INSTITUTE FOR JUSTICE

TO: MEMBERS OF THE OREGON SENATE COMMITTEE ON EDUCATION

FROM: MICHAEL BINDAS AND TIM KELLER, SENIOR ATTORNEYS, INSTITUTE FOR JUSTICE

SUBJECT: CONSTITUTIONALITY OF EDUCATION SAVINGS ACCOUNT PROGRAM PROPOSED BY SB 437

DATE: JUNE 8, 2017

I. ISSUE

Would the education savings account ("ESA") program that SB 437 would create be constitutional?

II. SHORT ANSWER

It is highly likely that the ESA program proposed by SB 437 would withstand constitutional scrutiny. If the program is enacted, the most likely constitutional challenges that might be made to it would be under the: (1) Establishment Clause of the First Amendment to the U.S. Constitution; (2) the "Blaine Amendment" (Article I, section 5) of the Oregon Constitution; and (3) the "Uniformity Clause" (Article VIII, section 3) of the Oregon Constitution. The program would almost certainly pass constitutional muster under each of these three provisions.

First, the ESA program would survive a challenge under the Establishment Clause of the U.S. Constitution because it would: (1) be neutral toward religion (meaning schools and other educational entities would be free to participate regardless of whether they are religious or non-religious, with no government actor or action skewing towards either type); and (2) operate based on private choice (meaning parents, not government officials, would decide the uses to which the funds in their children's ESA accounts would be put). Under the federal Constitution, religious neutrality and private choice are the hallmarks of a permissible school choice program.

Second, the program would almost certainly survive an attack under the Oregon Constitution's Blaine Amendment, which prohibits public funding "for the benefit of any religeous [sic], or theological institution." In interpreting and applying this provision, Oregon courts follow federal Establishment Clause jurisprudence, which, as noted above, allows the ESA program.

Finally, the program would almost certainly survive a challenge under the Oregon Constitution's Uniformity Clause, which requires the Legislature to "provide by law for the

establishment of a uniform, and general system of Common schools." Nothing in SB 437 or the ESA program it would create undermines the Legislature's obligation—and commitment—to provide for such a common, or public, school system. Rather, the ESA program would simply provide children with educational alternatives to that system—that is, with *additional* educational opportunities.

III. DISCUSSION

This memo addresses the three most likely constitutional challenges that might be made to the ESA program that SB 437 would create. As discussed below, none of those challenges has merit, and all three, therefore, would almost certainly fail.

A. THE FEDERAL ESTABLISHMENT CLAUSE

There can be no question that the proposed ESA program would withstand a challenge under the federal Establishment Clause, which provides that "Congress"—and, by judicial extension, the States—"shall make no law respecting an establishment of religion." In the landmark decision *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the U.S. Supreme Court rejected an Establishment Clause challenge to a school voucher program under which elementary and secondary students received publicly funded scholarships that they could use to attend private, including religious, schools. Applying the Establishment Clause test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (hereinafter "the *Lemon* test"), the Court upheld the voucher program because it had a "valid secular purpose of providing educational assistance to . . . children" and did not have the "the forbidden 'effect' of advancing . . . religion," despite the fact that the vast majority of families chose religious schools. *Zelman*, 536 U.S. at 647, 649. As the Court explained, the program was: (1) "neutral with respect to religion, . . . permit[ting] the participation of all schools within the district, religious or nonreligious"; and (2) a program of "true private choice," providing a benefit "to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice." *Id.* at 652, 653 (emphasis omitted).[1]

For the same reasons that the voucher program in *Zelman* was upheld, the ESA program proposed by SB 437 would be upheld in the face of an Establishment Clause challenge. The program, after all, would have the valid secular purpose of providing educational assistance to Oregon's children, and it would not have the forbidden effect of advancing religion. As in *Zelman*, it would be "neutral with respect to religion," allowing participation by schools and other educational entities regardless of whether they are religious or nonreligious. *Id.* at 652. Moreover, it would be a program of "true private choice": no funds from any ESA account would be used at any participating entity, religious or non-religious, but for the "genuine and independent private choice" of participating students and their parents. *Id.* at 652, 653. So long as these constitutional touchstones of neutrality and private choice are satisfied—and they would

[1] *Zelman* culminated a line of cases upholding religion-neutral student aid programs that operate on the private choice of students and parents. *See Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983); *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968).

be under SB 437—the ESA program would survive a challenge under the Establishment Clause of the U.S. Constitution.

