IN THE SUPREME COURT OF FLORIDA

Case No. SC 18-67

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

Appellants,

v.

FLORIDA STATE BOARD OF EDUCATION, et al.,

Appellees.

On Appeal from the First District Court of Appeal

AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT/PETITIONERS

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STATEMENT OF IDENTITY AND INTEREST IN THE CASE

I. Statement of Interest in the Case

The *Amici*[1] seek to advocate for education provided to certain students– including homeless, Black, and Hispanic students, English Language Learners ("ELL"), and students receiving free or reduced-price lunch ("FRL students") (collectively "Disadvantaged Children") –who are underachieving in disparate numbers compared to the overall population in Florida. These students make up a large and important subset of students whose achievement scores demonstrate they are not receiving a high quality education, as mandated by Florida's Constitution. As organizations committed to serving at-risk students, the *Amici's* interest is whether the First District Court of Appeal incorrectly found Florida courts incapable of enforcing the constitutional mandate that the State provide high quality education for ***all*** students. The *Amici* submit that refusal to require Florida to comply with the mandate leaves these students without equal access to a quality public education.

II. The *Amici Curiae*'s Respective Interests

The National Law Center of Homelessness & Poverty (the "Law Center") is the only national organization dedicated solely to using the power of law to end

[1] The *Amici Curiae* are four organizations and one professor of law: (1) National Law Center on Homelessness & Poverty; (2) Florida's Children First; (3) the Children and Youth Law Clinic at the University of Miami School of Law; and (4) FSU College of Law, Children's Advocacy Clinic and Michael J. Dale, professor of law at Nova Southeastern University.

and prevent homelessness. Through policy advocacy, public education, and impact litigation, the Law Center addresses the symptoms and root causes of homelessness by developing, advocating for, and implementing effective laws and policies that meet the needs of those who are homeless or at risk of becoming homeless.

Florida's Children First ("FCF") is a non-profit organization dedicated to advancing the rights of at-risk children, especially those in foster care. FCF works to improve government and private systems that exist to serve children through advocacy to executive and legislative branches of government as well as training of attorneys representing at-risk youth.

Florida State University College of Law, Children's Advocacy Clinic, is a leading advocate for children's rights in Florida, and provides full legal representation for children with foster care, juvenile delinquency, health care, special education, school discipline, disability, social security and criminal law issues. State court judges routinely appoint the Clinic to represent disadvantaged children throughout Florida. The Clinic has extensive experience in special education and discipline cases before school districts in the Florida Panhandle. The Director of the Children's Advocacy Clinic routinely publishes on special education issues and trains on special education for Florida Guardian Ad Litem Programs and Legal Services Programs around the state.

The Children and Youth Law Clinic ("CYLC") is a legal clinic staffed by faculty and students of the University of Miami School of Law. CYLC engages in individual and law reform advocacy to serve legal needs of vulnerable children, with emphasis on child welfare and juvenile justice systems. Many CYLC clients experience homelessness as children or young adults, and a significant focus of its policy advocacy is improving educational outcomes for foster children and addressing youth homelessness. CYLC has appeared as amicus curiae in many federal and state court cases implicating constitutional interests of children.

Michael J. Dale is a professor at Nova Southeastern University College of Law in Fort Lauderdale. The focus of his litigation and scholarship over 40 years has been the rights of children, including the right to educational benefits in a variety of contexts such as racial discrimination, special education, and due process in public schools and institutions. He is the former attorney in charge of the Special Litigation Unit, Juvenile Rights Division, of the Legal Aid Society of the City of New York, and Executive Director of the Youth Law Center in San Francisco, where he litigated cases involving rights to education in state and federal courts. At Nova College of Law he has litigated cases involving educational rights through the school's family and children's clinic. Professor Dale has authored over 75 articles focusing primarily on legal rights of children, and a textbook, "Representing the Child Client."

