**IN THE**
**SUPREME COURT OF FLORIDA**

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

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ANDY FORD, *et al.*

Petitioners,

v.

KURT S. BROWNING,

Respondent.

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

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# REPLY BRIEF OF PETITIONERS

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## ARGUMENT

Plaintiffs/Petitioners Andy Ford, *et al.*, have explained at length why the Taxation and Budget Reform Commission ("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, *see* Brief of Petitioners ("Pl. Br.") at 15-40, and why the language adopted by the TBRC for the ballot title and summary of Ballot Initiative No. 9 is misleading as to the true effect of the Initiative, *see also id.* at 42-46. That explanation responds to all of the arguments made in the briefs of Defendant/Respondent Kurt Browning ("Def. Br."), Intervenors Florida Catholic Conference *et al.* ("FCC Br."), and the eight Intervenor members of the 2007-2008 TBRC ("TBRC Br."), and we will not burden this Court with a reiteration. We simply make a few supplementary observations keyed to the principal points made by Defendant and Intervenors in their briefs.[1]

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[1] At the outset, we respond to a threshold issue raised in passing by the FCC Intervenors – *i.e.*, that the Circuit Court erroneously concluded that Plaintiffs have standing to bring this suit inasmuch as Plaintiffs have not "suffered a 'special injury.'" *See* FCC Br. at 14, n.7. This assertion has no merit. Plaintiffs have brought suit as Florida citizens, taxpayers, and voters in order to vindicate their "right to amend their Constitution and . . . to require proposed amendments to be agreed to and submitted for adoption in the manner prescribed by the existing Constitution. . . ." *Crawford v. Gilchrist*, 59 So. 963, 967 (Fla. 1912); *see* Complaint ¶¶ 5-10. *Gilchrist* stands precisely for the proposition that a plaintiff acting as a "citizen, a taxpayer, and an elector" is the "proper party" to challenge the "due proposal" of a constitutional amendment. *Gilchrist*, 59 So. at 967. In

Before doing so, however, we offer a preliminary comment in order to put this appeal in context. This appeal presents the pure legal question of whether the TBRC complied with the requirements set forth in Article XI, section 6, for placing proposed constitutional amendments before the voters. The TBRC's motive in submitting Ballot Initiatives Nos. 7 and 9 for placement on the ballot for the November 2008 general election is not at issue, nor, as the Circuit Court correctly observed, is this appeal about "the merit or wisdom of the proposals" in Ballot Initiatives Nos. 7 and 9. It is worth noting, however, the unifying thread among what appear to be the otherwise unrelated constitutional amendments proposed by the TBRC in Ballot Initiatives Nos. 7 and 9. Defendant and the FCC Intervenors virtually acknowledge that – under the guise of its authority to propose constitutional amendments that deal with "taxation or the state budgetary process" – the TBRC manipulated its own authority in order to achieve the policy objective of bringing private-school vouchers to Florida. *See, e.g.*, Def. Br. at 1 (goal of the initiatives is to "protect . . . the ability of private entities to provide important

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*Gilchrist*, this Court sustained the right of the Governor of Florida to challenge the placement of a legislatively proposed constitutional amendment on the general election ballot based on his status "as a citizen, a taxpayer, and an elector," quite apart from his capacity as Governor, noting that "the individual rights of the complainant as a citizen, a taxpayer, and an elector" challenging the process by which the legislature placed a proposed constitutional amendment on the ballot were "in common with other taxpayers and electors." *Id. See also City of Hialeah v. Delgado*, 963 So. 2d 754, 756 (Fla. 3d DCA 2007), in which the Third District found that a plaintiff's standing to challenge a ballot summary and title provision inhered as a "citizen and voter," not as a taxpayer required to show special injury.

educational services that might otherwise be invalidated"); FCC Br. at 7 ("The amendments proposed by the TBRC are a reaction to [the *Holmes*] decisions and would obviate the rationale of *Holmes I* and the restriction on the adequacy mandate recognized in *Holmes II*.").

