

IN THE
SUPREME COURT
OF FLORIDA

NO. 83,301

In Re: ADVISORY OPINION
TO THE ATTORNEY GENERAL--
SAVE OUR EVERGLADES

BRIEF OF FLO-SUN INC.
REQUESTING THAT THE
PROPOSED AMENDMENT BE
STRICKEN FROM THE BALLOT

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STATEMENT OF
THE CASE AND THE
INTEREST OF FLO-SUN INC.

On March 11, 1994 the Court issued an Order permitting interested parties to file briefs relating to the Attorney General's Petition for an Advisory Opinion on the validity of the SAVE OUR EVERGLADES initiative petition. A copy of the initiative petition is attached to this Brief. The Attorney General's Petition was filed pursuant to article IV, section 10 of the Florida Constitution and section 16.061, Florida Statutes (1993).

The SAVE OUR EVERGLADES initiative petition seeks to amend article X of the Florida Constitution ("Miscellaneous") by adding a section which would: (1) find the sugarcane industry guilty of polluting the Everglades; (2) impose a "fee" on sugarcane processors "to clean up the pollution and to restore clean water;" (3) establish a "Trust Fund" to administer and expend the collected funds; (4) empower the Trustees to "adopt their own operating rules and regulations," resolve "[d]isputes arising under" the amendment and "refine" the amendment's definition of the "Everglades Ecosystem."

Flo-Sun Inc. is a Florida corporation whose principal business is sugarcane growing and processing within the area presently defined by the amendment as the "Everglades Ecosystem." Therefore it would be subject to the "fee" on raw sugar sought to be imposed by the proposed amendment. Article IV, section 10 of the Florida Constitution guarantees "interested persons" the right to be heard on questions presented by an initiative petition. As a target of the SAVE OUR EVERGLADES sanction, Flo-Sun Inc. has

standing to challenge the validity of the petition in this proceeding.

**SUMMARY OF
THE ARGUMENT**

Article XI, section 3 of the Florida Constitution requires a proposed amendment to "embrace but one subject and matter directly connected therewith." Section 101.161(1), Florida Statutes (1993), requires a proposed amendment to contain a summary explaining the "chief purpose of the measure," and a "ballot title." The title and summary must be "accurate and informative." In re Advisory Opinion to the Attorney General - Restricts Laws Related to Discrimination, ____ So. 2d ____, 19 Fla. L. Weekly S109, S110 (March 3, 1994), quoting Smith v. American Airlines, 606 So. 2d 618, 621 (Fla. 1992). The demand for accuracy and informativeness is "to assure that the electorate is advised of the true meaning, and ramifications, of an Amendment." Restricts Laws Related to Discrimination, supra, quoting Askew v. Firestone, 421 So. 2d 151, 156 (Fla. 1982).

SAVE OUR EVERGLADES fails the title, summary, and single-subject tests.

The title "SAVE OUR EVERGLADES" is an inaccurate, uninformative, deceptive campaign slogan. The "fee" imposed by the amendment will not save our Everglades. The title fails to apprise voters of the "legal effect of the amendment, and no more;" rather it flies the false colors of "political motivation" substituting "subjective evaluation of special impact." Evans v. Firestone, 457 So. 2d 1351, 1355 (Fla. 1984) condemns those deceits. Askew v.

Firestone, 421 So. 2d 151, 156 (Fla. 1982) prohibits the false flag title disguise utilized by the SAVE OUR EVERGLADES proponents.

The proposed amendment's summary suffers similar shortcomings. It promises "to restore the Everglades for future generations" and to make "the sugarcane industry which polluted the Everglades" pay for the "clean up" of the Everglades. The summary is political rhetoric, not an accurate and informative summary of the legal effect and organic law change purpose of the amendment. Askew, Evans, Smith, and Restricts Laws Related to Discrimination compel the same conclusion: the summary fails the fair notice of the meaning and effect test because it does not inform the voters of the multiple changes it makes to the legislative, executive and judicial functions of Florida government in violation of the article XI, section 3 single-subject rule.

The proposed amendment encroaches upon article V by using an initiative referendum to usurp the jurisdiction of the judicial branch to make determinations of guilt and appropriate penalties, and/or to provide judicial review of findings of guilt and impositions of punishment. The proposed amendment also violates article I, section 9 (due process) and section 10 (bill of attainder).

The proposed amendment's imposition of a one cent per pound "fee" on raw sugar imposes a tax. Article VII, section 1(a) of the Florida Constitution gives the power to tax to the legislature. The amendment's appropriation of the collected tax collides with article VII, section 1(c), which makes appropriations a legislative function. Thus the proposed amendment makes changes in fundamental legislative functions. The summary and the text omit mention of

these changes.

The proposed "Trust Fund," administered by five Trustees to execute and implement policies regarding "water quality, quantity, timing and distribution (including pollution clean up and control, exotic species removal and control, land acquisition, restoration and management, construction and operation of water storage and delivery systems, research and monitoring)," intrudes upon numerous executive functions presently performed by state, federal, and Indian Nation governmental units. The Trustees, like an executive agency, are granted authority to adopt rules and regulations and to resolve disputes under the proposed amendment. The SAVE OUR EVERGLADES amendment modifies the executive structure of the state, established in article IV, section 6, Fla. Const., and empowers the Trustees to perform executive functions under article II, section 7, "to conserve and protect [the state's] natural resources and scenic beauty" in the "Everglades Ecosystem." In addition, those powers usurp and interfere with the myriad laws, rules and regulations of dozens of federal, state and local governmental units and two Indian Nations: The Seminole Tribe of Florida and the Miccosukee Tribe of Florida.

