

IN THE
SUPREME COURT OF FLORIDA

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

JOHN ELLIS “JEB” BUSH, *et al.*,
CHARLES J. CRIST, JR., and
BRENDA McSHANE, *et al.*,

Appellants,

v.

RUTH D. HOLMES, *et al.*,

Appellees.

On Direct Appeal from the First District Court of Appeal

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STATEMENT OF THE CASE AND FACTS

A. Under the Opportunity Scholarship Program (“OSP”), § 1002.38, Fla. Stat., funds are taken from the public treasury and used to pay the tuition for certain schoolchildren to attend private – including sectarian – schools rather than receiving their constitutionally guaranteed education in the free public schools.

Plaintiffs challenged the OSP as contrary to, *inter alia*, Article I, § 3, and Article IX, § 1, of the Florida Constitution. The circuit court (per Hon. L. Ralph Smith) struck down the OSP on the latter ground without reaching the former. R9:1453 (attached as Appendix B). The First District Court of Appeal (“DCA”) reversed, 767 So. 2d 668 (Fla. 1st DCA 2000), and this Court denied review. 790 So. 2d 1104 (Fla. 2001). On remand, a different judge of the circuit court, Hon. P. Kevin Davey, held that the OSP violated the “clear and unambiguous” language of Article I, § 3, and entered summary judgment in favor of plaintiffs. R16:2888. The DCA, after granting rehearing *en banc*, affirmed. 886 So. 2d 340 (Fla. 1st DCA 2004). A concurring opinion signed by five judges would, in the alternative, have affirmed on the basis of Article IX, § 1. *Id.* at 367 (Benton, J., concurring).

B. The OSP provides vouchers for private-school tuition to any student who previously attended a public school designated as “failing” for two years of a four-year period. § 1002.38(2)(a), Fla. Stat. These vouchers are disbursed in the form of warrants made out to the participating student’s parent, but by law they are

mailed directly to the private school, rather than to the parent, who is required to “restrictively endorse the warrant to the private school.” § 1002.38(6)(g).¹

The statute creating the OSP expressly provides for the participation of “sectarian” private schools. § 1002.38(4). Approximately two-thirds of Florida private schools eligible to participate in the program identify themselves as religious, as did 60% of the schools registered to participate at the time of the circuit court’s summary judgment ruling in 2002. *See* R14:2430-2542; R15:2543-2671, 2675-81. In fact, more than 90% of the program’s participants at the time it was struck down by the circuit court attended sectarian schools. R15:2673.

Discovery taken of the four sectarian schools that enrolled those students – all Catholic schools affiliated with the Diocese of Pensacola – makes clear that religious indoctrination is an integral part of the schools’ educational programs. The Diocese itself identifies as one of the “goals” of its schools to “inculcate in each student a strong spirit of faith in the message of Jesus . . . ,” R3S:3708, and the individual schools’ own statements of their goals and missions are fully

¹ The vouchers, paid for from funds appropriated through the Florida Education Finance Program to the public school districts of participating students, § 1002.38(6)(f), are in an amount that is the lesser of (1) the tuition and fees charged to the student by the participating private school, or (2) a “calculated amount” that is roughly equivalent to the public funds that would be expended on the student’s education in a public school. § 1002.38(6)(a), (b). As a condition of participation, private schools must accept OSP vouchers as full payment of OSP students’ tuition and fees. § 1002.38(4)(i).

consistent with this Diocese goal. For example, “[t]he mission of St. Michael Interparochial School is to provide a Christ-centered and gospel-based education” R4S:3902. As St. Michael’s principal explained in her deposition, this goal of “provid[ing] a Christ-centered and gospel-based education” “permeate[s] the entire building”; it is “why we exist.” R4S:3856-57. The schools pursue these goals by means of a curriculum that is infused with religion. It includes daily religion classes, prayer, worship services, and religious observances. The record in this regard – which is summarized and catalogued in Appendix C to this brief – describes these activities in detail, and confirms the pervasively sectarian nature of the educational programs at these schools.²

Although participating schools may not “compel” OSP students “to profess a specific ideological belief, to pray, or to worship,” § 1002.38(4)(j), the statute does not bar them from compelling OSP students to take part in other religious activities, such as religious training and instruction. Nor are they prohibited from requiring the passive attendance of OSP students at prayers and worship services. In fact, the record shows that *all* students at the sectarian schools participating in

² Appendix C, Plaintiffs’ Supplemental Evidentiary Submission in Support of Motion for Summary Judgment, R16:2828-47, was submitted to the circuit court as a summary of the evidence obtained in discovery from participating schools. The exhibits referred to therein are found in several supplemental volumes of the record (containing pages 3465-4256). Citations in this brief to these volumes include the letter “S” following the volume number.

the OSP at the time of the circuit court’s summary judgment ruling – including the OSP students – were required to receive Catholic religious instruction and to attend regular worship services and prayers.³

SUMMARY OF ARGUMENT

1. Article IX, § 1 of the Florida Constitution requires the state to make adequate provision for the education of all Florida children, and it also prescribes the manner in which that mandate is to be carried out – through a “system of free public schools.” That constitutional choice reflects the framers’ recognition of the importance of public education to a free society. The OSP defeats the purpose of Article IX, § 1 by providing for certain students to receive their publicly funded education in private schools in lieu of the mandated system of free public schools.

2. The plain language and the history of Article I, § 3 make clear that the state may not use public funds to pay for sectarian schools to provide a religious education to Florida schoolchildren. The OSP violates the “no-aid” provision Article I, § 3 because it directly and substantially aids the religious missions of

³ As the Pensacola Diocese’s Superintendent of Schools explained, the Diocese’s lawyers had confirmed that “our tradition of *requiring all students to attend religion classes and prayer* is within the [OSP] law,” and “[t]he Bishops of Florida have made it clear that they are clearly committed to having all children attend classes and activities including religion and liturgies.” R5S:4022 (emphasis added). Thus, “[i]t is understood on our part that *every child will attend religion classes, mass and other prayer services.*” R5S:4019 (emphasis added); *see also* R3S:3655 (no changes would be made in schools’ regular programs to accommodate OSP students).

participating sectarian schools and the churches that operate those schools by enabling them to bring their religious message to children whom they otherwise would be unable to reach. That conclusion is fully consistent with this Court's cases applying Article I, § 3, and it does not result in the wholesale invalidation of other state programs. The federal Free Exercise argument defendants seek to raise is not presented by this case, and is in any event foreclosed by the U.S. Supreme Court's decision in *Locke v. Davey*.

ARGUMENT

Article IX, § 1 of the Florida Constitution specifies that the state's duty to provide for the education of its children is to be carried out through a system of free public schools. Article I, § 3 prohibits the state from expending public funds in aid of sectarian institutions. The OSP is contrary to both, and each provides an independent basis for affirming the judgment below.⁴

⁴ It should go without saying that whether private-school vouchers are sound public policy is a question for the political branches of government, not the courts. The issue here is not education policy but constitutional law, and we therefore confine ourselves to what it is appropriate for this Court to consider in ruling on the issue that is before it. We note in passing only that most of the studies cited by defendants and their *amici*, *see, e.g.*, Brief of Black Alliance for Educational Options *et al.*, are the work of committed voucher advocates whose conclusions are in fact highly controversial – “in large part,” as one scholar has put it, “because the Peterson group's statistical analysis seems always tilted to favor a positive result for vouchers.” Martin Carnoy, *School Vouchers: Examining the Evidence 2* (Economic Policy Inst. 2001). More dispassionate researchers have found little, if any, evidence that voucher programs improve either the academic achievement of participating students or the performance of public schools. *See id.* at 5-30. There

I. ARTICLE IX, § 1 DOES NOT ALLOW THE STATE TO MEET ITS PUBLIC EDUCATION OBLIGATION TO FLORIDA SCHOOLCHILDREN BY PAYING TUITION FOR THEIR EDUCATION IN A COMPETING SYSTEM OF PRIVATE SCHOOLS

As the Leon County Circuit Court correctly held – and as five members of the *en banc* DCA agreed – Article IX, § 1 and its predecessors dating back to the middle of the nineteenth century establish not only the constitutional mandate that the state is to provide for the education of all Florida children, but also prescribe the manner in which the state is to fulfill that mandate – through a “system of free public schools.” It is implicit in Article IX, § 1 that the state may not attempt to fulfill this mandate other than in the prescribed manner. But that is what the OSP does, by making tuition payments for Florida schoolchildren to receive their publicly funded education through a competing system of private schools, rather than in the “system of free public schools” required by the Constitution.⁵

Public education has a unique constitutional status in Florida. Alone among the substantive functions that government performs, education is the subject of an

are, in our view, far better, proven ways to provide a high-quality education than by diverting urgently needed public funds to private schools – such as by reducing class size in the public schools, as Article IX, § 1 now requires.

⁵ This Court’s earlier denial of review of the DCA’s decision on this issue does not preclude the Court from addressing the issue at this time. *Cf. Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973); *Missouri v. Jenkins*, 515 U.S. 70, 83-86 (1995).

article of the Florida Constitution. Unlike the eleven other articles, which generally set the procedural parameters within which government functions, or place limits on its powers, Article IX imposes on the state a substantive duty – to “make adequate provision for the education of all children residing within [the state’s] borders.” Art. IX, § 1(a), Fla. Const.

