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.

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLANTS AND URGING REVERSAL

On Direct Appeal from the First District Court of Appeal

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INTEREST OF THE UNITED STATES

The Florida Court of Appeals' decision striking down the Florida Opportunity Scholarship Program ("Scholarship Program") raises important issues involving the right of individuals to be free from discrimination based on religion under the Free Exercise Clause of the First Amendment. In particular, this case raises important questions about the scope of the U.S. Supreme Court's decision last term in *Locke* v. *Davey*, 124 S. Ct. 1307 (2004), and the degree to which a State may depart from the Free Exercise principle of nondiscrimination on the basis of religion in order to seek greater separation of church and state than that required by the federal Constitution.

This case is the first to address squarely the applicability of *Locke* to other Free Exercise Clause contexts. The federal government operates numerous programs, and funds numerous state-operated programs, which provide, directly or indirectly, benefits to students and others taking advantage of services provided by religious entities. For example, the U.S. Department of Education is currently supervising a congressionally mandated and funded opportunity scholarship program very similar to Florida's in the District of Columbia. See Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, 118 Stat. 3, div. C, tit. 3, 126-134. In this case, the Florida Supreme Court will be asked to apply *Locke* broadly to insulate state programs that exclude religious entities or individuals from

otherwise generally available public programs. The United States has a significant interest in the proper application of *Locke*. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The court of appeals erred in its application of *Locke* v. *Davey*, 124 S. Ct. 1307 (2004). *Locke* does not govern the facts at issue in this case. Furthermore, were this Court to abandon its established understanding of the no-aid provision in favor of the court of appeals' substantially broader reading, the result would create substantial and troublesome federal constitutional problems.

1. The court of appeals greatly over-read *Locke*. A program such as the Scholarship Program presents different Free Exercise issues from *Locke* in two critical respects. First, this case does not involve actual state funding for ministerial training; rather, it deals with general primary and secondary instruction, an area where no special historical pedigree of barring funding exists. Second, whereas in *Locke* the Court found the burden on the seminarian in that case to be light, this case involves poor children in failing schools who may not be able to leave these failing schools without the Scholarship Program funding. Accordingly, the court of appeals erred in its heavy reliance on *Locke*.

2. The interpretation of the Florida Constitution is of course a question of

state law. Nevertheless, this Court has long recognized the doctrine of constitutional avoidance. This Court previously has interpreted the no-aid provision in a manner consistent with the Scholarship Program, declining to apply it to prohibit a neutral program whose primary purpose was not religiously motivated and where any benefit to religion was incidental. To abandon that established understanding in lieu of the court of appeals' broader reading necessarily would create substantial bases for finding federal constitutional deficiencies in a number of Florida public programs. The doctrine of constitutional avoidance militates toward a reading of the no-aid provision that avoids such constitutional problems.

Accordingly, this Court should not change its interpretation of the no-aid provision and should reverse the court of appeals and disavow its conclusion that *Locke* governs this case.

ARGUMENT

I

THE FLORIDA COURT OF APPEALS ERRED IN HOLDING THAT *LOCKE* V. *DAVEY* BARRED APPELLANTS' FREE EXERCISE CLAUSE CLAIM

The court of appeals erred in holding that *Locke* v. *Davey*, 124 S. Ct. 1307 (2004) barred the appellants' Free Exercise Clause claim. *Locke* did not purport to

overrule prior Free Exercise precedents, but simply applied these precedents to the specific situation of a State declining to fund the actual training of clergy.

Under the Free Exercise Clause, the government is barred from "impos[ing] special disabilities on the basis of religious views or religious status." *Employment Div., Dep't of Human Res.* v. *Smith*, 494 U.S. 872, 877 (1990). As the Court stated in *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533 (1993), the Free Exercise Clause requires neutrality toward religion, and "the minimum requirement of neutrality is that a law not discriminate on its face." See also *id.* at 563 (Souter, J., concurring) ("This case * * * involves the noncontroversial principle repeated in *Smith*, that formal neutrality and general applicability are necessary conditions for free-exercise constitutionality."); see also *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 846 (1995) (O'Connor, J., concurring) ("We have time and again held that the government generally may not treat people based on the God or gods they worship, or do not worship.") (quoting *Board of Educ.* v. *Grumet*, 512 U.S. 687, 714 (1994)). As the Supreme Court stated nearly 60 years ago, a State cannot exclude religious believers "because of their faith, or lack of it, from receiving the benefits of public welfare legislation." *Everson* v. *Board of Educ.*, 330 U.S. 1, 16 (1947). Thus, as a general matter, discriminating against students and parents who

choose to use their Opportunity Scholarship to attend a school with some degree of religious character or curriculum would violate these fundamental principles.

