IN THE
SUPREME COURT OF FLORIDA

Case No. SC08-1529
LT Case Nos. 2008-CA-1905, 1D08-3934

ANDY FORD, *et al.*

Petitioners,

v.

KURT S. BROWNING,

Respondent.

On Review from the Circuit Court of the
Second Judicial Circuit in and for Leon County

BRIEF OF PETITIONERS

RONALD G. MEYER
Florida Bar No. 0148248
JENNIFER S. BLOHM
Florida Bar No. 01062
Meyer and Brooks, P.A.
2544 Blairstone Pines Dr.
Post Office Box 1547
Tallahassee, FL 32302
(850) 878-5212

ROBERT H. CHANIN*
National Education Association
1201 16th Street, N.W.
Washington, D.C. 20036
(202) 822-7035

JOHN M. WEST*
DANIEL A. ZIBEL*
Bredhoff & Kaiser, P.L.L.C.
805 Fifteenth Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 842-2600

(Additional counsel for Petitioners listed on next page)

PAMELA L. COOPER
Florida Bar No. 0302546
Florida Education Association
300 East Park Avenue
Tallahassee, FL 32301
(850) 224-7818

JUDITH E. SCHAEFFER*
People For the American Way Foundation
2000 M Street, NW, Suite 400
Washington, D.C. 20036
(202) 467-4999

JOY CAUSSEAUX FRANK
Florida Bar No. 0316245
Florida Association of District School Superintendents, Inc.
208 South Monroe Street
Tallahassee, Florida 32301
(850) 488-5099

AYESHA N. KHAN*
Americans United for Separation of Church and State
518 C Street, N.E.
Washington, D.C. 20002
(202) 466-3234

DAVID L. BARKEY
Florida Bar No. 23964
Anti-Defamation League
One Park Place
621 NW 53rd Street
Boca Raton, FL 33487-8235
(561) 988-2900

JEFFREY PHILIP SINENSKY*
American Jewish Committee
165 East 56 Street
New York, New York 10022
(212) 891-6740

RANDALL C. MARSHALL
Florida Bar No. 181765
American Civil Liberties Union Foundation of Florida, Inc.
4500 Biscayne Boulevard, Suite 340
Miami, FL 33137-3227
(786) 363-2700

* *pro hac vice* motions pending

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES, RULES AND CONSTITUTIONS

MISCELLANEOUS

STATEMENT OF THE CASE AND FACTS

A. The Florida Taxation and Budget Reform Commission ("TBRC" or "Commission") is a constitutionally established entity that is required to convene every twenty years for the purpose of "examin[ing] the state budgetary process, the revenue needs and expenditure processes of the state, the appropriateness of the tax structure of the state, and governmental productivity and efficiency." Art. XI, § 6(d), Fla. Const. The Constitution authorizes the TBRC, *inter alia*, to transmit to the Defendant Secretary of State for placement on a general election ballot proposals for "a revision of this constitution or any part of it dealing with taxation or the state budgetary process." Art. XI, § 6(e), Fla. Const.

The TBRC convened for its 2007-2008 session on March 16, 2007, and, after thirteen months of deliberation, ultimately adopted seven proposals for amending the constitution, which it transmitted to the Secretary of State for placement on the ballot for the November 2008 general election. Five of these proposals clearly deal with "taxation or the state budgetary process," and are not in dispute here. The other two proposals – which have been designated by the Secretary of State as Ballot Initiatives Nos. 7 and 9 – are the subject of this litigation.

The apparent purpose of these two Ballot Initiatives – which address respectively issues of separation of church and state (Ballot Initiative No. 7), and

the means by which the state provides for the education of Florida's children and how local school districts expend their funds (Ballot Initiative No. 9) – is to overrule the decision of the First District Court of Appeal that struck down Florida's Opportunity Scholarship Program ("OSP") as contrary to the religious freedom provisions of Article I, section 3, *Bush v. Holmes*, 886 So. 2d 340, 359 (Fla. 1st DCA 2004), and this Court's decision affirming that holding on the basis of the public education provisions of Article IX, section 1. *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).[1]

1. Ballot Initiative No. 7 would amend Article I, section 3, which is the section of Florida's Declaration of Rights that addresses religious freedom and the separation of church and state. Section 3 currently provides as follows:

> There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

Art. I, § 3, Fla. Const.

---

[1] In affirming the decision of the First District Court of Appeal on other grounds, this Court left undisturbed the lower court's holding with respect to Article I, section 3, stating that it "neither approve[d] nor disapprove[d] the First District's determination that the OSP violates the 'no aid' provision in Article I, section 3 of the Florida Constitution, an issue we decline to reach." 919 So. 2d at 413.

The final sentence of this section – known as the "no aid" clause – promotes religious liberty and freedom of conscience by prohibiting the use of public funds "'directly or indirectly in aid of' not only churches, religions, and sects, but any sectarian institution." *Bush v. Holmes*, 886 So. 2d at 359. The First District Court of Appeal relied on this clause in striking down the OSP, holding that it was unconstitutional for the state to pay for Florida's children to attend sectarian private schools.

Ballot Initiative No. 7 would make two changes in Article I, section 3. First, it would delete the existing "no aid" clause in its entirety. Second, the Ballot Initiative would add a new sentence to section 3, which would read as follows: "An individual or entity may not be barred from participating in any public program because of religion."

2. Ballot Initiative No. 9 consists of what initially were two proposals related to the education of Florida's children which the TBRC, on the final day of its 2007-2008 session, consolidated into a single proposal.

The first change made by Ballot Initiative No. 9 would undo this Court's decision in *Bush v. Holmes* striking down the OSP as contrary to Article IX, section 1(a), of the Florida Constitution. As currently written, that section provides in the pertinent part as follows:

> (a) The education of children is a fundamental value of the people of the State of Florida. It is, 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 and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require. . . .

In *Bush v. Holmes*, this Court held that the OSP failed to pass muster because the state was seeking to fulfill its constitutional duty to provide an education for Florida's children in a manner other than through the "uniform . . . system of free public schools" prescribed by Article IX, section 1(a). 919 So. 2d at 406-07.

Ballot Initiative No. 9 would amend Article IX, section 1, so that the state's duty to provide an education for Florida's children could be fulfilled "at a minimum and not exclusively" through a system of free public schools. With the proposed amendment, section 1(a) would read as follows (with new language underscored and deleted language struck through):

> (a) The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. <u>This duty shall be fulfilled, at a minimum and not exclusively, through adequate</u> ~~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 and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.

> Nothing in this subsection creates an entitlement to a publicly-financed private program.

Ballot Initiative No. 9 would underscore the change in educational policy embodied in the revised section 1(a) by amending the title of Article IX, section 1. Now titled "Public Education," the Initiative would instead label the subject of this section as "Public Funding of Education."

The second change made by Ballot Initiative No. 9 would add a new section 8 to Article IX, which would require local school districts to spend at least 65% of the funds they receive (not only from the state, but from all sources) on "classroom instruction":

> SECTION 8. Requiring sixty-five percent of school funding for classroom instruction.– At least sixty-five percent of the school funding received by school districts shall be spent on classroom instruction, rather than on administration. Classroom instruction and administration shall be defined by law. The legislature may also address differences in administrative expenditures by district for necessary services, such as transportation and food services. Funds for capital outlay shall not be included in the calculation required by this section.

In approving Ballot Initiative No. 9, the TBRC also adopted and submitted to the Secretary of State the following ballot title and summary language, which would describe Ballot Initiative No. 9 on the November 2008 general election ballot:

> REQUIRING 65 PERCENT OF SCHOOL FUNDING FOR CLASSROOM INSTRUCTION; STATE'S DUTY FOR CHILDREN'S EDUCATION. – Requires at least 65 percent of school funding received by school districts be spent on classroom instruction, rather than administration; allows for differences in administrative expenditures by district. Provides the constitutional requirement for state to provide a "uniform, efficient, safe, secure, and high quality system of free public schools" is a minimum, nonexclusive duty. Reverses legal precedent prohibiting public funding of private school alternatives to public school programs without creating an entitlement.

