**IN THE DISTRICT COURT OF APPEAL OF FLORIDA**
**FIRST DISTRICT**

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| JOANNE McCALL *et al.*,<br>Plaintiffs-Appellants,<br>v.<br>RICK SCOTT, Governor of Florida, in his official capacity as the head of the Florida Department of Revenue, *et al.*,<br>Defendants/Intervenor Appellees. | Case No. 1D15-2752<br>L.T. Case No. 2014-CA-002282 |

# RESPONSE BRIEF OF INTERVENOR APPELLEES

*On Appeal from the Circuit Court of the Second Judicial Circuit, Leon County*


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## STATEMENT OF FACTS

The Florida Tax Credit Scholarship Program ("Tax Credit Scholarship Program" or "Program") aims to "[e]nable taxpayers to make private, voluntary contributions to nonprofit scholarship-funding organizations." § 1002.395(1)(b)(1), Fla. Stat. It therefore allows Florida taxpayers to apply for tax credits that correspond to their donations to scholarship-funding organizations. § 1002.395(5)(b), Fla. Stat. The Department of Revenue approves such applications on a "first-come, first-served basis" before reaching an overall tax credit cap. § 1002.395(5)(b)(1), Fla. Stat.

Eligible nonprofit scholarship-funding organizations include: (1) state universities; (2) private colleges and universities that participate in the William L. Boyd IV Florida Resident Access Grant Program; and (3) charitable 501(c)(3) organizations that provide scholarships for qualified students to attend private schools providing K-12 education. § 1002.395(2)(f), Fla. Stat. Students qualify for scholarships if they appear on the "direct certification list" compiled by the Department of Children and Families—a certified list of children qualifying for the food assistance program, the Temporary Assistance to Needy Families Program, or the Food Distribution Program on Indian Reservations—or if their families have annual incomes below 185% of the federal poverty level. § 1002.395(3)(c), Fla. Stat.

An earlier scholarship program that aimed to provide tuition assistance, the Florida Opportunity Scholarship Program ("OSP"), was invalidated by the Florida Supreme Court because it allowed children "to receive a ***publicly funded*** education through an alternative system of private schools." *Bush v. Holmes*, 919 So. 2d 392, 412 (Fla. 2006) (emphasis added). The Court concluded that the Florida Constitution "does not allow ***the use of state monies*** to fund a private school education." *Id.* at 413 (emphasis added). The Court was careful to emphasize that its decision "does not deny parents recourse to either public or private school alternatives" but that such choice is limited only "when the private school option depends upon ***public funding***." *Id.* at 412 (emphasis added).

Appellants insist that the Tax Credit Scholarship Program is "the successor program to the Opportunity Scholarship Program." Appellants' Br. 1. That is incorrect. When the Legislature enacted the Tax Credit Scholarship Program in early 2001, this Court had recently *upheld* the OSP against a constitutional challenge, concluding that the circuit court erroneously struck it down. *See Bush v. Holmes*, 767 So. 2d 668, 677 (Fla. 1st DCA 2000) ("[W]e hold that the trial court erred in finding the OSP facially unconstitutional under article IX, section 1."). The Legislature expected that both programs would serve Florida's schoolchildren; it did not intend the Tax Credit Scholarship Program to replace the OSP but to operate alongside it.

Under the OSP, scholarship funds were drawn "from each school district's appropriated funds." *Holmes*, 919 So. 2d at 402. Under the Tax Credit Scholarship Program, by contrast, the State pays no money out of the state treasury to any private school. Vol. I, p. 24 ¶ 50. Instead, Floridians may make private, voluntary contributions—creditable up to a cap against certain taxes—to private nonprofit organizations that award scholarships to needy children, whose parents choose the schools their children will attend. §§ 1002.395(5), 1002.395(7)(a), Fla. Stat. The State makes no appropriation in connection with the Program. Because all scholarship funds result from private contributions, the Tax Credit Scholarship Program accommodates the restrictions on "the state's use of public funds" identified by the Florida Supreme Court. *Holmes*, 919 So. 2d at 410. It also responds to the objection of each Appellant to having his or her tax dollars "support religious instruction in faiths to which he does not subscribe." Vol. I, p. 14 ¶ 10. Appellants can be certain that *none* of their tax dollars support religious instruction because no tax dollars are appropriated to private schools.

The Tax Credit Scholarship Program ensures that the only persons whose dollars end up supporting education at a religious institution are those who have voluntarily chosen to contribute to a scholarship-funding organization. In this way, the Program furthers the State's interest in "expanding educational opportunities for children of families that have limited financial resources," § 1002.395(1)(b)(3),

Fla. Stat., while respecting constitutional limitations on the use of public funds. Florida is one of fifteen states that balance these concerns by providing tax credits for private contributions to scholarship-funding organizations. The other states are Alabama, Arizona, Georgia, Indiana, Iowa, Kansas, Louisiana, Nevada, New Hampshire, Oklahoma, Pennsylvania, Rhode Island, South Carolina, and Virginia.[1] The earliest of these states' programs was enacted in 1997. Despite constitutional challenges such as Appellants make here, no tax credit scholarship program has ultimately been held unconstitutional in the state or federal courts.

## STATEMENT OF THE CASE

Appellants, along with other plaintiffs that have since left this action, challenged the Tax Credit Scholarship Program as a violation of article I, section 3 (the "no-aid provision") and of article IX, section 1 (the "uniform-public-schools

[1] *See* Ala. Code § 16-6D-9 (Alabama Tax Credits for Scholarship-Granting Organizations); Ariz. Rev. Stat. § 43-1089 (Arizona Tuition Tax Credit Program); Ga. Code § 48-7-29.16 (Georgia Tax Credit for Qualified Education Expenses); Ind. Code § 6-3.1-30.5-7 (Indiana School Scholarship Tax Credit); Iowa Code § 422.11S (Iowa School Tuition Organization Tax Credit); Kan. Stat. § 72-99a07 (Kansas Tax Credit for Low Income Students Scholarship Program); La. Stat. § 47:6301 (Louisiana Tuition Donation Rebate Program); 2015 Nev. Laws Ch. 22 § 4 (Nevada Educational Choice Scholarship Program); N.H. Rev. Stat. § 77-G:3 (New Hampshire Education Tax Credit Program); 68 Okla. Stat. § 2357.206 (Oklahoma Equal Opportunity Education Scholarships); 72 Pa. Stat. § 8705-F (Pennsylvania Educational Improvement and Opportunity Scholarship Tax Credits); 44 R.I. Gen. Laws § 44-62-1 (Rhode Island Tax Credit for Contributions to a Scholarship Organization); S.C. State Budget Proviso 1.80, 2014 WL 8584494, at *6 (South Carolina Educational Credit for Exceptional Needs Children); Va. Code § 58.1-439.26 (Virginia Education Improvement Scholarships Tax Credits).

provision") of the Florida Constitution. Vol. I, pp. 11-30. The action was initially brought against state officials and two state agencies (the "State Appellees"). Parents of children who attend school on tax credit scholarships (the "Intervenor Appellees") were granted the right to intervene in the case with full party status in order to defend the Program. Vol. I, pp. 76-153; Vol. II, pp. 266-68. The State Appellees and Intervenor Appellees moved to dismiss the complaint because Appellants lacked taxpayer standing and had not alleged a special injury sufficient to support standing to challenge the Tax Credit Scholarship Program. Vol. I, pp. 174-93; Vol. II, pp. 269-319. Following a hearing, the circuit court granted those motions. Vol. II, pp. 355-58.

