IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

JOHN ELLIS "JEB" BUSH, et al.,

Appellants,

v. CASE NO. 1D00-1121/1D00-1150

RUTH D. HOLMES, et al.,

Appellees.

REPLY BRIEF OF APPELLANTS

On Appeal From the Circuit Court of the
Second Judicial Circuit, In and For
Leon County, Florida

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SUMMARY OF REPLY

As Appellees concede, the trial court disregarded the Rules of Civil Procedure by moving sua sponte to a final hearing despite the fact that no party had even filed a motion for judgment on the pleadings or for summary judgment. The trial court's unauthorized procedure fundamentally prejudiced the State's ability to present a defense of the Opportunity Scholarship Program. For that reason alone, the judgment must be reversed.

Appellees' answer briefs also reveal the existence of disputed issues of material fact that demonstrate the trial court's error in entering a final judgment on the pleadings. Appellees' central claim is that the Opportunity Scholarship Program represents an unconstitutional "abandonment" of Florida's "system of free public schools." Appellees must prove their claim with fact evidence, not with unsupported arguments. Appellees must also prove with fact evidence that the Opportunity Scholarship Program is not the kind of "narrowly targeted" program that they concede the State may constitutionally establish. But no such evidence exists in the fact-barren record developed below. Nothing in Appellees' answer briefs refutes the State's central legal point: that the Florida Legislature is free to enact educational programs that support and complement, rather than supplant, our "system of free public schools."

In addition, there is no basis to affirm the trial court's judgment based on the three constitutional grounds Appellees raise

for the first time in this Court. Those arguments are not properly before this Court because they all involve material disputed facts, as the trial court properly concluded. Moreover, they are legally meritless.

ARGUMENT

I. THE TRIAL COURT DENIED THE STATE DUE PROCESS AND A FAIR TRIAL BY IGNORING THE FLORIDA RULES OF CIVIL PROCEDURE AND ENTERING FINAL JUDGMENT WITHOUT TRIAL OR EVIDENCE, UPON DISPUTED FACTS, AND WITHOUT A MOTION FOR SUMMARY JUDGMENT OR FOR JUDGMENT ON THE PLEADINGS.

Appellees offer three arguments to affirm the trial court's disregard for the Florida Rules of Civil Procedure and entry of judgment without motion, evidence, or trial. They contend that this Court should ignore the trial court's errors because (1) the procedural defects constituted harmless error; (2) the trial court had "inherent authority" to fashion its own rules; and (3) the State failed to timely object. As described below, none of these arguments can salvage the ruling by the trial court.

A. The Trial Court's Departure From Authorized Procedures Requires Reversal.

"De novo review" does not mean that reviewing courts should ignore fundamental errors in the entry of judgment. On the contrary, the first step in a de novo review is to determine whether the judgment was validly entered. See Padovano, Fla. Appellate Practice, § 9.4 (2d ed. 1997). In this case, judgment

was not validly entered because the trial court ignored mandatory rules of procedure for entry of judgment.

Appellees argue that any procedural irregularities committed by the trial court were harmless error and that the trial court had inherent authority to fashion its own rules. These arguments fundamentally misconceive the importance of the Rules of Civil Procedure for entry of judgment. These rules are mandatory, not optional, because they are necessary both to ensure compliance with due process and to provide a proper legal and factual record for meaningful appellate review. Cf. In re Newman, 782 F.2d 971, 974 (Fed. Cir. 1986). Thus, the trial court was not free to fashion its own "make-them-up-as-you-go" procedures. Morever, by fashioning its own rules, the trial court effectively relieved Appellees of their obligation to define the critical issues they wished to litigate and deprived the State of its ability to use the tools of discovery to fashion an effective response. The trial court also deprived this Court of a full and complete record for appellate review.

In Florida, appellate courts quite properly have reversed trial court judgments where "there appears to have been an utter disregard of the rules and procedure prescribed for the governance of such cases." Smith v. Atlanta & Lowry Nat'l Bank, 96 Fla. 824, 119 So. 136 (1928); see also Pierce v. Anglin, 721 So. 2d 781 (Fla. 1st DCA 1998) (requiring strict compliance with Rule 1.440, Fla. R. Civ. P., prior to entry of judgment). In this case, that principle

requires reversal and a remand to the trial court for further action in conformity with the rules of procedure.

