IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

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

Plaintiffs/Appellants,

vs.

FLORIDA STATE BOARD OF EDUCATION, et al.,

Case No. 1D16-2862
L.T. Case No. 09-CA-4534

Defendants/Appellees,

and

CELESTE JOHNSON, et al.,
Intervenors/Defendants/Appellees.

ON APPEAL FROM THE SECOND JUDICIAL CIRCUIT, LEON COUNTY, FLORIDA

INITIAL BRIEF OF PLAINTIFFS/APPELLANTS

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Plaintiffs/Appellants Citizens for Strong Schools, Fund Education Now, Eunice Barnum, Janiyah Williams, Jacque Williams, Sheila Andrews, Rose Nogueras, and Alfredo Nogueras will be referred to as Parents. While not all are technically parents (grandmother, three parents, two students, and two citizen organizations), Parents is a fair nomination of their interests.

Defendants/Appellees Florida State Board of Education, Speaker of the Florida House of Representatives Steve Crisafulli, Senate President Andy Gardiner, and Florida Commissioner of Education Pam Stewart, all sued in their official capacities, will be referred to as the State.

Defendants-Intervenors/Appellees Celeste Johnson, Deaundrice Kitchen, Kenia Palacios, Margot Logan, Karen Tolbert, and Marian Klinger will be referred to as Intervenors.

Citations to the Record and Supplemental Record, will be to the Record and page number, e.g., R.534.

Citations to the trial transcript will be to the transcript volume, page and line, e.g., Tr.v.6, 791:18-792:11.

Citations to the trial exhibits, which were sent by the lower court via separate CD, will be to the Exhibit number and page therein, e.g., Ex. 4040, at 45.

The following chart of acronyms will assist the Court in reviewing the brief:

CRC	Constitution Revision Commission
DA	Differentiated Accountability Program
ELL	English Language Learners
ESE	Exceptional Student Education
FCAT	Florida Comprehensive Assessment Test
FCAT 2.0	Florida Comprehensive Assessment Test, 2d version
FDOE	Florida Department of Education
FEFP	Florida Education Finance Program
FRL	Free and Reduced Lunch
IEP	Individualized Educational Program
NAEP	National Assessment of Educational Progress
PECO	Public Education Capital Outlay
SBE	State Board of Education
Title I	School meeting federal definition of high poverty

STATEMENT OF THE CASE AND FACTS

I. Statement of the Case

Filed in 2009, Parents seek a declaration that the State is failing to meet its paramount duty to provide a uniform, efficient and high quality system of free public schools that allows students to obtain a high quality education, as required by Article IX, Section 1(a) of the Florida Constitution.

The State filed a motion to dismiss that argued that Parents' claim raised non-justiciable political questions. (R.072-74.) The trial court denied the motion. (R.103-08.) The State filed a writ of prohibition in this Court, which en banc denied the petition but certified a question to the Florida Supreme Court. *Haridopolos v. Citizens for Strong Schs., Inc.*, 81 So. 3d 465, 473 (Fla. 1st DCA 2012). The Florida Supreme Court declined review. *Haridopolos v. Citizens for Strong Schs., Inc.*, 103 So. 3d 140 (Fla. 2012).

Parents subsequently filed a second amended complaint to update the factual allegations and add a claim challenging the constitutionality of the State's pre-kindergarten program. (R.130-64.) The trial court severed the pre-kindergarten claim. (R.223-24.) The trial court permitted six parents interested in the Florida Tax Credit (FTC) program and the John M. McKay Scholarship Program for Students with Disabilities (McKay Program) to intervene as Defendant-Intervenors. The court granted the Intervenors' motion for judgment on the pleadings with respect to the FTC program, finding that Parents lacked standing to assert any claim because

the FTC program does not involve the appropriation of public funds and Parents could not show any special injury. (R.2539-41.)

The trial court conducted a four-week bench trial and rendered final judgment for the State (R.3371-99), and included a 175-page findings of fact appendix (R.3400-3578). This appeal was timely filed. (R.3579-82.)

II. Statement of the Facts

A. Conditions Necessary for Student Achievement

Hundreds of thousands of children fail to pass required statewide assessments (*see infra* Facts § B), thousands attend persistently low-performing schools (Facts § C), and achievement varies dependent on race, ethnicity, disability, geography or socioeconomic factors (Facts § B). The trial court found that school districts have a duty to respond to children's needs at whatever level the children are at in order to make educational opportunities meaningful. (R.3413 ¶32.) The majority (58%) of public school students receive free or reduced lunches (FRL),[1] a proxy for poverty.[2] (R.3404 ¶2.) Many come to school not ready to learn, without having the background that more privileged children have.[3] (R.3413 ¶33.) There is a clear disparity in the performance of economically disadvantaged students versus those who are not economically disadvantaged.[4] (*Id.*) Students living in poverty

[1] Exs. 1980, 1982, 3355. Tr.v.3, 319:14-19.
[2] Tr.v.3, 375:8-11; v.8, 1203:6-10; v.9, 1352:13-18; v.12, 1799:16-17; v.13, 1970:13-14; v.19, 2842:1-6; v.29, 4396:24-25; v.33, 4965:12-13.
[3] Tr.v.19, 2773:23-2774:8; v.13, 1889:19-1890:8.
[4] Tr.v.6, 761:4-25; *also see* Ex. 5343.

require a variety of additional resources in order to succeed at school.[5] (*Id.* ¶34.) Poverty is not an excuse as children can achieve regardless of socio-economic background, but extra resources are needed to provide these students with an opportunity to achieve, which state funding does not provide.[6] (R.3414 ¶35.)

In addition to effective teachers, a team of professionals are necessary to support the academic and emotional needs of low performing students (R.3415 ¶38): behavior specialists (*id.* ¶39),[7] mental health counselors (*id.* ¶40),[8] social workers (*id.* ¶41),[9] guidance counselors (R.3416 ¶42),[10] academic coaches (*id.* ¶43),[11] class aides or paraprofessionals (*id.* ¶44),[12] nurses (*id.* ¶45),[13] tutors (*id.* ¶46),[14] and media specialists (*id.* ¶47).[15] Smaller class sizes, small group instruction, and individualized instruction are vital for providing the intensive instruction that is necessary for students who are under-performing.[16] (R.3417 ¶48.) Sufficient instructional time, extended day (before and after school) and

[5] Tr.v.5, 596:21-597:6; v.6, 769:25-770:11; v.19, 2774:9-19; v.13, 1892:15-1893:7.
[6] Tr.v.5, 597:7-12.
[7] Tr.v.6, 788:3-13; v.9, 1287:25-1288:12; v.13, 1891:10-14, 1896:6-1898:6-8, 1929:14-24.
[8] Tr.v.6, 742:16-23, 770:12-20, 788:14-16; v.7, 1072:4-1073:6; v.9, 1291:9-24; v.13, 1890:9-22, 1893:21-1894:11, 2013:16-24.
[9] Tr.v.6, 742:16-23, 771:10-772:18, 787:15-788:2; v.7, 984:23; v.9, 1288:21-1289:11; v.13, 1900:5-14; v.22, 3234:16-3235:18.
[10] Tr.v.6, 788:25-789:25; v.7, 1076:9-23; v.9, 1287:13-15.
[11] Tr.v.5, 632:22-633:5; v.6, 742:5-15, 790:16-791:17; v.7, 1073:7-21; v.9, 1288:13-20.
[12] Tr.v.6, 790:1-15; v.9, 1287:20-24; v.13, 1898:9-1899:25.
[13] Tr.v.6, 742:16-23; v.7, 984:23-985:11.
[14] Tr.v.7, 1074:7-16.
[15] Tr.v.16, 2425:9-17; 2465:16-23.
[16] Tr.v.5, 597:13-20, 632:22-633:5; v.6, 742:5-15, 773:23-774:6, 786:23-787:11, 790:1-15; v.7, 1059:11-24; v.13, 1899:2-25, 1903:21-1904:23; v.18, 2726:16-2727:25; v.20, 3010:21-3011:8; v.21, 3151:3-7; v.22, 3241:21-3242:14.

summer programs (*id.*) are important for children in poverty (*id.* ¶49).[17] ELL students also need small classes, additional instructional time (including summer camps), and individualized attention.[18] Teachers need time and professional development to learn new standards.[19] (*Id.* ¶50.) Constant changes to standards impede teachers' ability to learn and teach the new standards.[20] (*Id.*; R.3431-33 ¶¶91-96.) Students in poverty are primarily affected by changing standards. (R.3433 ¶95.) The benefits of differentiated classroom instruction is reflected in Florida law. § 1008.25(7)(b), Fla. Stat. (2016). Providing sufficient instructional time[21] and support personnel[22] cost money. (R.3418 ¶C.)

B. Lack of Proficiency and Disparities in Achievement

Whether the State has provided a high quality education can be measured by the results of state assessments (R.3437 ¶108), which align with the content standards established by the Florida Legislature and the SBE. (R.3419-20 ¶¶53-56.) § 1000.03(5)(c). Content standards define what children should be taught at each grade level for each subject area and what children should know and understand by the end of the year.[23] (R.3421 ¶¶55,58.) Fla. Admin. Code R. 6A-1.09401. The purpose of uniform content standards is to

[17] Tr.v.2, 104:19-105:7; v.5, 597:13-20; v.6, 742:5-15, 780:13-781:22, 815:7-11; v.7, 1060:14-1061:3; v.9, 1284:20-24; v.13, 1892:9-14; v.16, 2455:9-25; v.22, 3234:16-20; v.28, 4294:23-4295:5.
[18] Tr.v.18, 2703:14-2704:8, 2706:17-21, 2707:1-4, 2712:1-23, 2722:10-2723:24.
[19] Tr.v.6, 775:3-776:11, 816:8-817:22, 879:22-880:10; v.9, 1284:24-1285:2; v.22, 3234:16-23.
[20] Tr.v.9, 1278:22-1280:3.
[21] Tr.v.9, 1285:12-17.
[22] Tr.v.5, 597:21-598:8; v.6, 791:18-793:4; v.8, 1076:24-1077:1; v.18, 2723:18-2724:9; v.28, 4282:19-24.
[23] Tr.v.5, 653:20-654:13; v.30, 4610:12-20.

measure whether education is appropriate, whether it is standard across the state and how students are performing. (R.3420 ¶¶54-56.) Data from the state accountability system measure whether the State is allowing all students to obtain a high quality education. (R.3438 ¶108.) Commissioner Stewart agrees that if the standards are mastered, students have obtained a high quality education.[24]

Part of the State's definition of a high quality education includes standards for art education.[25] (R.3429 ¶¶82-82.) Yet there are disparities in the provision of arts education across the state due to funding. (R.3429-30 ¶84.) Some school districts discontinued arts education due to lack of financial resources. (R.3430 ¶86.) Some districts had to seek voter approval for arts funding, but in other districts the referenda failed. (R.3430-31 ¶¶87-90.)

The trial court found that "the most appropriate consideration of student performance under Article IX is to examine student performance over time and in context." (R.3380.) By averaging all grades and all districts, the trial court found that student performance in the aggregate and by subgroup has improved since 1999 on state assessments. (R.3380-12; R.3483-88 ¶¶205-16.)

The court did not make any findings using district-level or grade-level data. Due to a change in standards and assessments, the court found that "it is not particularly useful to directly compare year-over-year student performance on FCAT to that on the FCAT 2.0," yet it made longitudinal comparisons it had deemed improper. (R.3484-86 ¶¶208-09, 212-13.) The court did not examine the current

[24] Tr.v.27, 4082:10-16; v.31, 4683:3-14.
[25] Ex. 3343-2, at 80414-81.

trend line on the FCAT 2.0 (2011-14) reading, which shows minimal improvement.[26] The court acknowledged that there was no progress on the FCAT 2.0 Math[27] yet explained this was due to higher performing students who instead take Algebra I EOC. (R.3485 ¶210.)

The most current results, 2014, show that in reading 58% of all students across all grades achieved Level 3 or higher,[28] which represents 667,252 students who cannot read at grade level.[29] For math, 56% of students statewide are proficient, which represents 509,196 students who did not pass the math assessment.[30]

Undisputed evidence in the record shows disparities in reading achievement by subgroup (compared to 58% for all students): 38% of Black students, 54% Hispanic students, 27% ELL,[31] 47% FRL,[32] and 37% homeless students are at grade level.[33]

There also are wide disparities among school districts. Third grade is important to examine as retention is considered for students achieving only Level 1 in Reading.[34] § 1008.25(7)(b). Tenth grade is important as Level 3 on Grade 10 Reading (or concordant score) is required for graduation.[35] (R.3446 ¶126a&b.)

