THE NEW UNIFORM DEBATE: Mccall V. Scott AND THE CONSTITUTIONAL STATUS OF THE FLORIDA TAX CREDIT SCHOLARSHIP PROGRAM

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I. INTRODUCTION

In McCall v. Scott, Florida’s First District Court of Appeal (First District)\(^1\) considered whether the plaintiffs had standing to sue Florida over the constitutionality of the “Florida Tax Credit Scholarship Program” (FTCSP).\(^2\) However, the First District never addressed constitutionality, instead denying standing to the plaintiffs.\(^3\) The Florida Supreme Court denied certiorari to the

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1. For the purposes of this Article, when discussing the First District Court of Appeal, which decided McCall v. Scott, the court will be referenced as First District. For the Florida Supreme Court, either the full name or Court is used.


3. McCall, 199 So. 3d at 364 (addressing standing and not addressing constitutionality); Waddell A. Wallace III, Maria F. Gibson & Michael S. Roscoe, The 2017 Constitution Revision Commission: School Vouchers and Choice in Education to be Major Points of Interest, 18 FLA. COASTAL L. REV. 63, 84 (2016).
As a result, *McCall* effectively left the FTCSP legally intact. However, under Florida precedent, the plaintiffs were correct that the FTCSP is unconstitutional, so if plaintiffs with proper standing object to the program in the future, Florida courts should find the FTCSP unconstitutional. The *McCall* case is important because it leaves the status of tax credit scholarship programs completely uncertain in the First District and in Florida generally. While Florida precedent suggests that the FTCSP may eventually be struck down, for now both proponents and opponents of the FTCSP may need to consider all strategies to pursue their objectives of either keeping the program intact or getting it struck down. Suggested strategies for both sides of the debate will be discussed throughout this Article. Hopefully, the legal status of the FTCSP will soon be decided so that all parties involved will have closure on its constitutional status.

### A. Summary of the Facts and the Court’s Holding

In *McCall* *v.* *Scott*, plaintiffs, including several Florida interest groups, challenged the state constitutionality of the “Florida Tax Credit Scholarship Program.” At the trial court, the plaintiffs suggested that the FTCSP violated the Florida Constitution in two respects. First, they argued that the FTCSP “violate[d] the no-aid provision” of the Florida Constitution because it used government money to give children private, educational opportunities. 

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5. See *McCall*, 199 So. 3d at 374 (affirming the complaint’s dismissal); see, e.g., Wallace, Gibson & Roscoe, supra note 3, at 84 (explaining that holding).

6. See infra note 96 (citing arguments in support of this proposition).

7. See infra note 96 (citing arguments in support of this proposition); Postal, supra note 4 (explaining that there could be another lawsuit, with new plaintiffs, in the future).


9. *McCall*, 199 So. 3d at 363 (arguing the violation of Article I, Section 3 and Article IX, Section 1(a)).
Second, the plaintiffs argued the law “violate[d] the mandate for the provision of a system of free and uniform public schools,” the uniform education provision, because it used government money to give children private education under different educational standards than those used by public schools. 11

In response, the defendants contended that, for three reasons, the plaintiffs should not have standing to bring their suit. 12 First, they argued there was no “special injury” to the plaintiffs. 13 Second, the program did not spend any money that fell under the “Legislature’s spending authority.” 14 Third, nothing in the program implicated “the Legislature’s taxing authority.” 15 The plaintiffs then responded that they possessed standing “based on their allegation of special injury, and also as taxpayers under the limited exception to the special injury rule.” 16 The trial court concurred with the defendants and dismissed the case, 17 never actually addressed the case’s constitutional merits, and decided the case solely on standing grounds. 18

The plaintiffs appealed to Florida’s First District Court of Appeal. 19 The First District concurred with the trial court, 20 and it dismissed the complaint challenging the FTCSP on standing

10. Id. That provision states, “[n]o 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.
11. McCall, 199 So. 3d at 363. Florida’s Article IX, Section 1(a) explains, “[a]dequate provision shall be made by law for a uniform, efficient, safe, secure, and high-quality system of free public schools.” FLA. CONST. art. IX, § 1.
12. McCall, 199 So. 3d at 361, 363; see Defendants’ Motion to Dismiss and Incorporated Memorandum of Law at 2, McCall v. Scott, 199 So. 3d 359 (Fla. 1st Dist. Ct. App. 2016) (No. 2014 CA 002282) (laying out the defendants’ arguments on standing).
13. McCall, 199 So. 3d at 363; see Miller v. Publicker Indus., Inc., 457 So. 2d 1374, 1375 (Fla. 1984), cited in McCall, 199 So. 3d at 364 (implicitly applying special injury standing); Council for Secular Humanism, Inc. v. McNeil, 44 So. 3d 112, 121 (Fla. 1st Dist. Ct. App. 2010), cited in McCall, 199 So. 3d at 364 (explaining special injury standing).
14. McCall, 199 So. 3d at 363.
15. Id.
16. Id. at 361 (citing Dept. of Admin. v. Horne, 269 So. 2d 659 (Fla. 1972); Rickman v. Whitehurst, 73 Fla. 152 (Fla. 1917)).
17. McCall, 199 So. 3d at 363–64.
18. Id. at 364 (“The sole issue before this Court is whether Appellants have standing to challenge the FTCSP.”); Brief of Intervenors–Respondents on Jurisdiction at 7, McCall v. Scott, 2016 WL 6922365 (Fla. Nov. 23, 2016) (No. SC16–1668) [hereinafter Br. of Intervenors–Resp’ts] (stating the McCall decision only addressed standing).
19. McCall, 199 So. 3d at 361 (hearing the case on appeal).
20. Id. at 362.
The First District, too, decided the case solely on the basis of standing, and it never actually addressed the constitutional merits. When the plaintiffs appealed that decision, the Florida Supreme Court denied certiorari.

