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

BRIEF OF PROFESSOR STEVEN G. GEY AS *AMICUS CURIAE* SUPPORTING APPELLEES

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SUMMARY OF ARGUMENT

The Opportunity Scholarship Program (OSP) allocates substantial government funds for religious education conducted by sectarian organizations and directed at young children. This program violates the clear terms of Article I, § 3 of the Florida Constitution. Appellants, Intervenors, and their supporting amici attempt to avoid this result by raising the possibility that invalidating the OSP will cast doubt on a large number of other government educational and social service programs. This argument is flawed in several ways. First, courts in this state and elsewhere have drawn constitutional distinctions between government funding of religious activity and government funding of secular activity that happens to be carried out by religiously affiliated organizations.

Second, the OSP provides government funds to many pervasively sectarian institutions, whose secular activities are inextricably intertwined with their religious mission. The government cannot fund such organizations without also funding (and therefore sponsoring) their religious purposes. Third, there are many mechanisms available to religious organizations that want to participate in government funded secular programs without undercutting their religious missions. Finally, nothing in this case implicates the general rule that religious organizations may partake of general social benefits to the same extent as all other organizations in society. The OSP does not fall into the category of a general social benefit. Rather, it is a program that funnels millions of state dollars to a specifically religious cause, and for that reason is unconstitutional under Article I, § 3.

ARGUMENT

I. THE TEXT OF ARTICLE I, § 3 STRICTLY LIMITS STATE FUNDING OF RELIGIOUS ACTIVITY

The District Court of Appeals correctly interpreted Article I, § 3 of the Florida Constitution as imposing strict limitations on state programs funding religious and sectarian activity and enterprises. Like many state constitutions, the Florida Constitution's provision regarding religious freedom is much more explicit than the analogous provision of the United States Constitution. The First Amendment of the United States Constitution prohibits only laws

"respecting an establishment of religion," without specifying which types of laws constitute an impermissible establishment. *See* U.S. Const. amend. I. There is no specific reference in the federal constitution describing how courts should apply the nonestablishment mandate to government funding of religion. Thus, over time the United States Supreme Court has shifted from a strict application of the Madisonian principle that no amount of government funds could go to religion, *see Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947), to the theory that tax money may support religious institutions so long as the money is distributed under a "neutral" program that includes both religious and non-religious recipients. *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000).

The Supreme Court's radical shift in its approach to the constitutionality of government funding of religious institutions can be explained in part by the nonspecific phrasing of the First Amendment. Whether a program funding religious education constitutes a "law respecting an establishment of religion" is open to conflicting interpretations. By contrast, the Florida Constitution avoids the ambiguities of the federal Constitution by spelling out precisely how government funding should be construed. In addition to language tracking the federal Constitution's prohibition of laws "respecting the establishment of religion," Article I, § 3 also states flatly that "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 plain meaning of this provision prohibits *any* state financial support of a church or other institution engaged in a religious or sectarian enterprise.

Appellants and their supporting amici attempt to avoid this result by treating the "no revenue" language as inapplicable to any legislative program having an ostensibly secular purpose. Crist Br. 4; Gov. Br. 11. This interpretation would effectively subsume the "no revenue" language into the constitutional language prohibiting religious establishments generally.

Accepting the Appellants' interpretation would impute to the drafters of § 3 extraordinarily poor drafting skill. If the drafters of § 3 had intended the provision to prohibit only the intent to aid religious institutions (as opposed to the aid itself), then they would have phrased the Constitution in those terms. Likewise, if the framers of Article I, § 3 had intended the broadly phrased prohibition of laws "respecting an establishment of religion" to exhaust the range of religious freedom protected by that section, they would not have added an explicit provision barring financial aid to religious enterprises. Appellants' interpretation renders the "no revenue" provision a meaningless redundancy.

The effort to rewrite or excise the "no revenue" provision from Article I, § 3 is only one prong of the Appellants' attack on the constitutional no-aid principle. The second prong of that attack is the argument that this Court cannot enforce the "no revenue" portion of Article I, § 3 because to do so would lead to "absurd and unintended consequences." Gov. Br. at 24. In particular, Appellants argue that this interpretation would "inexorably lead to the conclusion that no public funds, or goods or services paid for with public funds, can flow to any religiously-affiliated entity under any circumstances." *Id.* According to the Governor, 37 different statutes would be jeopardized if this Court were to rigorously apply the terms of Article I, § 3. See Gov. Br. Appendix F.

