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)
and REVEREND HARRY PARROT, JR.,)
)
Plaintiffs,)
) Case No. 37 2008-CA-1905
v.)
)
KURT BROWNING, in his official capacity)
as Florida Secretary of State,)
)
Defendant.)

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CLERK CIRCUIT COURT
LEON COUNTY, FLORIDA

PLAINTIFFS' CONSOLIDATED (1) REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT, AND (2) OPPOSITION TO DEFENDANT'S AND DEFENDANT-INTERVENORS' CROSS MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs Andy Ford, Beverly Slough, Joseph Joyner, Christi Moss, Rabbi Merrill Shapiro, and Reverend Harry Parrott, Jr. submit this consolidated (1) Reply Memorandum in Support of Their Motion for Summary Judgment, and (2) Memorandum in Opposition to the three Cross Motions for Summary Judgment filed by Defendant Kurt Browning ("Defendant"), defendant-intervenors Florida Catholic Conference, Inc., *et. al.* ("FCC Intervenors"), and defendant-intervenors Hon. Allan Bense, William Gregory Turbeville, Patricia Levesque, Richard Corcoran, Susan Story, Mike Hogan, Nancy J. Riley, and Kenneth Wilkinson ("TBRC Intervenors").[1]

[1] By this Court's July 1, 2008 Order, Plaintiffs' Motion for Temporary Injunction filed on June 13, 2008 (hereinafter "Pl. Mem.") is being treated as a Motion for Final Summary Judgment.

INTRODUCTION

Almost a century ago, the Florida Supreme Court made it clear that any amendments to the Constitution must be placed before the voters in a manner that complies with the requirements set out in the Constitution itself. As the court put it, "[t]he proposal of amendments to the Constitution is a highly important function of government that should be performed with the greatest certainty, efficiency, care, and deliberation." *Crawford v. Gilchrist*, 59 So. 963, 968 (Fla. 1912); *see also Armstrong v. Harris*, 773 So. 2d 7, 12 n.15 (Fla. 2000) (quoting *Gilchrist*). Therefore, the court explained, the people of Florida have both a "right to amend their Constitution, and . . . *a right to require proposed amendments to be agreed to and submitted for adoption in the manner prescribed by the existing Constitution*, which is the fundamental law." *Gilchrist*, 59 So. at 968 (emphasis added). And "[i]f essential mandatory provisions of the organic law are ignored in amending the Constitution of the state . . . it violates the right of all the people of the state to government regulated by law." *Id.* It is this fundamental principle of law that governs the question before this Court.

On April 28, 2008, the Florida Taxation and Budget Reform Commission ("TBRC" or "Commission") transmitted, *inter alia*, two proposed constitutional amendments to the Secretary of State – designated by the Secretary as Ballot Initiatives No. 7 and No. 9 – for placement on the ballot for Florida's November 2008 general election. As we showed in our opening memorandum, because these Ballot Initiatives exceed the TBRC's constitutional authority to propose constitutional amendments, and because the ballot title and summary language of Ballot Initiative No. 9 is misleading as to the effect of the proposed amendment, placing these Ballot Initiatives on the ballot would both "ignore[] . . . essential mandatory provisions of the organic

law" and violate the right of the people to amend the Constitution only "in the manner prescribed by the existing Constitution." *Gilchrist*, 59 So. at 968.

To be clear, this case is not about the merits of either Ballot Initiative, and it does not require the Court to consider issues of church-state separation, methods of educating Florida's children, or ways to allegedly "save taxpayers billions of dollars." *See, e.g.*, Def. Mem. in Opp. to Pl.'s Mtn. for Summ. J. ("Def. Mem.") at 2; FCC Intervenors Mem. in Opp. to Pl's Mtn. for Summ. J. ("FCC Mem.") at 2-7. Instead, this Court is simply being asked to give effect to the plain, unambiguous language of Article XI, section 6(e), of the Florida Constitution and § 101.161, Fla. Stat. (2008), and enjoin the placement of the two Ballot Initiatives on the ballot for the November 2008 general election.

I. THE STANDING AND JUSTICIABILITY CLAIMS MADE BY DEFENDANT-INTERVENORS ARE WITHOUT MERIT.

We begin with the issues of standing and justiciability raised by the Defendant-Intervenors.[2] *First*, the FCC Intervenors contend that the Plaintiffs lack standing to assert that the TBRC exceeded its constitutional authority in attempting to place these Initiatives on the general election ballot.[3] *Second*, the TBRC Intervenors assert that the issues raised in this lawsuit are nonjusticiable. TBRC Intervenors Mem. in Opp. to Pl.'s Mtn. for Summ. J. ("TBRC Mem.") at 13-17. Neither of these assertions has merit.

