OA 8-28-95

IN THE SUPREME COURT OF FLORIDA

COALITION FOR ADEQUACY AND FAIRNESS IN SCHOOL FUNDING INC., et al.,

Appellants,

v.

LAWTON CHILES, et al.,

Appellees.
_____/

Appeal from the Second Judicial Circuit Court In and For Leon County, Florida On Certification From the First District Court of Appeal

Case No. 85,375

ANSWER BRIEF OF APPELLEES PRESIDENT OF THE FLORIDA SENATE AND SPEAKER OF THE FLORIDA HOUSE OF REPRESENTATIVES

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STATEMENT OF THE CASE

Defendants generally accept plaintiffs' statement of the case, except for their description of the operative allegations in the complaint. Paragraph 75(H), states:

> The State of Florida, acting by and through its Legislature, enacted Chapter 94-357, General Appropriations Act which includes, among other things, appropriations for free public schools. The total of such appropriated funds is constitutionally inadequate, thus depriving public school boards of the ability to discharge their obligations to operate, control and supervise free public schools within their respective districts, and depriving public school students of their right to an adequate education.

R. 172-73 (emphasis added). Plaintiffs' prayer for relief states:

> WHEREFORE, Plaintiffs pray that this Court will take jurisdiction over this case, and on final hearing thereof:
>
> 1. Declare that the right to an adequate education is a fundamental right under the Constitution of Florida, and that the State of Florida is constitutionally obligated to provide adequate funds for a uniform system of free public schools;
>
> 2. Declare that the defendants, individually and collectively, have failed to make adequate provision for a uniform system of free public schools in Florida and thereby have failed to discharge their constitutional responsibilities as required by Article I, Sections 2 and 9, Article II, Section 9, Article IX, Sections 1 and 6, and Article X, Section 15 of the Constitution of the State of Florida;
>
> 3. Retain jurisdiction over this cause until the Defendants have fully complied with their obligations under the Constitution and laws of Florida;

> 4. Require the Defendants to serve upon all parties and file with the Court copies of newly enacted laws, including future General Appropriations Acts and Implementing Provisions relating to funding for free public schools, and to schedule such further hearings as may be required to monitor and evaluate such legislation and appropriations;
>
> 5. Award Plaintiffs their attorney fees and costs; and
>
> 6. Grant such other relief as the Court may from time to time deem just and equitable.

R. 174 (emphasis added).

These excerpts speak for themselves.

Amici's statement of the case, by contrast, is a classic Brandeis Brief, see Black's Law Dictionary 188 (6th ed. 1991), rife with non-record factual allegations. Moreover, to the extent that Amici's facts are derived from the intervenors' complaint, R. 75-113, they are irrelevant to this proceeding because that complaint was not the subject of the Order on review. R. 304.

SUMMARY OF ARGUMENT

Plaintiffs want the judiciary to order the Legislature to appropriate more money for education in derogation of the Florida doctrine of separation of powers. Pursuant to article VII, section 1(c) of the Florida Constitution, the power to appropriate state funds is expressly and exclusively assigned to the Legislature. In addition, article V, section 14 of the Florida Constitution expressly forbids the judiciary from fixing appropriations. Moreover, the authority to determine a "uniform system of free public schools" is specifically assigned to the legislature by article IX, section 1. Accordingly, the issue of legislative appropriations for education is a nonjusticiable political question.

The Legislature's sole obligation under article IX, section 1 is to enact appropriate legislation to insure the establishment of a free public school system that is uniform. The phrase "adequate provision" in article IX, section 1 refers to the enactment of laws, not funding.

Decisions from other states are inapposite because there is no out-of-state decision where the legislature was required to increase funding within an already uniform educational system. Florida's education financing system has been uniform since the adoption of the Florida Education Finance Program, chapter 236, Florida Statutes, in 1973.

Finally, neither the individual school board members nor the school boards themselves have standing to bring this action.

Accordingly, the lower court's order of dismissal should be AFFIRMED.

ARGUMENT

The real issue before the Court is: Who decides the amount of funding for public education?

Plaintiffs attempt to state the issue on appeal as a truism: The right to an adequate education is fundamental under the Florida Constitution.[1] Initial Brief at 2.[2] This statement is unavailing. None of the defendants disputes, and none has ever disputed, that education is basic to our society and that Florida's children need education.

This Court must bear in mind that plaintiffs are not complaining that Florida's system of school financing is unconstitutional.[3] Thus, they do not argue that, no matter how much money is invested, Florida's school children cannot receive

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1/ Plaintiffs raise no federal constitutional claims in their complaint. See San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1 (1973) (holding that education is not a fundamental right under the 14th Amendment).

2/ See also Amici Brief at 3.

