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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' BRIEF ON JURISDICTION FOR DISCRETIONARY REVIEW OF A DECISION OF THE FIRST DISTRICT COURT OF APPEAL

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FLORIDA RULES

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Jurisdictional Statement

This Court has discretionary jurisdiction under Art. V, § 3(b)(3), Fla. Const., and Fla. R. App. P. 9.030(a)(2)(A)(ii), which provide that this Court may review decisions that expressly construe a provision of the Florida Constitution.

Statement of Case and Facts

Petitioners seek a declaration that the State is failing to meet its constitutional paramount duty to provide a uniform, efficient and high quality system of free public schools that allows students to obtain a high quality education, as required by Article IX, Section 1(a) of the Florida Constitution. The trial record shows that hundreds of thousands of children fail to pass required statewide assessments, thousands attend persistently low-performing schools, and achievement varies dependent on race, ethnicity, disability, geography or socioeconomic factors. There are clear disparities among population groups and across school districts. Superintendents, school board members, and teachers from around the state testified that school districts do not have sufficient resources to establish the conditions necessary to deliver a high quality education for all students. Deficiencies in resources are statewide.

The trial court rendered final judgment for the State. It concluded that Petitioners' claim fails because of Florida's separation-of-powers doctrine and that the standards in Article IX, Section 1(a) are not judicially manageable and involve political questions. The trial court further concluded that the McKay Scholarship

Program does not implicate Article IX's uniformity requirements.

The First District Court of Appeal in *Citizens for Strong Sch. v. Fla. State Bd. of Educ.*, Case No. 1D16-2862 (Fla. 1st DCA 2017) (App. A), affirmed and held that Petitioners' claim under Article IX is a non-justiciable political question. It further held that Article IX permits the State to operate a specialized tuition voucher program to private schools for children with disabilities.

Summary of Argument

This Court has discretionary jurisdiction under Art. V, § 3(b)(3), Fla. Const. and Fla. R. App. P. 9.030(a)(2)(A)(ii), which provide that this Court may review decisions that expressly construe a provision of the Florida Constitution. The First DCA expressly construed several terms and phrases under Article IX, section 1(a) of the Florida Constitution, thus the Court has discretionary jurisdiction.

This Court should accept discretionary jurisdiction to establish that courts have the power to interpret and enforce the State's paramount duty under Article IX, Section 1(a) of the Florida Constitution, and to interpret Article IX's terms so that the will of the voters who passed Article IX can be fulfilled.

Argument

I. THIS COURT HAS DISCRETIONARY JURISDICTION BASED ON THE FIRST DCA'S DECISION THAT EXPRESSLY CONSTRUED SEVERAL PROVISIONS OF THE FLORIDA CONSTITUTION.

The jurisdiction of the Florida Supreme Court is set forth in the Florida

Constitution. Art. V, § 3(b), Fla. Const. The Florida Constitution grants the Florida Supreme Court discretion to "review any decision of a district court of appeal that ... expressly construes a provision of the state … constitution." Art. V, § 3(b)(3), Fla. Const.; *see also* Fla. R. App. P. 9.030(a)(2)(A)(ii) (same). There must be an actual construction of a constitutional provision, meaning that a "judge must undertake to explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision. It is not sufficient merely that the trial judge examines into the facts of a particular case and then apply a recognized, clear-cut provision." *Armstrong v. City of Tampa*, 106 So. 2d 407, 409 (Fla. 1958).

The First DCA expressly construed Article IX, section 1(a) of the Florida Constitution, which 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....

The First DCA construed the terms "adequate," "efficient" and "high quality," and held that these terms "lack judicially discoverable or manageable standards that would allow for meaningful judicial interpretation." (App. A, at 10.) The appellate court agreed "with the trial court that the terms 'efficient' and 'high quality' are no more susceptible to judicial interpretation than 'adequate' was under the prior version

of the education provision." (*Id.* at 14.) The court further construed that these terms "fail to provide the courts with sufficiently objective criteria by which to measure the performance of our co-equal governmental branches." (*Id.* at 17.) It held that Petitioners' case presented a non-justiciable political question, and would violate Florida's separation of powers. (*Id.* at 10.)

