IN THE SUPREME COURT OF FLORIDA
Case No. SC 18-67

CITIZENS FOR STRONG SCHOOLS, INC.; et al., Petitioners,	)	
vs.	)	L.T. Case Nos. 1D16-2862; 1D10-6285; 09-CA-4534
FLORIDA STATE BOARD OF EDUCATION; et al., Respondents,	)	
and	)	
CELESTE JOHNSON; et al., Intervenors/Respondents.	)	

PETITIONERS' INITIAL BRIEF

ON APPEAL FROM
THE FIRST DISTRICT COURT OF APPEAL

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Petitioners Citizens for Strong Schools, Fund Education Now, Eunice Barnum, Janiyah Williams, Jacque Williams, Sheila Andrews, Rose Nogueras, and Alfredo Nogueras will be referred to as Parents. While not all are technically parents (grandmother, three parents, two students, and two citizen organizations), Parents is a fair nomination of their interests.

Respondents Florida State Board of Education, Speaker of the Florida House of Representatives Richard Corcoran, Senate President Joe Negron, and Florida Commissioner of Education Pam Stewart, all sued in their official capacities, will be referred to as the State.

Respondents-Intervenors Celeste Johnson, Deaundrice Kitchen, Kenia Palacios, Margot Logan, Karen Tolbert, and Marian Klinger will be referred to as Intervenors.

Citations to the Record and Supplemental Record, will be to the Record and page number, e.g., R.534.

As the trial transcripts are not paginated in the Record on Appeal, citations to the trial transcript will be to the transcript volume, page and line, e.g., Tr.v.6, 791:18-792:11.

Citations to the trial exhibits, which were sent by the lower court to the First DCA via separate CD, will be to Exhibit number and page, e.g., Ex. 4040, at 45.

STATEMENT OF THE CASE AND FACTS

I. Statement of the Case

In 2009, Parents filed a complaint in Leon County Circuit Court against various defendants collectively responsible for the state's education system alleging that the State had failed to meet its paramount duty to provide a uniform, efficient, and high quality system of free public schools. Art. IX, § 1(a), Fla. Const.

The State filed a motion to dismiss arguing that Parents' claim raised non-justiciable political questions. (R.072-74.) The trial court denied the motion. (R.103-08.) The State filed a writ of prohibition in the First DCA, which en banc denied the petition but certified a question to this Court. *Haridopolos v. Citizens for Strong Schs., Inc.*, 81 So. 3d 465, 473 (Fla. 1st DCA 2012). This Court declined review. *Haridopolos v. Citizens for Strong Schs., Inc.*, 103 So. 3d 140 (Fla. 2012).

Parents filed a second amended complaint to update facts. (R.130-64.) The trial court permitted six parents interested in the Florida Tax Credit (FTC) program and the McKay Scholarship Program for Students with Disabilities (McKay) to intervene as Defendant-Intervenors. The court denied Parents' motion for partial summary judgment on the McKay and FTC programs. (R.248-1122, 2542-43.) It granted the Intervenors' motion for judgment on the pleadings with respect to the FTC program, finding that because tax credits are not public funds, Parents lacked both taxpayer and special injury standing. (R.2539-41, 3398.) The trial court ruled that Parents could not

submit evidence at trial on the uniformity of FTC. After trial, but prior to filing the Initial Brief on appeal, the First DCA ruled in a related case that there was no taxpayer or special injury standing to challenge FTC. *McCall v. Scott*, 199 So. 3d 359, (Fla. 1st DCA 2016), *cert. denied*, 2017 WL 192043 (Fla. 2017). *McCall* was controlling in the First DCA. *Citizens for Strong Sch. v. Fla. State Bd. of Educ.*, 232 So. 3d 1163, 1173 (Fla. 1st DCA 2017). Parents thus did not argue FTC in the First DCA, but preserved it for appeal before this Court. They incorporated by reference their legal argument and undisputed facts submitted in the trial court. (R.257-68, 271-80, 282-90, 293-1122.)

The trial court conducted a four-week bench trial, rendered final judgment for the State (R.3371-99), and made findings of fact in an appendix (R.3400-3578). It concluded that Parents' claim was not justiciable (R.3394), and that the McKay program does not violate Article IX's uniformity requirements. (R.3398.)

The First DCA affirmed, holding that Parents' claim is a non-justiciable political question, and that the McKay voucher program does not violate Article IX. 232 So. 3d 1163. Parents timely sought discretionary review.

II. Statement of the Facts

As discussed in the Argument, Parents request this Court hold that their claim is justiciable, and remand to the trial court for further review under the appropriate standard of review. Parents present some of the undisputed facts, not for this Court to

re-weigh and make a decision on the merits, but to show that on remand with guidance and an appropriate standard of review that there is a basis on which the trial court can determine whether Article IX's mandate has been fulfilled.

A. The State Has Determined What a High Quality Education is and How to Measure It.

The State has defined a "high quality" education, and how to measure whether that standard has been met, using state assessments (R.3437 ¶108), which align with the State's content standards. (R.3419-20 ¶¶53-56.) § 1000.03(5)(d), Fla. Stat. (2017). Content standards define the core content knowledge that children should be taught at each grade level for each subject area and what children should know by the end of the year.[1] (R.3421 ¶¶55,58.) § 1003.41, Fla. Stat. (2017). The standards are "rigorous and relevant and provide for the logical, sequential progression of core curricular content that incrementally increases a student's core content knowledge and skills over time." *Id.* The statewide assessment system the State designed determines whether its standards have been met. *Id.* § 1008.22(3). The State Board of Education sets passing scores for each statewide standardized assessment. *Id.* § 1008.22(3)(e)3. That scores from these assessments are used for graduation, *id.* § 1003.4282(3), grade promotion, *id.* § 1008.25, teacher evaluations, *id.* § 1012.34(7), and A–F letter grades to schools and districts, *id.* § 1008.34(3), emphasizes the importance to the State of using the assessment system to measure whether a high quality education has been

[1] Tr.v.5, 653:20-654:13; v.30, 4610:12-20.

delivered.

B. Assessment Results Show Low Achievement and Wide Disparities.

On remand, using an appropriate standard of review, there is undisputed evidence for a trial court to measure whether a uniform and high quality education is being delivered to all students. The most current results in the record from the statewide assessments, from 2014, show that 58% of students across all grades passed on grade level (which is Level 3, *id.* § 1008.34(1)(a)), or higher in reading,[2] and 56% of students statewide passed math.[3] The failure rates are high: 667,252 students (42%) did not read at grade level,[4] and 509,196 students (44%) did not pass math.[5] There are disparities in reading achievement by subgroup as only 38% of Black students passed reading; 54% of Hispanic students; 19% of English Language Learners (ELL);[6] 47% of students receiving Free-Reduced Lunch (FRL) (a proxy for poverty);[7] and 37% of homeless students.[8]

There also are wide disparities among school districts. It is illustrative to use

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[2] Ex. 2907, at 72026. Tr.v.5, 599:3-12; 943:7-10; v.30, 4532:20-4533:2.
[3] Ex. 2907, at 72054.
[4] *Id.* at 72050.
[5] *Id.* at 72072. Reading proficiency rates are averaged across grades 3-10 and math are grades 3-8.
[6] Ex. 2907, at 72027, 72031.
[7] Ex. 1833; Tr.v.3, 375:8-11; v.8, 1203:6-10; v.9, 1352:13-18; v.12, 1799:16-17; v.13, 1970:13-14; v.19, 2842:1-6; v.29, 4396:24-25; v.33, 4965:12-13.
[8] Ex. 3588, at 96689.

third[9] and tenth[10] grade results as they are important for grade promotion and graduation. *Id*. § 1003.4282(3)(a); § 1008.25(7)(b). (R.3446 ¶126a&b.) The statewide average passing rate for reading for third graders is 56%, and 55% for tenth graders.[11] In St. Johns, 76% of third graders and 75% of tenth graders passed reading.[12] Hamilton has the lowest overall reading passing rate for third graders at 35% of students.[13] The lowest reading rate for tenth graders was Gadsden with 26%.[14] Thus, the difference in reading rates among districts in third grade is 41 percentage points, and 49 in tenth grade.

