IN THE SUPREME COURT OF THE STATE OF FLORIDA

No. SC04-2323

JOHN ELLIS "JEB" BUSH, et al.,
Defendants-Appellants,

v.

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

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

BRIEF AMICUS CURIAE OF INDEPENDENT VOICES FOR BETTER EDUCATION, TEACHERS FOR BETTER EDUCATION, IRA J. PAUL, AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS AND IN SUPPORT OF THE CONSTITUTIONALITY OF FLORIDA'S OPPORTUNITY SCHOLARSHIP PROGRAM

(Filed by leave of the Court)

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IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Florida Rule of Appellate Procedure 9.370, Independent Voices for Better Education, Teachers for Better Education, Ira J. Paul, and Pacific Legal Foundation (PLF) (collectively, "Amici") respectfully submit this brief amicus curiae in support of the constitutionality of Florida's "Opportunity Scholarship Program." (Fla. Stat. Ann. § 1002.38).[1] Amici participated in the prior two appeals of this case to the Florida First District Court of Appeal. From the beginning, the amici participated in the proceedings in the Leon County Circuit Court. In each of these proceedings, Amici represented the interests of Floridians who will be directly impacted by the resolution of this case and whose interests would not otherwise be represented fully by the parties.

Independent Voices for Better Education is a nonprofit, tax-exempt Florida corporation formed in 1990 for the purpose of advocating educational accountability and reform in the Florida public schools. From its modest beginning as a group of parents and teachers in South Florida who came together to improve the quality of education in area public schools, Independent Voices for Better Education has grown

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[1] The First District Court of Appeal decision, *Bush v. Holmes*, 886 So. 2d 340 (1st DCA 2004), referred to Fla. Stat. Ann. § 229.0537, the 1999 version of the Florida Opportunity Scholarship Program statute, throughout its opinion. However, that statute no longer exists. Effective January, 2003, the Florida Legislature repealed section 229.0537 and reenacted the Opportunity Scholarship Program under Fla. Stat. Ann. § 1002.38. Amici refer to section 1002.38 unless otherwise indicated.

into a statewide organization with many members and supporters. Its membership includes parents, teachers, businesses, and families who home-school their children. Teachers for Better Education is an affiliate of Independent Voices for Better Education consisting of public school teachers who are also interested in educational reform. Among the reforms that the Independent Voices for Better Education and its affiliate Teachers for Better Education have advocated are limitation of class size, adequate funding of classrooms before administrative functions, the elimination of teacher tenure, meaningful teacher competency testing, and vouchers for low-income families. Independent Voices for Better Education also participated in the public debate and legislative efforts surrounding the adoption of the Florida Opportunity Scholarship Program.

Ira J. Paul is a teacher in the Florida public schools with more than 27 years of teaching experience. Since 1976, Mr. Paul has been an instructor in the fields of mathematics, physical education, and reading at Hialeah-Miami Lakes Senior High School in Miami-Lakes, Florida. His many professional accomplishments include the development of a program for teaching mathematics to senior high school under-achievers, the development of a proposal to teach reading to senior high school male athletes who were reluctant readers, and the securing of a grant for the implementation of these programs. Mr. Paul is the President of Teachers for Better Education.

PLF is a nonprofit, tax-exempt foundation incorporated under the laws of the State of California, organized for the purpose of litigating important matters of public interest. PLF has offices in Bellevue, Washington; Coral Gables, Florida; Honolulu, Hawaii; and a liaison office in Anchorage, Alaska. Formed in 1973, PLF believes in and supports the principles of limited government and free enterprise, the right of individuals to own and reasonably use private property, and the protection of individual rights. Through litigation in courts across the country, PLF has developed significant expertise in the area of education reform. PLF participated as amicus curiae in numerous United States Supreme Court cases including *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); and *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), among others. PLF maintains an office in the State of Florida staffed by the undersigned, a member of the Florida Bar, as its full-time managing attorney. PLF is interested in improving the quality of educational opportunities offered to children. It believes that the solution to the crisis in education must include school choice programs. This brief amicus curiae is being submitted as part of PLF's K-12 Education Reform Project.