The multiple effects of the proposed amendment upon the functions, laws, rules and regulations of the three branches of government, and the failure to mention these effects, makes the amendment violative of the section 101.161(1) summary requirement and the Florida Constitution's single-subject rule.

ARGUMENT

THE SAVE OUR EVERGLADES PROPOSED
CONSTITUTIONAL AMENDMENT SHOULD
BE STRICKEN FROM THE BALLOT AS
VIOLATIVE OF ARTICLE XI, § 3,
FLORIDA CONSTITUTION AND
SECTION 101.161(1), FLORIDA STATUTES

I.

THE GUIDING PRINCIPLES

Proposed constitutional amendments demand careful scrutiny:

The legal principles in the state constitution inherently command a higher status than any other legal rules in our society. By transcending time and changing political mores, the constitution is a document that provides stability in the law and society's consensus for general, fundamental values. Statutory law, on the other hand, provides a set of legal rules that are specific, easily amended and adaptable to the political, economic and social changes of our society.

Advisory Opinion to the Attorney General - Limited Marine Net Fishing, 620 So. 2d 997, 999 (Fla. 1993) (McDonald, J., concurring, joined by Barkett, C.J., and Overton and Kogan, JJ.). That majority-of-the-court concurrence expressed a preference for use of the legislative process "on matters that are statutory in nature" and a doubt about the sufficiency of the "technical requirements ... to prevent abuse of the amendment process." Id.

The "technical" requirements are that a proposed amendment "shall embrace but one subject and matter directly connected therewith" (Article XI, § 3, Fla. Const.) and:

[w]henever a constitutional amendment or other public measure is

submitted to the vote of the people, the substance of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot.... The substance of the Amendment or other public measure shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure. 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.

Section 101.161(1), Fla. Stat. The statute's purpose is "to assure that the electorate is advised of the true meaning, and ramifications of an amendment." In re: Advisory Opinion to the Attorney General - Restricts Laws Related to Discrimination, ___ So. 2d ___, 19 Fla. L. Weekly S109, S110 (March 3, 1994), quoting Askew v. Firestone, 421 So. 2d 151, 156 (Fla. 1982).

Facial constitutional issues raised by a proposed amendment are not cognizable in an Attorney General Advisory Opinion Petition. Restricts Laws Related to Discrimination, 19 Fla. L. Weekly at S112, n. 1 (Kogan, J., concurring). Thus we focus on the several "technical" failures of the proposed amendment, including a single-subject violation involving article V, which arises from the amendment's conflict with the Bill of Attainder clauses of article I, § 10 of the United States Constitution and article I, § 10 of the Florida Constitution.¹

^{1/} The proposed amendment summary states, inter alia: "Directs the sugarcane industry, which polluted the Everglades, to help pay to clean up pollution and restore clean water supply." The text, section (a), provides, inter alia: "The sugarcane industry in the Everglades Ecosystem has profited while damaging the Everglades with pollution and by altering water supply. Therefore the sugarcane industry should help pay to clean up the pollution and to restore clean water." No federal or state court or agency has made such an adjudication. (footnote continued...)

(footnote 1 continued)

A bill of attainder is a law that legislatively or by referendum determines guilt and inflicts punishment upon an identifiable person or group without the protections of a judicial trial. See United States v. Brown, 381 U.S. 437, 445, 447, 85 S. Ct. 1707, 1713, 1714, 14 L.Ed. 2d 484 (1965); Nixon v. Administration of General Services, 433 U.S. 425, 468, 97 S.Ct. 2777, 2803, 53 L. Ed. 2d 867 (1977). The prohibition against such laws extends to "all legislative acts, no matter what their form, that apply to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial." United States v. Lovett, 328 U.S. 303, 315, 66 S.Ct. 1073, 1078, 90 L.Ed. 1252 (1946). See also Cummings v. Missouri, 4 Wall. 277, 324, 18 L.Ed. 356 (1867) (striking a portion of the Missouri Constitution). A state constitutional amendment adopted by popular referendum "exacerbates[s] the concern for not circumventing the procedural safeguards of a judicial trial or other adversary hearing--a concern which has also been central in the jurisprudence of the bill of attainder clauses." Tribe, American Constitutional Law, p. 647 n.27 (2d ed. 1988).

The "Save Our Everglades" Amendment is a classic bill of attainder. Justice Overton has suggested that conformity with the Constitution of the United States is within the scope of an Attorney General Advisory Opinion proceeding:

Granted, we must consider whether the proposed amendment and the ballot title and summary comply with Article XI, section 3 of the Florida Constitution, and section 101.161 Florida Statutes (1989). However, I find that those provisions do not limit our responsibility in considering whether or not the proposed amendment to this constitution meets constitutional requirements of validity under the Constitution of the United States.

Advisory Opinion to the Attorney General - Limited Political Terms in Certain Elective Offices, 592 So. 2d 225, 229 (Fla. 1991) (Overton, J., concurring in part and dissenting in part). Should the Court wish to reconsider its technical scrutiny only view, this case presents a vehicle for Justice Overton's suggestion.

II.

**THE BALLOT TITLE AND
SUMMARY FAIL THE
SECTION 101.161(1) TEST**

Section 101.161(1), Florida Statutes, requires an "explanatory statement...of the chief purpose of the measure," and a "ballot title...of a caption...by which the measure is commonly referred to or spoken of." This Court explained:

The critical issue concerning the language of the ballot summary is whether the public has "fair notice" of the meaning and effect of the proposed amendment.... [T]he ballot title and summary are expected to be "accurate and informative".

