

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

RABBI MERRILL SHAPIRO, REVEREND
KENT SILADI, REVEREND HARRY
PARROTT, JR., REVEREND HAROLD
BROCKUS, RABBI JACK ROMBERG,
REVEREND BOBBY MUSENGWA,
ANDY FORD, LEE SWIFT and SUSAN
SUMMERS-PERSIS,

Case No. 2011-CA-1892
(Honorable Terry P. Lewis)

Plaintiffs,

v.

KURT BROWNING, in his official capacity
as Florida Secretary of State,

Defendant,

and

STATE OF FLORIDA,

Intervenor/Defendant.

AMICUS CURIAE BRIEF OF THE FLORIDA CATHOLIC CONFERENCE

The Florida Catholic Conference, *amicus curiae* for the Defendant and Intervenor/Defendant, in accordance with this Court's September 16, 2011 Agreed Order, files its amicus brief in support of the placement of the proposed amendment to article I, section 3, of the Florida Constitution (the "Amendment") on the November 2012 general election ballot.

STATEMENT OF INTEREST

The Conference, a Florida not-for-profit corporation, is a nonpartisan group serving as liaison to state government on matters of concern to the Catholic Church in the seven dioceses of Florida. Established in 1969 as an agency of the Catholic bishops of Florida, the Conference speaks for the Catholic Church and represents a number of organizations serving the Florida

community through Catholic health care, education, and social welfare programs. On issues of importance to the Catholic Church in Florida, the Conference advocates sound public policies in federal, state, and administrative forums in accordance with faith-based principles.

The proposed Amendment is of interest and concern to the Conference because Florida's existing "no-aid provision" discriminates against religious institutions, and recent court cases interpreting the no-aid provision jeopardize state funding for critical programs and services provided by Catholic not-for-profit institutions such as hospitals, nursing homes, schools, and relief organizations. These Catholic institutions, as well as other Catholic health, education, and social welfare programs, provide needed services to thousands of Floridians each year, particularly lower income individuals and families. Catholic institutions are committed to serving *all* residents of Florida regardless of religious belief; and all Floridians, particularly the vulnerable and in need, deserve to benefit from the secular programs provided by these and other religious organizations.

SUMMARY OF THE ARGUMENT

Article I, section 3, of the Florida Constitution currently states:

Religious freedom.—There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. *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.* (Emphasis added).

The italicized text, commonly referred to as Florida's no-aid provision or "Blaine Amendment," appears to be a simple "separation of church and state" provision. In fact, this language is rooted in the nativist, anti-Catholic sentiments of the late 19th Century. Born of the desire to educate new immigrants and instill "American" attitudes and values, such provisions were intended to

encourage “common schools” and their non-denominational Protestant moral education over “sectarian schools,” *i.e.*, Catholic parochial schools. Indeed, a non-denominational Protestant religious education in the common schools was seen as a defense of democratic values, rather than as promoting the values of a particular religious tradition. By the 1890s, roughly thirty states had incorporated Blaine-style amendments into their constitutions.

Today, even without the history of religious discrimination, no-aid provisions implicate First Amendment concerns. The restrictive language in Florida’s no-aid provision goes beyond the restrictions of the federal Establishment Clause and raises free exercise and free speech concerns. Moreover, in light of two recent Florida cases, the continued existence of Florida’s no-aid provision jeopardizes the funding—and in some cases, the very existence—of current and future programs offered by religious institutions for the benefit of all Floridians. And in one of these two cases, the First District specifically stated that a constitutional amendment would be the appropriate way for Floridians to remove or lessen the restrictions of Florida’s no-aid provision. Therefore, the Conference supports the Amendment, which would remove the no-aid provision and amend article I, section 3, of the Florida Constitution to state:

Religious freedom.—There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace, or safety. *Except to the extent required by the First Amendment to the United States Constitution, neither the government nor any agent of the government may deny to any individual or entity the benefits of any program, funding, or other support on the basis of religious identity or belief.* (Emphasis added).

