IN THE SUPREME COURT OF FLORIDA

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

JOHN ELLIS (JEB) BUSH, ET AL.,
***Appellants*,**

v.

RUTH D. HOLMES, ET AL.,
***Appellees*.**

INITIAL BRIEF OF GOVERNOR JOHN ELLIS (JEB) BUSH, CHIEF FINANCIAL OFFICER TOM GALLAGHER, COMMISSIONER OF AGRICULTURE CHARLES H. BRONSON, FLORIDA DEPARTMENT OF EDUCATION, AND THE STATE BOARD OF EDUCATION

On Direct Appeal from the First District Court of Appeal

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STATEMENT OF THE CASE AND FACTS

In 1999, the Florida Legislature, expressly recognizing the constitutional declaration that education of the state's children is a paramount duty of the state, enacted an educational package that included the Opportunity Scholarship Program. [1]

In its Findings and Intent, the Legislature stated the purposes of the act:

> The Legislature further finds that a student should not be compelled, against the wishes of the student's parent, to remain in a school found by the state to be failing for 2 years in a 4-year period. The Legislature shall make available opportunity scholarships in order to give parents the opportunity for their children to attend a public school that is performing satisfactorily or to attend an eligible private school when the parent chooses to apply the equivalent of the public education funds generated by his or her child to the cost of tuition in the eligible private school ***.

§ 1002.38(1), Fla. Stat. Simultaneously with the passage of the Opportunity Scholarship Program, the Legislature enacted section 1008.34, Florida Statutes, which establishes a methodology for grading public schools according to student achievement.

The Opportunity Scholarship Program makes scholarships available to any student who is attending or is assigned to attend a school that has received a failing grade for two years in a four year period. § 1002.38(2)(a), Fla. Stat. The

[1] The Opportunity Scholarship Program was originally codified as section 229.0537, Florida Statutes, and has been renumbered as section 1002.38, Florida Statutes. A full copy of the statute is included as Appendix A to this brief.

scholarship may be used at any eligible public or private school of the parent's choice, based upon criteria having nothing to do with religion. § 1002.38(3) and (4), Fla. Stat.

In the case of a private school, scholarship checks are made payable to the parents of the participating student and are mailed to the school for restrictive endorsement by the parents. § 1002.38(6)(f) and (g), Fla. Stat. The private school must accept the scholarship as full tuition and fees and must accept scholarship students on an entirely random and religious-neutral basis and agree not to compel any student attending on a scholarship to profess a specific ideological belief, to pray, or to worship. § 1002.38(4)(i) and (j), Fla. Stat.

On March 14, 2000, the trial court declared the Opportunity Scholarship Program facially violates article IX, section 1 of the Florida Constitution, requiring that Florida provide an adequate free public education to children. [R:9:1453][2] The First District Court of Appeal reversed, finding no support for the trial court's conclusion that article IX, section 1 impliedly establishes an exclusive manner of funding education. *Bush v. Holmes*, 767 So. 2d 668 (Fla. 1st DCA 2000), *rev. denied*, 790 So. 2d 1104 (Fla. 2001).[3]

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[2] The symbol "R" is used to designate the record, followed by reference to the volume and page numbers.

[3] A copy of the First District Court of Appeal's October 3, 2000 opinion is included as Appendix B to this brief.

On remand, on August 5, 2002, the trial court rendered a final judgment declaring that the Opportunity Scholarship Program facially violates article I, section 3 of the Florida Constitution, and enjoining the State from taking any action to implement the program. [R:16:2888][4] On August 16, 2004, a 2-1 decision of the First District Court of Appeal upheld the trial court's ruling that the Opportunity Scholarship Program violates article I, section 3. The court also held that such interpretation of article I, section 3 does not violate the Free Exercise of Religion Clause of the First Amendment of the United States Constitution. *Bush v. Holmes,* 29 Fla. L. Weekly D1877 (Fla. 1st DCA Aug. 16, 2004).[5] On November 12, 2004, on rehearing en banc, an 8-5-1 decision affirmed and certified the following question to the Florida Supreme Court:

> Does the Florida Opportunity Scholarship Program, section 229.0537, Florida Statutes (1999), violate article I, section 3 of the Florida Constitution?

Bush v. Holmes, 886 So. 2d 340 (Fla. 1st DCA 2004).[6] This appeal ensued.

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[4] A copy of the final judgment is included as Appendix C to this brief.

[5] A copy of the First District Court of Appeal's August 16, 2004 opinion is included as Appendix D to this brief.

[6] A copy of the First District Court of Appeal's November 12, 2004 opinion on rehearing is included as Appendix E to this brief.

STANDARD OF REVIEW

A lower court's decision on the constitutionality of a statute presents an issue of law that is subject to *de novo* review on appeal. Even when the lower court has held a statute unconstitutional, the statute is favored with a presumption of constitutionality and all reasonable doubts as to its validity are resolved in favor of constitutionality. *See In re Estate of Caldwell*, 247 So. 2d 1, 3 (Fla. 1971).

Furthermore, it is a "judicial obligation" to sustain an act of the Legislature if it is possible to do so. *See Armstrong v. City of Edgewater*, 157 So. 2d 422, 425 (Fla. 1963). An act "will not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt." *See Todd v. State*, 643 So. 2d 625, 627 (Fla. 1st DCA 1994), *rev. denied*, 651 So. 2d 625 (Fla. 1995), *cert. denied*, 515 U.S. 1143 (1995). It must be "patently invalid." *See Florida Jai Alai, Inc. v. Lake Howell Water & Reclamation Dist.*, 274 So. 2d 522, 524 (Fla. 1973).

Appellees face "a heavy burden" because a "facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since *the challenger must establish that no set of circumstances exists under which the Act would be valid*." *Rust v. Sullivan*, 500 U.S. 173, 183 (1991) (emphasis added). The fact that the Opportunity Scholarship Program "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [it] wholly invalid." *Id*.

SUMMARY OF ARGUMENT

The Opportunity Scholarship Program is a religiously-neutral program of general eligibility with a secular purpose. Until this case, no Florida court since 1885 has struck such a program under article I, section 3 of the Florida Constitution. The trial court and the majority of the district court below concluded that "in aid of" is synonymous with "that results in a benefit to." That conclusion was contrary to this Court's historic interpretation of article I, section 3. If upheld, the decision would have, in the words of Judge Wolf, "catastrophic and absurd results." A myriad of state benefit programs upon which thousands of Floridians have depended for decades would be jeopardized.

The district court strained to dismiss the breadth and impact of its decision on the grounds that the other state benefit programs were not before the court; however the majority's opinion leaves no room for distinguishing them and fails to accord proper meaning to the phrase "in aid of" in article I, section 3. Additionally, contrary to the district court's rationale, this Court need not construe article I, section 3 more restrictively than the U.S. Supreme Court has construed the First Amendment. The latter interpretation has varied sharply over time and the federal Establishment Clause was not even incorporated against the states until long after 1885.

This Court's jurisprudence finding neutral programs of general eligibility with a secular purpose constitutional preceded the U.S. Supreme Court's by decades. For this Court to reject this proud legal tradition now and require state-sponsored discrimination against faith-based providers and persons pursuant to a "doctrine born of bigotry," would reinstate separate and unequal treatment of a class of persons contrary to the law and public policy. Thus interpreted, article I, section 3 would also violate the federal Free Exercise Clause and the state free exercise clause.

Moreover, article IX, section 1 of the Florida Constitution does not provide an avenue to avoid adjudicating the necessity of religious discrimination. Previously, for reasons that remain valid, the district court held that article IX, section 1 does not impliedly establish the exclusive manner of funding education. The lines are drawn: this Court may treat "in aid of" as "intent to aid" *or* merely "benefiting"; may follow *or* break with historic neutrality precedent and legislative enactments; may require that state programs incorporate neutral and general eligibility criteria with a secular purpose *or* discriminate against a class of persons solely on the basis of religion; may hold consistent with *or* violate federal First Amendment law; and may confer equal status on *or* eviscerate the state free exercise clause.

