

**IN THE SUPREME COURT OF FLORIDA  
Case No. SC18-67**

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CITIZENS FOR STRONG  
SCHOOLS, INC., et al.

Petitioners,

v.

FLORIDA STATE BOARD OF  
EDUCATION, et al.,

Respondents,

and

CELESTE JOHNSON, et al.,

Intervenors/Respondents.

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

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**ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL**

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**BRIEF OF AMICUS CURIAE  
FOUNDATION FOR EXCELLENCE IN EDUCATION  
IN SUPPORT OF RESPONDENTS' ANSWER BRIEF**

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RECEIVED, 07/30/2018 05:53:25 PM, Clerk, Supreme Court

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## **STATEMENT OF AMICUS CURIAE**

The Foundation for Excellence in Education, Inc. (“ExcellinEd”) is a 501(c)(3) nonprofit, nonpartisan organization founded in 2008 whose mission is to build an American education system that equips every child to achieve his or her individual potential. ExcellinEd designs and promotes student-centered education policies and provides model legislation, rule-making expertise, implementation assistance, and public outreach. ExcellinEd’s interest in this case is linked to its mission: it believes that Florida’s education system provides high-quality, student-centered education in the state, and for that reason is interested in the outcome of this litigation.

### **SUMMARY OF THE ARGUMENT**

Florida leads the nation in improving performance for all students through innovative education policy consisting of more educational options and increased accountability. When comparing Florida to its peers on nationwide assessment metrics, the record shows the State’s methods are increasing student achievement at a faster rate than any other state and putting Florida near the top nationwide in important metrics such as Grade 4 student performance.

Despite this record of achievement, Petitioners insist that the Florida judiciary should insert itself into education policy by finding a justiciable right to an “efficient” and “high quality” education in Article IX of the Florida Constitution. Petitioners assume that a justiciable right to education will somehow lead to better

outcomes for Florida students. But judicial involvement does not entail better education policy, as evidenced by comparing Florida students' performance to that of their peers from various states that have a justiciable constitutional right to education.

Petitioners also claim that because some students have not met Florida's high academic standards as measured through state-level testing, Florida is failing to give its students a "high quality" education. But this argument, which would have the Court constitutionalize the current legislatively-mandated standards, is wrongheaded and would perversely incentivize lawmakers to lower those same rigorous standards that have led to improvements. Given the serious political complications and possible harmful policy effects of judicial involvement in education policy, the District Court of Appeal's holding that Petitioners' claim is a nonjusticiable political question should be upheld.

### **ARGUMENT**

The District Court of Appeal rightly concluded that 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." Opinion, No. 1D16-2862, at 17 (Dec. 13, 2017). While several courts have correctly agreed with the Court of Appeal when faced with very similar constitutional language, other states have found

a justiciable right to education, igniting years of litigation and conflict between those states' legislatures and courts. And a review of academic performance by students in the states with a justiciable right to education reveals widely varying outcomes. These results suggest that, in practice, there are no judicially manageable standards with which courts can reliably address shortcomings in education policy.

Petitioners point to Florida's own statewide academic standards as a judicially manageable benchmark for a constitutional right to education. But turning state standards into a minimum *constitutional* standard would be unwise. This argument ignores Florida's innovation in using high assessment standards as performance goals, a policy that has allowed Florida to outperform other states. In other states that have not taken this approach, statewide standards show no correlation with achieving high performance nationwide. Therefore, it is inappropriate for the courts to use Florida's high internal standards to manage a constitutional right to education.