On the 8th grade math assessment, Bradford had the lowest passing rate at 5% overall, 0% for Black students, 6% for FRL, and 0% for students with disabilities.[15]

In 2015, Franklin had the lowest graduation rate at 49%, and three other school districts were below 60%.[16] In contrast, St. Johns and three other districts had graduation rates over 90%, and Dixie had the highest at 96.9%.[17] The difference in graduation rates between Franklin and Dixie was almost 48 percentage points.[18] One of the State's measures of college readiness shows a statewide average of 27%, with

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[9] Tr.v.5, 606:25-607:15, v.7, 966:2-4.
[10] Tr.v.27, 4092:16-4093:1
[11] Exs. 2901.
[12] Ex. 4186.
[13] Ex. 4152.
[14] Ex. 4148.
[15] Ex. 4065.
[16] Ex. 4050.
[17] *Id*.
[18] *Id*.

disparities ranging from St. Johns at 55% versus Hamilton with 1%.[19]

C. Assessment Results Show Persistently Low Performing Schools.

It is uncontroverted that the number of A and B schools decreased between 2011 and 2014, while the number of D and F schools increased.[20] There were 489 schools in the state's school improvement program in 2015-16.[21] The majority of these schools serve a high percentage of FRL and minority students.[22]

There are 32 schools in 14 school districts that received either a grade of D or F for four consecutive years from 2010-11 through 2013-2014.[23] There are 28 schools (all serving high poverty students) that are persistently low-performing (5 or more years as F).[24] Schools identified as low-performing, D or F typically serve high numbers of FRL, Black, or Hispanic students.[25] Of the 300 lowest performing elementary schools in 2013-2014, 294 serve high poverty students, 291 have a 50%+ minority rate, and 168 have a minority rate that is 90% or higher.[26]

Of the 300 low performing elementary schools in 2013-14, 54 schools (all high

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[19] Exs. 2929, at 72463, 72483-84.
[20] Ex. 5320.
[21] Ex. 1950.
[22] Tr.v.5, 592:15-19; v.12, 1842:10-21; v.14, 2170:16-25; v.15, 2218:11-2219:16; v.19, 2839:11-15, 2841:13-2842:6.
[23] Ex. 1950.
[24] Exs. 1950; 5292.
[25] Tr.v.5, 592:7-22; v.9, 1281:3-5; v.12, 1842:14-21; v.14, 2170:16-25; v.15, 2218:11-2219:16; v.19, 2839:11-15, 2841:13-2842:6.
[26] Ex. 2011.

poverty)[27] in 18 school districts received D's or F's for three consecutive years (2011-12 through 2013-14). Five schools in Pinellas earned D's or F's for five consecutive years, and an additional two earned D's or F's for four consecutive years (all high poverty). One of those schools earned six consecutive F's with only 19% of all students passing reading, and 18% passing math in 2013.[28]

D. Inputs Low Performers Need to Achieve Core Content Knowledge.

The trial court made findings about what low performers need in order to achieve. It found that school districts have a duty to respond to children's needs at whatever level the children are at in order to make educational opportunities meaningful. (R.3413 ¶32.) The majority (58%) of public school students live in poverty (FRL). (R.3404 ¶2.) Many come to school not ready to learn, lacking the background that more privileged children have.[29] (R.3413 ¶33.)

There is a clear disparity in the performance of economically disadvantaged students versus those who are not economically disadvantaged.[30] (*Id.*) Students living in poverty require additional resources in order to succeed at school.[31] (*Id.* ¶34.) Children can achieve regardless of socio-economic background, but extra resources are needed to provide economically disadvantaged students with an opportunity to

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[27] *Id.*
[28] Exs. 1950; 5292; 1900, at 56851, 56866-67.
[29] Tr.v.19, 2773:23-2774:8; v.13, 1889:19-1890:8.
[30] Tr.v.6, 761:4-25; *also see* Ex. 5343.
[31] Tr.v.5, 596:21-597:6; v.6, 769:25-770:11; v.19, 2774:9-19; v.13, 1892:15-1893:7.

achieve, which state funding does not provide.[32] (R.3414 ¶35.)

In addition to effective teachers, the trial court found that a team of professionals are necessary to support the academic and emotional needs of low performing students (R.3415 ¶38): behavior specialists (*id.* ¶39),[33] mental health counselors (*id.* ¶40),[34] social workers (*id.* ¶41),[35] guidance counselors (R.3416 ¶42),[36] academic coaches (*id.* ¶43),[37] class aides or paraprofessionals (*id.* ¶44),[38] nurses (*id.* ¶45),[39] tutors (*id.* ¶46),[40] and media specialists (*id.* ¶47).[41] Smaller class sizes, individualized and small group instruction are vital for providing the intensive instruction that is necessary for students who are underperforming.[42] (R.3417 ¶48.)

E. State Funding Inefficiencies.

The trial court made findings of fact about funding and concluded that state funding was sufficient or that the responsibility lay with local school boards. (R.3499

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[32] Tr.v.5, 597:7-12.
[33] Tr.v.6, 788:3-13; v.9, 1287:25-1288:12; v.13, 1891:10-14, 1896:6-1898:8.
[34] Tr.v.6, 742:16-23, 770:12-20, 788:14-16; v.7, 1072:4-1073:6; v.9, 1291:9-24; v.13, 1890:9-22, 1893:21-1894:11, 2013:16-24.
[35] Tr.v.6, 742:16-23, 771:10-772:18, 787:15-788:2; v.7, 984:23; v.9, 1288:21-1289:11; v.13, 1900:5-14; v.22, 3234:16-3235:18.
[36] Tr.v.6, 788:25-789:25; v.7, 1076:9-23; v.9, 1287:13-15.
[37] Tr.v.5, 632:22-633:5; v.6, 742:5-15, 790:16-791:17; v.7, 1073:7-21; v.9, 1288:13-20.
[38] Tr.v.6, 790:1-15; v.9, 1287:20-24; v.13, 1898:9-1899:25.
[39] Tr.v.6, 742:16-23; v.7, 984:23-985:11.
[40] Tr.v.7, 1074:7-16.
[41] Tr.v.16, 2425:9-17; 2465:16-23.
[42] Tr.v.5, 597:13-20, 632:22-633:5; v.6, 742:5-15, 773:23-774:6, 786:23-787:11, 790:1-15; v.7, 1059:11-24; v.13, 1899:2-25, 1903:21-1904:23; v.18, 2726:16-2727:25; v.20, 3010:21-3011:8; v.21, 3151:3-7; v.22, 3241:21-3242:14.

¶256, 3534-35 ¶¶346-49, 3537 ¶¶353-54, 3538-39 ¶356-57, 3542 ¶363, 3554 ¶¶392-93, 3563 ¶422, 3564 ¶423, 3565 ¶426, 3577 ¶464.) As Parents do not appeal these for clear error, but rather seek a remand using the appropriate standard of review, Parents present the following undisputed facts to show evidence for consideration on remand.

The Legislature sets the amount of state and local funds through a funding formula called FEFP. § 1011.60, Fla. Stat. (2017). Neither the Legislature nor the Department of Education has ensured that education financial resources are aligned with student performance expectations as required by statute. *Id*. § 1000.03(5)(d).[43] The FEFP has been amended since enacted in 1973, but neither the Legislature nor the Department has conducted a cost analysis[44] to determine if the amount funded is adequate to ensure that all students can achieve on Florida's standards.[45] The State has not determined what resources are necessary to ensure that all students achieve on the standards, or how much it costs to deliver a high quality education.[46]

No extra funds are provided for schools in the school improvement program[47] (R.3468 ¶176), yet schools graded "A" get extra funding. § 1008.36, Fla. Stat. (2017). The State expects school districts to re-allocate funds within the district to implement

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[43] Tr.v.33, 4986:20-24; v.34, 5089:6-12.
[44] Tr.v.2, 109:19-110:5, 113:14-114:1.
[45] Tr.v.15, 2306:2-9; v.16, 2361:2-6; v.27, 4070:7-16; v.33, 4963:19-4964:12; v.34, 5088:1-12.
[46] Tr.v.3, 4963:19-4964:12; v.4, 5088:1-12; v.5, 2306:2-9; v.16, 2361:2-6.
[47] Tr.v.30, 4510:21-4511:5; Ex. 1708, at 49607.

school improvement.[48] § 1001.42(18)(d), Fla. Stat. (2017). Witnesses from multiple districts described the benefit of additional resources in improving struggling schools, but also the problems with taking money away from other schools.[49] The State has not analyzed whether school improvement funds are sufficient[50] or whether there are sufficient resources to implement the goals in school improvement.[51] The State asserts that effective teachers are needed in order to improve student performance (*see* R.3473 ¶183), yet it has failed to analyze whether effective teachers need additional support to do their job,[52] such as the court found was necessary. *See supra* Facts, § D.

To obtain extra funding, school boards may seek voter approval for additional taxes, but this results in disparities across the state.[53] While school boards have the authority to seek voter approval for extra millage or sales taxes, they cannot raise

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[48] Ex. 5356, at 30-31, 76:3-17, 76:22-77:2, 77:5-6, 77:7-78:1, 78:2-9, 78:10-11; Tr.v.5, 595:23-596:5; v.10, 1406:12-1407:22; v.13, 1991:22-1993:1; v.15, 2217:23-2218:10; v.19, 2837:10-12; v.22, 3238:21-3829:10.
[49] Tr.v.5, 613:20-615:12, 682:18-683:8; v.13, 1990:15-1996:11; v.22, 3236:23-3237:17, 3238:21-3239:10, 3300:23-3301:12; Ex. 1950, at 58177.
[50] Ex. 5356, at 30-31; 76:3-17, 76:22-77:2, 77:5-6, 77:7-78:1, 78:2-9, 78:10-11; Tr.v.5, 595:23-596:5; v.10, 1406:12-1407:22; v.13, 1991:22-1993:1; v.15, 2217:23-2218:10; v.19, 2837:10-12; v.22, 3238:21-3829:10.
[51] Tr.v.10, 1433:4-11; v.12, 1856:25-1857:1, 1873:11-23; v.14, 2175:25-2176:14, 2177:11-21, 2178:14-2179:6, 2198:21-2199:2; v.15, 2221:21-2222:4, 2223:12-2225:2, 2230:18-2232:2, 2257:15-2258:22, 2259:2-2261:20; v.19, 2845:22-2846:5, 2846:21-25, 2863:22-2864:11, 2869:24-2870:3, 2871:14-23, 2876:7-21, 2905:12-16, 2927:22-2928:5; v.27, 4074:23-4076:5; v.30, 4635:19-4636:18.
[52] Tr.v.15, 2230:14–2232:2.
[53] Tr.v.4, 3569:11-3570:1; v.7, 1046:20-1047:15.

