No. 113,267
IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Clarence G. Oliver, Jr., et al.,

Plaintiffs/Appellees,

v.

Joy Hofmeister,
in her official capacity as State Superintendent of Public Instruction, et al.,

Defendant/Appellants.

Brief of *Amici Curiae* Americans United for Separation of Church and State, American Civil Liberties Union, ACLU of Oklahoma, Baptist Joint Committee for Religious Liberty, and The Interfaith Alliance Foundation In Support of Appellees

Appeal from the District Court of Oklahoma County, Case No. CV-2013-2072
The Honorable Bernard M. Jones
Nature of Action: Declaratory Judgment and Injunctive Relief

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Interests of *Amici Curiae*

Amici are nonprofit, public-interest organizations. They have longstanding concerns about voucher programs that divert taxpayer funds from public schools—which strive to educate all students, whatever their religious beliefs—to religious schools which use public dollars for religious indoctrination, are barely accountable to the state, and often discriminate in selecting both students and employees.

Americans United for Separation of Church and State is a national, nonsectarian organization based in Washington, D.C. Its mission is to protect the right of individuals and religious communities to worship as they see fit, and to preserve the separation of church and state as a vital component of democratic government. Americans United has more than 120,000 members and supporters across the country.

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization with over 500,000 members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The ACLU of Oklahoma is a statewide affiliate of the national ACLU. The ACLU has long been committed to both preserving the freedom of religion and opposing discrimination, including discrimination based on religion.

The Baptist Joint Committee for Religious Liberty (BJC) is a 79-year-old education and advocacy organization that serves fifteen cooperating Baptist conventions and conferences in the United States, with supporting congregations throughout the nation. BJC deals exclusively with religious liberty and church-state

separation issues and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to religious liberty for all Americans.

The Interfaith Alliance Foundation is a 501(c)(3) non-profit organization that celebrates religious freedom by championing individual rights, promoting policies that protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, Interfaith Alliance's members across the country belong to 75 different faith traditions as well as no faith tradition. Interfaith Alliance supports people who believe their religious freedoms have been violated, as a vital part of its work promoting and protecting a pluralistic democracy and advocating for the proper boundaries between religion and government.

In recent years, *amici* have participated in numerous cases addressing the constitutionality of school-voucher programs, including cases involving state constitutional provisions similar to those in the Oklahoma Constitution. *See, e.g.*, *Richardson v. North Carolina*, No. 384A14 (N.C. 2015) (Americans United, ACLU, BJC, and Interfaith Alliance as *amici*); *Hart v. North Carolina*, No. 372A14 (N.C. 2015) (same); *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009) (ACLU as plaintiff; Americans United as *amicus*); *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006) (Americans United and ACLU as co-counsel); *Owens v. Colo. Cong. of Parents, Teachers & Students*, 92 P.3d 933 (Colo. 2004) (Americans United as counsel).

Summary of Argument

Defendants and their *amici* ask the Court to uphold a voucher program using taxpayer money to pay for private religious education at private religious schools.

The Oklahoma Constitution, however, broadly prohibits the use of public money to fund religious institutions. Its No Aid Clause bars efforts to fund religious entities "directly or indirectly," and thus leaves no room for government funding of religious schooling.

In enacting this provision, the framers of the Oklahoma Constitution sought to avoid the divisiveness and conflict that accompany government funding of religious training, and to ensure that government funds are reserved for public schools, which are open to all students, regardless of religious belief. Article I, section 5 states, in relevant part, "Provisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of the state and free from sectarian control." Okla. Const. art. I, § 5. Article II, section 5 sets forth that "No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such." Okla. Const. art. II, § 5. The first provision requires the state to create a system of secular public schools. The second provision—the No Aid Clause—prohibits the diversion of public funds away from secular schools to private religious institutions.

In prohibiting both direct and indirect aid to a comprehensive list of religious institutions, the Oklahoma No Aid Clause provides robust protections against the diversion of taxpayer money to religious programs. That is no accident. The No Aid

Clause resolved a decades-long battle over whether and to what extent the government should promote religion in school, and it reflects a specific desire to prohibit voucher-like programs, in order to protect Native Americans who were being manipulated into sending their children to religious schools. The No Aid Clause also reflects a broader effort to ensure that public schools remained free of religious influence, and that citizens would not be forced to compromise their religious beliefs and practices to participate in government programs. These rigorous protections remain in place today.

