

November 17, 2017

DELIVERED VIA EMAIL

Florida Constitution Revision Commission
The Capitol
400 S. Monroe Street
Tallahassee, FL 32399

Re: Vote No on Proposals Amending Art. 1, Section 3

Dear Chair Carlton and Declaration of Rights Committee Commissioners,
and Chair Johnson and Education Committee Commissioners:

On behalf of more than 100,000 supporters state-wide, the American Civil Liberties Union (ACLU) of Florida submits this testimony urging the Constitution Revision Commission to reject various proposals to delete or alter the “No Aid” provision of the Florida Constitution. (e.g., Proposals 4, 59).



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Preserve Religious Freedom – Article I, Section 3

We urge the Commission to preserve Florida’s “No Aid” provision as is, which currently provides: “No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasure directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.”

Proposal 4, which would delete the No Aid provision, and Proposal 59, which would amend the No Aid proposal, would open the door to taxpayers being compelled by the State to advance religious beliefs that they may not agree with or that represent a faith tradition other than their own. Moreover, deleting or amending the No Aid provision would create an unacceptable risk of Floridians directly or indirectly funding religious indoctrination, proselytizing, or discrimination in publicly-funded services.

Trinity Lutheran Does Not Invalidate the No Aid Provision

We note that some members of the Constitution Revision Commission have raised questions about the impact of the United States Supreme Court’s decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) (“*Trinity Lutheran*”) on Florida’s 130-year old No Aid provision. We write to clarify that *Trinity Lutheran* does not require a change to the Florida Constitution, because the No Aid provision, as interpreted by Florida courts, is not affected by *Trinity Lutheran*.

The relevant facts in *Trinity Lutheran* are as follows: Missouri’s Department of Natural Resources had a Scrap Tire Grant Program that offered reimbursement grants to qualifying organizations that install playground surfaces made from recycled tires. The state had a strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or

other religious entity. Trinity Lutheran operated a preschool/daycare center that applied for the grant funding. Pursuant to the state's express policy of not funding churches or other religious institutions, it denied Trinity Lutheran's application, and the church brought suit.

In *Trinity Lutheran*, the Supreme Court held that the state policy violated the federal Free Exercise Clause of the First Amendment by denying a church operated preschool -- solely because of its religious status -- a grant to purchase a rubber surface for its playground. The Court's narrow decision held that denial of an otherwise generally available public grant to a religious institution solely based on its *religious status* violated the Trinity Lutheran Church's First Amendment free exercise rights. 137 S. Ct. at 2024-25.



The Supreme Court's *Trinity Lutheran* opinion was a narrow decision holding that a religious institution cannot be denied a generally available public benefit (grant funding) for non-religious use (resurfacing a playground) solely because of its religious institution status, and is limited to grant funding that does not advance religion.

In reaching its conclusion, the Supreme Court reiterated its prior holding in *Locke v. Davey*, 540 U.S. 712 (2004), in which the Court upheld the State of Washington's application of its constitutional No Aid provision to bar scholarships to be used for the pursuit of a devotional theological degree. *Id.* at 2023. The Court explained that, in *Locke*, the plaintiff-student "was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*. Here there is no question that *Trinity Lutheran* was denied a grant simply because of what it is—a church." *Id.* Thus, the policy that was rejected in *Trinity Lutheran* was the denial of public funds to a religious organization solely because it was a religious organization, while the constitutionally permitted policy in *Locke* was the denial of public funds that would be used for religious purposes. *Id.* In other words, *Trinity Lutheran* does not disturb the constitutional bar on the use of public funds to advance religion.

Trinity Lutheran is further limited in its application to religiously-affiliated institutions by Footnote 3 of the opinion, that stated: "This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination." *Id.* at 2024 n. 3.¹ Thus, *Trinity Lutheran*, by its express

¹ Four of the six justices that joined the majority opinion joined footnote 3. *Id.* at 2016. The two remaining justices favored a broader ruling. *Id.* at 2026. However, as the narrower holding, footnote 3 is the controlling opinion. *Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds ...'" (quoting *Gregg v. Georgia*, 428 U.S. 153, 169, n. 15 (1976))).



terms, is limited to cases involving “express discrimination based on religious identity with respect to playground resurfacing.” *Id.* Even viewed slightly more broadly, the opinion is limited to cases involving “general program[s] designed to secure or to improve the health and safety of children.” *Id.* at 2027 (Breyer, J. concurring in judgment).

Moreover, the Missouri state constitution’s No Aid provision at issue in *Trinity Lutheran* is similar to Florida’s No Aid provision. Both bar spending public money “directly or indirectly, in aid of any church.” It is significant to note that the Supreme Court’s decision in *Trinity Lutheran* did not result in any repeal or amendment to Missouri’s No Aid provision; instead, the Court simply limited the provision’s application in the narrow, unique circumstances addressed by that case, and the provision remains on the books and in effect in Missouri. As such, there is no mandate or justification for repealing Florida’s No Aid provision in light of *Trinity Lutheran*. Moreover, *Trinity Lutheran* does nothing to change the fact that the government shall not compel taxpayer funding of religious institutions for religious uses.

