**SC19-1649**

# In the Supreme Court of Florida

THE SCHOOL BOARD OF ALACHUA COUNTY, FLORIDA, *et al.*,

*Petitioners*,

v.

FLORIDA DEPARTMENT OF EDUCATION, *et al.*,

*Respondents*,

ON PETITION FOR DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIRST DISTRICT
CASE NO. 1D18-2072

## RESPONDENTS' BRIEF ON JURISDICTION

Amit Agarwal (FBN 125637)
*Solicitor General*
Edward M. Wenger (FBN 85568)
*Chief Deputy Solicitor General*
OFFICE OF THE ATTORNEY GENERAL
PL-01, The Capitol
Tallahassee, FL 32399-1050

Rocco E. Testani (*pro hac vice*)
EVERSHEDS SUTHERLAND (US) LLP
999 Peachtree Street, NE, Suite 2300
Atlanta, GA 30309-3996

Matthew H. Mears (FBN 885231)
DEPARTMENT OF EDUCATION
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, FL 32399-0400

*Counsel for Respondents*

## TABLE OF CONTENTS

## TABLE OF CITATIONS

**Cases**

**Constitutional Provisions**



**Statutes**



**Other Authorities**

## STATEMENT OF THE CASE AND FACTS

Petitioners are nine local school boards that have challenged as unconstitutional multiple provisions of Chapter 17-116, Laws of Florida, known as "HB 7069." The challenged provisions include amendments to the statutes governing charter schools, one of which allows charter schools to receive a share of the capital millage funds that school boards are authorized to levy by the Legislature, as well as other statutes aimed at improving low-performing schools. Petitioners argue that these amendments violate various provisions of the Florida Constitution, primarily Article IX, section 4(b), which states that each local school board "shall operate, control and supervise all free public schools" within its district. Petitioners also claim that some of the provisions violate Article IX, section 1(a) by creating a non-"uniform" system, as well as Article VII, section 1 by permitting the State to levy ad valorem taxes.

The Circuit Court granted summary judgment in favor of Respondents on the merits of each of Petitioners' claims, although it rejected Respondents' procedural defenses, including lack of standing. Petitioners appealed, Respondents cross-appealed, and the First District affirmed the decision of the Circuit Court, although on different grounds.

Specifically, the First District concluded that the public official standing doctrine precluded all but two of Petitioners' claims. Under this well-established

doctrine "grounded in the separation of powers," "a public official's '[d]isagreement with a constitutional or statutory duty, or the means by which it is to be carried out, does not create a justiciable controversy or provide an occasion to give an advisory judicial opinion.'" (App. at 16 (citations omitted); *accord id*. at 17 ("State officers and agencies must presume legislation affecting their duties to be valid, and do not have standing to initiate litigation for the purpose of determining otherwise." (quoting *Dep't of Educ. v. Lewis*, 416 So. 2d 455, 458 (Fla. 1982))).) Because Petitioners' challenge "represents their disagreement with new statutory duties enacted by the Legislature" (App. at 17), they lacked standing to challenge the statutory "provisions pertaining to the schools of hope, the charter school standard contract, and the charter school 'turnaround' provisions" (*id*. at 18).

But the court did consider the merits of Petitioners' challenge to two sections of HB 7069 that deal with school funding—the capital millage and Title I provisions. This is because the "public funds exception" to the public official standing doctrine "allows for standing to challenge the constitutionality of a law providing for the expenditure of public funds." (*Id.*) The First District, however, rejected these challenges. As to Article IX, section 4, the court adopted the reasoning of a case from the Fourth District and concluded that the provisions are constitutional in light of "the State's constitutional authority under Article IX, section 1 to ensure the adequate provision of education for all children in Florida."

(*Id*. at 22.) And, based on two of this Court's previous decisions, there also was no violation of Article VII, section 1(a). (*Id*. at 23–25.)

## SUMMARY OF ARGUMENT

Contrary to Petitioners' argument, this case is far from the "perfect vehicle" for this Court's review. (Br. at 6.) The First District's decision did not announce any new or expanded legal rule and merely relied on and applied settled law. The First District rejected Petitioners' constitutional claims based on a long line of decisions from this Court as well as a case from the Fourth District. And the court's standing decision is entirely consistent with this Court's prior cases refusing to recognize additional exceptions to the public official standing doctrine. Nowhere have Petitioners pointed to any language—much less a holding—from any case of this Court or any district court that evinces even a slight conflict.

The issues in this case have been, and will continue to be, the subject of well-reasoned decisions of Florida's district courts of appeal. What Petitioners seek is an improper advisory opinion that the First District's decision (and the precedent on which it relied) was wrongly decided. This Court should deny review.