B. On June 13, 2008, Plaintiffs filed a Complaint in the Circuit Court of the Second Judicial District for Leon County, seeking (1) a declaratory judgment that the TBRC exceeded its authority under Article XI, section 6, of the Florida Constitution by transmitting Ballot Initiatives Nos. 7 and 9 to the Secretary of State for placement on the ballot for the November 2008 general election; (2) a declaratory judgment that the ballot title and summary language accompanying Ballot Initiative No. 9 did not accurately inform voters of the true effect of the proposed amendment, in violation of Article XI, section 5, of the Florida Constitution and § 101.161, Fla. Stat.; and (3) an injunction barring the Secretary of State, and all persons and entities acting under his direction, from placing Ballot Initiatives Nos. 7 and 9 on the ballot for the November 2008 general election. On the same day, Plaintiffs also filed a motion for temporary injunction, which –

pursuant to an order entered by the Circuit Court on July 1, 2008 – was treated as a motion for Summary Final Judgment.

The court allowed intervention on behalf of Defendant Browning by two intervenor groups – a group of religious organizations led by the Florida Catholic Conference, and eight of the 25 members of the 2007-2008 TBRC.

Following briefing and oral argument, the Circuit Court (Hon. John C. Cooper) denied Plaintiffs' motion for summary judgment and granted the cross-motions filed by Defendant and the Intervenors. *See* Summary Final Judgment for Defendant and Intervenors (Aug. 4, 2008) (attached hereto as Appendix Tab 1).

Plaintiffs promptly appealed the Circuit Court's ruling to the First District Court of Appeal and suggested certification to this Court pursuant to Article V, section 3(b)(5), of the Florida Constitution and Rule 9.125 of the Florida Rules of Appellate Procedure. By order of August 13, 2008, the Court of Appeal certified that "the issues pending in this case are of great public importance requiring immediate resolution by the Supreme Court of Florida." On August 15, 2008, this Court entered an order accepting the appeal.

SUMMARY OF ARGUMENT

The TBRC's authority to propose constitutional amendments for placement on the ballot is conferred – and limited – by Article XI, section 6(e), of the Florida Constitution. Unlike the plenary authority conferred under the other methods of

constitutional revision established by Article XI, the TBRC's authority under section 6(e) is limited to proposed amendments "dealing with taxation or the state budgetary process." The question presented in this case is whether the phrase "state budgetary process" encompasses the constitutional amendments proposed by the TBRC that appear in Ballot Initiatives Nos. 7 and 9. The answer to this question is "no."

The phrase "state budgetary process," on its face, refers to the structural and procedural aspects of developing and implementing the state budget. And, this plain-language understanding of the phrase is confirmed by standard dictionary definitions and by the way in which the same language is used elsewhere in the Florida Constitution and statutes.

Contrary to the position taken by the Circuit Court, the limited authority to propose constitutional amendments given to the TBRC by section 6(e) is wholly consistent with the broader authority given it by section 6(d) to engage in a variety of analytical and investigatory activities. These latter activities enable the TBRC to exercise its section 6(e) action authority in a responsible and informed manner, by providing the Commission with an understanding of the ramifications that a proposed amendment is likely to have at both the state and local levels.

Moreover, section 6(e) does not simply authorize the TBRC to propose constitutional amendments. The section also provides that the Commission "shall

issue a report of the results of the review carried out [pursuant to section 6(d)], and propose to the legislature any recommended statutory changes related to the taxation or budgetary laws of the state." The analytical and investigatory activities engaged in pursuant to section 6(d) could provide the basis for legislative changes, or the TBRC's report could lead to a proposed constitutional amendment by the legislature, the CRC, the people, or a constitutional convention, all of which – unlike the TBRC – have plenary authority to place on the ballot proposed constitutional amendments dealing with any subject whatever.

The reading of the Commission's section 6(e) authority as extending only to "process" issues of state budgeting (as well as to taxation) is reinforced by the constitutional history of the TBRC, which makes clear that the Commission was created in order to provide an opportunity for systematic, routine, and thoughtful consideration of revisions in Florida's tax structure and budget structure. And it finds further support in the Commission's adoption, shortly after its creation, of a rule that defined "state budgetary process" in a way that focuses on the structures and procedures by which a budget is developed and implemented, as well as by the TBRC's identification of sections of the Constitution that it believed came within its jurisdiction – sections that relate to the appropriations process, fiscal authorities, finance and taxation, municipal taxation, debts, and bonds.

It is clear from this discussion that the TBRC does not have the authority to place the proposed constitutional amendments in Ballot Initiatives Nos. 7 and 9 on the ballot for the November 2008 general election. Ballot Initiative No. 7 would add to the religion clause of the Declaration of Rights a new provision regarding participation in public programs, which has nothing whatever to do with taxation or the state budgetary process. And, it would delete the "no-aid" clause that protects taxpayers' rights of conscience by prohibiting the use of public funds for religious purposes. The fact that this clause may involve a substantive limitation on state expenditures does not mean that it deals with the "state budgetary process."

The two proposed constitutional amendments in Ballot Initiative No. 9 are equally outside the TBRC's authority. The first would change the Constitution's instruction on how the state is to fulfill its mandate to provide for the education of Florida's children – a matter dealing with educational policy rather than with "taxation or the state budgetary process." The second proposed amendment would specify how local school districts are to expend their funds, by requiring that at least 65% of those funds be spent on "classroom instruction." Even if this amendment could be considered to deal with the budgetary processes of local school districts, it does not deal with the *state* budgetary process, as required by Article XI, section 6(e).

Although none of the four proposed constitutional amendments in Ballot Initiatives Nos. 7 and 9 "deal[] with taxation or the state budgetary process," such an across-the-board showing is not required for Plaintiffs to prevail. A ballot initiative must stand or fall as a whole, and if Ballot Initiative No. 7 or Ballot Initiative No. 9 includes any provision that exceeded the TBRC's authority to propose, the Initiative fails in its entirety and cannot be saved by some other provision contained in the Initiative that would, standing alone, be within the Commission's authority to propose.

Ballot Initiative No. 9 is also defective because of the deceptive ballot title prepared by the TBRC. Apparently attempting to capitalize on the perceived popularity among voters of the 65% floor on classroom instruction spending, while concealing the more controversial amendment that would remove a constitutional barrier to public funding of private schools, the TBRC prepared a ballot title that describes the former ("REQUIRING 65 PERCENT OF SCHOOL FUNDING FOR CLASSROOM INSTRUCTION"), while merely identifying the general subject matter of the latter ("STATE'S DUTY FOR CHILDREN'S EDUCATION"). The misleading nature of this ballot title cannot be cured by the summary language that follows it – which many voters, judging themselves sufficiently informed by the (misleading) information given in the title, would doubtless never read.

ARGUMENT

For nearly 100 years, this Court has made it clear that any amendments to the Constitution must be placed before the voters in a manner that complies with the requirements set out in the Constitution itself. As the Court put it, "[t]he proposal of amendments to the Constitution is a highly important function of government that should be performed with the greatest certainty, efficiency, care, and deliberation." *Crawford v. Gilchrist*, 59 So. 963, 968 (Fla. 1912); *see also Armstrong v. Harris*, 773 So. 2d 7, 12 n.15 (Fla. 2000) (quoting *Gilchrist*); *Floridians Against Expanded Gambling v. Floridians for a Level Playing Field*, 945 So. 2d 553, 558 (Fla. 1st DCA 2006) (same). Therefore, this Court has explained, the people of Florida have both a "right to amend their Constitution, and *. . . a right to require proposed amendments to be agreed to and submitted for adoption in the manner prescribed by the existing Constitution*, which is the fundamental law." *Gilchrist*, 59 So. at 967 (emphasis added). And, "[i]f essential mandatory provisions of the organic law are ignored in amending the Constitution of the state . . . it violates the right of all the people of the state to government regulated by law." *Id.* at 967-68. It is this "fundamental" principle of law that governs the question before this Court.

The Circuit Court's holding that the TBRC acted within the scope of its authority in proposing Ballot Initiatives Nos. 7 and 9, and its ruling upholding the

ballot title and summary language for the latter, is reviewed *de novo*, without deference to the decision below. *See Zingale v. Powell*, 885 So. 2d 277, 280 (Fla. 2004) ("[C]onstitutional interpretation ... is performed *de novo.*"); *D'Angelo v. Fitzmaurice*, 863 So. 2d 311, 314 (Fla. 2003) (stating that in a *de novo* review, "no deference is given to the judgment of the lower courts").

