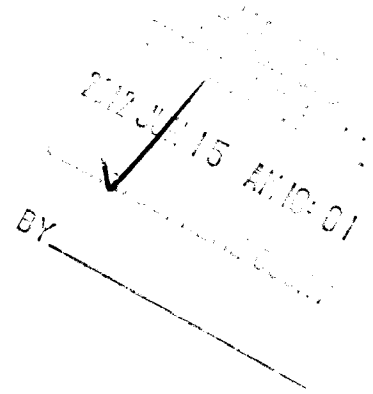

FLORIDA SUPREME COURT

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

BOB GRAHAM; TALBOT "SANDY" D'ALEMBERTE; JOAN RUFFIER; BRUCE W. HAUPTLI; JAMES P. JONES; HOWARD B. ROCK; ERIC H. SHAW; 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' REPLY BRIEF ON MERITS

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
Counsel for Petitioners

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PREFACE

The full meanings of the terms and abbreviations used in this Reply Brief are:

- Petitioners = Bob Graham, Talbot "Sandy" D'Alemberte; Joan Ruffier; Bruce W. Hauptli; James P. Jones; Howard B. Rock; Eric H. Shaw; and Frederick R. Strobel.

- Legislature = Mike Haridopolos, President of the Florida Senate; and Dean Cannon, Speaker of the Florida House of Representatives, on behalf of the Florida Legislature.

- Amendment = Article IX, Section 7, Florida Constitution.

- In. Br. = Initial Brief in this appeal.

- In. Br. A. = Appendix to Initial Brief in this appeal.

- Ans. Br. = Answer Brief in this appeal.

- Opp. In. Br. = Opponent's Initial Brief, *Advisory Op. to the Atty. Gen. re: Local Trustees*.

- Pro. Ans. Br. = Proponent's Answer Brief, *Id.*

SUMMARY OF ARGUMENT

The Florida Constitution explicitly states the effect of article IX, section 7: "[T]he people hereby establish a system of governance for the state university system of Florida." The constitutional system thereby replaced the previous legislative system with a citizen Board of Governors granted the power to "operate, regulate, control, and be fully responsible for the management of the whole university system." The replacement of one system for the other acted to fully divest the Legislature of its article III legislative power over universities and transfer that power to the Board of Governors. Since tuition and fees were creatures of legislation, and were not exceptions to the divestment, they were part of the transfer.

The self-executing Amendment was careful to specify its only exceptions: the Legislature's authority to appropriate for the expenditure of funds, to confirm the Board's appointed members, and to set members' staggered terms.

The power of appropriations remains unchanged. As before, the power still enables the Legislature to expend article VII general revenue funds and also to expend the funds generated by each of its article III state agencies. The university system is, however, no longer a legislative state agency. Instead, the sovereign has replaced the Legislature's article III controls with the broad constitutional powers granted by the people to the article IX Board of Governors.

No legislative act therefore contrary to the constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principal, that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.

—ALEXANDER HAMILTON
The Federalist Papers, 1788

ARGUMENT

I. Standard of Review

The Parties agree that the standard of review for this matter is de novo.

II. Petitioners Agree that this Appeal can be Resolved by Answering the One Question Posed by the Legislature in its Answer Brief

The Legislature's Answer Brief has effectively framed the key issue for the resolution of the case. The first paragraph of the brief's Statement of the Case reads as follows: *"This appeal presents one question: Did the adoption of article IX, section 7, of the Florida Constitution* [A] *divest the Legislature of its authority* [B] *to appropriate for university tuition and fees, which* [C] *has historically been part of its power to appropriate revenue to maintain the university system?"* (emphasis added). Petitioners answer the question by addressing each of its three bracketed elements.

