SC18-67

In the Supreme Court of Florida

CITIZENS FOR STRONG SCHOOLS, *et al.*,

Petitioners,

v.

FLORIDA STATE BOARD OF EDUCATION, *et al.*,

Respondents,

and

CELESTE JOHNSON, *et al.*,

Intervenors/Respondents.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIRST DISTRICT
CASE NO. 1D16-2862

RESPONDENTS' BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Constitutional Provisions

Rules

Other Authorities

STATEMENT OF THE CASE AND FACTS

This case originated in 2009, when Petitioners brought suit seeking a declaration that Florida's education system violates article IX, section 1(a) of the Florida Constitution. That provision states, "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." Respondents moved to dismiss the complaint based on this Court's previous decision in *Coalition for Adequacy & Fairness in School Funding, Inc. v. Chiles*, 680 So. 2d 400 (Fla. 1996). *Coalition* had rejected as a non-justiciable political question a similar blanket challenge under a prior version of article IX, section 1(a) ("Adequate provision shall be made by law for a uniform system of free public schools.").[1] Specifically, this Court determined that the *Coalition* plaintiffs "failed to demonstrate in their allegations, or in their arguments on appeal, an appropriate standard for determining 'adequacy' that would not present a substantial risk of judicial intrusion into the powers and responsibilities assigned to the legislature." *Id*. at 408.

Respondents' motion to dismiss based on *Coalition* was denied by the circuit court, and Respondents petitioned the First District for a writ of prohibition. That court (in a 7-1-7 decision) denied the writ but certified the question whether

[1] Article IX, section 1(a) was amended in 1998.

article IX, section 1(a) provides "judicially ascertainable standards" for determination of the claim. *Haridopolos v. Citizens for Strong Sch., Inc.*, 81 So. 3d 465 (Fla. 1st DCA 2011). This Court declined to review the certified question, and the case proceeded in the trial court. 103 So. 3d 140 (Fla. 2012).

"After extensive pre-trial discovery, a four-week bench trial was conducted" in 2016, during which "more than forty witnesses testified and over 5,300 exhibits were submitted." Slip. Op. 7. At trial, Petitioners based their challenge on the constitutional terms "adequate," "efficient," and "high quality," while also arguing that the McKay Scholarship Program for Students with Disabilities made the system not "uniform" under *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).

In a lengthy judgment supported by extensive findings of fact, the trial court found that, as in *Coalition*, Petitioners failed to establish standards by which to measure Respondents' compliance with the constitutional terms in article IX, section 1(a). For that reason, "all of the issues raised by [Petitioners] regarding educational adequacy, efficiency, and quality were properly considered 'political questions best resolved in the political arena.'" Slip Op. 8 (quoting trial court). The trial court nevertheless made findings on numerous aspects of Florida's education system, including "that the State had made significant efforts and advances in education, leading to sustained improvement on outcomes for Florida students." *Id.* The court also found the McKay Program constitutional under *Holmes*.

The First District affirmed the trial court's judgment, agreeing that Petitioners "failed to demonstrate any meaningful standards under which the courts could find that the State has violated its constitutional duties regarding the adequacy, efficiency and quality of the public school system." Slip Op. 17–18. The First District also agreed with the trial court's determination as to the McKay Program, noting that the program "does not materially impact the K-12 public school system" and "provides a benefit to help disabled students obtain a high quality education." *Id*. at 5.

Petitioners now seek further review based solely on this Court's discretionary jurisdiction over decisions of the district courts of appeal that "expressly construe[] a provision of the state . . . constitution." Art. V, § 3(b)(3), Fla. Const.; *accord* Fla. R. App. P. 9.030(a)(2)(A)(ii). Pet. Juris. Br. 1.

SUMMARY OF ARGUMENT

This Court lacks jurisdiction because the First District did not construe any constitutional terms. Even if discretionary jurisdiction did exist, review should be denied because the First District properly applied this Court's decision in *Coalition* to the facts found by the trial court. After extensive discovery and a 4-week trial, Petitioners, like the *Coalition* plaintiffs, "failed to demonstrate . . . an appropriate standard for determining adequacy" much less the additional terms "efficiency" and "high quality." 680 So. 2d at 408. Given Petitioners' failure to supply such

standards, the First District was unable to construe the constitutional language.

Nor is the First District's decision regarding the McKay Program subject to review. Petitioners do not claim that the First District construed any constitutional term but merely that the court "misappli[ed]" this Court's decision in *Holmes*. Pet. Juris. Br. 10. Regardless, the First District correctly applied *Holmes* to the facts found by the trial court.

