**IN THE SUPREME COURT OF FLORIDA**

Case No. SC08-1529

Certified Question of Great Public Importance

**ANDY FORD, et al.,**

**Petitioners,**

**v.**

**KURT BROWNING, et al.,**

**Respondents.**

# ANSWER BRIEF OF INTERVENORS/RESPONDENTS, FLORIDA CATHOLIC CONFERENCE, INC.; MERCY HOSPITAL, INC.; FRIENDS OF LUBAVITCH OF FLORIDA, INC.; CATHOLIC CHARITIES OF THE ARCHDIOCESE OF MIAMI, INC.; and ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL

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## PREFACE

This case concerns the authority of the Florida Taxation and Budget Reform Commission ("TBRC") under article XI, section 6 of the Florida Constitution to adopt two resolutions: Ballot Initiative 7 strikes the last sentence of article I, section 3 of the Florida Constitution, otherwise known as the Blaine amendment. It replaces language discriminating against religious persons with respect to the expenditure of public funds with the opposite statement. Ballot Initiative 9 retains the mandate in article IX, section 1(a) of the Florida Constitution to make adequate provision for the education of all children, but removes what this Court termed article IX's restriction for satisfying the mandate. *Bush v. Holmes*, 919 So. 2d 392, 406 (Fla. 2006) (hereinafter *Holmes II*). This case also addresses whether the ballot title and summary of Ballot Initiative 9 (not Ballot Initiative 7) are misleading.[1] In all respects, the lower court decided against the Petitioners.

## STATEMENT OF THE CASE AND FACTS

Respondents adopt the other Respondents' statement of the case and facts. Respondents add that Petitioners have not put in the record any evidence contrary to the potential $4.1 billion in savings available from Ballot Initiatives 7 and 9. (R-11 309).

[1] This brief adopts the arguments of the other Respondents on the latter point without additional argument.

## Procedural Posture of the Instant Case

On April 28, 2008, the TBRC transmitted seven ballot initiatives to the Florida Secretary of State for submission to the electors on the 2008 General Election ballot. More than one month later, on June 13, 2008, Petitioners filed the instant action seeking to remove them from the ballot. Two sets of Intervenors moved to intervene. The lower court granted these motions after briefing and argument on July 14, 2008, but ordered all parties to comply with an expedited briefing and argument schedule. On August 4, 2008, on cross-motions for summary judgment joined by the Intervenors,[2] the court granted summary final judgment for Respondents and denied Petitioners' motion for summary judgment, concluding a 13-page order as follows:

> The Court finds that the TBRC did not exceed its constitutional authority in proposing the challenged ballot initiatives, and that the ballot title and summary for Ballot Initiative 9 are not misleading. Accordingly, summary final judgment is hereby entered in favor of Defendant and the Intervenors.

[T-IV 685]

On August 8, 2008, Petitioners filed their notice of appeal and suggestion for certification to the Florida Supreme Court. The First District Court of Appeal approved the suggestion of certification, pursuant to article V, section (3)(b)(5) of

[2] By oral motion, Intervenors joined the State's motion for summary judgment. (Transcript, at 4) By its Scheduling Order dated July 1, 2008, the court deemed Petitioners' motion for temporary injunction a motion for summary judgment.

the Florida Constitution. On August 18, 2008, this Court accepted jurisdiction and ordered expedited briefing and argument. This Answer Brief is filed pursuant to this order.

## SUMMARY OF THE ARGUMENT

The Florida Taxation and Budget Reform Commission ("TBRC") is empowered to approve ballot initiatives pertaining to "taxation" and the "state budgetary process." The last sentence of article I, section 3 and article IX, section 1(a) of the Florida Constitution, as recently interpreted by the First District Court of Appeal and this Court, are primarily about state funding and expenditures and, thus, the state budgetary process. In the words of the First District, "the drafters of the no-aid provision clearly intended at least to prohibit the direct or indirect use of public monies to fund education at religious schools." *Bush v. Holmes*, 886 So. 2d 340, 351 (Fla. 1st DCA 2004), *aff'd on other grounds*, 919 So. 2d 392 (Fla. 2006). Likewise, this Court held that article IX, section 1(a) precludes public or taxpayer funding of private education. *Bush v. Holmes*, 919 So. 2d 392, 407-08 (Fla. 2006) (applying the principle of construction "expressio unius est exclusio alterius").

Article I, section 3 also pertains to taxation and not merely in the education context as the Florida Supreme Court held in *Johnson v. Presbyterian Homes*, 239 So. 2d 256 (Fla. 1970) and *Nohrr v. Brevard County Educ. Facilities Auth*., 247 So. 2d 304 (Fla. 1971). In these cases, this Court held tax exemptions for a religious retirement home and tax-exempt bond financing constitutional under

article I, section 3. By addressing expenditures, article I, section 3 and article IX, section 1 also naturally pertain to taxation and revenue, because an expenditure naturally requires a tax or revenue to pay for it.

The lower court held that both resolutions were within the jurisdiction of the TBRC. It found that article I, section 6 provides the TBRC with "broad authority to review any matters involving taxation or the state budgetary process." (R-IV 680). The court concluded that the "scope of the TBRC's authority to propose statutory and constitutional changes in section 6(e) must logically flow from and relate to the scope of authority in section 6(d)." *Id*. Furthermore, the court gave "state budgetary process" its natural meaning, rather than the Petitioners' interpretation at odds with ordinary English usage.

The lower court found that a "budget" includes "expenses and income for a given period'" or, in other words, expenditures and revenue. (R-IV 681). The lower court held that a "process" involves a sequential ordering of steps or "'series of actions … that bring about an end result.'" *Id*. Petitioners take issue with this natural reading of the words. They recognize only one-half of a balanced budget and erroneously equate "process" with "procedure" and, as if it clarified the matter, "structure." (IB, at 8-9, 19, 20, 24-25, 28) Veering further from the vernacular, they say a "substantive constitutional limitation on the purposes for which public funds may be expended (such as the 'no aid' clause of Article I, section 3)" is not the same as "a structural or procedural" limitation; whereas, if a "structural" restraint

means anything different from a procedural limitation, it should be exactly this. (IB, at 24) Most remarkably, Petitioners contend that the word "budgetary" excludes expenditures altogether (IB, at 20), so that in the end, they propose that "budgetary process" means little more than "revenue procedure." To the contrary, the lower court found that "[i]n the context of state governmental operations, the concept of a 'budgetary process' must necessarily take into account how the state raises revenue, how much revenue is raised, how state monies are spent, the relationship between revenues and expenditures, and ways to help the state become fiscally sound while meeting the needs of its people." (R-IV 681)

Concerning the word "state" in "state budgetary process," the lower court recognized that educational funding even at the local level is controlled by state law. That "funds are distributed to local school districts does not transform this proposed amendment to an exclusively local budget issue." (R-IV 683). Furthermore, section 6(d) grants the TBRC license to consider taxation and spending at the state and local level. *Id*. But Petitioners ask this Court to drive a wedge between article XI, section 6(d) and 6(e), to prohibit the TBRC from proposing constitutional reforms bearing upon public expenditures even if they constitute the lion's share of the budget. Educational expenditures are among the largest in the budget. If ever a constitutional reform measure is proposed to authorize a state income tax, it will be due in large measure to educational

expenditures. This is why expenditures and taxation are opposite sides of the same coin or, more accurately, budget.

