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IN THE SUPREME COURT OF FLORIDA

Case No. SC 18-67

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

Petitioners,

L.T. Case Nos. 1D16-2862; 1D10-6285; 09-CA-4534

vs.

FLORIDA STATE BOARD OF EDUCATION; et al.,

Respondents,

and

CELESTE JOHNSON; et al.,

Intervenors/Respondents.
_____/

ON PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE FIRST DISTRICT COURT OF APPEAL

INTERVENORS/RESPONDENTS' BRIEF ON JURISDICTION

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Intervenors/Respondents ask this Court to deny the petition for discretionary review as to the First District Court's decision regarding the John M. McKay Scholarship Program for Students with Disabilities ("McKay Program") for lack of jurisdiction because the First District Court did not expressly construe the uniformity provision of the Florida Constitution's Education Article, Art. IX, § 1(a). Moreover, the First District Court correctly affirmed the trial court's decision that the McKay Program does not undermine the state's obligation to fund and operate a uniform public-school system.

STATEMENT OF THE CASE AND THE FACTS

I. Procedural History (2009-2014): *Haridopolos* and the Second Amended Complaint.

This action commenced in 2009 when Petitioners, several organizations and taxpayers, sued the Florida State Board of Education and various state officials alleging "that the State's entire K-12 public education system—which includes 67 school districts, approximately 2.7 million students, 170,000 teachers, 150,000 staff members, and 4,000 schools—is in violation of the Florida Constitution." *Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ.*, 232 So. 3d 1163 (Fla. 1st DCA 2017) (hereinafter citations to the First District Court opinion are to "Pet'rs' App.," to provide a pin cite). Petitioners' claim was that Florida's K-12 public education system violates the "paramount duty of the state to make adequate provision for the education of all children residing within its borders," Art. IX, § 1(a), Fla. Const. *Id.*

After the state's motion to dismiss was denied, the state filed a petition for writ of prohibition to halt proceedings in the trial court. The First District Court, in a 7-1-7 en banc decision, denied the petition but certified the question as one of great public importance. *Haridopolos v. Citizens for Strong Sch., Inc.*, 81 So. 3d 465, 466 (Fla. 1st DCA 2012). This Court, however declined jurisdiction. *Haridopolos v. Citizens for Strong Sch., Inc.*, 103 So. 3d 140 (Fla. 2012). Petitioners then filed a second amended complaint in 2014 that is the operative complaint in this action.

A. The 2014 Second Amended Complaint.

The second amended complaint added substantial new factual allegations involving two of Florida's longstanding school choice programs, the McKay Program, § 1002.39, Fla. Stat. (2016), which was enacted and launched in 1999, and the Florida Tax Credit Scholarship ("FTC") Program, § 1002.395, Fla. Stat. (2017), which was enacted and launched in 2001. Neither program had been mentioned in either the original or first amended complaint. However, Petitioners' second amended complaint did not add claims for relief that either the McKay or FTC programs, standing alone, was unconstitutional.

B. Identity of Intervenors/Respondents and the Limited Nature of Their Intervention.

To protect their children's interests as recipients of scholarships under both the McKay and FTC programs, six parents (three under each program) sought to intervene as defendants. Over Petitioners' opposition, the trial court granted the

parents' motion to intervene, but limited their participation in the case to defending their interests in the two scholarship programs.

Intervenors/Respondents Margot Logan, Karen Tolbert, and Marian Klinger are all parents who have children participating in the McKay Program.[1] For nearly 20 years, the McKay Program has allowed eligible students with disabilities to "attend a public school other than the one to which [they are] assigned" or provided "a scholarship to a private school of choice." § 1002.39(1), Fla. Stat. (2016). Each of the intervening McKay parents have chosen to receive a scholarship to assist them in sending their eligible student to a private school. At present, "approximately 30,000" students participate in the McKay Program. Pet'rs' App. 21-22.

[1] The remaining intervening parents, Celeste Johnson, Deaundrice Kitchen, and Kenia Palacios, have students who rely on scholarships funded by the FTC Program. After discovery, the trial court granted the intervenors' motion for judgment on the pleadings as to the FTC Program, finding that Petitioners "lacked standing to challenge that program." Pet'rs' App. 7, n.1. Petitioners conceded in the First District Court that the trial court's ruling was controlled by the First District's "opinion in *McCall v. Scott*, 199 So. 3d 359 (Fla. 1st DCA 2016) (holding that appellant parents and teachers lacked taxpayer standing to challenge the Florida Tax Credit Scholarship Program . . . .)," *rev. denied*, No. SC16-1668, 2017 WL 192043 (Jan. 18, 2017). *Id.* at 20. Petitioners have abandoned their arguments relating to the FTC Program by not asking this Court to review the standing issue. *See City of Miami v. Steckloff*, 111 So. 2d 446, 447 (Fla. 1959) ("It is an established rule that points covered by a decree of the trial court will not be considered by an appellate court unless they are properly raised and discussed in the briefs."). Indeed, they do not even mention the FTC Program within the four corners of their petition for discretionary review. *Cf. id*. ("An assigned error will be deemed to have been abandoned when it is completely omitted from the briefs.").

