IN THE SUPREME COURT OF FLORIDA

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

GOVERNOR JOHN ELLIS "JEB" BUSH, ET AL., APPELLANTS,

v.

RUTH D. HOLMES, ET AL., APPELLEES

On Direct Appeal From the First District Court of Appeal

BRIEF OF *AMICI CURIAE* THE COALITION OF MCKAY SCHOLARSHIP SCHOOLS; THE FLORIDA ASSOCIATION OF ACADEMIC NONPUBLIC SCHOOLS; THE FLORIDA COUNCIL OF INDEPENDENT SCHOOLS; THE FLORIDA ASSOCIATION OF CHRISTIAN COLLEGES AND SCHOOLS; THE CHILD DEVELOPMENT EDUCATION ALLIANCE; REDEMPTIVE LIFE ACADEMY; LEAH ASHLEY COUSART; ED AND CARMEN DELGADO; MARTHA PARKER; AND MICELLE EMERY IN SUPPORT OF APPELLANTS GOVERNOR JOHN ELLIS ("JEB") BUSH, CHARLES J. CRIST, JR., BRENDA MCSHANE, ET AL.

ROBERT R. GASAWAY
ASHLEY C. PARRISH
PADRAIC B. FENNELLY
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000

LANSING C. SCRIVEN
FLA. BAR NO. 729353
LANSING C. SCRIVEN, P.A.
442 W. Kennedy Blvd.
Suite 280
Tampa, Florida 33606
(813) 254-8700

This Brief Is Filed By Consent of All Parties.

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

PAGE(S)

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF INTEREST OF AMICI CURIAE

This brief is filed on behalf of several non-profit educational associations whose members provide education in Florida through a variety of state-sponsored scholarship programs. These organizations include: The Coalition of McKay Scholarship Schools; the Florida Association of Academic Nonpublic Schools; the Florida Council of Independent Schools; the Florida Association of Christian Colleges and Schools; and the Child Development Education Alliance.

This brief is also filed on behalf of an individual school participating in these programs, Redemptive Life Academy, as well as scholarship recipients and their parents, including: Leah Ashley Cousart, a sophomore attending Southeastern College, a private, religious university, on a Bright Futures Scholarship; Ed and Carmen Delgado, whose two sons, David and Francisco Delgado, attend Tampa Baptist Academy using McKay Scholarships; Martha Parker, whose son Lucius Parker, receives funds to attend Tampa Baptist Academy under the Corporate Tax Credit Scholarship Program; and Micelle Emery, whose daughter Aislinn and son Erid will be eligible to attend pre-school in the upcoming school year under the recently enacted Voluntary Pre-Kindergarten Education program.

The ruling below constitutes a direct threat to these scholarship programs, which enable the members of the *amici* organizations to provide, and the individual *amici* to receive, educational opportunities that would not otherwise be available.

INTRODUCTION AND SUMMARY OF ARGUMENT

The First District's decision striking down the Opportunity Scholarship Program ("OSP") embraces an astonishingly restrictive interpretation of the Florida Constitution's Article I, section 3, and calls into question the constitutional validity of programs serving hundreds of thousands of needy Florida citizens. Unless and until it is reversed, that decision promises to threaten the finances, complicate the educational planning, and disturb the sleep of thousands of parents of deserving students who have come to depend on public monies to pursue their dreams through education.

1. The First District's interpretation is fundamentally at odds with the plain language and overall structure of Article I, section 3, this Court's well-settled precedent, and decisions of other courts interpreting similar state constitutional provisions. Putting no weight on section 3's first sentence, which prohibits government action "penalizing" the free exercise of religion, the court below assumed, without analysis, that section 3's third and final sentence imposes additional substantive restrictions on governmental action. But the third sentence does no such thing. Instead, it merely recognizes and incorporates limitations already implicit in the Florida Establishment Clause. It is thus most naturally read to prohibit only public expenditures that have a primary purpose of "aiding" religion—not programs like the OSP that benefit religion only incidentally. The

First District's departure on this score is mystifyingly incorrect and should be reversed.

2. The First District's decision also should be reversed because it threatens to cast a debilitating pall of constitutional doubt on a wide range of health, welfare, educational, and social services programs that serve the vital needs of some of Florida's least fortunate citizens. Most importantly, the lower court's destabilizing interpretation, unless corrected, will place at risk educational programs currently relied on by approximately 140,000 students, including the McKay Scholarship Program, the Corporate Tax Credit Scholarship Program, and the Bright Futures Scholarship Program. The ruling also threatens the recently-enacted Voluntary Pre-Kindergarten Education Program, which is expected to provide financial support to an additional 150,000 students in the upcoming school year.