Contrary to the Governor’s assertion, the Legislature has *not* been “vested with ‘enormous discretion’ in deciding how to do this.” Gov. Br. at 43.⁶ The opposite is true: in addition to imposing upon the state the mandate to provide for the education of all of its children, Article IX, § 1 also prescribes the *manner* in which that mandate is to be carried out. Thus, the sentence that makes it a “paramount duty of the state to make adequate provision for the education of all children” is followed immediately by the requirement – which can only be read as an instruction on how to fulfill that duty – that the state make such provision through “a uniform, efficient, safe, secure, and high quality *system of free public*

⁶ The Governor cites for this proposition *Coalition for Adequacy & Fairness in School Funding v. Chiles*, 680 So. 2d 400 (Fla. 1996). In that case, this Court concluded that the Legislature had “enormous discretion . . . to determine what provision to make for an adequate and uniform *system of free public schools*.” *Id.* at 408 (emphasis added). Nowhere did the Court suggest that the Legislature had *any* discretion – let alone “enormous discretion” – to provide for the education of Florida children by going outside the constitutionally prescribed “system of free public schools.”

schools” Art. IX, § 1(a), Fla. Const. (emphasis added). The Legislature’s discretion is limited by this constitutional instruction.

Defendants deny that the third sentence of Article IX, § 1 prescribes the manner in which the second sentence’s universal education purpose is to be accomplished; for them, the second and third sentences articulate separate – and essentially unrelated – goals. *See* AG Br. at 26-27 (referring to the “overarching general purpose” of “the education of children” and the “more specific purpose” of making adequate provision for a system of free public schools). But this reading is inconsistent with both the language and history of Article IX, § 1.

The language of this constitutional provision leaves no doubt as to the link between the two sentences:

It is . . . a paramount duty of the state *to make adequate provision* for the education of all children within its borders. *Adequate provision shall be made* by law for a uniform, efficient, safe, secure, and high quality system of free public schools

Art. IX, § 1(a), Fla. Const. (emphasis added). The repetition in wording indicates that the duty to provide for the education of children articulated in one sentence is to be carried out in the manner specified in the immediately following sentence.

The requirement that the state provide for the education of its children through a “uniform . . . system of free public schools” has appeared – in these or equivalent words – in the opening sections of the Constitution’s education article

since 1868.⁷ The timing is not accidental, for in the middle of the nineteenth century Florida made a choice in favor of a system of public schools as the means by which the state would provide universal education.⁸ That choice was written into the state’s organic law through the Constitution of 1868, which established it as the state’s “paramount duty” to make provision for the education of all its children, and to that end required the Legislature to provide for a “uniform system of common schools.” Art. VIII, § 2, Fla. Const. of 1868. While the details have varied from one constitutional iteration to another, the basic principles established by the Constitution of 1868 have remained constant in their reliance on the public schools as the means by which the state is to carry out its education mandate.

That the framers’ intent was to make the public schools the exclusive means for this purpose is particularly apparent from the simultaneously enacted language of what is now Article IX, § 6, which provides that the income and interest from the state school fund may be appropriated “*only* to the support and maintenance of free public schools.” Art. IX, § 6, Fla. Const. (emphasis added). At the time this

⁷ See Art. VIII, § 2, Fla. Const. of 1868 (“The Legislature shall provide a uniform system of common schools”); Art. XII, § 1, Fla. Const. of 1885 (“The Legislature shall provide for a uniform system of public free schools”); Art. IX, § 1, Fla. Const. of 1968 (“Adequate provision shall be made by law for a uniform system of free public schools”).

⁸ See generally Nita Pyburn, *The History of the Development of a Single System of Education in Florida 1822-1903* (1954); Thomas Cochran, *History of Public-School Education in Florida* (1921).

language entered the Constitution, the school fund (along with a special tax also dedicated solely for the common schools) was the sole source of state funding of education.⁹ The framers' determination that these funds set aside for education were to be used only for the "free public schools" – and not for any other purpose – is powerful evidence of what is implied by the language of Article IX, § 1: that the way in which the state was to fulfill its public-education responsibility was through a "system of free public schools."

The reason for that determination is not difficult to perceive. In making their choice for a system of free public schools, the framers recognized the important role the common schools play in preparing citizens to function in a free society – both through a curriculum that teaches the responsibilities of citizenship, and through the informal interaction and socialization of children from diverse walks of life. As this Court has explained, "[t]he purpose intended to be accomplished in establishing and liberally maintaining a uniform system of public free schools, is to advance and maintain proper standards of enlightened citizenship." *State ex rel. Clark v. Henderson*, 137 Fla. 666, 668, 188 So. 351, 353 (1939). Indeed, "[t]he free public school system required by the Constitution of Florida . . . is the 'cornerstone of our civilization,'" which "the very future of our

⁹ See Art. VIII, §§ 4-6, Fla. Const. of 1868. The appropriation of general state revenues for public education was prohibited until 1926. See *State ex rel. Kurz v. Lee*, 163 So. 859, 860 (Fla. 1935).

form of government may well depend upon.” *Thomas v. State ex rel. Cobb*, 58 So. 2d 173, 175 (Fla. 1952). The choice of a system of free public schools as the means through which universal education would be provided thus reflects the belief that it was important to maintaining a representative system of government that children receive not just an education, but a *public* education.

The issue is not, as defendants assert, whether the Legislature can “[d]o[] *more*” than the Constitution requires. AG Br. at 27. The Legislature’s plenary authority may well allow it to create programs – in education as elsewhere – not specifically provided for by the Constitution. But, as defendants recognize, the Legislature may *not* create such programs “‘in lieu of’ the mandated system of free public schools.” *Id.* at 25. That is because “the state cannot take an action different from *and in lieu of* an action mandated by the constitution”; to do so would “defeat the purpose of the constitutional provision.” *Id.* at 26 (quoting *Weinberger v. Board of Pub. Instr.*, 93 Fla. 470, 479, 112 So. 253, 256 (1927)).

But this is precisely what the OSP does. For participating children, the program provides for a publicly funded education in private schools “in lieu of the mandated system of free public schools.” To hold that this 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. That reading would allow the state to devote

most of its education funding to paying for children to attend private schools, as long as it maintained some public-school alternative.

Certainly the constitutionality of the OSP under Article IX, § 1 does not turn on the specific facts and limitations of that program – defendants do not contend it does – and accepting defendants’ interpretation would thus open the door to a universal voucher system, under which every Florida student could take his or her share of the state’s education funds and use these funds for private-school tuition. That may well be the ultimate objective of some voucher proponents, but, we submit, it is certainly not the manner in which the framers of Article IX, § 1 intended for the state to fulfill its obligation to make adequate provision for the education of Florida’s children.¹⁰

¹⁰ That Article IX, § 1, does not contain express language prohibiting the state from carrying out its universal-education mandate through private schools is, of course, not determinative. As the Governor concedes, the Legislature’s plenary power ends where it is “expressly *or impliedly* limited” by the Constitution. Gov. Br. at 44 (emphasis added). It is therefore “well established” that,

where the Constitution expressly provides the manner of doing a thing, it impliedly forbids its being done in a substantially different manner. Even though the Constitution does not in terms prohibit the doing of a thing in another manner, the fact that it has prescribed the manner in which the thing shall be done is itself a prohibition against a different manner of doing it.

Weinberger, 93 Fla. at 478-79, 112 So. at 256. Here, the express instruction that the state is to provide for the education of Florida’s children by establishing and maintaining a “system of free public schools” necessarily implies that it may not accomplish that objective by paying for children to attend private schools instead.

The Attorney General attempts to save the OSP by pointing to the language in Article IX, § 1, that requires the state to provide such “other public education programs that the needs of the people may require.” AG Br. at 29-30. The circuit court correctly rejected defendants’ reliance on this language, observing that it would effectively render optional the core requirements of Article IX, § 1, as to the nature of the school system the state is to provide:

[T]he Defendants’ argument that by establishing “other public education programs” the State may educate elementary and secondary students in some way other than through the constitutionally mandated “system of free public schools” leads to an untenable result. That interpretation would permit the State to evade *all* of the constitutional requirements regarding the education it is to provide to Florida children – not only the requirement that this education be provided through a “system of free public schools” – and would allow the State to provide Florida children with their elementary and secondary education through “other public education programs” that are not “uniform, efficient, safe, secure, and [of] high quality.” [App. B, at 16 (R9:1468).]

The historical record confirms that defendants’ reliance on the “other public education programs” language is misplaced. As this Court has explained, that language, added to Article IX, § 1 in 1968, was intended to refer to “the existing systems of junior colleges, adult education, etc., which are not strictly within the general conception of free public schools or institutions of higher learning.” *Board of Pub. Instr. v. State Treasurer*, 231 So. 2d 1, 2 (Fla. 1970).¹¹ It simply has no

¹¹ The record of the 1968 Constitutional Convention, reviewed in the circuit court’s opinion, fully supports this Court’s reading of that language. *See* App. B,

reference to K-12 education, and there is no basis for defendants’ contention that it allows the Legislature to depart from a “system of free public schools” as the means by which it is to provide for the education of Florida’s children.

