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

JOANNE McCALL, *et al.*,

Plaintiffs,

v. Case No. 2014-CA-2282

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

Defendants,

and

UMENE PROPHETE, *et al.*,

Intervenor-Defendants.
_____/

PLAINTIFFS' OPPOSITION TO INTERVENOR-DEFENDANTS' MOTION TO DISMISS

In opposing the motion to dismiss previously filed by Defendants Rick Scott *et al.* ("State Defendants"), Plaintiffs explained why they have standing to bring this challenge to the Florida Tax Credit Scholarship Program ("Scholarship Program") – both as persons who have alleged "specific injury" resulting from the Scholarship Program, and in their capacity as taxpayers. *See* Plaintiffs' Opposition to Defendants' Motion to Dismiss (Nov. 26, 2014) ("Pl. Opp. to State Mtn."). The Intervenor-Defendants ("Intervenors") have now filed a parallel motion seeking the same relief. In responding to the Intervenors' motion, Plaintiffs do not generally repeat the arguments made in response to the State Defendants, which are incorporated herein by reference,

but rather focus on responding to new arguments raised, or further elaborated upon, by Intervenors.

One over-arching problem runs through Intervenors' motion: It devotes inordinate consideration to arguing the *merits* of the constitutional claims brought by Plaintiffs in this case. As the courts have repeatedly emphasized, however, a plaintiff's *standing* to raise a claim does not turn on the merits of that claim: "[S]tanding depends on the nature of the injury asserted…. It does *not* depend on the elements or merits of the underlying claim." *Peace River/Manasota Reg'l Water Supply Auth.*, 18 So. 3d 1079, 1083 (Fla. 2d DCA 2009) (emphasis in original); *see also, e.g., Sun States Utils., Inc. v. Destin Water Users, Inc.*, 696 So. 2d 944, 945 n.1 (Fla. 1st DCA 1997) ("Standing should not be confused with the merits of a claim."); *St. Martin's Episcopal Church v. Prudential-Bache Sec., Inc.*, 613 So. 2d 108, 110 n.4 (Fla. 4th DCA 1993) ("Whether the [litigant] will prevail on the claim is not an issue implicated by an inquiry into a question of prudential standing."); *Reily Enters., LLC v. Fla. Dep't of Envtl. Prot.*, 990 So. 2d 1248, 1251 (Fla. 4th DCA 2008) (rejecting "attempt[] to inject factual considerations properly applicable to consideration of the merits … into the issue of standing"); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 624 (1989) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)) ("[A]lthough … standing 'often turns on the nature and source of the claim asserted,' it 'in no way depends on the merits of the [claim].'").

Plaintiffs' underyling claims in this case, as articulated in their Complaint, are that the Scholarship Program violates both Article IX, § 1, and Article I, § 3, of the Florida Constitution for the same reasons that the State's initial attempt to provide publicly funded private-school vouchers – the Opportunity Scholarship Program ("OSP") – was struck down by the Florida

Supreme Court and the First District Court of Appeal, respectively. *See Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006); *Bush v. Holmes*, 886 So. 2d 340 (Fla. 1st DCA 2004) (en banc).

As explained in the Complaint, the only substantive difference between the two programs is the mechanism through which funds are directed from the public fisc to private schools. Under the OSP, the State established a highly regulated voucher program and funded it through appropriations that were channeled, through participating parents, to the private schools their children attended. Here, the State has established a similarly detailed voucher program through legislation that prescribes and regulates all aspects of the program – including such matters as the criteria students must meet to participate in the program, the amounts of the vouchers they will receive, the qualifications of private schools to participate in the Program, the tests that participating private schools must administer to voucher students, the aggregate dollar amount of vouchers that can be funded each year through the program, and much more. *See generally* § 1002.395, Fla. Stat. (2014).

The crux of Plaintiffs' legal argument in this case is that it is constitutionally immaterial that, instead of being funded through direct appropriations, as was the OSP, this state-established and state-operated Scholarship Program is funded by a mechanism through which the State reimburses – by means of a 100%, dollar-for-dollar tax credit – the "donations" made by taxpayers to private intermediary organizations that are required, by law, to transmit those funds as voucher payments to private schools. The distinction is immaterial because "[i]t is fundamental and elementary that the legislature may not do that by indirect action which it is prohibited by the Constitution to do by direct action." *Lewis v. Florida Bar*, 372 So. 2d 1121, 1122 (Fla. 1979) (quoting *State ex rel. Powell v. Leon Cnty.*, 182 So. 639 (Fla. 1938)).

Intervenors contend that what is at issue here are merely "private, voluntary contributions," *e.g.*, Intervenor-Defendants' Motion to Dismiss ("Int. Motion") at 6, that do not implicate the constitutional restrictions – on the use of public funds to support religion, and on the education of Florida children through a parallel system of private schools – on which the First District Court of Appeal and the Supreme Court relied in striking down the OSP. But whether the funds that pay for private-school vouchers under the Scholarship Program are indeed, as Intervenors argue, merely "private, voluntary contributions" in which the State has no constitutionally relevant involvement – or whether, as Plaintiffs contend, these tax credits are a sophisticated form of "money laundering" intended to circumvent the Florida Constitution's restrictions on state support of private-school education – is a matter to be briefed, argued, and decided when this Court reaches the merits of the case. These issues will come before the Court later in this litigation – most likely on cross-motions for summary judgment.

