IN THE SUPREME COURT OF FLORIDA
Case No. SC 18-67

CITIZENS FOR STRONG SCHOOLS, INC.; et al., Petitioners,	)	
vs.	)	L.T. Case Nos. 1D16-2862; 1D10-6285; 09-CA-4534
FLORIDA STATE BOARD OF EDUCATION; et al., Respondents,	)	
and	)	
CELESTE JOHNSON; et al., Intervenors/Respondents.	)	

PETITIONERS' REPLY BRIEF

ON APPEAL FROM
THE FIRST DISTRICT COURT OF APPEAL

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Petitioners Citizens for Strong Schools, Fund Education Now, Eunice Barnum, Janiyah Williams, Jacque Williams, Sheila Andrews, Rose Nogueras, and Alfredo Nogueras will be referred to as "Parents." While not all are technically parents (grandmother, three parents, two students, and two citizen organizations), Parents is a fair nomination of their interests.

Respondents Florida State Board of Education, Speaker of the Florida House of Representatives Richard Corcoran, Senate President Joe Negron, and Florida Commissioner of Education Pam Stewart, all sued in their official capacities, will be referred to as "the State."

Respondents-Intervenors Celeste Johnson, Deaundrice Kitchen, Kenia Palacios, Margot Logan, Karen Tolbert, and Marian Klinger will be referred to as "Intervenors."

Citations to the Record and Supplemental Record, will be to the Record and page number, e.g., R.534.

As the trial transcripts are not paginated in the Record on Appeal, citations to the trial transcript will be to the transcript volume, page and line, e.g., Tr.v.6, 791:18-792:11.

Citations to the trial exhibits, which were sent by the lower court to the First DCA via separate CD, will be to Exhibit number and page, e.g., Ex. 4040, at 45.

ARGUMENT

I. INTRODUCTION

The Court should reject the State's efforts to evade constitutional scrutiny of its compliance with its paramount duty to adequately provide for a uniform, efficient and high quality system of free public schools. The Court should hold that Article IX is justiciable, adopt a standard of review suitable to a fundamental constitutional value, and remand for consideration under the correct standard of review by the appropriate trier of fact.

The State lays clear its illogical position that Article IX is only an aspirational statement, not a legal requirement, even though the current constitutional language was drafted and adopted with the explicit goal of creating an enforceable right. The State asks this Court to ignore both the principles this Court set forth in *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006), and the will of the voters who approved the 1998 amendments to Article IX. This would violate basic principles of constitutional interpretation and democratic choice. The State also asks the Court to apply the lowest possible rational basis standard to the State's compliance with a "fundamental value" and "paramount duty," terms unique in the Florida Constitution to education. Finally, it asks the Court to affirm fact findings on the merits of the constitutionality of Florida's education system, including two voucher programs, which were based on an improper standard of review and burden of proof.

II. ARTICLE IX IS JUSTICIABLE

The framers and voters of the 1998 amendments intended Article IX to be justiciable. (*see* Initial Br., at 17-20.) Article IX's terms are judicially manageable. (*Id.* at 23-42.) The State argues that this Court should find Article IX non-justiciable, a holding which would defeat "the intention and purpose of the people in adopting it." *See Amos v. Mathews*, 126 So. 308, 316 (Fla. 1930) ("The object of constitutional construction is to ascertain and effectuate the intention and purpose of the people in adopting it."). The State's efforts to evade judicial review should be rejected. This Court should hold that, consistent with its prior analysis, Article IX provides judicially manageable "standards by which to measure the adequacy of the public school education provided by the state." *Holmes*, 919 So. 2d at 403.

A. *Coalition* was Superseded by Florida Voters.

The State's argument that this Court should find the education clause non-justiciable relies extensively on a case decided prior to the passage of the current education clause, *Coalition for Adequacy & Fairness in Sch. Funding v. Chiles,* 680 So. 2d 400 (Fla. 1996). (Ans. Br., at 24-34.) The State, in essence, asks this Court to rely on precedent analyzing a prior version of Article IX to hold that the 1998 revisions of Article IX had no legal effect. (Ans. Br., at 25: "And regardless of later amendments to article IX, *Coalition* applies with full force.") The State's position ignores that this Court's principles of constitutional construction presume that the

framers of constitutional amendments do not intend to enact useless provisions. *See Edwards v. Thomas*, 229 So. 3d 277, 284-85 (Fla. 2017).