B. THE BLAINE AMENDMENT: ARTICLE I, SECTION 5

The ESA program would almost certainly withstand any challenge under the "Blaine Amendment"—that is, Article I, section 5—of the Oregon Constitution, which provides that "[n]o money shall be drawn from the Treasury for the benefit of any religeous [sic], or theological institution." The Oregon Supreme Court has held that the appropriate test for resolving a challenge under the Blaine Amendment is the "*Lemon* test" employed by courts in resolving challenges under the federal Establishment Clause. As noted above, there can be no doubt that the ESA program proposed by SB 437 would survive a challenge under the Establishment Clause, and there should therefore be no doubt that it would survive a challenge under Oregon's Blaine Amendment, as well.

The case that school choice opponents would most likely rely on in challenging the ESA program under the Blaine Amendment is *Dickman v. School District*, 232 Or. 238 (1961), which involved a Blaine Amendment challenge to a school district's policy of providing textbooks to students attending private, including religious, schools.[2] In defending the program, the school district argued that the textbook program did not violate the Blaine Amendment's proscription on public funding of religious or theological "institutions" because, under it, the textbooks were provided for the benefit of students—not the schools they attended. The court, however, rejected this "child benefit theory" and invalidated the program. *Id.* at 250-54. In so doing, it relied heavily on two cases—*Judd v. Board of Education*, 15 N.E.2d 576 (N.Y. 1938), and *Gurney v. Ferguson*, 122 P.2d 1002 (Okla. 1941)—in which the New York Court of Appeals (New York's highest court) and Oklahoma Supreme Court, respectively, rejected the child benefit theory in invalidating programs that provided publicly-funded bus transportation for students attending private, including religious, schools. *See Dickman*, 232 Or. at 250-54.

Although school choice opponents would undoubtedly rely on *Dickman* in any constitutional challenge they might mount against the ESA program proposed by SB 437, it is very unlikely that the courts would invalidate the program under that case. This is so for three reasons.

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[2] School choice opponents might also invoke *Fisher v. Clackamas County School District*, 507 P.2d 839 (Or. Ct. App. 1973), in which the Oregon Court of Appeals, relying on *Dickman*, held that the Blaine Amendment prevented the state from paying the salaries of teachers who taught secular subjects to parochial school students only. *Fisher* was decided in 1973, shortly after the U.S. Supreme Court's 1971 *Lemon* decision, and it involved a government program very similar to those the U.S. Supreme Court invalidated in *Lemon*. *Fisher* is thus consistent with federal Establishment Clause jurisprudence. *Dickman*, on the other hand, has long been clearly out of step with that jurisprudence, as evidenced by the fact that, in 1968, the U.S. Supreme Court *upheld* a New York textbook program similar to the one invalidated in *Dickman*. *See Bd. of Educ. v. Allen*, 392 U.S. 236 (1968).

1. ***In Interpreting The Blaine Amendment, Oregon Courts Now Follow Federal Precedent, Which Clearly Authorizes The ESA Program***

First, in 1976—a quarter century after *Dickman* was decided—the Oregon Supreme Court officially adopted the federal *Lemon* test as the applicable test for resolving challenges under Oregon's Blaine Amendment. The court did so in *Eugene Sand & Gravel, Inc. v. City of Eugene*, 276 Or. 1007 (1976), holding that "[t]he test established by the Supreme Court of the United States for application in determining whether a law is constitutional under the First Amendment 'Establishment Clause'"—that is, the *Lemon* test that the U.S. Supreme Court used in upholding the voucher program in *Zelman*—"is also appropriate for application in determining whether a law is constitutional under similar provisions of the Oregon Constitution," including, specifically, Article I, section 5 (the Blaine Amendment). *Id.* at 1012-13. Oregon courts continue to use the federal *Lemon* test to this day. *See, e.g.*, *State v. Howard*, 204 Or. App. 438, 446 (2006) (noting that "[t]he [Oregon] Supreme Court is free to adopt a federal constitutional analysis as the analysis that it uses to interpret a parallel provision in our state constitution" and that, in *Eugene Sand & Gravel*, it "adopt[ed] [the] federal test for establishment of religion as the appropriate test to be used under the state constitution as well"), *aff'd*, 342 Or. 635 (2007); *Kay v. David Douglas Sch. Dist. No. 40*, 79 Or. App. 384, 390 (1986) (noting that in *Eugene Sand & Gravel*, the Oregon Supreme Court "adopted the three-part test established by the United States Supreme Court in *Lemon v. Kurtzman*" and that "[t]he test should be viewed and applied within the broader framework of law that has developed around the Establishment Clause of the First Amendment"), *rev'd on other grounds*, 303 Or. 574 (1987).

