IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

JOANNE McCALL, *et al*.,

Plaintiffs/Appellants,

v.

Case No. 1D15-2752
L.T. Case No. 2014-CA-2282

RICK SCOTT, Governor of Florida, in his Official capacity as head of the Florida Department of Revenue, *et al*.,

Defendants/Intervenors/Appellees.
_____/

INITIAL BRIEF OF APPELLANTS

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

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Statement of Facts

This is an action challenging the constitutionality of the Florida Tax Credit Scholarship Program, a program which redirects state tax receivables to fund education for certain students in private schools. The challenged program is the successor program to the Opportunity Scholarship Program previously invalidated by both this Court and the Florida Supreme Court. The sole issue on appeal is whether the Appellants have standing to litigate their claims.

The Opportunity Scholarship Program

In 1999, the Florida legislature enacted the "Opportunity Scholarship Program" ("OSP"), a program that used taxpayer money to fund the education of certain Florida children in private schools. *See* Ch. 99-398, § 2, at 8-12, Laws of Fla. (1999). The legislation specifically permitted the use of OSP vouchers to attend religious schools. *See id.* § 2, at 10.

In 2004, this Court, sitting *en banc*, held the OSP unconstitutional under Article I, § 3 of the Florida Constitution in light of the fact that the vast majority of the vouchers were used to pay for religious education in sectarian schools. *See Bush v. Holmes*, 886 So. 2d 340, 354 (Fla. 1st DCA 2004) (en banc) (*Holmes I*), *aff'd on other grounds*, 919 So. 2d 392 (Fla. 2006). The court held that "the drafters of the no-aid provision clearly intended at least to prohibit the direct or

indirect use of public monies to fund education at religious schools." *Id.* at 351. A five-judge concurring opinion also found the OSP unconstitutional under Article IX, § 1, in violation of the mandate in that section requiring the state to provide for a "uniform, efficient, safe, secure, and high quality system of free *public* schools . . . ." *Id.* at 367-71 (Benton, J., concurring) (emphasis added).

In 2006, the Florida Supreme Court affirmed the judgment that the OSP was unconstitutional, relying only on the ground that the statute violated Article IX, § 1. *Bush v. Holmes*, 919 So. 2d 392, 412 (Fla. 2006) (*Holmes II*). The Court held that the OSP was contrary to Article IX because the program "diverts public dollars into separate private systems parallel to and in competition with the free public schools that are the sole means set out in the Constitution for the state to provide for the education of Florida's children." *Holmes II*, 919 So. 2d at 398.

The Florida Tax Credit Scholarship Program

While the *Holmes* litigation against the OSP was pending, the Florida Legislature created the Florida Tax Credit Scholarship Program ("Scholarship Program" or "Program"), which also uses taxpayer money to fund the education of Florida children in private schools. Ch. 2001-225, § 5, at 6-9, Laws of Fla.

(2001).[1] Like the OSP, the Scholarship Program is intended to provide for the education of Florida children in private schools, including religious schools, at public expense. Fla. Stat. § 1002.395(1), (8) (2014). To achieve this goal, the Scholarship Program relies on a mechanism through which taxpayer funds are diverted to private intermediary organizations and then transmitted in the form of warrants to participating private schools. *Id.* § 1002.395(5), (12).

The Scholarship Program creates a 100% tax credit through which entities that are required to pay corporate income tax, insurance premium tax, severance taxes on oil and gas production, self-accrued sales tax, or alcoholic beverage excise taxes are fully reimbursed for contributions made to an eligible Scholarship Funding Organization ("SFO"). *Id.* § 1002.395(5). The SFO, in turn, transmits these contributions as voucher payments to private schools. *Id.* § 1002.395(6), (12). The Scholarship Program's private school vouchers are thus entirely funded by the State, which provides a 100% tax credit for all "private, voluntary contributions." *Id.* § 1002.395(5). Indeed, this is how the program is publicized and promoted to potential SFO donors: "It costs you NO extra dollars – the legislature has made it possible for your company to earmark up to 100 percent of

[1] The program initially had no specific title and simply provided for "a credit of 100 percent of an eligible contribution against any tax due for a taxable year." Ch. 2001-225, § 5, at 6, Laws of Fla. (2001). In 2006 it was named the "Corporate Income Tax Credit Scholarship Program," *see* Ch. 2006-75, § 2, at 14, Laws of Fla. (2006). It was later renamed the Florida Tax Credit Scholarship Program. *See* Ch. 2009-108, § 2, at 2, Laws of Fla. (2009).

its state corporate income tax payment to fund low-income student scholarships." (Vol. I, p. 26 ¶ 55).

