IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

CLARENCE G. OLIVER, JR., EARLY GARRISON, AMY VARGUS, DAVID PENNINGTON, RAY HICKMAN, KIRBY A. LEHMAN, STACY L. ACORD, ROBERT M. PETERS, RANDALL K. RABURN, MELISSA ABDO, TIM GREEN and GORDON R. MELSON,

PLAINTIFFS/APPELLEES

VS.

JOY HOFMEISTER, IN HER OFFICIAL CAPACITY AS STATE SUPERINTENDENT OF PUBLIC INSTRUCTION, THE OKLAHOMA STATE DEPARTMENT OF EDUCATION and THE OKLAHOMA STATE BOARD OF EDUCATION,

DEFENDANT/APPELLANTS.

SUPREME COURT NO. 113267

APPELLANTS' BRIEF ON THE MERITS

PATRICK R. WYRICK, OBA#21874
Solicitor General
SARAH A. GREENWALT, OBA#31566
Assistant Solicitor General
Oklahoma Attorney General's Office
313 NE 21st Street
Oklahoma City, OK 73105
Telephone: (405) 521-1961
Facsimile: (405) 522-0608
Email: sarah.greenwalt@oag.ok.gov

Attorneys for Appellants

FEBRUARY 27, 2015

TABLE OF CONTENTS

Introduction 1

I. The Lindsey Nicole Henry Act 1

II. The Litigation 2

Summary of the Argument 3

Arguments and Authorities 6

I. The district court's novel interpretation of Article 2, Section 5 places the validity of that constitutional provision in question—a clear violation of the court's duty to avoid constitutional doubt when possible. 6

II. The district court disregarded a long line of cases from this Court holding that Article 2, Section 5 does not prohibit government expenditures that are made for a valid public purpose and in exchange for consideration—even if made at a sectarian business or organization. 10

III. The district court's novel interpretation of Article 2, Section 5 calls into question a host of longstanding—and highly successful—state programs. 15

Conclusion 18

TABLE OF AUTHORITIES

Cases

Board of Education for Independent School District 52 v. Antone,
1963 OK 165, 384 P.2d 911 ..... 12, 13, 14

Burkhardt v. City of Enid
1989 OK 45, 771 P.2d 608 ..... 11, 12

Children's Home and Welfare Association v. Childers,
1946 OK 180, 171 P.2d 613 ..... 12, 13

Colo. Christian Univ. v. Baker,
No. 04-02512, 2007 WL 1489801 (D. Colo. May 18, 2007) 7

Colo. Christian v. Weaver,
534 F.3d 1245 (10th Cir. 2008) ..... passim

Gurney v. Ferguson,
1941 OK 397, 122 P.2d 100 ..... 12, 13, 14

Indep. Sch. Dist. No. 5 of Tulsa Cnty v. Spry,
2012 OK 98, 292 P.3d 19 2

Locke v. Davey,
540 U.S. 712 (2004) 7, 8

Mitchell v. Helms,
530 U.S. 793 (2000) 8, 9

Murrow Indian Orphans Home v. Childers
1946 OK 187, 171 P.2d 600 ..... 12, 13

Sharp v. City of Guthrie,
1915 OK 768, 152 P. 403 ..... 11, 12

Statutes

57 O.S.Supp.2007, § 521.1 17

70 O.S.2011 & Supp.2013, §§ 2601-2605 15

70 O.S.Supp.2013, § 3953.1 16

OKLA. CONST. art. II § 5 ..... passim

APPELLANTS' BRIEF ON THE MERITS

Appellants, Defendants Joy Hofmeister, in her official capacity as State Superintendent of Public Instruction, the Oklahoma State Department of Education, and the Oklahoma State Board of Education, submit the following brief on the merits.

Introduction

I. The Lindsey Nicole Henry Act

The Lindsey Nicole Henry Scholarship Act ("the Act") was enacted in 2010 with broad-based, bipartisan support. The Act allows parents of children with disabilities to receive scholarship moneys from the State Department of Education that parents can then use to send their child to one of over four-dozen participating private K-12 schools. Some of the participating schools are affiliated in varying degrees with a church or religious organization, while others are not.