In overturning the circuit court’s decision and upholding the OSP under Article IX, § 1, the DCA relied in part on *Scavella v. School Board*, 363 So. 2d 1095 (Fla. 1978), but – as we explain in the margin – that case has no bearing on the issue before the Court.¹² The contrast between the OSP and the program at issue in *Scavella*, however, highlights the constitutional flaw in the OSP. The latter principally served students with disabilities, who were sent not to privately run schools that duplicated the work of the public schools, but rather to specialized programs that offered services the public schools were not able to provide. *See*

at 15 n.4 (R9:1467). The CRC documents cited by the circuit court are found in the record at R8:1254-76.

¹² *Scavella* involved a program under which the Dade County School District paid for exceptional students to attend private schools “because of the lack of special services in the Dade County public schools to meet their special needs.” *Id.* at 1097. The issue presented was whether the state, having chosen to send certain exceptional students to private schools instead of providing them with an education in the public schools, could arbitrarily limit the amount it would pay for that private-school education without depriving the students of their constitutional right to a free education. Whether Article IX, § 1 allowed the state to send those students to private schools in the first place was not before the Court: neither the school district, whose program was at issue, nor the students, who benefited from it, had any interest in suggesting that the program might not be constitutional under Article IX, § 1. And this Court quite appropriately did not reach out to decide a constitutional issue that had not been presented to it. Accordingly, *Scavella* is of no precedential value on the question presented here.

363 So. 2d at 1097.¹³ Under the OSP, on the other hand, *all* students at designated public schools who wish to do so may leave the public school system and instead receive their publicly funded education in the form of tuition checks to attend private schools. This wholesale substitution of private for public schools “does not augment but instead supplants the educational programs the constitution requires the legislature to provide in public schools.” *Davis v. Grover*, 480 N.W.2d 460, 482 (Wis. 1992) (Abrahamson, J., dissenting). It thus “defeat[s] the purpose of the constitutional provision,” *Weinberger*, 93 Fla. at 479, 112 So. at 256, that designates a system of free public schools as the manner in which the state is to fulfill its mandate to provide for the education of Florida’s children.

II. ARTICLE I, § 3 PROHIBITS THE STATE FROM USING PUBLIC FUNDS TO PAY FOR THE RELIGIOUS EDUCATION OF FLORIDA SCHOOLCHILDREN

Religion is a part of the American tradition, and an education that integrates religious training and instruction with secular learning is a constitutionally protected option for those who prefer it. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). At issue here, however, is not the value of religion or of a religious education, but the permissibility of state funding of religion – specifically, whether

¹³ Whether or not such selective use of private educational institutions to provide specialized services not readily available in the public schools passes muster under Article IX, § 1, has never been tested. But the least that can be said is that such programs for students with special needs are distinguishable from the OSP and raise issues not presented in this case.

Article I, § 3 permits the use of public funds to pay for the religious training and instruction of young children. As we now show, the answer to that question is “no,” and nothing in the federal Constitution requires a different result.

A. The OSP Is Unconstitutional Under Article I, § 3 Of The Florida Constitution

While the Constitutions of Florida and the United States both embody the fundamental principle of separation of church and state, this Court has emphasized, in a line of cases beginning with *Traylor v. State*, 596 So. 2d 957 (Fla. 1992), that the provisions of Florida’s Declaration of Rights are to be construed independently of their federal counterparts. In doing so, this Court has recognized that “[u]nder our federalist system of government, states may place more rigorous restraints on government intrusion than the federal charter imposes,” and, indeed, that “state courts and constitutions have traditionally served as the prime protectors of their citizens’ basic freedoms.” *Id.* at 961.

Traylor and subsequent decisions embrace what has come to be called the “primacy” doctrine: “When called upon to decide matters of fundamental rights, Florida’s state courts are bound under federalist principles to give primacy to our state Constitution and to give independent legal import to every phrase and clause contained therein.” *Id.* at 962. This means that where, as here, provisions of both the state and federal Constitutions touch on the validity of a governmental action, the Florida courts should look first to the applicable state provision. *See id.* at 961.

And, rather than construing the state constitutional provision as a mere reflection of its federal counterpart, “state courts should focus primarily on factors that inhere in their own unique state experience, such as [*inter alia*] the express language of the constitutional provision, [and] its formative history” *Id.* at 962.

Consistent with this Court’s elaboration of the primacy doctrine, defendants and their *amici* recognize that there is “no reason to believe . . . that the framers of article I, section 3 intended to peg it to the U.S. Supreme Court’s meandering Establishment Clause jurisprudence . . . ,” McShane Br. at 5, and that, in particular, the third sentence of Article I, § 3 “constrain[s] the degree to which Florida courts must follow judicial innovations in [federal] First Amendment doctrine.” McKay Br. at 10. It is clear, therefore, that the U.S. Supreme Court’s school voucher decision in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) – which marked the culmination of what the Governor acknowledges to have been “as radical a departure from *stare decisis* [as] ever undertaken by the U.S. Supreme Court away from federal no-aid precedent,” Gov. Br. at 30-31 – is not a “judicial innovation[]” this Court need or should follow in evaluating the OSP under Article I, § 3.

To the contrary, as we now show, the language and history of Article I, § 3 compel the conclusion that, as both courts below held, this provision was intended to prohibit precisely what is at issue here – the use of public funds to pay for Florida children to receive a religious education in sectarian schools.

1. The Language And History Of Article I, § 3 Establish That The State May Not Use Public Funds To Pay For Florida Children To Receive A Religious Education In Sectarian Schools

a. Article I, § 3 of the Florida Constitution provides in pertinent part:

There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. . . . 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.

While the first sentence of this section repeats nearly verbatim the language of the federal First Amendment’s Establishment and Free Exercise Clauses, the final sentence – for which, as the DCA recognized, “there is no analogue . . . in the federal constitution,” 886 So. 2d at 348 – states the further limitation on the use of public funds that is imposed by the state Constitution.

On its face, this constitutional language makes clear that the state may not use taxpayer funds to pay for churches and other religious institutions – through their parochial schools – to teach their religion to Florida schoolchildren. As the trial court observed, “[t]he language utilized in this provision is clear and unambiguous. There is scant room for interpretation or parsing.” R16:2889. It is difficult to imagine how the prohibition on the use of public funds for this purpose could have been more clearly expressed. Indeed, as one proponent of private-school vouchers has recognized, any “strained construction” this Court might adopt to uphold the OSP under Article I, § 3 “could only be seen as judicial legislating or

judicial activism.” J. Scott Slater, *Florida’s “Blaine Amendment” and its Effect on Educational Opportunities*, 33 *Stetson L. Rev.* 581, 615 (2004).

The conclusion that flows from the language of Article I, § 3 is reinforced by an examination of the available history of that provision – both as it was originally adopted in 1885 and as reenacted in 1968.

What is now the final sentence of Article I, § 3 dates from the Constitution of 1885, which contained virtually the same language as part of its Article I, § 6. As defendants have observed, there exists no record from the constitutional convention that adopted the 1885 Constitution. But that does not mean that nothing can be said about the origins and purpose of the 1885 provision – and indeed defendants themselves have supplied much of the historical record.

There is much we disagree with in defendants’ and their *amici*’s discussions of the so-called “Blaine Amendments” of the latter part of the nineteenth century, including particularly the implication that these amendments were purely the product of religious bigotry. *See infra* pp. 24-26. But defendants certainly are correct that the Blaine Amendments were intended to bar the use of public funds to pay the cost of educating children in private sectarian schools – which, at the time, were almost uniformly Catholic. *See, e.g.*, AG Br. at 14 (“Nineteenth century proponents of these provisions sought to prevent Catholics from obtaining public funding for Catholic schools and charities, either through direct appropriation, or

through various covert means of providing equivalent benefits.”). *See generally* 886 So. 2d at 348-51 (DCA opinion reviewing the historical record).

As defendants’ own briefs make clear, therefore, the “no aid” provision was adopted in 1885 *in order to prevent state funding of sectarian education* – whether directly or through some artifice such as (in this instance) payments channeled through parents. Defendants cannot assert that the “Blaine Amendments” were intended to bar public funding of Catholic schools, and at the same time argue that Article I, § 3 does not prohibit the use of taxpayer monies to fund education in Catholic – and other – sectarian schools. As the DCA concluded:

Given this historical context and the highly restrictive language in Florida’s no-aid provision, the drafters of the no-aid provision clearly intended at least to prohibit the direct or indirect use of public monies to fund education at religious schools. [886 So. 2d at 351.]