The court interpreted another phrase in Article IX: "adequate provision shall be made by law." The First DCA construed that this language "assigns such matters to the legislative branch" and "continues to commit education policy determinations to the legislative and executive branches." (*Id.* at 17.) The court reasoned that "absent explicit constitutional authority" to the judiciary, courts would violate Florida's separation of powers to "dictate educational policy choices." (*Id.* at 16.)

Noting incorrectly that "the sole uniformity claim on appeal relates to the McKay Scholarship Program," the First DCA further construed the term "uniform" as permitting the State to operate a tuition voucher program to private schools for children with disabilities. (*Id.* at 20-21.) By reaching a decision on the merits and concluding that the McKay program does not violate uniformity, the First DCA implicitly interpreted uniformity as justiciable.

For the above reasons, it is clear that this Court has discretionary jurisdiction based on the First DCA expressly construing Article IX of the Florida Constitution.

II. THIS COURT SHOULD ACCEPT JURISDICTION TO ESTABLISH THAT COURTS HAVE THE POWER TO INTERPRET AND ENFORCE ARTICLE IX.

Petitioners respectfully request that this Court exercise its jurisdiction to establish that courts have the power to interpret and enforce the State's constitutional paramount duty under Article IX, Section 1(a) of the Florida Constitution. As this Court has previously recognized, Article IX imposes "a maximum duty on the state to provide for public education that is uniform and of high quality." *Bush v. Holmes*, 919 So. 2d 392, 404 (Fla. 2006). The First DCA held that the duty to provide for public education is reserved to the Legislature and that the judicial branch has absolutely no role in ensuring that this constitutional duty is being fulfilled. It is important for the citizens of this State to have a determination by this Court as to whether the education clause is justiciable and enforceable, or merely aspirational.

As it stands under the First DCA's opinion, no court has the power to interpret and enforce the State's constitutional paramount duty under Article IX. This interpretation renders the education clause meaningless. The First DCA's opinion conflicts with this Court's precedent that clearly found Article IX to be an enforceable "mandate to provide for children's education and a restriction on the execution of that mandate." *See id.* at 406.

The role of the judiciary is to ensure the mandate is carried out consistent with the limitation on legislative power set forth in this constitutional provision. *Id.* at 405

(education clause contains a "mandate in article IX, section 1(a) that it is the state's 'paramount duty' to make adequate provision for education and that the manner in which this mandate must be carried out is 'by law for a uniform, efficient, safe, secure, and high quality system of free public schools'"). If there is no role for the courts in ensuring this constitutional mandate is enforced, then Article IX is not a mandatory duty at all. Without an enforcement mechanism, this provision fails in its primary purpose to protect the education of children as a "fundamental value" of the people of the State of Florida. *See* Art. IX, § 1(a), Fla. Const.

The First DCA concluded that Florida has a strict separation of powers jurisprudence which precludes any judicial review of the State's implementation of its Article IX duties. (App. A, at 16-17.) As the *Holmes* Court noted, the 1998 amendment to the education clause was proposed in response to the *Coalition* Court's conclusion that the Legislature "is vested with the power to decide what funding is 'adequate.'" 919 So. 2d at 403, citing *Coalition for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 406-07 (Fla. 1996). The new language was intended to strengthen and clarify Article IX and to "provide standards by which to measure the adequacy of the public school education provided by the state." *Id.* The First DCA's view of separation of powers is that there is no language that the voters could approve or facts that could ever support a claim that would allow the judiciary to review the State's efforts to adequately provide for the public school system. (App.

A, at 17 (“it is the political branches that must give meaning to these terms”).)

If Article IX is truly a mandate, as this Court has previously held, then there must be a role for the courts to hold the legislature accountable to this constitutional restraint on its exercise of power. For example, under the pre-1998 revision of Article IX, Justice Overton used an example of a 30% illiteracy rate to illustrate that certainly a minimum threshold exists below which the funding provided by the Legislature is inadequate. *See Coalition,* 680 So. 2d at 409 (Overton, J., concurring). The 1998 Constitution Revision Commission specifically revised the “adequacy” provision in response to *Coalition*. *See* 919 So. 2d at 404. The strongest language in the country, *see id*., should not be interpreted to mean that even if the Legislature funded only $1 per child that no court could review that. If the current language from the 1998 revision does not provide judicially manageable standards, it is important for the people of Florida to understand if there are any standards that could be judicially manageable. Likewise, the people of Florida need a determination as to whether Florida’s separation of powers doctrine prohibits the judiciary from ever holding the State accountable for failing to adequately provide for education. Importantly, if the State’s “paramount duty” for education can be carved out from judicial review, there likely will be an impact on other subsidiary duties.