## ARGUMENT

### I. The First District's Decision Does Not Expressly Conflict with Previous Decisions and Did Not Construe a Provision of the Florida Constitution.

Although Petitioners' brief references a number of supposed bases for this Court's discretionary jurisdiction (Br. at 5–6), the only ground actually argued is

that the First District's opinion purportedly conflicts with prior decisions (*id*. at 6–10). But the First District expressly recognized and adopted decisions from this Court and other district courts. Moreover, because the decision merely applied established precedent regarding the relevant constitutional provisions, there was no express constitutional construction.

"The measure of [the Court's] appellate jurisdiction on the so-called 'conflict theory' is not whether we would necessarily have arrived at a conclusion differing from that reached by the District Court." *Kincaid v. World Ins. Co.*, 157 So. 2d 517, 517 (Fla. 1963). Instead, "[t]he constitutional standard is whether the decision of the District Court on its face collides with a prior decision of this Court or another District Court on the same point of law so as to create an inconsistency or conflict among the precedents." *Id*. For a decision to conflict with one from another district, the holdings must be "irreconcilable." *Aravena v. Miami-Dade Cty.*, 928 So. 2d 1163, 1166 (Fla. 2006).

And constitutional construction jurisdiction exists only over decisions that "explain, define or otherwise by express language remove existing doubts as to the proper construction of a constitutional provision." *Rojas v. State*, 288 So. 2d 234, 238 (Fla. 1973). Accordingly, "jurisdiction is not properly invoked merely because the trial court may [a]pply a constitutional provision to the facts before it." *Dykman v. State*, 294 So. 2d 633, 635 (Fla. 1973). Neither portion of the First

District's decision—on the merits of Petitioners' claims nor on their lack of standing—meets these standards.

### A. Decision on capital millage and Title I provisions of HB 7069

Petitioners ask the Court to revisit the First District's ruling on the capital millage and Title I provisions of HB 7069 (the only two provisions considered on the merits) because, they claim, there is "tension" between two sections of Article IX of the Florida Constitution, making this case the "perfect vehicle" for the Supreme Court "to examine just what" those sections mean together. (Br. at 6.) But that is not the standard for jurisdiction, and nowhere do Petitioners point to an express (much less "irreconcilable") conflict with previous cases or to an express constitutional construction. *See Aravena*, 928 So. 2d at 1166.

The structure of Article IX is not new, and the "hierarchy" applied by the First District has been established and defined by a long line of cases. The respective roles of the State and local school boards were discussed by the Florida Supreme Court almost 50 years ago in *Board of Public Instruction of Brevard County v. State Treasurer*, 231 So. 2d 1 (Fla. 1970), and more recently by the Fourth District in *School Board of Palm Beach County v. Florida Charter Education Foundation*, 213 So. 3d 356 (Fla. 4th DCA 2017), *rev. denied*, No. SC17-958 (Sept. 19, 2017). Both of these cases were followed by the First District. (App. at 21, 23–25.) This year, in *Citizens for Strong Schools, Inc. v. Florida State*

*Board of Education*, this Court reaffirmed the State's broad authority "by law" over the statewide "system" of public schools. *See* 262 So. 3d 127, 128–43 (Fla. 2019) (approving trial court's findings and conclusions on the "structurally complicated" nature of Florida's education system given the constitutional roles of the State and local school boards). The First District properly applied this precedent.

Petitioners claim that the First District's decision is "inconsistent" with previous cases that discuss "local control" by school boards. But none of the four cases they cite conflicts with the First District's decision:

1. *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006), had nothing to do with "local control" and does not even mention Article IX, section 4. It deals with use of private school vouchers under the Opportunity Scholarship Program ("OSP") to meet the State's obligations under Article IX, section 1(a). *Id*. at 398. Indeed, the part of the OSP allowing transfers between public schools—arguably implicating the school board's "local control"—was not challenged. *Id*. at 400.

2. *Duval County School Board v. State Board of Education*, 998 So. 2d 641 (Fla. 1st DCA 2008), had nothing to do with capital millage or Title I funds, and the decision below in fact cited *Duval* with approval. (App. at 18.) Regardless, *Duval* was decided by the First District, not "another" district, and therefore could not be a basis for conflict jurisdiction. *See* Harry Lee Anstead et al., *The Operation*

*and Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. 431, 514–15 (2005) ("[T]here is no such thing as 'intradistrict conflict' as a basis for supreme court jurisdiction.").

3. *Brevard*, 231 So. 2d 1, was adopted and heavily relied on in the First District's decision. (App. at 23–25.) Indeed, the court specifically rejected Petitioners' attempt to distinguish *Brevard*. (*Id.* at 25.)