This expansive claim is inconsistent with a large body of jurisprudence that distinguishes between the sectarian and secular activities of church-related institutions. Government aid to secular activities that happen to be conducted by religious institutions would not in any way advance or endorse religion itself, and therefore would not implicate Article I, § 3. The key to analyzing Article I, § 3 is not whether the recipient of government funds is a church-affiliated entity, but rather whether the entity is engaged in quintessentially religious activity. If Article I, § 3 is interpreted in light of this basic distinction, the parade of horribles invoked by Appellants will never occur.

II. ENFORCING ARTICLE I, § 3 WILL NOT LEAD TO "CATASTROPHIC AND ABSURD RESULTS"

Appellants and their supporting amici buttress their implausible reading of Article I, § 3 by warning of dire consequences if the constitutional text is taken at face value. In the words of Judge Wolf's dissent in the DCA, interpreting the constitutional text as written would lead to "catastrophic and absurd results." *Bush v. Holmes*, 886 So.2d 340, 373 (Fla. 1st DCA 2004) (Wolf, C.J., concurring in part and dissenting in part). Appellants concur, arguing that several government programs will be undermined if the OSP is held unconstitutional.

These fears are overstated and unwarranted. The key to understanding the primary thrust of the "no revenue" provision of Article I, § 3 is to view it in light of the overall purpose of § 3: to prevent government from endorsing or advancing religion. Government programs that do not endorse or advance a particular religion or religion in general do not implicate § 3—even if those programs happen to benefit the nonreligious aspects of religious institutions.

Even the most rigidly separationist jurisdictions typically distinguish between a church's religious and nonreligious activities. In *Locke v. Davey*, 540 U.S. 712 (2004), for example, the United States Supreme Court upheld the state of Washington's Promise Scholarship Program, which denied funds to students seeking devotional theology degrees. The limits on such scholarships were mandated by the Washington state constitution, which "has been authoritatively

interpreted as prohibiting even indirectly funding religious instruction that will prepare students for the ministry." *Id.* at 719.

Despite Washington's strict separationist approach to government funding of specifically religious activities, on several occasions the Washington Supreme Court has upheld programs that provide government financial benefits or assistance to religiously affiliated institutions engaged in nonreligious activity. In *Washington Health Care Facilities Authority v. Spellman*, 633 P.2d 866 (Wash. 1981), for example, the court held that the state did not violate the Washington constitution when it issued tax-exempt bonds on behalf of four hospitals that were affiliated with religious organizations. The court held that the financial benefits to the institutions were too incidental to implicate the Washington constitution's no-aid provision. In *Washington Higher Educ. Facilities Authority v. Gardner*, 699 P.2d 1240 (Wash. 1985), the court applied the same logic to uphold a state program issuing bonds that benefited universities with ties to religious organizations. In *Malyon v. Pierce County*, 935 P.2d 1272 (Wash. 1997), the court upheld the direct payment of state funds to a nondenominational Christian chaplaincy group, which was hired to provide counseling services for a local sheriff's department. The court upheld this payment under the Washington constitution because the counselors provided "counseling to people of all religions, and those with no religion at all, in a

secular manner." *Id.* at 1288. The fact that a religious organization received the state funds was not dispositive; the salient factor was the secular nature of the uses to which the organization put the state funds.

Other states with constitutional provisions analogous to Florida's have made similar distinctions between the religious and nonreligious aspects of a religious institution's operations. The Montana constitution, for example, prohibits the state from "mak[ing] directly or indirectly, any appropriation . . . in aid of any church, or for any sectarian purpose . . . [or any institution] controlled in whole or in part by any church, sect, or denomination whatever." Art. XI, § 8, Mont. Const. Nevertheless, the Montana Supreme Court held that the state did not violate the Montana constitution when it provided assistance to indigent pregnant women who sought adoptive services from Lutheran Social Services, Catholic Charities, and other religiously affiliated adoption agencies. *See Montana State Welfard Bd. v. Lutheran Social Services of Montana*, 480 P.2d 181 (Mont. 1971). The court reasoned that the religious nature of the agencies was irrelevant, because the funds were used for purely secular services such as medical care, hospitalization, and foster home assistance. *Id.* at 186.

