SC18-67

In the Supreme Court of Florida

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

Petitioners,

v.

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

Respondents,

and

CELESTE JOHNSON, *et al.*,

Intervenor–Respondents.

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

ANSWER BRIEF OF RESPONDENTS

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INTRODUCTION

At issue is whether the First District Court of Appeal erred by refusing to set aside a final judgment in which the circuit court concluded, *after a four-week trial*, that the Plaintiff–Petitioners had "failed to meet their burden to prove that Defendants have failed to meet their obligations under Article IX, Section 1(a) of the Florida Constitution." (R.3399.)[1] The circuit court reached that conclusion—which was based on an extensive evidentiary record including thousands of trial exhibits and live testimony from dozens of witnesses—for at least four independently sufficient reasons: (1) Plaintiffs' failure to demonstrate judicially manageable standards for assessing their claim (R.3388–89), (2) the barrier posed by Florida's strict separation of powers (R.3390), (3) Plaintiffs' failure to prove a causal connection between a lack of appropriations or other resources and allegedly low-quality student outcomes (R.3395), and (4) Florida's record of sustained improvement and impressive achievements over time (R.3394–96).

The First District affirmed the circuit court's judgment primarily on the first and second grounds summarized above, but *each and any one* of them was sufficient to sustain that final judgment. The circuit court properly found and concluded that Plaintiffs had failed to identify judicially manageable standards or

[1] This brief generally refers to Plaintiff–Petitioners as "Plaintiffs," to Defendant–Respondents (the Florida State Board of Education, Commissioner of Education, and Legislature) as the "State," and to Intervenor–Respondents as "Intervenors."

otherwise to prove, even by a preponderance of the evidence, that a lack of appropriations or other resources had caused the State to violate article IX, section 1(a) of the Florida Constitution. The First District's decision should therefore be approved as right for *any* of these reasons, and the circuit court's final judgment should stand.

STATEMENT OF THE CASE AND FACTS

I. STATEMENT OF THE CASE

A. Nature of the Case

Plaintiffs challenge Florida's entire system of K–12 public schools and seek "a declaration that the State of Florida is breaching [a] constitutional paramount duty to [make adequate] provi[sion 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, as required by Article IX, section 1(a) of the Florida Constitution." (R.130 (2d Am. Compl.), ¶ 1.) After criticizing nearly every aspect of the State's major educational programs and policy choices, Plaintiffs asked the circuit court to "[o]rder Defendants to establish a remedial plan that: (1) conforms with the Florida Constitution . . . ; and (2) includes necessary studies to determine what resources and standards are necessary to provide a high quality education to Florida students." (R.162, ¶ c.)

Yet Plaintiffs failed to provide the circuit court or First District with any

consistent, coherent, or judicially manageable standards to evaluate their claim. Plaintiffs also failed to satisfy their demanding burden of proof—or even to overcome the weight of the evidence against them. The circuit court thus found no connection between any alleged lack of resources and alleged poor student performance and found that Florida has become one of the most successful and efficient states in improving student performance over time. Plaintiffs do not challenge the circuit court's findings "for clear error" in this appeal (Pet. Br. 9), and this Court should reject their attempt to undermine Florida's successful education policies as crafted, debated, and implemented by the other branches of government.

B. Course of Proceedings

Plaintiffs filed this action in 2009. The circuit court denied an early motion to dismiss on justiciability grounds, and although the First District denied the State's petition for a writ of prohibition, the First District noted that there had been no trial and that justiciability arguments would remain "available to the [State] on appeal" and subject to "plenary review." *Haridopolos v. Citizens for Strong Schs., Inc.*, 81 So. 3d 465, 471, 473 (Fla. 1st DCA 2012) (en banc) (plurality opinion). This Court declined to review the First District's decision on the writ of prohibition. *Haridopolos v. Citizens for Strong Schs., Inc.*, 103 So. 3d 140 (Fla. 2012) (table).

The circuit court partly granted a motion for judgment on the pleadings filed

by the Intervenors—parents of children participating in the Florida Tax Credit (FTC) Scholarship Program and the McKay Scholarship for Students with Disabilities Program—on the ground that Plaintiffs lack standing to challenge the FTC Program because it "does not involve any state appropriation or any diversion of public money from the state treasury that was earmarked for the public schools." (R.2540 (Pet. App. 69).) The circuit court also denied Plaintiffs' motion for partial summary judgment with respect to the FTC and McKay programs because the operative complaint "does not contain a claim that either program violates the Florida Constitution and does not include a request for such a declaration." (R.2543.)[2] The triable issues were further narrowed by Plaintiffs' decision to "withdr[a]w any challenge to the safety or security of Florida's public-school system." (R.3389.)

C. Disposition in the Lower Tribunal

After hearing the testimony of over 40 live witnesses during a four-week trial, and on the basis of a record with over 5,300 exhibits, the circuit court rejected Plaintiffs' claim and entered a Final Judgment for the State. The court's order spanned nearly 30 pages (R.3371–99 (Pet. App. 39–67)) and was accompanied by 175 pages of factual findings and citations to the evidence (R.3400–3578).[3]

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[2] Plaintiffs did not specifically challenge this ruling—which the circuit court repeated in its Final Judgment (R.3773)—on appeal before the First District.

[3] Plaintiffs' appendix omitted the circuit court's factual findings, which the State is therefore submitting in its own appendix for the Court's convenience.

First, the court concluded that Plaintiffs' claim was not justiciable, because "there are not judicially manageable standards to determine whether the State has made adequate provision 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.'" (R.3388–89.) As the court explained, "[t]he evidence shows that many of Florida's education policies and programs are subject to ongoing debate without any definitive consensus in the education community. They are political questions best resolved in the political arena." (R.3389.)

Second, the circuit court rejected Plaintiffs' claim "because of Florida's strict separation-of-powers doctrine." (R.3390.) Noting that "Plaintiffs ha[d] conceded that Florida courts cannot order the Legislature to appropriate additional funds for public education," the court concluded that it could not interfere in the State's budgeting process, require a "cost study," or order the State to create new "implementing legislation" without "exceed[ing] the judiciary's authority and lead[ing] the courts into a quagmire by forcing them to second-guess legislative and executive policy judgments." (R.3392; R.3393.)

Third, the circuit court found that given the weight of the evidence to the contrary, Plaintiffs "failed to prove a causal connection between the level of state funding, on one hand, and student performance or the overall quality of the public school system, on the other." (R.3395.) The court thus concluded, because "[t]he

goals of Florida's K–20 education system are not guarantees," § 1000.03(5)(g), Fla. Stat., the State cannot "be held liable for 'the many other factors . . . beyond school influences' that Plaintiffs allege affect individual student performance." (R.3395 (quoting R.149, ¶ 120).) Nor can the State "be held liable for potentially ineffective decisions made by local school districts in the exercise of their own constitutional obligation to operate Florida's public schools." (R.3396–97.)

Fourth, the circuit court found that Plaintiffs had "not shown that Defendants' actions are irrational or unconstitutional beyond a reasonable doubt." (R.3394.) Because "the State has adopted rigorous academic standards and an accountability system, enhanced teacher quality, lowered class sizes, provided extensive choice options, made education funding a priority even during difficult economic conditions, and provided by law for a system in which student performance on multiple metrics has improved over time," the court "conclude[d] the Defendants' education policies as presented at trial are rationally related to the provision of a uniform, efficient, safe, secure, and high-quality system that allows students to obtain a high-quality education"—thus "satisf[ying] the constitutional requirements of Article IX, Section 1(a)." (R.3394; R.3399.)

Finally, the circuit court rejected Plaintiffs' challenges to charter schools,[4]

[4] Plaintiffs abandoned their challenge to charter schools before the First District and have not mentioned those schools in their initial brief before this Court.

the FTC Program, and the McKay Program. The court reiterated its conclusion that Plaintiffs lack standing to challenge the FTC Program and further found "that the weight of the evidence does not support their speculative allegations that the FTC Program diverts state funding or has any material, detrimental effect on Florida's system of public schools." (R.3398.) And with respect to the McKay Program, the court concluded 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." (*Id.* (citing *Bush v. Holmes*, 919 So. 2d 392, 412 (Fla. 2006)).)

Plaintiffs appealed from the circuit court's judgment, which the First District then affirmed. *Citizens for Strong Schs., Inc. v. Fla. State Bd. of Educ.* (*CSS*), 232 So. 3d 1163 (2017) (Pet. App. 3–38). The First District noted the circuit court's "comprehensive findings on a broad range of subjects, including: the structure of Florida's education system; the various policies and programs implemented by the State to achieve its educational goals; the funding allocated for these programs; and student performance—overall and by various demographics—under state and national assessments." *Id.* at 1167. And after observing that "no language or authority in Article IX, section 1(a) . . . empower[s] judges to order the enactment of

educational policies regarding teaching methods and accountability, the appropriate funding of public schools, the proper allowance of charter schools and school choice, the best methods of student accountability and school accountability, and related funding priorities," the First District "agree[d] with the trial court that the terms 'adequate,' 'efficient,' and 'high quality' as used in Article IX, section 1(a) lack judicially discoverable or manageable standards that would allow for meaningful judicial interpretation, and that an attempt to evaluate the political branches' compliance with the organic law would constitute a violation of Florida's strict requirement of the separation of powers." *Id.* at 1166, 1168.

The First District also rejected the Plaintiffs' challenges to the FTC and McKay programs. Because Plaintiffs had "properly concede[d]" that they lacked standing to challenge the FTC Program under *McCall v. Scott*, 199 So. 3d 359 (Fla. 1st DCA 2016), *review denied*, No. SC16-1668, 2017 WL 192043 (Fla. Jan. 18, 2017), the court concluded that "the sole uniformity claim on appeal relates to the McKay Scholarship Program." *CSS*, 232 So. 3d at 1173. And with respect to McKay, the court held that "a modestly sized program designed to provide parents of disabled children with more educational opportunities to ensure access to a high quality education" did not "violate the text or spirit of a constitutional requirement of a uniform system of free public schools." *Id.* at 1174.

The First District thus concluded that Plaintiffs' "claims either raise political

questions not subject to judicial review or were correctly rejected on the merits." *CSS*, 232 So. 3d at 1174.

II. STATEMENT OF THE FACTS

A. Florida has implemented many successful education policies and reforms since the 1998 constitutional amendment at issue.

In 1998, Florida voters approved the following amendment to article IX, section 1 of the Florida Constitution (new language in italics):

> *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 . . . .*

(R.3387.) *See generally Holmes*, 919 So. 2d at 403.

Partly in response to that amendment, the State began to adopt and implement a series of educational reforms, including the A+ Plan for Education. (R.3448, ¶ 130.)[5] Those reforms and current policies have paved the way for the successes summarized below.