The idea behind the program is that children with disabilities have unique and special needs, and thus there is a particular need for school choice with regard to this class of children. The State does not presume that it is best-situated to make this choice for a parent of a child with such unique and special needs; the Act thus leaves that choice to the parents, and provides them with the financial wherewithal to do so.

The amount of each scholarship is determined by looking at the amount that the Department of Education would have paid to the public school district attended by the child, were the child to attend that school. The Department of Education simply makes that amount—or the amount of the tuition, whichever is lower—available to the parents to apply towards tuition at the school of their choice. In other words, the Department of Education is no worse off financially as a result of the scholarship program, and is in

some respects better off. For example, when a parent elects to receive scholarship moneys, the cost to the State for the child remains the same as it was prior to that election, and may even decrease in some instances. But in every instance, the State is relieved of the burden of providing the child with an education, and is relieved of the various liabilities and federal law burdens that attach when providing that education. So too for the school districts, many of which have for years complained that the costs of providing an education to children with disabilities exceeds the amount the district receives from the Department of Education. The Act relieves the school districts of the burdens of these uncompensated costs.

II. The Litigation

In 2011 several school districts challenged the validity of the Act, arguing that it violated a host of state constitutional provisions. *See Indep. Sch. Dist. No. 5 of Tulsa Cnty v. Spry*, 2012 OK 98, 292 P.3d 19. The primary thrust of the 2011 suit was that it violated Article 2, Section 5 of the Oklahoma Constitution, which prohibits state funds from being appropriated for "the use, benefit, or support of any . . . sectarian institution as such." OKLA. CONST. art. II, § 5. This Court ultimately upheld the scholarship program based on the school districts' lack of standing to challenge the Act. The merits of the Article 2, Section 5 question were thus left undecided.

Unfazed, individual (former) administrators from those school districts, along with other individuals, sued again raising the same claims. The district court readily disposed of all but the Article 2, Section 5 claim. With regard to that claim, the district court held that the Act's scholarships may be applied toward tuition at non-sectarian schools and at religiously-affiliated schools, but not at sectarian schools. *See* Journal Entry of J., App. 12

at 2. The district court reasoned that the difference between a "religiously-affiliated" school and a "sectarian" school was like the difference between Southern Methodist University and the University of Notre Dame. *See* Tr. of Proceedings, App. 11 at 24-25. At Southern Methodist University, the district court said, the church was "involved and . . . on the board of trustees," and the school's teachings were certainly "influenced by the teachings and principles of the United Methodist Church," but that the school was really "Methodist in name only," and thus merely "religiously affiliated." *Id.* at 25. Notre Dame, on the other hand, had a president who "is a priest" and was "a Catholic institution through and through," and thus "sectarian." *Id.* at 25.

As a result of the district court's decision, the Department of Education, which administers the scholarship program, must now make this sort of "religiously affiliated v. sectarian" determination for each of the fifty-one schools that participate in the scholarship program. For those that the Department of Education determines to be "sectarian," the Department of Education will have to inform those schools that they are no longer welcome to participate in the program.

Summary of the Argument

I. The district court decision should be reversed because its novel construction of Article 2, Section 5 places that section at risk of invalidation under the federal constitution. Specifically, by holding that Article 2, Section 5 allowed state dollars to flow to "religiously-affiliated" organizations but not "sectarian" institutions, the district court required the State Department of Education to engage in the very sort of practices condemned by the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit") in a similar context as prohibited by the federal Free Exercise and Establishment Clauses.

In 2008, the Tenth Circuit examined a Colorado program that provided state-funded scholarships to certain Colorado students to attend that state's colleges and universities. *See Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1250 (10th Cir. 2008). The program allowed the scholarships to be used at some sectarian schools, but barred their use at institutions that were "pervasively sectarian." *Id.* As a result of that requirement, the Colorado agency in charge of the scholarship program was forced to review each school's curriculum to determine whether the courses "tend[ed] to indoctrinate or proselytize." *Id.* at 1253. The Tenth Circuit held that the program constituted "discrimination 'on the basis of religious views or religious status,'" *id.* at 1258, was "fraught with entanglement problems," *id.* at 1261, was "subject to heightened constitutional scrutiny," *id.* at 1258, and was plainly in violation of the federal Free Exercise and Establishment Clauses, *id.* at 1250.

