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.*,

Intervenors/Respondents.

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

RESPONDENTS' RESPONSE IN OPPOSITION TO MOTION FOR LEAVE TO FILE AMICUS BRIEF ON BEHALF OF CERTAIN MEMBERS OF THE 1998 CONSTITUTION REVISION COMMISSION

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Respondents (the Florida State Board of Education, the Florida Senate President, the Speaker of the Florida House of Representatives, and the Florida Commissioner of Education) object to the motion for leave to file an amicus brief filed by certain members ("Movants") of the 1998 Constitution Revision Commission ("CRC")—including a member who served as Petitioners' counsel in proceedings before the circuit court below. The proposed amicus brief would merely express the personal views of ten witnesses on the 37-member CRC about events that occurred some 20 years ago. The purported "legal analysis" that these individuals ask to provide, like their recollections of their personal experiences on the 1998 CRC, are irrelevant to deciding whether the constitutional language at issue provides judicially manageable standards. And even if these members' views were somehow relevant, their testimony should have been presented during the four-week trial below, where they would have been subject to cross-examination, and where the circuit court could have weighed their personal opinions against the rest of the evidence—including testimony from dozens of other witnesses. Movants (and Petitioners' former counsel) should not be permitted to use an amicus brief to supplement the record with primary evidence that was not presented below.

I. BACKGROUND

Petitioners (the Plaintiffs below) seek a declaration that Florida's K–12 education system violates article IX, section 1(a) of the Florida Constitution, which states (in part), "Adequate provision shall be made by law for a uniform, efficient, . . . and high quality system of free public schools that allows students to obtain a high quality education." As the district court summarized the proceedings in its opinion, "[a]fter extensive pre-trial discovery, a four-week bench trial was conducted by the successor circuit judge, in which more than forty witnesses testified and over 5,300 exhibits were submitted." *Citizens for Strong Schs., Inc. v. Fla. State Bd. of Educ.*, 232 So. 3d 1163, 1167 (Fla. 1st DCA 2017). "The [circuit] court made comprehensive findings on a broad range of subjects" and ultimately "found all of the issues raised by [Petitioners] regarding educational adequacy, efficiency, and quality were properly considered 'political questions best resolved in the political arena,' as the organic law did not provide judicially manageable standards by which to measure the State's actions in enacting and implementing educational policies." *Id.*

But the circuit court also "addressed [Petitioners'] arguments on the merits, concluding that the State had made significant efforts and advances in education, leading to sustained improvement on outcomes for Florida students"—and the court "thus ruled that [Petitioners] had failed to demonstrate beyond a reasonable

doubt that the State's education policies and funding were not rationally related to fulfilling its constitutional duty under Article IX, section 1(a) of the Florida Constitution." 232 So. 3d. at 1167, 1168.

The district court affirmed. With respect to justiciability, that court "agree[d] with the trial court that the terms 'efficient' and 'high quality' are no more susceptible to judicial interpretation than 'adequate' was under the prior version of the education provision," which had been held non-justiciable in *Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles*, 680 So. 2d 400, 408 (Fla. 1996). *Citizens for Strong Schs.*, 232 So. 3d. at 1170. "As to the trial court's additional finding that . . . [Petitioners] failed to meet their burden to prove 'beyond a reasonable doubt that the State's education policies and funding system were'" unconstitutional, the district court also rejected the Petitioners' argument that the circuit court had "applied an overly stringent standard." *Id.* at 1172 n.5.

II. ARGUMENT

The stated purpose of Movants' proposed brief—"to provide Florida courts with their legal analysis of the 1998 amendments to Article IX and show how they were intended" to be construed two decades ago (Mot. at 2)—is not relevant, would not "assist the [C]ourt in the disposition of the case," and would impermissibly expand the record with new evidence that was not presented at trial. Fla. R.

App. P. 9.370(a). Their motion for leave to file an amicus brief should be denied.

A. The Subjective Intent of Certain Individual CRC Members Is Not Proper Evidence of the Intent of the Framers and the Voters.

"The rules governing statutory interpretation generally apply with equal force to the interpretation of constitutional provisions." *Brinkmann v. Francois*, 184 So. 3d 504, 509 (Fla. 2016). Courts should therefore attempt to construe "a constitutional provision consistent with the intent of the framers and the voters," starting with the examination of the constitutional language itself. *Id*. (quoting *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 614 (Fla. 2012)).