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[2] While Plaintiffs respond to these claims on their merits, we also note that in making these claims, Defendant-Intervenors have violated this Court's July 14, 2008 Order that, as a condition of being permitted to intervene, the Intervenors "may not raise new claims." Order (7/14/08) at ¶ 4.

[3] The FCC Intervenors do not question Plaintiffs' standing to challenge the adequacy of the ballot title and summary language for Ballot Initiative No. 9.

A. The FCC Intervenors contend that Plaintiffs lack standing to challenge the placement of these Ballot Initiatives on the ballot for the November 2008 general election because their interest is "no different than the right vested in the members of the public at large," and because they "have failed to plead any such special injury different in kind from that of any other Florida resident." FCC Mem. at 8. But this contention is flatly contrary to the Florida Supreme Court's holding in *Gilchrist*. This is not a case where the plaintiffs, acting as taxpayers, are challenging appropriations that affect them in some particularized manner. Plaintiffs have brought suit as Florida citizens and voters in order to vindicate their "right to amend their Constitution and . . . to require proposed amendments to be agreed to and submitted for adoption in the manner prescribed by the existing Constitution. . . ." *Gilchrist*, 59 So. at 967; *see* Complaint ¶¶ 5-10. *Gilchrist* stands precisely for the proposition that a plaintiff acting as a "citizen, a taxpayer, and an elector" is the "proper party" to challenge the "due proposal" of a constitutional amendment. *Gilchrist*, 59 So. at 967.

In *Gilchrist*, the Governor of Florida challenged the placement of a legislatively proposed constitutional amendment on the general election ballot. The court – in rejecting a challenge to the justiciability of the lawsuit – explained that the Governor's standing was based on his status "as a citizen, a taxpayer, and an elector," quite apart from his capacity as Governor, and noted that "the individual rights of the complainant as a citizen, a taxpayer, and an elector" challenging the process by which the legislature placed a proposed constitutional amendment on the ballot were "in common with other taxpayers and electors." *Id.*

Plaintiffs have filed suit in that same capacity, and they too are "proper" parties with standing to bring this suit. *See also City of Hialeah v. Delgado*, 963 So. 2d 963 So. 2d 754, 756 (Fla. 3d DCA 2007), in which the Third District found that a plaintiff's standing to challenge a

ballot summary and title provision inhered as a "citizen and voter," not as a taxpayer required to show special injury. Finding that the plaintiff in that case had standing to challenge the summary and title provision of a ballot initiative, the Florida Supreme Court noted that the state "misapprehend[ed] the difference between taxpayer standing and standing in election law cases," and expressly distinguished the requirements for standing in each circumstance. *Id.; cf. Florida Wildlife Fed'n v. State Dep't of Envtl. Regulation,* 390 So. 2d 64, 67 (Fla.1980) (noting that the "special injury" rule is "not absolute . . . and exceptions to it have been carved out both by [the Florida Supreme] Court and the legislature").

Any other result would be devoid of logic because no citizen of Florida would ever have standing to challenge an action of the TBRC. This is so because no citizen's right to insure that the Constitution is amended only "in the manner prescribed by the existing Constitution," is any more "special" than that of any other citizen. Thus, just as no "special injury" is required to challenge the ballot title and summary language on a general election ballot, *e.g., City of Hialeah*, 963 So. 2d at 756, no "special injury" can be required to challenge the improper placement of constitutional amendments on the ballot. *See Gilchrist*, 59 So. at 967.[4]

B. The TBRC Intervenors assert that this case is nonjusticiable because, they opine, the "voters, not the Judiciary, should be the final arbiter of whether a proposal on the ballot is considered misleading." TBRC Mem. at 17. But that is not the law in this state. In point of fact, the Florida courts consistently adjudicate questions of whether initiatives should be placed on the ballot. *See, e.g., Hialeah*, 963 So. 2d at 754; *Sancho v. Smith*, 830 So. 2d 856, 864 (Fla. 1st DCA 2002) (finding that individual citizens have standing to challenge an initiative's compliance with

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[4] While no "special injury" is necessary, we note in any event that plaintiffs *have* alleged such injury, in that they will be put to the expense of contributing funds to defeat these Ballot Initiatives if they are placed on the general election ballot. *See* Complaint ¶ 11.

the ballot summary adequacy requirements); *Gilchrist*, 59 So. at 967 (recognizing standing of Governor as citizen and elector to challenge proposed constitutional amendment); *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000) (adjudicating suit brought by citizen-voters challenging ballot title and summary language of proposed constitutional amendment); *Askew v. Firestone*, 421 So. 2d 151 (Fla. 1982) (adjudicating suit brought by citizen-voter and organizational plaintiffs challenging ballot title and summary language of a proposed constitutional amendment).[5]

II. SECTION 6(e) ESTABLISHES THE LIMITS OF THE TBRC'S AUTHORITY TO PROPOSE CONSTITUTIONAL AMENDMENTS.

Article XI, section 6(e), of the Florida Constitution grants the TBRC authority, *inter alia*, to propose constitutional amendments "dealing with taxation or the state budgetary process." As we explained in our opening memorandum, the plain language, context, and history of this provision, as well as its contemporaneous interpretation by the TBRC, make it abundantly clear that the Commission has no authority to place Ballot Initiatives No. 7 and 9 on the ballot for the November 2008 general election. *See* Pl. Mem. at 9-18.