## **I. PETITIONERS FAIL TO OFFER JUDICIALLY MANAGEABLE STANDARDS FOR APPLYING ARTICLE IX**

### **A. Petitioners Have Asked The Court To Decide A Political Question**

A question is not justiciable when there is "a lack of judicially discoverable and *manageable standards for resolving it.*" *Coalition for Adequacy & Fairness in School Funding v. Chiles*, 680 So. 2d 400, 408 (Fla. 1996) (citing *Baker v. Carr*, 369 U.S. 186, 209 (1962)) (emphasis added). Petitioners have asked this Court to involve itself in complex education policy issues that are appropriately left to the

other branches of government under Florida’s system of separation of powers.<sup>1</sup> The restraint shown by the District Court of Appeal respects that separation of powers and aligns with the approach taken by other courts presented with these issues.

Florida has a robust constitutional provision preserving separation of powers between the Executive, Legislature, and Judiciary.<sup>2</sup> Because the political question doctrine is “essentially a function of separation of powers,” *Baker*, 369 U.S. at 217, the District Court of Appeal correctly concluded that the principle of separation of powers in Florida law prevented it from deciding political issues such as the efficiency and uniformity of the state’s school system. Petitioners ask the Court to contravene these principles by enmeshing itself in the State’s education policy.

Like the District Court of Appeal here, many courts in other states have ruled on political question grounds that similar constitutional provisions do not create justiciable rights to education. For example, the Supreme Court of Illinois explained that “what constitutes a ‘high quality’ education cannot be ascertained by any judicially discoverable or manageable standards” and that “the [state] constitution provides no principled basis for a judicial definition of ‘high quality.’” *Lewis E. v.*

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<sup>1</sup> See Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1291 (2006) (standard “may be deemed judicially unmanageable if it would require courts to make empirical findings or predictive judgments for which they lack competence”).

<sup>2</sup> See Fla. Const. art. II, § 3 (“No person belonging to one branch shall exercise any powers appertaining to either of the other two branches.”).

*Spagnolo*, 710 N.E.2d 798, 803 (Ill. 1999). Similarly, the Oklahoma Supreme Court held that claims for “uniform, basic, [and] adequate education” presented political questions due to the Oklahoma Constitution’s separation of powers provision. *Oklahoma Educ. Ass’n v. State*, 158 P.3d 1058, 1063, 1065 (Okla. 2007). And other state supreme courts have found no justiciable constitutional right to education for similar reasons.<sup>3</sup> Despite Petitioners’ protestations to the contrary, therefore, the Court of Appeal’s holding was well within the mainstream of this area of law.<sup>4</sup>

**B. The Experience Of Other States Shows That Courts Are Ill-Suited To Manage Education Policy**

As shown by the experience of other states, involving courts in education policy issues is fraught with difficulties and results in no meaningful improvement in educational outcomes. Despite justiciability obstacles, courts in various other states have waded into education policy on the basis of broad constitutional

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<sup>3</sup> See *Bonner ex rel. Bonner v. Daniels*, 907 N.E.2d 516, 518 (Ind. 2009); *Nebraska Coalition for Educ. Equity & Adequacy (Coalition) v. Heineman*, 731 N.W.2d 164, 178-79 (Neb. 2007); *Ex Parte James*, 836 So. 2d 813, 819 (Ala. 2002); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 58 (R.I. 1995).

<sup>4</sup> Indeed, when other courts *have* found a justiciable constitutional right to education, they often impose refined, narrow tests that Petitioners here could not satisfy. See, e.g., *McCleary v. State*, 269 P.3d 227, 259 (Wash. 2012) (refusing to order a cost study because doing policy work would violate the state constitution’s separation of powers); *Roosevelt Elementary Sch. Dist. No. 66 v. State*, 74 P.3d 258, 268 (Ariz. Ct. App. 2003) (holding that plaintiff failed to meet high burden required for court to invalidate educational system); *Lobato v. State*, 304 P.3d 1132, 1140 (Colo. 2013) (holding that the education system would be evaluated under deferential “rational basis” review to avoid violating separation of powers).

language, *see* Brief of Amicus Curiae Education Law Center 8 n.1 (collecting cases)—often with poor results.