We will first briefly explain the background of state Blaine Amendments such as Florida’s no-aid provision, before arguing that such provisions run afoul of the First Amendment to the United States Constitution. Next, we will discuss two recent cases that implicate Florida’s no-aid provision and explain how, under certain circumstances, those cases and the no-aid

provision could throw Florida into financial crisis. The Conference believes that it is critically important that the citizens of Florida have the opportunity to vote to repeal the no-aid language and also include non-discrimination language in the Florida Constitution. Moreover, the Conference believes that the approved ballot summary and ballot title clearly and unambiguously set forth the substance of the Amendment.

ARGUMENT

I. NO-AID PROVISIONS ARE DERIVED FROM THE ANTI-CATHOLIC SENTIMENT IN THE LATE NINETEENTH CENTURY AND TODAY DISCRIMINATE AGAINST ALL FAITH-BASED ENTITIES

The language and history of the Blaine Amendments raise serious constitutional questions under the First Amendment. As discussed below, Florida’s no-aid provision has a questionable history, and time has not washed away its anti-Catholic taint. The plain text of the no-aid provision also discriminates against *all* religious institutions and runs afoul of both the Free Exercise Clause and the Free Speech Clause of the First Amendment.

A. Exclusionary No-Aid Provisions like Florida’s were born of anti-Catholic bias

In 1875, United States Representative James G. Blaine of Maine proposed a constitutional amendment that would have barred states from spending public funds on sectarian institutions—commonly understood to be Catholic parochial schools—while preserving mainline non-denominational Protestant moral instruction in public schools. *See Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (“[I]t was an open secret that ‘sectarian’ was code for ‘Catholic.’”); *see also Zelman v. Simmons-Harris*, 536 U.S. 639, 721 (2002) (Breyer, J., dissenting) (noting that the purposes of the Blaine Amendment movement was “to make certain that government would not help pay for ‘sectarian’ (*i.e.*, Catholic) schooling for children”). Blaine’s federal constitutional amendment failed in the United States Senate, but the sentiment behind it was so

strong that many states, including Florida in 1885, voluntarily adopted the language in their state constitutions. *See Bush v. Holmes*, 886 So. 2d 340, 348-49 (Fla. 1st DCA 2004) (“*Bush II*”) (noting that Florida’s no-aid provision “was adopted . . . during the historical period in which so-called ‘Blaine Amendments’ were commonly enacted into state constitutions”); *see also* Nathan A. Adams, IV, *Pedigree of an Unusual Blaine Amendment: Article I, Section 3 Interpreted and Implemented in Florida Education*, 30 *Nova L. Rev.* 1, 3 (2005-2006).¹ Indeed, the “spirit of the age” of the Blaine Amendment is well captured in an 1875 speech by President Grant, in which he called for an end to all funding for “sectarian” schools on the ground that the Catholic Church was a source of “superstition, ambition and ignorance” as opposed to “patriotism and intelligence.” President Ulysses S. Grant, Address to the Army of the Tennessee at Des Moines, Iowa (Sept. 29, 1875), *quoted in* Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 *Emory L.J.* 43, 51 (1997); *see also* John T. McGreevy, *Catholicism and American Freedom: A History*, 91-92 (2004) (discussing the importance of Grant’s speech to the no-aid movement).

In *Mitchell v. Helms*, four Justices of the United States Supreme Court acknowledged and condemned the prejudice that led to the federal and state Blaine Amendments. *See* 530 U.S. at 828-29 (plurality opinion of Thomas, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.) (noting that “consideration of the [Blaine Amendment] arose at a time of pervasive hostility to the Catholic Church and to Catholics in general”). Two years later, in *Zelman v. Simmons-Harris*, three more Justices recognized that the state Blaine Amendments were part of a backlash against “political efforts to right the wrong of discrimination against religious minorities in

¹ In fact, the same 1885 Florida convention that precluded aid to “sectarian” institutions also adopted the now disgraced “separate but equal” racial doctrine. *See* Adams, *Pedigree of an*

primary education.” 536 U.S. at 720-21 (dissenting opinion of Breyer, J., joined by Stevens and Souter, JJ.). Scholars and jurists may reach different conclusions about the *effect* of this underlying anti-Catholic bias, but Blaine Amendments clearly exist because of a widespread desire to inconvenience, discourage, and even eliminate Catholic parochial schools.² See Richard W. Garnett, *The Theology of the Blaine Amendments*, 2 First Amend. L. Rev. 45, 60-62 (2004); John Jeffries & James Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 281-82, 297-305 (2001). Thus, it cannot be seriously disputed that the failed federal Blaine Amendment was born of pervasive anti-Catholic bias.