Along the same lines, many other state courts have held that state aid to church-affiliated hospitals does not violate state constitutional provisions prohibiting aid to religion. The courts typically justify this result by focusing on

the secular nature of the health services provided in the facilities. *See, e.g., Truitt v. Bd. of Public Works of Maryland*, 221 A.2d 370 (Md. 1966) (approving state loans to religiously affiliated hospitals); *Lien v. City of Ketchikan, Alaska*, 383 P.2d 721 (Alaska 1963) (approving a city-subsidized lease of land to a religiously affiliated hospital); *Abernathy v. City of Irving, Ky.*, 355 S.W.2d 159 (Ky.), *cert. denied*, 371 U.S. 831 (1962) (same); *Opinion of the Justices*, 113 A.2d 114 (N.H. 1955) (approving a state-funded nursing education program at religiously affiliated hospitals). It is especially significant that in two of these states—Alaska and New Hampshire—the state courts have also struck down educational voucher programs under their state constitutions. *See Sheldon Jackson College v. State*, 599 P.2d 127 (Alaska 1979); *Opinion of the Justices*, 616 A.2d 478 (N.H. 1992).

The theme running through all these cases was once summarized by the United States Supreme Court: "The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion." *Tilton v. Richardson*, 403 U.S. 672, 679 (1971). It does not violate constitutional provisions prohibiting aid to religion when the government funds a religiously affiliated institution that provides religiously neutral social services such as medical care, adoption services, or other religiously neutral assistance. These activities may

be funded because religion itself is not being financed, endorsed, or advanced by the state. As the District Court of Appeal noted in this case, "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." *Bush v. Holmes*, 886 So.2d 340, 362 (Fla. 1st DCA 2004).

The analysis in these cases cannot salvage the OSP. The OSP specifically permits payment of state funds to sectarian schools, *see* § 1002.38(4), and more than 90 percent of the students participating in the program at the time it was struck down attended sectarian schools. *See* R15:2673. The fact that the OSP falls far short of the constitutional mark, however, says nothing about other state programs providing funds to religiously affiliated institutions in other contexts.

The DCA was wise to avoid expressing an opinion about any program other than the one being challenged here because the analysis of whether a state aid program is constitutional under Article I, § 3 is always going to be highly contextual. Nevertheless, it is difficult to construct a scenario under which this Court would find unconstitutional some of the programs cited by Appellants. For example, it is difficult to see how (as the Governor suggests in Appendix F to his brief) the analysis adopted by the DCA with regard to the OSP would also implicate Florida's Medicaid program, Ch. 409, Fla. Stat., Nursing Scholarship

Program, § 1009.67, Fla. Stat., or homelessness assistance programs, *see* § 420.624, Fla. Stat. These programs are inherently nonreligious. While particular applications of these programs may violate Florida's ban on aid to religious activity (for example, if a religiously affiliated homelessness shelter aggressively proselytized its residents), the programs themselves are not vulnerable to a facial attack of the sort raised against the OSP.

It is impossible to set forth in the abstract all the factors that are relevant to the determination of whether a particular program violates Article I, § 3. It is possible to draw some broad inferences about the relevant factors, however, from what federal and other state courts have said in similar cases involving similar constitutional provisions. The courts have developed several analytic tools that are useful in assessing whether a government program impermissibly advances the sectarian activities of religious institutions, or merely assists a religiously affiliated institution in carrying out secular tasks that serve a public purpose. The next three sections describe some of those analytic tools.

A. Article I, § 3 Permits Aid to Religiously Affiliated Institutions That Are Engaged in Secular Educational Activities and Are Not Pervasively Sectarian

Appellants argue that several state scholarship and educational benefits programs are vulnerable if this Court strikes down the OSP. The Governor lists nineteen different educational programs that he believes are at risk. *See* Gov.

Br. Appendix F. Intervenors make the broad claim that the entire Bright Futures Scholarship Program is rendered invalid under the DCA's opinion because a few scholarship recipients are currently permitted to study theology in preparation for the ministry. *See* Intervenors Br. 9 n.14.

These claims go far beyond what is justified by the reasoning of the DCA opinion. First, the Governor's argument that nineteen different educational programs are invalid is based on the fact that some of the students receiving state scholarships are permitted to attend private religious institutions. *See* Gov. Br. Appendix F. Likewise, Attorney General Crist notes that a large number of state scholarship programs "allow students or their parents to choose to apply public funds for private school education at religiously-affiliated schools," Crist Br. 17, and concludes that "there is no reasonable basis under the text of Article I, Section 3, for distinguishing the OSP from any of these programs." Crist Br. 18.

