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

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

Plaintiffs,

v. Case No: 2007-CA-1358

MICHAEL D. CREWS, in his official capacity as the Secretary of Corrections of Florida; PRISONERS OF CHRIST, INC., a Florida corporation; and LAMB OF GOD MINISTRIES, INC., a Florida corporation,

Defendants.
_____/

DEFENDANTS PRISONERS OF CHRIST AND LAMB OF GOD MINISTRIES' CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE OPPOSING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This lawsuit is a thinly-veiled attempt to bar religious nonprofits from competing for government contracts solely because they are "too" religious. But the Florida Constitution does not require the State of Florida to discriminate against religious nonprofits who want to serve released prisoners and society. And even if such an absurd reading of the Florida Constitution were to be credited, it would be in plain violation of the United States Constitution, which rejects discriminatory treatment of religious groups simply because of their religion. The reality is that the Contractors sued by the Center for Inquiry provide legitimate rehabilitation services that are effective and inexpensive to the citizens of Florida. Both offenders and the State would be worse off if they were irrationally excluded from a State program. At bottom, these Contractors serving clients in need of help have garnered Plaintiffs' ire not because of what they have done, but because of who they are. The Court should render summary judgment for all defendants.

STATEMENT OF FACTS

I. The Plaintiffs' Statement of the Facts

This case involves contracts between the State of Florida, Department of Corrections ("FDC") and two service providers, Lamb of God Ministries and Prisoners of Christ ("Contractors"). Plaintiffs allege that the contracts for substance abuse transitional housing services, entered into through the public procurement process, violate Article I, Section 3 of the Florida Constitution, referred to as the No-Aid provision. Thus, the ultimate question is whether payments pursuant to the subject contract are "in aid of" a church, sect, religious denomination, or sectarian institution. This obviously turns on what the FDC has contracted for and is paying for.

At both the beginning and the end of their Statement of Undisputed Facts, the Plaintiffs acknowledge that the focus must be on the actual services provided by the Contractors. Plaintiffs' Motion for Summary Judgment ("Mot.") at 4 ("it is the services actually provided by Defendant Contractors that are at issue"); *id* at 14 ("Plaintiffs' claims are based on the actual services provided by Defendant Contactors pursuant to the contracts"). Despite this acknowledgement, they then devote several pages to discussion of materials and websites with the most tenuous of connections with the contracts and services at issue. Nowhere in their numerous pages of undisputed facts do the Plaintiffs actually mention the many services provided pursuant to the contracts with FDC. These services are described below.

Rather, after paying lip service to their burden of proof, the Plaintiffs go to great lengths to paint the Contractors as too religious, both in their "nature" and their "Christian perspective." Mot. 6, 26. Plaintiffs point to various literature and publications, parts of which may have been

used or referred to by the Contractors.[1] However, the Plaintiffs do not even acknowledge, much less describe, the actual services the Contractors provide. In short, their statements to the contrary notwithstanding, the Plaintiffs' Motion for Summary Judgment focuses almost exclusively on who the Contractors are, and not the services they provide pursuant to their contracts with the FDC.

II. Services Provided Under the State Contracts

In 2000, the Florida Legislature created a task force to study how to address the cycle of substance abuse and criminal recidivism. *See* Ch. 2001-110, Laws of Fla. The task force received testimony from "substance-abuse experts, governmental officials, and private organizations throughout Florida," and issued a report recommending solutions. *Id.* In 2001, the Legislature undertook a coordinated and integrated response that substantially amended fifteen Florida statutes. *Id.* As a part of this effort, the Legislature also passed the law that Plaintiffs challenge here: a statute allowing faith-based organizations to compete on equal terms in bids to provide substance abuse and transitional housing services. *Id*.; *see also* § 944.4731, Fla. Stat. The Legislature created this law because it found that "inmates with histories of substance abuse will most likely return to prison" without such measures, and that "research has proven" that private and faith-based organizations are "often more effective than government programs" and "can offer cost-effective substance-abuse treatment." Ch. 2001-110, Laws of Fla. (stating also that a study had "measure[d] the effectiveness of faith-based programs in Florida's correctional

[1] Notably, these publications, websites and such from other organizations are filled with inadmissible hearsay. In fact, most of them have not even been authenticated, much less is there a basis to be admitted over hearsay objection. These items were written by organizations and individuals who are not parties or witnesses to this case. They are not statements of the Contractors, and they cannot be attributed or imputed to them. They are inadmissible and should not be considered by the Court, particularly not for the purpose of attributing statements in them to the Contractors. This is explained in more detail in the Motion to Strike/Exclude Portions of Plaintiffs' Motion for Summary Judgment ("Mot. to Strike") being filed concurrently.

facilities" and "found a strong and beneficial correlation between faith-based programming and remaining crime-free and drug-free upon release.").

Under this statute, the Contractors provide a wide variety of services to clients recently released from prison. Under the state contracts, the Contractors provide housing, employment assistance, transportation, and food for their clients. Appx. 1395, 1309, 1487. They also provide substance abuse treatment modeled on widely-used, effective 12-step and cognitive-behavioral models of treatment. Appx. 405, 443. This begins as soon as men are released from prison: the Contractors meet them at the bus stop and bring them to their facilities, where they help them to adjust to life outside prison and come up with a plan based upon each client's needs. Appx. 39-40; 414-16. In addition to food, shelter, clothing, and substance abuse treatment, those needs may include services such as obtaining social security cards, driver's licenses or ID cards. Appx. 39-40, 414-15, 1309, 1399-1400, 1443-44, 1487, 1491-92. They also help clients to obtain services such as transportation, medical and dental services, mental health services, food stamps, GEDs, and post-secondary education. Appx. 39-40, 414-15, 1309, 1399-1400, 1443-44, 1487, 1491-92. Securing and maintaining employment is a critical part of the program, so contractors provide training in life skills, workplace demeanor, budgeting skills, grooming, and personal hygiene. Appx. 39-40, 384, 414-16, 1309, 1399, 1436, 1443-44, 1525.

Contractors were awarded their contracts after a competitive public procurement process. Appx. 1589. They have provided services to the state for thirteen years. Appx. 1590. The state is aware that it could not purchase these services this cheaply from other sources. As FDC's witness testified, "[T]he small amount of money of State funds that are paid to this contract, there's no way that they would come close to covering the light bills and gasoline bills, just the

upkeep on the houses." Appx. 1094; *id.* at 1096 ("I don't think [state funding] would even come close to completing all their expenses.").

Under the contracts, participation in the program is "strictly voluntary." Appx. 1391; *see also id.* 1114, 1590. The program is open to clients of any faith, or no faith. Appx. 72-73, 1393, 1441, 1485. Any religious content is purely voluntary. Appx. 42, 409-10, 1397, 1489. The state contracting agents are not aware of any complaints against the Contractors relating to any voluntary religious content. Appx. 1100; 1094 (the state provides a mechanism for anonymous complaints by clients).

III. Prisoners of Christ

Prisoners of Christ (POC) runs several transitional living facilities in Jacksonville. The organization's mission is to assist men transitioning back into the community from prison. Appx. 383. Dr. Stephen McCoy is the group's current executive director. Appx. 1807. In addition to Dr. McCoy, POC employs a full-time assistant and two full-time volunteers. Appx. 1808. It also employs resident leaders, current clients who perform extra services in the facilities and earn a small weekly salary in return. *Id.*

POC is primarily supported by private donations. Appx. 1808. It also receives $14.28 per client per day for the services it provides under State contracts. *Id.*; Appx. 452. Dr. McCoy testified that the State funding does not cover the expense of housing, feeding, and providing transitional services to the clients. Appx. 451-52; *see also id.* at 1808. POC provides these services at a loss because it has a mission to serve those in need. Appx. 1808, 384-85.

