

IN THE FLORIDA SUPREME COURT

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

JOHN ELLIS ("JEB") BUSH, et al.,

Appellants,

vs.

RUTH D. HOLMES, et al.,

Appellees,

On Direct Appeal From The
District Court of Appeal, First District

**AMICUS BRIEF OF THE CITY OF JACKSONVILLE,
OFFICE OF THE MAYOR, IN SUPPORT OF APPELLANTS
(By consent of the parties)**

Of Counsel:
Devin J. Reed, Esq. (FBN 62472)
Director, Department of Procurement
City of Jacksonville
117 West Duval St., Suite 335
Jacksonville, FL 32202

RICHARD A. MULLANEY
GENERAL COUNSEL
Scott D. Makar (FBN 709697)
Chief, Appellate Division
Office of General Counsel
117 West Duval Street, Suite 480
(904) 630-1847
(904) 630-1316 (fax)
Attorneys for Amicus, City of
Jacksonville, Office of the Mayor

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF CITATIONS..... ii

STATEMENT OF INTEREST..... 1

SUMMARY OF THE ARGUMENT 2

LEGAL ARGUMENT 4

 I. THE FIRST DISTRICT’S INTERPRETATION OF ARTICLE I, SECTION 3 OF THE FLORIDA CONSTITUTION WOULD SEVERELY AFFECT THE CITY’S HISTORIC RELIANCE ON THE RELIGION-NEUTRAL PROCUREMENT AND AWARD OF ESSENTIAL SOCIAL SERVICES FROM FAITH-BASED ORGANIZATIONS, A NUMBER OF WHICH ARE THE ONLY PROVIDERS OF SUCH SERVICES IN THE COMMUNITY 4

CONCLUSION..... 13

CERTIFICATE OF SERVICE/TYPEFACE COMPLIANCE..... 14

TABLE OF CITATIONS

CASES

<u>Bush v. Holmes,</u> 886 So. 2d 340 (Fla. 1 st DCA 2004)	10, 11
<u>Johnson v. Presbyterian Homes of Synod of Fla., Inc.,</u> 239 So. 2d 256 (Fla. 1970)	2, 11
<u>Koerner v. Borck,</u> 100 So. 2d 398 (Fla. 1958)	2
<u>Nohrr v. Brevard County Educ. Facilities Auth.,</u> 247 So. 2d 304 (Fla. 1971)	2, 10
<u>Southside Estates Baptist Church v. Bd. of Trustees, School Tax Dist. No. 1, In and For Duval County,</u> 115 So. 2d 697 (Fla. 1959)	2, 11

STATUTES

Art. I, section 3, Fla. Const.	passim
-------------------------------------	--------

OTHER AUTHORITIES

§ 126.212, Jacksonville Ord. Code (2005).....	7
§ 126.313, Jacksonville Ord. Code (2005).....	7
Chapter 126, Jacksonville Ordinance Code (2005)	7

STATEMENT OF INTEREST

This amicus brief is on behalf of the City of Jacksonville, Office of the Mayor, which has an interest in this case as the executive branch of government that administers the City's procurement process. In this capacity, the mayor appoints (and the City Council confirms) all directors of executive departments, including the Department of Procurement, which procures goods and services for the City. Because the City (through the Mayor's Office) procures or awards a substantial number of contracts and grants to faith-based organizations on a religion-neutral basis involving the provision of critical social services with a secular purpose, it has a substantial interest in the outcome of this litigation.

SUMMARY OF THE ARGUMENT

The City of Jacksonville, Florida, Office of the Mayor, urges that this Court interpret the “in aid of” clause in article I, section 3 of the Florida Constitution to preserve the long-standing practice of the City to procure or award contracts for critical social services to faith-based organizations, as has been done historically and by necessity in this community, in keeping with this Court’s long-standing jurisprudence that religion-neutral programs of general eligibility with a secular purpose are constitutional. *See generally* Nohrr v. Brevard County Educ. Facilities Auth., 247 So. 2d 304 (Fla. 1971); Johnson v. Presbyterian Homes of Synod of Fla., Inc., 239 So. 2d 256 (Fla. 1970); Southside Estates Baptist Church v. Bd. of Trustees, School Tax Dist. No. 1, In and For Duval County, 115 So. 2d 697 (Fla.1959).