The district court's decision below requires Department of Education officials to do precisely what the Tenth Circuit has said they cannot do as a matter of federal constitutional law. As a result, that decision has put the validity of Article 2, Section 5 of the Oklahoma Constitution in doubt—and needlessly so, because Article 2, Section 5 has *never* been construed as barring a State program that has a public purpose and from which the State receives consideration. For this reason and others, the decision should be reversed.

II. The constitutional doubt invited by the district court's decision would have been avoided had it simply applied this Court's longstanding Article 2, Section 5 test, which deems an expenditure permissible if (1) the expenditure has a valid public purpose, and (2) the State receives consideration in exchange for that expenditure. Indeed, the

district court had little trouble concluding that the Act met both of these criteria. But instead of applying the public-purpose-plus-consideration test to the Act, the district court crafted a novel test that strictly prohibits state dollars from flowing to sectarian K-12 schools at any time, for any purpose. Had the district court applied the proper test, its findings with regard to the existence of a valid public purpose and adequate consideration mandated that it find the scholarships valid, even when used at "sectarian" schools. For this reason, too, the district court decision should be reversed.

III. Lastly, the district court's decision should be reversed because it is contrary to longstanding public policy and practices in this State. Indeed, a number of State programs utilize "sectarian" organizations to provide non-sectarian public benefit to the State. For example, the long-running and enormously popular Oklahoma's Promise college scholarship program, which provides scholarships to Oklahoma students with financial need, allows scholarship recipients to attend an Oklahoma college or university of their choice, including sectarian institutions such as Oral Roberts University. Likewise, through the Office of Faith-Based and Community Initiatives, state funds administered by the Department of Human Services flow to a variety of religious institutions. And through SoonerCare (Oklahoma's Medicaid program), the State of Oklahoma spends over $1 billion annually providing health benefit packages to over a million qualifying Oklahomans. These dollars are spent at authorized providers throughout the state, a host of which are religiously-affiliated and potentially "sectarian" entities. The novel Article 2, Section 5 test adopted by the district court, if applied to these critically important programs, would potentially invalidate them all. For this reason too, the district court's decision should be reversed.

Arguments and Authorities

I. The district court's novel interpretation of Article 2, Section 5 places the validity of that constitutional provision in question—a clear violation of the court's duty to avoid constitutional doubt when possible.

The district court's decision should be reversed because it violates the basic principle that courts should avoid needlessly placing the constitutional validity of laws into doubt. Specifically, by holding that Article 2, Section 5 allowed state dollars to flow to "religiously-affiliated" institutions but not "sectarian" institutions, the district court required the State Department of Education to engage in the very sort of practices condemned by the Tenth Circuit as prohibited by the federal Free Exercise and Establishment Clauses.

In 2008, the Tenth Circuit examined a Colorado program whereby the State of Colorado provided scholarships to eligible students who attend any accredited college in the state—public or private, secular or religious—other than those the state deems "pervasively sectarian." *Colo. Christian,* 534 F.3d at 1250. To determine whether a school is "pervasively sectarian," state officials were directed to examine, among other things, whether the policies enacted by school trustees adhere too closely to religious doctrine, whether all students and faculty share a single "religious persuasion," and whether the contents of college theology courses tend to "indoctrinate." *Id.* at 1251. State officials used these criteria to extend scholarships to students attending a Methodist university and a Roman Catholic university run by the Jesuit order while denying scholarships to otherwise eligible students attending a non-denominational evangelical Protestant university and a Buddhist university. *Id.* at 1250.