Petitioners’ focus on the mere fact that certain states have found justiciable constitutional rights to education ignores the chaotic consequences of these decisions, including significant inter-branch conflict. For example, the Washington Supreme Court recently held the state legislature in contempt of court for failing to adequately fund state schools; the contempt order required the legislature pay daily fines of \$100,000.<sup>5</sup> And in Kansas, the courts’ management of education has been so intrusive that the state is considering adjusting the state constitution to ensure that education policy is solely determined by the legislature.<sup>6</sup>

Further, the educational adequacy litigation that stems from such rulings wastes resources without achieving meaningful outcomes, in particular because such litigation is typically lengthy. For instance, New Jersey has been litigating one challenge to its education system for over thirty years<sup>7</sup> (with the Supreme Court of New Jersey issuing *over twenty* substantive holdings in the case<sup>8</sup>) and a challenge to

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<sup>5</sup> Olympian Editorial Board, *McCleary Case Ends; K-12 Funding Issue Doesn’t*, THE OLYMPIAN (June 21, 2018), <https://www.theolympian.com/opinion/editorials/article213622049.html>.

<sup>6</sup> *Big Business: Cut Kansas Courts Out of School Funding Issue*, ASSOCIATED PRESS (Apr. 3, 2018), <https://apnews.com/201d5f1ae07945d1865a6773ad474587>.

<sup>7</sup> Education Law Center, *The History of Abbott v. Burke*, <http://www.edlawcenter.org/litigation/abbott-v-burke/abbott-history.html>.

<sup>8</sup> *See Abbott v. Burke*, 20 A.3d 1018 (N.J. 2011) (*Abbott XXI*).

the Connecticut school system took over a decade before it was resolved.<sup>9</sup> If this Court were to find for the Petitioners, it would trigger lengthy, wasteful litigation that would drain state resources that could be put to better use.

In addition to their wastefulness, these judicial interventions have not led to meaningful or consistent improvements in student outcomes. In fact, states with judicial involvement show wildly divergent student performance. For example, according to the National Assessment of Education Progress (“NAEP”) 2017 Report Card (the gold standard in this area as the only interstate student assessment report), Massachusetts has the top Grade 4 Reading score in the nation, while Texas is ranked 46th in the same report.<sup>10</sup> In Grade 8 Mathematics, New Jersey has the 5th best score, while West Virginia has the 47th.<sup>11</sup> There is simply no correlation between judicial involvement and strong educational performance: overall, for Grades 4 and 8 Mathematics and Reading, the average spread between the highest-ranked and lowest-ranked state with judicial involvement is over 43 places.<sup>12</sup>

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<sup>9</sup> Robert Storace, *Conn. Supreme Court Sides with State in Education Funding Fight*, CONNECTICUT LAW TRIBUNE (Jan. 17, 2018), <https://www.law.com/ctlawtribune/sites/ctlawtribune/2018/01/17/conn-supreme-court-sides-with-state-in-education-funding-fight/>.

<sup>10</sup> *NAEP Data Explorer*, THE NATION’S REPORT CARD, <https://www.nationsreportcard.gov/ndecore/xplore/NDE>.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* In Grade 4 Mathematics, Massachusetts is ranked 1st, and New York is ranked 40th. In Grade 4 Reading, Massachusetts is ranked 1st, and Texas is ranked 46th. In Grade 8 Mathematics, Massachusetts is ranked 1st, and West Virginia is ranked

As these results show, student outcomes cannot be improved by a mere court decree that an educational system is “inadequate.” And no judicial standard for “adequacy” offered by Petitioners can properly account for the careful policy judgments required to manage an effective education system. It is no surprise that states with judicial involvement have seen inconsistent results: although courts are often presented as a solution, judicial involvement tends to complicate education policy decisions and shift policymakers’ focus from what is best for student outcomes to what is most likely to win judicial approval.

