IN THE SUPREME COURT OF FLORIDA

BOB GRAHAM, et al.,

Petitioners,

Case No.: SC11-2453
L.T. Case Nos.: 1D11-384
2007-CA-1818

v.

MIKE HARIDOPOLOS, President of the Florida Senate; and DEAN CANNON, Speaker of the Florida House of Representatives on behalf of the Florida Legislature,

Respondents.
_____/

RESPONDENTS' ANSWER BRIEF

On Discretionary Review From A Decision Of The
First District Court of Appeal

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PRELIMINARY STATEMENT

Petitioners Bob Graham; Lou Grey, Jr.; Talbot "Sandy" D'Alemberte; Joan Ruffier; Bruce W. Hauptli; James P. Jones; Howard B. Rock; Eric H. Shaw; Manjo Chopra; and Frederick R. Strobel will be collectively referred to as "Petitioners."

Respondents Mike Haridopolos, as President of the Florida Senate, and Dean Cannon, as Speaker of the Florida House of Representatives, will be referred to as "the Legislature."

The record on appeal consists of nine volumes and will be referred to as "Rx:y-z," with "x" representing the volume number and "y-z" representing the page number(s).

All emphasis is added, unless otherwise indicated.

STATEMENT OF THE CASE

This appeal presents one question: Did the adoption of article IX, section 7, of the Florida Constitution divest the Legislature of its authority to appropriate for university tuition and fees, which has historically been part of its power to appropriate revenue to maintain the state university system?

The trial court and the First District Court of Appeal concluded the answer to that question is no. The First District held that university tuition and fees are state funds; article IX, section 7 did not alter or curtail the Legislature's power over tuition and fees; and it did not give the power to set and appropriate tuition and fees to the Board of Governors of the State University System ("BOG"). To the contrary, that constitutional article expressly makes BOG's management authority subject to the Legislature's appropriation power. *Graham v. Haridopolos*, 75 So. 3d 315 (Fla. 1st DCA 2011). Petitioners seek review of that decision.

In the trial court, Petitioners and BOG challenged the Legislature's power to set tuition and fees for the state university system. In counts III, IV, VII and IX of the Third Amended Complaint, Petitioners and BOG asserted:

(1) article IX, section 7 divested the Legislature of the power to appropriate university tuition and fees, and transferred the power to set and appropriate tuition and fees to BOG;

(2) the Legislature's 2007 appropriation for university tuition and fees

and related proviso language in chapter 2007-72, Laws of Florida, are unconstitutional under article IX, section 7;

(3) sections 1011.41, 1011.4106, and 1011.91, Florida Statutes (2007), which relate to the appropriation of tuition and fees, are unconstitutional under article IX, section 7; and

(4) these challenged laws violate the "single subject" provision of article III, section 12, and the appropriations provision of article VII, section 1(c) of the Florida Constitution.

(R3:502-03). Other counts of the complaint challenged statutes that do not relate to the appropriation of tuition or fees, and are not relevant here.

The trial court ruled that BOG had standing to assert the claims in all counts of the Third Amended Complaint, but Petitioners (the individual plaintiffs) only had standing to assert the claims in counts III, IV, VII and IX. (R4:718-30). BOG later voluntarily dismissed all of its claims, and the case proceeded only on the Petitioners' claims in counts III, IV, VII, and IX. (R6:1117-18).

The trial court resolved Petitioners' claims on cross motions for summary judgment, entering final judgment in favor of the Legislature. (R9:1735-56). The court ruled that the challenged laws did not offend article IX, section 7; article III, section 12; or article VII, section 1(c) of the Florida Constitution. *Id.*

Petitioners appealed only the trial court's ruling that the challenged

appropriations laws do not violate article IX, section 7. Applying longstanding precedent from this Court, the First District affirmed the trial court's ruling, holding that article IX, section 7(d) does not grant BOG the authority to set and appropriate tuition and fees; but rather, as has been the case since Florida's first constitution in 1838, the power to appropriate for such funds remains exclusively with the Legislature. *Graham*, 75 So. 3d at 318-19.

The First District reasoned that decisions from this Court dating back to 1874 hold the Florida Constitution vests the "power of the purse" in the Legislature by granting it exclusive and plenary power to raise and appropriate funds, and the Legislature's power to raise funds includes the power to impose fees and taxes to offset the costs of state government services. *Id.* (citing numerous, settled Florida Supreme Court precedents). The Legislature's appropriations power extends to all funds in the State Treasury from whatever source, and tuition and fees are "unquestionably" state funds. *Id.* (citing § 215.31, Fla. Stat).

