused on prohibiting the appropriation of state funds or property for "the use, benefit, or support of any . . . sectarian institution." This language is plainly directed at institutional assistance and

says nothing about assisting individuals through the provision of educational scholarships. This Court was plainly incorrect in *Gurney* and *Antone* in equating assistance to families with assistance to the institutions the parents of those families choose for their children to attend.

C. The Rationale of *Gurney* and *Antone* Jeopardizes Other Programs.

By ignoring the distinction between aiding individuals and aiding the institutions from which they buy services, the rationale of *Gurney* and *Antone* places in legal jeopardy a wide array of state benefit programs that permit individuals to choose a religiously-affiliated service provider. As noted previously, Article II, § 5 is not limited to K-12 education but extends to other "sectarian institutions" as well. Consider the application of the *Gurney* and *Antone* rationale to one example of a higher education program, followed by one example of a social welfare program.

Oklahoma has a higher education aid program called the Oklahoma Higher Learning Access Act, or "Oklahoma's Promise." 70 Okl. St. Ann. §§ 2601 *et seq.* It provides tuition assistance to Oklahoma students to obtain associate and bachelor's degrees from Oklahoma public and private universities by encouraging low-income high school students to stay in school and do well. It is obviously a student assistance program, structurally similar to the Lindsey Nicole Henry Scholarships for Students with Disabilities program. Both provide assistance to individual families and both permit the families to choose religious schools or colleges from among other schools and colleges at which to spend their benefits. *See* Okla. State Regents, *Oklahoma's Promise: 2013-14 Year End Report* 15 (2014), *available at* http://www.okhighered.org/okpromise/pdf/okp-report-13-14.pdf. Yet if Article II, § 5 prohibits the parents of special needs students from using their scholarships at religious K-12 schools, it must also prohibit recipients of Oklahoma's Promise scholarships from using their

scholarships at religious colleges because Article II, § 5 applies to higher education institutions by covering all "sectarian institutions."

Oklahoma also participates in the federal-state Medicaid program, which provides low-income individuals with coverage of their medical expenses. *What is SoonerCare?*, Okla. Health Care Auth., http://www.okhca.org/individuals.aspx?id=52&menu=40&parts=11601_7453 (last visited Feb. 26, 2015). Medicaid beneficiaries benefit from state assistance in paying their medical bills to Medicaid providers, which can include religious hospitals and nursing homes. *Id.* Like religious schools and colleges, these hospitals and nursing homes provide their services in exchange for payment for their services, and as sectarian institutions they are covered by Article II, § 5. These are only two examples of where the *Gurney-Antone* rationale leads and of programs it places in jeopardy.

Additionally, this Court should repudiate *Gurney* and *Antone* not only for failing to distinguish between programs that aid families and programs that aid institutions, but also because continuing to give those cases credence breathes new life into the anti-Catholic animus that motivated the Blaine Amendment upon which Article II, § 5 was modeled by extending that animus to disadvantage all religions.

III. The Blaine History Is Unambiguous and Germane to This Court's Interpretation of Article II, § 5.

Understanding the history of the Blaine Amendment will inform the proper interpretation and scope of Article II, § 5. The Blaine movement was "born of bigotry." *Mitchell v. Helms*, 530 U.S. 793, 829 (2000) (plurality op.). This history is well-settled and clear. *Zelman v. Simmons-Harris*, 536 U.S. 639, 721 (Breyer, J., dissenting) (recognizing that anti-Catholic sentiment "played a significant role" in a state Blaine provisions and that references to "'sectarian' schools . . . in practical terms meant Catholic"). This history is

relevant because Oklahoma is not the first state to consider its Blaine Amendment in the context of an educational assistance program. When the Arizona Supreme Court considered a scholarship program under its similar Blaine Amendment,[5] it found "no recorded history directly linking the amendment with Arizona's constitutional convention." *Kotterman v. Killian*, 972 P.2d 606, 624 ¶ 66 (Ariz. 1999). Nevertheless, the court said it "would be hard pressed to divorce the amendment's language from the insidious discriminatory intent that prompted it." *Id.* The court found no violation of Arizona's Constitution because "the range of choices reserved to taxpayers, parents, and children, [and] the neutrality built into the system" led the Court "to conclude that benefits to religious schools are sufficiently attenuated to foreclose a constitutional breach." *Id.* at 620, ¶ 46. This Court should also refuse to turn a deaf ear to the Blaine Amendment's sordid history so as to not fall prey to the siren's song of an expansive and discriminatory interpretation.