It is well-settled that when called upon to construe the Bill of Rights, Florida state courts should examine “the express language of the constitutional provision, *its formative history*, both preexisting and developing state law, evolving customs, traditions and attitudes within the state, the state’s own general history, and finally any external influences that may have shaped state law.” *Traylor v. State*, 596 So. 2d 957, 962 (Fla. 1992) (emphasis added). Thus, courts properly consider its nativist history when addressing Florida’s no-aid provision. In *Bush v. Holmes*, discussed in more detail below, the First DCA examined the controversy over whether Florida’s specific Blaine-era amendment limiting the use of public money with regard to “sectarian institutions” had its origin in anti-religious bigotry. *Bush II*, 886 So. 2d at 351 n.9. That court found no specific evidence of anti-Catholic bigotry in the enactment of Florida’s no-aid

Unusual Blaine Amendment, supra, at 4 & n.11 (citing Fla. Const. Convention, J. of the Proceedings (1885) (documenting each of the forty-six days of the convention)).

² For a far more detailed history, see Amicus Brief for the Becket Fund for Religious Liberty (the “Becket Fund”) *et al.* as *amici curiae* supporting Respondent, *Locke v. Davey*, 124 S. Ct. 1307 (2004) (No. 02-1315), 2003 WL 22118852 (Sept. 8, 2003). The Becket Fund’s amicus brief was endorsed by a number of the nation’s leading historians, legal scholars, and experts on the history and context of the Blaine Amendments.

provision and its retention in the 1968 general revision of the Florida Constitution,³ but there is no reason to think that Florida's no-aid provision is uniquely free of the desire for cultural uniformity underlying all Blaine Amendments. On the contrary, as one commentator put it, Florida's no-aid provision is representative of the Blaine-era no-aid provisions at large. Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 Fordham L. Rev. 493, 495 n.7 (2003).

The provision's re-enactment in 1968, without more, does not remove the taint of discriminatory intent, which "tend[s] to persist through time." *United States v. Fordice*, 505 U.S. 717, 746-47 (1992) (Thomas, J., concurring). Unfortunately, even in recent times, the strict "no-aid position has given off airs of rank anti-Catholicism" and "significant elements of the no-aid coalition in modern times have sounded the same themes as did the mid-nineteenth century nativist movement." Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions*, 72 U. Cin. L. Rev. 151, 206 (2003); Laycock, *The Underlying Unity of Separation and Neutrality*, *supra*. Thus, courts should consider this "formative history" as well as "attitudes within the state" when construing Florida's "no-aid provision." See *Traylor*, 596 So. 2d at 962.

B. Florida's no-aid provision discriminates against all religious institutions and implicates First Amendment concerns

Governments may not single out religiously motivated activity for discriminatory treatment. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523, 532 (1993). Yet regardless of the framers' intent, the no-aid provision on its face discriminates on the basis of religion and, accordingly, violates the religious freedom guarantees of the First Amendment. Article 1, section 3, states that no state funds may be paid "in aid of any church,

³ Indeed, neither the 1885 nor the 1968 convention records explain the intent of the framers of Florida's no-aid provision. See Adams, *Pedigree of an Unusual Blaine Amendment*, *supra*, at 4 & n.8 & n.9.

sect, or religious denomination or in aid of any sectarian institution.” Thus, Florida’s no-aid provision imposes a disability on the basis of religion, with the effect of “punishing” religious status and behavior, and selectively disqualifying religiously affiliated organizations from otherwise available public funds. Such a scheme attacks the very deepest roots of American religious freedom. *See* Duncan, *Secularism’s Laws*, *supra* at 498-99.