The term "taxation" is relatively straightforward and largely irrelevant to the issues presented here. This case turns on the meaning of the term "state budgetary process." Read naturally, the term "budgetary process" would appear to refer to the *process and procedures* by which budgetary inputs and outputs are studied, proposed, approved, and effectuated. Defendant and Defendant-Intervenors attempt to avoid this result by relying on dictionary definitions, the TBRC's rules, and other portions of Article XI, section 6. But this reliance is misplaced.

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[5] Unable to point to decisions of the Florida courts in support of their position, the TBRC Intervenors rely instead on a footnote in Justice Powell's concurring opinion in *Goldwater v. Carter*, 444 U.S. 996, 1001 n.2 (1979), as well as a law review article cited therein, and on the *dissenting* opinion of Justice Wells in *Armstrong v. Harris*. Yet in *Armstrong* the Florida Supreme Court did exactly what Justice Wells – in his dissenting opinion – thought was inappropriate. *See* 773 So. 2d at 13-16 (adjudicating adequacy of ballot title and summary of constitutional amendment proposed by legislature).

A. The meaning that Plaintiffs attribute to the term "budgetary process" is fully consistent with the dictionary definitions proposed by Defendant and Defendant-Intervenors. Defendant asserts that the *American Heritage Dictionary* defines the term "budget" as "[a]n itemized summary of probable expenses and income for a given period," or "a systematic plan for meeting expenses in a given period." Def. Mem. at 16 (quoting *The American Heritage Dictionary* 214 (2d College ed. 1985)).[6] Further, Defendant asserts that a "process" is a "system of operations in the production of something" or a "series of actions, changes, or functions that bring about an end result." *Id.* FCC Intervenors assert that a process is "a progression past various stages to completion." FCC Mem. at 15 (citing Webster's Dictionary). Using these dictionary definitions as guidance, it is clear that a "budgetary process" refers to the "system of operations" or "series of actions" necessary to produce or bring about the "itemized summary of probable expenses and income for a given period," which is the state budget, and does not refer to the substance of these "probable expenses and income."

Failing to interpret the phrase "budgetary process" in this manner – and equating that term with the word "expenditure," as does Defendant – would, at a minimum, render the word "process" entirely meaningless. Such an outcome directly contradicts the cannon of statutory and constitutional interpretation requiring courts to give meaning to each word in a phrase. *See Kasischke v. State*, No. SC07-128, 2008 WL 2678449, at *3 (Fla. July 10, 2008) (refusing to "render[] [statutory] language superfluous"); *Hechtman v. Nations Title Ins. of N.Y.*, 840 So. 2d 993, 996 (Fla. 2003) ("[W]ords in a statute should not be construed as mere surplusage."); *see*

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[6] The TBRC Intervenors cite a different edition of *The American Heritage Dictionary*, which defines "budget" as an "itemized summary of estimated or intended expenditures." TBRC Mem. at 6 n.2.

also Zingale v. Powell, 885 So. 2d 277, 282 (Fla. 2004) (instructing Florida courts to follow principles of statutory interpretation when interpreting the constitution).

B. To the extent a government entity's interpretation of its own authority is relevant, only its contemporaneous interpretation is accorded weight. *See Level 3 Communications, LLC v. Jacobs*, 841 So. 2d 447, 450 (Fla. 2003) (noting also that courts should "not give deference to an agency's determination when the agency exceeds its authority."). But the documents which Defendant and Defendant-Intervenors cite as evidence of the Commission's contemporaneous interpretation of its authority under Article XI, § 6(e), Fla. Const. – and indeed claim deserve deference – do not support Defendant's and Defendant-Intervenors' position.

Defendant and Defendant-Intervenors rely principally upon the Commission's rules, adopted in 1991 and 2007, which define the term "state budgetary process" to mean

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

See Def. Mem. at 18 (emphasis added); *see also* TBRC Int. at 8; FCC Int. at 17. But this definition does not support Defendant's and Defendant-Intervenors' position. To the contrary, it establishes that the "state budgetary process" means the "*manner in which*" government entities accomplish a number of specific tasks, and includes the "legislative appropriations *process*," and the "budgetary *practices and principles*" of state agencies. In short, the Commission's own definition confirms that its authority to propose constitutional amendments "dealing with the state budgetary process" encompasses amendments dealing with the structures and procedures by which the budget is created. Nothing in the definition suggestions, as Defendants would have it,

that the TBRC's authority extends to any constitutional provision that is at all related to expenditures, such as the Constitution's substantive instructions about the purposes for which public funds may be expended. And certainly nothing in the TBRC's definition of "state budgetary process" suggests that the Commission has the authority to regulate the separation of church and state or the manner in which the state is to provide for the education of its children.