ARGUMENT

I. THE OPPORTUNITY SCHOLARSHIP PROGRAM COMPLIES WITH ARTICLE I, SECTION 3 OF THE FLORIDA CONSTITUTION BECAUSE IT DOES NOT USE PUBLIC FUNDS IN AID OF SECTARIAN INSTITUTIONS.

The lower court's decision ignores the historic holdings by this Court that a religiously-neutral program of general eligibility with a secular purpose is consistent with article I, section 3 of the Florida Constitution (the "state establishment clause"). The trial court and the majority of the district court concluded that "in aid of" as it appears in article I, section 3 of the Florida Constitution is synonymous with "that results in a benefit to." That conclusion was unnecessary and contrary to this Court's historic interpretation of "in aid of" as "intent to aid" or "for the purpose of aiding." If upheld, the decision would have, in the words of Judge Wolf, "catastrophic and absurd results." [A:E:71];[7] *Bush v. Holmes*, 886 So. 2d at 373. (Wolf, C.J., concurring in part and dissenting in part). Article I, section 3 of the Florida Constitution provides:

> **Religious Freedom. –** 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.

[7] The symbol "A" is used to designate the appendix to this brief, followed by a reference to the tab number and the internal page number of the item.

Art. I, § 3, Fla. Const.

A. The Opportunity Scholarship Program Does Not Use Funds in Aid of Sectarian Institutions.

In every case in which this Court has construed article I, section 3 of the Florida Constitution, or identical language at the local level, it has interpreted the phrase "in aid of" to address the purpose of a law, not its incidental effect. The question has always been whether the challenged law was designed for the purpose of aiding a church, sect or religious denomination or for a *bona fide* secular purpose unrelated to religious affiliation. The assertion that the provision was intended to bar any act that has the incidental effect of benefiting a religious interest has been repeatedly rejected by this Court. *Johnson v. Presbyterian Homes of Synod of Fla., Inc.*, 239 So. 2d 256 (Fla. 1970); *Nohrr v. Brevard County Educ. Facilities Auth.*, 247 So. 2d 304 (Fla. 1971); *Southside Estates Baptist Church v. Board of Trustees*, 115 So. 2d 697 (Fla. 1959); *Koerner v. Borck*, 100 So. 2d 398 (Fla. 1958).

The Opportunity Scholarship Program is not "in aid of" religion or any sectarian institution. The purpose of the Opportunity Scholarship Program is to serve the public welfare and promote improved public education and uniform educational opportunities to all students, not to favor sectarian institutions, and any benefit received by them is merely incidental to the achievement of those public purposes. The finding by the district court that article I, section 3 is

unconstitutional on the grounds that it unambiguously prohibits participation of religiously-affiliated schools in the Opportunity Scholarship Program conflicts with every preceding decision interpreting the constitutionality of a religion-neutral statute with a secular purpose that incidentally benefited religiously-affiliated entities.

In *Johnson*, this Court reviewed the constitutionality of a statute that granted tax exemptions to homes for the aged. A city and county had assessed real property taxes against a church-affiliated home for the aged, in spite of the statute, and the owner of the facility brought an action against them. 239 So. 2d at 258. The defendants argued that the statute as applied to homes for the aged "owned by religious organizations and operated primarily for religious purposes" violated the state establishment clause. *Id.*

In upholding the constitutionality of the tax exemption, the Court in *Johnson* focused upon the general eligibility, neutrality, and secular purpose of the property tax exemption. The Court was not concerned that "[u]nquestionably, a Christian atmosphere is maintained," as demonstrated by, among other things, daily chapel services (except Sunday) under the supervision of an ordained minister, Bible instruction and study, and transport to the churches of the residents' choice on Sunday. *Id*. at 258. Although the Synod of Florida of the Presbyterian Church operated and controlled the home through its officers and directors and 76 out of

158 residents were members of the Presbyterian Church, *id*. at 263, this Court articulated the basis for rejecting the majority's view of the phrase "in aid of" as follows:

> It is apparent that Fla. Stat. (1967), § 192.06(14), F.S.A., was enacted ***to promote the general welfare*** through encouraging the establishment of homes for the aged ***and not to favor religion***, since it is not limited to homes for the aged maintained by religious groups, but applies to any which are owned and operated in compliance with the terms of the statute by Florida corporations not for profit. Under the circumstances, ***any benefit received by religious denominations is merely incidental to the achievement of a public purpose***.
>
> * * *
>
> ***A state cannot pass a law to aid one religion or all religions, but state action to promote the general welfare of society, apart from any religious considerations, is valid, even though religious interests may be indirectly benefited***.

Id. at 261 (emphasis added). Significantly, the Court in *Johnson* stated that "***[t]o exempt all homes complying with the statute, except church-related homes, would indeed be discriminatory and inconsistent with the obvious intent and secular aims of the Legislature***." *Id.* at 262 (emphasis added). Yet this is precisely the type of discrimination that would result from application of the district court's decision. The Court in *Johnson* further emphasized its point:

> ***By granting the exemption to church properties used as a home for the aged, Florida does not support all religious bodies or any of them in the sense that the state espouses their acceptance or the acceptance of any of them by its citizens.*** The exemption goes, not only to homes for the aged owned by religious bodies, but to any bona fide homes for the aged duly licensed, owned and operated in compliance with the terms of the statute by Florida corporations not

> for profit. Such a home for the aged could be owned by any organization complying with the statute, regardless of religious beliefs. There is nothing to prevent organizations which do not believe in a Supreme Being from also complying with the statute. In Florida, ***tax exemption is by no means synonymous with approval of the purposes of the body whose property is exempt.***
>
> Fla. Stat. (1967) § 192.06(14), F.S.A., does not violate the Fla. Const. (1885), Declaration of Rights, § 6, F.S.A., and the First Amendment to the United States Constitution.

Id. at 261-62. The clear message of the case is that a neutral program of general eligibility having a secular purpose such as the Opportunity Scholarship Program is not "in aid of" a sectarian institution within the meaning of article I, section 3.

The majority in the case at bar distinguished *Johnson* solely on the ground that it involved a tax exemption rather than a direct disbursement of funds from the public treasury. However, the dissenting opinion aptly notes that "[t]he distinction between a benefit arising from a tax exemption and a payment from the state is one without a difference." [A:E:92]; *Bush v. Holmes*, 886 So. 2d at 382 (Polston, J. dissenting joined by Barfield, Kahn, Lewis and Hawkes, JJ.)[8] Either costs the public revenue.[9]

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[8] The dissent further elaborated on this point stating: "[f]or example, a taxpayer may get the same bottom-line benefit on an income tax return whether it is in the form of a tax exemption . . . or simply a payment from the government to the individual [out of the public treasury]. *Id.* The Opportunity Scholarship Program could as easily be framed either way.

[9] The U.S. Supreme Court has not shrunk from striking under the establishment clause aid solely on the basis of its label or treatment in the tax code. *See Committee for Public Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 789

A reading of the Court's opinion in *Johnson* discloses that it had nothing to do with the fact that the benefit was in the form of an exemption rather than a grant. Instead, the clear language of the opinion focuses on the fact that the act was designed to "promote the general welfare" and "not to favor religion" and that "any benefit received by religious denominations" was "merely incidental to the achievement of a public purpose." *Id.* at 261. This Court's focus was on neutrality, not the nature of the aid as a tax exemption, not the sectarian character of the institution, and not how indirectly the benefit reached the institution.

Subsequent to its decision in *Johnson*, the Court reviewed the Higher Educational Facilities Authorities Law challenged on the grounds that it purportedly violated article I, section 3 by permitting authorities to issue revenue bonds in aid of religious and non-religious schools. *Nohrr*, 247 So. 2d at 304. Before the U.S. Supreme Court held faith-based tax-exempt bond financing consistent with the federal establishment clause, *see Hunt v. McNair*, 413 U.S. 734 (1973), this Court upheld it under the state establishment clause:

(1973) (striking a New York statute providing state funds for the maintenance and repair of private schools and a tax deduction and recognizing that the constitutionality of a tax benefit "does not turn in any event on the label we accord it.") *Accord Kotterman v. Killian*, 972 P.2d 606, 616 (Ariz. 1999) ("both [tax] credits and deductions ultimately reduce state revenues, are intended to serve policy goals, and clearly act to induce 'socially beneficial behavior' by taxpayers"), *cert. denied*, 528 U.S. 921 (1999).

