

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

GOVERNOR JOHN ELLIS "JEB"
BUSH; ATTORNEY GENERAL
CHARLIE CRIST; CHIEF FINANCIAL
OFFICER TOM GALLAGHER;
COMMISSIONER OF AGRICULTURE
CHARLES H. BRONSON, in their
official capacities; the FLORIDA
DEPARTMENT OF EDUCATION; and
the STATE BOARD OF EDUCATION,

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED.

BRENDA McSHANE, DERMITA
MERKMAN, TRACY RICHARDSON,
SHARON MALLETY, BARBARA
LANDRUM, on behalf of themselves and
minor children; and URBAN LEAGUE
OF GREATER MIAMI, INC.,

Appellants

v.

CASE NOS.: 1D02-3160, 1D02-3163 and
1D02-3199

RUTH D. HOLMES, GREGORY AND
SUSAN WATSON, REBECCA HALE,
JOHN RIGSBY, QUEEN E. NELSON,
SAMUEL WATTS, LINDA LERNER,
BETSY H. KAPLAN, on behalf of
themselves and minor children; FLORIDA
STATE CONFERENCE OF
BRANCHES OF NAACP; CITIZENS'
COALITION FOR PUBLIC SCHOOLS;
THE FLORIDA CONGRESS OF
PARENTS AND TEACHERS (a/k/a
"Florida PTA"); LEAGUE OF WOMEN
VOTERS OF FLORIDA, INC.;

FLORIDA EDUCATION
ASSOCIATION/UNITED, AFT AFL-
CIO, a labor organization and Florida
taxpayer; PAT TORNILLO, JR., ANDY
FORD, RITA MOODY, MARY LOPEZ,
and ROBERT F. LEE, as Florida
taxpayers,

Appellees.

Opinion filed March 23, 2004.

An appeal from an order of the Circuit Court for Leon County.
Honorable P. Kevin Davey, Judge.

Barry Richard, Greenberg Traurig, P.A., Tallahassee; Charlie Crist, Attorney General, Christopher M. Kise, Solicitor General, Office of the Attorney General, Tallahassee; Raquel A. Rodriguez, General Counsel, Office of the Governor, Tallahassee; and Daniel Woodring, General Counsel, Florida Department of Education, Tallahassee, for Appellants Governor Jeb Bush, et al.

Kenneth W. Sukhia, Fowler, White, Boggs, Banker, PA., Tallahassee, Clint Bolick, Clark M. Neily, Robert M. Freedman, Institute for Justice, Washington, D.C., for Appellants Brenda McShane, et al.

Ronald G. Meyer, Meyers and Brooks, P. A., Tallahassee; Robert H. Chanin, John M. West, and Alice O'Brien, of Bredhoff & Kaiser, P.L.L.C., Washington, D.C.; Pamela L. Cooper of Florida Education Association, Tallahassee; Randall Marshall of American Civil Liberties Union Foundation of Florida, Inc., Miami; Joan Peppard of Anti-Defamation League, Miami; Steven Freeman and Steven Sheinberg of Anti-Defamation League, New York, New York; Steven K. Green and Ayesha N. Khan of Americans United for Separation of Church and State, Washington, D.C.; Jeffrey P. Sinensky and Kara H. Stein of American Jewish Committee, New York, New York; Elliot M. Minberg and Judith E. Schaeffer, of People for the American Way Foundation, Washington, D.C.; Steven R. Shapiro, American Civil Liberties Union Foundation, New York, New York; David Strom of American Federation of Teachers, Washington, D.C.;

Michael A. Sussman, National Association for the Advancement of Colored People, Goshen, New York; Marc D. Stern of American Jewish Congress, New York, New York; Julie Underwood of National School Board's Association, Alexandria, VA, for Appellees.

Frank A. Shepherd, Independent Voices for Better Education, Teachers for Better Education, Ira J. Paul, Robert N. Wright, and Pacific Legal Foundation, Coral Gables, Amici Curiae.

***ORDER ON MOTION TO REVIEW ORDER CONDITIONING AUTOMATIC
STAY ON BOND***

POLSTON, J.

Appellants seek the removal of the bond the trial court required as a condition of the automatic stay in effect while their appeal of the trial court's final judgment is pending. The trial court's final judgment held that the Opportunity Scholarship Program, section 229.0537, Florida Statutes (1999), is unconstitutional under Article I, section 3, of the Florida Constitution. The trial court required appellants to post a bond or letter of credit to secure reimbursement of funds lost to the school districts while this case is appealed. The trial court required \$2,500,000 to be posted for the 2002-03 school year and an additional \$2,380,576 for the 2003-04 school year.

Florida Rule of Appellate Procedure 9.310(b)(2) provides "the state, any public officer in an official capacity, board, commission, or other public body" an automatic

stay pending review without the necessity of posting a bond. The Florida Supreme Court has interpreted its rule as "allowing trial and appellate courts the discretion to require governmental entities to post supersedeas bonds in suits where the judgment concerns operational-level functions but find[s] that no authority exists to lawfully require such bonds in planning-level governmental functions." City of Lauderdale Lakes v. Corn, 415 So. 2d 1270, 1272 (Fla. 1982).

The trial court, in Corn, declared a municipal zoning ordinance unconstitutional, and the city appealed the adverse ruling. Id. at 1271. The trial court granted a motion by Corn, a land developer, to require the city to post a \$1,140,000 bond for potential damages for delay. Id. The Fourth District Court of Appeal affirmed the trial court's requirement for a bond. Id. at 1272. Quashing the district court's decision, the Florida Supreme Court stated: "We can conceive no justification for this Court to require the government to pay for judicial review of legislative actions." Id. "It is paramount for governmental bodies to have unrestricted appellate court review of their authority to act in a legislative capacity." Id.¹ As in Corn, the Florida Legislature's enactment of the

¹"The only exception is when no justiciable issue is present and when the record establishes that the governmental body is seeking review in bad faith solely as a delaying tactic." Id. Appellees, in response, do not argue that an exception applies, but instead assert that laches bars appellants' motion. Because the prejudice argued by appellees is speculative, laches does not bar the motion.

Opportunity Scholarship Program, at issue in this case, is clearly a planning-level governmental function that does not require a bond for review of the trial court's declaration that it is unconstitutional.

Therefore, we grant appellants' motion to review the trial court's orders conditioning the automatic stay with the posting of a bond and hold that the automatic stay will remain in effect pending review without appellants posting a bond or letter of credit as required by the trial court. We do not reach the other arguments raised by appellants in support of their motion.

VAN NORTWICK, J. AND SMITH, LARRY G., SENIOR JUDGE, CONCUR.