

2 STATE OF OKLAHOMA

10 of Public Instruction, THE)

2014.08.28 Transcript of Trial Court Proceedings
OKLAHOMA STATE DEPARTMENT OF)

11 EDUCATION, and THE OKLAHOMA)

STATE BOARD OF EDUCATION,)

12)

Defendants.

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TRANSCRIPT OF THE PROCEEDINGS

16 HAD ON THE

28TH DAY OF AUGUST, 2014

17 BEFORE THE HONORABLE

BERNARD M. JONES

18 DISTRICT JUDGE

19

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22 Reported By:

2014.08.28 Transcript of Trial Court Proceedings

23 Jeanna D. Whitten, CSR, RPR
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1 A P P E A R A N C E S

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PROCEEDINGS

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2 (The following proceedings were had in open
3 court on the 28th of August, 2014:)

4 THE COURT: We are on the record in
5 CV-2013-2072. Oliver v. Barresi, et al. For purposes
6 of the record, will the parties state their entry of
7 appearance.

8 MR. RICHARDSON: Jerry Richardson and Doug
9 Mann for the Plaintiffs.

10 MS. GREENWALT: Sarah Greenwalt on behalf of
11 the Defendants.

12 MR. WYRICK: And Patrick Wyrick on behalf of
13 the Defendants.

14 THE COURT: Thank you, Counsel. Will you-all
15 come on forward and let's approach the bench. As I
16 indicated before, we are going to do this on the record.
17 Before we began -- or begin, I should say, our
18 arguments, let me go ahead and, for purposes of our
19 record, make the same disclosures on the record that I
20 made off the record last week.

21 As I indicated, I serve on the board of
22 directors of St. John Christian Heritage Academy. It is
23 a Christian Heritage School affiliated with St. John
24 Missionary Baptist Church. It certainly is not -- based
25 on, I believe, you-all's research and, certainly, my

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1 own -- a school that would fall under one of these
2 schools eligible for these, I think it's been coined
3 vouchers, at issue in this proceeding today; but
4 nevertheless, I need to make that disclosure.

5 I also need to disclose that I know -- and
6 have known and, certainly, my wife more so than I -- the
7 named Defendant here. I understand Secretary Barresi is
8 named in her official capacity in this matter. So, I

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9 want to disclose that.

10 Likewise, I am the chairman of the board for
11 the Urban League of Greater Oklahoma City, which -- as I
12 disclosed on the telephone, like many non-profits -- has
13 received grants from the State Board of Education, in
14 particular, Secretary Barresi's office. And, so, while
15 I don't believe that that is, in any way, going to
16 impact my ability to fairly and impartially analyze this
17 matter or rule, I certainly want to again make those
18 disclosures.

19 As you-all have indicated in the past that you
20 don't have any objection to this Court hearing this

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21 matter, certainly, some time has lapsed and I want to,

22 on the record, give you-all the opportunity should you

23 have anything -- any objection, to make that objection

24 at this point in time. Otherwise, I will proceed -- I

25 will deem your silence as a waiver and again will

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1 proceed.

2 Any objections, Counsel, from the State?

3 MR. WYRICK: No objection.

4 THE COURT: Anything from --

5 MR. RICHARDSON: No objection.

6 THE COURT: Thank you so much.

7 All right. At issue here -- and, again, as I
8 indicated off the record, if you-all will just indulge
9 me for a minute. At issue here is the constitutionality
10 of the Lindsey Nicole Henry Scholarships for Students
11 with Disabilities Program Act, 70 O.S. 13-102.
12 The act, as represented, allows parents of
13 children with Individualized Education Programs, or
14 IEPs, to request scholarship money from the State to pay
15 tuition at an approved private school, religious or
16 otherwise.

17 Competing motions for summary judgment have

18 been filed, and that is what we are here to do. I am

19 going to rule on those motions for summary judgment.

20 In their motion for summary judgment,

21 Plaintiffs, taxpayers seek to have the State permanently

22 enjoined -- or this is in their lawsuit, generally --

23 from expending public funds under the act and alleges

24 that the act violates Article II, Section 5's

25 prohibition of the use of public funds to aid religious

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1 institutions; Article I, Section 5 and Article XIII,
2 Section 1's requirement that the legislature maintain a
3 system of public schools in which all children of the
4 state may be educated. They also allege that the act
5 amounts to an impermissible gift of public funds in
6 violation of Article X, Sections 14 and 15; and that the
7 act violates the anti-discrimination component of the
8 Oklahoma Due Process Clause.

9 For its part, the State disputes challenges to
10 the constitutionality of the act and, in a separate
11 motion for summary judgment, alleges that Plaintiffs'

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12 challenges should be rejected, as the act is

13 constitutional, because the State has discretion to

14 provide for the education of children, even if some of

15 those institutions have a religious affiliation.

16 It also alleges, having conceded the six of

17 the eligible private schools are nonsectarian,

18 Plaintiffs cannot prove their claim that the act

19 authorizes monies to be used for sectarian purposes in

20 every instance. Also, that educating school children is

21 a patently public purpose; so, the allocated monies are

22 not constitutionally-prohibited gifts.

23 The act does not interfere in the State's

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24 maintenance of a system of public schools, and the act

25 doesn't treat similarly-situated children differently.

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1 As we think about -- or as I thought about
2 these motions, we ought not lose sight of the summary
3 judgment standard. Certainly, the moving party has the
4 burden to show an entitlement to summary judgment based
5 on the absence of a substantial controversy as to any
6 material fact, and they must also prove that they are
7 entitled to judgment as a matter of law.

8 In looking at these motions, there does not
9 appear to be a substantial controversy as to any
10 material fact. It appears that you-all don't
11 dispute -- this is really a question of law. And, so,
12 that is what we are looking at and that is why we gather
13 here today to ascertain who is entitled to judgment as a
14 matter of law.