In holding that Appellants lacked taxpayer standing, the circuit court noted this Court's instruction that "[t]o withstand dismissal on standing grounds ... the challenge must be to legislative appropriations." *Council for Secular Humanism v. McNeil*, 44 So. 3d 112, 121 (Fla. 1st DCA 2010). It further observed that this Court has carefully distinguished between tax exemptions and credits, on the one hand, and appropriations from the treasury, on the other hand. *See Bush v. Holmes*, 886 So. 2d 340, 356 (Fla. 1st DCA 2004) (explaining that "such mechanisms as tax exemptions …. constitute substantially different forms of aid than the transfer of public funds"). Because the Program does not involve appropriations from the treasury, but only tax credits extended to private contributors, the circuit court

concluded that taxpayer standing was unavailable. Vol. II, p. 356 ¶ 5. In so holding, the circuit court reached the same conclusion as the U.S. Supreme Court when it decided that taxpayer standing was unavailable to challenge Arizona's tax credit scholarship program. *See Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1447 (2011) ("The distinction between governmental expenditures and tax credits refutes respondents' assertion of standing.").

The circuit court also explained that Appellants' allegations of special injury, involving an alleged diminution of public school resources, rested on "speculation about whether a decrease in students will reduce public school costs and about how the legislature will respond to the decrease in students attending public schools." Vol. II, p. 357 ¶ 6 (quoting *Duncan v. State*, 102 A.3d 913, 927 (N.H. 2014)). The circuit court concluded that it did not need to defer to Appellants' speculative and conclusory allegations that some Appellants have been "injured" by the Tax Credit Scholarship Program. Vol. II, p. 357 ¶ 7.

## SUMMARY OF ARGUMENT

The circuit court correctly decided that Appellants lack special-injury standing. Unlike the OSP, which "transfer[red] tax money earmarked for public education to private schools," *Holmes*, 919 So. 2d at 408, the Tax Credit Scholarship Program does not draw on tax dollars or any source of public funds. The tax credit signals the State's decision *not* to exercise its taxing power over the

credited funds and *not* to allocate those funds to any public purpose. Accordingly, there is no "diversion" of public funds to which the public schools would otherwise be entitled. Appellants cannot establish a special injury by claiming that the public schools are entitled to untaxed, unappropriated, private funds.

Even if Appellants could make such a claim, they have not sufficiently alleged that the public schools have suffered a financial hardship as a result of the Program. Appellants' speculative and conclusory allegations fail to account for additional appropriations to the public school system or for the cost savings related to the Program. These factors make implausible the allegation that the public system has suffered financial harm as a result of the Program. And even if it had, Appellants have not shown how this alleged harm is a particularized injury that is personal to them.

The circuit court was also correct that Appellants lack taxpayer standing. As this Court has squarely held, taxpayer standing is available only where a plaintiff challenges appropriations. *Secular Humanism*, 44 So. 3d at 121 ("To withstand dismissal on standing grounds ... the challenge must be to legislative appropriations."). That holding follows directly from the rationale articulated by the Florida Supreme Court when it recognized a limited exception to the special-injury requirement for taxpayer suits. Courts will entertain such suits only where the taxpayer's money is being extracted and spent by the government for allegedly

unconstitutional purposes. Because the Program does not compel taxpayers to support sectarian institutions, but relies only on voluntary contributions, taxpayer standing is unavailable.

This Court previously recognized this distinction. In the case of an appropriation benefiting sectarian schools, "the state forcibly diverts the income of both believers and nonbelievers to churches." *Holmes,* 886 So. 2d at 356. That forcible diversion harms taxpayers who object to having their tax dollars spent on sectarian activities and justifies taxpayer standing. In the case of a tax credit, by contrast, "the state merely refrains from diverting to its own uses income independently generated … through voluntary contributions." *Id.* All Program funds that may ultimately support sectarian activities come from voluntary, private contributions. Because no taxpayer's income is forcibly diverted to private or sectarian purposes, no taxpayer is harmed and taxpayer standing is unavailable.

Appellants attempt to sidestep the actual prohibitions contained in the Florida Constitution that are the subject of their complaint—neither of which limit the Legislature's authority to provide tax credits for voluntary, private contributions made to nonprofit scholarship funding organizations because both provisions restrict only the appropriation of public funds. Taxpayer standing is available only "if the taxpayer can show that a government taxing measure or expenditure violates ***specific constitutional limitations*** on the taxing and spending

power." *Alachua Cnty. v. Scharps*, 855 So. 2d 195, 198 (Fla. 1st DCA 2003) (emphasis added). Thus, neither the no-aid provision nor the uniform-public-schools provision can serve as the predicate for taxpayer standing in a challenge to the Tax Credit Scholarship Program.

## ARGUMENT

### I. APPELLANTS HAVE NOT ALLEGED A SPECIAL INJURY FROM THE TAX CREDIT SCHOLARSHIP PROGRAM SUFFICIENT TO CONFER STANDING.

***Standard of Review*:** Intervenor Appellees agree that this Court will review *de novo* the circuit court's order dismissing Appellants' challenge to the Program for lack of standing. *Nevitt v. Bonomo*, 53 So. 3d 1078, 1081 (Fla. 1st DCA 2010) ("This court reviews *de novo* an order of dismissal for lack of standing.").

To avoid dismissal, Appellants "must allege a 'special injury' which differs in kind and degree from that sustained by other members of the community at large." *Secular Humanism*, 44 So. 3d at 121. Appellants contend that the complaint alleges a special injury by asserting that the Tax Credit Scholarship Program creates a "diversion" of monies "away from the public education system" that "will have a harmful effect on the public schools." Appellants' Br. 10.[2] That allegation is

[2] Before this Court, Appellants assert that they "never claimed to rely upon a single paragraph for their allegations of injury." Appellants' Br. 10 n.3. Yet at oral argument before the circuit court, Appellants stated: "[W]e don't think we need to amend in any way at all. We think what we have said here in the second sentence of paragraph 19 is fully sufficient to allege that some [Appellants] have been

insufficient for three reasons. First, as a matter of law, the Program causes no "diversion" of public monies. Second, Appellants have not alleged that the public school system has suffered financial harm because of the Program other than in a manner that is speculative and conclusory. Third, Appellants have not alleged a personal "special injury" that is not shared by the public at large.

### A. The Tax Credit Scholarship Program Does Not Divert Public Monies From Public Schools.

The complaint alleges that Appellants are suffering a special injury because of a "diversion" of resources from the public schools. Vol. I, p. 16 ¶ 19. Appellants use the term "diversion" to imply that the Program redirects funds to which the public schools would otherwise be entitled. Yet that claim is contrary to law. All funds that ultimately flow to private schools as part of the Tax Credit Scholarship Program come from private contributions. *See* § 1002.395(1)(b)(1), Fla. Stat. (providing for "private, voluntary contributions to nonprofit scholarship-funding organizations"). No funds come out of the state treasury, let alone from an allotment to which the public schools would otherwise be entitled. *See* § 1002.395(2)(e), (6)(d), Fla. Stat. (providing that scholarships are payable exclusively from "eligible contributions" or "a monetary contribution from a taxpayer").

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directly injured because of the loss of funding caused directly by the scholarship program." S.R. 50:23-51:7.

In *Bush v. Holmes*, the Florida Supreme Court invalidated the OSP because it "transfers tax money earmarked for public education to private schools," 919 So. 2d at 408, and thereby "diverts public dollars into separate private systems," *id.* at 398. This case involves no such diversion of public funds but only the State's decision *not* to tax private funds and to leave those funds in private hands. That visits no special injury on Appellants or the public schools because neither Appellants nor the schools have any "right," "interest," or other entitlement to unappropriated, untaxed, private funds. *Dep't of Revenue v. Markham*, 396 So. 2d 1120, 1122 (Fla. 1981) (holding "some immunity, power, privilege or right of the complaining party" must be at stake to establish standing).

