IN THE SUPREME COURT OF FLORIDA

Case No. SC 18-67

CITIZENS FOR STRONG SCHOOLS, INC.; et al.,

Petitioners,

L.T. Case Nos. 1D16-2862; 1D10-6285; 09-CA-4534

vs.

FLORIDA STATE BOARD OF EDUCATION; et al.,

Respondents,

and

CELESTE JOHNSON; et al.,

Intervenors/Respondents.
_____/

ON APPEAL FROM
THE FIRST DISTRICT COURT OF APPEAL

INTERVENORS/RESPONDENTS' ANSWER BRIEF

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INTRODUCTION

The Intervenors/Respondents ("Intervenor-Parents") are six parents whose children's lives have been made better because of the educational options available to them through the John M. McKay Scholarship for Students with Disabilities Program ("McKay Program"), codified at § 1002.39, Fla. Stat. (2014), and the Florida Tax Credit Scholarship Program ("FTC Program"), codified at § 1002.395, Fla. Stat. (2014). The trial court concluded that (1) Petitioners did not plead constitutional claims against these two programs; (2) Petitioners lacked standing to challenge the FTC Program; and (3) neither program negatively impacts the State's ability to adequately provide for the public-school system. The First DCA affirmed that Petitioners lack standing to challenge the FTC Program and agreed that the McKay Program has no material effect on Florida's public education system.

Petitioners claim that the McKay and FTC Programs violate Article IX, section 1(a)[1] of the Florida Constitution and this Court's decision in *Bush v. Holmes*,

[1] Art. IX, § 1(a), Fla. Const. reads:

> 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 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.

919 So. 2d 392 (Fla. 2006). However, Petitioners never pled independent claims that the programs were unconstitutional. As such, this Court has no jurisdiction to consider Petitioners' constitutional arguments. Moreover, Petitioners lack both special-injury and taxpayer standing to challenge the FTC Program and have abandoned any contrary arguments.

Even though Petitioners did not plead stand-alone constitutional claims against the McKay and FTC Programs, the trial court did permit them to introduce evidence regarding both programs to try and support their claim that the State has not made adequate provision for its public-school system. The evidence adduced at trial, however, demonstrated that neither program had a material impact on the public-school system and, if anything, benefited the system. Petitioners ignore these findings entirely with regard to the FTC Program. And regarding McKay, rather than challenge the factual findings, they instead retreat to their unpled constitutional argument that the McKay Program independently violates Article IX, section 1(a) under this Court's decision in *Holmes*. However, even if Petitioners had pled a stand-alone constitutional claim, they are wrong that *Holmes* dooms the two-decades-old program because this Court in *Holmes* explicitly rejected the notion that "other publicly funded educational . . . programs," such as the McKay Program, "would . . . be affected." *Holmes*, 919 So. 2d at 412.

The lower court decisions should be affirmed and Petitioners' request for a remand, so that they may properly assert their claims, should be denied.

COUNTER-STATEMENT OF THE CASE AND THE FACTS

I. The Second Amended Complaint.

Petitioners, several organizations and taxpayers, filed this case in 2009, alleging "that the State's entire K-12 public education system . . . is in violation of the Florida Constitution." *Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ.*, 232 So. 3d 1163, 1165 (Fla. 1st DCA 2017). They claim that the current system violates the "paramount duty of the state to make adequate provision for the education of all children residing within its borders," under Article IX, section 1(a) of the Florida Constitution. *Id*. at 1170.

After this Court declined jurisdiction of the First DCA's decision denying the State's writ of prohibition to halt the proceedings in the trial court, *Haridopolos v. Citizens for Strong Sch., Inc.*, 103 So. 3d 140 (Fla. 2012), Petitioners filed a Second Amended Complaint, which is now the operative complaint. (R. 130–164).[2]

The Second Amended Complaint added substantial new factual allegations regarding both the McKay and FTC Programs. (R. 140–147). Both programs had

[2] Citations to the Original Record from the trial court, as transmitted to the First DCA, are designated as "R." Citations to the Appellate Record are designated "App. R." And citations to the record, as supplemented by this Court's July 17, 2018 Order supplementing the record with the trial court's March 11, 2016 Pre-Trail Order are designated "Supp. R."

been in effect in 2009, when Petitioners initiated their case. The McKay Program was enacted and launched in 1999. It is a publicly funded program "established to provide the option to attend a public school other than the one to which assigned, or to provide a scholarship to a private school of choice, for students with disabilities." § 1002.39(1), Fla. Stat. To be eligible to participate in the McKay Program, a student must have spent the prior year in attendance at a Florida public school and have either an "individual educational plan developed by the local school board" or a "504 accommodation plan has been issued under s[ection] 504 of the Rehabilitation Act of 1973." *Id*. at § 1002.39(2). The McKay Program currently serves over 30,000 students. *See* John M. McKay Scholarship Program, February 2018 Quarterly Report, 3, *available at* http://www.fldoe.org/core/fileparse.php/7559/urlt/McKay-February-2018-Quarterly-Report.pdf.

The FTC Program was enacted and launched in 2001.[3] The FTC Program incentivizes private, charitable donations to Scholarship Funding Organizations ("SFOs") that are eligible to be offset against the donor's income taxes in the form

[3] Contrary to Petitioners' assertion, the FTC Program was not passed to "replace" any other choice program. Pet'rs' Initial Br. 46. In 2001, the only scholarship program that was then under legal challenge was the Opportunity Scholarship Program, which had recently been *upheld*, not struck down, by the First DCA. *See Bush v. Holmes*, 767 So. 2d 668, 677 (Fla. 1st DCA 2000). The FTC Program was designed to serve a different population of students (low-income students) than was served by the OSP (students attending schools designated as "failing").

of a tax credit. The SFOs are non-governmental entities to which parents who satisfy the program's strict income limits apply for private school scholarships. SFOs choose the scholarship recipients and parents choose the school. As of February 2018, there were 107,095 students relying on scholarships generated by the FTC Program. *See* Florida Tax Credit Scholarship Program, February 2018 Quarterly Report, 1, *available at* http://www.fldoe.org/core/fileparse.php/7558/urlt/FTC-Feb-2018-Q-Report.pdf. Over 65% of scholarship recipients are minorities (38.1% Hispanic; 29.8% African American) and over 50% are female. *Id.* at 3–4. Moreover, 57% of participants come from single-parent households while the average household income is $25,362—just 8.3% above poverty level. *See* Step Up for Students, *Florida Tax Credit Scholarship Fact Sheet*, March 2018, *available at* https://www.stepupforstudents.org/wp-content/uploads/18.3.1-FTC-Fact-Sheet-.pdf.

