SC16-1668

In the Supreme Court of Florida

JOANNE MCCALL, *et al.*,

Petitioners,

v.

RICK SCOTT, Governor of Florida, in his official capacity as head of the Florida Department of Revenue, *et al.*,

Respondents.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT
Case No.: 1D15-2752

STATE RESPONDENTS' BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Overview of Florida's Tax Credit Scholarship Program

In 2001, the Florida Legislature set out to "expand educational opportunities for children of families that have limited financial resources." Ch. 2001-225, § 5, Laws of Fla. It wanted to ensure "that all parents, regardless of means, may exercise and enjoy their basic right to educate their children as they see fit." § 1002.395(1)(a)3., Fla. Stat. (2014). Rather than appropriating funds—or otherwise relying on public dollars—the Legislature sought to "[e]ncourage private, voluntary contributions to nonprofit scholarship-funding organizations," which could in turn provide private dollars for scholarships. Ch. 2001-225, § 5, Laws of Fla. As a result, "children in this state [would] achieve a greater level of excellence in their education." § 1002.395(1)(b)4., Fla. Stat.

To that end, Florida's Tax Credit Scholarship Program relies on private, voluntary donations—not public dollars. *Id.* §§ 1002.395(1)(b)1. & (2)(e). And the program provides tax credits to donors—not schools or students. *Id.* § 1002.395(5)(b). In the 2015-2016 school year alone, the private, voluntary contributions resulted in scholarships (and enhanced educational opportunities) for over 78,000 children from low-income families. Fla. Dep't of Educ., *Florida Tax Credit Scholarship Program Fact Sheet* (Sept. 2016), *available at* http://www.fldoe.org/core/fileparse.php/15230/urlt/FTC_Sep_2016.pdf.

Two principal components work together to effectuate the Scholarship Program. First, the law authorizes the creation of Eligible Nonprofit Scholarship-Funding Organizations (SFOs), which provide the scholarships. § 1002.395(2)(f), Fla. Stat. An eligible SFO must award scholarships to eligible students on a first-come, first-served basis, except that SFOs must give priority to students previously participating in the program. *Id.* § 1002.395(6)(e)-(f).

Second, to encourage private donations to the SFOs, the Legislature provided for donor tax credits. Not unlike the well-known federal tax deduction for charitable contributions (including to religious organizations), *see* 26 U.S.C. § 170, Florida's tax law allows credits for those making private, voluntary contributions, § 1002.395(5), Fla. Stat. Taxpayers who make eligible contributions to an SFO may apply for tax credits that can be applied toward liability for certain state taxes, such as oil, gas, and mineral severance taxes or corporate income tax. *Id.* § 1002.395(5). The law caps the aggregate total of allowable tax credits. *Id.*

The scholarships are limited to those with financial need. Applicants can qualify if 1) they qualify for free or reduced-price school lunches or are on the direct certification list, or 2) they are or recently were in foster care or in out-of-home care. *Id.* § 1002.395(3). Previous qualifiers may continue in the Program as long as their family income does not exceed a certain level. *Id.* § 1002.395(3)(b)-(c). Beginning with this 2016-2017 school year, the student's household income

may not exceed 260 percent of the federal poverty level, *id.* § 1002.395(3)(c), but SFOs must give priority to new applicants "whose household income levels do not exceed 185 percent of the federal poverty level." *Id.* § 1002.395(6)(e).

Procedural Background

Seeking declaratory and injunctive relief, Petitioners brought suit challenging the Scholarship Program's validity under the Florida Constitution's "uniformity" provision in Article IX, section 1, and the "no aid" provision in Article I, section 3. App. at 6. Specifically, Petitioners alleged that the Program violates the "uniformity" provision because it diverts taxpayer funds from public schools to fund private school scholarships, thereby creating a non-uniform system of public education. *Id.* at 7. Petitioners also alleged that the Program violates the "no-aid" provision because it diverts funds from the public treasury and channels them predominantly to sectarian schools. *Id.* at 6-7.

As to Petitioners' interest in bringing the case, the complaint asserted that "[a]s Florida citizens and taxpayers, [Petitioners] have been and will continue to be injured by the unconstitutional expenditure of public revenues under the Scholarship Program," and additionally, "many of the [Petitioners] whose children attend public schools, or who are teachers or administrators in the public schools, have been and will continue to be injured by the Scholarship Program's diversion of resources from the public schools." *Id.* at 11.