For all the above reasons, the ruling in *Trinity Lutheran* is consistent with Florida courts’ interpretation of the No-Aid provision.

No Aid Provision Does Not Bar the State from Contracting with Religiously-Affiliated Entities to Provide Social Services

Florida’s No Aid provision does not prevent the State from contracting with religiously-affiliated organizations to provide social services. This is exemplified by the fact that there exists longstanding and successful partnerships between Florida and the faith-based community through religiously-affiliated organizations such as Catholic Charities, Lutheran Social Services and Jewish Federations. These organizations enter into contracts with the state and agree to provide services on a non-discriminatory basis and not to proselytize or force religious activity on the beneficiaries they serve. Consequently, for decades in Florida, and throughout the country, religiously-affiliated organizations have freely contracted with the state to provide housing, food, refugee services, and other secular services for those in need.

Moreover, Florida courts have consistently interpreted the No Aid provision as a prohibition on the use of state funds to advance religion, not as a *per se* ban on the state giving funds to any religiously-affiliated institution. For example, in *Council for Secular Humanism, Inc. v. McNeil*, the First District Court of Appeal determined that the Florida Department of Corrections did not violate the No Aid provision when it used state funds to support a faith-based substance abuse transitional housing program. 44 So. 3d 112, 120-21 (Fla. 1st DCA 2010) (holding that the No Aid provision is not a “per se bar” on government contracts with religious organizations and that funds paid to a

religious organization for secular purposes would not violate the No Aid provision). The Department's policy was to "consider faith-based service groups on an equal basis with other private organizations," which the court determined "was merely an expression of a nondiscrimination policy that would prevent the state from excluding groups based on religion." *Id.* at 118. "Given the text of the no-aid provision, we conclude that the overriding purpose of the provision is to prohibit the use of state funds to *promote religious or sectarian activities*. Thus, to violate the no-aid provision, in addition to providing social services, the government-funded program must also *advance religion*." *Id.* at 119-20 (emphasis added). The court concluded that "the no-aid provision does not constitute a per se bar to state or local government contracting with religious entities for the provision of goods and services." *Id.* at 121.



More recently, the Eleventh Circuit explained that, under the No Aid provision, state funds advance religion "when a government-sponsored program is 'used to promote the religion of the provider, is significantly sectarian in nature, involves religious indoctrination, requires participation in religious ritual, or encourages the preference of one religion over another.'" *Atheists of Florida, Inc. v. City of Lakeland, Fla.*, 713 F.3d 577, 596 (11th Cir. 2013) (quoting *McNeil*, 44 So. 3d at 120).

Additionally, in *Bush v. Holmes*, the district court of appeal determined that the state's Opportunity Scholarship Program (OSP), which provided public funds for students who attended a failing public school to choose a higher performing public school or a participating private school, violated the No Aid provision. 886 So. 2d 340, 366 (Fla. 1st DCA 2004).² The court based its decision on the fact that "the vast majority of the schools receiving state funds from OSP vouchers at the time of the hearing below are operated by religious or church groups with an intent to teach to their attending students the religious and sectarian values of the group operating the school." *Id.* at 354. The court noted that nothing in the No Aid provision bars the state from aiding or funding not-for-profit, religiously-affiliated organizations. *Id.* at 362.

As is clear from the above, Florida courts have interpreted and applied the Florida Constitution's No Aid provision as prohibiting the state from using its funds to *advance religion*, but there is no prohibition on the use of state funds for the delivery of non-religious social services by religiously-affiliated entities.

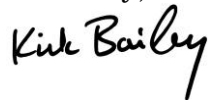
In sum, because the No Aid provision is not affected by *Trinity Lutheran*, there is no reason to repeal the provision nor any mandate to amend it. The provision has been maintained in the Florida Constitution in nearly identical

² When the case was appealed to Florida Supreme Court, the court determined that the OSP was unconstitutional based on another provision of the Florida Constitution, and did not address the No Aid provision. *Bush v. Holmes*, 919 So. 2d 392, 398 (Fla. 2006). Thus, the First District Court of Appeal's ruling on the No Aid provision remains the current law. *McNeil*, 44 So. 3d at 117.

form since the 1885 Florida Constitution, and it does not preclude contracting with religiously-affiliated entities for secular social service purposes.

Thank you for your consideration of the above and we look forward to working with you as this process moves forward. Please do not hesitate to contact us at kbailey@aclufl.org (786) 363-2713 or kgross@aclufl.org (786) 363-4436, if you have any questions or would like any additional information.

Sincerely,



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