The record of the 1966-68 general revision of the Florida Constitution confirms that the prohibition against public funding of sectarian schools was among the intended purposes of the “no aid” language in Article I, § 3. The DCA reviewed this history, noting that the Legislature specifically rejected a draft of the Constitution Revision Commission (“CRC”) that would have *omitted* the no-aid provision, thus leaving Article I, § 3 equivalent to the First Amendment. *See* 886 So. 2d at 351 (citing documents found in record at R15:2685-89). The court concluded that the decision to “retain[] the specific prohibition on using public funds to support sectarian institutions contained in the 1885 Constitution in

addition to the Establishment Clause language . . . made clear that article I, section 3 necessarily imposes restrictions beyond the Establishment Clause.” *Id.*

Much of the pressure to retain the no-aid provision, moreover, came precisely from a concern that public funds should not be used to pay for education in sectarian schools. Thus, the CRC’s Education and Welfare Committee agreed to delete from the Education Article a prohibition on the use of school funds to aid sectarian schools *only* if the “very strong language” to the same effect was retained in the Declaration of Rights. *See* R15:2701, 2705-07. That “very strong language,” which ultimately remained part of Article I, § 3, clearly was intended to prohibit public funding of education in sectarian schools.

b. The Court has no license to “attempt a strained construction” to “remedy the problem” of Article I, § 3, by “read[ing] an ‘intent-to-aid requirement’ into the Blaine provision,” Slater, 33 Stetson L. Rev. at 613-14, as many of the defendants and *amici* urge.¹⁴ To do so would be to re-write the Constitution in a way that has no grounding in its language or history, and that would effectively nullify this constitutional provision.

¹⁴ *E.g.*, AG Br. at 15-16 (“the provision only precludes the Legislature from appropriating public money *for the purpose of* supporting a sectarian beneficiary or beneficiaries”); Indep. Voices Br. at 10 (“The prohibition against aid to religious schools applies only where there is a *specific intent* to do so on the part of the government actor to aid religion as such”); McKay Br. at 13 (“the relevant inquiry is whether a primary purpose of a challenged program is to advance religion”).

If, as defendants propose, the only relevant inquiry under Article I, § 3 were the statutory purpose, a law providing for even the most substantial aid to sectarian institutions would be constitutional as long as the Legislature were able to recite a plausible secular purpose for the program. That is not difficult to do, and in fact programs funding sectarian schools almost invariably are justified on the basis of secular considerations.¹⁵ Limiting the no-aid provision to instances where a “specific intent” or “primary purpose” to advance religion can be shown would simply duplicate a prohibition already contained in the first sentence of Article I, § 3, *see Silver Rose Entm’t, Inc. v. Clay County*, 646 So. 2d 246, 251 (Fla. 1st DCA 1994), and thus effectively write the no-aid language out of the Constitution as a separate limitation on legislative power.

It is not surprising, therefore, that almost nothing in the extensive caselaw construing such no-aid provisions even hints that they should be limited to

¹⁵ *See, e.g., Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 763-65 (1973) (noting legislative purpose for program of direct grants and tuition reimbursements to private schools was to preserve healthy and safe educational environment, promote pluralism and diversity, and relieve an overburdened public school system). Indeed, even the most overt support for religion can be given a secular justification. Thus, Patrick Henry’s infamous Bill Establishing a Provision for Teachers of the Christian Religion, by which Virginia would have levied a tax to support ministers and places of worship, was based on the purely secular purpose that “the general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society” Reprinted in *Everson v. Board of Educ.*, 330 U.S. 1, 72-74 (1947).

prohibiting uses of public funds motivated by a religious purpose.¹⁶ One of the *amici* cites for that proposition the California Supreme Court’s decision in *California Educational Facilities Authority v. Priest*, 526 P.2d 513 (Cal. 1974), *see* McKay Br. at 13-14, but in fact that case – which construed California’s analogue to Article I, § 3 – holds just the opposite: “[T]he fact that a statute has some identifiable secular objective *will not immunize it from further analysis* to ascertain whether it also has the direct, immediate, and substantial *effect* of advancing religion.” 526 P.2d at 521 (emphasis added).¹⁷ While it is neither unusual nor inappropriate for courts to inquire *inter alia* into the statutory purpose, we know of no case – with perhaps one exception¹⁸ – that even arguably can be read to suggest that, as defendants urge, the question whether a statute provides constitutionally impermissible aid to sectarian institutions turns *solely* on its purpose.

¹⁶ Certainly this Court’s cases do not suggest such an interpretation, as the Governor asserts. Gov. Br. at 8. The Governor mistakes the conclusion that a particular statute has a secular purpose for a holding that any statute with a secular purpose *ipso facto* passes constitutional muster.

¹⁷ Nor did the court in *Embry v. O’Bannon*, 798 N.E.2d 157 (Ind. 2003), also relied upon by the McKay Schools, inquire solely into the statute’s purpose; rather, it held that the no-aid provision “prohibit[ed] the use of public funds . . . when directly used for [religious] institutions’ activities of a religious nature.” *Id.* at 167.

¹⁸ Several of the briefs cite *Board of Education v. Allen*, 228 N.E.2d 791 (N.Y. 1967). Whatever broader principle might be teased out of that opinion, *Allen* did not involve a voucher plan like the OSP. Rather, its holding was that the state could supply secular textbooks to students attending sectarian schools – a position, incidentally, with which many other courts disagree. *See infra* note 30.

c. Certainly, moreover, defendants' partisan account of the history of the so-called "Blaine Amendments" cannot be taken as justification for giving Article I, § 3 the "strained construction" they propose. This Court's obligation in interpreting the Constitution is, of course, "to ascertain and effectuate the intention and purpose of the people in adopting it." *Amos v. Mathews*, 126 So. 308, 316 (Fla. 1930). But defendants and their *amici* devote large portions of their briefs to the contention that the Court should *not* give effect to what they recognize to have been the people's intent. Defendants do not contend that adding a "specific intent" requirement to the third sentence of Article I, § 3, or otherwise interpreting it narrowly, reflects the intent of the Constitution's framers, in either 1885 or 1968. Rather, they urge the Court to give Article I, § 3 such an interpretation because they disapprove of what they contend the framers' intent was.

Defendants' view of the so-called "Blaine Amendments" as nothing more than the product of anti-Catholic bigotry and nativism is, in fact, a vastly oversimplified and highly controversial rendering of nineteenth century history. No one denies that it was principally Catholic schools that were affected by efforts to ban the diversion of public funds to sectarian institutions in the latter half of the nineteenth century, or that religious bigotry motivated some who championed the federal Blaine Amendment and some of its state offspring. But contrary to the single-factor motivation defendants selectively extract from the historical record,

the no-aid movement was far more complex than defendants portray it, and their revisionist history of the Blaine Amendments is highly controversial.¹⁹

Nowhere in their voluminous discussions of the Blaine Amendments, moreover, have defendants and their *amici* adduced an iota of evidence that the adoption of the specific constitutional provision at issue here – Article I, § 3 of the Florida Constitution – was the product of bigotry. That goes both for the original adoption of the no-aid provision in 1885 and for its reenactment in a far different political context in 1968.²⁰

It should come as no surprise that constitutional principles are established in a particular political context, one that often involves a multitude of motivations.

¹⁹ See, e.g., Noah Feldman, *Non-Sectarianism Reconsidered*, 18 J.L. & Pol. 65, 92-117 (2002) (demonstrating that the “nonsectarian ideal” that motivated the no-aid movement was far broader than simple anti-Catholicism, and that as it succeeded it lost its anti-Catholic coloring); Laura S. Underkuffler, *The “Blaine” Debate: Must States Fund Religious Schools*, 2 First Amend. L. Rev. 179, 195 (2003) (“[L]egal prohibitions against public funding of religious schools were the products of far more diverse political, religious, and educational concerns than simple anti-Catholic animus, or any other particularly identifiable view.”); Steven K. Green, “*Blaming Blaine*”: *Understanding the Blaine Amendment and the “No-Funding” Principle*, 2 First Amend. L. Rev. 107 (2003) (same); Marc D. Stern, *Blaine Amendments, Anti-Catholicism, and Catholic Dogma*, 2 First Amend. L. Rev. 153, 166-76 (2003) (nineteenth century opposition to the political objectives of the Catholic church was not simply the product of bigotry or nativism).

²⁰ Apparently recognizing that no such showing can be made, one *amicus* retreats to the assertion that the Constitution’s mere use of the word “sectarian” is sufficient evidence of religious bigotry to condemn Article I, § 3. Becket Fund Br. at 5. Certainly something more is required to support the extraordinary suggestion that this Court should disregard the language and clear intent of the Constitution.

But constitutional principles endure even as the context changes. The school conflicts of the nineteenth century left Florida and most other states with the constitutional principle 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. This understanding was ratified and confirmed through the reenactment of the “no aid” provision as part of Article I, § 3, in the 1968 Constitution – in an environment that even defendants do not seriously claim was characterized by religious intolerance. The intent of Article I, § 3 to prohibit public funding of religious education is clear from the provision’s language and history, and it is that intent that should guide this Court.

2. The OSP Directly And Substantially Aids Participating Sectarian Schools And The Churches That Operate Them

a. Under the OSP it is clear that “revenue of the state” is “taken from the public treasury” and used to pay tuition at “sectarian institution[s],” which are operated by “church[es], sect[s], or religious denomination[s].” The only even arguable question is whether these funds are “in aid of” such institutions.