A. State Blaine Amendments Were Designed to Rebuff Catholic Demands to Split the Public School Funds Between the Protestant Public Schools and the Catholic Private Schools.

State Blaine Amendments arose at a time when public schools were not the secular public institutions we know today. Lloyd P. Jorgenson, *The State and the Non-Public School: 1825-1925* 69-72 (1987). Public schools were originally designed to be religious schools, except that their religion was a generic, nondenominational Protestantism that taught doctrines that most Protestant sects could agree upon. *Id.* at 60. A key component was reading of the King James Bible in the public schools. *Id.* at 60, 72, 85. Unhappy with the Protestant orientation of the public schools, in which their children were forced to read the Protestant Bible, the Catholics began creating their own schools and campaigning for a

[5] Arizona's Constitution prohibits the use of public money for "religious worship, exercise, or instruction, or to the support of any religious establishment." Ariz. Const. art. II, § 12.

proportional share of public school funds. *Id.* at 83-85. These efforts outraged the Protestant majority, and fed the anti-Catholic sentiment that fueled several American political parties, most notably the Know Nothings, who briefly obtained considerable political success in the mid-1850's with the demise of the Whigs. Tyler Anbinder, *Nativism & Slavery: The Northern Know Nothings & the Politics of the 1850s* at 95, 110-15 (1992). Know Nothings took control of several New England states, including Maine, Massachusetts, and New Hampshire. In Massachusetts in 1855 the Know Nothings enacted one of the earliest state Blaine Amendments to ensure that the schools and colleges of the growing Catholic minority would not receive the same subsidies that the Protestant schools and colleges had received. *Id.* at 135-36. The tensions that led to the approaching Civil War shattered the Know Nothings, whose remnants were absorbed into the new Republican Party.

After the Civil War the Catholics renewed their demands for a share of the common school funds. In 1875, President Grant, himself a former Know Nothing, *id.* at 274, proposed in a speech a constitutional amendment banning the expenditure of public funds on parochial education. *Id.* at 271. Representative James G. Blaine, eager to secure the Republican presidential nomination to succeed Grant, took up the President's charge. Within days, he introduced an amendment to prohibit public funding of "sectarian" schools.

B. The Blaine Movement Was a Manifestation of Anti-Catholic Bigotry.

Blaine's proposed amendment was a "transparent political gesture against the Catholic Church." Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 671 (1998). It was part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a "Catholic menace." Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 Yale L. & Pol'y

Rev. 113, 146 (1996); *see also* Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38 (1992). The U.S. Supreme Court recognized this discriminatory history in *Mitchell v. Helms* and called for its legacy to be "buried now." 530 U.S. at 739, 829 (2000) (plurality op.). Considering the undisputed history of the Blaine Amendment, when applied to prohibit individuals from using state aid at religious institutions, as did the District Court, these amendments violate one of the First Amendment's clearest commands—do not discriminate against "a particular religion or . . . religion in general." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993).

C. Article II, § 5's Text Is Plainly a Blaine Amendment and Thus Manifests the Anti-Catholic Animus Underlying It.

The language of the state Blaine Amendments that preceded Blaine's proposed federal amendment, Blaine's proposed amendment itself, and the state Blaine Amendments passed after the failure of the federal effort, all contain similar language designed to rebuff the efforts of Catholics to acquire institutional assistance for their parochial school system, comparable to that provided to the Protestant public school system. This is why the language of Oklahoma's Blaine Amendment speaks in terms of prohibiting aid to "sectarian institutions." The term "sectarian" was widely understood as "Catholic" and used by the public to refer obliquely to Catholic schools. *Mitchell*, 530 U.S. at 828 (plurality op.) ("Consideration of the [Blaine] amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic.'"). In short, the language of Article II, § 5 was designed to prohibit institutional aid of the sort the Catholic Church was seeking for its parochial school system.

As explained in more detail below, under *Hunter v. Underwood*, 471 U.S. 222 (1985), and *Romer v. Evans*, 517 U.S. 620 (1996), state constitutional provisions adopted for

discriminatory reasons violate the Equal Protection Clause of the Fourteenth Amendment, and a state constitutional provision that was adopted to discriminate against a particular religion would also violate the Free Exercise and Establishment Clauses of the First Amendment. *See Church of the Lukumi Babalu Aye,* 508 U.S. 520. As such, this Court should reject any interpretation of Oklahoma's Blaine Amendment that would resurrect the historical animus that engendered them.