Nor does the term "*state* budgetary process" extend to the budgetary processes or the expenditures of political subdivisions, such as local school districts. The limitation of the authority conferred by Article XI, section 6(e), to the "*state* budgetary process" is clear, and to the extent the TBRC's rule could be read to suggest that the term gives the TBRC authority to propose constitutional amendments concerning the budgetary processes of school districts and other local political subdivisions, such a reading is so far afield from the plain text of the Constitution that the Commission's interpretation deserves no deference. *See, e.g., Pan Am. World Airways, Inc. v. Florida Pub. Serv. Comn'n*, 427 So. 2d 716, 719 (Fla. 1983) (no deference given to an agency interpretation that is "clearly erroneous").[7]

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[7] Defendant and Defendant-Intervenors also rely on proposals that were considered, but not adopted, by the 1991 TBRC, *see* Def. Mem. at 18; FCC Mem. at 18 – implicitly inviting the Court to speculate on (1) the constitutionality of prior proposals; and (2) the reasons why the TBRC did not ultimately adopt them, one of which may have been the realization that they would not pass constitutional muster. The fact that the Commission considered and rejected proposals relating to public school choice cannot possibly be taken as evidence of the Commission's authority to adopt such proposals. *Cf. Shands Teaching Hosp. & Clinics, Inc. v. Smith*, 480 So. 2d 1366, 1374 (Fla. 1st DCA 1985) ("[L]egislative silence may reflect any of a variety of attitudes."). In addition, Defendant and Defendant-Intervenors rely on a 1991 memorandum purporting to opine on the Commission's ability to propose constitutional amendments relating to school choice. *See* Memo from Donna Blanton to Steve Uhlfelder, TBRC Commissioner, at 1 (attached at Tab 3 of Appx. to Def. Mem.). But this memorandum merits no weight because: (1) it appears to have been the work product not of the Commission itself but of a law student working at a private law firm, *see* http://www.radeylaw.com/attorneys-and-consultants/6 (biography of Donna E. Blanton); (2) it is entirely unclear from the record whether the memorandum was drafted as a disinterested legal opinion or as an advocacy piece; and, (3) even if the memorandum were otherwise relevant, it *expressly assumes away the*

C. Rather than coming to grips with the language of the constitutional provision that confers authority on the TBRC to propose constitutional amendments – Article XI, section 6(e) – Defendant and Defendant-Intervenors endeavor to define the scope of the Commission's authority by looking instead to section 6(d), which does not address the TBRC's authority to propose constitutional amendments. *See* Def. Mem at 12-13; FCC Mem. at 12-13; TBRC Mem. at 6-7. By using section 6(d) to define the TBRC's authority without reference to the different terms used in section 6(e), Defendant and Defendant-Intervenors impermissibly fail to give effect to each section, and each phrase, of Article XI, in violation of a fundamental cannon of constitutional interpretation. *See Department of Envtl. Protection v. Millender*, 666 So. 2d 882, 886 (Fla. 1996) (noting that constitutional provisions must be read "so as not to render any language superfluous").

Section 6(d) of Article XI empowers the Commission to engage in a variety of analytical tasks. Specifically, that section mandates that 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

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question at issue in this case. See Blanton Memo at 1 ("assum[ing]," without analysis, that the proposal in question "would be linked to a matter relating to taxation and the state budgetary process").

> information adequately supports a strategic decisionmaking process.

Art. XI, § 6(d), Fla. Const. (emphasis added). This section does not grant the Commission any affirmative authority to act, but rather only provides the Commission with analytical tools that will enable it to act in a responsible and informed manner.

It is, in point of fact, only section 6(e) that gives the Commission any affirmative authority to act. That section mandates that the Commission "shall issue a report of the results of the review carried out," and gives the TBRC discretionary authority to "propose to the legislature any recommended statutory changes related to the taxation or budgetary laws of the state," and to propose constitutional revisions "dealing with taxation or the state budgetary process." Art. XI, § 6(e), Fla. Const.

Defendant and Defendant-Intervenors suggest that the proper way to read sections 6(d) and 6(e) together is, in effect, to interpret section 6(e) as giving the Commission the authority to "propose constitutional amendments dealing with" any matter that § 6(d) requires it to "examine," "review," or "determine." Any other reading, they insist, renders unnecessary the analytical authority conferred by section 6(d). *See* Def. Mem. at 13-15; TBRC Mem. at 7-8; FCC Mem. at 10-11. Specifically, Defendant claims that 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" if it could not propose amendments with respect to such limitations. Def. Mem at 13-15. That analysis is misguided for several reasons.