Defendants contend that the answer to this question is “no,” because, they assert, any benefit to participating schools is only “incidental to the achievement of a non-sectarian public purpose.” Gov. Br. at 17.²¹ To the extent defendants mean

²¹ The Governor and certain other briefs purport to draw that rule from this Court’s cases under Article I, § 3. We address this caselaw *infra* pp. 33-37.

to suggest as a matter of law that any benefit to religious organizations is necessarily “incidental” when the public expenditure is motivated by a secular purpose, we have just explained why such a “specific intent” requirement cannot be read into Article I, § 3. *See supra* pp. 21-23. If, on the other hand, defendants’ contention is that, as a factual matter, the OSP does not “aid” religious institutions in any significant way, they are simply wrong. As we now show, the OSP’s “aid” to sectarian schools and the churches that operate them is direct and substantial.

There is little doubt that participating sectarian schools benefit financially from the OSP,²² but the aid they receive cannot be measured simply in financial terms. The OSP directly aids the participating sectarian schools and the churches that operate them by making it possible for these schools and churches to inculcate their religious beliefs in children whom they otherwise would not be able to reach.

²² Defendants’ contention that those schools derive no financial benefit from the OSP because tuition does not always pay the full cost of educating students, AG Br. at 4 n.1, ignores the economic reality that the marginal cost of educating additional students will generally be far less than the average cost of educating each student. For example, the principal of St. Michael Interparochial School testified that the school could accommodate 50 more students without having to hire additional faculty. R4S:3854-55. Participating schools receive the financial benefit of the influx of these additional students whose tuition is paid by the state, and the courts have uniformly held that this tuition revenue constitutes aid to the institution that receives it. *Hartness v. Patterson*, 179 S.E.2d 907, 909 (S.C. 1971); *State ex rel. Gallwey v. Grimm*, 48 P.3d 274, 279 (Wash. 2002); *Weiss v. Bruno*, 509 P.2d 973, 978 (Wash. 1973); *Almond v. Day*, 89 S.E.2d 851, 857 (Va. 1955).

As discovery taken from the sectarian schools participating in the program at the time of the summary judgment ruling makes plain, such schools are extensions of the religious ministries of the churches that operate them, *see* R5S:3987 (“The Catholic school is an expression of the education mission of the parish with which it is associated and of the diocese.”), and an integral part of their mission is to provide students with a *religious* upbringing. Providing a “Christ-centered and gospel-based education” is, as one school principal testified, “why we exist.” R4S:3856-57. These schools seek to “inculcate in each student a strong spirit of faith in the message of Jesus . . . ,” R3S:3708, and the OSP makes it possible for them to carry out this mission on a broader scale, by offering a religious education to students who, without the OSP, would not have received one. *See* R3S:3678-79 (testimony by Diocesan Superintendent confirming that the OSP enables children to attend Diocesan schools who otherwise would have been unable to do so).

Far from providing a merely “incidental” benefit, therefore, the OSP aids participating sectarian schools and the churches that operate them in the most fundamental way possible: it pays the cost for them to bring their religious message to children whom they otherwise would be unable to reach.

b. Nor can defendants escape that conclusion on the ground that the OSP channels the public funds to participating schools through the students’ parents.

There is no need to debate whether that device makes the aid to the schools' religious missions less "direct" in any meaningful sense – although we think it clear that this aid is both direct and substantial – because Article I, § 3 prohibits the state from providing such aid "directly *or indirectly*."²³ In any event, the fact that the state makes out warrants in the names of the OSP students' parents is of no substantive significance, because the parents have no discretion whatever about the use to which these funds may be put. Under the statute, the warrants are not even mailed to the parents, but rather are sent directly to the private schools, and the parents are required to "restrictively endorse the warrant to the private school." § 1002.38(6)(g), Fla. Stat. The pretense of writing checks to the parents does not alter the substance of the transaction, which is that funds are taken from the state treasury and transferred to the participating private schools.

Nor does the fact that it is the parents who decide which schools their children will attend alter the conclusion that the revenue the OSP takes from the public treasury is used in aid of churches and other sectarian institutions.

Particularly in view of the heavy predominance of sectarian schools among all

²³ The history of the 1968 Constitution makes clear that the presence of this language in Article I, § 3 is not accidental. During its consideration of the draft Constitution the Legislature twice considered and rejected proposed amendments that would have weakened the prohibition on indirect funding of sectarian institutions – one amendment by removing the words "or indirectly," and the other by deleting the entire phrase "directly or indirectly." *See* R15:2691-92.

Florida private schools, it is inevitable that public funds will be used for this prohibited purpose. Indeed, this result is specifically intended, for the OSP explicitly provides for the participation of “sectarian” schools. § 1002.38(4), Fla. Stat. This is a program, as one commentator has put it, “in which individual decisions to forward voucher money to religious schools are entirely related, anticipated, and authorized actions, which accomplish the [statutory] goal.” Laura S. Underkuffler, *The “Blaine” Debate: Must States Fund Religious Schools*, 2 First Amend. L. Rev. 179, 193-94 (2003).²⁴

It is immaterial, moreover, that parents who send their children to sectarian schools may have freely chosen the religious education those schools offer. Article I, § 3 is not concerned simply with compelled religious indoctrination. Its purpose is, rather, 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. Even if parents are not compelled to send their children to religious schools, that does not obviate the fact that under the OSP all of Florida’s taxpayers are required to pay for the religious indoctrination of children whose parents do make that choice.

²⁴ As the OSP parent may do nothing with the scholarship funds but sign them over to one of a discrete group of recipients approved by the state, the situation is unlike that where “a Florida citizen uses a portion of his or her state welfare check to donate money to his or her church.” *Indep. Voices Br.* at 11 n.9. In that scenario – unlike the OSP – the individual’s unfettered choice of how to spend the funds cannot be attributed to the state.

The Vermont Supreme Court, anticipating the *Zelman* decision, made this very point, in explaining why the parental choice argument that proved successful under the First Amendment was not persuasive under the Vermont Constitution:

[T]he United States Supreme Court may well decide that the intervention of unfettered parental choice between the public funding source and the educational provider will eliminate any First Amendment objection to the flow of public money to sectarian education. We cannot conclude, however, that parental choice has the same effect with respect to Article 3. If choice is involved in the Article 3 equation, it is the choice of those who are being required to support the religious education, not the choice of the beneficiaries of the funding.

Chittenden Town Sch. Dist. v. Vermont Dep't of Educ., 738 A.2d 539, 563 (Vt. 1999). “[T]hose who are being required to support the religious education” – the state’s taxpayers – of course have no choice in the matter.

Cases from other states also make clear that the state may not evade a restriction on the use of public funds to support religion by establishing a program through which the state makes payments to parents. That is so even in jurisdictions where the constitutional restriction on the use of public funds for religious purposes does not – as does Florida’s Constitution – explicitly forbid such aid from being provided “directly or indirectly.” Thus, the Supreme Court of Virginia has explained that “[t]he fact that . . . the funds may be paid to the parents or guardians of the children and not directly to the institutions does not alter their underlying purpose and effect.” *Almond v. Day*, 89 S.E.2d 851, 856 (Va. 1955). Similarly, in

Sheldon Jackson College v. State, 599 P.2d 127, 132 (Alaska 1979), the Alaska Supreme Court held that a tuition grant program was not saved merely because the grants were made to students (who were required to convey the funds to the private colleges of their choice), even though Alaska's constitution prohibited only using public funds for the *direct* benefit of religious or other private schools. Other cases to the same effect are cited in the margin.²⁵ In *all* of these cases, decided under state constitutional provisions similar to Florida's, the programs at issue allowed students and parents to determine the school at which their voucher, scholarship, or

²⁵ *Opinion of the Justices*, 616 A.2d 478, 480 (N.H. 1992) (unconstitutional for school districts to pay partial tuition for parents who sent students to private schools of their choice); *Doolittle v. Meridian Joint Sch. Dist. No. 2*, 919 P.2d 334, 342 (Idaho 1996) (payment of public funds for handicapped child's tuition at sectarian school chosen by parents was contrary to Idaho Constitution); *Otken v. Lamkin*, 56 Miss. 758 (1879) (statute that paid students attending private schools their pro rata share of state education funds unconstitutional); *People ex rel. Klinger v. Howlett*, 305 N.E.2d 129 (Ill. 1973) (striking down tuition grants to parents sending children to private schools of their choice); *Opinion of the Justices to the Senate*, 514 N.E.2d 353, 356 (Mass. 1987) (tax deduction for private-school tuition unconstitutional; channeling aid to student rather than school not dispositive where effect was indirect aid to private schools); *Hartness v. Patterson*, 179 S.E.2d 907 (S.C. 1971); *State ex rel. Rogers v. Swanson*, 219 N.W.2d 726 (Neb. 1974) (tuition grants to students for private colleges of their choice unconstitutional); *Witters v. State Comm'n for the Blind*, 771 P.2d 1119 (Wash. 1989) (use of vocational rehabilitation grant at religious college contrary to state constitution); *Asociación de Maestros v. Torres*, No. AC-94-371 (P.R. Nov. 30, 1994) (copy in record at R18, Exhibits, Plaintiffs' Bench Book, Tab 15) (Puerto Rico constitution's ban on "support" of private schools violated by voucher program, as it directly contributed to the institutions' educational missions).

other benefit would be used; in none of them did the courts deem the element of parental choice sufficient to avoid invalidation of the program.

