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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA DEPARTMENT OF EDUCATION,

Appellant,

vs.

CASE NO. 80,286

KAY E. GLASSER, JANICE K. MEE, NANCY C. DETERT, E. LEE BYRON, and M. JANE HARTMAN, individually and as members of the School Board of Sarasota County, Florida,

Appellees.

AMENDED INITIAL BRIEF OF APPELLANT STATE OF FLORIDA DEPARTMENT OF EDUCATION

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TERMINOLOGY

In the trial court ("trial court"), the Appellant, State of Florida Department of Education was made a party-defendant (R-45) after the hearing in this case and was the Appellant in the Second District Court of Appeal ("District Court"). It will be referred to in this brief as the "Department." The Attorney General, who was not a defendant, asked to be heard at the hearing in the trial court pursuant to §86.091, Fla. Stat. (R-29-32), and in this brief will be referred to as the "Attorney General."

The Plaintiffs, members of the School Board of Sarasota County, were the Appellees in the District Court, and will be

referred to as the "School Board."

The only named and served defendant at the time of the hearing in the trial court, was a nominal defendant, Barbara Ford-Coates, as the Tax Collector for Sarasota County, and will be referred to as the "Tax Collector." The Tax Collector did not file an appeal in this case and did not join the Department in the instant appeal.

The symbol (A-) refers to the Appendix, the symbol (R-) refers to the Record on Appeal, the symbol (T-) refers to the transcript of the proceeding, and the numbers following those references will indicate the page.

TABLE OF AUTHORITIES

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STATEMENT OF THE CASE AND FACTS

This suit was instituted by the School Board representing one of the most wealthy school districts in Florida (R-1-9) against a single defendant, the Tax Collector.[1]

Curiously, the Department of Education, the proper party, the party which has the responsibility for administering education, the party knowledgeable about the issues of school finance and public policy to achieve equity in school finance and the party joined in other similar litigation brought in Florida, was not given notice until the day before the only hearing in this case.

The School Board sought declaratory relief against the Tax Collector, challenging the validity of a state law governing educational finance and an item of the Appropriations Act of 1991, both laws of statewide importance which are fundamental in the very complex arrangements under which schools are financed and equity between school districts is achieved.

The School Board and Tax Collector agreed to an expedited final hearing (R-13-15) without informing or consulting the Department or the Attorney General.

On the afternoon of the day before the expedited final hearing, the Department was given notice, via facsimile, that the expedited final hearing was to be held the following day, June 27, 1991. Neither the Attorney General nor the Department was served with process in this matter. (R-29-32.)

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[1]/ The Tax Collector of Sarasota County had no knowledge of the issues in this case and has been decidedly indifferent to the outcome in which the Tax Collector has no stake.

At the expedited final hearing, the Attorney General sought dismissal or, in the alternative, a continuance of the expedited final hearing until a proper party-defendant could be served with process and be properly prepared, on the basis that the Tax Collector has only ministerial duties as they relate to school funding. The trial court denied these motions. (T-12, lines 15-16.)

At the conclusion of the expedited final hearing, the School Board presented the trial court with a proposed final order, which had not been furnished to any state agency. (T-51-52, lines 22-25, 1-3.) That order, prepared by the School Board's counsel before the hearing, was signed by the judge. It held that §236.25(1), Fla. Stat., and §1, item 509 of Ch. 91-193, Laws of Fla., violated Art. III, §§6 and 12, and Art. IX, §4 and Art. VII, §9, Fla. Const. (R-58-65); (A-1-8.)

On July 8, 1991, the Attorney General moved the trial court for Rehearing and Clarification of its June 27, 1991, Order. (R-36-38.) On July 9, 1991, the Department moved to intervene. (R-39-43.) On July 16, 1991, the respective parties Stipulated to Intervention of the Department as a party-defendant and, on July 16, 1991, the Court made the Department a party-defendant. Thereafter, the Attorney General withdrew the Motion for Rehearing and Clarification (R-44-45) and appealed to the District Court. (R-66-67.)

The trial court granted the School Board's Motion to Vacate Automatic Stay (R-53-54), allowing it to levy and collect

the millage but requiring that the money be held in a special reserve account until this matter is finally resolved.

On July 31, 1992, the District Court entered its decision declaring §236.25(1), Fla. Stat. (1989), and §1, item 509 of Ch. 91-193, Laws of Fla., as it related to the levy of a nonvoted operating discretionary millage, unconstitutional under its reading of Art. VII, §9, and Art. IX, §§1 and 4, Fla. Const. (A-9-23). Although there was no mention of the trial court's holding that the Appropriations Act violated Art. III, §§6 and 12, Fla. Const., the opinion affirmed the trial court opinion and that question is therefore presented in this appeal.

The Department timely filed its Notice of Appeal to this Court on August 5, 1992, and on September 11, 1992, filed its Initial Brief. The School Board moved to strike the Department's brief, arguing that the brief included material which was not part of the record in the lower courts. The Department responded, noting that the materials objected to were mostly public records and regularly published reports of the Department of Education which illustrated the great inequity in property wealth between school districts. The Court granted the School Board's motion and ordered the Department to file a new brief and appendix. The brief now filed has eliminated all the material identified in the School Board's motion and, therefore, the inequities between the school districts will not be addressed by reference to any actual numbers or dollar amounts.

SUMMARY OF ARGUMENT

Florida's political and constitutional history demonstrates that the legislature has the power to determine school millage, that this power has been used over the course of years (even by the very legislature which adopted the 1968 revision) and that this power is important in achieving equity between rich and poor school districts under the constitutional ideal of a "uniform system of free public schools." Article IX, §1, Fla. Const. The legislative power over school district millage comes from the general legislative power (Art. III, §1, Fla. Const.) and the Taxation Article (Art. VII, §§1, 8, and 9, Fla. Const.,". . . school districts . . . shall . . . be authorized by law to levy ad valorem taxes . . ."). These provisions leave no doubt that the legislature is empowered to control millage (and strive for equity in school finance) and the history of the drafting confirms this.

There are over thirty parallel constitutional provisions giving authority to the legislature and case law construing those provisions demonstrates that the Constitution confers on the legislature power over school millage. To construe it otherwise renders Art. VII, §9(a), Fla. Const., meaningless. The District Court erred in holding §236.25(1), Fla. Stat., unconstitutional.

The trial court erred in holding that the 1991 Appropriations Act violated constitutional principles of single subject and the District Court erred in affirming that judgment. The setting of school district millage, like the setting of salaries, does not modify other general law.

Finally, the Department should have been joined in the law suit under principles requiring the joinder of proper parties and the provision of adequate notice.

ARGUMENT

I.

FLORIDA'S CONSTITUTIONAL HISTORY DEMONSTRATES THAT THE LEGISLATURE HAS AUTHORITY TO EQUALIZE MILLAGE

This Court has for determination the question of whether the legislature has the authority, within constitutionally defined limits, to determine school board millage. To answer this question, the Court must deal with the Florida Constitution provisions on taxation (Art. VII, §9, Fla. Const.) and education (Art. IX, §§1: "Adequate provision shall be made by law for a uniform system of free public schools. . ." and 4(b), Fla. Const.) These sections are noted in the opinion of the District Court of Appeal. This case also implicates three sections of the Constitution not mentioned in the opinion below -- the authority of the legislature, (Art. III, §1, Fla. Const.: "The legislative power shall be vested in a legislature of the State of Florida. . ."), the basic principle of legislative authority over taxes (Art. VII, §1, Fla. Const.: "No tax shall be levied except in pursuance of law"), and the principle that state funding to local governments may contain conditions, (Art. VII, §8, Fla. Const.: "State funds

may be appropriated to the . . . school districts . . . upon such conditions as may be provided by general law.")

The District Court does not treat any of these constitutional provisions in the context of their history nor the context of their practical operation. Since these perspectives are essential for a proper determination of the case, the Department will review the history of public education and school finance, demonstrating that the issues of school finance, property tax concern, and legislative power all converged in the period 1966-68 when the Florida Constitution was being revised.

A. The History of Educational Finance Supports the Construction of Legislative Power Urged By The Department of Education.