The two cases relied upon by Appellees to justify the trial court's departure from the rules of procedure are not relevant to this issue. National Union Fire Insurance Company of Pittsburgh v. Blackmon, 754 So. 2d 840 (Fla. 1st DCA 2000), involved a trial court's evidentiary rulings during trial. It does not address the situation here, where a trial court improperly injected itself into the case and unilaterally adopted its own unauthorized mode of proceeding to judgment. Nor does Scull v. State, 569 So. 2d 1251 (Fla. 1990), support Appellees' position. In Scull, the Court reversed the trial court's entry of a death sentence, stating "... the appearance of irregularity so permeates these proceedings as to justify suspicion of unfairness." Id. at 1252. See also id. ("Due process envisions a law that hears before it condemns, proceeds upon inquiry, and renders judgment only after proper consideration of issues advanced by adversarial parties.").

Finally, Appellees' "timely objection" argument is erroneous: The State placed the trial court on notice[1] that the court was committing a procedural error, and provided the court with an

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[1] The State orally objected at the December 2, 1999 case management conference, R-VII-1327-28 (December 2, 1999 transcript, at 11-12); in writing on December 3, 1999, see R-IV-682-683; and at a February 7, 2000 hearing, see R-VII-1361, 1373. The State filed a written "Objection to the Final Hearing Procedures," on January 28, 2000 (R-V-765).

opportunity to correct the error.[2] See Castor v. State, 365 So. 2d 701, 703 (Fla. 1978); Bailey v. Treasure, 462 So. 2d 537, 539 (Fla. 4th DCA 1985).

In sum, Appellees have offered no authority to contradict the State's position that the trial court's unilateral departure from authorized procedure is per se reversible error.

B. Judgment on the Record Below Was Erroneous, In Any Event, Because There Are Disputed Issues of Material Fact.

Even if wholesale departure from authorized procedures was not per se reversible error, it was prejudicial error for the trial court to enter judgment on the non-existent factual record in this case. Contrary to the trial court's apparent belief and Appellees' arguments on appeal, there are disputed issues of material fact that preclude judgment on the record below.

While Appellees claim that this case presents a pure legal question on appeal, that is not the presentation Appellees made below. At the trial court hearing, counsel for the Holmes Appellees stated as follows:

> We contend that voucher programs are unconstitutional because of this particular expenditure of public funds. The use of public funds to pay for elementary and secondary school students to attend private schools to be taught English and math and history and to receive all the other services that are readily available to them in the

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[2] In its order of February 16, 2000, the trial court considered and overruled the objections without reference to timeliness or waiver. R-VIII-1369.

> public schools, this is unconstitutional, and it's unconstitutional because it defeats the underlying purpose, the underlying purpose of Article IX, Section One.

R-VIII-1380, 1402-1403 (emphasis added). This factual characterization of the Opportunity Scholarship Program's operation and effect is disputed by the State, which had a right to conduct discovery and present record evidence to rebut Appellees' characterization - a characterization which the trial court clearly relied upon in its ruling.

In their answer briefs in this Court, Appellees again effectively concede the fact-dependent nature of their so-called "pure legal claims," by asserting that the Opportunity Scholarship Program is an unconstitutional attempt by the State to "abandon" or "disregard" the "system of free public schools" in favor of an alternative private school system. See, e.g., Holmes Br. at 18, 23 and FEA Br. at 22, 29. This is again a factual (or mixed law and fact) contention that the State rejects and would refute with record evidence that the "system of free public schools" is receiving record funding and improving student performance as a result of the very reforms Appellees now challenge. In fact, the State would show that each of the 78 "voucher eligible" failing schools described by Appellees below has come off of the failing schools list this year in direct response to the A+ Plan and Opportunity Scholarship Program. The State would also present record evidence to rebut Appellees' unsupported factual claim that

the Opportunity Scholarship Program is not a "narrowly targeted" educational program akin to those which Appellees now concede may constitutionally be provided in private schools.[3]

As this Court can see, the essence of Appellees' arguments below necessitated the development of a factual record. But the trial court did not permit the parties to create such a record.[4] Instead, the record below contains only the pleadings, court orders, Defendants' Proposed Discovery Schedule, Defendants' Objections to Final Hearing Procedure (and responses), and the parties' briefs.[5] There are no stipulations, affidavits, or requests for admissions; no interrogatories or depositions. Thus, even the question whether there were disputed issues of material fact was never addressed.