ARGUMENT

I. GENERALLY APPLICABLE PUBLIC WELFARE PROGRAMS DO NOT VIOLATE THE FLORIDA CONSTITUTION MERELY BECAUSE THEY INCIDENTALLY BENEFIT RELIGION.

A. Article I, Section 3's Third Sentence Clarifies And Entrenches—But Does Not Expand—The Core Limitations Of Florida's Establishment Clause.

The mistaken decision below rests in large measure on the Court of Appeals' false impression that Article I, section 3 "necessarily imposes restrictions ***beyond*** [what is restricted by the federal] Establishment Clause." *Bush v. Holmes*, 886 So. 2d 340, 351 (Fla. 1st DCA 2004) (emphasis added). This conclusion grew

from the court's erroneous determination that section 3's third and final sentence functions as an independent source of legal rights beyond those described in the non-Establishment Clause found in section 3's opening sentence.

In fact, this "additional rights" reading is directly at odds with Article I, section 3's plain terms:

> There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

The substantive core of Article I, section 3 is undoubtedly its first sentence, largely tracking the federal constitution's Establishment and Free Exercise Clauses. The principal difference between the two constitutions is that Florida's textually prohibits government action that so much as "penalizes" the free exercise of religion. *Cf.* U.S. Const. Amend I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;") *with* Fla. Const. Art. I, § 3 ("There shall be no law respecting the establishment of religion or prohibiting ***or penalizing*** the free exercise thereof.") (emphasis added). As Justice Polston recognized in dissent below, this Florida variation on a First Amendment theme strongly implies that Florida's constitution enforces ***even greater*** protections for religious activity than the federal constitution. *See Bush v.*

Holmes, 886 So. 2d at 392 (Polston, J., dissenting). But this means the OSP must necessarily be constitutional: after all, plaintiffs here, as well as the First District, concede that the OSP passes federal constitutional muster under the U.S. Supreme Court's decision in *Zelman v. Simmons-Harris*. *See* Appellees' Answer Br., below (filed Nov. 11, 2002) at 2 n.2; *Bush v. Holmes*, 886 So. 2d at 359. Given that concession, and the fact that the Florida Constitution textually forbids financial "penalties" on religious exercise—such as a mandated forfeiture of educational benefits used in religious contexts—the OSP's constitutionality follows *a fortiori*.

The First District majority, tellingly, failed to put any weight on Article I, section 3's first sentence, which is the core religious-freedom provision of the Florida Constitution. The court instead read section 3's first and third sentences as if they were at war. Whereas section 3's initial sentence textually forbids "penalties" on religious exercise, the First District held that its third sentence affirmatively ***requires*** such penalties.

The First District's mistake was its departure from time-honored canons of construction requiring that Article I, section 3, like all constitutional provisions, be read as a congruent whole. *See, e.g.*, *Wheeler v. Meggs*, 78 So. 685, 686 (Fla. 1918) ("The provisions of the Constitution should be interpreted with reference to their relation to each other unless a different intent is clearly manifest."); *Mugge v. Warnell Lumber & Veneer Co.*, 50 So. 645, 646 (Fla. 1909); *cf. United States v.*

Balsys, 524 U.S. 666, 673 (1998). Reading Article I, section 3 as a whole compels the conclusion that both its second and third sentences clarify and entrench—but in no way contradict—the core non-establishment and free exercise provisions found in its opening sentence.

The first of these clarifying provisions relates to free religious exercise and states that "[r]eligious freedom shall not justify practices inconsistent with public morals, peace or safety." Under the lower court's analysis, this "public morals" exception to the free exercise right must be read as establishing an independent principle of state law, varying Article I, section 3's free exercise rule from that of its federal counterpart. But such a construction is not tenable, for the "public morals" principle is undoubtedly implicit in the ***federal*** Free Exercise Clause. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 885 (1990); *cf. Lyng v. Northwest Indian Cemetery Prot. Ass'n*, 485 U.S. 439, 452 (1988).

