IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

JOANNE McCALL, *et al*.,

Plaintiffs/Appellants,

v.

Case No. 1D15-2752
L.T. Case No. 2014-CA-2282

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

Defendants/Intervenors/Appellees.
_____/

REPLY BRIEF OF APPELLANTS

On Appeal from the Circuit Court of the Second Judicial Circuit, Leon County

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REPLY ARGUMENT

I. PLAINTIFFS HAVE ADEQUATELY PLED SPECIAL INJURY AND SHOULD BE GIVEN THE OPPORTUNITY TO PROVE THEIR ALLEGATIONS.

According to the four corners of the complaint, drawing all inferences in favor of the pleader, and accepting all well-pled allegations as true, *e.g.*, *Wheeler v. Powers*, 972 So. 2d 285, 288 (Fla. 5th DCA 2008), Plaintiffs have alleged:

Plaintiffs include parents of students in public schools and teachers in public schools. (Vol. I, pp. 13, 15, 16 ¶¶ 7, 13, 15, 19). Plaintiffs challenge the Florida law that authorizes entities owing certain taxes to the State to redirect a portion of their tax payments to scholarship organizations created and regulated by Florida law, which organizations then facilitate payment of these funds to private schools on behalf of students deemed eligible under the challenged law. (*Id*. pp. 20, 22, 24, 25, 26 ¶¶ 31, 38, 50-52, 55). The redirected tax revenues have grown to over $350 million per year, with nearly 60,000 students receiving scholarships in 2013-14. (*Id*. pp. 20, 21, 26 ¶¶ 31, 33, 56). For each student leaving public school to attend private school through this program, funding to the public schools is automatically reduced. (*Id.* p. 24 ¶ 48). The reduction in public school funding is greater than the amount of tax funds allocated toward the scholarships, because the scholarship amount is a proportion of the per-student amount under the Florida Education Finance Program (72% in 2013-14), while the public school that the student leaves

loses 100% of the FEFP funding amount. (*Id.* p. 21 ¶ 37).[1] Therefore, the program cost public schools $486 million in 2013-14. This significant reduction in funds flowing to the public schools which Plaintiffs' children attend and in which Plaintiffs teach causes injury to these students and teachers. (*Id.* p. 16 ¶ 19).

Ignoring the factual basis for each of these allegations, Defendants and Intervenors repeatedly characterize Plaintiffs' allegations as "speculative," suggesting that the allegations depend upon a future chain of events which may or may not happen. This is incorrect. It is not speculation that the challenged program has lured tens of thousands of students away from the public schools resulting in the diversion of hundreds of millions of dollars in state funding from these schools to private schools. (*Id*. pp. 20, 21-22, 24, 26 ¶¶ 33, 37, 38, 50, 55).

Rather than address Plaintiffs' actual allegations, the State Defendants purport to describe Plaintiffs' "diversion theory" in a deliberately convoluted backwards chain of hypothetical events conjecturing what "would" happen if the challenged law did not exist. (State Defendants' Brief 11-12). But it is the Plaintiffs' description of the chain of events that *has occurred*, as set forth in the four corners of the complaint, that must be evaluated by the Court in determining

[1] Up until 2014, every student who received a scholarship came from a public school which had previously received funding for the student, as this was an eligibility requirement. § 1002.395(3)(b)1.a., Fla. Stat. (2013).

standing—not some fabricated tale by Plaintiffs' opponents of what Plaintiffs might assert would happen if the challenged law were invalidated.

Intervenors, likewise, are simply unable to accept Plaintiffs' allegations as true, and spend much of their brief arguing the allegations are factually wrong. Intervenors contend that "The Tax Credit Scholarship Program Does Not Divert Public Monies From Public Schools," and the Program "Has Not Reduced Funding for Public Schools or Undermined Educational Quality." (Intervenors' Brief 10-18). Both contentions of course are directly at odds with Plaintiffs' well-pled allegations. (*E.g.*, Vol. I, p. 16, 24, 26 ¶ 19, 48, 50, 55). These arguments go to the merits and belong in a trial brief following presentation of evidence regarding the actual operation of the program. They have no place in this early stage of the litigation where Plaintiffs' allegations must be accepted as true.

