

IN THE
SUPREME COURT OF FLORIDA

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

JOHN ELLIS “JEB” BUSH, *et al.*,
CHARLES J. CRIST, JR., and
BRENDA McSHANE, *et al.*,

Appellants,

v.

RUTH D. HOLMES, *et al.*,

Appellees.

On Direct Appeal from the First District Court of Appeal

APPELLEES’ RESPONSE
TO SUPPLEMENTAL BRIEF

RONALD G. MEYER
Florida Bar No. 0148248
Meyer and Brooks, P.A.
2544 Blairstone Pines Drive
Post Office Box 1547
Tallahassee, FL 32302
(850) 878-5212

ROBERT H. CHANIN
JOHN M. WEST
Bredhoff & Kaiser, P.L.L.C.
805 Fifteenth Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 842-2600

(Additional counsel listed on next page)

PAMELA L. COOPER
Florida Bar No. 0302546
Florida Education Association
118 North Monroe Street
Tallahassee, FL 32399-1700
(850) 224-7818

RANDALL MARSHALL
Florida Bar No. 181765
ACLU Foundation of Florida, Inc.
4500 Biscayne Blvd., Suite 340
Miami, FL 33137
(305) 576-2337

DAVID STROM
American Federation of Teachers
555 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 879-4400

JOAN PEPPARD
Florida Bar No. 0341355
Anti-Defamation League
2 South Biscayne Blvd., Suite 2650
Miami, FL 33131
(305) 373-6306

AYESHA N. KHAN
RICHARD B. KATSKEE
Americans United for Separation
of Church and State
518 C Street, N.E.
Washington, D.C. 20002
(202) 466-3234

ELLIOT M. MINCBERG
JUDITH E. SCHAEFFER
People For the American Way Foundation
2000 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 467-4999

STEVEN R. SHAPIRO
American Civil Liberties Union
Foundation
125 Broad Street, 17th Floor
New York, NY 10004
(212) 549-2500

MARC D. STERN
American Jewish Congress
15 East 84th Street
New York, NY 10028
(212) 360-1545

STEVEN M. FREEMAN
Anti-Defamation League
823 United Nations Plaza
New York, NY 10017
(212) 490-2525

JULIE UNDERWOOD
National School Boards Association
1680 Duke Street
Alexandria, VA 22314
(703) 838-6710

Of Counsel:
JEFFREY P. SINENSKY
American Jewish Committee
165 East 56th Street
New York, NY 10022
(212) 751-4000

Counsel for Appellees

APPELLEES' RESPONSE TO SUPPLEMENTAL BRIEF

Appellees have no objection to the Governor's request that the parties be allowed to file short supplemental briefs in response to questions raised at oral argument about the state school fund. Assuming the Court grants the motion, appellees respond to the Governor's supplemental brief as follows.

1. While until 1968 the state school fund was defined in the Constitution, *see* Fla. Const. of 1885, art. XII, § 4, the composition of that fund is now provided for by statute. *See* § 1010.71, Fla. Stat. The school fund is made up of proceeds from federal land grants, unspecified donations to the state, state appropriations, escheated or forfeited property, and a portion of the proceeds from sales of public lands. *Id.* Prior to 1868 the Constitution merely restricted the use of school fund proceeds to “schools and seminaries of learning,”¹ but since that date it has provided that the income derived from the school fund could be appropriated “only to the support and maintenance of free public schools.” Fla. Const. art. IX, § 6; *see also* Fla. Const. of 1885, art. XII, § 4 (“exclusively applied to the support and maintenance of public free schools”); Fla. Const. of 1868, art. VIII, § 4 (“exclusively applied to the support and maintenance of Common Schools”).

¹ Fla. Const. of 1838, art. X, § 1; Fla. Const. of 1861, art. X, § 1; Fla. Const. of 1865, art. X, § 1.