A. The Amendment Fully Divested the Legislature of its Article III Authority Over the University System.

The undeniable purpose of the Amendment was to replace the Legislature's statutory system of university governance with a constitutional system. The Amendment acted to divest the Legislature, *Beck v. Game & Fresh Water Fish Comm'n,* 33 So. 2d 594, 595 (Fla. 1948), of its article III power to legislate over universities, and vest that power, *State ex rel. Griffin v. Sullivan,* 30 So. 2d 919, 920 (Fla. 1947), in the constitutionally independent Board of Governors. *Advisory Op. to Atty. Gen. Re Local Trustees,* 819 So. 2d 725, 729 (Fla. 2002); *Caribbean Conservation Corp. v. Fla. Fish & Wildlife Conservation Comm'n,* 838 So. 2d 492, 497 (Fla. 2003).

The Legislature has attempted throughout this litigation to deny the constitutional entity a full transfer of power. Whether that denial has in fact occurred is resolved by consulting this Court's standard for determining whether "some" or "all" legislative power has been transferred to a constitutional entity. *Caribbean,* 838 So. 2d at 500-03.

The standard consists of a common sense examination of the plain language of the transfer. If it states that "the power" was transferred, that means all the power. *Caribbean*, 838 So. 2d at 502-03. On the other hand, if it just states that "power" has been transferred, that means some, not all, has been transferred. *Id.* In

this event, a second step comes into play whereby the court determines what was "constitutionally excepted" from the transfer. *Id.* at 501.

The plain language of the instant transfer empowers the Board of Governors to "operate, regulate, control, and be fully responsible for the management of the whole university system." (emphasis added). Applying the *Caribbean* standard demonstrates that all, not some, of the Legislature's article III power over universities was transferred to the Board of Governors. The only "constitutional exceptions" are those specified in the Amendment: the legislative power to appropriate for the expenditure of funds, to confirm the Board's appointed members, and to set members' staggered terms. *NAACP, Inc. v. Fla. Bd. of Regents,* 876 So. 2d 636, 640 (Fla. 1st DCA 2004).

The Amendment leaves nothing to chance. It explicitly delineates the separation of powers by describing both what was transferred and what was not transferred. It is therefore "self-executing," *NAACP*, 876 So. 2d at 639, which acts to place the transferred powers beyond the ability of the Legislature to modify them and "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).

B. The Legislature's Power of Appropriations is Unchanged by Amendment

Recognizing that the Amendment explicitly retained the power of appropriations for its use, the Legislature is here attempting to enlarge the power beyond its limits as a way of retaining authority for itself that was in fact transferred to the Board of Governors.

The enlarged power is said to include the "plenary" power to raise revenues as well as expend them. Ans. Br., pp. 8,10,12. This definition turns out to be contrary to the Legislature's own definition that pre-existed the litigation. The Legislature normally operates under the longstanding, universal definition that limits the power of appropriations to *expenditures* and provides no authority for raising revenue. § 216.011(1)(b) Fla. Stat. (2011). The definition the Legislature previously lived by is consistent with the Florida Constitution, Art. VII, § 1(c), this Court's case law, *Dept. of Education. v. Lewis*, 416 So. 2d 455, 459 (Fla. 1982), the "generally accepted view" across the country, 63C Am. Jur. 2d *Public Funds* § 33 (1997), as well as the plain language of the Amendment itself, which explicitly describes the power as involving "expenditures." Art. IX, § 7(d).

The dual nature of public university funding has been previously described in Petitioners' Initial Brief at pages 7 and 9. The funding consists of: 1) tuition and fees from article III revenue paid by the recipients of education services, and 2) the state subsidy from article VII general revenue paid by taxpayers.

Article III tuition and fees are the university system's version of a user fee. They are non-compulsory payments made by those benefiting from the service rendered, are designed to defray the cost of the entity's operations, and are paid by virtue of a voluntary contract. *Jacksonville Port Auth. v. Alamo Rent-A-Car, Inc.*, 600 So. 2d 1159, 1164-65 (Fla. 1st DCA 1992). Tuition and fees are not article VII taxes because they are not a "forced charge or imposition [that] operates whether we like it or not," and thereafter becomes a "general revenue source for the support of a sovereign government." *Id.* at 1162, 1164.