Restricts Laws Related to Discrimination, 19 Fla. L. Weekly at S110, quoting Smith v. American Airlines, 606 So. 2d 618, 621 (Fla. 1992). Compare, Askew v. Firestone, 421 So. 2d 151, 155 (Fla. 1982):

Simply put, the ballot must give the voter fair notice of the decision he must make.... [P]roposal of amendments to the Constitution is a highly important function of government, that should be performed with the greatest certainty, efficiency, care and deliberation.... [T]he people who are asked to approve them must be able to comprehend the sweep of each proposal from a fair notification in the proposition itself that it is neither less nor more extensive than it appears to be.

Neither the title nor the explanatory summary of this proposed amendment meets those requirements. "SAVE OUR EVERGLADES" is inaccurate, misleading, and its sweep is not only less than it appears to be; it is, simply put, a dishonest promise. The proposed "fee on raw sugar...of one cent per pound, indexed for

inflation" will not "SAVE OUR EVERGLADES." The deceit of the Ballot Title precludes approval of the proposed amendment. "A proposed amendment cannot fly under false colors, this one does." Askew v. Firestone, 421 So. 2d at 156. So does this one.²

A survey of amendment titles since the advent of the Attorney General Advisory Opinion process demonstrates the deceptiveness which destroys the integrity of the "SAVE OUR EVERGLADES" title:

Advisory Opinion to the Attorney
General - RESTRICTS LAWS RELATED TO
DISCRIMINATION, __ So. 2d __ (1994)

* * *

Advisory Opinion to the Attorney
General - LIMITED MARINE NET
FISHING, 620 So. 2d 997 (Fla. 1993)

* * *

Advisory Opinion to the Attorney
General - LIMITED POLITICAL TERMS IN
CERTAIN ELECTIVE OFFICES, 592 So. 2d
225 (Fla. 1991)

* * *

In re Advisory Opinion to the
Attorney General - HOMESTEAD
VALUATION LIMITATION, 581 So. 2d 586
(Fla. 1991)

* * *

^{2/} Justice McDonald's legislation/constitution dichotomy in Limited Marine Net Fishing, 620 So. 2d at 999, is especially relevant in this case. The legislative proposals for aiding the Everglades, pending in the present session, demonstrate the careful balancing required to meet future environmental restoration concerns. Among the relevant existing statutes are Chapter 373 (Water Management and Use); Chapter 376 (Pollutant Discharge Prevention and Control Act); Chapter 403 (Water and Air Pollution). The Marjorie Stoneman Douglas Everglades Protection Act, adopted to protect the Everglades, is at § 373.4592, Fla. Stat.

In re Advisory Opinion to the
Attorney General - ENGLISH IS THE
OFFICIAL LANGUAGE OF FLORIDA, 520
So. 2d 11 (Fla. 1988)

* * *

In re Advisory Opinion to the
Attorney General - LIMITATION ON
NON-ECONOMIC DAMAGES IN CIVIL
ACTIONS, 520 So. 2d 284 (1988)

Each of those titles accurately described the purpose and function of their respective proposals. Even the proponents of the HOMESTEAD VALUATION LIMITATION Amendment were careful to separate the name of their organization - "SAVE OUR HOMES" - from the title of their proposed amendment. See, Florida League of Cities v. Smith, 607 So. 2d 397, 400, n. 6 (Fla. 1992) ("The Save Our Homes organization, which drafted and circulated proposed Amendment 10 ..."). "Save Our Homes" served the organizers' political purposes; it disserved the duty to offer an accurate, non-misleading title. Those proponents understood the difference; they used an accurate title and saved the slogans for their political campaign.

The SAVE OUR EVERGLADES title, by promising more than it can produce, implicates another strand of constitutional amendment review doctrine. Evans v. Firestone, 457 So. 2d 1351, 1355 (Fla. 1984) framed the indicia of a "fair" ballot as one which does not offer "subjective evaluation of special impact;" as one which focuses on "the legal effect of the amendment, and no more;" and as one which propounds its "political motivation...outside the voting booth." SAVE OUR EVERGLADES violates those precepts in its title

and in its summary.³

The summary is especially pernicious:

SUMMARY: Creates the Save Our Everglades Trust to restore the Everglades for future generations. Directs the sugarcane industry, which polluted the Everglades, to help pay to clean up pollution and restore clean water supply. Funds the Trust for twenty-five years with a fee on raw sugar from sugarcane grown in the Everglades Ecosystem of one cent per pound, indexed for inflation. Florida citizen Trustees will control the Trust.

The summary is supposed to "advise the voter sufficiently to enable him intelligently to cast his ballot." Askew v. Firestone, 421 So. 2d 151, 155 (Fla. 1982). The summary must state the "chief purpose of the measure." § 101.161(1). Putting aside the constitutional issues presented by the proposal (note 1, supra), the "sugarcane industry which polluted the Everglades" language advises the voter of the substance of the proponents' need to punish - not the constitutional substance of the "Save Our Everglades" amendment. It compounds its flawed approach by promising to "restore the Everglades for future generations" - a laudable goal, but an inaccurate and uninformative summary of the organic law change purpose of the amendment. And, as we

^{3/} No Florida decision has struck an amendment because its title was a campaign slogan. Other states have condemned "sloganeering." Mason v. Jernigan, 540 S.W. 2d 851, 852 (Ark. 1976). See, discussion in Brief of Florida Sugar Cane League. The trouble with slogan-style political rhetoric is that its superficiality often makes it misleading. Whatever the political dangers of campaign rhetoric may be, they are magnified when changes to the organic law of a government are put to the people under false colors. Politicians and statutes come and go; constitutions are made for the ages.

demonstrate below, it utterly fails to apprise the electorate of the proposed amendment's taxing power and its impact on separate functions of government and other provisions of the constitution. One cannot give the public the critical "'fair notice' of the meaning and effect of the proposed amendment," Restricts Laws Related to Discrimination, supra at S110, via a summary which combines political rhetoric promises with punishment for "polluters." The admixture of punitiveness, false promises, and non-disclosure renders SAVE OUR EVERGLADES defective under the provisions of § 101.161(1) requiring that ballot titles and explanatory summaries of constitutional amendments be accurate, and not misleading.