POC provides substance abuse treatment classes using the Alcoholics Anonymous 12-step program. Appx. 404-06. POC experimented with a different program, Celebrate Recovery, for a few months, but discontinued it and went back to AA because "it's a much more proven product." Appx. 404, 408. POC does not attempt to impose its beliefs upon its clients, complies

with the contract requirement that it not proselytize, and does not discriminate on the basis of belief in its provision of services. Appx. 1485. Dr. McCoy is not aware of any complaints about optional faith-based content at POC. Appx. 1808. To the contrary, Dr. McCoy's experience has been that clients who are Christians benefit from the ability to attend optional worship services and rely upon their faith as a source of strength in their recovery. Appx. 1808-09.

IV. Lamb of God

Lamb of God Ministries (LOG) was founded twenty-eight years ago. Appx. 13-14. Its mission is to help men recover from drug and alcohol addiction. Appx. 18. To further that mission, it runs a halfway house in Pompano Beach. Appx. 16-17. Don Fugate is the current president and CEO. Appx. 10-12. In addition to Mr. Fugate, LOG employs two full-time employees. Appx. 1804.

LOG is supported primarily by income it receives from non-state clients. Those clients pay a little over $24 per day for their services. Appx. 58-59. The State pays LOG $20 per client per day for those it serves under the contracts. Appx. 1405. LOG pays over $11,000 per month on rent, utilities, insurance, and food. See Appx. 59-61 (roughly $11,350 per month for these expenses). It receives roughly $6,500 per month from the State. Appx. 1803. LOG even continues to house, feed, and provide services to State clients when the State funds run short and the Contractors are not receiving State money to provide services. Appx. 65-66, 1803. Since LOG provides services to the State at a loss, it must make up the difference through the income it receives from paying clients. Appx. 1804. LOG provides these services at a loss because it has a mission to help men in substance abuse recovery. Appx. 46, 1805.

LOG offers substance abuse treatment classes using the standard 12-step Alcoholics Anonymous text. Appx. 37. It tailors its curriculum to individual needs and challenges. Appx. 39-41. LOG's leaders may refer to a variety of substance abuse recovery materials when

preparing for their meetings, but most of those materials simply serve as background and are not passed on to clients. *See* Appx. 36-37 (discussing reference use of Genesis, Journey to Freedom, and Faith Walk). LOG does not attempt to impose its beliefs upon its clients, and complies with the contract requirement that it not proselytize. Appx. 44-45, 1393, 1441. In fact, LOG has "often" accommodated requests by non-Christian participants for non-Christian scriptures. Appx. 52. Mr. Fugate is not aware of any complaints about optional faith-based content at LOG. Appx. 1804-05. To the contrary, Mr. Fugate's experience has been that clients who are Christians benefit from the ability to attend optional worship services and rely upon their faith as a source of strength in their recovery. *Id.* at 1805. Like POC, LOG provides religious content to those who want to hear it, and does not impose it on those who do not. *Id.* at 1804-05.

ARGUMENT

I. Plaintiffs have not proven a violation of the No-Aid provision.

Plaintiffs bear a heavy burden to prove that the statute at issue violates the No-Aid provision. The statute is "presumed valid" and cannot "be declared unconstitutional unless it is demonstrated beyond a reasonable doubt that the statute conflicts with" the No-Aid provision. *Metro. Dade Cty. v. Bridges*, 402 So. 2d 411, 413 (Fla. 1981). Plaintiffs have not met their burden.

Florida's No-Aid provision states, "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." Fla. Const. art. I, § 3. This provision does not bar state contracts with religious groups, but only state funding which is "in aid of" churches, sects, denominations, or sectarian institutions. To determine whether government actions violate the provision, prior cases have looked at the nature of the program at issue and whether the government's actions aid religion or merely accomplish secular state

purposes. Plaintiffs' construction of the clause would prohibit all state contracts with religious organizations, which they pejoratively call "pervasively sectarian" institutions. *See, e.g.*, Mot. at 5.[2] This Court and the court of appeals have rejected that construction. A proper analysis of the No-Aid provision shows that the contracts do not violate that provision, but merely accomplish the secular purposes of the state. To rule otherwise would endanger a wide variety of government contracts and public programs, limiting the State's ability to provide critical social services to the needy, and ruling out entire classes of organizations based upon nothing more than their religious identity and viewpoint. It would also, as explained in the next section, violate federal law.

A. Plaintiffs' misreading of the No-Aid provision conflicts with binding precedent.

Plaintiffs urge the Court to bar all contracts with POC and LOG because they seem too religious. This argument has already been rejected by this court and the First District Court of Appeals. As the First District said, "[A]llegations that government funds are paid to a religious entity to provide social services are not sufficient, standing alone, to state a cause of action under the no-aid provision." *Council for Secular Humanism, Inc. v. McNeil*, 44 So. 3d 112, 119 (Fla. 1st DCA 2010) ("*CSH*"). To do so would create a rule barring "[a] government program that merely purchases at market prices secular services or products from a church, synagogue, or

[2] The word "sectarian" is pejorative. *See Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1258 n.5 (10th Cir. 2008) (McConnell, J.) ("We recognize that the term 'sectarian' imparts a negative connotation … [and that] the Supreme Court has not used the term in recent opinions"). As the U.S. Supreme Court has recognized, the word has a "shameful pedigree" of nativist sentiment against recent Catholic immigrants, which gave rise to many state No-Aid provisions, also known as "Blaine Amendments." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality op.); *see also Locke v. Davey*, 540 U.S. 712, 273 n.7 (2004) (noting "link" between Blaine Amendments and anti-Catholicism); *Bush v. Holmes*, 886 So. 2d 340, 351 n.9 (Fla. 1st DCA 2004) *aff'd on other grounds*, 919 So. 2d 392 (Fla. 2006) ("Certain commentators contend that the original Blaine-era no-aid provisions were based in part on anti-Catholic religious bigotry."). It is perhaps for this reason that only two reported Florida cases even use the term "pervasively sectarian," and neither embrace it. *Cf. Holmes*, 886 So. 2d at 353 n.10 (noting ambiguity, but declining to adopt "pervasively sectarian").

mosque." *Id.* at 119-20. The result would be absurd: the state would be barred from, *e.g.*, renting out the parking lot of a church because the funds went to "sectarian" entities or from using state-administered Medicaid funds to pay the bills of religious hospitals. In order to prove their case, Plaintiffs must show that the contracts have actually been "in aid of" religion.

The analysis under the No-Aid provision treats social service organizations differently from school vouchers. The First District made this distinction in *CSH*: "Unlike the sectarian schools receiving OSP vouchers, it has been observed that the health and social service programs and activities raised in the appellants' arguments, although affiliated with a church or religion, are generally operated through non-profit organizations that are not sectarian or, at least, not pervasively sectarian institutions." *Id.* at 118. While the "pervasively sectarian" inquiry is problematic, as discussed below, the fact remains that the court of appeals recognizes a distinction between religious schools educating impressionable children and social service organizations serving adults. As the court of appeals said in *Holmes*, "The primary purpose of [no-aid] amendments to the various state constitutions was to bar the use of public funds to support religious schools." *Bush v. Holmes*, 886 So. 2d 340, 349 (Fla. 1st DCA 2004) *aff'd on other grounds*, 919 So. 2d 392 (Fla. 2006). Although *Holmes* may be instructive, the analysis and conclusion here are distinct: "nothing in the Florida no-aid provision would create a constitutional bar to state aid to a non-profit institution that was not itself sectarian, even if the institution is affiliated with a religious order or religious organization." *Id.* at 362.

Rather than a bright-line rule against state dollars going to religious entities, *CSH* requires the Court to look to the nature of the programs at issue.

