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

JOANNE McCALL *et al.*, Plaintiffs, v. RICK SCOTT, Governor of Florida, in his official capacity as the head of the Florida Department of Revenue, *et al*., Defendants, and UMENE PROPHETE *et al*., Intervenor-Defendants.	Case No. 2014 CA 002282

INTERVENOR-DEFENDANTS' MOTION TO DISMISS
AND SUPPORTING MEMORANDUM OF LAW

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Intervenor-Defendants Umene Prophete, Cheryl Joseph, Rabbi Boaz Levy, Wendy Fiorilo, Febe Rodriguez, Noraida Rivera, Linzi Morris, Olivia Schaeffer, Onekia Garner, Marlene Desdunes, Andrea Wiggins, Keyla Pineda, Helean Curry, Maria Torresi, and Alyson Hochstedler move to dismiss Plaintiffs' complaint for lack of standing under Florida Rule of Civil Procedure 1.140(b) and state as follows:

MOTION TO DISMISS

Plaintiffs lack standing to challenge the Florida Tax Credit Scholarship Program and therefore their complaint must be dismissed with prejudice. Taxpayer standing is available only where a plaintiff challenges legislative appropriations. *Council for Secular Humanism, Inc. v. McNeil*, 44 So. 3d 112, 121 (Fla. 1st DCA 2010) ("To withstand dismissal on standing grounds . . . the challenge must be to legislative appropriations."). A "tax expenditure," such as a tax credit or exemption, is not a legislative appropriation and does not confer taxpayer standing. The First District has squarely rejected Plaintiffs' claimed equivalence between appropriations and "tax expenditures" in this context. *Bush v. Holmes*, 886 So. 2d 340, 356 (Fla. 1st DCA 2004) ("[A]ssistance to a religious institution through such mechanisms as tax exemptions . . . . constitute[s] substantially different forms of aid than the transfer of public funds."), *aff'd* in part, 919 So. 2d 392 (Fla. 2006).

In the case of an appropriation benefiting sectarian schools, the First District has held, "the state forcibly diverts the income of both believers and nonbelievers to churches." *Id*. That forcible diversion harms taxpayers who object to having their tax dollars spent on sectarian activities and justifies taxpayer standing. In the case of a tax credit, by contrast, "the state merely refrains from diverting to its own uses income independently generated by the churches through voluntary contributions." *Id.* All funds that ultimately support sectarian activities come from voluntary,

private contributions. Because no taxpayer's income is forcibly diverted to private or sectarian purposes, no taxpayer is harmed and therefore taxpayer standing is unavailable.

The Florida courts have also made clear that article I, section 3 (the "no-aid provision") and article IX, section 1 (the "uniform-public-schools provision") of the Florida Constitution restrict only the appropriation of public funds. *Id.* at 352 ("[T]he no-aid provision focuses on ***the use of state funds*** to aid sectarian institutions, not on other types of support."); *Bush v. Holmes*, 919 So. 2d 392, 408 (Fla. 2006) ("The Constitution prohibits the state from ***using public monies*** to fund a private alternative to the public school system.") (emphases added). Because these constitutional provisions do not limit the Legislature's authority to provide credits against taxes owed for voluntary contributions made to nonprofit scholarship funding organizations, neither provision can serve as the predicate for taxpayer standing in a challenge to the Tax Credit Scholarship Program. *See Alachua Cnty. v. Scharps*, 855 So. 2d 195, 198 (Fla. 1st DCA 2003) ("[T]axpayer standing is available if the taxpayer can show that a government taxing measure or expenditure violates ***specific constitutional limitations*** on the taxing and spending power.") (emphasis added).

Plaintiffs also lack special-injury standing. Unlike the Opportunity Scholarship Program, which "transfer[red] tax money earmarked for public education to private schools," *Holmes*, 919 So. 2d at 408, the Tax Credit Scholarship Program does not draw on tax dollars "earmarked for public education" or any other source of public funds. The tax credit signals the State's decision *not* to exercise its taxing power over the credited funds and *not* to allocate those funds to any public purpose. Accordingly, there is no "diversion" of public funds to which the public schools would otherwise be entitled. Plaintiffs cannot establish a special injury by claiming that the public schools are entitled to untaxed, unappropriated, private funds.

Even if Plaintiffs *could* make such a claim, moreover, they have not plausibly alleged that the public schools have suffered a financial hardship as a result of the Tax Credit Scholarship Program. Plaintiffs fail to account for the Legislature's additional appropriations to the public school system and for the cost savings that the Tax Credit Scholarship Program has accomplished. These factors make implausible the allegation that the public system has suffered financial harm as a result of the Scholarship Program. And even if it had, Plaintiffs have not shown how this alleged harm is personal to them. To survive dismissal, Plaintiffs must allege a "concrete and particularized injury in fact which must affect the plaintiff in a personal and individual way," *Save Homosassa River Alliance, Inc. v. Citrus Cnty.*, 2 So. 3d 329, 344 (Fla. 5th DCA 2008) (quotation marks omitted), that is "different in degree and kind from that suffered by the community at large," *U.S. Steel Corp. v. Save Sand Key, Inc.*, 303 So. 2d 9, 12 (Fla. 1974). By alleging only harm to the school districts in general, Plaintiffs have not met that burden.

Finally, Plaintiffs claim that the Florida School Boards Association, on behalf of its members, has standing to challenge the statutory obligations of school boards under the Tax Credit Scholarship Program. That is incorrect. In Florida, "a public official may only seek a declaratory judgment when he is 'willing to perform his duties, but . . . prevented from doing so by others.'" *Dep't of Revenue v. Markham*, 396 So. 2d 1120, 1121 (Fla. 1981) (quoting *Reid v. Kirk*, 257 So. 2d 3, 4 (Fla. 1972)). In this case, there is no allegation that the school boards are willing to perform their duties under the Scholarship Program but are prevented from doing so. Instead, the school boards simply disagree with the Program. Standing is not available for such a claim. *Id.* ("Disagreement with a constitutional or statutory duty, or the means by which it is to be carried out, does not create a justiciable controversy or provide an occasion to give an advisory judicial

opinion."). Accordingly, the Florida School Boards Association lacks standing for this reason alone as well as for the others stated herein.

BACKGROUND

The Florida Tax Credit Scholarship Program aims to "[e]nable taxpayers to make private, voluntary contributions to nonprofit scholarship-funding organizations." § 1002.395(1)(b)(1), Fla. Stat. (2014). It therefore allows Florida taxpayers to apply for tax credits that correspond to their donations to scholarship-funding organizations. *Id.* § 1002.395(5)(b). The Department of Revenue approves such applications on a "first-come, first served basis" before reaching an overall tax credit cap. *Id.* § 1002.395(5)(b)(1).

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

An earlier scholarship program that aimed to provide tuition assistance to children, the Florida Opportunity Scholarship Program ("OSP"), was invalidated by the Florida Supreme Court because it allowed children "to receive a ***publicly funded*** education through an alternative system of private schools." *Holmes*, 919 So. 2d at 412 (emphasis added). The Court concluded in that case that the Florida Constitution "does not allow ***the use of state monies*** to fund a private school education." *Id.* at 413 (emphasis added). The Court was careful to emphasize that its decision

"does not deny parents recourse to either public or private school alternatives to a failing school. Only when the private school option depends upon public funding is choice limited." *Id.* at 412.

Plaintiffs contend that the Florida Tax Credit Scholarship Program is "the State's replacement for the OSP." Pls.' Opp. to Defs.' Mot. to Dismiss 1. That is incorrect. When the Legislature enacted the Florida Tax Credit Scholarship Program in early 2001, the First District Court of Appeal had recently *upheld* the OSP against a constitutional challenge, concluding that the circuit court had been wrong to strike it down. *See Bush v. Holmes*, 767 So. 2d 668, 675 (Fla. 1st DCA 2000) ("[N]othing in article IX, section 1 clearly prohibits the Legislature from allowing the well-delineated use of public funds for private school education.") (footnote omitted); *id.* at 677 ("[W]e hold that the trial court erred in finding the OSP facially unconstitutional under article IX, section 1."). So the Legislature expected that both programs would serve Florida's schoolchildren; it did not intend the Tax Credit Scholarship Program to replace the OSP but to operate alongside it.

Accordingly, the purpose of the Tax Credit Scholarship Program is different from that of the OSP. The Tax Credit Scholarship Program aims to "expand[] educational opportunities for children of families that have limited financial resources" by "[e]nabl[ing] taxpayers to make private, voluntary contributions to nonprofit scholarship-funding organizations." § 1002.395(5)(b), Fla. Stat. (2014). The OSP, by contrast, was designed to provide alternatives to students who are assigned to failing public schools. *See Holmes*, 919 So. 2d at 400 ("The OSP provides that a student who attends or is assigned to attend a failing public school may attend a higher performing public school or use a scholarship provided by the state to attend a participating private school."). In other words, the OSP sought to discharge the State's obligation to provide an adequate basic education to students whose public schools were failing while the Tax Credit

Scholarship Program seeks to encourage charitable contributions to support educational opportunities for needy children. These are two separate and independent programs.

