IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

COUNCIL FOR SECULAR HUMANISM, INC., RICHARD HULL and ELAINE HULL,

DEC 30 2009

Appellants,

v.

Case No.: 1D08-4713
L.T. No.: 2007-CA-1358

WALTER A. MCNEIL, in his official capacity as the Secretary of the Florida Department of Corrections, PRISONERS OF CHRIST, INC., a Florida corporation; and LAMB OF GOD MINISTRIES, INC., a Florida corporation,

Appellees.
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APPELLEES' MOTION FOR REHEARING EN BANC

Appellees, Walter A. McNeil, in his official capacity as Secretary of the Florida Department of Corrections, and Prisoners of Christ, Inc. and Lamb of God Ministries, Inc., pursuant to Rules of Appellate Procedure 9.330 and 9.331(d), move for rehearing en banc of the panel decision issued December 15, 2009.

Grounds for Rehearing En Banc

The panel decision expands the reach of the Florida "No-Aid Provision" of article I, section 3 of the Florida Constitution[1] well beyond precedents of the

[1] The No-Aid Provision of article I, section 3, provides: "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."

Florida Supreme Court and this Court, thereby placing in serious jeopardy the State's ability to procure critical social services from contractors that it relies upon to serve needy populations – in this case, contractors providing halfway house and substance abuse rehabilitation services.

Three aspects of the panel decision merit en banc review for the sake of uniformity of this Court's decisions and due to their critical importance to the State's ability to procure necessary social services:

1) The panel decision announces a new interpretation of Florida's No-Aid Provision, applying it for the first time to social service programs and far afield of the context of public schools, in a manner that is contrary to controlling precedent of the Florida Supreme Court and this Court's decision in Bush v. Holmes, 886 So. 2d 340 (Fla. 1st DCA 2004) (en banc), *aff'd on other grounds*, 919 So. 2d 392 (Fla. 2006);

2) The panel decision compels an improper inquiry on remand into whether social service providers are "too religious" and thereby violates the federal constitution, which prohibits religious discrimination of this type; and

3) The panel decision violates separation of powers and taxpayer standing principles by allowing *a third-party* to litigate whether state vendors are complying with contract terms (in this case, non-proselytization and use of funds restrictions in the Contracts).

In view of these points, Appellees' counsel certify below this matter merits rehearing en banc in accordance with Rule of Appellate Procedure 9.331(d)(2).

Brief Background Statement

In 2007, Appellants Council for Secular Humanism, Inc. and two of its members, Richard and Elaine Hull (together "CSH") filed a declaratory judgment action to stop the Department of Corrections from making contract payments to Appellees, Prisoners of Christ, Inc. and Lamb of God Ministries, Inc. (together "Contractors"), in return for their provision of halfway house services to inmates trying to overcome substance abuse and addiction. As amended, CSH's petition alleged that the Contracts and relevant statutes (§§ 944.473 and 944.4731, Fla. Stat.) violate Article I, Section 3 of the Florida Constitution because (Count I) the Contracts involve the "payment of funds from the public coffers" to "pervasively sectarian institutions," and because (Count II) the Contractors offer "pervasively sectarian programs." R2:269-75. Count III sought to bar DOC from involving prison chaplains with the substance abuse transitional housing programs. Id. CSH alleged no special harm with respect to their claims, but only taxpayer standing.

Appellees filed separate Motions for Judgment on the Pleadings arguing that CSH lacked standing and that both counts failed on the merits. R2:300 *et seq.* The trial court held a hearing and then issued a written order granting judgment on the pleadings as to all counts. R2:386. CSH appealed; briefing and argument occurred; and a panel of this Court issued a decision on December 15, 2009.

Discussion

I. The Panel Decision Is an Unprecedented Construction of Florida's "No-Aid" Provision that Departs from This Court's Prior Decision and Controlling Precedent and that, Through Compelled Religious Discrimination, Threatens the State's Ability to Contract for Critical Social Service Needs.

The panel decision marks a watershed in Florida constitutional jurisprudence. Never before has the No-Aid Provision been extended outside the context of public schools; indeed it has never been viewed as restricting the state's use of vendors to procure important social services. This Court's en banc decision in Holmes, which involved a school program, took pains to distinguish social service programs from the context of that decision.[2] It noted that the peculiar language, history and intent of the No-Aid Provision "which was originally enacted, in no small part, to prohibit the state from using its revenue to benefit religious schools," as evidence that the provision is uniquely applicable to schools. 886 So. 2d at 362. It explicitly distinguished "social services, such as substance abuse transitional housing or assistance to victims of crime." Id.