3. The Reasoning Of The Courts Below Is Fully Consistent With This Court's Cases Construing Article I, § 3, As Well As With Relevant Cases From Other Jurisdictions

a. As the DCA observed, “[t]here is not a substantial body of case law interpreting the Florida no-aid provision.” 886 So. 2d at 354. More to the point, none of this Court’s cases involves facts even remotely close to those at issue here. Defendants rely on four cases from the late 1950s and early 1970s involving a tax exemption for retirement homes, *Johnson v. Presbyterian Homes*, 239 So. 2d 256 (Fla. 1970); revenue bonds for higher-education facilities, *Nohrr v. Brevard County Educ. Facilities Auth.*, 247 So. 2d 304 (Fla. 1971); the use of school buildings in off hours by a church, *Southside Estates Baptist Church v. Board of Trustees*, 115 So. 2d 697 (Fla. 1959); and a devise to a county of park land with an easement permitting certain religious use by a church, *Koerner v. Borck*, 100 So. 2d 398 (Fla. 1958).²⁶ Disregarding the specific facts on which these cases were decided, defendants abstract from them the doctrine that “when public financial benefits enjoyed by religious institutions are merely incidental to the achievement

²⁶ An additional case cited by defendants, *City of Boca Raton v. Gidman*, 440 So. 2d 1277 (Fla. 1983), is wholly inapposite, as the DCA noted. 886 So. 2d at 357. *Gidman* involved no religious entity at all; the issue presented was the construction of a public-purpose clause contained in a municipal charter.

of a non-sectarian public purpose, there is no violation of article I, section 3.” Gov. Br. at 17. Declaring those to be “precisely the facts in the case at bar,” *id.*, defendants conclude that the decision below is contrary to this Court’s cases. This syllogism cannot hold, as both premises upon which it rests are faulty.

In the first place, unless one accepts defendants’ position that the no-aid provision applies only when there is a legislative *purpose* to aid sectarian institutions, and that short of such an impermissible purpose any benefit is as a matter of law “incidental,” *see supra* pp. 21-23, the benefit the OSP provides to participating sectarian schools and the churches that operate them is anything but “merely incidental.” To the contrary, the OSP directly and substantially aids and furthers the core religious missions of these institutions. *See supra* pp. 26-28.

In any event, defendants’ argument is fatally flawed because it attempts to divorce this Court’s cases from their facts. As the DCA observed, “none of these cases involve the use of state revenues to aid a sectarian institution,” 886 So. 2d at 354, which is what is at issue here. None of them involved an appropriation of funds from the public treasury at all. Tax exemptions for religious institutions, the issue in *Johnson*, had just been upheld under the Establishment Clause, *Walz v. Tax Comm’n*, 397 U.S. 664 (1970), and the *Johnson* Court devoted the bulk of its discussion of the federal and state religion clauses to reviewing the *Walz* opinion – quoting it for the proposition that “[t]he grant of a tax exemption is not

sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state.” 239 So. 2d at 261 (quoting 397 U.S. at 675).²⁷ Similarly, in *Nohrr*, this Court emphasized that no use of public funds was involved: “[N]o aid is granted at public expense. All expenses are required to be borne by the educational institution involved” 247 So. 2d at 307.²⁸ The other two cases on which defendants rely are even

²⁷ Cf. *Kotterman v. Killian*, 972 P.2d 606, 618 (Ariz. 1999) (restriction on use of “public money” not implicated by private-school tax credit, as “no money ever enters the state’s control”); *Toney v. Bower*, 744 N.E.2d 351, 357-58 (Ill. App. Ct. 2001) (religion clause not implicated by private-school tax credit, which was not an “appropriation” and involved no payment from a “public fund”); *In re Certification of Question*, 372 N.W.2d 113, 117 (S.D. 1985) (in holding loan of secular textbooks was unconstitutional aid to sectarian schools, court distinguished tax exemption for religious educational institutions, which did not constitute such aid). Defendants assert that the *Johnson* opinion “had nothing to do with the fact that the benefit was in the form of an exemption rather than a grant,” Gov. Br. at 12, but that assertion is belied by the Court’s extensive discussion of *Walz*. As one commentator has observed, “the Court spent its entire analysis discussing the federal Establishment Clause, and it never once mentioned the ‘directly or indirectly’ language. The most likely reason the *Johnson* Court found the exemptions constitutional under [then-]Section 6 was because the money involved was not taken from the public treasury.” Slater, 33 Stetson L. Rev. at 615.

²⁸ Cf. *Washington Health Care Facilities Auth. v. Spellman*, 633 P.2d 866 (Wash. 1981) (prohibition against applying public money to the “support of any religious establishment” not implicated by issuance of revenue bonds for religious hospitals, as no “public money or property” was involved); *Durham v. McLeod*, 192 S.E.2d 202, 204 (S.C. 1972) (revenue bond proceeds used to make or guarantee student loans involved no “public money or credit”).

further removed from any use of funds from the public treasury.²⁹

A final point remains to be made. Apart from the specific holdings of *Johnson* and *Nohrr*, it is clear that the analytical framework the Court applied in those cases does not survive into the era of the primacy doctrine, under which courts are to look first to Article I, § 3 and analyze it independently of the federal Establishment Clause. *See supra* pp. 16-17. In contrast to this approach, the opinions in *Johnson* and *Nohrr* – which involved challenges under both the Establishment Clause and Article I, § 3 – were based *entirely* on an Establishment Clause analysis. The Court relied exclusively on cases construing federal law – notably *Walz, supra*; *Everson v. Board of Educ.*, 330 U.S. 1 (1947); and a Maryland case, *Murray v. Comptroller of Treasury*, 216 A.2d 897 (Md. 1966) – none of which, obviously, purported to construe the Florida Constitution. *See Johnson*, 239 So. 2d at 259-62; *Nohrr*, 247 So. 2d at 307. After thus reviewing and analyzing Establishment Clause caselaw, the Court held conclusorily that neither the Establishment Clause nor the Florida Constitution was violated.

Johnson, 239 So. 2d at 262; *Nohrr*, 247 So. 2d at 307. The reasoning applied in

²⁹ *Johnson* and *Nohrr* are also distinguishable for an entirely different reason: these cases involved institutions – nursing homes and universities – that, while church-related, were not devoted largely to religious training and instruction. *See* 239 So. 2d at 262 (“The primary purpose of the home is the care of the aged.”). This Court could well uphold funding to such church-affiliated – but arguably not “sectarian” – entities that would be impermissible for the pervasively sectarian schools that participate in the OSP. *See infra* pp. 40-42.

these cases, in other words, is nothing more than an exposition of Establishment Clause doctrine as it stood prior to *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

The cases' specific holdings with respect to the constitutionality of tax exemptions and revenue bond funding for retirement homes and universities are doubtless still good law. But their reasoning cannot withstand this Court's subsequent teaching that, "when called upon to construe their bills of rights, state courts should focus primarily on factors that inhere in their own unique state experience, such as the express language of the constitutional provision, [and] its formative history . . .," rather than treating the state constitutional provision as a mere reflection of its federal counterpart. *Traylor*, 596 So. 2d at 962. For this reason as well, they do not control the Court's decision with respect to the OSP.

b. The decision below is not only consistent with this Court's cases construing Article I, § 3, but it is in full accord with the great weight of authority from other jurisdictions addressing voucher and scholarship programs under constitutional language similar to that of Florida's no-aid clause.

Defendants cite one such case – the Wisconsin Supreme Court's decision upholding a school voucher program in *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998). The DCA considered *Jackson*, finding it distinguishable – based on differences in the constitutional language – and "unpersuasive." 886 So. 2d at 361. Indeed, the Wisconsin court's holding that the "benefits clause" of that state's

constitution was merely the “equivalent of the Establishment Clause of the First Amendment,” 578 N.W.2d at 620, is squarely at odds with the “primacy doctrine” this Court has enunciated for interpretation of the Florida Constitution.

Against that single case stand nearly a score of decisions under provisions similar to Article I, § 3 that either strike down voucher and scholarship programs like the one at issue here, or invalidate programs that aid sectarian schools even less directly. We have discussed the voucher and scholarship cases earlier in this brief, *see supra* pp. 31-32 & note 25, and we add to them cases striking down programs supplying textbooks or bus transportation for sectarian schools – the reasoning of which would, *a fortiori*, invalidate programs like the OSP that provide sectarian schools with unrestricted funds.³⁰ In short, the overwhelming weight of authority holds that, under state constitutional provisions similar to Florida’s, public funds may not be used to pay for students to attend sectarian schools.