those taxes on their own without voter approval and cannot guarantee that any referendum would pass.[54] Many referenda have failed in recent years.[55] There are costs associated with voter referenda.[56]

Funds from voter approved taxes in some districts pay for basic education, such as highly qualified teachers, reading and academic programs, arts and music, nurses, elementary guidance, school library, and magnet programs.[57] Some school improvement plans rely on support from referendum funds.[58] There is a disparity in how much revenue can be raised: for example, 1 mill is worth over $225 million in Miami-Dade, but only $224,084 in Liberty.[59] Some school districts also rely heavily on private grants to pay for school improvement and basic programs.[60]

Several school districts in recent years have had to submit fiscal recovery plans

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[54] Tr.v.6, 924:17-925:1; v.7, 979:20-980:20; v.8, 1136:1-3; v.18, 2686:1-3; v.22, 3301:13-3302:9; v.33, 4979:23-25.
[55] Ex. 1204, at 29331-43, 29769-75, 29110-27, 29176-79, 29206-07, 29224-77, 29282-89, 29372-74, 29385-92, 29416-21, 29503-04, 29550-58, 29569-70, 29731-33, 29084-89, 29375-77, 29658-67, 29669-70. *See also* Tr.v.7, 1047:6-14; v.13, 2015:7-14.
[56] Tr.v.7, 1056:21-1057:3; v.20, 2943:15-21.
[57] Ex. 1204, at 29062-68, 29074-75, 29080-83, 29130-31, 29215-16, 29297-99, 293-19-20, 29358-60, 29379-85, 29430-33, 29518-25, 29532-47, 29567-68, 29575-81, 29671-709, 29711-22, 29724-25, 29735-41, 29765-66, 29776-79. *See also* Tr.v.6, 801:20-802:10; v.22, 3219:21-3220:19.
[58] Ex. 1903, at 57026; Tr.v.19, 2896:8-2897:5.
[59] Ex. 3419.
[60] Tr.v.5, 613:20-615:1; v.7, 1000:18-1001:8, 1064:5-1065:24; v.8, 1074:9-16; v.9, 1288:22-23; v.12, 1850:21-25; v.13, 1940:25-1941:2; v.22, 3222:18-3227:18; v.23, 3526:17-3527:12; v.24, 3707:4-3708:16, Exs. 1991, at 58981; 1075, at 24374-45; 1898, at 56767; 1899, at 56824, 56832.

to the Department of Education.[61] Gadsden has been in fiscal recovery for three years[62] with hiring and spending freezes to the point that it is concerned with buying pencils and pens.[63] The State does not provide additional funding to school districts that are in financial distress.[64] Insufficient resources in Gadsden has impacted student performance, as it now has the lowest overall proficiency rate in tenth grade reading, with only 26% of students reading at grade level.[65] Other school districts in financial distress such as Franklin also have significant problems with student performance.[66]

F. The McKay Program Is Neither Free Nor Uniform.

The following facts reflecting how McKay private schools differ from public schools are not disputed. Parents review these facts to demonstrate that the trial court, while considering McKay justiciable, applied the wrong standard of review here as well and that there is evidence for consideration on remand. In the 2014-15 school year, payments for McKay vouchers totaled $205.8 million.[67] McKay private schools are not required to accept all Florida residents to participate in the program.[68] Private schools are not free as the vouchers do not cover all of the schools' tuition or other

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[61] Tr.v.7, 1051:1-24, v.8, 1105:1-4; v.14, 2039:8-10; v.17, 2659:12-2600:10, 2606:11-13, 2607:18-23, 2609:15-2610:2; v.24, 3662:21-3664:6.
[62] Tr.v.17, 2599:12-2600:10, 2606:11-13, 2607:18-23, 2609:15-2610:2.
[63] Tr.v.17, 2602:20-22, 2605:4-25, 2608:7-12.
[64] Tr.v.7, 1051:24-1052:4; v.17, 2610:8-2611:5; v.27, 4072:24-4073:14.
[65] Ex. 4148.
[66] Tr.v.7, 1050:18-1051:12; Exs. 4147; 4050.
[67] Ex. 3180.
[68] Exs. 5361, at 14-15, 146:9-147:5; 5355, at 2, 26:8-27:8; at 9, 62:21-63:14.

expenses.[69] Private schools are not responsible for transportation.[70]

Teachers in private schools do not all have bachelors degrees or educator certificates.[71] Teachers do not need a high school diploma if they have "special skills, knowledge or expertise" in the subjects taught.[72] § 1002.421(2)(h), Fla. Stat. (2017).

Students in private schools are not required to take particular courses or learn the subjects set out in state standards.[73] Public school graduation requirements do not apply to private schools.[74] Private school course credits are not always accepted when McKay students return to public schools.[75] Curriculum in private schools is not required to be aligned with state standards.[76] § 1002.395(1)(c), Fla. Stat. (2017). Unlike public schools, private schools are not required to be non-sectarian and some require courses in creationism, the Bible or the Quran to graduate.[77] In 2014-15, 59.5%

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[69] Tr.v.23, 3394:20-3395:18. Ex. 5360, at 12, 55:22-25; Exs. 5361, at 8, 88:20-24; 5355, at 7, 42:19-43:9; 5358, at 1-2, 9:23-10:2, 10:8-13; 5362, at 1, 41:11-24; 5352, at 4-5, 47:3-10, 46:15-23, 49:20-23, 50:3-10 50:25-51:15; 5369, at 2-4, 32:23-33:11, 37:15-39:13; 5355, at 3-8, 32:18-33:1, 35:2-37:18, 38:4-6, 38:24-40:25, 44:25-45:19.
[70] Tr.v.23, 3405:3-5; Ex. 5352, at 1, 18:12-13; 5355, at 1, 17:10-14.
[71] Exs. 5352, at 2, 26:16-21; 5369, at 5, 45:5-13, 47:17-48:2, 51:2-23.
[72] Ex. 5370, at 3-4, 59:10-22; Tr.v.23, 3399:13-3400:7.
[73] Tr.v.23, 3398:10-18.
[74] Ex. 5360, at 9, 41:4-9; Tr.v.23, 3399:5-6.
[75] Ex. 5357, at 7-8, 57:19-58:12; at 12, 75:25-76:8; at 13, 81:13-15.
[76] Exs. 5361, at 6, 69:3-9; 5360, at 7, 30:6-9, 13-24; at 9, 39:1-3; 5352, at 2, 36:11-19; at 3, 38:20-39:12, 41:12-18; at 3-4, 42:14-18; 5352, at 1, 20:19-21:2; Tr.v.23, 3383:10-16; 3387:15-3388:15; 3398:23-3399:1.
[77] Exs. 5369, at 6, 57:22-59:2; at 6-7, 59:10-61:8; at 8-9, 68:10-69:3; at 9, 69:18-70:11; at 9-10, 70:18-71:21; 5369, at 1, 22:10-15; 5369, at 1-2, 23:13-24:13; 5369, at 3, 35:11-36:16; at 8, 64:13-65:21; at 9, 70:12-17; at 10-11, 77:2-10; 5355, at 8, 61:2-62:2.

of the students in McKay were enrolled in religious schools.[78]

Even though McKay is directed at students with disabilities, McKay schools are not required to offer services related to the student's disability.[79] They are not required to follow federal or state disability education laws or provide procedural protections.[80]

SUMMARY OF ARGUMENT

Parents' claim that the State is failing to comply with its mandatory duty under Article IX, Section 1(a), Florida Constitution, is justiciable. The 1998 revision to Article IX was intended to and does provide judicially manageable terms. The Legislature established the standard for measuring whether the State is providing an opportunity for a high quality education when it developed the core content knowledge that all students need to learn. It also provided an assessment to measure whether students have achieved on those standards. Parents presented evidence to the trial court that not all children are learning the core content knowledge, as measured by wide disparities in achievement on state assessments, especially for children experiencing poverty or attending school in poorer school districts. The First DCA was wrong to categorically reject that judicially manageable standards for assessing the adequacy of Florida's education system might exist.

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[78] Ex. 3180.
[79] Tr.v.23, 3395:19-3396:4; Ex. 5352, at 1, 23:9-14; at 2, 24:21-25:10; at 4, 45:14-21; 5358, at 1-2, 11:10-14; 5358, at 1, 6:13-23.
[80] Tr.v.23, 3403:18-3404:16; v.36, 5364:9-17.

The Florida Constitution's separation of powers provision does not bar Parents' suit because they are not asking the judiciary to encroach on the legislative duty to make educational policy, nor are they asking the courts to make appropriations or order the Legislature to do so. Parents instead seek only declaratory relief, and for courts to fulfill their traditional responsibility to: (1) interpret constitutional terms, and (2) determine if the other branches have acted constitutionally. Article IX mandates that the Legislature act, which it has done, but that does not take away the judicial responsibility to ensure that those actions are consistent with Article IX's restrictions on legislative power.