## I. The TBRC Exceeded Its Limited Constitutional Authority In Proposing Ballot Initiatives Nos. 7 and 9

### A. The Relationship Between Section 6(d) and Section 6(e)

The question presented is a matter of constitutional interpretation, involving Article IX, section 6(e), of the Florida Constitution – which is the only provision in the constitution that speaks directly to the authority of the TBRC to place proposed constitutional amendments on the general election ballot. Yet Defendant and Intervenors largely ignore the actual language of this section and assert that "[t]he best evidence of the intended scope of section 6(e) is the text of 6(d)." Def. Br. at 22. Thus, Defendant and Intervenors argue that the TBRC's authority to propose constitutional amendments must extend "broadly" to any subject that it is authorized by section 6(d) to "examine" or "review." And, the *only* reason they offer as to why that should be so is their contention that a failure to read the amendatory authority granted by section 6(e) coextensively with the analytical and investigatory authority granted by section 6(d) – despite the very different wording of the two sections – would produce "a nonsensical result that renders" the latter section "superfluous." Def. Br. at 15.

In our opening brief, we set out three separate reasons why there is no merit to Defendants' and Intervenors' contention, and why 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 TBRC has under section 6(e) to propose constitutional amendments. *See* Pl. Br. at 22-25. We noted particularly that Defendant's and Intervenors' contention rests not so much on a reading of section 6(d) as a whole, but rather on a single clause – authorizing the TBRC to "examine constitutional limitations on taxation and expenditures at the state and local level" – that they argue is the "best evidence" of the TBRC's authority to propose constitutional amendments under section 6(e). *See id.* at 22. But quite apart from any other consideration, this argument misconstrues even the single clause upon which it rests, by interpreting that clause in isolation from the rest of section 6(d). *See id.* at 24-25.[2]

[2] Defendant attempts to buttress his ability to give an expansive interpretation to the TBRC's authority by asserting that the phrase "state budgetary process" "does not appear in the Florida constitution, the Florida Statutes, or Florida caselaw other than in section 6." In fact, the phrase appears in all three, *see* Pl. Br. at 20, and examination of the use of the phrase in these sources confirms what is apparent from the plain language of section 6(e) itself – that the constitutional authority conferred on the TBRC to propose constitutional amendments dealing with the "state budgetary process" refers to the structural and procedural aspects of budget development and implementation. *See* Pl. Br. at 22.

### B. The Reach of Defendant's and Intervenors' Interpretation of the Phrase "State Budgetary Process"

In our opening brief, we demonstrated the almost limitless reach of the Circuit Court's conclusion that the TBRC can propose any constitutional amendment that would "impact the state's budget." *See* Pl. Br. at 41-42. Stating that "[s]uch a test would allow the Commission to propose constitutional amendments far removed from 'taxation or the state budgetary process,'" we noted, by way of example, that "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.'" *Id.* Referring to this example as "[p]etitioners' cataclysmic prognostication," the FCC Intervenors assert that it "is as ridiculous as it is immaterial." FCC Br. at 28, n.16. The various interpretations of the phrase "state budgetary process" advanced by Defendant and Intervenors provide ample support for this "cataclysmic prognostication."

According to Defendant, the "TBRC's authority broadly encompasses *any* substantive area that *involves* tax or budget matters." Def. Br. at 20 (emphasis added). Elsewhere, Defendant asserts that the phrase "budgetary process . . . enables the TBRC to propose revisions to any portion of the constitution *touching upon the state budgetary process generally*." *Id.* at 24 (emphasis added).

Regardless of its substance, Defendant asserts, a proposal is permissible "[s]o long as the proposal revises . . . a section of the constitution that deals with taxation or budgetary matters." *Id.* at 32. Under this most extreme reading, the subject of the proposal need not even relate to "taxation or the state budgetary process" – as long as it is housed in a section of the constitution that "deals with taxation or budgetary matters."[3] And, Defendant and Intervenors appear to take the position that a proposed amendment to a section of the constitution that deals with "taxation or the state budgetary process" comes within the TBRC's authority as long as it could have *some impact* on the state's budget – regardless of the subject of the proposed amendment itself. *See*, *e.g.*, Def. Br. at 31 (amendment proposed by Initiative No. 7 involves "a matter of immense importance to the state's budget"); *id.* at 32-33 (amendment proposed by Initiative No. 9 is "related to the state's budget" because it "eliminat[es] [an] economic barrier to the availability of alternative private educational services"); TBRC Br. at 25 (amendment proposed by Initiative No. 9 is "all about the money"); FCC Br. at 39 (amendment proposed by Initiative No. 7 "ha[s] the potential directly to impact the state budgetary process by influencing public expenditures").