Nor is this federal recognition of the "public morals" principle of recent vintage. At the time of the Florida Constitution's last revision, it had already been recognized by the U.S. Supreme Court. *See Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944); *Reynolds v. United States*, 98 U.S. 145, 167 (1878). Even in 1966-1968, then, the public morals clause added no substantive content to the

Florida Constitution's free exercise rights; it merely clarified and entrenched what was already implicit in the federal Constitution.

Likewise, the critical third sentence of Article I, section 3, on which the lower court relied so heavily, must also be read as clarifying and entrenching (but not altering or expanding) Florida's core commitment to non-establishment of religion. Article I, section 3's third sentence provides: "No revenue of the state … shall ever be taken from the public treasury directly or indirectly … in aid of any sectarian institution." Read in context, this clause sets forth a public purpose requirement, recognizing the proposition—already familiar in federal jurisprudence in 1966-1968, *see Bd. of Educ. v. Allen*, 392 U.S. 236 (1968); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947)—that it is impermissible for government to provide financial support in order to foster religion.

In interpreting similarly phrased religion clauses found in other state constitutions, other states' high courts have recognized that these types of clauses entrench restrictions substantively identical to those of the federal First Amendment. For example, the Wisconsin Supreme Court's *Jackson v. Benson* decision holds that Article I, section 18 of the Wisconsin Constitution, "'while more specific than the terser' clauses of the First Amendment, carries the same import." 578 N.W.2d 602, 620 (Wis. 1998) (citation omitted). Likewise, the Michigan Supreme Court concluded that, far from creating additional rights and

obligations beyond those encompassed by the First Amendment, the religion clauses of Michigan's Constitution were merely an "expanded and more explicit statement of the Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution" and thus were "subject to similar interpretation." *In re Legislature's Req. for an Op. on the Constitutionality of Ch. 2 of Amendatory Act No. 100 of Pub. Acts of 1970*, 180 N.W.2d 265, 274 (Mich. 1970).[1]

Perhaps aware of this contrary authority from other states, the Court of Appeals emphasized the fact that the U.S. Supreme Court has stated that the religion clauses of at least one other state, Washington, are "far stricter" and "more stringent" than the Establishment Clause. *See Bush v. Holmes*, 886 So. 2d at 360 (citing *Witters v. Dep't of Servs. for the Blind*, 474 U.S. 481, 489 (1986); *Locke v. Davey*, 540 U.S. 712, 721 (2004)). But the Washington provision, unlike Florida's, reaches "public money ***or*** property," and bars the legislature from "appropriat[ing] or appl[ying]" such money or property to benefit religion. *See* Wash. Const. Art I, § 11 (emphasis added). Given the differing language used in these provisions, it is not surprising that this Court for decades has interpreted

[1] While the Michigan Supreme Court appears to have erred in its interpretation of relevant federal law—erroneously concluding that the Establishment Clause permitted the state to pay instructors' salaries at religious schools—that error of ***federal*** constitutional interpretation does not call into question the Court's more fundamental and entirely correct determination of state constitutional law; namely, *(continued…)*

Article I, section 3 to permit government action that the Washington Supreme Court would almost certainly find invalid. *Cf. Southside Estates Baptist Church v. Bd. of Trs.*, 115 So. 2d 697, 700-01 (Fla. 1959) (permitting use of public school buildings as places of worship), *with Perry v. Sch. Dist. No. 81*, 344 P.2d 1036, 1043 (Wash. 1959) (making announcements on school property concerning an admittedly constitutional released-time program for religious education "is a use of school facilities supported by public funds for the promotion of a religious program, which contravenes Art. I, § 11 of our state constitution") (emphasis omitted). Indeed, the practice struck down in *Locke* under the Washington Constitution—the use of public scholarship funds to pursue a theology degree—is not uncommon in the Florida Bright Futures Program and has never been challenged. And, it is worth noting that, even under the purportedly "far stricter" Washington constitutional provision, the scholarship program at issue in *Locke* "***permit[ted] students to attend pervasively religious schools***." 540 U.S. at 724 (emphasis added).

In the end, the Court of Appeals was forced to justify its piecemeal interpretive approach to Article I, section 3 almost solely on the grounds that any other construction would render the "public purpose" clause mere surplusage. *See*

---

that the religion clauses of the Michigan Constitution should be interpreted as congruent with those of the federal Constitution.