ARGUMENT

I. THE COURT LACKS JURISDICTION BECAUSE THE FIRST DISTRICT MERELY APPLIED THIS COURT'S PRECEDENTS.

Review is not appropriate here because the First District simply applied this Court's precedents to the facts found by the trial court. Jurisdiction over decisions expressly construing constitutional provisions (the only basis raised by Petitioners) exists only where the challenged decision "undertakes . . . 'to explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision.'" *Ogle v. Pepin*, 273 So. 2d 391, 392 (Fla. 1973) (quoting *Armstrong v. City of Tampa*, 106 So. 2d 407, 409 (Fla. 1958)); s*ee also Rojas v. State*, 288 So. 2d 234, 238 (Fla. 1973) (no jurisdiction where lower court "did not explain, define or otherwise by express language remove existing doubts as to the proper construction of a constitutional provision"). "[J]urisdiction is not properly invoked merely because the trial court may [a]pply a constitutional provision to the facts before it." *Dykman v. State*, 294 So. 2d 633, 635 (Fla. 1973).

The First District correctly applied *Coalition*, in which this Court concluded that the challenge there, based on the phrase "[a]dequate provision shall be made by law," was not justiciable because the term "adequate" lacks "straightforward content," and because the plaintiffs "failed to demonstrate . . . an appropriate standard for determining 'adequacy' that would not present a substantial risk of judicial intrusion into the powers and responsibilities assigned to the legislature." 680 So. 2d at 405, 408. As the First District explained in this case, "[w]hile the supreme court declined to hold that an adequacy challenge to the education system could *never* succeed, it concluded that the *Coalition* plaintiffs failed to demonstrate any manageable standards that could be applied." Slip Op. 13–14.

Here, Petitioners were given ample opportunity—years of litigation and a 4-week trial with more than 40 witnesses (including multiple experts) and over 5,300 exhibits—to present standards for determining "adequacy" as well as "efficiency" and "high quality" (terms added by the 1998 amendment). But in the end, the trial court found that Petitioners "failed to demonstrate any meaningful standards under which the courts could find that the State has violated its constitutional duties regarding the adequacy, efficiency and quality of the public school system." *Id*. at 17–18. Despite the trial court's repeated requests, Petitioners never articulated—and certainly never demonstrated—any consistent or manageable judicial standards to evaluate their claim. And, on appeal to the First District, Petitioners argued for a

new standard—not presented to the trial court or supported by any evidence—under which the entire statewide system should be judged against the achievement of students in the highest-performing local school district.

This is not a situation where the court misinterpreted constitutional terms or rejected fixed definitions supplied by the litigants. Petitioners' failure to establish (or even articulate) any consistent, appropriate standards underscores the political nature of these questions and the very problem identified by the trial court and the First District. *See id*. at 17 ("[A]s the trial court recognized here, the lack of any definitive consensus regarding education policies and programs demonstrates the political nature of Appellants' assertions.").

In the face of Petitioners' failure to demonstrate consistent and judicially manageable standards, the First District correctly "agree[d] 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" at issue in *Coalition*. *Id*. at 14. Indeed, all three of these "terms are adjectives of degree" that "do not lend themselves to a 'yes or no' evaluation" and require judgments on educational policy that are beyond the jurisdiction of the courts. *Haridopolos*, 81 So. 3d at 477 (Roberts, J., dissenting).

In *Haridopolos*, the First District certified the question whether article IX, section 1(a) "set[s] forth judicially ascertainable standards that can be used to

determine the adequacy, efficiency, safety, security, and high quality of public education on a statewide basis." 81 So. 3d at 473, *rev. denied*, 103 So. 3d 140 (Fla. 2012). Although this question could not be definitively answered in the negative without an evidentiary record, Petitioners bore the burden of "demonstrate[ing] . . . appropriate standard[s]." *Coalition*, 680 So. 2d at 408. The trial court and the First District correctly determined that Petitioners have not carried that burden.