**C. Florida Has Seen Significant Improvement In Student Outcomes Without Judicial Intervention**

Florida outperforms comparable states where courts have intervened in education policy based on justiciable constitutional rights to education. Comparing Florida’s experience to New York’s is instructive. Each state has approximately twenty million residents,<sup>13</sup> and New York and Florida students have similar racial and ethnic profiles.<sup>14</sup> Yet, despite the intervention of New York courts, Florida outperforms New York on almost every metric according to NAEP.

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47th. In Grade 8 Reading, Massachusetts is ranked 2nd, and West Virginia is ranked 46th.

<sup>13</sup> United States Census Bureau, *Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2017*, <https://www.census.gov/data/tables/2017/demo/popest/state-total.html>.

<sup>14</sup> *NAEP State Profiles: Florida Demographics*, THE NATION’S REPORT CARD, <https://www.nationsreportcard.gov/profiles/stateprofile/overview/FL>.

These differences reflect, in part, the sustained and consistent commitment of Florida’s Legislative and Executive branches to improving the state’s public education system. Partly in response to the 1998 constitutional amendment, Florida lawmakers introduced a suite of reforms called the Florida A+ Plan for Education, meant to transform “a failing system through a student-centered approach that empowered families with more options and ushered real accountability into [Florida] schools.”<sup>15</sup> Following these reforms, Florida went from consistently performing below the NAEP Grade 4 national average in Mathematics and Reading to consistently performing above it.<sup>16</sup>

These reforms have helped Florida students outperform New York students, according to NAEP. Since the enactment of the Florida A+ Plan for Education, Florida ranks among the top states in the nation in education outcomes and uses its education funding efficiently.<sup>17</sup> In 2017, Florida was in the top ten states in both

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<sup>15</sup> Jeb Bush, *Florida’s Rising NAEP Scores Show Education Reforms Are Working for All Students in the State*, THE 74 (Apr. 18, 2018), <https://www.the74million.org/article/jeb-bush-floridas-rising-naep-scores-show-education-reforms-are-working-for-all-students-in-the-state/>.

<sup>16</sup> *NAEP State Profiles: Florida Overview*, THE NATION’S REPORT CARD, <https://www.nationsreportcard.gov/profiles/stateprofile/overview/FL>.

<sup>17</sup> Stan J. Liebowitz & Mathew L. Kelly, *Fixing the Currently Biased State K-12 Education Rankings*, at 6 (June 15, 2018), <https://ssrn.com/abstract=3185152>. Florida received the number one “efficiency” ranking in this recent study, which considers “how well [a state’s] heterogeneous students do on NAEP exams in comparison to how much the state spends to achieve those rankings.” *Id.* at 10.

Grade 4 Mathematics and Reading scores according to NAEP.<sup>18</sup> In fact, Florida schools showed more improvement in 2017 in Grade 4 Mathematics than any other state in the nation.<sup>19</sup> In contrast, New York has struggled to make improvements, despite vastly outperforming Florida on a per student basis. New York has made almost no total progress in Grade 4 Mathematics and Reading scores since 2003.<sup>20</sup> New York's eighth graders perform no better than they did ten years ago.<sup>21</sup>

Florida also does better than New York in serving minority students, students with disabilities, and students eligible for Free-Reduced Lunch ("FRL"), which is a proxy for poverty used to identify economically disadvantaged children. Black students in Florida have higher 2017 Grade 4 and Grade 8 Mathematics and Reading NAEP scores than black students in New York.<sup>22</sup> The same is true for Hispanic students and students with disabilities.<sup>23</sup> Likewise, FRL-eligible students in Florida achieved higher Grades 4 and 8 Reading and Grade 4 Mathematics scores than their New York counterparts.<sup>24</sup>

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<sup>18</sup> *Id.*

<sup>19</sup> *NAEP Data Explorer, supra* n.10.

<sup>20</sup> *NAEP State Profiles: New York*, THE NATION'S REPORT CARD, <https://www.nationsreportcard.gov/profiles/stateprofile/overview/NY>.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *NAEP Data Explorer, supra* n.10.

