

IN THE SUPREME COURT OF FLORIDA

Case No. SC18-1368

L.T. Case Nos. 1D18-3529; 2018-CA-001523XXXXXX

KENNETH J. DETZNER,

in his official capacity as Florida Secretary of State,

Appellant,

v.

LEAGUE OF WOMEN VOTERS OF FLORIDA, INC.,

PATRICIA BRIGHAM, individually, and as President of the League of Women Voters of Florida, Inc., and **SHAWN BARTELT**, individually, and as Second Vice President of League of Women Voters of Florida, Inc.,

Appellees.

**BRIEF OF AMICI CURIAE FLORIDA CONSORTIUM OF PUBLIC
CHARTER SCHOOLS AND FLORIDA CHARTER SCHOOL ALLIANCE
IN SUPPORT OF APPELLANT**

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PREFACE

Amicus Curiae Florida Consortium of Public Charter Schools is referred to as the “Consortium.” Amicus Curiae Florida Charter School Alliance is referred to as the “Alliance.” Collectively, the Consortium and the Alliance are referred to as “Amici.”

Throughout the brief, the proposed amendment being challenged here will be referred to as “Amendment 8” in reference to its designated position on the November general election ballot.

With respect to quoted material, unless otherwise indicated, emphasis is supplied and citations and internal quotations are omitted.

IDENTITY OF AMICI CURIAE AND STATEMENT OF INTEREST

The Consortium is a non-profit membership association of Florida public charter schools that provides advocacy, support, resources, and networking opportunities to new and existing charter schools, parents, and students. The Alliance is a non-profit organization whose mission is to increase student achievement and meet the demand for parental choice by advocating for and supporting high quality public charter schools in Florida. Together, the Consortium and the Alliance represent ninety percent of the public charter schools in Florida.

The members of the Consortium and the Alliance have a strong interest in responsible expansion of quality public school options for Florida's parents and students. The Amici, therefore, bring this case a focus and perspective on behalf of those most impacted by its decision. As representatives of nearly all of Florida's public charter schools, the Consortium and the Alliance are in a unique position to assist the Court in understanding the existing relationship between charter schools and the state's school districts and how Amendment 8 maintains that status quo rather than alters it, while also granting the Legislature the flexibility to make future changes to public school options.

SUMMARY OF THE ARGUMENT

The chief purpose of Amendment 8 is to ensure the state's elected policymakers in the legislature have the flexibility to make policy decisions and provide innovative approaches to how future public schools are operated, controlled, and supervised. This is accurately reflected in the ballot title and summary proposed by the Constitution Revision Commission.

First, the ballot summary clearly outlines the existing state of the law, that currently, district school boards have a constitutional duty under article IX, section (4)(b) to operate, control, and supervise all public schools. By definition charter schools are public schools, therefore they are encompassed in this ballot summary language.

Second, Amendment 8 is not self-executing. Its mere passage would not alter the existing relationship between public charter schools (or any other public schools) and district school boards. Any future changes related to the establishment of new public schools would require legislative action and gubernatorial approval. The ballot summary includes this important component of Amendment 8 by explaining that the Amendment maintains a school board's duties to public schools it establishes.

Finally, the exclusion of the phrase "charter schools" from the ballot summary does not render it misleading. The trial court's conclusion to the contrary

illustrates a fundamental misunderstanding of the purpose of Amendment 8, which is to ensure the legislature has flexibility to establish *all* types of new and innovative public schools. Public charter schools are only one of a multitude of non-traditional public school options that currently exist for students in Florida and that may benefit from passage of Amendment 8.

Ultimately, voters should be allowed to decide the future of school choice in Florida. In the decades to come, Florida's approach to public education should be constantly evaluated and debated by the legislature with all options available so the right policy can be crafted to ensure that every child in our state is given the best opportunity and environment in which to learn. Students should not be denied the best, most innovative learning options because of constitutional barriers.

ARGUMENT

I. THE CHIEF PURPOSE OF AMENDMENT 8 IS ACCURATELY REFLECTED IN THE BALLOT TITLE AND SUMMARY.

In the proceedings below, Appellees incorrectly represented that the ballot title and summary for Amendment 8 obscure its true purpose by omitting the word “charter” because the Amendment’s intended effect is solely to benefit public charter schools. In reality, if approved, Amendment 8 would not change the current relationship between public charter schools and district school boards. Amendment 8 is not drafted narrowly to only apply to today’s charter schools; it is drafted broadly to apply to all public schools (charter included)—those existing today and those that may exist in the future. Because there is no way to know exactly what future students will require from public education in Florida, nor the policy preferences of the legislature in years to come, Amendment 8 ensures the legislature has the flexibility to make policy decisions and provide innovative approaches to how future public schools are operated, controlled, and supervised. This—the chief purpose of Amendment 8—is accurately reflected in the ballot title and summary proposed by the Constitution Revision Commission.