Petitioners recognize that this Court must act with "care, caution, and restraint" before preventing the people from voting on a proposed constitutional amendment. *Advisory Op. to Att'y Gen. re Fla. Marriage Prot. Amendment*, 926 So. 2d 1229, 1233 (Fla. 2006). But this "care, caution, and restraint" do not diminish the fundamental right of the people of Florida to ensure that the Constitution is only amended in a manner that comports with the existing requirements of the Constitution, *e.g.*, *Gilchrist*, 59 So. at 967, and that the ballot title and summary language are sufficient to meet constitutional requirements. *Advisory Op. to Att'y Gen. re Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1021 (Fla. 1994) ("Although we are wary of interfering with the public's right to vote on an initiative proposal, . . . we are equally cautious of approving the validity of a ballot summary that is not clearly understandable."); *see also Smith v. American Airlines*, 606 So. 2d 618, 621-22 (Fla. 1992) (striking a TBRC-proposed constitutional amendment from the general election ballot, while "cognizant" that

such a ruling "prevents the people of Florida from even having the chance to vote on the merits of the proposal").

We add one further prefatory point. It should go without saying that this case is not about the merits of either Ballot Initiative, and the substantive questions of church/state separation and educational policy that are addressed by the Ballot Initiatives themselves are not now before this Court. *See Advisory Op. to Att'y Gen. re People's Prop. Rights Amendments Providing Compensation for Restricting Real Prop. Use May Cover Multiple Subjects*, 699 So. 2d 1304, 1306 (Fla. 1997) ("[T]his Court does not rule on the merits or wisdom of the proposal but rather determines the legal issues presented by the constitution and relevant statutes."). The issues presented by this appeal involve the meaning of Article XI, section 6(e), of the Florida Constitution, as well as the requirements of § 101.161, Fla. Stat. As we now show, proper interpretation of these provisions requires this Court to reverse the Circuit Court's decision and to enjoin the placement of the two challenged Ballot Initiatives on the ballot for the November 2008 general election.

I. THE TBRC EXCEEDED ITS LIMITED CONSTITUTIONAL AUTHORITY IN PROPOSING BALLOT INITIATIVES NOS. 7 AND 9 FOR PLACEMENT ON THE BALLOT FOR THE NOVEMBER 2008 GENERAL ELECTION.

A. The Only Provision Of The Constitution That Speaks Directly To The Authority Of The TBRC To Propose Constitutional Amendments Is Article XI, Section 6(e), Which Expressly Limits That Authority to Amendments That Deal With Taxation Or The State Budgetary Process.

In ruling that the TBRC acted within its constitutional authority in proposing Ballot Initiatives Nos. 7 and 9 for placement on the ballot for the November 2008 general election, the Circuit Court largely ignored the only provision in the Florida Constitution that speaks directly to the authority of the TBRC to propose constitutional amendments. This controlling provision is Article XI, section 6(e), which by its plain terms limits that authority to amendments that "deal[ ] with taxation or the state budgetary process."

The Circuit Court began, and for all practical purposes ended, its inquiry into the limitation imposed by section 6(e) by looking to section 6(d) of Article XI, which grants the TBRC no action authority but instead requires it to "examine" and "review" various matters. The court held that whatever authority section 6(d) gives the TBRC to examine and review must necessarily define its authority to propose constitutional amendments – regardless of the actual language of section 6(e) that confers and limits that authority. *See* Summary Final Judgment at 8. Phrased otherwise, the Circuit Court in effect re-wrote section 6(e) to provide that

the TBRC may propose constitutional amendments "dealing with any matter that it is authorized to examine or review under section 6(d)," whereas section 6(e) actually limits the TBRC to amendments "dealing with taxation or the state budgetary process."[2]

1. The Plain Text Of Section 6(e) Establishes The Limits Of The TBRC's Authority.

The Circuit Court's approach to constitutional interpretation was, we respectfully submit, erroneous in multiple respects. Not only was the attempt to construe the Commission's section 6(e) constitutional-amendment authority by looking to its investigatory authority under section 6(d) misplaced even on its own terms, *see infra* pp. 21-25, but more fundamentally the court started in the wrong place. As this Court has explained, a court interpreting a constitutional provision "follows principles parallel to those of statutory interpretation," *Zingale*, 885 So. 2d. at 282, and foremost "must examine the actual language used in the Constitution." *Crist v. Florida Ass'n of Criminal Def. Lawyers*, 978 So. 2d 134,

[2] Whatever weight should be given to the Commission's actions, contemporaneous to its creation, in adopting rules and identifying portions of the Constitution that it believed came within its jurisdiction, *see infra* pp. 28-34, it goes without saying that the Commission's attempt to expand its constitutional jurisdiction to encompass the matters at issue here is entitled to no deference. The issue presented is not the construction of a "statute [the TBRC] is charged with enforcing," Summary Final Judgment at 6, but rather is solely a matter of constitutional interpretation – a matter as to which the lay appointees to an inherently political body like the TBRC have no particular expertise. This is, rather, "a question of law subject to de novo review" by the courts. *Crist v. Florida Ass'n of Criminal Def. Lawyers*, 978 So. 2d 134, 139 (Fla. 2008).

140 (Fla. 2008); *see also Florida Soc'y of Ophthalmology v. Florida Optometric Ass'n*, 489 So. 2d 1118, 1119 (Fla. 1986) ("Any inquiry into the proper interpretation of a constitutional provision must begin with an examination of that provision's explicit language."). We begin, accordingly, with an examination of the text of section 6(e).

Article XI of the Florida Constitution sets forth five procedures by which proposals to amend the Constitution can be placed on the ballot for consideration by the voters – by a three-fifths vote of each house of the legislature; by the Constitution Revision Commission ("CRC"), which convenes in every twentieth year; by the people through the power of initiative; by a constitutional convention; and by the TBRC. *See* Art. XI, §§ 1-4, 6, Fla. Const.[3]

The authority granted to the TBRC – which, like the CRC, is authorized to meet once every 20 years – is unlike that conferred through any of the other sources of proposed amendments in one very important respect. While the legislature, the CRC, the people, and a constitutional convention have plenary authority to place on the general election ballot proposed constitutional

[3] The enumeration in Article XI of these five methods of amending the Constitution necessarily excludes an amendment that is not adopted in conformity with one of these procedures, for it is hornbook law that "where one method or means of exercising a power is prescribed in a constitution it excludes its exercise in other ways." *S&J Transp., Inc. v. Gordon*, 176 So. 2d 69, 71 (Fla. 1965).

amendments dealing with any subject whatever, the TBRC, as its name suggests, is confined to the placement of amendments that come within a narrow field:

> Not later than one hundred eighty days prior to the general election in the second year following the year in which the commission is established, the commission shall file with the custodian of state records its proposal, if any, of a revision of this constitution or any part of it *dealing with taxation or the state budgetary process*.

Art. XI, § 6(e), Fla. Const. (emphasis added).

The dispositive phrase – "dealing with taxation or the state budgetary process" – allows the Commission to place on the ballot constitutional amendments dealing with either of two related subjects. The first – taxation – is not relevant here; neither the Circuit Court's holding, nor the argument of any party below, rested on the contention that Ballot Initiatives Nos. 7 and 9 "deal[] with taxation."