3/ See, for example, the experiences of Texas and New Jersey, where courts struck down school finance legislation which was based primarily on local property values as opposed to substantially equal per pupil funding. Compare Edgewood Indep. School Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989), and Abbott v. Burke, 575 A.2d 359 (N.J. 1990), with § 236.012, Fla. Stat. ("The intent of the legislature is ... [t]o guarantee to each student in the Florida public educational 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." (emphasis added)).

a proper education.[4] Rather, Plaintiffs' argument is that Florida's school finance system, although constitutional, is not adequately funded.[5]

In short, plaintiffs want more money. Relying on value judgments only properly considered by the legislative branch, they claim that there is not enough money to run the school system the way they like it, and they want the judiciary to order the Legislature to appropriate more money for education.[6] To accomplish this end, they ask the courts to retain jurisdiction

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[4] What this case is not about is clear from the face of the complaint. It is not about a challenge to the constitutionality of any particular statute or law. No provision of the Florida Statutes relating to education (chapters 228 through 239) is cited or challenged in the complaint. Nor is it a challenge to the General Appropriations Act. See Complaint ¶¶ 74, 75.

[5] The Court has consistently rejected every challenge to the uniformity of Florida's schools since 1973. District School Board of Lee County v. Askew, 278 So. 2d 272 (Fla. 1973); Penn v. Pensacola-Escambia Governmental Center Authority, 311 So. 2d 97 (Fla. 1975); School Board of Escambia County v. State, 353 So. 2d 834 (Fla. 1977); Gindl v. Department of Education, 396 So. 2d 1105 (Fla. 1979); St. Johns County v. Northeast Florida Builders Association, Incorporated, 583 So. 2d 635 (Fla. 1991); Florida Department of Education v. Glasser, 622 So. 2d 944 (1993).

[6] Plaintiffs ask for this relief notwithstanding that 37% of Florida's 1994-95 General Revenue budget was allocated to K-12 education; notwithstanding that the total appropriations and authorization for state and local effort for education was $8.5 billion; and notwithstanding the recent constitutional amendment imposing a tax cap on the Legislature. Hearing Transcript at 11. The 1995-96 General Appropriations Act, Senate Bill No. 2800, awaiting action by the Governor, increases the level of education funding provided in 1994-95.

indefinitely to monitor all future legislation, including general appropriations acts.

POINT I -- THE TRIAL COURT CORRECTLY HELD THAT TO GRANT PLAINTIFFS RELIEF WOULD UNCONSTITUTIONALLY VIOLATE THE SEPARATION OF POWERS DOCTRINE.

The heart of this case is plaintiffs' request that the Court declare the total funds appropriated for education "constitutionally inadequate." Complaint ¶ 75(H). As relief, they want the Court to order the appropriation of more money. The dispositive issue is whether the judiciary would violate the doctrine of separation of powers in granting plaintiffs the relief requested.

The separation of powers doctrine is expressly codified in article II, section 3 of the Florida Constitution.

> The powers of the State government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

The doctrine of separation of powers contains two fundamental restrictions. The first is that no branch of government may encroach upon the powers of another. The second, which is not at issue here, is that no branch may delegate to another branch its constitutionally assigned power. Chiles v. Children, 589 So. 2d 260, 264 (Fla. 1991).

It is important to bear in mind that the doctrine of separation of powers is not a historic relic. In Chiles, this

Court invalidated a statute delegating to the Governor the authority to reduce the general appropriations act. The Court based its decision entirely on the doctrine of separation of powers. "The fundamental concern of keeping the individual branches separate is that the fusion of the powers of any two branches into the same department will ultimately result in the destruction of liberty." 589 So. 2d at 263.

The power to appropriate state funds is expressly assigned in the Florida Constitution to the Legislature. Chiles held that the power to appropriate state funds "is legislative and is to be exercised only through duly enacted statutes." Id. at 265. The Court relied on the plain language of the constitution, which provides in article VII, section 1(c) that "[n]o money shall be drawn from the treasury except in pursuance of appropriation made by law." Chiles reasoned:

> Under any working system of government, one of the branches must be able to exercise the power of the purse, and in our system it is the Legislature, as representative of the people and maker of laws, including laws pertaining to appropriations, to whom that power is constitutionally assigned. . . .
> . . . .
> The Constitution specifically provides for the Legislature alone to have the power to appropriate state funds. More importantly, only the Legislature, as the voice of the people, may determine and weigh the multitude of needs and fiscal priorities of the State of Florida. The Legislature must carry out its constitutional duty to establish fiscal priorities in light of the financial resources it has provided.

589 So. 2d at 267 (emphasis added).

By using the words "by law" in article VII, section 1(c), the framers of the Florida Constitution expressly assigned the appropriations power to the Legislature.

> "The object of a constitutional provision requiring an appropriation made by law as the authority to withdraw money from the state treasury is to prevent the expenditure of the public funds already in the treasury, or potentially therein from tax sources provided to raise it, without the consent of the public given by their representative in formal legislative acts. Such a provision secures to the Legislative (except where the Constitution controls to the contrary) the exclusive power of deciding how, when, and for what purpose a public fund shall be applied in carrying on the government."

589 So. 2d at 265 (quoting State ex rel. Kurz v. Lee, 121 Fla. 360, 384, 163 So. 859, 868 (1935) (emphasis added)).

Not only is the appropriations power specifically assigned to the Legislature, but so too is the authority to determine a "uniform system of free public schools." This is because the education article specifically provides that adequate provision shall be made "by law" for a uniform school system. Just like the words "by law" in article VII, section 1(c) indicate that the Legislature was assigned the appropriations power, the same words in article IX, section 1 mean that decisions as to the total amount of state revenue committed to education is solely designated to the prerogative of the Legislature.[7]

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[7] In other words, article IX, section 1 is not "self-executing." See Glasser, 622 So. 2d at 947 ("We decline the invitation and leave it to the Legislature, in the first instance, to give content to this constitutional mandate"

(continued...)