[5] *See also* Tr. vol. 37 at 5575:19–22 (Test. of former Lt. Gov. F. Brogan) (Q: "Was it the case that this legislation—again, which became known as A+—was designed to meet that standard that had been approved by the voters in the '98 election?" A: "Yes, sir."); *id.* at 5573–97 (describing development, major components, rationale, and early successes of the A+ Plan).

1. *Florida's system of public education provides comprehensive educational opportunities for K–12 students.*

The circuit court found that "the State has adopted rigorous academic standards and an accountability system, enhanced teacher quality, lowered class sizes, provided extensive choice options, made education funding a priority even during difficult economic conditions, and provided by law for a system in which student performance on multiple metrics has improved over time." (R.3394.) For example, Florida's accountability and assessment system is rated among the best in the nation and has resulted in more top-rated schools over time, even as the State has continued to raise the bar for academic standards and performance. (R.3376; R.3424–26, ¶¶ 69, 72–75.)[6] At the same time, Florida's rigorous and well-regarded teacher certification, evaluation, and training standards have caused the vast majority of the state's teachers to be "highly qualified" (under the federal No Child Left Behind Act) and rated "effective" or "highly effective" by their school districts. (R.3376; R.3459–66, ¶¶ 156–171; R.3467, ¶ 174.) Many Florida schools and school districts have received awards or national recognition for their quality. (R.3431, ¶ 90; R.3543–44, ¶¶ 366–367.)

Moreover, despite Plaintiffs' allegations about a lack of resources, the circuit

[6] *See also* Tr. vol. 29 at 4382–89 (Test. of Fla. DOE Deputy Comm'r J. Copa, describing history of school grades in Florida); Exs. 1829, 1830.

court found that funding for public education is at the highest level in Florida history (consisting of over $19.7 billion in state and local funds for the 2015–2016 school year alone), and education funding—based on a highly equalizing formula that considers actual costs—is consistently the largest part of the State's general-revenue budget. (R.3377; R.3495–96, ¶¶ 242–244.) Among other things, school funding is sufficient to support competitive teacher salaries (R.3532, ¶ 340; R.3548-49, ¶ 376), to allow school districts to meet constitutional class-size requirements (R.3509, ¶¶ 260–261; R.3549, ¶ 379), and to provide instructional and technological resources[7] in school facilities, which are safe, secure, and compliant with applicable codes and standards (R.3380–81; R.3553–54, ¶¶ 389–392).

2. *Florida has achieved dramatic improvements in student performance over time and become a leading state on many national and international assessments.*

Florida's school reforms and education policies—most of which were implemented after the 1998 constitutional amendment to article IX—have led to steady and impressive gains in student performance. As the circuit court explained, "[s]ince the implementation of statewide assessment and accountability reforms

[7] Florida's schools have a vast array of curricular offerings and programs, including virtual education, "magnet programs and schools; STEM, STEAM, and robotics programs; college and career enhancement programs such as Advanced Placement, International Baccalaureate, Cambridge, and career and technical education with industry certification; dual enrollment [for college credit]; and arts, music, and many other elective and extracurricular programs." (R.3543, ¶ 365; *see also* R.3554–57, ¶¶ 393–403.)

beginning in the 1990s, Florida has seen a dramatic increase in student achievement on a variety of measures, including national and international assessments, state assessments, graduation rates, and Advanced Placement participation and performance." (R.3474–75, ¶ 188.) The court devoted 20 pages to its detailed findings in this regard (R.3474–95, ¶¶ 188–241), which include the following:

- Despite Florida's increasingly rigorous graduation requirements, "since the 1998–99 school year, the high school graduation rate [*i.e.*, the percentage of students who graduate within four years of their first enrollment in ninth grade] has *increased by over 25 points*, with more students of all racial, ethnic, and socioeconomic backgrounds graduating than ever before." (R.3380–81 (emphasis added); *see also* R.3490–94, ¶¶ 226–236 (citing, in part, Exs. 4050, 5328, 5329 (depicting gains and shrinking gaps)).)
- On the National Assessment of Educational Progress (or NAEP, a federal testing program that allows state-to-state comparisons of student performance over time),[8] Florida has seen some of the nation's greatest improvements in reading and mathematics scores since the 1990s; in many categories—and for key demographic groups, including Black/African-

[8] Florida law requires NAEP participation, § 1008.22(2), Fla. Stat., and NAEP data is routinely considered by experts, policy makers, and courts. *See, e.g.*, *Morath v. Tex. Taxpayer and Student Fairness Coal.*, 490 S.W.3d 826, 891 (Tex. 2016) (using NAEP scores "to grade Texas in comparison to other states").

American, Hispanic/Latino, and economically disadvantaged students—Florida now boasts scores among the highest in the country. (R.3381; R.3475–82, ¶¶ 189–201.) Florida's Hispanic/Latino and economically disadvantaged students in particular *rank first in the nation* on key measures of reading performance. (R.3479–80, ¶ 198.a–b.)[9]

- Regarding Plaintiffs' allegations about "college readiness" (Pet. Br. 5), "Florida ranks second in the nation in Advanced Placement ('AP') participation rates and third in the nation for performance on AP exams," "has eliminated the AP participation gap and the success gap for Hispanic/Latino students," and "has significantly increased participation and success rates among low-income students." (R.3381; *see also* R.3488–90, ¶¶ 217–225.)
- Florida's students are among the top performers in the world, and exceed the United States' average scores, on international comparative assessments in math, science, and reading. (R.3482–84, ¶¶ 202–205.)

[9] The accomplishments of some of Florida's largest and most diverse school districts illustrate these trends. "Both Miami-Dade and Hillsborough Counties were recognized as among the top five performing urban [school] districts in the nation on NAEP in 2013," and in 2015 Miami-Dade—which has a diverse enrollment of over 340,000 students—"was ranked the top performing urban district in the nation." (R.3482, ¶ 200; *see also* Ex. 1739.) In addition, Miami-Dade and Orange County recently received "the prestigious Broad Prize, a national award given each year to the urban school district most successful in increasing student performance and closing achievement gaps," and Palm Beach was a finalist for the same prize in 2012. (R.3544, ¶ 367.)

- "The record also shows that Florida students have continually improved on state assessments and Florida has reduced achievement gaps over time, even as the state standards and assessments have become more rigorous." (R.3381; *see also* R.3483–88, ¶¶ 205–216.)

The circuit court further found that "Florida has also seen a closing of 'achievement gaps' among low-income and minority students at a rate faster than that of the rest of the nation." (R.3475, ¶ 188.) These gaps "exist throughout the country with respect to student performance of certain minority and low-income subgroups," but "Florida's gaps are smaller than the national gaps, and Florida has outpaced the nation in closing the[m]." (R.3477, ¶¶ 194, 195.)[10]

3. *Florida has one of the most efficient systems in the country.*

The circuit court found that Florida's primary funding formula (the Florida Education Finance Program, or FEFP) "results in a K–12 education system that has been recognized as one of the most efficient in the nation." (R.3499, ¶ 255.) This finding was based on evidence that "[o]ver the past two decades, Florida has

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[10] On NAEP, for instance, Florida was "the only state in the nation to narrow the achievement gap between White and Black/African-American students in both reading and mathematics in the fourth and eighth grades." (R.3381.) In 2015, "Florida's grade 4 Hispanic/Latino students continued to have the nation's highest percentage of students performing at or above Basic and at or above Proficient in reading." (R.3479, ¶ 198.a.) Also in 2015, "Florida's grade 4 [economically disadvantaged] students had the nation's highest percentage . . . performing at or above Basic . . . and the highest average scale score in reading." (R.3480, ¶ 198.b.)

achieved the second greatest achievement gains on NAEP tests while expenditure increases during this period have been lower than in other states." (*Id.*) Florida "accomplished this improvement with the lowest per pupil expenditure increases in the nation." (R.3573, ¶ 453 (citing, in part, Ex. 197 (showing state-by-state comparisons of spending increases and performance improvements over time)).)

B. The circuit court made detailed findings regarding Florida's performance standards.

Plaintiffs impugn the quality of Florida's public-education system primarily by highlighting disaggregated state-assessment scores in a few specific counties or within certain demographic subgroups.[11] Yet they do not acknowledge the circuit court's findings about the State's "rigorous and thorough public process for setting performance standards, with stakeholder input at multiple levels meant to ensure that expectations are set at the appropriate level to gauge improvement." (R.3443, ¶ 122.) And "the State of Florida cannot be the guarantor of each individual student's success." § 1000.03(5)(g), Fla. Stat.

The circuit court "recognize[d] that the level at which the State sets its standards and determines 'cut scores' for proficiency levels goes to the heart of the

[11] For example, Plaintiffs implicitly suggest that more English language learners (ELLs) should be "pass[ing]" the statewide reading assessment. (Pls.' Br. 4.) But "[b]ecause students who earn a Level 3 or above on the statewide assessment are no longer counted as ELLs, it is not appropriate to look at performance of ELLs on the statewide assessment as an indicator of educational quality." (R.3559, ¶ 410.)

education policymaking that is, under our Constitution, reserved to the executive and legislative branches of government." (R.3380.) Because cut scores are set "*after* students have sat for the first administration of any new assessment," the scores necessarily "represent a policy choice about performance level standards." (R.344, ¶ 124 (emphasis added); R.3445, ¶ 125.)

Thus, with respect to the assessment statistics that Plaintiffs misconstrue as "failure rates" (Pet. Br. 4), the circuit court correctly found that "[t]he State could have chosen to set the scores so that more students would be performing at the satisfactory level, but Florida has made a policy choice to have high performance standards, which have led to improvement over time, even if the initial cut scores placed the majority of students below the satisfactory level" (R.3445, ¶ 125). For the current Florida Standards Assessment, the State set the "passing" cut scores for "Level 3" performance such that only 51% to 55% of the students who had taken the statewide reading assessment—and only 36% to 59% of students who had taken statewide math assessments—would receive a Level 3 score.[12] As the circuit

[12] Ex. 4047 at 23–24; *cf.* Tr. vol. 26 at 3984:21–3985:5 (Test. of Fla. DOE Comm'r P. Stewart) ("We could make it such that it would appear that 85 percent of our students are performing at Level 3 or higher. But you use judgments . . . . And in our process of reform in Florida, we've always been wanting to raise the bar."); *id.* at 3986:11–18 ("I do believe there are states that set it so more of their students can get over that bar. But we have seen tremendous success with our process in Florida and how we have set high expectations. We've adopted rigorous standards, and our students are responding to that.").

court explained, "Despite Plaintiffs' desire to hold Defendants liable for student performance on state assessments, *even their counsel conceded* that '[i]t is certainly within the legislative and executive authority to set the cut scores,' which themselves reflect rational policy judgments about how to improve student performance over time." (R.3396 (emphasis added) (quoting Tr. vol. 38 at 5642:12–14).)

