FINAL BILL ANALYSIS

BILL #: CS/HJR 1471

FINAL HOUSE FLOOR ACTION:
81 Y's 35 N's

SPONSOR: Rep. Plakon and Rep. Precourt

GOVERNOR'S ACTION: N/A

COMPANION BILLS: SJR 1218

SUMMARY ANALYSIS

CS/HJR 1471 passed the House on April 27, 2011, by the required three-fifths margin, and subsequently passed the Senate on May 6, 2011, by the required three-fifths margin. The joint resolution is not subject to any action by the Governor. If adopted by the voters, the amendment will take effect on January 8, 2013.

The joint resolution amends the Florida Constitution relating to religious freedom. The resolution:

- Repeals a limit on the power of the state and its subdivisions to spend funds "directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution."

- Provides that government may not deny the benefits of any program, funding, or other support on the basis of religious identity or belief, except to the extent required by the First Amendment to the United States Constitution.

The joint resolution will be placed on the ballot at the November 6, 2012, general election. Sixty percent voter approval is required for adoption.

This joint resolution requires an estimated nonrecurring expenditure for publication in fiscal year 2012-2013 of $22,820 payable from the General Revenue Fund. The joint resolution does not appear to have a fiscal impact on local governments.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Present Situation

The U.S. Constitution and the Florida Constitution both contain an Establishment Clause and a Free Exercise Clause. The Establishment Clauses are based on the clause including the words "establishment of religion." The Free Exercise Clauses are based on the clause including the words "free exercise."

The First Amendment to the U.S. Constitution states:

> Congress shall make no law respecting an **establishment of religion**, or prohibiting the **free exercise thereof**; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances (emphasis added).

Similarly, Article I, Section 3 of the Florida Constitution states:

> There shall be no law respecting the **establishment of religion** or prohibiting or penalizing the **free exercise thereof**. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. **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** (emphasis added).

Blaine Amendments

The last sentence of Article I, Section 3 of the Florida Constitution is known as the "Blaine Amendment" or "no-aid" provision.[1] The U.S. Constitution **does not** contain a similar provision. "Blaine Amendments" are provisions adopted in the latter part of the nineteenth century as part of many state constitutions in an attempt to restrict the use of state funds at "sectarian" schools. Florida's "Blaine Amendment" imposes "further restrictions on the state's involvement with religious institutions than the Establishment Clause" of the Florida or U.S. Constitutions.[2] Florida's Blaine Amendment reads:

[1] *Bush v. Holmes*, 886 So.2d 340, 344, 348-349 (Fla. 1st DCA 2004).
[2] *Holmes*, at 344.

> 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.[3]

In 1875, President Ulysses S. Grant, in his State of the Union Address, called for an amendment to the U.S. Constitution to mandate free public schools and prohibit the use of public money for sectarian schools. President Grant laid out his agenda for "good common school education." He attacked government support for "sectarian schools" run by religious organizations, and called for the defense of public education "unmixed with sectarian, pagan or atheistical dogmas." President Grant declared that "Church and State" should be "forever separate." Religion, he said, should be left to families, churches, and private schools devoid of public funds.[4]

After President Grant's speech, Congressman James G. Blaine proposed the President's suggested amendment to the U.S. Constitution. In 1875, the proposed amendment passed by a vote of 180 to 7 in the House of Representatives, but failed by four votes to achieve the necessary two-thirds vote in the U.S. Senate. The proposed text of Blaine's amendment was:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects and denominations.[5]

While the amendment failed at the federal level, in the following years a majority of states adopted amendments similar to that of Blaine's and such amendments became known as "Blaine Amendments."[6] During this time period, there was a large increase in Catholic immigration to the United States. Catholic families resisted sending their children to public schools where the Protestant bible was read and Protestant prayers were used. This led many Catholic organizations to organize their own school systems, and created concern among Protestants that the government would begin funding Catholic schools. Some commentators believe the "Blaine Amendments" were a reaction to this fear.[7] Today, 37 states have provisions placing some form of restriction on government aid to "sectarian" schools that goes beyond any limits in the U.S. Constitution.[8]

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[3] Article I, s. 3, FLA. CONST.
[4] Deforrest; Mark Edward. "*An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*," Harvard Journal of Law and Public Policy, Vol. 26, 2003.
[5] *Id*.
[6] *The Blaine Game: Controversy Over the Blaine Amendments and Public Funding of Religion*. Pew Forum on Religious and Public Life. July 24, 2008. Available at: http://pewforum.org/Church-State-Law/The-Blaine-Game-Controversy-Over-the-Blaine-Amendments-and-Public-Funding-of-Religion.aspx (last visited March 25, 2011).
[7] *Id*.
[8] The Becket Fund for Religious Liberty, What are Blaine Amendments? http://www.blaineamendments.org/Intro/whatis.html (last visited March 25, 2011).