Because of these prejudicial procedural errors, this Court must reverse the judgment entered below.

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[3] As a variant on this argument, Appellees contend that public schools are not always "well equipped" to provide certain services and that, in such circumstances, the State may provide funds for use at private schools - but not in the circumstances present at Opportunity-Scholarship-eligible schools. Holmes Br. at 30. That is a naked and untested factual assertion that cannot supply the basis for a judgment on the record below.

[4] At the February 7, 2000, hearing on the State's Objections to the Final Hearing Procedure, the trial court stated: "This is a pure facial challenge. Absolutely no facts are going to be considered." R-VIII-1366. The Final Judgment expressly states: "No evidence was received or considered by the court from any party." R-VIII-1246.

[5] There were requests for judicial notice and proposed proffers of fact filed in connection with the briefs, but none were granted by the trial court and considered in its Final Judgment.

II. THE TRIAL COURT'S JUDGMENT ON THE MERITS CANNOT BE SUSTAINED.

In their central legal argument, Appellees urge this Court to affirm the trial court's judgment based on an interpretation of Article IX, Section One that is both unprecedented and inconsistent with its text, history and judicial construction. See FEA Br. at 19-35; Holmes Br. at 14-31.

Article IX, Section One imposes a "paramount duty" on the State "to make adequate provision for the education of all children residing within its borders." As part of this duty, the State must take certain steps, such as providing "by law for a uniform, efficient, safe, secure, and high quality system of free public schools" and approving "other public education programs that the needs of the people may require." Fla. Const. Art. IX, § 1. But the text of Section One imposes no limitation on the Legislature's authority to take additional steps or to exercise discretion to determine what "public education programs" meet the "needs of the people."

Appellees concede the absence of an express textual prohibition in Section One, yet suggest that it is of "no moment." Holmes Br. at 19. According to Appellees, Section One contains an implicit limitation on programs that "abandon" or "disregard" the State's obligations to a "system of free public schools." Holmes Br. at 23; FEA Br. at 22. But Appellees identify no credible legal

or factual basis for this Court to apply such an interpretation to the Opportunity Scholarship Program.

Appellees err in relying on the expressio unius canon and on Weinberger v. Board of Public Instruction, 112 So. 253, 254 (Fla. 1927), and In re Advisory Opinion, 306 So. 2d 520 (Fla. 1975), as authority for finding an implicit prohibition on the Opportunity Scholarship Program. FEA Br. at 20-22, 26-27 and Holmes Br. at 20-23,31. In Weinberger, the Court found that the State had taken action different from and in lieu of that mandated by the Constitution. Likewise, in In re Advisory Opinion, 306 So. 2d 520 (Fla. 1975), the Court applied the expressio unius canon to prevent the Legislature from exercising clemency powers in tandem with the Governor, holding that Article II of the Florida Constitution forbids any government branch from exercising a power (such as clemency) explicitly provided to another branch. Id. at 522.

Here, by contrast, the Legislature has not established the Opportunity Scholarship Program in lieu of the system of free public schools. The public school system obviously continues under the Opportunity Scholarship Program; indeed, the program is designed to improve the public school system. See § 229.0537(1), Fla. Stat. (1999) (citing purpose of Opportunity Scholarship Program); Journal of the House of Representatives at 1671 (April 29, 1999)(same). The Supreme Court has uniformly upheld programs that supplement and support rather than supplant a constitutionally required program. See State Br. at 30-31; Brevard County v. State

Treasurer, 231 So. 2d 1 (Fla. 1970); St. Johns County v. Northeast Builders Ass'n, 583 So. 2d 635 (Fla. 1991).[6]

Furthermore, the Court has emphasized that the expressio unius canon applies only "sparingly" to assist courts in determining unknown legislative intent. See Taylor v. Dorsey, 19 So. 2d 876, 881 (Fla. 1944); see also SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 350-351 (1943); cf. Christensen v. Harris County, 120 S. Ct. 1655, 1660-61 (2000). On that basis, the expressio unius canon is inapplicable here because the legislative intent is known - it is clear that the drafters or adopters of Section One did not intend to prohibit programs such as the Opportunity Scholarship Program.