> The Educational Facilities Law was enacted to promote the general welfare by enabling institutions of higher education to provide facilities and structures sorely needed for the development of the intellectual and mental capacity of our youth.
>
> ***A state cannot pass a law to aid one religion or all religions, but state action to promote the general welfare of society, apart from any religious considerations, is valid, even though religious interests may be indirectly benefited.***
>
> * * * * *
>
> The Educational Facilities Law does not violate the First Amendment to the United States Constitution ***nor does it do violence to Art. I, § 3 of the Florida Constitution***.

Id. at 307 (emphasis added).

As with *Johnson*, the majority distinguishes *Nohrr* because it did not involve a disbursement out of the public treasury. However, similar to *Johnson* and contrary to the majority decision in the instant case, nothing in *Nohrr* even hints that the decision had anything to do with the nature of the supposed aid, how sectarian the educational institution was, or how indirectly the aid flowed to it. Additionally, as with a property tax exemption, tax-advantaged revenue bonds result in foregone public revenue and the benefit from the perspective of the institution is fairly direct. *Accord Kotterman*, 972 P.2d at 613 n.2 (property tax exemption is "a direct government benefit.")

This Court's decisions in *Johnson* and *Nohrr* are consistent with its earlier decision in *Koerner*, 100 So. 2d at 398. In *Koerner*, the Court upheld a devise of

land to Orange County that carried with it a perpetual easement for a nearby church to use the lake on the property for baptismals. The plaintiffs argued that the county would violate the state establishment clause by accepting the property subject to this condition. The Court rejected petitioner's theory that the benefit to the church was unconstitutional, notwithstanding its apparent substantial direct value to the congregation. *Koerner* began to elaborate this Court's neutrality jurisprudence well in advance of the U.S. Supreme Court's as follows:

> Nor is the Chancellor's decree amenable to attack here made under Section 6 of the Declaration of Rights of the Florida Constitution, F.S.A., prohibiting the expenditure of public funds, directly or indirectly, in aid of any church, sect, religious denomination, or sectarian institution. Here, as in *Fenske v. Coddington*, *supra*, 57 So. 2d 452, ***any improvement to the county-owned land will be made for the benefit of the people of the county and not for the church***.

Id. at 402.

In the case at bar, the majority distinguishes *Koerner* by stating that the case "did not involve a specific disbursement to improve the park made from the public treasury, though in *dicta* the Court in *Koerner* stated that a disbursement to improve the park would not, under the facts of that case, render the devise unconstitutional." [A:E:28]; *Bush v. Holmes,* 886 So. 2d at 354-55. However, the clear holding by this Court cannot be characterized as dicta as suggested by the district court's opinion. To the contrary, and as pointed out in the dissenting

opinion, the perpetual easement was indeed revenue to the county. [A:E:87]; *Bush v. Holmes,* 886 So. 2d at 380.

The opinions in *Johnson, Nohrr, and Koerner* are also consistent with *Southside Estates,* 115 So. 2d at 697. In *Southside Estates,* this Court reviewed a public school policy of making public school buildings available to churches for worship services on Sundays. Petitioner argued "that regardless of how small the amount of money might be, nevertheless, if anything of value can be traced from the public agency to the religious group, the Constitution has been thereby violated." 115 So. 2d at 699. The Court in *Southside Estates* squarely rejected this view, and held, premised upon *Koerner*, that "an incidental benefit to a religious group resulting from an appropriate use of public property is not violative of Section 6 of the Declaration of Rights of the Florida Constitution." *Id*. at 700. According to the Court, to hold otherwise would lead to absurd results:

> Were we to apply literally the rule advocated by the appellants it could lead to almost absurd results. It will be recalled that the appellants contend that any benefit to a religious group resulting from the use of the public property ipso facto constitutes an indirect contribution of public funds in violation of the cited section of the Florida Declaration of Rights. Were this the rule no religious organization could ever legitimately rent or otherwise use or occupy any public property.

Id.

Accordingly, as early as *Southside Estates*, this Court rejected the view that "in aid of" means results in any benefit to a religious organization. *Koerner* rejected it with respect to a perpetual easement; *Johnson*, a property tax exemption; and *Nohrr*, bond financing. The Court in *Southside Estates* was not concerned that a church benefited from the aid and was not concerned that the benefit, access to worship facilities, was fairly direct. Equally remarkable, the U.S. Supreme Court would not hold that granting sectarian organizations equal access to public facilities is consistent with the federal establishment clause until *Widmar v. Vincent*, 454 U.S. 263 (1981).

Although in the case at bar the district court focuses on the Court's finding in *Southside Estates* that the record did not support a conclusion that any public funds had been contributed to the school, more telling is the Court's lack of concern over "appellant's insistence that the use of the building is something of value and that the wear and tear is an indirect contribution from the public treasury…." *Southside Estates*, 115 So. 2d at 699. More important was the Court's decision not to remand for a full accounting of "any direct expenditure of public funds" as the use of facilities necessarily implied expenditure of public revenue for, among other things, electricity and maintenance. *Id.*

In the case at bar, the majority's attempt to distinguish *Johnson*, *Nohrr*, *Koerner* and *Southside Estates* on the basis that none of those cases involved

disbursements directly from the public treasury overlooks not only the fact that two of the decisions involved foregone revenue and two others indirect public expenditures, but also the consistently reiterated basis of those decisions. Those cases stand for the proposition that when public financial benefits enjoyed by religious institutions are merely incidental to the achievement of a non-sectarian public purpose, there is no violation of article I, section 3.

These are precisely the facts in the case at bar. The Opportunity Scholarship Program is not intended or designed to aid any religious denomination or affiliated institution. Rather, it is a program intended to improve the overall quality of Florida's public schools. There is nothing in the Opportunity Scholarship Program that is designed to favor or encourage the use of the scholarships at sectarian schools. The criteria for a school to be eligible to receive scholarships have nothing to do with religion. In fact, a private school must "[a]ccept scholarship students on an entirely random and *religious-neutral* basis . . ." and "[a]gree not to compel any student attending the private school on an opportunity scholarship to profess a specific ideological belief, to pray, or to worship." § 1002.38(4)(e) and (j), Fla. Stat. (emphasis added). To the extent that scholarship funds are paid to religiously-affiliated schools, it is only because particular parents or guardians have exercised their unfettered right to select a school of their choice, so long as the school meets certain criteria having no connection with religion.

Consequently, the district court has failed to distinguish controlling Florida Supreme Court precedent.

The instant facts are even less similar to a program "in aid of" a sectarian institution than a property tax exemption, revenue bonds, access to public facilities for worship services, or a perpetual easement for purposes of baptismals. Religious organizations – even churches – chose directly to pursue these advantages and benefited directly, whereas parents must decide to send their children to religious schools for them to benefit incidentally. The district court made a choice not required by article I, section 3 to treat a parent's decision about where to send a child to school as other than a necessary superseding independent decision. On the facts closest to this case, this Court held that needy children received the benefit, not a day-care.

In *City of Boca Raton v. Gidman*, 440 So. 2d 1277 (Fla. 1983), this Court reviewed an action brought against a city to enjoin the contribution of city funds to subsidize a child day-care center run by a nonprofit organization. The action was brought on the basis that it violated a section of the city's charter remarkably similar to article I, section 3 and providing that "[n]o city funds shall be expended in any manner whatsoever to accrue either *directly or indirectly to the benefit of* any religious, charitable, benevolent, civic or service organization." 440 So. 2d at 1278 (emphasis added).