Because the Oklahoma No Aid Clause provides such strong protections, its application in this case is straightforward. Although this Court has yet to address the legality of school vouchers, courts in other states with similar constitutional provisions have prohibited the funding of voucher programs. Several narrower provisions, which permit "indirect" funding of religious institutions, have also been interpreted to prohibit taxpayer-funded school vouchers. The decisions from states that do permit vouchers, moreover, usually involved more permissive language than is found in the Oklahoma Constitution, and they supply no basis to uphold the law here.

Contrary to the arguments of Defendants and their *amici*, application of the Oklahoma No Aid Clause in this case complies with the U.S. Constitution. Neither Defendants nor their *amici* show that the No Aid Clause was motivated by anti-Catholic animus. No court has ever refused to apply a state No Aid Clause on federal constitutional grounds; several state courts have rejected similar arguments.

And the U.S. Supreme Court and many other federal and state courts have held that states may exclude religious programs, including religious education, from general funding schemes.

The intent behind the No Aid Clause, the breadth of its protections, and the decisions of other courts confirm that the Oklahoma Constitution requires the government to stay out of religious schooling. A decision to the contrary would undermine the religious liberty interests that Oklahoma's Framers sought to protect. As a result, the District Court was correct and its decision should be affirmed.

Argument

I. The Voucher Program Undermines The Framers' Intent To Prohibit Taxpayer Funding Of Religious Schools.

The Framers of the Oklahoma Constitution prohibited indirect funding of religious institutions in order to protect religious liberty against encroachment by religious or government leaders, and to ensure a robust system of public institutions, including public schools. Oklahoma's history—including ongoing threats to the religious liberty of Native Americans—showed the Framers how government financing of religious education could harm religious minorities and trigger religious strife. Allowing the government to fund religious schools, moreover, would have threatened the effectiveness of the state's public-school system and the religious freedom of students enrolled in those schools.

A. *The Voucher Program Undermines the Framers' Intent to Prevent Private Parties From Directing Government Funds to Religious Schools.*

Any program authorizing or inducing citizens to direct government money to religious schools would contradict the intent of the Framers of the Oklahoma Constitution. The Constitution's No Aid Clause strictly limits the use of government funds to support religious institutions, including religious schools—whether directly or indirectly. The prohibition against indirect funding of religious institutions was essential to the Framers' goals: both Protestant and Catholic leaders were attempting to coerce Native Americans into authorizing the use of their government-controlled funds to finance religious schools. The Framers would have wanted to prohibit any program—like the school voucher program—that would direct government funds to religious schools under the guise of parental choice.

1. *Catholics and Protestants seek to control Native American religious education.*

The tribes in Indian Territory (the eastern half of present-day Oklahoma) first came to the state during the 1830s, after their forced march on the Trail of Tears. *See* Roy Gittinger, *The Formation of the State of Oklahoma (1803–1906)* 9–22 (1917). A few decades later, the federal government adopted a "peace policy" designed to assimilate relocated Native Americans. *See* Henry E. Fritz, *The Making of Grant's 'Peace Policy'*, 37 Chrons. of Okla. 411, 417–19, 421 (1960), *available at* http://tinyurl.com/MakingOfPeacePolicy. The assimilation strategy tried to use schools to convert Native American students to Christianity. *See id.* at 416–17; Francis Paul Prucha, *The Churches and the Indian Schools, 1888–1912* ix, x, 5 (1979). The

government saw education as "a primary force in destroying the old Indian ways." Rennard Strickland, *The Indians in Oklahoma* 41 (1980).

As a result, in the 1870s the federal Indian Bureau began to contract with missionaries to provide education in Native American territories. Prucha, *supra*, at 3. By 1886, the federal government was contracting with fifty religious schools, both Catholic and Protestant, to educate Native Americans. *See id.* at 8. After the Indian Bureau began to invest in a system of nominally secular schools, the Protestant schools stopped contracting with the federal government. *See id.* at 8, 11, 24. In 1896, federal Indian Bureau Commissioner Browning directed Indian Agents to fill available slots at government schools before permitting Native American children to attend Catholic mission schools. *Id.* at 58. The government lifted this restriction, however, after Catholic missionaries warned, "Without pupils we cannot have schools, and without schools we can make little headway in the Christianization of the Indian." *Id.* at 59, 62–63.

