

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

ANDY FORD, BEVERLY SLOUGH,
JOSEPH JOYNER, CHRISTI MOSS,
RABBI MERRILL SHAPIRO, and
REVEREND HARRY PARROT, JR.,

Plaintiffs,

v.

CASE NO. 2008-CA-1905

KURT S. BROWNING, in his official
capacity as Florida Secretary of State,

Defendant.

**DEFENDANT'S MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AND CROSS-MOTION FOR SUMMARY JUDGMENT**

Pursuant to Rule 1.510, Florida Rules of Civil Procedure, Defendant, Kurt S. Browning, Secretary of State, State of Florida, moves this Court for summary final judgment in his favor, and submits this memorandum of law in support of his cross-motion and in opposition to Plaintiffs' motion for summary judgment. Defendant is entitled to summary judgment as a matter of law on the Plaintiffs' claims that the Taxation and Budget Reform Commission ("TBRC") exceeded its constitutional authority in proposing Ballot Initiatives 7 and 9 for voter consideration and that the ballot summary for Ballot Initiative 9 is defective. The purpose, language, structure, and history of article XI, section 6, which established the TBRC, demonstrate that the TBRC was well within its authority in proposing both amendments for the people's consideration, and its ballot summary for Ballot Initiative 9 fully complies with applicable law. The relief the Plaintiffs seek should be denied so that the people of Florida may decide for themselves whether the two proposals should become part of the state's constitution.

BACKGROUND

At issue are two proposed constitutional amendments that, if adopted by the people, would enable the legislature to continue programs that save taxpayers billions of dollars that otherwise would have to be included in the state's budget. The TBRC, after exhaustively reviewing the public education system including fiscal information from the Collins Center for Public Policy¹ and other non-partisan sources, proposed these amendments to enable private entities to continue providing necessary educational programs that might otherwise be deemed invalid under judicial interpretations of article I, section 3, and article IX, section 1, of the Florida Constitution. If enacted, the proposed amendments would protect the continuity of such programs, which have saved the state more than \$4.4 billion and would cost the state more than \$4.1 billion dollars to replicate.

Plaintiffs ask this Court to strike the proposals from the ballot, claiming they have "nothing to do" with taxation, the state budgetary process, or other areas in which the TBRC has constitutional authority. [PM 1]² The constitutional language establishing the TBRC, along with its purpose, structure and history, reflect that the people intended that the TBRC have broad authority to propose these types of amendments, particularly as to education, which comprises one-third of the State's annual budget. Proposed amendments to the constitution that involve budgetary savings of this magnitude clearly and directly implicate the state's budget and necessarily involve taxation, the primary source of state revenue.

¹ See Fla. TBRC Publ. Educ. Report, Gov't Servs. Comm. (Nov. 29, 2007) [hereinafter "TBRC Educ. Rep."], available at <http://www.floridatbrc.org/pdf/GSCEducationReport08.pdf> (see Tab 1). The Collins Center for Public Policy, established in 1988, is a private, independent, non-partisan organization. See Collins Center for Public Policy, Inc., <http://www.collinscenter.org> (see Tab 2).

² By the parties' agreement, the Plaintiffs' motion and memorandum in support of a temporary injunction is deemed their motion for summary judgment, and is cited as [PM #] (# = page no.).

The History of the Creation of the TBRC

In 1988, Florida's electorate voted to adopt article XI, section 6 of the Florida Constitution, which created the TBRC "to review the revenue needs and expenditure processes of the state, recommend statutory changes, and propose revisions to the constitution."³ The TBRC was modeled after the Constitution Revision Commission ("CRC"), which in 1968 was the first commission in the country given the power to propose amendments directly to the people. Talbot D'Alemberte, The Florida Constitution 147 (1991).

The proposal to establish the TBRC was placed on the ballot via a joint resolution of the Florida Legislature. *See* Fla. HJR 1616 (1988). The Senate and House initially offered different resolutions. Under the Senate's proposal, the TBRC's authority to propose amendments was narrow and limited to taxation issues under article VII of the constitution. *See* Fla. SJR 360 (1988). That proposal was rejected in favor of the House's more expansive version, which gave the TBRC "jurisdiction over matters pertaining to taxation, budget, and governmental expenditures."⁴

Article XI, section 6 transferred the authority for tax, budget, and expenditure-related matters from the existing Constitution Revision Commission ("CRC"), placing it with the TBRC to propose constitutional amendments affecting these matters "in any part" of the constitution.

³ *See* Smith v. Am. Airlines, 606 So. 2d 618, 619 (Fla. 1992); Talbot D'Alemberte, The Florida Constitution 152 (1991) (noting the TBRC's "broad charge").

⁴ Fla. HJR 1616 (1988); Memo. from Donna Blanton to Steve Uhlfelder, TBRC Commissioner, at 2 (July 31, 1991) [hereinafter "Blanton Memo"] (available at Fla. Dep't of State, Div. of Archives, ser. 1470, carton 6, Tallahassee, Fla.) (Tab 3); Fla. H.R., tape recording of proceedings (May 31, 1988) (available at Fla. Dep't of State, Div. of Archives, ser. 38, box 94, Tallahassee, Fla.).

Fla. HJR 1616 (1988).⁵ The TBRC would consist of 25 members appointed by the Governor (11), Speaker of the House of Representatives (7), and the Senate President (7). Art. XI, § 6(a), Fla. Const. Four non-voting members of the legislature were included. *Id.*

The TBRC's Authority

Section 6(d) of article XI broadly sets forth the TBRC's scope of authority for examining, reviewing, and making determinations about a broad range of matters:

(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.

Nothing in section 6(d) excludes consideration of these matters in the public education context.

Section 6(e) provides that the TBRC must hold public hearings as needed, issue a report, and make proposals for statutory and constitutional revisions:

(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.

⁵ The CRC's original plenary authority to propose amendments on any topic was restored via a 1996 constitutional amendment; the scope of the TBRC's broad authority was left unchanged. *See infra*.

Art. XI, § 6(e), Fla. Const. The TBRC may propose its recommended changes related to the state's taxation or budgetary "laws" and may propose a revision to "any part" of the constitution "dealing with taxation or the state budgetary process."

The TBRC's Rules

The TBRC, both in 1991 and 2007, adopted rules defining the concepts of "taxation" and the "state budgetary process" broadly to meet its constitutional purpose and mandate.⁶ Each TBRC interpreted its authority under section 6(d) and 6(e) in a pragmatic and reasonable way to fulfill its ultimate purpose, determining that its "primary role ... shall be to recommend statutory and constitutional changes." *Id.*

The TBRC's Initial Proceedings: 1991-92

The TBRC, which first convened in 1991, concerned itself with expenditures of public funds generally and with education expenditures specifically. The four constitutional amendments it ultimately proposed dealt mostly with taxation matters, but one involved a spending restriction to limit the use of a one-cent local sales tax to "the purpose of funding local government services."⁷ A proposal related to education spending and the lottery received a favorable 20-4 vote, but failed due to the TBRC's existing voting requirements.⁸ Moreover, the TBRC considered other education amendment proposals very similar to those in the instant case,

⁶ See TBRC Rule 1.005 (as amended Feb. 26, 2008); TBRC Rule 1.005 (as amended Oct. 8, 1991) (Tab 4).

⁷ See *Authorizing Municipalities and Counties To Levy A One-Cent Sales Tax With Local Voter Approval* (1992) (proposed art. VII, § 9, Fla. Const.) available at <http://election.dos.state.fl.us/initiatives/fulltext/pdf/12-2.pdf>. In the 1992 general election, two of the four amendment proposals passed, one failed, and one was invalidated prior to the election due to a ballot title and summary defect. See *Smith v. Am. Airlines*, 606 So. 2d 618 (Fla. 1992).

⁸ See TBRC Meeting Proceedings for Apr. 22, 1992, Minutes, at 4 (the vote failed because a majority of the House's appointees did not support it) (Tab 5).

including an education choice-related proposal and a proposal to limit administrative spending.
See **Tab 6 & 7.**

Modifications to the TBRC and CRC in 1996 & 1998

Modifications to the TBRC and CRC were made in 1996 and 1998 to address concerns about their authority and procedures. In 1996, the CRC's plenary authority to propose constitutional amendments on any topic was restored. The concern that caused the change was that the TBRC's broad authority over taxation and budget matters might potentially "neuter" the CRC's authority to propose amendments.⁹ Specifically, the concern was that the CRC might propose a matter that incidentally affected taxation and budget matters thereby subjecting it to claims of exceeding its authority.¹⁰ As a consequence, the CRC's full authority was restored; the scope of the TBRC's broad authority, however, was left unchanged.

