IN THE SUPREME COURT OF FLORIDA

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

JOHN ELLIS "JEB" BUSH, *et al.*,
Defendants/Appellants,

CHARLES J. CRIST, JR. *et al.*,
Defendants/Appellants,

BRENDA MCSHANE, *et al.*,
Intervenors/Defendants/Appellants,

v.

RUTH D. HOLMES, *et al.*,
Plaintiffs-Appellees.

On Direct Appeal From the District Court of Appeal For the First District

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REPLY BRIEF OF INTERVENORS/DEFENDANTS/APPELLANTS BRENDA MCSHANE, ET AL.

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SUMMARY OF ARGUMENT

Appellees' construction of Florida's Blaine Amendment cannot be reconciled with the state's long history of allowing religious service providers to participate in public aid programs on equal terms with nonreligious entities. Unable to dispute that history, Appellees seek to avoid it by offering a convoluted interpretation of article I, section 3 that calls for elimination of the one educational aid program they object to on policy grounds, while (supposedly) leaving intact a dozen or more functionally identical aid programs. Neither logic nor precedent support that result, and Florida's tradition of religious neutrality precludes it.

Simply put, the Florida constitution does not dictate that only the wealthy may send their children to private schools while parents of lesser means are forced to accept even demonstrably inadequate services from their local public schools. While many states have experimented with equality of educational funding, Florida is the first to experiment on a state-wide basis with equality of parental *choice.* Appellees' attempt to terminate that experiment by wrenching a constitutional provision from its historical context and selectively applying it to a religiously neutral, indisputably secular educational aid program should be rejected.

ARGUMENT

I. CONTRARY TO APPELLEES' REVISIONIST ACCOUNT, FLORIDA HAS A LONG HISTORY OF HELPING STUDENTS PURSUE "RELIGIOUS EDUCATION" AT SECTARIAN INSTITUTIONS.

Appellees assert that article I, section 3 of the Florida constitution was intended "to prohibit the funding of religious education." Appellees' Br. at 26. But that claim is directly contradicted by the historical record, which shows that Florida has been providing financial aid to students pursuing "religious education"—including at so-called "pervasively sectarian" institutions—for *decades*. As explained below, that history of inclusiveness is critically important to the proper interpretation and application of article I, section 3 in this case.

This Court has held that in construing their bills of rights, state courts should "focus primarily on factors that inhere in their own unique state experience" including "evolving *customs, traditions and attitudes* within the state, [and] the state's own general history." *Traylor v. State*, 596 So. 2d 957, 962 (1992) (emphasis added). Although the Appellees, their *amici*, and the district court all fail to acknowledge it, Florida has a long history of funding religious studies at "pervasively sectarian" institutions through a variety of programs including Bright Futures,[1] José Martí Challenge Grant,[2] Children of Deceased or Disabled

[1] www.firn.edu/doe/bin00072/pri4yr.htm.
[2] www.firn.edu/doe/bin00065/eliginstjm.htm.

Veterans,[3] and many others.[4] As a result, "revenue of the state" is routinely "taken from the public treasury" to pay for students to attend such unabashedly religious institutions as:

- **Florida Christian College:** "Requires a *Bible emphasis* of all who earn a degree. . . . *[E]very employee* of Florida Christian College *confesses Jesus of Nazareth as Christ*. . . . *The purpose* of Florida Christian College *is to . . . educate men and women for Christian service . . . and to serve as a resource to the churches*, especially in Florida."[5]

- **Florida College:** "*Each member of our faculty is a Christian* and they see themselves fundamentally as servants. . . . . *Each class* at Florida College is taught from the perspective of *faith in God* and in His revealed truth."[6] "In addition to your *daily Bible classes*, you'll meet your fellow students *every morning* to begin each day with a period of *praise and worship*."[7]

- **Hobe Sound Bible College:** "*The mission* of Hobe Sound Bible College *is to provide a Christ-centered, Bible-based education . . . .*[8] Most of all we want to teach our students to 'Know Christ and Make Him Known' as our motto states. We are firmly committed to our rich holiness heritage and *intend to see it proclaimed around the world*."[9]

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[3] www.firn.edu/doe/bin00065/eliginstcddv.htm.

[4] A list of college scholarship and grant programs is available on the Florida Department of Education's website: www.firn.edu/doe/bin00065/splist.htm. The fact that several of those programs were already on the books at the time of the 1968 Constitutional Convention strongly suggests that article I, section 3 was not understood to prohibit public financing of religious studies at sectarian institutions. *See* Exhibit B to Intervenor-Appellants' opening brief ¶¶ 1, 5 & 6.