IV. Interpreting Oklahoma's Blaine Amendment to Forbid Scholarship Recipients from Using Their Benefits at Religious Schools—While Permitting Others to Use Their Benefits at Non-Religious Schools—Creates Serious Federal Constitutional Problems.

The District Court's interpretation and application of Oklahoma's Blaine Amendment to exclude families who choose religious schools from an otherwise religiously neutral program creates real and significant federal constitutional problems. The federal Constitution demands religious neutrality and therefore prohibits the wholesale exclusion of religious options from an otherwise generally available government aid program. *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (holding that the government "*cannot exclude* individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation" (emphasis added)). While the federal Constitution does not require states to create educational choice programs, if a state does enact such a program, it may not, consistent with the federal Constitution, exclude families who desire to enroll their children in religious private schools from the program.[6]

[6] This non-exclusion requirement is perfectly consistent with the fact that public schools are required by the federal Constitution to be entirely non-religious. *See Engel v. Vitale*, 370 U.S. 421 (1962) (declaring state-sponsored prayer in public schools unconstitutional); *Abington Twp. v. Schempp*, 374 US 203 (1963) (declaring state-sponsored Bible reading in public

As enacted, the Lindsey Nicole Henry Scholarship for Students with Disabilities program takes no cognizance of religion. This is as it should be. The U.S. Supreme Court has emphasized that religion ought to be exempt "from the cognizance of [c]ivil power." *McDaniel v. Paty*, 435 U.S. 618, 624 (1978) (plurality op.) (quoting 5 Writings of James Madison 288 (G. Hunt ed. 1904)). The District Court's order, however, alters the program from one that takes no cognizance of religion to one that is hostile to religion. Excluding families desiring a religious education from a religiously neutral government program, on the sole basis of religion, unconstitutionally interferes with both parental liberty and religious liberty. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (holding that government cannot "unreasonably interfere[] with the liberty of parents and guardians to direct the upbringing and education of children under their control"); *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545 (1983) (holding that "the government may not deny a benefit to a person because he exercises a constitutional right."); *see also Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970) (holding that the First Amendment "will not tolerate . . . governmental interference with religion").

Interpreting and applying Article II, § 5 to exclude families who enroll their children in religious schools from an otherwise religiously neutral scholarship program creates an unnecessary conflict with the federal Constitution's Free Exercise, Equal Protection, and Establishment Clauses. To resolve this case, however, this Court need not declare Article II, § 5 null and void. Invalidation would be necessary only if that provision is read to give effect to its original discriminatory purpose. This Court need only recognize that the

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schools unconstitutional). Public schools must be non-religious because compulsory education laws force students to attend them and the Establishment Clause does not permit the government to compel anyone to receive religious instruction and training.

language of Article II, § 5 does not prohibit religiously-neutral programs where any incidental benefits to religious schools result from the private decisions of scholarship recipients. The Colorado Court of Appeals recently recognized these potential federal concerns when interpreting Colorado's Blaine Amendments and wisely avoided them. *See Taxpayers for Public Educ. v. Douglas Cnty. Sch. Dist.*, No. 11CA1856, 2013 WL 791140, at n.17 (Colo. App. Feb. 28, 2013) (overturning trial court decision striking down an educational aid program that permitted families to choose religious schools and emphasizing that the Colorado Constitution must be interpreted in a manner that does not violate the federal Constitution's Religion Clauses). This Court should do likewise.

A. Excluding Families That Choose Religious Schools Violates the Free Exercise Clause of the First Amendment.

Under the Free Exercise Clause, the government cannot "impose burdens only on conduct motivated by religious belief." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993). Therefore, laws—including constitutional provisions—drawn along religious lines or passed with the purpose of, or having the effect of, either advancing or inhibiting religion are subject to heightened scrutiny. *Id.* at 532. "The state may justify an inroad on religious liberty [only] by showing that it is the least restrictive means of achieving some compelling state interest." *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981); *see also id.* at 716 ("[A] person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program."); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (holding that only "those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion"). Even laws that only "incidentally" burden the free exercise of religion must be justified by a compelling state interest. *Sherbert v. Verner*, 374 U.S. 398,

403-05 (1963) ("[C]onditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms."). Absent a compelling state interest, the Free Exercise Clause precludes the government—including the courts—from requiring the exclusion of religious options from otherwise neutral and generally available educational aid programs.