The prospect of additional government funding led religious leaders to pressure Native Americans into authorizing the use of their federal trust funds to pay for religious schooling. Beginning in 1904, President Roosevelt authorized the use of Native American trust funds (held by the U.S. Treasury) and treaty funds (appropriated by Congress to fulfill treaties with Native Americans) to pay for Catholic mission schools. *See id.* at 84, 117, 131. But the President also required religious schools to show valid annual petitions from members of tribes whose trust and treaty funds would be used to pay for that schooling. *See id.* at 120–23. Catholic

leaders presented Native Americans with boilerplate petitions touting Catholic religious instructors; these petitions had Native Americans improbably proclaiming that "[w]e are amply able to give such aid from our trust funds … for our civilization and the education of our children." *Id.* at 86–87. Even President Roosevelt, who supported government funding of Catholic education, worried that many of the Native American signatures were not genuine. *See id.* at 124 (citing Letter from Theodore Roosevelt, President, to Nelson Aldrich, Senator (Jan. 21, 1906)).

At the same time, Protestant leaders attempted to manipulate Native Americans into opposing the Catholic-school petitions. Protestant missionaries circulated petitions stating, "we have been trying to arouse the friends of Indians in our behalf to oppose the unjust contracts made with the 'Catholic Bureau of Indian Missions.'" *Id.* at 90. And they sought more generally "to discredit the Catholic missionaries, painting them as greedy men who were trying to obtain the Indians' funds for their own purposes." *Id.* at 125.

Many if not most Native Americans resented this pressure over religious education; they believed that educating their children in Christian schools imperiled Native American culture and traditions. *See id.* at 124, 126–27. And the process for Native Americans to record their choice hardly inspired confidence that their true wishes would be respected.

2. *Native Americans seek to protect their religious freedom.*

Concerns over encroachment on Native American religious liberty produced

robust religious-liberty protections in the 1905 Sequoyah Constitution, which in turn influenced the creation and content of the Oklahoma Constitution.

Protections for Native American religious liberty were first codified in the 1905 Sequoyah Constitution, the tribes' final attempt to preserve their political autonomy by forming a state from Indian Territory alone. *See* Amos D. Maxwell, *The Sequoyah Convention*, 28 Chrons. of Okla. 161, 187 (1950), *available at* http://tinyurl.com/SequoyahConvention. The Sequoyah Constitution contained two clauses roughly analogous to the Oklahoma Constitution's single No Aid provision. The first provided, "No person can be compelled to erect, support or attend any place or system of worship or to maintain or support any priest, minister, preacher, or teacher of any sect, church, creed, or denomination of religion, but, if any person shall voluntarily make a contract for any such object, he shall be held to the performance of the same." The second stated, "No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion, or in aid of any priest, preacher, minister, or teacher thereof, as such. No preference shall be given to, nor any discrimination made against any church, sect, or creed of religion, or any form of religious faith or worship." Sequoyah Const. art. I §§ 5–6, *in* 1 *Oklahoma Red Book* 624 (Stephen K. Corden & W.B. Richards eds., 1907).

Attention to Native American religious liberty surfaced throughout the proceedings. For instance, when the Sequoyah bill of rights was adopted by the full convention in September 1905, Vice-Chairman Haskell (although himself not Native

American) read a poem lamenting the decline of Native American nations and religions. *See* Maxwell, *supra*, at 309–10. And although Native American leaders were ultimately unable to form an independent state, the Sequoyah Constitution—and its religious-liberty provisions—would proceed to influence the content of the Oklahoma Constitution.

Indeed, several framers of the Sequoyah Constitution led the drafting of the Oklahoma Constitution. Delegates were elected from both Indian Territory and Oklahoma Territory, *see* Enabling Act of 1906, Pub. L. No. 234 § 21, 34 Stat. 267 (1906), *available at* http://tinyurl.com/OKEnabling, and the Oklahoma Convention elected William H. Murray as President. *Proceedings of the Constitutional Convention of the Proposed State of Oklahoma* 15 (1907). Murray was one of the two principal drafters of the Sequoyah Constitution and he represented the Chief of the Chickasaws, whose niece was Murray's wife. *See* Albert H. Ellis, *A History of the Constitutional Convention of the State of Oklahoma* 12 (1923).