[2] The Florida Supreme Court affirmed Holmes on different grounds and did not "approve nor disapprove the First District's determination that the OSP violates the "no aid" provision." Bush v. Holmes, 919 So. 2d 392, 413 (Fla. 2006).

The dissent in Holmes recognized this limitation as well:

> The majority states that its holding is premised on the history and intent of Florida's no-aid provision as originally enacted, to prohibit the state from using its revenue to benefit religious schools, and then cautions that the holding "should not in any way be read as a comment on the constitutionality of any other government program or activity which involves a religious or sectarian institution." In other words, the majority says that schools are different under Article I, § 3.

Id. at 377 (Polston, J. dissenting). The majority's construction was anchored in the No-Aid Provision's historic context and purpose as a school funding restriction, as the majority acknowledged. The trial court's ruling below did nothing more that to follow this understanding. R2:383 (quoting Holmes as to the No-Aid Provision's original intent to restrict state revenues from religious schools).

The panel decision, however, unmoors the No-Aid Provision from its original context and goes much further by creating from whole cloth a new religious test for courts to administer on vendors of social services, a test without precedent in either this Court or the Florida Supreme Court. Moreover, this new religious test must be applied judicially anytime any taxpayer complains about a contract's performance. In doing so, the panel has unleashed a new, broadly-applicable, religious restriction on all vendors whose services are procured via state programs.

In this case, the panel acknowledges that "the services received by the state under the programs here serve legitimate penological goals." Id. n.3.[3] Yet, it requires on remand the development of a factual record as to the nature and extent of the Contractor's "religious mission" so that the new religious test can be applied. Op. at 10, 13. Under the new test, the provision of social services will be unconstitutional if the Contractors' religious mission predominantly motivates their provision of services to needy inmates (op. at 10). Thus, the essence of the panel opinion is that the No-Aid Provision requires the State to discriminate against institutions with a religious mission in the procuring and awarding of social service contracts, even though contracting with them serves a laudable secular public purpose (and survives Establishment Clause scrutiny, discussed below).

Never in its 120-year history has a construction of the No-Aid Provision so broadly threatened state services to needy persons by forcing qualified vendors to undergo a religious test of their mission and motivation. Judge Polston's dissenting opinion in Holmes listed many state programs that the panel's interpretation of the No-Aid Provision jeopardizes, including: Medicaid and

[3] As developed in point II, *infra*, the inquiry ordered by the panel decision raises grave concerns under the federal Free Exercise and Establishment Clauses.

hospital funding, historic preservation funding, rent for polling places, childcare programs, programs for disabled children, programs for minorities, and other social service programs. Id. at 376-77. In departing from the limiting principle set forth in Holmes, the panel decision jeopardizes these important state programs by dramatically restricting, through religious discrimination, the pool of potential eligible vendors that may compete for government contracts.

Moreover, the panel decision runs afoul of the Florida Supreme Court's No-Aid jurisprudence. In a very similar case, City of Boca Raton v. Gidman, 440 So. 2d 1277 (Fla. 1983), the Court granted discretionary review and reversed the Fourth District in order to spare a subsidized daycare program for disadvantaged children from the district court's application of a "no-aid to charitable organizations" provision in a city charter. The Court concluded that the district court's construction of the charter limitation "would hamstring the city in carrying out its governmental functions." Id. at 1281. Also, because of strict state eligibility requirements, the Court found there to be no material benefit to the contractor, which had "no power to expend these funds for any purpose other than child care services for the Boca Raton community." Id. This same analysis applies here, where the Contractors are providing legitimate penological services under strict agency-established parameters. *See* R1:143 (Contract No. C2260 (II)(B)(1)(c))

(requiring that state funds be used "for the sole purpose of furthering the secular goals of criminal rehabilitation, the successful reintegration of offenders into the community, and the reduction of recidivism").

