IN THE SUPREME COURT OF FLORIDA

Case Nos. SC04-2323/SC04-2324/SC04-2325

JOHN ELLIS (JEB) BUSH, ET AL.,
***Appellants*,**

v.

RUTH D. HOLMES, ET AL.,
***Appellees*.**

REPLY BRIEF OF GOVERNOR JOHN ELLIS (JEB) BUSH, CHIEF FINANCIAL OFFICER TOM GALLAGHER, COMMISSIONER OF AGRICULTURE CHARLES H. BRONSON, FLORIDA DEPARTMENT OF EDUCATION, AND THE STATE BOARD OF EDUCATION

On Direct Appeal from the First District Court of Appeal

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ARGUMENT

Appellees have presented no argument indicating that the Opportunity Scholarship Program is inconsistent with this Court's prior precedent and have provided no viable alternative construction of article I, section 3 consistent with its plain language and the state and federal constitutions. Appellees have also made no effective argument to support a reversal of the district court's prior determination that the Program does not violate article IX, section 1.

I. ARTICLE IX, SECTION 1 DOES NOT PRESCRIBE AN EXCLUSIVE MANNER OF FUNDING EDUCATION.

By focusing on what the parties agree article IX, section 1 prohibits -- the Legislature creating programs "in lieu of the mandated system of public schools" (AB at 11) -- Appellees impliedly concede that a program *in addition to* this mandated system of public schools, such as the Opportunity Scholarship Program, is constitutional. Appellees have not identified anything in article IX, section 1 explicitly or implicitly precluding the Legislature from such enhancement of public education. In fact, article IX, section 1 anticipates, in addition to adequate funding for public education, "other public education programs that the needs of the people may require." Art. IX, § 1(a), Fla. Const.

Not an iota of evidence is in the record that the State of Florida is failing to make adequate provision for the education of a single child much less that Florida is failing this mission due to the Opportunity Scholarship Program. The Program

is one of many requiring the expenditure of public funds on something other than direct funding for public schools without any inherent conflict with article IX, section 1. Appellees raise the unsustainable spectre of a conflict only because they know that the Legislature is empowered to do more than what is constitutionally required unless manifestly prohibited by the Florida Constitution. Constitutional presumptions (i) favor the Legislature's contemporaneous construction of the constitution, (ii) favor the constitutionality of a statute, and (iii) resist the maxim, *expressio unius est exclusio alterius.* Appellants' IB at 43-45.

The Opportunity Scholarship Program must be sustained unless there are *no set of circumstances* under which the state could both make adequate provision for public education and fund the Program. Self-evidently, this is not the case. Consequently, article IX, section 1 does not provide an avenue for the Court to avoid adjudicating the constitutionality of the Program under article I, section 3.

II. THE OPPORTUNITY SCHOLARSHIP PROGRAM COMPLIES WITH ARTICLE I, SECTION 3.

Through one-half century of jurisprudence, this Court has held that (i) religion-neutral programs (ii) of general eligibility (iii) with a non-sectarian public purpose, are consistent with the Florida Constitution. *Johnson v. Presbyterian Homes of Synod of Fla., Inc*., 239 So. 2d 256 (Fla. 1970); *Nohrr v. Brevard County Educ. Facilities Auth*., 247 So. 2d 304 (Fla. 1971); *Southside Estates Baptist Church v. Board of Trustees*, 115 So. 2d 697 (Fla. 1959); *Koerner v. Borck*, 100

So. 2d 398 (Fla. 1958). Appellees pay short shrift to this precedent. In fact, they fail to even address it until page 33 of their answer brief, then attempt quickly to dismiss it without ever grappling with the rationale of the holdings in these cases.

A. Appellees Fail to Distinguish Florida Precedent.

Appellees argue form over substance and immaterial factual differences over law, because the latter – the "analytical framework" (Answer Brief (AB) at 36) – is so clear. The sole relevant inquiry is whether the Opportunity Scholarship Program is (i) a religion-neutral program (ii) of general eligibility (iii) with a secular purpose.[1] The Opportunity Scholarship Program clearly satisfies this Court's three-prong test, because in the interest of improving the overall quality of Florida's public schools, the Program is entirely neutral with respect to where parents decide to send their children who are attending under-performing public schools.