The lower court's decision contrary to Petitioners' poor semantics and tortuous interpretation of article XI, section 6 should be affirmed both with respect to the jurisdiction of the TBRC to propose Ballot Initiatives 7 and 9 and the validity of the ballot title and summary. Especially in light of the deferential standard of review for constitutional initiatives proposed by a constitutional body, the remedy sought by the Petitioners, thwarting the ability of the electorate to approve a resolution at odds with this Court's prior decision, should be denied.

## ARGUMENT AND AUTHORITIES

**Standard of Review.** Judicial review of a proposed constitutional amendment is deferential. *Advisory Op. to the Att'y Gen. re: Fla. Marriage Protection Amendment*, 926 So. 2d 1229, 1233 (Fla. 2006). In this respect, the standard of review discussed by the other Respondents is hereby adopted. Put simply, with respect to legislatively submitted amendments, "if there is any reasonable theory under which it can be done," they must be submitted to the voters. *Armstrong v. Harris*, 773 So. 2d 7, 14 (Fla. 2000), *cert. denied*, 532 U.S. 958 (2001) (*quoting Gray v. Golden*, 89 So. 2d 785, 790 (Fla. 1956)).

## I. HISTORY REVEALS THAT ARTICLE I, SECTION 3 AND ARTICLE IX, SECTION I AND THEIR PROPOSED AMENDMENTS ESSENTIALLY PERTAIN TO PUBLIC EXPENDITURES.

In order to understand the impetus for Ballot Initiatives 7 and 9, it is necessary to review this Court's decision in *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006). In that case, the First District Court of Appeal struck down the Opportunity Scholarship Program ("OSP") as a violation of the last sentence of article I, section 3 of the Florida Constitution, otherwise known as the Blaine amendment. *Bush v. Holmes*, 886 So. 2d 340, 351 (Fla. 1st DCA 2004), *aff'd on other grounds*, 919 So. 2d 392 (Fla. 2006) [hereinafter *Holmes I*].

On appeal, this Court affirmed the decision, but on different grounds without approving or disapproving the rationale of the First District Court of Appeal. *Bush v. Holmes*, 919 So. 2d 392, 413 (Fla. 2006) [hereinafter *Holmes II*]. The Court held that OSP violated article IX, section 1 of the Florida Constitution, which requires the state to make adequate provision by law for a uniform, efficient, safe, secure, and high quality system of free public schools. The amendments proposed by the TBRC are a reaction to these decisions and would obviate the rationale of *Holmes I* and the restriction on the adequacy mandate recognized in *Holmes II*.

It is important to consider the history of these two provisions of our Constitution. As the First District stated in *Holmes I*, "history tells us a great deal about the origins and intent" of article I, section 3 "which can assist us in its interpretation." 886 So. 2d at 348. This court has also relied on history to interpret

article IX, section 1. *Holmes II*, 919 So. 2d at 406-07. Petitioners would now distort this history. Whereas in *Holmes II*, Petitioners argued that article I, section 3 and article IX, section 1 were essentially about public school expenditures,[3] now they argue that article I, section 3 essentially concerns separation of church and state, religious liberty, and freedom of conscience (IB, at 1, 3, 36), and that article IX primarily deals with education. (IB, at 2-3) Their original position is most in accord with the historical record. The only question which remains is whether the TBRC had the authority to propose constitutional reforms concerning public expenditures of the largest kind. Respondents believe it did.

### A. History Indicates that Article I, Section 3 and Ballot Initiative 7 Pertain to Public Expenditures.

In 1875, Representative James G. Blaine proposed to the United States House of Representatives in pertinent part the following amendment to the United States Constitution: "[N]o money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations." *Holmes I*, 886 So. 2d at 349 n.7.

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[3]R-II 387 (*Bush v. Holmes*, Case Nos. SC04-2323/SC04-2324/SC04-2325, Answer Brief, at 17 ("[T]he language and history of Article I, § 3 compel the conclusion that, as both courts below held, this provision was intended to prohibit … the use of public funds to pay for Florida children to receive a religious education in sectarian schools.").

The amendment passed the House, 180 to 7, but fell 4 votes shy in the Senate. All the same, supporters eventually persuaded at least 30 states, including Florida, to adopt similar language. *Holmes I*, 886 So. 2d at 349 n.8. Although not always amendments in the strict sense,[4] they have become known as "Blaine amendments," in that they ban the use of public funds to support sectarian public schools. The United States Supreme Court recognized this defining feature of Blaine amendments as follows: "to make certain that government would not help pay for 'sectarian' (i.e., Catholic) schooling for children." *Zelman v. Simmons-Harris*, 536 U.S. 639, 721 (2002) (Breyer, Stevens, Souter, JJ., dissenting). *Accord Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion of Thomas, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ).

Blaine amendments were a reaction by the so-called Know Nothing or nativist movement to immigration from predominately Catholic Southern Europe. As the number of Catholic immigrants in the United States increased, they "began to resist Protestant domination of the public schools." *Id*. at 720. "Catholics sought equal government support for the education of their children in the form of aid for private Catholic schools. But the 'Protestant position' on this matter, scholars report, 'was that public schools must be 'nonsectarian'…." *Id*. at 721.

[4] Many states incorporated Blaine amendments in constitutions drafted by newly formed states or states readmitted to the Union; therefore, they were not technically always amendments.

This is not to say that nativists wanted the public schools to be secular. Far from it, they favored the so-called "common religion" taught in the public (or common) schools of the time. As described in *Vidal v. Girard's Ex'rs*, 43 U.S. 127, 153 (1844) and by Horace Mann himself,[5] the common religion was a form of nondenominational Protestantism. For example, in Florida, until the early-1960's, public school students were statutorily required to observe it through daily recitation of the Lord's Prayer, readings from the King James Bible, and singing religious hymns. *See Chamberlin v. Dade County Bd. of Pub. Instruction*, 143 So. 2d 21, 23, 35 (Fla. 1962) (statute requiring these and baccalaureate programs constitutional), *rev'd*, 377 U.S. 402 (1964) (*referencing* § 231.09, Fla. Stat. (1961)). The Blaine movement was not, therefore, separationist or primarily interested in promoting religious liberty and freedom of conscience; it favored a Protestant establishment in the public schools and disfavored equal treatment of minority religious groups.

The Florida Constitution of 1885 enacted Florida's Blaine amendment as article I, section 6. It states in pertinent part: "[N]o money 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." Similar language was adopted

[5] HORACE MANN, LIFE AND WORKS: ANNUAL REPORTS OF THE SECRETARY OF THE BOARD OF EDUCATION OF MASSACHUSETTS FOR THE YEARS 1845-1848, at 292 (1891).

as article I, section 3 of the Florida Constitution of 1968: "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."

The First District's conclusion concerning article I, section 3 echoes the U.S. Supreme Court's and the comments of Petitioners' counsel in the same case as follows: "the drafters of the no-aid provision clearly intended at least to prohibit the direct or indirect use of public monies to fund education at religious schools." *Holmes I*, 886 So. 2d at 351. Left in doubt by the court was whether article I, section 3 also precludes neutral public funding of other critical social services provided by religious institutions to the neediest among us, including the types of services offered by the Intervenors, such as eldercare, healthcare, education, and indigent care. Because the question did not present itself squarely in *Holmes*, the majority left it for another day. *Id*. at 362.

The concurrence argued that whether including religious institutions in these programs is constitutional should depend upon "the purpose of the program, the extent of public funding, whether the level of funding substantially exceeds the cost of the public benefit, or the means by which the public dollars reach the sectarian institution," *see id*. at 371 (Allen, Davis, Padovano, and Browning, JJ., concurring, and Wolf, C.J., concurring in part and dissenting in part), whereas the dissent argued:

> The majority's caution that the holding 'should not in any way be read as a comment on the constitutionality of any other government program or activity which involves a religious or sectarian institution,' is only to ignore the problem. Why wouldn't the holding be applied to other programs? There is no meaningful difference.