B. Significance of *McCall v. Scott* and Scope of Analysis

Even though the Florida Supreme Court did not hear the appeal, the outcome of *McCall* at the First District is important for two reasons. First, it sheds light on the national climate toward voucher programs. With the appointment of Betsy DeVos as Secretary of Education, a federal voucher program that is similar to the FTCSP could be introduced. The FTCSP supposedly “unites three broad concepts that DeVos is friendly toward: (1) privatization (2) religious education and (3) a hands-off approach to accountability for private schools.” The constitutional status of the FTCSP undoubtedly has implications not only for the program itself, but also for the ability of a national voucher program to survive constitutional objections. However, right now, the constitutional status of the FTCSP is unclear, so it is hard to know whether and how any future Florida law on the issue would affect national debates about vouchers. Given Florida’s lack of clarity on the issue, parties on both sides of the debate should consider all potential strategies to either support or oppose the FTCSP. Second, if, in the future, proper plaintiffs challenge the program, Florida courts will likely find the FTCSP

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21. *Id.* at 374.
22. *Supra* note 18 and accompanying text.
25. Kamenetz, *supra* note 4 (discussing DeVos’ previous appointment as Chair of the American Federation for Children (AFC), an organization that supports charter and private school choice and that ranked Florida’s tax credit scholarship as number one in its recent report on current private school choice programs); see Postal, *supra* note 4 (discussing DeVos’ support for “tax-credit scholarships and other choice programs”). But see Laura Meckler, *The Education of Betsy DeVos: Why Her School Choice Agenda Has Not Advanced*, WASH. POST (Sept. 4, 2018), https://www.washingtonpost.com/local/education/the-education-of-betsy-devos-why-her-school-choice-agenda-has-crashed/2018/09/04/c21119b8-9666-11e8-810c5fa705927d54_story.html?noredirect=on&utm_term=.3d0a0c4e7562 (discussing the lack of support DeVos has received for school choice from both political parties since her appointment).
unconstitutional. Therefore, the best strategy for proponents of the program may be an extrajudicial one: passing an amendment to the Florida Constitution.

This Article analyzes whether the FTCSP violates the uniform education provision of the Florida Constitution. Part II addresses a short history of relevant Florida law leading up to McCall. Part III reviews the First District’s analysis of standing that prevented it from considering constitutionality in McCall. Part IV is the Author’s critical analysis, focusing on the plaintiffs’ contention that the FTCSP is unconstitutional under the uniform education provision, and addressing the potential for a specific constitutional amendment to make the FTCSP constitutional. Part V offers a summary of the Author’s arguments about McCall and provides recommendations for parties on both sides of the debate as they move forward.

II. HISTORY OF THE FTCSP

A. History of Florida Law on Uniform Education

The creation of the Florida school system stems from the 1868 amendment to the Florida Constitution. One hundred years later, in 1968, the Legislature added the uniform education provision. The uniform education provision states, in part:

The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall

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27. Postal, supra note 4 (explaining that there could be another lawsuit, with new plaintiffs, in the future); see infra notes 96, 99, 100 (citing arguments in support of and against this proposition).
28. See Fla. Const. art. IX, § 1 (describing rights involving public education); infra pt. IV.
29. Infra pt. II.
30. Infra pt. III; see McCall v. Scott, 199 So. 3d 359, 364 (Fla. 1st Dist. Ct. App. 2016) (“The sole issue before this Court is whether Appellants have standing to challenge the FTCSP.”).
31. Infra pt. IV.
32. Infra pt. IV.A.
33. Infra pt. IV.B.
34. Infra pt. V.
35. Fla. Const. of 1868, art. VIII; Wallace, Gibson & Roscoe, supra note 3, at 69.
36. Wallace, Gibson & Roscoe, supra note 3, at 69; see Fla. Const. art. IX, § 1 (discussing the state’s obligation to provide an adequate education to all children in Florida).
be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.\footnote{37}

In 1996, the Florida Supreme Court decided the \textit{Chiles} case, interpreting the uniform education provision.\footnote{38} In \textit{Chiles}, the Court held that it was not up to the judicial system to determine the Legislature's intent regarding the usage of the word “adequate” in the uniform education provision.\footnote{39} The \textit{Chiles} Court also implied that while the court system did not have to define the word “adequate,” it still recognized the Legislature’s responsibility to pay for public schools adequately.\footnote{40} The Florida Legislature amended the state constitution in 1998 in response to the \textit{Chiles} Court’s ambiguous interpretation of “adequate.”\footnote{41}

\footnote{37. FLA. CONST. art. IX, § 1 (emphasis added).}
\footnote{38. Coal. for Adequacy and Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400 (Fla. 1996). \textit{Chiles} was the next important legal development in this part of the law. See Wallace, Gibson & Roscoe, \textit{supra} note 3, at 70 (explaining the \textit{Chiles} case after explaining the 1968 amendments, implying that \textit{Chiles} was the next important change).}
\footnote{39. \textit{Chiles}, 680 So. 2d at 406–07; see FLA. CONST. art. IX, § 1 (using the word “adequate”); Wallace, Gibson & Roscoe, \textit{supra} note 3, at 70. See also Lila Haughey, \textit{Florida Constitutional Law: Closing the Door to Opportunity: The Florida Supreme Court’s Analysis of Uniformity in the Context of Article IX, Section 1}, 58 FLA. L. REV. 945, 946–47 (2006) (explaining that “Florida courts have struggled to define the terms 'adequate' and 'uniform'”). Similarly, in 1993, the Florida Supreme Court declined to define the word “uniform” used in the uniform education provision. FLA. CONST. art. IX, § 1 (using the word “uniform”); Fla. Dept. of Educ. v. Glasser, 622 So. 2d 944, 947 (Fla. 1993), \textit{cited in Chiles}, 680 So. 2d at 406; Haughey, \textit{supra} note 39, at 950 n.37. However, the Court asserted that it might have to define uniformity at some point, and it is not necessarily the Legislature’s job to do so. Glasser, 622 So. 2d at 947. \textit{Contra} Haughey, \textit{supra} note 39, at 947 (stating that “the court has vested the Florida Legislature with broad authority to provide for an adequate and uniform system”)).}
\footnote{41. FLA. CONST. art. IX, § 1; Fla. Constitution Revision Commission, \textit{supra} note 40 (describing the revision as “[p]rovid[ing] guidance and standards”).}
B. The Opportunity Scholarship Program