Contrary to Appellees' claims, see Holmes Br. at 18 n.13 and FEA Br. at 31-32, the comments of Constitution Revision Commission members Brochin and Mills do not support holding the Opportunity Scholarship Program unconstitutional. Commissioner Brochin stated that the amended Section One "does not address" programs such as the Opportunity Scholarship Program, Holmes Br. at 18 n.13, but that statement simply makes the obvious point that Section One as amended would neither require nor prohibit such programs.

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[6] In each of the other cases cited by Appellees, the expressio unius canon was applied (i) to invalidate statutes that (unlike the Opportunity Scholarship Program) took action different from and in lieu of that mandated by the State Constitution or (ii) to ensure that the Separation of Powers Clause of the State Constitution was not violated. See Center for Education Reform Br. at 10 n.2.

Similarly, the statement by Commissioner Mills that the 1998 amendment reinforced the State's duty "to provide a public education," Holmes Br. at 18 n.13, merely addressed the minimum level of state funding for public schools (the primary issue under debate at the time). Commissioner Mills did not state or even imply that Section One would prohibit additional state educational programs.[7] Finally, it is impossible to reconcile Appellees' position with the ruling in Scavella v. School Board of Dade County, 363 So. 2d 1095 (Fla. 1978), where the Court contemplated that the State may (and indeed, in certain circumstances, must) fund students who choose to attend private schools. Appellees try to evade Scavella by aggressively arguing that Section One's alleged implicit limitation on funding for private education was not raised in Scavella. Holmes Br. at 28. But this argument ignores the reality that Scavella was premised on some State funding of students in private schools being not only permissible but indeed required.

Recognizing the indefensible nature of their argument, Appellees alternatively argue that the State's other programs to

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[7] Appellees' version of Article IX's legal history is also at odds with the longstanding understanding of the Florida Legislature, which has provided for at least some public education programs within private schools for more than a century. See Intervenors' Br. at 34-35 (describing millions in contemporary funding); David P. Page, Bishop Michael J. Curley and Anti-Catholic Nativism in Florida, 45 Fla. Hist. Q. 101, 104 (1966) (describing provision of public educational services in public and parochial schools from the 1860s through the turn of the century).

assist private education - other than, of course, the Opportunity Scholarship Program - are "narrowly targeted" programs, and that Section One should be interpreted to allow only these other "narrowly targeted" programs. This "narrowly targeted" distinction finds no support in the text of Section One - nor in any history, policy, or case law. In any event, as explained above, because no factual record has been developed, there is no way to determine at this juncture whether the Opportunity Scholarship Program is in fact the kind of "narrowly targeted" program that Appellees concede is permissible.

III. THE COURT SHOULD REJECT APPELLEES' ALTERNATIVE GROUNDS FOR AFFIRMANCE.

A. The Court Should Not Address Appellees' Alternative Grounds for Affirmance Because, As the Trial Court Concluded, They All Require Factual Development.

As alternative grounds for affirmance, Appellees argue that the Opportunity Scholarship Program violates (i) Article IX, Section Six of the Florida Constitution; (ii) the Establishment Clause of the United States Constitution; and (iii) Article I, Section Three of the Florida Constitution. The trial court properly concluded that it could not decide these claims on the pleadings because they all involve material disputed facts, and the "right for the wrong reason" rule does not apply when, as here, the alternative ground is fact-dependent. See, e.g., Tr. of Motion Hearing/Case Management Proceeding (Dec. 7, 1999) ("[T]hose are all

evidentiary matters."); ("I'm not going to even suggest that there's - any issue regarding the establishment clause [that] isn't going to require some evidentiary basis."). R-VII-1362-1363. But there is no record that this Court could review to resolve these issues of fact because the trial court did not even permit arguments, much less the introduction of evidence, or even a trial regarding any constitutional ground other than Article IX, Section One, and expressly refused to consider such other grounds. R-VII-1333-36. For these reasons, if this Court reaches the merits and rules for the State on the Article IX, Section One claim, it should remand the case for additional factual development and a decision by the trial court in the first instance on the remaining issues in the case. See Department of Revenue v. Morris, 736 So. 2d 41, 42 (Fla. 1st DCA 1999) (alternative ground "must be supported by evidence in the record"); see also Dade County School Board v. Radio Station WQBA, 731 So. 2d 638, 645 (Fla. 1999).