*Holmes I*, 886 So. 2d at 378 (Polston, Barfield, Kahn, Lewis, Hawkes, JJ., dissenting).

Until *Holmes I*, no reported decision in Florida held that article I, section 3 required excluding religious institutions altogether from the state budgetary process. To the contrary, repeated cases held that, as long as a public benefit flowed to the religious institution incidentally as a result of a neutral program of general eligibility, there was not a violation of the Constitution. *Koerner v. Borck*, 100 So. 2d 398, 401-02 (Fla. 1958) ("any improvement to county-owned land" over which the church had an easement "will be made for the benefit of the people of the county and not for the church"); *Southside Estates Baptist Church v. Bd. of Trs.*, 115 So. 2d 697 (Fla. 1959) ("We ourselves have heretofore taken the position that an incidental benefit to a religious group, resulting from an appropriate use of public property, is not violative of [the precursor to Article I, section 3]."); *Johnson v. Presbyterian Homes of the Synod of Fla., Inc.*, 239 So. 2d 256, 261-62 (Fla. 1970) (statute exempting properties used as licensed homes for the elderly, including religious homes, was consistent with Blaine amendment); *Nohrr v. Brevard County Educ. Facilities Auth.*, 247 So. 2d 304, 307 (Fla. 1971) ("A state cannot pass a law to aid one religion or all religions, but state action to promote the

general welfare of society, apart from any religious considerations, is valid, even though religious interests may be indirectly benefited."); *Rice v. State*, 754 So. 2d 881 (Fla. 5th DCA 2000), *rev. denied*, 779 So. 2d 272 (Fla. 2000) ("expenditure of public money to enforce" a criminal statute enhancing penalties for controlled substance crimes near a place of worship "is too remote to aid any sectarian purpose."); *accord* 72-246 Fla. Op. Att'y Gen. 421, 421 (1972); 77-55 Fla. Op. Att'y Gen. 117, 119 (1977).

*Holmes I* was singular in this respect and framed the debate for the TBRC's consideration of Ballot Initiative 7. As proposed by the TBRC for consideration by the Florida electorate, Ballot Initiative 7 strikes the last sentence. Then, to remove any ambiguity about the effect,[6] it replaces the sentence with the opposite statement as follows:

> An individual or entity may not be barred from participating in any public program because of religion. ~~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~~.

There is no doubt that as originally framed and as the electorate could modify it, the last sentence of article I, section 3 pertains to publicly-funded programs from which persons are presently excluded because of religion, but from which they would no longer be excluded exclusively on this basis if amended.

[6] But for the replacement language, Petitioners would surely have contended that the title and summary of Ballot Initiative 7 were misleading.

Petitioners speculate that, if amended, the amendment would imply greater substantive rights than this, but point to nothing in the record indicating this was the TBRC's intent or justifying this conclusion. In addition, they fail to explain why an incidental effect would matter in any event. The TBRC has previously proposed constitutional rights embedded in article I. *See* Art. I, § 25, Fla. Const. Consequently, the lower court concluded:

> The constitutional provision addressed by Ballot Initiative 7 is the prohibition against the public funding of religious and sectarian institutions in Article I, section 3. Plaintiffs fail to explain persuasively why Ballot Initiative 7's elimination of this barrier to state budgetary expenditures for religious-affiliated programs, thereby allowing them to be eligible for educational services, public contracting, and procurement matters, is not a matter of the state's budgetary process.[7] (R-IV 682)

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[7]The lower court held without discussion that the Plaintiffs had standing to challenge Ballot Initiative 7 (R-II 349-51), notwithstanding that the Plaintiffs did not make a ballot summary or title challenge to it. Secular vendors of publicly-paid services that religious institutions could provide if Ballot Initiative 7 is approved may have standing. But the sole allegations of these Plaintiffs supporting standing are that (1) they are citizens, taxpayers, and voters who intend to vote in the 2008 General Election and (2) have strong convictions about separation of church and state. (R-I 2-4 (Compl. ¶¶ 5-11)) Four of the Plaintiffs purported to sue in their "individual and official capacities," but no associations are plaintiffs. (R-I 2-3 (Compl. ¶¶ 5-8)) In *United States Steel Corp. v. Save Sand Key, Inc.*, 303 So. 2d 9, 13 (Fla. 1974), this court held that a private plaintiff has standing to enforce a public right only if it can be established that the plaintiff has suffered a 'special injury.'" A governor challenging the procedure by which the legislature proposed a constitutional amendment may have standing, but there is not an applicable exception for mere taxpayers to challenge the TBRC's authority to propose a resolution. *Armstrong v. Harris*, 773 So. 2d 7, 12 (Fla. 2000), *cert. denied*, 532 U.S. 958 (2001) (*explaining* C*rawford v. Gilchrist*, 64 Fla. 41, 59 So. 963 (1912) by reference to ballot summary challenges not here at issue with respect to Ballot Initiative 7). *Cf. Hein v. Freedom from Religion Found., Inc.*, __ U.S. __, 127

By eliminating the foremost historical barrier to religious persons participating in publicly-financed programs, Ballot Initiative 7 necessarily pertains to public expenditures and was, thus, within the jurisdiction of the TBRC to propose.

### B. History Indicates that Article IX, Section 1 and Ballot Initiative 9 Pertain to Public Expenditures.

Just as *Holmes I* framed the debate for the TBRC over Ballot Initiative 7, *Holmes II* framed it over Ballot Initiative 9. In *Holmes II*, this Court recounted the history of article IX, section 1, beginning with article VIII, sections 1-9 of the Florida Constitution of 1868. The 1868 Constitution for the first time made education the "paramount duty of the State" and required the State to make "ample provision for the education of all the children." 919 So. 2d at 402. But these gains were short-lived.

The education provisions were moved and these 1868 provisions deleted in the Florida Constitution of 1885, potentially in furtherance of another discriminatory purpose "to prevent both mixed-race schooling and any real 'equality' requirement for the supposedly 'separate but equal' schools established for African-American children." *Id*. at 403 n.8. Article XII, section 12 of the Florida Constitution of 1885 included this infamous doctrine, alongside article XII,

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S.Ct. 2553 (2007) (limiting taxpayer standing under the federal establishment clause).

section 13 and article I, section 6, precluding public appropriations for sectarian schools.[8]

Article IX, section 1 of the Florida Constitution of 1968 included for the first time the requirement of "adequate provision" for public education. Reviewing this language in *Coalition for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 405 (Fla. 1996), this Court "ultimately concluded that it is the Legislature, not the Court, that is vested with the power to decide what funding is 'adequate.'" *Holmes II*, 919 So. 2d at 403.

After 1968, this Court found that the situation changed as follows:

> In 1998 in response in part to *Coalition for Adequacy & Fairness*, the Constitutional Revision Commission proposed and the citizens of this state approved an amendment to article IX, section 1 to make clear that education is a 'fundamental value' and 'a paramount duty of the state,' and to provide standards by which to measure the adequacy of the public school education provided by the state.

*Id*.

In other words, premised upon another ballot initiative proposed by the Constitutional Revision Commission ("CRC") "in response in part" to a decision of this Court, *Holmes II* held that the adequacy of school funding is now a justiciable question. Specifically, this Court found that article IX, section 1(a) "is a limitation

[8] Article XII, section 13 of the Florida Constitution of 1885 provided: "No law shall be enacted authorizing the diversion or the lending of any County or District School Funds or the appropriation of any part of the permanent or available school Fund to any other than school purposes; Nor shall the same, or any party thereof, be appropriated to or used for the support of any sectarian school."

on the Legislature's power because it provides both a mandate to provide for children's education and a restriction on the execution of that mandate." *Id*. at 406.