The tax credit signals the State's decision *not* to exercise its taxing power over the credited funds and *not* to allocate those funds to any public purpose. Appellants' argument ignores the difference between a legislative decision to leave private funds untaxed (i.e., a tax credit) and a legislative decision to appropriate public funds (i.e., an expenditure). This Court has recognized the crucial difference between tax exemptions and public expenditures. In *Bush v. Holmes*, this Court explained that "a property tax exemption" extended to a religious organization was constitutionally permissible because it "did not involve a disbursement from the public treasury." *Holmes*, 886 So. 2d at 355-56. This Court emphasized that "assistance to a religious institution through such mechanisms as tax exemptions"

constitutes "substantially different forms of aid than the transfer of public funds." *Id.* at 356. In this way, this Court recognized that whereas the public schools may have a legal entitlement to appropriated public funds, that entitlement does not extend to untaxed private funds.

The Florida Supreme Court reached the same conclusion in *Bush v. Holmes*, which held that public education suffers harm only where the State "diverts ***public dollars***" that are earmarked for public education. *Holmes*, 919 So. 2d at 398 (emphasis added). Thus, Appellants' reliance on *Bush v. Holmes* is misplaced. In that case, the Florida Supreme Court explicitly limited its analysis to the "diversion of ***public funds*** to private schools." *Id.* at 409 (emphasis added). Because the Program does not draw on public education dollars but on private contributions, there is no "diversion" of public funds to which the public schools are entitled.

As other courts have recognized, this distinction between a tax credit and appropriated public funds means that a plaintiff lacks standing to challenge tax credits:

> [A] tax credit expresses the legislature's wish to declare a portion of the pool of taxable assets off-limits to its own power to collect taxes. Properly understood, this does not result in "less" money in the treasury because the legislature never wished it to be there in the first place. A tax credit is not a drain on the state's coffers; it closes the faucet that money flows through into the state treasury rather than opening the drain.

*Manzara v. State*, 343 S.W.3d 656, 660 (Mo. 2011); *see also id.* ("Lowering tax liability by such means does not move money out of the public treasury; it leaves it

in private hands."). The U.S. Supreme Court and the Arizona Supreme Court have reached the same conclusion specifically when evaluating a tax credit scholarship program: there is no "loss" of money to the public schools because the relevant funds remain in private hands; those funds support scholarships only as a result of the independent decisions of private contributors. *Winn*, 131 S. Ct. at 1448 ("Like contributions that lead to charitable tax deductions, contributions yielding STO tax credits are not owed to the State and, in fact, pass directly from taxpayers to private organizations."); *Kotterman v. Killian*, 972 P.2d 606, 618 (Ariz. 1999) ("[N]o money *ever* enters the state's control as a result of this tax credit.").[3]

Appellants' argument, by contrast, relies on the discredited premise that "because taxpayer money *could* enter the treasury if it were not excluded by way of the tax credit, the state effectively controls and exerts quasi-ownership over it." *Id.*; *see also Winn*, 131 S. Ct. at 1448 ("Respondents' contrary position assumes that income should be treated as if it were government property even if it has not come into the tax collector's hands. That premise finds no basis in standing jurisprudence. Private bank accounts cannot be equated with the ... State Treasury.").

Appellants insist that they have standing to ask this Court to order the

[3] Conversely, the Arizona Supreme Court has struck down a state-funded scholarship program for students with disabilities similar to Florida's McKay Scholarship Program. *See Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009) (en banc).

Legislature to tax income it has currently decided not to tax and to order the Legislature to appropriate the resulting tax revenue to public education. Not only do Appellants lack an entitlement to such relief; the Court even lacks the power to provide it. *See Coalition for Adequacy & Fairness v. Chiles*, 680 So. 2d 400, 407 (Fla. 1996) ("[A]ppropriations are textually and constitutionally committed to the legislature. Any judicial involvement would involve usurping the legislature's power to appropriate funds for education."). Thus, Appellants have failed not only to establish a special injury to "some immunity, power, privilege or right" but also to show that their alleged injury is redressable. *See Sosa v. Safeway Premium Fin. Co.*, 73 So. 3d 91, 101 (Fla. 2011) (noting that standing requires "a redressable injury suitable for adjudication"). In these circumstances, Appellants' "remedy should be at the polls and not in the courts." *Markham*, 396 So. 2d at 1122.

### B. The Tax Credit Scholarship Program Has Not Reduced Funding For Public Schools Or Undermined Educational Quality.

Even if Appellants *could* establish a special injury based on their alleged entitlement to untaxed, unappropriated funds, they still would lack standing because Appellants fail to offer plausible allegations that the Program has caused a reduction in funding for the public schools or otherwise "undermined" those schools. Appellants argue that because public schools receive funding on a per-student basis, the mere fact that the Program enables students to attend private schools "necessarily entails ... reductions in public-school funding." Appellants'

Br. 10. Appellants' reliance on this simplistic argument fails to account for (1) increases in appropriations to the public schools by the Legislature and (2) cost savings generated by the Program that offset losses of per-student funding.

The Legislature decides how much to appropriate to the public schools on an annual basis, and it makes that determination in full awareness of changes in the student population—which shifts for many reasons besides the Tax Credit Scholarship Program (e.g., graduation and relocation). There is nothing about the Program that "necessarily" results in reduced public-school funding because the Legislature has discretion to increase or reduce that funding as circumstances warrant. *See* S.R. 6:23-7:4. For example, Appellants insist that the decisions of parents to send some 59,000 students to private schools in the 2013-2014 school year "resulted in hundreds of millions of dollars in reduced funding for the public schools." Appellants' Br. 11. Yet Appellants ignore additional legislative appropriations to the public schools. In 2013-2014, the Legislature appropriated an additional $1.05 billion to public schools as part of the Florida Education Finance Program, including a 6.3% increase in per-student funding.[4] That appropriation precludes the conclusion that the public schools suffered overall losses.

Appellants' allegations that they have been or will be harmed by a loss of

[4] Final Conference Report on S.B. 1500, Fla. Leg., at 7 (Apr. 29, 2013), *available at* http://www.fldoe.org/core/fileparse.php/7507/urlt/0076974-20-13firstcalc.pdf; *see also* S.R. 23:20-24; 75:17-18; 78:16-19.

public-school funds rely on speculative assumptions—in this case, assumptions contrary to fact—about how the Legislature will react to changes in the student population and how overall cost savings from the Tax Credit Scholarship Program will affect the education budget. The circuit court correctly concluded that these allegations of special injury are too speculative to survive dismissal. *See State v. Florida Consumer Action Network*, 830 So. 2d 148, 152 (Fla. 1st DCA 2002) (noting that a complaint may not rely on "speculative fear of harm that may possibly occur"); *see also Santa Rosa Cnty. v. Admin. Comm'n*, 661 So. 2d 1190, 1193 (Fla. 1995) (noting that declaratory relief is unavailable for "merely the *possibility* of legal injury" based on "contingent" or "uncertain" events).

Appellants argue that the circuit court improperly relied on *Duncan v. State*, 102 A.3d 913 (N.H. 2014), in reaching this conclusion. But the circumstances of that case are almost identical to the circumstances here. Like Appellants here, the plaintiffs in New Hampshire attempted to establish standing to challenge that state's tax credit scholarship program on the ground that the program would "harm certain [plaintiffs] who have children in or teach in the public schools by taking state funding away from the public schools." *Duncan*, 102 A.3d at 926. The New Hampshire Supreme Court held that the plaintiffs lacked standing because their claim of injury rested on impermissible speculation:

> [T]he purported injury asserted here—the loss of money to local school districts—is necessarily speculative. Even if the tax credits result in a

> decrease in the number of students attending local public schools, it is unclear whether, as the petitioners allege, local governments will experience "net fiscal losses." The prospect that this will occur requires speculation about whether a decrease in students will reduce public school costs and about how the legislature will respond to the decrease in students attending public schools, assuming that occurs.