In 1998, article XI, section 6 was amended due to concerns that the TBRC's unique voting requirements were unworkable. The initial requirement (two-thirds vote of the full commission *and* a majority vote of the members of each appointing authority (Governor, Senate, and House)) was replaced with only the former. Section 6 was also amended to provide that the TBRC would convene every 20 years instead of every 10 years, beginning in 2007. Either the CRC or TBRC now meets every 10 years on a staggered basis.

The TBRC's Proceedings: 2007-08

On March 16, 2007, the TBRC convened for its second time. During the thirteen months of public meetings, it exhaustively studied the state's fiscal situation and needs, received input

⁹ Give Constitution Meaning with Amendment to Fix 'Glitches,' Ft. L. Sun-Sent., Apr. 28, 1996, at 4G (**Tab 8**).

¹⁰ William A. Buzzett & Deborah K. Kearney, Commentary, Fla. SJR 210 (1996), Fla. Stat. Ann., Art. XI, § 2, Fla. Const. (West) (**Tab 9**) (hereinafter "Buzzett & Kearney, Art. XI, § 2").

from experts, considered dozens of proposals to amend the Florida statutes or constitution, and issued numerous detailed reports. For example, the Government Services Committee issued substantial reports in six major budget-related areas: the Courts System, Public Education, Health and Aging, Public Safety and Corrections, Transportation, and Water Policy.¹¹ The Public Education Report alone exceeds 100 pages, incorporating testimony from numerous experts and education analysts, none of which were religious groups.¹²

The TBRC passed seven proposed constitutional amendments that were presented to the Secretary of State for placement on the November 2008 general election ballot. TBRC Ballot Initiatives 3-6 and 8 (as designated by the Secretary of State) mainly address taxation issues: tax assessments, tax exemptions, eliminating certain taxes, increasing certain tax rates, and lowering millage rates. One addresses taxation and the funding of education programs.¹³

Ballot Initiatives 7 and 9

Ballot Initiatives 7 and 9 address the TBRC's finding that limited public-private programs "are an efficient way to use Florida tax dollars and to provide *statewide* tax savings for Floridians." *Id.* at 18 (*see* Tab 1). They arise due to uncertainty created by the decisions of the Florida Supreme Court and the First District in the Bush v. Holmes litigation, judicial precedents that conceivably could be used to invalidate many existing state programs and thereby

¹¹ See TBRC Reports, available at <http://www.floridatbrc.org/reports08.php>.

¹² TBRC Educ. Report at 2-3 (Tab 1).

¹³ Ballot Initiative 5 proposes the replacement of the state-required school property tax with revenue from a variety of funding options, including an increased sales tax and elimination of certain sales tax exemptions.

dramatically increase the state's fiscal obligations.¹⁴ The TBRC's Public Education Report, which included detailed information including that of the Collins Center for Public Policy, stated that six of Florida's innovative state programs had saved Florida's taxpayers more than \$4.4 billion and that if "the [Bush v. Holmes] decision were applied to the Corporate Tax Credit Scholarship Program, the McKay Scholarship Program, and the Voluntary Pre-K program, the cost to Florida taxpayers might reach an additional \$4.1 billion dollars in additional operating and capital costs."¹⁵

Ballot Initiative 7

Ballot Initiative 7 directly addresses the limitation on governmental expenditures in article I, section 3, which states: "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." Art. I, § 3, Fla. Const. The First District interpreted article I, section 3 to invalidate Florida's Opportunity Scholarship Program. Holmes, 886 So. 2d at 366. Ballot Initiative 7 removes this limitation, adding a new sentence stating: "An individual or entity may not be barred from participating in any public program because of religion."¹⁶ If adopted, these changes would align Florida law with federal law, which allows governmental procurement of secular services from religiously-affiliated

¹⁴ In Bush v. Holmes, 886 So. 2d 340 (Fla. 1st DCA 2004), the court interpreted article I, section 3 to prohibit the state from providing funds to sectarian and non-sectarian schools. On appeal, the Florida Supreme Court relied upon the education clause in article IX, section 1 to prevent the state from funding non-governmental schools; it did not "approve or disapprove" the First District's interpretation of article I, section 3. Bush v. Holmes, 919 So. 2d 392, 413 (Fla. 2006).

¹⁵ See TBRC Educ. Report (see **Tabs 1 & 2**); see also Fla. TBRC, CS/CP 40 Final Staff Analysis 1, 7-9 (Mar. 19, 2008) (discussing risk of Holmes' applying to existing education programs) (**Tab 10**).

¹⁶ See TBRC, CS/CP 20 Staff Analysis and Impact Statement 1 (Mar. 26, 2008) (**Tab 11**).

entities. See Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (school choice program does not violate federal religion clauses).

Ballot Initiative 9

Ballot Initiative 9 combines two substantive amendments to article IX of the Florida Constitution involving education expenditures. First, it adds a new section 8, requiring that 65 percent of a school district's education funds be spent on classroom instruction:

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.

Second, it amends the article IX, section 1(a) spending limitation that the Florida Supreme Court relied upon to invalidate a state scholarship program that allowed students to choose a school run by a private entity. Amended article IX, section 1(a) would read:

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 and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require. Nothing in this subsection creates an entitlement to a publicly-financed private program.

The TBRC prepared a ballot title and summary (*see* Section II below) for Ballot Initiative 9. Ballot Initiatives 7 and 9 were transmitted to the Secretary of State on April 28, 2008. On June 13, 2008, Plaintiffs filed this action to prevent the initiatives' placement on the general election ballot.

STANDARD OF REVIEW

Plaintiffs bear a substantial burden to remove a proposed constitutional amendment from the voters' consideration based on the alleged unconstitutional actions of the TBRC or the challenged ballot title. The Florida Supreme Court long ago explained the amendment process to be "the most sanctified area in which a court can exercise power." Pope v. Gray, 104 So. 2d 841, 842 (Fla. 1958). As the Court stated, "[s]overeignty resides in the people and the electors have a right to approve or reject a proposed amendment to the organic law of this State, limited only by those instances where there is an entire failure to comply with a plain and essential requirement of the organic law." Id. Courts must act with "extreme care, caution, and restraint" before removing a constitutional amendment from the vote of the people. Advisory Op. to the Att'y Gen. re: Fla. Marriage Protection Amendment, 926 So. 2d 1229, 1233 (Fla. 2006) (quoting Askew v. Firestone, 421 So. 2d 151, 156 (Fla. 1982)).

Given this "extreme" degree of "care, caution, and restraint," judicial review is extremely deferential. If "any reasonable theory" exists for approving an amendment for ballot placement, it should be upheld. Armstrong v. Harris, 773 So. 2d 7, 14 (Fla. 2000) (quoting Gray v. Golden, 89 So. 2d 785, 790 (Fla. 1956)); *see also* Am. Airlines, 606 So. 2d at 621 (noting reluctance to remove a TBRC-proposed amendment "from a vote of the public"). Florida courts will not interfere with the amendment process "unless the laws governing the process have been 'clearly and conclusively' violated." Advisory Op. to the Att'y Gen. re: Right to Treatment & Rehab. For Non-Violent Drug Offenses, 818 So. 2d 491, 498-99 (Fla. 2002).

This burden is heightened due to the TBRC's extremely limited window for exercising its broad authority to propose amendments (once every 20 years and not again until 2027), the

presumption that the TBRC has acted within its authority,¹⁷ and the deference due its own determination of its authority.¹⁸ This burden is justifiably the most stringent possible given that the TBRC has no power to change the constitution or impose or change organic law; instead its authority only extends to proposing amendments for consideration by the people of Florida, who may or may not vote to accept them. As the Florida Supreme Court stated over fifty years ago:

[S]overeignty resides in the people. It is their Constitution that we are construing. They have a right to change, abrogate or modify it in any manner they see fit so long as they keep within the confines of the Federal Constitution. The legislature which approved and submitted the proposed amendment took the same oath to protect and defend the Constitution that we did and our first duty is to uphold their action if there is any reasonable theory under which it can be done. This is the first rule we are required to observe when considering acts of the legislature and it is even more impelling when considering a proposed constitutional amendment which goes to the people for their approval or disapproval. Changes in government such as proposed here are provoked in the interest of economy and efficiency, they necessarily contemplate the abolition of some offices, boards and agencies and the combination of others, but this is well within the power of the electorate.