That a decision of this Court relating to article IX is once again before the electorate is not surprising, because public funding of education comprises fully one-third of the State budget and is a politically charged topic. Like the CRC before it, the TBRC has reacted to a decision of this Court interpreting article IX by proposing Ballot Initiative 9, which would enable the electorate to retain the adequacy mandate identified in *Holmes*, but eliminate its restriction on public funding as follows:

ARTICLE IX

EDUCATION

> SECTION 1. Public <u>funding of</u> education.—
> (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…. <u>Nothing in this subsection creates an entitlement to a publicly-financed private program</u>.

In reaction to the Appellants' argument that the TBRC lacked the authority to make this proposal, the lower court held, "Plaintiffs fail to explain persuasively why Ballot Initiative 9's alteration of the education clause as it applies to public funds is not a matter of the state's budgetary process." (R-IV 682). Indeed, Ballot

Initiative 9 proposes a new section of Article IX specifically focused on school funding and budgeting for the electorate's consideration:

> 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.

Article IX, section I and the amendment to it proposed by the TBRC unambiguously relate to public expenditures of the most substantial kind and, therefore, also concern the taxes needed to pay for them. As the lower court put it: a "35 percent cap on administrative spending would impact the state's budget." (R-IV 683). The TBRC found that the cap would potentially save the State of Florida $4.1 billion tax dollars that would otherwise have to be raised. (R-II 309) Petitioners have not pointed to any evidence in the record to the contrary.

## II. THE TBRC'S JURISDICTION EXTENDS TO PUBLIC FUNDING AND TAXATION.

The other Respondents have definitively elaborated upon the scope of the TBRC's jurisdiction. This Answer Brief adopts their arguments in full.[9] Contrary to the effort of the Petitioners to cabin the TBRC's authority, the plain text of

[9] The other answer briefs discuss in detail the history of the TBRC. Intervenors adopt these statements, drawing special attention to only a few salient points.

article XI, section 6 and the historical record relating to the TBRC indicate the same thing: the TBRC's authority was intended to be broad and certainly broad enough to propose Ballot Initiatives 7 and 9 dealing with public funding and taxation.

### A. The Plain Text Indicates the TBRC's Jurisdiction Extends to Taxation and Public Expenditures

The text of article XI, section 6 is plain on its face, beginning with the title of the section. It is the "Taxation and Budget Reform Commission," not advisory board. Its purposes or inputs are set forth plainly in section 6(d) and its outputs in section 6(e) as follows:

> **SECTION 6. Taxation and budget reform commission.—**
>
> ***
>
> (d) The commission shall 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.
>
> (e) The commission shall hold public hearings as it deems necessary to carry out its responsibilities under this section. The commission

> shall issue a report of the results of the review carried out, and propose to the legislature any recommended statutory changes related to the taxation or budgetary laws of the state. 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.

The two are best viewed as an organic whole, but the Petitioners ask this court to drive a wedge between them on the theory that the TBRC's outputs mentioned in (e) dealing with "taxation or the state budgetary process" are somehow narrower than its inputs mentioned in (d). In other words, the Petitioners claim, for example, that the TBRC can "examine constitutional limitations on taxation and expenditures at the state and local level," but afterwards, the TBRC is powerless to propose amendments to fix at least the second of these problems because the "state budgetary process" somehow does not encompass "expenditures."

The argument requires an unnatural divorce of section 6(d) from 6(e) and hinges entirely on an unnatural use of the word "budget" and "process" within the phrase "state budgetary process." Contrariwise, "sections 6(d) and 6(e) must be read in conjunction with the overall purpose of the TBRC, which is to study and propose reforms on taxation and budget matters." (T-IV 680 (*citing Physicians Healthcare Plans, Inc. v. Pfeifler*, 846 So. 2d 1129, 1134 (Fla. 2003) (noting that "constitutional provisions must be read in *pari materia* 'to form [a] congruous

whole so as to not render any language superfluous.'")). The scope of section 6(d) should naturally suggest the intended scope of section 6(e). (T IV 680-81). But the lower court did not end its inquiry here as suggested by the Petitioners. (IB, at 15) It turned to the plain language of the text. It is well settled that

> [t]he words and terms of a Constitution are to be interpreted in their most usual and obvious meaning, unless the text suggests that they have been used in a technical sense. The presumption is in favor of the natural and popular meaning in which the words are usually understood by the people who have adopted them.
>
> *City of Jackonville v. Continental Can Co*, 113 Fla. 168, 172, 151 So. 488, 489-90 (1933). In general, a dictionary may provide the popular and common-sense meaning of terms presented to the voters. *Myers v. Hawkins*, 362 So. 2d 926, 930 n.10 (Fla. 1978).

*Advisory Opinion to Governor-1996 Amendment 5 (Everglades)*, 706 So. 2d 278, 283 (Fla. 1997).

In the common vernacular, the term "budget" includes inputs and outputs or "expenses and income for a given period." (T-IV 681). [10] Inputs for the state are primarily tax revenue. Outputs are public appropriations for expenses, services, and the like. Outputs drive inputs and vice-versa. The more outputs are essential for school funding or the like, the more inputs must exist. In this sense, they are

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[10] *See also* BLACKS LAW DICTIONARY (6th ed. 1990) ("[B]udget" is "[a] statement of estimated revenues and expenses for a specified period of time, generally a year."); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976) ("Budget" is a "statement of the financial position of a sovereign body (as of a nation) for a definite period of time based on detailed estimates of planned or expected expenditures during the period and proposals for financing them").

necessarily related to one another. Ideally, the "state budgetary process" reconciles the two, premised upon an estimate of both over a specified period of time, usually a fiscal year. This is known as a "balanced budget."[11] Plaintiffs ask this court to define the budgetary process minus one-half of the equation–the outputs. Under their construction, a budget would never be balanced. This is no plain textual reading of article VII, section 6, but a modification of the English lexicon. It is also contrary to an essential purpose of the TBRC, which is to ensure that the State has the ability to pay for its "needs during the next twenty year period." Art. XI, § 6(d), Fla. Stat.

"Process" in section 6(d) is a progression past various stages to completion[12] or a "series of actions … that bring about an end result." (T-IV 681) The TBRC's process begins in section 6(d) with examining and reviewing, turns to determining, and ends in 6(e) with "issu[ing] a report of the results of the review carried out," "propos[ing] to the legislature any recommended statutory changes related to the taxation or budgetary laws of the state," and, most importantly, "fil[ing] 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."

[11] BLACKS LAW DICTIONARY (6th ed. 1990) ("A balanced budget is one in which revenues equals or exceeds expenditures.")

[12] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976).

In this sense, process is broader, not narrower than "laws," because under section 6(e) the process may result in laws. Process is also broader than "procedure," which is "a particular way of doing or of going about the accomplishment of something."[13] A process may employ or choose among multiple procedures to bring about an output. Therefore, Petitioners' argument that "budgetary process" is the same as "revenue procedure" is without basis in the English language.