*Id.* at 926-27 (internal citation omitted). The same logic applies to this case.

Indeed, Appellants similarly ignore "whether a decrease in students will reduce public school costs." *Id.* at 927. As the U.S. Supreme Court explained in *Winn,* the potential cost savings is another reason why an alleged reduction in public-school funding is too speculative an injury to confer standing: "By helping students obtain scholarships to private schools, both religious and secular, the STO program might relieve the burden placed on Arizona's public schools. The result could be an immediate and permanent cost savings for the State." *Winn*, 131 S. Ct. at 1444. Appellants insist that the U.S. Supreme Court's decision in *Winn* is "entirely off point." Appellants' Br. 12. Yet that case provides further support for the circuit court's conclusion that allegations of financial harm resulting from a tax credit scholarship program are too speculative to confer standing. It could not be more precisely on point.

In this case, the mechanism for such savings is apparent. First, the cost of each scholarship is substantially less than the state spends per-student in the public system. The amount of each scholarship is capped at 82% of state per-student education funding. § 1002.395(12), Fla. Stat. The statutory cap provides a

guaranteed minimum cost savings to the State for each student who participates in the Tax Credit Scholarship Program. Second, even though school funding is based on a per-student allotment in Florida, districts are required to spend only 80% of each allotment at the school the student attends. § 1011.69(2), Fla. Stat. As a result, there are variations in per-student *expenses*. To the extent that Florida's most challenging students enroll in the Tax Credit Scholarship Program, they are educated at a lower cost and the Program increases the per-student funding in the public system for remaining students. *See* S.R. 23:16-20.

Given these factors, it is simply not plausible for Appellants to assert that 77,000 students participating in the Tax Credit Scholarship Program results in an overall financial harm to the public schools—much less that such harm is "the natural and intended result of the program's operation." Appellants' Br. 10. That assertion not only relies on "unjustifiable economic and political speculation," *Winn*, 131 S. Ct. at 1443, but also ignores the realities of the Program and the actions of the Legislature.

### C. Appellants Have Not Alleged A Personal Injury.

Even if Appellants could sufficiently allege that the Program results in an overall reduction in funds for school districts—and they have not—they would still need to show how such a reduction has caused a "special injury" that is personal to each Appellant. Appellants must allege a "concrete and particularized injury in fact

which must affect the plaintiff in a personal and individual way," *Save Homosassa River Alliance, Inc. v. Citrus Cnty.*, 2 So. 3d 329, 344 (Fla. 5th DCA 2008) (quotation marks omitted), that is "different in degree and kind from that suffered by the community at large," *U.S. Steel Corp. v. Save Sand Key*, 303 So. 2d 9, 12 (Fla. 1974).

As Appellants note, Appellants' Br. 9, parents and students have an interest in educational quality. *See Coalition for Adequacy*, 680 So. 2d at 403 n.4 (noting that students may allege "a continuing injury as a result of being denied an adequate education"). A single Appellant, Joanne McCall, claims to be a parent of a public-school student, but this alone is insufficient as a foundation for special injury. Vol. I, p. 13 ¶ 7. She has not alleged that the education that her child receives is inadequate, much less that it is inadequate because of the Tax Credit Scholarship Program. The complaint alleges that additional "members of the plaintiff organizations" have children attending public schools also without claiming that they are inadequately educated because of the Tax Credit Scholarship Program. Vol. I, p. 16 ¶ 19. The conclusory allegation that such parties are "injured," without specifying the nature of the injury, does not suffice to overcome a motion to dismiss. *W.R. Townsend Contracting v. Jensen Civil Const.*, 728 So. 2d 297, 300 (Fla. 1st DCA 1999). The circuit court was right to conclude as much. Vol. II, p. 364 ¶ 7.

Other Appellants—the Florida Education Association and the Florida Congress of Parents and Teachers Inc.—are associations of school employees. Vol. I, p. 15 ¶¶ 13, 15. But these Appellants likewise have not alleged any personal injuries as a result of the Program. At most, these Appellants have alleged that as parents or teachers they are especially interested in public-education issues. But this special interest, without a personal injury, does not confer standing. The New Hampshire Supreme Court rejected precisely this reasoning: "Although some of the petitioners have school-aged children or are public school teachers, at best, this establishes that those petitioners have a special interest in education. Such a special interest, alone, does not constitute a 'definite and concrete' injury sufficient to confer standing." *Duncan*, 102 A.3d at 926; *see also ASARCO Inc. v. Kadish*, 490 U.S. 605, 616 (1989) ("Although the members of the teachers association might argue that they have a special interest in the quality of education in Arizona, such a special interest does not alone confer federal standing."); *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (holding that a "special interest" in the subject-matter of the litigation is insufficient to establish standing absent personal injury).

Several Appellants—such as Sen. Geraldine Thompson, Rabbi Merrill Shapiro, Rev. Harry Parrott Jr., Rev. Harold Brockus, the League of Women Voters of Florida Inc., and Florida State Conference of Branches of NAACP—do not allege that they are parents or teachers and allege nothing more than a

generalized interest in high-quality and nonsectarian, publicly financed education. Vol. I, pp. 13-16 ¶¶ 8, 10-12, 17-18. In other words, these Appellants assert no more than "the generalized interest of all citizens in constitutional governance." *Schlesinger v. Reservists Comm.*, 418 U.S. 208, 217 (1974). That is insufficient for standing.

Instead of alleging particularized personal harms, Appellants rely on the vague allegation that the public schools have been or will be "undermine[d]" by the Program. Appellants' Br. 11. Appellants argue this allegation is sufficient because the Florida Supreme Court in *Holmes* held that the OSP "undermines the system of 'high quality' free public schools." 919 So. 2d at 409. Yet that language was part of the Court's ruling on the merits. The Court in *Holmes* did not even address standing, much less did it hold that a general "undermining" of the public schools constitutes a special injury for all parents, teachers, and administrators in the district. Moreover, Appellants do not and cannot allege the sort of "undermining" the Court described in *Holmes*. The *Holmes* Court explained that the OSP undermined the public system by transferring "tax money earmarked for public education" away from public schools that "failed to meet the Legislature's standards for a 'high quality education.'" *Holmes*, 919 So. 2d at 408-09 & n.12. None of that applies here. Accordingly, the circuit court properly held that Appellants did not adequately allege a specific injury sufficient to confer standing.

## II. APPELLANTS LACK TAXPAYER STANDING.

***Standard of Review*:** As previously noted, the standard of review is *de novo*. *Nevitt*, 53 So. 3d at 1081.

### A. Taxpayer Standing Is Available Only For Challenges To Appropriations.

In *Rickman v. Whitehurst*, "the Florida Supreme Court construed the right of citizen-taxpayers to sue the state by requiring that, when challenging government policy or actions, a taxpayer must allege a 'special injury' which differs in kind and degree from that sustained by other members of the community at large." *Secular Humanism*, 44 So. 3d at 121 (describing *Rickman v. Whitehurst*, 74 So. 205, 207 (Fla. 1917)). The Florida Supreme Court has recognized a limited exception to the *Rickman* rule against taxpayer standing for cases in which a plaintiff alleges that a legislative exercise of the taxing and spending power "is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power." *Dep't of Admin. v. Horne*, 269 So. 2d 659, 663 (Fla. 1972) (quoting *Flast v. Cohen*, 392 U.S. 83, 106 (1968)). "To withstand dismissal on standing grounds, however, ***the challenge must be to legislative appropriations***." *Secular Humanism*, 44 So. 3d at 121 (emphasis added). As this Court has emphasized, "[t]his is a narrow exception which applies ***only to constitutional challenges to appropriations***; a plaintiff does not have standing to challenge other actions of the government simply by establishing his or her status

as a taxpayer." *Id.* (quoting Philip J. Padovano, Florida Civil Practice § 4.3 (2009 ed.)) (emphasis added).