[3] Contrary to Defendant's assertion, *see* Def. Br. at 29, Plaintiffs do not suggest that the TBRC is limited to proposing amendments to those sections of the constitution enumerated by the TBRC in its 1991 report. What we do suggest, however, is that these sections are representative of the general types of subjects as to which the 1991 TBRC believed it could propose amendments. *See* Pl. Br. at 30-31.

It scarcely warrants extended discussion to demonstrate that this expansive view of the TBRC's authority would allow the TBRC to propose precisely the types of constitutional amendments that we suggested in our opening brief – which the FCC Intervenors view "as ridiculous." Or, to offer another example, if the TBRC proposed to repeal the constitutional limitation on public school class sizes, *see* Art. IX, § 1(a), Fla. Const., because of the high cost of smaller classes, such a proposal – under Defendant's and Intervenors' theory – also would be entirely within the TBRC's authority.

Any argument that the TBRC's authority extends so broadly would negate the distinction drawn in Article XI between the limited nature of the authority given the TBRC to propose constitutional amendments dealing with "taxation and the state budgetary process" and – in marked contrast – the broad plenary power given to the legislature to propose "[a]mendment of a section or revision of one or more articles, or the whole, of this constitution," Art. XI, § 1; to the Constitution Revision Commission to propose "a revision of this constitution or any part of it," Art. XI, § 2(c); to the people through the initiative process to propose "the revision or amendment of any portion or portions of this constitution," Art. XI, § 3; and to a

constitutional convention "to consider a revision of the entire constitution," Art. XI, § 4(a).[4]

### C. Defendant's and Intervenors' Contention That the TBRC's Interpretation of its Own Authority to Propose Constitutional Amendments is Entitled to Deference

Defendant and Intervenors contend that the TBRC's interpretation of its own authority to propose constitutional amendments is "entitled to deference and presumed correct." Def. Br. at 26. Defendant and Intervenors – and the Circuit Court, *see* Summary Final Judgment at 6 – are wrong: no judicial deference is owed to the TBRC's attempt to expand its constitutional jurisdiction to encompass Ballot Initiatives Nos. 7 and 9.

As we explained briefly in our opening brief, Pl. Br. at 16 n.2, and as *amici* Eileen Roy *et. al* have explained at greater length, Roy Amicus Br. at 8-13, this is not a case in which an administrative agency is construing a statute it is charged

[4] Defendant's and Intervenors' equation of the phrase "budgetary process" with anything touching on the expenditure of public funds would re-write Article XI, section 6(e), to read "taxation and state expenditures," rather than "taxation and the state budgetary process." Not only would such a reading fail to give independent meaning to the phrase "budgetary process" in section 6(e), but it would also be inconsistent with the first phrase of section 6(d), which authorizes the TBRC to "examine the state budgetary process, the revenue needs and expenditure processes of the state." The phrase "revenue needs and expenditure processes" must mean something different than the phrase "state budgetary process," because the phrases are listed separately among the subjects the TBRC is directed to "examine" in section 6(d). *See Kasischke v. State*, 33 Fla. L. Weekly S481, 2008 WL 2678449, at *3 (Fla. July 10, 2008) (refusing to "render[] [statutory] language superfluous").

with enforcing. Rather, this case presents a question of the proper construction of Article XI, section 6, of the constitution, and that is a matter for this Court to determine. As *amici* have pointed out, the TBRC

> is not an enforcement agency and not a regulatory agency. T[B]RC is a political body appointed by political officials to make political decisions. . . . T[B]RC does not conduct quasi-judicial proceedings and enforces no statutes. T[B]RC is a temporary, infrequently recurring body of lay people who are not required to possess training or experience in law or constitutional interpretation. T[B]RC has no expertise in construing the meaning of the Florida Constitution.

*Id.* at 10. For this reason, "any decision about the limits of T[B]RC's constitutional authority is a pure question of constitutional law and must be subjected to *de novo* review by this court and all appellate courts." *Id.*[5]

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[5] We add in this connection that Defendant's and Intervenors' reliance on proposals that were considered *but not adopted* by the 1991 TBRC, *see* Def. Br. at 28; FCC Br. at 31-32, is entirely misplaced. Such reliance implicitly invites this Court to speculate on (1) the constitutionality of prior proposals; and (2) the reasons why the TBRC did not ultimately adopt them, one of which may have been the realization that they would not pass constitutional muster. The fact that the 1991 TBRC considered and rejected proposals relating to public school choice cannot possibly be taken as evidence of the TBRC's 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).