Bush v. Holmes, 886 So. 2d at 358. But, while Article I, section 3's "public morals" and "public purpose" clauses certainly do recognize, incorporate, and solidify limitations already recognized in First Amendment jurisprudence at the time of the 1966-1968 constitutional revision, they are far from superfluous. Rather, these subordinate clauses provide interpretive limits, constraining the degree to which Florida courts must follow judicial innovations in First Amendment doctrine. In particular, the public purpose clause protects against the possibility that the federal judiciary might significantly weaken, or abandon outright, the enforcement of core Establishment Clause principles. *See*, *e.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639, 677-79 (2002) (Thomas, J., concurring) (questioning incorporation of the Establishment Clause against the States and concluding that "in the context of the Establishment Clause, it may well be that state action should be evaluated on different terms than similar action by the Federal Government"). To be sure, that leaves the public purpose clause with limited substantive effect, absent significant innovations in federal jurisprudence. But the fact that statutory or constitutional language is applicable only in certain circumstances does not render it surplusage. *Cf. Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886, 890 (D.C. Cir. 1992) (interpreting duplicative provisions of statute "not as redundancies, but rather as insurance policies" guaranteeing proper judicial interpretation).

Finally, it is highly significant that the basic approach to constitutional draftsmanship evident in Article I, section 3, is also found elsewhere in similar, rights-granting provisions of the Florida Constitution. The Constitution's Article I, section 4, for example, provides for the freedom of speech and of the press:

> Every person may speak, write and publish sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated.

Like Article I, section 3, Article I, section 4 contains a sentence granting core rights of citizenship in terms roughly equivalent to, but slightly more protective than, the analogous federal provision. *Cf.* U.S. Const. Amend I ("Congress shall make no law … abridging the freedom of speech, or of the press;") *with* Fla. Const. Art. I, § 4 ("No law shall be passed to ***restrain or abridge*** the liberty of speech or of the press.") (emphasis added). Also, as in Article I, section 3, the remaining sentences of Article I, section 4 serve mostly to clarify the contours of the core individual rights, while not necessarily providing any substantive content beyond that of the First Amendment. *See, e.g.*, Fla. Const. Art. I, § 4 ("Every person may speak, write and publish sentiments on all subjects but shall be responsible for the abuse of that right."). As this Court recognized in interpreting an earlier version of the Florida Constitution's Declaration of Rights, the Florida framers' decision to

spell out such rights "merely reinforced" the federal protections for these same liberties. *Singleton v. Woodruff*, 13 So. 2d 704, 705 (Fla. 1943).

B. By Prohibiting Only Appropriations Made "In Aid Of" Sectarian Institutions, Article I, Section 3 Limits Its Application To Statutes With A Primary Purpose Of Aiding Religion.

The Court of Appeals' determination that Article I, section 3 prohibits any funding program that incidentally benefits a religious institution directly conflicts with the plain language of Article I, section 3. Article I, section 3's final clause prohibits the use of public funds only "***in aid of***" religious institutions. This language, read naturally, prohibits only those public expenditures that have a primary purpose of "aiding" religion.

In concluding otherwise, the First District misconstrued Article I, section 3 to preclude "indirect … ***benefit[s]***." *Bush v. Holmes*, 886 So. 2d at 352. But the actual language of the provision forbids only expenditures "directly or indirectly ***in aid of***" religious institutions. The modifier "direct[] or indirect[]" is thus intended to encompass all programs with the underlying purpose of aiding religion—whether overtly or covertly—not to force lawmakers to sterilize all social services programs against the possibility that some religious institution might be benefited. *Cf. Bd. of Educ. v. Allen*, 228 N.E.2d 791, 794 (N.Y. 1967) ("the words 'direct' and 'indirect' relate solely to the means of attaining the prohibited end of aiding religion as such").

As the U.S. Supreme Court has explained, "constitutional rights would be of little value if they could be ***indirectly*** denied." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995) (internal quotations and citation omitted) (emphasis added). Of necessity, a constitution "nullifies sophisticated as well as simple-minded modes of infringing on constitutional protections." *Id.* The Florida Constitution's prohibition on "indirectly" taking money "in aid of" religion must be read in this vein—as a prohibition on "indirect" or "sophisticated" nullifications of religious liberties by purposefully aiding religion. It certainly is not what the First District thought—a prohibition on incidentally benefiting religious groups in the course of achieving legitimate objectives.