The First District's decision is also consistent with *Holmes*, which involved the term "uniform." This constitutional term predates the 1998 amendment and was specifically distinguished in *Coalition*, because, unlike "uniform," "'adequacy' simply does not have such straightforward content." 680 So. 2d at 408. *Holmes* did not purport to define or interpret the terms "efficient" and "high quality" at all, and its observations about other language were dicta unnecessary to its holding. Neither *Holmes* nor the Constitution Revision Commission (CRC) commentary that it quotes undermines the finding that article IX lacks judicially manageable standards to assess Petitioners' efficiency and quality challenges.[2]

[2] Review of the CRC commentary indeed demonstrates a lack of consensus about whether any justiciable standards could be derived from the amended language. *See, e.g.*, *CRC Minutes* Jan. 15, 1998 (http://fall.fsulawrc.com/crc/minutes/crcminutes011598.html) 286:25–287:6 ("Now, what does high quality mean? I don't know. Maybe you do. We all have our ideas about what high quality is but nobody really knows and so then the court would take expert testimony from all of the Ph.Ds and what have you all around the world and decide what high quality education is."); *CRC Minutes* Feb. 26, 1998 (http://fall.fsulawrc.com/crc/minutes/crcminutes02269

With the benefit of an extensive trial record, the First District correctly applied settled law to the trial court's factual findings (not challenged on appeal by Petitioners). Throughout their brief, Petitioners inappropriately ask this Court to reweigh the relevance and significance of certain achievement evidence and data. *See* Pet. Juris. Br. 1, 8 n.1. But the trial court made voluminous findings about this very evidence, determining that it either was not relevant in context or was outweighed by countervailing evidence.[3] A reweighing of this evidence is not the purpose of appellate review.

The First District's application of the Court's existing precedent does not meet the requirements for jurisdiction under article V, section 3(b)(3). The First District was unable to construe the constitutional terms "adequate," "high quality," and "efficient," because, as in *Coalition*, Petitioners did not meet their burden to supply appropriate standards for doing so.[4] Moreover, even if discretionary

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8.html) 59:1–10 ("[E]fficient could mean a lot of things in a lot of different contexts. . . . by including this in the language, do you potentially produce ambiguity that may be a stumbling block to the success of what you are trying to achieve?").

[3] For example, "Florida's high school graduation rate has dramatically improved, 'with more students of all racial, ethnic and socioeconomic backgrounds graduating than ever before,' and [] 'Florida students have substantially improved their performance on the National Assessment of Education Progress . . . a testing program required by federal and state law [and] . . . Florida is now among the highest scoring states in the nation.'" Slip Op. at 9 (quoting trial court).

[4] Nor did the First District construe the other constitutional terms relied on by Petitioners—"adequate provision shall be made by law" and "uniform." As to the first, the First District merely relied on this Court's decision in *Coalition*, which

jurisdiction did exist, the First District's decision would not present an appropriate case for the Court to exercise that discretion. *See* Harry Lee Anstead *et al.*, *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. 431, 484–85, 502 (2005) (discussing the Court's discretion to deny review).

II. THE COURT LACKS JURISDICTION TO REVIEW THE FIRST DISTRICT'S DECISION UPHOLDING THE MCKAY SCHOLARSHIP PROGRAM.

There similarly is no jurisdiction to review Petitioners' contention that the McKay Program violates article IX, section 1(a)'s uniformity requirement. Petitioners admit that the First District's decision on the McKay Program merely applied this Court's decision in *Holmes* and the construction of "uniform" contained therein. *See* Pet. Juris. Br. 10 (asking the Court to exercise its jurisdiction "to correct the First DCA's misapplication of *Holmes*").

Even if there were an express construction sufficient for discretionary jurisdiction, the First District's application of *Holmes* to the facts found by the trial court would not be a basis for exercise of that discretion. *Holmes*, while holding that the Opportunity Scholarship Program violated the uniformity requirement, explicitly "reject[ed] the suggestion . . . that other publicly funded educational and welfare programs would necessarily be affected by our decision." 919 So.2d at

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concluded that this language is not susceptible of judicial construction. Slip Op. 13. And, as to "uniform," Petitioners explicitly claim that the First District "neglect[ed] to construe the term uniform." Pet. Juris. Br. 7.

412. As an example, the Court pointed to "the program for exceptional students at issue in *Scavella* [*v. School Board of Dade County*, 363 So. 2d 1095 (Fla. 1978)]," which allowed use of public funds for private education of students with disabilities. *Holmes*, 919 So.2d at 412.

Comparing these programs to the trial court's factual findings, the First District correctly determined that the McKay Program does not create a non-uniform system. Specifically, McKay "is a specialized scholarship limited to students with disabilities," "involve[s] only approximately 30,000 of the total 2.7 million students in the public schools, and only a fraction of the statewide K-12 public school budget, such that it could not be reasonably argued that the McKay Scholarship Program had a 'material effect' on the public K-12 education system," and that "research has shown that the McKay program has a positive effect on the public schools." Slip Op. 21–22. The court's straightforward application of *Holmes* to these facts does not warrant discretionary review.

CONCLUSION

For the reasons set forth above, the Court does not have jurisdiction, and review should be denied.

Respectfully submitted this 16th day of April, 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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