<sup>24</sup> *Id.* Florida and New York students eligible for FRL both achieved a score of 269

Florida has also outperformed other states with judicial involvement. In fact, Florida's students had better 2017 NAEP Grade 4 Reading scores than their counterparts in states on which Petitioners focus (Kentucky, New York, Pennsylvania, and Washington).<sup>25</sup> And Florida saw more improvement in Grades 4 and 8 Mathematics and Reading than Massachusetts between 2015 and 2017.<sup>26</sup>

Petitioners present judicial intervention, even in the absence of clearly manageable standards, as a solution to the challenges facing the State's education system. But the reality is that courts have done little to improve outcomes elsewhere. Florida's reforms are based on a consistent approach to standards and assessments. Second-guessing every appropriations or policy decision made by the Legislature would only undermine that approach and throw the educational system into a state of uncertainty, which would be bad for student outcomes.<sup>27</sup> Florida has made significant strides through education reforms enacted and implemented by the Legislative and Executive branches, where education policy properly belongs. The

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in NAEP Grade 8 Mathematics in 2017.

<sup>25</sup> *Id.* Moreover, in 2017, Florida outperformed Washington in Grade 4 Mathematics as well. *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *See* Laura Slover, "Ensuring the Quality and Consistency of Course is Fundamental to Fixing High School," THOMAS B. FORDHAM INSTITUTE (Mar. 14, 2018), <https://edexcellence.net/articles/ensuring-the-quality-and-consistency-of-courses-is-fundamental-to-fixing-high-school> (emphasizing importance of consistency in courses).

lower court’s ruling that Petitioners’ claims are non-justiciable should therefore be approved.

## **II. THE STATE’S CURRICULUM STANDARDS ARE NOT CONSTITUTIONAL BENCHMARKS**

### **A. Petitioners Imprudently Conflate Florida’s Curriculum Standards With Constitutional Requirements**

Petitioners assert that the State has already defined what constitutes a constitutionally-adequate “high quality” education by adopting state-level curriculum standards and assessments. Pet. Br. 21. They accordingly argue that the Florida education system is not providing a “high quality” education because some students have received low or “failing” scores on state assessments. *Id.* at 22–24. This argument is misplaced, and the Court should reject it.

Performance standards and assessments serve a fundamentally different purpose than constitutional requirements. Standards are intended as goals that districts, schools, and classrooms should strive to reach—they are *designed* so that not every school or student will meet them. Assessments measure progress toward those standards. Florida has chosen to incorporate high standards in its rigorous state assessments, a decision that has led to significant improvements in Florida students’ performance, as assessed at the national level.<sup>28</sup> High standards are intended to spur

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<sup>28</sup> *NAEP State Profiles: Florida Overview*, *supra* n.16.

improvement in schools, and the fact that some schools fall short does not mean that the education they provide is not “high quality” as a constitutional matter.

Because standards serve as goals, whether students meet those standards can sometimes be a poor measure of education quality. For example, in Texas, despite a very high 92% state exam passage rate in 2015,<sup>29</sup> Texas ranked 39th among all states in 2015 NAEP Grade 4 Reading scores; Florida fourth graders ranked 10th nationwide by contrast.<sup>30</sup>

Indeed, adopting State standards as constitutional minima would have the perverse effect of encouraging the *weakening* of curriculum standards in order to achieve higher passage rates and to satisfy court-imposed requirements.<sup>31</sup> This phenomenon occurred under the No Child Left Behind Act of 2001 (“NCLB”),

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<sup>29</sup> *Morath v. Tex. Taxpayer & Student Fairness Coal.*, 490 S.W.3d 826, 866 (Tex. 2016).