Gray, 89 So. 2d at 790 (emphasis added). The highlighted language emphasizes the heightened burden and judicial scrutiny that is required in this case. The ultimate goal and central purpose of the TBRC, for which the people created it, was to present broad and comprehensive proposals upon which the people could vote. For this reason, to the extent any doubt about the TBRC's jurisdiction exists, it should be resolved in favor of the constitutional exercise of its authority.

¹⁷ See Florida Interexchange Carriers Ass'n v. Beard, 624 So. 2d 248, 250 (Fla. 1993) (Public Service Commission presumed to act within its authority unless shown to the contrary).

¹⁸ See P.W. Ventures, Inc. v. Nichols, 533 So. 2d 281, 283 (Fla. 1988) (an agency's interpretation of its jurisdiction comes within "the well established principle that the contemporaneous construction of a statute by the agency charged with its enforcement and interpretation is entitled to great weight"); Pershing Indus., Inc. v. Dep't of Banking & Fin., 591 So. 2d 991, 993 (Fla. 1st DCA 1991) ("If an agency's interpretation is one of several permissible interpretations, it must be upheld despite the existence of reasonable alternatives.").

LEGAL ARGUMENT¹⁹

I. Ballot Initiatives 7 And 9 Are Within The TBRC's Authority.

The purpose and plain language of article XI, section 6 supports the TBRC's exercise of its authority to propose constitutional amendments to the "no aid" clause (Ballot Initiative 7) and the education clause (Ballot Initiative 9). Principles of constitutional interpretation support the TBRC's exercise of its authority. Indeed, the TBRC's current and past interpretations of its authority are entitled to deference and support its actions here. Further, the history of the TBRC and the CRC support a broad reading of the TBRC's authority. Finally, the 65 percent provision is well within the TBRC's authority.

A. The purpose and plain language of article XI, section 6 authorizes the TBRC to propose Ballot Initiatives 7 & 9.

The purpose and plain language of article XI, sections 6 support the TBRC's authority to propose Ballot Initiatives 7 and 9 to the voters. The importance of determining the *purpose* of the TBRC is both fundamental and determinative. As the Fourth District recently noted:

In interpreting constitutional provisions, as distinguished from statutes, we consider the object or purpose to be accomplished by the provision, the prior state of the law, including the origin of the provision, as well as contemporaneous and practical considerations. Comments by the Constitution Revision Commission, as the author of the provision, as to the meaning of text are especially important.

City of Ft. Lauderdale v. Crowder, 983 So. 2d 37, 39 n.2 (Fla. 4th DCA 2008) (emphasis added).

As the TBRC's own title suggests,²⁰ it is the constitutional body with broad authority to examine and propose reforms in matters related to the state's monies (i.e., taxation and budget reform).

The broad purpose to be accomplished, the history of the TBRC's creation, the language of

¹⁹ Defendant adopts the Intervenor's arguments to the extent not inconsistent with this submission.

²⁰ Florida Dep't of Rev. v. Piccadilly Cafeterias, Inc., 128 S. Ct. 2326, 2336 (2008) (noting that "titles and section headings are tools available for the resolution of a doubt about the meaning of a statute") (citation omitted).

section 6 read together, other contemporaneous and practical matters, and commentary of the TBRC itself must each be considered; all support the TBRC's action.

The obvious purpose of the TBRC is that its work efforts under section 6(d) are to be transformed into meaningful and comprehensive proposed reforms under section 6(e), which provides that the TBRC is to report on its findings, make recommended "statutory changes related to the taxation or budgetary laws of the state," and propose "a revision of this constitution or any part of it dealing with taxation or the state budgetary process." Sections 6(d) and 6(e) must be read together in conjunction with the TBRC's purpose of broad and comprehensive tax and budget reform. Indeed, the ballot summary of the 1988 proposal to establish the TBRC told voters that the TBRC's purpose was to "review matters relating to state and local taxation and the budgetary process" and to "submit proposed constitutional changes to the voters."²¹

Moreover, nothing in section 6(d) precludes the TBRC from exercising these broad responsibilities as they apply to education (one-third of the state's budget)²² or the provision of educational services by private entities. Rather, the TBRC's authority broadly encompasses any substantive area that involves tax or budget matters.

Given the TBRC's purpose and the language of section 6, Plaintiffs take an unjustifiably constricted view of the TBRC's authority to propose constitutional revisions. They ignore the TBRC's broad overall purpose and urge a cramped interpretation of a portion of section 6(e)'s language, which provides that the TBRC may propose a constitutional revision to any part of the constitution that deals with "taxation or the state budgetary process." Rather than viewing this

²¹ Taxation And Budget Reform Commission (1988) (proposed art. XI, § 6, Fla. Const.), available at <http://election.dos.state.fl.us/initiatives/initdetail.asp?account=10&seqnum=51>.

²² See Governor Charlie Crist, Policy and Budget Recommendations, Fiscal Year 2008-09, at 2, available at <http://www.thepeoplesbudget.state.fl.us/handouts.pdf>.

broad phrase as complementing the TBRC's broad charge in section 6(d), they characterize this authority as "narrow" and claim (without any citation of authority) that Ballot Initiatives 7 and 9 exceed this authority. [PM 10] They fail to explain how this narrow view can be squared with the language of section 6(d), which explicitly contemplates that the TBRC may review "constitutional limitations on taxation and expenditures at the state and local level." They also mischaracterize Ballot Initiatives 7 and 9 as involving only "religious liberty" and "separation of church and state" matters, making it sound as if these proposals have no foundation under the TBRC's broad tax and budget reform authority. [PM 10]

It is a fundamental principle of constitutional interpretation that sections 6(d) and 6(e) must be read together and harmonized in determining the scope of the TBRC's authority to propose amendments. See Physicians Healthcare Plans Inc. v. Pfeifler, 846 So. 2d 1129, 1134 (Fla. 2003) ("constitutional provisions must be read in *pari materia* 'to form [a] congruous whole so as to not render any language superfluous'" (citation omitted). They may not be interpreted in a way that would render either's provisions superfluous or unnecessary. Hechtman v. Nations Title Ins. of New York, 840 So. 2d 993, 996 (Fla. 2003). Courts should follow the plain meaning of a statute's text except when to do so leads to an absurd result. Maddox v. State, 923 So. 2d 442 (Fla. 2006).

Plaintiffs' cramped interpretation violates all of these fundamental canons of construction. Read together, 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). To construe section 6(e) narrowly, in the face of section 6(d)'s breadth, would lead to illogical results and render portions of section 6(d) superfluous. For example, it would be illogical for the TBRC to have the authority in section 6(d) to "examine *constitutional*

limitations on taxation and expenditures at the state and local level,” determine that a constitutional limitation should be revised, but be prevented from proposing an amendment under Plaintiffs’ unduly restrictive view of section 6(e). It is illogical for the TBRC to have broad powers in section 6(d) to study matters for constitutional change, but be powerless to propose them under an indefensibly narrow reading of the phrase “taxation or the state budgetary process.” Section 6(d) is rendered pointless and superfluous under Plaintiffs’ construction of section 6(e). The best evidence of the intended scope of section 6(e) is the scope of section 6(d).²³

Moreover, Plaintiffs’ “plain text” argument for invalidating the TBRC’s proposals is wholly conclusory. They claim that the phrase “budgetary laws” in section 6(e) regarding recommended statutory changes is *broader* than the term “budgetary process” in section 6(e) regarding proposed constitutional revisions. [PM 12]. Plaintiffs fail to explain their conclusion. This distinction in section 6(e)’s language, however, is easily explained. The phrase “budgetary laws” is merely shorthand for the statutory “laws” that the legislature enacts; the legislature may enact “laws” but they cannot enact constitutional provisions. The most natural reading of section 6(e), given neighboring section 6(d)’s breadth, is that the TBRC has authority to propose revisions to “budgetary laws” (i.e., laws enacted by the legislature).