II. Procedural History 2014-2016: Proceedings After Intervention.

Approximately two-and-a-half years of fact and expert discovery ensued, followed by dispositive motions. The trial court granted intervenors' motion for judgment on the pleadings with respect to the FTC Program for lack of standing. Pet'rs' App. 7 n.1. Petitioners filed a motion for partial summary judgment regarding both the McKay and FTC programs. The trial court denied Petitioners' motion, reiterating their lack of standing to challenge the FTC Program, and concluding that Petitioners had not pled a stand-alone claim that the McKay Program violated the uniformity provision of Article IX, section 1(a) of the Florida Constitution. Order Den. Pls.' Mot. Partial Summ. J. 2 ("Plaintiffs are not entitled to use a motion for partial summary judgment to obtain relief that was not sought in their Complaint."). The trial court therefore limited the evidence presented at trial respecting the McKay Program to its impact on the public-school system. Pre-Trial Order ¶ 4(a) ("Evidence regarding the constitutionality of [the McKay] program will not be admitted. Evidence regarding the impact of [the McKay] program on the uniformity and funding of the overall public education system will be admitted.").

After a four-week trial, the trial court entered final judgment in favor of the state defendants and intervenors, Pet'rs' App. 7, and reiterated that Petitioners had not asserted a claim for relief with respect to the McKay Program. Final J. 28. As noted by the First District Court, the trial evidence established not only that the

McKay Program had no negative effect on the uniformity or efficiency of the public-school system, but that the program was "reasonably likely to improve the quality and efficiency of the entire system." Pet'rs' App. 22. Petitioners appealed to the First District Court of Appeals.

III. The First District Court's Decision and the Petition for Discretionary Review.

On appeal, Petitioners relied on this Court's decision in *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006), to argue that the McKay Program violated Article IX, section 1(a) of the Florida Constitution "because it diverts public funds to private schools, which are not subject to the same standards and oversight as public schools." Pet'rs' App. 20-21. Recognizing that "the *Holmes* court expressly disavowed that its decision would necessarily impact other more specialized educational programs," the First District Court affirmed the trial court's ruling "that it could not be reasonably argued that the McKay Scholarship Program had a 'material affect' on the public K-12 education system." *Id*. 21-22.

The sole jurisdictional basis cited by Petitioners is that the First District Court's decision expressly construed a provision of the Florida Constitution. Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(ii). Petitioners do assert, without citation to authority, that "[a]nother reason that this Court should exercise its jurisdiction is to correct the First DCA's misapplication of *Holmes*." Pet'rs' Br. Juris. 10. But misapplication of precedent is not a basis for discretionary review (as

opposed to the authority to review a decision that "expressly and directly conflicts with a decision" of this Court. Art. V, § 3(b)(3), Fla. Const.).

SUMMARY OF THE ARGUMENT

This Court should deny the petition for discretionary review as to the First District Court's decision regarding the John M. McKay Scholarship Program for Students with Disabilities for two reasons. First, this Court lacks jurisdiction because the First District Court did not expressly construe the uniformity provision of Article IX, section 1(a) of the Florida Constitution. Rather, its decision merely applies this Court's existing uniformity jurisprudence to the facts of this case as adduced at trial. Second, the First District Court correctly rejected Petitioners' argument that the McKay Program materially and negatively impacts Florida's duty to operate a uniform public-school system.

ARGUMENT

I. This Court Should Decline Review of the First District Court's Decision Regarding the McKay Program Because the Court Did Not Expressly Construe the Florida Constitution.

Petitioners assert only one basis for this Court's power of discretionary review, which is this Court's authority to review "any decision of a district court of appeal that . . . expressly construes a provision of the state . . . constitution," Art. V, § 3(b)(3), Fla. Const. *See* Pet'rs' Br. Juris. 1. But here, at least in the context of the McKay Program, the First District Court did not "expressly construe" the Florida

Constitution. The First District Court merely applied Article IX, section 1(a), as interpreted by this Court in *Bush v. Holmes*, 919 So. 2d 392 (2006), to the fact record.

A lower court does not "expressly construe" a constitutional provision when it merely applies the provision to the facts of the case. *Dykman v. State*, 294 So. 2d 633, 635 (Fla. 1973). "[A]n opinion or judgment does not construe a provision of the constitution unless it undertakes to explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision." *Ogle v. Pepin*, 273 So. 2d 391, 392 (Fla. 1973) (internal quotation marks, citation, and alteration omitted). Indeed, jurisdiction over decisions construing constitutional provisions exists to "remove existing doubts as to the proper construction of a constitutional provision." *Rojas v. State*, 288 So. 2d 234, 238 (Fla. 1973).