4. Holding The OSP Unconstitutional Does Not Result In Wholesale Invalidation Of Other State Programs

A remarkable feature of defendants’ briefs is how much more attention they seem to devote to various state programs that are *not* before this Court than they do

³⁰ *See In re Certification of Question*, 372 N.W.2d 113 (S.D. 1985) (textbooks); *California Teachers Ass’n v. Riles*, 632 P.2d 953 (Cal. 1981) (textbooks); *Paster v. Tussey*, 512 S.W.2d 97 (Mo. 1974) (textbooks); *Epeldi v. Engelking*, 488 P.2d 860 (Idaho 1971) (bus transportation); *Spears v. Honda*, 449 P.2d 130 (Haw. 1968) (bus transportation); *Dickman v. School Dist. No. 62C*, 366 P.2d 533 (Or. 1961) (textbooks).

to the OSP itself. Contrary to the warning of “dire implications for a multitude of significant Florida social programs,” Gov. Br. at 24, it is only in defendants’ briefs that the reasoning of the circuit court and the DCA leads to “absurd and unintended results.” *Id.* While we do not exclude the possibility that one or another of the many programs defendants cite – such as the McKay Scholarship Program, § 1002.39, Fla. Stat., enacted contemporaneously with the OSP in 1999 – may be vulnerable to constitutional challenge, the reasoning of the courts below does not “inexorably lead,” Gov. Br. at 24, to the wholesale invalidation of multiple state programs.

The parade of horrors defendants conjure up rests on the premise that undergirds all of their arguments – that the OSP was struck down in the courts below because it provided a merely “incidental” benefit to a religiously affiliated organization. Both the trial court and the DCA, the Governor asserts (without citation), “concluded that ‘in aid of’ . . . is synonymous with ‘that results in a benefit to,’” *id.* at 7, and that “any direct or indirect public financial benefit that inures to the benefit of a religiously-affiliated entity is unconstitutional.” *Id.* at 24. Having set up that straw man, defendants then find it easy to assert that affirming the judgment below “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,” *id.*, and to enumerate any number of

programs – Medicaid, indigent care at religiously affiliated hospitals, scholarships for study at church-related universities, any government contracting with religious institutions, and even the rental of church premises for use as polling places – that would inevitably be swept away.

If there is anything “absurd” here, it is the suggestion that it is impossible to distinguish such programs from the OSP, under which the state pays for pervasively sectarian schools – whose very reason for being is religious education and indoctrination – to carry out their religious mission of “inculcat[ing] in each student a strong spirit of faith in the message of Jesus.” R3S:3708.

To be sure, it is not inconceivable that a court *might* read Article I, § 3 broadly enough to require the invalidation of certain of the programs defendants cite, but such a result is by no means compelled by invalidation of the OSP. Far from it. In the first place, as the DCA observed, “nothing in the Florida no-aid provision would create a constitutional bar to state aid to a non-profit institution that was not itself sectarian, even if the institution is affiliated with a religious order or religious organization.” 886 So. 2d at 362.³¹

³¹ The City of Jacksonville, which submitted an *amicus* brief addressed solely to this issue, declares itself “comfort[ed]” by this language from the DCA opinion. Jacksonville Br. at 10. Jacksonville’s apparent concern is that this language is merely “non-binding dicta,” *id.* at 11 – but that is to some degree inevitable when a court is deciding the case before it rather than offering an advisory opinion with respect to facts not presented.

Even more broadly, a court might find it consistent with the language and history of the “no aid” provision to read the constitutional term “sectarian institution” to mean an institution that is “pervasively sectarian,” as that term has been used in cases applying the federal Establishment Clause. *See, e.g., Bowen v. Kendrick*, 487 U.S. 589, 621 (1988) (remanding for determination whether public aid “is flowing to grantees that can be considered ‘pervasively sectarian’ religious institutions, such as we have held parochial schools to be”). That reading, which would be consistent with the adoption of the no-aid provision in the historical context of concern over public funding of sectarian schools, would leave untouched state programs involving religiously affiliated institutions – such as hospitals, retirement homes, institutions of higher education,³² or other faith-based

³² There is a considerable body of caselaw from other jurisdictions on the constitutionality, under state no-aid provisions, of publicly funded scholarships for study at church-affiliated colleges and universities. These cases are nearly equally divided. A number of state courts have struck such programs down. *See Hartness, supra; Almond, supra; Sheldon Jackson College, supra; Rogers v. Swanson, supra; Witters, supra*. Others, however, have declined to do so, pointing out that most church-related colleges and universities are not, like sectarian elementary and secondary schools, “pervasively sectarian” institutions devoted to religious indoctrination. *See, e.g., Americans United v. Rogers*, 538 S.W.2d 711, 722 (Mo. 1976) (“the parochial school cases with which this court has dealt in the past involved completely different types of educational entities than the colleges and universities herein involved”); *Alabama Educ. Ass’n v. James*, 373 So. 2d 1076 (Ala. 1979) (upholding postsecondary grant program based on finding that none of the recipient colleges were “pervasively sectarian” and that no state funds would be used for sectarian purposes); *Americans United v. State*, 648 P.2d 1072 (Colo. 1982) (upholding college scholarship program that excluded pervasively sectarian institutions); *Minnesota Fed’n of Teachers v. Mammenga*, 485 N.W.2d 305 (Minn.

providers of “secular social services,” Jacksonville Br. at 12 – in which religious training and instruction is not an integral part of the institution’s functions.³³

Finally, there are certainly situations in which a public entity’s economic transaction with even a pervasively sectarian institution may not constitute “aid” to that institution within the constitutional meaning. The rental of church facilities for use as polling places – an example cited in the dissenting opinion below, 886 So. 2d at 376 – may provide some financial benefit to the church. But such transactions – involving a simple “fee-for-services,” Gov. Br. at 23, where any benefit is indeed “incidental” – are readily distinguishable from a program like the OSP, through which the state pays for sectarian institutions to engage in activity that significantly and directly advances their core religious missions.

Regardless of how a court might ultimately hold with respect to any of these various programs, what is clear is that under *any* conceivable reading of Article I,

Ct. App. 1992) (upholding program on finding that most participating colleges were not pervasively sectarian); *Gallwey*, 48 P.3d at 284-87 (upholding postsecondary grant program that barred “enroll[ment] for any program that include[s] any religious worship, exercise, or instruction”).

³³ It is not necessary to decide whether that is a correct reading of Article I, § 3 in order to resolve this case. Defendants admitted in the trial court that the four religiously affiliated schools participating in the OSP “are sectarian institutions within the meaning of Article I, § 3 of the Florida Constitution.” R3S:3573 (Admission 13). The DCA appropriately declined to go further and determine whether that constitutional term should be read to mean “pervasively sectarian.” *See* 886 So. 2d at 353 n.10.

§ 3, the public funds supplied by the OSP to pay for sectarian schools to provide children with a religious education are “in aid of” those “sectarian institution[s].”

B. Striking Down The OSP Under Article I, § 3 Does Not Conflict With The Free Exercise Clause Of The Federal Constitution

Even if the DCA correctly interpreted Article I, § 3, defendants argue, its decision nonetheless should be overturned because it is in conflict with the Free Exercise Clause of the United States Constitution.³⁴ This argument is doubly flawed: the issue of “religious discrimination” that defendants seek to raise simply is not presented in this case, and their argument is in any event foreclosed by the U.S. Supreme Court’s recent decision in *Locke v. Davey*, 540 U.S. 712 (2003).

1. No Federal Issue Is Presented

The federal constitutional issue defendants seek to raise – whether a private-school voucher program that excludes sectarian schools violates the Free Exercise

³⁴ The Governor also asserts that the decision below is contrary to the Free Exercise Clause of the state Constitution, which differs, at least semantically, from its federal counterpart in proscribing laws “prohibiting *or penalizing*” the free exercise of religion. Art. I, § 3, Fla. Const. (emphasis added). This argument was not preserved below and is therefore not properly before this Court. As the DCA noted, no party raised the argument either in the trial court or on appeal. “Whether the application of a statute, or here the no-aid provision, is constitutional must be raised first at the trial level.” 886 So. 2d at 365 (citing cases). In any event, both the Free Exercise Clause and the no-aid provision are part of Article I, § 3, and defendants’ argument amounts to saying that one part of that Article is unconstitutional under another part of that Article. Obviously, the two must be construed in harmony – partly by recognizing that the state does not “prohibit” or “penalize” the exercise of anyone’s religion by declining to fund it.

Clause of the federal Constitution – is simply not presented by this appeal.³⁵ The Legislature has not established a program that does that, nor does the judgment of the court below leave such a program in place. The OSP on its face allows participation by both sectarian and nonsectarian private schools. The circuit court was not asked to – nor did it – exclude sectarian schools from participating in an otherwise valid program; rather, it struck down the program in its entirety and enjoined its further implementation.³⁶ The DCA affirmed that ruling. Neither

³⁵ We note that defendants do not argue that Florida is required by the federal Constitution to pay for education at sectarian schools merely because it funds education in the public schools. The Supreme Court long ago rejected that contention, *Brusca v. Missouri*, 405 U.S. 1050 (1972) (mem.), *aff'g* 332 F. Supp. 275 (E.D. Mo. 1971), and accordingly defendants argue only that *if* Florida maintains a private-school voucher program it cannot exclude sectarian schools.