<sup>30</sup> *NAEP State Profiles: Florida State Comparisons*, THE NATION’S REPORT CARD, <https://www.nationsreportcard.gov/profiles/stateprofile/overview/FL>. In the 2017 NAEP, Florida improved its ranking to 6th, while Texas dropped to 45th in Grade 4 Reading performance. *Id.*

<sup>31</sup> See James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1250 (2008); *William Penn Sch. Dist. v. Pennsylvania Dep’t of Educ.*, 170 A.3d 414, 483 (Pa. 2017) (Saylor, C.J., dissenting) (“[Assigning constitutional meaning to legislative education standards] would give rise to a situation in which a finding of unconstitutionality could be remedied by a lowering of the achievement parameters without altering the educational program being delivered. Relatedly, it could incentivize the political branches to set targeted proficiency levels artificially low, or dispense with them entirely, as a means of narrowing their legal exposure and avoiding judicial intervention.”).

which required states to set “challenging” academic standards and regularly test to determine proficiency under those standards, and then sanctioned schools that failed to meet their targets.<sup>32</sup> For example, after the passage of the NCLB, Tennessee lowered the number of questions eighth-graders had to answer correctly on statewide exams to be deemed “proficient” from 36 out of 70 (51%) in 2003, to 22 out of 55 (40%) by 2005.<sup>33</sup> While the percentage of students that passed the exam increased from 80% to 87%,<sup>34</sup> Tennessee students achieved no real gains on Grade 8 NAEP Reading scores during that same time period.<sup>35</sup> Thus, while state standards were being met at greater rates, the quality of education was actually not improving.

For these reasons, no state has accepted Petitioners’ argument. Even courts that have found a justiciable constitutional right to education have rejected attempts to equate legislated standards with constitutional requirements. For example, the Supreme Court of Pennsylvania recognized that it is “reasonable to maintain that

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<sup>32</sup> See James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 933-34 (2004); see also Ian Urbina, *As School Exit Tests Prove Tough, States Ease Standards*, N.Y. TIMES (Jan. 11, 2010), <https://www.nytimes.com/2010/01/12/education/12exit.html> (“The real pattern in states has been that the standards are lowered so much that the exams end up not benefiting students who pass them while still hurting the students who fail them.”).

<sup>33</sup> Ryan, *Standards*, *supra* n.31 at 1248.

<sup>34</sup> *Id.* at 1248-49.

<sup>35</sup> *NAEP State Profiles: Tennessee*, THE NATION’S REPORT CARD, <https://www.nationsreportcard.gov/profiles/stateprofile/overview/TN>.

[legislated standards] necessarily are mutable, and are ill-suited, as such, to serve as a constitutional minimum now or in the future.” *William Penn*, 170 A.3d at 449. The court concluded: “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.” *Id.* at 450.<sup>36</sup>

Petitioners arbitrarily and shortsightedly focus on curriculum standards as a measure of “high quality” education. But adopting Petitioners’ argument would invite the same problems experienced following No Child Left Behind. As one commentator has explained: “If states have lowered standards or manipulated test scores to avoid NCLB sanctions, it is hard to see why they would not also lower standards or manipulate test scores” in response to court-imposed requirements.<sup>37</sup>

### **B. Florida’s High Standards Have Contributed To Gains In Educational Performance**

Florida’s high standards are working, as shown by the fact that Florida students increasingly outperform students in many other states on national academic tests. As the circuit court expressly found: “The State could have chosen to set the

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<sup>36</sup> See also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 43, (1973) (“[T]he judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.”).

<sup>37</sup> Ryan, *Standards*, *supra* n.31 at 1250.

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.

Petitioners’ focus on the number of students who fall short of state standards misses the larger reality that Florida students are, as a whole and even at the subgroup level, performing well compared to their peers in other states. The State’s policy decision to administer rigorous state exams based on high standards has led to better academic outcomes over time, as reflected in national assessments.