Historians do not often praise the turbulent period in the South following the Civil War -- the Reconstruction Era -- ("the peace which passeth all understanding") yet there was one great and enduring program introduced in this period -- state-supported free public education. Florida can trace its statewide commitment to public schools to Reconstruction and the constitutional provisions for public education first appeared in Art. VIII, Fla. Const., (1868):

> Section 1. It is the paramount duty of the State to make ample provision for the education of all the children residing within its borders, without distinction or preference.
>
> Section 2. The Legislature shall provide a uniform system of common schools, and a university, and shall provide for the liberal

maintenance of the same. Instruction in them shall be free.

Happily for public education, the Democratic administration which came to power at the end of Reconstruction in 1876 was also convinced that public education was important for the future of the state and a large part of the struggle to achieve a system of public education was a struggle over millage caps on education.[2]

The legislative reduction of authorized school millage (a reduction from 5 mills to 2.5) in the 1879 legislature was followed soon afterwards (in 1881 and 1883) by a powerful campaign led by Governor Bloxham to provide state funding for teacher training, special education programs, and even support for federal funds to "help the South reduce illiteracy and educate black children." White, pp. 9, 10.

This battle over millage limitations and state funding has been a feature of the struggle for educational improvements since this early time. The authority of the legislature to weigh the merits of state versus local funding for public school education has also been informed by the continuing struggle to achieve equalization among school districts. By "equalization," school finance experts refer to the attempt to achieve equity in

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[2]/ Governor George Drew, elected as Governor in 1876, appointed William P. Haisley as superintendent of public education and Haisley stayed in office until 1881. One of Haisley's great fights was lost when the legislature in 1879 reduced millage caps. Arthur O. White, One Hundred Years of State Leadership in Florida Public Education (Florida University Presses, 1979) p.7. Hereafter, cited as "White."

funding of education where property taxes are used in part to fund education and where there is so much disparity between counties in the yield of a mill. The disparity in wealth available to school districts through the property tax base presents a significant problem for a legislature which seeks to carry out the constitutional mandate for a "uniform" system of public education. Article IX, §1, Fla. Const. See §236.012, Fla. Stat.

The quest for equalization and for a way to achieve a "uniform system of free public schools" has been through many steps in Florida. We can pick up the story of that quest in modern times by turning to the period of World Was II and the stewardship of Governor Spessard L. Holland (1940-44) whose record of supporting new revenue sources for school finance, the creation of a teacher retirement system, and other measures allowed him to campaign for office as the "champion of Florida teachers." White, 114. Governor Holland, supported by a Florida Education Association funded Brookings Institution study, carried forward a program of education reform which was based on the concept that "counties and districts should be compelled to carry their share of the costs of public schools to the full limit of their abilities." White, p. 115. While Governor Holland supported increased state resources for education, he also worried about the tendency of state funding increases to cause an imbalance, taking Florida schools away from the constitutional ideal of a "uniform system of free public schools." Indeed, Governor Holland resisted a flat increase in the funding in part "because the required method of distribution

according to average daily attendance directed too many state dollars to property rich counties. . ." White, p. 115, emphasis added.

The program of educational improvement advocated by Governor Holland was popular with many people but, to the extent that it relied on increased local millage, "urban county legislators promised a hard fight" and their cause was millage limitations. White, p. 117. Holland, concerned with improvement in education but sensitive to the problems of equalization, decided to support enactment of a constitutional amendment to limit state and local millage to ten mills. White, p. 117. This full program was not enacted but there were further improvements in the state funding of public education.

The next governor, Millard Caldwell (1944-48) was an even greater friend of education in Florida and the emergence of Florida's economy in the post World War II years helped the movement which was led by a citizens committee with exceptional staff support and by legislative leadership (particularly Senator LeRoy Collins) who shared this vision of an improved education system. White, p. 121. The 1947 report of the citizen's committee provided a comprehensive blueprint for the improvement of Florida public schools and introduced a new approach to school finance. Their approach, which was called the Minimum Foundation Program ("MFP") was to make state money available to fund the teaching units with the distribution each county would receive depending on the wealth of the county. White, p. 122. As LeRoy Collins'

biographer notes, "Reformers wanted to equalize educational support between the wealthy and poor counties. . ."[3] Since the assessment practices were widely known to be haphazard and at great variance from county to county, the MFP program relied on a calculation known as the "index of tax-paying ability" to measure the relative wealth of counties. White, p. 122.

The program was not without controversy. White reports (p. 123): "[r]epresentatives of wealthier counties told business clubs and PTA meetings of their opposition to transferring school taxes from wealthy counties to impoverished ones." But the program which contained the equalization feature passed the legislature and was widely praised:

> In July 1947 The Nation's Schools called Florida's MFP 'nothing short of miraculous.' The NEA Bulletin praised Florida for attaining in one law what would have taken most states several laws and several legislative sessions. The Ladies Home Journal stated that Florida was an example to any other state 'wanting to lift itself up by its educational bootstraps.' Requests poured into the DOE for copies of the MFP and within a few years, forty-four states had followed the Florida example in enacting the MFP.

White, p. 125.

The next Governor of Florida, Fuller Warren (1948-52), did not advance new educational programs but, faced with increasing demands for state funds occasioned by Florida's post-war growth, put aside his posture of "frontier frugality" and helped enact the

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[3]/ Tom Wagy, Governor LeRoy Collins of Florida: Spokesman of the New South (University of Alabama Press 1985), p. 31.

first general sales tax legislation which helped maintain the MFP. White, p. 129. The debate about school finances continued under Governor Dan McCarthy who was required to deal with another problem of equalization, that which existed between segregated schools.[4] During this period, there were a number of United States Supreme Court decisions striking down as unconstitutional systems of segregated education which were clearly not equal, and the fear of similar decisions in Florida undoubtedly caused the pace of equalization to accelerate. See Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

The brunt of desegregation fell on Governor LeRoy Collins (1954-1960) who was elected to fill Governor McCarthy's term after his death and who went on to be reelected to a full term. Remarkably, Governor Collins was able to greatly advance public education during this time of crisis. In 1957, Governor Collins achieved teacher pay raises, funds for rural classroom construction, exceptional education, and adult education. Governor Collins was justifiably proud, describing it as "the best effort for schools made by any state in the country this year and the biggest thing for Florida since the 1947 MFP." White, p. 139.

But, despite these advances, public support for education became mixed up in the desegregation battle which remained through

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[4]/ White, pp. 132-134. This problem is interesting in the state constitutional law context because it is likely that the framers of the 1868 Constitution (during the Reconstruction era) contemplated that the word "uniform" applied to public schools would protect all students in both black and white schools. See White, pp. 1-7.

the Collins years and into the term of his successor, Farris Bryant (1960-64). Governor Bryant's administration saw increased state funding for teacher salaries and textbook purchases but, overall, support for the public schools deteriorated during his years in office. White, p. 146.

When Governor Hayden Burns began his two-year term (1964-66), he was pledged to no new taxes and he was able to kill efforts to increase state support for education "by fusing traditional North Florida opposition to high taxes with a growing resentment among South Floridians that the MFP acted as a subsidy to rural counties that continued to underassess their property and to turn down school bond issues." White, p. 147. The Bryant and Burns years were very thin years for public education and the legislature, reacting to the fear of rising property taxes, enacted a millage rollback law in 1965.[5]

In late 1966, with an upcoming election for a reapportioned legislature and a new governor, two conflicting political pressures were growing: First, neglect of public education during the Bryant and Burns years left schools in bad shape, some even losing accreditation, and, second, the great growth in Florida occasioned an increase in property values and, thus, property tax assessments which threatened many Floridians. This fear of increased property taxes escalated after this Court's January 1967 decision, holding that constitutional provisions for

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[5]/ White, p. 147. See Chs. 65-258, 67-395, and 67-396, Laws of Fla. See also Ch. 63-250, Laws of Fla.

equality and uniformity in taxation allowed a taxpayer's challenge to property taxation based on allegations of systematic underassessment. Dade County v. Salter, 194 So.2d 587 (Fla. 1967).[6]

The issues of property taxes and school financing dominated the political scene in many Florida counties at precisely the time that Governor Burns' term came to an end and Governor Claude Kirk was elected. The 1966 campaign (and the special "full apportionment" special legislative election early in 1967) brought to office the people who voted to send the 1968 revision of the Florida Constitution to the ballot.[7]

B. The Florida Constitution Was Revised At A Time When Tax Policy and School Funding Issues Were At The Top Of The Agenda Of the Newly Apportioned Legislature.