Florida adopted its "Blaine Amendment" in 1885, later than most other states.[9] It was readopted in the 1968 rewrite of the Florida Constitution as part of Article I, Section 3. It has been reported that:

> As elsewhere in the United States, the history of Florida's Blaine Amendment is irrevocably linked to the progress of the common school movement and immigration, urbanization, and industrialization. The common school movement, in Florida and elsewhere, taught a "common religion" that was essentially Protestant in character, requiring until the 1960s, daily reading from the King James Bible, prayer, and other Protestant religious observances in the public schools.[10]

Florida Court Cases

Bush v. Holmes

Taxpayers challenged the constitutionality of a school voucher program entitled the Opportunity Scholarship Program (OSP). The trial court found the OSP in violation of the free public school system provision in Article IX, Section 1 of the Florida Constitution, relying on the principle of "expressio unius est exclusio alterius"[11] in finding that the expression in the Florida Constitution of a public school system prohibits the Legislature from funding private schools.[12] On appeal, the First District Court of Appeal reversed and remanded, holding that the OSP was not unconstitutional on its face under this provision.[13]

On remand, the circuit court found the OSP unconstitutional again, this time based on the State Constitution's "no-aid" provision ("Blaine Amendment") in Article I, Section 3. On appeal, a divided 3-judge panel of the First District Court of Appeal affirmed the trial court's order.[14] The First District subsequently withdrew the panel opinion and issued an en banc decision in which a majority of the First District again affirmed the trial court's order.[15] The Court found that the "no-aid" provision involves three elements:

> (1) the prohibited state action must involve the use of state tax revenues;
> (2) the prohibited use of state revenues is broadly defined, in that state revenues cannot be used "directly or indirectly in aid of" the prohibited beneficiaries; and

[9] *Holmes* at 351-352.
[10] Adams, Nathan. *Pedigree of an Unusual Blaine Amendment: Article I, Section 3 Interpreted and Implemented in Florida Education*. 30 Nova L. Rev. 1, Fall 2005.
[11] "A canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative." BLACK'S LAW DICTIONARY (9th edition 2009).
[12] *Bush v. Holmes*, 767 So.2d 668, 672 (Fla. 1st DCA 2000).
[13] *Id.*
[14] *Bush v. Holmes*, 29 Fla. L. Weekly D1877 (Fla. 1st DCA Aug.16, 2004).
[15] *Bush v. Holmes*, 886 So.2d 340 (Fla. 1st DCA 2004).

> (3) the prohibited beneficiaries of the use of state revenues are "any church, sect or religious denomination" or "any sectarian institution."[16]

In interpreting the "no-aid" provision, the Court commented that:

> [W]e cannot read the entirety of article I, section 3 of the Florida Constitution to be substantively synonymous with the federal Establishment Clause… For a court to interpret the no-aid provision of article I, section 3 as imposing no further restrictions on the state's involvement with religious institutions than the Establishment Clause, it would have to ignore both the clear meaning and intent of the text and the unambiguous history of the no-aid provision... Finally, based upon the recent United States Supreme Court decision in *Locke v. Davey*, 540 U.S. 712 (2004), we hold that the no-aid provision does not violate the Free Exercise clause of the United States Constitution.[17]

On appeal of the First District's 2004 opinion interpreting the "no-aid" provision, the Supreme Court struck the OSP on other grounds.[18] The Court found "it unnecessary to address whether the OSP is a violation of the "no aid" provision in article I, section 3 of the Constitution, as held by the First District."[19]

Council for Secular Humanism, Inc. v. McNeil, Florida 1st DCA 2010

The Council for Secular Humanism (CSH) brought suit against the Department of Corrections (DOC) challenging the use of state funds to support the faith-based substance abuse transitional housing programs of Prisoners of Christ, Inc. (Prisoners) and Lamb of God Ministries, Inc. (Lamb of God). The Council for Secular Humanism (CSH) alleged that payments to these organizations by DOC constituted payments to sectarian institutions contrary to the "no-aid" provision in Article I, Section 3 of the Florida Constitution. The trial court found in favor of DOC. [20]

On appeal, the First District Court of Appeal found:

> As this court explained in *Holmes*, Article I, section 3 of the Florida Constitution is not "substantively synonymous with the federal Establishment Clause." While the first sentence of Article I, section 3 is consistent with the federal Establishment Clause by "generally prohibiting laws respecting the establishment of religion," the no-aid provision of Article I, section 3 **imposes "further restrictions on the state's involvement with religious institutions than**

[16] *Id*. at 352.
[17] *Id.* at 344.
[18] *Bush v. Holmes*, 919 So.2d 392, 399 (Fla. 2006). The Florida Supreme Court agreed with the original trial court's opinion that the OSP was in violation of the free public school system provision in Article IX, Section 1 of the Florida Constitution, thus overturning the First District's opinion to the contrary.
[19] *Id.* at 398.
[20] *Council for Secular Humanism, Inc. v. McNeil*, 44 So.3d 112 (Fla.1st DCA 2010).

> **[imposed by] the Establishment Clause**." Specifically, the state may not use tax revenues to "directly or **indirectly**" aid "any church, sect, or religious denomination or any sectarian institution." As we noted in *Holmes*, the United States Supreme Court has recognized that state constitutional provisions such as Florida's no-aid provision are "far stricter" than the Establishment Clause and "draw [ ] a more stringent line than that drawn by the United States Constitution." [Citations omitted; emphasis added].[21]

Because the Court recognized that their decision was one of first impression in which the Florida no-aid provision was applied outside the school context and was important to how the state could contract for social services, it certified the question to the Florida Supreme Court as one of great public importance under rule 9.330, Florida Rules of Appellate Procedure.[22] The certified question was:

> WHETHER THE NO-AID PROVISION IN ARTICLE I, SECTION 3 OF THE FLORIDA CONSTITUTION PROHIBITS THE STATE FROM CONTRACTING FOR THE PROVISION OF NECESSARY SOCIAL SERVICES BY RELIGIOUS OR SECTARIAN ENTITIES?[23]

The Supreme Court did not accept the certified question,[24] so the case was remanded to the trial court for a hearing on whether Prisoners and Lamb of God are sectarian institutions and a determination if the DOC contracts are in violation of Article I, Section 3 of the Florida Constitution. The remanded case is on the circuit court's docket as of June 3, 2011.

Effect of Proposed Changes

The joint resolution repeals a limit on the power of the state to spend funds directly or indirectly in aid of sectarian institutions. Specifically, the measure repeals the "Blaine Amendment" or "no-aid" provision of Article I, Section 3 of the Florida Constitution.

The joint resolution replaces the "Blaine Amendment" with the following statement:

> Except to the extent required by the First Amendment to the United States Constitution, neither the government nor any agent of the government may deny to any individual or entity the benefits of any program, funding, or other support on the basis of religious identity or belief.

The joint resolution includes numerous "whereas clauses" that provide statements regarding the importance of religious freedoms, tolerance, and diversity; the history of the Blaine Amendment; the legal history of Blaine Amendment challenges; the abundance and role of private religious

[21] *Id.* at 119.
[22] *Id.* at 121.
[23] *Id.*
[24] *McNeil v. Council for Secular Humanism, Inc.*, 41 So.3d 215 (Fla. 2010).

affiliated hospitals, schools, adoption agencies, and other benevolent institutions; and discussion regarding the Establishment Clause.

The joint resolution is silent regarding an effective date for the constitutional amendment. Therefore, in accordance with section 5, Article XI, of the Florida Constitution, it would take effect on the first Tuesday after the first Monday in January following the election at which it was approved by the electorate, which is January 8, 2013.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The joint resolution does not appear to have a fiscal impact on state revenues.

2. **Expenditures:**

The State Constitution requires the proposed amendment to be published, once in the tenth week and once in the sixth week immediately preceding the week of the election, in one newspaper of general circulation in each county where a newspaper is published. The Department of State executes the publication of the Joint Resolution if placed on the ballot. The Florida Department of State estimates that required publication of a proposed constitutional amendment costs $106.14 per word. At approximately 215 words, the amendment would require an estimated expenditure of $22,820. These funds must be spent regardless of whether the amendment passes, and would be payable in FY 2012-2013 from the General Revenue Fund.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. **Revenues:**

The joint resolution does not appear to have a fiscal impact on local revenues.

2. Expenditures:

The joint resolution does not appear to have a fiscal impact on local expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Private religious institutions could benefit from receiving more public funds.

D. FISCAL COMMENTS:

The cost to publish the amendment is estimated at $22,820.