One of the schools who was denied participation based on its "pervasively sectarian" nature challenged the program, contending that excluding its students solely on the basis of that school's religiosity violated the First and Fourteenth Amendments. *Id.* Colorado argued that the United States Supreme Court decision in *Locke v. Davey*, 540 U.S. 712 (2004), controlled the case and mandated a ruling in their favor. Relying in part on *Locke,* the Colorado district court granted summary judgment in favor of Colorado. *See Colo. Christian Univ. v. Baker*, No. 04-02512, 2007 WL 1489801, at *5, 15 (D. Colo. May 18, 2007). The Tenth Circuit reversed, distinguishing *Locke* and finding that the Colorado program's exclusion of "pervasively sectarian" institutions was unconstitutional for two reasons: first, because the program required state agencies to discriminate between schools based on their religiosity; and second, because its criteria for denying participation to pervasively sectarian schools involved an "unconstitutionally intrusive scrutiny of religious belief and practice." *Colo. Christian*, 534 F.3d at 1250.

The Tenth Circuit began its analysis by distinguishing the case relied on by both the State defendants and the district court—*Locke v. Davey*. It did so by reasoning that while the Supreme Court held in *Locke* that a state may exclude students training to become members of the clergy from receiving college scholarships they would otherwise qualify for, 540 U.S. at 722 n. 5, the program in *Locke* did not require discrimination based on *how religious* a school program was. As the Tenth Circuit described it:

> [b]y giving scholarship money to students who attend sectarian—but not "pervasively" sectarian—universities, Colorado necessarily and explicitly discriminates among religious institutions, extending scholarships to students at some religious institutions, but not those deemed too thoroughly "sectarian" by government officials.

Colo. Christian, 534 F.3d at 1258. That is, the program at issue in *Locke* did not discriminate based on religiosity. And because the *Locke* program did not discriminate based on religiosity, the State in *Locke* was not then forced to review each school's curriculum to determine whether the courses "tend[ed] to indoctrinate or proselytize" as the Colorado program required state officials to do. *Id.* at 1253; *see id.* at 1259 ("Here, the discrimination is expressly based on the degree of religiosity of the institution and the extent to which that religiosity affects is operations, as defined by . . . the content of its curriculum and the religious composition of its governing board.").

Having distinguished *Locke*, the Circuit court concluded that the idea that "pervasively sectarian" institutions could not receive otherwise-available education funding was a "now-discarded doctrine" that collided with the Supreme Court's decisions prohibiting governments from discriminating in the distribution of public benefits based upon religious status or sincerity. *Id.* (citing *Mitchell v. Helms*, 530 U.S. 793, 828 (2000)). The Court held that because "[t]he sole function and purpose of the challenged provisions . . . is to exclude some but not all religious institutions on the basis of the stated criteria," *id.* at 1258, the Colorado program was therefore subject to a heightened constitutional scrutiny that it could not overcome, *id.* at 1266.

The district court's reading of Article 2, Section 5 requires the same result reached in *Colorado Christian*. Just as the program at issue in that case required discrimination "based on the degree of religiosity of the institution and the extent to which that religiosity affects its operations," so too does the district court's interpretation of Article 2, Section 5 require discrimination based on religiosity. This is so because that interpretation of Article 2, Section 5 would mean that some schools the State identifies as

merely "religiously affiliated" would be allowed to participate in this program, but those that cross the line and are "too religious" would be defined as sectarian and would therefore not be allowed to participate. The First Amendment of the federal constitution precludes such a discriminatory reading of Article 2, Section 5.

Further, forcing the Oklahoma State Department of Education to evaluate each school to determine whether they are a "sectarian institution" or merely "religiously affiliated" would require an in-depth and intrusive inquiry into the religious belief and practice of these private schools identical to the inquiry invalidated in *Colorado Christian*. Quoting Supreme Court language, the Tenth Circuit in *Colorado Christian* reiterated that "[t]he inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive. It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs." *Colo. Christian*, 534 F.3d at 1261 (quoting *Mitchell v. Helms*, 530 U.S. 793, 828 (2000)). Based on *Mitchell* and other Supreme Court decisions, the Tenth Circuit found that an Act requiring state officials to so intrusively evaluate the religiosity of each school wishing to participate was "fraught with entanglement problems." *Id.*

The district court's reading of Article 2, Section 5 requires the State Department of Education to scrutinize the curriculum, organization, and manifestation of religious belief for each and every school that wishes to participate in the scholarship program. The result of such an interpretation presents precisely the type of "entanglement problem" that the Tenth Circuit condemned.