15 Applying the standard, the Court is prepared
16 to make the following findings:

17 The Court does not believe the act violates
18 the Oklahoma Constitution's requirement that the
19 legislature maintain a system of free public schools.

20 The Court does not interpret Article I,
21 Section 5, nor does it interpret Article XIII,
22 Section 1, as being limitations on the legislature's
23 power to satisfy its constitutional duty to maintain a
24 system of free public schools. It would appear to this
25 Court that this constitutional mandate is merely the

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1 floor and not the ceiling; therefore, so long as the
2 legislature continues to maintain a system of free

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3 public schools, there can be no constitutional

4 violation.

5 Further, the Court does not believe the act
6 violates Article X, Section 14, nor does it violate
7 Article X, Section 15, of the Constitution.

8 This Court is not entirely persuaded that
9 these scholarships constitute gifts of public funds; but
10 even if they do amount to gifts, this Court will afford
11 deference to the legislature which has determined that
12 educating special needs children constitutes a public
13 purpose. And in evaluating the adequacy of the
14 consideration received, given our understanding of the

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15 term consideration, a benefit received or detriment

16 assumed, this Court is persuaded by the arguments of the
17 State, as set forth in its motion for summary judgment.

18 As parents and guardians, in exchange for
19 receiving scholarship funds, assume full financial
20 responsibility for educating their children, as opposed
21 to the State assuming this obligation.

22 Finally, the Court further finds that the act
23 does not violate Article II, Section 7, or the Equal
24 Protection Rights of students.

25 Not only do Plaintiffs, I believe, lack

1 standing to vicariously assert the individual rights of
2 students; but even if they were allowed to assert these
3 rights, thus triggering an equal-protection analysis,
4 there is, I believe, a rational basis on which the
5 legislature can rely to justify treating students with
6 disabilities different. And given that this distinction
7 has a reasonable relation to the State's purpose of
8 educating children, it can cannot be said that such
9 distinction is either arbitrary or capricious.
10 Therefore, the act survives rational basis review.

11 These, then, are the Court's findings and
12 orders as to the constitutionality of the act with
13 respect to these arguments.

14 Where the Court has difficulty and where I
15 want you to devote your arguments this morning is on
16 Article II, Section 5, known as the no-funding clause,
17 because this Court is essentially being asked to
18 ascertain the meaning of this clause. So, I begin with
19 this very simple question to all of you -- and,
20 certainly, I will afford Plaintiffs an opportunity to
21 respond first -- but where language is clear and
22 unambiguous, is not this Court to give effect to the

23 words as set forth therein?

24 Counsel.

25 MR. RICHARDSON: Absolutely. I think

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1 that's -- that's axiomatic, Your Honor. And the

2 language of Article II, Section 5, is clear and it's

3 straightforward and -- but the Court, if you will allow

4 me, doesn't really have to worry about that because the

5 Oklahoma Supreme Court has already addressed this and

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6 has ruled in the regarding case and, again, in the

7 Antone case what this statute means -- or what this

8 constitutional provision means in the context of aid to

9 private religious schools.

10 There is absolutely no doubt. There is no

11 possible doubt that these institutions are sectarian

12 institutions -- these private religious schools are

13 sectarian institutions and that's the word -- or the

14 term that the Constitution uses.

15 There is also -- it's clear that the

16 Constitution speaks both to direct aid and indirect aid.

17 It is very broadly worded. In fact, as we point out in

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18 our brief, legal scholars, in articles discussing the

19 no-funding clause -- which, as the Court may or may not

20 know, has been a subject of controversy in many states,

21 not just in Oklahoma, the -- that the meaning of the

22 various constitutional prohibitions on funding of

23 religious and sectarian institutions -- that the legal

24 scholars have said that Oklahoma's constitutional

25 provision on the no-funding of religion in sectarian

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1 institutions is one of the strictest, strongest in the

2 country, of any state Constitution.

3 So, Your Honor, I believe that the language of
4 the Constitution is clear and I believe, obviously, this
5 Court has to give effect to it; but again, respectfully,
6 that's really -- this is certainly not a question of
7 first impression that this Court has to worry about
8 because the Oklahoma Supreme Court has spoken clearly
9 and it has spoken more than once.

10 THE COURT: Well, Counsel, let me ask you this
11 because, certainly, it appears that what the State is
12 asking this Court to do to in evaluating that meaning is
13 to apply the public-purpose analysis. I presume, you

14 reject that.

15 MR. RICHARDSON: Well, yes, we do, and --

16 because the same type of public-purpose argument was

17 again considered by the Oklahoma Supreme Court in

18 Gurney, in particular, and also, to some extent, in the

19 Antone decision. And the Court said, certainly, it's

20 important to educate children, but we reject the

21 argument -- if I'm not mistaken, I believe in both cases

22 the decision was unanimous by the Oklahoma Supreme

23 Court; they are certainly in our published dissents --

24 that educating children, though a worthwhile public

25 goal, does not trump the no-funding clause. And there

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1 simply -- there's simply no authority that the
2 Defendants have presented that even suggest that the
3 court has ever backed away from that or any authority
4 that has superceded that analysis.

5 THE COURT: Well, Counsel, I will tell you,
6 certainly, as I thought about Antone, that was going to
7 be my next question -- and, certainly, this is something
8 the State will need to address in just a second -- but

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9 you know Antone came down in 1963. A lot has changed

10 since 1963. I, quite frankly, wouldn't even be sitting
11 here were this was 1963.

12 In fact, it was not until 1968 that Judge
13 Charles Owens sat in this seat in this very courtroom,
14 indeed; and he was the first African-American judge on
15 the bench. That was some five years later. So, what to
16 this argument that, well, things have changed? And then
17 we have -- as we think about Antone, I know that, based
18 on shepardizing this case, it has only received some,
19 quote/unquote, negative treatment; and that would be
20 from a Ninth Circuit case back in 2002. And beyond

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21 that, I have not seen any treatment that would suggest

22 to this Court that it is not still good law.