> [T]he inquiry necessarily will be case-by-case and will consider such matters as [1] whether the government-funded program is used to promote the religion of the provider, [2] is significantly sectarian in nature, [3] involves religious

> indoctrination, [4] requires participation in religious ritual, or [5] encourages the preference of one religion over another.

CSH, 44 So. 3d at 120. As Plaintiffs admit, these are not mandatory factors, but guideposts for the court's analysis.[3]

Despite this holding, Plaintiffs' motion relies explicitly and entirely on the *Holmes* test, rather than the multi-factor analysis mandated by the court of appeals *in this case*. *See* Mot. at 22 (applying *Holmes* test), 17 (reciting, but not applying, *CSH* factors). Plaintiffs' extreme reading of the *Holmes* test and the No-Aid provision would put Florida at odds with other states and render the state particularly hostile to religious organizations. *See infra* I.C. Proper application of the *CSH* factors demonstrates that no violation has occurred in this case.[4]

B. Plaintiffs have not met their burden to bring forward facts showing a violation of the No-Aid Provision.

After more than eight years and 1,500 pages of exhibits, Plaintiffs failed to prove that any state funds are being used "in aid of any church, sect, or religious denomination or in aid of any sectarian institution." Fla. Const. art. I, § 3. That was their evidentiary burden, and they failed to meet it. To cover the gap, Plaintiffs emphasize that the Contractors are faith-based recovery organizations, a fact which was never in doubt and did not require almost a decade to prove up.

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[3] Contractors do not necessarily agree with these factors, particularly considering whether the programs are "significantly sectarian." They reserve the right to argue on appeal that the *CSH* analysis is mistaken. *Cf. CSH*, 44 So. 3d at 123 (Thomas, J., dissenting) ("The panel's opinion here will apply *Holmes* for the first time beyond the context of school vouchers, thus potentially jeopardizing a wide range of governmental social welfare programs, including faith-based placement programs for foster children, faith-based prison programs, and other State contracts with faith-based providers, as Judge Polston predicted in his dissenting opinion in *Holmes.*")

[4] The *Holmes* test itself is suspect, both as a general matter and as applied to this case. The status of the *Holmes* test is uncertain; the Florida Supreme Court refused to apply the No-Aid provision to strike down the state's voucher program, relying instead upon Fla. Const. art. IX, § 1(a). *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006). The Eleventh Circuit applied *CSH*, rather than *Holmes*, to analyze the No-Aid provision's application to churches. *Atheists of Fla., Inc. v. City of Lakeland, Fla.*, 713 F.3d 577, 595 (11th Cir. 2013). Defendants reserve the right to raise arguments about the validity of this analysis on appeal.

Plaintiffs ignore both the terms of the contracts and the wide variety of social services provided by the Contractors, instead relying on religious materials with the most tenuous of connections with those contracts. But this case is not about whether the Contractors' staff sometimes read religious materials, nor whether they discussed religious matters with clients at the clients' request. It is whether state funds were actually used in aid of any religious activity. This, Plaintiffs failed to establish. Plaintiffs failed to prove that *any* of the *CSH* factors is present here, much less all of them.

1. *The government-funded program is not used to promote the religion of the provider.*

The Plaintiffs have not demonstrated that any government funds are used to promote the Contractors' religion. Participating in the program is "strictly voluntary." Appx. 1391; *see also id.* 1114, 1590. It is undisputed that the program is open to clients of any faith, or no faith. Appx. 72-73, 1393, 1441, 1485, 1504, 1804-05, 1808; 1705 (Plaintiff admitting it has no evidence of "any preferential treatment" for certain religious groups). It is undisputed that any religious activities are strictly voluntary. Appx. 42 (LOG: religious portions are "not a mandatory part of the program"), 409-10 (POC prayer meetings voluntary), 1397, 1489 (contracts stating that participants may be discharged for "refusal to participate in substance abuse programming," but "not" for "failure to participate in faith-based components of the program"), 1707 (Plaintiff admitting it has no evidence that participants must attend religious services), 1804-05, 1808.

Further, it is undisputed that offenders get to choose whether to go to a particular contractor, and can choose to leave that contractor. Appx. 1590. Clients can also file complaints if a contractor requires participation in religious activities. But there have been no such complaints about the Contractors in this case. Appx. 1100 (State not aware of any violation);

Appx. 1094 (State contracting agent asks offenders and provides them forms to make anonymous complaints of involuntary religious activity); Appx. 1591.

The record shows that the services provided are not akin to religious education or indoctrination. The Contractors do not proselytize. Appx. 44-45, 1393, 1441, 1485. The Contractors' purpose is to help men recover from drug and alcohol addiction, Appx. 18 (LOG), and to assist men transitioning back into the community from prison. Appx. 383 (POC). The services provided could be provided by a secular institution. Appx. 72-74, 453-54.

Moreover, the Contracts specifically require that funds be used for the "sole purpose" of "criminal rehabilitation, the successful reintegration of offenders into the community, and the reduction of recidivism." Appx. 1393, 1441, 1485, 1590. The State takes standard measures to ensure that its funds are used only for contractually permitted purposes. Appx. 944-45, 956-58, 1043, 1048-49. Plaintiffs have no standing to challenge the "downstream performance of these contracts by the ministries and the Department's oversight of the contracts." *CSH*, 44 So. 3d at 122. Even if they did, they have failed to unearth any deviation from the contract requirements.

These programs are not used to promote religion. They are used to keep recently released offenders off of drugs and alcohol, gainfully employed, and out of prison. This "aids" the offenders and the citizens of Florida, not religion.

2. The program is not "significantly sectarian" in nature.

As noted above and explained below, there is a fundamental problem when courts decide questions such as whether a contract program is "significantly sectarian." But under any understanding of that term, these programs would pass muster. Both Contractors testified that non-religious providers could provide the same services. Appx. 72-74, 453-54. This should come as no surprise. Religious people provide social services every day in Florida—and many of them do so because it is motivated by their faith. Religious hospitals and nursing homes provide

care for the sick and elderly. That care is motivated by the religious beliefs of the groups that established those homes and hospitals. Yet the courts have never suggested that the state cannot contract with those hospitals, even if they feature chaplains and religious scriptures to serve the spiritual needs of the patients, or chapels where their family members may pray. *CSH* was careful to draw a line permitting the state to purchase services from religious non-profits. Whatever it means, "significantly sectarian" must mean something more than a religious person serving the public for religious reasons. But Plaintiffs failed to prove that anything more is happening here.

It is undisputed that the state has contracted for housing, food, and assistance finding and maintaining employment. Appx. 1395, 1309, 1487. In addition, the Contractors provide a whole host of additional social services to clients. They help teach clients life skills, workplace demeanor, budgeting skills, grooming and personal hygiene. Appx. 384, 1309, 1399, 1436, 1443-44, 1525, 1613. They assist clients with obtaining social security cards, driver's licenses or ID cards, transportation, medical and dental services, mental health services, GEDs, post-secondary education, parenting education, food stamps, and clothing. Appx. 414-15, 1309, 1399-1400, 1443-44, 1487, 1491-92. At a more basic level, Contractors provide housing, electricity, heating and air, access to telephone service, bedding, toiletries, laundry equipment and supplies, housing maintenance, and dining facilities. Appx. 1609, 1804, 1808.

Yet the government funds make up a minority of the Contractors' income. Appx. 56 (roughly 1/3 for LOG); Appx. 838, 884, 420-21 (most POC income comes from private donations); Appx. 451-53 (only about $40,000 of POC's $245,000 budget comes from state contracts). For LOG, the amount paid on rent, utilities, insurance, and food outstrips the amount received from the state. See Appx. 59-61 (roughly $11,350 per month for these expenses); Appx.