Appellees insist that the analysis this Court never performed in *Johnson*, *Nohrr*, *Southside Estates* and *Koerner* is controlling. However, if public appropriations and the devoutness of the sectarian recipient were dispositive in other article I, section 3 litigation, this Court would presumably have mentioned these factors in one, if not all, of the four cases. Instead, this Court ruled not in

[1] Merely stating that a program has a secular purpose, contrary to Appellees' claim (AB at 22), is not binding on the courts. *See Silver Rose Entertainment, Inc. v. Clay County*, 646 So. 2d 246, 252 (Fla. 1st DCA 1994), *rev. denied,* 658 So. 2d 992 (Fla. 1995), *cert. denied,* 516 U.S. 932 (1995).

ignorance of these factors, but despite them that religiously-neutral programs of general eligibility with a secular purpose are constitutional. Of the Court's decisions regarding article I, section 3, two involved indirect public expenditures, two involved foregone public expenditures, and all involved devoutly religious recipients.

Koerner and *Southside Estates* addressed indirect public expenditures. The defendants in the latter case advocated Appellees' view of article 1, section 3, yet this Court squarely rejected it and decided it was not consequential or necessary to remand for a determination of whether state revenue benefited sectarian institutions. 115 So. 2d at 699-700. *Johnson* and *Nohrr* involved foregone revenue from the public treasury, something Appellees have argued should be interpreted as actual appropriations from the public treasury in other establishment clause litigation, but not here. *See* McShane Initial Brief (IB) at App. D. Alternatively and without basis, Appellees declare that *Johnson* and *Nohrr* have been superseded. AB at 36.

Nowhere in their answer brief do Appellees identify a controlling distinction rendering the Opportunity Scholarship Program facially unconstitutional under this Court's analytical framework or argue the framework is other than as Appellants represent. Appellees also make no attempt at all to explain this Court's decision in the factually similar case of *City of Boca Raton v. Gidman*, 440 So. 2d 1277 (Fla.

1983). *See* Appellants' IB at 18-19. Apparently unable to make a valid distinction between *Gidman* and the instant matter, Appellees relegated their discussion of this important and relevant case to one sentence in a footnote. AB at 33 n.26.

B. The District Court Decision Will Impact a Wide Variety of State Programs.

The parties agree that additional public programs beginning with the McKay Scholarship Program are vulnerable to this Court's ruling. AB at 39. This inquiry goes to the core of whether in fact a principled distinction can be drawn between, on the one hand, prevailing precedent and the Legislature's numerous other religiously-neutral programs of general eligibility with a secular purpose and, on the other hand, the constitutionality of the Opportunity Scholarship Program. Appellees' and their amicis' best effort to draw this distinction is noteworthy for their failure to be constrained by the text of article I, section 3. This is a striking departure from Appellees' earlier assertion that the amendment is clear and unambiguous and requires no judicial interpretation.

As compared to Appellants' literal interpretation of article I, section 3 consistent with this Court's jurisprudence, Appellees' and their amicis' interpretation would require this Court to act like a legislative body so as to enact Appellees' policy preferences. Despite their assertion to the contrary, article I, section 3 supports no difference whatsoever between: (i) publicly funding religious organizations, but not devoutly religious organizations; (ii) secular activities or

social services performed by sectarian groups, but not religious activities or instruction; (iii) post-secondary education provided by devoutly religious universities, but not K-12 education provided by religious schools; or (iv) religious hospitals, but not religious schools. AB at 41-42; Amicus Curiae Brief of Steven G. Guy (Amicus Guy) at 5, et seq.

Article I, section 3 mentions "any church, sect or religious denomination or … sectarian institution." Art. I, § 3, Fla. Const. The common theme is that all are religious without distinction as to degree. One lodestar of legal historical research indicates that in 1885, "sect" and "sectarian" meant Catholic[2] and Appellees do not deny it. AB at 19. Article I, section 3 mentions churches or religious denominations, but Appellees do not necessarily oppose publicly funding them. AB at 40. Rather, they propose drawing the line at funding "secular social services" (AB at 42), notwithstanding that article I, section 3 says nothing about the type of activities precluded. Furthermore, Appellees give nothing but an ad hoc reason why K-12 education is not a social service. AB at 41.