Parents ask that ordinary or rational basis scrutiny be rejected as insufficient to evaluate whether the State has met its paramount duty. Consistent with this Court's precedent, the constitutional provision itself provides the yardstick by which to measure compliance. Parents request that a constitutional compliance standard or a heightened level of scrutiny be adopted that is appropriate for determining compliance with a fundamental value. Further, preponderance of the evidence, the typical burden of proof in civil cases, rather than beyond a reasonable doubt, should be applied.

The First DCA relied on the trial court's findings of facts made under an incorrect standard of review related to whether McKay violates Article IX's uniformity mandate. Parents ask this Court to remand this issue for consideration under the correct standard of review.

Parents seek a ruling that taxpayer standing involves challenges to taxing and spending of the State, and not just appropriations. They seek a remand for a determination of whether FTC's tax credits should be considered public funding under Article IX. Parents also seek a ruling that they have special injury standing and that the FTC issue be remanded for a determination under the proper standard of review of whether it meets Article IX's mandates and restrictions.

ARGUMENT

I. THE ADEQUACY PROVISIONS OF THE EDUCATION ARTICLE ARE JUSTICIABLE.

The standard of review for interpreting Article IX is de novo. *Bush v. Holmes*, 919 So. 2d 392, 399-400 (Fla. 2006). The standard of review for separation of powers determinations is de novo. *Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004).

Article IX, Section 1(a), Florida Constitution, provides, in relevant 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 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....

This text was approved by voters in 1998. The revision mandates that the State give all children in Florida a chance to obtain a high quality education. Parents allege this is not occurring. But the First DCA ruled that, regardless, courts have no power

to ensure it does. That decision was an abdication of the courts' core responsibility to act when other branches of government's acts violate the constitution. *Locke v. Hawkes*, 595 So. 2d 32, 36 (Fla. 1992) (primary judicial function is to interpret constitutional provisions).

The First DCA's justiciability holding was wrong for two reasons. First, in deciding that Article IX's terms are not judicially manageable, it either misinterpreted or ignored key elements of the revision's text and history, and ignored the State's enacted standards. Second, its separation of powers analysis misconstrued the relevant portion of the Florida constitution.

A. The History of Article IX Shows That the First DCA Was Wrong to Conclude That Adequacy Challenges Are Not Justiciable.

In reaching the conclusion that some terms in Article IX are not justiciable, the First DCA relied on this Court's decision in *Coalition for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 408 (Fla. 1996). This was wrong as it: (1) misinterpreted *Coalition*; (2) ignored voters' response to *Coalition* (the 1998 revision intended to strengthen the education article); and (3) ignored this Court's subsequent decision in *Holmes*, which treated the education article as justiciable.

In *Coalition,* the three-judge per curiam opinion held that the education article's adequacy provisions could be justiciable, but that plaintiffs had failed to propose a standard for adequacy that did not impinge on the legislature's policy-making authority. *Id.* at 408. The Court concluded that the judiciary is not competent to

determine whether the system was "adequate in the abstract, divorced from the required uniformity," but declined to hold that there could "never" be a case in which a court could hold that the state's education system violates the constitution. *Id.* at 406-07. Even the First DCA recognized that *Coalition* did not hold that an adequacy challenge could **never** be justiciable, yet it treated it as so in declaring Parents' challenge nonjusticiable. 232 So. 3d at 1170.

In a concurrence, Justice Overton explained that Article IX as it existed then contained a minimum threshold below which the funding provided by the legislature would be considered "inadequate." *Id.* at 409 (allegation of a county with 30% illiteracy rate would state a cause of action). However, he agreed that on the facts presented that the complaint did not allege inadequacy sufficient to state a claim. *Id.* The three dissenting justices would have gone even further and remanded to the district court for "further proceedings so that a factual context can be established for determining whether the legislature has complied with the mandate of the people of Florida to make adequate provision for a uniform system of free public schools." *Id*

The First DCA's reliance on *Coalition* also was misplaced because the 1998 CRC revision to Article IX, Section 1(a) was a direct response to *Coalition* to provide the judicially-manageable standards that *Coalition* said Article IX lacked. *Holmes*, 919 So. 2d at 404. *See also State v. Creighton*, 469 So. 2d 735, 739 (Fla. 1985), receded from on other grounds by amendments to Fla. R. App. P., Nov. 22, 1996

(when language of constitution is altered or amended, courts presume that such changes are intentional, and that a different effect is intended from prior language). The ballot statement presented to the voters who approved the revision explained:

> Our Constitution presently requires 'adequate provision' for public schools. The Florida courts have held, however, that the Constitution does *not* provide any standards for determining whether adequate provision has been made.
>
> To address these shortcomings, the Commission recommended that our Constitution state that the education of Florida's children is a fundamental value and is a paramount duty of the state. Also, guidelines for determining whether the education system is adequate are provided, and require that our system be efficient, safe, secure and high quality.

CRC Analysis of Revisions for Nov. 1998 Ballot, Revision 6, http://fall.law.fsu.edu/crc/tabloid.html.[81] *See State v. Grassi*, 532 So. 2d 1055, 1056 (Fla. 1988) (relying on ballot summary to determine effect of constitutional amendment). Voters also were explicitly informed that one "pro" (i.e., positive outcome) of the revision was that it "**provides a basis for legal challenge** if the system does not meet the standards." *Id.* (emphasis added).

This language was consistent with what the drafters intended, which is to provide a standard for compliance that can be enforced by the judiciary. *See* CRC Minutes, Jan. 13, 1998, at 147, 150, 202, http://fall.law.fsu.edu/crc/minutes/crcminutes011398.html; *City of St. Petersburg v. Briley, Wild & Assocs., Inc.*, 239 So.

[81] All cited portions of the CRC Analysis or Minutes are included in the Appendix.

2d 817, 822 (Fla. 1970) (relying on CRC minutes to prevent unreasonable interpretation or one inconsistent with intent of framers). Despite this unambiguous evidence that the revision was intended to create a judicially manageable and enforceable set of standards for education, the First DCA erroneously construed the provision in precisely the opposite manner. *See Caribbean Cons. Corp. v. Fla. Fish & Wildlife Cons. Comm'n*, 838 So. 2d 492, 501 (Fla. 2003) (courts must ascertain intent of the framers and interpret constitution in a way that does not defeat but rather fulfills the intent of the people).

In interpreting the effect of the 1998 revision to Article IX, this Court recognized that the provision "sets forth **how** the state is to carry out this education mandate, specifically, that '**[a]dequate** provision shall be made by law for a **uniform, efficient, safe, secure, and high quality system of free public schools**.'" *Holmes*, 919 So. 2d at 405, quoting Art. IX (emphasis added). Without discussing separation of powers or political question, *Holmes* interpreted and applied the terms "uniform" and "free system of public schools." *Id.* at 406-10. It also noted that reducing funding for public schools undermines their "high quality." *Id.* at 409. The revision to the education article was clearly intended to and resulted in judicially manageable standards that courts have an obligation to review to determine whether the State has fulfilled its duty in the "manner" specified by Article IX. *See id.* at 408.

B. Article IX Contains Judicially Manageable Standards.

The First DCA held that "[w]hile 'adequate,' 'efficient,' and 'high quality' represent worthy political aspirations, they fail to provide the courts with sufficiently objective criteria," and that, hence, it could not consider Parents' claims without violating the separation of powers by substituting its own policy judgment for the Legislature's. 232 So. 3d at 1172.

1. *The State of Florida Has Adopted Judicially Manageable Standards.*

Responding to its constitutional duty, the Legislature has: (a) adopted academic standards; (b) enacted a system to measure progress toward those standards; and (c) set out its priorities for education through statute. § 1000.03, Fla. Stat. (2017). The legislatively adopted standards "establish the core content of the curricula to be taught in the state and specify the core content knowledge and skills that K-12 public school students are expected to acquire." *Id.* § 1003.41(1). An assessment system determines whether the standards have been met. *Id.* § 1008.22(3). Passing scores are set by the State Board of Education for each assessment. *Id.* § 1008.22(3)(e)3. The State uses the scores not only to measure individual student performance, but also for graduation, *id.* § 1003.4282(3); grade promotion, *id.* § 1008.25; teacher evaluations, *id.* § 1012.34(7); and A–F letter grades to schools and districts, *id.* § 1008.34(3).

At trial, Parents submitted uncontroverted evidence that not all children were achieving under the State's own standards. Averaged across all grades, only 58% of

students achieved a passing score in reading and 56% in math. These failure rates are under the state's own standards. In some places, such as Hamilton County, only 1% of students are college ready. Also, there are disparities in subgroups, e.g., only 38% of black students passed reading. *See supra* Facts, § B.

The First DCA decided this case solely on justiciability grounds, and the trial court, while purporting to decide the case on both justiciability and the merits, adopted an inappropriate standard of review for its analysis of the merits. *See infra* Argument II. As such, given the posture of this case, Parents do not request this Court resolve whether Florida's education system is constitutionally adequate. Rather, Parents cite these legislative enactments and uncontroverted facts to show that the First DCA was wrong to categorically reject the possibility that judicially manageable standards may exist to assess the constitutional adequacy of Florida's education system. The Florida Legislature has enacted standards, and the State's success or failure in meeting those standards must be subject to judicial review.