Neither the original Complaint nor the First Amended Complaint mentioned either program. (R. 001, 045). However, even though Petitioners added *factual* allegations regarding the two programs, their Second Amended Complaint did not add claims for relief asserting that either the McKay or FTC Programs were unconstitutional.[4] (R. 160–62).

[4] In contrast, Petitioners' Second Amended Complaint also included new factual allegations concerning the State's Pre-Kindergarten Program *and also* a specific claim for relief asking that the Pre-Kindergarten Program be declared

II. The Intervenor-Parents.

The Intervenor-Parents are six mothers whose children's lives have been transformed because they received either publicly funded scholarships under the McKay Program or scholarships financed by the private, charitable donations incentivized by the FTC Program. (R. 3868–3920). Three of the intervening mothers, Margot Logan, Karen Tolbert, and Marian Klinger, intervened to defend the McKay Program. (R. 3873–77). Karen is representative of the McKay Moms. Her son, "M," has a Dandy-Walker Malformation that affects his cerebellum and the way he learns. (R. 3874–75). Thanks to a McKay Scholarship, Karen has enrolled M in a school with experience meeting needs like his. (R. 3875). The other three mothers, Celeste Johnson, Deaundrice Kitchen, and Kenia Palacios, moved to intervene to protect their interests in the FTC Program. (R. 3871–73). Deaundrice, a public-school teacher, typifies the FTC parents, who all rely on the monies donated under the FTC Program to afford to send their children to private schools at which they are thriving. (R. 3869). Deaundrice is a single-mother whose two children are enrolled in private schools that fit their unique needs, but she recognizes the value and quality of Florida's public schools and may enroll her kids in one of those public schools for high school. (R. 3896–97).

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unconstitutional. (R. 159–61). That separately pled claim for relief was later severed by the trial court. (R. 3866–3867).

The McKay and FTC Programs have enabled each of the Intervenor-Parents to afford private schools for their children—schools the parents believe are best suited to meet their children's unique educational needs. (R. 3869). Without the financial assistance from the programs, none of the Intervenor-Parents would have been able to afford a private education. *Id.*

Over Petitioners' opposition, the trial court permitted these six mothers to intervene as defendants for the limited purpose of protecting their interests in the two scholarship programs. (R. 3921–3922).

III. The Trial Court Proceedings.

A. Petitioners' Motion For Partial Summary Judgment.

After the close of discovery, and before trial, Petitioners filed a Motion for Partial Summary Judgment asking the trial court to declare the McKay and FTC Programs unconstitutional under Article IX, section 1(a). The trial court denied their motion because the Second Amended Complaint "does not contain a claim that either program violates the Florida Constitution and does not include a request for such a declaration in the Prayer for Relief." (R. 2543). As such, Petitioners were "not entitled to use a motion for summary judgment to obtain relief that was not sought in their Complaint." (R. 2543).

B. Intervenor-Parents' Motion For Partial Judgment On The Pleadings.

Concurrent with its ruling on Petitioners' Motion for Partial Summary Judgment, the trial court granted Intervenors' Motion for Partial Judgment on the Pleadings, with regard to the FTC Program, because Petitioners "lacked standing to assert any claim because the FTC program does not involve the appropriation of public funds and [Petitioners] could not show any special injury." (R. 2539–2541, 3373). As authority, the trial court cited its previous ruling in *McCall v. Scott*, which was later affirmed by the First DCA. *See McCall v. Scott*, 199 So. 3d 359 (Fla. 1st DCA 2016), *rev. denied*, 2017 WL 192043 (Fla. 2017).

C. Trial Evidence Concerning The McKay And FTC Programs.

In its Pre-Trial Order dated March 11, 2016, the trial court ruled that while it would refuse to admit "[e]vidence regarding the constitutionality of each specific program," (Supp. R. 2) (Mot. Suppl. R. *granted*, July 17, 2018), it would nevertheless admit "[e]vidence regarding the impact of each program on the uniformity and funding of the overall public education system." *Id.* This order contradicts Petitioners' assertion that the trial court did not permit the introduction of evidence regarding the impact of the FTC Program on Petitioners' adequacy claim. Pet'rs' Initial Br. 45.

The trial court's Final Judgment reiterated that Petitioners lacked standing to challenge the FTC Program and "that they did not plead a claim challenging the

constitutionality of the McKay Program." (R. 3385). "Nevertheless, the Court f[ound] no negative effect on the uniformity or efficiency of the State system of public schools due to these choice programs, and indeed, evidence was presented that these school-choice programs are reasonably likely to improve the quality and efficiency of the entire system." *Id*.

The Court made specific findings of fact regarding both the McKay and FTC Programs, based on the evidence presented at trial. (R. 3568, 3571). Regarding the McKay Program, these finding include:

- "The McKay Program allows children with disabilities and their families to choose a public or private school that best meets the student's individualized, special needs." (R. 3571).

- "There are approximately 30,000 students who participate in the McKay Program (compared to roughly 2.7 million students in Florida's public schools)." *Id*.

- "[T]he total funding for the McKay Program amounts to a very small fraction of school district budgets statewide." *Id*.

- Petitioners "have not shown that the McKay Program causes any material financial losses that would impair school districts' ability to provide opportunities for a high-quality education in accordance with Florida law." (R. 3572).

- "[R]esearch has shown that the McKay Program has a positive effect on the public schools, both in terms of lessening the incentive to over-identify students and by increasing the quality of services of the students with disabilities in the public schools." *Id*.

