SUPREME COURT OF FLORIDA

Case No. SC16-1668

JOANNE McCALL et al.,

Petitioners,

v.

RICK SCOTT, GOVERNOR OF FLORIDA, et al.,

Respondents.

On Petition for Discretionary Review
From the First District Court of Appeal,
No. 1D15-2752

BRIEF OF INTERVENORS-RESPONDENTS ON JURISDICTION

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Intervenors-Respondents ask this Court to deny the petition for discretionary review for lack of jurisdiction and lack of a question of exceptional importance.

STATEMENT OF THE CASE AND THE FACTS

The Florida Tax Credit Scholarship Program (the "Tax Credit Program") allows Florida taxpayers to apply for certain tax credits based on "private, voluntary contributions to nonprofit scholarship-funding organizations." § 1002.395(1)(b)(1), (5)(b) Fla. Stat.

An earlier scholarship program that provided tuition assistance from appropriated funds, the Florida Opportunity Scholarship Program ("OSP"), was invalidated by this Court because it allowed children "to receive a ***publicly funded*** education through an alternative system of private schools." *Bush v. Holmes*, 919 So. 2d 392, 412 (Fla. 2006) (emphasis added). The Court stressed that its decision "does not deny parents recourse to either public or private school alternatives," but that such choice is limited only "when the private school option depends upon ***public funding***." *Id.* at 412 (emphasis added).

Appellants insist that the Tax Credit Scholarship Program is "a successor program" to the OSP. That is incorrect. When the Legislature enacted the Tax Credit Program in early 2001, the OSP had recently been *upheld* against a constitutional challenge. *See Bush v. Holmes*, 767 So. 2d 668, 677 (Fla. 1st DCA

2000). The Legislature did not intend the Tax Credit Program to replace the OSP, but to operate alongside it.

As the First DCA noted in the opinion below, the Tax Credit Program serves a different purpose; it supports low-income students rather than students attending "failing public schools." Most importantly, the Tax Credit Program is funded through private contributions, rather than legislative appropriations. Under the Program, Floridians may make voluntary contributions—creditable up to a cap against certain taxes—to private nonprofit organizations that award scholarships to needy children, whose parents choose the schools their children will attend. §§ 1002.395(5), 1002.395(7)(a), Fla. Stat. Because all scholarship funds come from private contributions, the Tax Credit Program accommodates the restrictions on "the state's use of public funds" identified by this Court. *Holmes*, 919 So. 2d at 410. It also ensures that the only persons whose dollars end up supporting education at a religious institution are those who have voluntarily chosen to contribute to a scholarship-funding organization. No taxpayer sees his or her tax dollars diverted to religious instruction. In this way, the Program furthers the State's interest in "expanding educational opportunities for children of families that have limited financial resources," § 1002.395(1)(b)(3), while respecting constitutional limitations on the use of public funds. Florida is one of fifteen states that balance these concerns by providing tax credits for private contributions to

scholarship-funding organizations.[1] Despite constitutional challenges such as the one below, no tax credit scholarship program has ultimately been held unconstitutional in the state or federal courts.

Florida's Tax Credit Program now serves over 92,000 students with an average family of 4 household income of $24,075—just 4.4% above the federal poverty level. Two-thirds of scholarship students are minorities; more than half live in a single-parent home. The scholarships allow students to attend 1600 private schools, including proven institutions such as Academy Prep Center of Tampa. Intervenor families also have children in the McKay Scholarship Program.

In this case, the circuit court agreed with precedents from state and federal courts holding that plaintiffs lack standing to challenge a tax-credit scholarship program in the absence of a special injury. *McCall v. Scott*, No. 2282, 2015 WL 3945409 (Fla. Cir. Ct. May 18, 2015) (citing *Duncan v. State*, 102 A.3d 913, 926-27 (N.H. 2014); *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1443 (2011)). The First DCA affirmed, holding that Petitioners failed to allege a special injury and that taxpayer standing is not available where no public funds have been

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[1] The other states are Alabama, Arizona, Georgia, Indiana, Iowa, Kansas, Louisiana, Nevada, New Hampshire, Oklahoma, Pennsylvania, Rhode Island, South Carolina, and Virginia. *See* Ala. Code § 16-6D-9; Ariz. Rev. Stat. § 43-1089; Ga. Code § 48-7-29.16; Ind. Code § 6-3.1-30.5-7; Iowa Code § 422.11S; Kan. Stat. § 72-99a07; La. Stat. § 47:6301; 2015 Nev. Laws Ch. 22 § 4; N.H. Rev. Stat. § 77-G:3; 68 Okla. Stat. § 2357.206; 72 Pa. Stat. § 8705-F; 44 R.I. Gen. Laws § 44-62-1; S.C. State Budget Proviso 1.80, 2014 WL 8584494, at *6; Va. Code § 58.1-439.26.

appropriated in violation of constitutional limitations on spending. *McCall v. Scott*, 199 So. 3d 359 (Fla. 1st DCA 2016).