In addition to the specific assignment of appropriations and education to the Legislature, the Florida Constitution contains a specific prohibition against the exercise of appropriations power by the judiciary. Article V, section 14 of the Florida Constitution provides that "[t]he Judiciary shall have no power to fix appropriations."

The doctrine of separation of powers flows directly from the heart of the principles underlying a democracy. In a democracy, the Chiles Court noted, "'primary policy decisions shall be made by members of the legislature who are elected to perform those tasks'" (quoting Askew v. Cross Key Waterways, 372 So. 2d 913, 925 (Fla. 1978)).[8] Simply, if the electorate is dissatisfied with public school funding, then Floridians can vote their representatives and senators out of office and elect new officials who can make different policy decisions. If the judiciary accepts the invitation to make political decisions, then democracy will break down in favor of judicial oligarchy.

The United States Supreme Court echoed similar concerns in San Antonio Independent School District v. Rodriquez, which

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[7](...continued)
(emphasis added)); see also Lewis v. Florida State Board of Health, 143 So. 2d 867, 869 (Fla. 1st DCA 1962) (holding that the constitutional language "provided by law" is not self-executing).

[8] See also Wilson v. State, 288 So. 2d 480, 482 (Fla. 1974) ("It is not the province of the judiciary to legislate; . . . [C]ourts should not shoulder the burden and responsibility of the Legislature.").

addressed the reliance on local property tax revenues to finance the Texas public schools.

> We hardly need to add that this Court's action today is not to be viewed as placing its judicial imprimatur on the status quo. The need is apparent for reform in tax systems which may well have relied too long and too heavily on the local property tax. . . . <u>But the ultimate solutions must come from the lawmakers and from the democratic pressure of those who elect them.</u>

411 U.S. 1, 58-59 (1973).

Although the functions of the various branches of government often overlap, there are certain functions which belong solely to one branch or the other. For the Legislature, appropriating a general budget is its single most important constitutional function. <u>See</u> Art. VII, § 1(d), Fla. Const. Appropriating funds for education, which represents <u>more</u> than one-third of the budget, is a crucial part of that function. Making the "fundamental and primary policy decisions" for funding competing state interests such as building prisons, providing health and human services, and education lies constitutionally with the Legislature, not with the judiciary.

Notwithstanding the doctrine of separation of powers, the plaintiffs are asking this Court to usurp the Legislature's appropriation power. They want the courts indefinitely to monitor all future legislation, including the general appropriations act. This remedy would cause the judiciary to violate the doctrine of separation of powers.

Beyond asking the Court to disregard the separation of powers doctrine, plaintiffs also ask the Court to decide a nonjusticiable political question.[9] Although the Florida Supreme Court has not delineated the standards for determining political questions, the United States Supreme Court set forth six separate criteria in Baker v. Carr, two of which are applicable here.

The first is a "lack of judicially discoverable and manageable standards." Id. at 210. Plaintiffs allege that the Legislature has appropriated inadequate funds. They base their allegation on the language of article 9 that requires "adequate provision" to be made "by law" for a "uniform system of free public schools." That clause, however, provides no "judicially manageable standards" to determine adequacy. The education article only expressly provides that the Legislature is obligated to create a free public school system that is uniform. See infra Point III.

"Uniform" is a judicially manageable standard. Uniformity, by definition, means a lack of variation. It means conforming to a single pattern or a single standard -- regardless of what that standard is. The word "adequacy," by contrast, does not have any individual content. According to Webster's Third New International Dictionary, adequate means "sufficient"; it means

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[9] The separation of powers doctrine is closely related to the political question doctrine. Baker v. Carr, 369 U.S. 186, 210 (1962) ("The nonjusticiability of a political question is primarily a function of the separation of powers.").

"equal to, proportionate to, or wholly sufficient for a specified or implied requirement."

The reason "adequate" is not a standard is because, by definition, it needs to be compared to a benchmark. The word has no meaning out of context, and the Constitution provides no such context. The absence of a particular standard with which to measure adequacy suggests the Framers' realization that the Legislature must have discretion in an area that involves their ability to formulate a budget and to make difficult policy decisions.

This explanation was recognized, at least implicitly, in St. Johns and Glasser. In St. Johns the Court said that "basic educational goals" must be "prescribed by the Legislature." 583 So. 2d at 641. In Glasser the majority noted that it is up to the Legislature "to give content to this constitutional mandate" -- meaning the phrase "a uniform system of free public schools." 622 So. 2d at 947. In his concurring opinion in Glasser, Justice Kogan said "it is necessarily the Legislature's prerogative to operate according to its own policies. 'Uniformity' is a complicated question involving the special expertise of the Legislature, its staff, its advisers on public finance, and the Department of Education." Id. at 951 (Kogan, J. specially concurring).