First, it is not in the least unreasonable to suggest that, before proposing any constitutional amendment concerning the "state budgetary process," the Commission should be permitted to conduct studies that go beyond the limited area in which it is authorized to act. Contrary to Defendant's views, there is every reason to believe that, for example, before the

TBRC proposed a constitutional amendment that might have the effect of reducing the state's tax revenue, it should know about the constitutional authority of local governments to pick up the slack. Thus, the fact that section 6(d) may authorize the TBRC to study "constitutional limitations on ... expenditures," and to do so at the local as well as the state level, does not necessarily mean that the authors of section 6(e) intended the TBRC to have the authority to propose constitutional amendments that broadly.

Second, limiting the Commission's authority to propose constitutional amendments dealing with the "state budgetary process," as required by the plain text of section 6(e), does not render the Commission's analytical tools superfluous because of the TBRC's mandate, also found in section 6(e), to "issue a report of the results of the review carried out" pursuant to section 6(d). And this report could be of assistance to the legislature or other entities in deciding whether or not to take various actions.

Finally, Defendants entirely ignore the point we made in our opening memorandum, *see* Pl. Mem. at 12-13 n.6, that the phrase of section 6(d) authorizing the TBRC to "examine constitutional limitations on taxation and expenditures at the state and local level" must, under the canon *noscitur a sociis*, be read in conjunction with what surrounds it. Viewed in that broader context, the phrase clearly refers to the kinds of "limitations on ... expenditures" that are of a structural or procedural nature – such as, for example, a constitutional provision limiting the state's expenditures to the amount of its revenues. For this reason as well, there is no anomaly between the TBRC's authority under section 6(d) to "examine constitutional limitations on taxation and expenditures at the state and local level" and section 6(e)'s limitation of its authority to propose constitutional amendments to those "dealing with taxation or the state budgetary process."

III. DEFENDANT'S INTERPRETATION OF THE TERM "STATE BUDGETARY PROCESS" TO ENCOMPASS ANY MATTER THAT COULD IMPACT STATE OR LOCAL EXPENDITURES WOULD AUTHORIZE THE TBRC TO PROPOSE CONSTITUTIONAL AMENDMENTS ENTIRELY UNRELATED TO TAX AND STATE BUDGET ISSUES.

The interpretation Defendant and Defendant-Intervenors offer of the TBRC's authority to propose constitutional amendments is broad indeed. According to Defendant, the "TBRC's authority broadly encompasses any substantive area that *involves* tax or budget matters." Def. Mem. at 13 (emphasis added). Further, Defendant asserts that the phrase "budgetary process . . . enables the TBRC to propose revisions to any portion of the constitution *touching upon the state budgetary process generally*." *Id.* at 15 (emphasis added). Regardless of its substance, Defendant asserts, a proposal is permissible "[s]o long as the proposal revises a section of the constitution that deals with taxation or budgetary matters." *Id.* at 23. Under this most extreme reading, the subject of the proposal need not even relate to "taxation or the state budgetary process" – as long as it is housed in a section of the Constitution that "deals with taxation or budgetary matters."[8] And, Defendant and Defendant-Intervenors appear to adopt the position that a section of the constitution deals with "taxation or the state budgetary process," as thus comes within the TBRC's authority as long as it could have some impact on the state's budget. *See, e.g.*, Def. Mem. at 23 (amendment proposed by Initiative No. 7 involves "a matter of immense importance to the state's budget"); *id.* (amendment proposed by Initiative No. 9 is "related to the state's budget" because it "eliminat[es] [an] economic barrier to the availability of alternative private educational services").

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[8] Contrary to Defendant's assertions, *see* Def. Mem. at 19, Plaintiffs do not suggest that the TBRC is limited to proposing amendments to those sections enumerated by the Commission in its 1991 report. *See* Pl. Mem. at 16. What we do suggest, however, is that the subjects of these sections are representative of the general types of subjects as to which the TBRC believed it could propose amendments.

Taken to its logical extreme, this expansive view of the TBRC's authority would allow the Commission to propose constitutional amendments far removed from issues of tax and the state budgetary process. For example, the Commission could propose fundamental constitutional changes in Florida's form of government, such as switching from a bicameral to a unicameral legislature, or abolishing the District Courts of Appeal, on the theory that such changes could save millions of dollars and thus have an impact on the state budget. Or, if the TBRC proposed to repeal the constitutional limitation on public school class sizes, *see* Art. IX, § 1(a), Fla. Const., because of the high cost of smaller classes, such a proposal – under Defendant's theory – also would be entirely within the TBRC's authority. Yet neither Defendant nor Defendant-Intervenors can reasonably argue that any of these proposals is of the sort meant to be reviewed by the Taxation and Budget Reform Commission.