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[26] *Id.* at 72026.
[27] Ex. 2907, at 72054.
[28] Ex. 2907, at 72026. Level 1 is the lowest achievement and level 5 is the highest, with Level 3 considered passing or on grade level. § 1008.34(1)(a). Tr.v.5, 599:3-12; 943:7-10; v.30, 4532:20-4533:2.
[29] Ex. 2907, at 72050.
[30] *Id.* at 72072.
[31] Ex. 2907, at 72027, 72030-31.
[32] Ex. 1833.
[33] Exs. 4320, at 123529; 3588, at 96689. Parents note the court found that homeless students' lower performance is not evidence of State not providing a high quality school system. (R.3564 ¶424.)
[34] Tr.v.5, 606:25-607:15, v.7, 966:2-4.
[35] Tr.v.27, 4092:16-4093:1.

§ 1003.4282(3)(a). In St. Johns, on the FCAT 2.0 Reading, 76% of third graders and 75% of tenth graders passed.[36] The district with the lowest overall reading proficiency rate for third graders is Hamilton with 35% of students reading at grade level,[37] and for Grade 10 Reading it is Gadsden where 26% of the students are reading at grade level.[38] The statewide average is in between with 56% of third graders and 55% of tenth graders passing.[39] St. Johns has the highest college ready rate at 55% versus Hamilton with 1%.[40]

In Math, Bradford had the lowest passing rate at 5% overall, 0% for Black students, 6% for FRL and 0% for ESE.[41] Hamilton has the lowest rate for Hispanic students at 15%.[42] Walton has the greatest achievement gap between White and Black students at 46%.[43] There also are disparities in passing the Algebra I EOC with 88% in St. Johns versus 16% in Jefferson.[44] Passing Algebra I EOC (or comparative score) is required for graduation. § 1003.4282(3)(b).

In Lafayette and Madison, ESE students have a 0% passing rate on the FCAT 2.0 Reading.[45] In 2013, 32% of students experiencing homelessness in high school passed reading compared to the 42% of FRL and 54% of overall Florida high school population.[46] Another group, ELL students, have low scores on FCAT reading and math, and

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[36] Ex. 4186.
[37] Ex. 4152.
[38] Ex. 4148.
[39] Exs. 2901, 4308.
[40] *Id.*
[41] Ex. 4065.
[42] Ex. 4085.
[43] Ex. 4127.
[44] Ex. 2929, at 72483-84.
[45] Exs. 4162 (3rd grade); 4168 (6th grade).
[46] Tr.v.2, 206:14-17; Ex. 1546.

on NAEP.[47] In 2014, only 11% of 10th grade ELL students passed the FCAT 2.0 Reading.[48]

For graduation rates, the court used "continuous improvement over time" and statewide averages, and did not examine disparities among the districts. (R.3491 ¶¶227-28.) In 2015, Franklin had the lowest graduation rate at 49%, with three other school districts below 60%. By contrast, St. Johns and three other districts had graduation rates over 90%, with Dixie the highest at 96.9%.[49]

The trial court relied on NAEP as another indicator of improvement and trend over time. (R.3381-82.) NAEP is an assessment directed by the U.S. Department of Education.[50] (R.3475 ¶189.) NAEP is not aligned to Florida's standards.[51] The court made no findings about the undisputed record evidence showing the current Proficient[52] rates for Florida, which are (2015 is most recent for Grades 4 and 8, and 2013 for Grade 12):

Test	Total %	Black %	Hispanic %	FRL %
Grade 4 Reading[53]	39	20	34	29
Grade 4 Math[54]	42	21	38	31
Grade 8 Reading[55]	30	15	26	22
Grade 8 Math[56]	26	11	22	16

[47] Tr.v.4, 496:15-497:21.
[48] Ex. 2901.
[49] Ex. 4050.
[50] In each state, on average 2,500 students in approximately 100 schools, public and private, are selected per grade, per subject assessed. Ex. 1401, at 44797.
[51] Tr.v.30, 4510:21-4511:5; Ex. 1708, at 49607.
[52] While the court cautioned that Proficient is a "high bar" (R.3476 ¶191), NAEP states that all students should reach the Proficient level; the Basic level is not the desired goal, but rather represents only partial mastery that is a step toward Proficient. Ex. 2028, at 59674.
[53] Ex. 1356.
[54] Ex. 1354.
[55] Ex. 1357. The 30% total is lower than 28 other states.
[56] Ex. 1355. The 26% total is lower than 36 other states.

Grade 12 Reading[57]	36	16	34	no data
Grade 12 Math[58]	19	8	13	no data

C. Persistently Low Performing Schools

The State uses assessment results to give an A–F letter grade to schools and districts. § 1008.34(3). The number of A and B schools decreased between 2011 to 2014, while the number of D and F schools increased during that same time period.[59] Even in an A school, there could be large numbers of students not achieving on the content standards.[60]

The SBE and Commissioner are responsible for holding schools and districts accountable for student improvement. §§ 1001.11(5), 1008.33(3)(a), 1008.345(1),(2)&(5). The DA program is the State's system of school improvement for supporting districts and schools. (R.3468 ¶176.) Fla. Admin. Code R. 6A-1.099811. Schools that earn a D or F are assigned to DA.[61] There were 489 schools in DA in 2015-16.[62] The majority of DA schools serve a high percentage of FRL and minority students.[63] The State does not provide DA schools with direct interventions.[64] (R.3469 ¶177.)

A school is required to implement a turnaround plan when it earns a third consecutive grade below a C or two consecutive grades

[57] Ex. 1378.
[58] Ex. 1377.
[59] Ex. 5320.
[60] Tr.v.15, 2251:7-12; v.29, 4365:12-4367:1.
[61] Ex. 5356, at 40, 118:6-25; Tr.v.5, 591:16-592:10; v.12, 1828:22-25, 1829:4-7; v.14, 2155:2-4.
[62] Ex. 1950.
[63] Tr.v.5, 592:15-19; v.12, 1842:10-21; v.14, 2170:16-25; v.15, 2218:11-2219:16; v.19, 2839:11-15, 2841:13-2842:6.
[64] Tr.v.10, 1433:12-1434:2; v.12, 1855:14-1856:10, 1875:6-23; v.14, 2152:12-19, 2154:9-18; v.15, 2219:17-2220:2; v.19, 2845:16-21; v.27, 4075:1-8, 4081:14-4082:9.

of F. Fla. Admin. Code R. 6A-1.099811(4)&(5). There are 83 schools in 20 school districts currently implementing turnaround plans.[65] The State has not taken any action to address schools that have a number of consecutive years as D's or F's other than requiring turnaround plans.[66] There are 32 schools in 14 school districts that have received either a grade of D or F for four consecutive years from 2010-11 through 2013-2014.[67] There are 28 schools (all Title I/high poverty schools) that are persistently low-performing (5 or more years as F).[68] Schools identified as low-performing, D or F typically serve high numbers of FRL, Black or Hispanic students.[69]

Since 2014, school districts have been required to use funds to provide an additional hour per day of intensive reading instruction beyond the normal school day for each day of the school year for students in each low performing elementary school.[70] § 1011.62(9). Of the 300 lowest performing elementary schools in 2013-2014, 294 are Title I, 291 have a 50%+ minority rate, and 168 have a minority rate that is 90% or higher.[71]

Out of the 300 low performing elementary schools for 2013-14, 54 schools in 18 school districts have received grades of D's or F's for three consecutive years (from 2011-12 through 2013-14). All 54 schools are Title I schools.[72] Five schools in Pinellas have

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[65] Ex. 1950.
[66] Tr.v.19, 2931:9-16; v.27, 4115:13-4117:21.
[67] Ex. 1950.
[68] Exs. 1950; 5292.
[69] Tr.v.5, 592:7-22; v.9, 1281:3-5; v.12, 1842:14-21; v.14, 2170:16-25; v.15, 2218:11-2219:16; v.19, 2839:11-15, 2841:13-2842:6.
[70] Ex. 2011; Tr.v.16, 2425:18-2427:2.
[71] Ex. 2011.
[72] *Id.*

earned five years of consecutive grades of D's or F's and an additional two schools that have earned D's or F's for four consecutive years from 2011-12 through 2014-15. All seven are Title I schools. One of those schools earned six consecutive F's during the past five years with 19% of all students proficient in reading and 18% proficient in math in 2013.[73] These trends are based on public grades. There is a one-letter grade drop protection policy that has been in place for four years that masks the actual performance of schools.[74] (R.3449-50 ¶134.)

The court found that "a school should not be allowed to remain indefinitely in the DA program without there being some concern that the 'state' is tolerating or being complacent about the inability of the local district to improve that school's performance." (R.3468 ¶175; R.3384.) "At some point in time the State Board should do more if the local School District will not." (R.3473 ¶183.)

The State does not provide any additional funding for DA (R.3468 ¶176), turnaround, or low-performing schools.[75] The State expects school districts to re-allocate funds within the district to implement this school improvement.[76] § 1001.42(18)(d). Parents'

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[73] Exs. 1950; 5292; 1898, at 56756, 56770-56771; 1900, at 56851, 56866-67.
[74] Tr.v.3, 390:14-19, 391:2-393:7, 396:4-22, 402:11-406:16; v.5, 650:7-652:12; v.10, 1411:24-1413:11; v.12, 1839:20-1840:21; v.14, 2165:10-2166:17; v.19, 2843:16-2844:14; v.26, 4041:5-12, 4042:17-4043:8; v.30, 4526:6-4527:9.
[75] Tr.v.30, 4510:21-4511:5; Ex. 1708, at 49607.
[76] Ex. 5356, at 30-31, 76:3-17, 76:22-77:2, 77:5-6, 77:7-78:1, 78:2-9, 78:10-11; Tr.v.5, 595:23-596:5; v.10, 1406:12-1407:22; v.13, 1991:22-1993:1; v.15, 2217:23-2218:10; v.19, 2837:10-12; v.22, 3238:21-3829:10.

witnesses from multiple districts described the benefit of additional resources in improving struggling schools, but also the problems with taking money away from other schools.[77] The State has not analyzed whether school improvement funds are sufficient[78] or whether there are sufficient resources to implement the goals in the school improvement plan.[79] The State asserts that in order to improve student performance effective teachers are needed (*see* R.3473 ¶183), yet it has failed to analyze whether effective teachers need additional support staff in order to do their job.[80]

D. Lack of Sufficient Funding

The trial court disagreed with Parents' evidence on the sufficiency of funding. (R.3497 ¶249, 3499 ¶256, 3534 ¶¶346-47, 3535 ¶¶348-49, 3537 ¶¶353-54, 3542 ¶363, 3553 ¶390, 3554 ¶¶392-93, 3563 ¶422, 3564 ¶423, 3565 ¶464.) As will be demonstrated *infra* in the argument, the court's findings are not legally significant because it made erroneous conclusions of law and applied an incorrect standard and burden. Parents' evidence showed, though the court found differently, that funding is insufficient for safe

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[77] Tr.v.5, 613:20-615:12, 682:18-683:8; v.13, 1990:15-1996:11; v.22, 3236:23-3237:17, 3238:21-3239:10, 3300:23-3301:12; Ex. 1950, at 58177.

[78] Ex. 5356, at 30-31; 76:3-17, 76:22-77:2, 77:5-6, 77:7-78:1, 78:2-9, 78:10-11; Tr.v.5, 595:23-596:5; v.10, 1406:12-1407:22; v.13, 1991:22-1993:1; v.15, 2217:23-2218:10; v.19, 2837:10-12; v.22, 3238:21-3829:10.

[79] Tr.v.10, 1433:4-11; v.12, 1856:25-1857:1, 1873:11-23; v.14, 2175:25-2176:14, 2177:11-21, 2178:14-2179:6, 2198:21-2199:2; v.15, 2221:21-2222:4, 2223:12-2225:2, 2230:18-2232:2, 2257:15-2258:22, 2259:2-2261:20; v.19, 2845:22-2846:5, 2846:21-25, 2863:22-2864:11, 2869:24-2870:3, 2871:14-23, 2876:7-21, 2905:12-16, 2927:22-2928:5; v.27, 4074:23-4076:5; v.30, 4635:19-4636:18.