On review, the Court found that the beneficiaries of the city's contributions were the city's disadvantaged children. *Id.* at 1282. The Court stated that "[a]ny benefit received by the charitable organization itself is insignificant and cannot support a reasonable argument and this is the quality or quantity of benefit intended to be proscribed." *Id.* The Court held that the expenditure of city funds for the day-care center run by the non-profit was not a violation of the city's charter. *Id.*

The majority wholly fails to distinguish *Gidman* from the case at bar, but rather summarily dismisses it because it also involved the question of whether the provision of childcare services was within the city's home rule powers. Nevertheless, the importance, relevance and application of this Court's decision in *Gidman* to the case at bar is recognized by both the dissenting opinion and by Judge Wolf in his opinion (concurring in part and dissenting in part). [A:E:68-70, 94-95]; *Bush v. Holmes,* 886 So. 2d at 372-73, 383-84). As in *Gidman*, the primary beneficiaries of opportunity scholarships are parents who might otherwise be deprived of an opportunity to make meaningful decisions about their children's education and the students themselves primarily from low socio-economic areas. *Accord Kotterman*, 972 P.2d at 616.

The district court also failed adequately to distinguish *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), *cert. denied,* 525 U.S. 997 (1998), where the

Wisconsin Supreme Court addressed a challenge to a program like the Opportunity Scholarship Program allowing parents the option of spending tuition at private sectarian or non-sectarian schools. The Wisconsin constitution provided, in pertinent part:

> *** nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.[10]

Wis. Const. art. I, § 18; *Jackson*, 578 N.W.2d at 620 n.20. The court held that the program did not violate Wisconsin's establishment clause and stated:

> Unlike the court of appeals, which focused on whether sectarian private schools were "religious seminaries" under art. I, § 18, we focus our inquiry on whether the aid provided by the amended MPCP is "for the benefit of" such religious institutions. We have explained that the language "for the benefit of" in art. I, § 18 "is not to be read as requiring that some shadow of incidental benefit to a church-related institution brings a state grant or contract to purchase within the prohibition of the section." *Nusbaum I,* 55 Wis. 2d at 333, 198 N.W. 2d 650. Furthermore, we have stated that the language of art. I, § 18 cannot be read as being "so prohibitive as not to encompass the primary-effect test." *State ex rel. Warren v. Reuter*, 44 Wis. 2d 201, 227, 170 N.W.2d 790 (1969). ***The crucial question, under art. I, § 18, as under the Establishment Clause, 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."

Id. at 621 (emphasis added).

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[10] The court noted that the term "religious societies" was synonymous with religious organizations and the term "seminaries" with academies or schools. *Jackson,* 578 N.W.2d at 621 n. 22.

The district court's attempt to distinguish Wisconsin's constitutional provision from article I, section 3 on the basis that the Wisconsin provision "lacks a prohibition on both direct and indirect benefits" and that it "does not expressly bar benefit to all 'sectarian institutions'" misses the point. What the district court fails to recognize is that the Wisconsin analysis reflects the consistent position of this Court that benefits which are merely incidental to a program of general eligibility with a non-sectarian public purpose are not "in aid of" religion so as to violate the state establishment clause. *Accord Kotterman*, 972 P.2d at 614 (upholding a state tax credit for donations to school tuition organizations); *Toney v. Bower*, 744 N.E.2d 351 (Ill. App. Ct. 2001), *appeal denied*, 195 754 N.E.2d 1293 (Ill. 2001) (upholding a tax credit for elementary and secondary school education).

Overall, the district court disregarded the undisputed fact that the Opportunity Scholarship Program is a general public welfare measure that is not intended or designed to aid religion. It reasoned as if "in aid of," means "no-aid" or "results in a benefit to" when this Court has already rejected these interpretations. *See Southside Estates*, 115 So. 2d at 697. If the framers had intended article I, section 3 simply to prohibit the flow of public funds to religious institutions, they could have easily done so as in stricter state establishment clauses. *See, e.g.*, Wash. Const. art. I, § 11, ("No public money or property shall be appropriated for or applied to *any religious* worship, exercise or *instruction*, or

the support of any religious establishment") (emphasis added). Instead, the framers incorporated an "intent to aid" or "for the purpose of aiding" requirement.

The district court's discussion of *Witters v. Washington Dep't of Servs. for the Blind,* 474 U.S. 481 (1986) and *Witters v. State Comm'n for the Blind,* 771 P.2d 1119 (Wash. 1989), *cert. denied,* 493 U.S. 850 (1989), misses this crucial difference between Washington's establishment clause and Florida's. On remand after the U.S. Supreme Court held that the federal establishment clause did not preclude Washington from extending assistance to a blind person studying for the ministry, the Washington Supreme Court held that the "stricter" state constitution prohibited the application of public funds to any religious *instruction*. 771 P.2d at 1120. The Washington Supreme Court did not interpret that portion of the state establishment clause pertaining to *support of* any religious establishment; it only addressed whether public funds could be used for the pursuit of a degree in theology or career in ministry. *Id*. at 1120-22. The Opportunity Scholarship Program is a K-12 program and cannot be used for a degree in theology or clerical career. Therefore, the Washington court's decision in *Witters* is not relevant to the case at bar.

Once more, unlike in *Witters,* but as in *Koerner, Johnson, and Nohrr,* Florida taxpayers receive a proximate secular benefit in exchange for sectarian institutions participating in the public benefit program: in this case, an educated

pupil who would otherwise have to attend public schools at greater public expense and an indirect benefit in the form of improved public schools. Terming this "aid" rather than a fee-for-services transaction or value-for-value contract is a choice rather than a self-evident conclusion. A fee-for-services transaction has ordinarily not been deemed aid. These are *quid pro quo* transactions such as reimbursing a sectarian school for performing administration and grading or testing. *Committee for Pub. Educ. and Religious Liberty v. Regan*, 444 U.S. 646 (1980).[11] In contrast, aid to religious institutions has traditionally involved direct, unrequited financial or other assistance financed by government funds.

The language of the state establishment clause provides less reason to hold the Opportunity Scholarship Program unconstitutional under all circumstances than

[11] The most common fee-for-service transactions include postal services, bus, train, and ferry services; toll roads; trash collection; water and electric utilities; airport landing rights; pavilion and camping site rentals; building permits; paid parking spaces, police security, and firefighter services. *See Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664, 671 (1970) ("we fail to see how … police and fire protection given equally to all churches, along with nonprofit hospitals, art galleries and libraries … is different for purposes of the Religion Clauses"); *Everson v. Board of Educ.*, 330 U.S. 1, 17-18 (1947) (general government services should be available to religious institutions because the "First Amendment requires the state to be a neutral in its relations with groups of religious believers and nonbelievers and does not require the state to be their adversary. . ."); *Roemer v. Board of Pub. Works*, 426 U.S. 736, 747 (1976) (if government provision of a benefit to a religious institution were impermissible "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair"); *Board of Educ. v. Allen*, 392 U.S. 236, 242 (1968) (even though payment of bus fares, like "public provision of police and fire protection, sewage facilities, and streets and sidewalks," conveys benefit upon religion, such is not "a prohibited establishment of religion").

the neutral programs of general applicability involving property tax exemptions, revenue bonds, or access to public facilities. All of these incidentally benefited religious organizations. A couple benefited churches. All did so more directly than opportunity scholarships as the benefit passed directly to the religious organization, whereas parents receive opportunity scholarships just as this Court held children received day-care subsidies in *Gidman*.

The district court here concluded that any direct or indirect public financial benefit that inures to the benefit of a religiously-affiliated entity is unconstitutional, even if it is equally available to all persons and institutions based on uniform, non-religious criteria. That same reasoning 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. This conclusion would lead to absurd and obviously unintended consequences and would discriminate against a class of persons based solely on religious affiliation. *See Southside Estates*, 115 So. 2d at 700.

B. The District Court Decision Would Lead to Absurd and Unintended Results By Effectively Invalidating a Multitude of Traditional Florida Public Programs.