1803 (roughly $6,500 per month received from state). LOG even continues to house, feed, and provide services to clients when the state funds run short and the Contractors are not receiving state money to provide services. Appx. 65-66, 1803. LOG receives $20 per client per day from the state. Ex. 58-59. POC receives $14.28 per client per day under the contracts. Appx. 452, 1808. It should come as no surprise that housing, feeding, and transporting an adult costs more than $14.28 per day. And the Contractors do not only provide housing and food—they provide the wide variety of social services listed above. As FDC's witness testified, "[T]he small amount of money of State funds that are paid to this contract, there's no way that they would come close to covering the light bills and gasoline bills, just the upkeep on the houses." Appx. 1094; *id.* at 1096 ("I don't think [state funding] would even come close to completing all their expenses."). There is no "aid" to religion.

Plaintiffs do not raise objections to these social services; indeed, they scarcely mention those services, focusing instead on religious materials with only tenuous connections to the Contractors' programs. *See, e.g.*, Mot. at 5-16. Other than these materials, there is very little, if any, factual basis for Plaintiff's claims. The Plaintiffs point to newsletters, websites, and voluntary prayer meetings. Mot. at 23-24.[5] But they fail to establish any link between government funds and emailing a newsletter or saying a voluntary prayer. They also complain about a class using Biblical foundations, but never establish whether that portion of the class has actually occurred, whether it was an optional activity, or whether the content was devotional or

[5] They also object to religious décor at meeting sites. Mot. 24. But they do not claim that funds are expended on this décor. *See id.* They complain about the tax status of the Contractors, but do not prove that the tax status alters in any respect the actual social services provided. *See* Mot. at 9-10. They object to Mr. Fugate's pastoral allowance, Mot. at 8, omitting the portion of the regulations which permits this allowance for "the administration and maintenance of religious organizations and their integral agencies." 26 C.F.R. § 1.107-1(a). This again just amounts to the Plaintiffs saying "look, they are religious."

merely featured religious viewpoints. Mot. at 10; Appx. 396 (noting the class "hasn't actually taken place yet," and would address issues such as "financial management, family, relationships"). Newsletters, websites, and voluntary religious meetings are not a portion of the services contracted for, and therefore the Plaintiffs can have no cognizable interest in those matters. *See CSH*, 44 So. 3d 112, 122 (ruling Plaintiffs had no standing to "challenge[] the downstream performance of these contracts by the ministries and the Department's oversight of the contracts").

Plaintiffs never explain what is "sectarian" about beds, breakfasts, or bus passes. Nor could they—these are valuable social services that the state has contracted to obtain, and obtains at a significant cost savings. Most of Plaintiffs' complaints are about the substance abuse training portion of the program. Mot. at 23-25. Notably, under the current contracts, the state does not even pay for the substance abuse training portions of the program. Appx. 1436, 1590. Even if it did, the Contractors use 12-step programs similar to Alcoholics Anonymous. Appx. 404-06; Appx. 36-37. There is nothing "significantly sectarian" about these programs. Surely the plaintiffs do not mean to suggest that voluntary AA meetings are impermissible in state facilities. To rule this way would invalidate a wide swath of government programs and use of government facilities both inside and outside of prison.

3. The program does not involve religious indoctrination.

Plaintiffs fail to show any religious indoctrination in the state program. The Contractors testified that they did not try to impose their faith on clients. Appx. 44-45, 1485; *see also* Appx. 1804-05, 1808.

Plaintiffs rely heavily on printed materials, which they claim show indoctrination. *See, e.g.*, Mot. at 12-13; Appx. 476-834. But they failed to prove that those materials are given to program participants or used in any required program activities, much less used for purposes of

indoctrination. *See* Mot. to Strike. In some cases, Plaintiffs demonstrated no link between the materials and the program at all. *See* Mot. at 12-13 (objecting to Celebrate Recovery and *Walking the 12 Steps with Jesus Christ*), Appx. 49 (materials not used since at least 2009, no knowledge of when or whether they were ever used), 403-05 (Celebrate Recovery materials used only for a few months, then replaced with standard 12-step program), 405-06 (not aware of any use of *Walking the 12 Steps with Jesus Christ*); *see also* Mot. to Strike.

The record does not contain *any* evidence of the program involving religious indoctrination. Other than quoting publications that are not even written by any of the Defendants, the Plaintiffs have nothing to support this argument.

4. The program does not require participation in religious ritual.

As discussed above, any religious activities are optional under the contracts. Plaintiffs insist that POC prayer meetings are "strongly encouraged," but POC's director testified that those meetings are missed by many men who have jobs and not attended by POC staff. Appx. 409. In all their discovery, the Plaintiffs have not unearthed even a single complaint by someone who claimed he was required by the Contractors to attend prayer meetings or other religious services. *See* Appx. 1003, 1112-13 (no such complaints received by state contract officers). In short, required participation in religious activity is not permitted under the contracts and not supported by the record. There is no evidence of it.

5. The program does not encourage the preference of one religion over another.

Finally, the Plaintiffs failed to prove that the programming provided under the state contracts encourages the preference of one religion over another. The record shows that the state is contracting for social services and has been careful to ensure that the services are open to all and not contingent upon religious belief or indoctrination. *See, e.g.*, Appx. 1485. Religious

activities are optional. *See supra.* Clients of different faiths and no faith have participated in the programs and graduated from them. Appx. 73, 395, 452-53. The Contractors stated that they do not attempt to impose their beliefs on others and, indeed, have "often" accommodated requests for scriptures of other faith groups. Appx. 52. The record does not support this factor, either.

Absent any proof that the contracts actually fail the *CSH* test, Plaintiffs are left with an attack on the religious identity of the Contractors themselves. But the No-Aid provision does not bar all state contracts with religious social service organizations.

C. Plaintiffs' construction of the No-Aid provision would render Florida an extreme outlier among the states.

Plaintiffs urge the Court to construe Florida's No-Aid provision far more severely than virtually every state constitution in the nation. They go so far as to push an interpretation that violates the federal Free Exercise Clause, Establishment Clause, Free Speech Clause, and the Equal Protection Clause. *See infra* at Part II. But Florida and other states do not construe their no-aid provisions in such an absurd fashion. Even states with stringent no-aid provisions generally recognize that the analysis ought to turn on the state's interests and the actual program beneficiaries.

For example, California's No-Aid Provision is similar to Florida's. *See* Cal. Const. art. XVI, § 5. But California has not construed its provision with anything approaching the severity Plaintiffs prefer. California, like Florida, does not hold that the mere presence of a contract with a religious group is unconstitutional. Instead, the state recognizes that contracts with religious institutions are permissible if, among other things, they "serve the public interest and provide no more than an incidental benefit to religion." *Barnes-Wallace v. City of San Diego*, 704 F.3d 1067, 1079 (9th Cir. 2012) (allowing religious group to lease public property on financially favorable terms). This is akin to Florida's conclusion that "an incidental benefit to a religious

group resulting from an appropriate use of public property" does not violate the No-Aid provision. *Southside Estates Baptist Church v. Bd. of Trs., Sch. Tax Dist. No. 1*, 115 So. 2d 697, 700 (Fla. 1959).

Similarly, in *California Statewide*, a tax-exempt bond program did not violate the state's No-Aid provision, even though it provided benefits to religious institutions. *Cal. Statewide Cmtys. Dev. Auth. v. All Persons Interested*, 152 P.3d 1070, 1072 (Cal. 2007). This tracks Florida's conclusion regarding state-issued bonds for religious institutions. *Nohrr v. Brevard Cty. Educ. Facilities Auth.*, 247 So. 2d 304, 307 (Fla. 1971) ("A state cannot pass a law to aid one religion or all religions, but 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 focus is not on the character of the religious groups, but upon the public purposes served by the contracts.