The First District further held that nothing in the language of the Amendment that created article IX, section 7 (known as "Amendment 11"), and nothing in its ballot summary, suggests a change to the "quintessential legislative power of raising and appropriating state funds" was intended or effectuated. *Id.* at 319-20. Rather, the court concluded that Amendment 11 expressly makes clear that BOG's powers are subject to the power of the Legislature to appropriate for

the expenditure of funds. *Id.*

Finally, the First District observed that the ballot title and summary of Amendment 11 nowhere indicated – or even intimated – that the Legislature's appropriation power was to be limited in any way with respect to the state university system. *Id.* Amendment 11 and its ballot summary do not make the supposed distinction Petitioners advocate between "agency" funds and other funds, in respect to the appropriations power expressly reserved to the Legislature by the Amendment. *Id.*

STATEMENT OF THE FACTS

Petitioners' Statement of the Facts does not accurately set forth the facts of this case, asserts facts not relevant to the narrow issue before the Court, contains very few record citations, and relies on non-record materials. The facts of this case, with appropriate citations to the record, follow.

In 2002, the voters approved Amendment 11, a constitutional amendment proposed by citizen initiative. Art. IX, § 7, Fla. Const. (History). Amendment 11 became article IX, section 7 of the Florida Constitution. *Id.* Proposed Amendment 11 was summarized on the ballot as follows:

> A local board of trustees shall administer each state university. Each board shall have thirteen members dedicated to excellence in teaching, research, and service to community. A statewide governing board of seventeen members shall be responsible for the coordinated and accountable operation of the whole university system. Wasteful duplication of facilities or programs is to be avoided. Provides

> procedures for selection and confirmation of board members, including one student and one faculty representative per board.

(R8:1405).

Amendment 11 was sponsored by an organization named Education Excellence for Florida ("EEF"). (R7:1351). EEF's only statement of its intent concerning Amendment 11 appears in the briefs it filed with this Court in the Amendment's ballot access proceeding, and in the responses of EEF's attorney to questions posed by the Court during oral argument in that case. (2d Supp. Rec.). That intent was that Amendment 11 only affected the executive branch. *Id.* at 22. As EEF stated in its Initial Brief in that proceeding:

> The drafters of the amendment realized that the governance system specified for the State University System would be located within the executive branch. <u>The only descriptive terms used</u> in the Title ("manage"), Ballot Summary ("administer," "operation"), and Text ("administer," 'administered," "operate, regulate, control," "management") of the proposed amendment <u>are those calling for the exercise of executive responsibility</u>.

Id.

During oral argument, EEF's counsel said:

> JUSTICE WELLS: "And so doesn't it [Amendment 11] affect both the legislative branch and the executive branch?"
>
> MR. GIBSON: "<u>No, sir. Just the executive branch</u>."

(R4:782-83).

Based on the proposed amendment's language, the ballot summary, and the

ballot access proceeding record, this Court held that because "the proposed amendment does not substantially affect or alter any provision of the state constitution, the ballot summary is not defective," and the Court approved Amendment 11's placement on the ballot. *Advisory Op. to the Atty. Gen. re Local Trustees*, 819 So. 2d 725, 732 (Fla. 2002).

After Amendment 11 was placed on the ballot, supporters published conflicting views on the parameters of the Amendment. Some occasionally published letters in newspaper editorial pages, stating their view that Amendment 11 would give BOG authority over tuition and fees, but on other occasions supporters expressed the view that Amendment 11 would not disturb the Legislature's appropriation power over university funding. (R5: 973-74, 977-78; 984-86, 1017-18, 1021-26; R6:1005-09, 1020). Others provided isolated statements of support, giving their subjective opinions as to what they believed the amendment to mean. None of the views of such individuals were adopted or endorsed by EEF as an entity. (R5:984-86; R6:1017-18, 1021-26). Indeed, those statements were inconsistent with EEF's statement of intent to this Court. *Id.*

As ultimately approved by the voters, article IX, section 7 states that "a board of governors shall govern the state university system." Art. IX, § 7(b), Fla. Const. Where pertinent, article IX, section 7(d) states:

> The board of governors shall be a body corporate consisting of seventeen members. The board shall operate, regulate, control, and be

> fully responsible for the management of the whole university system. These responsibilities shall include, but not be limited to, defining the distinctive mission of each constituent university and its articulation with free public schools and community colleges, ensuring the well-planned coordination and operation of the system, and avoiding wasteful duplication of facilities or programs. The board's management shall be subject to the powers of the legislature to appropriate for the expenditure of funds, and the board shall account for such expenditures as provided by law.

When Amendment 11 was proposed and approved, several constitutional provisions relating to the Legislature's power to appropriate funds already existed. Article VII, section 1(c) stated: "No money shall be drawn from the treasury except in pursuance of appropriation made by law." Article VII, section 1(d) stated: "Provision shall be made by law for raising sufficient revenue to defray the expenses of the state for each fiscal period." Article IX, section 1(a) stated that "[a]dequate provision shall be made by law . . . for the establishment, maintenance, and operation of institutions of higher learning . . . ." These constitutional provisions remain the same today.