The 1998 revisions of Article IX were proposed by the 1997-98 Constitution Revision Commission (CRC) in direct response to *Coalition* "to provide constitutional standards to measure the 'adequacy' provision." *Holmes*, 919 So. 2d at 404. The requirement that the school system be "uniform" was in the provision pre-1998. *Id. Coalition* confirmed that, consistent with longstanding precedent, "uniform" was a judicially manageable standard, but that courts could not determine whether the State had made "adequate provision" for education divorced from the uniformity requirement. 680 So. 2d at 408. The amendments proposed by the CRC, and subsequently adopted by the voters, revised Article IX by: "(1) making education a 'fundamental value,' (2) making it a paramount duty of the state to make adequate provision for the education of children, and (3) defining 'adequate provisions' by requiring that the public school system be 'efficient, safe, secure, and high quality.'" *Holmes*, 919 So. 2d at 403.

As this Court has already recognized, the 1998 amendments had a significant legal impact. *Id*. at 403-05. At the time of *Coalition*, the education clause imposed a lesser duty on the State to provide for education. 680 So. 2d at 405 n.7 (recognizing four-category system to measure level of duty imposed by education clause). Prior to the 1998 amendments, the education clause was a Category II, which required the

legislature "to provide some minimal level of quality in education." *Id.* This Court recognized that the 1998 revisions had the legal effect of increasing the State's education provision to a Category IV—the highest classification—which now imposes "a maximum duty on the state to provide for public education that is uniform and of high quality." *Holmes*, 919 So. 2d at 404.

Thus, it cannot be true that *Coalition* supports the argument that Parents' claim is not justiciable. This interpretation fails to give legal effect to the revisions. Further, it ignores that even *Coalition* stopped short of saying that an adequacy challenge could never be justiciable. 680 So. 2d at 408; *see also id.* at 408-09 (Overton, J., concurring) (even if "adequate" is difficult to quantify, there are types of inadequacies that may fail to meet that minimum threshold).

B. Framers Intended to Create Judicially Manageable Standards.

In another departure from basic principles of constitutional construction, the State claims that the framers' intent is "irrelevant." (Ans. Br., at 33, quoting *Haridopolos v. Citizens for Strong Schools*, 81 So. 3d 465, 478 (Fla. 1st DCA 2011) (Roberts, J., dissenting)). As this Court has made clear:

> The fundamental object to be sought in construing a constitutional provision is to ascertain the intent of the framers and the provision must be construed or interpreted in such manner as to fulfill the intent of the people, never to defeat it. Such a provision must never be construed in such manner as to make it possible for the will of the people to be frustrated or denied.

In re Sen. Jt. Res. of Legis. Apportionment 1176, 83 So. 3d 597, 599 (Fla. 2012), quoting *Gray v. Bryant*, 125 So. 2d 846, 852 (Fla. 1960). This approach "has been consistently undertaken when interpreting constitutional provisions." *Id.* Ignoring the intent of the framers of Article IX—to create a justiciable standard for education—is inconsistent with how this Court interprets the Florida Constitution. *Holmes*, 919 So. 2d at 403-05 (analyzing intent of framers in proposing specific constitutional words and phrases in the 1998 revisions). Thus, their intent to create judicially manageable standards should be given effect. (*See* Initial Br., at 17-20.)

This Court may properly consider the minutes of the CRC proceedings and should reject the State's arguments otherwise. In construing provisions of the Constitution, the Court may be guided by the historical background of a provision and the circumstances which led to its adoption, including the minutes of the CRC. *Gallant v. Stephens*, 358 So. 2d 536, 539-40 (Fla. 1978).

The State argues that this Court should not consider the CRC minutes because they purportedly are "unauthenticated" and were not presented to the circuit court. (Ans. Br., at 32.) Yet, Parents cited portions of the minutes below (R.2580-81, 2584, 2592, 2594-95, 2598, 2603, 2605, 2618), and even presented expert testimony based on them in part (Tr.v.2, 94:15-95:24, 96:7-13, 100:25-103:16). The State therefore had ample opportunity to challenge their authenticity below, but chose not to, even referencing CRC commentary in their own pre-trial memorandum. (R.2644-45.)

In any event, the CRC minutes are subject to judicial notice. *See* § 90.202, Fla. Stat. (2018) (judicial notice proper for "facts that are not subject to dispute because they are capable of accurate and ready determination by resort to sources whose

accuracy cannot be questioned"). The State cannot seriously contest the authenticity or accuracy of the minutes, which are publicly available on an official archive. *Holmes* cited to the very same website that Parents and amici now rely on.[1] 919 So. 2d at 419. That website contains the transcripts of CRC hearings and the ballot pros and cons presented to the voters. Although the State notes accurately that the "pros and cons" statement is not the ballot summary, it does not dispute that the statement was presented to the voters in 1998. (Ans. Br., at 33 n.23.) *See Fla. Senate v. Graham*, 412 So. 2d 360, 364 (Fla. 1982) (relying on CRC analysis of proposed constitutional provisions given to the people as evidence of provision's meaning). The statement is relevant in considering the CRC's intent.