The secular purpose underlying the City’s procurement of wide-ranging essential social services on a religion-neutral basis is to benefit the City of Jacksonville itself, does not “aid” the successful vendors within the meaning of art. I, section 3, and is thereby constitutional. *See* Koerner v. Borck, 100 So. 2d 398, 402 (Fla. 1958). Prohibited “aid” to a religious organization, such as unilateral donations, gifts or handouts without bargained-for and mutual consideration, has the purpose of benefiting the religious organization itself with no commensurate benefit to the government. In sharp contrast, where the government pays for and

receives a competitively-negotiated or bargained-for service from a faith-based organization, pursuant to a religion-neutral public program of general eligibility with a secular purpose, such as the Opportunity Scholarship Program, that organization is not “aided” within the meaning of article I, section 3 in any meaningful way vis-à-vis other organizations that might have provided the service at issue. As the City’s experience shows, faith-based non-profit organizations are sometimes the *only* organizations willing to provide essential social services to the Jacksonville community and are, therefore, necessary social service providers.

The First District’s interpretation of article I, section 3 of the Florida Constitution goes beyond merely preventing the use of government funds to provide “aid” to religious or sectarian organizations. Instead, its interpretation of the “in aid of” clause would, if drawn to its logical and literal conclusion, threaten the ability of the City to procure a vast array of essential social services from faith-based organization simply because of the religious views, affiliations, or status of the organization. The City urges that this Court not adopt the First District’s construction of the “in aid of” clause and, instead, hold that religion-neutral programs of general eligibility with a secular purpose are constitutional thereby safeguarding the City religion-neutral procurement process, which benefits the community and is in keeping with this Court’s long-standing jurisprudence.

ARGUMENT

I. THE FIRST DISTRICT'S INTERPRETATION OF ARTICLE I, SECTION 3 OF THE FLORIDA CONSTITUTION WOULD SEVERELY AFFECT THE CITY'S HISTORIC RELIANCE ON THE RELIGION-NEUTRAL PROCUREMENT AND AWARD OF ESSENTIAL SOCIAL SERVICES FROM FAITH-BASED ORGANIZATIONS, A NUMBER OF WHICH ARE THE ONLY PROVIDERS OF SUCH SERVICES IN THE COMMUNITY.

In 1968, the City of Jacksonville and Duval County merged into a single entity governing all of territorial Duval County excepting only certain beach communities (Atlantic Beach, Neptune Beach and Jacksonville Beach) and the Town of Baldwin. This consolidation of local government has substantial benefits by providing for the centralized provision and procurement of essential governmental and social services.

The City's government operates under a mayor as head of the executive branch with the City Council as the legislative branch. Mayor John Peyton, the current and eighth mayor since consolidation, was elected in 2003. As mayor, he is responsible for the administration of the central government, which includes ten departments. Each department is headed by a director and is composed of divisions under the direction of division chiefs. The mayor appoints the department directors, and those appointments are confirmed by the City Council.

The City's Department of Procurement is one of the departments under the mayor's responsibility. Its director is Devin Reed, Esq., formerly of the General

Counsel's Office and Of Counsel in this action. Mr. Reed is the person charged with responsibility for oversight of the Department's operations and is the person most knowledgeable about the City's procurement process, the City's procurement needs, and the vendors with whom the City contracts or issues grants.¹

The City and its independent agencies have thousands of employees and annual budgets in excess of a billion dollars. The City of Jacksonville alone has over 7,000 employees and a budget of approximately \$1.1 billion. The JEA, an independent agency and a \$5.1 billion public utility, has over 2,000 employees and a budget of \$1.6 billion per year. The Duval County School Board has over 125,000 students, over 14,000 employees and a budget of \$1.3 billion. Collectively, the City and its independent agencies are major economic and social forces in the Duval County region and play important and prominent roles in the community's governance, economy, and quality of life.²

Despite the size of the City (population approaching 1 million) and the size of the growing urban economic community in the area, the City has historically

¹ See <http://www.coj.net/Departments/Procurement/default.htm> (Dep't website).