Because Plaintiffs' allegations of injury in this case are based upon a specific, concrete, provable chain of *past* events, they are not susceptible to the reasoning of the Supreme Court of New Hampshire in *Duncan v. State*, 102 A.3d 913 (N.H. 2014) which found allegations of prospective harm too speculative to confer standing. There, the trial court had blocked the program from full implementation, and the state supreme court said that whether local governments would experience "net fiscal losses" required "speculation about whether a decrease in students will reduce public school costs and about how the legislature

will respond to the decrease in students attending public schools, assuming that occurs." *Id*. at 918, 927. Plaintiffs here allege that the challenged program *has* decreased the number of students in the public schools, and that by operation of statute—not any speculative response of the legislature—this has resulted in a significant decrease in funding to public schools to Plaintiffs' detriment.

The case of *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011), is even further removed from the question of whether Plaintiffs in this case have sufficiently alleged special injury to confer standing. The plaintiffs in *Winn* "contend[ed] that they have standing for one and only reason: because they are Arizona taxpayers." *Id.* at 130. Every bit of the Court's discussion regarding speculation had to do with the plaintiffs' contention that they had standing as taxpayers, not, as discussed here, as having suffered an injury based upon specific reductions in funding due to the challenged program. The trial court's reliance upon *Winn* in relation to Plaintiffs' claims of special injury was error.

The Appellees protest that Plaintiffs' complaint does not describe their injuries in detail. This is not required at the pleading stage. Plaintiffs have alleged that they are harmed by the reduction in funds flowing to their public schools as a result of the challenged program. Allegations such as these have been held sufficient to move forward with proof. *See Bennett v. Spear*, 520 U.S. 154, 167-68 (1997) (complaint alleged requisite injury in fact where it alleged only a

"diminution in the aggregate amount of water," without establishing that plaintiffs themselves would receive less water); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 115 (1979) (allegation that defendants manipulated housing market "to the economic and social detriment of the citizens" of the village "fairly can be read" as alleging economic injury sufficient for standing, subject to proof); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688-89 (1973) (plaintiffs sufficiently alleged standing to challenge increase in railroad freight rates on theory that it would increase use of nonrecyclable commodities and natural resources; rejecting railroads' assertion that plaintiffs could never prove this theory); *Alliant Energy Corp. v. Bie*, 277 F.3d 916, 917-18 (7th Cir. 2001) (corporations sufficiently alleged injury resulting from state statutes restricting corporate activities even though they "did not spell out exactly what harm they suffer from not being able to do them") ("Perhaps the plaintiffs will be unable to prove their allegations of injury, but they are entitled to try.").

Perhaps, as Appellees contend, Plaintiffs here will be unable to prove their allegations of injury, but in light of these authorities they are entitled to try.

II. APPELLANTS ALSO HAVE ADEQUATELY ALLEGED TAXPAYER STANDING

A. Taxpayer standing in Florida exists to bring a constitutional challenge to an exercise of the legislature's taxing and spending power; it is not confined to constitutional provisions that expressly limit this power.

Faced with the authorities cited in Plaintiffs' initial brief demonstrating that the taxpayer standing doctrine applies to any exercise of the Legislature's taxing and spending authority, the State Defendants and Intervenors pivot to an argument not relied upon by the trial court: that taxpayer standing exists only for alleged violations of express constitutional limitations on taxing and spending authority. This theory must be rejected, both because the constitutional provisions relied upon here *do* operate to limit the government's taxing and spending authority, and because Appellees' theory is inconsistent with the precedents of this state.

Article I, Section 3 and Article IX, Section 1 of the Florida Constitution have been recognized as limitations on the Legislature's taxing and spending authority. Article I, Section 3 obviously places express restrictions on uses of state revenues: this Court has recognized that this provision "prohibit[s] the state from using its revenue to benefit religious schools." *Bush v. Holmes*, 886 So. 2d 340, 362 (Fla. 1st DCA 2004), *aff'd on other grounds,* 919 So. 2d 392 (Fla. 2006). And the Florida Supreme Court has expressly found taxpayer standing to pursue a claim under Article IX, § 1. *See Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 403 (Fla. 1996). More specifically, the Court has held that this provision "is a limitation on the Legislature's power because it provides both a mandate to provide for children's education and a restriction on the execution of that mandate" and that it prohibits the legislature from "devoting the state's

resources to the education of children within our state through means other than a system of free public schools." *Bush v. Holmes*, 919 So. 2d 392, 407 (Fla. 2006).