The Florida Supreme Court has also validated the participation of mission-minded religious groups in generally available government programs. *See, e.g.,* Johnson v. Presbyterian Homes, 239 So. 2d 256, 258 (Fla. 1970) (extension of generally available tax exemption to home for elderly "owned by religious organizations and operated primarily for religious purposes" did not violate Article I, Section 3); Nohrr v. Brevard County Educ. Facilities Auth., 247 So. 2d 304, 307 (Fla. 1971) (extension of generally available revenue bonds to "sectarian" schools did not violate Article I, Section 3); Southside Estates Baptist Church v. Board of Trustees, School Tax Dist. No.1, 115 So. 2d 697, 700 (Fla. 1959) (extension of generally available privilege to use public school buildings to churches for Sunday religious services did not violate Article I, Section 3). In particular, the Supreme Court in Johnson explicitly upheld state benefits to a religious home for the elderly in a No-Aid Provision challenge, even though the home subscribed to an overtly Christian mission and purpose:

> state action to promote the general welfare of society, apart from any religious considerations, is valid, even though religious interests may be indirectly benefited. . . . The secular aspect of a church-related

> home for the aged should not be ignored. The primary purpose of the home is the care of the aged, which is a problem of widespread governmental concern. [citation omitted] In any home for the aged, there is a strong likelihood that one will find religious overtones. Admittedly, one of the purposes of [the home] is religious. However, the Legislature has specified the requirements which must be met in order for the home to qualify for the tax exemption, and a religious group has complied with these requirements. *To exempt all homes complying with the statute, except church-related homes, would indeed be discriminatory.*

Johnson, 239 So.2d at 261-62 (emphasis added). Under the identical principle announced in Johnson, the Contractors who serve needy prisoners in this case should be free from governmental discrimination rather than be subject to the panel's newly-devised "too religious" test, a test the home for the elderly in Johnson would have failed. The panel decision's outcome erroneously manifests the religious discrimination that was specifically disavowed in Johnson.

For all of these reasons, the panel decision's expansion of the No-Aid Provision and its newly-devised religious test on providers of social services is not only exceptionally important to the future of state-provided social services, but departs from Holmes and other controlling precedent in ways that merit en banc review.

II. The Panel Decision Invites an Improper Inquiry Into Whether Social Service Providers Are Too Religious.

Relatedly, the panel decision seriously errs by requiring an inquiry into "whether the programs...***are predominantly religious in nature*** and whether the programs ***promote the religious mission of the organizations*** receiving the funds." Op. at 10 (emphasis added). This inquiry, which goes well beyond what any Florida appellate court has previously held, violates the federal constitution.

The panel's new test is very close to the "pervasively sectarian" test effectively abandoned by the U.S. Supreme Court and repudiated by federal courts. Very recently, for instance, the Tenth Circuit struck down a similar test used by Colorado to determine whether students could receive state college scholarship funding. *See* Colorado Christian Univ. v. Weaver, 534 F.3d 1245 (10th Cir. 2008) ("CCU"). That court determined that a pervasively sectarian inquiry was foreclosed by the federal constitution because of *what the test did* – it based funding on an institution's perceived religiosity; and *how the test was conducted* – it required intrusive inquiries into religious practice and doctrine. In Mitchell v. Helms, the Supreme Court also warned against this type of analysis, a plurality concluding that "this doctrine, born of bigotry, should be buried now." 530 U.S.

793, 829 (2000); *see also* Holmes, 886 So.2d at 351 n.9 (acknowledging the checkered history of bans on funding to "sectarian" institutions).

The panel decision remands for this same type of flawed inquiry. Like the state in CCU, the panel decision "expressly discriminates among religions ... and it does so on the basis of criteria that entail intrusive governmental judgments regarding matters of religious belief and practice." 534 F.3d at 1256. On remand, the trial court will be required to review the programs to determine whether they "are predominantly religious in nature," and whether they "promote the religious mission of the organizations." Op. at 10. This inquiry will necessarily evaluate the Contractors' religiosity and how that religiosity, or "religious mission," impacts programming. Just as in CCU, the trial court will be required to make inexact and "intrusive determinations" into the affiliation of Contractors' staffs and boards, the content of their courses and whether they "tend to indoctrinate," and whether the program is believed generically to further a "religious mission." *See* 534 F.3d at 1250-51, 1263-64 (citing NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979)); op. at 4 (noting allegations regarding the Contractors' curriculum content and their connections with various churches and other ministries).[4] This is exactly

[4] The dissent in Holmes also suggested that such an inquiry might also violate the Florida Free Exercise Clause. Holmes, 886 So.2d at 389-91 (Polston, J.,

the sort of intrusive, entangling inquiry into the operations of religious organizations that was invalidated by the Tenth Circuit and warned against by the U.S. Supreme Court in Mitchell. For these additional reasons, en banc review is warranted.