23 MR. RICHARDSON: Well, I certainly -- it

24 clearly is still good law, Your Honor. That's what our

25 research has indicated, and, again, the Defendants

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1 certainly have not presented anything to suggest to the

2 contrary.

3 The Court is certainly right. Things have

4 changed since 1963; and in most cases -- certainly, in

5 the example you gave as to your position on the
6 bench -- I think everyone in the courtroom would agree
7 things have changed much for the better and we are a lot
8 better country for that. Nevertheless, this issue is
9 not something that relates to those type of social
10 changes.

11 In fact, this country was founded on one of
12 the fundamental precepts that religious liberty is an
13 important -- in fact, central guiding principle of our
14 nation. And the founders and drafters of the Oklahoma
15 Constitution were very cognizant of that and were very
16 aware of the importance of keeping both the state out of

17 the religion and to keep the state and church separate,
18 to use Jefferson's phrase.

19 So, yes, things have changed in some
20 regard -- and as I said, in many ways for the
21 better -- but this is a particular issue of the
22 relationship between church and state that I would
23 respectfully suggest has not changed.

24 THE COURT: Well, but what say you with
25 respect to the realities that courts -- I think our

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1 Supreme Court, for example, has found instances where
2 religious-affiliated institutions are eligible to
3 receive public funds.

4 What say you on that?

5 MR. RICHARDSON: Oh, that's absolutely
6 correct, Your Honor. There is no doubt that the United
7 States Supreme Court has said that the United States
8 Constitution does not prohibit the public funding of
9 religious organizations and institutions. But the
10 United States Supreme Court has also said -- and I don't
11 know if we cited this case in our brief -- but the case

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12 of Locke v. Davey -- I would commend of the Court's

13 reading and your research has probably already disclosed

14 it to you.

15 The United States Supreme Court said just

16 because the Constitution, the Federal Constitution,

17 permits something does not mean that the free exercise

18 clause requires it. And, so, in the case of no-funding

19 provisions that draw a more stringent line as to public

20 funding of religious organizations and sectarian

21 institutions than does the Federal Establishment

22 Clause -- or the Establishment Clause of the Federal

23 Constitution.

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24 So, Locke v. Davey makes clear that the State

25 of Oklahoma has an absolute right to draw a more strict

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1 line than the Establishment Clause draws with regard to
2 public funding. And that's exactly what we submit that
3 the no-funding clause does. There's no correspondent --
4 there is no corresponding provision, as this Court well
5 knows, in the United States Constitution to the
6 no-funding clause.

7 This is simply something that founders and

8 drafters of state constitutions, because of the
9 importance of the issue of separating church and state,
10 they put in. And I want to emphasize -- just because I
11 think this is the most important issue about -- or the
12 most important point about this issue, and I'm -- and,
13 so, in case we don't get back to this. The no-funding
14 clause, I think it's very, very important to understand
15 what it is.

16 It is a guarantee of religious liberty, Your
17 Honor. It is not hostility to religion. It is not
18 antipathy on the part of the State to religion. It is
19 the exact opposite. It ensures that the State

20 cannot -- by prohibiting the State from aiding one
21 particular religion at the expense of another or
22 choosing a state religion and disfavoring the other
23 religions, it ensures that every one in this diverse
24 religious nation and this diverse religious state that
25 we have, that everyone can practice their own religion

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1 freely. And by prohibiting the State from the favoring
2 religion, the corresponding -- or correlation to that is

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3 the State must keep its hands off of religion.

4 And that, in fact, is the ironic thing that
5 the Defendants argue about this case, is they say these
6 vouchers buy the State control over these religious
7 schools. And that's absolutely abhorrent to what the
8 court said in Gurney about the legislature making
9 incremental steps to infringe upon religious liberties.

10 THE COURT: But isn't it really about the
11 church having its hands on religion? Isn't it really
12 about that? Isn't there a different -- I mean,
13 certainly -- and I go back and I keep going back to this
14 idea of legislative deference.

15 The legislature, it would seem to me -- I

16 agree, this idea that this is, to some degree, about

17 religious liberty; but there is nothing with this

18 scholarship that would prevent anyone from exercising

19 their religion, would it?

20 MR. RICHARDSON: Well, that's -- I don't think

21 that there is -- well, yes. Certainly, these

22 states -- or I'm sorry -- these schools, these private

23 schools, that are receiving public funds are religiously

24 discriminatory. If you want to go to a Catholic

25 parochial school, that school has every right to exclude

1 you if you are a Jew, if you are a Muslim, if you are a
2 Protestant.

3 Now, the State should not be in the business
4 of providing taxpayer funds to institutions that
5 discriminate on the basis of religion. And certainly
6 not only on the basis of religion, another huge irony
7 about this whole act, Your Honor, is that these
8 organizations, these private schools -- and they say in
9 their Web sites. This is not a disputed fact -- they
10 make clear that they also discriminate on the basis of

11 handicapping conditions, on the basis of disability.

12 The vast majority of these schools, in the

13 letters that they provided to the State Department

14 identifying the special ed services they could provide,

15 said we can give you smaller class sizes and we can give

16 speech therapy.

17 Well, what if you are a severely hand- -- what

18 if you are severely emotionally disturbed? What if you

19 are autistic? What if you have multiple handicaps? No

20 need to apply. We are not interested in those kids.