The second subject as to which section 6(e) authorizes the TBRC to propose constitutional amendments – which the Circuit Court believed encompassed the amendments at issue here – is the "state budgetary process." That phrase limits the TBRC's authority in two respects. First, amendments proposed by the TBRC must deal with the "state" budgetary process; section 6(e) does not extend to amendments dealing with the "budgetary process[es]" of political subdivisions, such as counties, municipalities, or school districts. Second, the limitation of the TBRC's authority to amendments that deal with the state "budgetary process"

restricts the Commission to *process*-based proposals relating to the budget. Read naturally, the phrase "budgetary process" refers to the structural and procedural aspects of developing and implementing a budget, and does not extend so far as to authorize the TBRC to propose constitutional amendments dealing with the substantive purposes for which government may expend funds.[4]

This plain-language reading of section 6(e) is confirmed by recourse to standard dictionary definitions. *See Seagrave v. State*, 802 So. 2d 281, 286 (Fla. 2001) ("When necessary, the plain and ordinary meaning of words can be ascertained by reference to a dictionary."). As the Circuit Court noted, "[t]he primary definitions of the word 'budget' include '[a]n itemized summary of probable expenses and income for a given period' and 'a systematic plan for meeting expenses in a given period.'" Summary Final Judgment at 9 (citing *The American Heritage Dictionary* 214 (2d college ed. 1985)). The court further stated that "[t]he primary definitions of the word 'process' include a 'system of

[4] The focus of this provision of section 6(e) on *process* is underscored by the language in the previous sentence, which authorizes the TBRC to make recommendations for *statutory* changes that relate to "budgetary laws" – a broader term than "budgetary process." It is, of course, "an elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage." *Hechtman v. Nations Title Ins.*, 840 So. 2d 993, 996 (Fla. 2003). It follows from the juxtaposition of the two terms that, whatever "budgetary process" may mean, it is something narrower than "budgetary laws" generally. Constitutional amendments dealing with the "budgetary process" are, in other words, those that deal with structural and procedural aspects.

operations in the production of something' and a 'series of action[s], changes, or functions that bring about an end result.'" *Id.* (citing *The American Heritage Dictionary* at 987). The definitions of "process" cited by the Circuit Court are entirely consistent with the plain-language reading of the word "process" as limiting the TBRC's authority to propose constitutional amendments to those related to the "production of" the budget, or the "series of action[s] [to] bring about a[]" budget.

Finally, the use of the same language elsewhere in the Florida Constitution also confirms this understanding of the phrase "state budgetary process" as used in Article XI, section 6(e). Article III, section 19, entitled "State Budgeting, Planning and Appropriations Processes" – a constitutional provision proposed by the TBRC and adopted by the voters in 1992 – provides that "[g]eneral law shall prescribe the adoption of annual state budgetary . . . processes." That "general law," found in Chapter 216 of the Florida Statutes, "sets out the general state budget process." *Martinez v. Florida Legislature*, 542 So. 2d 358, 359 n.2 (Fla. 1989); *Thompson v. Graham*, 481 So. 2d 1212, 1214 (Fla. 1985). Perusal of the detailed provisions of both Article III, section 19, and Chapter 216 of the statutes makes clear that the phrase "budgetary process" refers to the structural and procedural aspects of budget development and implementation, and not to the substantive purposes for which government may expend funds.

2. Section 6(d) Is Wholly Consistent With The Foregoing Interpretation Of Section 6(e).

The Circuit Court, as noted above, relied heavily for its interpretation of section 6(e) on the preceding section of Article XI, which authorizes the Commission to engage in a variety of analytical and investigatory activities. In particular, the court pointed to a phrase in section 6(d) that allows the TBRC to "examine constitutional limitations on taxation and expenditures at the state and local level." Summary Final Judgment at 8. That authority, the court opined, would be "render[ed] useless" if the TBRC's authority to propose constitutional amendments under section 6(e) were any narrower: "The Court does not agree that the TBRC can determine that a constitutional limitation should be revised, but be prevented from doing so under Plaintiffs' view of section 6(e). Section 6(d) would be substantially rendered superfluous under the Plaintiffs' construction of section 6(e)." *Id.* The Circuit Court is wrong. The broad analytical and investigatory activities that the TBRC is authorized to engage in by section 6(d) are wholly consistent with Plaintiffs' view of the limited authority that the Commission has under section 6(e) to propose constitutional amendments.

Section 6(d), requires the Commission to:

> ***examine*** the state budgetary process, the revenue needs and expenditure processes of the state, the appropriateness of the tax structure of the state, and governmental productivity and efficiency; ***review*** policy as it relates to the ability of state and local government to

> tax and adequately fund governmental operations and capital facilities required to meet the state's needs during the next twenty year period; ***determine*** methods favored by the citizens of the state to fund the needs of the state, including alternative methods for raising sufficient revenues for the needs of the state; ***determine*** measures that could be instituted to effectively gather funds from existing tax sources; ***examine*** constitutional limitations on taxation and expenditures at the state and local level; and ***review*** the state's comprehensive planning, budgeting and needs assessment processes to determine whether the resulting information adequately supports a strategic decisionmaking process.

Art. XI, § 6(d), Fla. Const. (emphasis added). Unlike section 6(e), section 6(d) does not grant the Commission any affirmative authority to act, but rather provides the Commission with the analytical tools that will enable it to exercise its action authority under section 6(e) in a responsible and informed manner. The Circuit Court's belief that reading the phrase "state budgetary process" in section 6(e) to mean what it says would "render useless that portion of section 6(d) allowing the TBRC to 'examine constitutional limitations on taxation and expenditures at the state and local level,'" Summary Final Judgment at 8, is erroneous for at least three reasons.

First, in considering whether to propose a constitutional amendment dealing with "taxation" or the "state budgetary process," the Commission should not act in a vacuum, but should be able to investigate whether and to what extent a proposed amendment is likely to have broader ramifications at both the state and local levels.

Contrary to the holding of the court below, there is every reason to believe that, for example, before the TBRC proposed a constitutional amendment that might have the effect of reducing the state's tax revenue, it should know about the constitutional authority of local governments to pick up the slack. Thus, the fact that section 6(d) may authorize the TBRC to study "constitutional limitations on … expenditures," and to do so at the local as well as the state level, does not necessarily mean that the authors of section 6(e) intended the TBRC to have the authority to propose constitutional amendments that broadly.

Second, in asserting that the analytical and investigatory activities that the TBRC is authorized to engage in by section 6(d) would be "rendered superfluous" to the extent that they are broader than the authority given to the TBRC to propose constitutional amendments, the Circuit Court ignored the fact that section 6(e) also charges the TBRC with other responsibilities. Specifically, it provides that the TBRC "shall issue a report of the results of the review carried out [pursuant to section 6(d)], and propose to the legislature any recommended statutory changes related to the taxation or budgetary laws of the state." The analytical and investigatory activities engaged in pursuant to section 6(d) could provide the basis for legislative changes. Or, to take the Circuit Court's example, if "the TBRC . . . determine[d] that a constitutional limitation should be revised, but [is] prevented from doing so under Plaintiffs' view of section 6(e)," *id*. at 8, its report could lead

to a proposed constitutional amendment by the legislature, the CRC, the people, or a constitutional convention, all of which – unlike the TBRC – have plenary authority to place on the ballot proposed constitutional amendments dealing with any subject whatever.

Finally, the Circuit Court's apparent belief that the phrase authorizing the TBRC to "examine constitutional limitations on taxation and expenditures at the state and local level" must be read as referring to *substantive* constitutional limitations on the purposes for which public funds may be expended (such as the "no aid" clause of Article I, section 3) is belied by the context in which that phrase appears. The canon *noscitur a sociis* (a word is known for the company it keeps) requires that this phrase be read in conjunction with what surrounds it. *See, e.g., Nehme v. SmithKline Beecham Clinical Labs.*, 863 So. 2d 201, 205 (Fla. 2003). Viewed in the broader context of the rest of section 6(d), the phrase clearly refers to the kinds of "limitations on . . . expenditures" that are of a structural or procedural nature – such as, for example, a constitutional provision limiting the state's expenditures to the amount of its revenues. It cannot be taken as referring to substantive policy limitations on the purposes for which the state may expend public funds.

The broader reading given this particular phrase in section 6(d) by the Circuit Court would make it an anomaly as the only provision of Article XI,

section 6, going beyond the context of structural and procedural budgetary issues (as well as taxation issues). And, were that provision – which authorizes the Commission only to "examine" certain constitutional limitations – to be read, as the Circuit Court did, to determine the scope of the Commission's authority under section 6(e) to propose constitutional amendments in the face of that section's plain language, this would truly be a case of the tail wagging the dog.

In short, there is no inconsistency between the broad authority given to the TBRC by section 6(d) to engage in analytical and investigatory activities – including the authority to "examine constitutional limitations on taxation and expenditures at the state and local level" – and section 6(e)'s limitation of its authority to propose constitutional amendments to those "dealing with taxation or the state budgetary process." And, indeed, the focus of section 6(d), read in its entirety, on procedural and structural issues reinforces the conclusion that this is what is meant by the phrase "state budgetary process" as used in section 6(e).