This Court meant what it said in *Secular Humanism*. Taxpayer standing is limited to cases in which a plaintiff challenges appropriations—that is, cases in which the government taxes the citizen and then spends the resulting public funds for an allegedly unconstitutional purpose. The limitation of the *Horne* exception to appropriations follows directly from the rationale for the exception. In recognizing the *Horne* exception, the Florida Supreme Court adopted the reasoning of the U.S. Supreme Court in *Flast v. Cohen*. *See Horne*, 269 So. 2d at 663 ("We choose to follow the United States Supreme Court (*Flast*)."); *Paul v. Blake*, 376 So. 2d 256, 259 (Fla. 3d DCA 1979) (noting that *Horne* "adopt[ed] as the law of Florida, *Flast v. Cohen*").

In *Flast*, the U.S. Supreme Court held that a taxpayer-plaintiff could be deemed to suffer a particularized injury for standing purposes when, in violation of the Establishment Clause, his property is transferred through the government treasury to a sectarian institution. "The taxpayer's allegation in such cases would be that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power." *Flast*, 392 U.S. at 106. The Court concluded that "[s]uch an injury is appropriate for judicial redress" because it represents harm to the taxpayer rather than "generalized

grievances about the conduct of government." *Id.*

Thus, when the Legislature unconstitutionally appropriates money to sectarian institutions, it has caused "taxpayer injury" because the taxpayer's money is being extracted and spent on religious activities in violation of the taxpayer's rights of conscience.[5] Yet where the Legislature does not appropriate funds from the treasury but merely declines to tax private, voluntary contributions, this taxpayer injury is not present. No taxpayer's money is "extracted and spent" on sectarian activities. The U.S. Supreme Court has explicitly held that where a plaintiff challenges a tax credit rather than appropriation, taxpayer injury is *not* present and therefore the *Flast* exception does *not* apply:

> [T]ax credits and governmental expenditures do not both implicate individual taxpayers in sectarian activities. A dissenter whose tax dollars are "extracted and spent" knows that he has in some small measure been made to contribute to an establishment in violation of conscience. ... When the government declines to impose a tax, by contrast, there is no such connection between dissenting taxpayer and alleged establishment.

*Winn*, 131 S. Ct. at 1447 (holding that plaintiffs lack taxpayer standing to challenge tax credits for contributions to scholarship-funding organizations). The

[5] *See Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 497-98 (1982) ("The concept of taxpayer injury necessarily recognizes the continuing stake of the taxpayer in the disposition of the Treasury to which he has contributed his taxes, and his right to have those funds put to lawful uses."); *see also Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 643 (2007) (Souter, J., dissenting) ("*Flast* speaks for this Court's recognition (shared by a majority of the Court today) that when the Government spends money for religious purposes a taxpayer's injury is serious and concrete enough to be 'judicially cognizable.'").

taxpayer in *Flast* could be certain that his tax dollars, to some small extent, were being used to finance sectarian activities. But where, as here, the State provides tax credits to taxpayers who choose to contribute to scholarship-funding organizations, no taxpayer contributes to sectarian activities unless he or she has freely chosen to do so. *See id.* ("When Arizona taxpayers choose to contribute to STOs, they spend their own money, not money the State has collected from respondents or from other taxpayers. ... The STO tax credit is not tantamount to a religious tax or to a tithe and does not visit the injury identified in *Flast*."). For that reason, the Supreme Court has held that taxpayers challenging a tax credit scholarship program do not qualify for the *Flast* exception and lack standing to maintain their suit. *Id.* ("Finding standing under these circumstances .... would be a departure from *Flast*'s stated rationale.").

The same result applies in this case, as the circuit court correctly decided. Appellants do not challenge the State's taxing and spending of public funds for allegedly unconstitutional purposes. It is undisputed that the Tax Credit Scholarship Program involves no legislative appropriation to any private school. *See* Vol. I, p. 24 ¶ 50. Rather, the Legislature has chosen *not* to tax private, voluntary contributions to scholarship-funding organizations. In other words, the Legislature has *declined* to exercise its taxing power, just as it has with respect to numerous other credits, deductions, exclusions, and exemptions under Florida law.

The *Horne* exception does not confer standing on all taxpayers to challenge the Legislature's various decisions *not* to tax certain expenditures or to credit certain expenditures against tax payments owed. Because tax credits do not injure taxpayers by extracting and spending their tax dollars on sectarian activities, the *Horne* exception does not apply and taxpayer standing is not available.

Appellants nevertheless insist, contrary to the plain language in *Horne*, that the *Horne* exception somehow extends beyond the logic of *Flast* to encompass challenges to tax credits as well as appropriations. Appellants' Br. 14-15. The Florida Supreme Court, however, has never said that the *Horne* exception extends beyond *Flast* to encompass challenges to dozens of tax credit programs.[6] Instead, the Court was clear in *Horne* that it was adopting *Flast* as the law of Florida. *Horne*, 269 So. 2d at 663 ("We choose to follow the United States Supreme Court (*Flast*)."). Indeed, the very words on which Appellants rely—"exercise of the taxing and spending power"—were quoted verbatim from *Flast*. *Horne*, 269 So. 2d at 663 (quoting *Flast*, 392 U.S. at 106).

In subsequent decisions, the Florida Supreme Court has been clear that the *Horne* exception has not expanded beyond its initial *Flast* rationale. *N. Broward Hosp. Dist. v. Fornes*, 476 So. 2d 154, 156 (Fla. 1985) ("This Court has refused to

[6] The Florida Legislature has enacted at least 32 tax credit programs, which would all be subject to taxpayer lawsuits under Appellants' view. *See* Vol. II, p. 290 n.8.

depart from the special injury rule or expand our exception established in *Horne*."); *Alachua Cnty.*, 855 So. 2d at 198 ("The supreme court refused to depart from this special injury rule or expand this exception."). For that reason, Florida law provides no justification for expanding the *Horne* exception beyond the *Flast* rationale that allows taxpayer standing to challenge legislative appropriations but not tax credits or exemptions. *See Winn*, 131 S. Ct. at 1447 (holding that expanding taxpayer standing to challenge tax credits "would be a departure from *Flast*'s stated rationale").

As if that were not enough, this Court has also distinguished between appropriations and exemptions in this context. This Court has held that exemptions from taxation do not cause the taxpayer injury identified by *Horne* and *Flast* because "[i]n the case of direct subsidy, the state forcibly diverts the income of both believers and nonbelievers to churches. In the case of an exemption, the state merely refrains from diverting to its own uses income independently generated by the churches through voluntary contributions." *Holmes*, 886 So. 2d at 356. Because tax exemptions do not "forcibly divert[]" the income of taxpayers to sectarian activities, tax exemptions cannot inflict the same taxpayer injury as do appropriations. It follows directly that taxpayer standing is available only for constitutional challenges to appropriations where such forcible diversion of taxpayer funds is alleged. *Secular Humanism*, 44 So. 3d at 121 ("To withstand

dismissal on standing grounds ... the challenge must be to legislative appropriations."); *see also* 55 FLA. JUR 2D *Taxpayers' Actions* § 8 (2015) ("Where there is no special injury, to withstand dismissal on standing grounds, the constitutional challenge must be to legislative appropriations."). Consequently, the circuit court properly dismissed Appellants' suit for lack of standing.