In fact, in *Powell v. Bunn*, 185 Or. App. 334 (2002), the Oregon Court of Appeals expressly rejected a call to abandon adherence to the federal Establishment Clause test in interpreting and applying the state's Blaine Amendment. After noting that *Eugene Sand & Gravel* had "held that the appropriate test for deciding an establishment-like challenge brought under the Oregon Constitution is the so-called *Lemon* test" and that the Oregon Supreme Court "ha[d] never overruled" that decision, the Court of Appeals "reject[ed] plaintiff's invitation" to undertake an independent interpretation of the provision. *Id.* at 356, 357.

Significantly, *Powell* also stressed that the Blaine Amendment, as interpreted in *Eugene Sand & Gravel*, "does not embrace an unusually strict principle of separation of church and state." *Id.* at 357. "Rather," the court stressed, "Oregon's religion clauses were intended to ensure that the state does not cross the line between neutrality toward religion and support of religion." *Id.*

Accordingly, it is very likely that if the ESA program were adopted and challenged under Oregon's Blaine Amendment, Oregon courts would apply the *Lemon* test and uphold the program, just as the U.S. Supreme Court upheld the voucher program at issue in *Zelman* under that test. The courts would place particular emphasis on the fact that the program is "neutral[] toward religion," just as the Oregon Constitution demands. *Id.*

2. *Dickman Relied On Cases That Have Since Been Overruled Or Distinguished*

There is a second reason the Oregon courts would likely refuse to invalidate the ESA program under the half-century-old *Dickman*: the primary cases that *Dickman* relied upon in invalidating the school textbook program at issue in that case—*Judd* and *Gurney*—have since been overruled (*Judd*) or held *not* to bar publicly-funded school choice programs (*Gurney*). In *Board of Education v. Allen*, 228 N.E.2d 791 (N.Y. 1967), the New York Court of Appeals overruled *Judd*, and only last year, in *Oliver v. Hofmeister*, 368 P.3d 1270 (Okla. 2016), the Oklahoma Supreme Court held that *Gurney* does not prohibit a state-funded school voucher program.[3] Thus, *Judd* and *Gurney* no longer provide support for the outcome in *Dickman*.

3. *To Invalidate The ESA Program Under The Blaine Amendment Would Likely Violate The U.S. Constitution*

Finally, to apply Oregon's Blaine Amendment to invalidate the ESA program would very likely violate the federal Constitution—specifically, its Free Exercise, Equal Protection, and Establishment Clauses, which demand neutrality, not hostility, toward religion. Federal courts of appeals are currently divided on the question of whether government may, consistent with the federal Constitution, bar religious options or entities from otherwise neutral and generally-available public benefit programs.[4] The Supreme Court recently granted *certiorari* in one case (*Trinity Lutheran Church of Columbia, Inc. v. Pauley*, No. 15-577) and is currently considering whether to grant *certiorari* in another (*Doyle v. Taxpayers for Public Education*, Nos. 15-556, 15-557, 15-558) that may resolve this question. It is very possible that the Court will hold that state Blaine Amendments such as Article I, section 5 may not be applied to exclude religious options from school choice programs and other public benefit programs. In fact, the Court's existing precedent supports such a holding. In two cases, the U.S. Supreme Court has refused to allow states that have expansively interpreted their Blaine Amendments to interfere with federal constitutional rights. *See Widmar v. Vincent*, 454 U.S. 263 (1981); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *see also Everson v. Bd. of Educ.*, 330 U.S. 1, 16

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[3] *See Allen*, 228 N.E.2d at 794 ("We cannot agree with the reasoning of the majority in the *Judd* case and accordingly hold that it should not be followed."); *Hofmeister*, 368 P.3d at 1275-77. In fact, *Allen* and *Hofmeister* adopted approaches similar to that employed under the federal Establishment Clause even though, unlike the Oregon Blaine Amendment, the New York and Oklahoma Blaine Amendments contain expansive language prohibiting both "direct[]" and "indirect[]" aid to religious schools. *See* N.Y. Const. art. XI, § 3; Okla. Const. art. II, § 5. As the New York Court of Appeals concluded, aid to students provides neither direct nor indirect aid to the schools they attend, and whatever "aid" the schools receive is incidental to their selection by the parents. *See Allen*, 228 N.E.2d at 793-94.

[4] *Compare Badger Catholic, Inc. v. Walsh*, 620 F.3d 775 (7th Cir. 2010), *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245 (10th Cir. 2008), *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998), *and Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995), *with Trinity Lutheran Church of Columbia, Inc. v. Pauley*,788 F.3d 779 (8th Cir. 2015), *cert. granted*, 136 S. Ct. 891 (2016), *KDM v. Reedsport Sch. Dist.*, 196 F.3d 1046 (9th Cir. 1999), *and Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999).