In 1999, Governor Jeb Bush started an initiative addressing the quality of education received by poor children in the State of Florida.42 The Florida Opportunity Scholarship Program (OSP), which the Legislature created in 1999, addressed those same issues.43 The OSP was touted as providing a private option for children at underperforming public schools.44 Under the OSP, when parents decided to send their children to private schools, the schools received money from the Florida Department of Education.45

In Bush v. Holmes, plaintiffs challenged the constitutionality of the OSP under the Florida Constitution and the United States Constitution.46 They challenged it for violation of: (1) Florida’s public education provision; (2) Florida’s public-school funding provision; (3) Florida’s religious freedom provision (including the Blaine Amendment); and (4) the federal Establishment Clause.47 The trial court held the OSP unconstitutional because it violated Florida’s Blaine Amendment48—the no-aid provision in Article I, Section 3 of the Florida Constitution—which prevents the government from funding religious institutions.49 However, when the case reached the Florida Supreme Court, the Court did not decide whether it survived under the Blaine Amendment; instead, it held that the OSP violated the uniform education provision.50

42. E.g., McCall, 199 So. 3d at 362; Wallace, Gibson & Roscoe, supra note 3, at 73–74.
43. E.g., McCall, 199 So. 3d at 362.
44. Id.; see, e.g., FLA. STAT. § 229.0537 (1999) (original version of OSP); Graham, supra note 8, at 48 (detailing how the program allows children to go to private schools after attending public schools). The OSP later became FLA. STAT. § 1002.38 (2005), which was declared unconstitutional by Bush v. Holmes, 919 So. 2d 392, 405 (Fla. 2006).
45. McCall, 199 So. 3d at 362; see Holmes, 919 So. 2d at 397 (explaining how the OSP worked).
46. Holmes, 919 So. 2d at 398–99; see, e.g., J. Scott Slater, Comment, Florida’s Blaine Amendment and Its Effect on Educational Opportunities, 33 STETSON L. REV. 581, 595 (2004). The Holmes litigation had many stages. See Holmes, 919 So. 2d at 398–99 (explaining Holmes’ long judicial history).
47. Slater, supra note 46, at 595.
48. Holmes, 919 So. 2d at 399 (explaining that “[t]he trial court found that the OSP violated the last sentence of [Article I, Section 3,] referred to as the ‘no aid’ provision”).
49. McCall, 199 So. 2d at 369; FLA. CONST. art. I, § 3.
50. Holmes, 919 So. 2d at 412–13; e.g., Stephen Messer, School Vouchers and the Road to Academic Excellence After Bush v. Holmes, 17 GEO. J. ON POVERTY L. & POL’Y 33, 37 (2010) (explaining the Florida Supreme Court’s holding). Contra Holmes, 919 So. 2d at 425 (Bell, J., dissenting) (arguing that the OSP is constitutional under the uniform education provision); Jamie Dycus, Lost Opportunity: Bush v. Holmes and the Application of State
C. The Florida Tax Credit Scholarship Program

The Florida Legislature started the FTCSP in 2001, and it was supposed to build on the progress made by the OSP. The FTCSP is authorized under Florida Statutes, Section 1002.395. According to the statute, as described by the First District,

\[\text{individual and corporate taxpayers make voluntary contributions to Scholarship Funding Organizations (SFOs), including state universities, independent colleges and universities, and nonprofit organizations. After making a contribution to an SFO, the taxpayer may seek a credit against their liability for the following taxes: (1) oil, gas, and mineral severance tax, (2) alcoholic beverage tax, (3) corporate income tax, (4) insurance premium tax, and (5) self-accrued direct-pay sales tax. Parents and guardians apply to SFOs to secure a scholarship for their student at a school of their choice.}\]

The FTCSP allows parents to seek scholarships for their children to obtain private education (including religious education), transportation to laboratory schools, or transportation to a different district’s public institution. According to McCall, the FTCSP addresses educational problems in a broader sense than the OSP does. Rather than targeting “students attending ‘failing’ [public] schools,” the FTCSP specifically targets students who receive “certain government assistance or students whose families have an annual income below 185% of the federal poverty level.”

Plaintiffs challenged the FTCSP on constitutional grounds in McCall v. Scott. After the trial court and the First District denied standing to the plaintiffs, the plaintiffs

\[\text{Constitutional Uniformity Clauses to School Voucher Schemes, 35 J.L. \\ \\ & EDUC. 415, 458 (2006) (arguing that the Court made the wrong decision on uniformity in Holmes).}\
\[\text{51. McCall, 199 So. 3d at 362; see Fla. Stat. § 1002.395 (2015) (the version of the FTCSP in effect at the time McCall was decided).}\
\[\text{52. Fla. Stat. § 1002.395.}\
\[\text{53. McCall, 199 So. 3d at 362–63 (citing Fla. Stat. § 1002.395(5)(b)).}\
\[\text{54. Id. at 363. Interestingly, “[o]ver 70 percent of the scholarships are directed at religious, primarily Christian, schools.” Kamenetz, supra note 4; Postal, supra note 4 (offering the same statistic).}\
\[\text{55. McCall, 199 So. 3d at 362 (citing Fla. Stat. § 1002.395(3)(c) (2015)).}\
\[\text{56. Id. But see Kamenetz, supra note 4 (detailing that the program funds scholarships for “families with incomes of up to 200 percent of the federal poverty level”).}\
\[\text{57. McCall, 199 So. 3d at 363.}\
\[\text{58. Id. at 363–64, 374.}\\
\]
brought the case to the Florida Supreme Court, but in January 2017, the Court denied certiorari due to lack of jurisdiction.\textsuperscript{59} However, in the future, there is a possibility that other plaintiffs could try to litigate the same constitutional issues in order to get Florida courts, including the Florida Supreme Court, to reconsider.\textsuperscript{60}