A. The ballot title and summary for Amendment 8 accurately states the existing state of the law.

The operation of Florida’s system of public education is governed by three key provisions of article IX of the state constitution, which creates a hierarchy between the state and local school districts in governing and overseeing the public

education system. *See Sch. Bd. of Palm Beach Cty. v. Fla. Charter Edu. Found., Inc.*, 213 So. 3d 356, 360 (Fla. 4th DCA 2017). First, the constitution instructs that “[a]dequate 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, Fla. Const. The constitution also directs that “the state board of education shall be a body corporate and have such supervision of the system of free public education as is provided by law.” Art. IX, § 2, Fla. Const. Finally, the constitution provides that “[t]he school board shall operate, control and supervise all free public schools within the school district and determine the rate of school district taxes within the limits prescribed herein.” Art. IX, § 4(b) Fla. Const.

The constitutional interplay of these three provisions has long been at issue. But in 2008, the First District Court of Appeal dealt a major blow to the school choice movement when it determined that all control of public schools—whether traditional, charter, or otherwise—is reserved *exclusively* for locally elected school boards. *Duval Cty. Sch. Bd. v. State Bd. of Edu.*, 998 So. 2d 641, 643-44 (Fla. 1st DCA 2008). The First District held that section 1002.335, Florida Statutes (2006), establishing the Florida Schools of Excellence Commission, an independent, state-level entity with the authority to authorize charter schools throughout the state, was facially unconstitutional because it violated the constitutional authority of the local

school boards under article IX, section 4(b). *See Duval Cty. Sch. Bd.*, 998 So. 2d at 643-44. The result of this ruling was to effectively sideline the legislature for the last ten years in its ability to fully craft policy to expand public school choice options. *See id.* at 642.

The ballot summary for Amendment 8 clearly spells out this existing state of the law as it relates to public charter schools and local school districts—“Currently, district school boards have a constitutional duty to operate, control, and supervise *all public schools.*” (Emphasis added). By definition, charter schools are public schools, § 1002.33(1), Fla. Stat., (“All charter schools in Florida are public schools and shall be part of the state’s program of public education.”), thus public charter schools are encompassed in the text of the ballot summary.

B. Passage of Amendment 8 will not alter the current relationship between public charter schools and district school boards.

Most public charter schools must operate under a contract (a “charter”) with the local school district where they are located. *See* § 1002.33(7), Fla. Stat.; *see also* § 1002.33(5)(a)2., Fla. Stat. (providing for state universities to sponsor and grant a charter to a lab school). Local school districts have the exclusive power to establish new public charter schools. *See Sch. Bd. of Palm Beach Cty.*, 213 So. 3d at 360-61. Upon approval of a public charter school application, the proposed charter school’s governing board negotiates a charter with the local school district outlining the school’s obligations for academic and financial performance. *See* §

1002.33(7)(b), Fla. Stat. The charter, which is generally granted for a period of five years, but may be granted for up to fifteen years, governs the relationship between the public charter school and the local school district throughout the length of its term. *See* § 1002.33(7)(a)12., Fla. Stat. School districts are required to use a standard charter application form, standard contract, standard evaluation instrument, and standard renewal contract all developed by the Department of Education and comprised of state criteria and information. *See* §1002.33(21)(a), Fla. Stat.; *see also* § 1002.33(7), Fla. Stat.

The trial court correctly points out that “the initial determination of whether new schools, charter or not, are needed and desirable” is made by the district school board. However, even today, the district school board does not have the final say on whether a charter school may be approved in its district. § 1002.33(6)(c)1., Fla. Stat. (“An [charter] applicant may appeal any denial of that applicant’s application or failure to act on an application to the State Board of Education”). If a charter application is denied by the district school board an appeal can be made to the State Board of Education whose decision *must* be implemented by the district school board, subject to any judicial appellate review. § 1002.33(6)(c)3.a., Fla. Stat. This process “does not infringe upon the School Board’s constitutional power to ‘operate, control and supervise all free public schools *within the school district.*’” *Sch. Bd. of Palm Beach Cty*, 213 So. 3d at 360

(emphasis in original).

Amendment 8 is not self-executing; all changes would require legislative action and gubernatorial approval. *See* Erika Donalds & Ben Gibson, *Amendment 8 School Board Term Limits and Duties; Public Schools*, Fla. B.J. 17 (Sept./Oct. 2018). This impact of Amendment 8 is reflected in the following language in the ballot summary—“The Amendment maintains a school board’s duties to public schools it establishes” Upon passage of Amendment 8, charters currently in place will remain in effect between the public charter schools and local school districts, and the status quo will remain unless and until the legislature makes a policy decision to change the law by providing for the establishment and governance structure of new and innovative public schools. Further, Amendment 8 does not direct the legislature to do anything. It simply eliminates the constitutional barrier to the state’s ability to establish schools to be operated, controlled, and supervised by an entity other than the district school board. Accordingly, the ballot title and summary accurately describe the effect Amendment 8 will have on existing public schools upon its passage.