During the 2013-2014 school year, some 59,674 children attended private schools at public expense using vouchers provided under the Scholarship Program, funded by tax credits totaling over $286 million. (*Id.* ¶ 56). The Scholarship Program has been expanded on multiple occasions, with increases in the amount of the vouchers provided, increases in the aggregate annual expenditure cap, expansion of the eligibility criteria to obtain a voucher, and inclusion of additional funding sources. (Vol. I, p. 20 ¶ 32).

During 2013-14 approximately 82% of all voucher recipients under the Program attended sectarian schools. (Vol. I, p. 23 ¶ 42). In most or all such schools, religious proselytization is an integral part of the educational program, and the secular aspects of the education these schools provide are intertwined with religious exercise and religious education. (*Id.* ¶ 43). Private schools may use the publicly funded voucher payments they receive for any purpose, including the teaching of religion. (*Id.* ¶ 44). The private schools may discriminate against children seeking admission on the basis of religion, and may require Scholarship Program students to participate in worship, prayer, and other religious exercises. (Vol. I, pp. 23-24 ¶¶ 45, 46).

The tax credit cap for the 2014-15 school year was $357 million, and is eligible to increase each year by 25% if 90% of the available cap is used in the prior fiscal year. (Vol. I, pp. 25-26, ¶ 54). As students who receive vouchers withdraw from the public schools and enroll in private schools under the Program, their public school districts' funding under the Florida Educational Finance Program is proportionally reduced. (Vol. I, p. 24 ¶ 48).

Statement of the Case

The Plaintiffs in this action filed suit challenging the Scholarship Program on the grounds that the Program, like its predecessor the OSP, violates Article IX, Section 1 and Article I, Section 3 of the Florida Constitution. (Vol. I, pp. 11-30). The Appellants in this Court are parents of children in public schools, teachers in the public schools, religious and community leaders, the Florida Education Association ("FEA") on behalf of its approximately 140,000 members who are employed in the public schools, the Florida Congress of Parents and Teachers, Inc. ("PTA"), the League of Women Voters of Florida, Inc. ("League"), and the Florida State Conference of Branches of NAACP ("Florida NAACP"). (Vol I, pp. 3-6 ¶¶ 7, 8, 10, 11, 12, 13, 15, 17, 18).[2] Each of the individual Appellants is a Florida

[2] Also included as original plaintiffs were the Florida Association of School Administrators (FASA), its immediate Past President, Bob Jones, and the Florida School Boards Association (FSBA). FASA and Jones were dropped as plaintiffs before the final judgment and are not among the Appellants. The FSBA also is not an Appellant in this appeal. (Vol. I, pp. 3-5 ¶¶ 9, 14, 16; Vol. II, pp. 350-54, 359).

citizen and taxpayer, and each of the organizational Appellants brings suit on behalf of its members who are Florida citizens and taxpayers. (*Id.*).

After the lawsuit was filed, a group of parents of children who currently receive payments under the Scholarship Program sought, and were granted, leave to intervene as defendants in this action. (Vol. I, pp. 76-153; Vol. II, pp. 264-65).

The State Defendants and Intervenors moved to dismiss the complaint on the grounds that the Plaintiffs lacked standing, and the Plaintiffs responded. (Vol. I, pp. 174-93; Vol. II, pp. 269-319, 220-237, 326-349). Following a hearing, the trial court dismissed the case with prejudice on the basis that the Plaintiffs lacked standing to bring this action, either based upon the doctrine of taxpayer standing or upon allegations of special injury. (Vol. II, p. 355-58).

Specifically, the trial court posited that taxpayer standing exists only to challenge a legislative appropriation, and therefore no taxpayer standing exists in the present case because the Program is funded by tax credits extended to third parties rather than by legislative appropriation. (Vol. II, p. 356 ¶¶ 3-5) (citing *Council for Secular Humanism, Inc. v. McNeil*, 44 So. 3d 112, 121 (Fla. 1st DCA 2010)). The trial court also found that the complaint's allegations of special injury did not confer standing. According to the court, the Plaintiffs' contention that the Program diverts resources from public schools was speculative and conclusory, and therefore not sufficient to confer standing. (Vol. II, p. 356-57 ¶¶ 6-7) (citing

Duncan v. State, 102 A.3d 913, 926-27 (N.H. 2014) and *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S.Ct. 1436, 1443 (2011)).

