IN THE SUPREME COURT OF FLORIDA

GOVERNOR JOHN ELLIS "JEB" BUSH, CHARLES J. CRIST, JR., BRENDA MCSHANE, et al.,

Appellants,

CONSOLIDATED CASE NOS.: SC04-2323, SC04-2324, SC04-2325

v.

RUTH D. HOLMES, et al.,

Appellees.
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REPLY BRIEF BY APPELLANT CHARLES J. CRIST, JR., ATTORNEY GENERAL, STATE OF FLORIDA

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

CHRISTOPHER M. KISE
Solicitor General
Florida Bar No. 0855545
LOUIS F. HUBENER
Chief Deputy Solicitor General
Florida Bar No. 0140084
ERIK M. FIGLIO
Deputy Solicitor General
Florida Bar No. 0745251
JAMES A. MCKEE
Deputy Solicitor General
Florida Bar No. 0638218
OFFICE OF THE ATTORNEY GENERAL
PL-01 The Capitol
Tallahassee, FL 32399
Tel: (850) 414-3681
Fax: (850) 410-2672

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REPLY ARGUMENT

This is a straightforward case about constitutional construction, in which the Court is asked to answer three relatively straightforward questions: (1) What does the third sentence of Article I, Section 3, of the Florida Constitution mean?; (2) If this sentence requires invalidation of section 1002.38, Florida Statutes, for the reasons identified by Appellees, then is Article I, Section 3, itself invalid under the federal Free Exercise Clause?; and (3) What does the second sentence of Article IX, Section 1, mean? The Attorney General submits that this case can and should be decided on the text of the Florida Constitution, informed by this Court's settled rules of constitutional construction and its jurisprudence construing the relevant constitutional provisions. By contrast, Appellees attempt to distract this Court from the substance of this case by reading into the Florida Constitution a series of terms and tests that simply aren't there.

The majority of the arguments raised in Appellees' answer brief are answered in the Attorney General's initial brief. To the extent that Appellees have misinterpreted the arguments of the Attorney General or raised issues not addressed in the initial brief, they are addressed briefly below.

I. ARTICLE I, SECTION 3, MAY NOT BE ARBITRARILY LIMITED IN ITS APPLICATION

Appellees argue that this Court may adopt a construction of Article I, Section 3, that would render the OSP unconstitutional, but would not affect the

majority of other programs of general applicability involving sectarian institutions. However, if Article I, Section 3, prohibits state funding to sectarian institutions for education, the provision must be construed as prohibiting state funds flowing to any "church," "sect," "religious denomination," or "sectarian institution" for *any* purpose, not just for school vouchers or educational programs.

Appellees admit that the McKay Scholarship Program would be vulnerable to constitutional challenge under the First District's construction of Article I, Section 3. However, they assert that other programs would not be as vulnerable. In order to strike down the OSP while preserving similar programs they find more desirable, Appellees ask this Court to read language into the Constitution where it suits them.[1]

First, Appellees and their Amici urge this Court to interpret the term "sectarian institution" to mean an institution that is "pervasively sectarian," as that term has been used in cases applying the federal Establishment Clause.[2] This

[1] The irony of Appellees' new stance in this regard is that Appellees have, up until now, contended that the "in aid of" language in Article I, Section 3, was clear and unambiguous. *See* Ans. Br. at 18 (quoting trial court's holding that "[t]he language utilized in this provision is clear and unambiguous. There is scant room for interpretation and parsing.").

[2] Appellees invoke federal Establishment Clause jurisprudence only here, and ask this Court to disregard it in the majority of their brief. This is not surprising, because any argument for invalidating the OSP under the federal Establishment Clause was inescapably foreclosed by *Zelman v. Simmons-Harris*, 536 U.S. 639, 653-54 (2002) (upholding constitutionality of materially identical school choice

interpretation would require the Court to construe the term "any sectarian institution" to mean "any pervasively sectarian institution." Such a construction would run contrary to the well-established principle that terms in constitutional provisions must be given their clear and unambiguous meaning. *See e.g. Florida Soc. of Ophthalmology v. Florida Optometric Assoc.*, 489 So. 2d 1118, 1119 (Fla. 1986); *In re Advisory Opinion of Governor Request of Nov. 19, 1976*, 343 So. 2d 17, 26 (Fla. 1977). Although the meaning of the "in aid of" provision as a whole is unclear, the meaning of "any sectarian institution" is not. Appellees cannot credibly contend that the framers of Article I, Section 3, intended the courts to engage in the difficult case-by-case, facts and circumstances analysis that their formulation of Article I, Section 3, would unquestionably entail. Accordingly, the relevant inquiry is whether an institution is affiliated with a sect, not whether it is "very" affiliated or only "a little" affiliated.