[5] www.fcc.edu/about/default.asp (emphases added here through n.11).

[6] www.flcoll.edu/academic-life/.

[7] www.flcoll.edu/spiritual-life/.

[8] www.hsbc.edu/info/MissionStatement.php.

[9] www.hsbc.edu/services/StudentRecruitment.php.

- **The Baptist College of Florida**: "*Shall* operate within the context of a Christian worldview to . . . *provide* . . . a program of *education and training for ministers* and other religious workers."[10]

- **Trinity College**: "*The mission* of Trinity College *is to equip men and women for ministry* . . . ."[11]

Thus, whatever may be said of article I, section 3, it certainly has never been understood to "prohibit the state from using public funds to aid sectarian schools in providing a religious education even to those who have freely chosen it," as Appellees claim. Appellees' Br. at 30. Faced with this contradiction of their basic argument, Appellees have only two responses, neither of which is persuasive.

First, Appellees and one of their *amici* invoke the increasingly discredited[12] practice of distinguishing "pervasively sectarian" schools from those that are merely "religiously affiliated." Appellees' Br. at 41-42; Prof. Gey Br. at 12-18. Appellees then suggest that by applying the pervasively sectarian doctrine, Florida courts might "leave untouched state programs involving religiously affiliated

[10] www.baptistcollege.edu/AboutBCF/Purpose.htm.
[11] www.trinitycollege.edu/.
[12] The plurality in *Mitchell v. Helms*, 530 U.S. 793, 829 (2000), observed that "hostility to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow" and concluded that "[t]his doctrine, born of bigotry, should be buried now." At least one federal circuit court has questioned the continuing validity of the pervasively sectarian doctrine in light of *Mitchell*. *See Columbia Union College v. Oliver*, 254 F.3d 496, 502-04 (4th Cir. 2001) (summarizing *Mitchell*'s discussion of the "pervasively sectarian" doctrine, including reasons "to formally dispense with" it).

institutions . . . in which religious training and instruction is not an integral part of the institution's function." Appellees' Br. at 41-42.

The problem with this argument, of course, is that it fails to address Florida's long history of providing financial aid to students attending schools where "religious training and instruction" *could not be more* "integral" to the institution's function. Thus, if article I, section 3 truly had the purpose Appellees impart to it—namely, "to prohibit the funding of religious education"—then Florida's decades-long practice of paying for students to attend, for example, Florida Christian College and Hobe Sound Bible College, would constitute a glaring violation of that provision.[13]

Appellees' second rejoinder is not explicitly stated in their brief, but is instead hinted at through their repetition of the words "children" and "schoolchildren" in discussing the supposed scope of Florida's Blaine

[13] Like the Appellees' arguments, Professor Gey's *amicus* brief is remarkable for its incompatibility with Florida's practice of providing scholarships to students pursuing religious educations at manifestly "sectarian" institutions. *See, e.g.*, Prof. Gey Br. at 4 ("The plain meaning of [article I, section 3] prohibits *any* state financial support of a church or other institution engaged in a religious or sectarian enterprise") (emphasis in original); 13 ("Government financing" of pervasively sectarian institutions "will *inevitably* run afoul of constitutional prohibitions on state aid to religion") (emphasis added). Strangely missing from Professor Gey's extensive discussion of (and reliance upon) the "pervasively sectarian" doctrine is any serious attempt to address the fact that Florida *routinely* pays for students to attend such institutions through Bright Futures and other scholarship programs. Professor Gey's assertion that "universities that take seriously their academic missions" will not simultaneously "advance a religious cause," *id*. at 14, reflects a rather blatant and misinformed prejudice against those schools and their students.

Amendment. Thus, for example, Appellees claim that the language and history of article I, section 3 prohibit "the use of public funds to pay for Florida *children* to receive a religious education in sectarian schools"; that taxpayer funds may not be used to help churches and other religious institutions "teach their religion to Florida *schoolchildren*"; that "public monies are not to be used to pay for the education of the state's *children* in schools operated by churches and other religious organizations"; and that the Opportunity Scholarship program "aids participating sectarian schools" by enabling them to "bring their religious message to *children* whom they would otherwise be unable to reach." Appellees' Br. at 17, 18, 26, 28 (emphases added).