The State's decision to set ambitious performance standards—even if the resulting cut scores place many students temporarily below "grade level"—does not mean that those students are being deprived of an opportunity to obtain a high-quality education. For example, the circuit court found that "[e]arning a Level 1 or 2 in reading on the Florida state assessment . . . is not an indication that a student 'can't read' or is illiterate." (R.3444, ¶ 123.) Instead, "[t]he achievement levels on Florida's statewide assessments correlate to levels of mastery of Florida's rigorous content standards, not to external conceptions of literacy and educational attainment or to other assessments." (R.3487, ¶ 216.)[13] The circuit court thus explained that "[t]his case is not about a significant level of illiteracy." (R.3387 n.8.)

Plaintiffs' discussion of supposed "failure rates" (Pet. Br. 4) also ignores the fact that Florida's graduation standard *requires* high-school students to "pass" the

[13] *See also* Tr. vol. 26 at 4055:9–11 (Test. of Comm'r P. Stewart) ("[O]ur level 1 and level 2 students are not illiterate. Our level 1 and level 2 students can, in fact, accomplish great things.").

statewide reading and math assessments (or to earn a "concordant" or comparative score on an alternative test) to graduate from high school (R.3445–46, ¶ 126.b–c; R.3456–57, ¶ 148). As noted above, Florida's graduation rate is now the highest in state history after years of steady growth, and nearly 80% of all public high-school students meet the State's increasingly rigorous graduation standard within four years. (R.3455–57, ¶¶ 146–148; R.3491, ¶¶ 227–228.)

In addition, Plaintiffs continue to assert—incorrectly—that "[n]o extra funds are provided for schools in the school improvement program." (Pet. Br. 9.)[14] To the contrary, the circuit court found that although the State may not provide additional "direct moneys" to schools through the Differentiated Accountability (DA) school-improvement program,[15] "Plaintiffs' assertion that schools with high levels of low-income and minority students are not being given additional resources . . . is not supported by evidence." (R.3471, ¶ 182.) Instead, "additional resources *are* directed to schools with 'D' and 'F' grades and to schools with higher levels of poverty, as these schools spend substantially more per pupil than schools with higher levels of performance and socioeconomic status." (*Id.* (emphasis added);

[14] Plaintiffs alleged in the operative complaint that Florida's entire school-accountability system is unconstitutional (R.148–51, ¶¶ 113–136), but they have abandoned those arguments on appeal.

[15] Tr. vol. 15 at 2218:1–10 (Test. of Fla. DA Regional Exec. Dir. E. Thompson).

see also R.3498–99, ¶¶ 252–254.)[16]

Plaintiffs also overstate the prevalence of "persistently low-performing" schools in the DA system. (Pet. Br. 6–7.) As the circuit court found, "the evidence shows that [consecutive low school grades] ha[ve] occurred in only a small fraction of schools statewide." (R.3472, ¶ 183.) "For the 2013–14 school year, only 5% of traditional schools in the state had an 'F' grade, only 1.37% had been graded 'F' for two or more consecutive years, and only 0.07% (two schools [in Pinellas County]) had received an 'F' for four consecutive years." (*Id.*) The circuit court thus found that "[f]rom its inception in the late 1990s, the evidence shows the State's accountability system has been generally effective in turning schools around, increasing schools from 'D' or 'F' grades to grades of 'C' or above"—"without additional [cash] resources being provided." (R.3472, ¶ 183; R.3384.)

C. The circuit court made detailed findings regarding Florida's funding of public education.

In the operative complaint and throughout the history of this litigation, Plaintiffs have insisted that the State's alleged violation of article IX arises from a supposed lack of "funding" or "resources" for public education. (*See e.g.*, R.137,

[16] The circuit court also found that the DA program provides additional support for struggling schools in the form of "school improvement planning, leadership quality improvement, educator quality improvement, professional development, curriculum alignment and pacing, and use of continuous improvement and monitoring plans to identify barriers and strategies for school improvement." (R.3468, ¶ 176.)

¶ 30; R.138, ¶ 32; R.139, ¶¶ 42, 45; R.153, ¶ 155; R.154, ¶ 165; Pet. Br. 7–12.) But by any standard, the evidence supports the circuit court's findings and conclusion that "Florida law provides local school districts with adequate funding to allow students the opportunity to obtain a high-quality education." (R.3537, ¶ 354.)

1. *Florida's education funding is sufficient, cost-based, and results in greater resources for schools with struggling students.*

The circuit court properly found that "Plaintiffs' assertion that the state funding system does not result in sufficient funding for Florida's public schools is not supported *by the weight of the evidence*." (R.3535, ¶ 348 (emphasis added).) For example, the evidence shows that funding is sufficient to satisfy Florida's constitutional class-size requirements and the requirements of federal law with respect to students with disabilities and students experiencing homelessness. (R.3549, ¶ 379; R.3561, ¶¶ 416–417; R.3564–65, ¶ 425.) "The State is not required to dictate specific funding streams and resources to be used for each subgroup of possibly at-risk students. This is appropriately a job for the local districts that are responsible for educating the individual students . . . ." (R.3565, ¶ 426.) And as noted above, "[t]he weight of the evidence demonstrates that Florida's funding system directs more funds to schools with high numbers of economically disadvantaged students and to schools with low student performance." (R.3534, ¶ 347.)

More broadly, the circuit court found that "Plaintiffs' assertions that the

FEFP is deficient because it does not consider the cost of educating students, does not appropriately provide funding for students in poverty, or does not generate adequate funding to provide students with an opportunity to receive a high quality education," are "not supported by the evidence." (R.3499, ¶ 256.) With respect to costs, the court found that the FEFP funding formula "has numerous cost-based elements, including the number of students to be educated ('FTE'), program cost factors, the District Cost [of living] Differential, sparsity and declining enrollment supplements, transportation, and the class-size-reduction categorical." (R.3534, ¶ 346.) "Thus, Plaintiffs' assertion that the state education-funding system does not consider costs is incorrect and is without evidentiary support." (*Id.*)

2. *Florida equalizes funding across school districts.*

The circuit court found that "[t]he FEFP is generally recognized as one of the most equalizing school funding formulas in the nation." (R.3497, ¶ 248.) To compensate for differences across school districts, the FEFP accounts for varying local tax bases, program costs, and costs of living, as well as the sparsity and dispersion of the student population. (R.3497, ¶ 247.) "The FEFP [thus] considers and provides funding on the basis of the actual cost of providing educational services in various settings, and in different parts of the state." (R.3497, ¶ 248.)

Plaintiffs' emphasis on alleged funding "disparities" caused by differences

in local taxes (Pet. Br. 10–11) ignores the circuit court's finding that "[s]chool districts in the state generally have strong financial ratings and reserves, and the ability to raise substantial additional revenue if, with voter approval, local school boards and communities determine additional resources are important" (R.3380). Indeed, "all of the school districts in Florida have excess capacity for generating revenue through local property taxes or sales surtaxes," and voters almost always approve the taxes proposed by local school boards. (R.3539, ¶ 357; *see also* R.3517, ¶ 287; R.3540, ¶ 358.) The court thus found that "complaints from local school district officials about a lack of funding [are] not persuasive—any lack of resources is more the result of local school board and district budgeting and resource-allocation choices, than a lack of funding made available by the State." (R.3537–38, ¶ 354.)

The court also found that the "few districts" (like Gadsden County) with low fiscal reserves were outliers,[17] where "the financial situation was the result of ineffective local choices, such as a failure to reduce staff or consider school consolidation . . . , and that these fund balances have returned to healthy levels" with guidance from the State. (R.3538–39, ¶ 356.) "The vast majority of school

[17] At trial, even Gadsden County was "not in financial emergency condition." Tr. vol. 32 at 4883:19–4885:10 (Test. of Fla. DOE Deputy Comm'r L. Champion). And *absolutely no evidence* supports Plaintiffs' assertion that "[i]nsufficient resources in Gadsden ha[ve] impacted student performance." (Pet. Br. 12.)

districts have healthy reserve funds, which they were able to maintain throughout the [Great R]ecession," and the "State has limited responsibility or control over the choices made by local school boards when it comes to local taxation, budgeting, expenditures, and management practices, all of which are properly the role of local boards under the Constitution." (R.3538, ¶ 355; R.3542, ¶ 363.)

SUMMARY OF ARGUMENT

The First District properly concluded that Plaintiffs' blanket attack on Florida's entire system of K–12 public schools raises non-justiciable political questions and implicates prohibitive separation-of-powers concerns. Article IX, section 1(a) does not create a privately enforceable right to public education, it commits responsibility for defining the public-education system to the Legislature "by law," and its only arguably judicially manageable standards concern class sizes that Plaintiffs do not (and factually *could* not) challenge.

But even if the First District's justiciability or separation-of-powers reasoning were somehow incorrect, its decision should be approved for other reasons supported by the record. The circuit court correctly found that Plaintiffs proved no causal connection between any alleged lack of school resources and student performance. The weight of the evidence actually showed the *absence* of such a connection, regardless of the burden of proof. And the circuit court correctly

found that the State has *more* than satisfied any reasonable interpretation of its obligations under article IX, section 1(a) of the Florida Constitution.

ARGUMENT

This Court is not a forum for Plaintiffs to explore new legal theories or identify supposed "errors" that they invited. "Even under a *de novo* standard of review, the trial court's final judgment has the presumption of correctness and the burden is on the appellant to demonstrate error.'" *Snowden v. Wells Fargo Bank*, 172 So. 3d 506, 507 (Fla. 1st DCA 2015) (quoting *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1151 (Fla. 1979)). And "[e]ven when based on erroneous reasoning, a conclusion or decision of a trial court will generally be affirmed if the evidence or an alternative theory supports it." *Applegate*, 377 So. 2d at 1152.

I. PLAINTIFFS' CLAIM IS NOT JUSTICIABLE.

Standard of Review: Questions involving the interpretation of article IX, section 1(a) are reviewed de novo. *See Holmes*, 919 So. 2d at 399.

A. Plaintiffs' claim implicates non-justiciable political questions.

1. *There are no judicially manageable standards to determine the meaning of an "efficient" or "high quality" education.*

The adequacy claim here is strikingly similar to the one rejected 20 years ago in *Coalition for Adequacy & Fairness in School Funding, Inc. v. Chiles*, 680 So. 2d 400 (Fla. 1996). The plaintiffs in that case "asked the trial court to declare . . . that the State has failed to provide" a constitutionally "adequate

education" by "failing to allocate adequate resources." *Id.* at 402.

