

**IN THE SUPREME COURT  
STATE OF FLORIDA**

Supreme Court Case No.: SC11-2453  
DCA Case No. 1D11-384  
Lower Tribunal Case No.: 2007-CA-1818

---

BOB GRAHAM; LOU FREY, JR.; TALBOT "SANDY" D'ALEMBERTE;  
JOAN RUFFIER; BRUCE W. HAUPTLI; JAMES P. JONES; HOWARD B. ROCK;  
ERIC H. SHAW; MANOJ CHOPRA; and FREDERICK R. STROBEL,

*Petitioners,*

vs.

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

*Respondents.*

---

**PETITIONERS' BRIEF ON JURISDICTION**

---

ON DISCRETIONARY REVIEW FROM A DECISION OF THE  
FIRST DISTRICT COURT OF APPEAL

ROBIN GIBSON  
GIBSON LAW FIRM  
299 E. Stuart Avenue  
Lake Wales, FL 33853  
863-676-8584 (Office)  
863-676-0548 (Fax)  
Florida Bar No. 028594  
[r.gibson@gibsonlawfirm299.com](mailto:r.gibson@gibsonlawfirm299.com)  
Counsel for Petitioners

**TABLE OF CONTENTS**

CITATION OF AUTHORITIES .....iv

STATEMENT OF THE FACTS .....1

JURISDICTIONAL STATEMENT .....2

SUMMARY OF ARGUMENT .....2

ARGUMENT .....3

I. The State needs for this Court to Determine the Extent of the Authority Transferred from the Legislature to the Board of Governors by the Amendment to the State Constitution.....3

    A. Statewide Implications .....3

    B. The Legislature’s Effort to Interpret the Constitutional Amendment and Separate the Powers to its Advantage Demonstrates the Need for this Court to Exercise the Judiciary’s Fundamental and Exclusive Responsibility to Interpret the Constitution. ....4

II. After Establishing the Extent of the Constitutional Transfer, this Court will be able to Determine Whether the All-Important Fee-Setting Authority was Included Within the Transfer. ....6

    A. This Court Needs to Determine Whether the Legislature’s Edict to Force Compliance with its own Tuition and Fee-Setting Decisions Constitutes an Abuse of the Appropriations Power. ....7

    B. This is a Case of First Impression in Florida, and Needs to be Considered by the State’s Highest Court. ....8

CONCLUSION.....9  
CERTIFICATE OF SERVICE .....11  
CERTIFICATE OF COMPLIANCE.....11

CITATION OF AUTHORITIES

Constitution

Article V, Section 3(b)(3), Fla. Const.....2  
Article IX, § 7, Fla. Const.....1, 2, 5, 8  
Article IX, § 7(a), Fla. Const .....4  
Article IX, § 7(d), Fla. Const. ....1  
Article VIII, § 4, Minn. Const. ....4

Statutes

Section 1001.705(2), Fla. Stat.....5  
Section 1001.705(3), Fla. Stat. (2005).....8  
Section 1001.706, Fla. Stat. ....5  
Section 1009.24, Fla. Stat. (2007).....7

Rules

Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.....11

Cases

*Cooper v. Aaron*, 358 U.S. 1 (1958).....6  
*Federation Publications, Inc. v. Board of Trustees of Michigan State University*, 594 N.W. 2d 491 (Mich. 1999).....4