This appeal followed. (Vol. II, pp. 359-365).

SUMMARY OF THE ARGUMENT

Appellants have pled both special injury standing and taxpayer standing to bring the constitutional claims asserted here. Appellants pled specific injuries resulting from the Scholarship Program, asserting that the diversion of tax revenues to send students to private schools in Florida intentionally and necessarily results in significant reduced funding to Florida's public schools to the detriment of the students, teachers, and others associated with the schools represented in this lawsuit. This was precisely the harm recognized by the Florida Supreme Court in *Bush v. Holmes*, 919 So. 2d 392, 409 (Fla. 2006).

Appellants also have standing to bring this suit as taxpayers. Florida courts have consistently recognized that taxpayers have standing to bring constitutional challenges to impermissible uses of the State's taxing and spending powers. The Scholarship Program is clearly an exercise of legislative taxing and spending powers. No Florida court has limited taxpayer standing to challenges to appropriations acts, as the trial court below ruled. Finally, to the extent the trial court relied upon distinctions in other cases between state expenditures and tax exemptions with regard to analyzing potential violations of Article I, Section 3 of

the Florida Constitution, this was error. These distinctions are irrelevant to the question of standing, which is to be determined on the allegations of the complaint and not to be conflated with the merits of the claim.

ARGUMENT

Standard of Review: Standing is a pure question of law to be reviewed de novo. *E.g., Public Defender, Eleventh Judicial Circuit of Fla. v. State*, 115 So. 3d 261, 282 (Fla. 2013).

I. APPELLANTS HAVE ALLEGED SPECIFIC INJURIES ARISING FROM THE SCHOLARSHIP PROGRAM SUFFICIENT TO CONFER STANDING.

A party has standing to challenge the constitutionality of a statute upon showing that application of the statute injuriously affects the party's rights. *Miller v. Publicker Indus., Inc.* 457 So. 2d 1374, 1375 (Fla. 1984). "When considering standing, the trial court must accept all the material allegations as true, and construe them in favor of the challenged party." *See, e.g., Sun States Utils., Inc. v. Destin Water Users, Inc.*, 696 So. 2d 944, 945 n.1 (Fla. 1st DCA 1997). In determining whether to dismiss a complaint for lack of standing, a court must confine its review to the four corners of the complaint, draw all inferences in favor of the pleader, and accept all well-pled allegations in the complaint as true. *Wheeler v. Powers*, 972 So. 2d 285, 299 (Fla. 5th DCA 2008) (internal quotations and citation omitted).

Here, the Complaint alleges specific harms suffered by the Appellants resulting from the operation of the Scholarship Program. Nevertheless, the trial court found that Appellants' claims of harm were speculative and conclusory. (Vol. II, pp. 356-57 ¶¶ 6-7). This was error.

The Florida Supreme Court has held that public-school students and their parents have standing to allege the denial of an adequate education under Article IX, Section 1 of the Florida Constitution. *See Coalition for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 403 n.4 (Fla. 1996). Reversing the trial court's dismissal, the Court stated: "There is no question that this case involves a controversy that would have a direct impact on Florida children." *Id.* Because the same is true here, the trial court erred in dismissing this cause due to lack of standing.

As detailed above, the Complaint alleged that the Scholarship Program diverts state tax receivables to private intermediaries, who channel the money to private schools, as provided by the statute, to pay the cost of tuition for participating Florida children. (Vol. I, p. 11-30, ¶¶ 4, 31-32, 49-56, 60, 65-66). Since the 2005-2006 school year—when the Supreme Court invalidated the OSP—the amount of tax revenue that has been diverted to pay for these private-school vouchers has increased from $88 million to more than $286 million. (*Id.* pp. 10-11, ¶ 33). For the 2014-15 school year, that amount was expected to exceed $357

million. (*Id.*) As students leave the public schools to use Scholarship Program vouchers, the funding their public school districts receive under the Florida Educational Finance Program is proportionally reduced. (*Id.* p. 24 ¶ 48).[3] Therefore, the harm resulting from the Scholarship Program is far from speculative, but is instead the natural and intended result of the program's operation, which necessarily entails such reductions in public-school funding. *See* Fla. Stat. § 1011.62 (2014) (providing that districts are allocated funds for operation of schools based upon the number of students enrolled in each district).