[80] Tr.v.15, 2230:14–2232:2.

schools,[81] Supplemental Academic Instruction,[82] transportation,[83] buses,[84] technology,[85] Digital Classrooms,[86] and capital outlay class size reduction.[87] No extra funds are provided for the required extra hour of intensive reading instruction for the 300 lowest performing elementary schools.[88] Nor has there been a cost analysis to determine the necessary amount of funding for the extra hour.[89] There is no additional *state* funding for students in poverty or who are experiencing homelessness.[90]

School districts do not have sufficient resources to establish the conditions necessary to deliver a high quality education.[91] Additional resources improve learning gains.[92] Individualized instruction may be needed to achieve on the standards,[93] but

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[81] Tr.v.7, 974:25-977:16; v.13, 2011:21-2012:13; v.22, 3226:23-3227:8; Ex. 4044.
[82] Tr.v.5, 646:4-16; v.22, 3280:9-18; v.33, 4952:5-25; 4953:1-2; Exs. 1788, at 50124; 1787, at 50113; 4031, at 121645.
[83] Tr.v.7, 1058:15-21; v.13, 1980:24-1981:16.
[84] Tr.v.9, 1273:18-1274:3; v.11, 1532:11-22, 1539:10-1540:3; Exs. 4031, at 121643; 5366, 55:3-14; 1092.
[85] Tr.v.5, 641:2-16; v.6, 783:7-22; v.10, 1484:14-1485:7; v.11, 1536:3-17; v.14, 2101:10-2101:1; v.24, 3695:22-3697:2; Exs. 4031, at 121643; 1788, at 50124.
[86] Tr.v.11, 1536:3-10, 1537:23-1538:15.
[87] Tr.v.6, 786:21-22; v.9, 1331:14-13332:6; Ex. 327, at 6458.
[88] Ex. 4031, at 121644.
[89] Tr.v.33, 4957:1-17, 4958:13-18.
[90] Tr.v.5, 595:17-597:12; v.8, 1225:6-23; v.16, 2416:24-25, 2417:1; v.33, 4952:5-9; v.34, 5088:25-5089:5.
[91] Tr.v.5, 597:13-598:8; v.6, 742:24-743:16, 791:18-792:16, 796:25-797:9, 797:23-798:8, 879:22-880:10; v.7, 985:12-986:6, 1059:25-1060:13, 1071:16-1072:3, 1073:22-1074:6, 1076:24-1077:1, 1100:16-19; v.9, 1280:15-1281:9, 1287:25-1289:11, v.13, 1898:4-8, 1900:1-4, 15-17, 2013:16-24; v.22, 3237:2-17; Exs. 1787, 1788, 4031, 4044.
[92] Tr.v.2, 164:18-165:18; v.5, 629:5-631:14; v.18, 2712:14-23; v.20, 3010:21-3011:8; v.24, 3707:4-3708:16, 3736:10-23; v.28, 4279:17-4280:9, 4280:20-4281:14, 4284:20-25.
[93] Tr.v.5, 597:13-20, 632:22-633:5; v.6, 742:5-15, 773:23-774:6, 786:23-787:11, 790:1-15; v.7, 1059:11-1060:13; v.13, 1899:2-25, 1903:21-1904:23; v.18, 2726:16-2727:25; v.20, 3010:21-3011:8; v.21, 3151:3-7; v.22, 3241:21-3242:14.

districts lack resources to provide differentiated classroom instruction and sufficient support personnel.[94] Districts "rob Peter to pay Paul" to improve student performance by moving resources from one school to another.[95] Current funds are not sufficient to meet the education needs of students with disabilities[96] or homeless students.[97] Deficiencies in resources are statewide with serious operational[98] and capital outlay resource needs (facilities, technology, buses).[99]

The legislature sets the amount of state and local funds through the FEFP funding formula. § 1011.60. Neither the legislature nor FDOE have ensured that education financial resources are aligned with student performance expectations as required by section 1000.03(5)(c).[100] The FEFP has been amended since enacted in 1973, but neither the legislature nor FDOE have conducted a cost analysis[101] to determine if the amount funded is

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[94] *See supra* note 91.
[95] Tr.v.13, 1991:16-1996:11, 2084:19-2085:20.
[96] Tr.v.6, 793:8-25, 795:6-23; v.7, 969:3-19; v.10, 1501:25-1502:6; v.13, 1897:1-1898:8, 1905:10-22, 2007:25-2011:17; v.20, 2987:1-17, 2988:1-2989:19, 2992:2-11, 3010:21-3011:8; v.22, 3231:10-3233:1; v.24, 3692:16-3694:4; v.33, 4958:19-4959:19; Exs. 1054, at 22966; 4031, at 121639-40; 1788, at 50124.
[97] Ex. 3699, at 104457-58, 104314, 104319, 104329, 104682, 104207, 104208, 104579, 104669, 104740, 104751, 104753.
[98] *See supra* note 91; v.5, 646:4-16; v.7, 1058:15-21; v.13, 1906:7-1907:13, 1916 10-21, 1980:24-1981:16; v.19, 2806:5-20, 2807:4-9; v.22, 3231:10-3233:1; v.24, 3692:16-3696:14; v.33, 4958:19-4959:19; Exs. 4031, 121639-40; 1788, at 50124; 1787, at 50113.
[99] Tr.v.5, 646:23-647:6, v.6, 786:21-22; v.7, 974:25-977:16; v.9, 1272:4-21, 1273:18-1274:3, 1274:10-21, 1331:14-1332:6; v.11, 1536:3-10, 1539:10-1540:3; v.13, 2011:21-2012:13; v.18, 2634:7-16, 2635:3-2639:3; v.22, 3226:23-3227:8, 3229:12-24; v.24, 3554:5-22, 3623:11-17, 3695:22-3697:2; Exs. 5364, at 11-12, 27:5-28:11; 5366, 55:3-14; 1092; 327, at 6458; 4031, at 121640, 121643.
[100] Tr.v.33, 4986:20-24; v.34, 5089:6-12.
[101] Tr.v.2, 109:19-110:5, 113:14-114:1.

adequate to ensure that all students can achieve on Florida's standards.[102] The base student allocation is not based upon a cost analysis.[103] Missing from the state budgeting process is any information about what resources are necessary to ensure that all students achieve on Florida's standards, and a determination of how much it costs to deliver a high quality education.[104] Cost analyses would assist the legislative decision-making process.[105] As the State's economist testified, it would be feasible to conduct a cost analysis for delivering a high quality education.[106]

A large portion of capital outlay funds comes from local property taxes. The legislature sets the millage cap.[107] During the recession, the legislature decreased the millage for capital outlay from 2 to 1.5 mills at the same time there was a loss of taxable property value. For three years, charter schools received all of the State's PECO funds,[108] which impacted school districts' repair and maintenance problems.[109] These circumstances led to a capital outlay and deferred maintenance crisis in the school districts.[110]

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[102] Tr.v.15, 2306:2-9; v.16, 2361:2-6; v.27, 4070:7-16; v.33, 4963:19-4964:12; v.34, 5088:1-12.
[103] Tr.v.34, 5088:4-12.
[104] Tr.v.3, 4963:19-4964:12; v.4, 5088:1-12; v.5, 2306:2-9; v.16, 2361:2-6.
[105] Tr.v.1, 109:19-24; v.2, 142:14-25.
[106] Tr.v.32, 4847:9-4850:11; v.33, 4962:14-19; v.34, 5085:12-5086:1; Ex. 131.
[107] Tr.v.9, 1260:11-19; v.10, 1472:5-14; v.16, 2427:25-2428:4; v.24, 3697:3-9, v.25, 3738:15-20; v.32, 4978:20-24; v.33, 4980:1-25; v.34, 5077:5-24.
[108] Tr.v.5, 644:16-25; v.7, 1032:3-5; v.18, 2635:5-10; v.21, 3084:11-18; v.23, 3411:18-21, 3412:11-16; v.24, 3599:23-3600:7; Exs.5367, at 3, 10:8-20; at 12, 27:22-28:5.
[109] Tr.v.5, 645:1-20; v.13, 2001:9-2002:9; v.18, 2635:5-10; v.24, 3600:16-24; Ex.5364, at 13, 29:12-25.
[110] Ex. 5364, at 11-12, 27:5-28:11.

Deferred maintenance is inefficient and a statewide problem.[111]

School boards may seek voter approval for additional taxes, but this results in disparities across the state.[112] The State acknowledges that the legislature has the authority and could choose to raise millage or sales taxes on its own.[113] The State economist did not know how much additional millage would raise,[114] but an additional penny in sales tax would bring in approximately $4.3 billion,[115] far more than any school district could raise on its own. In contrast, while school boards have the authority to seek voter approval for extra millage or sales taxes, they cannot do so on their own without voter approval and cannot guarantee any referendum would pass.[116] Many referenda have failed in recent years.[117] There are costs associated with voter referenda.[118]

In some districts, funds from voter approved taxes are paying for basic education such as highly qualified teachers, preserving reading and academic programs, arts and music, nurses, elementary guidance, school library and magnet programs, because the FEFP is

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[111] Tr.v.5, 646:23-647:6; v.9,1272:4-21, 1274:10-21; v.10, 1481:15-24; v.18, 2634:7-16, 2635:3-2639:1-3; v.22, 3229:12-3230:9; v.24, 3554:5-22, 3623:11-17; v.37, 5505:9-5506:6; Ex. 4031, at 121640, 121642.
[112] Tr.v.4, 3569:11-3570:1; v.7, 1046:20-1047:15.
[113] Tr.v.34, 5076:3-5077:4, 5077:5-24.
[114] Tr.v.34, 5077:25-5078:3.
[115] Tr.v.34, 5075:13-5076:2.
[116] Tr.v.6, 924:17-925:1; v.7, 979:20-980:20; v.8, 1136:1-3; v.18, 2686:1-3; v.22, 3301:13-3302:9; v.33, 4979:23-25.
[117] Ex. 1204, at 29331-43, 29769-75, 29110-27, 29176-79, 29206-07, 29224-77, 29282-89, 29372-74, 29385-92, 29416-21, 29503-04, 29550-58, 29569-70, 29731-33, 29084-89, 29375-77, 29658-67, 29669-70. *See also* Tr.v.7, 1047:6-14; v.13, 2015:7-14.
[118] Tr.v.7, 1056:21-1057:3; v.20, 2943:15-21.

insufficient.[119] Some School Improvement Plans rely on support from referendum funds.[120] Voters support capital outlay projects in some districts, including school security and state-mandated technology.[121] There is a disparity in how much revenue can be raised as 1 mill is worth over $225 million in Miami-Dade, but only $224,084 in Liberty.[122] Some school districts also rely heavily on private grants to pay for school improvement and basic programs.[123]

Several school districts in recent years have had to notify the Commissioner and submit fiscal recovery plans.[124] Gadsden has been in fiscal recovery for three years[125] with hiring and spending freezes to the point that it is concerned with buying pencils and pens.[126] The State does not provide additional funding to school districts that are in financial distress.[127] Insufficient resources in Gadsden has impacted student performance as it has the lowest

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[119] Ex. 1204, at 29062-68, 29074-75, 29080-83, 29130-31, 29215-16, 29297-99, 293-19-20, 29358-60, 29379-85, 29430-33, 29518-25, 29532-47, 29567-68, 29575-81, 29671-709, 29711-22, 29724-25, 29735-41, 29765-66, 29776-79. *See also* Tr.v.6, 801:20-802:10; v.22, 3219:21-3220:19.
[120] Ex. 1903, at 57026; Tr.v.19, 2896:8-2897:5.
[121] Ex. 1204, at 29076-77, 29090-93, 29094-99, 29108-09, 29157-66, 71-80, 29185-94, 29210-11, 29368, 29406-15, 29423-25, 29434-51, 29496-501, 29515-16, 29559-65, 29584-658, 29727-30.
[122] Ex. 3419.
[123] Tr.v.5, 613:20-615:1; v.7, 1000:18-1001:8, 1064:5-1065:24; v.8, 1074:9-16; v.9, 1288:22-23; v.12, 1850:21-25; v.13, 1940:25-1941:2; v.22, 3222:18-3227:18; v.23, 3526:17-3527:12; v.24, 3707:4-3708:16, Exs. 1991, at 58981; 1075, at 24374-45; 1898, at 56767; 1899, at 56824, 56832.
[124] Tr.v.7, 1051:1-24, v.8, 1105:1-4; v.14, 2039:8-10; v.17, 2659:12-2600:10, 2606:11-13, 2607:18-23, 2609:15-2610:2; v.24, 3662:21-3664:6.
[125] Tr.v.17, 2599:12-2600:10, 2606:11-13, 2607:18-23, 2609:15-2610:2.
[126] Tr.v.17, 2602:20-22, 2605:4-25, 2608:7-12.
[127] Tr.v.7, 1051:24-1052:4; v.17, 2610:8-2611:5; v.27, 4072:24-4073:14.