\section*{III. COURT’S ANALYSIS}

The First District in \textit{McCall} explicitly analyzed whether the plaintiffs had standing and reviewed the issue de novo.\textsuperscript{61} The First District analyzed two methods of finding standing: special injury standing and taxpayer standing.\textsuperscript{62} The First District decided that the plaintiffs lacked both types of standing, and it never addressed the constitutional status of the FTCSP.\textsuperscript{63}

\subsection*{A. Special Injury Standing}

According to \textit{McCall}, a plaintiff may have special injury standing if the plaintiff has a harm or damage that other people do not have.\textsuperscript{64} The point of special injury standing is to prevent citizens from challenging laws just because they do not like paying for them, while allowing citizens to sue when those laws or programs have genuinely injured them.\textsuperscript{65} The First District in \textit{McCall} held that there was no standing based on special injury.\textsuperscript{66} It based this holding on three distinct arguments.\textsuperscript{67} First, the plaintiffs argued that the FTCSP injured them because it used

\begin{footnotesize}
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\item[60.] Postal, \textit{supra} note 4. In \textit{Holmes}, for example, the plaintiffs were parents and organizations. Bush v. Holmes, 919 So. 2d 392, 398–99 (Fla. 2006).
\item[61.] \textit{McCall}, 199 So. 3d at 364.
\item[62.] \textit{Id.} at 364–74.
\item[63.] \textit{Id.} at 364 ("The sole issue before this Court is whether Appellants have standing to challenge the FTCSP."); Wallace, Gibson & Roscoe, \textit{supra} note 3, at 84 (explaining \textit{McCall}'s procedural posture).
\item[64.] \textit{McCall}, 199 So. 3d at 364 (citing Miller v. Publicker Indus., Inc., 457 So. 2d 1374, 1375 (Fla. 1984); Council for Secular Humanism, Inc. v. McNeil, 44 So. 3d 112, 121 (Fla. 1st Dist. Ct. App. 2010)).
\item[65.] See \textit{id.} at 364–65 (explaining that “the special injury rule . . . requires courts to accord proper deference to legislative actions rather than opening the courthouse doors to disgruntled taxpayers”).
\item[66.] \textit{Id.} at 368.
\item[67.] \textit{Id.} at 365–68 (providing the First District’s analysis involving special injury standing).
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public money to send children to private schools.\textsuperscript{68} In reality, the First District stated, no public funds go from the state budget directly to private schools.\textsuperscript{69} Rather, children start attending new schools, and then those organizations receive tuition money from donors.\textsuperscript{70} Second, the First District found the plaintiffs’ allegations of injury to be “conclusory and speculative.”\textsuperscript{71} The First District based this argument on a prior United States Supreme Court decision involving a challenge to an Arizona “tax credit scholarship program.”\textsuperscript{72} In that case, the plaintiffs did not have special injury standing because the evidence for special injury was speculative, rather than based on concrete proof.\textsuperscript{73} In \textit{McCall}, the First District decided that the same was true for the FTCSP.\textsuperscript{74} Third, the First District asserted that the plaintiffs relied on distinguishable Florida case law that did not help them establish special injury standing.\textsuperscript{75} As a result, the First District found that the plaintiffs did not have special injury standing.\textsuperscript{76}

\textsuperscript{68} \textit{Id.} at 365. According to \textit{McCall}, the plaintiffs argued:

As Florida citizens and taxpayers, and organizations whose members are Florida citizens and taxpayers, plaintiffs have been and will continue to be injured by the unconstitutional expenditure of public revenues under the Scholarship Program. In addition, many of the plaintiffs (and members of the plaintiff organizations) whose children attend public schools, or who are teachers or administrators in the public schools, have been and will continue to be injured by the Scholarship Program’s diversion of resources from the public schools.

\textit{Id.} (quoting Complaint ¶ 19, \textit{McCall v. Scott}, 199 So. 3d 359 (Fla. 1st Dist. Ct. App. 2016) (No. 2014 CA 002282) [hereinafter Compl. in \textit{McCall}]).

\textsuperscript{69} \textit{Id.}

\textsuperscript{70} \textit{Id.} at 365–66.

\textsuperscript{71} \textit{Id.} at 366.

\textsuperscript{72} \textit{Id.} at 366–67 (citing Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125 (2011)).

\textsuperscript{73} \textit{Winn}, 563 U.S. at 137–38, \textit{quoted in McCall}, 199 So. 3d at 366–67.

\textsuperscript{74} \textit{McCall}, 199 So. 3d at 367.

\textsuperscript{75} \textit{Id.} at 367–68 (explaining the flaws in the plaintiffs’ reliance on \textit{Coalition for Adequacy and Fairness in School Funding v. Chiles}, 680 So. 2d 400 (Fla. 1996) and \textit{Bush v. Holmes}, 919 So. 2d 392 (Fla. 2006)). According to the First District in \textit{McCall}, the \textit{Chiles} case was distinguishable because in \textit{Chiles}, the plaintiffs made “very specific allegations of harm.” \textit{Id.} at 367. Additionally, the \textit{Holmes} case was distinguishable because in \textit{Holmes}, “the court found the diversion of appropriated education funds from the public school system to private schools to be a tangible, concrete harm.” \textit{Id.} at 367–68.