Further, the amicus brief submitted by several CRC members in support of the State[2] attack the CRC-Parents brief and contend that it should not be considered merely because the brief was written 20 years after the amendment was drafted. (CRC-State Br., at 8-10.) The CRC-Parents, however, properly rely on minutes taken at the time of the debate in 1998 (CRC-Parents Br., at 6, 7, 10, 20), and does not provide new testimony in the form of affidavits. (*See* CRC-State Br., at 9.)

C. 1998 Amendments Created Judicially Manageable Standards.

The State contends that the new terms added to the Constitution, including "efficient" and "high quality," are no more manageable than "adequacy" (Ans. Br., at 26-28), yet that is not the appropriate comparison as the new terms, along with

[1] That website is http://fall.fsulawrc.com/crc/.

[2] To distinguish between the two amicus briefs by CRC members, they will be cited in reference to which party they support: CRC-Parents or CRC-State.

uniform, were intended to define adequacy. *Holmes*, 919 So. 2d at 404. Parents ask this Court to perform a typical judicial function to interpret these terms. This is not impossible, as the State claims. (Ans. Br., at 24-27.) Courts interpret such terms regularly. For instance, the Florida Legislature mandates that the state's college system make "efficient progress" and provide a "high-quality, affordable education." §§ 1001.02(6) & 1004.65(4), Fla. Stat. (2018). The Fifth DCA already has found these terms "provide sufficient standards and guidelines against which the rules adopted by the Board can be evaluated for compliance with legislative intent." *United Faculty of Fla. v. Fla. State Bd. of Educ.*, 157 So. 3d 514, 519 (Fla. 1st DCA 2015). Similarly, the term "uniform" is judicially manageable, as the State concedes (Ans. Br., at 34), because this Court interpreted it in at least four cases. (*See* Initial Br., at 27.) *See, e.g., Coalition*, 680 So. 2d at 408 (uniform is manageable).

The State also claims that because the term "by law" remains in the post-1998 version of Article IX, this "demonstrates that the constitution continues to commit educational policy determinations to the legislative and executive branches." (Ans. Br., at 26, quoting the First DCA's opinion.) Parents agree that it is the role of the legislature to make policy determinations. But that does not mean the judiciary is excluded from reviewing those legislative decisions to determine whether the State has met its paramount duty under Article IX. It is the role of the courts to determine whether the state has met its constitutional duties. *See Holmes*, 919 So. 2d at 398.

Further, the State's argument ignores that in 1998 language was added that it is "a paramount duty of the state to make adequate provision." *Id.* at 403. As the CRC-Parents point out, this sentence indicates that a specific role for the judiciary as the duty is imposed on the state as a whole, not simply the legislative or executive branch. (CRC-Parents Br., at 18-20; *see also* Initial Br., at 36.)

The State's reliance on the Fifth DCA's conclusion in *Simon v. Celebration Co.*, 883 So. 2d 826, 831 (Fla. 5th DCA 2004), that the term "by law" excludes judicial review is misplaced. (Ans. Br., at 26-27.) *Simon* only holds that there is no private right of action for damages against individual school boards under Article IX because the responsibility to pass laws lies with the legislature. *See Sch. Bd. of Miami-Dade Cnty. v. King*, 940 So. 2d 593, 603 (Fla. 1st DCA 2006). *Simon* does not address whether there can be judicial review of the State's actions, and is thus inapplicable to the case at bar.

Finally, the State repeatedly conflates whether it is possible for a court to ever interpret Article IX and whether Parents have presented the proper facts to do so in this matter. Because the lower court concluded that the answer to the first question was no, it never properly addressed the second. Therefore, if the Court concludes that Article IX is justiciable, it can then provide guidance about what the appropriate constitutional standards would be, and the lower court—the proper finder of fact—can use those standards of interpretation going forward.

D. Parents Articulated Judicially Manageable Standards.

The State also is wrong that Parents have not articulated judicially manageable standards. (Ans. Br., at 35-38). As Parents have explained, the Legislature and State Department of Education have provided the standards and measurements necessary for the Court to review whether all children have the opportunity to achieve on those standards. (Initial Br., at 21-24.)