Second, Appellees and their Amici ask this Court to arbitrarily limit the application of Article I, Section 3, to programs involving school vouchers or educational programs. The provision contains no language limiting its application in such a manner. There is simply no basis in the text of Article I, Section 3, to support Appellees' conclusion that the "in aid of" provision is somehow "more

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program because it was a program of "true private choice" and "permit[ted] participation of all schools within the district, religious or nonreligious").

applicable" in the context of primary education than in any other context.

II. THE OSP FULFILLS A SECULAR OBJECTIVE THROUGH TRUE PARENTAL CHOICE

Appellees protest that an intent-to-benefit formulation of the "in aid of" provision could be easily circumvented if the Legislature recited a sham public purpose in order to disguise a covert sectarian purpose. Appellees do not suggest, however, that in passing the OSP the Legislature was really trying to aid sectarian schools under the guise of aiding children. Instead, Appellees argue that when the Legislature appropriates public revenue for the public welfare, the "in aid of" provision is violated if the Legislature is cognizant that some of that revenue may end up in the hands of sectarian institutions. This theory is insupportable because it requires the Court to conclude that the Legislature cannot fulfill a secular objective if funds may in some way reach sectarian institutions. This is precisely the situation at issue in this case.

In passing the OSP, the Legislature sought to provide children in failing schools with alternatives to remaining in public schools. Recognizing, as do Appellees, that many private schools in Florida are sectarian, the Legislature could not possibly have accomplished this objective without allowing parents of eligible students to choose among all alternatives, including sectarian alternatives. This Court should reject Appellees' suggestion that the Legislature cannot act with *a public purpose* if sectarian institutions might indirectly benefit in this manner.

Absent the independent choices made by parents, no school, sectarian or non-sectarian, receives OSP funds. Other courts have recognized that funds distributed to sectarian institutions by the independent choices of parents do not constitute "aid" to the institution. *See Simmons-Harris v. Goff*, 711 N.E.2d 203, 212 (Ohio 1999) ("Sectarian schools receive money [from school choice program] only as the result of independent decisions of parents and students"); *see also Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998). Likewise, the funds distributed through true parental choice in this case do not constitute aid to any sectarian institution.

This Court adopted an interpretation of Article I, Section 3, in *Johnson v. Presbyterian Homes of Synod, Inc.*, 239 So. 2d 256 (Fla. 1970), and *Nohrr v. Brevard County Educational Facilities Authority*, 247 So. 2d 304 (Fla. 1971), which gives effect to the language in Article I, Section 3, while avoiding absurd results. The construction of Article I, Section 3, adopted by this Court in *Johnson* and *Nohrr*, renders the OSP and other public welfare programs of general applicability constitutional and is manifestly reasonable under the text of the provision.[3]

[3] Finding no support in this Court's jurisprudence, Appellees' primary authority to the contrary is a comment written by a Stetson University law student, which is quoted, with or without acknowledgement, at least four times in Appellees' brief. *See* Ans. Br., at 18-19, 21, 24, 35 (quoting J. Scott Slater, *Florida's "Blaine Amendment" and its Effect on Educational Opportunities*, 33 Stetson L. Rev. 581

III. THE OSP IS NOT UNCONSTITUTIONAL UNDER ARTICLE IX, SECTION 1.

The Legislature is bound by Article IX, Section 1, to make adequate provision for free public schools. In this respect the parties are in full agreement. However, the Constitution does not prevent the Legislature from providing other education programs *in addition* to making adequate provision for free public schools. This is where the parties differ. A common sense reading of Article IX, Section 1, reveals that while the Legislature is bound to make adequate provision for free public schools, no language in the provision prohibits the Legislature from providing other programs.