The funding restriction in article 1, section 3, goes beyond the restrictions found in the federal Establishment Clause. *See Bush II*, 886 So. 2d at 348-49. Indeed, the United States Supreme Court has rejected the argument that “any program which in some manner *aids* an institution with a religious affiliation violates the Establishment Clause.” *Mueller v. Allen*, 463 U.S. 388, 393 (1983) (emphasis added) (internal quotation marks omitted); *see also Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) (holding that government programs that provide benefits to citizens are not subject to Establishment Clause challenges simply because sectarian institutions also receive financial benefits). Unlike the federal Establishment Clause, however, Florida’s no-aid provision *singles out* religious institutions for separate and discriminatory treatment. This raises serious First Amendment concerns, including free exercise of religion and viewpoint discrimination.

The First Amendment applies to the states, and courts will closely examine laws that discriminate against believers based on their status as members of a religion. *See Davey v. Locke*, 540 U.S. 712, 715 (2004); *see, e.g., McDaniel v. Paty*, 435 U.S. 618, 626-28 (1978); *Church of the Lukumi*, 508 U.S. at 532-33. The Establishment Clause prohibits the government from discriminating on the basis of a religious tradition or denomination. *See County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 589-90 (1989). Although at one time, the language “Congress shall make no law respecting an establishment of religion, or

prohibiting the free exercise thereof” was understood only to protect diversity within Christianity, today these words guarantee free exercise to “the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.” *Wallace v. Jaffree*, 472 U.S. 38, 49 n.32, 52 (1985). Thus, governments—state or federal—“may not discriminate among persons on the basis of their religious beliefs and practices.” *County of Allegheny*, 492 U.S. at 590-91.

Because Florida’s no-aid provision on its face denies funds to “any church, sect, or religious denomination or in aid of any sectarian institution” where such funds would be available to a secular institution providing the same service, the no-aid provision targets religious institutions for treatment different from other private organizations and individuals. Indeed, the no-aid provision discriminates against all religious organizations in favor of secular ones. Therefore, it clearly implicates the First Amendment’s Free Exercise Clause.

Florida’s no-aid provision also implicates free speech concerns, particularly the doctrine that prohibits “viewpoint discrimination.” See *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 828-29 (1995) (plurality opinion) (citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641-43 (1994)); see also *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (holding that to deny a church access to school premises to exhibit a religiously based film series for public viewing constituted impermissible viewpoint discrimination). The government may not regulate speech “based on its substantive content or the message it conveys” as this is “an egregious form of content discrimination.” *Rosenberger*, 515 U.S. at 828-29. Blaine Amendments, including Florida’s no-aid provision, violate this doctrine; once the state decides to provide funding for a public program or service, it cannot discriminate against providers on that service based of the religious message or character of the providers. See *id.* States may not discriminate against religious organizations seeking aid

generally available to other private parties, so long as the religious organization falls within the scope of the government aid program. *Id.* Florida's no-aid provision purports to exclude religious institutions from otherwise available funding based solely on the viewpoint of the religious organizations and their members. If approved by the voters in November 2012, the Amendment would promote religious freedom by eliminating these First Amendment concerns and ensuring that religious institutions are not excluded from otherwise available state funding solely because of their religious viewpoint.

II. IN LIGHT OF RECENT COURT CASES, FLORIDA'S STRICT AND FAR-REACHING NO-AID PROVISION HAS THE POTENTIAL TO WREAK HAVOC WITH THE STATE'S BUDGET

At present, Florida funds many essential services provided by faith-based entities for the benefit of all Floridians. Some recent Florida state appellate decisions, however, combined with the no-aid provision, may invite a legal challenge to the current funding structure and threaten millions of dollars in quality state programs—from Bright Futures to voluntary pre-kindergarten and from Medicaid services provided by Catholic hospitals and nursing homes to Catholic social welfare organizations. If approved by Florida voters in November 2012, the Amendment will protect existing and future programs against such court challenges.