In rejecting the possibility of judicial review of the actions of other branches under Article IX, the First DCA cited a few decisions from the minority of other state supreme courts which have concluded that their states' education articles are not justiciable. But it ignored the majority, which found judicially manageable standards for determining legislative compliance with their state constitutional requirements.

Washington is the only other state with a constitution that refers to providing

education as a "paramount duty." Wash. Const. Art. 9, § 1. Decades ago, that state's supreme court "directed the legislature to comply with its duty by 'defining and giving substantive meaning' to the word 'education' and the program of basic education." *McCleary v. State*, 269 P.3d 227, 232 (Wash. 2012), quoting *Seattle Sch. Dist. No. 1 of King Cnty. v. State*, 585 P.2d 71, 95 (Wash. 1978). In response, the legislature created specific standards for nine content areas to "define what all students should know and be able to do at each grade level" and developed a testing system to assess whether students in fact met them. *Id.* at 236. *McCleary* found that the "legislature devised a basic education program" and "defined the resources and offerings the legislature believed were necessary to give all students an opportunity to meet state standards." *Id.* at 253. It held that "substantial evidence shows that state allocations have consistently fallen short of the actual cost of implementing the basic education program. By the legislature's own terms, it has not met its duty to make ample provision for 'basic education.'" *Id.*

McCleary makes clear that this Court need not take on the task of defining the components of an adequate education. Instead, it can use the tools provided by the State for that purpose, intervening only when the Legislature's own standards are being violated, as they are here.

Instead of taking its cue from Washington, the First DCA cited a Pennsylvania holding that was recently reversed, which had stated "that it would be contrary to the

very essence of our constitution's educational aspirations for the courts to 'bind future Legislatures ... to a present judicial view' of adequacy, efficiency, and quality." 232 So.3d at 1172, quoting *Marrero ex rel. Tabalas v. Commonwealth of Penn*., 739 A.2d 110, 112 (Pa. 1999), *rev'd, William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 170 A.3d 414, 450 (Pa. 2017). While *William Penn* did not definitively resolve whether the legislature's standards were the only measurable standards under the education clause of the state constitution, it did quote those standards and noted that, "in light of [them] it was "somewhat incongruous for Respondents to maintain that there is no prospect that a court could fashion a constitutionalized account not unlike this one, and measure the state of public education against that rubric, just as other states have done." *Id*. at 452-53. Thus, the non-justiciability decision the First DCA relied on as persuasive precedent has, in fact, been overturned and the relevant constitutional guarantee found justiciable. Other courts have reached similar conclusions. *See, e.g., Conn. Coal. for Justice in Educ. Funding, Inc., v. Rell*, 990 A.2d 206, 225 n.24 (Conn. 2010) (collecting cases for "the vast majority of jurisdictions" that conclude that "claims that their legislatures have not fulfilled their constitutional responsibilities under their education clauses are justiciable").

2. *Article's IX's Terms Have Been Defined*.

To assist the court in interpreting Article IX, section 1(a), Parents review the pertinent terms. The following is meant to explain briefly how the CRC, c*f. Caribbean*

Cons. Corp., 838 So. 2d at 501 (intent of the framers), and then the Legislature, did the necessary work to make these terms judicially manageable.

"All children." This term identifies who has a right to receive an education, not the specific form of the education. The intent of this term was to ensure that "none of Florida's children get left behind." CRC Minutes, Feb. 26, 1998, at 66-67, http://fall.law.fsu.edu/crc/minutes/crcminutes022698.html. The Legislature codified this mandate throughout the Education Code. *See, e.g.*, §§ 1000.01(3); 1000.02(2); 1000.03(3)&(5)(a); 1004.04; 1008.31(2)(a), Fla. Stat. (2017). The obligation to "all children" requires that a constitutionally adequate education be provided to students across counties, economic circumstances, race, ethnicity, housing status, disability, and English language proficiency, among other factors. Specifically, the Legislature provided that its priorities include that "[a]ll students demonstrate increased learning and completion at all levels, graduate from high school, and are prepared to enter postsecondary education without remediation." *Id.* § 1000.03(4)-(5)(a).

The term "all children" is judicially manageable and measurable by disaggregating statewide data to look at results for subgroups and across districts to examine whether all groups of children are achieving the educational goals established by the State. The low rates of proficiency on reading and math for certain populations of children demonstrate that far from **all** children are achieving. *See supra* Facts, § B. Wide disparities in achievement among school districts further show that far from

all children are receiving uniform educational opportunities. *Id*.

"Adequate provision." In response to this Court's decision in *Coalition*, the 1998 CRC added terms to the education article with the explicit purpose of providing standards "to define what adequate education should be in the state of Florida with common terms used in other constitutions ... which would give guidance to either the legislature or the courts." CRC Minutes, Jan. 13, 1998, at 147-48, http://fall.law.fsu.edu/crc/minutes/crcminutes011398.html. As such, the current constitution includes terms, including uniform, efficient, and high quality, that define "adequate provision," and restrict how "adequate" provision is to be made under the constitution. *Holmes*, 919 So. 2d at 405. The constitution now contains clear standards that set forth how the state is to carry out its mandate. *Id.*

"Uniform." The term "uniform" has been defined by this Court and is manageable and justiciable. The First DCA conceded that prior courts had held "uniform" to be a judicially manageable and enforceable term, but it incorrectly claimed that "the sole uniformity claim on appeal" relates to McKay. 232 So. 3d at 1173. If the First DCA's holding of non-justiciability is applied to "uniform," it would render the current education article even less powerful than the pre-1998 one that was before the *Coalition* Court.

By neglecting to apply the constitutional mandate to the wide disparities among different populations and school districts, the First DCA recedes from the long history

of case law interpreting and exercising jurisdiction over the "uniformity" provision of Article IX. *See Holmes*, 919 So. 2d at 409-10 ("private school's curriculum and teachers are not subject to the same standards as those in force in public schools," and thus are not uniform); *Coalition*, 680 So. 2d 408 ("uniform" is manageable and means lack of substantial variation); *St. Johns Cnty. v. NE Fla. Builders Ass'n, Inc.*, 583 So. 2d 635, 641 (Fla. 1991) ("uniformity" requires that a system be provided that gives every student an equal chance to achieve basic educational goals prescribed by the legislature); *Fla. Dep't of Educ. v. Glasser*, 622 So. 2d 944, 950 (Fla. 1993) (Kogan, J., specially concurring) ("variance from county to county is permissible so long as no district suffers a disadvantage in the basic educational opportunities available to its students, as compared to the basic educational opportunities available to students of other Florida districts").

"Uniformity" thus requires that public education be uniformly adequate. Applying this Court's precedent, a trial court can objectively evaluate whether all children have an equal chance (*St. Johns Cnty.*) to achieve basic educational goals (*St. Johns Cnty. & Glasser*) with no substantial variations (*Coalition*). The basic educational goals have been established by the Legislature, and are measurable.

"Efficient." One reason "efficient" was added in 1998 was the intention that adequacy was not "simply money" and therefore "a system could be judged to be inadequate and not require any money to fix it." CRC Minutes, Feb. 26, 1998, at 59,

http://fall.law.fsu.edu/crc/minutes/crcminutes022698.html. Florida courts have not interpreted this term. Black's Law Dictionary defines efficiency as "the measure of the cost of an approach and its achievement versus expectation." https://thelawdictionary.org/efficiency/. Efficiency is used throughout Florida's education statutes in a manner consistent with an achievement-versus-expectation meaning. *See, e.g.*, §§ 1000.02(1)(b); 1000.03(3); 1008.31(2), Fla. Stat. (2017). This Court could define "efficient" by looking to Florida's own education standards and assessing whether the State is meeting those standards given the resources it has allocated to the system (including whether those resources are allocated equitably) to determine whether the education provided achieves what is expected. *See supra* Facts §§ A-E.

As this Court has not defined "efficiency," it may be instructive to look at other courts. *See, e.g., Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 211-13 (Ky. 1989) ("efficient" funding system would ensure that the "children of the poor and the children of the rich, the children who live in the poor districts and the children who live in the rich districts … be given the same opportunity and access to an adequate education"); *Campbell Cnty. Sch. Dist. v. State*, 907 P.2d 1238, 1258-59 (Wyo. 1995) ("thorough and efficient system of public schools" is "marked by full detail or complete in all respects and productive without waste and is reasonably sufficient for the appropriate or suitable teaching/education/learning of the state's school age

children").

"High quality." The constitutional requirement of "high quality" is judicially manageable as the Legislature already has defined it by providing substantive content standards that students need to learn to obtain core content knowledge. S*ee supra* Facts, §A. Also, one priority is that students are prepared to enter postsecondary school without remediation. *See* § 1000.03, Fla. Stat. (2017). A high quality education in Florida is therefore one which allows students to learn the core content knowledge and be ready for college.

"System of free public schools." This Court found that this language operates as a "brake on legislative power" and prescribes the exclusive means of fulfilling the state's obligation "to make adequate provision for the education of Florida's children–through a system of public education." *Holmes*, 919 So. 2d at 412. The Court held that Article IX contains a mandate and a prohibition: the Legislature must adequately fund a uniform and high quality public educational system that is free to students and does not authorize additional equivalent alternatives. *Id.* at 408.