SUMMARY OF ARGUMENT

This Court lacks jurisdiction to review the First DCA's decision because it decided only a question of standing. The DCA did not reach the merits of any constitutional question, and its decision does not conflict with *Holmes*.

Even if this Court had jurisdiction, it still should decline to review the decision. The DCA's decision stands only for the unexceptional propositions that (1) a plaintiff must plead a special injury to establish standing and (2) taxpayer standing is available only when a plaintiff can identify an unconstitutional expenditure of public funds. Neither of these holdings breaks any new ground or otherwise alters well-established Florida law.

ARGUMENT

I. This Court Lacks Jurisdiction to Review the Judgment Below.

The First DCA said at the outset of its analysis that "[t]he sole issue before this Court is whether Appellants have standing to challenge the [Tax Credit Program]." 199 So. 3d at 364. The First DCA did not address the merits issues raised by Petitioners. Accordingly, it did not reach any constitutional holding. Instead, the DCA addressed two standing issues—special-injury standing and taxpayer standing. With respect to special-injury standing, the DCA concluded that "the trial court correctly determined that Appellants lacked special injury standing

because they failed to allege that they suffered a harm distinct from that suffered by the general public." *Id.* at 365. In reaching this conclusion, the DCA did not "expressly construe a provision of the state or federal constitution," Rule 9.030(a)(2)(A)(ii), Fla. R. App. P., but only examined Petitioners' pleadings.

With respect to taxpayer standing, the DCA applied the standards this Court articulated in *Dep't of Admin. v. Horne*, 269 So. 2d 659 (Fla. 1972). To qualify for taxpayer standing under that decision, a plaintiff must "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." 199 So. 3d at 369. Under the second prong of that test, the DCA was required to consider whether Petitioners had identified such constitutional limitations. Accordingly, it looked at the "plain language of the no-aid provision" to determine that the provision "imposes no limitation on the Legislature's taxing authority" but "restricts only the Legislature's authority to appropriate state revenues from the public treasury." *Id.* at 370 (considering Art. I, § 3, Fla. Const.). It also looked at the "plain language of article IX, section 1(a)" to note that this provision "does not contain any express or implied limitation on the Legislature's *taxing* authority" but only "limits the Legislature's spending authority." *Id.* at 372.

That is the entirety of the DCA's consideration of state constitutional provisions. Having observed that the constitutional provisions, on their face,

restricted only the Legislature's spending rather than taxing authority, the DCA proceeded to determine whether Petitioners had in their pleadings identified an exercise of the Legislature's spending authority. The DCA concluded that Petitioners had not. Thus, Petitioners lacked taxpayer standing because they "failed to allege that the Legislature appropriated any public funds to private schools." *Id.* at 373; *see also id.* at 370 ("[T]he legislative actions challenged in this case … involve no appropriation from the public treasury.").

This analysis entails no express construction of the state constitution. For purposes of Rule 9.030(a)(2)(A)(ii), a lower court does not "expressly construe" a constitutional provision when it merely applies the provision to the facts of the case. *Rojas v. State*, 288 So. 2d 234, 236 (Fla. 1973); *Dykman v. State*, 294 So. 2d 633, 635 (Fla. 1973). "[A]n opinion or judgment does not construe a provision of the constitution unless it undertakes to explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision." *Ogle v. Pepin*, 273 So. 2d 391, 392 (Fla. 1973) (internal quotation marks, citation, and alteration omitted). In this case, the DCA did not even purport to *apply* the constitutional provisions. It looked at their plain language—to note the obvious fact that such provisions limit only the spending but not the taxing authority of the Legislature—in the course of applying the *Horne* test for taxpayer standing. That is not a constitutional construction sufficient to establish jurisdiction in this Court.

Petitioners argue that the DCA's decision conflicts with *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006). Yet *Holmes* did not even address standing, while the decision below addressed only standing, so there can be no conflict. To the extent one nevertheless compares the two decisions, the DCA was correct that the holding of *Holmes*—that constitutional concerns arise "[o]nly when the private school option depends upon public funding," *id.* at 412—is fully consistent with the DCA's conclusion that taxpayer standing is not justified when no public funds have been appropriated to private schools. *See* 199 So. 3d at 373-74. The DCA expressly stated that its decision was consistent with *Holmes*, so the requirement of Rule 9.030(a)(2)(A)(iv) that the lower court's decision "***expressly*** and directly conflict with a decision ... of the supreme court on the same question of law" is certainly not met (emphasis added).