21 THE COURT: But they don't say that, do they?

22 MR. RICHARDSON: Well, Your Honor, with due

23 respect, I think, in going back to 1963, there were a
24 lot of people that didn't actually say, you know, we
25 don't want -- we want to keep African-Americans in their

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1 place, but they may not have said that. So, I don't
2 think that the fact that they -- they don't come out and
3 say that in so many words, but that's clearly -- I mean,
4 there's no doubt that that's what their Web sites say.
5 And, so, yes, I would say they actually do say that.

6 They just say it in a nice way. But they --

7 they say you have got to -- don't apply to our school if

8 you are not prepared to -- if you don't follow our

9 religion, if you are not prepared to participate in the

10 Catholic religious rights or in the Presbyterian

11 religious rights. Whatever. Do not apply to our school

12 unless your family is committed to participating in the

13 church organizations and the doctrine of this religion.

14 That is clearly discriminatory, and the State

15 has no business giving my money, your money, or

16 Mr. Wyrick's and Mr. Mann's money to an organization

17 that discriminates on that basis.

18 Now, there's absolutely nothing wrong with an

19 organization having -- choosing to practice religion in

20 its own way and advocating for that religion, but it

21 should it on its own nickel. It should not be doing it

22 on the taxpayer's nickel.

23 THE COURT: Let me turn to the State. There

24 is a lot that has been said. What say you -- and I have

25 got some questions for you --

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1 MS. GREENWALT: Yes, Your Honor.

2 THE COURT: -- because certainly legislative
3 deference is something that you-all are advocating,
4 which certainly this Court, based on its prior ruling,
5 has said that it embraces; but the question becomes are
6 there limits to that? But why don't you respond, first,
7 and then get to that point for me.

8 MS. GREENWALT: Sure. I will go ahead and
9 begin addressing your initial question as to, you know,
10 whether or not, this Court is obligated to follow the
11 unambiguous language of the Oklahoma Supreme Court.
12 And, of course, it is. And if you look at the language
13 from the cases -- the Article II, Section 5, cases

14 dating back to 1915, the Oklahoma Supreme Court makes
15 clear that public funds are allowed to be spent at
16 private sectarian institutions, so long as there is
17 furtherance of a public purpose and in exchange for
18 adequate consideration; and because Your Honor has
19 already decided that the act is valid under Article X,
20 Sections 14 and 15, this becomes an easy case.

21 Clearly, the State has public purpose, has
22 adequate consideration. And because there is not a
23 gratuitous benefit being given to these sectarian
24 institutions, the Lindsey Nicole Henry Scholarship
25 Program is valid under Article II, Section 5.

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1 THE COURT: But my ruling was limited. What I
2 just announced was based on if you are treating this as
3 a gift and you don't -- this is a little different.
4 We are talking about educational institutions
5 here. And beyond, of course, an attorney general's
6 opinion -- which, I think, was in response or maybe it
7 predates the Murrow and Children's cases, which are a
8 little bit different -- I don't think there's been

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9 anything that has really addressed this in terms of --

10 or applied that analysis to educational institutions,

11 which is what is at dispute here, Counsel.

12 MS. GREENWALT: Well, respectfully, Your

13 Honor, Gurney and Antone did not say that there is some

14 categorical exclusion of public funds being spent at

15 private K through 12 schools.

16 In fact, if you look, five years later, in

17 Murrow Indian Orphan's Home, it said, Look, we are going

18 to describe it -- describe their Gurney opinion in this

19 way. It said the analysis of the problem presented in

20 Gurney was that there were was public funds being given

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21 to furnish a service to a private parochial school in

22 absence of consideration. No value was received.

23 That is critical language because it shows that the

24 court in Gurney was taking this all into consideration.

25 And the court in Murrow, in reiterating this, says, of

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1 course in the context of K through 12 religious schools,

2 you don't get rid of the public-purpose-consideration

3 analysis.

4 THE COURT: Well, but certainly, as I look

5 at -- this is again Antone, 1963 -- something that they
6 say here, certainly, that analysis was attempting to be
7 advanced. But it seems like this purpose analysis was
8 being advanced. But it certainly says, "Defendants urge
9 providing for needy children should not be measured by
10 whether the same aids any particular sectarian
11 institution or religion, but whether the purpose is the
12 general welfare of the community." And, certainly, it,
13 the court, then begins to give us a very brief
14 historical analysis with respect to the First
15 Amendment -- right to religion, the exercise of one's
16 religion -- and, certainly, it, in the end, rejects that

17 purpose analysis.

18 And then it concludes its opinion with this,

19 that I find very persuasive, in that it says "Any such

20 aid or benefit, either directly or indirectly, is

21 expressly prohibited by the above-quoted provision of

22 the Constitution of Oklahoma."

23 MS. GREENWALT: And I would answer, Your

24 Honor, that Antone rejects that public purpose alone can

25 be used in this analysis.

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1 What Antone says is, you can't look at only
2 the public purpose, but you must consider if a sectarian
3 institution is receiving a gratuitous benefit. And
4 because the schools there -- or I'm sorry, the State
5 there was receiving nothing in return for the services
6 provided to those schools, it was a gratuitous benefit.
7 And you have to look at both of those things in order to
8 be valid under Article II, Section 5.

9 THE COURT: But you would concede,
10 Counsel -- maybe you won't, but I am going to ask you
11 anyway -- that there has been no case that speaks to

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12 education that has said that?

13 MS. GREENWALT: Well, Your Honor, I would also
14 say that there has been no case that has spoken, as to
15 education, that public purpose and adequate
16 consideration is not part of the analysis.

17 THE COURT: Right. And then that
18 becomes -- as I think about the role of this Court, and
19 that is what is so troubling to me. Certainly, this
20 Court has said -- and I think you-all have appeared
21 before -- you certainly have appeared before me in a
22 matter before -- and I am fond of saying that this Court
23 is not a fan of making precedents. I'm a fan of

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24 following those precedents. And in the absence of a

25 precedent that speaks on point, I simply follow the law

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1 that is presented. Not the law I think ought to be.