Now, however, the only issue before the Court is whether or not the Plaintiffs have *standing* to advance their claims. Intervenors' attempt to argue their position on the merits of Plaintiffs' constitutional claims is a transparent effort to confuse the issue.

As explained in Plaintiffs' Opposition to the State Defendants' motion, Plaintiffs have standing to litigate this case *both* because they have suffered a "special injury" – one that "differs in kind and degree from that sustained by other members of the community at large," *Council for Secular Humanism, Inc. v. McNeil*, 44 So. 3d 112, 121 (Fla. 1st DCA 2010) – *and* because the Plaintiffs are taxpayers challenging an exercise of the legislature's taxing and spending power. We address these two separate grounds for standing in turn.

I. PLAINTIFFS HAVE STANDING BECAUSE THEY HAVE ALLEGED SPECIFIC INJURIES ARISING FROM THE SCHOLARSHIP PROGRAM

Plaintiffs' principal ground for "special injury" standing – applicable to those Plaintiffs (and Plaintiff organizations representing members) whose children attend Florida public schools, as well as teachers and administrators in those schools – is that the Scholarship Program directs funds away from the Florida public schools, and unless enjoined will continue to do so, thus "by its very nature undermin[ing] the system of 'high quality' free public schools" on which Plaintiffs' children depend for their education. *Bush v. Holmes*, 919 So. 2d 392, 409 (Fla. 2006). *See* Pl. Opp. to State Mtn. at 5-7. Intervenors attack this theory of standing on three grounds. *See* Int. Motion at 29-40. In addition, they question the separate basis for standing of Plaintiff Florida School Boards Association. *Id.* at 40-41. None of these arguments has merit.[1]

A. Notwithstanding the Scholarship Program's Different Funding Mechanism, its Impact on the Public Schools is the Same as That of the OSP in *Bush v. Holmes*

Intervenors' first and most fundamental challenge to Plaintiffs' standing is an attack on the premise that the Scholarship Program directs funding away from the public schools. Int. Motion at 29-32. But Intervenors' assertion that the Program "Causes no 'Diversion' of Resources" because "[a]ll funds that ultimately flow to private schools as a result of the

[1] Intervenors also rely on a recent decision of another judge of this Court denying standing in a lawsuit challenging an act of the 2014 legislative session as having been unconstitutionally enacted in violation of the Florida Constitution's single-subject rule, Art. III, § 6. *See* Int. Motion at 28 (citing *Faasse v. Scott*, No. 2014 CA 1859 (Fla. 2d Cir. Dec. 30, 2014)). Such an order of a trial court, of course, can only be authoritative to the extent that its reasoning is persuasive. But the order in question contains no explanation as to why the court found that the plaintiffs in that case lacked standing. It identifies no facts upon which the decision was based, and it cites no legal authority. Accordingly, the cited order provides no guidance here.

Scholarship Program come from private contributions," *id.* at 29, rests entirely on argument about the merits of Plaintiffs' constitutional challenge to the Scholarship Program.

Thus, whether or not it is constitutionally significant that the funding of private-school education under the Scholarship Program comes from "private contributions" – subsequently reimbursed in full by the State through the 100% tax credit – is, as discussed above, a *merits* question that is not now before the Court. Similarly irrelevant for present purposes is Intervenors' argument that this case involves "only the State's decision *not* to tax private funds and to leave those funds in private hands," and that the public schools have no "'right,' 'interest,' or other entitlement to unappropriated, untaxed, private funds." *Id.*[2]

What is relevant for purposes of standing is, instead, the *impact* of this Program on public-school funding – and thus its effect on parents who depend on the public schools for the education of their children (as well as teachers and administrators in those schools). For this inquiry, the relevant fact is that the Program causes the Florida public schools – including those in which the children of Plaintiffs (and of the members of Plaintiff organizations) are educated – to receive reduced funding. On that point there can be no serious debate. Two things happen as a result of the Scholarship Program. One, the Program diverts revenues from the public fisc to the intermediary Scholarship Funding Organizations, from which these funds are then used to pay private-school tuition. (Again, whether or not that diversion of taxpayer funds is or is not

[2] Because the merits issue is not now before the Court, Plaintiffs do not respond to Intervenors' attempts to show that Plaintiffs' constitutional challenge to the Scholarship Program has no merit. It does bear noting, however, that much of what Intervenors have to say is based on caricature or distortion of Plaintiffs' argument. It is decidedly *not* Plaintiffs' contention, for example, "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.'" Int. Motion at 30-31 (quoting *Kotterman v. Killian*, 972 P.2d 606, 618 (Ariz. 1999)). Nor do Plaintiffs "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." *Id.* at 31.

constitutional is not the issue here.) Two, as children leave the public schools to attend private schools with Scholarship Program vouchers, their public school districts lose operating funds that they previously received – and otherwise would continue to receive – under the Florida Education Finance Program ("FEFP"). *See* § 1011.62, Fla. Stat. (school district funding under the FEFP based on the number of students enrolled). As explained in our response to the State Defendants, there is nothing remotely "speculative" about this impact of the Program on the funding of the public schools, which is documented in quarterly reports published by the Florida Department of Education. *See* Pl. Opp. to State Mtn. at 5-6 & n.1.[3]

In short, even though the funding mechanism for the Scholarship Program differs from that of the OSP struck down in *Bush v. Holmes*, the impact of the Program in reducing funding for the public education system – to the detriment and injury of students seeking a high-quality education in the school districts that lose funding – is precisely the same. *That* is the relevant point for purposes of determining Plaintiffs' standing.