Because the programs serve different purposes, the funding for each program comes from a different source. Under the OSP, funds for opportunity scholarships were drawn "from each school district's appropriated funds." *Id.* at 402; *see also* Compl. ¶ 27. Under the Florida Tax Credit Scholarship Program, the State pays no money out of the state treasury to any private school. Compl. ¶ 50. Instead, Floridians may make private, voluntary contributions—creditable up to a cap against certain taxes—to private nonprofit organizations that award scholarships to needy children, who in turn choose the schools they will attend. §§ 1002.395(5), 1002.395(7)(a), Fla. Stat. (2014). Thus, the State makes no appropriation in connection with the Program. Because all scholarship funds result from private contributions, the Florida Tax Credit Scholarship Program accommodates the restrictions on "the state's use of public funds" identified by the Florida Supreme Court. *Holmes*, 919 So. 2d at 410. It also responds to the objection of Plaintiffs to having their tax dollars "support religious instruction in faiths to which he does not subscribe." Compl. ¶ 10. Plaintiffs can be certain that *none* of their tax dollars are supporting religious instruction because no tax dollars are appropriated to private schools.

The Florida Tax Credit Scholarship Program ensures that the only persons whose dollars end up supporting education at a religious institution are those who have voluntarily chosen to contribute to a scholarship-funding organization. In this way, the Program furthers the State's interest in "expanding educational opportunities for children of families that have limited financial resources," § 1002.395(1)(b)(3), Fla. Stat. (2014), while respecting constitutional limitations on the use of public funds. Florida is one of fourteen states that balance these concerns by providing tax credits for private contributions to scholarship-funding organizations. The other states are

Alabama, Arizona, Georgia, Iowa, Indiana, Kansas, Louisiana, New Hampshire, Oklahoma, Pennsylvania, Rhode Island, South Carolina, and Virginia.[1] The earliest of these states' programs was enacted in 1997. No tax credit scholarship program has ultimately been held unconstitutional in the state or federal courts.

As of September 23, 2014, there are nearly 69,000 students in Florida studying on scholarships provided by scholarship-funding organizations pursuant to the Program. The average family participating in the Program during the 2014-15 school year had an annual income equivalent to a family of four earning less than $25,000. Based on recent census data, these families are, on average, in the bottom 18% of the household income distribution for Florida. The majority of current scholarship students are minorities: 30% are African American, 38% are Hispanic, and 3% are of mixed race. These students have demonstrated educational improvement since entering the Program. Participating students "tend to be disproportionately low-performing prior to their arrival into the program," but the results of nationally norm-referenced tests show that scholarship students are now making annual gains equivalent to the gains of the average American student, keeping pace with "a national peer group that includes not just low-income families but also higher-income families."[2] Eligible Florida families have expressed strong demand for the Program. In the current year, families initiated over 120,000 student applications

[1] *See* Friedman Foundation for Educational Choice, School Choice Programs, http://www.edchoice.org/School-Choice/School-Choice-Programs.aspx.

[2] *See* David N. Figlio, Evaluation of the Florida Tax Credit Scholarship Program Participation, Compliance and Test Scores in 2012-13, at 36 (August 2014), *available at* http://www.floridaschoolchoice.org/pdf/FTC_Research_2012-13_report.pdf. Participating schools must administer an approved nationally norm-referenced test identified by the Florida Department of Education, such as the Stanford Achievement Test or Basic Achievement Skills Inventory. § 1002.395(8)(c)(2), Fla. Stat. (2014). *See generally* Florida Department of Education, Office of Independent Education and Parental Choice, Florida Tax Credit Scholarship Program, http://www.floridaschoolchoice.org/information/ctc/.

for scholarships before the application process was cut off, yet current contributions to scholarship-funding organizations cover only about 69,000 scholarships.

STANDARD OF REVIEW

Whether a party has standing is a pure question of law. *Alachua Cnty*., 855 So. 2d at 198. "When standing is raised as an issue, the trial court must determine whether the plaintiff has a sufficient interest at stake in the controversy which will be affected by the outcome of the litigation." *Id.* In considering a motion to dismiss, the court must "accept as true all well-pled allegations" in the complaint and draw reasonable inferences in favor of the pleader, but the court "need not accept internally inconsistent factual claims, conclusory allegations, unwarranted deductions, or mere legal conclusions made by a party." *W.R. Townsend Contracting, Inc. v. Jensen Civil Const., Inc.*, 728 So. 2d 297, 300 (Fla. 1st DCA 1999) (citing with approval *Response Oncology, Inc. v. MetraHealth Ins. Co.*, 978 F. Supp. 1052, 1058 (S.D. Fla. 1997)); *see also Response Oncology*, 978 F. Supp. at 1058 ("Courts must liberally construe and accept as true allegations of fact in the complaint and inferences reasonably deductible therefrom, but need not accept factual claims that are internally inconsistent; facts which run counter to facts of which the court can take judicial notice; conclusory allegations; unwarranted deductions; or mere legal conclusions asserted by a party.").[3] Florida courts may take notice of legislative and executive actions and public records. §§ 90.201, 90.202, Fla. Stat. (2014); *Conyers v. State*, 123 So. 817, 818 (Fla. 1929) ("Courts may take judicial cognizance of all public documents and public records."); 23 Fla. Jur 2d Evidence and Witnesses § 57 (2014).

[3] In accordance with this standard, Intervenor-Defendants accept for purposes of this motion Plaintiffs' allegations that some schools participating in the Tax Credit Scholarship Program are "sectarian" within the meaning of the no-aid provision. A determination of that issue on the merits would require a factual inquiry. *Council for Secular Humanism*, 44 So. 3d at 120.

MEMORANDUM OF LAW

I. PLAINTIFFS LACK TAXPAYER STANDING.

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

In *Rickman v. Whitehurst*, "the Florida Supreme Court construed the right of citizen-taxpayers to sue the state by requiring that, when challenging government policy or actions, a taxpayer must allege a 'special injury' which differs in kind and degree from that sustained by other members of the community at large." *Council for Secular Humanism*, 44 So. 3d at 121 (describing *Rickman v. Whitehurst*, 74 So. 205, 207 (Fla. 1917)). The *Rickman* rule against taxpayer standing is based on the traditional view that in order to invoke judicial review a plaintiff must assert more than "the generalized interest of all citizens in constitutional governance." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974). Rather, "the injury must affect the plaintiff in a personal and individual way" and must be "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 & n.1 (1992); *see also Williams v. Howard*, 329 So. 2d 277, 282 (Fla. 1976) (noting requirement "that there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter").

The Florida Supreme Court has recognized a limited exception to the *Rickman* rule against taxpayer standing for cases in which a plaintiff alleges that a legislative exercise of the taxing and spending power "is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power." *Dep't of Admin. v. Horne*, 269 So. 2d 659, 663 (Fla. 1972) (quoting *Flast v. Cohen*, 392 U.S. 83, 106 (1968)). "To withstand dismissal on standing grounds, however, ***the challenge must be to legislative appropriations***." *Council for Secular Humanism*, 44 So. 3d at 121 (emphasis added). The First District Court of Appeal has emphasized that "[t]his is a narrow exception which applies ***only to constitutional challenges to***

appropriations; a plaintiff does not have standing to challenge other actions of the government simply by establishing his or her status as a taxpayer." *Id.* (quoting Philip J. Padovano, Florida Civil Practice § 4.3 (2009 ed.)) (emphasis added).

In this case, Plaintiffs do not challenge a legislative appropriation and therefore taxpayer standing is unavailable. As Plaintiffs admit, the Tax Credit Scholarship Program involves no legislative appropriation to any private school. Compl. ¶ 50. Rather, the Legislature has chosen *not* to tax private, voluntary contributions to scholarship-funding organizations. In other words, the Legislature has *declined* to exercise its taxing power, just as it has with respect to numerous other credits, deductions, exclusions, and exemptions under Florida law. The *Horne* exception does not confer standing on all taxpayers to challenge the Legislature's various decisions *not* to tax certain expenditures or to credit certain expenditures against tax payments owed. *See Markham*, 396 So. 2d at 1122 (noting that standing is not available for "disgruntled taxpayers, who . . . are not entirely pleased with certain of the taxing and spending decisions of their elective representatives. It is felt that absent some showing of special injury . . . the taxpayer's remedy should be at the polls and not in the courts.") (quoting *Paul v. Blake*, 376 So. 2d 256, 259 (Fla. 3d DCA 1979)).[4]

The limitation of the *Horne* exception to appropriations follows directly from the rationale for the exception. In recognizing the *Horne* exception, the Florida Supreme Court adopted the

[4] The Florida Supreme Court has held to this rule even where it could prevent taxpayers from challenging unlawful government conduct because "it has long been recognized that in a representative democracy the public's representatives in government should ordinarily be relied on to institute the appropriate legal proceedings to prevent the unlawful exercise of the state or county's taxing and spending power." *Markham*, 396 So. 2d at 1122; *see also N. Broward Hosp. Dist. v. Fornes*, 476 So. 2d 154, 155 (Fla. 1985) (noting "the rule announced in *Rickman v. Whitehurst* that in the event an official threatens an unlawful act, the public by its representatives must institute the proceedings to prevent it, unless a private person can show a damage peculiar to his individual interests [i.e., a special injury]") (internal citation omitted).

reasoning of the U.S. Supreme Court in *Flast v. Cohen*. *See Horne*, 269 So. 2d at 663 ("We choose to follow the United States Supreme Court (*Flast*)."); *Paul*, 376 So. 2d at 259 (noting that *Horne* "adopt[ed] as the law of Florida, *Flast v. Cohen*"). In *Flast*, the Supreme Court held that a plaintiff could be deemed to suffer a particularized injury for standing purposes when, in violation of the Establishment Clause, his property is transferred through the government treasury to a sectarian institution. "The taxpayer's allegation in such cases would be that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power." *Flast*, 392 U.S. at 106. The Court concluded that "[s]uch an injury is appropriate for judicial redress" because it represents actual harm to the taxpayer rather than "generalized grievances about the conduct of government." *Id.*