A. Two recent Florida cases potentially jeopardize funding for programs and services provided by religious institutions

The federal Establishment Clause provides that Congress shall make no law respecting the establishment of religion; as discussed above, article 1, section 3, of the Florida Constitution says essentially the same thing and also imposes additional restrictions. *See supra* 7-9. To determine whether a claim violates the federal Establishment Clause, courts apply a three-part test, asking whether (1) there is a secular purpose; (2) the primary or principal effect neither advances nor inhibits religion; and (3) there is excessive government entanglement with religion.

Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). Florida courts have recognized that under article I, section 3, a similar test applies, except that the no-aid provision adds a fourth consideration: the statute must not authorize the use of public monies, directly or indirectly, in aid of any sectarian institution. See *Johnson v. Presbyterian Homes of the Synod of Fla., Inc.*, 239 So. 2d 256, 259-61 (Fla. 1970); *Silver Rose Entm't, Inc. v. Clay Cnty.*, 646 So. 2d 246, 251 (Fla. 1st DCA 1994), *rev. denied*, 658 So. 2d 992 (Fla. 1995). For programs complying with this test, courts have held that public funding is not “in aid of” sectarian institutions because the primary beneficiaries are those *receiving* the service, not the religious institutions *providing* the service. *Johnson*, 239 So. 2d at 261; see *Koerner v. Borck*, 100 So. 2d 398, 402 (Fla. 1958). Public programs may also comply with article I, section 3, because they do not confer “aid” at all, but are “fee-for-service” transactions.⁴ Institutions meeting these tests provide a number of crucial social services in Florida.

Despite the more than 125-year-old no-aid provision, Florida has funded, and continues to fund, community services provided by religiously affiliated organizations. For example, the Florida Supreme Court has held that the fact that a home for the aged was owned by a religious denomination did not negate its secular benefit of caring for the elderly, which was a governmental concern. *Johnson*, 239 So. 2d at 262. Furthermore, “[t]o exempt [from a certain tax] all homes [for the aged] complying with the statute, except church-related homes, would indeed be discriminatory and inconsistent with the obvious intent and secular aims of the Legislature.” *Id.* As explained below, however, two recent appellate decisions may invite a legal challenge to the current funding structure which, combined with the current no-aid provision, would threaten millions of dollars in quality state programs.

⁴ An example of such a “fee-for-service” transaction would be the state paying a market rate to

1. *Bush v. Holmes*

In *Bush v. Holmes*, Plaintiffs challenged the facial constitutionality of the Florida Opportunity Scholarship Program (“OSP”), asserting that the OSP violated two separate provisions of the Florida Constitution: article I, section 3 (the no-aid provision), and article IX, section 1. *See Bush II*, 886 So. 2d at 344-45. Article IX, section 1, states that “[a]dequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools.” The trial court ruled the OSP unconstitutional “insofar as it establishes a program through which the State pays tuition for certain students to attend private schools.” *Id.* The First District reversed that ruling. *Bush v. Holmes*, 767 So. 2d 668, 675 (Fla. 1st DCA 2000) (“*Bush I*”). On remand, the trial court ruled that the OSP violated article I, section 3. *Id.* On appeal of that second decision, the First DCA affirmed, holding that the no-aid provision was not “substantively synonymous” with the federal Establishment Clause. *Bush II*, 886 So. 2d at 344.

The Florida Supreme Court reviewed the First DCA’s decision, but based its holding that the OSP was unconstitutional entirely on article IX, section 1. *See Bush v. Holmes*, 919 So. 2d 392, 398 (Fla. 2006) (“*Bush III*”). The Supreme Court held that “through the OSP the state is fostering plural, nonuniform systems of education in direct violation of the constitutional mandate for a uniform system of free public schools.” *Id.* The Supreme Court found it unnecessary to address whether the OSP violated the no-aid provision, and the First DCA’s holding on that issue was left unchallenged. *Id.*

Then-Judge Polston, in a lengthy dissent in *Bush II*, noted that “[t]here is no distinction between [the OSP] and the state Medicaid program that funds religiously affiliated or operated health care institutions providing free or subsidized medical care (e.g., St. Mary’s Hospital in

rent a church’s facilities as a polling station.