### 1. Tax Credits Are Not Appropriations.

Appellants nevertheless ask this Court to ignore what it said in *Holmes* about the difference between tax exemptions and legislative appropriations. Appellants suggest that the tax credits in this case should be treated as the equivalent of appropriations out of the state treasury because the credited funds *could* have been taxed and taken for the state treasury. *See* Appellants' Br. 15 (arguing that the Program "involves an exercise of the Legislature's *spending* power" because absent the tax credits funds "would be paid into the public fisc"). As the U.S. Supreme Court has explained, this argument "assumes that income should be treated as if it were government property even if it has not come into the tax collector's hands. That premise finds no basis in standing jurisprudence. Private bank accounts cannot be equated with the [Florida] State Treasury." *Winn*, 131 S. Ct. at 1448. The legal reality is that "contributions yielding STO tax credits are not owed to the State and, in fact, pass directly from taxpayers to private organizations." *Id.* In this way, no taxpayer is implicated in allegedly

unconstitutional conduct and therefore no taxpayer suffers an injury related to the taxing and spending power. Thus, this case falls outside the *Horne*/*Flast* exception.

Not only the U.S. Supreme Court but also state courts have consistently held that a tax credit is not equivalent to an appropriation as a matter of law. *See, e.g.*, *Manzara*, 343 S.W.3d at 664 (finding no taxpayer standing because "tax credits are not government expenditures"); *Kotterman*, 972 P.2d at 618 ("[N]o money *ever* enters the state's control as a result of this tax credit. Nothing is deposited in the state treasury or other accounts under the management or possession of governmental agencies or public officials. Thus, under any common understanding of the words, we are not here dealing with 'public money.'"); *Toney v. Bower*, 744 N.E.2d 351, 358 (Ill. App. Ct. 2001) ("[W]e reject plaintiffs' argument that a tax credit constitutes a public fund or an appropriation of public money."); *State Bldg. & Const. Trades Council v. Duncan*, 76 Cal. Rptr. 3d 507, 510-11 (Cal. Ct. App. 2008) ("Tax credits are, at best, intangible inducements offered from government, but they are not actual or de facto expenditures by government. As such, they do not qualify as ... the 'payment of ... the equivalent of money by the state.'"); *Griffith v. Bower*, 747 N.E.2d 423, 426 (Ill. App. Ct. 2001) ("The credit at issue here does not involve any appropriation or use of public funds. No money ever enters the state's control as a result of this tax credit."); *Olson v. State*, 742 N.W.2d 681, 685 (Minn. Ct. App. 2007) (denying "standing as taxpayers to challenge a tax

exemption" because "appellants are private citizens with no injury-in-fact and no evidence of an expenditure made as a result of the challenged statutes").

The Third District reached a similar conclusion in *Paul*, when taxpayers sought to enjoin the grant of certain property tax exemptions by Dade County. The court ruled that the plaintiffs had standing *not* because a tax exemption is an exercise of the spending power but because the exemptions in that case violated "sections of the Florida Constitution [that] specifically limit the authority of a county to grant tax exemptions." *Paul*, 376 So. 2d at 260 (citing Art. VII, §§ 3(a), 10(c)). No such specific limitation on the authority of the State to grant tax exemptions or credits applies here. Appellants' brief is misleading when it suggests that "Florida courts have recognized that taxpayers have standing to bring constitutional challenges" to tax credits and exemptions. Appellants' Br. 15. The only cases Appellants cite involve county governments, which are subject to specific limitations that do not apply to the State. *See also Charlotte Cty. Bd. v. Taylor*, 650 So. 2d 146, 147 (Fla. 2d DCA 1995) (applying Art. VIII, § 1(g), which "provides that counties operating under county charters shall have all powers of local self-government not inconsistent with general law"). No Florida court has held that tax exemptions or credits represent the exercise of the legislative spending power. To the contrary, this Court has distinguished between exemptions and actual spending. *Holmes*, 886 So. 2d at 356 ("[A]ssistance to a religious

institution through such mechanisms as tax exemptions .... constitute[s] substantially different forms of aid than the transfer of public funds."). In the context of aid to religious institutions, neither the Florida courts, nor the federal courts, nor other state courts equate tax credits with direct expenditures.

### 2. Appellants' Position Contradicts Well-Established Law Governing Tax Benefits.

The Arizona Supreme Court, in dismissing a challenge to that state's tax credit scholarship program, explained that equating tax credits with government expenditures would eliminate longstanding limitations on taxpayer standing. "[U]nder such reasoning all taxpayer income could be viewed as belonging to the state because it is subject to taxation by the legislature." *Kotterman*, 972 P.2d at 618. If courts embraced this reasoning, then when the State extends a tax credit, exemption, or deduction for charitable contributions, it could be deemed to have expended public funds on the underlying charities—including religious organizations—that individual taxpayers choose to support. Treating favorable tax treatment as the equivalent of public expenditures "directly contradicts the decades-long acceptance of tax deductions for charitable contributions, including donations made directly to churches, religiously-affiliated schools and institutions." *Kotterman*, 972 P.2d at 618.

Under Florida law, property used for religious purposes may be "fully exempt from taxation." § 196.011(4), Fla. Stat. Florida law also provides tax

deductions for charitable contributions, including to religious organizations. § 220.13(1)(b), Fla. Stat. According to Appellants' argument, taxpayer standing would be available to challenge these statutes—and the statutes would be presumptively unconstitutional—because these tax exemptions are the equivalent of legislative spending for religious purposes. In this way, Appellants' argument represents a dramatic expansion of the taxpayer standing doctrine and would fundamentally transform Florida tax policy. If a tax credit or deduction is the equivalent of an expenditure of public funds, then a charitable deduction for private donations to religious institutions would amount to an unconstitutional state subsidy of religion. This approach conflicts with longstanding practice and precedent approving charitable deductions and denying that tax credits are the equivalent of expenditures. As the U.S. Supreme Court put it over 40 years ago:

> The 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. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees 'on the public payroll.' There is no genuine nexus between tax exemption and establishment of religion.

*Walz v. Tax Comm'n*, 397 U.S. 664, 675 (1970); *see also Winn*, 131 S. Ct. at 144 ("[T]ax credits and governmental expenditures do not both implicate individual taxpayers in sectarian activities."). This is the distinction this Court embraced by distinguishing between tax exemptions and appropriations. *Holmes*, 886 So. 2d at 356 ("Tax exemptions and general subsidies, however, are qualitatively different.")

(quoting *Walz*, 397 U.S. at 690). This Court should decline Appellants' invitation to abandon that distinction. A tax credit is not the equivalent of a legislative appropriation for which taxpayer standing is available. The circuit court's ruling should be affirmed.

### B. *Council for Secular Humanism v. McNeil* Squarely Holds That Taxpayer Standing Is Limited To Challenges To Appropriations.

In *Council for Secular Humanism v. McNeil*, this Court held, with respect to taxpayer standing, that "[t]o withstand dismissal on standing grounds ... the challenge must be to legislative appropriations." *Secular Humanism*, 44 So. 3d at 121. As explained above, that holding was consistent with the Florida Supreme Court's reasoning in *Horne*, the U.S. Supreme Court's reasoning in *Flast* and *Winn*, and this Court's own reasoning in *Holmes* that "the payment of public funds" as distinct from tax exemptions involves "an especially problematic governmental involvement in religious institutions." *Holmes*, 886 So. 2d at 356. Yet Appellants nevertheless argue that this Court's statement in *Secular Humanism* was somehow inconsistent with the facts of *Secular Humanism* itself. Appellants' Br. 16-20. That argument is baseless.