The First Amendment and Equal Protection Clause of the United States Constitution prohibit governments from discriminating against religious institutions based on their religiosity. *See Colo. Christian*, 534 F.3d 1245. Reading Article 2, Section 5 to require discrimination based on religiosity would needlessly call into question the validity of Article 2, Section 5 itself under the First Amendment of the federal constitution. Consistent with the principle of constitutional avoidance, this Court should decline to accept such an interpretation.

II. The district court disregarded a long line of cases from this Court holding that Article 2, Section 5 does not prohibit government expenditures that are made for a valid public purpose and in exchange for consideration—even if made at a sectarian business or organization.

The constitutional doubt invited by the district court's decision would have been avoided altogether had the district court simply applied the public-purpose-plus-consideration test that this Court has always applied in the context of Article 2, Section 5. Instead, the district court explicitly rejected that test: "this Court, one that believes in and indeed exercises judicial restraint, will not give an expanded meaning to the Constitution by applying the public-purpose test to this set of facts." Tr. of Proceedings, App. 11 at 39. In other words, the district court, in the name of judicial modesty, actually did something quite immodest and disregarded the Article 2, Section 5 test that has been the touchstone of each and every one of this Court's significant Article 2, Section 5 decisions. *See* A.G. Opin. No. 08-10 ("Although the language of Article II, Section 5 of Oklahoma's Constitution would appear to prohibit payment of public funds to a sectarian institution, such is not the case. The Oklahoma Supreme Court has found payments to a sectarian institution for a public purpose and for adequate consideration does not violate Article II, Section 5.").

The district court attempted to justify this departure by concluding that the public-purpose-plus-consideration test was inappropriate in the context of K-12 schools. In the district court's view, Article 2, Section 5 prohibits state dollars from flowing to sectarian K-12 schools at any time, for any reason. This conclusion is not supported by any of this Court's cases, including those involving K-12 schools.

Burkhardt v. City of Enid is this Court's most recent Article 2, Section 5 decision. 1989 OK 45, 771 P.2d 608. In *Burkhardt*, the Court examined a claim that use of tax dollars to fund the City of Enid's purchase of the Phillips University campus constituted an impermissible transfer of state funds to a sectarian institution. *Id.* at ¶ 1. The Court rejected that claim for two reasons. First, the Court concluded that while Phillips University had some level of religious-affiliation, it was not a "sectarian institution" within the meaning of Article 2, Section 5. *Id.* at ¶ 15. Second, and of relevance here, the Court concluded that even if Phillips University *were* a sectarian institution, the use of tax dollars was permissible because "the public benefits to the City of Enid and the obligations assumed by Phillips provide sufficient consideration to validate the instant transaction." *Id.* at ¶ 16.

Burkhardt was therefore an affirmation of the longstanding principle that use of state dollars at sectarian institutions—even schools—is permissible so long as the expenditure accomplishes a public purpose and the state receives consideration in return. The *Burkhardt* Court in fact relied upon a 1915 case, *Sharp v. City of Guthrie*, 1915 OK 768, 152 P. 403, as first establishing this principle. In *Sharp*, the Court upheld a conveyance of property to a sectarian institution that was to be used as a university:

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

Sharp, 1915 OK 768, ¶ 30. As the *Burkhardt* Court put it, the use of state dollars at issue in *Sharp* were "for a public purpose" and "the value of a university to the city and the obligations and responsibilities assumed by the institution were sufficient consideration to uphold the conveyance." *Burkhardt*, 1989 OK 45, ¶ 16.