The State argues that Parents must identify an exact percentage of children who must be proficient in order to provide a judicially manageable standard, and fault Parents for not pinpointing one. (Ans. Br., at 36-37.) But whether it is even appropriate to use set percentages to evaluate constitutional adequacy is a decision a trial court should make utilizing the correct standard of review.

The State's repeated insistence that Parents are asking the courts to take on an impossibly complex task is belied by the experience of other courts which have done precisely what Parents urge Florida's to do. For example, a North Carolina court considered whether the number of students failing to achieve Level III proficiency[3] was "inordinate enough" to be a factor in determining that a "large group" of students have been improperly denied their opportunity to obtain a sound basic education. *Hoke Cnty. Bd. of Educ. v. State*, 599 S.E.2d 365, 382 (N.C. 2004). The court found

[3] The Supreme Court of North Carolina concluded that a "student who is performing below grade level (as defined by level I or level II) is not obtaining a sound basic education." *Hoke Cnty. Bd. of Educ. v. State*, 599 S.E. 2d 365, 382 (N.C. 2004).

that an "unacceptably high number" of students are failing to obtain a sound basic education. *Id*. at 384. In a separate case, a New York court looked to test scores, but without setting an exact percentage, used them as a factor in determining if a constitutional education had been provided by the state. *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 338 (N.Y. 2003) (35 to 40% of New York City third graders and 30% of sixth graders scored at the need for improvement level in reading, while in the rest of the state only about 10% so scored). A trial court on remand in this case could review, for example, the performance of various groups of students and determine that a particularly high number (e.g., 68% of Black students, 53% of students in poverty, or 63% of homeless students did not pass reading, *see* Initial Br., at 4) is a key fact for determining constitutional inadequacy.

The State and the Foundation for Excellence (FFE) Amicus argue that the State's content standards and assessment results are not an appropriate measure of "high quality."[4] (Ans. Br., at 37-38; FFE Br., at 12-15.) FFE says that no state has adopted such a standard. This is inaccurate. The Supreme Court of Kansas found that adopting legislative standards as a yardstick for constitutional adequacy was appropriate, as its legislature defined:

> the outcomes for Kansas schools, which includes the goal of preparing the learners to live, learn, and work in a global society. Through the quality performance accreditation

[4] The Florida Commissioner of Education agreed that if the content standards are mastered, students have obtained a high quality education. (Tr.v.27, 4082:10-16.)

> standards, the Act provides a legislative and regulatory mechanism for judging whether the education is 'suitable'. These standards were developed after considerable study by educators from this state and others. It is well settled that courts should not substitute judicial judgment for educational decisions and standards. Hence, the court will not substitute its judgment of what is 'suitable', but will utilize as a base the standards enunciated by the legislature and the state department of education.

Unified Sch. Dist. No. 229 v. State, 885 P.2d 1170, 1186 (Kan. 1994) (internal citations omitted). More examples can be found in the amicus brief of the Education Law Center, which has litigated such cases extensively. (ELC Br., at 10 n.2.)

Parents note that looking to legislatively-determined standards does not mean that the standards cannot change. The State could undergo another "rigorous and thorough process" to revise the standards. (Ans. Br., at 15.) But the possibility that the State would, in bad faith, lower its standards to manipulate constitutional compliance (FFE Br., at 15) is hardly a basis to reject any consideration of the current standards, which were designed in good faith.

III. PARENTS' CLAIM DOES NOT VIOLATE SEPARATION OF POWERS OR RAISE A POLITICAL QUESTION

The State, relying on the *Haridopolos* dissent and *Coalition*, claims that if Article IX is held to be justiciable, then the courts will need to make policy judgments and "wade into a political thicket." (Ans. Br., at 30.) But this concern is misplaced. Parents ask only that the courts answer the judicial question of whether "the Legislature's resolution of public policy issues" complies with Article IX. *See*

Holmes, 919 So. 2d at 398. This is no different from other determinations courts make about whether policy decisions made by the legislature comply with the state and federal constitutions. (*See* CRC-Parents Br., at 16-17, explaining that courts routinely interpret difficult terms such as "cruel and unusual" and "compact.") Political question concerns are not applicable. (*See also* Initial Br., at 37, discussing *Baker v. Carr*, 369 U.S. 186 (1962).)

The State also argues that Parents' claim is not justiciable because granting judgment in their favor would violate separation of powers as legislative and executive actions are entitled to great deference. (Ans. Br., at 42.) There is no conflict between separation of powers and judicial review under Article IX. The judiciary determines compliance with the constitution. It does not weigh competing public policy interests. And while deference to legislative decisions typically is given, that deference is "at all times circumscribed by the Constitution." *Holmes,* 919 So. 2d at 398. The State fails to acknowledge any limits on legislative power. (*See* Ans. Br., at 42.)