The flaw in these arguments is their implicit assumption that all religiously affiliated schools raise the same constitutional issues. This has never been the approach of courts analyzing the constitutionality of state funding in the educational area. Both state and federal courts commonly distinguish between institutions that are religiously affiliated but provide a broad-based secular education, which states may fund, and religiously affiliated institutions that are "pervasively sectarian," which must rely entirely on private funds. The term

"pervasively sectarian" refers to an institution "in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission." *Hunt v. McNair*, 413 U.S. 734, 743 (1973). Government financing of such an institution will inevitably run afoul of constitutional prohibitions on state aid to religion because the secular components of the school's curriculum cannot be separated from the religious components. Funding the secular part of such a school's operation will therefore necessarily entail funding the religious part.

The courts have identified several factors that are relevant to the determination of whether an institution is pervasively sectarian: "(1) does the college mandate religious worship, (2) to what extent do religious influences dominate the academic curriculum, (3) how much do religious preferences shape the college's faculty hiring and student admission processes, and (4) to what degree does the college enjoy '"institutional autonomy' apart from the church with which it is affiliated." *Columbia Union College v. Clarke*, 159 F.3d 151 (4th 1998), *cert. denied*, 527 U.S. 1013 (1999).

At the university level, these factors are applied relatively leniently. In *Roemer v. Maryland Public Works Bd.*, 426 U.S. 736 (1976), the Supreme Court discussed these factors in the context of a state program providing noncategorical grants to private colleges, including religiously affiliated colleges. The Court held that the colleges were not pervasively sectarian

because the colleges did not try to indoctrinate their students in the school's religion, had a significant amount of institutional autonomy from the church, did not hire faculty or admit students on a religious basis, and taught courses (including religion courses) according to the secular academic standards relevant to the discipline. *Id.* at 755-57. The overwhelmingly secular nature of the educational experience was the key factor, rather than the mere fact that some of the schools were affiliated with a church.

There is good reason to apply similar factors in assessing particular scholarship or educational programs under Article I, § 3 of the Florida Constitution. The central focus of the analysis should be whether state money is being used to advance a religious cause; this will not be the case where state money flows to universities that take seriously their academic missions. Religious schools below the university level are more problematic. As the Supreme Court has noted:

> There are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools. The "affirmative if not dominant policy" of the instruction in pre-college church schools is "to assure future adherents to a particular faith by having control of their total education at an early age." There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination. . . . [B]y their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines. Many church-related colleges and universities are characterized by a high degree of

> academic freedom and seek to evoke free and critical responses from their students.

Tilton v. Richardson, 403 U.S. at 685-86. With regard to the specific evidence on this point with regard to schools participating in the OSP, *see* Appellees Br., Appendix C.

The critical distinction between universities and schools below the university level, along with the heavily sectarian nature of many of the schools involved in the OSP, explains why this Court should view this program much more skeptically than many of the university scholarship programs cited by the Appellants as potentially subject to the same analysis.

It is also clear that the Intervenors are wrong when they claim that the "Appellees' rationale would appear to require immediate termination" of the Bright Futures Scholarship simply because scholarships under this program are awarded to students seeking degrees in theology or divinity. *See* Intervenor's Br. 8-9. Even the restrictive Washington scholarship program upheld in *Locke v. Davey* did not bar students receiving scholarships from taking theology courses. *See Locke v. Davey*, 540 U.S. at 716. Whether Article I, § 3 would permit the state to pay for a minister's sectarian theological training is perhaps an open question, but it is fanciful to suggest that if this Court affirmed the DCA's opinion, the state would immediately

have to withdraw scholarship funds from any university student involved in any course of study touching religion.

It is also untrue that if this Court affirms the DCA, then every scholarship program would immediately be deemed facially unconstitutional. *See* Intervenor Br. 9 n.14. Again, every program would have to be considered on its own terms. The Supreme Court has used this approach for several decades. In *Bowen v. Kendrick*, 487 U.S. 589 (1988), the Court rejected a facial challenge to a federal program that provided grants to religious and other organizations to conduct family planning services. The Court held that as-applied challenges must be raised to particular applications of statutes that do not allocate (as the OSP does) substantial amounts of state funds to pervasively sectarian institutions.