Evans v. Firestone's condemnation of a summary's subjective evaluations controls the outcome here:

[T]he ballot summary is no place for subjective evaluation of special impact. The ballot summary should tell the voter the legal effect of the amendment and no more. The political motivation behind a given change must be propounded outside the voting booth.

457 So. 2d at 1355.

III.

THE PROPOSED SAVE OUR EVERGLADES
AMENDMENT VIOLATES THE SINGLE-SUBJECT
REQUIREMENT OF ARTICLE XI, SECTION 3
OF THE FLORIDA CONSTITUTION

A. THE SINGLE-SUBJECT STANDARD

Article XI, section 3 of the Florida Constitution requires that a proposed amendment "shall embrace but one subject and matter directly connected therewith." Restricts Laws Related to Discrimination, supra at S110. "Oneness of purpose" is the hallmark of the single-subject inquiry:

[W]e must consider whether the proposal affects separate functions of government and how the proposal affects other provisions of the constitution.

Id.

This single-subject requirement is a "rule of restraint" designed "to allow the citizens, by initiative petition, to propose and vote on singular changes in the functions of our governmental structure." Fine v. Firestone, 487 So. 2d 984, 988 (Fla. 1984) (emphasis supplied). Its purpose is to prevent "logrolling," Evans v. Firestone, 457 So. 2d 1351, 1554 (Fla. 1984) and "multiple precipitous changes in our state constitution." Fine, 487 So. 2d at 988. This Court requires:

strict compliance with the single-subject rule in the initiative process for constitutional change because our constitution is the basic document that controls our governmental functions, including the adoption of any laws by the legislature.

Fine, 487 So. 2d at 989.

Of the five methods⁴ of amending or revising the Constitution in article XI, only the initiative process is limited by the single-subject requirement. The defining differences between the initiative and the other amendment methods are that (1) the other methods involve public hearings, debate, and deliberation before the proposed amendment is drafted and submitted to the electorate, and (2) the drafters are either elected or appointed representatives of the public. The initiative process lacks a "filtering legislative process," and the public has "no representative interest in drafting" the amendment; thus an initiative amendment cannot contain multiple subjects. Fine, 487 So. 2d at 988.⁵

The "oneness of purpose" inquiry utilizes a functional analysis focusing on the proposal's effect upon separate functions of government and other provisions of the Constitution. Restricts Laws Related To Discrimination, 19 Fla. L. Weekly at S110. A proposed amendment is constitutionally deficient if it (1) affects more than one function of government, Fine, supra at 990, or (2) "performs the functions of different branches of government." Evans, 457 So. 2d at 1354. SAVE OUR EVERGLADES fails the single subject test. It substantially affects multiple governmental

⁴ Those methods are joint resolution of the Legislature; Revision Commission proposal; initiative; constitutional convention; and Taxation and Budget Reform Commission proposals. Art. XI, Fla. Const.

⁵ For those reasons, the Court has recognized that the single-subject requirement imposed on every legislative act under Article III, Section 6, is not construed as demandingly as the single-subject requirement for an initiative. Fine, 448 So.2d at 988.

functions and more than one branch of government.

B. THE SAVE OUR EVERGLADES SCOPE

The SAVE OUR EVERGLADES amendment proposes the following:

▶ A finding that the sugarcane industry has "damaged the Everglades with pollution." Section (a).

▶ Establishes a Trust Fund with the purpose of expending funds "to recreate the historical functions of the Everglades Ecosystem." Section 16(a). The Trustees are to implement this goal by "restoring water quality, quantity, timing, and distribution (including pollution clean up and control, exotic species removal and control, land acquisition, restoration and management, construction and operation of water storage and delivery systems, research and monitoring)." Section 16(a).

▶ Imposes a tax (labeled a fee) of one cent per pound on the processor of sugarcane grown in the Everglades Ecosystem. Section 16(c). This tax operates for 25 years.

▶ Mandates the Legislature to appropriate all of the funds generated by the tax to the Trust Fund. Section 16(c).

▶ Provides that the Trust Fund is to be controlled and administered by five Trustees who have terms of five years, who must be Florida residents with experience in environmental protection, and who shall not hold elected governmental office. Section 16(b).

▶ Authorizes the Trustees to adopt their own operating rules and regulations "subject to generally-applicable law," and requires any disputes arising under the amendment to be first presented to the Trustees for resolution after a hearing and

"thereafter according to generally-applicable law." Section 16(b).

▶ Initially defines the boundaries of the Everglades Ecosystem and authorizes the Trustees to "refine this definition." Section 16(d).