Here, the First District Court's decision does not undertake to explain, define, or otherwise eliminate any existing doubts about Article IX, section 1(a). Instead, the First District Court simply applied the standards set forth by this Court in *Holmes*, which struck down a school voucher program under Article IX, section 1(a).[2] Pet'rs' App. 21. However, as the First District Court pointed out, "[T]he

[2] The McKay Program was adopted and went into effect in 1999. This Court decided *Holmes* in 2006. It is now 2018 and the McKay Program is getting ready to celebrate its 20th anniversary. If the *Holmes* decision so obviously spelled disaster for the McKay Program, as Petitioners insinuate, it is more than a bit surprising that no such claim has reached this Court in well over a decade. And, indeed, despite Petitioners' apparent wish to the contrary, no such stand-alone claim was presented in this case.

Holmes Court expressly disavowed that its decision would necessarily impact other more specialized educational programs." *Id*. Indeed, this Court distinguished a program for students with special needs that "use[d] state funds to pay for a private school education." *Holmes*, 919 So. 2d at 411. The McKay Program "is [also] a specialized scholarship limited to students with disabilities." Pet'rs' App. 21.

The First District Court's decision neither breaks new constitutional ground nor alters any of this Court's established jurisprudence. As such, the decision does not "expressly construe" a constitutional provision. There is thus no basis for this Court to exercise its discretionary review jurisdiction pursuant to Article V, section 3(b)(3) of the Florida Constitution. Because Petitioners did not assert a stand-alone claim under Article IX against the McKay Program, the only question that the First District Court answered on appeal was whether the facts introduced at trial regarding the McKay Program established that the program materially and negatively impacted the state's obligation to operate a uniform public-school system. And, as shown below, the First District correctly held that the facts established no such violation.

II. This Court Should Decline Review of the First District Court's Decision Regarding the McKay Program Because the Court Correctly Affirmed that the McKay Program Does Not Materially or Negatively Impact the State's Duty to Operate a Uniform Public-School System.

While Petitioners' argument that the First District Court misapplied *Holmes*, Pet'rs' Br. Juris. 10, is not a basis for jurisdiction, the First District correctly applied Article IX's uniformity requirements, as interpreted by *Holmes*, to assess the McKay

Program's impact on the overall education system and correctly concluded that the McKay Program did not materially or negatively impact Florida's K-12 education system. Even if misapplication of precedent were a proper basis for jurisdiction, this Court should, in the sound exercise of its discretion, deny the petition for review.

The McKay Program is a proportionally small program in the overall public-school framework, even though it serves over 30,000 students. Pet'rs' App. 21-22. Granting review would throw an unnecessary legal cloud over this nearly two-decades old program—a program that supplements and expands each disabled student's right to an individualized education. There is no reason to sow such distress for the parents and students who are, as the evidence below showed, well-served by the McKay Program. Indeed, based on the evidence presented at trial, the First District Court correctly applied *Holmes* to the facts of the case and properly affirmed the trial court's finding that the McKay Program does not undermine the state's obligation to operate a uniform public-school system.

Petitioners' argument that the McKay Program violates Article IX for the same reasons that the voucher program was struck down in *Holmes*, 919 So. 2d 392, ignores the reality that they did not bring a stand-alone claim that the McKay Program was unconstitutional. The only argument actually—and properly—considered by the First District Court was whether the McKay Program has a "material affect" on the uniformity of the state's public-school system, which the

court concluded was not the case based on the trial court record. Pet'rs' App. 22. Indeed, Petitioners' brief does not forthrightly acknowledge that the evidence introduced at trial regarding the McKay Program, and the First District Court's review of that evidence, was limited to the question of whether the McKay Program has a negative effect on the public-school system as a whole. Petitioners' brief thus ignores the First District Court's evidence-based conclusion that the McKay Program is (1) "reasonably likely to improve the quality and efficiency of the entire system"; (2) "a beneficial option for disabled students to help ensure they can have a 'high quality' education"; and (3) that the "research has shown that the McKay program has a positive effect on the public schools." Pet'rs' App. 22.

There is no need for this Court to reweigh the evidence presented at trial, and properly acknowledged by the First District Court, demonstrating that the McKay Program benefits both individual students and the public-school system as a whole. And certainly it is no impediment to the state in carrying out its duty to provide a uniform educational system for Florida's elementary and secondary aged students.

CONCLUSION

Intervenors/Respondents respectfully ask this Court to deny review of the First District's Court's decision regarding the John M. McKay Scholarship Program for Students with Disabilities.

RESPECTFULLY SUBMITTED this 16th day of April 2018.

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I HEREBY CERTIFY that on this 16th day of April 2018, a true and correct copy of the foregoing *Intervenors/Respondents' Brief on Jurisdiction* was filed and served electronically on the following counsel of record:

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