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

Yet where the Legislature does not appropriate funds from the treasury but merely declines to tax private, voluntary contributions, this taxpayer injury is not present. No taxpayer's money is "extracted and spent" on sectarian activities. The U.S. Supreme Court has explicitly held that

where a plaintiff challenges a tax credit rather than appropriation, taxpayer injury is *not* present and therefore the *Flast* exception does *not* apply:

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

Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1447 (2011) (holding that plaintiffs lack taxpayer standing to challenge tax credits for contributions to scholarship-funding organizations). The taxpayer in *Flast* could be certain that his tax dollars, to some small extent, were being used to finance sectarian activities. But where, as here, the State provides tax credits to taxpayers who choose to contribute to scholarship-funding organizations, no taxpayer contributes to sectarian activities unless he or she has freely chosen to do so. *See id.* ("When Arizona taxpayers choose to contribute to STOs, they spend their own money, not money the State has collected from respondents or from other taxpayers. . . . The STO tax credit is not tantamount to a religious tax or to a tithe and does not visit the injury identified in *Flast*."). For that reason, the Supreme Court has held that taxpayers challenging a tax credit scholarship program do not qualify for the *Flast* exception and lack standing to maintain their suit. *Id.* ("Finding standing under these circumstances . . . . would be a departure from *Flast*'s stated rationale.").[5]

Because tax credits do not injure taxpayers by extracting and spending their tax dollars on sectarian activities, the *Horne* exception does not apply and taxpayer standing is not available. Plaintiffs nevertheless insist, against the Florida Supreme Court's plain language in *Horne*, that

[5] Plaintiffs challenge the State's reliance on *Winn* in the context of special-injury standing. *See* Pls.' Opp. to Defs.' Mot. to Dismiss 8. But Plaintiffs do not even address *Winn*'s holding on taxpayer standing. That holding is directly on point. The Arizona program at issue in that case is substantively identical to Florida's. *See Winn*, 131 S. Ct. at 1440 ("Arizona provides tax credits for contributions to school tuition organizations.").

the *Horne* exception somehow extends beyond the logic of *Flast* to encompass challenges to tax credits rather than appropriations. Pls.' Opp. to Defs.' Mot. to Dismiss 10 n.3. To that end, Plaintiffs wrest out of context the Florida Supreme Court's statement that "in Florida, unlike the federal system, the doctrine of standing has not been rigidly followed." *Coalition for Adequacy*, 680 So. 2d at 403 (citing *Dep't of Revenue v. Kuhnlein*, 646 So. 2d 717, 720 (Fla. 1994)). In context, the Court was referring to the plenary jurisdiction granted Florida courts as distinct from the limited jurisdiction of the federal courts, which obviates the need rigidly to ensure, for example, that all matters of controversy are fully ripe and that alternative remedies have been exhausted. *See Kuhnlein*, 646 So. 2d at 720 ("Unlike the federal courts, Florida's circuit courts are tribunals of plenary jurisdiction. They have authority over any matter not expressly denied them by the constitution or applicable statutes. Accordingly, the doctrine of standing certainly exists in Florida, but not in the rigid sense employed in the federal system.").[6] But the Florida Supreme Court has never suggested that Florida courts have relaxed the standing requirement of a special injury that creates the controversy in the first place. Nor has the Court ever indicated that Florida's less rigid *application* of standing doctrine means that the *substance* of the doctrine is dramatically more expansive.

There is no basis for concluding that the *Horne* exception confers taxpayer standing in swaths of cases outside the reach of *Flast*. Neither of Plaintiffs' citations about avoiding "rigidity" even relate to taxpayer standing, much less address the scope of *Horne*.[7] The Florida Supreme

[6] In *Kuhnlein*, the State questioned the standing of plaintiffs to challenge an allegedly unconstitutional fee on the ground that the plaintiffs "either have not paid the fee or have not requested a refund of any fee paid," which might have raised ripeness issues in federal court. 646 So. 2d at 720. The Court said it was enough "that these plaintiffs face penalties for failure to pay an allegedly unconstitutional tax." *Id.*

[7] In both cases, the court was addressing whether plaintiffs had suffered a special injury sufficient to confer standing. In *Coalition for Adequacy & Fairness v. Chiles*, the Court concluded that

Court has never said that the *Horne* exception extends beyond *Flast* to encompass challenges to dozens of tax credit programs.[8] Instead, the Court was clear in *Horne* that it was adopting *Flast* as the law of Florida. *Horne*, 269 So. 2d at 663 ("We choose to follow the United States Supreme

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public-school students had shown a special injury because they "alleged that they are suffering a continuing injury as a result of being denied an adequate education." 680 So. 2d 400, 403 n.4 (Fla. 1996). In *Reinish v. Clark*, the court concluded that the plaintiffs suffered the special injury of having to pay more in taxes than similarly situated residents "because of a tax exemption that unconstitutionally discriminates against them based on their out-of-state residency." 765 So. 2d 197, 203 (Fla. 1st DCA 2000). In both of these cases, the plaintiffs did not need to rely on taxpayer standing. The *Reinish* opinion does not even mention taxpayer standing. While the plaintiffs in *Coalition for Adequacy* may have had taxpayer standing in addition to special-injury standing, the case is consistent with *Horne* and with *Flast* because the plaintiffs had challenged legislative appropriations. 680 So. 2d at 406 (noting that plaintiffs asked the court to determine "whether the Legislature's appropriation of funds is adequate"). The requirement that a taxpayer-plaintiff challenge an actual appropriation is apparent also from the Court's ultimate conclusion that the plaintiffs could not maintain an action without raising "an objection to some specific funding issue" rather than an objection to the overall funding level. *Id.*

[8] The Florida Legislature has enacted at least 32 tax credit programs: the Florida Health Maintenance Organization Credit, § 631.828, Fla. Stat.; Enterprise Zone Jobs Credit, § 220.181, Fla. Stat.; Enterprise Zone Property Tax Credit, § 220.182, Fla. Stat.; Community Contribution Tax Credit, § 220.183, Fla. Stat.; Hazardous Waste Facility Tax Credit, § 220.184, Fla. Stat.; Contaminated Site Rehabilitation Tax Credit, § 220.1845, Fla. Stat.; State Housing Tax Credit, § 220.185, Fla. Stat.; Florida Alternative Minimum Tax (AMT) Credit, § 220.186, Fla. Stat.; Credit for Contributions to Nonprofit Scholarship Funding Organizations, §§ 220.1875, 624.51055, Fla. Stat.; Rural Job Tax Credit, §§ 212.098, 220.1895, Fla. Stat.; Urban High Crime Area Job Tax Credit, §§ 212.097, 220.1895, Fla. Stat.; Entertainment Industry Tax Credit, § 220.1899, Fla. Stat.; Child Care Tax Credits, § 220.19, Fla. Stat.; Capital Investment Tax Credit, § 220.191, Fla. Stat.; Florida Renewable Energy Technologies Investment Tax Credit, § 220.192, Fla. Stat.; Florida Renewable Energy Production Tax Credit, § 220.193, Fla. Stat.; Emergency Excise Tax (EET) Credit, § 220.195, Fla. Stat.; Research and Development Tax Credit, § 220.196, Fla. Stat.; New Markets Tax Credit, § 288.9916, Fla. Stat.; Energy Economic Zone Tax Credit, § 377.809, Fla. Stat.; Corporate Income Tax for Spaceflight Projects, § 220.194, Fla. Stat.; Corporate Income Tax Credit Against Insurance Premium Tax, §§ 624.09, 631.72, Fla. Stat.; Credit for Salaries Paid by an Insurer, § 624.509, Fla. Stat.; Florida Life and Health Insurance Guaranty Association Credit, § 631.72, Fla. Stat.; Credit for Municipal Premium Taxes Payable for Firemen's Relief Fund and Policemen's Retirement Funds, §§ 175.141, 185.12, 624.509, Fla. Stat.; Worker's Compensation Assessment Credit, § 440.51, Fla. Stat.; Qualified Defense Contractor and Space Flight Business Refunds, § 288.1045, Fla. Stat.; Qualified Target Industry Business Tax Refunds, § 288.106, Fla. Stat.; Brownfield Redevelopment Bonus Refunds, § 288.107, Fla. Stat.; Gross Receipts Tax Credit, § 203.01; Beer Distributors' Collection Credit, § 563.07, Fla. Stat.; Sales/Use Tax Dealers' Collection Credit, § 212.12, Fla. Stat.

Court (*Flast*)."); *see also Paul*, 376 So. 2d at 259 (describing *Horne* as "adopting as the law of Florida, *Flast v. Cohen*"); *Godheim v. City of Tampa*, 426 So. 2d 1084, 1087 (Fla. 2d DCA 1983) ("The court based its 'exception' to the Rickman rule upon *Flast v. Cohen*."); *Martin v. City of Gainesville*, 800 So. 2d 687, 688 (Fla. 1st DCA 2001) (citing *Flast* and *Horne* together). Since that decision, the Court has been clear that *Horne* has not expanded beyond its initial *Flast* rationale. *Fornes*, 476 So. 2d at 156 ("This Court has refused to depart from the special injury rule or expand our exception established in *Horne*."); *Alachua Cnty.*, 855 So. 2d at 198 ("The supreme court refused to depart from this special injury rule or expand this exception."). For that reason, Florida law provides no justification for expanding the *Horne* exception beyond the *Flast* rationale that allows taxpayer standing to challenge legislative appropriations but not tax credits or exemptions. *See Winn*, 131 S. Ct. at 1447 (holding that expanding taxpayer standing to challenge tax credits "would be a departure from *Flast*'s stated rationale").