Yet it has long been the law of this State that courts should not look to statements of *individual* framers regarding their subjective intentions when interpreting statutory or constitutional provisions. *See Sec. Feed & Seed Co. v. Lee*, 138 Fla. 592, 596 (1939) ("We do not overlook the support given appellants' contention by affidavits of members of the Senate as to what they intended to accomplish by the act brought in question. The law appears settled that such testimony is of doubtful verity if at all admissible to show what was intended by the Act."); *State v. Patterson*, 694 So. 2d 55, 58 n.3 (Fla. 5th DCA 1997) ("The State correctly concedes that the testimony provided by former Representative Glickman did not shed meaningful light on the legislature's intent . . . .").

Statements of individual framers' intent are particularly inappropriate for

consideration when expressed after the fact in litigation, rather than through contemporaneous minutes or legislative records. "[L]egislative history is far more problematic when sources outside of the Legislature are consulted, or when courts speculate upon the significance of the fact that a certain interest group sponsored or opposed particular legislation." *Fla. Dep't of Revenue v. DIRECTV, Inc.*, 215 So. 3d 46, 55 (Fla. 2017) (internal quotation marks omitted); *see also id.* at 54 (refusing to consider "affidavits from lobbyists and two former legislators" or other "statements by proponents and sponsors" to "unmask the true purpose" of a statute); *McLellan v. State Farm Mut. Auto. Ins. Co.*, 366 So. 2d 811, 813 (Fla. 4th DCA 1979) ("[A]n affidavit from a member of the Legislature at the time the act in question was passed stating his view of what the Legislature intended by the provision in question . . . is generally not accepted as admissible evidence to demonstrate legislative intent."); *cf. Walsh v. Brady*, 927 F.2d 1229, 1233 n.2 (D.C. Cir. 1991) (dismissing a letter from an amendment's sponsor as "oxymoronic 'subsequent legislative history'" that "can add nothing").

Here, Movants purport to reconstruct their individual, subjective views about what they intended as members "who proposed and voted in favor of amending Florida's education provisions" almost two decades ago. (Mot. at 2.) The proposed brief would not reflect the views of the entire CRC, of all the members who voted in favor of the amendment, or even of a majority of those members. The ten

Movants do not speak for the 37-member CRC, and their views are not probative of the meaning of the Florida Constitution.

Instead, the Movants' assertions about what they thought the revisions to article IX meant in 1998, like their "legal analysis" of what they think those revisions mean today (Mot. at 2), are necessarily influenced by their personal views and opinions about the underlying policy choices. *See Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1080 (5th Cir. 1980) ("The retroactive wisdom provided by the subsequent speech of a member of Congress stating that yesterday we meant something that we did not say is an ephemeral guide to history. . . . What happened after a statute was enacted may be history and it may come from members of the Congress, but it is not part of the legislative history of the original enactment.").

At least one Movant, Jon Mills, has advocated against the Respondents' education reforms *in this litigation*. Mr. Mills was one of the Petitioners' attorneys in this case until withdrawing in 2014—after Petitioners filed the operative Second Amended Complaint that defined the issues for trial—and he represented Petitioners when this dispute came before the district court on a writ of prohibition. *See Haridopolous v. Citizens for Strong Schs., Inc.*, 81 So. 3d 465 (Fla. 1st DCA 2011), *review den.*, 103 So. 3d 140 (Fla. 2012) (table).

As shown further below, Movants' proposed amicus brief would essentially serve as an improper second bite at the apple to expand the trial record (where Petitioners did not carry their burden of proof) and improperly present the additional views of Petitioners' counsel as an advocate for some of the parties—not as a friend of the Court.

B. The Movants' Brief Would Not Assist the Court in Determining Whether Article IX, Section 1 Provides Judicially Manageable Standards.

