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

CENTER FOR INQUIRY,
INC.; RICHARD HULL; and
ELAINE HULL,

Plaintiffs,

v.

Case No.: 2007-CA-1358

Judge George S. Reynolds, III
JULIE L. JONES, in her official capacity
as the Secretary of Corrections of
Florida; et al,

Defendants.
_____/

DEFENDANTS PRISONERS OF CHRIST AND LAMB OF GOD MINISTRIES' RESPONSE OPPOSING PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

ARGUMENT

I. Plaintiffs do not have standing to challenge downstream performance of the contracts.

Plaintiffs attempt to shore up their standing with additional arguments and new affidavits. But they ignore the First District Court of Appeals' holding, which plainly stated that "standing to raise Count II is foreclosed by *Markham* because Count II challenges the downstream performance of these contracts by the ministries and the Department's oversight of the contracts." *Council for Secular Humanism, Inc. v. McNeil*, 44 So. 3d 112, 122 (Fla. 1st DCA 2010) ("*CSH*"). This is necessary because the courts cannot "allow[] third parties to gain access to courts based upon taxpayer standing to challenge the performance of contracts and the decision of an executive agency to enter into a contract." *Id.* Doing so "would be extraordinarily burdensome and would impermissibly allow a taxpayer to interfere with State procurement

contracts." *Id.* Nevertheless, Plaintiffs spend a great deal of time arguing about the substance of classes provided under the program and FDC's decision to enter into contracts with these "pervasively sectarian" providers. Mot. at 14, 23-26. While the First District allowed Plaintiffs to challenge the program itself, it did not permit them to challenge FDC's decision to enter into particular contracts, nor the ways that the contractors perform those contracts.[1]

II. The Center for Inquiry failed to prove that it has standing.

The Center also fails to prove it has standing. It is a tax-exempt, non-profit organization. Supp. Br. at 2. It claims taxpayer standing because it has paid Florida sales taxes. *Id.* But non-profit organizations are exempt from sales taxes in Florida. *See* § 212.08(p), Fla. Stat. (exempting 501(c)(3) organizations). Out-of-state organizations should not be permitted to voluntarily pay unnecessary taxes, then use those taxes to sue the state.

The few examples that the Center refers to as instances where the Council for Secular Humanism ("CSH") paid sales tax do not establish taxpayer standing. *See* Supp. Br. at 2. During the CSH corporate representative deposition, Mr. Lindsay had only vague, speculative recollections about in-state purchases by CSH Executive Director Tom Flynn, which possibly resulted in CSH paying Florida sales tax. *See* App. 1689-90. There was no affirmative statement nor any documents, such as receipts or reimbursement forms, describing any specific purchases that Mr. Flynn bought in Florida for which CSH reimbursed him, including any sales tax, or when those purchases were made. Nor was there any evidence that any such past expenses for CSH could be attributed to the Center for Inquiry.

The Center also claims standing on the basis of paying sales associational standing. To do so, it must satisfy each part of a 3-part test:

[1] Plaintiffs also assert organizational standing for the Center for Inquiry. But the appeals court never discussed organizational standing in its earlier opinion. *See, generally, CSH*, 44 So. 3d 112.

> [A]n association must demonstrate that [1] a substantial number of its members, although not necessarily a majority, are "substantially affected" by the challenged rule. [2] Further, the subject matter of the rule must be within the association's general scope of interest and activity, and [3] the relief requested must be of the type appropriate for a trade association to receive on behalf of its members.

Fla. Home Builders Ass'n v. Dep't of Labor & Emp't Sec., 412 So. 2d 351, 353-54 (Fla. 1982). Plaintiffs failed to prove that enough members are affected to warrant its participation. The Center claims it has 200 members in Florida, but says nothing about what percentage of its total membership is in Florida. *See* Supp. Br. at 2-3. This is insufficient to prove that "a substantial number of the Association's members have been affected in the instant case." *Hillsborough Cnty. v. Fla. Rest. Ass'n, Inc.*, 603 So. 2d 587, 589 (Fla. 2d DCA 1992) (41% of members affected). Nor has the Center shown that its members would be "substantially affected" within the meaning of Florida law; they claim only a general interest as state taxpayers. *See* Supp. Br. at 2.