Although property tax questions were a dominant issue in most counties and the dominant issue in some counties, there were other very significant political developments which converged on

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[6]/ The Salter case was followed by others which ultimately spelled out the duty of tax assessors to assess at full value. The resulting panic among taxpayers fed the fear that property taxes would become too burdensome. Powell v. Kelly, 223 So.2d 305 (Fla. 1969), St. Joe Paper Co. v. Brown, 223 So.2d 311 (Fla. 1969).

The legislative interest in this issue is demonstrated by the fact that the 1966-68 House of Representatives had a separate committee for Ad Valorem Taxation.

[7]/ We have seen that the equalization in school finance has been an issue from the earliest days of our public school system and this issue required legislative control over school millage. The tax assessment crisis of the early 1960's was another reason for the legislature to retain control over property taxes. See, Dade County v. Dickinson, infra, p.p. 17-19.

the legislature elected in 1966/1967. Legislative reapportionment, begun under federal court supervision with the decision in Baker v. Carr, 369 U.S. 186 (1962), was finally completed in 1967. The legislature, controlled by a Democratic majority, filled with pride about its new urban composition, was presented with an opportunity to define its own powers through revision of the constitution. The effort to modernize the state constitution, which had been underway for many years, was being concluded by the statutory Constitution Revision Commission under its Chair, Chesterfield Smith. This period is worthy of great attention because it is the time in which the legislature received the report of the Constitutional Revision Commission and used it to revise the 1885 Constitution.

(1) The Constitution Revision Commission Draft of what is now Art. VII, §9(a), Fla. Const., demonstrates that there is "no inherent right to levy taxes."

The language of Art. VII, §9, Fla. Const., is a focus of this appeal and that section has two sub-sections. Sub-section (a) was drafted by the Constitution Revision Commission, Sub-section (b) (the millage cap provision) was added by the legislature in response to the growing issue of property tax relief. We first address the history of the Constitution Revision Commission.

It is clear that the drafters of the original document which led to the revision of the Constitution of Florida in 1968 believed that the legislature had the authority to control the millage of local governments. In the transcript of proceedings from the Constitution Revision Commission, the record reveals that

the Commission at one point debated an amendment to Section 9 which is now Art. VII, §9, of our Constitution. The following dialogue is especially revealing because it takes place between Ralph Marsicano (long-time general counsel and lobbyist for the Florida League of Cities and an outspoken proponent of power for local government), Ralph Turlington (then a State Representative, a long-time advocate for education, later Speaker of the House, and then Commissioner of Education), and former Justice Harold Sebring (one of the most tenacious advocates for constitutional reform). The discussion reveals their understanding of legislative power in Art. VII, §9, Fla. Const.[8] In this discussion, Commission member Ralph Marsicano offered an amendment to change the word "may" to the word "shall":

> MR. MARSICANO: . . .
> Now, that does not mean that a tax has to be levied, but the word "shall" there would be the same word that is in the present constitution, which says that the Legislature shall be authorized to levy taxes for counties and cities.
> I move the adoption of the amendment.
>
> CHAIRMAN SMITH: You have heard the motion. Is there a discussion?
>
> MR. TURLINGTON: Mr. Chairman?
>
> CHAIRMAN SMITH: Mr. Turlington.
>
> MR. TURLINGTON: Mr. Marsicano, what does this actually do? Can you think of any legal rights that this gives the cities[9] that the word "may" doesn't give them?

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[8]/ The full transcript of this portion of the proceeding and the text of Amendment No. 73 can be found in the State Archives and copies have been lodged with the Clerk of the Court.

[9]/ Note that the language of this section ultimately deals with school millage as well.

MR. MARSICANO: I think it makes the Legislature more conscious of the fact that it's got to make provisions for the finances of our local governments.

MR. TURLINGTON: You say that this is exactly like the present constitution?

MR. MARSICANO: That is right. If you put the word "shall" in, it goes back to the present constitution.

MR. SEBRING: Will the gentleman yield?

CHAIRMAN SMITH: Do you yield to Mr. Sebring, Mr. Marsicano?

MR. MARSICANO: Yes, sir.

MR. SEBRING: May I suggest, sir, that what you are proposing has more far-reaching implications than the mere substitute of the word "shall" for "may."

MR. MARSICANO: Judge, I will be glad to have you suggest it.

MR. SEBRING: May I suggest to you, sir, that the counties and municipalities of the state -- and this is in partial answer to you, Mr. Turlington -- have no inherent right to levy taxes. Such right as they have is just purely by delegation from the congress (sic) and without that delegation, the counties and the municipalities would be entirely impotent.

MR. MARSICANO: That is correct. (Emphasis supplied.)

This transcript reveals that the drafters of the 1968 revision agreed to the idea expressed so directly by Judge Sebring -- the idea that the units of local government have "no inherent right to levy taxes," and that, as Mr. Marsicano said, this was the way to return the draft "back to the present constitution." The intent of Ralph Marsicano in replacing the word "shall" into the constitution was "to make the legislature more conscious of the fact that it's got to make provisions for the finances of our local governments." There is in this colloquy no suggestion of any

limitation of legislative powers to control millage. To the contrary, there was agreement that local government had "no inherent right to levy taxes" and that the legislature would have to make provisions for the taxes.

(2) The History of Art. VII, §9(b), Fla. Const., demonstrates that it was not intended to lessen legislative power nor increase local government power, but rather, to place an upper limit on legislative authorization of millage.

The Constitutional Revision Commission offered a taxation article to the legislature which did not contain a cap on millage but, during the months of 1967 and 1968 that the legislature considered the issues of constitution revision, the tax crisis grew. It is not necessary to recount each step in this crisis because this Court has covered much of the relevant history in Dade County v. Dickinson, 230 So.2d 130 (Fla. 1969), reh. den., 1970, which stated the then recent events:

> Recently, because of our State's unparalleled growth in every area, the pressure exerted upon governmental services at all levels has become inordinate; consequently, property, as the prime source of local tax revenue, has been taxed to the limit. It is common knowledge that this process has resulted in seething resentment by taxpayers and mounting resistance to property taxation excesses not only in Florida, but throughout the nation as well. . . . This situation has been further exacerbated by the impact of full valuation.

230 So.2d at 132. In reaching its decision in Dade County v. Dickinson, this Court dealt with an act of the legislature adopted in July 1967 and since this was the same legislature which adopted the 1968 Constitution Revision, it is useful to see the Court's

analysis of the political motivation:

> In essence this chapter was a declaration that county millage rates had exceeded the people's tolerance; further that the combined millages levied against real or tangible personal property by "the various taxing authorities, including boards of county commissioners, municipalities and various other districts and boards" would be considered oppressive if over twenty mills, unless approved by vote of the property-holders. So strong was the intent to establish a state-wide millage ceiling that the chapter specifically required an automatic readjustment in millages whenever a "home rule" city or county exceeded the 10-mill limitation by taking on any function previously rendered by the entity which surrendered the function.

230 So.2d at 133. (Emphasis in original.)

The Court also cited the work of a distinguished University of Florida political scientist, Dr. Manning Dauer, who, with his colleagues, wrote a commentary entitled "Should Florida Adopt the Proposed 1968 Constitution?" An Analysis, Studies in Public Administration No. 31, U. of Fla. Public Administration Clearing House, commented on the "drastic departure" of millage caps[10]:

> Why then did the legislature take the drastic step of setting limits for each unit of local government? Undoubtedly, this reflects the public reaction to the sharp increases in tax bills incurred by many following assessment of

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[10]/ Article XII, §8, Fla. Const. (1885), had a limit for schools which also set a minimum millage:

> Each county shall be required to assess and collect annually for the support of the public free schools therein, a tax of not less than three (3) mills, not more than ten (10) mills on the dollar on all taxable property in the same.

> their properties at full value. In many of the legislators' campaigns property tax limitation was a key issue.

230 So.2d at 134. Emphasis added.

The fact that the very legislature which adopted the Revision of 1968 was itself setting limits on millage (as had the 1965 legislature) and the fact that property tax limitation was such a "key issue" for legislators is strong evidence that the legislature did not surrender its authority to determine millage except to constitutionally limit (in Art. VII, §9(b), Fla. Const.) the maximum property tax which could be levied. Nothing in this history supports the opinion of the court below.

