By FAX

Representative Carl Gatto April 12, 2011
State Capitol Room 118
Juneau AK 9980 I
Dear Chairman Gatto:

My name's Richard D, Komer and m a senior attorney at the Institute for Justice in Arlington, Virginia, specializing in constitutional law as it pertains to school choice programs. The Institute for Justice is a public interest law firm that assists in the design and defense of school choice programs nationwide, At the request of the Alaska Public Policy Institute I phoned in to the hearing that you chaired yesterday on HJR 16, a proposal to amend two provisions of the Alaska Constitution, one of which is your state's Blaine Amendment, Article VII, section I, Unfortunately, my line seems to have been muted, so that when you had finished receiving testimony from various individuals in Alaska you could not hear me asking to testify. While I was delighted to hear your Committee pass out HJ R 16, I write to provide you with the testimony that I would have delivered had I been able to be heard,

I hope that you will forward my testimony to the other members of the Committee because it is important to understand the context in which the need arises to amend your Constitution and to correct a misstatement concerning the U.S. Constitution. The Institute for Justice has been assisting state legislators in designing school choice programs for nearly 20 years now, as well as defending those that pass and are challenged in court. We have represented parties in both of the U.S. Supreme Court's cases involving school choice, its landmark decision of *Zelman v. Simmons-Harris* from 2002 upholding the Cleveland 0hio scholarship program and last week's decision in *Arizona Christian School Tuition Organization v. Winn,* which allowed Arizona's individual tax credit scholarship program to continue. In short, we consider ourselves the lawyers for the school choice movement and have developed considerable expertise in analyzing the various state constitutions' religion clauses and their relationship to the federal religion clauses found in the First Amendment. On our website at www.ij.org you can find a short biography of me, a booklet a colleague and I wrote entitled "School Choice and State Constitutions: A Guide To Designing School Choice Programs" and an article I wrote for the Journal of School Choice.

As you know, Article VII, section I of the Alaska Constitution is what is known as a state Blaine Amendment, which take their name from a failed federal constitutional amendment introduced in 1876 by James G. Blaine of Maine, who aspired to be the Republican nominee for President to succeed President Ulysses S. Grant and who hoped to ride a wave of anti-Catholic sentiment into the White House. At the time he proposed his Amendment virtually all Catholics

were Democrats, and the Catholics were seeking funding for their parochial schools equal to that provided to the then generically-Protestant public schools. The Catholics had felt compelled to create their parochial school system because of the hostility that they faced in the public schools. In crafting his federal constitutional Amendment, Blaine turned to an amendment made to the Massachusetts Constitution in 1855, when the Know Nothing Party swept the state elections in Massachusetts and enacted a provision prohibiting any public funds from being given to aid the Catholic schools. The Know Nothing Party was viciously anti-Catholic and developed in response to the earliest wave of Catholic immigration into the U.S., at the time of the Irish Potato Famine in the 1840's.

Although the federal Blaine Amendment fell one vote short of passage in the Senate after passing the House with the requisite supermajority, the federal Congress had more than enough votes to pursue an alternate route to their same goal of ensuring no funding for Catholic schools. This alternate route was mentioned by another witness at your hearing, namely to require in enabling legislation that federal territories wishing to become a state include Blaine-like Amendments in their state constitutions.
Consequently, every state created after 1876 has a Blaine Amendment in its constitution, including Alaska. Some older states, like New York, also jumped on the Blaine bandwagon, joining Massachusetts and the newer states in having Blaine Amendments.

The misstatement that I would like to correct is Representative Gruenberg's statement that it is easier to amend the federal Constitution than the Alaska Constitution because while the federal charter requires only a majority vote of both houses of Congress the Alaska Constitution requires a two-thirds majority in both houses. This is mistaken - under Article 5 of the U.S. Constitution both houses of Congress must pass an amendment by a two-thirds majority, just as is the case with the Alaska Constitution. Two thirds of the states must then pass the federal amendment, thereby making it substantially harder to pass a federal amendment. Each state, however, passes the amendment by a majority vote of its people, just as Alaska requires of its electorate.

As previously mentioned, the federal Blaine Amendment failed to achieve the necessary two-thirds majority by one vote in the Senate after meeting that mark in the House, which is why it was possible for the substantial majorities in both Houses to put the requirement of a state Blaine Amendment into the enabling legislation with which potential new states had to comply. Enabling legislation, being ordinary legislation, requires only a majority vote in both Houses. If federal constitutional amendments required only a simple majority as Representative Gruenberg believes, the Congress would not have been able to force territories to adopt Blaine Amendments as a condition of becoming a state.