The State Respondents (various state officers in their official capacities, along with two state agencies) and Intervenor Respondents (a group of parents of students currently participating in the Scholarship Program) moved to dismiss Petitioners' complaint for lack of standing. *Id.* at 7. The trial court granted both motions and dismissed the complaint with prejudice. *Id.* at 3.

Petitioners appealed that dismissal to the First District, which affirmed the trial court's ruling in a unanimous decision. Specifically, the First District held that Petitioners had not established a special injury sufficient to confer standing because they "failed to allege that they suffered a harm distinct from that suffered by the general public." *Id.* at 11. Indeed, at the hearing before the trial court, Petitioners were given an opportunity to offer additional factual allegations to support their claim of harm, but they refused. *Id.* at 7-8 ("Judge, we don't think we need to amend in any way at all. We think what we have said here in the second sentence of paragraph 19 is fully sufficient . . . .").

Failing to allege any concrete injury, Petitioners instead chose to rely on a diversion theory of harm. Like the trial court, the First District rejected this theory as "conclusory and speculative," as well as incorrect as a matter of law. *Id.* at 12. Because the Program is funded by private, voluntary donations, the First District determined there was no "diversion" of any state revenues from public schools. *Id.*

The First District also rejected Petitioners' reliance on an exception to the special injury requirement, first recognized by this Court in *Department of Administration v. Horne*, 269 So. 2d 659 (Fla. 1972). This exception recognizes standing where a taxpayer alleges that the challenged legislative act violates a specific constitutional limitation on the Legislature's taxing and spending power. App. at 19-20. Here, "while both article I, section 3 and article IX, section 1(a) of Florida's Constitution expressly or implicitly limit the Legislature's spending authority, [Petitioners] failed to identify any portion of the [Program] that exceeds the Legislature's authority under either constitutional provision. Second, neither provision limits the Legislature's taxing authority." *Id.* at 20.

Petitioners now seek this Court's discretionary review on the basis that the First District's decision 1) presents an express and direct conflict, and 2) expressly construes two provisions of the Florida Constitution. Pet. Juris. Br. at 4.

SUMMARY OF THE ARGUMENT

This Court should deny review because the First District's decision is correct and fits well within Florida's long-settled standing jurisprudence. First, the decision does not expressly and directly conflict with any other decision; therefore, this Court's review is not necessary to resolve any irreconcilable holdings on the same issue of law. Second, to the extent that the First District construed two constitutional provisions in assessing Petitioners' claim to taxpayer standing, this

Court should decline review because the First District's thorough and well-reasoned decision leaves no substantial doubt as to the proper construction of those provisions. Accordingly, its decision should remain undisturbed.

ARGUMENT

I. THIS COURT SHOULD DECLINE REVIEW BECAUSE THE FIRST DISTRICT'S DECISION IS CORRECT UNDER FLORIDA'S WELL-SETTLED STANDING JURISPRUDENCE.

A. The First District's Decision Does Not Present an Express and Direct Conflict.

This Court's conflict jurisdiction exists to resolve irreconcilable holdings within Florida on the same question of law. *Wainwright v. Taylor*, 476 So. 2d 669, 670 (Fla. 1985); *see also* Art. V, § 3(b)(3), Fla. Const. Such jurisdiction does not lie in the absence of express and direct conflict appearing within the four corners of a district court's decision. *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986). Here, the requisite conflict is absent because the First District's holding in no way conflicts on the same point of law with any of the cases cited by Petitioners. Accordingly, this Court does not have jurisdiction to review the First District's decision based on an express and direct conflict.

Petitioners allege a conflict with this Court's decision in *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006). Pet. Juris. Br. at 6. But that decision did not in any way address standing, and it is axiomatic "that no decision is authority on any question not raised and considered." *State ex rel. Helseth v. Du Bose*, 128 So. 4, 6 (Fla.

1930). Beyond that, the case is also distinguishable because the discussion of diversionary funding in *Holmes* was made in the context of a voucher program that "specifically require[d] the Department of Education to 'transfer from each school district's appropriated funds the calculated amount from the Florida Education Finance Program and authorized categorical accounts to a separate account for the Opportunity Scholarship Program.'" 919 So. 2d at 409 (quoting § 1002.38(6)(f), Fla. Stat. (2005)). In short, there was an actual diversion of *appropriated* education funds from public schools to private schools.