Nor is it "speculative" that this systematic diversion of hundreds of millions of dollars away from the public education system will have a harmful effect on the public schools and those they serve. To the contrary, the Supreme Court expressly recognized in *Holmes II* that when a voucher program diverts money away from the public education system, that program "*by its very nature* undermines the system of 'high quality' free public schools." 919 So. 2d at 409 (emphasis added). This is the harm alleged in the Complaint, and it flows directly from the continued operation of the Scholarship Program. Indeed, even though the funding mechanism for the Scholarship Program differs from that of the voucher program

[3] Although the trial court's order considered only a single paragraph of the complaint based upon the purported invitation of Appellants to do so (Vol. I, pp. 356-57 ¶ 6), it is clear from the complaint and memoranda filed in this action that Appellants never claimed to rely upon a single paragraph for their allegations of injury. (Vol. I, pp. 11-30, ¶¶ 7-19, 33, 48, 56; Vol. II, pp. 224-28; 330-38).

struck down in *Homes II*, the harm of the two programs in reducing funding for the public education system—to the detriment and injury of students in that system—is precisely the same. Just as in *Holmes II*, the Appellants in this case are harmed by this diversion of resources from the public schools and the systematic "undermin[ing]" of those schools. (Vol. I, pp. 16, 24, 26 ¶¶ 19, 48, 56).

The trial court's order summarily rejects this argument without even addressing it, instead relying upon authorities from other jurisdictions that address entirely different arguments. Specifically, the court's reliance upon the New Hampshire Supreme Court's decision in *Duncan v. State*, 102 A.3d 913 (N.H. 2014), is wholly misplaced. It was unknown in that case whether or not the tax credit program at issue would result in "loss of money to local school districts," as this would depend on whether any students would leave the public schools and "how the legislature will respond to the decrease in students attending public schools, assuming that occurs." *Id.* at 927. No such uncertainty exists here. During the 2013-2014 school year alone, over 59,000 students opted not to attend public schools in Florida and instead to be educated in private schools at public expense through the Scholarship Program. (Vol. I, p. 26 ¶ 56). This resulted in hundreds of millions of dollars in reduced funding for the public schools in Florida. (Vol. I, pp. 20-21, 24 ¶¶ 33, 48).

Likewise, the U.S. Supreme Court's decision in *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436 (2011), is entirely off point, for that case does not even purport to address the type of harm alleged here. Rather, the injury that the Court rejected as speculative in *Winn* was the assertion that the tax credits at issue would result in higher taxes being imposed on the plaintiffs. *See Winn*, 131 S. Ct. at 1444 ("To conclude there is a particular injury in fact would require speculation that Arizona lawmakers react to revenue shortfalls by increasing respondents' tax liability.").

Indeed, the very proposition the trial court relied upon from *Winn* is inapplicable to this case. In explaining why the plaintiffs' status as taxpayers did not constitute special injury in that case, the Supreme Court observed that "[w]hen a government expends resources or declines to impose a tax, its budget does not necessarily suffer." *Id.* at 1443. But the Appellants here do not base their claims on an alleged general budget reduction as a result of the Scholarship Program; they allege that the Scholarship Program is designed to, and does in fact, draw tens of thousands of students from Florida's public schools and that as a result the budgets of those schools are directly and substantially harmed to the tune of hundreds of millions of dollars. This unquestionably harms the persons associated with those schools. Clearly, the rejection of an entirely different argument in *Winn* has no bearing upon Appellants' arguments here.

In sum, Appellants' well-pleaded allegations of specific, non-speculative injuries, which must be taken as true, establish the requisite stake in the outcome of the litigation to have standing to sue. The trial court's order to the contrary should be reversed.

II. APPELLANTS ALSO HAVE TAXPAYER STANDING.

A. Longstanding case law in Florida recognizes that taxpayer standing exists to challenge an exercise of the legislature's taxing and spending power.