Appellees reject the Attorney General's suggestion that *expressio unius* cannot apply to the "adequate provision" reference in Article IX, Section 1, because Article IX, Section 1, obligates the Legislature to provide for other educational programs required by the public interest, in addition to the system of free public schools. In making their argument, Appellees rely on the circuit court's conclusion that the Attorney General's interpretation "would permit the State to evade *all* of the constitutional requirements regarding the education it is to provide to Florida children." *Holmes v. Bush*, No. CV 99-3370, 2000 WL 526364, at *8 (Fla. Cir. Ct. Mar. 14, 2000), *rev'd*, 767 So. 2d 668 (Fla. 1st DCA 2000). This

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(2004)). This same article concludes that the Bright Futures Scholarship Program, McKay Scholarships, Florida Resident Access Grants, and a number of other State programs violate Article I, Section 3. *See id.* at 603-06

holding, which was properly rejected by the First District, is irreconcilable with the text of Article IX, Section 1. The text of Article IX, Section 1, makes clear that the Legislature's authority to create other educational programs is, at most, coextensive with and in no way supplants its constitutional obligation to adequately fund the public schools.

Appellees argue that "To hold that [the OSP] does not 'defeat the purpose of the constitutional provision,' it would be necessary to interpret Article IX, § 1 as requiring no more than that the state provide Florida children with the option of attending a public school." Ans. Br. at 11. This argument exposes the inherent weakness in Appellees' effort to invalidate the OSP under Article IX, Section 1. Article IX, Section 1, has *never* been read as an affirmative mandate that the Legislature compel children to attend public schools. Public schools have always existed as an option for parents to choose or not choose. *Cf. Pierce v. Soc'y of Sisters of Holy Names of Jesus and Mary*, 268 U.S. 510, 535 (1925) ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only.").

Although enrollment by students in public schools is now, as it has always been, clearly optional, this does not mean that the Legislature has no affirmative duty to make adequate provision for the option. The Legislature is free to create

optional educational programs in addition to public schools, so long as it maintains the public schools at a level that fulfills the Article IX requirement. *Cf. Davis v. Grover*, 480 NW.2d 460, 473-74 (Wis. 1992) (school choice program did not violate mandate in state constitution to provide for uniform free public schools because program offered an alternative in addition to the public school system); *see also Simmons-Harris*, 711 N.E.2d at 212 (rejecting argument that the state constitutional mandate to provide for "a thorough and efficient system of common schools" implicitly prohibited state-financing of nonpublic schools); *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998).

CONCLUSION

For the reasons stated above, the First District Court's decision should be reversed.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

_____
CHRISTOPHER M. KISE
Solicitor General
Florida Bar No. 0855545
LOUIS F. HUBENER
Chief Deputy Solicitor General
Florida Bar No. 0140084
ERIK M. FIGLIO
Deputy Solicitor General
Florida Bar No. 0745251
JAMES A. MCKEE
Deputy Solicitor General
Florida Bar No. 0638218
OFFICE OF THE ATTORNEY GENERAL
The Capitol - PL01
Tallahassee, FL 32399-1050
Tel: (850) 414-3681
Fax: (850) 410-2672

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 21, 2005, a true and correct copy of the foregoing has been furnished by United States Mail to the following:

RONALD G. MEYER Meyer & Brooks, P.A. P. O. Box 1547 2544 Blairstone Pines Drive Tallahassee, Florida 32302	**MICHAEL A. SUSSMAN** National Association for the Advancement of Colored People Law Offices of Michael A. Sussman 25 Main Street Goshen, NY 10924
BARRY RICHARD **M. HOPE KEATING** Greenberg Traurig, P.A. P. O. Drawer 1838 Tallahassee, FL 32302	**STEVEN M. FREEMAN** **STEVEN SHEINBERG** Anti-Defamation League 823 United Nations Plaza New York, NY 10017
RAQUEL RODRIGUEZ Office of the Governor The Capitol, Suite 209 Tallahassee, FL 32399	**RANDALL MARSHALL** American Civil Liberties Union Foundation of Florida, Inc. 4500 Biscayne Blvd., Suite 340 Miami, FL 33137
DANIEL WOODRING **NATHAN A. ADAMS, IV** Department of Education 325 W. Gaines Street, #1244 Tallahassee, FL 32399	**DAVID STROM** American Federation of Teachers 555 New Jersey Avenue, N.W. Washington, D.C. 20001
ROBERT H. CHANIN **JOHN WEST** Bredhoff & Kaiser, P.L.L.C. 850 Fifteenth Street, NW, Suite 1000 Washington, DC 20005	**CLINT BOLICK** **CLARK NEILY** Institute for Justice 1717 Pennsylvania Avenue, NW Suite 200 Washington, DC 20006
PAMELA L. COOPER Florida Education Association 118 North Monroe Street Tallahassee, FL 32399-1700	**ELLIOTT M. MINCBERG** **JUDITH E. SCHAEFFER** People for the American Way Foundation 2000 M Street, N.W., Suite 400 Washington, D.C. 20036