SUMMARY OF ARGUMENT

Florida's Constitution makes education a fundamental value, and requires a uniform system of education to be provided to all children in the state. The appellate court erred in finding those requirements non-justiciable. The court should have looked to state-mandated performance assessments and the language of the Constitution itself for guidelines to determine whether the State has complied with its constitutional duty. Disadvantaged Children in Florida perform significantly worse than their peers in state assessments. These disparities indicate that not all children are provided with a high quality education, and present the State with an opportunity to move toward fulfilling the requirements of the Constitution. The record is replete with evidence that additional funding and resources to address educational needs of Disadvantaged Children would correct these disparities, getting the State closer to providing a uniform education.

Florida would not be the first state to hold a legislature accountable to constitutional standards. Other states have looked at performance of all children within their education systems and found that the states failed to provide the uniform, quality education mandated by their constitutions based on failure to address disparities among children in the schools. These states were held accountable by their courts for violating constitutional mandates. *Amici* ask this Court to do the same - use the standards approved by the people of Florida in its

Constitution and hold the State accountable to the performance standards it adopted. Assessing whether all children in the State are learning core content the State selected as evidence of "high quality" education is well within this Court's power.

ARGUMENT

I. HEIGHTENED SCRUTINY IS WARRANTED TO MEASURE WHETHER THE STATE HAS FULFILLED ITS CONSTITUTIONAL DUTY TO PROVIDE HIGH QUALITY EDUCATION TO ALL STUDENTS.

A. The Citizens of Florida Voted to Strengthen the Mandate on Education

In 1998, the people of Florida voted to bypass the legislative process to strengthen the State's obligation to provide a system of high quality public education by amending the Florida Constitution. *See Bush v. Holmes*, 919 So.2d 392, 403 (Fla. 2006) ("[I]n 1998… the Constitutional Revision Commission (the "CRC") proposed, and the citizens of this state, approved an amendment to article IX, section 1 to make clear that education is a "fundamental value" and "a paramount duty of the state"). The 1998 amendment, referred to as "Revision 6," modified the former education clause to the present clause:

> 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.

Art. IX, 1(a), Fla. Const. (emphasis supplied). The clear intent of the revision was to raise the standard for public education received by Florida's students. Jon Mills & Timothy McLendon, *Setting a New Standard for Public Education: Revision 6 Increases the Duty of the State to Make 'Adequate Provision' for Florida Schools*, 52 Fla. L. Rev. 329 (2000), http://scholarship.law.ufl.edu/facultypub/520.

In addition to a heightened duty to provide a high quality education, the inclusion of the phrase "all children" mandates that a constitutionally adequate education be provided to children across all counties, economic circumstances, housing statuses, disabilities, English language proficiencies, races, and ethnicities. Mills, 52 Fla. L. Rev. 329 at 370 (2000). The incorporation of "all children" and "paramount duty" was not inadvertent, but reflects the intent of the CRC to emphasize both the importance of education in Florida and access to education for every student in the state. The terms are reflective of those adopted in the 1868 Florida Constitution, which declared "[i]t is a paramount duty of the State to make ample provision for the education of all children residing within its borders, without distinction or preference." Art. VIII, 2, Fla. Const. The history of the constitutional revision of 1868 shows the intent of the drafters was to require free education without regard to race. David Tyack and Robert Lowe, *The Constitutional Moment: Reconstruction and Black Education in the South*, American Journal of Education, Vol. 94, No. 2, at 244 (1986); Jamie S. Dycus,

Lost Opportunity: Bush v. Holmes and the Application of State Constitutional Uniformity Clauses to School Voucher Programs (2006), Student Scholarship Papers, Paper 29, http://digitalcommons.law.yale.edu/student_papers/29.

Both terms, "paramount duty" and "all children", disappeared from subsequent versions of the Constitution, replaced with pro-segregation language. *See* Dycus, Student Scholarship Papers, Paper 29 (2006) (only guiding principles for Florida's public education system after the 1885 amendment were a vague requirement for uniformity and a mandate for segregation). Thus, the re-inclusion of the "all children" and "paramount duty" language into Florida's Constitution must be considered an intentional move to elevate the state's duty to education.

