IN THE SUPREME COURT OF FLORIDA

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

JOHN ELLIS "JEB" BUSH, *et al.*,
Defendants/Appellants,

CHARLES J. CRIST, JR. *et al.*,
Defendants/Appellants,

BRENDA MCSHANE, *et al.*,
Intervenors/Defendants/Appellants,

v.

RUTH D. HOLMES, *et al.*,
Plaintiffs-Appellees.

On Direct Appeal From the District Court of Appeal For the First District

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INITIAL BRIEF OF INTERVENORS/DEFENDANTS/APPELLANTS BRENDA MCSHANE, ET AL.

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STATEMENT OF THE CASE AND FACTS

Intervenors/Defendants/Appellants Brenda McShane, et al. (hereafter "Intervenor-Appellants"), adopt the Statement of the Case and Facts contained in the Initial Brief of Appellants John Ellis (Jeb) Bush, et al.

SUMMARY OF ARGUMENT

It is a simple fact that some public schools in this country succeed spectacularly while some fail spectacularly. It is also a fact that most children who attend failing public schools are there by necessity, not choice, and they are not being "educated" in any meaningful sense of the word. In most states, only families that are wealthy enough to live in high-performing (which does not necessarily mean "high-spending") school districts or pay for private school can ensure that their children's futures are not jeopardized by substandard educational opportunities. But Florida is different. Alone among the states, Florida ensures that all parents—regardless of their financial means—have the same ability to escape chronically failing public schools and enroll their children at schools they believe can deliver the "high quality education" to which they are constitutionally entitled. For many parents, including Intervenor-Appellants and hundreds more like them around the state, the Opportunity Scholarship program is the only taste of true educational choice they have ever had.

As demonstrated below, nothing in the Florida constitution prevents the state from giving "have nots" the same freedom to choose educational excellence for their children that society's "haves" take for granted. Nor, as the Appellees mistakenly contend, does the Florida constitution require the state to single out religious schools and exclude them from a K-12 educational aid program that operates just like dozens of other Florida aid programs by allowing recipients to choose among a wide variety of religious and nonreligious service providers.

In short, for over 50 years, all three branches of Florida government have embraced principles of personal choice and religious neutrality in the provision of myriad public services, including health care, prison and rehabilitation services, aid to the homeless, and all levels of education, from pre-kindergarten through college. Appellees' reading of article I, section 3 as requiring the exclusion of religious options from the Opportunity Scholarship program marks a radical departure from the principles of tolerance, inclusiveness, and neutrality that have been the consistent hallmarks of this Court's interpretation of that provision.

ARGUMENT

I. THE OPPORTUNITY SCHOLARSHIP PROGRAM PROVIDES AID TO PARENTS WHOSE CHILDREN ARE TRAPPED IN FAILING PUBLIC SCHOOLS, NOT AID TO RELIGIOUS INSTITUTIONS.

The last sentence of article I, section 3 of the Florida constitution provides that

> 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.

The question in this case is whether that language mandates the exclusion of religiously-affiliated schools from a state-funded K-12 scholarship program designed to help the state fulfill its obligation to deliver a "high quality education" to the children of Florida. Because Opportunity Scholarships provide "aid" to families seeking broader and better educational options for their children, and because any benefits to religious institutions are merely incidental to that goal—as they are in dozens of other public welfare programs in Florida that allow religious groups to participate—the program is perfectly consistent with the text, intent, and historical interpretation of article I, section 3.[1]

[1] Intervenor-Appellants agree with the State-Appellants that article I, section 3's "directly or indirectly" language modifies "from the public treasury" rather than "in aid of." Otherwise, one must assume the drafters of article I, section 3 intended that public money not be allowed to aid *churches*, *sects*, or *religious denominations* "directly or indirectly," but that it would be fine for public money to aid "any *sectarian institution*" (to which the "directly or indirectly" language

Even if this Court were writing on a blank slate, it would be far from clear—let alone clear beyond a reasonable doubt[2]—that article I, section 3 prohibits the state from giving the same kind of scholarships to K-12 students that it has offered at the post-secondary level for decades. But the Court is not writing on a blank slate. As explained in Part I.A of the Governor's Initial Brief, this Court has consistently interpreted article I, section 3 as allowing programs that promote the general welfare of society, even if "religious interests may be indirectly benefited" as a result. *See, e.g., Johnson v. Presbyterian Homes of Synod of Fla., Inc.,* 239 So. 2d 256, 261 (Fla. 1970).