In *Locke*, the Supreme Court held that a State may carve out an exception to this rule in order to avoid funding ministerial or clerical training; specifically, it did not violate the Free Exercise Clause to deny a divinity student the ability to use a $1,125 per year state scholarship toward his divinity degree. The Court did not undo its prior understanding of the First Amendment religion clauses. Rather, it drew two significant and critical distinctions.

First, in *Locke*, the Court stressed the long and distinguished pedigree of the principle that government should not fund the training of ministers: "[W]e can think of few areas in which a State's antiestablishment interests come more into play." 124 S. Ct. at 1313. Opposition to "procuring taxpayer funds to support church leaders," dates back to the founding, and "was one of the hallmarks of an 'established' religion." *Ibid.* The Court recounted how Jefferson and Madison strongly opposed the practice, and observed that "[m]ost States that sought to avoid an establishment of religion around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry." *Id.* at 1314. The fact that "early state constitutions saw no problem in explicitly excluding *only* the ministry from receiving state dollars reinforce[d] [the Court's]

conclusion that religious instruction is of a different ilk." *Ibid.*

Second, the Court noted the *de minimis* nature of the burden imposed by the rule. Unlike prior Free Exercise Clause cases, the Washington State program placed no meaningful disability on the divinity student. Barring use of the scholarship toward divinity degrees did not "require students to choose between their religious beliefs and receiving a government benefit." *Locke*, 124 S. Ct. 1312-1313. The Court noted that scholarship recipients were not absolutely barred from using their scholarship and choosing to study for the ministry at the same time, because they could use their scholarship toward a separate degree at a different institution. *Id.* at 1313 n.4. This second institution could also be a pervasively religious school. The Court found that "[f]ar from evincing the hostility toward religion which was manifest in *Lukumi*, we believe that the entirety of the [scholarship program] goes a long way toward including religion in its benefits." *Id*. at 1314. The Court noted that students are permitted to attend "pervasively religious" schools, and even to take "devotional theology courses" while there. *Id*. at 1315. The State, the Court stressed, simply bars recipients from using the scholarship toward a ministerial degree program. *Id*. at 1314-1315.

The Court thus distinguished the situation presented in *Locke* from prior precedents concerning the "impos[ition of] special disabilities on the basis of

religious views or religious status," *Smith*, 494 U.S. at 877, on the grounds (1) of the State's special interest in avoiding funding clerical training, and (2) the fact that the burden imposed in *Locke* was particularly mild: "The State's interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on Promise Scholars." *Locke*, 124 S. Ct. at 1315. While the Court drew this distinction carefully and narrowly, the court of appeals below applied *Locke* broadly to the present case.[1] The court of appeals erred in so doing.

First, unlike the *de minimis* effect on the plaintiff in *Locke*, the impact of a denial on recipients of the benefits of an Opportunity Scholarship will be dramatic. Because the Scholarship Program specifically targets schools found to be "failing," which tend to be located in low-income areas, Scholarship Program

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[1] The court rejected the argument that *Locke* should be limited to the context of aid for the training of clergy. "Although in *Locke* the prohibitions in * * * the Washington Constitution * * * w[ere] applied to deny the use of state funds for the pursuit of a theology degree, nothing in the *Locke* opinion or the Washington Constitution limits its application to those facts." *Bush* v. *Holmes*, 886 So. 2d 340, 364 (Fla. Dist. Ct. App. 2004). However, as the dissent noted, the Supreme Court in *Locke* expressly stated that it was not laying down a license to the State that is "without limit," stressing that "the only interest at issue * * * is the State's interest in not funding the religious training of clergy," *id*. at 388 (emphasis omitted) (quoting *Locke*, 124 S. Ct. at 1314 n.5), and that the case involved a "relatively minor burden" on the plaintiff's religion, *ibid*. (quoting *Locke*, 124 S. Ct. at 1315).

recipients will tend to be poor. Moreover, the scholarship is quite large, equal to the several thousand dollars that the government would have spent on the child in public school, see Fla. Stat. Ann. § 1002.38(6) (West 2002), substantially greater than the amount at issue in *Locke*. Thus, the practical result of the court of appeals' decision could be to deny poor children the ability to escape a failing school to the academic institution of their choice.