The State further argues that the judiciary cannot make appropriations, and therefore any remedial plan is prohibited because it will "presumably" aim to increase funding. (Ans. Br., at 43-44.) That presumption is premature and speculative. The procedure would be that the trial court would issue a declaration that the State has failed to meet Article IX's mandates, and then order the State to develop a plan for

constitutional compliance. If the judicial order goes too far, the State could appeal and argue separation of powers at that point, but it cannot now assert that any possible future order is prohibited.

IV. THE TRIAL COURT APPLIED AN INAPPROPRIATE STANDARD OF REVIEW AND BURDEN OF PROOF

The trial court adopted the standard of review and burden of proof proposed by the State, requiring Parents to prove beyond a reasonable doubt that there is no rational basis for the state's action. Rational basis scrutiny and beyond a reasonable doubt burden of proof are not applicable to fundamental duties placed on the State by the Florida Constitution. Contrary to the State's claims, Parents have not argued that the state's education system is "presumptively unconstitutional" or conceded to a beyond a reasonable doubt burden of proof. Instead, they request that their claims be judged under a heightened standard of review and a preponderance of the evidence burden of proof, and that the case be remanded to the trial court to reweigh the facts under those standards.

A. Fundamental Constitutional Values Require a Heightened Standard of Review.

This Court is being asked for the first time to determine what standard of review to apply to a "fundamental value" guaranteed to Florida's children. The State argues that the legislature's decisions about how to meet its "paramount duty" to educate all of Florida's children should be subject only to rational basis scrutiny. Rational basis,

a highly deferential standard of review, is inconsistent with the constitutional limitation on the legislature's power imposed by Article IX. *See Holmes*, 919 So. 2d at 406. Like the standards governing the reapportionment process, Article IX provides an "express constitutional mandate" requiring a heightened level of scrutiny. *See League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 397 (Fla. 2015); *see also In re Sen. Jt. Res.,* 83 So. 3d at 607 ("By virtue of these additional constitutional requirements, the parameters of the Legislature's responsibilities under the Florida Constitution, and therefore this Court's scope of review, have plainly increased, requiring a commensurately more expanded judicial analysis of legislative compliance.").

League noted that the heightened standard of review it applied was appropriate because "'the framers and voters' of the Fair Districts Amendment 'clearly desired more judicial scrutiny' of the Legislature's decisions in redistricting." 172 So. 3d at 398, quoting *House of Rep. v. League of Women Voters of Fla*., 118 So. 3d 198, 205 (Fla. 2013). The voters had a similar intent in 1998 when they imposed on the State a paramount duty to provide a uniform, efficient, and high quality system of free public schools. (*See* Initial Br., at 17-20.)

Parents challenge whether the State has met its paramount duty to make adequate provision for education, a fundamental value of the people of the State of Florida. Art. IX § 1(a), Fla. Const. While "fundamental value" is used instead of

"fundamental right," the purpose of that wording, as articulated by the 1998 CRC and later accepted by this Court, was to avoid creating an enforceable right for complaints about an individual's particular education.[5] *Holmes*, 919 So. 2d at 404. The "value" versus "right" language did not absolve the "maximum duty on the state to provide for public education that is uniform and of high quality." *Id.*

Parents do not claim, as the State suggests, that the education system is "presumptively unconstitutional." (Ans. Br., at 54.) Parents argue that the courts should determine whether the State is complying with its constitutional duties, as in the redistricting context, by measuring "the constitutionally mandated criteria in Article IX" against the reality of the state education system. (Initial Br., at 41.) Only when the State fails in practice to carry out its duty to provide a uniform, efficient, and high quality system of free public schools will state action be found unconstitutional. *See Holmes*, 919 So. 2d at 398.

The appropriate standard is more demanding than rational basis review, which asks only if the state action "bear[s] a rational relationship to a legitimate state purpose." *Lite v. State*, 617 So. 2d 1058, 1060 (Fla. 1993). As the Washington Supreme Court explained in a similar challenge, the "typical inquiry whether the State

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[5] *See, e.g.,* CRC Minutes, Jan. 15, 1998, at 285:21-286:21, http://fall.law.fsu.edu/crc/minutes/crcminutes011598.html (remarks of Langley, voicing concern over the ability of an individual child to contest her education); CRC Minutes, Feb. 26, 1998, at 67:24-68:6, http://fall.fsulawrc.com/crc/minutes/crcminutes022698.html (remarks of Brochin, stating that the language's intent is a collective, not individual, purpose).

has overstepped its bounds … does little to further the important normative goals expressed" when interpreting a requirement that the legislature act to provide education, and "instead ... we must ask whether the state action achieves or is reasonably likely to achieve the constitutionally prescribed end." *McCleary v. State*, 269 P.3d 227, 248 (Wash. 2012) (citation omitted).