In sharp contrast with this Court's unwavering line of religion-neutral, "incidental benefits"-based precedent, the district court concluded that article I, section 3 "necessarily imposes restrictions beyond what is restricted by the Establishment Clause." *Bush v. Holmes*, 886 So. 2d 340, 351 (Fla. 1st DCA 2004) (attached hereto as Appendix A). While that conclusion is flawed in a number of ways, two stand out in particular.

First, as explained in Part I.C of the Governor's Initial Brief, the Establishment Clause did not even apply to the states when Florida's Blaine

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plainly does not apply), as long as it did so more obliquely. For the reasons set forth in Part I.B of the Attorney General's Initial Brief, that interpretation is both implausible and inconsistent with the historical record.

[2] *E.g.*, *State v. Kinner*, 398 So. 2d 1360, 1363 (Fla. 1981); *Todd v. State*, 643 So. 2d 625, 627 (Fla. 1st DCA 1994), *rev. denied*, 651 So. 2d 625 (Fla. 1995).

Amendment was enacted in 1885,[3] nor had the Supreme Court explicated its meaning at that time. Even in 1968, when the Constitutional Revision Commission decided to retain Florida's Blaine language, the *meaning* of the federal Establishment Clause was—and remains—a moving target. There is simply no reason to believe, as the Appellees contend, that the framers of article I, section 3 intended to peg it to the U.S. Supreme Court's meandering Establishment Clause jurisprudence—with the meaning of article I, section 3 constantly changing to remain "more restrictive" than the Supreme Court's latest pronouncements.

Second, Appellees' "more restrictive" theory directly contradicts the historical record. If the theory were correct, Florida's practice and precedent regarding the inclusion/exclusion of religious groups from public welfare programs should follow a distinct trend line that parallels federal practice and precedent, but

[3] Intervenor-Appellants sometimes use the term "Blaine Amendment" as a shorthand reference to the last sentence of article I, section 3. The district court explains the historical genesis of Blaine Amendments in its opinion, *Holmes*, 886 So. 2d at 349 n.7 & 351 n.9; contrary to the district court's suggestion, however, there is no serious disagreement among courts or scholars regarding the bigoted pedigree of the federal Blaine Amendment and its state progeny. *See, e.g.*, *Kotterman v. Killian*, 972 P.2d 606, 624 (Ariz. 1999) (explaining that "[t]he Blaine amendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a growing 'Catholic menace'") (citing Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 Yale L. & Pol'y Rev. 113, 146 (1996)); *see also Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality op.) (noting that "hostility to aid to pervasively sectarian schools has a shameful pedigree" that acquired prominence with Congress' consideration of the Blaine Amendment).

always at a more restrictive level. As the graph attached hereto as Appendix B makes clear, however, that is not at all what happened. Far from tracking (again, at a more restrictive level) federal practice and precedent as it has wandered from neutrality, to favoritism, to exclusion, and back to neutrality, Florida practice and precedent shows a decades-long history of consistent and near-perfect neutrality towards religion—both in court decisions construing article I, section 3, and in legislative enactments implicating that provision.[4] If Florida's Blaine Amendment was really intended to be "more restrictive" than the (perpetually shifting) federal Establishment Clause regarding participation of religious service providers in secular aid programs, it is a fact that has been lost on the courts,[5] the legislature,[6]

[4] There have been two minor deviations from Florida's history of religious neutrality, one in the direction of preference and the other in the direction of exclusion. *Compare Chamberlin v. Bd. of Pub. Instruction*, 143 So. 2d 21 (1962) (authorizing Bible-reading, recitation of Lord's Prayer, and display of religious symbols in public schools) *with* Florida Resident Access Grant ("FRAG"), § 1009.89, Fla. Stat. (1967) (post-secondary scholarship program that prohibits use of scholarships in programs of study "leading to a degree in theology or divinity").