As if that were not enough, Florida courts have also embraced the distinction between appropriations and exemptions in this context. The First District Court of Appeal has held that exemptions from taxation do not cause the taxpayer injury identified by *Horne* and *Flast*. As the First District explained: "In the case of direct subsidy, the state forcibly diverts the income of both believers and nonbelievers to churches. In the case of an exemption, the state merely refrains from diverting to its own uses income independently generated by the churches through voluntary contributions." *Holmes*, 886 So. 2d at 356. Because tax exemptions do not "forcibly divert[]" the income of taxpayers to sectarian activities, tax exemptions do not inflict the same taxpayer injury as appropriations. Accordingly, the First District has explicitly held that taxpayer standing is available only for constitutional challenges to appropriations. *Council for Secular Humanism*, 44 So. 3d at 121 ("To withstand dismissal on standing grounds . . . the challenge must be to legislative

appropriations."). Florida commentators agree. *See, e.g.*, Philip J. Padovano, Florida Civil Practice § 4.3 (2014 ed.) ("[T]his is a narrow exception which applies only to constitutional challenges to appropriations; a plaintiff does not have standing to challenge other actions of the government simply by establishing his or her status as a taxpayer."); 55 Fla. Jur 2d Taxpayers' Actions § 8 (2014) ("Where there is no special injury, to withstand dismissal on standing grounds, the constitutional challenge must be to legislative appropriations.").

Without an appropriation from the state treasury, the injury recognized by the *Horne*/*Flast* exception—that a taxpayer's funds have been "extracted and spent" on sectarian activities—does not exist, and therefore the exception does not apply. This court should respect the Florida Supreme Court's instruction that *Horne* allows "only a very limited exception to the special injury rule" where taxpayers suffer an injury from the violation of constitutional limitations on the taxing and spending power, *U.S. Steel*, 303 So. 2d at 13, and decline to expand the exception to cases where the plaintiff taxpayers suffer no injury at all. Plaintiffs can allege no misuse of their tax dollars or injury to themselves as taxpayers. Accordingly, Plaintiffs' complaint must be dismissed for lack of taxpayer standing.

B. Tax Credits Are Not Appropriations And Do Not Confer Taxpayer Standing.

Plaintiffs suggest that the tax credits in this case should be treated as the equivalent of appropriations out of the state treasury because the credited funds *could* have been taxed and taken for the state treasury. As the U.S. Supreme Court has explained, this argument "assumes that income should be treated as if it were government property even if it has not come into the tax collector's hands. That premise finds no basis in standing jurisprudence. Private bank accounts cannot be equated with the [Florida] State Treasury." *Winn*, 131 S. Ct. at 1448. The legal reality is that "contributions yielding STO tax credits are not owed to the State and, in fact, pass directly from taxpayers to private organizations." *Id.* In this way, no taxpayer is implicated in allegedly

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

Not only the U.S. Supreme Court but also state courts have consistently held that a tax credit is not equivalent to an appropriation as a matter of law. *See, e.g.*, *Manzara v. State*, 343 S.W.3d 656, 664 (Mo. 2011) (finding no taxpayer standing because "tax credits are not government expenditures"); *Kotterman v. Killian*, 972 P.2d 606, 618 (Ariz. 1999) ("[N]o money *ever* enters the state's control as a result of this tax credit. Nothing is deposited in the state treasury or other accounts under the management or possession of governmental agencies or public officials. Thus, under any common understanding of the words, we are not here dealing with 'public money.'"); *Toney v. Bower*, 744 N.E.2d 351, 358 (Ill. App. Ct. 2001) ("[W]e reject plaintiffs' argument that a tax credit constitutes a public fund or an appropriation of public money."); *State Bldg. & Const. Trades Council v. Duncan*, 76 Cal. Rptr. 3d 507, 510-11 (Cal. Ct. App. 2008) ("Tax credits are, at best, intangible inducements offered from government, but they are not actual or de facto expenditures by government. As such, they do not qualify as . . . the 'payment of . . . the equivalent of money by the state.'"); *Griffith v. Bower*, 747 N.E.2d 423, 426 (Ill. App. Ct. 2001) ("The credit at issue here does not involve any appropriation or use of public funds. No money ever enters the state's control as a result of this tax credit."); *Olson v. State*, 742 N.W.2d 681, 685 (Minn. Ct. App. 2007) (denying "standing as taxpayers to challenge a tax exemption" because "appellants are private citizens with no injury-in-fact and no evidence of an expenditure made as a result of the challenged statutes"). The Third District reached a similar conclusion in *Paul*, when taxpayers sought to enjoin the grant of certain property tax exemptions by Dade County. The court ruled that the plaintiffs had standing *not* because a tax exemption is equivalent to an appropriation but because the exemptions in that case violated "sections of the

Florida Constitution [that] specifically limit the authority of a county to grant tax exemptions." *Paul*, 376 So. 2d at 260 (citing Art. VII, §§ 3(a), 10(c)). No such specific limitation on the authority of the State to grant tax exemptions applies here.

Most importantly, the First District has agreed with the position of these courts and the U.S. Supreme Court by holding that "assistance to a religious institution through such mechanisms as tax exemptions . . . . constitute[s] substantially different forms of aid than the transfer of public funds." *Holmes*, 886 So. 2d at 356. In the context of aid to religious institutions, neither the Florida courts, nor the federal courts, nor other state courts equate tax credits with direct expenditures. *See Kotterman*, 972 P.2d at 619 (noting that the U.S. Supreme Court "has generally refused to recognize the tax expenditure concept where religion is involved").

Plaintiffs ask this court to abandon the approach of the First District, of the U.S. Supreme Court, and of other state courts in order to embrace "tax expenditure analysis." Plaintiffs assert that there is a "well-established understanding that 'tax expenditures' are the practical and economic equivalent of direct payments." Pls.' Opp. to Defs.' Mot. to Dismiss 12 n.4. Yet there is no such "well-established understanding" among the courts, which have uniformly rejected tax expenditure analysis in this context. Among the reasons for this rejection is that tax expenditure analysis provides no objective method for deciding which tax provisions should be classified as "tax expenditures" and which should not. As an article in the *Yale Law Journal* recently observed:

> Whatever its value in other settings, in the context of constitutional decisionmaking, tax expenditure analysis has little to contribute. . . . At the end of the day, we do not know what a tax expenditure is. The problem of defining tax expenditures is not one of borderlines and close questions. Rather, at the very core of the concept, there is no satisfactory definition of a tax expenditure. . . . We thus find adherents of tax expenditure analysis still debating among themselves how to define tax expenditures—nearly two generations after the concept was introduced.[9]

[9] Edward A. Zelinsky, *Winn and the Inadvisability of Constitutionalizing Tax Expenditure Analysis*, 121 Yale L.J. Online 25, 27 (2011). The problem is that tax expenditure analysis

The description of a particular tax provision as a "tax expenditure" necessarily reflects the subjective views of plaintiffs rather than a neutral—much less a "well-established"—standard.[10]

The Arizona Supreme Court, in dismissing a challenge to that state's Tax Credit Scholarship Program, rejected tax expenditure analysis because of its potential to eliminate longstanding limitations on taxpayer standing by treating all favorable tax treatment as the equivalent of government expenditures. "[U]nder such reasoning all taxpayer income could be viewed as belonging to the state because it is subject to taxation by the legislature." *Kotterman*, 972 P.2d at 618. If courts embraced this reasoning, then when the State extends a tax credit, exemption, or deduction for charitable contributions, it could be deemed to have expended public funds on the underlying charities—including religious organizations—that individual taxpayers choose to support. Indeed, Plaintiffs themselves maintain that their argument applies not only to tax credits but to "deductions, credits, exclusions, exemptions, deferrals, and preferential rates," all of which Plaintiffs include in the category of "tax expenditures." Pls.' Opp. to Defs.' Mot. to Dismiss 12 n.4. If all of these tax provisions are to be treated as expenditures, then the *Rickman*

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distinguishes between "normative" tax provisions that are part of the ideal tax base and "expenditure" tax provisions that depart from the ideal. Yet "no one has yet devised a principled way to implement the distinction between normative and expenditure provisions." *Id.*; *see also* David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 Yale L.J. 955, 973 (2004) ("The definition of tax expenditures has been frequently debated in the literature.").

[10] As Professor Boris I. Bittker of Yale Law School once explained, tax expenditure analysis necessarily entails the drawing of "debatable lines" such that "every man can create his own set of 'tax expenditures,' but it will be no more than his collection of disparities between the income tax law as it is, and as he thinks it ought to be." Boris I. Bittker, *Accounting for Federal "Tax Subsidies" in the National Budget*, 22 Nat'l Tax J. 244, 250, 260 (1969); *see also* Boris I. Bittker, *A "Comprehensive Tax Base" as a Goal of Income Tax Reform*, 80 Harv. L. Rev. 925 (1967) (explaining that "a neutral, scientific measure of taxable income is a mirage"). The malleability of tax expenditure analysis is only one reason that courts have rejected it. *See* Linda Sugin, *Tax Expenditure Analysis and Constitutional Decisions*, 50 Hastings L.J. 407, 418 (1999) ("The ambiguities of tax expenditure analysis are not the only reason why courts have wisely resisted embracing it.").

rule would no longer be a meaningful limitation on taxpayer standing to challenge tax policy. Moreover, as the Arizona Supreme Court observed, treating tax deductions and exemptions as the equivalent of public expenditures "directly contradicts the decades-long acceptance of tax deductions for charitable contributions, including donations made directly to churches, religiously-affiliated schools and institutions." *Kotterman*, 972 P.2d at 618.

