IN THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA
FIRST DISTRICT

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

Plaintiffs/Appellants,

DCA Case No. 16-2862

vs.

L.T. No. 09-CA-4534

FLORIDA STATE BOARD OF EDUCATION;
et al.,

Defendants/Appellees,

and

CELESTE JOHNSON; et al.,

Intervenors/Defendants/Appellees.
_____/

INTERVENORS-DEFENDANTS-APPELLEES' RESPONSE TO APPELLANTS' RULE 9.125 SUGGESTION

Intervenors-Defendants-Appellees (hereinafter "Intervenor-Appellees") respond in opposition to Appellants' Suggestion that this court certify this case for immediate resolution by the Supreme Court pursuant to Fla. R. App. P. 9.125 and state as follows.

While there is no question that this case is an important one, there is nothing about the case that requires immediate review by the Supreme Court under Florida Rule of Appellate Procedure 9.125. As Appellants note in their Suggestion for Certification at page 2, this court previously certified the core question in this case

to the Florida Supreme Court in *Haridopolos v. Citizens for Strong Schools, Inc.*, 81 So.3d 465, 473 (Fla. 1st DCA 2012), And the Florida Supreme Court declined review. *Haridopolos v. Citizens for Strong Schools, Inc.,* 103 So. 3d 140 (Fla. Sept. 11, 2012). Nothing in the intervening period has enhanced the immediacy of a need for Supreme Court review; indeed, if anything it is clear that the need for immediate review is reduced by the fact that the trial court on remand has issued a thorough and comprehensive opinion rejecting all claims of the Appellants, after extensive discovery and a four-week trial.

This court grants certification when there is an external event, like an election, that creates a need for a quick decision. Here, there is no such exigency. This is not a case like, for example, *Harris v. Coalition to Reduce Class Size*, 824 So. 2d 245, 247 (Fla. 1st DCA 2002), where this court determined that circumstances existed that required immediate resolution of issues by the Supreme Court. In *Harris*, this court found that the trial court's order would have thwarted the legislature's intent to inform the electorate of the fiscal impact of the pending class-size amendment of the Education Article of the Constitution. Clearly, it was the fact that the amendment was on the ballot in the impending election that lent immediacy to the case and triggered certification. Similarly, in *ACLU of Florida, Inc. v. Hood*, 881 So. 2d 664 (Fla 1st DCA 2004), this court granted certification of

an issue pertaining to another proposed constitutional amendment that was being placed on the ballot.

In both *Harris* and *Hood* it was the coming statewide elections that necessitated not allowing the normal appellate process to run its course. Here, there is no similar justification for truncating the appellate process. The system of public school funding is structurally the same as when the Supreme Court declined to intervene in 2012 and, indeed, substantially the same as it has been since shortly after the Education Article was amended in 1998.

Moreover, unlike the situation four years ago when this court certified the issue at the core of this dispute to the Supreme Court, the current situation is that a highly experienced trial judge has supervised exhaustive discovery, conducted a four-week trial, and determined that the education system is constitutional in all respects challenged by the Appellants. The status quo does not justify truncating the appellate process – that process should be allowed to run its course.

As Judge Reynolds made clear in his well-reasoned decision below, the evidence adduced by the parties demonstrates that, contrary to the experience of most, if not all, of the other states' public education systems, the performance of Florida's public school system has improved dramatically over time, particularly with regard to low-income and minority students. See App. A to Appellants' Suggestion for Certification (Judge Reynolds' Final Judgment). Of particular

interest to the Intervenor-Appellees, whose children use those programs, he found no negative impact on the uniformity or efficiency of the state system of public schools due to the school-choice programs and that it is reasonably likely that they improve the quality and efficiency of the entire system. App. A at 15.

In addition, contrary to the impression created by the Appellants' Suggestion, this case has become substantially more complex as a result of their amending their complaint again after this court's remand. As a result, their appeal covers a number of issues not present when this case was last before this court, and makes this appeal a poor vehicle for certification. As explained in more detail below, these additional issues include:

- Appellants' standing to challenge the Florida Tax Credit Scholarship program;
- Whether Appellants properly added an independent constitutional challenge to the tax credit program to their complaint;
- Whether Appellants properly added an independent constitutional challenge to the McKay Scholarship Program to their complaint.

These procedural issues should be addressed by this court in the first instance.

In their Second Amended Complaint, Appellants attempted to add claims that the state's implementation of various other programs also violated the Education Article. Appellants included many new factual allegations concerning

Florida's school-choice programs, including the charter school program, the Florida Tax Credit Scholarships program ("FTC"), and the John M. McKay Scholarship for Students with Disabilities Program. They also included a claim concerning the constitutional requirement for a high quality Pre-Kindergarten Learning Opportunity. Although Judge Reynolds allowed the inclusion of the claims against the charter school program, he held that Appellants had not properly pled independent constitutional claims against the FTC and McKay Programs. He also held that the Appellants lacked standing to challenge the FTC program because that program does not involve appropriations, only provision of tax credits to corporations. He also severed the claim against the Pre-Kindergarten program, with permission to the Appellants to refile as an independent action, in an Amended Order of Severance and Denial of Motion to Dismiss filed January 27, 2015 (see App. A at 5).

Appellants' Notice of Appeal challenges not only Judge Reynolds' Final Judgment but also his Orders concerning the lack of standing regarding the FTC program. The identical standing issue is the subject of an appeal in a separate lawsuit currently before this court, *McCall v. Scott*, 2014 CA 002282 (argued May 10, 2014). Certification of Appellants' appeal would put this issue before the Supreme Court at the same time this court is considering an identical issue.

Intervenor-Appellees expect Appellants to also challenge the aspect of Judge Reynolds' decisions concluding they did not properly plead independent violations of the Constitution with respect to the FTC and McKay programs as well. Declining to certify the case to the Supreme Court prematurely will allow this court to hear all these issues and possibly prune the case down prior to any subsequent Supreme Court review. "In light of all the facts and circumstances of the case," *League of Women Voters v. Detzner*, 178 So. 3d 6, 8 (Fla. 1st DCA 2014), this case is not a good candidate for certification.

In summary, there is no event looming, such as an impending election, that requires this court to short circuit the normal appellate process. Although the Appellants continue to believe that the state is unconstitutionally depriving the public school system of adequate resources to the detriment of their clients and many of Florida's schoolchildren, Judge Reynolds, an experienced trial judge, has exhaustively evaluated their claims and found them wanting. Intervenor-Appellees respectfully request that this court decline to certify this case to the Supreme Court.

RESPECTFULLY SUBMITTED this 6th day of July, 2016.

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*Motions for Admission *Pro Hac Vice*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of July, 2016, a true and correct copy of the foregoing INTERVENORS-DEFENDANTS-APPELLEES' RESPONSE TO APPELLANTS' RULE 9.125 SUGGESTION was filed with the clerk of court and served on the following counsel of record:

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