"Allows students to obtain a high quality education." This second use of the term "high quality" is not intended to be redundant. *See* CRC Minutes, Jan. 13, 1998, at 207, http://fall.law.fsu.edu/crc/minutes/crcminutes011398.html; *cf. State v. Bodden*, 877 So. 2d 680, 686 (Fla 2004) (words not construed as superfluous if reasonable construction exists to give effect to all words).

The Legislature has declared that the purpose and guiding principles of the public school system is to provide a system that maximizes education access and allows the opportunity for a high quality education for all Floridians. §§ 1000.01(3), 1000.02(2)(c), Fla. Stat. (2017). The State assessment system measures whether a student has obtained what the State has determined is a high quality education. Passing rates are thus a measure that the State has set for itself to determine whether "all children" in Florida are obtaining a high quality education. *See* § 1008.31(1)(a), Fla. Stat. (2017) (performance accountability system assesses effectiveness of education delivery system).

A trial court can use outcome measures produced by the State's own assessment system which is designed to measure mastery of Florida's standards, and which provides measures for graduation, grade promotion, and college readiness. *See supra* Facts § B. *See Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 336-40 (N.Y. 2003) (in determining whether New York provided opportunity for constitutionally required education, trial court took evidence of resulting outputs such as test results and graduation and dropout rates); *see also Coalition*, 680 So.2d at 409 (Overton, J., concurring) (suggesting 30% illiteracy rate would suggest education system is inadequate).

C. Courts Do Not Violate Separation of Powers by Considering Whether the Legislature Has Violated its Duty to Provide for an Adequate Education for Florida's Children.

In refusing to review actions of the other branches, the First DCA relied on the Florida's strict separation of powers. Florida's constitutional separation of powers does not bar Parents' suit because they do not ask the judiciary to encroach on the legislative duty to make educational policy, nor do they ask the courts to make appropriations or order the Legislature to do so. Parents instead seek only declaratory relief—that is, they ask that the courts fulfill their traditional responsibility to: (1) interpret constitutional terms, and (2) determine if the other branches have acted constitutionally. *See, e.g., In re Sen. Jt. Res. of Legis. Apportionment 1176*, 83 So. 3d 597, 686 (Fla. 2012) (issuing declaratory judgment that senate apportionment plan was unconstitutional).

The declaratory relief Parents seek merely requires courts to examine educational standards enacted by the Legislature and determine if they have been met. Such a request is appropriate and does not violate separation of powers. The First DCA provided five reasons for its conclusion on separation of powers. As discussed below, its reasoning was incorrect.

1. *Florida's Strict Separation of Powers Does Not Preclude Judicial Review of the State's Implementation of Article IX.*

Unlike the federal constitution, Florida's Constitution explicitly requires separation of powers: "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." Art. II, § 3, Fla. Const. The second sentence is a limitation on the first. *See Askew v. Cross Key Waterways*, 372 So. 2d 913, 924 (Fla. 1978). Separation of powers prohibits, for example, the judiciary from legislating by reading in provisions of a statute that are not there. *See Schmitt v. State*, 590 So. 2d 404, 414 (Fla. 1991); *Pepper v. Pepper*, 66 So. 2d 280, 284 (Fla. 1953). But it does not bar the courts from reviewing legislative enactments to determine their constitutionality. *See Holmes,* 919 So. 2d at 398.

Article II, section 3 "encompasses two fundamental prohibitions. The first is that no branch may encroach upon the powers of another. The second is that no branch may delegate to another branch its constitutionally assigned power." *Chiles v. Children A, B, C, D, E, & F,* 589 So. 2d 260, 264 (Fla. 1991). But, contrary to the First DCA's characterization of their plea, Parents here neither ask the court to encroach on the Legislature's duty to make educational policy, nor ask the judiciary to perform a duty delegated to another branch of government. Parents seek a declaration that measures the acts of the legislative and executive branches against the

"yardstick" of Article IX. *See Askew v. Schuster*, 331 So. 2d 297, 300 (Fla. 1976) (Court "will not seek to substitute its judgment for that of another coordinate branch of government, but will only measure acts done with the yardstick of the constitution") (citations omitted).

Parents do not seek a remedy that would encroach on the Legislature's duty to make education policy. It is not encroachment to declare whether the State has complied with its paramount duty under Article IX. *Cf. In re Sen. Jt. Res.,* 83 So. 3d at 685 (declared that legislatively-enacted map violated constitution; provided standards for legislature to use when revising it). If a lower court later orders a remedy that does encroach on the Legislature, that decision can be appealed. But the possibility that a remedy Parents have not requested could hypothetically impinge on the Legislature is not a sufficient ground to bar them from seeking **any** remedy.

The First DCA also suggested that allowing Parents' claim to proceed would require the Legislature to delegate to the courts its constitutionally assigned power. Ironically, the opposite is true. If the First DCA's decision stands, it will be the courts that will have impermissibly delegated its constitutionally assigned power to the Legislature. The power and duty to interpret the constitution belongs to the judiciary. *Sullivan v. Askew*, 348 So. 2d 312, 314 (Fla. 1977). The First DCA's decision takes that power away by allowing the Legislature to determine for itself whether the laws it passes are

constitutional. *See State v. City of Stuart*, 120 So. 335, 345 (Fla. 1929) (courts' highest duty is to maintain integrity of constitution).

Nor does the Florida Constitution's provision that "[t]he judiciary shall have no power to fix appropriations" bar Parents' claim. Art. V, §14(d), Fla. Const. They do not ask the judiciary to force, mandate, or require the other branches to allocate a certain amount of funds or to spend money in any particular way. Instead, Parents seek a declaration determining whether the Legislature and the executive branch have fulfilled their constitutional obligations under the education article.

2. *Courts Do Not Need an Explicit Grant of Constitutional Authority to Engage in Constitutional Interpretation and Judicial Review.*

The First DCA's second rationale was that "absent explicit constitutional authority to the contrary, the legislative and executive branches possess exclusive jurisdiction" over "educational policy choices and their implementation" and "sole power to appropriate and enact substantive policies and budgetary appropriations" 232 So. 3d at 1166, 1171. Parents did not and do not intend to ask the trial court to make educational policy choices, order specific policies implemented, or make appropriations. Nor have they sought to "entangle courts in the details and execution of educational policies and related appropriations, involving millions of students and billions of dollars." *Id.* at 1171.

Parents ask the judiciary to undertake its traditional role of constitutional interpretation and to determine whether the Legislature has abided by its constitutional

duties. Florida's separation of powers doctrine recognizes that the judiciary's role is to say what the law is. As this Court has explained, "[t]he judiciary is in a lofty sense the guardian of the law of the land and the Constitution is the highest law. A constitution would be a meaningless instrument without some responsible agency of government having authority to enforce it." *Dade Cnty. Classroom Teachers Ass'n, Inc. v. Legislature*, 269 So. 2d 684, 686 (Fla. 1972).

If the standards established by the Legislature have not been met, it is for the courts to say so. The Legislature then has the opportunity to present its plan for remediation. This is the typical process: courts issue declarations that the Legislature is not meeting its constitutional duty, and the Legislature is charged with remedying the problem. *See, e.g., In re Sen. Jt. Res.,* 83 So. 3d at 686.

3. *The Phrase "Adequate Provision Shall be Made by Law" Does Not Commit All Education Decisions Solely to the Legislature.*

The First DCA's third rationale, that "adequate provision shall be made by law" commits all education functions solely to the Legislature, also is not grounded in law.[82] The phrase "by law" in Article IX is a directive to the Legislature to pass legislation implementing the constitutional mandate. *See St. John Medical Plans, Inc. v. Gutman*, 721 So. 2d 717, 719 (Fla. 1998) ("may be provided by law" leaves "to the Legislature the task of implementing the mandate of the people"). This phrase,

[82] It is important to note that any interpretation of the phrase "adequate provision shall be made by law" may impact the State's duty with regard to the environment, because Article II, section 7 uses identical language.

however, does not mean that the Legislature has sole authority, with no judicial remedy, if the Legislature has failed to address the public's will in a reasonable period of time. *Dade Cnty.,* 269 So. 2d at 686.

Further, this phrase must be read *in para materia* with the first and second sentences which provide that because education is a fundamental value it is a paramount duty of **the State** to make adequate provision for education. The CRC clearly intended that the use of "the state" would place the duty on all three branches of government. CRC Minutes, Jan. 15, 1998, at 278-80, http://fall.law.fsu.edu/crc/minutes/crcminutes011598.html (responsibility of entire three branches of government's to meet constitutional mandate); CRC Minutes, Jan. 13, 1998, at 202-03, http://fall.law.fsu.edu/crc/minutes/crcminutes011398.html (revision intended to make all three branches responsible for education).

4. *Article IX's Terms Provide a Mandate with an Enforceable Restriction, and Are Not Mere Political Aspirations.*

The First DCA's fourth rationale, that Article IX's terms are merely political aspirations, 232 So. 3d at 1171, is wrong. It is inconsistent with the ruling in *Holmes* that Article IX's language creates a mandate. 919 So. 2d at 404, 408. Further, if taken to its logical conclusion, the First DCA's holding permits absurd results as it would prevent judicial review even if the Legislature funded education at only $1 per child, or there was a 70% illiteracy rate. *Cf.* 680 So. 2d at 409 (Overton, J., concurring).