The *Coalition* Court held that "there are no judicially manageable standards available to determine adequacy" under article IX, section 1 and further held that "the legislature has been vested with enormous discretion by the Florida Constitution to determine what provision to make for an adequate and uniform system of free public schools." *Coalition*, 680 So. 2d at 408. This Court thus affirmed the complaint's dismissal because the plaintiffs had failed to identify "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, both generally (in determining appropriations) and specifically (in providing *by law* for an adequate and uniform system of education)." *Id.*

Plaintiffs have made a similar "blanket assertion that the entire system is constitutionally inadequate." (R.3386 (quoting *Coalition*, 680 So. 2d at 406).) And regardless of later amendments to article IX, *Coalition* applies with full force.

The 1998 constitutional amendment changed the education clause that had been interpreted in *Coalition* (as relevant here) to include the new adjectives "efficient" and "high quality." Art. IX, § 1(a), Fla. Const. Yet applying either of those new terms to Florida's system of public schools—which must be provided for *by law*—necessarily involves "political question[s] which [are] outside the scope of the judiciary's jurisdiction." *Coalition*, 680 So. 2d at 408. The First District thus

correctly held "that the terms 'efficient' and 'high quality' are no more susceptible [of] judicial interpretation than 'adequate' was under the prior version of the education provision, and to define these terms would require 'an initial policy determination of a kind clearly for nonjudicial discretion.'" *CSS*, 232 So. 3d at 1170 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). (*Accord* R.3387.)

First, the constitutional requirement that "[a]dequate provision shall be made *by law* for a . . . system of free public schools," Art. IX, § 1(a), Fla. Const. (emphasis added), shows "that the constitution has committed the determination of 'adequacy' to the legislature." *Coalition*, 680 So. 2d at 408.[18] "The fact that this language remains in the education amendment after *Coalition* demonstrates that the constitution continues to commit education policy determinations to the legislative and executive branches." *CSS*, 232 So. 3d at 1171. And Plaintiffs are wrong to suggest that the meaning of "by law" somehow changed with the 1998 amendment. (Pet. Br. 35–36.) Indeed, the Fifth DCA has specifically held that the amended education clause "can not be found to be self-executing"—*i.e.*, privately enforceable—"because the language set forth in the provision leaves too many issues unresolved. . . . Article IX, section 1 specifically states that the provision of

[18] *See also Holzendorf v. Bell*, 606 So. 2d 645, 648 (Fla. 1st DCA 1992) ("Under the Constitution, the phrase 'as provided by law' means as passed 'by an act of the legislature.'" (quoting *Broward Cty. v. Plantation Imports, Inc.*, 419 So. 2d 1145, 1148 (Fla. 4th DCA 1982))).

an adequate education must be made by the Legislature since the provision states that 'adequate provision shall be made by law.'" *Simon v. Celebration Co.*, 883 So. 2d 826, 831 (Fla. 5th DCA 2004).[19] The constitutional requirement that adequate provision be made "by law"—both at the time of the *Coalition* case and today—clearly limits the courts' ability to define an "adequate" system of public schools under the Florida Constitution.[20]

Second, article IX, section 1(a) still lacks "judicially discoverable and manageable standards for resolving" the political questions raised by Plaintiffs' claim. *Coalition*, 680 So. 2d at 408. As Chief Judge Roberts of the First District explained when the State sought a writ of prohibition, the justiciability of Plaintiffs' claim turns on "whether the [1998] amendment provides standards by which the

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[19] *School Board of Miami-Dade County v. King*, 940 So. 2d 593, 602–03 (Fla. 1st DCA 2006), purported to distinguish and qualify the *Simon* holding, but the *Haridopolos* plurality recognized that the discussion of article IX (and hence *Simon*) in *King* was "*obiter dicta*." *Haridopolos*, 81 So. 3d at 472.

[20] Plaintiffs' argument that "[t]he phrase 'by law' in Article IX is a directive to the Legislature to pass legislation implementing the constitutional mandate" (Pet. 35) is a red herring. The circuit court properly rejected Plaintiffs' request for "implementing legislation" on the ground that the State has already enacted and implemented "numerous reforms and refinements of Florida's K–12 public school system." (R.3392.) And Judge Wolf, who suggested in *Haridopolos* that "implementing legislation" *might* be an available remedy under article IX, properly concluded that "[t]he plaintiffs in this case chose not to pursue that remedy." *CSS*, 232 So. 3d at 1174 (Wolf, J., concurring).

judiciary can measure the statutes challenged to determine whether they are constitutional." *Haridopolos*, 81 So. 3d at 477 (Roberts, J., dissenting). But the adjectives "efficient" and "high quality" do not give judicially manageable content to the "adequacy" standard that was held non-justiciable in *Coalition*:

> [E]ven though the additional language clearly expresses an emphasis on education, it does not provide any more of a justiciable standard than the "adequate provision" command did in *Coalition*. . . . The terms are adjectives of degree, meaning that even an unlimited amount of resources and ideal policies and administration could not provide a guarantee of perfect efficiency . . . or quality. . . . [T]he terms require a policy judgment regarding whether the system is efficient . . . or high quality. Whether the legislature has created a system that meets the requirements expected by our citizens will have to be judged by the citizens themselves. For a court to attempt to determine whether the school system is efficient . . . or high quality would require the court to substitute its own judgment for the policy decisions made by the other branches of the government.

Id. (footnote omitted); *see also Simon*, 883 So. 2d at 831 ("[T]here is no benchmark for determining what 'adequate provision for education' is meant to entail, nor is the term 'high quality education' defined in the provision.").

In fact, the only judicially manageable standards added to article IX, section 1(a) since *Coalition*—and the only provisions that make *any* reference to state funding—concern class size. In 2002, voters approved an amendment that added the following language to the end of section 1(a) (emphasis added): "*To assure that children attending public schools obtain a high quality education,* the legislature shall make adequate provision to ensure that . . . the maximum number of

students per classroom does not exceed the requirements of this subsection . . . ."

As Chief Judge Roberts observed, the vague adjectives in the 1998 amendment "can be contrasted with the language in . . . the [2002] class size amendment," which "provides detailed definitions and quantifiable measures. If the drafters of the 1998 amendment to article IX had intended to create judicially manageable standards, it would not have been difficult to do so." *Haridopolos*, 81 So. 3d at 478 n.10 (Roberts, J., dissenting). What is more, given the "principle of construction, 'expressio unius est exclusio alterius,' or 'the expression of one thing implies the exclusion of another,'" *Holmes*, 919 So. 2d at 407, the class-size amendment's introductory phrase—"To assure that children attending public schools obtain a high quality education," Art. IX, § 1(a), Fla. Const.—strongly suggests that class size is the *exclusive* standard for determining whether the State has adequately provided by law for a "high quality education."

The circuit court thus correctly reasoned that "Article IX, Section l(a) also specifies that the way to 'assure that children attending public schools obtain a high quality education' is for the Legislature to provide funding to meet the class-size requirements specified therein." (R.3395.) And despite Plaintiffs' complaints about funding, they have not challenged the court's finding that "[t]he weight of the evidence shows that these class-size requirements—which are contained in Article IX's only *specific* funding provision—have been satisfied." (*Id.*)

2. *The other* Coalition *and* Baker *factors, and the evidence, further show that Plaintiffs' claim is not justiciable.*

The *Coalition* case turned on only two of the justiciability considerations identified in *Baker v. Carr*, 369 U.S. 186: "(1) a textually demonstrable commitment of the issue to a coordinate political department; [and] (2) a lack of judicially discoverable and manageable standards for resolving it." *Coalition*, 680 So. 2d at 408. But the other *Baker* factors—(3) the involvement of non-judicial policy determinations, (4) the impossibility of attempting a judicial resolution without disrespecting coordinate branches of government, (5) a need for adherence to previous political decisions, and (6) potential embarrassment from multifarious pronouncements by various departments, *id.*—further support the conclusion that Plaintiffs' challenge raises insurmountable political questions. As Chief Judge Roberts recognized, Plaintiffs "would have the courts first create a standard by which to determine whether the schools are efficient . . . and high quality, and then substitute the policy judgments of the judicial branch for those of the legislative and executive branches." *Haridopolos*, 81 So. 3d at 478 (Roberts, J., dissenting).

The trial here confirmed that Plaintiffs are asking Florida's courts to wade into a political thicket. As the circuit court found, "[t]he evidence shows that many of Florida's education policies and programs are subject to ongoing debate without any definitive consensus in the education community." (R.3389.) For example,

"Plaintiffs' own witnesses do not agree on what part, if any, of the teacher evaluation system they think is unfair to teachers . . . , and still others have no objection to VAM [evaluations] or even think it is a good policy." (R.3465, ¶ 169.) And at least some Plaintiffs even disagreed with their own counsel. One Plaintiff testified that they want the courts to strike down all of Florida's statutes and policies on charter schools, accountability, merit pay, standardized testing, third-grade retention, and graduation requirements—while Plaintiffs' counsel disclaimed any desire for the Court to decide the constitutionality of any statutes other than the appropriations act.[21] The circuit court aptly summarized this conflict when it found that "even Plaintiffs and their witness acknowledge" that many of the "legislative and executive policy judgments" at issue "are subject to ongoing debate." (R.3393.)

The judicial branch is not equipped to redefine the structure, contours, and funding of Florida's public-education system under the Florida Constitution given the "complex public-policy questions" involved in "legislative and executive decisions involving billions of dollars and multiple demographic, fiscal, and logistical factors" that "must be promptly implemented and then consistently reevaluated."

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[21] *Compare* Tr. vol. 21 at 3117:18–3118:21 (Test. of Pl. Fund Education Now's K. Oropeza), *with* Tr. vol. 26 at 3917:13–14 (argument of Plaintiffs' counsel) ("And we're not asking this Court to strike down the specific statutes . . . ."); Tr. vol. 38 at 5639:15–17 (same) ("And we are not asking for any specific remedy on any specific statute, it is really a declaration about the entire system . . . .").