C. Other Provisions of the Constitution, Ignored by the Second District, Support the Legislative Authority.

The District Court did not understand the Constitution it attempted to apply and its decision entirely displaced legislative authority over school board millage despite the clear requirement of Art. VII, §9(a), Fla. Const., that there be a legislative act to authorize millage. The Court below also failed to note, much less reconcile, its sweeping opinion to the provisions of the following sections of the 1968 Revision:

> Article III, §1: The legislative power of the state shall be vested in a legislature of the State of Florida . . .
>
> Article VII, §1: (a) No tax shall be levied except in pursuance of law. . . .

Finally, the District Court failed to explain how its holding can be accommodated to the provisions of Art. VII, §8,[11] new to the Constitution in 1968, which states:

> State funds may be appropriated to the . . . school districts . . . upon such conditions as may be provided by general law.

The legislative design of public school finance conditions school district participation on compliance with the Florida Education Finance Program, §§236.02(7), 236.081(4), and 236.25, Fla. Stat.

It is difficult to think of how any person drafting a constitution could make the legislative power over school finance more clear in more places than in this 1968 Revision.

D. The 1991 Legislature Exercised Its Power To Set The School Board Millage.

Article IX, §1, Fla. Const., which is entitled "System of public education" provides:

> Adequate provision shall be made by law for a uniform system of free public schools and for the establishment, maintenance and operation of institutions of higher learning and other public education programs that the needs of the people may require. (Emphasis supplied.)

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[11]/ Article VII, §8, Fla. Const., has been applied in several cases which are unremarkable, precisely because they apply the clear language of the Constitution. Board of Public Instruction of Brevard County v. State Treasurer, 231 So.2d 1 (Fla. 1970) and Community Ass'n of Community Colleges v. State Department of Education, 43 Fla. Supp. 135 (Fla. 2nd Cir. Ct. 1975, Judge Hugh Taylor).

The above constitutional provision is the foundation from which the Legislature is to provide by law a uniform system of free public schools.[12]

The Legislature through the enactment of Chs. 228 through 240, Fla. Stat., has implemented that section of the Constitution. (See, particularly, §228.051, Fla. Stat.)

School funds come from primarily two sources, state funds and county (local) funds (raised through ad valorem taxes and fees, etc.). Each year the Legislature determines the total amount of money to be spent per student for education. Section 236.081(1), Fla. Stat. The Legislature also determines what percent of this amount is to come from state funds and from county ad valorem tax funds. Section 236.081(4), Fla. Stat. The county ad valorem part of this comes from two ad valorem levies (required local effort - §236.081, Fla. Stat., and discretionary millage - §236.25(1), Fla. Stat.) both of which are determined in the Appropriations Act

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[12]/ Section 229.011, Fla. Stat., entitled "State functions," states:

> Public education is basically a function and responsibility of the state. The responsibility for establishing such minimum standards and regulations as shall tend to assure efficient operation of all schools and adequate educational opportunities for all children is retained by the state.

By definition a uniform system results when the constituent parts operate subject to a common plan or serve a common purpose. School Board of Escambia County v. State, 353 So.2d 834, 838 (Fla. 1977).

yearly. This is, incidentally, much the same statutory device which is used to set judicial salaries.[13]

Traditionally, state education agencies have distributed dollars to school districts by formulas based upon instruction units or special services. In 1973, the Florida Legislature passed the Florida Education Finance Program ("FEFP") which changed the focus for funding education in the state. The intent of the law is:

> To guarantee to each student in the Florida public school system the availability of programs and services appropriate to his educational needs which are substantially equal to those available to any similar student notwithstanding geographic differences and varying local economic factors.

Section 236.012(1), Fla. Stat., (emphasis supplied).

The FEFP is the primary method by which the annual allocation of funds to each school district for the operation of its school is calculated. In enacting the FEFP and other school funding provisions found in Ch. 236, Fla. Stat., the Legislature has made adequate provision by law for a uniform system of free

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[13]/ Article V, §14, Fla. Const., states that judicial salaries are to be provided by law. The general rule governing state officials' salary is set forth in §216.251, Fla. Stat., and the Appropriations Act actually contains the salary amount. See Ch. 91-193, §1.1, Laws of Fla., the very act before this Court.

public schools as required by Art. IX, §1, Fla. Const., and as defined in §228.051, Fla. Stat.

To accomplish this result, the 1991 Legislature used its general legislative authority under Art. III, §1, Fla. Const., its taxation authority under Art. VII, §1(a), Fla. Const., its specific authority over school district millage under Art. VII, §9(a), Fla. Const., and its authority to make grants of state funds under Art. VII, §8, Fla. Const. The range of the millage was set in §236.25(1), Fla. Stat., and, once the specifics of state funding were worked out in the appropriations process, the specific millage figures were set and those figures were included in the Appropriations Act.

II.

THE DISTRICT COURT DECISION UNDERMINES THE AUTHORITY RESERVED TO THE LEGISLATURE IN EVERY ARTICLE OF THE CONSTITUTION.

In Point I, we demonstrated that legislative control of school board millage has been historic, was clearly contemplated by those who drafted the 1968 Revision of the Florida Constitution, and was consistent with traditions of school finance reform. In Point II, we look at the many other places in the constitution where the legislature is given authority to act. An inventory of those provisions is in the Appendix to the Amended Initial Brief (A-24-29) and some appreciation for what is at stake in this case can be gained by reviewing those provisions.

A. The Art. VII, §9, Fla. Const., Language Providing For Millage To Be Set By The Legislature Requires A Legislative Act To Authorize School Board Millage.

The focus of this case is Article VII, which begins with a clear statement, "no tax shall be levied except in pursuance of law." Art. VII, §1, Fla. Const. In particular, the provisions of Art. VII, §9, Fla. Const., are at issue here:

> (a) Counties, school districts, and municipalities shall, and special districts may, be authorized by law to levy ad valorem taxes and may be authorized by general law to levy other taxes, . . .
>
> (b) Ad valorem taxes, . . . shall not be levied in excess of the following millages upon the assessed value of real estate and tangible personal property: for all county purposes, ten mills; for all municipal purposes, ten mills; for all school purposes, ten mills . . . (emphasis supplied)

Incredibly, the District Court states that the language of Art. VII, §9(a), Fla. Const., providing that school districts "shall be authorized by law" to levy ad valorem taxes is sufficient to conclude that the school district's power of taxation is expressly authorized by the Constitution and, therefore, the Legislature has no power to restrict the school district's millage.[14]

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[14]/ There are, of course, principles which are well known to this Court:

> It is fundamental that the State possesses the inherent power to tax as an attribute or characteristic of its sovereignty, Cheney v. Jones, 14 Fla. 587, 610 (1874); Hunter v. Owens, 80 Fla. 812, 86 So. 839 (1920) and that a school district has no inherent power to tax and may levy taxes only when expressly granted the power to do so. Wilson, infra p. 28.
>
> It is universally understood that our state constitution is not a grant of power, but a limitation upon power. State ex

The District Court does not assess the extraordinary implications of its holding. The critical language of Art. VII, §9(a), Fla. Const., states: ". . . school districts . . . shall . . . be authorized by law to levy ad valorem taxes . . .". This language has many parallels in other sections of the Florida Constitution. The use of this phrase or similar phrases which require legislative authority for implementation appear at least thirty-one times in the Florida Constitution and these phrases are catalogued in the appendix (A-24-29).

It is apparent that the District Court rather carelessly ignored these other sections of the Florida Constitution in much the same way it ignored the history of the Constitution.

The District Court also does not explain why its decision would actually read out of the Constitution a phrase -- "shall . . . be authorized by law" -- which simply has no meaning under its decision. Presumably, a District Court faithful to principle would also ignore the language in the other thirty-one sections of the

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(Footnote 14 cont.)
rel. Collier Land Inv. Corp. v. Dickinson, 188 So.2d 781 (Fla. 1966); Fowler v. Turner, 157 Fla. 529, 26 So.2d 792 (1945).

This Court should not forget that "[t]he presumption of constitutionality imposes a heavy burden of proof upon one attacking the validity of a statute." Department of Business Regulation, Division of Florida Land Sales and Condominiums v. Smith, 471 So.2d 138, 142 (Fla. 1st DCA 1985). Indeed, an act of the legislature is presumed valid and will not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt. Knight and Wall Co. v. Bryant, 178 So.2d 5, 8 (Fla. 1965), cert. denied, 383 U.S. 958 (1966). The School Board has not carried out this burden.