The Legislature's article III powers enable it to be the creator, operator, and terminator of its statutorily created state agencies. (The university system has, for example, felt the full range of those powers.) While the university system was still a state agency in 2001, and prior to the Amendment's effective date of January 7, 2003, tuition and fees were creatures of legislation --- section 240.235 of the Florida Statutes, to be exact. Simply recognizing what was historically legislated results in determining what wound up being transferred.

The Amendment acts as the charter for the public corporation created by the sovereign to operate its public universities. There is no stated intent for the powers of the public corporation to be any less than the powers of the state agency the corporation was tasked to replace. To the contrary, the purpose of the people in adopting the constitutional form of university governance was to, in their

judgment, make a change for the better. The opening paragraph of the Amendment explicitly states its purpose: to bring "excellence through teaching students, advancing research and providing public service for the benefit of Florida's citizens, their communities and economies." Art. IX, § 7(a), Fla. Const.

The people of Florida are somewhat unique in having reserved for themselves a direct voice for affecting law other than through the legislative process. In the instant case, the people acted by initiative to replace legislative control of universities with constitutional control. To withhold from the constitutional governance system the same control over tuition and fees that had been exercised by the statutory system the constitutional system was designed to replace, would: 1) substantially compromise the instructions handed down by the people for the independent Board to "govern," "operate," "regulate," "control," "manage," and be "fully responsible" for the "whole university system," and 2) seriously debilitate the Board of Governors. Perhaps the most cited case in the country concerning the legal effect of university constitutional governance is *State ex rel. Univ. of Minn. v. Chase*, 220 N.W. 951 (Minn. 1928). On the subject at hand, the Minnesota court has aptly stated that "[t]he right to so control University finances is the power to dictate academic policy and direct every institutional activity." *Id.* at 952.

The recognition of the Board's all-inclusive power of university governance does nothing to alter the Legislature's power of appropriations. The power to

appropriate still operates to expend article VII general revenue funds and still operates to expend the funds generated by each of the Legislature's article III state agencies. The fact that the revenues generated by the university system are now controlled by the constitutional entity and are no longer available for legislative appropriation does nothing to alter the power of appropriations itself, which remains intact.

C. History Cannot Become a Constitutional Power, but it May be Helpful for Interpreting Constitutional Provisions

The Legislature's Answer Brief contends that it possesses a "longstanding historic power to appropriate for tuition and fees." Ans. Br., p. 9. However, what the Legislature has given through its enactments, including "long-standing legislation," the people can take away through amendment to the constitution. *Fla. Hosp. Waterman, Inc. v. Buster,* 984 So. 2d 478, 494 (Fla. 2008). Moreover, the anticipation of the continuance of an existing law may not rise to a vested right. *Id.* at 490.

Other aspects of university system history were apparently more persuasive to the voters when it came time to consider an alternative to legislative control. As referenced in more detail in the Initial Brief on pages 3 and 4, the university system had been impacted by political turmoil for some sixty years leading up to the passage of the Amendment. The few years prior to the vote on the Amendment had been particularly disruptive and uncertain. After several unsuccessful attempts

to abolish the Board of Regents, the Legislature was, effective July 1, 2001, successful in doing away with the statutorily created Board that was solely focused on the university system. § 229.003(5)(a), Fla. Stat. (2001). On that date, university system governance was folded into a huge structure controlled by the legislatively created "Florida K-20 Education System." The K-20 System placed all of public education, beginning with pre-kindergarten and extending into the highest reaches of graduate university education, under one legislatively created board. § 229.0061, Fla. Stat. (2001).

The response of the people was swift and decisive. By a substantial margin, the voters extricated the university system from the control of elective politics and the K-20 System. In the judgment of the people, the university system would be better served by a transfer of its governance to a constitutionally independent citizen board that would be "fully responsible for the management of the whole system."