Nor could they. Any argument that the TBRC's authority extends so broadly would negate the distinction drawn in Article XI between the limited nature of the authority given the TBRC to propose constitutional amendments dealing with "taxation and the state budgetary process" and – in marked contrast – the broad plenary powers given to the legislature to propose "[a]mendment of a section or revision of one or more articles, or the whole, of this constitution," Art. XI, § 1; to the Constitution Revision Commission to propose "a revision of this constitution or any part of it," Art. XI, § 2(c); to the people through the initiative process to propose "the revision or amendment of any portion or portions of this constitution," Art. XI, § 3; and to a constitutional convention "to consider a revision of the entire constitution," Art. XI, § 4(a).

There is no need to belabor the point. Defendants' broad equation of the term "budgetary process" with anything touching on the expenditure of public funds would re-write Article XI,

section 6(e) to read "taxation and state expenditures," rather than "taxation and the state budgetary process." That reading of the constitutional language cannot be sustained.

IV. EVEN UNDER DEFENDANT'S BROAD DEFINITION OF "STATE BUDGETARY PROCESS," BALLOT INITIATIVES NO. 7 AND 9 WOULD NOT BE WITHIN THE TBRC'S JURISDICTION.

Even using Defendant's and Defendant-Intervenors' expansive view of "taxation or the state budgetary process," Ballot Initiatives No. 7 and 9 still would be beyond the scope of the TBRC's authority to propose constitutional amendments. This is so because of a principle of law set forth in Plaintiffs' opening memorandum that neither Defendant nor Defendant-Intervenors contest. If a Ballot Initiative includes provisions that are not within the TBRC's power to propose, the Ballot Initiative cannot be placed on the general election ballot, and it will not be saved even if some other provision contained in the Initiative would, standing alone, be within the Commission's authority to propose. *See* Pl. Mem. 18-19; *cf. Smith v. American Airlines*, 606 So. 2d 618, 621-22 (Fla. 1992). Because the TBRC is not constrained from "logrolling" by the single-subject rule that applies to citizen-initiatives under Article XI, section 3,[9] the constitutional limits on its authority would be effectively nullified if they could be avoided by the expedient of adding to an otherwise unauthorized Ballot Initiative an additional proposed change "dealing with taxation and the state budgetary process."

A. Ballot Initiative No. 7 proposes two changes to the language of Article I, section 3. The Initiative proposes that the following line be added to the section: "An individual or entity may not be barred from participating in any public program because of religion." And, the amendment also would delete what is currently the third sentence in that section, which reads:

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[9] *Advisory Op. to Att'y Gen. re Race in Pub. Educ.*, 778 So. 2d 888, 891 (Fla. 2000); *Advisory Op. to Att'y Gen. re Save Our Everglades*, 636 So. 2d 1336, 1341 n.2 (Fla. 1994).

"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. Neither the addition of the new language, nor the elimination of the existing third sentence come within a proper reading of the terms "taxation" or the "state budgetary process." But even under Defendant's proposed reading – which equates "state budgetary process" with "expenditures" in an attempt to bring the latter change within the TBRC's jurisdiction – Initiative No. 7 still exceeds the Commission's authority to propose ballot initiatives for two reasons.

First, even on Defendant's expansive reading, the proposed addition to Article I, section 3, does not deal with the "state budgetary process"; it does not relate to taxation, budgets, expenditures, or money. *See* Pl. Mem. at 19. While the proposed new clause undoubtedly would have an enormous impact on the role of religion in public programs, there is simply no logical nexus between *participation* "in a public program because of religion" and taxation, budgetary process, budgets, or expenditures at the state or local level. For example, this language would prohibit religious discrimination in state and local government employment and it might be argued that a high school graduation could not be held on the Jewish sabbath.

Second, and undisputed by any of the parties, the deletion of the third sentence of Article I, section 3 is not within the TBRC's authority because it addresses the use of not only the state's funds, but also the funds of "political subdivisions." *See* Art. I, § 3, Fla. Const. ("No revenue of the state or any political subdivision . . . ."); *see also* Pl. Mem. at 20 & n.21. While the FCC Intervenors vaguely suggest Ballot Initiative No. 7 is a constitutional exercise of the Commission's authority because Article I, section 3 "indirectly impacts taxation and revenue," none of the parties assert that the deletion of the existing third sentence of that section, insofar as

it affects the expenditures of political subdivisions, deals with "taxation or the *state* budgetary process." Art. XI, § 6(e), Fla. Const. (emphasis added).

B. Ballot Initiative No. 9 proposes two constitutional amendments which are largely unrelated. First, the Commission has proposed an amendment to Article IX, section 1(a), that alters the constitution's instruction about the manner in which the state is to fulfill its "paramount duty . . . to make adequate provision for the education of all children residing within its borders." Art. IX, § 1(a), Fla. Const. Second, the Commission has proposed adding a new section to Article IX that would require all school districts to spend at least 65 percent of their funds on classroom instruction, rather than on administration. Neither of these provisions, on a proper understanding of Article XI, section 6(e), deals with "taxation" or the "state budgetary process," *see* Pl. Mem. at 21-22, but even on Defendant's expansive view of the "state budgetary process" it was beyond the TBRC's power to propose Ballot Initiative No. 9.