Even further off the mark is the reliance by Defendant and Intervenors on a 1991 memorandum purporting to opine on the TBRC's ability to propose constitutional amendments relating to school choice, *see* Def. Br. at 29 n.27 (citing Memo from Donna Blanton to Steve Uhlfelder, TBRC Commissioner (attached at Tab 3 of Appx. to Def. Br.), at 1); FCC Br. at 32 (citing Blanton memo). This memorandum appears to have been the work product not of the TBRC itself, but of

D. The New Sentence Added to Article I, Section 3 By Ballot Initiative No. 7, and the Requirement in Ballot Initiative No. 9 That Local School Districts Spend At Least 65% of their Funds On Classroom Instruction

Although none of the four analytically distinct constitutional amendments proposed in Ballot Initiatives Nos. 7 and 9 comes within the TBRC's amendatory authority, we pointed out in our opening brief that a ballot initiative must stand or fall as a whole, and the entire initiative must be kept off the general election ballot if any portion of the initiative was beyond the scope of the TBRC's authority. *See* Pl. Br. at 34-35. In light of this proposition of law – which Defendant and Intervenors do not challenge – it is noteworthy that Defendant and Intervenors focus almost entirely on Ballot Initiative No. 7's deletion of the "no aid" clause and Ballot Initiative No. 9's change in how the state is to fulfill its mandate to provide for the education of Florida's children, while making little or no effort to show that the other proposed constitutional amendments in Ballot Initiatives Nos. 7 and 9 deal with "taxation or the state budgetary process." Nor could they make such a showing.

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a then-law student working at a private law firm, *see* http://www.radeylaw.com/attorneys-and-consultants/6 (biography of Donna E. Blanton). It is, moreover, entirely unclear from the record whether the memorandum was drafted as a disinterested legal opinion or as an advocacy piece. And, even if the memorandum were otherwise relevant, it *expressly assumes away the question at issue in this case. See* Blanton Memo at 1 ("assum[ing]," without analysis, that the proposal in question "would be linked to a matter relating to taxation and the state budgetary process").

As we explained in our opening brief, the new sentence that would be added to Article I, section 3, by Ballot Initiative No. 7 does not even remotely relate to taxation or the state budgetary process. *See* Pl. Br. at 35-36. There is simply no logical nexus between *participation* in an existing, already funded, "public program because of religion" and taxation, budgetary process, budgets, or even expenditures at the state or local level.[6]

Similarly, Defendant and Intervenors make only a token – and flawed – effort to defend the proposed amendment in Ballot Initiative No. 9 that would require all 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. Defendant points out that "a 35 percent cap on administrative spending . . . clearly protects the state budget and promotes the effective use of tax dollars," Def. Br. at 37, noting in this connection that state spending on education "exceeds $20 billion," approximately one-third of the total state budget. *Id.* But whatever portion of its total budget the state devotes to education, the proposed amendment does not in the least affect state *spending* on education. The amendment does not change what local school districts receive from the state, but only directs how they may expend the funds that they do receive. The impact of

[6] The proffered explanation, *see* FCC Br. at 37, that this new sentence is the "inverse" of what is now the third sentence of Article I, section 3, suggests that the addition accomplishes nothing beyond the deletion of the "no aid" clause – an explanation that would render the proposed new sentence wholly superfluous.

this amendment, in other words, is solely on local school district expenditures, not on *state* expenditures. As such, it is beyond the TBRC's authority to propose constitutional amendments dealing with the "*state* budgetary process."[7]

In short, Defendant and Intervenors have failed to offer an effective defense of the latter two proposed amendments, and for this reason alone both Ballot Initiatives Nos. 7 and 9 fail in their entirety.[8]

## II. The Language Adopted By The TBRC For The Ballot Title And Summary For Ballot Initiative No. 9 Is Misleading As To The True Effect Of The Initiative

As we showed in our opening brief, Ballot Initiative No. 9 should not be placed on the ballot for the November 2008 general election for the additional