Constitution which have been identified. See infra, p. 30. (A-24-29).

A provision of the constitution is self-executing when it clearly establishes a right which may be implemented without the aid of any legislative enactment. See e.g. State ex rel. Citizens Proposition for Tax Relief v. Firestone, 386 So.2d 561 (Fla. 1980), wherein the Court held that the constitutional provision pertaining to initiative petition was self-executing. Article XI, §5, Fla. Const., "establishes a right to propose by initiative a constitutional amendment and that right may be implemented without the aid of any legislative enactment." Id, at 566. Cf. Williams v. Smith, 360 So.2d 417, 418 (Fla. 1978), where the Court construed Art. II, §8(d),[15] "the Sunshine Amendment," and held it was not self-executing. In the absence of implementing legislation, a Circuit Court Judge who had been indicted, convicted and sentenced on federal charges was able to apply for disability benefits under the Judicial Retirement System. Therefore, Article II, §8(d), did not operate to invoke a forfeiture of the Judge's rights and privileges under the retirement system.

In Horne v. Markham, 288 So.2d 196 (Fla. 1974), the Supreme Court was confronted with the question of whether the right to a homestead exemption from taxation provided in Art. VII, §6, Fla. Const., was an absolute right or whether it was subject to

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[15]/ Art. II, §8(d), Fla. Const., states in relevant part that "[a]ny public officer . . . convicted of a felony . . . shall be subject to forfeiture of rights . . . under a public retirement system . . . as may be provided by law.

statutory conditions, specifically those contained in §196.131, Fla. Stat. The Supreme Court found that Art. VII, §6, Fla. Const., does not establish an absolute right to a homestead exemption. Rather, it provides that a taxpayer who otherwise qualifies shall be granted an exemption only upon establishment of a right thereto in the manner prescribed by law. Horne, 288 So.2d, at 199.

Subsection (a) of Art. VII, §9, Fla. Const., directs the Legislature to authorize by law school districts to levy ad valorem taxes[16] and is not self-executing.[17] In Lewis v. Florida State Board of Health, 143 So.2d 867, 869 (Fla. 1st DCA 1962), cert. denied, 149 So.2d 41 (Fla. 1963), the Court construed 1885 Constitutional (Art. XV, §2) provision which stated:

> 'That the State Board of Health shall have supervision of all matters relating to public health, as may be provided by law.' (Emphasis in the original.)

The Court explained as follows:

> It is elementary that a constitutional provision may be self-executing which requires no legislative action to put its terms into operation, or it may not be self-executing in which case legislative action is required to make it operative. The phrase 'provided by

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16/ A levy is a limited legislative function which declares the subject and rate of taxation (the setting of millage). Metro Dade County v. Golden Nugget Group, 448 So.2d 515 (Fla. 3rd DCA 1984), (citing Atlantic Coast R. Co. v. Amos, 94 Fla. 588, 115 So. 315, 320 (1927)), aff'd, 464 So.2d 535 (Fla. 1985).

17/ See e.g. Desert Ranches of Florida, Inc. v. St. Johns River Water Management District, 406 So.2d 1132 (Fla. 5th DCA 1981), modified, 421 So.2d 1067 (Fla. 1982), where the Supreme Court held that §373.503, Fla. Stat., provided the implementing legislation which allowed the District to levy ad valorem taxes authorized in Art. VII, §9, Fla. Const., for water management purposes. Id., 421 So.2d, at 1070.

> law' means a legislative enactment upon the specific subject matter. . . . (Footnote omitted, emphasis supplied.)

Lewis at 869.

Without this legislative authorization there is no authority in the school district to levy any millage, much less any nonvoted discretionary millage. School districts do not have the unbridled inherent authority to levy ad valorem taxes. Wilson v. School Board of Marion County, 424 So.2d 16, 19 (Fla. 5th DCA 1983), citing, In Certain Lots upon which Taxes Are Delinquent v. Town of Monticello, 159 Fla. 134, 31 So.2d 905 (1947).

It should not go unnoticed that the District Court has failed to discuss Wilson. The Wilson court stated that a school district has no inherent power to tax and may levy taxes only when expressly granted the power to do so by the Legislature. Id., 424 So.2d 16, 19-20. The District Court, while not addressing Wilson, claimed that the school districts have inherent power to tax and sought support for its conclusion in dicta from the case of Mallard v. Tele-Trip Co., 398 So.2d 969 (Fla. 1st DCA 1981), rev. denied, 411 So.2d 384 (Fla. 1981).[18] Such reliance is misplaced. The Mallard court stated that the use of the word "shall" in Art. VII, §9, Fla. Const., mandates the Legislature to authorize the power to levy ad valorem taxes. Mallard at 973. Mallard does not stand for the proposition that entities, such as the School Board, have the inherent power to tax. This conclusion is consistent with the commentary to this constitutional provision that states:

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[18]/ Glasser, (A-18).

> The language, mandatory in tone, does contemplate a legislative act for they "shall be authorized by law" to levy ad valorem taxes.

Commentary, Florida Statutes Annotated, Art. VII, §9, Fla. Const., p. 143.

Unlike Mallard, this is not a preemption case. In this case, the Legislature is following the mandate of the Constitution and authorizing school boards to levy ad valorem taxes within the framework of Art. VII, §9(a) and (b), Fla. Const., as well as Art. IX, §1, Fla. Const. The School Board seems to feel that it is unwise to limit the available 10 mills provided in Art. VII, §9(a), Fla. Const., forgetting that the wisdom of the Legislature is not a proper inquiry for the judiciary.[19]

The provisions of Art. VII, §9(a), Fla. Const., direct the Legislature to authorize the school districts to levy ad valorem taxes. Then in subsection (b), it limits the power of the Legislature to authorize ad valorem taxes in excess of 10 mills for all school purposes. The language of the millage cap contemplates that the legislative authorization under subsection (a) shall be in excess of zero (0) mills but shall not exceed ten (10) mills. Read together these provisions of the Constitution specify that no ad valorem tax shall be levied except in pursuance of law. Thus, no school district may levy ad valorem taxes absent legislative authorization. Lewis, supra, 143 So.2d at 869.

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[19]/ Holley v. Adams, 238 So.2d 401 (Fla. 1970); Just Valuation and Taxation League, Inc. v. Simpson, 209 So.2d 229 (Fla. 1968); and, Miller v. Higgs, 468 So.2d 371 (Fla. 1st DCA 1985) review denied, 479 So.2d 117 (Fla. 1985).

Chapter 236, Fla. Stat., and §1, item 509 of the 1991-92 Appropriations Act do not contradict these constitutional provisions; they implement them. They are general laws describing precisely what millage is "authorized." By enacting §236.25(1), Fla. Stat., the Legislature has "prescribed" the millage, in addition to the required local effort millage levy, for nonvoted current operating discretionary millage for school districts. Because §236.25(1), Fla. Stat., does not authorize the levy of ad valorem taxes in excess of 10 mills, it cannot be said to violate Art. VII, §9(b), Fla. Const.[20]

If the position of the District Court were to prevail, it would do substantial mischief not only to principles of construction, principles of equity in school finance, and to principled adjudication, but also to the very basis of the 1968 Constitution Revision. There are at least thirty-one sections of Florida's Constitution which are not self-executing and which contain language authorizing the Legislature to implement those articles: See, e.g., Art. I, §15(b) and §18; Art. II, §7 and §8(d); Art. IV, §8(c) and §9; Art. V, §3(b)(2), §4(b)(1), §4(b)(2), §5(b), §14 and §17; Art. VI, §2 and §5; Art. VII, §1, §6, §6(d), §9(a), §9(b), §11(a), §12(a) and §14(a); Art. VIII, §1(e), 2(b) and §4; Art. IX, §2 and §4(a); Art. X, §4(c), §7 and §11; and, Art. XII, §9(a)(2).

The very reason that there are so many sections of the

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[20]/ Contemporary interpretation of these sections, then recently adopted, is consistent with the Department's position. 1969 Op. Att'y Gen. Fla. 069-71 (Aug. 19, 1969).

Constitution which use a phrase like "shall be authorized by law" is that this phrase provides greater flexibility to our constitutional structure and a greater play for political forces.