Together these Amici are uniquely qualified to participate as amici curiae in these proceedings. This case presents the fundamental question concerning how the state can meet its obligation to provide a high quality education to the children within

its jurisdiction. It is well recognized that the education of its citizenry is the primary mission of state government. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of state and local governments."); *Coalition for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 409 (Fla. 1996) ("The basic responsibility for education has always been with the states."). If there is any single contribution that the state can make to the well-being of its children—especially those who are disadvantaged—it is the opportunity for a quality education. There are few cases which could be presented to this Court that could have a more wide-ranging effect on the future of this state than the instant case.

SUMMARY OF ARGUMENT

In 1998, Florida citizens amended article IX, section 1, of the Florida Constitution to declare that the education of the children of this state is a "fundamental value" and that adequate provision for that purpose is a "paramount duty." Florida citizens thereby sought to impose a "maximum duty" on their elected officials to significantly improve the quality of education in Florida. One year later, the Florida Legislature responded with a comprehensive education reform package that included the Florida Opportunity Scholarship Program (Scholarship Program). Fla. Stat. Ann. § 1002.38, formerly Fla. Stat. Ann. § 229.0537. The Florida Legislature designed the Scholarship Program to respond to the secular concerns of

parents and their children, who all too frequently have been trapped for decades in poor-performing public schools in this state. Importantly, there is no evidence of an intent on the part of the Florida Legislature to aid religious schools through the Scholarship Program.

When the Florida Legislature adopted the Scholarship Program, significant data showed that similar scholarship programs implemented in other jurisdictions fulfilled the valid legislative purpose of improving educational opportunity for all. Since then, studies on Florida's Scholarship Program have demonstrated its success. It is clear that the Florida Legislature sought to advance the general welfare of its citizenry when it adopted the Scholarship Program. With appellees failing to show that the Scholarship Program is unconstitutional, this Court should defer to the Legislature's judgment, reverse the court of appeal's decision, and find the Scholarship Program constitutional.

ARGUMENT

I

THE FLORIDA OPPORTUNITY SCHOLARSHIP PROGRAM IS NEUTRAL WITH RESPECT TO RELIGION AND PROVIDES ASSISTANCE DIRECTLY TO A BROAD CLASS OF CITIZENS WHO IN TURN DIRECT TUITION PAYMENTS TO RELIGIOUS AND NONRELIGIOUS SCHOOLS AS A RESULT OF GENUINE AND INDEPENDENT CHOICE

A. The Opportunity Scholarship Program Is Similar in All Material Respects to That Recently Upheld by the United States Supreme Court in *Zelman v. Simmons-Harris*

The delivery of public education in the United States takes many forms. There are traditional public schools, vocational schools, magnet schools, charter schools and a myriad of other educational alternatives. There are also many programs that provide assistance to those who are seeking to better themselves or their family members through education. In Florida, these programs range from a public-school tuition tax credit program[2] and a disability scholarship program at the elementary and secondary school levels[3] to various college programs, such as Bright Futures Scholarships,[4] Florida Resident Access Grants,[5] and the Florida Teacher Scholarship

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[2] Fla. Stat. Ann. § 220.187.

[3] Fla. Stat. Ann. § 1002.39.

[4] Fla. Stat. Ann. § 1009.53.

[5] Fla. Stat. Ann. § 1009.89.

and Forgivable Loan Program.[6] Although it has been singled out by the appellees in this case, Florida's Opportunity Scholarship Program (Scholarship Program) fits squarely within the tradition of educational alternatives that have existed in Florida for many years. To fail to consider the Scholarship Program in this context is to fail to appreciate how Florida's diverse educational system actually functions.