5. *Parents' Claim Is Not a Non Justiciable Political Question*.

In its incorrect assertion that Parents' claim presents a political question, the First DCA quoted *Baker v. Carr's* consideration of needing "finality to the action of the political departments and also lack of satisfactory criteria for a judicial determination." 232 So. 3d at 1168 (emphasis omitted), citing *Baker v. Carr*, 369 U.S. 186, 210 (1962). *Baker* stands for the proposition, however, that political **questions**, not political **cases** are of concern; the case itself states that "courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." 369 U.S. at 217. The political question doctrine does not preclude resolution of all claims that touch on politically-sensitive subjects. *I.N.S. v. Chadha*, 462 U.S. 919, 942-43 (1983) ("[r]esolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications").

Neither *Baker* consideration cited by the First DCA applies here. First, the lower court stated that judicial review would impede the need for "finality" in public policy. 232 So.3d at 1169. That is not one of the six factors listed in *Baker*, but an underlying concern the *Baker* factors were intended to reach. 369 U.S. at 213-14, 17. There is a reason the need for finality is not one of the judicially significant factors—if it were sufficient to preclude judicial review, virtually any policy legislation would be immune from such review. The second *Baker* factor that the First

DCA relied on was a lack of judicially manageable criteria, 232 So. 3d at 1168, which is not applicable because Article IX provides these criteria as discussed above.

II. THE TRIAL COURT ERRED IN APPLYING AN ORDINARY SCRUTINY STANDARD OF REVIEW.

Interpretation of a constitutional provision involves pure questions of law and therefore the standard of review under a particular provision is de novo. *See Crist v. Fla. Ass'n of Criminal Def. Lawyers, Inc.*, 978 So. 2d 134, 139 (Fla. 2008).

Because it held that Parents' claim was not justiciable, the First DCA declined to rule on the standard of review and the burden of proof. 232 So. 3d at 1172 n.5. Parents request that this Court rule that the trial court erred in applying an incorrect standard of review and burden of proof. The trial court applied rational basis (or ordinary) scrutiny, evaluating whether the education system and its policies were "rationally related" to the constitutional requirements. (R.3394.) It held that Parents did not show that the State's actions "are irrational or unconstitutional beyond a reasonable doubt." (*Id.*) Using rational basis and reasonable doubt was reversible error because it resulted in the improper weighing of the facts. *See N. Fla. Women's Health & Couns. Servs. v. State*, 866 So. 2d 612, 626 (Fla. 2003). The trial court's conclusions were wrongly influenced by an incorrect standard and burden, e.g., how State holds schools accountable is rational process (R.3379), trends over time of student performance results satisfy rational basis test (R.3382), and burden beyond a reasonable doubt rested with Parents on need for more resources (R.3378-79).

The trial court was incorrect to apply ordinary scrutiny to Parents' claims, as that standard is typically applied when constitutional rights are not invovled.[83] *N. Fla. Women's Health & Counseling Servs. v. State*, 866 So. 2d 612, 626 (Fla. 2003). There is a presumption of constitutionality under "ordinary scrutiny" and the burden is on the challenger "to demonstrate that the law does not bear a reasonable relationship to a proper state objective." *Id. Holmes* recognized that "[a]bsent a constitutional limitation, the Legislature's 'discretion reasonably exercised is the sole brake on the enactment of legislation.'" 919 So. 2d at 406 (citation omitted). Whether the Legislature has a reasonable basis for carrying out its duties in a particular way is immaterial when evaluating whether the Legislature has exercised its power in a manner consistent with constitutional constraints. *Id.* at 398 (in striking voucher program as unconstitutional, court noted "obvious merit" in public policy).

As *Holmes* implicitly recognized, that highly deferential standard of review is plainly inconsistent with education's status as a "fundamental value," the provision of which is the "paramount duty" of the State. Those terms establish that the State's fulfillment of that responsibility must be carefully scrutinized as they emphasize the importance of a constitutional duty, and bear on the level of scrutiny courts must give to the fulfillment of that duty. "Fundamental value" is new to the constitution and does

[83] For impingement on constitutional rights, the court either applies mid-level scrutiny (applies to certain types of speeches and classifications) or strict scrutiny (applies to fundamental rights). *North Fla. Women's Health,* 866 So. 2d at 625.

not appear anywhere else. *Id*. at 403. It was intended to codify language from *Coalition*. *Id.* at 404.[84] "Paramount duty" imposes a "maximum duty." *Id.*

If, as is the case under ordinary scrutiny, the State can insulate all of its decisions regarding education from challenge so long as it can provide some "reasonable doubt" that its actions are "rationally related" to that goal,[85] a low bar for the State to meet, that intent of the drafters and the voters will be undermined. *See* CRC Minutes, Feb. 26, 1998 at 68-69, http://fall.law.fsu.edu/crc/minutes/crcminutes022698.html ("Fundamental value" and "paramount duty" intended to put burden on government to take education to much higher constitutional level).

Applying rational basis to the State's compliance with a constitutional mandate would not be consistent with other interpretations of constitutional rights and duties in the Florida Constitution. For instance, when reviewing apportionment, the constitutional standards "act as a restraint" on legislative discretion. *In re Sen. Jt. Res.,* 83 So. 3d at 599. The Court has a duty to measure apportionment plans "with the yardstick of express constitutional provisions," to decide if the Legislature operated within constitutional limitations. *Id.* at 599, 604. Similarly, *Holmes* ruled that Article

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[84] "Fundamental value" instead of "fundamental right" was utilized in the 1998 revision because the intent was not to create a cause of action for every individual harmed by the system. *Holmes*, 919 So. 2d at 404.

[85] *See, e.g., Franklin v. State*, 887 So. 2d 1063, 1073 (Fla. 2004) (setting out elements of ordinary scrutiny).

IX has restraints on legislative discretion, and evaluated whether the voucher program met the "criterion of uniformity." S*ee* 919 So.2d at 409.

Parents request that this Court hold that the constitutionally mandated criteria in Article IX that set forth how the state is to carry out its mandate provide the standard of review. *Id.* at 405. The criteria specified in the constitutional text, further clarified and defined by the State through legislation and effectuated by the executive branch, are the yardstick by which to measure compliance.

This is similar to the standard applied in *McCleary*, which interpreted a state educational clause that also makes education the "paramount duty" of the State. 269 P.3d at 247-48 (standard of review is "whether the state action achieves or is reasonably likely to achieve 'the constitutionally prescribed end.'"). *McCleary* noted that unlike "other 'rights' such as freedom of religion or freedom of speech, which the State may impair 'upon showing a compelling state interest,'" the right to education "cannot be 'invade[d] or impair[ed].'" *Id.* at 248.

However this Court frames the compliance standard, it must be sufficient to ensure "a maximum duty on the State to provide for public education that is uniform and of high quality." 919 So. 2d at 404. Ordinary scrutiny should be rejected as insufficient. The voters explicitly codified that education is our collective "fundamental value" and "paramount duty." *Id*. A heightened level of scrutiny is needed to determine whether the State has met its paramount duty.

Further, the beyond a reasonable doubt burden is not appropriate. *See In re Sen. Jt. Res.*, 83 So. 3d at 607-08 n.5 (rejecting reasonable doubt standard because it drew a distinction between its role in determining whether apportionment plans comply with constitutionally mandated criteria and evaluating the constitutionality of legislation). Because education is a "fundamental value" and a "paramount duty of the state," if the trial court on remand finds that the education of all children in Florida is not, among other things, "uniform, efficient, and high quality," that system is presumptively unconstitutional. *See, e.g., N. Fla. Women's Health*, 866 So. 2d at 626 (law which "impinges upon a fundamental right explicitly or implicitly secured" by Constitution "presumptively unconstitutional") (citation omitted). Alternatively, preponderance of the evidence, the typical civil burden of proof, should be applied. *See Beal Bank, SSB v. Almand & Assoc.*, 780 So. 2d 45, 58 n.19 (Fla. 2001).

III. THE FIRST DCA ERRED IN REACHING THE MERITS OF PARENTS' CHALLENGE TO THE MCKAY PROGRAM.

The standard of review for interpretation of article IX, section 1(a) is de novo, without deference to the decision below. *Holmes*, 919 So. 2d at 399.

The legal issues discussed elsewhere in this filing—justiciability and standard of review—apply equally to the First DCA's decision with regard to McKay. First, this Court has held that uniformity challenges to private-school voucher programs are justiciable. 919 So. 2d at 412. Second, the same standard of review is applicable to Parents' challenge to McKay as is applicable to the rest of their adequacy challenge

to Florida's education system overall. Both issues call on the courts to determine, as a matter of fact, that the State has failed to fulfill its constitutional duty to provide for a uniform, efficient, and high quality system of free public schools. Although the trial court agreed that McKay was justiciable, it addressed all of Parents' claim, including McKay, under an inappropriate ordinary scrutiny standard of review. That standard was wrong as discussed above in Argument II.