Furthermore, Florida courts have applied taxpayer standing in challenges to the unconstitutional exercise of the State's taxing or spending power, even where the constitutional provision that provides the cause of action could also be used to challenge other types of legislation. In the very case that created the taxpayer standing doctrine, one of the constitutional claims was a challenge under the single-subject rule contained in Article III, § 6. *See Dep't of Admin. v. Horne*, 269 So. 2d 659, 660 (Fla. 1972). Article III, § 6 of course applies to all types of legislation, but taxpayers have standing to bring claims under that provision when, as in *Horne*, the challenged legislation involves an exercise of the State's taxing or spending powers. *Id.* at 662-63; *see also Coal. for Adequacy*, 680 So. 2d at 403 (finding taxpayer standing to pursue claim under Article IX, § 1); *Chiles v. Children A, B, C, D, E, and F*, 589 So. 2d 260, 263 & n.5 (Fla. 1991) (taxpayer standing to bring constitutional challenge under separation of powers doctrine); *Dep't of Educ. v. Lewis*, 416 So. 2d 455, 459 (Fla. 1982) (taxpayer standing to bring challenge under "the state and federal constitutional prohibition against state action abridging the freedoms of speech and association"); *Jones v. Dep't of Revenue*, 523 So. 2d 1211, 1214 (Fla. 1st DCA 1988) (taxpayer standing to bring constitutional challenge under Article II, § 3 and Article III, § 1).

The holdings of the cases cited by the Appellees do not support their contention that the taxpayer standing doctrine applies only to challenges involving express constitutional limitations on taxing or spending powers. In each case finding no taxpayer standing, the plaintiff had failed to allege a constitutional violation and instead relied on statutory violations. *See North Broward Hosp. Dist. v. Fornes*, 476 So. 2d 154, 155 (Fla. 1985) (taxpayer lacked standing to challenge hospital district's expenditure of funds on grounds that it violated competitive bidding laws); *Alachua County v. Scharps*, 855 So. 2d 195, 199 & n.4 (Fla. 1st DCA 2003) (finding that none of the plaintiff's allegations "constitute a constitutional challenge to the taxing or spending power of the County" but rather were "general claims of expenditures beyond statutory authority"); *Martin v. City of Gainesville*, 800 So. 2d 687, 689 (Fla. 1st DCA 2001) ("Mr. Martin's claims of statutory and general law violations" were insufficient for taxpayer standing); *Paul v. Blake*, 376 So. 2d 256, 260 (Fla. 3d DCA 2001) (finding taxpayer standing over constitutional claims but lack of standing as to *statutory* claims).

Moreover, Appellees' argument misunderstands the purpose of taxpayer standing in Florida. Taxpayer standing is not grounded in any "injury" suffered by taxpayers, notwithstanding Intervenors' repeated assertions to the contrary. Rather, the concept of taxpayer standing rests on the Florida courts' recognition that a taxpayer can bring a constitutional challenge to the legislature's exercise of

its taxing and spending power even "without having to demonstrate a special injury." *Chiles,* 589 So. 2d at 263 n.5. Taxpayer standing is thus not intended to allow the plaintiff to redress an injury; rather, this limited exception to the normal rules of standing has been permitted because "an unconstitutional exercise of the taxing and spending power is intolerable in our system of government," *Paul,* 376 So. 2d at 259, and "[i]f a taxpayer does not launch an assault, it is not likely that there will be an attack from any other source," *Horne*, 269 So. 2d at 660.

Neither the State Defendants nor the Intervenors make any serious argument that the Scholarship Program is not an exercise of the legislature's taxing authority. *See* Fla. Stat. § 1002.395(1)(a), Fla. Stat. (2014) (citing Legislature's "sovereign power to determine subjects of taxation and exemptions from taxation" as authority for Scholarship Program). *Manzara v. State*, 343 S.W.3d 656 (Mo. 2011), cited by the State Defendants for the proposition that taxpayer standing requires "a direct expenditure of funds generated through taxation," *id.* at 659, is flatly contrary to Florida law. *See Paul v. Blake,* 376 So. 2d at 260 (taxpayer had standing to bring constitutional challenge to tax exemption); *Charlotte County Bd. of County Comm'rs v. Taylor,* 650 So. 2d 146, 148 (Fla. 2d DCA 1995) (taxpayer had standing to challenge amendment to county charter placing cap on ad valorem taxes).