2. The assertion that “no revenue for the Opportunity Scholarship Program is derived from the State School Trust Fund,” Appellants’ Supp. Br. at 2, is incorrect, and this is a matter that can be resolved by reference to legislative enactments that are judicially noticeable. *See* § 90.201(1), Fla. Stat. The statute creating the Opportunity Scholarship Program (“OSP”) directs the Department of Education to take funds to pay for the OSP’s private-school vouchers “from each school district’s appropriated funds . . . *from the Florida Education Finance Program* [“FEFP”] and authorized categorical accounts.” § 1002.38(6)(f), Fla. Stat. (emphasis added). Since its inception in 1973, the FEFP has, in turn, been funded in part from the state school fund.² To be sure, the state school fund now supplies only a small portion of all FEFP funds, but it nonetheless contributes to the pool of funds from which OSP vouchers are paid.

3. The larger point – particularly as appellees do not rely on Article IX, § 6 as an *independent* ground for invalidation of the OSP – is this: The language of Article IX, § 6 restricting use of the school fund to “the support and maintenance of free public schools” dates to the 1868 Constitution. At that time

² *See, e.g.*, Ch. 73-335, Laws of Fla. (appropriating \$2.5 million to FEFP from State School Trust Fund); Ch. 2003-397, Laws of Fla., Appropriation 59 (\$63,000,000 to FEFP from State School Trust Fund); Ch. 2004-268, Laws of Fla., Appropriation 81 (\$72,186,968 to FEFP from State School Trust Fund); Ch. 2005-70, Laws of Fla., Appropriation 73 (\$72,186,968 to FEFP from State School Trust Fund).

the school fund was – apart from a special tax also dedicated to support of the common schools – the sole vehicle for state funding of education. *See Answer Brief of Appellees at 9-10.* The Constitution’s restriction on the use of school fund proceeds thus established that state funding of education was to be – exclusively – through the free public schools. The requirement that the state make adequate provision for a system of free public schools – which also entered the Constitution in 1868 – can only be read in light of the restriction that the Constitution’s framers simultaneously placed on the use of all state education funding. The school fund language, in other words, reinforces our reading of Article IX, § 1 as not only requiring the state to provide for the education of all Florida children, but also specifying the manner in which the state is to fulfill that mandate – through a “system of free public schools.”

Any other reading would, as counsel for the Governor agreed at oral argument, permit the state to devote half, 60 percent, or even 90 percent of its public education funding to paying tuition for children to attend a competing system of private and religious schools, in lieu of educating them in the public schools for which the Constitution requires it to make provision. Interpreting Article IX, § 1 to allow the state to do so would indeed “defeat the purpose of the constitutional provision,” *Weinberger v. Board of Pub. Instr.*, 93 Fla. 470, 479, 112

So. 253, 256 (1927), that establishes a system of free public schools as the means by which the state is to carry out its education mandate.

Respectfully submitted,

/s/
RONALD G. MEYER, ESQUIRE
On Behalf Of:

RONALD G. MEYER
Florida Bar No. 0148248
Meyer and Brooks, P.A.
2544 Blairstone Pines Drive
Post Office Box 1547
Tallahassee, FL 32302
(850) 878-5212

ROBERT H. CHANIN
JOHN M. WEST
Bredhoff & Kaiser, P.L.L.C.
805 Fifteenth Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 842-2600

PAMELA L. COOPER
Florida Bar No. 0302546
Florida Education Association
118 North Monroe Street
Tallahassee, FL 32399-1700
(850) 224-7818

ELLIOT M. MINCBERG
JUDITH E. SCHAEFFER
People For the American Way Foundation
2000 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 467-4999

RANDALL MARSHALL
Florida Bar No. 181765
ACLU Foundation of Florida, Inc.
4500 Biscayne Blvd., Suite 340
Miami, FL 33137
(305) 576-2337

STEVEN R. SHAPIRO
American Civil Liberties Union
Foundation
125 Broad Street, 17th Floor
New York, NY 10004
(212) 549-2500

DAVID STROM
American Federation of Teachers
555 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 879-4400

MARC D. STERN
American Jewish Congress
15 East 84th Street
New York, NY 10028
(212) 360-1545

JOAN PEPPARD
Florida Bar No. 0341355
Anti-Defamation League
2 South Biscayne Blvd., Suite 2650
Miami, FL 33131
(305) 373-6306