The District Court held that Oklahoma's Blaine Amendment demands stricter church-state separation than does the federal Establishment Clause. But whatever interest a state may have "in achieving greater separation of church and State than is already ensured under the Establishment Clause . . . is limited by the Free Exercise Clause." *Widmar v. Vincent*, 454 U.S. 263, 276 (1981). One might argue that the District Court's order does not violate the Free Exercise Clause because rather than discriminating among different kinds of religion it bars *all* religious schools from participating in the program. But any such argument falls flat. A distinction between religion and non-religion is just as constitutionally offensive as distinctions between religions.[7]

The Free Exercise Clause forbids discrimination against "a particular religion or ... religion in general." *Church of the Lukumi Babalu Aye*, 508 U.S. at 532; *Hartmann v. Stone*, 68 F.3d 973, 977 (6th Cir. 1995) ("[T]he Supreme Court has made it clear that 'neutral' also means that there must be neutrality between religion and non-religion"). In fact, the Tenth

[7] *Locke v. Davey*, 540 U.S. 712 (2004), is not to the contrary. *Locke* concerned a state scholarship program that permitted students to attend religious schools, but which excluded devotional theology majors training to become ministers. The Court upheld the exclusion because it was justified by the "historic and substantial state interest" in not funding ministerial training. *Id.* at 725. *Locke* emphasized the many ways in which the scholarship program *included* religious options, despite its narrow exclusion of vocational ministerial majors. *Id.* at 724-25. "Far from evincing ... hostility toward religion," the Court concluded, "the entirety of the [challenged program] goes a long way toward including religion in its benefits." *Id.* at 724.

Circuit made this very point in *Colorado Christian*, explaining that the Free Exercise Clause does not permit "the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1255 (10th Cir. 2008). Other federal courts of appeal have come to the same conclusion. For example, the Eighth Circuit held that denying special education benefits to students at religious schools would violate the Free Exercise Cause, if it imposed a disability on students "because of the religious nature" of the schools their parents chose for them. *Peter v. Wedl*, 155 F.3d 992, 997 (8th Cir. 1998). The Sixth Circuit similarly held that excluding religious day-care providers from the Army's Family Child Care program violated the Free Exercise Clause because it amounted to a "direct and unequivocal regulation, and even prohibition, of private acts of religious conscience." *Hartmann*, 68 F.3d at 985-86. And in *Columbia Union College v. Oliver*, 254 F.3d 496 (4th Cir. 2001), the Fourth Circuit addressed the perniciousness of religious exclusions generally: "[B]y refusing to fund a religious institution solely because of religion, the government risks discriminating against a class of citizens solely because of faith. The First Amendment requires government neutrality, not hostility, to religious belief." *Id.* at 510. These cases make it clear that excluding *all* religious options from student aid programs is just as violative of the Free Exercise Clause as excluding only some religious options. Any argument to the contrary is perverse and illogical; increased discrimination does not mean increased constitutionality.

Finally, interpreting Oklahoma's Blaine Amendment to exclude parents from choosing religious schools effectuates and extends the anti-Catholic animus that underlies the Amendment. Such animus can itself engender a Free Exercise Clause violation. *See Church*

of the Lukumi Babalu Aye, 508 U.S. at 547 (holding that government "may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion"). And even if, today, discrimination against Catholics *specifically* would not be the effect of the excluding families desiring a religious education, discrimination against *religion* would be. That an enactment born of anti-Catholic animus takes on a broader discriminatory effect over time only compounds the Free Exercise problem. *See Nichol v. Arin Intermediate Unit 28*, 268 F. Supp. 2d 536, 552 (W.D. Pa. 2003) ("[T]he Garb Statute . . . was motivated by anti-Catholic animus when initially enacted in 1895. [It] was reenacted . . . in 1949 . . . and presumably . . . there was no anti-Catholic animus behind the reenactment. Nevertheless . . . its effect remained hostile to religion by singling out and prohibiting . . . *religious* symbolic speech and expression."). The District Court's order thus gives new effect to the anti-religious animus that motivated the Blaine Amendment. Favoring students who choose nonreligious private schools by denying scholarships to all students choosing religious private schools violates the strict religious neutrality requirement of the First Amendment.

B. Treating Families Differently Based on Nothing More Than Religion Violates the Fourteenth Amendment's Equal Protection Clause.