This Court certainly had the opportunity to decide case law consistent with Appellees' themes, but never did. For example, this Court in *Johnson* did not consider material the devoutly religious character of a retirement home sponsoring

[2] *See, e.g.*, Amici Curiae Brief of Florida Catholic Conference, Inc., et al. (Amici Catholic Conf.) at 16-17; Amicus Curiae Brief of The Becket Fund (Amicus Becket) at 5-6.

religious instruction. And the Court in *Koerner* and *Southside Estates* did not consider it relevant that benefits would flow to a church for worship services, religious instruction, proselytization, and baptismals. Like the Court, the Legislature has also chosen not to implement Appellees' policy preferences. Indeed, in the same year article I, section 3 took effect, the Legislature enacted vouchers for disabled students to attend private K-12 religious and non-religious schools. Ch. 68-24, § 5, Laws of Fla.

Appellees persuaded the district court to ignore the ramifications of its decision on other public programs, and urges this Court to don the same blinders. However, there is certainly no requirement prohibiting the Court from considering the implications of its decision.[3] Here, such consideration is essential so as to accomplish the intent of the drafters and the people and to avoid unintended or absurd consequences. *See, e.g., In re Advisory Opinion to the Governor*, 374 So. 2d 959, 964 (Fla. 1979).

Appellees' effort to differentiate the constitutionality of other religiously-neutral public programs of general eligibility with a secular purpose from the Opportunity Scholarship Program has no basis in article I, section 3. Ironically, its

[3] Numerous courts have considered the consequences of construing a religion clause in factual circumstances not before the court. *See, e.g., Zorach v. Clauson*, 343 U.S. 306, 312-13 (1952); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Southside Estates*, 115 So. 2d at 700.

only footing is in superseded federal law[4] which, even if valid, Appellees argue would not be persuasive due to the primacy doctrine.[5]

C. Scholarships-for-Education are Fee-for-Service Transactions.

The parties agree that fee-for-services transactions with faith-based organizations are constitutional. AB at 42. A fee-for-services transaction is not "aid" within the meaning of article I, section 3. Although Appellees assert otherwise, the state's receipt of an educated student in exchange for an opportunity scholarship is as much an example of a fee-for-service transaction as paying rent for a polling place. AB at 42. In fact, the fee-for-services transaction here includes an additional step rendering the benefit more incidental than in the fee-for-polling station example. Opportunity scholarships must pass through parents' hands before any school receives them.

Parents and their children decide where to spend opportunity scholarships and are the primary beneficiaries of the Program.[6] See *Gidman*, 440 So. 2d at

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[4] *See, e.g., Columbia Union College v. Oliver*, 254 F.3d 496, 501-03 (4th Cir. 2001) (calling into question the pervasively religious test); *cf*. Amicus Gey at 13.

[5] Contrary to Appellees' argument, nothing in *Traylor v. State*, 596 So. 2d 957 (1992), or its progeny suggests the primacy doctrine precludes this Court from considering federal precedent or precedent from another jurisdiction, or that cases preceding *Traylor* relying on the precedent must be disregarded. To the contrary, *Traylor* itself references no less than thirteen federal cases construing the U.S. Constitution and adopts the procedures set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966). *Traylor*, 596 So. 2d at 965-66; *id*. at 974 (Barkett, J., concurring).

1282. Of course, the state benefits as well by receiving educated students and improved public schools. It is undoubtedly true that as a result of opportunity scholarships some less privileged children may attend religious schools who otherwise could not, yet more privileged children potentially attend the same religious schools as a result of other fee-for-service transactions including, for example, fees for trash removal, sewage disposal, crossing guards, curb cuts, and utilities. *See Everson v. Board of Educ*., 330 U.S. 1, 17-18 (1947). Religious schools may also attract additional students as a result of property tax exemptions, yet to exclude solely religious schools from such programs on that basis "would indeed be discriminatory . . . . " *Johnson*, 239 So. 2d at 262.