Bookended between *Sharp* and *Burkhardt* are nearly a century's worth of cases consistently applying the public-purpose-plus-consideration test, even in the context of K-12 schools. Of particular importance to the district court were three mid-century cases: *Gurney v. Ferguson*, 1941 OK 397, 122 P.2d 100; *Children's Home and Welfare Association v. Childers*, 1946 OK 180, 171 P.2d 613; and *Board of Education for Independent School District 52 v. Antone*, 1963 OK 165, 384 P.2d 911.

In *Gurney*, this Court considered a statute requiring public school boards to provide transportation for children attending parochial schools. 1941 OK 397, ¶ 2. This Court struck down the statute, reasoning that it was for the benefit of the parochial schools rather than the benefit of children generally and was in direct aid to parochial schools "as such," *id.* at ¶¶ 9, 12. In striking down the statute, this Court employed the same public-purpose-plus-consideration test it had been since its decision in *Sharp*. The statute in *Gurney* was impermissible not because state aid was flowing to a parochial school, but because it was aiding the parochial schools in their role as a sectarian institution. In other words, had the State received consideration in return for providing busing services to the parochial schools, it would not have been aiding the schools "as such," and would have been a permissible allocation of state funds.

This becomes especially clear when we look at the language this Court used just 5 years later in *Murrow Indian Orphans Home v. Childers*, describing its *Gurney* decision. In *Murrow*, this Court described the *Gurney* opinion in this way: "[a]nalysis of the problem

presented in the Gurney case shows that public money was being spent to furnish a service to a parochial school *for which no corresponding value was received.*" 1946 OK 187, ¶ 5, 171 P.2d 600 (*emphasis added*). It is therefore clear that the statute at issue in *Gurney* was not invalidated because state money was flowing to a K-12 private school as the district court below suggested, but because state money was flowing to a K-12 private school *absent consideration*. Therefore where, as here, state funds flow to a sectarian institution and those funds are in furtherance of a public purpose and in exchange for adequate consideration, there is no violation of Article 2, Section 5.

Likewise, in *Children's Home and Welfare Association v. Childers*, decided the same day as *Murrow Indian Orphans Home*—this Court considered whether payments to residential children's homes for the care of orphans and dependent children pursuant to contracts with the State Board of Affairs violated Article 2, Section 5 1946 OK 180, ¶ 1. Consistent with its opinions before, this Court found that such payments did not violate Article 2, Section 5 because the payments were for a public purpose and the State received adequate consideration for those payments in the form of the care of needy children, which the State had a duty to provide. *Id.* at ¶ 5.

This Court was again presented with the issue of providing public busing for private schools in *Board of Education for Independent School District No. 52 v. Antone*. 1963 OK 165, 384 P.2d 911. While the issue presented to the Court in *Antone* was identical to the issue in *Gurney*, the defendants in that case proposed new arguments in support of the state aid. These new arguments focused on the fact that providing transportation for children attending private schools is in furtherance of many public purposes beyond those listed in *Gurney*, and that "whether the purpose is the general

welfare of the community" should be the relevant inquiry instead of whether the aid benefits the sectarian school as such. *Id.* at ¶ 10. The defendants also pointed to an intervening United States Supreme Court case upholding a similar program under the First Amendment. *Id.* at ¶ 4. This Court held that pointing to additional public purposes did not distinguish the case from *Gurney*, and correctly so, because like in *Gurney*, the second part of the public-purpose-plus-consideration test was not satisfied—there simply was no consideration received by the State. *See id.* at ¶ 12 (reiterating that the cost and maintenance of providing school buses to the private schools directly aided those schools, and not the State).

In both *Gurney* and *Antone*, the State did not receive anything in return for its expenditure; rather, the funds directly benefited the schools. Put another way, but for the statute authorizing the providing of the busing service to the private schools, those schools would have been forced to dip into their own pockets to provide that service to their students. That is why this Court held that those busing statutes were to the benefit the sectarian schools as such. But here, in the absence of the Act, there is no obligation that the private school must step in and fill out of its own pocket; the private schools are out nothing because the loss of the tuition is accompanied by loss of a student. Thus, as a matter of logic and reason, it is impossible to analogize this Act to the busing statutes at issue in *Gurney* and *Antone*.[1]

[1] To make such an analogy would be akin to arguing that the State's providing of WIC vouchers to low income Oklahomans is actually a benefit to the grocery stores where those vouchers are used, rather than a benefit to the individual recipient. Sure, if the State were picking up the shipping cost for deliveries of shipments of food to the store, then there would be a benefit to the store, and the *Gurney* and *Antone* cases would be analogous. But that is not the case here.