4. *School Board of Hillsborough County v. Tampa School Development Corp.*, 113 So. 3d 919 (Fla. 2d DCA 2013), consistent with the decision below, rejected a local school board's argument that a statute usurped the local board's authority under Article IX, section 4. The case quotes the "operate, control, and supervise" language of Article IX, section 4, but so does the First District's opinion below. And both courts concluded that this language was not violated by the statute at issue.

**B. Application of public official standing doctrine**

As to public official standing, Petitioners do not identify any conflict or constitutional construction but instead claim that the First District's decision expands the doctrine beyond its original purpose. (Br. at 9–10.) But the Petitioners' disagreement with the decision below is not a basis for this Court's jurisdiction, and Petitioners' brief makes clear that they, not the First District, are seeking to create a new rule of law.

Petitioners urge that the public official standing doctrine should not apply where the public official asserts that he or she is being prevented from performing its constitutional duty. (*Id*. at 9.) This Court, however, has repeatedly held that there are two—and only two—exceptions to the general rule that a public official cannot challenge the constitutionality of a statute he or she is charged with administering: (1) if "he will be injured in his person, property, or rights by its enforcement" and (2) "where 'his administration of the Act in question will require the expenditure of public funds.'" *Crossings at Fleming Island Cmty. Dev. Dist. v. Echeverri*, 991 So. 2d 793, 799 (Fla. 2008) (quoting *Barr v. Watts*, 70 So. 2d 347, 350 (Fla. 1953)); *id*. at 798–800 (rejecting a "defensive posture" exception to the public official standing doctrine). Indeed, in allowing Petitioners to challenge the capital millage and Title I provisions of HB 7069, the First District recognized and applied the public funds exception.

The two primary cases with which Petitioners attempt to create a conflict are *Reid v. Kirk*, 257 So. 2d 3 (Fla. 1972), and *Coalition for Adequacy & Fairness in School Funding v. Chiles*, 680 So. 2d 400 (Fla. 1996). But the First District addressed both of these cases and accepted "the rule that standing is allowed where a public official is willing to perform his or her duties but is prevented from doing so by others." (App. at 12–13.) The court then followed the Supreme Court's decision in *Department of Revenue of State of Florida v. Markham*, which made

clear that, even in light of *Reid*, "Disagreement with a constitutional or statutory duty, or the means by which it is to be carried out, does not create a justiciable controversy or provide an occasion to give an advisory judicial opinion." 396 So. 2d 1120, 1121 (Fla. 1981), *superseded by statute as recognized in Echeverri*, 991 So. 2d 793.

As to *Chiles*, standing was proper there because, unlike here, the school boards were not challenging a statute based on their disagreement with it. *Chiles* instead dealt with a "blanket challenge" to the State's compliance with Article IX, section 1(a), and the Court affirmed dismissal of that challenge because it presented a non-justiciable political question. 680 So.2d at 407–08.[1]

## II. The Remaining Jurisdictional Grounds Are Insufficient to Warrant this Court's Discretionary Review.

Petitioners also claim that the First District's decision declared valid a state statute and affects a class of constitutional officers. These grounds could not apply at least as to the court's decision on standing, which does not discuss any statute or affect a class of constitutional officers. *See* Anstead, *supra*, at 503 ("For

[1] Petitioners point to other cases in which, they assert, courts considered statutory challenges brought by school boards (Br. at 10.) These cases do not support Petitioners' argument. In one of the cases, *Loxahatchee River Environmental Control District v. School Board of Palm Beach County*, the school board was arguing for, not against, the statute's constitutionality. 496 So. 2d 930 (Fla. 4th DCA 1986). And none of these cases (two of which were decided by the First District) discuss standing at all. *See Palm Beach*, 213 So. 3d at 356; *Duval*, 998 So. 2d at 641; *Div. of Admin. Hearings v. Sch. Bd. of Collier Cty.*, 634 So. 2d 1127 (Fla. 1st DCA 1994); *Loxahatchee River*, 496 So. 2d 930.

jurisdiction to exist, the decision under review must contain some statement to the effect that a specified statute is valid or enforceable."); *Spradley v. State*, 293 So. 2d 697, 701 (Fla. 1974) ("To vest this Court with certiorari jurisdiction, a decision must *directly* and, in some way, *exclusively* affect the duties, powers, validity, formation, termination or regulation of a particular class of constitutional or state officers." (emphasis in original)).