Under Florida law, property used for religious purposes may be "fully exempt from taxation." § 196.011(4), Fla. Stat. (2014). Florida law also provides tax deductions for charitable contributions, including to religious organizations. § 220.13(1)(b), Fla. Stat. (2014). According to Plaintiffs' argument, taxpayer standing would be available to challenge these statutes—and the statutes would be presumptively unconstitutional—because these "tax expenditures" are the equivalent of legislative appropriations for religious purposes. In this way, Plaintiffs' argument not only represents a dramatic expansion of the taxpayer standing doctrine; it would also transform Florida tax policy. If a tax credit or deduction is the equivalent of an expenditure of public funds, then a charitable deduction for private donations to religious institutions would amount to an unconstitutional state subsidy of religion. This approach, however, conflicts with longstanding practice and precedent approving charitable deductions and denying that tax credits are the equivalent of expenditures. As the U.S. Supreme Court put it over 40 years ago:

> The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees 'on the public payroll.' There is no genuine nexus between tax exemption and establishment of religion.

Walz v. Tax Comm'n, 397 U.S. 664, 675 (1970). If Plaintiffs want to abandon this well-established principle in the formulation of tax policy, their "remedy should be at the polls and not in the courts." *Markham*, 396 So. 2d at 1122.

Ultimately, the *economic* similarity between tax credits and appropriations is less important than the crucial *legal* distinction between compelling taxpayers to contribute to sectarian activities, on the one hand, and supporting the voluntary choices of private citizens to contribute, on the other. As the Supreme Court has said:

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

Winn, 131 S. Ct. at 1447; *see also Manzara*, 343 S.W.3d at 660 ("While 'expenditures' and 'tax credits' might be compared in that their end result is 'less' money in the state treasury, the similarity is superficial."). The First District has embraced this very same distinction. *Holmes*, 886 So. 2d at 356 ("[A]ssistance to a religious institution through such mechanisms as tax exemptions . . . . constitute[s] substantially different forms of aid than the transfer of public funds."). Because tax credits as distinct from appropriations do not implicate taxpayers in sectarian or private activities, tax credits cause no taxpayer injury and confer no taxpayer standing.

C. The "No Aid" Provision Limits Only Appropriations.

In order to establish taxpayer standing, Plaintiffs must show that the challenged measure violates a specific limitation in the Florida Constitution on the State's taxing and spending power. *See Alachua Cnty.*, 855 So. 2d at 198 ("[T]axpayer standing is available if the taxpayer can show that a government taxing measure or expenditure violates ***specific constitutional limitations*** on the taxing and spending power."); *Fredericks v. Blake*, 382 So. 2d 368, 370 (Fla. 3d DCA 1980) ("A taxpayer may institute a suit without a showing of special injury if he attacks the exercise of the state or county's taxing or spending authority on the ground that it exceeds ***specific limitations*** imposed on the state or county's taxing or spending power by the United States or Florida

Constitutions.") (emphases added). In this case, Plaintiffs rely on the no-aid provision of article I, section 3, but that provision restricts only the appropriation of public funds. Art. I, § 3, Fla. Const. ("No ***revenue of the state*** or any political subdivision or agency thereof shall ever be ***taken from the public treasury*** directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution") (emphases added). The constitution means what it says: the restriction applies only to "revenue of the state" that is "taken from the public treasury." Because article I, section 3 does not limit the Legislature's authority to define tax credits, Plaintiffs cannot rely on the no-aid provision as a predicate for taxpayer standing.

In *Bush v. Holmes*, 886 So. 2d 340, the First District Court of Appeal authoritatively interpreted the no-aid provision.[11] The court made clear that "the prohibitions of the no-aid provision are limited to the payment of public monies" because "the payment of public funds in aid of religious institutions involves an especially problematic governmental involvement in religious institutions," and that the provision does not reach other forms of state assistance that benefit religious institutions. *Holmes*, 886 So. 2d at 356. In fact, the court specifically held that prior cases in which "state government provided or allowed a form of assistance to a religious institution through such mechanisms as tax exemptions, revenue bonds, and similar state involvement" remained good law because "[t]hese forms of assistance constitute substantially different forms of aid than the transfer of public funds expressly prohibited by the no-aid provision." *Id.*

[11] Though the Florida Supreme Court subsequently reviewed the decision of the First District, "the Florida Supreme Court did not reach the issue addressed by this court in *Holmes*" and therefore the "court's majority opinion in *Holmes*, construing Article I, section 3, remains controlling law." *Council for Secular Humanism*, 44 So. 3d at 117.

For example, in *Johnson v. Presbyterian Homes of Synod of Fla., Inc.*, 239 So. 2d 256 (Fla. 1970), the Florida Supreme Court upheld a statute granting property tax exemptions to nonprofit nursing homes, including sectarian institutions such as the Presbyterian Homes of the Synod of Florida. As the First District explained, the tax exemption granted to religious institutions was constitutionally permissible because it "did not involve a disbursement from the public treasury." *Holmes*, 886 So. 2d at 355-56. Thus, the First District held that article I, section 3 prohibits only expenditures from the treasury, not tax exemptions or other forms of aid that entail financial benefits.[12] The court explained that "the no-aid provision focuses on the use of state funds to aid sectarian institutions, not on other types of support." *Holmes*, 886 So. 2d at 352. In fact, the court specifically noted, consistent with the Florida Supreme Court's holding in *Johnson*, that the State may constitutionally provide a tax exemption *directly* to a religious institution without offending the Florida Constitution. *Id.* at 356-57.

The First District thereby rejected tax expenditure analysis as a guide to applying the no-aid provision. To make their required showing that the Florida Tax Credit Scholarship Program

[12] In other cases, the Florida Supreme Court has upheld grants to religious institutions of the use of public buildings, *see Southside Estates Baptist Church v. Bd. of Trustees, Sch. Tax Dist. No. 1*, 115 So. 2d 697, 699 (Fla. 1959) ("[W]e find nothing in this record to support a conclusion that any public funds have been contributed."); *see also Holmes*, 886 So. 2d at 356 (recognizing the constitutionality of the grant because "no disbursement was made from the public treasury in *Southside Estates Baptist Church*"), and of an easement on a public park, *see Koerner v. Borck*, 100 So. 2d 398 (Fla. 1958); *see also Holmes*, 886 So. 2d at 354 (observing that *Koerner* involved "no state aid flowing to the church" in violation of the constitutional prohibition). The Florida Supreme Court has also upheld a law authorizing counties to assist educational institutions, including sectarian institutions, through the issuance of revenue bonds. *Nohrr v. Brevard Cnty. Educ. Facilities Auth.*, 247 So. 2d 304 (Fla. 1971). According to the First District, "The issuance of revenue bonds to support centers of higher education . . . regardless of whether they are sectarian or non-sectarian, is not the payment of money from the revenue of the public treasury 'directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution' as prohibited by article I, section 3." *Holmes*, 886 So. 2d at 355. These cases further demonstrate that the no-aid provision restricts only the direct appropriation of public funds, not "tax expenditures" or other aid that may benefit sectarian institutions.

violates the no-aid provision, therefore, Plaintiffs must identify an actual expenditure of state funds "taken from the public treasury." Because they cannot make that showing, Plaintiffs lack taxpayer standing to pursue a claim under the no-aid provision.

The First District explained that the touchstone of the no-aid provision is a disbursement out of the state treasury because such a direct subsidy coerces *all* taxpayers to sponsor religion. An exemption from taxation, by contrast, involves no such coercion. *Id.* at 356 ("A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfer."). The same principle applies here. This is not a case in which "the state forcibly diverts the income of both believers and nonbelievers to churches." *Id*. Rather, by granting tax credits for private donations, "the state merely refrains from diverting to its own uses income independently generated by the [scholarship-funding organizations] through voluntary contributions." *Id.* Accordingly, there are no coerced contributions, no use of state revenue from the public treasury, and no violation of article I, section 3.

If, as the First District held, the no-aid provision allows the State to provide tax benefits *directly* to churches, it follows that the indirect benefit of the Tax Credit Scholarship Program must also be permissible. Under the Program, the State provides tax credits to private taxpayers, who choose to contribute to nonprofit scholarship-funding organizations, which award scholarships to qualified Florida children, whose families may choose to use that scholarship at a nonsectarian or sectarian school. If the State may permissibly grant a tax exemption *directly* to a sectarian institution, then surely this indirect chain of private choices is also constitutionally permissible. *See Winn*, 131 S. Ct. at 1448 ("Like contributions that lead to charitable tax deductions, contributions yielding STO tax credits are not owed to the State and, in fact, pass directly from

taxpayers to private organizations."). Because Plaintiffs cannot show that the Program "violates specific constitutional limitations on the taxing and spending power," taxpayer standing is unavailable. *Alachua Cnty.*, 855 So. 2d at 198.

D. The "Uniform Public Schools" Provision Limits Only Appropriations.

Plaintiffs also rely on article IX, section 1, but that provision similarly limits only appropriations and does not restrict the Legislature's power to exempt or credit income from taxation. *See* Art. IX, § 1, Fla. Const. ("Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.").