B. The Education Article Does Not Support The District Court Decision.

The District Court erred in its reliance on St. Johns County v. N.E. Florida Builders Ass'n, Inc., 583 So.2d 635 (Fla. 1991) to support its conclusion. In St. Johns, this Court found that a county ordinance imposing an impact fee, not a tax, on new residential construction, did not conflict with Art. IX, §1, Fla. Const., which mandates a uniform system of free public schools.

A careful analysis of St. Johns reveals that the District Court's interpretation of it is overbroad. In St. Johns, this Court quotes with approval School Board of Escambia County v. State, 353 So.2d 834 (Fla. 1977):

> 'By definition, then, a uniform system results when the constituent parts . . . operate subject to a common plan or serve a common purpose.'

St. Johns, 583 So.2d, at 641. The paragraph immediately following the above quoted language in School Board of Escambia County v. State, further clarifies the Court's reasoning:

> Just as there need not be uniformity of physical plant and curriculum from county to county because their requirements differ, there is no compelling reason for school boards of identical size from county to county. Consequently, we conclude that the provision for a uniform system of free public schools embraces the notion that although equal pupil funding treatment such as the Minimum Foundation Program and coordinated

> effort and direction supplied by the State Board of Education are essential, identity in size of the constituent school boards is not.

School Board of Escambia County v. State, 353 So.2d, at 838, (emphasis supplied). That case distinguished between elements which the Court noted need not be uniform (physical plants and curriculum) and those elements (equalization of per pupil funding as well as coordinated effort and direction supplied by the State Board of Education) which are essential.

This Court in St. Johns also cited Penn v. Pensacola-Escambia Governmental Center Authority, 311 So.2d 97 (Fla. 1975) for the proposition that even if city or county funds benefitted the capital needs of a school board, there would be no violation of Article IX. This citation of Penn immediately follows the language quoted from the St. Johns opinion by the District Court below stating that inherent inequities, such as varying revenues because of higher or lower property values or differences in millage assessments will always favor or disfavor some districts. Glasser, (A-21), quoting St. Johns, 538 So.2d 635, 641.

In the discussion of the imposition of impact fees in St. Johns, this Court emphasized that "educational facilities impact fees are themselves a vehicle for achieving a uniform system of free public schools because in rapidly growing counties ordinary funding sources may not be sufficient to meet the demand for new facilities." St. Johns, 583 So.2d at 641.

The District Court's opinion cites to page 642 of St. Johns to support the proposition that "[a]rticle IX, section 4(b) further supports the grant of constitutional authority to school boards in the area of ad valorem taxation." Glasser, (A-19). On the contrary, this Court made it clear in St. Johns that the challenged ordinance did not violate Art. IX, §4(b) because the ordinance dealt with an impact fee, not a tax, St. Johns, supra, 583 So.2d at 642.

The District Court then looks to the commentary of the 1968 revision of the State Constitution, "In discussing the clause in article IX, section 4(b) limiting the tax rate within the limits prescribed in the constitution the commentary states 'see article VII, section 9(b).'" Glasser, (A-20).

Article IX, §4(b), Fla. Const., states:

> The school board shall operate, control and supervise all free public schools within the school district and determine the rate of school district taxes within the limits prescribed herein. (emphasis supplied)

While this subsection states that school districts can determine the rate of school district taxes, this is not an unconditional grant of authority. The authority is conditional. The operative phrase in this subsection is "within the limits prescribed herein." This is the limitation on the exercise of any determination by the school district. The District Court glosses over and thus ignores this unequivocal condition.

Thus, the District Court failed to recognize this Court's distinction between impact fees and taxes when Art. IX, §4(b), Fla.

Const., was discussed in St. Johns, supra at 642. The District Court also failed to recognize this Court's emphasis on physical plants rather than per pupil funding for current operations.[21]

One must look to other provisions of the Constitution to ascertain the extent to which school districts may determine the rate of school district taxes. The District Court analysis ignores section 9(a) and the commentary regarding it. Under the District Court's reasoning, Section 9(a) becomes meaningless. Why must the Legislature pass a law on a subject which is already spelled out in the Constitution?

C. The District Court Ignored Florida Cases on School Funding.

The District Court misstated the Department's position:

> DOE's argument, however, is based on an incorrect premise that a 'uniform system' of public schools requires equal dollars be spent on each student. Glasser, (A-20).

The Legislature does not, and historically has not, interpreted the constitutional requirement for a uniform system of free public schools to require equal dollars be spent on each student. The Legislature recognizes, as has this Court, that some disparity in per pupil spending exists and is constitutionally permissible under Art. IX, §1, Fla. Const.

In Gindl v. State Board of Education, 396 So.2d 1105 (Fla. 1979), this Court upheld the utilization of discretionary

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[21]/ These are separate tax levies authorized by §236.25(1) (current operations) and §236.25(2) (capital outlay), Fla. Stat.

millage (referred to as "leeway millage" in the opinion) in the Florida Education Finance Program as provided for in §236.25, Fla. Stat. (1975).[22]

In 1978, the School Board of Escambia County challenged Florida's system of funding education in Gindl. The School Board asserted that the levying of discretionary millage had a disequalizing effect in that it resulted in property-rich districts having more dollars to spend per pupil than property-poor districts. The School Board argued that this violated the uniformity provision of Art. IX, §1, Fla. Const. The Gindl court upheld the utilization of discretionary millage in the Florida Education Finance Program finding that:

> . . . the Florida education funding formula, in allowing leeway millage, does not violate the equal protection clause, and substantial equality of education is not prevented by the use of leeway millage. (emphasis supplied)

Gindl, at 396 So.2d at 1106.

Several years passed before another court challenge was brought again challenging the use of discretionary millage under the uniformity provision of Art. IX, §1, Fla. Const. Christensen et al. v. Graham, et al., No. 86-1390, (Fla. 2nd Cir. Ct. 1987). (A-30-31). In the time between Gindl and Christensen, the number of school boards challenging the utilization of discretionary millage grew from one to twenty-two. Again, the school boards argued that the use of discretionary millage (both for current

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[22]/ At the time Gindl was filed, discretionary millage for current operations was set at 1.6 mills. Id.

operations and capital outlay) resulted in a disparity of funding between property-rich and property-poor school districts. Relying on Gindl, the Christensen trial court upheld the use of discretionary millage.[23]

Thus, Florida courts have established some acceptable parameters of disparity of per pupil funding. However, the opinion of the District Court opens up a potential disparity of per pupil funding that is significantly greater than that which has been previously subjected to judicial scrutiny in this state.

There is uncontroverted evidence in the record that the component of discretionary millage is interwoven with the other components of the FEFP, and that changing one component can have an effect, in and of itself, on the entire funding formula for public schools.

> The Florida Education Finance Program consists of many components which have a unique relationship to each other. Attachment "C" compares 1990-91 and 1991-92. Changing only one of the components such as discretionary millage requires changes in other components to prevent violations of the Constitutional requirement of substantially equal funds per student. . . .

Golden affidavit,[24] (R-34) (A-33).[25] At the time of filing

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[23]/ Discretionary millage was at 1.5 mills for capital outlay and .819 mills for current operations at the time the lawsuit was filed (FY 1986-87). Section 236.081(4), Fla. Stat. (1986 Supp.); Chapter 86-168, §32, Laws of Fla.

[24]/ The Golden affidavit, with its attachments, has been reproduced and can be found at A-32-41).

[25]/ Attachment "C" of the Golden affidavit is found in the record on appeal at R-18-20 rather than attached to affidavit. (A-37-39).

the instant lawsuit, required local effort millage was set at 6.373 mills (FY 1991-92) leaving a potential of 3.627 of millage within the ten mill cap. Of course, 3.627 mills will raise a great deal of money in wealthy counties and far less in poor counties. To prevent excessive inequities between school districts, the 1991 Appropriations Act limited millage was limited to .510 mills. See Attachments to the Golden affidavit (A-35-41).

Under the rationale of the District Court's opinion, a school district could levy up to 3.627 mills of discretionary millage. Thus, there is the potential of a large disparity in per pupil spending far exceeding the parameters approved by this Court in Gindl as acceptable under the uniformity provision of Art. IX, §1, Fla. Const.

III.

THE 1991 APPROPRIATIONS ACT, SETTING THE SCHOOL DISTRICT DISCRETIONARY MILLAGE, DID NOT VIOLATE CONSTITUTIONAL PRINCIPLES.