Treating families differently based on nothing more than their decision to use a scholarship at a religious school also violates the Equal Protection Clause.[8] Distinctions drawn on the basis of religion are "inherently suspect" and thus subject to strict scrutiny. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam); *see also United States v. Batchelder*, 442 U.S. 114, 125 n.9 (1979) ("The Equal Protection Clause prohibits selective enforcement based on an unjustifiable standard such as race [or] *religion* . . . ."

[8] The exclusions in *Colorado Christian* and *Wedl* were held unconstitutional under both the Free Exercise and Equal Protection Clauses. 534 F.3d at 1258, 1269; 155 F.3d at 997.

(emphasis added) (internal quotation marks omitted)). Moreover, exclusions "born of animosity," such as Article II, § 5's Blaine language, are subject to heightened scrutiny. *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (striking down as racially discriminatory a provision of Alabama's Constitution because "its original enactment was motivated by a desire to discriminate . . . and the section continues to this day to have that effect").

In *Romer v. Evans*, the U.S. Supreme Court struck down a Colorado constitutional provision that made it "more difficult for one group of citizens than for all others to seek aid from the government." 517 U.S. 620, 633 (1996). "Central . . . to the . . . Constitution's guarantee of equal protection," the Court explained, "is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Id.* at 633. The Court also noted that "the disadvantage imposed [wa]s born of animosity toward the class of persons affected." *Id.* at 634. For the same reasons, the Court struck down an Alabama constitutional provision that disenfranchised persons convicted of crimes of moral turpitude in *Hunter v. Underwood*, 471 U.S. 222 (1985). As in *Romer*, (1) the provision in *Hunter* negatively impacted one group, African-Americans, more than others, *id.* at 227, and (2) historical evidence demonstrated the provision was born of "discriminatory motivation." *Id.* at 231.

As interpreted by the District Court, Article II, § 5 presents the same equal protection problems that doomed the provisions in *Romer* and *Hunter*. Treating families who choose religious schools differently than those who choose non-religious schools makes it "more difficult for one group of citizens than for all others to seek aid from the government." *Romer*, 517 U.S. at 633. This disadvantage was "born of animosity" toward Catholics and extended to religion in general, thus "compound[ing] the constitutional difficulties the

[provision] creates."[9] *Id.* at 630, 634; *see also Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968) (holding that when a law's purpose is the "inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution"). The sole basis for the District Court's exclusion of families choosing religious options was Oklahoma's Blaine Amendment. As demonstrated above, *supra* Section III, the irrefutable purpose of such Blaine language was to disadvantage Catholics and the District Court's order has the pernicious effect of expanding that disadvantage to all religions.

Should this Court entertain the District Court's interpretation, it will have to confront the federal constitutionality of state Blaine provisions. Rather than confront that thorny issue, this Court should take the jurisprudentially-prudent approach and avoid the federal equal protection problems by construing the plain language of Article II, § 5 to allow religious options in religiously neutral student-aid programs. The District Court's decision should be overturned because "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is [] a denial of equal protection of the laws in the most literal sense." *Romer*, 517 U.S. at 633.

C. Favoring Non-Religion Over Religion Violates the Establishment Clause of the First Amendment.

The District Court's interpretation of Article II, § 5 also violates the Establishment Clause. The Establishment Clause not only "prohibit[s] the government from favoring religion," it prohibits government from "discriminating *against* religion." *Bd. of Educ. v. Grumet*, 512 U.S. 687, 717 (1994) (O'Connor, J., concurring); *see also Everson*, 330 U.S. at 18 ("[T]he First Amendment . . . requires the state to be neutral in its relations with groups of

[9] A discriminatory purpose need only have been a "motivating"—not the "sole" or "primary"—factor to trigger equal protection problems. *Hunter*, 471 U.S. at 228.

religious believers and nonbelievers; it does not require the state to be their adversary."). If either "the purpose [or] the primary effect of [an] enactment . . . is . . . inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by" the Establishment Clause. *Abington Twp. v. Schempp*, 374 U.S. 203, 222 (1963). This is true whether the inhibition is of "a particular religion or . . . religion in general." *Church of the Lukumi Babalu Aye*, 508 U.S. at 532. The District Court's interpretation of Article II, § 5 creates an inhibition of religion in general, and this Court should therefore reject it.