III. The Panel Decision Disregards Separation of Powers and Taxpayer Standing Principles by Allowing *a Third-Party* to Litigate Whether State Vendors are Complying with Contract Terms (in this case, the Contracts' Non-Proselytization and Funding Restriction Terms).

The panel decision has major consequences on the state's ability to contract for and carry out state programs without unjustified and burdensome interference via litigation by disaffected taxpayers. By remanding for costly discovery and a full trial, the panel decision effectively allows any third-party taxpayer to audit the midstream performance of state contractors *via litigation,* which is clearly proscribed by taxpayer standing and separation of powers doctrines.

In the absence of special injury, the taxpayer standing doctrine only permits CSH to challenge *state* action "based directly upon the Legislature's taxing and spending power," but not downstream actions involving the particulars of a contractor's performance. Dep't of Admin. v. Horne, 269 So. 2d 659, 663 (Fla.

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dissenting); *id.* at 392-93 (explaining how religion might be penalized in violation of Florida's Free Exercise Clause).

1972); *see also* Alachua County v. Scharps, 855 So. 2d 195, 198 (Fla. 1st DCA 2003) (noting that *government* action must form the basis of a taxpayer suit). Courts closely guard the state's exposure to taxpayer litigation for a very good reason. At any given time, government agencies administer thousands of contracts and a standing doctrine permissive of taxpayer suits based on supposed contractor performance deficiencies would burden agencies extraordinarily, consume agency and judicial resources, make it easy for bad actors to meddle with state business and contractual relationships, drive up costs, and jeopardize agency missions:

> without a special injury standing requirement, the courts would in all likelihood be faced with a great number of frivolous lawsuits filed by disgruntled taxpayers, who, along with much of the taxpaying public these days, are not entirely pleased with certain of the taxing and spending decisions of their elective representatives. ... [A]bsent some showing of special injury as thus defined, the taxpayer's remedy should be at the polls and not in the courts.

Dep't of Rev. v. Markham, 396 So. 2d 1120, 1122 (Fla. 1981).

Under Horne and Markham, the panel decision should only have permitted CSH to challenge *state* action – the statutes themselves or as applied by DOC in the text of the Contracts (which CSH submitted with the Amended Complaint) – instead of remanding for scrutiny of the Contractors' performance. In this way, the trial court got it exactly right by limiting its review and determining that the

statutes and Contracts complied with the No-Aid Provision as a matter of law.[5] The panel decision thus violates important taxpayer standing restrictions by ordering an inquiry of non-state action (the contractors' performance), which effectively opens the door for anyone to audit, via the courts, a state vendor's downstream compliance with a state contract.[6]

The panel decision also materially co-opts the role of the executive branch by remanding to the trial court to investigate the Contractors' performance. It is

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[5] The trial court analyzed and noted that state law and the Contracts forbid religious proselytization and improper use of state funds as might offend the No-Aid Provision. *See, e.g.,* § 944.4731(3)(b), Fla. Stat. (forbidding any "attempt to convert an offender toward a particular faith or religious preference"); R1:143 (Contract No. C2260 (II)(B)(1)(c)) (requiring that State funds be "used for the sole purpose of furthering the secular goals of criminal rehabilitation, the successful reintegration of offenders into the community, and the reduction of recidivism"); 154 ((II)(C)(9)(a)(10)) (contractors may not "disparage the personal religious beliefs of program participants or coerce program participants to change their religious beliefs or preferences or attempt to convert them"). Program "success" is defined without respect to religious goals. "Successful Discharge" is based on whether offenders meet goals of: (1) mastery of independent living skills, (2) an identifiable, stable residence, (3) maintaining sobriety and abstinence from drug use, and (4) secured employment. Id. at 147 ((II)(C)(3)(a)). An "unsuccessful discharge" may *not* arise from non-participation in faith-based program components. Id. at 148((II)(C)(3)(b)).