For the FTC, the trial court found that:

- The FTC is funded by "private, voluntary contributions." (R. 3569).
- The FTC "does not involve any public funds" or "legislative appropriation." *Id*.
- "There was no persuasive evidence presented that the FTC Program has any direct or indirect impact on public-school funding or on the uniformity, efficiency, safety, security, or quality of Florida's public schools." (R. 3570).

As to the McKay Program, the trial court's Conclusions of Law explicitly relied on this Court's decision in *Bush v. Holmes*, 919 So. 2d 392, 412 (Fla. 2006), for the proposition that "parental decisions to send individual children with special needs to private school do not implicate the uniformity of the broader public school system—regardless of whether some of those parents accept scholarship funds from the State." (R. 3398). The trial court said that "[t]his conclusion is further supported by the McKay Program's relatively small size, both in terms of student participation and overall funding—neither of which has been shown to have a material impact on the State's multibillion-dollar budget for K-12 education." *Id*.

Petitioners appealed only the trial court's Final Judgment and the order granting Intervenor-Parents' Motion for Partial Judgment on the Pleadings. (App. R. 11–14).

IV. The First DCA Proceedings.

On appeal to the First DCA, regarding the FTC Program, Petitioners conceded that the decision in *McCall*, 199 So. 3d 359 (concluding plaintiffs lacked both

special-injury and taxpayer standing to challenge the constitutionality of the FTC Program), controlled the standing issue and merely "incorporate[d] by reference their legal argument and undisputed facts submitted in the trial court to preserve this issue for any further appellate review." (App. R. 427). Petitioners did not present any argument to the First DCA that their case was factually distinguishable from *McCall*.

In its published opinion, the First DCA affirmed the trial court's judgment that the McKay Program "provides a benefit to help disabled students obtain a high quality education" and found no material impact on the State's ability to make adequate provision for its system of public schools under Article IX, section 1(a), especially in light of the fact that the McKay Program "affects only 30,000 students," a small fraction of the State's approximately 2.7 million students. *Citizens for Strong Sch., Inc.*, 232 So. 3d at 1165–66.

V. The Petition For Discretionary Review.

Petitioners sought review in this Court of the First DCA's decision regarding their overall adequacy claim and the McKay Program's impact on the public-school system. Their Brief on Jurisdiction in support of the Petition for Discretionary Review made no mention of the FTC Program.

SUMMARY OF THE ARGUMENT

Petitioners are jurisdictionally barred from pursuing any independent constitutional claims[5] alleging that the McKay and FTC Programs violate Article IX, section 1(a) of the Florida Constitution because they never pled any such violations. And even if such claims had been pled, with regard to the FTC Program, Petitioners lack standing to assert a constitutional claim. Moreover, Petitioners have now twice failed to preserve their standing arguments in this Court—first when they failed to present their standing arguments in the First DCA and second when they omitted any reference to the FTC Program in their brief in support of their Petition for Discretionary Review. This latter omission also removes any consideration of the FTC Program's impact on Petitioners' main adequacy claim from this Court's scope of review. Of course, even if Petitioners had preserved their standing arguments, under this Court's precedents they lack both special-injury and taxpayer standing, as aptly demonstrated by the First DCA's opinion in *McCall v. Scott*. Finally, Petitioners do not even attempt to demonstrate any error regarding the lower courts' conclusions that the McKay Program does not impinge the State's obligation to make adequate provision for its public schools. Instead, they recycle their

[5] By "independent constitutional claims" Intervenor-Parents mean claims independent of any effect the McKay and FTC Programs have on Petitioners' original and primary claim that the State of Florida is not making adequate provision for its public-school system.

constitutional arguments under Article IX, section 1(a) and *Bush v. Holmes*—arguments that fail on the merits even if they are considered by this Court.

ARGUMENT

This Court should (1) reject Petitioners' unpled claims that the McKay and FTC Programs are unconstitutional; (2) affirm that Petitioners lack standing to challenge the FTC Program—if, that is, their standing arguments are not jurisdictionally barred or otherwise waived; and (3) affirm the lower courts' rulings that the McKay Program does not interfere with the State's ability to make adequate provision for the public-education system.

I. The Constitutionality Of The McKay And FTC Programs Are Not Before This Court.

Petitioners argue—despite never having pled—that both the McKay and FTC Programs are unconstitutional under Article IX, section 1(a) of the Florida Constitution and this Court's decision in *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006). Their constitutional arguments, however, are jurisdictionally barred for two reasons. First, Petitioners' Second Amended Complaint did not assert any claims for relief seeking declarations that the McKay and FTC Programs are unconstitutional. And second, with respect to the FTC Program, separate and apart from the fact that they lack standing, *see* Section II, *infra*, Petitioners abandoned their FTC arguments when they elected not to argue them in either the First DCA or in their Brief on Jurisdiction in this Court. As shown below, these jurisdictional defects bar this Court from

transmuting Petitioners' factual allegations concerning the impact of the McKay and FTC Programs on their overall adequacy claim into independent constitutional claims against those programs.

A. Petitioners Are Jurisdictionally Barred From Arguing That The McKay And FTC Programs Are Unconstitutional.

Petitioners seek a ruling striking down the McKay and FTC Programs as unconstitutional. This Court should deny Petitioners any such opportunity because they did not seek such relief in their Second Amended Complaint.

Petitioners first asked the trial court to disregard their pleading's deficiencies by filing a Motion for Partial Summary Judgment addressing the constitutionality of the McKay and FTC Programs. (R. 248–270). The trial court correctly held:

> Plaintiffs' Second Amended Complaint, however, does not contain a claim that either program violates the Florida Constitution and does not include a request for such a declaration in the Prayer for Relief. *Plaintiffs are not entitled to . . . obtain relief that was not sought in their Complaint.*

(R. 2543) (citations omitted) (emphasis added). *See, e.g., Bank of Am., Nat'l Ass'n v. Asbury*, 165 So. 3d 808, 809 (Fla. 2d DCA 2015) ("[S]o that the parties and the court are absolutely clear what the issues to be adjudicated are . . . 'issues in a cause are made solely by the pleadings.'") (quoting *Hart Props., Inc. v. Slack*, 159 So. 2d 236, 239 (Fla. 1963)).