B. The Complaint's Allegations that the Public Schools Lose Funding Because of the Scholarship Program Must be Taken as True in Deciding a Motion to Dismiss

Rather than accepting as true and construing in Plaintiffs' favor the Complaint's allegations that the public schools are losing resources because of the Scholarship Program – as

[3] Intervenors point out that the Department of Education's reports show the amounts that are expended under the Program for private-school tuition, rather than actual reductions of funding to the public schools, Int. Motion at 32, but that objection only makes clear that these reports actually *understate* the amounts of funding the public schools lose as a result of the Program. That is because the vouchers provided under the Scholarship Program are limited to a percentage of school district FEFP funding (rising from 60% in 2010-11 to 82% as of the 2016-17 fiscal year). *See* § 1002.395(12)(a), Fla. Stat. (2014). But when a student withdraws from her public school to attend a private school with a voucher, the public school loses the entire amount of FEFP funding it otherwise would have received for that student. § 1011.62, Fla. Stat. Accordingly, the funding that public school districts actually lose as a result of the Scholarship Program is significantly higher than the amounts set out quarterly for each school district in the Department's reports.

the court must do in deciding a question of standing on a motion to dismiss, *see, e.g.*, *Sun States Utils.*, 696 So. 2d at 945 n.1 – Intervenors attempt to argue otherwise in reliance on materials outside the Complaint that are irrelevant, inadmissible, or both.

First, Intervenors assert that Plaintiffs have suffered no injury from the Scholarship Program because the legislature increased the per-pupil funding provided under the FEFP for the school year 2013-14. Int. Motion at 33. But whether in a given year the legislature raises or lowers the per-pupil rate for funding under the FEFP – an adjustment it makes annually – has no bearing on the issue presented here. What is at issue is the impact of the Scholarship Program on school district funding, and specifically whether that Program reduces the funding that Florida school districts would otherwise receive. There is no question that it does: For each student departing to private schools the school district's funding is reduced. *See supra*, pp. 6-7. Whether in any given year the legislature raises or lowers the per-pupil funding rate is entirely irrelevant to whether the Scholarship Program has a negative impact on school district funding.

Intervenors' contention is, indeed, no more relevant to the issue of Plaintiffs' standing to challenge the Scholarship Program than would be, for example, an assertion that a plaintiff suing his employer for failure to pay required overtime rates lacked standing because the employer had raised its employees' base hourly pay. In one case as in the other, the plaintiffs' standing turns on whether they have suffered an injury as a result of the complained-of actions.

Intervenors next cite a recent New Hampshire decision, which we addressed in our response to the State Defendants. *See* Pl. Opp. to State Mtn. at 8-9. That decision is utterly inapposite, because the New Hampshire plaintiffs' theory of injury was based on speculation that "local governments will experience 'net fiscal losses.'" Int. Motion at 34 (quoting *Duncan v. State*, 102 A.3d 913, 926-27 (N.H. 2014)). In this case, by contrast, the lost funding Florida

public school districts have suffered and will suffer as a result of the Scholarship Program is a necessary and automatic consequence of the Program's operation and is in no way dependent on "speculation 'about how the legislature will respond.'" *Id.*

Nor is there any merit to Intervenors' contention that the Scholarship Program will result in savings for the State and for Florida taxpayers. Int. Motion at 34-36. Even assuming *arguendo* that this assertion is factually correct, it is entirely irrelevant. The injury alleged here results from the loss of funding by the Florida school districts that Plaintiffs' children (and the children of members of Plaintiff organizations) attend; it is beside the point whether or not the Scholarship Program saves money for the State or for Florida taxpayers.

Finally, Intervenors go well outside the boundaries of what is properly considered on a motion to dismiss for lack of standing, in contending that Plaintiffs have suffered no injury because the Scholarship Program actually "has *improved* educational performance in the public schools." *Id.* at 37 (emphasis in original). Intervenors cite a research report for that assertion, *see id.* at 35 n.17, 37 n.20 – but neither the availability of that document on the Department of Education's website, nor anything else about it, makes the report judicially noticeable. *See* § 90.202, Fla. Stat.; *Nationwide Mut. Fire Ins. Co. v. Darragh*, 95 So. 3d 897, 901 (Fla. 5th DCA 2012) (information on government website was not subject to judicial notice as there was "no Y way to test the methods, assumptions and underlying explanations" for the conclusions offered). This reliance in a motion to dismiss on factual materials outside the Complaint – indeed, highly controversial factual propositions that purport to contradict the allegations of the

Complaint – is, to say the least, improper. [4]

C. Plaintiffs Suffer Personal Injury Because of the Defunding of Public Schools Caused by the Scholarship Program

Intervenors' next contention – that, whatever the Program's impact on the public schools, the Plaintiffs have not alleged any personal injury "different in degree and kind from that suffered by the community at large," Int. Motion at 37 (quoting *U.S. Steel Corp. v. Save Sand Key, Inc.*, 303 So. 2d 9, 12 (Fla. 1974)) – fares no better.