SUMMARY OF THE ARGUMENT

The powers conferred on BOG by article IX, section 7 are explicitly "subject to the powers of the legislature to appropriate for the expenditure of funds." Art. IX, § 7(d), Fla. Const. The constitution has long granted plenary appropriation power to the Legislature over university funding by article VII, section 1, and article IX, section 1. This Court held in its ballot access decision that Amendment

11 would not "substantially affect or alter any provision of the state constitution," if adopted. *Advisory Op. to the Atty. Gen. re Local Trustees*, 819 So. 2d at 732. This conclusively settles the question of whether Amendment 11 gave BOG authority over tuition and fees. It did not. No further inquiry is allowed or needed.

The constitution does not make the distinction Petitioners urge between "general revenue funds" and "university funds" in relation to the Legislature's appropriation power, and it does not confine the Legislature's appropriation power to "general revenue funds," either in article IX, section 7 or elsewhere. Instead, without qualification or circumscription, the constitution broadly invests the Legislature with the power to raise "revenue to defray the state's expenses" and to appropriate "moneys" and "funds." Art. VII, § 1(c),(d); Art. IX, § 7(d), Fla. Const.

Furthermore, the purported intent of the framers is legally irrelevant to the proper interpretation of article IX, section 7. Article IX, section 7 unambiguously preserves to the Legislature the power to appropriate for the expenditure of funds for the university system. In such a case as this, Florida law is settled that the intent of a citizen initiative's sponsor or individual supporters is of little or no relevance when interpreting the amendment.

Finally, even if the intent of the amendment's supporters could be considered, Petitioners' argument rests on statements by individuals whose subjective opinions differ from the sponsor's statement of intent in Amendment

11's ballot access proceeding, and those individuals' statements are contradicted by other stated opinions of Amendment 11 supporters. The evidence Petitioners rely on for their assertion of the "framers' intent" thus is not reliable as an extrinsic interpretational aid. Consequently, Petitioners' assertions about the "framers' intent" are of scant or no value, if resort to extrinsic information were permissible at all.

Petitioners' other arguments for reversal are also legally incorrect. They are based on constitutional provisions from other states that differ materially from article IX, section 7, cases that are not on point, and a misreading of the constitutional source of the Legislature's appropriation power.

The First District's decision is correct, and this Court should approve it.

ARGUMENT

I. STANDARD OF REVIEW

The standard of review of a trial court order granting summary judgment is de novo. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000).

II. ARTICLE IX, SECTION 7 DOES NOT CHANGE THE LEGISLATURE'S LONGSTANDING, HISTORIC POWER TO APPROPRIATE FOR TUITION AND FEES.

A. The Florida Constitution Grants Power Over Tuition And Fees To The Legislature As Part Of The Appropriation Power, And Nothing In Article IX, Section 7 Demonstrates An Intent To Abolish Or Curtail That Power.

Article IX, section 7 explicitly states that the Legislature has the power "to appropriate for the expenditure of funds," and that BOG's powers are subject to that legislative power. That provision does not merely reserve to the Legislature the power to appropriate for the expenditure of "general revenue" – the artificial limitation Petitioners attempt to assert here. It makes clear that the Legislature's power over "funds" remains the same.

It is even clearer that the Legislature's appropriation power extends to tuition and fees when article IX, section 7 is viewed in conjunction with other longstanding constitutional provisions that give plenary revenue-raising and appropriation power to the Legislature. Those constitutional provisions were not altered or affected by article IX, section 7. *See Advisory Op. to the Atty. Gen. re Local Trustees*, 819 So. 2d 725, 732 (Fla. 2002).

Article VII, section 1 of the Florida Constitution grants plenary revenue-raising and appropriations power to the Legislature. It provides:

> (c) No money shall be drawn from the treasury except in pursuance of appropriation made by law.
>
> (d) Provision shall be made by law for raising sufficient revenue to defray the expenses of the state for each fiscal period.

Those clauses do not limit the Legislature to raising "general revenue," or to raising "taxes," and do not limit the Legislature to appropriating "general revenue," as Petitioners contend. Instead, they imbue the Legislature with the power to raise

"revenue," in the broadest sense, for expenses of the state. They broadly empower the Legislature to appropriate for the expenditure of "money" from the treasury, without qualification.

This Court made those points clear in *Chiles v. Children A, B, C, D, E, and F*, 589 So. 2d 260, 267 (Fla. 1991), when it reiterated that the power to raise revenue and appropriate for its expenditure is vested only in the Legislature:

> We note again that it is the legislature's constitutional duty to determine and raise the appropriate revenue to defray the expenses of the state. . . . Under any working system of government, one of the branches must be able to exercise the power of the purse, and in our system it is the legislature, as representative of the people and maker of laws, including laws pertaining to appropriations, to whom that power is constitutionally assigned.

In addition, article IX, section 1(a) vests the Legislature with the constitutional duty and authority to determine the funding sources and levels to sustain Florida's public institutions of higher learning. It states:

> Adequate provision shall be made by law . . . for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.