Indiana likewise interprets its No-Aid provision to focus upon the actual beneficiaries of the program. In *Meredith v. Pence*, the Indiana Supreme Court permitted a voucher program that allowed state funds to be spent on religious schools. The court noted that the No-Aid provision could not have prohibited all funding for institutions with religious components, since at the time the amendment was passed, public schools had significant religious components. 984 N.E.2d 1213, 1230 (Ind. 2013); *see also Holmes*, 886 So. 2d at 348-50 (noting prevalence of religious exercises in public schools before and after Blaine amendments). The question was rather whether the primary beneficiaries were the religious schools or the lower-income families in need of education. *Id.* at 1227-29. The true beneficiaries were the latter. *Id.*[6] *See also Magee v.*

[6] The *Pence* decision may, in some respects, disagree with the majority decision in *Holmes. Cf. Holmes*, 886 So. 2d at 384-86, *aff'd on other grounds*, 919 So. 2d 392 (Fla. 2006) (Polston, J., dissenting) (urging adoption of test similar to Indiana's).

Boyd, No. 1130987, 2015 WL 867926, at *46 (Ala. Mar. 2, 2015) (upholding school choice program that "was designed for the benefit of *parents and students*, and not for the benefit of religious schools").

Georgia's No-Aid provision, which is nearly identical to Florida's, *CSH*, 44 So. 3d at 120-21, permits for more contacts with religious institutions than Plaintiffs would countenance. For instance, in *Taetle v. Atlanta Independent School System*, the Georgia Supreme Court found that the state may lease space from a church to run a public kindergarten. 625 S.E.2d 770 (Ga. 2006). The state even paid for improvements to the church property, improvements that would doubtless benefit the church when it held religious classes and services in the same facility. *See id.*; *see also Koerner v. Borck*, 100 So. 2d 398, 402 (Fla. 1958) (allowing county to use and improve land where baptisms took place because "any improvement to the county-owned land will be made for the benefit of the people of the county and not for the church"). But a mere commercial transaction with an admittedly religious institution was not enough to violate the state's No-Aid provision. *Id.* at 771. The *Taetle* court did not delve into whether the church was "sectarian," nor how the church might choose to use the funds and renovations it received from the government. *Id*. Plaintiffs ignore *Taetle*, but *CSH* held that the decision was "instructive" here. *CSH*, 44 So. 3d at 120-21.

Plaintiffs instead reach back eighty years before *Taetle* to two decisions, neither of which *Taetle* found applicable to the contract at issue there. Nor are they persuasive here. First, nothing in *Bennett v. City of La Grange* suggests that the municipal contract at issue had the sort of limitations Florida places on involuntary religious participation, proselytization, or religious discrimination, nor that the contract provided beneficiaries a level of choice comparable to the choices Florida provides here. 112 S.E. 482 (Ga. 1922). Further, *Bennett* appears to be a case

where the municipality assigned the entirety of its civil social welfare duties to a single private religious organization. *Id.* at 486. Such governmental assignments of entire core civil functions to a single denomination or religion have been recognized as constitutionally problematic since the founding era. *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part 1: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2131, 2169 (2003). That is not true here, where the Contractors play a very small role in Florida's very large, complex corrections system.

Second, *Richter v. Mayor & Aldermen of City of Savannah*'s single-sentence opinion simply pointed to *Bennett* and, like *Bennett*, did nothing to show whether the program in question was at all comparable to Florida's. 127 S.E. 739, 740 (Ga. 1925). Moreover, if applied in the manner Plaintiffs urge, *Richter* illustrates just how far-reaching Plaintiffs' interpretation is. As Plaintiffs see it, state Medicaid payments to religious hospitals violate the No-Aid provision. *Id.*; Mot. at 21; *see also* Appx. 1728-29, 33 (Plaintiff admitting it sees State lease of church parking space as No-Aid violation). That's exactly the sort of overreach *CSH* warned against. 44 So. 3d at 119-21.

Despite this warning, Plaintiffs argue for an extreme interpretation of the No-Aid provision, relying primarily upon cases related to state funding of religious schools. *See* Mot. at 20-21. But Florida law treats social service agencies differently than schools. *See supra* at Section I.A; *see also CSH*, 44 So. 3d at 121 (certifying question on this issue to the Florida Supreme Court); *McNeil v. Council for Secular Humanism, Inc.*, 41 So. 3d 215, 216 (Fla. 2010) (Polston, J., concurring) (urging Florida Supreme Court to decide this question at the proper time). Even the U.S. Supreme Court in *Locke v. Davey* recognized that state funding for

ministerial training was a distinct issue involving serious state anti-establishment concerns. 540 U.S. 712, 722 n.5 (2004). Plaintiffs' cases are inapplicable here.[7]

In short, Plaintiffs urge this Court to adopt a construction of Florida law that would go much further than Florida's closest neighbors, Georgia and Alabama, and other states like California and Indiana. They urge this Court to ignore the distinction between general aid to religious schools and competitive contracts with social service agencies for specific social services. That cannot be the proper analysis. To rule otherwise would be to make Florida a significant outlier.

Under the *CSH* factors, or the standard used by other states with similar constitutional provisions, the program does not violate the No-Aid provision. After what will soon become a decade of litigation, Plaintiffs failed to demonstrate that state funds are being used "in aid of" religion. Nor have they shown how the sky has fallen in the last decade, as the Contractors continue to provide much-needed services to drug-addicted former offenders.

II. Plaintiffs' interpretation of the No-Aid provision would violate federal law.

This Court should also reject Plaintiffs' highly irregular interpretation of the No-Aid provision to "avoid" the "unconstitutional result" of violating the First and Fourteenth Amendments to the U.S. Constitution. *McNeil v. Canty*, 12 So. 3d 215, 217 (Fla. 2009). Plaintiffs are clear that their objection is to the religious "nature of Defendant Contractors" and to "the services they provide." Mot. at 26. Plaintiffs urge the court to adopt a reading of the law which would ban private contractors if the contractors provide religious viewpoints, even in wholly

[7] Although Plaintiffs identify *Trinity Lutheran* as a non-school case, it actually involved a preschool and daycare that were part of and run by a church. *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779, 781 (8th Cir. 2015). *Hewitt v. Joyner* is also distinct. 940 F.2d 1561 (9th Cir. 1991). That case involved government ownership and maintenance of a park filled with statues depicting the life of Jesus Christ.

optional aspects of the program. But Plaintiffs identify no case that has so held, and for good reason: such a holding would violate at least four federal constitutional provisions.

"'[T]he Religion Clauses—the Free Exercise Clause, the Establishment Clause, the Religious Test 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, Inc. v. Town of Surfside*, 366 F.3d 1214, 1239 (11th Cir. 2004). 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.*

Plaintiffs' expansively discriminatory interpretation runs afoul of all these clauses, plus the Free Speech Clause to boot. Plaintiffs escaped these federal law issues in *CSH* and *Holmes* for reasons which are not applicable here. First, both the *CSH* court and Justice Polston emphasized the lack of record and the preliminary nature of the case. *CSH*, 44 So. 3d at 119-20; *Id.* at 216 (Polston, J., concurring). Thus, that appeal did not fully tee up the federal issues for resolution. This Court, by contrast, has a full record. Second, the *Holmes* holding addressed only the federal Free Exercise defense. *Holmes*, 886 So. 2d at 344. This means the Free Speech, Establishment Clause, and Equal Protection Clause arguments raised here were not considered or resolved by *Holmes*. And neither *Holmes* nor *Locke* determined how the Free Exercise Clause applies to cases involving social service providers serving adults.

A. Plaintiffs' interpretation would violate the Free Exercise Clause by requiring the state to single out religion for disfavor.