overall proficiency rate in Grade 10 Reading, with only 26% of students reading at grade level.[128] Other school districts that have been below the 3% fund balance in the last few years also have significant problems with student performance.[129] Even districts that the State commends for being highly efficient (Miami-Dade, Orange and Palm Beach) have large numbers of D and F schools.[130] They also each heavily rely on voter referenda.[131]

E. Lack of Uniformity of McKay Program

The McKay Program's primary purpose is to provide tuition vouchers for students with disabilities to attend private schools. (R.3570 ¶443.) § 1002.39(1). After a student enrolls in an eligible private school, the State distributes a voucher payment in the same amount of the per pupil funding that would have been provided to the school district for the student. § 1002.39(9)&(10). In 2014-15, payments for the private school vouchers totaled $205,800,583.[132]

There are significant differences in the education of public school students and those who attend private schools through the McKay Program. Voucher private schools do not accept all Florida residents.[133] There is no requirement that a voucher private school accept the voucher amount as full tuition payment.[134] The private schools are not free as the vouchers do not cover all of the

[128] Ex. 4148.
[129] Exs. 4147; 4050.
[130] Exs. 1980; 1982.
[131] Ex. 1204, at 29157-66, 29171-80, 29515-25, 29532-47.
[132] Ex. 3155.
[133] Exs. 5361, at 14-15, 146:9-147:5; 5355, at 2, 26:8-27:8; at 9, 62:21-63:14.
[134] Tr.v.23, 3394:20-3395:18. Ex. 5360, 55:22-25.

schools' tuition or other expenses.[135] Voucher private schools also are not responsible for transportation to the private schools.[136]

Teachers in voucher private schools do not all have bachelors degrees or educator certificates.[137] Teachers only need "special skills, knowledge or expertise" in the subjects taught.[138] § 1002.421(2)(h). For those with only teaching experience, there is no requirement that they have a high school diploma.[139] Students in voucher private schools are not required to take any particular courses.[140] Public school graduation requirements do not apply to voucher private schools.[141] Voucher private school course credits are not always accepted when voucher students return to public schools.[142] Curriculum in voucher private schools is not required to be aligned with any standards.[143] § 1002.395(1)(c).

Even though the McKay Program is directed at students with disabilities, voucher private schools are not required and many do not provide IEPs.[144] McKay schools are not required to offer

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[135] Exs. 5361, 88:20-24; 5355, 42:19-43:9; 5358, 9:23-10:2, 10:8-13; 5362, 41:11-24; 5352, 47:3-10, 46:15-23, 49:20-23, 50:3-10 50:25-51:15; 5369, 32:23-33:11, 37:15-39:13; 5355, 4:6-14, 32:18-33:1, 35:2-37:18, 38:4-6, 38:24-40:25, 44:25-45:19.
[136] Tr.v.23, 3405:3-5; Exs. 5362, 58:23-59:4; 5352, 18:12-13; 5355, 17:10-14.
[137] Exs. 5352, at 2, 26:16-21; 5369, at 5, 45:5-13, 47:17-48:2, 51:2-23.
[138] Ex. 5370, at 3-4, 59:10-22.
[139] Tr.v.23, 3399:13-3400:7.
[140] Tr.v.23, 3398:10-18.
[141] Ex. 5360, at 9, 41:4-9; Tr.v.23, 3399:5-6.
[142] Ex. 5357, at 7-8, 57:19-58:12; at 12, 75:25-76:8; at 13, 81:13-15.
[143] Exs. 5361, at 6, 69:3-9; 5360, at 7, 30:6-9, 13-24; at 9, 39:1-3; 5352, at 2, 36:11-19; at 3, 38:20-39:12, 41:12-18; at 3-4, 42:14-18; 5352, at 1, 20:19-21:2; Tr.v.23, 3383:10-16; 3387:15-3388:15; 3398:23-3399:1.
[144] Tr.v.36, 5364:9-17; Exs. 5370, at 4, 60:11-13; 5362, at 2, 40:4-9.

sufficient services to meet the unique needs for an appropriate education.[145] They are not required to comply with the IDEA or provide procedural protections for parents or students.[146] Nor are the private schools required to administer any standardized test.[147]

Voucher private schools are not required to be non-sectarian. Since 2008-09, of the private schools participating in McKay, an average of 64% are religious schools, with 52-59% of the participating students attending religious schools each year.[148] Voucher private schools may teach religion as part of their curriculum.[149] In some of the religious schools, creationism is taught, Bible and Quran courses are required to graduate, and religious curricula are incorporated into every class.[150]

SUMMARY OF ARGUMENT

This case is justiciable. It does not violate separation of powers as the judiciary has the authority to interpret the constitution and determine if the State has met its paramount duty under Article IX, section 1(a). It is not a political question as there is no textually demonstrable constitutional commitment of the issue to the legislature. The relief sought is a declaratory judgment which is permitted in Article IX controversies. The terms

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[145] Tr.v.23, 3395:19-3396:4; Exs. 5361, at 3, 136:3-13; 5352, at 1, 23:9-14; at 2, 24:21-25:10; at 4, 45:14-21; 5358, at 1-2, 11:10-14; 5358, at 1, 6:13-23.
[146] Tr.v.23, 3403:18-3404:16; v.36, 5364:9-17.
[147] Tr.v.23, 3397:24-3398:4.
[148] Exs. 3183; 3164; 3165; 3166; 3168; 3179.
[149] Tr.v.36, 5363:10-5364:3.
[150] Exs. 5369, at 6, 57:22-59:2; at 6-7, 59:10-61:8; at 8-9, 68:10-69:3; at 9, 69:18-70:11; at 9-10, 70:18-71:21; 5369, at 1, 22:10-15; 5369, at 1-2, 23:13-24:13; 5369, at 3, 35:11-36:16; at 8, 64:13-65:21; at 9, 70:12-17; at 10-11, 77:2-10; 5355, at 8, 61:2-62:2.

in the current Article IX are judicially manageable.

Without interpreting Article IX's terms and establishing the criteria for analyzing facts, it was error for the court to make any conclusions on the merits. The trial court erred in applying a minimal rational basis standard, which is insufficient to determine affirmative compliance with Article IX. The trial court erred in applying "beyond a reasonable doubt" and should have applied the preponderance of the evidence burden.

The trial court erred in shifting the State's legal responsibility to local school boards. There is no private right of action against school boards to enforce Article IX, § 1. The legislature is responsible for enacting laws that assure efficient operation of the education system and the SBE is responsible for exercising oversight over the school districts.

Without interpreting the constitutional terms, the trial court erroneously concluded that given improvements over time, the funding in Florida allows students to obtain a high quality education. The court ignored the over half million children who are not *currently* obtaining a high quality education. Due to legal errors, the court's findings on funding are legally insufficient.

The trial court misinterpreted *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006), to conclude that the McKay Program does not implicate uniformity. *Holmes* applies and controls this issue. The McKay Program diverts funds from the public school system to private schools that do not meet the uniformity requirements.

ARGUMENT

I. Trial Court Erred in Holding Parents' Claim Not Justiciable.

The standard of review for separation of powers determinations is de novo. *Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004). Interpretation of article IX, section 1(a) is de novo, without deference to the decision below. *Holmes*, 919 So. 2d at 399.

A. Parents' Claim Does Not Violate Separation of Powers.

The trial court concluded that Parents' claim "fails because of Florida's strict separation-of-powers doctrine." (R.3390.) Article II, section 3 of the Florida Constitution provides:

> 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.

Protecting constitutional rights does not violate the separation of powers doctrine. "The judiciary is in a lofty sense the guardian of the law of the land and the Constitution is the highest law. A constitution would be a meaningless instrument without some responsible agency of government having authority to enforce it." *Dade Cnty. Classroom Teachers Ass'n, Inc. v. Legislature*, 269 So. 2d 684, 686, 688 (Fla. 1972) (at appropriate time, court would "have no choice but to fashion such guidelines by judicial decree in such manner as may seem to the Court best adapted to meet the requirements of the constitution, and comply with our responsibility"). Interpreting statutes and constitutional provisions is a primary function of the judicial branch and separation of powers is not violated even when a statute is

construed in a manner that adversely affects the executive or legislative branch. *Locke v. Hawkes*, 595 So. 2d 32, 36 (Fla. 1992). *Cf. Rose v. Council For Better Educ. Inc.*, 790 S.W.2d 186, 209 (Ky. 1989) (judiciary has ultimate power and duty "to apply, interpret, define, construe all words, phrases, sentences and sections of the Kentucky Constitution as necessitated by the controversies before it. It is *solely* the function of the judiciary to so do.").

The trial court relied on *Coalition* in reasoning that Parents had not identified "an appropriate standard for determining 'adequacy' that would not present a substantial risk of judicial intrusion into the powers and responsibilities assigned to the legislature." (R.3387, citing *Coalition for Adequacy v. Chiles,* 680 So. 2d 400, 408 (Fla. 1996)). Yet, in casting the deciding vote,[151] Justice Overton concurred that an insufficient showing had been made in that case, but emphasized that a case could be made "without engaging in micro-management and without offending the separation-of-powers doctrine." *Id.* at 409. His example was an allegation of one county with a 30% illiteracy rate. *Id.* The undisputed facts in the instant case show a far worse situation than a single school district as well as rates of failures in reading and math assessments much higher than 30%. (Facts § B.)

Importantly, the 1996 *Coalition* Court was interpreting constitutional language that has since been amended and strengthened. In 1998, Florida's citizens provided:

> The education of children is a *fundamental value* of the people of the state of Florida. It is,

[151] *See Haridopolos*, 81 So. 3d at 471.

> therefore, a *paramount duty of the state* to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a *uniform, efficient, safe, secure, and high quality system of free public schools* that allows students to obtain a high quality education....

Art. IX, §1(a), Fla. Const. (emphasis added). As discussed *infra* §I.C, "adequacy" is now more specific as to what is required and contains judicially manageable standards.

Other states' courts have held that separation of powers does not preclude their judiciaries from deciding education issues under their state constitutions.[152] The Texas Supreme Court reasoned that while its constitution commits to the legislature the authority to determine the broad range of policy issues involved in providing for public education, nowhere does it suggest that the legislature is the final authority on whether it has discharged its constitutional obligation. *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 778 (Tex. 2005). "If the framers had intended the Legislature's discretion to be absolute, they need not have mandated that the public education system be efficient and suitable; they could instead have provided only that the Legislature provide whatever public education it deemed appropriate. The constitutional commitment of public education issues to the Legislature is primary but not absolute." *Id*. The *Neeley* court ultimately concluded that "the separation of powers does not preclude the judiciary from determining whether the Legislature has met its constitutional obligation to the people to

[152] *See, e.g., Conn. Coalition for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 225 n.24 (Conn. 2010) (collecting cases).

provide for public education." *Id.* at 780-81.

The cases relied on by the trial court (R.3390-91) are inapposite. *See Office of State Attorney for 11th Jud. Cir. v. Polites*, 904 So. 2d 527, 532 (Fla. 3d DCA 2005) (court cannot order public defender or state attorney to pay for experts that court ordered); *Agency for Pers. with Disabilities (APD) v. J.M.*, 924 So. 2d 1, 2 (Fla. 3d DCA 2005) (Medicaid Waiver crisis process was statutorily delegated to APD and a dependency judge did not have authority to decide whether someone met crisis criteria); *Chiles v. Children A, B, C, D, E & F*, 589 So. 2d 260, 264 (Fla. 1991) (cannot delegate constitutionally assigned powers to another branch; case does not address encroachment as cited by trial court).