2 And that's somewhat where I find myself and why we are

3 continuing this discussion, because certainly were I on

4 the Court of Appeals, this would be different. But the

5 Court of Appeals, their purpose is to provide clarity to

6 the law.

7 My job in this particular instance is simply

8 to follow the law. And as I think about -- let's say,
9 for the sake of argument and let's argue that I'm a
10 strict constructionist and I just look at things as they
11 are and I don't give any more meaning beyond what is
12 there, as I look at this constitutional provision, I am
13 struggling to see how I, in the absence, again, of a
14 precedent that speaks to the application of this
15 purpose, public-purpose analysis, in the context of
16 education, how I simply overlook these clear,
17 unambiguous words in this Constitution? That's what I'm
18 struggling with.

19 MR. WYRICK: May I take it from here?

20 THE COURT: Please, Mr. Wyrick. Please.

21 MR. WYRICK: With all due respect, I think you

22 just explained all the reasons why you have to uphold

23 this particular piece of legislation.

24 There is no case that says that even in the

25 context of K through 12 education, that when you clearly

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1 have consideration -- clearly have consideration -- and

2 we have consideration here -- that the legislative act

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3 can be invalidated under Article II, Section 5. And we

4 actually do have an educational case, the Burkhardt

5 case, the City of Enid case. Now, that was higher

6 education, but I don't think it matters.

7 If anything, I think it cuts in our favor

8 because the State has no obligation under the

9 Constitution to provide higher education. But in that

10 case, although the court ultimately concluded that

11 Phillips University wasn't a sectarian institution, the

12 court also said this transfer would otherwise be valid

13 under Article II, Section 5, even if it were a sectarian

14 institution because consideration is present.

15 And with all due respect to, you know, the

16 policy arguments that we heard from Mr. Richardson,

17 those were -- those lost today at the legislature.

18 Right? And that's --

19 THE COURT: That's not my job.

20 MR. WYRICK: Yeah. That's what those are.

21 But what they are asking you to do is to construct

22 Article II, Section 5, in a way that requires the State

23 to discriminate against sectarian institutions from

24 legislating in this arena. That is, that the Lindsey

25 Nicole Henry Scholarship Act has to exclude sectarian

1 institutions. And, then, if you do that, you are
2 running headlong into the Federal Constitution and
3 potentially have a Free Exercise.

4 So, just in constructing Article II,
5 Section 5, just under the cannon of avoiding
6 constitutional doubt -- if you want to avoid raising
7 constitutional doubt as to Article II, Section 5, you
8 have to read it, I think, the way we read it, which is
9 if you have public purpose and you have consideration,
10 that's enough. And you read Antone and Gurney to say

11 those acts weren't invalidated based on the religiosity
12 of the institutions. Right? Those acts were
13 invalidated because of the lack of consideration.
14 That's what Murrow tells us and that's what the cases
15 that have come since tell us.

16 THE COURT: But Murrow dealt with orphanages,
17 and I know that Mr. Mann is going to bring that up. It
18 dealt with orphanages. But I think where I have greater
19 comfort in embracing this logic, is that we are
20 talking -- it was really about a constitutional mandate;
21 and we have a constitutional mandate here as well.

22 Certainly, the State is obligated to, I

23 think -- I can't remember the exact constitutional
24 provision, but to care for orphans in this state. Much
25 like, as I read Article I, Section 5, were obligated to

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1 have a system of public education. And as I have
2 indicated before, I don't think that that then operates
3 to exclude the State doing, what I would call,
4 supplemental measures to ensure that we have an educated
5 populous.

6 MR. WYRICK: And we ag- -- they are not

7 mutually exclusive. You are right. But this case

8 actually -- we have learned something from Murrow

9 because those constitutional obligations that were at

10 play there -- the obligation to provide for the needy

11 and the disabled and the orphan -- we think are actually

12 in play here.

13 They weren't in play in Antone and Gurney.

14 That was just about kids going to private religious

15 schools, so, we actually have that extra layer injected

16 here. But, again, you read those cases -- if you read

17 those cases as saying that you have to invalidate those

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18 legislative acts that were at issue based solely on the

19 religiosity of the school -- if it's a religious school,

20 we have to invalidate it -- you have a Federal

21 constitutional problem. And that's why we read

22 Article II, Section 5, and we think the court in the

23 subsequent cases has read Article II, Section 5, saying

24 we decided those cases on the basis of lack of

25 consideration. That had there been consideration, even

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1 those transfers would have been okay because, again,

2 what does the plain language of Article II, Section 5,
3 say? It says, no aid. And the court has said that's a
4 gratuitous support of the sectarian institution, as
5 such. And there, we have schools. They wanted bussing
6 for their kids. But for the State providing the
7 bussing, the school was going to have to pay for that
8 itself.

9 THE COURT: But certainly, Counsel, you would
10 agree with me there is a difference between a sectarian
11 institution and a religious-affiliated institution,
12 which is what, I think, in Burdhardt, the court
13 ultimately found, that that was a religious-affiliated

14 institution and I think, for me, the difference would

15 be, one, is control.

16 Does the church control the school? Is the

17 school, then, required to advance the tenants of that

18 faith, that religion? That, then, I think would make it

19 a sectarian institution, which is, I think, where the

20 court has come out. And I think what makes these

21 arguments, even if I adopted that, a little bit

22 different because we are not talking -- we are talking

23 sectarian institutions. We are not talking about

24 religious-affiliated institutions.

25 I attended, for example, Southern Methodist

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1 University; and I can tell you it's Methodist in name
2 only. Certainly, the church is involved and has a seat
3 on the board of trustees; but the institution does not
4 exist, nor is there any tenant therein, to advance the
5 Methodist Church. Certainly, it's influenced by the
6 teachings and principles of the United Methodist Church,
7 but there does not exist for that purpose.