3. The Constitutional History Of The TBRC Underscores That The Phrase "State Budgetary Process" In Section 6(e) Refers To The Structural And Procedural Aspects Of Developing And Implementing The State's Budget.

The plain meaning interpretation of the phrase "state budgetary process" is also supported by an examination of the constitutional history of Article IX, section 6. Amendment by proposal of the TBRC is the most recently adopted method of proposing constitutional amendments. In 1988, faced with a state tax

structure which had been described as "serious" and "worsening,"[5] and responding to the belief that Florida needed a new mechanism for examining the structural fiscal problems of the 1980s, the Florida Legislature proposed, and the voters approved, amending the Constitution to create a commission with authority to review and propose changes to Florida's taxation and budget laws and processes.[6] In short, the Commission was created to help bring Florida's tax and budget structure "into line with 20th Century norms before the 20th Century ends,"[7] and it was never envisioned as a vehicle for dealing with the substantive purposes for which the state – much less local school districts and other political subdivisions – could and could not expend funds.

As originally created, the Commission was to meet in 1990 and every ten years thereafter, Art. XI, § 6, Fla. Const. (1990), and – insofar as its charge to propose constitutional amendments was concerned – it divested authority from the CRC to propose amendments relating "directly to taxation or the state budgetary

---

[5] Editorial, *Budget: The A-Team*, Miami Herald, Apr. 25, 1990, at 16A.

[6] *See generally*, Donna Blanton, *The Taxation and Budget Reform Commission: Florida's Best Hope for the Future*, 18 Fla. St. U. L. Rev. 437 (1991).

[7] Miami Herald, *supra note* 5; *see also* Editorial, *Commission Off to a Promising Start With Proposals for Budget Reform*, South-Florida Sun-Sentinel, Dec. 18, 1990 at 12A (noting that the Commission was appointed "to examine the state's financial structure").

process that are to be reviewed by the taxation and budget reform commission." Art. XI, § 2, Fla. Const. (1990). But in 1996, the Florida Legislature proposed, and the voters adopted, an amendment to the Constitution that restored the CRC's authority to propose amendments relating to taxation and the state budgetary process. In that year, many felt that divesting the CRC of this authority had the potential to compromise the effectiveness of the CRC.[8] Two years later, in 1998, sensing no need for two commissions to have concurrent jurisdiction, the CRC considered proposing an amendment to abolish the TBRC in its entirety.[9] Upon due consideration, however, the CRC recognized the importance of the TBRC as providing "an opportunity to, in a systematic, routine and thoughtful way … consider revisions to our tax *structure* and importantly to our *budget structure*,"[10] and did not make a proposal to abolish it.[11]

---

[8] *See* Commentary to 1996 Amendments in Art. XI, § 2, Fla. Const. (West 2008).

[9] *See* William A. Buzzett, *Miscellaneous Matters and Technical Revisions*, Florida Bar Journal vol. LXXII, No. 9 at 67; 25 Journal of the 1997-1998 Constitution Revision Commission at 192 (Feb. 24, 1998) (noting the preliminary adoption of an amendment to abolish the TBRC).

[10] Transcript, State of Florida Constitution Revision Commission Meeting, March 17, 1998 vol. II at 185:10-13 (emphasis added). *See also id.* at 186:22-24 (noting that it is a "very important and necessary mechanism in our Constitution to address our tax *structure* and our *budget structure*") (emphasis added); Transcript, State of Florida Constitution Revision Commission Meeting, Feb. 24, 1998 at 252:8-10 (advocating the TBRC's role to provide a "deliberate, concentrated review of the tax *structure* of this state") (emphasis added); *id.* at

4. The TBRC's Contemporaneous Understanding Of Its Authority To Propose Constitutional Amendments Confirms That The Phrase "Budgetary Process" Refers To The Structural And Procedural Aspects Of Developing And Implementing A Budget.

The TBRC's own interpretation of section 6(e) contemporaneous to the enactment of that provision confirms that the phrase "budgetary process" refers to the structural and procedural aspects of developing and implementing a budget. In the first place, the Commission's rules, originally adopted in 1990, contain a definition of "budgetary process" that focuses on the structural and procedural aspects of developing and implementing a budget:

> the ***manner*** in which every level of government … expends funds, incurs debt, assesses needs, acquires financial information, and administers its fiscal affairs, and includes the legislative appropriation ***process*** and the budgetary ***practices and principles*** of all agencies and subdivisions of the state involved in financial ***planning***, ***determining***, ***implementing***, ***administering***, and ***reviewing*** governmental programs and services.

252:19-20 (noting the Commission's role to engage in a "concentrated review of the revenue *structure* of this state") (emphasis added); *id.* at 259:1-7 ("The Tax and Budget Reform Commission will consider things other than the personal income tax or the services tax or any of those things. It will consider those, if we are lucky, but it'll also consider the *budget process* of this state, the appropriations process of this state.") (emphasis added).

[11] The 1998 CRC proposed, and the voters adopted, an amendment that changed the voting requirements of the TBRC and the schedule on which the TBRC would meet. After the 1998 amendment, the TBRC was to meet in 2007 and every twentieth year thereafter. The 1998 amendments did not change the TBRC's authority.

See TBRC Rule 1.005 (2007, as amended February 26, 2008) (emphasis added); *see also* TBRC Rule 1.005 (1990). Notwithstanding the Circuit Court's view, Summary Final Judgment at 10, this definition simply does not support the TBRC's broad assertion of its authority.

To the contrary, the TBRC's definition establishes that the phrase "budgetary process" means the "*manner in which*" government entities accomplish a number of specific tasks, and includes the "legislative appropriation *process*," and the "budgetary *practices and principles*" of such entities. In short, the Commission's own definition confirms that its authority to propose constitutional amendments encompasses amendments dealing with the structure and procedure by which a budget is developed and implemented. Nothing in that definition suggests that the TBRC has authority to propose constitutional amendments simply because they may in some way be related to expenditures – such as the Constitution's substantive instructions about the purposes for which public funds may be expended.[12]

[12] We rely on the TBRC's contemporaneous interpretation of section 6(e) only with regard to the meaning of the disputed phrase "budgetary process." We note that in the material cited, the TBRC interpreted the phrase "state budgetary process" to encompass the budgetary process of "every level of government" and of "all . . . subdivisions of the state." *See* TBRC Rule 1.005 (1990). But the term "state" is not even arguably ambiguous: it clearly refers to the State of Florida, and to the extent the TBRC suggested otherwise in 1990, that

In addition, shortly after its creation the TBRC made clear its understanding of the nature of its authority to propose constitutional amendments through its identification of certain existing constitutional provisions that it believed came within its jurisdiction. In February 1991 the Commission issued a report in which it set forth, among other things, its own understanding of the constitutional terms "taxation or the state budgetary process." After noting that those terms "are not defined in the Constitution,"[13] the Commission identified 28 sections of the Constitution that it believed were encompassed within its authority to propose constitutional amendments.[14] These sections were: (1) Article III, §§ 8 and 12; (2) Article IV, §§ 4 and 9; (3) Article VII, §§ 1-17 inclusive; (4) Article VIII, §§ 1 and 2; (5) Article IX, § 6; and (6) Article XII, §§ 2, 8, 9, and 15.

These sections of the Constitution relate generally to the appropriations process, fiscal authorities, finance and taxation, municipal taxation, debts, and bonds. Notably, the Commission's list of the constitutional provisions that fell within its mandate included nothing from the Declaration of Rights (Article I). And, the only section from the Education Article (Article IX) that was included on

---

interpretation is "clearly unauthorized or erroneous." *Level 3 Communications, LLC v. Jacobs*, 841 So. 2d 447, 450 (Fla. 2003).

[13] Florida Taxation & Budget Reform Commission, A Program for Reform of FLORIDA Government at 15 (Feb. 1991) (Appendix p. 17).

[14] *Id.*

the list was section 6 – which deals with the appropriation of the income and principal from the separate "school fund." Neither Article I, section 3, nor Article IX, section 1 – the provisions that Ballot Initiatives Nos. 7 and 9 propose to amend – was included on the Commission's 1990 list of constitutional sections that came within the scope of its amendatory authority. To the contrary, all of the sections the Commission identified deal with what would be included in the ordinary and accepted meaning of "taxation" and the "state budgetary process."