Plaintiffs' interpretation requires the State to discriminate against religious organizations *solely based on religious criteria*. That is a classic violation of the federal Free Exercise Clause.

Under that clause, a law burdening religious exercise is subject to strict scrutiny if it is either not "neutral" or "generally applicable." *Empt. Div. v. Smith*, 494 U.S. 872, 880 (1990); *accord Midrash*, 366 F.3d at 1232.[8] Plaintiffs' interpretation is neither, and it cannot withstand scrutiny.

1. Plaintiffs' interpretation fails the Free Exercise Clause's requirement of neutrality and generally applicability.

The "minimum requirement of neutrality" is that a law not discriminate against religion "on its face." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993). And a law that fails "to treat analogous groups equally" violates "principles of … general applicability." *Midrash*, 366 F.3d at 1235. Thus, a law "violates Free Exercise rights" when it bans actions "only when they are engaged in for religious reasons" or "selectively imposes burdens on religious conduct." *Id.* at 1231-32 (citing *Lukumi*, 508 U.S. at 534).

That's precisely what Plaintiffs' interpretation of the No-Aid provision does. Plaintiffs do not argue that the state cannot contract for housing, job-training services, transportation, or substance-abuse counseling. Instead, they argue that Contractors should be prohibited from providing these services to the state *solely because* Contractors are religious and offer religious viewpoints to clients who ask for them. Such "discriminatory treatment extinguishes a[] [law's] neutrality" and its general applicability. *Id.* at 1234.

2. Locke v. Davey *condemns, not rescues, Plaintiffs' interpretation.*

Plaintiffs will doubtless argue that *Locke v. Davey* carves out an exception to this clear-cut conclusion. Not so. In *Locke*, the Supreme Court repeatedly emphasized that "the State's

[8] Although *Midrash* was decided under the federal Religious Land Use and Institutionalized Person Act, 42 U.S.C. § 2000cc *et seq.*, the relevant analysis is the same under the Free Exercise Clause. *Midrash*, 366 F.3d at 1232, 35 ("RLUIPA's equal terms provision codifies the *Smith-Lukumi* line of precedent" and thus "a violation of [RLUIPA's] equal treatment provision indicates that the offending law also violates the *Smith* rule requiring neutrality and general applicability").

interest in not funding the religious training of clergy," was one of "few" areas where the "State's antiestablishment interests" were sufficiently "historic and substantial" to justify the conclusion. 540 U.S. at 722, 725 & n.5. *Holmes* relied on *Locke* to find that Florida has a similar interest in not funding children's education at religious schools. 886 So. 2d at 344.

But this case doesn't concern well-established historic interests against state-funded religious education for clergy or impressionable children. *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1255-56 (10th Cir. 2008) (McConnell, J.) (noting *Locke* implicitly recognizes that "less long-established governmental" interests cannot justify even "minor burdens"). It concerns the State's attempt to help adult criminal offenders stop the revolving door of substance abuse and recidivism. Here, the State has *no* interest in restricting the options available to adult drug addicts seeking proven forms of rehabilitation, forms that may include religious viewpoints. The government's interest runs the other way, toward *accommodating* offender's religious and recovery needs. *See, e.g.*, *Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972) (offenders must be afforded "reasonable opportunities" to "exercise the religious freedom guaranteed by the First . . . Amendment").

Further, in *Locke*, the burden was much more minor: the State declined to fund devotional theology *degrees* while funding other degrees at the same religious schools. But Plaintiffs request a "wholesale exclusion of religious institutions" from "otherwise neutral and generally available" government programs. *Weaver*, 534 F.3d at 1255. Neither *Locke* nor the Free Exercise Clause permits that kind of exclusion. *Id.*

3. Plaintiffs' interpretation fails strict scrutiny.

Because Plaintiffs urge a rule that is not neutral toward religion, Plaintiffs must demonstrate that their interpretation passes "the most rigorous of scrutiny": first, that it "advance[s] interests of the highest order," and second, that it is "narrowly tailored in pursuit of

those interests." *Midrash*, 366 F.3d at 1235 (quoting *Lukumi*, 508 U.S. at 546); *accord Enoch v. State*, 95 So. 3d 344, 351-52 (Fla. 1st DCA 2012) (stating strict scrutiny test). This is "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). Indeed, when a law "discriminates against religion as such," the presumption is that "it automatically will fail strict scrutiny." *Lukumi*, 508 U.S. at 579 (Blackmun, J., concurring in judgment). Similarly, where a law mandates a viewpoint-based restriction on religious speech (which Plaintiffs' rule does, as shown below), it presumptively fails strict scrutiny and Plaintiffs bear a "heavy burden" to prove otherwise. *Enoch*, 95 So. 3d at 350-51.

Here, there is no compelling interest in the wholesale exclusion of religious contractors from the program. This case implicates none of the typical governmental interests concerning impressionable children or clergy education at play in *Holmes* and *Locke*. Rather, it concerns "adult citizens," which the law presumes are "firm in their own beliefs" and can tolerate voluntary exposure to others' expression of faith. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1823 (2014).

Nor is there a concern of government entanglement. Florida's program has layers of safeguards ensuring that it is not directly funding any of Contractors' religious viewpoints, and the limited guidelines it does employ have been successfully followed in other fora for decades without problem. *Compare* § 944.4731(3)(b), Fla. Stat. (restricting proselytizing and faith-based discrimination), *with Marsh v. Chambers*, 473 U.S. 783, 794-95 (1983) (restricting attempts "to proselytize or advance any one, or to disparage any other, faith" during legislative prayer).

Nor is there a threat of religious coercion. As discussed above, any religious activities are voluntary. Plaintiffs complain that some of the programs' meetings are held in church facilities featuring religious images. But the record shows that the meetings—which, again, were

voluntary—are held there because the facilities are free and spacious, not because they are religious. Appx. 413. In any event, courts have refused to treat religious facilities as too "tainted" for governmental use. *See, e.g.*, *Cooper v. U.S. Postal Serv.*, 577 F.3d 479, 496 (2d Cir. 2009) (noting with approval that customers nationwide patronize contract postal units in "churches or synagogues or monasteries or mosques" and in so doing encounter "ecclesiastical architecture, schedules of religious services, and religious iconography or statuary"); *accord Johnson v. Presbyterian Homes*, 239 So. 2d 256, 258-59 (Fla. 1970) (upholding a Florida government benefit granted to a religious nursing home that "[u]nquestionably" had "a Christian atmosphere").[9]

Thus, there is no compelling governmental interest in banning religious organizations from providing substance abuse and transitional housing services to drug-addicted offenders who voluntarily choose to obtain those services. If anything, the State's interest here is in providing exactly the kind of voluntary program that allows offenders caught in a cycle of addiction to choose the most effective means for breaking that cycle.

Even if there *was* a compelling interest, though, a complete ban is not sufficiently tailored to that interest. The tailoring requirement is "exceptionally demanding." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014). If "a less restrictive means is available for the Government to achieve its goals, the Government must use it." *U.S. v. Playboy Ent'mt Grp., Inc.*, 529 U.S. 803, 815 (2000); *accord Lukumi*, 508 U.S. at 546. Applied here, a less restrictive means is obvious. If the State wishes to create even more safeguards than it already has, it could simply impose greater reporting requirements on Contractors. Requiring separate accounts and detailed expense records, while unnecessary, is less burdensome than categorical exclusion.

[9] *Accord Otero v. State Election Bd. of Okla.*, 975 F.2d 740 (10th Cir. 1992) (approving the use of churches as "conveniently located" election polling places).

In sum, Plaintiffs' proposed discrimination against religion violates the Free Exercise Clause's command of neutrality and general applicability and cannot be justified under strict scrutiny.