D. Appellees Misunderstand the History of Article I, Section 3.

The parties agree that, although the intent of the people in approving article I, section 3 has not been fully preserved, anti-Catholic religious bigotry was a factor. AB at 19. Appellees argue that Appellants cannot assert that Blaine Amendments were intended to bar public funding of sectarian schools, and at the same time argue that article I, section 3 does not prohibit the use of taxpayer monies to fund education at sectarian schools. To the contrary, the historical

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6 The parties agree that parents receiving state welfare or public service checks do not violate article I, section 3 when exercising their "unfettered choice" to spend them at sectarian institutions. AB at 30 n.24. The choice of parents between public and private religious or secular schools is equally unfettered.

record reveals that article I, section 3 was not intended to bar public funding of any but Catholic schools. Taxpayers explicitly supported funding Protestant religious observances including Bible reading, prayer, and hymn-singing in the public schools through the 1960s.[7] As the U.S. Supreme Court has recognized, the purpose of Blaine Amendments nationally was to ensure that the public paid for only Protestant religious observances. *Zelman v. Simmons-Harris*, 536 U.S. 639, 720-21 (2002) (Breyer, Stevens, Souter, J.J., dissenting); *Lemon v. Kurtzman*, 403 U.S. 602, 628 (1971) (Douglas, Black J.J., concurring). *See also* Amici Cath. Conf. at 16; Amicus Becket at 7, 10-11.

Appellees argue that the refusal of the Constitutional Revision Commission ("CRC") to omit the last sentence of article I, section 3 proves it intended the provision to mean something different than the federal Establishment Clause, yet no such conclusion can be drawn. When the CRC convened, the few Florida cases interpreting article I, section 3 and the federal cases interpreting the Establishment Clause both furthered the neutrality principle.[8] Neither line of precedent was necessarily more exclusionary than the other.

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[7] *See Chamberlin v. Dade County Bd. of Pub. Instruction*, 143 So. 2d 21 (Fla. 1962), *vacated*, 374 U.S. 487 (1963); *Chamberlin v. Dade County Bd. of Pub. Instruction*, 171 So. 2d 535 (Fla. 1965).

[8] *Koerner*, 100 So. 2d at 398 (upheld devise of land with perpetual easement for baptisms and public disbursements for improvements thereto); *Southside Estates*, 115 So. 2d at 697 (upheld equal use by church of school building); *Bradfield v. Roberts*, 175 U.S. 291 (1899) (upheld use of federal funds for construction at

Few conclusions about article I, section 3 can be drawn from the failed amendments at the CRC either. Appellees cherry-picked among them. The historical record reveals the CRC also rejected an amendment to article I, section 3 permitting "the provision of health and welfare or other non-curricula services authorized by law for the benefit of all school children,"[9] but under Appellees' theory, the CRC actually supported funding these secular services. AB at 42. Another rejected amendment to article I, section 3 stated, "[t]he liberty of conscience hereby secured shall not be so construed as to justify licentiousness or practices subversive of, or inconsistent with, public morals, peace or safety,"[10] yet, the CRC presumably did not intend to permit licentiousness.

Consequently, the only thing certain that can be drawn from this record is that the CRC preferred to retain an establishment clause at a time when a nascent neutrality model prevailed in both state and federal law. This neutrality jurisprudence was subsequently crystallized by this Court and readopted by the

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religious hospital); *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370 (1930) (upheld law providing secular textbooks to all students); *Everson*, 330 U.S. at 1 (upheld law providing reimbursement to parents for cost of transporting children to religious schools); *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (upheld law requiring secular textbooks be provided to private and public schools).

[9] Minutes, Comm. of Whole House, H.R. Constitutional Revision Sessions at 15, 17 (Aug. 7, 1967) (available at Fla. Dep't of State, Div. of Archives, series 727, box 2, folder 5, Tallahassee, Fla.).

[10] *Id.*

U.S. Supreme Court after rejecting a quarter-century of holdings consistent with Appellees' interpretation of article I, section 3.