It also bears noting that these expressions of the 1990 TBRC's understanding of its authority are fully consistent with the constitutional amendments the Commission proposed in that year. After examining "Florida's tax structure, budgetary and spending processes, governmental structure, and planning and needs assessment processes"[15] – an extensive review that focused on systemic, structural issues with Florida's taxation scheme and Florida's budgetary processes[16] – the Commission sent four constitutional proposals to the voters for approval:[17]

---

[15] *Id.* at 1 (Appendix p. 16).

[16] *See generally* Florida Tax Watch, *Briefings: The Florida Taxation and Budget Reform Commission Set to Begin Meeting Again in 2007* (Nov. 2005) *available at:* http://www.floridataxwatch.org/resources/pdf/BriefingsNovember2005TaxationandBudgetReformCommission.pdf.

[17] Although these were not the only proposals considered by the Commission during this session, they were the only proposals that were *adopted* by

(1) Amendment 4 amended the constitution to add the provisions of Article III, section 19, for a "state budgeting, planning and appropriations process," including: (a) a 72-hour public review for appropriations bills; (b) the creation of a reserve fund equal to 5% of total revenue that was only to be used for revenue shortfalls and emergencies; (c) an annual budget and planning process; (d) altering the format for appropriations bills; (e) requiring agencies to submit planning documents and budget requests for legislative review; (f) mandating an annual budget report; (g) making it harder to create trust funds; (h) including a biennial review of the state comprehensive plan; (i) granting the governor and cabinet increased authority to make budget cuts to balance the budget; and (j) expanding the public school capital outlay fund.

(2) Amendment 6 allowed cities and counties to levy up to a 1% local option sales tax with voter approval.

(3) Amendment 7 altered the taxation of leaseholds on government property.

(4) Amendment 8 subjected government leaseholds to *ad valorem* taxation.[18]

Amendments 4 and 8 received the necessary voter approval and were incorporated into the Constitution, while Amendment 6 failed, and Amendment 7 was struck from the ballot due to deficiencies in its ballot title and summary language. *See*

---

the Commission. That the Commission considered and rejected proposals relating to public school choice cannot possibly be taken as evidence of the Commission's views as to its authority to adopt such proposals. *Cf. Shands Teaching Hosp. & Clinics, Inc. v. Smith*, 480 So. 2d 1366, 1374 (Fla. 1st DCA 1985) ("[L]egislative silence may reflect any of a variety of attitudes."), *aff'd*, 497 So. 2d 644 (Fla. 1986).

[18] Florida Secretary of State Division of Elections, *Initiatives / Amendments / Revisions, at* http://election.dos.state.fl.us/initiatives/initiativelist.asp (year=1992; status=all).

Smith v. American Airlines, 606 So. 2d 618 (Fla. 1992). Most significant for present purposes is that all of these proposed amendments dealt with taxation or structural or procedural aspects of the state budget.[19]

To be sure, the TBRC did not assert in the 1991 report that it could only propose amendments dealing with the identified 28 sections of the Constitution, and we do not suggest otherwise. Quite apart from any other consideration, for example, the Commission obviously did not consider itself barred from proposing entirely new constitutional provisions dealing with taxation and the budgetary process – as it did in proposing what is now Article III, section 19. But the Commission's identification of existing constitutional provisions that were within its jurisdiction, together with the four proposals the 1990 Commission adopted, clearly is indicative of the TBRC's contemporaneous understanding of the nature of what was encompassed by the phrase "taxation or the state budgetary process."

---

[19] Indeed, apart from the two ballot initiatives at issue in this litigation, the other constitutional amendments proposed by the 2007-2008 TBRC have the same focus, dealing with taxation or structural or procedural aspects of the state budget. Thus, Initiative No. 3 would make changes in the factors that may be considered in assessing the value of residential real estate for *ad valorem* taxation purposes. Initiative No. 4 addresses property tax exemptions for real property encumbered by conservation easements, as well as the classification and assessment of land used for conservation purposes. Initiative No. 5 (stricken from the ballot by the Circuit Court because of a defective ballot title and summary) involved property assessments for the purposes of *ad valorem* taxation, and the use of tax proceeds for education. Initiative No. 6 would make changes in the tax assessment of certain types of waterfront properties. And Initiative No. 8 involves sales taxes levied for community college funding.

B. The Constitutional Amendments Proposed In Ballot Initiatives Nos. 7 And 9 Do Not Deal With Taxation Or The State Budgetary Process.

Four analytically distinct constitutional amendments are proposed in Ballot Initiatives Nos. 7 and 9, none of which "deal[] with taxation or the state budgetary process." It is important to point out, however, that it is not Plaintiffs' burden to show that *all* components of a ballot initiative were unlawfully adopted, for an initiative must be stricken from the ballot if any portion thereof was beyond the scope of the TBRC's authority to propose.

In *Smith v. American Airlines,* 606 So. 2d 618 (Fla. 1992), this Court held that courts do not have the authority to rewrite a ballot initiative's title or summary language, and it accordingly struck from the ballot for the general election a TBRC-proposed ballot initiative because of its defective summary language. *Id.* at 621-22. The teaching of *Smith* is relevant here in two ways. In the first place, if it is beyond the power of the courts to rewrite a ballot initiative's summary language adopted by the TBRC, it must *a fortiori* be impermissible for the courts to revise the text of the initiative itself. And, even if that were not the case, severing the defective portion of a ballot initiative without rewriting the summary language – which *Smith* forbids – would mean that the partially struck proposed amendment would not be represented by a clear and unambiguous ballot summary and would

be defective for that reason. *See, e.g., Armstrong v. Harris*, 773 So. 2d 7, 16 (Fla. 2000).

It follows that a ballot initiative must stand or fall as a whole, and if Ballot Initiative No. 7 or Ballot Initiative No. 9 includes a provision that was outside the TBRC's authority to propose, it will not be saved even if some other provision contained in the Initiative would, standing alone, be within the Commission's authority to propose. This proposition of law was uncontested in the Circuit Court.

1. The Proposed Amendments Of Ballot Initiative No. 7 Do Not Deal With Taxation Or The State Budgetary Process.

Both of the changes proposed in the language of Article I, section 3 – the provision of Florida's Declaration of Rights that establishes freedom of religion and the separation of church and state – are beyond the Commission's authority to propose.

a. The Addition To Article I, Section 3

One of the changes proposed to Article I, section 3, by Ballot Initiative No. 7 would add the following line to that section: "An individual or entity may not be barred from participating in any public program because of religion." The Circuit Court did not address the constitutionality of this proposed amendment in holding that Ballot Initiative No. 7 passed muster. *See* Summary Final Judgment at 10.

This proposed addition is a substantive provision that deals with exclusions from participation in public programs on the basis of religion. It does not even

remotely relate to taxation or the state budgetary process. To be sure, the new language undoubtedly would have an enormous impact on the role of religion in public programs. Thus, for example, it might prevent a high school graduation from being held on the Jewish Sabbath. But there is simply no logical nexus between *participation* in an existing, already funded, "public program because of religion" and taxation, budgetary process, budgets, or expenditures at the state or local level. There is simply no question that the TBRC has exceeded its authority under section 6(e) in placing this proposed amendment on the ballot.

b. The Removal Of The "No Aid" Provision In Article I, Section 3

The second change in Article I, section 3, that would be made by Ballot Initiative No. 7 is equally beyond the Commission's authority. The Commission proposes to delete what is currently the third sentence of that section, which has been held to "impose restrictions" on state support for religious institutions "beyond what is restricted by the federal Establishment Clause." *Bush v. Holmes*, 886 So. 2d at 351; *see also id.* at 357-61; *Silver Rose Entm't, Inc. v. Clay County*, 646 So. 2d 246, 251 (Fla. 1st DCA 1994). That sentence, upon which the First DCA relied in striking down the Opportunity Scholarship Program, reads: "No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution." Art. I, § 3, Fla.

Const. Deleting this provision from Article I, section 3, would significantly alter the limits the Constitution places on the state's involvement with religious institutions, but it would not in the slightest affect "taxation or the state budgetary process."