Second, the State's educational goals differ substantially from those at issue in *Locke*. There, the State had elected to avoid funding the actual training of religious ministers. Here, by contrast, the State actively is seeking means to improve *general* primary and secondary education for the poorest of students. No comparable historical pedigree exists for barring such funds from being used by families for tuition at religiously affiliated primary and secondary schools.

Indeed, quite the opposite is true: there is substantial evidence that state efforts to deny funds to sectarian schools arose not out of benign separation-of-church-and-state concerns but rather out of anti-Catholic animus and an effort to preserve Protestant hegemony in the public schools. The plurality in *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000), explained this history:

> Opposition to aid to "sectarian" schools acquired prominence in the 1870's with Congress' consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any

> aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that "sectarian" was code for "Catholic."

Early public schools "were Protestant in character. Their students recited Protestant prayers, read the King James version of the Bible, and learned Protestant religious ideals." *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 720 (2002) (Breyer, J, joined by Stevens and Souter, JJ, dissenting). When the Blaine Amendment failed, various States amended their constitutions to include provisions barring state aid to sectarian schools. See Philip Hamburger, *Separation of Church and State* 335 (2002) (explaining history of state amendments). By 1890, 29 States had adopted constitutional provisions barring the use of state funds for religious schools. Stephen K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38, 43 (1992). Far from the special and distinguished lineage the Supreme Court found the bar on funding the training of clergy to have in *Locke*, Blaine-type amendments have, in fact, a manifestly sectarian paternity.[2]

Thus, while the historical record may be silent as to Florida's motivations in adopting the no-aid provision (with regard both to its original adoption in 1885

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[2] The Court in *Locke* specifically noted that the constitutional provision before it was not such a "Blaine Amendment." 124 S. Ct. at 1314 n.7.

and its re-adoption in 1966-1968), the history of the Blaine Amendment undercuts any argument that there exits a benign constitutional tradition of denying public funding to students attending primary and secondary schools comparable to the tradition declining public funding for the training of clergy. In light of this, and the severe burdens on scholarship recipients of striking down the program, the court of appeals erred by relying upon *Locke* in disposing of the instant matter.

II

THIS COURT'S DOCTRINE OF CONSTITUTIONAL AVOIDANCE SUGGESTS THAT THIS COURT SHOULD MAINTAIN ITS PRIOR CONSTRUCTION OF THE NO-AID PROVISION AND UPHOLD THE SCHOLARSHIP PROGRAM

The proper interpretation of the Florida Constitution is a matter of state law. Nevertheless, it can and does implicate federal concerns. Indeed, the doctrine of constitutional avoidance militates in favor of interpreting statutes and state constitutions with the presumption that they do not contravene federal law. This Court previously has interpreted the no-aid provision in such a manner. Were it to discard its prior, more limited understanding of the no-aid provision, and instead adopt the broader reading adopted by the court of appeals, its decision would immediately place the Florida Constitution, and therefore a number of Florida programs, in likely contravention of the federal Constitution. In order to avoid the

thorny constitutional thicket that such a reading would create, the doctrine of constitutional avoidance militates in favor of the Florida Supreme Court maintaining its current, more narrow, construction.

This Court has long held that an act "must be construed, if fairly possible, as to avoid unconstitutionality and to remove grave doubts on that score." *Franklin* v. *State*, 887 So. 2d 1063, 1073 (Fla. 2004); see also *Industrial Fire & Cas. Ins. Co.* v. *Kwechin*, 447 So. 2d 1337, 1339 (Fla. 1983) ("When two constructions of a statute are possible, one of which is of questionable constitutionality, the statute must be construed so as to avoid any violation of the constitution."); *State* v. *Beasley*, 317 So. 2d 750, 752 (Fla. 1975) ("We have a responsibility to avoid a holding of unconstitutionality if a fair construction of the statute can be made within constitutional limits.").

This Court's prior decisions articulate a construction of Article I, Section III of the Florida Constitution that will avoid federal constitutional problems in this case and in future cases. As discussed in the State's brief, this Court previously has understood the no-aid provision not to prohibit a neutral program the primary purpose of which is not to advance religion, but which affects religion or religious institutions only incidentally. See *Johnson* v. *Presbyterian Homes of the Synod of Fla., Inc.*, 239 So. 2d 256 (Fla. 1970). Indeed, in *Johnson*, this Court saw no

difficulty in permitting a religiously operated nursing home to participate in a tax-exception program for homes for such facilities. The program "was enacted to promote the general welfare through encouraging the establishment of homes for the aged and not to favor religion[.] * * * [A]ny benefit received by religious denominations is merely incidental to the achievement of a public purpose." *Id.* at 261.