The Florida Supreme Court "has long held that a citizen and taxpayer can challenge the constitutional validity of an exercise of the legislature's taxing and spending power without having to demonstrate a special injury." *Chiles v. Children A, B, C, D, E, and F*, 589 So. 2d 260, 263 n.5 (Fla. 1991). Taxpayer standing is an important and necessary safeguard because "an unconstitutional exercise of the taxing and spending power is intolerable in our system of government," and therefore "the courts should be readily available to immediately restrain such excesses of authority." *Paul v. Blake*, 376 So. 2d 256, 259 (Fla. 3d DCA 1979). As the Supreme Court observed, "[i]f a taxpayer does not launch an assault, it is not likely that there will be an attack from any other source," and thus taxpayers may be "the only champion of the people" in these circumstances. *Dep't of Admin. v. Horne*, 269 So. 2d 659, 660, 663 (Fla. 1972). Taxpayer standing is not grounded in any "injury" suffered by taxpayers, but rather rests on the Florida

courts' recognition that a taxpayer can bring a constitutional challenge to the legislature's exercise of its taxing and spending power even "*without* having to demonstrate a special injury." *Chiles*, 589 So. 2d at 263 n.5 (emphasis added).

The taxpayer standing doctrine has never been limited to challenges to actual appropriations, but rather applies to *any* "exercise of the legislature's taxing and spending power." *Chiles*, 589 So. 2d at 263 n.5; *see also N. Broward Hosp. Dist. v. Fornes*, 476 So. 2d 154, 155 (Fla. 1985) (taxpayer standing exists "where the taxpayer constitutionally challenges the exercise of governmental taxing and spending powers"); *Horne*, 269 So. 2d at 662 (taxpayer status sufficient to confer standing when the claim involves "constitutional challenges on taxing and spending").

There can be no dispute that the Scholarship Program involves an exercise of the State's *taxing* power. The Scholarship Program contains the following "Findings" by the Legislature:

> 1. It has the *inherent power to determine subjects of taxation* for general or particular public purposes.
>
> 2. Expanding educational opportunities and improving the quality of educational services within the state are valid public purposes that the Legislature may promote *using its sovereign power to determine subjects of taxation and exemptions from taxation*.
>
> 3. Ensuring that all parents, regardless of means, may exercise and enjoy their basic right to educate their children as they see fit is a valid public purpose that the

> Legislature may promote *using its sovereign power to determine subjects of taxation and exemptions from taxation*.

Fla. Stat. § 1002.395(1)(a), Fla. Stat. (2014) (emphasis added). These findings acknowledge that the Legislature's ability to create tax credits and determine who may take such credits, in what amounts, and for what purposes clearly stems from the State's taxing power. Florida courts have recognized that taxpayers have standing to bring constitutional challenges to such legislation. *See Paul*, 376 So. 2d at 260 (taxpayer had standing to bring constitutional challenge to tax exemption); *Charlotte Cnty. Bd. of Cnty. Comm'rs v. Taylor*, 650 So. 2d 146, 148 (Fla. 2d DCA 1995) (taxpayer had standing to challenge amendment to county charter placing cap on ad valorem taxes).

Nor can it seriously be disputed that the Scholarship Program also involves an exercise of the Legislature's *spending* power, in that the Legislature has created an elaborate state program funded by monies that are due and owing to the State and which, but for this Program, would be paid into the public fisc. The Legislature has established through the Scholarship Program a mechanism by which taxpayer funds are earmarked for the chosen purpose of paying private-school tuition. Indeed, the SFO which has served as the principal intermediary for channeling taxpayer funds to private schools expressly acknowledges that the "private, voluntary contributions" it receives are in fact diverted tax payments:

"[T]he legislature has made it possible for your company to *earmark* up to 100 percent of its state corporate income tax payment to fund low-income student scholarships." (Vol. I, p. 26 ¶ 55) (emphasis added).

The complaint in this case clearly alleges that the Scholarship Program is an unconstitutional exercise of the legislature's taxing and spending power as set forth under binding precedents. The trial court erred in failing to follow them.

B. *Council for Secular Humanism v. McNeil*, 44 So. 3d 112 (Fla. 1st DCA 2010) does not hold that taxpayer standing is limited to challenges of legislative appropriations.

Ignoring these longstanding precedents, the trial court ruled that taxpayer standing is limited to challenges to legislative appropriations. (Vol. II, p. 356 ¶¶ 3-5). In support, the court relied upon on a single sentence from this Court's decision in *Council for Secular Humanism v. McNeil*, 44 So. 3d 112, 121 (Fla. 1st DCA 2010), *rev. denied*, 41 So. 3d 215 (Fla. 2010): "To withstand dismissal on standing grounds . . . the challenge must be to legislative appropriations." (Vol. II, p. 356 ¶ 3). This single sentence cannot be read in isolation to rewrite the longstanding body of case law providing that taxpayer standing is appropriate in the context of a challenge to the government's exercise—in various forms—of its taxing or spending authority.