\textsuperscript{76} \textit{Id.} at 368.
B. Taxpayer Standing

Next, in *McCall*, the First District explained that a plaintiff can establish standing as a taxpayer.77 Here, the First District stated, “to establish standing . . . Appellants [are] required to identify both (1) a specific exercise of the Legislature’s taxing and spending authority, and (2) a specific constitutional limitation upon the exercise of that authority.”78 Taxpayer standing was important in the case because Florida law does not require a plaintiff to have a special injury if the plaintiff argues that the basis for the lawsuit is an objection to the manner in which the state Legislature exercised the spending power—a tax issue.79 The Florida Supreme Court asserted, in the *Chiles* and *Holmes* cases, that the uniform education provision of the Florida Constitution limits the spending authority of the Legislature.80 “In *Chiles*, the supreme court construed [the uniform education] provision to require the Legislature to appropriate sufficient public revenue to adequately fund Florida’s public school system,”81 and “[i]n *Holmes II*, the supreme court construed this provision to restrict the Legislature’s authority to use public revenues to fund private schools.”82 Therefore, while the uniform education provision does not prescribe a limit on the taxing power of the Florida Legislature, it does prescribe a limit on the spending power of the Florida Legislature.83 Any standing in this case, consequently, must come from the State’s use of its spending power with regard to the FTCSP.84

However, the First District denied taxpayer standing to the plaintiffs with regard to both Florida constitutional provisions at issue in the case.85 Regarding the no-aid provision (Blaine Amendment), the First District denied the plaintiffs taxpayer standing because they could not identify “appropriation of state

77. *Id.* at 364, 368.
78. *Id.* at 369.
79. *Id.* at 364 (citing Dept. of Admin. v. Horne, 269 So. 2d 659, 663 (Fla. 1972); Alachua Cty. v. Sharps, 855 So. 2d 195, 198 (Fla. 1st Dist. Ct. App. 2003)).
80. *Id.* at 372–73 (citing Bush v. Holmes, 919 So. 2d 392, 408 (Fla. 2006); Coal. for Adequacy and Fairness in Sch. Funding v. Chiles, 680 So. 2d 400, 405–06 (Fla. 1996)).
81. *Id.* at 372 (citing *Chiles*, 680 So. 2d at 405–06).
82. *Id.* at 372–73 (citing *Holmes*, 919 So. 2d at 408).
83. *Id.* at 372.
84. *Id.*
85. *Id.* at 374.
revenues to aid any sectarian institution.”86 Regarding the uniform education provision, the First District denied the plaintiffs taxpayer standing because they “failed to allege that the Legislature appropriated any public funds to private schools,” and they “failed to allege any inadequacy in the funding of the state’s system of education.”87

The First District reasoned that unlike in Chiles, where the public school system had inadequate funding because of an action of the Legislature, here, the FTCSP did not result in inadequate funding for the existing public school system.88 Additionally, unlike in Holmes, where the children received private education using public funds,89 here, the plaintiffs failed to show that the government funded private education with government money.90 The First District used these two cases to argue that in authorizing the FTCSP, the Legislature did not violate its constitutional spending power.91 On this basis, the First District did not find an unconstitutional use of the State’s spending power, which meant the plaintiffs did not have standing on that basis either.92 Because the plaintiffs did not have special injury or taxpayer standing, the First District dismissed the case and never considered the constitutional issues.93

IV. THE CONSTITUTIONAL STATUS OF THE FTCSP UNDER FLORIDA’S UNIFORM EDUCATION PROVISION AFTER MCCALL V. SCOTT

The McCall case held that the plaintiffs did not have standing to sue,94 so the case itself technically left the FTCSP legally intact.95 However, Florida precedent suggests that the plaintiffs are correct in their belief that the FTCSP is actually

86. Id. at 370.
87. Id. at 373.
88. Id. at 373 (contrasting with the Chiles case).
89. Id. (citing Bush v. Holmes, 919 So. 2d 392, 412–13 (Fla. 2006)).
90. Id. (contrasting with the Holmes case).
91. Id. at 373–74.
92. Id.
93. Id. at 374 (dismissing the case for lack of standing, and never addressing the constitutionality of the program itself).
94. Id.
95. See Wallace, Gibson & Roscoe, supra note 3, at 85–86 (explaining the affirmation of the dismissal).
unconstitutional under the explicit wording in *Holmes*. Therefore, if the FTCSP is challenged in the future, and if a Florida court addresses the merits of the issue, the court will likely find the FTCSP unconstitutional. However, until such time, both proponents and opponents of the program should consider all possible avenues, both judicial and extrajudicial, to achieve their legal objectives for the program.

A. The FTCSP is Unconstitutional According to the Explicit Reasoning in *Holmes*

As the *Holmes* plaintiffs/petitioners suggest, the FTCSP is unconstitutional under the uniform education provision of the Florida Constitution for two reasons, based on the explicit reasoning in *Holmes*. First, it is unconstitutional because it utilizes public money to place children in private schools. Second, it is unconstitutional because it helps students attend private institutions not following the same educational restrictions as the public schools.

Notwithstanding *McCall*’s relative silence on the constitutional issues at hand, the FTCSP is unconstitutional under Florida’s uniform education provision based on the explicit reasoning in *Holmes* because it publicly pays to fund “additional

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96. Compl. in *McCall*, supra note 68, ¶¶ 59–61 (asserting that the FTCSP fails on the same grounds as the OSP at issue in *Holmes*); Messer, *supra* note 50, at 43 (suggesting that the FTCSP might be unconstitutional because its support for private schools violates uniformity and stating, “any time money that would otherwise be allotted directly to Florida’s public schools is reallocated to a private school voucher, there may be a *Holmes*-style constitutional concern”).