Petitioners further argue that the DCA's decision conflicts with that court's prior decision in *Bush v. Holmes*, 886 So. 2d 340 (Fla. 1st DCA 2004). Yet Rule 9.030(a)(2)(A)(iv) applies only to a conflict with "***another*** district court of appeal" (emphasis added). Even so, the DCA correctly explained that its decision was fully consistent with its prior *Holmes* decision. In *Holmes*, the DCA emphasized that "such mechanisms as tax exemptions" do not raise the same constitutional concerns as direct appropriations because "in the case of an exemption, the state merely refrains from diverting to its own uses income independently generated by

the churches through voluntary contributions." *Holmes*, 886 So. 2d at 356-57. That is precisely the rationale the DCA applied in this case—and, for that matter, the same rationale the U.S. Supreme Court adopted in *Winn* to hold that taxpayer standing was unavailable. 199 So. 3d at 371 (citing *Winn*, 563 U.S. at 141-42).[2]

II. This Court Should Not Review the Judgment Below.

Even if jurisdiction were available, this Court should nevertheless exercise its discretion to deny the petition for review. There is simply no need for this Court to consider such pedestrian issues of standing.

Contrary to Petitioners' contention, there is no equivalence between the tax credits at issue in this case and the legislative appropriations that funded the OSP. The argument that tax credits and direct expenditures are legally equivalent has been roundly rejected. The U.S. Supreme Court has rejected it. *Winn*, 563 U.S. at 144 ("Respondents' ... position assumes that income should be treated as if it were government property even if it has not come into the tax collector's hands. That premise finds no basis in standing jurisprudence."). Other state supreme courts have rejected it. *See, e.g., Manzara v. State*, 343 S.W.3d 656, 657 (Mo. 2011) ("[T]his Court agrees with the recent statement of the Supreme Court of the United

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[2] Petitioners further suggest that the decision conflicts with *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260 (Fla. 1991), because that case supposedly did not involve appropriations. Yet the *Chiles* Court could not have been clearer that it was addressing "the power to appropriate state funds," in particular a decision "to reapportion the state budget." *Id.* at 263-65.

States that tax credits are not public expenditures."); *Kotterman v. Killian*, 972 P.2d 606, 618 (Ariz. 1999) ("[N]o money *ever* enters the state's control as a result of this tax credit. … [W]e are not here dealing with 'public money.'"). Legal scholars have rejected it. *See, e.g.*, Edward A. Zelinsky, *Winn and the Inadvisability of Constitutionalizing Tax Expenditure Analysis*, 121 Yale L.J. Online 25, 29 (2011) ("[T]ax expenditure analysis, despite its contribution to tax policy debate, is ill-suited as a tool of constitutional decisionmaking.").

Equating tax credits with expenditures "directly contradicts the decades-long acceptance of tax deductions for charitable contributions, including donations made directly to churches, religiously-affiliated schools and institutions. If credits constitute public funds, then so must other established tax policy equivalents like deductions and exemptions." *Kotterman*, 972 P.2d at 618. Florida law provides tax deductions for charitable contributions to religious organizations. § 220.13(1)(b), Fla. Stat. Petitioners' argument would cast such laws into constitutional doubt. This Court has upheld a law authorizing counties to assist educational institutions, including religious institutions, through the issuance of revenue bonds, *Nohrr v. Brevard Cnty. Educ. Facilities Auth.*, 247 So. 2d 304 (Fla. 1971), and it has upheld grants to religious institutions of the use of public buildings precisely because there was "nothing in this record to support a conclusion that any public funds have been contributed," *Southside Estates Baptist Church v. Bd. of Trustees, Sch. Tax Dist.*

No. 1, 115 So. 2d 697, 699 (Fla. 1959). Petitioners' argument that not only the use of public funds, but even the facilitation of private contributions is constitutionally prohibited, would require drastic changes in the law.

Finally, Petitioners' argument that the DCA's decision alters the law of taxpayer standing is unfounded. In *Horne*, this Court adopted the rationale of the U.S. Supreme Court's decision in *Flast v. Cohen*, 392 U.S. 83 (1968). *See Horne*, 269 So. 2d at 663 ("We choose to follow the United States Supreme Court (*Flast*)."). The U.S. Supreme Court has explained that the rationale of *Flast* does not support taxpayer standing to challenge a tax-credit scholarship program. *Winn*, 563 U.S. at 143 ("Finding standing under these circumstances ... would be a departure from *Flast*'s stated rationale."). That is because when "taxpayers choose to contribute to [scholarship-funding organizations], they spend their own money, not money the State has collected from [petitioners] or from other taxpayers." *Id.* at 142. No taxpayer is being compelled to support sectarian activities through his tax dollars. It would be anomalous to authorize taxpayer standing under these circumstances, and it would require an unjustified expansion of *Horne*. *But see N. Broward Hosp. Dist. v. Fornes*, 476 So. 2d 154, 156 (Fla. 1985) ("This Court has refused to ... expand our exception established in *Horne*.").

CONCLUSION

This Court should deny the petition for 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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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic service through the Florida Courts E-Filing Portal on this 23rd day of November, 2016, to the following:

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