Similarly, the most natural reading of the phrase “budgetary process” is a broad one that enables the TBRC to propose revisions to any portion of the constitution touching upon the state budgetary process generally. Contrary to Plaintiffs’ claims, it is implausible that the phrase

²³ Indeed, it would be odd to accept Plaintiffs’ interpretation of the phrase “state budgetary process” when they cannot define it. The phrase “state budgetary process” appears nowhere else in the Florida constitution, the Florida Statutes, or the caselaw of the State of Florida other than in section 6. That it is used only in section 6, and lacks a specific identifiable definition in the constitution, statutes, or caselaw, supports that it is most naturally read in context in a broad (rather than restrictive way) to fulfill the TBRC’s purpose of proposing comprehensive tax and budget reform.

“budgetary process” was meant to constrict the TBRC’s authority. Their claim that the word “laws” is broad and the word “process” is narrow ignores the context and meaning of these terms in section 6(e). It is akin to arguing “due process of law” to be a narrow concept when, of course, courts have given this constitutional language a broad substantive meaning. Plaintiffs’ reading of this phrase places “greater strain” on the constitutional text; of the two views presented, Plaintiffs’ clearly is less plausible. Piccadilly Cafeterias, Inc., 128 S. Ct. at 2332-33.

Beyond the fact that the phrase “budgetary process” must be given a broad meaning to preserve the viability of the language in section 6(d), the natural meanings of “budget” and “process” are exceptionally broad in this context. The primary definitions of the word “budget” includes “[a]n itemized summary of probable expenses and income for a given period” and “a systematic plan for meeting expenses in a given period....”²⁴ The primary definitions of the word “process” include a “system of operations in the production of something” and a “series of actions, changes, or functions that bring about an end result.”²⁵ In the context of state governmental operations, the concept of a “budgetary process” must necessarily account for how the state raises revenue, how much revenue is being 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. Florida, one of the nation’s most populous states, has a budgetary process that is complex and far-reaching, touching upon many portions of the constitution, thereby undermining Plaintiffs’ narrow reading of section 6.

Finally, Plaintiffs’ footnoted argument that the TBRC lacks authority to examine or propose “*substantive* constitutional limitations on types of expenditures that the state is

²⁴ The American Heritage Dictionary 214 (2d College Ed. 1985).

²⁵ Id. at 987.

prohibited from making” is unfounded. [PM 12-13 n.6 (emphasis added)] Their argument that section 6(d) is largely concerned with “structural” matters is likewise indefensible. Nothing in section 6 supports Plaintiffs’ distinction between “substantive” and “non-substantive” revisions to the constitution or their claim that only “structural” matters may be acted upon. And the notion that the TBRC – which is charged with “examin[ing] constitutional limitations on taxation and expenditures at the state and local level” – cannot propose a revision to an existing limitation on expenditures in the Florida constitution is both circular and illogical.

In the final analysis, the most natural and reasonable reading of section 6(d) is that it sets the scope of the TBRC’s authority broadly to examine tax and budget issues, while section 6(e) empowers it to act upon the results of its examination, including, where it deems appropriate, to propose constitutional revisions. Plaintiffs’ restrictive and insupportable view of the phrase “state budgetary process” would thwart the central purpose of the TBRC, which is to propose statutory and constitutional reforms for the legislature’s and people’s consideration, respectively.

B. The TBRC’s rules and prior actions support a broad interpretation of its authority to propose constitutional amendments on tax and budget matters.

The TBRC’s interpretation of its own authority is entitled to deference unless its interpretation is unreasonable or contrary to the plain meaning and purpose of article XI, section 6. Nichols, 533 So. 2d at 283. The presumption is that an agency’s interpretation of its own authority is correct. Id. Indeed, Plaintiffs correctly note that the TBRC’s “understanding ... of its own mandate is particularly important because of the well-established principle that courts should not ‘depart from the *contemporaneous* construction of a statute by a state agency ... unless the construction is clearly ... erroneous.’” [PM 15 (citing Level 3 Comme’ns, LLC v. Jacobs, 841 So. 2d 447, 450 (Fla. 2003) (emphasis supplied)]

Plaintiffs fail to note, however, that the TBRCs in both 1991 and 2007 explicitly adopted rules that interpreted their authority to propose constitutional amendments by defining the terms “taxation” and “state budgetary process.” These definitions, which are entirely reasonable, are entitled to deference and presumed correct. The rule, in relevant part, states:

1.005 – Functions and Duties.

The primary role of the Commission shall be to recommend statutory *and constitutional changes dealing with taxation and the state budgetary process*. The “state budgetary process” means 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*. “Taxation” means all public revenues and revenue raising laws at every level of government in the state.²⁶

Under its own rules, which are accorded deference, Ballot Initiatives 7 and 9 easily fall within these highlighted definitions.

In addition, much like the TBRC in 2007, the TBRC in 1991 carefully considered an education-related spending amendment proposal that combined an express requirement that lottery funds be spent on education with a requirement that local districts provide school choice options. This proposal would have amended article X, section 15, an article not listed in the interim report upon which Plaintiffs rely.²⁷ Although the educational choice element of the proposal ultimately was dropped, the TBRC overwhelmingly (20-4) supported the lottery-

²⁶ TBRC Rule 1.005 (as amended Oct. 8, 1991) (emphasis added); *see also* TBRC Rule 1.005 (as amended Feb. 26, 2008) (adopting the same definitions) (Tab 4).

²⁷ *See* TBRC, Gov’t Services/Procedures Structures Joint Comm. Meeting Proceedings for Aug. 6, 1991, Minutes, at 3 (Tab 6).

education spending proposal in 1991.²⁸ Moreover, much like the 65 percent proposal in Ballot Initiative 9, the TBRC in 1991 considered, but ultimately failed to pass, an amendment proposal to limit education spending on administration. *See* Tab 7.

Finally, in addition to adopting the same definitions of “taxation” and “state budgetary process,” both TBRCs received legal advice on the meaning of these terms. In one of its early meetings, the General Counsel for the TBRC in 2007 circulated a memorandum highlighting those portions of the Florida Constitution within the TBRC’s purview; article 1, section 3 and article IX, section 1 were among those highlighted.²⁹

In contrast, Plaintiffs’ argument relies exclusively on the first TBRC’s *interim* report that listed sections of the Florida Constitution under its purview.³⁰ This interim report was issued early in the process and did not claim to be an exhaustive list of sections of the constitution within the TBRC’s authority. *Id.* (“the following sections are covered by the Reform Commission”). Indeed, the first TBRC did not follow the suggestion in this interim report; it proposed a revision to article IV, section 1, a section *not* enumerated in the interim report. Two other proposals involved entirely new sections, also not enumerated in the interim report.

Furthermore, the first TBRC explicitly enunciated a broader interpretation of its scope of authority than that contained in its interim report, stating that its “purpose ... is to examine and

²⁸ *See* TBRC Meeting Proceedings for Apr. 22, 1992, Minutes, at 4 (it failed because it did not receive majority support from the House TBRC appointees) (Tab 5).

²⁹ *See* Cibula Handout, TBRC Gov’t Proc. and Structures Comm. Meeting June 26, 2007 (Tab 12), available at <http://www.floridatbrc.org/reports.php>; *see also* Blanton Memo. (Tab 3) (affirming the 1991 TBRC’s authority to propose a constitutional amendment involving school choice).

³⁰ *See* [PM 15 (citing TBRC, A Program for Reform of Florida Government at 15 (Feb. 1991))].

make recommendations on questions of taxation and spending.”³¹ It more fully defined its role as follows: “The Commission has been given ten constitutional responsibilities. They encompass the broadest possible meaning of financial policy, both at the state and local level. They involve procedural, institutional and substantive considerations.”³² Not only did the first TBRC broadly interpret its scope, but it expressly stated that it would “review the funding formulas for public education (K-12).”³³ Thus, both the 1991 and 2007 TBRCs clearly understood their constitutional mandate to encompass much more than Plaintiffs now assert, including education spending-related amendment proposals.

C. The constitutional history of the TBRC and CRC demonstrate the TBRC’s broad authority.

The history of the TBRC and its companion commission, the CRC, supports a broad construction of the TBRC’s authority. The constitutional amendment that created the TBRC was proposed by joint resolution of the legislature after determining that a constitutionally based commission would be better positioned to bring necessary fiscal reform to Florida.³⁴ The joint resolution was based on the broader House version, which did not limit the TBRC to proposing tax amendments:

Proposed amendment to s. 6 Art. XI, State Const. - Provides for the establishment of a taxation and budget reform commission ... to review the tax structure and budgetary process of the State and [sic] well as its revenue needs, *expenditures*,

³¹ *Id.* at 5 (Tab 13).