To the extent the First District's decision on the merits meets one of these jurisdictional criteria, however, the Court should decline review. As discussed above, the First District's decision applied existing decisions interpreting decades-old constitutional provisions. Petitioners disagree with those decisions and want this Court to "examine" the interplay between those provisions. (Br. at 6.) But those provisions have been considered, and harmonized, by this Court and the district courts, and will continue to be. This Court should reject Petitioners' invitation to contemplate a non-existent conflict.

## CONCLUSION

For all these reasons, the Court should decline review of the First District's sound decision.

Respectfully submitted this 18th day of November, 2019.

*/s/ Matthew H. Mears*
Amit Agarwal (FBN 125637)
Solicitor General
Edward M. Wenger (FBN 85568)
Chief Deputy Solicitor General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399-1050

Rocco E. Testani (*pro hac vice*)
Eversheds Sutherland (US) LLP
999 Peachtree Street, NE, Suite 2300
Atlanta, Georgia 30309-3996

Matthew H. Mears (FBN 885231)
General Counsel, Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

*Counsel for Respondents*

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by electronic mail on November 18, 2019, to the following counsel of record:

| | |
|---|---|
| Franklin R. Harrison<br>Heather K. Hudson<br>Hand Arendall Harrison Sale, LLC<br>304 Magnolia Avenue<br>Panama City, Florida 32401<br>fharrison@hsmclaw.com<br>hhudson@hsmclaw.com<br><br>*Attorneys for Appellants/Petitioners* | John W. Borkowski<br>Michael T. Raupp<br>Aleksandra O. Rushing<br>Husch Blackwell LLP<br>120 South Riverside Plaza, Suite 2200<br>Chicago, Illinois 60606-3912<br>john.borkowski@huschblackwell.com<br>michael.raupp@huschblackwell.com<br>aleks.rushing@huschblackwell.com<br><br>*Attorneys for Appellants/Petitioners* |
| Steven L. Brannock<br>Ceci C. Berman<br>Philip J. Padovano<br>Joseph T. Eagleton<br>Brannock & Humphries<br>1111 W. Cass Street, Suite 200<br>Tampa, Florida 33606<br>sbrannock@bhappeals.com<br>cberman@bhappeals.com<br>ppadovano@bhappeals.com<br>jeagleton@bhappeals.com<br>eservice@bhappeals<br><br>*Attorneys for Appellants/Petitioners* | James D. Fox<br>Christopher D. Donovan<br>Roetzel & Andress, LPA<br>850 Park Shore Drive<br>Trianon Center – 3rd Floor<br>Naples, Florida 34103<br>jfox@ralaw.com<br>cdonovan@ralaw.com<br>serve.cdonovan@ralaw.com<br><br>*Attorneys for Co-Appellant The School Board of Collier County* |

| | |
|---|---|
| Shawn A. Arnold<br>Braxton A. Padgett<br>The Arnold Law Firm<br>6279 Dupont Station Court<br>Jacksonville, Florida 32217<br>sarnold@arnoldlawfirmllc.com<br>braxton@arnoldlawfirmllc.com<br><br>*Attorneys for Intervenor Defendants/Appellees* | Jon Mills<br>Stephen Zack<br>Boies Schiller Flexner LLP<br>100 SE 2nd Street, Suite 2800<br>Miami, Florida 33131<br>jmills@bsfllp.com<br>szack@bsfllp.com<br><br>*Attorneys for amicus curiae The School Board of Palm Beach County* |
| Stuart H. Singer<br>Sabria A. McElroy<br>Boies Schiller Flexner LLP<br>401 East La Olas Boulevard, Suite 1200<br>Fort Lauderdale, Florida 33301<br>ssinger@bsfllp.com<br>smcelroy@bsfllp,com<br>ftleserve@bsfllp.com<br><br>*Attorneys for amicus curiae The School Board of Palm Beach County* | Edward J. Pozzuoli<br>Stephanie Alexander<br>Jeffrey S. Wood<br>Tripp Scott, P.A.<br>1110 SE 6th Street, 15 Floor<br>Fort Lauderdale, Florida 33301<br>ejp@trippscott.com<br>sda@trippscott.com<br>jsw@trippscott.com<br>rlt@trippscott.com<br>eservice@trippscott.com<br><br>*Attorneys for amicus curiae Florida Consortium of Public Charter Schools* |

| | |
|---|---|
| Wendy S, Loquasto<br>Fox & Loquasto, P.A.<br>1882 Capital Circle NE, Suite 206<br>Tallahassee, Florida 32308-4568<br>wendyloquasto@flaappeal.com<br><br>*Attorneys for amicus curiae League of Women Voters of Florida* | |

*/s/ Matthew H. Mears*
Matthew H. Mears (FBN 885231)

## 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).

*/s/ Matthew H. Mears*
Matthew H. Mears (FBN 885231)