C. Passage of Amendment 8 gives the legislature the flexibility to make policy decisions to provide high-quality, innovative public education opportunities for students.

The trial court found fault in the ballot summary for Amendment 8 because of its “failure to use the term voters would understand, ‘charter schools.’”

However, public charter schools are only one type of existing public school that would benefit from Amendment 8. The trial court's conclusion illustrates a fundamental misunderstanding of the purpose of Amendment 8, which is to ensure the legislature has flexibility to establish *all* types of new, innovative public schools. The current model for establishing public charter schools has been successful in Florida for the last two decades, and that will continue. But to address the educational needs of students for the decades to come the legislature must have the flexibility to apply new and innovative approaches to public education.

Section 1002.20(6)(a), Florida Statutes, provides:

Public educational school choices.—Parents of public school students may seek any public educational school choice options that are applicable and available to students throughout the state. These options may include controlled open enrollment, single-gender programs, lab schools, virtual instruction programs, charter schools, charter technical career centers, magnet schools, alternative schools, special programs, auditory-oral education programs, advanced placement, dual enrollment, International Baccalaureate, International General Certificate of Secondary Education (pre-AICE), CAPE digital tools, CAPE industry certifications, collegiate high school programs, Advanced International Certificate of Education, early admissions, credit by examination or demonstration of competency, the New World School of the Arts, the Florida School for the Deaf and the Blind, and the Florida Virtual School. These options may also include the public educational choice options of the Opportunity Scholarship Program and the McKay Scholarships for Students with Disabilities Program.

Pursuant to this statutory directive, there are a multitude of public school options that currently exist in Florida beyond public charter schools. For example,

Florida is nationally recognized in K-12 virtual education. Florida Virtual School, operated at the state level, is the largest state virtual school in the nation, providing full-time and flexible options for students in grades K-12.¹ In addition, approximately 600 students on campus and 400 infants and toddlers and their families across the state are served by the Florida School for the Deaf and Blind (FSDB), which is the only public school of its kind in the state specifically addressing the needs of hearing-impaired and visually-impaired students in preschool through 12th grade.² Other non-traditional public schools include the New World School of the Arts created by the Legislature, *see* § 1002.35(1), Fla. Stat., to serve the state through academic and artistic studies for high school and college students in the visual and performing arts. For purposes of governance, the legislature has assigned the school to Miami-Dade College, Miami-Dade County Public Schools, and one or more universities designated by the State Board of Education. § 1002.35(2)(a), Fla. Stat.

In proposing Amendment 8 to eliminate the constitutional barrier to school choice in article IX, section 4(b), the Constitution Revision Commission, in its wisdom, recognized that the future of public education is unknown, and therefore,

¹ Fla. Dep't of Edu., *Florida's Public Virtual Education Programs* (Nov. 2017), http://www.fl DOE.org/core/fileparse.php/18564/urlt/Virtual_Nov_2017.pdf.

² *See* § 1002.36, Fla. Stat.; Fla. School for the Deaf and Blind, *About FSDB*, <http://www.fsdb.k12.fl.us/index.php/about-us/>.

chose not to limit the legislature’s innovative policymaking to only charter schools, but chose to draft the proposed amendment broadly to include all types of public schools. It is for exactly this reason Amendment 8 does not include the phrase “charter schools” or any other phrase about a possible type of public school. Therefore, the trial court’s suggestion to use the term “charter schools” instead of “public schools” in the ballot title or summary would materially mislead voters because public charter schools are only one of a multitude of non-traditional public school options that currently exist for parents of students in Florida and that may benefit from passage of Amendment 8.

Florida has been a leader in providing public school choices for parents of students from all backgrounds, abilities, and socio-economic statuses. The state has achieved these school choice successes in spite of the existing constitutional barriers. Passage of Amendment 8 would allow Florida to further innovate the existing types of non-traditional public school options and to create entirely new types of high-quality public education options for students.

II. VOTERS SHOULD BE ALLOWED TO DECIDE THE FUTURE OF SCHOOL CHOICE IN FLORIDA.

Although the Court should not review the merits or wisdom of a proposed amendment, but only whether the ballot title and summary meet the constitutional and statutory requirements, the Court should be aware of the impact of its decision.

See Askew v. Firestone, 421 So. 2d 151, 155 (Fla. 1982).