It is true, of course, that several of the six individual Plaintiffs and the six Plaintiff organizations have no more than a "special interest in education," Int. Motion at 38, and these Plaintiffs thus claim to have standing only in their capacity as taxpayers (and organizations whose members are taxpayers). But others among the Plaintiffs allege that they (or their members) are being injured as a result of the Scholarship Program's defunding of the public schools their children attend. At a minimum, that is true of Plaintiff McCall, whose child attends public school in Leon County, and of the Florida PTA, which includes among its members parents of children in the Florida public schools. *See* Complaint ¶¶ 7, 15, 19.[5] It should go without saying that the decreased ability of the school districts in which these Plaintiffs' children are educated to provide them with a high-quality education, due to the Scholarship Program's

[4] Inspection of the report demonstrates why its content cannot be assumed to be true. The report refers to "recent statistical research" purporting to show "that the FTC Program has improved the performance of Florida public schools to a modest degree." *See* David N. Figlio, Evaluation of the Florida Tax Credit Scholarship Program Participation, Compliance and Test Scores in 2011-12, at 2, 33 (July 2013), *available at* http://www.fldoe.org/core/fileparse.php/5423/urlt/FTC_Research_2011-12_report.pdf. But that "recent statistical research" is not identified or discussed anywhere in the report. Thus, Intervenors ask the Court to rule that Plaintiffs have suffered no injury on the basis of a conclusory statement that unidentified authors of unidentified research have concluded that the Scholarship Program is actually good for public schools.

[5] The same is true of most or all of the other Plaintiff organizations, many of whose members are the parents of children in the Florida public schools.

impact on their funding, is a concrete injury that gives these Plaintiffs standing to sue. And, if it needed saying, the Florida Supreme Court has explicitly said it: "[B]ecause voucher payments reduce funding for the public education system," a voucher program like the Scholarship Program "by its very nature undermines the system of 'high quality' free public schools" on which Plaintiffs depend for their children's education. *Bush v. Holmes*, 919 So. 2d at 409.[6]

Others among the Plaintiffs – including Plaintiffs McCall and Jones, as well as the members of the Florida Education Association, Florida School Boards Association, Florida PTA, and Florida Association of School Administrators – are similarly injured by the Scholarship Program's adverse impact on the resources available to the school districts in which they work or for which they are responsible, with the resulting negative impact on their ability to provide a high-quality education for the children entrusted to them.

Nor is the injury Plaintiffs allege any less valid for standing purposes simply because a substantial number of other people within the State of Florida are also the parents of public school students, or are teachers or administrators in the public schools, and thus can allege the same injury. It is well established that "standing is not to be denied simply because many people suffer the same injury." *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 687-88 (1973) ("To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody."). *See also Warth v. Seldin*, 422 U.S. 490, 501 (1975) (that an "injury [is] shared by a large class of other possible litigants" does not disqualify it as a specific injury on which standing can be based); *Coalition for Adequacy &*

[6] That Plaintiffs have not alleged that the education their children receive is "inadequate," Int. Motion at 38, is beside the point. The issue is not whether the public schools meet a minimum standard of adequacy, but whether their ability to provide Plaintiffs' children with a high-quality education has been impaired as a result of the Scholarship Program.

Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 403 & n.4 (Fla. 1996) (public school students' allegation of injury from being denied an adequate education was sufficient to confer standing, even though the injury presumably was suffered by other public school students); *Gargano v. Lee Cnty. Bd. of Cnty. Comm'rs*, 921 So. 2d 661, 666-67 (Fla. 2d DCA 2006) (finding special injury, even where that injury was shared with all other residents of island). It is, rather, sufficient that the Plaintiffs are threatened with an injury that is different in kind from any harm suffered by citizens and taxpayers at large. And that is so even where, as here, the class of persons who have suffered that specific harm is large.

D. Intervenors' Contention that Florida School Boards – and the Association that Represents Them – Cannot Challenge the Constitutionality of the Scholarship Program is Incorrect

As noted in our response to the State Defendants' motion, one of the Plaintiffs, the Florida School Boards Association ("FSBA"), is also injured in a different way – by the statutory requirement that its member school boards use their resources for various purposes in implementation of the Scholarship Program. *See* Pl. Opp. to State Mtn. at 7. In responding to this point, Intervenors do not question FSBA's standing as the representative of its member school boards. Rather, they contend only that this injury does not provide a basis for FSBA's standing because the school boards themselves would not have had standing to sue to overturn the Scholarship Program. Int. Motion at 40-41.

Intervenors base that argument on the rule that government officials and agencies generally lack standing to question the laws they are required to apply. Intervenors cite one exception to that rule, which applies when officials allege that they are "prevented from carrying out their statutory duties," *id.* at 40 (quoting *Coalition for Adequacy*, 680 So. 2d at 403 n.4), but

they erroneously assert that this is the *only* exception to the rule.[7] In fact there are others, one of which is directly applicable here. As the court explained in *Kaulakis v. Boyd*, 138 So. 2d 505 (Fla. 1962), "[i]t has long been held that the general rule that a ministerial officer cannot in a judicial proceeding attack the validity of a law imposing duties on him is subject to the exception that such a law *may be challenged where it involves the disbursement of public funds*." *Id.* at 507 (emphasis added) (citing cases); *see also, e.g., Barr v. Watts*, 70 So. 2d 347, 350 (Fla. 1953) (exception applies where public officer's "administration of the Act in question will require the expenditure of public funds"); *Arnold v. Shumpert*, 217 So. 2d 116, 119-20 (Fla. 1968) (same); *City of Pensacola v. King*, 47 So. 2d 317, 319 (Fla. 1950) (applying the exception where statute required the public agency to hold a hearing, thus expending public funds); *Fla. Pharmacy Ass'n, Inc. v. Lindner*, 645 So. 2d 1030, 1032 (Fla. 1st DCA 1994).