In addition to lacking judicially discoverable standards, the second reason plaintiffs' complaint presents a political question is because, as discussed above, the issue of

appropriations, and particularly educational appropriations, is textually and constitutionally committed to the Legislature. Baker v. Carr, 369 U.S. at 211.

In November 1994 Floridians approved a constitutional amendment limiting the amount of money that the Legislature can raise annually for appropriations.[10] As a result, for each additional dollar plaintiffs want this Court to appropriate for education, a dollar will be deducted from a competing state program. Thus, by stepping on the education side of the scale, the judiciary would, in effect, remove funds from, among other programs: prisons, courts, health care, juveniles, and the elderly. In a constitutional democracy, the value judgments inherent in allocating limited state funds among competing societal interests are better left to the Legislature. See Glasser, 622 So. 2d at 951 ("To a substantial degree the Legislature's field of action already is severely limited on one side by constitutional restrictions on the state's tax base, and on the other side by the requirement of uniformity" (footnote omitted)).[11]

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[10] Voters approved House Joint Resolution 2053 amending article VII, section 1 of the Florida Constitution. The amendment provides that, absent an extraordinary vote, the Legislature can only collect revenues in the same amount as the preceding year plus a growth adjustment based on the percentage of growth in Florida personal income.

[11] Moreover, to order the Legislature to increase the total number of education dollars, plaintiffs are necessarily asking the Court to determine what increase in the current budget is necessary to improve educational performance. To borrow a tort law concept, this raises an issue of proximate causation. Plaintiffs ask the Court to presume that, by

(continued...)

In short, as defendants argued below, this lawsuit, if it continues, will be the first step along a slippery slope to long-term judicial oversight of education funding. Hearing Transcript at 26-30 (discussing the example of 20 years of school finance litigation in New Jersey). Defendants submit that this Court should not abandon the long-established doctrine of separation of powers and wade into the debate over how much of Florida's limited resources should be devoted to education as opposed to, for example, health care, criminal justice, and public transportation. Only the legislative process is democratically constituted to mediate among competing state needs and to determine the appropriate and achievable level of funding for each need, <u>including education</u>.

POINT II -- <u>PLAINTIFFS IMPROPERLY SEEK AN ADVISORY OPINION.</u>

Attempting to side-step the separation of powers issue, plaintiffs disavow any interest in having this Court mandate an

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[11/](...continued)
increasing the aggregate amount of state funds, there will automatically be an increase in student academic performance. This is not necessarily so. Common sense and experience tell us that there are many other factors effecting the performance of a child in school, particularly family life and a variety of socioeconomic factors. Moreover, Plaintiffs are only asking the Court to increase funding at the state level; they neglect the issue of local school district control. If plaintiffs want to assure that monies appropriated actually impact positively on educational performance, they would need to ask the Court to evaluate local spending priorities, as well.

appropriation by the Legislature.[12] Rather, they claim to seek a declaration that the right to an adequate education is "fundamental" under the Florida Constitution[13] and that the state is constitutionally obligated to provide "adequate" resources to an existing uniform system of free public schools. Initial Brief at 2. Plaintiffs thus place themselves between Scylla and Charybdis: by attempting to side-step the separation of powers issue, they end up seeking only an advisory opinion.

In May v. Holley, 59 So. 2d 636 (Fla. 1952), the Court set forth the elements for a declaratory relief action.

> [i] a bona fide, actual, present practical need for the declaration; [ii] the

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[12] Their disavowal is unconvincing. Even if the Court were not being asked right now to set the level of education funding, the plaintiffs reserve the right to ask for "supplemental relief" under the declaratory judgment statute and thus leave open the likelihood that they will subsequently request a mandatory injunction.

[13] Glasser contains obiter dictum that "[t]he right to education is basic in a democracy." 622 So. 2d at 948. That comment, however, does not rise to the level of finding a "fundamental right" to education. Nor does it establish a fundamental right to a particular level of educational funding. The entire Glasser opinion makes it clear that the Legislature has considerable discretion in interpreting the constitutional directive in article IX, section 1 and that the courts will give the Legislature great deference. As Justice Kogan noted in his concurrence, "although the Constitution requires a uniform system of free public schools, it stops short of declaring public education to be a fundamental right." 622 So. 2d at 950 n.8 (Kogan, J., specially concurring) (emphasis added).

Interestingly, at oral argument, the Sarasota County School Board asked the Glasser Court to find that education is a fundamental right. Staros, infra note 15, at 514 n.140. The Court made no such finding in its opinion upholding the constitutionality of the Florida Education Finance Program.

> declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; [iii] some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; [iv] there is some 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; [v] the antagonistic and adverse interest[s] are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity. These elements are necessary in order to maintain the status of the proceeding as being judicial in nature and therefore within the constitutional powers of the courts.

59 So. 2d at 639 (emphasis added).

Even though the Legislature has expressed its intent that the declaratory judgment act be broadly construed, there still must exist a justiciable controversy between the parties. Otherwise, any opinion on a statute's validity would be merely advisory and improperly considered in a declaratory action. Martinez v. Scanlan, 582 So. 2d 1167, 1174 (Fla. 1991); Ervin v. City of North Miami Beach, 66 So. 2d 235, 236 (Fla. 1953); Ready v. Safeway, 24 So. 2d 808, 809 (Fla. 1946). Scarce judicial resources should not be spent giving advisory opinions, other than those authorized by the Florida Constitution under article IV, section 1(c).

