

IN THE
SUPREME COURT OF FLORIDA

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

JOHN ELLIS “JEB” BUSH, etc., et al., v. RUTH D. HOLMES, et al.

CHARLES J. CRIST, et al. v. RUTH D. HOLMES, et al.,

BRENDA MCSHANE, etc., et al. v. RUTH D. HOLMES, et al.

On Appeal from the First District Court of Appeal
Nos. 1D02-3160, 1D02-3163, 1D02-3199

**MOTION FOR LEAVE OF AMICI
CURIAE TO FILE BRIEF ON SEVERABILITY**

Lyonsdown School, Inc. d/b/a The Berkshire School (“THE BERKSHIRE SCHOOL”); Sagemount Learning Academy, Inc. (“SAGEMOUNT LEARNING ACADEMY”); The Broach School of Jacksonville, Inc. d/b/a Broach School Mandarin (“THE BROACH SCHOOL”); Pathways School, Inc. (“PATHWAYS SCHOOL”); Alternate Educational Systems, Inc. d/b/a The Randazzo School (“THE RANDAZZO SCHOOL”); Victoria’s Higher Learning Academy, Inc. (“VICTORIA’S HIGHER LEARNING ACADEMY”); and Glades Day School, Inc. (“GLADES DAY SCHOOL”) (hereinafter collectively referred to as “AMICI CURIAE”), move this Court for leave to file a brief as *amici curiae* solely to address

the severability of the provision of the Opportunity Scholarship Program, Florida Statutes § 229.0537 (1999) (“OSP”), being challenged on constitutional grounds herein, and would show:

1. AMICI CURIAE are an underrepresented group of non-parties that would be adversely affected by affirmance of the decision under review. Specifically, AMICI CURIAE are all nonsectarian, private schools providing educational services to students from failing public schools that have received scholarships to defray the cost of tuition under the OSP. The number of OSP students attending each of these schools, as verified by the State of Florida, Department of Education’s recent tally (attached),¹ are as follows:

a.	THE BERKSHIRE SCHOOL	2 students
b.	SAGEMOUNT LEARNING ACADEMY	1 student
c.	THE BROACH SCHOOL	15 students
d.	PATHWAYS SCHOOL	3 students
e.	GLADES DAY SCHOOL	22 students
f.	THE RANDAZZO SCHOOL	6 students
g.	VICTORIA’S HIGHER LEARNING ACADEMY	<u>28 students</u>
	TOTAL	77 students

2. AMICI CURIAE, as friends of the Court, respectfully request leave to file the contemporaneously submitted brief that solely addresses the severability of

¹ Appellees and the Lower Court have characterized the number of OSP students attending sectarian schools as a “vast majority” of the program participants. The State of Florida, Department of Education’s recent tally sheet (attached) shows that in addition to the 77 students attending school at one of the AMICI CURIAE, 307 OSP students attended the nonsectarian Lincoln-Marti Schools, a total of 384

the provision found to violate Art. I, § 3 of the Florida Constitution by the Lower Court.

3. The Lower Court’s decision not to sever the unconstitutional portion of the Act was made without briefing of the parties. According to the majority, the act was not severable because, “[u]nlike Judge Wolf, we cannot say that the Florida Legislature intended the OSP statute to be severable or that the legislature would have adopted the OSP without vouchers being provided to sectarian schools.” Bush v. Holmes, 886 So. 2d 340, 346 n. 4 (Fla. 1st DCA 2004) (en banc). However, the Lower Court apparently was not advised that the Legislature was keenly aware of the possibility of a challenge under Art. I, § 3 at the time it adopted this legislation, see Fla. H.R. Comm. on Transforming Florida Schools, CS/HBs 751, 753 and 755 (1999) Staff Analysis 7-8 (final June 22, 1999) (on file with comm.), and included an express severability provision in the Act:

If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared severable.

Ch. 99-398, § 77, at 2679, Laws of Fla. (1999).²

4. Even in the absence of an express severability provision, prior

out of 920 participants.

² Approved by the Governor (Appellant herein) on June 21, 1999.

decisions of this Court and the doctrine of separation of powers also mandate consideration of severability. See Ray v. Mortham, 742 So. 2d 1276, 1280 (Fla. 1999) (“Severability is a judicial doctrine recognizing the obligation of the judiciary to uphold the constitutionality of legislative enactments where it is possible to strike only the unconstitutional portions.”)

4. None of the parties to this dispute briefed this issue to the Lower Court, as noted by both the majority and Judge Wolf in his separate opinion. Bush v. Holmes, 846 So. 2d at 346 n. 4 (en banc) (“The appellants, however, do not argue . . . that the OSP statute is severable.”); Id., at 374 (Wolf, J., concurring and dissenting) (“While the issue of severability was not raised by the parties, I feel we should address this issue in order to uphold the intent of the Legislature.”) Appellants again have not briefed the issue of severability in their initial briefs in this Court. The failure of the parties to submit briefs that would aid the Court in fulfilling its constitutional duty to uphold valid legislation to the maximum extent possible is precisely why AMICI CURIAE request leave to file the contemporaneously filed brief.

5. AMICI CURIAE take no position regarding the constitutionality of the OSP as it relates to aid to sectarian private schools. They only ask that in the event the Court finds that the OSP unconstitutionally renders aid to religion that it only

strike the offending portion of the otherwise constitutional and worthy legislation aimed at providing choices to families of students in failing public schools. This is essential to prevent the students who are attending school with AMICI CURIAE or similarly situated nonsectarian private schools from being forced to return to the situation found unacceptable by the Legislature. At minimum, this issue is worthy of the Court's consideration.

WHEREFORE AMICI CURIAE request leave to file the brief submitted simultaneously herewith and such other and further relief, including a right to participate in oral argument, if requested, as the Court deems proper and in the public interest.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to **Ronald G. Meyer**, Meyer and Brooks, P.A., 2544 Blairstone Pines Drive, Post Office Box 1547, Tallahassee, Florida 32302; **Robert H. Chanin and John M. West**, Bredhoff & Kaiser, P.L.L.C., 805 Fifteenth Street, N.W., Suite 1000, Washington, D.C. 20005; **Pamela L. Cooper**, Florida Education Association, 118 North Monroe Street, Tallahassee, Florida 32399; **Barry Richard**, Greenberg Traug, P.A., 101 East College Avenue, Post Office Box 1838, Tallahassee, Florida 32302; **Christopher M. Kise and Louis F.**

Hubener, Office of the Solicitor General, PL-01 The Capitol, Tallahassee, Florida 32399; **Raquel Rodriguez**, Office of the Governor, The Capitol, Suite 209, Tallahassee, Florida 32399; **Daniel Woodring and Nathan Adams**, Florida Department of Education, 325 West Gaines Street, Suite 1244, Tallahassee, Florida 32399; and **Clark Neily**, Institute of Justice, 1717 Pennsylvania Avenue, NW, Suite 200, Washington D.C. 20006 this 24th January, 2005.

s/ Timothy W. Weber
Timothy W. Weber, Esquire
Florida Bar No. 86789
Andrew W. Lennox, Esquire
Florida Bar No. 937681
BATTAGLIA, ROSS, DICUS & WEIN, P.A.
Wachovia Bank Building
980 Tyrone Boulevard
Post Office Box 41100
St. Petersburg, Florida 33743
Telephone No.: (727) 381-2300
Fax: (727) 343-4059
Attorneys for AMICI CURIAE