The trial court's concern with encroachment is misplaced. Encroachment occurs when the judiciary disagrees with a legislative enactment and decides not to follow it or effectively amends it. *See Pepper v. Pepper*, 66 So. 2d 280, 284 (Fla. 1953) (judge violated separation of powers when he did not agree that 90 days statutory divorce requirement for residency was sufficient and required 6 months). Parents here do not seek this type of a unilateral amendment of statutes by the judiciary; rather, they seek a declaration that measures the acts of the legislative and executive branches against the yardstick of Article IX. *See Askew v. Schuster*, 331 So. 2d 297, 300 (Fla. 1976), quoting *In re Apportionment Law, Sen. Jt. Res. No. 1305*, 263 So. 2d 797 (Fla. 1972) (courts will not substitute their judgment for that of another coordinate branch of government, but will measure acts done

with the yardstick of the constitution).

Parents also are not asking the judiciary to force, mandate, or require the executive or legislative branches to spend money in any particular way, but rather to make a determination whether education funding appropriated by the legislature and implemented by the executive branch fulfills the State's constitutional obligations. The instant case is instead similar to a Fourth DCA case in which the separation of powers was not violated when a court order compelled a state agency to fulfill its statutory obligations to provide mental health services. *Dep't of Children & Families Serv. v. Leons*, 948 So. 2d 988, 992 (Fla. 4th DCA 2007).

The trial court similarly erred when it held that this case presents a political question. (R.3388-89.) The U.S. Supreme Court summarized political question caselaw and established the *Baker* factors that present non-justiciable political questions. *Baker v. Carr*, 369 U.S. 186, 217 (1962); *accord Coalition*, 680 So. 2d at 408 (adopting *Baker* factors). *Baker* explained that the doctrine is about political *questions*, not political *cases*, and that "courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." 369 U.S. at 217. Controversies that may be termed "political" do not automatically invoke the political question doctrine. Examining the *Baker* factors, a later Court reasoned that "[r]esolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications in the sense urged

by Congress." *I.N.S. v. Chadha*, 462 U.S. 919, 942-43 (1983).

Two *Baker* factors are at issue here: 1) textually demonstrable constitutional commitment of the issue to a coordinate political department; and 2) lack of judicially discoverable and manageable standards for resolving it, *see infra* § I.C. Applying the first to the instant case, it is clear that there is no textually demonstrable constitutional commitment of the issue to a coordinate political department. Examples of such a demonstrable commitment include: 1) legislature has sole power to judge qualifications of its members, and courts have no jurisdiction to determine these constitutional qualifications, *McPherson v. Flynn*, 397 So. 2d 665, 668 (Fla. 1981); and 2) internal procedures of legislature are solely for the legislature to decide, but the final product of legislation can be reviewed by the courts, *Moffitt v. Willis*, 459 So. 2d 1018, 1021 (Fla. 1984). By contrast, the *I.N.S.* Court explained that neither Congress nor the Executive can decide the constitutionality of a statute; that is a decision for the courts. 462 U.S. at 941-42.

The trial court ruled that because the constitution requires "adequate provision shall be made by law" that "the constitution has committed the determination of 'adequacy' to the legislature." (R.3388, citing *Coalition*, 680 So. 2d at 408.) The phrase "by law" has been interpreted as a directive to the legislature to pass legislation implementing the constitutional mandate. *See Haridopolos*, 81 So. 3d at 474 (Wolf, J., specially concurring) (Article IX is not self-executing); *St. John Medical Plans, Inc. v.*

Gutman, 721 So. 2d 717, 719 (Fla. 1998) ("may be provided by law" leaves "to the Legislature the task of implementing the mandate of the people"). Further, "shall" is construed as mandatory and judicially enforceable. *Neal v. Bryant*, 149 So. 2d 529, 532 (Fla. 1962); *Gannon v. State*, 319 P.3d 1196, 1220 (Kan. 2014). "Shall be made by law" does not mean that the legislature has the sole authority with no judicial remedy if the "Legislature has failed to address the public's will in a reasonable period of time." *Haridopolos*, 81 So. 3d at 475 (Wolf, J., concurring).

By relying on *Coalition*, the trial court ignored the *current* constitutional language which provides that it is "a paramount duty of the State" which makes clear it is not solely the legislature that has a constitutional duty. The CRC intended to make clear that compliance with the education clause transcends constitutional duties assigned to a specific branch of government, and adequately providing a high quality education is the duty of all State government, not merely the legislature. *See, e.g.*, *CRC Minutes*, at 278-80 (Jan. 15, 1998), *available at* archive.law.fsu.edu/crc/ (amendment informs all three branches of government that this is the minimum level of education that the people of this state demand from its government, and if the legislative branch fails to do so, then the judicial branch will enforce it so that the legislature complies with the mandate of the Constitution that all children be provided a high quality education). *See also Holmes*, 919 So. 2d 403-04; *CRC Minutes*, at 202-04 (Jan. 15, 1998). *Holmes* implicitly found the current Article IX to be justiciable by reviewing the

language and history of the education article, interpreting its terms, and issuing a ruling on the merits. 919 So. 2d 392.

The *Baker* Court reasoned that "when challenges to state action ... have rested on claims of constitutional deprivation," courts can act on the merits. 369 U.S. at 229. Here, the State's failure to meet its constitutional duty (adequately provide for education) has caused Parents to suffer a constitutional deprivation.

B. Relief Sought is Declaratory Judgment, Not Advisory Opinion.

The trial court made several errors regarding the declaratory relief Parents sought. The court based its holding on the misunderstanding that Parents sought an order requiring a cost analysis and erroneously concluded that to effect this remedy would require an order to the legislature to appropriate additional funds to the school system. (R.3392.) The trial court incorrectly focused on whether a cost study could be ordered as part of a remedy, finding that such a remedy would amount to a separation of powers violation. (R.3391-92, citing *Advisory Op. to Att'y Gen. re Requirement for Adequate Public Educ. Funding*, 703 So. 2d 446, 449 (Fla. 1997)). Finding there was no relief it could order, the court concluded the case presented only an advisory opinion. (R.3393.)

The trial court overlooked that the relief sought here is the declaratory judgment itself, not a cost study.[153] Evidence was submitted to show that Florida had not conducted cost analyses to support that Florida's education funding is not efficient, fails to

[153] A cost study was requested in the complaint, R.162, but Parents made clear prior to and at trial that they were only seeking declaratory relief at that time. R.3369-70; Tr.v.38, 5779:11-14.

provide a high quality education, and that there is a disconnect between needed resources and funding provided.[154] (Facts § D.) Rather than "second-guess legislative and executive policy judgments" (R.3393), cost analyses would assist the legislative decision-making process. (Facts § D.)

Trial courts may issue declaratory judgments on the existence, or nonexistence of any immunity, power, privilege, or right. § 86.011, Fla. Stat. (2016). It is clear that declaratory relief is proper in Article IX challenges. *Coalition,* 680 So. 2d at 404; *accord Sch. Bd. of Miami-Dade Cnty. v. King*, 940 So. 2d 593, 602 (Fla. 1st DCA 2006). Declaratory relief is consistent with relief ordered in other states in similar challenges. *See, e.g., Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 398-99 (Tex. 1989); *McDuffy v. Sec'y of Exec. Office of Educ.,* 615 N.E.2d 516, 555 (Mass. 1993); *Rose*, 790 S.W.2d at 215.

Any person seeking a declaratory judgment *may* also demand additional, alternative, coercive, subsequent, or supplemental relief in the same action. § 86.011 (emphasis added). Supplemental relief is requested by motion, and if the application is sufficient, the court requires the party whose rights *already* have been adjudicated by declaratory judgment to show cause why further relief should not be granted. § 86.061 (emphasis added). Any supplemental relief would flow from the findings made in a declaratory judgment. Depending on the findings, supplemental relief here could include an order that the State establish a

[154] Tr.v.5, 2306:2-9; v.15, 2306:2-9; v.16, 2361:2-6; v.27, 4070:7-16; v.33, 4963:19-4964:12; v.34, 5085:12-5086:1, 5088:1-12.

remedial plan that conforms with the Florida Constitution. Florida law "authorizes in a proper case an additional adjudication based upon and supplemental to the declaratory decree." *City of Miami Bch. v. State*, 242 So. 2d 170, 172 (Fla. 3d DCA 1970) (supplemental relief makes declaratory judgment effective).

Supplemental relief also could order implementing legislation. On a prior appeal in this case, Judge Wolf recognized this by finding that Parents' allegations presented a "clear failure of the Legislature over a reasonable period of time to assure the fundamental values identified within the amendment were being met," which implementing legislation could remedy. *Haridopolos*, 81 So. 3d at 475. However, the trial court concluded that since the legislature had already enacted implementing legislation that no further legislation is necessary. (R.3392-93, citing 81 So. 3d at 475 (Wolf, J., concurring)). The trial court misconstrued the issue which is not whether the legislature has enacted any implementing legislation, but rather whether the legislation that has been implemented is sufficient to meet the State's constitutional duty.

The trial court further concluded that "[i]t would be improper for the Court to make an advisory finding of 'liability' without being able to order an appropriate remedy." (R.3393.) The court misconstrued the relief of declaratory judgments with advisory opinions as Florida courts have the legal authority to interpret constitutional terms and to issue declaratory judgments to ensure constitutional compliance. *In re Sen. Jt. Res. Of Legis. Apportionment 2-B,* 89 So. 3d 872, 881 (Fla. 2012).

Advisory opinions are authorized by the Florida Constitution in very limited circumstances, none of which apply here. *See* Art. IV, §§ 1(c) & 10; Art. V, §2(a), Fla. Const. Unlike advisory opinions, Parents seek a binding adjudication on: 1) the existence of their constitutional right to a uniform, efficient and high quality system of free public schools; and 2) whether there has been a deprivation of that right caused by the State's failure to fulfill its paramount duty. This is not mere legal advice to satisfy Parents' curiosity, but would decide Parents' rights and the State's obligations under Article IX. *See, e.g.*, *May v. Holley*, 59 So. 2d 636, 639 (Fla. 1952).

Relying on *Dep't of Revenue v. Markham*, 396 So. 2d 1120, 1121 (Fla. 1981), the trial court further confused declaratory relief with the case and controversy requirements for standing. (R.3393.) It similarly erred in relying on *Askew v. City of Ocala*, 348 So. 2d 308, 310 (Fla. 1977), which held there was no controversy when city officials sought a declaration about how to conduct future meetings. (R.3393.) Here, Parents clearly have standing and present a current controversy.

C. Standards Are Judicially Discoverable and Manageable.

Relying on *Coalition*, the trial court erroneously concluded that "the amended language of Article IX, Section 1(a) does not provide standards that are any more judicially manageable than the abstract concept of 'adequacy' was before the 1998 constitutional amendment," and that "[a]pplying the terms 'efficient and high quality' ... necessarily involves 'political questions.'" (R.3387-

88, quoting *Coalition*, 680 So. 2d at 408.))

The trial court committed clear error by not analyzing and applying the requirement of uniformity as the Florida Supreme Court already has interpreted it several times. *See infra*. The court ignores the term "all children" and asserts that "efficient and high quality" are not any more manageable than "adequacy." (R.3387.) This is incorrect as *Holmes* pointed out that in response in part to *Coalition*, the 1998 constitutional amendment added more specific and detailed standards for measuring adequacy. 919 So. 2d at 403-04; *accord Haridopolos*, 81 So. 3d at 471. Article IX has judicially discoverable and manageable standards as explained below, thus the trial court erred in its legal conclusions regarding this second *Baker* factor. *See* 369 U.S. at 217.

Even in *Coalition*, four justices agreed that certain allegations would give rise to a justiciable claim under Article IX, Section 1. 680 So. 2d at 408-11 (Overton, J., concurring, Anstead, J., dissenting in part, Kogan, J. & Shaw, J., concurring in dissent). Justice Overton explained that "[w]hile 'adequate' may be difficult to quantify, certainly a minimum threshold exists below which the funding provided by the legislature would be considered 'inadequate.'" *Id.* at 409. The dissenting justices agreed with his example that a 30% illiteracy rate would violate the adequacy provision, and emphasized that "low literacy rates constitute just one form of proof of an inadequate educational system." *Id.* at 410. The evidence in the trial below showed many forms of an inadequate system: low achievement in reading and math,

high grade retention, disparities among subgroups and districts, and disparities in funding. (Facts §§ B-D.)