Of course, the words "children" and "schoolchildren" appear nowhere in the text of article I, section 3. Nor is there anything in the state's history or this Court's precedents to support Appellees' tacit assertion that it is perfectly acceptable for an eighteen-year-old college freshman to pursue a "Christ-centered, Bible-based education"[14] or undertake a "program of education and training for ministers"[15] using a Bright Futures scholarship, but that it is unconstitutional to give her seventeen-year-old brother an Opportunity Scholarship simply because he too might choose a religious school. As explained in the next section, that conflict arises because Appellees' conception of what constitutes "aid to religion" ignores

[14] www.hsbc.edu/info/MissionStatement.php.
[15] www.baptistcollege.edu/AboutBCF/Purpose.htm.

rather than embraces Florida's "own unique state experience," *Traylor v. State*, *supra*, at 962, and misconstrues the larger historical context into which Blaine Amendments fit.

II. THE OPPORTUNITY SCHOLARHIP PROGRAM IS A *BONA FIDE* LEGISLATIVE EFFORT TO REMEDY PERSISTENT EDUCATIONAL DEPRIVATIONS, NOT AN "ARTIFICE" FOR AIDING RELIGIOUS INSTITUTIONS.

As demonstrated above, Appellees' claim that article I, section 3 of Florida's constitution prohibits the state from "funding religious education" directly contradicts over fifty years of state practice and precedent. Appellees' error arises from their misconception of Opportunity Scholarships as a mere "artifice" by which payments from the state treasury are "channeled through parents" to religious schools. Appellees' Br. at 20. That characterization of the program is fundamentally flawed for several reasons.

First, as discussed above, there is no categorical distinction between Opportunity Scholarships and the various financial aid programs through which the state pays for college students to pursue religious educations at "pervasively sectarian" institutions. If anything, Opportunity Scholarships implicate *fewer* of Appellees' stated concerns because participating schools are required to accept scholarship students on an "entirely random and religious-neutral basis" and are specifically prohibited from compelling scholarship recipients to "profess a specific ideological belief, to pray, or to worship." § 1002.38(4)(e) & (j), Fla. Stat.

Bright Futures and other college scholarship programs place no such limitations on participating schools, *see*, *e.g*., § 1009.533, Fla. Stat., and in fact mandatory prayer and worship are very much a part of the culture at some of them.[16] If Florida's myriad college scholarship programs are not mere "artifices" for channeling state funds to religious institutions, then neither are Opportunity Scholarships.

Another reason to reject Appellees' characterization of Opportunity Scholarships as state "aid" to religious institutions is the extensive chain of contingencies that must occur before any money from that program can reach a religious school. First, students only become eligible for an Opportunity Scholarship if the public school where they are enrolled fails to deliver the "high quality education" to which they are constitutionally entitled. Art. IX, section 1, Fla. Const; § 1002.38(2)(a), Fla. Stat. Second, eligible students must actually decide to leave their school. Third, students who do opt out of their failing public school must choose to attend a private school instead of transferring to a higher-performing public school, which is another option under the program. 1002.38(3)(a)(2), Fla. Stat. Fourth, religious schools must actually decide to participate in the program. And fifth, parents who choose the private-school-

[16] For example, Florida College advises prospective students that "[i]n addition to your daily Bible classes, you'll meet your fellow students every morning to begin each day with a period of praise and worship." *See* www.flcoll.edu/spiritual-life.

transfer option must further choose a religious school over a nonreligious one, which current figures indicate about 58% of them do.[17]

Finally, Appellees' characterization of an individual-choice-based scholarship program as a mere "artifice" designed to "aid" religious institutions disregards the historical context in which article I, section 3 was adopted. As the author of the *amicus* brief supporting Appellees on this issue has written elsewhere, the impetus for Blaine Amendments arose when "Catholics, seeing the obvious evangelical Protestant overtones to public education, set up parochial schools and sought shares of the common school fund."[18] Catholics sometimes succeeded in those efforts, with the diocese of New York City, for example, receiving hundreds of thousands of dollars per year from the state of New York for parochial education.[19] When Protestants succeeded in passing measures to prohibit those payments, funding often continued through indirect means.[20] Thus, the "directly or indirectly" language contained in many Blaine Amendments was intended to address the specific, ongoing practice of intentionally funding Catholic schools; it was not designed to prohibit indisputably secular educational aid

[17] www.firn.edu/doe/choice/opschoolsenrolled.html.
[18] Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38, 41 (1992).
[19] *Id*. at 43.
[20] *See id*.

programs like Opportunity Scholarships and Bright Futures that happen to include religious schools as one option among many possible choices.