Each of these cases demonstrates that the analysis of a state-aid program under Article 2, Section 5 begins and ends with the public-purpose-plus-consideration analysis. A program or expenditure will therefore survive an Article 2, Section 5 challenge if the state moneys are given in furtherance of a public purpose *and* the State receives adequate consideration for the aid or expenditure. Because the district court below found that the Act had a valid public purpose and that the State received consideration in exchange for the funds it expended, this Court's precedents mandated that it find the scholarship program valid under Article 2, Section 5, even when those scholarships are used at "sectarian" schools. For this reason alone, the district court decision should be reversed.

III. The district court's novel interpretation of Article 2, Section 5 calls into question a host of longstanding—and highly successful—state programs.

Lastly, the district court's decision should be reversed because it is contrary to longstanding practices and policies of this State. Indeed, a number of State programs utilize "sectarian" organizations to provide non-sectarian public benefit to the State.

For example, the long-running and enormously popular Oklahoma's Promise college scholarship program, which provides scholarships to Oklahoma students with financial need, allows scholarship recipients to attend an Oklahoma college or university of their choice, including sectarian institutions such as Oral Roberts University. The program has been in effect since 1992, when the Oklahoma Legislature passed the "Oklahoma Higher Learning Access Act." 70 O.S.2011 & Supp.2013, §§ 2601-2605. Subject to the availability of funds, the program guarantees that those students who meet the eligibility criteria will be awarded tuition assistance. *Id.* In the two-decades-plus since its creation, the program has awarded tuition assistance to thousands of Oklahoma students, allowing those students to achieve their dream of receiving a college education. The tuition assistance paid

by Oklahoma's Promise comes from the Oklahoma Higher Learning Access Trust Fund. 70 O.S.Supp.2013, § 3953.1. This year, an anticipated $61 million in state funds will be paid to fund Oklahoma's Promise scholarships. *See* 2013-14 Year End Report, 1 (Jan. 29, 2015) (available at http://www.okhighered.org/okpromise/pdf/okp-report-13-14.pdf).

Oklahoma's Promise works much like the scholarship program at issue here. Through Oklahoma's Promise, the State will pay a student's tuition at an Oklahoma public two-year college or four-year university, and will pay at least a portion of the tuition at an Oklahoma accredited private college or university. *See* Okla. State Regents for Higher Educ., *Scholarship Benefits* (Feb. 23, 2015), http://www.okhighered.org/okpromise/benefits.shtml. This scholarship program is available to students whose parents' incomes do not exceed $50,000 per year, who are Oklahoma residents, and who are either enrolled in the 8th, 9th, or 10th grades, or are homeschooled and are between the ages of 13 and 15. *See* Okla. State Regents for Higher Educ., *Application/enrollment Requirements* (Feb. 23, 2015), http://www.okhighered.org/okpromise/application-requirements.shtml. In exchange for the funds expended the student must, among other things, take certain high school courses; meet certain GPA requirements, scholastic requirements, and behavioral requirements; and must engage with their teachers, counselors, or principals. *See* Okla. State Regents for Higher Educ., *Student Requirements* (Feb. 23, 2015), http://www.okhighered.org/okpromise/student-requirements.shtml.