To revive Petitioners' claims regarding the constitutionality of the McKay and FTC Programs, this Court would need to overturn the trial court's decision that those

claims were never properly pled. But, as noted in Intervenor-Parents' appellate briefing, (App. R. 863), Petitioners never appealed that ruling. And a "court has no jurisdiction to review" matters addressed by a separate order, but from which "no notice of appeal . . . was filed." *Acquisition Corp. of Am. v. Am. Cast Iron Pipe Co.*, 543 So. 2d 878, 882 (Fla. 4th DCA 1989). Accordingly, "[b]ecause [Petitioners] failed to appeal th[ose] order[s]," this Court "lack[s] jurisdiction over th[ose] issue[s]." *Ransom v. Fernandina Beach Chamber of Commerce*, 752 So. 2d 118, 119 (Fla. 1st DCA 2000).

Petitioners cite no authority that would empower this Court to address un-appealed rulings or grant relief that was not sought in the complaint. Issues not raised in the pleadings may not be addressed on appeal. *See, e.g.*, *Mayo v. Allen*, 973 So. 2d 1257, 1259 (Fla. 1st DCA 2008) (citing *Mapoles v. Mapoles*, 332 So. 2d 373 (Fla. 1st DCA 1976). Thus, Petitioners' assertions that the McKay and FTC Programs are unconstitutional—claims the trial court recognized were never pled, in an order that Petitioners never appealed—are not properly before this Court.

B. Petitioners Have Twice Abandoned Their FTC Arguments.

Petitioners have abandoned all claims, constitutional or otherwise, regarding the FTC Program. First, they waived their argument that this case is factually distinguishable from *McCall v. Scott* by not presenting that argument to the First DCA. Petitioners do not ask this Court to overrule *McCall*. Instead, they argue that

McCall, under its own reasoning, is not applicable to the facts of their case. But they never presented that argument to the First DCA for its consideration in the first instance and have thus waived that argument in this Court. And second, they abandoned any other arguments concerning the FTC Program in this Court when they omitted any mention of the program in their Brief on Jurisdiction in support of their Petition for Discretionary Review.

1. Petitioners Waived Their Standing Argument In This Court By Not Presenting It To The First DCA.

Florida precedent is clear that a party may not present on appeal a legal argument that was undeveloped and unbriefed in the lower courts. One way in which an argument may be deemed "inadequately briefed and . . . not preserved for review," *Inquiry Concerning a Judge No. 14-488 Re: Shepherd*, 217 So. 3d 71, 80–81 (Fla. 2017), is when the "brief states that arguments made at the trial court level . . . are incorporated by reference into [the] brief on . . . appeal." *Simmons v. State*, 934 So. 2d 1100, 1117 n.14 (Fla. 2006). As this Court explained in *Duest v. Dugger*, that is because "[t]he purpose of an appellate brief is to present arguments in support of the points on appeal." 555 So. 2d 849, 852 (Fla. 1990). Thus, where a party "[m]erely mak[es] reference to arguments below without further elucidation . . . these claims are deemed to have been waived." *Id*. That is precisely what Petitioners did in the First DCA.

Specifically, Petitioners chose to completely forego any argument addressing their lack of standing to challenge the FTC Program in their First DCA brief. Instead, they offered the following three short sentences in their appellate brief:

> In a related case, this Court recently ruled that there was no standing to challenge the FTC Program under Article IX in part because tax credits are not public funds. *McCall v. Scott*, 2016 WL 4362399, *14 (Fla. 1st DCA Aug. 16, 2016) (appeal pending). Petitioners recognize this holding controls in this Court. *Accordingly, they incorporate by reference their legal argument and undisputed facts submitted in the trial court to preserve this issue for any further appellate review*.

(App. R. 427) (emphasis added). Florida courts have uniformly held that this sort of perfunctory argument, without more, constitutes waiver of an issue. *See, e.g.*, *Tillman v. State,* 471 So. 2d 32, 35 (Fla. 1985) ("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and *the specific legal argument or ground to be argued on appeal or review* must be part of that presentation if it is to be considered preserved." (emphasis added)); *Norman v. State*, 215 So. 3d 18, 25 n.4 (Fla. 2017) (same); *Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005) (same).

In front of this Court, however, Petitioners do not argue that *McCall* was binding on their alleged claims against the FTC Program. Rather, they argue that this case is factually *distinguishable* from *McCall*, under *McCall*'s very own reasoning. Petitioners argue that "[p]art 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.'" Pet'rs' Initial Br. 49 (quoting *McCall* at 373), whereas Petitioners "allege many inadequacies, including state funding." *Id*. If Petitioners had believed their case was so readily distinguishable from *McCall*, those arguments should have been presented first to the appellate court. Instead, Petitioners conceded in the First DCA that *McCall* was *controlling*. But Petitioners do not ask this Court to overturn *McCall*. Instead, Petitioners argue that the First DCA erred in its application of *McCall* to the peculiar facts of this case. But the First DCA did no such thing.

The First DCA accepted and agreed with Petitioners' statement that *McCall* controlled the outcome of their case. Had Petitioners argued that their case did not fit within the four corners of *McCall*, the First DCA would have had an opportunity to thoughtfully consider their contention and either accept it or reject it in the first instance. Petitioners should not be permitted to present an argument for overturning the First DCA that was never presented to that court for consideration. Accordingly, with respect to the Petitioners' standing arguments, their "failure to fully brief and argue these points constitutes a waiver of these claims." *Coolen v. State*, 696 So. 2d 738, 742 n.2 (Fla. 1997).