Interpreting Article I, section 3 consistently with its terms, this Court has repeatedly upheld programs in which government action benefits religious people or institutions only incidentally. *See*, *e.g.*, *Nohrr v. Brevard Cty. Educ. Facilities Auth.*, 247 So. 2d 304, 307 (Fla. 1971); *Johnson v. Presbyterian Homes of the Synod of Fla.*, 239 So. 2d 256, 261-62 (Fla. 1970); *Southside Estates*, 115 So. 2d at 700. Likewise, when faced with constitutional provisions similar to Article I, section 3, other state courts have recognized that the relevant inquiry is whether a primary purpose of a challenged program is to advance religion.

In *California Educational Facilities Authority v. Priest*, 526 P.2d 513 (Cal. 1974), for example, the California Supreme Court rejected an anti-establishment

challenge based on the California Constitution's current Article XVI, section 5, which provides, in language similar to that of Florida's Constitution:

> Neither the Legislature, nor any county, … shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or ***in aid of*** any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, … controlled by any religious creed, church, or sectarian denomination whatever ….

The *Priest* court held that this provision did not "prohibit a religious institution from receiving an indirect, remote, and incidental benefit from a statute which has a secular primary purpose." 526 P.2d at 521.

Likewise, in *Embry v. O'Bannon*, 798 N.E.2d 157 (Ind. 2003), the Indiana Supreme Court adopted a similar interpretation of Article I, section 6 of the Indiana Constitution, which provides that "[n]o money shall be drawn from the treasury, ***for the benefit of*** any religious or theological institution." *Id.* at 158, 167 (emphasis added). And, as noted above, the Wisconsin Supreme Court's *Jackson v. Benson* decision refused to strike down a program quite similar to the OSP under Article I, section 18 of the Wisconsin Constitution, which, in language materially similar to Florida's, provides "nor shall any money be drawn from the treasury ***for the benefit of*** religious societies, or religious or theological seminaries." 578 N.W.2d 602, 620 (Wis. 1998).

In sum, the Florida Constitution outlaws calculated efforts to advance religion, not all incidental governmental benefits that might accrue to religious

institutions. Here, of course, the OSP represents the legislature's attempt to remedy an intractable social ill—the abandonment of underprivileged children trapped in failing public schools—so as to fulfill its constitutional obligations. *See* § 1002.38(1), Fla. Stat.; *see also* Fla. Const. Art. IX, § 1 (It is "a paramount duty of the state" to make "adequate provision" for "education."). As in *Zelman*, "[t]here is no dispute that the program challenged here was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system." 536 U.S. at 649. Because there is no question that the OSP serves legitimate public purposes, and because any benefits it might confer on religious institutions are purely incidental, the Court of Appeals erred in striking down the program.

II. THE RULING BELOW JEOPARDIZES A VAST ARRAY OF SOCIAL PROGRAMS DESIGNED TO PROMOTE THE HEALTH, EDUCATION, AND WELFARE OF THE CITIZENS OF FLORIDA.

The OSP is not an isolated oddity, but one piece in a colorful mosaic of interlocking programs bestowing essential educational and other services on needy Florida citizens. Religious schools, hospitals, nursing homes, homeless shelters, drug-abuse prevention and rehabilitation centers, and other faith-based charitable organizations are integrated into the fabric of Florida civic life. Completely apart from their religious functions, these institutions provide pre-school, primary, secondary, and postsecondary education, healthcare assistance, substance abuse

counseling, domestic abuse counseling, and a variety of other social services—all with the support, financial and otherwise, of the State of Florida. Acceptance of the lower court's ruling would undermine the long-settled legitimacy of these programs and plunge this Court into years of desultory constitutional litigation.

Most immediately, the Court of Appeals' decision threatens the scholarship programs that currently enable members of Florida's non-profit education associations to provide, and needy scholarship recipients to receive, educational opportunities that would not otherwise be available. Up until now, Florida has led the nation in expanding educational access and achievement through school choice, with nearly a dozen programs serving over 140,000 students from kindergarten through post-secondary education. But the lower court's decision, unless it is corrected, places at risk each and every one of these vital, educational programs:

- ***Bright Futures Scholarship Program.*** Established by the Florida Legislature in 1997, *see* § 1009.53, *Fla. Stat.*, the Bright Futures Scholarship Program awards scholarships to Florida high school graduates to attend qualifying post-secondary institutions, many of which are religiously affiliated or operated. Such institutions include Clearwater Christian College, Florida Christian College, Hobe Sound Bible College, The Baptist College of Florida, and Trinity Baptist College. During the 2002-03 award year, over 112,000 students received more than $202 million in state funds under this program.