The trial court held that the legislative action in setting the millage as part of the appropriations act was also unconstitutional on the ground that they violated the Florida Constitution's protection against incorporating substantive law in the Appropriations Act, Art. III, §12, Fla. Const.[26] Since the District Court affirmed the trial court (without addressing this issue as it relates to Article III, §§6 and 12, Fla. Const.) it is necessary to address it as well.

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[26]/ See §236.25(1), Fla. Stat., and item 509, §1, Ch. 91-193, Laws of Fla.

The School Board alleged that the appropriations act was in violation of the Florida Constitution because item 509 of the 1991 Appropriations Act, amended a Florida Statute (§236.25(1), Fla. Stat.) by reference to its title or number only. To determine whether Ch. 91-193, Laws of Fla., is in violation of the Florida Constitution, we must turn to the two-part test set out by the Florida Supreme Court in Brown v. Firestone, 382 So.2d 654 (Fla. 1980).

Brown dealt with similar issues. In his effort to uphold his vetoes of certain provisions of the 1979 appropriations act, the Governor had challenged the laws as violating Art. III, §12, Fla. Const. In analyzing the situation, the Supreme Court made two broad pronouncements. First, the Court stated that the Legislature is vested with the power to "enact appropriations and reasonably direct their use." Brown, 382 So.2d at 663. In addition, the Legislature "may attach qualifications or restrictions to the use of appropriated funds." Id., citing, In re Advisory Opinion to the Governor, 239 So.2d 1, 9 (Fla. 1970). However, the Court went on to state that this power of the Legislature is "tempered by the limitation" contained in Art. III, §12, Fla. Const. Brown, 382 So.2d at 663. In summary, the Court stated that:

> a general appropriations bill must deal only with appropriations and matters properly connected therewith. Id.[27]

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[27]/ The two reasons enunciated by the Supreme Court for this limitation were the necessity to avoid "logrolling" in appropriations bills and the need to preserve the integrity of the legislative process by not permitting substantive changes in a bill whose purpose it is to deal with financial matters of the State.

In order to test any potential part of an appropriations bill to see if there is a violation of the Florida Constitution, this Court set out a two-part test. The test in Brown seeks to determine if the Legislature passed the appropriations only with the qualification or restriction to the funds or whether the language is merely a subterfuge to achieve a totally unrelated purpose to the appropriated funds. Brown, 382 So.2d at 664.

In making the determination in this case as to whether or not Ch. 91-193, Laws of Fla., is violative of the Florida Constitution, we must begin with the underlying school tax statute that is directing the Legislature in Ch. 91-193, Laws of Fla. That pertinent part of §236.25(1), Fla. Stat., concerning discretionary millage states:

> . . . The Legislature shall prescribe annually in the appropriations act the maximum amount of millage a district may levy. . . . (Emphasis supplied)

The language in this statute accomplishes a number of points. First, it is the legislative authorization to the local school boards permitting them to levy a "nonvoted current operating discretionary" tax. Without this authorization, the school board would not be permitted to levy the tax.

Second, it is a direction to the local school boards telling them of the "range" of discretionary tax they may levy. This statute does not set any particular millage rate, only the range in which the Legislature may prescribe annually that the

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Brown, 382 So.2d at 663-64.

local boards may set. It is a notice to the local school boards of the maximum that can be levied under this law. This statute is a "cap" on millage, similar to that set out in Art. VII, §9(b), Fla. Const.

Finally, the statute directs the Legislature to prescribe the amount of the nonvoted discretionary millage that can be levied by the local boards and that such annual prescription by the Legislature is to be included annually in the appropriations act.

It is now time to put item 509 to the test of Brown v. Firestone, supra. First, item 509 does not "change or amend existing law on subjects other than appropriations," Brown 382 So.2d at 664, because it changes nothing in §236.25(1), Fla. Stat. Section 236.25(1), Fla. Stat., does not set the annual millage rate that the local boards could set annually -- it only prescribes the "range" in which the local board has room to operate. This item sets the rate for 1991 within the specifically stated range.

The School Board cannot show this Court just what item 509 "changes or amends," nor can they show that §1, item 509 changes or amends any other existing law.

Furthermore, §1, item 509, does just what the Legislature directs in §236.23(1), Fla. Stat. -- that the annual appropriations act will, "prescribe annually in the appropriations act the maximum amount of millage a district may levy" in nonvoted discretionary taxes.

The second test of Brown asks whether the qualification language is "directly and rationally relate[d] to the purpose of an

appropriation." Id., 382 So.2d at 664. In this case, the qualification language in §1, item 509, here challenged, is directly and rationally related to an appropriation. To determine the amount of public funds that may be expended annually around the State on education, the Legislature uses a formula to determine the state amount of funds to be distributed to and by the school districts.

The levy of nonvoted current operating discretionary millage ["discretionary millage," "discretionary local effort," "discretionary funds" are used interchangeably by the Legislature] has a direct effect on the distribution of state monies under the Florida Educational Finance Program (FEFP). Section 236.081, Fla. Stat. The three key dollar amounts which are considered in the local FEFP dollars; selected categorical programs; and actual discretionary local effort.[28]

Section 1, item 509, Ch. 91-193, [Appropriation Act] provides in pertinent part:

> Funds appropriated in Specific Appropriation 509 shall be allocated using a funding adjustment calculated in the following manner: (Step 1) Each district's total 1990-91 funds available shall be divided by the district's 1990-91 weighted full-time equivalent (FTE) student enrollment. Total available funds shall include state FEFP formula and major categorical funds, and local required and discretionary funds. (Emphasis supplied.)

Thus one can see that it is without question that

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[28]/ See Attachments to Golden affidavit, particularly Attachment C which illustrates the complicated nature of public school finance. (A-35-41.)

discretionary funds [maximum nonvoted discretionary millage] are inextricably interwoven into the formula entitlement that comprises the FEFP, and is not a qualification or restriction being used merely as a device to further a legislative objective unrelated to the fund appropriated. In summation, item 509 met both tests of Brown.

IV.

THE DEPARTMENT OF EDUCATION SHOULD HAVE BEEN JOINED AS A PARTY TO THIS CHALLENGE OF STATUTES OF STATEWIDE APPLICATION

Given the clarity of the Constitutional provisions and the history and practical considerations which support the reading urged by the Department, it may not be significant in this case that the School Board sought to conduct this important constitutional litigation as a surprise attack but strong public policy reasons require an adherence to established rules of fair play. Since their "raid on Entebbe" tactic might be used in future litigation if not addressed here, the Department feels it must raise the issue.[29]

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[29]/ In the case of The School Board of Alachua County, et al. v. The State of Florida Department of Education, No. 91-2343-CA, (Fla. 8th Cir. Ct. 1991), the Alachua County School Board borrowed the Sarasota County School Board's complaint, and sued the Tax Collector challenging the same laws on the same grounds as in the instant case. The trial court in the Alachua County case dismissed the Tax Collector from the action and ordered that the Department be made a party. Memoranda were submitted by both the School Board and the Department. The trial Court then held a hearing on an expedited basis and upheld the same laws that the trial court in this case, without the participation of the Department, struck down.

Why worry with this issue now? This controversy is now before this Court with the proper parties. If the District Court's opinion stands, entire statewide programs can be subject to a patchwork of challenges and applications. The validity of these programs would be dependent upon local officials suing non-interested local officials from county to county without the state agency responsible for the programs or its involvement being joined in the litigation. This would result in the fragmentation of programs of statewide impact. In the area of education such a result violates not only the system established by the Legislature, but also the dictates of the Constitution in Art. IX, §1, Fla. Const.

Generally, before any proceeding for declaratory relief should be entertained, six elements should be made to appear, including: A person or persons who have, or reasonably may have, an actual, present, adverse, and antagonistic interest in the subject matter, either in fact or law. Retail Liquor Dealers Association of Dade County v. Dade County, 100 So.2d 76 (Fla. 3d DCA 1958); May v. Holley, 59 So.2d 636, 639 (Fla. 1952); Askew v. City of Ocala, 348 So.2d 308 (Fla. 1977); 19 Fla. Jur. 2d, Declaratory Judgments §9 (1980).

In Retail Liquor Dealers Association, supra, the Association brought a declaratory judgement action against Dade County to determine whether or not state law required retail liquor establishments to remain closed on certain dates which were set for special charter elections. Initially, the Third District Court of

Appeal noted that the record on appeal consisted "only of a complaint for declaratory decree and a decree thereon." 100 So.2d at 77.