As illustrated by this case, history provides valuable perspective. When considering a similar circumstance in *Caribbean Conservation Corp. v. Fla. Fish & Wildlife Conservation Comm'n,* 838 So. 2d 492 (Fla. 2003), this Court began its analysis by recounting the "historic background" as a basis for applying the appropriate rules of constitutional construction: 1) an examination of the provision's explicit language, 2) the intent of the framers and voters, and 3) a

construction or interpretation that would fulfill the intent of the people, never to defeat it. *Caribbean,* 838 So. 2d at 501.

D. Answer to Question Posed by Legislature

Based upon Florida's seventy-year body of law concerning the transfer of legislative authority to a constitutionally independent entity, together with the rules of constitutional construction, the answer to the question posed in the Legislature's Answer Brief is as follows:

> **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 university system?"*
>
> **Answer:** *The Amendment acted to fully divest the Legislature of its article III legislative power over the state university system, including tuition and fees, which were creatures of legislation. The constitutional exceptions to the transfer to the Board of Governors were the Legislature's authority to appropriate for the expenditure of funds, to confirm the Board's appointed members, and to set members' staggered terms.*

Both the question and the answer are straightforward. The answer limits the power of appropriations to its actual authority to make expenditures, and benefits from historic perspective as it applies the rules of construction for its response.

III. The Following Concise Replies to the Collection of Subsidiary Arguments in the Legislature's Answer Brief Demonstrate that the Subsidiary Arguments Do Not Change the Outcome

A. Ans. Brief: Ejusdem Generis/Noscitur a Sociis (p. 18-19)

Reply: The explicit language of the Amendment states that the powers of the Board of Governors are not limited to the examples of Board activities mentioned in the Amendment. Art. IX, Sec. 7(d).

B. Ans. Brief: Framers' Intent is "Legally Irrelevant" (p. 8)

Reply: The rules of constitutional construction include framers' intent as an element to be considered when interpreting a constitutional transfer of legislative power to an independent entity. *Caribbean*, 838 So. 2d at 501.

C. Ans. Brief: Ballot Title and Summary were Inadequate (p. 4)

Reply: Ten years ago, the consequences of adopting the instant Amendment were fully presented, Opp. In. Br., p. 6; Pro. Ans. Br., p. 11, and were appreciated and understood by this Court at the ballot eligibility stage. *Advisory Op.,* 819 So. 2d at 729-31. This Court unanimously found: 1) the Amendment would create "a new independent" entity "akin" to the Fish and Wildlife Conservation Commission, 2) the ballot title and summary would not mislead the voters as to the Amendment's purpose, and 3) legal requirements had been met for voters to be able to cast an intelligent and informed ballot. *Id.*

D. Ans. Brief: Petitioners' Statement that Instant Amendment was Modeled after Amendment Proposed by 1978 Constitution Revision Commission is "Specious" (p. 26)

Reply: The instant Amendment was modeled, not after the 1978 Constitution Revision Commission's proposed amendment, but rather the version that was recommended to the Commission by its *Education Committee.* (The full text of the Education Committee Report is included in the Appendix to Petitioners' Initial Brief.) The Commission opted not to adopt the Committee's recommendation and instead placed its own version on the ballot, which was defeated. The framers of the instant Amendment preferred the language of the recommendation. It was a self-executing version that explicitly identified and separated the powers of both the Board and Legislature.

E. Ans. Brief: Constitutional Precedent from Other States is "Irrelevant" (pp. 9, 26-29)

Reply: This Court is not precluded from considering authorities from other states to determine whether such law might be helpful or persuasive. Sometimes the law can be useful. For example, the Education Committee of the 1978 Florida Constitution Revision Commission referenced *State ex rel. Univ. of Minn. v. Chase*, 220 N.W. 951 (Minn. 1928) in its Report. (In. Br., A. 13).