Petitioners also assert that the First District's decision conflicts with its earlier decision in *Bush v. Holmes*, 886 So. 2d 340 (Fla. 1st DCA 2004). However, any potential intra-district conflict would not confer jurisdiction on this Court. *See* Art. V, § 3(b)(3), Fla. Const. ("The supreme court . . . [m]ay review any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of *another* district court of appeal . . . ." (emphasis added)).

Finally, in a footnote, Petitioners assert conflict with *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260 (Fla. 1991), in which this Court addressed a challenge to a statute authorizing an executive branch commission to restructure an appropriations act in the event of a budget deficit. But no direct conflict is present. The *Chiles* opinion addressed the principle of taxpayer standing in dicta, in a footnote, noting that the standing of plaintiffs *had not been challenged* but the

Horne exception would be applicable because "[t]he budget reductions ordered pursuant to [the challenged law] go to the very heart of the legislature's taxing and spending power." *Id.* at 263 n.5. The statute in *Chiles*, unlike the Program challenged here, involved specific authority to make budget reductions to legislative appropriations. By contrast, the Legislature's taxing and spending authority is not implicated by the Scholarship Program, which neither imposes any tax nor spends any public money.

In sum, the First District's decision does not present an express and direct conflict with any of the cases relied upon by Petitioners. Therefore, discretionary jurisdiction does not lie on that basis.

B. The First District Correctly Concluded that Petitioners Lack Standing, and that Decision Does Not Warrant Further Review.

In rejecting Petitioners' reliance on the *Horne* exception to establish standing, the First District addressed two constitutional provisions: the "uniformity" provision in Article IX, section 1, and the "no aid" provision in Article I, section 3. App. at 20-29. To the extent that the First District "expressly construed" those provisions, this Court should decline review because the First District's thorough and well-reasoned decision does not implicate any substantial and "existing doubts" concerning the relevant constitutional authorities. *See Dykman v. State*, 294 So. 2d 633, 635 (Fla. 1973).

Even when discretionary jurisdiction exists in any particular case, this Court has no duty to grant review. *See* Harry Lee Anstead *et al.*, *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. 431, 502 (2005) (recognizing that "the Court, in every instance, can decline to hear a [discretionary review] case"). Jurisdiction over decisions construing constitutional provisions exists to "remove existing doubts as to the proper construction of a constitutional provision." *See Rojas v. State*, 288 So. 2d 234, 238 (Fla. 1973). Applying that standard here, this Court's review is not warranted.

At bottom, Petitioners' assertion of taxpayer standing is predicated on the assumption that this case involves the unlawful "use of public funds." Pet. Juris. Br. at 8. As the trial court and the First District correctly concluded, that position is flatly at odds with the how the Scholarship Program actually operates, and misconstrues the plain language of Florida's Constitution.

The First District addressed the two constitutional provisions in the context of the *Horne* exception to the special injury rule in taxpayer standing cases. In order to establish standing under *Horne*, Petitioners "were required to identify both (1) a specific exercise of the Legislature's taxing and spending authority, and (2) a specific constitutional limitation upon the exercise of that authority." App. at 20. Examining the operation of the Scholarship Program and the plain language of the two constitutional provisions, the First District concluded that Petitioners could not

proceed under the *Horne* exception because they had failed to establish that "any portion of the [Scholarship Program exceeded] the Legislature's spending authority under either constitutional provision" and "neither provision limits the Legislature's taxing authority." *Id.* at 20-29. The plain text of the constitution and pertinent statute supports that conclusion, there is no split of authority on the issue, and Petitioners' attempt to seek error correction in this Court does not warrant disturbing the First District's correct and well-reasoned decision.

Finally, the First District's opinion does not immunize the Scholarship Program (or any other tax credit program) from constitutional challenge. *See* Pet. Juris. Br. at 4, 7-9. As always, any taxpayer may assert standing by establishing special injury or presenting a claim that falls within the *Horne* exception. As the circuit court and the unanimous panel of the First District correctly concluded, however, Petitioners' disagreement with the Legislature's carefully crafted policy choice does not suffice to establish a concrete, particularized injury; and a scholarship program that does not impose any tax or spend any public money does not and cannot run afoul of constitutional limits on the legislature's authority to impose taxes or expend public funds. The First District's affirmation of that altogether unremarkable proposition does not warrant this Court's review.

CONCLUSION

This Court should deny review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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