The Court went on to note, that from the face of the complaint it appeared that the County Commissioners had asked for a legal opinion from their county attorney as to whether state law required establishments selling retail alcoholic beverages to remain closed on the date set for special charter elections. Id. Their attorney answered this opinion request in the affirmative. Acting upon this affirmative opinion, the Appellants brought suit against Dade County. The County apparently did not file any responsive pleadings to the complaint. However, it did consent to a final hearing and the cause of action was heard five days after the filing of the complaint. The lower court entered the order from which the appeal was taken.

The Third District Court of Appeal reversed the lower court with directions to set aside the decree and dismiss the complaint for declaratory judgment, by stating the following:

> [The trial court] was led to believe that there was a bona fide dispute between the contending parties. It now appears from argument before this Court that the circuit judge was inadvertently misled. The appellants, in essence, ask for a construction of a state statute. Their controversy, if any, exists between themselves and the agency or agencies of the State of Florida charged with the enforcement of the state law regulating the closing hours of retail liquor establishments. It neither is shown that the Board of County Commissioners are charged with such responsibility, nor have they undertaken the enforcement of such laws. See §104.381, Fla. Stat. F.S.A.., and §562.14, Fla. Stat.,

> F.S.A. It is essential that the party defendant in a declaratory action be the party or parties whose interest will be affected by the decree. (emphasis supplied)

Retail Liquors, supra., 100 So.2d at 77.

The similarity of Retail Liquor, to the case at bar is illustrated by the following comparison:

Facts - Retail Liquors	Facts - Sarasota
Association brought action against the County for declaratory judgment.	School Board brought action against the Tax Collector for declaratory judgment.
Final hearing was expedited.	Final hearing was expedited.
Defendant was not the State Agency charged with the enforcement of the statute at issue.	Defendant was not the State Agency charged with the enforcement of the laws at issue.
Defendant did not defend statute at issue. Trial court was inadvertently misled into believing a controversy existed between the parties.	Defendant did not defend laws at issue. Trial court was inadvertently misled into believing a controversy existed between the parties.

As in the Retail Liquor case, the School Board, in the instant case, wanted an opinion from the trial court without the participation of any real adverse party. The School Board asked for, on an expedited basis, a construction of several state statutes dealing with the state system of school funding. The School Board's controversy, if any, exists between itself and the state agency, the Department, charged with the enforcement of the law regulating school funding. See Ch. 236, Fla. Stat. It was not shown, nor can it, that the Tax Collector is charged with such responsibility, nor did the Tax Collector undertake the enforcement

of Ch. 236, Fla. Stat. Moreover, the Tax Collector undertook no defense of the laws in question. See, Askew v. City of Ocala, supra; State v. Lewis, 72 So.2d 823 (Fla. 1954); Naples Airport Authority v. Naples, 360 So.2d 48 (Fla. 2nd DCA 1978); Ashe v. Boca Raton, 133 So.2d 122 (Fla. 2nd DCA 1961),.

When the School Board filed its complaint in the trial court challenging the constitutionality of Florida statutes governing school finance in Florida, the School Board only sued the Tax Collector. The Tax Collector has only ministerial duties as they relate to school funding.[30] The School Board should have known that the Tax Collector has no interest, legal or otherwise, in defending the constitutionality of these statutes.

The School Board's action is all the more questionable because it filed a similar action in the trial court in 1987 and it must have known that the relief requested would have a tremendous impact on school funding throughout the State of Florida.[31]

The School Board knew well before it filed on June 21, 1991 (R-1-9) that they would challenge these funding provisions yet it still failed to notify and join the true "real parties in interest," the State Board of Education or the Department of the challenge. The School Board never explained to the trial court why the pleadings were not sent to the Department on June 21, 1991, the date they were filed.

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[30]/ Sections 237.091, 237.181, and 237.211(1), Fla. Stat.

[31]/ See, Olson, et. al. v. Ford-Coates, etc., No 87-3295 CA-01 (Fla. 12th Cir. Ct. 1987), in and for Sarasota County, Florida. (T-5, lines 17-24)

In Tallahassee, the Attorney General became aware of the action at 4:15 p.m. on Wednesday, June 26, 1991, the day before the final hearing in Sarasota. The School Board's counsel faxed a copy of the pleadings to the Department and this form of notice did not permit the Attorney General sufficient time in which to prepare an adequate response to the School Board's pleadings.

Thus, the stage was set for the hearing. There was no bona fide dispute between the Sarasota School Board and the Sarasota Tax Collector, yet the School Board was asking the trial court to find a statute of statewide impact unconstitutional.[32] The trial court denied the Attorney General's motion to dismiss or, in the alternative, postpone the hearing. The District Court sustained the trial court stating that "the tax collector's interest was sufficient to create a bona fide and practical need for declaration pursuant to section 86.091." Glasser, (A-15). The District Court went on to say "it was not necessary for the trial court to consider DOE's interest or position concerning the validity of the challenged legislation to make a determination as a matter of law" Glasser, (A-15).

The District Court seemed to rewrite the law as it relates to the necessity of a controversy as the foundation of all

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[32]/ The Tax Collector should have, but did not, challenge the School Board's standing to question the constitutionality of the laws at issue in this case. The School Board did not have the requisite standing to initiate such a constitutional challenge. Barr v. Watts, 70 So.2d 347 (Fla. 1953); Department of Education v. Lewis, 416 So.2d 455 (Fla. 1982); Miller v. Higgs, 468 So.2d 371, 374 (Fla. 1st DCA 1985), review denied, 479 So.2d 117 (Fla. 1985); and, Jones v. Department of Revenue, 523 So.2d 1211, 1214 (Fla. 1st DCA 1988).

litigation. Chapter 86 was not intended to do away with such a requirement especially in the area of a statute of statewide impact. There is no serious question that the tax collector's duties under §§237.09, 237.181, and 237.211(1), Fla. Stat., are ministerial in nature. The Legislature has specifically given the authority to challenge the levying of millage to the Department of Revenue. Section 200.65(12), Fla. Stat. There was no controversy between the School Board and the tax collector. The only proper parties would be the Department of Education and the Department of Revenue.

The District Court attempts to create a controversy in its opinion, at page 6, suggesting that the School Board would violate state law. (A-14.) This situation presupposes that the School Board would deliberately violate §236.25(1), Fla. Stat., and face the sanctions of §200.065(12)(a), Fla. Stat., and Ch. 236, Fla. Stat.

The District Court contends that the Department was not an indispensable party. Glasser, (A-15). That position is not viable in this day and time of programs of statewide application and ignores the truly unique position of the Department. Unlike the many agencies which are purely statutory, the Department is the administrative arm of the State Board of Education which derives its existence and duties from the Constitution. See, Art. IX, §2, Fla. Const.; §§228.01, 229.011, 229.053 and part III, Ch. 229, Fla. Stat. Except for filing an answer, the Tax Collector has not sought to defend in the most elementary way the statutes involved

in this case. The Legislature has implemented the directive with the enactment of Art. IX, §1, Fla. Const. The Department carries out those directives.

The District Court opinion ignores basis principles. The Constitution calls for the Legislature to provide a "uniform system of free public schools." The Legislature has provided for that system and has given the Department authority to administer that system. The lower court now allows a non-interested party to defend the constitutionality of this complex statutory arrangement. If approved, this procedure would permit piecemeal challenges and patchwork adjudication. Sound principles of judicial administration and concepts of basic fairness require that the Department be joined when school finance issues of statewide importance are litigated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing INITIAL BRIEF was sent by U.S. Mail to **RICHARD E. NELSON, ESQ.**, Nelson, Hesse, Cyril, Smith, Widman & Herb, P.O. Box 2524, Sarasota, Florida 34230; **A. LAMAR MATTHEWS, ESQ.**, Matthews, Hutton & Eastmoore, 1777 Main Street, Suite 500, P.O. Box 49377, Sarasota, Florida 34230; and **CLAIRE L. HAMNER, ESQ.**, Dickinson, Gibbons, Shields, Partridge, Dahlgren & Collins, P.A., 1750 Ringling Boulevard, P.O. Box 3979, Sarasota, Florida 34230; on this 4th day of November, 1992.

Talbot D'Alemberte

TALBOT D'ALEMBERTE