It is not surprising that a proposed amendment entitled "SAVE OUR EVERGLADES" would affect multiple functions of government and every branch of government. A matter as complex and multifaceted as the homeostatic balance of the plants, animals, water and minerals within the environment they inhabit -- i.e., an ecosystem located in eight counties (Okeechobee, Martin, Glades, Hendry, Palm Beach, Broward, Dade, Monroe) and comprising nearly four million acres -- is an unlikely subject of a single governmental function. An analysis of the powers and functions of this amendment shows that it spreads through the government of Florida much like the primordial everglade it is trying to protect. This proposed amendment taxes, appropriates, creates a new independent agency with executive power, and declares the sugarcane industry guilty of pollution. It substantially affects article VII, § 1 (taxing); article VII, § 1(c) (appropriations); article IV, § 6 (allocation of executive functions); and article V (judicial review).

Violation of the single-subject requirement is not the amendment's only flaw. The SAVE OUR EVERGLADES amendment also fails to "identify the articles or sections of the constitution substantially affected" and improperly places this Court in the position of "redrafting substantial portions of the constitution by judicial construction." Fine, 448 So. 2d at 989.

It leaves for future judicial construction numerous

unanswered questions about its effect on article II, § 5(a) (prohibition on dual offices); article I, § 6 (right to collective bargaining); article III, § 14 (civil service system); and article III, § 19 (budgeting, planning, and appropriations).

We address the major multiple, undisclosed effects in light of this Court's rule:

Although an initiative petition under the present constitution may amend multiple sections of the constitution as long as the proposal contains a single subject, an initiative petition should identify the articles or sections of the constitution substantially affected. This is necessary for the public to be able to comprehend the contemplated changes in the constitution and to avoid leaving to this Court the responsibility of interpreting the initiative proposal to determine what sections and articles are substantially affected by the proposal. ... We do not believe it was the intent of the authors of the initiative-amendment provision, nor the intent of the electorate in adopting it, that the Supreme Court should be placed in the position of redrafting substantial portions of the constitution by judicial construction. This, in our view, would be a dangerous precedent.

Fine v. Firestone, 448 So. 2d at 989.

C. **THE AMENDMENT AFFECTS JUDICIAL FUNCTIONS DELINEATED BY THE CONSTITUTION**

The SAVE OUR EVERGLADES constitutional amendment substantially affects article V of the Florida Constitution. Article V places the judicial power in the courts of our State. SAVE OUR EVERGLADES usurps that power by finding the sugarcane

industry guilty of "pollution" and "altering the water supply," and fining it with a "fee on raw sugar."

The ballot summary is unequivocal:

Directs the sugarcane industry, which polluted the Everglades, to help pay to clean up pollution and restore clean water supply.

The amendment's preamble is equally clear:

The sugarcane industry in the Everglades Ecosystem has profited while damaging the Everglades with pollution and by altering the water supply. Therefore the sugarcane industry should help pay to clean up the pollution and to restore clean water.

Numerous Florida statutes impose criminal and civil liability upon water polluters. See, e.g., §§ 403.121; 403.161, Florida Statutes. We have noted the bill of attainder and due process Florida and federal constitutional restraints on guilt finding and punishment without a trial. See, note 1, supra, p. 2. By arrogating the function of trial and punishment to a constitutional amendment, SAVE OUR EVERGLADES abrogates and encroaches upon the judicial function reserved, under article V, to Florida courts. At this Advisory Opinion jurisdictional juncture, the article I, §§ 9 and 10 bill of attainder and due process implications inherent in SAVE OUR EVERGLADES serve to demonstrate its effect upon the article V function. Those provisions limit the power of the people to substitute the ballot for a judge and jury. By finding guilt and imposing punishment, the proposed amendment violates the single-subject rule by silently affecting the authority of the judiciary. See, Restricts Laws Related to Discrimination, 19 Fla. L. Weekly at S110: "[T]he proposed

amendment encroaches on the...authority of...the judiciary...[and] ...the amendment modifies article I, section 2 of the Florida Constitution...and also affects article I, section 6 of the Florida Constitution...." SAVE OUR EVERGLADES suffers a similar article V flaw; only the article I sections differ.

**D. THE AMENDMENT AFFECTS LEGISLATIVE
FUNCTIONS DELINEATED BY THE CONSTITUTION**

What is the "oneness of purpose" of this proposed amendment? "Save Our Everglades" or "create a trust fund to restore the Everglades for future generations," as stated by the title and summary, do not denote a constitutional subject, i.e., a proposed change in organic law. They are the "expansive generality" condemned in Restricts Laws Related to Discrimination because "enfolding disparate subjects within the cloak of a broad generality does not satisfy the single-subject requirement." Id. at S110, quoting Evans v. Firestone, 457 So. 2d at 1353. This Court cannot rely upon the amendment's self-characterization; it "must consider whether the proposal affects separate functions of government and how the proposal affects other provisions of the Constitution." Restricts Laws Related to Discrimination at S110.

The power to tax and the power to appropriate are two quintessential legislative functions. This Court has held that "[t]he power to tax lies with the legislative branch," Campus Communication v. Department of Revenue, 473 So. 2d 1290, 1292 n.1 (Fla. 1985), and "the power to appropriate state funds is legislative and is to be exercised only through duly enacted statutes." Chiles v. Children A, B, C, D, E, & F, 589 So. 2d 260,

265 (Fla. 1991).

The juxtaposition below illustrates the changes wrought by the proposed amendment.

Constitution

Amendment

Taxation

Taxation

Article VII, § 1(a).
No tax shall be levied
except in pursuance of law.