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[7] Defendants argue that, because the ballot summary language accompanying the 1988 constitutional amendment that created the TBRC stated that the TBRC would "review matters relating to state and local taxation and the budgetary process," the TBRC should be able to propose constitutional amendments relating to local expenditures. Def. Br. at 20. Quite apart from the facts that the ballot summary language cannot trump the text of the amendment itself, and that the summary's reference is to the TBRC's authority to "review" issues rather than to propose constitutional amendments, the natural reading of the ballot summary language is that "state and local" modifies the term "taxation," not "the budgetary process." The summary language is, in other words, entirely consistent with the text of Article XI, section 6(e) that authorizes the TBRC to propose constitutional amendments dealing with "taxation" at any level of government, as well as amendments dealing with the "*state* budgetary process."

[8] Because the TBRC is not constrained from "logrolling" by the single-subject rule that applies to citizen initiatives under Article XI, section 3, the limitation on the TBRC's authority to propose constitutional amendments would be effectively nullified if it could be avoided by the expedient of adding to an otherwise unauthorized ballot initiative an additional proposed amendment that deals with "taxation or the state budgetary process."

reason that the ballot title and summary language adopted by the TBRC is misleading, in violation of § 101.161, Fla. Stat. (2008), and Article XI, section 5, of the Florida Constitution. *See* Pl. Br. at 42-46; *Armstrong v. Harris*, 773 So. 2d 7, 12 (Fla. 2000) (*citing* Art. XI, § 5, Fla. Const.).

Plaintiffs' contention in this regard is not – as Defendant would have it – that the ballot title "giv[es] too much emphasis (*i.e.*, 'disproportionate information') on the 65 percent requirement," Def. Br. at 41, or "that other ballot titles might be more proportionate or appropriate." *Id.* at 43. It is rather that the TBRC – in combining two largely unrelated proposals – adopted a ballot title that misleads voters by describing what one of the proposals would do, while only identifying the general subject matter of the other. The result is a deceptive ballot title that informs the voters that Ballot Initiative No. 9 would do something that the TBRC believes they are likely to find attractive, *i.e.*, requiring more spending on classroom instruction – without informing them of the Ballot Initiative's more controversial side, *i.e.*, removing a constitutional barrier to public funding of private schools. The title is thus neither "accurate, objective, [nor] neutral," *Advisory Op. to Att'y Gen. re Additional Homestead Tax Exemption*, 880 So. 2d 646, 653 (Fla. 2004), and it "'hide[s] the ball' as to the amendment's true effect," *Armstrong*, 773 So. 2d at 22. *See also Advisory Op. to Att'y Gen. re Save Our Everglades*, 636 So. 2d 1336, 1341 (Fla. 1994). Because the Court cannot rewrite

the ballot title or summary language adopted by the TBRC, or revise the text of the Ballot Initiative itself, *Smith v. American Airlines*, 606 So. 2d 618, 621-22 (Fla. 1992); *see also* Pl. Br. 19 n.20, Ballot Initiative No. 9 may not lawfully be placed on the ballot for the November 2008 general election.

Other than simply expressing disagreement with our contention that the ballot title is misleading, the only response Defendant offers is to state that the ballot title and summary "must be read together," from which Defendant appears to derive the proposition that any flaw in a ballot title can be cured by the summary that follows it. Def. Br. at 42-43.[9] But if this were so, the requirement that a ballot title be "accurate, objective, [and] neutral" would be meaningless, and the title for Ballot Initiative No. 9 presumably would pass muster even if it referred only to the 65% requirement and made no reference to the state's duty for children's education. Whether or not it is ever possible for a flawed ballot title to be cured by the summary that follows, this is not such a case. The blatantly deceptive information about the effect of Ballot Initiative No. 9 that would be provided to voters – in capital letters, at the top of the ballot summary – undoubtedly will give many voters all the information that they believe is necessary for them to know what they are voting on. As the Circuit Court put it in the Amendment 5 case, "[a]

[9] Contrary to Defendant's assertion, *see* Def. Br. at 13, the Circuit Court never held that the ballot title that the TBRC adopted for Ballot Initiative No. 9 was sufficient to meet the standards of § 101.161, Fla. Stat. and Article XI, section 5, Fla. Const.

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 (Fla. 11th Cir. Ct. Aug. 14, 2008).

## 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,

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

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