CSS, 232 So. 3d at 1169. These "profound questions—such as those involved in adopting and executing education policies for millions of K–12 students—must necessarily be performed exclusively within the political branches, which by their nature are far more responsive and prompt to address the needs of parents and students than the courts could ever be." *Id.*

3. *Neither the history of the Constitution Revision Commission nor* Bush v. Holmes *makes Plaintiffs' claim justiciable.*

Plaintiffs (and their supporting amici) inappropriately rely on unauthenticated materials related to the Constitution Revision Commission (CRC) that drafted the 1998 amendment to article IX as "unambiguous evidence that the revision was intended to create a judicially manageable and enforceable set of standards for education." (Pet. Br. 20.) None of this "evidence" was presented to the circuit court, and it should not be considered in this appeal.[22] Indeed, unlike the CRC materials quoted in *Bush v. Holmes*, 919 So. 2d at 418–19, the materials cited by Plaintiffs include an unsourced "ballot statement" and list of "pro[s]" and

[22] *See Altchiler v. State, Dep't of Prof'l Regulation*, 442 So. 2d 349, 350 (Fla. 1st DCA 1983) ("That an appellate court may not consider matters outside the record is so elemental that there is no excuse for any attorney to attempt to bring such matters before the court."); *Ellsworth v. Ins. Co. of N. Am.*, 508 So. 2d 395, 398 (Fla. 1st DCA 1987) (noting that, because "an appeal is a proceeding to review a judgment or order of a lower tribunal based upon the record made before the lower tribunal, . . . appellate judicial notice of a legislative Staff Summary and Analysis would be incompatible with traditional standards of appellate practice" (internal quotation marks omitted).

cons (Pet. Br. 19) that may not even be official CRC records.[23] By contrast, the CRC materials quoted in *Holmes* reveal uncertainty and disagreement about the amendment's effect and explain that its drafters did *not* intend to make education a "fundamental right" (as opposed to a "value") or to expose the State to "liab[ility] for every individual's dissatisfaction with the education system." *Holmes*, 919 So. 2d at 404 (quoting CRC commentary); *see also id.* at 419 (describing concerns).

At any rate, as a majority of the First District (both the dissenting and concurring judges) concluded, "[w]hether the Commission *intended* to create a justiciable standard is ultimately irrelevant." *Haridopolos*, 81 So. 3d at 478 (Roberts, J., dissenting) (emphasis added).[24] "The test is whether an enforceable standard was actually created by the text of the amendment itself. Because the terms 'efficient . . . and high quality' are no more susceptible [of] judicial enforcement than the term 'adequate,' this claim cannot be enforced by the courts." *Id.*

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[23] The "ballot *statement*" that Plaintiffs cite is *not* the official ballot *summary* that was presented to voters (which is available at http://dos.elections.myflorida.com/initiatives/fulltext/pdf/11-2.pdf) and does not comply with the statutory requirements for ballot language of the sort considered in *State v. Grassi*, 532 So. 2d 1055, 1056 (Fla. 1988) (*cited in* Pet. Br. 19). *See generally* § 101.161, Fla. Stat.

[24] *See also Haridopolos*, 81 So. 3d at 474 (Wolf, J., concurring) ("Clearly, it was the intent of the Constitutional Revision Commission that drafted the 1998 amendment . . . to address the decision in *Coalition*, 680 So. 2d 400, by adding language to further elucidate the public's desires concerning the public education system. Unfortunately, this language *still* did not provide measurable goals by which the court could judge legislative performance and enforce the provision in any particular manner."), *cited in CSS*, 232 So. 3d at 1174 (Wolf, J., concurring).

Plaintiffs' reliance on *Bush v. Holmes* is similarly misplaced. *Holmes* involved a uniformity challenge to Florida's Opportunity Scholarship Program (OSP), which allowed students attending a "failing" public school to request a state-funded scholarship to attend private school instead. *See generally Holmes*, 919 So. 2d at 400–01. The Supreme Court held the OSP unconstitutional on the ground that it "foster[ed] plural, nonuniform systems of education in direct violation of the constitutional mandate for a uniform system of free public schools." *Id.* at 398. The *Holmes* Court thus applied uniformity standards that existed before the 1998 constitutional amendment (and that were distinguished in *Coalition*).[25]

The *Holmes* Court did not define or interpret the terms "efficient" and "high quality" at all. And all of its observations about the 1998 amendment were dicta unnecessary to the Court's uniformity holding. Neither *Holmes* nor the CRC materials—much less the views of the selected CRC members who filed an amicus brief supporting Plaintiffs in this appeal—undermines the circuit and district courts' conclusion that article IX lacks judicially manageable standards to assess Plaintiffs' challenges *here*.

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[25] *See Coalition*, 680 So. 2d at 406 ("While the courts are competent to decide whether or not the Legislature's distribution of state funds to complement local education expenditures results in the required '*uniform system*,' the courts cannot decide whether the Legislature's appropriation of funds is *adequate* in the abstract." (second emphasis added) (quoting trial court)).

B. Plaintiffs never articulated a consistent, judicially manageable standard to assess the State's compliance with article IX.

Plaintiffs make much of a single sentence at the end of *Coalition*: "While we stop short of saying 'never,' appellants have failed to demonstrate in their allegations, or in their arguments on appeal, an appropriate standard for determining 'adequacy.'" 680 So. 2d at 408 (*cited in* Pet. Br. 17-18). They also cite Justice Overton's special concurrence, in which he opined that "certainly a minimum threshold exists below which the funding provided by the legislature would be considered 'inadequate.'" 680 So. 2d at. 409 (Overton, J., concurring) (*cited in* Pet. Br. 18.) Yet neither of those debatable qualifications to *Coalition*'s holding can be used to salvage the Plaintiffs' claim.

Regardless of whether some *other* case might arise in which Justice Overton's hypothetical "minimum threshold" warranted further judicial review, Plaintiffs *here* "failed to demonstrate in their allegations, or in their arguments on appeal"—*or even at trial*—"an appropriate standard" for assessing their claim without a substantial risk of judicial intrusion into the powers and responsibilities assigned to the legislature."[26] *Coalition*, 680 So. 2d at 408. And despite Justice Overton's hypothetical involving a 30% illiteracy rate, the circuit court found that

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[26] Instead of *demonstrating* an appropriate standard, the operative complaint includes a prayer seeking "studies to *determine* what resources and *standards* are necessary to provide a high quality education to Florida students." (R.162, ¶ c. (emphasis added).)

"[t]his case is not about a significant level of illiteracy." (R.3387 n.8.)

In response to the circuit court's repeated requests, Plaintiffs never articulated any consistent or manageable judicial standards to evaluate their claim. Plaintiffs focused generally on statewide test scores, for example—despite their allegations that "the accountability system, changes to graduation requirements, retention and promotion requirements," and standardized testing are all unconstitutional (R.148, ¶ 112; *see also* Tr. vol. 21 at 3117:18–3118:21 (Test. of Pl. Fund Education Now's K. Oropeza)). But "in a case consuming almost a decade of litigation and demonstrating the lack of finality inherent in an attempt to litigate such a complex political dispute," *CSS*, 232 So. 3d at 1168-69, their suggestions about mandatory performance outcomes have been all over the map.

Does "'[h]igh quality' mean[] above average," as alleged in the operative complaint? (R.152, ¶ 149.) Or is a "high-quality education" instead "one which allows students to learn the core content knowledge and be ready for college"? (Pet. Br. 29.) Does "'[e]fficient' mean[] productive of desired effects without waste," as alleged in the complaint? (R.147, ¶ 111.) Then what does it mean for Plaintiffs to say on appeal that "[t]his Court *could* define 'efficient' by looking to Florida's own education standards . . . (including whether [system] resources are allocated equitably) to determine whether the education provides what is expected"? (Pet. Br. 28 (emphasis added).) If constitutional compliance is

"measurable by disaggregating statewide data to look at results for subgroups and across districts to examine whether all groups of children are achieving the educational goals established by the State" (Pet. Br. 25), how would courts set the right "constitutional" targets for each group's achievement? Is every "disparit[y] among different populations and school districts" (Pet. Br. 26) proof of an unconstitutional statewide system—even though achievement gaps exist throughout the entire country (and are often narrower in Florida)? Despite repeated opportunities during a four-week trial, Plaintiffs' counsel never gave a straight answer to these obvious questions.[27]

Nor does Plaintiffs' suggestion to "use outcome measures produced by the State's own assessment system" (Pet. Br. 30) make these difficult questions more judicially manageable. Are the State's successful policies regarding cut scores inherently unconstitutional because they temporarily prevent more students in certain subgroups from "passing"? Can courts adopt the State's "outcome measures" but ignore statutes providing that "Florida cannot be the guarantor of each individual

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[27] *Compare* Tr. vol. 26 at 3894:20–23 (argument of Plaintiffs' counsel) ("So, first of all, can you guarantee a particular outcome, which is that 100 percent of all students are proficient? No. You know, I don't believe that that's possible."), *and* Tr. vol. 38 at 5641:13–14 (same) ("I don't think it has to be 100 percent."), *with id.* at 5641:18–21 (same) ("And whatever that number is—I mean, a high-quality system should be an A system. Is that 90 percent? Maybe."), *and id.* at 5668:24–5669:1 (same) ("I don't think you have to make a determination of what is that cutoff. Is it 90 percent? Is it more? Is it less?").

student's success" and that "[t]he goals of Florida's K–20 education system are not guarantees that each individual student will succeed or that each individual school will perform at the level indicated in the goals," ? § 1000.03(5)(g), Fla. Stat. Courts in several other states—even in the Pennsylvania and Washington decisions cited by Plaintiffs (Pet. 23–24)—have been rightfully wary of constitutionalizing statutory or regulatory performance goals.[28]

Requiring every Florida school district or subgroup to achieve a specific "passage" rate on statewide assessments would also jeopardize successful policies that depend on continually raising the bar with increasingly rigorous performance standards. Despite Florida's impressive gains in performance over the past 20 years, the State cannot ensure that every student achieves "above average" results any more than it can guarantee perfection. And the judiciary should not assume control over Florida's system of public schools when even Plaintiffs cannot identify a standard to determine whether and when the State has satisfied article IX.

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[28] *See Neeley v. W. Orange–Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 789 (Tex. 2005) (holding that "legislative policy statements . . . cannot be used to fault a public education system that is working to meet their stated goals merely because it has not yet succeeded in doing so"); *William Penn Sch. Dist. v. Penn. Dep't of Educ.*, 170 A.3d 414, 450 (Pa. 2017) ("Surely, it cannot be correct that we simply constitutionalize whatever standards the General Assembly relies upon at a moment in time, and then fix those as the constitutional minimum moving forward."); *McCleary v. State*, 269 P.3d 227, 251 (Wash. 2012) ("Nothing in article IX, section 1 requires the State to guarantee educational outcomes.").

C. Plaintiffs' selective references to adequacy decisions in other states are unpersuasive.

"While the views of other courts are always helpful, . . . the dispute here must be resolved on the basis of Florida constitutional law and the relevant provisions of the Florida Constitution." *Coalition*, 680 So. 2d at 404–05. For that reason alone, this Court should reject Plaintiffs' suggestion that courts in Washington (or any other state) can supply the judicially manageable standards that Plaintiffs themselves failed to allege or establish at trial.