When interpreting a new constitutional provision, the court's duty is to discern and give effect to the will of the voters who adopted the provision. *Plante v. Smathers*, 372 So. 2d 933, 936 (Fla. 1979). Courts look to the legislative history of the provision and statements by the drafters and adopters in interpreting a constitutional provision. *Winfield v. Div. of Pari-Mutuel Wagering*, 477 So. 2d 544, 548 (Fla. 1985).

The CRC revision to the education clause was in direct response to *Coalition*: (1) to establish education as a "fundamental value" of Florida's citizenry; (2) to make it a "paramount duty of the state" to make adequate provision for the highest quality education for all of Florida's children; and (3) to set forth meaningful standards by which to measure the adequacy of education provided by the state. *Holmes*, 919 So. 2d at 403. Florida's education clause is the only one in the country that: mandates a high quality education; specifies characteristics of the education system; and elevates education above other government functions. This unique combination was drafted intentionally to contain specific definable "standards by which to measure the adequacy of the public school education provided by the state." *Id.*

"**All Children**." The intent of "all children" is to ensure "none of Florida's children get left behind." *CRC Minutes*, at 66-67 (Feb. 26, 1998). The legislature codified this mandate throughout the Education Code. *See, e.g.*, §§ 1000.01(3); 1000.02(2);

1000.03(3)&(5)(a); 1004.04; 1008.31(2)(a).

Florida's obligation to all children must be without regard to place of residence, economic circumstances, housing status, disability, English language proficiency, race or ethnicity. *See, e.g., Rose,* 790 S.W.2d at 212 (constitutional duty requires state to provide all children with equal educational opportunities, regardless of place of residence or economic circumstances); *McDuffy*, 615 N.E.2d at 548 ("the Commonwealth has a duty to provide an education for *all* its children, rich and poor, in every city and town of the Commonwealth at the public school level"); *Campaign for Fiscal Equity, Inc. v. State,* 801 N.E.2d 326, 337 (N.Y. 2003) (state must "provide schools wherein all children may be educated" including those with "socioeconomic deficits" as "[a]ll children can learn given appropriate instructional, social, and health services"); *McCleary v. State,* 269 P.3d 227, 249 (Wash. 2012) ("all children" includes "'each and every child since each will be a member of, and participant in, this State's democracy, society, and economy.' No child is excluded.").

The term "all children" is judicially manageable and measurable by examining whether any groups of children are not achieving the educational goals established by the State. The low rates of proficiency on reading and math for FRL, ESE, ELL, Black, Hispanic and homeless students demonstrate that not all children are achieving. (Facts § B.) The wide disparities in achievement among school districts further show that not all children across the state are receiving uniform educational opportunities. (*Id.*)

"**Uniform.**" A uniform system has been constitutionally required since 1868. *Holmes*, 919 So. 2d at 402-03. In 1939, the Florida Supreme Court interpreted "uniform" to mean that "a system of public free schools ... shall be established upon principles that are of uniform *operation* throughout the State and that such system shall be liberally maintained." *State ex rel. Clark v. Henderson*, 188 So. 351, 352 (Fla. 1939) (emphasis added).

In addressing whether impact fees violate uniformity, the Florida Supreme Court held they do not as "the Florida Constitution only requires that a system be provided that gives *every* student an equal chance *to achieve basic educational goals prescribed by the legislature*." *St. Johns Cnty. v. Ne. Fla. Builders Ass'n, Inc.*, 583 So. 2d 635, 641 (Fla. 1991) (emphasis added). This is precisely what Parents seek - that all children have the resources they need to be able to achieve basic educational goals on the content standards established by the State. The trial court agreed that children in poverty and other groups may need additional resources in order to achieve. (R.3413-14 ¶¶32-37.) Clearly, with hundreds of thousands not achieving (Facts § B), not all students are allowed an equal chance to achieve basic educational goals. *See Abbott v. Burke*, 575 A.2d 359, 385-86 (N.J. 1990) (through effective education, children of poorer urban districts can perform).

Justice Kogan explained that under uniformity, "variance from county to county is permissible so long as no district suffers a disadvantage in the basic educational opportunities available to its students, as compared to the basic educational opportunities

available to students of other Florida districts." *Fla. Dep't of Educ. v. Glasser*, 622 So. 2d 944, 950 (Fla. 1993) (Kogan, J., specially concurring). In other words, uniformity would "allow school districts to provide educational enhancements that may be unavailable in other districts." *Id.*

On the other hand, the "Legislature cannot allow students in one district to be deprived of basic educational opportunities while students in other districts do not suffer the same." *Id.* at 950-51. The evidence clearly shows vast differences among districts in the ability to provide basic educational opportunities to its students. (Facts § B.) In Gadsden, only 26% of tenth graders read at grade level, whereas 75% do so in St. Johns. (*Id.*) The trial court found, but brushed aside, that "variation in local school districts becomes obvious with only a cursory look." (R.3376.) The State is aware of these inequities, yet has failed to address them.

In the instant case, there are districts with severe resource deficits that significantly impact the achievement of students. (Facts § D.) *See Campbell Cty. Sch. Dist. v. State*, 907 P.2d 1238, 1279 (Wyo. 1995), as clarified on denial of reh'g (Dec. 6, 1995) ("state financed basket of quality educational goods and services available to all school-age youth must be nearly identical from district to district"). Further, voters in some districts have approved extra funding for basic educational services, not enhancements (*see supra* notes 119-21), while other voters have rejected referenda (*see supra* note 117). *See* 907 P.2d at 1279-80 (if local district wants to enhance content of basket, legislature

can provide a mechanism by which it can be done, but before all else, the constitutional basket must be filled).

Lack of uniformity also exists with regard to publicly funded vouchers. The *Holmes* Court found that uniformity was violated because there was no state oversight over private schools, the private schools' curriculum and teachers were not subject to the same standards as public schools, teacher certification and background screening were not required, and course subjects and accreditation were not the same. 919 So. 2d at 409-410. All of the same problems apply to the McKay Program, thus it clearly does not meet uniformity. *See infra* § IV.D.

"**Efficient.**" The trial court erred in holding that "efficient" is not judicially manageable. (R.3388-89.) Florida courts have not interpreted Article IX's term of "efficient," but it is referenced throughout the Florida education statutes and is used in a way that is consistent with the plain meaning of the term. *See, e.g.*, §§ 1000.02(1)(b); 1000.03(3); 1008.31(2). "Efficient" was intended "to provide constitutional standards to measure the 'adequacy' provision." 919 So. 2d at 404, quoting Buzzett & Kearney, *Commentary*, art. IX, §1, 26A Fla. Stat. Ann. (W. Supp. 2006).

In an education funding case, the Texas Supreme Court interpreted "efficient" to mean an effective or productive use of resources so as to produce results with little waste. *Edgewood,* 777 S.W.2d at 395. That court ruled that an efficient funding system would not allow the vast disparities among school districts where "resources in property-rich school districts that are taxing low

when property-poor districts that are taxing high cannot generate sufficient revenues to meet even minimum standards." *Id.* at 397. The Wyoming Supreme Court adopted the dictionary definition of efficient, which was "productive without waste." *Campbell Cnty. Sch. Dist.*, 907 P.2d at 1258-59. The court found that the disparities in funding were not cost-based and violated the constitution. *Id.* at 1276. The court eloquently explained how an efficient system includes the needs of all children:

> Children with an impaired readiness to learn do not have the same equal opportunity for a quality education as do those children not impacted by personal or social ills simply because they do not have the same starting point in learning. A legislatively created finance system which distributes dollars without regard for the need to level the playing field does not provide an equal opportunity for a quality education. Having no losers in the system requires there be no shrinking pie but a pie of the size needed. Once education need is determined, the pie must be large enough to fund that need.

Id. at 1278-79.

"**High quality**." The constitutional requirement of "high quality" is manageable as the legislature has provided substantive content standards for students to obtain a high quality education. (Facts § B.) The court need only look to the standards that "establish the core content of the curricula to be taught in the state and ... that K-12 public school students are expected to acquire." § 1003.41(1); *see also* § 1003.41(2); Fla. Admin. Code R. 6A-1.09401. Statewide assessments determine whether a student has achieved on the standards. § 1008.22(3). Test scores are used for graduation, § 1003.4282(3), grade promotion, § 1008.25, teacher

evaluations, § 1012.34(7), and school grades, § 1008.34. Passing rates on statewide assessments are thus a measure of whether a high quality education is being obtained by all children. *See* § 1008.31(1)(a) (performance accountability system assesses effectiveness of education delivery system). Measuring high quality with the standards established by the State is judicially manageable. *See Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 109 P.3d 257, 262 (Mont. 2005) (state constitution requires quality education, which must be defined by legislature first, then determined if constitutionally deficient by the court).

Relying on an Illinois case, the trial court erroneously concluded that "judiciaries are ill-equipped to address adequacy challenges." (R.3388 n.9.) The Illinois Constitution contains "high quality," yet the Illinois Supreme Court ruled this term was not judicially manageable because "questions relating to the *quality of education* are solely for the legislative branch to answer." *Lewis E. v. Spagnolo*, 710 N.E.2d 798, 804 (Ill. 1999), quoting *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1189 (Ill. 1996) (emphasis in original). Parents urge this Court not to follow Illinois in this regard because in contrast to Illinois, Florida has statutorily given content to "high quality," which makes it measurable and manageable. *See Unified Sch. Dist. No. 229 v. State*, 885 P.2d 1170, 1186 (Kan. 1994) (court would not substitute its judgment as to what type of education was "suitable," but will utilize as a base the standards enunciated by the legislature and the state department of education). Further, Illinois does not have

Florida's amendment history of the CRC intentionally adding "high quality" and other terms to modify adequate.

The other cases relied on by the trial court are not helpful. (R.3388 n.9.) *See Marrero v. Commonwealth*, 739 A.2d 110, 112-13 (Pa. 1999) (education provision places requirements only on General Assembly); *Bonner v. Daniels*, 907 N.E.2d 516, 520-22 (Ind. 2009) (education clause only requires General Assembly to *encourage* and does not impose an affirmative duty that mandates educational quality). These other states' clauses cannot be compared to Florida's maximum paramount duty.

"**Allows students to obtain a high quality education.**" The second use of the term "high quality" is in the clause "that allows students to obtain a high quality education." This is not intended to be redundant. *See* CRC Minutes, Jan. 13, 1998, at 207 (discussion regarding second "high quality" as not duplicative); *State v. Bodden*, 877 So. 2d 680, 686 (Fla 2004) (words not to be construed as superfluous if reasonable construction exists that gives effect to all words). The second "high quality" is a separate, outcome-based standard to provide both an input and outcome-based standard that can be measurable and meaningful. *See* Mills & McLendon, *Setting a New Standard for Public Educ.: Revision 6 Increases the Duty of the State to Make "Adequate Provision" for Fla. Schools*, 52 Fla. L. Rev. 329, 376 (2000). The trial court agreed that data from the "state accountability system is one way to measure whether the State is allowing all students to obtain a high quality education" and "whether or not there is evidence that the State is providing

a high quality education." (R.3438 ¶108.) The use of "high quality" twice in the constitution further distinguishes Florida from Illinois.

In the context of the instant case, the term "allows" can be interpreted as whether the State has afforded the opportunity for achievement by all students by ensuring that the conditions necessary to deliver a high quality education are provided.

Article IX's terms are definable and judicially manageable and thus the case does not present a political question.

II. Trial Court Erred in Reaching Merits Without Interpreting Article IX's Terms.

If a trial court's ruling consists of mixed questions of fact and law addressing constitutional issues, the ultimate ruling is subject to de novo review. *See Stephens v. State*, 748 So. 2d 1028, 1031-32 (Fla. 1999). Findings of fact will be set aside if they were induced by an erroneous view of the law. *Holland v. Gross*, 89 So. 2d 255, 258 (Fla. 1956).

As discussed above, the court erroneously held that this case is not justiciable. It then compounded the error by reaching the merits without interpreting the constitutional terms. In concluding that Article IX's terms are not judicially manageable, the court relied on cases from other states. (R.3388 n.9.) Yet, in those cases, once the courts concluded the case was non-justiciable they did not make decisions on the merits. The court also cited *Neeley* to support its view of the merits. (R.3395-96.) *Neeley*, however, properly held the action did *not* present a political question before interpreting constitutional terms and establishing criteria

for analyzing facts. 176 S.W.3d at 780-81, 792.