Murray provided ample opportunity to protect Native American religious liberty. One committee member even stressed to the chiefs the importance of maintaining Native American religious traditions: "This is your religion like my white church. Keep it for your younger children that they too will preserve it for the future generations." *See* Dennis Wiedman, *Upholding Indigenous Freedoms of Religion and Medicine: Peyotists at the 1906–1908 Oklahoma Constitutional Convention and First Legislature*, 36 Am. Indian Q. 215, 229 (2012).

The Committee on Preamble and Bill of Rights, moreover, received at least

thirty-four petitions on religious liberty and the separation of church and state. *See Proceedings of the Constitutional Convention*, *supra*, at 73. The representative petition, printed in the convention's official *Proceedings*, came from Indian Territory and maintained that "Church and the State should be kept entirely and forever separate; that religious legislation is subversive of good government, contrary to the principles of sound religion, and can result only in religious persecutions and political corruption." *Id.*

The first draft of the Bill of Rights, reported by the Committee on Preamble and Bill of Rights in January 1907, included the exact language that ultimately became the No Aid Clause found in Article II, § 5: "No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such." Okla. Constitutional Convention, Comm. Report 4 (Jan. 3, 1907). This formulation mirrored the language of the religion clauses of the Sequoyah Constitution. *See* Okla. Constitutional Convention, Proposition 54 (Dec. 3, 1906). And it reflects the Framers' concern for the rights of religious minorities and a desire to avoid pressure on private citizens to direct government funds to religious schools.

B. *The Voucher Program Undermines the Framers' Intent To Direct Government Funds to Religiously Neutral Public Schools.*

The No Aid Clause is part of a broader effort to protect the religious liberty of

students and to ensure that government-funded schools are open to everyone, regardless of religious belief. Other provisions of the Oklahoma Constitution reinforce these goals as well. Article I, § 5 requires that "provisions be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of said State [of Oklahoma] and free from sectarian control." Okla. Const. art. I, § 5. Article XI, § 5 provides, among other things, that "no part of the proceeds arising from the sale or disposal of any lands granted for educational purposes or the income or rentals thereof shall be used for the support of any religious or sectarian school, college or university." Okla. Const. art. XI, § 5. Oklahoma's Convention also rejected a provision that would have authorized Bible reading in public schools, after delegates warned that the practice was incompatible with public education and would promote religious conflict. *See Proceedings and Debates of the Constitutional Convention of Oklahoma: November 20, 1906 to March 11, 1907*, 3/5/07-42-0 (1907), at 43–45.

Oklahoma's voucher program undermines these principles. In practice, those who want to participate in the government voucher program must send their children to religious schools (virtually all of which are Christian schools). Those unwilling or unable to place their children in these religious schools will be left in public schools with depleted funds.

First, all but three of the forty-eight schools approved to receive voucher funds are religiously affiliated. *See* Opening Brief in Support of Plaintiffs' Motion for Summary Judgment, pp. 4–7, Tab 4, ROAA. Virtually all of these schools are

Christian. *See id.* For parents raising their children in another faith, or for those who do not wish to enroll their child in a religious school, the voucher program provides few if any options.

Second, even if parents were otherwise willing to send their child to a school promoting a different faith, Oklahoma law permits private school receiving voucher funds to discriminate against students and parents (as well as employees) on the basis of religion. *See* Okla. Stat. Tit. 70, § 13-101.2(H)(3); Okla. Stat. Tit. 42, § 2000d. Oklahoma Christian School, for example, requires that each student's parent "must be a professing believer in Jesus Christ, agree with the school's statement of faith, and provide a written Christian testimony." Exhibits to Opening Brief in Support of Plaintiffs' Motion for Summary Judgment, p. 292, Tab 5, ROAA. In addition, every applicant must submit a reference from a pastor; high-school applicants "must profess to be Christians"; and "[s]tudents and at least one parent must regularly attend and be involved in a Christ-centered church." *Id.* Emmanuel Christian School requires applicants' parents to submit statements of their "personal Christian experience and faith." *Id.* at 256. And All Saints Catholic School expects its students to participate in religion classes, prayer services, and weekly liturgies, and "to adhere in word and deed to Catholic teachings." *Id.* at 247.