Movants state that they "wish to convey to the Court, as *amici*, their intent and legal basis for proposing the amendments to Article IX along with a legal analysis of how and why the 1998 amendments to Article IX provide judicially manageable standards." (Mot. at 3.) But Movants' recollections about their previous intent and purported legal analysis will not "assist the [C]ourt in the disposition of the case." Fla. R. App. P. 9.370(a). The Court's analysis of the constitutional language here will turn on what the Constitution actually says—not the views of certain individual CRC members. As Judge Roberts noted when the district court denied a writ of prohibition in this matter, "Whether the Commission intended to create a justiciable standard is ultimately irrelevant. The test is whether an enforceable standard was actually created by the text of the amendment itself." *Haridopolous*, 81 So. 3d at 478 (Roberts, J., dissenting).[1]

[1] Although the district court allowed some of the ten Movants to file an amicus brief in the Petitioners' initial appeal below, the district court's opinion did not

Indeed, the contemporaneous minutes of the CRC meetings show the danger of a post-hoc inquiry into the intentions of individual members. Despite Movants' expressed intent to create judicially manageable standards, the CRC minutes show that its members debated whether the language created any manageable standards at all. As to the term "high quality," one commissioner, Dick Langley, asked, "Now, what does high quality mean? I don't know. Maybe you do. We all have our ideas about what high quality is but nobody really knows and so then the court would take expert testimony from all of the Ph.Ds and what have you all around the world and decide what high quality education is." *CRC Minutes Jan. 15, 1998,* at 286:25–287:6 (http://fall.fsulawrc.com/crc/minutes/crcminutes011598.html). Another, Ken Connor, expressed concerns about the ambiguity of the term "efficient":

> In other words, efficient could mean a lot of things in a lot of different contexts. It has to do with getting the most bang for the buck, it has to do with maybe eliminating or reducing bureaucracy. It has to do with the way we deliver services.
>
> While advocating, certainly, an efficient school system, the question that I have is by including this in the language, do you potentially produce ambiguity that may be a stumbling block to the success of what you are trying to achieve?

CRC Minutes Feb. 26, 1998, at 59:1–10 (http://fall.fsulawrc.com/crc/minutes/crcminutes022698.html). None of these concerns was definitively resolved in the

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discuss their arguments or give any other indication that it found their analysis to be helpful within the meaning of Fla. R. App. P. 9.370.

1998 amendment's final language.

Several commissioners also expressed concerns that language initially proposed (but left out of the final amendment) could lead to judicial intrusion into the province of the legislative and executive branches. For example, in advocating that the proposed language "*the* paramount duty" be changed to "*a* paramount duty" (a change reflected in the amendment as it was later approved), Mr. Connor stated, "I would suggest to you that it is not the paramount duty of the state to provide for the education of the children. . . . This will have all kinds of implications in terms of budgetary resources and how we allocate resources and materials in this state." *Id*. at 69:13–15, 70:9–11; *see also CRC Minutes Jan. 13, 1998,* at 168:10–11 (http://fall.fsulawrc.com/crc/minutes/crcminutes011398.html) (Chairman Douglass: "[W]e don't want the courts running the school system and the courts don't want to run the school system either."); *id*. at 208:8–9 (Chairman Douglass, noting that revised language would "cut down on the probability of unending litigation").

Movants' retrospective intentions thus will not assist the Court in determining what was actually accomplished through 1998 constitutional amendment. Moreover, their subjective views—even if couched in terms of "a *legal analysis* on the history of Florida's education articles" (Mot. at 5 n.2)—can only be their own and would likely contradict those of the other 27 members of the

CRC, not to mention the views of many Florida voters who ultimately approved the amendment based on its text.

C. Even if Relevant, Evidence of CRC Members' Intentions Cannot Be Introduced for the First Time on Appeal.

The Court should also reject the Movants' attempt to use an amicus brief to present first-hand witness testimony that was never presented to the trial court. Aside from the fact that this testimony would be irrelevant, it would be inappropriate and prejudicial to consider this evidence for the first time on appeal. "When investigation beyond the journals [of the House and Senate] appears appropriate, it is our view that the correct practice and procedure is to give way to the evidentiary character of legislative proceedings and require close scrutiny by the factfinder under chapter 90, Florida Statutes." *Jacksonville Elec. Auth. v. Dep't of Rev.*, 486 So. 2d 1350, 1354 (Fla. 1st DCA 1986); *see also 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" (quoting *Hillsborough Cty. Bd. of Cty. Comm'rs v. Pub. Emps. Relations Comm'n*, 424 So. 2d 132, 134 (Fla. 1st DCA 1982))). The same reasoning applies with equal force to the CRC proceedings, particularly when Movants

purport to rely on what is effectively their own unsworn witness testimony presented 20 years after those proceedings concluded.