In *Secular Humanism*, this Court determined that the petitioners had taxpayer standing to pursue Count I but not Count II. The Court explained that "petitioners have adequately alleged grounds for taxpayer standing in Count I to attack the constitutionality of sections 944.473 and 944.4731, since the state was

***using legislative appropriations*** allegedly to aid sectarian institutions. Such is not the case with Count II." *Secular Humanism*, 44 So. 3d at 122 (emphasis added). The crucial distinction between the two counts was that Count I challenged the use of legislative appropriations. *See id.* at 116 ("[A]ppellants allege that sections 944.473 and 944.4731 authorize the '***payment of funds from the public coffers***' to these 'sectarian institutions' in violation of Article I, section 3.") (emphasis added). In other words, Count I fell squarely within the scenario envisioned by the *Horne*/*Flast* exception in which taxpayer funds are "extracted and spent" on sectarian activities in violation of constitutional prohibitions. *Flast*, 392 U.S. at 106. Count II, by contrast, challenged "the performance of contracts and the decision of an executive agency to enter into a contract." *Secular Humanism*, 44 So. 3d at 122. Because that challenge was not directed at the use of appropriated funds, taxpayer standing was unavailable. *Id.* This Court's reasoning in *Secular Humanism* is fully consistent with—and, in fact, relies upon—the limitation of the *Horne*/*Flast* exception to appropriations.[7]

Appellants further argue that the limitation of taxpayer standing to

[7] Appellants argue that "the statutes challenged in Count I were not themselves 'legislative appropriations'—they simply authorized a state agency to enter into contracts with faith-based entities to provide substance-abuse services." Appellants' Br. 17. This argument seems purposefully obtuse. The statutes clearly authorized the expenditure of public funds. Accordingly, there is no question that by challenging those statutes the petitioners were challenging appropriations.

appropriations is somehow inconsistent with *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260 (Fla. 1991). Appellants' Br. 19. Yet in that case, the challengers alleged that "the legislature, in passing section 216.221, violated the doctrine of separation of powers by assigning to the executive branch the broad discretionary authority to ***reapportion*** the state budget" and, through that constitutional challenge, sought to enjoin the Administration Commission from "attempting to restructure the 1991 ***Appropriations Act*** pursuant to the budget reduction procedure established in chapter 216." *Chiles*, 589 So. 2d at 262-63 (emphases added). There is no question that the case involved a constitutional challenge to appropriations alleging an unlawful delegation of the legislative power "to appropriate funds." *Id.* at 265; *accord Jones v. Dep't of Revenue*, 523 So. 2d 1211 (Fla. 1st DCA 1988) (standing based on alleged unlawful delegation of legislative appropriation power). Standing was not contested. *Chiles*, 589 So. 2d at 263 n.5.

Finally, Appellants insist that the limitation of taxpayer standing to appropriations conflicts with two cases in which taxpayers challenged the authority of counties to grant tax exemptions. Appellants' Br. 20. Again, these cases are specific to the county context because "the Florida Constitution specifically limit[s] the authority of a county to grant tax exemptions." *Paul*, 376 So. 2d at 260. No such prohibition applies to the State, and therefore these cases provide no warrant for expanding taxpayer standing to sue the State. *See Alachua Cnty.*, 855

So. 2d at 198 ("[T]axpayer standing is available if the taxpayer can show that a government taxing measure or expenditure violates ***specific constitutional limitations*** on the taxing and spending power.") (emphasis added). The circuit court's ruling should be affirmed.

### C. The Circuit Court Did Not Improperly Conflate Standing With The Merits.

Appellants argue that the circuit court improperly conflated standing with the merits when it noted that this Court has carefully distinguished between tax exemptions and appropriations. Appellants' Br. 20. But there was nothing improper about the circuit court's reliance on this Court's precedent. The particular statement of the circuit court to which Appellants object reads as follows:

> The First District has carefully distinguished between tax exemptions and credits, on the one hand, and appropriations from the treasury, on the other. *Bush v. Holmes*, 886 So. 2d 340, 356 (Fla. 1st DCA 2004) (state government may provide "a form of assistance to a religious institution through such mechanisms as tax exemptions, revenue bonds, and similar state involvement" because "[t]hese forms of assistance constitute substantially different forms of aid than the transfer of public funds"); *id.* at 356-57 ("[I]n the case of direct subsidy, the state forcibly diverts the income of both believers and nonbelievers to churches," while "[i]n the case of an exemption, the state merely refrains from diverting to its own uses income independently generated by the churches through voluntary contributions.").

Vol. II, p. 363 ¶ 4. As argued above, this distinction is crucially relevant to the question of taxpayer standing because it demonstrates that the justification for taxpayer standing—that taxpayers see their funds "extracted and spent" for allegedly unconstitutional purposes—applies in the case of an appropriation but

not in the case of a tax credit. In fact, the U.S. Supreme Court drew the exact same distinction when it addressed the question of taxpayer standing in *Winn*:

> [T]ax credits and governmental expenditures do not both implicate individual taxpayers in sectarian activities. A dissenter whose tax dollars are "extracted and spent" knows that he has in some small measure been made to contribute to an establishment in violation of conscience. ... When the government declines to impose a tax, by contrast, there is no such connection between dissenting taxpayer and alleged establishment.

*Winn*, 131 S. Ct. at 1447. Thus, Appellants fault the circuit court for (1) following this Court's precedents and (2) adopting reasoning that parallels the U.S. Supreme Court on the same issue. Those are meritless objections.

Moreover, Appellants are wrong to insist that the scope of the prohibition under article I, section 3 is not relevant to the issue of taxpayer standing. In order to establish taxpayer standing, Appellants must show that the Tax Credit Scholarship Program violates a specific limitation in the Florida Constitution on the State's taxing and spending power. *See Alachua Cnty.*, 855 So. 2d at 198 ("[T]axpayer standing is available if the taxpayer can show that a government taxing measure or expenditure violates ***specific constitutional limitations*** on the taxing and spending power.") (emphasis added). Thus, because the Florida Constitution does not impose a specific limitation on the State's power to grant tax credits for charitable contributions, Appellants cannot establish taxpayer standing to maintain their suit against the statutes authorizing those credits.

### 1. The "No Aid" Provision Limits Only Appropriations.

Appellants rely on the no-aid provision of article I, section 3, but that provision restricts only the appropriation of public funds. Art. I, § 3, Fla. Const. ("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") (emphases added). The constitution means what it says: the restriction applies only to "revenue of the state" that is "taken from the public treasury." Because article I, section 3 does not limit the Legislature's authority to define tax credits, Appellants cannot rely on the no-aid provision as a predicate for taxpayer standing.

In *Bush v. Holmes*, this Court made clear that "the prohibitions of the no-aid provision are limited to the payment of public monies" because "the payment of public funds in aid of religious institutions involves an especially problematic governmental involvement in religious institutions." In addition, the Court specifically held that prior cases in which the "state government provided or allowed a form of assistance to a religious institution through such mechanisms as tax exemptions, revenue bonds, and similar state involvement" remained good law because "[t]hese forms of assistance constitute substantially different forms of aid than the transfer of public funds expressly prohibited by the no-aid provision." *Holmes*, 886 So. 2d at 356.