In natural usage, the text of article XI, section 6 is plain and, therefore, does not require statutory construction. *State ex rel. West v. Gray*, 74 So. 2d 114, 116 (Fla. 1954) ("Where the words are plain and clear and the sense distinct and perfect … there is generally no necessity to have recourse to other means of interpretation.") On its face, section 6(e) provides that the TBRC may propose revisions to the Constitution dealing with taxation and budgetary inputs and outputs. There is no ambiguity or doubt that should arise in this Court's mind about the term "budget" even when linked with "state" and "process." Yet if the Court feels the need also to deploy the basic canons of constitutional construction, they point in the same direction.

Article XI, section 6 "must be construed as a whole in order to ascertain the general purpose and meaning of each part; each subsection, sentence, and clause

[13] ID.

must be read in light of the others to form a congruous whole." *Bush v. Holmes*, 919 So. 2d 392, 407 (Fla. 2006) (*citing, inter alia, Dep't of Envtl. Protection v. Millender*, 666 So. 2d 882, 886 (Fla. 1996)). A construction that will lead to an absurd result such as that "budget" excludes outputs or that the outputs of 6(e) are narrower than the inputs in 6(d) will not be adopted "when contra interpretation is more in keeping with the obvious intent and purpose sought to be accomplished." *Millender*, 666 So. 2d at 886-87. Self-evidently, it was not the framers' intent to assign a duty to the TBRC such as examining limitations on expenditures that it then could not do anything about.

Relatedly, "[t]he fundamental object in construing a constitutional provision is to ascertain and give effect to the intentions of the framers and adopters," so as not to defeat it, including the evils sought to be remedied. *State ex rel. Dade County v. Dickinson*, 230 So. 2d 130, 135 (Fla. 1969). As explored in more detail below, the intent of the framers was to establish a "reform commission," not an advisory board that a simple executive order could create. The 1991 Commission Rules, a contemporaneous construction of article XI, section 6, put it this way: "The primary role of the Commission shall be to recommend statutory and constitutional changes dealing with taxation and the state budgetary process." (TBRC Rule ¶ 1.005 (as amended Oct. 8, 1991)). Narrowing the outputs of 6(e) as compared to the inputs in 6(d) fails this test.

In addition, the list of phrases in 6(d) having to do with budgeting and taxation does not require the conclusion that they are different in kind from "state budgetary process." To be sure, the doctrine of construction "noscitur a sociis" teaches that a word is known by the company it keeps; but the company kept is not, as Petitioners suggest, merely procedural. (IB at 24) In 6(d), "state budgetary process" is followed immediately by "the revenue needs and expenditure processes of the state." This is nearly the dictionary definition of "budget" presented above, which has nothing to do with procedure, but further underscores that the state budgetary process deals with inputs and outputs.

Next comes "the appropriateness of the tax structure of the state," followed by a comma, and "governmental productivity and efficiency" prior to a semicolon. (emphasis added). Here is another closely-related pair unrelated to procedure. A productive or efficient entity converts inputs to outputs in the least wasteful manner,[14] requiring an appropriate tax structure. The word "structure" appearing in 6(d) does not appear in section 6(e), yet Petitioners seize on this term without explanation as an example of "process." In so doing, they inexplicably depart from their standard rule of construction treating sections (6)(d) and (e) as unrelated. In addition, they fail to say what structure is, as opposed to what it supposedly is not; *i.e.*, substantive. (IB, at 24) In this sense, the word conveys nothing helpful and

[14] ID.

only obfuscates the meaning of "process." According to the dictionary, a "structure" is a building. A structure is also made up of parts.[15] The "legal structure" is composed of constitutional and statutory laws, administrative rules, and the common law; therefore, to suggest that structure is necessarily non-substantive or quasi-procedural (IB at 24) is, once again, contrary to ordinary English usage. In fact, the company "structure" keeps in section 6(d) is substantive such as "policy," "measures," and "constitutional limitations." Petitioners also treat "tax" or "taxation," which appears in the same list in 6(d), as substantive without explaining why it should be used in the substantive sense here, but not structure.

Another oddity of Petitioners' theory of the case is their view that phrases in 6(d) if not different in kind must be superfluous, whereas under the Respondents' construction, their important meaning lies in the manner in which they elaborate slightly upon the different aspects of taxation, funding, and the process. Table 1 shows three primary categories of terms in article XI, section 6(d). As budgetary inputs, the TBRC is required to look at needs, tax structure, the interaction between state and local taxation, alternative methods for raising revenue, ways to more efficiently gather revenue from the same sources, and constitutional limitations on taxation (which article I, section 3 addresses). As budgetary outputs, the TBRC must look at different aspects of funding, including the expenditure processes, the

[15] ID.

ability of state and local governments to adequately fund operations and facilities, alternative methods to fund needs, and constitutional limitations on expenditures at the state and local level (which article I, section 3 and article I, section 9 address). Each of these phrases relate to their heading and, thus, are similar in kind, but elaborate on a specific TBRC duty like a species within a genus. To imply, as do the Petitioners, that this classification is proper for taxation, but not for funding and expenditures is entirely without foundation.

**Table 1: The Company of Words Kept in Article XI, Section 6(d)**

| **Taxation** | **Fund and Expenditure** | **Process** |
|---|---|---|
| | | "[E]xamine the state budgetary **process**…." |
| "[E]xamine … the **revenue** needs" | "[E]xamine … **expenditure** processes of the state" | "[E]xamine … expenditure **processes** of the state" |
| "[E]xamine … the appropriateness of the **tax** structure of the state | | |
| "[R]eview policy as it relates to the ability of state and local government to **tax**…." | "[R]eview policy as it relates to the ability of state and local government to … adequately **fund** governmental operations and capital facilities required to meet the state's needs during the next twenty year period" | |
| "[D]etermine … alternative methods for raising sufficient **revenues** for the needs of the state" | "[D]etermine methods favored by the citizens of the state to **fund** the needs of the state…." | |
| "[D]etermine measures that could be instituted to | | "[R]eview the state's comprehensive |

| | | |
|---|---|---|
| effectively gather funds from existing **tax** sources" | | planning, **budgeting**, and needs assessment **processes** to determine whether the resulting information adequately supports a strategic decisionmaking **process**" |
| "[E]xamine constitutional limitations on **taxation**…." | "[E]xamine constitutional limitations on … **expenditures** at the state and local level | |

The TBRC's statutory and constitutional outputs are the same for each of its inputs. Petitioners' effort to limit the outputs in the area of expenditures, but not taxation, is inconsistent with the text of article XI, section 6 and should be rejected.[16]

### B. The Jurisdiction of the TBRC Has Always Extended to Taxation and Public Expenditures.

Supporting this plain textual reading of article XI, section 6 is the fact that the jurisdiction of the TBRC has always been construed to extend to taxation and public expenditures. The documents presenting the most relevant foundational understanding of the scope of the TBRC's jurisdiction include the following: (1) legislative staff analysis relating to the purpose of the TBRC; (2) the 1991 Commission Rules repeating the purpose of the TBRC and broadly defining the

[16]Petitioners' cataclysmic prognostication that, if the lower court is affirmed, the TBRC may next propose doing away with bicameral government (IB, at 41) or eliminating the tiniest expenditure is as ridiculous as it is immaterial.

"state budgetary process" and "taxation"; and (3) the subject matter considered by the first TBRC.

The legislative record indicates that the foremost purpose of the TBRC was to provide an additional avenue for constitutional reform proposals bearing upon taxation, revenue, and public funding measures for submittal directly to the voters. Legislative staff analysis observed in pertinent part:

> A. Present Situation:
>
> > Presently there are only four ways to amend the Florida Constitution: by Joint Resolution agreed to by three-fifths of the membership of each house of the Legislature; by proposal of the constitution revision commission which meets every twenty (20) years; by initiative; and by a constitutional convention called by the electors. There is no commission established, statutorily or constitutionally, which examines the tax structure and revenue needs of the State with an aim toward recommending equitable ways to fund current and future growth needs of the State.
>
> B. Effect of Proposed Changes:
>
> > …Any proposal of the Commission for constitutional changes could be submitted directly to the voters.