Id. "Maintenance" or to "maintain" means to "bear the expense of" or to "furnish means for subsistence or existence of," Black's Law Dictionary 953 (6th ed. 1990) – in other words, to provide for sources and methods of funding. *See generally, Bush v. Holmes*, 919 So. 2d 392, 405 (Fla. 2006) ("This Court has long recognized the constitutional obligation that Florida's education article [article IX, section

1(a)] places upon the Legislature.").

Article IX, section 7 must be read in the context of these longstanding constitutional provisions. *E.g.*, *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006); *Adv. Op. to Governor*, 706 So. 2d 278, 281 (Fla. 1997); *see also Askew v. Fla. Game & Fresh Water Fish Comm'n*, 336 So. 2d 556, 560 (Fla. 1976) (A constitutional amendment is to be construed *in pari materia* with other constitutional provisions bearing on the subject to ensure a consistent and logical meaning that gives effect to each constitutional provision.).

Nothing in article IX, section 7 or in the ballot summary for Amendment 11 contains even a whisper of intent to displace or alter the Legislature's appropriation power in respect to university system funding. Nothing in its text empowers BOG, an executive branch agency, either to raise revenue by setting tuition and fees or to spend tuition and fees without legislative authorization. Quite to the contrary, the plain language of article IX, section 7 makes clear that the power "to appropriate for the expenditure of funds" continues to reside in the Legislature, not BOG.

B. Neither The Text Of The Constitution Nor Florida Precedent Supports Petitioners' Distinction Between "General Revenue" And "University Funds."

Petitioners contend that the power to "appropriate for the expenditure of funds" in article IX, section 7 refers only to "general revenue funds," and not to

what they now call "university funds." (In the First District below, Petitioners characterized tuition and fees as "agency funds.") Petitioners contend that article IX, section 7 transferred to BOG what they label a "statutory" appropriation power over "university funds" (*i.e.*, tuition and fees). (IB at 7, 9, 18-20, 28). Every element of Petitioners' proposition is unsupportable as a matter of law.

At the most fundamental level, it makes no difference to the Legislature's appropriation power whether Petitioners label tuition and fees as "university funds" or "agency funds," or contrive some other characterization for them. Long before Amendment 11, this Court held that the "[c]onstitution requires legislative appropriation or authorization for the use of <u>any funds [received] from whatever source</u> by a public agency or official." *Advisory Op. to the Governor*, 200 So. 2d 534, 536 (Fla. 1967) (addressing art. IV, § 24, and art. IX, § 4, Fla. Const. (1885), now art. IV, § 4(c), and art. VII, § 1, Fla. Const. (1968)).

Indeed, the Court reached that conclusion in the context of private-source funds received by the Governor – an office which, like BOG, is created by the constitution. Thus, notwithstanding the constitutional status of BOG as an executive branch agency, the constitution requires that funds received by it "from whatever source," must be deposited into the state treasury, and the Legislature must authorize their expenditure by appropriation. Accordingly, no matter how Petitioners now seek to characterize tuition and fees, the inescapable fact remains:

They are funds received by an executive branch agency, and therefore "require legislative appropriation or authorization for [their] use." *Id.* at 536.

Moreover, the distinction Petitioners fashion between "agency funds" or "university funds" and "general revenue funds" appears nowhere in the constitution in relation to the Legislature's revenue-raising and appropriation power. While article III, section 19 places procedural constraints on general revenue appropriations for certain purposes and on appropriation of certain general revenue deposited into the budget stabilization fund, the constitution nowhere restricts the Legislature's revenue-raising and appropriation power to "general revenue," and nowhere refers to "agency" or "university" funds.

Instead, the constitution broadly empowers the Legislature to raise "revenues to defray the expenses of the state," not merely general revenue. Art. VII, § 1(d), Fla. Const. It empowers the Legislature to appropriate "moneys" or "funds" from the treasury without qualification, not merely "general revenue." Art. VII, § 1(c); art. IX, § 7(d), Fla. Const. It further empowers the Legislature to provide by law for the maintenance (funding) of the state universities. Art. IX, § 1(a), Fla. Const.

Thus, the source of the Legislature's appropriation power over tuition and fees – which Petitioners wish to classify as "agency" or "university" funds – is and always has been constitutional. It is not, and never was, merely a "statutory"

power, as Petitioners contend. (IB at 7, 18-20). Article IX, section 7 preserved the Legislature's constitutional power to raise and appropriate revenues to defray the expenses of the state. That power includes tuition and fees.

In part, Petitioners believe university tuition and fees are not subject to the Legislature's appropriation power because they mistakenly infer that legislative permission to hold tuition and fees in university accounts somehow deprives the Legislature of constitutional appropriation authority over them.[1] However, legislative permission to hold tuition and fees in university accounts does not change their character as funds subject to the Legislature's constitutional appropriation power.