² For comparison purposes, the overall budgets of the City of Jacksonville and its independent agencies exceed the estimated individual budgets of the States of Vermont, North Dakota, South Dakota and Wyoming (and is roughly the same as New Hampshire) for the same fiscal period. See State Expenditure Report 2001 (Summer 2002, National Association of State Budget Officers); Budget Summary Year 2002/2003, Office of the Council Auditor, City of Jacksonville.

found it necessary to rely on a limited number of community and faith-based organizations for the provision of critical social services that are of great importance. For instance, the City's Public Service Grant Program is one of the country's largest municipal grant programs. Each year, the City utilizes local tax dollars to purchase measurable services from both sectarian and secular organizations on a religion-neutral basis to improve the quality of life for Jacksonville's citizens in service areas that include, without limitation, education and training, elder care, victim services, veteran services, mental health and welfare, drug prevention and rehabilitation, juvenile justice and prevention, ex-offender education and re-entry programs, and various programs and services for the disabled.

The number of organizations that provide these types of critical services is small because of the limited market for the services and the lack of a commercial, profit-driven marketplace for such services. In many instances, the services are provided by 501(c)(3) organizations because of their commitment to a particular social or religiously-motivated calling to provide a secular social service.

Faith-based and community-based non-profit organizations are frequently either the most qualified (within the meaning of the City's procurement code) or the lowest-cost bidders. In the City's experience, they are also frequently the most effective providers that obtain the best results. Consequently, when faith-based

organizations compete as part of a competitive procurement process for City contracts, the City and taxpayers benefit from lower cost, better quality services with enhanced results.

In a number of cases, these faith-based organizations are the *only* organizations in the community that offer particular secular social services. Indeed, under the City's procurement code, the City is permitted to enter into a so-called "sole source" purchase directly with a vendor where it is shown that the vendor is the only one that can practicably provide the particular professional service sought.³ Likewise, the City is also permitted to enter "proprietary" awards for non-professional services where it is shown that the vendor is the only one that can practicably provide them.⁴ Finally, the City enters into a number of "reference awards" where a contract is awarded to a particular organization directly via a federal or state grant program.

Based upon a general review of the City's procurement needs, a significant portion of the City's budget is expended on the procurement of secular social services that are provided by faith-based organizations either through the religion-

³ See §§ 126.212 & .313, Jacksonville Ord. Code (2005).

⁴ Id. (and policies adopted thereto). The City's procurement code, in full, is set forth in Chapter 126 of the Jacksonville Ordinance Code (available at <http://www.municode.com/>).

neutral competitive bidding process (i.e., where the faith-based organization is the successful bidder), via a “sole source” or “proprietary” award, or via a “reference award” involving a governmental grant.⁵

Because of the importance of the services that faith-based and community-based organizations provide and their leadership roles in the community, the Mayor's Office of Faith and Community Based Partnerships was recently established to further develop the ability of these organizations to grow and thrive by contributing to the City through their provision of services and addressing community-wide needs. Among the goals of the Office are to fully utilize the organizations' human capital and community assets and to build the capacity of these organizations to improve management and fiscal accountability, allowing them to become more effective service providers.

The rationale for the Office is based on the City's historic reliance on these organizations to contribute to the essential fabric of the community through their social services and resources:

Jacksonville faces many of the same challenges plaguing other urban areas nationwide: poverty, homelessness, hunger, illiteracy, family deterioration and troubled youth. Faith and community based

⁵ For instance, faith-based organizations constituted 25 of the 121 organizations that received public service grants for fiscal year 2003/04. For 2004/05, faith-based organizations comprised 27 of 132 organizations that received such grants.

organizations already address these issues, motivated by an intense desire to serve those in need. The heart and spirit at the foundation of these organizations forges a personal connection with those being served, resulting in countless stories of lives changed. While highly skilled in social service delivery, grassroots organizations are often less successful at managing budgets or staff. The [Mayor's Office of Faith and Community Based Partnerships] will fill this void by providing funding and training to build organizational capacity and expand service networks. The Office's goal is to equip grassroots organizations with the tools necessary for self-sustainability, allowing them to continue their good works in the community. The city and its partner faith and community based organizations will benefit by sharing talents and resources to improve the quality of life for Jacksonville citizens.⁶