The principle that the Establishment Clause does not permit the government to prefer religion over non-religion and conversely non-religion over religion is enshrined in the U.S. Supreme Court's *Lemon* test, taken from *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Under the second prong of that test, a program violates the Establishment Clause if its primary effect either advances or inhibits religion, and a program that allows parents to choose non-religious schools but not religious ones obviously inhibits religion. *Id.* at 612. The District Court's order violates the Establishment Clause by singling out religiously motivated decisions for disfavor—and for no other reason than that they are religious.

CONCLUSION

Understood in its proper historical context, Oklahoma's Blaine Amendment was intended to prohibit institutional aid to Catholic schools, hospitals, and orphanages. It was not intended to address student assistance programs, such as the Lindsey Nicole Henry Scholarship for Students with Disabilities program. This Court should adopt the plain and common sense reading of Article II, § 5, to allow religious options in religiously neutral public benefit programs, and overrule the *Gurney* and *Antone* precedents if necessary. Moreover, by reversing the District Court's order, this Court can avoid the serious federal constitutional concerns raised by the Blaine Amendment's disgraceful history.

Respectfully submitted this 2nd day of March, 2015.

Eddie Foraker (OBA #22564)
Stipe, Harper, Laizure, Uselton,
Belote, Maxcey & Thetford
P.O. Box 1369
McAlester, OK 74502-1369
Phone: (918) 423-0421

Richard D. Komer* (DC Bar #253146)
Institute for Justice
901 N. Glebe Rd., Ste. 900
Arlington, VA 22203
Phone: (703) 682-9320

Attorneys for Amicus Curiae Institute for Justice in Support of Defendants/Appellants

**Motion to Associate Counsel pending*

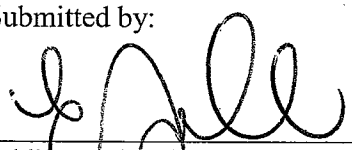
CERTIFICATE OF SERVICE

I, Eddie Foraker, certify that on March 2, 2015, a true and correct copy of Brief of Institute for Justice as Amicus Curiae in Support of Defendants/Appellants was served via U.S. mail on the following parties:

Sarah A. Greenwalt
Assistant Solicitor General
Oklahoma Office of the Attorney General
313 N.E. 21st Street
Oklahoma City, Oklahoma 73105

Frederick J. Hegenbart
Douglas J. Mann
Jerry A. Richardson
525 South Main Street
Suite 700
Tulsa, OK 74103

Submitted by:



Eddie Foraker (OBA #22564)
Stipe, Harper, Laizure, Uselton,
Belote, Maxcey & Thetford
P.O. Box 1369
McAlester, OK 74502-1369
Phone: (918) 423-0421

Richard D. Komer* (DC Bar #253146)
Institute for Justice
901 N. Glebe Rd., Ste. 900
Arlington, VA 22203
Phone: (703) 682-9320

Attorneys for Amicus Curiae Institute for Justice in Support of Defendants/Appellants

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Rule 1.301, Form No. 1

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Clarence G. Oliver; et al.,	)	
	)	
Plaintiffs/Appellees,	)	
vs.	)	No. 113267
	)	
Janet Barresi, et al.,	)	Oklahoma County
	)	Case No. CV-2013-2072
Defendants/Appellants.	)	

ENTRY OF APPEARANCE

The undersigned attorney hereby appears as counsel for: Institute for Justice, amicus curiae in the case.

Eddie Horaker (OBA #22564)
Stipe, Harper, Laizure, Uselton,
Belote, Maxcey & Thetford
P.O. Box 1369
McAlester, OK 74502-1369
Phone: (918) 423-0421

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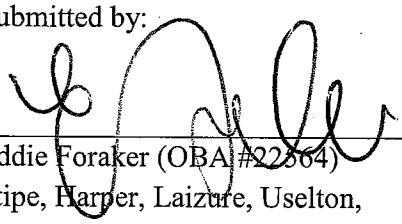
I, Eddie Foraker, certify that on March 2, 2015, a true and correct copy of Entry of Appearance was served via U.S. mail on the following parties:

Sarah A. Greenwalt
Assistant Solicitor General
Oklahoma Office of the Attorney General
313 N.E. 21st Street
Oklahoma City, Oklahoma 73105

Frederick J. Hegenbart
Douglas J. Mann
Jerry A. Richardson
525 South Main Street
Suite 700
Tulsa, OK 74103

Submitted by:



Eddie Foraker (OBA #22564)
Stipe, Harper, Laizure, Uselton,
Belote, Maxcey & Thetford
P.O. Box 1369
McAlester, OK 74502-1369
Phone: (918) 423-0421