Tuition and fees always have been subject to the Legislature's constitutional appropriation power, no matter what accounts the Legislature allows them to be held in. The Legislature has the constitutional authority to allow funds to be permissively held in local accounts, subject to a continuing appropriation provided

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[1] *See, e.g.*, § 1011.91, Fla. Stat.:

> Except as otherwise provided in the General Appropriations Act, all moneys received by universities, from student fees authorized in s. 1009.24, from federal sources, from private sources, and from vending machine collections, are hereby appropriated to the use of the respective universities collecting same . . . . [H]owever, the funds shall not be expended except in pursuance of detailed budgets filed with the Board of Governors and shall not be expended for the construction or reconstruction of buildings except as provided under s. 1013.74.

by law. *E.g., Brown v. Firestone*, 382 So. 2d 654 (Fla. 1980); *In re Opinion of the Justices*, 199 So. 350 (1940). It likewise has the constitutional power to revoke that permission at any time. *See, e.g., In re Advisory Op. to the Governor*, 239 So. 2d 1, 10 (Fla. 1970) (general appropriations bill may substitute specific appropriations for prior continuing appropriations); *Advisory Op. to the Governor*, 200 So. 2d 534 (Fla. 1967); *see also* § 216.011(1)(i), Fla. Stat. (2007) ("'Continuing appropriation' means an appropriation automatically renewed without further legislative action, period after period, until altered or revoked by the Legislature.").

Moreover, even if the Legislature's appropriation power for state universities were limited to appropriating general revenue (which it is not), Petitioners' argument nevertheless overlooks this established principle: The power to appropriate general revenue includes the power to specify reasonable and related conditions on the appropriation. *See In re Advisory Opinion to the Governor*, 239 So. 2d 1, 10-11 (Fla. 1970) ("The Constitution expressly recognizes the power of the Legislature to make appropriations subject to qualifications and restrictions . . . [which] . . . may limit or qualify the use to which the moneys appropriated may be put and may specify reasonable conditions precedent to their use . . . ."); *see also Fla. Dep't of Educ. v. Glasser*, 622 So. 2d 944, 946, 948 (Fla. 1993) (the Legislature may place conditions on appropriations if the conditions "directly and

rationally relate[] to the purpose of the appropriation.").

The Legislature's decision about how much general revenue to appropriate for the universities necessarily requires determining the relative proportions of the overall university funding that will come from general revenue and from other funding sources. The Legislature therefore is constitutionally entitled to specify the level of tuition and fees that will complement a general revenue appropriation for the universities.

Petitioners argue that the Legislature's power to appropriate for the expenditure of funds is detached from the power to raise the funds in the first place, and contend therefore that BOG (a concededly executive branch agency) is invested with legislative power to establish tuition and fees. (IB at 24). Petitioners are wrong.

The appropriation power vested in the Legislature by article VII, section 1(c) ("No money shall be drawn from the treasury except in pursuance of appropriation made by law") is textually joined in the same section of the constitution with the Legislature's power to raise revenue. Art. VII, § 1(d), Fla. Const. ("Provision shall be made by law for raising sufficient revenue to defray the expenses of the state . . . ."). Hence, it is not surprising that the courts have long regarded revenue-raising and appropriation as intertwined parts of the same overall power, which is constitutionally vested in the Legislature. *See,e.g., Chiles v. Children A, B, C, D,*

E, and F, 589 So. 2d at 267.

The construction principle of ejusdem generis also deflates Petitioners' argument that BOG's constitutional management authority includes the power to set and expend tuition and fees without legislative appropriation, as does the broader maxim, noscitur a sociis, from which ejusdem generis stems. *See State ex rel. Winton v. Town of Davie*, 127 So. 2d 671, 673 (Fla. 1961) ("[ejusdem generis] may be applied to the construction of constitutional provisions"); *see generally, In re Henson*, 913 So. 2d 579, 587 (Fla. 2005); *Bush*, 919 So. 2d at 400; *Zingale v. Powell*, 885 So. 2d 277 (Fla. 2004); *City of Jacksonville v. Continental Can Co*., 151 So. 488, 489 (Fla. 1933); *State ex rel. Wedgworth Farms, Inc. v. Thompson*, 101 So.2d 381, 385 (Fla. 1958) ("[Ejusdem generis] is merely an application of a phase of the broader maxim noscitur a sociis which simply means that general and specific words capable of analogous meaning when associated together take color from each other so that the general words are restricted to a sense analogous to the less general."); *see also Sutherland Statutes and Statutory Construction*, § 47:17, pp. 362-371 (7th Ed. West 2007) (ejusdem generis applies when specific terms follow general ones or vice versa, and restricts application of the general terms to things similar to the specifics enumerated).

After describing the general powers of BOG, article IX, section 7(d) provides examples of the sort of power intended for BOG, stating:

> These responsibilities shall include, but not be limited to, defining the distinctive mission of each constituent university and its articulation with free public schools and community colleges, ensuring the well-planned coordination and operation of the system, and avoiding wasteful duplication of facilities or programs.