[5] *See Koerner v. Borck*, 100 So. 2d 398 (Fla. 1958), *Southside Estates Baptist Church v. Bd. of Trustees*, 115 So. 2d 697 (Fla. 1959), *Johnson v. Presbyterian Homes of Synod of Fla., Inc.*, 239 So. 2d 256 (Fla. 1970), *Nohrr v. Brevard County Educ. Facilities Auth.*, 247 So. 2d 304 (Fla. 1971).

[6] *See* Appendix C hereto at 2-4 and Appendix F to Governor's Initial Brief (listing three dozen aid programs in which public money flows to religious groups as an incidental byproduct of achieving the program's secular purpose).

the executive branch,[7] and the people of Florida since its enactment over one hundred years ago. *See* Appendix B.

II. LIKE THIS COURT'S PRECEDENTS, THE LEGISLATURE'S ENACTMENTS SHOW THAT ARTICLE I, SECTION 3 HAS ALWAYS BEEN UNDERSTOOD TO PRESENT NO BAR TO PROGRAMS THAT ARE DESIGNED TO PROMOTE THE GENERAL WELFARE, EVEN IF RELIGIOUS INTERESTS MAY BE INDIRECTLY BENEFITED.

As the graph and table in Appendices B and C make clear, the Florida legislature has not only shared but also relied upon this Court's neutrality-based interpretation of Florida's Blaine Amendment.[8] Over the years since this Court first articulated that doctrine in *Koerner* and *Southside Estates*, *supra*, the legislature has enacted literally dozens of public welfare programs that distribute money to individuals who then choose among a variety of public, private, religious, and nonreligious providers in obtaining the particular services for which the program was designed.[9]

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[7] *See* Part I.C of Attorney General's Initial Brief (listing Attorney General opinions approving religion-neutral programs that provide incidental benefits to religious groups).

[8] Indeed, the legislature has done so as recently as December 2004, when it enacted the universal pre-kindergarten legislation that specifically includes faith-based entities among eligible service providers. *See* Voluntary Prekindergarten Education Program, Fla. HB 1-A (2004) § 1002.55(1)(a).

[9] *See* Appendix C hereto at 2-4 and Appendix F to Governor's Initial Brief (listing programs).

Consistently applied, the logic of the district court's holding would render most, if not all, of those programs invalid.[10] Of course, it would be astonishing to learn that the legislature has been passing—and the people of Florida consistently accepting—unconstitutional public welfare programs for decades, particularly under the watchful gaze of Appellees and others who share their keen interest in Florida church-state relations.

Given their unwillingness to meaningfully address it, the most problematic aspect of the Appellees' "more restrictive" rationale may well be its real-world impact on other aid programs in Florida. While the precise number of programs that would be judicially foreclosed by an adverse ruling in this case is not clear, Appellees' rationale would appear to require immediate termination of at least the following:

- **John M. McKay Program for Students with Disabilities, § 1002.39, Fla. Stat.** Appellees have already stated that this program, which enrolls approximately 14,000 K-12 students, "may suffer from the same constitutional flaws" as the Opportunity Scholarship program.[11] Notwithstanding their delicate phraseology, Appellees have never identified any material distinction between the two programs, so it is clear the McKay program must share the same fate as Opportunity Scholarships under Appellees' reasoning.

[10] *See*, *e.g*., *Holmes*, 886 So. 2d at 378 (Polston, J., dissenting, joined by Barfield, Kahn, Lewis and Hawkes, JJ.) (explaining that article I, section 3 is not limited to schools and finding "no meaningful difference" between Opportunity Scholarships and other programs that allow recipients to choose religious service providers).
[11] *See* Appellees' Answer Brief filed in the First District Court of Appeal Nov. 11, 2002 (hereafter "Appellees' 1st DCA Answer Brief") at 29-30 n.17.