The role of the Office is to:

- Offer training, technical assistance and resource identification to agencies for the purpose of capacity building.
- Provide faith and community based organizations assistance in navigating the city's processes.
- Provide small grants for capacity building to agencies as part of individualized technical assistance plan.
- Provide match funding to enable existing programs to apply for grant funding, increasing their capacity to provide services and ensure program sustainability.
- Promote collaboration between faith and community based organizations and city government to develop innovative solutions to community issues.
- Create and maintain database to track organizations, programs, and funding.⁷

Given the City's significant and ongoing reliance on these organizations, particularly those that are faith-based, the City urges this Court to avoid a construction of article 1, section 3 of the Florida Constitution that would prevent,

⁶ See <http://www.coj.net/Mayor/Faith+Based+Partnerships.htm>).

⁷ Id.

hinder, or create uncertainty as to the City continuing its important procurement relationships with these organizations or that would undermine the City's ability to enabling them to develop into more efficient providers of services through religion-neutral programs.

The City's concern focuses on the First District majority's discussion of the implications of its ruling in a section titled the "Unconstitutionality of the OSP Does Not Render Other State Programs Similarly Unconstitutional." Bush v. Holmes, 886 So. 2d 340, 362 (Fla. 1st DCA 2004). At first blush, this heading provides comfort to the City because it seems to suggest that programs other than the Opportunity Scholarship Program are not in danger of being deemed unconstitutional. Indeed, the majority states that "nothing in the Florida no-aid provision would create a constitutional bar to state aid to a non-profit institution that was not itself sectarian, even if the institution is affiliated with a religious order or religious organization." Id. The majority goes on to state that "it has been observed that the health and social service programs and activities raised in the appellants' arguments, although affiliated with a church or religion, are generally operated through non-profit organizations that are not sectarian or, at least, not pervasively sectarian institutions." Id.

Nevertheless, the First District majority within this same section sends a mixed message by suggesting uncertainty as this Court's long-standing

jurisprudence that religion-neutral programs of general eligibility with a secular purpose are constitutional. *See generally* Nohrr v. Brevard County Educational Facilities Authority, 247 So. 2d 304 (Fla. 1971); Johnson v. Presbyterian Homes of Synod of Fla., Inc., 239 So. 2d 256 (Fla. 1970); Southside Estates Baptist Church v. Board of Trustees, School Tax Dist. No. 1, In and For Duval County, 115 So. 2d 697 (Fla. 1959). The majority states that the “analysis of the application of the no-aid provision to other programs is for another time and another case involving its own unique facts.” Id. It also states that its “holding here does not reach such programs” and only “resolves the case before us and leaves for another day, if need be, a decision on the constitutionality of any other government program or activity which involves a religious or sectarian institution.” Id.

Of course, all of the First District’s discussion in this section is non-binding dicta, thereby making it necessary for this Court to provide clarity to avoid impeding or unsettling existing religion-neutral procurement programs that provide essential social services and to prevent discrimination against vendors due solely to their religious status or affiliation. In this regard, the most important issue from the City’s perspective is to ensure that this Court’s ruling and analysis clearly and unequivocally safeguards the City’s ability to use its funds to procure or award secular social services contracts on a religion-neutral basis to all vendors, without regard to whether they are faith-based or religiously-affiliated. The City urges that

the construction of article I, section 3 most consistent with this Court's caselaw, and the constitutional language itself, is to permit the religion-neutral procurement of services for secular purposes from community- and faith-based organizations. That the constitution prohibits the use of public revenue "in aid of any church, sect, or religious denomination or in aid of any sectarian institution" does not compel a judicial interpretation that precludes a city, a county or the state from procuring services with a secular purpose as long as the procurement process is neutral as to religion. In short, the competitive procurement and award of bargained-for secular social services contracts discussed herein is for the benefit of the City, and is not "aid" to any faith-based organizations. Where government funds are used to procure secular services on a religion-neutral basis, the fact that a faith-based organization is the successful bidder or provider is irrelevant and not a violation of the "in aid of" clause.