(T-IV 436-40 (House of Rep., Comm. on Fin. and Taxation, Staff Analysis, Bill No. HJR 1616, ¶ I.A.-B. (May 10, 1988) (emphasis added)).

The legislature rejected the Senate's effort to limit the TBRC's authority to propose constitutional revisions to article VII, (T- IV 432-34 (Fla. SJR 360 (1988)), in favor of the House proposal, (T-IV 436-40(Fla. HJR 1616 (1988)), which did not limit the TBRC's purview to any section of the constitution. (*See*

*also* T-IV 428 (Blanton Memo, at 2)). Consequently, the resolution approved by Florida's electorate as article XI, section 6 of the Florida Constitution was the broadest proposed.

The TBRC's rules adopted at its very first meeting are also compelling evidence of both the purpose of the Commission and its jurisdiction. The Commission stated that its "primary role" was "to recommend statutory and constitutional changes dealing with taxation and the state budgetary process." (T-IV 464 (TBRC Rule ¶ 1.005, at 7 (as amended Oct. 8, 1991)). Then, the TBRC went on to define the "state budgetary process" broadly within the meaning of article XI, section 6(e) of the Florida Constitution as follows:

> the manner in which every level of government in the state 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.

(*Id*. (emphasis added)).

Petitioners pick and choose from this definition components they believe support their position, while disparaging others; when, in truth, the entire text is entirely incompatible with their argument. (IB, at 29 & n.12) Altogether, Petitioners' futile exercise betrays the weakness of their position. On the one hand, Petitioners contend that the "manner in which … the state expends funds" somehow supports their position that "state budgetary process" is merely

procedural or structural. (IB, at 28) On the other hand, they favor jettisoning reference in Rule 1.005 to terms like "expend" and "legislative appropriations," "every level of government," and "all … subdivisions of the state." (IB at n.12) To be sure, these are totally inconsistent with the Petitioners' argument, but so is the first. "The manner in which every level of government in the state expends funds" is precisely what article I, section 3 and article IX, section 1 govern. Put otherwise, a manner restriction is none other than a substantive restriction on the expenditure of public funds, subject to the jurisdiction of the TBRC.

Therefore, the plain text of article XI, section 6 and the contemporaneous historical understanding of its jurisdiction concur that the phrase "state budgetary process" includes budgetary inputs and outputs and the process itself. The 1991 Commission Rules also define "taxation" broadly to mean "all public revenues and revenue raising laws at every level of government in the state." (*Id.*) This also accords with the plain textual reading presented above.

Among the first reforms considered by the TBRC are some specifically indicative of the view that article I and article IX are within its purview. For example, the TBRC considered and proposed article I, section 25, the Taxpayers' Bill of Rights. (T-IV 509 (Tom Rankin, Memo. to Members, TBRC at 14 (batesnumber) (April 20, 1992)). Petitioners provide a list of other constitutional reforms proposed by the 1990 TBRC, which they say "were the only proposals that were adopted by the Commission." (IB, at 31-32 n.17) This is wrong.

Conspicuously absent is article I, section 25, which had nothing at all to do with procedure. It is a substantive right requiring government "to deal fairly with taxpayers under the laws of this state."

The TBRC also deliberated upon public education funding. For example, the TBRC considered a proposal quite similar to proposed article IX, section 8 to be entitled, "No more than 10 percent of the non-instructional personnel in each school district, excluding the superintendent and principals of each school shall receive compensation in excess of the average of teacher's salaries in that district." (T-IV 565-66 (Intro. of Proposal No. M-276 at 0-1 (batesnumbers) (Sept. 30, 1991)). In addition, the TBRC considered a school choice measure, which Donna Blanton opined in a legal memorandum was within its jurisdiction. (T-IV 555-56, 562-63 (Tom Slade, Memo. to Members, TBRC at 2-3, 9-10 (batesnumbers) (Aug. 16, 1991) (outlining recommended amendment requiring school districts to "enact policies offering parents choices in where their children attend public school to be eligible to receive State Education Lotteries Trust Fund proceeds.")); T-IV 427-28 (Blanton Memo, at 1-2).

Altogether, the plain text, historical record, and first reforms undertaken by the TBRC unambiguously indicate that the scope of the TBRC's jurisdiction extends to taxation, revenue, expenditures, public funding, and process. They also show that the TBRC is not limited to procedural, but also substantive budgetary

reform involving expenditures. Therefore, the lower court's order should be affirmed.

## III. ARTICLE I, SECTION 3 AND ARTICLE IX, SECTION 1 AND THEIR PROPOSED AMENDMENTS DEAL WITH TAXATION AND THE STATE BUDGETARY PROCESS.

It is not an overstatement to say that, historically, as discussed above, the *raison d'etre* of Blaine amendments is to limit public expenditures. Petitioners concede as much specifically with reference to the last sentence of article I, section 3. They state that this "'no aid' clause" is a "substantive constitutional limitation on the purposes for which public funds may be expended." (IB, at 24). This is reason enough for this court to affirm the lower court's judgment that the TBRC had the authority to propose Ballot Initiative 7. Nothing more is necessary.[17]

Petitioners would confuse the matter by suggesting the last sentence of article I, section 3 is really about separation of church and state, rights of conscience, and religious freedom. As discussed above, this is error. Nationally, supporters of Blaine amendments favored an establishment of religion in the public schools. In Florida, an establishment of religion co-existed in the public schools with article I, section 6 and article I, section 3 until the 1960's. *See Chamberlin v. Dade County Bd. of Pub. Instruction*, 143 So. 2d 21, 23, 35 (Fla. 1962) (statute

[17] Although Petitioners insist that the TBRC lacks the authority to propose substantive constitutional measures impacting expenditures, the claim is without merit from a textual and historical perspective, as well as inconsistent with the cannons of constitutional construction.

requiring these and baccalaureate programs constitutional), *rev'd*, 377 U.S. 402 (1964) (*referencing* § 231.09, Fla. Stat. (1961)).

Florida's establishment of religion was overturned, not under the last sentence of article I, section 3, but the federal establishment clause. In Florida, as elsewhere, the Blaine amendment is accompanied by a state establishment clause: "There shall be no law respecting the establishment of religion…." Art. I, § 3, Fla. Const. It is roughly the equal of its federal counterpart. *Rice v. State*, 754 So. 2d 881, 883 (Fla. 5th DCA 2000), *rev. denied*, 779 So. 2d 272 (Fla. 2000) ("Florida courts have recognized that, in analyzing a statute under Florida's establishment clause, a similar test [to the *Lemon v. Kurtzman* test] applies."); *Todd v. State*, 643 So. 2d 625, 628 & n.3 (Fla. 1st DCA 1994), *rev. denied*, 651 So. 2d 1197 (Fla. 1995), *cert. denied,* 515 U.S. 1143 (1995) ("Because the language regarding establishment in the Florida constitution parallels the language of the First Amendment, federal law will be of great value in determining issues under Florida's constitution.")

With or without the last sentence of Article I, section 3, an establishment of religion is prohibited in Florida. The significance of the last sentence of Article I, section 3 by comparison to the first (when read in *pari materia*) is not that it prohibits an establishment, but is a restraint on a possible use of "revenue of the state." Art. 1, § 3, Fla. Const. Therefore, in outlining the elements of a claim for violating the "no aid" clause, courts require proof that state tax revenues are used.