West Palm Beach and Baptist Medical Center in Jacksonville). Other examples are legislative programs providing public funds to any public or private person or organization for preservation of historic structures, rent paid to churches for use of their facilities as polling places, and government subsidized pre-K or childcare programs operated by churches or faith-based organizations.” *Bush II*, 886 So. 2d at 376-77 (Polston, J., dissenting). Therefore, Judge Polston found that the majority’s “caution that the holding ‘should not in any way be read as a comment on the constitutionality of any other government program’” only ignored the problem. *Id.* at 378. “Why wouldn’t the holding be applied to other programs,” he asked. *Id.* “There is no meaningful difference. These other programs could be successfully challenged under the majority opinion.” *Id.*

2. *Council for Secular Humanism, Inc. v. McNeil*

This case, decided just last year, involved state funding for prison ministries and relied on the First DCA’s previous no-aid holding in *Bush II*. Under Florida law, inmates who meet certain criteria are required to “participate in substance abuse program services when such services are available.” *Council for Secular Humanism, Inc. v. McNeil*, 44 So. 3d 112, 116 (Fla. 1st DCA 2010). The Florida Department of Corrections contracted with qualified service providers, such as Prisoners of Christ, Inc. and Lamb of God Ministries, Inc., to provide services to individuals with substance abuse problems. *Id.* These two faith-based “halfway houses” provided former prisoners with assistance in overcoming substance abuse problems and, thus, provided a vital secular public service. *See id.* Prisoners could request placement in these facilities and their placement in a faith-based facility was voluntary. *Id.* In 2007, the New York-based Council for Secular Humanism (“CSH”) sued the State of Florida to stop state funding to Prisoners of Christ and Lamb of God Ministries because of the religious nature of these

institutions. CSH alleged that payment from the public coffers to these “sectarian institutions” violated Florida’s no-aid provision despite the public service being offered. *Id.* at 115-116.

The First DCA applied its prior reasoning from *Bush II* to consider the no-aid provision of article I, section 3, generally. *Id.* at 117-118. The court explained that Florida’s no-aid provision was not “substantively synonymous with the federal Establishment Clause” and imposed “far stricter” limitations on state funding than the Establishment Clause did. *Id.* at 119. The court rejected the argument that, even if Prisoners and Lamb of God were considered sectarian institutions, paying them to provide social services in this context did not violate the no-aid provision. *Id.* While the court agreed that there was no *per se* bar to state funded religious institutions providing necessary social services, “simply because a sectarian organization is paid to provide social services for the state, does not remove such social services program from examination under the no-aid provision.” *Id.* The court endorsed a case-by-case inquiry to determine whether, “in addition to providing social services, the government-funded program . . . also advance[d] religion.” *Id.* at 119-20. Some factors to consider include whether the program “is used to promote the religion of the provider, is significantly sectarian in nature, involves religious indoctrination, requires participation in religious ritual, or encourages the preference of one religion over another.” *Id.* at 120.⁵

Judge Thomas, dissenting from the decision to deny rehearing en banc, stated, “[t]he panel’s opinion here will apply *Holmes* for the first time beyond the context of school vouchers,

⁵ The First DCA noted that “the teaching of moral values, and creating a comprehensive rehabilitation program intentionally focused on moral values and character development, need not imply indoctrination into a religious faith.” *Council for Secular Humanism*, 44 So. 3d at 120 n.4 (citing *Americans United for Separation of Church & State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862, 875, n.12 (S.D. Iowa 2006)). Respectfully, this statement misses the point. While moral values and character development may occur outside of a religious setting, a prisoner should have the right to incorporate a religious identity into substance abuse treatment.