2. Petitioners Abandoned All FTC-Related Claims By Omitting Any Mention Of The Program From Their Jurisdictional Brief.

Petitioners abandoned all arguments, constitutional and not, relating to the FTC Program by omitting any reference to the program at the petition for

discretionary review stage. *See City of Miami v. Steckloff*, 111 So. 2d 446, 447 (Fla. 1959) ("It is an established rule that points covered by a decree of the trial court will not be considered by an appellate court unless they are properly raised and discussed in the briefs."). Here, Petitioners made absolutely no mention of the FTC Program anywhere in their Brief on Jurisdiction. *Cf. id*. ("An assigned error will be deemed to have been abandoned when it is completely omitted from the briefs."). This Court should thus decline to address any arguments related to the FTC Program, either as a stand-alone constitutional claim or in support of their main adequacy claim.

* * * * *

If this Court disagrees that Petitioners waived their standing arguments, it should reject those arguments on the merits. As explained in the next section, this Court's precedents make it clear that Petitioners lack both special-injury and taxpayer standing to challenge the constitutionality of the FTC Program.

II. Petitioners Lack Standing To Challenge The Constitutionality Of The FTC Program.

Petitioners claim to have both special-injury and taxpayer standing to challenge the FTC Program. They are wrong on both counts. In *Rickman v. Whitehurst*, this Court required that when a taxpayer challenges a government policy or action, the taxpayer must allege a "special injury." 74 So. 205, 207 (Fla. 1917). To establish a special injury, a party must show that enforcement of the challenged statute "will injuriously affect [her] personal or property rights." *Miller v. Publicker*

Indus., Inc., 457 So. 2d 1374, 1375 (Fla. 1984). Petitioners have made no such showing. And while taxpayer standing is a recognized exception to the special-injury requirement, *Dep't. of Admin. v. Horne*, 269 So. 2d 659, 663 (Fla. 1972), to establish taxpayer standing, the taxpayer must show that the challenged statute or action violates a specific constitutional limitation on the Legislature's taxing and spending power. *Id*. ("[W]here there is an attack upon *constitutional* grounds based directly upon the Legislature's taxing and spending power, there is standing to sue without the *Rickman* requirement of special injury.") (emphasis added). Here, Petitioners allege a violation of Article IX, section 1(a), which, by its plain language, restricts the Legislature's spending power, *Holmes*, 919 So. 2d at 406, but not its taxing power. As shown below, the FTC Program does not implicate the Legislature's spending power because it is funded entirely by voluntary donations of private funds. Petitioners therefore lack taxpayer standing.

As explained more fully below, Petitioners have suffered no special injury and do not possess taxpayer standing.

A. Petitioners Lack Special-Injury Standing.

This Court adopted the special-injury rule over 100 years ago in *Rickman v. Whitehurst*, 74 So. 205 (1917), and it has repeatedly "rejected invitations to eliminate the requirement of special injury for taxpayer lawsuits." *McCall*, 199 So. 3d at 365 (collecting cases from this Court). Here, just like the plaintiffs in *McCall*,

Petitioners have not alleged any harm "distinct from that suffered by the general public." 199 So. 3d at 365. Petitioners' "entire argument for special injury standing is that they have been harmed by the [FTC's] alleged diversion of public revenues from public schools to private schools." *Id*.; *see also* Pet'rs' Initial Br. 49 ("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"). Petitioners claim that, but for the grant of tax credits to fund student scholarships, the taxpayers who claim FTC credits would instead pay the amount contributed to an SFO to the state treasury, thus theoretically increasing state revenues. Their argument then assumes that the Legislature would channel those increased revenues to the public-school system.

Courts routinely reject as speculative the notion that tax credits decrease revenue. *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 136 (2011) (recognizing that it is pure speculation that tax credits result in a net loss to the state, holding that "[w]hen a government . . . declines to impose a tax, its budget does not necessarily suffer. On the contrary, the purpose of many . . . tax benefits is 'to spur economic activity, which in turn *increases* government revenues.'") (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006)); *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 614 (1989); *Gaddy v. Ga. Dep't. of Rev.*, 802 S.E. 2d 225, 230 (Ga. 2017) (finding "[t]he notion that a tax credit from state income tax liability

decreases the total revenue pool . . . purely speculative"); *Duncan v. New Hampshire*, 102 A.3d 913, 927 (N.H. 2014) (rejecting taxpayer standing to challenge a scholarship tax credit program because allegation that tax credits result in a net fiscal loss on the state was entirely "speculative"). In *McCall*, the First DCA held that it was also speculative to say that any revenue that might have been collected would have been appropriated to fund Florida's public schools. *McCall*, 199 So. 3d at 366 (noting that it is not possible "to predict whether the tax revenue that would have been collected in the absence of the tax credit would have been allocated to the budget for the public school system.").

There is simply no way to determine what effect, if any, tax credits have upon the state's revenue collection. Even if it could be guaranteed that the elimination of the tax credit would increase state revenue, there is no way to know whether the Legislature would appropriate that revenue to the public education system. "Because Appellants' allegations of harm are legally insufficient, entirely speculative, and express no particularized injury to [Petitioners], they lack standing to bring suit on grounds of special injury." *Id*. at 368.

B. Petitioners Lack Taxpayer Standing.

This Court adopted a narrow exception to the *Rickman* special-injury rule in *Department of Administration v. Horne*, 269 So. 2d 659 (Fla. 1972). *Horne* recognized a limited exception to the special-injury requirement "where a taxpayer

challenges a legislative exercise of the taxing and spending power in contravention of specific constitutional provisions." *McCall*, 199 So. 3d at 368. To establish taxpayer standing, Petitioners must identify both "a specific exercise of the Legislature's taxing and spending" power and "a specific constitutional limitation upon the exercise of that authority." *Id*. at 369.

Petitioners cite only one constitutional provision, Article IX, section 1(a). That provision serves only as a limit on the Legislature's spending power. Petitioners cite no constitutional provision limiting the Legislature's taxing authority. Because the scholarships generated by the FTC Program are funded with private donations, it does not implicate the Legislature's spending power. As such, Petitioners lack taxpayer standing to challenge it.