Consequently, BOG's generally described powers in article IX, section 7 (to "operate, regulate, control, and be fully responsible for the management" of the university system) are limited to the sort of executive powers itemized in the foregoing passage – the authority to efficiently manage the operational activities of the various constituent universities. Article IX, section 7 thus describes classic executive powers for BOG. The legislative power to raise and appropriate revenue is not among them.

Simply put, article VII, section 1; article IX, section 1(a); and article IX, section 7 clearly distinguish between the appropriation power – which is vested in the Legislature – and executive powers granted to BOG.

C. No Constitutional Article Referenced By Petitioners Abolished The Legislature's Power To Raise And Appropriate Funds.

Petitioners point to earlier constitutional articles for the general proposition that the citizens may transfer legislative power to other entities by constitutional amendment. (IB at 10-13). This power is not in question here. The question here is whether the citizens intended to transfer the Legislature's appropriation power to BOG by voting to approve Amendment 11. None of the previous constitutional

amendments Petitioners allude to transferred the Legislature's appropriation power to another constitutionally created entity. Accordingly, none of them supports the notion that article IX, section 7 did so.

Petitioners further suggest that the First District's earlier decision in *NAACP, Inc. v. Florida Board of Regents*, 876 So. 2d 636 (Fla. 1st DCA 2004), held that the authority remaining in the Legislature under article IX, section 7 does not include the power to appropriate for tuition and fees. (IB at 17). As the First District noted below in this case, that is not at all what the First District held in *NAACP*. *NAACP* nowhere addressed whether the Legislature or BOG had the power to set and appropriate tuition and fees.

III. THE LEGISLATURE'S POWER OF APPROPRIATION OVER TUITION AND FEES DERIVES FROM ARTICLE VII OF THE CONSTITUTION, AND IS NOT AFFECTED BY THE FACT THAT TUITION AND FEES HISTORICALLY HAVE BEEN "SEGREGATED" IN AN EDUCATION TRUST FUND.

Petitioners incorrectly assume that the Legislature's appropriation power over tuition and fees derives solely from article III of the constitution. Based on that incorrect assumption, they make this murky argument: (1) Before the adoption of Amendment 11, the Legislature statutorily established an education trust fund and directed that tuition and fees be deposited to that trust fund. (2) Article IX, section 7 transferred some article III legislative power to BOG. (3) Thus, it transferred to BOG what Petitioners wish to characterize as a "statutory" article III

power over those "segregated" trust funds. (IB at 17-20).

Petitioners' assumption, and the argument they labor to extrude from it, fail as a matter of law. First, the Legislature's power to appropriate for tuition and fees derives not simply from article III, but from article VII, section 1(c), which provides: "No money shall be drawn from the treasury except in pursuance of appropriation made by law." This Court has long recognized article VII, section 1(c) as the specific source of the Legislature's appropriation power. *E.g., State v. Am. Tobacco Co*., 723 So. 2d 263, 268 (Fla. 1998). Thus, Petitioners' fundamental assumption that article III is the sole constitutional source of the Legislature's appropriation power over tuition and fees is wrong.

Furthermore, the fact that tuition and fees historically have been held in a trust fund has no bearing on the Legislature's constitutional appropriation authority over such funds. As the First District correctly noted below:

> The fact that the tuition and fees are deposited into a trust fund rather than the General Revenue Fund has no bearing on the Legislature's plenary authority over those monies because a trust fund is, at its essence, nothing more than an accounting tool used to segregate monies within the State Treasury.

Graham v. Haridopolos, 75 So. 3d 315, 318-19 (Fla. 1st DCA 2011) (citing *Secretary of State v. Milligan*, 704 So.2d 152, 158 (Fla. 1st DCA 1997) (noting that a trust fund "merely segregates or earmarks funds" and holding that, when a trust fund is terminated but its funding source remains, the monies collected must be

deposited in the General Revenue Fund)); *see also* Art. III, § 19(f)(4), Fla. Const. (the balances in any abolished trust funds "shall be deposited into the general revenue fund.").

IV. THE "FRAMERS' INTENT" ASSERTED BY PETITIONERS IS NOT RELEVANT, AND IN ANY EVENT, IS NOT SUPPORTED BY THE RECORD.

Petitioners argue the First District's opinion is contrary to what they assert to be the intent of Amendment 11's "framers," IB at 10-12, 25-26, but that assertion is legally irrelevant to the interpretation of article IX, section 7. Moreover, the record contains no reliable evidence of the subjective "framers' intent" touted by Petitioners.

This Court has made clear that the voters' intent, not the framers' intent, is dispositive in construing a constitutional amendment passed by citizens' initiative:

> In analyzing a constitutional amendment adopted by initiative rather than by legislative or constitution revision commission vote, the intent of the framers should be accorded less significance than the intent of the voters as evidenced by materials they had available as a predicate for their collective decision. An absence of debate and recorded discussion marks the development of an initiative proposal. To accord the same weight to evidences of the intent of an amendment's framer as is given to debates and dialogue leading to a proposal adopted from diverse sources would allow one's persons private documents to shape constitutional policy as persuasively as the public's perception of the proposal. This we cannot permit.