The constitution authorizes the Legislature rather than the courts to determine whether provision for the public schools is "adequate." *See Coalition for Adequacy*, 680 So. 2d at 407 ("[T]he Court declines to interpret Article IX, Section 1, of the Florida Constitution . . . . in a manner which allows the judiciary to usurp the exercise of the appropriations power allocated exclusively to the Legislature under our Constitution."). Accordingly, the issue here is not whether the Legislature's authorization of tax credits affects public-school funding in relation to some abstract level of "adequacy." Rather, the issue is whether the Tax Credit Scholarship Program violates the holding of the Florida Supreme Court that article IX, section 1 "prohibits the state from ***using public monies*** to fund a private alternative to the public school system." *Holmes,* 919 So. 2d at 408 (emphasis added). The straightforward language of the Florida Supreme Court demonstrates that it does not.

In *Holmes*, the Florida Supreme Court held that the OSP violated article IX, section 1 because it "allows some children to receive a ***publicly funded*** education through an alternative system of private schools that are not subject to the uniformity requirements of the public school

system," *id.* at 412, "***uses public funds*** to provide an alternative education in private schools that are not subject to the 'uniformity' requirements for public schools," *id.*, involves "***expending public funds*** to allow students to obtain a private school education," *id.* at 397, allows students "to receive ***funds from the public treasury***," *id.*, "diverts ***public dollars*** into separate private systems," *id.* at 398, "transfers ***tax money*** earmarked for public education to private schools," *id.* at 408, and involves a "systematic diversion of ***public funds*** to private schools," *id.* at 409 (all emphases added).

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

Just in case the repeated stress on public funding were lost on some readers, the Court underscored the point. The Court explained that parents "certainly" have a constitutional "right to choose how to educate their children." *Id.* at 408. In fact, it would be unconstitutional for the State to interfere with this right by preventing "parents from choosing private education over public schooling for their children." *Id.* at 408 n.11. Thus, the Florida Constitution does not mandate a systematic preference for public schools over private schools in all areas of state action. Rather, the constitutional restriction applies only to the use of state funds. As the Court put it strongly and unmistakably:

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

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

In this way, the analysis under the uniform-public-schools provision of the Florida Constitution resembles the analysis under the no-aid provision because the purpose is to avoid the violation of conscience that occurs when taxpayers are forced to finance a system of private schools not subject to the uniformity requirements of the public schools. Other states, adopting the same principle, include aid to private schools in their own "no aid" constitutional provisions. *See, e.g.*, Art. IX, § 10, Ariz. Const. ("No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation."); *Kotterman*, 972 P.2d at 621 (noting that Arizona's no-aid provision "applies to all private schools, whether sectarian or not"). Florida accomplishes the same result through the combination of the no-aid provision that prevents appropriations to sectarian institutions and the uniformity provision that prevents appropriations to private schools.

Yet neither provision prevents the legislature from authorizing tax credits for private contributions to scholarship-funding organizations because both provisions are concerned with the injury that occurs when taxpayers see their own monies "extracted and spent" on private or sectarian activities "in violation of conscience." *Winn*, 131 S. Ct. at 1447. The Tax Credit Scholarship Program does not cause that injury because it does not cause any taxpayer's funds to be extracted and spent on private or sectarian schools. It only provides a tax credit for taxpayers who choose to make voluntary contributions. § 1002.395(5)(b), Fla. Stat. (2014). For that reason,

Plaintiffs cannot show that the Scholarship Program violates the uniform-public-schools provision or any other "specific constitutional limitations on the taxing and spending power," and taxpayer standing is unavailable. *Alachua Cnty.*, 855 So. 2d at 198.

II. PLAINTIFFS LACK SPECIAL-INJURY STANDING.

Where, as here, Plaintiffs do not qualify for taxpayer standing, they "must allege a 'special injury' which differs in kind and degree from that sustained by other members of the community at large." *Council for Secular Humanism*, 44 So. 3d at 121. In a declaratory judgment action such as this one, the special-injury requirement means that the case cannot proceed unless it is "clearly made to appear" that "some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts" and that "there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter." *Markham*, 396 So. 2d at 1122. Plaintiffs cannot make that showing.

In *Faasse v. Scott*, Chief Judge Francis concluded that the plaintiffs lacked standing to challenge the Tax Credit Scholarship Program as a violation of article III, section 6 because the complaint "fails to allege a legally sufficient basis to sustain a finding of special injury." Order Granting Motions to Dismiss With Prejudice at 2, *Faasse v. Scott*, No. 2014 CA 1859 (Fla. 2d Cir. Dec. 30, 2014). There is no reason to reach a different result in this case, where Plaintiffs rely on the same purported showing of special injury. As in *Faasse*, Plaintiffs assert that they are "injured by the Scholarship Program's diversion of resources from the public schools." Compl. ¶ 19. Plaintiffs claim that this injury consists of "the systematic undermining of those schools." Pls.' Opp. to Defs.' Mot. to Dismiss 7 (quotation marks and alteration omitted). That showing is insufficient for three reasons. First, as a matter of law, the Tax Credit Scholarship Program causes no "diversion" of resources. Second, Plaintiffs have not plausibly alleged that the public school system has suffered financial harm because of the Program. Plaintiffs' allegations fail to account

for benefits to the schools from additional legislative appropriations and cost savings from the Program itself. Third, Plaintiffs have not alleged a personal "special injury" that is different from that shared by the public at large. In addition, Plaintiffs claim that the Florida School Board Association on behalf of the school boards may challenge their statutory duties under the Program, but public bodies such as school boards lack standing to pursue these claims.

A. The Tax Credit Scholarship Program Causes No "Diversion" Of Resources.

Plaintiffs claim they suffer a special injury because of the "diversion" of resources from the public schools. Compl. ¶ 19. Plaintiffs use the term "diversion" in order to imply that the Scholarship Program redirects funds to which the public schools would otherwise be entitled. Yet the claim is contrary to law. All funds that ultimately flow to private schools as a result of the Scholarship Program come from private contributions. *See* § 1002.395(1)(b)(1), Fla. Stat. (2014) (providing for "private, voluntary contributions to nonprofit scholarship-funding organizations"). No funds come out of the state treasury, let alone from an allotment to which the public schools would otherwise be entitled. *See* § 1002.395(2)(e), (6)(d), Fla. Stat. (2014) (providing that scholarships are payable exclusively from "eligible contributions" or "a monetary contribution from a taxpayer").

In *Bush v. Holmes*, the Florida Supreme Court invalidated the OSP because that program "transfers tax money earmarked for public education to private schools," 919 So. 2d at 408, and thereby "diverts public dollars into separate private systems," *id.* at 398. This case involves no such diversion of public funds but only the State's decision *not* to tax private funds and to leave those funds in private hands. That visits no special injury on Plaintiffs or the public schools because neither Plaintiffs nor the schools have any "right," "interest," or other entitlement to unappropriated, untaxed, private funds. *Markham*, 396 So. 2d at 1122 (holding that "some

immunity, power, privilege or right of the complaining party" must be at stake to establish standing).

The tax credit signals the State's decision *not* to exercise its taxing power over the credited funds and *not* to allocate those funds to any public purpose. Plaintiffs' argument again relies on the superficial economic similarity between tax credits and expenditures while ignoring the more significant legal difference between the two measures. The Missouri Supreme Court explained the point in holding that plaintiffs lacked standing to challenge tax credits:

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

Manzara, 343 S.W.3d at 660. By leaving funds untaxed, the Legislature has made clear that no public entity has any claim or entitlement to those funds, let alone that the funds would otherwise be "earmarked" for the public schools. Instead, those funds remain private property:

> The legislature, through approving the Act, decided to leave the money in the hands of a particular person or entity. Its passage of the Act constituted an acknowledgment that the State never would have the tax revenue to spend because it was waived by tax credits. Lowering tax liability by such means does not move money out of the public treasury; it leaves it in private hands. A particular person or entity would retain the power to spend the money instead of paying the money over to the government as taxes.

Id.; *see also Winn*, 131 S. Ct. at 1448 ("Like contributions that lead to charitable tax deductions, contributions yielding STO tax credits are not owed to the State and, in fact, pass directly from taxpayers to private organizations."); *Kotterman*, 972 P.2d at 618 ("[N]o money *ever* enters the state's control as a result of this tax credit.").

Plaintiffs' argument relies on the discredited premise that "because taxpayer money *could* enter the treasury if it were not excluded by way of the tax credit, the state effectively controls and

exerts quasi-ownership over it." *Id.*; *see also Winn*, 131 S. Ct. at 1448 ("Respondents' contrary position assumes that income should be treated as if it were government property even if it has not come into the tax collector's hands. That premise finds no basis in standing jurisprudence. Private bank accounts cannot be equated with the . . . State Treasury."). The premise conflicts with controlling precedent from the First District holding that the conferral of tax benefits does not represent an expenditure of public funds, *Holmes,* 886 So. 2d at 355-56, and from the Florida Supreme Court holding that public education suffers an injury only where the State "diverts ***public dollars***" that are earmarked for public education, *Holmes*, 919 So. 2d at 398 (emphasis added).

Plaintiffs claim that they have standing to ask this court to order the Legislature to tax income it has currently decided not to tax and, further, to order the Legislature to appropriate the resulting tax revenue to public education. Not only do Plaintiffs lack an entitlement to such relief; the court even lacks the power to provide it. *Coalition for Adequacy*, 680 So. 2d at 407 ("[A]ppropriations are textually and constitutionally committed to the legislature. Any judicial involvement would involve usurping the legislature's power to appropriate funds for education."). Thus, not only have Plaintiffs failed to establish a special injury to "some immunity, power, privilege or right"; Plaintiffs have failed to show that their injury is redressable. *See Sosa v. Safeway Premium Fin. Co.*, 73 So. 3d 91, 101 (Fla. 2011) (noting that standing requires "a redressable injury suitable for adjudication").