8 I don't know if the same can be true to where

9 I attended law school which is Notre Dame. It's a
10 little different. It's a Catholic institution through
11 and through. The church -- the President of that
12 institution is a priest; and, so, religion influences
13 every aspect of Notre Dame. So, I think, if I even
14 compared those two, it's a little bit different. I
15 would argue one is more of a sectarian and the other,
16 Southern Methodist, is a religious-affiliated.

17 So, how do you justify or how do you respond
18 to that type of analysis?

19 MR. WYRICK: Well, respectfully, in Burkhardt
20 the court said even if it were a sectarian institution

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21 and not just a religiously affiliated, consideration is

22 present and then this transfer would be fine under

23 Article II, Section 5.

24 I think, secondly, I mean, if you look at the

25 cases, our argument is, even if it is a sectarian

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1 institution, the transfer is okay. And in the second of

2 those bussing cases -- or it may have been in the Murrow

3 case, I forget which one -- the court actually said, We

4 have no doubt that the State could contract with a

5 sectarian institution to provide bussing for a public
6 school because in that event the State would be getting
7 something of value back, in return. So, even in that
8 case, the fact that they were contracting with a
9 sectarian K through 12 school was not enough to
10 invalidate it under Article II, Section 5.

11 You still have to look at public purpose and
12 consideration. And Article II, Section 5, teaches us
13 that the State can't have a public purpose in operating
14 the church. Right? We know that. But that's not what
15 we have here.

16 Instead, what we have is a non-gratuitous

17 benefit, different than Antone and Gurney; and what we
18 have is the State providing educational services to
19 these children. Educational services to special needs
20 kids with specialized needs and that implicates them the
21 constitutional duty of the State to provide for the
22 needy and the disabled.

23 THE COURT: But in those particular cases,
24 Counsel, I again go back to this. Were the issues not
25 whether those constituted gifts, public gifts to those

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1 institutions, or did they just apply generally to
2 educational institutions?

3 MR. WYRICK: Which cases?

4 THE COURT: Well, the cases that you are
5 referencing. You have just discussed certain cases.
6 You have listed or you have, at least, articulated these
7 general principles where you talked about the State
8 being able to contract with sectarian institutions to
9 provide -- but was not the allegation, was not the
10 argument there whether those contracts constituted
11 gifts?

12 MR. WYRICK: No. The argument was Article II,

13 Section 5, is at play in every one of those instances.

14 And when the court was describing that theoretical

15 contract with the sectarian institution to provide

16 bussing, that was in the context of its Article II,

17 Section 5 analysis.

18 MR. RICHARDSON: May I respond?

19 THE COURT: Please.

20 MR. RICHARDSON: First, Your Honor, I am

21 dismayed to hear the State argue that not only should

22 this Court ignore the rulings of the Oklahoma Supreme

23 Court, they are now asking you to ignore the rulings of

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the United States Supreme Court.

25 I just explained in Locke v. Davey that there

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1 is absolutely no First Amendment issue with regard to

2 the states having a more stringent line for public

3 funding of religious institutions. And Mr. Wyatt turns

4 around and tries to make this Court believe that by

5 enforcing the Oklahoma Constitution, there's somehow

6 going to be a violation of the United States

7 Constitution.

8 THE COURT: Well, that's not my concern, I

9 will tell you, Counsel; but I appreciate you --

10 MR. RICHARDSON: Well --

11 THE COURT: Go ahead.

12 MR. RICHARDSON: -- it's absolutely untrue.

13 And I the precedent makes it clear it's untrue, and I

14 just don't believe that should go unrefuted. But the

15 other point, the larger point, perhaps, with regard to

16 this consideration argument, I went back and looked at

17 all these cases that the Defendants have relied on. And

18 every case that they have relied on that talks about

19 consideration was a contract case. The Court -- you put

20 your finger on it.

21 Of course, when there is a contract involved,

22 consideration is an issue. Of course, parties negotiate

23 back and forth, as to, you know, what will you give?

24 What can I get? What is the consideration that's going

25 to flow between us for this contract? But there is no

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1 case in which a statute has been held to be enforceable

2 because consideration was received.

3 THE COURT: But isn't there a contract at play

4 here? Does not the Secretary --

5 MR. RICHARDSON: No, absolutely not. And the

6 Gurney case was the case that we have here. It was a

7 statute not a contract, and that is why the court was

8 not persuaded by this argument that consideration was

9 enough.

10 It boggles my mind, Your Honor, quite frankly,

11 that the State is actually saying that, well, when the

12 State provides transportation to students, that's --

13 that can be prohibited by the no-funding clause; but

14 when the State goes ahead and pays 8- or 10- or \$12,000

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15 per year, per student, for these kids to have tuition to

16 go to a private school, that's okay? I mean, that's

17 straining out a gnat and swallowing a camel. I mean,

18 that's just -- that's inconceivable.

19 And the court -- I think Antone is clearly the

20 controlling precedent because it said exactly what this

21 case is about. The court said, of course, parents have

22 the right to choose religious instruction for their

23 child and to have the child go to a school that teaches

24 those things; but they said when a parent chooses to

25 seek for their child educational facilities which

1 combine secular with religious instruction, that parent
2 is faced with the necessity of assuming the financial
3 burden that that choice entails.

4 How else could the -- how more plainly could
5 the court have been? And the last point -- and I don't
6 want to belabor this. But my colleague pointed out to
7 me that in response to your earlier question about the
8 1963, the Antone decision, we do have many subsequent
9 Attorney Generals' opinions, going up into the eighties,
10 in which the Attorney General repeatedly said, Hey, the

11 Oklahoma Supreme Court has construed this and this is
12 what it means.

13 THE COURT: And wasn't there one from 1986, or
14 something, along those lines?

15 MR. RICHARDSON: I believe there was -- the
16 last one I remember was 1981, I believe; but you may
17 be -- I am not going to say you are wrong.