Finally, those students unwilling or unable to meet these religious requirements will be left in public schools whose resources have been depleted by the voucher program. Oklahoma's voucher program is funded by money appropriated to the State Board of Education—money that would otherwise help to

maintain the state's public schools. *See* Okla. Stat. Tit. 70, § 13-101.2(J)(1). So far, the voucher program has diverted over $4.5 million from public schools over the past three school years. Opening Brief in Support of the Pls.' Mot. for Summary J., p. 10, Tab 4, ROAA. These funds, moreover, come from public schools that already receive less support than their counterparts in other states; census data from 2012 shows that Oklahoma spent less per pupil on public elementary and secondary schooling than all but two other states in the nation. *See* Mark Dixon, *Public Education Finances: 2012*, U.S. Census Bureau, 8 (May 2014), http://tinyurl.com/EducationFinances.

Parents are left to choose between enrolling their children in religious schooling, which may violate their conscience, or keeping their children in a public school whose funding has been compromised by the voucher program. This strikes at the heart of the Oklahoma Constitution, which sought to protect the rights of religious minorities and keep the government out of the business of funding religious education.

II. School-Voucher Cases Nationwide Confirm That The Oklahoma Voucher Program Is Unconstitutional.

The No Aid Clause's broad protections against taxpayer funding of religious institutions dictate the outcome in this case. This Court has yet to decide whether this language prohibits school-voucher programs, but it has explained that when a citizen seeks "educational facilities which combine secular and religious instruction, he is faced with the necessity of assuming the financial burden which that choice entails." *Bd. of Educ. v. Antone*, 1963 OK 165, 384 P.2d 911, 913 (Okla. 1963). Courts in

other states have concluded that similar No Aid provisions—even those more permissive than Oklahoma's No Aid Clause—prohibit taxpayer-funded voucher programs. And an overwhelming body of federal and state authority confirms that the federal Constitution does not compel Oklahoma to include religious schools in its voucher program.

A. *Courts Interpreting Similar Provisions From Other States Have Concluded That School Vouchers Constitute Unlawful Aid To Religious Institutions.*

A decision upholding vouchers notwithstanding the Oklahoma No Aid Clause would thwart the intent of the Framers and deviate from decisions of other courts interpreting similar language. As detailed above, the Framers of the Oklahoma Constitution adopted a No Aid Clause that was especially protective against the diversion of taxpayer funds to religious institutions: "No public money or property shall ever be appropriated, applied, donated, or used, *directly or indirectly*, for the use, benefit, or support of *any* sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or *sectarian institution* as such." Okla. Const. art. II, § 5 (emphasis added). Because it prohibits religious funding of all varieties, Oklahoma's No Aid Clause "imposes some of the more rigid restrictions on aid to sectarian schools." Catharine V. Ewing, Comment, *Constitutional Law: Vouchers, Sectarian Schools, and Constitutional Uncertainty: Choices for the United States Supreme Court and the States*, 53 Okla. L. Rev. 437, 479 (2000).

Indeed, "[i]t is difficult to imagine how the framers of [the Oklahoma]

constitution could more completely and expressly state that public money shall not be directly or indirectly used for any sectarian purpose." 1979 OK AG 132 ¶ 3. If the state could finance religious education and religious schools merely by funneling taxpayer money through a voucher program, *see* Br. of Inst. For Justice at 5–7, the prohibition on "indirectly" funding religious institutions would become illusory.

Courts in other states have recognized as much. For instance, the Florida Constitution states, "No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution." Fla. Const. art. I, § 3. Applying this "directly or indirectly" language, the Florida Court of Appeals enjoined a statewide school-voucher program, concluding that the "primary purpose of [No Aid Clauses] to the various state constitutions was to bar the use of public funds to support religious schools." *Bush v. Holmes*, 886 So. 2d 340, 349 (Fla. Dist. Ct. App. 2004). Although the Florida Supreme Court affirmed this decision on alternative grounds, *see Bush v. Holmes*, 919 So. 2d 392, 398 (Fla. 2006), the appeals court's No Aid Clause ruling remains good law. *See Council for Secular Humanism v. McNeil*, 44 So. 3d 112, 117 (Fla. Dist. Ct. App. 2010) (applying the decision).