B. The State's Paramount Duty to All Children Requires Heightened Scrutiny

The State's paramount duty to ensure every child has access to a high quality education must be read *in pari materia* with other parts of the State Constitution, including the equal protection clause (as provided in Fla. Const. Art. I, § 2). *See State v. Div. of Bond Fin. of Dep't of Gen. Servs*., 278 So. 2d 614, 618 (Fla. 1973) ("A constitutional amendment becomes a part of the Constitution and must be construed *in pari materia* with all of those portions of the Constitution which have a bearing on the same subject"). *Amici* urge this Court to reject the First District Court of Appeal's application of the rational basis test, and apply heightened scrutiny. A higher standard of review would address disparities in the achievement

of Disadvantaged Children and comport with the Constitution's guarantee of equal protection for all children. The legislative history makes clear that the CRC and people of Florida intended to hold the State to a higher standard by providing judicially manageable standards. Further, legislatively-created state assessments testing student proficiency and school performance are an appropriate yardstick by which to measure the adequacy of education. Thus, this Court should reject the lower courts' use of rational basis to determine whether the state is abiding by its constitutional mandate.

Other state high courts have held that their constitution's equal protection clauses apply to the duty to provide a public school system. *DuPree v. Alma Sch. Dist. No. 30 of Crawford Cty.*, 651 S.W.2d 90 (Ark. 1983). The Arkansas Supreme Court found that the State failed to provide equal educational opportunities to all students, applying its equal protection clause to the state funding system that provided disparate funds amongst its school districts based largely on local tax base. *Id.* at 92; citing, *Washakie County School District No. One v. Herschler*, 606 P.2d 310 (Wyo.1980); *Pauley v. Kelly*, 255 S.E.2d 859 (W.Va.1979); *Serrano v. Priest*, 557 P.2d 929 (Cal.1976); *Horton v. Meskill*, 172 Conn. 615, 376 A.2d 359 (Conn.1976) (holding respective state equal protection clauses require equal education opportunities for all).

C. The 1998 Amendment and State Assessment System Provide Standards That Can Be Judicially Enforced

The people of Florida voted both to strengthen the constitutional mandate to provide a high quality education through the 1998 amendment, and sought to provide judicially manageable standards of review of the State's obligation to provide a system of high quality public education. *See Bush*, 919 So.2d at 403 (Fla. 2006) ("in 1998… the Constitutional Revision Commission proposed and the citizens of this state approved an amendment to article IX, section 1 . . . *to provide standards by which to measure the adequacy of the public school education provided by the state*.") (emphasis supplied). As further noted by this Court, "the addition of 'efficient, safe, secure, and high quality' represents an attempt by the 1997-1998 CRC to provide constitutional standards to measure the 'adequacy' provision found in the second sentence of section 1." *Id.* at 404.

In holding that Article IX lacks judicially manageable standards, the First District not only ignored the plain language of the Constitution and intent of Florida Citizens that the judiciary enforce the standards, but also ignored clear evidence before it demonstrating a measuring stick for the State's compliance with its obligations: existing disparities in academic performance among the students of Florida. Whether the State has provided a high-quality education can be measured by looking at the results of state assessments, which are designed to measure the content standards created by the Legislature and the State Board of Education.

Rec. 3437 ¶ 108, 3419-20 ¶¶ 53-56. Disparities in performance on these assessments will guide the adjudication of claims challenging whether the legislature carried out its constitutionally mandated obligations. Rec. 3438 ¶ 108.

As set forth below, other states have looked at disparities among schools and students to guide them in determining whether legislatures are meeting their constitutional burdens. The State's inability to address existing disparities violates the Florida Constitution by failing to provide for equal protection in accessing education.