For example, in *Johnson v. Presbyterian Homes of Synod of Fla., Inc.*, 239 So. 2d 256 (Fla. 1970), the Florida Supreme Court upheld a statute granting property tax exemptions to nonprofit nursing homes, including sectarian institutions such as the Presbyterian Homes of the Synod of Florida. As this Court explained, the tax exemption granted to religious institutions was constitutionally permissible because it "did not involve a disbursement from the public treasury." *Holmes*, 886 So. 2d at 355-56. Thus, this Court held that article I, section 3 prohibits only expenditures from the treasury, not tax exemptions or other forms of aid that entail financial benefits.[8] This Court explained that "the no-aid provision focuses on ***the use of state funds*** to aid sectarian institutions, not on other types of support." *Holmes*, 886 So. 2d at 352 (emphasis added). In fact, the Court

[8] In other cases, the Florida Supreme Court has upheld grants to religious institutions of the use of public buildings, *see Southside Estates Baptist Church v. Bd. of Trustees, Sch. Tax Dist. No. 1*, 115 So. 2d 697, 699 (Fla. 1959) ("[W]e find nothing in this record to support a conclusion that any public funds have been contributed."); *see also Holmes*, 886 So. 2d at 356 (recognizing the constitutionality of the grant because "no disbursement was made from the public treasury in *Southside Estates Baptist Church*"), and of an easement on a public park, *see Koerner v. Borck*, 100 So. 2d 398 (Fla. 1958); *see also Holmes*, 886 So. 2d at 354 (observing that *Koerner* involved "no state aid flowing to the church" in violation of the constitutional prohibition). The Florida Supreme Court has also upheld a law authorizing counties to assist educational institutions, including sectarian institutions, through the issuance of revenue bonds. *Nohrr v. Brevard Cnty. Educ. Facilities Auth.*, 247 So. 2d 304 (Fla. 1971), *reaffirmed by Holmes*, 886 So. 2d at 355. These cases further demonstrate that the no-aid provision restricts only the direct appropriation of public funds, not tax credits or other aid that may benefit sectarian institutions.

specifically noted, consistent with the Florida Supreme Court's holding in *Johnson*, that the State may constitutionally provide a tax exemption *directly* to a religious institution without offending the Florida Constitution. *Id.* at 356-57.

If, as this Court has held, the no-aid provision allows the State to provide tax benefits *directly* to churches, it follows that the indirect benefit of the Tax Credit Scholarship Program must also be permissible. Under the Program, the State provides tax credits to private taxpayers, who choose to contribute to nonprofit scholarship-funding organizations, which award scholarships to qualified Florida children, whose families may choose to use that scholarship at a nonsectarian or sectarian school. If the State may permissibly grant a tax exemption *directly* to a sectarian institution, then surely this indirect chain of private choices is also constitutionally permissible. This is not a case in which "the state forcibly diverts the income of both believers and nonbelievers to churches." *Holmes*, 886 So. 2d at 356. Rather, by granting tax credits for private donations, "the state merely refrains from diverting to its own uses income independently generated by the [scholarship-funding organizations] through voluntary contributions." *Id.* Accordingly, there are no coerced contributions, no use of state revenue from the public treasury, and no violation of article I, section 3. Because Appellants cannot show that the Program "violates specific constitutional limitations on the taxing and spending power," the circuit court's ruling should be affirmed. *Alachua Cnty.*, 855 So. 2d at 198.

### 2. The "Uniform Public Schools" Provision Limits Only Appropriations.

Appellants also rely on article IX, section 1, but that provision limits only appropriations and does not restrict the Legislature's power to exempt or credit income from taxation. *See* Art. IX, § 1, Fla. Const. ("Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require."). The issue here is whether the Tax Credit Scholarship Program violates the holding of the Florida Supreme Court that article IX, section 1 "prohibits the state from ***using public monies*** to fund a private alternative to the public school system." *Holmes*, 919 So. 2d at 408 (emphasis added). The straightforward language of the Court demonstrates that it does not.

In *Holmes*, the Florida Supreme Court held that the OSP violated article IX, section 1 because it "allows some children to receive a ***publicly funded*** education through an alternative system of private schools that are not subject to the uniformity requirements of the public school system," *id.* at 412, "***uses public funds*** to provide an alternative education in private schools that are not subject to the 'uniformity' requirements for public schools," *id.*, involves "***expending public funds*** to allow students to obtain a private school education," *id.* at 397, allows

students "to receive ***funds from the public treasury***," *id.*, "diverts ***public dollars*** into separate private systems," *id.* at 398, "transfers ***tax money*** earmarked for public education to private schools," *id.* at 408, and involves a "systematic diversion of ***public funds*** to private schools," *id.* at 409 (all emphases added).

The Court was unambiguous in holding that it was "the state's ***use of public funds*** to support an alternative system of education [that] is in violation of article IX, section 1(a)." *Id.* at 410 (emphasis added). The Court read article IX, section 1 in conjunction with the limitations on the use of monies from the State School Fund set forth in article IX, section 6 to show the constitution's "clear intent that ***public funds*** be used to support the public school system, not to support a duplicative, competitive private system." *Id.* at 411 (emphasis added). Thus, the constitutional prohibition involves the use of public funds from the state treasury, not state support for private schooling *per se*.[9]

Just in case the repeated stresses on public funding were lost on some readers, the Court underscored the point. The Court explained that parents "certainly" have a constitutional "right to choose how to educate their children." *Id.* at 408. In fact, it would be unconstitutional for the State to interfere with this

[9] Again, Appellants' contrary position conflicts with well-established law governing tax benefits. If Appellants were correct that the uniform-public-schools provision prohibited not only the use of public funds but also tax credits and exemptions that benefit private schools, then all tax exemptions for nonprofit schools—whether religious or secular—would be unconstitutional.

right by preventing "parents from choosing private education over public schooling for their children." *Id.* at 408 n.11. Thus, the Florida Constitution does not mandate a systematic preference for public schools over private schools in all areas of state action. Rather, the constitutional restriction applies only to the use of state funds. As the Court put it strongly and unmistakably:

> Our decision does not deny parents recourse to either public or private school alternatives to a failing school. ***Only when the private school option depends upon public funding is choice limited.*** This limit is necessitated by the constitutional mandate in article IX, section 1(a), which sets out the state's responsibilities in a manner that does not allow ***the use of state monies*** to fund a private school education.

*Id.* at 412-13 (emphases added). The Supreme Court left no room for doubt that its holding was focused on the use of public funds to fund private education rather than any state support or facilitation of private education.

In this way, the analysis under the uniform-public-schools provision of the Florida Constitution resembles the analysis under the no-aid provision because the purpose is to avoid the violation of conscience that occurs when taxpayers are forced to finance a system of private schools not subject to the uniformity requirements of the public schools. Yet neither provision prevents the legislature from authorizing tax credits for private contributions to scholarship-funding organizations because both provisions are concerned with the injury that occurs when taxpayers see their own monies "extracted and spent" on private or sectarian activities "in violation of conscience." *Winn*, 131 S. Ct. at 1447. The Tax Credit

Scholarship Program does not cause that injury because it does not cause any taxpayer's funds to be extracted and spent on private or sectarian schools. It only provides a tax credit for taxpayers who choose to make voluntary contributions. § 1002.395(5)(b), Fla. Stat. For that reason, Appellants cannot show that the Tax Credit Scholarship Program violates the uniform-public-schools provision or any other "specific constitutional limitations on the taxing and spending power," and taxpayer standing is unavailable. *Alachua Cnty.*, 855 So. 2d at 198.

## CONCLUSION

For the foregoing reasons, the circuit court's judgment must be affirmed.

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Respectfully submitted,

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## CERTIFICATE OF RULE 9.210 COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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