97. *Supra* note 96.

98. See *supra* note 96 (citing arguments in support of the proposition that the FTCSP is unconstitutional).


100. Pet’rs’ Br. on Jurisdiction in *McCall*, *supra* note 99, at 6–7; Compl. in *McCall*, *supra* note 68, ¶¶ 60–61, (asserting that the FTCSP fails on the same grounds as the OSP); *Contra Recent Developments*, 33 FLA. ST. U. L. REV. 1227, 1238 (2006) (suggesting that the FTCSP does not violate uniformity); Stephen D. Sugarman, *Tax Credit Scholarship Plans*, 43 J.L. & EDUC. 1, 43 (2014) (arguing that Florida has “the thickest” standards for private schools that participate in the FTCSP).
equivalent alternatives” to state-funded education.101 Again, the First District in McCall denied taxpayer standing to the plaintiffs for two reasons: (1) the plaintiffs insufficiently alleged a misappropriation of “public funds to private schools,” and (2) they insufficiently alleged “any inadequacy in the funding of the state’s system of education.”102 The first reason, the insufficient allegation of misappropriating public funding, is based on the First District’s interpretation of the first holding in Holmes.103 The First District correctly classifies Holmes as prescribing a limitation on the spending power of the Legislature.104 The Holmes opinion did prevent the government from utilizing public money to give children private education.105 However, McCall incorrectly ignored an important explanation that goes with Holmes’ holding.

McCall explains that in Holmes, “the supreme court’s analysis of whether the Legislature exceeded its spending authority under [the uniform education provision] was limited to determining if the Legislature appropriated public funds for use in private schools.”106 However, Holmes’ assessment of the limitations on the spending authority was actually much more nuanced than the interpretation by the First District in McCall.107 After asserting that the OSP failed by utilizing public funding to give children private education, the Holmes Court elaborated on the meaning of the holding and the reasoning behind it.108 Namely, the Florida Supreme Court stated that under the uniform education provision, the Legislature may not employ “additional equivalent alternatives” to public education to educate “Florida’s children.”109

102. McCall, 199 So. 3d at 373.
103. Id. (citing Holmes, 919 So. 2d at 408–13).
104. Id. at 372–73 (citing Holmes, 919 So. 2d at 408).
105. Id.
106. Id. at 373.
107. The Holmes opinion characterized the limitation in this way: “Article IX, [S]ection 1(a) is a limitation on the Legislature’s [spending] power because it provides both a mandate to provide for children’s education and a restriction on the execution of that mandate.” Holmes, 919 So. 2d at 406. According to Holmes, that restriction comes from the third part of the uniform education provision—the part that requires a “uniform, efficient, safe, secure and high quality system of free public schools.” Id. at 407; see Fla. Const. art. IX, § 1; see also David Wilhelmsen, Orphans, Baby Blaines, and the Brave New World of State Funded Education: Why Nevada’s New Voucher Program Should Be Upheld Under Both State and Federal Law, 42 J. LEGIS. 257, 273 (2016) (linking the prohibition on private education funding to the Florida Constitution).
109. Holmes, 919 So. 2d at 408.
The Court then explained the meaning of “additional equivalent alternative”:

The Constitution prohibits the state from using public monies to fund a private alternative to the public school system, which is what the OSP does. Specifically, the OSP transfers tax money earmarked for public education to private schools that provide the same service—basic primary education. Thus, contrary to the defendants’ arguments, the OSP does not supplement the public education system. Instead, the OSP diverts funds that would otherwise be provided to the system of free public schools that is the exclusive means set out in the Constitution for the Legislature to make adequate provision for the education of children.110

The Holmes Court further explained, “[t]he systematic diversion of public funds to private schools on either a small or large scale is incompatible with [A]rticle IX, [S]ection 1(a).”111 According to Holmes, in rerouting children to private schools, the OSP “undermine[d] the system of ‘high quality’ free public schools” that is constitutionally required.112

The FTCSP is unconstitutional under this logic because it uses tax credits, a form of public money, to fund an “additional equivalent alternative” to public education: private school education.113 Like in the OSP, where the state money funded private school education, under the FTCSP, state tax money indirectly funds private education.114 In the FTCSP, taxpayers receive tax credits equal to “the amount of any contributions” they send to designated organizations.115 The OSP diverted “funds that would [have] otherwise be[en] provided to the system of free public schools.”116 Similarly, without the FTCSP’s tax credit, the government would have acquired this money via the taxpayer’s tax return, therefore the money itself should be considered public

110. Id. at 408–09 (emphasis added).
111. Id. at 409.
112. Id.
113. McCall v. Scott, 199 So. 3d 359, 363 (Fla. 1st Dist. Ct. App. 2016) (explaining that the scholarships from the FTCSP may be used at public or private schools); supra note 96 and 99.
114. McCall, 199 So. 3d at 363 (explaining how the FTCSP works).
115. Wallace, Gibson & Roscoe, supra note 3, at 83.
116. Holmes, 919 So. 2d at 408–09.
money.\textsuperscript{117} In that light, granting credits to donors essentially funds an “additional equivalent alternative” to public schools—private education; and like the OSP, it violates the uniform education provision for that reason.\textsuperscript{118}

Additionally, the FTCSP is unconstitutional under the explicit reasoning in \textit{Holmes} because the private educational institutions participating in the program have substantially different rules and educational standards than the public schools do.\textsuperscript{119} According to the \textit{Holmes} Court, the uniform education provision requires that Florida private education be uniform with Florida public education.\textsuperscript{120} The Court held that the OSP violated the uniform education provision because it made “no provision to ensure that the private school alternative to the public school system meets the criterion of uniformity.”\textsuperscript{121} The FTCSP, like the OSP, funds relatively autonomous private schools that do not follow the same standards as public schools.\textsuperscript{122} According to Mark Pudlow, a representative of one of the \textit{McCall} plaintiffs, Florida private education is not uniform with Florida public education because private institutions “don’t have to follow the state curriculum, don’t have to participate in testing, [and] don’t have to hire certified teachers. They don’t have to follow the same rules.”\textsuperscript{123}