The exception clearly applies here, where the statute requires Florida school boards to engage in various acts that require the expenditure of public funds, including informing parents of their right to apply for vouchers under the Scholarship Program, and providing statewide assessments of voucher students attending private schools. *See* § 1002.395(10), Fla. Stat. Accordingly, for this independent reason as well, Plaintiff FSBA has standing to challenge the constitutionality of the Scholarship Program.

II. PLAINTIFFS HAVE TAXPAYER STANDING TO BRING THESE CONSTITUTIONAL CHALLENGES TO THE SCHOLARSHIP PROGRAM

In the alternative, as Plaintiffs explained in responding to the State Defendants' motion, Plaintiffs have standing as taxpayers to bring this challenge to "the constitutional validity of an

[7] Although the Florida Supreme Court in *Coalition for Adequacy* noted the rule that allows public officials to sue when they allegedly are prevented from performing their duties, the court did *not* say – contrary to Intervenors' representation – that public-official standing exists *only* under such circumstances. *See* 680 So. 2d at 403 n.4.

exercise of the legislature's taxing and spending power." *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 263 n.5 (Fla. 1991). Such taxpayer standing does not require a plaintiff to suffer any special injury. *Id.* Although the basis for Plaintiffs' taxpayer standing is fully laid out in our previous brief, *see* Pl. Opp. to State Mtn. at 9-15, we add the following points in response to the Intervenors.

A. Taxpayer Standing is Not Limited to Cases Challenging an Actual Appropriation

Ignoring the cases' teaching that taxpayer standing is available for constitutional challenges to the legislature's exercise of its taxing and spending power, *see* Pl. Opp. to State Mtn. at 10, Intervenors echo the State Defendants' attempt to restrict taxpayer standing to challenges to legislative acts that contain an actual appropriation. Indeed, the bulk of Intervenors' argument depends on this contention, including notably their assertion that taxpayer standing is unavailable here because tax credits are not "appropriations."

Like the State Defendants, Intervenors base their argument for this cramped interpretation of taxpayer standing *entirely* on a single sentence from a single case, *Council for Secular Humanism*, 44 So. 3d at 121. As Plaintiffs explained in responding to the State Defendants, it cannot have been the intention of the First District in *Secular Humanism* to limit taxpayer standing to challenges to actual appropriations – not least because such a limitation would have been in conflict with the court's holding in *Secular Humanism* itself, in which the court entertained and sustained a taxpayer challenge to a statute involving the use of public funds that did not itself contain any appropriation. *See* Pl. Opp. to State Mtn. at 10-11.

Intervenors offer no response to what we have previously said on this point, and they add nothing to the State Defendants' argument other than a citation to *Department of Revenue v. Markham*, 396 So. 2d 1120 (Fla. 1981), for the proposition that taxpayer standing "is not

available for 'disgruntled taxpayers, who … are not entirely pleased with certain of the taxing and spending decisions of their elective representatives.'" Int. Motion at 10 (quoting *Markham*, 396 So. 2d at 1122). *Markham*, however, rejected taxpayer standing in the case before it *not* because the challenge did not involve an actual appropriation, but rather because "it did not attack the constitutionality of the taxing statutes in question." 396 So. 2d at 1121. From the beginning, the taxpayer exception to the generally applicable rules of standing has been "limited to *constitutional* challenges on taxing and spending." *Dep't of Admin. v. Horne*, 269 So. 2d 659, 662 (Fla. 1972) (emphasis added). Taxpayer standing was denied in *Markham* on the straightforward ground that the challenge brought there was not constitutionally based, and that case in no way supports Defendants' and Intervenors' attempt to limit taxpayer standing to cases involving actual appropriations.

Intervenors' theory that taxpayer standing applies only to actual appropriations is also squarely contradicted by their own reliance on *Paul v. Blake*, 376 So. 2d 256 (Fla. 3d DCA 1979), where "taxpayers sought to enjoin the grant of certain property tax exemptions." Int. Motion at 17. The *Paul* court correctly found that the plaintiff taxpayers had standing to challenge this exercise of the legislature's taxing power, notwithstanding that it did not involve an appropriation or even – as Intervenors themselves concede – anything that was "equivalent to an appropriation." *Id.*

When it first articulated the taxpayer standing doctrine, the Florida Supreme Court rejected as a "distinction without a difference" the attempt to limit taxpayer standing by dividing the legislature's taxing and spending powers into the "cutting of the pie" and "eating" the pie. *Horne*, 269 So. 2d at 660. The court explained that "[w]e do not view the matter as turning upon whether or not it constitutes a direct 'expenditure.'" *Id.* Rather, the court has consistently

allowed taxpayer standing for any constitutional challenges to the "exercise of the legislature's taxing and spending power." *Chiles*, 589 So. 2d at 263 n.5. The attempt of the Defendants and Intervenors to introduce a rejected distinction between "cutting the pie" and "eating the pie" is thus entirely misplaced.