Florida has been a national leader in the public charter school movement since 1996. Since that time, public charter schools have provided expanded educational opportunities for K-12 students and put competitive pressure on traditional public schools to improve. Charter schools have also served the purpose of meeting the needs of special population students not well-served by traditional public schools. In the last decade, charter school enrollment in Florida has grown by almost 200 percent.³ More than 283,000 students were enrolled in 654 charter schools in 46 school districts in the 2016-17 school year.⁴ Charter school students comprise nearly eleven percent of the state's students in public schools. And, overall, charter schools' minority student enrollment is higher than the same at traditional public schools.⁵

These statistics illustrate the importance of ensuring the legislature has the flexibility to continue to expand upon the education opportunities provided to public school students through charter schools and other non-traditional public school options. They also demonstrate the way in which parents have embraced the

³ Fla. Dep't of Edu., *Fact Sheet: Florida's Charter Schools* (Sept. 2017), http://www.fldoe.org/core/fileparse.php/7696/urlt/Charter_Sept_2017_rev.pdf.

⁴ *Id.*

⁵ Fla. Dep't of Edu., *Student Achievement in Florida's Charter Schools: A Comparison of Performance of Charter School Students with Traditional Public School Students* (Mar. 2017), http://www.fldoe.org/core/fileparse.php/7778/urlt/Charter_Student_Achievement_Report_1516.pdf.

benefits of non-traditional public schools when choosing where to educate their children. As more and more Florida parents choose a public charter school for their students, the legislature should be able to ensure these students are receiving access to high-quality educational opportunities regardless of their zip code.

If the voters are given the opportunity to approve Amendment 8, the legislature's ability to provide public school choice options across the board, including public charter schools, would increase. For example, Amendment 8 would clearly allow the legislature to pass legislation creating an independent, statewide authorizer of public charter schools that operates in addition to the district school boards. As of 2018, multiple charter authorizers exist in 19 of 45 states with charter laws, representing roughly half of the 7,000 charter schools nationwide.⁶ And Florida is one of only six states that in practice allows only local school districts to authorize charter schools.⁷

Independent statewide authorizers, in addition to district school boards, allow for an equal and uniform application of state law, provide checks and balances preventing forum shopping based on the politics or hostility of the local

⁶ Nat'l Assoc. of Charter Sch. Authorizers, *Introduction to Multiple Authorizers, State Policy Resources*, <https://www.qualitycharters.org/state-policy/multiple-authorizers/introduction-to-multiple-authorizers/>.

⁷ Nat'l Assoc. of Charter Sch. Authorizers, *List of Charter School Authorizers by State, State Policy Resources*, <https://www.qualitycharters.org/state-policy/multiple-authorizers/list-of-charter-school-authorizers-by-state/>

school board, ease the burden on local school boards to evaluate an increasing number of applications, and provides the opportunity for high quality evaluators with an additional level of expertise, resources, and experience with charter schools that is impossible to replicate in every local school district.⁸

As education rapidly changes and as other competitor states continue to offer specific educational plans tailored for each student, it is vital that the state's elected policy-makers (the legislature) have the necessary flexibility to establish innovative types of public schools, including public charter schools, and to operate, control, and supervise these schools. Currently, the courts of this state have interpreted Florida's constitution to create real barriers for the legislature when it comes to providing innovative learning opportunities for students. These barriers stem directly from the language in article IX, section 4(b), which this amendment removes.

Allowing the legislature the option and ability to establish new and innovative public schools that it may operate, control, and supervise, ensures Florida is able to maintain its edge on other states in providing access to high-quality public education for every student. This provides the state with additional tools to fulfill the **state's** paramount duty to adequately provide for a "uniform, efficient, safe, secure and high quality system of free public schools that allows

⁸ *See generally* supra note 6.

students to obtain a high quality education,” art. IX, § 1, Fla. Const., and for the State Board of Education to provide “supervision of the system of free public education,” art. IX, § 2, Fla. Const.

In the decades to come, Florida’s approach to public education should be constantly evaluated and debated by the legislature with all options available so the right policy can be crafted to ensure that every child in our state is given the best opportunity and environment in which to learn. Students should not be denied the best, most innovative learning options because of constitutional barriers. Ultimately, the voters should have the opportunity to vote on providing the legislature with the flexibility to expand school choice. This Court must reverse the trial court’s summary final judgment and restore Amendment 8 to the general election ballot.

CONCLUSION

For these reasons, the Consortium and the Alliance respectfully suggest this Court should reverse the trial court’s summary final judgment and reinstate Amendment 8’s place on the general election ballot.

Respectfully submitted,

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I HEREBY CERTIFY that on this 27th day of August 2018 a true and correct copy of the foregoing was furnished by e-mail to all counsel listed below.

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I certify that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210 because it was prepared using Times New Roman 14-point font.

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