In 2017, Florida students made more progress and improved at a greater rate than any other state according to NAEP:

- In Grade 4 Reading performance, Florida moved from being ranked 12th in 2011 to 5th in 2017.<sup>38</sup> Florida has improved 23 scale score points in Grade 4 Reading since 1994, while the national average scale score increased only 9 points.<sup>39</sup>
- For Grade 8 Reading performance, Florida improved 14 scale points compared to the national average 5-point score increase since 1998.<sup>40</sup>
- Florida was the only state to have a score increase for both Grades 4 and 8 NAEP Mathematics in 2017.<sup>41</sup> Florida improved 32 points versus

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<sup>38</sup> *NAEP State Profiles: Florida State Comparisons*, *supra* n.30.

<sup>39</sup> *NAEP State Profiles: Florida Overview*, *supra* n.16.

<sup>40</sup> *Id.*

<sup>41</sup> *NAEP Mathematics Report Card: State Average Scores*, NATIONAL CENTER FOR EDUCATION STATISTICS (2017), [https://www.nationsreportcard.gov/math\\_2017/#states/scores?grade=4](https://www.nationsreportcard.gov/math_2017/#states/scores?grade=4) (Grade 4), *and* <https://www.nationsreportcard.gov/>

20 points nationally in Grade 4 Mathematics since 1992, and 24 points versus 21 scale points nationally in Grade 8 Mathematics since 1990.<sup>42</sup>

- In Grade 4 NAEP Mathematics, Florida jumped from 32nd in the nation in 2011 to 8th in the nation by 2017.<sup>43</sup>

In addition, Florida's graduation rate has steadily improved over the last decade, rising over twenty points to 82.3% in 2017.<sup>44</sup> These gains demonstrate that Florida's high educational standards, high-quality assessments, and rigorous system of accountability have led to consistently strong results in student performance relative to student performance nationwide.<sup>45</sup>

Florida demonstrated improvements compared to the national average in all major demographic categories.<sup>46</sup> In 2017, all of Florida's student subgroups—white,

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math\_2017/#states/scores?grade=8 (Grade 8). Florida's ranking in Mathematics has significantly improved while the national public average has remained constant.

<sup>42</sup> *Id.*

<sup>43</sup> *NAEP State Profiles: Florida State Comparisons*, *supra* n.30. In 1998, nearly half of Florida's fourth graders were reading severely below grade level. In 2017, Florida outperformed the national average in every subgroup on NAEP Grade 4 Reading.

<sup>44</sup> FLORIDA DEPARTMENT OF EDUCATION, *Florida's High School Cohort 2016-2017 Graduation Rate* (Jan. 2018), <http://www.fldoe.org/core/fileparse.php/7584/urlt/GradRates1617.pdf>.

<sup>45</sup> *See NAEP State Profiles: Florida State Comparisons*, *supra* n. 30; *see also* Bush, *supra* n.15.

<sup>46</sup> Matthew M. Chingos, *Breaking the Curve: Promises and Pitfalls of Using NAEP Data to Assess the State Role in Student Achievement*, URBAN INSTITUTE (Oct. 2015), <https://www.urban.org/sites/default/files/publication/72411/2000484-breaking-the-curve-promises-and-pitfalls-of-using-naep-data-to-assess-the-state-role-in-student-achievement.pdf>. According to Peggy Carr, associate commissioner of assessment at the National Center for Education Statistics, all Florida students showed growth

black, Hispanic, Asian/Pacific Islander, students eligible for FRL, students with disabilities, and English Language Learners—*significantly* outperformed their national peers in Grade 4 Mathematics according to NAEP.<sup>47</sup> Likewise, all Florida student subgroups outperformed their counterparts nationwide in Grade 4 Reading.<sup>48</sup> Petitioners focus on the passage rates of black, Hispanic, and FRL-eligible students for the 2014 Florida *statewide* reading assessment, but ignore the fact that last year these same subgroups of Florida students scored higher than their peers in almost every state and the District of Columbia on a national level for Grade 4 Reading.<sup>49</sup> According to at least one study, Florida ranks even higher on a national scale in Grades 4 and 8 Mathematics and Reading when the 2017 NAEP scores are adjusted

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on the 2017 NAEP, regardless of race, family income, gender, or disability. See Leslie Postal, *Nation's report card: 'Something very good is happening in Florida.'* ORLANDO SENTINEL (Apr. 10, 2018), <http://www.orlandosentinel.com/features/education/school-zone/os-0s-florida-naep-test-scores-20180409-story.html>.