Here, plaintiffs have not pled that the 1994 General Appropriations Act, Chapter 94-357, Laws of Florida, is unconstitutional. Nor have they pled that any of the public

education provisions in Title XVI, chapters 228-239, Florida Statutes, are unconstitutional. Instead, as the lower tribunal commented, "they assert the judicially unmanageable claim that the entire system is holistically defective and underfunded." R. 305.

Accepting plaintiffs' interpretation of the pleadings, three of the essential elements required in May are missing. First, there is no bona fide, actual, practical need for the declaration (i.e., no demand for more money and no demand that any law be declared unconstitutional). Second, the declaration would not deal with a present, ascertained or ascertainable state of facts (i.e., no specific legislation is being challenged). Third, the relief sought is merely seeking legal advice (i.e., whether education is a fundamental right).

Without a challenge to any specific legislation, plaintiffs do not present a justiciable controversy; rather they ask for legal advice prohibited by Martinez, Ervin, and May. Divorced from the possibility of any practical, enforceable relief (e.g., mandating a larger appropriation or declaring a statute unconstitutional), plaintiffs seek only an advisory opinion.

In Askew v. City of Ocala, 348 So. 2d 308 (Fla. 1977), the City and Marion County School Board sought a declaration permitting them to conduct future meetings with their attorney to discuss pending litigation in private, notwithstanding the state sunshine law. The court concluded that the complaint did not

present a justiciable controversy and did not state a cause of action.

> [C]ourts have no power to entertain a declaratory judgment action which involves no present controversy as to the violation of the statute, and where the judgment sought will not constitute a binding adjudication of the rights of the parties.

348 So. 2d at 310. Critically, the Court found that

> there exists between respondents and the named petitioners no present dispute, only a desire by these public officials to meet in the future privately with their attorneys and to ward off possible consequences. It seems to us that respondents really seek judicial advice which is different from that advanced by the Attorney General and the state attorney.

(Emphasis added).

Here, accepting plaintiffs' argument at face value, they are no different than the Askew plaintiffs. There is no present controversy concerning specific legislation. There is no demand for binding adjudication (e.g., to declare a statute unconstitutional). In the end, there is only the plaintiffs' desire to have certain abstract rights promulgated. Just as in Askew, plaintiffs here fail to state a cause of action because, if they are really only seeking a declaration, they do not present a justiciable controversy but merely seek judicial advice.

Trial courts grant declaratory relief within their discretion. North Shore Bank v. Town of Surfside, 72 So. 2d 659, 661-62 (Fla. 1954). Plaintiffs must show clear error to obtain

reversal. Kelner v. Woody, 399 So. 2d 35 (Fla. 3d DCA 1981); City of Miami v. Butcher, 303 So. 2d 378 (Fla. 3d DCA 1974). Here, the trial court found that plaintiffs failed to allege a legal basis for declaratory relief. Plaintiffs have not shown an abuse of discretion or clear error, and thus have not met their burden for reversal.

POINT III -- ARTICLE IX, SECTION I ONLY MANDATES A "UNIFORM SYSTEM OF FREE PUBLIC SCHOOLS," NOT AN ENTITLEMENT TO A PARTICULAR LEVEL OF FUNDING.

The plain language and history of article IX, section 1 demonstrate that it only requires the Legislature to create a uniform system of free public schools.

> 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.

Article IX, section 1 does not say that "provision shall be made by law for a uniform and adequate system of free public schools."[14] Plainly, the Legislature's sole obligation under article IX, section 1 is to enact appropriate legislation to insure the establishment of a free public school system that is

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[14] Plaintiffs ask the Court to read article IX, section 1 "without adjectives and adverbs," Initial Brief at 12, or to read it so that "adequate provision" modifies the phrase "free public schools" rather than "uniform." Plaintiffs misplace the modifier and thus torture the constitutional syntax. See Glasser, 622 So. 2d at 949 ("This court has no authority to 'read out' . . . words . . . . We must assume that the framers chose those words for some reason." (Barkett, J., concurring with Shaw and Harding, J.J.)).

uniform. In point: the term "provision" in article IX, section 1 refers to enactment of "statutes," not "funding."

The framers of the Constitution must be presumed deliberately to have chosen the present syntax of article IX, section 1. In so doing, the framers specifically did not impose a duty upon the Legislature to appropriate funds at any particular level. This Court has never read article IX, section 1 as an "adequacy and uniformity" clause. See Glasser, 622 So. 2d at 950 (commenting that article IX, section 1 is a "uniformity clause" which "manifestly gives authority to the Legislature to take steps to ensure uniformity") (Kogan, J., specially concurring)).

The legislative history of article IX, section 1 reinforces the view that it only mandates uniformity.[15] All Florida Constitutions since 1868 have included an article relating to a system of public schools.

The 1868 Constitution expressly made public education a "paramount duty of the State" and required the State to "make ample provision for the education of all children." Fla. Const. of 1868, art. VIII, § 1. The 1868 Constitution also included a separate requirement that the Legislature provide a uniform system of public free schools. Id., art. VIII, § 2.