II. DISPARITIES AMONG FLORIDA'S STUDENTS AND SCHOOL DISTRICTS DEMONSTRATE THAT THE STATE IS FAILING TO MEET ITS CONSTITUTIONAL BURDEN

A. Disparities in Performance Demonstrate That the State Has Failed Its Paramount Duty to *All* Children

The record is replete with examples showing that the State is failing to meet its constitutional burden to all children, as measured across subgroups of students. Wide disparities exist on achievement scores based on race and economic status. While 58% of the general student population could read at grade level, as evidenced by 2014 assessments, only 38% of Black students, 54% of Hispanic students, and 27% of ELL students read at grade level. Rec. Ex. 2907, at 72050-72072. These rates demonstrate that minority students are at higher risk of failure to meet standards set by the State for measuring a "high quality" education. Similarly, there is a clear disparity among children of varying socioeconomic

statuses. Rec. 3404, ¶ 2. For example, only 42% of FRL students (who make up 47% of all students) and only 37% of homeless students could read at grade level in 2014. Rec. 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; Exs. 4320, at 123529; 3588, at 96689. Minority subgroups in some districts fared even worse. In Lafayette and Madison Counties, students who qualify for the "Exceptional Education and Student Services" program, based on a disability, had a 0% passing rate on state assessments, and ELL Students had an 11% passage rate for tenth grade reading. Rec. Exs. 4162 (3rd grade) and 4168 (6th Grade); Ex. 4050.

It is clear from the legislative record that the CRC intended not that the State be measured by the aggregate or average child's performance, but that it be evaluated on whether it is providing a high quality education to *all* children. Both the trial court and the appellate court ignored this mandate, even as Plaintiffs demonstrated gross discrepancies between subsets of children in the State. For example, despite the tremendous evidence on the plight of the education of homeless students, the Trial Court dedicated a paltry two of the 169 pages of its findings of fact to homeless students. R. 3776-3777. If the Florida Constitution is to have any meaning at all, the very disparate performance of a large subset of

students in Florida public schools must be determinative of whether the State is meeting its burden.

B. Compliance with the Constitution Can Be Achieved by Addressing the Disparities

Empirical evidence shows that addressing disparities in school performance can help states provide high quality education that is uniform across the population of students. According to studies conducted by the Educational Testing Service, which provides standardized tests such as the GRE and the TOEFL, equalization of spending levels leads to a narrowing of test score outcomes across family background groups. Tom Ewin, *Study: To Close the Achievement Gap, Close the Resource Gap*, Educational Testing Service (2016), http://news.ets.org/press-releases/study-to-close-the-achievement-gap-close-the-resource-gap/. The authors concluded that "[a]s a rule of thumb, for a state finance system to provide equal educational opportunity, that system must ensure sufficiently higher resources in higher need settings than in lower need settings." *Id.*

A similar research project, which involved the compilation of over twenty years of National Assessment of Educational Progress (NAEP) data on revenue and expenditures for schools, explored the relationship between school finance reforms and improved student outcomes. Bruce D. Baker, et al., *Minding the Gap: Twenty Years of Progress and Retrenchment in School Funding and Achievement*

Gaps, Policy Information Report and ETS Research Report Series No. RR-16-15, available at (2016), https://files.eric.ed.gov/fulltext/EJ1124843.pdf. The authors found that increased staffing in schools with higher numbers of low-income students is directly related to closing the achievement gap between low-income and non-low-income students. *Id*. at 27. The authors ultimately concluded that a uniform education requires focus not necessarily on equal funding, but on funding that provides all students equal access to education. By focusing on disparities in performance, and what is needed to overcome those disparities, the State can act to ensure a uniform education is provided to all students.

Trial evidence established that students in lower socioeconomic groups can perform as well as their more advantaged peers if they receive additional support. Rec. 3414, ¶ 35. In fact homeless students, who demonstrated the lowest scores and were most unlikely to achieve the standards mandated by the State, can achieve performance scores closer to those of the general population of their peers if given the proper tools and additional support. Tr. v. 2, 218: 1-25; 219:1-13, 21920-25, 220:1-18. Given that there are empirically based remedies available to help close the achievement gap among the differing socioeconomic statuses, races, and ethnicities, it is incumbent upon the State to utilize those tools in order to satisfy the uniformity requirement of the Florida Constitution.