As it stands, the district court's decision effectively invalidates a major executive and legislative initiative and has dire implications for a multitude of significant Florida social programs. Under the district court's rationale, literally

dozens of state educational, health and welfare programs -- many in place for decades -- would be in violation of article I, section 3.[12] The decision severely restricts, if not eliminates, the ability of the state to maintain any such programs in the future. As forcefully noted in the dissenting opinion:

> Appellant Attorney General Robert A. Butterworth argued that a general application of the trial court's construction of Article I, § 3, 'would prohibit any religious institution from acting as a government service provider or participating in secular general welfare programs where there is only an incidental benefit to religion.' There is no distinction between this Opportunity Scholarship Program and the state Medicaid program that funds religiously affiliated or operated health care institutions providing free or subsidized medical care (e.g., St. Mary's Hospital in West Palm Beach and Baptist Medical Center in Jacksonville). Other examples are legislative programs providing public funds to any public or private person or organization for preservation of historic structures, rent paid to churches for use of their facilities as polling places, and government subsidized pre-K or childcare programs operated by churches or faith-based organizations.
>
> The Attorney General identified various legislative programs, in addition to Opportunity Scholarships, that eligible persons may utilize at private educational institutions across Florida, including those that are religiously affiliated or operated: Florida Bright Futures Scholarship Program, John M. McKay Scholarships for Students with Disabilities Program, Florida Private Student Assistance Grant Program, William L. Boyd, IV, Florida Resident Access Grants, Florida Partnership for School Readiness, Florida Postsecondary Student Assistance Grant Program, Jose Marti Scholarship Challenge Grant Program, Mary McLeod Bethune Scholarship Program, Critical Teacher Shortage Student Loan Forgiveness Program, and the Minority Teacher Education Scholars Program. No fewer than 23 religiously affiliated or operated private four-year universities in Florida are eligible to receive Bright Futures scholarship funds.

[12] A representative list of such programs is included as Appendix F.

[A:E:79,80]; *Bush v. Holmes,* 886 So. 2d at 376-77 (Polston, J. dissenting, joined by Barfield, Kahn, Lewis and Hawkes, JJ.)

The majority dismissed the dissenting judges' concerns on the grounds that the other programs were not currently before the court. However, the implications of the three-pronged test announced by the district court for evaluating compliance with article I, section 3 cannot be so easily dismissed. As explained by Judge Wolf in his separate opinion:

> In order to avoid catastrophic and absurd results which would occur if this inflexible approach was applied to areas other than public schools, the majority is forced to argue that that the opinion is limited to public school funding and article I, section 3 may not apply to other areas receiving public funding. As pointed out in Judge Polston's dissenting opinion, the language of the Florida Constitution itself does not support this interpretation.

[A:E:71]; *Bush v. Holmes,* 886 So. 2d at 373 (Wolf, J., concurring in part and dissenting in part).

The majority's opinion leaves no room for distinguishing a myriad of Florida social programs incidentally benefiting religious organizations for decades from the Opportunity Scholarship Program. Several of the educational programs Attorney General Butterworth mentioned date to the 1950-60s. *See* Ch. 29726, § 2, Laws of Fla. (1955) and Ch. 29819, § 2 Laws of Fla. (1955) (pertaining to the critical teacher shortage and nursing shortage scholarship programs); Ch. 63-452, § 5 Laws of Fla. (postsecondary tuition assistance program); Ch. 63-404, §§ 1-6,

Laws of Fla. (Seminole Indian Scholarship program); Ch. 68-24, § 5, Laws of Fla. (exceptional student K-12 education); Ch. 61-496, § 1, Laws of Fla. (corporate scholarship programs). *See also Scavella v. Sch. Bd. of Dade County*, 363 So. 2d 1095 (Fla. 1978) (reviewing a matter involving the exceptional student funding program). In 1965, the Legislature approved the precursor to today's Florida Bright Futures Scholarship Program, the Florida Regent Scholarship. Ch. 65-495, § 1, Laws of Fla.[13] The Florida Legislature has certainly acted as if neutral educational programs incidentally benefiting religious institutions are constitutional without any court in a half-century ruling otherwise.

Florida K-12 private school funding is perhaps the most time-honored, another reason the district court's decision is flawed insofar as it failed to take into account the practice of policymakers since 1885. Florida K-12 private school funding dates to the founding of the Florida common school movement and continued after the adoption of the state Blaine Amendment. In the 1870s, at least fifteen percent of the budget of private schools came from public funding.[14] As

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[13] The Florida Regent Scholarship Program expanded and assumed new names over the years including the Florida Academic Scholars' Fund, § 240.402, Fla. Stat. (1980), Florida Graduate Scholars' Fund, § 240.4025, Fla. Stat. (1985), Florida Undergraduate Scholars' Fund, § 240.402, Fla. Stat. (1986), and Florida Bright Futures Scholarship Program. § 240.40201 (1997).

[14] SUPERINTENDENT OF CENSUS, U.S. DEPARTMENT OF INTERIOR, NINTH CENSUS (JUNE 1, 1870), VOL. I, THE STATISTICS OF THE POPULATION OF THE UNITED STATES, EMBRACING THE TABLES OF RACE, NATIONALITY, SEX, SELECTED AGES AND OCCUPATIONS, TO WHICH ARE ADDED THE STATISTICS OF SCHOOL ATTENDANCE AND

late as the 1910s, Duval County and Pasco County erected or funded schools where students were taught by the Sisters of St. Joseph.[15] The Sisters surrendered their common schools only with the advent of anti-Catholic and anti-black bigoted nativism in the 1910s, leading to legislation such as an *Act Prohibiting White Persons from Teaching Negroes in Negro Schools*, which only the Sisters were willing to undertake; the *Religious Garb Bill,* which would have precluded the Sisters from wearing religious garb when teaching; and the *Convent Inspection Bill*.[16] Certainly, the implementation of article I, section 3 was grounded in religious and racial bigotry, contrary to the district court's opinion and of considerable importance to the federal Free Exercise Clause analysis. *See Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality) ("it was an open secret that 'sectarian' was code for 'Catholic.'") (citation omitted).

The precedential effect of the district court's opinion is significant not only with respect to its social impact, but also to the question of whether the drafters of the Florida Constitution and the people truly intended such a draconian construction contrary to Florida precedent. Since 1885, not a single decision of

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ILLITERACY, OF SCHOOLS, LIBRARIES, NEWSPAPERS AND PERIODICALS, CHURCHES, PAUPERISM AND CRIME, AND OF AREAS, FAMILIES, AND DWELLINGS at 450-57 (1872).

[15] MARY ALBERTA, A STUDY OF THE SCHOOLS CONDUCTED BY THE SISTERS OF ST. JOSEPH OF THE DIOCESE OF ST. AUGUSTINE, FLORIDA, 1866-1940 at 42 (1940).

[16] *See* ALBERTA, *supra* note 15; MICHAEL J. MCNALLY, CATHOLIC PARISH LIFE ON FLORIDA'S WEST COAST, 1860-1968 at 75-78 (1996) (referencing Ch. 6490, § 1, Laws of Fla. (1913) and Ch. 7374, Laws of Fla. (1917)).

any Florida court held a neutral program of general eligibility with a secular purpose unconstitutional. To the contrary, this Court anticipated the U.S. Supreme Court's establishment clause holdings premised upon neutrality and equal treatment by decades in the case of *Southside Estates* and *Koerner* and by a few years in the case of *Nohrr*. Turning back now would not merely be inconsistent with state law, but would also ultimately create a conflict with federal law.

C. It Is Not Necessary that Article I, Section 3 Be Construed More Restrictively than the U.S. Supreme Court Has Construed the First Amendment.

The majority of the district court argues that article I, section 3 must be interpreted to impose greater restrictions than does the First Amendment of the U.S. Constitution.[17] Otherwise, the majority asserts, the last sentence of the Florida provision would be merely superfluous. The district court's reasoning fails to consider several important factors.

First, at the time of the adoption of the language of the last sentence of article I, section 3, the federal Establishment Clause did not even apply to the states. The text of the First Amendment was not incorporated against the states

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[17] The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . .

U.S. CONST. amend. I

through the Fourteenth Amendment until *Everson v. Board of Educ. of Ewing*, 330 U.S. 1 (1947). As such, the framers of the 1885 Constitution could not have prohibited without a state establishment clause a state-recognized church such as America's first states acknowledged.

Next, the majority's argument is offered from the perspective of what we know now is the Supreme Court's interpretation of the Establishment Clause of the First Amendment; however, this interpretation has shifted dramatically over the last half-century and was not fixed at all in 1968.[18] It was not until the 1970s, most notably *Lemon v. Kurtzman*, 403 U.S. 602 (1971), that the U.S. Supreme Court began to issue a series of decisions addressing the Establishment Clause and public aid to sectarian organizations. Most of these decisions disapproved aid to religious organizations.[19] The 1980s signaled as radical a departure from *stare decisis* ever

[18] Prior to 1968, the United States Supreme Court only addressed public funds as related to religious organizations in a few limited holdings. *Everson,* 330 U.S. at 1 (statute authorizing reimbursement to parents for bus fares of their children to attend public and other schools was not a violation of the Establishment Clause); *Reuben Quick Bear v. Leupp,* 210 U.S. 50 (1908) (payment of public money to support sectarian schools on an Indian reservation was upheld to fulfill obligations under the Sioux Treaty); *Bradfield v. Roberts*, 175 U.S. 291 (1899) (appropriation of money to a hospital owned by a corporation which was not subject to the supervision or control by any ecclesiastical authority, even though members of the corporation were also members of a church and of a monastic order or sisterhood, was not a violation of the Establishment Clause).

[19] *Board of Educ. v. Allen*, 392 U.S. at 236 (upheld state law requiring secular textbooks be provided to private and public schools); *Lemon,* 403 U.S. at 602 (disallowed law appropriating salary supplements for private school teachers; disallowed law authorizing purchaser of services from private schools by

undertaken by the U.S. Supreme Court away from federal no-aid precedent toward the neutrality pioneered by this Court.[20]

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reimbursing them for teachers' salaries, textbooks, and instructional material); *Essex v. Wolman*, 409 U.S. 808 (1972) (summarily affirming judgment that state tuition grants to parents enrolling children in non-public schools violates Establishment Clause); *Nyquist*, 413 U.S. at 756 (disallowed state law authorizing reimbursement to low income families for portion of parochial school tuition; disallowed sliding scale tax deductions for families with students in religious schools; disallowed direct grants to private schools serving low income students for costs of maintenance and repair); *Levitt v. Committee for Pub. Educ.*, 413 U.S. 472 (1973) (disallowed state law authorizing reimbursement for state-required records and tests); *Sloan v. Lemon*, 413 U.S. 825 (1973) (disallowed reimbursement to parents for portion of religious school tuition); *Franchise Tax Bd. v. United Americans for Pub. Schs*, 419 U.S. 890 (1974) (stating income tax deduction for parents enrolling children in non-public schools is unconstitutional); *Griggs v. Pub. Funds for Pub. Schs.*, 417 U.S. 961 (1974) (summarily affirming judgment that state programs providing cash funding to parents of non-public school students for textbooks, supplies, and auxiliary services unconstitutional); *Meek v. Pittenger*, 421 U.S. 349 (1975) (disallowed loans to private schools of materials such as maps, photos, films, projectors, recorders and lab equipment; disallowed counseling, remedial and accelerated teaching, psychological and speech and hearing therapy to private school children), *overruled*, 530 U.S. 793 (2000); *New York v. Cathedral Academy*, 434 U.S. 125 (1977) (disallowed parochial school reimbursement for state-mandated recordkeeping and testing expenses); *Wolman v. Walter*, 433 U.S. 229 (1977) (disallowed loan of instructional materials to private schools or to parents; disallowed transportation for field trips by private schools), *overruled*, 530 U.S. 793 (2000); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985) (disallowed practice of providing remedial and enrichment courses taught by public school personnel and religious schools leased to the public schools), *overruled*, 521 U.S. 203 (1997); *Aguilar v. Felton*, 473 U.S. 402 (1985) (disallowed providing and monitoring federally funded Title I remedial services at private schools).

[20] *Witters*, 474 U.S. at 481 (upholding as consistent with the Establishment Clause public aid to a blind person attending a sectarian institution of higher education to enter a religious vocation); *Zobrest v. Catalina Foothill Sch. Dist.*, 509 U.S. 1 (1993) (government provided interpreter does not violate Establishment Clause); *Agostini v. Felton*, 521 U.S. 203 (1997) (remedial educational services on the

In comparison to the lack of federal fixity with respect to the Establishment Clause, this Court's guiding star has been neutrality since *Koerner* and *Southside Estates* in the 1950s. The framers of article I, section 3 might well have included the last sentence simply to ensure that religious grants would remain religion-neutral at a time when such a restriction was not ensured with respect to the First Amendment.[21] Ultimately, we cannot know because the framer's intent was not preserved, although the practice of neutral public funding discussed above for non-

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campus of private schools did not violate Establishment Clause); *Mitchell*, 530 U.S. at 793 (aid providing library books and educational equipment to K-12 schools was consistent with Establishment Clause); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (school voucher program enabling parents to spend public tuition assistance at public or private schools even when religious schools predominate was consistent with Establishment Clause).

[21] The 1968 constitution simply retained the original language of article I, section 3. The district court majority notes that the Constitutional Revision Commission that drafted the 1968 constitution considered and failed to adopt a motion to delete the last sentence of article I, section 3. As pointed out by the dissent, a legislative body's failure to adopt a proposed change to the constitution is not evidence of intent. *See, e.g., Fleeman v. Case*, 342 So. 2d 815, 817 (Fla. 1976) (declining to infer legislative intent from one attempt to amend a proposed law). Otherwise, it might equally be said that since the 1968 constitutional revision, this Court has issued two decisions, *Johnson*, 239 So. 2d at 256 and *Nohrr*, 247 So. 2d 304, both holding that a neutral program of general applicability having a secular purpose is not a violation of article I, section 3. Since then, there have been two Florida Constitutional Revision Commissions proposing at least seventeen constitutional amendments, and a multitude of proposed amendments to the Florida Constitution. Yet there has not been a single proposed amendment to article I, section 3 requiring a more restrictive interpretation. *See* websites of the Florida Department of State and Florida State University at http://election.dos.state.fl.us/initiatives/initiativelist.asp and http://www.law.fsu.edu/crc/conhist/contents.html.

sectarian and sectarian education through the 1910s, then again after the 1950s, is most consistent with the neutrality approach.

Assuming arguendo, as the majority asserts, the framers of the 1968 constitution only included language that differed from the First Amendment in order to differentiate the Florida provision from the federal, there is no explanation for the second clause of article I, section 3, which reads:

> Religious freedom shall not justify practices inconsistent with public morals, peace or safety.

That sentence is a precise recitation of the law with respect to the Free Exercise Clause of the First Amendment as it was interpreted by the U.S. Supreme Court prior to adoption of the 1968 Florida Constitution.[22] Evidently, the framers of the Florida Constitution were not adverse to restating the First Amendment in the Declaration of Rights and if they had done so as well in the state establishment clause, it would not be evidence of intent to differentiate it from the federal counterpart.

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[22] *See, e.g., Davis v. Beason*, 133 U.S. 333 (1890) (holding that First Amendment could not be invoked as protection against legislation for the punishment of acts inimical to the peace, good order, and morals of society), *overruled on other grounds*, 517 U.S. 620 (1996); *Cantwell*, 310 U.S. at 296 (1940) (statute prohibiting solicitation of money for religious cause and thereby safeguarding the peace, good order, and comfort of the community did not violate religious freedoms guaranteed by First Amendment); *McGowan v. State of Maryland*, 366 U.S. 420 (1961) (First Amendment does not ban regulations that protect general welfare of society).