AYESHA N. KHAN
RICHARD B. KATSKEE
Americans United for Separation
of Church and State
518 C Street, N.E.
Washington, D.C. 20002
(202) 466-3234

STEVEN M. FREEMAN
Anti-Defamation League
823 United Nations Plaza
New York, NY 10017
(212) 490-2525

JULIE UNDERWOOD
National School Boards Association
1680 Duke Street
Alexandria, VA 22314
(703) 838-6710

Of Counsel:
JEFFREY P. SINENSKY
American Jewish Committee
165 East 56th Street
New York, NY 10022
(212) 751-4000

Counsel for Appellees

CERTIFICATE OF SERVICE

I hereby certify that the foregoing notice was furnished on this 17th day of June, 2005, by first-class mail, postage prepaid, to the following:

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

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

Kenneth W. Sukhia
Fowler, White, Boggs, Banker, P.A.
101 North Monroe Street, Suite 1090
Tallahassee, FL 32301
Raquel A. Rodriguez
Office of the Governor
The Capitol, Room No. 209
Tallahassee, FL 32399

Bill McBride
601 Bayshore Boulevard
Suite 700
Tampa, FL 33606
Daniel Woodring
Nathan A. Adams, IV
Florida Department of Education
325 W. Gaines Street
Tallahassee, FL 32399

Clark M. Neily
Clint Bolick
Institute for Justice
1717 Pennsylvania Avenue, N.W.
Suite 200
Washington, DC 20006

Major B. Harding
Jason Gonzalez
Stephen C. Emmanuel
Ausley & McMullen
227 South Calhoun Street
Tallahassee, FL 32301

E. Bryan Wilson
Gregory R. Miller
R. Alexander Acosta
Assistant United States Attorney
111 North Adams Street
Fourth Floor
Tallahassee, FL 32301

David K. Flynn, Eric W. Treene
Gordon Todd, Conor Dugan
U.S. Department of Justice
Civil Rights Division, Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044

Thomas C. Berg
University of St. Thomas
School of Law
MSL 400-1000 La Salle Avenue
Minneapolis, MN 55403

Richard W. Garnett
University of Notre Dame
School of Law
327 Law School, P.O. Box R
Notre Dame, IN 46556

Robert R. Gasaway, Ashley C. Parrish
Padraic B. Fennelly
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, DC 20005

Lansing C. Scriven
442 W. Kennedy Blvd., Suite 280
Tampa, FL 33606

Anthony R. Picarello, Jr.
Derek L. Gaubatz
Becket Fund for Religious Liberty
1350 Connecticut Ave., N.W., Suite 605
Washington, DC 20036

Isaac M. Jaroslawicz
Givner & Jaroslawicz
1177 Kane Concourse, Suite 232
Miami, FL 33154

Richard A. Mullaney, Scott D. Makar
Devin J. Reed
City of Jacksonville
Office of General Counsel
117 West Duval Street, Suite 480
Jacksonville, FL 33202

Valerie A. Fernandez
Pacific Legal Foundation
1320 South Dixie Highway, Suite 1105
Coral Gables, FL 33146

G. Marcus Cole
Stanford Law School
Stanford, CA 94305

Carlos G. Muñiz
Gray Robinson
301 South Bronough Street
Tallahassee, FL 32302

Briscoe R. Smith
Atlantic Legal Foundation
60 East 42nd Street
New York, NY 10165

Timothy W. Weber, Andrew W. Lennox
Battaglia, Ross, Dicus & Wein, P.A.
P.O. Box 41100
St. Petersburg, FL 33743

Steven K. Green
Willamette University College of Law
245 Winter Street, SE
Salem, OR 97301

Karen Gievers
524 East College Avenue #2
Tallahassee, FL 32301

Talbot D'Alemberte
Florida State University
College of Law
425 West Jefferson
Tallahassee, FL 32306

_____/s/_____
Ronald G. Meyer

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellees' Response to Supplemental Brief was prepared in Times New Roman 14-point font, in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

_____/s/_____
Ronald G. Meyer