CONCLUSION

Based upon the foregoing, the City of Jacksonville, Florida, Office of the Mayor, urges that this Court interpret the “in aid of” clause of article I, section 3 of the Florida Constitution to preserve the ability of the City to procure or award secular social services on a religion-neutral basis to faith-based organizations, as has been done historically and by necessity in this community and consistent with this Court’s long-standing jurisprudence.

RICHARD A. MULLANEY
GENERAL COUNSEL

Of Counsel:
Devin J. Reed, Esq. (FBN 0062472)
Director, Department of Procurement
117 West Duval St., Ste. 335
Jacksonville, FL 32202

Scott D. Makar (FBN 709697)
Chief, Appellate Division
City of Jacksonville
Office of General Counsel
117 West Duval Street, Suite 480
Jacksonville, FL 32202
(904) 630-1847
(904) 630-1316 (fax)
Attorneys for Amicus, City of
Jacksonville, Office of the Mayor

**CERTIFICATE OF SERVICE/
TYPEFACE COMPLIANCE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the persons listed below by U. S. mail this 24th day of January, 2005; and that this Brief uses the Times New Roman 14-point font.

Attorney

Ronald G. Myer Meyer and Brooks, P.A. 2544 Blairstone Pines Drive Tallahassee, FL 32302	Elliot M. Mincberg Judith E. Schaeffer People for the American Way Foundation 2000 M Street, N.W., Suite 400 Washington, DC 20036
Robert H. Chanin John M. West Alice O'Brien (National Education Association) Bredhoff & Kaiser, P.L.L.C. 805 Fifteenth Street, N.W. Suite 1000 Washington, DC 20005	Steven R. Shapiro American Civil Liberties Union Foundation 125 Broad Street, 17 th Floor New York, NY 10004
Pamela L. Cooper Florida Educational Association 118 North Monroe Street Tallahassee, FL 32399-1700	Joan Peppard Anti-Defamation League 2 South Biscayne Boulevard Suite 2650 Miami, FL 33131

<p>David Strom American Federal of Teachers 555 New Jersey Avenue, N.W. Washington, DC 20001</p>	<p>Steven M. Freeman Steven Sheinberg Anti-Defamation League 823 United Nations Plaza New York, NY 10017</p>
<p>Michael A. Sussman National Association for the Advancement of Colored People Law Offices of Michael A. Sussman 25 Main Street Goshen, NY 10924</p>	<p>Ayesha N. Khan Americans United for Separation of Church and State 518 C Street, N.E. Washington, DC 20002</p>
<p>Marc D. Stern American Jewish Congress 15 East 84th Street New York, NY 10028</p>	<p>Jeffrey P. Sinensky American Jewish Committee 165 East 56th Street New York, NY 10022</p>
<p>Julie Underwood (Florida School Board Association) General Counsel National School Boards Association 1680 Duke Street Alexandria, VA 22314</p>	<p>Clint Bolick Clark Neily Institute for Justice 1717 Pennsylvania Avenue, NW Suite 200 Washington, DC 20006</p>
<p>Barry Richard M. Hope Keating Greenberg Traurig, P.A. 101 East College Avenue P.O. Drawer 1838 Tallahassee, FL 32302</p>	<p>Daniel Woodring General Counsel Nathan A. Adams, IV Deputy General Counsel Florida Department of Education 325 W. Gaines Street, Suite 1244 Tallahassee, FL 32399-0400</p>

<p>Raquel A. Rodriguez General Counsel Office of the Governor The Capitol, Rm. No. 209 Tallahassee, FL 32399-0001</p>	<p>Christopher M. Kise Louise F. Hubener Erik Figlio Office of the Solicitor General PL 01, The Capitol Tallahassee, FL 32399-1050</p>
<p>Kenneth Sukhia Fowler, White, Boggs, Banker, P.A. Post Office Box 11240 Tallahassee, FL 32302</p>	