- ***Corporate Income Tax Credit Scholarship Program.*** To "[e]ncourage private, voluntary contributions to nonprofit scholarship-funding organizations" and "[e]xpand educational opportunities for children of families that have limited financial resources," the Florida Legislature created the Corporate Income Tax Credit Scholarship Program in 2001. *See* § 220.187(1)(a)-(b), *Fla. Stat.* The program permits individual

corporations to direct up to 75% of their corporate income tax liability (up to $5 million) to an approved scholarship funding organization ("SFO"). Eligible low-income students may apply to an SFO to receive scholarships of up to $3,500 per year for the tuition, textbook, or transportation costs of attending an eligible nonpublic school—including private, religious schools—or up to $500 per year to attend an out-of-district public school. There are approximately 12,000 students currently participating in the CTC program statewide, with an average household income of approximately $23,058.

- ***The John M. McKay Scholarship Program.*** Under the McKay Scholarship Program, created by the Florida Legislature in 1999, *see* § 1002.39, *Fla. Stat.*, parents of disabled children may transfer their child to a qualified public or private school, including schools that are religiously affiliated or operated. The amount of the scholarship is generally limited to the amount of state-generated funding the student would have otherwise received or the cost of the private school's tuition and fees, whichever is less. During the 2002-03 academic year, the McKay Scholarship Program for Students with Disabilities served approximately 14,000 Florida students with special needs.

- ***Florida Voluntary Universal Pre-Kindergarten Program.*** In 2002, Florida voters approved Amendment 8 to the Florida Constitution, mandating that the legislature establish, by the 2005 academic year, a new "voluntary, high quality, [and] free" early childhood development program. Fla. Const., Art. IX, § 1(b)-(c). House Bill 1-A, signed into law on January 2, 2005, creates the Voluntary Pre-Kindergarten Education Program, which allows parents to enroll their children in free pre-kindergarten programs. Eligible private pre-kindergarten providers include religiously-affiliated and faith-based child-care providers. Preliminary estimates project that approximately 150,000 children will participate in the program at a cost to the State of approximately $400 million.

Disturbingly, there appears to be no principled basis on which to shield any of the above programs from the destructive effects of the reasoning below. There appears, for example, to be no way to cabin the lower court's ruling only to the primary and secondary-school scholarships offered under the OSP, or even to

educational programs more generally. For instance, Article I, section 3 does not, by its terms, differentiate between different categories of "sectarian institutions," or other types of religious activities, in sharp contrast to comparable provisions of some other constitutions, which expressly identify religious schools and education as subjects of particular concern. *See, e.g.*, Colo. Const. Art. IX, § 7; Mo. Const. Art. 9, § 8. The Florida Constitution's failure to supply a natural limit to the lower court's logic—as some other constitutions do—further underscores the grave peril posed by the decision.

The First District simply refused to acknowledge this peril. Instead, the court ignored students' need for a stable legal regime on which to base their educational planning, as well as the immediate, painful consequences of its reasoning for the confidence of needy students in the future availability of the money they depend on to attend their current schools. Instead, the court blithely announced: "Our holding in this case resolves the case before us and leaves for another day, if need be, a decision on the constitutionality of any other government program which involves a religious or sectarian institution." *Bush v. Holmes*, 886 So. 2d at 362.

Nothing in this Court's precedent, or sound judicial practice generally, sanctions such head-in-the-sand indifference to citizens' needs. To the contrary, in reaching decisions of constitutional significance, responsible courts, including both

the U.S. Supreme Court and this Court, routinely consider the practical effects of their rulings beyond the isolated circumstances of the case under review. *See*, *e.g.*, *Smith*, 494 U.S. at 888-89 ("The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind"); *Jones v. State*, 640 So. 2d 1084, 1089 (Fla. 1994) (Kogan, J., concurring) (constitutional privacy rights do not abrogate state age-of-consent laws because that reasoning "potentially would mean that children of a young age could enter into contracts …[;] marry …[;] purchase and consume tobacco and alcoholic beverages; … attend adult movies and purchase pornography; and much else").

Most relevant here, in *City of Boca Raton v. Gidman*, 440 So. 2d 1277 (Fla. 1983), this Court rejected arguments that a Boca Raton charter provision prohibiting expenditures of city funds "to accrue directly or indirectly" to the benefit of religious organizations prevented that city from hiring a non-profit, religious organization to provide child daycare. *Id.* at 1279-80. The Court relied in part on the precedential effects of endorsing such a constitutional challenge. Specifically, it explained that it would be unreasonable to adopt a construction that, if applied uniformly to all city programs, "would hamstring [Boca Raton] in carrying out its governmental functions." *Id.* at 1281.