Further, the Scholarship Program is not the first school-choice program of its kind to be challenged. The Milwaukee Parental Choice Program, the oldest of the most recent vintage of school choice programs,[7] was found constitutional by the Wisconsin Supreme Court in 1998. *Jackson v. Benson*, 578 N.W.2d 602 (Wisc. 1998). More recently, the United States Supreme Court found that the Cleveland, Ohio Pilot Scholarship Program did not violate the First Amendment to the United States Constitution in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). *Zelman* is particularly instructive because it considered both a program similar in all material respects to the Scholarship Program and the question of whether the program aided religion.

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[6] Fla. Stat. Ann. § 1009.57.

[7] Some New England states began using a combination of public and private religious and nonreligious schools for the purpose of delivering education to the children in their jurisdictions more than 200 years ago. *Campbell v. Manchester Bd. of Sch. Directors*, 641 A.2d 352 (Vt. 1994).

Like the Scholarship Program, the Cleveland program provides scholarships to students to attend qualified private schools, whether religious or nonreligious. *Id.* at 645. Tuition aid is distributed to Ohio parents according to financial need. *Id.* at 646.[8] Both the Florida and Ohio programs authorize numerous choices for eligible students. They may remain in public school as before, obtain a scholarship and choose a religious school, obtain a scholarship and choose a nonreligious private school, enroll in a charter or community school, or enroll in a magnet school. *Compare* Fla. Stat. Ann. § 1002.38(2)-(3) *with Zelman*, 536 U.S. at 655. Under both programs, if parents choose a private school, checks are made payable to the parents, who endorse the checks over to their chosen school. *Compare Zelman*, 536 U.S. at 646 *with* Fla. Stat. Ann. § 1002.38(6)(g).

On these facts, the United States Supreme Court concluded that the Ohio Pilot Scholarship Program "was enacted for the valid secular purpose of providing

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[8] Florida's Scholarship Program is broader, insofar as the scholarships are available to any student in a school that has been graded "F" in two of the last four years. Fla. Stat. Ann. § 1002.38(2)-(3)(a). Schools in this category generally serve populations that are poor and minority. One study in 2003 reported that "88% of their students are enrolled in the free or reduced price lunch program, 18% are deemed limited English proficient, and only 1% of their students are white." Jay P. Greene, Ph.D. & Marcus A. Winters, Manhattan Institute for Policy Research, *When Schools Compete: The Effects of Vouchers on Florida Public School Achievement* (Aug. 2003), *available at* http:// www.manhattan-institute.org/html/ewp_02.htm (last visited Dec. 27, 2004).

educational assistance to poor children in a demonstrably failing public school system." *Zelman*, 536 U.S. at 649. The Court reasoned:

> [O]ur decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools, and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals.

Id. at 649 (citations omitted).

> We believe that the program challenged here is a program of true private choice, consistent with *Mueller* [*v. Allen*, 463 U.S. 388 (1983)], *Witters* [*v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986)], and *Zobrest* [*v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993)], and thus constitutional. As was true in those cases, the Ohio program is neutral in all respects toward religion. It is part of a general and multifaceted undertaking by the State of Ohio to provide educational opportunities to the children of a failed school district.

Id. at 653.

Here, the court of appeal rejected this reasoning. Instead the court held that the Scholarship Program provides indirect aid to sectarian schools and therefore violates article I, section 3's "no aid" provision. *Holmes*, 886 So. 2d at 361. But this conclusion ignores both the proper interpretation of the "no aid" provision and the role of a parent in the rearing and education of a child.

B. There Is No Evidence That the State of Florida Specifically Intends to Aid Sectarian Schools by Implementing the Scholarship Program

The prohibition against aid to religious schools applies only where there is a *specific intent* to do so on the part of the government actor to aid religion as such; if the mere fact of aid alone, with no evidence of a specific intent, were enough to invalidate the Scholarship Program, many benefits afforded by the State of Florida to religious schools and other institutions would necessarily be unconstitutional—a result that the Legislature could not have intended. (*See* section B below.) Moreover, even if the "no aid" provision imposed strict liability on the state with no consideration of intent, the Scholarship Program still would escape the provision's reach, because it is the parent—not the State of Florida—who makes the decision about which school ultimately receives the scholarship money.

