Testimony of Richard D. Komer

For the Alaska House of Representatives

Committee on Education

Concerning HJR 1

Held on March 1, 2013

Madame Chair and Members of the Committee:

My name is Richard D. Komer, and I am a Senior Attorney at the Institute for Justice ("IJ") based in Arlington, Virginia. Thank you for inviting me to offer my views on HJR 1. HJR 1 is a proposal to amend Alaska's Constitution by subtracting the "Blaine Amendment" language found at Article VII, Section 1, and by adding language to Article IX, Section 6 authorizing state assistance to students for educational purposes. This written testimony supplements the oral testimony I presented during my two minute presentation at the Friday, March 1 Hearing.

The Institute for Justice is a non-profit public interest law firm headquartered in Arlington, Virginia, a suburb of Washington, D.C. Since opening our doors in 1991, we have worked on legal issues in four areas: property rights, economic liberty, the First Amendment Free Speech Clause, and school choice. In cases we litigate, we represent clients on a pro bono basis, and in the first three areas we typically sue governments for violating individuals' rights. In the fourth area, school choice, we assist legislators interested in creating school choice programs, seeking to ensure that whatever programs are passed can withstand any subsequent legal challenge. If such challenges are filed against the constitutionality of the program, we intervene in those lawsuits on behalf of parents seeking to defend their rights under the program and are aligned with the state officials defending the program. We consider ourselves the lawyers to the school choice movement.

The Institute for Justice has participated in the successful defense of virtually all current school choice programs that have undergone legal challenge in either federal or state courts and under both the Federal and state constitutions. These programs have included both scholarships provided directly by the state on behalf of eligible families and scholarships generated by private donations to scholarship-granting organizations from either private individuals or businesses. We represented parents in both cases decided by the U.S. Supreme Court involving school choice programs: *Zelman v. Simmons-Harris* (2002) and *Winn v. Arizona Christian School Tuitioning Organization* (2011). *Zelman* upheld a direct scholarship program in Cleveland, Ohio against a challenge alleging that it violated the federal Establishment Clause. *Winn* rejected a similar Establishment Clause challenge to an Arizona program providing state income tax credits for donations to scholarship granting organizations.

Both the Ohio and Arizona federal court cases arose after similar state court challenges concluded in the Ohio and Arizona supreme courts: *Simmons-Harris v. Goff* (Ohio 1999) and *Kotterman v. Killian* (AZ 1999). In addition to alleging violations of the federal Establishment Clause, these state court challenges alleged violations of state constitutional provisions, including state Blaine Amendments

 Provided by Senator Mike Dunleavy

similar to Alaska's, as have a number of other appellate cases we have successfully litigated in other states around the country, including Colorado, Illinois, and Wisconsin. Challenges based on state Blaine Amendments are currently pending in Indiana and New Hampshire, although there are additional states with school choice programs and Blaine Amendments where no challenges were ever brought, including Florida, Georgia, and Pennsylvania. In short, we at the Institute for Justice are intimately familiar with the jurisprudence involving both the federal Establishment Clause and state Blaine Amendments.

I personally have been involved with reviewing and defending school choice programs since I came to IJ in 1993, nearly 20 years ago. Prior to joining IJ, I was a career civil rights lawyer for several of the federal government's civil rights agencies, including the Civil Rights Division at the Department of Justice, the Equal Employment Opportunities Commission, and two separate stints at the U.S. Department of Education's Office for Civil Rights, the second one in a political capacity as Deputy Assistant Secretary for Civil Rights. At IJ I work exclusively in the area of school choice, and co-authored a survey of state constitutions' entitled "School Choice and State Constitutions: A Guide to Designing School Choice Programs," which can be found on our website at ___ . A principal focus of that survey is on the language and case law interpreting the state Blaine Amendments found in 39 state constitutions, including Alaska's.

My testimony at the March 1st hearing of your committee was the fourth time I have testified in Alaska legislative hearings, including one in each of the last two sessions and then most recently on February 13th on SJR 9 before the Alaska Senate Joint Education, Judiciary and Fiscal Committee Hearing chaired by Senator Coghill. All of my testimonies have addressed the need to repeal the Alaska Blaine amendment language to overturn the interpretation of that language by the Alaska Supreme Court in a pair of decisions I consider poorly reasoned. Unless those interpretations are eliminated by removing the language I believe they have misinterpreted, Alaska will be unable to create legally-defensible direct scholarship programs at either the elementary and secondary level or the collegiate level.