*Holmes I*, 886 So. 2d at 352 (the first element of a claim under this provision is "the prohibited state action must involve the use of state tax revenues."); *Silver Rose Entertainment, Inc. v. Clay County*, 646 So. 2d 246, 251 (Fla. 1st DCA 1994) ("To these tests [set forth in *Lemon v. Kurtzman* … article I, section 3 of the Florida Constitution adds a fourth: The statute must not authorize the use of public moneys, directly or indirectly, in aid of any sectarian institution."); *Rice*, 754 So. 2d at 883 ("[W]hen considering an establishment clause claim under Florida's constitution, a fourth consideration has been added by article I, section 3 of the Florida Constitution: 'The statute must not authorize the use of public moneys, directly or indirectly, in aid of any sectarian institution.'")

If not about separation, Petitioners suggest that the last sentence of article I, section 3 is about freedom of conscience and religious freedom. (IB, at 3, 10) But the free exercise of religion is preserved by the first sentence of article I, section 3: "There shall be no law … prohibiting or penalizing the free exercise" of religion. Case law does not support a conflation of this clause with the "no aid" clause of article I, section 3. In fact, *Mitchell v. Helms* indicates that Blaine amendments and federal free exercise rights are in tension with one another. 530 U.S. 793, 828 (2000) (plurality opinion of Thomas, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.) ("hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow").

The federal religion clauses provide for religious freedom, rather than freedom from religion. Nativists intended Blaine amendments to have the second effect by discriminating against religious minorities and preserving Protestant control of the public schools. Now, the "no aid" clause disadvantages all religious persons solely because of their religious convictions. Therefore, to suggest that the last sentence of article I, section 3 somehow promotes religious liberty may nearly be as insulting and condescending to the Intervenors as the other "separate but equal" doctrine enacted in the 1885 Florida Constitution was to racial minorities.

### A. The Ballot Initiative for Article I, Section 3 Is a Restraint on Public Expenditures.

The relevance of the last sentence of article I, section 3 to state funding and expenditures is plain. According to *Holmes*, the first element of a violation of article I, section 3 requires evidence of "use of state funds to aid sectarian institutions." 886 So. 2d at 352. "Revenue of the state" mentioned in article I, section 3 is funds "taken from the public treasury." Art. 1, § 3, Fla. Const. The First District struck the Opportunity Scholarship Program ("OSP") because it was undisputed that it used state revenue to fund scholarships paid to private schools, including religious ones. 886 So. 2d at 352. According to the court, this is what

distinguished the OSP from the facts in prior cases.[18] *Id*. Consequently, article I, section 3 clearly relates to public funding and expenditures.

Ballot Initiative 7 proposes to revoke the last sentence of article I, section 3 and to replace it with a non-discriminatory standard: "An individual or entity may not be barred from participating in any public program because of religion." The proposal is the inverse of the present standard and, in this sense, joins other cases involving constitutional amendments inspired by precedent.[19] Whereas sectarian institutions may not presently use state funds for some purposes, the full scope of which is presently unknown, Ballot Initiative 7 would permit their use by enabling religious institutions to participate in public programs from which they are presently barred. The First District has held that article I, section 3 limits the use of public funds; therefore, its revocation and replacement with a sentence that

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[18]Actually, in *Koerner v. Borck*, 100 So. 2d 398, 398 (Fla. 1958) (disbursement to improve the park) and *Southside Estates Baptist Church v. Bd. of Trs.*, 115 So. 2d 697, 698 (Fla. 1959) (utilities), it was also anticipated that there could be a small public disbursement benefiting religious institutions, but the court fashioned an incidental and *de minimus* funding exception.

[19]Petitioners imply there is something sinister about constitutional reforms proposed in reaction to precedent. *But see Holmes*, 919 So. 2d at 403 ("In 1998, in response in part to *Coalition for Adequacy & Fairness*, the Constitutional Revision Commission proposed and the citizens of this state approved an amendment to article IX, section 1…."*); Armstrong v. Harris*, 773 So. 2d 7, 17 & n.26 (Fla. 2000), *cert. denied*, 532 U.S. 958 (2001) (death penalty amendment changing "cruel or unusual punishment" to "cruel and unusual punishment" to conform with the federal standard in reaction two cases). The Constitution is, in the final analysis, the peoples' to modify.

permits their use by religious institutions certainly impacts fully one-half of the state budgetary process by enabling the State to make expenditures directly or indirectly to religious organizations for various charitable services.

Plaintiffs erroneously claim that the amended language in Ballot Initiative 7 has nothing to do with the state budgetary process. First, their argument conflates the last sentence of article I, section 3 with the first by supposing that both primarily concern separation of church and state and religious freedom. This position accords insufficient meaning to the different roles played by the various clauses of article I, section 3. Second, their argument is premised upon a fundamentally unsound restatement of the word "budget," as discussed in detail above. Last, the argument fails to take into account that the removal of an obstacle to state expenditures obviously enables the legislature to expand and enact programs and make appropriations previously forbidden or drawn into question by *Holmes I*. For example, Plaintiffs' counsel has himself called into question the constitutionality of at least the first of these scholarship programs: the Corporate Income Tax Scholarship Program, McKay Scholarship Program, and Voluntary Pre-K / Early Learning Coalition Scholarship Program.[20]

[20] *See, e.g., Legislature Crafts Plan to Keep School Vouchers*, ST. PETERSBURG TIMES (Jan. 7, 2006) ("Teacher-union attorney Ron Meyer of Tallahassee believes the tax-credit approach might be just as vulnerable under the Constitution."); *see also* J. Scott Slater, *Florida's "Blaine Amendment" and Its Effect on Educational Opportunities*, 33 STETSON L. REV. 581, 600 (2004) ("The constitutionality of the TaxCredit Program under Florida's Blaine Amendment is uncertain.")

For these reasons, article I, section 3 and Ballot Initiative 7 do or have the potential directly to impact the state budgetary process by influencing public expenditures; therefore, they are within the article XI, section 6 jurisdiction of the TBRC.

**B. The Ballot Initiative for Article I, Section 3 Deals with Taxation.**

The last sentence of article I, section 3 also deals with taxation and the input side of the state budgetary process. In both *Johnson v. Presbyterian Homes of Synod of Fla., Inc*., 239 So. 2d 256 (Fla. 1970) and *Nohrr v. Brevard County*, 247 So. 2d 304, 307 (Fla. 1971), tax exemptions for religious institutions were challenged under article I, section 3. In *Johnson*, Manatee County and the City of Bradenton argued that section 192.06(14), Fla. Stat. (1967) was "unconstitutional as applied to the facts of this case in that it attempts to grant tax exemptions to homes for the aged owned by religious organizations and operated primarily for religious purposes." 239 So. 2d at 258. This Court held the statute "does not violate the Fla. Const. (1885), Declaration of Rights, § 6, F.S.A., and the First Amendment to the United States Constitution."[21] *Id*. at 262. Then, in *Nohrr*, an

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[21] The precursor to Article I, section 3 was Fla. Const. of 1885, Declaration of Rights, § 6 ("No preference shall be given by law to any church, sect or mode of worship and no money 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.")

intervenor urged that "the Educational Facilities Law violates the First and Fourteenth Amendments to the United States Constitution and Fla. Const., Art. 1 § 3…." 247 So. 2d at 307. The theory was that "the law permits the authorities to issue [tax exempt] revenue bonds in order to aid religious schools, as well as secular schools." *Id*. This Court held that neutral treatment under the Educational Facilities Law did not violate article I, section 3. *Id*.