The standard of review urged by Parents is precisely the standard applied in *Holmes*, the last major decision on the meaning of Article IX. 919 So. 2d at 412-13 (statute which "violates the mandate of Article IX § 1(a)" must be struck down). Indeed, while *Holmes* noted that statutes are presumptively constitutional, the Court did not apply a rational basis scrutiny, but instead measured a voucher program by the "yardstick" of Article IX's mandate. *Id.* at 407; *cf. In re Sen. Jt. Res.,* 83 So. 3d at 599 (Court must measure apportionment plans "with the yardstick of express constitutional provisions").[6] Rational basis scrutiny is insufficient. A heightened standard is necessary to determine if the State has met its paramount duty to provide a uniform, efficient, and high quality education to all children.

B. Parents Did Not Invite Error as to the Application of Beyond a Reasonable Doubt.

Parents have consistently argued that preponderance of the evidence is the appropriate burden of proof. (Initial Br., at 42; Parents' 1st DCA Initial Br., at 48-50.)

[6] In the redistricting context, this Court has repeatedly recognized the presumption of validity while according judicial relief where the legislature has failed its constitutional mandates. *See, e.g.*, *In re Sen. Jt. Res.,* 83 So. 3d at 606.

The State contends that Parents conceded below that the beyond a reasonable doubt standard is appropriate. (Ans. Br., at 52). Parents repeatedly argued at trial that beyond a reasonable doubt should not apply (Tr.v.1, 9:7-10:13; v.38, 5778:17-5779:14; 5822:3-24). After the close of evidence, the trial court ruled it would apply a burden of beyond a reasonable doubt to a challenge to the general appropriations act. (Tr.v.38, 5789:17-5790:8.) In light of that ruling, Parents incorporated this burden into their proposed final judgment, while still proposing that beyond a reasonable doubt be applied narrowly, solely for findings on the appropriations act. (R.3350-51.) Parents have not invited error or precluded their challenge to the improper burden of proof applied by the trial court.

The trial court erred in applying an overly deferential burden of proof to Parents' challenge under Article IX. *See Holmes*, 919 So. 2d at 398 ("the usual deference given to the Legislature's resolution of public policy issues is at all times circumscribed by the Constitution."). Just as in the redistricting cases, where the Florida Supreme Court has rejected beyond a reasonable doubt, Article IX imposes an express constitutional mandate, implicating "this Court's duty, given to it by the citizens of Florida, to enforce adherence to the constitutional requirements." *See In re Sen. Jt. Res.,* 83 So. 3d at 607. Beyond a reasonable doubt is "ill-suited" to a court's evaluation of whether the education system is constitutionally adequate, and should be rejected in favor of preponderance of the evidence, the typical civil burden.

C. The Trial Court's Factual Findings Were Based on an Erroneous Standard of Review and Burden of Proof, and Must Not Be Affirmed.

As the State recognizes, findings of fact "induced by an erroneous view of the law" will be set aside on appeal (Ans. Br., at 47, citing *Holland v. Gross*, 89 So. 2d 255, 258 (Fla. 1956).) The State urges affirmance of the trial court on the basis that, whatever the standard of review, the facts in the record support a finding that Florida's education system is constitutionally sufficient. (Ans. Br., at 47-50.) But this argument relies on factual findings based on rational basis and beyond a reasonable doubt.[7] (*See, e.g.*, Ans. Br., at 56-57).

If this Court agrees with Parents that the trial court applied the wrong legal standard, this Court may not affirm the lower courts' decisions on the merits. *See Pullman-Standard v. Swint*, 456 U.S. 273, 291-92 (1982) (where findings are infirm due to erroneous view of the law, remand is proper remedy because factfinding is basic responsibility of trial courts). The fact finder must instead make new findings under the correct standard. *Van v. Schmidt*, 122 So. 3d 243, 262 (Fla. 2013) (when trial courts make errors of law in reaching findings, appellate courts remand for reconsideration in light of proper standard.) Parents request this Court remand for the trial court to play its role as factfinder using the correct legal standard and burden.