³² *Id.* at 21.

³³ *Id.* at 38; *see also* Fla. TBRC, Florida’s Fiscal Future Balancing Needs & Taxes (1991) at 45 (“Fla. Fiscal Future”), available at <http://www.floridatbrc.org/pdf/90-92FloridasFiscalFuture.pdf>. (discussing the TBRC’s intention to propose an education spending-related amendment) (Tab 14).

³⁴ William A. Buzzett and Deborah K. Kearney, Commentary, Fla. HJR 1616 (1988), Fla. Stat. Ann., Art. XI, § 6, Fla. Const. (West) (Tab 16) (hereinafter “Buzzett & Kearney, Art. XI, § 6”).

productivity, and efficiency. The commission may hold public hearings and recommend proposals for constitutional or statutory changes.³⁵

The sponsor of the proposal broadly summarized the TBRC's "jurisdiction over matters pertaining to taxation, budget, and governmental expenditures."³⁶

Plaintiffs' contrary argument that the TBRC has had a very narrow constitutional charge from its inception is grounded in 1990 Miami Herald editorials and a limited CRC discussion in 1998. [PM 13] The CRC discussion adds nothing to the legislative history detailed above. They are merely comments that generally discuss the TBRC's authority to review "tax structure," "budget structure," the "budget process," and even "taxing, revenue, and spending."³⁷ They have no legal or persuasive force, and do not contradict the legislative history of the amendment creating the TBRC, or the TBRC's scope of authority to propose constitutional amendments, which shows that the sponsors intended a broad scope.

More importantly, the history of the relationship between the TBRC and CRC conclusively shows that the TBRC's authority to propose constitutional revisions is broad rather than narrow. When the TBRC was created, it was given the CRC's authority on tax and budget reform matters. As the commentary to article XI, section 2 states:

In 1988, section 2(c) was amended to remove matters relating to taxation or the state budgetary process from the jurisdiction of the constitution revision commission and place them under the purview of the newly created taxation and budget reform commission. The amendment to section 2(c) was part of a larger amendment creating an independent tax and budget reform commission (Article XI, section 6). The purpose of the new commission was to provide a method to

³⁵ Fla. H. Comm. on Fin. and Tax., HJR 1616 (1988) Final Staff Analysis & Econ. Impact Statement 2 (June 21, 1988) (Tab 15).

³⁶ Fla. H.R. 1616, tape recording of proceedings (May 31, 1988) (available at Fla. Dep't of State, Div. of Archives, ser. 38, box 94, Tallahassee, Fla.).

³⁷ Fla. Constitution Revision Commission, transcript of proceedings at 253: 5-10 (Feb. 24, 1998).

*accomplish tax reform in a comprehensive and complete manner.*³⁸

The broad authority granted to the TBRC, however, presented possible difficulties for the CRC, whose actions could easily have tax or budget implications.³⁹ To avoid this potential conflict, the CRC's original plenary jurisdiction was restored in 1996:

Sections 2(a) and (c) were amended by restoring the jurisdiction of the constitution revision commission to all matters relating to Florida's constitution, including tax and budget issues. Just eight years earlier, an amendment removed the review of tax and budget issues from the jurisdiction of the constitution revision commission and placed it with the taxation and budget reform commission. *Subsequently, many felt that this amendment compromised the duties of the constitution revision commission because the review of matters within the constitution may inadvertently have budget or taxation ramifications. As a result of this amendment, the constitution revision commission and the taxation and budget reform commission now share jurisdiction over tax and budget matters.*⁴⁰

The highlighted language makes clear that the TBRC's jurisdiction was considered so broad that the CRC required an amendment to restore its original jurisdiction so that it could carry out its mission. All the while the TBRC's broad jurisdiction over tax and budget matters has remained constant. This fact undermines decisively the Plaintiffs' contention that the language of section 6 must be narrowly construed and given the restrictive reading they advance.

D. The claim that Ballot Initiatives 7 and 9 are invalid because they implicate "substantive" portions of the constitution involving religious liberty, separation of church and state, and public education is misguided.

The claim that Ballot Initiatives 7 and 9 are impermissible because they involve portions of the constitution involving religious freedoms and public education is misguided. Both

³⁸ See Buzzett & Kearney, Art. XI, § 6, supra note 34 (emphasis added) (Tab 16).

³⁹ See Give Constitution Meaning with Amendment to Fix 'Glitches,' Ft. L. Sun-Sent., Apr. 28, 1996, at G4 (concluding that the CRC "is kind of neutered if they can't look at tax and budget issues") (Tab 8).

⁴⁰ See Buzzett & Kearney, Art. XI, § 2, supra note 10 (emphasis added) (Tab 9).

proposals clearly involve state funding, and are supported by non-partisan evidence showing that the state's budget will be protected substantially if they are approved.

The constitutional impediment to be removed via Ballot Initiative 7 involves the religious discrimination in the use of public funding in article I, section 3. Plaintiffs fail to explain why Ballot Initiative 7's elimination of this clear economic barrier for religiously-affiliated entities to be eligible and compete for educational services, public contracting, and procurement matters is not a matter of immense importance to the state's budget. Imagine that the "no aid" clause of article I, section 3 provided that no public funds could be taken directly or indirectly from the public treasury in aid of any African-American companies. Imagine further that African-American companies, if allowed to compete for government contracts, would increase competition and increase budgetary savings for the state and local governments. Would the TBRC's proposal to eliminate the language of this clause of article I, section III, and replace it with the type of language in Ballot Initiative 7, be impermissible? Clearly not. So long as the proposal revises a section of the constitution that deals with taxation or budgetary matters – which article I, section 3, clearly does – the proposal is permissible.

Likewise, the constitutional impediment to be removed via Ballot Initiative 9 is the Florida Supreme Court's reading of the education clause as it applies to public funds. Plaintiffs fail to explain why Ballot Initiative 9's elimination of this economic barrier to the availability of alternative private educational services is not a matter related to the state's budget. The TBRC has historically made educational funding a key priority. The first TBRC proposed school spending reforms, noting that the "funding of Florida's educational system is of great concern to the [TBRC]." *See Fla. Fiscal Future* at 45 (Tab 14). It focused on proposing an education-spending amendment to direct lottery funds to schools and included a requirement that school

districts offer increased school choices. *See* Tab 6. The TBRC later separated these two elements, proposing the lottery funds directive as a constitutional amendment, but recommending that the legislature “explore the feasibility and merits of choice.” Fla. Fiscal Future at 45-46 (Tab 14). While the lottery directive failed to make the ballot due to the then more stringent voting requirements,⁴¹ the legislature took action on the TBRC’s school choice recommendations by enacting various educational programs that save the state billions of dollars. *See, e.g.*, §§ 220.187, 1002.33, 1002.37, 1002.38, & 1002.39, Fla. Stat.; Tabs 1 & 2.

Importantly, the initial TBRC in 1991 did not have before it the history of judicial action invalidating on state constitutional grounds the legislature’s authority to implement school choice innovations. The judicial precedents in the Bush v. Holmes litigation potentially threaten other programs that currently save the billions of taxpayer dollars. As such, the TBRC in 2007 merely “picked up the ball” from the first TBRC in 1991, which considered such matters, and now proposes to let the people of Florida decide whether the state constitution should be revised to allow these types of educational programs.

E. The 65 percent funding requirement likewise comports with the TBRC’s authority to propose constitutional amendments.

Plaintiffs erroneously argue that the 65 percent requirement in Ballot Initiative 9 is impermissible because it does not concern a *state* budgetary process. [PM 22] They claim that the TBRC cannot propose amendments dealing with “local” processes because section 6(e) includes the term “state” in the phrase “taxation or the state budgetary process.” Id.

⁴¹ In 1998, Florida voters eliminated the former requirement in article XI, section 6(c) that constitutional proposals receive the support of a majority of each of the Governor’s, Senate’s, and House’s appointees, which was in addition to the “affirmative vote of two thirds of the full commission” requirement that remains in the constitution. *See* Art. XI, § 6(c), Fla. Const.

A 35 percent cap on administrative spending, however, clearly protects the state budget and promotes the effective use of tax dollars. State spending on education exceeds \$20 billion, which is approximately one-third of the annual state budget.⁴² That state funds are distributed to local school districts does not diminish the fact that education funding is one of the state's most substantial budgetary issues.