Whether other programs are as comprehensively sectarian as the OSP remains to be seen. Whether any other program is facially unconstitutional will depend on the facts of that program and other matters of statutory interpretation, such as whether the legislature intended unconstitutional provisions to be severable from other, constitutional portions of the same statute. In any event, there is no basis for the claim that a decision to strike down the OSP will inevitably undermine most other state aid programs as well.

B. Article I, § 3 Permits Aid to Religiously Affiliated Institutions That Segregate Their Sectarian Activities

Even if a particular religious institution is found to be pervasively

sectarian, this does not mean that the institution is forever foreclosed from participating in a government program funded with tax dollars and therefore governed by Article I, § 3. A pervasively sectarian entity that wants to participate in a government-sponsored program may do so by simply structuring its participation in a way that erects a formal legal division between the sectarian portion of the enterprise and a separate social services or educational entity. *See generally* Carl H. Esbeck, *Government Regulation of Religiously Based Social Services: The First Amendment Considerations*, 19 Hastings Const. L.Q. 343, 346-49 (1992) (describing the range of different structures available to religious organizations seeking to participate in publicly financed programs).

As a general matter, the Supreme Court has already rejected a First Amendment challenge to government mandates that require recipients of government aid to structure their programs in ways that isolate a publicly funded organization from its privately funded affiliates. In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court permitted the government to require organizations receiving government funds under a federal family planning statute to be legally and physically separate from affiliated organizations that were engaged in First Amendment activity that the government did not endorse. The Court held that this did not violate the First Amendment rights of the recipient organizations; it simply "required a certain degree of separation from the [government funded]

project in order to ensure the integrity of the federally funded program." *Id.* at 198.

The same rule would apply to the range of statutes cited by Appellants in this case. Even if the interpretation of Article I, § 3 in this case applies to some of the statutes cited by Appellants, and even if this interpretation would affect certain religiously affiliated organizations in receiving funds under those programs, the organizations could easily ameliorate this effect by organizing a separate, secular legal entity that could continue to provide publicly funded services.

C. Article I, § 3 Will Not Bar Aid in the Form of Generally Available Social Benefits

In addition to arguing that the enforcement of Article I, § 3 in this case would undermine most of Florida's social service funding, Appellants and Intervenors also claim that a ruling in this case could jeopardize the provision of "neutral programs of general applicability" to churches and other religiously affiliated institutions. Gov. Br. 24. For example, the Governor argues that § 3 might invalidate Florida's inclusion of religious institutions in the state's general property tax exemption statute, Gov. Br. 24 & Appendix F, and also jeopardize religious groups' access to public facilities. Gov. Br. 24.

None of these claims are true. With regard to generalized tax exemptions, the classic response to this claim was provided by the United States Supreme Court in *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 675 (1970):

> The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees "on the public payroll." There is no genuine nexus between tax exemption and establishment of religion.

So long as the indirect benefits of a tax exemption are provided to a broad range of nonprofit institutions—as they are in Florida—then there is no implication that the state has sponsored or endorsed religion in violate of § 3. *See Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 11 (1989) (emphasizing the importance of a broad grant of tax exempt status).

As for religious access to public institutions, the response again has already been provided by the United States Supreme Court, in one of a long line of cases granting religious groups the same First Amendment free speech rights as every other group in society. In *Widmar v. Vincent*, 454 U.S. 263, 274 (1981), the Court noted that permitting religious groups access to public forums "does not confer any imprimatur of state approval on religious sects or practices," any more so than granting access to the Students for a Democratic Society commits the government to the goal of socialist revolution. Public

access is not affected by the rules applicable to OSP because the Supreme Court has specifically held that scholarship programs such as OSP are not subject to a First Amendment public forum analysis. *Locke v. Davey*, 540 U.S. at 720 n.3.

CONCLUSION

Five factors distinguish the OSP from the unrelated statutes and programs cited by Appellants and Intervenors. In this case the program involves (1) direct, rather that indirect funding; (2) the funding is substantial; (3) a substantial portion of the funds are being provided to sectarian institutions; (4) the recipients are involved in specifically religious activities; and (5) the program affects students below the university level, an age at which the courts have always been especially wary of government-funded religious coercion. The application of § 3 principles to this program is clear; this Court should find the OSP unconstitutional.

Respectfully submitted,

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