If nothing else, the jeopardy the First District's decision creates for a panoply of programs serving thousands of students is compelling proof that its interpretation is at odds with the legislature's own fundamental understanding of Article I, section 3. The law is settled that a "construction traditionally given to a [constitutional] provision by those officers affected thereby" is "presumably correct." *Fla. Soc'y of Opthalmology v. Fla. Optometric Ass'n*, 489 So. 2d 1118, 1120 (Fla. 1986). Indeed, as this Court has acknowledged, the courts must defer, where possible, to the legislature's interpretations of the Florida Constitution. *See Greater Loretta Improvement Ass'n v. State*, 234 So. 2d 665, 670 (Fla. 1970). Far from being "positively" and "certainly" opposed to Article I, section 3, as the First District suggests, the OSP is entirely in line with the provision's consistent, longstanding construction by the Florida Legislature—a construction on which thousands of Florida's most deserving students have come to depend.

CONCLUSION

For these reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

ROBERT R. GASAWAY
ASHLEY C. PARRISH
PADRAIC B. FENNELLY
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000

LANSING C. SCRIVEN
LANSING C. SCRIVEN, P.A.
442 W. Kennedy Blvd., Ste. 280
Tampa, Florida 33606
(813) 254-8700

Dated: January 24, 2005

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of January, 2005 a true and correct copy of the foregoing ***Brief of Amici Curiae*** has been furnished by U.S. Mail to:

Raquel A. Rodriguez
Office of the Governor
The Capitol, Suite 209
Tallahassee, FL 32399-0001

Christopher M. Kise
Louis F. Hubener
Office of the Solicitor General
The Capitol PL-01
Tallahassee, FL 32399-1050

Daniel Woodring
Nathan A. Adams, IV
Florida Department of Education
325 West Gaines Street
Suite 1244
Tallahassee, FL 32399-0400

Barry Richard
M. Hope Keating
Greenberg Traurig, P.A.
101 East College Avenue
Post Office Drawer 1838
Tallahassee, FL 32302

Ronald G. Meyer
Meyer and Brooks, P.A.
Post Office Box 1547
2544 Blairstone Pines Drive
Tallahassee, FL 32302

Pamela L. Cooper
Florida Education Association
118 North Monroe Street
Tallahassee, FL 32399-1700

Clint Bolick
Clark Neily
Institute for Justice
1717 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006

Randall Marshall
American Civil Liberties Union
Fndn. of Florida, Inc.
4500 Biscayne Blvd.
Suite 340
Miami, FL 33137

Robert H. Chanin
John West
Bredhoff & Kaiser, P.L.L.C
805 Fifteenth Street, NW, Suite 1000
Washington, DC 20005

Elliot M. Mincberg
Judith E. Schaeffer
People for the American Way Fndn.
2000 M Street, NW, Suite 400
Washington, DC 20036

Steven R. Shapiro
American Civil Liberties Union Fndn.
125 Broad Street, 17th Floor
New York, NY 10004

David Strom
American Federation of Teachers
555 New Jersey Avenue, NW
Washington, DC 20001

Michael A. Sussman
National Assoc. for the Advancement of Colored People
Law Offices of Michael A. Sussman
25 Main Street
Goshen, NY 10924

Marc D. Stern
American Jewish Congress
15 East 84th Street
New York, NY 10028

Julie Underwood
National School Boards Ass'n.
1680 Duke Street
Alexandria, VA 22314

Joan Peppard
Anti-Defamation League
2 S. Biscayne Blvd., Suite 2650
Miami, FL 33131

Steven M. Freeman
Steven Sheinberg
Anti-Defamation League
823 United Nations Plaza
New York, NY 10017

Ayesha N. Khan
Americans United for Separation of Church and State
518 C Street, NE
Washington, DC 20002

Jeffrey P. Sinensky
American Jewish Congress
165 East 56th Street
New York, NY 10022

_____

Attorney

CERTIFICATE OF COMPLIANCE WITH RULE 9.210(a)(2)

This brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) and has been prepared in a proportionally spaced typeface using Microsoft Word 2000 in 14 point Times New Roman.

_____

Lansing C. Scriven