As noted, one part of Ballot Initiative No. 9 would amend the constitution to direct local school districts on how to allocate their funds. Yet Defendant and Defendant-Intervenors cannot provide any plausible explanation of how the TBRC's authority extends to amendments relating to purely *local* expenditures. To be sure, they point out that "[a] 35 percent cap on administrative spending . . . clearly protects the state budget and promotes the effective use of tax dollars," Def. Mem. at 25, noting in this connection that state spending on education "exceeds $20 billion," approximately one-third of the total state budget. *Id.* But this rationale is entirely unavailing. Whatever portion of its total budget the state devotes to education, the proposed amendment does not in the least affect state *spending* on education. The amendment does not change what local school districts receive from the state, but only directs how they may expend the funds that they do receive. (And, it should be noted, the amendment as worded also

would regulate the expenditure of funds that local school districts receive from sources other than the state.) The impact of this provision is, in other words, solely on local school district expenditures, not on *state* expenditures.[10]

V. BALLOT INITIATVE NO. 9 CANNOT BE PLACED ON THE BALLOT BECAUSE THE BALLOT TITLE AND SUMMARY LANGUAGE PROPOSED BY THE TBRC IS MISLEADING AS TO THE TRUE EFFECT OF THE PROPOSED AMENDMENT.

The Secretary of State should also be enjoined from placing Initiative No. 9 on the ballot for the November 2008 general election for a second, independent reason: the ballot title and summary language drafted by the TBRC is misleading, in violation of § 101.161, Fla. Stat. (2008) and Article XI, section 5, of the Florida Constitution. *See Armstrong*, 773 So. 2d at 12 (*citing* Art. XI, § 5, Fla. Const.). As explained in our opening memorandum, *see* Pl. Mem. 23-26, Ballot Initiative No. 9 is a combination of two largely unrelated proposals which were combined by the TBRC on the final day of its 2007-2008 term. In combining the two proposals, the TBRC created a ballot title that misleads voters by describing what one of the proposals would do, while only identifying the general subject matter of the other. The result is a deceptive ballot title that informs the voters that the Ballot Initiative will do something that the Commission believes they are likely to find attractive, spending more on classroom instruction –

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[10] Defendants argue that, because the ballot summary language accompanying the 1988 constitutional amendment that created the TBRC stated that the TBRC would "review matters relating to state and local taxation and the budgetary process," the Commission should be able to propose constitutional amendments relating to local expenditures. Def. Mem. at 25. But quite apart from the facts that the ballot summary language cannot trump the text of the amendment itself, and that the summary's reference is to the TBRC's authority to "review" issues, not to propose constitutional amendments, the natural reading of the ballot summary language is that "state and local" modifies the term "taxation," not "the budgetary process." The summary language is, in other words, entirely consistent with the text of Article XI, section 6(e) in authorizing the TBRC to propose constitutional amendments dealing with "taxation" at any level of government, but dealing only with the "*state* budgetary process."

without informing them of the Ballot Initiative's more controversial side, *i.e.*, removing a constitutional barrier to public funding of private schools. The title is thus neither "accurate, objective, [nor] neutral," *Advisory Op. to Att'y Gen. re Additional Homestead Tax Exemption*, 880 So. 2d 646, 653 (2004), and it "'hide[s] the ball' as to the amendment's true effect," *Armstrong*, 773 So. 2d at 22. *See also Advisory Op. to Att'y Gen. re Save Our Everglades*, 636 So. 2d 1336, 1341 (Fla. 1994)). Because the Court cannot rewrite the ballot title or summary language adopted by the TBRC, or revise the text of the Ballot Initiative itself, *Smith*, 606 So. 2d at 621-22; *see also* Pl. Mem. 19 n.20, Ballot Initiative No. 9 may not lawfully be placed on the election ballot.

Other than disagreeing with the contention that the ballot title language is misleading, the only response Defendant offers is that any flaw in the title is cured by the summary that follows it. Def. Mem. at 26-28. That contention is wholly misplaced. 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 mislead as to its purpose, and can cast an intelligent and informed ballot." *Advisory Op. to Att'y Gen. re Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563, 566 (Fla. 1998). The ballot title and summary "must be read together in determining if the ballot information properly informs the voter." *Advisory Op. to Att'y Gen. re People's Prop. Rights Amendments*, 699 So. 2d 1304, 1309 (Fla. 1997) (citing *Advisory Op. to Att'y Gen. re Ltd. Casinos*, 644 So. 2d 71, 75 (Fla. 1994)). Where the proposed ballot title provides blatantly deceptive information in bold, capital letters about what is at stake in the Ballot Initiative, that deception cannot be cured by explaining the full effect of the initiative in the summary language

that follows – which many voters, judging themselves sufficiently informed by the (misleading) information given in the title, will doubtless never read.[11]

CONCLUSION

For the reasons stated herein, as well as in Plaintiff's initial memorandum of law, the Court should grant Plaintiff's Motion for Summary Judgment, deny the cross-motions of Defendant and the Defendant-Intervenors, and enjoin the Defendant from placing Ballot Initiatives No. 7 and 9 on the ballot for the November 2008 general election.