Other courts have agreed. The Massachusetts Constitution prohibits the use of public money for any "charitable or religious undertaking which is not publicly owned and under the [government's] exclusive control...." Mass. Const. Art 46 § 2. In *Opinion of the Justices*, 514 N.E.2d 353 (Mass. 1987), the Supreme Judicial Court of

Massachusetts concluded that a school-voucher program would violate this provision because even "[i]f aid has been channeled to the student rather than to the private school, the focus still is on the effect of the aid, not on the recipient." *Id.* at 356. Likewise, the New Hampshire Constitution provides that "no person shall ever be compelled to pay towards the support of the schools of any sect or denomination." N.H. Const. pt. 1, art. 6. In *Opinion of the Justices*, 616 A.2d 478 (N.H. 1992), the New Hampshire Supreme Court held that this provision prohibits a voucher program through which certain parents "could elect for the student to attend any other state approved school" and have the government pay for part of that tuition. *Id.* at 479–80.

Courts in certain states with even weaker No Aid Clauses have prohibited the government from giving scholarships to students attending religious colleges and secondary schools. The Alaska Supreme Court held that the state's No Aid Clause banned a program that "award[ed] Alaska residents attending private colleges in Alaska an amount generally equal to the difference between the tuition charged by the student's private college and the tuition charged by a public college in the same area." *Sheldon Jackson Coll. v. State*, 599 P.2d 127, 128 (Alaska 1979). The court did so even though the Alaska Constitution prohibited only the use of public funds "for the direct benefit" of any religious school or other private school. *See id.* at 129. Likewise, the Nebraska Supreme Court held that the state constitution—which prohibited government funds "in aid of any sectarian or denominational school or college"—prevented the government from "provid[ing] for public grants to students in need of

tuition aid to attend private colleges." *State ex rel. Rogers v. Swanson*, 219 N.W.2d 726, 728, 729 (Neb. 1974). And in *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009), the Arizona Supreme Court held that the Arizona No Aid Clause, which does not prohibit "indirect" aid, prohibits school-voucher programs because "[t]hese programs transfer state funds directly from the state treasury to private schools." *Id.* at 1184.

In addition, several state courts or attorneys general have interpreted their No Aid Clauses to bar public funding of even secular expenses, such as textbooks, for students enrolled in religious schools. *See, e.g.*, *In re Certification of a Question of Law from the U.S. Dist. Ct.*, 372 N.W.2d 113, 117–18 (S.D. 1985) (No Aid Clause prohibits "loaning of textbooks to age-eligible persons … enrolled in public schools and nonpublic schools"); *Cal. Teachers Ass'n v. Riles*, 632 P.2d 953, 953, 954 (Cal. 1981) (No Aid Clause prohibits government from "lend[ing] without charge, textbooks used in the public schools to students attending nonprofit nonpublic schools"); N.M. Att'y Gen. Op. 10-06, 2010 WL 5494051 (2006) ("[B]y providing textbooks to private schools without charge and reducing the schools' financial obligations, the state arguably … is using public funds for the support of sectarian, denominational and private schools in violation of [the state's No Aid Clause]"). If the government may not pay for textbooks to be used by students who elect to attend religious schools, then it certainly may not pay students' tuition for actual religious education.

Finally, although some courts in other states have upheld school-voucher programs against state constitutional challenges, those cases involved No Aid Clauses that are more permissive than the Oklahoma No Aid Clause. The provision

in the Ohio case, *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999), prohibited neither direct nor indirect aid and stated only that "no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state." Ohio Const. art. VI, § 2. The language at issue in *Meredith v. Pence*, 948 N.E.2d 1213 (Ind. 2013), stated only that "No money shall be drawn from the treasury, for the benefit of any religious or theological institution." Ind. Const. art. I, § 6. A Colorado appellate court upheld a county voucher program, but the Colorado Supreme Court is currently reviewing that decision. *Taxpayers for Public Educ. v. Douglas Cnty. Sch. Dist.*, __ P.3d __, 2013 WL 791140 (Colo. Ct. App. Feb. 28, 2013), *cert granted*, 2014 WL 1046020 (Colo. Mar. 17, 2014). And the Wisconsin Supreme Court upheld a voucher program, *see Jackson v. Benson*, 578 N.W.2d 602, 621 (Wis. 1998), under a provision barring only the use of government money "for the benefit of religious societies, or religious or theological seminaries," Wis. Const. art. I, § 18; and Wisconsin (unlike Oklahoma) has pegged the interpretation of its No Aid Clause to "the primary effect test employed in Establishment Clause jurisprudence." *Jackson*, 578 N.W.2d at 621. None of these decisions, then, informs the more protective Oklahoma provision.