B. The Florida Law of Taxpayer Standing Is Not a Wholesale Incorporation of Federal Law

Intervenors next devote a significant portion of their brief to an argument based on the federal law of standing, which Intervenors contend the Florida Supreme Court "adopted" when it recognized taxpayer standing in *Horne*. *See* Int. Motion at 10-15.

It is true, of course, that in embracing the concept of taxpayer standing the *Horne* court relied on federal precedent in *Flast v. Cohen*, 392 U.S. 83 (1968). In *Flast*, the United States Supreme Court recognized an exception to the normal standing rules, under which taxpayers could challenge expenditures of funds that were alleged to violate the Establishment Clause of the federal First Amendment. *See Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1445 (2011) (recognizing that "*Flast* turned on the unique features of Establishment Clause violations").

But the Florida Supreme Court's holding that it would "follow the United States Supreme Court (Flast)," *Horne*, 269 So. 2d at 663, can hardly be taken to mean that the Florida court intended to adopt "lock, stock, and barrel" the federal law of taxpayer standing. Thus, nothing in *Horne* remotely suggests that taxpayer standing in Florida would be *limited* to the circumstances recognized by federal law. To the contrary, while the taxpayer standing doctrine in *Flast* applied only to allegations of government spending in support of religion (in violation of the federal Establishment Clause), the taxpayer challenge in *Horne* had nothing to do with the Florida Constitution's religion clause. Rather, the court's holding extended the taxpayer standing

doctrine to *any* constitutional challenge to taxing and spending actions, *see* 269 So. 2d at 663 ("where there is an attack upon *constitutional* grounds based directly upon the Legislature's *taxing and spending* power"), and indeed the vast majority of Florida cases applying the doctrine of taxpayer standing have nothing to do with religion.

Thus, the Florida Supreme Court cannot reasonably be thought to have intended to incorporate the federal law of taxpayer standing in its entirety; rather, the court was following *Flast* in adopting the basic principle that in certain circumstances – which clearly are different under Florida law than they are in federal court – taxpayers could have standing to sue even without alleging a special injury.

Indeed, the Florida courts have repeatedly observed that the Florida law of standing is more relaxed than that applied by the federal courts. *See Coalition for Adequacy*, 680 So. 2d at 403 ("[I]n Florida, unlike the federal system, the doctrine of standing has not been rigidly followed."); *Reinish v. Clark*, 765 So. 2d 197, 202 (Fla. 1st DCA 2000) ("Florida does not adhere to the 'rigid' doctrine of standing used in the federal system."); *Dep't of Revenue v. Kuhnlein*, 646 So. 2d 717, 720 (Fla. 1994) ("the doctrine of standing certainly exists in Florida, but not in the rigid sense employed in the federal system"); *Apthorp v. Detzner*, No. 2014-CA-1321 (Fla. 2d Cir. July 28, 2014), at 5 n.3 (noting that Florida has not followed the federal courts in "rigidly" applying the doctrine of standing).[8]

Intervenors' argument, moreover, misunderstands the purpose of taxpayer standing in Florida. Taxpayer standing is not grounded in any "injury" suffered by taxpayers, contrary to

[8] Nothing supports Intervenors' attempt to dismiss these cases by asserting that when the Florida Supreme Court described Florida's "doctrine of standing" it was actually talking about issues of ripeness and exhaustion of remedies. Int. Motion at 13.

what Intervenors repeatedly assert throughout their Motion.[9] Rather, the concept of taxpayer standing rests on the Florida courts' recognition that a taxpayer can bring a constitutional challenge to the legislature's exercise of its taxing and spending power even "without having to demonstrate a special injury." *Chiles v. Children*, 589 So. 2d at 263 n.5. Taxpayer standing is thus not intended to allow the plaintiff to redress some injury; rather, this limited exception to the normal rules of standing has been permitted because "an unconstitutional exercise of the taxing and spending power is intolerable in our system of government," *Paul*, 376 So. 2d at 259, and "[i]f a taxpayer does not launch an assault, it is not likely that there will be an attack from any other source." *Horne*, 269 So. 2d at 660.

The relevant inquiry under Florida law is, in short, not whether Plaintiffs have suffered an injury – and certainly not whether they have suffered an injury of the kind the federal Establishment Clause is designed to prevent – but rather whether they have alleged that the legislature has violated the constitution in exercising its taxing and spending power.

It should be clear from the foregoing that the U.S. Supreme Court's recent decision in *Winn*, which denied taxpayer standing for a challenge to an Arizona tax credit program similar to the one at issue here, rests on an analysis that is foreign to Florida law. As Intervenors point out, *Winn* is premised on the notion that the purpose of allowing taxpayer standing in suits for violations of the federal Establishment Clause is to prevent individuals from being coerced

[9] *See* Int. Motion at 2 ("no taxpayer is harmed and therefore taxpayer standing is unavailable"); *id.* at 11 (no "taxpayer injury" where legislature "merely declines to tax private, voluntary contributions"); *id.* at 12 ("where a plaintiff challenges a tax credit rather than appropriation, taxpayer injury is *not* present and therefore the *Flast* exception does *not* apply"); *id.* (no taxpayer standing because "tax credits do not injure taxpayers"); *id.* at 15 ("tax exemptions do not inflict the same taxpayer injury as appropriations"); *id.* at 16 ("Without an appropriation from the state treasury, the injury recognized by the *Horne/Flast* exception … does not exist …."); *id.* at 17 ("no taxpayer suffers an injury"); *id.* at 27 ("Scholarship Program does not cause that injury").

through taxation to support religious beliefs to which they do not subscribe. *See* Int. Motion at 12 (quoting 131 S. Ct. at 1447). The Court's view in *Winn* that a tax credit did not place individual taxpayers in that position is thus inapplicable to the issue of taxpayer standing in Florida, which is instead intended to prevent legislative abuse of the taxing and spending power. *Paul*, 376 So. 2d at 259.