<i>Graham v. Haridopolos</i> . --- So.3d ---, No. 1D11-384, 2011 WL 4818046 (Fla. App. 1 Dist., Oct. 12, 2011) .....	2
<i>Gray v. Bryant</i> , 125 So. 2d 846 (Fla. 1960).....	5
<i>Haridopolos v. Citizens for Strong Schools, Inc.</i> , --- So.3d ---, No. 1D10-6285, 2011 WL 5865963 (Fla. App. 1 Dist., Nov. 23, 2011).....	6
<i>Knowalski v. Board of Trustees of Macomb County Community College</i> , 204 N.W.2d 272 (Mich. App. 1976).....	9
<i>Lister v. Hoover</i> , 706 F.2d 796 (7 <sup>th</sup> Cir. 1985) .....	9
<i>Miles v. Idaho Power Co.</i> , 116 Idaho 635, 778 P.2d 757 (1989) .....	6
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137 .....	6, 9
<i>NAACP, Inc. v. Florida Board of Regents</i> , 876 So.2d 636 (Fla. 1 <sup>st</sup> DCA 2004).....	5, 8
<i>Phillips v. Minnesota State University Mankato</i> , Civil No. 09-1659 (BSD/FLN) 2009 WL 5103233 (D. Minn. 2009).....	9
<i>Regents of University of Michigan v. State</i> , 208 N.W.2d 871 (Mich. App. 1973).....	9
<i>Royers Estate</i> , 56 P. 461 (Cal. 1899).....	4
<i>Schmidt v. Regents of University of Michigan</i> , 233 N.W.2d 855 (Mich. App. 1975).....	9
<i>Spielberg v. Board of Regents, University of Michigan</i> , 601 F.Supp. 994 (D. Mich. 1985).....	9
<i>State v. Chase</i> , 220 N.W. 951 (Minn. 1928).....	4

#### Miscellaneous Authorities

14A C.J.S. <i>Colleges and Universities</i> § 14 (2009) .....	9
---	---

Chapter 2000-170, Laws of Florida, SB 1162 .....	1
Florida Division of Elections, Committee Tracking System, <a href="http://www.election.dos.state.fl.us/committees/ComLkupByName.asp">http://www.election.dos.state.fl.us/committees/ComLkupByName.asp</a> .....	1
Hendrix Chandler, <i>Dreams and Political Realities: A 20<sup>th</sup> Century History of Florida’s University System</i> (1983) .....	1
Neal H. Hutchens, <i>Preserving the Independence of Public Higher Education: An Examination of State Constitutional Autonomy Provisions for Public Colleges and Universities</i> , J.C. & U.L. 271 (2009) .....	4
Mary Specht and Anthony DeBarros, <i>USA Today’s 2006 College Tuition &amp; Fees Survey</i> , USA Today (2007) .....	7

## STATEMENT OF THE FACTS

The people of Florida have been concerned about, and are heavily invested in, their State University System. In the last half century of its existence, the system was buffeted by debilitating political turmoil.<sup>1</sup>

As a result, the people of Florida made a momentous decision: they would join the ranks of other states by amending their constitution to remove control of the state's university system from elective politics. By a vote of more than sixty percent,<sup>2</sup> the people created a constitutionally grounded independent corporate body known as the Board of Governors to “operate, regulate, control, and be *fully responsible* for the management of the *whole university system*.”<sup>3</sup> (emphasis added). The legislature resisted its loss of power, thereby joining the constitutional issues of first impression here on appeal.

---

<sup>1</sup> Hendrix Chandler, DREAMS AND POLITICAL REALITIES: A 20<sup>th</sup> Century History of Florida's University System, 26-28 (1983) (unpublished manuscript on file with Board of Governors, Tallahassee). After a number of attempts, the Legislature succeeded in abolishing the Board of Regents in 2001, temporarily transferring university governance to the statutory “Florida Board of Education” (not to be confused with the constitutional State Board of Education). Chapter 2000-170, Laws of Florida, SB 1162. In 2002, the people opted to assume responsibility for university governance themselves by adopting Article IX, Section 7 of the Florida Constitution.

<sup>2</sup> Florida Division of Elections, Committee Tracking System, <http://www.election.dos.state.fl.us/committees/ComLkupByName.asp>.

<sup>3</sup> Article IX, § 7(d), Fla. Const. (adopted 2002, effective Jan. 7, 2003) (A-3).

## **JURISDICTIONAL STATEMENT**

Petitioners invoke the discretionary jurisdiction of this Court to review the decision of *Graham v. Haridopolos*, --- So.3d ---, No. 1D11-384, 2011 WL 4818046, at \*1 (Fla.App. 1 Dist., Oct. 12, 2011) (reh’g denied Nov. 20, 2011), attached as the Appendix to this brief. The decision expressly construes a provision of the state constitution, expressly declares a state statute valid and expressly affects a class of constitutional officers (Board of Governors). The Supreme Court may review the decision pursuant to Article V, Section 3(b)(3) of the Florida Constitution.