B. The Opportunity Scholarship Program Complies with Article IX, Section Six of the Florida Constitution Because Funds for the Program Are Not Derived from the State School Fund.

Article IX, Section Six provides that "[t]he income derived from the state school fund shall, and the principal of the fund may, be appropriated, but only to the support and maintenance of free public schools." Appellees alleged below (i) that the Opportunity Scholarship Program is financed by the Florida Education Finance Program ("FEFP"), (ii) that the FEFP includes

both general revenues and State School Fund monies, and (iii) that State School Fund monies are therefore being used to finance the Opportunity Scholarship Program in violation of Article IX, Section Six. Holmes Br. at 34-35.

The State denied Appellees' allegations, but the trial court refused to permit the State to introduce evidence proving they were without merit. Had the State been permitted to introduce evidence, it would have been clear that the allegations rest on a false premise. Shortly after enacting the Opportunity Scholarship Program, the Florida Legislature established a separate account within the FEFP that is composed solely of general-revenue appropriations specifically earmarked for the Opportunity Scholarship Program. That account contains no State School Fund money, and the Opportunity Scholarship Program thus receives no funds derived from the Fund. Therefore, Appellees' Article IX, Section Six argument is entirely unavailing.

C. The Opportunity Scholarship Program Complies with the Religion Clauses of the United States and Florida Constitutions.

As this Court has acknowledged, "Article I, Section 3 of the Florida Constitution is substantially the same" as the federal Establishment Clause, and thus "federal law will be of great value in determining issues under Florida's constitution." Todd v. State, 643 So. 2d 625, 628 & n.3 (Fla. 1st DCA 1994). Similarly, in its seminal decision in Johnson v. Presbyterian Homes of Synod of Florida, Inc., 239 So. 2d 256 (Fla. 1970), the Florida Supreme

Court found that Article I, Section Three and the Establishment Clause impose the same requirements. Analysis of Appellees' religion claims thus properly begins with the Establishment Clause, which is not violated by the Opportunity Scholarship Program.[8]

1. The Opportunity Scholarship Program Complies with the Establishment Clause of the United States Constitution.

Appellees' contention that the Opportunity Scholarship Program violates the Establishment Clause, see Holmes Br. at 47-50, conflicts with nearly two decades of United States Supreme Court precedent. As the Supreme Court has repeatedly held, an educational assistance program passes muster under the Establishment Clause where, as here, (i) any funds that indirectly flow to religious schools do so only as a result of the private choices of individuals who directly receive the assistance; and

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[8] This interpretive approach is consistent not only with Florida precedent, but also with the Free Exercise and Equal Protection Clauses of the United States Constitution. Because the federal Religion Clauses impose conflicting constitutional requirements that are in substantial tension with one another, a state court acting in this unique area generally cannot interpret its state constitution's anti-establishment provision more broadly than the federal Establishment Clause without simultaneously risking violation of the federal Free Exercise or Equal Protection Clauses. See McDaniel v. Paty, 435 U.S. 618 (1978) (holding unconstitutional provision in Tennessee Constitution that barred ministers from serving as legislators). See also Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 845 (1995) (state's exclusion of religious organization, because it was religious, from school funding program went beyond requirements of Establishment Clause and was unconstitutional because it "compromised . . . neutrality commanded of the State by the separate Clauses of the First Amendment").

(ii) the program is neutral in that it allows students to use the government assistance at religious or non-religious schools.