Plaintiffs may argue that the Legislature's decisions *not* to tax and *not* to appropriate could divest them of standing that might otherwise exist. Yet the First District has recognized that standing often depends on statutory entitlements that are within the Legislature's power to grant or to revoke. *See, e.g., State Bd. of Optometry v. Florida Soc. of Ophthalmology*, 538 So. 2d 878, 881 (Fla. 1st DCA 1988) (noting that, following a statutory change, ophthalmologists no longer

had the exclusive right to administer certain drugs and therefore "no longer are in a position . . . to assert a protected economic right" as the basis for standing). That the Legislature may alter statutory entitlements and thereby affect standing is no reason for courts to intrude on a well-established legislative function. *Coalition for Adequacy*, 680 So. 2d at 408 ("[I]t is well settled that the power to appropriate state funds is assigned to the legislature."). In these circumstances, Plaintiffs' "remedy should be at the polls and not in the courts." *Markham*, 396 So. 2d at 1122.

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

Even if Plaintiffs *could* establish a special injury based on their alleged entitlement to untaxed, unappropriated funds, there still would not be standing here because Plaintiffs fail to provide plausible allegations that the Tax Credit Scholarship Program has caused a reduction in funding for the public schools or otherwise "undermined" those schools. Plaintiffs assert that public schools are losing money because quarterly reports from the Florida Department of Education "identify the amount of funding lost as a result of the Scholarship Program by each public school district." Pls.' Opp. to Defs.' Mot. to Dismiss 6 n.1. That is not correct. The quarterly reports document only how much money was spent on tuition and fees for scholarship students. The reports make no claims about "lost" funding to school districts,[13] provide no figures on the overall funding of those districts, or demonstrate that school districts have been adversely impacted by the Tax Credit Scholarship Program. In terms of funding, Plaintiffs' reliance on these limited data fails to account for (1) increases in appropriations to the public schools by the Legislature and (2) cost savings generated by the Tax Credit Scholarship Program that offset losses of per-student funding. In fact, the Legislature has increased appropriations to public schools since

[13] It is inaccurate to describe the funds spent on scholarship as "lost" to the public schools because those funds were never appropriated or earmarked for the public schools.

the Scholarship Program was implemented, *and* the Program itself has generated significant cost savings. These factors demonstrate that the Program has caused no "special injury" consisting of decreased funding.

Plaintiffs assert that the reports show "hundreds of millions of dollars of reduced funding for public schools during the 2013-2014 school year alone." Yet Plaintiffs ignore additional appropriations to school districts from the Legislature. In 2013-2014, the Legislature appropriated an additional $1.05 billion to public schools as part of the Florida Education Finance Program, including a 6.3% increase in per-student funding.[14] Even if spending on the Scholarship Program could somehow be deemed to have been "lost" to the public schools, additional appropriations from the Legislature prevent the conclusion that the public schools have suffered overall losses.[15]

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[14] *See* Final Conference Report on S.B. 1500, Fla. Leg., at 7 (April 29, 2013), *available at* http://www.fldoe.org/core/fileparse.php/7507/urlt/0076974-20-13firstcalc.pdf.

[15] Intervenor-Defendants describe particular legislative appropriations and cost savings in order to respond to Plaintiffs, who attempt to bolster their allegations of financial harm with evidence purporting to show that schools have suffered a financial loss. Pls.' Opp. to Defs.' Mot. to Dismiss 6 n.1. In refuting that claim, Intervenor-Defendants rely only on formal legislation and public records maintained by the State—materials which are subject to judicial notice by this court. §§ 90.201, 90.202, Fla. Stat. (2014); *Fla. Accountants Ass'n v. Dandelake*, 98 So. 2d 323, 327 (Fla. 1957) ("This court takes judicial notice of the public records of this state."). It is not improper for this court to consider such materials when deciding a motion to dismiss. *See Response Oncology*, 978 F. Supp. at 1058 (noting that, in considering a motion to dismiss, courts need not accept allegations "which run counter to facts of which the court can take judicial notice").

Yet consideration of these materials is not essential for deciding this motion. It is enough that Plaintiffs' allegations in the complaint ignore even the *possibilities* of additional appropriations and overall cost savings from the Scholarship Program. Because of these possibilities, the allegations of financial harm to the public schools are too speculative to survive dismissal. *See State v. Florida Consumer Action Network*, 830 So. 2d 148, 152 (Fla. 1st DCA 2002) (noting that a complaint may not rely on "speculative fear of harm that may possibly occur"); *see also Santa Rosa Cnty. v. Admin. Comm'n*, 661 So. 2d 1190, 1193 (Fla. 1995) (noting that declaratory relief is unavailable for "merely the *possibility* of legal injury" based on "contingent" or "uncertain" events).

Like Plaintiffs here, plaintiffs in New Hampshire sought standing to challenge that state's Tax Credit Scholarship Program on the ground that the Program would "harm certain [plaintiffs] who have children in or teach in the public schools by taking state funding away from the public schools." *Duncan v. State*, 102 A.3d 913, 926 (N.H. 2014). The New Hampshire Supreme Court held that the plaintiffs lacked standing because their claim of injury rested on impermissible speculation:

> [T]he purported injury asserted here—the loss of money to local school districts—is necessarily speculative. Even if the tax credits result in a decrease in the number of students attending local public schools, it is unclear whether, as the petitioners allege, local governments will experience "net fiscal losses." The prospect that this will occur requires speculation about whether a decrease in students will reduce public school costs and about how the legislature will respond to the decrease in students attending public schools, assuming that occurs.

Id. at 926-27 (internal citation omitted). In this case, not only does the complaint rely on speculation "about how the legislature will respond"; Plaintiffs ignore how the Legislature actually has responded since implementation of the Program—with increases in public-school funding. That makes Plaintiffs' alleged injury, the loss of money to local school districts, not only speculative but nonexistent.

Plaintiffs also ignore "whether a decrease in students will reduce public school costs." *Id.* at 927. In this case, the Tax Credit Scholarship Program has offset the forgone tax revenue by generating cost savings for the State. The Florida Legislature's Office of Program Policy Analysis and Government Accountability found that Florida taxpayers saved $1.49 in state education costs for every dollar of forgone income tax revenue due to credits for scholarship contributions.[16] As the U.S. Supreme Court explained in *Winn*, the potential cost savings is another reason why an

[16] Office of Program Policy Analysis & Government Accountability, Fla. Leg., *The Corporate Income Tax Credit Scholarship Program Saves State Dollars*, Report No. 08-68, at 4 (Dec. 2008), *available at* http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/0868rpt.pdf.

alleged reduction in public-school funding is too speculative an injury to confer standing: "By helping students obtain scholarships to private schools, both religious and secular, the STO program might relieve the burden placed on Arizona's public schools. The result could be an immediate and permanent cost savings for the State." *Winn*, 131 S. Ct. at 1444; *Mueller v. Allen*, 463 U.S. 388, 395 (1983) ("By educating a substantial number of students [private] schools relieve public schools of a correspondingly great burden.").

Here, the mechanism for such savings is apparent. In Florida, even though school funding is based on a per-student allotment, districts are required to spend only 80% of each allotment at the school the student attends. § 1011.69(2), Fla. Stat. (2014). As a result, there is variation in per-student *expenses*, with some schools devoting 120% of an allotment to some students and 80% to others. Because the students who participate in the Tax Credit Scholarship Program "tend to be disproportionately low-performing prior to their arrival into the program,"[17] it stands to reason that those students are disproportionately more costly to educate.[18] So by helping these students obtain scholarships to private schools, the Program removes an expense of 120% from the public system while the "lost income" associated with the student is only 100%. In other words, by educating

[17] *See supra* note 2; *see also* David N. Figlio, Evaluation of the Florida Tax Credit Scholarship Program Participation, Compliance and Test Scores in 2011-12, at 33-34 (July 2013), *available at* http://www.fldoe.org/core/fileparse.php/5423/urlt/FTC_Research_2011-12_report.pdf ("[T]he program draws disproportionately low-income, poorly-performing students from the public schools into the private schools.").

[18] As of the 2007-2008 school year, public school districts were spending an average of $2,152 more per student at schools in which 75% of the students received free or reduced-cost lunches than in schools in which only 25% of students received free or reduced-cost lunches. *See* Per Pupil Expenditures, 2007-08, http://www.fldoe.org/core/fileparse.php/7579/urlt/0069126-ppe_schl_0708.xls; Student Membership by Category, 2007-08, http://www.fldoe.org/core/fileparse.php/7579/urlt/0069122-mem_category_schl_0708.xls (providing data on school-lunch-program participation).

Florida's most challenging students at a lower cost in private schools, the Program increases the per-student funding in the public system for remaining students.

The cost savings is even greater than this implies, however, because the cost of each scholarship is substantially less than the state spends per-student in the public system. For the current school year, the amount of each scholarship is capped at 76% of state per-student education funding. The statutory cap will peak at 82% in 2016. § 1002.395(12), Fla. Stat. (2014). The statutory cap provides a guaranteed minimum cost savings to the state for each student who participates in the Tax Credit Scholarship Program.[19] Given these factors, it is simply not plausible for Plaintiffs to assert that 69,000 students participating in the Scholarship Program results in an overall financial harm to the public schools—much less that such harm is "the natural and intended result of the program's operation." Pls.' Opp. to Defs.' Mot. to Dismiss 6. That assertion not only relies on "unjustifiable economic and political speculation," *Winn*, 131 S. Ct. at 1443, but ignores the realities of the Program and the subsequent actions of the Legislature.