The 1885 Constitution provided:

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[15] For a thorough discussion of the history of the Florida Constitution's education article, see Barbara J. Staros, School Finance Litigation in Florida: A Historical Analysis, 23 Stetson L. Rev. 497, 500-505 (1994).

> The Legislature shall provide for a uniform system of free public schools, and shall provide for the liberal maintenance of the same.

Fla. Const. of 1885, art. XII, § 1 (emphasis added). Significantly, the phrase "paramount duty" was deleted from the Constitution of 1885; the phrase "uniform system" was retained.[16] The Constitution of 1968 deleted the "liberal maintenance" clause as it applied to K-12 education, and added a new section requiring the "maintenance of institutions of higher learning and other public education programs."[17]

A significant change in constitutional language is presumed to be intentional and is presumed to be intended to have an effect different from the earlier language. State v. Creighton, 469 So. 2d 735, 739 (Fla. 1985).

The 1978 Constitution Revision Commission proposed amending Article IX, section 1 to impose specific duties on the Legislature.[18] However, the proposal was rejected by voters in

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[16] See Staros, supra note 15, at 501.

[17] The change concerning the word "maintenance" and the phrase it modifies was done at the behest of the legislature. The Constitution Revision Commission recommended language that would have left the word "maintenance" modifying the phrase "uniform system of free public schools." The wording was changed by the legislature before the proposed constitutional revision was submitted to the voters. Staros, supra note 15, at 503.

[18] The proposal stated:

> The primary purposes of elementary and secondary education in this state shall be to

(continued...)

the 1978 general election, as were all the proposals recommended by the Commission.[19]

The history of article IX, section 1 thus reinforces the conclusion that must be drawn from its plain text. The only constitutional obligation of the Legislature is to make adequate provision by law for a uniform system of free public schools.[20] A requirement for a particular level of educational funding cannot be read into article IX, section 1, and is belied by its history. The current constitutional provision simply does not obligate the Legislature to appropriate any particular amount of state revenue for education.

POINT IV -- DECISIONS FROM OTHER STATES ARE INAPPOSITE.

In support of their appeal, plaintiffs cite numerous cases from other states. Approximately 34 states have faced challenges to their education finance systems. The majority have upheld the

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[18](...continued)

> develop the ability of each student to read, communicate and compute and to provide an opportunity for vocational training. By general law, provision may be made for special instruction to aid disadvantaged students with special learning needs.

Staros, supra note 15, at 503 n.41.

[19] Id. at 503-05.

[20] Similarly, article II, section 7 of the Florida Constitution states: "Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise" (emphasis added).

constitutionality of the systems at issue. In a minority, courts have found the systems unconstitutional.

Decisions from other states are neither controlling nor persuasive. This is because other state's cases are categorically different from the instant case in two major respects.

The first difference is plain language.[21] Scholars have sorted state constitutions into four categories based on the level of educational duty imposed on the legislature by the constitutional text.[22] Category I includes those states that merely require the legislature to provide a system of free public schools without any requirement of uniformity. Category IV, by contrast, includes those constitutions that make education a paramount duty of the state. Florida -- a Category II state -- lies between these two extremes. Certainly, constitutions like Washington's, which make education "the paramount duty of the state," and those that guarantee a "thorough and efficient education" such as New Jersey's, are more likely to become

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[21] Defendants do not agree with plaintiffs' statement that "[i]t would serve no useful purpose to attempt to analyze these varying constitutional provisions for semantic content in order to arrange them along a scale of relative strength." Initial Brief at 41. Contrariwise, the plain words do count, and defendants would urge that the varying constitutional treatments of public education in the "laboratory" of the states is legally significant.

[22] Those categories are discussed in Staros, supra note 15, at 498-99 (discussing William E. Thro, To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation, 75 Va. L. Rev. 1639 (1989)).

subject to rigorous court analysis than Category II constitutions.

The second major distinction between this case and those from other jurisdictions is the issue of adequacy versus uniformity.[23] Every case in which school funding systems were declared unconstitutional involved an appalling disparity between educational opportunities available to students in "property

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[23] A number of out-of-state cases involve equal protection challenges. Defendants' review of those cases indicates that equal protection has been treated as the functional equivalent of uniformity. Eight courts that struck down education financing systems used an equal protection analysis and held that children in property-poor districts were denied equal protection in comparison to children in property-rich districts.

Plaintiffs here have not stated a cause of action under the Florida equal protection clause. As plaintiffs concede, Initial Brief at 44, it is difficult to conceive of an equal protection violation within a uniform system such as Florida's. Because uniformity and equal protection are functional equivalents, and because Florida's education finance system has already withstood numerous challenges to its uniformity, see supra note 5, the equal protection issue in Florida should be considered settled.