Likewise, through the Office of Faith-Based and Community Initiatives, state funds administered by the Department of Human Services flow to a variety of religious institutions. The Office was created in 2007, when the Oklahoma Legislature enacted a

new section of law to be known as the Transformational Justice Act. 2007 Okla. Sess. Laws ch. 274, § 1.1. In the Act, the Legislature created the Reentry Policy Council "for the purpose of providing oversight of the reentry policies and programs operated by the Department of Corrections." 57 O.S.Supp.2007, § 521.1(A). The Reentry Policy Council is charged with reviewing policies and procedures, identifying gaps in reentry programs and services, recommending changes, and reporting to the Legislature and the Governor. *Id.* § 521.1(B). The Transformational Justice Act creates in the State Treasury a revolving fund designated the Reintegration of Inmates Revolving Fund ("Fund"). *Id.* § 521.2(D). The Fund consists of appropriated dollars to be used for "grants to volunteer organizations including, but not limited to, faith-based organizations which provide health, educational or vocational training and programs that assist the reintegration efforts of the Reentry Policy Council." 2007 Okla. Sess. Laws ch. 234, § 7. The Act further provides that monies in the Fund are to be budgeted and expended by the Office of Faith-Based Initiatives. *Id.*

And finally, through SoonerCare (Oklahoma's Medicaid program), the State of Oklahoma spends over $1 billion annually providing health benefit packages to over 1 million qualifying Oklahomans. *See* Okla. Healthcare Authority, *Annual Report 2014*, available here http://www.okhca.org/research.aspx?id=84. These dollars are spent at authorized providers throughout the state—a host of which are religiously-affiliated and potentially "sectarian." For example, St. Anthony Heritage Family Medicine is a recognized SoonerCare provider whose mission is to "reveal the healing presence of God"

through "exceptional health care services." *See* St. Anthony Physicians Group, *Mission* (Feb. 25, 2015), available at http://www.saintsmedicalgroup.com/About/pages/mission.aspx.[2]

The novel Article 2, Section 5 test adopted by the district court, if applied to these critically important programs, would potentially invalidate them all. For this reason, too, the district court's decision should be reversed.

Conclusion

For these reasons, the judgment of the district court should be reversed.

Respectfully submitted,

Sarah Greenwalt
SARAH A. GREENWALT, OBA#31566
Assistant Solicitor General
Oklahoma Attorney General's Office
313 NE 21st Street
Oklahoma City, OK 73105
Telephone: (405) 521-4448
Facsimile: (405) 521-4518
Email: sarah.greenwalt@oag.ok.gov

Attorneys for Appellants

[2] The most recent list of SoonerCare providers (updated February 23, 2015) can be found here: https://www.okhca.org/client/pdf/providers.pdf.

CERTIFICATE OF MAILING

I hereby certify that on this 27th day of February, 2015, a true and correct copy of the attached document was sent via U.S. mail, postage prepaid to:

J. Douglas Mann, OBA #5663
Jerry A. Richardson, OBA #10455
Frederick J. Hegenbart, OBA #10846
525 S. Main, Suite 700
Tulsa, Oklahoma 74103
Telephone: (918) 585-9211
Facsimile: (918) 583- 5617
Email: dougm@rfrlaw.com
jerryr@rfrlaw.com
fredh@rfrlaw.com

ATTORNEYS FOR APPELLEES

Andrew W. Lester, OBA No. 5388
Carrie L. Vaughn, OBA No. 21866
Hossein Farzaneh, OBA No. 30549
LESTER LOVING & DAVIES, P.C.
1701 South Kelly Avenue
Edmond, OK 73013-3623
Telephone: (405) 844-9900
Facsimile: (405) 844-9958
Email: alester@lldlaw.com
Email: cvaughn@lldlaw.com
Email: hfarzaneh@lldlaw.com

AND

Eric S. Baxter
Eric C. Rassbach
Asma T. Uddin
The Becket Fund for Religious Liberty
1200 New Hampshire Avenue, Suite 700
Washington, D.C. 20036
Telephone: (202) 955-0095
Facsimile: (202) 955-0090

COUNSEL FOR PROPOSED AMICI, THE BECKET FUND FOR RELIGIOUS LIBERTY, STEPHANIE SPRY, RUSSELL SPRY, TIM TYLICKI, KIMBERLY TYLICKI, STEFAN HIPSKING, SHANNA SNEED, JERRY SNEED, JANE JOHNSON, CURTIS JOHNSON, AND GERALD BUCKLEY

Sarah Greenwalt

SARAH A. GREENWALT