B. The Federal Constitution Does Not Compel What the Oklahoma Constitution Prohibits.

Defendants' *amici* suggest that the First Amendment to the U.S. Constitution requires school-voucher programs to include religious schools. *See* Br. of Inst. for Justice at 17–25; Br. of Becket Fund for Religious Liberty at 19–24. But an

overwhelming body of cases—from the U.S. Supreme Court, federal appellate courts, and state courts—holds that the government is not required to fund religious education, or tuition for religious education, even as part of an otherwise neutral program.

The Supreme Court has dismissed the argument that the federal Constitution requires states to fund religious training when it funds other types of educational programs. In *Locke v. Davey*, 540 U.S. 712 (2004), the U.S. Supreme Court rejected a challenge to a college scholarship program that excluded students pursuing a degree in theology. The state "pursuant to its own constitution, which has been authoritatively interpreted as prohibiting even indirectly funding religious instructions that will prepare students for the ministry, can deny them such funding without violating the Free Exercise Clause." *Id.* at 719, 725 (citations omitted).

Case after case has reaffirmed that the right to freely exercise one's religion does not include a right to demand that the government subsidize one's religious education:

- Withholding of taxpayer funds from religious schools has been upheld repeatedly by the U.S. Supreme Court. *See, e.g., Luetkemeyer v. Kaufmann*, 419 U.S. 888 (1974), *aff'g mem.* 364 F. Supp. 376, 387 (W.D. Mo. 1973) (upholding statute providing free bus transportation to public-school pupils but not to pupils enrolled in sectarian schools); *Norwood v. Harrison*, 413 U.S. 455, 462 (1973) ("the Court [has] affirmed the right of private schools to exist and to operate; it [has] said nothing of any supposed right of private or parochial schools to share with public schools in state largesse, on an equal basis or otherwise"); *Brusca v. State Bd. of Educ.*, 405 U.S. 1050 (1972), *aff'g mem.* 332 F. Supp. 275, 276 (E.D. Mo. 1971) (upholding state constitutional provision prohibiting funding of any school "controlled by any religious creed, church, or sectarian denomination whatsoever"); *Sloan v. Lemon*, 413 U.S. 825, 834 (1973) ("[V]alid aid to nonpublic, nonsectarian schools [provides] no lever for

aid to their sectarian counterparts.").

- And by federal circuit courts. *See, e.g.*, *Teen Ranch, Inc. v. Udow*, 479 F.3d 403, 410 (6th Cir. 2007) (state may prohibit use government funds to place children in a youth residential organization that incorporated religious teaching into its programs, because "failure to fund [plaintiff's] religious programming does not violate [plaintiff's] free exercise rights"); *Eulitt v. Maine*, 386 F.3d 344, 346 (1st Cir. 2004) (federal Constitution does not require state "to extend tuition payments to private sectarian secondary schools on behalf of students who reside in a school district that makes such payments available on a limited basis to private nonsectarian secondary schools").

- And by state courts. *See, e.g.*, *Univ. of Cumberlands v. Pennybacker*, 308 S.W.3d 668, 680 (Ky. 2010) ("the Kentucky Constitution does not contravene the Free Exercise Clause when it prohibits appropriations of public monies to religious schools"); *Anderson v. Town of Durham*, 895 A.2d 944, 959 (Me. 2006) ("The statute merely prohibits the State from funding [religious parents'] school choice, and as such, it does not burden or inhibit religion in a constitutionally significant manner.").

These decisions confirm that states may "act upon their legitimate concerns about excessive entanglement with religion, even though the Establishment Clause may not require them to do so," and "are not required to go to the brink of what the Establishment Clause permits." *Eulitt*, 386 F.3d at 355.

Courts have also upheld these limitations in programs funding private disability education. For instance, in *Goodall by Goodall v. Stafford County School Board*, 60 F.3d 168 (4th Cir. 1995), the court held that the Free Exercise Clause did not require a public school board to continue providing transliteration services to a disabled student after the student transferred to a religious school. *See id.* at 172–73. And in *KDM ex rel. WJM v. Reedsport School District*, 196 F.3d 1046 (9th Cir. 1999), the court rejected a federal constitutional challenge to a state regulation "restrict[ing] the provision of [disability-education] services to 'religiously-neutral settings.'" *Id.* at

1050.