18 THE COURT: Well, let me go back to this
19 contract argument because, certainly, as I look at
20 Page 3 of Defendants' Motion for Summary Judgment, it
21 sets forth a le- -- this is not something that's
22 just -- as I understand it, under the act, it's not

23 something that is just automatic.

24 There appears, here, to be certain

25 expectations that the Department of Education has set

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1 forth or established for these private schools in order

2 to participate in this program; certainly,

3 accreditation; fiscal soundness; anti-discrimination

4 policies; adherence to local health and safety laws;

5 academic accountability. Those things -- would not that

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6 be a contract?

7 MR. RICHARDSON: No, Your Honor. Because can
8 you point to one of those provisions that would not
9 apply to a private parochial -- to a private religious
10 school in the absence of the Lindsey Nicole Henry
11 Scholarship?

12 Would a private school, in the absence of the
13 Lindsey Nicole Henry Scholarship, still not have to be
14 accredited by the State in order to operate? Would it
15 still not have to comply with the State health and
16 safety laws? Would it still not be expected to be
17 accountable to the parents of the children?

18 What does that require a private parochial

19 school or a private religious school to do that is not

20 required merely by the fact that it is a school?

21 There is no contractual relationship here.

22 MR. WYRICK: Respectfully, there are multiple

23 elements of consideration, including having to

24 demonstrate fiscal soundness to the State Department of

25 Education.

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1 But going back to this contract idea, I'm glad

2 that he brings up the AG opinions because under the
3 previous Attorney General, there's a 2008 opinion where
4 we have -- it's a legislative act that created the
5 Office of Faith-Based Initiatives. And the question
6 was, can the State, can it work with the Jesus House and
7 other clearly sectarian institutions who provide halfway
8 house services, drug counseling, and other things? And
9 that was upheld applying exactly the test that we are
10 asking you to apply today.

11 THE COURT: But they are not schools.

12 MR. WYRICK: No, they are not schools; but
13 that doesn't matter under Article II, Section 5.

14 MR. RICHARDSON: Respectfully, under Murrow,

15 it does matter because there is a duty to provide for

16 inmates just as there's a duty to provide for orphan

17 children. And that is the reason for the Transformation

18 of Justice Act, that it is not unconstitutional -- I

19 mean, the Attorney General. So, that's at least a valid

20 reason for the Attorney Generals' opinion.

21 THE COURT: Interesting. Interesting

22 analysis.

23 Well, Counsel, what I am going to -- do

24 you-all have anything further to add?

25 I need to take a very short recess to decide

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1 what I am going to do based on what I have heard this
2 morning. I tell you, both, I think, make very
3 compelling arguments. But this Court certainly has to
4 operate, not under the law that I would like it to be or
5 think it ought to be, but the law that is. And in
6 thinking about that, certainly, I am always persuaded by
7 opinions various -- whether it be from the Attorney
8 General, or what have you, and, certainly, the Law

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9 Review articles -- but I am more persuaded by court

10 precedent. And that's what I need to assess in thinking
11 about this issue.

12 I need to look at the precedent that
13 has -- that has been in place for some time in these
14 matters. And I will then base my ruling as to the
15 constitutionality of this act, under Article II
16 Section 5, based on that precedent.

17 We will stand in recess. If you-all will give
18 me about 30 minutes. I think that's all I am going to
19 need based on my familiarity with some of these cases.

20 If you will give me 30 minutes, I will come

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21 back and tell you what direction this Court is going to

22 go. Either way, I anticipate there will be some form of

23 an appeal. That's just how this goes, based on -- it

24 could be based on how I have already ruled. And, so,

25 either way, this Court will entertain requests for

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1 interlocutory appeals because the reality is, this is

2 something, I think, that would justify being clarified

3 by an appellate body now, as opposed to later. So, we

4 will see what happens. But we will stand in recess

5 until 10:45 -- I'm sorry. I keep saying 45 -- until

6 11:15 today.

7 MR. WYRICK: Okay.

8 MR. RICHARDSON: Yes, Your Honor.

9 (Brief recess)

10 THE COURT: After a brief recess, we are back

11 on the record in CV-2013-2072. Oliver, et al., v.

12 Barresi, et al.

13 This Court concludes, as it began, with the

14 recognition of the proper role of this Court. My job,

15 as I said before -- and I believe the job and role of

16 every court -- is to say not what the law ought to be

17 but to say what the law is.

18 As previously announced, this Court affords
19 great deference to the legislature. The legislature, I
20 believe, is comprised of duly-elected representatives of
21 the people charged with making laws and advancing public
22 policy to correct societal problems. Again, it is the
23 legislature, not courts, that are charged with making
24 law.

25 Courts generally should do no more than follow

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1 the law. And when the issues of public policy arise,
2 courts, again, should afford deference to the people's
3 representatives. This deference, however, is not
4 without limitation; and courts have a sacred obligation
5 to preserve and promote the Constitution and to respect
6 precedent interpreting the same.

7 As I think about this matter, as evidenced by
8 my rulings regarding the constitutionality of the act
9 under Sections 14 and 15 of Article X, there is, I
10 believe a public-purpose advance where an adequate
11 consideration has been received. And certainly were

12 this the extent of the Court's analysis, questions as to

13 the constitutionality of this act would be foreclosed.

14 But that's not entirely the case here because

15 we have clear, unambiguous language in Article II,

16 Section 5, prohibiting the direct or indirect awarding

17 of public funds for the aiding of private religious

18 institutions. And while there are precedents and

19 opinions of the Attorney General which have clarified

20 the meaning of that constitutional provision and have

21 determined that it is not an absolute prohibition on the

22 use of public funds to aid private religious-affiliated

23 institutions, there is no clear precedent that has

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24 expressly expanded this liberal application of

25 Article II, Section 5, to sectarian educational

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1 institutions.