By contrast, here, the trial court asserted there are no judicially manageable standards, but then concluded that "Plaintiffs have *failed to meet their burden* ... under Article IX, Section 1(a)." (R.3388-99, 3399.) The court concluded that the case involves "political questions best resolved in the political arena," but in the *same* paragraph holds that Parents "have not shown that the State has failed 'to make adequate provision.'" (R.3389.) The court concluded that the State's education policies are "rationally related" to Article IX's requirements. (R.3394.)

Without interpreting these constitutional terms and establishing the criteria for analyzing facts, it was error for the court to make any conclusions on the merits. When reviewing constitutional provisions, the Florida Supreme Court "follows principles parallel to those of statutory interpretation." *Zingale v. Powell*, 885 So. 2d 277, 282 (Fla. 2004). The fundamental objective in construing a constitutional provision is to ascertain the intent of the framers and interpret in a manner that fulfills the intent and will of the people. *Caribbean Cons. Corp. v. Fla. Fish & Wildlife Cons. Comm'n*, 838 So. 2d 492, 501 (Fla. 2003). Despite the availability of various methods of constitutional interpretation, including relying on the common meaning, the dictionary meaning, the intent of the voters, the legislative history and CRC statements, and case law, the trial court neglected to interpret Article IX's terms, yet at the same time improperly applied the facts to the constitutional mandates.

III. Trial Court Erred in Using a Minimal Rational Basis Standard and Beyond a Reasonable Doubt Burden.

Interpretation of a constitutional provision involves pure questions of law and therefore the standard of review under a particular provision is de novo review. *See Crist v. Fla. Ass'n of Criminal Def. Lawyers, Inc.*, 978 So. 2d 134, 139 (Fla. 2008). The appropriate burden of proof is a pure question of law, and the standard of review is de novo. *S. Fla. Water Mgmt. Dist. v. RLI Live Oak, LLC*, 139 So. 3d 869, 871 (Fla. 2014).

The trial court held that "Plaintiffs have not shown that Defendants' actions are irrational or unconstitutional beyond a reasonable doubt" and "education policies...are rationally related" to the constitution. (R.3394.) Its conclusions were wrongly influenced by an incorrect standard and burden: no constitutional level lack of resources (R.3377); burden beyond a reasonable doubt rested with Parents on need for more resources (R.3378-79); how State holds schools accountable is rational process (R.3379); trends over time of student performance results satisfy rational basis test (R.3382); schools that fail for extended period of time do not rise to level of a constitutional violation (R.3383-84). *See N. Fla. Women's Health & Couns. Servs. v. State*, 866 So. 2d 612, 626 (Fla. 2003) (application of wrong standard of review may tilt playing field and irreparably prejudice party's rights).

A. Constitutional Standard of Review

The trial court erred in applying a minimal rational basis standard of review, which resulted in the improper weighing of the facts. *See* 866 So. 2d at 626. The text of the constitution itself

provides the standard for determining constitutional compliance, which this Court previously articulated as: "whether the resources allocated by the legislature are sufficient to provide 'a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education,' as required by the Florida Constitution." *King*, 940 So. 2d at 602. There is no basis for concluding that the State could fail to comply with its mandatory duty as long as it has a rational basis. That would be contrary to the letter and spirit of the constitutional provision and the CRC intent. *See Caribbean Cons.*, 838 So. 2d at 501.

The trial court held that "Defendants' education policies as presented at trial are rationally related" to the constitutional requirements. (R.3394.) Notably, the court failed to address whether the state has actually achieved its affirmative duty as mandated by the citizens of this state; it concluded merely that the state could meet its obligation by having policies that are rationally related to this provision. The trial court's ruling means that the State may provide an education system that fails to meet the constitutional mandates because there may be a rational basis for doing so. A rational basis that fails to provide a uniform, efficient and high quality education is antithetical to the fundamental value and inconsistent with the State's paramount duty as mandated by this State's voters.

Minimal rational basis is an insufficient standard to determine affirmative compliance with the language of Florida's

constitution. Interpreting an almost identical paramount duty, the Washington Supreme Court explained:

> Positive constitutional rights do not restrain government action; they require it. The typical inquiry whether the State has overstepped its bounds therefore does little to further the important normative goals expressed in positive rights provisions. Moreover, federal limits on judicial review such as the political question doctrine or rationality review are inappropriate. Instead, in a positive rights context we must ask whether the state action achieves or is reasonably likely to achieve "the constitutionally prescribed end."

McCleary, 269 P.3d at 248 (citations omitted). *See also Gannon*, 319 P.3d at 1236-37 (adequacy is met when public education financing system through structure and implementation is reasonably calculated to have all public education students meet or exceed the standards codified in the statutes).

Rational basis is usually associated with the "minimal requirement a classification must meet to be consistent with the constitutional guarantee of equal protection when no suspect class or fundamental right is involved. In that context, the idea is that the government is permitted to give classes disparate treatment, notwithstanding the constitutional guarantee, as long as it has a rational basis for doing so." *Neeley*, 176 S.W.3d at 784; *see generally City of Ft. Lauderdale v. Dhar*, 185 So. 3d 1232, 1234-35 (Fla. 2016). This type of rational basis analysis does not fit in the context of adjudicating the State's constitutional duty as Article IX cannot be interpreted to allow the legislature to structure a public school system that is *not* uniform, efficient, safe, secure, and high quality "regardless of whether it has a

rational basis ... for doing so."[155] *Neeley*, 176 S.W.3d at 784.

As the *Holmes* Court stated, "[a]bsent a constitutional limitation, the Legislature's 'discretion reasonably exercised is the sole brake on the enactment of legislation.'" 919 So.2d at 406, quoting *State v. Bd. of Pub. Instruc.*, 170 So. 602, 606 (Fla. 1936). Article IX places "both a mandate to provide for children's education and a restriction on the execution of that mandate." *Id.* Thus, whether the legislature has a reasonable basis for resolving a public policy debate in a particular way is immaterial to determining if it has met its affirmative duty. *Id.* at 398. While recognizing there may be rational reasons for vouchers, *Holmes* struck down the program for violating uniformity. *Id.* at 412-13.

In the alternative to *King's* reasonableness standard, another standard that would be consistent with Florida's paramount duty was recently articulated by a Connecticut trial court. The standard is whether the state's educational resources or core components are rationally, substantially, and verifiably connected to creating educational opportunities for children. *Conn. Coalition for Justice in Educ. Funding v. Rell*, 2016 WL 4922730, at *14 (Conn. Super. Ct. Sept. 7, 2016) (appeal pending). Since education has a unique status in the constitution by requiring the State to do something rather than restricting what it can do, traditional equal protection rational basis analysis cannot apply. *Id.* at *5.

Parents urge this Court to reject the trial court's rational

[155] *Neeley* adopted an arbitrary standard, 176 S.W.3d at 785, which also is not appropriate here. However, the court's discussion as to why rational basis is not appropriate is instructive.

basis standard and instead apply the reasonableness standard as enunciated in *King* and articulated in *McCleary*: whether the State's action achieves or is reasonably likely to achieve the constitutionally prescribed end of a uniform, efficient and high quality system. In the alternative, Parents submit that *Rell's* meaningful rational basis standard should be adopted.

B. Burden of Proof

The trial court erred in applying beyond a reasonable doubt as the burden of proof. No appellate court in Florida has determined the proper burden of proof in a suit alleging the state's failure to comply with Article IX's mandatory duty.

The typical burden of proof in a civil case is the preponderance of the evidence standard. *Beal Bank, SSB v. Almand & Assoc.*, 780 So. 2d 45, 58 (Fla. 2001). However, challenges to the constitutionality of a state statute involve a presumption of constitutionality; therefore, a statute will not be held invalid unless clearly unconstitutional beyond a reasonable doubt because it is assumed the legislature intended to enact a valid law. *Brinkmann v. Francois*, 184 So. 3d 504, 507-08 (Fla. 2016). Although the *Holmes* Court invalidated a state statute for violation of Article IX, section 1, it did not discuss the burden. *See* 919 So. 2d at 413-14 (Bell, J., dissenting) (critiquing majority for failure to comply with beyond a reasonable doubt standard).

King's reasonableness standard for reviewing whether the legislature has made adequate provision for public schools, 940 So. 2d at 602, is unlike typical statutory challenges which involve an

evaluation of the statutory language to determine whether there is an infringement on a constitutional right. *See, e.g., Crist v. Ervin*, 56 So. 3d 745, 747 (Fla. 2010) (legislative acts accorded a presumption of constitutionality and construed to effect a constitutional outcome when possible).

An analogous situation is found in legislative apportionment cases, where the Florida Supreme Court rejected beyond a reasonable doubt because apportionment, unlike a legislative act adopted separate from a constitutional mandate, is adopted pursuant to instructions of the citizens in the constitution. *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 397-98 (Fla. 2015). The court recognized a distinction between evaluating the legislature's compliance with constitutionally mandated criteria and the typical evaluation of searching for a reasonable statutory interpretation that would make it constitutional. *Id.* at 398-99.

The legislature's role in apportionment, while unique in terms of the judiciary's role in reviewing redistricting plans, is similar to the legislature's role in establishing by law a constitutionally adequate education system. Both involve legislative acts adopted pursuant to specific mandates and instructions from the state's citizens in constitutional provisions. *See Holmes*, 919 So. 2d at 406 (Article IX contains a mandate and restriction on legislature's power). It is long established that legislation violating clear constitutional mandate must fail. *Holley v. Adams*, 238 So. 2d 401, 404-05 (Fla. 1970).

Further, the duty to make adequate provision for education

rests with the State, not just the legislature. It is thus unclear how the beyond a reasonable doubt standard could apply, if at all, to failures that are attributable to the SBE; for example, its failure to direct school improvement measures. (Facts § C.)

For these reasons, Parents urge this Court to adopt preponderance of the evidence to apply to the record in this case. Such a standard would ensure that the will and intent of the voters is not frustrated in ensuring that the State complies with its maximum duty to adequately provide for education.[156] *See Holmes*, 919 So. 2d at 412-13; *see also Lewis v. Leon Cnty.*, 73 So. 3d 151, 153-54 (Fla. 2011), quoting *Caribbean Cons.*, 838 So. 2d at 501 (constitution "must never be construed in such manner as to make it possible for the will of the people to be frustrated or denied").

IV. Trial Court Made Erroneous Legal Conclusions.

Misapplication of the law to established facts are subject to a clearly erroneous standard of review; reversal is warranted where trial court fails to give legal effect to the evidence in its entirety. *Holland,* 89 So. 2d at 258. The standard of review for interpretation of article IX, section 1(a) is de novo, without deference to the decision below. *Holmes*, 919 So. 2d at 399.

A. Court Improperly Shifted State's Duty to School Boards.

The trial court erred in shifting legal responsibility under Article IX, section 1 to local school boards. The court held that

[156] Florida's affirmative constitutional right to education is recognized as a "Category IV" imposing a "paramount" maximum duty on the state to provide for public education that is uniform and of high quality. 919 So. 2d at 404. This compares to weaker provisions in other states. *Id.*, citing Staros, *Sch. Finance Litigation in Fla.: A Historical Analysis,* 23 Stetson L. Rev. 497, 498-99 (1994).

"the State cannot be held liable for ineffective operational, control, and supervisory decisions at the local level." (R.3384.) Specifically, the court found that school boards were responsible for "particular levels of student performance," and "the availability of resources in particular schools." (*Id.*) The court attributed "variability" in schools from one district to the next to the school board's constitutional authority "to set policy and establish certain standards within their respective districts." (R.3374.) After detailing the negative impact of frequently changing standards (actions of the State), the court blamed school districts for not providing necessary supports for struggling students to learn the new standards. (R.3431-34 ¶¶91-97.) Ultimately, the court found that "[t]o the extent that Plaintiffs seek relief for decisions that Florida law entrusts to local school districts—including decisions on hiring, staffing, and the allocation of resources among schools within a particular district—the school districts are indispensable parties." (R.3397.)