The relief requested is also not the type appropriate for the organization to receive on behalf of its members, since its request for relief is overbroad. *See* Contractors' Mot. at 35. Moreover, this type of standing has been permitted for administrative proceedings and county ordinances. *See, e.g.*, *Hillsborough County*, 603 So. 2d at 589. But Plaintiffs point to no case where organizational standing was sustained for a constitutional challenge to a state statute. *See* Supp. Br. at 2-3.

III. Plaintiffs' interpretation of the No-Aid Provision violates the federal Constitution.

Plaintiffs' constitutional arguments fail. Plaintiffs rely entirely on *Bush v. Holmes* and *Locke v. Davey* to argue that no Free Exercise violation occurred. Supp. Br. at 3-4. But, as discussed in Contractors' cross-motion, *Holmes* and *Locke* are premised upon the state's interest in not funding religious education of ministers and impressionable minors. Those decisions do not control here. Contractors Mot. at 22-24. Although *CSH* said that the No-Aid provision is not

limited to schools, it noted uncertainty on this point, certifying the question to the Florida Supreme Court. 44 So. 3d at 121. More importantly, *CSH* was clear that, even if the No-Aid provision has some application outside the school context, the analysis is distinct when dealing with social service providers. *Id*. at 119 ("We agree that Florida's no-aid provision does not create a per se bar to the state providing funds to religious or faith-based institutions to furnish necessary social services."). This is consistent with *Holmes*, which was careful to distinguish religious social service providers from religious schools: "Our holding here does not reach [social service] programs. Our holding is premised on the record before us and on the language, history and intent of Florida's no-aid provision, which was originally enacted, in no small part, to prohibit the state from using its revenue to benefit religious schools." *Bush v. Holmes*, 886 So. 2d 340, 362 (Fla. 1st DCA 2004) *aff'd on other grounds*, 919 So. 2d 392 (Fla. 2006). *Locke* likewise rested "only" on the "historic and substantial" antiestablishment "interest in not funding the religious training of clergy." *Locke v. Davey*, 540 U.S. 712, 725 & n.5 (2004); *see* Contractors' Mot. at 23-24. Neither *Holmes* nor *Locke* resolved the Free Exercise question presented here.

Nor did *Holmes* and *Locke* reach the other constitutional defenses. *See Holmes*, 886 So. 2d at 359 n.15 ("[t]he parties . . . have conceded that the OSP program does not violate the federal Establishment Clause.").[2] Yet Plaintiffs assume that if their interpretation of the law passes muster under the Free Exercise Clause, it will also satisfy the Establishment Clause. Supp. Br. at 3-4. Not so. Colorado violated the Establishment Clause with a scholarship program which allowed some religious colleges to participate, but excluded others as "pervasively sectarian." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1250 (10th Cir. 2008). The court distinguished

[2] *Locke* briefly stated in a footnote that *because* there was no Free Exercise violation in that case, the plaintiff's Equal Protection claim was subject to, and passed, rational-basis scrutiny. 540 U.S. at 720 n.3. That is not true here, where Plaintiffs' discriminatory construction violates the Free Exercise Clause and, as shown below, could not even pass such scrutiny.

Locke and found that, among other things, the Colorado program's exclusion of "pervasively sectarian" institutions entailed "intrusive governmental judgments regarding matters of religious belief and practice," all with the impermissible goal of excluding institutions because of their "degree of religiosity." *Id.* at 1256, 1259. And that is exactly the sort of intrusive inquiry and impermissible goal Plaintiffs seek. For this reason, as well as the reasons explained in Contractors' motion, Plaintiffs' preferred reading of the No-Aid provision would violate the Establishment Clause.