thus potentially jeopardizing a wide range of governmental social welfare programs.” *Id.* at 123. Among those services potentially jeopardized: faith-based placement programs for foster children and State contracts with faith-based providers. *Id.* Judge Thomas advocated receding from the First DCA’s decision in *Bush II*, which he argued did not rely on a single Florida precedent in concluding that Florida’s no-aid provision is violated whenever a religious provider of State services receives State revenue, regardless of the secular nature or public benefit of those services. *Id.*

B. If approved by Florida voters in November 2012, the Amendment will protect existing and future programs that fund essential services provided by faith-based entities

The case-by-case test articulated in *Counsel for Secular Humanism* has the potential to wreak havoc with Florida’s social services. Of particular concern is the language finding suspect any government-funded program that “in addition to providing social services . . . also advance[d] religion.” *Id.*, 44 So. 3d at 119-20. The state currently funds many essential services provided by faith-based entities for the benefit of all Floridians, including educational scholarships for disabled and low income individuals; healthcare, eldercare, and indigent care; housing assistance for the homeless and disabled; food programs for the poor; prison services; and disaster services; and many others. Certainly it would be a financial burden to the state to provide these services directly or find alternate service providers. Moreover, religious programs may provide a mechanism for cutting state costs in the midst of the financial crisis. Faith-based and private organizations can often provide higher quality services for less money, lowering costs to taxpayers. Subsidizing an existing Catholic Medicaid provider or even a future provider, instead of funding a state-run program, could provide substantial savings to the State.

Many religious programs providing non-discriminatory social services consider it their religious obligation to serve the poor, feed the hungry, help the sick, and otherwise assist the

least fortunate. Despite this, these programs do not impermissibly “advance religion.” The First DCA’s list of factors to consider in deciding whether a program “advances religion” is problematic in that each of the factors implicates the free exercise of religion—for example, whether the program is “significantly sectarian in nature,” “involves religious indoctrination,” “requires participation in religious ritual,” or “encourages the preference of one religion over another.” *Id.*, 44 So. 3d at 120.

Plaintiffs have challenged both the ballot title and the ballot summary as misleading. But the ballot title, “Religious Freedom,” simply identifies and mirrors the section of the Florida Constitution being amended. Plaintiffs also contend that the ballot summary is misleading because the Amendment’s “true” intent is to *mandate* that funds be provided to religious organizations. This argument entirely misses the point of the Amendment. State funds are *currently* funding many necessary programs provided by religious and faith-based groups. Instead of mandating that funds be provided to religious groups, the Amendment provides that the government cannot “deny to any individual or entity the benefits of any program, funding, or other support on the basis of religious identity or belief.” Thus, the Amendment is a non-discrimination provision, not a mandatory funding provision; the government need not fund any programs at all, but if it chooses to fund a program, it cannot discriminate against providers based on religion. And Plaintiffs’ allegation that the Amendment “fosters governmental interference with the internal affairs of religious institutions” is unfounded. Indeed, in light of *Bush II* and *Counsel for Secular Humanism*, it is far more likely that the current no-aid provision will lead to unnecessary government entanglement because the government must decide whether an organization is “too religious” to receive funding.

If approved by the voters in November 2012, the proposed Amendment will protect existing and future legislatively enacted programs vulnerable to court challenges. Indeed, Plaintiffs do not deny that the ballot statement accurately discloses that the Amendment will repeal Florida's no-aid provision. The Amendment would replace the ban with a new provision prohibiting discrimination, preventing government agencies from denying "the benefits of any program, funding or other support on the basis of religious identity or belief." Putting the Amendment before Florida voters is a critical step toward protecting religious freedom and safeguarding health, education, and social service programs in which Floridians benefit through the participation of faith-based providers.

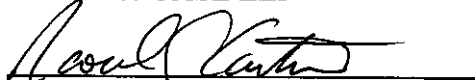
CONCLUSION

The Conference supports the Amendment's placement on the November 2012 general ballot so that Florida citizens may vote on repeal of the no-aid language and also the inclusion of the additional non-discrimination language in article I, section 3, of the Florida Constitution.

Dated: October 7, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that on October, 7, 2011, a copy of this brief was served via email and U.S.

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