In any event, Plaintiffs fail to allege a prima facie case for an equal protection violation because they have not identified any class of students in Florida that are being treated differently from any other class. There is no claim that African-American students, for instance, are being treated differently than Caucasian students, or that female students are being treated differently than male students. Without a discriminated class, there is no equal protection claim. Haber v. State, 396 So. 2d 707, 708 (Fla. 1981); see Brown v. Board of Education, 347 U.S. 483, 493 (1954). Moreover, even if the plaintiffs had identified a class, they would only be entitled to rational basis review, not strict scrutiny review, because they cannot identify a "suspect" class, such as race, and cannot implicate a fundamental right, such as procreation. Lite v. State, 617 So. 2d 1058, 1060 n.2 (Fla. 1993); see Virginia v. Love, 388 U.S. 1, 12 (1967).

rich," compared to those in "property poor," school districts. Florida's educational financing program, by contrast, compensates for disparities in local property values by allocating funding on a per pupil basis that guarantees substantially equal funding to each student regardless of residence. See supra note 3.

Thus, since 1973, when the Legislature enacted the Florida Education Finance Program, Florida achieved what other states were required to accomplish in the cases that found educational financing systems unconstitutional.[24/]

Consequently, not a single out-of-state case is relevant or controlling here because there is no case where a state was required to increase funding within an already uniform educational system. In other words, no case involves a successful challenge to a school system's adequacy divorced from a challenge to the uniformity of financing within that system.[25/]

[24/] Because the out-of-state cases address the education financing systems -- not the total amount of money appropriated within those systems -- the issue of separation of powers is seldom addressed. The courts simply were not required to determine the necessary level of appropriations, but only to strike down legislation which created a lack of uniformity.

[25/] Plaintiffs' suggestion to the contrary, Initial Brief at 38-39 nn. 8-9, is wrong. Of the 16 cases cited, only Idaho allowed plaintiffs to attempt to plead inadequate funding within a uniform system. Idaho Schools for Equal Educational Opportunity v. Idaho State Bd. of Education, 850 P.2d 724, 730, 733-34 (Idaho 1993) ("Should the plaintiffs be able to prove that they cannot meet the standards established by the State Board of Education, noted above, with the money provided under the current funding system they will have presented an apparent prima facie case that the State has not established a system of thorough

(continued...)

POINT V -- THE INDIVIDUAL SCHOOL BOARD MEMBERS DO NOT HAVE TAXPAYER STANDING.

The individual school board members claim standing based on their status as taxpayers. They rely, mistakenly, on Department of Education v. Lewis, 416 So. 2d 455 (Fla. 1982), and Jones v. Department of Revenue, 523 So. 2d 1211 (Fla. 1st DCA 1988). Initial Brief at 30-31.

Generally, a taxpayer has standing to bring a declaratory action to restrain the unlawful exercise of the state's taxing or spending authority only upon a showing of special injury which is distinct from that sustained by every other taxpayer. Rickman v. Whitehurst, 73 Fla. 152, 74 So. 205, 207 (1917). The Rickman rule

> is based on the sound policy ground that without a special injury standing requirement, the courts would in all likelihood be faced with a great number of frivolous lawsuits filed by disgruntled taxpayers who, along with much of the taxpaying public these days, are not entirely pleased with certain of the taxing and spending decisions of their elective representatives. It is felt that absent some

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[25](...continued)
education."). Unlike Idaho, the plaintiffs here have not alleged that they cannot satisfy the state-mandated education standards; rather, they state generally that students are not receiving an "adequate" education. Plaintiffs do not propose a standard, however, with which to measure a constitutionally adequate education.

Amici too recognize that there are no "pure" adequacy cases. Amici Brief at 21 ("The highest courts in several states overturned their school financing schemes, based at least in part on a theory that the specific substantive level of education required by the education clause in their constitutions were not met." (emphasis added)).

> showing of special injury as thus defined, the taxpayer's remedy should be at the polls and not in the courts. Moreover, it has long been recognized that in a representative democracy the public's representatives in government should ordinarily be relied on to institute the appropriate legal proceedings to prevent the unlawful exercise of the state or county's taxing and spending power.

Paul v. Blake, 376 So. 2d 256, 259 (Fla. 3d DCA 1979). Plaintiffs here have not alleged any "special" injury.

The one exception to the Rickman rule, recognized in Lewis and Jones, provides:

> A taxpayer may institute such a suit without a showing of special injury if he attacks the exercise of the state or county's taxing or spending authority on the ground that it exceeds specific limitations imposed on the state or county's taxing or spending power by the United States Constitution or the Florida Constitution.

Paul v. Blake, 376 So. 2d at 259; see also Department of Revenue v. Markham, 396 So. 2d 1120, 1121-22 (Fla. 1981).

Unlike the plaintiffs in Lewis and Jones,[28] the plaintiffs here do not suggest that the state is taxing or spending in excess of its constitutional authority. To the contrary, they argue that the state should spend more money, and presumably increase taxes if necessary to pay for the increased spending. Thus the exception to the Rickman rule recognized in Lewis and Jones is not applicable because plaintiffs seek a declaration that the Legislature must appropriate more money for educational

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[28] In both Lewis and Jones, the courts found that the plaintiffs fell within an exception to the Rickman rule.

purposes, not a declaration that the Legislature has exceeded its taxing or spending powers. The school board members do not have taxpayer standing.

POINT VI -- THE SCHOOL BOARDS LACK STANDING TO BRING THIS SUIT IN THEIR OFFICIAL CAPACITIES.