For example, the case that Plaintiffs cite from Washington, *McCleary v. State*, 269 P.3d 227, involved different constitutional language, and the Washington Supreme Court relied on a decades-old Washington case, a law-review article, and a concept of "positive" educational rights that have never been endorsed by Florida courts.[29]

Unlike the education clause at issue in *McCleary*,[30] the Florida Constitution provides that education is "*a* fundamental value" (though not a fundamental *right*)

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[29] *See McCleary*, 269 P.3d at 246 (citing *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978)); *id.* at 248 (citing a 1999 law-review article). Although the *Seattle School District* case was cited in a footnote in the *Coalition* dissent, 680 So. 2d at 410 n.9 (Anstead, J., dissenting), no Florida appellate court has adopted Washington's approach to public education.

[30] Unlike Florida's textual commitment to a strong separation-of-powers doctrine, Art. II, § 3, Fla. Const., Washington's "separation of powers doctrine is not specifically enunciated in . . . the Washington . . . constitution[]." *State v. Blilie*, 939 P.2d 691, 693 (1997).

and imposes "*a* paramount duty" on the State. Art. IX, § 1(a), Fla. Const. (emphasis added). The indefinite article at the beginning of these phrases (*i.e.*, the use of the word "*a*" as opposed to "*the*") reflects the reality that the State must weigh *all* of its duties and priorities in making appropriations and policy determinations.[31]

Plaintiffs (and the "Certain Commissioners" of the 1998 CRC who filed an amicus brief supporting them) also incorrectly suggest that other states have reached some sort of justiciability or adequacy consensus that would make outliers of this Court's *Coalition* decision and the First District's opinion below. In fact, courts in a number of other states—including one with "high quality" written into the state's education clause—have held that similar adequacy disputes are not appropriate for judicial resolution.[32] And many other states, including New York (which Plaintiffs cited), have adequacy caselaw emphasizing deference to the other

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[31] In this regard, this Court has held that "under the Constitution the lawmaking power is vested exclusively in the legislature. It is *the* paramount duty of the judiciary to recognize that power only in the legislature." *Kilgore Groves, Inc. v. Mayo*, 191 So. 498, 506 (Fla. 1939) (emphasis added).

[32] *See Lewis E. v. Spagnolo*, 710 N.E.2d 798, 803 (Ill. 1999) (holding that "what constitutes a 'high quality' education [under state constitution] cannot be ascertained by any judicially discoverable or manageable standards and that the constitution provides no principled basis for a judicial definition of 'high quality'"); *Ex Parte James*, 836 So. 2d 813, 819 (Ala. 2002); *Bonner ex rel. Bonner v. Daniels*, 907 N.E.2d 516, 518 (Ind. 2009); *Neb. Coal. for Educ. Equity and Adequacy v. Heineman*, 731 N.W.2d 164, 178–79 (Neb. 2007); *Okla. Educ. Ass'n v. State*, 158 P.3d 1058, 1065 (Okla. 2007); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 58 (R.I. 1995).

branches of government and clear burdens of proof for plaintiffs.[33] Even Washington's *McCleary* litigation recently ended when its supreme court concluded that the legislature had implemented the legislature's *own* "statutory program." Order at 4, *McCleary v. State*, No. 84362-7 (Wash. June 7, 2018), https://www.courts.wa.gov/content/publicUpload/McCleary/843627PublicOrderOther06072018.pdf. Given Florida's success and tremendous improvement over time, this Court should resist the selective efforts of Plaintiffs and their supporting amici to import their preferred justiciability standards from other states.

II. THE SEPARATION-OF-POWERS DOCTRINE BARS PLAINTIFFS' CLAIM.

Standard of Review: Questions involving the separation-of-powers doctrine are reviewed de novo. *See Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004).

The circuit and district courts also correctly concluded that Plaintiffs' claim is barred by the separation-of-powers doctrine, because "[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches," Art. II, § 3, Fla. Const., and "no branch may encroach upon the powers of another," *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 264 (Fla. 1991).

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[33] *See, e.g.*, *Maisto v. State*, 154 A.D.3d 1248, 1255 (N.Y. App. Div. 2017) ("For any district where the court finds that inputs were insufficient, it must determine—on a district-by-district basis—*whether plaintiffs have established causation* by showing that increased funding can provide inputs that yield better student performance." (emphasis added) (citation omitted)).

Plaintiffs' request for judicial intervention runs afoul of this "strict separation of powers doctrine." *Fla. House of Representatives v. Crist*, 999 So. 2d 601, 611 (Fla. 2008) (quoting *Schiavo*, 885 So. 2d at 329). Given the nature of Plaintiffs' claim under article IX, the courts cannot hold the State liable without answering a series of debatable policy questions about which qualities or outcomes are the necessary ingredients of an "efficient" and "high quality" system. Florida law requires the courts to defer to the State's legislative and executive choices in these matters, and courts lack the authority to order the relief that Plaintiffs seek.

A. Legislative and executive actions and policies are entitled to great deference and a presumption of constitutionality.

The judicial deference to which laws and executive actions are entitled is especially important in the area of public education, where competing interests and policy judgments must be balanced, and compromise is often essential:

> As in matters of appropriations, under our constitution's strict separation of powers, only the legislature is properly equipped to balance the competing interests involved in education debates, in addition to other vitally important issues such as criminal justice, health care, economic and environmental regulation, and other matters. Thus, it is solely in the legislative branch that the constitutional values of an "efficient, safe, secure and high quality" school system can be constitutionally defined and implemented.

Haridopolos, 81 So. 3d at 479 (Roberts, J., dissenting); *see also Holmes*, 919 So. 2d at 398 ("[T]he Legislature's power to resolve issues of civic debate receives great deference."). The First District thus correctly concluded that agreeing with

Plaintiffs "would entangle courts in the details and execution of educational policies and related appropriations, involving millions of students and billions of dollars, in an arena in which the courts possess no specific competence or specific constitutional authority." *CSS*, 2322 So. 3d at 1171. (*Accord* R.3391; R.3392.)

B. The Court cannot grant Plaintiffs relief by ordering the Legislature to make appropriations or undertake further "cost analysis."

Even if Plaintiffs' claim were in some sense justiciable—and even if they could show that the circuit court had erred in its findings and conclusions on the merits—no Florida court could usurp the Legislature's exclusive authority to make appropriations for public education.[34] "The legislative power of the state shall be vested in a legislature," Art. III, § 1, Fla. Const.; "[n]o money shall be drawn from the treasury except in pursuance of appropriation made by law," Art. VII, § 1(c), Fla. Const.;[35] and "[t]he judiciary shall have no power to fix appropriations," Art. V, § 14(d), Fla. Const. Plaintiffs themselves conceded as much at trial. (R.3392.)

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[34] *Cf. Advisory Opinion to the Attorney Gen. re Requirement for Adequate Pub. Educ. Funding*, 703 So. 2d 446, 449 (Fla. 1997) (striking down initiative petition that would have reserved a specific percentage of state funding for public education, because petition "would substantially alter the legislature's present discretion in making value choices as to appropriations among the various vital functions of State government" and "would affect the function of the Governor and Cabinet").

[35] *See also Republican Party of Fla. v. Smith*, 638 So. 2d 26, 28 (Fla. 1994) ("This provision [Art. VII, § 1(c)] gives to the Legislature the exclusive power of deciding how, when, and for what purpose the public funds shall be applied in carrying on the government." (internal quotation marks omitted)).

Plaintiffs insist that "they do not ask the judiciary to encroach on the legislative duty to make educational policy, nor do they ask the courts to make appropriations or order the Legislature to do so." (Pet. Br. 31.) But there is no doubt that this case concerns state funding. And the *Coalition* Court warned against this slippery slope:

> To decide such an abstract question of "adequate" funding, the courts would necessarily be required to subjectively evaluate the Legislature's value judgments as to the spending priorities to be assigned to the state's many needs, education being one among them. . . . While Plaintiffs assert that they do not ask the Court to compel the Legislature to appropriate any specific sum, but merely to declare that the present funding level is constitutionally inadequate, what they seek would nevertheless require the Court to pass upon those legislative value judgments which translate into appropriations decisions. And, if the Court were to declare present funding levels "inadequate," presumably the Plaintiffs would expect the Court to evaluate, and either affirm or set aside, future appropriations decisions, unless the Plaintiffs are seeking merely an advisory opinion from the Court.

680 So. 2d at 406-07 (quoting trial court).

Plaintiffs have not distinguished the *Coalition* Court's reasoning on this point, nor have they explained how the 1998 constitutional amendment could have conferred appropriation and spending powers on the judiciary. Plaintiffs' desired "remedial plan" will presumably aim to increase the "overall level of funding" (R.137, ¶ 30) until they believe it is "sufficient" to support their various policy preferences. The separation-of-powers doctrine, however, prohibits courts from

ordering any appropriations or "cost analysis" (Pet. 9) to support these initiatives.[36]

C. The aspirational terms of article IX, section 1(a) are meaningful even if they are not susceptible of judicial enforcement.

Plaintiffs' failure to articulate *judicially* manageable standards or overcome the strict separation-of-powers doctrine does not mean that the 1998 amendment was "meaningless" (Pet. Br. 35). Even non-justiciable standards can serve as useful guides for the Legislature. *See generally State ex rel. Landis v. Dyer*, 148 So. 201, 203 (Fla. 1933) ("In treating the potential laws, the scope of inquiry of the Legislature is much broader than that of the judiciary when adjudicating their validity."). The evidence at trial showed that the State *did* respond to the 1998 amendment by implementing Florida's successful A+ Plan for Education. Yet as the First District held below, "subjective and undefined phrases that might function to give guidance to political decision makers as laudable goals, but cannot guide

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[36] *Cf. In re Order on Prosecution of Criminal Appeals by 10th Judicial Circuit Pub. Def.*, 561 So. 2d 1130, 1136 (Fla. 1990) ("[W]hile it is true that the legislature's failure to adequately fund the public defenders' offices is at the heart of this problem, . . . it is not the function of this Court to decide what constitutes adequate funding and then order the legislature to appropriate such an amount."); *Agency for Persons with Disabilities v. J.M.*, 924 So. 2d 1, 2 (Fla. 3d DCA 2005) ("A trial court may not interfere with and does not have the authority to enter into the decision-making process which is delegated to a state agency."); *Office of State Att'y for 11th Judicial Circuit v. Polites*, 904 So. 2d 527, 532 (Fla. 3d DCA 2005) ("Judges may not direct an executive agency to spend its money in a particular way."); *Sharrard v. State*, 998 So. 2d 1188, 1192 (Fla. 4th DCA 2009) (quashing "orders requir[ing executive] department to expend its funds . . . [on] a priority over other expenditures it might deem more important").

judges in deciding whether a state or local government has in fact complied with the text." *CSS*, 232 So. 3d at 1169 (emphasis added).[37]

This Court should therefore reject Plaintiffs' argument that "the First DCA's holding permits absurd results as it would prevent judicial review even if the Legislature funded education at only $1 per child or there was a 70% illiteracy rate" (Pet. Br. 36). There is nothing "absurd" about the inherently political process of designing, implementing, and funding a statewide system of public education, and policymakers throughout that process are politically accountable to their constituents in a way that judges are not. Unsurprisingly, then, Florida does *not* have a $1 system with swathes of "illiterate" schoolchildren. The circuit court found that Florida has spent tens of *billions* of dollars on public education and found *no* evidence of pervasive "illiteracy." Even if Justice Overton's threshold justiciability test might apply in some other case, it certainly does not apply here.