State Blaine Amendments do, however, vary somewhat in their particular language and are, of course, subject to interpretation by their state supreme courts. While Alaska's Blaine language is on its face narrower than many other states', unfortunately the Alaska Supreme Court has interpreted it extremely broadly, which is what creates the need for a constitutional amendment to overturn those negative decisions.

What do I mean by Alaska's Blaine Amendment having narrower language than some other states"? Article VII, section I forbids the paying money from public funds "for the direct benefit of any religious or other private institution." South Carolina's Blaine Amendment used to read similarly but included "for the direct and indirect benefit" of private schools. When the South Carolina Supreme Court interpreted "indirect" to prohibit a student assistance program for college students, South Carolina amended its constitution to drop the indirect language to allow the program, viewing "direct benefit" as allowing student aid but not institutional grants to private colleges.

The Alaska Supreme Court has, however interpreted "direct benefit" extremely broadly. First *Mathews v. Quinton,* 362 pP.2d 932 (Alaska 1961) *cert. denied, 368*U.S. 517 (1962), the Court held that transporting private school students at public expense violated Article VII section 3, as well as Article IX, section 6, which states in part that no appropriation of public money shall be made except for a public purpose. (The use this second provision is what necessitates the second change proposed in HJR 16 which specifies that nothing in section 6 "shall prevent payment from public funds for the direct education benefit of students as provided by law.") Then in 1979 the Alaska Supreme Court held in *Sheldon Jackson College v. State*, 599 .2d 127 (Alaska 1979) that the Blaine Amendment prohibited tuition assistance grants for students attending private colleges in Alaska, finding no distinction between giving money to students and giving money to the schools they choose to attend.

Needless to say, under the federal Establishment Clause the U.S. Supreme Court has recognized precisely this distinction between aiding students and aiding the schools they choose for as long as that Court has the Establishment Clause to the states. In its first such case, *Board of Education v. Everson* (1947) the Court upheld a student transportation program similar to that rejected by the Alaska Supreme Court in *Mathews v. Quinton.* Through many intervening cases and decades, this distinction became the basis for upholding the Cleveland school choice program in *Zelman* in 2002.

It is also a distinction recognized by many state supreme courts with Blaine Amendments, such as New York and Wisconsin. New York is particularly noteworthy, as its Blaine Amendment uses similar "direct or indirect benefit" language as South Carolina's Blaine used to contain, but New York's highest court held that aid to students provides only "incidental" benefits to private schools chosen by the student beneficiaries of public funds, and neither direct

nor indirect benefits to the schools. *Board of Education v. Allen*, 228 N.E.2d 791 (N.Y. 1967), *affirmed*, 392 U.S. 236 (1968). The benefits to students that the Alaska Supreme Court views as "direct" aid to private schools in the *Sheldon Jackson College* case the New York Court of Appeals (and the U.S. Supreme Court) view as only "incidental" aid to the private schools.

I point this out only to illustrate that there are persuasive reasons for not equating aid to students to aid to the schools that they and their families freely choose and attend. Unfortunately, when the Alaska Supreme Court has spoken and given an authoritative interpretation of a provision of the Alaska Constitution, that interpretation, however wrongheaded, is the law of the land and can only be reversed by a constitutional amendment. That is precisely the purpose of HJR 16. The constitutional changes proposed would bring the language of the Alaska Constitution more in line with the federal Constitution and permit the sorts of programs struck down in the *Mathews* and *Sheldon Jackson College* cases, which were clearly permissible under the federal Constitution.

It is ironic that state Blaine Amendments, originally spawned during several waves of anti-Catholic bigotry to protect the Protestant monopoly over public school spending, and at a time when no one believed the federal religion clauses applied to the states, have become in modem times a vehicle for efforts to prevent programs that allow families in general to access private education, including that provided in religious schools, many of them Protestant. The Alaska Supreme Court through its decision has allowed Alaska's Blaine Amendment to tie the hands of the Legislature in enacting school choice reforms that can increase educational freedom for all of Alaska's students at all levels of education. Passage of HJR 16 would free the Legislature to consider whether greater school choice would benefit Alaska’s students.

Thank you for the opportunity to share with you and the Committee my views.

Sincerely,

Richard D. Komer
Senior Attorney
Institute for Justice
Arlington, Virginia