## **SUMMARY OF ARGUMENT**

This Court needs to review and determine two fundamental constitutional issues: 1) the extent of the powers transferred from the Legislature to the Board of Governors, and 2) whether tuition and fee-setting authority was included with the transfer. Both issues critically impact every public university in Florida, every student attending those universities now and in the foreseeable future, the all-important balance between access to and the quality of the state’s universities, the state’s economic development, and its quality of life.

The First District’s decision is erroneous because it fails to recognize and implement the independent constitutional powers of the Board of Governors (“the Board”). The First District’s interpretation of Article IX, Section 7 (“the



Amendment”) expanded the legislature’s power to appropriate for the expenditure of general revenue, and improperly extended that power so as to deny and eliminate the Board’s authority to set and expend tuition and fees. The power to set tuition and fees is a necessary and ordinary part of the Board’s constitutional function to “operate, regulate, control and be fully responsible for the management of the whole university system.”

The purpose of this appeal is to resolve the prevailing uncertainty by bringing constitutional questions of this magnitude to the place where they belong: the Supreme Court of Florida.

## **ARGUMENT**

### **I. THE STATE NEEDS FOR THIS COURT TO DETERMINE THE EXTENT OF THE AUTHORITY TRANSFERRED FROM THE LEGISLATURE TO THE BOARD OF GOVERNORS BY THE AMENDMENT TO THE STATE CONSTITUTION.**

#### **A. Statewide Implications.**

In the 2002 general election, over 2.8 million Floridians voted to create a new constitutional system of governance for universities in place of the existing legislative system. By their votes, it was the judgment of the people of Florida --- and that is the only judgment that counts --- that the change would improve and enhance the performance of universities for the benefit of the state’s citizens and

its economy.<sup>4</sup> The voters opted to join the ranks of states where independent constitutional governance has been a proven performer for over 150 years,<sup>5</sup> producing a number of individual universities with national reputations.<sup>6</sup>

**B. The Legislature’s Effort to Interpret the Constitutional Amendment and Separate the Powers to its Advantage Demonstrates the Need for this Court to Exercise the Judiciary’s Fundamental and Exclusive Responsibility to Interpret the Constitution.**

In 2004, the First District Court of Appeal interpreted the Amendment and found that all legislative authority, except the authority to “appropriate funds, to confirm the Board’s appointed members, and to set members’ staggered terms,” had been transferred by the Amendment and now resided with the Board of Governors. *NAACP, Inc. v. Florida Board of Regents*, 876 So. 2d 636, 639-40 (Fla. 1<sup>st</sup> DCA 2004). Regarding the statutes that remain “on the books” for managing the State University System, the court found that “those statutes have

---

<sup>4</sup> The Amendment states that its purpose is “for the benefit of Florida’s citizens, their communities and economies.” Art IX, § 7(a), Fla. Const. (2003).

<sup>5</sup> California: *Royers Estate*, 56 P. 461 (Cal. 1899) (Board of Regents created as corporation in Constitution of 1849); Michigan: *Federation Publications, Inc. v. Board of Trustees of Michigan State University*, 594 N.W. 2d 491, 496 (Mich. 1999) (Board of Regents created as corporation in Constitution of 1850); Minnesota: *State v. Chase*, 220 N.W. 951, 954 (Minn. 1928) (Board of Regents created as corporation in Territorial Laws 1851, c. 3, ss 7, 9, confirmed by MINN. CONST. art. 8, § 4).

<sup>6</sup> Neal H. Hutchens, *Preserving the Independence of Public Higher Education: An Examination of State Constitutional Autonomy Provisions for Public Colleges and Universities*, J.C. & U.L. 271, 272 (2009).

been implicitly repealed by the subsequent adoption of Article IX, section 7.” *Id.* at 640.