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[37] *See also CSS*, 232 So. 3d at 1171 ("While 'adequate,' 'efficient,' and 'high quality' represent worthy *political* aspirations, they fail to provide the courts with sufficiently objective criteria by which to measure the performance of our co-equal governmental branches. Rather, it is the political branches that must give meaning to these terms in accordance with the policy views of their constituents."); *id.* at 1172 (emphasizing "practical reality that educational policies and goals must evolve to meet ever changing public conditions, which is precisely why only the legislative and executive branches are assigned such power").

III. PLAINTIFFS FAILED TO PROVE THAT INADEQUATE RESOURCES ARE CAUSING POOR STUDENT OUTCOMES OR THAT ADDITIONAL RESOURCES WOULD IMPROVE THEM.

Standard of Review: "Whether or not proximate causation exists is a question of fact, involving an inquiry into whether the [Defendants'] breach of duty foreseeably and substantially contributed to the [alleged] injuries." *Sanders v. ERP Operating Ltd. P'ship*, 157 So. 3d 273, 277 (Fla. 2015). "A finding of fact by the trial court in a non-jury case will not be set aside on review unless there is no substantial evidence to sustain it, unless it is clearly against the weight of the evidence, or unless it was induced by an erroneous view of the law." *Holland v. Gross*, 89 So. 2d 255, 258 (Fla. 1956). And "an appellee, in arguing for the affirmance of a judgment, is not limited to legal arguments expressly asserted as grounds for the judgment in the court below." Under the so-called "tipsy coachman" rule, "the appellee can present any argument supported by the record even if not expressly asserted in the lower court," and "if a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the record." *Dade Cty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 645, 644 (Fla. 1999); *see also State v. Diaz de la Portilla*, 177 So. 3d 965, 974 (Fla. 2015) (applying "tipsy coachman doctrine" to First District opinion that reached right result for wrong reason).

A. Plaintiffs' claim depends on the unsupported assumption that a lack of resources (*i.e.*, appropriations) leads to allegedly low-quality or "inadequate" student outcomes.

Even if the First District had incorrectly concluded that Plaintiffs' claim is not justiciable and is barred by the separation-of-powers doctrine, Plaintiffs still could not prevail on their claim—which is based on resources appropriated and allocated by the State—because they did not prove that those resources are causally connected to the student outcomes of which they complain. Regardless of whether Plaintiffs had to prove a causal connection beyond a reasonable doubt or merely by a preponderance of the evidence, the circuit court specifically found that Plaintiffs "failed to establish *any* causal relationship between any alleged low student performance and a lack of resources." (R.3382 (emphasis added); *accord* R.3395.)[38]

B. Plaintiffs failed to meet their burden of proof on this issue, and the *State* actually proved a *lack* of causation.

The circuit court repeatedly found not only that Plaintiffs had "not met their burden of proving a causal relationship between the level of resources available to schools in Florida and student outcomes," but also that "the weight of the evidence

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[38] The circuit court's findings are consistent with "a growing consensus in education research that increased funding alone does not improve student achievement." *Horne v. Flores*, 557 U.S. 433, 464 (2009); *see also Davis v. State*, 2011 SD 51, ¶ 67, 804 N.W.2d 618, 640 (S.D. 2011); *Morath*, 490 S.W.3d at 852; *Conn. Coal. for Justice in Educ., Inc. v. Rell*, No. X07HHDCV145037565S, 2016 WL 4922730, at *14 (Conn. Super. Ct. Sept. 7, 2016), *rev'd on other grounds*, 176 A.3d 28 (Conn. 2018).

presented on that issue establishes a *lack* of any causal relationship between additional financial resources and improved student outcomes." (R.3572, ¶ 450.) In other words, the circuit court found that the State had *disproved* Plaintiffs' causation allegations by a preponderance of the evidence.[39]

In reaching that finding, the circuit court considered and accepted the results of numerous empirical and statistical analyses[40] that "corroborate[d] other evidence *refuting* Plaintiffs' assertions that Florida's system of public schools is not efficient and that the level of resources in Florida has negatively impacted student outcomes." (R.3575, ¶ 458 (emphasis added).)[41]

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[39] *See Tibbs v. State*, 397 So. 2d 1120, 1123 (Fla. 1981) ("The 'weight of the evidence' is the 'balance or preponderance of evidence.' It is a determination of the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than the other." (citation omitted)).

[40] The circuit court considered and accepted the results of a thorough study of "school district-level variables throughout the state of Florida, including per-pupil spending, teacher characteristics, and discipline rates." (R.3575, ¶ 459.) This study included "regression analyses of spending and performance data, controlling for student demographic differences and prior levels of achievement across school districts . . . to examine whether school districts would have better student outcomes if they had more resources." (R.3575–76, ¶ 461.) These "analyses revealed that there is no pattern between the level of spending in Florida school districts and student performance on the FCAT [assessment] or high school graduation rates." (R.3576, ¶ 461.)

[41] *See also* R.3577, ¶ 465 (finding that analyses of school-district-level variables "corroborate other evidence in the case showing the lack of causal relationship between the level of resources available in Florida schools and student outcomes, as well as evidence showing that the level of resources available is sufficient for a high quality system."). *See generally* R.3572–78, ¶¶ 449–469.

Plaintiffs and their supporting amici make little effort to challenge the circuit court's specific causation findings, other than citing the same anecdotes that Plaintiffs' witnesses presented at trial.[42] But causation is a question of fact, and the circuit court, in its role as fact-finder, was not persuaded. (*See, e.g.*, R.3535, ¶¶ 348–349; R.3538, ¶ 355; R.3539, ¶ 357.)

The First District's decision should be approved because of this lack of causation, regardless of whether the First District specifically relied on that reasoning to justify its decision to uphold the circuit court's final judgment. "Although Plaintiffs bear the burden of proof in this case, neither Plaintiffs' expert witnesses nor their school-district witnesses presented analyses or studies rebutting the work of [the State's causation experts]." (R.3577, ¶ 466.) And this Court should resolve "all conflicts in the evidence and all reasonable inferences therefrom . . . in favor of the [circuit court's judgment]"—not "retry [the] case or reweigh conflicting evidence" on appeal. *Tibbs*, 397 So. 2d at 1123.

IV. PLAINTIFFS HAVE NOT PROVED THAT FLORIDA'S SYSTEM OF PUBLIC SCHOOLS IS CONSTITUTIONALLY INADEQUATE.

Standard of Review: "[A]n appellate court is not free to substitute its judgment for the trier of fact, or to weigh evidence and reach a different conclusion from that reached at trial." *Crain & Crouse, Inc. v. Palm Bay Towers Corp.*, 326

[42] *See, e.g.*, Pet. Br. 10 ("Witnesses from multiple districts described the benefit of additional resources in improving struggling schools . . . .").

So. 2d 182, 182 (Fla. 1976). Legal questions concerning the appropriate burden of proof or the interpretation of article IX are reviewed de novo. *See S. Fla. Water Mgmt. Dist. v. RLI Live Oak, LLC*, 139 So. 3d 869, 871 (Fla. 2014); *Holmes*, 919 So. 2d at 399. But factual findings must be upheld "unless totally unsupported by competent substantial evidence." *Clegg v. Chipola Aviation, Inc.*, 458 So. 2d 1186, 1187 (Fla. 1st DCA 1984) (quoting *Concreform Sys., Inc. v. R.M. Hicks Constr. Co.*, 433 So. 2d 50, 50 (Fla. 3d DCA 1983)). And the lower court's decision "will be upheld if there is any basis which would support the judgment in the record." *Dade Cty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d at 644.

A. The circuit court applied the correct legal standard and burden of proof by applying rational-basis review and requiring Plaintiffs to prove their claim beyond a reasonable doubt.

Regardless of the First District's justiciability and separation-of-powers analysis, its decision should be approved because the circuit court correctly concluded that "Plaintiffs had the burden of establishing beyond a reasonable doubt that the State's education policies and funding system were not rationally related to the provision '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.'" (R.3376.) Plaintiffs' arguments to the contrary (Pet. Br. 38–42) overlook binding Florida precedent holding that the State's legislative and executive actions are entitled to great deference, a presumption of constitutionality, and rational-basis

review, such that they must be upheld unless invalid beyond all reasonable doubt.

As the circuit court explained (R.3390), to overcome the "presumption of constitutionality" afforded to statutes under Florida law, "the invalidity must appear *beyond reasonable doubt*, for it must be assumed the legislature intended to enact a valid law." *Pub. Def., 11th Judicial Circuit of Fla. v. State*, 115 So. 3d 261, 280 (Fla. 2013) (emphasis added) (internal quotation marks omitted). Thus, "the state is not obligated to demonstrate the constitutionality of the legislation. The burden is instead upon the party challenging the legislation to negate *every conceivable rational basis* which might support it." *Agency for Health Care Admin. v. Hameroff*, 816 So. 2d 1145, 1149 (Fla. 1st DCA 2002) (emphasis added) (citing *Coy v. Fla. Birth-Related Neurological Injury Compensation Plan*, 595 So. 2d 943, 945 (Fla. 1992)). And similarly deferential principles apply to the Defendant State Board of Education. (*See* R.3390–91.)[43]

The circuit court therefore correctly defined the State's obligations under article IX, section 1(a)—to the extent that they are justiciable at all—by considering

[43] Plaintiffs inappropriately rely on redistricting cases to argue for a less demanding burden of proof. (*See* Pet. Br. 40–41.) A court's role "in apportionment cases is far different than the Court's review of ordinary legislative acts," in part because of the necessary "effort to discern whether the [redistricting] map was drawn with improper intent." *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 397–98, 399 (Fla. 2015) (internal quotation marks and citation omitted). Plaintiffs' claim here does not warrant the same "unique" treatment.

whether the State's actions are consistent with a rational or reasonable understanding of the plain constitutional language.[44] And given Florida's successes and improvements in student performance over time, its system of public schools is rationally related to making adequate provision "by law"—*i.e.*, through legislation—"for a uniform, efficient, safe, secure, and high quality" system that *allows* "a high quality education" to be provided by local school boards.