(1947) (explaining that to "exclude . . . members of any . . . faith, because of their faith, . . . from receiving the benefits of public welfare legislation" would violate the Free Exercise Clause).[5]

In short, the Oregon courts would very likely uphold the proposed ESA program under the state's Blaine Amendment because: (1) Oregon courts follow federal Establishment Clause precedent in applying the Blaine Amendment and the U.S. Supreme Court has already upheld publicly-funded school choice programs under the Establishment Clause; (2) *Dickman*, which might have suggested a different conclusion when it was decided in 1961, relied on cases that have since been overruled or distinguished; and (3) to apply the Blaine Amendment to prohibit the ESA program would very likely violate the U.S. Constitution, which requires neutrality, not hostility, toward religion.

C. THE UNIFORMITY CLAUSE: ARTICLE VIII, SECTION 3

Finally, the Oregon courts would almost certainly reject any argument that the ESA program proposed by SB 437 violates the state constitution's Uniformity Clause (Article VIII, section 3), which requires the Legislature to "provide by law for the establishment of a uniform, and general system of Common schools."[6] Nothing in SB 437 or the ESA program it would create undermines the Legislature's obligation and commitment to provide for a common, or public, school system. Moreover, with only one easily distinguished exception, courts in other states with Uniformity Clauses have uniformly rejected challenges to school choice programs under them.

As the Oregon Supreme Court has held, the Uniformity Clause simply "requires the legislature to establish free public schools that will provide a basic education." *Pendleton Sch. Dist. 16R*, 345 Or. at 616. Should SB 437 be enacted and the ESA program implemented, the Legislature will continue to maintain free public schools that provide a basic education. The ESA program would simply provide additional opportunities to those families who choose not to utilize those free public schools.

Moreover, any argument that the ESA program violates the Uniformity Clause would rest on the illogical premise that the clause does not simply require the government to establish public schools, but also forbids the government from going beyond that baseline requirement by providing for education through means other than the traditional public school system. The Oregon courts would very likely reject any interpretation that treats the clause as a ceiling, rather than a floor, for what the Legislature may provide for when it comes to the education of Oregon's children.

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[5] In fact, the only state interest that the U.S. Supreme Court has recognized as sufficient to justify the exclusion of certain religious options from a student aid program is an interest in "not funding the religious training of *clergy*"—an interest obviously not implicated by the ESA program proposed by SB 437. *Locke v. Davey*, 540 U.S. 712, 722 n.5 (2004) (emphasis added).

[6] As the Oregon Supreme Court has noted, the term "'[c]ommon schools' was a synonym for public or free schools . . . [at the time of the] the framing of the Oregon Constitution in 1857." *Pendleton Sch. Dist. 16R v. State*, 345 Or. 596, 613 (2009).

In fact, with only one exception, every state court of last resort that has addressed whether a school choice program violates a state Uniformity Clauses has held that it does not. *See Schwartz v. Lopez*, 382 P.3d 886 (Nev. 2016); *Hart v. State*, 774 S.E.2d 281 (N.C. 2015); *Magee v. Boyd*, 175 So. 3d 79 (Ala. 2015); *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013); *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998); *Davis v. Grover*, 480 N.W.2d 460 (Wis. 1992). Significantly, one of those states is Wisconsin: its state supreme court has *twice* rejected a Uniformity Clause challenge to a school voucher program. This is significant because Oregon's Uniformity Clause was modeled on Wisconsin's, and the Oregon courts would likely find Wisconsin's interpretation of its clause persuasive in interpreting Oregon's clause. *See Pendleton Sch. Dist. 16R*, 345 Or. at 616 n.8 ("As originally introduced, Article VIII, section 3, appears to have been derived from the Wisconsin Constitution, Article X, § 3 (1848).").

In fact, only the Florida Supreme Court—in a roundly criticized opinion—has held that a school choice program violated a state Uniformity Clause. *See Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006). In that case, based on a strained interpretation of a 1998 constitutional amendment, the court held that Florida's Uniformity Clause "does not . . . establish a 'floor' of what the state can do to provide for the education of Florida's children." *Id.* at 408. Rather, the court reasoned, Florida's constitution limits the legislature to *exclusively* supporting the state's uniform system of public schools. In other words, the court concluded that the clause establishes a *ceiling* on the educational opportunities the state may provide. It is highly unlikely that the Oregon courts would come to the same perverse conclusion.

IV. CONCLUSION

Accordingly, it is highly unlikely that the Oregon courts would invalidate the ESA program that SB 437 would enact if that program were challenged. The program is constitutional under both the federal and state constitutions.