Plaintiffs overlook that the legislature in 1988 explained to voters in the ballot summary of the amendment creating the TBRC that the TBRC would "review matters relating to state *and local* taxation and the budgetary process." (Emphasis added.)⁴³ In this regard, the TBRC has traditionally viewed its authority as extending to local matters of statewide importance. The reports issued and amendments proposed by the 1991 TBRC suggest that the phrase "state budgetary process" does not foreclose local issues. In its 1991 report, the TBRC looked to the ballot summary language, stating that "the amendment transferred the authority to review matters relating to state *and local* taxation and the budgetary process[]." ⁴⁴ The TBRC also characterized its scope of authority as "encompass[ing] the broadest possible meaning of financial policy, both at the state *and local* level."⁴⁵

Finally, the TBRC in 1991 proposed an amendment with the chief purpose of impacting the local budgetary process. This amendment would have permitted a one-cent local sales tax

⁴² See Governor Charlie Crist, Policy and Budget Recommendations, Fiscal Year 2008-09, at 2, available at <http://www.thepeoplesbudget.state.fl.us/handouts.pdf>.

⁴³ Taxation And Budget Reform Commission (1988) (proposed art. XI, § 6, Fla. Const.), available at <http://election.dos.state.fl.us/initiatives/initdetail.asp?account=10&seqnum=51>.

⁴⁴ Fla. TBRC, A Program for Reform of Florida Government at 13 (Feb. 1991), available at <http://www.floridatbrc.org/pdf/90-92ProgramForReform.pdf>. (emphasis added) (Tab 13).

⁴⁵ *Id.* at 21 (emphasis added).

and restricted the use of that tax to “the purpose of funding local government services.”⁴⁶ Thus, the TBRC’s authority to propose an amendment to impose a spending mandate on school districts statewide – which it funds – fully comports with its constitutional charge.

II. **Ballot Initiative 9 Gives Fair Notice to the Voters and Does Not Mislead.**

Section 101.161(1), Florida Statutes, sets the standards for ballot titles and summaries. It states that the “ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of” and limits the ballot summary to 75 words that must explain “the chief purpose of the measure.” § 101.161(1), Fla. Stat. (2007). The purpose of a ballot title and summary is “to provide fair notice of the content of the proposed amendment so that the voter will not be misled as to its purpose, and can cast an intelligent and informed ballot.” Advisory Op. to the Att’y Gen. re: Right of Citizens to Choose Health Care Providers, 705 So. 2d 563, 566 (Fla. 1998) (quoting Advisory Op. to the Att’y Gen. – Fee on the Everglades Sugar Prod., 681 So. 2d 1124, 1127 (Fla. 1996)). The ballot title and summary must “state in clear and unambiguous language the chief purpose of the measure.” Health Care Providers, 705 So. 2d at 566. They cannot “fly under false colors” or “hide the ball” as to the proposed amendment’s true effect. Armstrong v. Harris, 773 So. 2d 7, 16 (Fla. 2000).

Ballot Initiative 9 suffers from none of these defects. Plaintiffs make no argument that the ballot summary is defective, nor do they contend that it is in any way misleading, insufficient, or ambiguous, or that it “hides the ball” as to the proposed amendment’s true effects. Rather, their only contention is that the ballot *title* is misleading by giving too much emphasis (i.e.,

⁴⁶ Authorizing Municipalities and Counties To Levy A One-Cent Sales Tax With Local Voter Approval (1992) (proposed art. VII, § 9, Fla. Const.), available at <http://election.dos.state.fl.us/initiatives/fulltext/pdf/12-2.pdf>.

“disproportionate information”) on the 65 percent requirement. [PM 25] Plaintiffs have cited no authority for this proposition. None exists.⁴⁷

Neither section 101.161 nor the caselaw provides any support for the Plaintiffs’ claim.

The ballot title and summary for Ballot Initiative 9 state as follows:

REQUIRING 65 PERCENT OF SCHOOL FUNDING FOR CLASSROOM INSTRUCTION; STATE’S DUTY FOR CHILDREN’S EDUCATION. –

Requires at least 65 percent of school funding received by school districts be spent on classroom instruction, rather than administration; allows for differences in administrative expenditures by district. Provides the constitutional requirement for the state to provide a “uniform, efficient, safe, secure, and high quality system of free public schools” is a minimum, nonexclusive duty. Reverses legal precedent prohibiting public funding of private school alternatives to public school programs without creating an entitlement.

The ballot title does not exceed 15 words and states how the proposal is “commonly referred to or spoken of” accurately. The amendment’s chief purpose is fully and accurately explained in the ballot title and summary, which “may not be read in isolation, but must be read together in determining whether the ballot information properly informs the voters.” Advisory Op. to the Att’y Gen. re: Voluntary Universal Pre-Kindergarten Educ., 824 So.2d 161, 166 (Fla. 2002).

The primary case upon which Plaintiffs rely, In re Advisory Op. to the Att’y Gen.-Save Our Everglades, 636 So. 2d 1336 (Fla. 1994), is clearly distinguishable. In that case, the Florida Supreme Court held that the ballot title and summary were both misleading. Specifically, the ballot title – “SAVE OUR EVERGLADES” – was affirmatively misleading because it “implies that the Everglades is lost, or in danger of being lost, ... and needs to be ‘saved’ via the proposed amendment” when “nothing in the text of the proposed amendment hints at this peril.” Id. at

⁴⁷ Plaintiffs imply that placing the 65 percent requirement first is improper because it was done to “capitalize” on the “perceived popularity” of that part of the proposed amendment. [PM 24] No legal principle supports their argument, and the TBRC’s decision was based entirely on objective drafting standards that required placement of any new constitutional language first to be followed by changes to existing constitutional language. *See, e.g.*, TBRC, transcript of proceedings, vol. 2 at 178-79 (Apr. 25, 2008) (Tab 17).

1341. The Court held that this title was merely “emotional language” that had nothing to do with the amendment itself. Id.

Here, Plaintiffs do not contend that the ballot title is inaccurate or rhetorical, or that it implies some perilous condition unsupported by the text of the proposed amendment. Indeed, the ballot title is entirely neutral in tone. Plaintiffs’ belief that other ballot titles might be more proportionate or appropriate⁴⁸ is immaterial if the ballot title complies with section 101.161 and is otherwise not misleading. The gist of Plaintiffs’ objection is that the ballot title is defective because it describes what the 65 percent spending requirement would do, while “merely identifying the general subject matter” of the remainder of the proposal. [PM 24] But this scenario violates neither section 101.161(1) nor any ballot title principles in the caselaw. The ballot title is limited to 15 words, is accurate and non-misleading, and is accompanied by a concededly accurate and non-misleading ballot summary. Even if some “proportionality test” applied, the ballot title and summary, read as a whole, set forth as much information about the proposed change to the state’s duty to provide for education as they do about the 65 percent spending mandate.

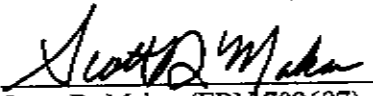
In summary, the ballot title is neither emotion-laden nor misleading. Whether read independently or together, the ballot title and summary comply with section 101.161(1) and accurately inform voters of the chief purpose of Ballot Initiative 9, as to both the 65 percent spending requirement and the modification of the state’s funding duty.

⁴⁸ [PM 24-25] Paradoxically, Plaintiffs state that the ballot title would pass muster if it provided *less* information, offering the following title as legally acceptable: “allocation of school district funding; state’s duty for children’s education.” [PM 25] They also offer as legally acceptable the following: “Requiring 65 percent of school funding for classroom instruction; allowing state funding of private schools.” [PM 25]

CONCLUSION

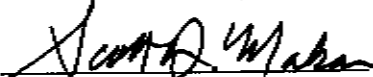
For the foregoing reasons, Defendant requests that final judgment be entered in his favor and against the Plaintiffs on each of the three counts presented in the Complaint.