Respectfully submitted,

RONALD G. MEYER, ESQUIRE
On Behalf Of:

RONALD G. MEYER
Florida Bar No. 0148248
JENNIFER S. BLOHM
Florida Bar. No. 0106290
Meyer and Brooks, P.A.
2544 Blairstone Pines Drive
Post Office Box 1547
Tallahassee, FL 32302
(850) 878-5212

ROBERT H. CHANIN*
National Education Association
1201 16th Street, N.W.
Washington, D.C. 20036
(202) 822-7035

JOHN M. WEST*
DANIEL A. ZIBEL*
Bredhoff & Kaiser, P.L.L.C.
805 Fifteenth Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 842-2600

[11] Both Defendant and the TBRC Intervenors respond to an argument that was never made, concerning the order in which the two provisions of Ballot Initiative No. 9 are placed in the title and summary. Def. Mem. at 27 n.47; TBRC Mem. at 12-13. But Plaintiffs have not disputed the order of the two provisions – and in fact the examples of more neutral titles we provided in our initial memorandum retained the order used by the TBRC. *See* Pl. Mem. at 24-25. Our objection is not to the order in which the two issues are placed in the title, but to the deceptive effect of explaining, in the boldface, capital-letter title, what one provision does while hiding the ball about the effect of the other.

PAMELA L. COOPER
Florida Bar No. 0302546
Florida Education Association
300 East Park Avenue
Tallahassee, FL 32301
(850) 224-7818

AYESHA N. KHAN*
Americans United for Separation
of Church and State
518 C Street, N.E.
Washington, D.C. 20002
(202) 466-3234

JUDITH E. SCHAEFFER*
People For the American Way Foundation
2000 M Street, NW, Suite 400
Washington, D.C. 20036
(202) 467-4999

DAVID L. BARKEY
Florida Bar No. 23964
Anti-Defamation League
One Park Place
621 NW 53rd Street
Boca Raton, FL 33487-8235
(561) 988-2900

JOY CAUSSEAUX FRANK
Florida Bar No. 0316245
Florida Association of District School
Superintendents, Inc.
208 South Monroe Street
Tallahassee, Florida 32301
(850) 488-5099

JEFFREY PHILIP SINENSKY*
American Jewish Committee
165 East 56 Street
New York, New York 10022
(212) 891-6740

DANIEL MACH*
ACLU Program on Freedom
of Religion and Belief
915 Fifteenth Street, NW
Washington, D.C. 20005
(202) 548-6604

RANDALL C. MARSHALL
Florida Bar No. 181765
American Civil Liberties Union
Foundation of Florida, Inc.
4500 Biscayne Boulevard, Suite 340
Miami, FL 33137-3227
(786) 363-2700

Dated: July 25, 2008

*admitted *pro hac vice*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing has been furnished by facsimile and U.S. Mail on this 25th day of July, 2008, to:

Stephen H. Grimes, Esquire
Nathan A. Adams, IV, Esquire
Jerome W. Hoffman, Esquire
Holland & Knight, LLP
Post Office Drawer 810
Tallahassee, Florida 32302
Fax No.: (850) 224-8832
Counsel for Intervenors Florida Catholic Conference, Inc., et al.

Daniel J. Woodring, Esquire
Woodring Law Firm
3030 Stillwood Court
Tallahassee, Florida 32308
Fax No.: (850) 254-2939
Counsel for Intervenors Members of TBRC

J. Patrick Fitzgerald, Esquire
J. Patrick Fitzgerald & Associates, P.A.
110 Merrick Way, Suite 3-B
Coral Gables, Florida 33134
Fax No.: (305) 443-6613
Counsel for Intervenor Catholic Charities

Blaine H. Winship, Esquire
Scott D. Makar, Esquire
Timothy D. Osterhaus, Esquire
Louis F. Hubener, Esquire
Office of the Attorney General
The Capitol – PL-01
Tallahassee, Florida 32399-1050
Fax No.: (850) 410-2672
Counsel for Defendant Browning

Lynn Hearn, Esquire
General Counsel
Office of Secretary of State
Florida Department of State
R.A. Gray Building
500 South Bronough Street
Tallahassee, Florida 32399
Fax No.: (850) 245-6127

RONALD G. MEYER