Most recently, in Mitchell v. Helms, 120 S. Ct. __, 2000 WL 826256 (June 28, 2000), the Court considered the constitutionality of a federal program that provided educational computer equipment on a per-capita basis directly to schools (including to private religious schools). In analyzing that program, the Court extensively explained the constitutional distinction between (i) a "per-capita school-aid" program that directly grants government assistance to religious institutions based on the number of students in the school, id. at *31 (O'Connor, J., concurring), and (ii) a program that is a "true private-choice program" such that any money indirectly flowing to religious schools does so "only as the result of the genuinely independent and private choices of aid recipients," id. at *30 (O'Connor, J., concurring) (quoting Witters v. Washington Dept. of Servs. for the Blind, 474 U.S. 481, 487-88 (1986)).

While recognizing that direct assistance programs can pose serious constitutional questions when the assistance is used for "indoctrination," see Mitchell, 2000 WL 826256, at *12-*13, the six Justices in the majority (as well as the three dissenters) made clear that the Establishment Clause permits a government assistance program that, like the Opportunity Scholarship Program, satisfies the twin criteria of private choice and neutrality. See id. at *30. As Justice O'Connor explained in the Court's controlling

opinion, a neutral, private-choice program is "akin to the government issuing a paycheck to an employee who, in turn, donates a portion of that check to a religious institution." Id.

The Mitchell decision continues the long line of Supreme Court decisions upholding educational assistance programs that are both neutral and directed by private choice. See Mueller v. Allen, 463 U.S. 388, 400 (1983)(upholding parent's ability to deduct expenses relating to private education as "the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit.") (emphasis added); Witters v. Washington Dept. of Servs. for the Blind, 474 U.S. 481, 488 (1986)(approving student's use of state scholarship for handicapped children to attend religious institution because "[a]ny aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients.")(emphasis added); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 10, 13 (1993)(upholding "a neutral government program dispensing aid not to schools but to individual handicapped children"; that program, "[b]y according parents freedom to select a school of their choice,[] ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private

decision of individual parents."); see also Agostini v. Felton, 521 U.S. 203, 235 (1997).[9]

In sum, the Supreme Court's numerous decisions plainly demonstrate that an educational assistance program satisfies the Establishment Clause when (i) the program is neutral (that is, it allows students to use the government benefit at religious or non-religious schools); and (ii) any tuition money that ultimately flows to religious schools does so only because of the private choices of individuals.

The Opportunity Scholarship Program is just such a program. First, the program is neutral. Under Section 229.0537(1), Florida Statutes, qualifying parents of children in failing public schools may choose to send their children (i) to the same failing school, (ii) to "a public school that is performing satisfactorily," (iii) to a non-religious private school; or (iv) to a religious private school. Moreover, a student's eligibility to participate in the Opportunity Scholarship Program is determined by the adequacy of the public school the student is attending, not by the student's religious affiliation. § 229.0537(2), Fla. Stat. (1999). Likewise, the eligibility of private schools to participate in the Opportunity Scholarship Program is based on religion-neutral

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[9] In Rosenberger v. Rector and Visitors of Univ. of Virginia, 515 U.S. 819 (1995), all nine Justices again agreed that the government could provide funds to sectarian institutions through neutral programs that utilize private choice. See id. at 838-40; id. at 880-81 (Souter, J., dissenting).

factors, such as the school's financial soundness and its compliance with state safety and health codes. Id. § 229.0537(4).

Second, the program utilizes a private choice. Under Sections 229.0537(1) and (2), any money that ultimately flows to religious schools does so only as a result of the decisions of private individuals. The Opportunity Scholarship Program does not itself permit a single dollar of public funds to flow to a religious school but rather makes assistance available directly to parents who must make an independent choice to send their child to a public, private non-sectarian or religious school, just as in Mueller, Witters, and Zobrest.

Two additional features of the Opportunity Scholarship Program further debunk any notion that the Opportunity Scholarship Program "establishes" religion. The first is the "opt-out" provision, Section 229.0537(4)(j), which provides that a private school participating in the Opportunity Scholarship Program must "[a]gree not to compel any student attending the private school on an [O]pportunity [S]cholarship to profess a specific ideological belief, to pray, or to worship." In addition, Section 229.0537(4)(e) requires that participating private schools "[a]ccept scholarship students on an entirely random and religious-neutral basis."