The problem arises from the Alaska Supreme Court's interpretation of the last sentence of Article VII, Section 1. That sentence reads "No money shall be paid from public funds for the direct benefit of any religious or other private educational institution." As previously mentioned, some 38 other states have similar language in their state constitutions, although none has language as succinct as Alaska's. We regard this as a state Blaine Amendment because it shares the one characteristic common to all of them, the prohibition on spending state money for the benefit of non-public educational institutions at the elementary and secondary school level. The failed federal Blaine Amendment, if enacted, would have prevented all states from spending their money on religious schools. Alaska's Blaine, like those of some other states, includes higher education institutions as well as lower, and prevents aid to private educational institutions as well as religious ones. In these two ways it is broader than the classic Blaine Amendment, but it is also narrower on its face than many by limiting its prohibition to money "paid for the direct benefit of any religious or private educational institution." I have noted that it is only narrower "on its face," and underlined "direct benefit" to emphasize that this is the issue where I think the Alaska Supreme Court has misinterpreted this language, and expanded the prohibition is a way never intended by those who enacted it.

One normally uses the adjective "direct" to create a contrast with "indirect" and indeed the history of the Alaska constitutional convention appears to bear out this commonsense conclusion. For example, Professor Gerald McBeath notes at page 141 of his book, "The Alaska State Constitution : A Reference Guide" (1997), in discussing Article VII, Section 1, that "Delegate Jack Coghill sought an amendment to section 1 that would replace the word *direct* with *indirect*" to increase protection of the public schools from encroachment. According to McBeath, this amendment as rejected by a nearly 2-to-1 margin because other delegates regarded it as too radical and noted that "it might be construed to prevent students in private schools from receiving welfare benefits typically administered through the schools." Unfortunately, Professor McBeath has somewhat misstated the issue at the convention and the proposed amendment, although he is clearly correct that the amendment was intended to expand the restriction on aid to private schools.

Victor Fisher, a delegate to the convention, explains in his book "Alaska's Constitutional Convention" (1975), that the rejected Coghill amendment would have added "and indirect" after "direct," so that the prohibition would have read "direct and indirect benefit." Fisher notes that opponents of the addition of "and indirect" "argued for the provision of services to the individual student if otherwise in keeping with the constitution." He concludes that a majority of the convention "agree[d] with those who argued that more important than these considerations *was the need to help each child attain the fullest level of development through programs such as free lunches, bus transportation, and even payment of room and board to parentless children, so long as the basic principle of separation of church and state was maintained."* (Emphasis added.)

I emphasis that the actual amendment was to add the prohibition of "indirect" benefit for private educational institutions, because this concept of prohibiting both direct and indirect benefits for private schools is found in a number of other states' Blaine Amendments and it is the "indirect" benefit idea that can lead them to interpret the language as prohibiting aid to students as well as direct aid to schools. The discussion of adding "indirect" to Alaska's Blaine Amendment clearly shows a similar understanding at the constitutional convention and the rejection of the amendment to add "indirect" was framed in terms of continuing to permit aid to private school students. Regrettably, the Alaska Supreme Court failed to honor this distinction in his two primary cases interpreting the Blaine language, which necessitates the need for repealing the Blaine language to remove the mistaken interpretation.

In the first of these cases, *Matthew v. Quinton* (1961), in a suit brought by the Fairbanks public school district, the Alaska Supreme Court held that the provision of public transportation to private school students attending a Catholic school in Fairbanks violated the direct benefit language of Section 1. Despite the fact that the program pre-dated the new Constitution and the specific reference to bus transportation in the convention debate rejecting the addition of "and indirect" to the Blaine language to protect such aid as bus transportation to private school students, the Court read the direct benefit language expansively. I also note that by 1955 went the constitutional convention occurred and 1961 when the Matthews case was decided, the U.S. Supreme Court had already decided that providing bus transportation to private school students did not violate "the basic principle of separation of church and state," in its *Everson v. Board of Education* decision from 1947.

In 1979, in the second case, the Alaska Supreme Court compounded its error, in *Sheldon Jackson College v. State* (1979). The Court invalidated a grant program helping student s pay tuition at private colleges. The Supreme Court characterized the students as "conduits" for direct benefits to private colleges. This approach utterly disregarded the fact that the students themselves were obviously the direct beneficiaries of the tuition assistance and that any "benefits" the colleges themselves derived came only as result of the students decision to attend the school and use their state aid to purchase an education from it. The U.S. Supreme Court had already dismissed an appeal in which the South Carolina Supreme court had upheld a student loan program under its Blaine Amendment and the federal Establishment Clause in which students could apply the funds to tuition at the college of their choice. *Durham v. McLeod*, 192 S.E.2d 202 (S.C. 1972), *appeal dismissed for want of a substantial federal question*, 413 U.S. 902 (1973.