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Clarence G. Oliver; et al.,	)	
	)	
Plaintiffs/Appellees,	)	
vs.	)	No. 113267
	)	
Janet Barresi, et al.,	)	Oklahoma County
	)	Case No. CV-2013-2072
Defendants/Appellants.	)	

MOTION TO ASSOCIATE COUNSEL

Amicus curiae Institute for Justice hereby moves the Court for an Order permitting attorney Richard D. Komer to practice in the above styled and numbered cause pursuant to the Rules Creating and Controlling the Oklahoma Bar Association, 5 O.S. Ch. 1, App. 1, Art. II. This motion is supported by the attached "Signed Applications" (Exhibit A), "Certificates of Good Standing" (Exhibit B), and the "Certificate of Compliance" from the Oklahoma Bar Association (Exhibit C).

Submitted by:

Eddie Foraker (OBA #22564)
Stipe, Harper, Laizure, Uselton,
Belote, Maxcey & Thetford
P.O. Box 1369
McAlester, OK 74502-1369
Phone: (918) 423-0421

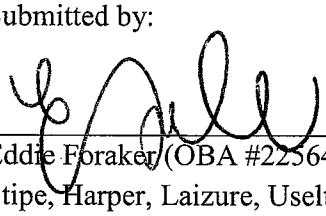
CERTIFICATE OF SERVICE

I, Eddie Foraker, certify that on March 2, 2015, a true and correct copy of Motion to Associate Counsel and supporting exhibits was served via U.S. mail on the following parties:

Sarah A. Greenwalt
Assistant Solicitor General
Oklahoma Office of the Attorney General
313 N.E. 21st Street
Oklahoma City, Oklahoma 73105

Frederick J. Hegenbart
Douglas J. Mann
Jerry A. Richardson
525 South Main Street
Suite 700
Tulsa, OK 74103

Submitted by:



Eddie Foraker (OBA #22564)
Stipe, Harper, Laizure, Uselton,
Belote, Maxcey & Thetford
P.O. Box 1369
McAlester, OK 74502-1369
Phone: (918) 423-0421

Exhibit A

APPLICATION APPROVED

OUT OF STATE ATTORNEY REGISTRATION

Richard (First Name) D (Middle Name) Komer (Last Name), Applicant, respectfully represents:

1. Applicant is an attorney at law and a member of the law firm of Institute for Justice

with its principal offices located at 901 N. Glebe Rd., Ste. 900 (Mailing Address) Arlington (City), Arlington (County), VA (State), 22203 (Zip Code), (703) 682-9320 (Telephone (Firm)), (703) 682-9320 Ext. 234 (Telephone (Applicant's Direct Dial)), (703) 682-9321 (Fax (Applicant)), rkomer@ij.org (E-mail Address (Applicant)). If Applicant's office address is different from above, please provide the following: _____ (Mailing Address) _____ (City), _____ (County), _____ (State), _____ (Zip Code),

2. Applicant is admitted to practice and is a member in good standing (certificates of good standing attached) of the bar(s) of the highest state court(s) of the following state(s):

State	Date of Admission

3. Applicant is admitted to practice before the following United States District Courts, United States Circuit Courts of Appeal, the Supreme Court of the United States, and/or other tribunals on the dates indicated for each, and is presently a member in good standing of the bars of said courts:

Tribunal	Date of Admission
District of Columbia Bar (Cert. Good Stand. attach.)	12/15/1978

U.S. Court of Appeals--4th Circuit 5/14/1997

U.S. Supreme Court 2/19/2002

4. Have you ever been suspended or disbarred in any court except as hereinafter provided (Give particulars; e.g. court, jurisdiction, date): _____

No.

5. Are you currently subject to any pending disciplinary proceedings by any organization with authority to discipline attorneys at law except as hereinafter provided (Give particulars; e.g. court, discipline authority, date, status): _____

No.

6. Have you ever received public discipline including, but not limited to, suspension or disbarment, by any organization with authority to discipline attorneys at law except as hereinafter provided (Give particulars; e.g. court, discipline authority, type of discipline, date, status):_____

No.

7. Have you ever had any certificate or privilege to appear and practice before any regulatory or administrative body suspended or revoked except as hereinafter provided (Give particulars; e.g. administrative body, date, status of suspension or reinstatement):

No.