Section 16(c).
Revenues collected by State shall
come from a fee on raw sugar from
sugarcane grown within the Everglades
Ecosystem. The fee shall be
assessed against each first proces-
sor of sugarcane at a rate of \$.01
per pound of raw sugar, increased
annually by any inflation measured
by the Consumer Price Index for all
urban consumers (U.S. City Average,
All Items), or successor reports of
the United States Department of
Labor, Bureau of Labor Statistics or
its successor, and shall expire
twenty-five years after the
effective date of this Section.

Appropriation

Appropriation

Article VII, § 1(c).
No money shall be drawn
from the treasury except
in pursuance of appro-
priation made by law.

Section 16(c).
The Trust shall be funded by revenues
which shall be collected by the State
and deposited into the Trust, all of
which funds shall be appropriated by
the Legislature to the Trustees to
be expended solely for the purpose
of the Trust.

The amendment's constitutional imposition of a tax at a specific rate on a specific item is unprecedented. The Florida Constitution does not now impose any tax or any tax rate. At most the Constitution authorizes certain taxes, prohibits certain taxes, caps the maximum rate, and enacts exemptions. See e.g., Article VII, §§ 2,3,4(c),5. Like the revenue proposal in Fine, the SAVE OUR EVERGLADES amendment "limits the way in which the [legislature]

can tax." 448 So. 2d at 992. This amendment usurps the legislative power to repeal this tax, to change the rate, or to change the event or object that is taxed.

Despite its label, there can be no doubt that the "fee" is a tax. The proponent's memorandum of Jon Mills submitted to the Attorney General seeking approval of the proposed amendment was candid:

The Everglades fee is more of [an] excise tax that is logically and properly linked to the purpose of expending funds for clean up.

* * *

Also, the targeted Trust and its purpose of Everglades conservation are more closely and logically linked to the source of the funds, i.e. an excise tax on a major source of pollution.

* * *

V. Precedents for Using Excise Taxes for Pollution Clean Up and Restoration.

Mills Memorandum, pp. 13, 14, 18. The proponent's assessment is correct. This is a tax, not a fee.

Courts faced with deciding the fee/tax distinction have tended to:

emphasize the revenue's ultimate use, asking whether it provides a general benefit to the public, of a sort often financed by a general tax, or whether it provides more narrow benefits to regulated companies or defrays the agency's costs of regulation.

San Juan Cellular Telephone v. Public Serv. Comm'n, 967 F.2d 683, 685 (1st Cir. 1992). The former is a tax; the latter is a fee.

Id.⁶ The SAVE OUR EVERGLADES "fee" upon the sugarcane processors is explicitly for the benefit of the public, and neither benefits the companies nor defrays costs of their regulation. It is, despite the amendment's misleading words, a tax.

E. THE AMENDMENT AFFECTS THE EXECUTIVE FUNCTIONS DELINEATED BY THE CONSTITUTION

The SAVE OUR EVERGLADES trust fund is not simply an accounting mechanism by which certain funds are segregated from the general revenue fund for specific uses. Instead the "trust fund" is far more than a trust fund, far more than a passive receptacle: it is a constitutional agency with specific executive powers. The SAVE OUR EVERGLADES trust fund is not administered by an existing department of government like all the trust funds provided for in article III, section 19(f)(3).⁷ Instead the SAVE OUR EVERGLADES trust fund is "controlled" and "administered" by five Trustees appointed by the Governor and confirmed by the Senate. These Trustees are to execute and implement the mandates of this amendment -- the classic governmental function of an executive department -- and specifically are authorized to expend funds on "water quality, quantity, timing, and distribution (including pollution clean-up and control, exotic species removal and control,

⁶ The decisions which have examined the fee/tax dichotomy are federal decisions involving the federal Tax Injunction Act, 28 U.S.C. § 1341, which gives federal court's jurisdiction to review a state-imposed "fee," but not a state "tax."

⁷ Those trust funds include, inter alia, the trust funds established for bond covenants, the state transportation trust fund, the Florida retirement trust fund, and the trust funds for institutions under the management of the Board of Regents.

land acquisition, restoration and management, construction and operating of water storage and delivery systems, research, and monitoring)." Section 16(a).

The SAVE OUR EVERGLADES amendment modifies the executive structure of the state established in article IV, section 6, Fla. Const., and empowers the Trustees to perform executive functions under article II, section 7, "to conserve and protect [the state's] natural resources and scenic beauty" in the "Everglades Ecosystem."

The breadth of the intrusion is demonstrated by the plethora of federal, state, local and Indian governmental units with jurisdiction over portions of the "Everglades Ecosystem." Section 373.453(2)(b), Florida Statutes requires that the Surface Water Improvement and Management (SWIM) plans identify those governmental units. With respect to Lake Okeechobee, the Everglades National Park, the water conservation areas, and their drainage basins, those units include, inter alia, the Seminole Indian Nation, the Miccosukee Indian Nation, the United States Departments of the Interior and Agriculture, the Environmental Protection Agency, the Army Corps of Engineers, the Florida Departments of Environmental Protection, Agriculture and Consumer Services, and Community Affairs, and the Florida Game and Fresh Water Fish Commission, as well as the South Florida Water Management District and the South Florida and South West Florida Regional Planning Councils, eight counties, 25 municipalities, and 41 drainage districts. South Florida Water Management Dist., Everglades SWIM Plan--Supporting Information Document, p.2, 3/13/92.