Although the judicial branch has long been considered the "least dangerous branch" of the government, it does have the final say on what constitutions and statutes mean, at least until those instruments are amended. There are only two ways in which a supreme court decision can be reversed: either the supreme court reverses itself in a subsequent decision, or the people, acting through their legislature and the constitutional amendment process, modifies the language in such a way as to necessitate a different outcome. The problem with the former process in the context of school choice programs is that before the supreme court could have an opportunity to reverse itself the legislature would have to pass a program it knew to violate existing constitutional law. Few state legislatures do this intentionally, given that legislators are sworn to uphold the constitution. But it does happen inadvertently on occasion. HJR 1 and SJR 9 are means of beginning the other alternative of amending the constitution itself.

To illustrate these alternatives let me give an example of each, in the Blaine Amendment context. Both New York and South Carolina have Blaine Amendments originally different than Alaska's in precisely the way in which Delegate Coghill proposed amending Alaska's Blaine during the constitutional convention of 1955. New York's Article XI, Section 3 prohibits use of state money or property "directly or indirectly" in aid of any religious school. South Carolina's Article XI, Section 4 used to prohibit payment of public funds for the "direct or indirect" of private or religious educational institutions. I want to discuss cases from each state's supreme court.

In *Judd v. Board of Education* (1936) the New York Court of Appeals (New York's highest court) help that busing private school children to their private schools violated its Blaine Amendment by indirectly aiding the schools. This case predated by a decade the U.S. Supreme Court's decision in Everson upholding a similar New Jersey program under the federal Establishment Clause. In reaction to this decision, New York amended its Blaine to explicitly permit the transportation of children to and from any school, but left the "direct and indirect" language intact. Decades later New York passed a textbook loan program that provided free textbooks to children in private and religious schools, and a lawsuit challenged the program under New York's Blaine Amendment, relying on the *Judd* decision. In *Board of Education v. Allen* (1967), the Court of Appeals upheld the textbook program and overruled *Judd* in the process. The Court held that while the program provided *incidental* benefits to the private schools the children attended, those benefits were neither direct not indirect benefits to the schools

themselves. As a result, student assistance programs in New York similar to the transportation and scholarship programs struck down by the Alaska Supreme Court in the Matthews and Sheldon Jackson College cases are now constitutional in New York.

In South Carolina the Blaine Amendment case was very similar to Alaska's *Sheldon Jackson College* case. The South Carolina Supreme Court struck down a tuition grant program for private college students on the grounds that it provided indirect benefits to the colleges. *Hartness v. Patterson* (1971). The people of South Carolina responded in 1973 by removing from their Blaine Amendment the prohibition on "indirect" benefits while retaining the prohibition on direct benefits. This change was made to reverse the result in the *Hartness* case, and recognized student assistance programs were not direct aid to educational institutions. Thus, the same programs that Alaska prohibits as "direct aid" are treated as incidental aid in New York as a result of the Court of Appeals overruling *Judd* and indirect aid in South Carolina as a result of a constitutional amendment overruling *Hartness* by deleting indirect aid.

In addition to New York and South Carolina, a number of other states have modified their Blaine Amendments in various ways when they found them unduly restrictive, including Delaware, Idaho, Massachusetts, Montana, Nebraska, South Dakota, and Virginia. And as I mentioned at the hearing, three states have repealed their Blaine Amendments entirely, Louisiana, North Carolina, and Tennessee. That brigs the total of states to have amended or repealed their Blaines to 12. Accordingly, it would not be unprecedented if Alaska were to pass HJR1 and then complete the process of repealing its Blaine Amendment.

The scope of my testimony here today is not to discuss the merits of school choice as a policy matter, but only to lay out the reasons how the Alaska Supreme Court has severely limited the ability of the Alaska legislation to consider school choice programs on their merits. By its unduly expansive reading of what constitutes a "direct benefit," an interpretation that fails to properly account for the deliberate rejection by the constitutional convention of covering "indirect benefits in its Blaine language, the Alaska Supreme Court has handcuffed the Legislature and only the Legislature and the people can free it.

Thank you for providing me with this opportunity to share my views with you. If you have any questions for me, I would be happy to answer them in writing.

Richard D. Komer

Senior Attorney

Institute for Justice

Arlington, Virginia