8. Applicant seeks admission to practice in the State of Oklahoma in the following matter (give particulars; e.g. caption of case, court or agency, type of matter, party to be represented): **Note - A separate application is to be submitted for each matter in which the applicant seeks admission!**

Oliver, et al. v. Barresi, et al.

Oklahoma Supreme Court Case No. 113267 (former Oklahoma Cty. Case No. CV-2013-2072)

Civil Litigation

9. The Oklahoma Bar Association member who is counsel of record for Applicant in this matter is:

Eddie		Foraker	22564
First Name	Middle Name	Last Name	O.B.A. Number

P.O. Box 1369	McAlester	OK	74502
Mailing Address	City	State	Zip Code

(918) 423-0421	(918) 423-0266	eforaker@stipelaw.com
Telephone Number	Fax Number	E-mail Address

10. The following accurately represents the names of each party in this matter and the names and addresses of each counsel of record who appear for that party:

Party Name	Counsel Name	Address of Counsel
Clarence G. Oliver, et al.	Frederick J. Hegenbart	525 South Main Street
	Douglas J. Mann	Suite 700
	Jerry A. Richardson	Tulsa, OK 74103
Janet Barresi, et al.	Sarah A. Greenwalt, Asst. Solicitor General	
		313 NE 21st St.
		Oklahoma City, OK 73105

11. Applicant certifies that he/she shall be subject to the jurisdiction of the courts and disciplinary boards of this state with respect to the laws of this state governing the conduct of attorneys to the same extent as a member of the Oklahoma Bar Association.

12. Applicant understands and shall comply with the standards of professional conduct required of members of the Oklahoma Bar Association.

13. Applicant has disclosed in writing to the client that the Applicant is not admitted to practice in this jurisdiction and the client has consented to such representation.

I, Richard D. Komer, do hereby swear/affirm under penalty of perjury that the assertions of this application are true:

I am the Applicant in the above referenced matter; I have read the foregoing and know the contents thereof; the same is true of my own knowledge except as to those matters therein stated on information and belief, and as to those matters I believe them to be true.

I further certify that I am subject to the jurisdiction of the Courts and disciplinary boards of this state with respect to the law of this state governing the conduct of attorneys to the same extent as a member of the Oklahoma Bar Association; I understand and shall comply with the standards of professional conduct required by members of the Oklahoma Bar Association; and that I am subject to the disciplinary jurisdiction of the Oklahoma Bar Association with respect to any of my actions occurring in the course of such appearance.

DATED this 25th day of February, 2015.

s/Richard D. Komer
Applicant

Mail with check or money order (payable to the OBA) to:

Out-of-State Attorney Registration
Oklahoma Bar Association
P.O. Box 53036
Oklahoma City, OK 73152-3036

Form 200B

Exhibit B

District of Columbia Court of Appeals
Committee on Admissions
430 E Street, N.W. — Room 123
Washington, D. C. 20001
202 / 879-2710

I, JULIO A. CASTILLO, Clerk of the District of Columbia Court of Appeals, do hereby certify that

RICHARD D. KOMER

was on ***DECEMBER 15, 1978*** *duly qualified and admitted as an attorney and counselor. This attorney is, on the date indicated below, voluntarily registered as an inactive member in good standing of the District of Columbia Bar and, therefore, is not currently eligible to practice law in the District of Columbia.*

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of this Court at the City of Washington, D.C., on FEBRUARY 24, 2015.

JULIO A. CASTILLO
Clerk of the Court

By: P. Fagan
Deputy Clerk

Exhibit C

Certificate of Compliance

Oklahoma Bar Association
1901 North Lincoln Boulevard
Post Office Box 53036
Oklahoma City, Oklahoma 73152-3036

The Oklahoma Bar Association, in response to the application of out-of-state attorney, submits the following certificate pursuant to 5 O.S. Ch.1 App.1, Art. II

1. Applicant has submitted a signed application of out-of-state attorneys, certificate(s) of good standing, and the non-refundable application fee pursuant to the Rules Creating and Controlling the Oklahoma Bar Association, 5 O.S. Ch. 1, App. 1, Art. II.

2. Date of Application: **February 27, 2015**

3. Application Number: **2015-72**

4. Applying Attorney: **Richard D. Komer**
   Institute for Justice
   901 N. Glebe Rd., Ste. 900
   Arlington, VA 22203

5. The Application was: **GRANTED**

Dated this **27th** day of **February**, 20**15**.

Gina L. Hendryx, General Counsel
Oklahoma Bar Association

Form 400C