The SWIM Act, §§ 373.451-.4595, Fla. Stat., and the

Marjorie Stoneman Douglas Everglades Protection Act, § 373.4592, Fla. Stat., require the South Florida Water Management District, in coordination with several state executive departments, to develop a SWIM plan for the Everglades. Section 373.4592(3). The SWIM plan is required to obtain compliance with water quality standards, to restore the Everglades' water quality and water quantity, and to identify and provide for the acquisition of land. § 373.4592 (3)(a)(1). Eminent domain is authorized to obtain lands "needed for the treatment or storage of water prior to its release into the Everglades Protection Area," § 373.4592(4)(a), and the Board of Trustees of the Internal Improvement Trust Fund may purchase or exchange property based upon appraisal pursuant to section 253.025(7).

The Everglades SWIM plan proposes multiple projects, costing approximately \$337 million through fiscal year 1997. These projects include each of the areas in which the SAVE OUR EVERGLADES trust fund claims constitutional authority to act, e.g., land acquisition, hydroperiod, melaleuca control, construction and treatment for stormwater runoff and phosphorus reduction. South Florida Water Management Dist., Everglades SWIM Plan--Planning Document, page v, 3/13/92.

The proposed amendment also provides the Trustees, as an executive agency, with quasi-legislative power to "adopt their own rules and regulations" and quasi-judicial power to resolve "disputes arising under this section" after a hearing. Thus it superimposes the SAVE OUR EVERGLADES Trustees on the extant extensive regulatory framework, with no hint of how the Trustees' executive functions are to affect or be reconciled with the efforts

of the numerous federal, state, local and Indian governmental units whose jurisdiction encompasses the Trustees' proposed jurisdiction.

Because the amendment substantially affects legislative functions, modifies the structure of the state's executive departments as set forth in article IV, section 6, Fla. Const., and modifies the executive function of protecting the state's natural resources provided for in article II, section 7, it has the same failing condemned in Evans: "where such an initiative performs the functions of different branches of government, it clearly fails the functional test for the single-subject limitation." 457 So. 2d at 1354.

The failure to identify the proposed amendment's multiple functions and multiple encroachments into federal, state, local and Indian nation executive authority makes SAVE OUR EVERGLADES analogous to RESTRICTS LAWS RELATED TO DISCRIMINATION:

[W]e find that the subject of discrimination in the proposed amendment is an expansive generality that encompasses both civil rights and the power of all state and local governmental bodies.

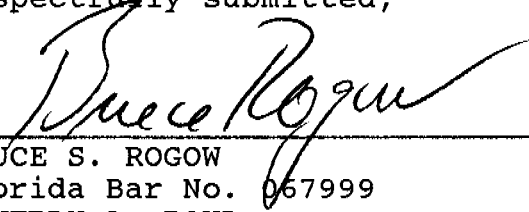
Restricts Laws Related to Discrimination, 19 Fla. L. Weekly at S110. Like the latter, SAVE OUR EVERGLADES' "summary and the text of the amendment omit any mention of the myriad of laws, rules and regulations that may be affected" (id.) by the creation of the Trust Fund -- a new governmental entity whose mandate knows no bounds within the millions of acres, dozens of agencies, and numerous government functions which serve to coherently govern our state and nation. This proposed amendment must meet the same fate visited upon RESTRICTS LAWS RELATED TO DISCRIMINATION. It should

be precluded from appearing on the November ballot.

CONCLUSION

For the foregoing reasons, the Court should strike SAVE OUR EVERGLADES from the ballot for failure to comply with the legal requirements of article XI, section 3 of the Florida Constitution and section 101.161, Florida Statutes (1993).

Respectfully submitted,



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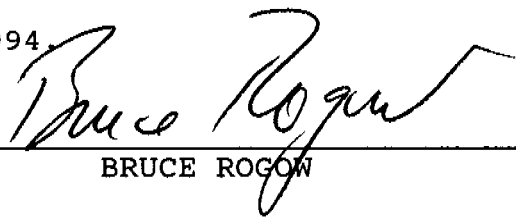
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Counsel for Flo-Sun Inc.

CERTIFICATE OF SERVICE

THE UNDERSIGNED CERTIFIES that a correct copy hereof has been furnished to (1) ROBERT BUTTERWORTH, Attorney General, The Capitol, Tallahassee, Florida 32399-1050 and (2) JIM SMITH, Secretary of State, The Capitol PL02, Tallahassee, FL 32399-0250, by hand delivery, and (3) MR. GEORGE BARLEY, Chairman, SAVE OUR EVERGLADES, INC., 1919 Espanola Drive, Orlando, FL 32804, by U.S. Mail this 31st day of March, 1994.



BRUCE ROGOW

CONSTITUTIONAL AMENDMENT PETITION FORM

SAVE OUR EVERGLADES

TITLE: SAVE OUR EVERGLADES

SUMMARY:

Creates the Save Our Everglades Trust to restore the Everglades for future generations. Directs the sugarcane industry, which polluted the Everglades, to help pay to clean up pollution and restore clean water supply. Funds the Trust for twenty-five years with a fee on raw sugar from sugarcane grown in the Everglades Ecosystem of one cent per pound, indexed for inflation. Florida citizen trustees will control the Trust.

I am a registered voter of Florida and hereby petition the Secretary of State to place the following amendment to the Florida Constitution on the ballot in the general election.

Name _____

(Please print information as it appears on voter records)

Street Address _____

City _____ Zip _____

Precinct _____ Congressional District _____

County _____ Date Signed _____

Sign as Registered

FULL TEXT OF PROPOSED AMENDMENT:

(a) The people of Florida believe that protecting the Everglades Ecosystem helps assure clean water and a healthy economy for future generations. The sugarcane industry in the Everglades Ecosystem has profited while damaging the Everglades with pollution and by altering water supply. Therefore, the sugarcane industry should help pay to clean up the pollution and to restore clean water. To that end, the people hereby establish a Trust, controlled by Florida citizens, dedicated to restoring the Everglades Ecosystem, and funded initially by a fee on raw sugar from sugarcane grown in the Everglades Ecosystem.