The general rule in Florida is that statutes affecting the duties of state officers are presumed valid, and such officers do not have standing to challenge it. Markham, 396 So. 2d at 1121.[27] The Court has recognized an exception to the general rule where "a public official is willing to perform his duties, but is prevented from doing so by others." Reid v. Kirk, 257 So. 2d 3, 4 (Fla. 1972).

The policy behind this rule is that government officials should not be permitted to challenge laws they are bound to uphold. As the Court stated in Barr v. Watts:

> The people of this state have the right to expect that each and every such state agency will promptly carry out and put into effect the will of the people as expressed in the legislative acts of their duly elected representatives. The state's business cannot come to a stand-still while the validity of any particular statute is contested by the very board or agency charged with the responsibility of administering it and to whom the people must look for such administration.

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[27] See also Santa Rosa County v. Administration Commission, 642 So. 2d 618 (Fla. 1st DCA 1994), review granted, 651 So. 2d 1195 (Fla. 1995).

70 So. 2d 347, 351 (Fla. 1953); see also Markham, 396 So. 2d at 1121 ("Disagreement with a constitutional or statutory duty, or the means by which it is to be carried out, does not create a justiciable controversy, or provide an occasion to give an advisory judicial opinion.").

Recognizing their limited ability to challenge legislation in their official capacities, the school boards attempt to invoke the Reid v. Kirk exception by alleging that they "are deprived of the ability to carry out their constitutional and statutory responsibility to provide adequate educational services for their students." Initial Brief at 31-33; Complaint ¶76.[28/]

Under the school boards' theory, however, merely alleging inadequate funding automatically would establish standing. This represents an unwarranted extension of Reid v. Kirk and is unsupported by case law.

As discussed above, article IX, section 1 is not "self-executing." See supra note 8. School boards have no independent authority to levy taxes or appropriate funding for education. Thus, they are not being prevented from carrying out their duties; rather, their lawsuit falls outside Reid v. Kirk ipso facto. Plaintiffs' attempted extension of the law opens a Pandora's Box of taxpayer funded, inter-government litigation

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[28/] Sections 230.01 and 230.031(2), Florida Statutes, vest responsibility in the school boards to operate, control, supervise and administer the public schools. The school boards have not alleged sufficient facts to support their conclusory allegation that they are prevented from performing such duties.

brought by disgruntled public officials who are unhappy with the funding that has been appropriated for their programs.

Moreover, as expressed in Barr, Floridians' expectations that government officials will promptly carry out their will should not be frustrated, nor should the state's business be allowed to come to a standstill, because of infighting among government officials.

For the sound policy reasons expressed in Rickman and Barr, this Court should maintain the limited standing of public officials and not extend the Reid exception as plaintiffs would have this Court do.[29] The school boards should not be allowed to bootstrap themselves into standing merely by alleging a lack of funding.[30]

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[29] Although the school boards cite Gindl and Glasser as further authority for their standing, neither case is helpful. While Gindl did uphold the trial court's finding that the school boards had standing, the Court offered no rationale on the standing issue. In Glasser, as the school boards admit, the Court never addressed standing. Thus, neither case has precedential value in this area.

[30] The school boards are currently spending precious tax dollars to pursue this litigation. The standing of the school boards to sue in their official capacities and to use those limited resources for litigation must be determined by this Court (even if other parties have standing to pursue the litigation) so that these limited tax dollars can be put to their appropriate educational use, and to prevent other public officials from inappropriately using tax dollars to sue in their official capacities, when they in fact do not have standing to do so.

POINT VII -- THE SENATE AND THE HOUSE ARE PROPER PARTIES.

The complaint names Pat Thomas, as President of the Florida Senate, and Bolley L. Johnson, as Speaker of the House of Representatives, as defendants in this case.[31] The trial court found that neither had authority "to bind their respective houses of the Legislature in a civil action of this nature, nor are they authorized to sue or be sued on behalf of either house." Dismissal Order at 7.

Defendants agree with the trial court that the President and the Speaker are not the proper parties in this case. However, the Florida Senate and the Florida House of Representatives, acting through their respective presiding officers, are proper parties.

The President and the Speaker, as the presiding officers, have the authority to act on behalf of their respective houses of the legislature in a civil action. Rule 2.4, Rules of the Florida House of Representatives, specifically authorizes the Speaker of the House to "initiate, defend, intervene in, or otherwise participate in any suit on behalf of the House." As plaintiffs note, Initial Brief at 8, the House has regularly participated in litigation where its interests are at stake. While the Senate does not have a similar rule, the Senate has also regularly participated in litigation where its interests are

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[31] The current President of the Senate is James A. Scott; the current Speaker of the House is Peter R. Wallace.

at stake. See, e.g., The Florida Senate v. Graham, 412 So. 2d 360 (Fla. 1982).

Traditionally, the party in suits against the Legislature is the institution, not the President or the Speaker. Defendants do not object to plaintiffs' technical oversight, but submit that the Court may wish to amend the style of the case to accurately reflect the historical nomenclature.

CONCLUSION

Plaintiffs want the Court to order the Legislature to appropriate more money. If it does, the Court will become, de facto, the Legislature. For this reason, and the other reasons presented above, the Order on review should be AFFIRMED.

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