The plaintiffs in *Council for Secular Humanism* challenged certain state statutes that authorized a state agency to enter into contracts with faith-based

private entities. 44 So. 3d at 115. Count I of the plaintiffs' petition alleged that the statutes violated Article I, section 3 of the Florida Constitution, by allowing state funds to be used directly or indirectly in aid of a sectarian institution. *Id.* Count II of the petition challenged the actual contracts entered into pursuant to the statutes. *Id.* The Court found the plaintiffs had taxpayer standing to challenge the authorizing statutes in Count I because "the state was using legislative appropriations allegedly to aid sectarian institutions," but that "such is not the case with Count II." *Id.* at 122 (characterizing Count II as the "downstream performance of these contracts" by the private entity and the agency's oversight of the contracts).

Significantly, 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. *See* §§ 944.473, 944.4731, Fla. Stat. (2007). Far from actually appropriating funds, both statutes made clear that the services were not guaranteed. *See* § 944.473(2)(a), Fla. Stat. (2007) (inmate shall participate in substance abuse program services "when such services are available"); *id.* § 944.4731(3)(a) (department shall enter into contracts with multiple providers, including faith-based service programs, "contingent upon funding"). Nevertheless, the Court found the plaintiffs had taxpayer standing to challenge the statutes on the grounds that they allegedly

allowed the *use* of appropriations to aid sectarian institutions. *Council for Secular Humanism*, 44 So. 3d at 122.[4] On the other hand, the Court concluded that the conduct challenged in Count II was too far removed from the exercise of legislative taxing and spending powers. *See id.* By finding that the plaintiffs had standing to challenge the constitutionality of an exercise of the Legislature's taxing and spending powers under Article I, § 3, but that they lacked standing to bring the *same* constitutional challenge to other types of governmental action, *id.*, the court was simply applying the established rule that taxpayer standing exists over constitutional challenges directed to an exercise of the taxing or spending power – precisely the type of claims pled here.

Thus, it is evident from the Court's finding of taxpayer standing as to Count I that it did not intend for the sentence in question with respect to Count II—that taxpayer standing requires the challenge "be to legislative appropriations"—to be interpreted as literally and narrowly as did the trial court in this case. Nor can the treatise cited by the Court for this proposition be read as standing for the narrow proposition cited by the trial court. *Id.* at 121 (citing Philip J. Padavano, *Florida Civil Practice*, § 4.3 (2009 ed.) ("[T]his is a narrow exception which applies only

[4] The appellees in that case filed a motion for rehearing *en banc*, which was denied. 44 So. 3d at 123. Although several judges of the Court joined in a dissenting opinion to the denial of the rehearing *en banc*, the dissenting opinion asserted only that the panel's ruling was wrong as to Count I on the merits; it did not challenge the Court's finding of taxpayer standing as to Count I. *Id.* at 123-26 (Thomas, J., dissenting).

to constitutional challenges to appropriations; a plaintiff does not have standing to challenge other actions of a government simply by establishing his or her status as a taxpayer."). It is clear that both the Court in *Council for Secular Humanism* and the treatise upon which it relied were using the term "appropriation" as shorthand for reference to the exercise of the Legislature's taxing and spending power, whether or not such exercise was literally in the form of an appropriations act. Neither the Court nor the treatise was attempting to differentiate between appropriation laws and other actions involving legislative taxing or spending authority; both were simply acknowledging that the taxpayer standing doctrine did not authorize taxpayer challenges to all actions of government, but only to constitutional challenges to an exercise of the taxing and spending powers.

If taxpayer standing were limited to challenges to legislative appropriations, as asserted by the trial court, not only would there have been no basis for taxpayer standing with respect to Count I of *Council for Secular Humanism* itself but there also would have been no taxpayer standing in *Chiles v. Children A, B, C, D, E, and F*, 589 So. 2d 260 (Fla. 1991). There, the taxpayers challenged a statute that delegated to the executive branch the authority to reapportion the state budget under certain circumstances. *Id.* at 263. Although the statute did not itself appropriate any funds, the court held there was taxpayer standing because the

statute went "to the very heart of the legislature's taxing and spending power." *Id.* at n.5. This holding cannot be reconciled with the trial court's ruling below.