B. Plaintiffs' interpretation would require the State to engage in unconstitutional viewpoint discrimination.

Plaintiffs want the State to ban Contractors from expressing any religious viewpoints on subject matter that the State authorized (and asked) the Contractors to discuss. What's more, they want to condition access to the contracts on the Contractors' willingness to abandon their religious viewpoints, even in activities beyond the scope of the program. That would be a viewpoint-discriminatory restriction on Contractors' speech, which violates the First Amendment's Free Speech Clause.

The Legislature found that the "greatest potential for successful substance abuse recovery" was "through treatment and transition assistance" offered by "private organizations," including "faith-based service groups." § 944.4731(2)(c), (3)(a), Fla. Stat. The Legislature provided those groups significant discretion "to use innovative approaches to treatment" and mandated that FDC "authorize a high level of flexibility in operating a program." § 944.4731(3)(b), Fla. Stat.; *accord* § 944.4731(54), Fla. Stat. (requiring every program contract to "invite innovation" and "minimize bureaucracy"). The Legislature thus opened a limited forum for private groups to help offenders by, *inter alia*, sharing their views on substance abuse, decision-making skills, job placement, employment, and other related life skills. § 944.4731(3)(a), Fla. Stat. Contractors have successfully operated in that forum for over a decade.

Now Plaintiffs want the State to censor the Contractors' viewpoint simply because it is informed by their religion. To Plaintiffs, the problem is not that someone might offer a "12-step program," "cognitive behavior therapy," an "understanding of what is broken that causes us to be

self -destructive," or teaching on "areas like anger management, financial management, family, [and] relationships." Mot. at 6, 7, 10, 23. Instead, Plaintiffs fear that willing listeners might discuss these issues with someone religious, using a "Christian perspective," a "biblical perspective," or a "Biblical . . . understanding." *Id*. But the State cannot censor viewpoints.

The founders wrote the "expansive" First Amendment "in broad, liberal terms" to afford "'breathing space'" for the exercise of "fundamental rights." *Enoch*, 95 So. 3d at 359, 361 (quoting *Dep't of Educ. v. Lewis*, 416 So. 2d 455, 463 (Fla. 1982)). To protect this space, it is "axiomatic" that government cannot restrict speech based on its content. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). Accordingly, "content-based regulation[s] that focus[] on what [a person] says and does" are "presumed invalid." *Enoch*, 95 So. 3d at 350-51. Where government targets not just content, "but particular views taken by speakers" on that content, "the violation of the First Amendment is all the more blatant." *Rosenberger*, 515 U.S. at 829.

In *Rosenberger*, a public university declined to fund a religious newspaper, offering as its "sole reason" that the paper was "pervasively devoted" to offering a "Christian perspective" on issues "relevant to college students." 515 U.S. at 822, 826, 838. The school argued its discrimination was permissible because the issue "involve[d] the provision of funds," a matter over which "the State must have substantial discretion." *Id.* at 832. The Court found that was both true and irrelevant. Because the school opened a forum for students to speak, it had no discretion to discriminate against specific viewpoints offered on topics appropriate to the forum. *Id.* The court also rejected the argument that the school could disfavor religious speech out of a misguided desire to avoid "promot[ing]" religion. *Id.* at 823, 831.

The same conclusion applies here. Florida opened a forum for qualified contractors to provide drug-addicted offenders with services and instruction in innovative, unique ways. *See* Appx. 1413, 1505 (FDC contracts broadly disclaiming "control or direction" over Contractors' speech); *id.* at 1629 (a "central tenet" of the program is to nurture the "creative approaches" of private organizations, and so it "places a high priority on programs using innovative approaches" and "authorize[s] a high level of flexibility").[10] The Contractors meet the program's qualifications and have provided the relevant services and instruction for over a decade. But under Plaintiffs' interpretation, the State must nonetheless discriminate against Contractors solely because they are religious and might offer a religious viewpoint on subject matters that are within the scope of the recovery program. Plaintiffs are fine with teaching on "family [and] relationships," just not when it comes "from a Christian perspective." Mot. at 10, 23. That's unconstitutional. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993) (condemning a rule that allowed teaching on "family issues" unless it came "from a religious standpoint."); *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 111–12 (2001) (rejecting the notion that religion "taints moral and character instruction in a way that other foundations for thought or viewpoints do not.")

It is no answer to say that Plaintiffs would be satisfied with a rule that banned religious *entities* instead of religious *viewpoints*. As shown above, Plaintiffs clearly are complaining about Contractors' viewpoints. Moreover, restrictions "based on the identity of the speaker" are generally "simply a means to control content." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015). That is obviously the case here.

[10] That Florida created a limited forum for speech expressly distinguishes *Locke*, which began and ended its viewpoint discrimination analysis with the observation that the Washington program at issue had not created "a forum for speech." 540 U.S. at 720 n.3.

And Plaintiffs' ban would be a very complete one. Once the Contractors accepted a dime of State money, that would mark the end of their ability to share any religious viewpoints. Even if a willing adult participant in Contractors' program wanted to hear those viewpoints on matters germane to the program, and even though no state funds would be spent in this regard, Contractors would be unconstitutionally "barred absolutely from" sharing them. *Agency for Int'l Dev. v. AOSI*, 133 S. Ct. 2321, 2329 (2013). Indeed, Plaintiffs' continual recourse to evidence that has nothing to do with the program itself shows that Plaintiffs want to "leverage funding to regulate speech outside the contours of the program." *Id.* at 2328. That is flatly unconstitutional. Even when the State has not created a forum for speech, and even where Contractors have "no entitlement" to a contract, Plaintiffs "may not" force the State to condition access to contracts on abandoning "constitutionally protected" speech. *Id.*

Other courts considering no-aid provisions have easily avoided such "blatant" viewpoint discrimination. *Rosenberger*, 515 U.S. at 829. They have recognized that "the expression of a religious viewpoint in otherwise secular [programs]" is permissible since the "benefit to religion . . . is merely incidental to the . . . primary purpose of promoting secular" ends. *Barnes-Wallace*, 704 F.3d at 1082. That incidental-effect analysis is consonant with Florida law on the No-Aid provision. *Johnson*, 239 So. 2d at 261-62 (finding "state action to promote the general welfare of society" is "valid" even when "religious interests may" receive incidental benefits).

C. Plaintiffs' interpretation would require the state to discriminate among religious groups in violation of the Establishment Clause.

On its face, Plaintiffs' interpretation requires the State to discriminate against religious organizations if they are "too" religious. Mot. at 21 (arguing that program violates No-Aid provision because Contractors are "pervasively sectarian institutions"); *accord id.* at 5, 23. But determining levels of religiosity, and discriminating against those whom the State deems too

faithful, is the kind of entangling, anti-religious state action that the Establishment Clause does not permit. *Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982) (banning government from making "explicit and deliberate distinctions between different religious organizations"); *Lukumi*, 508 U.S. at 532; *Midrash*, 366 F.3d at 1238 (noting that laws which "discriminated among religious sects" have been found unconstitutional). Thus, the Supreme Court has long "prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality op.).

To be sure, governments need not allow religious groups to participate in every program it runs. *Weaver*, 534 F.3d at 1254. But religious groups' access to such programs cannot turn "on the basis of the pervasiveness or intensity of their belief[s]." *Id.* at 1259. This reflects a basic Establishment Clause principle that a person's level of "'adherence to religion'" cannot be "'relevant to [that] person's standing in the political community.'" *Midrash*, 366 F.3d at 1241-42.