Even if Plaintiffs could show an overall reduction in funds for school districts—and they cannot—they would still need to show how such a reduction has caused a "special injury" that is personal to them. Parents and students have an interest in educational quality. *See Coalition for Adequacy*, 680 So. 2d at 403 n.4 (noting that students may allege "a continuing injury as a result of being denied an adequate education"). But Plaintiffs have not alleged that their education is

[19] The state per-student funding amounts to approximately 75% of the funds that school districts spend, with the rest coming from federal and county sources. These additional sources of funding provide a further reason why school districts may end up with *more* per-student funding because of the Tax Credit Scholarship Program. Plaintiffs raise the issue of each school district's "fixed costs" as a reason why a loss of students may harm the district. But Plaintiffs have not plausibly alleged that these costs outweigh the cost savings from the Program and the additional appropriations from the Legislature. Moreover, a reduction in the number of students per school may independently reduce costs—by saving the school the expense of maintaining extra classrooms, for example, or reducing financial strain from a growing school-district population.

inadequate. Rather, the Tax Credit Scholarship Program has *improved* educational performance in the public schools. "[T]he available evidence suggests that the FTC Scholarship Program has boosted student performance in public schools statewide," concludes a Department of Education Report, noting "statistically significant improvements in public school performance across the state."[20]

In short, Plaintiffs' assertion that the Program has caused financial harm to public schools relies on impermissible speculation and is contrary to the statutorily established parameters of the Program. And, on top of that failure, Plaintiffs fail to show how reduced funding for *schools* creates a special injury for *them*. Without that showing, Plaintiffs' complaint must be dismissed for lack of standing.

C. Plaintiffs Have Not Alleged A Personal Injury.

To survive dismissal, Plaintiffs must allege a "concrete and particularized injury in fact which must affect the plaintiff in a personal and individual way," *Save Homosassa River Alliance*, 2 So. 3d at 344 (Fla. 5th DCA 2008) (quotation marks omitted), that is "different in degree and kind from that suffered by the community at large," *U.S. Steel*, 303 So. 2d at 12. The Florida Supreme Court has repeatedly reaffirmed this rule, even where it has prevented taxpayers from challenging apparently unlawful government conduct, because it is not the courts but "the public's representatives in government [who] should ordinarily be relied on . . . to prevent the unlawful exercise of the state or county's taxing and spending power." *Markham*, 396 So. 2d at 1122.

Several of the Plaintiffs—such as Sen. Geraldine Thompson, Rabbi Merrill Shapiro, Rev. Harry Parrott Jr., Rev. Harold Brockus, the League of Women Voters of Florida Inc., and Florida State Conference of Branches of NAACP—allege nothing more than a generalized interest

[20] Figlio, *supra* note 17, at 33.

in high quality and nonsectarian, publicly financed education. Compl. ¶¶ 8, 10-12, 17-18. In other words, Plaintiffs assert no more than "the generalized interest of all citizens in constitutional governance." *Schlesinger*, 418 U.S. at 217. That is insufficient for standing. As the Florida Supreme Court has said, plaintiffs who are displeased with "the taxing and spending decisions of their elective representatives" have a remedy "at the polls and not in the courts." *Markham*, 396 So. 2d at 1122.

A single Plaintiff, Joanne McCall, claims to be a parent of a public-school student, but this also is insufficient as a foundation for special injury. Compl. ¶ 7. She has not alleged that the education that her child receives is inadequate, much less that it is inadequate because of the Tax Credit Scholarship Program. The complaint alleges that additional "members of the plaintiff organizations" have children attending public schools also without claiming that they are inadequately educated because of the Scholarship Program. Compl ¶ 19. The conclusory allegation that such parties are "injured," without specifying the nature of the injury, does not suffice to overcome a motion to dismiss. *W.R. Townsend*, 728 So. 2d at 300.

Several other Plaintiffs—such as Bob Jones, the Florida Education Association, Florida Congress of Parents and Teachers Inc., and Florida Association of School Administrators Inc.—are school employees or associations of school employees. Compl. ¶¶ 9, 13, 15-16. But these Plaintiffs have not alleged any personal injuries as a result of the Scholarship Program either. At most, Plaintiffs have alleged that as parents or teachers they are especially interested in public-education issues. But this special interest, without a personal injury, does not confer standing. The New Hampshire Supreme Court rejected precisely this reasoning: "Although some of the petitioners have school-aged children or are public school teachers, at best, this establishes that those petitioners have a special interest in education. Such a special interest, alone, does not

constitute a 'definite and concrete' injury sufficient to confer standing." *Duncan*, 102 A.3d at 926; *see also ASARCO Inc. v. Kadish*, 490 U.S. 605, 616 (1989) ("Although the members of the teachers association might argue that they have a special interest in the quality of education in Arizona, such a special interest does not alone confer federal standing."); *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (holding that a "special interest" in the subject-matter of the litigation is insufficient to establish standing absent personal injury).

Instead of alleging particularized personal harms, Plaintiffs rely on the vague allegation that the public schools have or will be "undermine[d]" by the Scholarship Program. Pls.' Opp. to Defs.' Mot. to Dismiss 6. Plaintiffs seem to think this allegation is sufficient because the Florida Supreme Court in *Holmes* held that the OSP "undermines the system of 'high quality' free public schools." 919 So. 2d at 409. Yet that language was part of the Court's ruling on the merits. The Court in *Holmes* did not even address standing, much less did it hold that a general "undermining" of the public schools constitutes a special injury for all parents, teachers, and administrators in the district.

Moreover, Plaintiffs do not even allege the sort of "undermining" that the Court described in *Holmes*. The *Holmes* Court explained that the OSP undermined the public system by transferring "tax money earmarked for public education" away from public schools that "failed to meet the Legislature's standards for a 'high quality education.'" *Holmes*, 919 So. 2d at 408-09 & n.12. None of that applies here. The Tax Credit Scholarship Program does not involve appropriated funds and it does not target failing public schools. One is left wondering what Plaintiffs mean by "undermining" in this case. Whatever it means, Plaintiffs have not shown that this alleged harm is concrete and particular to themselves. Plaintiffs simply repeat the

constitutional holding of *Holmes* without alleging that the Tax Credit Scholarship Program has actually harmed them in a personal and individual way. That is inadequate.

D. School Boards Lack Standing To Challenge Their Statutory Duties.

In addition to the vague interest in preventing the "undermining" of schools, Plaintiffs allege a separate injury to the Florida School Boards Association:

> The school boards represented by Plaintiff FSBA are further harmed by the specific statutory requirement that they must use their resources to publicize to parents their right to remove their children from the public schools and obtain vouchers under the Scholarship Program to attend private schools. *See* Compl. ¶ 47; Fla. Stat. § 1002.395(10)(a). School boards are also statutorily required to use their resources to provide statewide assessments to students at private schools that participate in the Scholarship Program. Fla. Stat. § 1002.395(10)(b).

Pls.' Opp. to Defs.' Mot. to Dismiss 7. The school boards have no standing to challenge these statutory requirements. As the Florida Supreme Court has explained, "courts have developed special rules concerning the standing of governmental officials to bring a declaratory judgment action questioning a law those officials are duty-bound to apply." *Markham*, 396 So. 2d at 1121. In Florida, "a public official may only seek a declaratory judgment when he is 'willing to perform his duties, but . . . prevented from doing so by others.'" *Id.* (quoting *Reid*, 257 So. 2d at 4). The Florida Supreme Court has applied this rule specifically to school boards, holding that standing exists only where "the school boards are allegedly prevented from carrying out their statutory duties." *Coalition for Adequacy*, 680 So. 2d at 403 n.4.

In this case, the school boards are duty bound to apply section 1002.395(10)(a) and section 1002.395(10)(b). There is no allegation, however, that the boards are prevented from carrying out their duties. The boards challenge these statutes only because of their disagreement with them. The boards lack standing under these circumstances. *See Markham*, 396 So. 2d at 1121 ("Disagreement with a constitutional or statutory duty, or the means by which it is to be carried out, does not create a justiciable controversy or provide an occasion to give an advisory judicial

opinion."). Rather, public officials "must presume legislation affecting their duties to be valid, and do not have standing to initiate litigation for the purpose of determining otherwise." *Dep't of Educ. v. Lewis*, 416 So. 2d 455, 458 (Fla. 1982); *see also Citrus Cnty. Hosp. Bd. v. Citrus Mem'l Health Found., Inc*., No. SC13-411, 2014 WL 5856370, at *3 (Fla. Nov. 13, 2014) ("Florida courts have precluded State agencies and local governments from challenging the constitutionality of certain legislation.").

The Florida School Boards Association has standing only insofar as the boards themselves have standing. *Florida Home Builders Ass'n v. Dep't of Labor & Employment Sec.*, 412 So. 2d 351, 353 (Fla. 1982) (noting that "an association has standing to bring suit on behalf of its members" only where "its members would otherwise have standing to sue in their own right"). Accordingly, the Florida School Boards Association must be dismissed as a plaintiff for the independent reason that the boards lack standing to challenge the Tax Credit Scholarship Program. Because the boards' statutory duties cannot serve as a predicate "special injury" for standing, Plaintiffs' complaint fails to identify a special injury and must be dismissed.

CONCLUSION

For the foregoing reasons, Plaintiffs' complaint must be dismissed with prejudice for lack of standing.

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Respectfully submitted,
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