It is no answer to say that this amendment is within the purview of the TBRC because it regulates the purposes for which state "revenue" may be expended. If that is what the Circuit Court meant in holding that the TBRC may propose an amendment "to any portion of the constitution *touching upon* the state budgetary process generally," Summary Final Judgment at 8 (emphasis added), it was in error. The phrase "budgetary process," given any reasonable meaning, cannot be taken as a synonym for "expenditure." In point of fact, the sentence the TBRC proposes to delete from Article I, section 3, is a substantive rule of law that establishes the state's protection for the rights of conscience and the separation of church and state. That it protects these rights by placing a substantive prohibition on the use of public funds does not make it a provision that "deal[s] with … the state budgetary process." Art. XI, § 6(e), Fla. Const.[20]

[20] In addition (although the Circuit Court failed to address this issue), the proposal to amend Article I, section 3 by deleting its third sentence is beyond the scope of the TBRC's authority because the amendment would not be limited to the *state* budgetary process. As currently written, the "no aid" clause of Article I, section 3 – which would be deleted by Ballot Initiative No. 7 – restricts the expenditure of public funds not only by the state but also by its political subdivisions. The proposed amendment, however, would remove from section 3

2. Ballot Initiative No. 9 Does Not Deal With Taxation Or The State Budgetary Process.

Ballot Initiative No. 9 proposes two constitutional amendments, which, except for the fact that they both relate to the general subject matter of education, are largely unrelated to each other. The first is an amendment to Article IX, section 1(a), that alters the way in which the state is to fulfill its "paramount duty … to make adequate provision for the education of all children residing within its borders." Art. IX, § 1(a), Fla Const. The second amendment adds a new section to Article IX that would require all local school districts to spend at least 65 percent of the funds that they receive (not only from the state, but from all sources) on classroom instruction, rather than on administration. Neither of these amendments deals with "taxation or the state budgetary process."

a. The Proposed Amendment To The State's Duty To Educate Florida's Children

In *Bush v. Holmes*, this Court held that Article IX, section 1(a), not only establishes the mandate that the state provide for the education of its children, but also "provides a restriction on the exercise of this mandate" by specifying that the mandate is to be carried out through the "system of free public schools" described

---

language that limits the use of revenues of "the state *or any political subdivision* or agency thereof." Art. I, § 3, Fla. Const. (emphasis added). Whatever else might be said about the authority given to the Commission by Article XI, section 6, it does not extend to proposing constitutional amendments dealing with *local* budgetary processes.

in the third sentence of section 1(a). 919 So. 2d at 406-07. One part of Ballot Initiative No. 9 would overrule that holding by amending Article IX, section 1(a), to specify that the educational mandate need not be fulfilled "exclusively" through the "system of free public schools." The major change in educational policy envisaged by this proposed amendment is underscored by the proposal to change the title of Article IX, section 1, from "Public Education" to "Public Funding of Education."

Whether the state should provide for the education of its children exclusively through a system of free public schools (as the Constitution presently provides) – or should be able to fulfill that mandate in part by paying for children to attend private schools (as was done by the Opportunity Scholarship Program) or through other means, such as funding home schooling or internet-based "virtual schools" – is a matter that can be, and indeed has been, hotly disputed on all sides. But what is beyond dispute is that these are matters of educational policy, and not matters that deal with "taxation or the state budgetary process." Those who believe that the proposed change in Article IX, section 1(a), would be desirable are entirely free to pursue that constitutional change through any of the four methods by which proposed constitutional amendments dealing with any subject may be placed before the voters. But they cannot do so through the TBRC, which has no

authority to propose constitutional amendments that do not "deal[] with taxation or the state budgetary process."

b. The Proposed 65 Percent Funding Allocation Rule

The second amendment proposed in Ballot Initiative No. 9 would add a new provision to Article IX providing that "[a]t least sixty-five percent of the school funding received by school districts [not only from the state, but from all sources] shall be spent on classroom instruction, rather than on administration." The amendment does not mention taxation, amend state law involving taxation, or in any other way relate to taxation. Nor for the reasons set forth above, does the fact that the amendment addresses the substantive purposes for which local school districts may spend their money mean that it deals with a "budgetary process" within the meaning of section 6(e)

But even if it could be argued that the amendment does deal with a "budgetary process," it would still exceed the authority of the TBRC. This is because, as discussed *supra*, Article XI, section 6(e), does not just limit the TBRC's authority to propose constitutional amendments to those dealing the "budgetary process" generally. Rather, the Commission's purview is also limited to proposing amendments "dealing with . . . the *state* budgetary process" (emphasis added). And, if the 65% requirement deals with any "budgetary process" at all, it

is not the *state* budgetary process, but rather the budgetary processes of local school districts.

The Circuit Court nonetheless concluded "that a 35 percent cap on [local school district] administrative spending" deals with the "state budgetary process" because the cap would "impact the state's budget." *See* Summary Final Judgment at 11. That view is erroneous for at least two reasons. In the first place, it has no support as a factual matter. The proposed amendment does not in the least affect state spending on education: it does not change the amount of educational funding that local school districts receive from the state, but only directs how they may expend the funds that they do receive. The impact of this provision is, in other words, solely on local school district expenditures, not on *state* expenditures.

A second consideration is even more fundamental. Article XI, section 6(e), authorizes the TBRC to propose only constitutional amendments that "deal[] with … the state budgetary process" – not any and all amendments that, as the Circuit Court puts it, would "impact the state's budget." Such a test would allow the Commission to propose constitutional amendments far removed from "taxation or the state budgetary process." By way of example, the TBRC could propose fundamental constitutional changes in Florida's form of government, such as switching from a bicameral to a unicameral legislature, or abolishing the District

Courts of Appeal, on the theory that such changes would save millions of dollars and thus "impact the state's budget." That clearly is not the law.

II. BALLOT INITIATVE NO. 9 CANNOT BE PLACED ON THE BALLOT FOR THE NOVEMBER 2008 GENERAL ELECTION BECAUSE THE LANGUAGE ADOPTED BY THE TBRC FOR THE BALLOT TITLE AND SUMMARY IS MISLEADING AS TO THE TRUE EFFECT OF THE PROPOSED AMENDMENT.

While the foregoing is sufficient to warrant enjoining the placement of Ballot Initiative No. 9 on the ballot for the November 2008 general election, that result is required for a second reason as well.

The Florida Constitution requires that any proposal to amend the Constitution be "*accurately* represented on the ballot; otherwise, voter approval would be a nullity." *Armstrong v. Harris*, 773 So. 2d 7, 12 (Fla. 2000) (citing Art. XI, § 5, Fla. Const.) (emphasis in original); *see also* § 101.161, Fla. Stat. (2008). This requirement, implicit in Article XI, section 5, mandates that the ballot title and summary language of a proposed amendment appearing on the general election ballot express the substance of the amendment in clear and unambiguous terms. *Armstrong*, 773 So. 2d at 12; *Smith*, 606 So. 2d at 620 (striking a TBRC-proposed ballot initiative from the general election ballot due to defective summary language). This "truth in packaging" requirement has been codified by the legislature in § 101.161, Fla. Stat. *Armstrong*, 773 So. 2d at 13; *see also Florida Ass'n of Realtors, Inc. v. Smith*, 825 So. 2d 532, 536 (Fla. 1st DCA 2002).

"[T]he gist of [this] … requirement is simple: A ballot title and summary cannot either 'fly under false colors' or 'hide the ball' as to the amendment's true effect." *Armstrong*, 773 So. 2d at 16. Though the gist of the rule may be simple, its importance cannot be overstated. Voters cast their votes based "*only* on the ballot title and summary." *Advisory Op. to Att'y Gen. re Additional Homestead Tax Exemption*, 880 So. 2d 646, 653 (Fla. 2004) (emphasis in original). "Therefore, an accurate, objective, and neutral summary of the proposed amendment is the *sine qua non* of the . . . process of amending our constitution." *Id.* at 653-54. This requirement also "assure[s] that the electorate is advised of the true meaning, and ramifications, of an amendment." *Advisory Op. to Att'y Gen. re Term Limits Pledge*, 718 So. 2d 798, 803 (Fla. 1998) (quoting *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982)). Accordingly, in order to pass muster, a ballot title and summary language must "state in clear and unambiguous language the chief purpose of the measure," *Advisory Op. to Att'y Gen. re Save Our Everglades*, 636 So. 2d 1336, 1341 (Fla. 1994), so that the voters "will not be misled as to its purpose." *Id.*

In the case of Ballot Initiative No. 9, the ballot title is nothing if not misleading. As explained above, in creating what became Ballot Initiative No. 9 the TBRC combined two largely unrelated proposals on the last day of its 2007-2008 term. Perhaps sensing that voters would be more receptive to the proposal to

add a constitutional requirement that local school districts spend 65% of their funds on classroom instruction than to the proposal to overturn this Court's ruling striking down private-school voucher programs, the TBRC created a ballot title for the combined ballot initiative that describes what the former proposal would do, while merely identifying the general subject matter of the latter proposal in a manner that hardly is likely to prompt objection: "REQUIRING 65 PERCENT OF SCHOOL FUNDING FOR CLASSROOM INSTRUCTION; STATE'S DUTY FOR CHILDREN'S EDUCATION."