Despite the fact that the Opportunity Scholarship Program plainly satisfies the controlling principles set forth in all of the recent Supreme Court decisions, Appellees rely on a single 27

year-old decision to argue that the Opportunity Scholarship Program is unconstitutional. But that case, Committee for Public Education v. Nyquist, 413 U.S. 756 (1973), involved a very different type of statute. The law that was challenged in Nyquist was a New York aid program that provided benefits exclusively to private-school students. Although the Court struck down that law, in footnote 38 it expressly distinguished Nyquist from "a [hypothetical] case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." Id. at 782 n.38 (emphasis added).

Appellees fail to note that the Supreme Court has relied on that footnote in Nyquist in upholding programs akin to the Opportunity Scholarship Program. In Mueller, the Court upheld a Minnesota statute that provided benefits to the parents of both private and public school students, specifically citing footnote 38 of Nyquist to distinguish the Minnesota statute from the New York scheme at issue in Nyquist, which had provided a benefit only to the parents of private school children. See 463 U.S. at 397-99. Likewise, a majority of the Justices pointed to Nyquist's footnote 38 in explaining why the aid program in Witters was consistent with the Nyquist holding. See Witters, 474 U.S. at 491 (Powell, J.,

concurring); see also id. at 490 (White, J., concurring); id. at 493 (O'Connor, J., concurring).[10]

Like the programs at issue in Mueller and Witters, the Opportunity Scholarship Program provides a benefit that can be used by students at public schools, as well as non-religious private schools or religious private schools. Therefore, the Opportunity Scholarship Program is perfectly consistent with Nyquist, as the Court explained in Mueller and Witters.

Finally, further evidence of the fact that these settled constitutional principles govern educational assistance programs is the fact that numerous courts, including the only three state courts of last resort to consider similar programs, have held that these programs are consistent with the Establishment Clause. See Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998); Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999); Kotterman v. Killian, 972 P.2d 606 (Ariz. 1999).[11]

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[10] To the extent that Nyquist is misinterpreted to prohibit any aid to a student who attends a religious school, the State preserves the argument (for purposes of later appellate review) that Nyquist, so interpreted, should be overruled to the extent necessary to conform it to later Supreme Court decisions. See, e.g., Mitchell, 2000 WL 826256, at *12, *28 (overruling Meek v. Pittenger, 421 U.S. 349 (1975), and Wolman v. Walter, 433 U.S. 229 (1977)).

[11] Appellees cite Strout v. Albanese, 178 F.3d 62 (1st Cir. 1999), but that case involved a challenge under the Free Exercise Clause to a state tuition-payment program that allowed attendance only at private non-religious schools. Likewise, the federal decision in Simmons-Harris v. Zelman, 72 F. Supp. 2d 834 (N.D. Ohio 1999), appeal pending, turned on whether the students in the program actually had a real opportunity to opt into non-religious

2. The Opportunity Scholarship Program Complies With Article I, Section Three of the Florida Constitution.

Notwithstanding the fact that this Court has made clear that "Article I, Section 3 of the Florida Constitution is substantially the same" as the federal Establishment Clause, Todd v. State, 643 So. 2d at 628 & n.3 (Fla. 1st DCA 1994), Appellees contend that Article I, Section Three imposes an absolute prohibition on any program in which state funds may be used by its recipients to benefit religious institutions. This interpretation, if accepted, would have dramatic ramifications for the State. For instance, it would prohibit the State from providing financial assistance that students could use at religious colleges. Cf. § 240.40201, Fla. Stat. (1999) (Bright Futures Scholarship Program).[12] It would prohibit the State from making Medicaid payments for patients in religiously affiliated hospitals, providing benefits that elderly persons could use at religiously affiliated nursing homes, or granting day-care vouchers that parents could use at religiously affiliated day-care centers. Cf. Johnson, 239 So. 2d at 261. And it would potentially prohibit government employees from giving

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schools (something the court found was not a meaningful option under the Ohio program). Here, however, not only are public schools fully available to students under the Opportunity Scholarship Program, but a majority of the students have actually opted into other public schools.