None of the cases cited by Defendants or their *amici* require the government to fund private religious education. *See* Appellants' Br. at 6–9; Br. of Inst. for Justice at 20–21; Br. of Becket Fund for Religious Liberty at 20, 22–24. Even *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008), acknowledged that "*Locke* [*v. Davey*] precludes any sweeping argument that the State may never take the religious character of an activity into consideration when deciding whether to extend public funding." *Id.* at 1256. The Tenth Circuit invalidated Colorado's program only because it "discriminate[d] *among* religions, allowing aid to 'sectarian' but not 'pervasively sectarian' institutions," a distinction made "on the basis of criteria that entail intrusive governmental judgments regarding matters of religious belief and practice." *Id.* (emphasis in original). The Oklahoma Constitution's No Aid Clause requires no such inquiry into the degree of sectarianism in particular schools.

Although Defendants' *amici* speculate that the Oklahoma Constitution uses the word "sectarian" as a code for anti-Catholic bias, they provide no evidence that anti-Catholic sentiment actually animated the No Aid Clause in Oklahoma. *See* Br. of Inst. for Justice at 13–17; Br. of Becket Fund for Religious Liberty at 3–10. The discussion above in Section I illustrates that the No Aid Clause was motivated not by any bias against Catholicism or any other religion, but rather by a desire to protect religious minorities against pressure to direct government money to schools seeking to convert them to other religions.

One of Defendants' *amici* has made this mistake before. In *Locke v. Davey*, the

Becket Fund told the U.S. Supreme Court, "Washington's Constitution was born of religious bigotry because it contains a so-called 'Blaine Amendment.'" *Locke*, 540 U.S. at 723 n.7 (citing Br. For Becket Fund for Religious Liberty et al as *Amici Curiae*). The Court rejected this argument, observing that the Becket Fund failed to "establish[] a credible connection" between anti-Catholic bias and the actual state constitutional provision at issue. *Id.* Defendants' *amici* have unearthed no more evidence of anti-Catholic animus here than they did in *Davey*.

Nor do Defendants' *amici* suggest that anti-Catholic sentiment had anything to do with the state's decision—in 1977—to retain language in Article I, § 5 that keeps public schools "free from sectarian control," even as the state removed language from that provision that discriminated on the basis of race. *See* Act of May 12, 1977, S. J. R. 18 (Okla.), *available at* http://tinyurl.com/1977Act. Even if Defendants' *amici* had presented evidence that anti-Catholic bias had motivated the original No Aid provisions in the Oklahoma Constitution, the later reauthorization of the same language, without a hint of animus, would remove any earlier taint. *Cf. Bush*, 886 So. 2d at 351 n.9 ("nothing in the proceedings of the CRC or the Florida Legislature indicates any bigoted purpose in retaining the no-aid provision in the 1968 general Revision of the Florida Constitution").

No court has refused to apply a state No Aid Clause on the basis of concerns about its origins. Courts in Arizona and Florida have rejected this argument in voucher cases. In *Cain v. Horne*, 183 P.3d 1269 (Ariz. Ct. App. 2008), *vacated on other grounds*, 202 P.3d 1178 (Ariz. 2009), the court explained that "none of the parties has

produced any authority suggesting [courts] may disregard constitutional provisions merely because we suspect they may have been tainted by questionable motives." *Cain*, 183 P.3d at 1273 n.2. And in *Bush*, the court held that even if the Florida No Aid Clause had a questionable history, "such a history does not render [any of its provisions] superfluous." *Bush*, 886 So. 2d at 351 n.9.

Nothing in the U.S. Constitution nullifies the Oklahoma Constitution's broad restrictions on the funding of religious programs, including religious education for students with disabilities. Students with disabilities who stay in public schools receive comprehensive protections, and the right to additional services, under the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq*. And parents of course may send their children to private religious schools. But the Oklahoma Constitution does not permit, and the federal Constitution does not require, the state to subsidize that choice.

Conclusion

The judgment of the district court should be affirmed.

Respectfully submitted,

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