[6] While the panel decision's treatment of Count II appears to apply taxpayer standing doctrine, it ultimately rejects the doctrine by (1) acknowledging that the dismissal of Count II is a "minor consequence" and subsuming its allegations into Count I, and (2) remanding Count I for an inquiry focused on the Contractors' downstream performance, instead of considerations "based directly upon the Legislature's taxing and spending power." Op. at 10, 15-16.

DOC's job to oversee and audit its contractors and address any deficiencies in their performance. These are *not* judicial responsibilities. Art. II, § 3, Fla. Const. ("No person belonging to one branch shall exercise any powers appertaining to either of the other branches...").

For these reasons, the Court en banc should review the panel decision, which errs by shifting contract oversight responsibilities from the agency to the judiciary and by validating taxpayer litigation that is impermissibly directed at contractor performance, instead of at the Legislature's taxing and spending power.

Conclusion

For the foregoing reasons, the full Court should grant Appellees' motion for rehearing en banc.

Rule 9.331(d)(2) CERTIFICATION

I express a belief, based on a reasoned and studied professional judgment that the panel decision is of exceptional importance. Further, I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to this court's decision in Bush v. Holmes, 886 So. 2d 340 (Fla. 1st DCA 2004), and that a consideration by the full court is necessary to maintain uniformity of this court's decisions.

Major B. Harding
Attorney for Prisoners of Christ, Inc.
& Lamb of God Ministries, Inc.
Ausley & McMullen
Post Office Box 391
Tallahassee, Florida 32301
Telephone: (850) 224-9115
Florida Bar No. 0033657

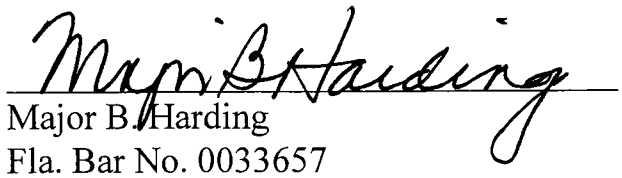
Timothy D. Osterhaus
Attorney for Fla. Dep't of Corrections
Secretary Walter A. McNeil
Office of the Attorney General
The Capitol, PL-01
Tallahassee, FL 32399-1050
Telephone: (850) 414-3681
Florida Bar No. 0133728

Respectfully Submitted,

BILL MCCOLLUM
ATTORNEY GENERAL

Scott D. Makar (FBN 709697)
Solicitor General
Timothy D. Osterhaus (FBN 0133728)
Deputy Solicitor General
Office of the Attorney General
The Capitol, PL-01
Tallahassee, FL 32399-1050
(850) 414-3300
(850) 410-2672 (fax)

Counsel for Florida Department of Corrections Secretary Walter A. McNeil



Major B. Harding
Fla. Bar No. 0033657
E. Dylan Rivers
Fla. Bar No. 0669555
Erik M. Figlio
Fla. Bar No. 0745251
Ausley & McMullen
Post Office Box 391
Tallahassee, FL 32302
850/224-9115
850/222-7560 (facsimile)

Eric C. Rassbach
DC Bar No. 493739
Admitted *Pro Hac Vice*

The Becket Fund for Religious Liberty
1350 Connecticut Avenue NW, Ste. 605
Washington, DC 20036
Telephone: (202) 955-0095
Facsimile: (202) 955-0090

Andrew G. McBride
DC Bar No. 426697
Jamie Alan Aycock
DC Bar No. 974343
Admitted *Pro Hac Vice*
Wiley Rein LLP
1776 K Street NW
Washington, DC 20006
Telephone: (202) 719-7000
Facsimile: (202) 719-7049

Attorneys for Appellees Prisoners of Christ, Inc. and Lamb of God Ministries, Inc.

CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that this computer-generated brief is prepared in Times New Roman 14-point font and complies with the font requirement of Rule 9.210(a), Florida Rules of Appellate Procedure, and that a true copy of the foregoing has been furnished this 29th day of December, 2009, by U.S. Mail to:

Appellants' Counsel

Ronald A. Lindsay, Esq., Center for Inquiry, 621 Pennsylvania Avenue Southeast, Washington, DC 20003; and

Christine Davis Graves, Esq., Carlton Fields, 215 South Monroe Street, Suite 500, Tallahassee, Florida 32301-1866

Attorney