Likewise, the trial court's insistence upon a legislative appropriation seems to ignore—and would effectively undo—the precedents holding that taxpayer standing exists not only for challenges to the constitutionality of the exercise of government spending power, but also as to its *taxing* power. *Charlotte Cnty. Bd. of Cnty. Comm'rs*, 650 So. 2d at 148 (taxpayer standing to challenge amendment to county charter placing cap on ad valorem taxes); *Paul*, 376 So. 2d at 260 (taxpayer standing to bring constitutional challenge to tax exemption). The trial court's ruling wholly ignores these authorities and cannot be reconciled with them.

C. The trial court improperly conflated standing with the merits by relying upon a distinction between appropriations and tax credits as a basis for finding no taxpayer standing.

As demonstrated above, the Scholarship Program challenged in this suit is an exercise of both the legislature's taxing power and its spending power, and it therefore is subject to challenge by the Appellant taxpayers in this case. In ruling to the contrary, the trial court improperly relied upon an excerpt from this Court's opinion in *Holmes I* which has nothing to do with taxpayer standing.

The trial court cited portions of *Holmes I* in support of the statement that this Court has "carefully distinguished between tax exemptions and credits, on the one hand, and appropriations from the treasury, on the other." (Vol. II, p. 356, ¶ 4).

This statement may be true, as far as it goes, but it has nothing whatsoever to do with the issue of taxpayer standing.[5] The cited passages are taken from a discussion of the merits of that suit, in which the Court addressed the cases the defenders of the OSP had cited in support of their contention that the OSP did not violate Article I, Section 3. *Holmes I*, 886 So. 2d at 354-56. This Court concluded that all of the cited cases were distinguishable "[b]ecause none of the[] cases involve the use of state revenues to aid a sectarian institution." *Id.* at 354.

It appears the trial court relied upon this discussion in *Holmes I* to suggest that, like the cases cited therein, the tax-credit funded Scholarship Program challenged in this case is permissible under Article I, § 3. Appellants dispute this proposition and submit that there are important distinctions between the cases cited and the present case. But more importantly, this is a merits argument that cannot properly be grafted into the standing issue presented at this stage of the case.

Florida courts have repeatedly emphasized that a plaintiff's *standing* to raise a claim does not turn on the merits of that claim: "[S]tanding depends on the nature of the injury asserted . . . . It does *not* depend on the elements or merits of the underlying claim." *Peace River/Manasota Reg'l Water Supply Auth.*, 18 So. 3d 1079, 1083 (Fla. 2d DCA 2009) (emphasis in original); *see also, e.g.*, *Sun States*

[5] In *Holmes I*, a challenge by many of the same entities and types of individual plaintiffs as brought the present case, the defendants and intervenors did not contest the standing of 17 of the 19 plaintiffs. *Holmes v. Bush*, No. CV 99-3370, 2000 WL 526364, at *1 n.2 (Fla. Cir. Ct. Mar. 14, 2000).

Utils., Inc. v. Destin Water Users, Inc., 696 So. 2d 944, 945 n.1 (Fla. 1st DCA 1997) ("Standing should not be confused with the merits of a claim."); *St. Martin's Episcopal Church v. Prudential-Bache Sec., Inc.*, 613 So. 2d 108, 110 n.4 (Fla. 4th DCA 1993) ("Whether the [litigant] will prevail on the claim is not an issue implicated by an inquiry into a question of prudential standing."); *Reily Enters., LLC v. Fla. Dep't of Envtl. Prot.*, 990 So. 2d 1248, 1251 (Fla. 4th DCA 2008) (rejecting "attempt[] to inject factual considerations properly applicable to consideration of the merits . . . into the issue of standing"); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 624 (1989) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)) ("[A]lthough . . . standing 'often turns on the nature and source of the claim asserted,' it 'in no way depends on the merits of the [claim].'").

In the event this cause is remanded for a determination on the merits, the Defendants and Intervenors are, of course, free to rely upon this discussion in *Holmes I* to argue that channeling taxpayer funds to private schools through a 100% tax credit obviates the constitutional prohibition in Article I, Section 3. But that clearly is an argument on the *merits* which does not have any bearing upon whether or not Appellants have standing as taxpayers to litigate this legal theory in the first instance. The trial court erred in ruling to the contrary.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the trial court's order dismissing this action with prejudice be reversed and this case be remanded for adjudication on the merits.

Respectfully submitted,

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

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