About these cases, the First District emphasized that they did not have to do with a payment of money from the revenue of the public treasury. *Holmes I,* 886 So. 2d at 355-56. "'In the case of an exemption, the state merely refrains from diverting to its own uses income independently generated by the churches through voluntary contributions.'" *Id*. at 356. Nevertheless, a tax exemption clearly impacts the state budgetary process by decreasing the pool of revenue that the state may otherwise appropriate. This is the patent reason local governments prefer businesses over religious institutions as property holders.[22]

Therefore, article I, section 3 of the Florida Constitution impacts taxation and state revenue and is within the article XI, section 6 jurisdiction of the TBRC.

[22] Tax exemptions impact governmental revenue. Article I, section 3 may also impact tax credits, another aspect of taxation and revenue, although no Florida court has yet been presented with this question.

### C. The Ballot Initiative for Article IX, Section 1(a) Deals with the State Budgetary Process and Taxation.

Article IX, section 1(a) affects the state budgetary process by requiring the legislature to make "adequate provision" for public education and to provide "sufficient funds" for classroom size reduction as follows:

> **Section 1. Public education –**
> (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.… To assure that children attending public schools obtain a high quality education, the legislature shall make **adequate provision** to ensure that, by the beginning of the 2010 school year, there are a sufficient number of classrooms
>
> ***
>
> … **Payment** of the costs associated with reducing class size to meet these requirements is the responsibility of the state and not of local schools districts. Beginning with the 2003-2004 fiscal year, the legislature shall **provide sufficient funds** to reduce the average number of students in each classroom by at least two students per year until the maximum number of students per classroom does not exceed the requirements of this subsection.

Art. IX, § 1(a), Fla. Const. (emphasis added).

As set forth above, until *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006), the adequacy requirement in article IX, section 1(a) was not justiciable. *See Coalition for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 405-06 (Fla. 1996) ("'[T]he courts cannot decide whether the Legislature's appropriation of funds is adequate in the abstract….'") (citation omitted). But interpreting

amendments to article IX, section 1(a) proposed by the CRC "in response in part to" this decision, this court in *Holmes* reached a different conclusion: "Article IX, section 1(a) is a limitation on the Legislature's power because it provides both a mandate to provide for children's education and a restriction on the execution of that mandate." 919 So. 2d at 406. The restriction on use is that article IX, section 1(a) "prohibits the state from using public monies to fund a private alternative to the public school system…." *Id*. at 408. Consequently, article IX, section 1(a) without question deals with public funding and expenditures, and for this reason concerns the state budgetary process within the meaning of the TBRC's article XI, section 6(e) jurisdiction.

The same is even more true of Ballot Initiative 9, which modifies article IX, section 1 and article XII in pertinent part as follows:

**ARTICLE IX**
**EDUCATION**

> **Section 1. Public funding of education –**
> (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. This duty shall be fulfilled, at a minimum and not exclusively, through **adequate** ~~**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.…Nothing in this subsection creates an entitlement to a **publicly-financed** private program.
>
> ***
>
> 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.

**ARTICLE XII**
**SCHEDULE**

SECTION 28. Requiring sixty-five percent of school **funding** for classroom instruction. –The requirement that sixty-five percent of school funding received by school districts be spent on classroom instruction in Section 8 of Article IX, and this section, shall first be applicable to school years commencing during the state fiscal year 2009-2010.

Ballot Initiative No. 9 (emphasis added; underlining and strikethroughs original).

The proposed modification to article IX, section 1(a) still explicitly incorporates a requirement for "adequate" provision of school funding for Florida's children, but revokes the second prong of the limitation on the legislature recognized in *Bush II*, 919 So. 2d at 408, specifying the manner of fulfilling the obligation. By stating that the proposed modification to section 1(a) does not create an entitlement to a publicly-financed private program, Ballot Initiative No. 9 deals in greater depth with the appropriation and expenditure side of the state budgetary process by making sure that any public funding of private education will be discretionary with the legislature.

The proposed addition of section 8 to article IX also squarely addresses school funding and budgeting by mandating how the money received by school

districts will be budgeted. Plaintiffs' argument that the TBRC could not address both state and local funds received by school districts is mistaken in two respects. First, article XI, section 6(d) requires the TBRC to "review policy as it relates to the ability of state and local government to adequately fund governmental operations and capital facilities…" and to "examine constitutional limitations on … expenditures at the state and local level…." (emphasis added).[23] Article IX, section 1(a) and Ballot Initiative No. 9 require nothing less than "adequate provision for the education of all children," as well as adequate classroom facilities to meet class size requirements. By adjusting how the first of these requirements is met, Ballot Initiative No. 9 is well within the TBRC's jurisdiction.

Second, in a very real sense all education funding is state funding or at least state-required funding. The Florida Education Finance Program ("FEFP") dictates even the minimum funding or Required Local Effort (RLE) and maximum local millage rates that localities may charge. § 1011.60(6), Fla. Stat. (each district participating in the state appropriations for the FEFP must "make the minimum financial effort required for the support of the Florida Education Finance Program as prescribed in the current year's General Appropriations Act"); § 1011.71, Fla.

[23] From the beginning, the implementing legislation for the TBRC first adopted in 1988 authorized and directed "[a]ll state and local governmental agencies … to assist, in any manner necessary, the Tax Reform Commission upon its request or the request of the chairman." (R III 577-588 (Fla. HB390 (enacting § 286.036(2), Fla. Stat. (May 10, 1988)).

Stat. (each district school board shall levy a millage rate "not to exceed the amount certified by the commissioner as the minimum millage rate necessary to provide the district required local effort for the current year….").

State law and appropriations determine total school funding each year both through the general appropriation process and amendment to the local millage rates. In this sense, there is no divorcing local from state educational funds within the FEFP framework. In fact, statutory law presently addresses "minimum classroom expenditure requirements" in Ch. 1011, Part II, Florida Statutes, dealing with state "funding for school districts." *See* §§ 1011.60(8); 1011.64, Fla. Stat.

There is also an obvious relationship between productivity and the amount of money spent on instruction, rather than administration. A constitutional charge of the TBRC was to examine "governmental productivity and efficiency." Art. XI, § 6(d), Fla. Const. Enhancing these obviously reduces the need for public funding and taxation. Accordingly, it was within the prerogative of the TBRC to make a constitutional proposal to require 65% of school funding to be spent on classroom instruction. For these reasons, article IX, section 1(a) is within the TBRC's jurisdiction and the lower court's order should be affirmed.

## CONCLUSION

The TBRC was empowered to transfer Ballot Initiatives Nos. 7 and 9 to the Florida Secretary of State to be "submitted directly to the voters." (House Staff Analysis 1616 ¶ I.A.) The TBRC will not meet again for another 20 years. There

could be no greater harm than preventing the voters from casting their ballots with respect to these once-in-two-decades Initiatives. In contrast, the harm identified by the Petitioners is, in reality, a privilege available to Floridians to try to persuade the electorate to their views about the Initiatives. In fact, it is the very privilege the Intervenors/Respondents respectfully request the right to exercise to persuade voters that they should be treated equally under the law. The remedy requested by the Petitioners negates all of the Intervenors/Respondents' rights, whereas the remedy sought by the Respondents ensures merely a vigorous public debate.

Respectfully submitted this 21st day of August, 2008.

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I HEREBY CERTIFY that this brief was prepared using the Times New Roman font in 14 point, and therefore is in compliance with the Florida Rules of Appellate Procedure.

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