(b) Article X, Florida Constitution, is hereby amended to add the following:

"Section 16. Save Our Everglades Trust Fund.

"(a) There is established the Save Our Everglades Trust Fund (Trust). The sole purpose of the Trust is to expend funds to recreate the historical ecological functions of the Everglades Ecosystem by restoring water quality, quantity, timing and distribution (including pollution clean up and control, exotic species removal and control, land acquisition, restoration and management, construction and operation of water storage and delivery systems, research and monitoring).

"(b) The Trust shall be administered by five Trustees. Trustees shall be appointed by the governor, subject to confirmation by the Senate, within thirty days of a vacancy. Trustees' appointments shall be for five years; provided that the terms of the first Trustees appointed may be less than five years so that each Trustee's term will end during a different year. Trustees shall be residents of Florida with experience in environmental protection, but Trustees shall not hold elected governmental office during service as a Trustee. Trustees may adopt their own operating rules and regulations, subject to generally-applicable law. Disputes arising under this Section

shall be first brought to a hearing before the Trustees, and thereafter according to generally-applicable law. Trustees shall serve without compensation but may be reimbursed for expenses.

"(c) The Trust shall be funded by revenues which shall be collected by the State and deposited into the Trust, all of which funds shall be appropriated by the Legislature to the Trustees to be expended solely for the purpose of the Trust. Revenues collected by the State shall come from a fee on raw sugar from sugarcane grown within the Everglades Ecosystem. The fee shall be assessed against each first processor of sugarcane at a rate of \$.01 per pound of raw sugar, increased annually by any inflation measured by the Consumer Price Index for all urban consumers (U.S. City Average, All Items), or successor reports of the United States Department of Labor, Bureau of Labor Statistics or its successor, and shall expire twenty-five years after the effective date of this Section.

"(d) For purposes of this Section, the Everglades Ecosystem is defined as Lake Okeechobee, the historical Everglades watershed west, south and east of Lake Okeechobee, Florida Bay and the Florida Keys Coral Reef, provided that the Trustees may refine this definition.

"(e) Implementing legislation is not required for this Section, but nothing shall prohibit the establishment by law or otherwise of other measures designed to protect or restore the Everglades. If any portion of this Section is held invalid for any reason, the remaining portion of this Section shall be severed from the void portion and given the fullest possible force and application. This Section shall take effect on the day after approval by the electors."

104.185 — It is unlawful for any person to knowingly sign a petition or petitions for a particular issue or candidate more than one time. Any person violating the provisions of this section shall, upon conviction, be guilty of a misdemeanor of the first degree, punishable as provided in s.775.082, s.775.083, s.775.084.

MAIL COMPLETED PETITION FORMS TO: SAVE OUR EVERGLADES, P.O. BOX 541046, ORLANDO, FL 32854

SAVE OUR EVERGLADES

Q. WHY SHOULD I SIGN THIS PETITION?

A. Every Floridian should have the opportunity to vote to make the polluter pay. By signing this petition you will put it on the ballot for November of 1994. Give the people the right to make the decision by signing this petition!

Q. WHAT IS THE PROBLEM WITH THE EVERGLADES?

A. Pollution from sugarcane fields and water pumped into the ocean is causing the death of the Everglades as we have known it. Florida Bay is in critical condition and the coral reefs in the Keys are threatened.

Q. WHAT CAN BE DONE TO SAVE THE EVERGLADES?

A. The polluters can be made to obey the law. Most importantly, we need to reduce the worst pollutant from the sugarcane fields and restore the flow of clean water into the Everglades.

Q. WHY HASN'T THE PROBLEM BEEN FIXED BEFORE NOW?

A. Until now we have had to rely on either the government or the sugar industry to clean up the problem. The government clearly has not had the will to do the right thing. And the sugar industry which has caused the pollution doesn't want to spend the money to clean it up.

Q. WHAT DOES THIS CONSTITUTIONAL AMENDMENT ACCOMPLISH?

A. It will provide the funding for a comprehensive plan to fix the Everglades. It charges a fee of one cent (\$.01) per pound of raw sugar produced in Florida to be deposited into a trust fund which will pay to fix the damage sugar has done to the Everglades. After 25 years the fee will be abolished.

Q. IS THIS ENOUGH MONEY TO DO THE JOB?

A. This proposal will provide the fair amount that the sugar industry should have to pay, no more, no less.

Q. IS THERE AN ALTERNATIVE WAY OF PAYING TO CLEAN UP THE EVERGLADES?

A. Yes. The taxpayer can shoulder the cost and let the polluter off without paying their fair share of the cost. That is what will happen if this constitutional amendment does not pass.

Q. IF WE DON'T FIX THE EVERGLADES, WHAT WILL HAPPEN?

A. We will lose the finest wetland in America, perhaps the world. But the health of the Everglades also affects rivers, estuaries and Florida Bay. We stand to lose countless jobs in the tourist industry, the commercial fishing industry and the sport fishing industry in South Florida including the Keys. South Florida's water supply will be endangered threatening tens of thousands of jobs and reducing tax revenues which will cause taxes to rise throughout Florida. Fish and wildlife will be harmed. The potential effects are devastating economically and environmentally.

Q. WHO IS GOING TO CONTROL THE SPENDING OF THIS MONEY?

A. A panel of respected Florida citizens will be appointed who will oversee the restoration of the Everglades.