III. OTHER STATES INTERPRET THEIR OWN RELIGION PROVISIONS IN A VARIETY OF WAYS AND PROVIDE NO BASIS FOR ABANDONING THIS COURT'S NEUTRALITY-BASED INTERPRETATION OF ARTICLE I, SECTION 3.

Given this Court's admonition that judges should "focus primarily on factors that inhere in their own unique state experience" in interpreting state constitutional provisions, *Traylor v. State*, *supra*, at 962, other states' treatment of their own Blaine Amendments is of limited relevance here. Nevertheless, Appellees' mistaken assertion that the "great weight of authority" from other states supports their interpretation of Florida's Blaine Amendment should not go unchallenged.

In reality, the picture that emerges from other states is not one of uniformity, but of remarkable variety instead—variety in the wording of constitutional text, variety in judicial interpretation of that text, and variety in the extent to which religious providers are or are not allowed to participate in educational and other public aid programs. In support of that point, Intervenor-Appellants have prepared a table that summarizes Appellees' representations concerning other states' interpretations of their religion provisions, evaluates the accuracy of those representations, and provides additional context that Appellees often failed to include. *See* Appendix A hereto. Notably, the table shows that of the twenty-three states cited or discussed in Appellees' brief, twelve have adopted some form of an

incidental benefit/purpose-based analysis akin to the one this Court has adopted for article I, section 3 of the Florida constitution. *See id*.[21]

CONCLUSION

Professor Steven Green, who prepared one of the amicus briefs supporting the Appellees, believes "the most lasting significance of the Blaine Amendment" may be "our nation's continual willingness to use religious issues for political

[21]*See Kotterman v. Killian*, 972 P.2d 606, 620 (Ariz. 1999) (sectarian schools only "incidental beneficiaries"); *Alabama Educ. Ass'n v. James*, 373 So.2d 1076, 1081 (Ala. 1979) (grants were for benefit of students); *California Ed. Facilities Auth. v. Priest*, 526 P.2d 513, 521 (Cal. 1974) (benefits to religion "incidental to a primary public purpose"); *Americans United v. State*, 648 P.2d 1072, 1083-84 (Colo. 1982) ("remote and incidental benefit" to religious institution not "aid"); *Embry v. O'Bannon*, 798 N.E.2d 157, 167 (Ind. 2003) (statute constitutional "notwithstanding possible incidental benefit" to religious institutions); *Bd. of Educ. v. Wheat*, 199 A. 628, 632 (Md. 1938) (aid was incidental byproduct of "proper legislative action"); *Americans United v. Ind. School Dist. No. 622*, 179 N.W.2d 146, 156 (Minn. 1970) (benefits to religion "purely incidental and inconsequential"); *Chance v. Miss. St. Textbook Rating and Purchasing Bd.*, 200 So. 706, 713 (Miss. 1941) (statute's purpose was to aid students); *State ex rel. Creighton Univ. v. Smith*, 353 NW.2d 267, 272 (Neb. 1984) ("possible indirect benefit" to religion permitted where "primary purpose" is secular); *Bd. of Educ. v. Allen*, 228 N.E.2d 791, 794 (N.Y. 1967) (benefit to religion was only a "collateral effect," not primary purpose of challenged program); *Durham v. McLeod*, 192 S.E.2d 202, 203 (S.C. 1972) (aid was to students, not institutions); *Jackson v. Benson*, 578 N.W.2d 602, 621 (Wis. 1998) ("incidental benefit" permissible where statute had secular "primary effect").

ends."[22] That aptly describes Appellees' attempt to single out and eliminate Opportunity Scholarships from a broad array of Florida aid programs in which religious and nonreligious providers have always participated on equal terms. Whether maximizing educational options for parents and children of limited means constitutes sound public policy is a political question about which people may fairly disagree. Given Florida's well-established traditions, customs, and history of religious neutrality, however, it is not a constitutional one.

Respectfully submitted,

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[22] Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38, 69 (1992).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing REPLY BRIEF OF INTERVENORS/DEFENDANTS/APPELLANTS' BRENDA MCSHANE, ET AL. AND APPENDIX were dispatched this ___ day of March, 2005, via first-class mail, postage pre-paid to the following counsel of record:

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CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. P. 9210(a)(2), the attached Reply Brief of Intervenors/Appellants Brenda McShane, *et al.*, is submitted in Times New Roman 14-point font and complies with the font requirements of this rule.

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