1. Article IX, Section 1(a) Limits The Legislature's Spending Power, Not Its Taxing Power.

Petitioners cite Article IX, section 1(a) as the only limitation upon the Legislature's authority to enact the FTC Program. Intervenor-Parents do not dispute that this Court's opinion in *Bush v. Holmes*, construing Article IX, section 1(a)'s duty to make "adequate provision" for the State's public-school system, circumscribes the Legislature's spending power. But, as the First DCA recognized in *McCall*, "[t]he plain language of article IX, section 1(a) does not contain any express or implied limitation on the Legislature's *taxing* authority." 199 So. 3d at 372. "Because article IX, section 1(a) does not limit the Legislature's taxing power,

[Petitioners] may only raise a constitutional challenge under that provision by showing that the Legislature exceeded its *spending* authority." *Id*.

2. The FTC Program Does Not Implicate The State's Spending Power Because It Is Funded With Private, Not Public Funds.

The FTC Program incentivizes donations of private funds by private corporations to nongovernmental SFOs to provide scholarships to needy families to send their children to private schools, whether secular or religious. The corporations choose the SFO to which they contribute, the SFOs choose the scholarship recipients, and parents decide where to enroll their children. No government actor, at any time, controls any of these decisions. No money is ever deposited in or taken from the State treasury—or from any other public fund. And none of the money involved in the FTC Program ever becomes the property of the State of Florida. It is thus clear that tax credits are not the equivalent of public funds—and thus not money that the state can appropriate under its spending power.

Ten courts (in eleven different decisions), including the U.S. Supreme Court and the First DCA, discussed above, have considered the issue of whether tax credit programs are funded with public monies. *All* these courts have held that these programs are not funded with public monies. Seven of these cases involve challenges to similar scholarship tax-credit programs.[6] The other four involve different types of

[6] *Ariz. Christian Sch. Tuition Org.*, 563 U.S. at 144 (concluding that tax credits are not public funds because "[l]ike contributions that lead to charitable tax deductions,

tax-credit programs.[7] No court has reached a conclusion like the one Petitioners ask this Court to reach here.

Though Petitioners cannot cite a single case holding that tax credits are the equivalent of public funds, they do assert that taxpayer standing is not limited to

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contributions yielding [SFO] tax credits are not owed to the State and, in fact, pass directly from taxpayers to private organizations."); *McCall* at 370 (concluding that the FTC Program does not involve an appropriation); *Magee v. Boyd*, 175 So. 3d 79, 136 (Ala. 2015) (finding that two school choice tax-credit programs were constitutional because "a tax credit cannot be equated to a government expenditure"); *Kotterman v. Killian*, 972 P.2d 606, 618, ¶ 40 (Ariz. 1999) ("For us to agree that a tax credit constitutes public money would require a finding that state ownership springs into existence at the point where taxable income is first determined, if not before."); *Gaddy*, 802 S.E.2d at 231 (holding that tax credits do not constitute the "distribution of public funds . . . because none of the money involved in the Program ever becomes the property of the State"); *Toney v. Bower*, 744 N.E.2d 351, 357 (Ill. App. Ct. 2001), *appeal denied*, 754 N.E.2d 1293 (Ill. 2001) (concluding that the terms "public fund" and "appropriation" were not broad enough to encompass a tax credit and that to find otherwise would "endanger the legislative scheme of taxation"),); *Griffith v. Bower*, 747 N.E.2d 423, 426 (Ill. App. Ct. 2001) (same), *appeal denied*, 755 N.E.2d 477 (Ill. 2001).

[7] *Tax Equity All. for Mass. Inc., v. Comm'r of Revenue*, 401 Mass. 310, 315 (Mass. 1987) (stating that the "granting of an income tax credit is not an appropriation according to any commonly understood sense of the word"); *Manzara v. Missouri*, 343 S.W.3d 656, 661 (Mo. 2011) ("The tax exemptions in [another case] and the tax credits here are similar in that they both result in a reduction of tax liability. The government collects no money when the taxpayer has a reduction of liability, and no direct expenditure of funds generated through taxation can be found."); *State Bldg. & Constr. Trades Council v. Duncan*, 162 Cal. App. 4th 289, 294, 299 (2008) (finding that "[t]ax credits are, at best, intangible inducements offered from government, but they are not actual or de facto expenditures by government" and thus "tax credits do not constitute payment out of public funds" under a state statute); *Olson v. Minnesota*, 742 N.W.2d 681, 683 (Minn. Ct. App. 2007) (concluding that tax credits and tax exemptions are not public expenditures).

"actual appropriations." Pet'rs' Initial Br. 47. They base their argument on *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260 (Fla. 1991), a case in which they claim this Court found taxpayer standing even though there was no actual appropriation involved.[8] However, *Chiles* stands for no such thing because, as this Court explicitly stated, it *was* addressing "the power to appropriate state funds" in *Chiles*; in particular it was addressing the power "to reapportion the state budget." *Chiles* at 263–65. *Chiles* involved a statutory grant of authority to make budget reductions to existing legislative appropriations. As such, it went "to the very heart of the legislature's taxing and spending power." *Id.* at 263 n.5. Thus, Petitioners are simply wrong that *Chiles* did not involve the appropriations power.

Petitioners also assert that there is a need for expert testimony on the question of whether tax credits are the functional equivalent of a direct legislative appropriation. Pet'rs' Initial Br. 48. There is no such need for expert testimony. Petitioners' "functional equivalency" argument is well-known as the "tax expenditure theory." *See Kotterman v. Killian*, 972 P.2d 606, 619, ¶¶ 41–42 (Ariz. 1999) (noting that under the "tax expenditure theory" tax deductions, credits, and exemptions are treated as the "practical equivalent of direct government grants") (rejecting the reasoning of *Op. of the Justices*, 514 N.E.2d 353, 355 (Mass. 1987)).

[8] In *Chiles*, neither party raised the standing issue, but this Court addressed it *sua sponte* in a brief footnote. 589 So. 2d at 263 n.5.