III. OTHER STATES HAVE CONSIDERED DISPARITIES IN APPLYING LEGISLATIVE STANDARDS TO DETERMINE COMPLIANCE WITH CONSTITUTIONAL REQUIREMENTS

State supreme courts around the U.S. have held states to standards set forth in their constitutions and intervened when education systems failed to adhere to them, finding such claims to be undoubtedly justiciable. *See e.g. Abbeville County School Dist. v. State*, 767 S.E.2d 157, 163 (S.C. 2014); *Gannon v. State*, 319 P.3d 1196, 1202 (Kan. 2014); *Martinez v. State*, 2014 WL 12729852, at *2 (N.M. Dist. Nov. 14, 2014); *Rose v. Council for a Better Educ., Inc.*, 790 S.W.2d 186, 189 (Ky. 1989) (denying that interpretation of constitution constitutes an intrusion on separation of powers).

A. State Courts Have Held Educational Systems Accountable for Disparities in Performance Among Sub-Groups of Children

The constitutions of Alaska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Utah, Virginia, Washington, West Virginia, and Wisconsin each explicitly mandate that "**all children**" have access to education. Many of these states' courts have laboriously interpreted their constitutions word-by-word to extract the true intent of the legislature. Most have construed a literal interpretation of “all children” in the education articles of their respective constitutions and determined that "all children" encompasses each and every public school student. *See e.g. McCleary v. State*, 269 P.3d 227, 249 (Wash. 2012) ("all children" includes "'each and every

child since each will be a member of, and participant in, this State's democracy, society, and economy.' No child is excluded.") These courts have held state education systems responsible for failing to ensure equal educational opportunities to "all children" in the state, especially minorities.

To illustrate, the Supreme Court of North Carolina in *Hoke County Bd. of Educ. v. State* held the state's board of education denied students their constitutional right to education as evidenced by widespread poor standardized test scores, high drop-out and low graduation rates, high demand for remediation, and deficient post-secondary education success. 599 S.E.2d 365, 372 (N.C. 2004). Numerous boards of education serving low-income school districts brought suit against the State of North Carolina and the State Board of Education, asserting the state failed to ensure equal educational opportunities to students in a particular low-wealth community. *Id.* The court found the evidence supported a conclusion that students had been denied access to a constitutionally adequate education as they "trailed their statewide counterparts for proficiency by a considerable margin" (approximately 14.7% below-average passing rate). *Id*. at 383. The Supreme Court of North Carolina held that the state must "assume the responsibility for, and correct, those educational methods and practices that contribute to the failure to provide students with a constitutionally-conforming education." *Id*. at 373.

Similarly, the New Hampshire Supreme Court held in *Claremont School Dist. v. Governor* that the state's constitution "imposes a duty on the State to provide a constitutionally adequate education to ***every*** educable child in the public schools in New Hampshire and to guarantee adequate funding." 635 A.2d 1375, 1376 (N.H. 1993)(emphasis supplied). Plaintiffs, including five low-income school districts, filed for declaratory judgment against the Governor for failing "to spread educational opportunities equitably among its students and adequately fund education." *Id*. at 1377. The court ultimately found that the language of its constitution "commands, in no uncertain terms, that the State provide an education to all its citizens and that it support all public schools." *Id.* at 1378.

The Kentucky Supreme Court explained the state's obligation to provide an "efficient" education system in *Rose v. Council for a Better Educ., Inc.*. 790 S.W.2d 186, 189 (Ky. 1989). Plaintiff corporation – made up of 66 different school districts and public school students – brought a declaratory judgment action against the Kentucky General Assembly for noncompliance with the state's "constitutional mandate to 'provide an efficient system of common schools throughout the state.'" *Id*. (quoting KY. Const. § 183). The state's definition of "efficient," as interpreted by the court, means, among other things, that "[e]ducation must be provided to the children of the rich and poor alike," "[e]ducation of children is essential to the prosperity of our state," "[e]ducation of children should be supervised by the

[s]tate," "[the state] must not finance our schools in a *de minimis* fashion," and "[a]ll schools and children stand upon one level in their entitlement to equal state support." *Id.* at 206.