This Court has reached similar conclusions in several other cases. See *City of Boca Raton* v. *Gidman*, 440 So. 2d 1277 (Fla. 1983) (holding that city charter provision that was analogous to the no-aid provision of the state constitution did not bar city from contracting with a charitable non-profit organization to provide child care); *Nohrr* v. *Brevard County Educ. Facilities Auth.*, 247 So. 2d 304 (Fla. 1971) (holding that law allowing revenue bonds to aid schools, both secular and religious, did not violate Article I, Section 3); *Southside Estates Baptist Church* v. *Board of Trs.*, 115 So. 2d 697 (Fla. 1959) (holding that no-aid provision was not violated by permitting religious group to meet in school on Sunday).

Adopting a more sweeping reading of Article I, Section III, whereby a program is no longer tested by its primary purpose but rather by whether any benefit, incidental or otherwise, flows to a sectarian institution, would necessarily implicate a broad range of Florida state programs and, in turn, would raise "grave

doubts" of constitutionality.

Affirming the reading adopted by the court of appeals would call into question a host of higher education programs, including various need-based and merit-based scholarships for college students,[3] loan forgiveness programs for public school teachers,[4] programs encouraging the training of minority teachers,[5] scholarship programs for minorities,[6] and other educational funding programs such as student grant or loan programs.[7] As the Supreme Court made clear in *Locke* v.

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[3] See, *e.g.*, Florida Bright Futures Scholarship Program (merit scholarship), at http://www.firn.edu/doe/bin00072/home0072.htm (last visited Jan. 4, 2005); Florida Student Assistance Grant Program (need-based grant program), at http://www.firn.edu/doe/bin00065/fsagfactsheet.htm (last visited Jan. 4, 2005) (codified at Fla. Stat. Ann. § 1009.50-52 (West 2002)); William L. Floyd, IV, Florida Resident Access Grant (generally available tuition assistance), at http://www.firn.edu/doe/osfa/fragfactsheet.htm (last visited Jan. 4, 2005) (codified at Fla. Stat. Ann. § 1009.89 (West 2002)).

[4] Critical Teacher Shortage Student Loan Forgiveness Program, at http://www.firn.edu/doe/bin00065/ctslffactsheet.htm (last visited Jan. 5, 2005) (codified at Fla. Stat. Ann. § 1009.59 (West 2002)).

[5] Minority Teacher Education Scholars Program. Fla. Stat. Ann. § 1009.60 (West 2002).

[6] Jose Marti Scholarship Challenge Grant Fund, at http://www.firn.edu/doe/bin00065/jmfactsheet.htm (last visited Jan. 4, 2005) (codified at Fla. Stat. Ann. § 1009.72 (West 2002)).

[7] See, *e.g.*, Critical Teacher Shortage Student Loan Forgiveness Program, *supra* n.4 (up to $5,000 per year); Jose Marti Scholarship, *supra* n.6 ($2,000 per year to Hispanic students based on need); Florida Student Assistance Grant Program, *supra* n.3 (need-based program).

Davey, 124 S. Ct. 1307, 1311 (2004), the use of state scholarships toward general programs of higher education at religion-oriented schools avoids any difficulty under the federal Establishment Clause. Were it petitioned to do so, a Florida court would likely have to invoke the no-aid provision to bar the use of such grants at any religiously affiliated institution. This discrimination would raise serious question as to whether it "impos[ed] special disabilities on the basis of religious views or religious status," *Employment Div., Dep't of Human Res.* v. *Smith*, 494 U.S. 872, 877 (1990), and whether it violated "the minimum requirement of neutrality * * * that a law not discriminate on its face," *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533 (1993), in violation of the federal Constitution.