- **Voluntary Prekindergarten Education Program, Fla. HB 1-A (2004).** This program allows parents to select among religious and nonreligious providers in obtaining pre-kindergarten educational services for their children at public expense; as such, it clearly runs afoul of Appellees' interpretation of Florida's Blaine Amendment.[12]

- **Corporate Tax Credits, § 220.187, Fla. Stat.** Because many of the 12,000 recipients attend religious schools, the only difference with Opportunity Scholarships is how the programs are funded—tax credits versus public funds. Appellees' lead counsel have consistently argued in other school choice cases that there is no constitutionally significant difference between those two funding mechanisms,[13] which means that—at least as far as Appellees are concerned—if Opportunity Scholarships violate Florida's Blaine Amendment, then Corporate Tax Credit scholarships do as well.

- **Bright Futures Scholarship Program**, **§ 240.402, Fla. Stat.** Many of the 112,000 recipients of Bright Futures Scholarships use them to attend religious colleges, and, unlike the Florida Resident Assistance Grant (FRAG), § 1009.89, Fla. Stat., there is no statutory bar to using Bright Futures scholarships for programs of study "leading to a degree in theology or divinity." Accordingly, the state of Florida has historically paid for, and continues to pay for, the training of ministers, which must certainly—again, according to Appellees' mistaken interpretation of Florida's Blaine Amendment—constitute "aid" to religious denominations.[14]

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[12] *See, e.g.*, Sonja Isger, *Preschool Plan Relies on, But Still Threatens, Faith Programs*, Palm Beach Post, Dec. 10, 2004, at 1A (reporting Appellees' counsel's belief that if universal pre-kindergarten program includes religious options then it is probably unconstitutional).

[13] *See* Appendix D.

[14] Appellees have consistently argued in this case that the availability of religious options renders the *entire* Opportunity Scholarship program invalid. *See, e.g.*, Appellees' 1st DCA Answer Brief at 40-43. Logical consistency therefore dictates that the ability of college students to use Bright Futures scholarships to attend religious schools and study for the ministry, assuming that constitutes "aid to religion," likewise renders the *entire* Bright Futures program invalid. *See id.*; *see also Holmes*, 886 So. 2d at 346 n.4 (rejecting concurring judge's suggestion that

Both the Appellees and the district court seek to avoid the alarming consequences of their reasoning by noting that none of those other programs are currently being challenged in court. Perhaps not, but they certainly will be—and presumably by these same Appellees, whose concern for church-state relations in Florida must surely extend to such evident affronts as, for example, state-funded training of clergy.[15]

But the point of this discussion is not so much the consequences of Appellees' logic—which, as Judge Wolfe noted below, would be "catastrophic"[16]—rather, it is the sheer implausibility of the Appellees' arguments concerning the "true meaning" of Florida's Blaine Amendment. It simply defies logic to contend that, going back at least as far as the Critical Teacher Shortage Program precursor in 1955 (which allowed post-secondary scholarships to be used

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instead of striking down the entire program, religious schools simply be excluded from Opportunity Scholarships).

[15] Even if Appellees' interest in Florida's Blaine Amendment reaches no further than using it to challenge Opportunity Scholarships, others will surely pick up where they leave off. *See, e.g., Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301 (2004) (atheist lacked standing to challenge constitutionality of Pledge of Allegiance at daughter's public school); *Atheist Files Second Suit on "Under God" in Pledge*, N.Y. Times, Jan. 6, 2005, at A19 (Newdow files new "Pledge" challenge); Carol Leonnig, *Judge Refuses to Ban Prayer at Swearing-In*, Wash. Post, Jan. 15, 2005 at A8 (Newdow seeks injunction against clergy saying prayers during inauguration).

[16] *Holmes*, 886 So. 2d 373 (Wolf, C.J., concurring in part and dissenting in part).

at religious schools),[17] and continuing to this very day with the recent enactment of the Voluntary Prekindergarten Education Program (which likewise allows recipients to select among religious and nonreligious providers),[18] the legislature has been either totally unaware of or blithely unconcerned about article I, section 3's supposedly "plain and unambiguous" prohibition against public money going to religious entities as an incidental byproduct of secular aid programs.

As demonstrated in the final section below, the "directly or indirectly" language that appears in Florida's and many other states' Blaine Amendments is neither plain nor unambiguous and, to the contrary, has produced a body of case law that is all over the map.