Although the constitutional provisions relied upon for the challenge in *Paul* happened to be express limitations on the county's taxing power, it cannot be gleaned from the opinion that this was a condition *sine qua non* of finding taxpayer standing. 376 So. 2d at 260. And the court in *Charlotte County* clearly did not impose any such condition, as the constitutional provision relied upon to challenge a proposed cap on ad valorem taxes, Article VIII, section 1(g), is a general provision providing that charter counties "shall have all powers of local government not inconsistent with general law." 650 So. 2d at 147. This provision is not an express limitation on the county's taxing or spending authority, yet it was found to be an appropriate basis for taxpayer standing.

To the extent the Intervenors contend that the Florida taxpayer standing doctrine is limited to the parameters of the federal version of the doctrine (an argument also not relied upon by the trial court) they are mistaken. Indeed, although the Florida Supreme Court "[chose] to follow the United States Supreme Court (*Flast*)," *Horne*, 269 So. 2d at 663, in recognizing the concept of taxpayer standing, it did not by any means adopt the federal doctrine in its entirety. The federal taxpayer standing doctrine recognized in *Flast v. Cohen*, 392 U.S. 83 (1968), applies only to allegations of government spending in support of religion in violation of the federal Establishment Clause. *Id.* at 105-106. The taxpayer challenge in *Horne* had nothing to do with the Florida Constitution's religion

clause. Rather, the court held that the taxpayer standing doctrine applies to *any* constitutional challenge to taxing and spending actions, *see* 269 So. 2d at 663 ("where there is an attack upon *constitutional* grounds based directly upon the Legislature's *taxing and spending* power"), and the vast majority of Florida cases applying the doctrine of taxpayer standing have nothing to do with religion.

Florida courts have observed that the Florida law of standing is more relaxed than that applied by the federal courts. *See Coalition for Adequacy*, 680 So. 2d at 403 ("[I]n Florida, unlike the federal system, the doctrine of standing has not been rigidly followed."); *Reinish v. Clark*, 765 So. 2d 197, 202 (Fla. 1st DCA 2000) ("Florida does not adhere to the 'rigid' doctrine of standing used in the federal system."); *Dep't of Revenue v. Kuhnlein*, 646 So. 2d 717, 720 (Fla. 1994) ("the doctrine of standing certainly exists in Florida, but not in the rigid sense employed in the federal system").

Accordingly, the U.S. Supreme Court's decision in *Winn*, which denied taxpayer standing for a challenge to an Arizona tax credit program, rests on an analysis that is foreign to Florida law. 563 U.S. 125 (2011). In *Winn* the Court explains that the purpose of allowing taxpayer standing in suits for violations of the federal Establishment Clause is to prevent individuals from being coerced through taxation to support religious beliefs to which they do not subscribe. *Id.* at 1447 ("A dissenter whose tax dollars are 'extracted and spent' knows that he has in

some small measure been made to contribute to an establishment in violation of conscience. . . . When the government declines to impose a tax . . . there is no such connection between dissenting taxpayer and alleged establishment."). The Court's view in *Winn* that a tax credit did not place individual taxpayers in the position of being coerced is inapplicable to Florida's taxpayer standing doctrine, which is instead intended to prevent legislative abuse of the taxing and spending power. *Paul*, 376 So. 2d at 259.

B. It is a matter of first impression in Florida which this Court need not presently reach whether a tax credit constitutes an exercise of the Legislature's spending authority for purposes of Florida's taxpayer standing doctrine.

Appellees spend much effort seeking to persuade this Court that the program does not involve an appropriation or "expenditure of public money" as they contend is required for taxpayer standing. This Court need not reach this question at this stage of the case, however, for the exercise of taxing authority is an appropriate basis for taxpayer standing under the precedents of this State. (Initial Brief 14-15; *supra pp.* 10-12). In any event, the tax credits in this case do in fact involve the expenditure of public money in every meaningful sense of the phrase.