Rather than determine whether the trial court applied the correct standard of review to either McKay or to Parents' claim overall, the First DCA declined to address the correct standard. Instead, it relied on the trial court's findings, and ruled on the merits of McKay without examining whether it was in a posture to be properly adjudicated. This Court need not address the merits of the First DCA's decision on McKay until the trial court has had an opportunity to re-examine the facts under the proper standard of review.

The First DCA relied on three facts found by the trial court: (1) the small number of McKay students and small portion of the public school budget, indicating that McKay did not have a "material affect" on the public school system; (2) McKay could reasonably likely improve the quality and efficiency of the entire system; and (3) McKay has a positive effect on the public schools. 232 So. 3d at 1173-74. Neither court explained how these facts are relevant under *Holmes'* rationale that it makes "no distinction between a small violation of the Constitution and a large one" in

acknowledging the small number of students the OSP program affected. 919 So. 2d at 398. These findings must be reexamined under the correct standard of review.

Because they applied such a deferential standard of review, the trial court and the First DCA glossed over other key factual questions necessary to determine whether to apply *Holmes* to McKay. For instance, *Holmes* discussed whether its holding would overturn *Scavella v. Sch. Bd. of Dade Cty*., 363 So. 2d 1095, 1097 (Fla. 1978). As *Holmes* explained, the program challenged in *Scavella* "allowed a school board to use state funds to pay for a private school education if the public school did 'not have the special facilities or instructional personnel to provide an … adequate educational opportunity' for certain exceptional students, specifically physically disabled students." 919 So. 2d at 412, quoting *Scavella*, 363 So. 2d at 10. It did not resolve what the implications of that program, if still in effect, would be under the current education article—a difficult issue in the first instance, as *Scavella* could not address the applicability of the modern incarnation of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, and *Holmes* did not take on this question directly. Regardless, given *Holmes'* discussion of *Scavella*, the trial court should have at least considered whether public schools "did 'not have the special facilities or instructional personnel to provide an … adequate educational opportunity.'" *Id.* If they did not, *Holmes* implies that the result should be different, and the McKay program would be unconstitutional as applied.

Nor did the trial court or the First DCA consider whether the education provided in McKay programs was "uniform" or "free" as compared to public schools. For example, the trial court's findings of fact do not address whether teachers at schools receiving McKay vouchers have credentials equivalent to those in public schools, or whether their curricula are equivalent to Florida's content standards. Each factor was important in *Holmes*. *Id.* at 409-10. A more searching review, using the correct standard, could have resulted in a different outcome here.

The First DCA and the trial court either considered all of these questions under the wrong standard or did not consider them at all. The First DCA's decision should therefore be vacated and the case remanded to the trial court for consideration under the correct standard of review.

IV. PARENTS SEEK REMAND TO DETERMINE FACTS UNDERLYING STANDING AND MERITS WITH REGARD TO FTC.

Standing is a question of law, which is reviewed de novo. *Pub. Def. Eleventh Jud. Cir. of Fla. v. State*, 115 So. 3d 261, 282 (Fla. 2013).

The trial court ruled that Parents lacked both taxpayer and special injury standing to challenge FTC, and did not allow evidence at trial on the program's uniformity. (R.2539-40, 3398.) It found that FTC "does not involve any state appropriation" and therefore Parents lack taxpayer standing to challenge FTC under Article IX. It further concluded there was no special injury standing based on its finding that there was no "diversion of public money from the state treasury that was

earmarked for the public schools." (R.2540.) As discussed below, taxpayer standing involves challenges to taxing and spending, and is not limited to state appropriation. Special injury standing under Article IX is not limited to "diversion of public money from the state treasury that was earmarked for the public schools." The trial court was following its previous ruling in a related case on the identical standing issue in *McCall,* which was decided by the First DCA before Parents could raise it on appeal. The First DCA in Parents' case thus did not address standing because *McCall* was controlling. *McCall*, 199 So. 3d at 374, *cert. denied*, 2017 WL 192043 (Fla. 2017).

A. Taxpayer Standing.

Taxpayers can challenge "the constitutional validity of an exercise of the legislature's taxing and spending power without having to demonstrate a special injury." *Children A, B, C, D, E, & F,* 589 So. 2d at 263 n.5. FTC involves both the taxing and spending power of the Florida Legislature.

In 2001, after the *Holmes* circuit court declared the OSP voucher program unconstitutional, and while the case was on appeal, the Legislature enacted the FTC Program. Ch. 2001-225, § 5, at 6-9, Laws of Fla. In relevant part, FTC provides scholarships for tuition and fees for eligible students in private schools. § 1002.395(6)(d)(1), Fla. Stat. (2017). Scholarships are funded through tax credits that corporate taxpayers elect to contribute to FTC in lieu of taxes due the State. *Id.* §§ 211.0251, 212.1831, 220.1875, 561.1211 & 624.51055. Taxpayers who contribute to

FTC are fully reimbursed for their contributions with tax credits worth 100% of the contribution. *Id.*

There can be no dispute that FTC involves an exercise of the State's taxing power as the statute expressly relies on taxing power. § 1002.395(a), (5)(b), Fla. Stat. (2017). A constitutional challenge to FTC as a taxation statute provides taxpayer standing. *See N. Broward Hosp. Dist. v. Fornes*, 476 So. 2d 154, 155 (Fla. 1985) (taxpayer would have standing if she had brought "a constitutional challenge to the taxing statutes at issue"); *Paul v. Blake*, 376 So. 2d 256, 260 (Fla. 3d DCA 1979) (taxpayer standing to bring constitutional challenge to tax exemption).

FTC also involves spending power. The trial court (R.2539-41, 3398) and the First DCA in *McCall,* 199 So. 3d at 373-74, both erred in ruling that because tax credits are not appropriations, there is no taxpayer standing. This is error as taxpayer standing is not limited to challenges to an actual appropriation. If taxpayer standing were so limited, there would have been no taxpayer standing in *Children A, B, C, D, E, & F* where the challenge was not to appropriations but to a statute that delegated to the executive branch the authority to reapportion the state budget. 589 So. 2d at 263. The Court held there was taxpayer standing because the statute went "to the very heart of the Legislature's taxing and spending power." *Id.* at n.5.

This Court has ruled that Article IX limits the Legislature's spending power by mandating that it only fund a system of free public schools. 919 So. 2d at 412-13.

McCall concedes this, but determined that tax credits are not state monies, and therefore are outside the Legislature's spending power. 199 So. 3d at 373-74. The standing determination in *McCall* was on a motion to dismiss and, in this case, on a judgment on the pleadings. In neither case was an evidentiary hearing held on the factual issue of whether FTC's tax credits should be considered public monies.

The consideration of whether FTC tax credits are public monies involves a tax law question of whether they are functionally equivalent to direct expenditures. Parents had tax law expert testimony and documentary evidence supporting a finding that FTC tax credits are functionally equivalent to direct expenditures, which were never considered due to the court's legal error in limiting public monies to appropriations. Further, the statutory scheme supports this finding. FTC tax credits are earmarked for the chosen purpose of paying private school tuition and the State has complete control over how the funds are spent. § 1002.395(6), Fla. Stat. (2017). For each public school student who uses FTC, the State reduces the amount of per-pupil education funding that would have been provided to the public school district if the student had remained in public school. *Id.* § 1011.62(d). FTC is thus financed entirely with money diverted from state funds that were due the State and would otherwise have been available to fund public schools.

Parents seek a ruling that taxpayer standing involves challenges to the Legislature's taxing and spending power, and is not limited to appropriations. They

seek a remand for a determination of whether FTC's tax credits should be considered public funding or state monies under Article IX. *See Holmes*, 919 So. 2d at 412-13.

B. Special Injury Standing.

Holmes found the systematic diversion of hundreds of millions of dollars each year from the public education system will have a harmful effect on the public schools and those they serve. 919 So. 2d at 409 (reduction of funding from public education system undermines the system of high quality free public schools). Part of *McCall's* reasoning that there was no special injury standing was because the plaintiffs there "failed to allege any inadequacy in the funding of the state's system of education." 199 So. 3d at 373. Parents here allege many inadequacies, including state funding. *See supra* Facts, §§ B-E. Special injury standing does not require that the diversion of money be limited to funds already earmarked for education. *See* 199 So. 3d at 366. (R.2540.) Another consideration is of the relationship between the FTC and the legislative formula for funding public schools on a per-pupil basis. Whenever a public school student uses the FTC, a public school district loses per-pupil funding and a private school district receives per-pupil funding. Further, the impact of this diversion must be considered in the context of Parents' broader claim that the State is failing to make adequate provision for a system of free public schools, and how FTC violates this paramount duty. Parents have special injury standing based on their challenge to the adequacy of the public school system, and request the FTC issue be remanded for

a determination on the merits under the proper standard of review of whether it meets Article IX's mandates and restrictions.

CONCLUSION

Parents request that this Court hold that Parents' claim does not violate separation of powers and is justiciable.

Parents request this Court vacate the First DCA's and the trial court's decisions and remand to the trial court to determine, under the correct standard of review, whether the State has met its paramount duty to make adequate provision for a uniform, efficient, and high quality system of free public schools.

Parents request this Court find that they have special injury standing, or, if necessary, remand for any factual determinations to establish taxpayer standing to challenge FTC.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE

I certify compliance with Fla. R. App. P. 9.210(a)(2) and that the font and size of this brief is Times New Roman 14.

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