The question of whether so-called "tax expenditures" are the equivalent of appropriating public funds is a pure legal question that has been considered by courts without expert testimony or discovery. *Kotterman*, 972 P.2d at 610, ¶ 1 (original action in Arizona Supreme Court); *Gaddy*, 802 S.E.2d at 234 (affirming grant of motion for judgment on the pleadings). Moreover, courts have unanimously rejected the tax expenditure theory in tax credit scholarship cases because it encompasses not only tax credits, but other tax policy equivalents such as deductions, exemptions, and exclusions. *Kotterman*, 972 P.2d at 618–19, ¶¶ 38–42; *Gaddy*, 802 S.E.2d at 230; *see also Toney*, 744 N.E.2d at 357 (concluding that the terms "public fund" was not broad enough to encompass a tax credit given that such reasoning would apply equally to "deductions, and exemptions from taxation" and that to find otherwise would "endanger the legislative scheme of taxation"); *Griffith*, 747 N.E.2d at 426 (concluding that "[t]he credit at issue here does not involve any appropriation or use of public funds).

In explicitly rejecting the tax expenditure theory, the Arizona Supreme Court pointed out a glaring problem overlooked by Petitioners: If a tax credit constitutes "public money," then that "require[s] a finding that state ownership springs into existence at the point where taxable income is first determined, if not before." *Kotterman*, 972 P.2d at 618, ¶ 40. "This expansive interpretation is fraught with problems. Indeed, under such reasoning all taxpayer income could be viewed as

belonging to the state because it is subject to taxation by the legislature." *Id.* at 618, ¶ 37. "It is far more reasonable to say that funds remain in the taxpayer's ownership *at least* until final calculation of the amount actually owed to the government, and upon which the state has a legal claim." *Id.* at 618, ¶ 40.

The Georgia Supreme Court came to a similar conclusion:

> It is . . . clear that "tax expenditures" are different from "appropriations," and only the latter involve money taken from the state treasury. Plaintiffs do not allege, and cannot demonstrate, that the Program's tax credits represent money appropriated from the state treasury. Moreover, to hold that "tax expenditures," . . . are the legal equivalent of appropriations would open up other tax advantages to constitutional scrutiny, such as tax deductions for contributions to religious organizations and tax exemptions offered to religious organizations. . . .

Gaddy, 802 S.E.2d at 230. For this Court to find that tax credits are the equivalent of public funds would make it an extreme outlier.

Indeed, accepting Petitioners' theory that tax credits are the equivalent of a direct appropriation of public funds would have ramifications far beyond this case. The FTC Program is not the only "tax expenditure" that excludes revenue from the State Treasury. If Petitioners are correct that any money excluded from the treasury could be used to fund public schools, then any exclusion, exemption, deduction, or credit that reduces a taxpayer's tax liability is unconstitutional because—under Petitioners' logic—it diverts money away from public education in violation of Article IX, section 1(a). Pet'rs' Initial Br. 48 (arguing tax credits divert monies that

"would otherwise have been available to fund public schools"). Petitioners' theory would, if accepted by this Court, thus jeopardize the State's entire tax scheme. This Court should avoid this absurd result by rejecting—consistent with the unanimous legal precedent on this issue—the notion that tax credits are the equivalent of public funds.

Because the FTC Program is funded by private dollars, and because the only constitutional provision cited by Petitioners limits the Legislature's spending power, Petitioners cannot establish taxpayer standing.

III. The McKay Program Does Not Undermine The Legislature's Ability To Make Adequate Provision For The Public-School System.

While couched in a request for a remand, Petitioners' argument boils down to a claim that the McKay Program is unconstitutional under *Bush v. Holmes*, 919 So. 2d 392, separate and apart from any effect the program has on the State's provision for the public-school system. As explained in Section I.A., *supra*, Petitioners' stand-alone constitutional argument is foreclosed by their failure to plead such a claim, coupled with their failure to appeal the trial court's order denying their Motion for Partial Summary Judgment for that very reason.

The only evidence allowed at trial respecting the McKay Program was limited to its effect on the adequacy of Florida's public-school system. (Supp. R. 2) (Mot. Suppl. R. *granted*, July 17, 2018). As such, the only argument actually—and properly—considered by the lower courts was whether the McKay Program has a

"material effect" on the State's obligations under Article IX, section 1(a) to make adequate provision for the public-school system. Both the trial court and the First DCA concluded, based on the record developed at trial, that was not the case.

However, the sole basis for Petitioners' arguments concerning the McKay Program in this Court is that the program should be struck down under *Bush v. Holmes*. This argument—that the McKay Program independently violates *Bush v. Holmes*, as opposed to the argument that it negatively impacts the Legislature's ability to adequately provide for Florida's whole education system— is foreclosed. *See supra*, Section I.A. However, even if this Court considers the standalone argument regarding the McKay Program, which it shouldn't, that argument fails.

In the discussion below, Intervenor-Parents (1) show that *Bush v. Holmes* does not require that the McKay Program be struck down; and (2) ask this Court to affirm the lower court's evidence-based conclusion that the McKay Program does not interfere with the state's obligation to make adequate provision for the public-school system.

A. The McKay Program Is Constitutionally Permissible Under *Bush v. Holmes*.

The McKay Program began operating in 1999—nearly 20 years ago. Since then, it has grown to serve over 30,000 students. However, in 2006, when the program was still relatively new, this Court was considering the constitutionality of a separate educational choice program, known as the Opportunity Scholarship

Program ("OSP"), in *Bush v. Holmes*. Not surprisingly, the State, intervenors, and various amici expressed concern in their briefs about the impact that a decision striking down the OSP might have on programs like the McKay Program.[9] This Court addressed those concerns head-on, in a separate section of the opinion titled "Other Programs Unaffected," and forcefully "reject[ed] the suggestion by the State and amici that other publicly funded educational and welfare programs would necessarily be affected by our decision." *Holmes*, 919 So. 2d at 412.