Finally, some amici rely on facts outside the record on appeal. This is

[7] Moreover, the trial court's error was compounded by its first deciding that the case was not justiciable, then deciding the case on the merits anyway. (R.3385-89.)

inappropriate. Such facts as whether Miami-Dade schools provide a high quality education (Urban League Br., at 3-8), test scores in Florida and other states (FFE Br., at 7-20), or the benefits of educational choice (EdChoice Br., at 10-20), go to the merits of this case and should be presented to the factfinder. Also, these facts are irrelevant to the appeal questions of justiciability and standard of review.

V. REMAND ON THE CONSTITUTIONALITY OF THE MCKAY AND FTC PROGRAMS IS PROPER

A. The FTC and McKay Issues Are Properly Before this Court.

There is no procedural bar to deciding the issues regarding the McKay Scholarship Program for Students with Disabilities (McKay), § 1002.39, Fla. Stat. (2018), or the Florida Tax Credit (FTC) Scholarship Program, § 1002.395, Fla. Stat. (2018). This Court should reject Intervenors' procedural arguments because they have no basis in fact or in law, and instead reach the limited legal questions on appeal and remand for further consideration.

First, the Intervenors argue that Parents did not raise the constitutionality of these programs in their prior pleading. (Intervenors Br., at 15.) Yet, in their motion to intervene, Intervenors argued the opposite: that the "obvious objective of Plaintiffs' Second Amended Complaint is to have these programs declared unconstitutional."[8] Intervenors suggest that there was a need to raise an "independent constitutional

[8] The motion to intervene can be found in the supplemental record on appeal. (*See* Order of Clerk of S. Ct. of Fla., dated Aug. 7, 2018.)

claim" to challenge these programs. (Intervenors Br., at 12 n.5, 13.) Parents did not need to do so as the uniformity challenge to these programs, as well as the efficient and high quality allegations, were all brought under the same constitutional provision: Article IX, section 1(a).

Proper pleading in Florida gives sufficient notice as to the "nature of the claim," which is needed to establish subject matter jurisdiction. *Pro-Art Dental Lab, Inc. v. V-Strategic Grp., LLC,* 986 So. 2d 1244, 1252, 1253 (Fla. 2008). Parents' Second Amended Complaint clearly gave sufficient notice that they were challenging McKay and FTC as it included 64 paragraphs alleging uniformity problems under a heading that "The State Has Failed to Provide a Uniform System of Free Public Schools." And the claim and prayer for relief referenced Article IX, section 1(a). (R.140, 145-47, 161 ¶214.) Having met the pleading requirements, there is no jurisdictional bar to challenge the programs. *See, e.g., Circle Finance Co. v. Peacock,* 399 So. 2d 81, 84 (Fla. 1st DCA 1981) (facts alleged, issues and proof, not form of prayer for relief, determine nature of relief).

Second, contrary to Intervenors' argument, Parents could not appeal the trial court's denial of their summary judgment motion (*see* Intervenors Br., at 15) as it was a non-final order. Parents properly appealed the final judgment, in which the trial court made a final determination that these programs did not violate Article IX. (R.3398.) *See generally Reeves v. Fleetwood Homes of Fla., Inc*., 889 So. 2d 812,

821-22 (Fla. 2004) (summary judgment denial generally is not appealable as it does not finally adjudicate any claim).

Third, Parents did not waive their FTC standing argument by not raising it in their brief on jurisdiction before this Court. There is no requirement, nor is it encouraged, to argue all of the issues on the merits, to the contrary only matters pertinent to jurisdiction are proper. *See* Comm. Notes to Fla. R. App. P. 9.120(d), 1977 Amd. ("jurisdictional brief should be a short, concise statement of the grounds for invoking jurisdiction and the necessary facts. It is not appropriate to argue the merits of the substantive issues involved in the case or discuss any matters not relevant to the threshold jurisdictional issue."); *see also Price v. State*, 995 So. 2d 401, 406 (Fla. 2008) ("Although this issue is not the one on which jurisdiction is based, we may, in our discretion, consider other issues properly raised and argued."). The case relied on by Intervenors does not address a brief on jurisdiction, rather it holds that if briefs on the merits fail to argue the issue for which the Court has invoked jurisdiction, then there no longer is jurisdiction. (Intervenors Br., at 19, citing *City of Miami v. Steckloff*, 111 So. 2d 446, 447 (Fla. 1959).)

Finally, Parents did not argue FTC standing in the First DCA because, as the First DCA in this case agreed, it would have been futile to do so: "As Appellants properly concede, however, the trial court's ruling that they lack standing to challenge [FTC] is controlled by this court's opinion in *McCall v. Scott,* 199 So. 3d 359 (Fla. 1st

DCA 2016)." *Citizens for Strong Sch. v. Fla. State Bd. of Educ.*, 232 So. 3d 1163, 1173 (Fla. 1st DCA 2016).