It would also violate the Free Speech Clause. *Locke* and *Holmes* are inapplicable to the Free Speech analysis. *See* Contractors' Mot. at 22. Plaintiffs do not even attempt to show otherwise. Nor could they. As the Eleventh Circuit explained in a case concerning a Florida municipality, "to deny equal treatment to a [religious organization] on the grounds that it conveys religious ideas is to penalize it for being religious." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1239 (11th Cir. 2004); *accord Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (targeting speech for its religious content is "blatant" viewpoint discrimination). That is exactly what Plaintiffs seek to do here, and that interpretation violates the Free Speech Clause.

Plaintiffs' interpretation of the No-Aid provision would also violate the Equal Protection Clause. "'[T]he Religion Clauses—the Free Exercise Clause, the Establishment Clause, . . . and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits.'" *Midrash Sephardi*, 366 F.3d at 1239. This is because "to deny equal treatment to a [religious organization] on the grounds that it conveys religious ideas is to penalize it for being religious. Such unequal treatment is impermissible based on the precepts of

the Free Exercise, Establishment and Equal Protection Clauses." *Id.*; *see also* Contractors' Mot. at 33-35.

Plaintiffs identify the state interest in this case as "prohibiting the use of tax funds 'directly or indirectly' to aid religious institutions." Supp. Br. at 4. They identify it as only a "substantial" state interest, not a compelling one. *Id.* Thus they have forfeited any argument that barring Contractors from the program would pass strict scrutiny. And their interpretation cannot pass even rational basis scrutiny. As described at length in the State's motion and the Contractors' motion, Plaintiffs failed to prove that any state funds are actually being used "in aid of" religious institutions. *See, e.g.*, Contractors' Mot. at 10-17. To the contrary, those funds are being used to aid offenders and the State; Contractors provide their services at a loss. *Id.* Plaintiffs have not explained how it is rational to prohibit the State from contracting with religious institutions who provide social services to wholly voluntary recipients. In fact, it would be irrational to exclude Contractors from a program which has proven successful at achieving the State's secular goals.

And the State's re-entry program has indeed been successful. According to FDC statistics, Florida inmates who complete a post-release transitional housing program have *half the recidivism rate* of those who do not—24% to 52%, respectively, at three years post-release.[3] Florida's program significantly outperforms the national average. For instance, a study by a U.S.

[3] *See* Florida Department of Corrections, *Table 6E: 2009-10 (2-Year Follow-up), Post-Release Transitional Housing Recommitment Data, by Level of Participation*, Substance Abuse Report - Inmate Programs FY 2011-12 (Oct. 14, 2015), http://www.dc.state.fl.us/pub/subabuse/inmates/11-12/tab6e.html (two years post-release, successful completers of the program have about a 15% recidivism rate and non-completers have a 36% recidivism rate); Florida Department of Corrections, *Table 6F: 2008-09 (3-Year Follow-up), Post-Release Transitional Housing Program Recommitment Data, by Level of Participation*, Substance Abuse Report - Inmate Programs FY 2011-12 (Oct. 14, 2015) http://www.dc.state.fl.us/pub/subabuse/inmates/11-12/tab6f.html (at 3 years, the numbers are 24% and 52%, respectively).

Department of Justice agency found the average recidivism rate at three years post-release is 67.8%.[4] This means that inmates who complete the program are about *a third as likely to re-offend* as the national average. Given these facts, it would be irrational for the state to exclude religious contractors from the program and leave their clients out on the streets.

Conclusion

For all the foregoing reasons, Contractors submit that this Court should reject Plaintiffs' motion for summary judgment and enter summary judgment in favor of Defendants.

DATED this 14th day of October, 2015.

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[4] *See* Matthew R. Durose et al., U.S. Department of Justice, Bureau of Justice Statistics, NCJ 244205, *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010* (April 2014), *available at* http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf. *See also* Lorelei Laird, ABA Journal, *77% of prisoners in DOJ recidivism study were rearrested within 5 years* (Sept. 24, 2015), *available at* http://www.abajournal.com/news/article/recidivism_study (reporting on recidivism rate).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by E-Service this 14th day of October, 2015, to:

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