The result is a ballot title that is affirmatively deceptive. It informs voters that the Ballot Initiative will do something that the Commission believes the voters are likely to find appealing – *i.e.*, spending more money on classroom instruction – without informing them of the Ballot Initiative's more controversial consequence, *i.e.*, removing a constitutional barrier to public funding of private schools.

A more neutral ballot title that did not seek to capitalize on the perceived popularity of setting a 65% floor on funding for classroom instruction while "hiding the ball" about the far less popular proposal to allow private school vouchers would have identified both of the proposals in the same way. For example, the ballot title might have identified only the general subject matter of both: "Allocation of school district funding; state's duty for children's education." Or, the TBRC could have prepared a ballot title that described the chief purpose of

both proposals: "Requiring 65 percent of school funding for classroom instruction; allowing state funding of private schools." But the TBRC chose to do neither, and the TBRC's ballot title for Ballot Initiative No. 9, as written, is "misleading," *Save Our Everglades*, 636 So. 2d at 1341, because it gives the voters disproportionate information about what one, but not the other, of the two combined proposals would do.

The Circuit Court did not appear to take issue with Plaintiffs' contention that the ballot title that the TBRC prepared for Ballot Initiative No. 9 was misleading as to the true effect that the Initiative would have. Rather, the court upheld the ballot title on the ground that the defect in the title was cured by the more balanced summary language that followed it. *See* Summary Final Judgment at 13.

But in this case, at least, the language of the body of the ballot summary cannot remedy the title's defect. The purpose of a ballot title and summary language is "to provide fair notice of the content of the proposed amendment so that the voter will not be misled as to its purpose, and can cast an intelligent and informed ballot." *Advisory Op. to Att'y Gen. re Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563, 566 (Fla. 1998) (quoting *Advisory Op. to Att'y Gen. re Fee on Everglades Sugar Prod.*, 681 So. 2d 1124, 1127 (Fla. 1996)). Where the proposed ballot title provides blatantly deceptive information in capital letters about what is at stake in the Ballot Initiative, that deception cannot be cured

by explaining the full effect of the Ballot Initiative in the summary language that follows – which many voters, judging themselves sufficiently informed by the (deceptive) information given in the title, will doubtless never read. Indeed, in another TBRC ballot case decided just a few days after this one, the same Circuit Court judge made precisely this point when he observed that the ballot summary language does not necessarily cure a deficient ballot title, because "[a] voter reading the title may well be misled into voting for or against the amendment without reading further." *Slough v. Department of State*, No. 2008-CA-2164, slip op. at 10 (2d Jud. Cir. Aug. 14, 2008). That is the case here.

The TBRC is not constrained from "logrolling" by the single-subject rule that applies to citizen initiatives under Article XI, section 3. *Advisory Op. to Att'y Gen. re Race in Pub. Educ.*, 778 So. 2d 888, 891 (Fla. 2000); *Save Our Everglades*, 636 So. 2d at 1341 n.2. But having chosen to combine two unrelated proposals into a single ballot initiative, the ballot title and summary language the Commission prepares for the general election ballot must describe both parts of the initiative fairly, and in a way that does not mislead the voters about what is at stake. The TBRC has failed to meet this requirement with respect to Ballot Initiative No. 9, and, for this reason as well, this Initiative may not lawfully be placed on the ballot for the November 2008 general election.

CONCLUSION

The judgment of the Circuit Court should be reversed and the case remanded with instructions to (1) enter summary judgment in favor of Plaintiffs, and (2) enjoin Defendant Browning from placing Ballot Initiatives Nos. 7 and 9 on the ballot for the November 2008 general election.

Respectfully submitted,

/s/
RONALD G. MEYER, ESQUIRE
On Behalf Of:

RONALD G. MEYER
Florida Bar No. 0148248
JENNIFER S. BLOHM
Florida Bar No. 01062
Meyer and Brooks, P.A.
2544 Blairstone Pines Dr.
Post Office Box 1547
Tallahassee, FL 32302
(850) 878-5212

ROBERT H. CHANIN*
National Education Association
1201 16th Street, N.W.
Washington, D.C. 20036
(202) 822-7035

PAMELA L. COOPER
Florida Bar No. 0302546
Florida Education Association
300 East Park Avenue
Tallahassee, FL 32301
(850) 224-7818

JOHN M. WEST*
DANIEL A. ZIBEL*
Bredhoff & Kaiser, P.L.L.C.
805 Fifteenth Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 842-2600

JUDITH E. SCHAEFFER*
People For the American Way Foundation
2000 M Street, NW, Suite 400
Washington, D.C. 20036
(202) 467-4999

AYESHA N. KHAN*
Americans United for Separation of Church and State
518 C Street, N.E.
Washington, D.C. 20002
(202) 466-3234

JOY CAUSSEAUX FRANK
Florida Bar No. 0316245
Florida Association of District
School Superintendents, Inc.
208 South Monroe Street
Tallahassee, Florida 32301
(850) 488-5099

DAVID L. BARKEY
Florida Bar No. 23964
Anti-Defamation League
One Park Place
621 NW 53rd Street
Boca Raton, FL 33487-8235
(561) 988-2900

RANDALL C. MARSHALL
Florida Bar No. 181765
American Civil Liberties Union
Foundation of Florida, Inc.
4500 Biscayne Boulevard, Suite 340
Miami, FL 33137-3227
(786) 363-2700

JEFFREY PHILIP SINENSKY*
American Jewish Committee
165 East 56 Street
New York, New York 10022
(212) 891-6740

* *pro hac vice* motions pending

Counsel for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, this 20th day of August, 2008, by hand delivery to:

Stephen H. Grimes, Esquire
Nathan A. Adams, IV, Esquire
Jerome W. Hoffman, Esquire
Holland & Knight, LLP
Post Office Drawer 810
315 S. Calhoun Street, Ste. 600
Tallahassee, Florida 32302
Fax No.: (850) 224-8832
Counsel for Intervenors Florida Catholic Conference, Inc., et al.

Blaine H. Winship, Esquire
Scott D. Makar, Esquire
Timothy D. Osterhaus, Esquire
Louis F. Hubener, Esquire
Office of the Attorney General
The Capitol – PL-01 *(Mailing)*
107 W. Gaines Street *(Hand Delivery)*
The Collins Building, Room 424
Tallahassee, FL 32399-1050
Fax No.: (850) 410-2672
Counsel for Defendant Browning

Daniel J. Woodring, Esquire
Woodring Law Firm
3030 Stillwood Court *(Mailing)*
203 N. Gadsden Street *(Hand Delivery)*
Suite 1-C
Tallahassee, Florida 32308
Fax No.: (850) 254-2939
Counsel for Intervenors Members of TBRC

Lynn Hearn, Esquire
General Counsel
Office of Secretary of State
Florida Department of State
R.A. Gray Building
500 South Bronough Street
Tallahassee, Florida 32399
Fax No.: (850) 245-6127
Counsel for Defendant Browning

and by facsimile and first-class mail to:

J. Patrick Fitzgerald, Esquire
J. Patrick Fitzgerald & Associates, P.A.
110 Merrick Way, Suite 3-B
Coral Gables, Florida 33134
Fax No.: (305) 443-6613
Counsel for Intervenor Catholic Charities

/s/
RONALD G. MEYER, ESQUIRE

CERTIFICATE OF COMPLIANCE

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

_____/s/_____
RONALD G. MEYER, ESQUIRE