<sup>47</sup> ExcelinEd, *#AskExcelinEd: 2017 NAEP Results Are Finally Out - What Does The Data Tell Us So Far?*, EXCELINED (Apr. 11, 2018), <https://www.excelined.org/edfly-blog/askexcelined-naep-2017-results-are-finally-out-what-does-the-data-tell-us-so-far/>. In fact, Florida's Grade 4 black, Hispanic, and FRL students scored higher than their peers in every state and the District of Columbia in 2017 NAEP Mathematics.

<sup>48</sup> *Id.*

<sup>49</sup> Florida's Grade 4 Hispanic students outperformed their peers in all other 49 states and the District of Columbia in Reading. Florida's FRL students outperformed their peers in the District of Columbia and every state except Massachusetts in Grade 4 Reading. Florida's Grade 4 black students scored higher than their peers in 46 states and the District of Columbia in 2017 NAEP Reading. See *NAEP Data Explorer*, *supra* n.10.

for each state's demographic profile.<sup>50</sup> In another study that accounts for states' diverse student populations, Florida ranks third in the nation for academic performance when using disaggregated NAEP scores.<sup>51</sup> These rankings demonstrate that *all* of Florida's students, regardless of race, are performing well when compared to their peers in other states.<sup>52</sup>

Rather than showing that Florida's school system is failing, as Petitioners allege, the only available nationwide benchmark (NAEP) demonstrates that Florida compares favorably to the top states in the country in educational performance and outperforms the nation as a whole. A National Center for Education Statistics official said this year that "Florida needs to be commended" because "[s]omething good is happening in Florida obviously" due to the "interesting and notable"

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<sup>50</sup> See Kristin Blagg & Alexandra Tisley, *America's Gradebook: How Does Your State Stack Up?*, URBAN INSTITUTE (April 10, 2018), [http://apps.urban.org/features/naep/?utm\\_source=EA&utm\\_medium=NAEP&utm\\_campaign=debtinteractivestudents&utm\\_content=r](http://apps.urban.org/features/naep/?utm_source=EA&utm_medium=NAEP&utm_campaign=debtinteractivestudents&utm_content=r). "These adjusted scores allow for students to be compared with their demographically similar peers using factors such as race, receipt of special education services, and status as an English language learner." *Id.*

<sup>51</sup> Liebowitz & Kelly, *supra* n.17. Liebowitz and Kelly compared the states' NAEP scores for four major ethnic groups (whites, blacks, Hispanics, and Asian/Pacific Islanders) in three subjects (Reading, Mathematics, and Science) in two grade levels (fourth and eighth grades) to create a "quality" ranking system that avoids misleading rankings based on aggregation that fails to account for student heterogeneity. *Id.* at 4-5.

<sup>52</sup> *Id.* at 7.

academic improvements of its students.<sup>53</sup> The performance of *all* Florida students compared to their peers around the nation confirms that the Florida educational system and its rigorous curriculum standards and assessments are working as they were designed to do. Petitioners' argument that the Court should constitutionalize the state's legislated standards would deprive the State of the ability to use this critical and flexible policy tool, and would in effect penalize the State for setting the high standards that have driven continued improvements in student performance.

### CONCLUSION

For the foregoing reasons, the First District Court of Appeal's decision should be approved.

Dated: July 30, 2018

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that, on this thirtieth day of July 2018, the foregoing brief was furnished by electronic mail to all counsel identified on the Service List that follows.

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I certify compliance with Florida Rule of Appellate Procedure 9.210(a)(2)  
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