The Kentucky Supreme Court found that "achievement test scores in the poorer districts [were] lower than those in the richer districts, and expert opinion clearly established that there is a correlation between those scores and the wealth of the district." *Rose*, 790 S.W.2d at 197. The court further determined that "Kentucky's children, simply because of their place of residence are offered a hodgepodge of educational opportunities. The quality of education in the poorer local school districts is substantially less." *Id*. at 198. Ultimately, the court clarified the duty of the General Assembly in facilitating a state education system equally accessible by all students:

> The system of common schools must be adequately funded to achieve its goals. The system of common schools must be substantially uniform throughout the state. Each child, *every child,* in this Commonwealth must be provided with an equal opportunity to have an adequate education. Equality is the key word here. 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 must be given the same opportunity and access to an adequate education. This obligation cannot be shifted to local counties and local school districts.

Id. at 211 (emphasis in original).

In *Abbeville County School Dist. v. State*, the South Carolina Supreme Court ordered the state to present a comprehensive education plan in order to satisfy the

constitutional mandate of providing "all children" equal access to education. 780 S.E.2d 609, 610 (S.C. 2014). The Court's intervention followed a finding that respondents, including the state governor and legislative branch, "violated their constitutional duty to ensure that the students of South Carolina receive a minimally adequate education." *Id*.

B. Courts Have Held the Funding Schemes of States With Similar Constitutional Language Insufficient and Unconstitutional for Failing to Account for the Unique Needs of "All Children"

State courts have found the funding of public school systems unconstitutional due to disparate educational resources provided to school districts of varying socioeconomic statuses, oftentimes finding distribution of education funds discriminatory. *See e.g. Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139, 155 (Tenn. 1993); *see also Gannon v. State*, 319 P.3d 1196, 1204 & 1227-28 (Kan. 2014) (holding constitutionality of state's school funding formula itself and whether state failed to fully or adequately fund formula both judiciable matters). States have begun realizing the significance of providing accessible education to disadvantaged children and the positive outcomes on the community at large. *See Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 341 (N.Y. 2003) (establishing causal link between funding sound basic education and resulting benefits to not only students but also community according to correlative data showing lower crime rate in more educated communities).

In 2014, the Supreme Court of Kansas held in *Gannon v. State* that the state "created unconstitutional, wealth-based disparities by withholding all capital outlay state aid payments to which certain school districts were otherwise entitled." 319 P.3d 1196, 1204 (Kan. 2014). Adopting Kentucky's "adequate" education standards as set forth in *Rose*, the Court held that "its adequacy component is met when the public education financing system provided by the legislature for grades K-12–through structure and implementation–is reasonably calculated to have all Kansas public education students meet or exceed the standards set out in *Rose* and presently codified." *Id*. at 1236-1237.

Some defendant parties argue that the unique learning barriers confronted by underprivileged students should be mitigated by social services, not the education system. The Supreme Court of New Jersey rejected that argument in *Abbott v. Burke*. Rather, it found that through effective education, children of poorer urban districts will have equal opportunity to perform at the level of their more privileged peers and be productive members of society. 575 A.2d 359, 369-371 (N.J. 1990). The "poorer the district and the greater its need, the less the money available, and the worse the education. That system is neither thorough nor efficient." *Id*. at 363. Holding the education system unconstitutional, the Court ordered its education act "be amended to assure funding of education in poorer urban districts at the level of property-rich districts. . . and that the level of funding must also be adequate to

provide for the special educational needs of these poorer urban districts in order to redress their extreme disadvantages." *Id.*

CONCLUSION

As intended by the 1998 revision to the Florida Constitution, this Court should hold the State accountable for complying with the demands of the Education Article. That the State is failing to provide a high quality education to all children is evident in the disparities that exist in school performance across racial and socioeconomic status and across school districts. As other state supreme courts have found, the blatant disregard for performance of some of the Florida's students falls well short of compliance with a constitutionally recognized duty. Without intervention by this Court, the most vulnerable of the children in Florida will have no means by which to enforce their right for a "high quality education."

CERTIFICATE OF SERVICE

We hereby certify that a true and correct copy of the foregoing was furnished via electronic means and/or U.S. Mail to the persons on the attached service list, this 20th day of June, 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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