C. Intervenors' Arguments on the Merits of Plaintiffs' Constitutional Claims Cannot Defeat Plaintiffs' Standing

Keeping in mind the distinction between merits and standing issues, *see supra* pp. 2-4, is particularly important in assessing Intervenors' argument on taxpayer standing. The vast bulk of that argument – indeed, almost all of what is said in Parts I.B, I.C and I.D (pp. 16-28) – goes to the *merits* of Plaintiffs' constitutional claims rather than to the issue of whether Plaintiffs have *standing* to raise those claims. Plaintiffs therefore do not respond in any detail to those merits arguments, but rather address briefly only the following points.

First, Intervenors' attempt to harness the First District's opinion in *Bush v. Holmes* in support of their cause, *see* Int. Motion at 15, 18, 23-24 (all citing 886 So. 2d at 355-56), is without merit for multiple reasons. The cited passage addresses the Florida Supreme Court's decision in *Johnson v. Presbyterian Homes, Inc.*, 239 So. 2d 256 (Fla. 1970), in which the Florida Supreme Court upheld the application to a church-owned facility of a tax exemption for nonprofit nursing homes. The gist of Intervenors' argument is that the *Holmes* court's distinction of the tax exemptions at issue in *Johnson* from the payments of public funds in the OSP case suggests that the tax-credit funded Scholarship Program is permissible under Article I, § 3. This, of course, is a merits argument that does not go to the narrow standing issue presented here – whether the Program reflects an exercise of the legislature's taxing and spending power. But even apart from that point, Intervenors err in conflating the tax exemption at issue in

Johnson – which simply relieved the affected entity from paying its share of property taxes – with the tax credit program at issue in this case, which is a mechanism established by the legislature *to fund a specific program* that it was prohibited from financing through direct appropriations.[10]

Second, it is striking that, of the cases cited at page 17 of Intervenors' brief from (mostly intermediate) courts of other jurisdictions, in the only ones involving constitutional challenges to taxation measures at all similar to the provision challenged here, the courts had no quarrel with the plaintiffs' standing as taxpayers, but rather entertained their claims and rendered decisions on the merits. *See Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999); *Toney v. Bower*, 744 N.E.2d 351 (Ill. App. Ct. 2001); *Griffith v. Bower*, 747 N.E.2d 423 (Ill. App. Ct. 2001).[11] Plaintiffs will address these cases' merits holdings as necessary at the appropriate time, but for present purposes they only support, at least implicitly, Plaintiffs' standing to bring their challenge to the Scholarship Program.

[10] In the same vein, Intervenors' extended discussion of the problems of "tax expenditure analysis," Int. Motion at 18-19, is a red herring. Plaintiffs' merits argument does not require "defining tax expenditures," *id.* at 18; rather, Plaintiffs contend that when the State establishes a state-run Program that provides vouchers for private-school education, and it funds that Program through a system of tax credits that amount to full state reimbursement of supposedly private "donations," the Program is subject to constitutional scrutiny under provisions such as those – Article IX, § 1 and Article I, § 3 – on which the OSP was struck down. That argument in no way rests on the reasoning that "all taxpayer income could be viewed as belonging to the state because it is subject to taxation by the legislature." Int. Motion at 19 (quoting *Kotterman*, 972 P.2d at 618).

[11] Of the other cited cases, *Manzara v. State*, 343 S.W.3d 656 (Mo. 2011), and *Olson v. State*, 742 N.W.2d 681 (Minn. Ct. App. 2007), are of little relevance as both cases (a) involved challenges to tax benefits that were wholly dissimilar to the Scholarship Program, and (b) were decided on the basis of state taxpayer standing law that appears more circumscribed than that of Florida. Finally, *State Bldg. Trades Council v. Duncan*, 76 Cal. Rptr. 3d 507 (Cal. Ct. App. 2008), was a merits decision in a statutory interpretation case that has no applicability to either the standing or merits issues presented here.

Addressing specifically Plaintiffs' claim under Article I, § 3, Intervenors do not – and cannot – argue that this provision is not a "specific constitutional limitation[] on the taxing and spending power." Int. Motion at 21 (quoting *Alachua Cnty. v. Scharps*, 855 So. 2d 195, 198 (Fla. 1st DCA 2003)). And, as noted in response to the State Defendants, the Scholarship Program is an exercise of both the State's *taxing* power and its *spending* power. *See* Pl. Opp. to State Mtn. at 11-13. Intervenors' insistence that, in order to prevail on the Article I, § 3 claim Plaintiffs "must identify an actual expenditure of state funds 'taken from the public treasury,'" Int. Motion at 23-24, is an argument that goes to the merits – and their assertion that "because they cannot make that showing, Plaintiffs lack taxpayer standing to pursue a claim under the no-aid provision," *id.* at 24, is simply a non sequitur. Intervenors will have a chance on summary judgment (or at trial) to make their case that the Article I, § 3 claim turns on whether funds literally are "appropriated" – but the outcome on that point is not dispositive of Plaintiffs' *standing* to litigate the claim. *See supra* pp. 14-15 (taxpayer standing not limited to challenges to actual appropriations).