The last sentence of article I, section 3, of the Florida Constitution requires that "[n]o revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury *directly or indirectly in aid* of any church, sect, or religious denomination or in aid of any sectarian institution" (emphasis added). Amici urges this Court to interpret this sentence to require a specific intent to aid religion. Any other interpretation leads to absurd and inequitable results because it would make the state culpable of a constitutional violation whenever public revenue

in any form finds its way to a religious institution—regardless of whether the state had a specific intent to aid religion or even without the state's knowledge.[9]

At least one other state has read an "intent" requirement into a "no aid" provision that is almost identical to Florida's provision. In *Bd. of Educ. of Central Sch. Dist. No. 1 v. Allen*, 228 N.E.2d 791 (N.Y. 1967), various New York boards of education and towns sued the state's commissioner of education for a declaration that a statute requiring school districts to purchase and loan textbooks on individual requests to public- and private-school pupils alike was unconstitutional under New York's "no aid" provision.[10] The court concluded that the law was constitutional:

> Certainly, not every State action which might entail some ultimate benefit to parochial schools is proscribed. Examples of co-operation between State and church are too familiar to require cataloguing here . . . . *It is our view that the words "direct" and "indirect" relate solely to the means of attaining the prohibited end of aiding religion as*

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[9] For example, a Florida citizen uses a portion of his or her state welfare check to donate money to his or her church—unbeknownst to state officials. Under a strict interpretation of article I, section 3, the state's issuance of welfare checks to that Florida citizen (and other similar donating welfare recipients) would constitute a constitutional violation because it would be "revenue of the state . . . taken from the public treasury . . . *indirectly in aid* of [a] church . . . ." Such a conclusion, of course, would be absurd, suggesting that an "intent" requirement is necessary to the proper interpretation of article I, section 3.

[10] Article XI, section 3, of the New York Constitution instructs that "[n]either the state nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught . . . ."

> *such.* The purpose underlying [the statute], found in the Legislature's own words, belies any interpretation other than that the statute is meant to bestow a public benefit upon all school children, regardless of their school affiliations . . . . *Since there is no intention to assist parochial schools as such, any benefit accruing to those schools is a collateral effect of the statute, and, therefore, cannot be properly classified as the giving of aid directly or indirectly.*

Id. at 803-04 (emphasis added) (citation omitted).

Amici urges this Court to adopt the reasoning in *Allen*. In adopting the Scholarship Program, there is no evidence in the record that the Florida Legislature had a specific intent to aid sectarian schools through the implementation of the Scholarship Program. To the contrary, the Scholarship Program's requirements and obligations demonstrate the state's neutrality with respect to religious schools as such:

- The state, through its scholarship program, gives parents the choice to attend either a sectarian or nonsectarian school, and it evinces no preference for one over the other. Fla. Stat. Ann. § 1002.38.
- Sectarian schools must accept Scholarship Program students on an entirely "random and religious-neutral basis." *Id.* § 1002.38(4)(e).
- Sectarian schools must "[a]ccept as full tuition and fees the amount provided by the state for each student," *id.* § 1002.38(4)(i), even when that amount falls short of the standard tuition and fees charged to non-Scholarship Program students, *id.* § 1002.38(6)(b).

! Sectarian schools must "[a]gree not to compel any student attending the private school on an opportunity scholarship to profess a specific ideological belief, to pray, or to worship." *Id.* § 1002.38(4)(j).

Moreover, an "intent to aid" interpretation of article I, section 3, is consistent with the reality that religious institutions already *constitutionally* receive many state benefits. J. Scott Slater, *Florida's "Blaine Amendment" and Its Effect on Educational Opportunities*, 33 Stetson L. Rev. 581, 613-14 (2004) (characterizing the "intent to aid" interpretation of article I, section 3, as a way to avoid the provision's "harmful effects" and "implications").