II. IF, AS INTERPRETED BY THE LOWER COURT, ARTICLE I, SECTION 3 OF THE FLORIDA CONSTITUTION PROHIBITS RELIGIOUS ENTITIES FROM PARTICIPATING IN NEUTRAL PROGRAMS OF GENERAL APPLICABILITY HAVING A SECULAR PURPOSE, THE CLAUSE VIOLATES THE FEDERAL FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT AND THE STATE FREE EXERCISE CLAUSE.

As construed by the district court, the state establishment clause would clash with federal rights secured by the Free Exercise Clause. It would likewise give insufficient meaning to the state free exercise clause. This Court's neutrality jurisprudence has avoided these legal pitfalls.

A. The Free Exercise Clause Forbids Discriminating on the Basis of Religion.

A law that discriminates against any particular religion or all religion violates the federal free exercise clause unless it is justified by a compelling interest and is narrowly tailored to advance that interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). The district court's finding that its interpretation of article I, section 3 did not render that provision in violation of the Free Exercise Clause was made on the basis of *Locke v. Davey*, 540 U.S. 712, 124 S. Ct. 1307 (2003). In reaching its conclusion, the majority misapprehended the holding of *Locke* and thereby misapplied it to the facts of the case at bar.

In *Locke,* the U.S. Supreme Court reviewed a Washington statute involving postsecondary education scholarships. 124 S. Ct. at 1309-10. The statute

prohibited the use of the scholarships for the pursuit of a degree in theology or the pursuit of degrees that are devotional in nature or designed to induce religious faith. *Id.* at 1310. The scholarships, however, *could be used at any private institution, including those that were "pervasively religious."* *Id.* at 1315 (emphasis added). The Court went to great lengths to emphasize that a scholarship program discriminating against persons pursuing a non-theological major would be a different case, *id*. at 1313-15, as would a case involving a state Blaine Amendment or public forum. *Id*. at 1313 n.3, 1314 n.7.

The plaintiff in *Locke* desired to use the scholarship to pursue a pastoral ministries degree. The U.S. Supreme Court found that the Washington constitutional provision precluding this did not show evidence of animus toward religion:

> ***"[f]ar from evincing . . . hostility toward religion . . . the entirety of the Promise Scholarship Program goes a long way toward including religion in its benefits. The program permits students to attend pervasively religious schools, so long as they are accredited.*** As Northwest advertises, its "concept of education is distinctly Christian in the evangelical sense." It prepares *all* of its students, "through instruction, through modeling, [and] through [its] classes, to use . . . the Bible as their guide, as the truth," no matter their chose profession. ***And under the Promise Scholarship Program's current guidelines, students are still eligible to take devotional theology courses.*** Davey notes all students at Northwest are required to take at least four devotional theology courses . . . and some students may have additional religious requirements as part of their majors.

124 S. Ct. at 1314-15 (internal citations omitted) (emphasis added). Based on these findings, the Court held that nothing in the scholarship program suggested animus toward religion and found the program constitutional. *Id.* at 1315. However, implicit in the Supreme Court's opinion was the assumption that the Washington constitutional provision would have violated the Free Exercise Clause if it had reflected an animus toward religion.

The expressed reason that the Court found no evidence of animus in the Washington constitutional clause was that it had been interpreted by the state to permit the use of scholarship funds by students "to attend pervasively religious schools, so long as they are accredited" and under the scholarship program "students are still eligible to take devotional theology courses." *Id.* The only religious restriction in the Washington scholarship program was that "students may not use the scholarship at an institution where they are pursuing a degree in devotional theology." *Id.* at 1309. The Supreme Court noted that "a 'degree in theology' is not defined in the statute, but, as both parties concede, the statute simply codifies the State's constitutional prohibition on providing funds to students to pursue degrees that are 'devotional in nature or designed to induce religious faith.'" *Id.* at 1310. The Supreme Court concluded:

> We hold that such an exclusion from ***an otherwise inclusive aid program*** does not violate the Free Exercise Clause of the First Amendment.

Id. at 1309 (emphasis added).

Locke may have eroded a federal free exercise defense against state exclusion of public funding for clerical education, but distinguished other types of state discrimination because "training for religious professions and training for secular professions are not fungible." *Id*. at 1313. In *Locke*, the Supreme Court went to considerable lengths to note that the scholarship program was available for use at religiously-affiliated schools, including schools that were "pervasively religious." It precluded only the use of state money to actually study to become a cleric. The Florida situation is vastly different from the Washington Scholarship Program. The Opportunity Scholarship Program is a K-12 program and cannot be used for the purpose of clerical education. The Opportunity Scholarship Program is more like those aspects of the Washington Scholarship Program the Supreme Court approved including the general eligibility of students to receive a scholarship to attend sectarian schools and pursue non-clerical studies.

As noted in the district court's opinion, the Opportunity Scholarship Program actually prohibits a school receiving scholarship students from requiring such students to participate in devotional exercises. However, as interpreted by the district court, article I, section 3 would not just restrict the use of scholarship funds for studies leading to a degree in theology. It would also prohibit the use of funds for any school if a portion of such funds made its way, however indirectly, to a

religious institution. It is noteworthy in this regard that the discrimination the district court proposes is wide-ranging. In order to qualify for scholarship funds and remain constitutional under the district court's ruling, an institution would be prohibited from engaging in *any* religious instruction with any students and from having *any* but a remote religious affiliation. The district court did not elaborate how the state could constitutionally distinguish too-religious affiliations.

This is a far cry from the restriction upheld in *Locke* and, by singling-out religious institutions for exclusion, the Florida constitutional provision as interpreted would necessarily reflect animus toward religion. The very fact that the Court in *Locke* emphasized the limited nature of the Washington restriction strongly suggests that it would not uphold a restriction as broad as that imposed by the majority's interpretation of the Florida Constitution.

The district court's determination is also at odds with other U.S. Supreme Court decisions respecting the Free Exercise Clause. In *Church of Lukumi Babalu Aye*, the Court held that "[a] law burdening religious practice that is not neutral … must undergo the most rigorous scrutiny" and that the "minimum requirement of neutrality is that a law not discriminate on its face…." 508 U.S. at 533, 541. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Id.* at 532. *See also McDaniel v.*

Paty, 435 U.S. 618 (1978). As early as *Everson v. Board of Educ. Of Ewing,* 330 U.S. 1 (1947), the Court held that a state "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." 330 U.S. at 16.

The U.S. Supreme Court has also expressed serious reservations about the constitutionality of a discriminatory state Blaine Amendment such as, according to the district court, article I, section 3. In *Mitchell*, the plurality concluded that "the exclusion of pervasively sectarian schools from otherwise permissible aid programs" is premised upon a "doctrine, born of bigotry, [that] should be buried now." 530 U.S. at 829 (Thomas, Rehnquist, Scalia, and Kennedy, JJ.). Joining this plurality, the dissent in *Zelman*, recognized that Blaine Amendments were intended to disadvantage Catholics and other religious groups, contrary to the majority's conclusion in the case at bar. 536 U.S. at 720-21 (Breyer, Stevens, and Souter, JJ., dissenting). *See also Kotterman*, 972 P.2d at 624. *Locke* does not backpedal from the Court's expressed reservations about discriminatory enforcement of a state Blaine Amendment, but instead emphasizes that the Court was not deciding the constitutionality of one. *Locke*, 124 S. Ct. at 1314 n.7.[23]

[23] Additionally, in *Widmar*, the U.S. Supreme Court held that a desire to provide stricter separation of church and state reflected in a state constitutional provision

To the extent the district court was tempted to define a sectarian institution within the meaning of article I, section 3 exclusively as "pervasively sectarian," [A:E:25n.10, 46]; *Bush v. Holmes,* 886 So. 2d at 354 n.10, 362, this would not resolve the constitutional deficiency. Discriminating against the devoutly religious is as problematic as discriminating against an entire class of persons solely because of religion as if the separate but equal doctrine retained legitimacy. It would imply state endorsement of one type of religion, the not-too-religious, and hostility toward the devoutly religious. Furthermore, to distinguish the too-religious from the not-too-religious would raise the unconstitutional spectre of applying a state orthodoxy test. *See Columbia Union College v. Oliver*, 254 F.3d 496 (4th Cir. 2001). Therefore, pursuant to existing U.S. Supreme Court precedent, the district court's decision would result in a violation of the federal Free Exercise Clause.