Further, by neglecting to construe the term uniform for the non-voucher issues involved in the wide disparities among different populations and between school

districts in the public school system, the First DCA recedes from the long history of caselaw interpreting and exercising jurisdiction over the "uniformity" provision of Article IX. *See State ex rel. Clark v. Henderson*, 188 So. 351, 352 (Fla. 1939) (system of public free schools shall be established upon principles that are of uniform operation throughout the State and that such system shall be liberally maintained); *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"); *cf. Holmes*, 919 So. 2d at 412 (public funding of alternative system of private schools not subject to uniformity requirements of public school system is prohibited).

The First DCA's opinion that Florida's public school system cannot be reviewed by the courts precludes any examination of measuring the many wide disparities in opportunities and achievement in the public education system[1] against

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[1] For example, 75% of tenth graders in St. Johns passed the reading assessment while only 26% passed in Gadsden. On the math assessment, Bradford had the lowest passing rate at 5% overall, 0% for Black students, 6% for students in poverty and 0% for students with disabilities.

the yardstick of the Constitution. *See Askew v. Schuster*, 331 So. 2d 297, 300 (Fla. 1976)*, quoting In re Apportionment Law, Sen. Jt. Res. No. 1305*, 263 So. 2d 797 (Fla. 1972) (courts will not substitute their judgment for that of another coordinate branch of government, but will measure acts done with the yardstick of the constitution). Regardless of whether the terms "efficiency" and "high quality" are determined to be judicially manageable, the term "uniform" already has been determined to be manageable and justiciable, and it is crucial that this Court ensure that its precedent is not discarded. If the First DCA's interpretation of non-justiciability is applied to "uniform," it would render the current education clause even less powerful than the previous one that was before the *Coalition* Court.

Additionally, the First DCA's interpretation of the phrase "adequate provision shall be made by law" may impact other areas of law beyond education. The First DCA interpreted the phrase "adequate provision shall be made by law" as assigning matters to the legislative branch. (App. A, at 17.) Because Article II, section 7 of the Florida Constitution uses identical language, the First DCA's opinion could mean that no court has the authority to review the laws "for the abatement of air and water pollution and of excessive and unnecessary noise and for the conservation and protection of natural resources." By accepting jurisdiction, this Court can ensure that the First DCA's opinion does not have widespread consequences that affect matters beyond education.

Another reason that this Court should exercise its jurisdiction is to correct the First DCA's misapplication of *Holmes*. The *Holmes* Court concluded that Article IX is violated when "some children [are allowed] to receive a publicly funded education through an alternative system of private schools that are not subject to the uniformity requirements of the public school system." 919 So. 2d at 412. The First DCA found that the McKay Scholarship Program is like the exceptional student education program that was distinguished in dicta by the *Holmes* Court. (App. A, at 21, citing 919 So. 2d at 412.) The exceptional student education program and the McKay program both apply to children with disabilities, but they are vastly different in that the exceptional student education program is a <u>public</u> school program whereas the McKay program is a publicly funded <u>private</u> school voucher program. The McKay program is structurally the same as the Opportunity Scholarship program which the *Holmes* Court found provided an unconstitutional alternative to the public school system. The McKay program also is identical to the Opportunity Scholarship program in that neither are subject to the uniformity requirements of the public school system. It is therefore a misapplication of Florida Supreme Court precedent to not apply Article IX's uniformity requirements to the McKay program as *Holmes* did to the Opportunity Scholarship program. *See* 919 So. 2d at 412.

<u>Conclusion</u>

For the reasons stated, this Court has discretionary jurisdiction, and Petitioners respectfully request that this Court exercise its jurisdiction.

Respectfully submitted,

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I hereby certify that the foregoing brief complies with the font requirement of Fla. R. App. P. 9.210(a)(2), and is submitted in Times New Roman, 14 point.

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