Unlike the facts of *Johnson v. Presbyterian Homes, Inc.*, 239 So. 2d 256 (Fla. 1970) (cited in *Bush v. Holmes*, 886 So. 2d 340 (Fla. 1st DCA 2004) (*Holmes I*)), in which a property tax exemption for nonprofit nursing homes simply relieved the affected entity from paying its share of property taxes, the program challenged

here is a mechanism established by the legislature *to fund a specific program* that it was prohibited from financing through direct appropriations. "[I]t is fundamental and elementary that the legislature may not do that by indirect action which it is prohibited by the Constitution to do by direct action." *Lewis v. The Florida Bar*, 372 So. 2d 1121, 1122 (Fla. 1979) (internal quotations and citation omitted).

Indeed, courts in several other states have rejected the distinction between tax credits and expenditures. The Supreme Court of Missouri has held that a tax credit "is as much a grant of public money or property and is as much a drain on the state's coffers as would be an outright payment by the state." *Curchin v. Missouri Indus. Dev. Bd.*, 722 S.W.2d 930, 933 (Mo. 1987). The Massachusetts Supreme Court struck down a tax deduction benefitting private schools, explaining "it has been recognized that the tax subsidies or tax expenditures of this sort are the practical equivalent of direct government grants."). *Opinion of the Justices to the Senate*, 514 N.E.2d 353, 355 (Mass. 1987). The New Hampshire Supreme Court has repeatedly held that there is no distinction between tax credits or exemptions and direct legislative expenditures. *Opinion of the Justices*, 258 A.2d 343, 346 (N.H. 1969) (property-tax credit for families with children attending private schools violated state constitutional clause providing that "no money raised by taxation shall ever be granted or applied for the use of the schools or institutions of any religious sect or denomination."); *Eyers Woolen Co. v. Town of Gilsum*, 146

A. 511, 15–16 (N.H. 1929) ("It is undoubtedly true that all exemptions from taxation are practically equivalent to a direct appropriation.") (internal quotation and citation omitted).

Of the out-of-state cases relied upon by Intervenors from courts of other states for the proposition that a tax credit is not equivalent to an appropriation as a matter of law (Intervenors' Brief 29-30), only two of the cases were decided on standing grounds. *See Manzara v. State*, 343 S.W.3d 656 (Mo. 2011); *Olson v. State*, 742 N.W.2d 681 (Minn. Ct. App. 2007). These cases are irrelevant here as they involved challenges to tax benefits that were wholly dissimilar to the Scholarship Program, and were decided on the basis of state taxpayer standing law not comparable to that of Florida. In the remaining cases, the courts had no quarrel with the plaintiffs' standing as taxpayers, but rather entertained their claims and rendered decisions on the merits. *See Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999); *Toney v. Bower*, 744 N.E.2d 351 (Ill. App. Ct. 2001); *Griffith v. Bower*, 747 N.E.2d 423 (Ill. App. Ct. 2001); *State Bldg. & Constr. Trades Council v. Duncan*, 76 Cal. Rptr. 3d 507 (Cal. Ct. App. 2008).

Plaintiffs contend that when the State establishes a state-run program that provides vouchers for private-school education, and funds that program through a system of tax credits that amount to full state reimbursement of purportedly private "donations," the program is subject to constitutional scrutiny under provisions, as

cited here, that place restrictions upon the use of state revenues and the allocation of state resources for education. This argument in no way rests on the reasoning that "income should be treated as if it were government property even if it has not come into the tax collector's hands." (Intervenors' Brief 28) (quoting *Winn*, 131 S. Ct. at 1448). This is because the "private, voluntary donations" collected by the Scholarship Program do not come from funds that businesses are free to spend however they want. Businesses must either pay the funds as taxes or contribute them to scholarship organizations. Without the legislature's manipulation of the state tax system, the Scholarship Program would not exist.

In short, if the Court should find it necessary to reach the issue of whether the program challenged here is an exercise of the legislature's spending (as well as taxing) power, it should reject the formalistic contention that the legislature is not "spending" public dollars when it funds a state-established and state-regulated program by redirecting taxes due and owing to the public fisc.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the trial court's order dismissing this action with prejudice for lack of standing be reversed and this case be remanded for adjudication on the merits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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