In the next legislative session, the Legislature sought to trump the judiciary with its own constitutional interpretations. In Florida Statutes Section 1001.705(2), the Legislature made certain findings “In accordance with s. 7, Art. IX of the State Constitution . . . .” and identified and separated the “CONSTITUTIONAL DUTIES OF THE BOARD OF GOVERNORS OF THE STATE” from the “CONSTITUTIONAL DUTIES OF THE LEGISLATURE.” (emphasis in original). Notably, the Legislature assigned to itself complete control of all finances, including tuition and fees.

The First District’s 2004 opinion in *NAACP* also construed the language of the Amendment to be “self-executing,”<sup>7</sup> thereby enabling the Board to carry out its powers and duties without further legislative enactment. The reason for such a designation is to deny the Legislature “the power to nullify the will of the people expressed in their constitution, the most sacrosanct of all expressions of the people.” *Gray v. Bryant*, 125 So. 2d 846, 851 (Fla. 1960).

Nonetheless, the Legislature did nullify the will of the people by enacting Section 1001.706 declaring that the Legislature enjoyed regulatory authority over

---

<sup>7</sup> *NAACP*, 876 So. 2d at 640.

the Board of Governors, and specifying the Board's powers and duties in exhaustive detail.

Instead of the Legislature, it is the judiciary's exclusive province and duty to interpret the fundamental and paramount law of the state. This principle has "been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system." *Cooper v. Aaron*, 358 U.S. 1,18 (1958).<sup>8</sup>

## **II. AFTER ESTABLISHING THE EXTENT OF THE CONSTITUTIONAL TRANSFER, THIS COURT WILL BE ABLE TO DETERMINE WHETHER THE ALL-IMPORTANT FEE-SETTING AUTHORITY WAS INCLUDED WITHIN THE TRANSFER.**

In the fall of 2008, more than 302,000 students were enrolled in Florida's public universities. Since the advent of constitutional governance in 2003, over a million students and their families have endured the uncertainty surrounding the unknowns of tuition and fee-setting.

Tuition and fee-setting is critical. Access issues need to be balanced with issues of institutional quality. Just prior to the filing of this action, USA TODAY published a study concerning the amounts of tuition received by 75 public flagship

---

<sup>8</sup> "Passing on the constitutionality of statutory enactments, even enactment[s] with political overtones, is a fundamental responsibility of the judiciary, and has been so since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1813)." *Haridopolos v. Citizens for Strong Schools, Inc.* --- So.3d ---, No. 1D10-6285, 2011 WL 5865963, at \*4 (Fla.App. 1 Dist., Nov. 23, 2011) (citing *Miles v. Idaho Power Co.*, 116 Idaho 635, 640, 778 P.2d 757, 762 (1989)).

universities in 50 states. Florida State University and the University of Florida ranked 74<sup>th</sup> and 75<sup>th</sup>, respectively. Dead last.<sup>9</sup>

By accepting this case, the Court will be able to interpret the constitution and determine by law the entity accountable to the people for striking the crucial balance between access and quality in public universities.

**A. This Court Needs to Determine Whether the Legislature's Edict to Force Compliance with its own Tuition and Fee-Setting Decisions Constitutes an Abuse of the Appropriations Power.**

The uncertainty over the constitutional authority to set tuition and fees apparently drove the Legislature to issue a questionable edict as part of the 2007 Appropriations Act.<sup>10</sup> Appropriation 156 required each university to comply with the tuition and fee charges imposed by the Legislature in Florida Statutes Section 1009.24 (2007). A university's failure to comply would result in that university losing the funds appropriated to it from General Revenue. (The University of Florida, for instance, would have lost \$183,771,093 in 2007 alone.) However, this legislative act is directly contrary to the power the Florida Constitution provides to

---

<sup>9</sup> Mary Specht and Anthony DeBarros, *USA Today's 2006 College Tuition & Fees Survey*, USA Today (2007).

<sup>10</sup> For the purpose of framing the issues for this litigation, the parties have used the finances for fiscal year 2007-2008, the most recent information available at the time this action was filed. (The issues framed by those figures have remained the same since the inception of the Amendment.)

the Board of Governors to “operate, regulate, control and be fully responsible for the management of the whole university system” Art. IX, § 7, Fla. Const.