III. THE DISTRICT COURT'S CONSTRUCTION OF ARTICLE I, SECTION 3 VIOLATES THE STATE AND FEDERAL FREE EXERCISE CLAUSES.

To strike a religiously-neutral program of general eligibility with a secular purpose solely because religious persons participate is in substance no different than striking the participation of religious persons from such programs in violation of the state and federal constitutions. Presumably, Appellees would not deem constitutional the termination of a public program because persons of a particular race participate in it, but they have no compunction about terminating a program due to the participation of religious persons. This Court and the U.S. Supreme Court need not tarry until the Legislature, at the lower court's behest, approves new enactments purposefully excluding persons on the grounds of religion to find this interpretation of article I, section 3 itself invalid under state and federal law.

A. The Free Exercise Clause Forbids Discriminating on the Basis of Religion.

"At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of Lukumi Babalu Aye, Inc., v. City of Hialeah,* 508 U.S. 520, 532 (1993). Appellees consider K-12 religious training and instruction a quintessential form of religious

expression (AB at 36, n.29), furthering "core religious missions" (AB at 34), or "religious indoctrination." AB at 30. They add that "defendants certainly are correct that the Blaine Amendments were intended to bar the use of public funds to pay the cost of educating children in private sectarian schools – which, at the time, were almost uniformly Catholic." AB at 19. Hence, Appellants propose an interpretation of article I, section 3 which would single-out a religious group for disparate treatment solely on the basis of its exercise of faith. Expanding the class government seeks to disadvantage from Catholics to all devoutly religious persons or even all religious persons engaged in religious instruction does not render the discrimination more constitutional. This is precisely why the U.S. Supreme Court has expressed serious reservations about the constitutionality of Blaine Amendments. *Mitchell v. Helms*, 530 U.S. 793, 828-29 (2000) (plurality); *Zelman*, 536 U.S. at 720-21.

In *Locke v. Davey*, the U.S. Supreme Court explicitly distinguished a case like this involving the application of a Blaine Amendment. "Far from evincing … hostility toward religion … the entirety of the Promise Scholarship Program goes a long way toward including religion in its benefits." 540 U.S. 712, 724 (2004). The expressed reason the Court in *Locke* found no evidence of animus in the Promise Scholarship Program is the very reason that a finding by this Court that the Opportunity Scholarship Program is unconstitutional would violate the federal

constitution. The U.S. Supreme Court found no religious animus in Washington's implementation of the Promise Scholarship Program precisely because scholarship recipients could attend pervasively religious schools and receive religious instruction. This rationale certainly indicates that the same Court would not affirm the unconstitutionality of another scholarship program on the ground of its inclusiveness of religious schools and its religious neutrality. Appellees do not address this point, because they cannot. Instead they opine, opposite to the reasoning in *Locke,* that no principled difference exists between publicly funding the training of clergy and an inclusive, religiously-neutral scholarship program such as the Opportunity Scholarship Program. AB at 49.

B. The State Free Exercise Clause Forbids Penalizing Persons on the Basis of Religion.

Any decision of this Court in the case at bar interpreting the last sentence of article I, section 3 will necessarily interpret the first sentence, the free exercise clause, and thereby construe what it means to penalize the free exercise of religion. *See, e.g., Burnsed v. Seaboard Coastline R.R. Co.,* 290 So. 2d 13, 16 (Fla. 1974) (construction of constitution must give effect to every clause). Against the great weight of the English language, Appellees strain to contend that to disadvantage, handicap, or bar persons from participating in a generally eligible public program on the basis of their faith is not a penalty. AB at 43 n.34. The framers of article I, section 3 may have intended to penalize Catholics (AB at 19) or, in effect, to

exclude them from the protection of the state free exercise clause, but Appellees deny this was any longer the case after 1968. Now, all persons are protected by the free exercise clause, yet this does not require a finding that one part of the article is now unconstitutional under another part, but only that the Court apply its historical analytical framework. The last time this Court did so in *Johnson*, the Court deemed unlawful the potential exclusion of a religious nursing home from a religiously-neutral program of general eligibility with a secular purpose.

CONCLUSION

For the foregoing reasons, the Court is respectfully urged to reverse the decision of the district court.

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