JOAN PEPPARD Anti-Defamation League 2 South Biscayne Blvd., Suite 2650 Miami, FL 33131	**STEVEN R. SHAPIRO** American Civil Liberties Union Foundation 125 Broad Street, 17th Floor New York, NY 10004
MARC D. STERN American Jewish Congress 15 East 84th Street New York, NY 10028	**AYESHA N. KHAN** Americans United for Separation of Church and State 518 C Street, N.E. Washington, D.C. 20002
JULIE UNDERWOOD National School Boards Ass'n 1680 Duke Street Alexandria, VA 22314	**JEFFREY P. SINENSKY** American Jewish Committee 165 East 56th Street New York, NY 10022
KAREN GIEVERS 524 East College Avenue, Suite 2 Tallahassee, FL 32301	**KENNETH W. SUKHIA** Fowler, White, Boggs, Banker, P.A. 101 North Monroe Street, Suite 1090 Tallahassee, FL 32301
MAJOR B. HARDING **JASON GONZALEZ** **STEPHEN C. EMMANUEL** Ausley & McMullen 227 South Calhoun Street Tallahassee, FL 32301	**E. BRYAN WILSON** **GREGORY R. MILLER** Assistant United States Attorney 111 North Adams Street Fourth Floor Tallahassee, FL 32301
THOMAS C. BERG University of St. Thomas School of Law MSL 400-1000 La Salle Avenue Minneapolis, MN 55403	**ROBERT R. GASAWAY,** **ASHLEY C. PARRISH** **PADRAIC B. FENNELL** Kirkland & Ellis LLP 655 Fifteenth Street, N.W. Washington, DC 2005
DAVID K.FLYNN **ERIC W. TREENE** **GORDON TODD,** **CONOR DUGAN** US Dept.of Justice, Civil Rights Div. Appellate Section Ben Franklin Station P. O. Box 14403 Washington, DC 20044	**RICHARD A. MULLANEY** **SCOTT D. MAKAR** **DEVIN J. REED** City of Jacksonville Office of General Counsel 117 West Duval Street, Suite 480 Jacksonville, FL 33202

G. MARCUS COLE Stanford Law School Stanford, CA 94305	**ANTHONY R. PICARELLO, JR.** **DEREK L. GAUBATA** Becket Fund for Religious Liberty 1350 Connecticut Ave., N.W., Suite 605 Washington, DC 20036`
RICHARD W. GARNETT University of Notre Dame School of Law 327 Law School, P.O. Box R Notre Dame, IN 46556	**LANSING C. SCRIVEN** 442 W. Kennedy Blvd. Suite 280 Tampa, FL 33606
ISAAC M. JAROSLAWICZ Givner & Jaroslawicz 1177 Kane Concourse, Suite 232 Miami, FL 33154	**VALERIE A. FERNANDEZ** Pacific Legal Foundation 1320 South Dixie Highway Suite 1105 Coral Gables, FL 33146
CARLOS G. MUNIZ **GRAY ROBINSON** 301 South Bronough Street Tallahassee, FL 32302	**R. ALEXANDER ACOSTA** Assistant Attorney General for Civil Rights U.S. Department of Justice Civil Rights Division Office of the Asst. Attorney General Room 5531 Washington, D.C. 20530
BRISCOE R. SMITH Atlantic Legal Foundation 60 East 42nd Street New York, NY 10165	**TIMMOTHY W. WEBER** **ANDREW W. LENNOX** Battaglia, Ross, Dicus & Wein, P.A. P. O. Box 41100 St. Petersburg, FL 33743
TALBOT D'ALEMBERTE Florida State University College of Law 425 West Jefferson Tallahassee, FL 32306	**BILL MCBRIDE** 601 Bayshore Boulevard Suite 700 Tampa, Florida 33606

_____

LOUIS F. HUBENER

CERTIFICATE REGARDING FONT SIZE AND TYPE

The undersigned attorney hereby certifies that the foregoing brief was typed in Times New Roman, 14-point type.

_____

LOUIS F. HUBENER