The Court’s acceptance of this case will end the confusion and uncertainty surrounding the responsibility for hundreds of millions of dollars generated by the universities from payments made by student families in exchange for instruction and services at the campus level.

**B. This is a Case of First Impression in Florida, and Needs to be Considered by the State’s Highest Court.**

The Supreme Court of Florida has never before had the opportunity to consider a case concerning a constitutionally-established university system. A case of first impression, and one of this magnitude, should rightfully be evaluated by Florida’s highest court.

Moreover, the Legislature has demonstrated that it will not respect the rulings of a lower court.<sup>11</sup> In fact, as pointed out above, the Legislature imposed financial sanctions on universities so that they would ignore the First District and instead comply with the Legislature’s tuition and fee-setting statutes --- the same statutes that the First District found to be implicitly repealed in *NAACP*.<sup>12</sup>

---

<sup>11</sup> § 1001.705(3), Fla. Stat. (2005).

<sup>12</sup> *NAACP, Inc. v. Florida Board of Regents*, 876 So. 2d 636, 640 (Fla. 1<sup>st</sup> DCA 2004).

By accepting this case, the Court will not be without guidance. More than a century of court decisions from other states are readily available that clarify and resolve most of the issues that could arise. See 14A C.J.S. *Colleges and Universities* § 14 (2009). For example, on the subject of tuition and fees, the opinion here on appeal is contrary to every reported case in the country. Every reported case either holds or acknowledges that the operation of universities by a constitutionally-created entity includes the authority to set tuition and fees.<sup>13</sup>

There is no exception.

### **CONCLUSION**

“The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written.” *Marbury v. Madison* (1803).

The constitutionally fundamental issues presented here should not be allowed to fall by default to one of twenty judicial circuits or to one of five district courts of appeal. A matter of this consequence, involving both the balance and separation of constitutional powers, needs to be resolved by the one court that is

---

<sup>13</sup> *Phillips v. Minnesota State University Mankato*, Civil No. 09-1659 (BSD/FLN) 2009 WL 5103233, at \*3 (D. Minn. Dec. 17, 2009); *Spielberg v. Board of Regents, University of Michigan*, 601 F.Supp. 994 (D. Mich. 1985) (citing *Lister v. Hoover*, 706 F.2d 796 (7<sup>th</sup> Cir. 1983)); *Knowalski v. Board of Trustees of Macomb County Community College*, 204 N.W.2d 272 (Mich. App. 1976); *Schmidt v. Regents of University of Michigan*, 233 N.W.2d 855 (Mich. App. 1975); *Regents of University of Michigan v. State*, 208 N.W.2d 871 (Mich. App. 1973).

empowered to be the ultimate authority for the state's judicial branch --- the Supreme Court of Florida.

The Court should exercise its discretionary jurisdiction to accept this case for review.

Respectfully submitted,

[Signature on Original]  
ROBIN GIBSON, FBN 028594  
GIBSON LAW FIRM  
299 E. Stuart Avenue  
Lake Wales, FL 33853  
[r.gibson@gibsonlawfirm299.com](mailto:r.gibson@gibsonlawfirm299.com)  
863-676-8584 (Ofc.)  
863-676-0548 (Fax)  
Counsel for Petitioners.



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that the original and eight copies of Petitioner’s Brief on Jurisdiction was sent by overnight mail to attorney John K. Aurell in Tallahassee to be hand delivered to the Clerk on Friday, December 30, 2011 and a copy of the Petitioners’ Brief on Jurisdiction has been furnished to Daniel C. Brown, Esquire, Carlton Fields, P.A., 215 South Monroe Street, Suite 500, Tallahassee, FL 32301 by e-mail and U.S. Mail this 28th day of December, 2011.

[Signature on Original]

Robin Gibson, Esquire  
Attorney for Petitioners

**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that the foregoing brief complies with the requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure, and is double spaced and formatted with Times New Roman 14-point font. In compliance with Administrative Order No. AOSC04-84, a Word copy has been provided by e-mail to the Clerk at [e-file@flcourts.org](mailto:e-file@flcourts.org).

[Signature on Original]

Robin Gibson, Esquire  
Attorney for Petitioners