³⁶ In this Court, one *amicus* brief asks the Court, should it affirm the judgment below, to sever four words from the statute and allow it to remain in effect with respect to nonsectarian schools. Berkshire School Br. None of the defendant parties has raised that argument, which accordingly is not properly before the Court. *See Michels v. Orange County Fire/Rescue*, 819 So. 2d 158, 159-60 (Fla. 1st DCA 2002) (*amici* may not inject issues not raised by the parties); *Turner v. Tokai Fin. Servs., Inc.*, 767 So. 2d 494, 496 n.1 (Fla. 2d DCA 2000) (same). Even if the issue were properly presented, the statute cannot be severed. The asserted basis for doing so is not the deletion of a discrete, separable provision, but rather the excision of four words (“may be sectarian or”) in a way that makes the sentence from which they were deleted say the opposite of what the Legislature wrote – sectarian schools *may not* participate, rather than sectarian schools *may* participate. *See* Berkshire Br. at 7. Furthermore, while the federal Free Exercise issue is insubstantial after *Locke v. Davey*, there was surely an argument at the time the OSP was enacted in 1999 that a purely nonsectarian voucher program would have violated the federal Constitution. Indeed, the Governor – who was the driving force behind enactment of the Voucher Program – continues to argue that position in his brief to this Court. In light of the doubt

under the statute as written nor under the lower court's ruling does there exist a program that excludes sectarian schools from an otherwise valid program.³⁷ The federal issue defendants seek to raise is, accordingly, not before the Court.

Nor can defendants get around this problem by claiming that the issue they are raising is whether the no-aid provision itself violates the federal Constitution. Nothing in Article I, § 3 requires the state to establish a program that excludes sectarian schools from a voucher program. *Both* Article I, § 3, as construed by the courts below, *and* what defendants contend is the mandate of the federal Free Exercise Clause, are satisfied by precisely the relief the trial court ordered in this case – invalidation of the OSP in its entirety. The absence of any voucher program is consistent with *both* the Florida Constitution's mandate against funding sectarian schools *and* the asserted prohibition in the federal Constitution against treating sectarian private schools differently than nonsectarian private schools.³⁸

about the validity of such a program at the time of the statute's enactment, the Court should not presume that the Legislature would have enacted a purely nonsectarian program had it known that the OSP as drafted was unconstitutional.

³⁷ As the DCA noted, "because we are holding the OSP unconstitutional in its entirety, and not just its application to sectarian schools, our decision . . . does not specifically target religion for disparate treatment." 886 So. 2d at 366 n.21.

³⁸ Thus, a ruling in defendants' favor on the federal issue they seek to raise would not (as they appear to assume) require reversal of the judgment below invalidating the OSP in its entirety. It would, rather, be a purely advisory ruling applicable to a factual situation not before the Court.

If the Legislature were to react to the ruling that the OSP as written is unconstitutional by enacting a private-school voucher program that excluded sectarian schools, then the federal issue defendants seek to raise would properly be presented in a challenge to that program. But it is not before the Court now, and the Court should therefore decline to address it.

2. *Locke v. Davey* Establishes That The Free Exercise Clause Does Not Prohibit Florida From Excluding Sectarian Schools From A Private-School Voucher Program

Even if it were properly before this Court, defendants' contention that the state cannot, under the Free Exercise Clause of the federal Constitution, fund a nonsectarian private-school voucher program without also paying for the religious education of children in sectarian schools is entirely without merit.

The Governor opens his argument on this point with the assertion that “[a] law that discriminates against any particular religion or all religion violates the federal free exercise clause” unless it survives the test of strict scrutiny. Gov. Br. at 34. But the Free Exercise Clause has never been understood to stand for this broad proposition. The Governor, and *amici* who make the same argument, attempt to draw their sweeping nondiscrimination rule from a case in which a city directly prohibited certain religious practices of a minority religion, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), and one in which a state denied to clergy the fundamental right to participate in the political process

by running for elective office. *McDaniel v. Paty*, 435 U.S. 618 (1978). These are not, by any stretch of the imagination, what is at issue here. No one suggests that by excluding sectarian schools from participation in a voucher program Florida would be prohibiting any form of religious exercise, or conditioning that exercise on the abandonment of other fundamental rights. What is at issue here is rather the state's *refusal to fund* religious exercise.

That is not what the Free Exercise Clause is about:

The fact that government cannot exact from me a surrender of one iota of my religious scruples does not, of course, mean that I can demand of government a sum of money, the better to exercise them. For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.

Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring). The Free Exercise clause prevents government from “plac[ing] a substantial burden on the observation of a central religious belief or practice,” *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989), but government’s mere refusal to pay the cost of a religious education – even if it pays for secular private or public schooling – does not impose any such burden.³⁹

³⁹ *Cf. Maher v. Roe*, 432 U.S. 464 (1977) (constitutional right to abortion not burdened by government’s refusal to fund abortions for indigent women, notwithstanding that government funds medical services related to childbirth).

To the extent there was any doubt about this question, it was removed by *Davey*. Reversing the Ninth Circuit’s holding that excluding students pursuing theology degrees from a generally applicable college scholarship program violated the Free Exercise Clause, the Supreme Court categorically rejected *Davey*’s central premises that a state is required by the Free Exercise Clause to fund religious education on the same terms as secular education if doing so is permissible under the Establishment Clause, 540 U.S. at 718-19, and that a state’s decision to exclude religious education from a general scholarship program is “presumptively unconstitutional because it is not facially neutral with respect to religion.” *Id.* at 720. In particular, the Court rejected the “strict scrutiny” argument based on *Lukumi* that forms the basis for defendants’ and *amici*’s arguments in this Court, stating that “to do otherwise would extend the *Lukumi* line of cases well beyond not only their facts but their reasoning.” *Id.* Without *Lukumi*’s presumption of unconstitutionality, the Court held, the state’s conclusion that “religious instruction is of a different ilk,” *id.* at 723, and its “cho[ice] not to fund [that] distinct category of instruction,” *id.* at 721, was reasonable and constitutional.

The DCA correctly held that *Davey* compels rejection of defendants’ Free Exercise claim. *See* 886 So. 2d at 362-66. Defendants now argue that *Davey* applies only to the exclusion of theology majors from college scholarship programs, but, as the DCA noted, “nothing in the *Locke* opinion . . . limits its

application to [the specific] facts” of that case. *Id.* at 364. Indeed, it is difficult to see what principled difference there might be between public funding of the training of ministers and public funding of their ministries of religious education. Even the dissenting judge below, in his subsequently withdrawn panel opinion, thought it evident that *Davey* was dispositive: “I agree with the majority that the trial court’s ruling does not violate the United States Free Exercise Clause pursuant to *Locke*.” Gov. App. D, at 81 n.31 (Polston, J., dissenting).

Attempting nonetheless to distinguish *Davey*, defendants argue that “by singling-out religious institutions for exclusion, the Florida constitutional provision as interpreted would necessarily reflect animus toward religion.” Gov. Br. at 38. But that assertion has no more force here than it did in *Davey*, where the Court held that treating religious education differently from secular education is “not evidence of hostility toward religion,” but rather the product of federal and state constitutional views that legitimately treat religion differently. 540 U.S. at 721.

The First Circuit has recently applied *Davey* to a voucher program, rejecting exactly the argument defendants advance here. In *Eulitt v. Maine Department of Education*, 386 F.3d 344 (1st Cir. 2004), the court rejected a federal constitutional challenge to the exclusion of sectarian schools from a Maine voucher program:

The appellants endeavor to cabin *Davey* and restrict its teachings to the context of funding instruction for those training to enter religious ministries. Their attempt is unpersuasive. We find no authority that suggests that the “room for play in the joints” identified

by the *Davey* Court, [540 U.S. at 718], is applicable to certain education funding decisions but not others. We read *Davey* more broadly: the decision there recognized that state entities, in choosing how to provide education, may act upon their legitimate concerns about excessive entanglement with religion, even though the Establishment Clause may not require them to do so.

Id. at 355. The court accordingly concluded that “it would be illogical to impose upon government entities a presumption of hostility whenever they take into account plausible entanglement concerns in making decisions in areas that fall within the figurative space between the [federal] Religion Clauses.” *Id.*

As one scholar has recently observed, “[t]he object or purpose of a government’s refusal to fund religion is not the suppression of religious conduct – it is avoidance of the divisiveness, strife, and violations of conscience that forcing taxpayers to fund the religions of others involves.” Underkuffler, 2 First Amend. L. Rev. at 185. Promotion of liberty of conscience, within which religion can flourish, is no less the purpose of the no-aid provision than it is of the Free Exercise Clause, and Florida’s refusal to permit the use of taxpayer monies to fund religious indoctrination is evidence not of hostility to religion but of its opposite.

CONCLUSION

The judgment of the court below striking down the OSP as contrary to the Florida Constitution should be affirmed, on the basis of Article I, § 3, or Article IX, § 1, or both.

Respectfully submitted,

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