B. The State Free Exercise Clause Forbids Penalizing Persons on the Basis of Religion.

The district court's interpretation of the state establishment clause would also violate the state free exercise clause, which means at least as much as the federal Free Exercise Clause. Just two sentences removed from the state establishment clause, article I, section 3 provides, "[t]here shall be no law respecting the establishment of religion or prohibiting or penalizing the free

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does not provide a compelling interest supporting discrimination on the basis of religion. 454 U.S. at 263.

exercise thereof." Art. I, § 3, Fla. Const. This Court has not had occasion to opine on impermissible free exercise penalties in recent years, because the Court's strong neutrality jurisprudence has enabled it to avoid the question. But the district court's opinion poses the question squarely anew, requiring this Court "to give independent legal import to every phrase and clause contained" in the state constitution. *Traylor v. State*, 596 So. 2d 957, 962 (Fla. 1992).

Webster's defines as a penalty the "disadvantage or painful consequences resulting from an action or condition" and a "handicap." WEBSTER'S II NEW COLLEGE DICTIONARY (1995). In 1943, this Court treated as a state free exercise violation a license tax of $50.00 imposed upon Jehovah's Witnesses for distributing religious pamphlets. *State ex rel. Singleton v. Woodruff*, 13 So. 2d 704, 706 (1943). In *Woodruff*, the relevant ordinance applied to all pamphleteers, but selective, arbitrary and capricious enforcement of similar statutes against Jehovah's Witnesses was commonplace. *See Hord v. City of Ft. Myers*, 13 So. 2d 809 (Fla. 1943) (permit ordinance to distribute literature struck on freedom of religion and freedom of speech grounds); *State ex. rel. Hough v. Woodruff*, 2 So. 2d 577 (Fla. 1941) (similar); *State ex rel. Wilson v. Russell*, 1 So. 2d 569 (Fla. 1941) (similar).

The district court has put parents wishing to spend opportunity scholarships at sectarian schools precisely at this disadvantage the penalty clause precludes due

solely to their religious convictions. They cannot receive a public benefit available to similarly-situated parents choosing to send their children elsewhere. This Court in *Johnson* deemed petitioner's similar attempted exclusion of nursing homes from property tax exemption as "indeed … discriminatory and inconsistent with the obvious intent and secular aims of the Legislature." *Johnson*, 239 So. 2d at 262. If contrary to *Johnson* and *Woodruff*, the state free exercise clause does not prevent this type of blatant religious discrimination in an otherwise neutral, generally applicable program with a secular purpose, the district court has not elaborated what relevant meaning the clause has. The state establishment clause and free exercise clause must be read in *pari materia* with neither defeating the other. Since 1885, the only way this Court has sought to do this is by advancing a jurisprudence of neutrality which is equally applicable to the Opportunity Scholarship Program.

III. ARTICLE IX, SECTION 1 DOES NOT PRESCRIBE AN EXCLUSIVE MANNER OF FUNDING EDUCATION.

In 1999, the Florida Legislature, expressly recognizing the constitutional declaration that education of the state's children is a paramount duty of the state, enacted an educational package that included the Opportunity Scholarship Program. Plaintiffs nevertheless sued arguing that the Opportunity Scholarship

Program facially violates article IX, section 1 of the Florida Constitution[24] on the theory that it impliedly establishes the exclusive manner of funding education by virtue of the principle of *expressio unius est exclusio alterius.* The district court rejected this theory in *Bush v. Holmes,* 767 So. 2d at 668. The district court was influenced by a prior decision of this Court, which upheld a legislative program authorizing the payment of private school tuition for students whose needs could not be met in the public schools. *Scavella*, 363 So. 2d at 1095. Nevertheless, a concurring opinion sought to revitalize this argument as an alternative basis for affirming the lower court. [A:E:57-65]; *Bush v. Holmes,* 886 So. 2d at 367-71 (Benton, J., concurring).

The Legislature's constitutional duty under article IX, section 1 is to make adequate provision for the public school system and for the education of all children. This Court has held that the Legislature is vested with "enormous discretion" in deciding how to do this. *See Coalition for Adequacy and Fairness in Sch. Funding v. Chiles*, 680 So. 2d 400, 408 (Fla. 1996). This accords with two fundamental principles of constitutional construction.

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[24] Article IX, section 1 provides in pertinent part:

> It is .. a paramount duty of the state to make adequate provision for education of all children . . . [a]dequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education . . . .

Art. IX, § 1, Fla. Const.

First, the Florida Constitution is a limitation upon, rather than a grant of power. *Bush v. Holmes*, 767 So. 2d at 673 (citing *Taylor v. Dorsey*, 19 So. 2d 876, 881 (1944); *Board of Pub. Instruction for County of Sumpter v. Wright*, 76 So. 2d 863, 864 (Fla. 1955)). Consequently, unless it "clearly appears" in the constitution that the Legislature is expressly or impliedly limited, the Legislature "is free to enact any statute." *State v. Miller*, 313 So. 2d 656, 658 (Fla. 1975).

Second, in matters of constitutional interpretation, the Legislature's view of its authority "is highly persuasive." *See Gallant v. Stephens*, 358 So. 2d 536, 540 (Fla. 1978). There is a strong presumption that the Legislature's contemporaneous construction "rightly interprets the meaning and intention of a constitutional provision," and even in doubtful cases that construction must be followed "unless it is manifestly erroneous." *See Greater Loretta Improvement Ass'n v. Boone*, 234 So. 2d 665, 670 (Fla. 1970). "[E]very doubt should be resolved in favor of the constitutionality of the law." *Bush v. Holmes*, 767 So. 2d 673 (*citing Taylor*, 19 So. 2d at 882)).

Third, the principle of *expressio unius est exclusio alterius* "should be used sparingly with respect to the constitution." *Id*. at 674 (*citing Taylor*, 19 So. 2d at 881). In contrast to cases where it has been applied because the constitution forbade any action other than as specified, "nothing in article IX, section 1 clearly

prohibits the Legislature from allowing the well-delineated use of public funds for private school education…." *Id*. at 675.

The concurrence argued that the Opportunity Scholarship Program only operates in circumstances "antithetical to and forbidden by article IX, section 1." [A:E:65]; *Bush v. Holmes,* 886 So. 2d at 370. The district court previously addressed this point directly:

> Although, in establishing the OSP, the Legislature recognized that some public schools may not perform at an acceptable level, the Legislature attempted to improve those schools by raising expectations for and creating competition among schools, while at the same time not penalizing the students attending failing schools.

Bush v. Holmes, 767 So. 2d at 676. *See also Scavella*, 363 So. 2d at 1099 (act permitting exceptional students to receive state funds to attend private schools applies only when special services unavailable in public schools); *Kotterman*, 972 P.2d at 611 ("[P]rivate schools frequently serve to stimulate public schools by relieving tax burdens and producing healthy competition.") The success of the Opportunity Scholarship Program in improving public schools consistent with article IX, section 1 is evident as measured by a variety of indicia; for example, African-American fourth graders reading on grade level improved from twenty-three percent in 1998-99 to fifty-three percent in 2003-04 and Hispanic fourth graders reading on grade level improved from thirty-eight percent to sixty-three

percent.[25] Accordingly, article IX, section 1 does not provide an avenue for this Court to avoid adjudicating the necessity of religious discrimination

CONCLUSION

For the foregoing reasons, the Court is respectfully urged to reverse the decision of the district court.

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[25] *See* http://www.fldoe.org/commissioner/factsheet.asp.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished on by hand delivery to RONALD G. MEYER, Meyer and Brooks, P.A., 2544 Blairstone Pines Drive, Tallahassee, FL 32302 and by U.S. Mail on January 18, 2005, to the following:

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I certify that this brief was typed in Times New Roman 14-point font in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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