A specific example bears this out. The dissent below pointed to the John M. McKay Program for Students with Disabilities as a program threatened by the majority's holding. This program provides a scholarship to permit primary and secondary school students with disabilities to attend the school that best meets their particular needs.[8] Use of such funds by disabled children is plainly permissible under the Establishment Clause, and there certainly exits no unique

[8] See McKay Scholarships Program, at https://www.opportunityschools.org/Info/McKay/ (last visited Jan. 5, 2005).

historical tradition of denying such funding. See *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993). Moreover, the burden on a disabled child whose special needs are not being met in his present situation would be particularly severe. Thus, use of the no-aid provision to deny the child the choice of the best school for the child's needs would not fall within the holding of *Locke*, and would likely violate the Free Exercise Clause. In order to satisfy both the Florida and the U.S. Constitutions, Florida may be forced to eliminate the program entirely.

Issues of religious discrimination would also be raised by various welfare programs were the court of appeals' broad reading of the no-aid provision affirmed, including Medicaid funding and the Florida Partnership for School Readiness Program,[9] designed to prepare disadvantaged children for kindergarten. Social welfare programs do not present a special case as in *Locke*. In fact, the Supreme Court has noted that "this Court has never held that religious institutions are disabled * * * from participating in publicly sponsored social welfare programs." *Bowen* v. *Kendrick*, 487 U.S. 589, 609 (1988) (holding that statute permitting religious organizations to participate in program providing abstinence-education grants was not facially invalid); see also *Bradfield* v. *Roberts*, 175 U.S.

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[9] See Florida Partnership for School Readiness, at http://www.schoolreadiness.org/home/index.asp (last visited Jan. 5, 2005).

291 (1899) (upholding plan under which federal government paid for construction of new Roman Catholic hospital). There is plainly no historic tradition barring such participation. And for the recipients of social welfare programs such as Medicaid or Head Start-like programs, the impact could be quite dramatic. Thus, a broad reading clearly would raise constitutional concerns in this area.

Denying the ability of individual beneficiaries of state programs the ability to participate because of their religious choices also could implicate Free Speech Clause issues where the government benefit in question involved access to a forum for speech. For example, Florida law provides that public universities shall charge student fees which "shall be expended for lawful purposes to benefit the student body in general. This shall include, but shall not be limited to, student publications and grants to duly recognized student organizations." Fla. Stat. Ann. § 1009.24(9)(b) (West 2002); see also *id.* § 1009.23(7) (allowing community colleges to establish separate activity and service fees for student publications and other organizations). An interpretation of the anti-aid provision that barred the use of such funds for publications with a religious viewpoint almost certainly would violate the Free Speech Clause. See *Rosenberger* v. *Rector & Visitors of Univ. of Va.,* 515 U.S. 819 (1995) (finding viewpoint discrimination where university denied student publication funding because of its religious viewpoint). Cf.

Widmar v. *Vincent*, 454 U.S. 263 (1981) (finding violation of free speech rights of religious group that was denied meeting space in public university).

Similarly, Florida law provides that boards of education "may permit the use of educational facilities and grounds for any legal assembly or for community use centers or may permit the same to be used as voting places in any primary, regular, or special election. The board shall adopt rules or policies and procedures necessary to protect educational facilities and grounds when used for such purposes." Fla. Stat. Ann. § 1013.10 (West 2002). Interpretation of the anti-aid provision of the Florida constitution to bar religious organizations such access very likely would violate the Free Speech Clause. See *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98 (2001) (finding Free Speech Clause violation where school district denied Christian club access to school classrooms after school); *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (finding Free Speech Clause violation where school district denied church access to school facilities to show religiously oriented film series); *Widmar* v. *Vincent*, *supra* (finding violation of Free Speech rights of religious group that was denied access to university's public forum). This could arise in other speech contexts as well. See, *e.g.*, *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753 (1995) (holding that state could not justify its denial of permit allowing group to

display cross on state grounds on the basis of the Establishment Clause).

Thus, the Florida Supreme Court should assume that the drafters of the Florida Constitution would not have intended to violate the United States Constitution or raise such constitutional concerns. If textually possible, the Court must attempt to give a reasonable reading of the Florida State Constitution's no-aid provision that neither explicitly violates the federal Constitution nor seriously implicates other constitutional concerns. This Court has demonstrated that the no-aid provision *is* susceptible to a reading that is not constitutionally problematic. Therefore, the Florida Supreme Court should not modify its understanding of the no-aid provision, but rather should continue to adhere to the interpretation previously advanced in *Johnson* and its other applicable precedents. This interpretation would avoid serious federal constitutional concerns in this and in future cases.

CONCLUSION

For the foregoing reasons, the order of the Court of Appeals striking down the Scholarship Program should be reversed.

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