To illustrate the types of programs that were unaffected, this Court singled out the "program for exceptional students . . . in *Scavella*," which the Court explained was "structurally different from the OSP, which provide[d] a systematic private school alternative to the public school system mandated by our constitution." *Id*. The program at issue in *Scavella*, like the McKay Program, "is a specialized scholarship limited to students with disabilities." *Citizens for Strong Sch., Inc*., 232 So. 3d at 1173; *see also Scavella v. Sch. Bd. of Dade Cty.*, 363 So. 2d 1098 (Fla. 1978) (upholding program allowing school districts to use public funds to pay for tuition on behalf of students with disabilities enrolled in private schools).

[9] *See* Br. of Amici Curiae Coal. of McKay Scholarship Schs.; Fla. Ass'n of Acad. Nonpublic Schs.; Fla. Council of Indep. Schs.; Fla. Ass'n of Christian Colls. & Schs.; the Child Dev. Educ. All.; Redemptive Life Acad.; Leah Ashley Cousart; Ed & Carmen Delgado; Martha Parker; and Micelle Emery in Supp. of Appellants Gov. John Ellis ("Jeb") Bush, Charles J. Crist, Brenda McShane, et. Al., 2005 WL 7860287.

Both the trial court and the First DCA rejected the notion that *Holmes* requires the invalidation of the McKay Program, noting its similarity to the program at issue in *Scavella*. 232 So. 3d at 1173. Indeed, the *Scavella* and McKay programs are sufficiently structurally similar so as to warrant the conclusion that both programs are constitutionally permissible under *Holmes*. First, the class of beneficiaries under both programs is the same: students with disabilities. Second, under both programs, public funds are used to pay for the education of students with disabilities in private schools. And third, under both programs, the private schools remain private. *See Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (holding that private school whose budget came almost entirely from contracts with school districts did not become a state actor as a result of those contracts). By narrowly tailoring the assistance provided to a small subset of public school students—those with special needs—the McKay Program, like the *Scavella* program, does not create the type of systematic alternative to the public-school system that concerned this Court when it struck down the OSP.

B. The McKay Program Benefits Florida's Public-School System.

The evidence introduced at trial regarding the McKay Program, and the First DCA's review of that evidence, was properly limited to the question of what effect the McKay Program has on the public-school system as a whole (because Petitioners did not make a stand-alone constitutional claim). Therefore, the only appropriate

question for this Court to consider is whether the evidence supports the lower courts' conclusions that the McKay Program not only has no negative impact on Florida's obligations to make adequate provisions "for a uniform, efficient, safe, secure, and high quality system of free public schools," but actually benefits the public-school system. And the answer to both of those questions is a resounding, "Yes."

Based on the trial evidence, the First DCA correctly affirmed the lower court's conclusions that the McKay Program is (1) "reasonably likely to improve the quality and efficiency of the entire system"; (2) "a beneficial option for disabled students to help ensure they can have a 'high quality' education"; and (3) that the "research has shown that the McKay program has a positive effect on the public schools."[10] *Citizens for Strong Sch., Inc.*, 232 So. 3d at 1173–74.

As the First DCA concluded, "it could not be reasonably argued that the McKay Program had a "material affect" on the public K-12 education system." *Id*. at 1173. Rather, as the evidence presented to the trial court showed, the McKay Program is "reasonably likely to improve the quality and efficiency of the entire system." *Id.* Indeed, the trial court found that "research has shown that the McKay program has a positive effect on the public schools, both in terms of lessening the

[10] The trial court also concluded, based on the evidence presented that "[t]here was no persuasive evidence presented that the FTC Program has any direct or indirect impact on public-school funding or on the uniformity, efficiency, safety, security, or quality of Florida's public schools." (R. 3570).

incentive to over-identify students and by increasing the quality of services of the students with disabilities in the public schools." *Id*. at 1173–74. Moreover, "[i]t is difficult to perceive how a modestly sized program designed to provide parents of disabled children with more educational opportunities to ensure access to a high quality education could possibly violate the text or spirit of a constitutional requirement of a uniform system of free public schools." *Id*.

Petitioners had the chance to prove otherwise but failed to do so. Remanding for further proceedings regarding the McKay Program would throw an unnecessary legal cloud over this nearly two-decades old program—a program that supplements and expands each disabled student's right to an individualized education.[11] There is

[11] Petitioners provide no explanation for their statement that "the applicability of the modern incarnation of the Individuals with Disabilities Act [IDEA], 20 U.S.C. § 1400 *et seq.*" may be relevant to the outcome of this case. Pet'rs' Initial Br. 44. However, the McKay Program clearly supplements the rights afforded parents of students with disabilities by allowing them to avoid the adversarial nature of the procedural remedies available under the federal IDEA. Absent the McKay Program, parents who are dissatisfied with the level of services for their student, or their student's placement, would have to file complaints against school officials to enforce their rights under the IDEA. But as the U.S. Supreme Court has acknowledged, "administrative and judicial review of a parent's complaint often takes years." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 238 (2009). Students deserve immediate solutions to vexing school problems. It is also difficult for parents to win such legal battles. According to one survey, in lawsuits for reimbursement for private-school expenses (because parents were dissatisfied with their child's public-school placement) "school districts won the clear majority (62.5%) of the decisions." Mayes, T.A., and P.A. Zirkel, *Special Education Tuition Reimbursement Claims*, Remedial and Special Education 22, no. 6, 350–58 (2001). The McKay Program is Florida's elegant solution for cutting through the federal IDEA's red tape.

no reason to sow such discord for the 30,000 students who are, as the evidence below showed, well-served by the McKay Program.

CONCLUSION

There is no need for this Court to consider Petitioners' claims that the McKay and FTC Programs are unconstitutional under Article IX, section 1(a). Those claims are jurisdictionally barred because they were never pled in their operative complaint. Moreover, Petitioners lack standing to challenge the constitutionality of the FTC Program. Finally, this Court should affirm that the McKay Program is good for individual students, beneficial for Florida's public-school system as a whole, and is not an impediment to the State in carrying out its duty to adequately provide an educational system for Florida's K-12 students.

RESPECTFULLY SUBMITTED this 19th day of July 2018.

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I CERTIFY that the foregoing brief complies with the font requirement of Florida Rule of Appellate Procedure 9.210(a)(2) and is submitted in Times New Roman 14-point font.

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