Federal courts have applied this principle in other states with laws banning state funds flowing to religious institutions. For instance, in *Colorado Christian University v. Weaver*, the State of Colorado categorically restricted "pervasively sectarian" colleges from accessing state financial aid. 534 F.3d at 1250. Even though it recognized that states have "greater latitude to discriminate in decisions about the use of tax dollars," the court rejected Colorado's restriction. *Id.* at 1255. The ban fell because the State's "exclusion expressly discriminates *among* religions" by favoring less-religious institutions, and the State made this religiosity determination "on the basis of criteria that entail intrusive governmental judgments regarding matters of religious belief and practice." *Id.* at 1256; *accord Oliver*, 254 F.3d at 510 (government cannot "refus[e] to fund a religious institution solely because of religion"); *Statewide Communities*, 152 P.3d at 1084

(noting that, for thirty years, the Supreme Court has refused to allow concerns about "pervasive[ ] sectarian[ism]" to bar "any government aid" to religious recipients).

Plaintiffs' interpretation fails for similar reasons. It is "expressly based on the degree of religiosity" Plaintiffs perceive in the Contractors and "the extent to which that religiosity affects [Contractors] operations," such as "the content of [their] curriculum and the religious composition" of their staff. *Weaver*, 534 F.3d at 1259. And the Plaintiffs' desired determination of "pervasive" religiosity is impermissible because "the very process of inquiry," *NLRB v. Catholic Bishop*, 440 U.S. 490, 502-03 (1979), requires "trolling through a person's or institution's religious beliefs." *Mitchell*, 530 U.S. at 828 (plurality op.) (inquiring whether a school is "pervasively sectarian" is "not only unnecessary but also offensive"); *Widmar v. Vincent*, 454 U.S. 263, 269-70 n.6 (1981) ("Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases."); *Holmes*, 886 So. 2d at 378 (Polston, J., dissenting) (it is not "sound constitutional analysis" to say that "sectarian" institutions are impermissible but institutions which are "a little religious" are permissible). Thus, the "sole function and purpose" of Plaintiffs' use of the terms "sectarian" and "pervasively sectarian" is to "exclude some but not all religious institutions." *Weaver*, 534 F.3d at 1258. That is unconstitutional. *Id.* at 1245; *Galloway*, 134 S. Ct. at 1826 ("classifying] citizens based on their religious views . . . violate[s] the Constitution").

This Court should reject Plaintiffs' construction of the No-Aid provision in order to avoid conflict with the Establishment Clause and problems raised by the unfortunate history of the Blaine Amendments. *Canty*, 12 So. 3d at 217 (courts should adopt constructions that "avoid . . . unconstitutional result[s]"); *Lukumi*, 508 U.S. at 540 (a law must undergo strict scrutiny if it was "enacted 'because of', not merely 'in spite of,' [its] suppression of [religious conduct]."). That

history is well documented. In "the early years of the Republic, American schools—including the first public schools—were Protestant in character," often incorporating Protestant prayers and religious teachings. *Zelman v. Simmons-Harris*, 536 U.S. 639, 720 (2002) (Breyer, J., dissenting). Then, heavy increases in Catholic populations came with requests that Catholics obtain "equal government support for the education of their children." *Id.* at 721. The majority population, though, felt that "public schools must be 'nonsectarian' (which was usually understood to allow Bible reading and other Protestant observances) and public money must not support 'sectarian' schools (which in practical terms meant Catholic)." *Id.*; *accord Mitchell*, 530 U.S. at 828 ("it was an open secret that 'sectarian' was code for 'Catholic'"). This "played a significant role" in creating the movement to amend state constitutions "to make certain that government would not help pay for 'sectarian' (*i.e.*, Catholic) schooling for children." *Zelman*, 536 U.S. at 721; *Mitchell*, 530 U.S. at 829 (concluding that the "exclusion of pervasively sectarian schools from otherwise permissible aid programs" was "born of bigotry").[11]

For all these reasons, this Court should reject Plaintiffs' request that it look at the nature of the Contractors, rather than the nature of the state program itself.

D. Plaintiffs' discriminatory interpretation requires the State to violate the Equal Protection Clause.

Plaintiffs' interpretation flunks the simple test for Equal Protection guarantees: by design, the interpretation "was motivated by a desire to discriminate" and has "that effect." *Hunter v. Underwood*, 471 U.S. 222, 233 (1985); *Weaver*, 534 F.3d at 1260 ("The 'intent to discriminate'

[11] Nor could it be any defense that the legislative history of Florida's No-Aid provision is slim, and that it was re-approved in later State constitutions. Where, as here, a state constitutional section was enacted as "part of a movement" to "disenfranchise" religious groups and "continues to this day to have that [discriminatory] effect," it violates the federal constitution. *Hunter v. Underwood*, 471 U.S. 222, 233 (1985); *Holmes*, 886 So. 2d at 348-49 (finding that "Florida's no-aid provision was adopted . . . during the historical period in which so-called 'Blaine Amendments' were commonly enacted into state constitutions").

forbidden under the Equal Protection Clause is merely the intent to treat differently"). And since the target of Plaintiffs' discrimination is the fundamental right to religious liberty, Plaintiffs' rule is thus subject to, and fails, strict scrutiny. *State v. J.P.*, 907 So. 2d 1101, 1109-10 (Fla. 2004). But even if only rational basis scrutiny applied, Plaintiffs' interpretation would still fail.

First, there is no evidence that any State money is actually funding religious viewpoints. State funds do not even cover the basic costs of housing, utilities, food, and transportation. Plaintiffs' claim would disappear if Contractors were to provide their services for free. Their claim should also disappear now that they have failed to show that Contractors' religious viewpoints are being funded by the State. It is irrational to deny funding on the grounds that it impermissibly aids religion when the funding goes only to non-religious uses.

Second, if Plaintiffs win, the State would remain free to pay its own staff to provide religious services at its own institutions because they are not "sectarian institutions." This Court and the court of appeals already foreclosed an attack on the chaplaincy under the guise of this case. *CSH,* 44 So. 3d at 123. It is irrational to say that the State may *directly* provide religious services to offenders, but that it is a No-Aid violation for the State to *indirectly* provide recovery services that may include voluntary expression of religious viewpoints. It is, of course, both reasonable and constitutional for the State to accommodate the religious needs of offenders. But Plaintiffs cannot make such a reasonable distinction since their whole argument boils down to a simplistic demand that no State money go to anyone deemed too religious, even if the money is being paid for legitimate social services. Such a ruling would endanger the entire FDC system of religious accommodation.

"Absent the most unusual circumstances," our constitutional traditions do not permit the State "to deny equal treatment" to religious organizations or to "penalize [them] for being

religious." *Midrash*, 366 F.3d at 1239. No such circumstances justify adopting Plaintiffs' pervasively discriminatory interpretation of the No-Aid provision.

III. Plaintiffs are not entitled to the injunctive relief they seek.

Even if Plaintiffs had demonstrated a violation of the No-Aid provision, the relief they seek is overbroad. They seek to "terminate the contracts" between FDC and the Contractors. Mot. at 1. But injunctive relief must be "adequately particularized, especially where some activities may be permissible and proper." *DeRitis v. AHZ Corp.*, 444 So. 2d 93, 94 (Fla. 4th DCA 1984) (quoting *Fla. Peach Orchards v. State*, 190 So. 2d 796, 798 (Fla. 1st DCA 1966). Nor should the Court enjoin hypothetical future contracts between the State and the Contractors. "There is no legal right to an injunction when the right to recover is contingent upon some future event like the outcome of a separate lawsuit." *Rolling v. State, ex rel. Butterworth*, 630 So. 2d 635, 637 (Fla. 1st DCA 1994).

If Contractors are providing permissible and proper services under the contracts—and the record establishes that they are—then that portion of the Contracts should remain in effect. If the Court were to determine that a violation had occurred, then appropriate, particularized relief would be to require additional safeguards or accounting measures, not to terminate the contracts, prohibit the State from ever contracting with the same entities, and leave the State and the clients without critical social services.

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 1st day of October, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by E-Service this 1st day of October, 2015, to:

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