Williams v. Smith, 560 So. 2d 417, 419 n.5 (Fla. 1978); *see also Myers v. Hawkins*, 362 So. 2d 926, 930 (Fla. 1978). The voters' intent is to be ascertained from the

language of the amendment itself. *Advisory Op. to Governor – 1996 Amendment 5*, 706 So. 2d 278 (Fla. 1997); *Justice Coalition v. First District Court of Appeal Judicial Nominating Comm'n*, 823 So. 2d 185, 190 (Fla. 1st DCA 2002). When the constitution's language is clear, resort to extrinsic material is not allowed. *Fla. League of Cities v. Smith*, 607 So. 2d 397, 400 (Fla. 1992).

Without ambiguity, article IX, section 7 affirms the Legislature's power to appropriate for the expenditure of funds for the university system. It is thus improper to look to extrinsic evidence of the subjective intent of the amendment's "framers" on the point. Such subjective intent is simply irrelevant to the question before the Court.

As for the supposed intent of the framers, the record contains no reliable evidence supporting Petitioners' contention as to what the "framers' intent" was. EEF – as an entity – was the sponsor, and thus the "framer" of Amendment 11. EEF specifically represented to this Court its intent in the briefs it filed in Amendment 11's ballot access proceeding and in the responses by EEF's attorney to questions posed by the court during oral argument. That intent was clear – the powers to be conferred on BOG were to be "those calling for the exercise of executive responsibility," and that, if passed, Amendment 11 would have no effect on the legislative branch. (R4:782-83; 2d Supp. Rec., at 22).

Petitioners latch on to isolated statements by some supporters during the

2002 election campaign as expressing the framers' intent. However, the statements reflect nothing more than the subjective opinions of supporters of the amendment, not adopted or endorsed by EEF, as an entity. (R5:984-86; R6:1017-18, 1021-26). In fact, those statements are inconsistent with EEF's statements to this Court regarding the effect of the amendment.

Moreover, Petitioners ignore the fact that supporters of Amendment 11 stated contrary opinions, expressing the view that the amendment would not disturb the Legislature's appropriation power over university funding. (R5: 973-74, 977-78, 984-86, 1017-18, 1021-26; R6:1005-09, 1020).

Furthermore, before Petitioners may clothe any given individual's opinion with the mantle of "the framers' intent," they must first establish that the individual was a framer. Yet, the record reflects conflicting views on even the fundamental question of who the amendment's framers actually were – if a citizen initiative even has "framers" apart from the political committee that sponsored it. (R7:1387-89, 1391, 1353-60, 1368-69). Therefore, as a matter of law, Petitioners cannot ascribe the status of "framers' intent" to the opinion of any given individual.

Finally, the extrinsic evidence Petitioners allude to cannot be given any credence, as a matter of law. If the intent and effect of Amendment 11 in fact had been to limit the Legislature's then-existing exclusive and plenary appropriation power, the ballot summary was required to clearly and accurately disclose it to the

voters. *See* § 101.161, Fla. Stat.; *see also, e.g., Fla. Dep't of State v. Fla. State Conf. of NAACP Branches*, 43 So. 3d 662 (Fla. 2010) (ballot title and summary must fairly inform the voters of the amendment's true meaning and ramifications, including whether and how the amendment would alter existing constitutional provisions). Long before Amendment 11 was drafted, this Court's precedents made clear that a ballot summary, to be clear and unambiguous, must disclose the amendment's effect on existing sections of the Florida Constitution. *See Advisory Opinion to Att'y Gen. ex rel. Amendment to Bar Gov't from Treating People Differently Based on Race in Public Educ.*, 778 So. 2d 888, 893-94, 898 (Fla. 2000); *Advisory Opinion to Att'y Gen. re Term Limits Pledge*, 718 So. 2d 798, 803 (Fla. 1998); *Advisory Opinion to the Att'y Gen.*, 656 So. 2d 466, 469 (Fla. 1995); *Advisory Opinion to the Att'y Gen. re Tax Limitation*, 644 So. 2d 486, 493 (Fla. 1994); *Advisory Opinion to Att'y Gen.—Limited Political Terms in Certain Elective Offices*, 592 So. 2d 225, 228 (Fla. 1991); *Fine v. Firestone*, 448 So. 2d 984, 989 (Fla. 1984); *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982).

Not only was there no reference to tuition and fees in the language of article IX, section 7 itself, the ballot summary contained nothing that alerted voters of the now-professed intent to limit the Legislature's appropriation power in article VII, section 1, or to transfer any of it to BOG. Accordingly, this Court held in its ballot access decision that Amendment 11 would not "substantially affect or alter any

provision of the state constitution." *Advisory Op. to the Att'y Gen. re Local Trustees*, 819 So. 2d at 732.