The trial court was incorrect and relied on an erroneous interpretation of Article IX to reach its legal conclusions. As evident from the constitutional language, there is no private cause of action against individual school boards to enforce Article IX, section 1. *King*, 940 So. 2d at 603. The education clause states that "adequate provision shall be made by law," which means that the duty lies with the State. *Id.* Therefore, the school boards could not be "indispensable parties" as they have no role in making "adequate provision" for the education system.

Further, the duty of the State under Article IX is a non-delegable duty. The legislature has the duty to "establish education policy, enact education laws, and appropriate and allocate education resources." § 1000.03(2)(a). These duties are non-delegable; the legislature may not delegate its power to enact law. *See Bailey v. Van Pelt*, 78 Fla. 337, 350-51 (Fla. 1919); *see also Chiles*, 589 So. 2d at 267 (language in constitutional provision stating that provision shall be made by law for raising sufficient revenue directs the legislature to make appropriations, which is the only branch to whom this power is constitutionally assigned).

Article IX section 2 sets out the respective duties of the SBE and section 4 of school boards. While the public education system is a "cooperative function" of state and local authorities, *see* § 1000.03(3), the SBE has the constitutional and statutory duty to supervise the education system, which includes individual school boards. (R.3407-08 ¶13.) *See Sch. Bd. of Volusia Cnty. v. Academies of Excellence*, 974 So. 2d 1186, 1193 (Fla. 5th DCA 2008) (while school board shall operate, control and supervise all free public schools within their district, SBE has supervision over the system of free public education); *see also Rell*, 2016 WL 4922730, at *2 (state's responsibility for education is non-delegable).

School districts are part of the state system of public education, § 1001.32, thus the SBE supervises them and is responsible for enforcing their compliance with laws and rules, overseeing their performance, and ordering compliance or taking

action to remedy noncompliance. §§ 1001.03(8), 1008.32. The SBE also is required to hold all school districts and public schools accountable for student performance and institute appropriate measures for enforcing improvement. § 1008.33(2)(a).

The trial court had significant concerns about failing schools: "There can be little doubt that allowing a school to remain in F status for an extended period of time raises serious issues regarding the constitutional acceptance of such an event." (R.3384.) The court incorrectly found "that this focus is on only a very small number of schools (primarily in one district)." (*Id.* at 3383.) The court ignored substantial evidence about numerous schools across many districts that are persistently low performing (Facts § C), and by misapplying the law to the facts erroneously concluded that this does not rise to the level of a constitutional violation. (R.3384.)

Failing schools are widespread in Florida and the vast majority serve FRL and minority students. (Facts § C.) A system that tolerates complacency with persistently low-performing schools is not high quality. (R.3468 ¶ 175.) Persistently low-performing schools almost always serve children in poverty and minority students, i.e., the State is systematically failing to allow all children the opportunity to obtain a high quality education.

The trial court found that instructional resources, including technology, were not available for "every school district or for every school." (R.3377.) Yet, it declined to attribute this failure to the State and instead noted it could be attributable to a lack

of efficiency. (R.3378.) This finding ignores that "efficiency" is one of Article IX's requirements that is placed on the State. Even if, as the trial court suggested, the "variability" in schools, resources, or levels of student performance from one district to the next could be solely attributable to poor local decisions (R.3410 ¶23, 3434 ¶97, 3471 ¶182, 3535 ¶349, 3537 ¶354, 3542 ¶363, 3552 ¶¶386&387, 3565 ¶426, 3578 ¶468), the SBE and the legislature still have a legal duty and authority to take action.

While school districts share responsibility for using resources efficiently, the State holds ultimate authority for ensuring that the system of laws, standards and rules assure efficient operation of the system. *See* § 1000.03(3); *see also* §§ 1000.02(1)(b), 1008.31(2)(a)-(c). The trial court explicitly held that some school districts are better managed and more effective at improving student performance than other districts. (R.3578 ¶468.) If some districts are so inefficient as to explain the vast disparities in student achievement, then both the legislature (responsible for enacting laws that assure efficient operation of the system) and the SBE (responsible for exercising oversight over the school districts) have failed to comply with their constitutional duty. *Cf. Rose,* 790 S.W.2d at 211 (system of common schools must be adequately funded and substantially uniform throughout state, and "children who live in the poor districts and the children who live in the rich districts must be given the same opportunity and access to an adequate education. This obligation cannot be shifted to local counties and local school districts.");

Claremont Sch. Dist. v. Gov., 635 A.2d 1375, 1381 (N.H. 1993) (local control does not dilute the state's duty to support public schools; state cannot abdicate that obligation through delegation to local government).

B. Court Did Not Use Proper Constitutional Measurements.

Without interpreting the constitutional terms, the trial court concluded that the system of public schools should "*allow*–but is not required to guarantee–a high-quality education *to be delivered by local school districts*." (R.3394, emphasis in original). The court further found that "[g]iven the improvements over time" the funding in Florida *allows* students to obtain a high quality education. (R.3396.) Parents do not argue that student success is guaranteed. Yet, by looking only at improvements over a long time, the court ignored the undisputed evidence of vast numbers of students who are not currently achieving on Florida's standards.[157] (Facts § B.)

Whether students are being allowed to obtain a high quality education must be measured by mastery of Florida standards on statewide assessments. Florida's maximum duty mandates that all children be allowed to obtain a high quality education, thus assessment results must show high quality for all subgroups and across all school districts, and not just a state average. *See Rell*, 2016 WL 4922730, at *13-14 (citing alarming statistics about reading skills among poor, court finds that "flaw of averages" mislead when they cut across wide extremes). Clearly, a high

[157] *See* Tr.v.19, 2931:9-16; v.27, 4115:13-4117:21; Exs. 1898, at 56756, 56770-56771; 1900, at 56851, 56866-67; 1950; 2011; 5292.

quality education in Florida must allow all groups of students to read and do math at grade level. By contrast, outcomes from national norm-referenced tests such as NAEP, which is not linked to Florida's standards, are not proper measurements of Florida's high quality constitutional standard. *See CFE*, 801 N.E.2d at 340.

Nor does high quality mean progress from terrible[158] to mediocre. Progress on the initial FCAT does not sufficiently measure whether the State is currently providing a high quality education (*see* R.3396) as any progress that occurred has stagnated since 2010. As measured on state assessments, over a half million children are not *currently* obtaining a high quality education. (Facts § B.) A proper benchmark is the high performance of students in districts such as St. Johns where at least 75% pass state assessments and over 90% graduate. (*Id.*) With the necessary conditions for a high quality education uniformly provided in all districts to all children (*id.* § A), students in Gadsden and other districts could be achieving at the rates in St. Johns (*id.* § B).

C. Court's Findings on Funding are Legally Insufficient.

The court's findings on funding are legally insufficient due its failure to interpret the constitutional duties, misapplication of minimal rational basis, use of the wrong burden of proof, and misplacement of the State's legal duty on school districts. The error is obvious when examining the holding that "there is not a constitutional level lack of resources available in Florida schools." (R.3377.) The court rejected Parents' evidence that the

[158] *See* Tr.v.37, 5538:15-5539:8, 5561:8-14.

funding formula is deficient because it does not consider the cost of educating students, provide state funding for students in poverty, nor generate adequate funding to provide students with an opportunity to receive a high quality education. (R.3499 ¶256.) This weighing of the evidence was based on legal error in evaluating the State's funding decisions. (R.3382.)

The question of the sufficiency of funding cannot be divorced from the standard of whether the State has allowed all children to obtain a high quality education or the State's obligation to provide an efficient system. *See King*, 940 So. 2d at 602. As discussed *supra* § IV.B, the court failed to meaningfully measure whether all students were provided the opportunity to achieve on the standards. When disaggregated by subgroup and district, glaring disparities emerge in the data. Across the state, persistently low-performing schools are high-poverty and high-minority. The court rejected Parents' evidence (through its misapplication of the law) that lack of resources from the State are causing these disparities and a non-uniform opportunity to achieve.

It is undisputed that the State has never undertaken an analysis to determine the cost of allowing all students an opportunity to achieve on the standards, even though the State's chief economist testified it is possible to do such an analysis. (Fact § D.) The court found there was no study on even the minimum amount of resources required to administer a school (R.3383) even though it found that "some amount of resources are necessary for school districts to fulfill their constitutional duty to operate a

high quality system of public education." (R.3418 ¶C.) Importantly, the court found that children in poverty often require "extra resources that the state funding formula does not provide." (R.3414 ¶35; Facts § A.) However, without interpreting the constitution and determining what is required, the court rejected the argument that funding was insufficient to allow all children the opportunity to achieve primarily placing the blame for any deficiencies or inefficiencies on local school districts. *See Columbia Falls Elem. Sch. Dist. No. 6*, 109 P.3d at 262 (without assessment of what constitutes quality education, legislature has no reference point from which to relate funding to relevant educational needs; in absence of threshold definition of quality, court could not conclude that system was adequately funded).

D. Court Erred in Concluding McKay Program Does Not Implicate Uniformity.

The McKay Program violates Article IX for all of the same reasons as the program at issue (Opportunity Scholarship) did in *Holmes*. The trial court misinterpreted *Holmes* to conclude that the McKay Program does "not implicate the uniformity of the broader public school system." (R.3398.) The McKay Program was not at issue in *Holmes* nor did it even imply this in *dicta*. The *Holmes* Court was distinguishing the Opportunity Scholarship from the ESE program, and not from McKay. The Court noted that state funds could be used for private school placements through the ESE program when an appropriate public school program could not be provided. 919 So. 2d at 411-12, citing *Scavella v. Sch. Bd. of Dade Cnty.*, 363 So. 2d 1095, 1099 (Fla. 1978) (legislative attempt to cap amount spent on

private placements needed for students with disabilities violated Article IX's provision that schools must be free). This is in line with federal special education law that an appropriate education must be free even in private schools when placed by the school district. 20 U.S.C. § 1412(a)(10)(B). McKay does implicate uniformity because it allows placement in private schools outside of any determinations of whether the private school is appropriate or provides individualized educational services.

The McKay Program uses public funds directly from the State Treasury for vouchers that may be used for tuition and fees of students with disabilities' enrollment in private schools. § 1002.39. The McKay Program "diverts funds that would otherwise be provided to the system of free public schools that is the exclusive means set out in the Constitution for the Legislature to make adequate provision for the education of children." 919 So. 2d at 408-09. The trial court erred in holding McKay is relatively small and therefore does not have a material impact on the K-12 budget. (R.3398.) As the *Holmes* Court reasoned, the "systematic diversion of public funds to private schools on either a small or large scale is incompatible with article IX, section 1(a)." 919 So. 2d at 409.

Moreover, the McKay Program "makes no provision to ensure that the private school alternative to the public school system meets the criterion of uniformity." *See id.* at 409. The McKay Program does not require private schools to hire certified teachers, teach any required courses, administer any standardized test, align curriculum with State standards, nor be accredited. Private schools

are not free. The vast majority teach religious curriculum. Importantly, even though this program targets students with disabilities, there is no requirement that the private schools provide appropriate special education services or provide parents procedural protections. (Facts § E.)

V. Standing to Challenge FTC Program.

In a related case, this Court recently ruled that there was no standing to challenge the FTC Program under Article IX in part because tax credits are not public funds. *McCall v. Scott*, 2016 WL 4362399, *14 (Fla. 1st DCA Aug. 16, 2016) (appeal pending). Parents recognize this holding controls in this Court. Accordingly, they incorporate by reference their legal argument and undisputed facts submitted in the trial court to preserve this issue for any further appellate review. (R.257-68, 271-80, 282-90, 293-1122.)

VI. Conclusion

For the reasons set forth above, Parents respectfully request that this Court: hold that their claim is justiciable; interpret Article IX's terms; correct the legal conclusions regarding the State's duties, measurement, funding and uniformity; and remand for review of the evidence under the proper standard of review and burden of proof. *See CVS EGL Fruitville Sarasota Fl, LLC v. Todora*, 124 So. 3d 289, 292 (Fla. 2d DCA 2013) (remand with directions to re-evaluate evidence using correct legal standards); *Cooper v. Gress*, 854 So. 2d 262, 268 (Fla. 1st DCA 2003) (remand with instructions on proper burden).

Dated: October 6, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE

I certify compliance with Fla. R. App. P. 9.210(a)(2) and that the font and size of this brief is Courier New 12.

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