1. *Plaintiffs specifically invited the circuit court to apply the beyond-a-reasonable-doubt burden of proof.*

Plaintiffs are also precluded from challenging the standards that the circuit court applied because Plaintiffs themselves asked the court to adopt *those very standards* after trial. Specifically, in their Proposed Findings of Fact and Conclusions of Law, Plaintiffs conceded that they were challenging the general appropriations act (for 2015–2016) and proposed the following conclusion of law:

> The Court finds that the Plaintiffs' challenge to the Legislature's breach of the duty to make adequate provision under Art IX., Sec. 1, [by] not adequately fund[ing] the state system of education[,] is essentially a constitutional challenge to a legislative enactment (i.e., the legislative general appropriation for public education). Accordingly,

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[44] *Cf. Davis*, 2011 SD 51, ¶ 17, 804 N.W.2d at 628 ("[P]laintiffs have the burden of persuading the Court beyond a reasonable doubt that the public school system fails to provide students with an education that gives them the [constitutionally required] opportunity . . . , and that this failure is related to an inadequate funding system."); *Neeley*, 176 S.W.3d at 785 ("If the Legislature's choices are informed by guiding rules and principles properly related to public education—that is, if the choices are not arbitrary—then the system does not violate the constitutional provision.").

> the burden of proof in evaluating this claim as to the Florida Legislature is that 'the law should not be held invalid *unless clearly unconstitutional beyond a reasonable doubt*.

(R.3350, ¶ 134 (emphasis added) (citations omitted).)[45]

"Under the invited error rule, a party cannot successfully complain about an error for which he or she is responsible or of rulings that he or she invited the court to make." *Muina v. Canning*, 717 So. 2d 550, 553 (Fla. 1st DCA), *cause dismissed*, 718 So. 2d 169 (Fla. 1998). Plaintiffs therefore cannot challenge the circuit court's application of the beyond-a-reasonable-doubt standard in this appeal.

2. *Plaintiffs' argument that Florida's statewide system of public schools is "presumptively unconstitutional" was never presented to the lower courts and makes no sense.*

Perhaps because the circuit court found Florida's system of public schools to be efficient and high quality even by a preponderance of the evidence (as explained below), Plaintiffs now argue—for the first time in nearly a decade of litigation—that the circuit court should have applied a standard of "presumptive[] unconstitutional[ity]." (Pet. Br. 42.) Aside from the fact that this argument was never presented to *either* the circuit court *or* the First District —and was thus waived, *see Advanced Chiropractic*, 103 So. 3d at 868–69—approaching Florida's system of

[45] Plaintiffs also urged the trial court to conclude that "Plaintiffs have established beyond a reasonable doubt that the funding appropriated by the Legislature is insufficient to comply with its constitutional duties." (R.3359, ¶ 163.) On appeal, however, Plaintiffs do not expressly argue that they should prevail if their claim is subject to rational-basis review and requires proof beyond a reasonable doubt.

public schools as if it were presumptively unconstitutional makes no sense.

Presumptive unconstitutionality is a concept borrowed from equal-protection and fundamental-rights cases. For example, "Florida's right of privacy is a fundamental right warranting 'strict' scrutiny. A legislative act *impinging* on this right is presumptively unconstitutional unless proved valid by the State." *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 626 (Fla. 2003) (emphasis added). But Plaintiffs have not asserted an equal-protection claim, and they acknowledge that article IX describes education as a "fundamental value"—not a "fundamental right." (Pet. Br. 40 n.84.) Beyond their broad-brush attack on the 2015–2016 general appropriations act,[46] Plaintiffs have never argued that any *specific* "legislative act *imping*[*es*]" on a "fundamental right." *N. Fla. Women's Health*, 886 So. 2d at 626 (emphasis added). Nor do Plaintiffs explain how to apply a presumptive-unconstitutionality framework to ever-shifting "standards" based on student performance outcomes, and this Court should refuse to do so.[47]

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[46] Any specific challenge to this appropriations act is now moot. *See Dep't of Admin. v. Horne*, 269 So. 2d 659, 663 (Fla. 1972) ("The protracted litigation in this cause has now consumed the fiscal year involved; accordingly, the substantive matters affected thereupon became moot and dismissal of the proceeding will be appropriate.").

[47] Plaintiffs do not identify any other state in which courts have used "presumptive unconstitutionality" to assess the adequacy of a statewide system of public schools.

B. The circuit court found that the "weight of the evidence" favors the State and that Florida's system is efficient and high quality.

Plaintiffs' criticisms of Florida's rational-basis standard are unwarranted, but the distinctions that they draw between that standard and their proposed reasonableness standard are insignificant given the circuit court's numerous factual findings in the State's favor by the weight of the evidence.

The State cannot (and is not constitutionally required to) "guarantee[] a perfect or ideal education," *Coalition*, 680 So. 2d at 409 (Overton, J., concurring). Rather, article IX provides for educational *opportunities* without guaranteeing specific academic *results*. The circuit court thus properly found that "[g]iven the improvements over time in Florida's graduation rates, NAEP scores, and other indicators of student performance, *the weight of credible evidence* belies Plaintiffs' allegation that funding for Florida's public schools does not '*allow* students to obtain a high quality education' under Article IX, Section l(a)." (R.3396 (first emphasis added).)[48]

[48] Courts in other states have similarly rejected the notion that an imperfect public-education system is necessarily unconstitutional. *See, e.g.*, *Hancock v. Comm'r of Educ.*, 822 N.E.2d 1134, 1140 (Mass. 2005) ("While the plaintiffs have amply shown that many children in the focus districts are not being well served by their school districts, they have not shown that the defendants are acting in an arbitrary, nonresponsive, or irrational way to meet the constitutional mandate."); *Davis*, 2011 SD 51, ¶ 68, 804 N.W.2d at 641 ("The plaintiffs have also shown some groups of students are not achieving at desired levels . . . . Even so, reasonable doubt exists that the statutory funding mechanisms or level of funding are unconstitutional.").

The court also properly rejected "Plaintiffs' argument that since certain percentages of students have not yet reached proficiency levels on certain tests, there must be a violation of Article IX":

> Such a condition exists not only across the nation, but even in schools, school districts and states that are considered the "best" systems [including St. Johns County]. Again, the constitutional language does not speak in terms of a guarantee of any particular level of student performance or of perfection; rather, Article IX refers to a "system" that "allows" students to obtain a high quality education.

(R.3382.) The circuit court's analysis of this issue was comprehensive, and its supporting findings were based on competent substantial evidence.

If anything, Florida has far *exceeded* the constitutional adequacy requirement set forth in article IX, section 1(a), by adopting policies that not only have a rational basis but have also succeeded, as shown by the weight of the evidence. Unlike Justice Overton's hypothetical in *Coalition* of a school district with pervasive illiteracy, this case does not involve any evidence of systemic educational failures. Quite the contrary—the evidence shows that Florida's educational system succeeds even in difficult conditions: "[*T*]*he weight of the evidence* shows that despite budget cutbacks associated with the Great Recession, student performance continued to improve." (R.3577, ¶ 466 (emphasis added).)

V. PLAINTIFFS' CHALLENGES TO FLORIDA'S CHOICE PROGRAMS FAIL AS A MATTER OF LAW AND FACT.

"Plaintiffs' specific allegations regarding the constitutional implications of

three of Florida's choice programs—charter schools, the FTC Program, and the McKay Program—are similarly unsupported *by the weight of the evidence*." (R.3397 (emphasis added).) The circuit court correctly found "no negative effect on the uniformity or efficiency of the State system of public schools due to [Florida's charter-school, FTC, and McKay] 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." (R.3385 (emphasis added).) These factual findings about the overall impact of these three choice programs effectively dispose of Plaintiffs' challenges to those specific programs with respect to the broader efficiency and quality of Florida's public schools.

The FTC and McKay programs, however, were also the subject of the only uniformity challenges (though not standalone claims) that Plaintiffs asserted in the operative complaint.[49] With respect to these challenges, the circuit and district courts properly concluded that Plaintiffs lack standing to challenge the FTC Program for the same reasons given in *McCall v. Scott*, 199 So. 3d 359,[50] and that the

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[49] The circuit court correctly noted that "Plaintiffs did not assert a uniformity challenge to charter schools in their pleadings." (R.3397 n.19.) Nor, despite their assertion of "wide disparities among school districts" (Pet. Br. 4), did they assert a uniformity challenge based on student performance.

[50] There is no need to "remand to determine facts . . . with regard to FTC" because Plaintiffs abandoned their challenge to the FTC Program when they "did not argue FTC in the First DCA." (Pet. Br. 45, 2.) *See Mendoza v. State*, 87 So. 3d 644, 663 n.16 (Fla. 2011) ("To the extent Mendoza seeks to incorporate by reference the

McKay Program does not run afoul of this Court's decision in *Holmes*. (R.3398.)

This Court should reject Plaintiffs' uniformity challenge to the McKay Program for the additional reasons that the program already existed at the time of the *Holmes* decision and that the Supreme Court "reject[ed] the suggestion by the State and amici [in that case] that other publicly funded educational and welfare programs would necessarily be affected" by the Court's decision. *Holmes*, 919 So. 2d at 412. The Supreme Court specifically distinguished a program "under which exceptional students could attend private schools because of the lack of *special* services in their school district." *Id.* at 411 (internal quotation marks omitted).[51] And Plaintiffs do not argue that the special-education program described in *Holmes* is distinguishable for uniformity purposes from the McKay Scholarship for Students with Disabilities Program as it exists today.

CONCLUSION

The First District's decision should be approved for all of the reasons above.

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other factual bases and arguments thereto raised in his motion . . . for purposes of appeal, having cited in his brief the record pages of the motion . . . and providing no argument, the rules of appellate procedure do not authorize that practice. We deem abandoned those other bases previously alleged in support of [the motion]." (internal citation and quotation omitted); *cf. State v. Baez*, 894 So. 2d 115, 121 (Fla. 2004) (Pariente, J., dissenting) ("Under the 'tipsy coachman' rule, an appellate court may *affirm* a lower court ruling for any reason supported by the record, but I can find no authority for using the rule to *quash or reverse* a lower court decision on a theory not argued by the party challenging the ruling in the reviewing court." (internal citation omitted)).

[51] *See generally* R.1146–1247 (Defs.' Br. Opp'n Pls.' Mot. Partial Summ. J.).

Respectfully submitted this 19 day of July 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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