2 Were that the case, this Court would be

3 inclined to apply the public-purpose analysis and would

4 ultimately conclude that the act is constitutional.

5 However, as I said, that is not the case; and

6 this Court, one that believes in and indeed exercises

7 judicial restraint, will not give an expanded meaning to

8 the Constitution by applying the public-purpose test to
9 this set of facts.

10 Accordingly, this Court reluctantly finds the
11 Lindsey Nicole Henry Scholarship for Students with
12 Disabilities Program Act to be unconstitutional, as it
13 violates Article II, Section 5's no-funding clause.

14 On this, the Court further finds, based on
15 this and previously-announced findings and orders that
16 Plaintiffs' and Defendants' respective Motions for
17 Summary Judgment are granted in part and denied in part,
18 accordingly.

19 That is the order of this Court.

20 Counsel?

21 MR. MANN: Your Honor, in our petition, we
22 requested a declaratory judgment, and I assume from the
23 Court's ruling that you are issuing a declaratory
24 judgment that it is unconstitutional on Article II,
25 Section 5.

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1 In addition, we asked for a permanent
2 injunction with regard to no more public funding. And I

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3 would hope that that follows from the declaratory

4 judgment. But what I'm also saying to you is that we

5 understand that this will go up to the Oklahoma Supreme

6 Court; and we have no problem, whatsoever, with your

7 injunction and declaratory judgment being stayed pending

8 a final decision of the Oklahoma Supreme Court. We are

9 not wanting to be disruptive in the middle of a school

10 year. That would be more for the Supreme Court.

11 Am I correct in my statement?

12 THE COURT: Certainly, that is the way this

13 operates.

14 MR. MANN: Okay.

15 THE COURT: And, certainly, as I announced

16 before we went on our recess that that would be the

17 effect of whatever is done today. It is going to be

18 stayed. And, certainly, it operates based on the

19 requested relief to afford you that declaratory

20 judgment, as well as the injunction.

21 MR. MANN: Thank you, Your Honor.

22 THE COURT: Mr. Wyrick, anything from you-all?

23 MR. WYRICK: Just for clarification, if I

24 could. Are you invalidating the act in its entirety, on

25 its face, or only as applied to those sectarian

1 institutions that participate in the program?

2 THE COURT: I appreciate that. That

3 certainly -- it would seem to me that it would

4 only -- it's very narrow; and, so, this ruling ought to

5 be interpreted very narrowly. And it would only apply

6 to sectarian institutions.

7 MR. WYRICK: And we -- I think about 104 of

8 the students -- 300 students participating, actually are

9 nonsectarian students.

10 THE COURT: That is exactly right. Again, I

11 saw and studied -- I was studying these briefs well into
12 the morning, again, and certainly saw that. And that is
13 why I ultimately concluded, as I did, that whatever is
14 done should be stayed pending final resolution from an
15 appellate body whose role it is to provide clarity to
16 the law. That's not my job.

17 MR. WYRICK: I appreciate that, Your Honor.

18 THE COURT: Anything further?

19 MR. MANN: We will prepare a final order and
20 submit it, Your Honor, to counsel --

21 MR. WYRICK: Okay.

22 MR. MANN: -- and get it to you.

23 THE COURT: Thank you. And please do that in

24 conformity with the rules within ten days.

25 MR. MANN: We will do so.

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1 THE COURT: All right.

2 MR. MANN: Thank you.

3 THE COURT: Thank you-all so much. I want to

4 just commend both of you, both sides, for the work done

5 on this matter. Certainly, the briefs were well written

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6 and the research -- I appreciate that. I didn't have to

7 do much research, much independent research, like I

8 normally have to do in these matters. So, I want to

9 thank you-all for that and, certainly, for how you

10 presented your arguments.

11 Oftentimes, in these contentious matters, I

12 feel like a referee at a WWE match or something like

13 that. And, so, I appreciate the respect that you-all

14 have shown for each other and, certainly, this Court.

15 I wish you-all well. And I am sure I will be

16 hearing, at some point in time, what the Supreme Court

17 or the Court of Appeals does with this matter. The best

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of luck to all of you.

19 (The proceedings were concluded at this time.)

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1 IN THE DISTRICT COURT OF OKLAHOMA COUNTY

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STATE OF OKLAHOMA

3

CLARENCE G. OLIVER, JR.,)

EARL GARRISON, AMY VARGUS,)

4

DAVID K. PENNINGTON,)

RAY HICKMAN, KIRBY A. LEHMAN,)

5

STACY L. ACORD, ROBERT M.)

PETERS, RANDALL K. RABURN,)

6

MELISSA ABDO, TIM GREEN, and)

GORDON R. MELSON,)

7

Plaintiffs,)

8

and) Case No. CV-2013-2072

9

JANET BARRESI, in her official)

capacity as State Superintendent)

10

of Public Instruction, THE)

OKLAHOMA STATE DEPARTMENT OF)

11

EDUCATION, and THE OKLAHOMA)

STATE BOARD OF EDUCATION,)

12

Defendants.)

13

14 C E R T I F I C A T E

15 I, Jeanna D. Whitten, Certified

16 Shorthand Reporter within and for the State of Oklahoma,

17 duly appointed and qualified reporter in the District

18 Court of Oklahoma County, do hereby certify that the

19 foregoing transcript is a true and accurate record of

20 the testimony given to the best of my understanding and

21 ability.

22 IN WITNESS WHEREOF, I hereunto set my

23 hand and seal this 8th day of September, 2014.

24

25 Jeanna D. Whitten, CSR, RPR

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