Petitioners' argument that article IX, section 7 was modeled after a 1978 proposed constitutional amendment is also specious. The language quoted by Petitioners from a committee report (IB at 25-26) does not depict what the 1978 proposed amendment actually said. The language proposed by the 1978 Constitution Revision Commission in Revision 8, which would have created article IX, section 7 (b), if adopted, read as follows:

> (b) The board of board regents (sic) shall operate, regulate, control, and be fully responsible for the management of the state university system, subject to the overall coordinative responsibilities of the state board of education and subject to general law, except on matters relating exclusively to the educational policy of the state university system.

http://www.law.fsu.edu/crc/conhist/1978rev.html. Revision 8 was not adopted, and in any event, contained no hint or suggestion of restricting or altering the Legislature's constitutional appropriation power.

In sum, the record contains no reliable extrinsic evidence of the "framers' intent" which Petitioners profess.

V. PETITIONERS INCORRECTLY RELY ON MATERIALLY DIFFERENT, IRRELEVANT CONSTITUTIONAL PROVISIONS OF OTHER STATES.

Petitioners argue that article IX, section 7 transferred the Legislature's

authority over university tuition and fees to BOG because it is patterned after the California, Michigan, and Minnesota constitutions, which are set up that way. (IB at 13-15, 28-29).[2] The fallacy of this argument is evident.

At the outset, Petitioners ignore the established principle that interpretation of a Florida constitutional amendment must be done in light of Florida's constitutional framework at the time of the amendment, and Florida's historic constitutional context is what is relevant to the interpretation, not that of other states. *See Mozo v. State*, 632 So. 2d 623, 630 (Fla. 4th DCA 1994);[3] *see also Hunter v. State*, 8 So. 3d 1052, 1073 (Fla. 2008) (refusing to consider cases from other states to interpret Florida constitution because the laws of the other states rest on differing considerations and standards); *Coalition for Adequacy & Fairness in School Funding v. Chiles*, 680 So. 2d 400, 404-05 (Fla. 1996) (refusing to rely on cases from other jurisdictions regarding the education clauses of the constitutions in those states, explaining that "the dispute here must be resolved on the basis of

[2] Petitioners' statement that other states have created constitutional entities is completely irrelevant to the issue here. The only thing shown by Petitioners' citation to these various constitutional provisions, IB at 15 n.7, is that the states vary widely in their methods of governing their state university systems. It says nothing about the power of the Florida Legislature to raise and appropriate funds.

[3] Although the court in *Mozo* was addressing a constitutional provision that affected personal rights, the court's reasoning applies with undiminished force here. Florida has a long constitutional history as to the Legislature's power to appropriate funds, and its own unique history regarding separation of powers. Other states' constitutional provisions are unrelated to Florida's constitutional context and history.

Florida constitutional law and the relevant provisions of the Florida Constitution").

Thus, how California, Michigan, or Minnesota allocate power over their universities under their constitutions simply is not relevant to interpreting the Florida Constitution. That is especially so because the California, Michigan, and Minnesota constitutions are quite different from Florida's in the way they apportion power over state universities.

As to Florida's university system, article IX, section 7 expressly reposes the constitution's appropriation power in the Legislature. California's constitution, to the contrary, grants the Regents of the University of California "full powers of . . . government, subject only to such legislative control as may be necessary to insure the security of its funds." *Compare* art. IX, § 7, Fla. Const. ("The board's management shall be subject to the powers of the legislature to appropriate for the expenditure of funds . . . ."), *with* art. IX, § 9, Cal. Const. (Regents of University of California have "full powers of organization and government, subject only to such legislative control as may be necessary to insure the security of its funds" and are vested with legal title and management of property of the university "without restriction"). (R6:1077-79)

Unlike article IX, section 7 of the Florida Constitution, article 8, sections 5 and 6 of Michigan's constitution expressly give the Michigan Board of Regents "control and direction of all expenditures from the institution's funds." (R6:1085,

1087) Finally, article VIII, section 4 of the Minnesota Constitution, unlike Florida, grants powers to its university governing board in the broadest terms, providing: "All rights, immunities, franchises, and endowments heretofore granted or conferred, are hereby perpetuated unto the said university . . . ." (R9:1729) That provision placed the University of Michigan "beyond the power of the Legislature by paramount law . . . ." *State ex rel. Univ. of Mich. v. Chase*, 220 N.W. 951, 953 (Minn. 1928). Under no reading of article IX, section 7 can it be concluded that it elevated BOG's authority above the Legislature's power of appropriation.

Accordingly, the provisions of these other states' constitutions are of no consequence in interpreting article IX, section 7, and related Florida constitutional provisions.

CONCLUSION

The First District correctly ruled article IX, section 7 does not alter the Legislature's well-established, historic power to appropriate tuition and fees for the state university system, and its decision should be approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via U.S. Mail to the following on this 25th day of May, 2012.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY FURTHER CERTIFY that the type size and style used throughout this brief is 14-point Times New Roman double-spaced, and that this brief fully complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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Attorney