III. THE WIDELY DIVERGENT INTERPRETATIONS OF "DIRECT OR INDIRECT" AID PROVISIONS BY VARIOUS STATE COURTS DESTROY ANY SUGGESTION THAT THEIR MEANING IS "PLAIN AND UNAMBIGUOUS."

In order to prevail in this case, Appellees must establish *beyond a reasonable doubt*[19] that article I, section 3 of Florida's constitution forbids the state from providing K-12 scholarships to parents for use at schools of their choice, including religious schools. As noted above, both the precedents of this Court and the enactment of dozens of similar aid programs by the Florida legislature cast

[17] Appendix C at 2 ¶ 1.
[18] *Id*. at 4 ¶ 25.
[19] *See, e.g*., *State v. Kinner*, 398 So. 2d 1360, 1363 (Fla. 1981); *Todd v. State*, 643 So. 2d 625, 627 (Fla. 1st DCA 1994), *rev. denied*, 651 So. 2d 625 (Fla. 1995).

ample doubt on the validity of that assertion; the inconsistent interpretation of virtually identical language by courts in other states destroys it entirely.

If it were true, as the district court and the Appellees maintain, that the meaning of Florida's Blaine Amendment is perfectly clear, then one would expect uniform agreement among courts in other states applying identical Blaine language that programs in which public funds flow incidentally to religious organizations are impermissible. But once again, the logic of Appellees' argument is flatly contradicted by the historical record.

Eight states—Florida, Georgia, Michigan, Missouri, Montana, New Mexico, New York, and Oklahoma—have religion clauses in their state constitutions that use the phrase "directly or indirectly" in connection with the appropriation of public funds or the use of such funds to "aid" religious institutions.[20] At least two other states, Louisiana and South Carolina, had "directly or indirectly" language in earlier versions of their constitutions.[21] Notably, courts in half of those states have

[20] *See* Appendix E hereto. The California and Virginia constitutions also use the term "directly or indirectly" in their religion provisions, but in a markedly different context. Cal. Const. Art. IX, § 8 ("…nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, *directly or indirectly*, in any of the common schools of this State"); Va. Const. Art. IV, § 16 (the legislature "shall not make any appropriation… [to] any association or institution of any kind whatever which is entirely or partly, *directly or indirectly*, controlled by any church or sectarian society") (emphases added).

[21] *See* Appendix E hereto. Louisiana completely removed Art. IV, § 8 from its constitution as part of a constitutional revision in 1973. South Carolina amended its constitution, also in 1973, to remove the words "or indirectly" from Art. XI, § 4.

applied the same neutrality-based, incidental-benefits construction to their Blaine Amendments that this Court has used for Florida's and that is fatal to Appellees' case.

For example, in *Board of Education v. Allen*, 228 N.E.2d 791 (N.Y. 1967), the New York Court of Appeals considered whether a textbook loan violated the state's Blaine Amendment because it included children attending religious schools. Rejecting that assertion, the court explained that "the words 'direct' and 'indirect' relate solely to the means of attaining the prohibited end of aiding religion as such. . . . *Since there is no intention to assist parochial schools as such, any benefit accruing to those schools . . . cannot be properly classified as the giving of aid directly or indirectly.*" *Id.* at 804 (emphasis added).

Louisiana's former Article IV, section 8 likewise prohibited the taking of money "from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion." In *Seegers v. Parker*, 241 So. 2d 213 (La. 1970), the Louisiana Supreme Court struck down a statute that paid the salaries of teachers in sectarian schools. In doing so, however, the court explicitly distinguished the aid in that case with the benefit to schoolchildren that was provided by the textbook loan program approved in *Cochran v. Board of Education*, 123 So. 664 (La. 1929), and *Borden v. Board of Education*, 123 So. 655 (La. 1929). The *Seegers* court made clear that, while the state was not permitted to act to relieve religious schools

of any obligations, the state was permitted to provide generally available benefits to students.