In *Johnson v. Presbyterian Homes*, 239 So. 2d 256, 261 (Fla. 1970), this Court considered a state tax exemption provided to both religious and nonreligious homes for the aged. This Court held that because the exemptions are permitted on a neutral basis to both, they do not violate either article I, section 3. The Court specifically stated:

> By granting the exemption to church properties used as a home for the aged, Florida does not support all religious bodies or any of them in the sense that the state espouses their acceptance or the acceptance of any of them by its citizens. The exemption goes, not only to homes for the aged owned by religious bodies, but to any bona fide homes for the aged duly licensed, owned and operated in compliance with the terms of the statute by Florida corporations not for profit. Such a home for the aged could be owned by any organization complying with the statute, regardless of religious beliefs. There is nothing to prevent organizations which do not believe in a Supreme Being from also complying with the

> statute. In Florida, tax exemption is by no means synonymous with approval of the purposes of the body whose property is exempt.

Id. at 261-62.

As described above, the Opportunity Scholarships are available for use at both religious and nonreligious institutions. It cannot be said that the state is espousing religion when parents noncoercively choose a sectarian school to educate their children when the state has failed to educate them. Indeed, a participating private school (whether religious or nonreligious) is not receiving a "benefit," but is simply being reimbursed for rendering a secular service that the state failed to perform.

Just one year after *Johnson*, this Court again considered the reach of article I, section 3. In *Nohrr v. Brevard County Educ. Facilities Auth.*, 247 So. 2d 304 (Fla. 1971), a taxpayer challenged the validity of the state's Higher Educational Facilities Authorities Law, Fla. Stat. Ann. § 243.18, which was adopted to accommodate financing for an urgently needed expansion of the state's institutions of higher learning. The complaint alleged that because the statute allowed revenue bonds to be used by both sectarian and nonsectarian institutions, it violated the doctrine of separation of church and state. *Nohrr*, 247 So. 2d at 307. This Court expressly rejected the challenge:

> The Educational Facilities Law was enacted to promote the general welfare by enabling institutions of higher education to provide facilities and structures sorely needed for the development of the intellectual and mental capacity of our youth.

> A state cannot pass a law to aid one religion or all religions, but state action to promote the general welfare of society, apart from any religious considerations, is valid, even though religious interests may be indirectly benefited. If the primary purpose of the state action is to promote religion, that action is in violation of the First Amendment, but if a statute furthers both secular and religious ends, an examination of the means used is necessary to determine whether the state could reasonably have attained the secular end by means which do not further the promotion of religion.

Nohrr, 234 So. 2d at 307.

Both the *Johnson* tax exemptions and the *Nohrr* bonds undoubtedly assisted the receiving entities. Here, there is no evidence that the Scholarship Program provides any benefit to participating schools beyond the cost of the student's education. Indeed, a Opportunity Scholarship is good only for the amount the public school would have spent on that student, or the total tuition and fees of the private school, *whichever is less*. Fla. Stat. Ann. § 1002.38(6). But even if there were some incidental benefit, it would not render the Scholarship Program unconstitutional. As mentioned in *Johnson*, "any benefit received by religious denominations is merely incidental to the achievement of a public purpose." 239 So. 2d at 261.

II

THE SCHOLARSHIP PROGRAM BENEFITS BOTH PARTICIPATING STUDENTS AND PUBLIC SCHOOLS AND, THUS, FULFILLS THE STATE'S OBLIGATION TO ENSURE THAT ALL CHILDREN RECEIVE A HIGH QUALITY EDUCATION

The data accumulated thus far on the performance of the Scholarship Program and similar programs that have been in existence for a longer period of time confirm that when the Florida Legislature adopted the Scholarship Program, it was not seeking to advance religion, but rather was making a good-faith effort to improve the public welfare by fulfilling the command of the citizens to greatly improve the quality of education in the state.[11] For example, when the Legislature was considering the Scholarship Program among the studies available included the Milwaukee Parental Choice Program, the first parental choice program in the nation. The study demonstrated that students taking advantage of the Milwaukee voucher program were substantially outscoring their public-school peers in basic skills areas such as reading and math.[12] Jay P. Greene, et al., Program in Education Policy and Governance, *Effectiveness of School Choice: The Milwaukee Experiment* (Mar. 1997), *available at* http://www.ksg.harvard.edu/pepg/other/mil.htm (last visited Jan. 17, 2005).