Private schools can “hire teachers without bachelor’s degrees” under some conditions, whereas public schools can only hire teachers if they have bachelor’s degrees (or more advanced degrees).\textsuperscript{124} Notably, under Florida law, public schools also must

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\item \textsuperscript{117} \textit{Id.}; see Slater, supra note 46, at 600 (“Because the money would otherwise enter the state treasury if the credit was not authorized, the State essentially has control and quasi-ownership over the money.”).
\item \textsuperscript{118} \textit{Id.} at 96 and 99.
\item \textsuperscript{119} See Kamenetz, supra note 4 (explaining private schools’ educational standards); supra note 96 and 100.
\item \textsuperscript{120} \textit{Holmes}, 919 So. 2d at 409.
\item \textsuperscript{121} \textit{Id.}
\item \textsuperscript{122} \textit{Id.} at 409–12.
\item \textsuperscript{123} Kamenetz, supra note 4 (quoting Mark Pudlow). Notably, however, there are some “accountability measures” under the FTCSP, such as requirements for annual financial reports, background checks for various people involved in the program, and independent evaluation. Sarah Katherine Johnson, School Choice in South Carolina: An Analysis of Whether Private School Tax Credits are Right for South Carolina, 64 S.C. L. REV. 903, 924 (2013).
\item \textsuperscript{124} \textit{Holmes}, 919 So. 2d at 409–10; \textit{FLA. STAT.} § 1002.421(2)(h) (2015) (allowing private schools participating in school choice programs to “[e]mploy or contract with teachers who hold baccalaureate or higher degrees, have at least 3 years of teaching experience in public or private schools, or have special skills, knowledge, or expertise that qualifies them to provide instruction in subjects taught”).
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make each teacher “submit to a background screening,” whereas some private schools (not participating in school choice scholarship programs) do not have to do that. Regarding curriculum, the Holmes Court explained:

Regarding curriculum, public education instruction is based on the “Sunshine State Standards” that have been “adopted by the State Board of Education and delineate the academic achievement of students, for which the state will hold schools accountable.” § 1003.41, Fla. Stat. (2005). Public schools are required to teach all basic subjects as well as a number of other diverse subjects, among them the contents of the Declaration of Independence, the essentials of the United States Constitution, the elements of civil government, Florida state history, African-American history, the history of the Holocaust, and the study of Hispanic and women’s contributions to the United States. See § 1003.42(2)(a), Fla. Stat. (2005). [Florida] private schools are not required to teach any of these subjects.

As illustrated by this quote from Holmes, Florida private schools are not required to educate children under the same standards and rules as Florida public schools—private education is simply not uniform with public education. Therefore, under the Holmes precedent, the FTCSP fails under the uniform education provision because it funds private schools that do not have to adhere to the same standards as Florida public schools.

In conclusion, the First District in McCall did not address constitutionality because it disposed of the case at the standing stage. However, based on the Holmes precedent, had the First District found standing and moved on to address constitutionality, it should have found the FTCSP unconstitutional under the same

125. Holmes, 919 So. 2d at 410 (citing FLA. STAT. § 1012.32(2)(a) (2005) (instructing public schools to require background checks of their teachers); FLA. STAT. § 1002.42(2)(c)(3) (making background checks for private school employees permissive rather than required)). However, private schools that participate in school choice scholarship programs are required to obtain background checks for their teachers, FLA. STAT. § 1002.421(2)(m) (2018).

126. Holmes, 919 So. 2d at 410. See also Compl. in McCall, supra note 68, ¶ 39 (discussing that the FTCSP does not require private schools to alter their curriculum).

127. See Compl. in McCall, supra note 68, ¶¶ 59–61 (explaining uniformity in the context of Holmes and asserting that the FTCSP fails on the same grounds as the OSP).

128. Id.; supra note 96 and 100.

129. McCall v. Scott, 199 So. 3d 359, 374 (Fla. 1st Dist. Ct. App. 2016) (dismissing the case for lack of standing, and never addressing the constitutionality of the program itself).
reasoning that doomed the OSP.\textsuperscript{130} It seems likely that new plaintiffs could challenge the FTCSP in the future.\textsuperscript{131} If that does happen, and the court finds standing, based on Florida precedent, the court should find the FTCSP unconstitutional. If it decided otherwise, the court would be deviating from the case law currently in place in Florida.

B. Implications of \textit{McCall} and Recommendations for Proponents and Opponents

The \textit{McCall} case provides little in the way of constitutional analysis or legal clarity on the tax credit scholarship issue in Florida. The decision was limited—\textit{McCall} did not protect the FTCSP from all future constitutional challenges, merely from one challenge in one instance because of the identity of the plaintiffs.\textsuperscript{132} The ambiguous nature of the FTCSP's legal status masks the importance of the issue and the merits of the arguments on both sides. The legal status of the FTCSP is important because many Florida students would be affected by a decision striking it down; “[i]n the 2015–2016 school year, 92,000 students received scholarships” under the program.\textsuperscript{133} Those thousands of students provide reason enough for Florida to make a final decision on the legality of the issue, one way or the other.