Finally, a former version of the South Carolina constitution prohibited the state from using public property or credit "directly or indirectly, in aid of" any religious organization.[22] In *Hartness v. Patterson*, the South Carolina Supreme Court struck down a program that provided tuition grants to students attending "independent institutions of higher learning," including religious institutions, based on the court's conclusion that, while the benefit to the schools was indirect, "the tuition grants were . . . *intended to aid the institution*." 179 S.E.2d 907, 909 (S.C. 1971) (emphasis added). But the very next year, the court *upheld* the constitutionality of a student loan program that included students attending religious schools and even those studying theology. *Durham v. McLeod*, 192 S.E.2d 202 (S.C. 1972). Explaining why the latter program was acceptable where the former was not, the court explained that "[t]he loan is to the student, and all eligible institutions are as free to compete for his attendance as though it had been made by a commercial bank. *This is aid, direct or indirect, to higher education, but not to any institution or group of institutions*." *Id.* at 203 (emphasis added).[23]

[22] S.C. Const., Art. XI, § 9. The "indirectly" language has since been removed. *See supra* note 21.

[23] The Montana and Oklahoma supreme courts have given similar interpretations to their states' Blaine Amendments. *See State Welfare Bd. v. Lutheran Social Servs. of Mont.*, 480 P.2d 181, 185-86 (Mont. 1971) (rejecting assertion that public

Against that historical backdrop, the notion that Florida's Blaine Amendment prohibits a neutral K-12 educational aid program that allows parents to choose among religious and nonreligious providers is highly dubious. The notion that Florida's Blaine Amendment prohibits such programs "beyond any reasonable doubt" is utterly unsustainable.[24]

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welfare program for indigent mothers constituted impermissible "aid" to religious organizations caring for those mothers—"[i]t is the indigent unwed mother who has the right to the funds and it is on her behalf that the funds should be paid to those persons extending to her medical, hospitalization and foster home care. . . . The *primary effect* of such payments to such a woman is the accomplishment of a *public purpose*") (emphasis added); *Murrow Indian Orphans Home v. Childers*, 171 P.2d 600, 603 (Okla. 1946) ("[S]o long as [contracts with religious institutions] involve the element of substantial return to the State and do not amount to a gift, donation, or appropriation to the institution having no relevancy to the affairs of the State, there are no constitutional provisions offended.").

Other courts, of course, have interpreted their states' Blaine Amendments more restrictively. *See, e.g.*, *McVey v. Hawkins*, 258 S.W.2d 927 (Mo. 1953) (striking down transportation of students to nonpublic schools); *Paster v. Tussey*, 512 S.W.2d 97 (Mo. 1974) (striking down textbook loan program); *but see Americans United v. Rogers*, 538 S.W.2d 711 (Mo. 1976) (upholding program of higher education tuition aid). What courts do not do, however, is what Appellees urge this Court to do—namely, suddenly abandon a well-established, consistently-applied interpretive framework after decades of reliance by the people and government of the state.

[24] Intervenor-Appellants believe the exclusion of religious options from the Opportunity Scholarship Program—or worse, the elimination of the entire program due to the participation of religious entities—violates the non-discrimination principles of the Federal Constitution. Because that issue is addressed at length elsewhere, *see, e.g.*, Part II of the Governor's Initial Brief, Intervenor-Appellants do not repeat those arguments here.

CONCLUSION

The state of Florida has decreed that no child should be trapped in a chronically failing school just because his or her family can't afford to choose which public school district to live in or pay for private school. The state ensures this equality of educational choice through the Opportunity Scholarship program, which, like countless other educational and social welfare programs in Florida, allows aid recipients to choose from both religious and nonreligious service providers. While some people disagree with that policy choice, it is nevertheless just that—a *policy choice*. Appellees' attempt to derail an educational-aid-to-families program that they and others dislike, but that is perfectly consistent with over 50 years of Florida practice and precedent, must fail. The decision of the First District Court of Appeal should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing INITIAL BRIEF OF INTERVENORS/DEFENDANTS/APPELLANTS' BRENDA MCSHANE, ET AL. AND APPENDIX were dispatched this ___ day of January, 2005, via first-class mail, postage pre-paid to the following counsel of record:

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CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. P. 9210(a)(2), the attached Initial Brief of Intervenors/Appellants Brenda McShane, *et al.*, is submitted in Times New Roman 14-point font and complies with the font requirements of this rule.

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