As to the Constitution's education clause, Article IX, § 1, we explained in response to the State Defendants why Plaintiffs also have taxpayer standing to pursue their challenge under that provision of the Constitution. *See* Pl. Opp. to State Mtn. at 13-15; *see also id.* at 10-13. In *Bush v. Holmes*, the Florida Supreme Court held that the OSP "violate[d] this provision by devoting the state's resources to the education of children within our state through means other than a system of free public schools." 919 So. 2d at 407. Plaintiffs' merits argument in this case is that the Scholarship Program does exactly the same thing. Intervenors' contention that the Scholarship Program survives constitutional scrutiny because the funds that are diverted from the public fisc to private schools through the 100% tax credit are not "public monies" or "public

funds" is one they can make on summary judgment. What is relevant here, as with Article I, § 3, is that Plaintiffs have standing as taxpayers to pursue this challenge to the legislature's exercise of its taxing power and its spending power.

CONCLUSION

For the reasons set forth above, as well as in Plaintiffs' previously filed Opposition to the State Defendants' motion, the Motions to Dismiss of the Intervenors and the State Defendants should be denied in their entirety.

DATED this 30th day of January, 2015.

Respectfully submitted,

s/ Ronald G. Meyer
RONALD G. MEYER

[remainder of signature block on following page]

On Behalf of:

RONALD G. MEYER
Florida Bar No. 0148248
rmeyer@meyerbrookslaw.com
JENNIFER S. BLOHM
Florida Bar No. 0106290
jblohm@meyerbrookslaw.com
LYNN C. HEARN
Florida Bar. No. 0123633
lhearn@meyerbrookslaw.com
Meyer, Brooks, Demma and Blohm, P.A.
131 North Gadsden Street
Post Office Box 1547 (32302)
Tallahassee, FL 32301
(850) 878-5212
(850) 656-6750 – facsimile

JOHN M. WEST
Pro Hac Vice No. 53444
jwest@bredhoff.com
RAMYA RAVINDRAN
Pro Hac Vice No. 110707
rravindran@bredhoff.com
Bredhoff & Kaiser, P.L.L.C.
805 Fifteenth Street, N.W.
Suite 1000
Washington, DC 20005
(202) 842-2600
(202) 842-1888 – facsimile

AYESHA N. KHAN
Pro Hac Vice No. 53428
khan@au.org
ALEX J. LUCHENITSER
Pro Hac Vice No. 90515
luchenitser@au.org
Americans United for Separation
of Church and State
1301 K Street, N.W.
Suite 850, East Tower
Washington, DC 20005
(202) 466-3234
(202) 898-0955 – facsimile

ALICE O'BRIEN
Pro Hac Vice No. 89985
aobrien@nea.org
National Education Association
1201 Sixteenth Street, N.W.
Washington, DC 20036-3290
(202) 822-7043
(202) 822-7033 – facsimile

DAVID STROM
Pro Hac Vice No. 111053
dstrom@aft.org
American Federation of Teachers
555 New Jersey Avenue, N.W.
Washington, DC 20001
(202) 879-4400
(202) 393-6385 – facsimile

PAMELA L. COOPER
Florida Bar No. 0302546
pam.cooper@floridaea.org
WILLIAM A. SPILLIAS
Florida Bar No. 0909769
will.spillias@floridaea.org
Florida Education Association
213 South Adams Street
Tallahassee, FL 32301
(850) 201-2800
(850) 224-0447 – facsimile

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, pursuant to Fla. R. Jud. Admin. 2.516(b)(1), a copy of the foregoing has been provided by e-mail through the Florida Courts e-filing Portal on this 30th day of January, 2015, to:

Allen Winsor
allen.winsor@myfloridalegal.com
allenwinsor@yahoo.com
Rachel E. Nordby
rachel.nordby@myfloridalegal.com
Blaine H. Winship
blaine.Winship@myfloidalegal.com
Office of The Attorney General
The Capitol, PL-01
Tallahassee, FL 32399-1050

Attorneys for Defendants

Karen D. Walker
karen.walker@hklaw.com
jennifer.gillis@hklaw.com
Nathan A. Adams, IV
nathan.adams@nklaw.com
janna.james@hklaw.com
Holland & Knight LLP
315 S. Calhoun Street, Suite 600
Tallahassee, FL 32301

Raoul G. Cantero
rcantero@whitecase.com
White & Case LLP
Southeast Financial Center, Ste. 4900
200 South Biscayne Boulevard
Miami, FL 33131

Jay P. Lefkowitz
lefkowitz@kirkland.com
Steven J. Menashi
Steven.menashi@kirkland.com
Kirkland & Ellis, LLP
601 Lexington Avenue
New York, NY 10022

Daniel J. Woodring
Daniel@Woodringlawfirm.com
Woodring Law Firm
203 N. Gadsden Street, Suite 1-C
Tallahassee, FL 32301

Attorneys for Intervenor-Defendants

s/ Ronald G. Meyer
RONALD G. MEYER