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[11] Data of this type is relevant to a consideration of the constitutionality of the Scholarship Program. *E.g.*, *Zelman*, 536 U.S. 663-676 (O'Connor, J., concurring).

[12] Wis. Stat. Ann. § 119.23.

Dr. Greene again examined the graduating rates for Milwaukee voucher students in 2004. He found that the graduating rates for those students was significantly higher than for public-school students. Jay P. Greene, Ph.D., School Choice Wisconsin, *Graduation Rates for Choice and Public School Students in Milwaukee* (Sept. 28, 2004), *available at* http://www.miedresearchoffice.org/whatusedtobenew.html (last visited Dec. 27, 2004). In the graduating class of 2003, Milwaukee voucher students attending private high schools had a 64% graduation rate; compared to the 36% graduation rate for 37 Milwaukee public high schools. *Id.* at 2.

Another recent study confirms that the Milwaukee parental choice program has been a positive influence on the Milwaukee public schools as well. A 2002 study showed that during between 1997 and 2001—a period of rapid expansion of both public and private school attendance in the city—Milwaukee public school students improved on eleven of fifteen tests where their performance was compared to a national sample, and the percentage of public school students demonstrating proficiency on all fifteen tests also increased. John Gardner, American Education Reform Council, *How School Choice Helps the Milwaukee Public Schools* i (Jan. 2002), *available at* http://www.schoolchoiceinfo.org/data/research/GardnerMPS.pdf (last visited Jan. 19, 2005).[13] At the same time, the percentage of students attending

[13] The improvements were concentrated in areas with low-income children. *Id.* at ii.

public schools increased from 78% to 80% and the state share of spending for the Milwaukee public schools grew from 54% to 67%. *Id.*

The results of the Cleveland program have been equally dramatic. In a recent study, voucher students gained an average of seven percentile points relative to the norm in reading and 15 percentile points in math. Paul E. Peterson, et al., Program on Education Policy and Governance, *An Evaluation of the Cleveland Voucher Program After Two Years* 10 (June 1999), *available at* http://www.ksg.harvard.edu/pepg/pdf/clev2rpt.pdf (last visited Dec. 27, 2004).

The data flowing from early experience with the Scholarship Program is even more dramatic. A recent study demonstrates that the Scholarship Program has had a positive impact on Florida's public schools. Jay P. Greene, Ph.D. & Marcus A. Winters, Manhattan Institute for Policy Research, *When Schools Compete: The Effects of Vouchers on Florida Public School Achievement* (Aug. 2003), *available at* http:// www.manhattan-institute.org/html/ewp_02.htm (last visited Dec. 27, 2004). According to that study, Florida's low-performing schools have improved in direct proportion to the challenges they face from voucher competition. Public schools facing voucher competition showed the greatest improvements of 9.3 scale score points on the Florida Comprehensive Assessment Test (FCAT)[14] math test, 10.1

[14] The FCAT is used to grade schools on a scale from A to F. If a school receives two F grades in any four-year period, it is considered chronically failing and its students

points on the FCAT reading test, and 5.1 percentile points on the Stanford-9 math test. *Id.* Not surprisingly, the Scholarship Program is accomplishing the secular purpose for which it was adopted.

CONCLUSION

For the reasons set forth above, Amici respectfully requests this Court to find the Scholarship Program constitutional and thereby affirm Florida's efforts to provide a high quality education to all of her children.

DATED: January 21, 2005.

Respectfully submitted,

By _____
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become eligible for vouchers under the Scholarship Program. Fla. Stat. Ann. §§ 1002.38, 1008.34.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman 14-point font and, thus, complies with the font requirement of Florida Rule of Appellate Procedure 9.210.

DATED: January 21, 2005.

_____

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CERTIFICATE OF SERVICE

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