F. Ans. Brief: A Quoted Portion of the Oral Argument at the Ballot Eligibility Stage Demonstrates that the Power of the Board of Governors is Limited to Executive Power (pp. 5, 13-14, 17)

Reply: The Answer Brief at page 5 quotes a six-word snippet taken from a twenty minute oral argument at the ballot eligibility stage as the basis for contending that the Board of Governors possesses only executive powers. The snippet is taken out of context. The full context of Proponent's position was expressed, for example, in its Answer Brief which asserted that the "chief purpose" of the Amendment was to "replace the existing statutory system with a new constitutional system." Pro. Ans. Br. p. 11. The Proponent also contended in both its briefs and in the balance of the oral argument that the Florida Fish & Wildlife Conservation Commission cases constituted the controlling precedent.

This Court ruled unanimously with the proponents. The Court found that the Board of Governors' constitutional power to "operate, regulate, control, and be fully responsible for the management of the whole university system" would create "a new independent" entity "akin" to the Fish & Wildlife Conservation Commission with: 1) legislative responsibility, and 2) the duty of the Florida Board of Education (the legislatively created state agency then governing universities) which was located at the time in the executive branch. *Advisory Op.*, 819 So.2d at 729-30.

Nonetheless, the Answer Brief reaches back ten years to the quoted out of context six-word snippet to find what it considers to be binding precedent sufficient to preempt the unanimous ruling of this Court. Page 14 of the Answer Brief contains the Legislature's assertion that today's tuition and fees are received by the Board of Governors, not as the independent entity described in this Court's ruling, but rather as an executive branch agency subject to legislative appropriations. There is no credible basis for that conclusion.

G. Ans. Brief: Article IX, § 1(a) Providing for "Maintenance" of Higher Learning Authorizes Legislature to Raise Revenue by Setting Tuition and Fees (pp. 11, 14)

Reply: This Court examined the two constitutional provisions and found that article IX, section 1(a) "does not substantially affect" the Amendment. *Advisory Op.*, 819 So. 2d at 730.

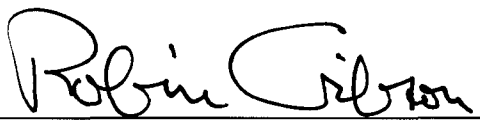
H. Ans. Brief: Legislature was Free to Deposit Tuition and Fee Trust Funds into General Revenue Funds and Thereby Control Tuition and Fees (Ans. Br., p. 21)

Reply: The Education and General Student and Other Fees Trust Fund was a creature of legislation, § 240.209(2)(e)7, Fla. Stat. (2001), and, as such, became part of the article III legislative authority transferred to the Board of Governors. Once transferred, the trust fund was no longer available to the Legislature for the exercise of its control.

CONCLUSION

The statutes on the books purporting to exercise legislative authority over universities, including the authority to control tuition and fees, are invalid and unconstitutional as violations of the separation of powers. Those statutes have been repealed by operation of constitutional law and should no longer be included among the operative Florida Statutes.

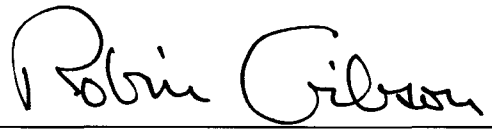
Respectfully submitted,



Robin Gibson, FBN 02849
Gibson Law Firm
299 East Stuart Avenue
Lake Wales, FL 33853
(863) 676-8584 (Office)
(863) 676-0548 (Fax)
r.gibson@gibsonlawfirm299.com
Attorney for Petitioners

CERTIFICATE OF SERVICE

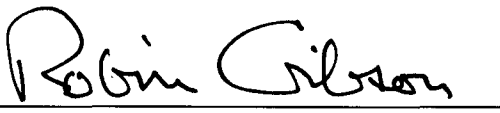
I HEREBY CERTIFY that the original and eight copies of Petitioners' Reply Brief was sent by Federal Express overnight delivery to the Clerk, with copy furnished to Daniel C. Brown, Esquire, Carlton Fields, P.A., by email to dbrown@carltonfields.com and by U.S. Mail to 215 South Monroe Street, Suite 500, Tallahassee, FL 32301 this 14th day of June, 2012.



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.



Robin Gibson, Esquire
Attorney for Petitioners