[12] Appellees might claim that these examples are exaggerations, but Appellees have failed to supply any coherent or logical basis to distinguish the Opportunity Scholarship Program from the examples.

portions of their salary to their church or synagogue. Cf. Mitchell, 2000 WL 856256, at *30 (O'Connor, J., concurring).

Given those severe consequences, it comes as no surprise that Appellees' argument has been flatly rejected by the Florida Supreme Court in closely analogous cases. In Johnson v. Presbyterian Homes of Synod of Florida, Inc., for example, the Court held that under Article One, Section Three, "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); see also Nohrr v. Brevard Co. Educational Authority, 247 So. 2d 304, 307 (Fla. 1971) (same).

The specific question presented in Johnson was whether the State could allow religiously affiliated homes for the elderly to take advantage of a general property tax exemption granted to such institutions. The Court held that Article I, Section Three did not pose any impediment to such a program:

> 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 . . . . Such a home for the aged could be owned by any organization complying with the statute, regardless of religious beliefs.

Johnson, 239 So. 2d at 261 (emphasis added).

The Court reached a similar decision in Nohrr, when it upheld the Educational Facilities Law against a claim that "the law permit[ted] the authorities to issue revenue bonds in order to aid religious schools, as well as secular schools." 247 So. 2d at 307. The Court explained that the 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." Id.

The analysis employed in Johnson and Nohrr applies forcefully to the Opportunity Scholarship Program: By allowing parents of students in failing schools to move their children to other public schools, to private non-religious schools, or to private religious schools, the State "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." Johnson, 239 So. 2d at 261. Rather, the Opportunity Scholarship Program is a "general welfare plan," in which the State dispenses a benefit to parents of students in failing schools. Parents can then use that benefit at public, private non-religious, or private religious institutions. The mere fact that some money might end up in religious institutions does not violate Article I, Section Three, any more here than it did in Johnson or Nohrr.[13]

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[13] Two recent supreme court decisions from other States have interpreted language that is nearly identical to the language in Article I, Section Three on which appellees rely. In Kotterman v. Killian, 972 P.2d 606 (Ariz. 1999), the court upheld a program

Appellees strive mightily to distinguish Johnson and Nohrr - arguing, for example, that the programs at issue in those cases did not take money "from the public treasury" (the triggering words in Article I, Section Three) but instead were financed by a tax exemption and a bond. But no case of which we are aware - and appellees cite none - has suggested that the source from which the State gathers funds for a benefits program has any bearing whatsoever on whether the program is constitutional under Article I, Section Three.

Appellees also suggest that Johnson and Nohrr are contrary to the plain language of the last sentence of Article I, Section Three, which provides that "[n]o 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." But Appellees' argument - in essence, that Johnson and Nohrr should be overruled - misinterprets Article I, Section

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giving a tax credit for private school tuition, including tuition for religious schools. In upholding the program, the court expressly noted that the "in aid of" language in the Arizona Constitution was similar to that in the Florida Constitution, among others. See id. at 624 n.10.

In Neal v. State, 986 S.W.2d 907 (Ky. 1999), the Kentucky Supreme Court upheld a transportation subsidy for children attending private schools, including religious schools. The court held that the Kentucky Constitution, which also prohibits appropriations "in aid of" any religious school, did not bar assistance to students who then choose to attend religious schools.

Three and in any event must be directed to the Florida Supreme Court, not to this Court.

Appellees also contend that Johnson and Nohrr apply only when inclusion of religious institutions is "the only means" by which the State could pursue its secular end. Holmes Br. at 45. But the passage from Johnson that Appellees quote to support the point merely states that an examination of alternatives becomes necessary only when the purpose of the statute is to "further[] both secular and religious ends." 239 So. 2d at 261. The Opportunity Scholarship Program, by contrast, is designed to fulfill a secular end - namely, providing assistance to qualifying students in failing schools. See also Horne v. Hernando County, 297 So. 2d 606, 607 (Fla. 2d DCA 1974) ("promotion of religion was not the primary purpose of the ordinance" and thus "incidental benefit" to religion does not render ordinance unconstitutional).

CONCLUSION

For the reasons set forth above, State Appellants respectfully request that the Court reverse the judgment below.

Respectfully submitted,

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