Proponents of the FTCSP should consider two strategies to protect the FTCSP from being struck down: (1) using the arguments in \textit{McCall} to deny standing to anyone who tries to challenge the FTCSP, and (2) pursuing an amendment to the Florida Constitution. The first strategy is fairly self-explanatory—\textit{McCall} lays out the arguments proponents should make.\textsuperscript{134} The second strategy should utilize the case of \textit{Ford v. Browning},\textsuperscript{135} which provides an example of an amendment that proponents could use to ensure that the FTCSP is constitutional in the future.\textsuperscript{136} In \textit{Ford}, plaintiffs challenged two proposed Florida

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  \item \textsuperscript{130} See supra notes 113–21 and accompanying text (discussing arguments relevant to the proposition that the FTCSP and OSP are similarly unconstitutional).
  \item \textsuperscript{131} Postal, supra note 4 (explaining that there could be another lawsuit, with new plaintiffs, in the future).
  \item \textsuperscript{132} \textit{McCall}, 199 So. 3d at 374 (dismissing the case for lack of standing).
  \item \textsuperscript{133} Kamenetz, supra note 4.
  \item \textsuperscript{134} Supra pt. III.A; supra pt. III.B.
  \item \textsuperscript{135} 992 So. 2d 132 (Fla. 2008).
  \item \textsuperscript{136} Answer Brief of Intervenors/Respondents, Florida Catholic Conference, Inc. at 38, \textit{Ford v. Browning}, 992 So. 2d 132 (Fla. 2008) (No. SC08-1529) [hereinafter Answer Br.]
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amendments, arguing that the Taxation and Budget Reform Commission (TBRC) did “not have the authority to propose constitutional revisions” relating to the topics chosen by the Commission. One of the proposed amendments in that case would have changed Article IX, Section 1(a) to read:

(a) The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing in its borders. This duty shall be fulfilled, at a minimum and not exclusively, through adequate Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require. Nothing in this subsection creates an entitlement to a publicly-financed private program.

The Court quashed both amendments, holding that the TBRC was not authorized to propose the amendments at issue. In other words, the amendments did not actually become law.

However, even though the Court effectively quashed the amendment by holding that the plaintiffs did not possess authority to propose it, the content of the amendment is still relevant to the destiny of the FTCSP. The proposed amendment was intended to make the OSP constitutional under the uniform education provision. Because the OSP and the FTCSP are arguably unconstitutional under the uniform education provision for the

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137. Ford, 992 So. 2d at 135; see Brett B. Pettigrew, Recent Developments - Constitutional Law, 38 STETSON L. REV. 651, 651 (2009) (explaining what the plaintiffs argued in Ford).
138. Ford, 922 So. 2d at 140 (quoting the proposed amendment where added provisions are underlined and removed language is crossed through).
139. Id. at 141; see Graham, supra note 8, at 47 (explaining that the Court “ruled against allowing the proposed amendments to appear on ballots”).
140. Pettigrew, supra note 137, at 651–52.
141. Answer Br. of Intervenors/Resp’ts in Ford, supra note 136, at 38 (explaining that the amendments would make the OSP constitutional).
same reasons, 142 the *Ford* amendment would have made the FTCSP constitutional under the uniform education provision as well. Therefore, even in light of the *Holmes* precedent that will likely lead Florida courts to declare the FTCSP unconstitutional, supporters of the FTCSP still have a valid option. With a slight rewording of the uniform education provision geared toward the verbiage of the amendment in *Ford*, the FTCSP could be constitutional under the uniform education provision.

On the other hand, opponents of the FTCSP should emphasize the arguments made in Part IV.A of this Article. 143 Opponents’ best strategy is to argue that the FTCSP is unconstitutional under the uniform education provision as written, as the plaintiffs in *McCall* did. As previously discussed in-depth, that argument is likely to be successful. Alternatively, opponents could lobby the Florida Legislature to eliminate or change the Florida Tax Credit Scholarship Program. Either way, Florida students and their parents will be affected by any changes to the Florida Tax Credit Scholarship Program. In the interest of giving Floridians closure, hopefully the constitutional status of the FTCSP will be decided sooner rather than later.

V. CONCLUSION: SUMMARY AND RECOMMENDATIONS

In *McCall v. Scott*, the First District disposed of the case by denying standing to the plaintiffs and never addressed the constitutional issue. 144 However, new plaintiffs could challenge the FTCSP in the future, and if they do, assuming those plaintiffs have standing, courts should find the FTCSP unconstitutional. 145 As the plaintiffs suggest, the FTCSP is unconstitutional based on the explicit reasoning in *Holmes* for two reasons: (1) it uses public money to give children private education; and (2) Florida private education funded under the program is not uniform with Florida

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142. *See supra* notes 113–21 and accompanying text (discussing arguments relevant to this proposition).
143. *See supra* pt. IV.A.
145. Postal, *supra* note 4 (explaining that there could be another lawsuit, with new plaintiffs, in the future); *see supra* notes 96, 99, 100 (citing arguments in support of and against this proposition).
public education.\textsuperscript{146} Therefore, under the current Florida Constitution and current Florida law, should this program be reconsidered in the Florida court system, Florida should find it unconstitutional under the uniform education provision. Consequently, if supporters of the FTCSP want to protect the constitutional status of the FTCSP, they should pursue a constitutional amendment similar to the amendment in \textit{Ford v. Browning}.\textsuperscript{147} Because the OSP would be constitutional under an amendment with the wording of the amendment in the \textit{Ford} case, so would the FTCSP. Should the uniform education provision be amended according to the constitutional amendment suggested in \textit{Ford}, the FTCSP would survive.

After \textit{Holmes} and \textit{Ford}, the constitutional fate of the FTCSP depends heavily on whether the uniform education provision is amended. Proponents of the FTCSP should also emphasize arguments made in \textit{McCall} and try to deny standing to anyone who tries to challenge the FTCSP. Opponents of the program, on the other hand, should make the arguments made by the \textit{Holmes} court (and those made earlier in the Article) and maintain that the FTCSP is unconstitutional.

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\textsuperscript{146} See supra note 96 (citing the plaintiffs’ arguments).
\textsuperscript{147} See supra note 136 (citing arguments relevant to this proposition).
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