Allowing the Movants to file their proposed amicus brief would thus deny Respondents their rights of cross-examination and to present opposing evidence at trial. Contrary to the Movants' assertion, the district court did not opine "that Article IX is *per se* not justiciable." (Mot. at 4.) Instead, the district court concluded that like the unsuccessful plaintiffs in the *Coalition* case, 680 So. 2d 400, Petitioners here "failed to *demonstrate* any meaningful standards under which the courts could find that the State has violated its constitutional duties regarding the adequacy, efficiency and quality of the public school system." *Citizens for Strong Schs.*, 232 So. 3d at 1171–72 (emphasis added).

Regardless of the Movants' professed historical "intent," nothing in the 1998 amendments to article IX changed the Petitioners' burden of proof in a constitutional challenge. *See generally Pub. Def., 11th Judicial Circuit of Fla. v. State*, 115 So. 3d 261, 280 (Fla. 2013) ("[S]tatutes come clothed with a presumption of constitutionality and must be construed whenever possible to effect a constitutional outcome. . . . To overcome the presumption, the invalidity must appear beyond reasonable doubt . . . ." (internal quotation marks omitted)). And the Movants (including Petitioners' former counsel, Mr. Mills) should not be permitted to help Petitioners shoulder that burden for the first time on appeal. *See Dep't of HRS v.*

Shatto, 487 So. 2d 1152, 1153 (Fla. 1st DCA 1986) ("We consider [introducing legislative history in the trial court] the preferable method, for two reasons. First, the trial court must be satisfied with the authenticity of the documents before judicial notice can be taken. Second, this procedure allows the party opposing the construction urged by the proponent of the report to search for legislative history materials which refute the position of the proponent and to introduce any such materials into evidence.").

These concerns about ensuring a fair trial strongly support the rule that an amicus brief cannot be used as a conduit for the introduction of new, primary evidence on appeal. *See Dade Cty. v. E. Air Lines, Inc.*, 212 So. 2d 7, 7 (Fla. 1968) (granting motion to strike brief of amicus curiae "on the ground that they attempt to interject in these proceedings matters dehors the record herein"). While amici often are allowed to present general, secondary evidence, such as social-science studies in support of a policy argument, they are not to be used to present new evidence and deprive a party of the opportunity to challenge and rebut that evidence. *Compare Krischer v. McIver*, 697 So. 2d 97 (Fla. 1997) (allowing briefs by various advocacy groups and medical associations in case concerning the constitutionality of a statute prohibiting physician-assisted suicide), *with Ciba-Geigy Ltd. v. Fish Peddler, Inc.*, 683 So. 2d 522, 523 (Fla. 4th DCA 1996) (denying motion to file amicus brief that contained "fact specific argument of the same type as is

contained in the appellants' 50 page brief"). Movants' proposed brief would "give one side more exposure than the rules contemplate" to discuss these issues, *id*., and it would do so through unsworn, after-the-fact, statements of individual fact witnesses who could have testified at trial.

It bears repeating that this case is the appeal of a final judgment entered after years of litigation and a four-week trial. Any evidence of individual CRC members' intentions should have been disclosed during discovery and presented at trial so that the circuit court could have ruled on its admissibility, determined its credibility, and given it the proper weight. At the very least, the testimony from any individual CRC members would have been subject to cross-examination by Respondents' counsel, who could have asked about contemporaneous statements that conflict with the Movants' stated position here. For example, when Mr. Mills was asked by another CRC member whether the purpose of the 1998 amendment was "to permit additional litigation" after the Florida Supreme Court's decision in the *Coalition* case, 680 So. 2d 400, Mr. Mills answered, "No," and continued: "The purpose of this is to bring the Florida Constitution in line with a lot of the rest of the Constitutions in the country . . . ." *CRC Minutes Feb. 26, 1998,* at 53:18–25. Another Movant, Robert Brochin, when explaining a change from "fundamental right" to "fundamental value," told the other CRC members that the sentence was merely an "aspirational statement." *Id*. at 66:5–10.

Petitioners, and certainly their former counsel Mr. Mills, were aware of the CRC proceedings and could have called these CRC members as witnesses at trial. Allowing certain CRC members to voice personal views that were never presented at trial would subvert the adversarial process and prejudice Respondents—who cannot cross-examine an amicus brief.

III. CONCLUSION

The Movants seek to present irrelevant and unhelpful arguments based on evidence that should have been presented at trial. For these reasons, the motion for leave to file an amicus brief on behalf of certain members of the 1998 Constitution Revision Commission should be denied.

Respectfully submitted this 1st day of June 2018.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by electronic mail on June 1, 2018, to the following counsel of record:

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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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