Respectfully submitted,
BILL McCOLLUM
ATTORNEY GENERAL


Scott D. Makar (FBN 709697)
Solicitor General
Blaine H. Winship (FBN 0356913)
Assistant Attorney General
Louis F. Hubéner (FBN 0140084)
Chief Deputy Solicitor General
Timothy D. Osterhaus (FBN 0133728)
Deputy Solicitor General
Office of the Attorney General
The Capitol - PL-01
Tallahassee, Florida 32399-1050
(850) 414-3681; (850) 410-2672 (fax)

CERTIFICATE OF SERVICE

I hereby certify that, on this 18th day of July, 2008, I caused a true and correct copy of the foregoing has been furnished via hand delivery to: Ronald G. Meyer, Jennifer S. Blohm, Esqs., Meyer & Brooks, P.A., 2544 Blair Stone Pines Dr., P.O. Box 1547, Tallahassee, FL 32302, *Counsel for Plaintiffs*; Stephen H. Grimes, Jerome W. Hoffman, Nathan A. Adams, IV, Esqs., Holland & Knight, P.O. Drawer 810, Tallahassee, FL 32302, *Counsel for Intervenors Florida Catholic Conference, Inc., et al.*; Daniel Woodring, Esq., Woodring Law Firm, 3030 Stillwood Court, Tallahassee, FL 32308, *Counsel for Intervenors Hon. Allan Bense, et al.*


Attorney

Defendant's Proposed Order

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

ANDY FORD, BEVERLY SLOUGH,
JOSEPH JOYNER, CHRISTI MOSS,
RABBI MERRILL SHAPIRO, and
REVEREND HARRY PARROT, JR.,

Plaintiffs,

v.

Case No. 2008-CA-1905

KURT S. BROWNING, in his official
Capacity as Florida Secretary of State,

Defendant, and

FLORIDA CATHOLIC CONFERENCE,
INC., et al.; HON. ALLAN BENSE, et al.,

Intervenors.

SUMMARY FINAL JUDGMENT FOR DEFENDANT

In this action, Plaintiffs contend that the Taxation and Budget Reform Commission ("TBRC") exceeded its authority in proposing Ballot Initiatives 7 and 9. These proposed initiatives, if approved by the voters, would amend article I, section 3, and article IX, sections 1 and 8 of the Florida Constitution. Plaintiffs also assert that the ballot title for Ballot Initiative 9 is defective. The parties seek to resolve this matter on motions for summary judgment pursuant to the Court's scheduling order. The Court, having reviewed the respective motions for summary final judgment and supporting memoranda of the parties and Intervenors, heard argument on August 4, 2008, and finding no genuine issues of material fact, finds and concludes, for the reasons set forth below, that Plaintiffs' motion for summary judgment is denied and those of the Defendant and Intervenors are granted.

BACKGROUND

The TBRC

Created in 1988 via article XI, section 6 of the Florida Constitution, the TBRC is constitutionally mandated “to review the revenue needs and expenditure processes of the state, recommend statutory changes, and propose revisions to the constitution.” Smith v. Am. Airlines, 606 So. 2d 618, 619 (Fla. 1992). The proposal to establish the TBRC as a constitutional body was placed on the ballot via a joint resolution of the Florida Legislature. *See* Fla. HJR 1616 (1988). The authority for tax, budget, and governmental expenditure-related matters was carved out from the authority of the existing Constitution Revision Commission (“CRC”) and placed with the TBRC, which was empowered to propose constitutional amendments affecting these areas “in any part” of the constitution to be placed directly on the ballot. *Id.*

Article XI, section 6 sets out the TBRC’s process, composition, duties, and powers. Beginning in 2007 and every twentieth year thereafter, the TBRC convenes. Art. XI, § 6(a), Fla. Const. Members are appointed by the Governor, Speaker of the House of Representatives, and the Senate President, and include four non-voting members from the legislature.

Section 6(d) of article XI sets forth the TBRC’s scope of authority for examining, reviewing, and making recommendations regarding a broad range of matters:

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.

Art. XI, § 6(d), Fla. Const.

Section 6(e) provides that the TBRC must hold public hearings as needed, issue a report, and make proposals for statutory and constitutional revisions:

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.

Art. XI, § 6(e), Fla. Const.

The TBRC's rules, as adopted by both its first and second commissions in 1991 and 2007, defined both "taxation" and "state budgetary process" broadly:

1.005 – Functions and Duties.

The primary role of the Commission shall be to recommend statutory and constitutional changes dealing with taxation and the state budgetary process. "Taxation" means all public revenues and revenue raising laws at every level of government in the state. The "state budgetary process" means 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.

The TBRC proposed seven amendments during its 2007-08 session. Two of those ballot initiatives are the subject of this action.

The Ballot Initiatives at Issue

Ballot Initiative 7 addresses an existing constitutional limitation on governmental expenditures in article I, section 3, which provides: "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.”¹ Ballot Initiative 7 removes this existing limitation and adds a new sentence stating: “An individual or entity may not be barred from participating in any public program because of religion.”

Ballot Initiative 9 modifies article IX as to education expenditures. First, it creates article IX, section 8 (an implementation schedule is set forth in article XII, section 28):

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.

Second, it modifies article IX, section 1(a):

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 and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require. Nothing in this subsection creates an entitlement to a publicly-financed private program.

Ballot Initiative 9 clarifies that it does not create an entitlement to publicly-funded private programs.

The combined effect of these proposals, if adopted by the voters, would be to allow public funds to be used for the procurement of secular services from religiously-affiliated entities.

¹ The First District relied on this constitutional provision to invalidate Florida’s Opportunity Scholarship in Bush v. Holmes, 886 So. 2d 340 (Fla. 1st DCA 2004), aff’d on other grounds, 919 So. 2d 392 (Fla. 2004).

Both proposals garnered the requisite vote of the TBRC on April 25, 2008. They were transmitted to the Secretary of State for placement on the November 2008 general election ballot. Art. XI, § 6(c) & (e), Fla. Const.

LEGAL DISCUSSION

Judicial review of proposed amendments is deferential. If “any reasonable theory” exists for approving an amendment for ballot placement, it is upheld. Armstrong v. Harris, 773 So. 2d 7, 14 (Fla. 2000) (quoting Gray v. Golden, 89 So. 2d 785, 790 (Fla. 1956)); Am. Airlines, 606 So. 2d at 621 (noting reluctance to remove TBRC-proposed amendment “from a vote of the public”). This Court will not interfere with the amendment process “unless the laws governing the process have been ‘clearly and conclusively’ violated.” Advisory Op. to the Att’y Gen. re Right to Treatment & Rehab. For Non-Violent Drug Offenses, 818 So. 2d 491, 498-99 (Fla. 2002).

A. Ballot Initiatives 7 and 9 are within the TBRC’s authority.

The Plaintiffs argue that the TBRC exceeded its authority by proposing initiatives which would amend the “no aid” provision of article I, section 3, and the education provisions in article IX, sections 1(a) and 8 of the Florida Constitution.

In interpreting the constitutional provisions that established the TBRC’s authority and duties, the Court “consider[s] the object or purpose to be accomplished by the provision, the prior state of the law, including the origin of the provision, as well as contemporaneous and practical considerations.” City of Ft. Lauderdale v. Crowder, 983 So. 2d 37, 39 n.2 (Fla. 4th DCA 2008). Fundamental considerations include the plain language of the provisions, the importance of harmonizing related provisions, and the interpretation of those provisions by the authors of the text. Zingale v. Powell, 885 So. 2d 277, 282-83 (Fla. 2004). Courts must also

avoid interpreting a provision in a way that would render other provisions superfluous or unnecessary. Hechtman v. Nations Title Ins. of New York, 840 So. 2d 993, 996 (Fla. 2003). The Court concludes that these principles of constitutional interpretation and the history and purpose of the TBRC support the Defendant's argument that the proposed initiatives are within the TBRC's authority.

Section 6(d) provides the TBRC with broad authority to review any matters involving "taxation or the state budgetary process." Nothing in section 6(d) precludes the TBRC from exercising its authority to review these broadly stated matters as they apply to education or the provision of educational services by private entities. 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). Additionally, 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. See 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'" (citation omitted)).

Taking section 6(d) into account, this Court reads the phrase "state budgetary process" in section 6(e) broadly as allowing the TBRC to propose revisions to any portion of the constitution touching upon the state budgetary process generally. Contrary to Plaintiffs' claims, the phrase "budgetary process" cannot be read to narrow the TBRC's authority. To do so would render useless that portion of section 6(d) allowing the TBRC to "examine constitutional limitations on taxation and expenditures at the state and local level." It makes little sense that the TBRC can determine that a constitutional limitation should be revised, but be prevented from doing so

under Plaintiffs' unduly restrictive view of section 6(e). Section 6(d) is rendered pointless and superfluous under Plaintiffs' construction of section 6(e).