B. Remand of McKay Issue is Proper.

The error of weighing the evidence under the wrong legal standard, as discussed above in Section IV, applies with equal force to the trial court's ruling on McKay. It found that "the McKay Program is *rationally related* to the goal of increasing the quality and efficiency of the Florida public school system." (R.3572.) (emphasis added). This Court should remand for a determination under the proper standard of review whether McKay meets Article IX's uniformity requirements.

Despite Intervenors' assertions to the contrary, *Holmes* did not address "head-on" whether McKay violated uniformity. (Intervenors Br., at 31; *see also* Ans. Br., at 59.) The program distinguished in *Holmes* was *not* McKay, but a much older public school program that allowed schools to pay for private school for certain students with special needs. *See* 919 So. 2d at 411-12, distinguishing *Scavella v. Sch. Bd. of Dade Cnty.*, 363 So. 2d 1095, 1097 (Fla. 1978). That program, unlike McKay, was operated directly by public schools and did not involve students sacrificing any of their rights as public school students[9]—indeed, it held that the program at issue was constitutional in part because it did not violate the guarantee of a free public education. 363 So. 2d

[9] Intervenors suggest that McKay "supplements the rights afforded parents of students with disabilities" (Intervenors Br., at 34 n.11), yet in order to participate in McKay parents actually have to waive their public school procedural rights. (Tr.v.23, 3403:18-3404:16; v. 36, 5364:9-17.)

at 1099. McKay, on the other hand, is not a public school program and is structurally similar to the voucher program at issue in *Holmes*.

Whether McKay is a beneficial option or has material impacts on the public school system, *see Citizens,* 232 So. 3d at 1173; (Ans. Br., at 58; Intervenors Br., at 32-34; EdChoice Br.,[10] at 10-20), are not relevant considerations under *Holmes.* 919 So. 2d at 398. The question is whether McKay violates uniformity, a factual determination that must be remanded and reexamined under the correct standard of review – the same heightened scrutiny that should be applied to all questions under Article IX.

C. Remand of FTC Also Is Proper.

Parents seek a remand for a factual determination of whether FTC's tax credits should be considered public funds under *Holmes*, 919 So. 2d at 412-13, and, if so, whether they have standing to challenge them. Parents' tax law expert testimony and documentary evidence supporting a finding that FTC tax credits are functionally equivalent to direct expenditures were never considered by the trial court due to the its legal error in limiting public monies to appropriations. (R.2539-40.)

The fear that a ruling that the FTC program involves public monies will impact every other tax credit and tax deduction (Intervenors Br., at 28-29) is misplaced. This case is only about Article IX, which places limitations on how the legislature funds

[10] EdChoice relies on numerous studies and facts outside the scope of the record, and should be disregarded by this Court. (EdChoice Br., at 11-20.)

public education.[11] *Holmes*, 919 So. 2d at 406-07. Tax credits and deductions that have no bearing on education would not be implicated by a ruling in this case. Moreover, the specific facts of the FTC that the trial court could consider distinguish FTC from every other "exclusion, exemption, deduction or credit that reduces a taxpayer's tax liability." (*See* Intervenors Br., at 28.) The FTC, unlike a tax deduction, is a 100% credit, § 1002.395(5)(b), Fla. Stat. (2018), which is economically indistinguishable from a direct expenditure out of state funds. Like a direct expenditure, the legislature specifies the precise amount of tax credits that will be funded each year and it completely controls how those funds are spent, leaving no discretion for the statutorily defined non-profits that administer the funds. *Id.* § 1002.395(6). The FTC reduces Florida school district money on a per student basis for each student who uses a tax credit scholarship to go to a private school. *Id.* § 1011.62(d). Thus, the facts on remand will address whether the legislature is using its taxing and spending power to fund a private school system using the functional equivalent of a direct appropriation.

VI. CONCLUSION

[11] None of the cases Intervenors or EdChoice cite to support that tax credits are not public funds involve challenges under a state constitutional requirement to make adequate provision for education. (*See* Intervenors Br., at 24-28 & nn.6&7; EdChoice Br., at 8-10.) They primarily rely on federal or state religious freedom claims, which are stricter in prohibiting use of money from a treasury. *See, e.g.*, Art. I, § 3, Fla. Const. (prohibits revenue "taken from the public treasury" that aids sectarian interests).

For the foregoing reasons, this Court should vacate the decisions of the trial court and the First DCA and remand for consideration of Parents' claims under the correct standard.

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Respectfully submitted,

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

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