Beyond the conclusion that the phrase "budgetary process" must be given a broad meaning to preserve the viability of the language in section 6(d), the natural meanings of "budget" and "process" also convey broad meanings. The primary definitions of the word "budget" include "[a]n itemized summary of probable expenses and income for a given period" and "a systematic plan for meeting expenses in a given period" ² The primary definitions of the word "process" include a "system of operations in the production of something" and a "series of actions, changes, or functions that bring about an end result." ³ In 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. For Florida, one of the nation's most populous states, the budgetary process is complex, far-reaching, and involves many portions of the constitution.

Moreover, as Plaintiffs note, the TBRC's understanding of its own mandate is particularly important because of the well-established principle that courts should not "depart from the contemporaneous construction of a statute by a state agency . . . unless the construction is clearly . . . erroneous." Level 3 Commc'ns, LLC v. Jacobs, 841 So. 2d 447, 450 (Fla. 2003); *see also* Pershing Indus., Inc. v. Dep't of Banking & Fin., 591 So. 2d 991, 993 (Fla. 1st DCA 1991) ("If an agency's interpretation is one of several permissible interpretations, it must be upheld despite the existence of reasonable alternatives."). The TBRC in both 1991 and 2007

² The American Heritage Dictionary 214 (2d college ed. 1985).

³ Id. at 987.

explicitly adopted rules that interpreted its authority to propose constitutional amendments by defining the terms “taxation” and “state budgetary process.” The rule is broad and states that “budgetary process” encompasses the “manner in which every level of government in the state expends funds,” 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.” TBRC Rule 1.005. In addition, the TBRC in 1991 also considered an education-related spending amendment proposal that combined an express requirement that lottery funds be spent on education with a requirement that local districts provide school choice options.

The constitutional impediment 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 religiously-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. Likewise, 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.

On the contrary, these two proposed amendments address the findings of a TBRC report that limited public-private programs “are an efficient way to use Florida tax dollars and to provide *statewide* tax savings for Floridians.” TBRC Education Report at 18. The report estimated that six of Florida’s innovative state programs had saved Florida’s taxpayers more than \$4.4 billion. *Id.* (emphasis added). The report also found that if “the [Bush v. Holmes] decision were applied to the Corporate Tax Credit Scholarship Program, the McKay Scholarship Program,

and the Voluntary Pre-K program, the cost to Florida taxpayers might reach an additional \$4.1 billion dollars in additional operating and capital costs.” *Id.* (emphasis added). The two proposed amendments thereby address the possibility of these types of state programs being invalidated on constitutional grounds and the resulting impact on the state’s budget.

Ballot Initiatives 7 and 9 are not impermissible simply because they happen to affect portions of the constitution involving religious freedoms and public education. The Court concludes that both proposals involve matters involving taxation or the budgetary process, and are supported by evidence showing that the state’s budget will benefit financially and substantially if they are approved.

Plaintiffs also argue that the 65 percent requirement in Ballot Initiative 9 is impermissible because it does not concern a *state* budgetary process. They assert that the TBRC cannot propose amendments dealing with “local” processes because section 6(e) includes the term “state” in the phrase “taxation or the state budgetary process.” It is undisputed, however, that a 35 percent cap on administrative spending would impact the state’s budget. The state annually spends more than \$20 billion on its schools. That these funds are distributed to local school districts does not transform this proposed amendment to an exclusively local budget issue. Moreover, section 6(d), which as noted must be taken into account in reading section 6(e), contemplates the TBRC’s review of constitutional limitations on taxation and spending at the state *and local* level. Art. XI, § 6(d), Fla. Const.

The Court finds that there is not clear and conclusive evidence that the TBRC exceeded the scope of its authority. Based on the plain language of the constitution, the TBRC rules, the history of the TBRC, and the subject of the Ballot Initiatives, the Court concludes that the TBRC acted well within the scope of its authority in proposing Ballot Initiatives 7 and 9.

B. The title and summary for Ballot Initiative 9 provide fair notice and are not misleading.

Plaintiffs next allege that the ballot title and summary for Ballot Initiative 9 are misleading. Section 101.161(1), Florida Statutes, sets the standards for ballot titles and summaries. It states that the “ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of” and limits the ballot summary to 75 words that must explain “the chief purpose of the measure.” § 101.161(1), Fla. Stat. (2007). The purpose of a ballot title and summary is “to provide fair notice of the content of the proposed amendment so that the voter will not be misled as to its purpose, and can cast an intelligent and informed ballot.” Advisory Op. to the Att’y Gen. re: Right of Citizens to Choose Health Care Providers, 705 So. 2d 563, 566 (Fla. 1998) (quoting Advisory Op. to the Att’y Gen.—Fee on the Everglades Sugar Prod., 681 So. 2d 1124, 1127 (Fla. 1996)). The title and summary must “state in clear and unambiguous language the chief purpose of the measure.” Health Care Providers, 705 So. 2d at 566.

Ballot Initiative 9 would amend article IX, section 1 of the Florida Constitution by expanding the State’s ability to fulfill its duty to make adequate provisions for education. A new section 8 would be added to article IX, providing that at least 65 percent of the money received by school districts must be spent on classroom instruction. In addition, the proposed amendment would add a new section 28 to article XII, specifying that the 65 percent requirement would become effective in fiscal year 2009-2010.

The ballot title and summary for Ballot Initiative 9 read as follows:

REQUIRING 65 PERCENT OF SCHOOL FUNDING FOR CLASSROOM INSTRUCTION; STATE’S DUTY FOR CHILDREN’S EDUCATION. — Requires at least 65 percent of school funding received by school districts be spent on classroom instruction, rather than administration; allows for differences in administrative expenditures by district. Provides the constitutional requirement

for the state to provide a “uniform, efficient, safe, secure, and high quality system of free public schools” is a minimum, nonexclusive duty. Reverses legal precedent prohibiting public funding of private school alternatives to public school programs without creating an entitlement.

Plaintiffs contend that the ballot title gives too much emphasis to the 65 percent requirement and is therefore misleading.

Ballot titles and summaries cannot “fly under false colors” or “hide the ball” as to the proposed amendment’s true effect. Armstrong v. Harris, 773 So. 2d 7, 16 (Fla. 2000). A ballot title may not imply some peril that is not supported by the text of the proposed amendment. Advisory Op. to the Att’y Gen. — Save Our Everglades, 636 So. 2d 1336, 1341 (Fla. 1994). Nor may the title and summary leave a key term undefined so that the meaning of the proposal is ambiguous or misleading. Advisory Op. to the Att’y Gen. re: People’s Prop. Rights Amendments Providing Confirmation for Restricting Real Prop. Use May Cover Multiple Subjects, 699 So. 2d 1304, 1308, 1309 n.2, 1311 (Fla. 1997).

Ballot Initiative 9 suffers none of these defects. The ballot title and summary are in no way misleading, insufficient, or ambiguous, nor do they “hide the ball” as to the proposed amendment’s true effects. Indeed, the ballot title, duly limited to 15 words, accurately indicates that the state’s duty to provide for children’s education is affected. The ballot summary sets out in detail in its 73 words the change in the state’s duty. Moreover, contrary to the Plaintiffs’ suggestion, the ballot title and summary, read as a whole, do not create any improper imbalance in their contents; they impart as much information about the proposed change to the state’s duty to provide for education as they do about the 65 percent spending mandate.

“[T]he ballot title and summary must be read together in determining if the ballot information properly informs the voter.” People’s Prop. Rights Amendments, 699 So. 2d at 1309. When considered in tandem, the ballot title and summary accurately inform the voters of the

chief purposes of Ballot Initiative 9, as to both the 65 percent spending requirement and the modification of the state's funding duty, and they do so in terms that are neither vague, ambiguous, emotional, nor misleading. Accordingly, the ballot title and summary comply with section 101.161(1).

CONCLUSION

Based on the foregoing, it is ORDERED AND ADJUDGED that Plaintiffs' Motion for Summary Judgment is DENIED, and Defendant's Cross Motion for Summary Final Judgment, joined by the Intervenors, is GRANTED. 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.

Done and ordered in Tallahassee, Leon County, Florida, this ____ day of August, 2008.

JOHN C. COOPER
Circuit Judge

Copies to: Counsel of Record